

**HB**

**408**

# Alaska State Legislature House Judiciary Committee

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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 carrying 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.

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## MEMORANDUM

February 16, 2010

**SUBJECT:** Misconduct Involving Weapons and Felons  
(Work Order No. 26-LS1459\A)

**TO:** Representative Bill Stoltze  
Attn: Ben Mulligan

**FROM:** Gerald P. Luckhaupt *GLP*  
Legislative Counsel

Enclosed is the bill draft you requested. As I have previously informed Ben, I have a few comments.

### 1. History of AS 11.61.200

AS 11.61.200(a)(1) does not completely include all conduct prohibited under AS 11.61.200(a)(12).

AS 11.61.200(a)(1) and (12) provide:

(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;

(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.

AS 11.61.200(a)(1) prohibits a felon from possessing a firearm capable of being concealed on the person.<sup>1</sup> An affirmative defense is provided to AS 11.61.200(a)(1) in (b)(1) of that section.

- (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 . . . .

This affirmative defense allows the felon to possess a handgun if one of these requirements is met but does not necessarily allow the felon to carry the handgun concealed. The felon is prohibited from carrying the handgun concealed by AS 11.51.200(a)(12). An affirmative defense is provided to AS 11.61.200(a)(12) in (g) of that section.

- (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 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 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

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<sup>1</sup> For ease of discussion in this memorandum I will refer to "a firearm capable of being concealed on the person" as a handgun even though other firearms are capable of being concealed on the person.

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

This provision allows the felon to only carry a handgun concealed if the felon meets the requirements for possessing a handgun in the affirmative defense to (a)(1) and the felon is either in or on the felon's own property or otherwise engaged in lawful hunting, fishing, trapping, or other lawful outdoor activity.

These provisions are different because one allows the handgun to be openly carried and the other sets a higher bar for the felon to carry the handgun concealed.

AS 11.61.220(a)(12) was enacted in 1998 as part of amendments to the concealed handgun permit laws. HCS CSSB 141(FIN) am H, by Senator Lyda Green, made substantial changes to the eligibility requirements to receive a concealed handgun permit and repealed almost all the restrictions on where a permittee could carry a concealed handgun. The rationale provided by Senator Lyda Green's staff was that anyone eligible to possess a handgun under state or federal law should be eligible to receive a concealed handgun permit and a person who has received a permit should be able to carry a concealed handgun anywhere not otherwise prohibited under state or federal law. To this end certain misdemeanor offenses that previously barred a person from receiving a permit were eliminated. In addition provisions relating to carrying a concealed firearm without a permit were strengthened and clarified while restrictions on where firearms could be possessed were mostly eliminated except for a few limited circumstances where those restrictions were applied generally to everyone (where previously the restrictions only had applied to persons holding permits to carry concealed weapons). As a part of this clarification AS 11.61.200(a)(12)<sup>2</sup> was enacted so that felons who possessed a handgun that was concealed were punished at a greater level than regular members of the public who carried a concealed handgun without a permit. And so a felon who might be permitted to possess a handgun due to the affirmative defense provided in AS 11.61.200(b)(1), would still be subject to a felony penalty if they carried that handgun concealed unless they (1) met the requirements to possess a handgun and (2) were in or on their own property or engaged in certain lawful outdoor activities.

In 2003 the Alaska Legislature enacted CSHB 102(STA) which removed restrictions on members of the public from carrying concealed deadly weapons, including firearms. CSHB 102(STA) made the concealed handgun permit system permissive; no longer would a permit be necessary to carry a handgun concealed.<sup>3</sup> Presumably at this time the legislature could have repealed AS 11.61.200(a)(12) and (g) as Alaska no longer

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<sup>2</sup> As well as the affirmative defense of AS 11.61.200(g).

<sup>3</sup> Although a permit could still be obtained if a person wanted to avail themselves of reciprocity provisions of other states and carry concealed in those states.

distinguished between open or concealed possession of firearms. But the legislature did not. I cannot say that the legislature merely overlooked those provisions as I remember some concern by at least some members about extending the right to carry concealed to those that had committed felonies. \*

2. Do you want to allow all felons convicted of crimes outside of AS 11.41 to be able to carry concealed handguns? \*

To build on my comment #1 above, the changes in this bill draft would allow felons convicted of crimes outside of AS 11.41 to carry concealed handguns, if they have received a pardon, a set aside, or 10 years have elapsed from the felon's unconditional discharge for the offense. Felonies outside of AS 11.41 include unclassified felonies and class A through C felonies, such as arson, misconduct involving controlled substances (including engaging in a continuing criminal enterprise, delivering drugs to children and methamphetamine manufacture and delivery), burglary of a dwelling or while armed with a firearm, promoting prostitution, and distribution and possession of child pornography. Clearly, felons who have received a pardon should be treated differently and a change in current law is clearly warranted in this regard. To a lesser extent persons who have received a set aside under AS 12.55.085(e) are probably deserving of a change in current law. The question becomes whether felons who have not had someone pass upon their character, whether that be the governor in issuing a pardon or a judge when issuing a set aside, should be able to possess concealed handguns merely because of the passage of time.. If so, should this apply to all felonies, even felonies that are considered more egregious or comparable to crimes against a person under AS 11.41?

3. Changing affirmative defense to nonapplicability provision.

The bill draft changes the affirmative defense provided in AS 11.61.200(b) to a nonapplicability provision. This change may have an extreme impact upon the ability of the state to prosecute felons possessing concealable firearms. Currently an affirmative defense is provided for felons to show that they have received a pardon, a set aside, or 10 years have elapsed from their conviction for a felony other than a crime against a person. The reason this is an affirmative defense is because the information necessary to establish the defense is within the knowledge and control of the felon and may not be available to the prosecution. A felon knows if they have received a pardon, a set aside, or 10 years have elapsed while the prosecution does not always have access to this information.<sup>4</sup> By making this a nonapplicability section, the prosecution may be required to disprove the existence of a pardon or set aside, or prove that 10 years have not elapsed, prior to the case proceeding. In many cases this may not be possible.

GPL:plm  
10-076.plm

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<sup>4</sup> Indeed, there is no organized way of searching for this information in most states.



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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**

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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.**

03-24-10

Dear Honorable House Judiciary Committee,

I regret I am not able to testify today. I am piloting a rescue helicopter in remote austere conditions where help is days away if trouble arises. I am on a search for an overdue individual 60 NM south of Kaktovik on the Arctic Slope. Not far from where we shot and killed a 3 year old grizzly that mauled and consumed two persons a few years ago. Last night I assisted Pt. Hope whalers on floating sea ice pans that broke loose from shorefast in high winds.

Article 3, subpart 21 of the Alaska Constitution gives the power of clemency exclusively to the executive branch. The clemency process is long, difficult, thorough and exhausting. It is rarely granted and requires extraordinary circumstances. It also requires exemplary efforts at rehabilitation. I assure you the chances of criminal recidivism after earning a pardon are zero.

Below are some definitions and laws. It is clear that both Congress and the Alaska Legislature intended to provide restorative avenues for ex offenders regarding firearm possession. Needless to say today I do not have the survival tools I need to protect myself, family or those I serve. Even after earning a full unconditional pardon I am still being punished in the worst way. Inability to protect my own life. I pray you will rectify the law to allow its intended design ring true. Allow those that earn pardons have all punishment removed. Thank you for defending the Alaska Constitution and the unique lifestyles we live.

***Federal law on firearms disability:***

18 U.S.C. §921(a)(20) provides:

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 [or implicitly as a matter of state law] provides that the person may not ship, transport, possess, or receive firearms.

Note: It is clear Congress intended for a restorative legal option. It also does not mention conceal has a limitation. This was added by the US Supreme court Caron split decision. (All or nothing)

***Excerpt from the current State of Alaska Clemency handbook:***

**Pardons**

A pardon is a form of Executive Clemency, which if full and unconditional, relieves an offender from further punishment and disabilities imposed by reason of a criminal offense. It is an act of grace which represents forgiveness for a particular crime.

***Definition of a pardon from Black's Law Dictionary:***

In contrast to a reprieve or a commutation, a "pardon" releases the offender from the entire punishment prescribed for the offense. BLACK'S LAW DICTIONARY, 1113 (6th ed. 1990).

See also, 1985 N.D. Op. Att'y Gen. 158 and 1988 N.D. Op. Att'y Gen. 65.

A pardon is usually an action that mitigates or sets aside punishment for a crime after a conviction. Black's Law Dictionary defines it as an 'act or an instance of officially nullifying punishment or other legal consequences of a crime' (ibid., at 1137).

Respectfully yours,

**Capt. Richard M. "Pat" Patterson**

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Edward L. Miner  
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6 January 2009

[REDACTED]  
State Capitol  
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Dear [REDACTED]

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

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

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

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

In Caron v. U.S., the U.S. Supreme Court held that if a person who has previously been convicted of a felony is prohibited from possessing any type of firearm under state law, then they are prohibited from possessing all firearms under federal law.<sup>1</sup> 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.<sup>2</sup> Alaska law draws no distinctions among the types of firearms which a previously convicted felon may possess.<sup>3</sup> 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.<sup>4</sup> 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."<sup>5</sup>

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.

<sup>1</sup> Caron v. U.S., 524 U.S. 308, 314 (1988).

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

<sup>3</sup> See AS 11.61.200(a) and (b).

<sup>4</sup> AS 11.61.200(a)(12) and (g)(2).

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

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

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

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

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

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Sincerely,



Wayne Anthony Ross  
Attorney at Law  
Director, NRA

cc Brian Judy, NRA

## Memorandum

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

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

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

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

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

#### The Alaska CHP Issue

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

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

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

The Alaska Department of Public Safety's interpretation of AS 11.61.200 was upheld in *Gabrielle v. State of Alaska*.<sup>1</sup> 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.*<sup>2</sup> There, the Court faced a person whose civil rights had been restored under Massachusetts law, including the right to possess long guns and handguns. However, he was not allowed to carry handguns outside his home or business, though this right was afforded to non-felons. The Supreme Court found that this restriction, though not strictly a prohibition against possession of handguns, was enough of a restriction to activate the exception to the exception found in §921(a)(20).

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

<sup>1</sup> 158 P.3d 813 (Alaska 2007).

<sup>2</sup> 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*.<sup>3</sup> 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.

---

<sup>3</sup> 118 Fed. Appx. 49 (C.A.6 (Mich.)).

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

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

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

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

### Conclusion

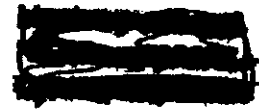
Alaska has made its own policy decision about how to handle the gun rights of ex-felons, however the Federal Government has stripped Alaska of the right to make our own judgments except for an all-or-nothing decision on the gun rights of ex-felons. That message of Federal interference with Alaska's laws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



State of Alaska  
Department of  
**Public Safety**

Sarah Palin, Governor  
Walt Monegan, Commissioner

May 13, 2008



By certified mail with return receipt

Dear Mr. [REDACTED]

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

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

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

*"Public Safety through Public Service"*

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

Mr. James Wargi  
Page 2  
May 13, 2008

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

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

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

Sincerely,



John D. Glass  
Deputy Commissioner

*"Public Safety through Public Service"*

Office of the Commissioner  
5700 E. Tudor Road - Anchorage, AK 99507 - Voice (907) 269-5086 - Fax (907) 269-4549  
Juneau Office - Voice (907) 466-4322 - Fax (907) 466-4362

To whom it my Concern,

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

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

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

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

I was given a second chance and have made a great life with that second chance, I'm allowed to vote, buy and posses firearms and I'm a avid hunter and sportsman. (Because I'm not considered 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 signature block]

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

Alaska Concealed Handgun Permits  
5700 E. Tudor Road - Anchorage, AK 99507 - Voice (907) 269-0392 - Fax (907) 269-5609

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 disablilties  
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 20, 2005, the Attorney General filed his answer. The state's position was that Mr. Troyer needs a permit to acquire a pistol prior to obtaining custody of the revolver. The court held a hearing on August 21, 2006. The parties subsequently signed on October 5, 2006, a stipulation for dismissal. Mr. Troyer agreed to drop his lawsuit and the police agreed to return the revolver to Mr. Troyer without requiring that he obtain a pistol acquisition permit. The revolver was returned.

### MONTANA

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

### NEW HAMPSHIRE

**Lone Pine Hunter's Club, Inc. (New Hampshire).** This is an effort to shut down a shooting range. New Hampshire has a range protection statute. The club has been operating a shooting range on the property since 1966. The case resulted in two reported decisions. *Lone Pine Hunters' Club v. Town of Hollis*, 149 N.H. 668, 826 A.2d 582 (2003), held that evidence was sufficient to uphold finding that the zoning board of adjustment's finding that, 34 years earlier, it merely decided that hunt club did not need a variance to build a proposed addition, rather than deciding that the club did not need a variance to use the property as a fish and game club. Consequently, under the 1999 zoning ordinance the club's use of the property could be approved as special exception. The club would have to cease and desist unless the club applied for a special exception and presented a site plan to the planning board depicting the nature of the club's entire operation. *Residents Defending Their Homes v. Lone Pine Hunters' Club, Inc.*, 124 A.2d 766 (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.

LAW OFFICES  
**WILLIAM R. SATTERBERG, JR.**

FAX (907) 452-3988

ATTORNEY AT LAW  
709 FOURTH AVENUE  
FAIRBANKS, ALASKA 99701  
(907) 452-4454

August 26, 2009

Richard Svodony  
Assistant Attorney General  
PO Box 110300  
Juneau, AK 99811

Dear Richard:

This letter is a follow-up to our recent conversation regarding the Lauterbach Amendment and your interpretation of the law.

Specifically, as indicated to you, the primary concern that I have is that the Department of Probation and Parole has apparently been advising individuals who have retained an SIS that they no longer have weapons rights. I believe that this is incorrect advice. I furthermore suggest that your office's interpretation of Judge Steinkruger's opinion is incorrect, as well. My analysis will follow shortly.

Recognizing that you indicated to me that the assistant attorney general for the state was essentially interpreting federal law, might I suggest that the state take an alternate position? Specifically, why cannot the state simply advise individuals that federal law may or may not impact their ability to own weapons, and that they should be aware that federal law may restrict the right to own weapons, but that the state law does not do so? This may solve the problem.

As indicated to you, the analysis of Judge Steinkruger in the case you referenced, I believe, contradicts your position as set forth to me on the phone. Specifically, I have reviewed a copy of the email communication between Assistant Attorney General John J. Novak and Assistant Attorney General John K. Bodick from April 3, 2009. In the email communication Mr. Novak opines that certain language regarding the right to keep and bear arms that is included in the restoration of rights letter typically distributed to offenders that successfully complete probation or parole is inaccurate. Respectfully, Mr. Novak's analysis is wrong for the following reasons:

First, Mr. Novak states that a felony conviction is a felony conviction even though the court grants an SIS that is later set aside. This is inaccurate. An SIS that is set aside is, by very definition, not a felony conviction, because in order to be a felony conviction a person must be found guilty and sentenced. A person who receives an SIS that is set aside is never sentenced, and is therefore never convicted. Moreover, 18 USC § 921(a)(20), provides that "any conviction which has been...set aside...shall not be considered a conviction for purposes of [lawful firearms

possession].” Thus, an SIS that is later set aside is not a felony conviction under either state or federal law. Mr. Novak’s assertion to the contrary is wrong.

Mr. Novak then states that a person commits the crime of misconduct involving a weapon in the third degree, in violation of AS 11.61.200(a)(12), by knowingly possessing a firearm concealed on one’s person after having been convicted of a felony offense *even when the court granted an SIS for the prior offense that was later set aside*. Again, Mr. Novak’s analysis is dead wrong, as he fails to mention AS 11.61.200(g)(1)(B) which states that “it is an affirmative defense to a prosecution under (a)(12) of this section that the underlying conviction upon which the action is based has been set aside under AS 12.55.085. Thus, AS 11.61.200 clearly states that it is **not** a crime to knowingly possess a concealed firearm if a person has been granted an SIS.

I submit that, Mr. Novak is also incorrect when he states that a person commits the federal offense of felony possession in violation of 18 USC 922(g)(1) by possessing a firearm or ammunition after having been convicted of a felony with the only exception being those cases where an Alaska Court granted an SIS between May 19, 1986, and April 14, 1998. It is truly baffling where this opinion comes from. As stated above, 18 USC § 921(a)(20) clearly states that a person who was granted an SIS is not a convicted felon for purposes of the felon in possession of a firearm statute. The date of the SIS is irrelevant, as 921 (a)(20) is not limited by date, and is currently valid federal law.

Perhaps, Mr. Novak’s confusion is a misunderstanding of the interplay between federal and state law. As previously explained, once a felony conviction is set aside, there are no longer any restrictions under federal or state law for firearms possession. It is, however, true that, under federal law, once a person is released from probation or parole from a felony conviction (not an SIS) he may not possess any firearms whatsoever until 10 years has passed from the date of unconditional discharge, which is generally the date the person is released from probation and/or parole. Under state law, however, a person is still allowed to possess long guns, i.e., rifles and shotguns, upon being released from probation and parole since there is no state law prohibiting such. Under the Carone v. US decision, mentioned by Mr. Novak in his email, it is accurate that such possession, although not prohibited by state law, would still be a violation of federal law until the 10 year period has passed. Once the 10 year period has passed, even a convicted felon who did not receive an SIS can possess any firearm they choose in Alaska, concealable or not, under both state and federal law.

Thank you once again for your kind consideration of this matter.

Sincerely,

William R. Satterberg, Jr.

Cc: Dan Sullivan, Attorney General

WRS:alm

July 27, 2009

Daniel S. Sullivan  
Attorney General  
P.O. Box 110300  
Juneau, AK 99811-0300

Dear Dan:

I enjoyed visiting with you briefly on July 26, 2009, when you were in Fairbanks. Unfortunately, time did not allow us to discuss a matter which I think is of rather serious concern.

Specifically, for many years, SIS sentences have been given out to felony offenders. Upon successful completion of the SIS, the offender has then been able to have their civil rights restored which, parenthetically, has included the right to commence hunting once again and owning firearms.

In April of this year, a decision was issued out of Anchorage as an Attorney General's opinion by Assistant Attorney General John Novak, copy attached, which essentially indicated that people who had an SIS record were still precluded from owning firearms because they "had been convicted" of a felony, even though the conviction had been set aside.

Needless to say, I disagree strongly with that decision, but the unfortunate byproduct is that the Department of Corrections is now taking the position based upon that letter of opinion that anybody who has an SIS conviction is still legally precluded from ever owning a firearm. I believe that this is incorrect, and I am also concerned that criminal charges may eventually be filed by somebody who has received advice either by defense counsel, or even the court, as well as from prior probation officers, that they are able to own a firearm once their rights have been restored, upon successful completion of the SIS.

Finally, it should be noted that one of the incentives for many individuals to plead guilty to a charge and obtain an SIS has been the understanding that they will be able to own a firearm at some future date, recognizing how important hunting is in Alaska. This latest decision, which may simply be further advocacy of gun control, is going to have a most chilling effect upon those decisions as well.

If possible, might you please consider having the decision reevaluated, and, if the decision is made to reverse your predecessor's position, taking appropriate steps? One of the important factors to this is that I am trying to avoid litigation which could be filed as a declaratory judgment action, to address the issue as well. If the Attorney General changes his position on the matter, however, the issue will be resolved.

Sincerely,

William R. Satterberg, Jr.

Encl.

WRS:alm

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
 FOURTH JUDICIAL DISTRICT AT FAIRBANKS

STATE OF ALASKA, )  
 )  
 Plaintiff(s), )  
 vs. )  
 )  
 ALLEN WILSON, )  
 )  
 Defendant(s). )  
 \_\_\_\_\_ )

Case No. 4FA-S99-3528 CR

**ORDER RE: DEFENDANT'S MOTION FOR  
 ORDER ALLOWING HIM TO POSSESS FIREARM**

In December 1999, Allen Wilson was charged with one count of theft in the second degree (AS 11.46.130(a)), a Class C felony and 24 counts of unsworn falsification (AS 11.56.210(a)), a Class A misdemeanor in connection with false claims for unemployment compensation. A jury found him guilty on all counts. On December 8, 2000, this court sentenced Mr. Wilson to pay restitution to the Alaska Department of Labor in the amount of \$7552, which Mr. Wilson paid in full the same day. In 2001, Mr. Wilson attempted to get his convictions set aside in order to get his permit to carry a concealed weapon reinstated. This court denied his request.

On January 18, 2005, Mr. Wilson wrote a letter to the court requesting that his right to possess a gun for hunting be restored so that he can hunt for subsistence purposes. This court has considered the letter and motion.

Discussion:

1. Can Allen Wilson Legally Possess a Firearm for Hunting at This Time?

Under AS 11.61.200, Mr. Wilson is prohibited from possessing a firearm, which is either concealed or is capable of being concealed on his person, for ten years after the date of unconditional discharge from the felony offense. The statute applies to all felony convictions, regardless of whether violence was involved in the offense. See AS 11.61.200. Therefore, the restriction applies to Mr. Wilson even though he was convicted of theft in a completely non-violent situation.

The term "unconditional discharge" requires "completion of any sentence of imprisonment, discharge from parole or probation, and release from any other restriction directly imposed as part of the judgment of conviction." Singleton v. State, 921 P.2d 636, 638 (Alaska App. 1996); AS 12.55.185(16); AS 11.61.200(h)(2). Mr. Wilson paid the restitution on the same day he was sentenced. No other restrictions were imposed by the judgment of conviction. Thus, Mr. Wilson was unconditionally discharged on December 8, 2000, and will be eligible to possess a firearm capable of being concealed on his person in December 2010.

Rifles or shotguns manufactured for hunting are generally too large to be considered "capable of concealment on one's person" under AS 11.61.200(a). Therefore, state law appears to permit Mr. Wilson to possess a firearm like a hunting rifle, so long as it is not covered or concealed.

Several other states along with Alaska have statutes that prohibit a convicted felon from possessing handguns or other concealable firearms while permitting them to possess rifles and

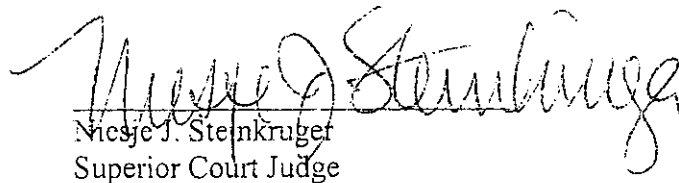
shotguns. E.g., United States v. Qualls, 172 F.3d 1136, 1138-39 (9<sup>th</sup> Cir. 1999); New York v. Adams, 747 N.Y.S.2d 909, 912-15 (Sup. Ct. 2002).

Under federal law, a felon may be charged under 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 921(a)(20) for possessing any firearm, including those permitted under state law. Caron v. United State, 524 U.S. 308, 313-317, 118 S. Ct. 2007, 2011-2012, 141 L. Ed. 2d 303 (1998); Adams, 747 N.Y.S.2d at 915; Qualls, 172 F.3d at 1138-39. The United States Supreme Court has interpreted the language in 18 U.S.C. § 921(a)(20) to prohibit convicted felons from possessing *all* firearms of *any* type for as long as *any* state restriction on possession of *any* type of firearm due to the felony conviction remains. Caron v. United State, 524 U.S. 308, 313-317, 118 S. Ct. 2007, 2011-2012, 141 L. Ed. 2d 303 (1998).<sup>1</sup>

Conclusion:

State law prohibits Mr. Wilson from possessing a firearm concealed or capable of being concealed until December 8, 2010. Federal law prohibits Mr. Wilson from possessing any firearm until December 8, 2010. This court is without jurisdiction to grant Mr. Wilson permission to possess a firearm. The Motion is DENIED.

Dated this 25 day of May, 2005, at Fairbanks, Alaska.

  
Niesje J. Steinkruget  
Superior Court Judge

<sup>1</sup> Although the Court did not use a preemption analysis, the opinion observed that "the Federal Government has an interest in a single, national, protective policy, broader than required by state law." Caron, 524 U.S. at 316. 118 S. Ct. at 2012.

certify that a copy of the foregoing was distributed via:  
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Subject: FW: Firearm Possession Following Completion of Felony Probation/Parole  
From: "Mercer, Delila D (DOC)" <delila.mercer@alaska.gov>  
Date: Mon, Jun 15, 2009 4:54 pm  
To: office@satterberg.net

6

Mr. Satterberg,

Sorry it's taken this long to get back to you regarding SIS and firearm rights. Here's what I have regarding that decision. The first email at the bottom is from John Novak, Assistant Attorney General. He explains his interpretation.

*Delila Mercer*

Criminal Justice Technician II

Department of Corrections

~~Division of Probation & Parole~~

Region 2, Fairbanks Office

455 Third Avenue, Suite 130

Fairbanks, AK 99701

Ph: 907-458-6830, Fx: 907-458-6831

**From:** Bacon, Glenn H (DOC)  
**Sent:** Friday, April 17, 2009 2:26 PM  
**To:** DOC - All FAIPO  
**Subject:** Firearm Possession Following Completion of Felony Probation/Parole  
**Importance:** High

Please read the text below. It clarifies an important point for which we apparently have been providing misinformation for years. According to the Department of Law, those offenders with an SIS also lose their firearms rights, even if the conviction is later set aside. Make sure this is covered in the orientation. For those POs who supervise someone with an SIS, please cover this information with them and enter a chrono that you did so. Thanks.

-- Glenn

**From:** Correa, Martie J (DOC)  
**Sent:** Friday, April 17, 2009 1:06 PM  
**To:** Bacon, Glenn H (DOC); Hering, Jennifer L (DOC)  
**Subject:** FW: Firearm Possession Following Completion of Felony Probation/Parole

Hi,

**This is the reason for the change in the language in the new case closing form that was sent out. Thanks.**

**Martie**

**From:** Novak, John J (LAW)  
**Sent:** Friday, April 03, 2009 3:10 PM  
**To:** Bodick, John K (LAW)  
**Cc:** McLean, Susan S (LAW); Gaffney, Eric L (DPS)  
**Subject:** Firearm Possession Following Completion of Felony Probation/Parole

John,

I recently spent a considerable amount of time researching and determining the law concerning the legality of possessing firearms in Alaska following a conviction for a felony offense. In my efforts, probation/parole officer Cris Sanders provided me a restoration of rights sample letter for an offender that successfully completed probation/parole. That letter contained the following text:

"Although your above rights have been restored [rights to vote, jury service, and to hold elected office], you should be aware that your right to keep and bear arms is automatically restored only if you received a suspended imposition of sentence and your record has been set aside. If you did not receive a SIS, your rights to keep and bear arms are subject to applicable state laws. Contact your attorney if you have questions."

**This above quoted language is wrong.** It is my suggestion that DOC restoration letters not include this erroneous language. I will attempt to briefly explain the law and why the above language is wrong.

First, a felony conviction - whether by plea or jury verdict - is a felony conviction, even when the court grants an SIS that is later set aside.

Second, a person commits the crime of misconduct involving a weapon in the third degree (a class C felony) in violation of AS 11.61.200(a)(12), by knowingly possessing on or after April 14, 1998 (the effective date of the statute section) a firearm concealed on the person after having been convicted of any felony offense even when the court granted a SIS for the prior offense that later was set aside.

And third, a person commits the federal offense of felon in possession in violation of 18 USC 922(g)(1) in Alaska by knowingly possessing any firearm or ammunition (including all handguns, shotguns and rifles as well as all types of ammunition) after having been convicted of any felony, with the only exception being those cases where the Alaska court granted a SIS and where a set aside order was issued between the dates of May 19, 1986 and April 14, 1998. See, *Caron v. United States*, 524 US 308 (1998); *United States v. Brown*, 69 F Supp 2d 925 (E.D. Mich. 1999); and effective date of federal Firearms Owners Protection Act of 1988.

The bottom line is that in the vast majority of cases a person will commit a felony offense (whether under state or federal law) by possessing any firearm or any ammunition after having been convicted of a felony, regardless if a SIS was granted and a court later issued a set aside order.

I suggest the following language be included in "restoration letters":

"Although your above rights have been restored [rights to vote, jury service, and to hold elected office], you should be aware that your right to possess firearms (all shotguns, rifles, as well as handguns) and ammunition remains restricted. Possession of any rifle, shotgun, rifle and/or ammunition likely will subject you to prosecution for felony criminal offense under state or federal law even if you received a suspended imposition of sentence and an order setting aside the conviction has been issued. You should contact your attorney if you have questions."

I will leave it to you to pass this information on to the appropriate folks at DOC. If desired, I am happy to further discuss this matter.

John Novak  
Assistant Attorney General  
Counsel for the Department of Public Safety  
269-6330



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# 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 Christiane



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

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

U.S. District Judge Ralph Bevilacqua gave Meach, a Republican from Willow, six months in prison. That's 12 months shy of the minimum in the federal guidelines, and the second-to-highest sentence so far for any convicted Senator's Club member (South Apalachee Sequester John Condeley got six months of house arrest).

But the (federal) conviction also says something else. It takes away Meach'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 Akiak and who finished the filtered four times. Now she's a member of the tiny club of Alaska politicians who get caught in the FBI dragnet. She's also in a pack that includes the growing number of people whose federal Amendment rights have been extinguished by a government that has no intention of getting them back.

"The tragic thing is, under state law you can get a firearm as long as it can't be concealed, so you can have a long rifle or shotgun," says federal public defender Richard Curmear, the attorney who represented Meach 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, substance rights, and an education law that proposes closing schools based on student test scores.

The federal gun law could use an Alaska exception, Curmear 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're alone subscribing 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 pardoned 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.

The 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 since 1982, Congress has used the bureau's annual budget appropriation to prohibit the ATF from spending money to "investigate or act upon" any reinstatement 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, Curmear says helping a client reinstate their gun rights would be outside his office's ability to help.

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

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

In rural Alaska, bearing 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 Olman, who works as a village public safety officer in Bragg Mission, an isolated village of about 375 people on the Seward Peninsula. Olman says he doesn't know enough about federal firearms prohibitions to talk about them. But as a VPSO, he's talked with knowing everyone in Bragg, including everyone who serves from prison.

"My brother-in-law, he's a felon, so he can't have any firearms in his home—no rifles, no shotguns," Olman says.

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

Olman'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 caribou or bearded seal—plating the head, spotting animals, field dressing and packing the meat—there's work a hunter can do without holding a gun.

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

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

One Alaska State Trooper, with experience as a VPSO overnight 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 Upiakuk. He remembers being one of the excited village kids who would run, not walk, to the airstrip when state trooper landed at Upiakuk.

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

Troopers are charged with enforcing state law, and that's where their focus is. Shanigan's current patrol is the Parks Highway from Tullahoma north to Cantwell. When he worked as a VPSO overnight 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 conservation, so he knows how to prosecute hunting and fishing violations.

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



Alaska State Trooper Yermess Shanigan: "Someone with that knowledge might say, 'Boy, that trooper had 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 so not to 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.

**"Arbitrage: attorney and gun-rights activists: Whyne**

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

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

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

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

Ross believes changing state law can solve the NICS problem for some felons. He's even drafted model legislation, but it hasn't been introduced despite his efforts to recruit a legislator to sponsor it. "We 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, married and finished his entire life. He only learned recently, when he applied for purchase of a new firearm, that he is now suddenly prohibited from owning firearms, despite having been granted a suspended imposition of sentence more than 30 years ago."

Ross's second example was Beverly Mississippian (PWS) Winifred Glasser. "Every village has a felon, at least one."

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

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

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

The implication is there won't be hordes of FBI or ATF agents flying around Alaska and repelling 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)," Courtney 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 Courtney told Beverly Missick, 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?'" Courtney says. "There is just no getting around it." ♦

scott@alaskaobserver.com



Beverly Mississippian (PWS) Winifred Glasser: "Every village has a felon, at least one."

**Representative Jay Ramras**  
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Chair, Economic Development,  
Trade & Tourism

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# Alaska State Legislature



## House of Representatives

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**House District 10**

### Memo

To: Senator Hollis French  
Chair Senate Judiciary Committee

From: Representative Ramras

A handwritten signature in black ink, appearing to be "JR".

Date: April 11, 2010

Re: Request for HB408 to be heard in Senate Judiciary

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Please accept this memo as a request for HB408 to be heard in Senate Judiciary.  
Attached please find the following documents:

- Sponsor Statement
- CSHB408(JUD) 26-LS1459\U
- LAW zero fiscal note
- DPS zero fiscal note
- HB408 26-LS1459\E
- Leg. Legal memo 2.16.10
- Support

Representative\_Jay\_Ramras@legis.state.ak.us