

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2005-0680

State of New Hampshire

v.

Chad Evans

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APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE  
ROCHESTER DISTRICT COURT

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BRIEF FOR THE STATE OF NEW HAMPSHIRE

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THE STATE OF NEW HAMPSHIRE

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(Oral Argument Waived)

**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ..... ii

ISSUES PRESENTED .....1

STATEMENT OF THE CASE AND FACTS.....2

SUMMARY OF THE ARGUMENT .....6

ARGUMENT .....8

    I.    THE DEFENDANT WAS NOT ENTITLED TO AN  
          EVIDENTIARY HEARING WHERE BOTH SIDES  
          PROCEEDED ON OFFERS OF PROOF. ....8

    II.   THE DISTRICT COURT PROPERLY REJECTED THE  
          DEFENDANT’S CLAIM THAT THE FIREARMS, WHICH  
          WERE THE SUBJECT OF FORFEITURE, BELONGED TO HIS  
          EX-WIFE AS “MARITAL PROPERTY.” .....10

CONCLUSION.....17

**TABLE OF AUTHORITIES**

**Cases**

Petition of Evans, \_\_\_ N.H. \_\_\_, 908 A.2d 976 (2006).....2  
Seifried v. Seifried, 726 N.Y.S.2d 837 (N.Y. Sup. Ct. 2001).....15  
State v. Cohen, \_\_\_ N.H. \_\_\_, 907 A.2d 983 (2006).....11, 14  
State v. Cossette, 151 N.H. 355 (2004).....8, 9  
State v. Evans, 150 N.H. 416 (2003) .....2  
State v. Gero, 152 N.H. 379 (2005) ..... passim  
State v. Henderson, \_\_\_ N.H. \_\_\_, \_\_\_, 907 A.2d 968 (2006).....12  
State v. Roy, 138 N.H. 97 (1993).....8, 9  
Thomas v. Finger, 141 N.H. 134 (1996).....8  
United States v. Bagley, 899 F.2d 707 (8th Cir. 1990).....12, 13  
United States v. Totaro, 345 F.3d 989 (8th Cir. 2003) .....15

**Statutes**

RSA 159:3 .....12, 16  
RSA 173-B:5 .....2  
RSA 595-A:6..... 3, 10, 11, 12

**Rules**

Super. Ct. R. 58 .....6, 8, 9

**ISSUES PRESENTED**

I. Whether the district court properly granted the State's motion to forfeit firearms owned by a convicted murderer and domestic batterer without an evidentiary hearing where both sides proceeded on offers of proof.

II. Whether the district court properly rejected the defendant's claim that the firearms, which were the subject of forfeiture, were marital property of the ex-wife, where there was no evidence that the firearms had been part of the divorce proceedings or were otherwise part of the marital estate.

## STATEMENT OF THE CASE AND FACTS

On March 28, 1999, the Rochester Police Department seized the defendant's weapons and ammunition pursuant to a domestic violence protective order issued pursuant to RSA 173-B:5. (NOA at 5; Def. Br. App. at 8, 10).<sup>1</sup> Sometime in the year 2000 the defendant was convicted of domestic-violence-related simple assault. (NOA at 5). The defendant was subsequently convicted of second degree murder, multiple counts of second degree assault, and endangering the welfare of a child for brutally beating and ultimately killing a young child, Kassidy Bortner. State v. Evans, 150 N.H. 416, 417 (2003). The defendant was also convicted in the same trial of simple assault against his girlfriend and Kassidy's mother, Amanda Bortner. Id. The defendant was effectively sentenced to 43 years to life in prison. See Petition of Evans, \_\_\_ N.H. \_\_\_, 908 A.2d 976 (2006), petition for cert. filed (U.S. Dec. 4, 2006) (No. 06-9176).

On September 15, 2005, the defendant's father, Chet Evans, filed a motion and affidavit for return of firearms. (Def. Br. App. at 8, 10; State's Br. Add. at 18-19). The Rochester District Court (Cappiello, J.) denied the motion to return the property to Chet Evans. (Def. Br. App. at 8-9). Accompanying that motion, Chet Evans presented what purported to be an undated bill of sale for the firearms. State's Br. Add. at 19. The defendant asserted he had sole ownership interest in the firearms and was selling that interest to his father. State's Br. Add. at 19. The court raised some doubts about the

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<sup>1</sup> References to the record are to the Notice of Appeal (NOA); the document attached to the appendix to the defendant's brief (Def. Br. App.); the transcript of the hearing on the forfeiture held on May 19, 2006 (T); and to documents attached to the State's Brief (State's Br. Add.).

credibility or validity of the bill of sale from the defendant to Chet Evans. (Def. Br. App. at 8). The court gave the State leave to file a motion to forfeit the firearms and ammunition under the authority of RSA 595-A:6 and State v. Gero, 152 N.H. 379 (2005). (Def. Br. App. at 9).

On March 24, 2006, the State filed a motion for forfeiture and destruction of the firearms. (Def. Br. App. at 10-12). The defendant, who was represented by counsel at that point in time, objected. (Def. Br. App. at 13-15). The defendant subsequently filed a document addressed to his attorney and signed by both the defendant and his ex-wife, Tristan Mellencamp. (Def. Br. App. at 16-17). The document, which was not in the form of an affidavit or otherwise under oath, asserted that Mellencamp claimed the firearms as "marital property," and that the defendant claimed to relinquish any interest in the property. (Def. Br. App. at 17). At the time the weapons were seized, the defendant and Mellencamp were married. (T at 5). Although the record is unclear about the timing, it appears undisputed that the defendant and Mellencamp subsequently divorced and Mellencamp remarried. (T at 5-6).

On May 19, 2006, the court (Capiello, J.) held a hearing on the State's motion for forfeiture and destruction of the firearms. The defendant again was represented by counsel at the hearing. (T at 2). Both sides proceeded on offers of proof. (T at 2-10). Mellencamp was present at the hearing, but the defendant's lawyer never attempted to call her as a witness and acknowledged that she was not formally a party to the forfeiture litigation. (T at 5-6).

On June 30, 2006, the court issued an order granting the State's motion to forfeit the weapons and ordered that the weapons be destroyed. (NOA at 5-6). The court ruled that the defendant failed to present credible evidence that the weapons were, in fact, marital property. (NOA at 6). Specifically, the court reasoned that the defendant failed to present any legal documentation of ownership or paperwork from the divorce court establishing that the weapons were part of the property settlement in the divorce proceedings. (NOA at 6). The court suggested that the defendant's efforts were actually a subterfuge to keep possession of the weapons by first using his father and then his ex-wife to keep the weapons from being destroyed. (NOA at 6).

The defendant filed a timely motion to reconsider. In that motion, the defendant, again represented by counsel, acknowledged that he had chosen to proceed by offers of proof at the hearing. (Def. Br. App. at 18-19). The State objected to the motion to reconsider. (Def. Br. App. at 20-21). The State pointed out that the defendant's attempt to establish that the firearms were marital property was not credible. Specifically, the State pointed to the fact that the defendant initially attempted to transfer the property to his father with no claim that his ex-wife had an ownership interest in the weapons. (Def. Br. App. at 21). When that effort failed, the defendant attempted to use his ex-wife to assert an ownership interest in the weapons. (Def. Br. App. at 21). The court (DeVries, J.) agreed with the State's reasoning and denied the defendant's motion to reconsider. (Def. Br. App. at 19). On August 31, 2007 – the day before he filed the present appeal – the defendant filed a motion to expand the record to include affidavits from both him and

his ex-wife. (Def. Br. App. at 1-3; NOA at 3). The district court never ruled on the motion to expand the record.

## SUMMARY OF THE ARGUMENT

I. The defendant was not entitled to an evidentiary hearing on a motion to forfeit property. Pursuant to Superior Court Rule 58, the defendant must establish why an evidentiary hearing will assist the court in determining the pending issues. Here, both parties proceeded at the forfeiture hearing on offers of proof. The defendant never attempted to call any witnesses at the hearing. After the court granted the State's motion to forfeit the defendant's weapons, the defendant filed a motion to reconsider, requesting an evidentiary hearing. The defendant proffered no new facts or information that would assist the court in deciding the issue that were not presented by way of offers of proof in the hearing. Accordingly, the trial court properly exercised its discretion in denying the defendant's request for an evidentiary hearing in his motion to reconsider.

II. The trial court properly granted the State's motion to forfeit weapons because the defendant was a convicted felon. The defendant's right to own, control, or possess weapons was extinguished upon his convictions for assault and murder. The defendant failed to establish that anyone else had a valid ownership interest in the weapons that existed before his rights were extinguished. The defendant presented no evidence that the ownership of the weapons was assigned to his ex-wife in the divorce proceedings before he became a convicted felon. Because "marital property" is an inchoate right, it provides a spouse or ex-spouse no right to prevent the forfeiture of property. An ownership interest in the property must be assigned to an ex-spouse in the context of divorce proceedings in order to claim that the property which is subject to

forfeiture belongs to the ex-spouse. Here, the defendant presented no evidence that his ex-wife owned the weapons. In fact, the evidence presented to the court indicated that the defendant alone attempted to sell the weapons to his father. Only when that attempt to dispose of the weapons failed did the defendant assert his ex-wife's claim that the weapons belonged to her as "marital property." Thus, in the context of this case, the trial court properly granted the State's motion to forfeit the weapons.

## **ARGUMENT**

### **I. THE DEFENDANT WAS NOT ENTITLED TO AN EVIDENTIARY HEARING WHERE BOTH SIDES PROCEEDED ON OFFERS OF PROOF.**

The defendant was not entitled to an evidentiary hearing because both sides proceeded on offers of proof and the defendant did not proffer any facts that required an evidentiary hearing. The district court properly granted the State's motion for forfeiture based on the offers of proof presented by both parties. Consequently, the district court did not err in denying the defendant's motion to reconsider in which he requested an evidentiary hearing.

The defendant has no right to an evidentiary hearing. See Thomas v. Finger, 141 N.H. 134, 136-37 (1996). A party requesting an evidentiary hearing must present to the court the reasons why an "evidentiary hearing will further assist the court in determining the pending issue(s)." Super. Ct. R. 58. Superior Court Rule 58 "clearly implies that the superior court now has discretion to deny a requested oral argument or evidentiary hearing if the proffered reasons for holding such a hearing are insufficient." State v. Roy, 138 N.H. 97, 98 (1993). The decision whether to hold an evidentiary hearing is discretionary. See Thomas, 141 N.H. at 137; Roy, 138 N.H. at 98. "To show an unsustainable exercise of discretion, the defendant must demonstrate that the trial court's decision was clearly unreasonable and that the decision prejudiced his case." State v. Cossette, 151 N.H. 355, 362 (2004). Where the trial court has sufficient information

before it to decide the issue, it is permissible to deny the defendant an evidentiary hearing. See Cossette, 151 N.H. at 362-63; Roy, 138 N.H. at 98.

In the case at bar, the defendant did not file a request for an evidentiary hearing as required by Rule 58 before the hearing on the State's motion for forfeiture of the weapons. Moreover, at the hearing itself both sides proceeded on offers of proof. While the defendant's counsel told the court that the defendant's ex-wife was present at the hearing (T at 5-6), he never attempted to call her as a witness. Moreover, after the court granted the State's motion to forfeit and destroy the weapons, the defendant filed a motion to reconsider. He acknowledged that he had elected to proceed in the hearing based on offers of proof. (Def. Br. App. at 18). In his motion to reconsider, he proffered the same facts he presented at the earlier hearing. While he stated that both the defendant and his ex-wife were available to testify "that Ms. Mellencamp was entitled to ownership of the weapons," he made no showing of what additional information they could have offered at an evidentiary hearing that was not contained in the offer of proof. As set forth in more detail below, the defendant's offer of proof was insufficient to establish that Mellencamp had a valid ownership interest in the weapons. Neither at the hearing nor in the motion to reconsider did the defendant offer any other facts upon which he would rely to establish Mellencamp's claim of ownership. Accordingly, the district court properly exercised its discretion in denying the defendant's request for an evidentiary hearing.

**II. THE DISTRICT COURT PROPERLY REJECTED THE DEFENDANT'S CLAIM THAT THE FIREARMS, WHICH WERE THE SUBJECT OF FORFEITURE, BELONGED TO HIS EX-WIFE AS "MARITAL PROPERTY."**

The district court properly granted the State's motion for forfeiture of the defendant's firearms where he presented insufficient evidence that the weapons belonged to anyone else. The court reasoned that there was insufficient evidence that the weapons belonged to the defendant's ex-wife as part of the marital property because the defendant presented no evidence establishing that the weapons were part of the divorce settlement. Moreover, the court appeared to view the latest effort to claim ownership over the weapons with suspicion in light of the circumstances of the defendant's first attempt to transfer ownership of the weapons to his father. In light of these circumstances, the district court properly concluded that the defendant had not presented any evidence that the weapons should not be forfeited.

RSA 595-A:6 (2001), which governs the disposition of property at issue in this case, provides in relevant part:

All . . . property seized in execution of a search warrant or otherwise coming into the hands of the police shall be returned to the owner of the property, or shall be disposed of as the court or justice orders, which may include forfeiture and either sale or destruction as the public interest requires, in the discretion of the court or justice, and in accordance with due process of law.

The seizure of property by the police does not automatically divest the owner of his or her property rights. State v. Gero, 152 N.H. 379, 383 (2005). However, once the police take possession of property, the owner may not dispose of the property by selling it

or otherwise. Id. Rather, the decision regarding the final disposition of the property is vested in the court or justice. Id. The court is under no obligation to transfer the seized property to a family member simply because the defendant executed a bill of sale for the property. Id. This Court articulated the following test for evaluating whether property should be forfeited under RSA 595-A:6:

[F]orfeiture of property in the public interest, other than contraband, should occur when: (1) the property involved directly relates to the acts underlying the committed crime in that it either influenced the defendant's behavior in relation to the crime, or is relevant to an understanding of the psychological or physical circumstances under which the crime was committed; or (2) returning the property to the defendant would be so offensive to basic concepts or decency treasured in a civilized society, or would justifiably spark outrage, disgust, and incredulity on the part of the general public that it would undermine public confidence in the criminal justice system.

Gero, 152 N.H. at 386 (emphasis added).

This Court will review a lower court's ruling on the forfeiture of property pursuant to RSA 595-A:6 for an unsustainable exercise of discretion. State v. Cohen, \_\_\_ N.H. \_\_\_, 907 A.2d 983, 985 (2006). "To show that the trial court's decision is not sustainable, a party must demonstrate that the court's ruling was clearly untenable or unreasonable to the prejudice of his case." Id.

The test articulated by the Court in Gero is premised on the proposition that the defendant continues to have an ownership interest in the property at the time of the forfeiture proceedings. See Gero, 152 N.H. at 383. As noted above, the seizure of property pursuant to RSA 595-A:6 does not, on its own, divest a person of his ownership interest in property. Id. It is clear from reading RSA 595-A:6 as a whole, that one of the

primary obligations of the court in deciding how to dispose of property is determining who the rightful owner of the property is. For example, the statute permits the court to release property to the “rightful owners” before trial and provides that all other property “coming into the hands of the police shall be returned to the owner of the property, or shall be disposed of as the court or justice orders . . . .” RSA 595-A:6 (emphasis added).

The case at bar is not controlled by the two-part test articulated in Gero because the weapons at issue were contraband at the time of the State filed its motion to forfeit and destroy the property. The defendant had been convicted of serious felonies, including murder and assault, at the time the State filed to motion for forfeiture. RSA 159:3, I, prohibits any person convicted of a felony against the person or property of another from owning, possessing, or controlling any firearms or other deadly weapons. See State v. Henderson, \_\_\_ N.H. \_\_\_, \_\_\_, 907 A.2d 968, 970 (2006) (“RSA 159:3 therefore authorizes conviction for ‘ownership,’ ‘possession’ or ‘control.’”). RSA 159:3, II provides: “The state shall confiscate to the use of the state the weapon or weapons of person convicted under this section.” (Emphasis added). Thus, defendant’s right to own, possess, or control the weapons in question vanished when he became a convicted felon.

In this regard, the case at bar is similar to United States v. Bagley, 899 F.2d 707 (8th Cir. 1990). In that case, the defendant was initially arrested on charges unrelated to his possession of firearms. Id. at 707. During his arrest, the police searched a locked briefcase and found two firearms inside. Id. The defendant was subsequently charged with being a felon in possession of firearms. Id. Those charges were dismissed when the

firearms were suppressed because the police had conducted an unconstitutional search of his briefcase. Id. The defendant then sought return of the firearms. Id. at 707, 708. He admitted that he could not lawfully possess the firearms, but requested the court to return the weapons to him so that he could sell them to a third person. Id. at 708. The United States Court of Appeals for the Eighth Circuit found the defendant's claim was "frivolous," reasoning "that to allow Bagley to reap the economic benefit from ownership of weapons which it is illegal for him to possess would make a mockery of the law." Id. (quotation and brackets omitted).

In this regard, the case at bar is also distinguishable from Gero. In Gero the defendant has not been convicted of a felony against the person or property of another. In that case, the defendant was initially charged with a felony but the charge to which he ultimately pled guilty was amended to misdemeanor domestic violence criminal threatening. Gero, 152 N.H. at 380. Thus, in Gero, the court did not address the issue of whether the weapons were contraband. The issue before the Court in that case then was whether the public interest would be violated by returning the firearms to the defendant or some other person. Gero, 152 N.H. at 387. The Court adopted the two-part test articulated above to guide the court in determining whether to return property where the defendant maintains an ownership interest in the items. Id.

In the case at bar, the district court initially recognized that the defendant could not transfer the weapons to his father because at the time the defendant's father filed his motion to return the property, the defendant had no right to own, possess or control the weapons as a result of the defendant's status as a convicted felon. (Def. Br. App. at 8-9).

The defendant does not challenge this aspect of the district court's ruling on appeal.

Since the defendant does not contest that his authority to control the guns by transferring them to this father was extinguished by his felony convictions, this Court does not need to decide whether, under Gero, the public interest could be served by returning the items. Cf. Cohen, 907 A.2d at 987 (recognizing that where the property at issue is contraband, the court need not also consider whether the public interest requires the property be destroyed).<sup>2</sup>

The issue on appeal, therefore, is whether someone other than the defendant still had a valid ownership interest in the weapons. The district court acknowledged this issue but found that the defendant had presented insufficient evidence to establish that Tristan Mellencamp had a valid ownership interest in the weapons. (NOA at 5). Specifically, the district court found that the defense had presented no evidence that the weapons were, in fact, marital property. (NOA at 6). The court noted that the defense did not proffer that the weapons had been part of the property settlement in the divorce case. (NOA at 6). In fact, the defense essentially admitted during the hearing that there was no order in the context of the divorce case assigning ownership of the weapons to Tristan Mellencamp. (T at 6).

The district court in the case at bar was well within its discretion to refuse to recognize Mellencamp's ownership claim in the weapons without evidence of a divorce

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<sup>2</sup> Even under the Gero test, however, it would shock the conscience to return firearms to someone who was convicted of a violent murder and multiple serious assaults. See 152 N.H. at 386. Here, convicted murderer is requesting the return of nearly 100 weapons plus ammunition, including multiple handguns and a military assault rifle. (State's Br. Add. at 19) Such a request to return these weapons would run afoul of the second prong of the Gero test.

decree and assignment of interest in the weapons to her. “Marital property” is an inchoate right that provides a spouse no legal interest in the property in the absence of a divorce decree assigning the property rights to one of the spouses. Cf. Seifried v. Seifried, 726 N.Y.S.2d 837, 839 (N.Y. Sup. Ct. 2001) (“Equitable distribution rights under New York law vest only upon the rendering of a judgment awarding distribution of marital property. . . . There are no vested present or contingent property rights or interests, legal or equitable, in such property solely because it may be categorized as marital property.”). Thus, several courts in other jurisdictions recognize that a spouse may not claim property that is subject to forfeiture as “marital property” in the absence of a court decree or some other resolution in the divorce proceedings. See generally United States v. Totaro, 345 F.3d 989, 997-98 (8th Cir. 2003) (citing numerous cases rejecting a spouse’s claim of ownership in property that is subject to forfeiture on the basis that the property at issue was “marital property”).

The defendant in the case at bar acknowledged that the divorce decree made no mention of the assignment of ownership interest in the weapons. (Def. Br. App. at 18). The defendant did not proffer that the weapons were purchased by Mellencamp or were otherwise owned by her independent of the “marital property” claim. Thus, in the absence of such an order in the divorce case, Mellencamp had no ownership interest in the weapons to assert. It is also clear from the record that there was no assignment of the weapons to Mellencamp before the defendant’s felony convictions. Since the weapons were owned by him at the time he was convicted of violent felonies, the weapons automatically became contraband because he could no longer own, possess or control

them. See RSA 159:3. Thus, there was no ability to amend the divorce decree to assign ownership of the weapons to Mellencamp after the defendant's convictions because it would be a crime for him to own or control the weapons by assigning his interest to her.

Moreover, the court indicated it had doubt about the validity of Mellencamp's claim of ownership in light of the defendant's earlier attempt to transfer the weapons to his father. (NOA at 6). During that first attempt to "sell" the weapons to his father, the defendant did not even suggest that his ex-wife was the rightful owner of the weapons. (T at 3-4). In fact, in the "bill of sale" the defendant asserted: "I am the lawful owner of the said goods and chattels; that they are free from all encumbrances, that I have good right to sell the same as aforesaid; and that I will warrant and defend the same against the lawful claims and demands of all persons." State's Br. Add. at 19 (emphasis added). In light of these circumstances the district court properly rejected the defendant's claim that the weapons belonged to his ex-wife as marital property.

**CONCLUSION**

For the foregoing reasons, the State of New Hampshire respectfully requests that this Honorable Court affirm the decision of the Rochester District Court.

The State waives oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

Kelly A. Ayotte  
Attorney General

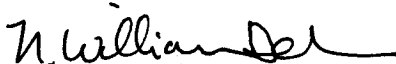


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March 29, 2007

I hereby certify that two copies of the foregoing were mailed this day, postage prepaid, to Chad Evans, *pro se*.



---

N. William Delker

PNO \_\_\_\_\_

# The State of New Hampshire

JUDICIAL BRANCH  
SEP 21 2005

STRAFFORD County

Rachel Antist Court  
05-CV-00177 Case/Docket No.

STATE (Petitioner) v. CHAD EVANS (Respondent)

## MOTION AND AFFIDAVIT FOR RETURN OF FIREARMS

NOW COMES the Respondent, CHAD EVANS, and respectfully represents and requests the following:

1. Pursuant to a Domestic Violence/Stalking Protective Order, or violation of a 169-C Stay Away Protective Order, my firearm(s) and/or ammunition was/were relinquished to:

- RACINESTER Police Department
- State Police Troop/Unit \_\_\_\_\_
- Fish & Game
- \_\_\_\_\_ County Sheriff's Department

2. The Order has expired or will expire on \_\_\_\_\_ and I would like return of my firearm(s) and ammunition.

3. I have no other outstanding civil protection orders issued against me, nor bail orders, and I have not been convicted of any misdemeanor or felony offenses in any state or federal court which would make it unlawful for me to possess any firearm pursuant to the Gun Control Act of 1968, as amended, nor am I under any other legal status that would render my possession of a firearm illegal.

4. My date of birth is March 31 1990 and I was born in the State of Vermont.

5. My Social Security Number is 008 - 30 - 3228.

6. My current address and telephone number are: 603 352 6329  
71 Sullivan St Keene, N.H. 03431

7. Race:  Caucasian  Black  Other

8. Physical Description:

- a. Eye Color Hazel
- b. Hair Color brown
- c. Height 5 (feet) 5 (Inches)
- d. Weight 220 (pounds)

9. I request a search of all pertinent records by the New Hampshire Department of Safety. YRS

10. I request a hearing on my motion. YEO

Date: 9-15-05

Chad Evans  
Signature of Respondent

### ACKNOWLEDGMENT

STATE OF NEW HAMPSHIRE  
Cheshire COUNTY

Personally appeared the above named Chad Evans and made oath that the statements contained in the Motion above are true and correct to the best of his/her knowledge and belief.

Date: 9-15-05

Kathy P. Frank  
Justice of the Peace / Notary Public 10-6-09

### NOTICE OF HEARING

You are hereby notified that a hearing is scheduled for 10/12/05 (date) at 10-30 a.m./p.m. at the above court. The Respondent shall appear or the Motion may be denied. The Petitioner and law enforcement agency have the right to appear and be heard, but neither is required to attend.

The New Hampshire Department of Safety is requested to undertake a search and report back to the Court prior to the hearing date.

Date: 9-26-05

Kathy  
Clerk / Coordinator

-19-

# Know All Men By These Presents

that I, Chad Evans of Concord, County of Merrimack, State of New Hampshire

in consideration of \$1.00 (One Dollar)  
paid by Chet Evans of 71 Sullivan Street, Keene, County of Cheshire, State of  
New Hampshire

the receipt whereof is hereby acknowledged, do I hereby grant, sell, transfer and deliver unto the said  
Chet Evans the following goods and chattels, named:

1. Case of Ammunition.
2. Box of Weapons, Quantity 75.
3. Display Case of Knives, Quantity 6.
4. Cobra 357 Magnum and Case, Serial #VK3781.
5. Mossberg 12 G Shotgun, Serial # K713054.
6. M14 .308 Rifle, Serial #000887.
7. Remington 03-A3 Rifle, Serial #3584030.
8. Colt AR-15 Rifle, Serial #SP166394
9. GLOCK 10MM, SERIAL #UX857.
10. Ruger .22 Cal Rifle, Serial #234-37228.
12. Stevens .22 Model 35 Rifle, Serial #E455673.

On here and to hold all and singular the said goods and chattels to the said Chet Evans  
and his executors, administrators, and assigns, to their own use and behoof forever.

And I hereby warrant with the vendee that I am the lawful owner of  
the said goods and chattels; that they are free from all incumbrances,

that I have good right to sell the same as aforesaid; and that I will warrant  
and defend the same against the lawful claims and demands of all persons

In Witness Whereof I the said Chad Evans

*Chad Evans*

hereunto set my hand and seal this Two Thousand and Five day of  
Sept in the year ~~two thousand and five~~

Signed and sealed in presence of

*Walter Varney*  
*Janet [Signature]*