Possession of destructive devices

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Ms. Eileen L. Husselbaugh
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U.S. Department of Justice
Bureau of Alcohol, Tobacco,
Firearms and Explosives
Tampa, Florida 33602 - 3945

Dear Ms. Husselbaugh:

On behalf of the Bureau of Alcohol, Tobacco, Firearms and Explosives you have requested guidance as to whether Florida law allows the possession of destructive devices. Attorney General Bondi has asked me to respond.

Your letter states that the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) is charged with enforcing the National Firearms Act, Title 26, United States Code, section 5801, *et seq*., which requires the filing of an application to make or transfer certain firearms, including destructive devices, that are not in the possession of the United States. An application to make or transfer such firearms shall be denied if the making, possession, transfer, or receipt of such firearm will place the person making, possessing, transferring, or receiving the firearm in violation of state law.

In 1975, your office received a letter from the Florida Department of Legal Affairs stating that we found "no provision in Florida Statutes which makes it unlawful for a person to possess a destructive device as defined in section 790.001(4), Florida Statutes." Your letter recognizes that the Florida Legislature has enacted additional provisions regulating the possession of destructive devices since 1975 and the ATF has requested assistance in determining whether Florida law continues to allow the possession of destructive devices in light of changes in the law since 1975.

Section 790.161, Florida Statutes (1975), made it "unlawful for any person to throw, place, discharge, or attempt to discharge any destructive device, as defined herein, with intent to do bodily harm to any person or with intent to do damage to property, and any person convicted thereof shall be guilty of a felony and punished" as provided therein. No mention of "possession" of a destructive device was made.

Section 790.161, Florida Statutes (2010), provides that:

"A person who willfully and unlawfully makes, possesses, throws, projects, places, discharges, or attempts to make, possess, throw, project, place, or discharge any destructive device:

(1) Commits a felony of the third degree, punishable as provided in s. 775.082 or s. 775.084.

(2) If the act is perpetrated with the intent to do bodily harm to any person, or with the intent to do property damage, or if the act results in a disruption of governmental operations, commerce, or the private affairs of another person, commits a felony of the second degree, punishable as provided in s. 775.082 or s. 775.084.

(3) If the act results in bodily harm to another person or in property damage, commits a felony of the first degree, punishable as provided in s. 775.082 or s. 775.084.

(4) If the act results in the death of another person, commits a capital felony, punishable as provided in s. 775.082. In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment if convicted of murder in the first degree or of a capital felony under this subsection, and such person shall be ineligible for parole. No sentence of death shall be reduced as a result of a determination that a method of execution is held to be unconstitutional under the State Constitution or the Constitution of the United States."

Thus, the statute makes the *unlawful* possession of a destructive device a criminal act.

Further, section 790.1612, Florida Statutes, makes it clear that governmental entities may authorize the manufacture, possession, and use of destructive devices:

"Authorization for governmental manufacture, possession, and use of destructive devices.—The governing body of any municipality or county and the Division of State Fire Marshal of the Department of Financial Services have the power to authorize the manufacture, possession, and use of destructive devices as defined in s. 790.001(4)."

Section 790.1612, Florida Statutes, was enacted in 1990.[1]

A review of the legislative history surrounding the changes made in 1990 to section 790.161, Florida Statutes, and the creation of section 790.1612, Florida Statutes, indicates that the intent of this legislation was to strengthen laws regarding explosive devices by changing the levels of punishment for violations of the statute, not to criminalize the legal possession of such devices. There are also statements made during legislative committee hearings that the changes to the bill "would not violate the rights of those who have these devices legally."[2]

Thus, it continues to be the position of this office that Florida law allows the lawful possession of destructive devices as defined in section 790.001(4), Florida Statutes, as is currently evidenced by sections 790.161 and 790.1612, Florida Statutes.

Sincerely,

Gerry Hammond
Senior Assistant Attorney General

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[1] *See* s. 6, ch. 90-124, Laws of Fla., *and* s. 6, ch. 90-176, Laws of Fla.

[2] *See* House Criminal Justice Committee Subcommittee on Prosecution and Punishment, April 5, 1990, considering HB 1645, audio tape, side B, series 414, box 909.