HB

408

<target><bill>HB 408</bill><subject>HB 408</subject><comm>HFIN26</comm></target>

1975

Alaska State Legislature
House Judiciary Committee

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Chairman
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Sponsor Statement
HB408 "An Act relating to misconduct involving weapons"

Under Alaska law, an individual who has been convicted of a felony can carry hand guns and have their right to bear arms restored by any of three occurrences: (1) a pardon, (2) the underlying conviction having been set aside under AS 12.55.085, or (3) by the passage of ten years time from an unconditional discharge.

However, the U.S. Supreme Court in the case of *Caron v. U.S.*, 524 U.S. 308 (1988), ruled that if a person who has been previously convicted of a felony is prohibited from possessing firearms, in any way, under state law, then they are prohibited from possessing firearms under federal law.

While under state law a previously convicted ex-felon's right to possession of firearms is fully restored, there are still limitations on carrying concealed weapons. Ex-felons can carry concealed on their own property, while engaged in lawful hunting, fishing, or trapping, or while engaged in other lawful activities that necessarily involves the carrying of a weapon for personal protection.

However, the ATF and the FBI are interpreting Alaska's statute to be a restriction upon possession. Due to this interpretation, Alaskans who under state law are allowed to possess firearms are being threatened with prosecution for serious Federal offenses.

This bill addresses the language in AS 11.61.200, Misconduct Involving Weapons in the Third Degree. AS 11.61.200(a)(12) bars all people convicted of felonies from caring concealed weapons, while AS 11.61.200(g) sets out exemptions to (a)(12)'s blanket ban.

The Alaska State Legislature has made its own policy decision about how to handle the gun rights of ex-felons; however the Federal Government has stripped Alaska of the right to make its own judgments, excepting an all-or-nothing decision on gun rights for ex-felons. HB408 is one of many bills that have been drafted in this legislation session to bring this issue back before the Alaska State Legislature for consideration.

Representative_Jay_Ramras@legis.state.ak.us

HOUSE COMMITTEE REPORT

(11)
Date Referred to Committee: March 26, 2010 **FURTHER REFERRALS:**

Date of Committee Action: 4/8/10

The FINANCE Committee considered: **HOUSE BILL NO. 408**

"An Act relating to misconduct involving weapons."

HB 408-MISCONDUCT INVOLVING WEAPONS

Recommends it be replaced with [ ] HCS *or* [X] CS *for* HB 408 (JUD)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[X] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
DHS
LWF
LAW
LEG
MVA
DNR
DPS
REV
DOT
UA

***NEW* FISCAL NOTES**
*Assigned by Chief Clerk's Office

List by Dept(s):	*FN#	Fiscal	Indet.	Zero

***PREVIOUS* FISCAL NOTES**

List by Dept(s):	FN#	Fiscal	Indet.	Zero
LAW	1			✓
DPS	2			✓

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	Thomas	✓			
	Gara	✓			
	DOOGAN	✓			
	Joule	✓			
	FOSTER	✓			
	KELLY	✓			
	Salmon	X			
Chair:	Stoltze	✱			
Chair:	Hawker	✱			

FISCAL NOTE

STATE OF ALASKA
2010 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: CSHB 408(JUD)
(H) Publish Date: 3/26/10

Identifier (file name): HB408-LAW-CRIM-03-08-10
Title: An Act relating to misconduct involving weapons.
Sponsor: Judiciary
Requester: Judiciary

Dept. Affected: Law
RDU: CRIMINAL
Component: Criminal Justice Litigation
Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2011**	**FY 2011**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**
Personal Services							
Travel							
Contractual							
Supplies							
Equipment							
Land & Structures							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES ( )							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2010) cost:

POSITIONS

Full-time							
Part-time							
Temporary							

ANALYSIS: *(Attach a separate page if necessary)*

HB 408 proposes amendments to the law relating to misconduct involving weapons in the third degree. It changes the affirmative defense, for example, to the crime of a felon in possession of a concealable weapon. Under current law it is an affirmative defense to this charge if the person had received a pardon, the conviction was set aside, or 10 years had elapsed from the felony conviction and the felony conviction was not a crime against a person. The bill would provide that the crime of felon in possession of a concealable weapon would not apply to these persons, rather than that the circumstances give rise to an affirmative defense. Enactment of the bill is not anticipated to fiscally impact the Department of Law.

Prepared by: Eileen Donahue, Division Operations Manager
Division: Administrative Services
Phone 465-5427
Date/Time 3/8/10 12:20 PM

Approved by: Daniel S. Sullivan, Attorney General
Department of Law
Date 3/8/2010

(Revised 11/6/2009 OMB)

FISCAL NOTE

STATE OF ALASKA
2010 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: CSHB 408(JUD)
(H) Publish Date: 3/26/10

Identifier (file name): HB408-DPS-AST-03-12-10
Title "An act relating to misconduct involving weapons."
Sponsor House Judiciary
Requester House Judiciary

Dept. Affected: Public Safety
RDU Alaska State Troopers
Component AST Detachments
Component Number 2325

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2011**	**FY 2011**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**
Personal Services							
Travel							
Contractual							
Supplies							
Equipment							
Land & Structures							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES ( )							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2010) cost: 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

ANALYSIS: *(Attach a separate page if necessary)*

This legislation would amend AS 11.61.200(b) and repeal (f) and (g), (misconduct involving weapons in the third degree). This bill changes language from one that currently provides an affirmative defense to prosecution, to one that states this statue "does not apply" if certain qualifiers exist.

Passage of this legislation will have no fiscal impact on the department.

Prepared by: Lt. Rodney Dial
Division Alaska State Troopers
Phone 907-247-4480
Date/Time 3/12/10 10:50 AM

Approved by: Joseph Masters, Commissioner
Department of Public Safety
Date 3/12/2010

(Revised 11/6/2009 OMB)

West's Alaska Statutes Annotated Currentness
Title 11. Criminal Law
Chapter 61. Offenses Against Public Order
Article 2. Weapons and Explosives

→§ 11.61.200. Misconduct involving weapons in the third degree

(a) A person commits the crime of misconduct involving weapons in the third degree if the person

(1) knowingly possesses a firearm capable of being concealed on one's person after having been convicted of a felony or adjudicated a delinquent minor for conduct that would constitute a felony if committed by an adult 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 controlled substance 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;

(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;

(7) violates AS 11.46.320 and, during the violation, possesses on the person a firearm when the person's physical or mental condition is impaired as a result of the introduction of an intoxicating liquor or controlled substance into the person's body;

(8) violates AS 11.46.320 or 11.46.330 by entering or remaining unlawfully on premises or in a propelled vehicle in violation of a provision of an order issued or filed under AS 18.66.100-18.66.180 or issued under former AS 25.35.010(b) or 25.35.020 and, during the violation, possesses on the person a defensive weapon or a deadly weapon, other than an ordinary pocketknife;

(9) communicates in person with another in violation of AS 11.56.740 and, during the communication, possesses on the person a defensive weapon or a deadly weapon, other than an ordinary pocketknife;

(10) resides in a dwelling knowing that there is a firearm capable of being concealed on one's person or a prohibited weapon in the dwelling if the person 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, unless the person has written authorization to live in a dwelling in which there is a concealable weapon described in this paragraph from a court of competent jurisdiction or from the head of the law enforcement agency of the community in which the dwelling is located;

(11) discharges a firearm from a propelled vehicle while the vehicle is being operated in circumstances other than described in AS 11.61.190(a)(2); or

(12) knowingly possesses a firearm that is concealed on the person after having been convicted of a felony or adjudicated a delinquent minor for conduct that would constitute a felony if committed by an adult by a court of this state, a court of the United States, or a court of another state or territory.

(b) It is an affirmative defense to a prosecution

(1) under (a)(1) of this section that

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

(B) 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

(C) a period of 10 years or more has elapsed between the date of the person's unconditional discharge on the prior offense or adjudication of juvenile delinquency and the date of the violation of (a)(1) of this section, and the prior conviction or adjudication of juvenile delinquency did not result from a violation of AS 11.41 or of a similar law of the United States or of another state or territory;

(2) under (a)(2) or (10) of this section that

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

(B) 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

(C) a period of 10 years or more has elapsed between the date of the person's unconditional discharge on the prior offense and the date of the violation of (a)(2) or (10) of this section, and the prior conviction did not result from a violation of AS 11.41 or of a similar law of the United States or of another state or territory.

(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) It is an affirmative defense to a prosecution under (a)(11) of this section that the person was using a firearm while hunting, trapping, or fishing in a manner not prohibited by statute or regulation.

(e) The provisions of (a)(3) and (11) of this section do not apply to a peace officer acting within the scope and authority of the officer's employment.

(f) For purposes of (a)(12) of this section, a firearm on a person is concealed if it is covered or enclosed in any manner so that an observer cannot determine that it is a firearm without removing it from that which covers or encloses it or without opening, lifting, or removing that which covers or encloses it. A firearm on a person is not concealed if it is unloaded and is encased in a closed container designed for transporting firearms.

(g) It is an affirmative defense to a prosecution under (a)(12) of this section that

(1) either

(A) the defendant convicted of the prior offense on which the action is based received a pardon for that convic-

tion;

(B) 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

(C) a period of 10 years or more has elapsed between the date of the defendant's unconditional discharge on the prior offense or adjudication of juvenile delinquency and the date of the violation of (a)(12) of this section, and the prior conviction or adjudication of juvenile delinquency did not result from a violation of AS 11.41 or of a similar law of the United States or of another state or territory; and

(2) at the time of possession, the defendant was

(A) in the defendant's dwelling or on land owned or leased by the defendant appurtenant to the dwelling; or

(B) actually engaged in lawful hunting, fishing, trapping, or other lawful outdoor activity that necessarily involves the carrying of a weapon for personal protection.

(h) 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; or

(iv) grenade;

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

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

(D) 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.

(i) Misconduct involving weapons in the third degree is a class C felony.

CREDIT(S)

SLA 1978, ch. 166, § 7; SLA 1990, ch. 63, § 1; SLA 1990, ch. 189, § 1; SLA 1991, ch. 59, §§ 4--6; SLA 1991, ch. 64, § 3; SLA 1992, ch. 79, §§ 11--14; SLA 1994, ch. 113, §§ 2, 3; SLA 1996, ch. 60, § 4; SLA 1996, ch. 64, § 7; SLA

1998, ch. 1, §§ 1, 2.

CROSS REFERENCES

Attempt, classification of offenses, see § 11.31.100.
Classification of offenses, see § 11.81.250.
Felonies, sentence of imprisonment, see § 12.55.125.
Fines, see § 12.55.035.
Legal accountability based upon the conduct of another, see §§ 11.16.110 and 11.16.120.
Offenses defined by statute, see § 11.81.220.
Prior convictions, effect on sentencing, see § 12.55.145.
Restitution and compensation, see § 12.55.045.
Victims of crimes, rights, see § 12.61.010 et seq.

LAW REVIEW AND JOURNAL COMMENTARIES

Compelling testimony in Alaska: The coming rejection of use and derivative use immunity. Jeffrey M. Feldman and Stuart A. Ollanik. 3 Alaska L. Rev. 229 (December 1986).

LIBRARY REFERENCES

Explosives 4.
Weapons 4 to 15.
Westlaw Key Number Searches: 164k4; 406k4 to 406k15.
C.J.S. Explosives §§ 9 to 14, 20, 22, 26, 31.
C.J.S. Weapons §§ 9 to 27, 29 to 30, 37 to 48.

UNITED STATES CODE ANNOTATED

Drive by shooting, federal crimes and offenses, see 18 U.S.C.A. § 36.

Explosives and other dangerous articles, federal crimes and offenses, see 18 U.S.C.A. § 831 et seq.; 18 U.S.C.A. § 841 et seq.

Firearms and weapons offenses, federal crimes and offenses, see 18 U.S.C.A. § 921 et seq.

UNITED STATES SUPREME COURT

Weapons offenses,

Possession of firearm by convicted felons, misdemeanor crime of domestic violence, domestic relationship as element of predicate offense, see U.S. v. Hayes, 2009, 129 S.Ct. 1079, 172 L.Ed.2d 816.

Use of firearm, firearm traded for drugs, see Watson v. U.S., 2007, 128 S.Ct. 579, 552 U.S. 74, 169 L.Ed.2d 472.

NOTES OF DECISIONS

1/2. Validity

Statute that prohibited a convicted felon from possessing a concealable firearm did not violate Alaska Constitution's provision guaranteeing an individual's right to keep and bear arms. Wilson v. State, 2009, 2009 WL 1424468. Weapons 3

1. Validity of prior laws

Term "gravity knife," which is included as prohibited weapon under statute making it a felony to possess such weapon, is not unconstitutionally vague; "gravity knife" is commonly understood as knife in which blade opens, falls into place, or is ejected into position by force of gravity or by centrifugal force, and "gravity knife" is included in statute in conjunction with switchblade knife, thus providing ordinary person with notice that "gravity knife" must be similar to switchblade in operating automatically or semiautomatically. AS 11.61.200(e)(1)(D). State v. Weaver, 1987, 736 P.2d 781. Weapons 3

2. In general

Legislature has considerable discretion in creating classifications denoting which former felons can possess firearm and classifications need not be perfect. AS 11.61.200(b); Const. Art. 1, § 6. McCracken v. State, 1987, 743 P.2d 382, dismissal of habeas corpus reversed 985 F.2d 573. Weapons 2

3. Equal protection

Statute defining misconduct involving weapons in the first degree, requiring passage of five years from unconditional discharge on prior felony offense before a person can possess firearm, did not violate equal protection clause of State Constitution, even though statute provided that receipt of pardon for prior conviction or having conviction set aside was affirmative defense. AS 11.61.200(b); Const. Art. 1, § 6. McCracken v. State, 1987, 743 P.2d 382, dismissal of habeas corpus reversed 985 F.2d 573. Constitutional Law 3234; Weapons 3

4. Due process

State did not deny defendant due process under Alaska Constitution by convicting him on a felon in possession charge even though his underlying conviction was reversed on constitutional grounds. AS 11.61.200(a)(1). Clark v. State, 1987, 739 P.2d 777. Constitutional Law 4509(25)

In prosecution of an ex-convict for possessing a concealable weapon, State was not required, as a matter of due process, to establish defendant's awareness of statute prohibiting such conduct. U.S.C.A. Const.Amend. 14. Afcan v. State, 1986, 711 P.2d 1198. Constitutional Law 4694

5. Double jeopardy

Conviction in the Court of the Municipal Magistrate of Anchorage, Alaska, of the crime of carrying a concealed weapon, in violation of an ordinance of that city did not bar prosecution on the same facts under Alaska statute forbidding persons convicted of a felony involving assault and like crimes from carrying firearms capable of being concealed upon the person. Act March 3, 1899, §§ 107, 143, 146, 147, 30 Stat. 1296, 1301; U.S.C.A.Const. Amend. 5; Laws Alaska 1947, c. 70. U.S. v. Farwell, 1948, 11 Alaska 507, 76 F.Supp. 35. Double Jeopardy 187

6. Right of association

Statute prohibiting felon from residing in dwelling with knowledge that concealable firearm was kept there, unless permission had been given by court or local law enforcement, did not infringe upon felon's First Amendment right of association by prohibiting felon from living with his family, absent assertion that stepson who owned gun was unwilling to keep gun elsewhere or that felon had ever applied to court or law enforcement for permission to reside in dwelling with gun. U.S.C.A. Const.Amend. 1; AS 11.61.200(a)(10). Morgan v. State (1997) Alaska App., 943 P.2d 1208, denial of habeas corpus affirmed 242 F.3d 382. Constitutional Law 1443; Weapons 3

7. Right to keep and bear arms

Statute prohibiting felon from residing in dwelling with knowledge that concealable firearm was kept there, unless permission had been given by court or local law enforcement, does not violate right to keep and bear arms, guaranteed by state constitution. Const. Art. 1, § 19; AS 11.61.200(a)(10). Morgan v. State (1997) Alaska App., 943 P.2d 1208, denial of habeas corpus affirmed 242 F.3d 382. Weapons 3

8. Right to privacy

Statute which makes possession of "gravity knife" in one's home a felony does not violate right to privacy under State Constitution; legislature may properly prohibit possession of object which interferes in serious manner with health, safety, rights, and privileges of others, or with public welfare. AS 11.61.200(a)(3); Const. Art. 1, § 22. State v. Weaver, 1987, 736 P.2d 781. Constitutional Law 1225; Weapons 3

9. Nature and elements of offense

The state forbidding persons convicted of a felony involving assault and like crimes from carrying firearms capable of being concealed upon the person did not forbid consideration of felony committed in Oregon seven years earlier, the statute being otherwise valid. Laws Alaska 1947, c. 70. U.S. v. Farwell, 1948, 11 Alaska 507, 76 F.Supp. 35. Weapons 6

A .45 caliber Colt Automatic pistol was a "firearm capable of being concealed upon the person" within statute forbidding persons convicted of felony involving assault and like crimes from carrying a "firearm capable of being concealed upon the person." Laws Alaska 1947, c. 70. U.S. v. Farwell, 1948, 11 Alaska 507, 76 F.Supp. 35. Weapons 8

Defendants who either have entered guilty plea or have been found guilty of felony at trial are "convicted of a felony" for purposes of the felon in possession of a firearm statute. AS 11.61.200(a)(1). Brant v. State (1999) Alaska App., 992 P.2d 590. Weapons 4

Felon can be convicted of violating statute prohibiting felon from residing in dwelling with knowledge that concealable firearm is kept there unless permission has been given by court or local law enforcement, even if felon was unaware of statute; it is widely known that felons are subject to variety of legal disabilities and restrictions, which thus makes it reasonable to hold felons to duty of inquiry concerning such restrictions. AS 11.61.200(a)(10), 11.81.620(a). Morgan v. State (1997) Alaska App., 943 P.2d 1208, denial of habeas corpus affirmed 242 F.3d 382. Weapons 4

Belated set aside of conviction, following completion of probation on suspended imposition of sentence, related back to date defendant was discharged from probation and, thus, previous conviction could not be used as basis for subsequent conviction of possessing weapon after having been previously convicted of felony. AS 11.61.200, 12.55.085; Rules Crim.Proc., Rules 11(h)(2), 35.2. Hansen v. State, 1992, 824 P.2d 1384. Weapons 4

Butterfly knife is not "switchblade or gravity knife" and therefore does not qualify as prohibited weapon. AS 11.61.200(a)(3), (e)(1)(D). Jacobson v. State, 1990, 786 P.2d 388. Weapons 4

"Butterfly" or "balisong knife" was not "switchblade" or "gravity knife" for purposes of statute making it felony to possess prohibited weapon which is defined to include switchblade or gravity knife. AS 11.61.200(a)(3), (e)(1)(D). State v. Strange, 1990, 785 P.2d 563. Weapons 4

Convicted felon's possession of partner's handgun for less than one-half hour for purpose of pawning it constituted "possession" within meaning of felon-in-possession statute. AS 11.61.200(a)(1). Baker v. State, 1989, 781 P.2d 1368. Weapons 4

Prosecution was not required to prove that defendant had notice or knowledge that his conduct in possessing firearm constituted crime in order to convict defendant of misconduct involving weapons in the first degree. AS 11.61.200(a)(1). McCracken v. State, 1987, 743 P.2d 382, dismissal of habeas corpus reversed 985 F.2d 573. Weapons 4

Defendant violated felon in possession law by possessing a concealable firearm while underlying conviction was on appeal, notwithstanding that underlying conviction was later reversed. AS 11.61.200(a)(1). Clark v. State, 1987, 739 P.2d 777. Weapons 4

In prosecution of an exconvict for possessing a concealable weapon, State was not required to establish defendant's awareness of statute prohibiting such conduct. AS 11.81.620(a). Afcan v. State, 1986, 711 P.2d 1198. Weapons 4

Defendant could be convicted of being a felon in possession of a concealable firearm while predicate conviction was on appeal and sentence stayed. AS 11.61.200(a)(1). Berg v. State, 1985, 711 P.2d 553. Weapons 4

Guilt of possession of gun by felon does not require actual possession and custody or control is sufficient, but knowledge is prerequisite to possession, control or custody. AS 11.55.030. Davis v. State, 1972, 499 P.2d 1025, certiorari granted 93 S.Ct. 1392, 410 U.S. 925, 35 L.Ed.2d 586, reversed 94 S.Ct. 1105, 415 U.S. 308, 39 L.Ed.2d 347. Weapons 4

Weapon is "concealed" if it is hidden from ordinary observation, and need not be absolutely invisible to other persons. AS 11.55.030. McKee v. State, 1971, 488 P.2d 1039. Weapons 10

10. Defenses

Applicant whose prior felony conviction was pardoned by governor would not have affirmative defense to unlawful possession of firearm by convicted felon, and thus, applicant was not eligible for permit to carry concealed weapon under state law, in that he would be subject to criminal liability if he carried concealed handgun in any place outside his dwelling or land appurtenant to dwelling or carried handgun while not engaged in lawful hunting, fishing or trapping, or other lawful activity. Gabrielle v. State, Dept. of Public Safety (2007) Alaska, 158 P.3d 813. Weapons 12

Defendant's alleged reliance on fact that probation officer failed to inform him of statute prohibiting felon from residing in home in which concealable firearm was kept did not present sufficient basis to assert statutory mistake-of-law defense to prosecution for violation of weapons statute. AS 11.61.200(a)(10), 11.81.420(a), (b)(1). Morgan v. State (1997) Alaska App., 943 P.2d 1208, denial of habeas corpus affirmed 242 F.3d 382. Criminal Law 32

Defendant's personal belief that he was not convicted for purposes of the felon in possession statute during the pendency of the appeal of the underlying conviction was not sufficient to establish the defense of mistake of law. AS 11.61.200(b)(1-3). Clark v. State, 1987, 739 P.2d 777. Criminal Law 32

Affirmative defenses provided under felon in possession statute arise only when the actions described therein occurred before the felon in possession offense was committed. AS 11.61.200(b)(1-3). Clark v. State, 1987, 739 P.2d 777. Weapons 4

11. Attorney discipline

Federal crime of aiding and abetting a convicted felon and mental defective in receiving ammunition is a "serious crime" within meaning of bar rule, which provides that an attorney convicted of a serious crime shall be suspended from practice pending final disposition of a disciplinary proceeding and which defines a "serious crime," in part, as including any crime that would be a felony in state, though state does not specifically prohibit furnishing ammunition to a convicted felon. State Bar Rules, rules 12, 16(c), 23, 23(d); 18 U.S.C.A. §§ 2, 922(h); AS 11.55.030, 12.15.010. Matter of Robson, 1978, 575 P.2d 771. Attorney And Client 39

12. Arrest

Police officer had probable cause for warrantless seizure and search of contents of plastic box containing crack cocaine, which was found on defendant's person during search incident to arrest for possessing firearm while intoxicated; officer's knowledge that type of glass pipe found on defendant was commonly used to smoke cocaine and that people who smoke cocaine and possess pipe usually carry cocaine, furnished probable cause for arrest of defendant for un-

lawful possession of drugs as well as probable cause for search of contents of plastic box for cocaine, and officer's observations of defendant's erratic behavior while possessing firearm, provided probable cause for officer to believe that defendant was high and thus to search defendant's person for cocaine. AS 11.61.200(a)(1), 11.71.040(a)(3)(A). Snider v. State (1998) Alaska App., 958 P.2d 1114. Arrest 71.1(6)

Where officer knew that hand guns and ammunition had been taken in recent burglary committed near where defendant was walking, he knew defendant had a criminal record, the hour was late, protrusions in defendant's coat were unusual and the position of his hand suggested that he was carrying a hand gun, officer was justified in stopping defendant and, when defendant kept his hand positioned so as to suggest that he was carrying unholstered gun, a search of defendant was also proper and gun uncovered by search should not be suppressed. AS 11.20.100, 11.55.010, 11.55.03 (Repealed); Const. Art. 1, § 14. Ozenna v. State, 1980, 619 P.2d 477. Arrest 63.5(5); Arrest 63.5(8)

13. Joint or separate trial

Trial judge did not abuse his discretion in denying defendant's motion for severance filed on morning of trial on ground that it was not timely where misconduct involving weapons in first degree was properly joined to kidnapping and other charges since all the charges were based on the same act or transaction, severance of the misconduct involving weapons charged would have resulted in essentially the same evidence being presented twice to two different juries, defendant made no showing that his failure to move for a severance was in any way related to State's misconduct in making late discovery, there was no claim that counsel obtained any new information which would justify failure to move for severance at earlier time and where it appeared that there could have been strategic reasons for the fact that defendant did not make his motion to sever at an earlier time. Rules Crim.Proc., Rules 8(a), 12(b, c, e), 16(f)(3); AS 11.41.200(a)(1, 3), 11.61.200(a). Wortham v. State, 1984, 689 P.2d 1133. Criminal Law 620(7)

Joint trial of defendant for not only crimes of burglary and larceny but also the crime of possession, by a person convicted of felony, of a firearm capable of being concealed on person was not so prejudicial as to require reversal of judgment and ordering of separate trials where jury was not told nature of prior conviction involved possession of firearm count and there was nothing inflammatory about way fact of prior conviction was presented to jury. Mead v. State, 1968, 445 P.2d 229, certiorari denied 90 S.Ct. 117, 396 U.S. 855, 24 L.Ed.2d 104. Criminal Law 1166(6)

14. Pleas

Refusing to let defendant withdraw guilty plea to charge of possessing weapon after having been convicted of felony was error given that defendant was entitled to set aside of previous conviction after completing probation on suspended imposition of sentence, and defendant was misinformed by his attorney when defendant entered his plea. AS 11.61.200; Rules Crim.Proc., Rules 11(h)(2), 35.2. Hansen v. State, 1992, 824 P.2d 1384. Criminal Law 274(4); Criminal Law 274(8)

15. Admissibility of evidence

Trial judge acted within his discretion, during prosecution for possession of altered firearm, in permitting police officer to testify as to why serial number would be removed from firearm; officer's testimony was not speculative, but was instead based on her experience and training with handguns. AS 11.61.200(a)(6). Collins v. State (1999) Alaska App., 977 P.2d 741. Criminal Law 474.5; Criminal Law 476.1

Evidence of defendant's prior conviction was admissible in prosecution for misconduct involving weapon, even though defendant had conceded existence of prior felony conviction and that his prior conviction precluded him from possessing concealable firearm, as jury had legitimate right to be informed of all elements of crime charged and of proof bearing on those elements so that jurors would not be misled to think that they were being asked to convict

defendant for mere possession of firearm. AS 11.61.200(a)(1); Rules of Evid., Rule 404(b)(1). State v. McLaughlin, 1993, 860 P.2d 1270. Criminal Law 661

Any error in trial court's failure to withhold from jury evidence of defendant's prior convictions in light of his proffered stipulation, for purposes of charge of misconduct involving weapons in first degree, that he had prior felony conviction, was harmless, given strength of state's case against defendant on robbery, murder, assault, and attempted murder charges; defendant conceded that he was guilty of robbery, was in possession of handgun, and had previously been convicted of felony, defendant was arrested at scene, his identity was not in doubt, and evidence of intent in shooting at police officers was overwhelming. Rules of Evid., Rule 403; Rules Crim.Proc., Rule 47(a); AS 11.61.200(a)(1). Weitz v. State, 1990, 794 P.2d 952. Criminal Law 1168(2)

Admission of prior felony charge in prosecution of defendant for kidnapping and misconduct involving weapons in first degree did not result in such unfair prejudice to defendant that he was entitled to new trial in spite of fact that his motion to sever was untimely, where defendant stipulated to existence of prior felony, jury was not informed of nature of conviction, evidence of prior conviction came in with minimum emphasis, and there was no emphasis on existence of prior conviction during remainder of trial, notwithstanding that court failed to give limiting instruction that prior felony was admissible only for purpose of proving misconduct involving weapons charge. AS 11.41.200(a)(1, 3), 11.61.200(a). Wortham v. State, 1984, 689 P.2d 1133. Criminal Law 1169.11

In prosecution of defendant for kidnapping, assault, robbery and misconduct involving weapons, trial judge did not abuse his discretion in refusing to admit testimony of defendant's proffered witness which was offered on narrow ground that pimp would not go to police if he had dispute with someone like defendant but that pimp and defendant would try to work things out, where defendant was able to introduce evidence through another witness' testimony that victim was a pimp, jurors could reason that pimp would prefer not to contact police and proffered witness' testimony would not have assisted jury in understanding defendant's case that victim was pimp who had disagreement with defendant and would be biased against him. AS 11.41.200(a)(1, 3), 11.41.300(a)(1), (a)(1)(E), 11.61.200(a); Rules of Evid., Rules 403, 702. Wortham v. State, 1984, 689 P.2d 1133. Witnesses 374(1)

Eyewitness' testimony, in prosecution for being a convict in possession of a prohibited weapon, that defendant took knife from his pocket, described how he had stabbed and raped his sister-in-law, mentioned he was on parole, and kissed witness was admissible to explain why defendant would be the kind of person who would carry a concealed weapon in a public building and exhibit it to a virtual stranger. McKee v. State, 1971, 488 P.2d 1039. Weapons 17(3)

16. Instructions

Ambiguity of definition of constructive possession in defendant's trial for weapons offenses after the police recovered a pistol from under the passenger seat of the vehicle in which he was riding, was harmless; the defense was that defendant did not know the pistol was under the seat, but the alleged flaw in the instruction would make a difference only if defendant conceded he was aware of the pistol; moreover, defendant was also convicted of possession of firearm in furtherance of a drug felony, so jury necessarily found that defendant knowingly possessed the pistol in aid or in furtherance of his drug offense. AS 11.61.200(a)(1). Alex v. State (2006) Alaska App., 127 P.3d 847, rehearing denied, dismissal of post-conviction relief vacated 210 P.3d 1225. Criminal Law 1172.1(3)

Defendant was not entitled to instruction on defense of necessity in trial for misconduct involving weapons in the first degree, despite defendant's testimony that he received threats from relatives of victim of defendant's former felony offense, absent showing that defendant had taken reasonable steps, other than illegally purchasing concealable firearm, in order to defend himself. AS 11.61.200(a)(1), 11.81.320. McCracken v. State, 1987, 743 P.2d 382, dismissal of habeas corpus reversed 985 F.2d 573. Weapons 17(6)

In prosecution of defendant for kidnapping and misconduct involving weapons in first degree, trial court's failure to give limiting instruction that prior felony was admissible only for purpose of proving the misconduct involving the weapons charge was not plain error where defendant never requested limiting instruction, although defendant was entitled to limiting instruction if he had requested one and better practice would have been for trial judge to have offered to give limiting instruction. AS 11.41.200(a)(1, 3), 11.61.200(a). Wortham v. State, 1984, 689 P.2d 1133. Criminal Law 1038.2

In prosecution of defendant for kidnapping, assault, robbery, and misconduct involving weapons, trial court did not err in refusing to give defendant's proposed instruction which summarized his theory of the case that victim voluntarily accompanied defendant, that victim had possessed the firearm involved and that victim was wounded as a result of his own actions in a struggle over the weapon, where instructions informed jury of elements of the crimes, law of self-defense and necessity, burden of proof, witness credibility and bias, defendant's theory of defense was adequately covered in the instructions which were given and defendant's attorney was able to argue the defense theory in closing argument. AS 11.41.200(a)(1, 3), 11.41.300(a)(1), (a)(1)(E), 11.61.200(a). Wortham v. State, 1984, 689 P.2d 1133. Criminal Law 829(4)

Where possession of concealable firearm by defendant, a convicted felon, was the only crime charged, where idea of obtaining firearm originated with defendant while he was in prison, where defendant retained exclusive control over firearm until it was later found by prison officials, and where defendant's cell mate shared no dominion and control over the gun, there was no basis from which jury could have reasonably inferred that cell mate was an accomplice, and thus trial judge did not err in refusing to give accomplice instruction to jury. AS 11.55.030; Rules of Criminal Procedure, rule 30(b)(2). Gordon v. State, 1975, 533 P.2d 25. Criminal Law 780(1)

Defendant charged with being a convict in possession of a prohibited concealed weapon was entitled to an instruction defining the term "concealed." AS 11.55.030. McKee v. State, 1971, 488 P.2d 1039. Criminal Law 800(2)

17. Sufficiency of evidence

Evidence that accused had been convicted of assault with intent to rob under the laws of Oregon and that at time of his subsequent arrest he had in his possession a .45 caliber Colt Automatic pistol justified conviction under Alaska statute forbidding persons convicted of a felony involving assault and like crimes from carrying a firearm capable of being concealed upon the person. Laws Alaska 1947, c. 70. U.S. v. Farwell, 1948, 11 Alaska 507, 76 F.Supp. 35. Weapons 17(4)

There was sufficient evidence that defendant possessed firearm knowing that its serial number had been altered with intent of rendering firearm untraceable to support his conviction for possession of altered firearm; defendant admitted that he purchased two handguns, including the altered handgun, on street from person he did not know for $50, the loaded handguns were found under mattress of bed in bedroom where defendant was found, and police officers testified that removal of serial number from weapon exhibited intent to render that firearm untraceable. AS 11.61.200(a)(6). Collins v. State (1999) Alaska App., 977 P.2d 741. Weapons 17(4)

In prosecution of an ex-convict for possessing a concealable weapon, State fully satisfied its burden of establishing defendant's culpable mental state by showing: that defendant knew he had been convicted of a felony; that he knew he had been discharged from probation for the felony within the past five years; and that he knew he was in possession of a concealable firearm. AS 11.61.200(a)(1), 11.81.610(b)(2). Afcan v. State, 1986, 711 P.2d 1198. Weapons 17(4)

Evidence sustained conviction for possession of pistol by felon, despite claim that exclusive possession was not established and although pistol did not have clip. AS 11.55.030. Davis v. State, 1972, 499 P.2d 1025, certiorari granted 93 S.Ct. 1392, 410 U.S. 925, 35 L.Ed.2d 586, reversed 94 S.Ct. 1105, 415 U.S. 308, 39 L.Ed.2d 347. Weapons 17(4)

18. Sentence and punishment--In general

Imposition of maximum sentence upon conviction for misconduct involving weapons in first degree was not clearly mistaken where state proved that defendant's prior criminal history included repeated instances of assaultive behavior and that defendant had three or more prior felony convictions. AS 11.61.200(a)(1), 12.55.125(e)(2), 12.55.155(c)(8, 15). Simmons v. State, 1995, 899 P.2d 931. Weapons 17(8)

Sentence of 11 years in prison for combination of crimes consisting of first-degree burglary, second-degree theft, first-degree weapons misconduct, and forgery was not excessive, where trial court found that defendant was third felony offender who could not be deterred or easily rehabilitated, and maximum term for defendant's single most serious offense was ten years. AS 11.46.130(b), 11.46.300(b), 11.61.200(f); AS 12.55.185(9) (1990). Wesolic v. State, 1992, 837 P.2d 130. Burglary 49; Forgery 51; Larceny 88; Weapons 17(8)

Defendant's abuse of his landlord's trust by burglarizing locked bedrooms and garage of home while landlord was absent was proper factor to consider when judging seriousness of burglary for purposes of sentencing. AS 11.46.130(b), 11.46.300(b), 11.61.200(f), 12.55.155(c)(15, 20, 21), (d)(9); AS 12.55.185(9) (1990). Wesolic v. State, 1992, 837 P.2d 130. Burglary 49

Defendant's prior sentences in Oregon for unauthorized use of motor vehicle and in Fairbanks for first-degree burglary and driving while intoxicated were sufficiently significant to support finding that defendant was danger to community, as basis for making defendant's sentence for misconduct involving weapons consecutive to defendant's sentences for first-degree burglary counts. AS 11.46.300(a)(2)(A), 11.61.200(a)(1), 12.55.125(d)(1), (e)(1), 12.55.155(c)(20). Ecklund v. State, 1986, 730 P.2d 161. Sentencing And Punishment 602

Trial court should, prior to imposing sentence, inquire of defendant and his counsel and resolve any factual questions in dispute regarding defendant's credit for time served based on conditions of presentence release, and should expressly identify those periods of time for which credit is to be allowed. AS 11.41.220(a)(2), 11.61.200(a)(1), 12.55.125(e)(1). Ackermann v. State, 1986, 716 P.2d 5. Sentencing And Punishment 354

In sentencing defendant on convictions of assault in the first degree, kidnapping, robbery in the first degree, and misconduct involving weapons in the first degree, trial judge was authorized to impose consecutive sentences and was also free to give little weight to mitigating factor that, except for misconduct involving weapons charge, defendant's former charges consisting of five prior felony offenses were less serious offenses that his current charges. AS 11.41.200(a)(1, 3), 11.41.300(a)(1), (a)(1)(E), 11.61.200(a); AS 12.55.155(d)(8)(Repealed). Wortham v. State, 1984, 689 P.2d 1133. Sentencing And Punishment 94; Sentencing And Punishment 590

Three-judge panel could legitimately conclude that conduct of defendant, who was convicted of first-degree misconduct involving weapons on basis of his possession of a handgun, was not the least serious included in the definition of the offense; furthermore, review of defendant's entire criminal record supported finding by three-judge panel and by original sentencing judge that defendant's conduct exhibited contempt for the law and law enforcement warranting a substantial sanction. AS 11.61.200(a), 12.55.155(d)(9, 13). Shaw v. State, 1983, 673 P.2d 781, modified on rehearing 677 P.2d 259, appeal after new sentencing hearing 1985 WL 1078167. Weapons 17(8)

Three-judge panel was not clearly mistaken in determining that presumptive sentence for misconduct involving weapons in the first degree was not manifestly unjust. AS 11.61.200(a)(1), (f). Shaw v. State, 1983, 673 P.2d 781, modified on rehearing 677 P.2d 259, appeal after new sentencing hearing 1985 WL 1078167. Sentencing And Punishment 77

Defendant convicted of misconduct involving weapons in the first degree, with prior convictions for assault with dangerous weapon and felon in possession of weapon, could properly be sentenced as third offender, even though a prior conviction was necessary element of both the present charge of misconduct involving weapons and the prior conviction of felon in possession of a weapon; same conviction could be used to prove element of misconduct involving weapons as well as to trigger application of presumptive sentencing. AS 11.61.200(a)(1), 12.55.125(e)(2), 12.55.155(c). Gilbreath v. State, 1983, 668 P.2d 1354. Sentencing And Punishment 1349

Even though defendant's prior felony conviction was a necessary element of the offense involving violation of statute prohibiting felons from possessing any concealable firearm, such conviction could form basis for applying presumptive sentence applicable to second felony offender. AS 11.61.200(a)(1), 12.55.125, 12.55.155, 12.55.185(7). Fry v. State, 1983, 655 P.2d 789. Sentencing And Punishment 94

In prosecution for assault in third degree and misconduct involving weapons in first degree, trial court erred in imposing sentence in excess of presumptive sentence absent finding of aggravating factors, even if excess term was suspended. AS 11.41.220, 11.61.200(a)(1), 12.55.155-12.55.175. McManners v. State, 1982, 650 P.2d 414. Assault And Battery 100; Weapons 17(8)

Fact that, with regard to process of determining sentence to be imposed for offense of being a felon in possession of a prohibited weapon, accused's prior "police contacts" not leading to convictions were discussed in ascertaining length of time he had served on a prior conviction and other matters did not prejudice accused, in view of indication that such police contacts were not a significant factor in trial court's decision to impose four-year sentence. AS 11.55.030, 11.55.040. Deveroux v. State, 1976, 548 P.2d 1296. Criminal Law 1177.3(2)

Where plea bargain entered into by accused, who pled guilty to being a felon in possession of a prohibited weapon, entailed his admitting, for purposes of sentencing, a charge of larceny in a building, such charge could be considered for sentencing purposes, though the charge was dropped. AS 11.55.030, 11.55.040. Deveroux v. State, 1976, 548 P.2d 1296. Sentencing And Punishment 98

Though some of accused's prior convictions of 11 criminal offenses and 13 traffic offenses were petty in nature, the number of such convictions warranted their consideration in determining sentence to be imposed for accused's offense of being a felon in possession of a prohibited weapon. AS 11.55.030, 11.55.040. Deveroux v. State, 1976, 548 P.2d 1296. Sentencing And Punishment 95

Trial court, in stating that "there is no question in my mind that * * * [defendant] is a danger to society" and in indicating that court had considered and rejected the possibility of rehabilitation "at least * * * unless there is a complete change of attitude by the defendant," sufficiently articulated court's reasons for and purpose to be served by imposition of four-year sentence against defendant for offense of being a felon in possession of a prohibited weapon. AS 11.55.030, 11.55.040. Deveroux v. State, 1976, 548 P.2d 1296. Sentencing And Punishment 373

19. ---- Aggravation and mitigation, sentence and punishment

Defendant's actions which formed the basis of his third-degree weapons misconduct conviction were not among the least serious forms of conduct encompassed by the crime of weapons misconduct, and thus was not a mitigating factor for sentencing purposes; court found that defendant was legally intoxicated and had concealed his loaded weapon under his clothing. AS 11.61.200(a)(1), 12.55.155(d)(9). Brockway v. State (2001) Alaska App., 37 P.3d 427. Sentencing And Punishment 66

Fact that defendant waited until owner of home was absent before burglarizing home was not mitigating factor with respect to sentencing for first-degree burglary conviction. AS 11.46.130(b), 11.46.300(b), 11.61.200(f),

12.55.155(c)(15, 20, 21), (d)(9); AS 12.55.185(9) (1990). Wesolic v. State, 1992, 837 P.2d 130. Burglary 49

Mitigating factor for cases where defendant's conduct is among least serious conduct within definition of offense may be applied to offense of felon in possession of concealable firearm. AS 11.61.200(a)(1), 12.55.155(d)(9). State v. LaPorte, 1983, 672 P.2d 466. Weapons 17(8)

Though offense of misconduct involving weapons in the first degree is defined in terms merely of knowing possession of a firearm, aggravating factor of directing the "conduct constituting the offense" at a law enforcement officer was shown by evidence that gun was pointing directly at officer when defendant first turned, that defendant refused at least three times to drop the weapon, and that defendant knew that person confronting him was a police officer. AS 11.61.200(a)(1), 12.55.155(c)(13). Gilbreath v. State, 1983, 668 P.2d 1354. Sentencing And Punishment 124

Aggravating factor of directing "conduct constituting the offense" at a law enforcement officer was applicable, despite defendant's contention that offense of misconduct involving weapons in the first degree was "complete" when police officer first saw him with the gun, before defendant was even aware of officer's presence. AS 11.61.200(a)(1), 12.55.155(c)(13). Gilbreath v. State, 1983, 668 P.2d 1354. Sentencing And Punishment 124

"Most serious conduct" aggravating factor with respect to offense of misconduct involving weapons in the first degree was shown by possession of concealable weapon by defendant, who was a felon, under circumstances indicating possible intent to use the weapon against a police officer or another. AS 11.61.200(a)(1), 12.55.155(c)(10). Gilbreath v. State, 1983, 668 P.2d 1354. Sentencing And Punishment 79

Finding of mitigating factor that harm caused by defendant's conduct was "consistently minor and inconsistent with the imposition of a substantial period of imprisonment" was not warranted, given circumstances of instant offense of misconduct involving weapon in the first degree and nature of defendant's original felony, an assault with a dangerous weapon in which victim was clearly placed in substantial fear. AS 11.61.200(a)(1), 12.55.155(d)(13). Gilbreath v. State, 1983, 668 P.2d 1354. Sentencing And Punishment 84

20. ---- Probation and related dispositions, sentence and punishment

Conviction in which person receives probation and suspended imposition of sentence is to be set aside at time defendant is discharged from probation, unless State can meet its burden of showing good cause why conviction should not be set aside. AS 11.61.200. Hansen v. State, 1992, 824 P.2d 1384. Sentencing And Punishment 1953

21. ---- Sufficiency, sentence and punishment

Composite sentence of 20 years for 12 offenses in six separate criminal cases was not excessive; defendant could have been sentenced to a term of 20 years imprisonment alone for class A felony burglary, the most serious of the crimes committed by defendant, trial judge found that defendant had not responded to five years worth of prior rehabilitative efforts and that it would be fruitless to place defendant on probation, defendant conceded to two aggravating factors during sentencing, and defendant had been under State supervision since he was 12-years-old. Smith v. State (2008) Alaska App., 187 P.3d 511. Sentencing And Punishment 645

Sentencing defendant, for convictions of two counts of first-degree burglary and one count of first-degree misconduct involving weapons, to concurrent six-year terms with two years suspended for two burglaries and consecutive two-year term for weapons misconduct, was not clearly mistaken. AS 11.46.300(a)(2)(A), 11.61.200(a)(1), 12.55.125(d)(1), (e)(1), 12.55.155(c)(20). Ecklund v. State, 1986, 730 P.2d 161. Burglary 49; Weapons 17(8)

Defendant's sentence totaling 53 years of imprisonment for convictions of assault in the first degree, misconduct involving weapons in the first degree, kidnapping, and robbery in the first degree was not excessive where trial judge could have properly given great weight to jury's finding that defendant kidnapped victim, intending to injure him and that defendant intentionally shot victim and then robbed him, defendant had record of five prior felony convictions, defendant had served sentences of greater than one year and had not been deterred by these former sentences, and defendant was on parole at time of the offenses and had just completed lengthy sentence four months before. AS 11.41.200(a)(1, 3), 11.41.300(a)(1), (a)(1)(E), 11.61.200(a). Wortham v. State, 1984, 689 P.2d 1133. Sentencing And Punishment 645

Sentence on charge of misconduct involving weapons in the first degree was illegal, since sentencing judge gave less than presumptive sentence of two years without finding any mitigating factors, and sentence therefore had to be vacated. AS 11.61.200(a)(1), 12.55.125(e)(1), (g), 12.55.165. State v. LaPorte, 1983, 672 P.2d 466. Sentencing And Punishment 995

Sentence of five years with 18 months suspended, imposed on conviction of defendant for misconduct involving weapon in the first degree, with two aggravating factors, was not excessive. AS 11.61.200(a)(1), 12.55.155(c)(10, 13), (d)(13). Gilbreath v. State, 1983, 668 P.2d 1354. Weapons 17(8)

Imposition of four-year sentence for offense of being a felon in possession of a prohibited weapon was not clearly erroneous with regard to accused who had prior convictions for 13 traffic offenses and 11 criminal offenses including burglary, and who had recently committed a larceny in a building. AS 11.55.030, 11.55.040. Deveroux v. State, 1976, 548 P.2d 1296. Weapons 17(8)

22. Review

In determining meaning of terms "switchblade" and "gravity knife" that are included in definition of prohibited weapons which it is felony to possess, Court of Appeals had to look to general usage for meaning of terms, where neither of the terms was defined in statutes. AS 01.10.040, 11.61.200(a)(3), (e)(1)(D). State v. Strange, 1990, 785 P.2d 563. Weapons 4

Trial court's failure to make factual finding as to whether knife seized from defendant was "gravity knife" within meaning of statute making possession of such weapon a felony required remand for further proceedings. AS 11.61.200(a)(3). State v. Weaver, 1987, 736 P.2d 781. Criminal Law 1181.5(3.1)

AS § 11.61.200, AK ST § 11.61.200

Current through the 2009 First Regular Session and First Special Session of the 26th Legislature

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158 P.3d 813
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(Cite as: 158 P.3d 813)

Supreme Court of Alaska.
Joseph R. GABRIELLE, Appellant,
v.
STATE of Alaska, DEPARTMENT OF PUBLIC SAFETY, Appellee.
No. S-11490.

May 18, 2007.

Background: Applicant sought judicial review of decision by Department of Public Safety to revoke permit to carry concealed handgun and to deny application to renew permit. The Superior Court, Third Judicial District, Anchorage, Sharon L. Gleason, J., affirmed, and applicant appealed.

Holdings: The Supreme Court held that:
(1) applicant was not eligible for permit to carry concealed weapon under state law, and
(2) federal statute prohibiting possession of firearm by convicted felon did not render applicant whose prior felony conviction was pardoned ineligible for permit to carry concealed weapon.

Affirmed.

West Headnotes

[1] Statutes 361 219(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(1) k. In General. Most Cited Cases
When state and federal statutes do not involve substantial expertise by an administrative agency, in construing these statutes on an administrative appeal, the court will apply its independent judgment in determining their meaning, adopting the rule that is most persuasive in light of precedent, reason, and policy.

[2] Weapons 406 12

406 Weapons
406k5 Carrying Weapons
406k12 k. Licenses or Permits. Most Cited Cases
Applicant whose prior felony conviction was pardoned by governor would not have affirmative defense to unlawful possession of firearm by convicted felon, and thus, applicant was not eligible for permit to carry concealed weapon under state law, in that he would be subject to criminal liability if he carried concealed handgun in any place outside his dwelling or land appurtenant to dwelling or carried handgun while not engaged in lawful hunting, fishing or trapping, or other lawful activity. AS 11.61.200(a)(12), (g)(2)(A, B).

[3] Weapons 406 12

406 Weapons
406k5 Carrying Weapons
406k12 k. Licenses or Permits. Most Cited Cases
Federal statute prohibiting possession of firearm by convicted felon did not render applicant whose prior felony conviction was pardoned by governor ineligible for permit to carry concealed weapon, in that pardon did not expressly state that applicant could not ship, transport, possess or receive firearms. 18 U.S.C.A. §§ 921, 922(g)(1).

*813 Wayne Anthony Ross, Ross & Miner, P.C., Anchorage, for Appellant.
Timothy W. Terrell, Assistant Attorney General,

Office of Special Prosecutions and Appeals, Anchorage, and Gregg D. Renkes, Attorney General, Juneau, for Appellee.

Before: BRYNER, Chief Justice, MATTHEWS, EASTAUGH, FABE, and CARPENETI, Justices.

OPINION

PER CURIAM.

Joseph R. Gabrielle appeals the Alaska Department of Public Safety's refusal to renew his permit to carry a concealed handgun as well as the department's decision to revoke his existing permit. The department concluded that Gabrielle was ineligible for a permit because he was convicted of a felony in 1983 and Alaska law forbids a felon to carry a concealed handgun. Gabrielle, who received a gubernatorial pardon in 1993, argues that he is entitled to a permit because the plain language of the licensing statute does not prohibit a felon from obtaining a permit, and because he has an affirmative defense to criminal liability. Because the legislature intended to bar felons from obtaining concealed handgun permits, and because it would be futile to issue Gabrielle a permit to carry a concealed handgun that would not give him the right to carry a concealed handgun beyond that which is available to all citizens, we affirm the department's decision.

*814 We have considered each of appellant's arguments and points on appeal. The record fully supports the Memorandum Decision on Appeal entered by Superior Court Judge Sharon L. Gleason, which we adopt as the opinion of this court. It is set forth below.[FN1]

FN1. We have edited the superior court's decision to conform to our technical rules.

APPENDIX

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

JOSEPH R. GABRIELLE, Appellant.

vs.

STATE OF ALASKA, DEPARTMENT OF PUBLIC SAFETY, Appellee.

Case No. 3AN-03-07244 CI

MEMORANDUM DECISION ON APPEAL

This is an appeal from a decision of the Department of Public Safety (DPS), which revoked Mr. Gabrielle's concealed handgun permit and refused to renew it. For the reasons set forth below, the decision of the Department is AFFIRMED.

Facts and Proceedings

In January 2003, the Alaska State Troopers Division of DPS revoked Mr. Gabrielle's concealed handgun permit and refused to renew the permit because Mr. Gabrielle had been convicted of two felonies in the early 1980's. The State Troopers took this action even though Mr. Gabrielle had received a pardon from Governor Hickel for the felony convictions in October 1993. Mr. Gabrielle appealed the Troopers' decision to the Commissioner of the Department of Public Safety in February 2003. On March 7, 2003, the Commissioner issued a letter denying that administrative appeal, and indicated that based on DPS's interpretation of the applicable statutes, specifically AS 11.61.200(a)(12) and (g), pardoned felons were precluded from obtaining handgun permits. The Commissioner's letter indicated that it "is a final administrative decision" and that Mr. Gabrielle could "seek judicial review of this decision under AS 44.62.560-44.62.570 within 30 days of receipt of this letter." The record reflects that Mr. Gabrielle received the letter on March 12, 2003.

On March 22, 2003, Mr. Gabrielle submitted a request for reconsideration to the Commissioner of DPS. On April 29, 2003, the Deputy Commissioner summarily denied the request, indicating that "there is no process for administrative 'reconsideration' of denial of an appeal."

On May 5, 2003, Mr. Gabrielle filed this appeal.

1. Is Mr. Gabrielle "eligible to own or possess a handgun under the laws of this state"?

Alaska Statute 18.65.705 lists several requirements for a person to be qualified to receive and hold a permit to carry a concealed handgun. The parties dispute whether Mr. Gabrielle meets one of those requirements-whether he "is eligible to own or possess a handgun under the laws of this state and under federal law." [FN2] The State argues that Mr. Gabrielle is not eligible under either state or federal law to possess a handgun, and this statutory subsection therefore precludes the issuance of the permit to Mr. Gabrielle.

FN2. AS 18.65.705(2).

[1] The state and federal statutes regulating possession and ownership of handguns do not involve substantial agency expertise. Accordingly, in construing these statutes in this administrative appeal, this court will apply its independent judgment in determining their meaning, adopting the rule that is most persuasive in light of precedent, reason, and policy.[FN3]

FN3. *Alyeska Pipeline Serv. Co. v. DeShong*, 77 P.3d 1227, 1231 (Alaska 2003) (citation omitted).

[2] Turning first to state law, the State argues that pursuant to AS 11.61.200(a)(12), Mr. Gabrielle is precluded from possessing a handgun. This statute provides that a person*815 commits the crime of misconduct involving weapons in the third degree if the person "knowingly possesses a firearm that is concealed on the person after having been convicted of a felony...."

The parties dispute whether AS 11.61.200(g), which establishes an affirmative defense to this statutory provision, operates to allow Mr. Gabrielle to possess a handgun. AS 11.61.200(g) provides:

> It is an affirmative defense to a prosecution under (a)(12) of this section that
>
> (1) either
>
> (A) the defendant convicted of the prior offense on which the action is based received a pardon for that conviction;
>
> (B) 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
>
> (C) a period of ten years or more has elapsed between the date of the defendant's unconditional discharge on the prior offense ... and the date of the violation of (a)(12) of this section, and the prior conviction ... did not result from a violation of AS 11.41...; *and*
>
> (2) at the time of possession, the defendant was
>
> (A) in the defendant's dwelling or on land owned or leased by the defendant appurtenant to the dwelling; or
>
> (B) actually engaged in lawful hunting, fishing, trapping, or other lawful outdoor activity that necessarily involves the carrying of a weapon for personal protection.

(Emphasis added).

Mr. Gabrielle asserts that as a result of his pardon, he has an affirmative defense to a prosecution under (a)(12), and is thus eligible to possess a concealed handgun under state law. The State argues that the affirmative defense in subsection (g) requires not only that Mr. Gabrielle receive a pardon or qualify under either of the other two components of subsection (g)(1), but that he must also meet the requirements of subsection (g)(2), which limits the places where the concealed handgun may be possessed as a precondition to this affirmative defense. In response to this argument, Mr. Gabrielle asserts that subsection (2) of the statute only modifies subsection (1)(C), and is not an additional requirement for a person who has been pardoned who falls within subsection (1)(A).

The State's reading is consistent with fundamental principles of statutory construction. To be entitled to the affirmative defense under AS 11.61.200(g), a criminal defendant would need to establish at least one of the components of subsection (1) *and* one of the components of subsection (2).

Alaska Statute 18.65.705 lists several requirements for a person to be qualified to receive and hold a permit to carry a concealed handgun. The parties dispute whether Mr. Gabrielle meets one of those requirements-whether he "is eligible to own or possess a handgun under the laws of this state and under federal law." [FN2] The State argues that Mr. Gabrielle is not eligible under either state or federal law to possess a handgun, and this statutory subsection therefore precludes the issuance of the permit to Mr. Gabrielle.

FN2. AS 18.65.705(2).

[1] The state and federal statutes regulating possession and ownership of handguns do not involve substantial agency expertise. Accordingly, in construing these statutes in this administrative appeal, this court will apply its independent judgment in determining their meaning, adopting the rule that is most persuasive in light of precedent, reason, and policy.[FN3]

FN3. *Alyeska Pipeline Serv. Co. v. DeShong*, 77 P.3d 1227, 1231 (Alaska 2003) (citation omitted).

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The State's reading is consistent with fundamental principles of statutory construction. To be entitled to the affirmative defense under AS 11.61.200(g), a criminal defendant would need to establish at least one of the components of subsection (1) *and* one of the components of subsection (2).

The State then notes that AS 11.61.220(b)(1) and (2) permits all citizens to carry a concealed weapon in the same two circumstances specified in AS 11.61.200(g)(2).[FN4] Therefore, as the State correctly notes, "the net result of the statutory scheme is that a pardoned felon can only carry a concealed handgun in those situations where an ordinary citizen would be able to carry a concealed handgun without a permit."

FN4. [This reference is to a prior version of AS. 11.61.220. Following both the department's revocation and the superior court's decision, the statute was amended in ways not relevant here.]

Under the statutory scheme, a pardoned felon could be prosecuted under AS 11.61.200(a)(12) for misconduct involving weapons in the third degree if the individual possessed a concealed firearm at any place other than the two statutory exceptions set out in AS 11.61.200(g)(2)(A) and (B). And, unlike a prosecution under AS 11.61.220(a)(1) for fifth degree misconduct, it would not be a valid affirmative defense to a prosecution for violation of AS 11.61.200(a)(12) that the individual was the holder of a valid permit to carry a concealed handgun.[FN5]

FN5. *See* former AS 11.61.220(b)(3).

And yet, as a pardoned felon, Mr. Gabrielle *is* eligible to own or possess a concealed handgun in at least some locations within the state-within his dwelling and while hunting and undertaking other specified outdoor activities. Moreover, as a pardoned felon, he cannot be prosecuted for violation of *816AS 11.61.200(a)(1) for "knowingly possessing a firearm capable of being concealed."[FN6]

FN6. *See*AS 11.61.200(b)(1)(A).

Harmonizing these different statutory provisions is a somewhat tortured process from any perspective. But resolution of these provisions is best determined, in this court's view, by assessing the consequences of issuing a concealed handgun permit to Mr. Gabrielle. Under the statutory scheme, possession of such a permit would constitute an affirmative defense to one of the bases for misconduct involving weapons in the fifth degree. Under AS 11.61.220(a)(1), a person commits the crime of misconduct involving weapons in the fifth degree if the person "knowingly possesses a deadly weapon ... that is concealed on the person." Under AS 11.61.220(b)(3), it is an affirmative defense to the prosecution for that crime that the person was "the holder of a valid permit to carry a concealed handgun." However, possession of the permit would *not* constitute a valid affirmative defense to a prosecution for misconduct involving weapons in the third degree based on a pardoned felon's knowing possession of a concealed firearm under AS 11.61.200(a)(12). And, as the State correctly notes, a pardoned felon has the same affirmative defenses as any other citizen to prosecution for weapons violations if, at the time of possession, the defendant was at his dwelling or actually engaged in lawful hunting, fishing, trapping, or other lawful outdoor activity that necessarily involved the carrying of a weapon for personal protection. In effect, the fifth degree misconduct weapons charge is a lesser-included offense to the third degree charge for pardoned felons, but the affirmative defense of a permit is not available to pardoned felons in a prosecution under the third degree charge.

Accordingly, issuance of a concealed handgun permit to Mr. Gabrielle would serve no lawful purpose since such a permit could not serve as an affirmative defense to a prosecution under AS 11.61.200(a)(12). Therefore, the court finds that Mr. Gabrielle should not be considered "eligible to own or possess a handgun under the laws of this state."[FN7] Since such eligibility is one of the necessary qualifications for issuance of a concealed handgun permit,[FN8] DPS's revocation of the permit and denial of the permit renewal was appropriate. Moreover, such a result is consistent with the legislative history regarding the concealed handgun permitting laws.[FN9]

FN7. AS 18.65.705(2).

FN8. *See*AS 18.65.705.

FN9. See Sen. Green, Sponsor Statement for Senate Bill 141, 20th Leg., 1st Sess. (April 23, 1997) (noting the bill was intended to "make clear that no felon, even a non-violent felon, would ever be able to apply for a concealed carry permit").

2. Mr. Gabrielle is not precluded from owning and

possessing a handgun under federal law.

[3] The State also asserts that Mr. Gabrielle cannot be issued a concealed carry permit because he is ineligible to own and possess a handgun under federal law. 18 U.S.C. § 922(g)(1) provides in pertinent part:

> It shall be unlawful for any person ... who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year ... to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

However, 18 U.S.C. § 921 provides in pertinent part:

> Any conviction which has been expunged, or set aside or for which a person *has been pardoned* or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

(Emphasis added.) Mr. Gabrielle's pardon did not expressly provide that he could not possess firearms. Therefore, federal law is not a bar to Mr. Gabrielle's permit eligibility.

The State asserts that two federal cases have held that this exception does not permit *817 the carrying of handguns if state law forbids it.[FN10] But neither Brown nor Caron were pardoned. Mr. Gabrielle references *United States v. Laskie*,[FN11] which held that Mr. Laskie's prior conviction could not be used as a predicated conviction under 18 U.S.C. § 922(g)(1) because Mr. Laskie had been honorably discharged and that discharge did not include a prohibition of firearm possession. Further, in *United States v. Gallaher*,[FN12] the Ninth Circuit held:

> Under our decisions in *Laskie* and [*United States v.*] *Herron*[45 F.3d 340 (9th Cir. 1995)], a criminal defendant cannot be charged with a federal crime after receiving a certificate restoring his civil rights that contains no express warning that he cannot possess firearms in spite of the restoration of his civil rights or that his state conviction may constitute an element of a crime if he is found in possession of a weapon.

Following this case law, Mr. Gabrielle is not subject to the prohibition under 18 U.S.C. § 922(g)(1) since he received a pardon for his convictions and his pardon did not contain an express warning that he cannot possess firearms.

3. Conclusion

Because this court concludes that Mr. Gabrielle was not "eligible to own or possess a handgun under the laws of this state," the decision of the Department of Public Safety is AFFIRMED.

/s/ Sharon L. Gleason

SHARON L. GLEASON

Superior Court Judge

Alaska,2007.
Gabrielle v. State, Dept. of Public Safety
158 P.3d 813

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FN10. *See* *Caron v. United States*, 524 U.S. 308, 118 S.Ct. 2007, 141 L.Ed.2d 303 (1998); *United States v. Brown*, 69 F.Supp.2d 925 (E.D.Mich.1999).

FN11. 258 F.3d 1047, 1052-53 (9th Cir.2001).

FN12. 275 F.3d 784, 792 (9th Cir.2001).

Supreme Court

CARON v. UNITED STATES (97-6270)

Affirmed.

Syllabus	Opinion [Kennedy]	Dissent [Thomas]
HTML version PDF version	HTML version PDF version	HTML version PDF version

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Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 97—6270

GERALD R. CARON, PETITIONER v. UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[June 22, 1998]

Justice Kennedy delivered the opinion of the Court.

Under federal law, a person convicted of a crime punishable by more than one year in prison may not possess any firearm. 18 U.S.C. § 922(g)(1). If he has three violent felony convictions and violates the statute, he must receive an enhanced sentence. §924(e). A previous conviction is a predicate for neither the substantive offense nor the sentence enhancement if the offender has had his civil rights restored, "unless such ... restoration of civil rights expressly provides that the person may not ... possess ... firearms." §921(a)(20). This is the so-called "unless clause" we now must interpret. As the ellipses suggest, the statute is more complex, but the phrase as quoted presents the issue for our decision.

The parties, reflecting a similar division among various Courts of Appeals, disagree over the interpretation of the unless clause in the following circumstance. What if the State restoring the offender's rights forbids possession of some firearms, say pistols, but not others, say

rifles? In one sense, he "may not ... possess ... firearms" under the unless clause because the ban on specified weapons is a ban on "firearms." In another sense, he can possess firearms under the unless clause because the state ban is not absolute. Compare, *e.g.*, *United States* v. *Estrella*, 104 F.3d 3, 8 (CA1) (adopting former reading), cert. denied, 521 U.S. ___ (1997) and *United States* v. *Driscoll*, 970 F.2d 1472, 1480–1481 (CA6 1992) (same), cert. denied, 506 U S. 1083 (1993), with *United States* v. *Qualls*, ___ F.3d ___, No. 95–50378, 1998 WL 149393, *2 (CA9, Apr. 2, 1998) (en banc) (intermediate position), and *United States* v. *Shoemaker*, 2 F.3d 53, 55–56 (CA4 1993) (same), cert. denied, 510 U.S. 1047 (1994).

The Government contends the class of criminals who "may not ... possess ... firearms" includes those forbidden to have some guns but not others. On this reading, the restoration of rights is of no effect here, the previous offenses are chargeable, and petitioner's sentence must be enhanced. On appeal, the Government's position prevailed in the Court of Appeals for the First Circuit, and we now affirm its judgment.

I

Petitioner Gerald Caron has an extensive criminal record, including felonies. In Massachusetts state court, he was convicted in 1958 of attempted breaking and entering at night and, in 1959 and 1963, of breaking and entering at night. In California state court, he was convicted in 1970 of assault with intent to commit murder and attempted murder.

In July 1993, petitioner walked into the home of Walter Miller, carrying a semiautomatic rifle. He threatened Miller, brandished the rifle in his face, and pointed it at his wife, his daughters, and his 3-year-old grandson. Police officers disarmed and arrested petitioner.

In September 1993, a federal agent called on petitioner at home to determine if he had other unlawful firearms. Petitioner said he had only flintlock or other antique weapons (not forbidden by law) and owned no conventional firearms. Federal law, the agent told him, forbade his possession of firearms and was not superseded by state law. In December 1993, agents executed a search warrant at petitioner's house, seizing six rifles and shotguns and 6,823 rounds of ammunition.

A federal jury convicted petitioner of four counts of possessing a firearm or ammunition after having been convicted of a serious offense. See 18 U.S.C. § 922(g)(1). The District Court enhanced his sentence because he was at least a three-time violent felon, based on his one California and three Massachusetts convictions. See §924(e). Petitioner claimed the Court should not have counted his Massachusetts convictions because his civil rights had been restored by operation of Massachusetts law. Massachusetts law allowed petitioner to possess rifles or shotguns, as he had the necessary firearm permit and his felony convictions were more than five years old. Mass. Gen. Laws §§140:123, 140:129B, 140:129C (1996). The law forbade him to possess handguns outside his home or business. See §§140:121, 140:131, 269:10.

At first, the District Court rejected the claim that Massachusetts had restored petitioner's civil rights. It held civil rights had to be restored by an offender-specific action rather than by operation of law. The First Circuit disagreed, vacating the sentence and remanding the case. *United States* v. *Caron*, 77 F.3d 1, 2, 6 (1996) (en banc). We denied certiorari. 518 U.S. 1027 (1996). On remand, the District Court, interpreting the unless clause of the federal statute, disregarded the Massachusetts convictions. It ruled Massachusetts law did not forbid petitioner's possession of firearms because he could possess rifles. 941 F. Supp. 238, 251–254 (Mass. 1996). Though Massachusetts restricted petitioner's right to carry a handgun, the District Court considered the restriction irrelevant because his case involved rifles and shotguns. See *ibid.* The First Circuit reversed, counting the convictions because petitioner remained subject to significant firearms restrictions. We granted certiorari. 522 U.S. ___ (1998).

II

A federal statute forbids possession of firearms by those convicted of serious offenses. An abbreviated version of the statute is as follows:

"It shall be unlawful for any person-

"(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

. . . . .

"to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U.S.C. § 922(g).

Three-time violent felons who violate §922(g) face enhanced sentences of at least 15 years' imprisonment. §924(e)(1). "Violent felony" is defined to include burglary and other crimes creating a serious risk of physical injury. §924(e)(2)(B)(ii). This term includes petitioner's previous offenses discussed above.

Not all violent felony convictions, however, count for purposes of §922(g) or §924(e). Until 1986, federal law alone determined whether a state conviction counted, regardless of whether the State had expunged the conviction. *Dickerson* v. *New Banner Institute, Inc.*, 460 U.S. 103, 119–122 (1983). Congress modified this aspect of *Dickerson* by adopting the following language:

"What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." §921(a)(20).

The first sentence and the first clause of the second sentence define convictions, pardons, expungements, and restorations of civil rights by reference to the law of the convicting jurisdiction. See *Beecham* v. *United States*, 511 U.S. 368, 371 (1994).

Aside from the unless clause, the parties agree Massachusetts law has restored petitioner's civil rights. As for the unless clause, state law permits him to possess rifles and shotguns but forbids him to possess handguns outside his home or business. The question presented is whether the handgun restriction activates the unless clause, making the convictions count under federal law.

We note these preliminary points. First, Massachusetts restored petitioner's civil rights by operation of law rather than by pardon or the like. This fact makes no difference. Nothing in the text of §921(a)(20) requires a case-by-case decision to restore civil rights to this particular offender. While the term "pardon" connotes a case-by-case determination, "restoration of civil rights" does not. Massachusetts has chosen a broad rule to govern this situation, and federal law gives effect to its rule. All Courts of Appeals to address the point agree. See *Caron*, 77 F.3d, at 2; *McGrath* v. *United States*, 60 F.3d 1005, 1008 (CA2 1995), cert. denied, 516 U.S. 1121 (1996); *United States* v. *Hall*, 20 F.3d 1066, 1068–1069 (CA10 1994); *United States* v. *Glaser*, 14 F.3d 1213, 1218 (CA7 1994); *United States* v. *Thomas*, 991 F.2d 206, 212–213 (CA5), cert. denied, 510 U.S. 1014 (1993); *United States* v. *Dahms*, 938 F.2d 131, 133–134 (CA9 1991); *United States* v. *Essick*, 935 F.2d 28, 30–31 (CA4 1991); *United States* v. *Cassidy*, 899 F.2d 543, 550, and n. 14 (CA6 1990).

Second, the District Court ruled, and petitioner urges here, that the unless clause allows an offender to possess what state law permits him to possess, and nothing more. Here, petitioner's shotguns and rifles were permitted by state law, so, under their theory, the weapons would not be covered by the unless clause. While we do not dispute the common sense of this approach, the words of the statute do not permit it. The unless clause is activated if a restoration of civil rights "expressly provides that the person may not ... possess ... firearms." 18 U.S.C. § 921(a)(20). Either the restorations forbade possession of "firearms" and the convictions count for all purposes, or they did not and the convictions count not at all. The unless clause looks to the terms of the past restorations alone and does

not refer to the weapons at issue in the present case. So if the Massachusetts convictions count for some purposes, they count for all and bar possession of all guns.

III

The phrase "may not ... possess ... firearms," then, must be interpreted under either of what the parties call the two "all-or-nothing" approaches. Either it applies when the State forbids one or more types of firearms, as the Government contends; or it does not apply if state law permits one or more types of firearms, regardless of the one possessed in the particular case.

Under the Government's approach, a state weapons limitation on an offender activates the uniform federal ban on possessing any firearms at all. This is so even if the guns the offender possessed were ones the State permitted him to have. The State has singled out the offender as more dangerous than law-abiding citizens, and federal law uses this determination to impose its own broader stricture.

Although either reading creates incongruities, petitioner's approach yields results contrary to a likely, and rational, congressional policy. If permission to possess one firearm entailed permission to possess all, then state permission to have a pistol would allow possession of an assault weapon as well. Under this view, if petitioner, in violation of state law, had possessed a handgun, the unless clause would still not apply because he could have possessed a rifle. Not only would this strange result be inconsistent with any conceivable federal policy, but it also would arise often enough to impair the working of the federal statute. Massachusetts, in this case, and some 15 other States choose to restore civil rights while restricting firearm rights in part. The permissive reading would make these partial restrictions a nullity under federal law, indeed in the egregious cases with the most dangerous weapons. Congress cannot have intended this bizarre result.

Under petitioner's all-or-nothing argument, federal law would forbid only a subset of activities already criminal under state law. This limitation would contradict the intent of Congress. In Congress' view, existing state laws "provide less than positive assurance that the person in question no longer poses an unacceptable risk of dangerousness." *Dickerson*, 460 U.S., at 120. Congress meant to keep guns away from all offenders who, the Federal Government feared, might cause harm, even if those persons were not deemed dangerous by States. See *id.*, at 119. If federal law is to provide the missing "positive assurance," it must reach primary conduct not covered by state law. The need for this caution is borne out by petitioner's rifle attack on the Miller family, in which petitioner used a gun permitted by state law. Any other result would reduce federal law to a sentence enhancement for some state-law violations, a result inconsistent with the congressional intent we recognized in *Dickerson*. Permission to possess one gun cannot mean permission to possess all.

Congress responded to our ruling in *Dickerson* by providing that the law of the State of conviction, not federal law, determines the restoration of civil rights as a rule. While state law is the source of law for restorations of other civil rights, however, it does not follow that state law also controls the unless clause. Under the Government's approach, with which we agree, the federal policy still governs the interpretation of the unless clause. We see nothing contradictory in this analysis. Restoration of the right to vote, the right to hold office, and the right to sit on a jury turns on so many complexities and nuances that state law is the most convenient source for definition. As to the possession of weapons, however, the Federal Government has an interest in a single, national, protective policy, broader than required by state law. Petitioner's approach would undermine this protective purpose.

As a final matter, petitioner says his reading is required by the rule of lenity, but his argument is unavailing. The rule of lenity is not invoked by a grammatical possibility. It does not apply if the ambiguous reading relied on is an implausible reading of the congressional purpose. See *United States* v. *Shabani*, 513 U.S. 10, 17 (1994) (requiring use of traditional tools of statutory construction to resolve ambiguities before resorting to the rule of lenity). For the reasons we have explained, petitioner's reading is not plausible enough to satisfy this condition.

In sum, Massachusetts treats petitioner as too dangerous to trust with handguns, though it accords this right to law-abiding citizens. Federal law uses this state finding of dangerousness in forbidding petitioner to have any guns. The judgment of the Court of Appeals is

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Edward L. Miner
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6 January 2009

[redacted]
State Capitol
Juneau, AK 99801

Dear [redacted]

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

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

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

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

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

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

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

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

[3] See AS 11.61.200(a) and (b).

[4] AS 11.61.200(a)(12) and (g)(2).

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

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

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

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

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

Sincerely,

Wayne Anthony Ross
Attorney at Law
Director, NRA

cc Brian Judy, NRA

Memorandum

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

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

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

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

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

The Alaska CHP Issue

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

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

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

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

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

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

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

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

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

[1] 158 P.3d 813 (Alaska 2007).

[2] 524 U.S. 308 (1998).

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

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

The Common Factor

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

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

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

The Possible Solutions

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

[3] 118 Fed. Appx. 49 (C.A.6 (Mich.)).

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

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

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

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

Conclusion

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

State of Alaska
Department of
Public Safety

Sarah Palin, Governor
Walt Monegan, Commissioner

May 13, 2008

[redacted]

By certified mail with return receipt

Dear Mr. [redacted]

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

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

The original decision to deny your application was based upon your convictions for 2nd degree burglary. Sentencing for your convictions was suspended and eventually your convictions were set aside. Burglary in the second degree is a felony. A felony conviction disqualifies an applicant from obtaining an Alaska Concealed Handgun Permit. A felony conviction that has been set aside is still a disqualifier for the issuance of an Alaska Concealed Handgun Permit. State law (13 AAC 30.900(6)) defines a conviction as meaning "...that a person has entered a plea of guilty or no contest to, or has been found guilty by a court or jury of, a criminal offense, **regardless of whether the judgment was after that set aside under AS 12.55.085** or a similar procedure in another jurisdiction, or was the subject of a pardon or other executive clemency..." (emphasis added) Consequently, because of your set aside felony convictions, we are prohibited, by law, from issuing you an Alaska Concealed Handgun Permit.

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

[redacted] [redacted] [redacted] 09:TT 8002/ZT/90

2014

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

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

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

Sincerely,

John D. Glass
Deputy Commissioner

To whom it my Concern,

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

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

I was 17 years old when I found myself on the wrong side of the law for the first and only time in my life.
I was young and dumb as we've all been, and made a bad choice in my young life, I was involved in a non-violent crime in which a felony was charged.I plead no contest because I knew what I did was wrong and there was no sense in fighting it andwaisting the courts time.I did a short jail term and was ordered to payrestitution and do 3 years probation.And because I was so young and payed my restitution in full and did my probation with no problems or violations. I was given a S.I.S (Suspended Imposition of Sentencing) my conviction was Dropped, Dismissed by a federal judge.(I'm not concidreda felon.)So why put me in that category.

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

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

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

Sincerely,

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] [redacted] [redacted] 11:55 AA07/27/90

State of Alaska
Department of Public Safety
Division of

Statewide Services

Sarah Palin, Governor
Walt Monegan, Commissioner

June 9, 2008

CERTIFIED RETURN RECEIPT

[redacted]

RE: Alaska Concealed Handgun Permit

Dear Mr. [redacted]

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

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

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

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

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

Presidential pardon!

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

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

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

Presidential Pardon!

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

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

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

Sincerely,

Terrie Satterfield
Permits and Licensing Unit

Terrie,

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

I meet the requirements of AS 18.65.705
There was "no change" on the renewal application
I meet all Federal and State laws to own and posses a handgun
Pardon granted by President not Governor of State of Alaska
Per AS a "Pardon" is the only way to restore rights lost and remove disabilities under Alaska Law
The ACHP Rules .doc was an information paper created by someone in DPS, not the State Attorney's Office

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

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

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

Respectfully,

[redacted]

back to him. He objected. A replevin petition was filed in the Circuit Court of Phelps County on June 18, 2005, seeking return of his revolver. On October 27, 2005, the Attorney General filed his answer. The state's position was that Mr. Troyer needs a permit to acquire a pistol prior to obtaining custody of the revolver. The court held a hearing on August 21, 2006. The parties subsequently signed on October 5, 2006, a stipulation for dismissal. Mr. Troyer agreed to drop his lawsuit and the police agreed to return the revolver to Mr. Troyer without requiring that he obtain a pistol acquisition permit. The revolver was returned.

MONTANA

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

NEW HAMPSHIRE

Lone Pine Hunter's Club, Inc. (New Hampshire). This is an effort to shut down a shooting range. New Hampshire has a range protection statute. The club has been operating a shooting range on the property since 1966. The case resulted in two reported decisions. Lone Pine Hunters' Club v. Town of Hollis, 149 N.H. 668, 826 A.2d 582 (2003), held that evidence was sufficient to uphold finding that the zoning board of adjustment's finding that, 34 years earlier, it merely decided that hunt club did not need a variance to build a proposed addition, rather than deciding that the club did not need a variance to use the property as a fish and game club. Consequently, under the 1999 zoning ordinance the club's use of the property could be approved as special exception. The club would have to cease and desist unless the club applied for a special exception and presented a site plan to the planning board depicting the nature of the club's entire operation. Residents Defending Their Homes v. Lone Pine Hunters' Club, Inc., 924 A.2d 366 (N.H. 2007), held that the range protection statute only protected a shooting range that was in lawful operation at its inception. The court held the club was not operating lawfully from its inception in 1966. Accordingly, the club must obtain approval from the town, in compliance with the zoning provisions allowing for a special exception as a shooting range.

Wayne Anthony Ross

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

Dear Mr. Ross:

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

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

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

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

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

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

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

Sincerely,

John Frazer

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

-----Original Message-----
From: Conte, Christopher
Sent: Tuesday, December 02, 2008 1:41 PM
To: Frazer, John
Subject: FW: Gun Rights for Ex-Felons

Here it is.

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

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

-----Original Message-----
From: Judy, Brian
Sent: Tuesday, December 02, 2008 12:35 AM
To: Conte, Christopher
Subject: Fw: Gun Rights for Ex-Felons

FYI.

---- Original Message ----
From: Ross & Miner Paralegal
To: bjudy@nrahq.org
Sent: Monday, December 01, 2008 3:29 PM
Subject: Gun Rights for Ex-Felons

Mr. Judy,

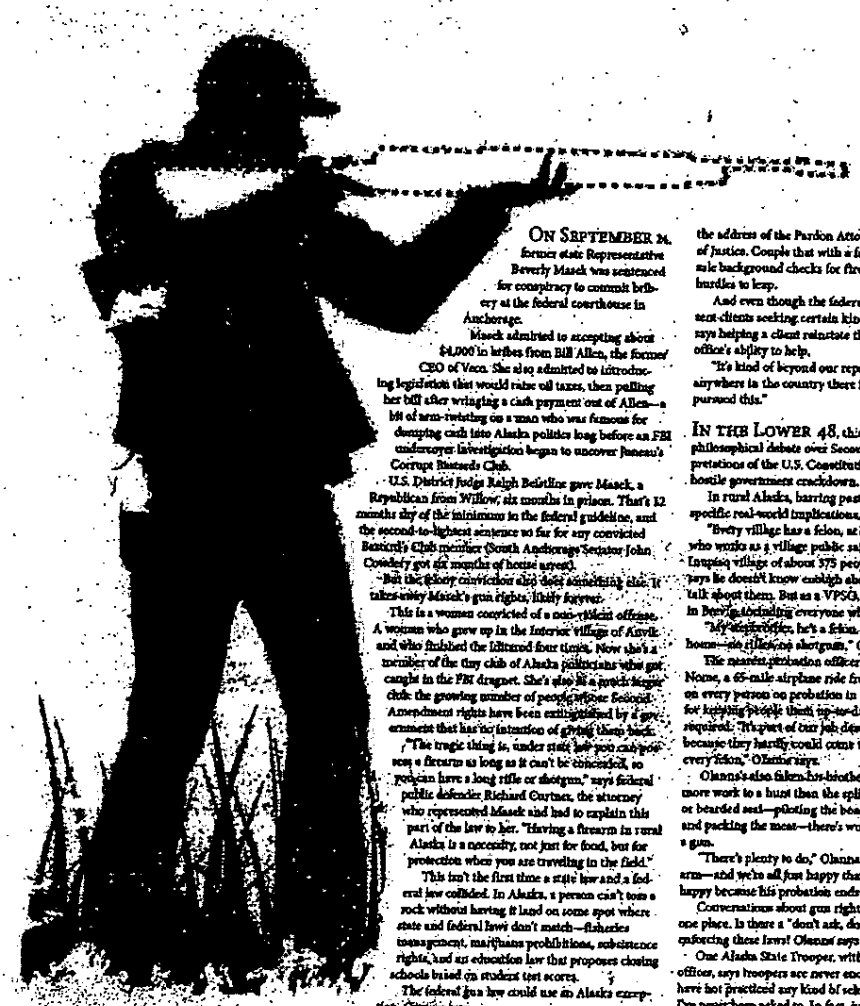
Wayne has asked me to forward the attached documents to you. I made the assumption that you do not have WordPerfect and converted the files into Word, which means they may look a bit different from the documents you have. Please let me know if there is anything else I can do.

Sincerely,

Hidden punishment

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

Story and photos by Scott Christianse



On September 26, former state Representative Beverly Masek was sentenced for conspiracy to commit bribery at the federal courthouse in Anchorage.

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

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

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

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

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

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

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

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

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

But ATF agents don't do those background checks anymore, and haven't for the last 17 years. That's according to a form letter ATF sends to anyone who inquires about reinstatement of rights. The letter calls Second Amendment rights "federal firearms privileges" and says that ever since 1992, Congress has used the bureau's annual budget appropriation to prohibit the ATF from spending money to "investigate or act upon" any restoration of rights application. The letter also says the convict may seek a presidential pardon, and gives the address of the Pardon Attorney's Office at the U.S. Department of Justice. Couple that with a federal law that created strict point-of-sale background checks for firearms, and you have some tall legal hurdles to leap.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"When you go down to the river, well, everybody is packing firearms," Shanigan says, but the trooper may not know who on the river has had their rights revoked until he is back at the office, running names through databases. "Now someone with that knowledge might say, 'Hey, that trooper let somebody go'—but that's not really what they saw," he says.

Cops can be suspicious for all kinds of reasons, Shanigan says, but they have to be careful to not trounce on anyone's rights. "You have to make decisions based on what you know to be true," he says.

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

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

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

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

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

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

In a letter to state Senator Charlie Huggins, Ross identified two clients by their initials and related their stories. One was convicted in 1970, becoming a felon at age 19 after being caught with hallucinogenic drugs, Ross wrote. "He has worked, hunted and fished his entire life. He only learned recently, when he applied for purchase of a new firearm, tat he is now suddenly prohibited form owning firearms, despite having been granted a suspended imposition of sentence more than 30 years ago."

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

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

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

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

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

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

scott@anchoragepress.com

Brevig Mission VPSO Winfred Olanna: "Every village has a felon, at least one."

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STATE & LOCAL AFFAIRS DIVISION
BRIAN JUDY, ALASKA STATE LIAISON

March 11, 2010

Background Information
House Bill 408
Restoration of Firearm Rights in Alaska

• Under Alaska State law, a person who has been convicted of a felony is NOT prohibited from possessing a rifle or shotgun. In effect, the person's right to possess such a firearm is restored by operation of law upon the person's release from incarceration.

• Under Alaska State law, a person who has been convicted of a felony IS prohibited from possessing a firearm *capable of being concealed* on one's person (Alaska Stat. § 11.61.200(a)(1)) and, separately, IS prohibited from possessing a firearm that *is actually concealed* on the person (Alaska Stat. § 11.61.200(a)(12)).

• Alaska State law also provides, however, for an "affirmative defense" to a prosecution under either the felon-in-possession-of-a-*concealable*-firearm statute or the felon-in-possession-of-a-*concealed*-firearm statute if the person's civil rights have been restored as follows:

(1) For possession of firearms *capable of being concealed*, if the person has received a pardon or if the conviction has been set aside or if a period of ten years or more has elapsed since the date of the person's unconditional discharge (Alaska Stat. § 11.61.200(b)); and

(2) For possession of firearms that *are actually concealed*, if the person has received a pardon or if the conviction has been set aside or if a period of ten years or more has elapsed since the date of the person's unconditional discharge. The restoration of the right to possess a *concealed* firearm is further limited, however, to the following circumstances: in the person's dwelling, on land owned or leased by the person appurtenant to the dwelling or while the person is actually engaged in lawful hunting, fishing, trapping or other lawful outdoor activity that necessarily involves the carrying of a weapon for personal protection (Alaska Stat. § 11.61.200(g)).

• Further, it is important to note that under Alaska State law, restoration, by operation of law after the passage of time, of the right to possess either a firearm that is *capable of being concealed* or a firearm that *actually is concealed* is limited to persons who were NOT convicted of an offense against the person (Alaska Stat § 11.41).

• It is also important to note that under Alaska State law, the rights to vote (and, as a qualified voter, to hold public office) and to serve on a jury are lost upon conviction of a felony but automatically restored, by operation of law, immediately upon the person's unconditional discharge (Alaska Stat. §§ 09.20.020; 15.05.030(a); 33.30.241).

• Under Federal law, a person who has been convicted of a "crime punishable by imprisonment for a term exceeding one year" may not possess a firearm (18 USC § 922(g)).

• Federal law also provides, however, that "any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction... *UNLESS* such pardon, expungement, or restoration of civil rights expressly provides that the person may not...possess firearms" (18 USC § 921(a)(20)).

• In the case of Caron v. United States (524 U.S. 308 (1998)), the Supreme Court of the United States:

(1) Found that "nothing in the text of §921(a)(20) requires a case-by-case decision to restore civil rights" so restoration of such rights by operation of law is sufficient; and

(2) Interpreted the aforementioned "unless clause" found in 18 USC § 921 (a)(20). The Court held that an "all-or-nothing" test must be applied and that "a state weapons 'limitation' activates the uniform ban on possessing any firearm at all." In other words, a state must completely restore "all" of a person's rights and treat the person whose rights have been restored in the same manner that other law-abiding citizens are treated. If a person does not have "all" rights restored by the state then, for the purpose of federal law, the person has no rights. Subsequent cases have held that complete restoration of "all" rights includes, not only ALL firearm rights, but also the rights to vote, hold public office and serve on a jury.

• Alaska State law contains two "limitations" on persons who have had their right to possess firearms otherwise restored that are not imposed on persons who have never lost their rights and which, therefore, activate the federal ban on possessing any firearm at all:

(1) A person whose right to possess firearms has been otherwise restored can not possess a firearm concealed outside their dwelling, property or while engaged in a lawful outdoor activity (Alaska Stat. § 11.61.200(g)(2); and

(2) A person whose right to possess firearms has been otherwise restored would be in the position of having to raise an affirmative defense to a charge of either possessing a concealable firearm (Alaska Stat. § 11.61.200(b)) or carrying a firearm concealed (Alaska Stat. § 11.61.200(g)), while a person who never lost his or her rights cannot be charged with such a crime whatsoever.

• Unless the Alaska State Legislature amends existing law to modify these two limitations, the existing policy of the State of Alaska to allow for the restoration of firearm rights cannot be implemented without impacted persons being subject to felony prosecution under Federal law.

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STATE & LOCAL AFFAIRS DIVISION
BRIAN JUDY, ALASKA STATE LIAISON

March 11, 2010

TO: Representative Bill Stoltze
CC: Members of the House Judiciary Committee
FROM: Brian Judy, NRA-ILA Alaska State Liaison
RE: House Bill 408 – **SUPPORT**

I am writing on behalf of the National Rifle Association – Institute for Legislative Action to express **support for House Bill 408.** HB 408 would facilitate the implementation of the current Alaska state law that allows persons who have long-past felony convictions but whose rights have been restored to possess firearms in the state. Although the legislative fix necessary to solve this problem is simple, the reason it is necessary is quite a technical and complicated interaction between state law, federal law and a U.S. Supreme Court decision (attached is a detailed summary of the various issues at conflict).

While many advocates for the restoration of voting rights for persons with past felony convictions talk about dignity, with respect to the restoration of firearm rights there is not only the issue of dignity but of life and death. The nature of life in Alaska, especially in the rural areas, makes possession of firearms a necessity not only for food but for protection in the field.

Current Alaska State law provides for the restoration of roughly 95% of firearms rights to those former offenders who qualify. They can possess rifles and shotguns, they can possess handguns, they can carry handguns openly and they can carry handguns concealed in their home, on their property and while engaged in lawful outdoor activities out in public. The only thing they cannot do under state law is put on a coat and cover a handgun when they are somewhere other than those places previously listed.

The problem is that, based on the Court decision discussed in my attachment, because the State of Alaska does not restore 100% of an affected person's firearm rights, under federal law the person is considered to have NO rights whatsoever! In a Legal Services Memorandum dated April 1, 2009, Legislative Counsel Gerald Luckhaupt described the Court's conclusion as "obviously incorrect." While the NRA would completely agree with Mr. Luckhaupt, only three Supreme Court Justices shared such a view and the decision was 6-3 in this case.

As discussed in my attachment, there are two changes that must be made to State law: first, the restriction on concealed carry must be repealed and second, two affirmative defenses found in AS § 11.61.200 must be changed to exceptions. With these two changes, Alaska State law would treat persons who have had their rights restored exactly the same as those who have never lost their rights and the problem would be solved.

It is the hope of the National Rifle Association that legislators can get beyond the perceived stigma of "giving firearms to felons" and realize the legitimacy of allowing persons, who have long ago paid their debt to society, to attain the restoration of their rights already provided by the State of Alaska but extinguished by an "obviously incorrect" U.S. Supreme Court decision.

Please support House Bill 408.

Helen Phillips

From: Rep. Bill Stoltze
Sent: Tuesday, April 06, 2010 1:15 PM
To: House Finance Legislation
Subject: FW: HB408

Please add to the packet for HB 408.

-----Original Message-----
From: housemajority_email@housemajority.org [mailto:housemajority_email@housemajority.org]
Sent: Tuesday, April 06, 2010 10:07 AM
To: Rep. Bill Stoltze
Subject: HB408

+----------+
DO NOT REPLY DIRECTLY TO THIS EMAIL: your reply will go to enews@housemajority.org To correspond with the author Hit 'Reply' or 'Forward'.
Then change the TO: address to pat@barrow.com If suspected Spam please forward to: support@housemajority.org
+----------+

From: pat@barrow.com

Thank you for your work on HB408. I stand in full support. I have earned a full unconditional pardon from Gov. Murkowski with specific firearm rights restoration listed on it. However even with this rare legal instrument of restoration with the state seal embossed and signed by the Governor I am not able to posses firearms. I can find no other state that has such a dilemma. Please continue to exercise your just wisdom to right 11.61.200. My life and those I serve depends on it.

Respectfully yours,

Pat Patterson

~ Richard \"Pat\" Patterson
Zip Code: 99723
Voter ID: 08014006

+----------+
DO NOT REPLY DIRECTLY TO THIS EMAIL: your reply will go to enews@housemajority.org To correspond with the author Hit 'Reply' or 'Forward'.
Then change the TO: address to pat@barrow.com If suspected Spam please forward to: support@housemajority.org
+----------+