No._____

IN THE

SUPREME COURT of the UNITED STATES

ALLAN RODGERS and
GREGORY RODGERS, and
ROBERT FRANKLIN, and
RAYMOND FRANKLIN

Petitioners,

v.

DANIEL KNIGHT, *et al.*,

Respondents.

On Petition for a Writ Of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether to resolve a split between the circuits and this Court created by the Eighth Circuit's holding in the underlying case that "[a] violation of state law, without more, is not the equivalent of a violation of the Fourteenth Amendment." In this case, state law gives standing to the homeowner from whose home firearms were seized to challenge the seizure and requires a hearing and judicial determination before the firearms may be lawfully transferred to another party. None of these due process requirements was met before one of the seized firearms was transferred to another party in violation of the Fourteenth Amendment to the United States Constitution.

II.

Whether to resolve a split between the circuits and this Court created by the Eighth Circuit's holding in the underlying case that the Fourth Amendment's warrant requirement of particularity was not violated. In this case, a warrant authorizing a search for drugs was used to seize firearms, outside the "particularity" of the warrant, from a home in which the homeowner was not arrested and had a lawful right to possess firearms. The seizure was based on the police department's general association of firearms to drugs as "evidence of drug trafficking" in violation of the Second, Fourth, and Fourteenth Amendments to the United States Constitution.

III.

Whether to resolve a split between the circuits and this Court created by the Eighth Circuit's holding in the underlying case that the plain meaning of a Missouri statutory exemption that permitted a leaseholder to lawfully conceal a firearm that "is in his or her dwelling unit or upon premises over which the actor has possession, authority or control" was not clearly established law despite a Missouri court having so construed the language. This holding was based on the 8th Circuit's belief that "[n]o court had construed the meaning..." and that police and prosecutors were entitled to a grant of immunity for the arrest and subsequent prosecution in violation of the Second, Fourth, and Fourteenth Amendment to the United States Constitution.

IV.

Whether to resolve a split between the circuits and this Court created by the Eighth Circuit's holding in the underlying case affirming summary judgment based on a finding that "[i]t was not clearly established that the officers, having developed probable cause for a concealed firearms offense, were required to investigate Greg's claim about a Florida permit" before arresting and prosecuting him for unlawfully concealing a firearm. It should be noted that police officers within the same department had previously inspected a valid Florida concealed carry permit belonging to Greg Rodgers and were informed by him on this occasion that he had a permit when

they took him into custody in violation of the Second, Fourth, and Fourteenth Amendments to the United States Constitution

V.

Whether to resolve a split between the circuits and this Court created by the Eighth Circuit's holding in the underlying case affirming summary judgment based on finding that an objectively reasonable police officer and prosecutor would believe that the presence of years old dated mail addressed to the homeowner's son, a felon, could constitute illegal possession by the son in his father's home of a firearm his father legally owned in Missouri. It should be noted that the son had been in North Carolina for months prior to the seizure. Despite this fact the Eighth Circuit found that police and prosecutors were entitled to immunity for the son's arrest and prosecution in violation of the Second, Fourth, and Fourteenth Amendments to the United States Constitution.

VI.

Whether to resolve a split between the circuits and this Court created by the Eighth Circuit's holding in the underlying case affirming summary judgment based on the finding that firearms seized from a citizen's home or real property that had no legal nexus to any pending criminal charge may be held for year(s) without providing the property owner a post-deprivation due process hearing. Further, the Eighth Circuit held that this property deprivation and denial of a post-deprivation hearing did not violate the

requirements of the Second, Fourth, and Fourteenth Amendments.

VII.

To answer a question of exceptional national importance: Whether it is a violation of the First and Second Amendment rights to retaliate against a citizen for filing of a police misconduct complaint. Subsequent to filing a misconduct complaint that citizen was arrested for unlawfully concealing a firearm, notwithstanding the facts that he was the holder of a valid concealed carry permit and a statutory exemption exists to permit him to lawfully conceal a firearm upon his leasehold premises, and a bond condition was requested and obtained that stripped this citizen of his right to possess any weapon for over six months in retaliation for petitioning the government for a redress of grievances. It should be noted, a police detective admitted the misconduct complaint was the "catalyst" for law enforcement actions against this citizen in violation of the First, Second, Fourth, and Fourteenth Amendments to the United States Constitution.

LIST OF PARTIES

The Petitioners are Dr. Allan Rodgers, PhD. and Gregory Rodgers, father and son; and Robert Franklin and Raymond Franklin, father and son.

The Respondents are Daniel Knight, duly elected Prosecuting Attorney for Boone County, Missouri; former First Assistant Prosecutor Richard Hicks; Assistant Prosecutor Cassandra Rogers; Boone County, a Missouri local government; the City of Columbia, a Missouri local government; and Columbia Police Officers Kenneth Burton, Brian Liebhart, Thomas Quintana, Lloyd Simons, Mark Brotemarkle, Mike Valley, Kyle Lucas, and Geoffrey Jones in their individual and official capacities.

Corporate Disclosure – There is no corporate entity as a party to this matter. All parties are individuals and/or political subdivisions of the State of Missouri.

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PETITION FOR WRIT OF CERTIORARI

Counsel Stephen Wyse, on behalf of the Petitioners Dr. Allan Rodgers, PhD, and Gregory Rodgers and Robert Franklin and Raymond Franklin, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion and judgment of the court of appeals in a consolidated appeal of *Rodgers v Knight* and *Franklin v Knight* are at 781 F.3d 932 (8th Cir. 2015), and are reproduced at Appendix B. The Eighth Circuit's order denying a rehearing en banc is reproduced at Appendix A. The United States District Court for Western District of Missouri's opinions are reproduced in Appendices C and D.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 2015. A petition for rehearing was denied on May 05, 2015. A petition for a writ of certiorari was timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On February 5, 2013, Allan and Gregory Rodgers jointly filed a lawsuit with Robert and Raymond Franklin under 42 U.S.C. §§ 1981, 1982 & 1983 in the U.S. District Court for the W.D. of Missouri. The lawsuit alleged violations of their 1st, 2nd, 4th, 5th, and 14th Amendment Rights by Boone County; Boone County Prosecutor Daniel Knight and his assistant prosecutors Richard Hicks and Cassandra Rogers; the City of Columbia; and Columbia Police Officers Kenneth Burton, Geoffrey Jones, Thomas Quintana, Brian Liebhart, Mark Brotemarkle, Michael Valley, Kyle Lucas, and Lloyd Simons. These violations of their constitutional rights resulted from the defendants fabricating felony gun charges, unlawfully seizing firearms, and then retaining the seized firearms, even though they were unrelated to pending criminal charges, and refusing to return them for year(s) without providing any sort of post-deprivation due-process hearing. These actions were in retaliation for filing a misconduct complaint against police officers or refusing to give consent to a search of the home or to the seizure of firearms.

On December 15, 2008, Robert Franklin was returning to his home at 1670 Sonora Drive, Columbia, Missouri, when he encountered law enforcement officers outside his home. Officers demanded that he permit them to enter and search his home. Robert Franklin refused the demand and was threatened with the destruction of his front door and arrest. Robert Franklin was informed that police

believed Billy Rogers was in Robert Franklin's (hereinafter, Robert) home and that the officers wanted to arrest Billy on a drug charge. Robert's then girlfriend was the sister of Billy Rogers' wife.

A search warrant was issued by Circuit Judge Kevin Crane at 5:45 P.M. on December 15, 2008. The warrant authorized a search and seizure at Robert Franklin's home at 1670 Sonora Drive for:

> CONTROLLED SUBSTANCES: Cocaine, a schedule II controlled substance. OTHER (Specify) Evidence of drug trafficking. To also include cash, records, paraphernalia, cellular telephone with number 573-356-3781, and apparatuses to facilitate the manufacturing, use and distribution of controlled substances. The search warrant shall also include the person of William H. Rogers III, wanted in connection to a drug trafficking charge. Search warrant shall include the entire premises thereof, all persons present on the premises, and motor vehicles associated to those present at time of search warrant service."

Prior to the service of that warrant, Billy Rogers exited Robert's home and surrendered to law enforcement. During the search of Robert's home a misdemeanor amount of marijuana and some cocaine residue were seized from inside the home. In addition, twelve firearms were seized by Columbia Police Department (hereinafter, CPD) Detective (hereinafter, Det.) Geoffrey Jones from Robert's

home as evidence of drug trafficking purportedly under the authorization of the drug warrant.

Det. Jones had no knowledge about Robert being involved in drug trafficking. Det. Jones had no specific knowledge that Billy Rogers had ever used a gun in drug trafficking (Rogers and co-conspirators all entered guilty pleas to drug related charges in federal court by April 2010). Det. Jones was under the general belief that Billy Rogers' involvement in drug trafficking and his presence in Robert's home meant that the firearms in the Robert's home were used to provide security for drug trafficking. Det. Jones had no specific knowledge that any of the twelve firearms (shotguns, rifles, and pistols) in Robert's home had ever been used in drug trafficking or on their face were contraband subject to a plain view seizure. Det. Jones admitted that there were no exigent circumstances and he had sufficient time to submit his information about the twelve firearms located in Robert's residence to a neutral judge for a warrant authorization, but he chose to seize them as evidence of drug trafficking under a general application of the warrant. Robert Franklin was never charged within any crime in relation to the seizures from his home on December 15, 2008, nor was he provided with any sort of post-deprivation due process hearing with regard to any of the twelve firearms seized on that day. Eleven of the twelve firearms in Robert's home belonged to him; the twelfth was entrusted to him by a cousin.

The statute of limitations for a felony in Missouri is three years. But even after that date passed on December 15, 2011, and despite that statutory bar to felony prosecution, the Prosecutor's

office continued to oppose the return of Robert's firearms until May 22, 2012, even though Robert made repeated demands to CPD and the Prosecutor's office for the return of his firearms in 2010, 2011, and 2012. On August 23, 2012, eleven of the firearms seized from Robert's home on December 15, 2008, were finally returned to his agent by CPD. However, CPD had received a report that twelfth firearm seized on December 15, 2008, a Remington Model 870 - 12 gauge shotgun, had been stolen from Randy Nelsen. So, on October 3, 2012, the shotgun was released to Randy Nelsen's agent, without the notice, hearing, or judicial determination required under RSMo 542.301, et seq., (2008) before seized property can be released to someone other than the person from whom it was seized. Under well established Missouri law that imposes a one year statute of limitations from the date of the seizure for the commencement of proceedings to transfer the custody of seized property to anyone other than the person from whom it was seized. No due process hearing or judicial order was provided with regard to the transfer of this firearm. CPD Evidence Custodian Heater admitted that she was aware that the statute of limitations for felony prosecutions in Missouri is three years, but it was the practice or custom of the CPD to transfer property on the allegation that it was stolen upon the authorization of the Prosecutor's office without due process and a judicial determination that a property transfer was lawful.

Robert's son, Raymond Franklin, in 2007, pled guilty to a felony drug charge and was placed on probation. He received permission from the court to

transfer his probation in July 2008, and transferred his probation supervision to North Carolina by September 2008. On June 30, 2010, Det. Geoffrey Jones alleged Raymond Franklin unlawfully possessed (RSMo. 571.070 (2008)) his father's 45 pistol in a sworn probable cause statement:

> The facts supporting this belief are as follows: On 12-15-08, a search warrant was served at 1670 Sonora Drive in Boone County. This was the home of Raymond Franklin and Robert Franklin. During the service of the search warrant, several firearms were located throughout the residence as well as items of drug evidence. Some of the firearms located were reported stolen. One particular firearm, a Vulcan V10 .45 caliber gun, was found in the downstairs locked bedroom. Inside the bedroom were several items in the name of Raymond Franklin. The gun was lying next to the bed. Raymond Franklin was convicted of a felony drug possession on 07-25-07. Raymond Franklin was a convicted felon at the time the gun was found in his bedroom.

Det. Jones also ran a criminal history on June 30, 2010, that showed Raymond Franklin's (hereinafter, Raymond) residence was in Raleigh, North Carolina and that Raymond had law enforcement contacts in July 2009 in North Carolina. Det. Jones admitted to having no specific knowledge that Raymond had been in the State of Missouri in December 2008, when he prepared his probable cause statement in June 2010. Despite this, the Boone

County Prosecutor's office filed a complaint on June 30, 2010, alleging that Raymond was unlawfully in possession of a firearm on December 15, 2008. On August 20, 2010, Assistant Prosecutor Hicks filed the felony information and on August 23, 2010, a Motion for Speedy Trial was filed. Raymond Franklin's probation, was revoked on September 27, 2010, upon a motion filed by the Boone County Prosecutor. The unlawful possession of a firearm case was continued from its first jury trial setting of October 19, 2010, and was subsequently repeatedly continued over Raymond's objections until April 21, 2011, when Prosecutor Hicks filed a *nolle prosequi*.

After the case was dismissed Prosecutor Hicks directed the Prosecutor's office staff to communicate continued opposition to the release of Robert Franklin's firearm(s). Mr. Hicks admitted that he did not believe Robert Franklin with regard to Raymond and Robert's 45 pistol stating, "...that I don't necessarily believe Robert Franklin. Robert Franklin at the time when this search warrant was being executed, was not cooperative with the police, would not cooperate with them in any way."

On January 28, 2011, Greg Rodgers (hereinafter, Greg) called CPD to report being assaulted. Officers Brotemarkle, Valley, and Lucas responded and reviewed Greg's driver's license and Florida Concealed Carry Permit. After being told the police were done and having his documents returned, Greg attempted to leave and was assaulted by Officer Brotemarkle. Greg then initiated a misconduct complaint against the three officers.

On May 11, 2011, Greg called 911 to report a road-rage incident. Greg was informed that CPD

officers were in route to arrest him for leaving the scene of an accident. Greg was unaware of any collision and noted no damage to his vehicle. Greg was arrested and handcuffed by a CPD officer and injured by the forceful application of the handcuffs. After twenty minutes he was released and issued a municipal summons for leaving the scene of an accident. In *Kansas City v. Bott,* 509 S.W.2d 42,44 (Mo. 1974) the Missouri Supreme Court stated, "[t]he courts of this state have said . . . that a prosecution for violation of a municipal ordinance is a civil action**,** despite its resemblance to a criminal action."

On the morning of Greg's Municipal Court hearing on July 18, 2011, he had chest pains and went to the emergency room where he was given nitro and prescribed bed rest. The emergency room doctor's note was faxed to Municipal Court requesting a continuance of his hearing. CPD officers had previously engaged in ex parte communications with Municipal Court Judge Robert Aulgur alleging that Greg threatened, "physical violence against Judges … and police officers." The Court had entered an order on July14, 2011, "[d]o not continue this case for any reason per Bob". Greg received a letter from Municipal Court informing him about the failure to appear warrant, he discussed that warrant with CPD Internal Affairs Sgt. Lloyd Simons and informed him of his plan to post the bond to the Court. Det. Liebhart admitted that there was no probable cause to believe that Greg had made threats of violence against judges or police.

On August 12, 2011, Greg was at 1607 Windsor Street, Columbia, MO where he leased apartment #8. Plain-clothed CPD Det. Geoffrey Jones

pretended to be searching for a dog. Upon noticing a CPD patrol car, Greg moved to re-enter his building, when from behind him Det. Jones yelled, "Police, Stop!" Greg stopped, dropped tools, and his pistol. He informed Det. Jones that he was unarmed and surrendered. CPD Officer Quintana exited the patrol car and took him into custody on a municipal failure to appear warrant. While being handcuffed, Greg informed the officers that he had a concealed-carry permit. At the Police Department, Det. Liebhart requested that Greg surrender every firearm to which he had access. When Greg refused, Det. Liebhart with the assistance of a prosecutor, obtained a search warrant alleging Greg was unlawfully in possession of firearms (RSMo. 571.070 (2008)). The warrant stated:

> Unlawful Possession of a Firearm. The evidence to include ammunition and firearms and any other evidence related to the crime of unlawful possession of a weapon. Further, the evidence will include written documents indicating the issuance of an arrest warrant. 1607 Windsor Street, apartment 8. This apartment is currently under police observation …

Det. Liebhart's affidavit gave these grounds:

> On 5/11/2011 Greg Rodgers was involved in a traffic accident in which he was issued a summons by the Columbia Police Department. Rodgers was given a court date but did not appear. A warrant for failure to appear was issued by the

municipal Judge. There have been two recent Crimestopper calls in which the caller indicated Greg Rodgers has made threats to harm the police if they come to his residence to arrest him for the warrant. On August 9, 2011, Crimestopper reporter indicated that Greg Rodgers had armor piercing bullets and will open fire on the police if they attempt to arrest him. Further, Rodgers is armed with an M-16 rifle, multiple semi-automatic pistols, and shotguns. The Crimestopper reported that Rodgers intends to blow up the Columbia Police Department. On 8/12/2011 there was another Crimestopper that indicated Greg Rodgers is heavily armed with semi-automatic pistols, shotguns, and assault-style rifle. He has armor piercing bullets. Rodgers has expressed a desire to kill the Judge and the police if there is attempt to arrest him. For the last several weeks Greg Rodgers has been in contact with Sgt. Lloyd Simons, Internal Affairs, Columbia Police Department, Simons spoke to Rodgers about the outstanding arrest warrant. Rodgers suggested to Simons that he did not intend to cooperate with the police if they came to arrest him and would not allow them to handcuff him. On 8/12/2011, Officers conducted surveillance near the Rodgers' residence. At about 8:45 P.M. he was observed leaving the residence

> on foot. As the uniformed officers from the Columbia Police Department approached him, Rodgers verbally acknowledged their presence but attempted to flee on foot. The officers caught him and as they were detaining him, Rodgers discarded a handgun. Prior to Rodgers discarding the gun, officers witnessed Rodgers remove it from beneath his clothing. The handgun was fully loaded with ammunition.

Greg was in custody of CPD for the municipal failure to appear warrant when this search warrant was requested and authorized. After discovering Dr. Allan Rodgers' (hereinafter, Allan) gun safe in the management storage area, Det. Liebhart returned to CPD station and threatened to destroy the gun safe unless Greg gave him the combination. On August 13, 2011, a rifle was seized from within Greg's home and nine firearms were seized from Allan's gun safe located in a management storage area. Greg was then arrested for unlawfully using by concealing a firearm (RSMo. 571.030 (2008)) when seized on August 12, 2011, and held in custody until August 15, 2011, when a $50,000 cash bond was posted. As a bond condition of the concealing charge, the prosecution had requested and court ordered a bond condition that he "not possess any weapons" while on bond. The prosecutor was permitted to amend the charge on December 22, 2011, alleging Greg was unlawfully in possessing a firearm (RSMo. 571.070 (2008)) as a "fugitive from justice" for missing the municipal court date on July 18, 2011. A Boone County Circuit Court dismissed Greg's amended felony weapons

charge "ruling that under section 571.101.2(4) RSMo Supp 2011, a fugitive from justice must be charged with a misdemeanor with a punishment exceeding one year of imprisonment for a permit to be suspended, Under Section 571.104.1(1) RSMo. Supp 2011 If the failure to appear on a Columbia Ordinance violation for a hearing the same is not sufficient to suspend permit..." finding that a municipal charge was insufficient to render Greg a 'fugitive from justice". The State appealed the dismissal and the Missouri Court of Appeals affirmed the dismissal on February 05, 2013 in *State v. Rodgers*, 396 S.W.3D 398 (2013). The Rodgers firearms seized on August 13, 2011, were held for over a year despite return requests without a due-process hearing or legal nexus to any pending charges. Greg's firearm seized on August 12, 2011, was returned after summary judgment was granted on February 07, 2014.

The Franklin lawsuit was filed jointly with the Rodgers' lawsuit in the District Court for the W. D. of Missouri on February 05, 2013. The District Court granted the Defendants' motions to sever the Franklin and Rodgers cases on July 08, 2013, The parties all filed summary judgment motions, and on February 07, 2014, the Court granted Defendants in both the Rodgers and Franklin cases summary judgment and denied summary judgment to Allan and Gregory Rodgers and Robert Franklin. Appeal was timely filed on February 11, 2014, for the Rodgerses and on February 12, 2014 for Franklins. These appeals were consolidated and argued at the 8th Circuit of Appeals September 11, 2014. The 8th Circuit handed down its decision on March 23, 2015. A timely motion for

rehearing was filed on April 06, 2015, and denied on May 05, 2015. This timely filed writ petition followed.

In an appeal from grants of summary judgment the court, "must view the facts and any inferences reasonably drawn from them in the light most favorable to the party against whom judgment was entered." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986).

REASONS FOR GRANTING THE WRIT

This case poses questions of exceptional importance relating to the First, Second, Fourth, and Fourteenth Amendment rights of all Americans: the right to petition their government for the redress of grievances by filing misconduct complaints and the right to refuse consent to a police demand to a search of their homes and seizure of their firearms, without being subjected to malicious and retaliatory arrest and prosecution; the right to be free from malicious arrest and prosecution for felony weapons offenses when their conduct is legal under the law, stripped of the right to possess any weapon for months, and subjected to the unjustified seizure of their legal firearms from their homes; the right to rely on the particularity requirement for search warrants and protected from a general warrant that relates all firearms to illicit drugs with no foundation; the right to be protected from the unjustified transfer or retention of their firearms for years without

establishing a legal nexus between the seized firearms and any pending criminal charges and without a post-deprivation due process hearing as required under law. This case also presents the questions of whether a prosecutor is entitled to absolute immunity for commencing a prosecution that any objectively reasonable prosecutor would admit lacked probable cause under the law and whether police and prosecutors are entitled to qualified immunity for the seizure, retention and transfer of firearms without legal authority and without due-process notice, a hearing, and judicial oversight.

Official reprisal for protected speech offends the Constitution [because] it threatens to inhibit the exercise of a protected right. See *Hartman v. Moore*, 547 U.S. 250, at 254 (2006) The *Hartman* Court found that the first element of a claim of retaliatory prosecution is "lack of probable cause." The Court went on to find that against an "official who allegedly influenced the prosecutorial decision . . . but between the retaliatory animus of one person and the adverse action of another. . . presumption of regularity accorded to prosecutorial decision making, a showing of the absence of probable cause [is necessary] . . . to rebut presumption." *Id.* at 260. The *Hartman* Court at 265 cited with approval *Bordenkircher v. Hayes,* 434 U.S. 357 (1978). The *Bordenkircher* Court stated,

> In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined

> by a statute, the decision whether or not to prosecute, and what charge to file . . . generally rests entirely in his discretion within the limits set by the legislature's constitutionally valid definition of a chargeable offense

Id. at 364. The *Bordenkircher* Court, also said, "[t]o punish a person because he has done what the law plainly allows him to do is due process violation of the most basic sort." *Id.* at 363. In the instant case, the Eighth Circuit found that despite the fact that,

> . . Missouri's prohibition on carrying a concealed weapon does not apply when a person 'is in his or her dwelling unit or upon premises over which the actor has possession, authority or control' Mo. Rev. Stat. § 571.030.3, the prosecutors have absolute immunity for the filing the charge, *Imbler v. Pachtman,* 424 U.S. 409, at 430. (1976), so the district court properly dismissed the claim against them. *Rodgers v. Knight,* 781 F.3d 932, at 939 (See Appendix B – App. 3-28)

The *Rodgers* Court went on to find,

> Nor was it clearly established that probable cause was defeated by the 'dwelling unit' exception for carrying concealed weapons in Missouri. No court has construed the meaning of 'dwelling unit or . . . premises over

which the actor has possession, authority of control. *Id*. at 939.

Thus, the Eighth Circuit added a new requirement that a court must construe the plain meaning of a statute before it becomes well established law. In doing so, the Eighth Circuit ignored the ruling of the Missouri Court of Appeals construing that specific language while resolving a double jeopardy issue involving state and city prohibitions on concealed firearms in *State v. McLemore*, 782 S.W.2d 127 (Mo. E.D. 1989), the Missouri Court of Appeals for the Eastern District held, "[t]hus the conduct proscribed by the ordinance – carrying a loaded or unsecured weapon on the person beyond residential or business premises—is also proscribed by the statute, if the weapon is concealed." *Id* at 129.

The *McLemore* Court's construction is consistent with the plain meaning of the statute. Black's Law Dictionary 6th Edition defines premises as ". . . a dwelling unit and the structure of which it is a part and facilities and appurtenances therein and grounds, areas, and facilities held out for the use of tenants generally or whose use is promised to the tenant." Webster's II New Riverside University Dictionary defines premises as, "a land and the buildings on it."

This Court made it clear when discussing qualified immunity in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) that "[w]here an official could be expected to know that certain conduct would

violate statutory or constitutional rights, he should be made to hesitate" or be denied immunity. This Court has never upheld a requirement that a court must construe the plain meaning of a statute before the law is "clearly established." It is longstanding precedent that courts only construe the meaning of a statute when the statute is ambiguous or to resolve a case or controversy.

The prosecutor who signed the criminal felony complaint against Greg for unlawfully concealing a weapon had previously reviewed and counter-signed the search warrant application for the seizure of Greg's firearms from his premises while he was in custody. The plain meaning of Mo. Rev. Stat. § 571.030.3 makes it clear that Greg had a lawful entitlement to conceal a firearm upon his premises where he was arrested. Greg was entitled to enjoy that right and no objectively reasonable prosecutor could have found probable cause to pursue charges.

In *Buckley v. Fitzsimmons,* 509 U.S. 259, this Court analyzed when prosecutors are entitled to absolute or qualified immunity and outlined the confines of prosecutor's immunity in a "functional approach."

> [W]hen a prosecutor 'functions as an administrator rather than as an officer of the court' he is entitled only to qualified immunity. . . .When a prosecutor performs investigative functions normally performed by a

> detective or police officer, it is 'neither appropriate nor justifiable that, for the same act, immunity should protect one and not the other." . . . A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested."

Id. at 273.

The current stance of the Eighth Circuit is contrary to its prior holdings and those of other circuits. In *McGhee v. Pottawattamie County*, 547 F.3d 922 (8th Cir. 2008), the court held that "[b]efore the establishment of probable cause to arrest, a prosecutor generally will not be entitled to absolute immunity." *Id* at 929. In *Whitlock v. Brueggemann, 6*82 F.3d 567 (7th Cir. 2012), the court held that,

> Under the functional line the Supreme Court drew in *Buckley,* a prosecutor does not enjoy absolute immunity before he has probable cause. 509 U.S. At 274, 113 S.Ct. 2606; see *Fields,* 672 F.3d at 512 ("Prosecutors do not function as advocates before probable cause to arrest a suspect exists."). *Id*. at 579

(See also the 9th Circuit in *Lacey v. Maricopa County*, 693 F.3d 896 (9th Cir. 2012); *Holloway v Brush*, 220 F.3d 767 (6th Cir. 2000)).

No objectively reasonable prosecutor could have found probable cause to prosecute Greg for unlawfully concealing a firearm. The arresting

officer's probable cause statement established that Greg was upon his leasehold premises when he was alleged to have unlawfully concealed a firearm. Further Greg was arrested and prosecuted for unlawfully concealing a firearm despite having a valid concealed carry permit. CPD officers had inspected Greg's valid permit prior to the date of his arrest, and Greg informed the arresting officers again that he had a valid permit at the time of his arrest and the seizure of his firearm. The CPD officers did not have probable cause to arrest Greg and the prosecutor did not have probable cause to prosecute him.

These two independent legal defenses to a charge of unlawfully concealing a weapon were ignored in retaliation for the filing of a misconduct complaint with CPD by Greg after he was assaulted by CPD officers. This retaliation strikes at the heart of the First Amendment Right to petition the Government for a redress of grievances. CPD Det. Liebhart admitted that this misconduct complaint was the "catalyst" for the police actions against Greg described above.

In the instant case, the Eighth Circuit held on the First Amendment retaliation claim that:

> [A] reasonable officer in 2011 could have believed that there was probable cause to charge Greg with unlawful use of a firearm based on carrying a concealed weapon or unlawful possession of a firearm as a fugitive

> from justice. The prosecutors are entitled to absolute immunity for their decision to prosecute Greg**.** See Imbler, 424 U.S. At 430-31. *Rodgers* at 942

The only grounds under Missouri law by which Greg could be found to be in violation of RSMo. 571.070 (2008) was if he was a "fugitive from justice" for missing the municipal court date on July 18, 2011. As cited above the Missouri Supreme Court in *Kansas City v. Bott,* held ordinance violations are civil matters. One cannot be a fugitive from justice on a civil matter. Columbia Municipal Judge Aulgur at the time of issuance was not a neutral and detached magistrate when he issued the contempt order and bond in that matter, since CPD officers had in ex parte communications falsely told him that Greg had threatened to kill him, blow-up the police department and harm police officers. False allegations that CPD Det. Liebhart admitted lacked probable cause to believe, yet were also contained in his sworn search warrant probable cause affidavit for the search warrant later obtained from Judge Crane. As Boone County Judge Daniels found when she dismissed the amended charge alleging Greg was a "fugitive from justice" that a municipal ordinance violation was insufficient to suspend a concealed carry permit and fugitive from justices were prohibited from having a concealed carry permit, therefore a municipal violation was insufficient to render a Missourian a fugitive from justice.

This Court in *United States v Leon*, 468 U.S.

897, 922 (1984) identified four circumstances in which the good faith exception to the exclusionary rule would not apply: (1) where the magistrate has been knowingly misled; (2) where the issuing magistrate wholly abandoned his or her judicial role; (3) where the application is so lacking in indicia of probable cause as to render reliance upon it unreasonable; and (4) where the warrant is so facially deficient that reliance upon it is unreasonable.

Facially, missing a municipal/civil court date cannot render a Missourian a fugitive from justice. Add to that the demonstrated bad faith demonstrated by these CPD officers knowingly disseminating false allegations of death threats to the judge that subsequently denied a medical necessity request for continuance and their defense is defeated.

To reach the above conclusion the Eighth Circuit disregarded Greg's declaration to the seizing officers about his concealed carry permit. A permit that had been inspected by three CPD Officers prior that year before Greg's filing of a misconduct complaint. A permit that was easily verifiable according to police admissions. In addition, to the separate statutory right under Missouri Law RSMo. 571.030.3 to lawfully conceal a firearm, ". . . or is in his or her dwelling unit or upon premises over which the actor has possession, authority or control" while on the common area premises of his leasehold apartment.

The Eighth Circuit further found, "[i]nsofar as Greg alleged a malicious prosecution claim against

police officers based upon the filing of the concealed weapons charge, he has not demonstrated any damages arising from that action, so the claim was properly dismissed." *Rodgers* at 939.

Greg has established a prima facie case that his misconduct complaint was the "catalyst" for CPD's First Amendment retaliation. As cited above Greg established damages were the violations of his fundamental liberty interests and his reputation. In addition, to the retaliation extending to his father's firearms being seized and retained for over a year for "safekeeping" without a post-deprivation due process hearing or legal nexus to a pending criminal charge. All demonstrate actual damages suffered by the Rodgerses.

Robert Franklin was retaliated against for refusing consent to search his home by the seizure of twelve firearms from his home that were not contraband and that he had the legal right to possess. Further, Robert's efforts to recover his firearms lead to the prosecution of his son Raymond for possessing one of his father's pistols by old mail in proximity, within his father's home, to that pistol in Missouri while his son Raymond was in North Carolina. This fabricated allegation was a basis for issuance of an arrest warrant eighteen months after the seizure that resulted in an arrest and subsequently the revocation of probation and incarceration operating to deny Raymond of his liberty. Admitted by Prosecutor Hicks in deposition that ". . . at the time when this search warrant was being executed, was not

cooperative with the police, would not cooperate with them in any way."

The Sixth Circuit of the United States Courts of Appeals stated a contrary view in *Leonard v. Robinson,* 477 F.3d 347 (6th Cir 2007),

> [G]overnment officials in general, and police officers in particular, may not exercise their authority for personal motives, particularly in response to real or perceived slights to their dignity." For a plaintiff to state a claim for First Amendment retaliation, he must show the injury was material, (internal citations omitted) (that the injury "would likely chill a person of ordinary firmness from continuing to engage in that activity"), "that this conduct was constitutionally protected," and that it was the "motivating factor" behind the government's actions. *Id*. at 355

This Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008) struck down a District of Columbia ordinance that totally banned handgun possession in the home. The Court reasoned that "the inherent right of self-defense has been central to the Second Amendment right" and "the home [is] where the need for defense of self, family and property is most acute." *Id.* at 628. The Court further clarified this in *McDonald v. City of Chicago,* 130 S.Ct. 3020 (2010) that, ". . . the Second Amendment protects a

personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home." *Id.* at 3044.

The Second Amendment Rights of Greg Rodgers were violated after he was falsely charged with unlawfully concealing a firearm despite a valid concealed carry permit and his right under Missouri statute to lawfully conceal a firearm upon his premises even without a permit. Thereby permitting a spurious felony charge with a requested bond condition that was granted stripping him of his right to possess "any weapon" for over six months. In violation of his right to keep and bear arms. The Eighth Circuit in *Walters v. Wolf*, 660 F.3d 307 (8th Cir. 2011) stated, ". . . to establish a violation of the Second Amendment; Walters must also show that the City kept him from acquiring any other legal firearm" *Id*. at 316. That was established here.

Dr. Allan Rodgers, PhD., Second Amendment rights were violated when a facially invalid warrant alleging Greg was unlawfully in possession of firearms was used to seize from Allan's real property his firearms for "safekeeping" and this seizure was maintained without a due process hearing for over a year.

Robert Franklin's Second Amendment Rights were violated when a search warrant for drugs was treated as a general warrant and all of his firearms were seized from his home and despite no charges against him or legal nexus of these firearms to any crime that seizure was maintained for over three

years and eight months without a post-deprivation due process hearing. A seizure from the home of all a citizen's firearms without legal cause is a violation of their Second Amendment Rights.

The Fourth Amendment warrant requirements were violated in both the Rodgers and Franklin Warrants. For the Franklin Warrant the Eighth Circuit stated,

> The warrant authorized only a search for '[e]vidence of drug trafficking." Firearms, however, are tools of the drug trafficking trade, and officers with probable cause to search for drug trafficking evidence reasonably could have determined that firearms in proximity to drugs or drug paraphernalia were within the scope of the warrant. *Rodgers* at 945

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and persons or things to be seized.

The chief evil that prompted the framing and adoption of the Fourth Amendment was the "indiscriminate searches and seizures" conducted by the British "under the authority of 'general warrants."

Payton v New York, 445 U.S. 573, 583, (1980); *Arizona v. Gant,* 556 U.S. 332, 345 (2009). The central concern underlying the Fourth Amendment is the concern about giving police officers unbridled discretion to rummage at will among a person's private effects. To prevent such "general, exploratory rummaging in a person's belongings" and the attendant privacy violations, *Coolidge v New Hampshire*, 403 U.S. 443 (1971), the Fourth Amendment provides that a warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity." *Kentucky v King,* 131 S.Ct. 1849, 1856, 179 L. Ed. 2D 865 (2011).

The particularity requirement has three components. First, a warrant must identify the specific offense for which the police have established probable cause. See *United States v. Bianco*, 998 F.2d 1112, 1116 (2d Cir. 1993) abrogated on other grounds by *Groh v. Ramirez*, 540 U.S. 551 (2004) warrant authorizing search for evidence "relating to the commission of a crime" was overbroad because "[n]othing on the face of the warrant tells the searching officer for what crimes the search is being undertaken"). Second, a warrant must describe the place to be searched. United States v. Voustianiouk, 685 F.3d 206, 211 (2d Cir. 2012); 2 W. LaFave, Search and Seizure § 4.6(a) (5th ed. 2012) ("[G]eneral searches are prevented by other Fourth Amendment requirement that the place to be searched be particularly described.") *United States v.*

Williams, 592 F.3d 511, 519 (4th Cir. 2010); see also *United States v. Buck*, 813 F.2d 588, 590-92 (2d Cir. 1987) (finding that a warrant authorizing the seizure of "any papers, things or property of any kind relating to [the] previously described crime" failed the particularization requirement because it "only described the crimes – and gave no limitation whatsoever on the kind of evidence sought"). "[A]n otherwise unobjectionable description of the objects to be seized is defective if it is broader than can be justified by the probable cause upon which the warrant is based." 2 W. LaFave, Search and Seizure §4.6(a)(5th ed. 2012) (See also Cassady v. Goering, 567 F.3d 628, 632 (10th Cir. 2009), which held a warrant that permits a general search and seizure of "all other evidence of criminal activity" violated the particularity requirement of the Fourth Amendment)

This Court has oft-held that the particularity requirement "makes general searches … impossible and prevents seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron v. United States,* 275 U.S. 192 (1927). This Court in *Groh* said, "We have long held... that the purpose of the particularity requirement is not limited to the prevention of general searches. A particular warrant also assure the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *Groh* at 561.

Nothing about the Franklin warrant authorizing a search for drugs or evidence of drug trafficking satisfied the particularity requirements when it was used to seize from his home his lawfully possessed firearms. The Eighth Circuit's argument that all firearms are evidence of drug trafficking is offensive to the protections of the Fourth Amendment.

The Rodgers warrant fails to meet the requirements in several ways. Facially, there was no probable cause that Greg was unlawfully in possession of firearms as he sat in custody of the CPD on the civil contempt order for failure to appear with a $500 bond when the search warrant was prepared and approved. Noting an alternate impossibility of being a "fugitive" while in custody. Nothing within the four corners of the search warrant provides an objectively reasonable basis that Greg Rodgers was unlawfully in possession of a firearm in violation of RSMo. 571.070 and therefore the warrant was facially invalid.

If this Court should find that missing a civil court date could render a citizen a "fugitive from justice" it should find that the knowing deception engaged in by CPD officers to deceive Municipal Judge Aulgur by their communication of false threats that Greg had threatened to "kill him" causing an order of "no more continuances for any reason" prior to the July 18, 2011, court date and on that date the municipal court rejection of a doctor's note requesting a medical necessity continuance of his

hearing thereby acts to deprive these officers of the good faith to believe in the validity of this seizure order. And that the underlying basis of the warrant was procured by the intentional deception of Judge Aulgur in retaliation for Greg's misconduct complaint previously filed against CPD officers and was a violation of Greg's First Amendment rights.

This Court in *Malley v. Briggs*, 475 U.S. 335 (1986) said, "[d]efendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue;" *Id.* at 341. Further stating, "...objectively ascertainable question whether a reasonable well-trained officer would have known that the search was illegal despite the magistrate's authorization." *Id*. at 345

This Court in *Albright v. Oliver,* 510 U.S 266 (1994), said "that [a defendant's] claimed right to be free from prosecution without probable cause must be judged under the Fourth Amendment" *Id*. at 266. And further said in *Michigan v. DeFillippo,* 443 U.S. 31 (1979), "[t]his Court has repeatedly explained that 'probable cause' to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, believing, in circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Id.* at 37

The Eighth Circuit stated, "[i]t was not clearly established that the officers, having developed

probable cause for a concealed firearms offense, were required to investigate Greg's claim about a Florida permit; our precedent suggests the opposite." *Rodgers* at 939.

The arrest of Greg for unlawfully concealing a firearm was objectively unreasonable when he told the arresting officers that he had a valid concealed carry permit. A permit that CPD officers admitted was easily verifiable. This arrest occurring upon his leasehold premises was further in violation of state law which specifically permits the lawful concealment upon a citizen's premises. In addition, during the event that would lead to the misconduct complaint against CPD officers, they had inspected Greg's concealed carry permit. A complaint that CPD Det. Leibhart admits was the "catalyst" for all CPD retaliatory actions against Greg, including the seizure of his father's firearms from Dr. Allan Rodgers' gun safe and their retention for over a year.

The Sixth Circuit has addressed an analogous situations, whether an officer has probable cause to arrest an individual who may have an affirmative justification for a suspected crime. In both *Painter v. Robertson*, 185 F.3d 557 (6th Cir. 1999) and *Estate of Dietrich v. Burrows*, 167 F.3d 1007 (6th Cir. 1999), the arrestee was charged with carrying a concealed weapon despite the presence of a statute that provided that an individual engaged in a business activity that is particularly susceptible to criminal attack has an affirmative defense to the charge. *Painte*r, 185 F.3d at 564-65; *Dietrich*, 167 F.3d at

1010-11. In both cases the court denied qualified immunity, holding that the arresting police officers lacked probable cause because the officers were aware of sufficient facts and circumstances to establish that the arrestees had a statutorily authorized affirmative justification for the suspected criminal act at the time of the arrest and knowledge of the statute was imputed to the police officers. *Painter*, 185 F.3d at 571; *Dietrich* 167 F. 3d at 1012.

In the Franklin matter no objectively reasonable officer or prosecutor could believe that a son's very old mail in his father's home could cause the son with a felony conviction to illegally possess his father's legal firearm across the room from the mail in Missouri while the son was in North Carolina. The Revised Statutes of Missouri Chapter 561.061(22) (2008) provides: ". . . constructive possession of an object with knowledge of its presence. . . . if such person has the power and the intention as a given time to exercise dominion or control over the object. . . ."

Under the Due Process Clause of the Fourteenth Amendment, no State shall "deprive any person of life, liberty or property, without the due process of law."

The Eighth Circuit found:

> Robert Franklin further argues that the officers' transfer of the Remington 870 shotgun to its registered owner violated procedures for the return of unclaimed seized property, as set

> forth in Mo. Rev. Stat. § 542.301.1. A violation of state law, without more, is not the equivalent of a violation of the Fourteenth Amendment." *Rodgers* at 945.

This was a violation of an enumerated constitutional right, namely the deprivation of property without the due process of law. Robert Franklin's firearm was seized from his home in December 2008 and in October 2012 and was transferred to another citizen based solely upon police acceptance of a report complaining about an allegedly stolen shotgun. The transfer of this shotgun was done in violation of the Fourteenth Amendment and Missouri law that required, notice, a hearing and a judicial finding before permitting the lawful transfer of this seized property.

This Court said in *Katz v. United States*, 389 U.S. 347 (1967) that, ". . . the protection of his property and of his very life, left largely to the law of the individual States." *Id* at 351. Missouri law may enhance the protections of the Fourteenth Amendment with regard to the due process of law, but any deprivation of property solely upon the caprice of an unelected government official without either hearing or judicial order is in violation of rights of free peoples protected under law since the Magna Carta. Such is the case here and no more clearly established and federally protected right exists under our Constitution.

> To bereave a man of life,' says he, 'or by violence to confiscate his estate,

> without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.'" Alexander Hamilton, quoting Blackstone's Commentaries, Federalist No. 84, July 16, 1788.

As noted supra, the deprivation of the Rodgers firearms seized on August 13, 2011, and their retention for over a year for "safekeeping" was also in violation of the Rodgers right to post-deprivation due process hearing. Further, the continuation of the seizure of Greg's pistol after February 05, 2013, Missouri Court of Appeals affirmation of the dismissal of the weapons charge held through the grant of summary judgment by the District Court on February 07, 2014, without a post-deprivation due process hearing was another Fourteenth Amendment Due Process violation.

In addition, to the Fourth Amendment violation by the seizure of Robert's firearms from his home on December 15, 2008, due to a general association of firearms to drugs was in violation of his Fourth Amendment right. Robert's Fourteenth Amendment due process rights were violated by the continuation of that seizure until at least August 23, 2012, without a legal nexus to any pending criminal

charges and without the provision of post-deprivation due process hearing to challenge the probable validity of that seizure.

This Court in *Mathews v. Eldridge,* 424 U.S. 319 (1976) announced a three factor test, noting,

> [D]ue process is flexible and calls for such procedural protections as the particular situation demands . . . consideration of three factors: (1) the private interest that will be effected by official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, an probable value, if any, of additional procedural safeguards; and (3) the Governments interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail.

Id at 332.

Due process is afforded only by the kinds of notice and hearing that are aimed at establishing the validity, or at least probable validity, of the government's claim against a citizen whose property has been seized.

Then Judge Sotomayor when writing for the 2d Circuit found in *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir 2002) that due process required a prompt post-deprivation hearing to determine the Fourth and Fourteenth Amendment rights for citizens whose property had been seized, to challenge the governments' "probable validity" for the seizure post-seizure and pre-judgment. These are now known as *Krimstock* hearings. (See also *Smith v. City of*

Chicago, 524 F.3d 834 (7th Cir. 2008) reversed on other grounds).

CONCLUSION

In his defense of British soldiers during the Boston Massacre trial, Founding Father John Adams said, "[f]acts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence." Quotes, John Adams Historical Society. In their summary judgment rulings, the courts below have attempted to alter facts and to construe the facts in favor of the defendants, contrary to this Court's guidance that the party against whom judgment was entered should be granted every reasonable inference drawn from the facts.

In the underlying matter, the Eighth Circuit's finding that the plain meaning of a statutory exemption is not well established law where "no court had construed the meaning . . ." operates to grant nearly universal immunity to law enforcement officers who violate the statutory rights of American citizens. As this Court knows, courts only construe statutes to resolve ambiguities or when a case or controversy exists. Courts do not construe statutory language when the plain meaning is clearly understood. In imposing this obstacle in overcoming immunity, the Eighth Circuit ignored the Missouri Court's *McLemore* construction of the statute

favorable to Petitioner's argument and radically expanded grants of immunity contrary to this Court's precedents.

This Court has repeatedly held in *Bordenkircher*, *Hartman*, and *Buckley* that a prosecutor is only entitled to absolute immunity during a criminal prosecution undertaken with probable cause. Absent that very fundamental and low threshold of probable cause no such absolute immunity is available to shield a prosecutor.

No objectively reasonable police officer or prosecutor could believe there was probable cause that existed to conclude that convicted felon Raymond was in possession of a pistol that was lawfully owned by his father and was in his father's home in Missouri near a very old piece of mail addressed to Raymond Franklin when Raymond was in North Carolina. No objectively reasonable police officer or prosecutor could believe there was probable cause that Greg was unlawfully concealing a firearm upon his person while located upon the premises of his leasehold, as permitted by well established Missouri law. It's also worth noting that Greg had informed the arresting officer that he was the holder of a valid concealed carry permit.

In the underlying matter, the Eighth Circuit's reasoning holds that the Fourth Amendment's objective reasonableness standard does not impose a duty upon law enforcement to investigate Greg's assertion made to them at the time of his arrest with regard to his concealed carry permit. This Court's

precedents suggest a contrary conclusion and that police may not willfully be blind to the easily verifiable facts and circumstances that establish a citizen is engaged in lawful conduct.

When a citizen, or a close family member, is subjected to spurious criminal charges and firearms seizures as retaliation for exercising his or her First Amendment rights – by filing a misconduct complaint, denying consent to search their home, or denying consent to the surrender of every firearm to which they have access – it sends a chill into citizens of reasonable firmness.

The Rodgers warrant was not supported by any objectively reasonable basis to believe that Greg was unlawfully in possession of firearms, and therefore it was facially invalid.

This spurious charge against Greg of unlawful concealment was the basis for a requested bond condition, granted by a court, that stripped Greg' of his Second Amendment Right to "possess any weapons" for over six months. The protection of the Second Amendment Rights of American citizens is an issue of national concern.

The retention of the Rodgers' firearms for over a year for "safekeeping," even though there was no legal nexus between these firearms and any criminal charges, is in violation of their Fourth and Fourteenth Amendment rights. Nor was their any post-deprivation due process hearing, in which the probable validity to this property seizure could have been challenged. A government seizure of firearms

from the home and prolonged retention without a valid warrant or legal cause is in violation of that citizen's Second, Fourth and Fourteenth Amendment rights.

In the underlying matter, the Franklin warrant for drugs was transformed by the Eighth Circuit into a general warrant that viewed all firearms as evidence of drug trafficking. The Eighth Circuit's perceived association between all firearms and illicit drugs is in direct violation of the Fourth Amendment's particularity requirement. All Americans have interest in having the particularity requirement upheld by opposing general warrants that find all firearms are evidence of drug trafficking.

The seizure of all of the firearms from Robert Franklin's home without legal basis was in violation of his Second Amendment Rights as articulated by this Court's precedent in *Heller* and *McDonald*.

The twelve seized Franklin firearms were held for almost four years with no post-deprivation due process hearing or legal nexus to any pending criminal charge. A due process hearing is necessary to give the owner of seized property an opportunity to challenge the probable validity of the seizure. Eleven of these firearms were returned. The subsequent transfer of the twelfth firearm without notice, a hearing, or a judicial determination finding that a transfer was warranted was in violation of Missouri law requiring those due process safeguards coextensive with those of the Fourteenth Amendment. The Eighth Circuit found no Fourteenth

Amendment due process violation in this deprivation of Robert Franklin's property without the required legal process, because there was an unsupported allegation that this firearm may have been stolen and the police summarily deemed the allegation reliable. This finding arbitrarily dispenses with the need to comply with the notice, hearing, and judicial determination requirements before the transfer of seized property to a person other than the party from whom it was seized.

For the foregoing reasons, Allan and Gregory Rodgers and Robert and Raymond Franklin request that this petition for a writ of certiorari be granted.

Respectfully submitted,

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July 22, 2015

APPENDIX

APPENDIX TABLE OF CONTENTS

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App. 1

(APPENDIX A)

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No: 14-1425

Allan Rodgers; Gregory Allan Rodgers

Appellants,

v.

Daniel K, Knight, et al.,

Appellees

United States of America

Intervenor

No: 14-1454

Raymond D'Sean Franklin and Robert Dewayne Franklin

Appellants

v.

App. 2

Daniel K. Knight, et al.

Appellees

United States of America

Intervenor

Appeal from U.S. District Court for the Western District of Missouri – Jefferson City

(2:13-cv-04033-NKL)

(2:13-cv-04171-NKL)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

May 05, 2015

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

App. 3

(APPENDIX B)

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No: 14-1425

Allan Rodgers; Gregory Allan Rodgers

Plaintiffs-Appellants,

v.

Daniel Knight, Brian Liebhart; Thomas Quintana; Lloyd Simons; Mark Brotemarkle; Kyle Lucas; Kenneth Burton; Cassandra Rogers,

Defendants – Appellees

Richard Hicks,

Defendant

City of Columbia, Missouri; Boone County

Defendants-Appellees

United States of America,

Intervenor.

No. 14-1454

App. 4

Raymond D'Sean Franklin; Robert Dewayne Franklin

Plaintiffs – Appellants,

v.

Daniel Knight, Geoffrey Jones; Kenneth M. Burton; Richard Hicks; City of Columbia; Boone County

Defendants – Appellees.

Appeal from U.S. District Court for the Western District of Missouri- Central Division

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Submitted: September 11, 2014

Filed: March 23, 2015

Before MURPHY, COLLOTON and KELLY, Circuit Judges

COLLOTON, Circuit Judge

This is a consolidated appeal from two decisions of the district court. Appellants Robert and Raymond Franklin in one case, and Allan and Greg Rodgers in another, brought suit under 42 U.S.C. § 1983 against law enforcement officials and municipalities. They alleged, as relevant on

appeal, violations of rights under the First, Second, Fourth, Fifth, and Fourteenth Amendments. The claims relate to the seizure of firearms from the appellants and the arrests and prosecutions of Greg Rodgers and Raymond Franklin. In both cases, the district court granted summary judgment for the defendants on all claims. We affirm.

I.

The Rodgers case involves an arrest of Greg Rodgers in August 2011, a subsequent search of his residence, a prosecution that was later dismissed, and the retention of seized firearms. Five police officers from Columbia, Missouri, arrested Greg at his apartment complex on August 12, 2011, on a municipal warrant for failure to appear in court. Greg was outside when officers approached, and he started to jog toward his apartment. When officers ordered Greg to stop, he turned around, took a Browning 9 millimeter pistol from his waistband, and threw the gun aside. After officers handcuffed him, Greg asserted that he had a Florida permit to carry a concealed weapon, but did not produce the permit. An arresting officer, Thomas Quintana, prepared a "Probable Cause Statement" for prosecutors that same day, alleging that Greg committed the offenses of unlawful use of weapons and resisting or interfering with arrest.

Later that month, police executed a warrant to search the "premises" of Greg's apartment for "ammunition and firearms and any other evidence related to the crime of unlawful possession of a weapon." Officers seized several firearms belonging to Greg Rodgers or his father, Allan Rodgers, from a locked storage closet below the stairs that led to Greg's second-floor apartment.

A county prosecutor then charged Greg with unlawful use of a firearm by carrying a concealed weapon. Later, after Greg's counsel notified the prosecutor in writing that Florida had issued Greg a permit to carry a concealed weapon, the prosecutor amended the charge to allege possession of a firearm by a "fugitive from justice." The prosecution's theory was that Greg was a fugitive from justice because he failed to appear in court on a summons that was issued for leaving the scene of a motor vehicle accident. The prosecutor also charged Greg with resisting arrest based on the August 12 incident.

The trial court dismissed the firearms charge, and the Missouri Court of Appeals affirmed on February 5, 2013. *State v. Rodgers*, 396 S.W.3d 398 (Mo. Ct. App. 2013). The court of appeals noted that "fugitive from justice" is not defined by statute, and that no case had defined the phrase in this context. *Id*. at 400-01. But the court concluded that the rule of lenity required strict construction of the ambiguous language in favor of Rodgers. *Id*. at

403. Thus, the court held that Greg was not a fugitive from justice and affirmed the dismissal of that charge. *Id*. at 404. The Missouri Supreme Court denied an application for transfer on April 30, 2013, and in May 2013, the prosecutor dismissed the remaining charge for resisting arrest.

In early 2012, Allan Rodgers asked the Boone County, Missouri, Prosecuting Attorney's Office to return his firearms that were seized during the search in August 2011. An assistant prosecuting attorney and the chief investigator at the prosecuting attorney's office directed the police department's evidence custodian in February 2012 to retain the firearms; the investigator noted that prosecutors would be refiling a criminal case against Greg. Eventually, a police captain authorized the evidence custodian to release Allan's firearms, and Allan reclaimed them on September 21, 2012. Greg requested return of his firearms on October 8, 2012, and police returned all but the Browning 9 millimeter pistol on October 22. Police eventually notified Greg on July 30, 2013, that he could pick up the Browning pistol.

II.

A.

Greg's lead argument on appeal is that county prosecutors and police officers arrested and

prosecuted him without probable cause for unlawful use of a firearm by carrying a concealed weapon. Greg contends that there was no basis for that charge once he told the arresting officers that he had a permit from Florida to carry a concealed weapon. Alternatively, he asserts that he lawfully carried the firearm because Missouri's prohibition on carrying concealed weapons does not apply when a person "is in his or her dwelling unit or upon premises over which the actor has possession, authority or control." Mo. Rev. Stat. §571.030.3.

The prosecutors have absolute immunity for filing the charge, *Imbler v. Pachtman*, 424 U.S. 409, 430-31, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976), so the district court properly dismissed the claim against them. Greg appears contend that police officers seized him without probable cause on August 12, but that claim fails because there was a warrant for Greg's arrest based on his failure to appear in court. The warrant justified the seizure whether or not other reasons articulated by the officers—including unlawful use of a weapon—were also sufficient.

Insofar as Greg alleged a malicious prosecution claim against police officers based on the filing of the concealed weapons charge, he has not demonstrated any damages arising from that action, so the claim was properly dismissed. See *Chi. Great W. Ry. Co. v. Robinson*, 243 F.2d 389, 391 (8th Cir. 1957). Prosecutors eventually

amended the charge to allege unlawful possession as a fugitive from justice, and Greg was not tried on the concealed weapons allegation.

In any event, the police officers were at least entitled to qualified immunity on a Fourth Amendment claim for their role in recommending the unlawful use of weapons charge. The officers determined that Greg did not have a Missouri permit to carry a concealed weapon, and they were not required to accept Greg's assertion that he had been issued a permit from Florida—especially when Greg attempted to flee from police and did not carry such a permit on his person as required by Florida law. Fla. Stat. §790.06. It was not clearly established that the officers, having developed probable cause for a concealed firearms offense, were required to investigate Greg's claim about a Florida permit; our precedent suggests the opposite. *Clayborn v. Struebing*, 734 F.3d 807, 809-10 (8th Cir. 2013). Although Greg reportedly informed different police officers about the Florida permit during a previous encounter in January 2011, there was no evidence that the arresting officers in August 2011 knew that information.

Nor was it clearly established that probable cause was defeated by the "dwelling unit" exception for carrying concealed weapons in Missouri. No court had construed the meaning of "dwelling unit or . . . premises over which the actor has possession, authority or control," Mo. Rev.

Stat. § 571.030.3, and there was Missouri authority suggesting that "a tenant does not have control of the common areas and thus does not possess them." *Motchan v. STL Cablevision, Inc.*, 796 S.W.2d 896, 900 (Mo. Ct. App. 1990). Officers reasonably could have believed that Greg was forbidden to carry a concealed weapon without a permit in common outdoor areas of the apartment complex. Therefore, officers are entitled to qualified immunity for recommending the firearms charge to county prosecutors.

B

Greg next appeals the dismissal of claims relating to the execution of the search warrant at his apartment. He argues that an officer sought the warrant without probable cause to believe that Greg committed a firearms offense, because Greg's failure to appear in municipal court did not make him a "fugitive from justice" under Mo. Rev. Stat.§ 571.070.1(2). A police officer applying for a search warrant is entitled to qualified immunity unless the warrant application is "so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Malley v. Briggs,* 475 U.S. 335, 344-45, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986).

At the time of the warrant application, the phrase "fugitive from justice" was undefined by Missouri statute or case law, and the Missouri Court of Appeals later characterized a proper analysis of the meaning as "elusive." *Rodgers*, 396 S.W.3d at 402. Because the question was close, and it was not clearly established that "fugitive from justice" excluded a person with an outstanding arrest warrant for municipal violations, it was reasonable for the officer seeking the warrant to believe that Greg's possession of firearms violated Missouri law. Therefore, the district court properly held that officers involved in procuring the warrant were entitled to qualified immunity.

Greg also contends that the searching officers exceeded the scope of the warrant and thus violated the Fourth Amendment when they seized firearms from a storage closet. The warrant authorized a search of the "premises" described as 1607 Windsor Street, apartment 8. The storage closet was located beneath stairs that led to Greg's second-floor apartment. It was reasonable for the officers to believe that they could search a structure "appurtenant to the premises" pursuant to a warrant authorizing a search of the premises. See *United States v. Fagan*, 577 F.3d 10, 13 (1st Cir. 2009). It was also reasonable for the officers to conclude that the storage closet—for which Greg had a key, and over which he admitted control—was appurtenant to the apartment. In similar circumstances, this court held that a resident's

consent to search an apartment included authority to search a locked storage room that was located ten feet outside of the door of the apartment, where the resident's lease included access to the room and the resident possessed a key. *United States v. Ware*, 890 F.2d 1008, 1010-11 (8th Cir. 1989); see also *United States v. Principe*, 499 F.2d 1135, 1137 (1st Cir. 1974) (holding that cabinet located three to six feet from apartment was appurtenant thereto and properly searched). The search was reasonable; at a minimum, the officers are entitled to qualified immunity for the scope of their search.

Greg also challenges the district court's dismissal of his claims against prosecutors Knight and Rogers based on their alleged role in the seizure of his guns. Greg presented no evidence, however, that the prosecutors were involved in drafting or executing the search warrant, so they are not responsible for any constitutional violations arising from the seizure of the weapons. See *Parrish v. Ball*, 594 F.3d 993, 1001 (8th Cir. 2010). In any event, even if Knight or Rogers played a role in the seizures, they would be entitled at least to qualified immunity for the same reasons that the officers are not subject to suit. See *Burns v. Reed*, 500 U.S. 478, 486-87, 496, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991)

C

The Rodgerses argue that officials deprived them of property without due process of law by retaining their firearms at the police department without a post-deprivation hearing. The district court ruled that the guns were properly retained because they were potential evidence in future court proceedings, and that officials at a minimum were entitled to qualified immunity.

"[W]hen seizing property for criminal investigatory purposes, compliance with the Fourth Amendment satisfies pre-deprivation procedural due process as well." Walters v. Wolf, 660 F.3d 307, 314 (8th Cir. 2011 (internal quotation marks omitted). Where retention of evidence is justified by pending charges or an arrest warrant, no further process is required. Id.; *United States v. David*, 131 F.3d 55, 59 (2d Cir. 1997). Likewise, if evidence is "needed for an ongoing or proposed specific investigation," law enforcement authorities are entitled to retain it. *Sovereign News Co. v. United States*, 690 F.2d 569, 578 (6th Cir. 1982).

The criminal charge against Greg was pending or the subject of appellate proceedings through April 30, 2013. Throughout that time, prosecutors and police had a reasonable basis to retain the seized firearms as evidence that Greg unlawfully possessed a firearm. Although some of the firearms belonged to Allan, they were seized from a storage locker to which Greg had access,

and it was reasonable for officials to believe that they could be evidence of unlawful possession by Greg. All but the Browning 9mm pistol were returned to Allan or Greg by the end of October 2012, before Greg's criminal case was resolved, so the district court correctly dismissed claims based on the retention of those firearms.

Police returned the Browning pistol to Greg within three months after the state supreme court refused to hear an appeal in Greg's criminal case. Given the need for information about legal proceedings to flow from the court to prosecutors to the police department and the evidence custodian, retention for that relatively brief period without further hearing was reasonable and thus did not violate the Constitution. *Walters,* 660 F.3d at 310, 315 (holding retention after dismissal of charges was unconstitutional deprivation where officials refused to return property until a court order instructed them to do so*); Lathon v. City of St. Louis*, 242 F.3d 841, 843-44 (8th Cir. 2001) (same*)*. The prosecutors who instructed the officers to retain the guns as evidence are entitled to absolute immunity. *Thompson v. Walbran,* 990 F.2d 403, 404-05 (8th Cir. 1993) (per curiam); see also *Imbler*, 424 U.S. at 430-31.

D.

The Rodgerses appeal the dismissal of claims based on the Second Amendment. They argue that officers, and any prosecutor who directed them, infringed their right to bear arms by seizing and retaining the firearms. Lawful seizure and retention of firearms, however, does not violate the Second Amendment. Indeed, this court has held that even the unlawful retention of specific firearms does not violate the Second Amendment, because the seizure of one firearm does not prohibit the owner from retaining or acquiring other firearms. *Walters*, 660 F.3d at 317-18. Greg also contends that the prosecutor defendants violated his right to bear arms by urging the court to adopt a condition of release that forbade Greg to possess a firearm. As the district court observed, the state court adopted the condition at the urging of a prosecutor who is not a defendant, and, in any event, the defendant prosecutors are absolutely immune from suit over their pleadings in the criminal case. *Imbler*, 424 U.S. at 430-31. The district court correctly dismissed the Second Amendment claims.

E

Greg Rodgers next argues that the district court erred in dismissing his claims alleging that officers arrested him and caused him to be prosecuted in retaliation for the exercise of his First Amendment right to freedom of speech. As of 2011, an officer was entitled to qualified

immunity against this type of retaliation claim if an arrest or prosecution was supported by probable cause. *Reichle v. Howards*, 132 S. Ct. 2088, 2096-97, 182 L. Ed. 2D 985 (2012). The qualified immunity extends further to an action based on at least "arguable" probable cause. McCabe v. Parker, 608 F.3d 1068, 1078-79 (8th Cir. 2010); *Thayer v. Chiczewski*, 705 F.3d 237, 253 (7th Cir. 2012). For reasons discussed in connection with Greg's Fourth Amendment claims, a reasonable officer in 2011 could have believed that there was probable cause to charge Greg with unlawful use of a firearm based on carrying a concealed weapon or unlawful possession of a firearm as a fugitive from justice. Therefore, the district court was correct to dismiss the First Amendment claims against the officers. The prosecutors are entitled to absolute immunity for their decision to prosecute Greg. See *Imbler*, 424 U.S. at 430-31.

F.

The Rodgerses dispute the district court's grant of summary judgment for the City of Columbia and Boone County on claims that they failed adequately to train their employees. Greg argues that the municipalities failed to train police officers and prosecutors regarding a citizen's rights, under Mo. Rev. Stat. § 571.030.3, to carry a concealed weapon in common areas of leased

property, and about the validity in Missouri of concealed carry permits issued in Florida.

A municipality may be liable under § 1983 for failure to train where (1) the municipality's training practices were inadequate; (2) the municipality was deliberately indifferent to the constitutional rights of others, such that the "failure to train reflects a 'deliberate' or 'conscious' choice" by the municipality; and (3) an alleged deficiency in the training procedures actually caused the plaintiff's constitutional injury. *City of Canton v. Harris*, 489 U.S. 378, 388-91, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989); *Andrews v. Fowler*, 98 F.3d 1069, 1076 (8th Cir. 1996). Municipalities do not enjoy qualified immunity, but a municipality "cannot exhibit fault rising to the level of deliberate indifference to a constitutional right when that right has not yet been clearly established." *Szabla v. City of Brooklyn Park*, 486 F.3d 385, 393 (8th Cir. 2007) (en banc). To establish municipal liability, a plaintiff must first show that an individual defendant committed a constitutional violation. *City of Los Angeles v. Heller*, 475 U.S. 796, 798-99, 106 S Ct.. 1571, 89 L. Ed. 2d 806 (1986).

Greg has not established a submissible claim that the municipalities were deliberately indifferent to the rights of citizens to carry concealed weapons. It was not clearly established that a citizen without a permit is permitted to carry a concealed weapon

in common areas of an apartment complex or other leasehold. The lack of clarity regarding the scope of Mo. Rev. Stat. § 571.030.3 "undermines the assertion that a municipality deliberately ignored an obvious need for additional safeguards." *Szabla*, 486 F.3d at 394.

The City of Columbia is not liable for failing to instruct officers that Florida concealed carry permits are entitled to reciprocity, because any failure to do so did not cause Greg's arrest or prosecution. Greg has presented no evidence that the arresting

officer who recommended charges had prior knowledge that Greg was issued a Florida permit, and it was not obvious that officers were required promptly to investigate Greg's assertion during his arrest that he was issued a Florida permit that he did not carry on his person. The related allegation that Boone County failed adequately to train prosecutors about reciprocity of permits is belied by the record. The record shows that after Greg's counsel notified the prosecutor that Greg had a Florida permit, R. Doc. 69-9, at 2, the prosecutor amended the complaint to withdraw the concealed carrying charge and to substitute the charge of unlawful possession by a fugitive from justice. R. Doc. 69-9, at 3. A "mere allegation of inadequate training will not give rise to a genuine dispute of

material fact on the subject." *Seymour v. City of Des Moines*, 519 F.3d 790, 801 (8th Cir. 2008).

G.

The Rodgerses argue finally that the district judge was not authorized as a judge in senior status to preside over this case, and that the judge should have recused herself. The claim that a senior judge lacks authority to adjudicate cases under Article III is foreclosed by precedent. *Williams v. Decker*, 767 F.3d 734, 743 (8th Cir. 2014). The recusal claims appear for the first time on appeal, so we review for plain error, *Fletcher v. Conoco Pipe Line Co.*, 323 F.3d 661, 663 (8th Cir. 2003), and we find none. That the Rodgerses' counsel filed a judicial complaint against the district judge in previous, unrelated litigation is insufficient to establish that the judge's impartiality in this matter might reasonably be questioned. That the judge formerly served as a municipal judge in Columbia likewise raises no reasonable question about appearance of impartiality, and there is no evidence of bias.

III.

The Franklin appeal involves a prosecution of Raymond Franklin and a seizure of firearms

owned by Robert Franklin. In December 2008, federal and state law enforcement officers sought to arrest a fugitive named Billy Rogers in a drug trafficking investigation. They traced Rogers to Robert Franklin's residence at 1670 Sonora Drive in Columbia. Officers asked Robert either to direct Rogers outside or to allow officers to search the home. Robert refused, so officers secured a warrant that authorized the search of Robert's home for "evidence of drug trafficking" and the arrest of Rogers.

During the ensuing search, officers seized twelve firearms, including a Vulcan .45 caliber handgun from a locked bedroom. The bedroom also contained pieces of mail addressed to Raymond Franklin at 1670 Sonora Drive, a package with Raymond's name on it, and correspondence from the Circuit Court of Boone County addressed to Raymond. Officers also seized drug paraphernalia and small quantities of cocaine and marijuana from other locations in the home.

On June 30, 2010, Sergeant Geoffrey Jones executed a probable cause statement for prosecutors alleging that Raymond Franklin, on the date of the search, unlawfully possessed the Vulcan .45 as a previously convicted felon. See Mo. Rev. Stat. § 571.070.1(1). A county prosecutor signed a criminal complaint alleging that Raymond committed the offense, and Raymond was arrested. Raymond had been convicted of a felony drug charge in 2007, and he moved from Missouri to

North Carolina in 2008 while serving a sentence of probation. After the 2010 arrest, a state court revoked Raymond's probation. In April 2011, Missouri prosecutors dismissed the firearms charge against Raymond. Robert's firearms were held by the Columbia Police Department from December 15, 2008, through August 23, 2012. On August 23, 2012, all but one gun, a Remington Model 870, was released to Robert's designee. The Remington had been reported stolen, and police returned that firearm to its registered owner.

IV.

A.

Raymond Franklin argues that officers and prosecutors violated his Fourth Amendment rights because they did not have probable cause to arrest and prosecute him for unlawful possession of a firearm. The prosecutors are entitled to absolute immunity for their initiation of the prosecution, see *Imbler*, 424 U.S. at 430-31, and the district court properly dismissed Franklin's claim against them. One of the police officer defendants, Kenneth Burton, was not involved in the arrest or prosecution, so there is no merit to a claim against him.

As to Jones, the officer who prepared the probable cause statement submitted with the warrant application for Raymond Franklin's arrest,

we conclude that there was probable cause for the arrest and prosecution, and thus no violation of the Fourth Amendment. A person commits the crime of unlawful possession of a firearm if he has been convicted of a felony under Missouri law and knowingly possesses a firearm. Mo. Rev. Stat. §571.070.1(1). Possession may be actual or constructive, and a person has "constructive possession" if he "has the power and the intention at a given time to exercise dominion or control over the object either directly or through another person or persons." Mo. Rev. Stat. § 556.061(22). Constructive possession does not require exclusive control or physical presence, and circumstantial evidence—such as "finding defendant's personal belongings" with firearms—can establish possession. *State v. Evans*, 410 S.W.3d 258, 263 (Mo. Ct. App. 2013).

Police found the Vulcan .45 in a bedroom along with several pieces of mail addressed to Raymond Franklin at 1670 Sonora Drive and a package with Raymond's name on it. This evidence was sufficient to establish probable cause that Raymond constructively possessed the gun. Raymond argues that because his probation supervision had been transferred to North Carolina, there could be no probable cause that he possessed a firearm in Missouri, but out-of-state supervision alone did not foreclose a prudent officer from suspecting based on circumstantial evidence that

Raymond was in Missouri nonetheless. There was probable cause to believe that Raymond possessed the firearm as a convicted felon, and the arresting officer did not violate Raymond's Fourth Amendment rights.

B.

The Franklins assert that police officers unlawfully seized firearms during the search of Robert's residence, because the warrant authorized only a search for "[e]vidence of drug trafficking." Firearms, however, are tools of the drug trafficking trade, and officers with probable cause to search for drug trafficking evidence reasonably could have determined that firearms in proximity to drugs or drug paraphernalia were within the scope of the warrant. See *United States v. Nichols*, 344 F.3d 793, 798-99 (8th Cir. 2003) (per curiam). The firearms, moreover, were in plain view within areas to which officers had lawful access, so whether or not the firearms came within the terms of the warrant, the officers permissibly could seize the guns based on probable cause that they were evidence of a crime. See *Horton v. California*, 496 U.S. 128, 142, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990). The district court properly granted summary judgment for the prosecutor defendants on this claim, because there was no evidence that they participated in the drafting, review, or

execution of the search warrant. See *Parrish*, 594 F.3d at 1001.

C.

Robert Franklin also argues that the officers and prosecutors deprived him of property without due process of law by retaining his firearms without a post-deprivation hearing. The district court ruled that the authorities properly retained the guns as potential evidence in federal or state court proceedings, and that officers and prosecutors were at a minimum entitled to qualified immunity.

The Columbia police officers retained the Vulcan .45 while unlawful possession of a weapon charges were pending against Raymond. After the charge was dismissed in April 2011, officers continued to retain the firearm pursuant to prosecutor Richard Hicks's recommendation that the Vulcan .45 would be needed as evidence for refiling charges against Raymond. As to the other firearms, Officer Jones was advised that the guns may have been relevant evidence in a federal investigation of a drug conspiracy involving Billy Rogers, and Jones communicated with federal prosecutors about the status of the guns. Officer Jones ultimately directed the police department to release the guns in August 2012 after a federal

prosecutor informed him that the guns were no longer needed for the federal investigation.

This court has recognized a due process claim under § 1983 where police officers refuse to return seized items to their owner without a court order after it is determined that the items were not contraband or required as evidence in a court proceeding. *Lathon*, 242 F.3d at 843-44. In this case, however, police retained the firearms because federal and state prosecutors advised them that the guns were potential evidence in ongoing criminal investigations, and there was a reasonable basis for the officers to believe there was a legitimate investigative purpose for the retention. At a minimum, the act of retaining the guns did not violate clearly established law. The prosecutors are entitled to absolute immunity for recommending that the Vulcan .45 be retained for Raymond's prosecution and for the potential refiling of charges. See *Thompson*, 990 F.2d at 404-05.

Robert Franklin further argues that the officers' transfer of the Remington 870 shotgun to its registered owner violated procedures for the return of unclaimed seized property, as set forth in Mo. Rev. Stat. § 542.301.1. "A violation of state law, without more, is not the equivalent of a violation of the Fourteenth Amendment." *Meis v.* Gunter, 906 F.2d 364, 369 (8th Cir. 1990). Insofar as Robert argues that the transfer of the shotgun

without a post-deprivation proceeding violated his due process rights, Robert has failed to present sufficient evidence that he had a property interest in the shotgun. Robert was not the registered owner of the gun, the gun had been reported stolen, and Robert testified in his deposition that he "[couldn't] really say" if the gun belonged to him. See generally *Bd. of Regents v. Roth*, 408 U.S. 564, 570, 92 S. Ct. 2701, 33 L.Ed. 2d 548 (1972).

D.

Robert Franklin disputes the dismissal of his claim that officers arrested and prosecuted his son Raymond in retaliation for Robert's exercise of his First Amendment right by withholding consent to search his home. But even assuming the unlikely proposition that an arrest of Raymond could amount to a violation of Robert's rights under the First Amendment, see *Smith v. Frye,* 488 F.3d 263, 273 (4th Cir. 2007) the district court correctly dismissed the claim against officers because there was probable cause that Raymond constructively possessed the Vulcan .45 firearm in violation of Missouri law. See *Reichle*, 132 S. Ct. at 2096-97. The prosecutors are entitled to absolute immunity for their decision to pursue the unlawful possession charge. See *Brodnicki,* 75 F.3d at 1266. Raymond separately advances a claim that officers and prosecutors arrested and prosecuted him because of

his race. This equal protection claim fails because Raymond presented no direct evidence of racial discrimination or indirect evidence that similarly situated persons were treated differently. See *Johnson v. Crooks*, 326 F.3d 995, 1000 (8th Cir. 2003).

E.

The Franklins appeal the dismissal of their claims against the City of Columbia and Boone County for failure to train employees. The Franklins contend that the district court erred in determining that the municipalities were not liable for failure to train officers and prosecutors regarding the law of constructive possession, the scope of search warrants, and the due process requirements for the retention of seized evidence. Because we conclude that no official violated the constitutional rights of the Franklins, the related claim for failure to train also fails. *Heller*, 475 U.S. at 798-99. At a minimum, the municipalities did not exhibit deliberate indifference by ignoring an obvious need to train officials about respecting constitutional rights. See *Szabla,* 486 F.3d at 393.

F.

Like the Rodgerses, the Franklins challenge the authority of the district judge to preside as a judge in senior status, and they argue for the first

time on appeal that the judge should have recused herself. For reasons discussed with respect to the Rodgers appeal, these points are without merit.

* * *

The judgments of the district court are affirmed

(APPENDIX C)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTAL DIVISION

ALLAN RODGERS, et al.,)
Plaintiffs,)
) No.2:13-04033-CV-NKL
v.)
)
DANIEL K. KNIGHT, et al.,)
Defendants)
)

ORDER

Before the Court are Defendants Knight, Rogers and Boone County, Missouri's motion for summary judgment [Doc. 139]; Defendants Brotemarkle, Burton, Jones, Liebhart, Lucas, Quintana, Simons, Valley, and City of Columbia, Missouri's motion for summary judgment [Doc. 142]; and Plaintiffs Allan Rodgers and Gregory Rodgers' motion for partial summary judgment [Doc. 145]. The Court has carefully reviewed the voluminous motions, suggestions, and exhibits submitted by the parties. In view thereof and because of the proximity of the trial setting, the Court summarily GRANTS the defendants'

respective motions for summary judgment and DENIES the plaintiffs' motion for partial summary judgment.

While it is difficult to clearly identify the issues the plaintiffs raise in their Complaint [Doc. 1], the defendants have identified and addressed numerous issues in their motions, and the plaintiffs have failed to identify additional ones. The Court therefore considers the defendants' respective motions to address all issues the plaintiffs have raised.

With respect to Defendants Boone County Prosecuting Attorney Knight, Assistant Prosecuting Attorney Cassandra Rogers, and Boone County, Missouri, the issues raised are the search of Greg Rodgers' residence and resulting seizure of weapons, the prosecution of Greg Rodgers, and delay in returning the seized weapons to both Greg and Allan Rodgers.

Neither Knight nor Rogers was in any way involved in the search of the residence and resulting seizure of the weapons. Neither is vicariously liable for the actions of another assistant prosecutor. Even if they were somehow involved, they are entitled to absolute immunity as prosecutors. They are also entitled to qualified immunity. The plaintiffs' mere disagreement with another assistant prosecutor's interpretation of the law does not establish an actionable failure to train, even if the other assistant prosecutor incorrectly interpreted the law in approving a search warrant. Moreover, the law addressing whether Gregory Rodgers was a "fugitive from justice" was not

clearly established in Missouri at the time of the search and seizure.

The evidence does not show Knight and Rogers' participation in Gregory Rodgers' prosecution, nor any connection with his judicially-imposed bond condition. Even if Knight and Rogers were involved, they have absolute immunity as prosecutors, and qualified immunity.

As for the retention of weapons, the evidence does not show a policy to recommend against return of weapons to persons from whom seized, and nor a conspiracy between Knight and Rogers and the defendant police officers. The evidence does show that the plaintiffs' weapons were potentially needed as evidence in court proceedings, and that the police retained the evidence while such proceedings were ongoing. The evidence additionally shows that Knight and Rogers did not have custody of the evidence, and only made recommendations about its release. As such, any actions Knight and Rogers took were in their capacity as prosecutors. They are therefore entitled to absolute immunity as prosecutors and at minimum to qualified immunity.

Boone County has no vicarious liability for its agents' acts. The evidence shows no governmental policy or custom that caused the plaintiffs injury, nor does the evidence show failure to train or supervise. In any event, to attach liability to the county at all, there must first be demonstration of individual liability on an underlying substantive claim, and here, there is not.

Defendants Brotemarkle, Burton, Jones, Liebhart, Lucas, Quintana, Simons, and Valley are police officers employed by Defendant City of Columbia, Missouri. The issues raised with respect to them variously concern probable cause for and propriety of Gregory Rodgers' arrest, the search of his residence and premises, seizure and retention of the plaintiffs' weapons, the plaintiffs' prosecution, and retaliation.

As for Gregory Rodgers' arrest, the plaintiffs establish no genuine dispute of material fact that Quintana was aware Rodgers had a valid conceal and carry permit, and intentionally or knowingly left such information out of the probable cause statement. Nor is there evidence that the other officers had such knowledge, and such knowledge cannot be imputed to them. The plaintiffs also establish no genuine dispute of material fact showing Rodgers fell within any other established exception permitting him to carry the weapon. The officers are also entitled to qualified immunity.

In searching Gregory Rodgers' residence and the premises, and seizing the weapons, the defendants did not exceed the 45 scope of the warrant. If they did, the law was not clearly established. In any event, the scope of the search was also guided by input of an assistant prosecuting attorney. The defendant police officers are at minimum entitled to qualified immunity.

As for the retention of weapons, they were potentially needed as evidence in court proceedings, and the government, both federal and

state, had a continuing interest in them. The weapons were held during the time the government had such

interest. In any event, the defendant police officers are at minimum entitled to qualified immunity for retention of the weapons.

The defendant police officers could not have violated the plaintiffs' constitutional rights by initiating or participating in a malicious prosecution, because any chain of causation was broken by the prosecutors' intervening exercise of independent judgment. At minimum, the defendants are entitled to qualified immunity.

The retaliation issue was raised in connection with Gregory Rodgers' filing of an administrative complaint against certain Columbia police officers, and his subsequent prosecution. The evidence does not show a motivation on the part of any particular police officer, nor any government official, to take adverse action against Rodgers for exercising his constitutional rights.

Finally, the City of Columbia has no vicarious liability for its agents' acts. The evidence shows no governmental policy or custom that caused the plaintiffs injury, nor does the evidence show failure to train or supervise. In any event, to attach liability to the city at all, there must first be demonstration of individual liability on an underlying substantive claim, and here, there is not.

Any issues not identified above are ruled in favor of the defendants, in accordance with their motions.

The defendants' respective motions for summary judgment [Docs. 139 and 142] are GRANTED and the plaintiffs' motion for partial summary judgment [Doc. 145] is DENIED.

/s/ Nanette K. Laughrey____
NANETTE K. LAUGHREY
United States District Judge

Dated: February 7, 2014
Jefferson City, Missouri

(APPENDIX D)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTAL DIVISION

ROBERT FRANKLIN, et al.,)
Plaintiffs,)

No.2:1304171-CV-NKL
)

DANIEL K. KNIGHT, et al.,)
Defendants)
)

ORDER

Before the Court are Plaintiffs Robert Franklin and Raymond Franklin's motion for partial summary judgment [Doc. 93]; Defendants Knight, Hicks, and Boone County, Missouri's motion for summary judgment [Doc. 106]; and Defendants Burton, Jones, and City of Columbia, Missouri's motion for summary judgment [Doc. 108]. The Court has carefully reviewed the voluminous motions, suggestions, and exhibits submitted by the parties. In view thereof and because of the proximity of the trial setting, the Court summarily GRANTS the defendants' respective motions for summary judgment and

DENIES the plaintiffs' motion for partial summary judgment.

While it is difficult to clearly identify the issues the plaintiffs raise in their Complaint [Doc. 1], the defendants have identified and addressed numerous issues in their motions, and the plaintiffs have failed to identify additional ones. The Court therefore considers the defendants' respective motions to address all issues the plaintiffs have raised.

With respect to Defendant Boone County Prosecuting Attorney Knight, Assistant Prosecuting Attorney Richard Hicks, and Boone County, Missouri, the issues raised relate to the revocation of Raymond Franklin's probation and pursuit of a weapons charge against him; and the search of Robert Franklin's residence and delay in returning his seized firearms.

The evidence fails to show Knight was in any way involved in the events about which the plaintiffs complain. Knight is not vicariously liable for the actions of an assistant prosecutor. Even if he was somehow involved, he is entitled to absolute immunity as a prosecutor, and to qualified immunity. The plaintiffs' mere disagreement with an assistant prosecutor's decision to pursue charges or seek continuances does not establish an actionable failure to train.

The evidence shows Hicks performed all the actions of which the plaintiffs complain in his capacity as a prosecutor, and is therefore entitled to absolute immunity. He is also entitled to qualified immunity. The revocation of Raymond Franklin's

probation, and continuances of trial settings were ordered by a court.

No evidence shows that Hicks took any actions based on race, or that he participated in events leading up to execution of the search warrant. As for the retention of weapons, the evidence shows that they were potentially needed as evidence in court proceedings, federal or state, and that the police, not Knight or Hicks, retained the weapons while such potential need existed. Whether Hicks recommended at some time that the weapons be retained, he took such action in his capacity as a prosecutor. No clearly established law required the weapons to be returned earlier. Hicks is therefore entitled to absolute immunity and at minimum to qualified immunity.

No evidence shows that Knight or Hicks conspired with the defendant police officers to retaliate against the plaintiffs for exercising their rights.

Boone County has no vicarious liability for its agents' acts. The evidence shows no governmental policy or custom that caused the plaintiffs injury, nor does the evidence show failure to train or supervise. In any event, to attach liability to the county at all, there must first be demonstration of individual liability on an underlying substantive claim, and here, there is not.

Defendants Burton and Jones are police officers employed by Defendant City of Columbia, Missouri. The issues raised with respect to them variously concern the propriety of Raymond Franklin's arrest, prosecution of

Raymond Franklin, and seizure and retention of Robert Franklin's weapons.

The evidence fails to show that Burton was in any way involved in the events about which the plaintiffs complain. Burton is not vicariously liable for the actions of another police officer.

As for Raymond Franklin's arrest, the plaintiffs establish no genuine dispute of material fact that Jones made a false or misleading probable cause statement, or recklessly omitted material that was critical to a finding of probable cause. Jones is at minimum entitled to qualified immunity.

Jones could not have violated Raymond Franklin's constitutional rights by initiating or participating in a malicious prosecution, because any chain of causation was broken by the prosecutors' intervening exercise of independent judgment. At minimum, Jones is entitled to qualified immunity.

The weapons were seized pursuant to a valid warrant, and Jones did not exceed the scope of the warrant. Under the circumstances, no constitutional violation was clearly established under the law. Even if the scope of the warrant was exceeded, Jones is entitled to qualified immunity. Jones is not liable for any participation he had in retention of the weapons. They were retained because they were potentially needed as evidence in court proceedings, and the government, both federal and state, had a continuing interest in them. The weapons were held during the time the government had such

interest. In any event, Jones is at minimum entitled to qualified immunity for retention of the weapons.

No evidence shows that any police officer conspired with the defendant prosecutors to retaliate against the plaintiffs for exercising their rights, nor does the evidence show a motivation on the part of Jones, or any police officer, to retaliate against Robert Franklin for refusing to consent to a search of his property, or to take any actions against the plaintiffs because of race.

Finally, the City of Columbia has no vicarious liability for its agents' acts. The evidence shows no governmental policy or custom that caused the plaintiffs injury, nor does the evidence show failure to train or supervise. In any event, to attach liability to the city at all, there must first be demonstration of individual liability on an underlying substantive claim, and here, there is not.

Any issues not addressed above are ruled in favor of the defendants, in accordance with their motions. The plaintiffs' motion for partial summary judgment [Doc. 93] is DENIED and the defendants' respective motions for summary judgment [Docs. 106 and 108] are GRANTED.

/s/ Nanette K. Laughrey____
NANETTE K. LAUGHREY
United States District Judge

Dated: February 7, 2014
Jefferson City, Missouri

(APPENDIX E)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The **First Amendment** to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The **Second Amendment** to the United States Constitution provides:

> A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

The **Fourth Amendment** to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but

> upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The **Fourteenth Amendment** to the United States Constitution, Section 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides:

> Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and

> laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, Any Act of Congress applicable exclusively to the District of Columbia.

The Revised Statute(s) of Missouri (RSMo.) in Chapter **542.301** (2008) provides:

> Property which comes into the custody of an officer or of a court as the result of any seizure and which has not been forfeited pursuant to any other provisions of law or returned to the claimant shall be disposed of as follows: (1) Stolen property, or property acquired in any other manner declared an offense by chapters 569 and 570, but not including any of the property referred to in subdivision (2) of this subsection, shall be delivered by order of court upon claim having been made and established, to the person who is entitled to possession: (a) The claim shall be made by written motion filed with the court with which a motion to suppress has been, or

may be, filed. The claim shall be barred if not made within one year from the date of the seizure;

(b) Upon the filing of such motion, the judge shall order notice to be given to all persons interested in the property, including other claimants and the person from whose possession the property was seized, of the time, place and nature of the hearing to be held on the motion. The notice shall be given in a manner reasonably calculated to reach the attention of all interested persons. Notice may be given to unknown persons and to persons whose address is unknown by publication in a newspaper of general circulation in the county. No property shall be delivered to any claimant unless all interested persons have been given a reasonable opportunity to appear and to be heard; (c) After a hearing, the judge shall order the property delivered to the person or persons entitled to possession, if any. The judge may direct that delivery of property required as evidence in a criminal proceeding shall be postponed until the need no longer exists; (d) A law enforcement officer having custody of seized property may, at any time that seized property has ceased to be useful as evidence, request that the prosecuting attorney of the county in which property was seized file a motion with the court of such county for the disposition of

the seized property. If the prosecuting attorney does not file such motion within sixty days of the request by the law enforcement officer having custody of the seized property, then such officer may request that the attorney general file a written motion with the circuit court of the county or judicial district in which the seizure occurred. Upon filing of the motion, the court shall issue an order directing the disposition of the property. Such disposition may, if the property is not claimed within one year from the date of the seizure or if no one establishes a right to it, and the seized property has ceased to be useful as evidence, include a public sale of the property. Pursuant to a motion properly filed and granted under this section, the proceeds of any sale, less necessary expenses of preservation and sale, shall be paid into the county treasury for the use of the county. If the property is not salable, the judge may order its destruction. Notwithstanding any other provision of law, if no claim is filed within one year of the seizure and no motion pursuant to this section is filed within six months thereafter, and the seized property has ceased to be useful as evidence, the property shall be deemed abandoned, converted to cash and shall be turned over immediately to the treasurer pursuant to section 447.543; (e) If the

property is a living animal or is perishable, the judge may, at any time, order it sold at public sale. The proceeds shall be held in lieu of the property. A written description of the property sold shall be filed with the judge making the order of sale so that the claimant may identify the property. If the proceeds are not claimed within the time limited for the claim of the property, the proceeds shall be paid into the county treasury. If the property is not salable, the judge may order its destruction. (2) Weapons, tools, devices, computers, computer equipment, computer software, computer hardware, cellular telephones, or other devices capable of accessing the internet, and substances other than motor vehicles, aircraft or watercraft, used by the owner or with the owner's consent as a means for committing felonies other than the offense of possessing burglary tools in violation of section 569.180, and property, the possession of which is an offense under the laws of this state or which has been used by the owner, or used with the owner's acquiescence or consent, as a raw material or as an instrument to manufacture, produce, or distribute, or be used as a means of storage of anything the possession of which is an offense under the laws of this state, or which any statute authorizes or directs to be seized, other than lawfully possessed weapons seized by an officer incident to an arrest, shall be forfeited

to the state of Missouri. 2. The officer who has custody of the property shall inform the prosecuting attorney of the fact of seizure and of the nature of the property. The prosecuting attorney shall thereupon file a written motion with the court with which the motion to suppress has been, or may be, filed praying for an order directing the forfeiture of the property. If the prosecuting attorney of a county in which property is seized fails to file a motion with the court for the disposition of the seized property within sixty days of the request by a law enforcement officer, the officer having custody of the seized property may request the attorney general to file a written motion with the circuit court of the county or judicial district in which the seizure occurred. Upon filing of the motion, the court shall issue an order directing the disposition of the property. The signed motion shall be returned to the requesting agency. A motion may also be filed by any person claiming the right to possession of the property praying that the court declare the property not subject to forfeiture and order it delivered to the moving party. 3. Upon the filing of a motion either by the prosecuting attorney or by a claimant, the judge shall order notice to be given to all persons interested in the property, including the person out of whose possession the property was seized and any lienors, of the time, place and nature of

the hearing to be held on the motion. The notice shall be given in a manner reasonably calculated to reach the attention of all interested persons. Notice may be given to unknown persons and to persons of unknown address by publication in a newspaper of general circulation in the county. Every interested person shall be given a reasonable opportunity to appear and to be heard as to the nature of the person's claim to the property and upon the issue of whether or not it is subject to forfeiture.

4. If the evidence is clear and convincing that the property in issue is in fact of a kind subject to forfeiture under this subsection, the judge shall declare it forfeited and order its destruction or sale. The judge shall direct that the destruction or sale of property needed as evidence in a criminal proceeding shall be postponed until this need no longer exists.

5. If the forfeited property can be put to a lawful use, it may be ordered sold after any alterations which are necessary to adapt it to a lawful use have been made. In the case of computers, computer equipment, computer software, computer hardware, cellular telephones, or other devices capable of accessing the internet, or other devices used in the acquisition, possession, or distribution of child pornography or obscene material, the law enforcement agency in possession of such items may, upon court

order, retain possession of such property and convert such property to the use of the law enforcement agency for use in criminal investigations. If there is a holder of a bona fide lien against property which has been used as a means for committing an offense or which has been used as a raw material or as an instrument to manufacture or produce anything which is an offense to possess, who establishes that the use was without the lienholder's acquiescence or consent, the proceeds, less necessary expenses of preservation and sale, shall be paid to the lienholder to the amount of the lienholder's lien. The remaining amount shall be paid into the county treasury.

6. If the property is perishable the judge may order it sold at a public sale or destroyed, as may be appropriate, prior to a hearing. The proceeds of a sale, less necessary expenses of preservation and sale, shall be held in lieu of the property.

(Ommitted: Clauses 7-13 on Obscene Material)

14. An appeal by any party shall be allowed from the judgment of the court as in other civil actions.

15. All other property still in the custody of an officer or of a court as the result of any seizure and which has not been forfeited pursuant to this section or any other provision of law after three years following the seizure

> and which has ceased to be useful as evidence shall be deemed abandoned, converted to cash and shall be turned over immediately to the treasurer pursuant to section 447.543.
>
> 16. In fiscal year 2003, the commissioner of administration shall estimate the amount of any additional state revenue received pursuant to this section and section 447.532, shall transfer an equivalent amount of general revenue to the schools of the future fund created in section 163.005*.

The Revised Statute(s) of Missouri (RSMo.) in Chapter **561.061(22)** (2008) provides:

> (22) "Possess" or "possessed" means having actual or constructive possession of an object with knowledge of its presence. A person has actual possession if such person has the object on his or her person or within easy reach and convenient control. A person has constructive possession if such person has the power and the intention at a given time to exercise dominion or control over the object either directly or through another person or persons. Possession may also be sole or joint. If one person alone has possession of an object, possession is sole. If two or more persons share possession of an object, possession is joint.

The Revised Statute(s) of Missouri (RSMo.) in Chapter **571.030** (2008) provides:

Unlawful use of weapons—exceptions--penalties.

571.030. 1. A person commits the crime of unlawful use of weapons if he or she knowingly:

(1) Carries concealed upon or about his or her person a knife, a firearm, a blackjack or any other weapon readily capable of lethal use; or

(2) Sets a spring gun; or

(3) Discharges or shoots a firearm into a dwelling house, a railroad train, boat, aircraft, or motor vehicle as defined in section 302.010, or any building or structure used for the assembling of people; or

(4) Exhibits, in the presence of one or more persons, any weapon readily capable of lethal use in an angry or threatening manner; or

(5) Has a firearm or projectile weapon readily capable of lethal use on his or her person, while he or she is intoxicated, and handles or otherwise uses such firearm or projectile weapon in either a negligent or unlawful manner or discharges such firearm or projectile weapon unless acting in self-defense;

(6) Discharges a firearm within one hundred yards of any occupied schoolhouse, courthouse, or church building; or

(7) Discharges or shoots a firearm at a mark, at any object, or at random, on, along or across a public highway or discharges or shoots a firearm into any outbuilding; or

(8) Carries a firearm or any other weapon readily capable of lethal use into any church or place where people have assembled for worship, or into any election precinct on any election day, or into any building owned or occupied by any agency of the federal government, state government, or political subdivision thereof; or

(9) Discharges or shoots a firearm at or from a motor vehicle, as defined in section 301.010, discharges or shoots a firearm at any person, or at any other motor vehicle, or at any building or habitable structure, unless the person was lawfully acting in self-defense; or

(10) Carries a firearm, whether loaded or unloaded, or any other weapon readily capable of lethal use into any school, onto any school bus, or onto the premises of any function or activity sponsored or sanctioned by school officials or the district school board.

2. Subdivisions (1), (8), and (10) of subsection 1 of this section shall not apply to the persons described in this subsection, regardless of whether such uses are reasonably associated with or are necessary to the fulfillment of such person's official duties except as otherwise provided in this

subsection. Subdivisions (3), (4), (6), (7), and (9) of subsection 1 of this section shall not apply to or affect any of the following persons, when such uses are reasonably associated with or are necessary to the fulfillment of such person's official duties, except as otherwise provided in this subsection:

(1) All state, county and municipal peace officers who have completed the training required by the police officer standards and training commission pursuant to sections 590.030 to 590.050 and who possess the duty and power of arrest for violation of the general criminal laws of the state or for violation of ordinances of counties or municipalities of the state, whether such officers are on or off duty, and whether such officers are within or outside of the law enforcement agency's jurisdiction, or all qualified retired peace officers, as defined in subsection 11 of this section, and who carry the identification defined in subsection 12 of this section, or any person summoned by such officers to assist in making arrests or preserving the peace while actually engaged in assisting such officer;

(2) Wardens, superintendents and keepers of prisons, penitentiaries, jails and other institutions for the detention of persons accused or convicted of crime;

(3) Members of the Armed Forces or National Guard while performing their official duty;

(4) Those persons vested by article V, section 1 of the Constitution of Missouri with the judicial power of the state and those persons vested by Article III of the Constitution of the United States with the judicial power of the United States, the members of the federal judiciary;

(5) Any person whose bona fide duty is to execute process, civil or criminal;

(6) Any federal probation officer or federal flight deck officer as defined under the federal flight deck officer program, 49 U.S.C. Section 44921 regardless of whether such officers are on duty, or within the law enforcement agency's jurisdiction;

(7) Any state probation or parole officer, including supervisors and members of the board of probation and parole;

(8) Any corporate security advisor meeting the definition and fulfilling the requirements of the regulations established by the board of police commissioners under section 84.340;

(9) Any coroner, deputy coroner, medical examiner, or assistant medical examiner;

(10) Any prosecuting attorney or assistant prosecuting attorney or any circuit attorney or assistant circuit attorney who has completed

the firearms safety training course required under subsection 2 of section 571.111; and

(11) Any member of a fire department or fire protection district who is employed on a full-time basis as a fire investigator and who has a valid concealed carry endorsement under section 571.111 when such uses are reasonably associated with or are necessary to the fulfillment of such person's official duties.

3. Subdivisions (1), (5), (8), and (10) of subsection 1 of this section do not apply when the actor is transporting such weapons in a nonfunctioning state or in an unloaded state when ammunition is not readily accessible or when such weapons are not readily accessible. Subdivision (1) of subsection 1 of this section does not apply to any person twenty-one years of age or older or eighteen years of age or older and a member of the United States Armed Forces, or honorably discharged from the United States Armed Forces, transporting a concealable firearm in the passenger compartment of a motor vehicle, so long as such concealable firearm is otherwise lawfully possessed**,** nor when the actor is also in possession of an exposed firearm or projectile weapon for the lawful pursuit of game, or is in his or her dwelling unit or upon premises over which the actor has possession, authority or

control, or is traveling in a continuous journey peaceably through this state. Subdivision (10) of subsection 1 of this section does not apply if the firearm is otherwise lawfully possessed by a person while traversing school premises for the purposes of transporting a student to or from school, or possessed by an adult for the purposes of facilitation of a school-sanctioned firearm-related event or club event.

4. Subdivisions (1), (8), and (10) of subsection 1 of this section shall not apply to any person who has a valid concealed carry endorsement issued pursuant to sections 571.101 to 571.121 or a valid permit or endorsement to carry concealed firearms issued by another state or political subdivision of another state.

5. Subdivisions (3), (4), (5), (6), (7), (8), (9), and (10) of subsection 1 of this section shall not apply to persons who are engaged in a lawful act of defense pursuant to section 563.031.

6. Nothing in this section shall make it unlawful for a student to actually participate in school-sanctioned gun safety courses, student military or ROTC courses, or other school-sponsored or club-sponsored firearm-related events, provided the student does not carry a firearm or other weapon readily capable of lethal use into any school, onto any school bus, or onto the premises of

any other function or activity sponsored or sanctioned by school officials or the district school board.

7. Unlawful use of weapons is a class D felony unless committed pursuant to subdivision (6), (7), or (8) of subsection 1 of this section, in which cases it is a class B misdemeanor, or subdivision (5) or (10) of subsection 1 of this section, in which case it is a class A misdemeanor if the firearm is unloaded and a class D felony if the firearm is loaded, or subdivision (9) of subsection 1 of this section, in which case it is a class B felony, except that if the violation of subdivision (9) of subsection 1 of this section results in injury or death to another person, it is a class A felony.

8. Violations of subdivision (9) of subsection 1 of this section shall be punished as follows:

(1) For the first violation a person shall be sentenced to the maximum authorized term of imprisonment for a class B felony;

(2) For any violation by a prior offender as defined in section 558.016, a person shall be sentenced to the maximum authorized term of imprisonment for a class B felony without the possibility of parole, probation or conditional release for a term of ten years;

(3) For any violation by a persistent offender as defined in section 558.016, a person shall

be sentenced to the maximum authorized term of imprisonment for a class B felony without the possibility of parole, probation, or conditional release;

(4) For any violation which results in injury or death to another person, a person shall be sentenced to an authorized disposition for a class A felony.

9. Any person knowingly aiding or abetting any other person in the violation of subdivision (9) of subsection 1 of this section shall be subject to the same penalty as that prescribed by this section for violations by other persons.

10. Notwithstanding any other provision of law, no person who pleads guilty to or is found guilty of a felony violation of subsection 1 of this section shall receive a suspended imposition of sentence if such person has previously received a suspended imposition of sentence for any other firearms-or weapons-related felony offense.

11. As used in this section "qualified retired peace officer" means an individual who:

(1) Retired in good standing from service with a public agency as a peace officer, other than for reasons of mental instability;

(2) Before such retirement, was authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the

incarceration of any person for, any violation of law, and had statutory powers of arrest;

(3) Before such retirement, was regularly employed as a peace officer for an aggregate of fifteen years or more, or retired from service with such agency, after completing any applicable probationary period of such service, due to a service-connected disability, as determined by such agency;

(4) Has a nonforfeitable right to benefits under the retirement plan of the agency if such a plan is available;

(5) During the most recent twelve-month period, has met, at the expense of the individual, the standards for training and qualification for active peace officers to carry firearms;

(6) Is not under the influence of alcohol or another intoxicating or hallucinatory drug or substance; and

(7) Is not prohibited by federal law from receiving a firearm.

12. The identification required by subdivision (1) of subsection 2 of this section is:

(1) A photographic identification issued by the agency from which the individual retired from service as a peace officer that indicates that the individual has, not less recently than one year before the date the individual is carrying the concealed firearm, been tested or

> otherwise found by the agency to meet the standards established by the agency for training and qualification for active peace officers to carry a firearm of the same type as the concealed firearm; or
>
> (2) A photographic identification issued by the agency from which the individual retired from service as a peace officer; and
>
> (3) A certification issued by the state in which the individual resides that indicates that the individual has, not less recently than one year before the date the individual is carrying the concealed firearm, been tested or otherwise found by the state to meet the standards established by the state for training and qualification for active peace officers to carry a firearm of the same type as the concealed firearm.

The Revised Statute(s) of Missouri (RSMo.) in Chapter **571.070** (2008) provides:

> Possession of firearm unlawful for certain persons--penalty--exception.
>
> 571.070. 1. A person commits the crime of unlawful possession of a firearm if such person knowingly has any firearm in his or her possession and:

(1) Such person has been convicted of a felony under the laws of this state, or of a crime under the laws of any state or of the

United States which, if committed within this state, would be a felony; or
(2) Such person is a fugitive from justice, is habitually in an intoxicated or drugged condition, or is currently adjudged mentally incompetent.

2. Unlawful possession of a firearm is a class C felony.

3. The provisions of subdivision (1) of subsection 1 of this section shall not apply to the possession of an antique firearm. Concealed carry endorsements, application requirements--approval procedures--issuance of certificates, when--record-keeping requirements—fees.

The Revised Statute(s) of Missouri (RSMo.) in Chapter **571.101** (2008) provides:

571.101. 1. All applicants for concealed carry endorsements issued pursuant to subsection 7 of this section must satisfy the requirements of sections 571.101 to 571.121. If the said applicant can show qualification as provided by sections 571.101 to 571.121, the county or city sheriff shall issue a certificate of qualification for a concealed carry endorsement. Upon receipt of such certificate, the certificate holder shall apply for a driver's license or nondriver's license with the director of revenue in order to obtain a concealed carry endorsement.

Any person who has been issued a concealed carry endorsement on a driver's license or nondriver's license and such endorsement or license has not been suspended, revoked, cancelled, or denied may carry concealed firearms on or about his or her person or within a vehicle. A concealed carry endorsement shall be valid for a period of three years from the date of issuance or renewal. The concealed carry endorsement is valid throughout this state.

2. A certificate of qualification for a concealed carry endorsement issued pursuant to subsection 7 of this section shall be issued by the sheriff or his or her designee of the county or city in which the applicant resides, if the applicant:

(1) Is at least twenty-one years of age, is a citizen of the United States and either:

(a) Has assumed residency in this state; or

(b) Is a member of the Armed Forces stationed in Missouri, or the spouse of such member of the military;

(2) Is at least twenty-one years of age, or is at least eighteen years of age and a member of the United States Armed Forces or honorably discharged from the United States Armed Forces, and is a citizen of the United States and either:

(a) Has assumed residency in this state;

(b) Is a member of the Armed Forces stationed in Missouri; or

(c) The spouse of such member of the military stationed in Missouri and twenty-one years of age;

(3) Has not pled guilty to or entered a plea of nolo contendere or been convicted of a crime punishable by imprisonment for a term exceeding one year under the laws of any state or of the United States other than a crime classified as a misdemeanor under the laws of any state and punishable by a term of imprisonment of one year or less that does not involve an explosive weapon, firearm, firearm silencer or gas gun;

(4) Has not been convicted of, pled guilty to or entered a plea of nolo contendere to one or more misdemeanor offenses involving crimes of violence within a five-year period immediately preceding application for a certificate of qualification for a concealed carry endorsement or if the applicant has not been convicted of two or more misdemeanor offenses involving driving while under the influence of intoxicating liquor or drugs or the possession or abuse of a controlled substance within a five-year period immediately preceding application for a certificate of qualification for a concealed carry endorsement;

(5) Is not a fugitive from justice or currently charged in an information or indictment with the commission of a crime punishable by imprisonment for a term exceeding one year under the laws of any state of the United States other than a crime classified as a misdemeanor under the laws of any state and punishable by a term of imprisonment of two years or less that does not involve an explosive weapon, firearm, firearm silencer, or gas gun;

(6) Has not been discharged under dishonorable conditions from the United States Armed Forces;

(7) Has not engaged in a pattern of behavior, documented in public records, that causes the sheriff to have a reasonable belief that the applicant presents a danger to himself or others;

(8) Is not adjudged mentally incompetent at the time of application or for five years prior to application, or has not been committed to a mental health facility, as defined in section 632.005, or a similar institution located in another state following a hearing at which the defendant was represented by counsel or a representative;

(9) Submits a completed application for a certificate of qualification as described in subsection 3 of this section;

(10) Submits an affidavit attesting that the applicant complies with the concealed carry safety training requirement pursuant to subsections 1 and 2 of section 571.111;

(11) Is not the respondent of a valid full order of protection which is still in effect.

3. The application for a certificate of qualification for a concealed carry endorsement issued by the sheriff of the county of the applicant's residence shall contain only the following information:

(1) The applicant's name, address, telephone number, gender, and date and place of birth;

(2) An affirmation that the applicant has assumed residency in Missouri or is a member of the Armed Forces stationed in Missouri or the spouse of such a member of the Armed Forces and is a citizen of the United States;

(3) An affirmation that the applicant is at least twenty-one years of age or is eighteen years of age or older and a member of the United States Armed Forces or honorably discharged from the United States Armed Forces;

(4) An affirmation that the applicant has not pled guilty to or been convicted of a crime punishable by imprisonment for a term exceeding one year under the laws of any state or of the United States other than a

crime classified as a misdemeanor under the laws of any state and punishable by a term of imprisonment of one year or less that does not involve an explosive weapon, firearm, firearm silencer, or gas gun;

(5) An affirmation that the applicant has not been convicted of, pled guilty to, or entered a plea of nolo contendere to one or more misdemeanor offenses involving crimes of violence within a five-year period immediately preceding application for a certificate of qualification to obtain a concealed carry endorsement or if the applicant has not been convicted of two or more misdemeanor offenses involving driving while under the influence of intoxicating liquor or drugs or the possession or abuse of a controlled substance within a five-year period immediately preceding application for a certificate of qualification to obtain a concealed carry endorsement;

(6) An affirmation that the applicant is not a fugitive from justice or currently charged in an information or indictment with the commission of a crime punishable by imprisonment for a term exceeding one year under the laws of any state or of the United States other than a crime classified as a misdemeanor under the laws of any state and punishable by a term of imprisonment of two years or less that does not involve an

explosive weapon, firearm, firearm silencer or gas gun;

(7) An affirmation that the applicant has not been discharged under dishonorable conditions from the United States Armed Forces;

(8) An affirmation that the applicant is not adjudged mentally incompetent at the time of application or for five years prior to application, or has not been committed to a mental health facility, as defined in section 632.005, or a similar institution located in another state, except that a person whose release or discharge from a facility in this state pursuant to chapter 632, or a similar discharge from a facility in another state, occurred more than five years ago without subsequent recommitment may apply;

(9) An affirmation that the applicant has received firearms safety training that meets the standards of applicant firearms safety training defined in subsection 1 or 2 of section 571.111;

(10) An affirmation that the applicant, to the applicant's best knowledge and belief, is not the respondent of a valid full order of protection which is still in effect; and

(11) A conspicuous warning that false statements made by the applicant will

result in prosecution for perjury pursuant to the laws of the state of Missouri.

4. An application for a certificate of qualification for a concealed carry endorsement shall be made to the sheriff of the county or any city not within a county in which the applicant resides. An application shall be filed in writing, signed under oath and under the penalties of perjury, and shall state whether the applicant complies with each of the requirements specified in subsection 2 of this section. In addition to the completed application, the applicant for a certificate of qualification for a concealed carry endorsement must also submit the following:

(1) A photocopy of a firearms safety training certificate of completion or other evidence of completion of a firearms safety training course that meets the standards established in subsection 1 or 2 of section 571.111; and

(2) A nonrefundable certificate of qualification fee as provided by subsection 10 or 11 of this section.

(Omitted: clauses 5-12 regarding the application for permit)