

spotlight

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NC GUN LAWS NEED A CHANGE

Legislature Went Too Far in Restricting Gun Possession by Ex-Felons

KEY FACTS: • In 2004, the legislature went too far in passing a complete and permanent ban on gun possession by all ex-felons.

• In August 2009, the North Carolina Supreme Court in *Britt v. North Carolina* held that those changes were unconstitutional as applied to the plaintiff, Barney Britt.

• The Court's decision was primarily influenced by the non-violent nature of Britt's crime and the non-violent nature of his life.

• The Court's holding and rationale indicate that many ex-felons likely have their constitutional rights violated through this ban on gun possession.

• The legislature should take action in the 2010 legislative short session to change the law in response to *Britt* to prevent other ex-felons from having their constitutional rights violated by this overbroad law.

• Specifically, the North Carolina legislature should place no restrictions on the possession of firearms by non-violent ex-felons. Before 1995, North Carolina generally placed no such restrictions on non-violent ex-felons.

• Unlike with a violent ex-felon, there is no objective act that demonstrates that the non-violent ex-felon may be a threat. It is unreasonable to restrict gun rights to protect the public safety from someone who has never presented a threat to the public safety.

• A blanket ban on firearm possession by violent ex-felons also may be problematic, although the *Britt* case does not directly suggest removing such a ban. It should be noted that as recently as 2004, violent and non-violent ex-felons were able to possess firearms in their homes and businesses.

• Any change to state law that would loosen the restrictions on gun possession should in no way restrict the types of firearms that could be possessed by ex-felons. If such state restrictions exist, federal law would prohibit the possession of all firearms thereby making the change in state law relatively meaningless.

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In 2004, the North Carolina legislature passed a blanket prohibition on the possession of all firearms by anyone who has committed a felony.¹ On August 28, 2009, the North Carolina Supreme Court held in *Britt v. North Carolina*² that this broad prohibition was unconstitutional as it applied to the specific plaintiff in the case.

This *Spotlight* report provides analysis of the gun possession laws in North Carolina as well as the *Britt* case. It argues that the legislature needs to take action in the 2010 legislative short session primarily to ensure that individual rights are not violated due to this overbroad law. While there may be greater changes that need to be made to the gun possession laws, this *Spotlight* focuses only on the changes that should be made in connection with *Britt*.

Gun Possession Laws Regarding Ex-Felons

In less than 10 years, North Carolina went from few restrictions on gun possession by ex-felons to excessive restrictions. The following table provides a timeline and highlights the changes.

Timeline and Details of Firearm Possession Restrictions in North Carolina

	<i>Before 1995</i>	<i>Law After 1995 Amendments</i> ³	<i>Law After 2004 Amendments</i> ⁴
Restrictions on Non-Violent Ex-Felons	No, with some exceptions. Law generally drew distinctions between violent and non-violent ex-felons.	Yes — no distinctions were made between violent and non-violent ex-felons.	Yes
Restrictions on Violent Ex-Felons	Yes	Yes	Yes
Restrictions Limited to Certain Types of Firearms	Yes, restrictions only applied to “any handgun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches.”	Yes, restrictions only applied to “any handgun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches.”	No, the law covers all firearms.
Time Limitation on Restrictions	Yes, the restrictions lasted five years after a conviction or an “unconditional discharge from a correctional institution, or termination of a suspended sentence, probation, or parole upon such conviction, whichever is later.”	No	No
Exceptions to Restrictions	Yes, all ex-felons could possess a firearm in their homes or businesses.	Yes, all ex-felons could possess a firearm in their homes or businesses.	No

The *Britt* Case

The Facts

In 2005, the plaintiff, Barney Britt, challenged the 2004 law that created a complete and permanent ban on firearm ownership by ex-felons.⁵ He took the case to the North Carolina Supreme Court arguing that the law was unconstitutional under the North Carolina Constitution.⁶ Article I, Section 30 of the North Carolina Constitution states “A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.”⁷ The Court already has interpreted this right to include an individual right to bear arms.⁸

In 1979, Mr. Britt was convicted of a non-violent felony (drug possession with the intent to sell and deliver drugs).⁹

Since his conviction 30 years earlier, Mr. Britt committed no other crimes.¹⁰ According to the North Carolina Supreme Court, he had exhibited “uncontested lifelong nonviolence towards others.”¹¹

Mr. Britt even owned firearms for 17 years, between 1987 and 2004 when it was lawful for him to do so.¹² After the 2004 legislative changes were made, he proactively went to the sheriff and willingly gave up his weapons.¹³

The Court's Holding and Analysis

In 2009, the North Carolina Supreme Court held that the 2004 law that banned Mr. Britt from possessing firearms was unconstitutional under the North Carolina Constitution as it applied to Mr. Britt.¹⁴ When courts hold that a law is unconstitutional “as applied,” it is saying that the law is not unconstitutional in every circumstance and therefore the law should not be struck down completely. In this instance, the Court is saying that “as applied” to Mr. Britt, the law is unconstitutional.

In analyzing the case, the Court considered whether the restrictions imposed on Mr. Britt were reasonable and bore “a fair relation to the preservation of the public peace and safety.”¹⁵ The Court found the restrictions to be unreasonable, explaining “the State unreasonably divested plaintiff of his right to own a firearm.”¹⁶

Who Would This Holding Apply to?

Critics of the *Britt* decision have expressed concern that after the case many other ex-felons will go to court and challenge the law as it applies to them.¹⁷ Unless the law is changed, this is exactly what those victimized by this over-broad law should and will do.

Certainly, if a plaintiff has a case with facts similar to the *Britt* case, he is likely to win his case. The Court was influenced by the non-violent nature of Mr. Britt's crime, his history of non-violence, and his respect for the law since being convicted. The fact that there was no way for Britt ever to own a firearm legally also was important. The Court also seems to have been influenced by his 17 years of ownership of firearms without incident.¹⁸

Whether all of these factors have to be present for another ex-felon to win a case is unclear. For example, while the Court seemed influenced by Mr. Britt's ownership of firearms without incident, it makes little sense for the Court to rule against an ex-felon who has a very similar history as Mr. Britt but had decided not to own firearms.

How Far-Reaching Could This Opinion Become?

This case is a major victory for the rights of individuals to possess guns even beyond protecting the rights of ex-felons. The North Carolina Supreme Court has made it clear that it is not going to rubber-stamp every law that is passed under the guise of protecting the public safety — there are limits that the Court is willing to enforce.

Justice Patricia Timmons-Goodson wrote a dissent in *Britt*. She argued, “Today's decision opens the floodgates wide before an inevitable wave of individual challenges to not only the Felony Firearms Act [the laws governing gun possession by ex-felons], but to our statutory provisions prohibiting firearm possession by incompetents and the mentally insane.”¹⁹

She certainly is correct that there will be challenges by ex-felons, as there should be. Laws should not be upheld though because citizens would have the audacity to try to protect their constitutional rights.

There is absolutely no basis to believe that the *Britt* case would somehow undermine reasonable provisions dealing with incompetents and the mentally insane. If there are unreasonable restrictions, such as prohibiting competent individuals that pose no threat to the public from possessing firearms, then these restrictions should be found unconstitutional.

The North Carolina Legislature Needs to Change the Law

Mr. Britt is not the only person who could win a lawsuit against the complete and permanent ban on gun possession by ex-felons. There likely are many individuals with similar backgrounds who also could win their cases. In other words, there are likely to be other individuals whose constitutional rights also are being violated because of the current law. The legislature should respond to the *Britt* case by amending the gun possession law so that citizens do not have their constitutional rights violated.

No Restrictions on Non-Violent Ex-Felons

At a minimum, to make sure the right to bear arms is not violated after *Britt*, the legislature would need to remove the complete and permanent ban imposed on gun possession by non-violent ex-felons. From a legal standpoint only, it is *possible* that some restrictions could be permissible. There could be time requirements and restrictions on the types of firearms that could be possessed (e.g., to protect against concealed weapons). In addition, there could be a requirement that guns could be possessed only at one's own home or place of business.

However, imposing any restrictions on gun possession by non-violent ex-felons ignores the underlying question: whether someone poses a threat to public safety. There is no genuine basis to prohibit non-violent ex-felons from possessing firearms once they have served their full sentences (including parole or probation). As a result, there should be no time requirements or other restrictions.

An individual's constitutional right to bear arms should not be infringed upon because of speculation that a non-violent ex-felon is more likely to commit a violent felony than anyone else and therefore should not possess a firearm. Unlike with a violent ex-felon, there is no objective act that demonstrates that the individual may be a threat. It is unreasonable to restrict the gun rights of someone who has never presented a threat to the public safety.

Before 1995, for the most part, there were no restrictions on gun possession that applied to non-violent ex-felons. As the North Carolina Supreme Court stated, the law before 1995 applied to felonies that were "mostly of a violent or rebellious nature."²⁰ North Carolina needs to get back to common sense and distinguishing between non-violent and violent ex-felons.²¹

Addressing Gun Rights of Violent Ex-Felons: Remove the Blanket Ban on Gun Possession

While the *Britt* opinion does not directly support getting rid of the blanket ban on gun possession by *violent* ex-felons, the case still provides at least indirect support for getting rid of such a blanket ban. As stated above, the North Carolina Supreme Court made it clear through its holding that it will find gun regulations unconstitutional if the regulations are unreasonable. There are many instances when a violent ex-felon would not reasonably present a threat to the public safety.

For example, if an individual, without any weapons, assaulted someone 40 years ago and since then has lived a non-violent and law-abiding life, it is difficult to see how that individual is a danger to the public. The legislature should carefully examine gun restrictions imposed on violent ex-felons—the blanket ban on gun possession by violent felons likely is overbroad and unconstitutional. In fact, as recently as 2004, violent and non-violent ex-felons were able to possess firearms in their homes and businesses.²²

Avoiding a Pitfall: Legislature Should Not Address Britt by Limiting the Weapons Owned by Felons

One possible way the legislature could address the *Britt* case would be to allow non-violent and/or violent ex-felons to own certain types of firearms only. A recent article in *The News & Observer* discussed the possibility that the legislature may take this approach, stating "The state legislature may address the issue [*Britt* case] with a bill [HB

1444^{23]} introduced for the 2009-2010 session by Rep. Phil Haire, a Democrat from Western North Carolina, that would give limited hunting privileges to nonviolent felons.²⁴ The bill would allow non-violent ex-felons to possess rifles and shotguns only. The barrel length could not be less than 18 inches and the overall length of the firearm could not be less than 26 inches.²⁵

This would be an inadequate way, however, to protect the rights of ex-felons such as Mr. Britt because of an unusual and not well-known wrinkle in the law. Federal law prohibits the possession of firearms by ex-felons unless a state has restored the civil rights of the felon.²⁶ Without getting into all the details of restoring civil rights, states deny certain rights to ex-felons and restore those rights when certain conditions are met.

In North Carolina, all civil rights are automatically restored, for example, upon “the unconditional discharge of an inmate by the state Department of Correction or the North Carolina Department of Correction, of a probationer by the State Department of Correction, or of a parolee by the Department of Correction, or of a defendant under a suspended sentence by the court.”²⁷

Once North Carolina restores a felon’s civil rights, federal law will respect that and it no longer would be a federal crime for that felon to possess firearms. There is an exception, however.

Based on the United States Supreme Court’s interpretation of federal statutes in *Caron v. United States* (1998),²⁸ if a state places a limitation on what types of firearms may be possessed by ex-felons, it is a federal crime for those individuals to possess any firearm.²⁹

For example, if North Carolina, after restoring the civil rights of non-violent ex-felons allowed these ex-felons to possess all firearms except pistols, the federal law would make it a federal crime for these ex-felons to possess *any type* of firearm. On the other hand, if North Carolina allowed the ex-felons to possess all types of firearms, it no longer would be a federal crime to possess firearms since North Carolina places no limitations on the types of firearms that could be possessed by ex-felons.

As a practical matter then, placing any restrictions on the types of firearms that can be possessed is not particularly helpful in terms of protecting the right to bear arms since federal law would make possession of the firearms a federal crime.

When it comes to non-violent ex-felons, there should be no restrictions as discussed above. If nothing else, they should be able to possess firearms without fear of violating federal law.

Conclusion

Mr. Britt said it best about owning firearms when he explained, “It’s not a privilege; it’s a right.”³⁰ Creating blanket prohibitions on exercising a right, even for ex-felons, makes gun possession a privilege rather than a right. The legislature can amend the law in 2010 and make North Carolina once again a state that respects the right to bear arms.

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End Notes

1. General Assembly of North Carolina, Session Law 2004-186, www.ncga.state.nc.us/Sessions/2003/Bills/House/HTML/H1354v9.html.
2. *Britt v. State of North Carolina*, 363 N.C. 546 (2009), www.aoc.state.nc.us/www/public/sc/opinions/2009/pdf/488-07-1.pdf.
3. General Assembly of North Carolina, Session Law 1995-487, www.ncga.state.nc.us/Sessions/1995/Bills/Senate/HTML/S865v4.html.
4. *Op. cit.*, note 1.
5. *Op. cit.*, note 2.
6. *Ibid.*

7. N.C. Const. Art. I § 30, www.ncga.state.nc.us/Legislation/constitution/article1.html.
8. See, e.g., *North Carolina v. Dawson*, 272 N.C. 535 (1968).
9. *Op. cit.*, note 2.
10. *Ibid.*
11. *Ibid.*
12. *Ibid.*
13. *Ibid.*
14. *Ibid.*
15. *Ibid.*
16. *Ibid.*
17. See, e.g., “N.C. Court’s gun decision may open unwanted door,” Editorial, *Charlotte Observer*, September 10, 2009, www.charlotteobserver.com/opinion/v-print/story/937018.html, and Justice Patricia Timmons-Goodson’s dissent in *Britt*.
18. *Op. cit.*, note 2.
19. *Ibid.*
20. *Ibid.*
21. A non-violent ex-felon should not be prohibited or limited in any way from possessing a firearm because of the felony *alone*.
22. *Op. cit.*, note 1.
23. General Assembly of North Carolina, Session 2009, House Bill 1444, Second Edition, www.ncga.state.nc.us/Sessions/2009/Bills/House/HTML/H1444v2.html.
24. *Ibid.*
25. *Ibid.*
26. 18 U.S.C. § 921 (33)(B)(ii), [frwebgate.access.gpo.gov/cgi-bin/usc.cgi?ACTION=RETRIEVE&FILE=\\$\\$xa\\$\\$busc18.wais&start=1449952&SIZE=48951&TYPE=TEXT](http://frwebgate.access.gpo.gov/cgi-bin/usc.cgi?ACTION=RETRIEVE&FILE=$$xa$$busc18.wais&start=1449952&SIZE=48951&TYPE=TEXT); see also David J. Shestokas, “Gun Ownership by a Convicted Felon: Exceptions to the Federal Prohibitions,” *Suite101.com*, October 4, 2008, peacesecurity.suite101.com/article.cfm/gun_ownership_by_convicted_felons.
27. N.C. Gen. Stat. § 13-1, www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_13/GS_13-1.html.
28. *Caron v. United States*, 524 U.S. 308 (1998), www.law.cornell.edu/supct/html/97-6270.ZO.html.
29. *Ibid.*; see also Raybin, David L, “Stick to Your Guns: Restoration of Tennessee Firearm Rights,” *Tennessee Bar Association Quarterly*, March 2003, www.hwylaw.com/CM/Articles/Articles8.asp.
30. Sarah Ovasha, “Felon wins right to own a gun,” *The News & Observer* (Raleigh, NC), September 1, 2009, www.newsobserver.com/news/local_state/story/88385.html.