NBI GUN LAW CLE 2018

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**NBI MISSOURI GUN LAW CLE**

**2018**

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**LEGAL DEVELOPMENTS**

**EXPUNGEMENT**

To my astonishment, Missouri has an expungement law. For felonies it must be seven years since being released from the Department of Correction/Probation or Parole. For misdemeanors it must be three years. Carrying a concealed weapon CAN be expunged, since that is no longer a crime. Drug crimes can be expunged. Certain crimes can NOT be expunged, DWI, violent crimes, crimes involving death, sexual crimes, forgery, and a host of others. Sometimes it depends on exactly what statute is charged.

**CONSTITUTIONAL**

The U.S. Supreme Court has ruled that the Second Amendment is an individual right. In doing so it evaded setting a standard of scrutiny for review of gun laws. Lower courts have responded with a flurry of intermediate scrutiny cases.

Other cases seeking to prohibit the arbitrary denial of concealed carry licenses are stirring. In “May Issue” states local authorities have absolute power to issue or not issue licenses. Licenses tend to go to the politically influential. In New York City “gun lawyers” make a living helping people through the process. There are periodic scandals involving corruption in the licensing unit. These cases have not been successful at the appellate level and without a split in the circuits it is unlikely that the Supreme Court will take a case.

There have been cases seeking to overturn state-level bans on semi-automatic firearms. These cases have been unsuccessful at the appellate level. There have been petitions for the Supreme Court to take these cases but none have been accepted to date. This has led Justice Clarence Thomas to complain that the Court treats the Second Amendment as a second-class right.

The late Justice Warren Burger has been quoted for his statement that the individual right interpretation of the Second Amendment is a “fraud.” Justice Burger’s entire body of work on the Second Amendment consists of a two page article in “Parade” magazine for 14 January, 1990. In it he makes four proposals for the regulation of firearms:

1. Require a purchase application contain age, residence, employment and any prior criminal convictions.
2. A ten day waiting period
3. Firearms be transferred in the same way as motor vehicles
4. A ballistic fingerprint of all firearms be filed.

His proposal in the first point had already been the law since 1968 under 18 U.S. Code Section 1983. His fourth point was not possible in 1990. Since then a computer program called IBIS has become available which compares images of fired bullets. The system has been successful in matching bullets fired in close succession to each other. Wear to the gun barrel leads to numerous false positives. It does narrow down possible bullets for human comparisons. Several states adopted this procedure for guns sold in the state but have repealed the law after it failed to solve any crimes.

Justice Burger’s article lacks the most basic research. It reads like a stream of consciousness editorial. Former Justice John Paul Stevens suggested that the Second Amendment be repealed. This caused much outraged among gun owners untiled they realized that he agreed with them. His argument is that guns cannot be restricted as long as the Second Amendment exists. The only Constitutional Amendment ever repealed was Prohibition.

Until another conservative justice joins the court, there does not seem to be a great deal of enthusiasm in gun-rights organizations for another Supreme Court case

**WHAT KIND OF WEAPONS**

The Second Amendment recognizes the right “to keep and bear arms . . .” Some 19th century cases defined these as the weapons of “civilized warfare.” This would preserve the right to Gatling guns and cannon but not boomerangs and blow guns. It is widely claimed that it only preserves the right to the weapons known by an agrarian society. There is a problem with this claim.

The Constitution does not refer to agriculture. It refers to the power of Congress to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and discoveries;" [[1]](#endnote-1) The Constitution was not written by hicks, but by amateur scientists so confident of the advance of technology that they provided for it in their fundamental law. Many technological advances were made during the lives of the Revolutionary generation.[[2]](#endnote-2) Machines for spinning thread and weaving cloth enabled mass production. A Revolutionary inventor created a submarine. Hot air balloons flew, which may have led to the invention of the parachute in 1783. Steam engines turned into pumps and machines and transportation. During the Revolutionary period the greatest scientific question of the age was solved; the invention of a means for measuring longitude.[[3]](#endnote-3) This holy grail of navigation was a chronometer, an improved clock which was accurate under shipboard conditions.

It will doubtless be argued that despite personal involvement with improved technology, the Founders could not possibly have imagined an increase in firepower. The Founders not only imagined an increase in firepower but knew of firepower improvements. Benjamin Franklin discussed the firepower advantage of bows and arrows over muskets.[[4]](#endnote-4) But even the great Franklin could not convince Americans to revert to bows and arrows. Instead there were efforts to make guns fire faster and more reliably. Advances in reliability had occurred in the previous century. Matchlock muskets, wheelocks, dog locks and snaphaunces had given way to flintlocks. Each step was an improvement in reliable ignition and therefore firepower. The invention of the socket bayonet doubled the effectiveness of the musket. However, multiple shots was the goal. Since the time of matchlocks multiple shots had been accomplished through multiple barrels and superimposed loads in a single barrel. Some flintlocks with revolving chambers and a single barrel survive. Several gunsmiths produced guns with powder and shot stored in the stock. A crank rotated each charge into firing position; one example carried ammunition for twenty-five shots. Multiple records of the 1720’s mention a “Mr. Pim of Boston” who offered a gun which fired eleven times in the space of two minutes, about twice as fast as a common musket of the period. The *Boston Gazette* of 12 April, 1756 advertised a gun which would fire nine times “as quick . . . as you please” proving the concept was well known in the center of Revolutionary activity.[[5]](#endnote-5) In 1718 James Puckle patented a crank operated machine gun which saw action against the French in the West Indies.[[6]](#endnote-6) During the Revolution British Major Patrick Ferguson invented a breech-loading rifle which combined firepower with accuracy in a package that was reliable under combat conditions.[[7]](#endnote-7)

There has been no question that freedom of speech includes high speed printing presses[[8]](#endnote-8) and electronic broadcasting, technologies unknown to the Founders.[[9]](#endnote-9) In no case have the courts limited a constitutional right to the technology available when the Bill of Rights was adopted in 1791.

The Bill of Rights establishes a set of principles, technology does not affect the reach of those principles, those principles affect the reach of technology. For example, the Fourth Amendment ensures that citizens shall be secure in “their persons, houses, papers, and effects against unreasonable searches and seizures”. In 1967 the Supreme Court was asked to determine if this right extended to comments made in a public phone booth. The genesis of the case had Mr. Katz "transmitting wagering information by telephone".[[10]](#endnote-10) Mr. Katz, believing his phone was tapped, took the precaution of using a phone booth, a technology and structure unknown to the founding fathers. However, the FBI had taken the precaution of placing a listening device on top of the booth; but they did not take the precaution of getting a warrant. The government argued that the booth was not a constitutionally protected area. The Court ruled that "the Fourth Amendment protects people, not places." Thirty-five years later the Court ruled that technology cannot be used to erode the privacy guaranteed by the Fourth Amendment.[[11]](#endnote-11) If the government cannot use technology to violate a right recognized in 1791, it follows that the government cannot confine a right to the technology of 1791.

The US Supreme Court has NOT confined the right to the technology of 1791. An abusive boyfriend put Ms. Jaime Caetano in the hospital. She obtained multiple protective orders which were ineffective in multiples. A friend gave her an electric stun gun which she accepted. The US Supreme Court opinion stated “It is a good thing she did.”[[12]](#endnote-12) When the boyfriend again accosted her she showed him her stun gun and he ran away. Ms. Caetano was arrested for possession of an illegal weapon; the stun gun. She was convicted on the grounds that they were “not in common use at the time of the Second Amendment’s enactment.” The Massachusetts Court also found that they were dangerous and unusual and that they were not adaptable to use in the military. The US Supreme Court reversed Quoting *Heller* that the Second Amendment “extends . . . to . . . arms . . . that were not in existence at the time of the founding. 554 U.S. at 582.” The state court found them “unusual” because they were modern and not in use in 1791. The court found this ruling inconsistent with *Heller* for the same reason. The US Supreme Court found that *Heller* “rejected the proposition that only those weapons useful in warfare are protected 554 U.S. at 624-5.”

The case is significant in that it was a unanimous decision following the death of Justice Scalia. It was an easy case for the court involving an abused woman (even before she was arrested) and a weapon which is rarely related to death.

On 8 June, 2017 the New Jersey Supreme Court ruled that it is a Constitutional Right to carry a machete in one’s home for self-defense.[[13]](#endnote-13) Mr. Montalvo was making a great deal of noise in his apartment above Mr. Daleckis. In retaliation Mr. Daleckis pounded on his ceiling. In retaliation Mr. Montalvo came down, pounded on the door, destroyed a small table and left. In retaliation Mr. Daleckis went upstairs and pounded on Mr. Montalvo’s door. In retaliation Mr. Montalvo answered the door with a machete in hand. Mr. Montalvo was arrested and convicted of possession of an implement as a weapon. The New Jersey Supreme Court found that it was possessed for the purpose of self-defense and therefore lawful.

The case stands for the proposition that one must cut the train of retaliation as early as possible. It is significant because it comes out of the fun-house mirror that is New Jersey weapons law.

**SEARCH AND SEIZURE**

For many years the New Jersey State Police maintained that an NRA bumper-sticker was probable cause to search for guns and a “Grateful Dead” bumper-sticker was probable cause to search for drugs. This standard has been quashed by the courts in favor of a totality of the circumstances.

A number of web sites advise people to call the police whenever they see a person with a gun; sometimes with imaginative exaggerations. The process is called “SWATing.” The mere report of a person with a gun is insufficient to create reasonable suspicion.[[14]](#endnote-14) Remarkably the Eighth Circuit expanded on that principle.

Convenience store clerks in Lincoln Nebraska called 911 to report a customer who had not answered their questions, starred at the cash register and then went outside to sit in a car. When one of the clerks went outside he saw the customer hold a pistol as if he was blowing smoke out of the barrel. Having worked the night shift in a liquor store, this would raise my alert level but is not far beyond the norm. The following day police officers conducted a felony stop on a similar car driven by a person bearing no resemblance to the strange customer. The innocent driver was injured and sued. The Eighth Circuit ruled that there was no probable cause for a felony stop because there is a right to open carry firearms in Nebraska.[[15]](#endnote-15)

**STATE CONSTITUTIONAL PROVISION**

**AMENDMENT 5 TO ARTICLE I SECTION 23**

A referendum on 5 August, 2014 changed Missouri's Constitution at Article I Section 23 to state:

That the right of every citizen to keep and bear arms, ammunition and accessories typical to the normal function of such arms, in defense of his home, person, family and property, or when lawfully summoned in aid of the civil power, shall not be questioned. The rights guaranteed by this section shall be unalienable. Any restriction on these rights shall be subject to strict scrutiny and the state of Missouri shall be obligated to uphold these rights and shall under no circumstances decline to protect against their infringement. Nothing in this section shall be construed to prevent the general assembly from enacting general laws which limit the rights of convicted violent felons or those adjudicated by a court to be a danger to self or others as result of a mental disorder or mental infirmity.

Article I section 23 of the Missouri Constitution was amended by Amendment 5 to make the right to keep and bear arms “unalienable.” Restrictions on the right are subject to “strict scrutiny.” This is the strongest state guarantee in the country. An open carry activist in St. Louis claims that the amendment abolishes laws against open carry. The Lt. Governor’s Office sent an e mail to a constituent advising that the amendment authorizes expungement of non-violent crimes. No legal memo accompanied the e-mail. By itself, the amendment does neither. It could very well be the basis of legal action to accomplish these goals but it does not end firearm regulations. Any such regulations are subject to strict scrutiny. It appears that the Attorney General must defend against further federal restrictions. Suit was filed over the ballot language. The Supreme Court ruled that the ballot language was sufficient on 30 June, 2015 in *Dotson v Kander*. The change to Article I section 23 states that these unalienable rights did not apply to violent felons or person adjudicated to be a danger to themselves or others. Certain optimistic persons appealed state convictions for being a felon in possession of firearms under the new constitutional provision. The *Dotson* decision stated that “The right to bear arms ‘is not unlimited’ and there are still ‘longstanding prohibitions on the possession of firearms by felons and the mentally ill,. . .”

On 18 August, 2015 Missouri’s Supreme Court ruled directly on this point in *State v Merritt* and *State v McCoy*. Both decisions upheld the state law prohibiting firearms possession by non-violent felons. Since then the Court has heard appeals by even more optimistic persons that the law prohibiting felons from possessing guns is unconstitutional because they were not arrested until after Amendment 5 was adopted. Since August, 2015 the Missouri Supreme Court has ruled six times that Amendment 5 did not allow non-violent felons to possess guns. Its next opinion on the subject may start out “Listen stupid . . .”

**NULLIFYING**

In recent years the Missouri legislature has been enchanted with the idea of nullifying federal firearms law. These efforts have failed. A lobbyist with a Tenth Amendment organization promoting states’ rights managed to convince the legislature that he was working for the gun rights movement. He was not. He used firearms to promote his state’s rights agenda, although I am sure that he believes that he was helping the firearms movement. One cannot rely on the legislature to remember this from one session to the next. He is likely to continue this effort. The legislature has sought to nullify federal acts which are unconstitutional and hence void to begin with but has been short on defining how this is to be determined.

Some states have sought to evade federal restrictions on firearms by declaring all guns manufactured within the state are exempt from federal controls. Unless the steel and other materials involved are mined and refined in the state this seems unlikely.

In 1942 the US Supreme Court heard *Wickard v Filburn,* 317 U.S. 111(1942). The case involved a farmer’s violation of wheat control regulations. He had raised an unauthorized ten extra acres of wheat. He had fed the wheat to cattle on his own property. The farmer’s defense was that the wheat never crossed state lines and therefore the federal government did not have jurisdiction to find him in violation. The court upheld the violation on the theory that if he had not raised the extra ten acres he might have purchased the extra what somewhere else and that wheat might have affected in interstate commerce. The question is if the Supreme Court will treat guns with the same “maybe” standard as it did wheat. This is to say; of course they will.

The Eighth Circuit considered the question in *United States v Hill*, 835 F.3d 796 (8th Cir 2016). The case was a felon in possession case and arose in Minnesota.[[16]](#endnote-16) Mr. Hill was caught with twenty-three 9 x 19mm cartridges made by the Federal Cartridge Ammunition company in Minnesota. Mr. Hill contended that the ammunition was manufactured, sold and used in Minnesota and there was no proof that the ammunition crossed state lines. At trial a representative of the company disassembled two cartridges at random into its component parts; bullet, cartridge case, primer and gunpowder. He testified that the first three were all manufactured by Federal in Minnesota. The gunpowder, however, was made in Florida. The fact that the indictment did not specifically mention the gunpowder was found to be unimportant. The conviction was affirmed.

If the gunpowder had not been enough for a conviction the chemicals in the primer could have affected interstate commerce. The lead in the bullet was not mined in Minnesota. The copper and zinc used to make the brass for the cartridge case were not mined in Minnesota. If the court had to go further afield for an interstate excuse I’m sure it could have found an illegal alien mowing the lawn outside the factory.

Two Kansas gentlemen, Shane Cox and Jeremy Kettler, manufactured short-barreled rifles and firearm suppressors without federal permission. They relied on the Kansas “Second Amendment Protection Act” which attempts to nullify federal firearms laws when the gun is made entirely in Kansas. They were arrested and convicted by federal district court in Wichita Kansas on 6 February, 2017. They were spared a prison sentence, according to the judge, because they had a “good faith belief that [they] were protected by the statute.” Their appeal failed.

**CONCEALED CARRY**

CONCEALED CARRY RECIPROCITY

Missouri lost concealed carry reciprocity with several states when it reduced the qualifying age to 19. Missouri continues to recognize the licenses of all other states and political subdivision of states even when they do not recognize ours. Of the states bordering Missouri, only Illinois does not recognize our license. Every state has its own peculiarities which must be followed when in that state. Travelers must consult [www.Handgunlaw.us](http://www.Handgunlaw.us) before crossing a state line. Travelers can carry firearms through all 50 states Puerto Rico and Guam under 18 U.S. Code Section 926A if the gun is unloaded and in a locked container not accessible from the passenger compartment of the vehicle AND possession of the gun is legal at the start of the journey and the intended destination. Unfortunately, certain jurisdictions have considered trivial interruptions in the journey to end the traveler’s status and make possession of the gun illegal. Travelers have been diverted to airports where possession of their gun is not legal. When they try to check onto the new aircraft they have been arrested for illegal possession of firearms. So far the courts of appeal have upheld this nonsense. A man was transporting an unloaded firearm through New Jersey. He got tired and pulled over to take a nap. The state police investigated. The judge said that because he took a nap he was no longer in a continuous journey and faced five years in prison. He was eventually given a diversion program.

POST OFFICE

Under federal law, guns cannot be taken into federal facilities except for “hunting or other lawful purposes.[[17]](#endnote-17)” Most federal facilities are content with guns locked in the car. The Postal Service has a much more expansive policy. They have claimed regulatory authority through the parking lot and even to the public sidewalk beyond.

The federal statute defines a “facility” as a building or part of a building owned or leased by the federal government.[[18]](#endnote-18) The Postal Service regulation brazenly expands this law designed to ban weapons inside a building to the parking lot outside.[[19]](#endnote-19) The Postal Service is adamant that this makes driving into the parking lot with a gun anywhere in the car a federal crime; albeit a misdemeanor.

A postal employee was convicted under this interpretation.[[20]](#endnote-20) The interpretation was challenged in Colorado, but denied by the 10th Circuit.[[21]](#endnote-21) With two circuits in agreement and no circuit in disagreement Supreme Court declined to review the question. Mere possession is punishable by a fine or imprisonment for up to one year under 18 U.S. Code Section 930.

Many have confused Corp of Engineer land with National Parks, with legal consequences. Corp regulations restrict the possession and use of firearms on Corp land; 36 C.F.R. §327.13. On 13 October, 2014 the US District Court for the District of Idaho found this unconstitutional in *Morris and Baker v U.S. Army Corps of Engineers* 3:13-CV-00336-BLW. The US District Court for the Northern District of Georgia came to a different decision on 18 August, 2014 in *GeorgiaCarry.org Inc v U.S.Army Corps of Engineers*. 2014 WL 4059375. Further festivities are expected.

Federal agencies interpret 18 U.S.C. Section 930 over-broadly claiming that as “owners” of the land the agency may issue such regulations as it pleases.

**SELF-DEFENSE INSURANCE**

We have uninsured motorist insurance so that if our car is totaled we have enough for a new one. When sued or charged with a gun-related matter we are faced with the immediate need for about the same amount of money. An unscientific survey of criminal defense attorneys finds that a murder charge can easily cost $100,000. A number of groups are selling “self-defense insurance.” I place this in quotes because some are underwritten by insurance companies and some are not. The NRA has rolled out its own policy. The US Concealed Carry Association finds that the average self-defense shooting to cost $25,000.[[22]](#endnote-22) A murder charge will cost far more. Traditional insurance will not cover a self-defense shooting. Insurance companies only insure mistakes. Self-defense by definition is a deliberate action. Fortunately there are membership groups which provide self-defense coverage. This coverage is not always underwritten by insurance companies.

The Armed Citizens Legal Defense Network reports that only one of their cases cost more than the initial attorney fee.[[23]](#endnote-23) They pay an initial $10,000 deposit against attorney fees the business day they are alerted to the case.

Different organizations offer different levels of coverage. More coverage costs more money. One group only covers fees up through the grand jury. The grand jury is where things start to get expensive. This does provide legal advice in the critical early states of the case when the authorities are deciding which way the case will go. One policy only offers 20% of legal fees until the defendant is acquitted. Some will not pay if there is a plea. This creates the ethical problem of taking a criminal case on contingency. Immediate needs include bail and legal fees. One of these groups does not offer bail money and is aggressively marketing in Missouri. Later costs include medical treatment, court costs, expert witnesses, lost wages and counseling for post-traumatic stress disorder.[[24]](#endnote-24) The Armed Citizens Legal Defense Network has a battery of expert witnesses available. Expert witnesses are increasingly necessary in our legal system. A gunsmith may be required for expert testimony that lightening the trigger pull does not make a revolver fire faster, or that a semi-automatic pistol does not require the slide to be manually pulled back after every shot. Prosecutors have seriously advanced these claims.

After surviving a criminal case, the member may have to do it all over again in a lawsuit. Bernard Goetz shot four muggers in a New York subway. He was acquitted on the grounds of self-defense. He was then sued for $43 million *and lost!* He was financially ruined for the rest of his life because in criminal court a charge must be proved “beyond a reasonable doubt.” In civil court it must only be proved “more probable than not.” In civil court a jury verdict does not have to be unanimous.[[25]](#endnote-25) Financial ruin can follow a majority that has let its soft heart run away with its soft head. These “self-defense policies” provide varying levels of defense in a civil case and may provide money to pay a claim.

In Missouri, self-defense is an “absolute defense.” Plaintiffs are prohibited from filing suit when a matter has been found to be self-defense. Such suits have been filed regardless and must be defended. It cannot be assumed that the judge will know of this statute or will dismiss a lawsuit on his own motion if he does know.

Some groups provide basic instructional materials either written or vetted by lawyers.[[26]](#endnote-26) These are of value if they are read or viewed. The defendant can always assert that he acted in accordance with legal advice.

Every person has unique insurance needs. Every policy is different. Self-defense insurance is not really insurance and is not regulated by state insurance commissioners. **Read the fine print**.

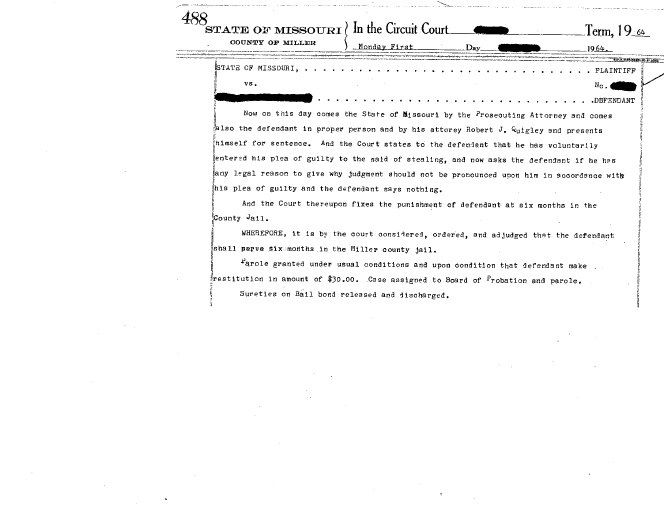
## PRIVATE PARTY ATF INSPECTIONS

I have been getting calls from Missouri gun collectors who have been called by the BATF with requests to view their collections. All these collectors are federally licensed collectors or have purchased two or more handguns in a week’s time and thus are in the government’s computer. The BATF asks politely to view the collection to see if all guns are present and not in Mexico.

The collector is well within his rights to refuse the inspection. Even assuming that all guns are present, everything the government agents sees after entering the home can be evidence of something. If one refuses the inspection, this raises suspicions. The BATF will ask every thug it meets if he has purchased guns from the collector until one of them gets the hint and a search warrant is issued. These calls raise the same problems as the 2 AM call about breathing into the breathalyzer. I don’t have any answers. They told us in law school that if we raised the right questions the answers would be obvious. They told us a lot of things in law school.

# OLD CONVICTIONS

The client was denied a License To Carry based on a felony record for stealing. The denial was the result of a computer check. The client could not remember a felony conviction, but it was forty-five years ago. We requested the original file from the county. A five inch by seven inch extract from the county records was received with a post-it note attached stating that it was the only record available. The record follows. It illustrates the problems of dealing with old records, old statutes, old standards, nearly illegible and extremely vague references to a criminal past. A request to Probation and Parole was made but they had no additional information. The attorney for the Sheriff’s office agreed that the sentence and restitution were more consistent with a misdemeanor than a felony.



Since the National Instant Check System was instituted in 1998 the government has been relentlessly computerizing old criminal records. The process accelerated after 9/11. The process has not always been accurate. Acts which were misdemeanors when committed are now felonies or were inaccurately entered into the computer. Frequently the computer shows an arrest but no disposition. This may be due to a Suspended Imposition of Sentence or because the disposition was never entered into the machine. This requires retrieval of old docket sheets, preferably the entire file, from the original courthouse. The US Supreme Court has ruled that assault cases against family members are a permanent bar against firearm ownership even if the act was charged as simple assault (not domestic violence) before the bar to possession became law; see *U.S. v Randy Edward Hayes* U.S. Supreme Court, decided 24 February, 2009.

A surprising number of people have collected guns for years only to be met with a sudden denial from NICS or a denied License To Carry. The oldest record I have dealt with was over fifty years old. The client had gone joy riding in a stolen car when he was fifteen years old. The party crossed a state line at a time when J. Edgar Hoover was bolstering his statistics with such crimes. There was no Youth Offender Act at the time. The man’s parents handled the matter and he had forgotten about it until he was denied by NICS. The man had been collecting guns for most of his life until he was abruptly informed it was a felony for him to possess as much as a single cartridge. He died before a course of action could be determined.

# Suspended Imposition of Sentence

(Not as Suspended as advertised)

Clients given an SIS have their cases stored in the same computer with not guilty verdicts and dismissed cases. For as long as I have practiced law we have told clients that an SIS made the case “as if it never happened”. We were wrong. Missouri’s Suspended Imposition of Sentence law bars a concealed carry license to persons who have “pled guilty or been found guilty” of a crime. In Missouri a person is not “convicted” until sentencing. Since an SIS prevents sentencing there is no conviction but a person would have “pled guilty or been found guilty”. I have argued that the “pled guilty” phrase is a term of art for “conviction”, but without success.

Because the federal government and other states only look at convictions, a person with an SIS can still buy guns and even get a License To Carry from another state *U.S. v. Solomon*, 826 F.Supp 1221 (E.D. Mo. 1993) at 1224. Licenses from other states are valid in Missouri. Kansas considers a Missouri SIS to be a conviction for the purpose of their felon in possession statute *State v Pollard*, 44 P.3d 1261 (KS 2002); full faith and credit clause of the Constitution be damned. A suspended *execution* of sentence is always a criminal conviction.

# Possession of firearm

In 2008 RSMo 571.070 was changed from “possession of a concealable firearm” to “possession of a firearm”. The time factor also changed from a bar to owning pistols for five years after leaving the custody of the department of corrections to permanent possession of any firearm in perpetuity. The conviction clause was changed from conviction of a dangerous felony, to conviction of any felony.

This means that anyone who has been “convicted” (***not*** pled or found guilty) is barred from owning guns for life. This may complicate firearm ownership for persons who have received pardons or received a restoration of right to own firearms from the BATF. The BATF has not been given the budget to restore rights for over twenty years.

**DOMESTIC VIOLENCE**

On 23 May, 2017 the 10th US Circuit Court of Appeals ruled in the case of Alexander Pauler that a municipal court conviction for domestic violence does not prevent ownership of guns. Mr. Pauler had been convicted under a Wichita city ordinance. The prohibition under 18 U.S. Code §922(g)(9) only applies to convictions by state, federal or tribal courts; not city ordinance. The ruling was by a three judge panel. The prosecution may ask for a rehearing by the full Court prepatory to an appeal to the Supreme Court.

What does this mean for Missouri? Very little at this point. It provides a legal basis for a defense if similarly charged. It is not binding in the Eighth Circuit.

# CONCEALED CARRY IN NATIONAL PARKS

A new federal statute was passed allowing concealed carry in federal parks under the same standards as the surrounding state; 16 U.S. Code Section 1a-7b. This does not provide a single standard for federal parks, but allows concealed carry under the same rules in the surrounding jurisdiction. Many have confused Corp of Engineer land with national parks. The rules are quite different. The state rules for concealed carry and reciprocity can be found at [www.handgunlaw.us](http://www.handgunlaw.us). Missouri law can be found at [www.KLJamisonLaw.com](http://www.KLJamisonLaw.com).

**OPEN CARRY**

Another client is an advocate of the “Open Carry” movement. Partisans of this movement carry guns openly to make the public used to people carrying guns. This is legal in Missouri under state law, but many local governments have ordinances against it. Local governments are allowed to restrict open carry due to a loophole in our uniform law at RSMo 21.750. However, there is no central repository to check which local governments have such laws. Persons with a concealed carry license can carry openly in cities with laws against open carry. In such cities one may carry openly if he has a license to carry concealed.

Missouri law prohibits carrying concealed weapons in government buildings and government meetings even if not in government buildings. “Town Meetings” put on by congressmen do not appear to be government meetings; however given the high emotions seen the state may have a different opinion.

**RETURN OF GUNS**

Another client was accidentally shot when his girlfriend mishandled his gun. City charges against the girlfriend were dropped. Under Missouri law the gun must be returned to the rightful owner at the end of a case under RSMO 571.095 unless the owner has been convicted of a felony. The city refused to return the gun or respond to me about doing so. A 42 U.S. Code §1983 suit for deprivation of property without due process of law resolved that matter.

I have resolved many of these disputes by writing the attorney for the relevant department (**not** the law enforcement chief) “I want to sue for deprivation of property without due process of law. My client only wants his gun back. Which of us will get his wish?” These letters have ruined some promising lawsuits but the clients are happy.

Guns scare some people, and scared people do stupid things. We can count on these stupid things to generate lawsuits.

**TRANSPORTATION**

In *Black Like Me* the author disguised himself as an African American and traveled through the Jim Crow south in the 1960's. He recounted how African Americans warned travelers about the unique racial practices of towns down the road. Gun owners must do the same and have the advantage of the internet; see www.NRA.org/gunlaws or www.handgunlaws.us for summaries of local laws and states which recognize Missouri concealed weapon licenses. An astonishing number of persons have crossed state lines in blissful ignorance that their concealed carry licenses are not valid in other states. Missouri's license is valid in 35 states at present. The Missouri Attorney general web site has a list of states with Missouri reciprocity. THIS LIST MAY CHANGE WITHOUT WARNING. The license to carry is NOT valid on an Indian Reservation or Military base even if it is surrounded by a state with reciprocity.

A number of persons have been diverted to airports in New York State, New Jersey, Chicago or Washington DC. When they declare their gun at the ticket counter they have been arrested for possession of a firearm.

Two cases create trouble when transporting guns across state lines. Federal law under 18 U.S.Code §926A states that guns can be transported through any state, regardless of that state’s law if it is unloaded and in a locked container, inaccessible and can be possessed in the states of departure and destination. On 22 March, 2010 *Gregg C. Revell v Port Authority of New York* was handed down in the Third US Circuit followed on 30 June, 2010 by *John Torraco v Port Authority of New York* in the Second US Circuit court of appeals. They both involved persons who were traveling by air through New York and New Jersey. Each checked his gun at the airport counter under Transport Security Administration regulations, each was arrested and the gun seized. The various plaintiffs sued under 42 U.S. Code §1983. It appears that §926A is not a federal right; it is at best a defense to criminal charges. These parties were in New York and New Jersey because their flights had been diverted. In *Torraco* a Port Authority Police Officer proclaimed, “This is New York City, federal law does not apply!” I ridiculed this comment in an article for “Concealed Carry Magazine.” Now it appears that he was right. The criminal charges against the parties were dismissed, but their property was held for years. They were forced to go to jail, pay a bail bond, appear in court and suffer the disruption of their travel plans. I cannot imagine the seizure of any other class of property, much less the arrest of the owner, which would result in two appellate courts treating the abuse as such a trivial matter. These cases were written before the *City of Chicago* case was decided, but do not mention *Heller* or the fact that such a decision was pending.

Both cases stress the burden on a police officer in the field to know federal firearms law and the law of the 50 states. However, law enforcement in these cases consisted of port authority officers at airports who must deal with travelers and require this information. In fact, one of the plaintiffs saw a folder in the Port Authority police office which purported to contain the gun laws of the 50 states. The desk sergeant refused to refer to the volume. The BATF has publications setting out federal and state firearms laws. These publications are available electronically on the BATF website.

Plaintiffs were deprived of their property for years; this was not a trivial inconvenience. It is odd that none of the plaintiffs made a claim for deprivation of property without due process of law. So far the courts of appeals have put up with this nonsense. The theory is that federal law allows transport of a firearm in a vehicle, but when wheeling baggage through an airport one is not in a vehicle. It may be possible to go everywhere in a motorized cart but one cannot count on it.

Both cases stressed that 1983 relief is not available unless administrative remedies have been exhausted, neither case points to any remedy the plaintiff should have pursued.

Washington DC police have been ordered that if they find someone in possession of an empty cartridge case (without powder, bullet or primer) they should investigate to see if the person has a District license for a gun of that caliber. If he does not he should be arrested for illegal possession of ammunition; the empty cartridge case.[[27]](#endnote-27) The District recently convicted a businessman for attempted illegal possession of ammunition because he had a Minnie ball for a replica Civil War musket; no gunpowder, no percussion cap and no musket, only the bullet. It is not illegal to possess antique replica muskets in the District. An appeal is pending. There were no expert witnesses involved and it is possible that the judge mistook the cavity in the base of the bullet to be a hollowpoint bullet. A number of superstitions involve guns and ammunition. It is useful to consult with an expert. Police officers and federal firearm dealers are not always as expert as they think they are. In one murder case the prosecutor argued in closing that the shooting was premeditated because "everyone knew" that the slide on a semi-automatic pistol had to be drawn back by hand for every shot. The defense attorney had to make a hurried call to an expert to confirm that the recoil of the cartridge blew back the slide to reload the next cartridge.

**DISARMED BY POLICE**

Under RSMo 21.750 a law enforcement officer cannot disarm anyone carrying a concealed or unconcealed firearm absent “reasonable and articulable suspicion of criminal activity.” This is likely to create problems when police respond to ambiguous situations and start by disarming all persons present. If this were to be reviewed by a court I would imagine it would give wide latitude to the officer on the grounds of “officer safety.” It is unwise to make an officer’s job more difficult or stressful than it already is. No one wins the constitutional argument during a police stop. I advise clients to comply with the officer’s demand to disarm and to be excruciatingly polite. If this does not resolve the situation, it plays better in court.

**SCHOOL PROTECTION OFFICER**

Missouri now has a School Protection Officer system by which teachers or staff can qualify to carry guns in school; RSMO 160.665.

The law requires that the school district hold a public hearing before establishing this program. Applicants would have to pass a training program established by the Peace Officers Standards and Training commission under RSMO 590.200.

**CONCEALED CARRY LICENSE**

AMMUNITION REQUIRED

The law requires that the license to carry course only require a familiarization course of twenty (20) rounds from either a revolver or semi-automatic. Students need only qualify with one type of handgun. The qualification course is also twenty (20) rounds and must hit the silhouette portion of a B-27 target with at least fifteen (15) rounds. This reduces the amount of ammunition required for qualification.

LICENSE TO CARRY ISSUED BY SHERIFF

Licenses were originally issued by the Department of Revenue. The Department provided the list of licensees to an outside contractor and the federal government in violation of two sections of the law. So, did the Missouri Highway Patrol. Neither agency saw anything wrong in what they had done. Licensees, who had been assured of privacy, were angry. The legislature was angry. The responsibility for issuing licenses was abruptly changed to the county sheriff. This was so abrupt that no standard license was issued for about a year. Licenses do not usually have photos and must be carried with state photo ID. Licenses issued after the change are valid for five years. This does NOT change the expiration date of licenses issued before the change. This has the result of seeing some variation in design of licenses for the next few years.

VALID

Concealed Carry Licenses are valid for five (5) years. They expire on the last day of the month in which they were issued instead of the day on which issued.

INSTRUCTORS

A certificate of training by person qualified to be an instructor is valid in all counties of Missouri and the City of St. Louis if the instructor has paid ten dollars to the sheriff of his county to be on a statewide approved list. This only requires a single ten dollar payment to the sheriff of the instructor's home county in order to provide instruction anywhere in the state or to persons from anywhere in the state.

There must be one instruction for every forty (40) students in a classroom and one instructor for every five (5) students on the firing range.

**QUALIFIED FOR A LICENSE TO CARRY**

Age

The age for a license to carry is 19. As I understand it one legislator demanded that the age be raised to 25 and the rest of the legislature pushed the other way. Persons under the age of 21 cannot purchase handguns from Federally Licensed Dealers under federal law. They can purchase from private parties or receive handguns as a gift. They should be aware of “strawman sales” regulations; see below.

An applicant must be 19 years of age, 18 if a veteran or in the armed forces. This reduction in age has cost us reciprocity with other states. Travelers are strongly warned to check the reciprocity web sites before crossing state lines. At this time Illinois is the only bordering state which does not recognize Missouri's license. THIS MAY CHANGE WITHOUT WARNING.

ALIENS

An applicant for a concealed carry license must be an American citizen or person with permanent residency. Citizenship is proved with a birth certificate, passport or certificate of naturalization. A sample certificate of naturalization can be found at www.uscis.gov. A permanent residency card issued by Citizenship and Immigration Services is often called a "Green Card "but it may or may not be green. It will have a photograph of the person and date of issue. A sample may be seen at www.uscis.gov. They must be renewed every ten years; however this requirement is only to get a new photograph for the card. An out of date card has never been the basis for revoking permanent residency to my knowledge. But times are changing. I have seen cards that were 30 years out of date joyfully renewed by USCIS with a new photo, fingerprints and background check. If the background check turns up a criminal record the person may be arrested and placed in deportation. In an abundance of caution the alien could do an on-line check with the Missouri Highway Patrol to see if there are any red flags. If the person has purchased guns through a licensed dealer and passed a NICS check there are no worries.

Illegal aliens cannot possess firearms under any circumstances. Under federal law a person legally, but temporarily, in the United States cannot possess firearms of any kind 18 U.S.C. §922(d)(5) and (g)(5). The few exceptions are at 18 U.S.C. §922(y)(2) which allows nonresident legal immigrants to possess guns if on a hunting visa or in possession of a hunting license. There is no such thing as a hunting visa. A tourist visa with some sort of hunting endorsement may be possible but I have never seen one. This does not specifically apply to target shooting, so if the Olympics were held in the United States it is arguable that the competitive shooters might be in violation of the law. It does allow exceptions for “sporting” purposes. Target shooting is a sport. Casual “plinking is considered a sporting pastime by shooters, but this view is not universally held. The law does not require that an alien in possession of a hunting license to be hunting in order to fall within the exception. This law was reinforced by executive order in 2001banning firearms possession by non-resident aliens. This was in an effort to prevent terrorists from driving airplanes into buildings and setting off bombs.

In the Spring of 2017 federal and Arizona state officials cited eight Chinese students for possession of firearms. They had all purchased hunting licenses in order to legally purchase firearms.[[28]](#endnote-28) However Arizona requires hunting license applicants to swear that they are Arizona residents and do not claim residency in any other jurisdiction. Under Immigration law students are in no way residents of the United States but are required to maintain residency in their home countries. The students were only charged with state misdemeanors relating to the purchase of hunting licenses by non-residents.

Missouri allows non-residents to purchase hunting licenses, however they must take a hunter safety course if born after 1 January, 1967. The federal law does not require the alien to possess a hunting license from the state in which he lives. It does not require that he purchase only hunting firearms.

CARRY WITHOUT LICENSE

Persons may carry concealed, weapons without a license. The person must be eighteen (18) years old. Weapons cannot be carried into areas which are prohibited under the concealed carry law. However, under the concealed carry law persons who enter these areas with a license can be charged with an infraction. Persons entering these areas without a license can be charged with a B misdemeanor. Persons entering federal property with or without a license are in a great deal more trouble.

OPEN CARRY

A number of persons have been convinced that the defining issue of the Second Amendment is the open carry of firearms. They do so to communicate that guns are owned by everyday people. This is symbolic speech but there have been frequent complaints. Police are called. When they arrive the open carry activists often appear to believe that the Constitution REQUIRES them to be jerks. They refuse to give their names to law enforcement and lecture the officer on the law, being very specific that the officer does not know his job. This does not win friends and influence people. Open carry has always been legal under state law. Many cities have passed ordinances against open carry. Kansas City’s City Council separately but equally declared that open carry "Sends the wrong message." This appears to be deliberate suppression of political speech. However courts have not agreed. In *Shawn Northrup v City of Toledo Police Division, et* al, 3:12-cv-01544 United States District Court for the Northern District of Ohio, Western Division dated 30 September, 2014, the City’s motion for summary judgment was granted in part specifically ruling that open carry is not symbolic speech. In *City of Cape Girardeau v Joyce*, 884 S.W.2d 33 (Mo. App E.D. Southern Division 1994) the court found that an ordinance against open carry was Constitutional under the Missouri Constitution. There has been a great deal of constitutional law since 1994 and the issue may be ripe for re-examination.

The new statute allows open carry, even in cities with ordinances against open carry, but only if the person has a license to carry concealed weapons. It doesn't have to make sense, its just the law. Persons with a license to carry concealed must show their license to law enforcement on request, under any circumstances. This helps police officers fill out their reports when called to an open carry demonstration.

There is a practice called “SWATing” in which people are encouraged to call the police whenever seeing a person with a gun; sometimes with imaginative and demonstrably false embellishments. At least one person has been killed. This game may give rise to lawsuits against frivolous callers.

**PUBLIC HOUSING**

Under RSMo 571.510 no public housing authority can prohibit a tenant or guest from personally possessing firearms in an individual residence, common area, or from transporting firearms to and from a residence. Public housing authorities have been losing cases on this point for many years. This does not discourage them.

**COMMON QUESTIONS**

Truckers

There is no law prohibiting interstate truckers from possessing firearms; if otherwise legal. They have been told otherwise.

Expungement

We have a decent expungement law in Missouri. There are a number of exceptions to the law. See RSMo 610.140 et seq. Federal restoration of rights has not been funded in over twenty years. If the crime was in Missouri and tried in state courts it is worth looking into. If it is a federal crime there is no chance short of a pardon.

Muzzleloading Guns

It is often asked if felons may possess muzzle loading guns. If the gun is a replica of an antique it is legal under federal and Missouri law; even if it is a handgun. There are modern “in line” muzzle loader designs which do not appear to be legal for felons. Many muzzleloaders can be converted to fire cartridges without gunsmithing. These guns cannot be owned by prohibited persons. There is no authoritative list of such guns. Many states do not allow felons to possess muzzle loading guns. Before crossing a state line this should be researched by a lawyer. Many police officers and gun dealers have given bad advice.

Denial by NICS

The National Instant Check System does background checks on all sales by Federal Firearm Dealers. It has access to records that will deny a person the right to buy guns for criminal, mental, addiction or protective order reasons. Private parties do not have access to the system. Some of these records are wrong. I have seen two judges denied by NICS because their name was used by a prohibited person or identifying information was similar. An old arrest may not have a disposition listed in the computer.

The firearms dealer will not be told why the person is denied. The denied person must get the transaction control number from the dealer. NICS may be contacted through their website and will respond with the reason for denial; www.fbi.gov/nics-appeals. It may be necessary to go through old court files to determine if the denial had any basis. An astonishing number of persons do not remember old convictions.

NICS is a year and a half behind in processing appeals.

If the denied person has identifying information similar to that of a prohibited person NICS has a Voluntary Appeal Program. Details are on the NICS website. This requires fingerprints to be submitted to NICS and will prevent future problems.

Denial of Concealed Carry License

Denials can be appealed to the county Small Claims Court. The Sheriff is always the defendant. Very often licenses are denied because the applicant has a Suspended Imposition of Sentence. This is interpreted as disqualifying a person for a license. It is possible to get an out of state license which is valid in Missouri. Clients have successfully received Arizona licenses through the mail; see their website at www.azdps.gov/services/Concealed\_Weapons/

Prohibited Family Member

Radio personality G. Gordon Liddy was quoted as saying that as a convicted felon he cannot possess firearms but his wife does, and keeps some on his side of the bed. One hopes that this is merely public relations to deter visits by unpleasant persons. A felon with such access to firearms can be imprisoned for being a felon in possession under the theory of “constructive possession”. Persons providing firearms to felons can also be imprisoned. It would be a terrible thing if either Mr. or Mrs. Liddy were arrested, but not everyone holds this opinion.

Ex-felons are not the only prohibited category.[[29]](#endnote-29) Many families have suffered through a member’s alcohol or drug addiction, probation or parole, dishonorable discharge,[[30]](#endnote-30) involuntary psychiatric commitment, indictment for a felony, an adult abuse order and even non-resident aliens.[[31]](#endnote-31) One notable exception is the 26 April, 2005 U.S. Supreme Court ruling in *Small v. United States*. The Court ruled that foreign convictions are not convictions for the purposes of federal gun laws.[[32]](#endnote-32) Mr. Small was convicted in Japan for illegal possession of firearms. The Court was concerned that Mr. Small did not have any meaningful access to his attorney, whose involvement in the case seemed limited to urging a guilty plea. Authorities testified at trial that this was common in Japanese courts.

Persons on parole or probation have a unique problem as they are considered to still be in prison although a very large and lightly supervised institution. Because of this legal fiction, regulations can be restrictive, to the point of absurdity. Typically the rules for persons on probation or parole are in a booklet however the probation officer can add or subtract to them. Any alteration must be requested in writing, this avoids misunderstandings. One Missouri parolee was a week away from the end of his parole when he was seen having dinner in a bar and grill. He was never shown to have consumed alcohol, however his parole officer did not remember giving him permission to enter restaurants that served alcohol, and he went back to prison.[[33]](#endnote-33) An avid hunter who had been convicted of a felony asked his attorney if he could still bow-hunt, he was assured that he could but the probation and parole officer conducting the pre-sentence investigation told him that a bow was “the same thing as a gun”. Reflecting on his lawyer’s advice the defendant ventured that this did not sound right. Based on this conversation the officer reported to the judge that the defendant believed himself to be above the law and advised a lengthy prison sentence. This raving idiot is not only allowed to meddle in people’s lives, but required to do so as part of her job.[[34]](#endnote-34)

Prohibited persons are prohibited from having access to firearms, ammunition, or bullet proof vests. It may seem improbable that guns on Mr. Liddy’s side of the bed would ever come to the attention of the police; however, such things do occur. Fires, medical emergencies, and the like often attract police attention. In 1998 a gentleman in Pennsylvania slept too deeply to hear his telephone. Worried neighbors called the police who, in waking the man up, saw that he owned semi-automatic firearms. The responding officer decided that this, coupled with refusal to answer the telephone, indicated insanity and he was dropped off at a mental ward. He was quickly found to be sane, but his brief stay was described as a “commitment” which prohibits possession of firearms.[[35]](#endnote-35) A Kansas City woman was told that the tests had come back and she did not have cancer. She dissolved in laughter and tears. The intern who delivered this news did not expect such a reaction and had her committed. She was swiftly found same, but had a record of involuntary commitment which prevents her from possessing guns.

An ex-felon in Cedar Rapids, Iowa found a .22 cartridge in his new apartment, which he tossed in a box of miscellany. Police investigating an argument entered the apartment, and of all the objects in the room, noticed the .22 cartridge; for which the ex-convict became a new convict and did fifteen years.[[36]](#endnote-36) No matter how innocent the possession, the prohibited person can expect to be prosecuted. One ex-convict migrated to San Francisco. He had the misfortune to be at a party when home invaders threatened the guests. The ex-convict disarmed one invader and routed the rest, saving five lives. For this heroism he was subsequently prosecuted for being a felon in possession of a handgun.[[37]](#endnote-37) It doesn’t have to make sense, it’s just the law, or so people seem to think.

It should be noted that the federal law prohibits *possession* by a prohibited person. Such a person may *own* a firearm as long as they do not have physical access to it. This allows prohibited persons to transfer a gun to their lawyer as part of a legal fee; see *Tony Henderson v United States*, US Supreme Court on 18 May, 2015.[[38]](#endnote-38)

In order to support a conviction, the prohibited person must know that a firearm is present; “the dominion and control must be knowing; mere proximity or accessibility to contraband is not enough”.[[39]](#endnote-39) This issue frequently arises from unfortunate selection of traveling companions. The Eighth Circuit ruled, “We have repeatedly stated that mere presence as a passenger in a car from which the police recover contraband or weapons does not establish possession.” This sounds encouraging but as a practical matter a prohibited person found in proximity to a firearm will cause no end of suspicion. One gentleman was arrested for illegal possession of three firearms. The court ruled that he was not in constructive possession of the handgun in his wife’s purse ruling “Constructive possession is ownership, dominion, or control over the item itself or control over the premises in which the item is concealed. Although a defendant’s exclusive occupancy of a place may establish his dominion and control over an item found there, his joint occupancy of a place cannot, by itself, support the same conclusion.”[[40]](#endnote-40) The court reasoned that no evidence indicated the guest of honor’s knowledge of his wife’s gun. When the police entered the room he admitted to the presence of only two guns. The court believed that this indicated he did not know about the third gun. Of course he was a drug user and may have miscounted. Note the court’s use of the waffle term “by itself”. Other facts may support a conviction, even thin facts. It may amount to the statement of a felon trying to bargain his way out of charges. In a recent case the police informant stole a shotgun and concealed it in the home of another person “Because he didn’t want to get caught with it.” The court ruled that this informant’s claim that the defendant knew the gun was concealed in his home was enough to support a conviction.[[41]](#endnote-41) Missouri has found that “Constructive possession occurs if one has power and intent to exercise dominion or control over the substance either directly or through another person.”[[42]](#endnote-42) The cases on constructive possession can be summarized by the *Gilbert* case where the guns were in the home of Mr. Gilbert’s estranged wife. There was evidence that he knew about the guns, which were either in a locked closet or concealed from view. The court ruled “Constructive possession exists when a person does not have actual possession but instead knowingly has the power and the intention at a given time to exercise dominion and control over an object.”[[43]](#endnote-43)

In order to prevent misunderstandings leading to incarceration there must be a physical barrier between the prohibited person and a firearm. Concealment may work, but there is nothing like a gun safe with a combination known only to the legal owner to prevent misunderstandings. A complete lack of fingerprints, DNA, hair samples, or property belonging to the prohibited person in the safe will complete the security. There is official approval for this practice. Machine guns are the most regulated of firearms. Both the gun and the owner must be licensed and registered. Yet, the BATF allows specifically machine guns to be stored at the residence of an unlicensed person so long as the unlicensed person does not have access to the gun. A locked room or container is specifically approved for such an arrangement.[[44]](#endnote-44)

Based on the above, one trusts that Mrs. Liddy’s guns are all antiques, locked up, or merely a public relations exercise.

**MENTAL**

It is illegal under RSMo 571.070 and 18 U.S. Code Section 922(g) and (h) for a mentally incapacitated person to possess firearms or to provide them with firearms. In Missouri a person is not suffering from a mental disease or defect until the probate judge says so after a commitment under RSMo 632.305. A detention for 96 hour evaluation is not a commitment as it is n ex-parte proceeding. In the federal system an administrative agency, usually the VA or Social Security can find that a person is disabled for reasons of mental incompetency **and** is a danger to themselves or others. They must take that extra step. Both the VA and Social Security have attempted to place entire categories of persons in the NICS computer as prohibited persons. The VA tried to label veterans with PTSD as prohibited persons. The Social Security Administration attempted to label persons as prohibited if they had mental disabilities and had named persons to administer their funds. This was stopped by congress.

**WEAPONS**

**Hands and Feet:**  On 30 September, 2014 the Eastern District Court of Appeals handed down *State v Murphy* and *State v Evans*. Evans was convicted of assault in the first degree and Murphy of murder. Both defendants had punched someone causing serious injury and death respectively. Murphy had the unfortunate nickname, “Knockout.” He was stupid enough to boast of this nickname to a cellmate. Both cases hold that hands and feet are not weapons for the purpose of the Armed Criminal Action law. These cases are contrary to *State v Burch*, 939 S.W.2d 525 (Mo. App. W.D. 1997) at 530 holding that an elbow can be a force likely to produce death or great bodily harm within the meaning of the statute defining assault in the second degree. In some jurisdictions courts have found that shoes were weapons when a person was kicked. In none of these cases were the aggressors martial artists.

Contrary to popular belief there is no law or regulation registering the hands of boxers or martial artists. The Supreme Court of Minnesota found that a punch from a trained boxer was not assault with a dangerous weapon.[[45]](#endnote-45) Only boxers are registered under 15 U.S.C. Section 6301, and then only to record them, identify them and license them for competition.

**Switchblades**: Under state law, it is no longer illegal to possess a switchblade except on federal property; RSMO 571.020.1(6). If the switchblade is on federal property it is a Class C felony. Federal law has its own ban on switchblades on federal property. May cities have ordinances against switchblades, brass knuckles and some martial arts weapons. These ordinances are not prohibited under state law. Missouri pre-emption law only applies to firearms and ammunition.

**Brass knuckles**: Brass knuckles are any hard substance covering the fingers or knuckles. They do not have to be brass; RSMo 571.010. This definition does not necessarily cover “sap” gloves which have powdered lead in the knuckles. It does cover many rings, and some kitchen devices designed to cut vegetables and mash potatoes. Some “key rings” employ prongs which protrude between the knuckles. They have the same effect as brass knuckles, but are not covered by the definition. Under state law possession of brass knuckles is a Class A misdemeanor unless they are possessed:

1. By the military, law enforcement or prison personnel.
2. In a business transaction with 1 above.
3. Incident to display in a public museum or exhibition.
4. In a lawful dramatic performance. RSMo. 571.020.2 (summarized)

Many cities have ordinances against brass knuckles, switchblades and certain martial arts weapons. These ordinances may be more restrictive than state or federal law.

**LEGAL WEAPONS FOR CONCEALED CARRY**

An assistant Attorney General informally replied to an inquiry claiming that the License To Carry law only allowed carrying handguns. A trial judge in Boone County ruled the same. They are wrong. Under RSMo 571.030 one is exempt from Missouri’s concealed *weapons* law if one has a License To Carry. The theory that this law only applies to handguns appears to have been inspired by 571.107 which states that license holders can carry concealed *firearms* (not just handguns) throughout the state with some exceptions. The Missouri legislature had pre-empted the field of firearms legislation (RSMo 21.750). It can therefore be argued that a local government might prosecute a license holder for a concealed knife but not the gun right next to it. It is a silly argument, but there it is. If anyone hears of such a case, I would be obliged if you let me know.

The Missouri Attorney General’s Office later responded to a different e-mail with the statement that since Missouri has a concealed *weapons* law a person with a License To Carry could also carry a concealed knife. The e-mail is very specific that this is not an official Attorney General Opinion. Even if it was, that does not mean that it is controlling law.

RIGHT TO POSSESS AFTER CONVICTION

It is against federal law for a felon to possess or even have access to firearms, ammunition or a bullet proof vest. It does not specifically prohibit a felon from owning a firearm, only to have access or possess. The US Supreme Court handed down *Tony Henderson v US,* on 18 May, 2015 holding that a person can continue to own guns after conviction; and transfer them to another person. This may affect inheritance and certain trusts. It may also affect the occasional lawyer who takes his fee in guns.

GUN “BUYBACKS”

The legislature has banned local governments from participating in gun “buybacks” in which the public is given anything of value for turning in guns. The only exception is if the guns are offered for sale to licensed dealers in a commercially reasonable manner. The legislature was kind enough to specify the terms of a commercially reasonable manner; RSMo 21.750.

CRIMINAL HISTORY AND EXPUNGEMENT

In 2008 the Missouri legislature, in its nearly infinite wisdom, amended RSMo 571.070 to ban knowing gun possession for any person who has been convicted of a felony at any time in any state or federal court. The prior statute banned possession if the person had “pled guilty or been convicted of a dangerous felony within the last five years. The new law is both expansive and limited; guess which part is emphasized.

The law expands the ban to the life of the defendant who has committed any felony. In this way it conforms to federal law. It is limited in that it applies to persons who have been “convicted.” The prior law referred to “pled guilty or been convicted.” The new law does not apply to persons who have admitted their guilt and pled guilty. This limited scope must be assumed because the legislature is believed to have used a different language for a reason.

It is possible to expunge some felonies and regain the right to own guns under RSMo 610.140 et seq. A “full and complete pardon,” on the other hand, does not mean what it says. Wayne Stallsworth received a “full and complete pardon” in 2004 for a burglary case in 1960. In 2005 he received a concealed carry license from the sheriff of Buchanan County. He renewed the license twice in Buchan County. He moved to Jackson County and attempted to change his license due to the change in counties. He was denied because he pled guilty in 1960. The concealed weapons law denies a license to persons who had pled guilty or been found guilty of a felony. He appealed to Small Claims Court which ruled that the pardon wiped out the plea as well as the crime. The sheriff’s office appealed to the circuit court which ruled that the pardon did not wipe out the plea. Mr. Stallsworth appealed to the Western District Court of Appeals which affirmed the circuit court’s opinion. In oral argument the panel asked the sheriff’s lawyer if he had gone to trial and been convicted would Mr. Stallsworth be eligible for a concealed carry license. Counsel said yes. Mr. Stallsworth was denied because he took responsibility for his crime and pled guilty. It doesn’t have to make sense; its just the law.

By the time of the decision Mr. Stallsworth had a concealed carry license from a different state which was valid in Missouri. He was no longer interested in appealing to the Supreme Court. Since concealed carry was decriminalized it no longer matters at all. It doesn’t have to make sense; its just the law.

It seems that pardons, expungements, restoration of rights or Suspended Imposition of Sentence would have no purpose if the statute applied to them. The BATF sees it differently. They claim that the (former) Missouri Attorney General sees this statute as affecting persons who have had their records wiped clean. The result is that persons who have ancient, long expunged convictions are suddenly told that they cannot possess firearms or work in the firearms industry. This is wrong on many levels. Rights have been restored to people, and then snatched away without cause. The truly offensive element is that the statute does not have to be interpreted in this fashion. It has always been the law that expungements and pardons and the like have erased convictions. The new statute does not have to be interpreted as requiring a repetition of this principle. In short gun owners who did something stupid a generation ago and went to the trouble of having it removed from their records are being abused by the same system which proclaims that we have a constitutional right to own guns.

The Missouri Attorney General’s office has not publicly announced their interpretation of RSMo 571.070. If forced to do so they will have to justify this interpretation; it need not.

On 3 April, 2018 the Missouri Supreme Court handed down *Jack Alpert v State of Missouri*. Mr. Alpert had federal and state convictions for drug sales. He had obtained a restoration of his right to own guns from the federal government. This was rare even when it was possible. For the last twenty-five years the ATF has not had a budget for this program. Without the money to buy a piece of paper on which to write a restoration the section of law is a promise without a means to effect the promise. Courts have refused to take this impasse as an administrative denial.

Since his restoration Mr. Alpert obtained a federal Firearms License and bought and sold firearms. At the time of his suit he ran a company which made bullets, but not complete ammunition, for reloading. Mr. Alpert sued to determine if he could be prosecuted under RSMo 571.070 as a felon in possession of firearms. The court ruled that he could be. The federal action restored his rights to possess firearms, but did not expunge or pardon his conviction. This indicates that persons pardoned or expunge in other states can possess firearms in Missouri.

**FELONS WITH ANTIQUE GUNS**

In 2010 RSMo 571.070 was amended in 2010 to allow convicted felons to possess antique firearms or replicas thereof. This restores an ability mistakenly taken away in 2008. Probation and parole regulations prohibit possession of any firearm and even bows and arrows. However, once released from Corrections supervision felons can hunt with replica black powder firearms. There are modern muzzle-loading designs called “In-Line” muzzle-loaders. Because they are modern designs and not replicas the BATF has regarded them as firearms for the purpose of federal possession statutes, but not for sale statutes. It doesn’t have to make sense, its just the law.

**GUN GIFTS AND STRAW SALES**

Sarah Brady bought a gun. It was a hunting rifle intended as a gift for a relative.[[46]](#endnote-46) This sparked all manner of comment about hypocrisy and then about illegal straw sales. Every time a gun is sold the buyer must swear that he (or she) is the real buyer and not some other person. This has the appearance of a stupid question. The casual reader would think that since that he is the one pushing money across the counter it is rather obvious that he is buying the gun. However since it is a government form all is not as it seems. Since it is a government form there are instructions for filling it out that go on for longer than the form itself. It is assumed that anyone filling out the form will read and understand these instructions. A man who did not was convicted of a felony.

An elderly Pennsylvania man needed a handgun, but he wanted to save money on it. His nephew, James Abramski, was a former police officer and thought that he could get a discount from a shop in Virginia which catered to police. Two FFL dealers told him that such a transaction would be legal.[[47]](#endnote-47) Uncle sent James a $400 check to purchase the gun. James then went to the Virginia store, passed a background check, and purchased the gun. The gun was transferred through a dealer in Pennsylvania where the uncle passed a background check and took possession of the gun.

Such transactions were considered legal in some federal judicial circuits, but not in the circuit covering Mr. Abramski. The transaction came to light when Mr. Abramski became the unlikely suspect in a bank robbery.[[48]](#endnote-48) During a search of Mr. Abramski’s home the receipt for the pistol was discovered. With the passion for minutia which is the FBI the gun was traced to the uncle who paid James for the gun with a check, containing a note on the memo line saying it was for a pistol.[[49]](#endnote-49) With this evidence Mr. Abramski was arrested for a straw sale.

He filed a motion to dismiss on the grounds that the federal statute does not use the term “actual buyer” only “transferee.” The motion was denied. He pled guilty with leave to appeal the denial of his motion to dismiss. It did not work. The Fourth Circuit Court of Appeals ruled in favor of the district court and he was off to the U.S. Supreme Court. Because different appellate circuits had come to opposing decisions the Supremes took the case. Mr. Abramski continued his argument that his he did not misrepresent himself as the buyer since he was the person pushing money across the counter. He further argued that any misrepresentation was immaterial since his uncle was legally able to purchase a gun. He argued that the question is vague and under the rule of lenity any confusion in a statute must be interpreted in favor of the defendant. The government argued that the transaction was a “straw sale” for someone else. It further argued that 18 U.S. Code §922(a)(6) makes it a felony to make any false statement in connection with purchasing a firearm. This is true, but it does not require the buyer to identify the ultimate buyer of the gun. This doctrine is an invention of the BATF. However, as the administrative agency charged with implementing federal firearms law they are charged with creating firearms regulations. Their argument was that a false statement on a required form is a felony even if the statute did not require that specific question.

On 16 June, 2014 the Court ruled in favor of the government in a 5-4 decision. The Court agreed that the BATF had previously interpreted the statute to allow exactly this type of transaction. The Court ruled that it does not have to pay attention to the interpretations of administrative agencies. It then went on to stress that the BATF now interprets such transactions as illegal. It accepts this interpretation unquestionably. Different federal circuits and 4 of the 9 Supreme Court justices had come to different conclusions but Mr. Abramski and the two dealers he had consulted should have known better.

The Court found that the purpose of federal firearms laws is to determine who obtains guns from licensed dealers. The Court admitted that if someone buys a gun, walks out of the store and then decides to sell it; that is legal. The Court agreed that if someone buys a gun and gives it to another person; that is legal. The Court’s reasoning was that the BATF has stated that these actions are legal and given these exceptions the interpretation against straw sales must be strictly enforced.

Under this ruling, the focus is on the source of the money used to purchase the gun as well as the ultimate possessor. If someone walks into a gunshop and buys a gun with money from another person and then gives that gun to the other person, it is a crime. There was a case in which the buyer took money from a woman to buy her a gun. She did not have enough money so the buyer put some of his own money into the purchase. Both parties were legally able to buy guns. He was convicted of a straw sale. If someone buys a gun and then sells it to another person, that is legal. If he makes a profit on the transaction, it is still legal. Such a sale only becomes illegal if the seller makes a practice of such transactions. He is then illegally in the business of selling guns without a license. If the person goes into a gunshop with an agreement to buy a gun with his own money and sell it to the other person; that might be legal. The operative word is might. We shall not know until the next brave volunteer is arrested.

It is also against the law to sell, give or loan a firearm to a prohibited person.[[50]](#endnote-50) It is legal to give a gun to a person who is not prohibited from owning a gun. However, the Abramski case makes it plain that this exemption is only by sufferance. It is a “loophole” which may be closed by administrative action.

We can expect more criminal “strawman” cases to be filed. We can expect the ATF to revoke more dealer licenses for alleged “straw” sales. Dealers are well advised to examine the National Shooting Sports Foundation’s “Don’t’ Lie for the Other Guy program at [www.DontLie.org](http://www.DontLie.org).

People may continue to give guns as gifts, but should be prepared to prove that it was a gift. We are supposed to be innocent until proven guilty, but Mr. Abramski spent months in jail labeled a dangerous offender until allowed to make bail.

PERMITLESS CARRY AND STAND YOUR GROUND

A gun bill has become law. There has been much misinformation and myth over the effect of SB 656. The major changes allow persons to carry concealed without a permit beginning 1 January, 2017 and a “stand your ground” provision beginning 14 October, 2016. It has been often stated that this law allows persons convicted of adult abuse to possess guns. It does no such thing. Even if it did, federal law prohibits persons convicted of adult abuse from possessing guns of any kind see 18 U.S. Code Section 922(g)(9). Missouri law cannot nullify federal law even if it tried.

After 1 January, 2017 persons legally allowed to possess firearms may carry them concealed. Persons between the ages of eighteen and twenty-one can possess handguns but not buy handguns from a federally licensed dealer. Under prior law they could possess handguns obtained by inheritance, gift or private sale. The new law does not change this.

It is legal to carry without training or a background check. None of the other ten states with similar laws has had problems. However, training looks better in court. Training also introduces students to obscure laws. It is legal to leave guns locked in cars in the parking lots of banned areas; except Post Offices where it is a federal misdemeanor. People undergo background checks under federal law when they buy a gun. Persons who would not pass a background check are legally unable to possess firearms under existing law. The new law does not change anything about obtaining a gun.

Under the new law unlicensed persons carrying into a prohibited area can be charged with a Class B misdemeanor punishable by six months in jail, a $500 fine or both. They cannot drive through school zones or drop their children off at school. For persons with a license to carry, entry into one of the 17 categories of banned areas is at worst an infraction punishable by a $100 fine, for the first offense. Unlicensed persons cannot carry across state lines unless the other state allows.

The new law provides for extended or lifetime licenses to carry. However these are only valid in Missouri. The law does not affect open carry. Under current law one may open carry anywhere in Missouri except for the statutory “no guns” zones. In cities that have ordinances against open carry a person may still carry openly if he has a license to carry concealed. In order to carry openly one has to have a license to carry concealed. It doesn’t have to make sense, its just the law.

The “stand your ground” provision means that one can act in self-defense without first proving that you tried to retreat or could not retreat “in complete safety.” One must still be in reasonable fear of deadly force. There must be an obvious threat to life or serious physical injury. Seeing a clown does not qualify no matter the personal phobia or current internet myth. This is a minor change from the Castle Doctrine which says that one does not have to retreat on property one owns or rents. This extends the principle to anywhere a person can legally be. The Castle Doctrine applies to a vehicle as well. However, this may depend on where the vehicle might be. It must be where it is allowed to be; a parking lot or road, but not a stranger’s yard or living room.

Certain persons, including elected officials, have claimed that the new law allows child molesters and persons convicted of adult abuse to buy and carry guns; they should know better. The new law says nothing about buying guns. Even if it did felons and persons convicted of adult abuse or the respondent in a civil protective order cannot buy or possess guns under federal law.

1. Constitution Article I Section 8 paragraph 8. [↑](#endnote-ref-1)
2. Philip ed. *Science and Technology*, George Philip Limited, Octopus Publishing Group London 1999 at 46-53. [↑](#endnote-ref-2)
3. Sobel and Andrewes *Longitude*, Walker & Co N.Y. 1995. [↑](#endnote-ref-3)
4. Wilcox ed *The Papers of Benjamin Franklin Vol 22*, Yale University Press New Haven 1982 at 343. [↑](#endnote-ref-4)
5. Dow *Every Day Life in the Massachusetts Bay Colony*, Dover Publications N.Y. 1988 at 136. [↑](#endnote-ref-5)
6. Greaves, “The Antiquity of Repeating Arms” Man at Arms Jan/Feb 1995 at 11 et seq. This summarizes the citations in this paragraph. [↑](#endnote-ref-6)
7. James, “Ferguson Rifle” Guns & Ammo September 2000 at 60 et seq. [↑](#endnote-ref-7)
8. *Near v. Minnesota* 283 U.S. 697 (1931). [↑](#endnote-ref-8)
9. *Red Lion Broadcasting Co v. Federal Communications Commission*, 395 U.S. 367 (1969). [↑](#endnote-ref-9)
10. *Katz v. U.S.*, 389 U.S. 347 (1967). [↑](#endnote-ref-10)
11. *Kylo v. U.S.*, 533 U.S. 27 (2001). [↑](#endnote-ref-11)
12. *Caetano v Mass*, 136 S. Ct. 1027 (2016) at 1028. [↑](#endnote-ref-12)
13. *State v Montalvo,* 8 June, 2017 New Jersey Supreme Court. [↑](#endnote-ref-13)
14. *Florida v J.L.* 529 U.S. 266 (2000) at 272. [↑](#endnote-ref-14)
15. *Duffie v City of Lincoln*, 834 F.3d 877 (8th Cir 2016). [↑](#endnote-ref-15)
16. Federal law prohibits convicted felons from having access to cartridge firearms, ammunition and bullet proof vests. [↑](#endnote-ref-16)
17. 18 US Code §930. [↑](#endnote-ref-17)
18. 18 US Code § 939 (g). [↑](#endnote-ref-18)
19. 39 C.F.R. §232.1(1). [↑](#endnote-ref-19)
20. *United States v Dorosan*. 5th Circuit 14 October, 2009. The opinion is unpublished. Author has a copy. [↑](#endnote-ref-20)
21. *Tab Bonidy v United States Postal Service*, 790 F.3d 1121 (10th Circuit 2015). [↑](#endnote-ref-21)
22. www.USConcealedCarry.com [↑](#endnote-ref-22)
23. www.armedcitizensnetwork.org [↑](#endnote-ref-23)
24. Everyone I have represented who killed in self-defense has suffered from PTSD to a greater or lesser extent. [↑](#endnote-ref-24)
25. This varies from state to state. [↑](#endnote-ref-25)
26. [www.USConcealedCarry.com](http://www.USConcealedCarry.com), [www.USLawShield.com](http://www.USLawShield.com), www.ArmedCitizensNetwork.org.. [↑](#endnote-ref-26)
27. Miller; Emily *Emily Gets Her Gun*, Regnery Pub Inc NY 2013 Appendix B. [↑](#endnote-ref-27)
28. They had been reading the internet. [↑](#endnote-ref-28)
29. See 18 U.S.C. section 922(d) and (g). Congress felt so strongly on this point that it made it law twice. [↑](#endnote-ref-29)
30. This is different from a general or bad conduct discharge, it is the military equivalent of a felony. [↑](#endnote-ref-30)
31. Non-resident aliens, those without permanent residency or “Green Card” can possess firearms only under very limited circumstances.. It would be unwise to have the foreign exchange student join a shooting event. [↑](#endnote-ref-31)
32. State courts may take a different view. [↑](#endnote-ref-32)
33. The specific experience of one of my clients, and the general experience of many. [↑](#endnote-ref-33)
34. I have a book which reprints pamphlets from Shakespeare’s time debating if guns or bows are the superior weapon. Benjamin Franklin briefly advocated the superiority of bows during the American Revolution. I believe the issue has been settled. [↑](#endnote-ref-34)
35. A gross misstatement of law, but such gross misstatements are often the resort of bureaucrats seeking to restrict rights. [↑](#endnote-ref-35)
36. *U.S. v Yirkovsky*, 259 F.3d 704 (8th Cir 2001). [↑](#endnote-ref-36)
37. “SoMa loft hero held on parole violation” San Francisco Chronicle 26 August, 2001. It should be noted that he was prosecuted in state court, one of the few times federal prosecutors showed more tolerance than their state counterparts. [↑](#endnote-ref-37)
38. Or so I have found, although I have occasionally had to sue to enforce the contract. [↑](#endnote-ref-38)
39. *U.S. v Garner*, 396 F.3d 438 (Ct. App. D.C. Cir. 2005) at 443. [↑](#endnote-ref-39)
40. *U.S. v Houston*, 364 F.3d 243 (5th Cir 2004) at 248. [↑](#endnote-ref-40)
41. *U.S. v Woods*, 2006 U.S. App. Lexis 14297 (8th Cir 2006). [↑](#endnote-ref-41)
42. *State v Cushshon*, Missouri Court of Appeals E.D. 4/3/07. [↑](#endnote-ref-42)
43. *U.S. v Gilbert*, 391 F.3d 882 (7th Cir 2004) at 886. [↑](#endnote-ref-43)
44. Q & A M23 ATF P 5300.4 (01-00) page 144. [↑](#endnote-ref-44)
45. *State v Basting*, 572 N.W.2d 281 (Minn. 1997). [↑](#endnote-ref-45)
46. Brady, *A Good Fight* Public Affairs N.Y. 2002 at 223-4. She describes the rifle as a “Remington thirty-aught-six . . . [with] scope.” [↑](#endnote-ref-46)
47. FFL dealers do not know as much law as they think they do. [↑](#endnote-ref-47)
48. Charges were dropped, not for lack of evidence but because the evidence was ridiculous. [↑](#endnote-ref-48)
49. So much for people who think they fly under the radar. [↑](#endnote-ref-49)
50. The term “firearm” does not include muzzle-loading guns under federal law. However some states treat all firearms equally, including muzzle-loaders. [↑](#endnote-ref-50)