

Sections from Trial Judges Bench Book, Volume 1 Family Law 2016

Chapter 7 Domestic Violence

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A. Relief Authorized in Ex Parte DVPO

1. Under certain circumstances, the court must order the defendant to surrender firearms, ammunition, and permits. [G.S. 50B-3.1.]
 - a. The court must ask the plaintiff, at an ex parte or emergency hearing, about (1) the defendant's ownership of or access to firearms, ammunition, or permits to purchase firearms or to carry concealed firearms and (2) identifying information for those items. [G.S. 50B-3.1(b).]
 - b. Upon issuance of an ex parte order, the court must order the defendant to surrender all firearms, machine guns, ammunition, and permits to purchase and carry concealed firearms that are in the defendant's care, custody, possession, ownership, or control if the court finds that the defendant:
 - i. Used or threatened to use a deadly weapon, or has a pattern of prior conduct involving the use or threatened use of a firearm against a person; or
 - ii. Has made threats to seriously injure or kill the aggrieved party or minor child; or
 - iii. Has made threats to commit suicide; or
 - iv. Has inflicted serious injuries upon the aggrieved party or minor child. [G.S. 50B-3.1(a).]
 - c. It is error for the court to enter an order requiring surrender of firearms without making one of the findings required by G.S. 50B-3.1(a). [*Stancill v. Stancill*, 773 S.E.2d 890 (N.C. Ct. App. 2015).]
 - d. Finding that defendant threatened suicide was sufficient to support order of surrender of firearms as part of an ex parte protective order. [*Stancill v. Stancill*, 773 S.E.2d 890 (N.C. Ct. App. 2015).]
 - e. G.S. Chapter 50B does not give the trial court authority to order that law enforcement search the defendant's person, vehicle, and residence and seize any weapons found. [*State v. Elder*, 368 N.C. 70, 773 S.E.2d 51 (2015), *aff'g as modified* 232 N.C. App. 80, 753 S.E.2d 504 (2014).]
 - f. An ex parte order is a "protective order" for purposes of G.S. 14-269.8 and 50B-3.1. [*State v. Poole*, 228 N.C. App. 248, 745 S.E.2d 26, *writ and review denied, appeal dismissed*, 367 N.C. 255, 749 S.E.2d 885 (2013).]
 - g. For a discussion of a defendant's right to have surrendered firearms returned and the procedure therefore, see [Section VI.A](#), below.

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B. Relief Authorized in DVPO

1.[DVPO may:]
 - a. Prohibit a party from purchasing a firearm for a time certain; [G.S. 50B-3(a)(11).
.....]
2. Under certain circumstances, the court must order the defendant to surrender firearms, machine guns, ammunition, and permits. [G.S. 50B-3.1.]
 - a. Surrender of firearms, machine guns, ammunition, and permits.
 - i. The court must ask plaintiff about the presence of, ownership of, or access to firearms, ammunition, or permits to purchase firearms or to carry concealed firearms by defendant, and identifying information for those items. [G.S. 50B-3.1(b).]
 - ii. The court must ask defendant about the presence of, ownership of, or access to firearms, ammunition, or permits to purchase firearms or to carry concealed firearms, and identifying information for those items. [G.S. 50B-3.1(c).]
 - iii. Upon issuance of an emergency or ex parte protective order, the court must order defendant to surrender all firearms, machine guns, ammunition, and permits to purchase firearms or to carry concealed firearms in defendant's care, custody, possession, ownership, or control if the court finds that defendant:
 - (a) Used or threatened to use a deadly weapon, or has a pattern of prior conduct involving the use or threatened use of a firearm against a person; or
 - (b) Has made threats to seriously injure or kill the aggrieved party or minor child; or
 - (c) Has made threats to commit suicide; or
 - (d) Has inflicted serious injuries upon the aggrieved party or minor child. [G.S. 50B-3.1(a).]
 - iv. An ex parte order is a "protective order" for purposes of G.S. 14-269.8 and 50B-3.1. [*State v. Poole*, 228 N.C. App. 248, 745 S.E.2d 26, writ and review denied, appeal dismissed, 367 N.C. 255, 749 S.E.2d 885 (2013).]
 - v. A court must make findings on the factors listed in G.S. 50B-3.1(a) before ordering a defendant to surrender a firearm, even if the court is using an AOC form order. [*Howe v. Howe*, 214 N.C. App. 193, 714 S.E.2d 529 (**unpublished**) (when trial judge failed to check any boxes representing the required statutory findings, it was error to order defendant to surrender his firearms; that portion of the order was reversed, instead of remanded for

findings, when there was no evidence to support a finding that defendant engaged in any act that would warrant surrender), *appeal dismissed, review denied*, 365 N.C. 355, 718 S.E.2d 151, *review denied*, 732 S.E.2d 345 (2011).]

- b. Order for surrender of firearms.
 - i. G.S. 50B-3.1(d) allows the trial court to order a defendant to immediately surrender to the sheriff all firearms, machine guns, ammunition, permits to purchase firearms, and permits to carry concealed firearms that are in the care, custody, possession, ownership, or control of the defendant. [*See State v. Elder*, 232 N.C. App. 80, 753 S.E.2d 504 (2014) (applying the dictionary definition of “surrender” to find that G.S. 50B-3.1 requires a defendant, upon service of an emergency or ex parte order, to “immediately yield” to a law enforcement officer the weapons and permits set out in [Section V.E.4.a](#), above), *aff’d as modified*, 368 N.C. 70, 773 S.E.2d 51 (2015).]
 - ii. It is error for the trial court to order surrender of weapons and permits without making one of the findings of fact required by G.S. 50B-3.1(a). [*Stancill v. Stancill*, 773 S.E.2d 890 (N.C. Ct. App. 2015).]
 - iii. G.S. 50B-3.1(d) does **not** give the trial court authority to order law enforcement to search defendant’s person, vehicle, or residence for weapons and to seize the weapons. [*State v. Elder*, 368 N.C. 70, 773 S.E.2d 51 (2015), *aff’g as modified* 232 N.C. App. 80, 753 S.E.2d 504 (2014).]
 - iv. If the court orders surrender of firearms, the order must provide that defendant is prohibited from possessing, purchasing, or receiving a firearm as long as the protective order or any successive protective order is in effect. [G.S. 50B-3.1(d)(1).] Defendant is also prohibited from attempting any of these acts. [G.S. 50B-3.1(d)(1).]
 - (a) This provision was effective Dec. 1, 2011, and is applicable to offenses committed on or after that date. [S.L. 2011-268, § 23.]
 - (b) Prosecutions for offenses committed before Dec. 1, 2011, are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions. [S.L. 2011-268, § 26.]
 - v. Prior to Dec. 1, 2011, G.S. 50B-3.1(d)(1) prohibited “ownership” of a firearm.
 - (a) If the court orders surrender of firearms, the order must provide that defendant is prohibited from owning, possessing, purchasing, or receiving a firearm as long as the protective order or any successive protective order is in effect. [G.S. 50B-3.1(d)(1).] Defendant is also prohibited from attempting any of these acts. [G.S. 50B-3.1(d)(1).]

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C. Return of Surrendered Firearms

1. No protective order entered at the expiration of an ex parte or emergency order. [G.S. 50B-3.1(e).]
 - a. If no protective order is entered at the expiration of an ex parte or emergency order, defendant may retrieve a surrendered weapon unless the court finds that defendant is precluded from owning or possessing a firearm by:
 - i. State or federal law [See [Section VI.B](#), below] or
 - ii. Final disposition of criminal charges arising from acts against the domestic violence victim. [G.S. 50B-3.1(e).]
 - b. A sheriff may not return surrendered firearms to a defendant unless the court orders the return of firearms after concluding that defendant is not precluded from owning or possessing a firearm. [G.S. 50B-3.1(d)(2).]
2. Motion for return at expiration of a protective order or final disposition of criminal charges. [G.S. 50B-3.1(f).]
 - a. The defendant must timely file a motion.
 - i. A defendant must file a motion for return of a firearm or other covered item no later than ninety days after expiration of a protective order or final disposition of any pending criminal charges for acts against the domestic violence victim. [G.S. 50B-3.1(f).]
 - b. Hearing required.
 - i. Upon receipt of a motion for return, the court must schedule a hearing and provide written notice to the domestic violence victim, who has the right to appear and be heard, and to the sheriff who has control of the items. [G.S. 50B-3.1(f).]
 - c. At the hearing, the court must:
 - i. Determine whether defendant is subject to any state or federal law or court order that precludes defendant from owning or possessing a firearm; [G.S. 50B-3.1(f). See [Section VI.B](#), below, for a partial list of federal and state statutes that ban firearms.]
 - ii. Inquire whether:
 - (a) The protective order has been renewed;
 - (b) Defendant is subject to any other protective orders;
 - (c) Defendant is disqualified from owning or possessing a firearm pursuant to 18 U.S.C. § 922 or any state law;
 - (d) Defendant has any pending criminal charges, in either state or federal court, for acts committed against the domestic violence victim; [G.S. 50B-3.1(f).]

- iii. Make findings;
 - (a) G.S. 50B-3.1(f) requires the trial court to conduct an inquiry before returning a defendant's firearms and to find facts as to the only substantive issue raised by the motion for the return of weapons defendant had surrendered: whether defendant was subject to any state or federal law or court order precluding defendant from owning or possessing a firearm. [*Gainey v. Gainey*, 194 N.C. App. 186, 669 S.E.2d 22 (2008) (when trial court did not address this issue and instead directed return of firearms to defendant after finding that sheriff had illegally seized them, the legality of which was not raised by defendant's motion and on which no relevant evidence was presented, matter was reversed and remanded for court to conduct the proper inquiry).]
- iv. Deny the motion for return of a firearm or other covered item if the court finds that:
 - (a) Defendant is prohibited from owning or possessing a firearm pursuant to state or federal law or
 - (b) There are current criminal proceedings, state or federal, pending against defendant for acts against the domestic violence victim. [G.S. 50B-3.1(f).]

D. Statutes Banning Firearms and Statutes Addressing Removal of Firearms Bans

The statutes discussed below comprise a partial list of federal and state statutes that ban firearms or address removal of a firearms ban.

- 1. Person mentally defective, adjudicated incompetent, or committed to a mental institution.
 - a. Federal disability and restoration.
 - i. 18 U.S.C. § 922(g)(4) makes it unlawful for a person who has been adjudicated a "mental defective" or who has been committed to a mental institution to possess any firearm or ammunition. [*See Gainey v. Gainey*, 194 N.C. App. 186, 669 S.E.2d 22 (2008) (order directing return of surrendered weapons was reversed and matter remanded for court to consider whether defendant was precluded by this law from owning or possessing a firearm; appellate court noted the "highly persuasive" evidence that defendant had been committed to a mental institution two years prior to entry of the ex parte domestic violence protective order).] Page 4 of Form AOC-CV-319, Motion for Return of Weapons Surrendered under Domestic Violence Protective Order and Notice of Hearing, sets out 18 U.S.C. § 922(g) in its entirety.
 - ii. 18 U.S.C. § 925(c) sets out a procedure for a person prohibited from possessing or receiving firearms or ammunition to apply to the U.S. Attorney General for relief from federal firearms disabilities, which may be granted if the applicant establishes to the satisfaction of the Attorney General that she 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. However, the Bureau of Alcohol, Tobacco, Firearms and Explosives, the agency to whom an application for restoration of firearm privileges is to be made, states on its website that it is no longer making the restoration form available due to Congressional appropriation restrictions and recommends that persons seeking relief from a federal firearm disability seek a presidential pardon. [See www.atf.gov/forms/download/atf-f-3210-1-notice.html; BENJAMIN M. TURNAGE, JOHN RUBIN, & DOROTHY T. WHITESIDE, NORTH CAROLINA CIVIL COMMITMENT MANUAL ch. 12 and app. D (UNC School of Government, 2d ed. 2011) (hereinafter CIVIL COMMITMENT MANUAL), www.sog.unc.edu/publications/books/north-carolina-civil-commitment-manual-second-edition.]

- b. State disability and restoration.
 - i. G.S. 14-404(c)(4) prohibits issuance of a permit for the purchase or receipt of a pistol (handgun permit) to a person who has been adjudicated mentally incompetent or who has been committed to any mental institution.
 - (a) An applicant shall not be ineligible to receive a handgun permit under G.S. 14-404(c)(4) because of involuntary commitment to mental health services if the individual's rights have been restored under G.S. 14-409.42 (formerly G.S. 122C-54.1). [G.S. 14-404(g), *added by* S.L. 2008-210, § 3.(a), effective Dec. 1, 2008; *amended by* S.L. 2015-195, § 11.(b), effective Aug. 5, 2015, to recodify G.S. 122C-54.1(a) as G.S. 14-409.42(a).]
 - (b) However, S.L. 2013-369, § 9, effective Oct. 1, 2013, removed G.S. 14-404 from the list of statutes eligible for removal of disability by petition under G.S. 122C-54.1(a). G.S. 14-404(g) was not amended and continued to reference restoration under G.S. 122C-54.1. In 2015, G.S. 404(g) was amended to change the reference from G.S. 122C-54.1 to G.S. 14-409.42, reflecting the recodification of G.S. 122C-54.1 to G.S. 14-409.42 pursuant to S.L. 2015-195, § 11.(b), effective Aug. 5, 2015. The 2015 amendment did not restore G.S. 14-404 to the list of statutes eligible for removal of disability by petition. It is not clear whether G.S. 14-409.42 is available to a person seeking to remove a firearm ban imposed pursuant to G.S. 14-404(c)(4) after Oct. 1, 2013.
 - (c) For a case determining that a trial court erred when it upheld a sheriff's denial of an application for a handgun permit based on G.S. 14-404(c)(4), see *Waldron v. Batten*, 191 N.C. App. 237, 662 S.E.2d 568 (2008) (while plaintiff's mother had petitioned for plaintiff's involuntary commitment some ten years earlier, the statutory requirements for plaintiff's involuntary commitment were never met and nothing in the record showed that plaintiff had voluntarily committed himself to a mental institution).
 - ii. G.S. 14-415.12(b)(6) prohibits issuance of a permit to carry a concealed handgun (concealed handgun permit) to a person who is currently, or has been previously adjudicated by a court or administratively determined by a

governmental agency whose decisions are subject to judicial review to be, lacking mental capacity or mentally ill. Receipt of previous consultative services or outpatient treatment alone shall not disqualify an applicant.

- (a) An applicant shall not be ineligible to receive a concealed carry permit under G.S. 14-415.12(b)(6) because of an adjudication of mental incapacity or illness or an involuntary commitment to mental health services if the individual's rights have been restored under G.S. 14-409.42. [G.S. 14-415.12(c), *amended by* S.L. 2013-369, § 11, effective Oct. 1, 2013; *amended by* S.L. 2015-195, § 11.(l), effective Aug. 5, 2015.]
 - (b) Before the 2013 amendment set out immediately above, G.S. 14-415.12(c) read as follows: An applicant shall not be ineligible to receive a concealed carry permit under [G.S. 14-415.12(b)(6)] because of an involuntary commitment to mental health services if the individual's rights have been restored under G.S. 122C-54.1. [G.S. 14-415.12, *added by* S.L. 2008-210, § 3.(b), effective Dec. 1, 2008.]
 - iii. G.S. 14-409.42 provides a procedure for an individual over the age of 18 to petition for the removal of the mental commitment bar. [S.L. 2015-195, § 11.(b) recodified G.S. 122C-54.1 as G.S. 14-409.42 effective Aug. 5, 2015.]
 - (a) An individual may petition for the removal of the disabilities pursuant to 18 U.S.C. § 922(g)(4) (set out in [Section VI.B.1.a.i](#), above) and G.S. 14-415.12 (set out in [Section VI.B.1.b.ii](#), above) arising out of a determination or finding required to be transmitted to the National Instant Criminal Background Check System by G.S. 14-409.43(1) through (6). The petitioner must establish by a preponderance of the evidence that he 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. [G.S. 14-409.42(a), (c). Note that S.L. 2015-195, § 11.(b), effective Aug. 5, 2015, recodified G.S. 122C-54.1 as G.S. 14-409.42.] Form AOC-SP-211, Petition and Order for Removal of Disability Prohibiting the Purchase, Possession or Transfer of a Firearm, may be used.
 - iv. For a discussion of the collateral consequences of commitment or admission to a mental health treatment facility on the right to own or possess firearms and an overview of involuntary commitment and the Federal Gun Control Act, see CIVIL COMMITMENT MANUAL ch. 12 and app. D, www.sog.unc.edu/publications/books/north-carolina-civil-commitment-manual-second-edition.
2. Person subject to a civil protection order or in violation of a protection order.
 - a. Federal disability.
 - i. 18 U.S.C. § 922(g)(8) makes it unlawful for a person subject to most civil protection orders to possess any firearm or ammunition as long as that protective order remains in effect. [This statute applies to protective orders

restraining conduct toward an “intimate partner” as defined by 18 U.S.C. § 921(a)(32) and requires an active protective order.]

- (a) The Fourth Circuit has held that application of the statute did not violate a defendant’s Second Amendment right to bear arms for self-defense. [*United States v. Chapman*, 666 F.3d 220 (4th Cir. 2012) (applying an intermediate scrutiny standard, defendant’s as-applied Second Amendment challenge was rejected).]
- (b) This provision was correctly applied when the order at issue resulted from defendant’s conviction in state court of assault and battery of a family or household member, with a 30-day sentence suspended for two years upon the judge’s hand-written condition “no violent, threatening or abusive contact [with] victim.” [*United States v. Larson*, 843 F. Supp. 2d 641, 646 n.1 (W.D. Va. 2012) (rejecting defendant’s argument that the court order described immediately above was not the type of order contemplated by the statute and holding that a formal DVPO issued after a hearing pursuant to state law is not required, only a “court order” that satisfies the elements of 18 § U.S.C. 922(g)(8)), *aff’d per curiam*, 502 F. App’x 336 (4th Cir. 2013) (**unpublished**).]

b. State disability.

- i. G.S. 14-404(c)(8) prohibits issuance of a permit for the purchase or receipt of a pistol (handgun permit) to a person who is subject to a court order, issued after notice and a hearing at which the person had an opportunity to participate, that restrains the person from harassing, stalking, or threatening an intimate partner or child of the intimate partner, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or to the partner’s child, if the order includes a finding that the person represents a credible threat as set out therein.
- ii. G.S. 14-269.8 makes it a Class H felony for any person to possess, purchase, or receive, or attempt to possess, purchase, or receive, a firearm, machine gun, ammunition, or permits to purchase and carry concealed firearms if that person is subject to a DVPO or any successive protective order. [G.S. 14-269.8(a), *amended by* S.L. 2011-268, § 7, effective Dec. 1, 2011, and applicable to offenses committed on or after that date.] Prosecutions for offenses committed before Dec. 1, 2011, are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions. [S.L. 2011-268, § 26.]
 - (a) Prior to Dec. 1, 2011, G.S. 14-269.8 made it a Class H felony for any person to own, possess, purchase, or receive, or attempt to possess, purchase, or receive, a firearm, machine gun, ammunition, or permits to purchase and carry concealed firearms if that person is subject to a DVPO or any successive protective order. [See S.L. 2011-268, § 7, eliminating the prohibition against “ownership” in G.S. 14-269.8(a).]
 - (b) An emergency or ex parte order is a “protective order” for purposes of G.S. 14-269.8 and 50B-3.1. [*State v. Poole*, 228 N.C. App. 248, 745

S.E.2d 26, *writ and review denied, appeal dismissed*, 367 N.C. 255, 749 S.E.2d 885 (2013).]

- (c) Criminal prosecution for violation of an ex parte order requiring the surrender of a defendant's firearms does not violate a defendant's due process rights under the U.S. or North Carolina Constitutions. [*State v. Poole*, 228 N.C. App. 248, 745 S.E.2d 26 (basis for a possible due process violation is entry of an ex parte order prior to notice and an opportunity to be heard, but exigencies of the domestic violence context justify a post-deprivation hearing; moreover, deprivation of the right to bear arms is for a short period of time and statutory requirements for issuance of an ex parte order limit the risk of an erroneous deprivation), *writ and review denied, appeal dismissed*, 367 N.C. 255, 749 S.E.2d 885 (2013).]
 - iii. G.S. 50B-3.1(j), in accordance with G.S. 14-269.8, makes it a Class H felony to possess, purchase, or receive, or attempt to do so, a firearm, machine gun, ammunition, or a permit to purchase or carry a firearm if that person is subject to a DVPO or any successive protective order. [G.S. 50B-3.1(j), *amended by S.L. 2011-268, § 24, effective Dec. 1, 2011, and applicable to offenses committed on or after that date.*] Prosecutions for offenses committed before Dec. 1, 2011, are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions. [S.L. 2011-268, § 26.]
 - (a) Prior to Dec. 1, 2011, G.S. 50B-3.1(j) made it a Class H felony for any person to own, possess, purchase, or receive, or attempt to possess, purchase, or receive, a firearm, machine gun, ammunition, or permits to purchase and carry concealed firearms if that person is subject to a DVPO or any successive protective order. [See S.L. 2011-268, § 24, eliminating the prohibition against "ownership" in G.S. 50B-3.1(j).]
 - iv. G.S. 14-415.12(b)(8a) prohibits issuance of a permit to carry a concealed handgun (concealed handgun permit) to a person who is or has been adjudicated guilty of or received a prayer for judgment continued or suspended sentence for one or more crimes of violence constituting a misdemeanor under G.S. 50B-4.1 (violation of a protective order). [G.S. 14-415.12(b)(8a), *added by S.L. 2015-195, § 7, effective July 1, 2015, and applicable to permit applications submitted on or after that date (other offenses listed in the statute).*]
3. Person convicted of the misdemeanor crime of domestic violence.
- a. Federal disability.
 - i. 18 U.S.C. § 922(g)(9) makes it unlawful for a person convicted in any court of a misdemeanor crime of domestic violence to ever possess or receive any firearm or ammunition. [A misdemeanor crime of domestic violence is defined by 18 U.S.C. § 921(a)(33)(A) in part as an offense having as an element the use or attempted use of physical force.] For a discussion of the type of conviction that can serve as a predicate to the federal conviction

under 18 U.S.C. § 922(g)(9), see Jeff Welty, *Vinson, Voisine, and Misdemeanor Crimes of Domestic Violence*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (July 18, 2016), <https://www.sog.unc.edu/blogs/nc-criminal-law/vinson-voisine-and-misdemeanor-crimes-domesticviolence>. See also *United States v. Castleman*, 134 S. Ct. 1405 (U.S. 2014), *rev'g* 695 F.3d 582 (6th Cir. 2012) (defendant's guilty plea to "intentionally or knowingly caus[ing] bodily injury to" the mother of his child, a misdemeanor domestic assault under the relevant Tennessee statute, qualified as a misdemeanor conviction of domestic violence under 18 U.S.C. § 922(g)(9); the requirement of physical force in § 922(g)(9) was satisfied by the degree of force that supports a common law battery conviction; defendant's argument that the Tennessee statute did not have a use of physical force element was rejected when the indictment made clear that use of physical force was an element of his state conviction).]

- (a) The Fourth Circuit has held that application of 18 U.S.C. § 922(g)(9) did not violate a defendant's Second Amendment right to bear arms for self-defense. [*United States v. Staten*, 666 F.3d 154 (4th Cir. 2011) (applying an intermediate scrutiny standard, defendant's as-applied Second Amendment challenge was rejected), *cert. denied*, 132 S. Ct. 1937 (U.S. 2012); *United States v. Chester*, 847 F. Supp. 2d 902 (S.D. W. Va. 2012) (applying intermediate level of scrutiny to a conviction under 18 U.S.C. § 922(g)(9) for illegal possession of firearms by a defendant convicted of a misdemeanor crime of domestic violence did not violate Second Amendment as applied to defendant), *aff'd per curiam*, 514 F. App'x 393 (4th Cir. 2013).]
- ii. North Carolina convictions for communicating threats and misdemeanor stalking are not convictions for misdemeanor crimes of domestic violence pursuant to 18 U.S.C. § 921(a)(33)(A). [*Underwood v. Hudson*, 781 S.E.2d 295 (N.C. Ct. App. 2015). For further discussion, see Cheryl Howell, *Return of Firearms after a DVPO*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (Dec. 18, 2015), <http://civil.sog.unc.edu/return-of-firearms-after-a-dvpo>, and Jeff Welty, *Vinson, Voisine, and Misdemeanor Crimes of Domestic Violence*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (July 18, 2016), <https://www.sog.unc.edu/blogs/nc-criminal-law/vinson-voisine-and-misdemeanor-crimes-domestic-violence>.
- iii. A person is not considered to have been convicted of the misdemeanor crime of domestic violence for purposes of Chapter 44 of the U.S. Code (Firearms) if the conviction has been expunged or set aside, or if the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms. [18 U.S.C. § 921(a)(33)(B)(ii).]

- b. State disability.
 - i. G.S. 14-415.12(b)(8b) prohibits issuance of a permit to carry a concealed handgun (concealed handgun permit) to a person who is prohibited from possessing a firearm pursuant to 18 U.S.C. § 922(g) as a result of a conviction of a misdemeanor crime of domestic violence. [G.S. 14-415.12(b)(8b), *added by* S.L. 2015-195, § 7, effective July 1, 2015, and applicable to permit applications submitted on or after that date.]
 - ii. North Carolina’s restoration statute, G.S. 14-415.4, set out in [Section VI.B.4.c](#), below, applies to felony convictions and does not cover misdemeanor convictions. [See Relief from a Criminal Conviction, UNC School of Government Microsite, “Firearm Rights after Felony Conviction,” www.sog.unc.edu/resources/microsites/relief-criminal-conviction/firearm-rights-after-felony-conviction (hereinafter Firearm Rights after Felony Conviction).]
 - c. For more on 18 U.S.C. § 922(g)(9), see James Lockhart, Annotation, *Validity, Construction, and Application of 18 U.S.C. 922(g)(9), Prohibiting Possession of Firearm by Persons Convicted of Misdemeanor Crime of Domestic Violence*, 50 A.L.R. Fed. 2d 31 (2010).
4. Person convicted of a felony.
- a. Disability under federal law.
 - i. 18 U.S.C. § 922(g)(1) makes it unlawful for a person convicted of a crime punishable by imprisonment for a term exceeding one year, to ship, transport, possess, or receive any firearm or ammunition.
 - ii. The term “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. [18 U.S.C. § 921(a)(20)(B).] This “describes almost all misdemeanors in North Carolina.” [Firearm Rights after Felony Conviction, at n.3.]
 - b. Federal law restoration.
 - i. Federal law lifts the federal ban imposed by 18 U.S.C. § 922(g)(1) for felony convictions “if a person’s civil rights have been restored unless the restoration does not permit the person to ship, transport, possess, or receive firearms.” [See Firearm Rights after Felony Conviction; 18 U.S.C. § 921(a)(20).]
 - ii. For a discussion of the effect of a restoration of firearm rights under G.S. 14-415.4, set out in [Section VI.B.4.c](#), below, on the federal firearms ban, see John Rubin, *Restoring State Firearm Rights as a Condition for Restoring Federal Firearm Rights*, UNC SCH. OF GOV’T: NC CRIM. L. BLOG (Sept. 14, 2015), <https://nccriminallaw.sog.unc.edu/restoring-state-firearm-rights-as-a-condition-for-restoring-federal-firearm-rights/>. See also Firearm Rights after Felony Conviction (discussing North Carolina’s restoration statute).

- c. Disability under state law.
- i. G.S. 14-404(c)(1) prohibits issuance of a permit for the purchase or receipt of a pistol (handgun permit) to a person who is under indictment for or has been convicted in any state or federal court, of a felony, unless the person is later pardoned or the person's firearm rights have been restored pursuant to G.S. 14-415.4, if the purchase or receipt of a handgun does not violate a condition of the pardon or restoration of firearm rights (exception for felonies pertaining to antitrust violations, unfair trade practices, or restraints of trade). [G.S. 14-404(c)(1), *amended by* S.L. 2010-108, § 4, effective Feb. 1, 2011, to add restoration under G.S. 14-415.4, and S.L. 2011-2, § 1 (clarifying effective date).]
 - ii. G.S. 14-415.12(b)(3) prohibits issuance of a permit to carry a concealed handgun (concealed handgun permit) to a person who has been adjudicated guilty in any court of a felony, unless the person's firearm rights have been restored pursuant to G.S. 14-415.4 (exception for felonies pertaining to antitrust violations, unfair trade practices, or restraints of trade). [G.S. 14-415.12(b)(3).]
 - iii. G.S. 14-415.1(a) makes it unlawful for any person who has been convicted of a felony to purchase, own, possess, or have custody, care, or control of any firearm.
 - (a) G.S. 14-415.1 does not apply to a person who, pursuant to the law of the jurisdiction in which the conviction occurred, has been pardoned or has had his or her firearm rights restored if such restoration of rights could also be granted under North Carolina law (exception for felonies pertaining to antitrust violations, unfair trade practices, or restraints of trade). [G.S. 14-415.1(d), (e), *amended by* S.L. 2011-268, § 13, effective Dec. 1, 2011, and applicable to offenses committed on or after that date; prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions). *See Booth v. State*, 227 N.C. App. 484, 742 S.E.2d 637 (affirming trial court determination that G.S. 14-415.1(d) did not apply to a plaintiff who had been granted a Pardon of Forgiveness in 2001 arising from a guilty plea in 1981 to one felony count of non-aggravated kidnapping; only requirement of statute, that both plaintiff's conviction and pardon occur in North Carolina, was met), *writ and review denied, review dismissed as moot*, 367 N.C. 224, 747 S.E.2d 525 (2013).]
- d. State law restoration.
- i. G.S. 14-415.4 sets out a procedure for a North Carolina resident convicted of a single nonviolent felony and whose citizenship rights have been restored for at least twenty years to petition the district court in the district where the person resides to restore the person's firearm rights. [G.S. 14-415.4(b), (c), *added by* S.L. 2010-108, §§ 1, 7, effective Feb. 1, 2011; *amended by* S.L. 2011-2, § 1 (clarifying effective date).] Prosecutions for offenses committed before Feb. 1, 2011, are not abated or affected by this act, and the

statutes that would be applicable but for this act remain applicable to those prosecutions. [S.L. 2010-108, § 7, effective Feb. 1, 2011.]

- (a) For the definition of “nonviolent felony”, see G.S. 14-415.4(a)(2). For the criteria that must be satisfied before a court can grant a petition to restore firearm rights pursuant to G.S. 14-415.4, see G.S. 14-415.4(d)(1) to (6). For matters that require a court to deny a petition to restore firearm rights pursuant to G.S. 14-415.4, see G.S. 14-415.4(e)(1) to (10).
- ii. Restoration of firearms rights under G.S. 14-415.4 does not constitute an expunction or pardon of any criminal history record information. [G.S. 14-415.4(i).]
- iii. The Felony Firearms Act, G.S. 14-415.1 *et seq.*, has been challenged on constitutional grounds.
 - (a) North Carolina’s Felony Firearms Act has been found constitutional when challenged on procedural due process grounds. [*Johnston v. State*, 224 N.C. App. 282, 735 S.E.2d 859 (2012) (the Felony Firearms Act did not violate plaintiff’s procedural due process rights under the North Carolina or U.S. Constitution; the portion of the trial court’s order that found federal and state substantive due process violations when the act was applied to plaintiff was reversed and remanded for additional findings as to plaintiff’s felony convictions and post-conviction history), *temporary stay allowed*, 366 N.C. 422, 562, 736 S.E.2d 180, *writ allowed, review on additional issues denied*, 366 N.C. 562, 738 S.E.2d 360, *appeal dismissed*, 366 N.C. 562, 738 S.E.2d 361, *aff’d per curiam*, 367 N.C. 164, 749 S.E.2d 278 (2013).]
 - (b) In another case, plaintiff’s as-applied due process challenge under the North Carolina Constitution was sustained. However, the case has no **precedential value**. [*Baysden v. State*, 217 N.C. App. 20, 718 S.E.2d 699 (plaintiff gun owner had two felony convictions that were decades old, his firearms-related rights had been restored under Virginia and federal law, and he had used his weapons in a safe and lawful manner for seventeen years; after an amendment to the North Carolina Felony Firearms Act, he was precluded from possessing firearms and did not qualify for restoration under G.S. 14-415.4), *temporary stay and writ allowed*, 365 N.C. 373, 719 S.E.2d 29 (2011), *appeal dismissed, review allowed*, 720 S.E.2d 390 (N.C.), *review allowed, appeal dismissed*, 365 N.C. 549, 742 S.E.2d 182 (2012), *aff’d per curiam without precedential value*, 366 N.C. 370, 736 S.E.2d 173 (2013).]

E. Disposal of Surrendered Firearms if Items Not Returned to Defendant

1. The sheriff must apply to the court for an order to dispose of the surrendered items if:
 - a. The defendant does not file a timely motion for return of surrendered items, or
 - b. The court determines that the defendant is not entitled to have the surrendered items returned, or

- c. The defendant or third-party owner does not timely pay all fees owed for storage. [G.S. 50B-3.1(h).]
2. For return of a surrendered firearm or other surrendered item pursuant to a motion of a third-party owner, see G.S. 50B-3.1(g).

F. Copies of Orders Regarding Firearms to Be Provided to Parties and Certain Others

1. Copies of any orders entered pursuant to G.S. Chapter 50B must be furnished to each party and to the law enforcement agency (city or county) responsible for the area in which the victim resides. [G.S. 50B-3(c).] If the defendant is ordered to stay away from the child's school, the sheriff is to deliver a copy of the protective order to the principal of each school named in the order. [G.S. 50B-3(c).]