

Judge Richard A. Jones

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

|                           |   |   |
|---------------------------|---|---|
| UNITED STATES OF AMERICA, | ) | NO. CR15-391RAJ                             |
|                           | ) |   |
| Plaintiff,                | ) | DEFENDANT’S MOTION TO                       |
|                           | ) | DISMISS RE: SECOND                          |
| vs.                       | ) | AMENDMENT AND COMMERCE                      |
|                           | ) | CLAUSE                                      |
| SCHULYER P. BARBEAU       | ) |   |
|                           | ) | <b>Note for: March 4, 2016</b>              |
| Defendant.                | ) | <b><i>EVIDENTIARY HEARING REQUESTED</i></b> |

The defendant, Schulyer Barbeau, through counsel, Assistant Federal Public Defender Dennis Carroll, submits this Motion to Dismiss the Indictment because the offense(s) with which he is charged violate the Second Amendment and the Due Process Clause to the United States Constitution.

Mr. Barbeau requests an evidentiary hearing. In support of this motion, Mr. Barbeau submits his declaration, attached as Exhibit 1, and he also requests an evidentiary hearing.

**I. Procedural History.**

On December 16, 2015, Mr. Barbeau was indicted on one count of Possession of an Unregistered Firearm (a short barreled rifle), in violation of 26 U.S.C. §§ 5861(d) and 5845(a)(3). The Government has informed defense counsel that it plans to seek a superseding indictment charging Mr. Barbeau with an additional offense, Possession of

1 a Machine Gun, in violation of 18 U.S.C. § 922(o). Both counts will be addressed  
2 herein. Trial is currently scheduled for May 2, 2106.

3 **II. Factual Background.**

4 According to the Complaint, Dkt #1, federal agents received information from a  
5 confidential source that Mr. Barbeau possessed a short barreled rifle. Mr. Barbeau gave  
6 the rifle to the confidential source so the source could sell it. Agents obtained the rifle  
7 from the confidential source and verified that it is an unregistered, fully automatic, short  
8 barreled rifle. There is no dispute that Mr. Barbeau knowingly possessed this rifle.

9 Mr. Barbeau is not a felon. In fact, he has no prior criminal convictions. He is  
10 not a drug user, nor has he been adjudicated as mentally ill. Indeed, he served four years  
11 in the United States Marine Corps, after which he was honorably discharged. He then  
12 served four years in the National Guard. Mr. Barbeau requests an evidentiary hearing to  
13 establish the above-cited facts related to his personal history. He also wishes to present  
14 evidence that possession of a fully automatic, short barreled rifle is necessary to  
15 preserve his right to self-defense due to a variety of facts, including the ubiquitous  
16 nature of more dangerous weapons possessed by criminal gangs, terrorists, mentally ill  
17 people, and others who threaten the safety of law-abiding citizens. In support of his  
18 request for an evidentiary hearing and dismissal, he submits the attached declaration.  
19 Exhibit 1 (Declaration of Schuyler Barbeau).

20 **III. Argument.**

21 A. Mr. Barbeau has a Second Amendment Right to Possess an Unregistered  
22 Short Barreled Rifle.

23 In *United States v. Miller*, 307 U.S. 174 (1939), the Supreme Court held that the  
24 federal government could require registration and taxation of short barreled shotguns  
25 without violating the Second Amendment. However, in *District of Columbia v. Heller*,  
26 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment protects the

1 right of individuals to possess firearms against certain kinds of restrictions by the  
2 federal government. The Court recognized that “the Second Amendment is not  
3 unlimited,” and does not include the “right to keep and carry any weapon whatsoever in  
4 any manner whatsoever and for whatever purpose.” *Id.* at 625.

5 Since *Heller*, there has been no Ninth Circuit published opinion addressing the  
6 constitutionality of the statutory ban of unregistered short barreled rifles. In light of the  
7 reasoning in *Heller*, this Court should find that it is unconstitutional to criminalize the  
8 possession of an unregistered short barreled rifle.

9 The Second Amendment to the United States Constitution provides: “A well-  
10 regulated Militia, being necessary to the security of a free State, the right of the people  
11 to keep and bear Arms shall not be infringed.” U.S. Const. Amend II. In *Heller*, the  
12 Supreme Court reaffirmed the basic right of all citizens under the Second Amendment  
13 to possess firearms to effectuate “the inherent right of self-defense.” 554 U.S. at 628.  
14 As the Supreme Court explained, the Second Amendment safeguards the “inherent right  
15 to self-defense” by protecting from undue government interference the right of citizens  
16 to protect themselves, their abodes, and their property—“to use arms in the defense of  
17 hearth and home.” *Id.* at 652, 679. While acknowledging that rights secured by the  
18 Second Amendment are not unlimited, the *Heller* Court stressed that government  
19 restrictions on the right to possess firearms are especially suspect when applied to “the  
20 home, where the need for defense of self, family, and property is most acute.” *Id.* at  
21 628.

22 The Court in *Heller* found that an outright handgun ban violated the Second  
23 Amendment given the specific characteristics of the type of gun itself; its commonality  
24 and ability to move around the home. The Court stated:

25 It is enough to note, as we have observed, that the American people have  
26 considered the handgun to be the quintessential self-defense weapon.  
There are many reasons that a citizen may prefer a handgun for home

1 defense: It is easier to store in a location that is readily accessible in an  
2 emergency; it cannot easily be redirected or wrestled away by an attacker;  
3 it is easier to use for those without the upper-body strength to lift and aim  
4 a long gun; it can be pointed at a burglar with one hand while the other  
5 hand dials the police. Whatever the reason, handguns are the most popular  
6 weapon chosen by Americans for self-defense in the home, and a  
7 complete prohibition of their use is invalid.

8 *Id.* at 629. Thus, although *Heller* involved complete prohibition, and not registration, as  
9 is the case with Section 5861(d)(which criminalizes possession of certain firearms  
10 unless they are registered with the National Firearms Registry), the *Heller* court  
11 nevertheless made it emphatically clear that the government must provide more than a  
12 rational basis to justify any restrictions on a citizens' right to own and possess a  
13 firearm. *See id.* at 629, n.27.

14 Because the Supreme Court has recognized in the Second Amendment a  
15 fundamental right to bear arms, a restriction on that right must withstand strict scrutiny.  
16 In applying the strict scrutiny test, this court must "review[] with care each gun law to  
17 determine whether it is 'narrowly tailored to achieve a compelling governmental  
18 interest.'" *Id.* at 688 (Breyer, J., dissenting). The Supreme Court has recognized that  
19 public safety and "the Government's general interest in preventing crime" are  
20 "compelling" interests and "has in a wide variety of constitutional contexts found such  
21 public-safety concerns sufficiently forceful to justify restrictions on individual  
22 liberties." *Id.* Thus, the question is whether the regulation is narrowly tailored to that  
23 interest.

24 In this case, the criminalization of an unregistered short barreled rifle is not  
25 narrowly tailored. There is no specific relationship between public safety and the  
26 prohibition against possessing unregistered short barrel rifles, especially as compared to  
other firearms that do not require registration. Essentially, there is no functional  
difference between a handgun and a short barreled rifle. With a shotgun, the shorter  
barrel causes a wider spread of shot, but there is no such effect with a short barreled

1 rifle. In fact, a short barreled rifle is no more dangerous than a handgun and is clearly  
2 far less dangerous than many powerful handguns that do not require registration. While  
3 a shortened barrel might make a rifle more concealable, that should be of no  
4 significance since all handguns are concealable, and this, by itself, does not justify  
5 government prohibition/regulation of handguns.

6 The *Heller* opinion indicates that any gun laws that “burden the right of self-  
7 defense” by threatening or imposing serious criminal sanctions for firearms possession  
8 in protection of self, property, and home are constitutionally suspect and cannot be  
9 justified by broad and generic claims about public safety interests. *Id.* at 634. In the  
10 instant case, generic claims about public safety interests clearly do not justify singling  
11 out short barreled rifles for heightened regulation and criminalization.

12 B. Mr. Barbeau Has a Second Amendment Right to Possess a Homemade  
13 Machine Gun.

14 Mr. Barbeau recognizes that in *United States v. Henry*, 688 F.3d 637 (9th Cir.  
15 2012), post-*Heller*, the Ninth Circuit held that the Second Amendment right to bear  
16 arms does not extend to defendant’s possession of a homemade machine gun and that  
17 the Commerce Clause authorized the criminal ban on the possession of machine guns.  
18 For the record, Mr. Barbeau asserts that *Henry* is wrongly decided and that a machine  
19 gun ban violates the Second Amendment.

20 While the *Heller* decision recognized that the right to keep and bear arms is  
21 subject to certain limitations, the Court described the individual right conferred by the  
22 Second Amendment as the right of “law-abiding, responsible citizens to use arms in  
23 defense of hearth and home.” *Id.* at 635. As noted above, Mr. Barbeau wishes to present  
24 a factual basis, consistent with his attached declaration, to establish that possession of a  
25 fully automatic weapon is necessary for him to defend himself. The laws prohibiting  
26 machine guns are closer to the outright ban of a class of firearms reviewed in *Heller*.

1 Federal law prohibits the possession of machines guns by ordinary, law-abiding  
2 citizens, except for those that are registered and manufactured prior to 1986. To the  
3 extent that *Heller* suggests that less common weapons, such as fully automatic rifles,  
4 may be banned, that holding should be reconsidered.

5 DATED this 23rd day of February, 2016.

6 Respectfully submitted,

7  
8 s/ Dennis Carroll

9 Dennis Carroll  
10 Assistant Federal Public Defender  
11 Attorney for Schuler Barbeau  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the date below, I filed the foregoing Defendant's Motion to Dismiss Re: Second Amendment with the Clerk of the Court using the CM/ECF system, which will send notification of filing to all parties of record.

DATED this 23rd day of February, 2016.

s/ Kathleen Gilkey  
Kathleen Gilkey, Paralegal

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