

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA) Criminal No. 07 - 376
)
vs.)
)
)
JAMES FRANCIS BARTON, Jr.)

MOTION TO DISMISS

Defendant, James F. Barton, Jr., through his undersigned counsel, files this *Motion To Dismiss* and in support thereof avers as follows:

1. James F. Barton, Jr. (Hereinafter, "Barton"), has been charged in a two count indictment. Count one charges him, under Section 922(g)(1) of Title 18, with possessing a firearm after being previously convicted of an offense which may be punished by imprisonment of one year or more. Count two charges him, under Section 922(g)(1) of Title 18, with possessing ammunition after

being previously convicted of an offense which may be punished by imprisonment of one year or more. In short, Section 922(g) makes it a federal crime for any person who has ever been convicted of any felony to ever possess any firearm or ammunition, inside or outside their home. This blanket federal ban is punishable with up to 10 years of imprisonment. 18 U.S.C. Section 924(a)(2).

2. On June 26, 2008, our Supreme Court decided the case of District of Columbia v. Heller, ___ U.S. ___, 2008 U.S. LEXIS 5268 (2008). *Heller* is commonly known as the D.C. gun ban case where the District of Columbia prohibited the possession of handguns. In rejecting the District of Columbia's ban on firearm possession, the court held that the Second Amendment gives individuals the right to keep firearms at home for self-protection.

3. *Heller* is the foundation for Barton's request to dismiss the indictment because, as it is applied, Section 922(g) is unconstitutional.

4. What led to Barton's indictment was the search of his home. The search was conducted after the obtainment of a search warrant. Found inside and taken from Barton's home were seven

(7) pistols, three (3) shotguns, five (5) rifles and 44 pieces of a particular type of ammunition.

5. It is Barton's position that he has the Second Amendment right to possess those items in his home and any prosecution based upon those items would violate his constitutional rights under the Second Amendment.¹

The Second Amendment provides, in full, as follows : "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." The phrase "the people" in the Second Amendment must mean the same as in other Amendments, such as the First, Fourth and Ninth.² Despite having a conviction history, Barton

¹ Counsel's anticipates the government arguing that Barton has no Second Amendment protection based upon two events. First, the Bush Administration filed an amicus brief in *Heller* wherein it advanced a position that "the Second Amendment, properly construed, ... does not provide any protections to certain individuals, such as convicted felons, who have never been understood to be within the Amendment's coverage." Brief for the United States as Amicus Curiae, Pg., 8. Second, the dicta offered up by the author of *Heller*, Justice Scalia, 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, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, at *95.

still has a right to free speech. He still has the right to exercise whatever religion he wants to. The Fourth Amendment speaks of the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Our Supreme Court has not even come close to saying that, once you are convicted of a federally defined felony³, you can not assert a Fourth Amendment right. While Samson v. California, 547 U.S. 843, 126 S. Ct. 2193, 165 L. Ed. 2d 250 (2006), holds that searches of prisoners and paroles can be reasonable even without individualized suspicion, this ruling is a far cry from suggesting that a convicted felon is no longer among "the people" who can assert a Fourth Amendment right.

Heller holds that "all Americans" have an "individual right to use arms for self-defense". This right is non-existent, however, to Barton because a statute of Congress, Section 922(g), eliminates

² The 9th Amendment provides : "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people". *Heller*, at *12, 13.

³ The felony label is not the sole means of triggering 922(g)'s reach as domestic violence misdemeanors are within its scope. 18 U.S.C. Section 922(g)(9).

his ability to protect himself and his family through the possession and use of firearms in his home. Felons, such as Barton, have the need and the right to protect themselves and their families by keeping firearms in their home.⁴ The present indictment denies Barton the ability to exercise his *Heller* recognized rights and justifies this indictment being dismissed.

WHEREFORE, Mr. Barton requests his motion to dismiss be granted.

Respectfully submitted,

/s/David B. Chontos

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⁴ Counsel is not advocating Barton has the right to take a firearm with him as he does his grocery shopping or to venture into the woods in search of Bambi's descendents.

