

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

**UNITED STATES,**

**Plaintiff,**

**C.A. No.: 2:07-cr-20460-PDB-DAS**

**-v-**

**Hon. Paul D. Borman**

**WILLIAM ELIAS KHAMI (D-2), et al.,**

**Defendants.**

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**DEFENDANT'S MEMORANDUM OF LAW IN REPLY TO THE  
GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS  
COUNT IV OF THE INDICTMENT**

On March 18, 2008, the United States Supreme Court will hear the oral arguments in *Heller v. United States*, 76 U.S.L.W. \*\* (2008); [www.supremecourtus.gov/docket/07-290.htm](http://www.supremecourtus.gov/docket/07-290.htm). Nearly 50 *amicus curiae* briefs have been filed in the case. The Government's position here that the Second Amendment preserves only a "collective right" to keep and bear arms, as contrasted with the "individual right" to do so, is contrary to the position of the United States taken by the Solicitor General, Paul Clement, on behalf of the Bush Administration; and, is contrary to the arguments of Vice-President Cheney, acting as the President of the Senate, and 55 members of Congress, as *amici* in *Heller*, as well as many, many other scholars and interests.

There seems little doubt that the Government's argument in the case at bar will be soundly rejected, when the opinion in *Heller* is finally announced.

#### **THE SECOND AMENDMENT CONFERS A FUNDAMENTAL CONSTITUTIONAL RIGHT**

"The very purpose of a Bill of Rights," as Justice Jackson opined in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 638; 63 S. Ct. 1178; 87 L. Ed. 1628 (1943), "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." Among the panoply of guaranteed rights, the Supreme Court has held that some are so fundamental that they are to be accorded primacy as "preferred rights." Chief among these are those contained within the First Amendment. *Murdock v. Pennsylvania*, 319 U.S. 105, 115; 63 S. Ct. 870; 87 L. Ed. 1292 (1943)("Freedom of press, freedom of speech, freedom of religion are in a preferred position.").

The Second Amendment is next in order.

The rights contained in the Second Amendment are “preferred rights” because, first and foremost, they are inextricably intertwined with the right of self-defense. As Cicero famously wrote, Marcus Tullius Cicero, *Selected Political Speeches* (Grant transl. 1969), p. 222, cited by Les Adams, *The Second Amendment Primer* (1996), at p. 23:

There exists a law, not written down anywhere, but inborn in our hearts; a law which comes to us not by training or custom or reading but by derivation and absorption and adoption from nature itself; a law which has come to us not from theory but from practice, not by instruction but by natural intuition. I refer to the law which lays it down that, if our lives are endangered by plots or violence or armed robbers or enemies, any and every method of protecting ourselves is morally right. When weapons reduce them to silence, the laws no longer expect one to await their pronouncements. For people who decide to wait for these will have to wait for justice, too—and meanwhile they must suffer injustice first.

*See also, Rex v. Dewhurst*, [1820], 1 St. Tr. (n.s.) 529, 601-602. (“A man has a clear right to protect his house. A man has a clear right to protect himself when he is going singly or in a small party upon the road where he is traveling or going for the ordinary course of business.”); [1744], *Mallock v. Eastley*, 87 Engl. Rpts. 1370, 1374

Second, the Second Amendment is the “default” Constitutional provision. “The Second Amendment is a doomsday provision, one designed for those exceptionally rare circumstances where all other rights have failed....” *Silveira v. Lockyear*, 328 F. 3<sup>rd</sup> 567, 570 (9<sup>th</sup> Cir. 2003)(Kozinski, J., *dissenting*).

For these reasons, and many others, the Second Amendment is clearly at the top of the Constitutional order.

**STATUTES IMPINGING UPON FUNDAMENTAL  
CONSTITUTIONAL RIGHTS ARE SUBJECT TO  
THE “STRICT SCRUTINY” TEST**

It is axiomatic that statutory enactments which encroach upon the “preferred rights” in the Constitution must withstand “strict scrutiny” review in order to pass Constitutional muster. One important aspect of this analytic framework is that “[e]ven if the legislative purpose is legitimate and one of substantial governmental interest, the government cannot pursue it by means that broadly stifle personal liberties if the end can be more narrowly achieved.” John E. Nowak & Ron D. Rotunda, *Constitutional Law* (7<sup>th</sup> ed. 2004)(Hornbook Series), Sec. 16.10, p. 1159. “The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.” *Shelton v. Tucker*, 364 U.S. 479, 488; 81 S. Ct. 247; 5 L. Ed. 2<sup>nd</sup> 231 (1960).

Here, the First Amendment analysis applies in the Second Amendment context.

**THE FELON IN POSSESSION OF A FIREARM  
FELONY IS NOT SUFFICIENTLY NARROW TO  
WITHSTAND “STRICT SCRUTINY” REVIEW**

The statute, under which the Defendant is now charged, is 18 U.S.C. Sec. 922(g)(1) is a broad and sweeping statute. Arguably, it punishes the status of being a felon; *see, Robinson v. California*, 370 U.S. 660; 82 S. Ct. 1417; 8 L. Ed. 2<sup>nd</sup> 758 (1962)(*held*, it is a denial of due process to criminalize a person’s status). Inarguably, the statute makes no distinction between violent crimes and non-violent crimes or street crimes and white collar crimes. The Defendant, in the case at bar, finds himself precisely in the same classification as Michael Millikin, Michael Vick, Martha Stewart, I. Lewis “Scooter” Libby, Jr., Gregory Reyes, William Lerach, and a whole host of others.

The statute makes no provision for redemption—as opposed to absolution, in the form of the intervention and application of Executive Branch powers. No matter how much time elapses, no matter how rehabilitative the life course of the offender, neither

“good works,” nor incorrigible recidivism, count for anything; except, perhaps, at sentencing.

The statute makes no distinctions between fully automatic weapons, handguns, rifles, shotguns, or military weapons: the drug trafficker’s “tools of the trade,” *see, e.g.*: *United States v. Hardin*, 248 F. 3<sup>rd</sup> 489, 499 (6<sup>th</sup> Cir. 2001)(“This Court has held many times that guns are tools of the trade in drug transactions.”)(internal quotation marks omitted); *but see, Quilici v. Village of Morton Grove*, 695 F. 2<sup>nd</sup> 261, 266 (7<sup>th</sup> Cir. 1982)(“Handguns are undisputedly the type of arms commonly used for recreation or the protection of person and property.”); and, a person’s family heirlooms, handed down from generation to generation. Great-Grandpa’s Civil War musket and a MAC-10 are precisely the same in the eyes of the law.

As Professor Douglas Berman of the Ohio State University’s Moritz College of Law has commented: if Constitutionalists are to take the forthcoming decision in *Heller* seriously, draconian Federal firearms legislation is no more analytically acceptable, under the Second Amendment, than a statute making it a 10 year Federal felony for a convicted felon to consult counsel, under the Sixth Amendment.. [www.sentencing.tyepad/](http://www.sentencing.tyepad/) (February 13, 2008)(8:27 PM).

While it may be Constitutional for Congress to tailor specific statutory language to a specific *class* of felon, the instant statute is not that law.

## **CONCLUSION AND RELIEF REQUESTED**

Measured by Second Amendment principles grounded in a fundamental, individual right to keep and bear arms, in the sanctity of one’s own home, for purposes of

self-defense, the statute under which the Defendant has been charged is overbroad and fatally flawed. Count IV of the Indictment should be dismissed.

Respectfully submitted,

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Dated: February 14, 2008

At: Detroit, Michigan.

#### **CERTIFICATE OF ELECTRONIC SERVICE**

The undersigned hereby certifies that service was made upon counsel of record utilizing the ECF System of the United States District Court for the Eastern District of Michigan, upon counsel of record, on the date and at the time shown by the electronic imprint; and, upon Non-ECF filers as follows:

Not applicable.

Respectfully submitted,

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