

Federal Firearm Offenses

Gun Prohibitions While Subject to a Protective Order

18 U.S.C. 922 (g)(8) makes it illegal for individuals who are the subject of a final restraining order to purchase, receive and/or possess a firearm. The statute applies to orders that restrain a person from harassing, stalking, threatening, or engaging in other conduct that would place an intimate partner or child of such intimate partner's in reasonable fear of bodily injury.

The person subject to the order must have received notice and the opportunity to be heard before the order was issued. The order must include either: (a) a finding that such person represents a credible threat to the physical safety of the intimate partner or child; or (b) an explicit provision prohibiting such person from using, attempting to use, or threatening to use physical force against the intimate partner or child that would reasonably be expected to cause bodily injury.

The gun ban in these sections is very inclusive and applies to all types of firearms, destructive devices and ammunition. Antique firearms are not included within the ban. The gun ban in 922(g)(8) and 922 (d)(8) is only applicable for the time the protective order is in existence.

The federal firearm prohibition of sections 922(d)(8) and (g)(8) do not apply to firearms issued to law enforcement officers or military personnel while that person is on duty. The exemption applies only to service weapons and not to personal weapons.

Under 18 U.S.C. 922(d)(8) it is illegal to transfer a firearm to a person subject to a protective order which restrains that person from harassing, stalking or threatening an intimate partner or child. A violation of this section must be knowing.

18 U.S.C. 922(g)(8) Case Law

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First Circuit (Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island)
United States v. Meade, 175 F. 3d 215 (1st Cir. 1999). Meade, while subject to an active protection order, threatened to shoot his wife while pounding on her apartment door. When police arrived, they instructed him to lie face down and show his hands. Instead, he crouched down and thrust his hand into his parked car. After his arrest, police retrieved a loaded handgun from the car. Meade was found guilty in district court of violating 922(g)(8) and (g)(8). On appeal, he argued that both 922(g)(8) and (g)(9) are unconstitutional. In terms of (g)(8), he asserted that the section violates the 10th Amendment, because it promotes interference by the federal government in state civil proceedings, and the Due Process Clause, because it does not require notice of the statute and the consequences of violating it. The 1st Circuit rejected all of Meade's arguments and affirmed his conviction.

United States v. Bunnell, 106 F. Supp. 2d 60 (D. Me. 2000). Steven Bunnell's ex-wife applied for, and was granted, an ex parte protection order. The order contained a warning in bold text that if the respondent failed to appear at the hearing, a protection order may be granted for a maximum of two years, and that if the respondent planned to oppose the order, he should not fail to appear at the hearing. Bunnell was served with the ex parte order on the day it was issued. Bunnell did not appear at the hearing, and the court issued a permanent order prohibiting Bunnell from harassing, stalking, or threatening Bunnell's ex-wife, and from the use, attempted use, or threatened use of physical force that could be reasonably expected to cause bodily injury. Bunnell was served with the permanent order on the same day it was issued. Thereafter, the local police department received information from a man who served with Bunnell in the National Guard that he had heard Bunnell make threats against his ex-wife during a training exercise while Bunnell was firing an M-60 machine gun, and that he had seen Bunnell in possession of a Colt AR-15 (a civilian version of the M-16 assault rifle). The local police department subsequently obtained a search warrant, recovered the firearm, four loaded magazines for the weapon, and a copy of the protection order. Bunnell was indicted on one count of violating 922(g)(8). Bunnell filed a motion to dismiss the indictment, arguing that the statute (1) is an unconstitutional exercise of Congress's Commerce Clause power, (2) violated his rights to due process, equal protection, and counsel under the 5th, 6th, and 14th Amendments of the U.S. Constitution, and (3) violates the 10th Amendment. The District Court denied the motion. Regarding the Commerce clause argument, the court rejected it because, unlike the statute in *United States v. Lopez*, 514, U.S. 549 (S. Ct. 1995), 922(g)(8) contains a jurisdictional element requiring that a firearm moved in interstate commerce. Regarding his due process argument, Bunnell argued that the order was issued at a hearing which he did not attend and at which he was not represented by counsel. The court noted that the statute requires only that the order be issued after a hearing of which a defendant received notice and had an opportunity to participate. Bunnell was personally served with the ex parte order, but chose not to participate in the hearing; therefore, he cannot now claim that he was denied due process. Bunnell failed to articulate any argument for a violation of his equal protection and right to counsel rights, and these claims were thus deemed waived. Finally, regarding Bunnell's challenge that the statute violates the 10th Amendment, the court rejected it, as well, citing *United States v. Meade, supra*, in which the 1st Circuit held that \square 922(g)(8) does not violate the 10th Amendment.

Fourth Circuit (Maryland, North Carolina, South Carolina, Virginia, and West Virginia) *United States v. Bostic*, 168 F. 3d 718 (4th Cir. 1999), *cert. denied*, 527 U.S. 1029 (1999). While subject to a protection order, Bostic tricked his estranged wife into coming to his home, brandished a .20 gauge shotgun, and threatened to kill her. After his arrest, execution of a search warrant yielded four firearms and numerous rounds of ammunition. Bostic filed a motion to dismiss, arguing that 922(g)(8) is unconstitutional because it violates the notice and fair warning principles of the 5th Amendment, Congress's power under the Commerce Clause, and the 10th Amendment. The district court rejected these challenges, and Bostic appealed, after pleading guilty to possessing one of the firearms. The 4th Circuit affirmed.

United States v. Henson, 55 F. Supp. 2d 528 (S.D. W.V. 1999). Henson's wife obtained a final protection order that prohibited Henson from harassing, stalking and threatening her or engaging in other conduct that would place her in reasonable fear of bodily injury. Henson drove to his wife's residence one night, saw her outside with a friend, and chased her and her companion into the apartment building. He was indicted for violating 922(g)(8) after being arrested and found with a loaded .22 caliber revolver in his jeep. Henson moved to dismiss the indictment on the grounds that 922(g)(8) violates the 2nd and 5th Amendments. In support of his arguments, the defendant did not provide a memorandum of law, but simply attached to his motion a copy of the *Emerson* district court opinion. The court rejected both arguments because the 4th Circuit has consistently held that the 2nd Amendment confers a collective, rather than an individual right to bear arms, and the statute does not violate the notice and fair warning principles embodied in the 5th Amendment because of the fundamental principle that "ignorance of the law is no excuse."

Fifth Circuit (Louisiana, Mississippi, Texas)

United States v. Emerson, 46 F. Supp. 2d 598 (N.D. Tex. 1999). Emerson was indicted for possession of a firearm while subject to a protection order in violation of 922(g)(8). He moved to dismiss the indictment, arguing that 922(g)(8) is an unconstitutional exercise of congressional power under the Commerce Clause, and the 2nd, 5th, and 10th Amendments. The district court granted the motion to dismiss, finding that the statute violates the 2nd Amendment because all that is required for prosecution under the statute is a boilerplate order with no particularized findings, and has "no real safeguards against an arbitrary abridgement of Second Amendment rights." Appellate briefs have been filed.

United States v. Spruill, 61 F. Supp. 2d 587 (W.D. Tex. 1999). After a Texas court issued a consent restraining order against Spruill. Spruill told a friend that he intended to shoot his wife. The friend contacted law enforcement. Federal agents asked the friend to phone Spruill and set up a transaction to exchange firearms; the phone call was recorded, and federal agents were present when Spruill traded one weapon for another with the friend. Spruill was arrested and indicted for violating 922(g)(8). He filed a motion to dismiss, challenging the statute on the grounds that it unconstitutionally violates the 2nd and 5th Amendments. The district denied the motion to dismiss. The court relied on the reasoning in *Wilson, supra.*, for rejecting Spruill's due process attack, and held that the 2nd Amendment does not prohibit the federal government from imposing "some restrictions on private gun ownership."

Sixth Circuit (Kentucky, Michigan, Ohio, Tennessee)

United States v. Napier, No. 00-5290, 2000 U.S. App. LEXIS 29531 (6th Cir. Nov. 21, 2000). Harvey Napier was subject to two domestic violence protection orders, one entered on December 9, 1996, and the other entered by another court on September 28, 1998. Both orders restrained Napier from committing acts of domestic violence against his wife and children, and contained notice of 922(g)(8). Napier received notice and an opportunity to participate in both hearings prior to entry of the orders. On January 30, 1999, Napier's wife called the police to report an assault by Napier. Responding police

officers stopped Napier's car, and subsequently found a 10 mm Glock Model 20 semi-automatic pistol and 22 rounds of 10 mm ammunition on the floorboard of the car. Napier was arrested and later indicted for two counts of violating 922(g)(8). Napier filed three motions to dismiss, arguing that the statute violates the Second and Fifth Amendments of the Constitution, is an unconstitutional exercise of the Congress's commerce power, that the underlying protection orders were either void or did not qualify as predicate offenses, and that domestic violence orders do not fulfill the substantive requirements of 922(g)(8). The district court denied all three motions, and Napier entered a conditional guilty plea, admitting that he had knowingly possessed the firearm and ammunition and was subject to two protection orders. Napier appealed the district court's denial of his motions to dismiss to the 6th Circuit. Napier challenged the statute on due process grounds on its face because it fails to require notice of its prohibitions, and as applied because he contended that he did not receive notice that his conduct violated the statute. The court referred to *Baker, infra*, which held that although the general rule that citizens are presumed to know the law is not absolute, and may not apply where the law is very technical and obscure and thus threatens to ensnare individuals engaged in seemingly innocent conduct, it was not necessary in that case to determine whether the statute violates due process because Baker received adequate notice of 922(g)(8)s prohibitions (each of the protection orders entered against Baker contained a bold print warning). Napier attempted to distinguish *Baker* because he never received copies of either protection order entered against him. The court rejected his argument because Napier was provided with adequate notice of the protection order hearings and appeared at both hearings. Additionally, whether he received or read the orders is irrelevant; his status as a person subject to a domestic violence protection order was sufficient to preclude him from claiming that he was not given fair warning of 922(g)(8). Regarding Napier's Commerce Clause challenge, the court rejected that argument, as well, relying on *Baker*, and holding that Congress did not exceed its powers under the Commerce Clause. Relying on *Emerson, supra*, Napier also contended that the statute violates his 2nd Amendment right to bear arms. The 2nd Circuit disagreed, holding that the 2nd Amendment does not guarantee an individual right to bear arms, and the statute does not violate the 2nd Amendment.

United States v. Baker, 197 F. 3d 211 (6th Cir. 1999), *cert. denied*, No. 99-8027, 2000 U.S. LEXIS 1727 (Feb. 28, 2000). Baker accidentally shot himself while he was subject to multiple protection orders. He was indicted for violating 922(g)(8). He filed a motion to dismiss the indictment, arguing that the statute is unconstitutional. The district court denied his motion, and Baker was subsequently convicted. He appealed to the 6th Circuit, arguing that 922(g)(8) violates the 5th Amendment, the Cruel and Unusual Punishment Clause of the 8th Amendment, and the Commerce Clause. The 6th Circuit rejected all of these arguments and affirmed the conviction.

United States v. Visnich, 65 F. Supp. 2d 669 (N.D. Oh. 1999). While subject to a restraining order that prohibited Visnich from abusing his wife and daughters and from possessing, using, carrying, or obtaining deadly weapons, he was arrested for breaking into the home of a friend's ex-wife to retrieve the friend's possessions. A post-arrest search of his vehicle produced sixteen firearms and ammunition. After indictment for

violating 922(g)(8), Visnich filed a motion to dismiss, arguing that the statute is an unconstitutional exercise of Congress's Commerce Clause powers, and violates his 2nd, 5th, and 10th Amendment rights. The district court denied the motion to dismiss.

Seventh Circuit (Illinois, Indiana, Wisconsin)

U.S. v. Wilson, 159 F.3d 280 (7th Cir. 1998), *cert. denied*, No. 98-1256, 1998 U.S. App. LEXIS 34124 (Nov. 16, 1998). Wilson was subject to a protection order was arrested for and outstanding warrant. He was found to be in possession of a .12 gauge shotgun, a MAC 90 Sportster rifle, and a loaded .9 mm Locrin handgun. Wilson was convicted at trial in the U.S. District Court for the Southern District of Illinois for violating 922(g)(8), and was sentenced to 41 months in prison and 3 years of probation after release. Wilson appealed, challenging the constitutionality of 922(g)(8). The 7th Circuit affirmed the conviction, holding that 922(g)(8) is a valid exercise of Congress's power under the Commerce clause, and does not violate the 10th or 5th Amendments of the Constitution.

Ninth Circuit (Alaska, Arizona, California, Guam, Hawaii, Nevada, Northern Mariana Islands)

United States v. Jones, 231 F.3d 508 (9th Cir. 2000). Charles Jones, a federally licensed firearms dealer, was subject to a restraining order issued on March 26, 1997, in California pursuant to a petition filed by his former girlfriend. The order prohibited Jones from contacting, threatening, or coming within 100 yards of the petitioner's residence, and was to remain in effect until March 26, 2000. The following year, Jones filed an application to renew his firearms license with the U.S. Treasury Department, Bureau of Alcohol, Tobacco, and Firearms. The renewal application asked whether Jones was subject to a domestic violence restraining order, and Jones answered no. Jones continued to stalk and harass the petitioner, and was convicted of a stalking charge in a California court in June 1997. The ATF later learned that Jones had pawned firearms in a pawn shop. Jones was arrested by the ATF when he returned to the pawn shop to redeem his firearms, falsely stated that he was not subject to a domestic violence restraining order and that he was not a felon, and received the firearms. Jones was indicted for violating 18 U.S.C. 922(g)(8), for being a felon in possession of firearms, for making false statements on firearms records, and for making a false statement on a firearms license renewal application. He was convicted on all four counts. On appeal to the 9th Circuit Court of Appeals, Jones raised several arguments, including that 922(g)(8) exceeds Congress' authority under the Commerce Clause and infringes on rights reserved to the states under the Tenth Amendment. The Ninth Circuit affirmed the conviction (but vacated and remanded as to the sentence). The court found that the *Kafka* (see below) decision trumped the due process argument. Jones argued that (g)(8) violates the Commerce Clause based on the reasoning in *United States v. Lopez*, 514 U.S. 549 (1995). This argument failed, because in *Lopez*, the statute in question lacked a jurisdictional element ensuring that the firearm in affected interstate commerce. Jones also contended that the recent U.S. Supreme Court decisions in *United States v. Morrison* (529 U.S. 598 (2000)) and *Jones v. United States* (529 U.S. 848 (2000)) support his argument that the statute violates the Commerce Clause. The Ninth Circuit distinguished these cases; the statute in *Morrison* did not contain the requisite jurisdictional element, and in *Jones*, the statute regulated non-economic activity (arson of a private residence). Due to the fact

that Congress did not exceed its authority under the Commerce Clause and therefore properly acted under one of its enumerated powers, 922(g)(8) does not violate the Tenth Amendment of the Constitution.

United States v. Kafka, No. 99-30305, 2000 U.S. App. LEXIS 21188 (9th Cir. Aug. 23, 2000). Kafka was subject to a restraining order issued in Washington state court that prohibited him from "causing physical harm, bodily injury, assault, including sexual assault, and from molesting, harassing, threatening or stalking" his wife. When subsequently stopped for a traffic violation, he advised the officers that he was carrying a pistol in the waistband of his pants. He was indicted for violating 922(g)(8), and filed a motion to dismiss. He entered a conditional guilty plea, and appealed the denial of the motion to dismiss. In his appeal, Kafka argued that the statute violates due process by failing to require that notice of the statute be provided to persons subject to protection orders. The 9th Circuit affirmed the conviction, distinguishing the case from *Lambert v. California* (355 U.S. 225 (1957)) (where the defendant was convicted of violating an ordinance making it a crime for felons to remain in the city for more than five days without registering with the police). Kafka's conduct did not involve conduct or circumstances "so presumptively innocent as to fall within Lambert's exception to the traditional rule that ignorance of the law is no defense."

Gun Prohibitions for Those Convicted of a Misdemeanor Crime of Domestic Violence

18 U.S.C. 922(g)(9) makes it illegal for someone to possess a firearm after a conviction of a misdemeanor crime of domestic violence. This prohibition is retroactive and applies to anyone convicted of such misdemeanors at any time. A qualifying domestic violence misdemeanor must have as an element the use or attempted use of physical force, or the threatened use of a deadly weapon. A previous conviction for a misdemeanor violation of a protective order will not qualify, even if the violation was committed by a violent act, if the state statute does not require the use or attempted use of physical force or the threatened use of a deadly weapon. The statute also contains due process requirements regarding counsel and jury trials. If the conviction has been expunged or set aside, the statute does not apply.

The official use exemption does NOT apply to sections 922(d)(9) and 922(g)(9). This means that law enforcement officers or military personnel who have been convicted of a qualifying domestic violence misdemeanor will not be able to possess or receive firearms for any purpose. There is no exception for the performance of official duties.

18 U.S.C. 922(d)(9) makes it illegal for someone to transfer a firearm to a person convicted of a misdemeanor crime of domestic violence. A violation of this section must be knowing.