

Shaking the Virginia Gun Rights 8 Ball

by Seth Saunders



photo by Deirdre Norman

Clients often come into our offices asking for the one thing, even with all of our schooling and experience, we cannot provide — certainty. Our clients shake us around like a Magic 8 Ball, hoping to tap into our infinite knowledge in our areas of expertise, waiting for us to respond with “As I see it, yes,” “Outlook good,” or “It is decidedly so.” In my chosen field, firearm rights restoration, maybe more so than any other legal specialty, a degree of certainty could be somewhat certain.

But that changed markedly with Governor McAuliffe’s April 22 executive order restoring the civil rights of 206,000 felons and the Supreme Court of Virginia’s subsequent nullification of that order on July 22. Now, the answers I find myself giving are much closer

to “Reply hazy, try again,” “Cannot predict now,” and my personal favorite, “Concentrate and ask again.” The pertinent questions that must be addressed by the “Legal 8 Ball” now are: (1) If a client’s firearm rights were restored during the April 22–July 22 window when their civil rights were validly restored, are their firearm rights still valid absent a regrant of their civil rights following the Court’s decision? and (2) Will commonwealth’s attorney’s offices and circuit court judges apply a higher level of scrutiny to firearm rights petitions involving the current wave of civil rights grants coming from the governor’s office?

Restored or not restored?

Virginia law not only prohibits firearm rights for convicted felons, it also provides the mechanism for having those rights restored.¹ Essentially, it is a two-part process, involving a felon obtaining a restoration of civil rights from the governor’s office, then petitioning the circuit court for restoration of firearm rights. With the April 22 order, 206,000 people immediately became eligible to petition the circuit courts to have their firearm rights restored. My office did not see a noticeable

uptick in inquiries following the order, but most of the cases we did see in late April, May, and June involved individuals whose civil rights were restored on April 22. Under Virginia Code, their cases were ripe to be heard since they possessed a valid order of civil rights restoration. And in all the cases my office handled, petitions for firearm rights predicated upon the April 22 civil rights restoration were granted. What's unclear now is whether those petitions were voided by the Court's decision.

That decision was clear on civil rights: the governor's order was an overreach of his clemency power and all civil rights restored were invalid.² There was even a directive to the state's registrars' offices to clear the rolls of the affected people. However, the Court failed to address the domino-effect the decision would have on corresponding firearm rights restoration petitions. Even Governor McAuliffe, when asked about the subject, had no definitive answer on the interplay between the two saying, "My actions were about giving you the right to vote, to serve on a jury, and run for political office. My action, I didn't think it had anything to do with gun rights. I stayed away from that."³ Hence, our uncertain Magic 8 Ball answers surrounding the subject.

The commentary from the pertinent actors in the process has been anything but uniform since the Court's decision. Through its spokesman Michael Kelly, Virginia Attorney General Mark Herring's office opined that, "This is a pretty unusual situation without a clear answer. The Supreme Court dealt with voters in its order, but not other Virginians who had relied on the governor's order to exercise certain rights and privileges. The situation will ultimately require some judicial clarification from a circuit court, or perhaps the Supreme Court itself."⁴

The Virginia State Police took a more definitive stance, explaining that, "Individuals need to refer to the governor's website for direction on how to proceed concerning the steps necessary to secure a valid restoration of their voting rights. Once that's accomplished, then those individuals will need to re-apply through the circuit court to have their gun rights restored."⁵

Shannon Taylor, the commonwealth's attorney for Henrico County, said that, "[F]or the one or two individuals who fall into this category, we will issue a show-cause motion to bring them back before the court so that

the judge might be able to explain what has happened with the Virginia Supreme Court decision and how it voided their order . . . it is our intention to work with the individual to ensure that they are following the law."⁶

So, where do the clients granted their firearm rights during the April 22–July 22 window stand as it relates to the restoration of their firearm rights? The answer seems to be "Reply hazy." If your rights were restored and you try to purchase a firearm, the Virginia State Police clearly articulated that they will not allow your purchase absent a new grant of civil rights from the governor and an updated order of restoration from the circuit court reflecting that new grant. As it pertains to possessing and carrying a firearm, the safest course of action is probably to heed the Virginia State Police recommendation. However, if a client possessing or carrying a firearm with a restoration order from the April 22–July 22 window, without notice that their gun rights were invalid, is cited for unlawful possession of a firearm, it would seem difficult to proceed with filing charges since a successful prosecution would be foggy given the unique circumstances. Absent some overarching edict from the Court, the answer to the question of whether the firearm restorations during this period will be valid will remain in the "Cannot predict now" category.

Increased Scrutiny?

While the first query involves a nuanced issue that will only affect a limited number of people, the second issue prompted by this summer's events could potentially impact the entire restoration of firearm rights process. Prior to the April 22 order and the cascade of events that followed, the grant of firearm rights restoration petitions was, unofficially, heavily dependent on the governor's grant of civil rights. The circuit court and the commonwealth's attorney's offices reviewed the petition, conducted the hearing, and made the final grant of firearm rights, but the completion of each of those steps lay upon the foundation of the governor's grant of civil rights.

In fact, a bipartisan group of forty-three commonwealth's attorneys articulated this



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point in their amicus brief to the Court in the *Howell* case, voicing their concern that:

[The] executive order shifts the entire burden of this vital review process onto Commonwealth's Attorneys and circuit courts. It is essential that Commonwealth's Attorneys discharge this burden effectively, given the public safety concerns associated with felons' possession of firearms. Their resources will thus be additionally taxed by the firearm restoration process.⁷

Joel Branscom, the commonwealth's attorney in Botetourt County, echoed those concerns: "[The governor's grant of civil rights has] always been the main factor. Once the governor has weighed in, it's been pretty regular [practice] for them to get their rights restored. That meant something."⁸

Formerly, a felon seeking to restore his civil rights went through a rigorous process, fraught with paperwork and extended waiting times. Because of the scrutiny involved in that process, the weight given to a governor's restoration of civil rights during the restoration proceedings was substantial. And understandably so. As the barriers surrounding civil rights restoration continue to fall, it remains to be seen how circuit courts and commonwealth's attorney's offices will respond. In the firearm rights cases my office has overseen involving civil rights restorations post-July 22, there has yet to be a discernible difference in how the petition process is handled. The petitions that we expected to be scrutinized based on the underlying charges were, and the petitions we expected would be granted without many speed bumps also were, just as it was prior to the genesis of these questions on April 22.

In my experience with firearm rights restoration cases, it always becomes plainly evident how seriously circuit court judges and commonwealth's attorneys take these cases. Judges routinely caution my clients about the weight of the court's decision, the responsibility that falls upon my clients once their rights are restored, and the responsibility that could fall on the courts should my clients forsake the responsibility of their newly-restored rights. That level of scrutiny, and the weight that is borne upon the shoulders of the courts and the commonwealth's attorneys, has been the consistent "Outlook good" during the "Cannot predict now" of the firearm rights restoration process over the last six months. My expectation is that will continue, regardless of the mechanics around the restoration of civil rights that precedes it.

Moving Forward

The uncertainty around civil rights restoration and its effect on firearm rights restoration is not moving to the background. In September, House Delegate Gregory D. Habeeb introduced House Bill 1406, which would put a constitutional amendment on the ballot during the November 2018 general election allowing non-violent felons who have their civil rights restored to simultaneously have their firearm rights restored without petitioning the circuit court.⁹ The bill proposes to amend Article II, Section 1 and Article V, Section 12 of the

Constitution of Virginia to provide that a person convicted of a felony's "right to possess, transport or carry [a firearm] is automatically restored upon the restoration of his civil rights."¹⁰ If approved by the General Assembly and subsequently by Virginians in the 2018 general election, HB1406 would take effect January 1, 2019.¹¹

Numerous hurdles need to be cleared before HB1406 becomes the law, but if enacted, firearm rights restoration in Virginia would experience quite the facelift. In petitions involving non-violent felons, the courts and the commonwealth's attorney's offices would be removed from the decision-making process. This would seemingly eliminate the questions raised here around scrutiny of firearm rights petitions in the commonwealth's new streamlined civil rights restoration world. Conversely, it would simultaneously discard two valuable firearm rights restoration gatekeepers. If 2016 is any indication, Virginia firearm rights restoration will no longer be the commonwealth's "You may rely on it" field of law. Instead, it will require multiple shakes of the Legal 8 Ball and answers of, "Concentrate and try again."

Endnotes:

- 1 Va. Code § 18.2-308.2 (A) and (C)
- 2 *Howell v. McAuliffe*, __ Va. __ (Va. 2016)
- 3 Portnoy, Jenna. "In Virginia, felon voting rights mean simpler path to gun ownership." The Washington Post, May 20, 2016.
- 4 Nolan, Jim. "Reversal of McAuliffe's voting rights order leaves restored gun rights in limbo." Richmond Times-Dispatch, August 20, 2016.
- 5 *Id.*
- 6 *Id.*
- 7 Brief of Amici Curiae Commonwealth's Attorneys In Support of Petitioners, p. 12, June 17, 2016.
- 8 Portnoy, Jenna. "In Virginia, felon voting rights mean simpler path to gun ownership." The Washington Post, May 20, 2016.
- 9 House Bill 1406, Sess. of 2017 (Va. 2017), <http://lis.virginia.gov/cgi-bin/legp604.exe?171+ful+HB1406>.
- 10 *Id.*
- 11 *Id.*



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