

INFORMATION NEEDED TO KEEP GUNS OUT OF THE HANDS OF PERSONS CONVICTED OF AN MCDV

This brochure is intended for those involved with the investigation and prosecution of domestic violence offenses, including law enforcement agencies, prosecutors, court officers, probation officers, attorneys, and advocates for victims of domestic violence. A misdemeanor conviction must meet several criteria for the federal prohibition against firearm possession by persons convicted of a misdemeanor crime of domestic violence (MCDV) to apply. This brochure explains what information is needed in what types of records so that those responsible for enforcing the law and making firearms eligibility decisions will be able to determine if the MCDV prohibition applies to a particular misdemeanor offense.

HOW THE INFORMATION IS USED

Information identifying an offense as an MCDV is used by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), federal prosecutors, and the FBI Criminal Justice Information Services Division's National Instant Criminal Background Check System (NICS). ATF uses the information in investigations of persons prohibited from receiving or possessing firearms under the federal Gun Control Act (GCA), firearms licensing matters, and the administrative forfeiture of firearms by prohibited persons. Federal prosecutors use the information in prosecutions of prohibited persons possessing firearms and in civil and criminal firearm forfeitures under the GCA. The NICS uses the information when making firearm eligibility determinations for persons seeking to acquire a firearm from a Federal Firearms Licensee (FFL). A NICS check includes a check of automated databases and, in cases where additional information is needed, follow-up requests to agencies, such as the police, prosecutors, or the courts, that may have relevant information. The NICS has 3 business days to determine whether a proposed gun transfer is prohibited. If the NICS has not been able to make a definitive determination within that time, the FFL may lawfully transfer the firearm.

WHAT IS AN MCDV?

The federal GCA prohibits persons who have been convicted of an MCDV from receiving or possessing a firearm. Title 18, United States Code (U.S.C.), Section 922(g)(9); see also 18 U.S.C. § 925(a)(1). The law defines an MCDV as “an offense” that:

- Is a misdemeanor under federal, state or tribal law;
- Has as an element the use or attempted use of physical force, or the threatened use of a deadly weapon; and
- At the time the offense was committed, the defendant was:
 - A current or former spouse, parent, or guardian of the victim;
 - A person with whom the victim shares a child in common;
 - A person who is cohabiting with or has cohabitated with the victim as a spouse, parent, or guardian; or
 - A person who was or is similarly situated to a spouse, parent, or guardian of the victim.

THE UNIVERSE OF MCDV OFFENSES

The universe of offenses that could constitute MCDVs includes all misdemeanor offenses that contain either the use of physical force, the attempted use of physical force, or the threatened use of a deadly weapon as an element, so long as the offense is committed against a person with whom the defendant had a qualifying relationship. As a result, offenses that could constitute MCDVs oftentimes encompass such offenses as generic assault and disorderly conduct.

Many misdemeanor offenses that could qualify as an MCDV have *disjunctive elements*, such that a conviction may be obtained under the applicable provision either with or without the use or attempted use of physical force or the threatened use of a deadly

weapon. For example, a state generic assault statute may provide that a person commits an assault either by using physical force against another person or by verbally threatening another person. Assuming the requisite domestic relationship is present, a conviction under the first prong of the statute would satisfy the MCDV definition, while a conviction under the second prong of the statute would not. 18 U.S.C. § 921(a)(33)(A)(ii); Title 27, Code of Federal Regulations, Sections 478.11, 478.32.

THE CHALLENGE OF MISDEMEANORS WITH DISJUNCTIVE ELEMENTS

Few MCDVs are labeled as such. Information must therefore be readily available in automated records or in the records of the convicting court to enable ATF investigators, federal prosecutors, and the NICS to determine whether a misdemeanor qualifies as an MCDV.

This information is particularly important to the NICS, which only has 3 business days to respond to an FFL on whether a proposed gun transfer would violate federal or state law. For example, if the NICS identifies a misdemeanor conviction under a provision that can only be violated by the use or attempted use of physical force or the threatened use of a deadly weapon, the NICS can deny the firearm transfer after establishing the necessary domestic relationship without further research into the conviction. If, however, the NICS identifies a misdemeanor conviction under a provision with *disjunctive elements*, where only some of those elements require the use or attempted use of physical force or the threatened use of a deadly weapon, but the particular element of conviction is not identified in the automated record, the transaction is delayed for further research. Once the NICS establishes that the requisite domestic relationship is present, which is typically made by reference to the police report, the NICS then seeks

information on whether the defendant was convicted under the part of the statute requiring the use or attempted use of physical force or threatened use of a deadly weapon.

WHAT CAN YOU DO TO ASSIST IN IDENTIFYING AN OFFENSE THAT QUALIFIES AS AN MCDV?

To help ATF, federal prosecutors, and the NICS determine whether an offense qualifies as an MCDV, those involved in the prosecution of domestic violence cases should ensure that information demonstrating the use or attempted use of physical force or threatened use of a deadly weapon is reflected in:

- The charging document;
- any plea agreement or plea colloquy;
- and any other final court records of the proceedings, such as:
 - judgments of conviction; or
 - sentencing orders.

When statutes are disjunctive, it is critical that the charging and conviction documents *list the exact disjunctive of the charge or conviction*. Doing so will allow the NICS and law enforcement officials to *quickly determine whether the MCDV prohibitor does or does not apply to the defendant's conviction*.

When statutes express the disjunctive by the use of "or," rather than through separate subsections, (e.g., a disorderly conduct statute that lists a series of behaviors, such as violence, indecency, boisterousness, or being unreasonably loud), or when a statute includes multiple clauses in the same subpart, the use of force, attempted use of force, or threatened use of a deadly weapon underlying a conviction under that statute should be *described in the charging papers and the record of conviction*.

It is also very beneficial, whenever possible, to have the *relationship between the defendant and the victim* documented in the charging papers and the court's record of conviction when a subject has

been convicted of a misdemeanor offense involving domestic violence. Information in non-court documents, such as police reports and case files, can also be relied upon to establish the existence of the domestic relationship. The information in court and non-court documents should record the existence of a spousal, parental, or guardian relationship or when the offender and victim have a child in common. Sufficient information should be included to indicate when the persons cohabit as or are similarly situated to one of these relationships. Simply indicating that the persons are boyfriend/girlfriend does not establish the relationship necessary for the MCDV prohibitor to apply.

GUIDANCE FROM ATF ON MCDV ISSUES

ATF has the primary responsibility for enforcing the GCA prohibitions on possession of firearms. Further information about MCDVs can be found at the ATF Web site, www.atf.gov, and questions can be directed to your local ATF Office by calling (800) 800-3855 or to the ATF Firearms Programs Division at (202) 648-7090.

INCLUDING MCDV INFORMATION IN THE AUTOMATED DATABASES USED BY THE NICS

Finally, in addition to ensuring that necessary information about domestic violence offenses is included in the records of the convicting court, investigators, prosecutors, court personnel, and victims' advocates should work with the agencies responsible for updating that information in the automated databases within their state and at the FBI, so that the information is available to NICS through its automated check. This will allow the NICS to immediately determine if the MCDV prohibitor applies, lessening the likelihood that (1) a gun will be transferred to a prohibited person because of delays in getting the information from the court or (2) a lawful transaction will be delayed because of the need to do additional research on the offense. The FBI can help identify the responsible agencies and relevant databases.

NICS INFORMATION

Customer Service: 1-877-444-NICS (6427)

Facsimile: 1-888-550-6427

NICS Web Site: www.fbi.gov/hq/cjsid/nics/index.htm

NICS E-mail Address: a_nics@leo.gov

U.S. Department of Justice



Information Needed to Enforce the Firearm Prohibition

Misdemeanor Crimes of Domestic Violence



November 2007