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Eighth Circuit Revisits Restoration Exception to Domestic Violence Gun Ban and Says “Restore” Means “Restore”

*United States v. Kirchoff*¹

I. INTRODUCTION

Under the restoration exception to the 1996 Domestic Violence Gun Ban, a convicted domestic abuser, who would otherwise be prohibited from possessing a firearm under federal law, may be allowed to do so if the person’s civil rights have been restored under state law.² The circuits have split over how to best implement the congressional policy behind the Domestic Violence Gun Ban and the restoration exception because differing state laws have caused divergent application of the exception to federal defendants. The Eighth Circuit first visited this issue in 1999, when it held that defendants who have never lost their civil rights, by definition, cannot have them restored, and, therefore, such defendants do not qualify for the restoration exception.³

Under the Eighth Circuit’s analysis and Missouri law, a person who did not go to jail following a domestic violence conviction may be forever barred from possessing a firearm, while a person who did serve jail time will be able to possess a firearm upon completion of the sentence.⁴ Several circuits have adopted the Eighth Circuit’s reasoning. Others have attempted to avoid similarly odd results.⁵ For example, the First and Sixth Circuits have held that persons who have not lost their civil rights under state law may, nevertheless, be treated as having them restored in order to qualify for the restoration exception.⁶ In *United States v. Kirchoff*, the Eighth Circuit reaffirmed its position; as a result, application of the Domestic Violence Gun Ban, its restoration exception, and Missouri law continue to give firearms privileges to previously incarcerated domestic abusers while denying firearms privileges to domestic abusers whose behavior did not warrant a sentence of confinement.⁷

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1. 387 F.3d 748 (8th Cir. 2004), *cert. denied*, 125 S. Ct. 2936 (2005).
 2. 18 U.S.C. §§ 921(a)(33)(B)(ii), 922(g) (2000).
 3. *United States v. Smith*, 171 F.3d 617, 623-26 (8th Cir. 1999). *See infra* notes 60-68, 85-89 and accompanying text.
 4. *See Kirchoff*, 387 F.3d at 751.
 5. *See infra* note 101.
 6. *United States v. Wegrzyn*, 305 F.3d 593, 595-97 (6th Cir. 2002); *United States v. Indelicato*, 97 F.3d 627, 631 (1st Cir. 1996).
 7. *Kirchoff*, 387 F.3d at 750-52.

II. FACTS AND HOLDING

In February 2000, Springfield attorney Bill Kirchoff was charged with three misdemeanor counts of third-degree assault under Missouri law for assaulting his girlfriend.⁸ In January 2001, Kirchoff was charged with two misdemeanor counts of third-degree domestic assault.⁹ For both the February 2000 and January 2001 charges, Kirchoff was released on bond.¹⁰ However, his bond for the February 2000 charges was revoked because, while out on bond, he had threatened a witness and assaulted his girlfriend again.¹¹ The associate circuit judge ordered Kirchoff held in the Greene County jail without bond.¹² The cases were consolidated, and Kirchoff entered guilty pleas.¹³ The state court sentenced him to concurrent one-year sentences but suspended execution of the sentences and placed him on probation until April 2003.¹⁴ The judge ordered Kirchoff's attorney to confiscate his firearms and ordered police to escort Kirchoff's victim to his home so she could collect her belongings.¹⁵

On August 7, 2002, Kirchoff was charged in federal court with possession of a firearm by a person who had been convicted of a misdemeanor crime of domestic violence.¹⁶ The indictment charged that from April through June 2002, while Kirchoff was on probation for the state court assault convictions, he possessed a 12-gauge shotgun, a .45 caliber pistol and ammunition, and a .556 caliber rifle.¹⁷ One week after the federal charges were brought against Kirchoff, the Missouri state court revoked his probation; accordingly, he began serving his sentence for the state criminal charges.¹⁸

On December 13, 2002, while serving his prison sentence, Kirchoff filed a motion to dismiss the federal indictment on the grounds that he qualified for the restoration exception of 18 U.S.C. § 921(a)(33)(B)(ii), which provides:

8. *Id.* at 749; *Attorney Jailed for Violating Bond*, SPRINGFIELD NEWS-LEADER, March 15, 2001, at 1B. Kirchoff was charged with violating MO. REV. STAT. § 565.070 (2000). *Kirchoff*, 387 F.3d at 749.

9. *Kirchoff*, 387 F.3d at 749. Kirchoff was charged with violating MO. REV. STAT. § 565.074 (2000). *Id.*

10. *Id.*

11. *Id.*; *Attorney Receives Probation in Assault*, SPRINGFIELD NEWS-LEADER, April 14, 2001, at 1B. Vernon County Associate Circuit Judge Gerald McBeth heard the case because all Greene County judges had previously recused themselves. *Id.*

12. *Attorney Jailed for Violating Bond*, SPRINGFIELD NEWS-LEADER, March 15, 2001, at 1B.

13. *Kirchoff*, 387 F.3d at 749.

14. *Id.*

15. *Attorney Receives Probation in Assault*, SPRINGFIELD NEWS-LEADER, April 14, 2001, at 1B.

16. *Kirchoff*, 387 F.3d at 749. His possession was in violation of 18 U.S.C. § 922(g)(9) (2000). *Id.* See *infra* note 44 and accompanying text.

17. *Kirchoff*, 387 F.3d at 749.

18. *Id.*

A person shall not be considered to have been convicted of [a domestic violence misdemeanor] if the conviction . . . is an offense for which the person . . . has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense)¹⁹

The District Court for the Western District of Missouri denied the motion to dismiss, reasoning that, because Kirchoff had never been confined under a sentence of imprisonment (a prerequisite to loss of civil rights under Missouri law), he had never lost his civil rights.²⁰ Because Kirchoff had never lost his civil rights, those rights could not have been restored to him.²¹ The court relied on two earlier Eighth Circuit cases that held the plain language of the restoration exception does not include defendants who have not lost their civil rights.²²

Kirchoff appealed the denial of his motion to dismiss to the Eighth Circuit.²³ The appellate court held that when a person convicted of a misdemeanor crime of domestic violence under Missouri law is charged with violating the federal Domestic Violence Gun Ban of 1996, the defendant only qualifies for the restoration exception after actual incarceration, which is necessary under Missouri law to trigger a loss of civil rights.²⁴ Furthermore, when the federal defendant has served a pretrial detention for the state case, that detention does not trigger loss of civil rights under Missouri law because pretrial detention does not qualify as being “confined under a sentence of imprisonment.”²⁵ Finally, when the defendant serves prison time for the federal possession offense, thereby losing his civil rights, the restoration of those rights upon release does not retroactively qualify the defendant for the restoration exception.²⁶ Accordingly, the Eighth Circuit affirmed the district court’s denial of Kirchoff’s motion to dismiss his federal indictment.²⁷

19. 18 U.S.C. § 921(a)(33)(B)(ii) (2000); *Kirchoff*, 387 F.3d at 749-50. Missouri law provides for the loss of civil rights by disqualifying a person convicted of any crime from voting in an election while confined under a sentence of imprisonment. MO. REV. STAT. § 561.026(1) (2000).

20. *Kirchoff*, 387 F.3d at 750.

21. *Id.*

22. *Id.* See *United States v. Smith*, 171 F.3d 617, 623-26 (8th Cir. 1999); *United States v. Keeney*, 241 F.3d 1040, 1043-45 (8th Cir. 2001).

23. *Kirchoff*, 387 F.3d at 750.

24. *Id.* at 750-52.

25. *Id.* at 752 (quoting MO. REV. STAT. § 561.026(1) (2000)).

26. *Id.*

27. *Id.* at 749. Kirchoff was ultimately disbarred. *Disciplinary Actions*, 61 J. MO. B. 215 (July-Aug. 2005).

III. LEGAL BACKGROUND

A. *The Domestic Violence Gun Ban of 1996*

Congress passed the Gun Control Act of 1968²⁸ to strengthen federal control over firearms traffic and help the states regulate firearms traffic within their borders.²⁹ The Gun Control Act, part of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968,³⁰ supplanted the Federal Firearms Act of 1938.³¹ A goal of both the Gun Control Act of 1968 and its predecessor was to prevent certain people – those considered more dangerous than others – from owning firearms.³² In pursuit of that goal, the Gun Control Act prevents sale to or possession by certain classes of people, including felons.³³ For the first twenty-eight years of its life, however, the Gun Control Act allowed people convicted of misdemeanor crimes of violence to possess firearms.³⁴

Senator Frank R. Lautenberg, a Democrat from New Jersey, believed that allowing people convicted of misdemeanor crimes of domestic violence to possess guns was a major flaw in the Gun Control Act.³⁵ Accordingly, on March 21, 1996, he introduced legislation to remedy the problem.³⁶ This legislation would become known as the “Domestic Violence Gun Ban.”³⁷ Senator Lautenberg announced that the ban would close the loophole in federal

28. Pub. L. No. 90-351, §§ 901-02, 82 Stat. 197, 225-26 (1968); Pub. L. No. 90-618, §§ 101-02, 82 Stat. 1213, 1213-14 (1968) (codified as amended at 18 U.S.C. §§ 921-31 (2000 & Supp. 2002)).

29. H.R. REP. NO. 90-1577, at 2 (1968), as reprinted in 1968 U.S.C.C.A.N. 4410, 4411. Congress passed the Gun Control Act of 1968 pursuant to its constitutional power under the Commerce Clause. 79 AM. JUR. 2D *Weapons and Firearms* § 8 (2004).

30. 16B AM. JUR. 2D *Constitutional Law* § 684 (2004).

31. W.A. Harrington, Annotation, *Lawfulness of Sale or Other Disposition of Firearms or Ammunition Under 18 U.S.C.A. § 922(d)*, 34 A.L.R. FED. 430 § 2[a] (1977).

32. *Id.*

33. *Id.* Under the Gun Control Act as originally passed and amended in 1968, a person was a member of one of the prohibited classes if he or she was a fugitive from justice; under indictment for or convicted of a crime punishable by more than one year incarceration; a user or addict of narcotics, marijuana, stimulants, or depressants; or an adjudicated “mental defective” or person committed to a mental institution. 18 U.S.C. §§ 922(d), (g), (h) (Supp. 1968) (current version at 18 U.S.C. § 922(g) (2000)). See Pub. L. No. 90-618, § 922, 80 Stat. 1213, 1220-21 (1968).

34. 142 CONG. REC. S2646-02 (daily ed. March 21, 1996) (statement of Sen. Lautenberg).

35. *Id.*

36. *Id.* See also Frank R. Lautenberg, *No Guns for Wife-Beaters*, WASH. POST, Apr. 3, 1997, at A21; Adam Piore, *Domestic Violence Gun Ban Advances*, THE RECORD (Northern New Jersey), July 27, 1996, at C15.

37. For the purposes of this Note, “Domestic Violence Gun Ban” shall mean 18 U.S.C. § 922(g)(9) (2000).

law by prohibiting people convicted of domestic violence misdemeanors from possessing firearms.³⁸

According to Senator Lautenberg, many domestic abusers are never charged with a felony, perhaps because of plea bargains.³⁹ If they walked away with only a misdemeanor conviction, under pre-1996 federal law, they would be allowed to possess firearms.⁴⁰ He believed that such a result was unacceptable because of the interplay of two factors: the prevalence of domestic abuse,⁴¹ and the widespread use of guns by many abusers:

[M]uch of the killing and maiming associated with domestic violence could not happen but for the presence of a firearm. The New England Journal of Medicine reports that in households with a history of battering, a gun in the home increases the likelihood that a woman will be murdered fivefold. Often, the only difference between a battered woman and a dead woman is the presence of a gun.⁴²

In an attempt to address this problem, the Domestic Violence Gun Ban added domestic abusers as a class of people prohibited under federal law from possessing firearms.⁴³

Senator Lautenberg's amendment to the Gun Control Act makes it a federal offense for a person who has been convicted of a misdemeanor crime of domestic violence to possess a firearm.⁴⁴ "Misdemeanor crime of domestic

38. 142 CONG. REC. S2646-02 (daily ed. March 21, 1996) (statement of Sen. Lautenberg).

39. *Id.*

40. *Id.*

41. Lautenberg preferred the following statistics:

[E]ach year an estimated 2 million women are victimized by domestic violence. That is 10 times the number of women who are diagnosed with breast cancer. Of those 2 million women, nearly 6,000 die at the hands of men who at least at one time claimed to love them. About 70 percent of the time, those hands are holding a gun.

Id.

42. *Id.*

43. *Id.* This was necessary, according to Senator Lautenberg, because "[t]hose guilty of acts of domestic violence should not be trusted to acquire or possess a gun. Period." *Id.*

44. *Id.* See also 18 U.S.C. § 922(g)(9) (2000). The current version of section 922(g) provides that a person is a member of one of the prohibited classes if he or she is: (1) convicted of a crime punishable by more than one year in prison, (2) a fugitive from justice, (3) a drug user or addict, (4) an adjudicated mental defective or committed to a mental institution, (5) an illegal alien or an alien admitted under a nonimmigrant visa, (6) dishonorably discharged from the military, (7) a former U.S. citizen who has renounced that citizenship, (8) subject to a domestic violence restraining order, or (9) a domestic violence misdemeanant. 18 U.S.C. § 922(g) (2000).

violence” is defined as a crime that is a misdemeanor under state or federal law, and involves the “use or attempted use of physical force, or the threatened use of a deadly weapon” by a person in a domestic relationship with the victim.⁴⁵ On September 30, 1996, President Clinton signed the Domestic Violence Gun Ban into law.⁴⁶

B. The Restoration Exception

Although the 1996 Domestic Violence Gun Ban prohibits people convicted of misdemeanor crimes of domestic violence from possessing firearms, an exception applies if the misdemeanant’s civil rights have been revoked and subsequently restored under state law.⁴⁷ The statutory loss of civil rights stems from the common law concept of civil death for felons, which prevented people convicted of felonies from performing legal functions.⁴⁸ Com-

45. 18 U.S.C. § 921(a)(33)(A) (2000). The exact language of the definition is as follows:

Except as provided in subparagraph (C), the term ‘misdemeanor crime of domestic violence’ means an offense that –

- (i) is a misdemeanor under Federal or State law; and
- (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

Id.

46. Statement by President William J. Clinton Upon Signing H.R. 3610, 32 WEEKLY COMP. PRES. DOC. 1935 (Oct. 7, 1996). The Domestic Violence Gun Ban ultimately passed as part of a spending bill. See David Pace, *New Bill Adopts Gun Ban for Domestic Violence*, PITTSBURGH POST-GAZETTE, Oct. 1, 1996, at A4.

47. 18 U.S.C. § 921(a)(33)(B)(ii) (2000). Restoration of civil rights is not the only way to avoid application of the Domestic Violence Gun Ban: section 921(a)(33)(B)(ii) says a person is not considered to have been convicted of a domestic violence misdemeanor:

if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

Id.

48. See 21A AM. JUR. 2D *Criminal Law* § 1311 (2004).

There were three principal incidents consequent upon an attainder for treason or felony, – forfeiture, corruption of blood, and an extinction of civil rights, more or less complete, which was denominated civil death. . . . The incident of civil death attended every attainder of treason or felony,

mon law civil death has not survived in the United States, but convicted persons may lose certain civil rights – such as the rights to vote, serve on a jury, and hold public office – pursuant to state statutes.⁴⁹ If a person loses civil rights in this way and those rights are later restored by operation of state law (for example, upon completion of a jail sentence), then the restoration exception of the Domestic Violence Gun Ban applies.⁵⁰ The person is no longer considered to have been convicted of the crime and, therefore, he or she may legally possess firearms.⁵¹

Missouri law provides for the loss of some civil rights upon conviction of a crime.⁵² First, a person convicted of any crime loses the right to vote “while confined under a sentence of imprisonment.”⁵³ Second, a person convicted of any crime related to voting loses the right to vote forever.⁵⁴ Finally, a person convicted of a felony loses the right to serve on a jury forever.⁵⁵ Taken together, Missouri law and the restoration exception of the Domestic Violence Gun Ban authorize a person convicted of a misdemeanor crime of domestic violence who has served a sentence of imprisonment (during which civil rights were lost) to possess a gun after the sentence ends and civil rights have been restored.⁵⁶

C. *The Circuit Split on Interpretation of the Restoration Exception*

The restoration exception of the Domestic Violence Gun Ban allows people who have lost their civil rights and subsequently had them restored to possess firearms.⁵⁷ By contrast, people who have not had their civil rights restored may not take advantage of the restoration exception and, therefore, are prohibited from possessing firearms.⁵⁸ The restoration exception thus distinguishes between people who have lost their civil rights (presumably because they committed a more serious offense and therefore had to serve jail

whereby . . . the attainted person “is disabled to bring any action, for he is *extra legem positus* [‘out of the law’], and is accounted in law *civilliter mortuus* [‘civilly dead’],” . . . “he is disqualified from being a witness, can bring no action, nor perform any legal function; he is in short regarded as dead in law.”

Avery v. Everett, 18 N.E. 148, 150 (N.Y. 1888) (citations and quotation marks omitted); BLACK’S LAW DICTIONARY 624, 1035 (8th ed. 2004).

49. 21A AM. JUR. 2D *Criminal Law* § 1311 (2004).

50. 18 U.S.C. § 921(a)(33)(B)(ii) (2000).

51. *Id.*; 18 U.S.C. § 922(g)(9) (2000).

52. *See* MO. REV. STAT. § 561.026 (2000).

53. *Id.* § 561.026(1).

54. *Id.* § 561.026(2).

55. *Id.* § 561.026(3).

56. *See id.* § 561.026(1); 18 U.S.C. § 921(a)(33)(B)(ii) (2000).

57. 18 U.S.C. § 921(a)(33)(B)(ii) (2000).

58. *Id.*

time) and people who have not lost their civil rights (presumably because they committed a minor offense and, therefore, were not sentenced to confinement). As a result of this distinction, those who committed more serious crimes will be able to possess firearms upon release from incarceration, whereas those who were never confined are banned from possessing firearms forever. Defendants in the latter group argue that Congress could not possibly have meant to allow presumably more dangerous criminals to possess guns while presumably less dangerous misdemeanants remain subject to the Domestic Violence Gun Ban.⁵⁹

In *United States v. Smith*,⁶⁰ the Eighth Circuit rejected a defendant's argument that the distinction between a misdemeanant who fails to qualify for the restoration exception because he never lost his civil rights and a felon who does qualify because his civil rights were restored violates equal protection.⁶¹ In *Smith*, the defendant had pleaded guilty to misdemeanor assault under Iowa law for assaulting the mother of his child and was fined \$100.⁶² Two years later, Smith shot and wounded the same woman during an argument and was convicted of firearm possession in violation of the Domestic Violence Gun Ban.⁶³ Because Iowa does not strip misdemeanants of their civil rights, Smith never lost his.⁶⁴ Nevertheless, Smith argued the restoration exception should apply to him because the end result was the same – he had his civil rights – and it was irrelevant whether they had been restored to him or whether he had never lost them under Iowa law.⁶⁵

The Eighth Circuit rejected this argument, holding that in order to have civil rights restored, a person must first lose them.⁶⁶ Applying the rational basis standard to its equal protection analysis, the court held that the distinction drawn by the statute was a result of Congress's express reference in the statute to state laws that vary on loss and restoration of civil rights.⁶⁷ Continuing its

59. See, e.g., *United States v. Smith*, 171 F.3d 617, 624 (8th Cir. 1999); *United States v. Indelicato*, 97 F.3d 627, 629 (1st Cir. 1996).

60. 171 F.3d 617 (8th Cir. 1999).

61. *Id.* at 624-26.

62. *Id.* at 619.

63. *Id.*

64. *Id.* at 623.

65. *Id.*

66. *Id.* at 623-24.

67. *Id.* at 624. The court noted that the restoration exception for felons, upon which the domestic violence misdemeanant restoration exception was patterned, see *infra* note 73, had survived constitutional challenges because "it was rational for Congress to rely on 'a state's judgment that a particular person or class of persons is, despite a prior conviction, sufficiently trustworthy to possess firearms,' despite the anomalous results." *Smith*, 171 F.3d at 624-25 (quoting *McGrath v. United States*, 60 F.3d 1005, 1009 (2d Cir. 1995)). In addition to such judicial acceptance of the "much-criticized" restoration exception for felons, Congress, although aware of the inconsistency, continued to look to state law for both restoration exceptions. *Id.* at 625. Congress was willing to allow the

analysis, the court found that the distinction was rationally related to the legitimate government interest of extending the firearm ban to domestic abusers.⁶⁸

In holding that a person must first lose their civil rights in order to have them restored and fit within the restoration exception, the Eighth Circuit explicitly refused to adopt the fiction indulged in by the First Circuit in *United States v. Indelicato*.⁶⁹ In *Indelicato*, the defendant was convicted in federal court for firearms possession after pleading guilty in Massachusetts state court to committing assault and battery with a knife and carrying a dangerous weapon.⁷⁰ Both offenses are termed “misdemeanors” under Massachusetts law, and Massachusetts does not strip misdemeanants of their civil rights.⁷¹ *Indelicato* argued that he qualified for the restoration exception because Massachusetts had never taken away his civil rights and his firearms privileges had not been restricted under state law.⁷²

Facing the same argument as offered in *Smith* and the instant case, the First Circuit in *Indelicato* looked to the legislative history of the restoration exception to interpret its proper application.⁷³ In enacting the restoration ex-

disparity because it was concerned with domestic abusers who could escape liability under the felony possession provision by simply pleading down to a misdemeanor. *Id.* With only a misdemeanor conviction, they could legally possess firearms and use them in the next round of abuse. *Id.* Furthermore, the court noted that *Smith* was not entirely precluded from future firearm possession – if he were pardoned or his conviction were expunged, for example, he would qualify for the exception. *Id.* Therefore, the exception did not “invidiously discriminate against him.” *Id.* at 626.

68. *Id.* at 624-26.

69. 97 F.3d 627 (1st Cir. 1996).

70. *Id.* at 628. The predicate offenses for his federal firearms conviction were defined as “misdemeanors” under Massachusetts law, but were punishable by a maximum of two and a half years in prison. *Id.* Thus, *Indelicato* was charged with violating the “felon-in-possession” statute (even though the predicate offenses were not termed “felonies” in Massachusetts), which prohibits firearms possession by a person who has been convicted of a crime punishable by more than one year. *Id.*; 18 U.S.C. § 922(g)(1) (2000).

71. *Indelicato*, 97 F.3d at 628-29.

72. *Id.* at 628.

73. *Id.* at 629. Because *Indelicato* was charged with violating the felon-in-possession statute, see *supra* note 70, he argued that the restoration exception for felons, 18 U.S.C. § 921(a)(20) (2000), should apply to him. *Indelicato*, 97 F.3d at 628. By contrast, *Kirchoff*, *Smith*, *Wegrzyn*, and *Jennings* were charged with possession by a domestic violence misdemeanant, and argued for application of the restoration exception for domestic violence misdemeanants. 18 U.S.C. § 921(a)(33)(B)(ii) (2000). Congress patterned the domestic violence misdemeanant restoration exception after the restoration exception for felons. *United States v. Kirchoff*, 387 F.3d 748, 751 (8th Cir. 2004), *cert. denied*, 125 S. Ct. 2936 (2005). Thus, the two restoration exceptions contain substantially similar language. Compare 18 U.S.C. § 921(a)(20) (2000), with *id.* § 921(a)(33)(B)(ii). However, the restoration exception for domestic violence misdemeanants contains a parenthetical phrase that the felon restoration exception does not: “A person shall not be considered to have been convicted of [a domestic

ception, Congress deliberately allowed the states to decide who may possess firearms.⁷⁴ States were not given full discretionary authority, but they could make their decisions through the mechanical means listed in the statute: expungement, setting aside of a conviction, pardon, or restoration of civil rights.⁷⁵ A state's use of these statutorily defined mechanical means of restoring civil rights represents the state's judgment that a class of people – for example, those who had been pardoned or to whom civil rights had been restored – may be trusted to possess firearms, despite their prior convictions.⁷⁶ The court concluded, however, that “it is hard to see why Congress would wish to distinguish between one whose civil rights were never taken away (*Indelicato*) and one whose civil rights were mechanically taken away and mechanically restored.”⁷⁷ Thus, despite the fact that *Indelicato* never lost his civil rights under Massachusetts law, the First Circuit concluded that *Indelicato*'s rights should be treated as “restored” for purposes of the exception to the possession ban.⁷⁸

In *United States v. Wegrzyn*,⁷⁹ the Sixth Circuit aligned itself with the First Circuit. The defendant in *Wegrzyn* had been convicted of a domestic violence misdemeanor in Michigan and subsequently arrested for possession of a firearm in violation of the Domestic Violence Gun Ban.⁸⁰ Michigan, like Missouri, strips misdemeanants of the right to vote while confined in a correctional facility.⁸¹ *Wegrzyn*, however, was never confined in a correctional facility and therefore never lost his civil rights.⁸² Nonetheless, the Sixth Circuit affirmed the district court's conclusion that *Wegrzyn* was eligible for the restoration exception and could possess firearms when his probation ended.⁸³ In support of its finding, the Sixth Circuit offered reasoning similar to that of the First Circuit in *Indelicato*.⁸⁴

By contrast, the Eighth Circuit in *Smith* had argued it was not “at liberty to engage in the fiction created by *Indelicato*” because the domestic violence

violence misdemeanor] if . . . [it] is an offense for which the person . . . has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) . . .” 18 U.S.C. § 921(a)(33)(B)(ii) (2000) (emphasis added); *id.* § 921(a)(20). This distinction has proved crucial. See *infra* notes 85-93 and accompanying text.

74. *Indelicato*, 97 F.3d at 629-30.

75. *Id.*

76. *Id.* at 630.

77. *Id.*

78. *Id.* at 631.

79. 305 F.3d 593 (6th Cir. 2002).

80. *Id.* at 594.

81. MICH. COMP. LAWS § 168.758b (2005); MO. REV. STAT. § 561.026 (2000).

82. *United States v. Wegrzyn*, 106 F. Supp. 2d 959, 961, 964 (W.D. Mich. 2000), *aff'd*, 305 F.3d 593 (6th Cir. 2002).

83. *Wegrzyn*, 305 F.3d at 595-97.

84. *Id.*

misdeemeanant restoration exception of section 921(a)(33)(B)(ii) “includes language that precludes such a fiction.”⁸⁵ The statute applies to “civil rights [that have been] restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense)”⁸⁶ The *Smith* court noted that “[t]his parenthetical language is not contained within [the felony restoration exception that] was applied in *Indelicato*.”⁸⁷ Furthermore, the court noted that applying the *Indelicato* “fiction” to the domestic violence misdemeanor restoration exception would render the Domestic Violence Gun Ban ineffective, since most misdemeanants do not lose their civil rights.⁸⁸ The Eighth Circuit thus found this distinction between the two restoration exceptions an appropriate basis on which to reject *Indelicato* and deny *Smith* the restoration exception.⁸⁹

In reaching the opposite conclusion, the district court in *Wegrzyn* distinguished *Smith* on the grounds that the Iowa law at issue in *Smith* did not strip misdemeanants of civil rights.⁹⁰ By contrast, Michigan law did, triggering application of the parenthetical language of the restoration exception.⁹¹ Because Michigan law thus “provide[d] for the loss of civil rights under [a domestic violence misdemeanor],”⁹² the *Wegrzyn* district court found it appropriate to apply the restoration exception to *Wegrzyn* using the *Indelicato* fiction.⁹³

Most recently, in *United States v. Jennings*,⁹⁴ the Fourth Circuit aligned itself with the Eighth Circuit. Jennings was convicted of criminal domestic violence in South Carolina and received a 30-day suspended sentence but was never incarcerated.⁹⁵ He was later charged with possession of a firearm in violation of the Domestic Violence Gun Ban.⁹⁶ Jennings first advanced a plain language argument that his rights were restored.⁹⁷ Jennings admitted the argument was weak, and the court was quick to reject it, noting that “the word ‘restore’ means ‘to give back . . . something lost or taken away’” and to re-

85. *United States v. Smith*, 171 F.3d 617, 623 (8th Cir. 1999).

86. 18 U.S.C. § 921(a)(33)(B)(ii) (2000) (emphasis added).

87. *Smith*, 171 F.3d at 623.

88. *Id.* For example, in Missouri, most domestic violence misdemeanants, because they do not serve a sentence of confinement, would be allowed to possess firearms under the *Indelicato* fiction. *United States v. Kirchoff*, 387 F.3d 748, 751 (8th Cir. 2004), *cert. denied*, 125 S. Ct. 2936 (2005).

89. *Smith*, 171 F.3d at 623.

90. *United States v. Wegrzyn*, 106 F. Supp. 2d 959, 966 (W.D. Mich. 2000), *aff'd*, 305 F.3d 593 (6th Cir. 2002).

91. *Id.*; 18 U.S.C. § 921(a)(33)(B)(ii) (2000).

92. 18 U.S.C. § 921(a)(33)(B)(ii) (2000).

93. *Wegrzyn*, 106 F. Supp. 2d at 966; 18 U.S.C. § 921(a)(33)(B)(ii) (2000).

94. 323 F.3d 263 (4th Cir. 2003).

95. *Id.* at 265.

96. *Id.*

97. *Id.* at 266-67.

store a thing never lost is a “definitional impossibility.”⁹⁸ Jennings next argued that a literal application of the word “restored” would produce an absurd result: treating misdemeanants like Jennings who had never lost their civil rights more harshly than those who had lost them and had them restored.⁹⁹ Jennings argued that *Indelicato* and *Wegrzyn* supported his position.¹⁰⁰ The Fourth Circuit, however, found the decisions of four other circuits, including the Eighth, to be more persuasive.¹⁰¹ Thus, the court held that, because Jennings had never lost his civil rights nor had them restored, he was not eligible for the restoration exception.¹⁰²

IV. INSTANT DECISION

A. Actual Incarceration as a Prerequisite to Restoration of Rights in Missouri

Kirchoff first argued that he was entitled to the restoration exception that would have made his firearm possession legal even though he was never “confined under a sentence of imprisonment.”¹⁰³ Under Missouri law, he argued, actual incarceration is not required to trigger the restoration exception.¹⁰⁴ The Eighth Circuit Court of Appeals rejected this argument, holding that the plain language of the Missouri statute providing for the loss of civil

98. *Id.* (quoting *McGrath v. United States*, 60 F.3d 1005, 1007 (2d Cir. 1995)).

99. *Id.*

100. *Id.*

101. *Id.* at 269. See *United States v. Barnes*, 295 F.3d 1354, 1368 (D.C. Cir. 2002) (holding a conviction did not violate equal protection when misdemeanants in the District of Columbia did not lose their civil rights, even though the result was to put them in a worse position than a person in another jurisdiction who loses their civil rights and later has them restored); *United States v. Hancock*, 231 F.3d 557, 565-67 (9th Cir. 2000) (rejecting equal protection challenge even though Arizona law strips felons but not domestic violence misdemeanants of their civil rights because the distinction is rationally related to a legitimate government purpose); *United States v. Smith*, 171 F.3d 617, 623-26 (8th Cir. 1999) (holding that in order to have civil rights restored a person must first lose them and that the distinction made between misdemeanants who never lose their civil rights and those who lose them and later have them restored does not violate equal protection); *McGrath v. United States*, 60 F.3d 1005, 1007-10 (2d Cir. 1995) (denying application of the restoration exception to a convicted felon who was never incarcerated and, therefore, never deprived of his civil rights under Vermont law, even though that conclusion meant people in certain states would be more susceptible to federal prosecution).

102. *Jennings*, 323 F.3d at 275.

103. *United States v. Kirchoff*, 387 F.3d 748, 749-50 (8th Cir. 2004), *cert. denied*, 125 S. Ct. 2936 (2005) (quoting MO. REV. STAT. § 561.026(1) (2000)). Kirchoff served time before his case went before the Eighth Circuit but *after* he was charged with the federal crime of firearm possession by a prohibited person. *Id.* at 749.

104. *Id.* at 750.

rights¹⁰⁵ upon conviction of certain offenses requires actual imprisonment.¹⁰⁶ At the time Kirchoff committed the federal offense, he was not “confined under a sentence of imprisonment,” and, consequently, he had not lost his civil rights.¹⁰⁷ Accordingly, the court found he was not eligible to have his rights restored and, as a result, did not qualify for the restoration exception.¹⁰⁸

Kirchoff argued the Eighth Circuit precedent on point (*Smith*¹⁰⁹ and *Keeney*¹¹⁰) should not control his case, because the state statutes in those cases did not provide for loss of civil rights for a misdemeanor conviction, whereas in Missouri, misdemeanants such as Kirchoff may lose their civil rights.¹¹¹ Instead, he argued that the court should follow the reasoning of the Sixth Circuit in *Wegrzyn*, which involved a Michigan loss-of-civil-rights statute similar to Missouri’s.¹¹² The Sixth Circuit held that, even if a misdemeanant were not sentenced to confinement, he or she could still claim the restoration exception.¹¹³ However, in *Kirchoff*, the Eighth Circuit refused to adopt the Sixth Circuit’s reasoning, relying instead on the reasoning it had adopted in *Smith*¹¹⁴ and the Fourth Circuit’s reasoning in *Jennings*.¹¹⁵

105. In footnote 2, the court noted that, because neither party raised the issue, it was assuming for the purposes of its opinion that Missouri’s taking away of the right to vote is a loss of civil rights for purposes of the restoration exception. *Id.* at 750 n.2. The court noted that “[a]lthough the Congress did not specify which civil rights it had in mind [in § 921(a)(33)(B)(ii)], the plurality view among the circuits . . . is that Congress had in mind the core cluster of citizen rights – namely, the right to vote, to serve on a jury and to hold public office.” *Id.* (quoting *United States v. Keeney*, 241 F.3d 1040, 1044 (8th Cir. 2001)).

106. *Id.* “Notwithstanding any other provision of law, a person who is convicted [o]f any crime shall be disqualified from registering and voting in any election under the laws of this state *while confined under a sentence of imprisonment . . .*” MO. REV. STAT. § 561.026(1) (2000) (emphasis added).

107. *Kirchoff*, 387 F.3d at 750.

108. *Id.*

109. *United States v. Smith*, 171 F.3d 617 (8th Cir. 1999).

110. *United States v. Keeney*, 241 F.3d 1040 (8th Cir. 2001). In *Keeney*, the Eighth Circuit held that revocation of a domestic violence misdemeanor’s right to possess a firearm while on probation was not a loss of civil rights under section 921(a)(33)(B)(ii). *Id.* at 1044. The court held the right to possess a firearm does not fall within the “core cluster of ‘citizen’ rights . . . namely, the right to vote, to serve on a jury and to hold public office.” *Id.* (quoting *United States v. Indelicato*, 97 F.3d 627, 630 (1st Cir. 1996)).

111. *Kirchoff*, 387 F.3d at 750. See MO. REV. STAT. § 561.026 (2000).

112. See *United States v. Wegrzyn*, 305 F.3d 593 (6th Cir. 2002). Compare MO. REV. STAT. § 561.026(1) (2000) (stripping people of the right to vote “while confined under a sentence of imprisonment”) with MICH. COMP. LAWS § 168.758b (2005) (stripping people of their right to vote during their “confinement in jail or prison.”).

113. *Kirchoff*, 387 F.3d at 750.

114. *Id.* at 751; *United States v. Smith*, 171 F.3d 617 (8th Cir. 1999).

115. *Kirchoff*, 387 F.3d at 751-52; *United States v. Jennings*, 323 F.3d 263 (4th Cir. 2003).

B. Kirchoff's Alternative Argument: He Lost His Civil Rights

Kirchoff argued alternatively that if actual incarceration is necessary for loss of civil rights under Missouri law, he lost his civil rights when he was jailed from March 14 to April 13, 2001, and was accordingly entitled to the restoration exception.¹¹⁶ The court disagreed, holding that Kirchoff's confinement was merely pretrial detention, which did not satisfy the statutory requirement of confinement "under a *sentence* of imprisonment."¹¹⁷ Because he was not confined under a sentence of imprisonment, he did not lose his civil rights and was, therefore, not entitled to the restoration exception.¹¹⁸

Similarly, Kirchoff argued that he was entitled to the restoration exception because he lost his civil rights when he was jailed on August 14, 2002, shortly after his indictment in federal court for firearm possession.¹¹⁹ Kirchoff contended that, because Missouri law provides credit for time served pretrial,¹²⁰ his pretrial detention in 2001 should merge with his 2002 incarceration into a single sentence of imprisonment.¹²¹ He further argued that because he lost his civil rights during the later period of confinement, the two sentences merged, and, therefore, Kirchoff also lost his civil rights during the earlier period of confinement.¹²²

The court agreed that Kirchoff lost his civil rights during his confinement beginning August 14, 2002, but rejected Kirchoff's argument that the 2002 incarceration qualified him for the restoration exception.¹²³ The Missouri statute allowing a person to receive credit on a sentence for pretrial detention does not provide for a loss of civil rights during the pretrial detention, even if the defendant loses civil rights during the later incarceration.¹²⁴ Furthermore, the court found that the credit statute did not merge Kirchoff's sentenced jail time with his earlier detention pending trial into a single sentence of imprisonment.¹²⁵ Finally, the court noted that Kirchoff's civil rights were restored, but not until May 19, 2003, when he was released.¹²⁶ On that date, Kirchoff could legally possess a gun.¹²⁷

116. *Kirchoff*, 387 F.3d at 752.

117. *Id.*; MO. REV. STAT. § 561.026(1) (2000) (emphasis added).

118. *Kirchoff*, 387 F.3d at 752.

119. *Id.* at 749, 752.

120. The relevant statute provides, in part: "Such person shall receive credit toward the service of a sentence of imprisonment for all time in prison, jail or custody after the offense occurred and before the commencement of the sentence, when the time in custody was related to that offense . . ." MO. REV. STAT. § 558.031.1 (2000).

121. *Kirchoff*, 387 F.3d at 752.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

Finally, Kirchoff argued that his 2002 federal indictment for illegal possession should be invalidated because of his later restoration of rights, in 2003.¹²⁸ The court rejected this argument as well, reasoning that such a result would be incompatible with Congress's intention in enacting the restoration exception for domestic violence misdemeanants,¹²⁹ which was to keep firearms out of the hands of domestic abusers so as to prevent them from using a gun against their victims.¹³⁰ Accordingly, the court refused to set aside Kirchoff's conviction based on his later restoration of rights.¹³¹ Having rejected all of Kirchoff's arguments, the court affirmed the district court's denial of Kirchoff's motion to dismiss his federal indictment.¹³²

V. COMMENT

By refusing to retreat from its reasoning in *Smith*, the Eighth Circuit in *Kirchoff* solidified its position on one side of the circuit split on the issue of how the restoration exception to the Domestic Violence Gun Ban should apply. The court could have wavered by distinguishing Kirchoff's situation from *Smith*'s based on the differing state laws at issue, as did the district court in *Wegrzyn*.¹³³ *Smith* could not have lost his civil rights in any event, because Iowa law does not strip misdemeanants of their civil rights.¹³⁴ Kirchoff, on the other hand, could have lost his civil rights under Missouri law as a domestic violence misdemeanor, but did not because he was never "confined under a sentence of imprisonment."¹³⁵ Applying the district court's logic in *Wegrzyn*, the parenthetical language of the restoration exception, "(if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense),"¹³⁶ would be invoked in Kirchoff's case. Thus, Kirchoff would be treated as if his civil rights had been restored, making him eligible for the restoration exception.

Had the Eighth Circuit so retreated from its *Smith* position, however, the result would be that *all* domestic violence misdemeanants in Missouri could

128. *Id.*

129. 18 U.S.C. § 921(a)(33)(B)(ii) (2000).

130. *Kirchoff*, 387 F.3d at 752.

131. *Id.* Kirchoff's final argument was that the district court failed to apply the rule of lenity. *Id.* at 752-53. The court rejected this argument as well, because the rule only applies when a statute is grievously ambiguous or uncertain. *Id.* at 753 (citing *United States v. Andrews*, 339 F.3d 754, 758 (8th Cir. 2003)). The court held that section 921(a)(33)(B)(ii) was not grievously ambiguous or uncertain and, therefore, the rule of lenity did not apply. *Id.*

132. *Id.* at 750, 753.

133. *United States v. Wegrzyn*, 106 F. Supp. 2d 959, 966 (W.D. Mich. 2000), *aff'd*, 305 F.3d 593 (6th Cir. 2002). See *supra* notes 79-93 and accompanying text.

134. *United States v. Smith*, 171 F.3d 617, 623 (8th Cir. 1999).

135. See MO. REV. STAT. § 561.026(1) (2000).

136. 18 U.S.C. § 921(a)(33)(B)(ii) (2000).

lawfully possess firearms under the restoration exception. The controlling fact would be whether the relevant state statute deprives misdemeanants of their civil rights, rather than whether the defendant had actually been deprived of civil rights and then had them restored.¹³⁷ This analysis would prevent the more favorable treatment of domestic violence misdemeanants who have served jail time in Missouri and are presumably more dangerous because their behavior warranted a sentence of confinement. Instead, all domestic violence misdemeanants in Missouri would be treated equally – they would all be allowed to possess firearms under federal law. Allowing all domestic violence misdemeanants in Missouri to have guns, however, is inconsistent with Congress’s goal of keeping guns away from domestic abusers.¹³⁸ Thus, in terms of results, the Eighth Circuit’s reasoning in *Kirchoff* is more persuasive than that of the Sixth Circuit in *Wegrzyn*.

In addition, the Eighth Circuit has the better plain-language argument. Because, by definition, something must be taken away in order for it to be restored later, a defendant must be deprived of his civil rights under state law in order for those rights to be restored. If a defendant is not deprived of his civil rights, then they may not be restored, and the defendant is not eligible for the restoration exception.

Furthermore, the Eighth Circuit is correct in holding that the distinction between domestic violence misdemeanants who are not eligible for the restoration exception because they never lost their civil rights and domestic violence misdemeanants who are eligible because they went to jail and had their civil rights restored does not violate equal protection. The distinction is rationally related to the legitimate government purpose of keeping guns away from convicted domestic abusers. Under the same rational basis analysis, the Constitution’s equal protection mandate is not violated when defendants are treated differently based on whether the jurisdiction of the predicate offense allows for loss and restoration of civil rights.¹³⁹ Therefore, given Eighth Cir-

137. “[M]ost misdemeanor convictions do not result in the loss of civil rights[,] and thus would not fit within the restoration exception.” *Kirchoff*, 387 F.3d at 751 (quoting *United States v. Smith*, 171 F.3d 617, 624 (8th Cir. 1999)) (alteration in original).

138. See 142 CONG. REC. S2646-02 (daily ed. March 21, 1996) (statement of Sen. Lautenberg).

139. See *United States v. Barnes*, 295 F.3d 1354, 1368 (D.C. Cir. 2002) (holding a conviction did not violate equal protection when misdemeanants in the District of Columbia did not lose their civil rights, even though the result put them in a worse position than a person in another jurisdiction who loses their civil rights and later has them restored); *United States v. Hancock*, 231 F.3d 557, 565-67 (9th Cir. 2000) (rejecting equal protection challenge, even though Arizona law strips felons of their civil rights, but not domestic violence misdemeanants, because the distinction is rationally related to a legitimate government purpose); *McGrath v. United States*, 60 F.3d 1005, 1007-10 (2d Cir. 1995) (denying restoration exception to convicted felon who was never incarcerated, and, therefore never deprived of his civil rights under Vermont

cuit precedent in *Smith*, the plain language of the restoration exception to the Domestic Violence Gun Ban, and the absence of a valid equal protection argument, the decision in *Kirchoff* was sound.

Although the analysis is sound, the result remains strange. The domestic offenders who are presumably the most dangerous because their behavior was bad enough to earn them time in a Missouri jail are allowed to have guns. Offenders who received a suspended sentence, however, are not allowed to have guns. This result is bothersome, but it is not a problem for the judiciary to solve. The disparity results from Congress's decision to allow states to determine who may be fit to own a firearm after past bad behavior, such as by choosing which criminals lose their civil rights and how those civil rights may be restored. Therefore, the solution lies either in Congress or in the state legislatures.

There is no indication that Congress intends to repeal the Domestic Violence Gun Ban. The real problem is not the Gun Ban anyway; rather, the problem is the interaction between the federal restoration exception and state law. Because there is likewise no indication that Congress intends to repeal the restoration exception, the state legislatures must make any desired changes.

To fix the disparate impact problem caused by the operation of the restoration exception in Missouri, the Missouri legislature could modify state law on loss and restoration of civil rights. The pro-gun camp might support a modification of the statute that would strip civil rights by deleting the language requiring *confinement* under a sentence of imprisonment and adding language allowing restoration of rights upon the expiration of any sentence, including probationary periods.¹⁴⁰ Under such a modified statute, Kirchoff would have been eligible for the federal restoration exception upon completion of his probation. This modification would change Missouri's determination of who is fit to own a gun by allowing more prior domestic abusers to own guns upon completion of a sentence that does not necessarily involve incarceration.

The anti-gun faction might support changing Missouri's risk calculus to make it harder for a former domestic abuser to own a gun. For example, the legislature could enact a statute providing for restoration of civil rights for the purposes of the Domestic Violence Gun Ban only upon an individualized determination that the person may be trusted with a firearm, rather than automatic restoration of civil rights upon completion of a jail sentence. In order to accommodate defendants like Kirchoff who did not serve time for their domestic violence convictions, the law could be further modified by stripping defendants of their civil rights upon *conviction* rather than incarceration. Under this scheme, all persons convicted of domestic violence mis-

law, even though that conclusion meant people in certain states would be more susceptible to federal prosecution).

140. See MO. REV. STAT. § 561.026(1) (2000).

demeanors would have the chance to have their civil rights restored and the corresponding opportunity to possess firearms again, rather than being banned for life from gun possession, but the restoration would not be automatic. Finally, anti-gun legislators could amend the statute more drastically to provide that only felons lose the right to vote during sentenced confinement, thus completely banning all misdemeanants, including domestic abusers, from the restoration exception.

Such changes in Missouri law would require a careful examination of the policies behind the Domestic Violence Gun Ban, the restoration exception, and state law governing loss and restoration of civil rights. Until such changes are made, Missouri lawyers must be aware of the consequences of a client's domestic violence conviction. A client like Kirchoff who is not incarcerated based on his domestic violence conviction should be advised that, under *Kirchoff* and barring one of the other exceptions to the Domestic Violence Gun Ban,¹⁴¹ he may never again possess a firearm. On the other hand, a client who is incarcerated will thereby lose civil rights, but their restoration upon release will allow that client to possess firearms without violating federal law.

VI. CONCLUSION

According to its design, the restoration exception to the Domestic Violence Gun Ban varies in application because Congress intentionally allowed the states to apply their own judgments about which persons may be trusted with guns despite a prior domestic violence conviction. Under Missouri law, only those domestic violence misdemeanants who have been incarcerated and subsequently restored with their civil rights may be trusted with firearm possession.¹⁴² Until the Missouri legislature adopts changes, a domestic violence misdemeanant who manages to avoid jail will never be allowed to possess a firearm under federal law.¹⁴³ Attorneys must be aware of the peculiarities of the law in Missouri as it stands after *Kirchoff*, and be prepared to advise their clients accordingly.

NATALIE J. NICHOLS

141. The other exceptions apply "if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned . . . unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." 18 U.S.C. § 921(a)(33)(B)(ii) (2000).

142. See *United States v. Kirchoff*, 387 F.3d 748, 750-52 (8th Cir. 2004), cert. denied, 125 S. Ct. 2936 (2005).

143. See MO. REV. STAT. § 561.026(1) (2000); 18 U.S.C. §§ 922(g)(9), 921(a)(33)(B)(ii) (2000). Other exceptions to the Domestic Violence Gun Ban may apply. See *supra* note 141 and accompanying text.