

RECEIVED

FILED

JUL 24 2008 UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT JUL 24 2008

LEONARD GREEN, Clerk

LEONARD GREEN, Clerk

NORMAN DAVID SOMERVILLE,
Petitioner-Appellant,
V.
UNITED STATES OF AMERICA,
Respondent-Appellee.

Case No. 08-1169
District Case No. 07-00773

Memorandum in Support of Cert Appealability
MOTION FOR DECLARATORY JUDGEMENT

Comes now, petitioner-appellant Norman David Somerville, proceeding pro se, moving this honorable court pursuant to Fed. Rules of Civil Procedure 57, for a Declaratory Judgment in the case captioned above.

Petitioner-Appellant, hereinafter "Somerville", is presently before this Honorable Court of Appeals seeking review of three issues appealed in a 28 USC § 2255 proceeding. In the intervening time since Somerville's original conviction and the appeal of his § 2255 Motion, the U.S. Supreme Court has issued an Opinion in the case of D.C. v. Heller (07-290) (June 26, 2008), which is reasonably understood to impact the standing Sixth Circuit precedents concerning Somerville's rights under the Second Amendment. Since this intervening change in the law has occurred while Somerville's case is pending with this Court of Appeals, he asks this court to exercise its power under the Declaratory Judgments Act, to declare Somerville's rights in this controversy as they may now be understood by virtue of Supreme Court Opinions.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

(bold emphasis added)

Cited from CASE, CONTROVERSY, OR ACTUAL CONTROVERSY, 40 L.Ed.2d 783, 788. "The mere possibility of adverse collateral legal consequences of a criminal conviction has been held sufficient to render litigation involving such a conviction a justiciable case or controversy." Id. at 789.

Somerville asks this Court of Appeals to answer the following narrowly tailored Federal Question:

Under the pre-existing Individual Rights secured and protected by the Second Amendment to the Constitution of the United States, does an individual have the Right to Keep and Bear, i.e. possess and use, Arms or Firearms suitable for the Lawful Purpose of serving as or preparing to serve as a part of the unorganized Militia of the People?

This Question does not seek to address the scope of what Arms are protected. This Question seeks to address the linkage between the Individual Right which the Supreme Court confirmed in D.C. v. Heller with a specific Lawful Purpose which has been previously denied to exist by this Court of Appeals. Prior to this time, the Congress had made a number of specific findings,

codified at Title 18 USC § 901(b) by Act of June 19, 1968,
P.L. 90-351, Title IV, § 901, 82 Stat. 225:

The Congress further hereby declares that the purpose of this title [18 USCS §§ 921 et seq. and notes] is to cope with the conditions referred to in the foregoing subsection, and that it is not the purpose of this title [18 USCS §§ 921 et seq. and notes] to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity, and that this title [18 USCS §§ 921 et seq. and notes] is **not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes,...**

(bold emphasis added)

The Congress has also codified "lawful purposes" in the Protection of Lawful Commerce in Arms Act at Title 15 USC § 7901(b)(2):

To preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive recreational shooting.

The Court of Appeals itself has referred to the militia of the people as the "sedentary militia"; see U.S. v. Warin 530 F.2d at 106. The Federal Question presented to this Court of Appeals is posed to clarify that the possession and use of firearms or other Arms suitable for militia purposes is a Lawful Purpose for this Court's defined "sedentary militia" to keep and bear those Arms or firearms.

Somerville has a practical interest in the declaration sought as his defense and stated purpose for possessing the Arms he was convicted of possessing was for militia purposes as both a member of a 'private militia' organization known as the

Michigan Militia and concurrently as a member of the "sedentary militia". The relief sought by answering this Question with the admission that possession and use of firearms for purposes of the unorganized militia is in fact a Lawful Purpose to keep and bear Arms under the Second Amendment, will settle a substantial portion of the controversy involved in Somerville's claim that 18 USC § 922(o) is unconstitutional, and further establish his basis for making that claim.

It is appropriate for this Court to Answer this Federal Question of Law as Somerville was not a prior felon in possession of firearms at the time of his conviction under 18 USC § 922(o)(1), nor was he concurrently convicted of any other crime, and he did raise the Second Amendment as a defense in his own pro se motion to dismiss in his initial district court proceedings.

The Supreme Court made clear in its Heller opinion that the Second Amendment protects an individual right which is not limited to membership in a government run select militia. Citing Holdings paragraph 1(f):

None of the Court's precedents forecloses the Court's interpretation. Neither United States v. Cruikshank, 92 U.S. 542, 543, nor Presser v. Illinois, 116 U.S. 252, 264-265, refutes the individual-rights interpretation. United States v. Miller, 307 U.S. 174, does not limit the right to keep and bear arms to militia purposes, but rather limits the type of weapon to which the right applies to those used by the militia, i.e., those in common use for lawful purposes.

Somerville's Federal Question asks this court to Answer whether or not statutes and case law which qualify possession or use of Arms or firearms for "lawful purposes" or "other lawful activity"

are understood to include the individual possession and use of Arms or firearms by the people for "unorganized militia" and "sedentary militia" purposes as Lawful Purposes.

While there may exist other adequate remedies which Somerville may make use of to obtain this Answer, this possibility does not preclude this Court's grant of declaratory relief. The interests of judicial economy are best served by this Court's Answer to this narrowly tailored Question. The best interests of justice are served by clarifying this matter prior to returning Somerville's case to the district court for further proceedings or granting restoration of his direct appeal rights. The Court's Answer to this Question resolves a substantial portion of Somerville's claim that 18 USC § 922(o) is unconstitutional under the Second Amendment and allows further proceedings to focus upon the scope of Arms or firearms protected by the Second Amendment.

WHEREFORE, for the foregoing reasons and purposes, it is prayed that the Honorable Court will Answer this Federal Question.

Dated: _____

Respectfully submitted:

Norman David Somerville
Petitioner-Appellant, pro se
11612-040 Yunity
Federal Medical Center
P.O. Box 14500
Lexington, KY 40512-4500

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NORMAN DAVID SOMERVILLE,)
)
 Petitioner-Appellant,)
) Case No. 08-1169
 V.)
) District Case No. 07-00773
 UNITED STATES OF AMERICA,)
)
 Respondent-Appellee.)

CERTIFICATE OF SERVICE

Pursuant to the provisions of Title 28 USC § 1746, the undersigned Certifies that he served a copy of the attached MOTION FOR DECLARATORY JUDGEMENT upon the Respondent-Appellee by sending same via first class U.S. Mail with postage prepaid and addressed to:

Michael L. Schipper
United States Attorney's Office
330 Ionia, NW, 5th Floor
P.O. Box 208
Grand Rapids, MI 49501-0208

on the _____ day of July, 2008.

Norman David Somerville

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NORMAN DAVID SOMERVILLE,)
)
 Petitioner-Appellant,)
) Case No. 08-1169
 v.)
) District Case No. 07-00773
 UNITED STATES OF AMERICA,)
)
 Respondent-Appellee.)

MEMORANDUM IN SUPPORT OF
MOTION FOR DECLARATORY JUDGEMENT

Comes now, petitioner-appellant Norman David Somerville, proceeding pro se, with his Memorandum in Support of the Motion For Declaratory Judgement pursuant to Federal Rules of Civil Procedure 57.

Petitioner-Appellant, hereinafter "Somerville", filed a Motion For Declaratory Judgement with the Court of Appeals on July 24, 2003, which the Court Clerk has docketed as a "MEMORANDUM IN SUPPORT" of the previously filed motion. The Court Clerk has apparently also altered the face of the same Motion with that misconstruction. Somerville objects to the Clerk's alteration of the Motion filed and its representation in the Court Docket as a "Memorandum".

The Court Docket in the instant case contends that a MOTION to grant a certificate of appealability was filed on 02/27/2008; this is incorrect. The MOTION FOR EXTENSION OF TIME TO PAY FILING FEE AND FOR EXTENSION OF TIME TO FILE MOTION FOR REASONS TO GRANT CERTIFICATE OF APPEALABILITY, filed on 02/27/2008, did NOT purport

in any way, to be a Motion to Grant a Certificate of Appealability; this Motion expressly described that the U.S. Mail had been obstructed in its delivery to Somerville and he was only then, as of February 25, 2008, made aware by letter from the Court that he had the right to file such a Motion. Somerville asked for extra time to have the \$455.00 filing fee paid and for extra time to file a Motion to Grant a Certificate of Appealability. Due to the extraordinary efforts of Somerville family members the \$455.00 filing fee was paid on February 27, 2008, and the Motion for Extension of Time was rendered moot as concerned the payment of the filing fee.

Somerville then filed a MOTION TO STAY the proceedings in the instant case until the U.S. Supreme Court decided D.C. v. Heller (07-290). This Motion was granted on 03/21/2008.

After D.C. v. Heller was decided on June 26, 2008, Somerville timely filed a MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY with an attached MEMORANDUM IN SUPPORT OF MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY with attachment copies of other documents from the Record, with Certificate of Service dated June 28, 2008. The Court Docket currently records that only a MOTION was filed on 07/02/2008.

Somerville then filed a MOTION TO SUPPLEMENT MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY to add two documents from the Record to the previously filed Motion, with Certificate of Service dated July 5, 2008. This document is currently recorded in the Court Docket as a MEMORANDUM IN SUPPORT, filed 07/08/2008.

Somerville understands that the Court of Appeals has jurisdiction in the instant case under Title 28 USC § 2253. Nothing in the language of that statute precludes the normal operation of Federal Rules of Civil Procedure. Title 28 USC § 2253(c)(2) states:

- (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

The MOTION FOR DECLARATORY JUDGEMENT asks the Court to Answer a Federal Question designed to address the new circumstances regarding the constitutional rights which Somerville should have had respected by the U.S. District Court for the Western District of Michigan when he filed his own pro se Motion to Dismiss. As the Supreme Court made clear in their opinion in the Heller case, all their prior opinions were consistent with the Individual Rights interpretation of the Second Amendment, including the interpretations in force from the U.S. v. Miller case (307 U.S. 174)(1939).

The District Court denied Somerville's § 2255 Motion because there was no intervening Supreme Court ruling overturning the Sixth Circuit's erroneous precedents regarding the Second Amendment. Somerville's MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY and its accompanying Memorandum argue that the Sixth Circuit's Collective Rights Theory precedents are overturned and the condition has been met to have Somerville's Second Amendment issues heard in a § 2255 Motion or in a new Direct Appeal.

The Motion For Declaratory Judgment is seeking clarification of the Court of Appeal's corrected interpretation of the Second

Amendment. As presented in the Motion For Declaratory Judgement, the Court's Answer to this Federal Question will resolve a major portion of the underlying issues regarding the Second Amendment challenge to the constitutionality of 18 USC § 922(o).

In Support of Somerville's position on the Federal Question presented in the Motion for Declaratory Judgement, the following argument is offered.

ARGUMENT

The opinion and the Holdings in the Heller case confirm that protection of the citizens' militia thru preservation of their ancient right to keep and bear arms was the primary purpose for codification of that right into the Second Amendment, and that from that primary purpose flowed other traditionally lawful purposes such as self-defense and hunting. The Holdings also confirm that laws which make it impossible for citizens to use arms for the core lawful purposes are unconstitutional.

Quoting from the Heller opinion Section II.A.3.:

"It was understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down.

It is therefore entirely sensible that the Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. But the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right—unlike

some other English rights—was codified in a
written Constitution."
(underline emphasis added)

This opinion shows that "the purpose" for which the Second Amendment was codified was to prevent elimination of the citizens' militia. "The purpose" of keeping and bearing Arms for purposes of the citizen's militia must be understood to be a Lawful Purpose, or the Court would now have to claim the Second Amendment was codified to protect an "unlawful purpose."

"The reason" this ancient right was codified was to prevent the Federal Government from destroying the citizens' militia by taking their Arms away; but this was not "the only reason" that Americans "valued" the ancient right, as it also provided for keeping and bearing Arms for the lesser and inherently included purposes of self-defense in the home and for hunting. The purpose of maintaining the citizens' militia was the superior lawful purpose of the Second Amendment from which other purposes for the Arms protected were "valued."

The Heller court's Holdings uphold their opinion in United States v. Cruikshank 92 U.S. 542. The Heller opinion states of the Cruikshank opinion: "We described the right protected by the Second Amendment as "'bearing arms for a lawful purpose'". In Heller footnote 22, it is further stated of Cruikshank:

"...the Court stated that "The second amendment declares that it [i.e., the right of bearing arms for a lawful purpose] shall not be infringed."
92 U.S., at 553."

If the Supreme Court opinion in Cruikshank is to be respected, as

specifically upheld in Heller, then keeping arms for a lawful purpose shall not be infringed, according to these two opinions.

Holdings paragraph 3 in Heller states:

"3. The handgun ban and the trigger-lock requirement (as applied to self-defense) violate the Second Amendment. The District's total ban on handgun possession in the home amounts to a prohibition on an entire class of "arms" that Americans overwhelmingly choose for the lawful purpose of self-defense. Under any of the standards of scrutiny the Court has applied to enumerated constitutional rights, this prohibition—in the place where the importance of the lawful defense of self, family, and property is most acute—would fail constitutional muster. Similarly, the requirement that any lawful firearm in the home be disassembled or bound by a trigger lock makes it impossible for citizens to use arms for the core lawful purpose of self-defense and is hence unconstitutional."
(underline emphasis added)

Similarly, a prohibition on an entire class of arms that Americans would (and do) choose for the lawful purposes of the militia should fail constitutional muster since it makes it impossible for citizens to use arms for the preeminent core lawful purposes of the citizens' militia no matter where the importance of that lawful defense is most acute.

The Heller opinion further supports this position in Section II.A.1.(b). with its ridicule of the absurdity of limiting the right of the militia to carry arms for the purpose of killing game:
game:

"If "bear arms" means, as we think, simply the carrying of arms, a modifier can limit the purpose of the carriage ("for the purpose of self-defense" or "to make war against the King"). But if "bear arms" means, as the petitioners and the dissent think, the carrying of arms only for military purposes,

one simply cannot add "for the purpose of killing game." The right "to carry arms in the militia for the purpose of killing game" is worthy of the mad hatter. Thus, these purposive qualifying phrases positively establish that "to bear arms" is not limited to military use."

(underline emphasis added)

This opinion shows that the right to bear arms for militia/military use is included in the Second Amendment's protection. It further shows that the Supreme Court believes if the right to keep and bear arms for militia purposes is limited to arms for the purpose of killing game, such a limitation is worthy of the Mad Hatter. It is just as absurd to claim that the militia exists for the purpose of killing game as it is to claim that the militia may only exist armed with arms whose purpose is that of killing game, for the net result is the same: a militia whose only rational function could be that of killing game. A statute which bans the citizens' militia from keeping arms in common use for lawful purposes by a State's select militias makes it impossible for citizens to use arms for the preeminent core lawful purposes of the citizens' militia. Citing Heller Holdings paragraph 1.(b).:

"The Antifederalists feared that the Federal Government would disarm the people in order to disable this citizens' militia, enabling a politicized standing army or a select militia to rule. The response was to deny Congress power to abridge the ancient right of individuals to keep and bear arms, so that the ideal of a citizens' militia would be preserved."

(underline emphasis added)

Disarming the citizens' militia of their effective Arms has effectively disabled the citizens' militia, enabling a politicized standing army and a select militia to rule. Congress was specifically denied the power to abridge the ancient right of individuals to keep and bear arms for the lawful purposes of the citizens' militia so that the ideal of the citizens' militia would be preserved.

It is therefore contended that the Court of Appeals should Answer the Federal Question with an opinion that confirms that keeping and bearing arms by individual citizens for the purposes of the citizens' militia is a lawful purpose, which, according to existing Supreme Court precedent in U.S. v. Cruikshank, is a lawful purpose which shall not be infringed.

Somerville attaches a photocopy of the first page of the Motion For Declaratory Judgement returned to him by the Court Clerk, mischaracterized and altered to purport to be "Memorandum in Support of Cert Appealability".

Dated: August 8, 2008

Respectfully submitted,



Norman David Somerville
Petitioner-Appellant, pro se
11612-040 Yunity
Federal Medical Center
P.O. Box 14500
Lexington, KY 40512

