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Edward L. Miner
Tamara Huffman, paralegal

6 January 2009

[REDACTED]
State Capitol
Juneau, AK 99801

Dear [REDACTED]

Several weeks ago, I furnished you some proposed draft legislation involving possession problems under Alaska law for persons who were pardoned or received suspended imposition of sentences for felony charges I have since run our proposed changes by the NRA attorneys and they have some improvements. As a result, I am resending this to you with what we originally sent along with the suggested improvements. This, then, is an updated version of what was sent previously. Please note the highlighted portions of the last paragraph.

The laws regarding possession of firearms in Alaska—laws which were contemplated and enacted by our own state legislature—are being attacked, gutted and rewritten by bureaucrats at the ATF and FBI. Attempts to correct these errors at the federal level have been ignored. It is now incumbent upon the Alaska legislature to take action to defend the rights of Alaskans. In this letter I will explain the source of the problem, illustrate particular grievances against the federal agencies involved, and offer the proper solution—a recrafting of Alaska Statute 11.61.200(g)(2).

Under Alaska law, an individual who has been convicted of a felony can have their right to bear arms restored by any of three occurrences: a pardon, a suspended imposition of sentence, or by the passage of ten years from unconditional discharge. The Alaska legislature, recognizing both the distinctions of life in Alaska and also the profound respect that the majority of Alaskans

have for the right to bear arms, has made the decision to establish a means by which individuals who have previously been convicted of a felony may regain their right to bear arms. The bureaucrats at the ATF and FBI have subverted the goals of the Alaska legislature through the tortured and twisted application of limited U.S. Supreme Court cases to Alaska law. In doing so, these agencies have wrongfully deprived Alaskans of their rights.

In Caron v. U.S., the U.S. Supreme Court held that if a person who has previously been convicted of a felony is prohibited from possessing any type of firearm under state law, then they are prohibited from possessing all firearms under federal law.¹ Prior to this ruling, several states allowed previously convicted felons to regain the right to possess rifles and shotguns but prohibited them from possessing handguns.² Alaska law draws no distinctions among the types of firearms which a previously convicted felon may possess.³ Alaska law allows an individual whose rights have been restored to possess rifles, shotguns and handguns. The only limit contained in our state law is upon the carrying of a concealed firearm by a person whose rights have been restored.⁴ While the right of possession is fully restored, an individual who has previously been convicted of a felony may only carry a firearm concealed under limited circumstances - either while he is upon his own land or while he is engaged in outdoor activities that would "necessarily involve the carrying of a weapon for personal protection."⁵

An accurate reading of the Alaska statutes reveals that our state law should not be impacted by the Court's holding in Caron. Alaska law does not limit the "type" of firearms which a previously convicted felon may possess. Furthermore, the single limitation in place for previously convicted felons proscribes only their ability to carry a firearm in a concealed manner, and does not limit their right of possession in any way. The ATF and FBI are, however, interpreting the Alaska statute as a restriction upon possession. Because of this interpretation, Alaskans who have led productive lives, but who have convictions sometimes decades in their past, are being denied their right to own guns, and even being threatened with prosecution for serious Federal offenses.

¹ Caron v. U.S., 524 U.S. 308, 314 (1988).

² See U.S. v. Tomlinson, 67 F.3d 508 (4th Cir. 1995); see also U.S. v. Dahms, 938 F.2d 131 (9th Cir. 1991).

³ See AS 11.61.200(a) and (b).

⁴ AS 11.61.200(a)(12) and (g)(2).

⁵ *Id.* The Alaska appellate courts have not established an objective test or enumerated specific criteria to consider when determining which activities necessarily involve the carrying of a weapon for personal protection. @

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To better understand the plight of the individuals being affected by this law, I will offer some specific examples. In 1970, at the tender age of 19, R.S. made the mistake of getting caught up in recreational drug use. He was arrested for the possession of hallucinogens and convicted of a felony. As a first-time youthful offender, he was granted a suspended imposition of sentence, and given the opportunity to mend his ways. He is now a happily married 56-year-old father. He has worked, hunted and fished his entire life. He only learned recently, when he applied for the purchase of a new firearm, that he is now suddenly prohibited from owning firearms, despite having been granted a suspended imposition of sentence more than 30 years ago.

R.P. was convicted of a felony in 1992. After paying for his crime, he went straight to work helping the public. He became the director of the search and rescue organization for an Alaskan borough. Governor Murkowski granted him a full pardon, expressly for the purpose of allowing him to possess a firearm to help him fulfill his duties. He recently became aware of the fact that—despite the Governor's pardon—federal law prohibits him from possessing firearms.

The Federal law has stripped Alaska of the right to make its own decision on restoring gun rights to ex-felons. The overreaching actions of the bureaucrats at the ATF and FBI have left Alaska with a single option - to amend AS 11.61.200 to remove the disability on carrying a concealed weapon by a person convicted of a felony who has had their rights restored. By removing this disability in Alaska's law, the ATF and FBI will have no basis whatsoever to challenge Alaska's laws, and we can allow ex-felons who have proven their rehabilitation to participate in the full rights that all Alaskans enjoy.

I have included the text of two sample bills that would amend AS 11.61.200, and restore Alaska's policy of allowing rehabilitated ex-felons to own firearms. I had the proposed legislation reviewed by the NRA and the NRA still sees problems with our proposed solutions. I've enclosed a copy of the memo I received from the NRA outlining such problems and the NRA's suggested proposal. We would urge the Legislature to adopt these changes, as suggested by the NRA, to assure the continued support of the right of Alaskans to bear arms for the defense of themselves and others.

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Sincerely,

A handwritten signature in black ink, appearing to read 'Wayne Ross'.

Wayne Anthony Ross
Attorney at Law
Director, NRA

cc Brian Judy, NRA

Memorandum

Re: Proposed legislation
File: 11.61.220 Project
Date: 9 September 2008

Several of our clients have experienced problems in either being denied an Alaska Concealed Handgun Permit (CHP) or denied permission to purchase firearms during a "National Instant Criminal Background Check System" (NICS) check.

These problems stem from the language of AS 11.61.200, the Alaska Statute for Misconduct Involving Weapons in the Third Degree. AS 11.61.200(a)(12) bars all people convicted of felonies from carrying a concealed weapon, while AS 11.61.200(g) sets out the exceptions to (a)(12)'s blanket ban.

Because of the limited nature of subsection (g)'s exceptions, the Alaska Department of Public Safety takes the position, upheld by the Alaska Supreme Court in *Gabrielle v. State of Alaska*, that anyone with a felony conviction is ineligible for an Alaska CHP. Additionally, the FBI has taken the position that the limit on a felon's ability to carry a concealed weapon under AS 11.61.200(a)(12) & (g) activate the federal ban on the possession of any firearm under 18 USC §922(g), as interpreted in *Caron v. U.S.*

I shall attempt to describe how the particular provisions of Alaska and Federal law have created these twin problems, and what we can do to attempt to fix them by changing Alaska's law.

The Alaska CHP Issue

The Alaska Department of Public Safety has taken the position that anyone with a prior felony conviction, regardless of the time since the conviction or whether the conviction was set aside or pardoned, does not qualify for an Alaska CHP. They have based this determination on the limited scope of the exceptions in AS 11.61.200(g) to the total ban in 11.61.200(a)(12) of any felon carrying a concealed firearm.

AS 11.61.200(g) only allows a convicted felon to carry a concealed firearm if; (1) the conviction has been pardoned, (2) the conviction has been set aside, or (3) 10 years have elapsed since the conviction, and either (a) the person was in their home or on land immediately adjacent to their home, or (b) was engaged in an outdoor activity that necessitated carrying the weapon for personal protection. Thus, without both some evidence of rehabilitation in (1)-(3), and observing the limited conditions for carrying in (a)-(b), a person convicted of a felony is guilty of

Misconduct Involving Weapons in the Third Degree if they carry a concealed weapon.

The Alaska Department of Public Safety's interpretation of AS 11.61.200 was upheld in *Gabrielle v. State of Alaska*.¹ There, the Supreme Court of Alaska held that a person with a felony record of any description, though not prohibited from applying for an Alaska CHP under the statutes and regulations governing eligibility for the permit, nevertheless was not entitled to an Alaska CHP because of the restrictions found in AS 11.61.200. Because this issue has been appealed to the highest court capable of deciding the issue, the only way to change this outcome is through legislation.

The NICS Check / 18 USC §922(g)(1) Issue

The FBI's National Instant Criminal Background Check System implements a federal requirement that all federally licensed firearms dealers conduct a background check on all prospective firearms purchasers. The background check screens those that have been disqualified from purchasing firearms through operation of federal law. Information is entered into the NICS system by multiple state and federal agencies, but the FBI determines whether the information provided disqualifies an individual from purchasing firearms.

Many of the federal restrictions on possession of firearms are found at 18 U.S.C. §922(g). §922(g)(1) prohibits anyone who has been convicted of a felony from possessing a firearm, however §921(a)(20) contains an exception for those felons who have had their civil rights restored (through operation of law, a pardon, or any similar means). The exception in §921(a)(20) has its own exception, however, prohibiting those convicted of a felony whose civil rights have been restored from possessing a firearm if state law prohibits them from possessing a weapon of any type.

The exception to the exception found in §921(a)(20) was interpreted by the U.S. Supreme Court in *Caron v U.S.*² There, the Court faced a person whose civil rights had been restored under Massachusetts law, including the right to possess long guns and handguns. However, he was not allowed to carry handguns outside his home or business, though this right was afforded to non-felons. The Supreme Court found that this restriction, though not strictly a prohibition against possession of handguns, was enough of a restriction to activate the exception to the exception found in §921(a)(20).

Applying *Caron* to Alaska law, the FBI has taken the position that the restrictions on ex-felons carrying concealed weapons found in AS 11.61.200(a)(12) & (g) are sufficient to activate the exception to the exception found in 18 U.S.C. §921(a)(20). Because of this interpretation, ex-

¹ 158 P.3d 813 (Alaska 2007).

² 524 U.S. 308 (1998).

felons in Alaska, even those who have had convictions set aside or pardoned, are barred from possessing any firearm by §922(g)(1).

The FBI's interpretation of the effect of AS 11.61.200 on the application of 18 U.S.C. §922(g)(1) is contrary to the Alaska Supreme Court's interpretation in *Gabrielle* (which was not binding on the FBI), and has been questioned in other federal cases such as the unpublished *U.S. v Flores*.³ However, given the similarity between Alaska law and the Massachusetts law at question in *Caron* (both allowed possession of all types of weapons, but restricted where and how handguns could be carried), the FBI's interpretation of the law is not clearly incorrect. It would be possible to challenge the FBI in court, but it is far from certain that we could obtain a favorable result.

The Common Factor

The common factor in both of these issues is AS 11.61.200, and the restriction on ex-felons carrying concealed weapons in Alaska, except under certain narrow exceptions. While Alaska has several statutes covering the crime of "Misconduct Involving Weapons," enumerating different degrees of the offense, no other iteration of the statute implicates the carrying or possession of weapons by ex-felons, and so would not impact either eligibility for an Alaska CHP or eligibility under the FBI's NICS system.

Likewise, Alaska's statutes and regulations governing Alaska's CHP program (AS 18.65.700-790, 13 AAC 30.010-900) set out eligibility requirements, including disqualifications if an applicant has had multiple recent misdemeanor offenses or has been ordered by a court to attend a drug- or alcohol-rehabilitation clinic. However, none of the requirements for a CHP touch on the status of the applicant as an ex-felon; pardoned, conviction set aside, or otherwise. Thus, none of these statutes or regulations need to be revised in addressing either the CHP or NICS issue.

Therefore, a legislative fix to this issue need only modify the restrictions on ex-felons carrying or possessing weapons that are found in AS 11.61.200.

The Possible Solutions

Alaska is unusually *laissez-faire* in its approach to gun rights (being one of two states that allows concealed carry of firearms without a permit). However, Alaska also tends towards a tougher stance on crime issues than other states. In attempting to change the policy embodied in AS 11.61.200 towards the gun rights of ex-felons, we will be working in the cross-currents of these two conflicting political priorities.

³ 118 Fed. Appx. 49 (C.A.6 (Mich.)).

From a strictly political perspective, we could attempt to counter some of the turbulence of a legislative proposal by noting that it is federal law that has forced us to seek a modification of our state law, in order to allow us to pursue our own policy of granting forgiveness to, and restoring the rights of, ex-felons. Federal law has stripped Alaska of its right to make its own determination of how ex-felons are to exercise their gun rights, and leaves us only a simplistic all-or-nothing choice as to whether ex-felons should regain their gun rights.

There are several different methods we could pursue to change AS 11.61.200 so as to allow for ex-felons to apply for an Alaska CHP and to bypass the federal ban on possession found in 18 U.S.C. §922(g)(1). The principal question in changing the restrictions found in AS 11.61.200, however, is how far to expand the re-enfranchisement of gun rights to ex-felons.

First, in order to permit ex-felons to apply for an Alaska CHP, or to possess a weapon under 18 U.S.C. §922(g)(1) and *Caron*, we must remove the restrictions on where an ex-felon may carry a concealed weapon found in AS 11.61.200(g)(2) (I have attached two sample proposed bills with this memo for you to review). This would allow an ex-felon to carry a concealed weapon under the same circumstances that any other citizen would be able to. This would broaden the rights of ex-felons, as it allows them to carry concealed weapons where previously they were not allowed to. However, this is the only means of restoring their right to own weapons at all, given the FBI's interpretation of 18 U.S.C. §922(g)(1).

As for how far to extend re-enfranchisement, currently AS 11.61.200(g) identifies three groups of ex-felons that it restores gun rights to; ex-felons who (1) received a pardon, (2) had their conviction set aside, or (3) had more than 10 years elapse since they finished serving their sentence and who had not committed a violent felony. There is a strong argument that all three groups should be granted full re-enfranchisement, as all three demonstrate some individualized showing of rehabilitation, rather than automatically granting an ex-felon gun rights as soon as they get out of jail.

Conclusion

Alaska has made its own policy decision about how to handle the gun rights of ex-felons, however the Federal Government has stripped Alaska of the right to make our own judgments except for an all-or-nothing decision on the gun rights of ex-felons. That message of Federal interference with Alaska's laws is the message we should emphasize in attempting to amend AS 11.61.200, in order to restore the gun rights of those denied them under the federal government's ban.



State of Alaska
Department of
Public Safety

Sarah Palin, Governor
Walt Monegan, Commissioner

May 13, 2008



By certified mail with return receipt

Dear Mr. [REDACTED]

I received your e-mail dated April 6, 2008 appealing the denial of your application to obtain an Alaska Concealed Handgun Permit, and have given careful consideration to your appeal. Your appeal is denied. An explanation of the reason for this denial is as follows.

In stating your case, you provide abundant evidence of your good character and legal standing, as well as expressing frustration with an action by this department which you feel unwarranted in your circumstances.

The original decision to deny your application was based upon your convictions for 2nd degree burglary. Sentencing for your convictions was suspended and eventually your convictions were set aside. Burglary in the second degree is a felony. A felony conviction disqualifies an applicant from obtaining an Alaska Concealed Handgun Permit. A felony conviction that has been set aside is still a disqualifier for the issuance of an Alaska Concealed Handgun Permit. State law (13 AAC 30.900(6)) defines a conviction as meaning "...that a person has entered a plea of guilty or no contest to, or has been found guilty by a court or jury of, a criminal offense, **regardless of whether the judgment was after that set aside under AS 12.55.086 or a similar procedure in another jurisdiction, or was the subject of a pardon or other executive clemency...**" (emphasis added) Consequently, because of your set aside felony convictions, we are prohibited, by law, from issuing you an Alaska Concealed Handgun Permit.

"Public Safety through Public Service"

Office of the Commissioner
5700 E. Tudor Road - Anchorage, AK 99507 - Voice (907) 269-5086 - Fax (907) 269-4543
Juneau Office - Voice (907) 465-4322 - Fax (907) 465-4362

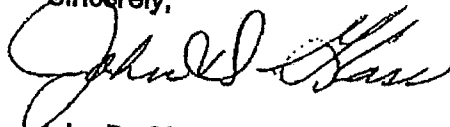
Mr. James Wargi
Page 2
May 13, 2008

Your message also indicates that you have not been denied a firearm transfer when presenting yourself for a NICS check. Although it is logical to assume that you are eligible to possess a firearm under federal law, an Alaska Concealed handgun permit may only be granted to those who are eligible to possess a handgun under both federal and state law. Alaska law (AS 11.61.200(a)(12)) prohibits you from carrying a concealable firearm. There is no unrestricted right to carry a concealed handgun for a convicted felon under Alaska law.

As a final administrative decision, the appeal to this action is denied.

You are reminded of your right to seek judicial review of this decision under Alaska Statute 44.62.560-570 within 30 days of receipt of this letter.

Sincerely,



John D. Glass
Deputy Commissioner

"Public Safety through Public Service"

Office of the Commissioner
6700 E. Tudor Road - Anchorage, AK 99507 - Voice (907) 269-5086 - Fax (907) 269-4543
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To whom it my Concern,

My name is [REDACTED] and I'm writing this letter in regards to the denial of a concealed carry permit that I applied for in the beginning of [REDACTED] of 2008. I have taken the concealed carry course and paid a considerable amount of money for that course to try and be a law abiding gun owner and carrier, even though in the state of Alaska it is not necessary to do so.

I'm a 36 year old father of [REDACTED] and a devoted husband, and I'm currently a superintendent for a multi-million dollar [REDACTED] and work year round at that job. I'm a tax payer, a voter and a yearly supporter of our Alaska Peace Officers and Public Safety Employee Association and a Member of the N.R.A. I'm a law abiding citizen that does not drink or do drugs and haven't even had a traffic violation in over ten years.

I was 17 years old when I found myself on the wrong side of the law for the first and only time in my life.

I was young and dumb as we've all been, and made a bad choice in my young life, I was involved in a non-violent crime in which a felony was charged. I plead no contest because I knew what I did was wrong and there was no sense in fighting it and waisting the courts time. I did a short jail term and was ordered to pay restitution and do 3 years probation. And because I was so young and payed my restitution in full and did my probation with no problems or violations. I was given a S.I.S (Suspended Imposition of Sentencing) my conviction was Dropped, Dismissed by a federal judge. (I'm not concidred a felon.) So why put me in that category.

I was given a second chance and have made a great life with that second chance, I'm allowed to vote, buy and posses firearms and I'm a avid hunter and sportsman. (Because I'm not concidered a felon that is all possible.)

In the State of Alaska I'm allowed to carry a concealed weapon without a permit, but yet I can't get a concealed carry permit if I want one. It doesn't make sense, why you would not want me on paper to show law enforcement that I would carry a concealed weapon. I have court documents, F.B.I and N.I.C.S background checks to prove my eligibility to own a handgun. I have talked to people at the permits and licensing unit that agree and don't understand it either.

I ask of you to grant me the right and please allow me to get my concealed carry permit and to go on paper as a permit holder and to be able to give law enforcement officers the ability to know that I have a weapon on my person and to be a law abiding and safety trained citizen.

Sincerely,

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]



State of Alaska
Department of Public Safety
Division of

Statewide Services

Sarah Palin, Governor
Walt Monegan, Commissioner

June 9, 2008

CERTIFIED RETURN RECEIPT

RE: Alaska Concealed Handgun Permit

Dear Mr. [REDACTED]

This is to notify you that your application for renewal of your Alaska Concealed Handgun permit is denied. Enclosed please find your cash in the amount of \$25.00.

Upon receiving an application for renewal, we are obliged to review the eligibility status of the applicant. In your case we have determined that you are not eligible to hold a concealed handgun permit and that the original issue was done in error.

Effective immediately, your concealed handgun permit is revoked. You must surrender the permit to the nearest peace officer. We recommend that you surrender the permit at the nearest State Trooper office or police department.

We apologize for any inconvenience this may cause you but the law does not allow any other course of action.

Alaska statute 18.65.705 states that, in order to be eligible for a permit, an applicant "must be eligible to own or possess a handgun under the laws of this state and under federal law." We understand that your right to possess a firearm has been returned to you under federal law but Alaska law continues to bar you from unrestricted possession of a firearm. As a result, you may not be issued an Alaska concealed handgun permit.

Under Alaska statute 11.61.200, misconduct involving weapons in the third degree, it is a class C felony for a person to knowingly possess a firearm capable of being concealed on

*Presidential
Pardon!*

one's person or to knowingly possess a firearm that is concealed on the person after having been convicted of a felony by a court of this state, a court of the United States, or a court of another state or territory.

The same statute does provide for two affirmative defenses to a prosecution for these offenses but does not make it legal conduct for a convicted felon. In your case, your felony convictions will forever bar you from unrestricted possession of a firearm in Alaska even in light of the fact that the federal government has apparently restored your federal rights.

*Presidential
Pardon!*

The person who initially reviewed your eligibility status mistakenly interpreted the restoration of your federal rights to possess a firearm as restoring your state right as well. It does not. Pardons do not create an exception. Set asides, whether court ordered or statutory, do not create an exception.

Please surrender your permit immediately to insure compliance with Alaska law.

Alaska statute 18.64.740 provides that you may appeal this revocation decision to the commissioner of the Department of Public Safety. The appeal must be received in writing within 30 days after the date of the notice of revocation, and must set out the reasons for the appeal.

Sincerely,

Terrie Satterfield
Permits and Licensing Unit

Terrie,

Here is what I had this e-mailed to me on the Pardon. Here is what I was told:

I meet the requirements of AS 18.65.705

There was "no change" on the renewal application

I meet all Federal and State laws to own and posses a handgun

Pardon granted by President not Governor of State of Alaska

Per AS a "Pardon" is the only way to restore rights lost and remove disabilities under Alaska Law

The ACHP Rules .doc was an information paper created by someone in DPS, not the State Attorney's Office

I have no idea of all the all the AS that apply and have been told that several contradict one another. In several AS it states that when a Pardon is issued It is as though the conviction never occurred. I have had CCW permits in several states (including Alaska).

If this does not clear it up to everyones satisfaction, please forward me the appeal procedures so I may address this to the Commissioner of Public Safety.

Thank you for your patience with me! I really do appreciate all your help!

Respectfully,



back to him. He objected. A replevin petition was filed in the Circuit Court of Phelps County on June 18, 2005, seeking return of his revolver. On October 20, 2005, the Attorney General filed his answer. The state's position was that Mr. Troyer needs a permit to acquire a pistol prior to obtaining custody of the revolver. The court held a hearing on August 21, 2006. The parties subsequently signed on October 5, 2006, a stipulation for dismissal. Mr. Troyer agreed to drop his lawsuit and the police agreed to return the revolver to Mr. Troyer without requiring that he obtain a pistol acquisition permit. The revolver was returned.

MONTANA

Van der Hule, Frank (Montana). The issue is whether Montana's restoration of rights satisfies the requirements of 18 U.S. Code section 921(a)(20), or is it insufficient based on the holding in *Caron v. United States*, 118 S.Ct. 2007 (1998), which held a person cannot be convicted under federal law of being a felon in possession of a firearm stemming from a state felony conviction if the state law that removed the disability allows the person to possess all firearms (rifle, shotgun, pistol). On the other hand, a person may be convicted under federal law of being a felon in possession of a firearm stemming from a state felony conviction if state law allows such a person to possess only certain firearms, e.g., rifles and shotguns, but not pistols. In this case, Mr. Van der hule was denied permission to purchase a hunting rifle following a background check. A lawsuit was filed. Plaintiff subsequently filed a motion for summary judgment. The government likewise filed a motion for summary judgment. Mr. Van der hule filed his reply on November 6, 2006. Oral argument occurred on March 23, 2007. The court held on September 21, 2007, that Montana's refusal to grant a license to carry a pistol to a person whose civil rights have been restored meant that under *Caron* he could not possess any firearm under federal law. However, there is a possibility that Montana law grants a licensing official discretion to grant the carrying license to such a person. Therefore, the court certified the question to the Montana Supreme Court.

NEW HAMPSHIRE

Lone Pine Hunter's Club, Inc. (New Hampshire). This is an effort to shut down a shooting range. New Hampshire has a range protection statute. The club has been operating a shooting range on the property since 1966. The case resulted in two reported decisions. *Lone Pine Hunters' Club v. Town of Hollis*, 149 N.H. 668, 826 A.2d 582 (2003), held that evidence was sufficient to uphold finding that the zoning board of adjustment's finding that, 34 years earlier, it merely decided that hunt club did not need a variance to build a proposed addition, rather than deciding that the club did not need a variance to use the property as a fish and game club. Consequently, under the 1999 zoning ordinance the club's use of the property could be approved as special exception. The club would have to cease and desist unless the club applied for a special exception and presented a site plan to the planning board depicting the nature of the club's entire operation. *Residents Defending Their Homes v. Lone Pine Hunters' Club, Inc.*, 124 A.2d 266 (N.H. 2007), held that the range protection statute only protected a shooting range that was in lawful operation at its inception. The court held the club was not operating lawfully from its inception in 1966. Accordingly, the club must obtain approval from the town, in compliance with the zoning provisions allowing for a special exception as a shooting range.

Wayne Anthony Ross

From: Frazer, John [John.Frazer@nrahq.org]
Sent: Thursday, December 04, 2008 11:16 AM
To: Ross, Col. Wayne Anthony
Cc: Judy, Brian; Conte, Christopher
Subject: FW: Gun Rights for Ex-Felons

Dear Mr. Ross:

Chris Conte, Brian Judy and I have reviewed your memo and draft legislation.

It appears to us that we will need to go a little farther than your drafts to fix the problem entirely.

Draft #2 completely repeals the limitation under which an ex-felon can only possess a gun on his own property, or while engaged in hunting, fishing, etc. This is the exception the Alaska Supreme Court relied on in *Gabrielle*, pointing out that under Alaska law at the time, "a pardoned felon [could] only carry a concealed handgun in those situations where an ordinary citizen would be able to carry a concealed handgun without a permit." 158 P.3d at 815. The flip side is that a pardoned felon couldn't carry a handgun anywhere else. This is similar to *Caron*, where (as Justice Thomas pointed out in his dissent) the ex-felon was only prohibited "from possessing only certain firearms (handguns) in only certain places (outside his home or office)." Getting rid of this limitation for all ex-felons would largely solve the *Caron* problem.

Draft #1 would reorganize AS 11.61.200(g) so that the property and hunting limitations only apply to persons whose rights are restored by operation of law after 10 years. This would help solve the problem for those whose rights are restored by a more particularized method (i.e., a pardon or set aside). Because there would be no limitations on gun possession by those people (and no problem with eligibility for carry permits), they would no longer be prohibited from possessing guns at the federal or state level. However, because the property and hunting limitations would still apply to those whose rights are restored by the passage of time, they would still be federally prohibited under *Caron*.

However, there is a potential problem with both drafts. AS 11.61.200(g) only creates an affirmative defense to prosecution under AS 11.61.200(a)(12). It is not a total exception, and therefore BATFE could argue that all pardons, set-asides, and 10-year restorations still limit ex-felons' right to possess firearms because they create a situation where the ex-felon can be arrested and put on trial before successfully raising his affirmative defense. BATFE would argue that if the Alaska legislature wanted to create a total exception, it knew how to do that; see, e.g., AS 11.61.200(e) (bans on possessing prohibited weapons and on discharging weapons from motor vehicles "do not apply to a peace officer acting within the scope and authority of the officer's employment.") If any limit exists on gun possession by ex-felons, those felons would still be prohibited from possessing firearms under federal law, and therefore from getting an Alaska carry permit. To avoid this problem, it would be necessary to change the affirmative defense to a full-scale exception.

As an aside on the federal interpretation of these provisions, I would not rely on the Alaska Supreme Court's holding that *Gabrielle* wasn't prohibited from possessing a gun under federal law because he was pardoned, rather than receiving a restoration of rights. The language in the federal statute is parallel for pardons and restorations, and I think a federal court would likely take a different view than the Alaska Supreme Court did.

12/4/2008

Fortunately, drafting a bill that will solve these problems is not difficult. All it needs to do is change the affirmative defense in AS 11.61.200(g) to an exception, and get rid of the property and hunting/fishing limitations. See attached, and please let us know if you have any questions.

Sincerely,

John Frazer

P.S. I am attaching a copy of the Gabrielle case for Brian's reference.

-----Original Message-----

From: Conte, Christopher

Sent: Tuesday, December 02, 2008 1:41 PM

To: Frazer, John

Subject: FW: Gun Rights for Ex-Felons

Here it is.

Christopher A. Conte
Legislative Counsel, NRA/ILA
(703) 267-1166

The information contained in this message and any attachments hereto, if any, should be presumed to be confidential. In addition, attorney/client and/or attorney/consulting privileges may attach. The information is intended only for the use of the addressee. If you are not the intended recipient or authorized agent, employee or counsel for the addressee, you are hereby notified that any use, dissemination, distribution or copying of this communication, in whole or in part is strictly prohibited. Have a nice day.

-----Original Message-----

From: Judy, Brian

Sent: Tuesday, December 02, 2008 12:35 AM

To: Conte, Christopher

Subject: Fw: Gun Rights for Ex-Felons

FYI.

----- Original Message -----

From: Ross & Miner Paralegal

To: bjudy@nrahq.org

Sent: Monday, December 01, 2008 3:29 PM

Subject: Gun Rights for Ex-Felons

Mr. Judy,

Wayne has asked me to forward the attached documents to you. I made the assumption that you do not have WordPerfect and converted the files into Word, which means they may look a bit different from the documents you have. Please let me know if there is anything else I can do.

Sincerely,

12/4/2008

Hidden punishment

In rural Alaska, where gun rights matter most, there's no way for reformed felons—even non-violent ones—to get them back.

Story and photos by Scott Christianse



ON SEPTEMBER 24, former state Representative Beverly Masek was sentenced for conspiracy to commit bribery at the federal courthouse in Anchorage.

Masek admitted to accepting about \$4,000 in bribes from Bill Allen, the former CEO of Veco. She also admitted to introducing legislation that would raise oil taxes, then pulling her bill after wringing a cash payment out of Allen—a bit of arm-twisting on a man who was famous for dumping cash into Alaska politics long before an FBI undercover investigation began to uncover Juneau's Corrupt Bastards Club.

U.S. District Judge Ralph Bealfine gave Masek, a Republican from Willow, six months in prison. That's 12 months shy of the minimum in the federal guideline, and the second-to-lightest sentence so far for any convicted Bastards Club member (South Anchorage Senator John Cowdery got six months of house arrest).

But the felony conviction also does something else: It takes away Masek's gun rights, likely forever.

This is a woman convicted of a non-violent offense. A woman who grew up in the Interior village of Anvik and who finished the Iditarod four times. Now she's a member of the tiny club of Alaska politicians who got caught in the FBI dragnet. She's also in a much larger club: the growing number of people whose Second Amendment rights have been extinguished by a government that has no intention of giving them back.

"The tragic thing is, under state law you can possess a firearm as long as it can't be concealed, so you can have a long rifle or shotgun," says federal public defender Richard Curtner, the attorney who represented Masek and had to explain this part of the law to her. "Having a firearm in rural Alaska is a necessity, not just for food, but for protection when you are traveling in the field."

This isn't the first time a state law and a federal law collided. In Alaska, a person can't toss a rock without having it land on some spot where state and federal laws don't match—fisheries management, marijuana prohibitions, subsistence rights, and an education law that proposes closing schools based on student test scores.

The federal gun law could use an Alaska exception, Curtner says.

"But people convicted of crimes don't have any lobby. There are all kinds of exceptions written into law for banks and for corporations, but when you've done something wrong in your past, there's no lobbyist for that," he says.

The federal government has a process for reinstating civil rights. In the case of gun rights, a felon who has paid their debt to society or been exonerated by a presidential pardon, can file an application for reinstatement of rights with the Bureau of Alcohol Tobacco Firearms and Explosives. The bureau's agents process the application, performing a background check to make certain the applicant qualifies.

But ATF agents don't do those background checks anymore, and haven't for the last 17 years. That's according to a form letter ATF sends to anyone who inquires about reinstatement of rights. The letter calls Second Amendment rights "federal firearms privileges" and says that ever since 1993, Congress has used the bureau's annual budget appropriation to prohibit the ATF from spending money to "investigate or act upon" any restoration of rights application. The letter also says the convict may seek a presidential pardon, and gives

the address of the Pardon Attorney's Office at the U.S. Department of Justice. Couple that with a federal law that created strict point-of-sale background checks for firearms, and you have some tall legal hurdles to leap.

And even though the federal public defenders occasionally represent clients seeking certain kinds of post-conviction relief, Curtner says helping a client reinstate their gun rights would be outside his office's ability to help.

"It's kind of beyond our representation, and I don't know that anywhere in the country there is a case where (a public defender) has pursued this."

IN THE LOWER 48, this issue might stand out as a mostly philosophical debate over Second Amendment rights, modern interpretations of the U.S. Constitution, or the hypothetical threat of a hostile government crackdown.

In rural Alaska, barring past felons from possessing a gun has specific real-world implications, ones that aren't just theoretical.

"Every village has a felon, at least one," says Winfred Olanna, who works as a village public safety officer in Brevig Mission, an Inupiat village of about 375 people on the Seward Peninsula. Olanna says he doesn't know enough about federal firearms prohibitions to talk about them. But as a VPSO, he's tasked with knowing everyone in Brevig, including everyone who returns from prison.

"My stepbrother, he's a felon, so he can't have any firearms in his home—no rifles, no shotguns," Olanna says.

The nearest probation officer to Brevig Mission is based in Nome, a 65-mile airplane ride from the village. He's even responsible for keeping people up-to-date with drug testing, when it's required. It's part of our job description to work with the P.O.s, because they hardly could come to every village twice a month for every felon," Olanna says.

Olanna also takes his brother-in-law hunting. After all, there's more work to a hunt than the split-second it takes to shoot a caribou or bearded seal—piloting the boat, spotting animals, field dressing and packing the meat—there's work a hunter can do without holding a gun.

"There's plenty to do," Olanna says. "He just can't carry a firearm—and we're all just happy that he is following his probation. He's happy because his probation ends next year."

Conversations about gun rights in rural Alaska inevitably lead one place. Is there a "don't ask, don't tell" policy when it comes to enforcing these laws? Olanna says there isn't in Brevig Mission.

One Alaska State Trooper, with experience as a VPSO oversight officer, says troopers are never encouraged to let anyone slide. "I have not practiced any kind of selective enforcement like that, and I've never been asked to. In fact, just the opposite," says Trooper Terrence Shanigan.

Shanigan, who is 38, grew up in rural Alaska, in the Bristol Bay village of Pilot Point and Ugashik. He remembers being one of the excited village kids who would run, not walk, to the airstrip when state trooper landed at Ugashik.

"I only knew him as 'trooper' but he was always exciting when he came to town," he says, adding troopers were pined with coffee and akutaq. He says a successful state trooper or VPSO must immerse themselves into the community, making a point to attend potlaches and community events such as planning meetings.

Troopers are charged with enforcing state laws, and that's where their focus is. Shanigan currently patrols the Parks Highway from Talkeetna north to Cantwell. When he worked as a VPSO oversight officer, he was sometimes assigned to villages with only on-and-off VPSO coverage, where he made frequent visits even though he couldn't be there every day. He's trained in wildlife enforcement, so he knows how to prosecute hunting and fishing violations.

Shanigan says it's possible that a trooper might come into contact with a felon on probation—someone the state law doesn't allow to



Alaska State Trooper Terrance Shanigan: "Someone with that knowledge might say, 'Hey, that trooper let somebody go—but that's not really what they saw,'" he says.

armed—without the information on-hand to charge that person with a probation violation.

"When you go down to the river, well, everybody is packing firearms," Shanigan says, but the trooper may not know back at the office, running names through databases. "Now somebody go"—but that's not really what they saw," he says. Cops can be suspicious for all kinds of reasons, Shanigan says, but they have to be careful to not trounce on anyone's rights. "You have to make decisions based on what you know to be true," he says.

ALL OF THE COMPETING STATE and federal regulations are further complicated by something called the National Instant Criminal Background Check System, NICS, as it's informally known, is the background check licensed gun dealers use to see if federal gun control laws allow a particular customer to purchase a gun. And the NICS system has flagged people who have their rights restored in their home state.

Anchororage attorney and gun rights activist Wayne

Anthony Ross has represented people attempting to earn their gun rights back. Ross says the reason NICS flags all Alaska felons is fallout from a U.S. Supreme Court ruling called *Carron v. U.S.* The case was decided in 1993, and requires that a person have all gun rights restored before the federal government recognizes any of their gun rights. The FBI applies this "all-or-nothing" approach to managing NICS.

Alaska law allows for restoration of most, but not all, of a felon's gun rights. A state felon cannot have a concealed weapon, Ross says, unless the felon wears the weapon on private property. (This interpretation differs slightly from that of Curtner, who tells clients they can't own a "concealable" weapon.)

A state felon is also prohibited from receiving Alaska's concealed weapons permit. The permit itself is an odd duck. It's no longer required in order to carry a concealed weapon in Alaska. Yet the state continues to offer them because gun rights activists want the right to carry in other states where Alaska has reciprocal agreements.

"The problem is that this Supreme Court case that says if there is any state prohibition on having firearms, no matter how minimal, then you can't own a firearm at all," Ross says. "So a guy who feeds his family through subsistence, and has paid his debt to society, isn't able to do that."

Ross believes changing state law can solve the NICS problem for some felons. He's even drafted model legislation, but it hasn't been introduced despite his efforts to recruit a legislator to sponsor it. "I've got clients who have received pardons. There is one guy who has received a presidential pardon and others are people who have completed their probation. So we have multiple classes of people who are affected by this," he says.

In a letter to state Senator Charlie Huggins, Ross identified two clients by their initials and related their stories. One was convicted in 1970, becoming a felon at age 19 after being caught with hallucinogenic drugs, Ross wrote.

"He has worked, hunted and fished his entire life. He only learned recently, when he applied for purchase of a new firearm, that he is now suddenly prohibited from owning firearms, despite having been granted a suspended imposition of sentence more than 30 years ago."

Ross's second example was

a man convicted of felony assault in 1992 and granted a full pardon by Governor Frank Murkowski in 2006. The man was a search and rescue pilot who wanted to carry a weapon while performing his job.

FEDERAL GUN LAWS ARE STRONGEST when applied to felons in possession of weapons, or people accused of using a gun while committing a felony crime. A drug dealer or repeat violent offender can have up to five years added to their sentence if they have a gun in their home. Newsrooms often get press releases from the U.S. Attorney's office touting new indictments and sentences related to such charges.

"We use our discretion when applying the law," Assistant U.S. Attorney Frank Russo says. "Usually we are applying the law at the request of the local community."

The implication is there won't be hordes of FBI or ATF agents flying around Alaska and rappelling into hunting camps to check IDs and round up gun owners. But defense attorneys aren't really satisfied with that.

"A client might know that it's very unlikely that they would be charged (for being a felon in possession)," Curtner says. "But I can't tell my people that, to trust the government not to charge you. I can only advise the client on the law, and the law in this case says you can't own a weapon."

So that's what Curtner told Beverly Masek, and every other nonviolent offender he's represented who was found guilty. "We talked about it, and it's one of those things that's what are you going to do?" Curtner says. "There is just no getting around it." ♦

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Beverly Masek: "Every village has a felon, at least one."