

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 CONSOLIDATED
	)	REPLY MEMORANDUM RE:
vs.	)	PRETRIAL MOTIONS
	)	
SCHULYER P. BARBEAU	)	
	)	
Defendant.	)	

The defendant, Schulyer Barbeau, through counsel, Assistant Federal Public Defender Dennis Carroll, submits this consolidated reply memorandum regarding his three pretrial motions: (1) Motion to Dismiss, Second Amendment, (2) Motion for Justification Instructions, and (3) Motion, re: Ignorance of the Law.

**I. MOTION TO DISMISS RE: SECOND AMENDMENT**

A. Count 1: Possession of the Unregistered Short Barreled Rifle

The Government argues that *District of Columbia v. Heller*, 554 U.S. 570 (2008), does not support Mr. Barbeau’s challenge to the constitutionality of regulations limiting the possession of short barreled rifles. In *Heller*, the Court struck down a local ordinance that banned handguns. The Government distinguishes *Heller* by asserting that it applied to handguns, not short barreled rifles. However, there is no meaningful distinction between a short barreled rifle and a handgun that warrants such an infringement on Mr. Barbeau’s Second Amendment right to possess arms for self-

1 defense. Indeed, the only meaningful difference between a short barreled rifle and a  
2 handgun is the presence of a buttstock on a short barreled rifle which allows it to be  
3 fired from the shoulder. A weapon does not suddenly become a “dangerous and  
4 unusual” firearm subject to strict regulation simply because it can be fired from the  
5 shoulder.

6 Recently, the Fourth Circuit determined that a virtual ban on popular assault  
7 rifles implicates citizens’ Second Amendment rights, and must survive strict scrutiny  
8 review. *Kolbe v. Tardy*, 2016 WL 425829, \*44-46 (4th Cir., Feb. 4, 2016).<sup>1</sup> The Court  
9 noted that “AR and AK-style” weapons are extremely popular, and that these types of  
10 weapons are possessed by citizens for lawful purposes. *Id.* at p. \*22. The Court also  
11 noted the many reasons citizens would favor an assault rifle over a handgun in  
12 defending themselves at home, i.e. handguns are less accurate, handguns are more  
13 difficult to steady when firing, handguns absorb less recoil. *Id.* at p. \*38-39. For the  
14 same reasons, regulations that regulate the possession of short barreled rifles implicate  
15 citizens’ Second Amendment rights.

16 The Supreme Court’s holding in *United States v. Miller*, 307 U.S. 174 (1939), is  
17 also not dispositive. In *Miller*, the Supreme Court held that the federal government  
18 could require registration and taxation of short barreled *shotguns* without violating the  
19 Second Amendment. However, the reasoning in *Miller* should be reconsidered in light  
20 of the Court’s subsequent holding in *Heller*. Furthermore, even assuming *Miller* is still  
21 sound, it is not dispositive because it addressed short barreled *shotguns*, not rifles. The  
22 Government bears the burden to establish that a particular weapon or activity falls  
23 outside the scope of the Second Amendment right. *Kolbe*, at p. \*8 (*citing Ezell v. City*  
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25 <sup>1</sup> See *contra Fyock v Sunnyvale*, 779 F.3d 991 (9th Cir. 2015) (Ordinance restricting possession  
26 of large-capacity magazines was subject to intermediate level of scrutiny under Second  
Amendment, and the district court did not abuse its discretion in determining that plaintiffs  
challenging the law failed to establish likelihood of success on merits).

1 of *Chicago*, 651 F.3d 684, 702–03 (7<sup>th</sup> Cir. 2011). The Government cannot meet this  
 2 burden by baldly asserting that a short barreled rifle is the same as a short barreled  
 3 shotgun. The Government has offered no evidence or justification that explains why a  
 4 short barreled rifle should be treated just like a sawed off shotgun.

5 **B. Count 2: Possession of the Homemade Machine Gun**

6 Mr. Barbeau recognizes that this Court is bound by controlling Ninth Circuit  
 7 precedent, *United States v. Henry*, 688 F.3d 637 (9<sup>th</sup> Cir. 2012), which held that the  
 8 Second Amendment does not extend to possession of a homemade machine gun. Mr.  
 9 Barbeau raises the issue to preserve the record for further review.

10 **II. JUSTIFICATION INSTRUCTIONS**

11 The Government initially argues that Mr. Barbeau is not entitled to justification  
 12 instructions because he eventually sold firearm. The Government’s argument lacks  
 13 merit. When Mr. Barbeau possessed the firearm, he reasonably believed that he was  
 14 subject to an imminent threat for which a fully automatic short barreled rifle is required.  
 15 When the threat momentarily abated, he sold the firearm. There is nothing illogical  
 16 about Mr. Barbeau’s actions.<sup>2</sup>

17 The Government next argues that Mr. Barbeau had a second, lawful gun (a  
 18 handgun), so he could have no justification for possessing the short barreled rifle.  
 19 Essentially, the Government argues there can be no justification defense if Mr. Barbeau  
 20 also had access to some other, less effective, means of self-defense, such a handgun or a  
 21 maybe even a baseball bat. “The right to self-defense is largely meaningless if it does  
 22 not include the right to choose the most effective means of defending oneself.”

23 *Friedman v. City of Highland Park*, 784 F.3d 406, 418 (7<sup>th</sup> Cir. 2015) (Manion, J.,  
 24 dissenting); *see id.* at p. 413 (“[T]he ultimate decision for what constitutes the most

25 \_\_\_\_\_  
 26 <sup>2</sup> If the Government’s point is that Mr. Barbeau violated federal law by transferring the firearm,  
 as recently alleged in Count 2 of the Superseding Indictment, Mr. Barbeau expects to file  
 future motions regarding the regulations prohibiting the transfer of firearms.

1 effective means of defending one's home, family, and property resides in individual  
2 citizens and not the government.... The extent of danger-real or imagined-that a citizen  
3 faces at home is a matter only that person can assess in full.”) If the Government’s  
4 argument is accepted, then justification instructions would never be allowed because it  
5 could always point to some other less effective means by which a person could defend  
6 himself or herself.

7 As outlined in his motion and declaration, Mr. Barbeau has satisfied the  
8 elements for a justification defense. While many of the threats he cites in his declaration  
9 are ubiquitous features of contemporary American society, the common nature of the  
10 threats does not diminish the reality that the United States is a dangerous place to live,  
11 and Mr. Barbeau has a reasonable belief that a fully automatic short barreled rifle was  
12 necessary in order to protect himself and others.

### 13 **III. IGNORANCE OF THE LAW**

14 Mr. Barbeau acknowledges that his request for mistake of law instructions is  
15 foreclosed by controlling Ninth Circuit precedent, *United States v. Summers*, 268 F.3d  
16 683 (9th Cir. 2001), and he makes this motion only to preserve the record for appeal.

17 DATED this 3rd day of March, 2016.

18 Respectfully submitted,

19 s/ Dennis Carroll

20 Dennis Carroll  
21 Assistant Federal Public Defender  
22 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 Consolidated Reply Memo Re: Pretrial Motions with the Clerk of the Court using the CM/ECF system, which will send notification of filing to all parties of record.

DATED this 3rd day of March, 2016.

s/ Kathleen Gilkey  
Kathleen Gilkey, Paralegal

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