**IN THE**
**SUPREME COURT OF OHIO**

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| **STATE OF OHIO,** | : | **Supreme Court No. 2019-1215** |
| **Plaintiff-Appellee,** | : | **Ohio Court of Appeals, Eighth Judicial District, No. CA-18-107374** |
| **v.** | : | |
| **DELVONTE PHILPOTTS,** | : | **Cuyahoga County Court of Common Pleas No. CR-17-619945-A** |
| **Defendant-Appellant.** | : | |

# MERITS BRIEF OF APPELLANT DELVONTE PHILPOTTS

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## PROPOSITIONS OF LAW

*First Proposition of Law*: On its face, R.C. 2923.13(A)'s blanket ban on continued possession of firearms by indictees violates the Second Amendment.

*Second Proposition of Law*: On its face, R.C. 2923.13(A)'s blanket ban on continued possession of firearms by indictees violates the constitutional right to procedural due process.

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## STATUTE UNDER ATTACK

**R.C. 2923.13 – Having weapons while under disability.**

(A) Unless relieved from disability under operation of law or legal process, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:

> (1) The person is a fugitive from justice.
>
> (2) The person is under indictment for or has been convicted of any felony offense of violence or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence.
>
> (3) The person is under indictment for or has been convicted of any felony offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse.
>
> (4) The person is drug dependent, in danger of drug dependence, or a chronic alcoholic.
>
> (5) The person is under adjudication of mental incompetence, has been adjudicated as a mental defective, has been committed to a mental institution, has been found by a court to be a mentally ill person subject to court order, or is an involuntary patient other than one who is a patient only for purposes of observation. As used in this division, "mentally ill person subject to court order" and "patient" have the same meanings as in section 5122.01 of the Revised Code.

(B) Whoever violates this section is guilty of having weapons while under disability, a felony of the third degree.

(C) For the purposes of this section, "under operation of law or legal process" shall not itself include mere completion, termination, or expiration of a sentence imposed as a result of a criminal conviction.

## INTRODUCTION

The Second Amendment to the United States Constitution secures to the People an "individual right to possess and carry weapons in case of confrontation." *District of Columbia v. Heller*, 554 U.S. 570, 592-593, 128 S.Ct. 2785, 171 L.Ed.2d 637 (2008); *see also McDonald v. City of Chicago*, 561 U.S. 742, 750, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) (incorporating against the several States). In blatant contravention of this liberty, section 2923.13 of the Ohio Revised Code makes it a crime for a person under indictment for "any felony" considered a statutory "offense of violence" or involving "the illegal possession, use, sale, [etc., of] any drug of abuse" knowingly to acquire, carry, use, or even continue to "have" any firearm. R.C. 2923.13(A)(2), (3). Because this statute automatically burdens all affected indictees,[1] who are presumed innocent until duly convicted, and bars them even from continuing to keep pre-indictment firearms in their homes for protection, it violates the Second Amendment on its face. Because the statute automatically dispossesses indictees without any procedural protections whatsoever, on its face it also violates the constitutional right to procedural due process. The lower courts in this case erred when they concluded otherwise. This Court should reverse.

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[1] As noted, R.C. 2923.13(A)(2) and (3) apply to people under indictment for "felony offense[s] of violence" or any felony drug offense. To avoid inelegant references to lumbering phrases like "persons under indictment for felony offenses of violence or any felony offenses involving drugs of abuse"—and without suggesting that the statute affects literally *everyone* under indictment—those encumbered by R.C. 2923.13 are referred to herein simply as "indictees."

## STATEMENT OF THE FACTS AND CASE

Delvonte Philpotts had never been convicted of a felony when sixteen armed police ransacked his home and discovered a single pistol therein. He had been indicted for a felony offense of violence, yes, but his trial was still months away and in the meantime he was presumed innocent. Except the trial never happened because the government dropped all charges. Tr.9.

Mr. Philpotts lived in a dangerous part of suburban Cleveland, so he felt safer having a weapon in his home to protect his sister and himself. Tr.13-14. But according to the government, once he was indicted he violated the law simply by continuing to keep a pistol at home for protection. The government took the case to the grand jury, which returned an indictment on one count of having a weapon while under a "disability," namely the later-dismissed indictment for a "felony offense of violence." Mr. Philpotts moved to dismiss the weapons charge because the Ohio statute under which he was being prosecuted, R.C. 2923.13, violated the constitution. The trial court ruled against him, wherefore he appealed to the Ohio Court of Appeals, Eighth Judicial District, raising three assignments of error challenging the constitutionality of the statute under the Second Amendment (and its Ohio analogue) as well as the Fifth Amendment's Due Process Clause. The Eighth District rejected all of them in a flawed, albeit lengthy opinion that, among other faults, was guilty of applying the wrong standard of review

and ignoring both the history of the liberty at issue and the utter novelty of the restraint.

Mr. Philpotts sought review in this Court. He raised two propositions of law, both of which this Court accepted but held pending resolution of *State v. Weber*, Supreme Court No. 2019-0544, 2020-Ohio-6832. After *Weber* was decided, this Court directed Mr. Philpotts to brief the merits of the two propositions of law. These are:

> (1) On its face, R.C. 2923.13(A)'s blanket ban on continued possession of firearms by indictees violates the Second Amendment.
>
> (2) On its face, R.C. 2923.13(A)'s blanket ban on continued possession of firearms by indictees violates the constitutional right to procedural due process.

This timely brief on the merits follows.

## LAW AND ARGUMENT

*First Proposition of Law*: On its face, R.C. 2923.13(A)'s blanket ban on continued possession of firearms by indictees violates the Second Amendment.

Ohio criminalizes the continued possession of a firearm by people under indictment for any of the myriad drug-related or statutorily "violent" felonies in Ohio, federal, or sister-state law. R.C. 2923.13(A)(2), (3). Yet the Second Amendment, as historically or presently understood, does not permit the indiscriminate, automatic deprivation of the right it secures based on mere indictment alone. Unlike "longstanding" limitations on *convicted* felons' Second Amendment rights, *see Heller*, 554 U.S. at 592, or other similarly ancient restrictions, Ohio's prohibition on the

continued possession of firearms by mere indictees is unexampled in history, directly impinges on the Second Amendment's core guarantee, and is far too burdensome to withstand even intermediate constitutional scrutiny. Consequently, on its face the statute violates the Second Amendment. It should be struck down.

**A. FUNDAMENTAL PRINCIPLES.**

The Second Amendment provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." It "codif[ies] a pre-existing right," it does not "fashion a new one." *Heller*, 554 U.S. at 603; *cf.* William Blackstone, 1 *Commentaries on the Laws of England*, ch. 1, 97 (Oxford 2016) (describing the "right of having and using arms" "for defence" as a function of the broader "natural right of resistance and self-preservation"). In *Heller*, the Supreme Court held that "on the basis of both text and history" the Second Amendment protects "an *individual* right to keep and bear arms." (Emphasis added.) 554 U.S. at 595. That right is strongest within the home, *id*. at 628, where laws that "burden the 'fundamental,' core right of self-defense" conversely are at their weakest, *United States v. Masciandaro*, 638 F.3d 458, 470-471 (4th Cir.2011), citing *Heller*, 554 U.S. at 628; *Kachalsky v. City of Westchester*, 701 F.3d 81, 89 (2nd Cir.2012) ("What we know from [*Heller*] is that Second Amendment guarantees are at their zenith within the home."). Moreover, "the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to

our system of ordered liberty." *McDonald*, 561 U.S. at 750. The Second Amendment therefore applies against both the federal government and the several States through the Fourteenth Amendment's Due Process Clause. *Id*. Ohio meanwhile separately preserves the People's "right to bear arms for their defense and security" in its own Bill of Rights. *See* Ohio Constitution, Article I, Section 4; *Arnold v. City of Cleveland*, 67 Ohio St.3d 35, 43, 616 N.E.2d 163 (1993) (Section 4 "secures to every person a fundamental individual right to bear arms."), citing *State v. Hogan*, 63 Ohio St. 202, 218-219, 58 N.E. 572 (1900)); R.C. 9.68(A) (declaring same by enactment).[2]

Although *Heller* did not state the exact test to be applied to Second Amendment constraints, the Supreme Court rejected rational basis review out of hand. 554 U.S. at 628 n.27; *id*. at 634-635 ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment * * * would have no effect."). Pre-*Heller* Ohio and federal case law applying rational basis review therefore no longer obtains. *E.g.*, *State v. Pauley*, 8 Ohio App.3d 354, 357, 457 N.E.2d 864 (8th Dist.1982) (requiring only "some rational basis or relevance to the purpose" of the statute); *Lewis v. United States*, 445 U.S. 55, 67, 100 S.Ct. 915, 63 L.Ed.2d 198 (1980) ("Congress'[s] judgment that a convicted felon * * * is among the class of persons who should be

[2] Because the Second Amendment's protection of an individual right has been incorporated against the several States, and because Section 4 of the Ohio Constitution's Bill of Rights separately secures an identical right, for brevity's sake both liberties are referred to collectively as "the Second Amendment" throughout this brief.

disabled from * * * possessing firearms because of potential dangerousness is rational."). The Supreme Court was explicit on this, at least: rational basis review is inappropriate. What then *is* the appropriate level of scrutiny?

Many courts have filled the gap in *Heller* with a two-step test. *See, e.g.*, *Kolbe v. Hogan*, 849 F.3d 114, 132-133 (4th Cir.2017) (citing cases from most of the federal circuit courts). In the first step, courts ask whether "'the challenged statute "regulate[s] activity falling outside the scope of the Second Amendment as it was understood at the relevant historical moment[.]"'" *Weber*, *supra*, Slip Op. at 5-6, quoting *Stimmel v. Sessions*, 879 F.3d 198, 204 (6th Cir.2018), quoting *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir.2012). If, as here, it does not—that is, if the law *does* burden core Second Amendment activity—then courts turn to the second step. Under the approach taken by the nominal majority in *Weber*, the second step is resolved by "'determin[ing] and apply[ing] the appropriate level of heightened means-end scrutiny' based on whether and how severely a particular law burdens the core Second Amendment right." *Id*. at 6, quoting *Stimmel*, 879 F.3d at 204. Under this approach, if the burden is severe, then strict scrutiny should be applied. *Id*. at 7. Only when the burden is *not* severe—when, for instance, it lasts just for the few hours of a person's drunkenness, *see id*.—can intermediate scrutiny be applied. *Id*. at 6. The concurring opinion in *Weber* took a somewhat different approach, however, under which a reviewing court must view the "text, history, and tradition" of the Second Amendment to be paramount. *Id*. at 25-28

(DeWine, J., concurring in judgment only). On this view, "[i]f a regulation wholly proscribes the core right to bear arms, it violates the Constitution * * * no matter how compelling the governmental interest" offered in support of the regulation. *Id*. at 28. (DeWine, J.).

**B. R.C. 2923.13(A)'S BLANKET BAN ON THE CONTINUED POSSESSION OF FIREARMS BY MERE INDICTEES IS UNCONSTITUTIONAL.**

Although holding in *Heller* that the Second Amendment protects an individual right, the Supreme Court in dicta cautioned that "nothing in [its] opinion should be taken to cast doubt on longstanding," "presumptively lawful" "prohibitions on the possession of firearms." 554 U.S. at 626-627, 627 n.26. Indeed, the state has long been considered able to take weapons away from *proven* felons, *see, e.g.*, *id*., who by virtue of conviction "ha[ve] demonstrated their unfitness to be entrusted with such dangerous instrumentalities." *Cases v. United States*, 131 F.2d 916, 921 (1st Cir.1942); *cf. Weber*, Slip. Op. at 11 (noting "inherent dangerousness" of using firearms while intoxicated).

This is different. Here, Ohio has categorically criminalized the continued possession of firearms by the merely *allegedly* lawless. Its wholesale, automatic ban is not remotely akin to the "presumptively lawful" regulations concerning convicted felons—or the mentally ill, legal infants, drunken people, and so on—tacitly approved of by the Supreme Court in *Heller* or recently upheld by this Court in *Weber*. Moreover, by burdening the timeless right to armed defense of the home by presumptively law-abiding people, R.C. 2923.13(A)(2) regulates activity falling squarely within the Second

Amendment's guarantee. Such a statute cannot withstand attack under any plausible degree of constitutional scrutiny. Although the putative governmental interest may be strong, the burden the statute imposes is absolute, automatic, and unattached to any individualized assessment of the particular indictee in question. It is therefore unconstitutional.

**1. R.C. 2923.13(A) regulates activity at the core of the Second Amendment.**

To the Founders, the Second Amendment was just as important as any of the other liberties guaranteed by the Bill of Rights. *See McDonald*, 561 U.S. at 789 (rejecting on historical and other grounds the idea that the right to bear arms should be treated "as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees"). As the Supreme Court explained in *Heller* and *McDonald*, the right to bear arms was already old at the founding. *McDonald*, 561 U.S. at 769, citing *Heller*, 554 at 600-603 (noting that in the years immediately preceding the Constitution's ratification, four states had already adopted Second Amendment analogues, with nine more to follow between ratification and the 1820s). Thus, when the Founders drafted and ratified the Second Amendment, they did so against a backdrop of Anglo-American law in which the right to bear arms in defense of hearth and home was ancient. At the same time, they were working within a long history of legal thinking in which the disarmament of dangerous criminals was possible, even common. What distinguishes the overwhelming bulk of Anglo-American history of felon disarmament from the law

at issue here, however, is that disarmament has long been assumed to be an incident of conviction, or some other independent judicial process, rather than mere *alleged* wrongdoing.[3]

***a. The earliest sources demonstrate an assumption that disarmament was contingent upon judicial process and not mere allegations.***

The idea that convicted criminals can be disarmed is truly longstanding. The earliest reference to the practice that Mr. Philpotts has uncovered, after considerable researches, comes from a 1305 English parish court roll, where we find reference to a person who "was found armed with iron corset and cap and a sword in the Guildhall in the presence of the Mayor, Alderman, and many citizens." *See* "Calendar: Roll F, 12 May 1303 - 13 January 1305," in *Calendar of Early Mayor's Court Rolls: 1298-1307*, pp. 142-169 (ed. A. H. Thomas, London 1924), available online at http://www.british-history.ac.uk/no-series/mayor-court-rolls/1298-1307/pp142-169 (last accessed Feb. 16, 2021). He was "adjudged to forfeit his arms and be committed to prison," a clear sign that he hadn't been formally disarmed until he'd first been "adjudged" by the duly authorized village worthies. *Id*. A few decades later, in the Statute of Northampton, 2

[3] The extremely rare early examples of blanket disarmament that can occasionally be disinterred from this or that early statute roll are uniformly shameful—*viz*. the baseless, blanket disarmament, on obviously bigoted grounds, of "papists," "Indians," or enslaved people. *See* Joyce Lee Malcolm, *To Keep and Bear Arms* 140-141 (Harvard 1994); Adam Winkler, *Gunfight*: *The Battle over the Right to Bear Arms in America* 115-116 (2011); Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 502-513 (2004).

Edw. 3, ch.3 (1328), Parliament decreed that no person except the King's officials was permitted "to go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers, nor" even "in no part elsewhere." 2 Edw. 3, ch. 3, available online at https://press-pubs.uchicago.edu/founders/documents/amendIIs1.html (last accessed Feb. 16, 2021). Those convicted of a violation were made "to forfeit their armour[4] to the king, and their bodies to prison, at the King's pleasure." *Id*. In one of the earliest cases arising under the act, Sir Thomas Figett was arrested because he "went armed under his garments, as well in the palace, as before the justice of the king's bench." Edward Coke, 3 *Institutes of the Lawes of England* 162 (1628). Sir Thomas pleaded that "there had been debate between him and Sir John Trevet knight * * *, who menaced him, & c. and therefore for doubt of danger, and safeguard of his life, he went so armed." *Id*. Notwithstanding this entreaty, good Sir Thomas was ordered to forfeit his arms and suffer imprisonment "during the king's pleasure." *Id*. Note that Sir Thomas was only disarmed *after* he pleaded and *after* the Court found his pleas wanting. Three centuries later, an English chronicler in 1682 noted in passing that he "c[ould] not deny but even by the common Law, upon Indictment for Treason or Felony, the Goods and Chattels might be Inventoried: but not seized as Forfeit till Conviction." *Rights of the kingdom, or, Customs of our ancestors touching the duty, power,*

[4] "Armour" in this sense presumably meaning both "armor" as understood today *and* the weapons with which the offender had "rid[den] armed by night []or day."

*election, or succession of our Kings and Parliaments. . . ,* available online at BYU Corpus Linguistics, Early English Corpus, lawcorpus.byu.edu (Doc. No. eebo.A59386) (last accessed Jan. 28, 2021). The assumption that disarmament depended upon conviction (or at least being "adjudged") is thus revealed to be at least seven hundred years old. The ancient assumption made its way to the American colonies, as shall be seen in the next section, where it animated the thoughts of the Founders.

### *b. Colonial and early American assumptions followed the earlier English ones.*

In colonial America it was routinely assumed—taken for granted, even—that termination of the right to armed self-defense was only appropriate after conviction or other judicial process. Thus, we find a 17th century Massachusetts law that disarmed those who were convicted of intentionally terrorizing "Their Majesties' Liege People" by going about heavily armed. Mass. Laws 12, no. 6 (1694). We find too that in 1779 the Virginia legislature enacted a statute providing, in terms scarcely different from the Statute of Northampton, that "no man great nor small, of what condition soever he be, * * * be so hardy to come before the Justices of any court * * * with force and arms on pain to forfeit their armour to the commonwealth and their bodies to prison at the pleasure of a court." A Bill Forbidding and Punishing Affrays (June 18, 1779). Note again that some neutral, judicial process ("at the pleasure of a court") was required before disarmament—mere allegations were not enough.

Constitutional proposals from the Founding show a similarly clear understanding that only those actually proven to be dangerous should be deprived of the preexisting right to keep arms for protection. Certain members of Pennsylvania's ratifying convention suggested a constitutional provision proclaiming that "no law shall be passed for disarming the people or any of them unless for crimes committed, or real danger of public injury from individuals." *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents* (Dec. 12, 1787). Meanwhile, a majority of the New Hampshire convention recommended that a bill of rights include the following protection: "Congress shall never disarm any citizen, unless such as are or have been in *actual* rebellion." (Emphasis added.) Jonathan Elliot, 1 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 326 (2d ed. 1891). At the time, "actual" meant "real; certain, not speculative," Samuel Johnson, *Johnson's Dictionary of the English Language, In Miniature* 81 (3d American ed. 1810), "really in act, not merely potential," Thomas Sheridan, *A Complete Dictionary of the English Language: Both With Regard to Sound And Meaning, To Which Is Prefixed a Prosodial Grammar* 81 (2d London ed. 1789), or "certain," William Perry, *The Royal Standard English Dictionary* 31 (6th American ed. 1788). Thus, rebellion that was merely *alleged* would presumably not have sufficed. And lest anyone think that indictees could be construed to present a "real danger of public injury," dictionaries from around the Founding defined "real" to mean "genuine," "true," "sure," Perry, *supra*, at 366, "not imaginary," Sheridan, *supra*, at 484,

or "certain," Johnson, *supra*, at 185. Even a "true" bill from the grand jury is by no means "certain" or "sure" proof of a crime's commission, *see, e.g., State v. Philpotts*, Cuyahoga Cuyahoga Cty. Common Pleas Case No. 17-614957 (dismissed by the government after indictment for want of evidence); Ohio Supreme Court, *Ohio Courts Statistical Report 2017* 60 (indicating that more than 1,100 criminal cases in the Cuyahoga County Court of Common Pleas were terminated by complete dismissal in 2017), much less of an indictee's general dangerousness—an issue discussed in detail *infra* at 20.

The assumption that conviction or at least some other judicial process was required before disarmament continued to appear into the late 19th century. For example, in the 1865 "Black Code" of St. Landry's Parish, Louisiana—hardly a model for robustly constitutional legislating, to be sure—it was provided that "no negro who is not in the military service shall be allowed to carry fire-arms * * * within the parish," and that "[a]ny one violating the provision[] * * * shall forfeit his weapons and pay a fine of five dollars." Even here, in an outrageously bad law by any standard, we still see by clear implication—in the word "violating" and the specification of a fine and other punishments—the basic assumption that disarmament required more than the mere allegation of wrongdoing. *See* Ord. No. 35, "An ordinance relative to the police of negroes recently emancipated within the parish of St. Landry," in Walter L. Fleming, 1 *Documentary History of Reconstruction* (1906). Along the same lines, Davis Tillson,

Assistant Reconstruction Commissioner of Georgia, released a circular on December 22, 1865, reading, in pertinent part, as follows:

> Any person, white or black, may be disarmed if *convicted* of making an improper and dangerous use of weapons; but no military or civil officer has the right or authority to disarm any class of people, thereby placing them at the mercy of others. All men, without distinction of color, have the right to keep arms to defend their homes, families, or themselves.

Doc. No. 70, House of Representatives, 39 Cong., 1st session, at 1, quoted in Stephen P. Halbrook, *Personal Security, Personal Liberty and The Constitutional Right to Bear Arms': Visions of the Framers of the Fourteenth Amendment*, 7 J. on Firearms & Pub. Pol'y 135, 157 n.266. Thus, an assumption first mentioned in passing by a village council the better part of a millennium ago finds continued expression and vitality even into the edges of our own times. What, if anything, changed?

***c. Early 20th century assumptions—surprise, surprise—continue to follow earlier American and English ones.***

Beginning in the early 20th century, various state codes and model statutes banned or urged banning the acquisition or continued possession of firearms by convicted felons but never mere indictees. *See, inter alia*, Cal. Laws, ch. 339, § 2 (1923) (prohibiting those "convicted of a felony against the person or property of another" from possessing firearms); N.H. Laws 138, ch. 118, § 3 (1923) (essentially same); Or. Laws, ch. 260, § 2 (1925) (essentially same); W.Va. Laws 25, ch. 3 (1925) (permit-seeker must "show * * * [he] has not been convicted of a felony"); Uniform Act to Regulate the

Sale & Possession of Fire Arms, § 4 (1926) (prohibiting a person convicted of a "crime of violence" from "own[ing] or hav[ing] in his possession" certain firearms); Uniform Machine Gun Act, § 4(b) (1932) (presuming unlawful "[p]ossession * * * for offensive purposes" by "a person who has been convicted of a crime of violence"). These early enactment gained nationwide scope with the passage of the federal Gun Control Act of 1968, Pub. L. 90-618.

The federal Gun Control Act's stated purpose was "to make it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency." S. Rep. No. 1501, 90th Cong., 2d Sess. (1968).[5] It was the first gun control law anywhere to reach indictees directly, and among other things criminalized the interstate receipt—but *not* continued possession—of firearms by anyone under indictment for a violent felony. *See* 82 Stat. 1221, § 922(h) (as enacted). Before the Gun Control Act, Congress had prohibited the interstate shipping, transportation, or receipt of firearms by "any person who ha[d] been convicted of a crime of violence," but did not concern itself directly with indictees, only banning certain interstate sales or transfers to them. *See* Federal Firearms Act of 1938, Pub. L. 75-785, 52 Stat. 1251, § 2(f) (as enacted). Simple possession while under indictment was not a federal crime and never has been. See 18 U.S.C. § 922(g) (convicted felons cannot

[5] *But see also* 114 Cong. Rec. 18,485 (asserting, in barely coded phrasing, that "[i]t goes without saying" that "right-thinking American[s]" wanted to keep firearms away from "hoodlums," "dope addicts," and so on).

possess), § 922(n) (indictees cannot receive, acquire, etc.) (each as subsequently amended); H.R. Rep. No. 495, 99th Cong., 2d Sess. (1986) (House Report on the Firearm Owners Protection Act of 1986) ("Persons under indictment are prohibited from receiving or transporting firearms *but may continue to possess them*." (Emphasis added.)).

Finally we have arrived relatively close to our own time. Still no legislature anywhere has disarmed mere indictees. Enter R.C. 2923.13, originally known as R.C. 2923.56 (re-codified in 1971). It was first enacted in 1969, only a few decades before *Heller* and was itself "based on a provision in the federal law," namely the Gun Control Act of 1968. *See* Ohio Legislative Commission, *Proposed Ohio Crim. Code: Final Report of the Technical Committee to Study Ohio Criminal Laws and Procedure* 254 (1971). But Ohio's law goes much further than the federal law that supposedly inspired it, and in doing so breaks with all convention. The entire history of American gun control records no parallel to this statute. Before 1968, no statute anywhere criminalized the simple possession of firearms by indictees, and today only Washington and Hawaii also do so. See WRC 9.41.040 (dispossessing indictees beginning only in 1983); HI Rev. Stat. 134-7 (dispossessing indictees beginning only in 1988). Compared with time-honored prohibitions on the possession of weapons by convicted felons, *e.g. Heller*, *supra*, or on bearing arms with lawless purpose, *e.g.*, Statute of Northampton, 2 Edw. 3, 258, ch. 3 (1328), or carrying concealed firearms, *e.g.*, *Louisiana v. Chandler*, 5 La. Ann. 489, 489-490 (La.1850) (concerning an act of 1813), or using weapons while intoxicated, *Weber*, Slip.

Op. at 15, 18 (citing historical antecedents), Ohio's ban on the continued possession of firearms by mere indictees is unmoored from any discernible historical referents and hardly "longstanding."

***d. R.C. 2923.13(A) regulates activity at the very core of the Second Amendment.***

At bottom, the text, history and tradition of the Second Amendment all show that while the right is not absolute, its guarantee can only be withdrawn from criminals who have actually been convicted rather than merely accused. Even the earliest medieval sources indicate that disarmament of criminals was only appropriate after some independent and neutral judicial consideration of the particular person being accused. Furthermore, none of the proposals from the Founding reach *alleged* crimes, and the Second Amendment doesn't refer to crimes at all, not to mention crimes that have merely been alleged. Likewise, neither federal nor state law (until 1968 in Ohio alone) barred *merely alleged* felons from continuing to possess firearms at home for protection. *Heller*'s dicta—the closest we get in modern times to a full, authoritative statement of what the Second Amendment *doesn't* reach—also doesn't mention alleged felons, but rather only "convicted" ones. *See Heller*, 554 U.S. at 626-627, 627 n.26.

On the other hand, "[w]hat we know from [*Heller*] is that Second Amendment guarantees are at their zenith within the home," *Kachalsky*, 701 F.3d at 89, and so "any law that would burden the 'fundamental,' core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny," *Masciandaro*, 638 F.3d at 470-471.

We also know that "[t]he assumption that [a defendant is] more likely to commit crimes than other members of the public, without an individualized determination to that effect, is contradicted by the presumption of innocence." (Emphasis added.) *United States v. Scott*, 450 F.3d 863, 874 (9th Cir.2006). In other words, the fact "[t]hat an individual is charged with a crime cannot, as a constitutional matter, give rise to any inference that he is more likely than any other citizen to commit a crime if he is released from custody." *Id*. The government's anxiety that indictees are likely to misuse firearms is not even supported by the data, and is therefore extremely dubious. *See* Bureau of Justice Statistics, U.S. Department of Justice, Compendium of Federal Justice Statistics – 2004, 54 (2006) (reporting that in 2004 fewer than two percent of federal felony defendants violated the terms of their pretrial release by committing any other crime, much less one with a weapon). We have thus, at long last, reached the inescapable conclusion, based on the history, text, and tradition of the Second Amendment and subsequent interpretations of its guarantee, which is this: the Second Amendment continues to extend its protections to those merely accused of crimes, and conversely has *never* been interpreted to exclude preemptively those who have not yet, or ever, been convicted of a felony. The first step of the post-*Heller* test is, accordingly, satisfied.

**2. The burden imposed by R.C. 2923.13(A) is unconstitutionally heavy.**

Whether the government's interest must needs be "compelling," as under strict scrutiny, or "important," as under intermediate scrutiny, let us assume *arguendo* that its

interest is satisfactorily strong in this case. Even then, even if the interest is strong, the means used to advance it—categorical, class-wide, indiscriminate disarmament—cannot be reconciled with the Constitution and are unduly burdensome to the core Second Amendment right of armed defense of self, hearth, and home. The statute therefore is not constitutional.

***a. This is different from the restriction in* Weber.**

In *Weber*, this Court concluded that R.C. 2923.15's ban on possession of firearms by presently intoxicated people imposed "only a slight burden at best" on the Second Amendment. Slip. Op. at 16. The weapons-while-intoxicated statute "regulates only the conduct of a person whose ability to carry or use a gun safely and effectively has already been undermined because of intoxication," *id*. at 11, a situation this Court correctly called "inherently dangerous," *id*. at 16. Moreover, this Court observed that R.C. 2923.15 is "*very* limited in its application," prohibiting only a "narrow range of conduct (carrying or using a gun) for a very limited period of time (while someone is in a state of intoxication) due to the inherently dangerous nature of carrying or using a gun while in that state." *Id*. at 11-12.

None of that is true of the restriction imposed by R.C. 2923.13(A)(2). The burden imposed is virtually absolute, yet based on the shakiest proofs. The statute regulates conduct that is not in itself inherently dangerous, something R.C. 2923.14 acknowledges

by its very existence.[6] Nor is the burden of limited duration, but rather lasts for the entire duration of the pretrial process, which may take many months. Perhaps worst of all, there are numerous approaches far less burdensome than this one that would advance the government's interest equally well or better *without* arbitrarily imposing on the Second Amendment rights of the presumably innocent while also offering actual procedural protections that the law currently does not offer until it is already too late.

***b. The grand jury process doesn't tell us* anything *about an individual person's riskiness.***

At the motion to dismiss hearing below, the government claimed without any evidence that "people indicted with * * * violent offenses * * * pose a unique danger on the streets to the public." Tr.31-32. The assumed danger of these indictees is supposedly based on "a legal finding of probable cause by a government entity, the grand jury." Tr.32. Although this inductive leap lacked and continues to lack support, the government claimed that this speculative "danger" allows it to criminalize not only post-indictment acquisition—a different matter entirely—but *any* possession, anywhere and for whatever purpose, even continued possession at home for protection. Tr.31-32.

That the grand jury system is flawed has been widely acknowledged. The late Supreme Court Justice William O. Douglas, for example, lamented the "common knowledge" that the grand jury, once meant to protect the citizenry from prosecutorial

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[6] This statute is discussed in greater detail *infra* at 28.

overreach, had become little more than "a tool of the Executive." *United States v. Mara*, 410 U.S. 19, 23, 93 S.Ct. 774, 35 L.Ed.2d 99 (1979). Many legal scholars are equally mistrustful of the "process," such as it is. *See, e.g.*, Marvin Frankel & Gary Naftalis, *The Grand Jury: An Institution on Trial* 22 (2d ed. 1977) ("Day in and day out, the grand jury affirms what the prosecutor calls upon it to affirm—investigating as it is led, ignoring what it is never advised to notice, failing to indict or indicting as the prosecutor 'submits' that it should."); W. Thomas Dillard *et al*., Cato Policy Analysis No. 476: *A Grand Façade: How the Grand Jury Was Captured by Government* (Cato Institute 2003) ("As a practical matter, the prosecutor calls the shots and dominates the entire grand jury process. The prosecutor decides what matters will be investigated, what subpoenas will issue, which witnesses will testify, which witnesses will receive 'immunity,' and what charges will be included in each indictment."). Even the Advisory Committee for the Federal Rules of Criminal Procedure has observed with palpable distaste that "there develops between a grand jury and the prosecutor with whom [it] is closeted a rapport—a dependency relationship—which can easily be turned into an instrument of influence on grand jury deliberations." Fed. R. Crim. P. 6 (Notes of Advisory Committee on Rules—1979 Amendment).

It is indeed trivially easy to secure an indictment, hence the droll if rather depressing quip that the government can indict something as blameless as "a ham sandwich." *In re Grand Jury Subpoena of Stewart*, 545 N.Y.S.2d 974, 977 n.1 (Sup. Ct. N.Y.

1989). The government's own statistics show that in 2015—the most recent available local data—just three percent of cases were "no-billed" by the Cuyahoga County grand jury. *See* Cuyahoga County Grand Jury Dispositions Chart (attached hereto in the appendix; recently removed from the web). Federal numbers are even more dismal—only *eleven* out of 162,351 cases nationwide, or a microscopic 0.0068%, were no-billed by federal grand juries in 2010. *See* Bureau of Justice Statistics, U.S. Department of Justice, *Federal Justice Statistics 2010*, Statistical Tables 11-12 (2013). Naturally many of these federal indictments would activate Ohio's automatic ban.

The government's enviable success rate is only possible because the "process" offers almost no protection to the soon-to-be-indicted. The target of a potential indictment is not present at the grand jury's secretive proceedings; nor is his attorney if he even has one. Ohio R. Crim. P. 6(D). He therefore lacks the opportunity to confront the government's witnesses or present his own. The rules of evidence do not apply, Ohio Evid. R. 101(C)(2), and so hearsay is freely permitted, routinely used, and may actually constitute the entirety of the government's so-called "evidence," *see Costello v. United States*, 350 U.S. 359, 361, 76 S.Ct. 406, 100 L.Ed. 397 (1956). The government is even allowed to present "evidence" that would violate the Fifth Amendment right against self-incrimination, *Lawn v. United States*, 355 U.S. 339, 345, 78 S.Ct. 311, 2 L.Ed.2d 321 (1958), or the Fourth Amendment's exclusionary rule, *United States v. Calandra*, 414 U.S. 338, 342, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974), if offered at a real trial. Indictments can

therefore be obtained on basically *zero* admissible evidence. *See, e.g.*, *Holt v. United States*, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021 (1910) (refusing to quash an indictment although there was "very little evidence against the accused" and most of it would be inadmissible at trial). On the other hand, if the government has exculpatory evidence it is under no obligation to disclose it to the grand jury. *State v. Wilks*, 2018-Ohio-1562, 114 N.E.2d 1092, ¶¶ 30-34. Then, after the grand jury has heard whatever quantum of "evidence" the government feels like giving it, it may indict without being unanimous, Ohio R. Crim. P. 6(F), and only needs probable cause to do so—scarcely conclusive proof of the indictee's dangerousness in general. In the very unlikely event that the grand jury returns a no-bill despite this cornucopia of prosecution-friendly rules, the government may simply re-present its case, again and again if necessary, until it gets what it wants. *United States v. Williams*, 504 U.S. 36, 49, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992). Although stupefying to relate, it is even okay if the grand jury foreman *personally knows the victim in a murder case*. *State v. Thomas*, 80 Ohio App.3d 452, 457, 609 N.E.2d 601 (3rd Dist.1992). Thus, not only "can [it] fairly be said that the prosecutor holds all the cards before the grand jury," *Massachusetts v. Walczak*, 463 Mass. 808, 979 N.E.2d 732, 752 (2012), it is an almost staggering understatement.

All this and less has been called sufficient process to initiate criminal proceedings against a person. After all, the now-accused has the rights *at trial* to secure counsel for his defense, confront the witnesses against him, keep out inadmissible testimony,

exclude biased jurors, obtain and present exculpatory evidence, demand conviction by a unanimous jury convinced of his guilt beyond a reasonable doubt, and avoid repeated prosecution for the same offense. If he loses some rights upon conviction, it won't have been for lack of procedural safeguards. But the grand jury, with its nonexistent protections and its enthrallment to the state? Behold—*this* is the process the government relies on for its supposed power to automatically criminalize the exercise of a fundamental constitutional right, and the source of its unsupported assumption of dangerousness *per se*.

***c. Vast multitudes are potentially affected.***

There are hundreds of purportedly disabling violent and drug-related felonies in Ohio law, *see* Ohio Criminal Sentencing Commission: Recodification Committee Memorandum (Oct. 19, 2015), and many more besides in federal law and the laws of other states. Although directly-applicable statistics are difficult to come by, the federal Bureau of Justice Statistics reported that in 2009 in America's 75 largest counties (of which Cuyahoga is one) fully 66% of felony arrests were for alleged offenses that would be automatically disabling under Ohio law upon indictment. *See* Bureau of Justice Statistics, U.S. Department of Justice, *Felony Defendants in Large Urban Counties*, 2009 – Statistical Tables, 3 (2013). Likewise, every one of the top five offenses of conviction for Ohio inmates at intake in 2015 was disabling. *See* Ohio Department of Rehabilitation and Corrections, 2015 Intake Study, 18 (2016). Meanwhile there were more than 10,000

felony cases filed in Cuyahoga County in 2015. *See* John Clark & Rachel Sottile Logvin, *Enhancing Pretrial Justice in Cuyahoga County*, 9 (Pretrial Justice Institute 2017). Thus, the government's claim before the trial court that "the [s]tate * * * has proscribed possession of a small class of people," Tr.23, is a parlour trick—the class is arguably "small," yes, but the sheer number of people it contains is potentially enormous, and disabling offenses make up the bulk of felony cases.

***d. No other collateral effect of indictment works this way.***

Indictment has historically had but limited effects on the indictee's constitutional rights and indeed no other collateral effect of indictment works to strip rights from the indictee. Probably the most important, and common, consequence of indictment is possible detention before trial, but this deprivation is kept constitutional only by substantial procedural protections. Hence, any comparison between pretrial detention and the automatic loss of Second Amendment rights would be ham-fisted.

In *United States v. Salerno*, the Supreme Court upheld the power of federal courts to detain an arrestee before trial under certain circumstances to ensure the safety of the community. 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). But the power withstood constitutional scrutiny only because it was constrained by many procedural safeguards. To wit:

> [T]he [g]overnment must first of all demonstrate probable cause to believe that the charged crime has been committed by the arrestee, *but that is not enough*. In a *full-blown adversary hearing*, the [g]overnment must [also] convince a *neutral*

> *decision-maker* by *clear and convincing evidence* that *no conditions* of release can *reasonably assure* the safety of the community or any person.

*Id*. at 751-752 (internal citations omitted; emphases added.). In other words, unlike Ohio's automatic disability upon indictment, an indictee may lose his right to be free pending trial only after an adversarial hearing, with counsel. Even then he can only be held without any bond—that is, absolutely dispossessed of a right—under rare circumstances and upon an individualized judicial finding of extreme risk. *See* R.C. 2937.222(A)-(C) (establishing narrow grounds for denying bail altogether; *see also* R.C. 2937.222(D)(1) (providing the right to immediate and expedited appeal).

Along the same lines, an indictee may be subjected to pretrial release *conditions* that infringe upon his constitutional rights only after an individualized judicial determination that such conditions are warranted. *See, e.g.*, Ohio R. Crim. P. 46(B)(5) (allowing pretrial restriction on contact with witnesses "*upon proof* of the likelihood" the accused will threaten or otherwise interfere with them (emphasis added)); Ohio R. Crim. P. 46(B)(6) (allowing mandated pretrial drug or alcohol treatment upon individualized judicial finding of need); *United States v. Bena*, 664 F.3d 1180, 1182-1185 (8th Cir.2011) (upholding ban on possessing firearms for those subject to court order for protection, 18 U.S.C. § 922(g)(8), based on statutory requirement of a "*finding* that such person represents a credible threat" to protected persons (emphasis added)). Collateral effects of indictment on employment—even when potentially impacting the public

weal—are generally either not mandatory, *see, e.g.*, R.C. 5164.33 (creating discretionary bar on employment with Medicaid provider after indictment), or only require automatic reporting of the indictment, *see, e.g.*, R.C. 1315.081 (check-cashing business licensees must report indictment to licensing authority). In any event, such effects, even when rarely mandatory and automatic, concern privileges like professional licensure, not fundamental constitutional rights. *See, e.g.*, R.C. 3319.40 (automatic suspension of public school teacher upon indictment for certain child-related offenses).

Conversely, when the government invents categorical restrictions on constitutional rights that attach automatically upon indictment, courts throughout the land have declared them unconstitutional—even if grave danger to the public is theoretically possible. *See, e.g.*, *Scott*, 450 F.3d at 874 (holding that pretrial release conditions requiring that the defendant "consent" to random home searches and drug tests violated the Fourth Amendment in the absence of an individualized judicial determination that the conditions were necessary); *Berry v. District of Columbia*, 833 F.2d 1031, 1036 (D.C. Cir.1987) (suggesting that mandatory drug testing and treatment as conditions of pretrial release would be constitutional only if "there is an individualized determination that an arrestee will use drugs while released pending trial"); *United States v. Polouizzi*, 697 F.Supp.2d 381, 394-395 (E.D.N.Y. 2010) (declaring unconstitutional the Adam Walsh Act of 2006's requirement that all individuals under arrest for child pornography charges automatically be required to undergo electronic

monitoring as condition of pretrial release); *United States v. Merritt*, 612 F.Supp.2d 1074, 1079 (D. Neb. 2009) (declaring automatic imposition of electronic monitoring and curfew as conditions of pretrial release unconstitutional); *United States v. Arzberger*, 592 F.Supp.2d 590, 607 (S.D.N.Y. 2008) (essentially same).

The problem here is the same. Ohio automatically criminalizes the possession of firearms in any place and for any reason by persons under indictment for *any* "violent" or drug-related felony, in the absence of an individualized judicial assessment of dangerousness and even if the "felony of violence" bears at most an obscure connection to gun crime. *See, e.g.*, such felonies "of violence" as: R.C. 2905.11(A)(4) (threatening to "[u]tter * * * any calumny"); R.C. 2909.03(A)(5) ("creat[ing, by fire,] a substantial risk of * * * harm * * * to any * * * brush-covered land"); R.C. 2921.03(A) ("recording * * * [a] fraudulent writing * * * in wanton manner * * * to influence * * * a public servant"); R.C. 2905.11(A)(5) ("exposing * * * any person to * * * ridicule").

***e. R.C. 2923.14(D) is a dollar short and a day late.***

The Eighth District premised its decision largely on the fact that R.C. 2923.14(D) provides for a *post*-deprivation hearing, in which an indictee can ask for his rights back from the very authorities who have preemptively withdrawn them. *State v. Philpotts*, 8th Dist. Op at ¶ 29. But R.C. 2923.14(D) doesn't solve the problem, because the prior restraint is itself the unconstitutional occurrence; a later hearing is too late to repair the damage. More importantly, though, the very existence of R.C. 2923.14(D) is a clear

acknowledgment by the General Assembly that the only way to find out who specifically is too dangerous to continue possessing their firearms during indictment is to have an individualized hearing. R.C. 2923.14(D)(2) directs the trial court to consider, among other things, whether the indictee-applicant has "led a law-abiding life since * * * release." In other words, the General Assembly knows that in fact not all indictees are necessarily too dangerous to continue possessing a firearm, and that some will be released on bond and be law-abiding. The problem is that right now, the law does it backwards. It takes the rights away first and asks the necessary questions later. This topsy-turvy approach is incompatible with the Constitution.

***f. Far less invasive approaches are ready-to-hand.***

Several alternative arrangements far less restrictive than automatic criminalization spring to mind. For instance, public safety could be adequately protected if the judge in the initial, potentially-disabling felony case simply made an individualized determination regarding whether the accused is sufficiently dangerous to be deprived of his Second Amendment rights as a condition of pretrial release. *See* 18 U.S.C. § 3142(c)(1)(B)(xiv) (requiring federal courts to set reasonable conditions of pretrial release); Ohio R. Crim. P. 46(B)(7) (requiring the same of Ohio courts); *see also Henderson v. United States*, — U.S. —, 135 S.Ct. 1780, 1783, 191 L.Ed.2d 874 (2015) (unanimous decision ordering that a convicted felon be permitted to direct the transfer of firearms seized as condition of pretrial release to person of his own choosing).

Bond conditions, properly tailored to individual risk factors, can—and already do—prohibit some people from continuing to possess firearms while an indictment is pending where their doing so is shown to be actually risky. Ohio R. Crim. P. 46(B)(i); R.C. 2937.222(A)-(C). Should a person violate the condition of his bond by nonetheless continuing to possess a firearm, his bond can be revoked and he can be detained pretrial. Ohio R. Crim. P. 46(I). Moreover, bond conditions, unlike automatic criminalization, can be tailored to fit individual characteristics while still allowing indictees who show no risk to continue possessing firearms within their own homes. Ohio R. Crim. P. 46(C). Limiting possession as part of the bond-setting process also allows the accused the important protection of a counseled, adversarial hearing that costs the government next-to-nothing, because it's already going to happen anyway.

Alternatively, the government could exclude possession from the statute as it pertains to indictees, like the federal government and almost all other states do, while continuing to prohibit acquisition after indictment. The law could easily separate prohibited conduct while under indictment—namely, acquiring or carrying firearms—from prohibited conduct after conviction—namely, acquiring, carrying, using, or *having* firearms. This would allow indictees to continue possessing firearms in their own homes for self-defense while prohibiting them from carrying their weapons out of doors or obtaining more of them. This is the major difference between the federal government's approach to indictees and Ohio's. As noted previously, the federal

government prohibits indictees only from "ship[ping], transport[ing], * * * or receiv[ing] any firearm or ammunition" affecting interstate or foreign commerce. 18 U.S.C. § 922(n). But, again, the federal government has never criminalized possession while under indictment. It bans it only after conviction. 18 U.S.C. § 922(g); *United States v. Laurent*, 861 F.Supp.2d 71, 102 (E.D.N.Y. 2011) ("Unless the defendant already possesses a firearm prior to his indictment, § 922(n) does deny him the ability to keep and bear arms for the purpose of self-defense in his home," meaning if he *does already* possess a firearm, § 922(n) does not deny him that ability.); H.R. Rep. No. 495("Persons under indictment are prohibited from receiving or transporting firearms but may continue to possess them."). In Ohio, though, it is absolutely forbidden to continue possessing a firearm after indictment, even though continued pre-existing possession at home—which the statute reaches by its expansive breadth—is not demonstrably portentous of evil intent.

Finally, the General Assembly could simply rewrite the law in order to make it constitutional under *Heller*. Nobody is saying that the General Assembly cannot in any way disarm by statute specific indictees who are shown to actually be a danger. But it can only do so constitutionally if it is with the benefit of a counseled, adversarial, individualized, pre-deprivation hearing.

Instead of any of this, Ohio has determined simply to automatically strip all indictees of their Second Amendment rights—regardless of individual risk factors,

regardless of whether possession predates indictment, regardless of whether the firearm in question is kept in the home for self-defense, and in the total absence of an individualized, adversarial hearing before a neutral judge or magistrate. This is not remotely the "least restrictive means" of accomplishing the government's stated goal, nor is it closely tailored to achieving the goal. Consequently, the statute is unconstitutional on its face. This Court should say so and reverse.

*Appellant's Second Proposition of Law*: On its face, R.C. 2923.13(A)'s blanket ban on continued possession of firearms by indictees violates the constitutional right to procedural due process.

The Due Process Clause of the Fifth Amendment prohibits the federal government from depriving any person of "life, liberty, or property, without due process of law," U.S. Const., am. V, and the same clause of the Fourteenth Amendment prohibits such abuses by the several states, *State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, ¶ 40; U.S. Const., am. XIV. These clauses protect procedural and substantive rights alike. Accordingly, even if "government action depriving a person of life, liberty, or property survives *substantive* due process scrutiny, it must still be implemented in a fair manner"—namely, with sufficient *procedural* due process. *Salerno*, 481 U.S. at 746 (Emphasis added.). "Procedural due process rules are meant to protect persons * * * from the mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus*, 435 U.S. 247, 259, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978). They prevent the government from either withdrawing benefits from those entitled to them or from

depriving people of their liberties or property wrongfully and needlessly. *See Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

"For all its consequences," the Supreme Court has stated, "due process has never been, and perhaps can never be, precisely defined." *Lassiter v. Department of Social Services,* 452 U.S. 18, 24, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981). "[U]nlike some legal rules," due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). Procedural due process requires from state actors "fundamental fairness," a somewhat imprecise term with no firm definition. *Lassiter*, 452 U.S. at 24. Inquiries into "fundamental fairness" require "considering any relevant precedents and then * * * assessing the several interests that are at stake." *Id*. at 25.

Under procedural due process, the "standard analysis" proceeds in two steps. First, a reviewing court asks "whether there exists a liberty * * * interest of which a person has been deprived, and if so [it] ask[s] whether the procedures followed * * * were constitutionally sufficient." *Swarthout v. Cooke*, 562 U.S. 216, 220, 131 S.Ct. 859, 178 L.Ed.2d 732 (2011); *Mathews*, 424 U.S. at 334-335.

The "right to be heard before being condemned to suffer grievous loss of any kind * * * is a principle basic to our society." *Joint Anti-Fascist Comm. v. McGrath*, 341

U.S. 123, 168, 71 S.Ct. 624, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews*, 424 U.S. at 333 (citing *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)). In *Mathews*, the Supreme Court set out three questions to be asked in order to determine whether the "procedures followed," if any, are sufficient, courts rely on the test articulated in *Mathews*, balancing "the private interest that will be affected by the official action" and "the risk of an erroneous deprivation * * * through the procedures used" against "the [g]overnment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 335.

Applying the *Eldridge* factors, the Supreme Court usually has held that the Constitution requires some kind of a hearing *before* the government deprives a person of liberty or property. *Zinermon v. Burch*, 494 U.S. 113, 132, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990); *see also, e.g.*, *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) ("[T]he root requirement of the Due Process Clause" is "that an individual be given an opportunity for a hearing before he is deprived of any significant protected interest;" hearing required before termination of employment); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978) (hearing required before cutting off utility service); *Wolff v. McDonnell*, 418 U.S. 539, 557-

558, 94 S.Ct. 2963, 41 L.Ed.2d 9335 (1974) (hearing required before forfeiture of prisoner's good-time credits); *Fuentes v. Shevin*, 407 U.S. 67, 80-84, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) (hearing required before issuance of writ allowing repossession of property); *Goldberg v. Kelly*, 397 U.S. 254, 264, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (hearing required before termination of welfare benefits).

"In situations where the [government] feasibly can provide a pre-deprivation hearing before taking property, it generally must do so regardless of the adequacy of a post-deprivation tort remedy to compensate for the taking." *Zinermon* 494 U.S. at 125-126. In *Zinermon*, a person suffering from schizophrenia admitted himself into a mental hospital and the Supreme Court held that a pre-deprivation remedy was required because it was foreseeable that a mentally ill patient was incompetent to give consent. *Id.* at 133. In holding that a pre-deprivation hearing was required, it recognized post-deprivation remedies "might" satisfy due process where it is unduly burdensome in proportion to the liberty interest at stake. *Id*., citing *Ingraham v. Wright*, 430 U.S. 651, 682, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977) (hearing not required before corporal punishment of junior high school students). It also recognized a post-deprivation hearing "might" satisfy due process where the government is truly unable to anticipate and prevent a random deprivation of a liberty interest. *Id*., citing *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) (hearing not required before unforeseeable negligent deprivation of an inmate's property); *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82

L.Ed.2d 393 (1984) (extension of *Parratt* to intentional deprivations of inmate property because it is equally unforeseeable). Pre-deprivation remedies are favored over post-deprivation remedies and the government must generally provide a pre-deprivation remedy when it is possible, as of course it is here. *See supra* at 29.

Further, the Supreme Court not only upheld the requirement of a pre-deprivation hearing but also emphasized that impartiality is a basic characteristic of procedural due process. *Connecticut v. Doehr*, 501 U.S. 1, 14, 111 S.Ct. 2105, 115 L.Ed.2d 1 (1991). It held due process requires a hearing before a plaintiff alleging an assault could have an attachment placed on the defendant's real property. *Id*. Fairness is rarely obtained by a one-sided account of the facts and the best instrument for arriving at the truth is to give the person in jeopardy of loss notice and an opportunity to be heard. *Id*. In *Doehr*, the Supreme Court invalidated a Connecticut statute under due process because it permitted prejudgment attachment of real property upon the plaintiff's description of probable cause in an affidavit. *Id.* at 12. The Court reasoned that even temporary or partial impairments to property rights, such as attachments, are sufficient to merit due process protection and that a judge could make no realistic assessment concerning the likelihood of the assault action's success based upon the self-serving and one-sided submission. *Id.* at 14. While the government provided an "expeditious" post-attachment advisory hearing, notice for the hearing, and judicial review of an adverse decision, the Court held that these "safeguards" did not meet the requirements of

procedural due process and "would not cure the temporary deprivation an earlier hearing may have prevented." *Id.* at 15.

People merely under indictment also have procedural due process rights not to be needlessly or wrongfully deprived of their liberties, including their Second Amendment rights, or their property, including firearms. Other categorical prohibitions on possession of firearms by indictees have been struck down as violating procedural due process. For example, the Adam Walsh Act's provisions mandate that a defendant charged with a child pornography offense be required to "refrain from possessing a firearm" as a condition of pretrial release. 18 U.S.C. § 3142(c)(1)(B). Several courts have held that those provisions violate procedural due process on their face because they mean "that an arrest on the stated charges, without more, irrebuttably establishes that such conditions are required, thereby eliminating the accused's right to an independent judicial determination as to required release conditions, in violation of the right to procedural due process * * * under the Fifth Amendment." *United States v. Crowell*, 2006 U.S. Dist. LEXIS 88489, *10 (W.D.N.Y. 2006); *see also Arzberger*, 592 F.Supp.2d at 602-603 (striking down same provisions on their face); *Polouizzi,* 697 F.Supp.2d at 394-395 (holding that requirement that all individuals under arrest for child pornography charges be required to undergo electronic monitoring as condition of release unconstitutional as applied).

Here, procedural due process is not satisfied by constructive notice and a post-deprivation hearing. As with *Zinermon*, the government must provide indictees with actual notice and a pre-deprivation hearing because current government "safeguards" do not protect indictees from the mistaken or unjustified deprivation of liberty or property. Under R.C. 2923.13 indictees are given constructive notice, a bare minimum requirement of due process, and under R.C. 2923.14 indictees have a meaningless opportunity to be heard only after they have already been deprived of their liberty and their property rights. As with *Doehr*, the "procedure" here is inadequate because it is one-sided and it allows a deprivation that could have been prevented. No pre-deprivation hearing or individualized determination is provided whatsoever, and the only "procedure" activating the ban is the grand jury process whose manifest systemic frailties were thoroughly exposed above. This procedure is inadequate and under the *Mathews* test it violates the constitutional right to due process.

Likewise, the private interest involved here is a fundamental, individual constitutional right based on the inalienable right to defense of family, hearth, and home. *Heller*, 554 U.S. at 628-629. The risk of erroneous deprivation is immense given that the law applies broadly and without regard to individual factors or specific risks, the "procedures used," *Eldridge*, 424 U.S. at 335, are literally non-existent, and the current political climate is hostile to uniformly-applicable Second Amendment rights, *see, e.g.*, Donald J. Trump, President of the United States of America (apparently

unscripted remarks of Feb. 28, 2018, stating "Take the firearms first and then go to court. * * * [T]ake the guns first, go through due process second. * * * I like taking the guns early."). Indeed, here, no hearing is provided whatsoever. The only "procedure" activating the ban is the grand jury process whose manifest systemic frailties were thoroughly exposed above. Finally, the government's interest in proceeding apace *without* a hearing is frail at best, especially when it would be a negligible burden for the government to include a dispossession hearing as part of the already-existing, constitutionally required bond-setting process. *See supra* at 29. Yet still indictees are not afforded the process that is needed and that can easily be provided. This violates the constitutional right to procedural due process. This Court should reverse.

## CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, defendant-appellant Delvonte Philpotts respectfully urges this Court to uphold the two propositions of law set forth above, declare R.C. 2923.13(A)(2) to be unconstitutional, and reverse the decision of the Ohio Court of Appeals, Eighth Judicial District.

Respectfully submitted,

/s/ *Robert B. McCaleb*
Robert B. McCaleb (0094005)
Assistant Public Defender
Counsel for Mr. Philpotts

**APPENDIX**
**(certain authorities which may be difficult to obtain, in order of reference)**

37 Ed. I. c. 3. Grandfather to our Lord the King that now is, wherein is contained, that Justices assigned to take Assises, if they be Laymen, shall make Deliverance; and if the one be a Clerk, and the other a Layman, that the Lay Judge, with another of the Country associate to him, shall deliver the Gaols: Wherefore it is enacted, That such [Justices *] shall not be made against the Form of the said Statute; and that the Assises, Attaints, and Certifications be taken before the Justices commonly assigned, which should be good Men and lawful, having Knowledge of the Law, and none other, after the Form of another Statute made in the Time of the said [King Edward the First;] and that the Oyers and Terminers shall not be granted but before Justices of the one Bench or the other, or the Justices Errants, and that for great [hurt,] or horrible Trespasses, and of the King's special Grace, after the Form of the Statute thereof ordained in Time of the said Grandfather, and none otherwise.

Justices of Assise and Gaol-delivery.

Oyers and Terminers.

III. Riding or going armed in Affray of the Peace.

ITEM, It is enacted, That no Man great nor small, of what Condition soever he be, except the King's Servants in his presence, and his Ministers in executing of the King's Precepts, or of their Office, and such as be in their Company assisting them, and also [upon a Cry made for Arms to keep the Peace, and the same in such places where such Acts happen,*] be so hardy to come before the King's Justices, or other of the King's Ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere, upon pain to forfeit their Armour to the King, and their Bodies to Prison at the King's pleasure. And that the King's Justices in their presence, Sheriffs, and other Ministers (*) in their Bailiwicks, Lords of Franchises, and their Bailiffs in the same, and Mayors and Bailiffs of Cities and Boroughs, within the same Cities and Boroughs, and Borough-Holders, Constables, and Wardens of the Peace within their Wards, shall have Power to execute this Act. And that the Justices assigned, at their coming down into the Country, shall have Power to enquire how such Officers and Lords have exercised their Offices in this Case, and to punish them whom they find that have not done that which pertained to their Office.

IV. The Statute of Lincoln, 9 Edw. II. concerning Sheriffs, &c. confirmed.

ITEM, Because the Peace cannot be well kept without good Ministers, as Sheriffs, Bailiffs, and Hundreders, which ought to do Execution as well of the King's Privities as of other Things touching our Lord the King and his People; It is ordained and established, That the Statute made in the time of King Edward, Father to the King that now is, at Lincoln, containing that Sheriffs, Hundreders, and Bailiffs shall be of such People as have Lands in the same Shires or Bailiwicks, shall be observed in all Points after the Form thereof; and that Sheriffs and Bailiffs of Fee shall cause their Counties and Bailiwicks to be kept by such as have Lands therein.

V. The Statute Westminster the Second, 13 Edw. I. chapter 30. concerning the Delivery of Writs to the Sheriff, confirmed.

ITEM, Where it was ordained by the Statute of Westminster the Second, that they which will deliver their Writs to the Sheriff, shall deliver them in the full County, or in the Rere County, and that the Sheriff or under Sheriff shall thereupon make a Bill; It is accorded and established, that at what Time or Place in the County a Man doth deliver any Writ to the Sheriff or to the Under-Sheriff, that they shall receive the same Writs, and make a Bill, after the form contained in the same Statute, without taking any Thing therefore; and if they refuse to make a Bill, others that be present shall set to their Seals; and if the Sheriff or Under-Sheriff do not return the said Writs, they shall be punished after the form contained in the same Statute; and also the Justices of Assises shall have power to enquire thereof at every Man's Complaint, and to award Damages, as having respect to the Delay, and to the loss and peril that might happen

* *Commissions* † *Grandfather*

* *upon a Proclamation of Deeds of Arms in time of Peace, and that in Places where such Deeds are to be done.*—See Lib. Rub. Scac. Westm. fo. 122 b. a Writ reciting a Grant of K. Richard I. "q̃d' Torneamenta sint in Angl in v. placis: Inf̃ Sarr & Wiltoñ: Inf̃ Warrewich & Kenelingworth: Inf̃ Stamford & Warneford: Inf̃ Brakele & Mixebr̃: Inf̃ Blie & Tykehill. Ita q̃d pax Re nr̃e nō infringet', nr̃ potestas Justiciarii minorabit' Nec de Libertatibus nr̃is dāpnū inferet'." ‡ *of the King*

nr̃e Seign' le Roi qore est, en quele est contenuz q̃ les Justices as assises p̃ndre assignez sils soient lais, facent les deliv̄ances; et si lun soit clerc, & lautre lais, q̃ le dit lais, associe a lui un autre du pais, facent la deliv̄ance des gaols; p qoi acorde est & establi, q̃ dels Justiceries ne soient mes g'ntees countre la forme du dit estatut, & q̃ les assises, atteintes, & c̄tifications soient p'nes devant les Justices cōmunement assignez, q̃ soient bones gentz & loialx & conissantz de la lei, & nemie autres; solonc la forme dun autre statut fait en temps meisme le ael; et q̃ les oiers & t̄miners ne soient grantees forsq̃ ---- devant les Justices de lun Baunk & de lautre, ou les Justices errantz; & ce p' led & orrible trespas, & de lespeciale g'ce le Roi, solonc forme de statut de ce ordene en temps meisme le ael; & nemie autrement.

Ensement acorde est & establi, q̃ nul, g'nt ne petit de quele condicion qi soit, sauve les p̃lantz le Roi en la p̃sence le Roi, & les Ministres le Roi, enfesantz execucion des mandementz le Roi, ou de lour office, & ceux qi sont en lour compaignies, eidantz as ditz ministres, & auxint au cri de fait darmes de pees, & ce en lieux ou tielx faitz se ferront, soit si hardi de venir devant les Justices le Roi, ou autres Ministres le Roi enfesant lour office, a force & armes; ne force mener en affrai de la pees, ne de chivaucher ne daler arme, ne de nuit ne de jour, en faires, marchees, nen p̃sence des Justices, ne dautres Ministres, ne nule part aillours, sur peine de p̃dre lour armures au Roi & de lour corps a la prisone a la volunte le Roi. Et q̃ Justices le Roi en lour p̃sences, viscountes & autres Ministres le Roi en lour baillies, seign's des fraunchises & lour baillifs en yceles, & Meire & Baillifs des Citees & Burghs deinz meismes les Citees & Burghs, Burghaldres, conestables, & gardeins de la pees deinz lour gardes, cient poair affaire execucion de cest acord. Et q̃ les Justices assignez, a lour venu en pais, eient poair denquere coment tielx Ministres & seign's ont use lour office en ce, & de punir ceux qils trov̄ont, qi nount mie fait ce q̃ a lour office appent.

Et p'ce q̃ la pees ne poet mie estre bien garde sauntz bons ministres, come Viscountes, Baillifs, & Hundreders qi deivent faire execucion, auxibien des p'vetez le Roi come dautres choses tochantes le Roi & son poeple, acorde est & establi q̃ lestatut fait en temps le Roi Edward, piere le Roi qore est, a Nicole, contenant q̃ Viscontes, Hundreders & Baillifs soient des gentz eantz p̃s en meismes les Countez, ou baillies, soit garde en touz pointz solonc la forme dycel, & auxint q̃ les Viscountes & Baillifs de fee, facent garder meismes lour Countez & Baillies p gentz eantz p̃s en yceles.

Ensement la ou ordine est, p statut de Westmonst̄ le second, q̃ ceux q̃ liv̄er volent lour briefs as viscountes, les liv̄ent en plein Counte, ou en rerecounte, & q̃ visconte ou southviscounte facent sur ce bille; acorde est & establi q̃ a quele heure ou a queu lieu deinz le Counte home livre a viscountes, ou a southviscontes, briefs, qils les resceivent & facent bille en la forme contenue en le dit estatut, & ce sanz rien p̃ndre; et sils refusent de faire bille, mettent autres lour seals qi p̃ront p̃sentz; et si le Viscounte ou le Southviscounte ne retorne mie les briefs, soient puniz solonc la forme contenue en le dit estatut; & jadumeins eient les Justices as assises p̃ndre assignez poair denquer de ce a chescuny pleinte & de agarder damages, eant regard au delai, & a les p̃tes & pils qi p'ront avenir,

treasurer or the inheritance tax appraiser of the county of the superior court having jurisdiction as provided in section fifteen of this act.

(6) This act shall become effective and in force contemporaneously with the taking effect of amendments to sections one thousand four hundred one and one thousand four hundred two of the Civil Code, which amendments were enacted at the forty-fifth session of the legislature of the State of California and known as chapter eighteen of the statutes of 1923, and not otherwise. Act takes effect.

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## CHAPTER 338.

*An act to add a new section to the Civil Code to be numbered three thousand fifty-one a, fixing a limit on the amount of a lien on property held under the provisions of section three thousand fifty-one of said code.*

[Approved June 13, 1923.]

*The people of the State of California do enact as follows:*

SECTION 1. A new section is hereby added to the Civil Code to be numbered three thousand fifty-one *a* and to read as follows:

3051*a*. That portion of any lien, as provided for in the next preceding section, in excess of one hundred dollars, for any work, services, care, or safekeeping rendered or performed at the request of any person other than the holder of the legal title, shall be invalid, unless prior to commencing any such work, service, care, or safekeeping, the person claiming such lien shall give actual notice in writing either by personal service or by registered letter addressed to the holder of the legal title to such property, if known. In the case of automobiles, the person named as legal owner in the registration certificate, shall be deemed for the purpose of this section, as the holder of the legal title. Limitation on amount recoverable where written notice not given.

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## CHAPTER 339.

*An act to control and regulate the possession, sale and use of pistols, revolvers and other firearms capable of being concealed upon the person; to prohibit the manufacture, sale, possession or carrying of certain other dangerous weapons within this state; to provide for registering all sales of pistols, revolvers or other firearms capable of being concealed upon the person; to prohibit the carrying of concealed firearms except by lawfully authorized persons; to provide for the confiscation and destruction of such weapons in certain cases; to prohibit the ownership, use, or possession of any of such weapons by certain classes of persons; to prescribe penalties for violations of this act and increased penalties for repeated violations hereof; to*

*authorize, in proper cases, the granting of licenses or permits to carry firearms concealed upon the person; to provide for licensing retail dealers in such firearms and regulating sales thereunder; and to repeal chapter one hundred forty-five of California statutes of 1917, relating to the same subject.*

[Approved June 13, 1923.]

*The people of the State of California do enact as follows:*

Manufacture, sale, carrying, etc., certain dangerous weapons prohibited.

SECTION 1. On and after the date upon which this act takes effect, every person who within the State of California manufactures or causes to be manufactured, or who imports into the state, or who keeps for sale, or offers or exposes for sale, or who gives, lends, or possesses any instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, sandbag, or metal knuckles, or who carries concealed upon his person any explosive substance, other than fixed ammunition, or who carries concealed upon his person any dirk or dagger, shall be guilty of a felony and upon a conviction thereof shall be punishable by imprisonment in a state prison for not less than one year nor for more than five years.

Aliens and felons must not possess certain firearms.

SEC. 2. On and after the date upon which this act takes effect, no unnaturalized foreign born person and no person who has been convicted of a felony against the person or property of another or against the government of the United States or of the State of California or of any political subdivision thereof shall own or have in his possession or under his custody or control any pistol, revolver or other firearm capable of being concealed upon the person. The terms "pistol," "revolver," and "firearms capable of being concealed upon the person" as used in this act shall be construed to apply to and include all firearms having a barrel less than twelve inches in length. Any person who shall violate the provisions of this section shall be guilty of a felony and upon conviction thereof shall be punishable by imprisonment in a state prison for not less than one year nor for more than five years.

Committing felony while carrying dangerous weapon.

SEC. 3. If any person shall commit or attempt to commit any felony within this state while armed with any of the weapons mentioned in section one hereof or while armed with any pistol, revolver or other firearm capable of being concealed upon the person, without having a license or permit to carry such firearm as hereinafter provided, upon conviction of such felony or of an attempt to commit such felony, he shall in addition to the punishment prescribed for the crime of which he has been convicted, be punishable by imprisonment in a state prison for not less than five nor for more than ten years. Such additional period of imprisonment shall commence upon the expiration or other termination of the sentence imposed for the crime of which he stands convicted and shall not run concurrently with such sentence. Upon a second conviction under like circumstances such additional period of impris-

# CHAPTER 118.

AN ACT TO CONTROL THE POSSESSION, SALE, AND USE OF PISTOLS AND REVOLVERS.



*Be it enacted by the Senate and House of Representatives in General Court convened:*

Definition of pistol or revolver.

SECTION 1. Pistol or revolver, as used in this act shall be construed as meaning any firearm with a barrel less than twelve inches in length.

Commission of crime by one armed with pistol and unlicensed, how punished.

SECT. 2. If any person shall commit or attempt to commit a crime when armed with a pistol or revolver, and having no permit to carry the same, he shall in addition to the punishment provided for the crime, be punished by imprisonment for not more than five years.

What persons forbidden to carry pistols or revolvers; penalty for violation.

SECT. 3. No unnaturalized foreign-born person and no person who has been convicted of a felony against the person or property of another shall own or have in his possession or under his control a pistol or revolver, except as hereinafter provided. Violations of this section shall be punished by imprisonment for not more than two years and upon conviction the pistol or revolver shall be confiscated and destroyed.

Carrying concealed weapon without license; penalty for violation.

SECT. 4. No person shall carry a pistol or revolver concealed in any vehicle or upon his person, except in his dwelling house or place of business, without a license therefor as hereinafter provided. Violations of this section shall be punished by a fine of not more than one hundred dollars or by imprisonment not exceeding one year or by both fine and imprisonment.

Persons exempt from application of preceding section.

SECT. 5. The provisions of the preceding sections shall not apply to marshals, sheriffs, policemen, or other duly appointed peace and other law enforcement officers, nor to the regular and ordinary trans-

9. County school superintendent, $1,500. The county school superintendent shall be allowed a deputy or clerk whose salary shall be determined by the county court; all claims of deputy for salary or services must be approved by the county school superintendent *[and the same shall be audited by the county court and paid as other claims against the county are paid. The county school superintendent] shall be allowed such sum as the county court may deem necessary for traveling expenses incurred in the discharge of his duties, which claims shall be audited and paid by the county court out of the general fund of the county.

Approved by the governor February 26, 1925.
Filed in the office of the secretary of state February 26, 1925.

## CHAPTER 260

## AN ACT

[H. B. 452]

To control the possession, sale and use of pistols and revolvers, to provide penalties.

*Be It Enacted by the People of the State of Oregon:*

Section 1. On and after the date upon which this act takes effect, any person who within the state of Oregon manufactures or causes to be manufactured or who imports into the state of Oregon or who keeps for sale or offers or exposes for sale or who gives, lends or possesses a pistol or revolver otherwise than in accordance with the provisions of this act shall be guilty of a felony, and, upon conviction thereof, shall be punishable by imprisonment in the state penitentiary for not more than five years.

Section 2. On and after the date upon which this act takes effect no unnaturalized foreign-born person and no person who has been convicted of a felony against the person or property of another or against the government of the United States or of the state of Oregon or of any political subdivision thereof shall own or have in his possession or under his custody or control any pistol, revolver or other firearm capable of being concealed upon the person. The terms "pistol," "revolver," and "firearms capable of being concealed upon the person," as used in this act, shall be construed to apply to and include all firearms having a barrel less than twelve inches in length. Any person who shall violate the provisions of this section shall be guilty of a felony, and, upon conviction thereof, be punishable by imprisonment in the state penitentiary for not less than one year nor for more than five years.

* The phrase inserted in brackets appears in the original and engrossed bills, but was not incorporated in the enrolled act.

# CHAPTER 3

(House Bill No. 7—By Mr. Robinson from the Select Committee)

AN ACT to amend and re-enact section seven of chapter one hundred and forty-eight of the code of West Virginia, as amended and re-enacted by chapter fifty-one of the acts of the legislature of West Virginia, one thousand nine hundred and nine, regular session, and as further amended and re-enacted by an act of the legislature of West Virginia, regular session, one thousand nine hundred and twenty-five, relating to offenses against the peace; providing for the granting and revoking of licenses and permits respecting the use, transportation and possession of weapons and fire arms; restricting the manner of the sale and display of weapons and fire arms; imposing liability upon certain persons for the accidental or improper, negligent or illegal discharges of weapons and fire arms; defining the powers and duties of certain officers in the granting and revocation of said licenses and permits, and providing penalties for the violation of this act and any part thereof.

[Passed June 5, 1925; in effect 90 days from passage. Approved by the Governor.]



*Be it enacted by the Legislature of West Virginia:*

That section seven of chapter one hundred and forty-eight of the code of West Virginia, as amended and re-enacted by chapter fifty-one of the acts of the legislature of West Virginia of one thousand nine hundred and nine, regular session, and as further amended and re-enacted by the legislature of West Virginia, one thousand nine hundred and twenty-five, regular session, in House Bill number four hundred six, be amended and re-enacted so as to read as follows:

Section 7 (*a*). If any person, without a state license therefor, carry about his person any revolver or other pistol, dirk, bowie-knife, slung shot, razor, billy, metallic or other false knuckles, or any other dangerous or deadly weapon of like kind or character, he shall be guilty of a misdemeanor and upon conviction thereof be confined in the county jail for a period of not less than six nor more than twelve months for the first offense; but upon conviction of the same person for the second offense in this state, he shall be guilty of a felony and be confined in the penitentiary not less than one or more than five years, and in either case fined not less than fifty nor more than two hundred dollars, in the discretion of the court; and it shall be the duty of the prosecuting attorney in all cases to ascertain whether or not the charge made by the grand jury is the first or second offense, and if it shall be the second offense, it shall be so stated in the indictment returned, and the prosecuting attorney shall introduce the record evidence before the trial court of said second offense, and shall not be permitted to use his discretion in charging said second offense nor in introducing evidence to prove the same on the trial; *provided,* that boys or girls under the age of eighteen years, upon the second conviction, may, at the discretion of the court, be sent to the industrial homes for boys and girls, respectively, of the state. Any person desiring to obtain a state license to carry any such weapon within one or more counties in this state shall first publish a notice in some newspaper, published in the county in which he resides, setting forth his name, residence and occupation, and that on a certain day he will apply to the circuit court of his county for such state license; and after the publication of such notice for at least ten days before said application is made and at the time stated in said notice upon application to said court, it may grant such person a license in the following manner, to-wit:

The applicant shall file with said court his application in writing, duly verified, which said application shall show:

*First:* That said applicant is a citizen of the United States of America.

*Second:* That such applicant has been a *bona fide* resident of this state for at least one year next prior to the date of such application, and of the county sixty days next prior thereto.

*Third:* That such applicant is over twenty-one years of age; that he is a person of good moral character, of temperate habits, not addicted to intoxication, and has not been convicted of a felony nor of any offense involving the use on his part of such weapon in an unlawful manner.

*Fourth:* The purpose or purposes for which the applicant desires to carry such weapon and the necessity therefor and the county or counties in which said license is desired to be effective.

Upon the hearing of such application the court shall hear evidence upon all matters stated in such application and upon any other matter deemed pertinent by the court, and if such court be satisfied from the proof that there is good reason and cause for such person to carry such weapon, and all of the other conditions of this act be complied with, said circuit court or the judge thereof in vacation, may grant said license for such purposes, and no other, as said circuit court may set out in the said license (and the word "court" as used in this act shall include the circuit judge thereof, acting in vacation); but before the said license shall be effective such person shall pay to the sheriff, and the court shall so certify in its order granting the license, the sum of twenty dollars, and shall also file a bond with the clerk of said court, in the penalty of three thousand five hundred dollars, with good security, signed by a responsible person or persons, or by some surety company, authorized to do business in this state, conditioned that such applicant will not carry such weapon except in accordance with his said application and as authorized by the court, and that he will pay all costs and damages accruing to any person by the accidental discharge or improper, negligent or illegal use of said weapon or weapons. Any such license granted after this act becomes effective shall be good for one year, unless sooner revoked, as hereinafter provided, and be co-extensive with the county in which granted, and such other county or counties as the court shall designate in the order granting such license; except that regularly appointed deputy sheriffs having license shall be permitted to carry such revolver or other weapons at any place, within the state, while in the performance of their duties as such deputy sheriffs and except that any such license granted to regularly appointed railway police

# A UNIFORM ACT TO REGULATE THE SALE AND POSSESSION OF FIREARMS.

## AN ACT

REGULATING THE SALE, TRANSFER AND POSSESSION OF CERTAIN FIREARMS, PRESCRIBING PENALTIES, AND RULES OF EVIDENCE, AND TO MAKE UNIFORM THE LAW WITH REFERENCE THERETO.

SECTION 1. [*Definitions.*]
"Pistol" or "revolver," as used in this act, means any firearm with barrel less than 12 inches in length.

"Crime of Violence," as used in this act, means any of the following crimes or an attempt to commit any of the same, namely, murder, manslaughter, rape, mayhem, assault to do great bodily harm, robbery [larceny], burglary, and housebreaking.

SEC. 2. [*Committing Crime When Armed.*]

If any person shall commit or attempt to commit a crime of violence when armed with a pistol or revolver, he may in addition to the punishment provided for the crime, be punished also as provided by this act.

SEC. 3. [*Being Armed Prima Facie Evidence of Intent.*]

In the trial of a person for committing or attempting to commit a crime of violence, the fact that he was armed with a pistol or revolver and had no license to carry the same shall be *prima facie* evidence of his intention to commit said crime of violence.

SEC. 4. [*Persons Forbidden to Possess Arms.*]

No person who has been convicted in this state or elsewhere of a crime of violence, shall own or have in his possession or under his control, a pistol or revolver.

SEC. 5. [*Carrying Pistol Concealed.*]

No person shall carry a pistol or revolver concealed in any vehicle or on or about his person, except in his dwelling house or place of business, or on other land possessed by him, without a license therefor as hereinafter provided.

SEC. 6. [*Exceptions.*]

The provisions of the preceding section shall not apply to marshals, sheriffs, prison or jail wardens or their deputies, policemen, or other duly appointed law enforcement officers, or to members of the Army, Navy, or Marine Corps of the United States, or of the National Guard, when on duty, or of organizations by law authorized to purchase or receive such weapons from the United States or this state, or to officers or employees of the United States authorized by law to carry a concealed pistol or revolver, or to duly authorized military organizations when on duty, or to the members thereof when at or going to or from their customary places of assembly, or to the regular and ordinary transportation of pistols or revolvers as merchandise, or to any person while carrying a pistol or revolver unloaded in a wrapper from the place of purchase to his home or place of business, or to a place of repair or back to his home or place of business, or in moving goods from one place of abode or business to another.

SEC. 7. [*Issue of Licenses to Carry.*]

[The justice of a court of record, the chief of police of a city or town, and the sheriff of a county, or persons authorized by any of them], shall, upon the application of any person having a *bona fide* residence or place of business within the jurisdiction of said licensing authority, or of any person having a *bona fide* residence or place of business within the United States and a license to carry a pistol or revolver concealed upon his person issued by the authorities of any state or subdivision of the United States, issue a license to such person to carry concealed upon his person a pistol or revolver within this state for not more than one year from date of issue, if it appears that the applicant has good reason to fear an injury to his person or property or has any other proper reason for carrying a pistol or revolver, and that he is a suitable person to be so licensed. The license shall be in triplicate, in form to be prescribed by the [Secretary of State], and shall bear the name, address, description and signature of the licensee and the reason given for desiring a license. The original thereof shall be delivered to the licensee, the duplicate shall within [seven] days be sent by registered mail to the [Secretary of State] and the triplicate shall be preserved for six years by the authority issuing said license.

Possession for offensive or aggressive purpose is also presumed if the machine gun is of the kind most commonly used by criminals and has not been registered, or if shells adapted to use in that particular weapon are found in the immediate vicinity. As stated above, the Thompson submachine gun, with wooden butt-stock removed, using ordinary .45 caliber Colt automatic pistol shells, is now used almost exclusively by criminals in the United States. Although these cartridges have a limited range, the bullets have satisfactory "stopping" effect at short range, and therefore answer the purpose of the gangster, besides being easily purchased, at any hardware or sporting goods store, without arousing suspicion. It was at first intended to make the presumption apply only to the .45 caliber guns and cartridges; but lest criminals evade the law by using a smaller caliber the act now specifies any pistol shell of caliber larger than .30 inch, or its metric equivalent of 7.63 millimeters. Few, if any, pistol cartridges are on the market exceeding .45 caliber, and no pistol cartridge of less than .30 caliber is made with sufficient range and stopping power to answer the purpose of the gangster.

To overcome any danger of a presumption arising against one who has legitimate use for a machine gun, such person need only either avoid the use of ordinary pistol shells, or else use a type of gun not readily transported or concealable. There are many such on the market, more effective for defensive purpose than the Thompson submachine gun.

The presumption contained in Section 5 is often found vital to successful prosecution of criminals.

The act requires manufacturers to keep a register of all machine guns handled, but only for purpose of inspection by police officers. On the other hand, all machine guns of the prohibited type (adapted to use pistol cartridges of .30 or larger caliber) must be registered in the office of the secretary of state, or other state official. Any failure to register raises the presumption of possession for offensive or aggressive purpose. The act further permits, in Section 9, search for, and seizure of, machine guns of the prohibited type.

If speedily adopted in a sufficient number of states, the act will doubtless have a very beneficent effect, particularly through its registration requirements.

It was necessary to make this act supplementary to the Uniform Firearms Act because of the technical difference in describing firearms, as distinguished from the machine gun, and it will help the administration of the law as to the use of firearms to have this act separate and distinct, or at least supplementary to whatever laws may already have been enacted with reference to firearms.

## UNIFORM MACHINE GUN ACT

AN ACT RELATING TO MACHINE GUNS, AND TO MAKE UNIFORM THE LAW WITH REFERENCE THERETO.

(Be it Enacted .....

1 SECTION 1. (Definitions.) " Machine Gun " applies to and

includes a weapon of any description by whatever name known, loaded or unloaded, from which more than five shots or bullets may be rapidly, or automatically, or semi-automatically discharged from a magazine, by a single function of the firing device.

"Crime of Violence" applies to and includes any of the following crimes or an attempt to commit any of the same, namely, murder, manslaughter, kidnapping, rape, mayhem, assault to do great bodily harm, robbery, burglary, housebreaking, breaking and entering, and larceny.

(Note: Crimes here enumerated to be modified to suit local definitions.)

"Person" applies to and includes firm, partnership, association or corporation.

SECTION 2. Possession or use of a machine gun in the perpetration or attempted perpetration of a crime of violence is hereby declared to be a crime punishable by imprisonment in the state penitentiary for a term of (not less than twenty years).

SECTION 3. Possession or use of a machine gun for offensive or aggressive purpose is hereby declared to be a crime punishable by imprisonment in the state penitentiary for a term of (not less than ten years).

SECTION 4. Possession or use of a machine gun shall be presumed to be for offensive or aggressive purpose:

(a) when the machine gun is on premises not owned or rented, for bona fide permanent residence or business occupancy, by the person in whose possession the machine gun may be found; or

(b) when in the possession of, or used by, an unnaturalized foreign-born person, or a person who has been convicted of a crime of violence in any court of record, state or federal, of the United States of America, its territories or insular possessions; or

(c) when the machine gun is of the kind described in Section 8 and has not been registered as in said section required; or

(d) when empty or loaded pistol shells of 30 (.30 in. or 7.63 mm.) or larger caliber which have been or are susceptible of use in the machine gun are found in the immediate vicinity thereof.

SECTION 5. The presence of a machine gun in any room, boat, or vehicle shall be evidence of the possession or use of the machine gun by each person occupying the room, boat, or vehicle where the weapon is found.

SECTION 6. (Exceptions.) Nothing contained in this act shall prohibit or interfere with

1. the manufacture for, and sale of, machine guns to the military forces or the peace officers of the United States or of any political subdivision thereof, or the transportation required for that purpose;

2. the possession of a machine gun for scientific purpose, or

THE

# ADDRESS AND REASONS OF DISSENT

OF THE

## MINORITY of the CONVENTION,

*Of the State of Pennsylvania, to their Constituents.*

Seventh. That the people have a right to bear arms for the defence of themselves and their own state, or the United States, or for the purpose of killing game, and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and be governed by the civil powers.

One Half of the Fines and Forfeitures to be unto Their Majeſties, and the other Half to the Informer.

AND further it is Enacted by the Authority aforeſaid, That all Fines, Penalties, and Forfeitures ariſing by force and virtue of this Act, ſhall be, the one Half to Their Majeſties, towards the Support of the Government of this Province, and the other Half to him or them that ſhall inform and ſue for the ſame in any of Their Majeſties Courts of Record within this Province.

Meaſurer of Salt, and Culler of Fiſh.

BE it further Enacted by the Authority aforeſaid, That there be a Meaſurer of Salt, and Culler of Fiſh in every Sea-port Town within this Province, to be appointed, as aforeſaid, who being likewiſe ſworn for the faithful Diſcharge of that Office, ſhall cull all merchantable Fiſh, and meaſure all Salt that ſhall be imported and ſold out of any Ship or other Veſſel, and ſhall have Three-half Pence for every Hogſhead of Salt by him ſo meaſured, to be paid, the one Half by the Buyer, the other Half by the Seller; and One Peny *per* Quintal for every Quintal of merchantable Fiſh by him culled, to be paid, one Half by the Buyer, and the other Half by the Seller.

N° 6.

## *An Act for the Puniſhing of Criminal Offenders.*

Swearing and Curſing.

BE it Enacted and Ordained by the Governor, Council, and Repreſentatives, in General Court Aſſembled, and by the Authority of the ſame, That if any Perſon or Perſons ſhall prophanely Swear or Curſe in the hearing of any Juſtice of the Peace, or ſhall be thereof convicted by the Oaths of Two Witneſſes, or Confeſſion of the Party, before any Juſtice or Juſtices of the Peace, every ſuch Offender ſhall forfeit and pay unto the Uſe of the Poor of the Town where the Offence ſhall be committed, the Sum of Five Shillings; and if the Offender be not able to pay the ſaid Sum, then to be ſet in the Stocks, not exceeding Two Hours: And if any Perſon ſhall utter more prophane Oaths or Curſes at the ſame time, and in hearing of the ſame Perſon or Perſons, he ſhall forfeit and pay to the Uſe aforeſaid, the Sum of Twelve Pence for every Oath or Curſe after the firſt, or be ſet in the Stocks Three Hours.

Exemplar.

PROVIDED, That every Offence againſt this Law ſhall be complained of, and proved, as aforeſaid, within Thirty Days next after the Offence committed.

Drunkenneſs.

FURTHER it is Enacted by the Authority aforeſaid, That every Perſon convicted of Drunkenneſs by View of any Juſtice of Peace, Confeſſion of the Party, or Oaths of Two Witneſſes, ſuch Perſon ſo convicted, ſhall forfeit and pay unto the Uſe of the Poor of the Town where ſuch Offence is committed, the Sum of Five Shillings for every ſuch Offence; and if the Offender be unable to pay the ſaid Sum, to be ſet in the Stocks, not exceeding Three Hours, at the Diſcretion of the Juſtice or Juſtices before whom the Conviction ſhall be: And upon a ſecond Conviction of Drunkenneſs, every ſuch Offender, over and above the Penalty aforeſaid, ſhall be bound with Two Sureties in the Sum of Ten Pounds, with Condition for the good Behaviour; and for want of ſuch Sureties, ſhall be ſent to the Common Goal until he find the ſame.

PROVIDED, That no Perſon ſhall be impeached or moleſted for any Offence againſt this Act, unleſs he ſhall be thereof Preſented, Indicted, or Convicted, within Six Months after the Offence committed; and the Juſtice or Juſtices before whom Conviction of any of the aforeſaid Offences ſhall be, are hereby impowered and authorized to reſtrain or commit the Offender, until the Fine impoſed for ſuch Offence be ſatisfied; or to cauſe the ſame to be levied by Diſtreſs and Sale of the Offender's Goods, by Warrant directed to the Conſtable, returning

returning the Overplus (if any be.) All ſuch Fines to be levied within One Week next after ſuch Conviction, and delivered to the Select-men, or Overſeers of the Poor, for the Uſe of the Poor, as aforeſaid.

Theft. IT is further Enacted and Ordained by the Authority aforeſaid, That whoſoever ſhall ſteal or purloin any Money, Goods, or Chattels, being thereof convicted by Confeſſion, or ſufficient Witneſs upon Oath, every ſuch Offender ſhall forfeit treble the Value of the Money, Goods, or Chattels ſo ſtoln or purloined, unto the Owner or Owners thereof; and be further puniſhed, by Fine or Whipping, at the Diſcretion of the Court or Juſtices that have Cognizance of ſuch Offence, not exceeding the Sum of Five Pounds, or Twenty Stripes: And if any ſuch Offender be unable to make Reſtitution, or pay ſuch Threefold Damages, ſuch Offender ſhall be enjoyned to make Satisfaction by Service; and the Proſecutor ſhall be, and hereby is impowered to diſpoſe of the ſaid Offender in Service to any of Their Majeſties Subjects, for ſuch Term as ſhall be aſſigned by the Court or Juſtices before whom the Proſecution was. And every Juſtice of the Peace in the County where ſuch Offence is committed, or where the Thief ſhall be apprehended, is hereby authorized to hear and determine all Offences againſt this Law: Provided, that the Damage exceed not the Sum of Forty Shillings. And if any Perſon ſhall commit Burglary by breaking up any Dwelling-houſe, Ware-houſe, Shop, Mill, Malt-houſe, Barn, Out-houſe, or any Ship or other Veſſel lying within the Body of the County, or ſhall rob any Perſon in the Field or High-ways, every Perſon ſo offending ſhall, upon Conviction, be branded on the Forehead with the Letter *B*; and upon a ſecond Conviction, ſhall be ſet upon the Gallows for the ſpace of One Hour, with a Rope about his Neck, and one End thereof caſt over the Gallows, and be ſeverely Whipt, not exceeding Thirty nine Stripes; and upon a third Conviction of the like Offence, ſhall ſuffer the Pains of Death, as being Incorrigible; and ſhall likewiſe, upon the firſt and ſecond Convictions, pay treble Damages to the Party injured, as is provided in caſe of Theft. Burglary and Robbery.

Fornication. AND it is further Enacted by the Authority aforeſaid, That if any Man commit Fornication with any ſingle Woman, upon due Conviction thereof, they ſhall be fined unto Their Majeſties, not exceeding the Sum of Five Pounds; or be corporally puniſhed by Whipping, not exceeding Ten Stripes apiece, at the Diſcretion of the Seſſions of the Peace, who ſhall have Cognizance of the Offence. And he that is accuſed by any Woman to be the Father of a Baſtard Child, begotten of her Body, ſhe continuing conſtant in ſuch Accuſation, being examined upon Oath, and put upon the Diſcovery of the Truth in the time of her Travail, ſhall be adjudged the Reputed Father of ſuch Child, notwithſtanding his Denial, and ſtand charged with the Maintenance thereof, with the Aſſiſtance of the Mother, as the Juſtices in the Quarter-Seſſions ſhall order; and give Security to perform the ſaid Order, and to ſave the Town or Place where ſuch Child is born, free from Charge for its Maintenance; and may be committed to Priſon until he find Sureties for the ſame, unleſs the Pleas and Proofs made and produced on the behalf of the Man accuſed, and other Circumſtances, be ſuch as the Juſtices ſhall ſee reaſon to judge him innocent, and acquit him thereof, and otherwiſe diſpoſe of the Child: And every Juſtice of the Peace, upon his Diſcretion, may bind to the next Quarter-Seſſions him that is charged or ſuſpected to have begotten a Baſtard Child; and if the Woman be not then delivered, the Seſſions may order the Continuance or Renewal of his Bond, that he may be forth-coming when the Child is born. Reputed Father of a Baſtard.

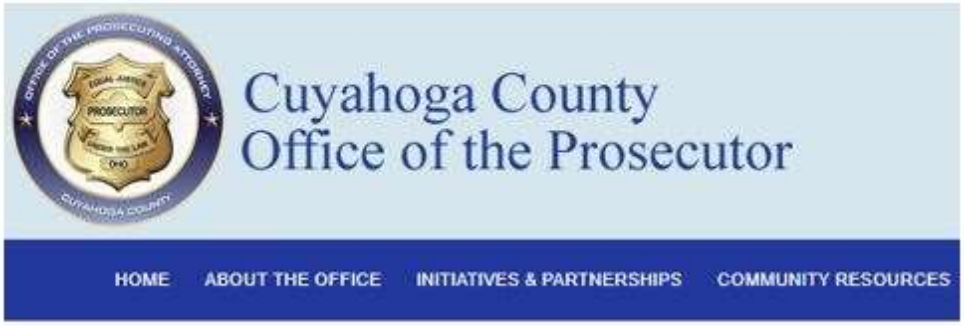
Power of the Juſtice of Peace. FURTHER it is Enacted by the Authority aforeſaid, That every Juſtice of the Peace in the County where the Offence is committed, may cauſe to be ſtaid and arreſted all Affrayers, Rioters, Diſturbers, or Breakers of the Peace, and ſuch as ſhall ride or go armed Offenſively before any of Their Majeſties Juſtices, or other Their Officers or Miniſters doing their Office, or elſewhere,

by

by Night or by Day, in Fear or Affray of Their Majeſties Liege People; and ſuch others as ſhall utter any Menaces or Threatning Speeches; and upon View of ſuch Juſtice or Juſtices, Confeſſion of the Party, or other legal Conviction of any ſuch Offence, ſhall commit the Offender to Priſon, until he find Sureties for the Peace and good Behaviour, and ſeize and take away his Armour or Weapons, and ſhall cauſe them to be apprized and anſwered to the King as forfeited: And may further puniſh the Breach of the Peace, in any Perſon that ſhall ſmite or ſtrike another, by Fine to the King, not exceeding Twenty Shillings, and require Bond with Sureties for the Peace, or bind the Offender over to anſwer it at the next Seſſions of the Peace, as the Nature or Circumſtance of the Offence may be; and may make Enquiry of forcible Entry and Detainer, and cauſe the ſame to be removed, and make out Hue and Cries after Runaway Servants, Thieves, and other Criminals.

Breach of the Peace.

Forcible Entry and Detainer.




# Grand Jury Dispositions

## Grand Jury Dispositions Chart

| | Grand Jury Disposition | | |
|---|---|---|---|
| Year | No Bill | True Bill | Withdrawn |
| 2011 | 280 | 11,517 | 869 |
| 2012 | 344 | 11,609 | 886 |
| 2013 | 444 | 10,888 | 1,007 |
| 2014 | 458 | 11,097 | 888 |
| 2015 | 311 | 9,013 | 483 |

## CERTIFICATE OF SERVICE

A copy of the foregoing **Merits Brief of Appellant Delvonte Philpotts** was served on Brandon Piteo, counsel for the State of Ohio, on March 15, 2021, via the Ohio Supreme Court's electronic filing and service website. Additionally, a courtesy hard copy was mailed via ordinary U.S. Mail to Mr. Piteo at the address listed on the cover of this brief. Finally, a courtesy electronic copy was mailed to Mr. Piteo at his government email address.

*/s/ Robert B. McCaleb*

Robert B. McCaleb
Assistant Public Defender
Counsel for Mr. Philpotts

**COURT OF APPEALS OF OHIO**

**EIGHTH APPELLATE DISTRICT**
**COUNTY OF CUYAHOGA**

STATE OF OHIO, :

Plaintiff-Appellee, :

No. 107374

v. :

DELVONTE PHILPOTTS, :

Defendant-Appellant. :

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JOURNAL ENTRY AND OPINION

**JUDGMENT:** AFFIRMED
**RELEASED AND JOURNALIZED:** July 18, 2019

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Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-17-619945-A

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***Appearances:***

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Kevin R. Filiatraut and Christopher D. Schroeder, Assistant Prosecuting Attorneys, *for appellee.*

Mark A. Stanton, Cuyahoga County Public Defender, Robert Blanshard McCaleb, Assistant Public Defender, *for appellant.*

MICHELLE J. SHEEHAN, J.:

**{¶ 1}** Delvonte Philpotts appeals from his conviction of having weapons while under disability. R.C. 2923.13(A)(2) prohibits a person under indictment for a felony offense of violence from acquiring, having, carrying, or using any firearm.



Philpotts was found to have a weapon while under indictment for rape. Although the rape charge against Philpotts was eventually dismissed by the state, Philpotts was prosecuted and convicted for the weapons-while-under-disability offense pursuant to R.C. 2923.13(A)(2). On appeal, he raises three assignments of error for our review:

1. Automatic criminalization of the possession of firearms by indictees violates the Second Amendment on its face.

2. Automatic criminalization of the possession of firearms by indictees violates the Second Amendment as applied.

3. Automatic criminalization of the possession of firearms by indictees violates the right to procedural due process, both on its face and as applied.

**{¶ 2}** Upon review, we conclude R.C. 2923.13(A)(2) to be constitutional on its face and as applied to Philpotts. In addition, we determine the statute does not violate the Due Process Clause. Finding no merit to his constitutional claims, we affirm the judgment of the trial court.

**Background**

**{¶ 3}** On March 10, 2017, Philpotts was indicted by the grand jury for rape, kidnapping, and assault. The rape and kidnapping counts were accompanied with one- and three-year firearm specifications. On March 15, 2017, Philpotts appeared for arraignment and pleaded not guilty. The court subsequently set a bond for $25,000, and as a condition of his bond, he was subject to GPS electronic home detention monitoring. On April 17, 2017, Philpotts posted the bond and was released from the county jail.

{¶ 4} Three months later, the Cleveland Police Department's Gang Impact Unit discovered that, while out on bond, Philpotts posted pictures of himself on his social media page showing him standing outside of his home with a handgun; his GPS home monitoring ankle bracelet was visible in some of the pictures, indicating the pictures were taken while he was out on bond.

{¶ 5} Based on the discovery, the police prepared a warrant to search his home. During the search, the police found an operable Taurus PT111 Pro 9 mm handgun with ammunition — the same gun displayed in his social media pictures. Philpotts subsequently admitted to the police that he possessed the firearm discovered by the police.

{¶ 6} On August 4, 2017, Philpotts was indicted by the grand jury for having a weapon while under a disability pursuant to R.C. 2923.13(A)(2). Subsequently, on November 27, 2017, the state dismissed the rape case without prejudice.

{¶ 7} Thereafter, on January 3, 2018, Philpotts moved to dismiss the indictment in the weapons-while-under-disability case, arguing R.C. 2923.13(A)(2) was unconstitutional. On March 14, 2018, the trial court held a hearing on the motion. On April 19, 2018, the court denied the motion.

{¶ 8} The record also reflects that, sometime after the March 14, 2018 hearing, Philpotts was arrested for having a loaded handgun in a vehicle, in violation of R.C. 2923.16 ("Improperly handling firearms in a motor vehicle"). Philpotts subsequently pleaded no contest in the weapons-while-under-disability

case but pleaded guilty to the charge of improperly handling firearms in a motor vehicle. The trial court sentenced him to three years of community control sanctions for his convictions in these two cases. Philpotts appeals from his conviction in the weapons-while-under-disability case only.

**{¶ 9}** We review de novo a trial court's decision concerning a defendant's motion to dismiss an indictment based on a constitutional challenge to the statute under which the defendant is indicted. *State v. Wheatley*, 2018-Ohio-464, 94 N.E.3d 578, ¶ 5 (4th Dist.)

**{¶ 10}** On appeal, Philpotts argues R.C. 2923.13(A)(2)'s automatic criminalization of possession of firearms by one who is under indictment violates the Second Amendment to the United States Constitution and is unconstitutional on its face and as applied to him. He argues the statute violates the Second Amendment to the United States Constitution as that amendment was interpreted by the United States Supreme Court in the landmark decision *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), as well as Article I, Section 4 of the Ohio Constitution.

**The Second Amendment and *District of Columbia v. Heller***

**{¶ 11}** The Second Amendment to the United States Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Historically, legal scholars debated whether the Second Amendment recognizes an individual's right to keep and bear arms beyond the goal of guaranteeing the availability of a citizen

militia for the security of the State. *See Heller* in passim and *United States v. Miller*, 307 U.S. 174, 176-183, 59 S.Ct. 816, 83 L.Ed. 1206 (1939). In *Heller*, the United States Supreme Court interpreted the Second Amendment to be conferring a right to keep and bear arms regardless of whether or not one is a member of an organized militia. Applying the Second Amendment, the court struck down a law in the District of Columbia that banned any handgun possession. Subsequently, in *McDonald v. Chicago*, 561 U.S. 742, 750, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010), the court extended *Heller* to the states, holding that the Second Amendment right to keep and bear arms is applicable to the states by virtue of the Fourteenth Amendment.

**{¶ 12}** Long before *Heller* and *McDonald*, Ohio courts have recognized the right to bear arms under the Ohio Constitution. Section 4, Article I of the Ohio Constitution states: "The people have the right to bear arms for their defense and security * * *." The provision has been found to confer upon the people of Ohio the fundamental right to bear arms. *Arnold v. Cleveland*, 67 Ohio St.3d 35, 46, 616 N.E.2d 163 (1993). *See also State v. Smith*, 10th Dist. Franklin No. 18AP-124, 2018-Ohio-4297, ¶ 10 (the Ohio Constitution expressly provides its citizens the right to bear arms for their defense and security unrelated to militia service).

**{¶ 13}** Thus, we review the constitutionality of R.C. 2923.13(A)(2) with the understanding that "[t]he right to keep and bear arms is a fundamental right enshrined in federal and state constitutional law." *State v. Robinson*, 2015-Ohio-4649, 48 N.E.3d 1030, ¶ 11 (12th Dist.).

## R.C. 2923.13: Weapons-While-Under-Disability Statute

**{¶ 14}** R.C. 2923.13 was enacted in 1972 as part of a bill that largely revamped Ohio's existing substantive criminal code. *State v. Carnes*, 154 Ohio St.3d 527, 2018-Ohio-3256, 116 N.E.3d 138, ¶ 16. It enumerates several disability conditions, and a violation of the statute is a third-degree felony. The statute states:

> (A) Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:
>
> (1) The person is a fugitive from justice.
>
> (2) The person is *under indictment for* or has been convicted of *any felony offense of violence* or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence.
>
> (3) The person is *under indictment* for or has been convicted of any felony offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse.
>
> (4) The person is drug dependent, in danger of drug dependence, or a chronic alcoholic.
>
> (5) The person is under adjudication of mental incompetence, has been adjudicated as a mental defective, has been committed to a mental institution, has been found by a court to be a mentally ill person subject to court order, or is an involuntary patient other than one who is a patient only for purposes of observation. As used in this division, "mentally ill person subject to court order" and "patient" have the same meanings as in section 5122.01 of the Revised Code.

(Emphasis added.)

**{¶ 15}** Philpotts challenges both section (A)(2) and (A)(3) of the statute that prohibit a person under indictment for a felony offense of violence or felony drug offense from possessing firearms. As an initial matter, we note Philpotts was charged and convicted under R.C. 2923.13(A)(2) only, the underlying offense being rape, a felony offense of violence. It is well established that "[a] party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights." *Cty. Court of Ulster Cty. v. Allen*, 442 U.S. 140, 154-155, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979). *See also Cleveland v. Berger*, 91 Ohio App.3d 102, 631 N.E.2d 1085 (8th Dist.1993) ("a person has standing to challenge only the constitutionality of rules and regulations that affected his interest and those rules and regulations applied to him"). As such, Philpotts does not have standing to challenge the constitutionality of R.C. 2923.13(A)(3), the section regarding the disability predicated upon felony drug offenses. Consequently, we only address the constitutionality of R.C. 2923.13(A)(2), which prohibits a person from acquiring, having, carrying, or using any firearm while under indictment for a felony offense of violence.

**Presumption of Constitutionality**

**{¶ 16}** When considering the constitutionality of a statute, we bear in mind that statutes enjoy a strong presumption of constitutionality. *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165, ¶ 36, citing *State v. Thompkins*, 75 Ohio St.3d 558, 560, 1996-Ohio-264, 664 N.E.2d 926, and *Sorrell*

*v. Thevenir*, 69 Ohio St.3d 415, 418-419, 633 N.E.2d 504 (1994). The party challenging the constitutionality of a statute assumes the burden of proving the statute's unconstitutionality beyond a reasonable doubt. *Id.* "An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 128 N.E.2d 59 (1955), paragraph one of the syllabus.

**Facial and As-Applied Challenges**

**{¶ 17}** A party may challenge a statute as unconstitutional either on its face or as applied to a particular set of facts. *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶ 17. In a facial challenge, the party challenging a statute must demonstrate that there is no set of facts under which the statute would be valid, i.e., that the law is unconstitutional in all of its applications. *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). In an as-applied challenge, the challenger claims the application of the statute in the particular context in which he or she has acted is unconstitutional. *Lowe* at ¶ 17. Here, Philpotts argues R.C. 2923.13(A)(2) is unconstitutional both facially and as applied to him.

**Whether R.C. 2923.13(A)(2) Is Unconstitutional on Its Face**

**{¶ 18}** We address Philpotts's facial challenge first. He claims R.C. 2923.13(A)(2) is unconstitutional on its face because it violates an individual's

right under the Second Amendment as construed by *Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637.

**a. The Right of Firearm Ownership Is Not Absolute Under *Heller***

**{¶ 19}** Our analysis begins with a recognition that *Heller* does not confer an absolute right to own arms under the Second Amendment. The *Heller* court itself cautioned that the right secured by the Second Amendment is not unlimited. *Heller* at paragraph two of the syllabus. "[T]he right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626. This also has always been the view held by the courts in Ohio when interpreting Article I, Section 4 of the Ohio Constitution. *See Arnold,* 67 Ohio St.3d 35, 616 N.E.2d 163 (the right to bear arms conferred under Section 4, Article I of the Ohio Constitution is to allow a person to possess certain arms "for defense of self and property" and "is not absolute").

**{¶ 20}** *Heller* recognizes that an individual's right under the Second Amendment is qualified and the government retains an ability to regulate the gun ownership of those who pose a risk to public safety. The Court cautioned that its opinion "should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Heller* at 626-627. Furthermore, the Court specifically noted that "these presumptively lawful regulatory measures [serve] only as examples; our list does

not purport to be exhaustive." *Id.* at 627, fn. 26. In both *Heller* and *McDonald,* 561 U.S. 742, 130 S.Ct. 3020, 177 L.Ed.2d 894, the gun regulations struck down by the high court banned *any* ownership of certain firearms regardless of an individual's potential risk to public safety such as those identified by *Heller.*

**{¶ 21}** Citing *Heller's* reference to "long-standing prohibitions," Philpotts argues that, unlike the time-honored prohibitions on the possession of weapons by convicted felons, Ohio's ban on possession of firearms by one who is under indictment is hardly "longstanding." He points out that Ohio, Washington, and Hawaii are the only three states in the country that criminalize the possession of firearms by one who is under indictment.

**{¶ 22}** Although *Heller,* 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637, did not fully explore the scope of limitations on the Second Amendment right, federal court decisions subsequent to *Heller* have concluded that the Second Amendment does not prohibit the government from criminalizing a "non-law-abiding" individual's possession of a weapon. *Wheatley,* 2018-Ohio-464, 94 N.E.3d 578, at ¶ 14. These courts have considered the Second Amendment's core protection under *Heller* to be the right of self-defense by "law-abiding, responsible citizens." *Id.,* citing *United States v. Carpio-Leon,* 701 F.3d 974, 979 (4th Cir.2012).

**{¶ 23}** Being under indictment arguably places a person outside of the "law-abiding" class identified in *Heller.* Before *Heller,* the Supreme Court of Ohio, in *State v. Taniguchi,* 74 Ohio St.3d 154, 1995-Ohio-163, 656 N.E.2d 1286, considered a defendant's claim that his conviction under R.C. 2923.13(A)(2)

should have been precluded because his indictment for the rape offense, which was the basis of the charge of weapons-while-under-disability, was subsequently dismissed. In rejecting the claim, the Supreme Court of Ohio reasoned that "[i]t is basic hornbook law that the state under its police powers may impose restrictions on *who* may possess firearms." (Emphasis added.) Although *Taniguchi* predated *Heller*, the Supreme Court of Ohio recently affirmed the notion that the court defers to the General Assembly for risk assessment regarding the potential danger posed by various categories of individuals. *Carnes*, 154 Ohio St.3d 527, 2018-Ohio-3256, 116 N.E.3d 138. Although *Carnes* involves a different aspect of R.C. 2923.13(A)(2) — regarding the disability of a prior juvenile adjudication of delinquency for committing an offense that, if committed by an adult, would have been a felony offense of violence — the court's analysis of the statute is instructive. In *Carnes*, appellant argued that his juvenile adjudication involved a proceeding where he was uncounseled and did not have a right to a jury trial and other protections and, therefore, using it as a predicate for criminal conduct under R.C. 2923.13(A)(2) violated due process. Citing *Taniguchi*, the Supreme Court of Ohio rejected the claim. It stated:

> "It is basic hornbook law that the state under its police powers may impose restrictions on who may possess firearms." *State v. Taniguchi*, 74 Ohio St.3d 154, 157, 656 N.E.2d 1286 (1995). In crafting R.C. 2923.13, the General Assembly set forth several broad categories of disabling conditions as an element of the crime; notably, "a legal disability can arise from far less than a jury-eligible criminal conviction." [*State v. Barfield*, 2017-Ohio-8243, 87 N.E.3d 233, ¶ 8 (1st Dist.) at ¶ 10.] For example, a person under indictment for any felony offense of violence or certain felony drug offenses is not

> permitted to carry a firearm. R.C. 2923.13(A)(2) and (3). And the mere fact of such an indictment—regardless of whether a trial is held or a conviction is subsequently obtained—is sufficient to create a disability; a conviction under R.C. 2923.13(A)(2) or (3) may stand even "when there is an acquittal on, or dismissal of, the indictment which had formed the basis for the charge of having a weapon while under disability." *Taniguchi* at syllabus.

*Carnes* at ¶ 11.

**{¶ 24}** With approval, the court cited *Taniguchi's* analysis of the disabling condition involving persons under indictment for felony offenses of violence or drug offenses. The court in addition reasoned that R.C. 2923.13(A)(2) represents the risk-assessment determination and policy decision made by the legislature that allowing weapons in the hands of certain individuals poses an increased risk to public safety. *Carnes* at ¶ 16-17. Although the court in *Carnes* was addressing the disability regarding the class of individuals who had prior juvenile adjudications, its analysis reflects a deference afforded to the legislative body's risk assessment as to who poses a potential safety risk. In accordance with *Taniguchi* and *Carnes*, we keep this deference in mind as we review Philpotts's constitutional claim.

**b. Intermediate Scrutiny**

**{¶ 25}** Having determined that the right of firearm ownership is not absolute under *Heller,* 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637, and that the risk assessment by the legislature should be accorded a degree of deference, we note that the *Heller* court did not set forth the level of scrutiny to be applied to laws restricting the right to bear arms under the Second Amendment. The *Heller* court only decided that the lesser levels of scrutiny such as the "rational basis" or

"interest-balancing" test were inappropriate. *Heller* at 634-635. Subsequent to *Heller*, courts in Ohio have applied the intermediate level scrutiny to gun-regulating statutes. *See* e.g., *State v. Weber*, 12th Dist. Clermont No. CA2018-06-040, 2019-Ohio-916 (R.C. 2923.15 "Using weapons while intoxicated"); *State v. Henderson*, 11th Dist. Portage No. 2010-P-0046, 2012-Ohio- 1268 (R.C. 2923.16 "Improperly handling firearms in a motor vehicle"); *State v. Campbell*, 1st Dist. Hamilton No. C-120871, 2013-Ohio-5612 (R.C. 2923.12 ("Carrying concealed weapons")); and *Wheatley*, 2018-Ohio-464, 94 N.E.3d 578 (R.C. 2923.13 ("Having weapons while under disability")).

**{¶ 26}** "Intermediate scrutiny does not demand that the challenged law 'be the least intrusive means of achieving the relevant governmental objective, or that there be no burden whatsoever on the individual right in question.'" *United States v. Masciandaro*, 638 F.3d 458, 474 (4th Cir.2011). Rather, under an intermediate level of scrutiny, we examine the statute to determine if the statute (1) is narrowly tailored to serve a significant government interest, and (2) leaves open alternative means of exercising the right. *Wheatley* at ¶ 17, citing *Perry Edn. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). *See also Henderson* at ¶ 52.

**c. Application of Intermediate Scrutiny to R.C. 2923.13(A)(2)**

**{¶ 27}** "No one seriously disputes that the state possesses a strong interest in maintaining public safety and preventing gun violence." *Wheatley* at ¶ 21, citing *Tyler v. Hillsdale Cty. Sheriff's Dept.*, 837 F.3d 678, 693 (6th Cir.2016) (stating

"protecting the community from crime" is a "compelling governmental interest"). The only question for us to resolve here is whether the regulation embodied in R.C. 2923.13(A)(2) is "narrowly tailored" to serve the significant government interest of preventing gun violence.

**{¶ 28}** Under the statute, the restriction on gun ownership only applies to those under indictment for a felony offense of *violence*,[1] reflecting the restriction is appropriately fashioned to minimize the potential risk of guns in the hands of individuals that may use firearms to facilitate conduct of violence. Furthermore, the statute uses the present tense in describing the disabling condition ("[t]he person is under indictment"), indicating the restriction is temporary and only exists during the time the person is under indictment. The disability ends once the person is no longer under indictment.[2] As such, we find the statute's temporary restriction on gun ownership by one who is currently under indictment for a felony offense of violence narrowly tailored to carry out a significant, in fact, compelling government interest.

**{¶ 29}** Furthermore, the statute leaves open alternative means of exercising one's right under the Second Amendment. In conjunction with the weapons-

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[1] The state represented in its brief that among the 196 sections in the Revised Code defining nondrug related criminal offenses, only 35 sections involve offenses of violence to which R.C. 2923.13(A)(2) applies.

[2] In Philpotts's case, his disability was removed on November 27, 2017, when the rape charge was dismissed by the state without prejudice. He was under the disability only for a total of eight months. When he was arrested for improperly handling a firearm in a motor vehicle in April 2018, he was no longer under the disability and the state did not charge him under R.C. 2923.13(A)(2).

while-under-disability statute, Ohio's legislature created a process whereby a person may seek relief from a disability. Under R.C. 2923.14 ("Relief from disability"), a person who is under a disability may apply to the common pleas court for a judicial review of the disability. Thus, while R.C. 2923.13 creates an assumption that gun possession by a person who has been indicted for an offense of violence poses a potential risk to public safety, R.C. 2923.14 allows such a person to rebut the presumption and show he or she is a "law-abiding citizen." Under R.C. 2923.14(D), the court is required to hold a hearing and may grant relief if the person under indictment has been released on bail or recognizance and can show he or she "has led a law-abiding life since discharge or release, and appears likely to continue to do so." R.C. 2923.14(D)(1)-(2).[3] Whereas the statute embodies a generalized risk assessment by the General Assembly, the hearing available under R.C. 2923.14 allows the court to make an individualized assessment as to an individual's potential risk.

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[3] R.C. 2923.14(D) provides:

(D) Upon hearing, the court may grant the applicant relief pursuant to this section, if all of the following apply:

(1) One of the following applies:

(a) If the disability is based upon an indictment, a conviction, or an adjudication, the applicant has been fully discharged from imprisonment, community control, post-release control, and parole, or, if the applicant is under indictment, has been released on bail or recognizance.

(b) If the disability is based upon a factor other than an indictment, a conviction, or an adjudication, that factor no longer is applicable to the applicant.

(2) The applicant has led a *law-abiding* life since discharge or release, and appears likely to continue to do so.

(3) The applicant is not otherwise prohibited by law from acquiring, having, or using firearms.

(Emphasis added.)

**{¶ 30}** Thus, applying the intermediate level of scrutiny, our review shows R.C. 2923.13(A)(2) is narrowly tailored to serve a significant government interest and also leaves open alternative means of exercising the right to bear arms granted in the Constitution. Accordingly, the statute is constitutional on its face.

**{¶ 31}** Our decision is consistent with other courts in Ohio called upon to review the constitutionality of various gun-regulating statutes post *Heller,* 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637. The courts have invariably found the challenged gun legislation passing constitutional muster. *State v. Weber*, 12th Dist. Clermont No. CA2018-06-040, 2019-Ohio-916, (R.C. 2923.15(A), prohibiting carrying a firearm while intoxicated); *Wheatley*, 2018-Ohio-464, 94 N.E.3d 578 (R.C. 2923.13(A)(4), prohibiting a person who is drug dependent from having a firearm); *State v. Smith*, 10th Dist. Franklin No. 18AP-124, 2018-Ohio-4297 (R.C. 2923.16(B), prohibiting having a loaded firearm in a motor vehicle in such a manner that the firearm is accessible to the driver or a passenger without leaving the vehicle); *State v. Glover*, 2015-Ohio-2751, 34 N.E.3d 1000 (9th Dist.) (R.C. 2923.12(A)(2), prohibiting the carrying of a concealed handgun); *State v. Shover*, 2014-Ohio-373, 8 N.E.3d 358 (9th Dist.) (also concerning the constitutionality of R.C. 2923.16(B)); *State v. Beyer*, 5th Dist. Licking No. 12-CA-27, 2012-Ohio-4578 (R.C. 2923.15, prohibiting carrying firearms while intoxicated); and *Henderson*, 11th Dist. Portage No. 2010-P-0046 (also concerning R.C. 2923.16(B)).

**d. Appellant's Argument**

**{¶ 32}** Philpotts argues that the prohibition of gun ownership while one is under indictment infringes on the Second Amendment right because it is "widely acknowledged" that the grand jury system is deeply flawed. He claims the system provides a person under the grand jury proceeding very little procedural safeguards, citing the inapplicability of the rules of evidence, the absence of the right of confrontation, and the lack of obligation by the prosecutor to disclose exculpatory evidence. Philpotts also argues the grand jury has become little more than "a tool of the Executive," and therefore, a finding of probable cause by the grand jury that a person has committed a felony offense of violence should not be conclusive proof of that person's danger to society. Philpotts contends that a person who is indicted is innocent until proven guilty beyond a reasonable doubt and, therefore, an indictee should be treated as a "law-abiding citizen" as contemplated in *Heller* until convicted. He argues that the assumption that an indictee is more likely to commit crimes than other members of the public, without an individualized determination to that effect, is contradicted by the notion of the presumption of innocence. He cites certain federal statistics from 2004 to show that fewer than two percent of federal felony defendants violated the terms of their pretrial release by committing crimes.

**{¶ 33}** In addressing Philpotts's argument regarding the grand jury system and the notion of the presumption of innocence, we find the reasoning put forth by the federal court in *United States v. Laurent*, 861 F.Supp.2d 71 (E.D.N.Y.2011)

persuasive. The court in *Laurent* reviewed the constitutionality of 18 U.S.C. 922(n), which similarly restricts the Second Amendment right of those who have been indicted.[4] As a part of its constitutionality analysis, the court in *Laurent* observed that indictment by a grand jury has historically had an effect on an individual's constitutional rights, such as the possibility of being subject to pretrial detention and pretrial release conditions that may infringe upon a person's constitutional rights. The *Laurent* court recognized that reliance on unconvicted conduct — activities that have not been proven beyond a reasonable doubt — to sanction defendants is constitutionally suspect. However, the court pointed out that the notion of the presumption of innocence was designed to ensure a fair trial and afford the accused broad protections in his or her trial and it properly allocates the burden of proof in criminal trials and serves as an admonishment to the jury to base an accused's guilt or innocence solely on the evidence adduced at trial. *Id.* at 96. The court observed that, outside of the context of the criminal trial, however, the presumption of innocence has limited application — for example, the state is permitted to restrict the rights of those who are detained while they await trial. *Id.* The court reasoned that, given the narrow scope of rights enjoyed by an indictee

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[4] 18 U.S.C. 922(n) states: "It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." The federal statute is slightly different from R.C. 2923.13(A)(2) in that the former prohibits all individuals indicted with any felony offense from receiving a firearm (that has travelled through interstate commerce) while the latter prohibits individuals indicted with felony offense of violence from possessing a firearm. The difference between possessing and receiving is irrelevant in our discussion here regarding the notion of presumption of innocence.

outside the context of criminal trials, the federal gun statute 18 U.S.C. 922(n) does not violate the principle of the presumption of innocence. *Id.* While the court acknowledged that "indictees must be treated as far as practicable in a manner similar to the general public," it concluded the presumption of innocence itself is not a sufficient ground to declare 18 U.S.C. 922(n) unconstitutional. *Id.* at 97. Evaluating the statute under intermediate scrutiny, the court upheld the statute as constitutional.

**{¶ 34}** We find the reasoning in *Laurent* persuasive. The notion of the presumption of innocence is important in our judicial system primarily to ensure an indicted person his or her rights to a fair trial. A person indicted by a grand jury loses certain rights even though such a person is yet to be found guilty beyond all reasonable doubt; a pretrial detention upon indictment, which involves a complete deprivation of freedom, is constitutionally permissible. In other words, the notion of presumption of innocence, which is essential to ensure a fair *trial,* has limited applicability in the context of restrictions of an indictee's rights before trial.

**{¶ 35}** Philpotts argues that the automatic ban on an indictee's firearm ownership cannot be compared to pretrial detention because a person indicted can be detained only before trial after an adversarial hearing for an individualized determination of risk. Philpotts's argument is unpersuasive. The hearing before pretrial detention is mandatory because a detention involves a *complete* loss of freedom. Firearm ownership, although a fundamental right, is not an absolute right pursuant to the United States Supreme Court's interpretation of the Second

Amendment. Furthermore, an individualized judicial risk assessment is available at an adversarial hearing when requested, as we have discussed above.

**{¶ 36}** For the same reason, we find unpersuasive Philpotts's claim that because the grand jury system is flawed, an indictment does not always reflect one's danger to society and therefore cannot be a disabling condition. Under the statutory scheme, the finding of probable cause that an individual has committed a felony offense of violence is not conclusive proof of one's dangerousness to society but an inference only, rebuttable by way of an individualized judicial assessment through a hearing upon request.

**Whether R.C. 2923.13(A)(2) Is Unconstitutional as Applied to Appellant**

**{¶ 37}** Philpotts also argues R.C. 2923.13(A)(2) is unconstitutional as applied to him, claiming that the statute's application "in the particular context in which he has acted" is unconstitutional.

**{¶ 38}** Philpotts alleges he lived in a crime-ridden and dangerous neighborhood and he needed a weapon to protect his sister and himself. He cites an investigation by Cleveland News 5 that showed that it takes the Cleveland police an average of 17 minutes to respond to priority 1 and 2 calls. He also cites data from the Cleveland Police Department's crime analysis showing the houses around his address were often shot at. Also, there were 220 reports of gunshots fired in his neighborhood since January 2016 as well as 70 reports of felonious assault, nine reports of rape, and 24 reports of robberies.

**{¶ 39}** While we acknowledge the systemic crime and safety problems in some of our city's neighborhoods and we are not unsympathetic to the frustration of residents living in crime-ridden areas, Philpotts's claim requires precisely the kind of individualized inquiry contemplated by R.C. 2923.14. He, however, never availed himself of the statutory avenue for relief. At no time since his arraignment for the rape charge on March 15, 2017, did he apply for a hearing under R.C. 2923.14.

**{¶ 40}** Furthermore, notable from the record before us is the manner in which the police were alerted to Philpotts's ownership of firearms. Philpotts was not found to carry a gun while defending himself or his home. Rather, the Cleveland Police Department's Gang Impact Unit discovered that, while he was out on bond in the rape case, he posted several pictures of himself on his social media page. Those pictures were attached to the affidavit for the search warrant that led to the discovery of a gun in Philpotts's house. In one of these social media pictures, which garnered 166 "likes," Philpotts stood outside of his home and pointed a gun directly at the viewer and the picture was accompanied by the caption "Everything dead in dem trenches nigga." Another picture, which had 95 "likes," depicted him in what appeared to be his driveway, and it was accompanied with the caption: "Dey told me 'no weapons' around da house but you kno I'm hard headed af." (Quotation marks sic.) His GPS home monitoring ankle bracelet was visible in several of these pictures, indicating the pictures were taken while he was out on bond.

**{¶ 41}** The Second Amendment's core protection is the right of citizens to use arms "in defense of hearth and home." *Heller,* 554 U.S. at 635, 128 S.Ct. 2783, 171 L.Ed.2d 637. Philpotts's puffing and touting of his gun ownership in the social media belies his claim that he needed a gun to protect his family and himself from potential burglars and robbers. His conduct can hardly be characterized as "in defense of hearth and home," protected under the Second Amendment as construed by *Heller.* As the state points out, had the police discovered that Philpotts possessed a firearm through an investigation of a reported burglary in his home, during which he used his gun for self-defense, his as-applied claim would be more availing. However, based on the record before us, we conclude the application of R.C. 2923.13(A)(2) "in the particular context" in which Philpotts acted is constitutional pursuant to *Heller.* The second assignment of error is without merit.

**Due Process**

**{¶ 42}** Under the third assignment of error, Philpotts claims automatic criminalization of firearm possession by one who is under indictment violates his procedural due process right. He argues the Due Process Clause of the Fifth Amendment to the United States Constitution prohibits the government from depriving any person of "life, liberty, or property, without due process of law."

**{¶ 43}** The fundamental requirements of due process are notice and the opportunity to be heard. *Armstrong v. Manzo,* 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965), and the analysis of a procedural due process claim begins with

an examination of whether there exists a liberty interest of which a person has been deprived. *Wheatley*, 2018-Ohio-464, 94 N.E.3d 578, at ¶ 31, citing *Swarthout v. Cooke*, 562 U.S. 216, 219, 131 S.Ct. 859, 178 L.Ed.2d 732 (2011). Here, Philpotts argues the liberty interest protected by due process includes the Second Amendment right.

**{¶ 44}** In the criminal context, the requirement of notice concerns "'the accused's right to fair notice of the proscribed conduct.'" *Wheatley* at ¶ 33, quoting *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). This refers to the principle that due process requires criminal statutes to be written clearly so that that individuals are provided with a fair warning that a certain conduct is within the statute's prohibition. *See Wheatley* at ¶ 33, citing *Screws v. United States*, 325 U.S. 91, 103-104, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945); *Connally* at 391 ("a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law"), and *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, 912 N.E.2d 582, ¶ 23 (due process requires law to be written so that the public can adequately inform itself before acting).

**{¶ 45}** However, as the Fourth District noted in *Wheatley*, preindictment notice has never been required before one can be punished for conduct falling within a criminal statute. *Wheatley* at ¶ 32. Instead, it is well established that "a statute's presence on the books constitute fair warning of the prohibited conduct."

*Wheatley* at ¶ 35, citing *Dobbert v. Florida*, 432 U.S. 282, 297, 97 S.Ct. 2290, 53 L.Ed. 344. Ignorance of the law is no defense to criminal prosecution. *Id.* at ¶ 36, citing *Cheek v. United Sta*tes, 498 U.S. 192, 199, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991). Otherwise "any defendant could free himself from the grasp of the law merely by pleading ignorance." *Id.* quoting *State v. Taylor*, 4th Dist. Meigs No. 377, 1987 Ohio App. LEXIS 8531, at 18 (Aug. 27, 1987), quoting 1 Wharton's Criminal Law, Sec. 77, 374, 376.

**{¶ 46}** Furthermore, R.C. 2923.13(A)(2), the statute on its face does not require that the defendant know about his disability (i.e., being under indictment) in order for a conviction under the statute. In *State v. Johnson*, 128 Ohio St.3d 107, 2010-Ohio-6301, 942 N.E.2d 347, the Supreme Court of Ohio, addressing a different section of the disability statute, R.C. 2923.13(A)(3) (prohibiting one who is under indictment of having been convicted of a drug offense from having guns), held that the state does not have to prove a culpable mental state for the element that a defendant is under indictment for a drug offense or has been convicted of a drug offense. *Id.* at ¶ 43. In other words, knowledge of a disability, such as knowing one is under indictment for an offense of violence, is not required for a conviction under R.C. 2923.13(A).

**{¶ 47}** Regardless of whether or not a defendant such as Philpotts should have knowledge of his indictment before criminal liability can attach, Philpotts *had* notice of his indictment because of his arraignment on March 15, 2017. The ankle monitor device he wore as part of the bail condition reflects his knowledge of his

indictment. In fact, Philpotts appears to be flaunting his knowledge of his disability in one of the picture captions ("Dey told me 'no weapons' * * *"). His conviction under the statute does not violate the notice requirement under due process.

**{¶ 48}** Regarding the opportunity to be heard as required by due process, as we have discussed in the foregoing, R.C. 2923.14 provides a legislative avenue for relief from disability. Once an application is filed for relief from disability imposed by R.C. 2923.13, the court is required to hold a hearing. *See In re Hensley*, 154 Ohio App.3d 210, 2003-Ohio-4619, 796 N.E.2d 973 (12th Dist.). Because of the relief available under R.C. 2923.14, other districts in Ohio have similarly rejected the defendant's due process argument. *Wheatley*, 2018-Ohio-464, 94 N.E.3d 578 at ¶ 40; and *Robinson*, 2015-Ohio-4649, 48 N.E.3d 1030, at ¶ 16. The third assignment is without merit.

**Conclusion**

**{¶ 49}** Ohio's General Assembly acted within the constitutional parameters set forth by the United States Supreme Court in *District of Columbia v. Heller* in prohibiting individuals under indictment for a felony offense of violence from ownership of firearms. R.C. 2923.13(A)(2), which temporarily separates firearms from such individuals, is narrowly tailored to serve a significant governmental interest in curtailing gun violence and it leaves open alternative means of exercising such an individual's Second Amendment right. For all the foregoing

reasons, we conclude R.C. 2923.13(A)(2) is constitutional on its face and as applied to Philpotts.

**{¶ 50}** Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MICHELLE J. SHEEHAN, JUDGE

MARY EILEEN KILBANE, A.J., and
EILEEN A. GALLAGHER, J., CONCUR