

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. Silvos, 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: California Supreme Court Confirms That Certain Misdemeanor Battery Convictions Do Not Trigger Federal Gun Ban After All**

**Date: September 6, 2013**

---

On May 6, 2013, the Second Appellate District of the California Court of Appeals ruled that certain people convicted of violating California Penal Code section 242 (battery) are not prohibited from possessing firearms under the federal law that prohibits those with a conviction for a “misdemeanor crime of domestic violence” (MCDV) from possessing firearms. *See Shirey v. Los Angeles County Civil Service Commission*, (2013) 216 Cal.App.4th 1 [156 Cal.Rptr.3d 517].

The decision clarifies that thousands of Californians previously thought to be prohibited from possessing firearms are not prohibited after all.

The State of California sought review of the *Shirey* decision by the California Supreme Court. DOJ also sought to have the case depublished so that it would not have a binding effect on lower courts. Thankfully, the California Supreme Court denied both requests. Such a denial often indicates that the lower court’s analysis is correct and should remain binding precedent. The State may appeal this case to the United States Supreme Court, but if they do, this case is unlikely to interest the high court.

As a result of this ruling, a person convicted of a misdemeanor 242 (and 243(e))<sup>1</sup> *should*

---

<sup>1</sup> Remember a 242 or a 243 misdemeanor conviction still carries with it a 10 year firearm restriction under California law regardless of whether the offense qualifies as an MCDV. P.C. 29805. Challenging a federal MCDV firearm restriction in California while a person is still

---

**Disclaimer:** The information contained in this memorandum has been prepared for general information purposes only. The information contained herein is not legal advice, should not to be acted on as such, may not be current, and is subject to change without notice. Michel & Associates, P.C., does not warrant or guarantee the accuracy, completeness, adequacy or currency of the information contained in this memorandum. Users of information from this memorandum do so at their own risk. This memorandum does not create an attorney-client relationship. Individual facts and circumstances may alter the conclusion(s) drawn. For legal advice consult an attorney.

Copyright © 2013 MICHEL & ASSOCIATES, P.C. All Rights Reserved  
Republishing this document or any part thereof without permission is prohibited.  
Contact Michel & Associates, P.C. for permission to reprint this document.

not be considered prohibited for a federal MCDV if the level of force used was minimal or the DOJ cannot determine what level of force was used. Nevertheless, we expect that DOJ will still continue to consider people prohibited from possessing firearms or delay their firearm transaction until the individual can prove otherwise.

People who are uncertain of their eligibility to possess and own firearms in California should request a Personal Firearms Eligibility Check using the form provided by the California Department of Justice website. *You should never attempt to purchase a firearm in order to test your eligibility in California.* California is being particularly aggressive in seizing firearms from people prohibited from possessing them. Many people are unaware of their prohibited status. Consequences are severe!

If you have a California Penal Code section 242, 243, or 415(1) conviction, its been more than 10 years since the date of your conviction, and DOJ/FBI still considers you ineligible to possess firearms, please contact our office to discuss your options.

Pay close attention to our firm's alerts for further information on this interesting development.

The facts of the case are as follows:

Mr. Shirey was charged in 1992 with domestic violence under California Penal Code section 273.5. At trial, Mr. Shirey was found not guilty of the domestic violence charge under the section 273.5 allegation or a violation of 243(e) (domestic battery), but was convicted of a lesser charge of "simple" battery under section 242.

Shirey was sentenced to probation, then had his case expunged under Penal Code section 1203.4, and had his firearm possession rights restored under *California law* via California Penal Code section 12021.<sup>2</sup>

After having his firearm possession rights "restored" under California state law, Shirey worked for the Los Angeles County Sheriff's Department. But in 2009, the Sheriff's Department determined he was prohibited from possessing firearms under the federal MCDV law, commonly know as the "Lautenberg Amendment." Deputy Shirey contested that determination.

The Lautenberg Amendment created the federal law that prohibits people convicted of a MCDV from receiving and possessing firearms. 18 USC §922(g)(9). The violation does not need to be defined as a "domestic violence" charge under the state's laws but simply a misdemeanor

---

considered prohibited from possessing firearms under *California law* will, more than likely, be considered moot.

<sup>2</sup> The court could find no case holding that an expungement under Penal Code section 1203.4 coupled with an order under (then) section 12021 restored firearm rights under federal law. Nevertheless, since the court determined that Shirey was not prohibited for a different reason, it didn't need to do a further analysis.

offense that has the following element as defined by section 921(a)(33)(A):

the *use or attempted use of physical force*, or 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...” (Emphasis added).

Under California Penal Code section 242, a “battery” is defined as “any willful or unlawful use of force or violence upon the person of another.”

The issue in the *Shirey* case was whether the required “use of force or violence” element for a 242 conviction was the same as the “use or attempted use of physical force” element for an MCDV conviction. The court of appeals held that it was *not*.

In determining whether a crime is a “crime of violence,” courts take one of two approaches depending on the statute.<sup>3</sup>

Generally, for purposes of sentencing, courts employ the formal categorical approach explained in *Taylor v. United States*, to determine whether a prior offense falls within the category of “crime of violence.” *Taylor v. United States*, 495 U.S. 575 (1990).

Using the *Taylor* analysis, courts look to the statutory elements of the specific offense and then ascertain the least culpable conduct necessary to sustain the conviction. *Id.* at 600. There is no consideration of the particular facts underlying the conviction because least culpable conduct is considered the basis for conviction. *Id.*

The modified categorical approach, however, looks beyond the statutory elements of the crime to determine the particular part of the statute under which the defendant was convicted. *United States v. Beardsley*, 691 F.3d 252 (2d Cir. 2012). This modified categorical approach allows courts to consider the indictment, plea agreement, criminal judgment, and judicial findings of fact to determine the conduct on which the conviction is based. *Shepard v. United States*, 544 U.S. 13, 20-3 (2005); *Singh v. Ashcroft*, 383 F.3d 144 (3d Cir.2004).

Under California state courts’ interpretations, the phrase “use of force or violence” for battery can include harmful or offensive touching as well as simple touching, which would

---

<sup>3</sup> Courts have not opined too often whether a crime meets the definition of one under an MCDV, but more often have been called upon to determine whether an offense is a “crime of violence” under federal sentencing guidelines. (See *Leocal v. Ashcroft* (2004) 543 U.S. 1, 125 S.Ct. 377, 160 L.Ed.2d 271 (*Leocal*) & *Johnson v. United States* (2010) 559 U.S. 133, 130 S.Ct. 1265, 176 L.Ed.2d 1 (*Johnson*)). *Shirey v. Los Angeles County. Civil Serv. Comm'n*, 216 Cal. App. 4th 1, 9-10, (2013). The wording for “crime of violence” and MCDV is practically identical.

constitute the least culpable conduct necessary to sustain a conviction.

In contrast, federal courts have held that “physical force” element of an MCDV offense requires some kind of “violence” or “violent force”-not just touching.

So to prove the “physical force” element of an MCDV offense, something more than mere touching is required. And since California’s battery statute, section 242, does not require proof of more than mere touching, it does not provide the required “physical force” element of an MCDV offense under the categorical approach.

However, in a footnote, the *Shirey* court does leave open the option for the modified categorical approach. Although types of conduct which constitute battery can range from simple touching to extremely violent conduct, a person can still face an MCDV restriction if there is proof that the amount of violence used in the underlying battery met the requirements of an MCDV. It was not clear to the court in the *Shirey* case what type of conduct Mr. Shirey committed, so the court treated the case as if Mr. Shirey used the least significant conduct in order to support a conviction, i.e. simple touching. If the record reflected Mr. Shirey had engaged in some form of violent conduct, an analysis under the modified categorical approach may have rendered him prohibited under federal law.

#### **For Further Assistance:**

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

To stay updated on firearm law issues please subscribe to our firearms law newsletters, Facebook pages, and Twitter feed. [CalGunLaws.com](http://CalGunLaws.com), CalGunLaws.com’s e-Bulletins, the [Self-Defense Defense](#), [Right to Keep and Bear Arms](#), [MichelLawyers](#), and [Shooting Range Lawyers](#) informational Facebook pages, and the [@MichelLawyers](#) Twitter feed are produced as a *pro bono* public service by [Michel & Associates, P.C.](#).

Michel & Associates, P.C. has the largest and most experienced firearms law practice in California, but it is also a full service law firm. We appreciate *all* of your legal business inquiries and client referrals for all types of legal work. This business helps support the many *pro bono* public services Michel & Associates, P.C. provides on behalf of your right to keep and bear arms.

Request a free case evaluation <http://michellawyers.com/free-case-evaluation/>. If you have questions or concerns regarding your legal obligations, we offer a free consultation. Contact us at [gunlawquestions@michellawyers.com](mailto:gunlawquestions@michellawyers.com).

---

**Disclaimer:** The information contained in this memorandum has been prepared for general information purposes only. The information contained herein is not legal advice, should not to be acted on as such, may not be current, and is subject to change without notice. Michel & Associates, P.C., does not warrant or guarantee the accuracy, completeness, adequacy or currency of the information contained in this memorandum. Users of information from this memorandum do so at their own risk. This memorandum does not create an attorney-client relationship. Individual facts and circumstances may alter the conclusion(s) drawn. For legal advice consult an attorney.