IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CRIMINAL ACTION - LAW

FILED FOR RECORD

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| COMMONWEALTH OF PENNSYLVANIA | : | |
| | : | |
| v. | : | No.: CP-14-CR-1569-2008 |
| | : | |
| HOBSON MCKOWN | : | |

**REPLY TO COMMONWEALTH'S BRIEF IN OPPPOSITION OF DEFENDANT'S MOTION TO DECLARE STATUTES UNCONSTITUTIONAL**

AND NOW, comes the Defendant, Hobson McKown, by and through his attorneys, Jason S. Dunkle, Esquire, and Masorti & Sullivan, P.C., and brings this Reply to Commonwealth's Brief in Opposition of Defendant's Motion to Declare Statutes Unconstitutional, whereof the following is a statement:

## I. COMMONWEALTH FAILS TO PROVIDE ADEQUATE CHALLENGE TO DEFENDANT'S MOTION TO DECLARE STATUTES UNCONSTITUTIONAL

In the Brief in Opposition to the Defendant's Brief to Declare Statutes Unconstitutional, the Commonwealth purports in regard to the Second Amendment of the United States Constitution that the concealed carry of firearms and possession of firearms in courtrooms are simply beyond the scope of that Amendment, or if they were within the scope, pass an intermediate scrutiny two-pronged test which is all that the Third Circuit requires, but that in *every* case, the challenger of constitutionality bears the heavy burden of proof. The Commonwealth further contends, under both the Pennsylvania Constitution and the United States Constitution, that 18 Pa.C.S. § 6106 and 18 Pa.C.S. § 913 are valid under the exercise of police power. To reach these conclusions, however, the Commonwealth places undue reliance on portions of the judicial building blocks used to set a legal foundation and largely fails to

provide adequate analysis of the constitutional provisions at issue.

### A. 18 P.A.C.S. § 6106 MUST BE FACIALLY UNCONSTITUTIONAL UNDER THE SECOND AMENDMENT AS THE STATUTE UNDUELY BURDENS THE RIGHT TO BEAR ARMS, THERE IS NO SUBSTANTIVE ILL, AND REMAINS NO COMPELLING INTEREST

In prefacing the burden of proof which a party must overcome to have a statute voided, the Commonwealth asserts that the challenger is always heavily burdened to overcome a presumed constitutionality of a section of statute. This is untrue. In a means-end analysis the "Government bears the burden of identifying a substantial interest and justifying the challenged restriction." Greater New Orleans Broadcasting Ass'n, Inc. v. U.S., 527 U.S. 173, 183 (1999). The Seventh Circuit, in United States v. Skoien, 587 F.3d 803, 814 (2009), recognized that "under the prevailing rational-basis test, the challenged law is presumed to be constitutional", but also charged, citing Board of Trustees of State University of New York v. Fox, 492 U.S. 469, 480, that "[i]ntermediate scrutiny, like strict scrutiny, reverses the presumption. The government "bears the burden of justifying its restrictions, [and] it must affirmatively establish the reasonable fit" that the test requires." The Third Circuit citation put forth by the Commonwealth, United States v. Marzzarella, 614 F.3d 85 (3rd Cir. 2010), discovers as much, as it reviews varied expositions on intermediate standards of scrutiny in First Amendment cases. Id. at 97-98.

The Commonwealth then attempts to jam Commonwealth v. Butler, 150 A.2d 172, 173 (Pa.Super. 1959), into the paradigm provided by Marzzarella, but identifies that the objectives in Marzzarella and Butler were identical, primarily "to keep firearms away from persons [a legislature] classified as potentially irresponsible and dangerous." Marzzarella, 614 F.3d at 98. This is confusing as the Commonwealth points to "unlicensed weapons" from Butler as an "inherent danger to human life and public peace." Cmwlth. Brief. Oppos., II(A). Unlicensed

weapons are not a class of persons. In fact, it is not that it is a weapon, or that it is a firearm, or that the weapon is unlicensed, that causes this supposed "inherent danger", given that "except in Philadelphia, firearms may be carried openly without a license. See Ortiz v. Commonwealth, 681 A.2d 152, 155 (Pa. 1996) (only in Philadelphia must a person obtain a license for carrying a firearm whether it is unconcealed or concealed; in other parts of the Commonwealth, unconcealed firearms do not require a license)." Commonwealth v. Hawkins, 692 A.2d 1068, 1071 n. 4 (Pa. 1997). Even if there was some foreseen danger justifying the section in the UFA regarded in Butler, Butler contained no challenge of a statute based on constitutionality, and therefore the defendant had no fair and full opportunity, and little incentive, to discover and litigate the alleged inherent danger of concealed carry. Butler contained only a sole contention that the evidence was insufficient to sustain his conviction.

The Commonwealth states that "Heller . . . noted in particular that prohibitions on carrying concealed weapons have, historically, been upheld." Cmwlth. Brief. Oppos., I. The court in Heller actually stated that "[f]or example, the majority of the *19th-century courts* to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. See, e.g., State v. Chandler, 5 La. Ann., at 489-490; Nunn v. State, 1 Ga., at 251[.]" (Heller, at 2816. Emphasis added.) The Commonwealth failed to address or discuss the problem with carrying concealed weapons that the 19th-century courts purported to recognize.

In fact, the aforementioned quotation by the Commonwealth from Butler, at 173, comes from the Butler Court citing the trial court judge, whom went on to say that the "primary thrust of the statute being to prohibit a practice evil in its tendencies". Still dealing in vagaries, Butler sends us to State v. Bias, 37 La. Ann. 259 (1885), which states only that concealing

weapons is “a practice that has been and is fruitful of bloodshed, misery, and death”. Bias, at 260. Given the severe lack of readily apparent evil, bloodshed, misery, and death surrounding the case before this court, the 19th-century courts opinions cited in Heller are slightly more eye-opening. The court in State v. Chandler, 5 La. Ann 489, 490 (1850) cited the ill to be a "tendency to secret advantages and unmanly assassinations". The same character is found by the court in Nunn v. State, 1 Ga. 251 (1846), in reviewing the findings in other states, finding the ill described as "the wearing of certain weapons in such a manner as is calculated to exert an unhappy influence upon the moral feelings of the wearer, by making him less regardful of the personal security of others". Of course, the Court in Nunn also discovered that a state court case that predated all of the aforementioned others, when confronting a prosecutor’s claim that “a distinction was taken between a law prohibiting the exercise of the right, and a law merely regulating the manner of exercising that right[, that] the former was admitted to be incompatible with the Constitution, it was insisted that the latter was not so”, decided that “an act to prevent persons from wearing even concealed weapons is unconstitutional and void.” Nunn, at 247-248.

However, we no longer have the honor culture which promotes openly carrying arms (over the ‘ills’ of concealed carry), which the Chandler court cited as a prerequisite to "incit[ing] men to a manly and noble defence of themselves, if necessary, and of their country". Chandler, at 490. In fact, while open carry is generally legal, and without licensing in Pennsylvania, "the socially-preferred form of carrying is now concealed carry", because it is believed to promote firearm retention when faced against someone who might attempt to disarm the carrier, and because "concealed carry reduces the anxiety among what some nineteenth century courts called the “timid” portion of the populace who are afraid of seeing a

firearm." David B. Kopel & Clayton Cramer, STATE COURT STANDARDS OF REVIEW, 50 Santa Clara L. Rev. 101, 160. The 19th-century courts which heralded open carry were also faced with a society whose socially-preferred form of carrying was open carry.

In determining whether 18 Pa.C.S. § 6106 represents an outright prohibition on carry of a firearm or instead only a regulation of mode or manner, we can examine the alternative, *open carry*. The Butler-noted State v. Bias, 37 La. Ann. at 260, declared that "to bear arms openly [is such] that when one meets an armed man there can be no mistake about the fact that he is armed. When we see a man with musket to shoulder, or carbine slung on back, or pistol belted to his side, or such like, he is bearing arms in the constitutional sense." Under Pennsylvania law, a person may openly carry a firearm, without a license (Ortiz v. Commonwealth, 681 A.2d 152, 155 (Pa. 1996)), through much of 66 of Pennsylvania's 67 counties. An open carrier, however, may not, without a license, carry openly on public streets and property in Philadelphia (18 Pa.C.S. 6108), during a state of emergency unless engaged in active defense (18 Pa.C.S. § 6107(a)), or within 1,000 feet from the grounds of a public, parochial or private school (18 U.S.C. §§ 921(a)(25)(B), 921(a)(26), 922(q)(2)(A)).

If open carry is supposed to be the morally superior and unregulated form of carry, Pennsylvanian open carriers suffer even further under our modern lifestyle which contemplates frequent and distant travel by vehicles. 18 Pa.C.S. 6106(a)(1) provides that "any person who carries a firearm in any vehicle . . . without a valid and lawfully issued license . . ." commits an offense. Although a facial reading of that wording might lead one to believe that the nexus of carry would be approximately the same as the liability for "on or about one's person" regarding the offense at § 6106(a)(1) of concealment, especially given the Superior Court finding that "[t]he essence of the offense is the 'concealed carrying' of a weapon, whether it is in a vehicle

or on the person", Commonwealth v. Walker, 280 A.2d 590, 591 (Pa.Super. 1971), Pennsylvania and Federal courts have generally construed carry to include where the vehicle, rather than the person, carries the firearm. See United States v. Garth, 188 F.3d 99, 110-111 (3rd Cir. 1999) (citing Muscarello v. United States, 118 S.Ct. 1911, 1918 (1998)); Commonwealth v. Boatwright, 453 A.2d 1058, 1059 (Pa.Super. 1982); Commonwealth v. Festa, 40 A.2d 112, 116 (Pa.Super. 1944). Because our modern lifestyle generally requires frequent transportation by 'vehicle' (defined at 1 Pa.C.S. § 1991 as "[a] conveyance in or on which persons or property may be carried",) a person who wishes to openly carry from place to place appears to be denied the ability because he cannot put that firearm in a vehicle without obtaining a license.

And then, when that open carrier reaches a court facility (under 18 Pa.C.S. 913(f)), Pennsylvania law, on at least prima facie facial reading, appears to discriminate against those who openly carry from checking in their firearms in mandatory lockers at court facilities as provided for in 18 Pa.C.S. § 913(e), which states that lockers are "for the temporary checking of firearms *by persons carrying firearms under section 6106(b) or 6109*". This would be confusing to someone who had read the bill from the General Assembly that had created § 913, which states that "it is not the purpose of this act to place any undue or unnecessary restrictions or burden on law-abiding citizens with respect to . . . possession, . . . transportation or use of firearm . . . for personal protection . . . or any other lawful activity". 1995, June 13, P.L. 1024, No. 17 (Spec. Sess. No. 1), § 1. It is the absence of law prohibiting open carry, and/or the constitutional right to bear arms, under which open carriers carry, not under 18 Pa.C.S. § 6106(b) or § 6109.

If open carry was to be the unprohibited mode or manner today, requiring no license,

as many of those nineteenth century courts required (see Nunn, 1 Ga., at 251, for example), why would the state deny them the ability to go to and from court facilities armed by denying them the lockers to do so?

The prohibition against unlicensed concealed carry in 18 Pa.C.S. § 6106(a), when combined with a collection of the rest of Pennsylvania and pertinent Federal law governing carry of both open and unconcealed types and with today's cultural affectations toward carry, we actually find that § 6106(a) represents a virtually complete prohibition on carry in modern society without a license. So, not only does § 6106(a) have little to do with a class of persons, but also the Commonwealth cannot meet its burden that the mode of carry causes particular danger of any substance to meet the intermediate scrutiny standard from Marzzarella, leaving no compelling interest to infringe on the liberty of bearing arms. "[W]e are in danger of forgetting that the Bill of Rights reflects experience with police excesses. It is not only under Nazi rule that police excesses are inimical to freedom. It is easy to make light of insistence on scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy. It is too easy. History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end." Barrios-Lomeli v. State, 114 Nev. 779, 782, 961 P.2d 750, 752 (1998) (quoting Davis v. United States, 328 U.S. 582, 597 (1946) (Frankfurter, J., dissenting)).

**B. 18 PA.C.S. §§ 6106 AND 913 MUST BE UNCONSTITUTIONAL UNDER THE PENNSYLVANIA CONSTITUTION, WHICH THE COMMONWEALTH DOES NOT ACTUALLY CONTEST**

After noting that "[t]he Pennsylvania Constitution recognizes a right of the citizens to 'bear arms in defense of themselves and the State.'" Cmwlth. Oppos. Brief., IV, the Commonwealth cites Commonwealth v. Ray, 272 A.2d 275, 279 (Pa.Super. 1970), vac'd on

other grounds, 292 A.2d 410 (Pa. 1972), as allowing the "reasonable regulation in a gun control law" as the right is "not unlimited", with reasons to support this found in the Commonwealths contentions on the Second Amendment. Yet, the Commonwealth, the court in Ray, and every Pennsylvania appellate court facing the implication of Pa. Const. art. I, § 21 have failed to perform an adequate "important and necessary", "independent" analysis of "the Pennsylvania Constitution, each time a provision of that fundamental document is implicated", Commonwealth v. Edmunds, 586 A.2d 887, 894-895 (Pa. 1991), something that needs to done, although not in an Edmunds four-pronged test approach, regardless of whether a seemingly analogous provision in the U.S. Constitution is implicated. See Jubelirer v. Rendell, 953 A.2d 514, 524-525, 528 (Pa. 2008).

In citing the "not unlimited" right, the Commonwealth chopped off an inconvenient section of Pa. Const. art. I, § 21 which states that the right "shall *not* be questioned", not unlike the way the court in District of Columbia v. Heller failed to examine the Second Amendment's guarantee that the right to keep and bear arms "shall *not* be infringed". In 1996, the Attorney General of Kentucky, referring to a historical analogous provision of Kentucky's constitution, noted that "We are aware of the case of Bliss v. Commonwealth, Ky., 12 Ky. 90 (1822), which construed Article 10, Section 23 of the Second Constitution of Kentucky (1799) as conferring on the individual citizen an *absolute* right to bear arms." Ky. OAG Op. 96-40 (1996), emphasis added. He noted further that "[a] comparison of Section 1, Seventh of our present Kentucky Constitution to its counterparts in prior Kentucky Constitutions reveals a change in language which suggests the framers of the 1891 Kentucky Constitution did not intend for the Constitution to confer an absolute right to bear arms openly. All prior versions of the Kentucky Constitution provided in relevant part that the right to bear arms "shall not be questioned"."

Two years earlier, the Attorney General of Kentucky recognized that "The case of Bliss v. Commonwealth, 12 Ky. 90 (1822) led to the addition of language in the 1850 Kentucky Constitution which expressly permits the General Assembly to enact laws to prevent the carrying of concealed weapons. This language was retained when the present Kentucky Constitution was ratified." Ky. OAG Op. 94-14 (1994). The Pennsylvania Constitution has no such enabling verbiage and has lacked it since 1776. "[B]ecause of the common heritage shared by the Kentucky Bill of Rights of 1792 and the Pennsylvania Bill of Rights of 1790", "[d]ecisions of the Pennsylvania Supreme Court interpreting like clauses in the Pennsylvania Constitution are uniquely persuasive in interpreting our own". Commonwealth v. Wasson, supra, 842 S.W.2d 487, 498 (Ky. 1992).

The Commonwealth also appears to ignore companion provisions of the Pennsylvania Constitution that effect the expansive right to carry and otherwise possess at all times without license nor prohibition: "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of . . . defending life and liberty, of acquiring, possessing and protecting property . . ." Pa. Const. art. I, § 1; "All power is inherent in the people, and . . . at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may think proper." Pa. Const. art. I, § 2. The Commonwealth makes no attempt to explain away these companion rights/reasons for the right to bear arms.

Since Pennsylvania's 1790 Constitution, its Declaration of Rights has contained a section that states that "To guard against the transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate." Pa. Const. art. I, § 25. Ray did not even

contemplate this provision when commenting on police power, and other right-to-bear-arms cases suffer the same lack of analysis. "Although the constitutional language is always our interpretive focus, we bear in mind that "because the Constitution is an integrated whole, effect must be given to all of its provisions whenever possible."" Jubelirer v. Rendell, 953 A.2d at 528. The "police power" is a general power that must be directed through this constitutional sieve, as specifically provided for by the People of Pennsylvania. "To prevent the evils which would inevitably result from the overthrow of the government, the equilibrium established by the Constitution must be preserved, and this can only be done by meeting on the threshold the first attempt at encroachment, whether arising from design, inattention or mistake, come from what branch of the government it may." Commonwealth ex rel. Hepburn v. Mann, 5 Watts & Serg 403, 421 (Pa. 1843).

Ray, along with the rest of Pennsylvania's right-to-bear-arms jurisprudential lineage, ultimately cites back to Wright v. Commonwealth, 77 Pa. 470 (1875). See Sayres v. Com., 88 Pa. 291, 308 (1879); Com. ex rel. City of Scranton v. Adams, 20 Pa. D. 91, 92 (Pa.Com.Pl. 1910); Commonwealth v. Patsone, 79 A. 928, 930 (Pa. 1911); Commonwealth v. Sweitzer, 21 Pa. D. 807, 808 (Pa.Quar.Sess. 1912); Mail Carrier's Case, 49 Pa.C.C. 124, 125 (Pa.Atty.Gen. 1920); Yeslow v. Board of License and Inspection Review, 18 Phila.Co.Rptr. 323, 325-326 (Pa.Com.Pl. 1988). See also, cases citing to those case, Gardner v. Jenkins, 541 A.2d 406, 409 (Pa.Commw. 1988); Lehman v. Pennsylvania State Police, 839 A.2d 265, 273 (Pa. 2003). Wright provided no analysis for its holding, as would appear to be required by Edmunds and Jubelirer. Wright held that the offense "of unlawfully and maliciously carrying upon the person of the defendant, a concealed deadly weapon, to wit, a pistol, with an intent, unlawfully and maliciously, to do bodily harm to another" had "no protection under the 21st section of the

Bill of Rights". Wright, at 470-471. Unfortunately, the Commonwealth would have us believe that it would be legitimate to stretch this purported lack of protection over conduct that is *not* "[s]uch an unlawful act and malicious intent" as whatever Wright had done, and which the court does not detail.

Wright, however, has not been blindly followed at *every* junction, and there is question as to its appropriateness given the understanding of the right to bear arms around the time of the Pennsylvania Constitution of 1874. "When an ordinance on the same subject was before us some time ago, we held it to be invalid, for the reason that it defined no offence against the law of the state. It simply prohibited the carrying of concealed deadly weapons, without reference to the intent unlawfully and maliciously to do injury to any other person." City of Scranton v. Adams, 20 Pa. D. 91, 92 (Pa.Com.Pl. 1910). In the debates on the Pennsylvania Constitution of 1874 just years before Wright, one debater noted "that in the acts of Assembly with regard to concealed weapons the word 'maliciously' or 'feloniously' is used, and there is something in the act itself which relates to the intent[,] . . . the evil intent[,] . . . [h]ence it is constitutional to pass such laws in order to restrain persons from carrying concealed weapons with malicious intent", an element of the offense which is absent from both § 6106(a) and § 913(a)(1). Some of the very same questions 19th century courts noted in Heller wrangled with were considered in the debates on the 1874 constitution, where it was debated whether to add the word "openly" after "citizens" in Section 21, because "persons . . . fall back on the Constitution, which they say authorizes the bearing of arms, and therefore the act of Assembly is unconstitutional . . . but that has been made constantly a matter of defence, and it gives the courts great annoyance." Several judges suggested a modification as proposed here, and it was noted during this debate that "when that question was brought before one of the courts of Philadelphia, one of the

judges declared that a person *upon the witness stand* who had a pistol concealed on his person had a constitutional right to carry that pistol concealed[.]" See Debates of the Convention to Amend the Constitution of Pennsylvania at 258 (Harrisburg 1873), (emphasis added).

In fact, the debates for the 1874 constitution were especially forgiving to all modes of carry as protected under Article I, Section 21. One debater opined, when putting forth an example of being transported by a conveyance (which would be 'carrying in any vehicle") and walking about at night, that "it is the very worst thing in the world to say that if a man of my condition offends a man like Judge Woodward, he is to take a severe beating whenever his enemy chooses to inflict it", acknowledging a "right of self-defence of the weak against the strong . . . as long as there are any weapons of defence to be had by which I can equalize my strength with his." Debates of the Convention to Amend the Constitution of Pennsylvania at 259 (Harrisburg 1873). This debater later could not "see why the Constitution should prohibit a man from carrying weapons to defend himself unless he carries them openly, why you should require him to sling a revolver over his shoulder." Id. at 259. Another debater noted that in certain areas, the culture recognized and encouraged the regular carry of concealed weapons. Id. at 259. It was said by one that "law against carrying concealed weapons does not interfere with the habit among the dangerous classes", and another that "[t]hieves and murderers never would and never do regard any law of this kind". Id. at 258-259.

The court is asked to recognize that a standard for the right to bear arms was established 188 years ago in Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 13 Am. Dec. 251 (1822) regarding Pennsylvania's Article I, Sections 21 and 25 provisions, and that those provisions have survived as they are now for over 220 years. The jurisprudential infrastructure for the finding of facial unconstitutionality of 18 Pa.C.S. §§ 6106(a) and 913 has been made

available. "Experience has also taught us the useful lesson, that there is no more effectual way of destroying the liberties of the people, than by gradual encroachments under colour of law, and that no better instrument could be employed for that purpose, than a venal, timeserving, timid and subservient judiciary." Commonwealth ex rel. Hepburn v. Mann, 1843 WL 5060, 3 (Pa. 1843).

WHEREFORE, the Defendant respectfully requests that this Honorable Court holds void all law in part or whole found unconstitutional.

Respectfully submitted,

MASORTI & SULLIVAN, P.C.

By:

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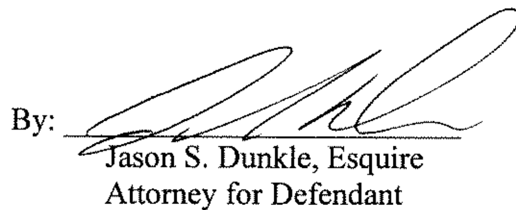
**VERIFICATION**

I, Jason S. Dunkle, Esquire, do hereby verify that I am the Attorney for the Defendant, that I am fully authorized to make this verification on his behalf and that the Defendant is unavailable to this make this verification and that the facts set forth in the foregoing document are true and correct to the best of my knowledge, information and belief, and that the source of my information is from discussions with my client and the documents provided.

I understand that the statements therein are made subject to the penalties of 18 Pa. C.S. A. §4904 relating to unsworn falsification to authorities.



By: ______________________
Jason S. Dunkle, Esquire
Attorney for Defendant

Dated: 11/29/10

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 29th day of November, 2010, a true and correct copy of Reply to Commonwealth's Brief in Opposition of Defendant's Motion to Declare Statutes Unconstitutional was served via hand delivery to the following:

Sean McGraw, Esquire
Centre County Assistant District Attorney
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Respectfully submitted,

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