# MEDICAL MARIJUANA PERMITS AND CONCEALED WEAPONS PERMITS: WHEN ONE RIGHT IMPACTS ANOTHER

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*Medical Marijuana Permits and Concealed Weapons Permits: When One Right Impacts Another*

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The decriminalization of an action is never as simple as a single piece of legislation. It is a long, slow evolving process, with each step revealing a new problem which must be solved. The legalization of medical marijuana on the state level has created a number of complex legal issues relating to the conflicts between state decriminalization and existing federal law. Addressed here is the impact of medical marijuana on gun ownership. Specifically, does getting a medical marijuana card (MMJ) mean you lose your right to have a concealed weapons permit (CWP)? [2]

The question of possessing both medical marijuana and a firearm is settled. [3] Until the federal government removes marijuana from Schedule I classification under the Controlled Substances Act, possession of both is a violation of 18 U.S.C. § 922(d), also known as The Gun Control Act. [4] The issue of MMJ possession's impact on CWP is a mixture of federal law,

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[2] The terminology and abbreviation for a permit to carry a concealed firearm varies by state. For the purposes of this article, the abbreviation CWP will be used unless citing specific state or court language.
[3] *See* U.S Dep't. of Just., *Memorandum to all United States Attorneys – Marijuana Enforcement* (2018).
[4] *Id.*; *See also* 21 USC 13 §811.

individual state statutes, and agency opinions, beginning with an open letter issued by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (BATFE).

*The 2011 BATFE Open Letter*

In 2011, the BATFE issued an Open Letter to All Federal Firearms Licensees (FFL) which offered guidance to firearms dealers on firearms purchases and possession in regard to medical marijuana.[5] In the letter, the BATFE references two relevant statutes, 18 U.S.C. § 922(d)(3), regulating the actions of the seller, and 18 U.S.C. § 922(g)(3), regulating the actions of the buyer and possessor of a firearm.[6]

When purchasing a firearm from a dealer, a buyer must fill out Form 4473, answering questions relating to the buyer's background.[7] Question 21(e) asks the buyer if they are "an unlawful user of or addicted to any controlled substance."[8] Under the BATFE interpretation of § 922(g)(3), the buyer is considered an unlawful user of a controlled substance if they use medical marijuana, even with an MMJ.[9] When a buyer who uses medical marijuana reaches the relevant question, they must answer that they are an unlawful user, therefore, disqualifying them from purchase.[10]

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[5] Bureau of Alcohol, Tobacco, Firearms, and Explosive, *Open Letter - Marijuana for Medicinal Purposes* (2011).
[6] *Id.*
[7] *Id.;* Form 4473 (revised May 2020) is issued by the BATFE for all firearms sales conducted by an FFL. Section A, filled out by the FFL, includes information on the firearms being purchased. Section B, questions 9-23, contains the buyer's personal and background information to be filled out by the buyer. Section C, completed by the FFL, includes the buyer's identification, results of a background check, and certification that the FFL believes they can legally sell the firearm to the buyer. The FFL then uses this form to conduct a background check, if required under state and federal law. The FFL is required to keep the 4473 on file indefinitely; however, the FFL maintains control of the 4473 until they relinquish their FFL license, at which time the 4473 is sent to the BATFE records department.
[8] *Id.*
[9] *Id.*
[10] *Id*.

To the actions of the FFL, § 922(d) states: "It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person . . . (3) is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))".[11] In the Open Letter, the BATFE interprets the dealer's knowledge of the buyer having an MMJ as "reasonable cause" that the buyer is a user of a controlled substance and, therefore, the seller must deny the sale.[12]

*Wilson v. Lynch*

One month after the issuance of the 2011 Open Letter, S. Rowan Wilson attempted to purchase a firearm from an FFL in Nevada.[13] Wilson, a marijuana activist, voluntarily notified the FFL that she had an MMJ.[14] When Wilson reached the question relating to use of a controlled substance, the dealer informed her that he had reasonable cause to believe she was an unlawful user and denied the sale.[15] Wilson sued the U.S. Attorney General and the BATFE, claiming, amongst other things, that the 2011 Open Letter violated her Second Amendment rights.[16] The lower court dismissed Wilson's first amended complaint for failure to state a claim.[17] Wilson appealed to the 9th Circuit for the dismissal and for not being allowed a second amendment to the

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[11] 18 U.S.C. § 922(d)
[12] Bureau of Alcohol, Tobacco, Firearms, and Explosives, *Open Letter - Marijuana for Medicinal Purposes* (2011).
[13] Wilson v. Lynch, 835 F.3d 1083, 1089 (9th Cir. 2016).
[14] *Id*.
[15] *Id*.
[16] *Id*. at 1090.
[17] *Id*.

complaint.[18] In the opinion, the Court addressed both the Open Letter's impact on the purchase and possession of a firearm.[19]

Starting with the right to possess a firearm, the Court held that the Open Letter did not prohibit a holder of an MMJ who did not use marijuana from owning a firearm.[20] Stating "18 U.S.C. § 922(d)(3), 27 C.F.R. § 478.11, and the Open Letter would not impede her right to keep her firearms or to use them to protect herself and her home."[21] The Court went on to state that the Open Letter only "prevent(s) her from purchasing a firearm under certain circumstances."[22] The Court then used this determination to apply intermediate scrutiny rather than strict scrutiny under *United States v. Chovan*[23] because the Open Letter does "not place a severe burden on Wilson's core right to defend herself with firearms."[24] Under intermediate scrutiny, the court then found that the link between "18 U.S.C. § 922(d)(3), 27 C.F.R. § 478.11, and the Open Letter and their purpose of preventing gun violence" was reasonable, holding the 2011 BATFE Open Letter to be valid.[25] A more conservative court may draw a different conclusion.

*Willis v. Winters*

Prior to the issuance of the 2011 BATFE Open Letter, the Oregon Supreme Court reviewed whether the federal prohibition on possession of firearms by an unlawful user of a controlled substance preempted the state licensing statutes.[26] In consolidated cases, sheriffs from

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[18] *Id*.
[19] *Id*. at 1091.
[20] *Id*. at 1093.
[21] *Id*.
[22] *Id*. at 1092.
[23] United States v. Chovan, 735 F.3d 1127 (9th Cir. 2013).
[24] *Id*.
[25] *Id*. at 1094; See also Bradley v. United States, 402 F. Supp. 3d 398 (N.D. Ohio 2019).
[26] Willis v. Winters, 253 P.3d 1058, 1058 (Or. 2011).

two Oregon counties denied concealed handgun licenses (CHL) to users of medical marijuana.[27] During the CHL licensing process, the applicants admitted to being users of medical marijuana with an MMJ.[28] The sheriffs reasoned that, as the applicants were unable to possess firearms under federal law, they were therefore prohibited from obtaining a CHL.[29] The sheriffs argued that 18 U.S.C. § 922(d)(3) preempted the state law on the matter; the Court disagreed.[30]

The Court looked at both the language of Oregon's CHL statute and the language of The Gun Control Act to determine if there was a conflict in which a preemption applied.[31] The Court determined that no conflict existed because the CHL statute addressed the concealment of firearms and prosecution under Oregon law, while The Gun Control Act addressed the possession of firearms and prosecution under Federal law.[32] Given that distinction, and an analysis of the language and purpose of The Gun Control Act, the Court determined that there was no preemption and that, under the Oregon CHL statute, the sheriffs must issue the permits.[33] However, the Court did state that the sheriffs may use their authority to enforce 18 U.S.C. § 922(d)(3), but, under the anti-commandeering principle, Congress cannot make states enforce it through either criminal penalties or licensing processes.[34]

*State Licensing Statutes*

In *Wilson*, the Court held that the BATFE interpretation of The Gun Control Act was valid and that it is illegal for users of medical marijuana to possess a firearm.[35] The *Wilson* court

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[27] *Id*. at 1060.
[28] *Id*.
[29] *Id*.
[30] *Id*.
[31] *Id*. at 1064-65.
[32] *Id*. at 1065-66.
[33] *Id*. at 1068.
[34] *Id*. at 1066.
[35] Wilson v. Lynch, 835 F.3d 1083, 1091 (9th Cir. 2016).

also upheld the BATFE opinion that when an FFL is aware that a buyer has an MMJ, the FFL has reasonable cause to believe the buyer is an unlawful user of a controlled substance and must deny the sale.[36] In *Willis*, the Court established that The Gun Control Act does not preempt state CWP licensing statutes.[37] Therefore, we must look at the individual state statutes to determine what impact the 2011 BATFE Open Letter has on licensing.

State CWP licensing schemes are typically divided into two categories: "shall issue" states and "may issue" states.[38] In "shall issue" states, the licensing agency must issue a permit unless the applicant is disqualified under statute.[39] In "may issue" states, the licensing entity can issue a permit if the applicant meets certain requirements.[40] Looking solely at the CWP licensing statute, an analysis of "may issue" states is moot as the issuing agency has broad discretion to deny an applicant a permit.[41]

An analysis of the 39 "shall issue" states found drastically different statutory requirements to deny a CWP application. For example, Arizona does not tie the issuance of a permit to the ability to purchase a firearm, nor does it list the usage of a controlled substance as a

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[36] *Id*. at 1094.
[37] Willis v. Winters, 253 P.3d 1058, 1068 (Or. 2011).
[38] *See* Richard S. Grossman & Stephen A. Lee, *May Issue Versus Shall Issue: Explaining The Pattern Of Concealed-Carry Handgun Laws, 1960–2001*, Contemporary Economic Policy, Western Economic Association International, vol. 26(2), 198-206 (April 2008).
[39] The "shall issue" states are Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming.
[40] The "may issue" states are California, Connecticut, Delaware, Hawaii, Maryland, Massachusetts, New Jersey, New York, and Rhode Island.
[41]In Hawaii, the Honolulu Police Chief openly checks CWP applicants against the MMJ database and denies permits to MMJ holders. *See* Kristen Costillio, *HPD in error over cannabis patients with guns, chief says*, Honolulu Star Advertiser (December 7, 2017) https://www.staradvertiser.com/2017/12/07/hawaii-news/hpd-in-error-over-cannabis-patients-with-guns-chief-says/ [https://perma.cc/NVG2-79W9].

disqualifier.[42] Alternatively, Louisiana requires that CWP holders both "not be an unlawful user of, or addicted to, marijuana" and "not be ineligible to possess or receive a firearm under 18 § U.S.C. 922(g) or (n)."[43] Of the 39 "shall issue" states, 26 have also legalized medical marijuana.[44] To see if the possession of an MMJ card makes an individual ineligible to also have a CWP, we must look at three statutory requirements on issuance: ability to legally purchase a firearm, ability to legally possess a firearm, and not an unlawful user of a controlled substance.[45] Further, we must also consider the language of the statue or amendment legalizing medical marijuana.

*Purchase of a firearm*. Arkansas, Florida, Illinois, Louisiana, Michigan, New Mexico, North Dakota, Pennsylvania, South Dakota, and Utah have similar language which requires a CWP applicant to have the ability to legally purchase a firearm.[46] One may wish to conclude that the 2011 BATFE Open Letter prohibiting an FFL from selling to a holder of an MMJ is dispositive of their ability to have a CWP in these states; however, there is a strong counterargument.

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[42] Ariz. Rev. Stat. § 13-3112(E).

[43] La. Stat. §1379.3.

[44] Those states are Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Illinois, Louisiana, Maine, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Utah, Virginia, Washington, and West Virginia.

[45] Alaska, Arizona, Missouri, New Hampshire, Ohio, Oklahoma, and Oregon licensing statutes have no relative prohibitive language, so the possession of an MMJ does not impact a CWP; See Alaska Stat. § 18.65.705.; Ariz. Rev. Stat. §13-3112(E); Mo. Rev. Stat. §§ 571.101.2, 571.101.7; N.H. Rev. Stat. Ann. § 159:6; Ohio Rev. Code § 2923.125(D)(1); Okla. Stat. Ann. tit. 21, § 1290.10; Or. Rev. Stat. § 166.291(1).

[46] Ark. Code Ann. § 5-73-309(6); Fla. Stat. § 790.06(2)(n); 430 Ill. Comp. Stat. § 66/25(2); La. Rev. Stat. § 40:1379.3(C)(17); Mich. Comp. Laws Serv. § 750.224f; N.M. Stat. Ann. § 29-19-4(A); N.D. Cent. Code § 62.1-04-03(1)(c)(8); 8 Pa. Cons. Stat. Ann. § 6109(e)(1)(xiv); S.D. Codified Laws §§ 23-7-7.1(10); Utah Code Ann. § 53-5-704(2)(a)(viii).

The *Wilson* court not only acknowledged, but relied on the fact that the plaintiff had alternative legal means to obtain and possess firearms.[47] The holder of an MMJ is not prohibited from purchasing a firearm; they are only prohibited from purchasing a firearm from an FFL with knowledge the buyer has an MMJ.[48] Under the 2011 BATFE Open Letter, a buyer is under no obligation to disclose they hold an MMJ, only to disclose if they are an unlawful user of a controlled substance.[49] A standard in state enactment language for medical marijuana is confidentiality of MMJ records, limiting access to only named entities like medical providers and law enforcement, but not the general public, including FFLs.[50] Unless a buyer voluntarily discloses to an FFL that they have an MMJ, the FFL would have no knowledge and, therefore, the buyer would not be prohibited from purchasing. However, in a case like *Wilson* where the MMJ holder openly publicized her MMJ status, the burden may shift to the MMJ holder to disprove the presumption by relinquishing their MMJ.[51]

*Possession of a firearm*. Alabama, Arkansas, Colorado, Florida, Illinois, Louisiana, Maine, Michigan, Minnesota, Montana, Nevada, New Mexico, North Dakota, Pennsylvania, South Dakota, Utah, Washington, and West Virginia have similar language which requires the holder of a CWP to be able to legally possess a firearm under state and/or federal law.[52] As stated in the

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[47] Wilson v. Lynch, 835 F.3d 1083,1092 (9th Cir. 2016).
[48] *Id*.
[49] Bureau of Alcohol, Tobacco, Firearms, and Explosives, *Open Letter - Marijuana for Medicinal Purposes* (2011).
[50] *See e.g*., Fla. Const. of 1968, Art. X, § 29(d)(1)(d)(4).
[51] Wilson v. Lynch, 835 F.3d 1083, 1093 (9th Cir. 2016).
[52] Ala. Code § 13A-11-75(b)(2); Ark. Code Ann. § 5-73-309(6); Colo. Rev. Stat. § 18-12-203(1); Fla. Stat. § 790.06(2)(n); 430 Ill. Comp. Stat. § 66/25(2); La. Rev. Stat. § 40:1379.3(C)(17); Me. Stat., 25 § 2003(1)(B); Mich. Comp. Laws Serv. § 750.224f; Minn. Stat. § 624.714, subd. 2(b)(4)( ix); Mont. Code Ann. § 45-8-321(a); Nev. Rev. Stat. Ann. § 202.3657(2)(b); N.M. Stat. Ann. § 29-19-4(A); N.D. Cent. Code § 62.1-04-03(1)(c)(8); 8 Pa. Cons. Stat. Ann. § 6109(e)(1)(xiv); S.D. Codified Laws § 23-7-7.1(10); Utah Code Ann. § 53-5-704(2)(a)(viii); Wash. Rev. Code Ann. § 9.41.070(1)(a); W. Va. Code § 61-7-4(b)(10).

2011 Open Letter and by the *Wilson* court, the simple possession of an MMJ does not prohibit someone from possessing a firearm.[53] There is no presumption of use when it comes to possession; therefore having an MMJ does not prohibit possession.[54]

*Unlawful User*. Louisiana, Maine, Nevada, Pennsylvania, and Virginia have language similar or tied to the federal law which prohibits an unlawful user from having a concealed weapons permit.[55] Some states have language which requires addiction or impairment of faculties to trigger these restrictions and would, therefore, not automatically be triggered by medical marijuana use.[56] Like with possession, there is no presumption of use with the simple possession of an MMJ.[57]

The standard that a user of medical marijuana is considered an unlawful user is upheld in *Wilson*; however, the court opens the door to an interesting question as to when the unlawful use ceases. The court stated that the plaintiff would immediately lose the presumption by the FFL of unlawful use upon relinquishing her MMJ.[58] The significant cases where a defendant has tried to avoid criminal prosecution for unlawful possession of a firearm have involved the dual physical possession of medical marijuana and a firearm.[59] It is not unreasonable that the holder of an

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[53] Wilson v. Lynch, 835 F.3d 1083, 1093 (9th Cir. 2016).
[54] In 2017, the police chief in Honolulu, Hawaii attempted to confiscate firearms from MMJ holders, but had to quickly reverse course citing "recent court rulings", most likely *Wilson. See* Kristen Costillio, *HPD won't take guns from medical marijuana users*, Honolulu Star Advertiser, (December 5, 2017) https://www.staradvertiser.com/2017/12/05/breaking-news/hpd-wont-take-guns-from-medical-marijuana-users/ [https://perma.cc/KYY4-ENYM]
[55] La. Rev. Stat. § 40:1379.3(C)(12); 8 Pa. Cons. Stat. Ann. § 6109(e)(1)(vi); Va. Code Ann. § 18.2-308.09(8).
[56] *See* Ark. Code Ann. § 5-73-309(7); Fla. Stat. § 790.06(2)(f); Nev. Rev. Stat. Ann. § 202.3657(3)(d); N.M. Stat. Ann. § 29-19-4(A); S.D. Codified Laws §§ 23-7-7.1(3); W. Va. Code § 61-7-4(b)(4).
[57] *Wilson*, 835 F.3d at 1093 (9th Cir. 2016).
[58] *id.*
[59] *See e.g.*, U.S. v. Bellamy, 682 F. App'x 447 (6th Cir. 2017); U.S. v. Patterson, 431 F.3d 832 (5th Cir. 2005); U.S. v. Seay, 620 F.3d 919 (8th Cir. 2010); U.S. v. Dugan, 657 F.3d 998, (9th

MMJ may use medical marijuana, then cease use, therefore no longer qualifying as an unlawful user. An MMJ holder need not relinquish their MMJ to legally possess a firearm, but the tipping point is unsettled.

*MMJ statutes*. A common thread in medical marijuana statutory language is the protection from criminal prosecution or civil penalties under state law for those who use medical marijuana under the state regulatory scheme.[60] However, some states have additional protections. Illinois' medical marijuana language states: "a registered qualifying patient is not subject to arrest, prosecution, or denial of *any right or privilege…*"[61] The Illinois State Police have interpreted this by stating if you possess an MMJ, your CWP "will not be revoked nor will your application (be) denied. Medical Marijuana Licenses are state-issued and cannot result in the denial of any right or privilege."[62]

This interpretation of "any right or privilege" may provide an alternative challenge to a denied or revoked CWP based not just on possession of an MMJ, but also accompanying use. Not all states use such clear language. The Florida Constitution states a licensed user of medical marijuana "is not subject to criminal or civil liability or sanctions under Florida law."[63] The interpretation of "sanctions" could be argued to mean the same as loss of "any right or privilege." This would not be dispositive of a loss of a CWP based on a criminal conviction.

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Cir. 2011); U.S. v. Yancey, 621 F.3d 681 (7th Cir. 2010); U.S. v. Patterson, 431 F.3d 832 (5th Cir. 2005).

[60] See e.g., Conn. Gen. Stat. § 21a-408a(a).

[61] 410 Ill. Comp. Stat. 130 § 25(a).

[62] Illinois State Police (last visited Jan. 20, 2022) https://isp.illinois.gov/Foid/Ccl [https://perma.cc/2BTE-DR3W].

[63] Fla. Const. of 1968, Art. X, § 29(a).

Another factor is the placement of the respective language. In the five states where medical marijuana was enacted through constitutional amendment, the included protections would override any conflicting statutory language relating to CWPs.[64]

*Conclusion*

Will you lose your concealed weapon permit if you get a medical marijuana license? That depends on your state of residence. While the BATFE and federal courts offer guidance on possession and sale of firearms, state courts will decide how to interpret the effect of medical marijuana licensing on concealed weapons permits, based on their state laws. Strong arguments can be made that even in the strictest "shall issue" states, the act of getting an MMJ does not interfere with a CWP. However, state legislatures would do well to clarify their statutes as to their intent. This continues to be a developing area of law which may ultimately be made moot through a federal reclassification of marijuana under the Controlled Substances Act.

[64] Those states are Arkansas, Colorado, Florida, Missouri, and Nevada.