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No. 60552-6-I

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

R. P. H.

Appellant

FILED  
COURT OF APPEALS CIV. #1  
STATE OF WASHINGTON  
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SUPPLEMENTAL REPLY BRIEF OF APPELLANT

On Appeal from the Superior Court of King County  
The Hon. Julie Spector and Carol Schapira, Presiding

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ORIGINAL

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**A. ISSUES IN REPLY**

1. Does the Second Amendment apply to the States?
2. If the Second Amendment recognizes, but did not create, an individual's right to bear arms, does this fact help Mr. Hunter, rather than the State?
3. Do any of the cases from other jurisdictions cited by the State have any bearing on the issues in this case?
4. Has the Supreme Court upheld a statutory scheme that forever bars children from possessing firearms as adults based upon a childhood offense?

**B. ARGUMENT**

**1. *The Second Amendment Applies to the States***

The State disputes the applicability of *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), arguing that the Second Amendment does not apply to the States through the Due Process Clause of the Fourteenth Amendment and only restricts the actions of Congress. Citing *United States v. Cruikshank*, 92 U.S. 542 (1876), *Presser v. Illinois*, 116 U.S. 252 (1886) and *Miller v. Texas*, 153 U.S. 535 (1894), the State argues that the question of incorporation is settled and that this Court cannot overrule the

United States Supreme Court's holdings in this area. Supplemental Brief of Respondent at 3-4. This Court should reject the State's arguments.<sup>1</sup>

In *Heller*, the Supreme Court cast grave doubt on the continuing validity of the argument that the Second Amendment does not apply to the States. The Court explained, in some detail, that the very reason for the adoption of the Fourteenth Amendment was to secure for newly freed slaves the constitutional rights enshrined in the Bill of Rights, including the right to bear arms. 128 S. Ct. at 2809-2812.<sup>2</sup> Given this history and given the core value that the right to bear arms now has (after *Heller*),

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<sup>1</sup> Mr. Hunter argues here that the Second Amendment applies to the State of Washington because the Second Amendment's right to bear arms has been incorporated in the 14<sup>th</sup> Amendment's Due Process Clause ("nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."). Additionally, Mr. Hunter submits that the Second Amendment also applies to the States through the 14<sup>th</sup> Amendment's "Privileges or Immunities" Clause ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . ."). Mr. Hunter hopes that one day the Supreme Court will overrule the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873) and adopt this position. See *Saenz v. Roe*, 526 U.S. 489, 522-28 (1999) (Thomas, J., dissenting) (raising possibility of reviving the Privileges or Immunities Clause).

<sup>2</sup> In this portion of *Heller*, Justice Scalia relied on the amicus brief prepared by the Institute for Justice. 128 S.Ct. at 2810 This brief is available on-line at [http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-290\\_RespondentAmCuInstforJustice.pdf](http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-290_RespondentAmCuInstforJustice.pdf). The brief sets out in intricate detail the history of the 14<sup>th</sup> Amendment and how one of the main concerns of the drafters of that amendment was the fact that freed slaves were being denied the right to bear arms in self-defense. See also *District of Columbia v. Heller*, No. 07-290, *Brief of Amicus Curiae Congress of Racial Equality in Support of Respondent* (arguing how Southern states during Reconstruction attempted to pass laws which had the effect of disarming former slaves, and how 14<sup>th</sup> Amendment was intended to guarantee to the Freedman their right to keep and bear arms for self-defense). ([http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-290\\_RespondentAmCuCongRacialEqualitynew.pdf](http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-290_RespondentAmCuCongRacialEqualitynew.pdf)).

under the 14<sup>th</sup> Amendment, States can no more disarm citizens than Congress can. *Cruikshank*, *Presser* and *Miller* do not compel a contrary result.

*Cruikshank* involved the prosecution of white members of an armed mob who attacked former slaves in Louisiana after the Civil War. The prosecution was brought under the Enforcement Act, 16 Stat. 140 (1870)<sup>3</sup> and alleged the defendants conspired to deny the citizens of color the free exercise of their constitutional rights. The Supreme Court upheld the reversal of the convictions on the ground that no federal constitutional rights had been violated.

*Cruikshank* has often been cited as holding that the Second Amendment is not incorporated into the Fourteenth Amendment. *See, e.g., Burton v. Sills*, 53 N. J. 86, 98, 248 A.2d 521 (1968), *appeal dismissed*, 394 U.S. 812 (1969); *Arnold v. City of Cleveland*, 67 Ohio.St.3d 35, 38-41, 616 N.E.2d 163 (1993). This conclusion is based upon language in *Cruikshank* stating that the right to bear arms under the Second Amendment “means no more than that it shall not be infringed by Congress.” 92 U.S. at 553. However, this language in *Cruikshank* cannot

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<sup>3</sup> The Enforcement Act is often referred to as the “Ku Klux Klan Act.”

be read out of context. The language that immediately follows this sentence makes it clear that the Court held that the federal Constitution does not protect against private violations of rights:

The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to what is called, in *The City of New York v. Miln*, 11 Pet. 139 [36 U.S. 102, 139 (1837)], the "powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police," "not surrendered or restrained" by the Constitution of the United States.

92 U.S. at 553.

This conclusion does not undermine the doctrine of incorporation, since, as explained, the very reason for the adoption of the Fourteenth Amendment was to protect individuals who were being denied their right to bear arms, not by Congress, but by states in the South. The Supreme Court in *Cruikshank* did not dispute this conclusion and merely held in *Cruikshank* that the Fourteenth Amendment did not apply because the amendment did not control the actions of private parties, such as the white mob that attacked the freedman in Louisiana, rather than state actors:

The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. . . .

....

The fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it, and which we have just considered, add any thing to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty.

92 U.S. at 554-55. This language supports a theory of incorporation, rather than opposes it.

In any case, in *Heller*, Justice Scalia expressly limited *Cruikshank* by stating that it had a only a “limited discussion of the Second Amendment,” 128 S. Ct. at 2813, and “also said that the First Amendment did not apply against the States and did not engage in the sort of

Fourteenth Amendment inquiry required by our later cases.” *Id.* at 2813 n.23. Thus, *Cruikshank* should not be cited for the broad proposition that the Supreme Court has already held that the Second Amendment does not apply to the states. The holding is only that the federal Constitution does not apply to the actions of private individuals.

As for *Presser*, the case involved whether the State of Illinois could restrict armed groups of men from parading in cities. The Court held that the Second Amendment did not bar such a law. The Court repeated *Cruikshank*'s analysis that the Second Amendment was only a limit on the national government. 116 U.S. at 265. However, when the Court turned to the Fourteenth Amendment, the Court did not hold that the Second Amendment's right to bear arms was somehow excluded from the protection of the Fourteenth Amendment's Privileges or Immunities Clause. Rather, the Court held that the claimed right of military association and drilling with arms did not implicate the right to bear arms at all, only potentially the right to assemble. Moreover, the right to assemble was not effected by state restrictions on military drills and parades. 116 U.S. at 266-67. Thus, the holding of *Presser* was not that the right to bear arms was not incorporated into the 14<sup>th</sup> Amendment, but

only that if the 14<sup>th</sup> Amendment was not offended by a state restriction parading by armed bands. In *Heller*, the Court recognized the very limited holding of *Presser*: “*Presser* said nothing about the Second Amendment’s meaning or scope, beyond the fact that it does not prevent the prohibition of private paramilitary organizations.” 128 S. Ct. at 2813.

Finally, *Miller v. Texas*, *supra*, involved review of a murder conviction which arose after the defendant shot and killed a police officer. He did not raise any federal constitutional issues regarding gun ownership either at the trial or appellate level, *see Miller v. State*, 20 S.W.1103 (Tex. Crim. App. 1893), *writ dismissed* 153 U.S. 535 (1894), and only raised a federal constitutional claim (that he had the right to walk on a public street carrying a pistol) for the first time on a motion for rehearing after he lost his appeal. 153 U.S. at 535. As for the Court’s discussion of the Second Amendment, the Court merely repeated its earlier holdings that the Second Amendment did not operate directly on the States. 153 U.S. at 538. As for a claim of incorporation under the 14<sup>th</sup> Amendment, the Court rejected this argument by simply by stating “it was fatal to this claim that it was not set up in the trial court.” 153 U.S. at 538. Thus, *Miller*’s precedential value is not regarding issues about incorporation, but rather about whether

there is federal jurisdiction if a state criminal defendant fails to raise a federal issue properly in state court. *See Citizens' Savings Bank of Owensboro v. Owensboro*, 173 U.S. 636, 643 (1899) (citing *Miller* for this proposition: "But after a decision by the court of last resort of a State the attempt to raise a Federal question for the first time is too late.").

Thus, the holdings of *Cruikshank*, *Presser* and *Miller* do not require this Court to rule that the Second Amendment does not apply to the States through the Fourteenth Amendment. On the other hand, the history of the Fourteenth Amendment – primarily, its intent to protect the right to bear arms at the state level – and the primacy of the right to bear arms which is ranked at the same cherished level as the rights protected by the First Amendment, should lead this Court to hold that the Second Amendment applies to the actions of the State of Washington.

The proper inquiry to determine if rights have been incorporated into the 14<sup>th</sup> Amendment is to see whether the right is among "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," or whether it is "basic in our system of jurisprudence." *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968). *See Palko v. Connecticut*, 302 U.S. 319, 326 (1937) ("If the Fourteenth

Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed."), *overruled on other grounds Benton v. Maryland*, 395 U.S. 784 (1969). Justice Scalia's thorough description of the core values protected by the Second Amendment, a right the majority in *Heller* constantly compares to the First Amendment's rights, should leave no doubt that the right to bear arms is so fundamental, it applies to the states through the Fourteenth Amendment's Due Process Clause.

**2. *The Fact that The Right to Bear Arms is Recognized, Not Granted, By the Second Amendment Favors Mr. Hunter, Not the State***

Strangely, the State makes the argument that because the Second Amendment did not create the right to bear arms, but merely recognized such a right as already being in existence, that this somehow makes it easier to impose a life-time bar on Mr. Hunter's ability to possess firearms. The State then argues that because "[f]elons were not endowed with the natural right to possess firearms," Supplemental Brief of Respondent at 5, the Second Amendment does not apply.

This is very circular argument that assumes the very conclusion the author (the State) wishes to reach. The issue is not whether "felons" had,

at the time of the adoption of the Second Amendment, a natural right to possess firearms. Rather, the issue is whether, given the basic right to possess firearms, which is so deeply entrenched in our society that it predates the Bill of Rights, a particular government regulation of that right (imposing a lifetime ban because of a juvenile offense) passes constitutional muster. While Justice Scalia did not actually set out the proper standard of review in *Heller*, his constant comparison to the First Amendment leaves little doubt that the same strict scrutiny should apply.

The State seems to suggest that all that is required is to look at common practices under English common law at the time of the adoption of the Second Amendment to see if Mr. Hunter's right to bear arms is effected by RCW 9.41.040. However, the State fails to cite to any cases from the 18<sup>th</sup> Century holding that a thirteen-year-old child who is found guilty of committing a juvenile offense (a concept that did not exist at the time) could be banned for life from bearing arms.

On the other hand, if 18<sup>th</sup> Century common law should guide here, it is worth noting that under English common law, Mr. Hunter would not have been convicted at all:

Under English common law, a child under the age of fourteen was conclusively presumed incapable of

committing rape. See *Commonwealth v. Green*, 2 Pick. 380 (1824); *Regina v. Waite*, 2 Q.B. 600, 601 (1892). See also J.R. Nolan, *Criminal Law* § 646, at 470 (1976); 3 C. Torcia, *Wharton's Criminal Law* § 286, at 24 (14th ed. 1980). Though the origins of the presumption are unclear, the rationale most often stated is that males in England seldom reached puberty before age fourteen and that a boy who was not sexually mature could not commit the common law crime of rape. See, e.g., 3 C. Torcia, *supra* at 25. Another rationale recognized as a possible explanation for the rule's origin is that, since the crime of rape at common law was a capital offense, judges were reluctant to hang one so young for this crime. See *Commonwealth v. Green, supra*.

*Commonwealth v. A Juvenile*, 399 Mass. 451, 452, 504 N.E.2d 1049 (1987). Undoubtedly, over the last two centuries, most American jurisdictions have departed from this rule. Nonetheless, under English common law, Mr. Hunter would not stand convicted of a felony for his conduct when he was 13, and thus would not have been barred from firearm ownership when he became an adult.

The State invites the Court to look at various state constitutions that existed at, or shortly after, the time of the Second Amendment's adoption. Supplemental Brief of Respondent, at 7, *citing Heller*, 128 S. Ct. at 2793-94 n. 8. However, the State's subsequent analysis at pages 7 through 9 of its supplemental brief looks only at *contemporary* constitutions and modern cases that construe them. More importantly, the

cited cases simply deal with the firearm rights of *adults* convicted of felonies as *adults*, and thus are of limited relevance to determining the constitutionality of a scheme that imposes a lifetime ban on firearm possession for children convicted of juvenile offenses.<sup>4</sup>

The Second Amendment itself contains no restrictions on gun ownership, even for adult felons. This lack of language in the text of the amendment itself should be contrasted with the 14<sup>th</sup> Amendment's language that allows states to deny voting rights to those convicted of crimes. *See Richardson v. Ramirez*, 418 U.S. 24 (1974) (upholding disenfranchisement based upon language in Section 2 of the 14<sup>th</sup> Amendment that allows for denial of right to vote based upon "participation in rebellion, or other crime").<sup>5</sup>

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<sup>4</sup> To be sure, English common law at the time of the adoption of the Second Amendment allowed for the denial of firearm rights not to felons, children and the insane. *See* G. Reynolds, "A Critical Guide to the Second Amendment," 62 *Tenn. L. Rev.* 461, 480 (1995) ("felons, children, and the insane were excluded from the right to arms precisely as (and for the same reason) they were excluded from the franchise"). This does not answer the question, though, of whether a child who was not convicted of an adult felony could be forever be barred from gun ownership once he or she reached majority.

<sup>5</sup> The highest courts of some of the world's leading liberal democracies have rejected felon or prisoner disenfranchisement schemes as being inconsistent with a commitment to the inherent worth and dignity of every individual. *See Sauve v. Canada*, 2002 S.C.C. 68 [Canada]; *August v. Electoral Commission*, 1999 (3) SALR 1 [South Africa]; *Case of Hirst v. United Kingdom*, European Court of Human Rights, No. 75025/01 (October 6, 2005).

Notably, in Washington, disenfranchisement does not apply to those convicted as  
(continued...)

This is not to say that the absence of specific authorization in the Second and Fourteenth Amendments prohibits states from adopting regulatory codes that restrict gun ownership. The Supreme Court in *Heller* recognized this by its dicta stating that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill.” 128 S. Ct. at 2816-17. *See also id.* at 2817 n. 26 (prohibition against felon possessing firearm identified as being “presumptively lawful”). However, not only are blanket felon prohibitions not pertinent to the instant case, but also the fact that a felon prohibition might survive strict scrutiny does not mean that the Supreme Court’s dicta in *Heller* means that a reviewing court can dispense with all constitutional analysis and simply state the conclusion. A blanket felon prohibition is only, under *Heller*, “presumptively lawful.” But if *Heller* means anything, it means that all regulations on firearm ownership still need to be reviewed under the tests announced in *Heller* (whatever test that may be), and not just simply approved of by rote citation to old cases.

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<sup>5</sup>(...continued)  
juveniles since juveniles cannot, by definition, be convicted of an “infamous crime.” Wash. Const. art. VI, sec. 3. Under RCW 29A.04.079, an “infamous crime” “is a crime punishable by death in the state penitentiary or imprisonment in a state correctional facility.” Juvenile convictions would not qualify.

3. *As It Is Applied to Mr. Hunter, RCW 9.41.040 is Unconstitutional*

The State is correct that Justice Scalia did not clearly announce what standard of scrutiny should be used to evaluate a regulation on firearm's ownership. The State then points to the fact that various states use a "reasonable regulation police power standard" to evaluate state constitutional arms provisions and suggests the use of this standard here. Supplemental Brief of Respondent at 11-12.

The Court in *Heller* though clearly rejected the use of a "reasonable regulation" approach. 128 S. Ct. at 2817 n. 27. Moreover, as noted in Mr. Hunter's Reply Brief, Justice Scalia's citation to First Amendment cases, *see, e.g., id.* at 2821, leads to the inexorable conclusion that gun regulations must be evaluated under an enhanced scrutiny level.

Here, the only justification given by the State for a lifetime ban for juveniles is as follows:

In any event, the right of the Legislature to prohibit those persons convicted of committing violence crimes from possessing a firearm, regardless of their age (which has little to do with their dangerousness at the time of the offense – otherwise there would not be such a high level of violence juvenile crime), exists and is justifiable under any level of scrutiny.

Supplemental Brief of Respondent at 12.

This argument is simply insufficient. The Supreme Court has recently made it clear that children cannot be simply lumped in with adult offenders:

First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." [Citations omitted]. . . . [T]he character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. . . . The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.

*Roper v. Simmons*, 543 U.S. 551, 569-70 (2005). Indeed, the Washington State Legislature itself has now recognized that adolescent brain development requires differential sentencing treatment for children convicted of serious crimes:

The legislature finds that emerging research on brain development indicates that adolescent brains, and thus adolescent intellectual and emotional capabilities, differ significantly from those of mature adults. It is appropriate to take these differences into consideration when sentencing juveniles tried as adults. The legislature further finds that applying mandatory minimum sentences for juveniles tried as adults prevents trial court judges from taking these differences into consideration in appropriate circumstances.

Laws of 2005, Ch. 437, § 1.

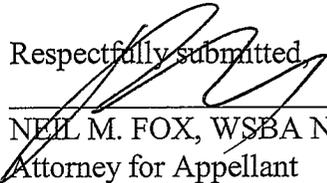
Given this research, a ban on gun ownership for *all* children, including those not even convicted of serious offenses, may make sense. However, the immaturity of children does not last forever, and, as the Supreme Court recognized in *Roper*, is generally transitory. By the time the child becomes an adult and, as in Mr. Hunter's case, is rehabilitated, there is no compelling circumstance to deny that child firearm rights for the rest of his or her life based upon conduct as a 13-year-old. Moreover, such a ban is not narrowly tailored (i.e. applied to children who are not rehabilitated by the time they reach majority). RCW 9.41.040 is therefore unconstitutional as it applies to Mr. Hunter.

C. **CONCLUSION**

For the foregoing reasons, and the reasons set out in the opening and reply briefs, Mr. Hunter requests that the trial court's orders be reversed and asks this Court to order the trial court to restore Mr. Hunter's right to bear arms.

Dated this 15 day of September 2008.

Respectfully submitted,

  
NEIL M. FOX, WSBA NO. 15277

Attorney for Appellant

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

STATE OF WASHINGTON,	}	COA NO. 60552-6-I
Respondent,	}	CERTIFICATE OF SERVICE
v.	}	
PATRICK RYAN HUNTER,	}	
Appellant.	}	

I, Breana Caldwell, certify and declare that on the 15<sup>th</sup> day of September 2008, I deposited into the United States mail with proper first class postage attached a copy of the Supplemental Reply Brief of the Appellant addressed to:

Dan Satterburg  
King County Prosecutor  
Dennis McCurdy, Deputy  
516 Third Ave. W-554  
Seattle WA 98104

I certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

9/16/08 Seattle, WA  
DATE AND PLACE

  
Breana Caldwell