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PRESIDENTIAL PARDON RELIEF AND ITS RELATIONSHIP TO FEDERAL FIREARM DISABILITY

WILLIAM J. VIOLET*

I. INTRODUCTION

This article explores the presidential pardon process applicable to individuals convicted of a federal felony and encumbered by a federal firearm disability. A state cannot restore a felon's civil right to own or hunt with a firearm if that felon has been convicted of a federal offense.¹

The Supreme Court in *Beecham v. United States*² requires a *federal* felon to seek *federal* restoration of his or her civil rights before those rights may be properly exercised.³ The presidential pardon process, executive clemency, provides an available avenue for restoration of *federal* civil rights for possessing a firearm. For example, assume that Sue has completed her federal drug trafficking sentence and now wishes to go hunting with a modern firearm. Sue must obtain a presidential pardon before she can hunt, even if her state civil rights had been previously restored. Failure to follow this procedure may cause serious consequences if she is confronted by an enforcement officer.

Federal felons who fail to obtain a presidential pardon may enter a world involving complex criminal litigation. This article will present and discuss complex issues in relation to federal firearm offenses. Practitioners may find resolution of these issues particularly useful when providing advice to their client. Before these issues are presented, a review of the pardon process will be undertaken.

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1. For a review of a particular state's civil restoration statutes and application, see *United States v. McBryde*, 938 F.2d 533 (4th Cir. 1991); *United States v. Cassidy*, 899 F.2d 543 (6th Cir. 1990); *United States v. Whitley*, 905 F.2d 163 (6th Cir. 1990); *United States v. Ellis*, 949 F.2d 952 (8th Cir. 1991); *United States v. Brebner*, 951 F.2d 1017 (9th Cir. 1991); *United States v. Dahms*, 938 F.2d 131 (9th Cir. 1991); *United States v. Swanson*, 947 F.2d 914 (11th Cir. 1991).

2. 511 U.S. 368 (1994). Supreme Court Justice Sandra Day O'Connor delivered the opinion for a unanimous court: "Petitioners can take advantage of § 921(a)(20) only if . . . their civil rights [have been] restored under federal law." *Beecham v. United States*, 511 U.S. 368, 374 (1994) (reasoning that the § 921(a)(20) exemption clause defining what constitutes a conviction is determined by the law of the jurisdiction where the earlier proceedings were held).

3. *Id.* at 374.

II. THE PETITION FOR PARDON

The Petition for Pardon After Completion of Sentence, may be obtained from the United States Department of Justice.⁴ This application is filled out by the client/felon.⁵ The application is available to any felon convicted of a federal offense, but the focus of this paper is limited to felons encumbered with a federal firearm disability. A five-year waiting period after completion of the felon's sentence is required before the petition can be submitted to the Department of Justice.⁶ Based on the author's experience, counsel should provide his or her client with assistance in completing the petition. This is essential to ensure that petitioner will not reargue his or her prior case and that the petitioner demonstrates acceptance of responsibility, atonement, and remorse for the prior conviction.⁷ Rearguing the merits of a case may be detrimental to the success of obtaining a pardon. This results from the process in which a petition proceeds to the President.

The petition is received at the Department of Justice and assigned to a Pardon Attorney. He or she reviews the petition and investigates petitioner's background and prior conviction(s).⁸ The Pardon Attorney is *not* acting as an arbiter. Therefore, rearguing the prior(s) is simply not appropriate. Furthermore, Pardon Attorneys examine the petition for statements and facts that imply acceptance of responsibility, atonement, and remorse.⁹ Rules governing Pardon Attorneys and Department of Justice personnel are explicit in this process.¹⁰ However, these rules are advisory only and create no rights in a petitioner and his or her attorney.¹¹ Nevertheless, a practitioner's familiarity with these rules is essential because it may result in a pardon for his or her client.

III. DEPARTMENT OF JUSTICE RULES

The rules used by a Pardon Attorney in reviewing a petition and making a recommendation are called *Rules Governing Petitions for Executive Clemency (Rules)*.¹² The *Rules* cover eligibility requirements

4. See generally *Petition for Pardon After Completion of Sentence*, in INFORMATION & INSTRUCTIONS ON PARDONS (published by U.S. Dep't of Justice).

5. *Id.*

6. 28 C.F.R. § 1.2 (2000).

7. INFORMATION & INSTRUCTIONS ON PARDONS ¶ 10, at 2 (published by U.S. Dep't of Justice). However, the pardon application form recognizes that there are unusual cases in which a pardon would be sought based on innocence. *Id.* Such cases are rare but have occurred in the past. *Id.*

8. 28 C.F.R. § 1.6 (2000).

9. INFORMATION & INSTRUCTIONS ON PARDONS, *supra* note 7.

10. 28 C.F.R. §§ 1.1-1.10 (2000).

11. *Id.* § 1.10.

12. *Id.* §§ 1.1-1.10.

of the petitioner, contents of the petition, submission, disclosure, and notification requirements.¹³ The more noteworthy elements of the *Rules* are discussed below.

Section 1.1 requires a formal petition, which is available from the Department of Justice.¹⁴ Petitioner eligibility is governed by section 1.2, which mandates a five-year waiting period after the date of release from confinement.¹⁵ Additionally, a petitioner must not be on parole, probation, or supervised release at the time of submitting a petition.¹⁶ Receipt of the petition requires a review, and it may trigger an investigation by the Pardon Attorney.¹⁷ Therefore, disclosure of pertinent facts surrounding a prior is essential, and a petitioner is put on notice that disclosures may become public.¹⁸

Based on the Deputy Attorney General's discretion, a recommendation to grant or deny a request is forwarded to the President.¹⁹ When a pardon is granted, the petitioner or his or her attorney is notified, and a warrant for pardon is forwarded.²⁰ When a pardon is denied, the Deputy Attorney General notifies the petitioner and closes the case.²¹ However, it is possible that the President will not act on a petition within thirty days of the submission of the Department of Justice's recommendation.²² If a denial has been recommended, it is assumed the President concurs with the adverse position of the Deputy Attorney General, and the case is closed.²³ The author has been informed by the Department of Justice that in recent years, on average, pardon cases have taken at least a year from filing to decision.²⁴

The *Rules* do not restrict the President's authority under Article II, Section 2 of the Constitution.²⁵ The President is free to grant a pardon

13. *Id.*

14. *Id.* § 1.1. Military offenses are treated differently. *Id.*

15. *Id.* § 1.2. The waiting period runs from release from incarceration in cases in which a period of confinement was imposed or from the date of conviction in cases in which the sentence did not include a period of confinement; therefore, for defendants sentenced to probation, the five years does not begin when the defendant completes probation, but rather when he starts it. *Id.* Thus, a defendant sentenced to a three-year period of probation would be eligible to apply five years after sentencing, but a defendant sentenced to a six-year period of probation would be unable to apply until he completes his probation. *Id.*

16. *Id.*

17. *Id.* § 1.6.

18. *Id.* §§ 1.5-1.6.

19. *Id.* § 1.6.

20. *Id.* § 1.7.

21. *Id.* § 1.8.

22. *Id.*

23. *Id.* However, § 1.8(b) has not been relied upon since the Reagan Administration. Telephone Interviews with U.S. Dep't of Justice officials (Feb. 2000); *see also* Lewis *infra* note 26 (showing that each president may adopt whatever pardon procedures he or she deems applicable).

24. Telephone Interviews with U.S. Dep't of Justice officials (Feb. 2000).

25. 28 C.F.R. § 1.10 (2000).

at his or her discretion for *federal* offenses, but he or she cannot grant a pardon for *state* offenses.²⁶

IV. INFORMATION AND INSTRUCTIONS ON PARDONS DOCUMENT

The *Information and Instructions on Pardons* document is provided as an instruction sheet to familiarize a petitioner with the pardon process.²⁷ Salient comments about and contained within this document are outlined below:

- The petition must be fully and accurately completed.²⁸
- Only *federal* convictions are subject to a presidential pardon, and federal pardon power does not extend to state offenses.²⁹
- A five-year waiting period after completion of sentence is required for petitioner eligibility.³⁰
- Specific reasons for seeking a pardon should be articulated.³¹ A practitioner may wish to have his or her client emphasize specific civil rights that are denied based on the conviction for which pardon is sought or organizations and activities in which the petitioner cannot participate.³² For example, a felon may not be eligible for membership in professional associations, and licensing authorities may prohibit licensing a felon as a doctor, lawyer, nurse, accountant, etc.

26. U.S. CONST. art. II, § 2, cl. 1 (stating the power to grant reprieves and pardons for offenses against the United States). President William Clinton granted approximately 140 pardons in his last month of office. Kurt Eichenwald & Michael Moss, *Pardon for Subject of Inquiry Worries Prosecutors*, N.Y. TIMES, Feb. 6, 2001, at A1. According to press accounts, many pardons were granted without a recommendation of the Deputy Attorney General. *Id.* It is important to note that each President is free to adopt whatever procedures he or she deems applicable. See Neil A. Lewis, *The Nation: Pardon Me Please; Lobbying for Forgiveness*, N.Y. TIMES, Feb. 25, 2001, at section 4 p. 3. The pardon process described in this article is taken from the Clinton Administration's rules. INFORMATION & INSTRUCTIONS ON PARDONS, *supra* note 7. However, those rules have not been superseded or modified to date by President George W. Bush.

27. INFORMATION & INSTRUCTIONS ON PARDONS, *supra* note 7.

28. *Id.*

29. *Id.*

30. INFORMATION & INSTRUCTIONS ON PARDONS, *supra* note 7; see also 28 C.F.R. § 1.2 (2000).

31. 28 C.F.R. § 1.10 (2000).

32. INFORMATION & INSTRUCTIONS ON PARDONS, *supra* note 7 ¶ 11, at 2. Petitioners should explain "why" a pardon is sought. *Id.* ¶ 4, at 1. That is, evidence should be provided why a pardon would help the petitioner in seeking employment or membership in certain organizations. *Id.* However, if an employment-related disability is based on conduct, rather than the fact of a federal conviction, a presidential pardon will not relieve a petitioner from character and fitness requirements of an organization. *Id.* ¶ 10, at 2. For example, a pardon will not necessarily result in an applicant's being able to obtain a license; however, a pardon may influence licensing authorities as evidence of rehabilitation. *Id.* ¶ 4, at 1.

- A petitioner's entire arrest record, federal and state, must be disclosed, as well as all civil litigation in which he or she was a party.³³
- There is no appeal from the President's decision.³⁴ It appears that under the Constitution, the President's pardon power is almost plenary and is vested only with the President.³⁵ Therefore, the President's decision is an answer to a political question. It is not a judicial controversy. Because of the political nature of this question, there is no appeal of the President's decision.³⁶ However, if a pardon is denied, a new petition may be submitted two years after the date of denial.³⁷
- The *Information and Instructions on Pardons* document reiterates suggestions discussed previously; that is, a Pardon Attorney considers statements made by a petitioner in accepting responsibility, remorse, and atonement.³⁸ Additionally, any hardships placed on a petitioner should be brought to the Pardon Attorney's attention.³⁹ Finally, charitable, meritorious, and community service, or other contributions should be noted in the petition.⁴⁰
- Step seventeen of the petition requests petitioner to refrain from asserting innocence or rearguing his or her case.⁴¹

V. CONSEQUENCES OF FAILING TO OBTAIN A PARDON

A petitioner who is denied a presidential pardon or a federal felon who fails to comply with the pardon process cannot exercise his or her federal civil right to possess a firearm. The following scenarios illustrate the potentially grave consequences and complex legal concepts involved when the pardon process is ignored by a federal felon under a federal firearm disability.

A. SCENARIO ONE

Assume Dan, your client, ignores the Pardon Process, and he decides to go hunting with his new rifle. Dan has been previously

33. *Id.* ¶¶ 7-8, at 2; *see also* 28 C.F.R. § 1.5.

34. INFORMATION & INSTRUCTIONS ON PARDONS, *supra* note 7 ¶ 12, at 2.

35. U.S. CONST. art. II, § 2, cl. 1 states: "The President . . . shall have Power to grant Reprieves and Pardons for offenses against the United States, except in Cases of Impeachment."

36. INFORMATION & INSTRUCTIONS ON PARDONS, *supra* note 7 ¶ 12, at 2.

37. *Id.*

38. *Id.* ¶ 10.

39. *Id.* ¶ 11.

40. *Id.*

41. *See supra* note 4, step seventeen, at 6.

convicted of a federal drug possession charge.⁴² Because of the amount of drugs involved in that incident, he was sentenced to five years in a federal prison.⁴³ Dan is considered a felon in possession of a firearm.⁴⁴ If Dan is confronted and arrested by an enforcement officer, he could face a fine and federal imprisonment of not more than ten years.⁴⁵ Thus, he is confronted with the grim reality of a federal prison sentence possibly consuming the next ten years of his life.⁴⁶

B. SCENARIO TWO

Assume Dan has been convicted of a federal drug-trafficking offense and has also been convicted of the following felonies in state X: statutory rape, third-degree burglary of a residential dwelling, and third-degree burglary of a commercial establishment.

Dan is arrested as a felon in possession of a firearm by federal enforcement officers. A trial date is set in a federal district court. Because Dan has been convicted of three previous felonies, the federal government may seek to enhance his sentence.⁴⁷ If the government is successful, Dan could be sentenced to fifteen years in a federal prison.⁴⁸ However, the three prior felonies must be violent felonies.⁴⁹ Statutory rape may not be considered a violent felony because of a lack of physical force.⁵⁰ Burglary may or may not be considered a violent felony.⁵¹

42. 21 U.S.C. § 844 (Supp. V 1999).

43. *Id.* § 844(a).

44. 18 U.S.C. § 922(g)(1) (1994 & Supp. V 1999).

45. *Id.* § 924(a)(2) (1994 & Supp. V 1999).

46. *Id.*

47. 18 U.S.C. § 924(e)(1) (1994).

In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be . . . imprisoned not less than fifteen years.

Id. Further, under 18 U.S.C. § 924(e)(1), the government may attempt to have Dan's priors classified as violent felonies. A *violent felony* is defined as:

any crime punishable by imprisonment for a term exceeding one year . . . that . . .

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

Id. § 924(e)(2)(B).

48. *Id.* § 924(e)(1).

49. *Id.*

50. Under U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(a)(4)(A) (1998), a crime of violence must have occurred. A crime of violence is defined as

any offense under federal or state law punishable by imprisonment for a term exceeding one year that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is burglary of a dwelling, arson, or extortion, involves the use of explosives, or otherwise

Federal law requires “a serious potential risk of physical injury to another.”⁵² The state in which the felon was convicted may define burglary of a commercial establishment without the use of a weapon as a nonviolent felony for purposes of 18 U.S.C. § 924(e)(1). On the contrary, a state may also define any burglary as a violent felony.⁵³ In addition, a state may also distinguish, by statute, the scope of a burglary in determining whether a particular burglary constitutes a violent felony.⁵⁴ Obviously, practitioner knowledge of the applicable state or circuit law is necessary for developing a proper defense.

In the above scenario, Dan could argue that the statutory rape conviction was not a violent felony.⁵⁵ The third-degree burglary charge of a commercial establishment may not be a violent felony if state law does not classify it as such.⁵⁶ The failure of either the statutory rape conviction or the third-degree burglary conviction to be classified as a violent felony would result in Dan’s sentence being reduced in a federal court from a mandatory minimum sentence of fifteen years to a sentence of not more than ten years, as in scenario one.⁵⁷

Additionally, the prosecution has the burden of proving that the three prior felonies exist.⁵⁸ In court, defense counsel should demand appropriate paperwork from the government proving the existence of the three priors.⁵⁹ Failure to provide proof of a prior conviction may result in that prior not achieving the status of a violent felony because of insufficient evidence.

C. SCENARIO THREE

Now assume Dan has been convicted of a federal drug offense and has committed three prior violent felonies. His brother-in-law, Jim, asks Dan to store some boxes of personal belongings. The boxes contain Jim’s gun collection, which consists of old and new weapons. The police are informed of these facts, and they obtain a search warrant for Dan’s premises. They discover the gun collection and charge Dan as a felon in possession. Again, Dan is facing a fifteen-year sentence enhancement

involves conduct that presents a serious potential risk of physical injury to another.

Id. § 4B1.2 (a).

51. 18 U.S.C. § 924(e)(2)(B)(ii).

52. *Id.*

53. *Id.*

54. *See e.g.*, *Taylor v. United States*, 495 U.S. 575, 600 (1990) (holding that the sentencing court should look to the state’s statutory definitions of the prior offense).

55. *See* SENTENCING GUIDELINES, *supra* note 50, § 2K2.1(a)(4)(A) (disputing that statutory rape is a crime of violence).

56. *See e.g.*, *Taylor*, 495 U.S. at 600.

57. 18 U.S.C. § 924(a)(2) (1994 & Supp. V 1999).

58. *United States v. Potter*, 895 F.2d 1231, 1238 (9th Cir. 1990).

59. *Id.*

under 18 U.S.C. § 924(e)(1). However, a “safe harbor” rule exists.⁶⁰ By virtue of this “safe harbor” rule, Dan may be sentenced to serve no time or up to eighteen months under *U.S. Sentencing Guidelines Manual* section 2K2.1(b)(2), depending on his previous criminal history category.⁶¹ This is a court decrease to a base offense level of six under the sentencing guidelines.⁶² Certainly, this is a significant reduction from a fifteen-year mandatory sentence under 18 U.S.C. § 924(e)(1).

D. SCENARIO FOUR

Dan has been convicted of a federal felony and wishes to go hunting with his sons. How can he accomplish this without any federal legal entanglements? A simple answer to this question would be to go hunting with a blackpowder weapon.

Section 922(g) establishes the felon-in-possession offense.⁶³ This section also makes the possession of ammunition a felony.⁶⁴ Therefore, the key is *not* to possess a firearm or ammunition.⁶⁵ A felon who insists on hunting or sport shooting and has not obtained a presidential pardon may do so as long as he or she does not utilize a *firearm* or *ammunition*.⁶⁶ A firearm is defined by federal statute, and firearms manufactured before 1898 are excluded from the Act’s coverage.⁶⁷ Replicas, commemoratives, and models made (assembled) after 1898 are covered by the Act, and these weapons are considered firearms.⁶⁸ Any centerfire or rimfire ammunition is considered ammunition under the law if it has moved in interstate commerce.⁶⁹

60. SENTENCING GUIDELINES, *supra* note 50, § 2K2.1(b)(2) (providing “[i]f the defendant . . . possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined above to level 6”).

61. *Id.* §§ 2K2.1, 2K2.1.1(a)(6), 2K2.1.1(b)(2). A fifteen-year mandatory sentence is approximately equal to a base offense level of twenty-nine to thirty-five, depending on the individual’s past criminal history.

62. *Id.*

63. 18 U.S.C. § 922(g) (1994 & Supp. V 1999).

64. *Id.*

65. *Id.*

66. *Id.*

67. A firearm is defined under 18 U.S.C. § 921(a)(3) (1994 & Supp. V 1999) as:

(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

Id. Ammunition is either rimfire or centerfire and has its common meaning under 18 U.S.C. § 921(a)(17)(A).

68. *Id.* § 921(a)(16).

69. *Id.* § 921(a)(16)(B).

Therefore, it is permissible to own a pre-1898 manufactured rifle.⁷⁰ However, the centerfire or rimfire ammunition (fixed ammunition) is prohibited if that ammunition moved in interstate commerce.⁷¹ If a client reloads his or her own bullets, the results may be similar because the bullet components moved in interstate commerce.⁷² It is possible to hunt with a pre-1898 manufactured weapon when the ammunition is manufactured within one's state, or when components of that ammunition are moved only in *intrastate* commerce.⁷³ One course of action is to hang a pre-1898 manufactured weapon on the wall, possess no fixed ammunition, and hunt only with percussion, flintlock, matchlock or wheellock weapons—that is, blackpowder hunting.⁷⁴ However, blackpowder is an explosive material, and a felon is prohibited from possessing more than twenty-five pounds of this material.⁷⁵

E. SCENARIO FIVE

Dan has been convicted of a crime of domestic violence under a *state* statute. He now wishes to own a firearm for hunting. May he legally do so? Assume his crime of domestic violence was only a misdemeanor. Dan could still be charged as a felon in possession under 18 U.S.C. § 922(g)(8) and (9).⁷⁶ This occurs even though the crime of conviction was in a state court and no federal offense has previously occurred.⁷⁷

70. *Id.* § 921(a)(3).

71. *Id.* § 921(a)(16)(B)(ii).

72. *Id.* § 921(a)(17)(A).

73. *Id.* § 921(a)(16) & (17).

74. *Id.* (demonstrating the complexity of the requirements).

75. 18 U.S.C. § 841 (1994 & Supp. V 1999).

76. 18 U.S.C. § 922(g)(8) & (9) (1994 & Supp. V 1999).

It shall be unlawful for any person—

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C) (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence.

Id. In addition, this would be a *state* offense. Presidential pardon power is applicable only to federal offenses. U.S. CONST. art. II, § 2, cl. 1. This scenario is presented to illustrate state entanglements with federal provisions that result in felon in possession status.

77. 18 U.S.C. § 922(g).

VI. PRAGMATIC ISSUES

Assume that your client, a felon, ignores the pardon process and goes deer hunting with a pre-1898 manufactured rifle and modern ammunition. If your client has a current history of being a law-abiding citizen, it is possible that he or she could avoid prosecution under § 922(g). The decision to prosecute involves prosecutorial discretion. It may well be that a prosecutor would consider ammunition to be abandoned contraband subject to confiscation. However, an attorney should not advise a client to ignore § 922(g) and risk prosecution. Section 922(g) is utilized most often in conjunction with an occurrence of another federal offense⁷⁸ such as when a drug bust occurs and a felon is discovered with a firearm in her possession.

VII. AN ALTERNATIVE PROCESS

Another process does exist to grant relief from firearm disabilities. The Bureau of Alcohol, Tobacco and Firearms (ATF) provides an alternative avenue for restoration of federal civil liberties.⁷⁹ However, this process of seeking a pardon from the Secretary of the Treasury has been restricted by Congress, and it is currently not funded.⁸⁰ Therefore, this form of relief is currently unavailable.⁸¹

VIII. STATE ISSUES

A state may restore an individual's state right to possess a firearm but not the federal civil right to possess a firearm.⁸² The spectrum of state procedural requirements may require a felon to do nothing or to file appropriate paperwork.⁸³ That is, a felon's state civil liberties may be automatically restored upon completion of his or her sentence and parole, or after some statutory period of time has elapsed; for example,

78. In the author's conversations with the Bureau of Alcohol, Tobacco and Firearms (ATF), agents indicated that the usual application of the conviction-based prohibitions of § 922(g) occurs when another offense is committed and, concurrently, a suspect is found with a firearm or ammunition in his or her possession. Telephone Interviews with ATF agents (Feb. 2000).

79. *Id.*

80. *Id.*

81. *Id.* This process may eventually be reinstated by Congress. *Id.* In the author's opinion, the likelihood of reinstating this program has increased in light of the current ongoing controversy and debate over the appropriateness of former President Clinton's pardons to individuals of dubious character. See Eichenwald & Moss, *supra* note 26 and accompanying text; see also Lewis, *supra* note 26 and accompanying text. This prediction is only speculation, but it does present a renewed possibility in the area of firearm disability relief. Telephone Interviews with ATF agents (Feb. 2000).

82. DEFENDING A FEDERAL CRIMINAL CASE, at 13-569 (Fed. Defenders of San Diego, Inc. 1998).

83. *Id.*

they may be restored five or ten years after completion of the sentence.⁸⁴ A state may require a statutory application and approval before restoration occurs.⁸⁵ Further, several states have no restoration process.⁸⁶ Because of these myriad state differences over civil rights restoration, complex client scenarios may develop.

For example, after her release as a federal felon, Sue goes deer hunting with a muzzleloader. Although she may legally hunt under federal law because a muzzleloader is not considered a firearm,⁸⁷ she may not have had her state civil rights restored. Hypothetically, it is possible she may reside in a state that prohibits, at the state level, any felon from possessing a dangerous weapon. Therefore, Sue could be considered a felon in possession of a dangerous weapon. Further, firearms may be *defined* differently among the states. A muzzleloader could be considered a firearm under a particular state's statutes. Practitioner knowledge of a particular state's restoration statutes and associated firearm definitions is a necessity for safeguarding a client's interests.

IX. STRATEGY

A specific strategy for obtaining executive clemency cannot be articulated. However, it appears that several factors may influence a Presidential pardon decision and should be considered by a practitioner. These factors are as follows:

- **Timing.** The timing of the submission of a petition may be critical. President Clinton, nearing the completion of his second term,

84. *Id.*

85. *Id.* The circuits are split

as to whether a state must take affirmative action to restore a prisoner's civil rights for purposes of the restoration of rights under § 921(a)(20) or whether automatic restoration will suffice. Those cases holding that the state must affirmatively restore civil rights include *U.S. v. Thomas*, 991 F.2d 206, 208-13 (5th Cir.) (defendant violated federal law although not prohibited under state law), *cert. denied*, 510 U.S. 1014 (1993); *Essick*, 935 F.2d at 29-31; *U.S. v. Erwin*, 902 F.2d 510, 513 (7th Cir.) (absent a pardon or restoring rights, the right to carry guns not restored by law), *cert. denied*, 498 U.S. 859 (1990); *Gomez*, 911 F.2d at 221 ("a person shall be restored the *full rights* of citizenship") (emphasis added). Several cases have expressly declined to reach that issue: *U.S. v. Essig*, 10 F.3d 968, 976 n.22 (3d Cir. 1994); *U.S. v. Sanders*, 18 F.3d 1488, 1490 (10th Cir. 1994). While others have alluded to an automatic restoration: *U.S. v. Dupaquier*, 74 F.3d 615, 617-18 (5th Cir. 1996) (restriction terminated before offense was committed); *U.S. v. Herron*, 45 F.3d 340, 341-42 (9th Cir. 1995) (restoration document must expressly prohibit the carrying of firearms).

A large number of cases have addressed the issue. A review of a particular state's civil restoration statutes in comparison to the statutes in the cases that have been decided is necessary.

Id. at 13-569 to 570; *see also* sources cited *supra* note 1.

86. *See Beecham v. United States*, 511 U.S. 368, 373 (1994) (noting that at least eleven states have no procedure for restoration of civil rights).

87. 18 U.S.C. § 921(a)(3) (1994 & Supp. V 1999).

granted a substantial number of pardons during his final moments as President.⁸⁸ Therefore, a President nearing completion of his or her term may be inclined to provide more leniency.

- Lobbying. If possible, a President and his or her staff should be lobbied to grant a pardon. Telephone calls and letters supporting a petition should be sent to the President. The pardon petition requires three affidavits as part of the application process.⁸⁹ While it is possible that an affidavit from an outstanding member of the community may influence the Attorney General, a letter from a public figure to the President may solicit a favorable pardon response. President Clinton was under intense lobbying pressure during his final days in office.⁹⁰
- Political party affiliation. A client's membership in a political party may influence a Presidential decision to pardon.
- Presidential party affiliation. The political party and philosophy of the President may influence how much leniency he is willing to grant. Whether the President is a conservative or a liberal may have a definitive impact on a grant of relief.
- Criminal History. Felons who have committed a one-time offense certainly possess a better chance of receiving a pardon.⁹¹

X. CONCLUSION

The pardon process provides a valuable service to federal felons attempting to obtain relief from the federal firearm disability based on conviction. Using a firearm and failing to utilize this process creates severe consequences. Several scenarios were discussed which illustrate the severity of consequences that may arise when a felon possesses a firearm or ammunition and has not been pardoned.

A practitioner should advise a client convicted of a federal felony to apply for a pardon. A felon not pardoned should not possess a firearm

88. Eichenwald & Moss, *supra* note 26.

89. *Petition for Pardon*, *supra* note 4.

90. Lewis, *supra* note 26.

91. In the author's conversations with the U.S. Department of Justice, officials indicated that the pardons are granted primarily to first time offenders who have remained law-abiding citizens since the completion of their sentence. Telephone Interviews with U.S. Dep't of Justice officials (Feb. 2000). There is approximately a six percent chance of receiving a pardon, and first-time offenders have a significant chance of receiving a pardon in comparison to a felon with multiple convictions. *Id.* The success rate of six percent occurred during the Clinton Administration and may not be similar to rates that will be established under President Bush. Further, the above factors for consideration are the author's opinion and do not reflect, in any way, the opinions of the U.S. Department of Justice or its employees. The Office of the Pardon Attorney is the responsibility of career employees for whom political considerations are irrelevant. The political statements in this article are the author's opinions.

or fixed ammunition. From a federal perspective, the safest course of action for a client would be to hunt or shoot with muzzleloading weapons and to avoid both a firearm using fixed ammunition and those using centerfire or rimfire ammunition.

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