

No. 12-17808

In The United States Court of Appeals For The Ninth Circuit

George K. Young Jr.

Plaintiff-Appellant,

v.

State of Hawaii et al.

Defendants-Appellees.

**Appeal from a Judgment of the United States District Court
For the District of Hawaii
Civ. No. 12-00336 HG BMK
The Honorable Judge Helen Gillmor
United States District Court Judge**

Appellant's Reply Brief

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Argument

Every Case Cited Regarding Issues Not Raised In The Trial Court is Inapplicable
To A 12(b) Appeal

Defendants' Contend this Court should not entertain issues not raised in the lower Court relying on the following authorities. *United States v. Carlson*, 900 F.2d 1346, 1349 (9th Cir.1990); *United States v. Elias*, 921 F.2d 870, 874 (9th Cir.1990); *In re Professional Investment Properties of America*, 955 F.2d 623, 625 (9th Cir.), cert. denied 113 S.Ct. 63 (1992). Every case cited deals with Plaintiffs who were afforded an evidentiary hearing. Mr. Young was not afforded one and is on appeal of a 12b(6) motion to dismiss. Mr. Young, while a pro se plaintiff, asked for an injunction of all of HRS 134. *See* ER 5. It is unclear how Defendants' argument is tenable when the lower court addressed many of these issues in the opinion this appeal stems from. Accordingly all issues are proper including those raised in the various notices of supplemental authority.

Mr. Young's Presumption of Waiver Has Never Been Rebutted

Defendants filed a motion to strike to a series of 28(j) letters earlier in this proceeding. Mr. Young plead a presumption of waiver. *See* Mr. Young's Response to Defendants' Motion to Strike at 15. "In a civil matter a rebuttable presumption can be created if a rational relation exists between an act and the presumption." *See*

Mobile, Jackson & Kan. City R.R. v. Turnipseed, 219 U.S. 35, 43 (1910). A rational relation exists between Defendants not promptly responding to the March 21st , 2013 Notice which explicitly states it contains a new argument and Defendants waiving their right to strike those notices. Defendants have never attempted to rebut this presumption. Accordingly, all notices of supplemental authority are proper and the motion to strike must be denied. However, Mr. Young concedes whether this Court accepts the requested affirmative relief of a supplemental brief is a separate issue. Accordingly, Mr. Young will reiterate the relief requested later in this brief.

Defendants Reliance on Guidelines For Security Guards Has No
Relevance

Defendants' rely on guidelines for the issuance of handguns permits for private investigators and security guards to claim there are guidelines for private citizens who are not engaged in these professions. Mr. Young is a retired infantryman (21 years) and currently a Tenrikyo Priest. As such Defendants take the position Mr. Young "is not entitled to due process" as their position is due process is a luxury not the right of every American.

Switchblades and Balisong Knives Are Less Deadly Than Legal Knives

Master Burton Richardson has conducted a study of a variety of blades in order to show there is not even a rational relationship to banning switchblades and balisong knives when other knives are legal. In candor to the Court, this was done per request of Counsel.

I live in Hawaii where there is a ban on switch blades and butterfly (Filipino balisong) knives. Apparently, the reasoning behind these bans is that these types of knives are inherently more dangerous than other legal folding knives due to their rapid, one-hand deployment. I wondered if this distinction was accurate, so I tested the speed of presentation of five different blades: a Benchmade switch blade, a butterfly knife, a Spyderco Delica 4, a Cold Steel “Espada”, and a common pocket knife. The switch blade was legally owned by a military officer. The butterfly knife was a legal, dull-edged training version, while the others are legal to carry in Hawaii.

To deploy a folding knife, one must first pull the blade from a pocket or carrying system before unfolding the knife. The old argument is that a switch blade or balisong is too dangerous to be entrusted to the public because a citizen can pull and quickly open the blade with one hand. But do these two actually have a decisive advantage on speed of deployment? To test the speeds, I started with the knife in my pocket and my hand grasping the knife in a manner conducive to opening. The person timing gave the command “draw” while pushing the start button on the stopwatch. The timer hit stop after the blade clicked into the locked position. In reality, a little extra time would be required to achieve a functional grip, but just timing until the locked position was empirically more accurate since the timer would have to visually judge when a proper grip was achieved. Please note that there is certainly some variance due to the impossibility of having the exact same draw stroke each time, but that variance is minimal. I did only four draws for each knife as I found that the difference per draw was very slight. Also, I did not go at absolute full speed. I did smooth, efficient draw.

Here are the draw times for each knife, starting in the pocket with my hand on the knife and ending when the blade was open and locked in place:

Switch Blade	0.9, 1.0, 0.9, 1.0	Average = 0.95 seconds
Butterfly knife	1.3, 1.4, 1.2, 1.5	Average = 1.35 seconds
Spyderco	0.9, 0.9, 1.0, 0.9	Average = 0.925 seconds
Cold Steel "Espada"	0.5, 0.7, 0.6, 0.6	Average = 0.6 seconds
Pocket Knife	1.0, 0.9, 1.0, 0.9	Average = 0.95

The Cold Steel "Espada" was by far the fastest. This was due to the "thumb plate" that can catch on the pocket hem so that the blade opens as the knife is pulled. Very quick and legal.

The Spyderco was second fastest. It has a ring at the top of the blade which is grasped between the thumb and forefinger. As soon as the knife clears the pocket a snap of the wrist locks open the blade. Very fast and legal.

Interesting to me is that the switch blade and the pocket knife tied for third. The pocket knife I used did have a stud in the blade so that one can push the blade open with thumb as the blade clears. The switch blade needs to be taken all the way out of the pocket before depressing the button to pop open the knife.

Slowest by far is the much-maligned butterfly knife. I started with the lock open and pinched between my thumb and forefinger for the quickest type of butterfly knife draw. I drew the knife, snapped down and up, the handle swung out and upward into my hand so I ended with a reverse grip. This is quicker than the more common 3-count opening that most people use. For fun, I timed the 3-count opening and got an average of 1.45 seconds.

So why are butterfly knives and switch blades illegal? It clearly doesn't have anything to do with superior quickness of deployment. I suppose the lawmakers watched a few too many action flicks where the switch blades and butterfly knives were in the hands of the bad guys.

Burton Richardson

<https://jkdunlimited.com/articles/by-burton-richardson/knife-drawing-speed-comparison-switch-blade-butterfly-knife-spyderco-cold-steel-common-pocket-knife/> (last visited 5/24/2013)

As shown in the Opening Brief, knives are protected arms. There is absolutely no reason why these types of protected arms are banned.

Defendants Have Given No Reason For The Restrictions At Issue

As some form of heightened scrutiny applies to every statute challenged, the burden is on the Defendants to provide a reason for these restrictions. They were given ample time to prepare their Answering Brief. They declined to give one. By implication, they acknowledge these statutes are unconstitutional.

H.R.S. 134 Prohibits Transport Where There is No Government Interest

The H.R.S. bans the transport of unloaded firearms and ammunition to locations Defendants do not have an important governmental interest in prohibiting transport to. H.R.S. §§ 134-23,134-24,134-25,134-27 regulate the transport of firearms and ammunition and individually fail any heightened scrutiny for the same reason. Other than the 6 enumerated locations, transport is prohibited. Mr. Young faces criminal prosecution for transporting a firearm or ammunition to a friend's house to show a firearm or ammunition; a Mason lodge or other

unorganized area to display or show. These are but a few of the many legitimate places excluded by Hawaii law. Mr. Young faces criminal prosecution if he as much as transports an unloaded firearm or ammunition to a friend's house to show it to him.

H.R.S. § 134-8 Is a Complete Ban on Types of Protected Classes of Arms

a. Hawaii's Ban the Ownership of Short Barrel Rifles Fails Strict
Scrutiny

Short barrel rifles are a type of rifle. The only concern is they are more concealable than a standard rifle. However, handguns are much easier to conceal and are not banned. Their shorter barrel actually adds to public safety and assists self-defense. A shorter barrel decreases the velocity of a bullet as it leaves the rifle. This means short barrel rifles are less likely to penetrate a wall and injure an innocent bystander. They also are better for self-defense in the home because their short barrel makes them better for navigating the tight confines of a house. Their complete ban fails strict scrutiny.

b. Hawaii's Ban on Short Barrel Shotguns Fails Strict Scrutiny.

For many of the same reasons that short barrel rifles are better for self-defense in the home so are shotguns. Their shorter barrel makes the buckshot

disperse quicker. This makes it easier to hit a home invader as the buckshot has a wider cone of dispersion. Vice President Biden has recently endorsed shotguns in general for their tactical superiority over rifles at close range. Short Barrel shotguns offer even greater dispersion and must be protected as the Vice President by implication recommends. *See*

<http://www.usatoday.com/story/news/politics/2013/02/19/biden-double-barrel-shotgun/1931223/>. *United States v. Miller* 307 U.S. 174 (1939) holds “in the

absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment.” *Id.* at 177.

Mr. Young submitted *Army Law*, October 1997 at 16 "Joint Service Combat Shotgun Program", as evidence short barrel shotguns have been weapons of the militia since the Revolutionary War and continue to be used to this day. As evidence has been presented *Miller* is not binding on this Court. Hawaii's complete ban on these types of shotguns must survive strict scrutiny and there is no compelling reason to ban their ownership.

c. Hawaii's complete ban on "assault pistols" fails strict scrutiny.

Hawaii bans the ownership of a type of handgun it calls assault pistols. This ban appears to be a poor copy of the 1994 Assault Weapons Ban applied to handguns. The six attributes which H.R.S. 134-1 uses to classify an assault pistol have little bearing on lethality when applied to handguns. Some are nonsensical such as the muzzle shroud attribute which purports to allow a person to place his hands on the shroud while firing. Handguns are held by their grip. Others such as an extended barrel similarly make no sense. The advantage of a handgun is concealability. Rifles are much more effective due to longer barrels. Why would an extended handgun barrel be grounds for a ban when rifles are legal?

a. The silencer attribute of an "assault" pistol adds to the public safety.

One of the attributes which HRS 134-1 uses to define an assault pistol is a threaded barrel capable of accepting a ... silencer; Suppressors are typically not designed for combat. They do not actually make a handgun silent when it fires. They simply suppress noise to levels that prevent hearing loss during firearms training.

Silencers ("Suppressors") "is any device for silencing, muffling, or diminishing the report of a portable firearm". *See* 18 U.S.C. § 921(a)(24). Hearing loss is a risk when training at a range due to the noise emitted by gunfire. *See City*

and County of Denver v. Moore, 504 P. 2d 367, 369 - Colo: Court of Appeals, 2nd Div. (1972) (“loss of hearing is the result of repeated monthly exposures at the firing range ... acoustic trauma which caused the injury was a result of exposure at the firing range once a month”). Training with a firearm is part of the Second Amendment right. “The right to maintain proficiency in firearm use [is] an important corollary to the meaningful exercise of the core right to possess firearms for self-defense.” *See Ezell v. City of Chicago*, 651 F. 3d 684, 708- Court of Appeals, 7th Cir. (2011). Suppressors aid individuals in training with firearms as they reduce the noise emitted by firearms when discharged. They are more effective than hearing protection because they stop the noise from leaving the gun so even people that inadvertently forget to wear hearing protection are saved from hearing loss. Accordingly, they are a group of items that provide a method of utility to handguns. By the terminology Mr. Young has adopted for purposes of briefing, an independent class of associational arms called handgun suppressor exist which are protected by the Second Amendment. As suppressors are not vital for Second Amendment use, intermediate scrutiny would apply where strict scrutiny would apply for a handgun. There is no reason for a handgun to be banned based on their ability to attach a suppressor. A forward handgrip also does nothing for a handgun’s lethality. Centerfire technology is the industry standard. Rimfire technology is outdated. H.R.S §134-1 is a poorly crafted and outdated statute.

Defendants were given ample time to respond to these contentions in their Answering Brief and failed to do so. Accordingly, Hawaii's ban on so called "assault pistols" must be struck down.

d. HRS § 134-8 Complete Ban on Handgun Magazines Over 10 Rounds

Handgun magazines are an independent class of associated arms which derive protection from handguns. Their complete ban must survive strict or near strict scrutiny. There is no compelling reason that handgun magazines should be banned when rifle magazines are not. Furthermore, even if this Court finds this ban constitutional, magazines which can be used in rifles and handguns should not be affected by this law. There are AR-15 magazines which can be used in both handguns and rifles. If the Hawaii legislature wants to restrict rifle magazines then it should do so via enacting a law which explicitly states it is doing so.

Defendants have been afforded an opportunity to respond to these arguments and the arguments raised in the Opening Brief. They have failed to provide a government interest in enforcing any of these laws. Accordingly, these laws must be struck down. Mr. Young takes the remainder of this brief to clarify some popular misconceptions about weapons and ammunition for the edification of this Court. It has become readily apparent there is a certain amount of basic math,

history and military science that needs to be inserted into this national conversation on our natural right to self-defense.

THE ESSENTIAL SMALL ARMS

A few points must be addressed to clarify erroneous misconceptions of arms.

First: The term “assault weapon”, is a recently invented word by the anti-gun community being incorrectly applied to small arms. The correct terminology is, according to Department of Homeland Security, a “personal defense weapon”, such as an M16, with semi-auto and full automatic selector switch, with the standard 30-rounds magazine. It is further identified as a personal offensive and defensive “small arm”. This means it does not require a crew of two or more persons to operate, such as a M224 M60 mortar (M60 Bulldog), 90mm recoilless rifle (replaces the M20 3.5 Bazooka), M60 7.62 machine gun, .50 caliber machine gun, etc. In other words, it is not a crew served weapon. An “assault weapon” in military terminology, is a fully automatic individual weapon, be it rifle, machine gun, or submachine gun, deployed in a manner to provide the capability to engage in protective, directional cover fire to maneuver offensively towards or defend against a hostile force.

Second: If an AR-15 in .223 caliber (civilian version of the military M16, 5.56 NATO cal.) semi-automatic, rifle is initially conceptualized, manufactured, boxed,

sold and distributed with a 20-round or 30-round magazine, with a bayonet stud, it is called the industry standard. The arm itself is also fully compliant with the Miller opinion of "...contributing to the efficiency of the militia." It is those after-market magazines that are capable of holding and exceeding more than the 30-rounds that reflects the qualifying terminology of a "high capacity magazine." Such as a 100-round coil drum magazine, in 5.56 NATO or .223 caliber. Both class of ammunition are capable of being fired from the same weapon, but they are not identical rounds, just similar casing diameter.

Third: Accessories and cosmetics of a rifle, shotgun, handgun or knife do not alter the ballistics of the ammunition or the fundamental function and purpose. A pistol grip mounted on a rifle aids in stabilizing and controlling rise of the rifle after firing a round and assists in a more rapid target realignment and sight acquisition. A collapsible folding shoulder stock of a rifle is convenient in tight environments such as buildings or tunnels, as it makes for a shorter rifle and maneuverability is better managed during an immediate engagement. A recoiling stock on a rifle helps to absorb the continuous recoil shock upon firing the rifle. A flash suppressor accomplish two functions, (1) it suppresses flash from the barrel of the rifle when fired, so that the exiting gases and flash is diverted sideways of the suppressors. (2) It aids in the control of lift of the rifle's barrel when firing in rapidly. This assists in faster target-sight reacquisition. The rifle, when colored

black or camouflaged (forest green or desert brown) simply eliminates reflections of light and blends with the terrain. The example quoted does not make a rifle an “assault weapon”, however it fully qualifies its status as being *Miller* compliant. Camouflaging also enhances a hunter’s ability to carefully stalk game at a distance, such as deer, elk, etc., undetected. Therefore a dual purpose is served.

RIFLE CLASS: There are considerable differences between a rifle and shotgun, although both are hand held, shoulder fired and are similar in appearances. The rifle is identified by the rifling grooves which are cut and located inside of the barrel. The rifling grooves help to generate the revolutions per minute (rpm) of the conical shape projectile (bullet) that departs the barrel and enhances its accuracy, velocity and impact upon a specific designated target. The general characteristics of a rifle are (a) Grooved Bore (b) Single Projectile (c) Long Range (d) Front and Rear Sights. A rifle can be loaded either through break action through the breach, such as a double barreled shotgun; single round at a time by means of a manually operated bolt action; and/or via a spring actuated magazine capable of holding multiple rounds and dispensing and chambering one at a time. Rifles are produced in long barrel and short barrel form. The U.S. military is presently transitioning from the industry standard M16 5.56 x NATO, 20 inch barrel and approximately 39.5 in (1,000 mm) to the preferred M4 carbine. The M4 carbine assault rifle is a family of firearms tracing its lineage back to earlier carbine versions of the M16

rifle, all based on the original AR-15 rifle designed by Eugene Stoner and made by ArmaLite. The M4 is a shorter and lighter variant of the M16A2 assault rifle, with 80% parts commonality.¹

The M4 carbine is a gas-operated, magazine-fed, selective fire, shoulder-fired weapon with a telescoping stock. A shortened variant of the M16A2 rifle, the M4 has a 14.5 in (370 mm) barrel, allowing its user to better operate in close quarters combat or engagement. The M4 has selective fire options including semi-automatic and three-round burst (like the M16A2 and M16A4), while the M4A1 has the capability to fire fully automatic instead of three-round burst (like the M16A1 and M16A3). The carbine is also capable of mounting an M203 grenade launcher (the M203A1 with a 9-inch barrel as opposed to the standard 12-inch barrel of the M203 used on the M16 series) as well as its successor, the M320 grenade launcher.

The M4 carbine is heavily used by the U.S. military. It is eventually going to replace the M16 rifle for most combat units in the United States Army.² The winner of the Individual Carbine competition might supplement the M4 carbine in

¹ “The Design & Development of the M-4 Carbine” (http://www.specialoperations.com/Weapons/Features/M4/Page_Two.htm)

² “Small Arms-Individual Weapons” (<http://www.fas.org/man/dod-101/sys/land/wsh2011/290.pdf>).

U.S. Army service. This is for the US Army only while all other services will continue to use the M4 carbine and M16 rifles.³

Throughout history there has always been a long barrel and short barrel rifle. A carbine, from the French *carabine*, is a long arm similar to-but shorter than ---a rifle or musket. Many carbines are shortened versions of full size rifles, firing the same ammunition at a lower rotational velocity due to a shorter barrel length.

The small size and light weight of carbine makes them easier to handle. They are typically issued to high mobility troops such as special operations soldiers and paratroopers, as well as to mounted, supply, or other non-infantry personnel whose roles do not require full-sized rifles. The civilian version for the “unorganized” militia and all other citizens of these United States of America is only semiautomatic. The recommended caliber of firearm should be capable of utilizing dual purpose ammunition. For rifles it would normally be in .223 cal. (5.56 mm NATO) and .308 cal. (7.62 mm NATO). These calibers of ammunition are suitable for the dual purpose of (1) hunting game, sport, target shooting, individual Self-defense and (2) when called upon in defense against a foreign hostile invasion of U.S. soil. The caliber of ammunition for the militia should be the same as the

³ “Project Manager Soldier Weapons Briefing for NDIA”
(<http://www.dtic.mil/ndia/2010armament/TuesdayLandmarkBTamilio.pdf>)

active military, and therefore reduces the need for a variety of ammunition sizes. This will facilitate operational readiness during times of emergencies, among the active U.S. military, the “organized militia” (Marine Corps, National Guard, Army, Air, and Naval Reserves) and the “unorganized militia”.

Size of ammunition for the “unorganized” militia is limited to a maximum of .50 caliber or a bullet not larger than one-half inch in diameter. A round over one-half inch in diameter the round is classified as a destructive device. *See* 26 USC 5845 – Definitions (f) Destructive Devices)

SHOTGUN CLASS: A shotgun is similar in length and is also shoulder fired as is a rifle. There are dramatic differences in their function. A shotgun (a) is Smooth Bore (b) Fires Multiple Projectiles with a single pull of the trigger (c) is Short Range (75 yards to 100 yards). Rifles are designed for accuracy to hit a precise point. Shotguns are designed to shoot a spread of shot at moving targets.

Shotguns are manufactured, distributed and sold in both short and long barrel models. A “short barrel” shotgun is defined to be a shotgun whose barrel is less than 18 inches in length.⁴ First to address a rude misconception, the terminology “sawed-off” shotgun does not necessarily mean to literally saw the end of the barrel of a shotgun to shorten it. It is improper vernacular to describe a short barrel

⁴ 26 U.S.C. 5845 – “Definitions”. National Firearms Act, Title II, June 26, 1934.

shotgun as “sawed off”. Therefore, it brings to the forefront the question of whether or not the “short barrel” shotgun (sawed-off) is privileged to Second Amendment protection.

We draw ourselves to the decision in United States v. Miller, 307 U.S. 174 (1939). Jack Miller and Frank Layton were accused of transporting a double barrel, a Stevens Shotgun, with a barrel length of less than 18 inches, without registering it and paying a \$200.00 tax stamp, a violation of the National Firearms Act of 1934. Jack Miller, Frank Layton and their representative attorney-at-law did not appear in court for the hearing. The lower trial court agreed with defendants’ argument that the NFA violated their Second Amendment right to keep and bear arms, and ultimately dismissed the government’s case. The government appealed, the Supreme Court reversed the lower court’s decision on the basis it is not within the judicial notice that a sawed-off shotgun is a militia-styled weapon privileged to Second Amendment protection. The unanimous Court held:

“In the absence of any evidence tending to show that a possession or use of “a shotgun having a barrel of less than eighteen inches in length” at this time has some reasonable relationship to the preservation of the efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that

this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.” Id.

The Supreme Court could have cited section VI of the act which states: “*VI. And be if further enacted. That two years after the commencement of this act, shall be allowed for providing arms and accoutrements herein directed; but in the meantime, the militia shall appear at musters with, and keep by them, the best arms and accoutrements they can get.*”

Therefore the best arms and accoutrements the militia can get included any and all types of firearms. This is consistent with earlier Militia acts such as the Virginia Militia Act of 1757. “*And if any soldier shall appear at any muster not armed, and without ammunition according to the directions of this act, it shall and may be lawful for the captain of the company to which such soldier shall belong to examine such soldier, upon oath, whether he hath any, and what arms and ammunition he really hath of his own property, and if on such examination it shall appear that such soldier hath any arms or ammunition of his own property, and hath not brought the same, or so much thereof as this act requires, to such muster, he shall be liable to the penalties inflicted by this act altho’ he hath not been inlisted twelve months.*”⁵

⁵ 7 Hening’s Statutes at Large, 1757, pp. 93-116. (1809)

HISTORICAL: It is important to understand correct firearm terminology and history. Since the founding of Jamestown in 1607, there were three major classes of shoulder fired arms known by many names but can be listed generally as Musket, Fowler, and Rifle. A musket is a smoothbore firearm primarily intended to be fired from the shoulder and contains a bayonet lug instead of a front sight. A musket generally discharges a single projectile called a musket ball. A Fowler is also a smoothbore firearm designed to be fired from the shoulder. A fowling piece however usually discharges multiple projectiles called shot, and is the reason that modern day fowlers are called shotguns. Both the musket and the fowler can shoot both single and multiple projectiles. A rifle is a firearm with a rifled bore designed to be fired from the shoulder and shoot a single projectile. Within these three major classes are subclasses such as a carbine or short musket/rifle and a Blunderbuss (Dutch for Thunder-gun) which typically is a short fowling piece with a large flared muzzle. The flared muzzle of the Blunderbuss main purpose is to aid in loading by acting as a funnel and is especially suited for loading on an unstable or moving surface. Blunderbusses were also called coach guns or boarding guns. A modern day “Sawed-off” shotgun is nothing more than a short barreled shotgun and in fact is legally defined by the length of the barrel not whether it was actually sawed off to be made short barreled. A Blunderbuss, the predecessor to the shotgun (due to the invention of shotshells) is a “Sawed-Off” shotgun. This is

because it has a barrel length of less than 18 inches or an overall length of less than 26 inches.

A detailed account of shotguns in the military and their origins to the blunderbuss has been detailed by the Army Judge Advocate General. “The Military history of the shotgun dates to the sixteenth century, when the blunderbuss was invented... a close range anti-personnel weapon from the outset.”⁶ Colonial Blunderbusses were heavily used by the naval forces, naval militia and privateers of the colony as they made excellent boarding guns. The following advertisements for sale of Blunderbusses in the Colonial Virginia Gazette is historical evidence of their freely being bought and sold and legal to own:

Preeson Bowdoin: 2 Carriage Guns and 2 swivels, 2 blunderbusses, with muskets and cutlasses. – August 1779.

St. George Tucker: Several Small Arms, Pistols, Blunder Busses, Powder etc. – September 1779.

Captain La Porte’s Store Williamsburg: Blunderbusses, Pistols with swivels, muskets, Cutlasses. – February 1780.

⁶ W. Hays Parks, “Joint Service Combat Shotgun Program. *The Army Lawyer* 17 (Oct 1997).

“By ca. 1673 the blunderbuss was recognized in English military circles as “very fit for doing great execution in a crowd, to make good narrow passage, door of a house, stair-case; or in boarding a ship” ...Admirably suited to its varied tasks, the blunderbuss in its time can be compared to the legendary sawed-off shotgun.”
(M.L. Brown, “Firearms in Colonial America 1492-1792, 143 (1980).

The military use of the blunderbuss was advised by the great Virginia General George Washington. In a letter to the Board of War he wrote on April 4, 1779: *“It appears to me that Light Blunderbusses on account of the quantity of shot they will carry, will be preferable to Carbines, for Dragoons, as the Carbines only carry a single ball especially in case of close action.”* In a letter to Major General Robert Howe, General Washington wrote on June 11, 1781: *“Dear Sir: I am this moment favored with yours of the same date, together with the Report of the Board of Officers, appointed to inspect Provisions. If there are any Blunderbusses and Swivels, I have no objection that Captain Pray should be furnished with them, ‘tho I think, that vigilance and attention will be his surest protection against the Enemy.”* In the early 1700s the blunderbuss started to become popular as a weapon for close quarters because of its ability to deliver a blast of shot or buck and ball. Numerous armies and navies produced various versions of this item all the way into the 1840s. However its zenith seems to have

been in the mid-1700s when it was used both by soldiers, sailors, and civilians as a means of defense in close quarters.

The Blunderbuss and short barreled shotguns have been utilized in all wars, up to and including the modern day wars in Iraq and Afghanistan. The modern day version of a short barrel shotgun is disguised the shotgun variant of the 40 mm grenade cartridge launcher in the military M203, M79, M320 and M32 MGL. The M203 has a length of 15 inches, a barrel length of 12 inches and fires the substitute M576 (Buckshot Round) which contains twenty 24-grain metal pellets.⁷ The XM576/XM576E1 was standardized to become the M576. Normal dispersion pattern of the M576 will put 13 of 20 pellets in a 1.5 meter circle at 40 meters.⁸ The remaining 7 pellets could be anywhere. Another test variant, the XM576E2, which had twenty seven, 24-grain metal pellets without a sabot within the shot cup was deemed to spread to quickly for effective use. Both types had a muzzle velocity of roughly 880 ft/s (268 m/s). The M576 was designed to give the soldier carrying a grenade launcher a powerful cartridge for close quarters combat such as found in clearing buildings, bunkers, and trenches, as well as thick vegetation.

⁷ US Army Technical Manual TM 43-0001-28 Ammunition Data Sheets page 6-33.

http://www.inetres.com/gp/military/infantry/grenade/40mm_amm.html

⁸ <http://www.mil-spec-industries.com/images/4/images/M576E1.pdf>

It is absolutely self-evident that based upon the historical records and actual military documentation of the shotgun's performance and necessity, that in a class by itself, both the short barrel and long barrel shotguns are qualified for protection under the Second Amendment. It is a simple foregone conclusion that a person would not attempt to shoot a fast, low flying bird, at 75 yards, with a rifle as it would likewise be illogical to attempt to shoot a deer at 250 yards with a 12 gauge shotgun. *Annex A, *Joint Service Combat Shotgun Program*, W. Hays Parks, Special Assistant for Law of War Matters, Office of the Judge Advocate General, U.S. Army, Washington, D.C.

On Ammunition; The formula for PENETRATION is (PEN = Weight of Bullet X Impact velocity/diameter of bullet = depth of penetration) For example: There is significant penetration differences between a 185 gr. (bullet) .45 cal. at 930 fps and a 230 gr. (bullet) .45d cal. traveling at 820 fps. Composition of the bullet is the next consideration to penetration. The usage of a full metal jacketed bullet; a hollow point bullet; or a sabot tipped bullet all affects penetration.

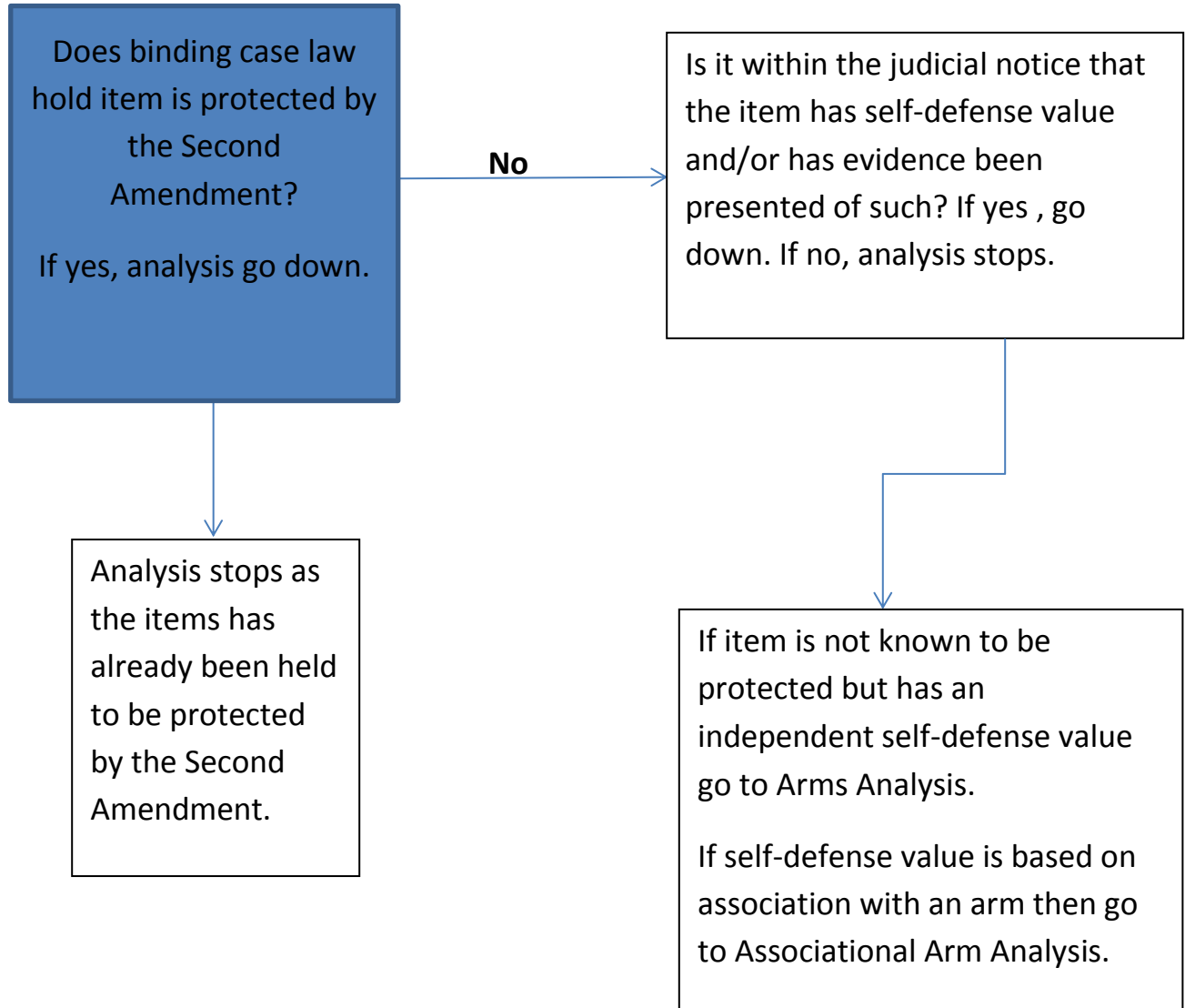
(1) On the subject of Teflon. The "Teflon Myth" is not true, and does not increase penetration. In an attempt to reduce barrel wear bullets were experimentally coated with a protective layer of Teflon. The inventors found

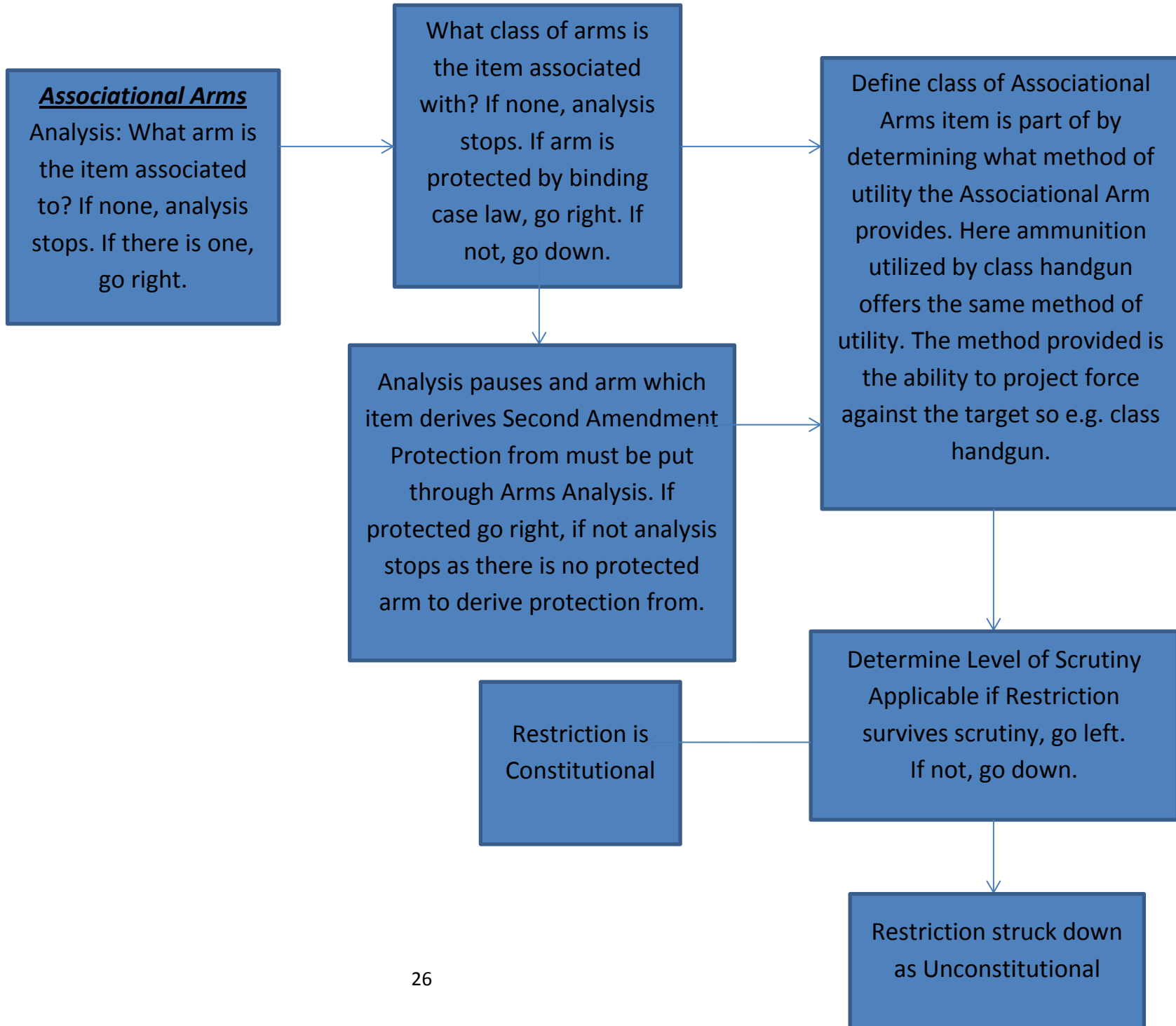
Teflon helps to grip surfaces. This means the addition of Teflon helped to prevent bullet deflection off vehicle windshields.

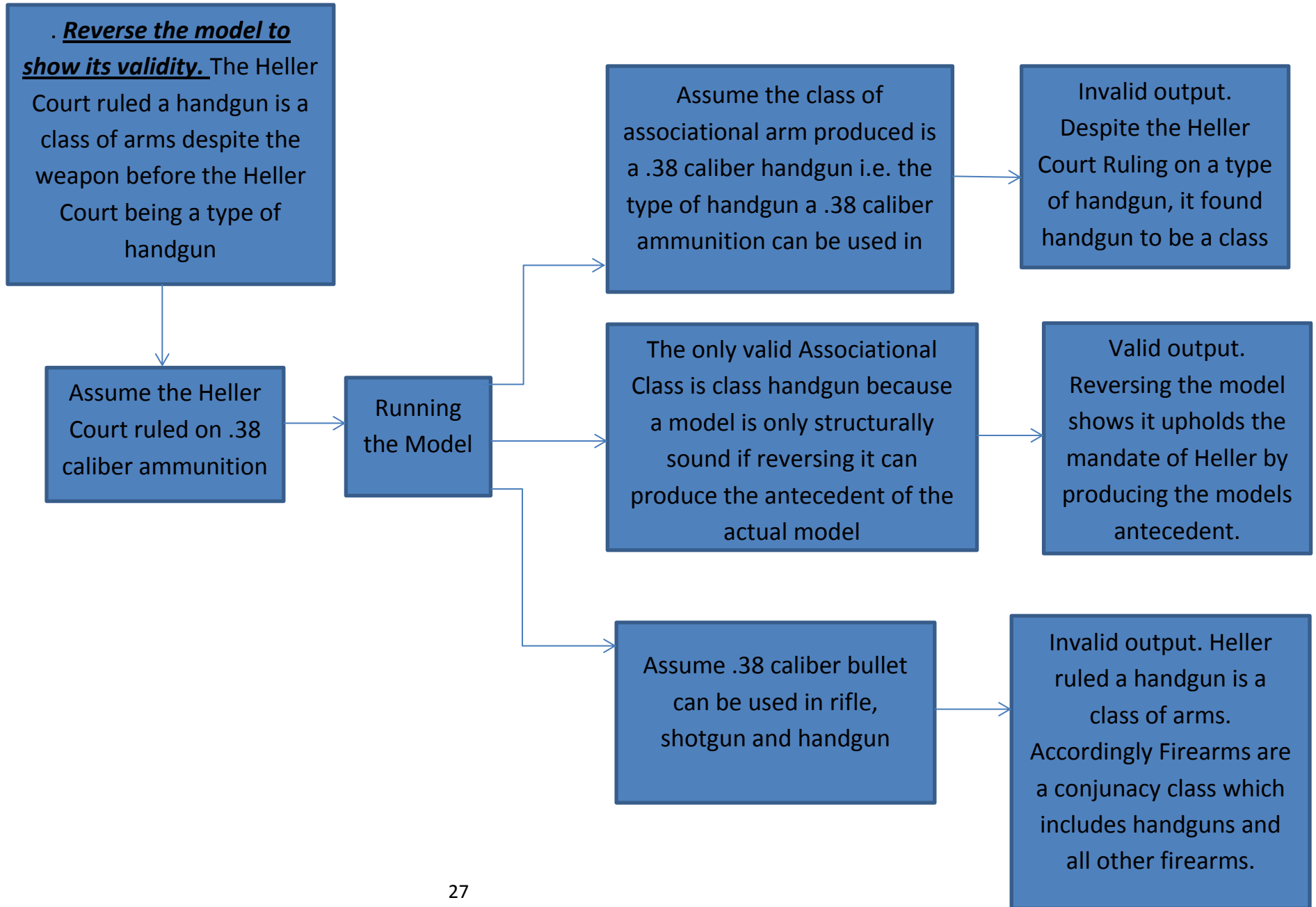
Teflon coating is not part of bullet composition. It merely aids in preventing deflection or ricochets off of angled vehicle windshields and vehicle doors.

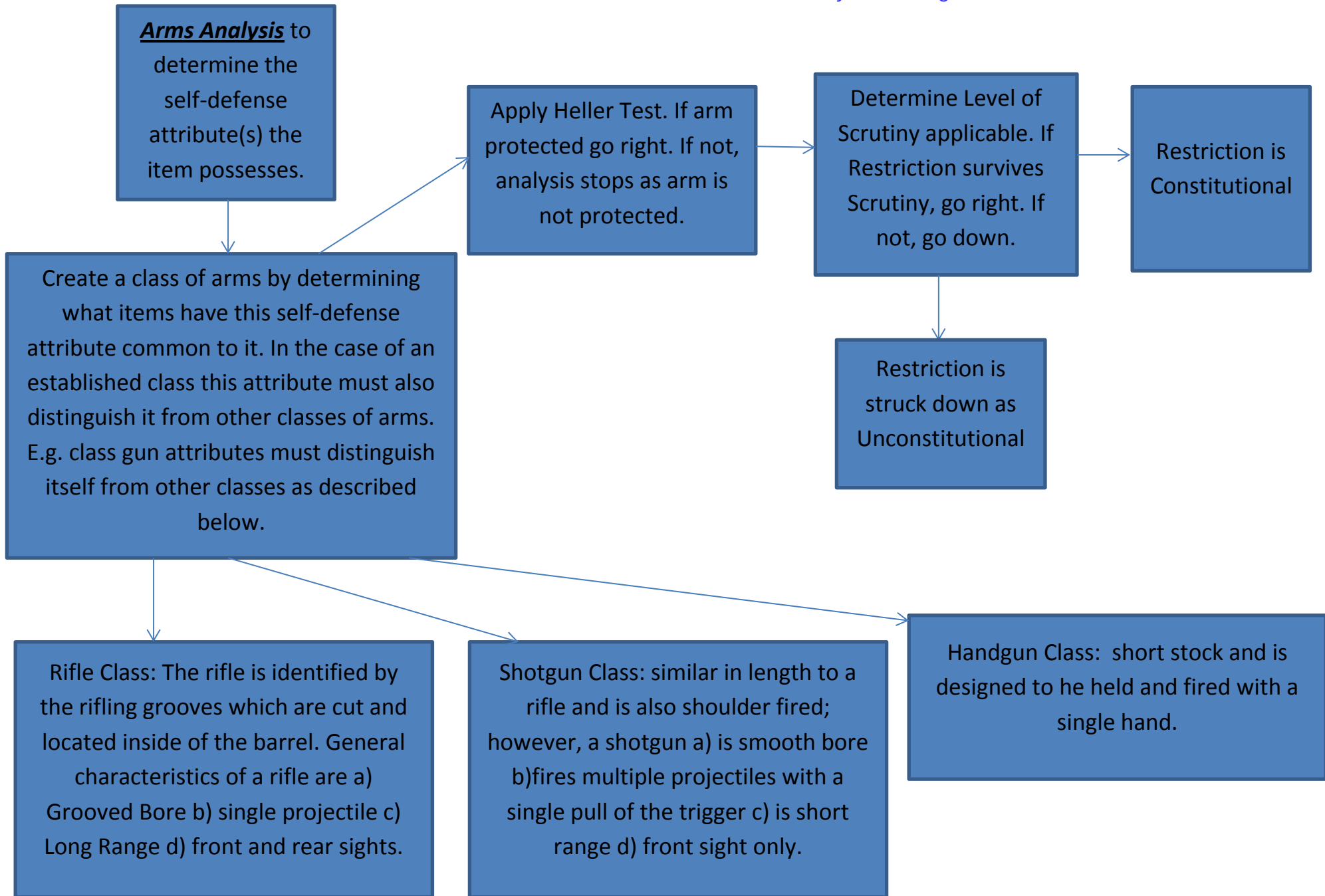
Normal bullets are more likely to deflect off angled windshields. Teflon coated bullets have more grip on angled surfaces which reduces ricochets. *See* “The Facts on Teflon Bullets” The American Rifleman February 1989. In practical terms this means that an armed citizen dealing with an attacker in a vehicle is less likely to injure an innocent bystander. A true armor piercing round is defined under federal law (unlike Hawaii law) as “a projectile or projectile core which may be used in a handgun and which is constructed entirely (excluding the presence of traces of other substances) from one or a combination of tungsten alloys, steel, iron, brass, bronze, beryllium copper, or depleted uranium;.” 18 USC § 921(17) (a). Mr. Young hopes that this treatise was both educational and aids this Court’s decision making in the future. Mr. Young concludes brief with his Analytical Model in Flow Chart Form. This flowchart proves that ammunition must derive its protection from a class of protected arm.

An Analytical Model For Defining Class in Flow Chart Form









Conclusion

Three times a good man sought justice in the United District Court of Hawaii. Three times he was denied. George K. Young Jr. has never even been given his day in Court which is the right of every American. Ultimately, all that is being asked for is that this Court to do what's right. In the interest of justice and judicial economy, please adopt the analytical model and grant Mr. Young a directed verdict on all the issues raised in this appeal.

Respectfully Submitted,

/s/ Alan Beck

Alan Alexander Beck
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS,

AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32-3(3) because this brief contains 6799 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionately spaced typeface using Microsoft Word 2007 in 14 point Times New Roman font.

/s/ Alan Beck

Alan Beck

Counsel for Appellant

CERTIFICATE OF SERVICE

On this, the 1st day of June, 2013, I served the foregoing Brief by electronically filing it with the Court's CM/ECF system, which generated a Notice of Filing and effects service upon counsel for all parties in the case.

I declare under penalty of perjury that the foregoing is true and correct.

/s/Alan Beck

Alan Beck