

**THE TOP 10 THINGS YOU NEED TO KNOW  
ABOUT FEDERAL GUN LAW**

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Federal gun crimes are being prosecuted as never before. Attorney General John Ashcroft announced in a press release on December 11, 2003, that “[i]n the past three years, federal gun crime prosecutions have increased by 68 percent.” In 2003, federal prosecutors “set a new Justice Department record with nearly 23 percent more defendants charged with gun crimes in one year.”

You may think that none of this matters to you, because you do not practice in federal court. Think again. All of us who handle criminal or domestic cases in state court need to have a general understanding of the federal gun laws. Why? Because those state cases often lay the foundation for a later federal gun prosecution. We need to be familiar with the basics of federal gun law, and we need to make our clients aware of their peril.

I cannot give you an exhaustive statement of federal firearms law, but I can give you ten important things to remember (in no particular order) when advising your clients:

**1. No guns for felons.** Most of us are familiar with the rule that a convicted felon cannot possess a gun. The federal rule is found in one of the main firearm statutes, 18 U.S.C. § 922(g)(1). It says that anyone “who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year” is barred from possessing a gun. The only felonies that are not covered by the federal gun ban are 1) those “pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices,” per 18 U.S.C. § 921(a)(20)(A); and 2) felony convictions from foreign countries, per *Small v. United States*, --- U.S. ---, 2005 WL 946620 (April 26, 2005).

Note that even the lowest level felony in North Carolina, a Class I, is punishable by imprisonment for more than twelve months. It does not matter that your client’s prior record level may be at the low end of North Carolina’s Structured Sentencing Act, yielding a maximum sentence of less than 12 months’ imprisonment in his particular case. All that matters is that at the highest end of the state sentencing chart (Level VI), it is possible for a Class I felon to receive a sentence of imprisonment in the aggravated range of punishment that is greater than twelve months.

What about misdemeanor convictions for driving while impaired, which carry a maximum sentence of two years imprisonment – are they subject to the federal gun ban? No, because a separate federal statute, 18 U.S.C. § 921(a)(20)(B), says that a “crime

punishable by imprisonment for a term exceeding one year” does not include “any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.” As a result, DWI convictions do not trigger the federal gun ban. Neither do old, two-year misdemeanor convictions from North Carolina’s Fair Sentencing Act (the sentencing scheme in place prior to the Structured Sentencing Act).

There are some exceptions, however – some state misdemeanor convictions that implicate the federal gun ban. Read on.

**2. *No guns after misdemeanor criminal domestic violence convictions and no guns during the time that a DVPO is in effect.*** Under federal law, anyone who has a criminal domestic violence conviction is barred from possessing a gun. Forever. As 18 U.S.C. § 922(g)(9) says, “[i]t shall be unlawful for any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence . . . to possess in or affecting commerce any firearm or ammunition.”

Under 18 U.S.C. § 921(a)(33), a “misdemeanor crime of domestic violence” is any misdemeanor that “has, as an element, the use or attempted use of physical force, or the 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.”

What does that mean? If someone has a state court conviction for simple assault, assault on a female, or any other misdemeanor assault, and if the victim is the client’s spouse, live-in partner, child, or anyone else “similarly situated,” then the client is forever barred by federal law from possessing a gun. The same applies to convictions for communicating threats, when the client threatens to use a deadly weapon against one of the victims named above. The client can never again possess a gun; if he does, he can be prosecuted in federal court and receive up to ten years in federal prison.

What if, in state court, a client is charged with misdemeanor assault but the magistrate fails to put the “domestic violence” label on the case? That makes no difference in federal court. If the client and the victim are related or connected as described above, the case will still qualify as a “crime of domestic violence” in federal court.

Domestic violence protective orders (DVPO’s) also fall within the federal firearms ban, but only for the length of time that the DVPO is in effect in state court. Anyone who “is subject” to a DVPO is barred from possessing a firearm, per 18 U.S.C. § 922(g)(8). Once the DVPO expires in state court (usually after one year, but it can be extended), the federal firearms ban goes away, because the person no longer “is subject” to the DVPO.

Practice tip: if you have someone charged with a civil DVPO as well as a misdemeanor domestic violence crime in state court, try to arrange a deal in which you agree to the DVPO in exchange for a dismissal of the criminal charge. After the DVPO expires, your client will be able to get his guns back.

**3. Does a PJC help?** No. There is an argument to be made under 18 U.S.C. § 921(a)(20) that for purposes of the federal gun ban, a person has been “convicted” of a state law crime only if the disposition of his case in state court qualified as a “conviction” under state law. You could use this section to argue that because a PJC is not a conviction under North Carolina law, it is not considered to be a “conviction” under federal law and thus it does not trigger the federal gun ban.

Two problems with this argument. First, the argument has a very limited scope of potential application. This portion of the federal gun statute deals only with prior felony convictions; it does not have anything do with prior convictions for misdemeanor crimes of domestic violence. So you cannot make the argument for a PJC on a misdemeanor domestic violence crime; you can only make it if your client received a PJC on a felony.

Second, a recent decision from the Court of Appeals says that a PJC in a felony case still qualifies as a “felony conviction” for purposes of the North Carolina felon in possession statute. *State v. Friend*, --- N.C. App. ---, 609 S.E.2d 473 (March 15, 2005). That means that if the federal courts look to North Carolina law, they will see that a PJC is considered to be a conviction for purposes of the state gun ban. This will almost certainly cause the federal courts to conclude that it is also a conviction for purposes of the federal gun ban.

Bottom line: a PJC is no help at all.

**4. The federal gun ban includes some people who are only under indictment!** Anyone who is “under indictment for a crime punishable by imprisonment for a term exceeding one year” is not allowed “to ship or transport . . . any firearm or ammunition or receive any such firearm or ammunition.” 18 U.S.C. § 922(n).

The meaning of this statute is a bit unclear. At the very least, it bars anyone under indictment from “receiving,” or acquiring, a gun that they did not own before being indicted. But what about guns that someone owned before they were indicted? Are they required to get rid of them after the indictment is handed down?

The express terms of the statute mention only shipping, transporting, and receiving a gun, not possessing one. In comparison, the federal statute that applies the gun ban to convicted felons and to those with misdemeanor domestic violence convictions expressly bans possession, as well as shipping, transporting, and receiving. You can make a strong argument based on the wording of the statute that someone under indictment is allowed to *possess* a gun he owned before being indicted, even if he is not allowed to ship, transport, or receive it.

But when does possession become transporting? And when does it become shipping? In my opinion, the issues are too murky, and the stakes are too high. The safer and better practice is probably to advise all clients under indictment to get rid of their guns and not to have anything to do with any guns while the indictment is pending.

**5. *No guns for drug users.*** Federal law also says that any person “who is an unlawful user of or addicted to any controlled substance” is barred from possessing guns. 18 U.S.C. § 922(g)(3). What does that mean? Good question. “[T]he exact reach of the statute is not easy to define,” to say the least! *United States v. Jackson*, 280 F.3d 403, 406 (4th Cir.), *cert. denied*, 536 U.S. 911 (2002).

The consensus seems to be that the statute does not apply to “infrequent” drug users or to those who used drugs in the “distant past.” Instead, it is aimed at those whose drug use is “sufficiently consistent, ‘prolonged,’ and close in time to [their] gun possession to put [them] on notice that [they] qualified as an unlawful user of drugs under the statute.” *United States v. Edwards*, 38 Fed. Appx. 134, 138 (4th Cir. 2002), *cert. denied*, --- U.S. ---, 123 S.Ct. 1764 (2003).

The bottom line is that if you have someone with a drug problem, you should tell them to get rid of their guns. If it is a close call, tell them about the law and let them decide if they want to take the risk of owning a gun.

**6. *Is there an exception for guns that someone keeps in their own home or business?*** Never under federal law and not any more under state law. There *used to be* a state law that allowed a convicted felon to keep a gun “within his own home or on his lawful place of business.” N.C. Gen. Stat. § 14-415.1(a). But that provision was deleted effective December 1, 2004. And even prior to the change in the law, the state exception had no effect on the federal gun ban. If someone was barred by federal law from possessing a gun (because they were a convicted felon, a drug addict, etc.), they were not allowed to possess a gun *even in their own home or business* as a matter of federal law. The old North Carolina law was no defense to a federal gun prosecution. As the Fourth Circuit put it, “the fact that state law permitted [the defendant] to possess a firearm in his home despite his status as a convicted felon whose civil rights had not been restored [was] not sufficient to insulate him from federal prosecution.” *United States v. King*, 119 F.3d 290, 293 (4th Cir. 1997).

**7. *What about long guns?*** Prior to December 1, 2004, North Carolina’s felon-in-possession statute prohibited only the possession of a “handgun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches.” N.C. Gen. Stat. § 14-415.1(a). Effective December 1, 2004, however, the statute changed. It now says that it shall be unlawful for any convicted felon to “to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction.” The statute goes on to define the term “firearm” by borrowing the federal definition found in 18 U.S.C. § 921(a)(3): “any weapon, including a starter gun, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive.” The term “firearm” also includes the frame of a weapon and

silencers. The length of the gun is now irrelevant; whether long or short, it cannot be possessed by a felon.

And even though a felon's possession of a long gun may have been permitted by state law prior to December 1, 2004, it has always been prohibited by federal law. So even before December 1, 2004, a felon in possession of a long gun was violating the federal ban on gun possession.

**8. *It's not just a ban on guns – it also includes ammunition.*** The federal gun laws prohibit possession of “any firearm or ammunition.” 18 U.S.C. § 922(g). “Ammunition” is defined as “cartridge cases, primers, bullets, or propellant powder designed for use in any firearm.” 18 U.S.C. § 921(a)(17)(A). I have heard anecdotally of a state prosecutor giving a case to the United States Attorney's Office to prosecute based on the fact that the defendant possessed a single bullet. That is ammunition and therefore enough to trigger prosecution in federal court.

**9. *Ignorance of the law is no excuse.*** It does not matter if someone is unaware of the federal firearms ban. In *United States v. Mitchell*, 209 F.3d 319, 322-23 (4th Cir.), *cert. denied*, 531 U.S. 849 (2000) the Fourth Circuit said that the Government is not required to show that a defendant knew that federal law prohibited him from possessing a gun. If the defendant knew that he possessed the gun and knew that he was a convicted felon (or knew that he was a person with a conviction for a misdemeanor crime of domestic violence, a drug addict, etc.), that is enough for him to be prosecuted in federal court. It does not matter whether he was aware that federal law prohibited him from possessing a gun. “The only knowledge the government was required to prove . . . was knowledge of the possession.” *Id.* (citations omitted).

**10. *Can a felon ever regain the right to own a gun by having his civil rights restored?*** Theoretically yes, but practically no. 18 U.S.C. §§ 921(a)(20) and (a)(33)(B)(ii) say that “[a]ny 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” the federal gun ban. To determine whether someone's civil right to own a gun has been restored, federal courts “look to the law of the jurisdiction of conviction . . . and consider the jurisdiction's entire body of law.” *United States v. O'Neal*, 180 F.3d 115, 119 (4th Cir.), *cert. denied*, 528 U.S. 980 (1999).

This means that if a client has a North Carolina felony conviction, the federal courts will look to North Carolina law to determine if his civil rights have been restored. If they have been restored under North Carolina law, then the federal authorities will not be able to prosecute him for being a felon in possession of a gun.

The problem is that North Carolina law does not ever restore the civil right to own a gun to a felon. As of December 1, 1995, N.C. Gen. Stat. § 14-415.1 provides that anyone convicted of a felony forever loses the right to own a firearm, and North Carolina makes no provision for restoration of a felon's right to own a gun. With no restoration of

rights under state law, our clients can never regain their right to own a gun under federal law.

What if your client was convicted of a felony in state court before December 1, 1995? Would he have different law applied to him? Unfortunately, the answer is no. It is true that prior to December 1, 1995, N.C. Gen. Stat. § 14-415.1 automatically restored the client's right to own a gun five years after he either finished his prison time or completed his probation. It was hoped that if a client had his right to own a gun restored to him prior to December 1, 1995, under the old version of the statute, and if that same client was later prosecuted for being a felon in possession under the new version of the statute after December 1, 1995, then he could argue that application of the new law to his case was a violation of his *ex post facto* rights.

On April 5, 2005, however, the Court of Appeals said that there was no *ex post facto* violation on these facts. “[A] statute which forbids possession of a firearm by a convicted felon does not violate the *ex post facto* clause even when the felony for which the defendant was convicted took place before the enactment of the [felon in possession] statute.” *State v. Johnson*, --- N.C. App., 2005 WL 756283 (2005). So the *ex post facto* argument is a dead letter.

Is there any other way to regain the right to own a gun? In theory, you can make application to the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) under 18 U.S.C. § 925(c) to request restoration of your gun rights. The application is supposedly granted if “it is established . . . that the circumstances . . . and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest.”

The problem is that since October 1992, Congress has prohibited ATF from spending any money to handle such applications. If you submit the application, ATF will not act on it. They will simply return it with an explanation that they cannot process it, due to a lack of available funds. Someone who went through this procedure sued in federal court, arguing that the court should bypass Congress in order to make available a procedure to restore the right to own a gun. The Supreme Court rejected the argument in *United States v. Bean*, 537 U.S. 71 (2002).

In sum, the federal gun laws are tough, and they are being aggressively prosecuted by the United States Attorneys. Keep them in mind when you advise your clients in state court.