Determining Eligibility for Return of Guns

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Lately I have received a number of questions relating to whether it is appropriate to return guns following a temporary firearms disqualification. The issue seems to arise most commonly when a domestic violence restraining order ("DVPO") is issued under Chapter 50B of the North Carolina General Statutes, which requires the surrender of guns by a defendant in certain circumstances and allows the defendant to seek return of the guns following the expiration of the order and final disposition of any related criminal charges. *See* G.S. 50B-3.1.

The issue of returning guns could pop up in other circumstances involving the seizure or surrender of guns. An interplay of state and federal law determines whether a person is disqualified from possessing firearms, temporarily or permanently, and some of the wrinkles are counterintuitive. This post examines some of the most common grounds for disqualification and discusses some limits of state authority in this area. It's long, but I hope readers find it useful.

Felony Convictions. Starting with perhaps the most common and most well-known disqualifier, state and federal law prohibit possession of firearms by a person previously convicted of a felony offense. 18 U.S.C. 922(g)(1) prohibits gun possession by a person convicted in any court of a crime punishable by more than one year of imprisonment. All felony sentences in North Carolina now require a maximum term of at least 12 months, so all North Carolina felony convictions trigger the federal ban. *See U.S. v. Barlow*, 811 F.3d 133 (4th Cir. 2015). North Carolina's ban on felons in possession is similar. Under G.S. 14-415.1, a felony conviction includes all felony convictions in North Carolina (subject to narrow exceptions for certain trade and antitrust offenses). It also includes federal convictions and convictions from other states that are substantially similar to North Carolina felonies and punishable by more than a year in prison. Thus, a person with almost any felony conviction is barred from possessing guns as a matter of state and federal law and will typically not be eligible for return of firearms.

For purposes of the federal disqualification (for felony convictions and other categories), it is worth noting that the U.S. Supreme Court has interpreted 18 U.S.C. 922(g) to require knowing possession of a firearm by a person who knows that he belongs to a category of people ineligible to do so. *Rehaif v. U.S.*, 139 S. Ct. 2191 (2019). There is no such 'knowledge of status' requirement under state law, and the State need not show that a defendant was aware that he had been convicted of a felony in a firearm by felon prosecution.

Effect of Restoration, Pardon, or Expunction of Felony Conviction. If a person was convicted of a North Carolina felony and went through the process to restore his or her gun rights under G.S. 14-415.4, that conviction is excluded from the reach of the state bar on possession of firearms by a felons. G.S. 14-415.1(b). A pardon from the North Carolina Governor, whether a pardon of

innocence or pardon of forgiveness, has the same effect. *Booth v. State*, 227 N.C. App. 484 (2013). It also appears that an expunction restores a person's firearm rights under state law because generally the effect of an expunction is to restore the person's status as if the proceeding had never occurred. *See, e.g.,* G.S. 15A-145.5(c).

We do not have cases interpreting the effect of these state law relief mechanisms on federal firearm prohibitions, but they may lift those prohibitions. *See* 18 U.S.C. 921(20) ("Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms."). A person in any of these situations should apply to the seizing authority for return of any seized or surrendered firearms (assuming the weapons were not lawfully forfeited or destroyed). For more information on issues surrounding restoration of firearms rights after a conviction, see John Rubin, Relief From a Criminal Conviction, Firearm Rights After a Felony Conviction (UNC School of Government 2021).

Misdemeanor Crimes of Domestic Violence. 18 U.S.C. 922(g)(9) prohibits gun possession by a person convicted of a misdemeanor crime of domestic violence ("MCDV"). Federal law defines this phrase as any misdemeanor or offense punishable by less than one year (including offenses punishable only by a fine), when the elements of the offense include the use or attempted use of physical force or the threatened use of a deadly weapon in a domestic violence context. 18 U.S.C. 921(33). This domestic violence category is broadly defined to include current and former spouses, parents, guardians, people with children in common, and people living together in an intimate relationship (among others). 18 U.S.C. 921(32).

That sounds straightforward enough. However, case law complicates things considerably, and few (if any) state misdemeanor offenses meet the federal definition. Jeff Welty wrote about the wrinkles some time ago, here and here. In case you missed it, the North Carolina offenses of simple assault and assault on female do *not* qualify as misdemeanor crimes of domestic violence in our federal circuit. That is because the federal law has been interpreted to require intentional use or attempted use of force and assault in North Carolina can be committed by culpable negligence. *U.S. v. Vinson*, 805 F.3d 120 (4th Cir. 2015). As Jeff noted, the U.S. Supreme Court came close to overruling *Vinson* in *Voisine v. U.S.,* 579 U.S. 686 (2016) (holding that assault committed by recklessness qualifies as a MCDV), but *Vinson* remains good law in this circuit.

North Carolina's misdemeanor assault with a deadly weapon may also be excluded from this subsection of the federal ban. While that offense often involves the use or threatened use of a deadly weapon, it too can be committed by culpable negligence. *State v. Maready*, 205 N.C. App. 1 (2010). This seemingly would not qualify under the federal definition and therefore would not trigger the federal ban on possession of a firearm. That said, the *Vinson* rule only applies in the Fourth Circuit, so a North Carolina misdemeanor assault conviction might be treated as a MCVD outside of North and South Carolina, Virginia, West Virginia, and Maryland.

Stalking and communicating threats too have been found not to qualify for purposes of the federal MCDV ban. Those offenses do not categorically involve the use or attempted use of force or the threatened of a deadly weapon, and therefore do not trigger the federal weapons ban. *Underwood v. Hudson*, 244 N.C. App. 535 (2015) (so holding). People convicted of these offenses who are otherwise not disqualified from possessing a firearm are therefore entitled to return of their firearms.

State law itself does not prohibit possession of firearms by a person with a misdemeanor domestic violence conviction. Under G.S. 14-415.12(b)(8) and (9), such offenses may disqualify a state resident from obtaining a carry concealed permit because those subsections kick in for misdemeanor "crimes of violence," which state courts may interpret as including crimes involving culpable negligence. Such offenses also may bear negatively on a person's character and fitness for purposes of the five-year lookback period for issuance of a gun purchase permit under G.S. 14-404. And, if a person has a felony conviction and tries to apply for restoration of their firearms, discussed above, a conviction of a misdemeanor "crime of violence" bars relief. G.S. 14-415.4(d)(4); G.S. 14-415.4(e)(6). However, possession of a firearm by a person with a conviction for a misdemeanor crime domestic violence or misdemeanor crime of violence is legal under state law.

Protective Orders for Intimate Partners and Their Children. Under 18 U.S.C. 922(g)(8), individuals subject to a restraining order prohibiting the stalking, harassment, or threatening of an intimate partner or their child are barred from possessing firearms during the pendency of the order. For this restraint to apply, the order must contain a finding that the person represents a credible threat to the intimate partner or their child, or it must expressly ban the person from the use, attempted use, or threat of physical force against the intimate partner or their child that could reasonably be expected to cause bodily injury.

State law tracks that language in regard to purchase permits under G.S. 14-404(c)(8). The state carry concealed permit statute does not explicitly address restraining orders, but a person subject to a DVPO or other qualifying restraining order is likely ineligible for concealed carry permit under 14-415.12(b)(1) as a person ineligible to possess or receive guns under federal law. There is otherwise no explicit state ban on individuals under a restraining order (including a DVPO) from possessing a firearm. Of course, a DVPO *may* and often does prohibit the person from possessing firearms during the life of the order, and a violation of that provision could constitute contempt or a criminal DVPO violation under G.S. 50B-4.1 (in addition to a violation of federal law). Both the state and federal restrictions in this context only apply so long as the order is in place.

It is worth noting that enforcement may be an issue where the defendant refuses to voluntarily surrender his or her firearms. In *State v. Elder*, 368 N.C. 70 (2015), the North Carolina Supreme Court found a Fourth Amendment violation where the trial court ordered law enforcement to search the defendant for firearms in order to ensure compliance with a DVPO (as discussed by Shea Denning here). "The plain language of section 50B-3 does not authorize courts to order law

enforcement to search a defendant's person, vehicle, or residence under a DVPO." *Id*. at 72. That said, where police have probable cause to believe a person is violating a DVPO by refusing to surrender guns, a search warrant to seize the weapons may well be justified.

Chapter 50C Protective Orders. For other types of restraining orders—those not involving an intimate partner or their child—federal law is silent. Thus, a person under a civil no-contact order pursuant to Chapter 50C of the General Statutes is not banned from possessing firearms as a matter of federal law. State law similarly does not ban firearm possession by a person subject to a 50C no-contact order. Neither G.S. 14-404 (purchase permits) or G.S. 14-415.12 (carry concealed permits) mention this type of restraining order, and it seems that the entry of a civil no-contact order does not directly affect a person's ability to obtain those permits (with the exception that the entry of such an order may bear on an applicant's character and fitness for a purchase permit for the five-year lookback period). Further, while G.S. 50B-3.1 expressly authorizes the court to order the surrender of guns as a part of a DVPO when certain conditions are met, Chapter 50C contains no such authorization. At least one case has held that a trial court had no authority to prohibit possession of firearms as a part of a civil no-contact order. *Russell v. Wofford*, 260 N.C. App. 88 (2018) (trial court exceeded authority under Chapter 50C in ordering defendant to refrain from possessing firearms, to surrender his firearms, and by revoking his carry concealed permit) (as discussed by my colleague Cheryl Howell here). However, firearms were not directly at issue in *Russell*, and the result may be different where there is evidence of use or threatened use of a firearm in the case.

Committed to a Mental Institution. Federal law prohibits people who have been committed to a mental institution from gun possession under 18 U.S.C. 922(g)(4). "Committed to a mental institution" in this context means a formal commitment order by a court, board, commission, or other lawful authority of a person at least 16 years old. This includes substance abuse commitments but does not include admission for observation or voluntary admission to a mental health facility. 27 CFR 478.11 ("Committed to a mental institution"). With a patient who voluntarily admits his or herself or who is discharged after involuntary admission for examination but before a formal commitment order by a district court is entered, it seems that federal firearms ban is not triggered.

North Carolina law does not specifically ban people who have been involuntarily committed from possessing a firearm. State law prohibits a person who has been committed to a mental institution from qualifying for a purchase permit under G.S. 14-404(c)(4). Our concealed carry permit law prohibits issuance of the permit to a person "adjudicated by a court or administratively determined by a governmental agency . . . to be mentally ill," which would seemingly cover people who have been involuntarily committed. G.S. 14-415.12(b)(6).

There does not appear to be any state authority in Chapter 122C or elsewhere permitting a North Carolina court to order the seizure or surrender of guns following an involuntary commitment, even when the federal ban applies (and even where the conduct leading to commitment involved

firearms). A district court judge who knows that a mentally ill and dangerous person has access to firearms can seek to persuade the person to voluntarily surrender the weapons or else may ask for the assistance of federal authorities to enforce the federal law.

There is a process to restore state and federal gun rights following a commitment or other mental health disqualification pursuant to G.S. 14-409.42. For more information on this type of disqualification, see Benjamin M. Turnage, John Rubin, & Dorothy T. Whiteside, North Carolina Civil Commitment Manual § 12.3, Firearm Ownership and Possession (UNC School of Government, 2d ed. 2011).

Adjudication of Incompetence or Incapacity. The same provision of federal law prohibits gun possession by a person who has been "adjudicated as a mental defective." 18 U.S.C. 922(g)(4). This means there has been a determination by a court, board, commission, or other lawful authority that a person is a danger to himself or others or lacks the mental capacity to control his own affairs because of mental illness, incompetency, or other condition or disease. 27 CFR 478.11 ("Adjudicated as a mental defective"). This seems to cover a person found to be incompetent under Chapter 35A of the North Carolina General Statutes. This provision also applies to determinations in criminal cases. It expressly includes people found not guilty by reason of insanity in a criminal case. The definition does not specifically include a state finding of incapacity to proceed to trial in a criminal case, but a state court finding that a person is incapable of proceeding may meet the federal definition of one lacking the capacity to control his or her own affairs.

Under state law, the permit schemes again seem to prohibit the issuance of a permit to a person falling into this category. G.S. 14-404(c)(4) bars a person who has been adjudicated incompetent from obtaining a purchase permit, and G.S. 14-415.12 bars the issuance of a carry concealed permit to one lacking mental capacity. Beyond permits, G.S. 14-415.3 bars possession of any firearm by a person who has been found not guilty by reason of insanity or found to lack capacity to proceed in regards to any felony offense or certain assault crimes. People found to lack capacity or to be found not guilty by reason of insanity for other offenses, as well as people adjudicated incompetent, are not otherwise barred from gun possession under state law.

The restoration of rights process in G.S. 14-409.42 also applies to people in this category, in addition to the broader restoration process in G.S. 35A-1130 for people adjudicated incompetent.

Age Limits. Federal law limits the age at which a person may lawfully purchase a firearm or ammunition but does not otherwise regulate the age at which guns may be lawfully possessed. Under 18 U.S.C. 922(b)(1), people under the age of 18 may not purchase a shotgun, rifle, or ammunition for those weapons from a federally licensed dealer, and people under the age of 21 similarly cannot purchase a handgun or handgun ammo from a licensed dealer. This federal age-based purchase prohibition was recently the subject of a successful challenge under the Second Amendment, but between the initial panel decision and en banc review, the plaintiffs reached the age of majority, and the case was mooted, vacating the panel decision. *See Hirschfeld v. ATF*, 5

F.4th 407 (4th Cir. 2021), *overruled by Hirschfeld v. ATF,* 14 F.4th 322 (4th Cir. 2021) (en banc).

Turning to state law, North Carolina generally prohibits the possession of a handgun by anyone under the age of 18. G.S. 14-269.7. There is no similar age prohibition for possession of rifles or shotguns under state law, although G.S. 14-316(a) bans possession of any firearm by a child under the age of 12 unless the child has permission of a parent or guardian and is under supervision of an adult. Assuming no other disability, there is no explicit state or federal prohibition on possession of a rifle or shotgun to a child under 18 but over 12 years of age. That said, a court likely has the authority to require a parent or guardian to take possession of the firearm(s) on behalf of a child as a condition of return, depending on the circumstances of the case. *See* G.S. 7B-3400 ("Juvenile under 18 subject to parents' control").

Other grounds. A few other grounds for disqualification are worth a quick mention. Federal law also restricts possession of firearms by a person under indictment for an offense punishable by more than a year in prison, by a person who is an unlawful user of or who is addicted to a controlled substance, by people not lawfully present in the country, by a person who received a dishonorable discharge from the Armed Forces, by a person who has renounced U.S. citizenship, and by a fugitive from justice, among other grounds in 18 U.S.C. 922(g). State law mirrors many of those provisions regarding such individuals' ability to obtain a purchase or carry concealed permit but does not otherwise ban possession by people in these categories.

Second Amendment Concerns. Most readers are likely aware of the recent decision by the U.S. Supreme Court in *New York Rifle and Pistol Association Inc., v. Bruen*, 142 S. Ct. 2111 (2022). The impact of the decision reaffirming the fundamental, individual right to keep and carry firearms has yet to be seen in the state or the circuit, but I suspect we may see challenges to some of the regulations discussed above in its aftermath. Stay tuned in that regard.

Practical Advice. To ensure that the court has all relevant information when deciding to return guns, a judge should likely order a full background check pursuant to the National Instant Criminal Background Check System ("NICS") on the person seeking return of the weapons. The parties to the action may be unaware of a disqualification to possess firearms that a NICS check will reveal.

For defendants, where there is any doubt about eligibility to possess firearms under state or federal law, the safest course of action may be to seek declaratory relief in either (or both) jurisdictions. *See generally Britt v. State*, 363 N.C. 546 (2009).

If I've missed anything or if you have any questions, comments, or concerns, please feel free to contact me as always at dixon@sog.unc.edu.

Author's Note: This post was largely inspired and informed by my friend, colleague, and former Pitt County alum Robert T. Broughton, who has carefully studied the interplay between firearms rights and civil commitment. Robb currently serves as a Special Deputy Attorney General for the North

Carolina Department of Justice representing the UNC Health Care System and UNC Hospitals. He and I know each other from his time as a prosecutor in Greenville. Big shout out and thank you to Robb for pointing the issues with the federal ban in the context of state civil commitment. Special thanks to John Rubin, Jeff Welty, and Keith Williams for their helpful feedback as well.