



Defense Strategy: Several California Firearms Offenses Don't Cause Immigration Penalties Based on "Firearms"

US v Aguilera-Rios (9th Cir. June 17, 2014)

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See *US v Aguilera-Rios* (9th Cir. June 17, 2014) at <http://cdn.ca9.uscourts.gov/datastore/opinions/2014/06/17/12-50597.pdf>

Thanks and congrats to Kara Hartzler, Federal Defenders of San Diego!

Holding. Under this Ninth Circuit panel decision by Judge Berzon, some California firearms convictions, including felon in possession of a firearm (former CPC § 12021, current CPC § 29800) never can be held to be a firearms aggravated felony or a deportable firearms offense. This is because the federal "generic" definition of firearm excludes antique firearms, while many California statutes include antique firearms.

Under this case, it appears that the following California offenses should not be held to come within the firearms deportation ground, or be aggravated felonies as a firearms offense: Cal Pen C §§ 245(a)(2) (assault with a firearm), 246 (discharge of a firearm at an inhabited enclosure), former Pen C §12022 (armed with antique weapon while committing felony), former Pen C §12021 (which is the current Pen C §29800) (felon or misdemeanor in possession), and Pen C §12025 (carrying a concealed firearm. This is because these statutes do not exclude antique firearms, and unpublished cases show that antique firearms actually have been prosecuted under the statutes.

Of course, this also should apply to other state offenses that include antique firearms within the Ninth Circuit, as long as there is evidence that antique firearms are prosecuted under the statutes.

There is no requirement that the person show an antique firearm was involved in his or her own case. This opinion explicitly partially overrules *Gil v. Holder*, 651 F.3d 1000, 1005–06 (9th Cir. 2011), and implicitly partially overrules *Matter of Mendez-Orellana*, 25 I&N Dec. 254 (BIA 2010).

Here the Ninth Circuit reversed the defendant's conviction for illegal re-entering the U.S. following removal, because it found that the prior removal order was issued in error, because Mr. Aguilera-Rios' prior California conviction for being a misdemeanor in possession of a firearm was not a deportable firearms offense and he was therefore not deportable.

Advice. California criminal defenders: This opinion seems secure. It is based squarely on a U.S. Supreme Court discussion in *Moncrieffe v. Holder* (2013) (see below), and it seems highly

unlikely that the Supreme Court or Ninth Circuit en banc would reverse the holding. Still, due to the constant risk that Something Bad Could Happen, it may be best to continue to plead to felon who "owns" a firearm, or other strategies discussed at §N.12 Firearms at www.ilrc.org/crimes.

Immigration advocates: This is not susceptible to a BIA claim that the Ninth Circuit should defer to it. While ICE might assert (wrongly) that as a federal criminal case it should not apply in removal proceedings, the case interprets *Moncrieffe v. Holder*, a Supreme Court immigration case. The ruling applies retroactively to past convictions. At least for purposes of conviction for illegal re-entry, it applies retroactively to invalidate past removal orders. See slip at 8-9.

Discussion. Federal law makes deportable a noncitizen "who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying . . . any . . . firearm or destructive device (as defined in section 921(a) of Title 18) in violation of any law." 8 U.S.C. § 1227(a)(2)(C). 18 USC 921(a)(3) provides the applicable definition of the term "firearm" and states that "[s]uch term does not include an antique firearm." An antique firearm is defined as one made in 1898 or before, plus certain replicas. 18 USC 921(a)(16).

The same definition of firearm at 18 USC 921(a), which excludes antique firearms, is used to define aggravated felonies relating to firearms. See 8 USC §§ 1101(a)(43)(C) [INA 101] (illicit trafficking in firearms or destructive devices) and 1101(a)(43)(E) (offenses "described in" certain federal firearm criminal statutes, including being a felon, addict, or undocumented alien in possession of a firearm).

With a few exceptions, California gun statutes do *not* exclude antique firearms. Thus one can be convicted of a firearms offense under California law that does not qualify as a firearms offense under the federal immigration definition.

In last year's opinion in *Moncrieffe v Holder*, to illustrate the categorical approach, the Supreme Court stated in dicta that if the minimum conduct to commit a state firearms offense includes an antique firearm, and if there is a "reasonable probability" that offenses involving antique firearms actually are prosecuted under that statute, then no conviction under the state statute meets the federal definition of, for example, the aggravated felony of felon in possession of a firearm. The Court noted that the noncitizen "would have to demonstrate that the State actually prosecutes the relevant offense in cases involving antique firearms." *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1693 (2013).

In *Aguilera-Rios* the Ninth Circuit noted that several cases show that California has prosecuted offenses involving antique firearms. See slip at 17-18.

Moncrieffe requires us to presume that *Aguilera* was convicted of an offense under California Penal Code § 12021(c)(1) using an antique firearm, because California actually prosecutes people for such conduct. See, e.g., *People v. Charlton*, No. A122842, 2011 WL 1492529, at *1, 4 (Cal. Ct. App. Apr. 19, 2011) (affirming conviction under California Penal Code § 12021 for

possession of replica muzzle-loading pistol); *People v. Servin*, No. E047394, 2010 WL 1619298, at *1 (Cal. Ct. App. Apr. 22, 2010) (affirming conviction under California Penal Code § 12021 for “family heirloom” replica single-shot muzzle-loading rifle incapable of using modern ammunition); *People v. Coffman*, No. C044728, 2005 WL 958409, at *1–2 (Cal. Ct. App. Apr. 26, 2005) (affirming conviction under California Penal Code § 12021 where the gun was described as an “antique cowboy-style gun with a long barrel” and an “old-style cap and ball pistol that was rusted and would only fire one shot at a time and had to be reloaded each time to fire”); *People v. Cushman*, No. C044129, 2005 WL 300024, at *1 (Cal. Ct. App. Feb. 9, 2005) (affirming conviction under California Penal Code § 12021 for possession of black powder, muzzle-loading firearms). These recent examples of California prosecutions involving antique firearms meet the “realistic probability” standard of *Duenas-Alvarez*, 549 U.S. at 193. Under the express language of *Moncrieffe*, the “categorical comparison” is therefore “defeat[ed].” 133 S. Ct. at 1693.

Moncrieffe’s overall analysis also supports the conclusion that California Penal Code § 12021(c)(1) and the federal firearms aggravated felony offense are not a categorical match.

More research may be needed to show exactly which California statutory offenses that could include antique firearms actually have been used to prosecute cases involving antique firearms -- and whether this distinction even matters, given that in general the state clearly prosecutes antique firearms under its firearm laws.

California firearms offenses that do not exclude antique firearms include, but are not limited to, former (prior to January 1, 2012) Calif. P.C. §§ 245, 12021(a) & (b), 12022(a)(1), 12025(a)(1), 12031(a)(1), which now appear as current Calif. P.C. §§ 25400(a), 27500, 29800, 33215. Some other sections specifically exclude antique firearms, such as current Calif. P.C. §§ 26350 (possession of unloaded firearm), 30600 (assault weapons). While the California offenses were reorganized and re-numbered in 2012, the legislature stated that this involved no “substantive change” to the offenses (see 2010 Cal SB 1080). See also *Aguilera-Rios*, n. 1.