

Marijuana and Firearms¹

NOTE: This material was prepared as an academic presentation. **This is not legal advice.** You must consult your attorney for the specifics of your situation.

QUESTION PRESENTED: Now that Missouri law allows recreational as well as medical use of marijuana, is it still a criminal offense to possess both marijuana and a firearm?

When the effect of new legislation seems uncertain, the answer often comes from a judicial opinion in a criminal case. Do you want to receive an answer to that confusion by being the defendant in State v. (insert your name here)? I always urge an abundance of caution when the wrong assumption may result in being sent to a federal prison. Current law is set out below.

A. FEDERAL LAW:

1. Marijuana is a controlled substance under the Controlled Substances Act.² There are no exceptions in federal law for marijuana use “*even if such use is sanctioned by State law.*”³
2. If you use marijuana, federal law automatically classifies you as an “unlawful user” of a controlled substance.⁴
3. Federal law prohibits any person who is an “*unlawful user of...any controlled substance*” from receiving or possessing firearms or ammunition.⁵ Therefore, under federal law, any person who uses marijuana is prohibited from possessing firearms or ammunition.⁶
4. The ‘4473’⁷ (the background check questionnaire) originally asked:
“Are you an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance?”
In 2011, the ATF added the following:
“**Warning:** The use or possession of marijuana remains unlawful under Federal law regardless of whether it has been legalized or decriminalized for medicinal or recreational purposes in the state where you reside.”⁸
5. Failure to disclose the use of marijuana when completing form 4473 is a federal felony.⁹
6. Federal law makes it a crime to sell, loan, or give ammunition or a firearm to any person whom you have reason to believe is an unlawful user of a controlled substance.¹⁰
 - a. If you are aware the buyer has a card authorizing the possession and use of marijuana under state law, you may *not* transfer firearms or ammunition to that person, even if the person answered “no” to question 11.e. on ATF Form 4473.¹¹ (The 4473 has been rewritten and the question about drugs is now #21g.)
7. Thus, federal law still penalizes the possession of both marijuana and a firearm.

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² <https://www.govinfo.gov/content/pkg/USCODE-2014-title21/html/USCODE-2014-title21-chap13-subchapI.htm>,

<http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title21-section812&num=0&edition=prelim>

³ <https://www.atf.gov/firearms/docs/newsletter/federal-firearms-licensee-ffl-newsletter-june-2021/download>

⁴ See 21 U.S.C. § 844.

⁵ 18 U.S.C. § 922(g)(3). See: <https://www.law.cornell.edu/uscode/text/18/922>

⁶ “Open Letter To All Federal Firearms Licensees” issued by the BATFE, September 21, 2011.

See: <https://www.atf.gov/firearms/docs/open-letter/all-ffls-sept2011-open-letter-marijuana-medicinal-purposes/download> and www.atf.gov/firearms/docs/newsletter/federal-firearms-licensee-ffl-newsletter-june-2021/download.

⁷ <https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download>

⁸ <https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download>

⁹ 18 U.S.C 922(d).

¹⁰ 18 U.S.C. § 922(d)(3) <https://www.law.cornell.edu/uscode/text/18/922>

¹¹ <https://www.atf.gov/firearms/docs/open-letter/all-ffls-sept2011-open-letter-marijuana-medicinal-purposes/download> and www.atf.gov/firearms/docs/newsletter/federal-firearms-licensee-ffl-newsletter-june-2021/download.

B. STATE LAW:

1. At the November 8, 2022 election, Missouri voters passed Amendment 3 legalizing recreational marijuana for personal use. That change took effect on December 8, 2022.¹²
2. Amendment 3 was an amendment to Section 1, Article XIV, of the Missouri Constitution and also added a new section (Section 2.)¹³
3. Prior to the passage of Amendment 3, possession of a firearm while in possession of marijuana constituted the felony “unlawful use of a weapon.”¹⁴
4. The new law retains two possible unlawful use of a weapon offenses.
 - a. Someone 21 or older who is in possession of *more than 3 ounces* of marijuana and is in possession of a firearm would still be guilty of the felony unlawful use of a weapon.
 - b. Someone *under 21* who is in possession of a firearm and *more than 35 grams* of marijuana would be guilty of the felony unlawful use of a weapon.¹⁵
5. However, under the new law it is no longer illegal for a person *at least 21 years of age* to possess three ounces *or less* of marijuana.¹⁶ Therefore, a person at least 21 years old who possesses a firearm and 3 ounces or less of marijuana would not be committing the offense of unlawful use of a weapon. (This assumes no other violation is involved. See RSMo 571.030.¹⁷)

CONCLUSION:

Federal law. It is still a felony to possess both marijuana and a firearm. At this time, the Second Amendment will not provide protection for someone who is in possession of both. The federal courts have previously held “*The Second Amendment does not protect the rights of unlawful drug users to bear arms*”¹⁸ just as it does not protect the rights of “*felons and the mentally ill.*”¹⁹

State law. Marijuana is no longer a controlled substance for someone at least 21 years of age who possesses three ounces of marijuana or less. Therefore, the Missouri statute on “unlawful use of a weapon” would no longer treat the possession of a firearm while in possession of marijuana as a criminal offense.

In other words, although possession of both a firearm and marijuana might not be a crime under Missouri law, it is still a crime under federal law. You may be thinking: “*What are the chances of a federal agent (ATF, FBI, etc.) catching me?*” When asked about this possibility, ATF spokesperson Cherice Williams responded:

*"ATF focuses on those criminals who utilize guns to commit their crimes as they pose the most danger to our communities. **However**, if an ATF Agent does come in contact with an individual who is in possession of a firearm and who does meet the definition of an 'unlawful user of a controlled substance,' that person would be subject to federal criminal prosecution.”²⁰ (Emphasis added.)*

¹² Amendment 3 <https://www.sos.mo.gov/cmsimages/Elections/Petitions/2022-059.pdf>

¹³ https://ballotpedia.org/Article_XIV,_Missouri_Constitution#Section_1, <https://www.sos.mo.gov/pubs/constitution>

¹⁴ RSMo 571.030, <https://revisor.mo.gov/main/OneSection.aspx?section=571.030>

¹⁵ RSMo 571.030,1.(11). <https://revisor.mo.gov/main/OneSection.aspx?section=571.030>

¹⁶ Art. XIV § 2 §§ 10. Personal Use of Marijuana. P 191

¹⁷ <https://revisor.mo.gov/main/OneSection.aspx?section=571.030>

¹⁸ *US v Dugan*, 657 F.3d 998, 999-1000, (9th Cir.2011).

¹⁹ *D.C. v Heller*, 554 U.S. 570, 626-627, (2008).

²⁰ <https://www.11alive.com/article/news/local/verify/verify-can-medical-marijuana-users-legally-carry-a-gun/85-a627c2ec-81f6-48c3-85df-3679a49b0606>

So, while the chance of getting caught by a federal agent might be small *the penalty is not*. In addition to attorney's fees, a federal violation could subject you to imprisonment for 'up to 10 years' and a fine of \$5,000. Upon release from prison, you would have a federal felony conviction on your record and could never lawfully own a firearm again.

Warning: Some marijuana dispensaries are telling their customers: "*Contrary to a popular rumor, yes, you can still own and purchase guns in Missouri as a medical marijuana patient!*"²¹ Really? Before you risk arrest and incarceration because of someone's 'advice', you might ask: (a) "*Where did you get your law degree?*" and (b) "*Are you going to pay for my legal defense if I get arrested?*" The dispensaries make money from your business. Could that affect their 'advice'?

Unlike the dispensaries, I am *not* offering legal advice. I am simply sharing the information I compiled for an academic presentation. Both the courts and various state legislatures continue to announce changes to your Second Amendment rights. This is especially true in light of the Supreme Court's recent decision in New York State Rifle & Pistol Association, Inc. v. Bruen.²² You *must* consult your own attorney about the facts of your situation.

LATE ADDITIONS. While this lesson was being prepared two new cases appeared in the news. These cases do not change state or federal law in Missouri but are worth consideration.

Banning Guns For Marijuana Users Unconstitutional.²³

On February 3rd, 2023, a federal judge in Oklahoma ruled the federal law prohibiting people who use marijuana from owning firearms is unconstitutional.²⁴ The US Supreme Court recently held in Bruen, that in order for firearms regulations to be constitutional they cannot restrict the rights covered by the Second Amendment's text. The Bruen decision went on to hold that any firearms regulations must be "consistent with this nation's historical tradition."²⁵ To be consistent with that tradition, the regulation must have a parallel in the types of regulations that were in place at the time of the Constitution's framing.²⁶ (Emphasis added.) The law banning possession of marijuana and firearms wasn't enacted by Congress until 1968.²⁷ Following the guidance set out in Bruen, Judge Wyrick wrote, "[T]he mere use of marijuana carries none of the characteristics that the Nation's history and tradition of firearms regulation supports." Upon review of the effect of this ban, the decision further noted:

Recall that § 922(g)(3) imposes the most severe burden possible:
a total prohibition on possessing any firearm, in any place, for any use,
in any circumstance—regardless of whether the person is actually
intoxicated or under the influence of a controlled substance.⁽²⁸⁾
It is a complete deprivation of the core right to possess a firearm for

²¹ <https://www.themedcard.com/missouri-mmj-card-gun-rights/>

²² New York State Rifle & Pistol Association, Inc. v. Bruen, 597 U.S. ____, (2022), <https://www.oyez.org/cases/2021/20-843>

²³ <https://apnews.com/article/us-supreme-court-oklahoma-state-government-new-orleans-city-c79d6fedc97ba657d2cab17f59354a95>

²⁴ US v Harrison, Case No. CR-22-00328-PRW, United States District Court, Western District Of Oklahoma.

<https://fingfx.thomsonreuters.com/gfx/legaldocs/zdpxdnqvkpx/02032023harrison.pdf>

²⁵ New York State Rifle & Pistol Association, Inc. v. Bruen, 597 U.S. ____, (2022)

²⁶ https://www.findlaw.com/legalblogs/law-and-life/can-you-own-a-gun-and-use-marijuana/?DCMP=cons_times:nwl:february2023:gen:feature

²⁷ Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1220–21.

²⁸ See 27 C.F.R. § 478.11 ("Such use is not limited to the use of drugs on a particular day, or within a matter of days or weeks before. A person may be an unlawful current user

of a controlled substance even though the substance is not being used at the precise time the person seeks to acquire a firearm or receives or possesses a firearm.").

self-defense, turning entirely on the fact that an individual is a user of marijuana.

This decision, coming from a federal court in Oklahoma, does not have any effect on the laws of Missouri. Moreover, it appears likely the Department of Justice will appeal that decision.

“Des Moines Man Sentenced on Firearm Offenses.”²⁹

According to court documents, an Iowa man knowingly made false misrepresentations on the 4473 (form.) He failed to disclose that he was a user of marijuana and was subsequently charged with lying on the 4473 form on four different occasions by checking “no” after question 21, which asks “*Are you an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance?*”

Thereafter, he “*knowingly possessed four pistols while being an unlawful user of marijuana*” and was sentenced to 12 months and 1 day in prison. Following his prison term, he must serve three years of supervised release (similar to probation.) As a convicted felon he can no longer lawfully possess ammunition or a firearm.³⁰

This case is noteworthy because it is virtually unheard of for the ATF / Department of Justice to arrest and prosecute someone for lying on the 4473 form. As a rule, cases are only brought against individuals involved in gang activity, drug sales, illegal gun distribution, etc., and lying on the 4473 is simply added as yet another offense. However, this individual was not charged with any other activity that would have brought him to the attention of federal authorities. Lying on that form is, of course, a violation of federal law but prosecuting that offense, absent additional criminal activity other than subsequent possession of the firearm(s) he purchased, is somewhat like prosecuting a motorist for not wearing a seatbelt when no other offense occurred. I don’t mean to minimize the federal offense. It’s just so rare to see it as a lone violation.³¹ Is this going to happen more often now that states have legalized marijuana?

THE FINAL NOTE:

The simultaneous possession of a firearm and marijuana is controlled by both federal and state law and we see how confusing that can be. In addition, decisions from courts around the country are challenging and changing the conduct that is considered lawful under the Second Amendment. More than ever, you must find a qualified attorney and ask about the facts of your situation.

²⁹ <https://www.atf.gov/news/pr/des-moines-man-sentenced-firearm-offenses>

³⁰ United States v. Harrison, No. CR-22-00328-PRW (W.D. Okla. Feb. 3, 2023) https://casetext.com/case/united-states-v-harrison-328?q=US%20v%20JARED%20MICHAEL%20HARRISON.&utm_medium=email&utm_source=education&utm_campaign=existing-users-education-1C&utm_content=image&sort=relevance&p=1&type=case&jxs=edok.ndok.wdok&tab=keyword

³¹ In fiscal 2017, the Bureau of Alcohol, Tobacco, Firearms and Explosives referred about 12,700 denied purchases to its field divisions for investigation. As of June 2018, U.S. Attorney’s Offices prosecuted ONLY 12 of these cases or 0.001% of the offenses. <https://www.gao.gov/products/gao-18-440>