

Relief from a Criminal Conviction (2018 edition)

Firearm Rights after Felony Conviction

This part deals with North Carolina procedures for restoration of the right to possess a firearm after conviction of a nonviolent felony (see Table 24). The restoration procedure, in G.S. 14-415.4, became effective February 1, 2011, meaning that a person who meets the criteria in that statute is eligible for restoration whether his or her offense or conviction occurred before or after February 1, 2011. See S.L. 2010-108 (H 1260), as amended by S.L. 2011-2 (H 18) (clarifying effective date). A person with a nonviolent felony conviction in North Carolina or in another jurisdiction may petition for restoration of firearm rights in North Carolina if the person meets the statutory criteria.[1]

An order granting restoration overrides G.S. 14-415.1, which otherwise bans a person convicted of a felony from purchasing, owning, possessing, or having any firearm or weapon of mass death and destruction as defined in G.S. 14-288.8(c). See G.S. 14-415.4(a), (b). Restoration also removes the felony conviction bar on eligibility for a handgun permit (see G.S. 14-404(c)) and for a concealed handgun permit. See G.S. 14-415.12(b)(3).[2] Restoration does not constitute an expunction or pardon. G.S. 14-415.4(i).

Federal law also imposes a firearms ban for felony convictions. 18 U.S.C. 922(g)(1).[3] Federal law lifts this ban if a person's civil rights have been restored unless the restoration does not permit the person to ship, transport, possess, or receive firearms. 18 U.S.C. 921(a)(20); see also *Caron v. United States*, 524 U.S. 308 (1998). Completion of a felony sentence alone does not lift the federal firearms ban. Although North Carolina law restores a person's civil rights after the person completes his or her sentence, it continues to impose a firearms ban.[4] The North Carolina General Assembly intended to fill this gap by allowing restoration of a person's firearm rights under G.S. 14-415.4. For a discussion of the impact of North Carolina's restoration procedure on the federal firearms ban, see John Rubin, *Restoring State Firearm Rights as a Condition for Restoring Federal Firearm Rights*, N.C. Crim. L., UNC Sch. of Gov't Blog (Sept. 14, 2015).

An expunction of a felony appears to lift North Carolina's firearms ban without a restoration order under G.S. 14-415.4. The North Carolina statutes allowing expunction of a felony lift state law disabilities. See *supra* Overview: Effect of Expunction. Federal law also provides that an expunged conviction does not count as a conviction for the purpose of the federal felony firearms ban unless the expunction provides that the person may not ship, transport, possess, or receive firearms. The question of whether an expunction lifts the federal firearms ban is a question of federal law, beyond the scope of this guide. See 18 U.S.C. 921(a)(20) (exempting expunged conviction from definition of conviction triggering federal felony firearms ban); *Logan v. United States*, 552 U.S. 23 (2007) (recognizing that Congress amended federal law to overrule earlier U.S. Supreme Court decision holding that expunged conviction did not nullify federal firearms ban); see also *Wyoming ex. rel. Crank v. United States*, 539 F.3d 1236 (10th Cir. 2008) (holding that state law expunction must completely remove effect of conviction to lift federal felony

firearms ban); 27 C.F.R. 478.142 (stating that expunction lifts firearms disability if it renders conviction “nugatory”). For a discussion of the impact of a pardon on firearm rights, see *infra* Other Procedures: Pardons.

Federal law imposes other firearms bans, including a ban for a conviction of a “misdemeanor crime of domestic violence.” See 18 U.S.C. 922(g)(9) (prohibition); 18 U.S.C. 921(a)(33) (definition of covered offenses); see also 18 U.S.C. 921(g)(8) (prohibiting firearm possession by person subject to qualifying domestic violence protective order). The meaning of this term is beyond the scope of this guide.[5] If a North Carolina offense is considered a misdemeanor crime of domestic violence within the meaning of federal law and is subject to the federal firearms ban, that ban affects the application of state firearms laws. For example, a person may not obtain a permit to purchase or receive a handgun or carry a concealed handgun if barred by federal law from owning, possessing, or receiving a firearm. See G.S. 14-404(a)(1) (permit to sell, give away, transfer, purchase, or receive handgun); G.S. 14-415.12(b)(1) (concealed handgun permit); see also S.L. 2015-195 (H 562) (effective for concealed handgun permit applications submitted on or after July 1, 2015, adds G.S. 14-415.12(b)(8b) to specifically prohibit issuance of concealed handgun permit to person who is prohibited from possessing firearm under 18 U.S.C. 922(g) as result of conviction of misdemeanor crime of domestic violence). Nor may a state court judge, after the expiration of a domestic violence protective order prohibiting a person from possessing firearms, order the return of firearms to that person if, among other things, the person has been convicted of a misdemeanor crime of domestic violence as defined by federal law. See G.S. 50B-3.1(f); see also AOC-CV-319 (Feb. 2006) (motion for return weapons surrendered under domestic violence protective order); AOC-CV-320 (Feb. 2014) (order). North Carolina law requires that a person receive notice of the possible applicability of the federal firearms prohibition if convicted of a misdemeanor crime of domestic violence. See S.L. 2007-294 (H 1810); see also AOC-CR-617 (Dec. 2007) (Firearm Prohibition Notice).

North Carolina’s restoration process for prior felony convictions does not cover misdemeanor convictions. To lift the federal firearms ban for a misdemeanor crime of domestic violence, if applicable, and the accompanying state law effects, a person would need to obtain an appropriate expunction, pardon, or other relief, such as an order granting a motion for appropriate relief (MAR). This is a question of federal law, beyond the scope of this guide. See 18 U.S.C. 921(a)(33)(B) (stating that federal firearms ban does not apply in those circumstances; also stating that ban does not apply unless person’s right to counsel and right to jury were honored). As a practical matter, a petitioner who qualifies for North Carolina’s felony-based restoration procedure will probably not have a conviction of a misdemeanor crime of domestic violence for federal law purposes. The reason is that under North Carolina law, a person with a felony conviction is not eligible for restoration if he or she has been convicted of any “crimes of violence constituting a misdemeanor.” See G.S. 14-415.4(d)(4); G.S. 14-415.4(e)(6). Because this language includes any misdemeanor crime of violence, it appears to be broader than the federal disqualification, which covers misdemeanor crimes of violence against a person in a domestic relationship. In one respect, the language may be narrower than the federal disqualification. One subsection of the state statute disqualifies a person from restoration if he or she is convicted of a misdemeanor crime of violence after the felony conviction that is the subject of the restoration petition (G.S. 14-415.4(d)(4)). Another subsection, however, appears to disqualify a person if he or she has been convicted of a misdemeanor crime of violence at any time. G.S. 14-415.4(e)(6).[6]

A person who is not eligible for restoration of firearm rights under G.S. 14-415.4 may be able to obtain relief through a civil suit in some circumstances. The General Assembly enacted G.S. 14-415.4 after the North Carolina Supreme Court issued its opinion in *Britt v. State*, 363 N.C. 546 (2009), in which the court

held under the North Carolina Constitution that the ban on possession of firearms by a person convicted of a felony was unconstitutional as applied to the plaintiff, who had one nonviolent felony conviction from 1979. Following the enactment of G.S. 14-415.4, the North Carolina Court of Appeals held in *Baysden v. State*, 217 N.C. App. 20 (2011), *aff'd per curiam by equally divided court*, 366 N.C. 379 (2013), that the ban was unconstitutional as applied to the plaintiff in that case, even though he did not satisfy the criteria for restoration in G.S. 14-415.4 because he had two separate felony convictions rather than one as required by the statute. *See also Johnston v. State*, 224 N.C. App. 282 (2012) (recognizing possibility for relief in civil action but remanding for further proceedings in trial court), *aff'd per curiam*, 367 N.C. 164 (2013). A criminal defendant may defend against a charge of possession of a firearm by a felon under G.S. 14-415.1 by establishing that the firearms restrictions, as applied to him or her, are unconstitutional. *See, e.g., State v. Price*, 233 N.C. App. 386 (2014). Such a strategy is, of course, a risky way for a person to determine whether he or she has the right to possess firearms.

For a listing of state and federal laws regulating firearm possession, see Jeff Welty, North Carolina Gun Law Quick Reference (2018).

Table 24. Restoration of Firearm Rights after Felony Conviction

| Matters Subject to Restoration of Firearm Rights | Principal Restrictions on Restoration of Firearm Rights | Applicable Statutes and Forms |
|---|--|---|
| <ul style="list-style-type: none"> • Conviction of a “nonviolent felony,” as defined in G.S. 14-415.4(a)(2), including multiple nonviolent felony convictions arising out of the same event and consolidated for sentencing, but excluding <ul style="list-style-type: none"> ◦ any Class A through B2 felony, and ◦ any Class C through I felony described in G.S. 14-415.4(a)(2)a., b., c., or d. | <ul style="list-style-type: none"> • No other felony convictions, including a PJC • No misdemeanor conviction of the type described in G.S. 14-415.4(d)(4) and (e)(6), including a PJC • No disqualifying matters described in G.S. 14-415.4(e) • Residence in North Carolina for at least one year immediately before filing of petition • Restoration of citizenship rights for at least 20 years before filing of petition | <ul style="list-style-type: none"> • G.S. 14-415.4 • AOC-CV-654 (Dec. 2017) |

[1] G.S. 14-415.4 contains conflicting language about the length of the waiting period before a person convicted of a felony in another jurisdiction may petition for the restoration of firearm rights in North Carolina. G.S. 14-415.4(c) states that a person may petition the court for a restoration order if his or her

civil rights, including the right to possess a firearm, have been restored in the other jurisdiction for at least 20 years. Under this language, if the other jurisdiction does not have a firearm restoration process, a person who is a resident of North Carolina and has an out-of-state felony conviction may have no right to use the restoration procedure in G.S. 14-415.4. If the state of conviction has a firearm restoration process but imposes a waiting period before restoration—for example, 20 years following the restoration of civil rights, as in North Carolina—then the person may have to wait for that period to expire in the other state, apply for restoration of firearm rights in that state, and then wait an additional 20 years before applying for restoration in North Carolina. On the other hand, G.S. 14-415.4(d)(3) states that the court may grant a petition by a person with an out-of-state felony conviction if he or she has had his or her civil rights restored for 20 years; it makes no mention of a requirement of restoration of firearm rights in the other jurisdiction. If this latter language is controlling, the same waiting period would apply to people with out-of-state and in-state convictions—that is, 20 years following restoration of the person’s civil rights.

A 2011 amendment to North Carolina’s firearms ban, in G.S. 14-415.1, affects the rights of people with out-of-state convictions. Revised G.S. 14-415.1(d) states that the ban does not apply to a person who had his or her firearm rights restored in another jurisdiction if such a restoration could have been granted under North Carolina law. S.L. 2011-268, sec. 13 (H 650) (also lifting ban if person received pardon in other jurisdiction). Although the legislation did not modify the restoration requirements in G.S. 14-415.4, a person with an out-of-state conviction who qualifies under G.S. 14-415.1(d) apparently does not have to petition for restoration in North Carolina. Without a ruling of some kind recognizing that another jurisdiction’s restoration is sufficient, however, a person may not be certain that he or she is protected from criminal prosecution. The legislation does not specify a mechanism for obtaining such a ruling. The statutes authorizing handgun and concealed handgun permits still may require that a person with a prior felony conviction have his or her firearm rights restored under G.S. 14-415.4. *See* G.S. 14-404(c)(1); G.S. 14-415.12(b)(3).

[2] A person who obtains a restoration order still must comply with other laws regulating use and possession of a firearm and other weapons. Thus, a person may not possess a weapon of mass death and destruction unless one of the exceptions in G.S. 14-288.8 applies, and he or she may not obtain a handgun or concealed handgun permit without satisfying the eligibility criteria in the statutes authorizing those permits.

[3] Federal law does not specifically use the term “felony.” Rather, the federal firearms ban applies to people convicted of a “crime punishable by imprisonment for a term exceeding one year.” 18 U.S.C. 922(g)(1). Federal law excludes misdemeanors from this definition if punishable by a term of imprisonment of two years or less (18 U.S.C. 921(a)(20)(B)), which describes almost all misdemeanors in North Carolina. How the quoted language from 18 U.S.C. 922(g)(1) applies to felonies depends on the sentencing scheme then in effect in North Carolina. *See generally McNeill v. United States*, 563 U.S. 816 (2011) (in considering whether a state conviction supports an enhanced sentence based on the possible term of imprisonment for that conviction, a federal court must look at the applicable imprisonment ranges at the time of the defendant’s state conviction); *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011) (en banc) (in considering whether a state conviction supports an enhanced sentence based on the possible term of imprisonment under North Carolina’s structured sentencing scheme, a federal court must look at the sentence the defendant actually could have received, not a hypothetical sentence that an offender with the worst possible record could have received); *U.S. v. Carter*, 471 F. App’x 136 (4th Cir. 2012) (unpublished) (applying the approach in *Simmons* to a federal charge of possession of firearm by felon and holding that the defendant’s conviction under North Carolina’s then-applicable structured

sentencing scheme was not punishable by a term of imprisonment exceeding one year). Effective for offenses committed on or after December 1, 2011, the North Carolina General Assembly added a minimum of nine months of post-release supervision to all felony sentences. In considering the federal offense of possession of a firearm by a felon, the Fourth Circuit held that this revised sentencing scheme makes every North Carolina felony punishable by a term of imprisonment exceeding one year. See *United States v. Barlow*, 811 F.3d 133 (4th Cir. 2015).

[4] The North Carolina statutes restoring citizenship rights, G.S. 13-1 through G.S. 13-4, do not specifically mention any firearms restriction. But, G.S. 14-415.1 makes it clear that a person who has been convicted of a felony is subject to a permanent firearms ban unless the person obtains relief from the ban. Consequently, completion of a felony sentence alone does not lift the federal firearms ban. See *United States v. Newbold*, 215 F. App'x 289, 295–96 (4th Cir. 2007) (unpublished) (reviewing the “whole of state law” and finding that the defendant’s completion of a North Carolina felony sentence did not restore the defendant’s firearm rights under state law and therefore the defendant remained subject to the federal firearms bar); AOC-CR-919 (May 2013) (certificate of restoration of citizenship rights for person with out-of-state conviction states that the certificate does not restore the person’s firearm rights; previous version of form did not include this statement).

Some circuits have held that “[i]f a state sends a document to a convicted felon that seems to restore all civil rights, the conviction does not count for federal purposes unless the document warns the person about a lingering firearms disability.” See *Buchmeier v. United States*, 581 F.3d 561, 566 (7th Cir. 2009) (treating rules as an “anti-mousetrapping provision”). The Fourth Circuit does not share this view. *United States v. McLean*, 904 F.2d 216 (4th Cir. 1990). The Fourth Circuit has held, however, that older North Carolina felony convictions do not necessarily trigger the federal firearms ban. See *United States v. Burlison*, 815 F.3d 170 (4th Cir. 2016) (holding that defendant’s firearm rights were automatically restored under then-applicable North Carolina law and that amendment of North Carolina law in 1995 to impose permanent firearms ban did not change defendant’s status under federal law; court expressed no opinion on whether defendant could be prosecuted under state law for possession of firearm by felon); cf. *State v. Johnson*, 169 N.C. App. 301 (2005) (upholding state law conviction under similar circumstances).

[5] See *Voisine v. United States*, ___ U.S. ___, 136 S. Ct. 2272 (2016); *United States v. Vinson*, 805 F.3d 120 (4th Cir. 2015); see also *Underwood v. Hudson*, 244 N.C. App. 535 (2015) (communicating threat and stalking convictions did not constitute misdemeanor crimes of domestic violence). For a further discussion, see Jeff Welty, *Vinson, Voisine, and Misdemeanor Crimes of Domestic Violence*, N.C. Crim. L., UNC Sch. of Gov't Blog (July 18, 2016).

[6] Another federal firearms ban applies to a person “who has been adjudicated as a mental defective or who has been committed to a mental institution.” 18 U.S.C. 922(g)(4); 27 C.F.R. 478.11(b) (applying ban to person found not guilty by reason of insanity); see also G.S. 14-415.3 (banning firearm possession under state law by person found not guilty by reason of insanity or incapable to proceed for most felonies and misdemeanor assault by pointing a gun). North Carolina has a firearms restoration procedure for people who have been involuntarily committed. See G.S. 14-409.42 (formerly G.S. 122C-54.1), revised by S.L. 2015-195 (H 562); see also G.S. 14-415.3(c) (stating that restoration procedure applies to people found not guilty by reason of insanity or incapable to proceed). For a discussion of the federal firearms ban in the commitment context, 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). *See also* G.S. 14-409.43(a)(7) (requiring notice to National Instant Criminal Background Check System (NICS) of removal of disabilities pursuant to G.S. 14-409.42).

Accessibility

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