The Intersection of State and Federal Gun Laws

BY KEITH WILLIAMS, ESQ.

Most of us who practice state criminal law feel a vague unease at times about the possible intersection of state and federal law, especially in firearm cases. A client may be charged as a felon in possession in state court, but we know they could be punished for the same offense in federal court. We have probably also heard talk of seemingly minor state misdemeanor domestic violence convictions being used to terminate a client's right to possess firearms and ammunition under federal law.

The purpose of this article is to demystify the intersection of state and federal firearm law, so we can give better advice to our clients in state court.

Separate Sovereigns

A client charged in state court can later be prosecuted for the same conduct in federal court. The state and federal governments are "separate sovereigns," each of which can punish criminal conduct committed within their respective jurisdictions. "[T]his Court has long held that two offenses are *not* the same offence [sic] for double jeopardy purposes if prosecuted by different sovereigns." *Gamble v. United States*, 139 S.Ct. 1960, 1964 (2019) (internal citations omitted). Having a client plead "guilty" in state court is having a client go on the record with an admission that can later be used against them in federal court.

The U.S. Attorney's Office has a general policy against prosecuting someone in federal court for conduct already punished in state court. The "Petite policy" "precludes the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on substantially the same act(s) or transaction(s)." *Justice Manual (formerly the United States Attorneys' Manual)*, § 9-2.031(A).

But the policy is subject to exceptions, and more important, the policy creates no enforceable rights for our clients. "All of the federal circuit courts that have considered the question have held that a criminal defendant cannot invoke the Department's policy as a bar to federal prosecution." *Id.*, § 9-2.031(F) (collecting cases).

> ***Practice Tip:*** when accepting a plea bargain in a state firearm case, do it with a "no contest" or "nolo contendre" plea whenever possible. Federal Rule of Evidence 410(a)(2) provides "a nolo contendere plea" "is not admissible against the defendant who made the plea." As the advisory committee note explains, the "rule gives effect to the principal traditional characteristic of the *nolo* plea, i.e., avoiding the admission of guilt which is inherent in pleas of guilty."

Intent Matters

As part of understanding the background of federal firearm issues, one positive development in recent years is that intent matters. One of the primary federal firearm statutes is 18 U.S.C. § 922(g), which establishes the categories of persons prohibited from having firearms under federal law. The full "prohibited persons" list is available online as an easier read at https://www.atf.gov/firearms/identify-prohibited-persons.

Until recently, it was unclear whether a federal prosecutor was required to show a firearm defendant *knew* they were a prohibited

person. For example, one type of prohibited person is someone "who, being an alien, is illegally or unlawfully in the United States." 18 U.S.C. § 922(g)(5)(A). In a case that went to the U.S. Supreme Court in 2019, a young man came to the U.S. on a student visa. He later left school but stayed in the country, which made him an alien illegally or unlawfully present.

He was found in possession of a firearm and prosecuted under 922(g)(5)(A). He pled not guilty and argued at trial the government had to prove he "knowingly" possessed a firearm under the statute, that is, he "knew [he] was illegally or unlawfully in the United States." *Rehaif v. United States,* 139 S.Ct. 2191, 2194 (2019) (internal citation omitted).

The Supreme Court agreed, with a ruling that applied to all categories of prohibited persons under the statute. "We conclude that in a prosecution under 18 U.S.C. § 922(g) … the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." *Id.* at 2200.

Intent matters. If you have a state firearm case and the right facts, and if you learn the federal authorities are reviewing it, do everything you can to make clear on the record that your client did not know they were a prohibited person.

Cooperating Witnesses

A different issue is presented in a case with a defendant who is guilty and knows it, and wants to cooperate with the authorities to seek a lower sentence. You or your client may receive word the state firearm case is going to be dismissed and moved to federal court, where the penalties for the same offense are probably harsher. As part of the discussions, the case agents may say your client needs to cooperate by telling everything he knows. The agents may say cooperating early is the best path to getting a "substantial assistance" sentence reduction in federal court.

Without question, substantial assistance can be helpful. But we do it in federal court with a promise that the information the client provides will not be used to increase their sentence or charge them with new crimes. The client receives "use immunity," in advance and in writing. "Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant, then such information shall not be used in determining the applicable guideline range." *United States Sentencing Guidelines*, § 1B1.8(a) (2018).

Giving a statement without use immunity is giving an "unprotected statement." Information in an unprotected statement concerning possession of a firearm or other criminal activity can be used to increase the client's sentence under the federal sentencing guidelines, even if the client thought they were cooperating at the time they made the statement. Unprotected statements have resulted in higher sentence ranges for many in federal court.

> "If you have a state firearm case and the right facts, and if you learn the federal authorities are reviewing it, do everything you can to make clear on the record that your client did not know they were a prohibited person."

Practice Tip: If you have a client who wants to cooperate, get use immunity in writing in an agreement signed by the state prosecutor, you, and your client. If you need a form, feel free to contact me, and I will be glad to send one to you.

Misdemeanor Domestic Violence Convictions

"It shall be unlawful for any person … who has been convicted in any court of a misdemeanor crime of domestic violence … to possess in or affecting commerce any firearm or ammunition." 18 U.S.C. § 922(g)(9).

Under 18 U.S.C. § 921(a)(33), a "misdemeanor crime of domestic violence" is any misdemeanor that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse,

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parent, or guardian of the victim, by a person with whom the victim shares a child in common, 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."

The required element is not the existence of the domestic relationship but the use of a deadly weapon or the use of physical force. *United States v. Hayes*, 555 U.S. 415, 426 (2009).

Am I saying this type of *misdemeanor* conviction imposes the same lifetime firearm ban as a felony conviction? Yes. Advise your clients accordingly in state court.

No Firearms While Under Indictment

Anyone who is "under indictment for a crime punishable by imprisonment for a term exceeding one year" is not allowed "to ship or transport … any firearm or ammunition or receive any such firearm or ammunition." 18 U.S.C. § 922(n).

The meaning of this statute is a bit unclear. At the very least, it bars anyone under indictment from "receiving," or acquiring, a gun they did not own before being indicted. But what about guns someone owned before indictment? Are they required to get rid of them after indictment?

The express terms of the statute mention only shipping, transporting, and receiving a gun, not possessing one. In comparison, the federal ban for convicted felons expressly bans possession, as well as shipping, transporting, and receiving. 18 U.S.C. § 922(g)(1). You can make a strong argument based on the wording of the statute that someone under indictment is allowed to possess a gun they owned before being indicted, even if they are not allowed to ship, transport, or receive it.

But how far can the person move the gun before possession becomes transporting or shipping? In my opinion, the issues are too murky, and the stakes are too high. The safer and better practice is probably to advise all clients under state felony indictment not to possess firearms or ammunition while the indictment is pending.

No Guns – and No Ammunition, Either

The state client may understand the federal ban on possessing firearms, but they may not realize the ban also extends to possession of "any firearm or ammunition." 18 U.S.C. § 922(g). "Ammunition" is defined as "cartridge cases, primers, bullets, or propellant powder designed for use in any firearm." 18 U.S.C. § 921(a)(17)(A). Fully advising the client on this point could protect them down the road.

Keep these points in mind when representing your state court criminal clients. Further questions? Feel free to call or email me at williamslawonline.com.

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