BATTERED WOMEN'S JUSTICE PROJECT
National Center on Protection Orders and Full Faith & Credit

18 U.S.C. § 922(g)(8) Case Law

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18 U.S.C. § 922(g)(8) Case Law

First Circuit (Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island)

In re Peirano, 155 N.H. 738 (N.H. 2007). Court rules that a portion of a divorce settlement requiring a husband in violation of 18 U.S.C. 922(g)(8) to sell his firearms and give the proceeds to his ex-wife was not permissible under New Hampshire law. *In the Matter of Beal & Beal*, 153 N.H. 349, 350 (2006). Court also says that the trial court was correct in prohibiting Peirano from owning the firearms and can dispose of them in some other way. **Key Issue: Disposal of Illegal Firearms.**

Magoon v. Thoroughgood, No. 2000-834 (N.H. issued July 26, 2002) (available at <www.state.nh.us/courts/supreme/opinions/0207/magoo084.htm>Internet). Magoon and Thoroughgood were divorced in 1999 pursuant to a divorce decree that included a provision that restrained Thoroughgood from "interfering with the person or liberty of [Magoon], from harassing, intimidating or threatening [Magoon], and from entering the residence or workplace of [Magoon]." A year later, Magoon obtained an ex parte stalking protection order against Thoroughgood, and the local sheriff's department confiscated approximately 17 firearms from Thoroughgood. After the final hearing, the judge dismissed the petition, finding that Magoon had not been stalked. Thoroughgood moved for return of his firearms, and the court granted the motion. However, the sheriff's department subsequently intervened, arguing against the return. The court reversed its previous ruling, and held that it could not return the firearms because Thoroughgood was subject to a protection order (the divorce decree) satisfying the requirements of 922(g)(8). Thoroughgood appealed, and the Hew Hampshire Supreme Court reversed the trial court's decision, holding that the language of the divorce decree does not "explicitly" prohibit the use, attempted use, or threatened use of physical force involving bodily injury, as required under section 922(g)(8)(B)(ii). Instead, the court found that, though the provision "implicitly" precludes Thoroughgood from using, attempting to use, or threatening to use physical force involving bodily injury, no language relating to physical force or bodily injury appears on the face of the provision. The court contrasted that provision with the domestic violence final order form used by the New Hampshire courts, which contains a provision that closely tracks the language of the federal statute. **Key Issue: Nature of prohibitory language in order.**

United States v. Bunnell, 106 F. Supp. 2d 60 (D. Me. 2000), *aff'd* 280 F.3d 46 (1st Cir. 2002). 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 his 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 § 922(g)(8) does not violate the 10th Amendment. **Key Issues: Commerce Clause; Due Process (hearing); 10th Amendment.**

United States v. Coccia, 249 F. Supp. 2d 79 (D. Mass 2003). After his conviction under § 922(g)(8), Coccia moved for a judgment of acquittal. In denying the motion, the court noted that it had incorrectly permitted the jury to be instructed that § 922(g)(8) requires that the defendant actually knew of the existence of the protection order issued against him. Upon further consideration, the Court concluded that § 922(g)(8) does not require that a defendant have actual knowledge of the particular court order at issue. The court concluded that although actual notice of a hearing is a requirement under the plain language of the statute, actual knowledge of a court order is not. The court supported its conclusion by citing cases holding that knowledge of the federal law or knowledge that the state court order proscribes firearm possession is not necessary to sustain a conviction under § 922(g)(8). Despite its error, the court held that the conviction should stand because the error was harmless because it introduced an additional element requiring proof beyond a reasonable doubt, and the jury nonetheless found Coccia guilty. Further, the court held that notwithstanding whether knowledge that an order has in fact issued is a required element, Coccia's motion must fail because at trial the defense itself had advanced sufficient evidence that Coccia knew of the order to remedy any defect in the government's prima facie case. **Key Issue: Due Process (notice).**

United States v. Coccia, 446 F.3d 233 (1st Cir. 2006). Larry Coccia appeals his conviction by a District Court of possession of a firearm while subject to a domestic restraining order under 18 U.S.C. §922(g)(8). The restraining order was issued while Coccia was in the midst of a difficult divorce in 2001, and he was found to be in violation of it after he told a psychiatrist that he was contemplating a terrorist attack. During his trail, Coccia moved to suppress the firearm found in a search of his car, saying that seizure of the car violated his Fourth Amendment Rights. He also contended that the Pennsylvania restraining order did not contain the restrictions explicitly required by 18 U.S.C. §922(g)(8)(C)(ii), and that §922(g)(8) is unconstitutional. The Court held that there was no violation of the Fourth Amendment because law enforcement officials have the authority to remove vehicles that impede traffic or threaten public safety or convenience (the "community caretaking" function). *S. Dakota v. Opperman,* 428 U.S. 364 (1976). The Court held that a restraining order does not have to state verbatim the restrictions required by 18 U.S.C. §922(g)(8)(C)(ii). *United States v. Bostic*, 168 F.3d 718, 722 (4th Cir. 1999). Finally, the Court said that §922(g)(8) is constitutional. *United States v. Emerson*, 270 F.3d 203, 261-65 (5th Cir. 2001) (discussing that the procedural requirements to be followed before imposing § 922(g)(8)'s restrictions adequately safeguard the right to possess firearms); United States v. Cardoza, 129 F.3d 6, 10-11 (1st Cir. 1997) (calling challenges to §922(g)(8)'s constitutionality under the commerce clause "hopeless"). **Key Issue: Fourth Amendment, Wording of Protective Orders.**

United States v. Knight, 574 F. Supp. 2d 224 (D. Me. 2008). Karl Knight moved to dismiss his indictment for charges related to making materially false statements when attempting to purchase a firearm. Knight was charged with answering question 12.h falsely, which asks: "Are you subject to a court order restraining you from harassing, stalking, or threatening your child or an intimate partner or child of such partner?" Knight answered "no" although subject to such an order as of August 26, 2004. Pursuant to 18 U.S.C. § 922(a)(6), such a false statement is unlawful when purchasing a firearm. Knight relied on *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), which recognized an individual right to bear arms under the Second Amendment; however, the district court found *Heller* inapplicable to the materiality of the answer to the 12.h question. First, the court differentiated *Heller* by nothing *Heller* pertained to a complete firearm ban, whereas § 922(g)(8) is not an outright ban on firearms and lasts only while the defendant is under a court order. The court also noted that *Heller* did not eliminate the crime of false statements, which is at issue here. Furthermore, the court stated *Heller* did not make 18 U.S.C. § 922(g)(8) unconstitutional, (if it did, the crime would no longer exist and therefore the 12.h question would not be material). Motion to dismiss denied. **Key Issues: 2nd Amendment.**

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)(9). 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. **Key Issue: 10th Amendment; due process (notice).**

United States v. Miles, 238 F. Supp. 2d 297 (D. Me 2002). Miles's wife filed for an order of protection against him in a Texas court. Miles was personally served in Maine, but did not participate in the hearing. The order was issued by default, and the court made a specific finding that family violence had occurred and was likely to occur again in the future. It also prohibited Miles from committing family violence as defined by the relevant section of the Texas Family Code and it further mandated that Miles be prohibited from communicating directly with his wife and children "in a threatening or harassing manner" or engaging in any conduct directed specifically toward these family members, including following them, that was "reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass" his wife and children. On two occasions after receiving a copy of the final protection order, Miles attempted to purchase firearms from federally licensed dealers. During both attempts, Miles indicated on ATF Form 4473 that he was not subject to a protective order, as defined under § 922(g)(8). He was subsequently indicted for violating 18 U.S.C. § 922(a)(6) (making a false statement in connection with the acquisition of a firearm) and filed a motion to dismiss the indictment, arguing that § 922(g)(8), the basis for the § 922(a)(6) indictment, is an unconstitutional infringement of his Second Amendment right to keep and bear arms. Citing *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2362 (June 10, 2002), Miles argued that the Second Amendment right is an individual one and that strict scrutiny must be applied in evaluating section 922(g)(8)'s effect on this fundamental right. In addition, Miles argued that he fell under 922(g)(8)(C)(ii) as a prohibited person, and it is this particular provision that is unconstitutional, as a violation of the Equal Protection Clause and substantive and procedural due process. The court refused to address Miles's Second Amendment challenge, noting that it must avoid considering constitutional questions where they are not necessary to the decision. The court held that "[r]egardless of whether there is such a fundamental individual right, the restriction

imposed by section 922(g)(8) is a narrow and reasonable one, and it passes constitutional muster even under a strict scrutiny test." The court cited the reasoning in *Emerson* to reject Miles's assertions that the court order was simply boilerplate that tracked the federal requirement and did not reflect any consideration or conclusion that Miles himself posed a threat of future harm. It agreed with the *Emerson* court that state courts will only issue domestic violence protection orders after making explicit findings with respect to the particular defendant at issue and the likelihood of injury that the defendant poses. The court found that restricting the firearm access of those who are thereby deemed to necessitate such protective orders is reasonable. Moreover, the court found that, as applied to Miles, his argument failed because the court *did* make a specific finding of violence in issuing the protection order. The court further found that § 922(g)(8) survives strict scrutiny because it is narrowly tailored to support a compelling government interest, that Miles had sufficient notice to satisfy due process because he knew that the protection order had been entered against him, and that Miles need not have been told about the consequences of entry of the protection order vis-à-vis his ability to possess a firearm in order for his due process rights to be satisfied. **Key Issues: 2nd Amendment; Due Process (notice).**

Second Circuit (Connecticut, New York, Vermont)

Benson v. Muscari, 769 A.2d 1291 (Vt. 2001). Benson obtained a protection order against Muscari that included a provision ordering Muscari "not to be in possession or control of any firearm or dangerous weapons …." Muscari appealed, contending among other things that the provision was overbroad and unsupported by the record, because no weapon was used in the underlying assault. The court rejected Muscari's challenges, finding that a firearm prohibition is authorized by the "catch-all" provision of Vermont's protection order code, and that inclusion of such a prohibition is appropriate in light of the federal prohibition in 18 U.S.C. § 922(g)(8) and the limited capacity of the federal authorities to enforce the federal prohibition. The court also noted that the federal restriction does not preempt the court's ability to impose a parallel provision. **Key Issue: Authority of State Court to Impose Firearm Prohibition.**

Matteo v. Town of Guilderland, No. 1:08-CV-00763 (NPM/RFT), 2008 WL 281027(N.D.N.Y. July 21, 2008). A protection order was issued against Matteo following his arrest and charge for harassment of his wife. He was ordered to surrender his gun collection to police pursuant to the order. In accordance with state criminal procedure law, the order was under contemplation of dismissal and modified to remove the condition that he surrender the gun collection; however, the police department denied his request for return of the firearms pursuant to 18 U.S.C. § 922(g)(8). Matteo argued he did not have adequate notice of the hearing for the protection order, required under 18 U.S.C. § 922(g)(8)(A). Counsel for defendant had stipulated that Matteo did not receive notice; therefore, the court granted Matteo's motion for a temporary restraining order and preliminary injunction seeking return of property. **Key issues: Due Process (notice).**

United States v. Erwin, No. 1:07-CR-566 (LEK), 2008 WL 4534058 (N.D.N.Y. Oct. 6, 2008).
Erwin was charged with knowingly making false statements to a firearms dealer and possessing certain weapons in violation of 18 U.S.C. § 922(g)(8). Erwin moved to dismiss his indictment in reliance on *Columbia v. Heller*, 128 S. Ct. 2783 (2008). The court found that reducing domestic violence is a compelling government interest, and that the statute was narrowly tailored in its limitation on possession of a firearm. Therefore, the court found § 922(g)(8) constitutional. Motion to dismiss indictment denied. **Key issues: 2nd Amendment.**

United States v. Montalvo, No. 08-CR-004S, 2009 WL 667229 (W.D.N.Y. Mar. 12, 2009). Montalvo, a police officer, was charged with a violation of 18 U.S.C § 922(g)(8) *inter alia*, for possession of a firearm while subject to an order of protection. Montalvo relied on *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) to argue § 922(g)(8) violated his Second Amendment right to possess a firearm. The district court rejected his argument and quoted *Heller*, which stated that the Second Amendment was not without limitations. Motion to dismiss denied. **Key Issues: 2nd Amendment.**

United States v. Russell, 2007 U.S. Dist. LEXIS 44125 (Vt. 2007). Police officers, responding to a complaint that the defendant had been calling his ex-girlfriend in violation of a restraining order, discovered guns in the defendant's home in violation of 18 U.S.C. §922(g)(8) and calls to her from his cellular phone. Russell filed a Motion to Suppress evidence. He contends that this was a warrantless search, but the Court says that Russell had voluntarily let the officers into his home so that he could get his shoes, and that he had told them to look at the phone as proof that he had **not** called his ex-girlfriend. A warrantless search does not violate the Fourth Amendment where the search is conducted pursuant to the free and voluntary consent of an authorized person. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). **Key Issue: Fourth Amendment.**

Third Circuit (Delaware, New Jersey, Pennsylvania, Virgin Islands)

New Jersey v. S.A., 675 A.2d 678 (N.J. Super. Ct. App. Div. 1996). A final restraining order was issued against the defendant in October 1994. The defendant's firearms had already been seized by law enforcement pursuant to a previous order entered by the court in September 1994. Upon issuance of the October order, the defendant petitioned for the return of his firearms, but the judge denied the request, stating that the guns would be returned if the state failed to file a forfeiture motion within 45 days, as required by New Jersey law. The state never did so, and the defendant petitioned the court in September 1995 for return of the firearms. The trial judge ordered that the guns be returned, but stayed his order to permit the state to appeal the issue of whether section 922(g)(8) forbade the return. On appeal, the Superior Court, Appellate Division, found that though New Jersey law calls for the return of seized weapons in the event that the state fails to initiate a forfeiture action within 45 days, the law also contemplates that guns should not be returned if the court finds that the defendant continues to pose a threat to the victim of domestic violence. The continued existence of the restraining order satisfied that requirement, according to the court, and in any event, the federal law barred defendant from possessing the guns because the order satisfied section 922(g)(8)'s requirements. The appellate court ruled that the trial judge should not have ordered the return of the guns because it was illegal for the defendant to possess those guns under federal law. The court also noted that the New Jersey firearm provisions are not preempted by the federal laws because the two sets of laws are not in conflict and the former do not act as an impediment to the application of the latter. **Key Issues: Return of firearms; Federal Preemption.**

Travieso v. Lopez, 23 F. Supp. 2d (D. V.I. 1998). Travieso contended that the court's orders against him failed to include the findings necessary to support the application of 18 U.S.C. § 922(g). The court held that, since he appeared at both of his scheduled hearings, the notice requirement of § 922(8)(A) was satisfied, and since the order contains specific information enjoining, restraining, and prohibiting him from performing abusive, threatening, and/or harassing conduct, §§ 922(8)(B) and (C) are satisfied. **Key Issue: Due Process (notice).**

United States v. Dunbar, 2007 U.S. Dist. LEXIS 35473 (W. Dist. Pa. 2007). Dunbar filed a motion to suppress ammunition seized during a search on the grounds that it exceeded the scope of the search

warrant. Court found that the ammunition fell under the plain view doctrine, so the officers could seize it without a warrant. *United States v. Menon*, 24 F.3d 550, 559 (3d. Cir. 1994). The Court said that the fact that the agents may not have read the protective order prior to the search was not relevant. **Key Issue: Fourth Amendment.**

United States v. LaBohne, No. 97-CR-382, 2002 U.S. Dist. LEXIS 12167 (E.D. Pa. March 22, 2002). Just over a month after LaBohne's wife obtained a civil protection order against him, he showed up at the day care center where she worked and fired a gun at her while she was surrounded by a large group of children. LaBohne pled guilty to a one-count indictment for violation of section 922(g)(8) and ultimately was sentenced to a 57-month term of imprisonment. He subsequently appealed the sentence, claiming, among other things, that he received ineffective assistance of counsel because his attorney had failed to argue that LaBohne did not receive notice and fair warning that his possession of the firearm violated federal law. The court rejected LaBohne's argument that it likely would have dismissed the indictment had the argument been made, noting that every federal appellate court that has considered the issue has rejected a notice and fair warning challenge to section 922(g)(8). **Key Issue: Due Process (notice).**

Fourth Circuit (Maryland, North Carolina, South Carolina, Virginia, West Virginia)

Barefoot v, United States, 2013 U.S. Dist. Lexis 65091 (E.D.N.C. May 6, 2013). The petitoner, Mr. Barefoot motions the court to vacate, set aside or correct his sentencing. Mr. Barefoot was sentenced to twenty-seven months in prison due to pleasing guilty to a count of possession of a firearm while being subjected to a domestic violence restraining order, thus violating 18 U.S.C. § 922(g)(8). Mr. Barefoot filed a motion to vacate, set aside or correct the sentence in 2004, which was denied. He filed a second motion in 2012 stating new evidence of prosecutorial misconduct. His motion was dismissed due to lack of subject matter jurisdiction. Because the motion in question was previously brought to the court attempting to vacate the same conviction and sentence, and that motion was dismissed on the merits, the court lacked jurisdiction to hear this instant case. **Key issues: Sentencing, Motion to Vacate, Domestic Violence Restraining Order**

Moore v. Moore, 376 S.C. 467 (Sup. Ct. S.C. 2008). Husband alleged the issuance of the order violated due process and denied him equal protection based on the fact that he did not receive ample notice and an opportunity to answer his wife's charges with the assistance of counsel, and based on the fact that his request for a continuance was denied whereas his wife was offered a continuance to retain counsel. He claims that the short notice and denial of a continuance prohibited him from procuring counsel and resulted in the issuance of a protective order that deprived him of access to his children and his right to own a firearm. Since he is employed in law enforcement, the firearm prohibition may impact his ability to perform his job. The Court says that while the husband's due process rights are implicated in this case, the Court must balance those rights against the state's interest in protecting the petitioner and household members from abuse. *Arnett v. Kennedy*, 416 U.S. 134. 167-68 (1974). The short period between the service of the petition and the hearing was intended to protect the petitioner and her children, advances a legitimate state interest, and was not a violation of due process. However, the Court *is* concerned that a factual finding of physical abuse was finally adjudicated at the emergency hearing. The emergency hearing is temporary in nature, and should be confined to the order of protection and should not have "collateral consequences" for the alleged abuser. *State v. Dispoto*, 189 N.J. 108 (N.J. 2007). An order of protection issued pursuant to an emergency hearing is temporary and that a hearing on the merits of the action should, if necessary, be conducted by the family court at a later date. **Key Issue: Notice and Opportunity.**

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. **Key Issues: Due Process (notice); Commerce Clause; 10th Amendment.**

United States v. Elkins, 2:10CR00017, 2011 WL 1642271 (W.D. Va. May 2, 2011). Elkins was charged with a violation of 18 U.S.C. 922(g)(8) for possessing a firearm when there was an existing domestic violence protection order. Elkins claims that the government cannot prove his knowledge of the existence of a domestic protection order beyond a reasonable doubt, because he was not aware of the 922(g)(8) provision preventing the possession of a firearm. The court determined that because the protection order specifically states in the section labeled "WARNINGS TO RESPONDENT" that the government has penalties for the possession of a firearm, this requirement is satisfied. Ignorance of the law is not a defense, and the government is required to show that the respondent was aware of the protection order, and is not required to show that the respondent was aware of the prohibition on the possession of firearms. **Key Issue: Ignorance is not a defense.**

United States v. Hayes, 129 S.Ct. 1079 (4th Cir. 2010). On grant of certiorari, the Supreme Court, Justice Ginsburg, held that a domestic relationship need not be a defining element of the predicate offense to support a conviction for possession of a firearm by a person convicted of misdemeanor crime of domestic violence. **Key Issues: Domestic Violence, element, firearm.**

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." **Key Issues: 2nd Amendment; Due Process (notice).**

United States v. Larson, 502 Fed. Appx. 336 (4th Cir. Va. 2013). Larson was sentenced to twelve month after pleading guilty to possessing a firearm while being subjected to an order which prevented him from harassing, stalking, or threatening his intimate partner. Possessing a firearm while under this order violated 18 U.S.C. § 922(g)(8). Larson contends that the order did not satisfy the statute, and that his due process rights and the second amendment were violated. The Court found that the order which prohibited him from harassing, stalking or threatening his intimate partner was sufficient under 18 U.S.C. § 922(g)(8)(C)(ii) was backed by sufficient evidence to show that he was a credible threat. The Court chooses not to address whether the conduct regulated by 18 U.S.C. § 922(g)(8) implicates the second amendment, and instead concludes that Larson falls into the category of those who's rights may be burdened but the second amendment doesn't bar him from being prosecuted. The district court's

judgment was therefore affirmed. **Key Issues: Firearms, Domestic Violence Restraining order, Second Amendment, due process**

United States v. Leary, 86 Fed. Appx. 559 (4th Cir. 2004) (unpublished). On appeal from his conviction, Leary argued that the district court improperly excluded evidence tending to show that he was not given an opportunity to participate at the hearing that led to the issuance of the predicate protection order. Specifically, Leary had proffered testimony by a witness to the hearing who had stated that domestic violence issues were not discussed during the hearing. The Fourth Circuit rejected Lear's contention, finding that Lear had received actual notice of the hearing (including notice that the hearing's purpose was to determine whether an *ex parte* order against him should remain in effect) and that he was present at the hearing and represented by counsel. The court held that the district court had not abused its discretion and that the witness's testimony does not tend to prove that Leary was not given an opportunity to participate at the hearing. The court noted that Leary was on notice that the hearing would determine whether a domestic violence protective order would continue in effect and that there was no evidence that Leary or his counsel were prevented from discussing issues related to the order. **Key Issue: Due Process (notice and hearing).**

United States v. Meyers, 581 Fed. Appx. 171, 173 (4th Cir. W. Va. 2014). John Charles Myers was convicted after a jury trial of possession of a firearm while subject to a domestic violence protection order, in violation of § 922(g)(8) and was sentenced to eighteen months. On appeal, Myers challenges the validity of the underlying state-court order ("the final order") entering and extending the duration of the terms of the previously-entered state-court domestic violence protection order. The court rejected Myers' challenge to the constitutionality of the final order on the basis that its one-hundred-year prohibition on his possession of firearms violated his right under the Second Amendment to bear arms. The validity of the final order is not relevant to the determination of whether Myers violated §922(g)(8). "[N]othing in the language of § 922(g)(8) indicates that it applies only to persons subject to a valid, as opposed to an invalid, protective order." United States v. Hicks, 389 F.3d 514, 535 (5th Cir. 2004). **Key Issue: Enforcement of statute**

Fifth Circuit (Louisiana, Mississippi, Texas)

Spruill v. Watson, 157 Fed. App'x 741 (5th Cir. 2005). Spruill was charged with violating 18 U.S.C. §922(g)(8), and Watson was the officer who filed the criminal complaint against him. The conviction was vacated because the Court found that the restraining order in question had not been issued "after a hearing of which Spruill received actual notice and accordingly was not within the scope of section 922(g)(8)." Spruill now sues Watson for violation of his due process rights under the Fourth and Fourteenth Amendments. The Fifth Circuit upholds dismissal of the action because Watson acted with probable cause. *Brown v. Lyford*, 243 F.3d 185, 189 (5th Cir. 2001). There was probable cause even though the recitation of facts in the restraining order was incorrect in asserting that the applicant and Spruill each "appeared in person and announced ready," and that the court entered the order after "having . . . heard the evidence and argument of counsel." **Key Issue: Notice and Opportunity.**

United States v. Banks, 339 F.3d 267 (5th Cir. 2003). Banks, after threatening the personal safety of his former live-in girlfriend in numerous ways, was served with a temporary *ex parte* order by the presiding district judge. The judge advised him that a hearing on the application for the temporary protective order was set for October 22, 2001. On Oct. 22, Banks appeared in court and consented to an agreed temporary protective order. He later signed the agreed order in his attorney's office. In January of 2002, he was suspected of causing an explosion in his former girlfriend's house, and the police obtained

permission to search his home and truck. Along with materials implicating Banks in the explosion, the police also found two firearms. The police then obtained a warrant and found two other firearms as well as further evidence implicating him in the explosion. He was charged with five counts of possession of a firearm while subject to a restraining order in violation of 18 U.S.C. § 922 (g)(8). The district court agreed with Bank's argument that the agreed order was not issued after a "hearing" within the meaning of the statute. 18 U.S.C. (g)(8)(A) states: It shall be unlawful for any person who is subject to a court order that "was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate." The Fifth Circuit held that the hearing requirement was met in this case. The presiding judge gave him actual notice of the hearing that was set for a particular date, and Banks appeared in court with his attorney in front of a judge, which provided him opportunity to participate. The court stated that it was Banks himself who did not choose to present evidence. The court distinguished this case from *United States v. Spruill*, 292 F.3d 207 (5th Cir. 2002), *infra*, because the defendant in that case did not have an actual hearing date, the protection order did not specify that Spruill could not possess a firearm, and Spruill never appeared before a judge. **Key Issue: Due Process (hearing).**

United States v. Brandon Banks, 480 Fed. Appx. 314 (5th Cir. La. 2012). Banks was apprehended while in possession of firearm. During the apprehension by ATF and DEA agents, Banks ran away while holding the firearm with the barrel pointed under his left arm toward Special Agent Evanoski. Banks is appealing the two-level enhancement of his sentencing for violating a state issued protection order, because Special Agent Evanoski was not privy to the protection order. Under a clear error standard of review, the Appellate court must decide whether the violation of the protection is an enhancement or a separate violation under federal law. The court opined that even though Banks stated that he knew he was not supposed to have a gun does not mean that he knew it was because there was a protection order filed against him. Though the court could have attempted a violation of 18 U.S.C. § 922(g)(8) due to the assault of Special Agent Evanoski but there is no proof that he violated the terms of the order of protection. **Key Issues: Protection Order, Firearms, enhanced sentencing, federal agents**

United States v. Emerson, 86 Fed. Appx. 696 (5th Cir. 2004). Emerson appealed his conviction under § 922(g)(8) (after the Fifth Circuit reversed the district court's original order dismissing the indictment on constitutional grounds—see summary *supra*), claiming among other things that the jury should have been instructed on the defense of entrapment by estoppel and that the statute violates due process because (1) it does not require express notice of the prohibition on keeping and bearing arms, (2) as applied against him, the statute is fundamentally unfair because it was impossible for him to both maintain the marital estate's assets and forfeit his guns, and (3) the statute criminalizes "passive" activity, in violation of *Lambert v. California*, 355 U.S. 225 (1957). The court rejected the entrapment by estoppel claim, holding that the defense requires that a *federal official* actively mislead the defendant about the legality of his firearms possession, which did not happen in this case. In addition, the court noted that Emerson had been placed on constructive notice of the existence of the federal law, and that to the extent he perceived a conflict in his duties under the federal law and the state court order, he could have sought clarification from the state court. The Fifth Circuit also rejected Emerson's due process challenges, citing its decision in the first appeal (see *infra*) and noting that possession of a firearm is active, not passive, conduct. **Key Issues: Due Process (notice); Entrapment by Estoppel.**

United States v. Emerson, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2362 (June 10, 2002). 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." On appeal, the Fifth Circuit upheld the constitutionality of section 922(g)(8) against the Second Amendment and other challenges. In addition, the court rejected the defendant's argument that Section 922(g)(8) must be construed to require that the order of protection include "a specific finding that the person enjoined posed a credible threat of violence to his spouse or child." Instead, the panel found that the statute requires either that the terms of the order expressly prohibit the use, attempted use, or threatened use of physical force or that there be a specific finding of credible threat of violence. The court also ruled that the federal court in the Section 922(g)(8) prosecution is not permitted to undertake a collateral review of the validity of the predicate order of protection unless it is "transparently invalid as to have only a frivolous pretense to validity." The court also joined several of its sister circuits in holding that due process under the Fifth Amendment is satisfied despite the defendant's claim of lack of notice about the Section 922(g)(8) prohibition where, as here, he was aware that on the relevant date he actively possessed a firearm covered by the statute while subject to an active protection order. Unlike every other circuit court to consider the issue, however, the majority found that the Second Amendment "protects the rights of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms, such as the pistol involved here, that are suitable as personal, individual weapons and are not of the general kind or type excluded by [*United States v. Miller*, 59 S. Ct. 816 (1939) – generally sawed-off shotguns]." In reaching its decision, the majority produced a lengthy treatise on the history and evolving interpretation of the Constitution and Bill of Rights generally, and the Second Amendment specifically. The majority concluded that the *Miller* decision (cited above) does not, as all of its sister circuits have found, reject an individual right to bear arms and that the other appellate courts acted "either on the erroneous assumption that *Miller* resolved [the] issue or without sufficient articulated examination of the history and text of the Second Amendment." The third judge on the panel, who entered a special concurrence, strongly criticized the majority for addressing the Second Amendment issue at all; he argued that the lengthy analysis was unnecessary and had no bearing on the judgment and so constitutes non-binding dicta. **Key Issues: 2nd Amendment; Due Process (notice and hearing); Commerce Clause; 10th Amendment.**

United States v. Henry, 288 F.3d 657 (5th Cir. 2002). Henry was arrested after having entered his wife's home with a rifle. At the time, he was subject to an agreed protection order entered by a Texas court. Henry was indicted on one count of possessing a firearm in violation of section 922(g)(8). After his motion to dismiss the indictment failed, Henry pled guilty and filed an appeal to the Fifth Circuit. On appeal, Henry argued that the indictment was defective because it failed to allege that he knew that it was unlawful to possess a firearm under the state protection order and, alternatively, that it was defective because it did not allege that he knowingly possessed the firearm while under the order. He also argued that section 922(g)(8) violates the Second Amendment and the Commerce Clause. The appellate court rejected the argument that the indictment should have alleged knowledge of the federal law, citing its recent decision in *Emerson*, *infra*. Regarding the alternative argument that the indictment lacks the requisite mens rea allegation, the court agreed that knowing possession is required to support a conviction under §§ 922(g)(8) and 924(a)(2) but held that the indictment must be read with maximum liberality and in light of the fact that the proper statutory citations were provided. Under such circumstances, the court found that the indictment was not fatally defective. The court also rejected the Second Amendment and Commerce Clause claims in view of its previous holdings in *Emerson, infra* and *U.S. v. Pierson*, 139 F.3d 501 (5th Cir. 1998). **Key Issue: Due Process (notice); 2nd Amendment; Commerce Clause.**

United States v. Ladouceur 578 Fed. Appx. 430, 433 (5th Cir. Tex. 2014). David Chance Ladouceur was convicted under § 922(g)(8) for possessing a firearm while being the subject of a domestic violence protective order. He appealed, alleging that the evidence was insufficient to prove he was an "intimate partner" of the protective order applicant because they never "cohabited" as required by the statute. The jury instructions did not define cohabitation; rather, the jury was told that being "intimate partners" was an element of the crime and that "the term 'intimate partner' means, with respect to a person, the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, or an individual who cohabitates or has cohabited with the person." The court found ample evidence presented at trial to support a rational jury's finding that Ladouceur and Colorado cohabited. The evidence showed that the two had a relationship as boyfriend and girlfriend that went beyond casual dating. During this time, over the span of several months, Ladouceur stayed over at Colorado's apartment most or often all days out of the week; he kept clothing and personal effects there to go directly to work in the mornings; he had a key to her apartment and was able to come and go as he pleased; and he rarely visited an apartment leased under his own name. Therefore, the defendant's conduct met the definition of cohabitation under § 922(g)(8) and the order is valid. **Key Issue: Definition of cohabitate**

United States v. Miles, 2006 U.S. Dist. LEXIS 27123 (W. Dist. La. 2006). A protective order against Miles meeting the requirements of 18 U.S.C. §922(g)(8) was signed on August 13, 2004 with an expiration date of February 13, 2006. Miles did not show up at the hearing, appeal the order, or otherwise contest its validity in state court. A copy of the order was mailed to his address. When he was found to be in possession of a gun, Miles filed a Motion for Release from Pre-trial Detention on the basis that he was never served with the August 13, 2004 protective order. Court says that the notice requirement is met if the defendant had actual notice of the hearing; actual notice of the order itself was not required. *United States v. Banks*, 339 F.3d 267, 270 (5th Cir. 2003). His own actions in not attending the hearing prevented his participation, and so the order is valid. **Key Issue: Notice and Opportunity.**

United States v. Pennywell, 2013 U.S. App. Lexis 2643 (5th Cir. La. Feb.7, 2013). Marcus Pennywell pleaded guilty to: possession with intent to distribute crack cocaine, possession of a firearm to further drug trafficking crime, as well as a possession of a firearm by a convicted felon, and possession of a firearm while being subjected to a protection order which is a violation of 18 U.S.C. § 922(g)(8). He was sentenced as a career offender, but in this appeal he contends that he is eligible for a sentence reduction because one of his counts was not based upon Career Offender Guidelines. The court found that Mr. Pennywell's sentence was based both on the Career Offender Guidelines and applicable guidelines range. Based upon this the circuit court was within its range when assigning a punishment of 276. **Key Issues: sentencing guidelines, drug trafficking, domestic violence, protection order**

United States v. Spruill, 292 F.3d 207 (5th Cir. 2002). After a Texas court issued a consent restraining order against Spruill, he 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." Spruill pled guilty but then appealed to the Fifth Circuit, which vacated the district court's judgment of conviction. The Fifth

Circuit ruled that the protection order issued against Spruill did not satisfy section 922(g)(8)'s requirement that the order be "issued after a hearing of which [respondent] received actual notice, and at which [respondent] had an opportunity to participate." The court based its decision upon the following facts: The order had been issued under Texas law as an "Agreed Order," without process having been issued or served, without any time or place for hearing having been set, and therefore without any notice of hearing having been issued or received by Spruill, without Spruill ever appearing before the judge, without any evidence having been presented to the judge, and without any hearing. The court noted also that Spruill was illiterate and that the order was explained to him by a prosecuting attorney, not a judge, and Spruill had not been represented by counsel. The court contrasted these facts with those of the *Wilson* case, *infra*, in which the Seventh Circuit found that a consent order triggered the section 922(g)(8) prohibition. **Key Issues: Due Process (hearing); 2nd Amendment.**

Sixth Circuit (Kentucky, Michigan, Ohio, Tennessee)

Cline v. United States, 2005 U.S. Dist. LEXIS 21614 (E. Dist. Ky. 2005). Cline argues that his counsel was ineffective for failing to argue under Federal Criminal Rule 29 that the government failed to prove an element of an offense charged under 18 U.S.C. § 922(g)(8). He claims the government failed to present evidence that he was given notice of a hearing and the opportunity to be present on the DVO. The Court says that the actual notice requirement was met by proof of a summons written into an emergency protective order that had been presented to the defendant. *United States v. Calor*, 340 F.3d 428, 431 (6th Cir. 2003). Thus, the Rule 29 motion would have been overruled and Cline's counsel had no duty to file it. **Key Issue: Notice and Opportunity.**

Conkle v. Wolfe, 722 N.E.2d 586 (Ohio Ct. App. 1998). An Ohio court entered a protection order against Wolfe, including a firearm prohibition. Wolfe appealed, arguing among other things that the court erred by applying the remedy in 18 U.S.C. § 922(g)(8) without specifically finding him to be a credible threat to the safety of an intimate partner or child. The appellate court rejected this argument, finding that although the court did not make that finding, it was not required to do so because the order was not issued pursuant to the federal law. Rather, the court had invoked its authority under Ohio law to prohibit firearms as part of the protection order. The court determined that Ohio's power to restrict firearms in this manner was not preempted by the federal firearms laws. **Key Issues: Federal Preemption; State Court Authority to Prohibit Firearms.**

Hopson v. Commonwealth Attorney's Office, 2013 U.S. Dist. LEXIS 49991 (W.D. Ky. Mar. 29, 2013). Plaintiff DeAndre Hopson filed a pro se complaint against 13 defendants. Of these complaints is a violation of 18 U.S.C. § 922(g)(8) by defendant Ruth Ann Spencer. However the statute does not provide the Plaintiff with a private cause of action, and therefore has not invoked the court's jurisdiction. There is no diversity, and the court sua sponte dismissed the complaint for lack of subject matter jurisdiction. **Key Issues: Diversity, Subject Matter Jurisdiction**

Mann v. Helmig, 2007 U.S. Dist. LEXIS 23839 (E. Dist. Ky. 2007). Suit arises from confiscation of plaintiff's firearms. Plaintiff alleges violations of his federal constitutional rights under the Second, Fourth, Fifth, and Fourteenth Amendments, as well as a state law claim for conversion. In 2002, Mann had petitioned the court to amend a restraining order to lift the firearm restrictions on the grounds that he and his sister were not "intimate partners" within the meaning of 18 U.S.C. §922(g). The Court says that only a person who has been restrained by a court order from harassing, stalking or threatening an "intimate partner" is prohibited by this subsection from possessing firearms. An "intimate partner" is defined, so far as pertinent here, as "one who cohabitates or has cohabited with the person." "Cohabitates" implies

a sexual relationship. *Webster's II New College Dictionary* 218 (2001). However, the Court also says that there is no liability on the part of the Sheriff or County under 42 U.S.C. §1983 because Mann cannot prove that his alleged constitutional injury resulted from a "policy" or "custom" attributable to the County. *Monell v. Dep't of Soc. Servs*., 436 U.S. 658 (1978). **Key Issue: Relationship Requirement.**

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. **Key Issues: Due Process (notice); Commerce Clause; 8th Amendment.**

United States v. Calor, 172 F. Supp. 2d 900 (E.D. Ky. 2001), *aff'd,* 340 F.3d 428 (6th Cir. 2003). Mary Beth Calor filed a domestic violence petition against her husband, Alexander Calor, in a Kentucky state court. The court issued an ex parte order against Alexander and set a date for a hearing three days later. The local sheriff's department seized a gun from him after entry of the order, which required relinquishment of firearms pursuant to Kentucky law. On the date set for the hearing, Alexander's attorney made a limited appearance for purposes of requesting an extension of time, which was granted. Two days later, while the order was still in effect, law enforcement seized several additional guns from Alexander. Thereafter, Alexander was indicted in federal court for being in possession of firearms in violation of section 922(g)(8). Alexander moved to dismiss the indictment, arguing that the Kentucky court order was not issued after a hearing as required by the federal statute, because the court held the hearing merely to consider whether to grant an extension of time and the merits of the order were never addressed. The district court rejected Alexander's argument, finding that the plain language of section 922(g)(8) does not require a hearing on the merits but only a hearing of which the defendant has received actual notice and at which he had an opportunity to participate. The court found that this more permissive requirement had been satisfied because Alexander had received notice of the hearing at which the extension was granted and he had the opportunity to participate and to raise any objections to the ex parte order – though he did not avail himself of that opportunity. **Key Issue: Due Process (hearing).**

United States v. Cline, 362 F.3d 343 (6th Cir. 2004). Cline was convicted in district court of, among other crimes, violating § 922(g)(8) after an extremely violent attack on his wife and her friend. The § 922(g)(8) violation was based upon a protection order with the following history: The order was issued originally on December 12, 2000 and scheduled to terminate December 12, 2003. In April 2001, court amended the prior order, removing the "stay away" and "no contact" provisions. All other provisions of the December 2000 order remained in force. Later in April 2001, Cline's wife petitioned to reinstate the "no contact" and "stay away" provisions based upon renewed abuse. This petition was denied when Cline's wife failed to appear at a hearing on the issue. During pretrial proceedings in the federal prosecution, Cline moved to dismiss the § 922(g)(8) charges, arguing that the "dismissal" of the April 2001 domestic violence petition removed any order then in force against him. The government responded by producing an affidavit from the issuing judge, which affirmed that the December 2000 order remained in effect after April 2001. The district court thereafter denied Cline's motion to dismiss. On appeal, Cline argued that the last order obtained by his wife had been marked as "dismissed" and so could not support his conviction. The government countered that the "dismissed" order was merely a modification of an existing and valid order and did not revoke the prior order. In his affidavit, the issuing

judge supported the government's interpretation. The Sixth Circuit rejected Cline's contention that accepting the affidavit of a state court judge as evidence of the status of the protection order violated his right to confront witnesses against him. Cline further argued that the district court erred when it granted the government's motion *in limine* to bar the defense from challenging the status of the protection order at trial. Cline contended that the jury should have been allowed to determine the order's status, because it was an element of the offenses charged. The Sixth Circuit rejected this challenge as well, holding that "[d]etermining the legal meaning of the [protection order] did not require trial of the general issue of guilt on any count and thus did not invade the province of the jury." **Key Issue: Evidence Regarding Status of Protection.**

United States v. Collins, 2008 U.S. Dist. LEXIS 22627 (E. Dist. Ky. Cent. Div. 2008). Defendant argues that the state court's Amended Domestic Violence Order (DVO) fails to satisfy the statutory requirements of §922(g)(8)(A) and fails to comport with constitutional due process requirements. Specifically, he argues that the state court failed to accord him sufficient notice and an opportunity to participate in the hearing prior to entering the Order. The Court agrees that even if Collins received actual notice of the hearing where the Amended DVO was entered, he was not afforded a meaningful opportunity to participate. The record reflects that the first time Collins was informed that an Amended DVO would be entered was at a show cause hearing on the same day that the order was extended. There is no evidence that the judge was prepared to hear from either party on the subject of the DVO, or that Collins had any opportunity to object to entry of the amended DVO. Therefore, Collins was not afforded a meaningful opportunity to participate in the hearing. Court also says that any ambiguity must be resolved in favor of the defendant under lenity. *Jones v. United States*, 529 U.S. 848 (2000). **Key Issue: Fifth Amendment, Notice and Opportunity.**

United States v. Cope, 312 F.3d 757 (6th Cir. 2002). Among numerous other charges, Terry Cope was convicted of violating § 922(g)(8) when he possessed a firearm while subject to an order of protection. On appeal, Cope contended that there was no proof that the gun used in a shooting was "in or affecting commerce." The court found that while the government could not identify the actual gun used in the shooting, the jury had accepted the government's argument that Cope had traveled with a gun from his home in Tennessee to the victim's home in Kentucky in order to carry out the shooting. The court held that such travel was sufficient to satisfy the "in-or-affecting-commerce" element. **Key Issue: Commerce Clause.**

United States v. Hopper, No. 00-5289, 2001 U.S. App. LEXIS 27594 (Dec. 28, 2001) (Unpublished). Hopper was subject to a Kentucky protection order obtained by his wife when he filled out an application to purchase firearms from a gun shop. On the form, he averred that he was not subject to a protection order and was allowed to purchase several guns. A few days later, he purchased a rifle from the same shop. Two months later, the gun shop owner informed Hopper that agents of the Bureau of Alcohol, Tobacco and Firearms had inquired about the purchases, and Hopper returned his guns but kept the rifle. During a subsequent search of Hopper's residence, agents found four firearms, including the rifle. Hopper was named in an eight-count indictment for violating section 922(g)(8) and for falsifying the firearm application forms. He subsequently pled guilt and appealed to the Sixth Circuit, arguing that his conviction violated due process because he did not receive fair notice that the state protection order disqualified him from firearm possession under federal law, and that the order itself did not satisfy the requirements of section 922(g)(8). The Sixth Circuit rejected the first argument, citing its decision in *Baker*, *infra*. It also rejected Hopper's second argument, noting that though the order's language, which restrained him "from committing further acts of domestic violence and abuse," was

broad, it was sufficiently explicit to include actual, attempted, and threatened physical force within its meaning. **Key Issues: Due Process (notice); Nature of Prohibitory Language.**

United States v. Jacobs, 244 F.3d 503 (6th Cir. 2001). Lauretta Jacobs obtained a protection order against her husband, Elisha Jacobs, in 1996, and subsequently moved from Kentucky to Indiana. One month later, the defendant called Lauretta and told her that she should come to his parents' home in Kentucky so he could give her some money to assist with living expenses. When Lauretta arrived, the defendant immediately accosted her and punched her in the face, injuring her mouth and damaging her teeth. Armed with a shotgun and a knife, the defendant forced Lauretta into his truck, and drove her into Tennessee. The next day, the defendant returned Lauretta to Kentucky, where she received treatment for her injuries, and reported the incident to the police. The defendant was then arrested and held on bond until his bond was reduced in April 1997. After his release, the defendant traveled from Kentucky to Lauretta's home in Indiana. He turned off the electricity to her home, restored the power a few minutes later, and then knocked on the front door. Lauretta did not open the door, and the defendant crashed through a closed window, brandishing a gun. The defendant dragged Lauretta by her hair out of her home, across cornfields, and a barbed wire fence, injuring her bare leg. Lauretta eventually escaped and was discovered along the highway and taken to a hospital. The defendant pled guilty in Indiana state court to abducting Lauretta in Indiana, and was sentenced to 15 years in state prison. He was then charged in a federal indictment with four counts related to the Tennessee abduction: Kidnapping, interstate domestic violence in violation of 2261(a)(2), use of a deadly weapon during a crime of violence, and interstate violation of a protective order, in violation of 2262. The indictment also contained three counts related to the Indiana abduction: Violation of 2261(a)(1), possession of a firearm while subject to a protection order in violation of 922(g)(8), and use of a deadly or dangerous weapon during a crime of violence. The defendant was found guilty on all seven counts and sentenced to 70 months on six counts, to run concurrently with any sentence imposed on any other matter, and 300 months for the convictions for use of a deadly weapon during a crime of violence, to run consecutively with any other sentence. The defendant appealed the sentence, but the 6th Circuit affirmed. **Key Issues: Joinder of Offenses; Double Jeopardy.**

United States v. Jones, 155 Fed. App'x 204 (6th Cir. 2005). Jones was indicted for a violation of 18 U.S.C. §922(g)(8) when a U.S. Secret Service agent found a gun under the seat of his car during an arrest. Jones moved to suppress the gun, alleging that the search for and seizure of the weapon violated his Fourth Amendment protections because there was no warrant. The Court held that defendant was a recent occupant of the car, and when a policeman has made a lawful custodial arrest of the occupant or recent occupant of an automobile, he may search the vehicle.

United States v. McQueen, 2012 U.S. Dist. LEXIS 183346 (E.D. Ky. Nov. 8, 2012). A judgment was entered against Mr. McQueen for: possessing a firearm while being an unlawful user of a controlled substance in violation of 18 U.S.C. § 922(g)(3) for possessing a firearm while under a domestic violence order in violation of 18 U.S.C. § 922(g)(8) for receiving, possessing, or concealing stolen firearms in violation of 18 U.S.C. § 922(j) for possessing an unregistered sawed-off shotgun in violation of 26U.S.C. § 5861(d). D.E. 41. He was sentenced to 46 months of imprisonment to be followed by three years of supervised release. Mr. McQueen was found to have violated his release due to marijuana possession. Congress mandates revocation of rights and release by statute. The court recommends revocation of Mr. McQueen's rights and imprisonment for five months and an additional supervised release term of twenty-nine months. **Key Issues: Sentencing, Supervised release, Violation, Possession**

United States v. Napier, 233 F.3d 394 (6th Cir. 2000), 109 F. Supp. 2d 757 (2002) (re-addressing Commerce Clause challenge). 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. **Key Issues: Due Process (notice); Commerce Clause; 2nd Amendment.**

United States v. Sizemore, (6th Cir. 2003) (unpublished). On appeal from his conviction for violating §§922(g)(1) and (8), Sizemore argued, among other things, that there was insufficient evidence to find that he had "knowingly possessed a firearm." The Sixth Circuit rejected this argument, noting that possession may be either actual or constructive. It found that there was sufficient evidence for a rational juror to find that Sizemore stayed in a small bedroom in which the firearms were found and that he knowingly had the power and the intention to exercise dominion and control over the firearms. The court based its finding on the testimony of a federal agent that, among other things, the bedroom contained Sizemore's pants next to the bed, the weapons were in reach of anyone lying on the bed, men's clothing was found in the bedroom near a firearm, various personal documents of the defendant were found in the bedroom, and both the defendant and the bed were warm despite the defendant's assertion that he lived in an unheated trailer on the property. **Key Issue: Definition of "Possession."**

United States v. Trabue, No. 99-6406, 2000 U.S. App. LEXIS 31926 (6th Cir. Dec. 5, 2000) (unpublished). Trabue's girlfriend petitioned for, and was granted, a protection order after Trabue poured lighter fluid on her clothing and flicked a cigarette at her, telling her that killing her was not a threat, but a promise. Five days before, Trabue had also threatened to kill her, stuck a gun in her stomach, and pulled the trigger. Less than two months after Trabue's former girlfriend obtained the protection order, Trabue struck her and her son in the head with a gun, and held two of his children hostage. A SWAT team was called in, and Trabue was subsequently arrested. Trabue was indicted on one count of possessing a firearm while subject to a protection order, in violation of § 922(g)(8), and one count of possessing a firearm after having previously been convicted of a misdemeanor crime of domestic violence, in violation of § 922(g)(9). Trabue entered a guilty plea for both counts, and the district court sentenced him to 57 months in prison, and two years of supervised release. He appealed the sentence, but the 6th Circuit affirmed the lower court's judgment. **Key Issue: Sentencing.**

United States v. Visnich, 65 F. Supp. 2d 669 (N.D. Ohio 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. **Key Issues: Due Process (notice); Commerce Clause; 2nd Amendment; 10th Amendment.**

Woolum v. Woolum, 723 N.E.2d 1135 (Ohio Ct. App. 1999). After Bonnie Woolum's protection order against her husband Randall had expired, Bonnie filed a renewal petition. Among other things, she sought and received a provision ordering Randall to surrender his firearms. He appealed, arguing *inter alia* that the firearm prohibition was unlawful because it exceeded the scope of the original order, which did not mention firearms. After noting the broad discretion given to judges to order appropriate relief by the domestic violence statute, the appellate court upheld the firearms provision, noting that Randall was subject to a protection order meeting the requirements of 18 U.S.C. § 922(g)(8) and that the trial court was "within its discretion to incorporate the remedy provided by congress in the Gun Control Act of 1968." **Key Issue: State Court Authority to Prohibit Firearms.**

Seventh Circuit (Illinois, Indiana, Wisconsin)

Garmene v. LeMasters, 743 N.E.2d 782 (Ind. App. 2001). An Indiana state court issued a protection order against Garmene, including a firearm prohibition. Garmene appealed, arguing among other things that "he did not receive sufficient notice that the court would make certain findings under the *Violence Against Women Act of 1994* [under which] a court may prohibit the possession of certain firearms when the court finds the respondent is a 'credible threat to the safety of the petitioner' and the respondent is an 'intimate partner' within the meaning of VAWA" (citing 18 U.S.C. § 922(g)(8)).The court rejected this argument, holding that the protection order statute itself, regardless of federal law, authorizes the firearms prohibition and that there is no requirement that the petition advise the respondent of all possible consequences. **Key Issue: Due Process (Notice).**

United States v. Clements, 2007 U.S. Dist. LEXIS 57272 (E. Dist. Wi. 2007). Clements was convicted of possessing a firearm in violation of 18 U.S.C. §922(g)(8). In this decision the Court considers whether to apply an enhancement of his sentence based on his prior conviction of a controlled substance offense and his alleged perjury during the §922(g)(8) trial. The government agreed to dismiss the §922(g)(8)

count at sentencing. *United States v. Richardson*, 439 F.3d 421, 422 (8th Cir. 2006) (stating that the defendant may be convicted under only one §922(g) classification based on a single incident of possession). **Key Issue: Sentencing.**

United States v. Gainer, 2014 U.S. Dist. LEXIS 53059 (N.D. Ind. Apr. 15, 2014). Gainer is charged with lying on an ATF form, stating that he was not subject to an order in which he had an opportunity to participate in. The Defendant argues that no testimony was taken as to the validity of the Protective Order, no evidence was produced, and no future hearing date was set despite the Defendant's statement that he desired to challenge the order, which he argues shows that he was not actually provided with an opportunity to participate at the hearing. The Court found, however, that the Defendant was reading more into the language "opportunity to participate" than the plain language of the provision requires. The language does not require the opportunity to formally present evidence or witnesses, as the Defendant suggests. Rather, it means merely what it says—the opportunity to participate in the hearing. A jury could find based on the recording that the Defendant had exactly that, as he in fact participated in the hearing and objected to the Protective Order, even though the judge ultimately sustained the Order. **Key Issue: Definition of Opportunity to Participate.**

United States 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. **Key Issues: Due Process (notice); Commerce Clause; 10th Amendment.**

Eighth Circuit (Arkansas, Iowa, Missouri, Minnesota, Nebraska, North Dakota, South Dakota)

United States v. Bena, 664 F.3d 854 (8th Cir. 2011). Bena plead guilty to the possession of firearms while subject to an order of protection in violation of 18 U.S.C. § 922(g)(8) in the U.S. District Court for the Northern District of Iowa, and was sentenced to three years' probation. On appeal, Bena argued that § 922(g)(8) was unconstitutional on its face under the Second Amendment, and unconstitutional as applied to him, under the Fifth and Sixth Amendments, because he did not have the assistance of counsel, or a meaningful opportunity to participate. The Eight Circuit found that limiting an individual's right to bear arms because of their categorization as a potentially dangerous individual was consistent with common-law tradition under the Second Amendment. In addition, the court found that Bena's arguments concerning the Fifth and Sixth Amendments were "an impermissible collateral attack on the predicate no-contact order" because he was subject to a qualifying protection order (having had notice and an opportunity to participate). **Key Issues: Second Amendment, Fifth Amendment, Sixth Amendment, Due Process (qualifying protection order).**

United States v. Eagle, 266 F. Supp. 2d 1039 (D.S.D. 2003). Eagle was charged with a violation of § 922(g)(8) based upon his possession of firearms while subject to a protection order issued by a South Dakota court. Eagle moved to dismiss the indictment, arguing that the state court did not make the necessary findings and conclusions that he and the petitioner were "family or household members," that domestic abuse had occurred and that he had actual notice of the hearing and an opportunity to participate. The court denied Eagle's motion, finding that the protection order plainly stated that Eagle

was present at the hearing, that he waived further hearing, and that he stipulated to the entry of the order and to its terms and conditions. The court further found that the remaining elements of § 922(g)(8) were likewise satisfied by the state court's directives in the order that "[t]he Respondent shall be restrained from committing any acts resulting in physical harm, bodily injury, or attempting to cause physical harm or bodily injury, or from inflicting fear of imminent physical harm of bodily injury against family or household members…." **Key Issues: Due Process (notice); Nature of Prohibitory Language in Order.**

United States v. Lippman, 369 F.3d 1039 (8th Cir. 2004). Lippman was convicted of possessing firearms in violation of § 922(g)(8) after U.S. customs agents found weapons in his possession at the U.S.-Canada border. At the time, Lippman was subject to a California protection order. Upon questioning, he admitted that he was aware of the order but that he did not think that it prohibited him from possessing firearms. The order had been entered after Lippman stipulated to its entry, despite his disagreement with the factual allegations in the application. The judge took note of Lippman's statement and issued the order based upon the stipulation, but the judge did not inform Lippman of the federal firearms law. The order did contain notice of § 922(g)(8)'s applicability, however.

On appeal, Lippman cited three grounds for reversal. First, he contended that the district court improperly refused to instruct the jury that the "hearing" required under § 922(g)(8) is "a proceeding in which witnesses testify and evidence is received." The Eighth Circuit rejected this argument, holding that the statute does not require that evidence actually have been offered or witnesses called. The court cited *United States v. Wilson*, 159 F.3d 280 (7th Cir. 1998), *supra*, and *United States v. Banks,* 339 F.3d 267 (5th Cir. 2003), *supra,* in reaching its decision, and it distinguished *United State v. Spruill*, 292 F.3d 207 (5th Cir. 2002), *supra*, noting that defendant in *Spruill* had not received notice of a hearing, never appeared before a judge, and never had an opportunity to participate because no hearing had been scheduled nor convened. As his second grounds for reversal, Lippman argued that the jury should have been instructed that he could be convicted only if he knew both that he possessed a firearm and that his possession was prohibited by the protection order. The court rejected this challenge, noting that every federal circuit that has addressed the issue has found that neither knowledge of the law nor intent to violate it is required. Finally, the court rejected Lippman's Second Amendment challenge, citing the Eighth Circuit's longstanding, consistent holding that the Second Amendment protects the right to bear arms only when it is reasonably related to the maintenance of a well regulated militia. The court further held that even if there were a freestanding individual right to bear arms under the Second Amendment, § 922(g)(8) is sufficiently narrowly tailored and based upon a sufficiently compelling government interest to be constitutional. **Key Issues: Due Process (notice and hearing); 2nd Amendment.**

United States v. McCall, 2006 U.S. Dist. LEXIS 25018 (N.D. Iowa 2006). McCall was arrested and charged with violations under 922(g)(8) and 922(g)(9). The magistrate judge recommended that the prosecution be forced to choose between the charges. The prosecution argued that the two charges should be combined at sentencing, if necessary (to avoid a "double sentence"). The district court judge ruled that the prosecution had to choose between the two charges, as making "duplicitous" charges prejudices the jury, i.e., if there is a litany of offenses, then jurors think the defendant must have committed at least one crime. **Key Issue: Duplicituous Charges under 922(g).**

United States v. Miller, 646 F.3d 1128 (8th Cir. 2011). Miller plead guilty to the possession of a firearm, while subject to a domestic violence protection order, in violation of 18 U.S.C. §§ 922(g)(8) and 924(a)(2), in the U.S. District Court for the Northern District of Iowa. Miller was sentenced to 69 months

imprisonment, above the sentencing guidelines because of the aggravating factor that he had threatened a state trooper. On appeal, Miller argued that he did not know his possession of a firearm was unlawful and that his sentence was unreasonable. The Eighth Circuit affirmed the district court, finding that § 922(g)(8) does not require the defendant to have knowledge that their possession of a firearm is unlawful and further that Miller's restraining order provided notice that his possession of firearms may be restricted. The court also found that the district court did not abuse its discretion by imposing an upwards variance of the sentencing guidelines, because of both Miller's criminal history and the aggravating factor of his having threatened a state trooper. **Key Issues: Due Process (notice).**

United States v. Olvey, 437 F.3d 804 (8th Cir. 2006). Olvey was subjected to a protection order in Nebraska. Under the Nebraska Protection from Domestic Abuse Act, a hearing to appeal an ex parte protection order must be requested within five days of the order. Although Olvey tried making such a request, the paperwork was not filed on time. He was subsequently arrested for possession of a sawed-off shotgun in violation of 922(g)(8). He claimed that he was not given an opportunity to participate in challenging the protection order because of the stringent Nebraska five-day rule, which he asserted violates 922(g)(8)'s due process requirements. The Eighth Circuit notes that despite the Domestic Abuse Act's five-day requirement, a district court in Nebraska has the power to vacate or modify its decision within the same term; in fact, Olvey's own protection order was modified under this inherent power. Because Olvey's protection order was modified, and could have been dismissed entirely, the court finds that 922(g)(8)'s opportunity to participate requirement was satisfied. **Key Issue: Due Process (opportunity to participate)**.

United States v. Stanley, 2008 U.S. App. LEXIS 5944 (8th Cir. 2008) (unpublished). Defendant Stanley pled guilty to possessing five firearms in violation of 18 U.S.C. § 922(g)(8). The lower court accepted his guilty plea and sentenced him to two years in prison. Stanley later tried to withdraw his plea, which was denied by the court. Stanley testified that he was unaware of the protection order. He testified that he did not receive a copy of the earlier temporary ex parte order, which listed the date for the formal hearing. He explained that the order may have been served at his mother's house while he was in jail. On appeal, the Eighth Circuit determined that while *withdrawing* the plea was not allowed, there was not an adequate factual basis for *accepting* the guilty plea, specifically regarding actual notice of the relevant protection order. The court equated "actual notice" with receipt of notice. *See Dusenbery v. United States*, 534 U.S. 161, 169 n. 5 (2002); *see also Black's Law Dictionary* 1090 (8th ed. 2004). The court remanded for further proceedings. **Key Issue: Due Process (notice)**.

United States v. Terry, 400 F.3d 575 (8th Cir. 2005). Terry contends that his Fourth Amendment rights were violated because the arresting officer had no reason to suspect that his possession of ammunition was criminal (and thus no reason to search/interrogate). The court finds that the officer knew Terry was subject to a qualifying protective order under 922(g)(8) that made his possession of the ammunition box—which was in plain sight—illegal; therefore, the officer had the right to seize the ammunition and interrogate Terry without violating his Fourth Amendment rights. **Key Issue: Fourth Amendment.**

Weissenburger v. Iowa Dist. Court for Warren County, 740 N.W.2d 431 (Iowa 2007). The Iowa District Court for Warren County issued a criminal no-contact order against an ex-husband regarding his ex-wife, which included a provision that explicitly banned him from possessing firearms. The husband sought to have the no-contact order amended so he could use firearms for hunting; the order was amended. On appeal, the Supreme Court of Iowa ruled that amending the order, so as to effectively allow firearm possession by a person subject to an intimate partner no-contact protective order, was illegal under 922(g)(8) and that state courts must apply relevant federal law because of the U.S. Constitution's

Supremacy Clause; therefore, the amended order that violated 922(g)(8) was nullified. **Key Issue: Supremacy Clause.**

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

Rodvik v. Rodvik, 151 P.3d 338 (Alaska 2006). The Supreme Court of Alaska finds that the lower court did not err by awarding a husband's gun collection to his wife during divorce proceedings because the husband was subject to a qualifying 922(g)(8) protective order.

United States v. Garretson, 2013 U.S. Dist. LEXIS 154246, (D. Nev. 2013). Defendant argues that for an individual to be subject to prosecution under §922(g)(8), the order upon which the charge is based must contain all of the elements set forth in the statute, including that the person in whose favor the order is entered is "an intimate partner" of the Defendant. Because the order does not expressly identify Ruchelle Stuart as Defendant's intimate partner, he argues that Count Six must be dismissed. There is no requirement that the underlying order expressly identify the person for whose protection the order is entered as the intimate partner of the individual against whom the order has been entered. The Government must, however, prove that Ruchelle Stuart was the Defendant's intimate partner as that term is defined in 18 U.S.C. §921(a)(32). **Key Issue: Requirements**

United States v. Gill, 39 Fed. Appx. 548 (9th Cir. 2002). Gill was convicted of possessing a firearm in violation of section 922(g)(8). On appeal to the Ninth Circuit, he argued that the statute as applied to him exceeds Congress' Commerce Clause authority. The Ninth Circuit rejected his argument, citing several decisions that establish that proof that the firearm was manufactured out of state is sufficient to establish the requisite jurisdictional element of the statute and thus to survive an as-applied challenge to the statute. **Key Issue: Commerce Clause.**

United States v. Heintz, 2005 U.S. Dist. LEXIS 27773 (E.D. Wash. 2005) (unpublished). On February 18, 2005, Heintz was arraigned on domestic violence criminal charges. The judge asked the prosecutor if the city wanted a no-contact order, and the city responded affirmatively. The judge did not allow Heintz to respond, commenting that such an order was standard procedure under the circumstances.

On March 11, 2005, Heintz was found in possession of two firearms and was indicted under 922(g)(8), with the February 18 no-contact order as the predicate protection order. Heintz claimed in his motion to dismiss that he was not given actual notice of the hearing nor was he given an opportunity to participate. The court ruled that notice of a criminal arraignment is not the same as a notice of a protection order hearing, citing *United States v. Banks*, 339 F.3d 267, 270-71 (5th Cir. 2003), *United States v. Wilson*, 159 F.3d 280, 290 (7th Cir. 1998), *United States v. Calor*, 340 F.3d 428, 431 (6th Cir. 2003) as examples where the defendant was given notice of a no-contact order hearing, and the court says this specified kind of notice is necessary for actual notice. Further, the court held that even if actual notice were given, Heintz was not given an opportunity to participate because the judge did not allow him to present evidence, recite facts, or make contra arguments as to why the protective order should not be given again citing *Banks*, *Calor*, and *Wilson* as examples where the order-subjected party was given a chance to refute the charges against him. Therefore, because the court found insufficient notice and opportunity to participate, it dismissed the indictment under 922(g)(8). **Key Issues: Due Process (actual notice + opportunity to participate).**

United States v. Henderson, 2006 U.S. Dist. LEXIS 62387 (N.D. Cal. 2006). On February 10, 2003, Henderson pled guilty to misdemeanor domestic violence regarding then-girlfriend Lakisha Powell, and

was placed on probation. On June 7, 2004, Henderson's current girlfriend filed a police report alleging assault. The prosecutor filed a probation revocation motion based on this incident. Henderson was subjected to a "stay away" order pending the adjudication of the probation revocation motion. On September 10, 2004, the prosecutor withdrew the motion to revoke probation. Subsequently, Henderson was charged under 922(g)(8). He contended that the underlying protective order had expired at the time he was in possession of a gun, while the prosecutor asserted that the protective order was in effect for three years from the date of issuance. The court found that under California law, the type of protective order issued to Henderson was limited to the duration of the relevant criminal proceeding; therefore, it expired when the prosecutor dropped the motion to revoke probation; therefore, there was no underlying protective order to support a 922(g)(8) charge. **Key Issue: Expired Protective Order.**

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. **Key Issues: Commerce Clause; 10th Amendment.**

United States v. Kafka, 222 F.3d 1129 (9th Cir. 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." **Key Issue: Due Process (notice).**

United States v. Perkins, 2:12-CR-00354-LDG CW, 2012 WL 6089664 (D. Nev. Dec. 6, 2012). Defendant was charged with two counts of violating 18 U.S.C. § 922(g)(8), after he was convicted of battery domestic violence. The defendant claims that he did not know he was prohibited from possessing a firearm, but court ruled the defendant's mental state was immaterial and inadmissible. Although not providing supporting evidence, the defendant alleges that being denied the ability to raise the defense of lack of knowledge violates due process, but the court excludes the defendant's motion to provide evidence of the defendant's ignorance of the law. **Key Issues: Knowledge.**

United States v. Sanchez, 639 F.3d 1201 (9th Cir. 2011). Defendant–Appellant Rolando Roman Sanchez appealed his conviction of possessing a firearm while subject to a restraining order in violation of 18 U.S.C. §922 (g)(8). Sanchez contended at trial and on appeal that the no contact order placed upon him was insufficient to qualify him as a prohibited possessor under §922 (g)(8) because it was not accompanied by a finding that Sanchez was a credible threat and also did not explicitly prohibit him from using, threatening to use, or attempting to use force against an intimate partner or child. The court agreed with Sanchez, holding that in order for §922 (g)(8) to be satisfied there must either be a finding that the defendant was a credible threat under §922 (g)(8)(C)(i) or the language in the court order must contain terms substantially similar to those found in §922 (g)(8)(C)(ii). The court further held that while identical language is not required to satisfy §922(g)(8)(C)(ii), the terms used must clearly prohibit the use, threatened use, or attempted use of force against an intimate partner or child. This was a case of first impression in the 9th Circuit and the court relied upon decisions by the Eleventh, First, and Fourth Circuits. *See United States v. DuBose*, 598 F.3d 726, 730–31 (11th Cir.2010) (per curiam); *United States v. Coccia*, 446 F.3d 233, 242 (1st Cir.2006); *United States v. Bostic*, 168 F.3d 718, 722 (4th Cir.1999). **Key Issue: Sufficiency of Protection Order to Trigger 18 U.S.C. §922 (g)(8)**

United States v. Young, 458 F.3d 998 (9th Cir. 2006). In a federal district court in Washington, a jury convicted Young of a 922(g)(8) violation. The U.S. District Court overturned the jury's verdict, explaining there was insufficient evidence of both "actual notice" and "opportunity to participate" to support a conviction. The District Court reasoned that "actual notice" in the statute really meant "advanced notice" that a protection order might be issued, and that without the advanced notice, the defendant was not given a meaningful opportunity to participate because he could not prepare ahead of time to fight the protection order. The government appealed.

On appeal, the Ninth Circuit found that "actual notice" and "opportunity to participate" should be given their normal meaning —i.e. that actual notice meant the defendant was made aware of the scheduled hearing and that opportunity to participate meant he was allowed to take part in the hearing. Despite Young's "advance notice" argument, the Ninth Circuit deduced that was "emphatically *not* what the statute says," noting that Congress chose "actual" rather than "advance" when it wrote the statute. The appeals court concluded that because the lower court appointed an attorney and told Young of his December 8 formal arraignment that this constituted actual notice.

As to Young's argument that"opportunity to participate" required actual participation, the court joined the Fifth and Seventh Circuits in ruling that "opportunity to participate" was a minimal requirement. *See United States v. Banks*, 339 F.3d 267, 268 (5th Cir. 2003) (finding that even though a hearing had no witnesses or evidence and the judge signed the order ex parte, this still gave an opportunity to participate); *see also United States v. Wilson*, 159 F.3d 280, 284 (7th Cir. 1998) (ruling that a defendant who represented himself had an opportunity to participate). The court concluded that the prosecution need only show that there was a proceeding where the defendant *could* have objected to the order, and that the December 8 hearing met that standard. **Key Issues: Due Process (actual notice; opportunity to participate).**

Tenth Circuit (Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming)

United States v. Arledge, 220 Fed.Appx. 864 (10th Cir. 2007) (unpublished). Donley filed for a protective order against co-habitant Arledge, alleging physical violence. (Arledge was later acquitted of domestic assault and maiming.) An emergency protective order was granted and was served on Arledge. The order informed Arledge that if he didn't show up for an October 12 hearing, then the order would become "permanent" (3 years) without further notice, and also informed him of the federal ban on firearm possession while subject to the protective order.

Arledge did not show up for the hearing, and the protective order was made permanent. He was arrested by an ATF agent in Oklahoma while the protective order was still in effect with a firearm. Arledge was convicted under 922(g)(8). On appeal, Arledge asserted that: (i) He should have been allowed to introduce his acquittals for the underlying charges of the protective order as a defense, i.e., challenge the protective order's merit, and (ii) that he was not given notice of the permanent protective order hearing. The court ruled that an acquittal for the charges underlying a protective order is irrelevant to a 922(g)(8) conviction. If there is a qualifying protective order in effect at the time of firearm possession, then that ends the inquiry for that element of 922(g)(8). The court cited *United States v. Young*, 458 F.3d 998, 1004-05 (9th Cir. 2006) and *United States v. Hicks*, 389 F.3d 514, 534 (5th Cir. 2004) in ruling that attacking the protective order's merit is not a legitimate defense to a 922(g)(8) charge. On the second claim, the court ruled that since the Sheriff testified that he served Arledge with the protective order, and also submitted a "Sherriff's Return" showing that the order had been served on Arledge, there was enough evidence to support a conviction. **Key Issues: Merit of Protective Order as a Defense; Due Process (evidence of notice).**

United States v. Bayles, 310 F.3d 1302 (10th Cir. 2002). Bayles pleaded guilty to possessing a firearm while subject to a domestic violence protective order. Bayles argued that 18 U.S.C. § 922(g)(8) violated the Second Amendment. However, the case law which he primarily relied upon had been reversed. The district court, when sentencing Bayles, departed far below the sentencing guidelines. The government challenged this, stating that the sentence should not reflect a defendant's knowledge or ignorance of the statute. The court determined that Bayles' ignorance of § 922(g)(8) was not a permissible basis for departure from the sentencing guidelines, and that there were no circumstances to find otherwise. Bayles' sentence was vacated and the case was remanded for resentencing. **Key Issues: 2nd Amendment; Sentencing.**

United States v. Edge, 238 Fed.Appx. 366 (10th Cir. 2007) (unpublished). Edge was indicted on under 922(g)(8). He pled not guilty, but was convicted by a jury. On appeal, Edge argued that there was insufficient evidence to support his 922(g)(8) conviction because the protection order was issued without notice or opportunity to participate. He testified that he never received notice of a hearing

regarding a permanent protective order and was never given an opportunity to object to such an order. A deputy sheriff, however, testified that she served Edge with notice, and the judge in charge stated that the protective order itself was by agreement of the parties; thus, Edge consented to the order, waiving his opportunity to participate right. Further, the court finds that having an attorney present is not necessary for "opportunity to participate," citing *United States v. Wilson*, 159 F.3d 280, 289-90 (7th Cir. 1998) as being directly on point. **Key Issues: Due Process (notice; opportunity to be heard).**

United States v. Rogers, 371 F.3d 1225 (10th Cir. 2004). Rogers was indicted by a federal grand jury for possession of a firearm while subject to a protection order, in violation of 18 U.S.C. § 922(g)(8), and following a misdemeanor conviction of domestic violence, in violation of 18 U.S.C. § 922 (g)(9). A magistrate found that there was "a serious risk that the defendant will endanger the safety of another person in the community" based on his outstanding domestic protective orders and detained Rogers under 18 U.S.C. §3142(f)(1) of the Bail Reform Act. Rogers filed an objection to the detention order, and the district court overruled his objection, agreeing with the magistrate's finding that he presented a danger to the community. Rogers appealed, arguing that his conviction did not fit within the "crime of violence" required by § 3142(f)(1). The court determined that possession of a firearm while subject to a domestic protection order and following a misdemeanor conviction of domestic violence "are felonies that by their very nature involve a substantial risk that physical force may be used against the person or property of another in the course of committing the offense" as set forth by 18 U.S.C. §3156(a)(4)(B)(defining "crime of violence").

The court found that convictions under § 922(g)(8) and (9) fit each of the elements of the definition in §3156(a)(4)(B). First, the crimes are felonies. Second, the court held that possession of a firearm while subject to a domestic protection order and following a misdemeanor conviction of domestic violence both involve a substantial risk, resulting from the nature of the offense, that physical force may be used against the person or property of another. The court found this to be particularly true in this case. Third, the court found that the possession of guns in violation of § 922(g)(8) and (9) increases the risk that individuals subject to a domestic protection order or convicted of a misdemeanor crime of domestic violence may engage in violent acts. That risk results from the nature of the offense. Fourth, the court determined that such a risk is "undoubtedly substantial" since the underlying actions leading to the prohibitions in § 922(g)(8) and (9) necessarily involve actual violence or credible threats of violence. Finally, the court held that the substantial risk of physical force created by the possession of a firearm in violation of § 922(g)(8) and (9) occurs "in the course of committing" the weapon-offense, since any violent use of the firearm would have inevitably occurred in the course of the commission of the offense of illegal possession. Thus, the court concluded that § 922(g)(8) and (9) are crimes of violence for the purpose of the Bail Reform Act, and the government was entitled to a detention hearing under 18 U.S.C. §3142(f)(1). **Key Issue: Pre-Trial Detention.**

United States v. Rolle, No. 00-8079, 2001 U.S. App. LEXIS 21166 (10th Cir. Sept. 27, 2001) (Unpublished Opinion). Rolle was arrested for, among other things, possessing a firearm in violation of section 922(g)(8), based upon a restraining order entered against him by a Montana court. Rolle was convicted after a jury trial and he appealed to the Tenth Circuit. Rolle argued on appeal that because the restraining order did not specifically contain the words "stalking or threatening," as used in section 922(g)(8)(B), it did not meet the requirements of the federal law. He also argued that the order failed to satisfy the requirements of section 922(g)(8)(C) because it did not contain all of the language required by that section. The Tenth Circuit examined the language of the order and concluded that it indeed satisfied all requirements of section 922(g)(8), including both the "credible threat" finding under 922(g)(8)(C)(i) and the alternative explicit prohibition on conduct requirement under 922(g)(8)(C)(ii).

Key Issue: Nature of Prohibitory Language in Order.

United States v. Wynne, 2003 U.S. App. LEXIS 186 (10th Cir. Jan. 7, 2003) (unpublished). Wynne was convicted of violating §922(g)(8) and § 922(a)(6) (making a false statement in connection with the acquisition of a firearm). He appealed his conviction on the following grounds, among others: (1) That §§ 922(g)(8) and 922(a)(6) are facially unconstitutional or unconstitutional as applied under the Second Amendment, (2) the same arguments with regard to the Fifth Amendment, and (3) that the notice and hearing requirements of §§ 922(g)(8) and 922(a)(6) were not met. The Tenth Circuit rejected the Second and Fifth Amendment arguments with little discussion based upon prior circuit precedent. Regarding the notice and hearing requirements, the court rejected Wynne's assertion that a 1997 amendment (to change the petitioner's address) to the original 1994 protection order was a "new" protection order of which Wynne had received no notice or opportunity to be heard. The court found agreed with the district court that the 1997 attempted address change "did not extinguish the 1994 order and replace it with a new [order]; nor did the 1997 amendments 'specifically modify' the 1994 [order]. Indeed, for purposes of § 922(g)(8)'s notice and hearing requirements, the 1997 change-of-address amendment had no effect at all, and the 1994 [order] was in full force and effect when Wynne purchased the firearm in 1999." The court further found that § 922(g)(8)'s notice and hearing requirements were satisfied when the original 1994 order was issued, although it was issued by default because Wynne did not appear at the hearing. **Key Issue: 2nd Amendment; Due Process (notice).**

Eleventh Circuit (Alabama, Florida and Georgia)

United States v. Hamm, 134 Fed. Appx. 328 (11th Cir. 2005) (unpublished). Hamm was convicted under 922(g)(8) and he appealed the conviction on the grounds that the Alabama statute under which the restraining order was issued is unconstitutional. The Alabama statute authorizes a temporary protection order to be issued ex parte upon a showing of good cause, provided that within fourteen days the court holds a hearing where the party seeking the protection order must prove the allegations. Hamm asserted that in order for a protection order not to offend due process the defendant must have notice and a hearing in front of a jury before it is issued. The court finds such a contention to be "without merit," and notes that the Alabama protection order statute mandates that a hearing be held within fourteen days and that a subjected party must be advised the he may be represented by counsel at that hearing. **Key Issue: Due Process (immediacy of hearing).**

District of Columbia Circuit

United States v. Chase, 2006 U.S. App. LEXIS 32411 (D.C. Cir. 2006). Chase appeals his conviction under 18 U.S.C. §922(g)(8) on the ground that the court should have suppressed a statement that he made about a gun being in a bag in his car before he was read his Miranda rights. The Court remanded the case to the D.C. District Court for further consideration because it was not clear whether the question that Chase provided the incriminating answer to was actually directed at him. **Key Issue: Self Incrimination, Fifth Amendment D.C. Circuit.**