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Guns and Ammo: For Convicted Americans Viewing Pictures of Others Enjoying Their Constitutional Right to Bear Arms in a Magazine is the Closest They Will Ever Get to Seeing the Second Amendment at Work - People V. Hughes

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GUNS AND AMMO: FOR CONVICTED AMERICANS VIEWING PICTURES OF OTHERS ENJOYING THEIR FUNDAMENTAL CONSTITUTIONAL RIGHT TO BEAR ARMS IN A MAGAZINE IS THE CLOSEST THEY WILL EVER GET TO SEEING THE SECOND AMENDMENT AT WORK

SUPREME COURT OF NEW YORK
APPELLATE DIVISION, SECOND DEPARTMENT

People v. Hughes[1]
(decided April 19, 2011)

The defendant, Franklin Hughes, was convicted of possession of a weapon in the second degree and in the third degree.[2] The defendant appealed his conviction under Penal Law section 265.02(1) and section 265.03(3), alleging that the statutes violated his Second Amendment right, both under the United States Constitution and the Civil Rights Law section 4.[3] The Appellate Division, Second Department, rejected the defendant's argument, holding that Penal Law section 265.02(1) and section 265.03(3) were constitutional.[4] The Second Department concluded that criminalizing the possession

[1] 921 N.Y.S.2d 300 (App. Div. 2d Dep't 2011).

[2] *Id.* at 300; N.Y. PENAL LAW § 265.02(1) (McKinney 2011) which reads: "A person is guilty of criminal possession of a weapon in the third degree when: [s]uch person commits the crime of criminal possession of a weapon in the fourth degree . . . and has been previously convicted of any crime."; N.Y. PENAL LAW § 265.03(3) (McKinney 2011) which provides, in pertinent part, a person is guilty of criminal possession of a weapon in the second degree when "such person possesses any loaded firearm." The defendant was convicted of criminal possession of a weapon in the second degree based on the provision under sub division one, because he was previously convicted of a crime. *Hughes*, 921 N.Y.S.2d at 301.

[3] *Hughes*, 921 N.Y.S.2d at 300; U.S. CONST. amend. II. (The Second Amendment to the United States Constitution provides "the right of the people to keep and bear Arms, shall not be infringed."); N.Y. CIV. RIGHTS § 4 (McKinney 2011) (which provides "the right of the people to keep and bear arms cannot be infringed.").

[4] *Hughes*, 921 N.Y.S.2d at 302.

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of a weapon by a person previously convicted of a crime did not transgress the Second Amendment or New York Civil Rights Law.[5] The court based its holding on the grounds that the statutes were not "a complete ban on hand guns and [are], therefore, not a 'severe restriction' improperly infringing upon defendant's Second Amendment rights."[6]

On July 8, 2009, the defendant, Franklin Hughes, was convicted of criminal possession of a weapon in the second and third degree.[7] The defendant had prior convictions for attempted possession of a controlled substance in the fifth degree and resisting arrest.[8] These prior convictions made it possible for the defendant to be found guilty by the county court.[9] The Appellate Division, Second Department, affirmed the decision handed down by the county court finding the defendant guilty of criminal possession of a weapon in the second and third degree.[10]

On appeal, the defendant alleged that Penal Law section 265.02(1) and Penal Law section 265.03(3) violated the United States Constitution and the Civil Rights Law, section 4.[11] The defendant's argument was based on recent decisions by the United States Supreme Court in *District of Columbia v. Heller* and *McDonald v. City of Chicago, Ill*.[12] The defendant's argument relied on these two

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[5] *Id.* at 301.

[6] *Id.* at 301 (quoting People v. Perkins, 880 N.Y.S.2d 209, 210 (App. Div. 3d Dep't 2009)).

[7] *Id.* at 300.

[8] Daniel Wise, *Gun Curb Survives High Court Decision*, N.Y.L.J., Apr. 25, 2011 (explaining that the attempted possession of a control substance is a class E felony and the resisting arrest charge was considered a class A misdemeanor); N.Y. PENAL LAW § 220.06(1) (McKinney 2011) ("A person is guilty of criminal possession of a controlled substance in the fifth degree when he knowingly and unlawfully possesses . . . a controlled substance with intent to sell it."); N.Y. PENAL LAW § 205.30 (McKinney 2011) ("A person is guilty of resisting arrest when he intentionally prevents or attempts to prevent a police officer or peace officer from effecting an authorized arrest of himself or another person.").

[9] Wise, *supra* note 8. It was the defendant's prior convictions for attempted possession of a controlled substance in the fifth degree and resisting arrest that allowed him to be charged and found guilty under section 265.02(1) and section 265.03(3). *Id.*; under the Penal Law section 265.02(1) and section 265.03(3) to be found guilty of criminal possession there is a requirement that the person has "been previously convicted of any crime . . . ." *Id.* (internal quotation marks omitted).

[10] *Hughes*, 921 N.Y.S.2d at 300.

[11] *Id.*

[12] 554 U.S. 570, 635 (2008) (holding that the United States Constitution's Second Amendment grants a constitutionally protected individual right to keep and bear arms for self-defense in the home); 130 S. Ct. 3020, 3026 (2010) (holding that the Second

decisions in making his appeal to have his criminal conviction overturned.[13] The defendant argued that the Penal Law section 265.02(1) and Penal Law section 265.03(3) violated his Second Amendment right to bear arms by making it a criminal penalty to possess a firearm after committing a crime.[14] The defendant claimed the statutes in question were unconstitutionally overbroad because they restrict the rights of anyone who has been convicted of any crime.[15]

The Appellate Division, Second Department, denied the defendant's claim and upheld the constitutionality of Penal Law section 265.02(1) and Penal Law section 265.03(3).[16] The court agreed with the defendant's position that *Heller* and *McDonald* did in fact confer the basic individual right to bear arms for self-defense in the home, but the Second Department refused to recognize that this right was unlimited.[17] The Second Department relied on Justice Scalia's majority opinion in *Heller* recognizing that the rights granted by the Second Amendment were not unlimited.[18] This was the foundation the court used to make their decision that Penal Law sections 265.02(1) and 265.03(3) are constitutional.[19]

The Second Department relied on important dicta from *Heller* that the Second Amendment was an individual right, which could be regulated.[20] Of crucial importance was Justice Scalia's statement regarding restrictions upon the Second Amendment that

> [n]othing 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

Amendment is incorporated by the Due Process Clause of the Fourteenth Amendment and is fully applicable to the States); *Hughes*, 921 N.Y.S.2d at 301.

[13] *Hughes*, 921 N.Y.S.2d at 301.

[14] *Id.* at 300-01.

[15] *Id.* at 301.

[16] *Id.*

[17] *Id.* at 921 N.Y.S.2d at 301; *Heller*, 554 U.S. at 626 ("[l]ike most rights, the right secured by the Second Amendment is not unlimited").

[18] *Hughes*, 921 N.Y.S.2d at 301; *Heller*, 554 U.S. at 626-27.

[19] *Hughes*, 921 N.Y.S.2d at 301-02.

[20] *Id.* at 301.

commercial sale of arms.[21]

From Justice Scalia's opinion, the Second Department rationalized that the Penal Laws were not in violation of the Second Amendment right to bear arms.[22] The Second Department strengthened their holding by utilizing *People v. Perkins*,[23] a decision of the Appellate Division, Third Department.[24] The Second Department agreed with the Third Department's opinion that " '[u]nlike the statute at issue in *Heller*, Penal Law article 265 does not effect a complete ban on handguns and is, therefore, not a 'severe restriction' improperly infringing upon the defendant's Second Amendment rights.' "[25] In differentiating the two New York decisions from the *Heller* decision, the Second Department recognized the issue presented by *Heller* involved a complete ban, whereas the two New York jurisdictions were not a total ban on possession of handguns.[26]

The Second Department reconciled the final claim made by the defendant that the statues in question were unconstitutionally overbroad.[27] The distinction the court enumerated in denying the defendant's claim was based on the Penal Law, which defines a crime as "a misdemeanor or a felony."[28] Accordingly, the Second Department held that the phrase "any crime" in the statue was not overbroad and, therefore, was constitutional in accordance with the Supreme Court's decision in *Heller*.[29]

The Supreme Court focused a lot of attention on *District of Columbia v. Heller*, because it was the first major decision made on a

[21] *Id.*; *Heller*, 554 U.S. at 626-27.

[22] *Hughes*, 921 N.Y.S.2d at 301-02.

[23] *Perkins*, 880 N.Y.S.2d 209 (App. Div. 3d Dep't 2009).

[24] *Hughes*, 921 N.Y.S.2d at 301; *Perkins*, 880 N.Y.S.2d at 210. The Appellate Division, Third Department, handed down its decision in a case that was similar to *Hughes*. *Id.* The defendant, Shawn Perkins, was convicted under criminal possession of a firearm in both the second and third degree. *Id.* The defendant, upon appeal of his conviction put forth the argument that the statutes he was convicted under, part of the same Penal Law codes Hughes was convicted under, were in violation of his Second Amendment rights and Civil Rights Law § 4. *Id.*

[25] *Hughes*, 921 N.Y.S.2d at 301 (quoting *Perkins*, 880 N.Y.S.2d at 210).

[26] *Id.*

[27] *Id.*

[28] N.Y. PENAL LAW § 10.00(6) (McKinney 2011). Section six reads: " 'Crime' means a misdemeanor or a felony." *Id.* The court in *Hughes* stressed this distinction to show that "lesser matters such as violations and traffic infractions do not fall within the ambit of the challenged statutes." *Hughes*, 921 N.Y.S.2d at 301.

[29] *Hughes*, 921 N.Y.S.2d at 301-02.

Second Amendment issue by the Supreme Court since 1939.[30] Prior to the decision in *Heller*, the issue of firearms lay dormant for almost seventy years. In 1939, the Supreme Court decided *United States v. Miller*[31] which was initiated in response to the National Firearms Act of 1934.[32]

Miller involved two men, defendants Jack Miller and Frank Layton, who were accused of transporting firearms in interstate commerce.[33] The weapon being transported was an unregistered twelve-gauge shotgun with a barrel less than eighteen inches in length.[34] The shotgun the two men were transporting was unregistered at the time, making it a violation under Title 26 of the United States Code, the National Firearms Act.[35] The police arrested them in violation of this act.[36] The charges against Miller and Layton were dismissed by the district court, holding the Second Amendment was violated by the Act.[37]

The United States argued on appeal that the purpose of the Second Amendment was to effectuate a well-maintained militia, and the shotguns were not being used for this purpose.[38] Justice McReynolds agreed with this argument by noting that "absen[t] any evidence . . . [showing] possession or use of a 'shotgun having a

[30] United States v. Miller, 307 U.S. 174 (1939).

[31] *Id.*

[32] *Id.* at 175 n.1.

[33] *Id.*

[34] *Id.* The sawed-off shotgun was originally introduced in 1898, by Winchester for use by police in riot control. People v. Cortez, 442 N.Y.S.2d 873, 874-75 (Sup. Ct. 1981). It soon became an effective tool of the criminal element because "[f]irst, the removal of the choke, by cutting the barrel, exposes potential victims to greater peril. Second, cutting the barrel and/or the stock makes it easier to conceal." *Id.* A sawed-off shotgun is a standard shotgun that has had the barrel of the gun altered by decreasing the length of the barrel. *Id.*

[35] *Miller*, 307 U.S. at 175.

[36] Brian L. Frye, *The Peculiar Story of* United States v. Miller, 3 N.Y.U. J. L. & LIBERTY 48, 49 (2008).

[37] United States v. Miller, 26 F. Supp. 1002, 1002 (W.D. Ark. 1939), *rev'd*, 307 U.S. 174 (1939).

[38] *Miller*, 307 U.S at 176. On appeal "[t]he court gave Miller's counsel . . . two weeks to submit his written brief and prepare for a grueling interrogation by the justices." Robert A. Levy, *Second Amendment Haze*, WASH. TIMES, June 17 2008. The defendant's counsel, "who was court-appointed and had not been compensated, replied he had received neither the government's brief nor a copy of the trial record. He wanted to file a brief, but doubted he could travel all the way to Washington, D.C., for oral argument." *Id.* The Supreme Court responded to Gutensohn, offering a later date to present the case. *Id.* Gutensohn replied, by telegram saying " '[s]uggest case be submitted on [government's] brief. Unable to obtain any money from clients to be present and argue case.' " *Id.*

barrel of less than eighteen inches in length . . . ' has some reasonable relationship to the preservation or efficiency of a well-regulated militia, . . . the Second Amendment [does not] guarantee[] the right to keep and bear such an instrument."[39] The court held that the National Firearms Act was constitutional and it did not violate the Second Amendment.[40]

In the decision the court wrestled with how to apply the Second Amendment in reference to a well-organized militia, which the court felt was its purpose.[41] Following *Miller*, courts "struggle[d] to decipher its holding."[42] This decision remained the last major decision on the Second Amendment until the Supreme Court decided *Heller* in 2008.

Contrary to *Miller*, in *People v. Hughes*,[43] the Second Department neglected to rule on any specific purpose or protection provided by the Second Amendment or the New York Civil Rights Law.[44] Instead, the Second Department focused on whether the application of the statute prohibiting firearms under certain circumstances was constitutional.[45] The Second Department discussed only "a policy determination by the Legislature that 'an illegal weapon is more dangerous in the hands of a convicted criminal than in the possession of a novice to the criminal justice system.' "[46] While the Second Department relied heavily on the decision in *Heller*, it did not narrow or clarify how the *Heller* decision would apply to New York.[47]

At issue in *Heller* were statutes that provided for a complete ban on the carrying of handguns and lawfully-possessed guns needed to be disassembled or locked while not in use for lawful activities.[48]

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[39] *Miller*, 307 U.S at 178.

[40] *Id.* at 183.

[41] *Id.* at 178-79.

[42] Frye, *supra* note 36, at 49. "Some find *Miller* adopted an individual right theory of the Second Amendment, some find it adopted a collective right theory, and some find it adopted a hybrid theory, protecting the right to possess a firearm in connection with militia service." *Id.* This would be one of the points that the Court in *Heller* would debate as well. *See Heller*, 554 U.S. 570.

[43] 921 N.Y.S.2d 300 (App. Div. 2d Dep't 2011).

[44] *Id.*

[45] *Id.* at 301.

[46] *Id.*

[47] *Id.*

[48] *Heller*, 554 U.S. at 575.

The statutes at issue were challenged on the basis that they violated the Second Amendment.[49] Respondent, Dick Heller, was a special police officer in the District of Columbia who was authorized as part of his position to carry a firearm while on duty.[50] He applied for registration of a handgun to use in his home, but his application was denied.[51] This prompted him to bring his lawsuit against the District of Columbia, challenging the statutes as a violation of the Second Amendment right to bear arms.[52]

The Supreme Court granted certiorari to decide whether these statutes violated the defendant's Second Amendment right to bear arms.[53] The Supreme Court recognized that there are two opposing views on what the Second Amendment protects.[54] First, there was the view that was championed by the dissenting Justices in *Heller*, that the protection offered by the Second Amendment only gave the right to carry firearms in connection with activities of a militia.[55]

The second view was the view of the respondent that the Second Amendment protects "an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home."[56] This was the view of the majority in the decision.[57] Justice Scalia's majority opinion concluded that the primary purpose of the Second Amendment is for self-defense.[58]

Historically, the rights secured by the Second Amendment are not connected with service in the Militia.[59] The Supreme Court, in its analysis of the intent of the framers of the Second Amendment prior to ratification, concluded from sources at the time that the Second Amendment was advanced for the purposes of self-defense.[60] The

[49] *Id.* at 575-76. The statutes that were at issue were "D.C.Code §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4) (2001)." *Id.* at 575.

[50] *Id.*

[51] *Id.*

[52] *Heller*, 554 U.S. at 575-76.

[53] *Id.* at 576.

[54] *Id.* at 577.

[55] *Id.*

[56] *Id.*

[57] *Heller*, 554 U.S.at 595.

[58] *Id.* at 630.

[59] *Id.* at 582.

[60] *Id.* at 606. This turns out to be the core right that the majority feels is protected by the Second Amendment. *Id*. at 630.

Supreme Court, in *Heller*, recognized that central to the Second Amendment is an "inherent right of self-defense."[61] According to the majority, the right that is granted is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[62] In *Heller*, the statutes in the District of Columbia amounted to a total ban on use of weapons for self-defense in the home, which the Supreme Court determined violated the Second Amendment.[63] The majority held that self-defense was "the central component of the right itself."[64] The significance that the Supreme Court placed on self-defense was an essential element in the court's holding.[65]

The Supreme Court's holding in *Heller* consisted of two concepts as to what protections were offered under the Second Amendment.[66] The first part of the holding was that the Second Amendment confers upon an individual the right to keep and bear arms.[67] The other important part of the holding is that if a statute either bans handgun possession in the home or renders a gun inoperable in the home, the statute is in violation of the Second Amendment.[68]

In making its decision that the Second Amendment grants certain individual rights, the Supreme Court recognized that "[l]ike most rights, the right secured by the Second Amendment is not unlimited."[69] This is an important component in analyzing whether prohibitions on handgun ownership by a person previously convicted of a crime violates the Constitution. The Court explicitly stated that some prohibitions on gun ownership are acceptable.[70] For example, the Supreme Court noted that prohibitions on carrying of firearms by

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[61] *Id.* at 628.

[62] *Heller*, 554 U.S. at 635.

[63] *Id.* at 628-29. The Court described the District of Columbia's statutory scheme by stating that "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban." *Id.* at 629.

[64] *Id.* at 599.

[65] *Id.* at 635.

[66] *Heller*, 554 U.S. at 635.

[67] *Id.* This secures a person's right under the Second Amendment to keep and bear firearms in their home in order to protect and defend. *Id.* at 628-29. The need for self-defense in a person's home is the most "acute" according the majority in *Heller*. *Id.* at 628.

[68] *Id.* at 628-29.

[69] *Heller*, 554 U.S. at 626. The Supreme Court also noted that "[w]e identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Id.* at 627 n.26.

[70] *Id.* at 626-27.

the mentally ill or felons are acceptable.[71] The Supreme Court left open many questions after *Heller* including a test or a standard to determine what regulations are consistent with the Second Amendment right to bear arms.

After *Heller*, one of the questions that remained was whether this decision was intended to be binding on the states, through incorporation into the Due Process Clause of the Fourteenth Amendment.[72] When the decision was handed down in 2008, the Second Amendment was one of the few amendments that had not been incorporated into the Due Process Clause of the Fourteenth Amendment.[73] This question was answered when the Supreme Court handed down its plurality decision in *McDonald v. City of Chicago, Ill*.[74]

The petitioners in the case were Chicago residents who wanted to keep handguns in their home for the purpose of self-defense.[75] Defendants, the City of Chicago and Village of Oak Park, had statutes in place that in essence were banned ownership of handguns.[76] The City of Chicago enacted the ban on handgun possession in order to protect residents of the city from property loss

[71] *Id.* at 626.

[72] *McDonald*, 130 S. Ct. at 3035 n.13. The Bill of Rights of the United States Constitution at its inception only applied to the federal government, and the states were in no way encumbered by it. *Id.* at 3028. It was not until after the Civil War and the adoption of the Reconstruction Amendments that this view changed. *Id.* The Due Process Clause of the Fourteenth Amendment became the avenue the Supreme Court utilized in order to incorporate the protections offered by the Bill of Rights and apply them to the states. *Id.* Originally, " the only rights protected against state infringement by the Due Process Clause were those rights 'of such a nature that they are included in the conception of due process of law.' " *Id.* at 3031 (quoting *Twining v. New Jersey*, 211 U.S. 78, 99 (1908)). Slowly the Supreme Court began to make the Bill of Rights applicable to the state through the Due Process Clause of the Fourteenth Amendment, choosing to follow the theory of selective incorporation. *McDonald*, 130 S. Ct. at 3034. Even though the incorporation was selective, out of the first eight amendments of the United States Constitution at the time *McDonald* was decided, there were only three amendments remaining to be incorporated to the states. *Id.* at 3035 n.13. The Supreme Court recognized that the only amendments that had not been made applicable to the states through the Due Process Clause of the Fourteenth Amendment were the "Sixth Amendment right to a unanimous jury verdict . . . the Third Amendment's protection against quartering of soldiers; the Fifth Amendment's grand jury indictment requirement; the Seventh Amendment right to a jury trial in civil cases; and the Eighth Amendment's prohibition on excessive fines." *Id.*

[73] *Id.* at 3035 n.13

[74] *Id.* at 3020.

[75] *McDonald*, 130 S. Ct. 3026.

[76] *Id.* at 3026.

or death.[77] The petitioner's argument was that the regulation did the exact opposite of what it intended to do, making it harder for citizens to protect themselves which was established by the Supreme Court's decision in *Heller*.[78] The defendants argued that the statutes were constitutional because they were not bound by the decision in *Heller*, as the Second Amendment was not applicable to the states.[79]

The Supreme Court held that the Second Amendment is incorporated through the Due Process Clause of the Fourteenth Amendment[80] and, therefore, is fully applicable to state actions.[81] The Supreme Court affirmed dicta in Heller that certain restrictions on possession of firearms are acceptable, and the incorporation of the Second Amendment would not "imperil every law regulating firearms."[82]

These two Supreme Court decisions establish an important foundation for determining whether prior criminal convictions are a valid ground for prohibition of ownership of firearms. Both cases said that restrictions on the Second Amendment individual right were appropriate, but the Court failed to lay out a foundation as to the type of prohibitions would be considered constitutional.[83]

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[77] *Id.* at 3026.

[78] *Id.* at 3026-27. The petitioners in the case were often "the targets of threats and violence." *Id.* at 3026. The Court offered the example of petitioner, Otis McDonald, who was in his late seventies. *McDonald*, 130 S. Ct. at 3026-27. Mr. McDonald "lives in a high-crime neighborhood. *Id.* at 3027. "He is a community activist involved with alternative policing strategies, and his efforts to improve his neighborhood have subjected him to violent threats from drug dealers." *Id.*

[79] *Id.* at 3026-27.

[80] U.S. CONST. amend. XIV, § 1 provides "[n]o State . . . shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .".

[81] *McDonald*, 130 S. Ct. at 3026. The opinion in *McDonald* was only a plurality. *Id.* Justice Thomas agreed with the four justices in favor of incorporation. *Id.* The plurality believed that the Second Amendment was incorporated to the states through the Fourteenth Amendment by way of Due Process Clause. *Id.* Justice Thomas agreed with incorporation, but it would be incorporated through the Fourteenth Amendments Privileges and Immunities Clause. *Id.* at 3058-59. Justice Thomas wrote "the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause." *McDonald*, 130 S. Ct. at 3059.

[82] *Id.* at 3047.

[83] *See Heller*, 554 U.S. 570; *McDonald*, 130 S. Ct. 3020.

After *Heller*, most of the circuits ruled that the possession of firearms by a person convicted of a crime was not a violation of the core right established in *Heller*.[84] The decisions handed down by the federal trial courts on the issue of possession of firearms by convicted criminals mirror decisions in the circuit courts on the same issue.[85]

In reliance on *Heller* and *McDonald*, federal circuits have consistently ruled that restricting possession of a firearm by a person previously convicted of a crime is a valid restriction on the Second Amendment right.[86] The federal statutory provision on this issue that has continually been called into question regarding its constitutionality is section 922 of the United States Code titled "Unlawful Acts."[87] While the statute has often been challenged as being unconstitutional since 2008, it has continued to withstand these challenges.[88]

One of the first federal cases to deal with the issue of whether a law denying people who have prior criminal convictions the right of gun ownership violates the Second Amendment was a decision handed down by Chief Judge Easterbrook in the *United States v. Skoien*.[89] Steven Skoien had been previously convicted on charges of domestic violence.[90] While on probation the defendant was found to be in possession of three firearms and pled guilty to the charge that

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[84] *See* United States v. Skoien, 614 F.3d 638 (7th Cir. 2010); United States v. Chester, 628 F.3d 673 (4th Cir. 2010) (In order to differentiate the individual right of possession of a firearm for self-defense, the courts focused on a person who was law-abiding or a responsible citizen).

[85] *See, e.g.*, United States v. Booker, 570 F. Supp. 2d 161, 162 (D. Me. 2008) (holding that a "law prohibiting persons who have been convicted of a misdemeanor crime of domestic violence survives Second Amendment scrutiny."); United States v. Smith, 742 F. Supp. 2d 855, 861-62 (S.D. W. Va. 2010) (holding that the statute the defendant was charged under was "presumptively lawful"); United States v. Tooley, 717 F. Supp. 2d 580, 598 (S.D. W. Va. 2010) (holding that U.S.C. § 922(g)(9) was constitutional).

[86] *See, e.g.*, United States v. White, 593 F.3d 1199, 1206 (11th Cir. 2010) (holding that the regulation of possession of firearms by a person with a prior criminal history is not in violation of a person's individual rights under the Second Amendment of the United States Constitution).

[87] 18 U.S.C. § 922 (2011). The code reads in pertinent part: "[i]t shall be unlawful for any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence, to . . . [possess] . . . any firearm or ammunition . . . ." *Id.*

[88] United States v. Marzzarella, 595 F. Supp. 2d 596, 598 (W.D. Pa. 2009) (holding that every court which has considered a Second Amendment challenge to 18 U.S.C. § 922, post-*Heller*, has upheld the statute as constitutional).

[89] *Skoien*, 614 F.3d 638.

[90] *Id.* at 639.

he violated 18 U.S.C. section 922(g)(9).[91] In determining whether the statute the defendant was charged under was constitutional, the court recognized that the Supreme Court left the issue open for lower courts to decide.[92] By utilizing the limited guidance given by the Supreme Court that "some categorical disqualifications [on the Second Amendment] are permissible," the court in *Skoien* was able to make its decision that the statute in question was constitutional.[93] The circuit court held that disqualification of the right to possess a firearm upon criminal conviction is acceptable under the *Heller* dicta.[94]

After the Seventh Circuit decided the issue in *Skoien*, it would again have to make a ruling on a similar issue in *United States v. Williams*.[95] This time the defendant, Adam Williams, made the argument that a statute criminalizing his possession of a firearm as a convicted felon was unconstitutional because this "infringed on his right to possess firearms for use in self-defense."[96]

In *Williams*, the defendant was the subject of a narcotics investigation carried out by the Hammond, Indiana, Police Department.[97] After the police gathered enough evidence, they obtained a warrant and sought to arrest the defendant.[98] Upon arriving at the defendant's place of residence, there was no answer and the police knocked down the door.[99] The defendant was in possession of a firearm, but put it down when he saw the police.[100] The defendant claimed that he thought there was an intruder, and he went to the bedroom for his gun for self-defense.[101] The defendant's

[91] *Id.* The defendant claimed he used his guns for hunting purposes, which is protected under *Heller*, and that he was only convicted of misdemeanors, not felonies.

[92] *Id.* at 640.

[93] *Id.* at 641.

[94] *Skoien*, 614 F.3d. at 645.

[95] United States v. Williams, 616 F.3d 685 (7th Cir. 2010).

[96] *Id.* at 691. 18 U.S.C. § 922(g)(1) (2011) states in part, "It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

[97] *Williams*, 616 F.3d. at 687.

[98] *Id.*

[99] *Id.* at 687.

[100] *Id.*

[101] *Id.* at 688. After the defendant's arrest, the Bureau of Alcohol, Tobacco, and Firearms met him in jail to give him his *Miranda* Rights. *Williams*, 616 F.3d. at 687-88. Williams

claim was that "the statute criminalizing his possession of a firearm as a convicted felon was unconstitutional because it infringed on his right to possess firearms for use in self-defense."[102] The court rejected the defendant's argument and held that "some categorical disqualifications [on firearm possession] are permissible."[103] In its holding, the court agreed with the decision in *Skoien* that the right to possession of a firearm was not absolute.[104]

One of the most recent cases addressing partial ban in the light of *Heller* and *McDonald*, was in the Fourth Circuit's decision in *United States v. Chester*.[105] The defendant, William Samuel Chester, had previously been convicted of domestic violence in West Virginia in 2005.[106] The defendant argued that, in violation of the Second Amendment, 18 U.S.C.A. section 922(g)(9) denied him possession of firearms for self-defense.[107] Aligning itself with its sister circuits in addressing the defendant's claim, the Fourth Circuit held that the defendant's right to bear arms was not being violated because permissible restrictions are allowed under *Heller*.[108]

Following the federal example, New York courts have generally decided that regulations on gun ownership by a person convicted of a crime does not violate an individual's Second Amendment rights.[109] The first case in New York to deal with an alleged Second Amendment violation, post *Heller*, was decided by the Appellate Division, Third Department in *People v. Perkins*.[110]

Perkins involved a claim similar to the one presented in *Hughes*.[111] In *Perkins*, the defendant alleged that his conviction

told "agents that when the officers had arrived to execute the warrant, he believed that someone was breaking into his house in an attempt to rob him, which is why he had retrieved the gun from under his bed." *Id.* at 688.

[102] *Id.* at 691.

[103] *Id.* (quoting *Skoien*, 614 F.3d at 641).

[104] *Williams*, 616 F.3d at 692.

[105] 628 F.3d 673 (4th Cir. 2010).

[106] *Id.* at 677. In 2007, the defendant was once again facing domestic violence charges when the police were called to his residence after he threatened his wife. *Id.* at 676-77. While searching the home the police discovered weapons, to which Chester admitted were his. *Id.* at 677.

[107] *Id.*

[108] *Chester*, 628 F.3d at 682-83. The protection given to the right to bear arms in *Heller* was a core right that was only granted to law abiding citizens. *Id.*

[109] *Perkins*, 880 N.Y.S.2d at 210; *Hughes*, 921 N.Y.S. at 302.

[110] *Perkins*, 880 N.Y.S.2d 209.

[111] *Id.* at 210.

under section 265 of the Penal Law violated the Second Amendment.[112] The defendant was convicted of criminal possession of a weapon in the second and third degree.[113] The court held that the statutes the defendant was charged under did not violate the Second Amendment or Civil Rights Law.[114] In discussing the constitutionality of Penal Law section 265, the Third Department recognized that the Penal Law was not a complete ban on handguns.[115] The court found that the statute placed no "severe restriction" on the defendant's Second Amendment rights.[116] This rationale would be followed by other courts in New York when deciding whether denial of ownership of a firearm violates an individual's Second Amendment rights.[117]

It was not long before another New York court would be faced with determining the constitutionality of Penal Law section 265.02(1) and section 265.03(3).[118] Less than two years after *Perkins*, the Second Department relied upon *Perkins* and held that the Penal Law section 265.02(1) and section 265.03(3) were clearly constitutional.[119] Placing great reliance on the Third Department's holding in *Perkins*, the Second Department acknowledged that the statutes were not "severe restriction[s]" on Hughes' Second Amendment right to bear arms.[120]

After the holdings were handed down by the Second Department in *Hughes* and Third Department in *Perkins*, the trial courts in New York began to apply the decisions to similar Second Amendment challenges.[121] The criminal courts of Kings County and

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[112] *Id.*

[113] *Id.*

[114] *Id.*

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

[116] *Id.*

[117] People v. Gerlow, 925 N.Y.S.2d 243, 244 (App. Div. 3d Dep't 2011). "Defendant's . . . argument that Penal Law § 265.02 violates the Second Amendment of the U.S. Constitution is unpreserved and, in any event, lacks merit." *Id.* (citing *Perkins*, 62 A.D.3d 1160; *Hughes*, 83 A.D.3d 960).

[118] *Hughes*, 921 N.Y.S.2d at 301.

[119] *Id.* at 302.

[120] *Id.* at 301.

[121] *See* People v. Foster, 915 N.Y.S.2d 449 (Crim. Ct. Kings Cnty. 2010) ("This court rejects as being without merit, defendant's argument that Penal Law § 265.01 violates the Second Amendment of the United States Constitution."); People v. Nivar, 915 N.Y.S.2d 801 (Crim. Ct. Bronx Cnty. 2011) ("[T]his Court holds that neither PL § 265.01(1) nor AC § 10131(b) violates the Second Amendment and neither is unconstitutional as applied to

Bronx County handed down decisions relying on *Perkins* in holding that Penal Law section 265.01(1) did not violate either defendant's Second Amendment rights.[122] New York is not the only state to ban possession of firearms by a person convicted of a crime.[123] Many states have regulations that bar prior convicted criminals the right to possess firearms, and these regulations have survived constitutional challenges in light of the decision handed down in *Heller*.[124]

While, the current state of federal and state law is in agreement that statutes that regulate possession of a firearm by a person criminally convicted do not violate the Second Amendment, the question remains as to how far a regulation may go before becoming violative of the Second Amendment.

One way to analyze government regulations in light of the Second Amendment is to determine whether "the challenged regulation burdens the core right protected by the Second Amendment."[125] The core right of the Second Amendment found in *Heller* is self-defense in the home.[126] If a regulation burdens this core right then it would trigger a balancing test utilizing strict scrutiny to determine how stringent the burden is on the person's individual right.[127] If the regulation does not burden this core right it would be subject to a lesser level of scrutiny.[128] Under a lesser level of scrutiny any statute that did not burden this core right would be more likely to survive a constitutional challenge.[129] The restriction at issue in *Heller* denied the possession and use of firearms for protection in the home which is inconsistent with the core purpose of the Second Amendment.[130] Arguably, the same can be said about the denial of possession of firearms by a convicted criminal for self-defense

defendant.").

[122] *Id.*

[123] Farmer v. State, Dept. of Law, Office of Atty. Gen., 235 P.3d 1012 (Alaska 2010); People v. Cross, 2010 WL 5113807 (Cal. App. 3d Dist. 2010); State v. Whitaker, 689 S.E.2d 395 (N.C. Ct. App. 2009).

[124] *E.g.*, CAL. PENAL CODE § 12316(b)(1); N.C. GEN. STAT. ANN. § 14-415.1; WASH. REV. CODE ANN. § 9.41.040(4); FLA. STAT. ANN. § 790.23(1)(a).

[125] Stephen Kiehl, *In Search of a Standard: Gun Regulations After Heller and McDonald*, 70 MD. L. REV. 1131, 1164 (2011).

[126] *Heller*, 554 U.S. at 628-29.

[127] Kiehl, *supra* note 125, at 1164.

[128] *Id.*

[129] *Id.*

[130] *Id.*

purposes in the home, requiring the court to weigh the restriction against the government's objectives in order to determine whether the burden on the core right serves a substantial government purpose.[131]

This, in essence, is what the court did in *Hughes*.[132] The court balanced the core right of gun ownership for self-defense purposes in the home with the government's interest in keeping weapons out of possession of prior convicted criminals.[133] As explained in *Hughes*, "the statutes represent a policy determination by the Legislature that 'an illegal weapon is more dangerous in the hands of a convicted criminal than in the possession of a novice to the criminal justice system.' "[134] Here, the interest of the government is a strong one in keeping firearms out of the hands of criminals previously convicted.[135] The government's interest is balanced against the individual right secured under the Second Amendment. The outcome of the balancing of the interests in this circumstance would allow the government to infringe on the Second Amendment. *Hughes* can be reconciled with *Perkins* because it is not a "complete ban" on firearms that is a "severe restriction" on the Second Amendment.[136] The burden/balance approach allows for regulations affecting the concealed carrying of weapons in public or the licensing of guns because these restrictions do not attack the core of the Second Amendment protection in the home.[137] This approach also leaves open ample channels to possess a firearm in the home for self-defense.

The one problem facing federal and state courts on the issue of firearm possession by criminals is the failure to distinguish between violent and nonviolent crimes.[138] The statutes at issue in

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[131] *Id.* at 1165.

[132] *Hughes*, 921 N.Y.S.2d at 302.

[133] *Id.* at 301 ("Instead, as relevant to the discussion here, the statutes represent a policy determination by the Legislature that 'an illegal weapon is more dangerous in the hands of a convicted criminal than in the possession of a novice to the criminal justice system.' " (quoting People v. Montilla, 862 N.Y.S.2d 11 (N.Y. Ct. App. 2008))); *Williams*, 616 F.3d at 693 (extending *Hughes* to include "those individuals who by their prior conduct had demonstrated that they may not possess a firearm without being a threat to society.") (quoting Landers v. State, 299 S.E.2d 707, 709-11 (Ga. 1983)).

[134] *Hughes*, 921 N.Y.S.2d at 301 (quoting *Montilla*, 891 N.E.2d 1175).

[135] *Williams*, 616 F.3d at 693.

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

[137] Kiehl, *supra* at 125, at 1164.

[138] *See* United States v. Yancey, 621 F.3d 681, 685 (7th Cir. 2010) (Stating that "while felon-in-possession laws could be criticized as 'wildly overinclusive' for encompassing

Hughes also fail to provide any distinction.[139] The statutes that Hughes was convicted under require that a defendant previously be convicted of a crime.[140] In New York, a crime is defined as "a misdemeanor or felony," without a distinction being made as to whether the crime is violent or nonviolent.[141] This means that a person, who was found guilty of fraud and served his sentence, would be permanently prohibited from owning a firearm.[142] This lack of distinction between violent and nonviolent crimes is contrary to the purpose of keeping firearms out of the hands of dangerous criminals. Often times the punishment against firearm ownership is more extreme and unfair than the actual punishment for the crime itself, and often takes the right to bear arms away from nonviolent offenders.[143]

One popular example was the highly publicized prosecution of Martha Stewart.[144] In the article, *Why Can't Martha Stewart Have a Gun?*, C. Kevin Marshall raises the question "[i]s the public safer now that Martha Stewart is completely and permanently disarmed?"[145] This question does not apply to just Martha Stewart, but also to many other citizens who have had their right to possess a firearm in accordance with the Second Amendment violated due to a conviction of a nonviolent crime. While Justice Scalia's opinion in *Heller* acknowledged that certain provisions could be placed on handgun ownership, this seems to be a "categorical ban" of a complete class of people.[146] If one were to broadly interpret the dicta

nonviolent offenders, every state court in the modern era to consider the propriety of disarming felons under analogous state constitutional provisions has concluded that step to be permissible.")

139 *Hughes*, 921 N.Y.S.2d at 301.

140 *Id.*

141 *Id.* (quoting N.Y. PENAL LAW § 10.00[6] (2008)).

142 18 U.S.C. § 922; N.Y. PENAL LAW § 265.01; *White*, 593 F.3d at 1205-06. The court explained that the statute, 18 U.S.C. § 922(g)(1), "does not distinguish between the violent and non-violent offender. Thus, both an armed robber and tax evader lose their right to bear arms on conviction under § 922(g)(1)."

143 C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 695-96 (2009). In 2004, Martha Stewart was convicted of obstruction of justice, making false statements, and two counts of conspiracy. *Id.* Martha Stewart served her sentence, a term of five months, but would be banned from possessing a firearm for life in compliance with federal law. *Id.*

144 *Id.* at 695.

145 *Id.* at 696.

146 *Heller*, 554 U.S. at 628-29.

in *Heller*, this line of ruling by the courts goes against the interpreted purpose of the Second Amendment – to allow a person to possess a firearm for use in a home for the purpose of self-defense.[147]

In *United States v. Yancey*, [148] the restriction on a constitutional freedom seems to be taken to the fullest extent possible. [149] The Seventh Circuit was presented with the constitutionality of 18 U.S.C. section 922(g)(3),[150] which prohibits any person "who is an unlawful user of or addicted to any controlled substance" from possessing a firearm.[151] The defendant, Matthew Yancey, was arrested and charged under 18 U.S.C. section 922(g)(3) for having a pistol in connection with being under the influence of marijuana.[152] The defendant argued that the statute he was convicted under violated his Second Amendment right because he was not a felon and even though he was in public the weapon he was carrying was a "commonplace" weapon.[153] The Seventh Circuit upheld the defendant's conviction and the constitutionality of 18 U.S.C. section 922(g)(3), even though the decision seems to be completely at odds with *Heller* and *McDonald*.[154]

The court's decision emphasizes that section 922 was designed to achieve "the broad objective of . . . suppressing armed violence . . . [that] is without doubt an important one."[155] In addition, the court stated "that keeping guns away from habitual drug abusers is substantially related to that goal [of suppressing violence]."[156] The court analogized that by keeping guns away from a person who was a drug user is the same as keeping guns out of the hands of a convicted felon.[157] This reasoning in *Yancey* incorrectly stretches the narrow purpose of keeping firearms out of the hands of persons convicted of

147 *Id.* at 635.

148 621 F.3d 681 (2010).

149 *Id.* at 682. "Matthew Yancey pleaded guilty to possession of a firearm as an unlawful user of marijuana . . ." *Id.* In June 2008, Police officers executed an arrest warrant for Yancey. *Id.* At the time of his arrest, Yancey was carrying a loaded pistol and 0.7 grams of marijuana. *Id.* Yancey confessed that he was habitual marijuana user. *Yancey*, 621 F.3d at 682.

150 *Id.*; 18 U.S.C. § 922(g)(3) (2011).

151 18 U.S.C. § 922(g)(3).

152 *Yancey*, 621 F.3d at 682.

153 *Id.*

154 *Id.* at 687.

155 *Id.* at 684.

156 *Id.*

157 *Yancey*, 621 F.3d at 684.

violent crimes to cover a group of people never convicted of a crime, but presumed that because they are under the influence of a substance that they will commit a crime and be in this position eventually.[158] The court noted that drug users, similarly to mentally ill persons are more likely to have trouble exercising self-control.[159]

With the confusion in the courts as to what type of limitations are allowed, problems arise where the heart of self-defense is violated. There is much disagreement about where to draw the line. The National Rifle Association (hereinafter "NRA") argues that there is "no evidence that 'gun control' reduces crime, suicides or accidents in the U.S. or abroad."[160] The NRA is an organization that describes itself "as America's foremost defender of Second Amendment rights."[161] The view of the NRA heavily leans toward expanding Second Amendment rights, and the NRA was one of the foremost supporters of the decision handed down in *Heller*.[162] In an article, dated March 23, 2011, the NRA criticized the proposed "*The Fix Gun Checks Act of 2011*."[163] The NRA claimed the act

> would greatly expand the definition of those legally prohibited from owning firearms to include anyone who's ever been arrested—even if never convicted or found guilty—for drug possession within a five year period. . . And it would seem fears that any new national gun control legislation would be used to limit the gun rights of law abiding citizens is at least partially justified.[164]

Prohibitions on people who can own firearms are a major concern of supporters of the Second Amendment. These prohibitions combined

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[158] *Id.* at 685.

[159] *Id.*

[160] *NRA-ILA: Firearm Fact Card 2011*, NATIONAL RIFLE ASSOCIATION, http://www.nraila.org/Issues/FactSheets/Read.aspx?ID=83 (last visited September 25, 2011).

[161] *A Brief History of the NRA*, NATIONAL RIFLE ASSOCIATION, http://www.nra.org/Aboutus.aspx (last visited September 25, 2011).

[162] *NRA-ILA: Victory In The Supreme Court!*, NATIONAL RIFLE ASSOCIATION INSTITUTE FOR LEGISLATIVE ACTION, http://www.nraila.org/Legislation/Federal/Read.aspx?id=4052 (last visited September 25, 2011).

[163] *NRA-ILA: New Gun Control Legislation Would Prohibit Those Arrested but not Convicted*, NATIONAL RIFLE ASSOCIATION INSTITUTE FOR LEGISLATIVE ACTION, http://www.nraila.org/News/Read/NewsReleases.aspx?ID=14930 (last visited September 25, 2011).

[164] *Id.*

with court decisions similar to the decision in *Yancey* could foreshadow how the Second Amendment will be dealt with in the future. The Second Amendment in its current state raises important issues to be considered such as the collateral consequences that are associated with being convicted of a crime.

There are collateral consequences that will flow from the decision handed down in *Hughes*. Decisions in the federal and state courts to deny convicted criminals possession of firearms will bring about new collateral consequences in the criminal justice system. While these collateral consequences are not mentioned in *Hughes*, they are of significant importance to a practicing attorney. When a defendant is going through the criminal justice system because of a criminal charge, the lawyer will need to make that person aware that there are additional consequences of accepting a plea bargain. A defendant who pleads guilty to a lesser criminal charge needs to be informed of the collateral consequences that will be associated with his plea.[165] In essence, under the current law when a person accepts a plea bargain in the criminal justice system he or she will essentially be surrendering his or her Second Amendment right.[166] It becomes important to notify defendants of this collateral consequence of accepting a plea that is a consequence similar to the loss of voting rights or professional licenses for guilty convictions.

The holding handed down by the court in *Hughes* was the right outcome in a new, unclear area of constitutional law. The Supreme Court has failed to offer much guidance regarding the questions left open in *Heller* and *McDonald*. While the Second Department in *Hughes* did an effective job providing some answers to the questions left open in *Heller*, it was merely a beginning point. Currently, there is no clear test endorsed by the Supreme Court for dealing with restrictions on the Second Amendment. While there seems to be unity in many of the state and federal courts, that could change. The further removed one is from these decisions on the Second Amendment, the more questions presented to the courts regarding what regulations are reasonable and unreasonable in light of the underlying purpose will arise. The legal system in the future will need to decide whether a person convicted of a violent crime is any different from a person in possession of a weapon convicted of a

[165] Marshall, *supra* at 143, at 695.

[166] *Id.*

nonviolent crime. In the area of possession of firearms by prior criminals there are still many questions to be answered.

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