

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

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

GOVERNMENT'S RESPONSE IN OPPOSITION
TO DEFENDANT'S MOTION TO DISMISS INDICTMENT

The United States of America respectfully opposes defendant's Motion to Dismiss (Docket No. 36). In support of that opposition, the United States submits the following:

1. Defendant James Francis Barton, Jr. is charged with the crime of Possession of a Firearm by a Convicted Felon, on or about May 10, 2007 (Count One), and Possession of Ammunition by a Convicted Felon, on or about April 20, 2007 (Count Two), both in violation of Title 18, United States Code, Section 922(g)(1).

2. At trial, the government expects to prove that, on April 20, 2007, defendant Barton, a convicted felon, sold to a confidential informant one antique (but fully functioning) .32 caliber revolver along with 44 rounds of .32 caliber ammunition. The transaction occurred inside the defendant's residence. The government will show that immediately prior to providing the revolver to the confidential informant, the defendant "drilled out" (i.e., obliterated) the revolver's serial number. Additionally, the government expects to prove that as a result of the execution

of a federal search warrant at the defendant's residence on May 10, 2007, federal and state law enforcement officers discovered and seized seven (7) pistols, five (5) rifles, and three (3) shotguns. After being advised of his Miranda Rights, defendant made various inculpatory statements regarding his possession of the firearms, and his knowledge that it was unlawful for him to possess firearms as a convicted felon.

3. On July 7, 2008, defendant filed the instant Motion to Dismiss (the Indictment). See Docket No. 36. In his motion, defendant relies on the Supreme Court's recent decision in Heller v. District of Columbia, No. 07-290, slip op. (U.S. June 26, 2008), in arguing that the indictment against him must be dismissed. Defendant argues (at 2-3) that 18 U.S.C. § 922(g) is unconstitutional, as applied, because it violates his right under the Second Amendment to possess firearms and ammunition in his home. Defendant asserts (at 4-5) that 18 U.S.C. § 922(g) "eliminates his ability to protect himself and his family through the possession and use of firearms in his home." Defendant's argument lacks merit, and his Motion to Dismiss should be denied.

4. In Heller, the Supreme Court held that the Second Amendment protects an individual right to possess a firearm for lawful self-defense within the home. Heller, slip op. at 2-54. The respondent in Heller was a special police officer in the District of Columbia, who applied to register a handgun that he

wished to keep in his home. Id. at 2. Relying on statutes that generally prohibit the possession of handguns in the District, the District refused to grant Heller a registration certificate. Id. Heller then filed a civil suit on Second Amendment grounds. Id. Heller sought to enjoin the District from enforcing (1) the District's ban on the registration of handguns; (2) the licensing requirement for firearms, insofar as it prohibits the carrying of a firearm in the home without a license; and (3) the "trigger-lock requirement," which requires that a lawfully owned firearm be kept "unloaded and disassembled or bound by a trigger lock or similar device" if the firearm is kept in the home. Id. at 1, 2.

The Supreme Court held that the Second Amendment does not permit "the absolute prohibition of handguns held and used for self-defense in the home." Heller, slip op. at 64. The District's ban on handguns was deemed unconstitutional to the extent that it prohibits "an entire class of 'arms' that is overwhelmingly chosen by American society for [the] lawful purpose [of self-defense]," and extends that prohibition to the home, "where the need for defense of self, family, and property is most acute." Heller, slip op. at 56. To the extent that the trigger-lock requirement renders firearms kept in the home inoperable, and contains no exception for self-defense, it too was found to violate the Second Amendment. Id. at 58. The Court specifically declined to address Heller's challenge to the District's licensing requirement, because the

Court presumed that its holding with respect to the registration requirement would enable Heller to secure a license to carry a firearm in his home for the lawful purpose of self-defense. Id. at 59, 64.

The Heller Court held that the relevant provisions were unconstitutional as applied in the context of banning handguns that are possessed in the home for the purpose of self-defense, but did not wholly invalidate the registration and licensing scheme.

Significantly, the Court specifically noted that the right secured by the Second Amendment is "not unlimited." Heller, slip op. at 54. The Court acknowledged, for example, that prohibitions on carrying concealed weapons have been deemed lawful under the Second Amendment. Id. Of particular significance to the matter presently before *this* Honorable Court, the Heller Court also emphasized 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." Id. at 54-55. And the Court specifically noted that those "presumptively lawful regulatory measures" were just examples, and that the list provided was not "exhaustive." Id. at 55 n.26. In addition, the Court limited the sorts of weapons protected by the Second Amendment to those "in

common use," Id. at 55, and noted that the Second Amendment "does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes," Id. at 53.

5. Contrary to the arguments set forth by defendant Barton, the Heller decision does not render 18 U.S.C. § 922(g) unconstitutional, and it does not provide convicted felons with the right to possess firearms (and/or ammunition) in the home. To the contrary, as noted above, the Heller Court specifically emphasized that *"nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons...."* Id. at 54-55.

6. Rights afforded to individuals under the Constitution are not absolute, and the Second Amendment is no exception. As stated above, the Heller Court specifically noted that the right secured by the Second Amendment is "not unlimited." Heller, slip op. at 54. In United States v. Rybar, 103 F.3d 273, 275, 286 (3d Cir. 1996), *cert. denied*, 522 U.S. 807 (1997), the Court of Appeals for the Third Circuit explained that "the Second Amendment furnishes no absolute right to firearms."

A conviction for a felony offense, for example, often carries consequences which affect or limit the rights of an individual. These rights include the right to vote, the right to sit on a jury, and, as here, the right to possess a firearm.

At the time of the framing, the most ardent supporters of a specific amendment guaranteeing an individual right to keep and bear arms recognized that convicted felons and those engaged in criminal activity would not enjoy the benefit of such a right. See Bernard Schwartz, The Bill of Rights: A Documentary History 665 (1971) (quoting proposal at the Pennsylvania Ratifying Convention stating that "no law shall be passed for disarming the people or any of them unless for crimes committed, or real danger of public injury from individuals" (emphasis added)); id. at 681 (quoting proposal by Samuel Adams at the Massachusetts Ratifying Convention to the effect that the proposed Constitution should "never [be] construed . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms" (emphasis added)); Stephen P. Halbrook, What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms", 49 Law & Contemp. Probs. 151 (1986) ("violent criminals, children, and those of unsound mind may be deprived of firearms" (emphasis added)).

7. In a recent unpublished opinion, the United States Court of Appeals for the Ninth Circuit referenced the Heller decision in United States v. Gilbert, 2008 WL 2740453, slip op. (9th Cir. 2008). The Gilbert Court stated that "Under Heller, individuals still do not have the right to possess machine guns or short-barreled rifles, as Gilbert did, and convicted felons, such as Gilbert, do not have the right to possess any firearms."

8. Finally, defendant Barton's Motion to Dismiss includes a footnote (see fn.1 at 3) stating that defense counsel anticipates the government will argue that Barton has no Second Amendment protection as a result of, among other things, the Heller Court's statement that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons....." Despite acknowledging this assertion by the Heller Court, counsel for defendant Barton fails to explain how his argument overcomes the Heller Court's clearly stated intention that nothing in the Heller Opinion should cast doubt on longstanding prohibitions on the possession of firearms by felons.

WHEREFORE, the government respectfully requests that the Court DENY defendant's Motion to Dismiss.

Respectfully submitted,

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