

SENIOR COUNSEL
C. D. Michel *

SPECIAL COUNSEL
Joshua R. Dale
W. Lee Smith

ASSOCIATES
Anna M. Barvir
Sean A. Brady
Scott M. Franklin
Thomas E. Maciejewski
Clint B. Monfort
Tamara M. Rider
Joseph A. Silvoso, III
Los Angeles, CA

*Also admitted in Texas
*Also admitted in District of
Columbia



MICHEL & ASSOCIATES, P.C.
Attorneys at Law

Firearms - Environmental - Land Use - Employment Law
Civil Litigation - Criminal Defense

180 East Ocean Boulevard • Suite 200
Long Beach • California • 90802
562-216-4444 • www.michel lawyers.com

OF COUNSEL
Don B. Kates
Battleground, WA

Ruth P. Haring
Matthew M. Horeczko
Los Angeles, CA

Glenn S. McRoberts
San Diego, CA

AFFILIATE COUNSEL
John F. Machtinger
Jeffrey M. Cohon
Los Angeles, CA

David T. Hardy
Tucson, AZ

MEMORANDUM OF LAW

Re: DROs - Delay FAQs

Date: September 23, 2013

The number of law-abiding firearms purchasers who have been “delayed” by the California Department of Justice in getting their purchases approved has significantly increased over the past year.

Since 2008, the number of firearms purchased in California and nationwide has skyrocketed. This has led to more work for the California DOJ in conducting background checks on purchases and transfers of firearms in California.

Notwithstanding this increase in workload, under current California law (Penal Code, § 28220), the only legitimate reasons you could have been delayed by the DOJ was if your DROS had been filled out incorrectly or if the DOJ didn’t receive the DROS fee. But in addition to the increased background check workload, last year the DOJ implemented a policy change where it is now interpreting the law to authorize it to delay your transaction when your criminal records on file are incomplete.

Until the DOJ fixes its own incomplete record about you, it won’t release your firearm. Both the increase in firearms purchases and the new policy about incomplete criminal records has led to delays.

Here are some answers to some frequently asked questions about the situation.

1. Why have I been delayed?

You have most likely been delayed for one of the following reasons:

1) You were arrested by the police but later released with no charges activity filed with a prosecutor. This

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shows up in the DOJ's records as an arrest for a potentially disqualifying crime with no "disposition" listed on your record. There is no information about what happened after that arrest – were you charged, were you convicted, etc.?

2) You were arrested and the case was referred to a prosecutor, but the prosecutor declined to prosecute you so no case was actually filed in court. In some instances, particularly in older cases, this may show up in the DOJ's records as an arrest for a potentially disqualifying crime with no disposition.

3) You were arrested and a case was filed in court against you, and you entered a plea to participate in a "diversion" program. This is common in drug possession cases. After completing the court's specified terms i.e., (drug treatment, etc), your case was supposed to be dismissed. And unless you violated the terms imposed by the court, no conviction was ever entered on the original charge. In some instances (again, more likely in older cases or in rural counties), this may show up in the DOJ's records as arrest for a potentially disqualifying crime, with no disposition listed on your record.

4) You were arrested in another state for a disqualifying crime but not convicted, or if you were convicted in that other state, you received a pardon through that state's pardon process. In running its background check, the DOJ will query interstate databases, including the NICS system. In some instances, this circumstance may appear on those interstate databases as an arrest for a potentially disqualifying crime with no disposition.

5) A temporary spike in purchases and transfers has caused a backlog at the DOJ during the time your DROS form was submitted.

If your delay is simply due to a temporal spike in workload at the DOJ, you can expect your delay to last from a couple of days to several weeks. If your delay is due to an issue with an incomplete criminal record in the DOJ's databases, your delay could last much longer, perhaps longer than a year. The only way to find out what is causing your delay is to contact the DOJ.

2. Why can't I get a hold of anyone at DOJ about my delay?

We don't know. As of the beginning of 2013, the DOJ had an additional \$24 million in DROS fee funds available to hire additional staff to process background checks and answer phones. Following the Sandy Hook attack, the Legislature expropriated the DROS surplus for the Automated Prohibited Persons System. But for some reason, it chose not to use those programmed funds for their intended use. Given this, when the (taken some would say stole, from the excess DROS funds that resulted from DOJ improperly over charging for background checks for years) phones will get turned back on at DOJ to answer DROS inquiries is unknown. In the meantime, the DOJ is directing delayed purchasers to go to the following page on its website: <http://oag.ca.gov/firearms>. This page is not particularly helpful.

3. Why did the DOJ's policy change?

We don't know. One educated guess is that a [2010 internal audit] by the DOJ of its criminal records databases prompted an effort to "clean up" incomplete records. That study showed that of the arrests entered into the DOJ's system over the prior decade, 45 percent of them had no corresponding disposition information. That is, the record has an arrest, but doesn't have follow-up information such as whether the arrested person was charged or convicted of a crime.

The DOJ is currently participating in a [pilot program in Santa Clara County] to try to resolve this issue. It has been speculated that the change in policy regarding firearms background checks is another avenue by which the

DOJ is trying to clean up their records.

4. What does an arrest with no disposition on my record mean?

An arrest with no disposition could mean a lot of things. It could mean you spent a night in jail to cool your heels and the police released you the next day without charging you. It could mean that a local prosecutor saw your arrest report and decided the case was too flimsy and declined to prosecute. It could mean that you appeared in front of a judge at a hearing, and the judge decided that it wasn't in the interests of justice to pursue the case against you, so he dismissed the case against you. It could mean that you were put into a diversion program, such as a drug treatment program, and you satisfactorily completed the program.

It could also mean that you were convicted of a disqualifying crime. But it's *highly unlikely* it means that. The amount of paperwork generated by the courts for a conviction is significant, and the likelihood that a court failed to report a conviction to the DOJ is infinitesimally low.

5. But isn't it worth it to inconvenience a few people if it means keeping a firearm out of the hands of a disqualified person?

Since mid-2012, we've heard stories of *thousands* of eligible firearms purchasers being delayed, some of those delays occurring for more than a year. In some instances, those delays impact individuals' safety and livelihoods, e.g., firearms instructors unable to buy necessary firearms to teach safety classes.

By contrast, we've not heard of one single instance where a disqualified convict was able to get a firearm through the DROS process because the DOJ didn't have a record of his conviction. The arrest records may be incomplete, but the conviction records seem to be secure.

Moreover, the Legislature didn't craft the background check law to deny many valid firearms purchasers the right to own a firearm so that a few unqualified people might be caught. Many of these delayed purchasers are now being delayed because they were caught smoking pot 25 years ago or more. The law does not bar these people from owning firearms.

6. Why are the arrest records incomplete?

California law requires police agencies to immediately report arrests to the DOJ. Unless the arrest record is later sealed, that arrest record is always a part of the DOJ's database, and is accessible to law enforcement, regardless of whether you are later convicted or not. So when a traffic officer pulls you over, takes your license, and runs your record, all of those past arrests are coming up on his mobile terminal.

California law also requires all courts to report to the DOJ all criminal cases that are opened in them. Further, the law requires that the disposition of those cases be reported to the DOJ as well. So based upon the DOJ's new policy, there is a "hole" in the law. There are no reporting requirements for arrests that don't make it to the charging stage. The police officer who lets you sleep it off in jail, or the prosecutor who rejects a case based on flimsy evidence, their decisions are subject to a reporting requirement. Thus, when the traffic officer or the DOJ pulls up your criminal record, they see an arrest, but with no information about what happened after the arrest.

Local prosecutors know that when they pull up a defendant's rap sheet and see arrests with no dispositions, it means that the defendant wasn't convicted of anything and may not have even been charged with a crime. The DOJ, for whatever reason, is now interpreting this information differently, however.

Lack of dispositions can also be traced to the increased use of diversion programs in sentencing. Under California law, you are only disqualified from owning a firearm if you were “convicted” of a disqualifying offense. It has become more likely that certain offenders, especially drug users, will be diverted to a drug rehabilitation program in lieu of being convicted. If the defendant completes the program, then the court imposes no further terms. If the defendant fails the program, then he may be hauled back into court with a conviction being imposed or with more onerous rehab terms being imposed.

When a diverted defendant completes his diversion or rehab terms, the court is supposed to formally dismiss the case, which dismissal would then be reported to the DOJ. But because some of these diversion or rehab terms run for 6 or 12 months, sometimes the issue never comes back before the court, and it simply forgets to dismiss the case. There’s no conviction of the defendant, but there’s no report to the DOJ what happened either.

7. Does the delay mean I am disqualified from owning the firearm I purchased?

No. Unless you are aware that you have suffered a disqualifying conviction, the delay at this point means that DOJ is currently backlogged on background checks or that your record in their database contains incomplete information. The delay is not an indication that you are disqualified.

8. Does the delay mean I should get rid of my other firearms?

Probably not. Again, the delay with your most recent purchase is not an indication that you are disqualified from owning firearms. If you know or reasonably suspect you might have suffered a disqualifying conviction in the past, you should consult with an attorney before deciding whether to dispose of any other firearms.

9. Can I get my arrest record “sealed” to resolve the issue.

Many delayed purchasers have reported that DOJ representatives have instructed them to get their arrest record sealed under Penal Code section 851.8. The DOJ has even sent some of these delayed purchasers the standard form Section 851.8 petition. You may only get your arrest record sealed if the following two conditions apply:

- 1) The arrest you are seeking to have sealed occurred less than three years ago; and
- 2) You were “factually innocent” of the crime for which you were arrested.

Please note that “factually innocent” is not the same thing as not being charged or not being convicted. It is literally the scenario of “they arrested the wrong person” or the victim lied about your involvement in the crime and later recanted to the police. Factual innocence does not apply to situations like, e.g., an arrest for pot possession where the local police decided to let you go after a night in jail rather than prosecute you because it wasn’t worth their trouble.

10. I got my arrest and conviction expunged under Penal Code section 1203.4. Shouldn’t that have cleared up the issue of my eligibility to own firearms?

No. Section 1203.4 expungements do not restore the right to own or possess firearms.

11. Two years ago I bought a firearm without any problem. Does this matter?

No. The DOJ’s new policy does not give any weight to prior DROS checks it conducted that showed you were eligible to purchase a firearm.

12. What if I can't find the records DOJ wants me to get?

To date, the DOJ's position has been that, at a minimum, you need to obtain a certified letter from the local prosecutor, law enforcement agency, and court attesting that they don't have any records. Some of these agencies have been helpful in providing these documents. We do not know for certain, however, if supplying the DOJ with this information will satisfy them and cause them to allow the purchase to proceed.

You can also try challenging the accuracy of your criminal record by filing a "Claim of Alleged Inaccuracy or Incompleteness" (Form BCIA 8706) with the DOJ. In doing so, you will be asking the DOJ to review and affirmatively fix specific incomplete portions of your record. In order to adequately make such a claim, you will need to know the specific aspect or arrest on the record that you are challenging. You will need a copy of your DOJ criminal record so that you can cite to the date of arrest, arresting agency, arrest number, and other pertinent information about the arrest. If you do not have a copy of your criminal record, you can order one from the DOJ by filling out a Livescan form ([Form BCIA 8016RR](#)), getting fingerprinted at a designated Livescan site. The cost to get your record varies based on the site provider you use, but expect the cost to be approximately \$85 at the most.

13. How long will my delay last?

Unfortunately, this is entirely unknown as it varies from person to person. The DOJ's position is that it has a right to delay your firearm purchase *indefinitely* until it determines that you are not a prohibited person. If you don't do the legwork they are asking and they are unwilling to do it, then it's impossible to know when, if ever, your delay will be resolved.

14. I thought the DOJ only had ten days to do my background check?

It does. Under Penal Code sections 26815 and 27540, the DOJ must complete its background check within ten days of submission of the DROS form to it by your FFL (firearms dealer). At the end of that ten-day period the DOJ must issue either a "Proceed" response – allowing the FFL to release the firearm to you – or a "Deny" response – meaning that you are ineligible to own a firearm. If the DOJ doesn't issue any response to the FFL within the ten-day-period, then by law the FFL can lawfully release the firearm to you. The law presumes that after the end of the ten-day-period, unless the DOJ knows that you are ineligible, you are entitled to take possession of your firearm.

Under Penal Code section 28220, the only reasons the DOJ can lawfully delay past the ten days is to request from you or the FFL incomplete or incorrect information *on the DROS form* (i.e., wrong name, missing birthdate) or to collect unpaid DROS fees. Section 28220 does not list incomplete criminal background records as a valid reason for delaying a purchase past the ten-day-period.

In fact, AB 500 is currently on the governor's desk to allow the DOJ additional time to conduct a background check – up to 20 additional days – when its own records are incomplete and it needs to do additional research on a particular purchaser's background. Without the Legislature's approval, the DOJ has already granted itself an open-ended extension with its new policy, and it isn't actively researching the incomplete background records during such an unjustified delay. It has effectively shifted the burden of completing the mandated background checks onto you.

15. Can't I just cancel the purchase and buy another firearm? Maybe the DOJ won't delay that subsequent purchase.

Unfortunately, no. You can cancel the delayed transaction (you will have to negotiate the terms of that cancellation with your FFL, whether you will have to pay restocking fees, etc.), but purchasing a new firearm won't resolve the issue. Since implementing the new policy, the DOJ's position has consistently been that until the incomplete information in your file is resolved, the DOJ will indefinitely delay any current *and future* firearms purchases you make. You will be in a sort of firearm buyers' purgatory until the DOJ is satisfied about the disposition of the incomplete arrest, or until it is forced to change the policy.

16. Should I contact my local representatives about this?

Of course. Yes! Please do! Your local representatives – state senators and representatives, and Congress members – should hear your voice on this issue. Maybe they can get answers from the DOJ it is unwilling to supply to you, and to us.

17. Somebody should sue.

Somebody has. The CalGuns Foundation is currently sponsoring a pending lawsuit in Fresno regarding the issue. Depending on the outcome NRA may join the fight. NRA was getting ready to file a suit, but since there already is one, we are waiting for results.

18. What can I do in the meantime?

You can retain counsel to file a lawsuit to get your firearm released or your criminal record corrected. You can file your own lawsuit in pro per (by yourself). You can challenge the validity of your DOJ criminal record by requesting your criminal record via Livescan and then filing a Form BCIA 8706 (“Claim of Alleged Inaccuracy or Incompleteness”). You can lobby your local representatives to get answers from the DOJ.

Because the DOJ's position is new and has no legal backing, it's currently unclear what the most effective, economical step would be to resolve the issue as to your own purchase.

19. This sounds complicated.

It is. As with other aspects of firearms ownership in California, this is just the latest in a long series of rules, regulations, and red tape that can trap the unwary but law-abiding firearm owner. Although California firearms law has gotten a little less opaque over the past several decades, Californians still can easily find themselves in trouble for technical violations of the law of which they had no knowledge or intent, and which defy an application of common sense.

20. Are there any other resources available I can consult to avoid unknowingly violating the law?

In addition to the DOJ's website, the [National Rifle Association](#) and the [California Rifle and Pistol Association](#) both have information for firearms owners and enthusiasts regarding current laws and pending legislation. [CalGunLaws.com](#) is another online resource dedicated to educating firearms owners on current legal issues in California.

For Further Assistance:

To avoid getting unintentionally caught in one the myriad legal traps, we also encourage you to purchase [California Gun Laws: A Guide to State and Federal Firearms Regulations](#). For everything from acquiring, storing, and transporting conventional firearms to how the law treats unusual items like potato guns, [California](#)

[Gun Laws](#) helps you enjoy your hobby or exercise your right of self defense with less risk of finding yourself on the wrong side of the law. It can be purchased online at <http://www.calgunlawsbook.com/>.

For links to free information on firearms laws, the Legal Resources section of our www.calgunlaws.com website has subsections on various firearms law topics. Check it out!

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