
IN THE MATTER OF THE :

NEW JERSEY SUPREME COURT

APPLICATION FOR A NEW JERSEY :

DOCKET No. 072329

PERMIT TO CARRY A HANDGUN BY :

RICHARD PANTANO :

_____ :

SUPPLEMENTAL BRIEF TO THE NEW JERSEY SUPREME COURT ON BEHALF OF PETITIONER RICHARD PANTANO

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Criminal Action: Appeal of the Denial of an Application for a
New Jersey Permit to Carry a Handgun

Sat Below: Messano, Ostrer and Kennedy, J.A.D.
New Jersey Superior Court, Appellate Division

Honorable Francis P. DeStefano, J.S.C.
New Jersey Superior Court, Law Division, Monmouth
County

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STATEMENT OF PROCEDURAL HISTORY

Petitioner relies upon the Statement of Procedural History presented in his Appellate Division brief.

STATEMENT OF FACTS

Petitioner relies upon the Statement of Facts presented in his Appellate Division brief with the addition of the following facts: Petitioner requires a handgun to protect himself while at home and place of business. He receives payments for supplies delivered and will take the payments home or to his office to process for deposit at the bank. [T8-23 through T9-3; T18-19] This makes him more vulnerable to being robbed at his home or office. [T10-23]

QUESTION PRESENTED

Does the statutory requirement that an applicant for a permit to carry a handgun demonstrate "a justifiable need to carry a handgun," N.J.S.A. 2C:58-4(d), violate the right to bear arms under the Second Amendment to the United States Constitution?

PRELIMINARY STATEMENT

The United States Constitution does not contain a Bill of **Needs**. It contains a Bill of **Rights**. No "need," justifiable or otherwise, is required to be provided for an individual to exercise the rights guaranteed by that document. The United States Supreme Court has specifically held that the Second Amendment recognizes that the right to keep and bear arms is a fundamental, individual right that is incorporated to the citizens of the States. District of Columbia v. Heller, 554 U.S. 570, 128 S.Ct. 2783 (2008); McDonald v. City of Chicago, 130 S.Ct. 3020 (2010).

In the past, New Jersey courts have referred to the statutorily granted "privilege" of firearm possession. Burton v. Sills, 53 N.J. 86 (1968). Possession of firearms in New Jersey is no longer a mere privilege. It is a right. Heller, 554 U.S. at 592; McDonald, 130 S.Ct. at 3026. Accord In re Application of Jonathan R. Wheeler for a Retired Officer Permit to Carry a Firearm Openly or Concealed, A-3704-11T4 (App. Div. 2013).

The "permit to carry" is specifically referred to as a "permit to possess" in New Jersey's approved Model Jury Charges.

Additionally, there is no New Jersey statute specifically making "carrying a handgun" a criminal offense. Rather, the law explicitly bans "possession" of a handgun under *NJS 2C:39-5b Unlawful Possession of Weapons-Handguns*, which reads as follows:

Any person who knowingly has in his possession any handgun, including any antique handgun, without first having obtained a permit to carry the same as provided in N.J.S.2C:58-4, is guilty of a crime of the second degree.(Emphasis added)

New Jersey's "permit to carry" is in fact a "permit to possess." Because New Jersey's "permit to carry" is a "permit to possess," Counsel will refer to it as such throughout his argument. In order to lawfully "possess" a handgun in New Jersey, even in one's home, a person must either:

(1) have a "permit to possess" (so-called "permit to carry");

or the **only** other alternative is,

(2) to be subjected to a "presumption of illegality" where the handgun possessor must endure a trial and establish a rational basis in the facts in order to meet the elements of a defense under the N.J.S. 2C:39-6 exemptions.

There is simply no other way under New Jersey law to lawfully possess a handgun, even in one's home. Only by having a "permit to possess" is a person not guilty of violating *NJS 2C:39-5b Unlawful Possession of Weapons-Handguns* and therefore not subjected to a "presumption of illegality."

New Jersey gun laws have long been recognized as hazardous for law abiding citizens to navigate. "When dealing with guns, the citizen acts at his peril." State v. Pelleteri 294 N.J. Super. 330 (1996)

The only way to legally possess a handgun in one's home without perpetually being at risk of arrest and prosecution and having to establish facts at trial that form a defense under NJS 2C:39-6e, is to have a permit to possess.¹

To be granted a New Jersey permit to possess a handgun one must demonstrate "justifiable need." This is an extraordinarily difficult and fundamentally unfair requirement for the average citizen to meet. In fact an average citizen can not meet this standard because it requires proof of a "special danger." It mandates that the only way a private citizen may achieve it is if the applicant can:

specify in detail the urgent necessity for self-protection, as evidenced by specific threats or previous attacks which demonstrate a special danger to the applicant's life that cannot be avoided by means other than by issuance of a permit to carry a handgun. NJAC § 13:54-2.4.

Furthermore, this does not pass the scrutiny level afforded the denial of an individual right, which cannot be denied based upon mere rational basis. The average private citizen who wishes to possess a handgun in his or her home, whether for protection, target practice, hunting, collecting or any other legitimate purpose, can not meet such an absurdly burdensome "urgent" "special danger" from which only the ability to carry a

¹ See State v. Aitken, A-0467-10T4, attached; State v. Moultrie, 357 N.J. Super. 547 (App. Div. 2003).

handgun can rescue the applicant. There is no such thing as a "right of last resort."

Here, Pantano wishes to possess a handgun inside his home and for business. (T18-3). He was denied his application for a permit to possess (so-called "permit to carry") because he supposedly does not have "justifiable need." If he possesses a handgun even in his home without a permit to possess, he must always run the risk of arrest, prosecution and of having to prove the defense of a N.J.S. 2C:39-6e home exemption through the judicial process. This insults the very concept of a "right."

Pantano can only avoid the "presumption of illegality" if he is granted a New Jersey permit to possess. However, this requires him to establish "justifiable need." He stands before this Court having been denied a permit to possess for failing to demonstrate "justifiable need."

Pantano's desire to also possess a handgun outside the home is irrelevant under New Jersey law. The "justifiable need" requirement creates a *de facto* ban on possession of a handgun anywhere, including inside his home. Therefore, the Court need not look any further to find that New Jersey's "justifiable need" requirement is a *per se* violation of Pantano's fundamental, individual Constitutional right to possess a handgun in his home. If the "justifiable need" requirement is

not struck down as unconstitutional, then *NJS 2C:39-5b Unlawful Possession of Weapons-Handguns* itself should be found unconstitutional.

LEGAL ARGUMENT

POINT 1

**THE EXERCISE OF A FUNDAMENTAL, INDIVIDUAL RIGHT
CAN NOT BE BASED UPON ON NEED.**

No person may possess a handgun without first obtaining a permit to possess (so-called "permit to carry"). *NJS 2C:39-5b Unlawful Possession of Weapons-Handguns* reads as follows:

Any person who knowingly has in his possession any handgun, including any antique handgun, without first having obtained a permit to carry the same as provided in N.J.S.2C:58-4, is guilty of a crime of the second degree.(Emphasis added)

A court shall only issue such a permit if the applicant has demonstrated a "justifiable need" to carry a handgun. N.J.S. 2C:58-4d.

The term "justifiable need" is not defined by statute. It has been defined by case law and by New Jersey Administrative Code, which promulgates:

In the case of a private citizen shall specify in detail the urgent necessity for self-protection, as evidenced by specific threats or previous attacks which demonstrate a special danger to the applicant's life that cannot be avoided by means other than by issuance of a permit to carry a handgun. NJAC § 13:54-2.4.

The above development of "justifiable need" pre-dates the United States Supreme Court holding that the Second Amendment recognizes that the right to keep and bear arms is a

fundamental, individual right incorporated to the citizens of the States. Heller, 554 U.S. at 592; McDonald, 130 S.Ct. at 3026. The case law development of "justifiable need" specifically relied upon Burton v. Sills, 53 N.J. 86 (1968), which had expressly rejected the Second Amendment protections as even applying to New Jersey.

No other fundamental right requires a showing of "need", whether "justifiable" or otherwise, before it may be exercised. For instance, the First Amendment does not provide that people can peaceably assemble -- but only if they cannot first communicate by other means, such as correspondence. No law restricts the exercise of religion to one's death-bed. The press is not limited to operations only when necessary and in the public interest. No need is required to decline a state search or interrogation. A defendant is not required to show a need to ensure he receives a speedy and public trial, nor does he have to explain why he wishes to remain silent. To require a defendant show need to confront the witnesses against him amounts to a "Star Chamber" scenario. Certainly, one need not show a need to avoid becoming a slave.

Prior restraint of individual constitutional rights is traditionally abhorred by our Courts, and if at all applicable, severely limited, and requires the government to bear a heavy

burden to justify imposing such a restraint. See, i.e., New York Times Co. v. United States, 403 U.S. 713 (1971).

The Second Amendment contains no such restriction of "need" and the right to keep and bear arms is no longer a mere statutory privilege. No constitutional right can be made into a "last resort."

The justifiable need standard creates a needs-based test, which is not in line with other constitutional precedent, and which, because it requires prediction of future events, is downright absurd. Under the present standard, permit applicants must convince a court that they will be in serious physical jeopardy in the future in order to receive a permit. Yet, no one can know the future.

A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. District of Columbia v. Heller, 128 S.Ct. 2783, 2821 (2008).

An individual who has been attacked in the past may never be attacked again. Another individual may realize that he is in jeopardy of initial attack due to his business or personal circumstances, yet be unable to prove where or when such attack might occur.

Here, New Jersey courts have interpreted the administrative code under such a limited view of justifiable need that

individuals who cannot demonstrate a "special danger," by proving previous attacks are denied their fundamental right to possess a handgun because they cannot "justify" that they "need" this right to self-defense.

Based on the above, the "justifiable need" requirement violates the right to keep and bear arms because the exercise of a fundamental, individual right cannot be need-based.

POINT 2

NEW JERSEY LAW UNCONSTITUTIONALLY REQUIRES "JUSTIFIABLE NEED" TO POSSESS A HANDGUN IN THE HOME OR ELSEWHERE; WITHOUT A PERMIT, ANY CITIZEN POSSESSING A HANDGUN FACES A "PRESUMPTION OF ILLEGALITY."

"When dealing with guns, the citizen acts at his peril."

State v. Pelleteri 294 N.J. Super. 330 (1996)

New Jersey's "permit to carry" is in fact a "permit to possess." New Jersey prohibits the possession of a handgun under *NJS 2C:39-5b Unlawful Possession of Weapons-Handguns*.

N.J.S. 2C:39-5b reads as follows:

Any person who knowingly has in his possession any handgun, including any antique handgun, without first having obtained a permit to carry the same as provided in N.J.S.2C:58-4, is guilty of a crime of the second degree. (Emphasis added)

No New Jersey statute specifically bans "carrying a handgun." Rather, the above law explicitly bans "possession" of a handgun. In order to lawfully "possess" a handgun in New Jersey, even in one's home, a person must either:

(1) have a "permit to possess" (so-called "permit to carry");

or the only other alternative is,

(2) to be subjected to a "presumption of illegality", where the handgun possessor must endure a trial and establish a rational basis in the facts in order to meet the elements of a defense under the NJS 2C:39-6 exemptions.

There is no other way, under New Jersey law, to lawfully possess a handgun, even in one's home. This creates an unconstitutional "presumption of illegality" for any citizen who has a handgun in their home without a permit to possess. Where the Constitution - in this case, the Second Amendment - imposes substantive limits on what conduct may be defined as a crime, a legislature may not circumvent those limits by enacting a statute that presumes criminality from constitutionally-protected conduct. Herrington v. United States, 6 A.3d 1287 (D.C. 2010), citing Patterson v. New York, 432 U.S. 197, 97 S. Ct. 2319 (1977).

In effect, such a presumption places the burden of persuasion to prove facts necessary to establish innocence on the defendant. Id. New Jersey citizens possess handguns either with a permit to possess, under N.J.S. 2C:58-4, or they must prove they fall under the narrowly drawn exemptions listed in N.J.S. 2C:39-6 to establish their innocence. Such exemptions are "...strictly construed to better effectuate the policy of gun control." State v. Rovito, 99 N.J. 581, 587 (1985) (Emphasis added).

This means that upon arrest for the unlawful possession of a handgun, even within one's home, a trial is inescapable because all N.J.S. 2C:39-6e exemptions are questions of fact,

rather than matters of law. This is implicit in the logic of State v. Lopez, A-3196-11T3 (May 23, 2013), which held "N.J.S.A. 2C:39-6(e) does not explicitly place the burden of proof or the burden of producing evidence on the defendant, it is an ordinary defense, State v. Moultrie, 357 N.J. Super. 547, 555 (App. Div. 2003), which the State must disprove. Id. at 556. However, a defendant requesting a defense must show that there is a rational basis in the facts before the defense will be included in the jury charge. Ibid."

Since a matter of law cannot be disproved, N.J.S. 2C:39-6 exemptions are factual questions of proof. Factual questions do not qualify for judicial notice. R. of Evid. 201(b). Prosecutors are not bound to present favorable facts or defenses to the grand jury unless they are credible, material, directly negate guilt, and so clearly exculpatory as to induce a rational grand juror to conclude that the State has not made out a prima facie case against the accused. State v. Hogan, 144 N.J. 216, 237 (1996). Thus, by forcing citizens to rely on the exemption to exercise a fundamental, constitutional right, this State requires them to prove themselves innocent at a trial.

Having a permit to possess under N.J.S. 2C:58-4 is the only way to legally possess a handgun in one's home without perpetually being at risk of arrest and prosecution and having

to establish facts at trial that form a defense under N.J.S. 2C:39-6e.² This insults the very concept of a "right."

Currently, Pantano does not have a permit to possess and therefore relies upon law enforcement exercising its discretion not to arrest him and force him to prove an exemption defense under NJS 2C:39-6e. A constitutional right should hardly be dependent upon police discretion.

New Jersey's approved *Model Jury Charges* for UNLAWFUL POSSESSION OF A HANDGUN (N.J.S.A. 2C:39-5b) further clarify that the required permit is a "permit to possess" NOT "permit to carry:"

In order to convict the defendant, the State must prove each of the following elements beyond a reasonable doubt:

1. S_ is a handgun;
(OR)
There was a handgun;
2. That the defendant knowingly possessed the handgun; and
3. That the defendant did not have a **permit to possess** such a weapon. (Emphasis added)

Only by having such a "permit to possess" is a person not guilty of violating *NJS 2C:39-5b Unlawful Possession of Weapons-Handguns*. This prohibition applies to possession of a handgun

² See also State v. Aitken, A-0467-10T4, attached; State v. Moultrie, 357 N.J. Super. 547 (App. Div. 2003).

anywhere within the jurisdiction of New Jersey, including in one's home.

Unless one has a permit to possess, the only way to legally possess a handgun in one's home without perpetually being subjected to potential arrest and prosecution is to establish facts at trial that prove a defense of the N.J.S. 2C:39-6e home exemption.

To be granted a New Jersey's permit to possess a handgun, one must demonstrate "justifiable need." This is an extraordinarily difficult requirement. The only way a private citizen may demonstrate justifiable need is if the applicant can "specify in detail the urgent necessity for self-protection, as evidenced by specific threats or previous attacks which demonstrate a special danger to the applicant's life that cannot be avoided by means other than by issuance of a permit to carry a handgun." N.J.A.C. § 13:54-2.4.

Average private citizens who wish to possess handguns in their homes, whether for protection, target practice, hunting, collecting or any other legitimate purpose, can not meet such an absurdly burdensome and limited requirement of "urgent" "special danger", from which only the ability to carry a handgun can rescue the applicant. Such a citizen includes Pantano, who wishes to possess a handgun inside his home, (as well as his office and the bank, T18-3).

Pantano is left with only one option under New Jersey law for him to exercise his fundamental, individual Constitutional right to possess a handgun in his home. He must always run the risk of arrest and prosecution and of having to establish his innocence by the defense of a N.J.S. 2C:39-6e home exemption at a trial.

This "presumption of illegality" is hardly the way any fundamental, individual Constitutional right should be treated. It insults the very concept of a "right."

This "presumption of illegality" can only be avoided by Pantano if he is granted a permit to possess. However this requires him to establish the requirement of "justifiable need." He stands before you having been denied such a permit for failing to demonstrate "justifiable need."

The statutory requirement that an applicant for a permit to possess a handgun demonstrates "a justifiable need to carry a handgun" plainly violates the right to keep and bear arms. Possession outside the home is irrelevant, as the "justifiable need" requirement creates a *de facto* ban on possession of a handgun inside the home as well. It is therefore a *per se* violation of Pantano's fundamental, individual Constitutional right to possess a handgun.

Rights may have exemptions, but rights themselves may not merely be exemptions. That is precisely what New Jersey has done to the right to possess a handgun. New Jersey has turned a fundamental right into a mere exemption. Yet exemptions should only exist for the limited circumstances in which such a right does not apply.

Furthermore, the narrow exemptions created by N.J.S. 2C:39-6 fail to address incalculable instances of lawful conduct where citizens possess firearms, but do not necessarily "carry" them.

The exemptions only allow an average citizen the possession of handguns in one's residence, between one's business or residence and other land owned by him, to a gunsmith for repair, to a gun club for target practice, and directly to and from a target range or hunting field. N.J.S. 2C:39-6. Many other innocent and appropriate destinations however are not covered by the statute, such as transporting a firearm:

- Back to a place of purchase for a refund or exchange
- To a licensed dealer in New Jersey for sale
- To a licensed dealer outside of New Jersey for sale
- To any location outside the State where it may be lawfully possessed or used
- Between one residence and another, unless that person is moving.³ (permanently changing his domicile or dwelling location)

³ In other words, the exemption for moving does not explicitly cover a situation where a person maintains two homes and wishes to transport his firearm from one residence to another and maintain it there temporarily.

- On a friend or relative's New Jersey farm or other land for the purpose of target shooting, upon invitation by the landowner
- By an out-of-state resident bringing his firearms into New Jersey for the purposes of instructing students in firearms safety or use
- By an out-of-state resident who is otherwise lawfully transporting his firearms through this State even though the firearms are cased and unloaded.⁴
- While traveling to, and being present at a gun buy-back program
- From a police evidence room back to one's residence after receiving a court order returning firearms due to a domestic violence or other firearms seizure

Because the exemption statutes fail to include the above, and other innocent firearm transportation requirements, people in New Jersey are required to show justifiable need and obtain a permit to possess their handguns when involved in these activities.

Such an unconstitutional scenario cannot stand. We respectfully request that this Court find that New Jersey law unconstitutionally bases a right upon need, and unconstitutionally classifies the exercise of Second Amendment rights as presumptively unlawful activity.

⁴ Under New Jersey law there is no exemption for out-of-state travelers possessing their firearms while merely transporting them through this State without also having the required possession permit.

POINT 3

PRE-HELLER AND -MCDONALD NEW JERSEY CASE LAW UPHOLDING THE JUSTIFIABLE NEED REQUIREMENT IS NO LONGER VALID AND DRAKE V. FILKO IS BASED ON FAULTY REASONING.

"A long habit of not thinking a thing wrong gives it a superficial appearance of being right." - Thomas Paine

On August 1, 2013, the Third Circuit Court of Appeals released a decision regarding New Jersey's justifiable need provision in Drake v. Filko, No. 12-1150 (3rd Cir. 2013). The Court, applying the two-step test from US v. Marzzarella, 614 F.3d 85, 89 (3rd Cir. 2010) asked whether the justifiable need requirement imposes a burden on conduct falling within the scope of the Second Amendment's guarantee, and if so, whether it passes the intermediate scrutiny level applied by Marzzarella.

The Drake Court initially found that the justifiable need requirement does not burden conduct within the scope of the Second Amendment's guarantee because the justifiable need requirement qualifies as a "longstanding regulation." Drake, at 19. The Court reasoned that longstanding regulations are exceptions to the right to keep and bear arms "such that the conduct they regulate is not within the scope of the Second Amendment." Drake, at 12, 19. Such a longstanding requirement is "presumptively lawful." Drake at 13. The Third Circuit then tortured the language from Heller to fit its rationale:

In Heller the Supreme Court noted that nothing in its 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" and identified these "regulatory measures" as "presumptively lawful" ones. 554 U.S. at 571, 571 n.26. It then stated that the presumptively lawful regulations it identified by name did not compose an "exhaustive" list, but the Court did not provide guidance on how to identify other regulations that may qualify. Id. Drake at 13.

In the Third Circuit's flawed reasoning, the Court extracted language from Heller that, in actuality, dealt with prohibiting felons and the mentally ill from possessing firearms. The Third Circuit then identified the justifiable need requirement as also "longstanding" and thus concluded that justifiable need was therefore also a valid regulation.

This is the logical fallacy known as *argumentum ad antiquitatem* or "Appeal to Tradition," whereby a position is asserted as truthful on the belief that it correlates to how things were done in the past. It is a "We've always done it this way." argument. This logical fallacy makes two assumptions: 1) The old way was correct in the past; and 2) The old way is still correct today.

Under this flawed logic, any regulation, if old enough, categorically can not violate the Second Amendment right to keep

and bear arms. This would be like finding Dred Scott valid even after the passing of the Civil Rights Act. Fundamental, individual constitutional and civil rights are often wrongfully denied for years until a single person takes a stand. Up until Rosa Parks' refusal, requiring Blacks to sit at the back of buses was also perfectly "acceptable."

Siccardi v. State, 59 N.J. 545, (1971) is the 43-year-old case upholding the justifiable need requirement under New Jersey law. Siccardi relies on Burton v. Sills for the proposition that New Jersey's gun control laws are constitutional in the first instance. Id. at 554. After hearing and recounting the opinions of various police officials, and recounting the history of the law governing the carrying of handguns, the Court upheld the denial of the applicant's carry permit based on lack of need.⁵ Id. at 558. Relying partly on Burton, the Siccardi court noted with approval each of the Due Process procedures the Legislature emplaced in the law, thus providing the justifiable need standard an air of constitutional legitimacy without specifically finding that the law passed any particular level of scrutiny. Id. at 555-56. Clearly, no heightened level of scrutiny was applied at all and it appears that the Court simply

⁵ It should be noted that, unlike Siccardi where the police chief found the applicant had no justifiable need, Petitioner's police chief encouraged him to apply for the permit and found that justifiable need existed.

found a rational basis for the justifiable need requirement. Id. at 555-57.

Siccardi's progeny marched in lockstep. See Doe v. Dover Twp., 216 N.J. Super. 539 (App. Div. 1987), App. of X, 59 N.J. 533 (1971), In re Preis, 118 N.J. 564 (1990), and App. of Borinsky, 363 N.J. Super. 10 (App. Div. 2003), all standing for the proposition that carrying large amounts of cash or valuables, or voluntarily engaging in avoidable personal business pursuits does not create sufficient "urgent necessity" to allow one to protect oneself from robbery and harm. All of these cases occurred before Heller and McDonald.

Heller and McDonald have since ruled that possession of a firearm is no longer a mere statutory privilege, but a fundamental, individual right. Therefore, Burton, Siccardi and their progeny are now overruled by Heller and McDonald. Moreover, Heller specifically ruled that a mere rational basis review, such as the review provided in Siccardi, is not enough to evaluate the extent to which a legislature may regulate a specific, enumerated right, like the Second Amendment right. Heller 554 U.S. at FN 27. "If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." Id.

Despite finding that the justifiable need requirement was a "presumptively valid longstanding regulation" that somehow did not infringe on the Second Amendment, the Drake court went on to address the second Marzarrella question of whether the regulation withstands the appropriate level of scrutiny. The Court first rejected the application of the prior restraint doctrine to this analysis. Drake at 20. The Drake court acknowledged that Heller forbids the application of rational basis scrutiny to the Second Amendment right. Drake at 22. The Drake court rejected the strict scrutiny approach argued by appellants because it did not believe that the regulation impacted the **core** of the Second Amendment right - the ability to possess firearms within the home.

The Federal Drake Court plainly erred in this regard. It clearly did not understand or apply the operation of New Jersey state law. The justifiable need requirement strikes directly at the core requirement of lawfully possessing a handgun in one's home. Only by having a "permit to possess" is a person is not guilty of violating *NJS 2C:39-5b Unlawful Possession of Weapons-Handguns* and not subjected to a "presumption of illegality" for possessing a handgun in one's home.

Additionally, the Drake court failed to consider that the justifiable need requirement amounts to a *de facto* ban on possessing handguns. In another case that addresses the ability

of a person to obtain a permit to carry a handgun, Coalition v. Florio, the New Jersey District Court addressed New Jersey's assault firearm law and found that the law created a *de facto* ban on the sale of certain semi-automatic air and B-B guns. 744 F. Supp. 602 ((1990). The Coalition Court noted that even though the law theoretically allowed for individuals to obtain these firearms by obtaining permits to carry an assault firearm, the restrictions were so substantial that they created a *de facto* ban. Id. at 608. The first requirement was that an application meet all the qualifications to receive a permit to carry a handgun under NJS 2C:58-4. Id. The concern that the district court recognized in Coalition applies equally here: By balancing the individual need against the public safety, the court has unbridled discretion to find that the applicant does not meet the requirement. Id. Applying the logic from Coalition, (that such substantial restrictions on the ability to obtain a permit provide the state with unbridled discretion to find that an applicant does not have justifiable need) leads to the conclusion that the justifiable need standard creates a *de facto* ban on the carrying of handguns.

Finally, Federal courts look to State courts to determine the constitutionality of state statutes and the Drake Court was looking at the holdings of New Jersey's case law before the incorporation of the Second Amendment.

The Drake decision is based upon overruled case law. It employs a logical fallacy. Thus, the decision of the Third Circuit is unsound and this Court should not adopt it. It is for this Court to decide whether the justifiable need provision passes constitutional muster now that the fundamental, individual right to keep and bear arms under the Second Amendment has been incorporated to the citizens of New Jersey.

POINT 4

**IF THE JUSTIFIABLE NEED REQUIREMENT IS ALLOWED TO STAND, THEN
NEW JERSEY'S STATUTE PROHIBITING THE UNLAWFUL POSSESSION OF A
HANDGUN WITHOUT A PERMIT IS UNCONSTITUTIONAL.**

If the "justifiable need" requirement is not struck down as unconstitutional then *NJS 2C:39-5b Unlawful Possession of Weapons-Handguns* is wholly unconstitutional.

In Heller, the Court held that the District's ban on handgun possession in the home and its prohibition against rendering any lawful firearm in the home operable for the purposes of immediate self-defense violated the Second Amendment. Heller at 2882. The Court held that the Second Amendment was not about militia service, but rather that it guaranteed the individual right to possess and carry weapons in order to defend one's self. Id. at 2793 to 2797. The Court noted that the Second Amendment (like the First and Fourth Amendments) did not codify the right, but merely recognized it as a pre-existing right that cannot be infringed. Id. at 2797, 2804. In studying the history, the Court noted that that it was recognized as part of the "natural right" of self-preservation and defense. Id. at 2798, 2809, 2838, *et al.* Thus, the Heller Court held that the Second Amendment right to keep and bear arms is a fundamental, individual right. Heller at 2821.

The Heller holding is in direct conflict with New Jersey's leading case upholding this State's gun control scheme, Burton v. Sills, 53 N.J. 86 (1968). In Burton v. Sills, the New Jersey Supreme Court upheld New Jersey's gun control regime as a valid exercise of the State's police power, based on a two-prong rationale. The first prong was the belief that the Second Amendment embodied a "collective right" of the States to maintain militia (National Guard) units, rather than an individual right.

The first prong is now overruled, as the Heller case has firmly established that "the Second Amendment right is exercised individually and belongs to all Americans," and finally put to rest the collective rights theory of the Second Amendment. Heller 128 S.Ct. at 2791.

The second prong upon which the Burton decision rested was the finding that the Second Amendment was never incorporated to the States. This second prong is now also overruled. McDonald v. Chicago, incorporated the Second Amendment to the citizens of the States via the *Due Process* Clause of the Fourteenth Amendment. The Court recognized that the Second Amendment is "deeply rooted in this nation's history and tradition."

Thus, the United States Supreme Court has now clearly reversed both prongs of Burton's rationale. As such, New Jersey's landmark case upholding the constitutionality of our

firearm laws has lost its entire foundation, and each section of New Jersey's gun control laws are now subject to Constitutional scrutiny.

The possession of handguns is banned in New Jersey in the first instance. N.J.S. 2C:39-5b. No resident of New Jersey or any other State may possess firearms within the State unless they can prove that they meet one of the exemptions provided in N.J.S. 2C:39-6 or possess a required permit. This prohibition directly conflicts with Heller in that it bans the possession of firearms within the home. Although the possession of a firearm within the home is subsequently exempted in another statute, such exemptions are "ordinary defenses," and are not automatically provided to the jury. This creates a situation where a court can deny, for whatever perceived reason, to provide the appropriate defense charge to the jury,⁶ and thus deny the existence of the Second Amendment right, even within the home. Likewise, the failure to provide the exemptions to a grand jury can result in a wrongful indictment in the first instance. Thus, New Jersey's gun-control statutes, which completely ban the possession of firearms, and then subsequently open narrow, ill-defined exemptions that a court must provide in the form of charges to a jury, do not pass constitutional muster

⁶ See State v. Aitken, A-0467-10, (attached) where it was reversible error for the trial Court to deny to provide the exemptions for moving firearms between residences to the petit jury.

under Heller. The subsequent narrowly construed, vague and confusing exemptions of N.J.S. 2C:39-6 do not save N.J.S. 2C:39-5b from being unconstitutional as a complete ban *ab initio*.

The only way New Jersey citizens possess handguns is either with a permit to possess (so-called permit to carry) under N.J.S. 2C:58-4 or they must prove they fall under one of the narrowly drawn exemptions listed in N.J.S. 2C:39-6. The N.J.S. 2C:58-4 permit statute is thus specifically incorporated into the elements of *NJS 2C:39-5b Unlawful Possession of Weapons-Handguns*.

To deny law-abiding citizens a permit to possess by upholding the justifiable need requirement forces them to rely on the unreliable exemptions of N.J.S. 2C:39-6 and to endure a "presumption of illegality" as their only means to enjoy their right to keep handguns in their homes. This is plainly a violation of Second Amendment rights. Either Pantano, an average, law-abiding citizen, must be able to qualify for a permit to possess, or *NJS 2C:39-5b Unlawful Possession of Weapons-Handguns* is unconstitutional in and of itself because it converts a right into an exemption.

CONCLUSION

Based on the above, it is respectfully requested that this Court rule that the statutory requirement that an applicant for a permit to possess a handgun demonstrates "a justifiable need to carry a handgun" violates the right to bear arms under the Second Amendment to the United States Constitution, and that Pantano's permit be issued. Alternatively, it is respectfully requested that this Court rule that N.J.S. 2C:39-5b, which requires a permit to possess a handgun, be found unconstitutional.

Respectfully Submitted,
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