HJR

7 (FILE 2)

NO. CC972

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
ex rel, CITY OF PRINCETON, PETITIONER,

V.

HAROLD L. BUCKNER, RESPONDENT.

CERTIFIED FROM THE CIRCUIT COURT
OF MERCER COUNTY, WEST VIRGINIA

BRIEF OF HAROLD L. BUCKNER

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V.

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BRIEF OF HAROLD L. BUCKNER

I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

Respondent, Harold L. Buckner, a duly elected and serving magistrate of Mercer County, West Virginia, refused to issue a warrant subsequent to the passage of Article 3, Section 22 of the West Virginia Constitution (The Right to Bear Arms Amendment). The petitioner sought a Writ of Mandamus in the Circuit Court of Mercer County, West Virginia, to require Magistrate Buckner to issue the warrant. The Circuit Court ruled that the constitutional provision did, in fact, void West Virginia Code, Chapter 61, Article 7, Section 1 insofar as it dealt with the carrying of firearms without a license. The Circuit Court directed the parties, with their agreement, to certify the questions presented to the West Virginia Supreme Court

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of Appeals, which granted the State's petition to docket the certified question on October 13, 1987.

II. THE CERTIFIED QUESTIONS

1. Is West Virginia Code, Chapter 61, Article 7, Section 1, constitutional in light of the subsequent adoption of Article III, Section 22 of the Constitution of West Virginia?

2. May the Legislature of the State of West Virginia by proper legislation regulate the right of a person to keep and bear arms in the State of West Virginia?

III. STATEMENT OF FACTS

On the 10th day of March, 1987, a city policeman in Princeton, Mercer County, West Virginia, arrested the operator of a motor vehicle for the offense of driving under the influence of alcohol. In a lawful search following that arrest the policeman discovered a .22 caliber automatic pistol in the pocket of the driver and requested the driver to produce a license for the same. The driver advised the city policeman that he did not have a license to carry the pistol.

The city policeman obtained a warrant for driving under the influence, charging the driver with that offense, and requested of the respondent magistrate that he issue a warrant for carrying a dangerous and deadly weapon without a license to do so. The respondent concluded that West Virginia Code, Chapter 61, Article 7, Section 1 was in violation of Article III, Section 22 of the Constitution of West Virginia. The Circuit Court of Mercer County found that the filing of a formal written complaint for this offense would have been a futile act and that no formal complaint

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under oath was necessary to properly bring the matter before the Circuit Court in the proceedings therein pending.

After hearing on the matter before the Circuit Court, the Court made the following findings of fact:

1. "The Court finds that in comparing West Virginia Code, Chapter 61, Article 7, Section 1, and in Article 3, Section 22 of the Constitution of West Virginia, that the said statute appears to be in conflict with the constitutional provision."

2. "The Court, therefore, finds that Article 3, Section 22, of the Constitution has voided that part of West Virginia Code, Chapter 61, Article 7, Section 1, dealing with the carrying of firearms without a license. The Court finds that the Legislature of the State of West Virginia may regulate in some fashion the right to keep and bear arms under circumstances not in conflict with Article 3, Section 22 of the Constitution of West Virginia."

The petitioner and respondent agreed to certify this matter to this Court.

ARGUMENT

A. THAT THE VOTERS WERE LED TO BELIEVE THAT THEIR PASSAGE OF THE AMENDMENT WOULD NOT ABROGATE EXISTING STATUTORY REGULATION OF DANGEROUS WEAPONS.

The State, in its brief, observes that "much of this argument was distilled from a draft of James W. McNeely's comprehensive article entitled 'The Right of Who to Bear What, When and Where—W.Va. Firearms Law v. The Right to Bear Arms Amendment', 90 W. Va. L. Rev. p. 1125 (1987)".

As pointed out in the amicus curiae brief of the National Rifle Association, Mr. McNeely was a member of the Legislature which passed the constitutional amendment in question, having been elected and duly serving as such from Mercer County. As pointed out on page 5 of the amicus curiae brief, Delegate McNeely

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attempted to insert the word "lawful" by amendment on March 20, 1985, and that amendment was subsequently stricken by the Legislature. Subsequently, on the next day Delegate Thomas A. Knight, D-Kanawha, attempted to have the resolution returned to second reading in order to make an amendment, subjecting the right to the "police power" of the state. This attempt was defeated seventy-six to twenty-two in the House of Delegates. The House of Delegates then voted ninety-one to seven to pass the resolution.

On the Senate side, Senator Palumbo argued long and hard against the resolution for the fear that it would strike down existing laws. See Appendix A-20 to the amicus curiae brief.

A review of the various articles, which are attached to the amicus curiae brief, as an appendix, indicates that newspapers and debates throughout the State during the passage of the resolution and thereafter, fully and thoroughly expressed the opinion of those who would oppose the resolution on the basis that it would cancel existing gun-control laws.

The State, in its brief, concludes (page 8) that "it is clear that the Right to Keep and Bear Bears Amendement to the West Virginia Constitution was not meant to nullify existing laws." This conclusion is without factual support or logic. Had the efforts of Delegate McNeely to add the word "lawful" and had the efforts of Delegate Knight to make the amendment subject to the "police power" of the State, or either of these efforts, been successful, then the argument of the State might bear some logic. The fact that both of these efforts were specifically turned down by the Legislature indicates clearly that the Legislature had no such intent as stated by the State. Had that been the clear intent of the Legislature in passing the resolution, it could have simply added language to that effect, or adopted one of the amendments referred to.

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The argument of the State in its brief, on page six and seven, alleging that the proponents repeatedly asserted "that the proposed amendment would have no effect on existing gun laws; the express purpose of the amendment was simply to prohibit municipalities from, at some point in the future, banning guns", is equally illogical in light of West Virginia Code, Chapter 8, Article 12, Section 5A, which very clearly provides that

> "...neither a municipality nor the governing body of any municipality shall have the power to limit the right of any person to own any revolver, pistol, rifle or shotgun, or any ammunition or ammunition components to be used therewith nor to so regulate the keeping of gunpowder so as to directly or indirectly prohibit the ownership of such ammunition...."

This statute was passed by the Legislature in 1982 prior to the passage of the resolution in question. That statute goes on to permit the municipalities to pass ordinances relating to the arresting and conviction of persons for carrying about their persons any revolver or other pistol, etc. It is interesting to note that this section does not even require an exemption where the person has a license therefor. Thus, with West Virginia Code, Chapter 8, Article 12, Section 5A in place, the municipalities could not have passed any laws banning or possessing the listed firearms in the future.

The basis of the argument of the State is that the proponents took the position that the right to bear arms amendment did not change existing laws. The fact of the matter is that the opponents of the amendment took the position that it would, in fact, change existing law and the Legislature refused, although given opportunity to do so, to word the amendment in such a fashion so as to deal with that question.

As pointed out by the undersigned in Respondent's Note of Argument heretofore filed, the function of constitutional provisions as opposed to statutory provisions, was discussed by Judge Browning in State v. Brown, 157 S.E. 2d 580 (W. Va. 1967), in which he makes the following observation:

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> "At the outset it might be well to reiterate what this court has said on several occasions...'The Legislature of this State, unlike the Congress of the United States, under the Federal Constitution, does not depend for its authority upon the express grant of legislative power. The Federal Constitution is a grant of power; the State Constitution is a restriction of power. The Constitution of the State is examined to ascertain the restraints, if any, which the people have imposed upon the Legislature, not to determine the powers they have conferred.'"

If West Virginia Code, Chapter 61, Article 7, Section 1 is still effective, why did we need Article III, Section 22 of the Constitution? If Article III, Section 22 of the Constitution means anything, it has to mean that the people of the State wanted to change the law in existence at the time and place restraints upon the Legislature. Any other conclusion is illogical and would render the act of the Legislature and the people in adopting the constitutional provision an exercise in futility.

The comparison by the State of the instant constitutional provision with the federal constitutional provision as discussed in State v. Workman, 35 W.Va. 367, 14 SE 9 (1891) ignores the fact that the provisions now before the Court are substantially different from the Second Amendment to the United States Constitution, which says

> "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."

The Federal Constitution refers to the "people" as a class, as compared to the constitutional provision now before the court, which refers to "a person".

There is an obvious and clear inconsistency between West Virginia Code, Chapter 61, Article 7, Section 1, and Article III, Section 22 of the Constitution. It is the duty, therefore, of this Court to apply the clear intention of the electorate and hold the statute in question unconstitutional. This principal has been enunciated by this court in unequivocable language:

> "If a constitutional provision is clear in its terms, and the intention of the electorate is clearly embraced in the language of the provision itself, this court must apply and not interpret the provision." State ex rel Bagley v. Blankenship, 246 SE 2d 99 (W. Va. 1978).

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B. THAT THE RIGHT TO BEAR ARMS IS NOT UNLIMITED, AND IS SUBJECT TO REASONABLE REGULATION BY THE LEGISLATURE TO PROMOTE THE PUBLIC WELFARE.

1. THAT THE LEGISLATURE'S POLICE POWER PERMITS REASONABLE REGULATION OF THE EXERCISE OF FUNDAMENTAL CONSTITUTIONAL RIGHTS.

The Right to Bear Arms Amendment is, as observed by the State in its brief on page nine, clear and unequivocable. It is conceded that the amendment would by implication exclude the use of arms for purposes other than as stated in the amendment. The Legislature may address those other purposes in a fashion not inconsistent with the constitutional provision. Unfortunately, West Virginia Code, Chapter 61, Article 7, Section 1 far exceeds the power of the Legislature to so address the use of arms for purposes not set forth in the Right to Bear Arms Amendment.

To argue that the licensing scheme satisfies the constitutional amendment is to ignore reality. The licensing scheme in West Virginia now in place is found in West Virginia Code, Chapter 61, Article 7, Section 2, and requires the applicant for the license to publish a notice setting forth his name and occupation and the fact that he will appear before the Circuit Court on a certain day and make application. The section goes on to provide that the court "may" grant the license. The applicant must file a verified application showing (1) that he is a citizen of the Uniteds States of America; (2) that he has been a bona fide resident of the state for at least one year and of the county for sixty days; (3) that he is over eighteen years of age, a person of good moral character, of temperate habits, not addicted to intoxicants nor controlled substance and that he has not been convicted of a felony or any offense involving the use of a weapon in an unlawful manner, and that he is gainfully employed in a lawful occupation and has been so engaged for a period of five years

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next preceding the date of his application; (4) the purpose or purposes for which the applicant desires to carry a weapon, the necessity therefor, the counties in which he desires to do so; (5) that he is qualified under minimum requirements for the handling and firing of firearms as promulgated by the Department of Natural Resources. The applicant, if he can convince the Circuit Court that he ought to have a license under these provisions, is then required to pay $50.00 to the Sheriff and file a bond with the Clerk of the Circuit Court in the penalty of $5,000.00. After all of this is done and the fees paid, the license is issued and the Clerk furnishes the Superintendent of the Department of Public Safety a certified copy of the order.

How is it possible to read into the constitutional amendment that a person's right to keep and bear arms can be so restricted? There is nothing in the constitutional amendment which could restrict the right to citizens of the United States of America, to a one-year residency of the state and a sixty day residency of the county. The statute requires that the person be gainfully employed in a lawful occupation and have been so engaged for a period of five years next preceding the date of his application. This would eliminate retired persons, persons on disability, housewives, persons in school and anyone else who has not been gainfully employed for a period of five years. Is the State taking the position that these people are not "persons" as contemplated by the constitutional amendment? Where in the constitutional amendment does it authorize the Legislature to delegate to the Department of Natural Resources the power to make rules and regulations for the handling and firing of firearms? Where in the constitutional amendment does it say that a person is restricted to a particular county or counties in which he may keep and bear arms? Where in the Constitution does it say that the Circuit Court shall, in its exclusive discretion, decide who can keep and bear arms and who can't keep and bear arms?

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This rather brief analysis of the licensing law should make it obvious that the existing law, with regard to the right to keep and bear arms for the reasons set forth in the amendment, is clearly unconstitutional.

It is admitted that the Legislature's police power may encompass "reasonable" restraints upon constitutionally granted rights, but the State herein is taking an extremely unreasonable view of that right. By way of example, the right of free speech as established by the Constitution does not extend to the right of a person to yell fire in a crowded theater. But here, if the State's position is well taken, the right of free speech could be restricted to persons who have a license to speak, who have been residents of the state for more than a year, have been gainfully employed for more than five years, and conform to the regulations set forth by some bureauracy of state government. All other persons would not have the right of free speech.

2. THAT LEGISLATURES FROM JURISDICTIONS WITH CONSTITUTIONAL PROVISIONS SIMILAR TO WEST VIRGINIA'S REGULATE CARRYING HANDGUNS.

The State here argues that many other states have similar constitutional provisions and goes forward with statutory regulations concerning the same. While this argument might be helpful, it is submitted that the same is an argument to the wrong branch of government. This is a legislative matter. The question before this court being narrowly limited to the constitutionality of West Virginia Code, Chapter 61, Article 7, Section 1, and the certified question as to whether or not the Legislature may regulate in some fashion the right to keep and bear arms under circumstances not in conflict with Article III, Section 22 of the Constitution of West Virginia.

The State seems on pages 13 and 14 of its brief to be conceding that the licensing requirements of West Virginia are oppressive, at least in the two instances of the posting of a bond and that the person be employed for the five preceding

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years, and concludes that they may be stricken without compromising legislative intent. The undersigned does not find in the statute the usual provision that the provisions therein are severable and that the statute would survive if any part of it is found to be unconstitutional. However, the entire philosophy of the licensing statute was passed without the benefit of the guidance of the Right to Bear Arms Amendment. The undersigned does not concede, by any interpretation, that the Legislature has the power to require a license based upon the other requirements set forth in West Virginia Code, Chapter 61, Article 7, Section 2. The Circuit Court still has, under the State's suggestion, the absolute right to grant or not grant the license and the other provisions of the licensing statute are equally oppressive. A person does not need a license to exercise the right of free speech. The Right to Bear Arms Amendment does not provide for a license. The right is stated in clear and unequivocable language, and is not subject to interpretation by applying conditions and restrictions not contained therein.

3. THAT COURTS FROM JURISDICTIONS WITH SIMILAR CONSTITUTIONAL PROVISIONS UPHOLD THE LEGISLATURE'S POWER TO IMPOSE REASONABLE RESTRICTIONS ON HANDGUN CARRYING VIA LICENSING.

Why does the State insist upon a license? Why can't we just accept the constitutional amendment as it is written and in its clear language? What is the fear?

These questions seem to require some answer before this issue can be put in perspective. For some unknown reason, governments in modern times seem to think that they can control people by requiring licenses for various aspects of life. The population of West Virginia by an overwhelming majority passed Article III, Section 22 of the Constitution of West Virginia and didn't put the word license in there anywhere. Why is it so hard for the State to accept the provisions of that constitutional amendment as it is written?

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Perhaps the State feels that bad people will have weapons and hurt good people. It probably shouldn't be a shock to the State to know that bad people already have weapons and are already hurting good people. Apparently the State feels that if the constitutional amendment is allowed to stand in its clear language, the bad people will have more guns and will hurt more good people. If this is their thought, they don't live in the real world. The bad people have all the guns they want. It is the good people, the people who respect and obey the law, who don't want to go to the trouble of going to the Circuit Court to obtain a license, post a bond, run an ad in the newspaper and prove all the requirements of the law, to obtain "permission" to keep and bear arms; these are the people who don't have arms in our state. Convicted felons are prohibited by federal law from possessing or carrying firearms which have moved in interstate commerce (18 U.S.C.A. Section 922(g), (1987 pocket part), which should alleviate the fear that these people will lawfully have weapons.

The State's chart of licensing statute indicates that most states permit the open bearing of arms without a license. The undersigned is informed by attorneys for the National Rifle Association, appearing by amicus curiae, that the claim in the chart, that Michigan requires a license to carry openly, is incorrect, citing M.S.A., Section 28. 424, M.C.L. Section 750.227, which reads as follows:

> "A person who shall carry a dagger, dirk, stiletto or other dangerous weapon, except hunting knives adapted and carried as such, concealed on or about his person, or whether concealed or otherwise in any vehicle operated or occupied by him, except in his dwelling house or place of business or on other land possessed by him; and a person who shall carry a pistol concealed on or about his person, or, whether concealed or otherwise, in a vehicle operated or occupied by him, except in his dwelling house or place of business, or on other land possessed by him, without a license to carry the pistol as provided by law, or if licensed, carrying in a place or manner inconsistent with any restrictions upon which such license, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than five years, or by a fine of not more than $2,500.00."

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Further that Connecticut and Indiana require a license to carry a pistol openly. However, a license is issued as a matter of right because of the right to bear arms. Rabbitt v. Leonard, 36 Conn. Super. 108, 413 A. 2d 498 (1979; Schubert v. Debard, 73 Ind. Dec. 510, 398 N.E. 2d 1339) (Ct.App. 1980), and that it has even been held that "not making (pistol license) applications available at the chief's office effectively denied members of the community the opportunity to obtain a gun permit and bear arms for their self defense". Motley v. Kellogg, 78 Ind. Dec. 316, 409 N.E. 2d 1207, 1210 (Ct. App. 1980).

Further, according to counsel for the National Rifle Association, the State has cited Utah Constitution erroneously, the same having been reworded to read as follows:

> "The individual right of the people to keep and bear arms for security in defense of self, family, others, property, or the state, as well as for other lawful purposes, shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms."

The up-to-date right to bear arms guarantees of the forty-two states may be found in the Appendix to the amicus curiae brief on pages A-25 to A-29.

Since virtually every case relative to the position of the respondent herein has been cited in the amicus curiae brief, the respondent adopts that brief and the contents thereof herein.

Respectfully submitted.

HAROLD L. BUCKNER, Respondent, P.Q.

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By _____
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CERTIFICATE OF SERVICE

I, ROBERT E. HOLROYD, of counsel for Respondent, do hereby certify that I served a copy of the foregoing Brief upon the following counsel, by depositing a true copy of same in the United States Mail, postage prepaid, addressed to them as follows, on the 12th day of January, 1988:

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Counsel for State of West Virginia
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Charleston, West Virginia 25305

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see bill referral file for full report

97th Congress
2d Session

COMMITTEE PRINT

THE RIGHT TO KEEP AND BEAR ARMS

REPORT

OF THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

FEBRUARY 1982

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1982

For sale by the Superintendent of Documents, U.S. Government Printing Office
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PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE NAVARRE

NAME: BILL LUND
TITLE: 376-5149 WK #
DDRESS: POB 870368
CITY: WASILLA ZIP: 99687
PHONE: 376-6533
ILL NO:
UBJECT: LOCAL AUTONOMY-ILLEGALIZE HOME BREWING???
ESSAGE: DEAR SIRS
PLEASE WORK TO REPEAL OR AMEND THE LAW WHICH MAKES HOME BREWING ILLEGAL IN THE STATE. I REALIZE AFTER TALKING TO MISTER LARSON'S OFFICE, THAT THE INTENT WAS NOT TO ILLEGALIZE IN THIS AREA AND WAS ADVISED THAT I COULD PROBABLY CONTINUE. BUT THIS IS A HOBBY OF MINE THAT I LIKE TO BRAG ABOUT AND I LIKE TO BE LEGAL. WOULD APPRECIATE A REPLY.

POMID: 14112057
DATE: 01/17/89
TIME: 11:20:57
IONAME: MAT-SU LIO

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	MILLER	PETTYJOHN	UEHLING
	PHILLIPS	SHARP	ZHAROFF
	SHULTZ	SWACKHAMMER	
	TAYLOR	ULMER	
	ZAWACKI		

PUBLIC OPINION MESSAGE

1389

DEAR: REPRESENTATIVE NAVARRE

NAME: RICHARD ROSS
TITLE: CHIEF OF POLICE
ADDRESS: 107 S. WILLOW ST
CITY: KENAI, ALASKA ZIP: 99611
PHONE: 283-7879
BILL NO: HJR 7
SUBJECT: RIGHT TO KEEP AND BEAR ARMS
MESSAGE: REQUEST THAT YOUR COMMITTEE NOT MOVE THIS RESOLUTION UNTIL IT HAS RE CEIVED THOROUGH LEGAL REVIEW. THE CONCERN BEING THAT THE MINIMAL STATUATORY R ULATION CURRENTLY PLACED ON FIREARMS POSSESSION (IE FELON IN POSSESSION;POSSES ION ON LICENSED PREMISES; WHILE INTOXICATED; OF ILLEGAL WEAPONS; CONCEALED WEA PONS) MAY BE JUDICALLY NULLIFIED IF ADOPTED.

POMID: 13143834
DATE: 01/17/89
TIME: 14:38:34
LIONAME: SOLDOTNA LIO

COPIES:	REPRESENTATIVE	SENATOR
	SWACKHAMMER	FISCHER

Copy Rep. Go!

Niggliek
Feb 2

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE SUND

NAME: SHIRLEY WARNER/APOA
TITLE: VICE PRESIDENT
ADDRESS: 7800 LOTUS DRIVE
CITY: ANCHORGE, ALASKA ZIP: 99502
PHONE: 786-8851
BILL NO: SJR 15
SUBJECT: RIGHT TO KEEP AND BEAR ARMS
MESSAGE: THE APOA STRONGLY OPPOSES THIS BILL. THE ALASKA CONSTITUTION AS IT IS WRITTEN WORKS WELL FOR LAW ENFORCEMENT. THERE ARE SOME POTENTIAL PROBLEMS WITH WHAT THE NRA WANTS. IF IT WORKS FINE IT SHOULD BE LEFT ALONE. PLEASE REMEMBER GUNS IN BARS AND ON SCHOOLGROUNDS. KEEP IN MIND RHEA VEGA.

POMID: 03171430
DATE: 05/03/88
TIME: 17:14:30
LIONAME: ANCHORAGE LIO

COPIES: REPRESENTATIVES

GRUENBERG
BARNES
COTTEN
NAVARRE
TAYLOR
ULMER

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE SUND

NAME: ROBERTA ROGERS
TITLE:
ADDRESS: 7310 MARCH COURT #2
CITY: ANCHORAGE, ALASKA ZIP: 99504
PHONE: 333-9485
BILL NO: HB 348
SUBJECT: MEMBERSHIP OF MEDICAID RATE COMMISSION
MESSAGE: I VOTE FOR YOU NOT TO TAKE CHIROPRACTIC OFF MEDICAID.

POMID: 03172411
DATE: 05/03/88
TIME: 17:24:11
LIONAME: ANCHORAGE LIO

COPIES: REPRESENTATIVES

BARNES
COTTEN
GRUENBERG
NAVARRE
TAYLOR
ULMER

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE SUND

NAME: JIM WEIDNER
TITLE: PRES. ASSOC. FOR PROTECTTION OF PF
ADDRESS: 5479 CHEAN HOT SPRINGS ROAD
CITY: FAIRBANKS ZIP: 99701
PHONE: 480-6366
BILL NO: SJR 25
SUBJECT: USE OF INCOME FROM PERMANENT FUND
MESSAGE: THIS ALSO PERTAINS TO HJR48. LET US NOT FORGET THESE IMPORTANT BALLOT PROPOSITIONS. URGE THAT THE CONCEPTS CUTLINED IN THESE RESOLUTIONS BE PLACED ON THE BALLOT. HJR 48'S TEXT SEEMS MOST REASONABLE, BUT SJR 25 IS ALL RIGHT TOO. EOM-FZ

POMID: 07091632
DATE: 05/04/88
TIME: 09:16:32
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BROWN CATO
COLLINS COTTEN
DAVIDSON DAVIS
DONLEY ELLIS
FRANK FURNACE
GOLL GRUENBERG
GRUSSENDORF HANLEY
HERRMANN HOFFMAN
HUDSON KOPONEN
LARSON MARTIN
MENARD MILLER
NAVARRE PEARCE
PETTYJOHN PHILLIPS
POURCHOT RIEGER
SHULTZ SPRINGER
SHACKHAMMER TAYLOR
ULMER WALLIS
ZAWACKI

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE SUND

NAME: DUANE UDLAND
TITLE: PRES.ALASKA CHIEFS OF POLICE
ADDRESS: BOX 2499
CITY: SOLDOTNA ZIP: 99669
PHONE: 262-4455
BILL NO: SJR 15
SUBJECT: RIGHT TO KEEP AND BEAR ARMS
MESSAGE: THE CHIEFS OF POLICE HAVE NOT CHANGED THEIR POSITION ON SJR15. WE D NOT BELIEVE A CONSTITUTIONAL AMMENDMENT IS NECESSARY. THE RIGHTS OF ALASKANS ARE ALREADY WELL PROTECTED UNDER OUR PRESENT CONSTITUTION. IF LEGISLATION MU BE PASSED WE PREFER THE VERSION AS WRITTEN BY REP. ULMER'S COMMITTEE.

POMID: 13092431
DATE: 05/04/88
TIME: 09:24:31
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ULMER

Voters know NRA rhetoric from real dangers

tom wicker
in the nation

NEW YORK — Is the National Rifle Association slipping? If the 1988 election returns are a guide, this most feared special interest in American politics may be shooting itself in the foot.

It's well known that the NRA poured $6.1 million into Maryland to overturn a state law banning cheap, concealable handguns. Voters nevertheless supported the legislation by a wide margin, as the NRA suffered its first defeat in a statewide referendum on gun control.

It's not so well known that every U.S. senator targeted by the NRA won re-election anyway. Among them was Howard Metzenbaum, D-Ohio, a persistent advocate of gun control who has been as persistently denounced by the gun lobby ("our biggest foe," declared Wayne LaPierre, chairman of the NRA Political Victory Fund).

Metzenbaum was the Senate sponsor of the Brady amendment. Named for James Brady, the former press secretary wounded in the attempt on President Reagan's life, the amendment called for a seven-day waiting period during which police could determine whether anyone trying to buy a handgun had a felony record.

Despite the organization's efforts to defeat Metzenbaum — he estimates that they spent "hundreds of thousands" against him in Ohio — he was re-elected by 602,000 votes.

Metzenbaum thinks his triumph over the NRA will improve chances for the Brady amendment in the next Congress.

The Maryland referendum defeat also should lessen legislators' fears of the NRA's ability to retaliate, since it happened on the congressional doorstep and was heavily covered by Washington press and television. The gun lobby put up $6.1 million of the total of $6.6 million spent in opposition to the state's handgun law.

Supporters of the handgun law spent only $752,107 to win by 58 to 42 percent. With Gov. Schaefer and most Maryland law enforcement officials on their side, they succeeded in convincing voters that the law did not threaten legitimate sportsmen and gun owners, but would be effective in banning sales of cheap weapons useful only to criminals.

These blows to the NRA in the 1988 elections were balanced, if at all, only by a Nebraska vote to amend the state Constitution to guarantee the right to bear arms. Bush's election also may be a boost for the NRA, since he has opposed the waiting period and other gun control legislation.

None of this necessarily means that the NRA will not remain a powerful opponent of legislation and candidates that appear to threaten the millions of non-criminal Americans who legitimately own and want to keep guns. In all but a few states, they form a powerful voting bloc easily aroused against anything they think would deprive them of, or restrict their ability to possess, weapons they regard as theirs by right.

The 1988 election returns suggest, however, that such gun owners may be making sharper distinctions between real threats to their perceived interests, and such reasonable, law-enhancing steps as the seven-day waiting period (already in effect in 22 states) and Maryland's ban on cheap, concealable handguns.

If that's so, the NRA will have to rethink its traditional cry-wolf tactics.

☐ Tom Wicker is a New York Times columnist.

DIALOG File 259: AP NEWS - JULY 1983 - JUN 1988 (COPR. 1988 ASSOCIATED PRESS)

In the 1986 congressional elections, not a single incumbent targeted for defeat by the NRA lost his or her seat.

LaPierre: "It's very tough to defeat incumbents in Congress these days. Most members of Congress who vote for gun control are in safe districts and nobody's going to beat them. There are few competitive districts left where the gun issue is the (major) issue."

In recent congressional battles and numerous state gun control fights, the NRA and the organized police groups have clashed bitterly. This has given state lawmakers and members of Congress a political escape hatch, allowing them to oppose the NRA by supporting their local police.

"I don't see their relationship with police as ever being very good again," says Jerald Vaughn, executive director of the International Association of Chiefs of Police.

LaPierre says he held meetings recently with "three or four" members of Congress, "people who we felt were confused" over the early version of the plastic gun bill. "They're still friends of the NRA."

LaPierre's view of his meeting with Exon: "I view it as informational. If information is fence-mending, and fence-mending is information, I guess you could interchange them."

Vaughn says of the NRA, "They are by no means out of the picture, but there are signs their stranglehold on this administration and Congress is starting to loosen a bit. There's a growing recognition in law enforcement the NRA is an organization out of control. But politically, they're a savvy organization. They make sure they're never in a position of having to admit defeat."

N.T. "Pete" Shields, chairman of Handgun Control Inc., says the entry of law enforcement groups into the fray has been crucial.

"The NRA used to call us bleeding-heart communists, soft on criminals," Shields says. "Now, whole law enforcement community the guys on the firing line on the street is behind it (the fight to control guns). It's not credible to think of those people as bleeding-heart, liberal communists."

0407539
SECTION: General news
STORY TAG: FloridaGuns
BY: COLE, RICHARD ; Associated Press Writer
DATELINE: MIAMI (AP) April 28, 1988
TIME: 1143PST CYCLE: AM
PRIORITY: Regular WORD COUNT: n/a

The shooting of three Miami policeman in a month, along with a skyrocketing murder rate, had authorities here demanding a change in Florida's liberal gun law Thursday, and the state Legislature appears to be responding.

Only hours after Miami motorcycle patrolman James Hayden was wounded twice with an automatic pistol during a routine traffic stop, a state House criminal justice subcommittee voted 4-3 Thursday to recommend an amendment to the state constitution to require a seven-day cooling-off period for gun buyers.

On Wednesday, the full Senate had approved another bill that tightened up gun law loopholes allowing some convicted criminals to get concealed weapons permits.

The current relaxed gun law, approved last year over the protests of urban police agencies, all but eliminated cooling-off periods, banned local gun control ordinances and allowed most Floridians to carry a concealed weapon.

Opponents, including Miami-area police and city officials, say it encourages a Wild West atmosphere they blame for a surge in violence.

"You liberalize gun laws and people feel they are at liberty to go out and shoot each other and shoot policemen," an angry Miami police Sgt. David Rivero said Thursday. "We're headed the wrong way."

Miami had an 18 percent increase in gun-related crimes between October and March, compared with the same period before the law was passed. And ominously, gun thefts were up 30 percent, said Rivero.

The murder rate in Dade County, after having dropped last year, has soared again, hitting the 100 mark in April four months ahead of the 1987 rate.

"We're going to have to see a lot more people killed and maybe a lot more policemen killed before the Legislature makes a change," said Metro-Dade police spokesman Al Hidalgo-Gato.

Miami Mayor Xavier Suarez on Thursday called for a new law or a state constitutional amendment giving local communities the right to regulate guns.

"We need extensive background checks and a cooling-off period," said Suarez. Under the current state law, counties can impose a limited two-day cooling-off period, but police say it's so vague that it's meaningless.

Wednesday night's wounding of Hayden, who was listed in stable condition Thursday, occurred in the same neighborhood
(cont. next page)

Alaska State Legislature

Please enter into the record my testimony to the House Judiciary
committee name

committee on SJR 15 dated 4-20-88
bill/subject

The Alaska Association of Chief's of Police has been opposed to this resolution since it's introduction. Our position on the committee substitute at this time is that we haven't had enough time to poll our membership on the new version, it's late in the session and we don't feel there is enough time left to resolve the issues to everyone's satisfaction. At the present time there are no attempts to infringe on individual rights to keep and bear arms, therefore we don't see any need for urgency in passage right now.

Signed: Dan Rushington
Testifier

KETCHIKAN P.D. & A.A.C.O.P.
Representing (Optional)

361 MAIN ST KETCHIKAN
Address

225-6631
Phone No.

ALASKA PEACE OFFICERS ASSOCIATION

State APOA Office • P.O. Box 240106 • Anchorage, AK 99524-0106 • (907) 786-1807

February 15, 1988

The Honorable Fran Ulmer
Chair, State Affairs Committee
Alaska State Legislature
P. O. Box V
Juneau, AK 99811

Dear Fran:

I am writing concerning Senate Joint Resolution 15 which proposes an amendment to the Constitution of the State of Alaska. The resolution has been referred to the House State Affairs Committee.

On January 14, 1988, the Alaska Peace Officers Association Board of Directors formally received the proposed resolution. At the conclusion of the review a motion was unanimously passed opposing Senate Joint Resolution 15.

Our concern with this amendment change is that the door could be conceivably left open to eliminate other laws currently on the books. Laws such as felon in possession of a handgun, possession of weapons by intoxicated persons, carrying concealed weapons, etc. We feel these are fair and justifiable laws that are obviously needed.

As you are probably aware, a majority of our members are gun enthusiast. We are engaged in many activities such as hunting, target shooting, trap shooting and almost any sporting activity relating to guns and weapons. We do not feel our current constitution prohibits or dampens any legitimate activity in relation to these activities.

Therefore, if the machine is not broken, why fix it. We do not feel the current constitution infringes upon any person or group, the right to bear arms. It does, however, allow the state to control the possession of weapons by certain people such as felons and people under the influence. It also allows the state to control certain classes of weapons, such as bombs, silencers, sawed-off shotguns, switchblade knives and the like.

If you have any further questions, please contact me.

Sincerely,

Ed Kalwara

Ed Kalwara
State President
Alaska Peace Officers Association
2760 Sherwood Lane
Juneau, AK 99801
789-2165 (work)
789-0036 (home)

cc: Governors Criminal Justice Working Group
John Sund, Chair, House Judiciary Committee ✓
All Members of the House State Affairs Committee

CITY OF SEWARD

P.O. BOX 167
SEWARD, ALASKA 99664

- Main Office (907) 224-3331
- Police (907) 224-3338
- Harbor (907) 224-3138
- Fire (907) 224-3445
- Telecopier (907) 224-3248

APR 21 1988

April 14, 1988

The Honorable John Sund, Chairman, Judiciary Committee
House of Representatives
P.O. Box V, Mail Stop 3100
Juneau, Alaska 99811

Dear Sir:

I am writing to express my opinion on Senate Joint Resolution No. 15.

I feel that the bill is unnecessary, because the rights of the individual are already addressed in the constitution.

But more importantly, it would appear that this bill is an effort to extend those rights by muddying the water. I am sure that the intent is not to allow those individuals who would use weapons criminally more freedom. However, there is the distinct possibility that this would be a spin off effect of the passage of this resolution.

Surely it is apparent that legislative direction, which many times affects public attitudes, must remain in an area of restraint when it comes to the use of weapons that may easily be turned against the public. Our personal freedoms currently are not being infringed. Telling the public that their rights extend past the current level will only cause trouble for all of us.

How many of the public will read this to mean that Saturday night specials, automatic weapons, and others are okay to own and use? I doubt that many of the citizens of this State will. However, those who do see fit to break the laws and endanger the lives of others will use this to their advantage.

I ask that you take these matters into consideration as you deliberate on the passage of this resolution.

Sincerely,

Louis A. Bencardino
Chief of Police
Seward Police Department

LAB/dra

Municipality of Anchorage

POUCH 6-650
ANCHORAGE, ALASKA 99502-0650
(907) 264-4545

TONY KNOWLES,
MAYOR

OFFICE OF THE MUNICIPAL ATTORNEY

May 6, 1986

Members of the House Judiciary Committee

Re: SJR 39

The Municipality does not oppose a constitutional amendment that redefines the "right to bear arms" as a personal right vested in each citizen of the state. We are very concerned however with the way in which the measure is now drafted. Our concerns are based on the fact that the present language, quite arguably, would not permit the state or a municipality to regulate either the type of arms possessed or the manner and circumstances of possession.

While the version passed by the Senate clearly allows regulation of the use of arms, many existing laws do not relate to the simple use of a weapon, but rather to its function and to the manner and circumstances in which it is possessed. Public safety concerns demand that the state legislature and local assemblies be permitted to ban certain types of arms such as bombs, hand grenades, machine guns, silencers, sawed-off shotguns and bullets designed to pierce protective devices worn by law enforcement officials. We believe likewise that the constitution should permit the Legislature to bar the possession of arms by certain classes of convicted criminals, intoxicated or mentally disturbed persons. Finally we feel it is essential to control the circumstances in which otherwise lawful weapons are possessed by limiting the carrying of concealed weapons, the possession of loaded firearms on licensed premises, the possession of a firearm by a minor without parental consent, et cetera. We reiterate the position taken by Attorney General Harold Brown in his March 26, 1986 letter regarding SJR 39:

> These statutes [that would be invalidated by SJR 39] serve an important public safety function by carefully regulating the possession of especially dangerous weapons or weapons

carried in an especially dangerous manner or place. If the legislature does not intend to render these statutes unenforceable, nor to foreclose a future legislature from adopting similar provisions (prohibiting possession of loaded firearms in a church or on school grounds for example), then the legislatures intent to continue to allow a reasonable regulation by law should be made clear.

The clarity of intent referred to by the Attorney General must be embodied in the measure itself. Otherwise both State and Municipal prosecutors will face a flurry of legal challenges by those charged with weapons-related offenses.

In conclusion, we urge that if the committee does not intend to invalidate existing statutes and ordinances regulating the type of arms that may be possessed, and the circumstances of possession, then it must embody this intent clearly within the amendment that is offered to the voters for ratification.

Jerry Wertzbaugher
Municipal Attorney

Brian Porter, Chief
Anchorage Police Department

Municipality of Anchorage

POUCH 6-650
ANCHORAGE, ALASKA 99502-0650
(907) 264-4545

TONY KNOWLES,
MAYOR

OFFICE OF THE MUNICIPAL ATTORNEY

February 25, 1986

TO: Members of the Senate Judiciary Committee

Re: Senate Joint Resolution No. 39

The proposed amendment to Article I, Section 19 of the State Constitution set forth in Senate Joint Resolution No. 39 could, in its original form, preclude the regulation of conduct which has traditionally been considered to be criminal. Of particular concern is the clause beginning on line 15 which specifies "...personal defense and for the defense of family, property...". This provision could be read to invalidate all existing state and municipal laws governing the use of firearms for self-defense and the defense of property. Historically, the right to use firearms to protect self, family, and property has been curtailed. The amendment in its present form would cast doubt on the viability of continued regulation of such items.

The amendment, in its present form, would also have the likely affect of nullifying state and municipalities laws regulating the possession of firearms. This is because of the deletion of provisions referencing a "well regulated militia." Historically, the courts have interpreted that phrase as creating not a personal right to bear arms, but rather a right of the state to maintain a militia. The deletion of that phrase would cast doubt on the validity of all previous court decisions pertaining to the interpretation of section 19, and a similar provision of the Federal Constitution. With the deletion of that body of law, the phrase "shall not be infringed" would take on a whole new meaning. Thus, the state and local governments could lose the ability to regulate such activities as the carrying of concealed weapons and the obliteration of serial numbers on firearms.

The provision could easily be amended so as to affirm the right of the individual to own and possess firearms (as opposed to the right of the state to maintain a militia) without precluding the Legislature's ability to prescribe certain conduct with respect

to the use and possession of deadly weapons. First, I would propose a change to line 15 whereby the term "personal" would be replaced by "lawful" and the phrase "and for the defense" be replaced by the phrase "of self". In addition, line 17 should be changed by adding language after the term "city" which would read "...except that the manner in which arms are possessed may be subject to reasonable regulations designed to protect the public safety".

In addition, if the Committee's intent is merely to establish a personal right to the ownership and possession of firearms and not to overturn existing laws governing the use of firearms, then such intent should be plainly set forth in a permanent report that will serve in the future to guide the courts. Furthermore, if the additional language I have suggested is added to the amendment, the Committee report should clarify the Committee's intent by specifying that the ability of state and local government to impose reasonable regulations on the possession of firearms would include laws curtailing the possession of concealed weapons or weapons that have altered identification marks, but would not include the right of the state or local government to enact an outright ban on the ownership or possession of arms.

Very truly yours,

DEPARTMENT OF LAW

Jerry Wertzbaugher
Municipal Attorney

JW:gml

STATE OF ALASKA

Bill Sheffield, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K - STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

RECEIVED
MAR 26 1986
Dept. of Law
Administration

March 26, 1986

The Honorable Vic Fischer
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: S.J.R. 39

Dear Senator Fischer:

You have asked for the Department of Law's comments upon the current language of S.J.R. 39, a resolution proposing an amendment to Article I, sec. 19 of the state constitution, relating to a citizen's right to keep and bear arms. As I understand it, S.J.R. 39, as amended on the Senate floor yesterday, provides that art. I, sec. 19 of the Alaska Constitution will be amended to read:

> SECTION 19. RIGHT TO KEEP AND BEAR ARMS. The [A WELL-REGULATED MILITIA BEING NECESSARY TO THE SECURITY OF A FREE STATE, THE] right of each citizen of the state [THE PEOPLE] to keep and bear arms for lawful defense of self, family, property, and the state and for lawful hunting, recreation, and other lawful purposes, shall not be infringed by a state or by a borough or city of the state.

We are concerned that the language presently contained in S.J.R 39 might allow later constitutional challenge to some existing state statutes. Present law, for example, prohibits a convicted felon from possessing a concealable firearm, prohibits possession of certain weapons such as bombs, hand grenades, silencers, and sawed-off shot guns, prohibits possession of a firearm while intoxicated, or the discharge of a firearm from, on, or across a highway, the carrying of a concealed weapon, possession of a loaded firearm on licensed premises, or possession of a firearm by a minor without parental consent. (See AS 11.61.200-.220.)

These statutes serve an important public safety function by carefully regulating the possession of especially dangerous weapons or weapons carried in an especially dangerous manner or place. If the legislature does not intend to render

these statutes unenforceable, nor to foreclose a future legislature from adopting similar provisions (prohibiting possession of loaded firearms in a church or on school grounds, for example), than the legislature's intent to continue to allow reasonable regulation by law should be made clear. The possibility that the language proposed in S.J.R. 39 could be interpreted as invalidating some portions of Alaska's present criminal code is a real one. See, for example, State v. Kessler, 614 P.2d 94 (Ore. 1980), and State v. Delgado, 692 P.2d 610 (Ore. 1984).

We believe that any possible ambiguity could be eliminated by the addition, at the end of the current language, of the phrase "except that the manner of keeping and bearing arms may be regulated by law." This suggested language is based upon similar provisions in the constitutions of several other states, including Florida (art. I, sec. 8), Georgia (art. I, sec. 1), and Utah (art. I, sec. 6). The addition of this clause would make it clear that, although a citizen's basic right to keep and bear arms may not be infringed, reasonable and appropriate regulation of the manner in which arms are kept or borne (i.e., possession by felons, by minors, in a bar, while intoxicated, etc.) is not an infringement on an individual's constitutional right. Mr. Rupe Andrews, Alaska Field Representative for the National Rifle Association, has indicated that his organization would not object to the inclusion of this additional language in S.J.R. 39. I also suggest that you consider retaining the language in the present constitutional provision "the people," rather than change it to "each citizen of the state." State constitutional provisions have traditionally recognized the equal rights of all residents of the state, regardless of the resident's national origin.

A carefully drafted amendment would minimize the possibility that, should the proposed constitutional amendment be adopted, a criminal defendant would later be able to argue that a criminal weapons misconduct statute is unconstitutional because it violates his right to keep and bear arms under art. I, sec. 19 of the state constitution.

Sincerely,

Harold H. Brown

Harold H. Brown
Attorney General

HMB:GAH:gb-13

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Bill Sheffield, Governor

POUCH K – STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

May 8, 1986

The Honorable M. Mike Miller
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Dear Representative Miller:

You have asked this office to comment upon the effect of "legislative intent" language currently contained in a resolution now under consideration by the House Judiciary Committee: CS SJR 39 (Jud) am. This resolution, if passed, would place a proposed constitutional amendment before the voters at the next general election. The resolution contains an amendment to art. I, sec. 19 of the state constitution, relating to a citizen's right to keep and bear arms. The stated purpose of the proposed amendment is to establish that the right to keep and bear arms under the state constitution is an individual right, rather than a collective one.

The proposed constitutional amendment now states that a citizen's right to keep and bear arms "shall not be infringed by the state or by a borough or city of the state." During consideration of CS SJR 39 (Jud) am on the Senate floor Senator Vic Fischer proposed an amendment which would have added the phrase "except that the manner of keeping and bearing arms may be regulated by law." This proposed amendment was rejected by the Senate on a vote of 16 to 2. See Senate Journal, March 26, 1986, at pp. 2166-2167. The Judiciary Committee version of the resolution, adopted with amendment by the Senate, contains a section entitled "legislative intent." Section 2 of CS SJR 39 (Jud) am now provides, in part, that the proposed constitutional amendment "should not be construed to preclude the regulation of the manner in which arms may be borne, carried, or used."

We are concerned that the language presently contained in CS SJR 39 (Jud) am might allow later constitutional challenge to some existing state statutes. Present law, for example, prohibits a convicted felon from possessing a concealable firearm, prohibits possession of certain weapons such as bombs, hand grenades, silencers, and sawed-off shot guns, prohibits possession of a firearm while intoxicated, the discharge of a firearm from, on, or across a highway, the carrying of a concealed weapon, possession of a loaded firearm

on licensed premises, or possession of a firearm by a minor without parental consent. (See AS 11.61.200-11.61.220.)

These statutes serve an important public safety function by restricting the possession of especially dangerous weapons or weapons carried in an especially dangerous manner or place. If the legislature does not intend that the proposed amendment of art. I, sec. 19 would render these statutes unenforceable, nor foreclose a future legislature from adopting similar provisions (prohibiting possession of loaded firearms in a church or on school grounds, for example), then the legislature's intent to continue to allow reasonable regulation by law should be made clear.

It may be that the Senate, in rejecting the amendment proposed by Senator Fischer but adopting section 2 of CS SJR 39 (Jud) am, believed that it was not necessary to explicitly state in the proposed constitutional provision that regulation of firearms by law is allowed, as this point is included in their "legislative intent" language. As a general rule, however, a measure will be enforced according to the plain meaning of the language on its face. 2A C. Sands, Sutherland Statutory Construction § 45.02 at 4 (4th ed. 1984); Wilson v. Municipality of Anchorage, 669 P.2d 569, 571 (Alaska 1983). It is a "fundamental principle of statutory interpretation ... that a statute means what its language reasonably conveys to others..." North Slope Borough v. Sohio Petroleum Corp., 585 P.2d 534, 540 (Alaska 1978); South Central Health Planning v. Commissioner, Dept. of Administration, 628 P.2d 551, 553 (Alaska 1981). 1/

While the courts in Alaska may consider a measure's legislative history to the extent it may assist the court in correctly interpreting the measure, a legislative committee report or formal statement of legislative intent may not be used to give the statute a meaning not fairly contained within its words. Chicago, M., St. P. & P. R. Co. v. Acme Fast Freight, 336 U.S. 465, 93 L.Ed.2d 817, 69 S.Ct. 692 (1949); North Slope Borough, 585 P.2d at 540.

1/ Although general rules of legal interpretation are most often expressed in the context of statutory interpretation, the same rules apply to the interpretation of legislative resolutions and constitutional amendments. 1A C. Sands, Sutherland Statutory Construction § 29.08 at 500 (4th ed. 1985).

When a reviewing court decides that it must consider the legislature's intent in order to construe a provision, the text of the measure itself is still considered the best evidence of legislative intent. See 2A C. Sands, Sutherland Statutory Construction § 46.03 at 82 (4th ed. 1984) and the cases cited there. Where the terms of a provision are clear and straightforward, the intent of the legislature will be based on those terms, even if the apparent intent conflicts with a statement of legislative intent or a committee report. See Caminetti v. United States, 242 U.S. 470, 61 L.Ed. 442, 37 S.Ct. 192 (1917) and 2A C. Sands, Sutherland Statutory Construction § 48.06 at 308 (4th ed. 1984).

In Commercial Fisheries Entry Commission v. Apokedak, 680 P.2d 486 (Alaska 1984) Apokedak, relying upon legislative intent language contained in the "preamble" to the Limited Entry Act, urged the state supreme court not to adopt a literal construction of the act. The court refused to adopt the interpretation suggested by Apokedak, stating: "a statutory preamble ... can neither restrain nor extend the meaning of an unambiguous statute; nor can it be used to create doubt or uncertainty which does not otherwise exist." 680 P.2d at 488, n.3. Thus, to the extent that language contained in the "legislative intent" section of CS SJR 39 (Jud) am conflicts with the plain meaning of the terms of the constitutional provision, it is the constitutional language which will control.

The courts may also consider the history of legislative action taken on a given measure when determining legislative intent. Generally, the rejection of a proposed amendment indicates that the legislature did not intend the bill to include the provisions embodied in the rejected amendment. Lapina v. Williams, 232 U.S. 78, 58 L.Ed. 515, 34 S.Ct. 196 (1914); United States v. Great Northern Railway Co., 287 U.S. 144, 155, 77 L.Ed. 223, 53 S.Ct. 28 (1932); 2A C. Sands, Sutherland Statutory Construction § 48.04 at 302, § 48.18 at 341 (4th ed. 1984). Thus, a reviewing court may well conclude that if the legislature had intended to allow the continued regulation by law of some aspects of a person's right to possess arms it would have adopted the language proposed by Senator Fischer during the Senate's consideration of the resolution. See, e.g., North Slope Borough, 585 P.2d at 541; Wilson, 669 P.2d at 571.

Perhaps the most important consideration here is that in the case of a measure (such as this one) which is to be decided by a vote of the electorate, descriptive statements accompanying the proposition are an important source of

guidance for interpretation. 2A C. Sands, Sutherland Statutory Construction § 48.04 at 301, § 48.19 at 345 (4th ed. 1984); State v. Lewis, 559 P.2d 630, 637-638 (Alaska 1977), cert. denied, 97 S.Ct. 2943, 432 U.S. 901, 53 L.Ed.2d 1073.

Under art. XIII, sec. 1 of the Alaska Constitution, the lieutenant governor is required to prepare a ballot title and a summary of the proposed constitutional amendment. The election pamphlet prepared pursuant to AS 15.58.010 must contain: 1) the text of the proposed constitutional amendment, 2) the ballot title and summary prepared by the lieutenant governor, 3) "a neutral summary" of the proposition prepared by the Legislative Affairs Agency, and 4) advocatory statements for and against the proposed amendment. AS 15.58.020(6). Thus, although the resolution directs the Legislative Affairs Agency to "consider" the statement contained in section 2 of CS SJR 39 (Jud) am when preparing its neutral summary for the ballot, this language will not appear on the ballot, and may well not appear in the elections pamphlet. Since, in the final instance, a reviewing court will look to the intent in the minds of the voters who voted to adopt the constitutional amendment, the legislature's statement of its intent when placing the measure on the ballot has limited significance. Lewis, 559 P.2d at 637-638.

One of the main purposes of a constitution is to limit legislative power. Ordinary acts of the legislature (i.e., statutes), whether adopted before or after a given constitutional provision, cannot be given effect if the statute conflicts with a substantive provision in the constitution. Thus, an amendment to the constitution may expressly, or by implication, repeal existing legislative enactments. Rhode Island v. Palmer, 253 U.S. 350, 64 L.Ed. 946, 40 S.Ct. 486 (1919); 1A C. Sands, Sutherland Statutory Construction § 23.20 at 387 (4th ed. 1985). The possibility that the language proposed in SJR 39 could be interpreted as invalidating some portions of Alaska's present criminal code is a real one, as this has occurred in similar circumstances in other states. See, for example, State v. Kessler, 289 Or. 359, 614 P.2d 94 (1980) and State v. Delgado, 298 Or. 395, 692 P.2d 610 (1984).

Principals of both common sense and responsible draftsmanship dictate that a well-drafted statute or constitutional provision should reduce the need for disputes about interpretation. 2A C. Sands, Sutherland Statutory Construction § 45.02 at 5 (4th ed. 1984). Statements of "legislative intent" are not an adequate substitute for clear, unambiguous language in the proposed constitutional amendment. A more precisely drafted amendment would minimize the

possibility that, should the proposed constitutional amendment be adopted, a criminal defendant would later be able to argue that a criminal weapons misconduct statute is unconstitutional because it violates his right to keep and bear arms under art. I, sec. 19 of the state constitution.

Sincerely,

Harold M. Brown
Attorney General

In the present case, had Publishers made a reasonable inquiry and informed Stevens that the inquiry was in preparation for its purchase of the timberland from Fernandez, then Stevens would have informed Publishers that plaintiffs held a mortgage on the timberland and had a "standard timber restriction" clause covering the land. The discovery of these facts would have immediately informed both parties that Fernandez was defrauding plaintiffs. Publishers is therefore charged with knowledge of the fraud because it would have learned of the fraud had it made a reasonable inquiry. *Murray v. Wiley, supra* at 407.

We therefore conclude that Publishers failed to sustain its burden of proving its affirmative defense. Publishers was not entitled to the status of a bona fide purchaser without notice.

Affirmed.

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,
Respondent,
v.
RANDY KESSLER,
Petitioner.

(TC DA 160004-7811, CA 14296, SC 26705)

On review from the Court of Appeals:*

Argued and submitted March 4, 1980.

David L. Slader, Portland, argued the cause and filed the brief for petitioner.

W. Benny Won, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief was James A. Redden, Attorney General, and Walter L. Barrie, Solicitor General, Salem.

Before Denecke, Chief Justice, and Tongue, Howell, Lent and Peterson, Justices.

LENT, J.

Affirmed in part, reversed in part.

---

*Appeal from Circuit Court, Multnomah County Phillip T. Abraham, Judge 43 Or App 303, 602 P2d 1096 (1979).

STATE v. KESSLER, 289 OR. 359 (1980)

614 P.2d 94

LENT, J.

The defendant in this case was convicted of "possession of a slugging weapon," ORS 166.510(1).[1] We allowed review to consider his claim that the legislative prohibition of the possession of a "billy"[2] in ORS 166.510(1) violates Article I, section 27, of the Oregon Constitution. That provision states:

"The people shall have the right to bear arms for the defence [sic] of themselves, and the State; but the Military shall be kept in strict subordination to the civil power."

The language of this provision raises several questions in this case, including:

(a) To whom does the right belong?

(b) What is the meaning of "defense of themselves"?

(c) What is the meaning of "arms," and what, if any, weapons of current usage are included in this term?

The scope of Article I, section 27, has not previously been analyzed by Oregon courts.[3] The decisions construing the second amendment to the United

[1] ORS 166.510(1) provides:

"(1) Except as provided in ORS 166.515 or 166.520, any person who manufactures, causes to be manufactured, sells, keeps for sale, offers, gives, loans, carries or possesses an instrument or weapon having a blade which projects or swings into position by force of a spring or other device and commonly known as a switch-blade knife or an instrument or weapon commonly known as a blackjack, slung shot, billy, sandclub, sandbag, sap glove or metal knuckles or who carries a dirk, dagger or stiletto commits a Class A misdemeanor."

Although the words "slugging weapon" are not used in ORS 166.510, this term was used in the complaint filed in this case.

[2] Webster's Third International Dictionary defines a "billy" as "a heavy usually wooden weapon for delivering blows: club, especially a policeman's club."

[3] In *State v. Robinson*, 217 Or 612, 619, 343 P2d 886 (1959) this court held that ORS 166.270, which prohibits ex-convicts from possessing concealed weapons did not violate Article I, section 27, of the Oregon Constitution. Accord, *State v. Cartwright*, 246 Or 120, 134-137, 418 P2d 822 (1967).

States Constitution are not particularly helpful because the wording of the second amendment differs substantially from our state provision. The second amendment has not yet been held to apply to state limitations on the bearing of arms.[4] The wording of Oregon's right to bear arms provision also differs from many other state constitutional provisions.[5]

Despite the many variations in wording, the states' constitutional provisions guaranteeing the right to bear arms share a common historical background. We begin first with an examination of this historical background and then with an examination of the meaning and purpose of the particular words chosen by the Oregon drafters. We are not unmindful that there is current controversy over the wisdom of a right to bear arms, and that the original motivations for such a provision might not seem compelling if debated as a new issue. Our task, however, in construing a constitutional provision is to respect the principles given the status of constitutional guarantees and limitations by the drafters; it is not to abandon these principles when this fits the needs of the moment.

[4] The second amendment to the United States Constitution provides:

"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."

In early cases the United States Supreme Court held that the second amendment proscription applies only to Congress. *Presser v. Illinois*, 116 US 252, 6 S Ct 580, 29 L Ed 615 (1886); *United States v. Cruikshank*, 92 US 548, 23 L Ed 588 (1876). The second amendment has not yet been held applicable to the states, either directly or through selective incorporation in the fourteenth amendment. *See* Rohner, *The Right to Bear Arms: A Phenomenon of Constitutional History*, 16 Catholic U L Rev 53 (1966).

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I. *The historical background*

The first article of Oregon's constitution of 1859 contains the state's bill of rights. Article I, section 27, regarding the right to bear arms was taken verbatim from sections 32 and 33 of the Indiana Constitution of 1851. C. Carey, *A History of the Oregon Constitution* 469 (1926); Palmer, *The Sources of the Oregon Constitution*, 5 Or L Rev 200, 202 (1926).

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The drafters of Indiana's bill of rights of 1816 borrowed freely from the wording of other state constitutions, most notably the constitutions of Kentucky, Ohio, Tennessee, and Pennsylvania. Twomley, *The Indiana Bill of Rights*, 20 Ind L J 211, 212-213 (1945). These state constitutions were drafted between 1776 and 1802. Oregon's right to bear arms provision therefore can be traced to state provisions drafted in the revolutionary and post-revolutionary war era.

The constitutions adopted by the original colonies generally included a bill or declaration of rights. Many of the declarations of rights were patterned largely upon the English Bill of Rights of 1689.[6] The background of the English Bill of Rights sheds some light upon the meaning of the right to bear arms provisions in the colonial constitutions.

James II, a Catholic king, ascended the English throne in 1685 amidst domestic religious controversy between the Catholics and Protestants. James II established a strong standing army which he

[6] *See generally*, B. Schwartz, *The Great Rights of Mankind* 1-36 (1977); Feller and Gotting, *The Second Amendment: A Second Look*, 61 Northwestern U L Rev 46, 47-56 (1966).

quartered in private homes. He sought to repeal certain laws of Parliament which barred Catholics from public offices. The Protestants revolted in the "Glorious Revolution" of 1688 and succeeded in deposing James II and bringing to power the king's Protestant daughter, Mary, and her husband, William of Orange. William and Mary were offered the crown in 1689 on condition that they sign the Declaration of Rights. The Declaration was later enacted as a statute, which was divided into two parts, first listing the allegedly illegal actions of James II, then declaring the rights of the people. The first part stated that James II:

> "* * * did endeavor to subvert and extirpate the Protestant Religion and the Laws and Liberties of this Kingdom * * *.
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The parallel provisions of the declaration of rights provided:

> "* * * 5. That the raising or keeping a Standing Army within the Kingdom unless it be with the Consent of Parliament is against Law.
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Historians have noted that the early colonial legislatures perceived themselves as descendants of the House of Commons who shared many of the same political experiences of their 17th century English counterparts. See B. Schwartz, *The Great Rights of Mankind* 15, 31-32 (1977). The French and Indian War ending in 1763 brought large numbers of British

[7] Bill of Rights, 1 W. & M., sess. 2, c. 2 (1689), *reprinted in* Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 Hastings Const L Q 961, 973 (1975).

soldiers to the colonies. King George III maintained and increased these standing armies following that war, and ordered the troops to be quartered in private homes. The colonists who were accustomed to relying on their own citizen militias viewed the standing armies as an unlawful instrument of oppression. *See* Weatherup, *Standing Armies and Armed Citizens; An Historical Analysis of the Second Amendment*, 2 Hastings Const L Q 961, 975-978 (1975). The state constitutions drafted in the revolutionary war era therefore included provisions guaranteeing the right to bear arms and prohibiting standing armies in time of peace. The relevant provisions of the English Bill of Rights of 1689 provided a useful model for the colonial drafters.

II. *The Oregon right to bear arms*

A. *"Defense of themselves and the state"*

We have noted that Oregon's constitutional right to bear arms provision, Or Const. Art I, § 27, was taken verbatim from the Indiana constitutional provision drafted in 1816. The phrase "for defense of themselves and the state" in Indiana's provision was most likely taken from the Kentucky provision in its 1799 constitution, or the Ohio provision in its 1802 constitution.[8] The phrase "for defense of themselves and the

[8] Art X, §§ 23 and 24, of the 1799 Kentucky constitution provided:

"Sec. 23. That the rights of the citizens to bear arms in defence of themselves and the State shall not be questioned. "Sec. 24. That no standing army shall, in time of peace, be kept up, without the consent of the legislature; and the military shall, in all cases and at all times, be in strict subordination to the civil power."

W. Swindler, *Sources and Documents of U. S. Constitutions*, Vol 4, p 183 (1975).

Art VIII, § 20, of the 1802 Ohio constitution provided:

"Sec. 20. That the people have a right to bear arms for the defence of themselves and the State; and as standing armies, in time of peace, are dangerous to liberty, they shall not be kept up, and that the military shall be kept under strict subordination to the civil power."

W. Swindler, *Sources and Documents of U. S. Constitutions*, Vol 7, p 855 (1978). Ohio's constitutional provision was most likely taken from Art XIII of Pennsylvania's constitutional Bill of Rights of 1776 which provided

(Continued on following page)

state" appears in the present day constitutions of Oregon, Indiana, and six other states.[9] The language is subject to varying interpretations. It has been suggested that the language includes three separate justifications for a state constitutional right to bear arms: (a) The preference for a militia over a standing army; (b) the deterrence of governmental oppression; and (c) the right of personal defense.[10]

The language "the right to bear arms * * * for defense of * * * the state" most likely refers to the historical preference for a citizen militia rather than a standing army as outlined above.[11] *See People v. Brown*, 253 Mich 537, 235 NW 245, 246 (1931):

> "It is generally recognized that * * * the right to bear arms had its origin in the fear of the American colonists of a standing army and its use to oppress the people, and in their attachment to a militia composed of all able-bodied men. Probably the necessity of self protection in a frontier society also was a factor."

The phrase "the right to bear arms in defense of themselves" has a suggested purpose which is

(Continued from previous page)

"That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power."

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[9] The phrase "for defense of themselves and the state" appears in the constitutions of Florida, Declaration of Rights § 20; Kentucky Bill of Rights § 1; Pennsylvania, art I, § 21; South Dakota, art VI, § 24; Vermont, ch I, art 16, and Wyoming, art I, § 24.

[10] *See* Note, *The Impact of State Constitutional Right to Bear Arms Provisions on State Gun Control Legislation*, 38 U Chi L Rev 185, 190-198 (1970).

[11] Despite the early Americans' objection to standing armies and their preference for citizen militias, our society today apparently prefers the maintenance of federally controlled standing armies. The federal government has assumed total responsibility for training and supplying the "state militias," i e, the National Guard. *See, e g*, 32 USC, §§ 101, 102, 501, 502, 701 (1976); Rohner, *The Right to Bear Arms: A Phenomenon of Constitutional History*, 16 Cath U L Rev 53, 72 (1966).

closely related to the preference for citizen militias. That suggested purpose is the deterrence of government from oppressing unarmed segments of the population. For example, King James II attempted to disarm the Protestants while allowing Catholics to bear arms, thus prompting the guarantee in the 1689 Bill of Rights that Protestants could have "arms for their defense."[12] Joseph Story wrote that,

> "The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them."

J. Story, *Commentaries on the Constitution*, Vol 3, p 746 (1833). *Cf, Carlton v. State*, 63 Fla 1, 58 So 486, 488 (1912) (state provision was "intended to give the people the means of protecting themselves against oppression and public outrage").

"Defense of themselves" has also been said to include an individual's right to bear arms to protect his person and home. *Schubert v. DeBard*, Ind , 398 NE2d 1339, 1341 (1980) (Indiana constitution provides citizenry the right to bear arms for their personal self-defense). Self-defense has been recognized as a privilege in both civil and criminal law since about 1400 in England and at all times in the United States.[13] Although the right to bear arms for self protection does not appear to have been an important

[12] *See* text accompanying note 7 *supra*.

[13]

> "The privilege of self-defense rests upon the necessity of permitting a man who is attacked to take reasonable steps to prevent harm to himself, where there is no time to resort to the law. The early English law, with its views of strict liability, did not recognize such a privilege; * * *. But since about 1400 the privilege has been recognized, and it is now undisputed, in the law of torts as well as in the criminal law." (citations omitted) W. Prosser, *Law of Torts* 108 (4th ed 1971).

development in England, the justification for a right to bear arms in defense of person and home probably reflects the exigencies of the rural American experience. *See People v. Brown, supra. Cf., Matthews v. State,* 237 Ind 677, 689-692, 148 NE2d 334, 339-341 (1958) (Emmert, C. J., dissenting) (constitutional guarantee based on historical necessity for personal defense.)[14]

B. *The meaning of the term "arms"*

The term "arms" is also subject to several interpretations. In the colonial and revolutionary war era, weapons used by militiamen and weapons used in defense of person and home were one and the same. A colonist usually had only one gun which was used for hunting, protection, and militia duty, plus a hatchet, sword, and knife. G. Neumann, *Swords and Blades of the American Revolution,* 6-15, 252-254 (1973). When the revolutionary war began, the colonists came equipped with their hunting muskets or rifles, hatchets, swords, and knives. The colonists suffered a severe shortage of firearms in the early years of the war, so many soldiers had to rely primarily on swords, hatchets, knives, and pikes (long staffs with a spear head). W. Moore, *Weapons of the American Revolution,* 8 (1967).

Therefore, the term "arms" as used by the drafters of the constitutions probably was intended to include those weapons used by settlers for both personal and military defense. The term "arms" was not limited to firearms, but included several handcarried weapons commonly used for defense. The term "arms" would not have included cannon or other heavy ordnance not kept by militiamen or private citizens.

[14] *Compare* the provisions in several state constitutions which guarantee that a person has the right to bear arms "in defense of his home, person and property." Colo Const, Art II, § 13; Miss Const, Art III, § 12; Mo Const, Art I, § 23; Mont Const, Art III, § 13; Okla Const, Art II, § 26; *State v. Nickerson,* 126 Mont 157, 247 P2d 188 (1952) (defendant cannot be convicted of assault if he pointed a loaded gun at a trespasser in his home), *accord, State v. Hassani,* 356 Mo 90, 195 SW2d 495 (1946).

The revolutionary war era ended at a time when the rapid social and economic changes of the so-called Industrial Revolution began. The technology of weapons and warfare entered an unprecedented era of change. P. Cleator, *Weapons of War* 143-152 (1967). Firearms and other hand-carried weapons remained the weapons of personal defense, but the arrival of steam power, mechanization, and chemical discoveries completely changed the weapons of military warfare. The development of powerful explosives in the mid-nineteenth century, combined with the development of mass-produced metal parts, made possible the automatic weapons, explosives, and chemicals of modern warfare. P. Cleator, *Weapons of War* 153-177 (1967).

These advanced weapons of modern warfare have never been intended for personal possession and protection. When the constitutional drafters referred to an individual's "right to bear arms," the arms used by the militia and for personal protection were basically the same weapons. Modern weapons used exclusively by the military are not "arms" which are commonly possessed by individuals for defense, therefore, the term "arms" in the constitution does not include such weapons.

If the text and purpose of the constitutional guarantee relied exclusively on the preference for a militia "for defense of the State," then the term "arms" most likely would include only the modern day equivalents of the weapons used by colonial militiamen. The Oregon provision, however, guarantees a right to bear arms "for defense of *themselves,* and the State." The term "arms" in our constitution therefore would include weapons commonly used for either purpose, even if a particular weapon is unlikely to be used as a militia weapon.

The constitutional guarantee that persons have the right to "bear arms" does not mean that all individuals have an unrestricted right to carry or use personal weapons in all circumstances. For example,

the danger of firearms was recognized shortly after the development of gunpowder. The English Statute of Northampton in 1327 forbade persons to ride at night carrying a firearm for the purpose of terrifying the people.[15] A 1678 Massachusetts law forbade shooting near any house, barn, garden, or highway in any town where a person may be "killed, wounded, or otherwise damaged."[16] The courts of many states have upheld statutes which restrict the possession or manner of carrying personal weapons. The reasoning of the courts is generally that a regulation is valid if the aim of public safety does not frustrate the guarantees of the state constitution. For example, many courts have upheld statutes prohibiting the carrying of concealed weapons, *see, e.g., State v. Hart*, 66 Idaho 217, 157 P2d 72 (1945); and statutes prohibiting possession of firearms by felons, *see, e.g., State v. Carturight*, 246 Or 121, 418 P2d 822 (1966).

III. *The present case*

We now turn to the facts of the present case. The defendant was involved in an off and on verbal argument with his apartment manager in the course of the day on November 13, 1978. The dispute escalated into name calling, colorful words, and object throwing. At one point the defendant kicked the elevator door in the apartment building. The police were called and arrested the defendant. The defendant asked the police to get his coat from his apartment. The officers found two "billy clubs" in the defendant's apartment.

The defendant was charged with disorderly conduct, ORS 166.025, and possession of a slugging weapon, ORS 166.510. The matter went to trial with-

[15] 2 Edward III, ch 3 (1328), reprinted in J. Bishop, Statutory Crimes, § 783 (3d ed 1901).

[16] Council held in Boston, March 28, 1678; referred to in Levin, *The Right to Bear Arms: The Development of the American Experience*, 48 Chi Kent L Rev 148, 150, n 18 (1971).

out a jury. The defendant at trial demurred to and moved to dismiss the second charge on the grounds that it failed to state a crime. The motion was denied and the defendant was found guilty as charged on both counts.

The defendant appealed to the Court of Appeals, contending first that his acts did not amount to the crime of disorderly conduct, and second that the statute prohibiting possession of billy clubs, ORS 166.510(1), violates Article I, section 27, of the Oregon Constitution. The Court of Appeals did not consider defendant's first contention because it was not raised at trial.[17] The Court of Appeals held that ORS 166.510(1) was within the reasonable exercise of the "police power" of the state to curb crime. 43 Or App 303, 307, 602 P2d 1096 (1979).

The defendant contends that his conviction for possession of a billy club violates his right to possess arms in his home for personal defense. Pursuant to our previous discussion regarding the purpose and scope of the right to bear arms provision, we hold that Aricle I, section 27, of the Oregon Constitution includes a right to possess certain arms for defense of person and property. The remaining question is whether the defendant's possession of a billy club in this case is protected by Article I, section 27.

The club is considered the first personal weapon fashioned by humans. O. Hogg, *Clubs to Cannon* 19 (1968). The club is still used today as a personal

[17] The general rule in both civil and criminal cases is that a question not raised and preserved in the trial court will not be considered on appeal. *State v. Abel*, 241 Or 465, 467, 406 P2d 902 (1965). Failure to raise an objection in trial court does not automatically preclude appellate review. The defendant's contention that his acts did not constitute the crime of disorderly conduct, however, does not present the exceptional circumstance or manifest error which justifies this court's consideration of such a claim. It follows that defendant's conviction of disorderly conduct is affirmed. Note that this case is not concerned with that aspect of the statute prohibiting disorderly conduct which we held to be unconstitutional in *State v. Spencer*, 289 Or 225, P2d (1980).

weapon, commonly carried by the police. ORS 166.510 prohibits possession of a "billy;" however, ORS 166.520 states that peace officers are not prohibited from carrying or possessing a weapon commonly known as a "blackjack"[18] or "billy."

The statute in this case, ORS 166.510, prohibits the mere possession of a club. The defendant concedes that the legislature could prohibit carrying a club in a public place in a concealed manner, but the defendant maintains that the legislature cannot prohibit all persons from possessing a club in the home. The defendant argued that a person may prefer to keep in his home a billy club rather than a firearm to defend against intruders.

Our historical analysis of Article I, section 27, indicates that the drafters intended "arms" to include the hand-carried weapons commonly used by individuals for personal defense. The club is an effective, hand-carried weapon which cannot logically be excluded from this term. We hold that the defendant's possession of a billy club in his home is protected by Article I, section 27, of the Oregon Constitution.

The defendant's conviction for disorderly conduct is affirmed, and his conviction for possession of a slugging weapon is reversed.

[18] Webster's Third International Dictionary defines a "blackjack" as "* * * 4. a small striking weapon typically consisting at the striking end of a leather enclosed piece of lead or other heavy metal and at the handle end of a strap or springy shaft that increases the force of impact."

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COURT OF APPEALS REPORTS

47 OR APP 1 — 108

CASES DECIDED
by the
COURT OF APPEALS

289 Or. 359

STATE of Oregon, Respondent,

v.

Randy KESSLER, Petitioner.

TC DA 160004-7811; CA 14296 and SC 26705.

Supreme Court of Oregon.

Argued and Submitted March 4, 1980.

Decided July 15, 1980.

Defendant was convicted in the District Court, Multnomah County, Philip T. Abraham, J., of disorderly conduct and possession of two billy clubs and he appealed. The Court of Appeals, 43 Or.App. 303, 602 P.2d 1096, affirmed and review was allowed. The Supreme Court, Lent, J., held that: (1) defendant's contention that his act did not constitute the crime of disorderly conduct did not present the exceptional circumstance or manifest error which would justify consideration of such claim on appeal, where it was not raised at trial, and (2) defendant's possession of a billy club in his home was protected by right to bear arms provision of Oregon Constitution.

Defendant's conviction for disorderly conduct affirmed; defendant's conviction for possession of a slugging weapon reversed.

1. Weapons ⇨1

Term "arms" in right to bear arms provision of Oregon Constitution does not include modern weapons used exclusively by the military. Const. Art. 1, § 27.

See publication Words and Phrases for other judicial constructions and definitions.

2. Weapons ⇨1

Term "arms" in right to bear arms provision of Oregon Constitution includes modern day equivalents of weapons used by colonial militiamen and weapons used for personal defense. Const. Art. 1, § 27.

3. Weapons ⇨1

Oregon constitutional guarantee that persons have right to "bear arms" does not mean that all individuals have an unrestricted right to carry or use personal weapons in all circumstances. Const. Art. 1, § 27.

4. Appeal and Error ⇨169, 181
Criminal Law ⇨1028, 1030(1)

Generally, in both civil and criminal cases, a question not raised and preserved in the trial court will not be considered on appeal; however, failure to raise an objection at trial court does not automatically preclude appellate review.

5. Criminal Law ⇨1030(3)

Defendant's contention that his acts did not constitute crime of disorderly conduct did not present exceptional circumstance or manifest error which would justify consideration of the claim on appeal, where it was not raised at trial. ORS 166.025.

6. Weapons ⇨1

Right to bear arms provision of Oregon Constitution includes a right to possess certain arms for defense of person and property. Const. Art. 1, § 27.

7. Weapons ⇨1

Defendant's possession of a billy club in his home was protected by right to bear arms provision of Oregon Constitution and therefore he could not be prosecuted under statute prohibiting mere possession of a club. ORS 166.510; Const. Art. 1, § 27.

David L. Slader, Portland, argued the cause and filed the brief, for petitioner.

W. Benny Won, Asst. Atty. Gen., Salem, argued the cause, for respondent. With him on the brief was James A. Redden, Atty. Gen., and Walter L. Barrie, Sol. Gen., Salem.

Before DENECKE, C. J., and TONGUE, HOWELL, LENT and PETERSON, JJ.

LENT, Justice.

The defendant in this case was convicted of "possession of a slugging weapon," ORS 166.510(1).[1] We allowed review to consider his claim that the legislative prohibition of the possession of a "billy"[2] in ORS 166.-510(1) violates Article I, section 27, of the Oregon Constitution. That provision states:

> "The people shall have the right to bear arms for the defence [sic] of themselves, and the State, but the Military shall be kept in strict subordination to the civil power."

The language of this provision raises several questions in this case, including:

(a) To whom does the right belong?

(b) What is the meaning of "defense of themselves"?

(c) What is the meaning of "arms," and what, if any, weapons of current usage are included in this term?

The scope of Article I, section 27, has not previously been analyzed by Oregon courts.[3] The decisions construing the second amendment to the United States Constitution are not particularly helpful because the wording of the second amendment differs substantially from our state provision. The second amendment has not yet been held to apply to state limitations on the bearing of arms.[4] The wording of Oregon's right to bear arms provision also differs from many other state constitutional provisions.[5]

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I. *The historical background*

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1. ORS 166.510(1) provides:

   "(1) Except as provided in ORS 166.515 or 166.520, any person who manufactures, causes to be manufactured, sells, keeps for sale, offers, gives, loans, carries or possesses an instrument or weapon having a blade which projects or swings into position by force of a spring or other device and commonly known as a switch-blade knife or an instrument or weapon commonly known as a blackjack, slung shot, billy, sandclub, sandbag, sap glove or metal knuckles or who carries a dirk, dagger or stiletto commits a Class A misdemeanor."

   Although the words "slugging weapon" are not used in ORS 166.510, this term was used in the complaint filed in this case.

2. Webster's Third International Dictionary defines a "billy" as "a heavy usually wooden weapon for delivering blows: club, especially a policeman's club."

3. In *State v. Robinson*, 217 Or. 612, 619, 343 P.2d 886 (1959) this court held that ORS 166.-270 which prohibits ex-convicts from possessing concealed weapons did not violate Article I, section 27, of the Oregon Constitution. Accord, *State v. Cartwright*, 246 Or. 120, 131-137, 418 P.2d 822 (1967).

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The original Indiana constitution was adopted in 1816 at Indiana's first statehood convention. Indiana's constitution was revised in 1851, but the 1816 version of the right to bear arms provision remained unchanged. *See* W. Swindler, *Sources and Documents of U.S. Constitutions*, Vol. 3, p. 345–400 (1974).

The drafters of Indiana's bill of rights of 1816 borrowed freely from the wording of other state constitutions, most notably the constitutions of Kentucky, Ohio, Tennessee, and Pennsylvania. Twomley, *The Indiana Bill of Rights*, 20 Ind.L.J. 211, 212 213 (1945). These state constitutions were drafted between 1776 and 1802. Oregon's right to bear arms provision therefore can be traced to state provisions drafted in the revolutionary and post-revolutionary war era.

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James II, a Catholic king, ascended the English throne in 1685 amidst domestic religious controversy between the Catholics and Protestants. James II established a strong standing army which he quartered in private homes. He sought to repeal certain laws of Parliament which barred Catholics from public offices. The Protestants revolted in the "Glorious Revolution" of 1688 and succeeded in deposing James II and bringing to power the king's Protestant daughter, Mary, and her husband, William of Orange. William and Mary were offered the crown in 1689 on condition that they sign the Declaration of Rights. The Declaration was later enacted as a statute, which was divided into two parts, first listing the allegedly illegal actions of James II, then declaring the rights of the people. The first part stated that James II:

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Historians have noted that the early colonial legislatures perceived themselves as descendants of the House of Commons who shared many of the same political experiences of their 17th century English counterparts. *See* B. Schwartz, *The Great Rights of Mankind* 15, 31 32 (1977). The French and Indian War ending in 1763 brought large numbers of British soldiers to the colonies. King George III maintained and increased these standing armies following that war, and ordered the troops to be quartered in private homes. The colonists who were accustomed to relying on their

6. *See generally* B. Schwartz, *The Great Rights of Mankind* 1 36 (1977); Feller and Gotting, *The Second Amendment: A Second Look*, 61 Northwestern U.L.Rev. 46, 47 56 (1966).

7. Bill of Rights, 1 W. & M. sess. 2, c. 2 (1689), *reprinted in* Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 Hastings Const.L.Q. 961, 973 (1975).

own citizen militias viewed the standing armies as an unlawful instrument of oppression. *See* Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 Hastings Const.L.Q. 961, 975-978 (1975). The state constitutions drafted in the revolutionary war era therefore included provisions guaranteeing the right to bear arms and prohibiting standing armies in time of peace. The relevant provisions of the English Bill of Rights of 1689 provided a useful model for the colonial drafters.

II. *The Oregon right to bear arms*

A. *"Defense of themselves and the state"*

We have noted that Oregon's constitutional right to bear arms provision, Or. Const. Art. I, § 27, was taken verbatim from the Indiana constitutional provision drafted in 1816. The phrase "for defense of themselves and the state" in Indiana's provision was most likely taken from the Kentucky provision in its 1799 constitution, or the Ohio provision in its 1802 constitution.[8] The phrase "for defense of themselves and the state" appears in the present day constitutions of Oregon, Indiana, and six other states.[9] The language is subject to varying interpretations. It has been suggested that the language includes three separate justifications for a state constitutional right to bear arms: (a) The preference for a militia over a standing army; (b) the deterrence of governmental oppression; and (c) the right of personal defense.[10]

The language "the right to bear arms • • • for defense of • • • the state" more likely refers to the historical preference for a citizen militia rather than a standing army as outlined above.[11] *See People v. Brown*, 253 Mich. 537, 235 N.W. 245, 246 (1931):

> "It is generally recognized that • • • the right to bear arms had its origin in the fear of the American colonists of a standing army and its use to oppress the people, and in their attachment to a militia composed of all able-bodied men. Probably the necessity of self protection in a frontier society also was a factor."

The phrase "the right to bear arms in defense of themselves" has a suggested purpose which is closely related to the prefer-

8. Art. X, §§ 23 and 24, of the 1799 Kentucky constitution provided:

> "Sec. 23. That the rights of the citizens to bear arms in defence of themselves and the State shall not be questioned.
>
> "Sec. 24. That no standing army shall, in time of peace, be kept up, without the consent of the legislature; and the military shall, in all cases and at all times, be in strict subordination to the civil power."

W. Swindler, *Sources and Documents of U.S. Constitutions*, Vol. 4, p. 163 (1975).

Art. VIII, § 20, of the 1802 Ohio constitution provided:

> "Sec. 20. That the people have a right to bear arms for the defence of themselves and the State; and as standing armies, in time of peace, are dangerous to liberty, they shall not be kept up, and that the military shall be kept under strict subordination to the civil power."

W. Swindler, *Sources and Documents of U.S. Constitutions*, Vol. 7, p. 553 (1978). Ohio's constitutional provision was most likely taken from Art. XIII of Pennsylvania's constitutional bill of Rights of 1776 which provided:

> "That the people have a right to bear arms for the defence of themselves and the state, and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up. And that the military should be kept under strict subordination to, and governed by, the civil power."

W. Swindler, *Sources and Documents of U.S. Constitutions*, Vol. 8, p. 279 (1979).

9. The phrase "for defense of themselves and the state" appears in the constitutions of Florida, Declaration of Rights § 20; Kentucky Bill of Rights § 1; Pennsylvania, art. I, § 21; South Dakota, art. VI, § 24; Vermont, ch. I, art. 16; and Wyoming, art. I, § 24.

10. *See* Note, *The Impact of State Constitutional Right to Bear Arms Provisions on State Gun Control Legislation*, 38 U.Chi.L.Rev. 185, 190-198 (1970).

11. Despite the early Americans' objection to standing armies and their preference for citizen militias, our society today apparently prefers the maintenance of federally controlled standing armies. The federal government has assumed total responsibility for training and supplying the "state militias," i.e., the National Guard. *See, e.g.*, 32 U.S.C. §§ 101, 102, 301, 502, 701 (1976). Rohner, *The Right to Bear Arms—A Phenomenon of Constitutional History*, 16 Cath.U.L.Rev. 54, 72 (1966).

ence for citizen militias. That suggested purpose is the deterrence of government from oppressing unarmed segments of the population. For example, King James II attempted to disarm the Protestants while allowing Catholics to bear arms, thus prompting the guarantee in the 1689 Bill of Rights that Protestants could have "arms for their defense."[12] Joseph Story wrote that,

> "The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them."

J. Story, *Commentaries on the Constitution*, Vol. 3, p. 746 (1833). *Cf. Carlton v. State*, 63 Fla. 1, 58 So. 486, 488 (1912) (state provision was "intended to give the people the means of protecting themselves against oppression and public outrage").

"Defense of themselves" has also been said to include an individual's right to bear arms to protect his person and home. *Schubert v. DeBard*, Ind.App., 398 N.E.2d 1339, 1341 (1980) (Indiana constitution provides citizenry the right to bear arms for their personal self-defense). Self-defense has been recognized as a privilege in both civil and criminal law since about 1400 in England and at all times in the United States.[13] Although the right to bear arms for self protection does not appear to have been an important development in England, the justification for a right to bear arms in defense of person and home probably reflects the exigencies of the rural American experience. *See People v. Brown*, *supra*. *Cf., Matthews v. State*, 237 Ind. 677, 689-692, 148 N.E.2d 334, 339-341 (1958) (Emmert, C. J., dissenting) (constitutional guarantee based on historical necessity for personal defense.)[14]

B. *The meaning of the term "arms"*

The term "arms" is also subject to several interpretations. In the colonial and revolutionary war era, weapons used by militiamen and weapons used in defense of person and home were one and the same. A colonist usually had only one gun which was used for hunting, protection, and militia duty, plus a hatchet, sword, and knife. G. Neumann, *Swords and Blades of the American Revolution* 6-15, 252-254 (1973). When the revolutionary war began, the colonists came equipped with their hunting muskets or rifles, hatchets, swords, and knives. The colonists suffered a severe shortage of firearms in the early years of the war, so many soldiers had to rely primarily on swords, hatchets, knives, and pikes (long staffs with a spear head). W. Moore, *Weapons of the American Revolution* 8 (1967).

Therefore, the term "arms" as used by the drafters of the constitutions probably was intended to include those weapons used by settlers for both personal and military defense. The term "arms" was not limited to firearms, but included several handcarried weapons commonly used for defense. The term "arms" would not have included cannon or other heavy ordnance not kept by militiamen or private citizens.

12. *See* text accompanying note 7 *supra*.

13. "The privilege of self-defense rests upon the necessity of permitting a man who is attacked to take reasonable steps to prevent harm to himself, where there is no time to resort to the law. The early English law, with its views of strict liability, did not recognize such a privilege; • • • But since about 1400 the privilege has been recognized, and it is now undisputed in the law of torts as well as in the criminal law." (citations omitted) W. Prosser, *Law of Torts* 108 (4th ed. 1971).

14. *Compare* the provisions in several state constitutions which guarantee that a person has the right to bear arms "in defense of his home, person and property." Colo.Const., Art. II, § 13; Miss.Const., Art. III, § 12; Mo.Const., Art. I, § 23; Mont.Const., Art. III, § 13; Okla. Const., Art. II, § 26; *State v. Nickerson*, 126 Mont. 157, 247 P.2d 188 (1952) (defendant cannot be convicted of assault if he pointed a loaded gun at a trespasser in his home); *accord, State v. Plassard*, 355 Mo. 90, 195 S.W.2d 495 (1946).

The revolutionary war era ended at a time when the rapid social and economic changes of the so-called Industrial Revolution began. The technology of weapons and warfare entered an unprecedented era of change. P. Cleator, *Weapons of War* 143–152 (1967). Firearms and other hand-carried weapons remained the weapons of personal defense, but the arrival of steam power, mechanization, and chemical discoveries completely changed the weapons of military warfare. The development of powerful explosives in the mid-nineteenth century, combined with the development of mass-produced metal parts, made possible the automatic weapons, explosives, and chemicals of modern warfare. P. Cleator, *Weapons of War* 153–177 (1967).

[1] These advanced weapons of modern warfare have never been intended for personal possession and protection. When the constitutional drafters referred to an individual's "right to bear arms," the arms used by the militia and for personal protection were basically the same weapons. Modern weapons used exclusively by the military are not "arms" which are commonly possessed by individuals for defense, therefore, the term "arms" in the constitution does not include such weapons.

[2] If the text and purpose of the constitutional guarantee relied exclusively on the preference for a militia "for defense of the State," then the term "arms" most likely would include only the modern day equivalents of the weapons used by colonial militiamen. The Oregon provision, however, guarantees a right to bear arms "for defense of *themselves*, and the State." The term "arms" in our constitution therefore would include weapons commonly used for either purpose, even if a particular weapon is unlikely to be used as a militia weapon.

[3] The constitutional guarantee that persons have the right to "bear arms" does not mean that all individuals have an unrestricted right to carry or use personal weapons in all circumstances. For example, the danger of firearms was recognized shortly after the development of gunpowder. The English Statute of Northampton in 1327 forbade persons to ride at night carrying a firearm for the purpose of terrifying the the people.[15] A 1678 Massachusetts law forbade shooting near any house, barn, garden, or highway in any town where a person may be "killed, wounded, or otherwise damaged."[16] The courts of many states have upheld statutes which restrict the possession or manner of carrying personal weapons. The reasoning of the courts is generally that a regulation is valid if the aim of public safety does not frustrate the guarantees of the state constitution. For example many courts have upheld statutes prohibiting the carrying of concealed weapons, *see, e. g., State v. Hart*, 66 Idaho 217, 157 P.2d 72 (1945); and statutes prohibiting possession of firearms by felons, *see, e. g., State v. Cartwright*, 246 Or. 120, 418 P.2d 922 (1966).

III. *The present case*

We now turn to the facts of the present case. The defendant was involved in an off and on verbal argument with his apartment manager in the course of the day on November 13, 1978. The dispute escalated into name calling, colorful words, and object throwing. At one point the defendant kicked the elevator door in the apartment building. The police were called and arrested the defendant. The defendant asked the police to get his coat from his apartment. The officers found two "billy clubs" in the defendant's apartment.

The defendant was charged with disorderly conduct, ORS 166.025, and possession of a slugging weapon, ORS 166.510. The matter went to trial without a jury. The defendant at trial demurred to and moved to dismiss the second charge on the grounds that it failed to state a crime. The motion was denied and the defendant was found guilty as charged on both counts.

15. 2 Edward III, ch. 3 (1328), reprinted in J. Bishop, *Statutory Crimes*, § 783 (3d ed. 1901).

16. Council held in Boston, March 28, 1678, referred to in Levin, *The Right to Bear Arms: The Development of the American Experience*, 48 Chi.-Kent L. Rev. 148, 150, n. 18 (1971).

[4, 5] The defendant appealed to the Court of Appeals, contending first that his acts did not amount to the crime of disorderly conduct, and second that the statute prohibiting possession of billy clubs, ORS 166.510(1), violates Article I, section 27, of the Oregon Constitution. The Court of Appeals did not consider defendant's first contention because it was not raised at trial.[17] The Court of Appeals held that ORS 166.510(1) was within the reasonable exercise of the "police power" of the state to curb crime. 43 Or.App. 303, 307, 602 P.2d 1096 (1979).

[6] The defendant contends that his conviction for possession of a billy club violates his right to possess arms in his home for personal defense. Pursuant to our previous discussion regarding the purpose and scope of the right to bear arms provision, we hold that Article I, section 27, of the Oregon Constitution includes a right to possess certain arms for defense of person and property. The remaining question is whether the defendant's possession of a billy club in this case is protected by Article I, section 27.

The club is considered the first personal weapon fashioned by humans. O. Hogg, *Clubs to Cannon* 19 (1968). The club is still used today as a personal weapon, commonly carried by the police. ORS 166.510 prohibits possession of a "billy;" however, ORS 166.520 states that peace officers are not prohibited from carrying or possessing a weapon commonly known as a "blackjack"[18] or "billy."

The statute in this case, ORS 166.510, prohibits the mere possession of a club. The defendant concedes that the legislature could prohibit carrying a club in a public place in a concealed manner, but the defendant maintains that the legislature cannot prohibit all persons from possessing a club in the home. The defendant argued that a person may prefer to keep in his home a billy club rather than a firearm to defend against intruders.

[7] Our historical analysis of Article I, section 27, indicates that the drafters intended "arms" to include the hand-carried weapons commonly used by individuals for personal defense. The club is an effective, hand-carried weapon which cannot logically be excluded from this term. We hold that the defendant's possession of a billy club in his home is protected by Article I, section 27, of the Oregon Constitution.

The defendant's conviction for disorderly conduct is affirmed, and his conviction for possession of a slugging weapon is reversed.

17. The general rule in both civil and criminal cases is that a question not raised and preserved in the trial court will not be considered on appeal. *State v. Abel*, 241 Or. 465, 467, 406 P.2d 902 (1965). Failure to raise an objection in trial court does not automatically preclude appellate review. The defendant's contention that his acts did not constitute the crime of disorderly conduct, however, does not present the exceptional circumstance or manifest error which justifies this court's consideration of such a claim. It follows that defendant's conviction of disorderly conduct is affirmed. Note that this case is not concerned with that aspect of the statute prohibiting disorderly conduct which we held to be unconstitutional in *State v. Spencer*, 289 Or. 225, 611 P.2d 1147 (1980).

18. Webster's Third International Dictionary defines a "blackjack" as "• • • 4. a small striking weapon typically consisting at the striking end of a leather enclosed piece of lead or other heavy metal and at the handle end of a strap or springy shaft that increases the force of impact."

KEY NUMBER SYSTEM

289 Or. 511

DEPARTMENT OF REVENUE, State of Oregon, Respondent,

v.

Donald W. GREAVES and Norma P. Greaves, Appellants.

TC 1378; SC 26873.

Supreme Court of Oregon, In Banc.

Argued and Submitted June 24, 1980.

Decided July 23, 1980.

Department of Revenue petitioned for statutory writ of mandamus commanding

298 Or. 395

STATE of Oregon, Petitioner on Review,

v.

Joseph Luna DELGADO, Respondent on Review.

TC CR83-946, CA A30962, SC S31059.

Supreme Court of Oregon, In Banc.

Argued and Submitted Nov. 6, 1984.

Decided Dec. 28, 1984.

Defendant was convicted in the District Court, Polk County, Walter W. Foster, J., of unlawful possession of a stabbing weapon, and he appealed. The Court of Appeals, 69 Or.App. 254, 684 P.2d 630, reversed, and appeal was taken. The Supreme Court, Lent, J., held that defendant's constitutional right to bear arms was violated by prohibition of mere possession and mere carrying of a switchblade knife.

Decision of the Court of Appeals affirmed.

Weapons ⇐1

Defendant's constitutional right to bear arms was violated by prohibition of mere possession and mere carrying of a switchblade knife. Const. Art. 1, § 27; ORS 166.510, 166.510(1).

Robert W. Muir, Asst. Atty. Gen., Salem, argued the cause for petitioner on review. With him on the briefs were Dave Frohnmayer, Atty. Gen., James E. Mountain, Jr., Sol. Gen., and Lynn Torno, Certified Law Student.

Susan M. Garrett, Salem, argued the cause and filed briefs for respondent on review.

Robert Dowlut, Washington, D.C., and Steven L. Krasik, Salem, filed a brief amicus curiae for Nat. Rifle Ass'n.

LENT, Justice.

The issue is whether ORS 166.510(1), insofar as it prohibits the mere possession and mere carrying of a switchblade knife, violates defendant's right to bear arms under Article I, section 27, of the Oregon Constitution. We hold that in that respect the statute does violate defendant's constitutional right.

ORS 166.510(1) provides, in relevant part:

"* * * [*Any person who* manufactures, causes to be manufactured, sells, keeps for sale, offers, gives, loans, *carries or possesses an instrument or weapon having a blade which projects or swings into position by force of a spring or other device and commonly known as a switch-blade knife* or an instrument or weapon commonly known as a blackjack, slung shot, sandclub, sandbag, sap glove or metal knuckles, or who carries a dirk, dagger or stiletto commits a Class A misdemeanor." (Emphasis added)

Article I, section 27, of the Oregon Constitution provides:

"The people shall have the right to bear arms for the defence of themselves, and the State * * * [.]"

The accusatory instrument charged that defendant "did unlawfully possess and carry" a weapon commonly known as a switch-blade knife in violation of ORS 166.510. Defendant demurred to the accusatory instrument on the ground that the statute was overbroad as impinging on the right guaranteed to him under Article I, section 27, of the Oregon Constitution. The trial court overruled the demurrer.[1]

Trial then proceeded on the basis of facts stipulated to be the same as those found by the trial court in the hearing on the motion

1. The defendant had also filed a motion to suppress the knife as evidence on the basis that it was obtained as a result of an unlawful search and seizure. The trial court's denial of that motion was not assigned as error.

to suppress mentioned in footnote 1, *supra*. Those facts are as follows.

On October 3, 1983, defendant was walking with a companion on a public street. The two appeared disorderly to an officer nearby, and when defendant reached up as he passed a street sign and tapped or struck it with his hand, the officer confronted both individuals and conducted a patdown search. Defendant was found with a switch-blade knife in his back pocket. Defendant told the arresting officer that he carried the knife "for protection" (defendant evidently feared attack by a jealous rival for his present girl friend).[2]

Defendant moved for judgment of acquittal, which was denied. The trial court then found defendant guilty and eventually sentenced defendant to jail "suspended on the condition" that defendant meet certain terms of probation.

Defendant appealed, assigning as error the trial court's overruling of his demurrer and denial of his motion for judgment of acquittal. The Court of Appeals, 69 Or. App. 254, 684 P.2d 630, per curiam, reversed on the basis of our decisions in *State v. Blocker*, 291 Or. 255, 630 P.2d 824 (1981), and *State v. Kessler*, 289 Or. 359, 614 P.2d 94 (1980). We allowed review to determine whether a switch-blade knife is within the constitutional guarantee. 298 Or. 37, 688 P.2d 845 (1984).

In *State v. Kessler, supra*, this court for the first time considered the scope of Article I, section 27. There, following the discovery by police officers of two billy clubs in his apartment, defendant was charged with the possession of billy clubs in violation of ORS 166.510(1), the same statute at issue in the case at bar. On appeal defendant argued that the statute violated Article I, section 27, of the Oregon Constitution. The Court of Appeals held that ORS 166.510(1) was within the reasonable exercise of what the court called the state's "police power" to control crime. 43 Or.App. 303, 307, 602 P.2d 1096, 1097 (1979). We reversed.

In *Kessler*, we examined the historical roots of Article I, section 27. We concluded that the drafters of Oregon's constitution did not wish to limit the right to bear arms to a citizen militia, but rather intended that the private citizen also have the right to "possess certain arms for the defense of person and property." 289 Or. at 371, 614 P.2d at 98.

Our analysis in *Kessler* of the meaning of the term "arms" is central to the case at bar and so merits a further discussion. We reasoned that because settlers during the revolutionary era used many of the same weapons for both personal and military defense, the term "arms," as contemplated by the constitutional framers, was not limited to firearms but included those hand-carried weapons commonly used for personal defense. 289 Or. at 368, 614 P.2d at 98. Thus, the term "arms" "includes weapons commonly used for either purpose, even if a particular weapon is unlikely to be used as a militia weapon." 289 Or. at 369, 614 P.2d at 98. On the basis of this historical examination, we held that the possession of a billy club was constitutionally protected:

> "Our historical analysis of Article I, section 27, indicates that the drafters intended 'arms' to include the hand-carried weapons commonly used by individuals for personal defense. The club is an effective, hand-carried weapon which cannot logically be excluded from this term."

2. We have in mind that defendant's principal argument is that, insofar as this charge of criminal conduct is concerned, the statute is overbroad in proscribing conduct in which he has a state constitutional right to engage. Ordinarily, we would have no reason to go beyond the facts described in the accusatory instrument to resolve whether error was committed in overruling defendant's demurrer. In this case, however, a factual record was developed, and the defendant also assigned as error the denial of his motion for judgment of acquittal. The facts are recounted to show that there is no evidence to support any possible charge of an illegal intent to use the weapon or an illegal use of the weapon.

289 Or. at 372, 614 P.2d at 100.[3]

The state argues that a switch-blade is not a weapon "commonly used for personal defense," and is therefore not an "arm" within the meaning of the Oregon Constitution. It insists that the switch-blade is an offensive weapon used primarily by criminals. In support of this argument we are referred to various authorities, especially the Federal Anti-Switchblade Act, 15 USC §§ 1241–44 (Supp. IV, 1980), which is aimed at prohibiting the introduction of switch-blade knives into interstate commerce because they are "almost exclusively the weapon of the thug and the delinquent." S.Rep. No. 1980, 85th Cong., 2d Sess., reprinted in 1958 U.S.Code Cong. & Ad.News 3435, 3437.

We note, first, that that material offers no more than impressionistic observations on the criminal use of switch-blades. More importantly, however, we are unpersuaded by this distinction which the state urges of "offensive" and "defensive" weapons. All hand-held weapons necessarily share both characteristics. A kitchen knife can as easily be raised in attack as in defense. The spring mechanism does not, instantly and irrevocably, convert the jackknife into an "offensive" weapon.[4] Similarly, the clasp feature of the common jackknife does not mean that it is incapable of aggressive and violent purposes. It is not the design of the knife but the use to which it is put that determines its "offensive" or "defensive" character.

There are statutes now on the books that concern the manner in which weapons are carried, the intent with which they are carried, the use to which they may not be put and the status of a person that results in forbidding his possessing a weapon.

> "This state has several such regulatory statutes, with which we are not concerned in this case: ORS 166.220(1) prohibiting possession of a dangerous weapon with intent to use such weapon unlawfully against another; ORS 166.240, prohibiting carrying certain weapons concealed about one's person; ORS 166.250, prohibiting carrying any firearm concealed upon the person or within any vehicle without a license to do so." (Footnote omitted.)

State v. Blocker, supra, 291 Or. at 259–260, 630 P.2d at 826. *See, also*, ORS 166.270, which prohibits an exconvict from possessing a firearm concealable on the person, which this court held not to offend Article I, section 27, of the Oregon Constitution in *State v. Robinson*, 217 Or. 612, 619, 343 P.2d 886 (1959).

The appropriate inquiry in the case at bar is whether a kind of weapon, as modified by its modern design and function, is of the sort commonly used by individuals for personal defense during either the revolutionary and post-revolutionary era,[5] or in 1859 when Oregon's constitution was adopted. In particular, it must be determined whether the drafters would have intended the word "arms" to include the switch-blade knife as a weapon commonly used by individuals for self defense. To answer that question we must journey briefly into the history of knives. We have resorted primarily to three books by H. Peterson for that history: Arms and Armour in Colonial America, 1526–1783 (1956); American Knives (1958); Daggers and Fighting Knives of the Western World (1968). What we have to say generally in

3. One year later, in *State v. Blocker*, 291 Or. 255, 259, 630 P.2d 824, 826 (1981), we held that the possession of a billy club outside as well as inside the home is constitutionally protected.

4. At one time the single-action, single-shot handgun was carried by many men for defense. Did the development of the double-action feature of the handgun or the addition of the revolving cylinder which enabled one to fire the gun several times without pausing to reload, as a matter of law, transform the handgun from a defensive weapon to an offensive weapon? Obviously, the gun, both before and after such changes, could be used for either defense or offense.

5. Article I, section 27, of the Oregon Constitution was taken verbatim from sections 32 and 33 of the Indiana Constitution of 1851. Indiana's bill of rights liberally drew upon the state constitutions of Kentucky, Ohio, Tennessee, and Pennsylvania, which were drafted between 1776 and 1802. *See State v. Kessler*, 289 Or. 359, 365, 614 P.2d 94, 95 (1980).

the next few paragraphs is drawn from those works.

The popularity of the fighting knife has had an uneven history, even to today. During the Roman civilization and for several centuries thereafter, for example, the knife was little appreciated as a tool of combat, but during the Viking Period of the 9th and 10th centuries large knives (scramasax), used for general purposes as well as for war, were popular among the Northmen, Germans, Franks and Anglo-Saxons. It was during the Middle Ages that the real flowering of the fighting knife and dagger occurred. New shapes appeared and the knife became part of the standard dress for all classes: from the knights and their men-at-arms as an adjunct to the sword, to the laborer and peasant for protection and convenience. During the 16th century the dagger came to be used by the aristocracy, mainly in conjunction with the sword, and was used primarily for combat; indeed, during the early part of that century the technique of fighting with sword and dagger developed, thus giving rise to the modern school of knife fighting. Through the 16th and 17th centuries knives and daggers declined in importance and were no longer an important part of the daily civilian costume.

In early colonial America the sword and dagger were the most commonly used edged weapons. During the American colonial era every colonist had a knife. As long as a man was required to defend his life, to obtain or produce his own food or to fashion articles from raw materials, a knife was a constant necessity. Around 1650 one form of dagger popular in the colonies was the "plug bayonet," so called because it fit into the muzzle of a musket. It was used both as a dagger or as a general utility knife. Other knives became popular during the 17th and 18th centuries. The American frontiersman used a large knife to ward off danger from Indian attacks and to hunt and trap; along with that he carried a smaller knife, the blade being three to four inches long, in his rifle bag.

In the 19th century, daggers remained popular, but in the west the renowned Bowie knife became the weapon favored by the lawless and law-abiding alike. These were violent times, particularly from the 1820s through the Civil War, when a weapon might be needed at a moment's notice. In response, "the well-equipped gentleman carried a pistol in his pocket and a knife beneath his coattails."

Of the many varieties of knives, none has been a more constant or enduring companion to man than the pocket knife. Specimens of folding pocket knives have been discovered in Roman archeological sites, indicating that such knives were popular at least from the first century A.D. They have been manufactured for their utility as both instruments of labor and combat. One of the most common of the specific named knives is the jackknife, a word of uncertain origin, which was a large single-bladed folding knife, ranging in size from four to seven inches when closed. By the early 1700s, when the eastern seaboard had become a highly settled area with large towns and cities and relatively good roads, men normally carried a folding pocket knife. Even when they joined the American army during the revolution, the knife they carried was the jackknife, which was mentioned frequently in colonial records. During the American Revolution at least two states, New Hampshire and New York, required their militiamen to carry a jackknife. Even during the mid-18th century, some of these "jackknives" were rather more lethal than their name suggests, measuring two feet long with the blade extended, and designed solely for fighting. G. Neumann, Swords and Blades of the American Revolution 247 (1973). Some others had blades over 16 inches long, extending well beyond the hilt even when folded, and were designed to be used open or closed. "Gentlemen" and officers during this same era often carried canes with slender daggers mounted inside which could be drawn with a quick tug and were used for personal defense. Neumann, Swords and Blades of the American Revolution *supra*, at 239. In the early 19th century a special form of

dagger also developed, the pocket or folding dagger, with blades ranging in size from four to sixteen inches; they were intended to be carried in the pocket or in special sheathes.

It is clear, then, that knives have played an important role in American life, both as tools and as weapons. The folding pocketknife, in particular, since the early 18th century has been commonly carried by men in America and used primarily for work, but also for fighting.

This brings us to the switch-blade knife. A switch-blade is defined as a "pocketknife having the blade spring-operated so that pressure on a release catch causes it to fly open." Webster's Third International Dictionary 2314 (1971). If ORS 166.510(1) proscribed the possession of mere pocketknives, there can be no question but that the statute would be held to conflict directly with Article I, section 27. The only difference is the presence of the spring-operated mechanism that opens the knife. We are unconvinced by the state's argument that the switch-blade is so "substantially different from its historical antecedent" (the jackknife) that it could not have been within the contemplation of the constitutional drafters. They must have been aware that technological changes were occurring in weaponry as in tools generally. The format and efficiency of weaponry was proceeding apace. This was the period of development of the Gatling gun, breach loading rifles, metallic cartridges and repeating rifles. The addition of a spring to open the blade of a jackknife is hardly a more astonishing innovation than those just mentioned.[6]

We stress again, as we have stressed before, that this decision does not mean individuals have an unfettered right to possess or use constitutionally protected arms in any way they please. The legislature may, if it chooses to do so, regulate possession and use. *See State v. Blocker, supra,* 291 Or. at 259, 630 P.2d at 826; *State v. Kessler, supra,* 289 Or. at 370, 614 P.2d at 100. This court recognizes the seriousness with which the legislature views the possession of certain weapons, especially switch-blades.[7] The problem here is that ORS 166.510(1) absolutely proscribes the mere possession or carrying of such arms. This the constitution does not permit.[8]

The decision of the Court of Appeals is affirmed.

71 Or.App. 356

Gerald Lee ALBERS, Appellant,

v.

Hoyt C. CUPP, Superintendent, Oregon State Penitentiary, Respondent.

137975; CA A31762.

Court of Appeals of Oregon.

Argued and Submitted Nov. 28, 1984.

Decided Dec. 12, 1984.

Reconsideration Denied Jan. 25, 1985.

Review Denied Feb. 12, 1985.

Appeal from Circuit Court, Marion County, Clarke C. Brown, Judge.

6. Charles Dickens, in his novel Martin Chuzzlewit, published in 1842 shortly after his return from America, referred to a certain Scadder, who "picked his teeth with a sort of young bayonet that flew out of his knife when he touched a spring." This suggests that America could have been the origin of the switch-blade. *See* A. Popkess, *Flick Knives,* [1959] Crim.L.R. 640.

7. ORS 166.510(1) was amended in 1957 to include, for the first time, proscription against the possession of switch-blades. Or.Laws 1957, ch. 290, § 1.

8. The analysis we have employed in *State v. Kessler* and *State v. Blocker, supra,* at footnotes 3 and 5, concerning clubs and in the case at bar concerning a knife may not be the same analysis that would be appropriate to the application of Article I, section 27, of the Oregon Constitution to a weapon such as a can of mace, not having a pre-twentieth century form or counterpart. It has been suggested that it is incongruous to believe that a woman today to defend herself from a rapist would have constitutional sanction for carrying a switch-blade knife but not for the can of mace because the latter was unknown to the mid nineteenth century. Such a case is not before us. The time to deal with that case is when it is presented.

(b) It is an affirmative defense to a prosecution under (a)(1) of this section that

(1) the defendant took reasonable steps to remove the substance from the highway; and

(2) no person suffered physical injury as a result of the presence of the substance on the highway.

(c) Obstruction of highways is a class B misdemeanor. (§ 7 ch 166 SLA 1978)

Collateral references. — 39 Am. Jur. 2d, Highways, Streets and Bridges, §§ 281-310.
39A C.J.S., Highways, §§ 217-231.

Article 2. Weapons and Explosives.

Collateral references. — Validity and construction of gun control laws, 28 ALR3d 845.

Sec. 11.61.200. Misconduct involving weapons in the first degree. (a) A person commits the crime of misconduct involving weapons in the first degree if the person

(1) knowingly possesses a firearm capable of being concealed on one's 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;

(2) knowingly sells or transfers a firearm capable of being concealed on one's person to a person who has 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;

(3) manufactures, possesses, transports, sells, or transfers a prohibited weapon;

(4) knowingly sells or transfers a firearm to another whose physical or mental condition is substantially impaired as a result of the introduction of an intoxicating liquor or drug into that other person's body;

(5) removes, covers, alters, or destroys the manufacturer's serial number on a firearm with intent to render the firearm untraceable; or

(6) possesses a firearm on which the manufacturer's serial number has been removed, covered, altered, or destroyed, knowing that the serial number has been removed, covered, altered, or destroyed with the intent of rendering the firearm untraceable.

(b) It is an affirmative defense to a prosecution under (a)(1) or (2) of this section that

(1) the person convicted of the prior offense on which the action is based received a pardon for that conviction;

(2) the underlying conviction upon which the action is based has been set aside under AS 12.55.085 or as a result of post-conviction proceedings; or

(3) a period of five years or more has elapsed between the date of the person's unconditional discharge on the prior offense and the date of the possession, sale, or transfer of the firearm.

(c) It is an affirmative defense to a prosecution under (a)(3) of this section that the manufacture, possession, transportation, sale, or transfer of the prohibited weapon was in accordance with registration under 26 U.S.C. 5801-5872 (National Firearms Act).

(d) The provisions of (a)(3) of this section do not apply to a peace officer acting within the scope and authority of the officer's employment.

(e) As used in this section,

(1) "prohibited weapon" means any

(A) explosive, incendiary, or noxious gas

(i) mine or device that is designed, made, or adapted for the purpose of inflicting serious physical injury or death;

(ii) rocket, other than an emergency flare, having a propellant charge of more than four ounces;

(iii) bomb;

(iv) grenade;

(B) device designed, made, or adapted to muffle the report of a firearm;

(C) metal knuckles;

(D) switchblade or gravity knife;

(E) firearm that is capable of shooting more than one shot automatically, without manual reloading, by a single function of the trigger; or

(F) rifle with a barrel length of less than 16 inches, shotgun with a barrel length of less than 18 inches, or firearm made from a rifle or shotgun which, as modified, has an overall length of less than 26 inches;

(2) "unconditional discharge" has the meaning ascribed to it in AS 12.55.185.

(f) Misconduct involving weapons in the first degree is a class C felony. (§ 7 ch 166 SLA 1978)

The CITY OF LAKEWOOD, a municipal corporation of the State of Colorado, Petitioner,

v.

Charles Edward PILLOW, Respondent.

No. C-164.

Supreme Court of Colorado, En Banc.

Oct. 10, 1972.

Defendant was convicted in Municipal Court of violation of city ordinance making it unlawful to possess dangerous or deadly weapon, and he appealed. The District Court, Jefferson County, Christian D. Stoner, J., reversed and declared ordinance invalid, and certiorari was granted. The Supreme Court, Hodges, J., held that the ordinance was unconstitutionally overbroad, where it would prohibit gunsmiths, pawnbrokers and sporting goods stores from carrying on substantial part of their business, it appeared to prohibit individuals from transporting guns to and from such places of business, it made it unlawful for person to possess firearms in vehicle or in place of business for purpose of self-defense, and several of such activities were constitutionally protected and, depending upon circumstances, might be entirely free of criminal culpability.

Affirmed.

1. Weapons ⇐3

City ordinance prohibiting possession of dangerous or deadly weapon was unconstitutionally overbroad, where it would prohibit gunsmiths, pawnbrokers and sporting goods stores from carrying on substantial part of their business, it appeared to prohibit individuals from transporting guns to and from such places of business, it made it unlawful for person to possess firearm in vehicle or in place of business for purpose of self-defense, and several of such activities were constitutionally protected and, depending upon circumstances, might be entirely free of criminal culpability. 1965 Perm.Supp., C.R.S., section 40-11-1; Const. art. 2, § 13.

2. Constitutional Law ⇐81

Governmental purpose to control or prevent certain activities, which may be constitutionally subject to state or municipal regulation under police power, may not be achieved by means which sweep unnecessarily broad and thereby invade area of protected freedoms.

3. Constitutional Law ⇐83(1)

Even though governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.

Raymond C. Johnson, Lakewood, for petitioner.

Theodore P. Koeberle, Boulder, for respondent.

HODGES, Justice.

On petition of the City of Lakewood, we granted certiorari to review the district court's declaration that a Lakewood ordinance is invalid.

The respondent Pillow was convicted in municipal court of a violation of this ordinance which makes it unlawful to possess a dangerous or deadly weapon. He appealed to the district court which reversed the conviction on the basis of a finding that there was a failure of proof before the municipal court and on the further ground that the ordinance was invalid. The district court's declaration of invalidity was premised on its finding that the subject matter of the ordinance is a matter of statewide concern and is therefore preempted by a state statute pertaining to the carrying of a concealed weapon. This state statute is 1965 Perm.Supp., C.R.S. 1963, 40-11-1.

We affirm the district court's reversal of the respondent's conviction but do so on the ground that the Lakewood ordinance is

D's conv. reversed on overbreadth grounds, not ∆ to bear arms.

unconstitutionally overbroad. It is therefore unnecessary to discuss the failure of proof issue; moreover, this case is not a suitable vehicle for a consideration of the preemption issue. Our decision to resolve this case in this manner was prompted to some degree by statements made by counsel for the City of Lakewood during oral argument. He conceded that the ordinance lacked specificity in certain respects and that a replacing ordinance was in the process of preparation.

The subject Lakewood ordinance is numbered 0–70–47, Sec. 3–9 and is set forth in full as follows:

"Unlawful to Possess, Carry or Use Dangerous or Deadly Weapons. (a) It shall be unlawful for any person to have in his possession, except within his own domicile, or to carry or use, a revolver or pistol, shotgun or rifle of any description, which may be used for the explosion of cartridges, or any air gun, gas operated gun or spring gun, or any bow made for the purpose of throwing or projecting missiles of any kind by any means whatsoever; provided that nothing in this section shall prevent use of any such instruments in shooting galleries or ranges under circumstances when such instruments can be fired, discharged or operated in such manner as not to endanger persons or property and also in such manner as to prevent the projectile from traversing any grounds or space outside the limits of such gallery or range; and provided further, that nothing herein contained shall be construed to prevent the carrying of any type of gun, when unloaded, or any bow, to or from any range, gallery or hunting areas. (b) Nothing in this section shall prevent the possession or use of any of said instruments by persons duly licensed for such purpose by the City of Lakewood. (c) Nothing in this section shall prevent the use of or possession of any said instrument by law enforcement personnel."

[1] An analysis of the foregoing ordinance reveals that it is so general in its scope that it includes within its prohibitions the right to carry on certain businesses and to engage in certain activities which cannot under the police powers be reasonably classified as unlawful and thus, subject to criminal sanctions. As an example, we note that this ordinance would prohibit gunsmiths, pawnbrokers and sporting goods stores from carrying on a substantial part of their business. Also, the ordinance appears to prohibit individuals from transporting guns to and from such places of business. Furthermore, it makes it unlawful for a person to possess a firearm in a vehicle or in a place of business for the purpose of self-defense. Several of these activities are constitutionally protected. Colo.Const. art. II, § 13. Depending upon the circumstances, all of these activities and others may be entirely free of any criminal culpability yet the ordinance in question effectively includes them within its prohibitions and is therefore invalid. Shuttlesworth v. Birmingham, 382 U.S. 87, 86 S.Ct. 211, 15 L.Ed.2d 176 (1965); Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840 (1948); People of the City of Detroit v. Sanchez, 18 Mich.App. 399, 171 N.W.2d 452 (1969).

[2, 3] A governmental purpose to control or prevent certain activities, which may be constitutionally subject to state or municipal regulation under the police power, may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967); Aptheker v. Secretary of State, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1963); NAACP v. Alabama, 377 U.S. 288, 84 S.Ct. 1302, 12 L.Ed.2d 325 (1964). Even though the governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. Aptheker v. Sec-

retary of State, *supra*, and Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960). *See also* Colorado Racing Commission v. Smaldone, Colo., 492 P.2d 619; Arnold v. Denver, 171 Colo. 1, 464 P.2d 515 (1970); and Goldman v. Knecht, 295 F.Supp. 897 (D.C.Colo.1969).

Judgment affirmed.

Minnie May CUNNINGHAM, Plaintiff-Appellant,

v.

SPRING VALLEY ESTATES, INC., a corporation, et al., Defendants-Appellees.

No. 72-068.

(Supreme Court No. 24727.)

Colorado Court of Appeals, Div. II.

June 6, 1972.

Rehearing Denied June 27, 1972.

Certiorari Granted Oct. 24, 1972.

Selected for Official Publication.

Owner of property by adverse possession brought action for damages for alleged trespass on such property through which sewer main was constructed by defendant city and to require defendants to restore property to its former condition. The District Court, Boulder County, Howard O. Ashton, J., determined that city had a right to sewer easement on basis of inverse condemnation, denied owner's request for injunctive relief and awarded monetary damages against defendants. Owner appealed. The Court of Appeals, Enoch, J., held that absent agreement or admissions by parties, resolution, at pretrial conference, of disputed issues as to city's right to easement on property and as to owner's right to injunctive relief was improper. The court further held that subject to any defenses which defendant might have had, owner was entitled to damages for any injury caused by construction of main from date of owner's adverse possession rather than merely from date of the judgment quieting title in owner.

Reversed and remanded for new trial.

1. Trial ⇐9(1)

Absent agreement or admissions by parties, in action for damages caused by defendant's alleged trespass on plaintiff's property and to require defendant to restore property to its former condition, resolution, at pretrial conference, of disputed issues as to defendant city's right to sewer easement on plaintiff's property on basis of inverse condemnation and as to plaintiff's right to injunctive relief was improper.

2. Adverse Possession ⇐106(5)

Subject to any defenses which defendant might have had, owner of property by adverse possession was entitled to damages for any injury caused by construction of sewer main through such property from date of owner's adverse possession rather than merely from date of judgment quieting title in plaintiff. 1967 Perm.Supp., C.R.S., section 118-7-1(1).

James H. Snyder, Boulder, Wesley H. Doan, Denver, for plaintiff-appellant.

Hollenbeck, King, French & Mills, Guy A. Hollenbeck, Peter C. Dietze, Boulder, for defendants-appellees, Spring Valley Estates, Inc. and James M. Burger.

Walter L. Wagenhals, City Atty., Gilbert M. Sackheim, Asst. City Atty., Boulder, for defendant-appellee, City of Boulder, Colo.

ENOCH, Judge.

This case was transferred from the Supreme Court pursuant to statute.

This action was brought by Minnie May Cunningham against the named defendants for damages caused by defendants' alleged trespass upon her property and to require

policies underlying Alaska Rule of Evidence 803(8)(b)(iii) which exempts from inclusion within the exception "factual findings offered by the state in criminal cases." We concluded that the factual findings exempted were limited to those resulting from "an investigation made pursuant to authority granted by law." *See* Alaska R.Evid. 803(8)(a). In so doing, we recognized, though we did not state, that Alaska Rule of Evidence 803(8)(b)(iv) specifically exempts from coverage under the exception "factual findings resulting from special investigation of a particular complaint, case, or incident." We agree that the factual findings offered by the state in a criminal case under subsection (iii) cover a broader category than factual findings resulting from special investigation of a particular complaint, case, or incident under subsection (iv). Nevertheless, we concluded that before a factual finding would fall within the bar of any of these subsections, it would have to be made under circumstances in which the person making the factual finding could foresee its use in litigation and use this knowledge to manipulate the ultimate decision in the litigation.

In applying this test to the various items contained within the breathalyzer packet, we are satisfied that a state employee could not tamper with the findings in time to affect a specific prosecution. Any effort by state employees to tamper with the results reported in the breathalyzer packet thereby making all defendants who were administered a breathalyzer test with a particular instrument falsely appear intoxicated would be readily discoverable.

Finally, we conclude that defendant has ample protection against negligent preparation of the breathalyzer packet in Alaska's broad rules of criminal discovery, the requirement that the breathalyzer machine be available for inspection by the defendant or his representative and with the defendant's right to discover sample "ampoules." *See Lauderdale v. State*, 548 P.2d 376 (Alaska 1976) and defendant's right to discover samples of his "breath". *See also Municipality of Anchorage v. Serrano*, 649 P.2d 256 (Alaska App., 1982) (defendant's breath samples must be preserved for their independent analysis or other means must be provided to check breathalyzer results); *Cooley v. Municipality of Anchorage*, 649 P.2d 251, 255 (Alaska App., 1982) (municipality has the burden to convince the jury that the breathalyzer is accurate). We conclude that the trial court did not err in finding the various documents within the breathalyzer packet to be within the public records exception to the hearsay rule.

Byrne does not complain that the various documents were not properly authenticated as did the defendants in *Huggins*. Consequently, it is not necessary for us to determine whether the factors which led us to remand those cases for further proceedings would warrant further action in this case.

The judgment of the district court is AFFIRMED.

ANCHORAGE, A Municipal Corporation, Appellant,

v.

Gregory RICHARDS, Appellee.

ANCHORAGE, A Municipal Corporation, Appellant,

v.

Douglas R. PHILLIPS, Appellee.

ANCHORAGE, A Municipal Corporation, Appellant,

v.

Michael B. PHELPS, Appellee.

ANCHORAGE, A Municipal Corporation, Appellant,

v.

Edward A. KEGLER, Appellee.

Nos. 6387, 6459, 6504 and 6540.

Court of Appeals of Alaska.

Nov. 19, 1982.

Municipality appealed from series of decisions of the District Court, Third Judi-

cial District, Anchorage, Beverly W. Cutler, Warren B. Tucker, and Elaine Andrews, JJ., dismissing prosecutions. The Court of Appeals, Singleton, J., held that a municipal ordinance regulating the carrying of a concealed weapon is not prohibited by the statute which prohibits someone from knowingly possessing a deadly weapon concealed "on his person."

Judgment reversed and remanded.

1. Municipal Corporations ⇐592(1)

Statute which prohibits someone from knowingly possessing a deadly weapon concealed "on his person" was not intended to expressly privilege the carrying of a weapon and, therefore, did not prohibit home rule municipality from enacting ordinance regulating carrying a concealed weapon. AS 11.61.220; Const. Art. 10, §§ 1, 11.

2. Municipal Corporations ⇐592(1)

Home rule municipalities are free to prohibit conduct that is not prohibited by state legislation. Const. Art. 10, § 11.

James F. Wolf, Asst. Municipal Prosecutor, Allen M. Bailey, Municipal Prosecutor, and Theodore D. Berns, Municipal Atty., Anchorage, for appellant.

Joan S. Schanen, Wasilla, for appellee Gregory Richards.

Jonathon A. Katcher, Asst. Public Defender, and Dana Fabe, Public Defender, Anchorage, for Douglas R. Phillips, Michael B. Phelps, and Edward A. Kegler, appellees.

Before BRYNER, C.J., and COATS and SINGLETON, JJ.

OPINION

SINGLETON, Judge.

This is an appeal by the Municipality of Anchorage from a series of decisions of the trial court dismissing prosecutions. The decisions are final, and we have jurisdiction. *State v. Michel*, 634 P.2d 383 (Alaska App. 1981). The appeals have been joined, because they present a single issue of law: whether a municipal ordinance regulating carrying a concealed weapon is prohibited by state law. We conclude that the trial court erred in its construction of the interplay between the state legislation and the ordinance, and therefore we reverse.

Appellees were charged with separate violations of AMC 8.05.070 which provides as follows:

> A. It is unlawful for any person to carry concealed about his person in any manner:
>
> 1. a revolver, pistol or other firearm;
>
> . . .

In each complaint, it was alleged that the defendant concealed a firearm about his person by storing it in his vehicle.

The complaints were dismissed by the district court on the assumption that AMC 8.05.070 was in irreconcilable conflict with AS 11.61.220 which prohibits someone from knowingly possessing a deadly weapon concealed "on his person." The district court noted that AS 11.61.220, as originally contemplated, proscribed concealing a weapon in an automobile but that members of the legislature objected to this provision, and it was deleted. Consequently, the district court inferred that the legislature's decision not to prohibit carrying a concealed weapon in a vehicle precluded a municipality from enforcing such a prohibition. On the assumption that the Anchorage ordinance prohibited carrying a weapon in a vehicle, the trial court held the ordinance invalid.

Anchorage is a home rule municipality with broad powers of legislation. Article 10, section 1 of our state constitution provides in relevant part:

> The purpose of this article [governing local government] is to provide for maximum local self-government with a minimum of local government units, and to prevent duplication of tax-levying jurisdictions. A liberal construction shall be given to the powers of local government units.

Article 10, section 11 provides in relevant part:

A home rule borough or city may exercise all legislative powers not prohibited by law or by charter.

[1, 2] The district court reasoned that AMC 8.05.070 was prohibited by the enactment of AS 11.61.220. We have concluded that the district court erred in this determination and therefore we reverse. AS 11.61.220 does not address municipal powers and therefore cannot be construed to explicitly prohibit any municipal action. Nor do we believe that the statute can be interpreted to implicitly prohibit municipal action. Generally, legislation can take three positions regarding conduct: (1) it can prohibit conduct; (2) it can expressly license conduct, that is, create an express "privilege" to engage in certain conduct; or (3) it can ignore conduct. There is nothing in the statute in question suggesting that it was intended to expressly privilege carrying weapons. The most that can be said is that the legislature elected to tolerate such conduct. Such toleration does not rise to the level of the prohibition contemplated by Article 10, section 11 of our state constitution. Home rule municipalities are free to prohibit conduct that is not prohibited by state legislation. *See Cremer v. Anchorage*, 575 P.2d 306 (Alaska 1978).

Our holding today does not depart from *Simpson v. Municipality of Anchorage*, 635 P.2d 1197 (Alaska App.1981). In that case, a majority of this court held that AS 28.01.010(a) constituted a legislative prohibition of any municipal ordinance governing traffic regulation which was "inconsistent" with a state statute or rule regulating traffic. In determining whether an inconsistency existed, we determined that state-wide uniformity was a significant purpose of the traffic regulations. *Id.* at 1202. We then found AMC 9.28.030, which at that time prescribed driving with a .10% blood alcohol level, inconsistent with AS 28.35.030, because it did not prohibit driving with a .10% blood alcohol level unless driving was impaired. There is nothing in the criminal code suggesting that its provisions dealing with possession of weapons were intended to establish state-wide uniformity; nor is there any state statute regulating firearms which prohibits inconsistent municipal ordinances. Finally, we find absolutely nothing in the state statutes that would suggest an intent to encourage people to carry weapons in automobiles.

The judgment of this district court is REVERSED and these cases REMANDED for further proceedings consistent with this opinion.[1]

1. The parties in the district court proceeded on the assumption that the municipal ordinance in question prohibits concealing firearms in vehicles. The trial court either so found or simply accepted the parties' construction of the ordinance *arguendo* and went on to reach the constitutional issue. We express no opinion as to whether this interpretation of AMC 8.05.070 is appropriate. *But see State v. Crumal*, 54 Or. App. 41, 633 P.2d 1313 (1981), (interpreting an Oregon statute identical to the ordinance in this case). The Oregon court held that the import of the phrase "carries concealed about the person" contained in the statute governing carrying concealed weapons is that the concealed weapon must be carried in such a manner that it moves along with a person's body, not just in reasonable proximity to the person or some place where it could be deemed to be in his constructive possession. Therefore, a firearm under an automobile seat was held not to be carried about the driver's person. ORS 166.240, 166.240(1).

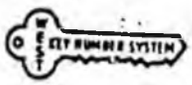
ichard E. O'Toole of Walentine, ›ole, McQuillan & Gordon, Omaha, for ·llees.

ASTINGS, C.J., BOSLAUGH, TE, CAPORALE, SHANAHAN, GRANT, JJ., and COLWELL ict Judge, Retired.

R CURIAM.

: plaintiffs-appellants, Robert J. and ·ia A. Luby, allege they were dam- by the conduct of defendants-appel- CBS Real Estate Company, Madeline y, and Jeannie Neff. The district sustained the demurrer of the de- nts on the basis that as real estate sionals they were entitled to the pro- of the 2-year period of limitations ble to professionals, embodied in ev1sStat. § 25-222 (Reissue 1985). *Zoucha*, 226 Neb. 476, 412 N.W.2d 987), holds that real estate brokers professionals within the meaning statute. Accordingly, the judgment district court is hereby reversed, and se is remanded for further proceed-

ISED AND REMANDED FOR FURTHER INGS.



neither of state court quoted here, Colo. & N.D. is absolute — ok's would be OK if qualified as N.D.'s do.

STATE of North Dakota, Plaintiff and Appellee,

v.

Elliot C. RICEHILL, Defendant and Appellant.

Cr. No. 870064.

Supreme Court of North Dakota.

Nov. 19, 1987.

Defendant was convicted in the District Court, Ramsey County, Lee A. Christofferson, J., of possession of firearm by convicted felon, and he appealed. The Supreme Court, VandeWalle, J., held that: (1) statute prohibiting convicted felons from possessing firearms did not violate state constitutional guaranty of right to keep and bear arms, and (2) defendant who alleged that he was denied effective assistance of counsel due to counsel's failure to subpoena witness was required to present proof of witness' proposed testimony.

Affirmed.

1. Weapons ⇐2

Although State Constitution prevents negation of right to keep and bear arms, that right nevertheless remains subject to reasonable regulation under State's police power. NDCC 62.1-02-01, subd. 1; Const. Art. 1, § 1.

2. Weapons ⇐3

Statute prohibiting persons previously convicted of felonies involving violence or intimidation from owning or possessing firearm for ten years from date of conviction or release did not violate state constitutional guaranty of right to keep and bear arms. NDCC 62.1-02-01, subd. 1; Const. Art. 1, § 1.

3. Criminal Law ⇐998(16)

Defendant who based his claim of ineffective assistance of counsel on counsel's failure to timely subpoena witness was required to present some form of proof as to what witness' testimony would have been by means of affidavit by proposed witness or by testimony in postconviction relief proceeding. U.S.C.A. Const.Amend. 6.

4. Criminal Law ⇐1134(3)

Ineffective assistance of counsel claim is generally more effectively presented in postconviction relief proceeding, rather than on direct appeal. NDCC 29-32.1-01 et seq., U.S.C.A. Const.Amends. 6, 14.

Lewis C. Jorgenson, State's Atty., Devils Lake, for plaintiff and appellee State of N.D.

David C. Thompson of Craft & Thompson, P.C., Fargo, for defendant and appellant.

VANDE WALLE, Justice.

Elliot Ricehill appealed from a judgment of conviction entered upon a jury verdict finding him guilty of the crime of possession of a firearm by a person previously convicted of a felony, in violation of Section 62.1-02-01(1), N.D.C.C. On appeal, Ricehill raises two issues:

1) That Section 62.1-02-01(1) is unconstitutional because it violates his right to keep and bear arms under Article I, Section 1, of the North Dakota Constitution, and

2) That he was denied effective assistance of counsel at trial.

We affirm, but without prejudice to Ricehill to raise his claim of ineffective assistance of counsel at a proceeding for postconviction relief.

The information in this case charged that on or about March 7, 1986, Ricehill had "in his possession and under his control a firearm, within 10 years from being incarcerated for a felony involving violence, to-wit: The said defendant had in his possession a pistol and had been incarcerated for the crime of murder within the last 10 years."

At trial, the State relied on the testimony of Mark Schimetz and city police officer Harry Johnson. Briefly related, the testimony of Schimetz was that on the evening in question Ricehill had invited him into his car where they had conversed and where Ricehill had shown him a rifle lying in the back seat and a revolver which Ricehill

removed from the glove compartment.[1] Schimetz gave conflicting testimony as to the time of evening of this meeting. Schimetz also testified that he reported this encounter to the police on that same evening.

Officer Johnson testified that later that evening he stopped the Ricehill car. Although he had been watching the car since the report of Ricehill's possession of a weapon, the stop occurred after he observed the car, while being driven by Mrs. Ricehill, drive over the centerline. During the stop, Johnson saw an open can of beer at the feet of Ricehill, who was a passenger in the car. Because this is a violation of North Dakota's open-bottle law, Johnson placed Ricehill under arrest and conducted a search of the automobile, looking for other evidence of the open-bottle violation. This search produced a rifle, and a revolver which was removed from the locked glove compartment.

Ricehill testified on his own behalf at trial. He testified that the two guns belonged to his wife, and that although he had spoken with Schimetz about the two guns he had never handled them. He further testified that he could not have shown the revolver to Schimetz because it was locked in the glove compartment of the car and he did not have the keys to the car. Ricehill testified that Curtis Posey had driven him in Ricehill's car into Devils Lake, and that Posey maintained possession of the car keys.

Posey did not testify at trial. On the day prior to trial Ricehill's trial counsel had a subpoena issued to compel Posey to appear at trial. However, the sheriff of Benson County was unable to serve the subpoena. Ricehill now argues that he received ineffective assistance of counsel because trial counsel failed to seek a subpoena for Posey at a time early enough to allow for service of the subpoena, denying Ricehill the testimony of a crucial witness.

I

We first consider Ricehill's argument that Section 62.1-02-01(1) is unconstitutional because it violates his right to keep and bear arms under Article I, Section 1, North Dakota Constitution. Section 62.1-02-01(1) prohibits a person previously convicted of a felony involving violence or intimidation from owning or possessing a firearm for a period of 10 years from the date of conviction or release, whichever is the latter.[2] In this case it was alleged that Ricehill possessed a revolver within 10 years of his release from an Iowa correctional facility to which he had been sentenced on a charge of murder in the second degree.

Article I, Section 1, of the North Dakota Constitution contains a guarantee of the right to keep and bear arms. This section provides:

"All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; *and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.*" [Emphasis added.]

The guarantee of the right to keep and bear arms was only recently added to the North Dakota Constitution. The emphasized language above was added by means of an initiated amendment in November of 1984. This case presents the first occasion for this court to interpret this provision of the North Dakota Constitution.[3]

1. Although there was testimony concerning Ricehill's possession of the rifle, he was not charged with having possessed a rifle.

2. Section 62.1-02-01(1) provides:

"A person who has been convicted anywhere for a felony involving violence or intimidation, as defined in chapters 12.1-16 through 12.1-25, is prohibited from owning a firearm or having one in possession or under control for a period of ten years from the date of conviction or release from incarceration or probation, whichever is the latter."

3. In *State v. Swanson*, 407 N.W.2d 204 (N.D. 1987), we considered the dismissal by the trial court of a criminal complaint charging reckless

subpoena, denying Ricehill the test- of a crucial witness.

I

first consider Ricehill's argument ection 62.1-02-01(1) is unconstitution- cause it violates his right to keep and arms under Article I, Section 1, North ta Constitution. Section 62.1-02-01(1) bits a person previously convicted of a y involving violence or intimidation owning or possessing a firearm for a d of 10 years from the date of convic- r release, whichever is the latter.[2] In ase it was alleged that Ricehill pos- d a revolver within 10 years of his se from an Iowa correctional facility hich he had been sentenced on a e of murder in the second degree.

ticle I, Section 1, of the North Dakota titution contains a guarantee of the to keep and bear arms. This section des:

'All individuals are by nature equally e and independent and have certain lienable rights, among which are se of enjoying and defending life and erty; acquiring, possessing and pro- ting property and reputation; pursu- ; and obtaining safety and happiness; *d to keep and bear arms for the fense of their person, family, proper- and the state, and for lawful hunt- g, recreational, and other lawful pur- ses, which shall not be infringed.*" mphasis added.]

e guarantee of the right to keep and arms was only recently added to the h Dakota Constitution. The empha- l language above was added by means n initiated amendment in November of . This case presents the first occasion his court to interpret this provision of North Dakota Constitution.[3]

[1] Ricehill argues that the right to bear arms is absolute. He argues that the language of the provision states that the right to bear arms "shall not be infringed," and that this means that the Legislature may place no limits on the possession of arms. We disagree with such a broad reading of the provision. Instead, we believe our Constitution's protection of the right to keep and bear arms is not absolute; although it prevents the negation of the right to keep and bear arms, that right nevertheless remains subject to reasonable regulation under the State's police power. As the Michigan Supreme Court stated in construing that State's right to bear arms, "regardless of the basis of the right to bear arms, the State, nevertheless, has the police power to reasonably regulate it." *People v. Brown*, 253 Mich. 537, 235 N.W. 245, 246 (1931).

In this case the Legislature prohibited the possession of firearms by persons who have previously committed serious crimes. It is patently reasonable for the Legislature to conclude that it is protecting the public welfare by enacting legislation that keeps firearms out of the hands of people who have shown a disposition to harm others. The Louisiana Supreme Court stated, in rejecting a State constitutional right-to-bear-arms challenge to its prohibition against possession of a firearm by a felon under a police-power rationale:

"It is beyond question that the statute challenged in the instant case was passed in the interest of the public and as an exercise of the police power vested in the legislature. Its purpose is to limit the possession of firearms by persons who, by their past commission of certain specified serious felonies, have demonstrated a dangerous disregard for the law and present a potential threat of further or future criminal activity." *State v. Amos*, 343 So.2d 166, 168 (La.1977).

Another State which has concluded that its constitutional provision protecting the right to bear arms is to be tempered by the State's police power is Colorado. In *People v. Blue*, 190 Colo. 95, 544 P.2d 385 (1975), the defendants had been convicted of violating Colorado's law prohibiting the possession of a firearm by a person previously convicted of a felony. They challenged this conviction under Colorado's constitutional provision protecting the right to bear arms. That provision, which may appear to be more inclusive than that of North Dakota, states:

"Right to bear arms. The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons." *Blue*, 544 P.2d at 390, quoting Art. II, § 13, Colo. Const.

The court rejected the defendants' argument that the right to bear arms was absolute and that the prohibition on firearm possession by a felon thus was unconstitutional. In so concluding, the court stated:

"When rights come into conflict, one must of necessity yield. The conflicting rights involved here are the individual's right to bear arms and the state's right, indeed its duty under its inherent police power, to make reasonable regulations for the purpose of protecting the health, safety, and welfare of the people.

"We do not read the Colorado Constitution as granting an absolute right to bear arms under all situations. It has limiting language dealing with defense of home, person, and property.... In our view, the statute here is a legitimate exercise of the police power.

"'. . . . To limit the possession of firearms by those who, by their past conduct, have demonstrated an unfitness to be entrusted with such dangerous instrumentalities, is clearly in the interest of the public health, safety, and welfare and within the scope of the Legislature's police power.' *Peo-*

2.1-25, is prohibited from owning a firearm having one in possession or under control or a period of ten years from the date of onviction or release from incarceration or robation, whichever is the latter."

In *State v. Swanson*, 407 N.W.2d 204 (N.D. 87), we considered the dismissal by the trial rt of a criminal complaint charging reckless endangerment on the basis of the right to bear arms. In *Swanson*, we declined to address the constitutional issue because we determined that the trial court erred in dismissing the complaint and that the right-to-bear-arms issue could not be resolved apart from facts which had yet to be determined.

ple v. Trujillo, 178 Colo. 147, 497 P.2d 1 [1978].

"To be sure, the state legislature cannot, in the name of the police power, enact laws which render nugatory our Bill of Rights and other constitutional protections. But we do not read this statute as an attempt to subvert the intent of Article II, Section 13. The statute simply limits the possession of guns and other weapons by persons who are likely to abuse such possession." 544 P.2d at 390–391. [Citations omitted.]

We agree with this analysis and thus the right to bear arms must be read in conjunction with the State's exercise of the police power. See also *State v. Krantz*, 24 Wash. 2d 350, 164 P.2d 453 (1945); *Carfield v. State*, 649 P.2d 865 (Wyo.1982), and cases cited therein.

[2] Therefore, we hold that Section 62.-1–02–01(1) does not violate the right to keep and bear arms in Article I, Section 1, of the North Dakota Constitution.

II

Ricehill next contends that he was denied effective assistance of counsel. Ricehill bases this claim on his trial counsel's request for a subpoena to compel Curtis Posey to appear at his trial. Ricehill claims that making the request the day before trial was unreasonable in that it did not provide sufficient time for service of the subpoena. Ricehill argues that because the sheriff of Benson County was unable to serve the subpoena in that one day, he was denied the presence of a witness whose testimony would have bolstered that of Ricehill. He argues that Posey could have testified that Ricehill could not have shown Schimetz the revolver because Posey had the car keys.

Effective assistance of counsel is guaranteed a defendant via the Sixth Amendment to the United States Constitution applied to the States through the Fourteenth Amendment, and by Article I, Section 12, of the North Dakota Constitution. In analyzing an ineffective-assistance-of-counsel claim this court utilizes the test established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See, e.g., *State v. Micko*, 393 N.W.2d 741 (N.D. 1986); *State v. Patten*, 353 N.W.2d 30 (N.D.1984). Under the *Strickland* test a convicted defendant must establish two things. First, the defendant must show that his trial counsel's representation "fell below an objective standard of reasonableness." 466 U.S. at 688, 104 S.Ct. at 2064. In doing so, he must overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." 466 U.S. at 689, 104 S.Ct. at 2065. Second, the defendant must establish that trial counsel's conduct was prejudicial to him: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694, 104 S.Ct. at 2068.

[3] In this case we decline to begin the ineffective-assistance-of-counsel analysis. We do so because the record before us is devoid of any indication of what Posey's testimony would have been, had he testified. The only indication we have of what that testimony would have been are the representations of Ricehill's counsel on appeal. While we do not dispute these representations, this court requires more than a mere representation of what the testimony would be; we require some form of proof, e.g., an affidavit by the proposed witness, or testimony in a post-conviction-relief proceeding.

[4] This case presents a situation where it would have been better for Ricehill to seek relief in a post-conviction-relief proceeding pursuant to Chapter 29–32.1, N.D. C.C. At that proceeding Ricehill could have established a record of what Posey's testimony would have been. Generally, an ineffective-assistance-of-counsel claim is more effectively presented in a post-conviction-relief proceeding because the court in those proceedings is the court before which the trial was held. As the Minnesota courts have stated:

to reinstate a defaulted interest in an entirely separate mining property where Jackson and Eustler were co-investors. Jackson said he did not know why the source of this money was B.R. Goodwin rather than Eustler himself. However, he stated that this fact had not concerned him.

[6] Upon this evidence the jury well could have inferred the existence of a fraud and conspiracy embracing Wulfenstein and Jackson. In doing so the jury would have chosen to disbelieve protestations by these defendants that they were unaware of any fraudulent scheme. But the jury did not make this choice. The jury, having heard and observed the witnesses, elected instead to find that the alleged conspiracy had not been proven. We decline to disturb this finding. The circumstantial evidence, though highly suggestive, was not so conclusive as to put the matter beyond disagreement among reasonable minds. Therefore, the jury verdict must be upheld.

III

[7,8] On cross appeal the defendants have argued that the trial judge should have granted their request for attorney fees under I.C. § 12-121. The trial judge found that the plaintiffs' cause "was not brought and pursued frivolously, unreasonably, or without foundation." Therefore, under I.C. § 12-121 and I.R.C.P. 54(e)(1), the court denied an award of attorney fees. The decision to grant or to deny attorney fees under section 12-121 is committed to the sound discretion of the trial court. We will not overturn that determination unless an abuse of discretion is shown. *Vichueg v. Thompson*, 103 Idaho 265, 647 P.2d 311 (Ct.App.1982). In this case, genuine issues were presented at trial. Consequently, we find no abuse of discretion in denying attorney fees.

The judgment of the district court is affirmed. Costs to respondents, Wulfenstein and Jackson. No attorney fees on appeal.

WALTERS, C.J., and SWANSTROM, J., concur.

107 Idaho 496

STATE of Idaho, Plaintiff-Respondent,

v.

Bruce L. GROB, Defendant-Appellant.

No. 14412.

Court of Appeals of Idaho.

Oct. 31, 1984.

Defendant was convicted in the First Judicial District Court, Kootenai County, James G. Towles, J., of first-degree kidnapping with intent to rape, second-degree kidnapping, aggravated battery, and using a firearm during the commission of a felony, and the defendant appealed as to sentence. The Court of Appeals, Burnett, J., held that: (1) the Court of Appeals could consider defendant's contention, raised for first time on appeal, that his additional sentence for use of a firearm impermissibly infringed upon his constitutional right to bear arms; (2) the statute does not infringe the right to bear arms; (3) the trial judge did not act beyond his authority in imposing additional sentence for the use of the firearm; and (4) the trial did not abuse his sentencing discretion since the length of the defendant's confinement as computed for purposes of sentencing review could reasonably be viewed if not exceeding the period necessary to achieve the goals of protecting society, retribution and deterrence.

Affirmed.

1. Criminal Law ⇐1028

In criminal appeal, Court of Appeals will not consider issues raised for first time on appeal unless they relate to fundamental error.

2. Criminal Law ⇐1030(2)

Constitutional question may be considered for first time on appeal if such

15. Criminal Law ⇐1205

Deterrence of others is sufficient ground for imposing substantial prison sentence.

16. Assault and Battery ⇐100
Criminal Law ⇐1208.6(2)
Kidnapping ⇐6

Trial judge did not abuse his discretion in sentencing defendant to indeterminate life sentence for first-degree kidnapping of adult woman with intent to rape her, concurrent and indeterminate 15-year sentence for second-degree kidnapping of her companion, consecutive and fixed ten-year sentence for aggravated battery, and another consecutive fixed ten-year sentence for use of firearm during commission of a felony, as facts of case could reasonably be viewed to indicate that length of defendant's confinement would not exceed period necessary to achieve goals of protecting society, retribution and deterrence.

Eric T. Nordlof, Seattle, Wash. (formerly of Coeur d'Alene), for defendant-appellant.

Jim Jones, Atty. Gen. by Lynn E. Thomas, Sol. Gen., and Myrna A.I. Stahman (argued), Deputy Atty. Gen., Boise, for plaintiff-respondent.

BURNETT, Judge.

This is a sentence review case. Appellant Grob has challenged a four-part series of sentences imposed for violent crimes committed against two female victims. After pleading guilty to each of the crimes, Grob received (1) an indeterminate life sentence for the first degree kidnapping of an adult woman with intent to rape her; (2) a concurrent and indeterminate fifteen-year sentence for the second degree kidnapping of her companion; (3) a consecutive and fixed ten-year sentence for an aggravated battery committed by shooting one of the victims; and (4) another consecutive, fixed ten-year sentence for using a firearm during commission of a felony. We affirm the sentences.

Grob's attack upon the sentences is two-pronged. First, he contends that the firearm sentence is unconstitutional. Second, he argues that the sentences, taken as a whole, were unduly harsh. We will consider these points in turn.

I

[1–3] The first issue is whether the additional sentence for use of a firearm impermissibly infringes upon the right to bear arms as provided in the Idaho Constitution. We deem it clear that this sentence represented an enhancement of the sentence for aggravated battery—the only offense which the prosecutor charged as having been committed by use of a firearm. Prefatorily, we note that the constitutional issue has been raised for the first time on appeal. In a criminal appeal, we will not consider such issues unless they relate to fundamental error. E.g., *State v. Wells*, 103 Idaho 137, 645 P.2d 371 (Ct.App.1982). Here, Grob contends that the district judge lacked authority to impose the firearm sentence. Moreover, a constitutional question may be considered for the first time on appeal if such consideration is necessary for subsequent proceedings in a case. *Messmer v. Kerr*, 96 Idaho 75, 524 P.2d 536 (1974). Grob's contention, were it not addressed on appeal, could be embodied in a subsequent motion under I.C.R. 35 to correct an allegedly illegal sentence. Accordingly, we deem it appropriate to consider the issue now.

[4] Idaho Code § 19-2520, enacted in 1977, provides in pertinent part that a person convicted of using a firearm while engaged in kidnapping or aggravated battery, "shall, in addition to the sentence imposed for the commission of the crime, be imprisoned in the state prison for not less than three (3) nor more than fifteen (15) years." The right to bear arms is set forth at Article 1, § 11, of the Idaho Constitution. When I.C. § 19-2520 was enacted, the constitutional provision read as follows: "The people have the right to bear arms for their security and defense; but the legislature shall regulate the exercise of this right by law." In 1978, Article 1, § 11, was amend-

ed to narrow the scope of such regulation. However, the Legislature was authorized, *inter alia*, to prescribe "minimum sentences for crimes committed while in possession of a firearm" and to punish the unlawful "use of a firearm." Thus, whether examined against the 1978 or pre-1978 versions of Article 1, § 11, we believe I.C. § 19-2520 passes constitutional muster.

[5] In a related line of argument, Grob contends that prior to the 1978 amendment of Article 1, § 11, a mandatory sentencing law—such as I.C. § 19-2520—impermissibly infringed upon the constitutional separation of legislative and judicial functions. Grob further argues that the infirm statute could not be saved by a subsequent constitutional amendment. Grob's argument is based upon the pre-1978 decision of our Supreme Court in *State v. McCoy*, 94 Idaho 236, 486 P.2d 247 (1971). In that case the Court struck down a statute imposing a mandatory minimum sentence for driving while intoxicated. However, we need not ponder the implications of *McCoy* in this appeal. In *State v. Cardona*, 102 Idaho 668, 637 P.2d 1164 (1981), the Supreme Court held the rule of *McCoy* inapposite to I.C. § 19-2520. The statute was upheld against a separation-of-powers attack. Consequently, the statute does not depend for its validity upon the 1978 amendment to Article 1, § 11. We hold that the district judge in this case did not act beyond his authority by imposing an additional sentence for use of a firearm, as provided by section 19-2520.

II

Grob next contends that his sentences were unduly harsh. Grob could have been sentenced to death or life imprisonment for first degree kidnapping, twenty-five years for second degree kidnapping, fifteen years for aggravated battery and fifteen additional years for use of a firearm. *See* I.C. §§ 18-4504(1), 18-4504(2), 18-908 and 19-2520. Therefore, the sentences imposed were within the maximum statutory limits. Aside from the general issue of undue harshness, the propriety of imposing a fixed sentence under section 19-2520 has not been placed at issue in this appeal.

[6-8] A sentence within statutory limits will not be disturbed unless a clear abuse of discretion is shown. *State v. Bartholomew*, 102 Idaho 106, 625 P.2d 1109 (1981). Such an abuse of discretion may be found if the sentence imposed is shown to be unreasonable upon the facts of the case. *State v. Nice*, 103 Idaho 89, 645 P.2d 323 (1982). A sentence is reasonable to the extent it appears necessary, at the time of sentencing, to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to a given case. *State v. Toohill*, 103 Idaho 565, 650 P.2d 707 (Ct.App.1982).

[9] Sentencing determinations cannot be made with precision. In deference to the discretionary authority vested in Idaho's trial courts, an appellate court will not substitute its view for that of a sentencing judge where reasonable minds might differ. The appellant must show that, under any reasonable view of the facts, his sentence was excessive in light of the criteria of protection of society, retribution, deterrence and rehabilitation. *State v. Toohill*, *supra*.

[10-12] In applying the *Toohill* standard, we first must determine the actual measure of confinement for sentencing review purposes. With respect to the indeterminate life sentence, ten years is the measure of confinement. *State v. Wilde*, 104 Idaho 461, 660 P.2d 73 (Ct.App.1983). For the fifteen-year indeterminate sentence, one-third (or five years) is the appropriate measure under *Toohill*. That period is concurrent with the ten-year period on the indeterminate life sentence. With regard to the fixed sentences, the duration of confinement is deemed to be the term of the sentence less the statutory formula reduction available as a matter of right for good conduct. *State v. Miller*, 105 Idaho 838, 673 P.2d 438 (Ct.App.1983). Where, as here, the fixed sentence is ten years or more, an inmate may receive a reduction of

The portion of the judgment entered below awarding appellees $13,000 for personalty taken, plus interest and attorney's fees thereon, is vacated and the case remanded for a new trial on the issues as limited by this opinion.

James F. BUSH, Appellant,

v.

James REID and Clarence Reid, Appellees.

No. 1841.

Supreme Court of Alaska.

Dec. 14, 1973.

Parolee brought action for injuries sustained in automobile accident and defendants filed motion to dismiss. The Superior Court, Third Judicial District, Anchorage, Ralph E. Moody, J., granted defendants' motion and the parolee appealed. The Supreme Court, Boochever, J., held that statutes suspending parolee's civil rights during time he was in custody of parole board denied parolee due process and equal protection to extent that they denied him the right to institute a civil suit.

Reversed and remanded.

Connor, Erwin and Fitzgerald, JJ., did not participate.

1. Constitutional Law ⇐250.3(2), 272
Pardon and Parole ⇐2

Statutes suspending parolee's civil rights during time he was in custody of parole board denied parolee his right to initiate a civil suit but, to that extent, statutes denied parolee due process and equal protection. AS 11.05.070, 33.15.190; Const. art. 1, §§ 7, 12; U.S.C.A.Const. Amend. 14.

2. Constitutional Law ⇐277(1)

A chose in action is a form of "property" within due process protection. U.S.C.A.Const. Amend. 14.

See publication Words and Phrases for other judicial constructions and definitions.

Barry Donnellan, Anchorage, Stephen C. Cowper, Fairbanks, Edgar Paul Boyko, Edgar Paul Boyko & Associates, Anchorage, for appellant.

No appearance for appellees.

Robert Wagstaff as amicus curiae, for American Civil Liberties Union.

Before RABINOWITZ, Chief Justice, BOOCHEVER, Justice, and EBEN H. LEWIS, Superior Court Judge.

OPINION

BOOCHEVER, Justice.

James F. Bush originally filed this lawsuit in superior court to recover damages for injuries received in an automobile accident. At the time of the accident and the filing of the suit, appellant Bush was a felon on parole. The Reids, as defendants below, filed, and the superior court subsequently granted, a motion to dismiss the complaint on the ground that AS 11.05.070[1] suspends the civil rights of a person sentenced to imprisonment in the penitentiary for a term less than life. Bush here appeals on the grounds that the superior court erred in interpreting the statute, or, alternatively, that the statute if interpreted to bar appellant from access to the courts, violates the Alaska and United States constitutions.

AS 11.05.070 and AS 33.15.190[2] when read together clearly indicate that a parol-

1. AS 11.05.070 provides:
A judgment of imprisonment in the penitentiary for a term less than for life suspends the civil rights of the person sentenced, and forfeits all public offices and all private trusts, authority, or power during the term or duration of imprisonment.

2. AS 33.15.190 provides:
The board may permit a parolee to return to his home if it is in the state, or to go elsewhere in the state, upon such terms and conditions, including personal reports from the paroled person as the board prescribes. The board may permit the parolee

ee's civil rights, similarly to those of a prisoner, remain suspended during the time he is in the custody of the parole board. The first question presented to this court is whether the right to bring and maintain a civil suit is among the civil rights suspended by AS 11.05.070.

[1] The general rule has been that in a jurisdiction where a convict loses his civil rights, he cannot sue while under such disability.[3] This rule has recently been applied and upheld in Kansas and Oregon.[4] New York courts consistently have held that Penal Code Sec. 510, which suspends all rights of a prisoner while incarcerated comprises the right to file a civil lawsuit.[5] Cases which allow convicts the right to initiate civil actions have been decided in the absence of statutes suspending civil rights such as the one in point here.[6]

Bush argues, however, that this court should consider the use of "*the* civil rights" instead of "*all* civil rights" in AS 11.05.070 (Kansas, Oregon, and New York provisions use "all civil rights"), and liberally construe the provision so as not to ex-

to go into another state upon terms and conditions as the board prescribes, and subject to the provisions of any compact executed under the authority of ch. 10 of this title and amendments to it. A prisoner released on parole remains in the legal custody of the board until the expiration of the maximum term or terms to which he was sentenced, less good time allowances provided by law. While in the custody of the board, a person is subject to the disabilities imposed by AS 11.05.070.

3. Quick v. Western Ry. of Alabama, 207 Ala. 376, 92 So. 608, 609 (1922); Sullivan v. Prudential Ins. Co. of America, 131 Me. 228, 160 A. 777, 779 (1932); McLaughlin v. McLaughlin, 228 Mo. 635, 129 S.W. 21, 23 (1910); Avery v. Everett, 110 N.Y. 317, 18 N.E. 148, 154 (1888); Miller v. Turner, 64 N.D. 463, 253 N.W. 437, 439 (1934).
The supporting rationale for this suspension of civil rights of prisoners is explained in Tabor v. Hardwick, 224 F.2d 526, 529 (5th Cir. 1955), cert. denied, 350 U.S. 971, 76 S.Ct. 445, 100 L.Ed. 843 (1956):

We do not question the wisdom of the rule recognized by such decisions as Ex parte Hull [, 312 U.S. 546, 61 S.Ct. 640, 85 L.Ed. 1034] and White v. Ragen [, 324 U.S. 760, 65 S.Ct. 978, 89 L.Ed. 1348], supra, that penitentiary inmates ought to have their right to inquire into the validity of their restraint of personal liberty and freedom zealously safeguarded by the courts, but we think that the principle of the cases so holding should not be extended to give them an absolute and unrestricted right to file any civil action they might desire. Otherwise, penitentiary wardens and the courts might be swamped with an endless number of unnecessary and even spurious law suits filed by inmates in remote jurisdictions in the hope of obtaining leave to appear at the hearing of any such case, with the consequent disruption of prison routine and concomitant hazard of escape from custody. As a matter of necessity, however regrettable the rule may be, it is well settled that, "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." [citations omitted].

4. Hammett v. San Ore Construction Co., 195 Kan. 122, 402 P.2d 820 (1965); Chinn v. State, 6 Or.App. 350, 488 P.2d 293 (1971). In *Hammett*, 402 P.2d at 822, the Kansas court said:

Under well-established authorities it is recognized (1) that the use of court process is a "civil right" within a statute providing that sentence of imprisonment in state prison for a term less than life suspends all civil rights during the term of sentence and (2) that the right to sue is a right which is suspended under a statute providing that sentence of imprisonment in state prison for a term less than life suspends all civil rights during term of sentence. See Nastasi v. State, 186 Misc. 1051, 61 N.Y.S.2d 438; Lipschultz v. State, 192 Misc. 70, 78 N.Y.S.2d 731; Application of White, 166 Misc. 481, 2 N.Y.S.2d 582.

5. Lynch v. Quinlan, 65 Misc.2d 230, 317 N.Y.S.2d 216 (1970); In re Cirello's Estate, 50 Misc.2d 1007, 271 N.Y.S.2d 841 (1966); Glena v. State, 207 Misc. 776, 138 N.Y.S.2d 857 (1955); Lipschultz v. State, 192 Misc. 70, 78 N.Y.S.2d 731 (1948); Grant v. State, 192 Misc. 45, 77 N.Y.S.2d 756 (1948). These cases are inapplicable to an action commenced before incarceration because so applied, they would violate § 70-b of the New York Civil Rights Law, McKinney's Consol.Laws, c. 6, a statutory due process clause. Thomas v. Gruppuso, 73 Misc.2d 427, 341 N.Y.S.2d 819, 822 (1973). The statute does not deprive *parolees* of civil process. *See* Glena v. State, 138 N.Y.S.2d at 858; Grant v. State, 77 N.Y.S.2d at 758.

6. *See* Panko v. Endicott Johnson Corp., 24 F.Supp. 678 (N.D.N.Y. 938); Bosteder v. Duling, 115 Neb. 557, 213 N.W. 809 (1927).

tend denial of civil access to the courts. The substitution of "the" for "all", while seemingly minor, does allow the possibility that certain civil rights might not be denied. We have been given no authority for such distinction however, and find no indication that this was the intent of the legislature. In light of this absence of indications of such legislative intent, and the strong common-law authority holding that convicts are denied civil access to the courts,[7] we hold that AS 11.05.070 and AS 33.15.190 combine to deny parolees the right to initiate civil suit.

Such finding, however, does not conclude our inquiry. We must also consider Bush's contention that these statutes, if read to bar him from access to the courts, are contrary to the Alaska and United States constitutions. Bush argues that AS 11.05.070 provides for "cruel and unusual punishment"[8] and violates the due process clauses of the Alaska and United States constitutions.[9] While we do not find the punishment provided to be so severe as to constitute "cruel and unusual punishment",[10] nor the statute void for vagueness, we do hold that AS 33.15.190 violates the due process and equal protection clauses of the Alaska and United States constitutions insofar as it prohibits parolees from having access to the civil courts.

Both art. I, sec. 7 of the Alaska Constitution and sec. 1 of the fourteenth amendment of the United States Constitution prohibit the state from depriving any person of "life, liberty, or property, without due process of law." Bush contends that the right to bring a civil action for damages is property, and that therefore the suspension of such right is a deprivation of property without due process of law.

Any suggestion that a parolee was deprived by his custodial status of standing to assert a denial of due process was dissolved by the United States Supreme Court in Morrissey v. Brewer.[11] The nature of protection due "depends on the extent to which an individual will be 'condemned to suffer grievous loss.'"[12] The loss suffered must have some relationship to a "liberty or property" interest within the ambit of the fourteenth amendment.[13]

Because Bush seeks to overcome a statutory denial of access to the courts as a

7. There is no Alaska case involving the right of an imprisoned convict to have access to the courts. We do not here reach that issue.

8. Art. I, sec. 12 of the Alaska Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Penal administration shall be based on the principle of reformation and upon the need for protecting the public.

The eighth amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

9. Art. I, sec. 7 of the Alaska Constitution provides:

> No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

Sec. 1 of the fourteenth amendment to the United States Constitution provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . .

10. This court in Lanier v. State, 486 P.2d 981, 990 (Alaska 1971), defined "cruel and unusual punishment" to be that punishment which is:

> inhuman and barbarous, or so disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice. [citing Green v. State, 390 P.2d 433, 435 (Alaska 1964)].

11. 408 U.S. 471, 481–482, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484, 494–495 (1972). This does not mean that the due process rights of ordinary citizens may not be somewhat modified by the necessities of the criminal correction process. Sostre v. McGinnis, 442 F.2d 178, 188–189 (2nd Cir. 1971), cert. denied sub nom. Sostre v. Oswald, 404 U.S. 1049, 92 S.Ct. 719, 30 L.Ed.2d 740 (1972), cert. denied sub nom. Oswald v. Sostre, 405 U.S. 978, 92 S.Ct. 1190, 31 L.Ed.2d 254 (1972).

12. Morrissey v. Brewer, 408 U.S. at 481, 92 S.Ct. at 2600, 33 L.Ed.2d at 494.

13. *Id.*

plaintiff, the starting point of our analysis must be Boddie v. Connecticut,[14] in which the United States Supreme Court held that a state could not deprive indigents of access to divorce tribunals by imposing a prohibitive filing fee.

Justice Harlan, writing for the Court in *Boddie*, recognized the centrality of the concept of due process in maintaining both order and justice in the resolution of the disputes which inevitably arise from human interaction. Upon that jurisprudential foundation he built the holding that where the state commands a monopoly over the only available legitimate means of dispute settlement and the relationship underlying the dispute is warp and woof of the fabric of society, the state may not deny access to the forum of settlement on account of poverty.[15]

We note superficial distinctions between the social context of the instant dispute and that in *Boddie*, but upon reflection we conclude that the denial of access to the civil courts rends the fabric of justice as surely here as in *Boddie*.

Although the collision of automobiles results in a dispute at first subject to private resolution, often the reconciliation of competing interests may be accomplished only by resort to the formal judicial process. The state exercises a monopoly over that paramount process where the "private structuring of individual relationships and repair of their breach" has failed.[16] Unlike the overburdened debtor, who was held in United States v. Kras[17] to have such adequate redress outside the Bankruptcy Act[18] that his right of access to bankruptcy adjudication could be denied by the imposition of a substantial filing fee, the injured citizen has no recourse but to the courts when those who caused his injuries refuse to enter a consensual resolution of the conflict, whether out of recalcitrance or in the assertion of a good faith defense. We further distinguish *Kras* because the prospective bankrupt could pay the required filing fee in unburdensome $2.00 per week installments;[19] here the bar is absolute and no ameliorative device exists. No "recognized, effective alternatives for the adjustment of differences remain."[20] Thus the initial element of the *Boddie* analysis exists here.

The second aspect of *Boddie* dealt with the importance of the marital relationship. Based on the hierarchy of social values the resolution of personal injury lawsuits might not be considered of such grave importance so as to justify invalidating this statute, although in the instance of a gravely-injured plaintiff, the very quality of his future existence may be dependent upon the outcome. In *Boddie* Justice Harlan sought the fundamental human relationship doctrine to satisfy the due process clause only because denial of access to a divorce court does not impair a simpler "liberty or property" interest. United States v. Kras instructs that one must search for a fundamental interest justifying access to the particular dispute resolution process in order to actuate the *Boddie*

14. 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971).

15. *Id.* at 374-376, 383, 91 S.Ct. at 784-785, 28 L.Ed.2d at 117, 122.

16. *Id.* at 375-376, 91 S.Ct. at 785, 28 L.Ed.2d at 117.

17. 409 U.S. 434, 443-444, 93 S.Ct. 631, 637, 34 L.Ed.2d 626, 635-636 (1973).

18. Because the actual disposition of payment remains in the debtor's control, consensual settlement was a viable option in *Kras*; mere non-action could settle the controversy forcibly to the debtor through the passage of the statutory limitations period; a state-law composition of creditors could be effected. Further, discharge in bankruptcy would effect no change in the debtor's ability to obtain and hold sufficient funds for life's necessities because of statutory protection of wages and welfare payments from assignment or civil process. United States v. Kras, 409 U.S. at 445, 93 S.Ct. at 638, 34 L.Ed.2d at 636.

19. United States v. Kras, 409 U.S. at 445, 93 S.Ct. at 638, 34 L.Ed.2d at 636.

20. Boddie v. Connecticut, 401 U.S. at 376, 91 S.Ct. at 785, 28 L.Ed.2d at 117.

doctrine.[21] The Court in *Kras* held that debtors do not have a fundamental right to an adjudication of bankruptcy. But here we must apply the test of *Morrissey*: whether the individual is "condemned to suffer grievous loss" in conjunction with an interest "within the contemplation of the 'liberty or property' language of the Fourteenth Amendment."[22]

[2] We begin with the understanding that a chose in action, such as Bush's claim for personal injuries, is a form of property.[23] The judicial process exists to reduce inchoate claims to money judgment where private settlement is unavailing (or to extinguish them as non-meritorious). Judgments may be executed or assigned for substantially their face value, presuming solvency of the debtor. Unlitigated claims for personal injury have slight market value. Deprivation of access to the courts thus denies both the ability to reduce the claim to a money judgment and the ability to collect the claim or otherwise convert it into property of an appreciable value and liquid nature during the parole status. Because the only reasonable use of the "property" represented by an unlitigated claim is reduction to judgment followed by collection or assignment, deprivation of that use deprives the claimant of the whole value of his property so long as he remains *non sui juris*.[24] The deprivation is no less severe than the taking of disputed wages or property during the pendency of litigation.[25] Additionally, the denial of access to the courts creates an unfair leverage in the potential defendant who may avoid or reduce a meritorious claim because the ordinarily penurious state of the parolee dictates an early settlement on whatever terms are available.[26] Finally, the risk of loss of the entire property due to staleness of evidence, loss of witnesses and similar complications constitutes an unreasonable burden. We note that the tolling of the statute of limitations[27] during disability prevents the baldest of takings; nevertheless, the disability robs the parolee of the opportunity to be heard "at a meaningful time and in a meaningful manner."[28]

We conclude that a parolee denied access to the judicial process by reason of his custodial status is thereby condemned to suffer a grievous loss of property rights protected by the due process clause of the fourteenth amendment of the United States Constitution. We further declare that we would reach an identical result in interpreting the due process provisions of the Alaska Constitution alone, finding as we do that Justice Harlan's insightful analysis of the social compact applies with equal force to our constitution. We have several times held that "we are free, and we are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution." Finding as we do that "civil death" of parolees violates the

21. United States v. Kras, 409 U.S. at 445–447, 93 S.Ct. at 638–639, 34 L.Ed.2d at 636–637.

22. Morrissey v. Brewer, 408 U.S. at 481, 92 S.Ct. at 2600, 33 L.Ed.2d at 494.

23. Sanner v. Trustees of Sheppard and Enoch Pratt Hospital, 278 F.Supp. 138, 142 (D.Md. 1968); Martinez v. Fox Valley Bus Lines, Inc., 17 F.Supp. 576, 577 (N.D.Ill.1936); City of Phoenix v. Dickson, 40 Ariz. 403, 12 P.2d 618, 619 (1932); Rosane v. Senger, 112 Colo. 363, 149 P.2d 372, 375 (1944).

24. Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337, 342, 89 S.Ct. 1820, 1823, 23 L.Ed.2d 349, 354 (1969) (concurring opinion of Harlan, J.). *See* Fuentes v. Shevin, 407 U.S. 67, 84–85, 92 S.Ct. 1983, 1996, 32 L.Ed.2d 556, 572–573 (1972).

25. *See* Fuentes v. Shevin, 407 U.S. 67, 84–85, 92 S.Ct. 1983, 1996, 32 L.Ed.2d 556, 572–573 (1972); Sniadach v. Family Finance Corp. of Bay View, 395 U.S. at 342, 89 S.Ct. at 1823, 23 L.Ed.2d at 354.

26. *See* Sniadach v. Family Finance Corp. of Bay View, 395 U.S. at 339–341, 89 S.Ct. at 1821–1822, 23 L.Ed.2d at 352–353.

27. AS 09.10.140.

28. Boddie v. Connecticut, 401 U.S. 371, 378, 91 S.Ct. 780, 786, 28 L.Ed.2d 113, 119 (1971), quoting from Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62, 66 (1965) and Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865, 873 (1950).

spirit and intention of the Alaska Constitution, we would not be impeded in our constitutional progress by a narrower holding of the United States Supreme Court.[29]

The finding of a deprivation of a property right does not conclude a due process analysis; the assessment of what process is due requires a balancing of the individual's interest against the state's justification for its enactment.[30] Denial of incarcerated felons' access to the civil judicial process has been justified by fears of disruption of prison routine, spurious litigation commenced in the hope of spending a few hours beyond the bars of prison and increased risks of escape by prisoners en route to hearings.[31] Where the litigant is a parolee, to state these arguments is to reveal their absurdity.[32] No argument has been pressed that engaging in civil litigation will encourage recidivism or otherwise interfere with the rehabilitation of an offender. If one may anticipate any effect, it is that active participation in the system of justice will develop added respect for the system and a sense of belonging in the mainstream of society.

Given this utter vacancy of rationale for the continued deprivation of access to the judicial process, we hold that AS 33.15.190, insofar as it suspends, in conjunction with AS 11.05.070, the access of parolees to civil courts, violates the due process clauses of the Alaska and United States constitutions.

Additionally, we find that AS 33.15.190 denies parolees "the equal protection of the laws", in violation of the fourteenth amendment to the United States Constitution,[33] and art. I, sec. 1 of the Alaska Constitution.[34] The state, by AS 33.15.190 and 11.05.070, denies parolees the right of access to the civil courts possessed by other persons. We find that the state interest in denying parolees this right satisfies neither the "compelling state interest" test applied when a "fundamental right" is at stake,[35] nor the traditional,

29. Baker v. City of Fairbanks, 471 P.2d 386, 401–402 (Alaska 1970); R. L. R. v. State, 487 P.2d 27 (Alaska 1971); *see* Roberts v. State, 458 P.2d 340, 342 (Alaska 1969).

30. Morrissey v. Brewer, 408 U.S. at 483, 92 S.Ct. at 2594, 33 L.Ed.2d at 495–496; Bell v. Burson, 402 U.S. 535, 540–541, 91 S.Ct. 1586, 1590, 29 L.Ed.2d 90, 95 (1971); Boddie v. Connecticut, 401 U.S. at 381–383, 91 S.Ct. at 783, 28 L.Ed.2d at 121; Sniadach v. Family Finance Corp. of Bay View, 395 U.S. at 339, 89 S.Ct. at 1821, 23 L.Ed.2d at 352.

31. Tabor v. Hardwick, 224 F.2d 526, 529 (5th Cir. 1955), cert. denied, 350 U.S. 971, 76 S.Ct. 445, 100 L.Ed. 843 (1956).

32. *See* Morrissey v. Brewer, 408 U.S. at 478, 92 S.Ct. at 2598, 33 L.Ed.2d at 492–493 and our discussion *infra* notes 37 to 39 and accompanying text.

33. The fourteenth amendment provides in relevant part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

34. Art. I, sec. 1 provides:

> This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

In Leege v. Martin, 379 P.2d 447, 451–452 (Alaska 1963), this court explained:

> The statutory denial of a stay is also without legal effect because it deprives appellees of "equal rights, opportunities, and protection under the law", to which they are entitled under art. I, § 1 of the state constitution. This constitutional guarantee of equal treatment, like the equal protection clause of the federal constitution, is the embodiment of the fundamental principle that all men are equal before the law. It is a prohibition against laws which, in their application, make unjust distinctions between persons. As to this case, the guarantee of equality of treatment prohibits legislation which denies to one group of persons the enjoyment of certain rights which are afforded to another group, when considering the purpose of the legislation, there is no reasonable basis for not treating both groups the same. [footnote omitted].

See Alex v. State, 484 P.2d 677, 684 (Alaska 1971).

35. *See* Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969). In Ramirez v. Brown, 9 Cal.3d 199, 107 Cal.Rptr. 137, 507 P.2d 1345, 1355–1357 (Cal.1973), the California Supreme Court held that the disenfranchisement of ex-felons was not necessary

more lenient "rational basis" test[36] otherwise applicable.

The state may have a reasonable basis for denying convicts while imprisoned access to civil courts for the reasons expressed in Tabor v. Hardwick[37] already discussed in this opinion. But the administration of a parole system differs so substantially from the administration of a prison that these reasons cannot logically support the "civil death" of parolees.[38] The conditions and purposes of parole were recently described by the United States Supreme Court in Morrissey v. Brewer:

> To accomplish the purpose of parole, those who are allowed to leave prison early are subjected to specified conditions for the duration of their terms. These conditions restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen. Typically parolees are forbidden to use liquor or to have associations or correspondence with certain categories of undesirable persons. Typically also they must seek permission from their parole officers before engaging in specified activities, such as changing employment or living quarters, marrying, acquiring or operating a motor vehicle, traveling outside the community and incurring substantial indebtedness. . . .
>
> The parole officers are part of the administrative system designed to assist parolees and to offer them guidance. The conditions of parole serve a dual purpose; they prohibit, either absolutely or conditionally, behavior which is deemed dangerous to the restoration of the individual into normal society. And through the requirement of reporting to the parole officer and seeking guidance and permission before doing many things, the officer is provided with information about the parolee and an opportunity to advise him. The combination puts the parole officer into the position in which he can try to guide the parolee into constructive development. [footnote omitted].[39]

Thus, although the state has a legitimate interest in restricting some activities of parolees, prohibiting a parolee from initiating civil actions has no logical connection with such an interest. The only interest here pertinent is preventing behavior which is detrimental to the restoration of a parolee into normal society. Since the parolee is no longer incarcerated, there is no justification based on the furthering of smooth penal administration. The parolee's ability to avail himself of the civil judicial process in order to vindicate his rights and protect his property interests in fact furthers, rather than restricts, the parolee's constructive development and restoration into normal society.

Failing to find either a "compelling state interest" or a "rational basis" for the state's denial to parolees of the right to initiate civil actions, we therefore hold that AS 33.15.190 denies parolees the "equal protection of the laws", in violation of the Alaska and United States constitutions.

For the reasons expressed above, we reverse the judgment of the superior court and remand the case for proceedings in accordance with this opinion.

Reversed and remanded.

CONNOR, ERWIN and FITZGERALD, JJ., not participating.

to the compelling interest of preserving the purity of elections.

36. *See* Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970).

37. 224 F.2d 526 (5th Cir. 1955), cert. denied 350 U.S. 971, 76 S.Ct. 445, 100 L.Ed. 843 (1956). *See* Chinn v. State, 6 Or.App. 350, 488 P.2d 293 (1971); Harrell v. State, 17 Misc.2d 950, 188 N.Y.S.2d 683 (1959). We do not, however, express an opinion now as to the state's interest in denying prisoners access to civil courts. We instead confine our holding here to the rights of parolees.

38. *Cf.* Price v. Johnston, 334 U.S. 266, 285, 68 S.Ct. 1049, 1059, 92 L.Ed. 1356, 1369 (1948).

39. 408 U.S. at 478, 92 S.Ct. at 2598, 33 L.Ed.2d at 492-493.

THE NEW REPUBLIC
FEBRUARY 22, 1988

GO AHEAD, MAKE OUR DAY

The National Rifle Association has launched a new advertising campaign. "The new ads are in response to a trend we're seeing in the whole gun control debate," says NRA spokesman Michael Lashbrook. "We're saying, hey, let's get off these fringe issues." By fringe issues he means controversies over the NRA's support for legalized plastic guns that foil metal detectors, submachine guns, and armor-piercing bullets. Lashbrook says, "The core of this issue has always been self-defense. We just wanted to remind people of that."

NRA advertisements used to emphasize the use of guns for hunting and the portrayal of gun owners as normal, healthy Americans. Now nine full-page ads in the *Washington Post*, the *New York Times*, and other newspapers emphasize a different message. One shows a high-heeled shoe with the heel ripped off. The headline says: "He's followed you for two weeks. He'll rape you in two minutes." Another shows a bent and twisted woman's locket. It reads: "Your mother just surprised two burglars who don't like surprises." A third presents a pair of shattered glasses with the caption, "You were beaten to death last night." It ends by asking, "Who cares?"

These advertisements pay lip service to the idea that they're not advocating the ownership of guns, merely demanding the right for those who wish to exercise it. But their actual point is clear enough. The message to women is that they are always vulnerable except when they're armed. The message to men is that they may not be doing all they can to protect their families. The alternative to "a bat, a bodyguard, or a handgun" is "your kids [hearing] your screams." The ads also suggest that if an unarmed person is attacked, the assailant will be coddled by the media, the law, and the political system. Armed, at least you have a fighting chance.

The graphic nature and emotional manipulation of these ads have provoked criticism from gun control organizations and the media. But both sides in the gun debate have resorted to emotional advertising. What about the factual assertion that carrying or keeping a handgun is no more than a sensible precaution in a dangerous world? In several advertisements, the NRA offers statistics to strengthen its case. These deserve closer examination.

The U.S. Department of Justice found that only three percent of rape attempts against armed victims are completed. This is an impressive figure. It implies that carrying a gun can prevent rapes 97 percent of the time. It doesn't say what percentage of rape attempts against unarmed victims are completed. Nor does it say how many people are victimized by guns that were purchased to guard against rape attempts but found other uses. The source of the statistic is a Justice Department report published in 1979 called "Rape Victimization in 26 American Cities." Fewer than 56 victims were interviewed for the report, far fewer than the minimum needed to draw a statistically reliable conclusion. After the advertisement came out, the Justice Department released a statement rebutting the NRA's claim.

What more reliable studies have shown—and what the police say—is that pulling a handgun in a dangerous situation is more likely to end your life than to save it. Since most people aren't trained to handle a gun in such situations, attackers can often easily take the gun away. And even people who are trained have difficulty firing at a

tacks each year with privately owned firearms. This figure was calculated by Gary Kleck, a Florida State University criminologist. Kleck didn't actually do any research. Instead, he reinterpreted the results of a seven-year-old survey that asked respondents if they had *ever* used a handgun for self-protection. Since the term "self-protection" was broadly defined, respondents could answer positively if they heard a noise in the basement and checked it out with a gun. The study was based on a sample of about 1,000. Kleck extrapolated to come up with figures for the entire country. It's not clear how he came up with an annual figure when the original poll had no time limit.

By stressing the "preventive" uses of handguns, the NRA avoids confronting the fact that only a tiny percentage of handgun victims are criminals caught in the act of assault or burglary. Some 22,000 people were killed by handguns in 1986. Roughly 12,000 of those deaths were suicides, one statistic the NRA doesn't like to talk about. Another 1,000 deaths were fatal accidents. Then there were 9,345 intentional handgun killings. If the NRA's view of the world were accurate, these deaths would involve either a criminal shooting an innocent victim or an armed potential victim shooting a criminal. Now, anyone who purposely kills with a handgun, except in self-defense, is a criminal by definition. But most are not professional criminals, and many might not be criminals at all if it weren't for the easy availability of guns. According to the FBI, 60 percent of murder victims are related to or acquainted with their killers. Many of these killings were crimes of passion that occurred simply because a handgun was around.

According to data from FBI reports compiled by the National Coalition to Ban Handguns, there were only 193 homicides committed in self-defense in 1986. That means it was roughly 115 times more likely that a handgun would be used in a suicide, murder, or accident than in legitimate self-defense against a criminal. These statistics vary little from year to year.

WE SUPPORT the banning of handgun sales, as do some 40 percent of Americans, according to Gallup. But the NRA still has the influence to keep that from happening. Republicans in particular are susceptible to pressure. At a recent meeting of the Gun Owners of New Hampshire, all six Republican presidential candidates vowed to veto pending gun control legislation. "My idea of gun control is a steady aim," Jack Kemp said.

At the very least, we could make it harder for people to own a handgun. As things stand, gun ownership is regulated by a hodgepodge of laws that vary from state to state. We should apply the same standard to private gun ownership that we do to automobile ownership: by requiring that all gun owners pass a test to get a license, register guns with state bureaus, pay an annual tax on their guns, and carry mandatory insurance for gun-related accidents.

Perhaps it's encouraging that the NRA has been driven to new depths of deception and hysteria. It may be a sign that the gun lobby's long-standing campaign against common sense is getting more desperate.

NOTEBOOK

□ THEY NEVER STOP:

Job market looks dim for office workers in early '88

—*Orange County Register*, January 5

Job Prospects Bright for Office Workers, Study Says

—*Los Angeles Times*, same day

(thanks to Michael A. Fried, Garden Grove, California)

Profit at Recovering BankAmerica

—*New York Times*, January 22

BankAmerica's worst annual loss

—*New York Daily News*, same day

(thanks to Larry Mone, New York, New York)

Cocaine on Wane

—*San Francisco Chronicle*, January 18, page 18

Alas For Parents — Now It's Cocaine

—same paper, same day, same page

(thanks to Robert H. Glidden, Oakland, California)

Going to Europe? Don't hold your breath awaiting bargains

—*Minneapolis Star Tribune*, January 10

Low dollar hasn't killed bargains in Europe

—same paper, same day

□ SEE DICK RUN, CONTINUED: Representative Richard Gephardt made great hay in Iowa denouncing nasty foreigners for keeping out American goods, especially American farm goods. For example, he said in Cedar Rapids the week before the Iowa caucuses: "Rice in Japan—a staple of their diet—costs seven times what it does in the United States, because they won't let any foreign rice in. It's not right. It's not just. It's not fair." Japan's rice policy is deplorable, to be sure. Just as deplorable as America's sugar quotas, which keep out foreign sugar in order to protect the wealth of a tiny group of domestic sugar growers. Michael Wines notes in the *Los Angeles Times* that Gephardt voted twice in the past few years to retain the sugar program. Because of this policy, sugar costs more than three times as much in the United States as it does on the world market. Gephardt says the difference is that Japan bans foreign rice completely, while we merely restrict imported sugar through quotas. This is of little comfort to nations such as the Philippines—nations we are rather anxious to help—that find our market blocked. "We've had a devil of a time keeping our sugar people in business," Gephardt told Wines, explaining his votes. Sure, and the reason has nothing to do

Police, NRA Brace for Rematch on Gun Control

Emboldened by a last-minute comeback in the 99th Congress and fortified with new-found experience, organization and unity, law enforcement groups are digging in to defend the nation's gun control laws against new attacks from the redoubtable National Rifle Association (NRA).

In the 99th Congress, the NRA caught the police off duty and forced Senate passage of a bill that would have significantly rolled back the landmark 1968 gun control law.

But when the measure went to the House, the police groups, bolstered by Handgun Control Inc., a gun control lobby, entered the fray and kept the NRA in check during the last weeks of legislative skirmishing.

The law officers emerged with two notable come-from-behind victories. The final version of the gun bill (PL 99-308) barred the sale of new machine guns and maintained the ban on the interstate sale of handguns. *(1986 Weekly Report p. 1034)*

Now the NRA is taking aim at these issues and new fights are looming. The police are determined not to make the same mistakes again, and their year-old organization, the Law Enforcement Steering Committee, is preparing to hold the line.

But with memories of last year's bitter fight still lingering, the NRA's top legislative strategists want to keep the din of battle at a manageable level this time around.

"There has been a tendency to sensationalize these issues, to put headlines out there that bear little relationship to what the real situation is on a specific issue," says Wayne LaPierre, the director of the NRA's Institute for Legislative Action and the man who ran the 1985-86 gun campaign.

"We are going to be doing everything we can to urge people to look behind the sensational headline and focus on the real situation."

James J. Baker, the NRA's director of governmental affairs, echoes LaPierre's views, and, referring to the police groups, adds, "I don't think [the gun control fight] helped either of us."

"A lot of their members are our members as well. We should try to minimize our differences."

The NRA has designated Rep. Larry E. Craig, R-Idaho, to meet with those police who are NRA members and who supported the organization last year, in an effort to devise a plan for reconciling differences with the law enforcement groups.

—By Nadine Cohodas

NRA Wants to Lift Ban on Machine Guns

thing the gun lobby springs," says Hubert Williams, president of the Police Foundation, a research group in Washington, D.C., that is represented on the 12-member Steering Committee.

Detroit police officer Robert T. Scully, president of the 90,000-member National Association of Police Organizations, thinks of the committee, which meets regularly in Washington, as "preventive medicine."

"I hope we don't have continued confrontation with the NRA," he says. "But whatever pops up on a national level, we will be prepared."

The police message to the gun groups is, "Don't even think of trying to sneak something past us," says Martha Plotkin, associate director of the Police Executive Research Forum (PERF), a group providing research and technical support to local police organizations.

"We regret that we have to operate in this fashion.... We think it is unfair that we have to compete with other interest groups."

—Cornelius J. Behan, Baltimore police chief

But Richard Boyd, president of the Fraternal Order of Police (FOP), is doubtful of rapprochement. "We're not disposed to mend those fences unless the NRA significantly changes its views," says Boyd, whose organization represents 193,000 police officers.

Battle Preparations

Although the police groups say they are not looking for a fight, they are preparing for the worst, a testament to the gun lobby's political might. In the 1986 campaigns, for example, Federal Election Commission figures show the NRA spent more than $1.7 million to help its congressional candidates.

"We are definitely ready for any-

Baltimore police Chief Cornelius J. Behan, president of PERF, says the law enforcement community was forced into an activist role. "We regret that we have to operate in this fashion," he says. "We see ourselves as an arm of government. We think it is unfair that we have to compete with other interest groups." But until the police organized, Behan says, "we were not heard or listened to."

The police groups are now a formidable force, but gun lobbyists con-

tend the Steering Committee does not represent the views of most policemen.

"I still think those organizations aren't representative of the feelings of the rank and file," says the NRA's Baker.

Comments like that anger police leaders, particularly Scully, who won re-election to his police group post in December. "The leadership of the NRA are not sworn police officers, and they are not elected to those positions by police officers," he says.

The police leaders say they have learned to play politics, and a major lesson, according to Boyd, is that members of Congress must be told they "will be held accountable at home" for their votes on law enforcement issues.

The police groups are encouraged by the Democratic takeover of the Senate. While many Democrats support the gun groups, the police are nonetheless optimistic about having more sympathetic ears at the Senate Judiciary Committee, which would be the starting point for most legislation.

Chairman Joseph R. Biden Jr., D-Del., said in an interview he will oppose efforts to eliminate the machine gun ban.

New Definitions, New Allies

The gun fight last year also created a new law enforcement litmus-test and brought about a partial realignment of political forces.

In the past, police groups generally supported members who were "tough on crime," favoring, among other things, preventive detention and the death penalty.

But while those issues remain important to the police, the gun control battle emphasized the significance of two other elements — police safety and the ability of law officers to protect the public. The law enforcement groups opposed the gun control bill because they felt it would create problems for the police in protecting themselves and in fighting crime, and they judged members on that basis.

This change in emphasis was reflected in the "congressman of the year" award Scully's organization gave to Sen. Howard M. Metzenbaum, D-Ohio, in December.

Metzenbaum, one of the Senate's most liberal members and hardly a conventional "law and order" man, was instrumental in crafting pro-police amendments to the Senate version of the gun control bill and in protecting law enforcement provisions in the House bill that eventually came back to the Senate for approval.

The Agenda

The NRA and its allies, Gun Owners of America and the Citizens' Committee for the Right to Keep and Bear Arms, will probably set the initial firearms agenda for the 100th Congress. The police groups are still sorting out their priorities, spokesmen say.

Almost before the ink was dry on last year's gun law, gun groups said they wanted to repeal the ban on new machine gun sales.

That section was a last-minute addition on the House floor that barred all future sales and possession of machine guns by private citizens. It did not affect existing machine guns.

The amendment was adopted by voice vote, and was later accepted by the Senate without change.

"The whole machine gun issue doesn't bear a lot of relationship to reality," says the NRA's LaPierre. He contends that there is no record of a lawfully owned machine gun ever having been used in a crime.

"How many do we have to have killed before we have to have a ban on it?" retorts FOP's Boyd. "Is it one or 10,000 a year? Why can't we have some preventive measures?"

The gun lobbyists are not optimistic that anything will be done soon.

"Philosophically, it's something I desire, but I think it is going to be hard in the 100th Congress," says John M. Snyder, public affairs director for the Citizens' Committee.

And Lawrence D. Pratt, executive director of Gun Owners, concedes, "It looks difficult."

Handgun Fight Less Predictable

The gun groups are more optimistic about repealing the ban on the interstate sale of handguns. When the gun bill passed the Senate in 1985, it included provisions lifting the handgun ban. But that was before the police got involved in the fight.

When gun legislation started moving through the House, the law officers organized and pressed hard to keep the handgun ban.

An amendment by William J. Hughes, D-N.J., restoring the ban prevailed 233-184. The Senate accepted that provision, even though it had killed a similar proposal in 1985, 69-26. *(1985 Almanac p. 228)*

Now the police are ready for a rematch on handguns.

"Just in the city of Detroit last year we had five police officers killed in the line of duty — one was from a shotgun, the other four by handguns," says Scully.

And Boyd argues that allowing unrestricted interstate sales of handguns would make it "almost impossible for us to keep a hand on the sale and exchange" of the weapons. "We can't even do it in-state now."

If the gun owners want the ban lifted, Boyd adds, "they'll have to give us something.... We'd offer them in return something like a 30-day waiting period."

Other Firearms Issues

A uniform waiting period between the purchase and receipt of a handgun is high on the agenda of Handgun Control, but it is anathema to the NRA.

Metzenbaum and Rep. Edward F. Feighan, D-Ohio, are expected to introduce waiting-period legislation early in February.

"A lot of [police group] members are our members as well. We should try to minimize our differences."

—James J. Baker, National Rifle Association

While the 1968 law and the revisions last year include provisions that bar certain people, such as convicted felons and drug addicts, from purchasing guns, there is no way salesmen can validate an applicant's qualifications.

Proponents of a waiting period contend it would give the police a chance to check the credentials of purchasers.

A gun bill that emerged from the Senate Judiciary Committee in 1982 included a 14-day waiting period, but the measure never reached the floor. *(1982 Almanac p. 415)*

Gun groups oppose the waiting period, claiming it is an unnecessary inconvenience and amounts to assuming a potential buyer is guilty until proved innocent.

Other firearms issues likely to emerge in this Congress include:

• **Ammunition Ban.** Rep. Mario Biaggi, D-N.Y., introduced a bill (HR 538) Jan. 8 to roll back provisions in the 1986 law that lifted licensing and record-keeping requirements on the interstate shipment of ammunition.

Biaggi's bill would ban in-state shipments except by federally licensed dealers, manufacturers, exporters and importers, and collectors shipping to one another.

Gun Owners of America seized upon the changes in the 1986 law, sending out mailings to members offering them special over-the-phone deals on ammunition.

Biaggi says the problem with mail-order ammunition is that there is no way to make sure it is not being sold to people who are prohibited by law from buying it. For example, no one under 18 is permitted to buy ammunition for rifles or shotguns, and no one under 21 can buy ammunition for handguns.

Pratt contends the bill is anti-consumer, but a Biaggi spokesman calls that "absurd."

"We fully support the rights of citizens to own and use firearms," he says. "We're looking for reasonable controls. . . . We're looking to help the law enforcement community."

• **Bullet Ban.** Sen. Daniel Patrick Moynihan, D-N.Y., has introduced a bill (S 25) to ban the production of .25 and .32 caliber bullets. Moynihan says a survey of shootings involving New York City police from 1975-85 showed that 25 percent of the bullets used were .25 or .32 caliber.

Gun groups flatly oppose the bill, and even some gun control advocates, while praising Moynihan's effort, think it may not be effective because it would prompt a shift to guns using different bullets.

• **Plastic Guns.** Rep. Robert J. Mrazek, D-N.Y., is planning to introduce a bill that would impose a "flexible ban" on plastic guns. The bill would ban the domestic manufacture or importation of any firearm the secretary of the Treasury determines cannot be detected by security devices.

Battles in Local Jurisdictions

In addition to its work on Capitol Hill, the NRA expects to be involved in several legislative battles on the state level. Last year, according to Ted Lattanzio, head of the NRA's State and Local Affairs Division, the NRA donated more than $750,000 to state and local candidates. Lattanzio says 83 percent of the NRA-supported candidates were elected.

A key item on the NRA's agenda is pushing "pre-emption" legislation that would prevent cities and counties from enacting gun control laws more stringent than statewide laws.

Lattanzio says legislation will be introduced on behalf of the NRA in 16 states, with highly visible fights expected in Michigan and Florida.

The NRA will be up against law enforcement groups in this arena as well. Spokesmen say the police groups will organize to defeat the pre-emption statutes.

Detroit officer Scully, who worked to stop a statute in Michigan last year, says, "We don't want to take local control away from city or county governments. That's a ploy by the NRA that cuts down on the individual police chief's [ability to do] his job."

Another legislative push — one that won't put the NRA at odds with the police — is a "hunter-harassment" proposal. Bills will be introduced in 13 states to create stiff civil penalties for people who try to interfere with lawful hunting. Lattanzio says it is aimed at animal rights groups that have published a "21-point pamphlet on how to stop a lawful hunt." ■

Hastings Responds to Charges

Federal District Judge Alcee L. Hastings of Florida has filed a two-pronged response to impeachment charges, stemming from his acquittal in 1983 on bribery charges.

Hastings, who is black, denounced the disciplinary procedure being used against him, saying it was "infected by a form of racism" and had more in common with a Moscow political trial than an American judicial proceeding. He claimed that the entire investigation and the underlying bribery prosecution were biased and were "conducted in a manner . . . to provide just cause for outrage as well as alarm."

The 11th U.S. Circuit Court of Appeals, which includes Florida, began investigating Hastings shortly after his acquittal. A special 11th Circuit investigative committee recommended that Hastings be removed from office, on the grounds that he had fabricated his defense and should have been convicted. The 11th Circuit accepted those findings and forwarded them to the Judicial Conference, which gave Hastings a chance to respond. *(1986 Weekly Report p. 2280)*

On Jan. 16 he petitioned the House and Senate to terminate the judicial investigation and to repeal or amend the 1980 judicial discipline law (PL 96-458) that is the basis for the probe.

The Judicial Conference is scheduled to meet in March and could decide then whether to end the investigation or to forward the impeachment recommendation to Congress.

Hastings' Senate petition was quickly referred to the Judiciary Committee, but as of Jan. 22, his House petition was still at the Speaker's office.

Rep. Robert W. Kastenmeier, D-Wis., who helped draft the 1980 discipline law, said in an interview Jan. 21 that it was unclear what Congress would do with the Hastings petition. Kastenmeier said he believed that the Judicial Conference should be allowed to proceed and either forward an impeachment recommendation to Congress or drop the matter.

Kastenmeier added, however, that he had intended to take another look at the judicial discipline law in the 100th Congress, even before Hastings suggested that.

At the Capitol

NRA fails to resurrect its right-to-bear-arms measure

Botched effort may be sign of group's waning strength

By Dennis J. McGrath
Staff Writer

Gun proponents failed Wednesday in what might be their last attempt to breathe life into the right-to-bear-arms amendment to the Minnesota Constitution.

Although the gun proposal could be attached to another bill, that appears unlikely. The National Rifle Association (NRA) effort has been defeated in the Senate, and the best procedural avenue was closed to it yesterday in the House.

"I guess Tony Bouza wins," said Sen. Florian Chmielewski, DFL-Sturgeon Lake, referring to the Minneapolis police chief who has symbolized opposition to the NRA.

With yesterday's defeat in the House Rules Committee, the NRA, which brimmed with confidence at the start of the 1988 Legislature, likely will leave St. Paul bruised and battered, its lobbying effort in shambles.

It would be a rare defeat for the powerful gun lobby, — and one that in many ways it brought on itself.

Analysis

Because of strategic errors, the NRA was forced to retreat from debating the merits of the bill to defending its integrity and morality. One NRA official was accused of lying to legislators, and another prominent gun lobbyist was charged with soliciting undercover policewomen posing as prostitutes.

The bill's apparent demise and the surprising victory by NRA opponents raise questions about how much remains of the gun group's once formidable political strength.

"Their effectiveness went down a few notches," said House Speaker Robert Vanasek, DFL-New Prague. "It doesn't mean they're not going to continue to have influence in future years, but it shows they're not invincible."

Some gun opponents see this defeat as evidence of the gun lobby's fall from power, locally and nationally. Bouza and other anti-NRA activists say the NRA has alienated supporters by taking extremist positions on reasonable gun-regulation legislation.

"I think people are beginning to see the blood . . . where the NRA is concerned," Bouza said. "Their support is eroding as people are coming to their senses."

But local NRA supporters say that the gun group's lobbying problems should not cause state politicians to underestimate the interest and voting power of sportsmen and gun owners in Minnesota elections.

"The leadership of the NRA has taken a lot of stands a lot of us don't support," said Rep. Robert Neuenschwander, DFL-International Falls, sponsor of the gun amendment in the House. "But nobody in rural Minnesota is adamantly saying people should not have the right to keep and bear arms."

Neuenschwander said he would continue to work in the final days of the legislative session to persuade Vanasek, who voted against the gun lobby yesterday, to change his mind and move the issue to the House floor.

NRA supporters say they were victims of lies by opponents, and that their efforts were thwarted by a key committee stacked with Twin Cities legislators who are cool to gun owners' rights.

Yesterday's vote was in the House Rules Committee, where pro-gun lawmakers attempted to move the bill to the House floor, where it likely would be approved. But the move by House Minority Leader William (Bill) Schreiber, IR-Brooklyn Park, fell short by one vote, when the Rules Committee voted 11-10 in favor of Duluth Rep. Willard Munger's motion to table Schreiber's motion until the Senate acted on the gun bill. The Senate Judiciary Committee has defeated the bill.

"That's the ballgame," said Norm Jensvold, vice president of the Committee for Effective Crime Control, an NRA affiliate. "I would say the bill is done for this year."

The bill's apparent failure is curious because it seemed at one point to be well on its way to the governor's desk. After the bill survived its first and most difficult test in the Senate Judiciary Committee, NRA officials were gleeful, even though the committee approved its own compromise version, not the NRA proposal.

Jensvold acknowledges that the gun lobby should have clearly stated then that the committee's language was unacceptable, instead of expressing tenative approval for the thrust of the compromise. When an NRA official subsequently told a House committee to reject the Senate version and restore the NRA's original language, opponents quickly tagged the gun lobby as liars. Although NRA officials denied the accusation, they have been unable to shake it. "The issue turned into the NRA rather than the right-to-bear-arms bill," Jensvold said.

The alleged deception also gave several lawmakers an excuse to vote against the NRA and defeat the bill when it was reconsidered in the Senate committee. And that gave opponents in the House the chance to sit on it.

Then Jensvold himself became part of the issue, when he was charged in February with soliciting undercover St. Paul policewomen posing as prostitutes. He denies the charge, and gun proponents say Jensvold was framed to undermine the gun lobby.

According to the police report on the incident, the policewomen said Jensvold told them that an important DFL legislator would be joining the three of them. The legislator, whose support for the bill was critical, never showed up, and he denies being in St. Paul the night of the incident. Since then, that legislator has provided no help in advancing the bill.

Gun proponents vow to be back next year.

Anchorage Police Department Employees Assoc.

P.O. Box 1539
786-8787

Anchorage, Alaska 99510

May 3, 1988

Honorable John Sund
Chairman, House Judiciary Committee
Room 120
Capitol Bldg.
Juneau, AK. 99811

Dear Representative Sund and Judiciary Committee Members,

We are writing to re-state our strongest opposition to Senate Joint Resolution 15 that is now before you. We fail to see the need for such ammending of the State Constitution.

We feel the existing language in the current constitution allows for controls on dangerous and illegal weapons and provides the necessary controls on use of firearms by those who are ineligible.

We find the existing laws to be reasonable and necessary. By considering and changing the constitution wording, the legislative intent can be loosely and broadly interpreted to allow further breeching of public safety.

The recent and tragic death of an Anchorage woman indicates a need for some restrictions in firearms rights in comparison to opening up the system to make it looser. The firearm used in her death was purchased the day of the offense, only 90 minutes before the attack.

We expect that changing the constitution to reflect the issue of individual right versus the collective right will open up pandora's box. We feel the present law is not broken so it does not need repair.

Sincerely,

Gregory C. Hansen
Chairman
Legislative Affairs Committee

NATIONAL RIFLE ASSOCIATION OF AMERICA
INSTITUTE FOR LEGISLATIVE ACTION
555 CAPITOL MALL, SUITE 455
SACRAMENTO, CA 95814
(916) 446-2455

April 6, 1988

I did not agree

Representative John Sund
State Capitol, Room 122
Pouch V
Juneau, AK 99811

APR 8 1988

Dear Representative Sund:

Thank you again for taking the time to meet with us last week regarding SJR 15, the Constitutional Amendment for the right to keep and bear arms.

You agreed that our language would not change the current statutes regarding ownership and possession of firearms by felons but you did express concern regarding other reasonable regulations which might be invalidated (i.e., concealed carrying, possession by intoxicated persons).

I have included, for convenient reference, a copy of the analysis given to you last week along with the constitutional language from each state from which a court case is cited. You will note that regardless of the specific language contained in the individual state's constitution, courts regularly and routinely rule that the right to bear arms is subject to reasonable regulation.

Representative Gruenberg offered alternative language to that which passed out of the State Affairs Committee. His proposed language is shorter and more concise than the current version of SJR 15, attributes which the National Rifle Association certainly agrees are desirable in constitutional language. Representative Gruenberg's proposal, which the NRA supports and has given to the Alaska Peace Officers Association for comment, reads as follows:

> "The right of the people to keep and bear arms for lawful purposes shall not be infringed by the state or any political subdivision thereof."

Your support for this alternate language would be greatly appreciated by the National Rifle Association and all law-abiding gun owners in Alaska. As we discussed, a hearing date some time during the week of April 18 would be desirable. Please have your staff contact me when a date has been selected.

Sincerely,

Brian Judy
State Liaison

BJ:bsw

Enclosure

B. Gatto
Research — find the different versions of the bill that were reviewed in 1986 legislature

JAN 26 1988

Governor's Criminal Justice Working Group

January 14, 1988

The Honorable Fran Ulmer
Chair, State Affairs Committee
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Dear Representative Ulmer:

As you may be aware, the Governor has appointed the undersigned representatives of various state and local agencies to an ad hoc working group on criminal justice. The members of the group meet together on a regular basis to consider, and occasionally to comment upon, issues that could affect the fair and efficient administration of criminal justice in Alaska.

At the end of the last session, the Senate adopted CS for Senate Joint Resolution 15 (Judiciary), which proposes an amendment to the Constitution of the State of Alaska. We understand that CS SJR 15 (Jud) has been referred to the House State Affairs Committee for consideration. We are writing as a body to strongly urge you and your fellow representatives to amend the language of the present resolution to clearly preserve the present power to reasonably regulate the possession and use of arms.

If passed by the legislature, CS SJR 15 (Jud) would place a proposed constitutional amendment before the voters at the next general election. The resolution contains an amendment to art. I, sec. 19 of the state constitution, relating to a citizen's right to keep and bear arms. As presently drafted, SJR 15 would make the following changes in the state constitution:

SECTION 19. RIGHT TO KEEP AND BEAR ARMS. The [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.

The stated purpose of the proposed amendment is to establish that the right to keep and bear arms under the state constitution is an individual right, rather than a collective one. We are concerned that the present language, if adopted by the voters at the next election, might allow later constitutional challenge to some existing state statutes. Present law, for example, prohibits a convicted felon from possessing a concealable firearm, prohibits possession of certain weapons such as bombs, hand grenades, silencers, and sawed-off shotguns,

prohibits possession of a firearm while intoxicated, the discharge of a firearm from, on, or across a highway, the carrying of a concealed weapon, possession of a loaded firearm on licensed premises, or possession of a firearm by a minor without parental consent. (See AS 11.61.200-11.61.220.)

These statutes serve an important public safety function by restricting the possession of especially dangerous weapons or weapons carried in an especially dangerous manner or place. If the legislature does not intend that the proposed amendment of art. I, sec. 19 would render these statutes unenforceable, nor foreclose a future legislature from adopting similar provisions (prohibiting possession of loaded firearms in a church or on school grounds, for example), then the legislature's intent to continue to allow reasonable regulation by law should be made clear.

We suggest the addition of language such as: "The right of the people to keep and bear arms shall not be infringed, except that the state or a political subdivision of the state may regulate the manner in which arms may be borne, carried, or used." or "...except that the manner of keeping and bearing arms may be regulated by law."

Section 2 of CS SJR 15 (Jud) contains a statement of "legislative intent" indicating that the constitutional amendment, if adopted, "should not be construed to preclude the regulation of the manner in which arms may be borne, carried, or used." We are concerned, however, that this statement of legislative intent will not be effective to preserve the present power to reasonably regulate the possession and use of weapons.

As a general rule, a statute or constitutional provision will be interpreted according to the plain meaning of the language on its face. If the intent behind the adoption of the amendment were to later become an issue, it is the intent of the voters who adopted the measure, rather than the intent of the legislators who drafted it, that will be relevant. Although the resolution directs the Legislative Affairs Agency to consider the statement contained in section 2 when preparing its neutral summary for the election pamphlet, the intent language will not appear on the ballot itself, and may well not be contained verbatim in the election pamphlet. See art. XIII, sec. 1 of the Alaska Constitution and AS 15.58.010.

Principles of both common sense and responsible draftsmanship dictate that a well-drafted statute or constitutional provision should reduce the need for disputes about

interpretation. Statements of "legislative intent" are not an adequate substitute for clear, unambiguous language in the proposed constitutional amendment. A more precisely drafted amendment would minimize the possibility that, should the proposed constitutional amendment be adopted, a criminal defendant would later be able to argue that a criminal weapons misconduct statute is unconstitutional because it violates his right to keep and bear arms under art. I, sec. 19 of the state constitution.

We urge you to amend CS SJR 15 (Jud) to address the concerns discussed above.

Sincerely yours,

Grace Berg Schaible
Grace Berg Schaible
Attorney General

Arthur H. Snowden, II
Arthur Snowden
Administrative Director
Alaska Court System

Arthur English
Arthur English
Commissioner
Department of Public Safety

Dana Fabe
Dana Fabe
Public Defender

Myra M. Munson
Myra Munson
Commissioner
Department of Health &
Social Services

Susan H. Humphrey-Barnett
Susan Humphrey-Barnett
Commissioner
Department of Corrections

Del Smith
Del Smith
President
Alaska Association of Chiefs
of Police

Brant McGee
Brant McGee
Public Advocate

Harold M. Brown
Executive Director
Alaska Judicial Council

John Havelock
Consultant on Criminal
Justice Planning

cc: All members of the House State Affairs Committee
John Sund, Chair, House Judiciary Committee

SJR 15

STATE OF ALASKA

Bill Sheffield, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K – STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

May 8, 1986

The Honorable M. Mike Miller
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Dear Representative Miller:

You have asked this office to comment upon the effect of "legislative intent" language currently contained in a resolution now under consideration by the House Judiciary Committee: CS SJR 39 (Jud) am. This resolution, if passed, would place a proposed constitutional amendment before the voters at the next general election. The resolution contains an amendment to art. I, sec. 19 of the state constitution, relating to a citizen's right to keep and bear arms. The stated purpose of the proposed amendment is to establish that the right to keep and bear arms under the state constitution is an individual right, rather than a collective one.

The proposed constitutional amendment now states that a citizen's right to keep and bear arms "shall not be infringed by the state or by a borough or city of the state." During consideration of CS SJR 39 (Jud) am on the Senate floor Senator Vic Fischer proposed an amendment which would have added the phrase "except that the manner of keeping and bearing arms may be regulated by law." This proposed amendment was rejected by the Senate on a vote of 16 to 2. See Senate Journal, March 26, 1986, at pp. 2166-2167. The Judiciary Committee version of the resolution, adopted with amendment by the Senate, contains a section entitled "legislative intent." Section 2 of CS SJR 39 (Jud) am now provides, in part, that the proposed constitutional amendment "should not be construed to preclude the regulation of the manner in which arms may be borne, carried, or used."

We are concerned that the language presently contained in CS SJR 39 (Jud) am might allow later constitutional challenge to some existing state statutes. Present law, for example, prohibits a convicted felon from possessing a concealable firearm, prohibits possession of certain weapons such as bombs, hand grenades, silencers, and sawed-off shot guns, prohibits possession of a firearm while intoxicated, the discharge of a firearm from, on, or across a highway, the carrying of a concealed weapon, possession of a loaded firearm

on licensed premises, or possession of a firearm by a minor without parental consent. (See AS 11.61.200-11.61.220.)

These statutes serve an important public safety function by restricting the possession of especially dangerous weapons or weapons carried in an especially dangerous manner or place. If the legislature does not intend that the proposed amendment of art. I, sec. 19 would render these statutes unenforceable, nor foreclose a future legislature from adopting similar provisions (prohibiting possession of loaded firearms in a church or on school grounds, for example), then the legislature's intent to continue to allow reasonable regulation by law should be made clear.

It may be that the Senate, in rejecting the amendment proposed by Senator Fischer but adopting section 2 of CS SJR 39 (Jud) am, believed that it was not necessary to explicitly state in the proposed constitutional provision that regulation of firearms by law is allowed, as this point is included in their "legislative intent" language. As a general rule, however, a measure will be enforced according to the plain meaning of the language on its face. 2A C. Sands, Sutherland Statutory Construction § 45.02 at 4 (4th ed. 1984); Wilson v. Municipality of Anchorage, 669 P.2d 569, 571 (Alaska 1983). It is a "fundamental principle of statutory interpretation ... that a statute means what its language reasonably conveys to others..." North Slope Borough v. Sohio Petroleum Corp., 585 P.2d 534, 540 (Alaska 1978); South Central Health Planning v. Commissioner, Dept. of Administration, 628 P.2d 551, 553 (Alaska 1981). 1/

While the courts in Alaska may consider a measure's legislative history to the extent it may assist the court in correctly interpreting the measure, a legislative committee report or formal statement of legislative intent may not be used to give the statute a meaning not fairly contained within its words. Chicago, M., St. P. & P. R. Co. v. Acme Fast Freight, 336 U.S. 465, 93 L.Ed.2d 817, 69 S.Ct. 692 (1949); North Slope Borough, 585 P.2d at 540.

1/ Although general rules of legal interpretation are most often expressed in the context of statutory interpretation, the same rules apply to the interpretation of legislative resolutions and constitutional amendments. 1A C. Sands, Sutherland Statutory Construction § 29.08 at 500 (4th ed. 1985).

When a reviewing court decides that it must consider the legislature's intent in order to construe a provision, the text of the measure itself is still considered the best evidence of legislative intent. See 2A C. Sands, Sutherland Statutory Construction § 46.03 at 82 (4th ed. 1984) and the cases cited there. Where the terms of a provision are clear and straightforward, the intent of the legislature will be based on those terms, even if the apparent intent conflicts with a statement of legislative intent or a committee report. See Caminetti v. United States, 242 U.S. 470, 61 L.Ed. 442, 37 S.Ct. 192 (1917) and 2A C. Sands, Sutherland Statutory Construction § 48.06 at 308 (4th ed. 1984).

In Commercial Fisheries Entry Commission v. Apokedak, 680 P.2d 486 (Alaska 1984) Apokedak, relying upon legislative intent language contained in the "preamble" to the Limited Entry Act, urged the state supreme court not to adopt a literal construction of the act. The court refused to adopt the interpretation suggested by Apokedak, stating: "a statutory preamble ... can neither restrain nor extend the meaning of an unambiguous statute; nor can it be used to create doubt or uncertainty which does not otherwise exist." 680 P.2d at 488, n.3. Thus, to the extent that language contained in the "legislative intent" section of CS SJR 39 (Jud) am conflicts with the plain meaning of the terms of the constitutional provision, it is the constitutional language which will control.

The courts may also consider the history of legislative action taken on a given measure when determining legislative intent. Generally, the rejection of a proposed amendment indicates that the legislature did not intend the bill to include the provisions embodied in the rejected amendment. Lapina v. Williams, 232 U.S. 78, 58 L.Ed. 515, 34 S.Ct. 196 (1914); United States v. Great Northern Railway Co., 287 U.S. 144, 155, 77 L.Ed. 223, 53 S.Ct. 28 (1932); 2A C. Sands, Sutherland Statutory Construction § 48.04 at 302, § 48.18 at 341 (4th ed. 1984). Thus, a reviewing court may well conclude that if the legislature had intended to allow the continued regulation by law of some aspects of a person's right to possess arms it would have adopted the language proposed by Senator Fischer during the Senate's consideration of the resolution. See, e.g., North Slope Borough, 585 P.2d at 541; Wilson, 669 P.2d at 571.

Perhaps the most important consideration here is that in the case of a measure (such as this one) which is to be decided by a vote of the electorate, descriptive statements accompanying the proposition are an important source of

guidance for interpretation. 2A C. Sands, Sutherland Statutory Construction § 48.04 at 301, § 48.19 at 345 (4th ed. 1984); State v. Lewis, 559 P.2d 630, 637-638 (Alaska 1977), cert. denied, 97 S.Ct. 2943, 432 U.S. 901, 53 L.Ed.2d 1073.

Under art. XIII, sec. 1 of the Alaska Constitution, the lieutenant governor is required to prepare a ballot title and a summary of the proposed constitutional amendment. The election pamphlet prepared pursuant to AS 15.58.010 must contain: 1) the text of the proposed constitutional amendment, 2) the ballot title and summary prepared by the lieutenant governor, 3) "a neutral summary" of the proposition prepared by the Legislative Affairs Agency, and 4) advocatory statements for and against the proposed amendment. AS 15.58.020(6). Thus, although the resolution directs the Legislative Affairs Agency to "consider" the statement contained in section 2 of CS SJR 39 (Jud) am when preparing its neutral summary for the ballot, this language will not appear on the ballot, and may well not appear in the elections pamphlet. Since, in the final instance, a reviewing court will look to the intent in the minds of the voters who voted to adopt the constitutional amendment, the legislature's statement of its intent when placing the measure on the ballot has limited significance. Lewis, 559 P.2d at 637-638.

One of the main purposes of a constitution is to limit legislative power. Ordinary acts of the legislature (i.e., statutes), whether adopted before or after a given constitutional provision, cannot be given effect if the statute conflicts with a substantive provision in the constitution. Thus, an amendment to the constitution may expressly, or by implication, repeal existing legislative enactments. Rhode Island v. Palmer, 253 U.S. 350, 64 L.Ed. 946, 40 S.Ct. 486 (1919); 1A C. Sands, Sutherland Statutory Construction § 23.20 at 387 (4th ed. 1985). The possibility that the language proposed in SJR 39 could be interpreted as invalidating some portions of Alaska's present criminal code is a real one, as this has occurred in similar circumstances in other states. See, for example, State v. Kessler, 289 Or. 359, 614 P.2d 94 (1980) and State v. Delgado, 298 Or. 395, 692 P.2d 610 (1984).

Principals of both common sense and responsible draftsmanship dictate that a well-drafted statute or constitutional provision should reduce the need for disputes about interpretation. 2A C. Sands, Sutherland Statutory Construction § 45.02 at 5 (4th ed. 1984). Statements of "legislative intent" are not an adequate substitute for clear, unambiguous language in the proposed constitutional amendment. A more precisely drafted amendment would minimize the

possibility that, should the proposed constitutional amendment be adopted, a criminal defendant would later be able to argue that a criminal weapons misconduct statute is unconstitutional because it violates his right to keep and bear arms under art. I, sec. 19 of the state constitution.

Sincerely,

Harold M. Brown
Attorney General

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

[illegible]
JUNEAU ALASKA 99811
907 465 3867

MEMORANDUM April 30, 1986

SUBJECT: Right of a citizen to keep and bear arms [CSSJR 39(Judiciary) am].

TO: Representative M. Mike Miller
Chair, House Judiciary Committee

FROM: Richard A. Bradley
Legislative Counsel

Hayden Kaden has asked that I comment on three issues relating to this resolution proposing a constitutional amendment.

The amendment proposed under CSSJR 39(Judiciary) am would amend art. I, sec. 19 of the Alaska Constitution, "Right to Bear Arms". The resolution contains a statement of "Legislative Intent".

It may be desirable to summarize each to set the stage for the comments that follow.

Section 1 of CSSJR 39(Judiciary) am amends as follows:

> SECTION 19. RIGHT TO KEEP AND BEAR ARMS. The [A WELL REGULATED MILITIA BEING NECESSARY TO THE SECURITY OF A FREE STATE, THE] right of each citizen of the state [THE PEOPLE] to keep and bear arms for lawful defense of self, family, property, and the state and for lawful hunting, recreation, and other lawful purposes, shall not be infringed by the state or by a borough or city of the state.

Sec. 2(a) of CSSJR 39(Judiciary) am states legislative intent: "the legislature intends only that the amendment . . . [provide] that the right to keep and bear arms is an individual rather than a collective right." And the "amendment, if adopted, should not be construed to preclude the regulation of the manner in which arms may be borne, carried, or used." [It] "should not be used to repeal or to

render unconstitutional existing statutes . . . or existing municipal ordinances."

I. What is the effect of an expression of legislative intent in a constitutional amendment?

I believe that the courts will give deference to legislative intent. There is an existing history of them doing that. In Alaska Public Employees Ass'n v. State, 525 P.2d 12, 17 - 18 and in Seward Marine Services, Inc. v. Anderson, 643 P.2d 493, the Alaska Supreme Court considered the extent to which it would consider evidence of legislative intent apart from that stated in the legislation itself. In each case, even though it would seem that extraneous evidence is weaker than legislative intent stated within the legislation itself, it considered the offered evidence carefully.

A statement of legislative intent in the context of a constitutional amendment would be entitled to equal weight as compared to a statement of legislative intent in legislation if everything were equal. Everything is not, however, equal.

There is a unique mechanical problem in the case of a constitutional amendment. In the usual statement of legislative intent, the theory and the fact is that those who vote for the bill have the statement of the legislative intent before them (if it is incorporated into the bill) as they vote or, in the case of the governor, when it is reviewed before signature or veto.

There is a difference here. The voters of the state who actually approve or reject the amendment will not have the statement of legislative intent before them. As a matter of law, it seems that they will have only section 1 of the resolution before them. See art. XIII, sec. 1 of the Alaska Constitution: the "lieutenant governor shall prepare a ballot title and proposition summarizing each proposed amendment, and shall place them on the ballot . . . ."

In an attempt to address that problem, sec. 2(b) of CSSJR 39(Judiciary) am directs the Legislative Affairs Agency, as it prepares the "neutral summary" under AS 15.58.020, to "consider" the statement of legislative intent. It is presumably only through the neutral summary published in the voter's pamphlet that a voter may become aware of sec. 2(a) of the resolution.

I am satisfied that the Agency, when it considers CSSJR 39(Judiciary) am, will prepare a neutral summary. The law requires no less. Some of the problems that the Agency may have in the preparation of the summary are suggested below.

The general rule is that the legislative intent will be considered only after the substantive language has itself been considered and then only if the court is unable to determine what the legislature intended from the substantive language. The corollary of the rule is that the legislative intent will not be considered if the substantive language is clear or to the extent that the legislative intent contradicts, in some fashion, the substantive language.

It is these points that present the problem for legislative intent.

Sec. 2(a) states that the legislature intends that the "right to keep and bear arms" be "an individual right rather than a collective right." Consistently with that, the amendment deletes the reference to the "well-regulated militia being necessary to the security of a free state".

The very substantial problem is that the language added in provides that the purpose of the right to bear arms is "for lawful defense of self, family, property, and the state". [Emphasis added.] It seems clear that the focus of the amendment is broadened; individual purposes for the right are affirmed. But the amendment also states a collective purpose: the "defense of . . . the state". To the extent that the "legislative purpose" seems inconsistent the substantive language of the amendment itself, the court must disregard the legislative purpose.

I assume that the legislative purpose of the amendment "not [being] used to repeal or render unconstitutional existing statutes . . . or existing municipal ordinances" will be effective.

II. What is the likely effect of the language of the amendment on existing laws against concealed weapons, etc.?

The legislative purpose says that the amendment should have no effect on those laws; predictions of actual effect in this area are, however, somewhat difficult.

The amendment and its analogs in the U.S. Constitution and in the constitutions of other states have a long history: I

think it is fair to say that the amendment has a meaning and an understanding that is larger then the language of the section itself; I see no reason to suggest that the amendment changes these understandings.

It has been said that the provision in the U.S. Constitution goes back to 1689. The English Bill of Rights, enacted by Parliament in 1689, granted the English the right "to have Arms for their Defence, suitable to their Conditions, and allowed by Law." See State v. Kessler, 289 Or. 359, 614 P.2d 94 (Oregon 1980).

The Kessler case and State v. Delgado, 692 P.2d 610 (Oregon 1984) construed the Oregon version of art. I, sec. 19. It provides "The people have the right to bear arms for the defence (sic) of themselves, and the State, . . ." [Art. I, sec. 27, Oregon Constitution.] It seems clear that the language of the Oregon Constitution is identical in function and almost identical in language to that contained in CSSJR 39(Judiciary) am. It should be reasonable, therefore, to expect them to be construed similarly.

The Kessler case involved a prosecution for the possession of a "billy", an item the possession of which was prohibited as a "slugging weapon."

The Oregon court noted that in colonial time and during the Revolutionary War, weapons used by militiamen and by individuals in the defense of their home or their person were the same. The court noted that the historical analysis of the provision indicated that

> the drafter intended "arms" to include the hand-carried weapons commonly used by individuals for personal defense. The club is an effective, hand-carried weapon which cannot logically be excluded from this term. We hold that the defendant's possession of a billy club in his home is protected by Article I, section 27, of the Oregon Constitution. [614 P.2d at 100.]

The Delgado case involved possession of a switchblade.

> The appropriate inquiry in the case at bar is whether a kind of weapon, as modified by its modern design and function, is of the sort commonly used by individuals for personal defense during either the revolutionary or posttrevolutionary era, or in 1859 when Oregon's consti-

> tution was adopted. In particular, it must be determined whether the drafters would have intended the word "arms" to include the switch-blade knife as a weapon commonly used by individuals for self defense. [692 P.2d at 612.]

The Oregon Supreme Court agreed that a law that sought to prohibit possession of the "jackknife" or "mere pocketknives" would violate the Oregon constitution.

> The only difference is the presence of the spring-operated mechanism that opens the knife. We are unconvinced by the state's argument that the switch-blade is "so substantially different from its historical antecedent" (the jackknife) that it could not have been within the contemplation of the constitutional drafters. They must have been aware that technological changes were occurring in weaponry as in tools generally. [692 P.2d at 614.]

Note that the provisions of Alaska law now prohibit the possession of a switchblade. See AS 11.61.200.

It is possible that the reference in the amendment to art. I, sec. 19 to "lawful" uses may be adequate to authorize regulation of an "unlawful" use, that is, to define what is unlawful.

On the other hand, a constitutional provision granting the legislature the authority to characterize a use as unlawful may then authorize a regulation that was unintended by the sponsors of the amendment.

I agree that such a result in this state is unlikely for more practical reasons. But that result occurs because of the understandings on the amendment, not really because of the language itself.

III. Elimination of militia concepts.

Your third question asks whether it would be possible to eliminate the "well-regulated militia" concepts while permitting reasonable regulation. The answer is a qualified yes; I think it is clear that some context for the regulation must be offered. Consider the section with the "militia" eliminated:

SECTION 19. RIGHT TO BEAR ARMS. The [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.

With no context for the regulation, the statement becomes absolute and no regulation would be possible. Accordingly, I believe that some threshold basis for the regulation (such as that in SJR 39) must be offered by the constitution.

If I may be of further assistance, please advise.

RAB:mkr
m5/046

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM May 9, 1986

SUBJECT: Right to bear arms
(Work Order No. 14-SJ39)

TO: Representative M. Mike Miller
Chair, House Judiciary Committee

FROM: Richard A. Bradley
Legislative Counsel

Hayden Kaden has requested a CS for SJR 39. It is enclosed as requested.

The amendment is changed in the second house. I believe we may have provided you with a concurrent resolution to address the question.

The resolution continues the "legislative intent" language in sec. 2. As my April 30 memorandum to your committee on the Senate version of this resolution suggested, we do not believe that "legislative history" is placed before the voters and therefore will not be considered before them.

Thus, the language of sec. 3 that directs the lieutenant governor to place the "legislative history" before the voters may be ineffective. Article XXX, sec. 1 of the Alaska Constitution tells the lieutenant governor what to place before the voters; it provides, in pertinent part:

> SECTION 1. AMENDMENTS. * * * The lieutenant governor shall prepare a ballot title and proposition summarizing each proposed amendment, and shall place them on the ballot for the next general election. * * *

Thus, as you see, the amendment itself is not placed before the voters but only "a ballot title and proposition summarizing each proposed amendment". If the lieutenant governor follows the constitution, which seems to offer mandatory

language, the lieutenant governor may not follow the instructions added in sec. 3 of the resolution.

And I also believe that the amendment to sec. 2(b) of the resolution is also ineffective in its instruction to the Legislative Affairs Agency to "include" the statement of legislative intent in the neutral summary.

Since the language in sec. 2 of the resolution is not law and has not (and cannot) amend the instructions to the Agency, the Agency will continue to be bound by the requirements of AS 15.58.020(6)(C). Those provisions now provide:

> Sec. 15.58.020. CONTENTS OF PAMPHLET. Each election pamphlet shall contain
>
> * * *
>
> (6) for each ballot proposition submitted to the voters by initiative or referendum petition or by the legislature,
>
> * * *
>
> (C) a neutral summary of the proposition prepared by the Legislative Affairs Agency;
>
> * * *

It seems that the obligation of the Agency is to prepare a summary (rather than simply accept a summary not prepared in the Agency). The Agency is also obligated to ensure that the summary is neutral (not weighted by any external considerations beyond the language of the actual proposed amendment itself).

I believe, therefore, that the Agency may consider the legislative history but cannot "include" as its own the legislative history suggested in sec. 2(a).

If I may be of further assistance, please advise.

RAB:ml
095/ml

Municipality
of
Anchorage

POUCH 6-650
ANCHORAGE, ALASKA 99502-0650
(907) 264-4545

TONY KNOWLES,
MAYOR

OFFICE OF THE MUNICIPAL ATTORNEY

February 25, 1986

TO: Members of the Senate Judiciary Committee

Re: Senate Joint Resolution No. 39

The proposed amendment to Article I, Section 19 of the State Constitution set forth in Senate Joint Resolution No. 39 could, in its original form, preclude the regulation of conduct which has traditionally been considered to be criminal. Of particular concern is the clause beginning on line 15 which specifies "...personal defense and for the defense of family, property...". This provision could be read to invalidate all existing state and municipal laws governing the use of firearms for self-defense and the defense of property. Historically, the right to use firearms to protect self, family, and property has been curtailed. The amendment in its present form would cast doubt on the viability of continued regulation of such items.

The amendment, in its present form, would also have the likely affect of nullifying state and municipalities laws regulating the possession of firearms. This is because of the deletion of provisions referencing a "well regulated militia." Historically, the courts have interpreted that phrase as creating not a personal right to bear arms, but rather a right of the state to maintain a militia. The deletion of that phrase would cast doubt on the validity of all previous court decisions pertaining to the interpretation of section 19, and a similar provision of the Federal Constitution. With the deletion of that body of law, the phrase "shall not be infringed" would take on a whole new meaning. Thus, the state and local governments could lose the ability to regulate such activities as the carrying of concealed weapons and the obliteration of serial numbers on firearms.

The provision could easily be amended so as to affirm the right of the individual to own and possess firearms (as opposed to the right of the state to maintain a militia) without precluding the Legislature's ability to prescribe certain conduct with respect

to the use and possession of deadly weapons. First, I would propose a change to line 15 whereby the term "personal" would be replaced by "lawful" and the phrase "and for the defense" be replaced by the phrase "of self". In addition, line 17 should be changed by adding language after the term "city" which would read "...except that the manner in which arms are possessed may be subject to reasonable regulations designed to protect the public safety".

In addition, if the Committee's intent is merely to establish a personal right to the ownership and possession of firearms and not to overturn existing laws governing the use of firearms, then such intent should be plainly set forth in a permanent report that will serve in the future to guide the courts. Furthermore, if the additional language I have suggested is added to the amendment, the Committee report should clarify the Committee's intent by specifying that the ability of state and local government to impose reasonable regulations on the possession of firearms would include laws curtailing the possession of concealed weapons or weapons that have altered identification marks, but would not include the right of the state or local government to enact an outright ban on the ownership or possession of arms.

Very truly yours,

DEPARTMENT OF LAW

Jerry Wertzbaugher
Municipal Attorney

JW:gml

STATE OF ALASKA

Bill Sheffield, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K – STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

June 27, 1983

The Honorable Patrick M. Rodey
Senator
Alaska State Legislature
Pouch V
Juneau, AK 99811

Re: SJR-28
A. G. #366-444-83

Dear Senator Rodey:

The Department of Law has completed a preliminary analysis of Senate Joint Resolution 28 regarding the proposed amendment to the Alaska Constitution pertaining to the right of a person to keep and bear arms.

You may wish to consider inserting the word "lawful" after the term "for" and before the word "defense". With this insertion, the new constitutional clause would read as follows:

> The right of a person to keep and bear arms for lawful defense of self, home and property, or for lawful hunting and recreational use, or for other lawful purposes shall not be infringed.

I believe it would be wise to make explicit that the Constitution provides for lawful activities, which of course are established by the legislature. In the absence of the term "lawful", I can envision a situation where persons attempt to use the constitutional language as a defense to behavior which ordinarily would constitute a violation of the Alaska criminal statutes. Also, I'm not sure the explicit mention of lawful hunting, recreational use and other specific activities is necessary to insure that individuals have a guaranteed right to keep and bear arms, however, I realize this language may be reassuring to certain groups within our state.

You may wish to review the language in other state Constitutions which relates directly to the right to keep and bear arms. In many instances this right is explicitly characterized as an individual right without mentioning specifically what constitutes appropriate use by an individual citizen. The

03-CSLH

constitutional clauses relating to arms from the thirty-seven states which have such constitutional language are as follows:

Alabama: That every citizen has a right to bear arms in defense of himself and the state. ALA. CONST. art I, §26.

Alaska: 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. ALASKA CONST. art. I, § 19.

Arizona: The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men. ARIZ. CONST. art. II, § 26.

Arkansas: The citizens of this State shall have the right to keep and bear arms for their common defense. ARK. CONST. art. II, § 5.

Colorado: The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons. COLO. CONST. art. II, § 13.

Connecticut: Every citizen has a right to bear arms in defense of himself and the state. CONN. CONST. art. I, § 15.

Florida: The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law. FLA. CONST. art. I, §. 8.

Georgia: The right of the people to keep and bear arms, shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms may be borne. GA. CONST. art I, § 1.

Hawaii: 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. HAWAII CONST. art I, § 15.

Idaho: The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation

providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms, except those actually used in the commission of a felony. IDAHO CONST. art. I, § 11.

Illinois: Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed. ILL. CONST. art. I, § 22.

Indiana: The people shall have a right to bear arms, for the defense of themselves and the State. IND. CONST. art I, § 32.

Kansas: The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power. KAN. CONST., Bill of Rights, § 4.

Kentucky: All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: ...The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons. KY. CONST. § 1.

Louisiana: The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person. LA. CONST. art. I, § 4.

Maine: Every citizen has the right to keep and bear arms for the common defense; and this right shall never be questioned. ME. CONST. artl, § 16.

Massachusetts: The people have a right to keep and bear arms for the common defence. And as, in times of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it. MASS. CONST. pt. 1, art. 17.

Michigan: Every person has a right to keep and bear arms for the defense of himself and the state. MICH. CONST. art I, § 6.

Mississippi: The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power where thereto legally summoned, shall not be called question, but the legislature may regulate or forbid carrying concealed weapons. MISS. CONST. art. III, § 12.

Missouri: That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons. MO. CONST. art I, § 23.

Montana: The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons. MONT. CONST. art II, § 12.

New Mexico: No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreation use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. N.M. CONST. art. II, § 6.

North Carolina: 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; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice. N.C. CONST. art. I, § 30.

Ohio: The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power. OHIO CONST. art I, § 4.

Oklahoma: The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons. OKLA. CONST. art. II, § 26.

Oregon: The people shall have the right to bear arms for the defense of themselves, and the State, but the Military shall be kept in strict subordination to the civil power. OR. CONST. art. I, § 27.

Pennsylvania: The right of the citizens to bear arms in defence of themselves and the State shall not be questioned. PA. CONST. art. I, § 22.

South Carolina: 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. As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it. No soldier shall in time of peace be quartered in any house without the consent of the owner not in time of war but in the manner prescribed by law. S.C. CONST. art I, § 20.

South Dakota: The right of the citizens to bear arms in defense of themselves and the state shall not be denied. S.D. CONST. art. VI, § 24.

Tennessee: That the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime. TENN. CONST. art. I, § 26.

Texas: Every citizen shall have the right to keep and bear arms in the lawful defence of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime. TEX. CONST. art. I, § 23.

Utah: The people have the right to bear arms for their security and defense, but the Legislature may regulate the exercise of this right by law. UTAH CONST. art. I, § 6.

Vermont: That the people have a right to bear arms for the defence of themselves and the State-and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should b kept under strict subordination to and governed by the civil power. VT. CONST. ch. 1, art. 16.

Virginia: That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the

people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that all cases the military should be under strict subordination to, and governed by, the civil power. VA. CONST. art. I, § 13.

Washington: The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men. WASH. CONST. art. I, § 24.

Wyoming: The right of citizens to bear arms in defense of themselves and of the state shall not be denied. WYO. CONST. art I, § 24.

In addition, thirteen states do not have express constitutional provisions related to the right to keep and bear arms.

I would be happy to discuss this matter with you in more detail.

Sincerely,

Norman C. Gorsuch
Attorney General

NCG:ml

Distribution of
identical letter: The Honorable Jalmar M. Kerttula
Alaska State Senate

The Honorable Rick Halford
Alaska State Senate

The Honorable Don Bennett
Alaska State Senate

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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RECEIVED
MAR 26 1986
Dept. of Law
Administration

March 26, 1986

The Honorable Vic Fischer
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: S.J.R. 39

Dear Senator Fischer:

You have asked for the Department of Law's comments upon the current language of S.J.R. 39, a resolution proposing an amendment to Article I, sec. 19 of the state constitution, relating to a citizen's right to keep and bear arms. As I understand it, S.J.R. 39, as amended on the Senate floor yesterday, provides that art. I, sec. 19 of the Alaska Constitution will be amended to read:

> SECTION 19. RIGHT TO KEEP AND BEAR ARMS. The [A WELL-REGULATED MILITIA BEING NECESSARY TO THE SECURITY OF A FREE STATE, THE] right of each citizen of the state [THE PEOPLE] to keep and bear arms for lawful defense of self, family, property, and the state and for lawful hunting, recreation, and other lawful purposes, shall not be infringed by a state or by a borough or city of the state.

We are concerned that the language presently contained in S.J.R 39 might allow later constitutional challenge to some existing state statutes. Present law, for example, prohibits a convicted felon from possessing a concealable firearm, prohibits possession of certain weapons such as bombs, hand grenades, silencers, and sawed-off shot guns, prohibits possession of a firearm while intoxicated, or the discharge of a firearm from, on, or across a highway, the carrying of a concealed weapon, possession of a loaded firearm on licensed premises, or possession of a firearm by a minor without parental consent. (See AS 11.61.200-.220.)

These statutes serve an important public safety function by carefully regulating the possession of especially dangerous weapons or weapons carried in an especially dangerous manner or place. If the legislature does not intend to render

those statutes unenforceable, nor to foreclose a future legislature from adopting similar provisions (prohibiting possession of loaded firearms in a church or on school grounds, for example), than the legislature's intent to continue to allow reasonable regulation by law should be made clear. The possibility that the language proposed in S.J.R. 39 could be interpreted as invalidating some portions of Alaska's present criminal code is a real one. See, for example, State v. Kessler, 614 P.2d 94 (Ore. 1980), and State v. Delgado, 692 P.2d 610 (Ore. 1984).

We believe that any possible ambiguity could be eliminated by the addition, at the end of the current language, of the phrase "except that the manner of keeping and bearing arms may be regulated by law." This suggested language is based upon similar provisions in the constitutions of several other states, including Florida (art. I, sec. 8), Georgia (art. I, sec. 1), and Utah (art. I, sec. 6). The addition of this clause would make it clear that, although a citizen's basic right to keep and bear arms may not be infringed, reasonable and appropriate regulation of the manner in which arms are kept or borne (i.e., possession by felons, by minors, in a bar, while intoxicated, etc.) is not an infringement on an individual's constitutional right. Mr. Rupe Andrews, Alaska Field Representative for the National Rifle Association, has indicated that his organization would not object to the inclusion of this additional language in S.J.R. 39. I also suggest that you consider retaining the language in the present constitutional provision "the people," rather than change it to "each citizen of the state." State constitutional provisions have traditionally recognized the equal rights of all residents of the state, regardless of the resident's national origin.

A carefully drafted amendment would minimize the possibility that, should the proposed constitutional amendment be adopted, a criminal defendant would later be able to argue that a criminal weapons misconduct statute is unconstitutional because it violates his right to keep and bear arms under art. I, sec. 19 of the state constitution.

Sincerely,

Harold M. Brown
Attorney General

HMB:GAH:gb-12

SJR15

STATE CONSTITUTIONAL GUARANTEES ON THE RIGHT TO KEEP AND BEAR ARMS

Forty-one (41) states have constitutional guarantees on the right to keep and bear arms.

Alabama: That every citizen has a right to bear arms in defense of himself and the state. Article I, Section 26.

Alaska: 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. Article I, Section 19.

Arizona: The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men. Article 2, Section 26.

Arkansas: The citizens of this State shall have the right to keep and bear arms for their common defense. Article II, Section 5.

Colorado: The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons. Article II, Section 13.

Connecticut: Every citizen has a right to bear arms in defense of himself and the state. Article I, Section 15.

Florida: The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law. Article I, Section 8.

Georgia: The right of the people to keep and bear arms, shall not be infringed, but the General Assembly shall have the power to prescribe the manner in which arms may be borne. Article I, Section I, para. VIII.

Hawaii: 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. Article I, Section 15.

Idaho: The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person, nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent passage of legislation providing penalties for the possession of firearms by a convicted

felon, nor prevent the passage of legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony. Article I, Section 11.

Illinois: Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed. Article I, Section 22.

Indiana: The people shall have a right to bear arms, for the defense of themselves and the State. Article I, Section 32.

Kansas: The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power. Kansas Bill of Rights, Section 4.

Kentucky: All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: *** 7. The right to bear arms in defense of themselves and of the state, subject to the power of the general assembly to enact laws to prevent persons from carrying concealed weapons. Kentucky Bill of Rights, Section I, para. 7.

Louisiana: The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person. Article I, Section 11.

Maine: Every citizen has a right to keep and bear arms for the common defense; and this right shall never be questioned. Article I, Section 16.

Massachusetts: The people have a right to keep and bear arms for the common defense. And as, in times of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it. Massachusetts Declaration of Rights, Part I, Article XVII.

Michigan: Every person has a right to keep and bear arms for the defense of himself and the state. Article I, Section 6.

Mississippi: The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power where thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons. Article 3, Section 12.

Missouri: That the right of every citizen to keep and bear

arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons. Article I, Section 23.

Montana: The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons. Article II, Section 12.

Nevada: Every citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes. Art. 1, Section II, para. 1.

New Hampshire: All persons have the right to keep and bear arms in defense of themselves, their families, their property, and the state. Part First, Art. 2-a.

New Mexico: No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms. Article II, Section 6.

North Carolina: 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; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice. Article I, Section 30.

North Dakota: All individuals are by nature equally free and independent and have certain inalienable rights, among which are ... to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreatnal, and other lawful purposes, which shall not be infringed. Article I, Section 1.

Ohio: The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power. Article I, Section 4.

Oklahoma: The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the

Legislature from regulating the carrying of weapons. Article 2, Section 26.

Oregon: The people shall have the right to bear arms for the defence of themselves, and the State, but the Military shall be kept in strict subordination to the civil power. Article I, Section 27.

Pennsylvania: The right of the citizens to bear arms in defence of themselves and the State shall not be questioned. Article I, Section 21.

Rhode Island: The right of the people to keep and bear arms shall not be infringed. Article I, Section 22.

South Carolina: 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. As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it. No soldier shall in time of peace be quartered in any house without the consent of the owner nor in time of war but in the manner prescribed by law. Article I, Section 20.

South Dakota: The right of the citizens to bear arms in defense of themselves and the state shall not be denied. Article VI, Section 24.

Tennessee: That the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime. Article I, Section 26.

Texas: Every citizen shall have the right to keep and bear arms in the lawful defence of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime. Article I, Section 23.

Utah: The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the State, as well as for the other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms. Article I, Section 6.

Vermont: That the people have a right to bear arms for the defence of themselves and the State -- and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power. Chapter I, Article 16.

Virginia: That a well regulated militia, composed of the

body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power. Article I, Section 13.

Washington: The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men. Article I, Section 24.

West Virginia: A person has the right to keep and bear arms for the defense of self, family, home, and state, and for lawful hunting and recreational use. Article III, Section 22.

Wyoming: The right of citizens to bear arms in defense of themselves and of the state shall not be denied. Article I, Section 24.

STATES WITHOUT CONSTITUTIONAL PROVISIONS:

Nine (9) states do not have a constitutional provision on arms: California, Delaware, Iowa, Maryland, Minnesota, Nebraska, New Jersey, New York, and Wisconsin.

STATE OF ALASKA

Bill Sheffield, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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RECEIVED
MAR 26 1986
Dept. of Law
Administration

March 26, 1986

The Honorable Vic Fischer
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: S.J.R. 39

Dear Senator Fischer:

You have asked for the Department of Law's comments upon the current language of S.J.R. 39, a resolution proposing an amendment to Article I, sec. 19 of the state constitution, relating to a citizen's right to keep and bear arms. As I understand it, S.J.R. 39, as amended on the Senate floor yesterday, provides that art. I, sec. 19 of the Alaska Constitution will be amended to read:

> SECTION 19. RIGHT TO KEEP AND BEAR ARMS. The [A WELL-REGULATED MILITIA BEING NECESSARY TO THE SECURITY OF A FREE STATE, THE] right of each citizen of the state [THE PEOPLE] to keep and bear arms for lawful defense of self, family, property, and the state and for lawful hunting, recreation, and other lawful purposes, shall not be infringed by a state or by a borough or city of the state.

We are concerned that the language presently contained in S.J.R 39 might allow later constitutional challenge to some existing state statutes. Present law, for example, prohibits a convicted felon from possessing a concealable firearm, prohibits possession of certain weapons such as bombs, hand grenades, silencers, and sawed-off shot guns, prohibits possession of a firearm while intoxicated, or the discharge of a firearm from, on, or across a highway, the carrying of a concealed weapon, possession of a loaded firearm on licensed premises, or possession of a firearm by a minor without parental consent. (See AS 11.61.200-.220.)

These statutes serve an important public safety function by carefully regulating the possession of especially dangerous weapons or weapons carried in an especially dangerous manner or place. If the legislature does not intend to render

these statutes unenforceable, nor to foreclose a future legislature from adopting similar provisions (prohibiting possession of loaded firearms in a church or on school grounds, for example), then the legislature's intent to continue to allow reasonable regulation by law should be made clear. The possibility that the language proposed in S.J.R. 39 could be interpreted as invalidating some portions of Alaska's present criminal code is a real one. See, for example, State v. Kessler, 614 P.2d 94 (Ore. 1980), and State v. Delgado, 692 P.2d 610 (Ore. 1984).

We believe that any possible ambiguity could be eliminated by the addition, at the end of the current language, of the phrase "except that the manner of keeping and bearing arms may be regulated by law." This suggested language is based upon similar provisions in the constitutions of several other states, including Florida (art. I, sec. 8), Georgia (art. I, sec. 1), and Utah (art. I, sec. 6). The addition of this clause would make it clear that, although a citizen's basic right to keep and bear arms may not be infringed, reasonable and appropriate regulation of the manner in which arms are kept or borne (i.e., possession by felons, by minors, in a bar, while intoxicated, etc.) is not an infringement on an individual's constitutional right. Mr. Rupe Andrews, Alaska Field Representative for the National Rifle Association, has indicated that his organization would not object to the inclusion of this additional language in S.J.R. 39. I also suggest that you consider retaining the language in the present constitutional provision "the people," rather than change it to "each citizen of the state." State constitutional provisions have traditionally recognized the equal rights of all residents of the state, regardless of the resident's national origin.

A carefully drafted amendment would minimize the possibility that, should the proposed constitutional amendment be adopted, a criminal defendant would later be able to argue that a criminal weapons misconduct statute is unconstitutional because it violates his right to keep and bear arms under art. I, sec. 19 of the state constitution.

Sincerely,

Harold M. Brown
Attorney General

HMB:GAH:gb-13

COMMENTARY ON PROPOSED AMENDMENT TO ALASKA RIGHT TO BEAR ARMS GUARANTEE

Article I, Section 19 of the Constitution of Alaska would be amended to read as follows:

> The right of each citizen of the state to keep and bear arms for personal defense and for the defense of family, property, and the state and for lawful hunting, recreation, and other lawful purposes shall not be infringed by the state or by a borough or city of the state.

This proposal guarantees a broad individual right and explicitly protects the traditional rights that gun owners in Alaska always assumed were guaranteed. The Alaska proposal is a blending of the New Mexico, Nevada, New Hampshire, North Dakota, Colorado, Mississippi, Missouri, Montana, Oklahoma, and Utah guarantees.

I. TO WHOM THE RIGHT BELONGS

This guarantee would belong to the citizen of the state. Citizenship includes the full enjoyment of all rights and privileges. The full enjoyment of all rights and privileges is obviously not enjoyed by certain groups, including the following: convicted felons, lunatics, and illegal aliens. This principle of law is so well established that commentators only mention it briefly in passing. See Dowlut & Knoop, State Constitutions and the Right to Keep and Bear Arms, 7 Okl. City Univ. L.Rev. 177, 191 (1982). See also State v. Kessler, 289 Or. 359, 614 P.2d 94, 99 (1980).

II.
WHAT CONSTITUTES ARMS

Constitutionally protected arms are those arms that are commonly kept by the people. The people of Alaska commonly keep and bear rifles, shotguns, pistols, revolvers, edged weapons, hatchets, and clubs. They do not possess weapons that are exclusively used by the military or weapons of mass destruction. Therefore, bombs, poison gas, or cannons do not come under the umbrella of the constitutional guarantee.

III.
THE RIGHT TO KEEP AND BEAR ARMS

Arms may be kept or borne for defensive, recreational, and other traditional lawful purposes. Alaska's frontier tradition is to carry arms openly. See Nunn v. State. 1 Ga. (1 Kel.) 243 (1846); State v. Kerner, 181 N.C. 574, 107 S.E. 222 (1921); Glasscock v. City of Chattanooga, 157 Tenn. 518, 11 S.W.2d 678 (1928); City of Las Vegas v. Moberg 485 P.2d 737 (N.M. App. 1971); City of Lakewood v. Pillow, 180 Colo. 20, 501 P.2d 744 (1972). The concealed carrying of arms may be prohibited in a public place. The state may require the obtaining of a license to carry an arm concealed. However, a concealed carrying license statute would have to be equitably administered. See Schubert v. DeBard, 73 Ind. Dec. 510, 398 N.E.2d 1339 (Ind. App. 1980).

The constitutional purpose for bearing arms would not be frustrated by a prohibition on carrying arms while drunk, to a polling place, court, public assembly, or in a manner calculated to inspire terror. The keeping or bearing of arms in the home or

place of business may be either open or concealed, keeping the castle doctrine in mind and the purpose of protecting a place of business.

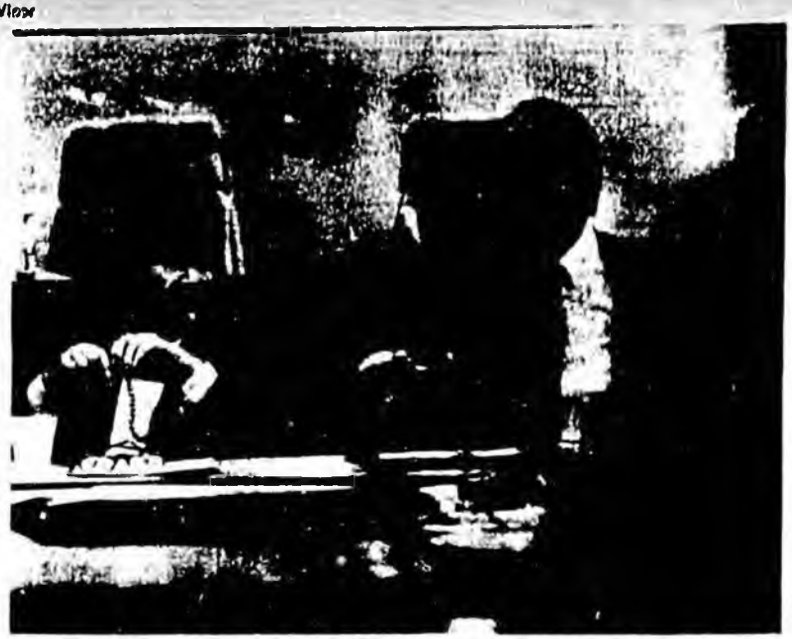
IV.
THE RIGHT SHALL NOT BE INFRINGED BY THE STATE OR ANY SUBDIVISION THEREOF

Neither the State nor any subdivision of the state could prevent the people from keeping or bearing constitutionally protected arms within the perimeters of the constitutional guarantee. Laws forbidding the sale of arms or ammunition, or preventing the repair, bearing, or keeping of constitutionally protected arms, laws requiring a license to possess or acquire arms, or the payment of special taxes, or requiring registration would be an infringement on the right to keep and bear arms. The guarantee would also provide for uniformity throughout the state. This would be a form of preemption. Units of local government could only enact legislation which was absolutely necessary and uniquely necessary for a unit of local government. Therefore, a city or village could regulate the discharge of firearms within its boundaries without infringing the right to keep and bear arms.

V.
CONCLUSION

The proposal guarantees the fundamental right of a citizen to keep and bear arms for traditional purposes. This right may not be infringed. The misuse of arms falls outside the boundaries of the constitutional guarantee. The types of

misconduct that the legislature may forbid and punish are well-known and self-evident; examples include using arms to rob, harass, intimidate, or recklessly endanger someone, shooting in an unsafe place or manner, and poaching. Therefore, this proposal will not hinder the legislature in performing its duty to punish the misuse of arms.



Attorney General Grace Berg Schaible, left, and UAA official Lee Gorsuch met in Kenai last week.

Group eyes gun control for Alaska

There may be a need for a cool-down period in the purchase of guns in Alaska, but members of the state's Criminal Justice Operations Group are afraid that the National Rifle Association and grassroots sentiment against gun control in Alaska make such legislation unlikely.

The members of the group held their monthly meeting last week at Kenai City Hall.

Clipped to their agendas for the meeting was a newspaper report of the Anchorage shooting case in which William O'Shea, who was under a court domestic order to leave Renee Vega alone, stands accused of killing her with a handgun he bought a short while before the shooting occurred at a local store.

Many people see this as a case where a "cooling-off period" might have helped, said Larry Weeks, head of the Department of Law's Criminal Division. But, he said, "that's a big step in this state to sort of take a position on something like this."

Some states have laws that require gun buyers to wait a few days after purchase to pick up the weapon.

Art English, commissioner of the Department of Safety, said that "the NRA has already put me on notice" regarding gun legislation. He said the NRA's national lobby will probably aim for legislation in the next Alaska Legislature to seek banning restrictions on firearms.

English said he agreed with Weeks that a cool-down period might have helped in a case like the Vega killing, but "it's going to be darn tough" to achieve. He added later that he was also unconvinced that it would work.

Myra Munson, commissioner of Health and Social Services, suggested that it might be possible to deal with NRA pressures in the context of a "horror story" like the Vega case. She said the state should consider introducing legislation so that it would be on the pro end of a resulting public debate, rather than let the NRA initiate proposals and place the state in the negative position of attacking the bills.

Dana Fabe, head of the Public Defender Agency, said legislation might achieve two protections: postponing the effects of immediate anger and allowing time for a routine check of an individual's record before giving that person possession of a gun.

Weeks seemed to agree, saying that the best defense might be a good offense. "They can tell me I'm wrong all day, but they're not going to convince me," he said. "I can get shot at by those people all day."

He added that O'Shea had a record of two felony convictions and "at least half a dozen misdemeanors" when he bought the gun.

However, Weeks went on to suggest that the group consider nothing more than exploration of the idea at this time. "Before we take a position for the administration, we better make sure the administration is involved in all this," he said.

John Havelock, an ex-attorney general who is the group's coordinator, and English expressed strong reservations about any such legislation having a chance of becoming law in Alaska. English said that the opposition, including the NRA, makes politicians afraid of gun control.

Attorney General Grace Berg Schaible was more optimistic, saying, "There is an increasing body of people who are concerned about the Saturday night specials (small handguns)."

Fabe said, "You need 'Mothers Against Saturday Night Specials'," or some such strong grassroots support.

Duane Udland, outgoing Soldotna chief of police, agreed about the strength of the opposition. "I think the NRA is going to flood this state... They've got a lot of arguments about these things with a lot of common sense about why these things don't work," he said.

The group took no action on the matter. English said, "The stands we take, we want to make darn sure we want to take."

The Criminal Justice Operations Group is more of an administration intercommunications and brainstorming group than an action group, but Havelock, after the meeting, said its discussions often lead to consensus or action later on.

The group did go on record last year, he said, in unanimous opposition to an NRA proposal for a constitutional amendment against gun control.

Taking a last look back at the O'Shea case as Monday's group meeting ended, Munson said that the nature of the case meant that "somebody's got to be blamed." But she said the NRA would make certain the public debate is not framed around the idea that there is a need for a cooling-off period in gun sales.

No representatives of the NRA spoke at the meeting.