

By Eugene Volokh <<http://www.washingtonpost.com/people/eugene-volokh>>
September 27, 2014 <[mailto:volokh@law.ucla.edu?subject=Reader feedback for 'A rare Second Amendment exemption from federal ban on felons possessing guns'](mailto:volokh@law.ucla.edu?subject=Reader+feedback+for+'A+rare+Second+Amendment+exemption+from+federal+ban+on+felons+possessing+guns')> In D.C. v. Heller, the Supreme Court stated that (emphasis added, citations omitted, as usual),

Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

[Footnote: We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.]

The question, then, is whether this “presumpti[on]” of validity can ever be rebutted — for instance, if a person’s felony conviction is many decades in the past, is for a not very serious felony, or both. Some federal courts have stated that the answer would be “yes” under the right circumstances. *United States v. Moore*, 666 F.3d 313, 320 (4th Cir. 2012); *United States v. Barton*, 633 F.3d 168, 174 (3d Cir. 2011); *United States v. Williams*, 616 F.3d 685, 693 (7th Cir. 2010); *United States v. Duckett*, 406 Fed. Appx. 185, 187 (9th Cir. 2010) (Ikuta, J., concurring); *United States v. McCane*, 573 F.3d 1037, 1049-50 (10th Cir. 2009) (Tymkovich, J., concurring). Some North Carolina state court decisions have actually set aside particular claimants’ state-law gun disabilities, under the North Carolina Constitution’s right to bear arms provision. *Britt v. State*, 681 S.E.2d 320 (N.C. 2009) (holding that a nonviolent felon whose crime was long in the past regained his state constitutional right to keep and bear arms); *Baysden v. State*, 718 S.E.2d 699 (N.C. Ct. App. 2011) (same). But Thursday’s *Binderup v. Holder* (E.D. Pa. Sept. 25, 2014) <<http://www.washingtonpost.com/news/volokh-conspiracy/wp-content/uploads/sites/14/2014/09/binderup.pdf>> is, to my knowledge, the first federal court decision to actually set aside such a gun disability on Second Amendment grounds.

The court began by deciding whether Daniel Binderup’s conviction counts as a felony for federal felon-in-possession law, and concludes that it does. Federal “felon-in-possession” law actually bars gun possession by people who have state or federal convictions for any crime punishable by a year or more in prison — or, if it’s labeled a misdemeanor by state law, by two years or more in prison. The focus isn’t (solely) on the formal felony-vs.-misdemeanor label attached to a crime by state or federal law, nor on the actual sentence for the crime, but on the maximum sentence authorized for the crime (or so the *Binderup* court held, consistently with other cases). The crime in this case — corruption of minors — is labeled by Pennsylvania as a first-

degree misdemeanor, which means it carries a maximum sentence of five years. It must therefore be treated, the court held, as a felony for purposes of the federal felon-in-possession statute.

But then, the court asked whether the Second Amendment nonetheless preempts federal felon-in-possession law in this particular case. In *Barton*, one of the cases cited above, the Third Circuit — the federal appellate court that sets binding federal precedent for Pennsylvania and some other jurisdictions — wrote:

To raise a successful as-applied challenge, [a defendant] must present facts about himself and his background that distinguish his circumstances from those of persons historically barred from Second Amendment protections. For instance, a felon convicted of a minor, non-violent crime might show that he is no more dangerous than a typical law-abiding citizen. Similarly, a court might find that a felon whose crime of conviction is decades-old poses no continuing threat to society. The North Carolina Supreme Court did just that in *Britt v. State*, 363 N.C. 546 (2009), finding that a felon convicted in 1979 of one count of possession of a controlled substance with intent to distribute had a constitutional right to keep and bear arms, at least as that right is understood under the North Carolina Constitution.

And *Binderup*, the court held, did present such facts about himself and his background. His only conviction was nearly 17 years before. It stemmed from a nonviolent incident — a consensual sexual relationship *Binderup* had with a 17-year-old employee. Pennsylvania law does not even treat the offense as a statutory rape; the formal age of consent in Pennsylvania (as in most other states) is 16, and sexual conduct by an adult with a 16- or 17-year-old is treated as consensual, though bad for the minor and therefore the crime of corruption of minors <http://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?txtType=HTM&ttl=18&div=0&chpt=63>. The statistics presented by the government, showing that people with criminal convictions — even nonviolent ones — are likely to commit other crimes aren't probative given the nature of the crime, how long ago the crime was, and *Binderup's* current age (59). For these reasons, the court held,

[P]laintiff has demonstrated that, if allowed to keep and bear arms in his home for purposes of self-defense, he would present no more threat to the community than the average law-abiding citizen.

And because of this, the presumption that there's no Second Amendment problem with barring felons from possessing guns, the court held, has been rebutted. I'm not sure whether the government will appeal, but, if it does, I expect the case will stand up on appeal, given the Third Circuit's *Barton* precedent; and I doubt that the U.S. Supreme Court would agree to hear the case.

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