COLLATERAL CONSEQUENCES OF COMMON CRIMES: FEDERAL LAW & REGULATION

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Chapter IV: Set Traps and Loaded Guns: Federal Firearms Law and Loss of Possessory Rights

"Congress created, and the department of Justice sprang a trap on Carlton Wilson as a result of which he will serve more than three years for an act … that he could not have suspected was a crime …" *United States v Wilson,* 159 F.3d 280, 294 (7thCir. 1999) (J. Posner, dissenting)

4.1 Introduction

Possessory rights to bear arms, although articulated in US.Const. Amend. II, and ballyhooed loudly, are nevertheless, for better or worse, substantially restricted by Federal law. A person becomes a "prohibited possessor," knowingly or not, and subject to federal prosecution, not just upon indictment for, or conviction of a state or federal felony, as is commonly understood, but in many cases absent any criminal charges at all.

For example, millions *currently* using marijuana sanctioned under state law, medicinally or recreationally, including residents of Colorado, Washington, California, Arizona, Nevada, Hawaii, Alaska, Maine, Maryland, Michigan, Massachusetts, Minnesota, Montana, Louisiana, Arkansas, Florida Connecticut, Delaware, Illinois, Ohio, Vermont, Rhode Island, and New Hampshire (23 states), are nevertheless considered prohibited possessors of firearms and ammunition under federal law, 18 USC § 922(g), and according to BATFE policy, realistically subject to federal prosecution. *See § 4.2 et. seq infra*

By way of another example, multitudes subject to "orders of protection" under state law, for "domestic violence," although never charged with any crime, are nevertheless, prohibited possessors under §922(g) ,whether they know it or not. [1] *See § 4.7 et.seq. infra.* Likewise, all those discharged dishonorably from the

[1] In *Wilson, supra,* Judge Posner laments that the protective-ordering civil judge didn't tell Wilson that the order of protection made him a prohibited

armed services, although never charged with any crime, are also considered prohibited possessors under 18 USC § 922(g). *See § 4.5 et. seq. infra*.

Similarly, all those civilly committed to mental hospitals, although never charged with any crime, are also prohibited possessors under federal law. *See § 4.4 et. seq. infra*. Finally, the multitudes of non-citizens, present in the United States, legally or otherwise, many the subject of recent executive orders, are likewise prohibited possessors under § 922(g). *See § 4.3 et. seq. infra*.

4.2 Statutory Source & Scheme

The sharp edge of the Gun Control Act of 1996, codified at 18 USC § 922(g)(1)-(9) prohibits broad 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 of foreign commerce." 18 U.S.C.A. 922(g).

4.2.1 ATF Form 4473 and Purchase

Not to be ignored, those persons are also prohibited from purchasing firearms from a licensee. ATF Form 4473 questions 11.b through 11.k ask prospective purchasers to indicate whether or not they are included in any of these categories. Before the signature block, the Form reads: "I understand that a person who answers "yes" to any of the questions 11.b. through 11.k. is prohibited from purchasing or receiving a firearm." ATF Form 4473 at 2.[2] Many federal

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possessor because the judge himself was "unware of the law" and Wilson's lawyer didn't tell him because "Wilson didn't have a lawyer." 159 F.3d at 294 (Posner dissenting).

[2] Note that 18 U.S.C.A. § 922(d) is the "flip side" or § 922(g). It makes it unlawful for all firearms sellers/ transferors (not only licensed ones) to "sell or otherwise dispose of any firearm" (not only firearms which have moved in interstate commerce) to any person who the seller knows or has reasonable cause to believe is a prohibited possessor. The categories of prohibited possessors are precisely the same as those specified by § 922(g).

Under §924(a)(2), a knowing violation of § 922(d) by a firearm seller/ transferor may lead to a prison term of up to ten years. 18 U.S.C.A. § 924(a)(2).

prosecutions arise, as well, solely from *false statements* on such forms. *See* 18 USC §922(a)(6). *See also 18 USC 924(a)(2)[penalties.]*

A table outlining the statutory basis for federal firearms possessory prohibitions , and corollary false statements upon purchase, is provided below:

Table 4(a) §922(g) classes of prohibited possessors

18 U.S.C.A. § 922(g) provision	**"It shall be unlawful for any person --**
§ 922(g)(1)	"who has been *convicted* in any court of, a crime punishable by imprisonment for a term exceeding *one year*"[**Felons**]
§ 922(g)(2)	"who is a fugitive from justice"
§ 922(g)(3)	"who is an unlawful *user* of or addicted to any controlled substance" [**including current legal recreational medical marijuana users under state laws**]
§ 922(g)(4)	"who has been adjudicated as a mental defective or who has been *committed* to a mental institution"
§ 922(g)(5)	"who, being an alien – (A) is illegally or unlawfully in the United States; (B)…has been admitted to the United States under a nonimmigrant visa" [including those **legally present with current student, work, or tourist visas**]
§ 922(g)(6)	"who has been discharged from the Armed Forces under dishonorable conditions"
§ 922(g)(7)	"who, having been a citizen off the United States, has

	renounced his citizenship"
§ 922(g)(8)	"who is subject to a court order that— (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate; (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or (ii) by its terms explicitly prohibits 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" [**Orders of Protection relating to Domestic Violence]**
§ 922(g)(9)	"who has been convicted in any court of a misdemeanor crime of domestic violence" [**Misdemeanor Crimes of Domestic Violence MCDV**]
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We discuss key provisions below.

4.3 Drug Users

First, pursuant to § 922(g)(3), a prohibited possessor includes anyone "who is *an unlawful user* of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))." ATF Form 4473 question 11.e, which asks "are you an unlawful user of, or addicted to, marijuana or any

depressant, stimulant, narcotic drug, or any other controlled substance?," addresses this prohibition.

Perhaps surprisingly, many persons who have never been charged with any state or federal drug crime, much less convicted, may, if they possess a firearm, nevertheless realistically expect to be prosecuted under 18 USC § 922(g)(3) as an "unlawful" "drug user" or "addict."[3] This prohibition against users applies broadly to all those whose drug use is proscribed by federal law and is "current" "regular" and "contemporaneous" with possession or purchase of any firearm in the United States.[4]

This prohibition also reaches, notably, and perhaps counterintuitively, the growing number of state-sanctioned or licensed medical and recreational marijuana users around the country. Under current federal policy, state sanctioned licit medicinal and recreational user is treated as federal illicit use: With current, regular and contemporaneous marijuana use, medical marijuana card holders and recreational users find themselves on precisely the same legal footing as the myriad illicit drug users.[5]

4.3.1 *State-sanctioned Medicinal & Recreational Marijuana Users: Current Federal Policy & Law*

Marijuana is listed in the Controlled Substances Act as a Schedule I controlled substance, (21 USC).

In a 2011 "Open Letter to All Federal Firearms Licensees," excerpted in the margin below, BATFE specifically warned that "regardless of whether [a] State has passed legislation authorizing marijuana use for medicinal purposes, [a person] is an unlawful user … and is prohibited by Federal law from possessing firearms or

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[3] 18 USC § 922(g)(3)

[4] *See e.g. U.S. v Purdy*, 264 F.3d 809, 812 (9th Cir. 2001) (affirming conviction under § 922(g)(3) obtained with evidence of "consistent use of drugs" and the use of drugs "maybe the night before the gun was found in the home").

[5]

ammunition."[6] Whether or not this stance makes sense where federal law recognizes prescribed use of other controlled substances such as large classes of opioids, commonly used and abused is beyond the scope of this treatise.

Moreover, federal policy, and its broad enforcement,[7] has repeatedly withstood Second Amendment and Commerce Clause challenges. For example, in

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[6] *See* U.S. Dep't. of Justice, BATFE, *Open Letter to All Federal Firearms Licensees* (Sep. 21, 2011), *available at* https://www.atf.gov/file/60211/download ("Federal law, 18 U.S.C. §922(g)(3), prohibits any person who is an "unlawful user of or addicted to any controlled substance…" from shipping, transporting, receiving or possessing firearms or ammunition. Marijuana is listed in the Controlled Substances Act as a Schedule I controlled substance, and there are no exceptions in Federal law for marijuana purportedly used for medicinal purposes, even if such use is sanctioned by State law…therefore, any person who uses or is addicted to marijuana, regardless of whether his or her State has passed legislation authorizing marijuana use for medicinal purposes, is an unlawful user of or addicted to a controlled substance, and is prohibited by Federal law from possessing firearms or ammunition"). This policy does not reach other controlled substances such as oxycodone, if used as prescribed, because federal law condones such use under the Food and Drug Act. However, where the increasingly common use of "prescription" medications regulated by federal law [schedule II, III, and IV] occur outside of the boundaries of current prescription at therapeutic levels, those persons will almost certainly be considered prohibited possessors under 18 USC § 922(g)(3). *U.S. v. Richard*, 350 Fed.Appx. 252 (10th Cir. 2009) ("Unlawful user of controlled substance," within meaning of statute rendering it illegal for any person who was unlawful user of or addicted to any controlled substance to possess, in or affecting commerce, any firearm, was individual who, on regular and on-going basis, **used controlled substance in manner other than that prescribed by licensed physician) (emphasis added).**

[7] *See, e.g., U.S. v. Grover*, 364 F.Supp. 2d 1298 (2005); *U.S. v. Sanders*, 43 Fed.Appx. 249 (10th Cir. 2002); *U.S. v. Rodriguez*, 711 F.3d 928 (8th Cir. 2013); *U.S. v. Johnson*, 572 F.3d 449 (8th Cir. 2009); *U.S. v. Augustin*, 376 F.3d 135 (3rd Cir. 2004); *U.S. v. Grey Water*, 395 F.Supp.2d 850 (D.N.D. 2005); *U.S. v Purdy*, 264 F.3d 809, 812 (9th Cir. 2001); *U.S. v. Carter*, 750 F.3d 462 (4th Cir. 2014); *U.S. v. Yancey*, 621 F.3d 681 (7th Cir. 2010); *U.S. v. Seay*, 620 F.3d 919 (8th Cir.

United States v. Dugan, the 9th Circuit, recently upheld a conviction for a violation of 18 USC § 922(g)(3) for a medical marijuana licensee, reasoning: "[h]abitual drug users, like career criminals and the mentally ill, more likely will have difficulty exercising self-control, particularly when they are under the influence of controlled substances."[8] In short, *Dugan* and other cases from around the circuits make clear that 18 USC § 922(g) (3) is both a valid exercise of Congress's power, and a valid restriction under the Second Amendment.

Moreover, the 9th Circuit has also held that the § 922(g)(3) category "unlawful user of or addicted to any controlled substance" is not unconstitutionally vague. *U.S. v. Ocegueda*, 564 F.2d 1363 (9th Cir. 1977) (holding that because "the use of heroin by laymen is not permissible in any circumstance," the term "unlawful user" is not unconstitutionally vague as applied to a daily heroin user).

4.3.2 *Limitations*

The term drug "user" is not statutorily defined.[9] However, for the possessory prohibition of firearms to apply, courts have consistently held that the disqualifying drug use, state-sanctioned or otherwise, use must be both (1) current (2) regular and (3) contemporaneous with the possession or purchase of a

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2010); *Wilson v. Holder*, 7 F.Supp.3d 1104 (D. Nev. 2014); *U.S. v. Conrad*, 923 F.Supp.2d 843 (W.D. Va. 2013).

[8] *U.S. v. Dugan*, 657 F.3d 998 (9th Cir. 2011) ("Habitual drug users, like career criminals and the mentally ill, more likely will have difficulty exercising self-control, particularly when they are under the influence of controlled substances. Moreover, unlike people who have been convicted of a felony or committed to a mental institution and so face a lifetime ban, an unlawful drug user may regain his right to possess a firearm simply by ending his drug abuse. The restriction in § 922(g)(3) is far less onerous than those affecting felons and the mentally ill. Because Congress may constitutionally deprive felons and mentally ill people of the right to possess and carry weapons, we conclude that Congress may also prohibit illegal drug users from possessing firearms.")(*citing District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). *See also U.S. v. Holder*, 7 F.Supp.3d 1104, 1117 (D. Nev. 2014), *appeal docketed*, No. 14-15700 (9th Cir. Apr. 11, 2014) (dismissing with prejudice a Second Amendment challenge to §922(g)(3) by a Nevada licensed marijuana possessor).

[9] 18 USC § 921 *Cf. "addict"* defined at 21 USC § 802(1).

firearm.[10] Infrequent use in the distant past will not subject a person to federal prohibited possessor prosecution under the Gun Control Act.[11] Moreover, those who are current users may regain their firearm possessory rights through reasonable cessation. For example, as noted in *U.S. v. Reed*: "There must be some proximity in time between drug use and weapon possession."[12] Infrequent use in the "distant past" will not suffice.[13]

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[10] *U.S. v. Purdy*, 264 F.3d 809, 812 (9th Cir. 2001) (affirming conviction under § 922(g)(3) obtained with evidence of "consistent use of drugs" and the use of drugs "maybe the night before the gun was found in the home"); *Compare U.S. v. Burchard*, 580 F.3d 341 (6th Cir. 2009) (Sufficient evidence established that defendant's drug use was consistent or prolonged, as required to support his conviction for knowingly possessing a firearm while being unlawful user; government witness testified that she and defendant smoked crack cocaine on various occasions over one-year period and on several occasions for days in a row, search of defendant's farm uncovered four firearms and drug paraphernalia, and defendant's blood and urine samples yielded positive test results for cocaine") *with U.S. v Williams*, 216 F.Supp.2d 568 (E.D.Va. 2002) (Evidence of one-time drug use proximate in time to the possession of a firearm, but absent any additional proof suggesting a pattern of, continuity of, or prolonged drug use, was insufficient to support conviction for possession of a firearm, in and affecting interstate commerce, by an unlawful user of controlled substances). *See also U.S. v. Chafin*, 2008 WL 4951028 (S.D. W. Va. 2008) (denying motion to dismiss for prosecution under §922(a)(6) where gun purchaser "confessed to regularly using marijuana and to smoking it that day").

[11] *Purdy*, *supra* at 812 ("the definition of an "unlawful user" of drugs is not without limits. Indeed, in Ocegueda we concluded our analysis by stating: Had Ocegueda used a drug that may be used legally by laymen in some circumstances, or **had his use of heroin been infrequent and in the distant past**, we would be faced with an entirely different vagueness challenge to the term "unlawful user") (emphasis added).

[12] *U.S. v. Reed*, 114 F.3d 1067, 1069 (10th Cir. 1997).

[13] *See e.g. U.S. v. Ocegueda*, 564 F.2d 1363 (9th Cir. 1977) (holding that: (1) the term "unlawful user" of narcotics was not unconstitutionally vague, in view of evidence that defendant frequently used heroin prior to his arrest; and (2) 18 USC § 922(g)(3) is not unconstitutional under Eighth Amendment) ("had his heroin use been infrequent and in the distant past, we could be face with an entirely different vagueness challenge to the term "unlawful user").

To prove an individual is a current "unlawful user," "the government must prove…that the defendant took drugs with regularity, over an extended period of time, and contemporaneously with his purchase or possession of a firearm."[14]

Those who are current users may regain their firearm possessory rights through reasonable cessation. In *Dugan*, the court noted that "unlike people who have been convicted of a felony … an unlawful drug user may *regain his right to possess a firearm* simply by ending his drug abuse."[15] Thus, a person who ceases drug use, state sanctioned or otherwise, for a reasonable period of time, before possessing or purchasing a firearm, will likely not be considered a prohibited possessor under 18 USC § 922(g)(3).

4.3.3 *Prosecution for False Statements on ATF Form 4473: Firearm Purchase & Drug "Use"for Licit Marijuana Users*

Moreover, as discussed above, all persons purchasing a firearm from a licensed dealer are required to complete, under penalty of perjury, ATF Form 4473, which specifically asks the purchaser: "Are you *an unlawful user of, or addicted to marijuana* or any depressant, stimulant, narcotic drug, or any other controlled substance?"[16] For medical marijuana users, this question may be thorny. In the author's view, the only circumstance where a medical marijuana cardholder, or a recreational user sanctioned under state law, should answer "no" on ATF

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[14] *U.S. v Purdy*, 264 F.3d 809, 812 (9th Cir. 2001) (affirming conviction under § 922(g)(3) obtained with evidence of "consistent use of drugs" and the use of drugs "maybe the night before the gun was found in the home"); *U.S. v. Grover*, 364 F.Supp.2d 1298 (D. Utah 2005) (holding that an unlawful user of a controlled substance for purposes of 18 USC § 922(g)(3) "is an individual who regularly and unlawfully uses any controlled substance over an extended period of time that is contemporaneous with the possession of a firearm"); *U.S. v. Rattler*, 237 Fed.Appx. 794 (4th Cir. 2007) (because evidence showed that defendant's drug use was neither infrequent nor in the distant past, as marijuana was found in four locations in defendant's home, including a bag in the freezer and remnants of marijuana cigarettes in three locations, evidence was sufficient to uphold conviction under 18 USC § 922(g)(3).

[15] *Dugan, supra*, 657 F.3d at 999.

[16] BATFE, ATF Form 4473, *available at* https://www.atf.gov/file/61446/download

Form 4473, is where all use has ceased for a reasonable, substantial, *and provable* period of time. For example, all states which have enacted medical marijuana laws require dispensaries to keep detailed searchable records of all dispensations to licensees. Those records, despite medical privacy laws, may be subject to government subpoena or search warrant.

Thus, for active state-sanctioned medical or recreational marijuana users, answering "no" on Form 4473, even if the person in light of her state issued card and state sanctioned use does not think she is an "illegal" drug user, is not a defense to a false statements prosecution. The stance of BATFE is that "there are no exceptions in Federal law for marijuana purportedly used for medicinal purposes, even if such use is sanctioned by State law."[17] Federal caselaw supports this position: Knowledge of status as a prohibited possessor is not required.[18]

4.3.4 Illegal Firearms Sales

Moreover, § 922(d)(3), the "flip side" of § 922(g)(3), prohibits the sale of a firearm to an individual whom the seller knows or has reasonable cause to believe is "an unlawful user of or addicted to any controlled substance." In *Wilson v. Holder*, the United States District Court for the District of Nevada held that this provision was constitutional as applied to marijuana users with or without a State issued license to possess or use marijuana. *United States v. Holder*, 7 F.Supp.3d 1104, 1117 (D. Nev. 2014), *appeal docketed*, No. 14-15700 (9th Cir. Apr. 11, 2014) ("just as Congress may constitutionally preclude illegal drug users from *possessing* a firearm, Congress likewise may preclude FFLs from selling firearms to illegal drug users and thereby prevent such prohibited persons from *acquiring* firearms").

4.3.5 Conclusion

[17] BATFE, *Open Letter to All Federal Firearms Licensees (Sep. 21, 2011), supra.*

[18] *See, e.g., U.S. v. Kafka*, 222 F.3d 1129 (9th Cir. 2000) (noting that the "knowledge requirement applies only to the act of possession, not to the prohibition on possessing firearms); *U.S. v. Bostic*, 168 F.3d 718, 722 (4th Cir. 1999) (knowingly "does not include a requirement that the defendant be aware of the illegality of his conduct").

Thus, drug "users," including current state-sanctioned medicinal and recreational marijuana users are, perhaps surprisingly, never arrested or charged are nevertheless realistically at risk for prosecution under federal Gun Control Act. Licensed firearm dealers are likewise subject to prosecution for sale to such persons. Research, limned above, suggests that such prohibitions have been and will be enforced by the federal government through criminal prosecutions.

4.4 Illegal Aliens and non-immigrant Visa Holders

Second, 18 USC 922(g)(5) prohibits from possessing firearms, or ammunition, all persons "illegally or unlawfully in the United States," or "have been admitted to the United States under a nonimmigrant visa." No arrest or conviction is necessary.

Because recent Executive Order 13769 (January 27, 2017)[19] purports to broaden the definition of non-citizen "criminal" to include those, uncharged, but who are believed to have "committed acts that constitute a chargeable criminal offense," the prohibition contained § 922(g)(5) may apply with special force to the implementation of contemporary immigration policy.

Note that that term "illegally or unlawfully in the United States" is not defined by statute. *See U.S. v. Ochoa-Colchado*, 521 F.3d 1292, 1294 (10th Cir. 2008). *But See* 8 USC § 1325(a) ("entering" the United States without "inspection" is punishable as a misdemeanor).

For the purposes of a section 922(g)(5) conviction, at least under existing caselaw,"the government must prove that the alien was in the United States without authorization at the time the firearm was received." *United States v. Hernandez*, 913 F.2d 1506, 1513 (10th Cir.1990). Note, however, that for those who entered or remained illegally, the filing of an application for adjustment of status does not legalize an alien's presence in the United States. *U.S. v. Latu*, 479 F.3d 1153, 1159 (9th Cir. 2007) ("the filing of an application for adjustment of status did not legalize Latu's presence"); *Ochoa-Colchado* at 1295.

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[19] [*see* https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements

Moreover, for §922(g)(5) purposes, the 8th Circuit has held that an alien who has received an Employment Authorization Document (EAD) while his application for asylum is pending is not in the country legally for purposes of § 922(g)(5). *United States v. Bazargan*, 992 F.2d 844, 848–49 (8th Cir. 1993) ("At the time the INS issues the employment authorization, it has not even fully reviewed the alien's asylum application, but simply has determined it to be non-frivolous. Because the federal immigration authorities do not interpret the employment authorization to have any effect on the alien's status with respect to anything other than his ability to engage in employment during the pendency of his case, we agree with the district court and the Immigration Judge that the employment authorization did not have the effect of converting Bazargan back into a legal alien").

In short, §922(g)(5) may provide, particularly in light of Executive Order 13769, a substantial basis for arrest or deportation of persons including those who have *applied* for adjustment of status or received employment authorization cards, found in possession of firearms, even if not criminally prosecuted.

4.5 Felons

Third, and most intuitively, 18 USC § 922(g)(2) prohibits from possessing a firearm those "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year." 18 USC 922(g)(1).

The term "punishable" in the phrase "a crime punishable by imprisonment for a term exceeding one year," refers to the maximum potential punishment a court could impose, whether or not set by statute, and therefore the statute applies to common-law offenses. *Shrader v. Holder*, 704 F.3d 980, 986 (D.C. Cir. 2013) (finding that the 922(g)(1) prohibition applied to an individual convicted of common law assault and battery because, in part, "the commonsense meaning of the term "punishable," refers to any punishment capable of being imposed, not necessarily a punishment specified by statute").

The possession element is satisfied simply by a knowing possession. As in other matters discussed below, particularly in reference to those persons subject to

domestic violence restraining orders, and thus prohibited possessors as well, no knowledge that possession is in violation of the federal statute is required.

Knowing possession of the firearm may be actual or constructive. Constructive possession is "ownership, dominion, or control over the contraband itself, or dominion or control over the premises in which the contraband is concealed." *U.S. v. Ybarra*, 70 F.3d 362, 365 (5th Cir. 1995), *citing United States v. Smith*, 930 F.2d 1081, 1085 (5th Cir.1991). In constructive possession cases, "mere control or dominion over the place in which contraband or an illegal item is found by itself is not enough to establish constructive possession when there is joint occupancy of a place." *United States v. Mergerson*, 4 F.3d 337, 349 (5th Cir. 1993). Instead, with joint occupancy, courts adopt a fact-specific approach, finding that constructive possession exists "only when there was some evidence supporting at least a plausible inference that the defendant had knowledge of and access to the weapon or contraband." *United States v. Mergerson*, 4 F.3d 337, 349 (5th Cir. 1993).

Finally, note that paradoxically, for §922(g) purposes, a felon may in many cases may restore his rights to bear arms while a misdemeanant may not. *See § 4.9 infra.*

4.6 Fugitives

Fourth, 18 USC 922(g)(2) from possessing a firearm anyone "who is a fugitive from justice." Again, no conviction is necessary. The term "fugitive from justice" is defined in 18 U.S.C. § 921(a)(15) as "any person who has fled from any state to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding." 18 U.S.C. § 921(a)(15); *U.S. v. Spillane*, 913 F.2d 1079 (4th Cir. 1990) (upholding conviction where "the record clearly reflects that the appellant purposefully stayed away from New York to avoid facing the charges pending against him. Appellant's own testimony, given at trial, removes any doubt about whether or not he knew of the pending charges and whether his failure to appear was deliberate. We find that this alone is enough to support the assertion by the government that the appellant was a "fugitive from justice" as defined by the statute under which he was prosecuted, and accordingly the prosecution has here met its burden of proof."); *U.S. v. Ballentine*, 4 F.3d 504, 506 (7th Cir. 1993); *U.S.*

v. Bennette, 208 Fed. Appx. 219, 221 (4th Cir. 2006) ("Bennette left Maine with the knowledge that there were charges pending against him in that state.")

At least one court has held that the government can convict under the statute individuals who have fled the State to avoid a *misdemeanor* bench warrant for DUI. *U.S. v. Rolle*, 19 Fed Appx. 812, 814 (10th Cir. 2001) ("At trial, the government introduced a certified copy of a bench warrant issued by a Montana court on October 21, 1999 as a result of Rolle's failure to appear on a charge of driving under the influence; testimony that Rolle was in Wyoming on December 3, 1999; and Rolle's statement to the ATF officer that he was aware of the outstanding warrant…The evidence amply supports the jury's conclusion that Rolle left Montana with the intent to avoid the charges pending against him in that state").

A defendant's knowledge of his status as a "fugitive" is not an element of the offense. Instead, the only knowledge required in order to convict a defendant under the statute is "that the defendant knew that charges were pending against him; that he left the jurisdiction where the charges were pending; and, that he refused to answer those charges by appearing before the Court where the charges were pending. It is not necessary that the defendant left the State with the intent to avoid the charges pending against him." *U.S. v. Ballentine*, 4 F.3d 504, 506 (7th Cir. 1993) (upholding conviction under § 922(g)(2) for an individual with an outstanding arrest warrant for failure to appear on weapons charges in an out-of-state court).

In short, as courts have held again and again, knowledge of one's status as a fugitive is simply not an element of § 922(g)(2). *U.S. v. Ballentine*, 4 F.3d 504, 506 (7th Cir. 1993), *United States v. Freed*, 401 U.S. 601, 91 S.Ct. 1112, 28 L.Ed.2d 356 (1971); *United States v. Horton*, 503 F.2d 810 (7th Cir.1974); *United States v. Schmitt*, 748 F.2d 249, 252 (5th Cir.1984), cert. denied, 471 U.S. 1104, 105 S.Ct. 2333, 85 L.Ed.2d 850 (1985); *United States v. Thrasher*, 569 F.2d 894, 895 (5th Cir.1978), cert. denied, 439 U.S. 840, 99 S.Ct. 128, 58 L.Ed.2d 137 (1978); *United States v. Goodie*, 524 F.2d 515, 517-18 (5th Cir.1975), cert. denied, 425 U.S. 905, 96 S.Ct. 1497, 47 L.Ed.2d 755 (1976); *United States v. Pruner*, 606 F.2d 871 (9th Cir.1979); *United States v. Haddad*, 558 F.2d 968 (9th Cir.1977).

In this respect, charges under § 922(g)(2) for possession of a firearm by a fugitive from justice should not be confused with charges under § 922(n), which prohibits any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." In § 922(g)(2)/ "under indictment" cases, knowledge of the pending indictment *is* an element of the offense. *U.S. v. Renner*, 496 F.2d 922 (6th Cir. 1974); *U.S. v. Forbes*, 64 F.3d 928 (4th Cir. 1997).

Knowledge of the pending indictment is also required for charges under 18 USC 922(a)(6) for knowingly making a false statement in response to question 11.b on ATF Form 4473. Question 11.b asks, "are you under indictment or information in any court for a **felony,** or any other crime, for which the judge could imprison you for more than one year?" (emphasis original). Convictions under §922(a)(6) for false statements in response to this question, in contrast to convictions under § 922(g)(2), *do require* that the defendant knew of the indictment. *U.S. v. Renner*, 496 F.2d 922 (6th Cir. 1974).

As noted, however, for charges under §922(g)(2), knowledge of fugitive status is *not* an element of the offense.

4.6 The Mentally Ill

Fifth, 18 USC § 922(g)(4) prohibits from possessing a firearm all those "who has been adjudicated as a mental defective or who has been *committed to a mental institution*." 18 USC § 922(g)(4). Again, here, no underlying criminal charge or conviction is necessary to trigger subsequent federal prosecution. An adjudication or civil commitment is enough.

Federal courts look to State civil commitment law to determine if the possessor was "committed" for firearms possessory purposes. For instance, in *U.S. v. B.H.*, the United States District Court for the Northern District of Iowa examined Iowa "involuntary hospitalization law to determine whether B.H. was "adjudicated as a mental defective" or "committed to a mental institution." *U.S. v. B.H.*, 466 F.Supp.2d 1139, 1144 (N.D. Iowa 2006); *see also United States v. Dorsch*, 363

F.3d 784, 786–87 (8th Cir.2004) (examining state law to determine whether a defendant was "committed to a mental institution"); *United States v. Hansel*, 474 F.2d 1120, 1123 (8th Cir.1973) (examining state law to determine whether a defendant was "adjudicated as a mental defective").

4.7 Dishonorably Discharged

Sixth, 18 USC § 922(g)(6) prohibits from possessing a firearm anyone "who has been discharged from the Armed Forces under dishonorable conditions." 18 USC § 922(g)(6). ATF Form 4473 question 11.g., which asks "have you been discharged from the Armed Forces under **dishonorable** conditions?" addresses this prohibition. No underlying criminal charge or conviction is required, although in cases of military bad conduct discharges, proceedings and adjudications under the Uniform Code of Military Justice, Articles 15 & 32 are often requisite.

Civilian courts have almost uniformly upheld this provision against a number of due process challenges. For instance, in *U.S. v. Day*, an individual convicted under § 922(g)(6) after a dishonorable discharge that had occurred 23 years earlier challenged the statute. The *Day* court upheld the statute. *U.S. v. Day*, 476 F.2d 562, 568 (6th Cir. 1973) ("Possession of a firearm by a person dishonorably discharged from the Armed Services, while not as dangerous, perhaps, as possession by a convicted felon, is sufficiently risky to justify Congressional regulation.

As Senator Russell Long stated in the debate on the bill on the floor of the Senate:

[T]his is a matter of saying that if he cannot be trusted to carry arms for Uncle Sam, he cannot be trusted to carry arms on the streets. This kind of person is part of the criminal element in many instances, the kind of person who does not know how to behave properly, and is a hazard to others when he possesses firearms… We hold that the finding by Congress that possession of guns by those dishonorably discharged from the armed services is hazardous was rational. We decline to overturn it.

[cite] (internal citations omitted). *See also U.S. v. Thomas*, 484 F.2d 909 (6th Cir. 1973) (denying due process challenge brought by individual convicted under §

922(g)(6) and finding rational basis for prohibiting individuals dishonorably discharged from the Armed Forces from possession).

Moreover, a false negative answer to ATF Form 4473 question 11.g (as to whether the purchaser has been dishonorably discharged from the Armed Forces) exposes the purchaser to prosecutions under § 922(a)(6) (making it a crime for anyone attempting the acquisition of a firearm to make any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale). *U.S. v. Thomas*, 484 F.2d 909, 914 (6th Cir. 1973).

4.8 Domestic Violence Restraining Orders

Seventh, 18 U.S.C. § 922(g)(8) prohibits from possessing a firearm persons subject to a to a domestic-relations restraining order. Although no underlying criminal charges are necessary, several strictures apply: The order must be (1) *adversarial* (not ex parte); (2) brought by a qualifying "intimate partner"—not a casual romantic interest; contain either a (3) *finding* that the respondent is a *credible threat* ; or (4) an *explicit prohibition* of firearm possession.

4.8.1 *Adversarial Nature of Proceeding*

Principally, the statute requires the order of protection or restraining order be issued only *afte*r a hearing of which the individual had actual notice, and at which the individual had an opportunity to participate. *See* 18 USC §922(g)(8)(A)-(C). Ex parte restraining orders, unchallenged, do not trigger the prohibition

4.8.2 The domestic relationship

Additionally,§ 922(g)(8) requires that the order be issued in relation only to an "intimate partner." 18 USC § 922(g)(8). The term "intimate partner" includes only ", the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has *cohabited* with the person."In contrast to many state legislative provisions, this definition excludes romantic partners with whom an individual has *not cohabited.*

As clarified in § 1116 of the U.S. Attorney's Manual, Criminal Resource Manual: "The term "intimate partner" is defined as including a spouse or former spouse, or a person with whom the victim has had a child, *but it does not include a girlfriend or boyfriend with whom the defendant has not resided*." United States Attorneys' Manual (USAM), Criminal Resource Manual (CRM) at §1116 (emphasis added).

The federal contours of the domestic relationship may be *narrower* than those of the state provisions under which the restraining order was obtained.

For example, California code defines the requisite domestic relationship as:

> (a) A spouse or former spouse.
> (b) A cohabitant or former cohabitant, as defined in Section 6209.
> *(c) A person with whom the respondent is having or has had a dating or engagement relationship.*
> (d) A person with whom the respondent has had a child, where the presumption applies that the male parent is the father of the child of the female parent under the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12).
> (e) A child of a party or a child who is the subject of an action under the Uniform Parentage Act, where the presumption applies that the male parent is the father of the child to be protected.
> (f) Any other person related by consanguinity or affinity within the second degree.

West's Ann.Cal.Fam.Code § 6211 (emphasis added).

Similarly, in New York, domestic violence protective orders may be issued when the relationship is of:

> (a) persons related by consanguinity or affinity;
> (b) persons legally married to one another;
> (c) persons formerly married to one another regardless of whether they still reside in the same household;
> (d) persons who have a child in common regardless of whether such persons have been married or have lived together at any time; and

> *(e) persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time. Factors the court may consider in determining whether a relationship is an "intimate relationship" include but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship. Neither a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute an "intimate relationship".*

N.Y. Family Law § 812 (McKinney 2013). McKinney's Family Court Act § 812 (emphasis added). [20] Of particular relevance here under New York law is subsection 6, which could include a casual present and former romantic partner.

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[20] Similarly, the Arizona domestic violence defines the requisite relationship in the following way:

> 1. The relationship between the victim and the defendant is one of marriage or former marriage or of persons residing or having resided in the same household.
> 2. The victim and the defendant have a child in common.
> 3. The victim or the defendant is pregnant by the other party.
> 4. The victim is related to the defendant or the defendant's spouse by blood or court order as a parent, grandparent, child, grandchild, brother or sister or by marriage as a parent-in-law, grandparent-in-law, stepparent, step-grandparent, stepchild, step-grandchild, brother-in-law or sister-in-law.
> 5. The victim is a child who resides or has resided in the same household as the defendant and is related by blood to a former spouse of the defendant or to a person who resides or who has resided in the same household as the defendant.
> *6. The relationship between the victim and the defendant is currently or was previously a romantic or sexual relationship. The following factors may be considered in determining whether the relationship between the victim and the defendant is currently or was previously a romantic or sexual relationship:*
> *(a) The type of relationship.*

4.8.3 "Credible Threat"

Additionally, to qualify as an order of protection that prohibits possession under § 922(g)(8), the order must also either : (1) "include a *finding* that such person represents a *credible threat* to the physical safety of [an] intimate partner or child; or (2) "by its terms explicitly prohibit the use, attempted use, or threatened use of *physical force* against [an] intimate partner or child that would reasonably be expected to cause bodily injury." 18 USC §922(g)(8)(C)(i)-(ii). The two requirements are disjunctively joined; that is, if the order meets either one, the subject of the order is a prohibited possessor.

The "credible threat" requirement for domestic violence restraining orders to qualify to prohibit possession is commonly referred to as a Brady finding. This is in reference to the Brady Handgun Violence Prevention Act, commonly called the Brady Bill, which enacted § 922(g) into law in 1993. Pub.L. 103–159, 107 Stat. 1536, enacted November 30, 1993. [21]

(b) The length of the relationship.
(c) The frequency of the interaction between the victim and the defendant.
(d) If the relationship has terminated, the length of time since the termination.
A.R.S. § 13-3601 (emphasis added).

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[21] The Brady Bill is perhaps most famous for the review it received in *Printz v. United States*, in which the United States Supreme Court held that certain interim provisions of the Bill, which required State law enforcement officers to carry out the federal program, violated the 10th Amendment. *Printz v. United States*, 521

The U.S. Attorney's Manual advises: "[T]he order must include a specific finding that the defendant represents a credible threat to the physical safety of the victim or by its terms explicitly prohibit the use, attempted use, or threatened use of physical force that would reasonably be expected to cause bodily injury." USAM, CRM, § 1116.

The States have taken different approaches when it comes to the entrance of Brady Findings or explicit prohibitions on firearms possession in protective orders. *See generally* Darren Mitchell and Susan B. Carbon, Firearms and Domestic Violence:A Primer for Judges, American Judges Association, Court Review (Summer 2002), available at http://aja.ncsc.dni.us/courtrv/cr39-2/CR39-2MitchellCarbon.pdf.

4.8.4 *Explicit Prohibition*

In some states, the entry of a domestic violence restraining order subjects the individual subject to the order to a mandatory prohibition on the possession of firearms. That is, the judge has no discretion to include an explicit prohibition on possession in the order; every order includes such a prohibition.

For example, in California, by statute, *every* person subject to a domestic violence restraining order "shall not own, possess, purchase, or receive a firearm or ammunition while that protective order is in effect." Cal. Fam. Code § 6389(a)(2013). Thus the California code, effectively triggers the requirement under § 922(g)(C)(ii) that the order "by its terms explicitly prohibits the use, attempted use or threatened use" of physical force.

In addition to California, Delaware, Florida, Hawaii, Illinois, Maryland, New Hampshire, Virginia, West Virginia, and Wisconsin are all States where the entry of a domestic violence order automatically subjects the individual subject to the order to the federal firearms ban. Cal. Fam. Code § 6389(a)(2013) ("shall not own, possess, purchase, or receive a firearm or ammunition while that protective

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U.S. 898 (1997). The provisions that we are interested in, however, were not reviewed in that case, and are a considered a constitutional exercise of Congress' power.

order is in effect"); (Del. Code Ann. Tit. 11 § 1448(a) (2016) ("the following persons are prohibited from purchasing, owning, possessing or controlling a deadly weapon or ammunition for a firearm within the State… (6) Any person who is subject to a Family Court protection from abuse order (other than an ex parte order), but only for so long as that order remains in effect or is not vacated or otherwise terminated"); Fla. Stat. Ch. 790.233 (2012) ("A person may not have in his or her care, custody, possession, or control any firearm or ammunition if the person has been issued a final injunction that is currently in force and effect, restraining that person from committing acts of domestic violence, as issued under s. 741.30 or from committing acts of stalking or cyberstalking, as issued under s. 784.0485"); Haw. Rev. Stat. § 134-7(f) (2016)("No person who has been restrained pursuant to an order of any court, including an ex parte order as provided in this subsection, from contacting, threatening, or physically abusing any person, shall possess, control, or transfer ownership of any firearm or ammunition therefor, so long as the protective order, restraining order, or any extension is in effect"); 725 Ill. Comp. Stat. 5/112A-14(b)(14.5) (2016) ("A person who is subject to an existing order of protection, interim order of protection, emergency order of protection, or plenary order of protection, issued under this Code may not lawfully possess weapons"); Md. Code Ann., Public Safety, § 5-133 (2015) ("a person may not possess a regulated firearm if the person… is a respondent against whom: (i) a current non ex parte civil protective order has been entered under § 4-506 of the Family Law Article; or (ii) an order for protection, as defined in § 4-508.1 of the Family Law Article, has been issued by a court of another state or a Native American tribe and is in effect"); N.H. Rev. Stat. § 173-B:5 (2014) ("Upon a showing of abuse of the plaintiff by a preponderance of the evidence, the court shall grant such relief as is necessary to bring about a cessation of abuse. Such relief shall direct the defendant to relinquish to the peace officer any and all firearms and ammunition in the control, ownership, or possession of the defendant"); Va. Code Ann. § 18.2-308.1:4(A) (2016) ("It is unlawful for any person who is subject to (i) a protective order… to purchase or transport any firearm while the order is in effect"); W.Va. Code § 61-7-7 (2016) ("no person shall possess a firearm…who… (7) Is subject to a domestic violence protective order"); Wis. Stat. § 813.12 (2016) (an individual subject to a protective order must "surrender any firearms that he or she owns or has in his or her possession to the sheriff"). *See generally* Darren Mitchell and Susan B. Carbon, Firearms and

Domestic Violence: A Primer for Judges, American Judges Association, Court Review (Summer 2002), *available at* http://aja.ncsc.dni.us/courtrv/cr39-2/CR39-2MitchellCarbon.pdf.

4.6.8 Non-mandatory States

In contrast to these mandatory prohibitions (automatic prohibitions on possession after a domestic violence restraining order), other states give judges issuing orders the *discretion* to craft the order to "by its terms explicitly prohibit the use, attempted use, or threatened use of physical force against [an] intimate partner or child that would reasonably be expected to cause bodily injury." 18 USC §922(g)(8)(C)(i)-(ii).

For example, the applicable Texas domestic violence statute provides that "in a protective order, the court **may** prohibit…possessing a firearm." Tex. Fam. Code § 85.022(b)(6) (2016) (emphasis added). In addition to Texas, Alaska, Arizona, Indiana, Michigan, Montana, New Jersey, Oregon and Utah provide judges the discretion to explicitly prohibit firearms in the order. Alaska Stat. § 18.66.100 (2016) ("A protective order under this section **may**…direct the respondent to surrender any firearm owned or possessed by the respondent") (emphasis added); Ariz. Rev. Stat. Ann. § 13-3602(G)(2013) ("If a court issues an order of protection, the court **may** do any of the following… If the court finds that the defendant is a credible threat to the physical safety of the plaintiff or other specifically designated persons, prohibit the defendant from possessing or purchasing a firearm for the duration of the order") (emphasis added); Ind. Code Ann. § 34-26-5-9(c)(4) 2010) ("a court **may** grant the following relief… prohibit a respondent from using or possessing a firearm, ammunition, or a deadly weapon specified by the court, and direct the respondent to surrender to a specified law enforcement agency the firearm, ammunition, or deadly weapon for the duration of the order for protection") (emphasis added); Mich. Stat. Ann. § 600.2950(1)(e) (2016) ("an individual **may** petition the family division of circuit court to enter a personal protection order to restrain or enjoin… Purchasing or possessing a firearm") (emphasis added); Mont. Code. Ann. § 40-15-201(2)(f) (2015) ("The temporary order of protection **may** include any or all of the following orders… prohibiting the respondent from possessing or using the firearm used in the assault") (emphasis added); N.J. Rev. St. §§ 2C:25-28(j), 2C:25-29 (16) (2012)

("Emergency relief **may** include forbidding the defendant from… possessing any firearm or other weapon") (emphasis added); Or. Rev. Stat. § 30.866 (10) ("the court shall also include in the order, **when appropriate**…[prohibiting] the respondent's ability to possess firearms and ammunition or engage in activities involving firearms") (emphasis added); Utah Code Ann. § 78B-7-106(2) ("A court **may** grant the following relief… prohibit the respondent from purchasing, using, or possessing a firearm or other weapon specified by the court") (emphasis added).

Practitioners should therefore look both to the language of the order and to state law to determine if the domestic violence restraining order qualifies as under 18 USC § 922 as a possessory prohibition either through a *Brady* finding, an explicit prohibition, or a mandatory prohibition by operation of state law.

4.8.5 Withdrawal of Positive Brady Indicators & Other Challenges to the Order

However, an individual may challenge the issuing court's Brady Findings and prohibitions on possession in three basic ways. First, a successful Motion to Withdraw Positive Brady Indicator filed with the issuing court, may remove the application of the Brady Bill, if one argues successfully that the person is not a "credible threat." Second, counsel may move to withdraw the Brady finding for reason that defendant fails to meet the requisite domestic relationship under 18 USC § 922(a)(32). Third, in those states where possessory prohibitions are not mandatory, counsel may move to Modify Order, asking the court to permit the respondent, in the court's discretion, to possess firearms. This may be especially important to military and law enforcement personnel, not accused of criminal conduct, and whose duties require possession and use of firearms.

4.6.10 *NICS&NCIC-POF Databases*

The Brady Bill further "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. 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. 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." *See* Darren Mitchell and Susan B. Carbon, Firearms and Domestic Violence: A Primer for Judges, American Judges Association, Court Review (Summer 2002), available at http://aja.ncsc.dni.us/courtrv/cr39-2/CR39-2MitchellCarbon.pdf.

4.8.6 Constitutional Challenges

18 USC § 922(g)(8) has repeatedly withstood constitutional challenges on Commerce Clause, 10th Amendment, and Due Process grounds.

For example, in *United States v. Wilson*, a leading case, the Seventh Circuit held that § 922(g)(8) was a valid exercise of Congress' power under the Commerce Clause [U.S. Const., art. I, §8, cl. 3.], did not violate the 10th Amendment, and, further, did not violate Wilson's due process rights to adequate notice. 159 F.3d 280 (7th cir. 1998)

There, Carlton Wilson married his wife , Angela, in June 1991, in Illinois. . *Id at 284.* However, his (now ex-) wife filed for divorce in 1994. *Id.* On August 15, 1995, Angela, and her attorney, obtained an "emergency order of protection against Wilson." *Id.* Wilson appeared at a subsequent hearing, acting *pro se,* addressing both the order and related divorce matters, on September 1, 1995. The court, upholding the order "explained the proposed order of protection to Wilson, who indicated that he did not have a problem with any of its terms." *Id.* The court then entered the order which "never rescinded." *Id.* But the court, it is undisputed, did not explain to Wilson, that the order rendered him a prohibited possessor.

A year later, on September 10, 1996, Wilson was stopped by State Troopers on a southern Illinois state highway. *Id.* at 283. During a search police discovered a .12 gauge shotgun , a nine-millimeter handgun, and a rifle , in Wilson's vehicle *Id.*

Wilson was indicted in United States District court for the Southern District of Illinois for possessing a firearm while subject to an order of protection, pursuant to 18 USC § 922(g)(8). He was convicted at a jury trial and sentenced to 41 months imprisonment.

In affirming the conviction, the appellate panel rejected Wilson's due process claim that the criminal statute failed to "give fair warning of the conduct that makes it a crime" because he was not aware of the prohibited possessor statute and the judge issuing the order of protection failed to advise him of it. *Id.* at 288.

Rather, the court in *Wilson* reasoned, that "[t]he traditional rule of American jurisprudence is that ignorance of the law is no defense to a criminal prosecution." *Id.* (internal citations omitted).

However, in a blistering dissent, excerpted above, Judge Posner observed that

> It is wrong to convict a person of a crime if he had no reason to believe that the act for which he was convicted was a crime, or even that it was wrongful. This is one of the bedrock principles of American law
>
> *Id.* at 293 (J. Posner dissenting)

Moreover:

> Congress created, and the Department of Justice sprang, a trap on Carlton Wilson as a result of which he will serve more than three years in federal prison for an act (actually an omission to act) that he could not have suspected was a crime or even a civil wrong. We can release him from the trap by interpreting the statute under which he was convicted to require the government to prove that the violator knew that he was committing a crime.
>
> *Id.* at 293 (J. Posner, dissenting).

Finally:

> The federal criminal code contains thousands of separate prohibitions, many ridiculously obscure …. The prohibition in section 922(g)(8) is one of

> the most obscure …. The judge didn't tell Wilson; so far as appears, the judge was unaware of the law. Wilson's lawyer didn't tell him either – Wilson didn't have a lawyer.
> *Id.*

But, the trap largely remain: No Circuit Court has, thus far, adopted Judge Posner's reasoning. *See e.g. U.S. v. Baker*, 197 F.3d 211, *220 (*6th Cir. 1999) (an individual subject to a domestic violence restraining order is provided with notice that his conduct is subject to increased government scrutiny; the statute does not violate due process); *U.S. v. Kafka*, 222 F.3d 1129, 1130 (9th Cir. 2000) ("every circuit court which has considered this argument has rejected it"); *U.S. v. Reddick*, 203 F.3d 767, 769-71 (10th Cir.2000) ("We agree with every circuit court that has considered due process challenges to § 922(g)(8) and conclude that due process does not require actual knowledge of the federal statute *United States v. Meade*, 175 F.3d 215, 225-26 (1st Cir.1999) (same); *U.S. v. Bostic*, 168 F.3d 718, 722 (4th Cir. 1999) (same). [22]

At bottom, therefore, the government is not required to prove that a defendant, subject to a restraining order, knew that his possession of a firearm violated § 922(g)(8), but only that a defendant knew he was in possession of a firearm.

4.9 *Misdemeanor Convictions of Domestic Violence (MCDV)*

Eighth, pursuant to the Lautenberg Amendment to the Gun Control Act of 1996, codified at 18 USC § 922(g)(9), like those subject to domestic violence

[22] However, at least one district court in Nebraska adopted Judge Posner's suggestion that § 922(g)(3) be interpreted to "require the government to prove that the violator knew that he was committing a crime." *U.S. v. Ficke*, 58 F.Supp.2d 1071 (D. Neb. 1999) (holding that because "defendant had no actual notice of the enactment of this obscure, hard-to-find provision, nor would he have had a reasonable opportunity to discover it, §922(g)(8) violated defendants due process rights).

restraining orders, those convicted of misdemeanor crimes of domestic violence (MCDV), are prohibited from possessing firearms and ammunition.[23]

4.7.2 *Background and Legislative Intent*

A tripartite of recent, and trenchant, Supreme Court opinions addressing prohibited possessor convictions for domestic violence misdemeanor offenders pursuant to 18 USC § 922(g)(8) , explains in detail the purpose and intent of the Lautenberg Amendment.

First, Justice Ginsburg, writing for the court in *U.S. v Hayes*, in 2011, emphasized

> existing felon-in-possession laws, Congress recognized, were not keeping firearms out of the hands of domestic abusers, because 'many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies.' By extending the federal firearm prohibition to persons convicted of "misdemeanor crime[s] of domestic violence," proponents of § 922(g)(9) sought to 'close this dangerous loophole.'

U.S. v. Hayes, 555 U.S. 415, 426 (2009) (internal citations omitted).

Second, three years later, Justice Sotomayor explained:

> This country witnesses more than a million acts of domestic violence, and hundreds of deaths from domestic violence, each year. Domestic violence often escalates in severity over time, and the presence of a firearm increases the likelihood that it will escalate to homicide….When a gun is in the house, an abused woman was 6 times more likely than other abused women to be killed. 'All too often,' as one Senator noted during the debate over § 922(g)(9), the only difference between a battered woman and a dead woman is the presence of a gun.' Congress enacted § 922(g)(9) in light of these sobering facts, to 'close a dangerous loophole' in the gun control

[23] ATF Form 4473 Question 11.i, which asks, "have you ever been convicted in any court of a misdemeanor crime of domestic violence," addresses this prohibition.

> laws: while felons had long been barred from possessing guns, many perpetrators of domestic violence are convicted only of misdemeanors.

U.S. v Castleman, 134 S.Ct. 1405, 1409 (2014).

Finally, and most recently, Justice Kagan, in 2016, citing both *Castleman and Hayes*, observed in *Voisine:* "Congress enacted § 922(g)(9) some 20 years ago to "close [a] dangerous loophole" in the gun control laws. 136 S.Ct. 2272, 2276 (June 27, 2016) citing *United States v. Castleman*, 572 U.S. ——, ——, 134 S.Ct. 1405, 1409, 188 L.Ed.2d 426 (2014) (quoting *United States v. Hayes*, 555 U.S. 415, 426, 129 S.Ct. 1079, 172 L.Ed.2d 816 (2009)).

Moreover, Justice Kagan observed that " many perpetrators of domestic violence are charged with misdemeanors rather than felonies, notwithstanding the harmfulness of their conduct."V*oisine at 2276* citing *Castleman*, 572 U.S., at ——, 134 S.Ct., at 1408–1409. Finally, "[f]irearms and domestic strife are a potentially deadly combination." Volisine, supra at 2277 *citing Hayes*, 555 U.S., at 427, 129 S.Ct. 1079.

Accordingly, "Congress added § 922(g)(9) to prohibit any person convicted of a "misdemeanor crime of domestic violence" from possessing any gun or ammunition with a connection to interstate commerce." *Voisine, supra at 2277.* Therefore, " it defined that phrase, in § 921(a)(33)(A), to include a misdemeanor under federal, state, or tribal law, committed by a person with a **specified domestic relationship** with the victim, that "has, as an element, the use or attempted use of **physical force."**

4.7.3 *Qualifying Relationship*

As in the case of restraining orders, 18 USC § 921(a)(33)(A) restricts the qualifying relationship to a " former *spouse, parent, or guardian* of the victim, by a person who is *cohabiting* with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim. § 921(a)(33)(A). Casual romantic relationships are, again, excluded.

However, The federal statute does not require that the misdemeanor statute *charge* a domestic relationship as a categorical element; instead, it requires only

that the misdemeanor have been committed against a person who was ***in fact*** in one of the specified domestic relationships. *U.S. v. Belless*, 338 F.3d 1063, 1065 (9th Cir. 2003). Thus, whether the state court labels the conviction as "domestic violence" is not determinative.

4.7.4 *Use of Physical Force*

Under § 921(a)(33)(A), a categorically requires "the use or attempted use **of physical force**, or the threatened use of a deadly weapon." § 921(a)(33)(A) (emphasis added)..

Notably in *Voisine v. United States*, cited above, the United States Supreme Court recently held that "reckless domestic assault qualifies as a 'misdemeanor crime of domestic violence'" for purposes of 19 USC § 922(g)(9) possessory prohibition prosecutions. 146 S.Ct 2272 (June 27, 2016) (Kagan, J.).

There, Voisine pleaded guilty in 2004 to recklessly assaulting his girlfriend, in violation of § 207 of the Maine Criminal code, a misdemeanor. *Id. at 2277.* Several years later Voisine was investigated for killing a bald eagle. *Id.* During such investigation , law enforcement learned thatVoisine owned a rifle. A background check turned up the prior misdemeanor, so the government charged him with a violation of 18 USC §922(g)(9). Voisine was convicted as a prohibited possessor and appealed.

In affirming the conviction, Justice Kagan reasoned that because "Congress enacted § 922(g)(9) in order to prohibit domestic abusers convicted under run-of-the-mill misdemeanor assault and battery laws from possessing guns," and because "fully two-thirds of state laws extend to recklessness," construction excluding reckless crimes "would substantially indermine the provision's design." *Id. at 2278.*

4.7.5"Physical Force" as de minimus"Offensive Touching"

Furthermore, in determining whether a State conviction meets the physical force element, the Supreme Court previously held in *Castleman* that **"Congress incorporated the common-law meaning of 'force' – namely, offensive touching** – in § 921(a)(33)(A)'s definition of a 'misdemeanor crime of domestic violence'

and that "the requirement of physical force is satisfied, for purposes of §922(g)(9), **by the degree of force that supports a common-law battery conviction."** *Castleman* at 1410 (emphasis added). In that case, where "*Castleman* pleaded guilty to having "intentionally or knowingly caused bodily injury," and "a bodily injury must result from physical force," the element was met. *Id.* Since the common law meaning of force is the new standard, "that the harm occurs indirectly (as with a poisoned drink, for instance), rather than directly (as with a kick or punch), does not matter." *Id.*

The *Castleman* decision abrogated the 2003 Ninth Circuit decision in *U.S. v. Belless*, which held that a conviction for a Wyoming statute which defined the crime as "unlawfully touches another in a rude, insolent or angry manner or intentionally, knowingly or recklessly causes bodily injury to another" did not meet the requirements of § 922(g)(9). 38 F.3d 1063, 1067 (9th Cir. 2003). The *Belless* Court had held that the "phrase "physical force" in the federal definition at 18 U.S.C. § 921(a)(33)(A)(ii) means the violent use of force against the body of another individual;" the *Castleman* court modified that definition to the common law meaning of force – namely, "offensive touching." See *Belless* at 1068; *Castleman* at 1410.

Thus, "violent" contact, intentional or reckless is no longer required after *Castleman and Voisine.* "Domestic violence is not merely a type of 'violence'; it is a term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context"—acts such as slapping, shoving, pushing, grabbing, hair-pulling, and spitting. *Castleman* at 1411 & n. 5. Instead, the requirement is met "by the degree of force that supports a common-law battery conviction"—including an offensive touching."

Therefore, in sum, the *facts* must establish a qualifying domestic relationship, and the statute of conviction must involve at least reckless ,if de minimus, use of physical force. A review of the two elements just discussed is including in the following chart below:

Table 4(b) MCDV Flow Chart

Is it Domestic?	(1) The federal "domestic relationship" definition is **narrower**

	than many state definitions; crimes committed by current and former spouses, parents, and guardians, and cohabitating those "similarly situated." ➢ Left out? e.g., non-spouse and non-cohibating sexual partners with no children in common, siblings, children, in-laws, non-guardian grandparents. (2) The federal court is **not limited** to the State record of conviction; instead, your client may be convicted under § 922(g)(9) without a State domestic violence designation with facts proven at trial. Relationship defined in **18 U.S.C. § 921(a)(32).**
Is it a Crime of Violence?	(1) The federal court **is limited** to the State record of conviction. ➢ Ask: Are the elements of the State crime a categorical fit? If the State statute is too broad, do the plea agreement and other judicially noticeable documents show that the crime fits? (2) **Intentional** or **reckless** use of force only. *Vosine v. United States 136 S.Ct. 772 (June 27 2016) abrogating U.S. v. Nobriga*, 474 F.3d 561 (9th Cir. 2006). ➢ *Nobriga* formerly representative of 9th Circuit majority view; 1st Circuit l minority (reckless *may* be sufficient in that jurisdiction). SCOTUS *certiori* granted to resolve. *U.S. v. Booker*, 644 F.3d 12, 21 (1st Cir. 2011); *United States v. Voisine*, 778 F.3d 176, 179 (1st Cir.), *cert. granted in part*, 136 S. Ct. 386, 193 L. Ed. 2d 309 (2015). ➢ (3) Physical Force defined as: **the common law meaning of force – namely, de minimus"offensive touching."** *U.S. v. Castleman*, 134 S.Ct. 1405 (2014). Includes spitting and shoving. ➢ Note abrogation of *U.S. v. Belless*, requiring violent use of force against body of another. *U.S. v. Belless*, 338 F.3d 1063 (9th Cir. 2003) (*abrogated by U.S. v. Castleman*, 134 S.Ct. 1405 (2014)).

4.7.6 *Contours and Limitations of 18 USC § 922(g)(9)*

18 USC § 922(g)(9) applies to *old* convictions for misdemeanor crimes of domestic violence, even those pre-dating the Lautenberg Amendment. As noted in the US Attorneys Manual, Criminal Resource Manual: "The prohibition applies to persons convicted of such misdemeanors at any time, even if the conviction occurred prior to the new law's effective date …" USAM/CRM § 1116 *citing United States v. Brady*, 26 F.3d 282 (2nd Cir 1994) (denying ex post facto challenge).

Constitutional challenges to this aspect of the statute have failed. "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. *See, e.g.*, United Sates v. Mitchell, 209 F. 3d 319, 322-23 (4th Cir. 2000), cert. denied, 531 U.S. 849 (2000)." Darren Mitchell and Susan B. Carbon, Firearms and Domestic Violence:A Primer for Judges, American Judges Association, Court Review (Summer 2002), available at http://aja.ncsc.dni.us/courtrv/cr39-2/CR39-2MitchellCarbon.pdf.

4.7.11 *The §922(g)(9) "Misdemeanor Paradox"*

If the misdemeanor crime of domestic violence is "set aside" or expunged the person is no longer a prohibited possessor. 18 USC § 921(a)(33)(B)(ii); 27 CFR 478.11. But where the misdemeanor conviction is not set aside or expunged, as may be the case, the prohibition remains, in some cases permanently. In contrast to many felons, who have restoration rights under most state law, regaining firearm possessory and other civil rights, non expunged MCDV's, in contrast, may remain a *permanent* prohibition. This known as the "misdemeanor paradox" to 18 USC §922(g)(9).

18 USC § 925 ostensibly provides that

A person who is prohibited from possessing …firearms or ammunition may make application to the Attorney Genral for relief from the disabilities imposed by Federal laws with respect to the … possession of firems and the attorney General may grant such relief if it is established to his satiffaction that the circumstances regarding the disability, and the applicant's record and reputation are such that the applicant will not be likely to act in a mannter dangerous to public safety and that the granting of the relief would not be contrary to the public interest.

18USC § 925©. Moreover, if the United States Attorney General denies the applicaition, the statute expressly provides for judicial review by the federal courts. *Id.*

However, since 1993 the Bureau of Alcohol tobacco Firearms and Explosives (BATFE), the agency designated by the Attorney General as the authority to §925© restoration applications, for MCDV's has refused to pass on the merits of any application for restoration of firearms rights. *Burtch v. US Dept. of Treasury*, 120 F.3d 1087 (9th Cir. 1997). That year Congress refused to authorize funds for the relief from disabilities program and specifically prohibited the expenditure of any funds "to investiage or act upon applications for relief from federal firearms disabilities under 18 USC § 935©". *Id. citing 1993-97 a*ppropriation bills. According to the ATF website, congress has yet to restore funding and continues to prohibit the use of federal monies to process applications. ATF doesn't even have an application form. Thus, a paradox arises: Those convicted of domestic violence state felonies, and other felonies are generally able to restore firearm possessory rights, while whose convicted of qualifying misdemeanors are not. Therefore, the only avenue for relief from a MCDV is "set aside" or expungement, in those states and jurisdictions where available.

4.7.12 *The §922(g) "Law Enforcement Anomaly": Banned with a misdemeanor but not a felony*

Finally, 18 USC § 925(a)(1) exempts military and police for *felony* convictions but not for convictions of misdemeanor crimes of domestic violence. This is known as the "law enforcement anomaly," a kissing cousin of the "misdemeanor paradox." As explained, in graphic terms, directly in the US Attorney's Manual:

> any member of the military or any police officer who has a qualifying misdemeanor conviction is no longer able to possess a firearm, even while on duty. We now have the anomalous situation that 18 USC § 925(c) still exempts felony convictions for these two groups. Thus if a police officer is convicted of murdering his/her spouse or has a protection order placed against them, they may under federal law, still may be able to possess a service revolver while on duty, whereas if they are convicted of a qualifying misdemeanor, they are prohibited from possessing any firearm or ammunition at any time.

USAM/CRM § 1117 (www.justice.gov/usam/criminal-resource-manual-1117-restrictions-possession-firearms-individuals-convicted *last visited* March 5, 2017). It

4.7.13 *Conclusions*

In sum, recent United States Supreme Court caselaw, citing the legislative purpose of the Lautenberg Amendment, has significantly expanded the definition of a qualifying Misdemeanor Crime of Domestic Violence to include reckless assaults and those involving de minimus touching. Paradoxically, a qualifying misdemeanor conviction may permanently render a person a prohibited possessor, under 18 USC § 922(g)(9), while a conviction for a similar felony would not. Thus, the bench and bar, adjudicating, advocating or counseling in domestic violence misdemeanor matters, should, at the least, be aware, of the collateral and sometimes permanent consequences of misdemeanor crimes of domestic violence. When negotiating resolutions, care in establishing an appropriate but safe statute of conviction may important to avoiding or limiting collateral consequences.

As to the Gun Control Act generally, the bench and bar should likewise employ both wisdom and caution when adjudicating ,advocating or counseling certain broad classes persons, including those using state-sanctioned marijuana; immigrants and non-citizens; those accused of domestic violence criminally as misdemeanants, or civilly or through restraining orders--particularly those in law enforcement or the military; those p who have been civilly committed to mental healthcare facilities; those armed services veterans who have been dishonorably discharged; and those who are fugitives or under indictment.

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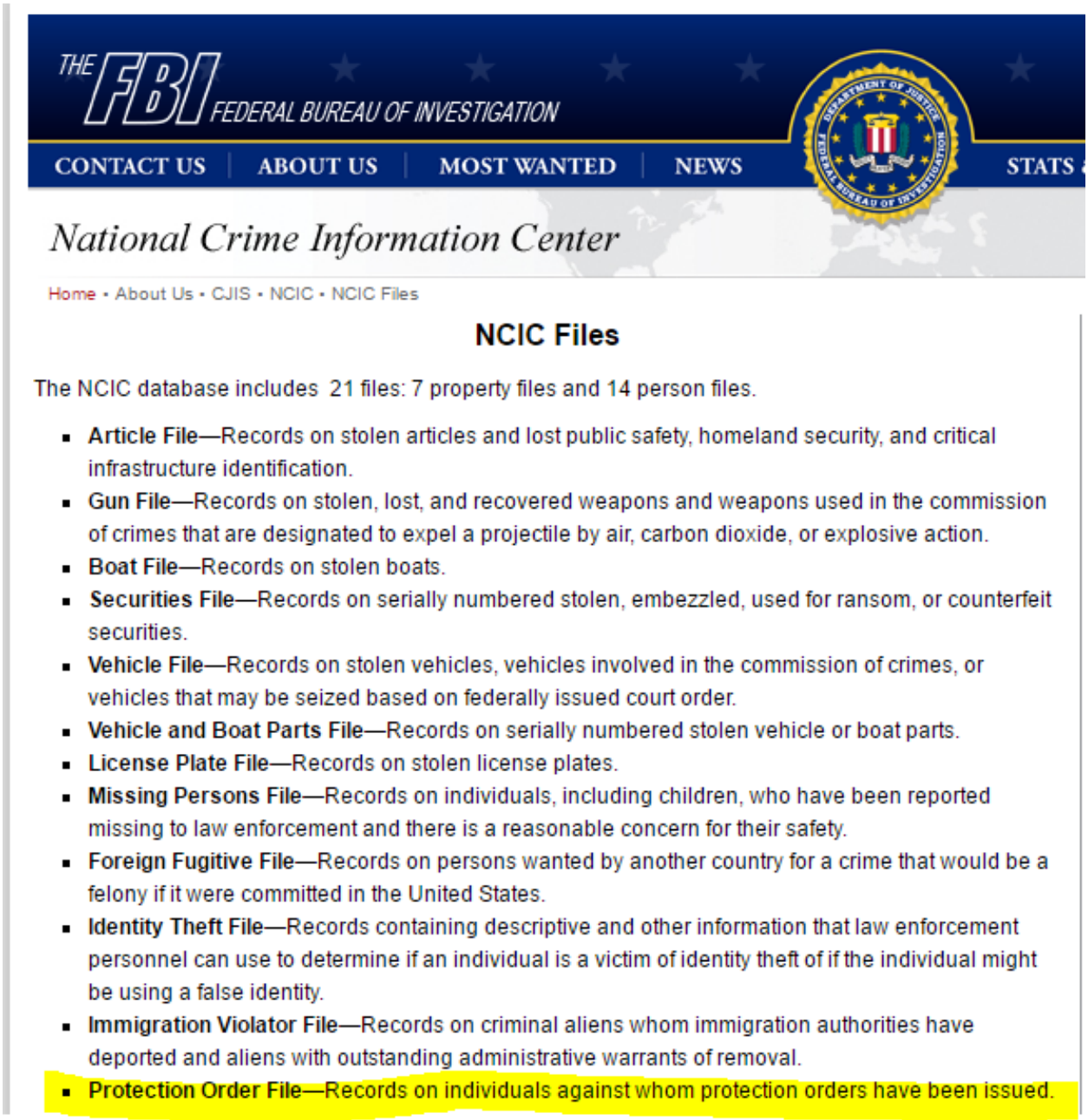

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NCIC Files

The NCIC database includes 21 files: 7 property files and 14 person files.

- **Article File**—Records on stolen articles and lost public safety, homeland security, and critical infrastructure identification.
- **Gun File**—Records on stolen, lost, and recovered weapons and weapons used in the commission of crimes that are designated to expel a projectile by air, carbon dioxide, or explosive action.
- **Boat File**—Records on stolen boats.
- **Securities File**—Records on serially numbered stolen, embezzled, used for ransom, or counterfeit securities.
- **Vehicle File**—Records on stolen vehicles, vehicles involved in the commission of crimes, or vehicles that may be seized based on federally issued court order.
- **Vehicle and Boat Parts File**—Records on serially numbered stolen vehicle or boat parts.
- **License Plate File**—Records on stolen license plates.
- **Missing Persons File**—Records on individuals, including children, who have been reported missing to law enforcement and there is a reasonable concern for their safety.
- **Foreign Fugitive File**—Records on persons wanted by another country for a crime that would be a felony if it were committed in the United States.
- **Identity Theft File**—Records containing descriptive and other information that law enforcement personnel can use to determine if an individual is a victim of identity theft of if the individual might be using a false identity.
- **Immigration Violator File**—Records on criminal aliens whom immigration authorities have deported and aliens with outstanding administrative warrants of removal.
- **Protection Order File**—Records on individuals against whom protection orders have been issued.