

'Right to Bear Arms' Defense Fails in Gun Possession Case

BY DANIEL WISE

A CRIMINAL COURT judge has rejected an attack on New York's illegal gun possession statute by a Brooklyn man who claimed that a constitutional right to bear arms protected his keeping three unlicensed handguns in his apartment.

Rashawn Handsome, who faces up to one year in prison for three counts of criminal possession of a weapon in the fourth degree, a Class A misdemeanor, relied on a "deeply flawed" ruling issued in March by the U.S. Court of Appeals for the District of Columbia finding that the Second Amendment of the U.S. Constitution creates a personal right "to keep and bear arms," ruled Judge Michael Gerstein, a Civil Court judge assigned to Criminal Court in Brooklyn.

Disagreeing with the reasoning of the D.C. circuit's ruling and the policy considerations behind it, Judge Gerstein in *People v. Handsome*, 2006KN076479, refused to extend the precedent to New York.

Appeals experts in interviews Friday said that no appeals have been brought in New York seeking to overturn the state's gun control

Weapons Possession Data

	Arrests	Convictions
2006	18,639	4,976
2005	16,535	4,475
2004	14,441	4,532
2003	13,231	4,304
2002	12,887	4,148

SOURCE: Division of Criminal Justice Services

or gun possession statutes based on the Second Amendment. Patricia Bath, a spokeswoman for the Legal Aid Society, which represented Mr. Handsome, said that no decision has been made on whether to appeal Judge Gerstein's ruling.

The decision will be published Thursday.
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 Ms. Bath of Legal Aid could not say whether the agency would routinely mount a Second Amendment defense to gun possession charges. Legal Aid "encourages its lawyers to provide vigorous and

creative defenses for its clients," she said, adding that defense arguments are based "on a case-by-case basis."

The federal circuit court in *Parker v. District of Columbia*, 478 F.3d 370, on March 9 struck down the District of Columbia's strict gun control law, finding that the Second Amendment protects a personal right to bear arms. Both the District of Columbia and the citizen plaintiffs, who succeeded in upending the district's gun control statute, have asked the U.S. Supreme Court to review the decision, but the Court has yet to rule on the applications for certiorari.

Seeking to apply the *Parker* ruling in New York, Mr. Handsome asked Judge Gerstein to void Penal Law §265.01 under which Mr. Handsome was charged with knowingly possessing an operable firearm.

Mr. Handsome had been charged with the illegal possession of three guns—a loaded .44 Magnum revolver, a .38 caliber H&R revolver and .25 caliber Raven semi-automatic pistol—in his apartment in a public housing project, Wyckoff Gardens.

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Right to Bear Arms Denied

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Mr. Handsome made no claim that he had sought to get a permit for the guns under the state's gun registration law, Judge Gerstein noted.

Precedent

In refusing to follow *Parker*, Judge Gerstein noted that the ruling's conclusion is at odds with the holdings of nine other circuits and the last U.S. Supreme Court decision to address the issue, *U.S. v. Miller*, 307 U.S. 174 (1939). All those rulings concluded that the Second Amendment, rather than creating a personal right to bear arms, circumscribes potential efforts by the federal government to curb state militias.

While the Second Circuit has not directly addressed the issue, Judge Gerstein wrote, it observed in a 1984 ruling that "the right to possess a gun is clearly not a fundamental right" (*U.S. v. Toner*, 728 F.2d 115).

The U.S. Supreme Court in *Miller* and the nine circuits agreeing with it, Judge Gerstein noted, all considered the prefatory clause of the Second Amendment controlling.

In its entirety, the Second Amendment reads: "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."

Mr. Handsome's argument relying on the *Parker* case to overturn New York's law "requires rejection of viable Supreme Court precedent and half of the [Second] Amendment's text," Judge Gerstein wrote.

"We instead reject defendant's invitation to ignore the prefatory

clause of the Amendment, or by interpretation render it meaningless," he added.

As a practical matter, Judge Gerstein said, state militias have either disappeared or been combined with the National Guard since the adoption of the Second Amendment.

To construe the amendment as conferring an individual right is to manipulate a "vestige of an eighteenth century Federal structure into something the Founders never intended it to be: a right for every individual to own firearms for their private, civilian use," the judge said.

Policy Concerns

Curbing gun control measures is also bad policy, Judge Gerstein wrote, noting that in the seven months since *Parker* was handed down, firearms had been used in 750 robberies and 520 assaults within the District of Columbia. Also there have been 111 murders within the district during that time, he noted, but it is unclear how many involved the use of firearms. Nationwide statistics show that firearms were used in 68 percent of the murders reported in 2006, the judge said.

In urging the court to follow *Parker* Mr. Handsome disregards "the tens of thousands of civilian deaths caused each year by firearms," he wrote.

He concluded, "The cause of these deaths, the private ownership of weapons unrelated to a 'well-regulated' militia, was not protected by the Second Amendment when it was drafted, and it is not today."

Assistant District Attorney Cyril Thomas handled the case for the Brooklyn District Attorney's Office.

Mr. Handsome was represented by Robyn Lear of the Legal Aid Society.

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Judge Gerstein