COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

DISTRICT COURT DEPARTMENT
GLOUCESTER DIVISION
DOCKET NOS. 0939CR000772,
1139CR000011, and 0939CR000784

COMMONWEALTH OF MASSACHUSETTS

v.

JAMES M. ATKINSON

NOTICE OF NEWLY DECIDED AUTHORITY

McDonald v. Chicago, 561 U.S. ___, 130 S.Ct. 3020 (2010), is a landmark decision of the Supreme Court of the United States that has determined that the Second Amendment applies to the individual states. The Court held that the right of an individual to "keep and bear arms" protected by the Second Amendment is incorporated by the Due Process Clause of the Fourteenth Amendment and applies to the states, including the State of Massachusetts. The decision cleared up the uncertainty left in the wake of *District of Columbia v. Heller* as to the scope of gun rights in regard to the states.

District of Columbia v. Heller, 554 U.S. 570 (2008), was a landmark case in which the Supreme Court of the United States held that the Second Amendment to the United States Constitution protects an individual's right to possess a firearm for traditionally lawful purposes in federal enclaves, such as self-defense within the home. The decision did not address the question of whether the Second Amendment extends beyond federal enclaves to the states, which was addressed later by *McDonald v. Chicago* (2010). It was the first Supreme Court case in United States history to decide

whether the Second Amendment protects an individual right to keep and bear arms for self defense.

On June 26, 2008, the Supreme Court affirmed the Court of Appeals for the D.C. Circuit in *Parker v. District of Columbia* . The Court of Appeals had struck down provisions of the Firearms Control Regulations Act of 1975 as unconstitutional, determined that handguns are "arms" for the purposes of the Second Amendment, found that the District of Columbia's regulations act was an unconstitutional banning, and struck down the portion of the regulations act that requires all firearms including rifles and shotguns be kept "unloaded and disassembled or bound by a trigger lock." "Prior to this decision the Firearms Control Regulation Act of 1975 also restricted residents from owning handguns except for those registered prior to 1975."

The Second Amendment applies "*most notably* for self-defense within the home," *McDonald v. City of Chicago*, 130 S. Ct. 3020, 2044 (2010) (plurality opinion) (emphasis added), "where the need for defense of self, family, and property is most acute," District of *Columbia v. Heller*, 128 S. Ct. 2783, 2717 (2008), but not exclusively so. The Supreme Court confirmed that "keep and bear," U.S. Const. amend. II, refers to two distinct concepts, rejecting the argument that "keep and bear arms" was a unitary concept referring only to a right to possess weapons in the context of military duty. "At the time of the founding, as no, to 'bear' meant to "carry.'" *Heller*, 128 S. Ct. at 2793(citations omitted). To "bear arms," as used in the Second Amendment, is to "wear, bear, or carry…upon the person or in the clothing or in a pocket, for the purposes…of being armed and ready for offensive or defensive action in a case of conflict with another person." Id. at 2793 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998)

(Ginsburg, J., dissenting)); BLACK'S LAW DICTIONARY 214 (6TH Ed. 1998)); see also *Heller*, 128 S. Ct. at 2804 ("the Second Amendment right, protecting only individuals' liberty to keep and carry arms…"); id. at 2817 ("the right to keep and carry arms") (emphasis added). "[B]ear arms means…simply the carrying of arms…Heller, 128 S. Ct. at 2796.

Having defined the Second Amendment's language as including a right to "carry" guns for self-defense, the Supreme Court instructively noted several exceptions that prove the rule. Explaining that this right is "not unlimited," in that there is no right to "carry any weapon whatsoever in any manner whatsoever and for whatever purposes," id. at 2816 (citations omitted), the Court confirmed that there is a right to carry at least some weapons, in some manner, for some purpose.

In upholding the right to carry a handgun under the Second Amendment, *Heller* broke no new ground. As early as 1846, Georgia's Supreme Court, applying the Second Amendment, quashed an indictment for the carrying of a handgun that failed to allege whether the handgun was being carried in a constitutionally-protected manner. *Nunn v. State,* 1 Ga. 243, 251 (1846); see also *In Re Brickey*, 70 P. 609 (Idaho 1902). Numerous state constitutional right to arms provisions have likewise been interpreted as securing the right to carry a gun in public, albeit often, to be sure, subject to some regulation. See, e.g., *Kellogg v. City of Gary*, 562 N.E. 2d 685 (Ind. 1990); *State ex rel. City of Princeton v. Buckner*, 377 S.E.2d 139 (W. Va. 1988); *City of Las Vegas v. Moberg*, 485 P.2d 737 (N.M. Ct. App. 1971); *State v. Rosenthal*, 55 A. 610 (Vt. 1903); *Andrews v. State*, 50 Tenn. 165 (1871); see also *State v. Delgado*, 692 P.2d 610 (Or. 1984) (right to carry a switchblade knife)

The Supreme Court, *supra* ,in *McDonald* , indicates that no state can control, license, or forbid the possession of a firearm or magazines inside the home except for convicted felons and the adjudged insane (in some states a convicted felon can possess arms, although such possession by felons is restricted under federal law). The Supreme Court in *McDonald*, supra, enunciates that the right to keep arms in the home is an absolute right, privilege, and immunity which no state can abridge, infringe, or attempt to infringe, save within the narrow exceptions addressed, *supra*.

It follows that the right to Keep arms cannot be "infringed on*"*. *A fortiori*, any right which cannot be infringed is, therefore, an unqualified right. Qualified rights by definition and nature are susceptible of the infringement(s) contained in any accompanying qualification(s). "[T]he core right identified in *Heller* [is] the right of a law-abiding , responsible citizen to possess and carry a weapon for self defense." *United States v. Chester*, ____F.3d___,2010 U.S. App. LEXIS 26508 at *26 (4th Cir. Dec. 30, 2010) (emphasis removed and added); see also *United States v. Booker*, 570 F. Supp. 2d 161, 162 (D. Me. 2008).

As the Court, *supra,* in *McDonald* stated, "(d) The Fourteenth Amendment makes the Second Amendment right to keep and bear arms fully applicable to the States. Pp.19–33."

"The right to keep and bear arms must be regarded as a substantive guarantee, not a prohibition that could be ignored so long as the States legislated in an evenhanded manner. Pp. 30–33."

The "KEEPING" of arms as described in *Heller, McDonald*, and others decided by the Supreme Court make the possession of firearms inside the home by non convicted felons and/or adjudged insane persons to be unqualified for the purpose of self defense. The possession inside the home, therefore, is not subject to restrictions imposed by any State relative to mode of storages, or of model of pistol or rifle, ammunition type, or caliber.

With respect to "BEARING" of arms, the right to bear arms is not abrogated by recognition of the fact it may be regulated. To the contrary, precedent approving of the government's ability to regulate the carrying of handguns confirms the general rule to which it establishes exceptions. Traditionally, "the right of the people to keep and bear arms (Article 2) is not infringed by laws prohibiting the carrying of *concealed* weapons…" *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897) (emphasis added). But more recently, the Supreme Court has suggested that such bans are only "presumptively" Constitutional. *Heller,* 128 S. Ct at 2817 n. 26 (emphasis added). In *State v. Chandler*, 5 La. Ann. 489, 490 (1850, the Louisiana Supreme Court held that citizens had a right to carry arms openly: "This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations."

It is suggested that any summary revocation of an existing right to possess and/or carry a firearm(s) is Constitutionally impermissible. Any statutory scheme the purports to justify that revocation suffers from severe Constitutional defects that fail to meet the

elevated standards required for the licensing or attempted licensing of a fundamental right, particularly an unqualified right to possess a firearm(s) in the home.

It is suggested that any license to keep and/or bear arms issued pursuant to a statutory scheme that purports to allow an issued license to be revoked "upon the occurrence of any event that would have disqualified the holder from being issued such license or from having such license renewed" or "if it appears that the holder is no longer a suitable person to possess such license" SMF 34; M.G.L. c. 140 § 131 (emphasis added) is Constitutionally and fatally flawed. Under such a scheme, no pre-termination process is required, and the same statute declares that "[n]o appeal or post-judgment motion shall operate to stay such revocation or suspension." Id. Further the placement upon the possessor and/or bearer of a firearm of the "burden … to produce substantial evidence that he is a proper person to hold a license to carry a firearm." *Chief of Police of Shelburne v. Moyer*, 453 N.E. 2d 461, 464 (Mass. App. Ct. 1983) is equally distasteful and flawed.

The Supreme Court's prior restraint doctrine mandates higher standards:

It is settled by a long line of recent decisions of this Court that an ordinance which… makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official – as by requiring a permit or license which may be granted or withheld in the discretion of such official – is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

Staub v. City of Baxley, 355 U.S. 313, 322 (1958) (citations omitted); see also *FW/PBS v. City of Dallas*, 493 U.S. 215, 226 (1990) (plurality opinion); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969); *Strassser v. Doorley*, 432 F. 2d 567, 569 (1st Cir. 1970); *Berger v. Rhode Island Bd. Of Governors*, 832 F. Supp. 515, 519 (D.R.I. 1993) ("the standards contain no guidelines or definite requirements to limit the reviewing

officer or direct his scrutiny of submitted advertisements. This is the ultimate in unfettered discretion residing in an executive official.")

Although McDonald's five Justice majority reached the conclusion that the right to keep and bear arms is a protected liberty interest under the Second Amendment in different ways, under either the Due Process Clause or Privileges or Immunities Clause, a majority confirmed that "the Second Amendment right is fully applicable to the States." *McDonald* at 3026. Where a "fourteenth amendment liberty interest is implicated…the state therefore must adhere to rigorous procedural safeguards." *Valdivieso Ortiz v. Burgos*, 807 F. 2d 6, 8 (1st Cir. 1986); see also *Kuck v. Danaher*, 600 F. 3d 159, 165 (2d Cir. 2010) (same).

"[T]he concept of due process is equivalent to 'fundamental fairness.'" *Newman v. Massachusetts*, 884 F. 2d 19, 23 (1st Cir. 1989) (citation omitted). Due process requires that impacted individuals are "entitled to the Constitutional minimum of 'some kind of hearing' and 'some pre termination opportunity to respond.'" *O'Neil v. Baker*, 210 F. 3d 41, 47-78 (1st Cir. 2000) (quoting *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (footnote omitted). "The ubiquity of the 'notice and opportunity to be heard' principle as a matter of fundamental fairness is deeply engrained in our jurisprudence." *Oakes v. United States*, 400 F. 3d 92, 98 (1st Cir. 2005) citations omitted.

In *Snyder v. Massachusetts*, 291 U. S. 97, 105 (1934), the Court spoke of rights that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." As the Supreme Court has found in the McDonald, Heller decisions, the right to keep and bear arms, particularly within the sanctity of one's home, is an ordered

liberty of United States citizenship fundamental and beyond the pale of discretionary, subjective regulations by the States.

It is respectfully submitted that any statutory scheme which invades the fundamental liberty right of self defense within the home by enacting any scheme which attempts to regulate the possession and/or storage of any firearm(s) providing a basis to interfere in any way or attempt to revoke or impinge upon such a right without the barest of fundamental fairness and due process such as a *Loudermill* type hearing, is fatally flawed and wholly prohibited under the application of the Second Amendment to all of the States in light of the newly decided authority contained herein. Under the present status of jurisprudence, in light of newly decided authorities, it is respectfully submitted that without a prior showing cloaked with the fairness of a *Loudermill* type hearing that an individual is either a convicted felon or legally and previously adjudged insane, any interfere with a Massachusetts citizen's unqualified right to keep arms within the sanctity of the citizen's home is *per se* unreasonable and prohibited.

This notice are being served upon the Attorney General of Massachusetts per Fed. R. Civ. Proc. 5.1(a)(2), by way of Certified U.S. Mail.

Respectfully submitted,

Dated: June 13, 2011

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PROOF OF SERVICE

On this, the 13 day of June, 2011, I served a copy of the foregoing Notice of Unconstitutionality via Certified U.S. Mail (receipt # 7010 1870 0002 3742 5465) pursuant to Fed. R. Civ. P. 5.1 on the following:

Attorney General's Office
One Ashburton Place
Boston, MA 02108

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 13th day of June, 2011.

By: _____
James M. Atkinson