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SECOND AMENDMENT UPDATE

Spring 2009

Second Amendment Litigation Survey – Nationwide Update

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2008 was a landmark year for Second Amendment litigation. The U.S. Supreme Court's decision in *District of Columbia v. Heller*, 128 S. Ct. 2783, 171 L.Ed.2d 637 (June 26, 2008), re-wrote the legal landscape of Second Amendment rights in much the same way as the Court's decision in *Roe v. Wade*, 410 U.S. 959, 93 S. Ct. 1409 (1973) re-wrote the arguments regarding a right to privacy more than thirty (30) years ago.

In the one (1) year since *Heller's* publication, there has been a flurry of legal activity. Not surprisingly, criminal defendants have seized upon *Heller* to mount various challenges to both federal and state prosecutions for firearm possession. Thus far, these efforts have been without success. In the civil realm, several cases have been decided at the interim appellate level that clearly outline emerging issues for Second Amendment advocates of all stripes: whether the Second Amendment creates a fundamental right (and the level of judicial scrutiny to be applied to that right); standing to bring Second Amendment claims; incorporation of the Second Amendment to State action via the Fourteenth Amendment; and the practical enforceability of the Firearms Owners Protection Act. The cases that have addressed and decided these issues – for now – are discussed here.

If you have any questions about any cases reported in this Update, or questions concerning Second Amendment Law in general, please contact Brian Stapleton at 170 Hamilton Avenue, Suite 203, White Plains, New York 10601; by phone at (914) 798-5470; or by email at bstapleton@goldbergsegalla.com.

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U.S. SUPREME COURT

District of Columbia v. Heller, 128 S. Ct. 2783, 171 L.Ed.2d 637 (June 26, 2008). A special policeman filed suit against the District of Columbia after it refused his application to register a handgun. D.C. law banned handgun possession, making it a crime to carry an unregistered firearm; prohibiting the registration of firearms; prohibiting the unlicensed carrying of a firearm; authorizing the police chief to issue 1-year licenses; and requiring that residents keep handguns unloaded and disassembled or otherwise bound by a trigger lock. Mr. Heller sought to enjoin enforcement of the registration, licensing and trigger lock requirements.

The District Court dismissed the suit, but the D.C. Circuit reversed. In a 5-4 decision written by Justice Scalia (Justices Stevens, Souter, Ginsburg and Breyer dissenting), the Supreme Court held that the District's ban on handgun possession in the home and its prohibition against rendering any lawful firearm in the home operable for the purposes of immediate self-defense violated the Second Amendment. The Court held that the Second Amendment protected an individual right to possess a firearm unconnected with service in a militia and to use that firearm for traditionally lawful purposes, such as self-defense within the home. The Court determined that the Second Amendment's prefatory clause announced a purpose but did not limit or expand the scope of the operative clause. The operative clause's text and history demonstrated that it connoted an individual right to keep and bear arms, and the Court's reading of the operative clause was consistent with the announced purpose of the prefatory clause. None of the Court's precedents (*U.S. v. Cruikshank*, 92 U.S. 542, 23 L.Ed. 588 (1876); *Presser v. Illinois*, 116 U.S. 252, 29 L.Ed. 615 (1886)) foreclosed its conclusions, and the holding of *U.S. v. Miller*, 307 U.S. 174, 83 L.Ed. 1206 (1939) was read as not limiting the right to bear arms used only *for* militia purposes. Instead, the Second Amendment only limited the types of arms to those used *by* the militia, which the Court interpreted as meaning arms "in common use for lawful purposes." The Court held that the Second Amendment right was not unlimited, and the opinion was not to be taken as casting doubt on certain long-standing prohibitions related to firearms, such as bans on possession of firearms in sensitive places (e.g., on government property or in schools), by the mentally ill, or by felons. Likewise, the opinion did not cast doubt on the laws imposing conditions or qualifications on the commercial sale of arms.

OUTCOME: The Court affirmed the judgment of the Court of Appeals. Assuming respondent was not disqualified from exercising Second Amendment rights, the Court held that the District must permit respondent to register his handgun and must issue him a license to carry it in his home.



FEDERAL COURTS

Maloney v. Cuomo, et al, 554 F.3d 56 (2nd Cir.) (Jan 28, 2009). A martial arts practitioner filed a complaint against New York's Attorney General, Governor, and a district attorney, seeking a declaration that those sections of New York's Penal Law prohibiting the in-home possession of nunchaku were unconstitutional. The State defendants filed a motion to dismiss, and the district attorney moved for judgment on the pleadings. The District Court granted defendants' motions. On appeal, the Second Circuit Court held that the ban on in-home possession of nunchaku did not violate the Second Amendment. It further held that the ban was supported by a rational basis, and thus did not violate the Fourteenth Amendment. Notably, in so holding the Court cited *Presser v. Illinois*, 116 U.S. 252 (1886) to rule that the Second Amendment limits only the legislative efforts of Federal – and not State – government. Equally important, the Court held that the Fourteenth Amendment provided no relief, since the State legislation did not interfere with a fundamental right, and was therefore subject only to rational basis review.

Practice Note: This case aligns the Second Circuit with those jurisdictions that do *not* view the Second Amendment as recognizing a fundamental right (compare, e.g., *United States v. Engstrum*, 2009 U.S. Dist. LEXIS 31323 (D. Utah 2009), below) and that do not view the Second Amendment as being incorporated to the States via the Due Process Clause of the Fourteenth Amendment.

United States v. Ross, 2009 U.S. App. LEXIS 9044 (3rd Cir.)(April 27, 2009). Ross was convicted, *inter alia*, of possession of a machine gun in violation of 18 U.S.C. 922(o)(1). On appeal, Ross argued that § 922(o) was unconstitutional after *Heller*. The Court disagreed: *Heller* was concerned with a statute that prohibited all possession of handguns by the public. The *Heller* majority focused on the history of gun possession as a means of self-defense, finding that the textual elements of the Second Amendment guarantee the individual right to possess and carry weapons in case of confrontation. In doing so, the Court was careful to state that it did not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation. In a further attempt to limit the effect of *Heller* to the right of law-abiding citizens to possess handguns for self-defense, the Supreme Court also cautioned that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill" and noted the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" Nothing in *Heller* supported Ross's challenge to the constitutionality of a statute criminalizing the possession of a machine gun.

Practice Note: This case is helpful in defining the limits of the *Heller* decision and in delineating the types of firearms currently beyond *Heller's* reach.

Nordyke v. King, 2009 U.S. App. LEXIS 8244 (9th Cir.)(Apr. 20, 2009). Appellants (promoters of gun shows) sued the County of Alameda, alleging that a county ordinance



prohibiting possession of firearms on county property violated the promoters' constitutional rights to freedom of speech and equal protection. The U.S. District Court for the Northern District of California granted summary judgment to the County without granting leave to add a claim based on the right to bear arms. The promoters appealed, contending that the ordinance violated the promoters' right to bear arms, suppressed the promoters' expressive conduct of gun possession, and unequally applied to possession of guns by the promoters but not to possession for entertainment and similar purposes. The Appellate Court affirmed, holding that the promoters failed to show that the ordinance was unconstitutional: although the right to bear arms was a fundamental right warranting the protection of substantive due process through the Fourteenth Amendment from county interference, the right did not extend to an entitlement to possess guns on county property. The county was entitled to regulate gun possession in its sensitive public spaces, and the prohibition against gun possession did not implicate the promoters' right to self-defense. Further, even assuming that the promoter's gun shows constituted speech as expressive conduct, the reduction of gun violence on county property was a reasonable basis for the ordinance, which was not directed at the suppression of speech, and the guns shows were not similarly situated to entertainment events which satisfied safety measures which the promoters could not meet.

Practice Note: This case contains a detailed analysis of the various ways the Second Amendment might apply to State action, focusing primarily on the concepts of substantive due process and selective incorporation.

Bruley v. Vill. Green Mgmt. Co., 592 F. Supp. 2d 1381 (M.D. Fla.) (Dec. 9, 2008). Plaintiff (a former employee) sued defendant (a former employer), alleging that the employee was wrongfully terminated from his position of apartment manager at one of the employer's apartment complexes. The employer moved for summary judgment. The employee, who kept a shotgun in his apartment, took the gun with him to respond to cries from a tenant that she had been shot. The employee rendered medical aid and gave a statement to police. The employer discharged the employee the following day for, *inter alia*, having a firearm on the property, in contravention of the employer's rule that no employee carry a firearm on the property. Because: (1) the employee was in an at-will employment relationship; (2) Florida provided no action for the common law tort of wrongful termination; and (3) Florida did not recognize a public policy exception to termination of at-will employment, the employee's wrongful discharge claims had to be predicated on a statutory cause of action. No such statute existed in this case. Fla. Stat. § 790.251 provided only that employers could not preclude employees from bringing their guns to work where the guns were stored in their vehicles and proper permits were obtained. Further, the Second Amendment may have given the employee the right to possess a firearm in his apartment, but it did not prevent the employer from discharging the employee for carrying the gun in common areas of the property. The court granted the employer's motion for summary judgment and ordered that the case be closed.



Practice Note: This case provides a useful focus on the distinction between federal constitutional mandates and a state’s employment statutes, utilizing the former as the fulcrum of analysis.

Jennings v. Mukasey, 2008 U.S. Dist LEXIS 82465 (D. Fla.) (Sept. 22, 2008). Plaintiff brought suit seeking, *inter alia*, a judgment determining whether a 1985 State court conviction for misdemeanor domestic violence prohibited him from lawfully possessing a firearm under federal law, notwithstanding the fact that the conviction had been expunged by a State court. Because his conviction has been expunged, Plaintiff alleged that 18 U.S.C. § 921(a)(33)(B)(ii) excepted him from § 922(g)(9)'s prohibition against firearm possession. Plaintiff further alleged that Defendants threatened him with criminal prosecution should he decide to possess a firearm; that this threat of prosecution infringed upon his Second Amendment rights; and that Defendants' threatened prosecution precluded him from obtaining employment in the firearms industry, in which he had approximately thirty (30) years experience in evaluating various handgun design for licensed firearm dealers. After the Court dismissed Plaintiff's initial Complaint for lack of standing, Plaintiff filed a Second Amended Complaint. In their second Motion to Dismiss, Defendants argued that they were entitled to sovereign immunity. Assuming that Plaintiff's conviction was duly expunged, the Court found he clearly fell within the statutory exception in § 921(a)(33)(B)(ii) and would not be subject to prosecution under § 922(g)(9). Furthermore, in light of *Heller*, Plaintiff raised a viable claim that the violation of his Second Amendment right also deprived him of the right to earn a livelihood. Taken together, the Court concluded that Plaintiff's allegations fell within the very limited exception to the general principle of sovereign immunity, that Plaintiff was otherwise without an adequate remedy at law, and that Plaintiff would suffer irreparable harm if not permitted to proceed in the instant action. Finally, in response to defendants' argument that Plaintiff had failed to plead an express statutory waiver, the Court ruled that a statutory waiver has not been required in cases seeking declaratory or injunctive relief where a plaintiff has been threatened with a criminal prosecution. Where the plaintiff's suit does not seek to impose upon the fisc, but only to declare the status of fundamental constitutional rights, the requirement of a statutory waiver should give way.

Practice Note: This case contains a useful discussion of the pleading intricacies implicated by the concepts of sovereign immunity and statutory waiver.

Range v. Indiana, Slip Copy, 2008 WL 4852679 (N.D.Ind.) (Nov. 6, 2008). Plaintiff filed a complaint alleging that Indiana's laws prohibiting “carrying a handgun without a license or by a person convicted of domestic battery was an infringement and law that abridged his “immunities and the immunities of citizens.” Plaintiff sought \$1m in damages and a declaration that the Indiana Code section violated the Second Amendment. The Court dismissed the complaint. In so doing it noted *Heller's* caveat that the Second Amendment does not guarantee *convicted persons* [as opposed to



convicted felons] the right to possess a gun. While not every domestic battery is a felony in Indiana, prohibiting a gun license to those who have been convicted of non-felony domestic battery is well within the non-exhaustive list of permissible prohibitions presented in *Heller*.

Practice Note: An interesting (but hardly surprising) extension of *Heller*'s prohibition of firearm possession by felons to an individual convicted on *non-felony* domestic battery. Here we find a clear judicial focus on the protection of others who reside in the same home as a potential firearm owner.

National Rifle Association v. City of Evanston I, 2008 U.S. Dist. LEXIS 95572 (N.D. Ill.) (Nov. 4, 2008). One day after the Supreme Court issued its decision in *Heller*, Plaintiffs filed this action challenging Evanston's then-existing ban on handgun possession. Evanston's City Code prohibited anyone from possessing a handgun unless it was inoperative or the individual qualified for various exemptions. The Code classified unlawful possession of a handgun as a misdemeanor, punishable by fine of not less than \$1,500 and/or incarceration for up to six months. In addition, the handgun at issue would be confiscated and destroyed. In their Complaint for Declaratory and Injunctive Relief, the NRA alleged that the Code infringed on the right of the people to keep and bear arms as guaranteed by the Second and Fourteenth Amendments; that the Code's exemption of certain people irrationally discriminated against all non-exempted persons, thus denying equal protection of the laws; and that the Code's handgun prohibition also conflicted with Plaintiffs' rights under 18 U.S.C. § 926A to transport firearms. In response to the *Heller* decision and the NRA lawsuit, Evanston amended the Code to read that "[n]o person shall possess, in the City of Evanston any handgun, except when said handgun is kept at the residence of said person for self-protection, provided that said person possesses a current and valid Firearm Owner's Identification card issued by the State of Illinois." Due to the amendment, the Court dismissed the NRA's challenge without prejudice as a mooted controversy. At the same time, the Court granted the NRA leave to re-plead its' Complaint.

Practice Note: This case demonstrates *Heller*'s clear and immediate impact on overly aggressive efforts to regulate handguns.

National Rifle Association v. City of Evanston II, 2009 U.S. Dist. LEXIS 35563 (N.D. Ill.) (April 27, 2009). Following dismissal in *Evanston I*, the NRA filed an Amended Complaint that focused on the restriction of interstate travel imposed upon handgun owners by Evanston's surviving Code sections. The NRA, both as an organization and on behalf of three named plaintiffs, claimed that the sections infringed on members' rights to keep and bear arms under the *Second* and *Fourteenth Amendments* because they prohibited transport of a handgun to the home, possession of a handgun within the home for purposes other than self protection, transportation of a handgun from the home to another location for lawful purposes, and possession of a handgun at one's place of



business. The City moved to dismiss under Fed.R.Civ.P. 12(b)(6), claiming that the Code section implicitly permitted transport to and from one's home. Moreover, the City argued that since the City's Corporate Counsel had pledged not to prosecute "transport" cases, there was no credible threat of harm to plaintiffs and they therefore lacked standing to sue. The Court denied the motion in part, finding that: (1) the representation by Corporation Counsel was not evidence that could be properly considered as part of the 12(b)(6) motion; (2) disavowal of the Code Section required the taking of an affirmative step against its enforcement, as opposed to a simple prospective promise not to prosecute; and (3) notwithstanding the City's arguments regarding "implicit permission," the Code section was silent about the issue of transportation, and lawful transport could not be assumed given the proscriptions on gun possession imposed by other Code sections. For these reasons, the Court found that the NRA and its members had standing to sue on the issues of "to and from home transportation" and "possession of handguns within and without the home for reasons other than family security." However, since neither the NRA nor the individual plaintiffs had alleged that its members actually had businesses within Evanston, no standing was found to make a claim that the Code section improperly limited the right to transport a handgun to / from a place of business.

Practice Note: This case contains an excellent outline of the criteria for establishing standing to sue, both on an individual and organizational basis.

Simmons v. Gillespie, 2008 WL 3925157 (C.D. Ill.) (Aug. 1, 2008). Plaintiff was a police officer. Defendant, in his capacity as Chief of Police, issued a personnel memorandum prohibiting Plaintiff from "possessing or carrying firearms without prior authorization from the Chief of Police." When informed of the prohibition, Plaintiff was also informed that the Department was aware he liked to hunt. For fear of disciplinary action, Plaintiff refrained from hunting or otherwise using his firearms. Plaintiff received no due process before the memo was issued. Plaintiff filed suit, seeking damages and "an injunction which restores his liberty as a citizen of the State of Illinois." Plaintiff asserted a liberty interest in keeping and bearing arms, which arose from art. I, section 22 of the Illinois Constitution and was protected by the due process clauses of the Illinois and U.S. Constitutions. Defendant removed and filed a motion to dismiss under Fed.R.Civ.P. 12(b)(6). In the wake of *Heller*, the Court construed the plaintiff's Complaint as encompassing a Second Amendment claim. Questioning whether the Illinois Constitution created a liberty interest protectable under the Fourteenth Amendment's Due Process clause - and the impact of *Heller* upon such a potential claim - the Court denied the motion to dismiss and directed further factual development and legal briefing.

Practice Note: This case is a good example of how Courts may treat motions to dismiss Second Amendment claims for failure to state a claim under Fed.R.Civ.P. 12(b)(6).

National Rifle Association v. Village of Oak Park, Slip Copy, 2008 WL 5111163 (N.D. Ill.) (Dec. 4, 2008); *National Rifle Association v. City of Chicago*, 2008 U.S. Dist.



LEXIS 98134 (N.D. Ill.) (Dec. 4, 2008); *McDonald v. City of Chicago*, 2008 U.S. Dist. LEXIS 98133 (N.D. Ill.) (Dec. 4, 2008). The NRA and some of its members filed lawsuits following the *Heller* decision, seeking to constitutionally invalidate gun control ordinances in the City of Chicago and the Village of Oak Park. The Court summarized plaintiff's arguments as a syllogism: (1) Under *Heller*, the Second Amendment's guaranty of the right to keep and bear arms has invalidated the District of Columbia's prohibition on the possession of handguns; (2) almost all of the guaranties that apply against the federal government and its agencies under the Bill of Rights have been held to have been incorporated in the guaranties that apply against the States and their agencies under the Fourteenth Amendment; (3) ergo, the Second Amendment's guaranty of the right of the people to keep and bear arms, as construed in *Heller*, also extends to Oak Park and Chicago via the Fourteenth Amendment. Without agreeing to or refuting this logic, the Court refused to follow it, ruling that it was bound by the decision in *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982). Declining an "invitation to overrule," the Court held that *Quilici* expressly followed the holding of *Presser v. Illinois*, 116 U.S. 252 (1886) (that the Second Amendment was not incorporated against the States by the Fourteenth Amendment) and expressly rejected the arguments: (1) that later Supreme Court decisions that had incorporated other Bill of Rights provisions into the Fourteenth Amendment had effectively overruled *Presser*; and (2) that the entire Bill of Rights had been implicitly incorporated into the Fourteenth Amendment to apply to the States.

Practice Note: This case demonstrates the emergence of incorporation as one of the key issues (if not *the* key issue) in developing Second Amendment litigation.

United States v Dorosan, Slip Copy, 2009 WL 273300 (E.D.La.) (Jan 28, 2009). Defendant was employed as a letter carrier by the United States Postal Service. After a postal inspector found ammunition and empty shell casings next to a letter case for Defendant's route, the Defendant was found with a pocket knife on his person and a semi-automatic pistol in his car, located in a post office parking lot. Defendant was charged with violating 39 C.F.R. § 232. 1(1), which prevents any person from carrying a firearm on postal property. Defendant moved to dismiss, asserting that the regulation violated his right to bear arms under the Second Amendment. The Court denied the motion, noting that district courts have long recognized the prohibition of firearms on postal parking lots as a constitutional regulation of the "workplace" under 39 C.F.R. 232.1(1).

Practice Note: This case is helpful in defining the limits of the *Heller* decision and in delineating the types of firearm regulations clearly beyond *Heller's* reach.

United States v. Knight, 574 F.Supp.2d 224 (D.Maine) (Sept. 4, 2008). The defendant was charged with making a materially false statement in trying to purchase a firearm in violation of 18 U.S.C. § 922(a)(6). Specifically, the defendant was charged with denying that he was subject to a Restraining Order in filling out an ATF questionnaire, which denial was untrue. Defendant moved to dismiss the indictment under *Heller*. The Court viewed the supposed "materiality" of the false statement as dependent upon whether



Heller invalidated 18 U.S.C. § 922(g)(8), which prohibits people who are subject to certain court orders from possessing firearms. The court denied the motion, finding that *Heller* did not constitutionally invalidate the § 922(g)(8) crime, since § 922(g)(8) does not impose an outright ban on firearm possession. Instead, the prohibition lasts only as long as the underlying state court order is in effect, and the scope of the prohibition is narrow. Reducing domestic violence is a compelling government interest, and § 922(g)(8)'s temporary prohibition, while the state court order is outstanding, is narrowly tailored to meet that compelling interest.

Practice Note: This case represents a strong affirmation of the validity and importance of § 922(g)(8), and presents a good example of judicial balancing of Second Amendment rights against other compelling governmental interests.

Livingston v. Francis, Slip Copy, 2009 WL 818133 (E.D.Mich.) (March 26, 2009). In a bitter custody dispute involving Protective Orders issued in both Ohio and Michigan, the plaintiff facially challenged the constitutionality of a Michigan Order that banned his possession of a firearm. The Court denied the challenge, finding that the Second Amendment is not incorporated through the Fourteenth Amendment as applicable to the individual states. In support of this conclusion, the Court cited to *Heller*; *Miller v. Texas*, 153 U.S. 535, 538, 14 S.Ct. 874, 38 L.Ed. 812 (1894); and *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 539 n. 18 (6th Cir.1998).

Practice Note: This case demonstrates the emergence of incorporation as one of the key issues (if not *the* key issue) in developing Second Amendment litigation.

Williams v. Padden, Slip Copy, 2009 WL 455806 (D.Minn.) (Feb. 23, 2009). A mother sued the City of Duluth after a caution alert was placed on her address by an officer who reported that the mother was agitated, had a gun, and may have had a possible relationship to a shooting. The mother claimed the city's policy of placing caution alerts on homes deprived her of constitutional rights, including her right to possess a firearm with a permit. The Court dismissed the claims, finding no evidence that police policies caused her injury. In so finding, the Court ruled that the plaintiff had a right under both State and Federal law to possess a firearm. However, the Court questioned whether the Second Amendment should be incorporated against the States under the Fourteenth Amendment's Due Process Clause, noting that *Heller* did not directly address this issue.

Practice Note: This case contains an excellent outline of the concepts of the elements of procedural due process, protectable liberty interests, substantive due process, and equal protection claims.

Swait v. University of Nebraska at Omaha, Slip Copy, 2008 WL 5083245 (D.Neb.) (November 2008). Plaintiff filed a Complaint against the University of Nebraska and the State of Nebraska alleging that he was wrongfully expelled in violation of the Fourteenth Amendment. Plaintiff claimed, *inter alia*, that he should not have been disciplined for



carrying a concealed weapon on school grounds because he had “a constitutional right to bear arms.” Plaintiff sought injunctive relief in the form of a court order directing the Defendants to expunge his record and provide him with the right to attend the University. Concerned with the conclusory nature of the allegations, the Court noted that states can prohibit the carrying of a concealed weapon without violating the Second Amendment. However, the Court gave Plaintiff thirty 30 days to amend his Complaint to clearly state a Second Amendment claim against Defendants upon which relief may be granted.

Practice Note: This case presents an interesting application of Due Process rights to a university setting, and is another good example of how Courts may treat motions to dismiss Second Amendment claims for failure to state a claim under Fed.R.Civ.P. 12(b)(6).

City of New York v. Bob Moates' Sport Shop, Inc., 253 F.R.D. 237 (E.D.N.Y. 2008). In consolidated cases, plaintiff city filed a nuisance suit against defendant out-of-state firearms retailers, alleging that they illegally and negligently furnished firearms to prohibited persons, which were then trafficked into the city. The retailers had sold guns to straw purchasers, which transferred guns through illegal interstate markets to criminals in the city. The proposed settlement involved most of the retailers. The city sought an injunction abating the public nuisance by the appointment of a special master to monitor the retailers to ensure that they did not make illegal sales. Monetary penalties would be imposed for violating the judgment. The court found that the settlement was reasonable and would protect New York citizens without unduly inhibiting the retailers' abilities to lawfully carry out their enterprises. The court found that personal jurisdiction existed under N.Y. C.P.L.R. § 302(a)(3)(ii) based on the retailers' supplying guns to individuals, who trafficked them to the state for criminal purposes. That the retailers knew or should have known that many of the guns they sold illegally would be trafficked to New York and used in crimes committed in the city constituted purposeful availment under § 302(a)(3)(ii). Subject matter jurisdiction was not precluded by the Protection of Lawful Commerce in Arms Act, 15 U.S.C.S. § 7903, because the retailers' participation in the straw purchases violated federal laws relating to the sale and marketing of firearms. The court further found that the U.S. Supreme Court's ruling in *Heller* was inapplicable to bar subject matter jurisdiction.

Practice Note: This case is a compelling example of judicial bias and the lengths to which certain jurisdictions will go to limit Supreme Court precedent.

Torraco v. Port Auth., 539 F. Supp. 2d 632 (E.D.N.Y. 2008). Two plaintiffs, gun owners, alleged claims under 42 U.S.C.S. §1983 arising from separate incidents. The unifying element was that as to each incident, the owners asserted that defendants failed to recognize the owners' rights under the Firearm Owners Protection Act (18 U.S.C.S. § 926A, et seq) (“FOPA”) which, under certain circumstances, allowed gun owners to transport their firearms interstate without incurring criminal liability under local gun laws. Defendants moved for summary judgment. The Court held that providing a damage



remedy under 42 U.S.C.S. § 1983 for a failure to adequately apply 18 U.S.C.S. § 926A was unworkable, given § 926A's apparent practical requirement that an arresting officer have knowledge of varying gun laws from many different jurisdictions. To the extent owner one was claiming a violation of his Fourth Amendment rights against unreasonable search and seizure under 42 U.S.C.S. § 1983, as opposed to an action under § 1983 to enforce independent rights under 18 U.S.C.S. § 926A, the individual defendants invoked the defense of qualified immunity. A reasonable officer, even one aware of § 926A, would be fully justified in not accepting owner one's explanation at face value. This was because § 926A itself did not answer the question; it required confirmation of a particular set of facts, which a police officer was not obligated to accept from the mouth of the suspect. Based on owner one's possession of a firearm in a manner that, absent extraneous facts, violated New York law, and owner one's inability to corroborate the facts behind his defense, probable cause existed for the arrest. Even if owner one's constitutional rights were violated, defendant officer's decision to arrest owner one was protected by qualified immunity. That was because owner one's rights under § 926A were "vague and amorphous," and far from clearly established. Defendants' motion for summary judgment was granted.

Practice Note: This case demonstrates the interesting challenges FOPA poses in balancing the well-established rights of traveling firearms owners with the safety concerns present in large travel centers across the country.

Practice Note: This case contains a detailed analysis of the types of statutory violations that fall within the scope of 42 USC § 1983, and the elements that determine the existence of a federal "right."

Practice Note: Defendants appealed, and the Second Circuit Court of Appeals heard oral arguments on the issues discussed here on April 29th, 2009.

United States v. Arzberger, 592 F.Supp.2d 590 (S.D.N.Y.) (Dec. 31, 2008). In a prosecution for possessing and receiving child pornography, the U.S. Government moved to modify the defendant's bail by adding conditions required by the Adam Walsh Amendments to the Bail Reform Act (18 U.S.C. § 3142). One of these conditions was a prohibition of possession of firearms. Upon defense objection, the District Court utilized the traditional two-step due process analysis found in *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989), as well as the balancing test enumerated in *Mathews v. Eldridge*, 424 U.S. 319 (1976). The Court declined to impose the firearms prohibition as a condition of bail, holding that the Second Amendment establishes a constitutionally protected liberty interest. This "private" interest was of such "paramount" importance that to require its' surrender without an opportunity to contest the reasonableness of such surrender was unconstitutional.

Practice Note: This case presents an interesting application of Second Amendment principles to Eighth Amendment considerations. More importantly, it



recognizes that the Second Amendment creates a protectable liberty interest in the right to possess firearms.

United States v. Montalvo, 2009 WL 667229 (W.D.N.Y.) (March 12, 2009). Defendant, a police officer, was initially charged with one count of possessing a firearm while subject to an Order of Protection, in violation of 18 U.S.C. §§ 922(g)(8) and 924(a)(2). Defendant moved to dismiss the indictment, relying on the Supreme Court's decision in *Heller* to argue that 18 U.S.C. § 922(g)(8), as applied to him, violated his Second Amendment right to possess a firearm. The Court found that the defendant had standing to make an "as applied" challenge to the statute, but denied the motion: reduction of domestic violence is a compelling governmental interest, and §922(g)(8)'s temporary prohibition, while the state court order is outstanding, is narrowly tailored and "well tuned to the legitimate concerns of avoiding serious physical injury to a partner or child."

Practice Note: This case represents a strong affirmation of the validity and importance of § 922(g)(8), and presents a good example of judicial balancing of Second Amendment rights against other compelling governmental interests.

Denning v. Metro. Gov't of Nashville, 564 F. Supp. 2d 805 (D. Tenn.)(June 16, 2008). Plaintiffs sued municipal defendants and police officers, alleging deprivation of plaintiffs' decedents' rights under the Second, Fourth, and Fourteenth Amendments after one officer fired his weapon, killing the decedent. Granting summary judgment against plaintiffs' claims that decedent was deprived of his Second Amendment right to carry a weapon, the court concluded that the Second Amendment was a limitation only upon the power of Congress and the national government - and not upon the State.

Practice Note: This case demonstrates the emergence of incorporation as one of the key issues (if not the key issue) in developing Second Amendment litigation.

United States v. Beldsoe, 2008 U.S. Dist. LEXIS 26268 (W.D. Tex.)(March 20, 2008). Defendant was charged with conspiring to obtain a firearm by making a false statement during the firearm purchase in violation of 18 U.S.C. §§ 371 and 922(a)(6). The Government charged that Bledsoe gave a co-defendant (Bouldin) cash to purchase a 9 mm pistol on her behalf because Bledsoe was under 21 and legally prohibited from making the purchase. During the purchase, Bouldin falsely represented that he was the actual buyer. Defendant Beldsoe claimed she was entitled under the Second Amendment to purchase a firearm and therefore there could be no "straw man liability" under § 922(a)(6). As of the date of the Order, the prevailing law was that 18 U.S.C. § 922(a)(6) was not in conflict with the Second Amendment. (The Supreme Court had recently heard oral argument in *Heller*, and would announce the decision several months later). Prescient of *Heller*, and reliant upon *U.S. v. Emerson*, 270 F.3d 203 (5th Cir. 2001), the Court held that Second Amendment rights may be subject to limited, narrowly tailored, and specific exceptions or restrictions for particular cases that are reasonable and consistent with the general right to individually keep and bear private arms. Felons,



infants and those of unsound mind may properly be prohibited from possessing firearms, and for this reason § 922(g)(1) does not violate the Second Amendment.

Practice Note: This case provides a detailed summary of the elements and standards applicable to rational basis review.

United States v. Engstrum, 2009 U.S. Dist. LEXIS 31323 (D. Utah) (April 10, 2009). Defendant was charged one count of Possession of a Firearm following a Domestic Violence Conviction, in violation of 18 U.S.C. § 922(g)(9). Defendant argued that the statute, *as applied*, was unconstitutional because it impermissibly infringed on his Second Amendment right to keep and bear arms. In analyzing this argument, the Court first determined that challenges under the Second Amendment should be subject to strict scrutiny review, for two reasons: the *Heller* Court described the right to keep and bear arms as a fundamental right that the Second Amendment was intended to protect; and the *Heller* Court categorized Second Amendment rights with other fundamental rights which are analyzed under strict scrutiny. Applying strict scrutiny, the Court found that protection of domestic partners and children from firearms violence by keeping firearms out of the hands of those who pose a prospective risk of violence is a compelling government interest. It further found that § 922(g)(9)'s requirement that the defendant have been convicted of using or attempting to use "physical force" or threatening to use "deadly force" was sufficiently narrow in scope so as to presumptively include only those who pose a prospective risk of violence to an intimate partner or child. The Court therefore found that § 922(g)(9) was narrowly tailored and therefore lawful.

Practice Note: This case recognizes that *Heller* elevated Second Amendment rights to a "fundamental" level. Even so, the ability of § 922(g)(9) to survive strict scrutiny review shows its ongoing viability.

United States v. Luedtke, 589 F. Supp. 2d 1018 (E.D. Wis. 2008). Defendant was charged with violating 18 U.S.C.S. § 922(g)(8) by possessing firearms and ammunition while subject to a domestic violence injunction. He moved to dismiss the indictment on the ground that § 922(g)(8) violated his Second Amendment rights. Relying on *Heller*, defendant argued that § 922(g)(8) was not a permissible limitation on individual rights under the Second Amendment. He also contended that § 922(g)(8) swept too broadly, because it applied to persons not found imminently dangerous by any court, and that the statute contained insufficient procedural protections. The court rejected all of his claims. The Supreme Court did not present a precise list of permitted restrictions in *Heller*, rather it provided examples of the types of regulations on gun possession that passed constitutional muster. The restriction placed on persons subject to state court-issued domestic restraining orders was similar to the restrictions placed on felons, children, and mentally ill persons, and other dangerous individuals historically barred from firearm possession. The statute provided sufficient procedural protections for issuance of domestic abuse orders. Although the court doubted it applied, it opined that § 922(g)(8) would survive even a strict scrutiny analysis.



Practice Note: This case represents a strong affirmation of the validity and importance of § 922(g)(8).

United States v. Skoien, Slip Copy, 2008 WL 4682598 (W.D.Wis.) (Aug. 27, 2008). Defendant was charged with possessing three firearms after having been convicted of a misdemeanor crime of violence, in violation of § 922(g)(9). Defendant moved to dismiss, acknowledging that the Court of Appeals for the Seventh Circuit had upheld the constitutionality of § 922(g)(9), but arguing that *Heller* cast doubt on the continued viability of the Seventh Circuit case law. Denying the challenge, the Court found that § 922(g)(9) passes constitutional muster. It is narrowly tailored, applying only to persons who have been found guilty by a court of domestic violence. These persons have shown that it is they - and not any outside intruders - who pose the greater danger to their families. The government has a compelling interest in protecting the families of such persons. The fact that the firearm defendant was charged with possessing was a hunting rifle did not change this analysis.

Practice Note: This case represents a strong affirmation of the validity and importance of § 922(g)(9).

STATE COURTS

People v. Yarbrough, 169 Cal. App. 4th 303 (Cal. App. 1st Dist. 2008). Defendant appealed a conviction for carrying a concealed firearm and carrying a loaded firearm in a public place. Defendant was carrying a firearm concealed under his clothes while he was on a residential driveway that was not closed off from the public. The court concluded that the defendant's Second Amendment right to bear arms was not violated because prohibiting the carrying of a concealed weapon without a permit was a lawful exercise of state regulatory authority, as was restricting firearm possession in public places.

Practice Note: This case presents a clear endorsement of a State's ability to regulate the carrying of a concealed weapon.

Sims v. United States, 963 A.2d 147 (D.C. 2008). Defendant appealed conviction for carrying a pistol without a license (CPWL), possession of an unregistered firearm (UF), and unlawful possession of ammunition (UA). A witness testified that defendant had confronted him on the street with the gun after the two had a brief dispute over a debt in defendant's home. A police officer saw defendant throw a pistol into the rear yard of a dwelling, which was not defendant's residence. On appeal, the court affirmed. While defendant claimed that the Second Amendment barred his prosecution for the weapons offenses as the CPWL, UF, and UA statutes were facially unconstitutional in light *Heller*, the appellate court held that this claim was not preserved as it was not raised in the trial court. Further, the court noted that the Second Amendment was not jurisdictional and thus could be waived. In any event, applying plain error review the argument failed at the



threshold as *Heller* dealt with possession of a firearm in one's residence and the defendant was seen abandoning the weapon in an area outside of his own home. Additionally, the evidence did not link defendant's possession of the gun to any arguable motive of self defense that would cause him to remove the gun from his home.

Practice Note: This case should provide cautionary guidance to trial practitioners seeking to advance Second Amendment claims at the trial level: such claims are not jurisdictional, and are thusly waiveable on appeal if not properly preserved. Trial practitioners should also note the need to develop testimony that establishes a link between the allegedly protected conduct and the defendant's own activities.

Howerton v. United States, 964 A.2d 1282 (D.C. 2009). Defendant was convicted, *inter alia*, of carrying a pistol without a license, possessing an unregistered firearm, and possessing ammunition. He appealed his weapons convictions on the grounds that they violated the Second Amendment. The appellate court held the Second Amendment barred absolute bans on handguns held for self-defense in the home, where he had the gun in question, but nothing showed he had it for self-defense. The statutes he was convicted under were not facially unconstitutional or invalidated by a finding that, collectively, the District of Columbia's gun-control laws violated the Second Amendment. He did not show his convictions were plain error, as he used a gun to threaten another instead of for a lawful purpose. Sufficient evidence showed he carried a pistol without a license because no proof of carrying it outside his home was required, it was "convenient of access" to him when found, and he used it two days earlier.

Practice Note: This case should provide cautionary guidance to trial practitioners seeking to advance Second Amendment claims at the trial level: such claims are not jurisdictional, and are thusly waiveable on appeal if not properly preserved. Trial practitioners should also note the need to develop testimony that establishes a link between the allegedly protected conduct and the defendant's own activities.

Brook v. State, 999 So. 2d 1093 (Fla. Dist. Ct. App. 5th Dist. 2009). After the Circuit Court for Orange County (Florida) denied defendant's motion to dismiss, defendant entered a *nolo contendere* plea to carrying a concealed firearm. Defendant appealed. Police had entered a business after smelling cannabis emanating from the business. Several men, including defendant, were playing cards, with cannabis on the table. Defendant was found in possession of a concealed firearm. Defendant argued that the concealed weapon charge should have been dismissed because he was an employee of the business where the incident took place. The appellate court agreed: Florida statute specifically exempted a person possessing arms at his home or place of business from criminal prohibition. The "place of business" language of the statute included a premises where the individual was employed by another. Defendant's conduct fell within the ambit of the exemption and accordingly the motion to dismiss should have been granted. The judgment was reversed and the case was remanded for entry of an order of discharge.



Practice Note: In reversing the denial of the motion to dismiss, the Court emphasized that the opinion did not contemplate the carrying of a firearm at a business where the express policy or directive of the business prohibited such conduct. The failure to express an opinion on such hypothetical conduct leaves open the possibility that it may be unlawful.

Lacy v. Indiana, 903 N.E.2d 486 (Ind. Ct. App. 2009). The defendant was convicted of possession of a knife with an automatic opening blade (a class B misdemeanor under the Indiana Code). She appealed, arguing that the statute violated her right to bear arms under Ind. Const. art. I, § 32 and was therefore unconstitutional on its face. The court focused on the actual operation of the statute at issue, refraining from “speculating upon hypothetical applications.” Thus, it only considered an *as applied* constitutional challenge. The Court found that the Code section was rationally calculated to advance the public good, and thus was a valid exercise of the State's police power. Furthermore, switchblades (the type of knife that defendant possessed) were not typically possessed by law-abiding citizens for self-defense purposes. Moreover, the Code section was properly limited because it did not prohibit the possession of *all* knives, but only knives that opened automatically or could be propelled by hand pressure applied to a button or other device in the handle of the knife. Based upon these conclusions, the Code section did not place a material burden upon the core value of defendant's right to defend herself, and therefore was not unconstitutional as applied to defendant.

Practice Note: This case presents a historical analytical method similar to the one used by the Court in *Heller*, but with an opposite result.

Association of N.J. Rifle & Pistol Clubs, Inc. v. City of Jersey City, 402 N.J. Super. 650 (N.J. App.Div.) (Sept. 29, 2008). Defendants (Jersey City, its mayor, and its chief of police) appealed an order of the Superior Court which determined that a Jersey City ordinance regarding firearms was void and invalid as being pre-empted by State law. Intervenor/defendant Associated Community Organizations for Reform Now (“ACORN”) filed a separate appeal. The city ordinance prohibited the sale or purchase of more than one handgun within a 30-day period, which was in direct conflict with the state statutory scheme that allowed an individual to purchase more than one handgun provided that he or she possessed more than one valid permit, without the imposition of any time or frequency restrictions. The city ordinance, however, expressly limited the number of handguns that a city resident could purchase regardless of the number of permits he or she possessed. The appellate court upheld the trial court's determination, finding that the city's ordinance could not stand to the extent it varied the rules of purchase and sale from what they were under the State's comprehensive gun control laws. As such, on the preemption issue, the city had exceeded the scope of its authority by enacting the ordinance restricting firearm sales and purchases beyond that of the State statutory scheme.



Practice Note: Jersey City and ACORN appealed, and the New Jersey Supreme Court heard oral arguments on the pre-emption issue on April 27th, 2009.

Matter of Bastiani, 2008 NY Slip Op 28529, 1 (Rockland, NY, County Ct. Dec. 15, 2008). Pistol permit applicant sought a hearing on the denial of her request to expand her sportswoman-residence pistol permit to an unrestricted and full carry permit. The applicant's initial request for an expansion of her gun permit was denied. At a hearing thereon, the applicant provided testimony in support of her application. It was noted that no representatives from any of the government agencies that were contacted appeared for the hearing. The applicant indicated that she felt afraid for her personal safety on two occasions while in public places. In one incident, a man appeared to be walking towards her in a mall parking lot but he moved in another direction before confronting her. In the other incident, a man in line behind her in a fast food restaurant said he was going to rob the place. However, he indicated that he was just kidding. The police were not called in either situation. The court acknowledged the right to possess a gun under the Second Amendment, but noted that such right had limitations. As the applicant did not show sufficient circumstances to distinguish her need from those of the general public and she did not show a specific need for self protection distinguishable from that of the general community of persons engaged in the same business or profession, the full-carry permit was not warranted. The court denied the request for an expanded permit.

Practice Note: this case presents hands-on insight to the nature and extent of the primary due process involved in the issuance / expansion of handgun permits.

City of Cleveland v. Fulton, 178 Ohio App. 3d 451 (Ohio Ct. App., Cuyahoga County 2008). Defendant was charged with using weapons while intoxicated, failure to secure a dangerous ordnance, and endangering children. The Court granted defendant's motion for acquittal on all charges. When he filed a motion for the return of his handgun, the City filed a petition for forfeiture. The trial court granted the city's petition and ordered that the handgun be forfeited. Defendant appealed. The appellate court held that the trial court erred when it denied defendant's motion for return of the handgun and granted the city's petition for forfeiture. Because defendant's unregistered handgun was not contraband *per se*, he was entitled to have his property returned to him upon dismissal of the charges. Defendant did not have a "legal disability" prohibiting him from possessing a handgun since the state of Ohio had issued him a carry-conceal license for the gun. Although the gun was unregistered, the handgun was not a legally banned handgun, nor was defendant prohibited from owning or possessing it. Defendant was never convicted of the crimes for which he was originally charged, nor was he charged with or convicted of any other Cleveland code violation. The judgment of the trial court was reversed and the cause was remanded for further proceedings.



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Practice Note: this case is an object lesson in persistence: individuals who are acquitted of criminal conduct involving otherwise legal firearms have a right to have those firearms returned. Often, these firearms have significant value, both fiscal and sentimental. Those aggrieved by a Court's refusal to return lawful firearms should tenaciously pursue their claims.



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