TOURO LAW
Touro College Jacob D. Fuchsberg Law Center

Touro Law Review

Volume 26
Number 3 *Annual New York State Constitutional Issue*

Article 10

July 2012

Appellate Division, Third Department - People v. Perkins

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SUPREME COURT OF NEW YORK
APPELLATE DIVISION, THIRD DEPARTMENT

People v. Perkins[1]
(decided May 21, 2009)

On August 17, 2007, a jury convicted Shawn Perkins "of criminal possession of a weapon in the second . . . and . . . third degree[s]."[2] He received concurrent sentences of eight and one-half years in prison with three and one-half years post-release supervision on the second-degree charge, and six and one-half years in prison with three years of post-release supervision on the third degree charge.[3] Perkins appealed his conviction, but the Appellate Division, Third Department, unanimously affirmed.[4]

In September 2006, Perkins "was involved in a verbal confrontation" that intensified into gunfire.[5] Perkins pulled a handgun and fired twice at the victim.[6] He then fled the scene, leaving the victim uninjured.[7] Perkins was subsequently indicted on various charges, including "possession of a weapon in the second . . . and . . . third degree[s]."[8] After a jury trial, Perkins was convicted on the two criminal possession charges.[9]

On appeal, Perkins argued that his conviction pursuant to article 265 of the New York Penal Law ("Article 265") violated his

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[1] 880 N.Y.S.2d 209 (App. Div. 3d Dep't 2009), *appeal denied*, 13 N.Y.3d 748 (2009).

[2] *Id.* at 209-10.

[3] *Id.* at 210.

[4] *Id.* at 211.

[5] *Id.* at 210.

[6] *Perkins*, 880 N.Y.S.2d at 210.

[7] *Id.*

[8] *Id.* Perkins was also indicted on "one count . . . of reckless endangerment in the first-degree, . . . attempted assault in the first-degree, and attempted murder in the second-degree." *Id.*

[9] *Id.* at 210. At trial, the government dismissed the reckless endangerment charge. *Perkins*, 880 N.Y.S. at 210 n.1. Also, the jury acquitted Perkins of the charges of attempted assault in the first-degree and attempted murder in the second-degree. *Id.* at 210.

rights under the United States Constitution,[10] and section four of the New York Civil Rights Law ("CRL").[11] More specifically, Perkins argued that in light of the United States Supreme Court's decision in *District of Columbia v. Heller*[12] he had a constitutionally protected right to bear arms in his home for self-defense purposes, and that Article 265 created a total ban on handgun possession; therefore, he argued his conviction violated his constitutional rights.[13]

The court disagreed and acknowledged that although the *Heller* Court concluded that the Second Amendment protects an individual's right to bear arms in the home for self-defense, it is not an absolute right but one that "may be limited by reasonable governmental restrictions."[14] The Appellate Division, Third Department, distinguished the challenged statutes in *Heller*[15] from Article 265, which, the court said, is not a total ban on the right to possess handguns, and therefore does not constitute a "severe restriction" on Perkins' Second Amendment right.[16] The court also reaffirmed New York's firearm licensing requirement as an acceptable regulation of handgun possession and stated that it "will not contravene *Heller* so long as it is not enforced in an arbitrary and capricious manner."[17]

Perkins was not home during the crime, and, more importantly, he "did not have a valid pistol permit."[18] Based on these facts, the court concluded that Perkins' constitutional challenge was meritless "[i]nasmuch as the relevant sections of the Penal Law are constitutionally sound and [his] conduct did not conform to that which is protected by the Second Amendment" or section four of the CRL.[19]

In *Heller*, the United States Supreme Court extensively discussed the Second Amendment right to bear arms. The respondent, Dick Heller, was denied a handgun registration certificate by the Dis-

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[10] U.S. CONST. amend. II, states: "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."

[11] N.Y. CIV. RIGHTS LAW § 4 (McKinney 1909) states: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms cannot be infringed." *See also Perkins*, 880 N.Y.S.2d at 210.

[12] 128 S. Ct. 2783 (2008).

[13] *Perkins*, 880 N.Y.S.2d at 210.

[14] *Id.* at 210 (citing *Heller*, 128 S. Ct. at 2816).

[15] *See infra* note 22.

[16] *Perkins*, 880 N.Y.S.2d at 210 (internal quotations omitted).

[17] *Id.* (citing *Heller*, 128 S. Ct. at 2819).

[18] *Id.*

[19] *Id.* at 210.

trict of Columbia.[20] He subsequently filed a federal lawsuit in which he sought to enjoin the District of Columbia from enforcing three gun control statutes.[21] The district court dismissed the complaint,[22] but the court of appeals reversed.[23] In reversing, the Court of Appeals for the District of Columbia held that an individual has the right to possess firearms under the Second Amendment "and that the city's total ban on handguns, as well as its requirement that firearms in the home be kept nonfunctional even when necessary for self-defense, violated that right."[24] Recognizing the constitutional magnitude of the issue, the Supreme Court subsequently granted certiorari.[25]

The limited scope of the issue presented to the Supreme Court was whether a prohibition against an operable handgun in an individual's "home violates the Second Amendment."[26] In a five to four decision written by Justice Scalia,[27] the majority held that a prohibition against the possession of handguns in an individual's home, as well as a prohibition against keeping a lawful gun operable for self-defense purposes, violates the Second Amendment.[28]

In reaching this conclusion, the Court first discussed the meaning of the Second Amendment and analyzed the parties' competing interpretations of the amendment.[29] After a thorough discussion of the historical background of the Second Amendment, the Court determined that it "guarantee[s] the individual [the] right to

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[20] *Heller*, 128 S. Ct. at 2788.

[21] *Id. See also* D.C. CODE § 7-2502.01 (a) (2009) ("[N]o person . . . in the District [of Columbia] shall possess or control any firearm, unless the person . . . holds a valid registration certificate for the firearm."); D.C. CODE § 7-2502.02 (a) (4) (2001) ("A registration certificate shall not be issued for a [p]istol not validly registered to the current registrant in the District . . . ."); D.C. CODE § 7-2507.02 (a) (2001) ("It shall be the policy of the District . . . that each registrant should keep any firearm in his or her possession unloaded and either disassembled or secured by a trigger lock, gun safe, locked box, or other secure device."). These statutes were found by the *Heller* Court to violate the Second Amendment.

[22] *See* Parker v. District of Columbia (*Parker I*), 311 F. Supp. 2d 103, 109 (D.D.C. 2004), *rev'd and remanded*, 478 F.3d 370 (D.C. Cir. 2007).

[23] Parker v. District of Columbia (*Parker II*), 478 F.3d 370, 373 (D.C. Cir. 2007).

[24] *Heller*, 128 S. Ct. at 2788 (citing *Parker II*, 478 F.3d at 395, 399-401).

[25] *Id.*

[26] *Id.* at 2787-88.

[27] *See id.* at 2787.

[28] *Id.* at 2821-22.

[29] *Heller*, 128 S. Ct. at 2789. The District of Columbia argued that the Second Amendment only applies "in connection with militia service," as opposed to Heller's interpretation that the right applies to individuals unconnected with militia service and for "lawful purposes, such as self-defense within the home." *Id.*

possess and carry weapons in case of confrontation."[30] However, the Court was careful to recognize that although it is "a *pre-existing* right,"[31] it does have its limitations.[32]

Heller made clear that the right of self-defense is fundamental to the Second Amendment, and laws that prohibit an individual from maintaining an operable handgun in their own home to protect that right is unconstitutional.[33] Although the *Heller* Court conceded that handgun violence is rampant and has plagued this country for years, the Court recognized that there are other ways to regulate handguns when it stated, "the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home."[34] Even though absolute prohibitions are unconstitutional, some restrictions are permissible and, arguably necessary. Examples of permissible restrictions include, "prohibitions on the possession . . . by felons and the mentally ill, . . . laws forbidding the carrying of firearms in sensitive places . . . , [and] laws imposing conditions and qualifications on the commercial sale of arms."[35]

When the Court analyzed the challenged statutes, it found that the requirement to keep handguns inoperable in the home created a total ban on a certain class of guns.[36] This class of handguns is the most popular type used by Americans for the lawful purpose of "self-defense in the home."[37] Furthermore, a handgun is a common type to use in self-defense situations in the home; it is easy to handle, quickly "accessible in an emergency," and it can be held while a person phones the police.[38] Significantly, the Court noted that the challenged statutes would not pass any standard of scrutiny used in a constitutional challenge.[39]

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[30] *Id.* at 2797.

[31] *Id.*

[32] *Id.* at 2799.

[33] *Heller*, 128 S. Ct. at 2817-18.

[34] *Id.* at 2822.

[35] *Id.* at 2817. Two examples of sensitive places the Court mentioned include "schools and government buildings." *Id. See also* People v. Ferguson, No. 2008QN036911, 2008 WL 4694552, at *1 (N.Y. City Crim. Ct. Oct. 24, 2008) (recognizing an airport as a sensitive place).

[36] *Id.* at 2817.

[37] *Heller*, 128 S. Ct. at 2818.

[38] *Id.* at 2818.

[39] *Id.* at 2817-18.

Heller does have its criticisms, however. The dissenters cautioned that the majority was declaring a new constitutional right—to keep and bear arms for a private use—that does not comport with the original understanding of the Second Amendment.[40] Furthermore, the dissenters were concerned that "the scope of permissible regulations" is left for future judicial review and, more importantly, that it could lead to a slippery slope.[41] In a separate opinion, Justice Breyer disagreed with the majority and noted that the District's ban on handguns was a well-reasoned decision that was a necessary response to an alarming number of handguns that were present in a high-crime area.[42] The legislative intent in passing the challenged statutes was to decrease a life-threatening problem.[43]

The life-threatening problem referred to by the dissent is well documented. A discussion of handgun violence statistics reveals that handguns play a major role in crime and death.[44] "From 1993 to 1997, there were 180,533 firearm-related deaths in the United States."[45] Approximately 50% were suicides, while "44% were homicides."[46] More troubling is that one out of every eight firearm related deaths were persons "under the age of [twenty;]" further "[f]irearm-related deaths account for 22.5% of all injury deaths" of

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[40] *Id.* at 2846 (Stevens, J., dissenting).

[41] *Id.* The dissenters were troubled by the majority's interpretation that the Second Amendment meant the right to possess handguns for a private purpose because it "upsets [the] settled understanding" of the amendment. *Heller*, 128 S. Ct. at 2846. Prior to *Heller* it was understood that legislatures were free to regulate handgun possession, provided that the well-regulated militia is preserved; however, it is now left to future courts to determine the scope of the new meaning. *Id.* The dissenters were concerned that the need for self-defense frequently arises outside the home; therefore, the dissenters fear that the right to possess a handgun in the home for self-defense will soon be expanded to locations outside of the home. *Id.* Furthermore, the dissent asserted that the Court should be cautious in entering a "political thicket" concerning the debate of gun control when the political process has not been questioned; instead, the Court should adhere "to a policy of judicial restraint" rather than announcing bold policy choices today. *Id.* at 2846 n.39.

[42] *Id.* at 2847 (Breyer, J., dissenting) ("[T]he District's regulation, which focuses upon the presence of handguns in high-crime urban areas, represents a permissible legislative response to a serious, indeed life-threatening, problem.").

[43] *Heller*, 128 S. Ct. at 2847.

[44] *See id.* at 2856-57.

[45] *Id.* at 2856. *See generally* MARIANNE W. ZAWITZ & KEVIN J. STROM, UNITED STATES DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FIREARM INJURY AND DEATH FROM CRIME, 1993-97 (2000), http://bjs.ojp.usdoj.gov/content/content/pub/pdf/fidc9397.pdf.

[46] *Heller*, 128 S. Ct. at 2856 (Breyer, J., dissenting).

individuals nineteen years old or younger.[47] The Court recognized that these statistics represent a disturbing problem in America, which requires reasonable restrictions on the possession of handguns in order to curtail the unfortunate number of handgun related deaths.[48]

Interestingly, *Heller* limits only Congress' powers, but not those of the individual states.[49] It was already settled in *United States v. Cruikshank*,[50] that the right "means no more than that it shall not be infringed by Congress."[51] Each state is allowed to either restrict or protect its citizens under its own police powers.[52] However, the language of section four of the CRL in New York is substantially similar to the Second Amendment and is interpreted the same way.[53]

In *Maloney v. Cuomo*,[54] the Second Circuit Court of Appeals addressed the constitutionality of Article 265 and held that it does "not violate the Second Amendment."[55] James Maloney was arrested and charged with possession of a weapon after being in possession of a chuka stick.[56] The charge was subsequently dismissed as a result of Maloney's guilty plea to disorderly conduct and his agreement to destroy the weapon.[57] Maloney then filed a lawsuit that sought a decla-

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[47] *Id.*

[48] *See id.* at 2816-17 (majority opinion).

[49] *Id.* at 2813.

[50] 92 U.S. 542 (1875).

[51] *Id.* at 553.

[52] *Heller*, 128 S. Ct. at 2813.

[53] Moore v. Gallup, 45 N.Y.S.2d 63, 66 (App. Div. 3d Dep't 1943) ("[A]uthoritative Federal decisions construing the Second Amendment may properly be applied to the State statute in the interest of homogeneity of interpretation."). *See also* Citizens for a Safer Cmty. v. City of Rochester, 627 N.Y.S.2d 193, 198 (Sup. Ct. Monroe County 1994) ("The [c]ourts of this State have concluded that the language of federal law interpreting the Second Amendment (which is identical in its language to Article 2, § 4 of the Civil Rights Law) should be used in interpreting the provisions of this state law.").

[54] 554 F.3d 56 (2d Cir. 2009) (per curiam).

[55] *Id.* at 59.

[56] *Id.* at 58. *See also* N.Y. PENAL LAW § 265.01 (1) (McKinney 2008) which provides, in pertinent part: "A person is guilty of criminal possession of a weapon in the fourth degree when: [h]e or she possesses any . . . chuka stick . . . . " A chuka stick, also known as a "nunchaku," is:

> [A]ny device designed primarily as a weapon, consisting of two or more lengths of a rigid material joined together by a thong, rope or chain in such a manner as to allow free movement of a portion of the device while held in the hand and capable of being rotated in such a manner as to inflict serious injury upon a person by striking or choking.

N.Y. PENAL LAW § 265.00 (14) (McKinney 2008).

[57] *Maloney*, 554 F.3d at 58.

ration that Article 265 was unconstitutional because it prohibited the "possession of nunchakus in [his] home."[58] The district court dismissed the complaint on the ground that "the Second Amendment does not apply to the states"; therefore, New York is not precluded from imposing its own regulations on the possession of chuka sticks.[59]

Maloney appealed and argued that the ban violated his Second Amendment right because there is no rational basis for the prohibition under the Fourteenth Amendment.[60] The Second Circuit affirmed the district court's ruling with respect to the Second Amendment irrespective of the *Heller* decision, because the Second Amendment does not apply to the states.[61] Even though *Heller* struck down statutes that placed a total ban on handguns, the Court did not address the issue of whether the Second Amendment is incorporated into the Due Process Clause of the Fourteenth Amendment.[62] Since states can impose reasonable restrictions on handguns, Article 265 does not violate the Second Amendment because it does not create a total prohibition on handguns.[63]

The court also found a rational basis for Article 265 in its legislative history.[64] " 'Legislative acts that do not interfere with fundamental rights or single out suspect classifications carry with them a strong presumption of constitutionality and must be upheld if rationally related to a legitimate state interest.' "[65] At the time the statute was being debated, letters were mailed to the Legislature that stated that chuka sticks are the cause of serious injuries and are primarily " 'used by muggers and street gangs.' "[66] Furthermore, the weapon serves no legitimate purpose other than to injure or, in some cases,

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[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.* (citing Presser v. Illinois, 116 U.S. 252 (1886)). The Court in *Presser* noted "the [Second] [A]mendment is a limitation only upon the power of [C]ongress and the national government, and not upon that of the state." *Presser*, 116 U.S. at 265.

[62] *Maloney*, 554 F.3d at 59; *Heller*, 128 S. Ct. at 2813 n.23.

[63] *Maloney*, 554 F.3d at 58-59.

[64] *Id.* at 59.

[65] *Id.* (internal quotations omitted) (quoting Beatie v. City of New York, 123 F.3d 707, 711 (2d Cir. 1997)).

[66] *Id.* (quoting Memorandum from Atty. Gen. Louis J. Lefkowitz to the Governor (Apr. 8, 1974)).

kill a person.[67] Although Maloney argued that the ban would inhibit martial artists' use of chuka sticks in training programs, the court declined to recognize this single purpose as sufficient to overcome the burden of showing " 'that there is no rational relationship between the legislation and a legitimate legislative purpose.' "[68]

The *Heller* Court's reference to "sensitive places" is one example of many permissible regulations the government may constitutionally impose on the possession of firearms.[69] In *People v. Ferguson*,[70] the court upheld the constitutionality of Article 265 that was enforced in arguably one of the most "sensitive places"—an airport.[71] The defendant, William Ferguson, was traveling home to California from New York while in possession of a handgun.[72] Although Ferguson had a valid license to carry the handgun in California, he did not have a license to possess it in New York.[73] After Ferguson informed an American Airlines agent that he had a gun in his possession, a police officer searched his bag.[74] He was subsequently arrested and "charged with [c]riminal [p]ossession of a [w]eapon in the [f]ourth [d]egree.[75] In his omnibus motion, Ferguson sought a declaration that Article 265 was unconstitutional.[76]

In support of his motion, Ferguson specifically argued that he had a license to carry the gun in California, he was properly trained to use the handgun, and it was unloaded while he possessed it in New York.[77] Moreover, in light of the Supreme Court's decision in *Heller*, he argued that his right to carry a handgun for protection was violated.[78] However, the challenged statutes in *Heller* were clearly distinguishable because " '[f]ew laws in the history of our nation have come close to the severe restriction of the District[sic] [of Columbia's] handgun ban.' "[79] In dismissing Ferguson's claim, the court

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[67] *Maloney*, 554 F.3d at 59.

[68] *Id.* at 59-60 (quoting *Beatie*, 123 F.3d at 711).

[69] *See Heller*, 128 S. Ct. at 2816-17.

[70] No. 2008QN036911, 2008 WL 4694552, at *1 (N.Y. City Crim. Ct. Oct. 24, 2008).

[71] *Id.* at *4.

[72] *Id.* at *1, *2.

[73] *Id.* at *1.

[74] *Id.*

[75] *Ferguson*, 2008 WL 4694552, at *1.

[76] *Id.* at *1.

[77] *Id.* at *2.

[78] *Id.* at *3.

[79] *Id.* (alteration in original) (quoting *Heller*, 128 S. Ct. at 2818).

referenced *Heller's* proposition for the permissible prohibition of firearms in "sensitive places."[80] It reasoned that an airport is considered a sensitive place, and such regulatory measures on the possession of handguns are essential to the safety and security of the public.[81] Furthermore, the court noted that Ferguson was not in his home at the time of his arrest; therefore, his argument that the law infringed upon his right to carry a handgun for self-defense was not afforded the *Heller* protection.[82] Again, the court upheld the constitutionality of Article 265 as it does not constitute a total ban on the possession of handguns, and therefore is not a "severe restriction."[83]

As the *Heller* Court pointed out, a state's handgun possession law will not violate the Second Amendment unless the law is " 'enforced in an arbitrary and capricious manner.' "[84] In *People v. Abdullah*,[85] New York's firearm licensing requirement was not enforced arbitrarily or capriciously when the defendant was arrested following a violation of a temporary order of protection and who was then charged with criminal possession of a handgun.[86] A police officer responded to the temporary order of protection violation and arrived at Abdullah's home.[87] Abdullah told the officer that he had a weapon in his kitchen.[88] The officer seized a handgun, arrested Abdullah, and charged him with criminal possession of a handgun in the fourth degree.[89]

Abdullah argued that the possession charge violated his Second Amendment right to bear arms in his home for self-defense, and that the city's requirement for handgun licenses was enforced in an arbitrary and capricious manner.[90] The court disagreed and upheld New York's handgun regulations as reasonable governmental restrictions.[91] Although the court did not directly address Abdullah's argu-

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[80] *Ferguson*, 2008 WL 4694552 at *4 (internal quotations omitted).

[81] *Id.*

[82] *Id.*

[83] *Id.* (internal quotations omitted).

[84] *Heller*, 128 S. Ct. at 2819 (quoting Transcript of Oral Argument at 74-75, *Heller*, 128 S. Ct. 2783 (No. 07-290)).

[85] 870 N.Y.S.2d 886 (N.Y. City Crim. Ct. 2008).

[86] *Id.* at 887.

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Abdullah*, 850 N.Y.S.2d at 886.

[91] *Id.* at 887.

ment that the gun licensing process was enforced in an arbitrary and capricious manner, the court cited New York's gun licensing statute, which provides the requirements for a license to be issued.[92] Because there was a temporary order of protection issued against Abdullah, his right to possess a handgun was suspended.[93] Therefore, it could hardly be said that New York's gun licensing statute was enforced arbitrarily or capriciously when the statute expressly prohibits possession of a handgun by those who have a temporary order of protection issued against them. The court concluded by saying that it is a criminal act to possess a handgun unless an individual has a valid license, and that Article 265 is not unconstitutional as violating the Second Amendment.[94]

In *People v. Handsome*,[95] the New York City Criminal Court elaborated on the factors that police commissioners may consider when determining whether to grant a handgun license to an applicant.[96] In *Handsome*, the police obtained a warrant to search Handsome's apartment based upon information that he possessed weapons.[97] The police seized three handguns and ammunition from the apartment.[98] Handsome "was charged with three counts of [c]riminal [p]ossession of a [w]eapon in the [f]ourth [d]egree."[99] He argued that Article 265 was unconstitutional because it violated his Second Amendment right in light of *Parker v. District of Columbia*.[100]

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[92] *Id.* *See also* N.Y. PENAL LAW § 400.00 (McKinney 2005) which provides, in pertinent parts:

> No license shall be issued . . . except for an applicant (a) twenty-one years of age or older . . . ; (b) of good moral character; (c) who has not been convicted anywhere of a felony or a serious offense; (d) who has stated whether he or she has ever suffered any mental illness . . . ; (e) who has not had a license revoked or who is not under a suspension . . . order issued pursuant to . . . section 530.14 of the criminal procedure law . . . ; (g) concerning whom no good cause exists for the denial of the license.

[93] N.Y. CRIM. PROC. LAW § 530.14 (1) (a) (McKinney 2007) which provides, in pertinent part: "Whenever a temporary order of protection is issued . . . the court shall suspend any such existing [handgun] license possessed by the defendant . . . and order the immediate surrender of any or all firearms owned or possessed . . . ."

[94] *Abdullah*, 870 N.Y.S.2d at 887.

[95] 846 N.Y.S.2d 852 (N.Y. City Crim. Ct. 2007).

[96] *See id.* at 861.

[97] *Id.* at 853.

[98] *Id.*

[99] *Id.*

[100] *Handsome*, 870 N.Y.S.2d at 853; *see also Parker II*, 478 F.3d at 395. At the time of

Handsome's argument was problematic because he claimed that his Second Amendment right was violated despite his failure to apply for a handgun license.[101] The court reasoned that judicial review was available if Handsome had applied for and been denied a handgun license.[102] If Handsome had applied for a license, the police commissioner would have considered a number of factors, including his age,[103] employment, high school attendance status, and residence in a New York City Housing Authority property among "many young children and senior citizens."[104] Furthermore, the government obtained information during discovery that provided that he was "a member of an organized gang."[105]

The court recognized that it is quite possible that Handsome would have been denied a license because he was under the minimum age imposed by the licensing statutes, he lived in public housing, and he was an alleged gang member.[106] More importantly, it would hardly be an arbitrary and capricious enforcement of Article 400 of the Penal Law or a violation of Handsome's Second Amendment right when he does not fit the class of persons that the statute permits to possess handguns.[107] The court concluded by noting that Article 265 "was enacted pursuant to the State's police power, and is more than rationally related to the end it seeks to accomplish, limiting gun violence and accidents which have caused many deaths and injuries."[108]

When supported by a rational basis, the denial of a pistol license will not violate the Second Amendment.[109] In *Wisotsky v. Kelly*, Wisotsky applied for a premises residence license for a handgun and was approved.[110] In support of his application he noted that

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Handsome, the Supreme Court had not yet decided *Heller*, but *Parker* was affirmed on appeal. *See Heller*, 128 S. Ct. at 2788.

[101] *Handsome*, 870 N.Y.S.2d at 861.

[102] *Id.*

[103] Handsome was only nineteen years old at the time. *Id.*

[104] *Id.*

[105] *Id.*

[106] *Handsome*, 870 N.Y.S.2d at 861

[107] *See* N.Y. PENAL LAW § 400 (1) (MCKINNEY 2007), which provides, in pertinent part: "No license shall be issued . . . except for an applicant (a) twenty-one years of age or older . . . ."

[108] *Handsome*, 846 N.Y.S.2d at 861.

[109] Wisotsky v. Kelly, No. 104213/09, 2009 WL 1620181, at *5 (Sup. Ct. N.Y. County June 2, 2009).

[110] *Id.* at *1.

he was a personal security guard for David Rockefeller, a retired warrant officer, and was a former "United States Marine . . . for twenty years" before being involuntarily discharged for unacceptable conduct.[111] A few months later, Wisotsky was "charged with criminal possession of a weapon in the third degree[,] . . . criminal impersonation in the third degree[,] . . . and assault in the third degree."[112] Although the charges were ultimately dismissed, two orders of protection were issued against Wisotsky in favor of the complaining witnesses in the criminal case.[113]

Wisotsky re-applied for a premises residence license after the charges were dismissed, but his application was denied.[114] In denying his application, the license division stated that the criminal charges against him were "disturbing," and that he exercised "poor judgment" when he carried his unsecured handgun outside the presence of the home in direct violation of his handgun license.[115] A subsequent appeal of his license denial was also dismissed, and in dismissing, the license division noted that he "fail[ed] to disclose the prior orders of protection" issued against him.[116]

Wisotsky then commenced an Article 78 proceeding to show cause as to the denial of the license.[117] He argued that the license division's decision to deny his application was arbitrary and capricious because the criminal charges were dismissed, he had twenty years of military service, he was currently employed as a personal security guard, and the denial violated his Second Amendment right.[118]

The decision to deny a premises residence license will stand unless the decision was arbitrary and capricious; thus, the decision is proper when "supported by a rational basis."[119] The license division found numerous reasons to deny the license, including the violation of his original license restriction, which led to criminal charges, and the failure to disclose three orders of protection against him when he

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111 *Id.*
112 *Id.*
113 *Id.* at *3.
114 *Wisotsky*, 2009 WL 1620181, at *3.
115 *Id.*
116 *Id.* at *4.
117 *Id.*
118 *Id.*
119 *Wisotsky*, 2009 WL 1620181, at *5.

re-applied for the license.[120] Although Wisotsky did have an otherwise stellar background and provided analogous cases in which applicants with more troubling backgrounds were given licenses, there is no authority that says an applicant is always "entitled to a second chance."[121] Furthermore, there are numerous factors to consider when deciding whether to deny a handgun license, which include the need to have a license and other mitigating factors.[122]

Future courts will be well guided by consistent decisions that uphold the constitutionality of Article 265, because in almost all of the decisions there was a clear violation of Article 265 or a rational basis to deny a handgun license. As *Heller* pointed out, regulations of handguns are necessary for the safety of the citizens of this country. *Ferguson* is a prime example of a reasonable restriction that is important for the safety and security of the public in sensitive places. Reasonable people will continue to disagree regarding handgun restrictions, but they are arguably necessary in airports for the safety of travelers. Without these restrictions, the troubling statistics that *Heller* referenced will continue to worsen.

New York should continue to implement regulations that only allow responsible persons the right to possess a handgun for self-defense purposes in the home. *Wisotsky* is important to show that even a stellar background can be negated by one criminal act. Wisotsky clearly did not exemplify the high level of responsibility that comes with possessing a handgun when he was charged with a crime directly related to his illegal use of a weapon. Article 400 of the Penal Law, therefore, is significant to protect the public from people like Wisotsky, who at one time satisfied the requirements to possess a handgun, but now clearly should not enjoy that right. Similarly, *Abdullah* and *Handsome* are important cases to show that those who are subjected to criminal prosecutions do not deserve to possess hand-

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[120] *Id.* at *5-6.

[121] *Id.* at *6 (internal quotation marks omitted).

[122] *Id.* Although courts normally take into account various factors to determine whether the grant or denial of a license is proper, one criminal act can negate an otherwise unblemished record. *See, e.g.*, Tolliver v. Kelly, 837 N.Y.S.2d 128, 130 (App. Div. 1st Dep't 2007) (reversing the decision to grant petitioner's handgun license because his "unblemished record of outstanding character . . . his military service, [and] his higher education" was negated by a criminal conviction, which evidenced "a startling lack of judgment") (internal quotation marks omitted).

guns because they are not "of good moral character."[123] Consistent decisions upholding the constitutionality of Article 265 as well as the imposition of harsh criminal sentences in different factual scenarios will further serve New York's determination to have strict handgun laws and act as a general deterrent to future persons who are considering violating the handgun laws.

However, at the same time, denying a handgun license to Abdullah after the criminal charges were dropped is contrary to the express language of Article 400 of the Penal Law that those convicted of a felony or serious offense are precluded from possessing a handgun.[124] A decision like this casts doubt on New York's ability to recognize that citizens are capable of rehabilitation and can earn the right to possess a handgun again. This, at first read, can be quite troubling when our criminal justice system encourages rehabilitation, but *Handsome* showed that judicial review is still available to appeal the decision. This will provide individuals another opportunity to argue why they deserve a handgun license and will serve as a check on determinations made by the police commissioner.

As long as future courts properly apply the rational basis test as they did in *Wisotsky*, New York residents should feel confident that courts only grant licenses to responsible individuals who are "of good moral character," and where there is otherwise "no good cause . . . for the denial of the license."[125] When this is done, the tragic handgun statistics reported in *Heller* should improve, and people similar to the victim in *Perkins* will be protected from violent criminals because article 265 is rationally related to the ends it seeks to accomplish—the protection of the public from handgun violence.

The United States Supreme Court granted certiorari in *McDonald v. City of Chicago*[126] to decide the question left open in *Heller*—whether the Second Amendment is incorporated into the Due Process Clause of the Fourteenth Amendment.[127] The decision is expected by the summer of 2010. In *McDonald*, the National Rifle Association

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[123] N.Y. PENAL LAW § 400.00 (1) (b).

[124] *Id.* § 400.00 (1) (c).

[125] *Id.* § 400.00 (1) (b), (g).

[126] Nat'l Rife Ass'n v. Chicago, 567 F.3d 856 (7th Cir. 2009), *cert. granted*, McDonald v. City of Chicago, 130 S. Ct. 48 (2009).

[127] *Heller*, 128 S Ct. at 2813 n.23; *see also* Petition for Writ of Certiorari at i, Nat'l Rifle Ass'n v. Chicago, 2009 WL 1556563 (U.S. June 3, 2009) (No. 08-1497).

filed a complaint alleging that certain Chicago ordinances prohibited the possession of handguns in the home, in violation of *Heller*.[128] The district court dismissed the complaint, holding that the Second Amendment does not apply to the states, and the Seventh Circuit Court of Appeals affirmed, holding that only the Supreme Court can decide whether the Second Amendment is incorporated into the Fourteenth Amendment.[129]

McDonald is significant; it will likely determine whether the Second Amendment is incorporated into the Fourteenth Amendment. Justice Stevens questioned the scope of the right established in *Heller*—is it the right to possess a handgun in the home, or is it more expansive to include the right to possess a handgun on the street?[130] Given the numerous issues regarding the scope of the Second Amendment, the Justices will likely remand the case with guidance on what types of reasonable restrictions will be constitutionally permissible.[131] In New York, if the Supreme Court does incorporate the Second Amendment, there will likely be an influx of litigation challenging the constitutionality of article 265 of the Penal Law. The implications of *McDonald* could be far-reaching and could significantly change the constitutionality of New York's restrictions on the possession of handguns.

Brian Shupak

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[128] *Nat'l Rifle Ass'n*, 567 F.3d at 857.

[129] *Id.* at 857, 860.

[130] Adam Liptak, *Justices Seem to Lean Toward Extending Individual Right to Own Guns*, N.Y. TIMES, Mar 3, 2010 at A14.

[131] *The Second Amendment's Reach*, N.Y. TIMES, Mar. 2, 2010 at A22.