

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
GAINSEVILLE DIVISION**

|                           |   |                       |
|---------------------------|---|-----------------------|
| DANNY LANIER HANEY,       | ) |                       |
|                           | ) |                       |
| Plaintiff,                | ) | CIVIL ACTION FILE NO. |
|                           | ) |                       |
| v.                        | ) |                       |
|                           | ) | 2:08-CV-0256-RWS      |
| UNITED STATES OF AMERICA, | ) |                       |
|                           | ) |                       |
| Defendant.                | ) |                       |

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF’S MOTION FOR  
SUMMARY JUDGMENT**

**Introduction**

Plaintiff commenced this action against Defendant United States of America after the Federal Bureau of Investigation’s (“FBI’s”) National Instant Criminal Background Check System (“NICS”) denied a request by Plaintiff to receive a firearm in interstate commerce and, when Plaintiff appealed, NICS further declared that Plaintiff is prohibited under federal law from possessing firearms. Because Plaintiff is legally entitled to possess and receive firearms, Plaintiff seeks a declaration of such entitlement and an order to allow the transfer.

## **Background**

In 2006, Plaintiff attempted to purchase a firearm from a federally-licensed firearms dealer (“FFL”). Doc 3-3, ¶ 3. Under 18 U.S.C. § 922(t), FFLs are required to perform a background check on a prospective firearms purchaser, using the NICS. When the FFL ran the NICS check on Plaintiff, NICS denied the transfer. Doc. 3-3, ¶ 4. NICS has an internal appeal procedure in which a prospective transferee may challenge a denial. *Id.* Plaintiff availed himself of that process, and on appeal NICS reversed itself and permitted the transfer. *Id.*

In 2008, Plaintiff attempted to purchase a firearm from a different FFL. Doc. 3-3, ¶ 5. When that FFL ran a NICS check, NICS denied the transfer. *Id.* On appeal this time, however, NICS affirmed itself and denied the 2008 transfer again. *Id.* In a letter to the FFL explaining the reason for the denial, NICS asserted that Plaintiff is a convicted felon who is prohibited by 18 U.S.C. § 922(g)(1) from receiving or possessing a firearm. *Id.*

NICS acknowledged that Plaintiff was pardoned for his felony conviction, but nonetheless maintained that the pardon does not relieve Plaintiff of the disability of the prohibition against possession. Doc. 3-3, ¶ 6. NICS specifically stated in the letter that Plaintiff “remains federally prohibited from possessing any firearm.” *Id.*

NICS went out of its way to attempt to infringe Plaintiff's rights by calling the Forsyth County Probate Court and attempting to have the Plaintiff's Georgia firearms license ("GFL") revoked. As Judge Jordan of the Forsyth County Probate Court noted in his decision, "[...] an individual from the National Instant Criminal Background Check System (NICS) telephoned the Chief Deputy Clerk of this Court... and suggested that Mr. Haney's existing Georgia Firearms License should be revoked." Doc. 3-3, p. 1.

Plaintiff challenges Defendant's legal conclusions.

### **Jurisdiction**

This Court has jurisdiction over the case because the Defendant is the United States of America. 28 U.S.C. § 1346(a)(2). Moreover, this Court has jurisdiction because the issues involved federal questions. 28 U.S.C. § 1331. The federal questions involve the interpretation and application of 18 U.S.C. § 922, pertaining to prohibitions on receiving and possessing firearms. This Court also has jurisdiction under 28 U.S.C. 1343(a)(4), because Plaintiff seeks equitable and other relief to secure a civil right (the right to keep and bear arms) protected by an Act of Congress (18 U.S.C. § 925A). Finally, the Court has jurisdiction under 18 U.S.C. § 925A, which specifically authorizes actions against the United States when a person is wrongfully denied the transfer of a firearm.

## **Argument**

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. In the present case, the facts are well documented and not susceptible of genuine issue. Because Plaintiff is legally entitled to receive and possess firearms, he is entitled to judgment as a matter of law.

The basis for the government's denial of a transfer of a firearm to Plaintiff is that Plaintiff is a convicted felon who is prohibited under 18 U.S.C. § 922(g) from receiving a firearm. As Plaintiff will show, he is not "convicted" for the purposes of the federal statute cited and is therefore entitled to receive and possess firearms.

Plaintiff acknowledges that he was convicted of a felony possession of marijuana in 1969 in the Superior Court of Fulton County, Georgia. In 1995, however, he received a complete pardon (the "Pardon") from the Georgia State Board of Pardons and Paroles. The Pardon is entitled on its face, "Pardon Including Restoration of the Right to Bear Arms." Doc 3-3, ¶ 12. In the Pardon Order, the Board said that it "hereby unconditionally fully pardons [Plaintiff]...." The Board further ordered "that all disabilities resulting from [the conviction] be and each and all are hereby removed...." The Board further ordered "that all civil and political rights,

including the right to receive, possess, or transport in commerce a firearm, lost as a result of [the conviction]... are hereby restored.” *Id.*

Plaintiff is not “Convicted”

18 U.S.C. § 921(a)(20) provides:

What constitutes a conviction of [a felony for purposes of § 922(g)] shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction ... for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights *expressly* provides that the person may not ship, transport, possess, or receive firearms.

[Emphasis supplied]. The correctness of the government’s position (that Plaintiff is prohibited from possessing firearms) thus hinges on whether, in light of Plaintiff’s pardon, is he considered “convicted” under 18 U.S.C. § 921(a)(20). If he is, then the government is correct and Plaintiff loses. If he is not, then the government is wrong and Plaintiff wins. Because Plaintiff’s Pardon expressly restores his firearms rights and does not contain an *express* reservation of firearms rights, the “unless” clause of the statute is not triggered in this case, and Plaintiff wins.

The 7<sup>th</sup> Circuit has examined the language of 18 U.S.C. § 921(a)(20), and determined the following:

The second sentence of § 921(a)(20) is an anti-mousetrapping rule. If the state sends the felon a piece of paper implying that he is no longer “convicted” and that *all* civil rights have been restored, a reservation in a corner of the state’s penal code can not be the basis of a federal prosecution. A state must tell the felon point blank that weapons are not kosher. The final sentence of § 921(a)(20) can not logically mean that the state may dole out an apparently-unconditional restoration of rights yet be silent so long as any musty statute withholds the right to carry guns. Then the state never would need to say a peep about guns; the statute would self-destruct. It must mean, therefore, that the state sometimes must tell the felon that under state law he is not entitled to carry guns, else § 922(g) does not apply.

*United States v. Erwin*, 902 F.2d 510, 512 (1990). [Emphasis in original]. The 9<sup>th</sup> Circuit quoted this language approvingly in *U.S. v. Herron*, 45 F.3d 340, 343 (9<sup>th</sup> Cir. 1995) and again in *U.S. v. Laskie*, 258 F.3d 1047, 1050 (9<sup>th</sup> Cir. 2001). The *Laskie* court also noted that:

If the “pardon, expungement, or restoration of civil rights occurred by operation of law, then it must “look to the whole of state law” to determine whether the state also had expressly prohibited the [felon] from possessing firearms. But if, as in this case, the “pardon, expungement, or restoration of civil rights,” occurred by a certificate or other written document, then the express reservation must be contained in the document itself.”

*Id.* [Internal cites omitted].

The *Laskie* court addressed whether a certificate granted pursuant to Nevada Revised Statute § 176.225 constituted a set aside for purposes of 18 U.S.C. § 921(a)(20). *Id.* at

1050-52. The certificate the defendant received stated, in pertinent part: "*the previous finding of Guilty be changed to that of Not Guilty, and the Information herein dismissed .... Defendant ... is hereby discharged from supervision and released from all penalties and disabilities resulting from the crime of which he has been convicted.*" (*Id.* at 1050.) Section 176.225.3 also provided, however, that the dismissed conviction still counted as a conviction for Nevada's felon-in-possession statute. *Id.* at 1051.

When Mr. Laskie was charged with a violation of 18 U.S.C. 922(g)(1), he appealed the district court's judgment of conviction. The court of appeals decided that the document the defendant received appeared on its face to "set aside" the conviction and any other reading of the document would in effect "mouse trap" the defendant since he believed he was free of all disabilities.

The Court in *Laskie* relied on the plain meaning of 18 U.S.C. 921(a)(20) in its definition of a crime punishable by more than one year to exclude crimes that had been pardoned, or "set aside." The government argued that the "unless clause" was triggered because of the defendant's continuing status as a felon in regards to Nevada's "felon-in-possession" statute. However, the court correctly determined that there were no prohibitors on the face of the certificate (that granted a restoration of rights) and therefore the "unless clause" was not triggered. The anti-mouse trapping

rule required that the defendant's error be based on the language of the discharging document itself and not on a "musty" statute.

As a result of this rule, the court concluded that the defendant's conviction had been set aside because the "[d]efendant ... reasonably can complain that he was 'mousetrapped'--that is, led to believe by the state that he was 'released from all penalties and disabilities resulting from the crime of which he has been convicted,' when, in fact, he was not entitled to possess firearms." *Laskie*, 258 F.3d at 1052. This rule is succinctly outlined in *U.S. v. Erwin* as quoted above.

The 11<sup>th</sup> Circuit adopted this line of reasoning in *U.S. v. Swanson*, 947 F.2d 914 (11<sup>th</sup> Cir. 1991), wherein it said a person was not "convicted" when he received a pardon "and the certificate restoring civil rights was not expressly limited in the manner contemplated by Congress." 947 F.2d at 919. If the express limitation cannot be found within the four corners of the Pardon, there is no express limitation.

The 11<sup>th</sup> Circuit relied on *Swanson* in *U.S. v. Fowler*, 198 F.3d 808, 811 (11<sup>th</sup> Cir. 1999) wherein it found a person was not "convicted" when he "was granted a certificate restoring his civil and political rights without any reservations or prohibitions limiting his right to ship, transport, possess, or receive firearms.... [T]he

state restored to him all civil and political rights and the certificate was not expressly limited in the manner contemplate and provided by Congress.”

Thus, the law in this Circuit as well as others is that, when a person receives an actual pardon (or other document restoring civil rights), the pardon itself must contain an express reservation of firearms rights in order to trigger the “unless” clause of 18 U.S.C. § 921(a)(20). The rule of *Erwin, Herron, Laskie, Swanson, and Fowler* applies to Plaintiff in this instant case. His Pardon occurred by a written document, and that document contains no express reservation of rights. He can not be federally prohibited because of a “reservation in the corner of the state’s penal code” or a “musty statute.” Because Plaintiff’s Pardon expressly removes all disabilities, it inherently triggers *Laskie*’s anti-mouse trapping rule. Because Plaintiff’s Pardon does not contain any reservation of any kind (and it even expressly *restores* firearms rights), Plaintiff cannot be “convicted” under 18 U.S.C. § 921(a)(20).

The government mistakenly relies on *Caron v. United States*, 524 U.S. 308, 309, 118 S.Ct. 2007, 2009, 141 L.Ed. 303, 307 (1998). In *Caron*, the Court was faced with a very different factual situation. Mr. Caron had been convicted of a felony in Massachusetts. By operation of state law, he was permitted to carry rifles and shotguns (but not handguns) outside of his home or business. The Supreme Court

ruled that, because the instrument that permitted him some firearms rights was the law itself, and the law contained some restrictions, the “unless” clause was triggered and Mr. Caron was federally prohibited from possessing *any* firearms.

The facts of the instant case are, as noted, very different. Plaintiff received a Pardon. Plaintiff does not rely on the law itself as the source for his relief. The Pardon does not contain anything remotely triggering the “unless” clause. In fact, the pardon has just the opposite of the “unless” clause trigger. Rather than containing language that *expressly* provides that Plaintiff may not ship, transport, possess or receive firearms, the pardon *expressly* provides that Plaintiff may receive, possess, or transport firearms.

Plaintiff is not Restricted From Possessing Firearms Under Georgia Law

Defendant claims (incorrectly), however, that Plaintiff retains a firearms disability under Georgia law. According to Defendant, Plaintiff is ineligible for a GFL. As support for this position, Defendant relies on O.C.G.A. § 16-11-129(b)(5)(A) and an unofficial Attorney General (of Georgia) opinion interpreting that statute.

Subsection (b)(5)(A) makes ineligible for a GFL:

Any person .... who has been convicted of an offense arising out of the

unlawful manufacture, distribution, possession, or use of a controlled substance or other dangerous drug.

“Convicted” for the purpose of this subsection is defined as follows:

Convicted" means a plea of guilty, a finding of guilt by a court of competent jurisdiction, the acceptance of a plea of nolo contendere, or the affording of first offender treatment by a court of competent jurisdiction *irrespective of the pendency or availability of an appeal or an application for collateral relief.*

O.C.G.A. § 16-11-129(b)(5)(ii). [Emphasis supplied]. In Unofficial Opinion U2005-3), the Georgia Attorney General rendered the unofficial opinion that a pardoned drug felon in Georgia cannot receive a GFL because of the emphasized language in O.C.G.A. § 16-11-129(b)(5)(ii). The assistant attorney general that wrote that particular opinion apparently believed that the emphasized language applies to *pardons granted*, not just *pardons applied for*.

Presumably, “collateral relief” may include a pardon, but, in Plaintiff’s case, the issue is not whether Plaintiff has filed an *application* for such relief, which is what the statute discusses. The issue is that Plaintiff has *received* such relief. In the absence of judicial direction, one could debate the meaning of this language. Fortunately, however, that is not necessary. Because NICS took it upon itself to notify the Forsyth

County Probate Court of Plaintiff's situation and suggest that Plaintiff's GFL should be revoked, Plaintiff's eligibility for a GFL has been litigated in the Probate Court.

Plaintiff filed a brief and presented oral argument to the Probate Court in this matter. In its final judgment, the Probate Court said, "[T]his Court is unable to agree with the position advanced by the National Institute of Criminal Background Check System (NICS) Unit of the Federal Bureau of Investigation." Doc. 3-3, p. 11. Ruling that the plain language of the statute did not render Plaintiff ineligible for a GFL, the Probate Court said:

This Court can find no such language limiting the legal effect of a pardon. No cannon of statutory construction need be applied other than the time honored rule that words are to be interpreted according to the ordinary meanings thereof.

This Court supplied emphasis to certain words in the [definition of "conviction" in O.C.G.A. § 16-11-129(b)(5)] . The word "pending" is clear, it means something is now occurring. The word "availability" is clear, it means that something is within reach to be used. The word "appeal" is obviously intended to refer to an appeal of the conviction. The word "application" is intended to mean a plea to be tendered for "collateral relief." "Pendency" or "availability" are prospective in their meanings. This statute is obviously intended to prevent a person convicted of a controlled substances offense from being able to acquire a Georgia Firearms License because he may intend to appeal, may have an appeal pending, or may be able to mount a collateral attack on some grounds such as subject matter jurisdiction.

This statute certainly cannot be interpreted to refer to concluded appeals or applications. An overturned (from an appeal or collateral attack)

conviction would form no bar whatsoever to an applicant for a Georgia Firearms License.

*Id.*

In *Laskie*, the court noted that upon receipt of the order restoring rights, “Defendant reasonably could have concluded that he was ‘released from all penalties and disabilities resulting from [his] crime,’ including the prohibition against possessing firearms.” The court noted that the defendant’s expectations attached upon receipt of the order. In this case, the Plaintiff’s expectations attached upon receipt of a Pardon validly issued by the Board of Pardons and Paroles, which is a constitutional board in Georgia.

The basis for determining what type of relief is afforded comes from the law of the jurisdiction which granted the relief. As the *Laskie* court noted, “Section 921(a)(20) ‘define[s] convictions, pardons, expungements, and restorations of civil rights by reference to the law of the convicting jurisdiction.’ *Caron*, 524 U.S. at 313; see also *Beecham v. United States*, 511 U.S. 368, 371 (1994).” Therefore it is necessary to look at the power and authority of the issuing body of the collateral relief.

Subparagraph (a) of Art. IV, Sec. II, Par. II of the Georgia Constitution of 1983 provides, “Except as otherwise provided in this Paragraph, the State Board

of Pardons and Paroles shall be vested with the power of executive clemency, including the powers to grant reprieves, pardons, and paroles, to commute penalties, to remove disabilities imposed by law; and to remit any part of a sentence for any offense against the state after conviction.” Plaintiff’s Pardon was issued by the Board that was vested with the constitutional power to “remove disabilities imposed by law”. The Pardon expressly removed these disabilities and provided that “the defendant may possess firearms” which is within the Board’s powers. Upon receiving this document, the Plaintiff reasonably concluded that the Board’s issuance of the Pardon carried with it the true intent of the State and removed all of the disabilities he was under.

O.C.G.A. § 16-11-129(b)(5) is Unconstitutional if It Makes Plaintiff Ineligible for a GFL

Even if this Court concludes that the General Assembly of Georgia intended to restrict the power of the Board to issue pardons to individuals convicted of certain drug offenses, the Georgia constitution precludes that reading of the statute.

Art. I, Sec. II, Par. III, Georgia Constitution of 1983 provides, “The legislative, judicial, and executive powers shall forever remain separate and distinct ...”

Because the powers of the Board are executive in nature, the General Assembly has no power to invade that province. “It is a fundamental principle of the

American governmental system that the legislature cannot usurp the powers of the executive department by exercising functions of the latter.” *Fuller v. State*, 232 Ga. 581, 208 S.E.2d 85 (1974).

In *Sentence Review Panel v. Moseley*, 284 Ga. 128, 663 S.E.2d 679 (2008), the Supreme Court interpreted this constitutional provision to bar the General Assembly from creating a sentencing review panel with authority to modify sentences set by the judiciary. The General Assembly is likewise barred from limiting the powers of the Board. “Legislative acts in violation of this Constitution or the Constitution of the United States are void, ***and the judiciary shall so declare them.***” Art. I, Sec. II, Par. V, Georgia Constitution of 1983. [Emphasis supplied]. Because a reading of the legislative act that makes Applicant ineligible for a GFL is in violation of the Constitution, it is void. The Forsyth County Probate court agreed with this line of reasoning in its Order [Doc. 3-3, Exhibit B]:

The legislature of the State of Georgia cannot proscribe the power of the State Board of Pardons and Paroles in the manner contended by the Assistant Attorney General in the 2005 unofficial opinion under examination here.

The State Board of Pardons and Paroles is established by Article IV Section II of the *Constitution of the State of Georgia*. The powers of the General Assembly with respect to the State Board of Pardons and Paroles are set forth in paragraph II of the Section. The General Assembly does

not have the power under the *Constitution of the State of Georgia* to allow, disallow, regulate, or otherwise affect the power of the State Board of Pardons and Paroles as granted by the Constitution except as authorized by the Constitution itself in those limited subject areas set forth therein.

The constitution specifically vests the State Board of Pardons and Paroles "... with the power of executive clemency." (emphasis supplied) Included within that power is the power "... to remove disabilities imposed by law...." *Constitution of the State of Georgia* Article IV Section II Paragraph II, (A).

The Constitution grants limited authority to the General Assembly with respect to certain offenses, and the power to pardon those offenses, but the General Assembly does not have the power under the Constitution to prevent the State Board of Pardons and Paroles from removing the disabilities involved in this case caused by the offense present in this case.

The clemency power of the State Board of Pardons and Paroles to pardon a controlled substances or dangerous drug conviction is executive and it is not within the purview of the General Assembly to regulate that power without Constitutional mandate as such would be a violation of the separation-of-powers doctrine. The Constitution specifically exempts the State Board of Pardons and Paroles from the General Assembly's power to enact laws affecting the powers and duties of members of constitutional boards. *Charron vs. the State Board of Pardons and Paroles*, 253 Ga. 274 (1984), *Constitution of the State of Georgia*, Article I Section II Paragraph III; and Article IV Section VII Paragraph II.

Nothing Has Changed Since NICS Approved Plaintiff in 2006

Upon appeal of its initial denial in 2006, NICS approved Plaintiff for a firearms transfer. The government can point to no change in law or circumstances in the intervening two years that now renders Plaintiff ineligible to possess firearms. Because Plaintiff was eligible to possess firearms in 2006, he remains eligible today.

**Relief**

Plaintiff is therefore entitled to specific relief from the conclusions, threats and actions of the Defendant. As shown above, Plaintiff is not prohibited state or federal law from legally possessing firearms of any type. Plaintiff is therefore eligible for a transfer under 18 U.S.C. § 922(g). Pursuant to 18 U.S.C. § 925A, a person wrongfully denied a firearms transfer by NICS may bring an action for an order to allow the transfer. Plaintiff requests such relief. Plaintiff also is entitled to a declaration that he is not federally prohibited from possessing firearms because of his 1969 conviction.

**Conclusion**

Plaintiff has received a complete Pardon with restoration of firearms rights. It was a validly issued Pardon from a constitutional board directed to issue such pardons and having the power to do so in its discretion. All of the language contained in the Pardon leads to the conclusion that the Plaintiff is under no further disabilities. Because Plaintiff's Pardon was an "issued document" and not a pardon or set aside by

operation of law, it is proper to look at the charging document and not to the totality of Georgia law. To conclude there is still a disability following the issuance of the Pardon would trigger the anti-mouse trapping rule. The NICS position that the Plaintiff is under a disability runs contrary to the plain meaning of 18 U.S.C. § 921(a)(20). The “unless clause” is not triggered in this case because the Pardon does not expressly forbid the possession of firearms. Therefore, Plaintiff is not expressly prohibited under either state or federal law and is entitled to relief from the erroneous conclusions of Defendant. Georgia does not prohibit the Plaintiff in any manner concerning firearms, and any other reading of Georgia statutes would be unconstitutional. For all the forgoing reasons, the Plaintiff is entitled to relief.

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/s/ John R. Monroe

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ATTORNEYS FOR PLAINTIFF

**Local Rule 7.1D Certification**

The undersigned counsel certifies that the foregoing Reply was prepared using Times New Roman 14 point, a font and point selection approved in LR 5.1B.

\_\_\_\_\_/s/ John R. Monroe\_\_\_\_\_  
John R. Monroe

### **CERTIFICATE OF SERVICE**

I certify that on January 13, 2009, I filed the foregoing Notice of Appearance of M. Douglas King II on Behalf of Plaintiff using the ECF system. On the same day, a copy of it was served via U.S. Mail upon:

David E. Nahmias, Esq.  
U.S. Attorney  
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/s/ John R. Monroe  
John R. Monroe