To be argued by:
James Ostrowski

Time requested:
Ten minutes

Supreme Court of the State of New York

Appellate Division, Fourth Department

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

vs.

BENJAMIN M. WASSELL,

Defendant-Appellant.

Chautauqua Co. Ind. No. 13-373

BRIEF OF APPELLANT

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   Answer of the court below: Issue not raised.

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   Answer of the court below: No.

7. Are the statutes the defendant was convicted of violating unconstitutional under the Second Amendment?

   Answer of the court below: No.

PROCEDURAL HISTORY

The defendant was indicted on September 11, 2013 and charged with the following crimes:

1. Criminal possession of a weapon in the third degree (Penal Law §265.02(7))
2. Criminal possession of a firearm with intent to sell in the third degree (Penal Law §265.11(2))
3. Criminal possession of a firearm in the third degree (Penal Law §265.11(1))
4. Transporting a dangerous instrument (Penal Law §265.10(2))
5. Unlawful activity with a dangerous weapon (Penal Law §265.10(3)

A Huntley hearing was held on February 20, 2014.

A jury trial was held on March 4, 5, 6, 7 and 10, 2014.

Counts 4 and 5 of the indictment were dismissed by the court prior to deliberations. [843:10-12]

The jury deliberated for parts of two days and a total of twelve hours.

On March 10, 2014, the defendant was convicted of criminal possession of a weapon in the third degree (PL §265.02(7)), criminal possession of a firearm with intent to sell in the third degree (PL §265.11(2)), and criminal possession of a firearm in the third degree (PL §265.11(1))

On May 30, 2014, the defendant was sentenced to five years probation and a $375 fine. [19-20]

The defendant filed a notice of appeal on June 16, 2014. [1]

STATEMENT OF FACTS

The defendant, Benjamin Wassell served two tours in Iraq as a Marine. [87:16-18 (All citations are to the Record on Appeal unless otherwise noted.] He was injured in two IED blasts. [755:5-757:2] He suffered a knee injury and a brain injury (traumatic brain injury—TBI), post-concussion syndrome and PTSD. [759:4-6] Apparently, as a result, he has short term memory problems. [784:27-28]

The current controversy begins at JJ's Gun shop where Wassell took a rifle—not the subject of the prosecution--to show the owner, Jeffrey Jankowiak. The episode was videotaped on a security camera without audio. The parties dispute what was said and done during the videotaped transaction. The defendant denied that he was trying to sell the rifle to Jankowiak. [764:13-18] Rather, he went because he was intending to get a Federal Firearms License (FFL) and wanted to discuss how to make modifications to rifles to make them more useful to hunters. [764:21-765:6] He stated that the two got into a discussion about whether the rifle stock had to be pinned by a manufacturer as opposed to a gunsmith. [764:24-725:4] He stated that he made sure the stock was pinned and he denied that the video showed him moving the stock back and forth. [766:7-20] He had previously had the rifle on public display at another gun store. [766:17-20]

Jeffrey Jankowiak was the first prosecution witness. He testified that he is a gun shop owner and gunsmith. [486:12] Without objection, he testified about his legal opinion on a number of issues. He testified about how long "assault weapons" had been banned. [489:13-15] He stated that a gun possessed by the defendant on a prior occasion was "not legal in New York State."

[500-b:8-9; 526:25-527:11] He testified that the defendant's gun can only be sold to law enforcement. [500-b:22; 501:4-6] and that he told the defendant he "can get in trouble for selling a gun like that." [502:20-23] He further stated that the "bayonet lug" on the defendant's gun would make it illegal in New York [503:16-18], and that he was concerned about losing his license if he didn't inform on the defendant. [506:12-16; 508:23-509:4] He stated that he told the State Police the defendant has an illegal gun. [506:21-23] He testified about which weapons must be registered under the SAFE Act [523:17-524:4], and that the SAFE Act does not legalize previously illegal guns. [524:19-23] He also testified about the definition of illegal rifles prior to the SAFE Act. [524:24-525:2]

Regarding the interaction with the defendant, he stated that the defendant wanted to sell him a rifle. [490:19-20] He stated that the defendant's rifle had a collapsible stock, pistol grip, muzzle break and bayonet lug. [500-a:5-8; 500-b:10-19]

Joel Catuzza testified that he is a State Police Investigator. [529:74-10] He stated that he received a tip that the defendant was attempting to sell an AR15 rifle. [531:16-22] He placed a call to the defendant on January 10, 2013 and left a voicemail stating that he was interested in purchasing an AR15. [532:11-16] The defendant left a return voicemail ten days later, stating that he had an AR15 for sale. [534:1-9] After the defendant left a second voicemail, Catuzza called him back. [537:17-25] The defendant stated that he had an AR15 for sale but didn't get into details. [538:22-25] After that, they exchanged text messages which are in evidence. [539:7-541:15]

At Catuzza's request, the defendant sent him a photo of the weapon. [544:3-19] Catuzza then determined that the manufacturer was Del-Ton. [544:20-25] In further texts, they agreed on a price, $1800, and a time and place to meet. [546:15-25] They met at Aunt Millie's

restaurant on Route 5 in the Town of Hanover on January 24, 2013, at about 2:00 p.m. [547:16-548:20] At that time, Catuzza purchased a Del-Ton AR15 rifle from the defendant for $1,900. [555:17-23; 559:5-7; People's Exhibit 7] Without objection, he described it as an "assault rifle." [556:101; 559:15-17; 569:10-12] He stated that it "has a telescoping stock, it has a pistol grip, it has a flash suppressor, and it has a bayonet mount." [556:14-16] The rifle could accept a detachable magazine as well. [556:20-22]

Catuzza claimed that the defendant said the rifle was illegal. [570:17-20] Catuzza testified without objection and based on hearsay that Del-Ton was formed in August of 1998. [572:24-573:4]

On cross-examination, he testified that "I sensed he was getting nervous throughout the deal and I tried to calm him down." [587:2-5]

On re-direct, the witness was allowed to opine that even if a weapon was legal in another state, it would *not* be legal in New York. [591:2-4]

State Police Investigator Dennis Gould testified that he arrested the defendant at his home on March 14, 2018. [593:23, et seq.] He refused the defendant's request to know what the charges were, telling him he wasn't sure. [596:7-11]

State Police Investigator Brian Snyder testified that he assisted with the arrest of the defendant. [615:21-24] He testified that the defendant asked the officers if he should get an attorney. They replied that they cannot give legal advice. [628:19-25] He also testified that he was not present during all the discussions between the defendant and Investigator Stacy Stawacki, who did not testify at the trial. [658:8-17]

Sandra Migaj, an investigator with the Attorney General's Office, testified that she was present when the defendant's statement [People's Exhibit 14] was taken after his arrest. [669:5-

9] She testified that the State Police had asked the Attorney General's Office to prosecute the case but provided no details or documentation. [677:19-25] She testified that Investigator Sawicki was in charge of the investigation of the defendant. [689:14-19] On redirect, she expressed her legal opinion without objection that the Attorney General's Office could prosecute since they had been requested to do so by a state agency. [690:16-20] She also expressed her legal opinion that an AR15 taken from the defendant's home was not illegal. [694:14-15]

Sergeant Lawrence Dorchak of the State Police testified as a firearms expert who examined the rifle the defendant sold to the undercover officer. [694:20, et seq.; People's Exhibit 7] He test-fired the weapon and found it to be operable. [702:1, et seq.] Although he testified that he examined the rifle and described several features, he never stated that the weapon was "rifled" (had spiral grooves in the barrel). [702:17-705:10] He did testify that the rifle accepts a detachable magazine, has a muzzle brake, threaded barrel, pistol grip, adjustable stock and bayonet lug. [702:17-24] He testified that the rifle is a semiautomatic and that the "mechanism of the gun" reloads automatically, but did not testify as to the how the "mechanism" works. [703:11-20]

Without objection, he testified that the weapon was illegal under the Penal Law and called it an "assault weapon." [705:2-14; 708:18-21; 713:10-16] He gave his legal opinion that the SAFE Act did not make "a previously-illegal gun legal." [708:25-709:2] He further gave his legal opinion that a pistol permit cannot cover such a weapon. [710:1-6] His written report was admitted into evidence without objection. [708:11-17] The report, People's Exhibit 19, states:

> "Item # 1 is an 'Assault Weapon,' as defined by section 265.00 sub 22(a)(i)(ii)(iii)(iv) and therefore further defined as a 'Firearm' by section 265.00 sub 3(e) of the New York State Penal Law. . . ."

The last prosecution witness was James Weissenburg, an investigator for ATF. [715:5, et seq.] He gave his legal opinion that a Federal Firearms License (FFL) is needed to buy and sell weapons. [717:8-12] He stated that even with an FFL, state laws would apply to limit potential sales in those states. [718:16-23] He stated that he did not find the defendant's name in the database of FFL licenses. [719:13-21]

After the People rested, defense counsel made a brief motion to dismiss that was denied. [727:15-728:14]

The defense called two witnesses, the defendant and the defendant's wife.

Jacqueline Wassell testified as to the circumstances of the defendant's arrest and the search of their home. [729:11, et seq.]

The defendant testified he served two tours in Iraq as a Marine. [751:17-18] While there, he was in two IED blasts. [755:5-8] As a result, he suffered a knee injury and traumatic brain injury including post-concussive syndrome and PTSD. [759:1-6]

He testified that he brought a rifle to JJ's Gun Store. [763:17-22] He told Jankowiak that he intended to apply for an FFL license and make rifles for hunting. [764:21-24] They got into a discussion about the rifle stock and whether it needed to be pinned by a gunsmith or manufacturer. [764:24-765:4] They also discussed the SAFE Act. [765:23-25] He denied that the video [People's Exhibit 1] showed that the stock of his rifle moved. [766:12-20]

The defendant testified that he was contacted by an individual about buying a rifle in January, 2013. [766:23-767:2] At that time, the SAFE Act had passed and he was "getting a lot of different information from a lot of different people." [768:22-24] He was told by a gun shop owner that "any weapon that I previously owned prior to the enactment of the SAFE Act was legal as long as I had registered it by April." [768:25-769:7] He stated that the rifle in evidence

was purchased in Pennsylvania where it was legal at that time and in that state, but it needed to be made New York compliant. [770:2-771:14] He stated, "I told him I couldn't [take it to NY] because it wasn't New York compliant." [771:10-11]

He testified that because the new buyer was referred to him by Jeffrey Jankowiak, who was a law-abiding gun dealer, he assumed "that the person who he sent to me was a legal person to own the rifle." [774:7-14] He further testified that when he met with Officer Catuzza:

> "At that meeting we discussed the rifle. And given the fact that I was still unsure about the laws under the SAFE Act, I recommended to him at some point that he take the rifle to a gunsmith and have it made New York compliant, whatever that entailed. My opinion or my understanding of the SAFE Act was that if he was not a person lawfully allowed to possess that rifle as it was, he would have to have the stock pinned, the compensator pinned and the bayonet lug removed." [775:2-10]

The defendant stated that he believed the sale was lawful because:

> "under the SAFE Act there's a grandfather clause in there that states that if you possess legally this weapon prior to the enactment of the SAFE Act, then you were legally allowed to possess it provided that you registered it by April, or dispose of it by April out of state to a person legally authorized to possess it." [777:14-19; see also, 808:16-21]

With respect to his interrogation, he testified that:

> "I said well, do I need a lawyer at this point. I mean, I have no idea what I'm being charged with. You know, should I have a lawyer? How serious is this? What's going on here? And she said we'll get into that." [783:2-5]

He further testified that he told the police: "I think that I should have a lawyer." [783:22-23; 785:1-5] While denied a lawyer, he continued answering questions because of his short-term memory problems. [784:27-28]

Regarding his written statement, the defendant denied that he had had an opportunity to review it before signing. [785:13-23]

The defendant further denied any intention to violate New York State law. [788:7-9]

On redirect, he stated: "the law was confusing, and I tried multiple times, and based on the information I was given, I was under the impression there was no violation taking place." [815:15-18]

At the close of proof, the court denied a motion for a missing witness instruction with respect to lead investigator Sawicki. [821:9-24] The court also denied a brief motion to dismiss. [822:1-11]

During jury instructions, the terms "semiautomatic" and "rifle" were not explained or defined and there was no effort to explain the statutory definition of "semiautomatic." The judge simply stated: "An assault weapon means a semi-automatic rifle that has an ability to accept a detachable magazine . . ." [859:22-25] Nor did the judge explain the SAFE Act's grandfather clause or what the pre-SAFE Act statutes prohibited.

The court instructed the jury: "Under our law, with certain exceptions not applicable here, a person has no legal right to possess a firearm, alleged to be an assault weapon . . ." [865:21-24] The court later explained: "Under our law, with certain exceptions not applicable here, a person has no right to sell, exchange, give or dispose of a firearm to another person." [866:4-7]

The jury sent many notes to the court during deliberations, requesting instructions and noting a possible hung jury. [1010, et seq.]

Court exhibit 2 stated:

> "—The defendant stated that the SAFE ACT states that a weapon legally possessed before the SAFE ACT was implemented would be legal in NYS if registered by April the SAFE ACT does not specify that the weapon must be legally possessed in NYS, only that it must be legally possessed.
>
> "The defendant indicated that the weapon legally possessed in another state meets the requirements of the SAFE ACT. Show where the prosecution proved that a

weapon legally possessed in PA, prior to Jan 15, will not be legal in NYS under the SAFE ACT if registered by April.

"—what is the definition of criminal possession of a weapon (Does exchange of money give you legal possession.)"

Court Exhibit 7 stated:

"Can we have a copy of the SAFE ACT that was presented. Just the page that was exhibited.

"Can we have a copy of Ben's testimony when questioned by prosecution regarding SAFE ACT?

"Stuck at 11:1"

Court Exhibit 12 stated:

"We know the Grandfather Clause of the SAFE Act does not apply to this case. However, because it (sic) Ben's defense we feel the ~~law~~ ACT/clause should be explained to us." [1025]

Court Exhibit 13 stated:

"we need clarification on how to legally purchase an out of state weapon. What does the PA seller of the weapon have to do prior [symbol unclear] after the sale? What qualifications does the seller need? We need to hear the testimony from the ATF investigator.

"-What does the buyer legally have to do to bring the weapon into NYS?" [1026]

Exhibit 13 reached the court before the court had a chance to address Exhibit 12 so the court addressed both notes at the same time.

Outside the presence of the jury, the trial court stated:

"[M]y sense of that is that I don't think I should be trying to explain the law to them. If there's evidence with respect to what the law says, they can consider that. But for me to try to interpret what the law -- because that's going to be the next question, what does that mean. And as I've indicated, it appears to me that the way the law is written in the first place is confusing because it refers to, you know, previous or other paragraphs and subsections. And by the time we're done, we might as well just hand them the Penal Law. So I don't see the purpose in that. And I'm not going to explain to them the act or any clause." [937:15-938:2]

Addressing Note 13, the court stated:

“All right, obviously, I can't answer all those questions and nobody can. The evidence is the evidence. We didn't have any evidence about Pennsylvania law, nor do we need to. And I've already told them that Pennsylvania law doesn't really apply in this case. The question concerning what does the buyer legally have to do to bring the weapon into New York State, I don't know if there's any evidence about that. The ATF whatever he is, investigator, may have touched on that. Does anybody recall anybody else talking about that?” [938:14-24]

He told the jury:

“Okay now, your notes um, first note you sent said we know the grandfather clause of the SAFE Act does not apply to this case. And then your next comment is however, because it's Ben's defense, we feel the act or clause should be explained to us. I'm not sure exactly what that means. I don't think it would be helpful for me to read the law to you. If it doesn't apply, if that's your conclusion, then it really only comes into play as part of the Defendant's knowledge or apparent knowledge or belief, right? I think that's what you're saying to me. And I'm going to address that in a minute. You sent the second note out, and I think you're going at the same thing, you're trying to determine whether or not he either legally possessed it or knowingly possessed it, or knowing possession came into play at all. Because of your questions. We need clarification on how to legally purchase an out of state weapon. Well, what does the PA seller of the weapon have to do prior to and after the sale? What qualifications does the seller need? All of those questions may be interesting, but they really have nothing to do with this case, okay. The law in Pennsylvania is the law in Pennsylvania. And frankly, I don't know the answers to them anyway. The only thing that I could tell you is if it's in the evidence presented in this case, you can consider it. If it's not in the evidence, then you can consider that as well. There's no evidence of that. So I can't answer those questions. Likewise, the question what does the buyer legally have to do to bring the weapon into New York State. I take it that's why you asked for the ATF investigator's testimony, which was just read to you, so you can pretty much heard the answer to that question. And again, my response to your question is if it's in the evidence, you can consider it. I can't tell you what I think the law of the State of New York or Pennsylvania or anywhere else is if it's not in evidence or pertinent to this case. What I can tell you and what I will reiterate to you -- I suppose with respect to the grandfather clause, I don't know -- I think there's testimony which talks about whether or not the grandfather clause could make what was previously an illegal weapon legal. You can look for that or ask for that if you want it.” [941:13-943:7]

After that instruction, the jury reached a verdict in 12 minutes. [1005 (jury exits at 12:30 p.m.); 1027 (verdict at 12:42 p.m.)] The jury found the defendant guilty of:

1. Criminal possession of a weapon in the third degree (PL 265.02(7));

2. Criminal possession of a firearm with intent to sell in the third degree (PL 265.11(2)); and,

3. Criminal possession of a firearm in the third degree (PL 265.11(1))

The Elements of the Charged Crimes.

Criminal Possession §265.02(7)

Penal Law §265.02(7) states: "A person is guilty of criminal possession of a weapon in the third degree when . . . (7) Such person possesses an assault weapon. . . " While that definition seems straightforward, when all the cross-references are considered, the statute turns out to be quite convoluted and confusing.

"Assault weapon" is defined by Penal Law §265.00(22):

> "Assault weapon" means
> (a) a semiautomatic rifle that has an ability to accept a detachable magazine and has at least one of the following characteristics:
> (i) a folding or telescoping stock;
> (ii) a pistol grip that protrudes conspicuously beneath the action of the weapon;
> (iii) a thumbhole stock;
> (iv) a second handgrip or a protruding grip that can be held by the non-trigger hand;
> (v) a bayonet mount;
> (vi) a flash suppressor, muzzle break, muzzle compensator, or threaded barrel designed to accommodate a flash suppressor, muzzle break, or muzzle compensator;
> (vii) a grenade launcher; or
>
> ****
>
> (e) a semiautomatic rifle, a semiautomatic shotgun or a semiautomatic pistol or weapon defined in subparagraph (v) of paragraph (e) of subdivision twenty-two of section 265.00 of this chapter as added by chapter one hundred eighty-nine of the

laws of two thousand and otherwise lawfully possessed pursuant to such chapter of the laws of two thousand prior to September fourteenth, nineteen hundred ninety-four;

(f) a semiautomatic rifle, a semiautomatic shotgun or a semiautomatic pistol or weapon defined in paragraph (a), (b) or (c) of this subdivision, possessed prior to the date of enactment of the chapter of the laws of two thousand thirteen which added this paragraph;

(g) provided, however, that such term does not include: . . .
(iv) a rifle, shotgun or pistol, or a replica or a duplicate thereof, specified in Appendix A to 18 U.S.C. 922 as such weapon was manufactured on October first, nineteen hundred ninety-three. The mere fact that a weapon is not listed in Appendix A shall not be construed to mean that such weapon is an assault weapon;

(v) any weapon validly registered pursuant to subdivision sixteen-a of section 400.00 of this chapter. Such weapons shall be subject to the provisions of paragraph (h) of this subdivision;

(vi) any firearm, rifle, or shotgun that was manufactured at least fifty years prior to the current date, but not including replicas thereof that is validly registered pursuant to subdivision sixteen-a of section 400.00 of this chapter;

(h) Any weapon defined in paragraph (e) or (f) of this subdivision . . . that was legally possessed by an individual prior to the enactment of the chapter of the laws of two thousand thirteen which added this paragraph, may only be sold to, exchanged with or disposed of to a purchaser authorized to possess such weapons . . .

The term “semiautomatic rifle,” used repeatedly in the statute, is further defined as follows:

> "Semiautomatic" means any repeating rifle, shotgun or pistol, regardless of barrel or overall length, which utilizes a portion of the energy of a firing cartridge or shell to extract the fired cartridge case or spent shell and chamber the next round, and which requires a separate pull of the trigger to fire each cartridge or shell.” Penal Law 265.00(21)

> “’Rifle’ means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed metallic cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger.” *Id.* at (11).

Even if a weapon is an assault weapon pursuant to Penal Law §265.00 (22)(a), such would not be considered an assault weapon if it falls under the provisions of §265.00(22)(g)(v), which in turn incorporates Penal Law §400.00(16-a).

That statute reads as follows:

> 16-a. Registration. "(a) An owner of a weapon defined in paragraph (e) or (f) of subdivision twenty-two of section 265.00 of this chapter, possessed before the date of the effective date of the chapter of the laws of two thousand thirteen which added this paragraph, must make an application to register such weapon with the superintendent of state police, in the manner provided by the superintendent, or by amending a license issued pursuant to this section within one year of the effective date of this subdivision except any weapon defined under subparagraph (vi) of paragraph (g) of subdivision twenty-two of section 265.00 of this chapter transferred into the state may be registered at any time, provided such weapons are registered within thirty days of their transfer into the state. Registration information shall include the registrant's name, date of birth, gender, race, residential address, social security number and a description of each weapon being registered. A registration of any weapon defined under subparagraph (vi) of paragraph (g) of subdivision twenty-two of section 265.00 or a feeding device as defined under subdivision twenty-three of section 265.00 of this chapter shall be transferable, provided that the seller notifies the state police within seventy-two hours of the transfer and the buyer provides the state police with information sufficient to constitute a registration under this section. Such registration shall not be valid if such registrant is prohibited or becomes prohibited from possessing a firearm pursuant to state or federal law. The superintendent shall determine whether such registrant is prohibited from possessing a firearm under state or federal law. Such check shall be limited to determining whether the factors in 18 USC 922 (g) apply or whether a registrant has been convicted of a serious offense as defined in subdivision sixteen-b of section 265.00 of this chapter, so as to prohibit such registrant from possessing a firearm, and whether a report has been issued pursuant to section 9.46 of the mental hygiene law. All registrants shall recertify to the division of state police every five years thereafter. Failure to recertify shall result in a revocation of such registration.
>
> (a-1) Notwithstanding any inconsistent provisions of paragraph (a) of this subdivision, an owner of an assault weapon as defined in subdivision twenty-two of section 265.00 of this chapter, who is a qualified retired New York or federal law enforcement officer as defined

> in subdivision twenty-five of section 265.00 of this chapter, where such weapon was issued to or purchased by such officer prior to retirement and in the course of his or her official duties, and for which such officer was qualified by the agency that employed such officer within twelve months prior to his or her retirement, must register such weapon within sixty days of retirement."

Thus, the following elements of the offense can be gleaned with much difficulty from these statutes:

(1) Knowingly

(2) Possessing

(3) A semiautomatic

(4) Rifle

(5) Capable of accepting a detachable magazine

(6) That has one of the following features:

- (a) a folding or telescoping stock;
- (b) a pistol grip that protrudes conspicuously beneath the action of the weapon;
- (c) a thumbhole stock;
- (d) a second handgrip or a protruding grip that can be held by the non-trigger hand;
- (e) a bayonet mount;
- (f) a flash suppressor, muzzle break, muzzle compensator, or threaded barrel designed to accommodate a flash suppressor, muzzle break, or muzzle compensator; or a
- (g) a grenade launcher;

(7) if the weapon was possessed before the effective date of the statute (January 15, 2013), and was then not registered by April 15, 2014.

The remaining two counts allege criminal sale of a firearm. The defendant was convicted of violating each of the two subdivisions in the statutes:

> "A person is guilty of criminal sale of a firearm in the third degree when such person is not authorized pursuant to law to possess a firearm and such person unlawfully either:

(1) sells, exchanges, gives or disposes of a firearm or large capacity ammunition feeding device to another person; or
(2) possesses a firearm with the intent to sell it." Penal Law §265.11

Since the statute requires proof of unauthorized possession of the firearm plus proof of a sale or possession with intent to sell, a conviction would initially require proof of the seven elements of unlawful possession set forth above with respect to criminal possession of a weapon in the third degree.

ARGUMENT

I. THE JUDGMENT SHOULD BE REVERSED BECAUSE THE ATTORNEY GENERAL HAD NO APPARENT AUTHORITY TO PROSECUTE THE CASE.

This case was prosecuted from start to finish by the New York Attorney General. [See, Indictment, 5-7]. In the absence of explicit authority, the Attorney General lacks the authority to prosecute crimes. *People v. Gilmour*, 98 N.Y.2d 126 (2002). Although the prosecutor alleged that the State Police asked the Attorney General to prosecute the matter, [105, paragraph 29(a)(ii)], there is no proof of such a request in the record. An employee of the Attorney General's office gave her unqualified legal opinion about how "the Attorney General's Office is able to become the prosecutor in an investigation," but provided no details or documentation. [690:16-21; see also, 142:23-143:1] In the absence of any apparent authority to prosecute this case, the judgment should be vacated and the indictment dismissed.

II. THE COURT ERRED IN INSTRUCTING THE JURY.

The Criminal Procedure Law states that when a jury asks for assistance during deliberations, "the court . . . must give such requested information or instruction as the court deems proper." Section §310.30. The Third Department recently reviewed the principles respecting jury instructions during deliberations:

> "While the court possesses some discretion in framing its supplemental instructions, it must respond meaningfully to the jury's inquiries (People v Malloy, 55 NY2d 296, 301 [1982], cert denied 459 US 847 [1982]; People v Gonzalez, 293 NY 259, 262 [1944]). The sufficiency of a trial court's response is gauged by "the form of the jury's question, which may have to be clarified before it can be answered, the particular issue of which inquiry is made, the supplemental instruction actually given and the presence or absence of prejudice

to the defendant" (People v Malloy, 55 NY2d at 302). . . . where the court fails to give information requested, upon a vital point, a failure to respond may constitute error. The error is not so much that an instruction is inadequate in some legal respect, but that the jury, misled by or not comprehending the original charge, remains perplexed about the elements of the crime or the application of the law to the facts.. . . when a jury seeks multiple re-explanations, it is clear that it is having difficulty understanding the concept as originally explained (see People v De Groat, 257 AD2d 762, 763 [3d Dept 1999] " *People v. Telesford*, 149 AD3d 170 (3rd Dept. 2017) (conviction reversed in the interest of justice); see also *People v. Fludd*, 68 AD2d 409 (2nd Dept. 1979) (failure to properly respond to jury note led to reversal in the interest of justice).

A Second Circuit case, though applying federal law, has valuable insights about the importance of proper instructions during deliberations:

"A supplemental instruction can be a potent influence. A jury's interruption of its deliberations "to seek further explanation of the law" is a "critical moment in a criminal trial"; and we therefore ascribe "crucial importance" to a "completely accurate statement by the judge" at that moment. United States v. Lefkowitz, 284 F.2d 310, 314 (2d Cir.1960). "[T]he district court must exercise special care to see that inaccuracy or imbalance in supplemental instructions do not poison an otherwise healthy trial. This is especially true since the judge's last word is apt to be the decisive word." Tart v. McGann, 697 F.2d 75, 77 (2d Cir.1982) (internal quotation marks and citations omitted). Unaddressed or aggravated juror confusion is almost certainly not harmless if it pertains to a defendant's "only" or "primary" defense. See Velez, 652 F.2d at 262; Rossomando, 144 F.3d at 198." *United States v. Kopstein*, 759 F3d 168 (2nd Cir. 2014).

A. THE COURT FAILED TO ADEQUATELY RESPOND TO JURY NOTE 2 CONCERNING THE SAFE ACT, RESULTING IN JURY CONFUSION AND THE NEED FOR FURTHER REQUESTS TO THE COURT.

Court exhibit 2 stated:

"—The defendant stated that the SAFE ACT states that a weapon legally possessed before the SAFE ACT was implemented would be legal in NYS if registered by April the SAFE ACT does not specify that the weapon must be legally possessed in NYS, only that it must be legally possessed.

"The defendant indicated that the weapon legally possessed in another state meets the requirements of the SAFE ACT. Show where the prosecution proved that a

> weapon legally possessed in PA, prior to Jan 15, will not be legal in NYS under the SAFE ACT if registered by April.
>
> "—what is the definition of criminal possession of a weapon (Does exchange of money give you legal possession.)"
>
> The court responded:
>
> "THE COURT: Okay, I have your note. The first question that you're asking here about what the Defendant said the SAFE Act says. Something to the effect that a weapon legally possessed in another state meets requirements of the SAFE Act, and then you say show where the prosecution proved that. I don't want -- I don't know how to tell you this: Nobody is going to show you anything anymore.
> MS. LAVALLEE: Your Honor, I don't think they can hear.
> THE COURT: I'm sorry. At this point nobody can show you anything anymore. The proof is in. What's in is in. That's all the evidence that's here. What I gather from your question is what does the law say. The law you take from me, not from anybody else. Anybody who expressed a view as to what the law is is simply that, an opinion. But I gave you the law as it applies to New York State and the possession and sale of weapons here and so forth. So, whether the law In Pennsylvania is different really has no bearing on New York state law, and therefore there's no requirement that the People prove something about Pennsylvania law." [905:2-24]

Here, the jury implicitly sought legal guidance about the SAFE Act while not making an explicit request for such guidance. In response, the Court essentially disparaged the defendant's theory of the case by stating: "the law you take from me, not from anyone else." This ignores the fact that much of the prosecution case consisted of unqualified and prejudicial legal opinions from their witnesses. The court then went on to provide instructions which were inaccurate yet highly favorable to the prosecution. The court did not cite any authorities for its conclusion that Pennsylvania law is irrelevant, nevertheless, a perusal of the relevant Penal Law sections indicates there does not appear to be any basis for the court's conclusion to that effect.

The SAFE Act, amending Penal Law Section 400.00(16-a)(a) to provide for registration of weapons uses the term "possessed" and does not specify that such possession can only be inside New York State. Thus, to the extent that the court attempted to address the concerns of

the jury concerning the legal validity of the defendant's defense, its instructions were erroneous and prejudicial to the defense.

In any event, the failure of the court to adequately address the jury's concerns about the SAFE Act led the jury to send two more notes asking for clarification. See, Section II-B, below.

B. THE COURT FAILED TO ADEQUATELY RESPOND TO JURY NOTES 12 AND 13, RESULTING IN A GUILTY VERDICT SHORTLY THEREAFTER.

The jury sent many notes to the court during deliberations, requesting instructions and noting a possible hung jury. However, the final notes from the jury and the court's response led directly to a conviction.

Court Exhibit 12 states:

> "We know the Grandfather Clause of the SAFE Act does not apply to this case. However, because it (sic) Ben's defense we feel the ~~law~~ ACT/clause should be explained to us." [1025]

Court Exhibit 13 states:

> "we need clarification on how to legally purchase an out of state weapon. What does the PA seller of the weapon have to do prior [symbol unclear] after the sale? What qualifications does the seller need? We need to hear the testimony from the ATF investigator.
>
> "-What does the buyer legally have to do to bring the weapon into NYS?" [1026]

The second note reached the court before the court had a chance to address the first note so the court addressed both notes at the same time.

The first clause of the first note is very significant since the jury somehow "knew" the SAFE Act did not apply to the case without receiving any relevant legal instructions from the court. How did they know this?

Outside the presence of the jury, the trial court stated:

> "[M]y sense of that is that I don't think I should be trying to explain the law to them. If there's evidence with respect to what the law says, they can consider that. But for me to try to interpret what the law -- because that's going to be the next question, what does that mean. And as I've indicated, it appears to me that the way the law is written in the first place is confusing because it refers to, you know, previous or other paragraphs and subsections. And by the time we're done, we might as well just hand them the Penal Law. So I don't see the purpose in that. And I'm not going to explain to them the act or any clause." [937:15-938:2]

This was an amazing confession from a veteran and highly respected Judge. The law is so "confusing" that he could not coherently explain it to the jury. If that was the case, he should have dismissed the charges right then and there as violative of due process: you can't be convicted of failing to abide by an incomprehensible statute. See also, Complaint against the SAFE Act, Record at 73, paragraph 73 (state officials unable to explain the Act in clear terms.) Failing that, the Judge was obligated to do his best to explain the admittedly convoluted statute.

Addressing Note 13, the court stated:

> "All right, obviously, I can't answer all those questions and nobody can. The evidence is the evidence. We didn't have any evidence about Pennsylvania law, nor do we need to. And I've already told them that Pennsylvania law doesn't really apply in this case. The question concerning what does the buyer legally have to do to bring the weapon into New York State, I don't know if there's any evidence about that. The ATF whatever he is, investigator, may have touched on that. Does anybody recall anybody else talking about that?" [938:14-24]

Here again, the trial judge essentially admits that he cannot answer the jury's questions about the law.

Having promised to the attorneys that he would not try to explain the confusing law to the jury, the trial court delivered on that promise. He told the jury;

> "Okay now, your notes um, first note you sent said we know the grandfather clause of the SAFE Act does not apply to this case. And then your next comment is however, because it's Ben's defense, we feel the act or clause should be explained to us. I'm not sure exactly what that means. I don't think it would be

> helpful for me to read the law to you. If it doesn't apply, if that's your conclusion, then it really only comes into play as part of the Defendant's knowledge or apparent knowledge or belief, right? I think that's what you're saying to me. And I'm going to address that in a minute. You sent the second note out, and I think you're going at the same thing, you're trying to determine whether or not he either legally possessed it or knowingly possessed it, or knowing possession came into play at all. Because of your questions. We need clarification on how to legally purchase an out of state weapon. Well, what does the PA seller of the weapon have to do prior to and after the sale? What qualifications does the seller need? All of those questions may be interesting, but they really have nothing to do with this case, okay. The law in Pennsylvania is the law in Pennsylvania. And frankly, I don't know the answers to them anyway. The only thing that I could tell you is if it's in the evidence presented in this case, you can consider it. If it's not in the evidence, then you can consider that as well. There's no evidence of that. So I can't answer those questions. Likewise, the question what does the buyer legally have to do to bring the weapon into New York State. I take it that's why you asked for the ATF investigator's testimony, which was just read to you, so you can pretty much heard the answer to that question. And again, my response to your question is if it's in the evidence, you can consider it. I can't tell you what I think the law of the State of New York or Pennsylvania or anywhere else is if it's not in evidence or pertinent to this case. What I can tell you and what I will reiterate to you -- I suppose with respect to the grandfather clause, I don't know -- I think there's testimony which talks about whether or not the grandfather clause could make what was previously an illegal weapon legal. You can look for that or ask for that if you want it." [941:13-943:7]

After that instruction, the jury reached a verdict in 12 minutes. It is easy to see that the court's instructions were inadequate, confusing, favorable to the prosecution and prejudicial to the defense. *The court refused to give the requested instruction*; worse yet, the court, in so refusing, led the jury to believe that their concerns were irrelevant to the case. Most catastrophically, the trial court led the jury to credit the testimony of prosecution witnesses, who improperly instructed the jury on the law in a manner directly prejudicial to the defendant. In sum, the court refused to give legal instructions to the jury, allowed the prosecution to do so, then virtually endorsed that improper testimony!

The trial court told the jury "this case is not about the SAFE Act." [917:23] However, elsewhere, he later stated that he did not know how the SAFE Act changed the law; he only

knows the law as it stands at the time of the indictment. [918:19-22] The jury hasn't the slightest clue about any of that. They only know that the defendant relied on the SAFE Act in his defense, so the court basically asked the jury to disregard the defendant's defense, without providing any explanation as to why, and effectively led the jury to convict the defendant by failing to give proper legal instructions.

In his testimony, the defendant explicitly relied on the grandfather clause of the SAFE Act, which he believed, allowed him to register a weapon by April. [768:21-769:7; 776:11-14; 777:14-19; 808:5-809:1]

Thus, the trial court, *not even knowing how the SAFE Act amended the law*, told the jury, which also had no clue how the SAFE Act amended the law, that the SAFE Act, which was the basis for the defendants' theory of the case and his prime defense, was irrelevant to the case, essentially instructing the jury to take it on faith alone, in the absence of any actual explanation of the elements of the SAFE Act, to ignore the SAFE Act and thus, inevitably, find the defendant guilty, which is exactly what they did, twelve minutes later.

If that was the whole story, a reversal would be mandatory. But there's more and worse. Several prosecution witnesses, without any objection from the defense [see Point V-A, below], had previously instructed the jury that the SAFE Act did not provide any defense to the charges *and* the court endorsed that improper testimony.

Jeffrey Jankowiak, a gun store owner, testified that the SAFE Act does not legalize previously illegal guns. [524:19-23]. He further testified as to the definition of illegal rifles prior to the SAFE Act. [524:24-525:2] A State Police investigator testified that even if the rifle in evidence was lawful in another state, it would still be illegal in New York. [591:2-4]

[591:5-7] Another State Police investigator, Joel Catuzza, stated that the legality of a gun outside New York would not affect its legal status in New York. [591:2-7] State Police Sergeant Lawrence Dorchak opined that the SAFE Act did not make any previously illegal weapon lawful. [708:21-709:2]

In fact, the SAFE Act, as it amended Penal Law §265.00(22), defining "assault weapon," can easily be read to mean exactly the opposite of what the witnesses alleged. §265.00(22)(g) states that the term "does not include" . . . "(v) any weapon validly registered pursuant to subdivision sixteen-a of section 400.00. . ." That section refers back to 265.00(f), which speaks of a semiautomatic rifle defined in "paragraph (a) . . . of this subdivision….." Paragraph (a) in turn *includes* rifles with multiple banned features that would have been unlawful even before the SAFE Act!

Thus, while the court failed to discuss and explain the SAFE Act, several prosecution witnesses had already done so in a manner very damaging to the defense and contrary to the actual law. Worse yet, the trial court essentially endorsed the validity of that improper testimony:

> "I think there's testimony which talks about whether or not the grandfather clause could make what was previously an illegal weapon legal. You can look for that or ask for that if you want it." [943:4-7]

Finally, the trial court, in addition to all the above errors, compounded them by misconstruing the defendant's theory of the case and then dispatching it with an irrelevant instruction:

> "I guess what you're saying in this prosecution the Defendant has testified that he was essentially unaware that his conduct was unlawful in that he didn't know that it was unlawful to possess a weapon of that sort. Well, you know, there's the old legal adage -- and I charge you that as a general rule -- ignorance of the law is no defense. Person's not relieved of criminal liability because he engages in conduct

under a mistaken belief that it does not, as a matter of law, constitute an offense." [927:7-16]

On the contrary, the defendant was arguing that he was not guilty because the SAFE Act's grandfather clause, which the court refused to explain to the jury, allowed him time to register the weapon and avoid any criminal liability. What there is no excuse for is refusing to explain the law the defendant was relying upon to the jury in spite of their repeated requests. A reversal is mandatory in this instance.

C. THE COURT ERRED IN FAILING TO PROPERLY DEFINE THE TERM 'ASSAULT WEAPON" TO THE JURY.

The defendant was convicted of criminal possession of an "assault weapon" in the third degree. However, the court never fully and completely explained to the jury what that term means. [859:21-860:4] There are many layers and permutations to that error which are spelled out in separate subdivisions herein. Briefly, in addition to the jury instructions being fatally flawed, defense counsel failed to object to this lapse (see Point V-E, below); there was insufficient evidence of this offense (See Point IV, below); and finally, we contend that the properly defined offense is either unconstitutionally vague or obscure such that only experts in firearms could understand the definition and how to apply it, thus rendering the statute violative of equal protection of the laws and/or due process by imposing special criminal liability on some persons in an arbitrary manner. See, Point III, below.

The definition of "assault weapon" is legalistic, convoluted and obscure. "Assault rifle" is primarily a political, propagandistic and legal term which has no fixed meaning in common parlance and thus must be rigorously and precisely defined at trial. We start with Penal Law

§265.02(7) which refers to "assault weapon." That term is defined in Penal Law 265.00(22)(a) as a "semiautomatic rifle" which has at least one proscribed feature. That additional term, however, raises more questions than it answers.

Penal Law §265.00(21), states:

> "'Semiautomatic' means any repeating rifle, shotgun or pistol, regardless of barrel or overall length, which utilizes a portion of the energy of a firing cartridge or shell to extract the fired cartridge case or spent shell and chamber the next round, and which requires a separate pull of the trigger to fire each cartridge or shell."

The language "which utilizes a portion of the energy of a firing cartridge or shell to extract the fired cartridge case or spent shell and chamber the next round. . .", requires expert testimony to comprehend and also to establish whether any particular weapon is in fact a semiautomatic. See, Points III and IV, below.

The term "rifle" is defined as follows: "a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed metallic cartridge to fire only a single projectile *through a rifled bore* for each single pull of the trigger." Penal Law 265.00 (11) (emphasis added). Even if the terms that constitute this definition are terms that are widely understood among the general public, a highly dubious proposition we do not concede, to convict someone of an offense involving possession of a rifle, at a minimum the definition would have to be explained to the jury and proven through competent evidence,

In this case, the trial court failed to explain to the jury what any of these terms mean as defined in the Penal Law. Specifically, the terms "semiautomatic," and "rifle" were not explained or defined and there was no effort to explain the esoteric and obscure statutory definition of "semiautomatic" which would necessarily involve advanced engineering if not

scientific knowledge not possessed by the trial judge in any event. Rather, the judge simply stated: "An assault weapon means a semi-automatic rifle that has an ability to accept a detachable magazine . . ." [859:22-25]

The court also failed to instruct the jury about the statutory exclusion for registered weapons as described in the Statement of Facts on pages 17-18.

Because the court failed to properly instruct the jury as to the specialized statutory meaning of these key elements of the statute, the judgment should be reversed.

In *People v. Gray*, 151 AD3d 1470 (3rd Dept. 2017), the court refused to reverse in the interest of justice on this issue, however, there is a critical distinction in that case which makes that decision inapplicable here: as noted at Point IV, below, there was specific expert testimony in *Gray* that the statutory definition had been met. Also in that case, there was no claim of ineffective assistance of counsel. See Points V-C and E, below.

D. THE COURT'S INSTRUCTIONS AMOUNTED TO A DIRECTED VERDICT.

The court instructed the jury: "Under our law, with certain exceptions not applicable here, a person has no legal right to possess a firearm, alleged to be an assault weapon . . ." [865:21-24] The court later explained: "Under our law, with certain exceptions not applicable here, a person has no right to sell, exchange, give or dispose of a firearm to another person." [866:4-7] Though the court failed to explain what those exceptions were, it remains clear nevertheless that the jury was in effect being directed to find certain facts, namely, that no such exceptions existed.

The defendant has the right to trial by jury under both state and federal law. NY Constitution, Article I, §2; US Constitution, 5th and 14th Amendments. That being the case, the trial judge can never direct a jury to find any facts whatsoever. See, Prince, *Richardson on Evidence* (11th Ed. Farrell), §1-311. The Court of Appeals stated in 1910:

> "It was necessary for the People to establish by legal evidence the three elemental facts already pointed out, constituting the crime charged. The evidence introduced to prove these facts involved the credibility of witnesses. The plea of not guilty and the presumption of innocence make the credibility of every witness for the People in a criminal action a question of fact for the jury. Within the limits of sound discretion the court may discuss and comment upon that question, but cannot decide it, for that is the exclusive duty of the jury, established by the practice of many generations. The court cannot withdraw from them any controlling fact which depends upon the credibility of witnesses, even of the highest character and standing. No matter how conclusive the evidence was in the case before us, and assuming that it was wholly uncontradicted and that the inferences all pointed one way, each of the three fundamental facts was for the jury to pass upon, for if the court could take away one from them it could take away all, and thus direct a verdict, which is never allowed in a criminal case. While in a civil action, when there is no conflict in the evidence and no diverse inferences therefrom are possible within reason, the court may direct a verdict even in a case of the utmost importance, still in a criminal action this is not permitted by the law even in a case of the most trifling importance." *People v. Walker,* 198 NY 329, 334 (1910); see also, *People v. Brady,* 16 NY2d 186, 189-190 (1965)

III. THE STATUTES THE DEFENDANT WAS CONVICTED OF VIOLATING ARE VOID FOR VAGUENESS AND VIOLATE DUE PROCESS AND EQUAL PROTECTION OF THE LAWS.

There is a further problem with the definition of "assault weapon," beyond the mere failure of the court to properly define the term for the jury. Subdivision 22 of PL §265.00, refers to "semiautomatic." That term is defined as follows in subdivision (21):

> "Semiautomatic" means any repeating rifle, shotgun or pistol, regardless of barrel or overall length, *which utilizes a portion of the energy of a firing cartridge or shell to extract the fired cartridge case or spent shell and chamber the next round*, and which

> requires a separate pull of the trigger to fire each cartridge or shell." (Emphasis added)

This is clearly a definition that can only be understood by an engineer, physicist or perhaps manufacturer of weapons. Thus, the statute fails to give notice to "ordinary people" as to which weapons are "semi-automatic" and therefore fails to give fair notice as to the behavior prohibited by the statute. See, *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Even if a particular defendant was in fact a scientist or engineer who understands this definition, it would be a violation of equal protection of the laws to penalize him or her and allow more ignorant people to escape liability. See *Kolender v. Lawson*, *supra*, prohibiting statutes that "encourage arbitrary and discriminatory enforcement." The Supreme Court in that case was concerned about statutes such as this one that "allows policemen, prosecutors, and juries to pursue their personal predilections" by deciding which suspects have enough knowledge of firearms to prosecute them because they may have specialized knowledge required to understand the statute. Since the drafters of the statute were blissfully unaware that they were imposing criminal liability that required specialized expertise to even grasp, they of course provided no guidance in the statute for the police to determine who in the population has such expertise and can therefore be charged.

The defendant respectfully requests that the Court dismiss the charges as based on statutes that are void for vagueness and violative of due process and/or equal protection of the laws. There are few if any case citations which strike down similar statutes. Thus could well be because the statutes at issue are uniquely odious and unfair or that lawyers have simply not yet raised similar arguments in the past. Nevertheless, the defendant challenges these statutes as violative of the due process and equal protection clauses of the Fifth and Fourteenth Amendments and of Article I, §§6 and 11 of the New York State Constitution.

IV. THE CONVICTIONS WERE NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE BEYOND A REASONABLE DOUBT AND ARE AGAINST THE WEIGHT OF THE EVIDENCE.

Not only were the terms “semiautomatic” and “rifle” not explained to the jury, but there was no evidence presented to the jury that the weapon the defendant was charged with possessing was either a semiautomatic or even a rifle as defined by the statute. Finally, there was no evidence that the weapon was not lawful under the SAFE Act’s grandfather clause. See, Penal Law §400.00 (16-a); Point V-C, below; *People v. Ramos*, 19 NY3d 133 (2012). Defense counsel failed to move for dismissal on these grounds or make that argument to the jury on summation. Nevertheless, this Court may and should reach this issue in the interests of justice. See CPL §470.15[6][a]).

It is undisputed that all three charges depend on proof of possession of an assault rifle. [860:5] Thus, the failure of such proof required dismissal of all charges.

In *People v. Gray, supra*, the court affirmed a conviction against a claim of insufficient proof that the weapon was a semiautomatic because the prosecution presented detailed expert testimony that the statutory definition was met:

> “[A]lthough defendant makes much of the fact that a spring was a component of the process by which new rounds were chambered in the weapon, the presence of the spring in the magazine does not take defendant's rifle outside of the definition of a semiautomatic rifle. In this regard, both Powers and D'Allaird testified that defendant's rifle was a "self feed[ing]" or "automatically fed weapon," meaning that "once it's loaded it will fire as long as the trigger is pulled." D'Allaird further clarified that, in order to fire multiple rounds, one would "have to release and squeeze the trigger again and again and again. One trigger, one round." As to the precise manner in which each round was advanced, Zell explained, "[A]s the trigger is pulled and the projectile goes down through the barrel, the gases will then lock the bolt to the rear forcing . . . the spent casing to eject through the ejection port, which then locks the bolt[] to the rear, which then the magazine with a spring in it allows pressure for the bolt to go forward and inject another round into the weapon."

> "From Zell's and D'Allaird's testimony, it is clear that defendant's rifle "utilize[d] a portion of the energy of [the] firing cartridge . . . to extract the fired cartridge case . . . and chamber the next round" and, further, "require[d] a separate pull of the trigger to fire each cartridge" (Penal Law § 265.00 [21]), which places such rifle squarely within the definition of a semiautomatic/repeating rifle. Such proof, coupled with the testimony from various witnesses as to the manner in which defendant pointed and discharged his rifle and the spent 9 millimeter casing recovered from the scene, which was scientifically linked to the casings recovered when defendant's rifle was successfully test-fired, established — beyond a reasonable doubt — each of the elements of criminal possession of a weapon in the second degree and reckless endangerment in the second degree. As the jury's verdict is in accord with the weight of the evidence, we discern no basis upon which to disturb it." *Id.*

Since there was zero similar expert testimony in this case, the convictions should be reversed.

Because there was insufficient evidence to convict the defendant of any count of the indictment, the numerous errors outlined in this brief are not subject to harmless error analysis.

V. THE DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

The defendant was deprived of the effective assistance of counsel under state and federal law. US Const Amend VI; NY Const, Art. I, § 6; *Strickland v Washington*, 466 US 668 (1984); *People v Baldi*, 54 NY2d 137 (1981). Defense counsel made a number of errors, many of which were serious enough in and of themselves to merit reversal but also cumulatively deprived him of effective and meaningful representation and a fair trial. See, *Henry v. Poole*, 409 F.3d 48 (2d Cir. 2005**)**; *People v McCallum*, 162 AD3d 1740 (4th Dept. 2018)

A. DEFENSE COUNSEL ALLOWED WITNESSES TO STATE THEIR OPINIONS ABOUT THE LAW.

Defense counsel allowed prosecution witnesses numerous times to state their legal opinions, all of which were prejudicial to the defense. This pattern of improper testimony usurps the function of the judge as the legal advisor to the jury, usurps the function of the jury as the finders of fact who must themselves decide whether the law applies to the facts they find; is beyond the expertise of the witness, whether expert or ordinary witness; and finally, interfered with the defense of lack of state of mind. Prince, *Richardson on Evidence, supra* at §§1-304; 7-101. Not even an attorney testifying as an expert witness is allowed to state a legal opinion:

> "Essentially, the affiant-attorney was offering a legal opinion as to what performance or absence thereof constitutes legal malpractice. But making those determinations is the function of a court. As we recently pointed out in another case, 'expert witnesses should not * * * offer opinion as to the legal obligations of parties * * *; that is an issue to be determined by the trial court. Expert opinion as to a legal conclusion is impermissible' (Colon v Rent-A-Center, Inc., 276 AD2d 58, 61). An expert may not be utilized to offer opinion as to the legal standards which he believes should have governed a party's conduct (Marx & Co., Inc. v Diners' Club Inc., 550 F2d 505, 509, cert denied 434 US 861)." *Russo v. Feder*, 301 A.D.2d 63 (1st Dept. 2002); see also, *Hygh v. Jacobs*, 961 F2d 359 (2nd Cir. 1992).

The testimony of the first prosecution witness, Jeffrey Jankowiak, a gun store owner, consisted in large part of providing unqualified and highly prejudicial legal commentary about the defendant's activities. He offered his legal opinion at least fourteen times, including the following gems that completely undermined the defendant's case:

1. How long "assault weapons" had been banned. [489:13-15]
2. A gun possessed by the defendant on a prior occasion was "not legal in New York State." [500-b:8-9; 526:25-527:11]

3. That gun could only be sold to law enforcement. [500-b:22; 501:4-6]
4. He told the defendant he "can get in trouble for selling a gun like that." [502:20-23]
5. That the "bayonet lug" on the defendant's gun would make it illegal in New York. [503:16-18]
6. That he was concerned about losing his license if he didn't inform on the defendant. [506:12-16; 508:23-509:4]
7. That he told the State Police the defendant has an illegal gun. [506:21-23]
8. That members of the military are not exempt from the law. [507:23-25]
9. In testimony that was also improper hearsay, on cross-examination, he testified that only a manufacturer can "pin the stock." [521:9-15]
10. That certain weapons must be registered under the SAFE Act. [523:17-524:4]
11. That the SAFE Act does not legalize previously illegal guns. [524:19-23]
12. The definition of illegal rifle prior to the SAFE Act. [524:24-525:2]
13. That registered weapons are legal to possess. [524:8-10]

14. The seller has to do a background check on the buyer.

[488:11]

Essentially, his whole testimony consisted of his unqualified legal opinions highly prejudicial to the defendant. Yet, there was not a single objection from counsel. The prosecutor effectively exploited this testimony on summation: "The defendant got any advice he needed to clear up any confusion when he went to JJ's Guns shop. . ." [833:13-14] The jury actually adopted the legal opinion of the witness in one of their last notes to the court: "We know the Grandfather Clause of the SAFE Act does not apply to this case. . ." [1025] The trial was effectively over after the first witness testified, Jeffrey Jankowiak, non-Esquire.

Yet, there was much more improper testimony to come. Improper legal opinions were generously sprinkled throughout the prosecution case. A State Police investigator testified, without objection from defense counsel, that even if the rifle in evidence was lawful in another state, it would still be illegal in New York. [591:2-4] He then testified that the rifle would be illegal even if restricted to home use. [591:5-7]

Another State Police investigator, Joel Catuzza, stated as a matter of fact that the weapon in evidence was "an assault rifle." [556:12] The same witness testified that the defendant's weapon was "a semi-automatic," a term that is both a legal term of art and a factual adjective. [572:12-17] Since the jury could easily have taken the testimony as a firm statement of law, there should have been an objection. Worse yet, the way the witness defined "semi-automatic" to mean that "every time you pull the trigger, a bullet's going to come out," [572:16-17] is not complete and does not contain the entire *legal* definition. See Point II-C, above. Investigator Catuzza further stated that the defendant is not "exempt from being held accountable for violations of the Penal Law." [574:20-22] On re-direct, he opined that the legality of a gun

outside New York would not affect its legal status in New York and that the motive of home protection does not make a gun legal. [591:2-7]

Defense counsel then allowed State Police Sergeant Lawrence Dorchak to opine what constitutes an "assault weapon" under the Penal Law. [705:2-14; 708:18-21; 713:10-16] The witness then stated, without objection, that the SAFE Act did not make any previously illegal weapon lawful. [708:21-709:2] In addition to other grounds for objection, this question seemed designed to anticipate and negate a possible line of argument for the defense on summation. The witness was also allowed to state his unqualified legal opinion about whether a weapon constituted a semiautomatic weapon under the Penal Law. [702:17-24] Like Catuzza, he was allowed to call the weapon in evidence a "semi-automatic," without any clarification as to whether this was a factual statement or a highly prejudicial legal opinion. [699:13-14; 703:11-20] Finally, he expressed his legal opinion that a pistol permit does not cover assault rifles. [710:1-6]

Most egregiously, however, the witness's firearms report was admitted into evidence without objection. [708:11-17] The report, insofar as it contains yet another instance of unqualified legal opinion, is devastating and indeed fatal to the defendant's cause. The report, People's Exhibit 19, states in relevant part, that the defendant is guilty as charged:

> "Item # 1 is an 'Assault Weapon,' as defined by section 265.00 sub 22(a)(i)(ii)(iii)(iv) and therefore further defined as a 'Firearm' by section 265.00 sub 3(e) of the New York State Penal Law. . . ."

Thus, defense counsel allowed the prosecution to admit into evidence a firearms report that explicitly finds the defendant guilty of the crimes charged by means of an unqualified opinion about the law.

The last of the *four* prosecution witnesses who were allowed to freewheel with legal opinions prejudicial to the defendant was James Weissenburg, an ATF investigator. He went far beyond testifying to *the fact* that the defendant lacked a Federal Firearms License. [719:13-21]. He opined about the legal ramifications of having such a license, basically giving legal instructions to the jury. [716:24-719:1]

B. DEFENSE COUNSEL FAILED TO OBJECT TO THE FAILURE TO RECORD NUMEROUS BENCH CONFERENCES.

There were several bench conferences during the trial which were not recorded and therefore deprived the defendant of a proper record to prosecute an appeal. [485:20; 528:4; 591:17; 690:8; 704:5; 729:2; 746:20; 879:12; 916:23] There is no indication that these conferences involved only trivial matters such as scheduling. The lack of a proper record of the trial deprives the defendant of his right to appeal and requires that the judgment be vacated.

C. DEFENSE COUNSEL FAILED TO MAKE PROPER MOTIONS TO DISMISS OR ARGUE THE LACK OF EVIDENCE ON SUMMATION.

Defense counsel made perfunctory motions to dismiss, which were essentially legal nullities. [727:23-728:14; 822:1-11] In so doing, he failed to argue that there was a lack of evidence to sustain the crimes charged. See Point IV, above.

D. DEFENSE COUNSEL STIPULATED TO A CRITICAL FACT FOR NO APPEARENT REASON.

Defense counsel stipulated that the defendant's weapon was not manufactured before August 1998. [592:14-22] This apparently waived proof of an element of the crimes alleged and, in the absence of any strategic reason, was improper.

E. DEFENSE COUNSEL FAILED TO SUBMIT APPROPRIATE REQUESTS TO CHARGE TO THE COURT.

Defense counsel failed to submit proper requests to charge with respect to the definition of semiautomatics, rifles, and the applicability of the SAFE Act's grandfather clause. See Points II-B and C, above; Elements of the Crimes Charged, supra at pp. 15 et seq.; *Ruiz v. United States*, 146 F. Supp. 3d 726 (D. Md. 2015). He also failed to properly object to the court's erroneous responses to jury notes 2, 12 and 13, or propose adequate alternative instructions. See, Points II-A and B, above.

F. DEFENSE COUNSEL MADE SEVERAL OTHER ERRORS INCLUDING FAILURE TO OBJECT TO IMPROPER TESTIMONY.

Beyond the deluge of error previously noted, defense counsel failed to object to numerous improper questions or answers throughout the trial. The gun store owner testified that he was concerned about losing his license if he did not report the defendant. This is irrelevant and bolstering. [506:12-16; 508:19-509:4] He also testified that the ATF told him that only a manufacturer can alter weapons, obviously hearsay. [521:9-13] Another witness testified about the manufacturer of the weapon, presumably based on a hearsay internet search. [544:21-25;

572:23-573:1]. The same witness gave very damaging testimony about his opinion of the defendant's state of mind and also made argumentative comments. [585:10-13; 574:20-22] This testimony was actually elicited on cross-examination by defense counsel.

Defense counsel failed to object to the prosecutor instructing the jury on the law during her opening statement and on summation. [478:17-23; 830:19-23; 833:2-4; 835:17-18] He failed to object to the legal advice Mr. Jankowiak gave to the defendant on the grounds of relevance. [501:3-6] Defense counsel failed to rebut or impeach the erroneous testimony of Mr. Jankowiak that there's no grandfather clause in the Safe Act. [523:17-22] He failed to object to questions calling the undercover officer to testify about the mental state of the defendant. [575:25-576:3; 585:10-13]

Defense counsel allowed the prosecutor to impeach the defendant by making him state New York law incorrectly and against his own interest as to whether the SAFE Act made previously unlawful weapons lawful under the grandfather clause. [808:22-809:1] This damaging testimony was read back to the jury during deliberations. [1018] He also failed to object to a critical interruption of his client when asked about whether the right to bear arms overrides state law. [809:13-18] The question also improperly called for a legal conclusion and was argumentative. See also, 812:14-15. Counsel inexplicably and incorrectly conceded on summation that the weapon was illegal. [827:1-5] Finally, defense counsel failed to move for an adverse inference due to the failure to produce chief investigator Stacy Stawacki at the Huntley hearing. See also, Point VI below.

G. THE NUMEROUS AND SERIOUS ERRORS OF COUNSEL WERE PREJUDICIAL TO THE DEFENDANT.

The prejudice caused by defense counsel's errors has already been delineated throughout this brief. To summarize:

1. defense counsel allowed prosecution witnesses to repeatedly state unqualified legal opinions about the defendant's behavior and those erroneous and unqualified opinions explicitly influenced jury deliberations and led directly to a conviction;
2. defense counsel failed to make proper motions to dismiss based on a clear lack of evidence on several elements and failed to argue said lack of evidence on summation;
3. defense counsel failed to submit proper requests to charge at several key points in the case, which failure led directly to a conviction.

VI. THE COURT ERRED IN DENYING A MISSING WITNESS INSTRUCTION AS TO THE LEAD INVESTIGATOR ON THE CASE.

The lead investigator, Stacy Stawacki, did not testify in the case. [634:5-7; 18-20] Defense counsel made a motion for a missing witness instruction which was denied by the court. [821:9-24] The court erred in so ruling. The prosecution relied heavily on the defendant's statement which was admitted into evidence. The defendant disputed the accuracy of the statement and also challenged its voluntariness in the sense that the defendant alleges that he requested an attorney but this request was ignored. Sawacki was an active participant in the

interrogation and in fact, there is evidence in the record that she was alone with the defendant at certain times. [128:5-8; 133:7-10; 115:3-6; 144:25-145:14; 506:19-23; 658:8-17; 676:4-6] Thus, her testimony was not cumulative and the instruction should have been given to the jury. *People v Smith*, 162 AD3d 1686 (4th Dept. 2018).

VII. THE CONVICTIONS SHOULD BE REVERSED ON SECOND AMENDMENT GROUNDS.

The defendant moved for dismissal on Second Amendment grounds. [33-34] The trial court summarily denied that motion without comment. [24] As is typical for most courts below the level of the United States Supreme, the court did not take the Second Amendment seriously.

The defendant contends that, although there is a paucity of New York cases on point—see, e.g., *People v. Morrill*, 101 AD2d 927 (3rd Dept. 1984)--the right to bear arms includes the right to possess a semiautomatic rifle with various features that make the weapon more efficient for its intended uses. Thus, the defendant asks this Court to hold that the statutes alleged to have been violated, PL §265.02(7) and PL §265.11, are unconstitutional on their face and as applied to him.

One of the few New York cases that addresses the issue is *Schultz v. State of New York*, 134 A.D.3d 52 (3rd Dept. 2015). That case involves the SAFE Act, was filed by pro se litigants and appears to depend on the failure of the pro se litigants to present "evidence" or "proof" to rebut a summary judgment motion in a civil case. It is therefore of little weight here. That case also applies a level of scrutiny, that is, intermediate, never sanctioned by the Supreme Court in its seminal Second Amendment cases. Since New York law bans "assault rifles" by definition,

strict scrutiny should apply. Wherefore, the defendant respectfully requests that the charges be dismissed on Second Amendment grounds.

We contend that the Second Amendment protects the individual right to keep and bear arms in common use for self-defense *and* defense against governmental tyranny. *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *Young v. State of Hawaii*, 2018 US App LEXIS 20525 (9th Cir. 2018); *Wrenn v. District of Columbia*, 864 F.3d 650, 665 (D.C. Cir. 2017); *Moore v. Madigan*, 702 F.3d 933, 936–37 (7th Cir. 2012). The Second Amendment is applicable to the states pursuant to the due process and privileges and immunities clauses of the Fourteenth Amendment. See, *McDonald v. City of Chicago, supra* (including the concurrence of Justice Clarence Thomas); K. Klukowski, "Citizen Gun Rights: Incorporating the Second Amendment through the Privileges or Immunities Clause," 39 *N.M. L. Rev.* 195 (Spring 2009).

Recently, in upholding the right to public carry arms, the Ninth Circuit provided a useful summary of what the leading thinkers of the past said about the right to bear arms:

> "In an early American edition of Blackstone's *Commentaries on the Laws of England*—indeed, the 'most important' edition, as *Heller* points out, *see* 554 U.S. at 594—St. George Tucker, a law professor at the College of William & Mary and former influential Antifederalist, insisted that the right to armed self-defense is the 'first law of nature' and that 'the right of the people to keep and bear arms' is the 'true palladium of liberty.' 1 St. George Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States; and of the Commonwealth of Virginia* app. n.D. at 300 (Phil., William Young Birch & Abraham Small 1803); *see also McDonald*, 561 U.S. at 769 (treating Tucker's notes on Blackstone as heavily instructive in interpreting the Second Amendment); *Heller*, 554 U.S. at 606 (same). And in advocating for the prerogative of the Judiciary to strike down unconstitutional statutes, Tucker wrote: 'If, for example, congress were to pass a law prohibiting any person from bearing arms, as a means of preventing insurrections, the judicial courts, . . . would be able to pronounce decidedly upon the constitutionality of these means.' Tucker, *supra*, at 289; *see also* Michael P. O'Shea, *Modeling the Second*

> *Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of 'Bearing Arms' for Self-Defense*, 61 Am. U. L. Rev. 585, 637–38 (2012). Indeed, as Tucker explained, '[i]n many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than a European fine gentleman without his sword by his side.' Tucker, *supra*, vol. 5, app., n.B, at 19. Blackstone himself espoused a similarly sacred view on the right to bear arms for Englishmen, which was most notably codified in the 1689 English Declaration of Rights as the right of Protestants to 'have Arms for their Defense suitable to their Conditions and as allowed by Law.' Bill of Rights 1689, 1 W. & M., c. 2 (Eng.); *see also Alden v. Maine*, 527 U.S. 706, 715 (1999) (noting that Blackstone's works 'constituted the preeminent authority on English law for the founding generation'). As Blackstone explained, the 1689 Declaration enshrined 'the natural right of resistance and self-preservation' and 'the right of having and using arms for self-preservation and defence.' 1 William Blackstone, Commentaries *144.8 It followed from Blackstone's premise that such a right, the predecessor to our Second Amendment, 'was by the time of the founding understood to be an individual right protecting against both *public* and private violence.' *Heller*, 554 U.S. at 594 (emphasis added); *see also* 2 William Blackstone, *Commentaries on the Laws of England* 441 (Edward Christian ed., 1795) ('[E]veryone 8 Blackstone was far from alone in viewing the right to self-defense as a natural right, thus belong[ing] to [all] persons merely in a state of nature, and which every man is intitled to enjoy whether out of society or in it.' 1 WILLIAM BLACKSTONE, COMMENTARIES *119. Quite a few scholars and commentators of that era on either side of the Atlantic likewise championed a natural right to defend oneself. *See* Leonard W. Levy, *Origins of the Bill of Rights* 140–41 (2001) (referencing a 1768 article in the prominent colonial newspaper *A Journal of the Times* that described the English right as 'a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defence'); *see also* David B. Kopel, *The Natural Right of Self-Defense: Heller's Lesson for the World*, 59 Syracuse L. Rev. 235, 242 (2008) ('The Anglo-Americans learned the language of natural rights, including the natural right of self-defense . . . .')." *Young v. State of Hawaii*, supra.

Thus, there is a fundamental right to bear arms rooted in our constitutional and legal and actual history which cannot be ignored or swept away or overruled by naked political ideology masked as constitutional analysis.

Like most gun control laws, the current ban on some kinds of rifles was not supported by any solid research prior to the law's enactment. Rather, it was simply the product of the prevailing ideology of our times, progressivism, which held and holds, without any evidence,

that legislation can magically improve human life. (See, James Ostrowski, *Progressivism: A Primer on the Idea Destroying America* (2014).) What is significant for present purposes is this. The famous Progressive Oliver Wendell Holmes once wrote: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." However, it is also the case that the Second Amendment does not enact the platform of the Coalition to Stop Gun Violence or its underlying ideology, progressivism that was developed well over a hundred years later. However, all too often and even after *Heller* and *McDonald*, many courts smuggle into their Second Amendment rulings various elements of the progressive ideology that are neither rooted in constitutional law nor based on any evidence or logic.

Heller and *McDonald* announced that the right to bear arms is an individual fundamental constitutional *right*. The State's ban on some kinds of semi-automatic rifles treats it as a *privilege* to be bestowed at the whim of politicians. One of these views must give way to the other and the Supremacy Clause states that federal law is supreme.

Even after *McDonald*, New York State courts have refused to take the right to bear arms seriously and have in several cases merely rubber-stamped gun laws as valid with little analysis.

Many of these cases rely on a flawed and extremely lenient standard of review, intermediate scrutiny, which essentially predetermines the rejection of virtually any Second Amendment challenge against virtually any statute.

Contrary to these cases is a well-reasoned decision of the United States Court of Appeals for the District of Columbia, *Wrenn v. District of Columbia*, 864 F.3d 650 (2017); see also, *Moore v. Madigan*, 702 F3d 933 (7th Cir. 2012); contra, *Peruta* v. *County of San Diego*, 824 F. 3d 919 (2016). After an exhaustive historical analysis, Judge Griffith's majority opinion in *Wrenn* stated:

> "These points confirm that the rights to keep and bear arms are on equal footing — that the law must leave responsible, law-abiding citizens some reasonable means of exercising each. The prevalence of, say, bans on carrying near sensitive sites would prove that the right to bear arms mattered less only if our law would reject equally modest burdens on *keeping* arms (*e.g.*, bans on storing them on open surfaces at home). Neither the Second nor the Fourth Circuit has suggested that it would. So each was too quick to infer that our legal tradition demotes the right to bear arms relative to its Constitutional twin." *Wrenn v. District of Columbia, supra* at 663.

We also rely on the compelling dissent of Justice Clarence Thomas joined by Justice Neil Gorsuch in *Peruta v. California*, 137 S. Ct. 1995 (2017) (denying certiorari):

> "As we explained in Heller, to "bear arms" means to "'wear, bear, or carry upon the person or in the clothing or in a pocket, for the purpose of being armed and ready for offensive or defensive action in a case of conflict with another person.'" 554 U. S., at 584 (quoting Muscarello v. United States, 524 U. S. 125, 143 (1998) (GINSBURG, J., dissenting); alterations and some internal quotation marks omitted). The most natural reading of this definition encompasses public carry. I find it extremely improbable that the Framers understood the Second Amendment to protect little more than carrying a gun from the bedroom to the kitchen. See Drake v. Filko, 724 F. 3d 426, 444 (CA3 2013) (Hardiman, J., dissenting) ("To speak of 'bearing' arms solely within one's home not only would conflate 'bearing' with 'keeping,' in derogation of the [Heller] Court's holding that the verbs codified distinct rights, but also would be awkward usage given the meaning assigned the terms by the Supreme Court"); Moore v. Madigan, 702 F. 3d 933, 936 (CA7 2012) (similar). . . Finally, the Second Amendment's core purpose further supports the conclusion that the right to bear arms extends to public carry. The Court in Heller emphasized that "self-defense" is "the central component of the [Second Amendment] right itself." 554 U. S., at 599. This purpose is not limited only to the home, even though the need for self-defense may be "most acute" there. Id., at 628. "Self defense has to take place wherever the person happens to be," and in some circumstances a person may be more vulnerable in a public place than in his own house. Volokh, Implementing the Right To Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda, 56 UCLA L. Rev. 1443, 1515 (2009)."

To paraphrase Justice Clarence Thomas, New York courts so far treat the Second Amendment as an inferior right in contrast to most other textual rights such as the First Amendment and Fourth Amendment and nontextual rights such as abortion. See, Justice

Thomas' dissenting from a denial of certiorari in *Silvester v. Becerra*, 138 S. Ct. 945 (2018).

Justice Thomas writes:

> "the lower courts are resisting this Court's decisions in Heller and McDonald and are failing to protect the Second Amendment to the same extent that they protect other constitutional rights. See Friedman v. Highland Park, 577 U. S. ___, ___ (2015) (THOMAS, J., dissenting from denial of certiorari) (slip op., at 1); Jackson v. City and County of San Francisco, 576 U. S. ___, ___ (2015) (THOMAS, J., dissenting from denial of certiorari) (slip op., at 1). This double standard is apparent from other cases where the Ninth Circuit applies heightened scrutiny. The Ninth Circuit invalidated an Arizona law, for example, partly because it "delayed" women seeking an abortion. Planned Parenthood Arizona, Inc. v. Humble, 753 F. 3d 905, 917 (2014). The court found it important there, but not here, that the State "presented no evidence whatsoever that the law furthers [its] interest" and "no evidence that [its alleged danger] exists or has ever [occurred]." Id., at 914–915. Similarly, the Ninth Circuit struck down a county's 5-day waiting period for nude-dancing licenses because it "unreasonably prevent[ed] a dancer from exercising first amendment rights while an application [was] pending." Kev, Inc. v. Kitsap County, 793 F. 2d 1053, 1060 (1986). The Ninth Circuit found it dispositive there, but not here, that the county "failed to demonstrate a need for [the] five-day delay period." Ibid. In another case, the Ninth Circuit held that laws embracing traditional marriage failed heightened scrutiny because the States presented "no evidence" other than "speculation and conclusory assertions" to support them. Latta v. Otter, 771 F. 3d 456, 476 (2014). While those laws reflected the wisdom of "thousands of years of human history in every society known to have populated the planet," Obergefell v. Hodges, 576 U. S. ___, ___ (2015) (ROBERTS, C. J., dissenting) (slip op., at 25), they faced a much tougher time in the Ninth Circuit than California's new and unusual waiting period for firearms. In the Ninth Circuit, it seems, rights that have no basis in the Constitution receive greater protection than the Second Amendment, which is enumerated in the text." *Id.* at 950-951.

Similarly, Justice Thomas' dissent in *Peruta v. California, supra*, stated:

> "The Court's decision to deny certiorari in this case reflects a distressing trend: the treatment of the Second Amendment as a disfavored right. See Friedman v. Highland Park, 577 U. S. ___, ___ (2015) (THOMAS, J., dissenting from denial of certiorari) (slip op., at 6) ("The Court's refusal to review a decision that flouts two of our Second Amendment precedents stands in marked contrast to the Court's willingness to summarily reverse courts that disregard our other constitutional decisions"); Jackson v. City and County of San Francisco, 576 U. S. ___, ___ (2015) (same). The Constitution does not rank certain rights above others, and I do not think this Court should impose such a hierarchy by selectively enforcing its preferred rights. Id., at ___ (slip op., at 1) ("Second Amendment

> rights are no less protected by our Constitution than other rights enumerated in that document"). The Court has not heard argument in a Second Amendment case in over seven years—since March 2, 2010, in McDonald v. Chicago, 561 U. S. 742. Since that time, we have heard argument in, for example, roughly 35 cases where the question presented turned on the meaning of the First Amendment and 25 cases that turned on the meaning of the Fourth Amendment. This discrepancy is inexcusable, especially given how much less developed our jurisprudence is with respect to the Second Amendment as compared to the First and Fourth Amendments. For those of us who work in marbled halls, guarded constantly by a vigilant and dedicated police force, the guarantees of the Second Amendment might seem antiquated and superfluous. But the Framers made a clear choice: They reserved to all Americans the right to bear arms for self-defense. I do not think we should stand by idly while a State denies its citizens that right, particularly when their very lives may depend on it. I respectfully dissent."

Finally, we credit the dissenting views of Judge Brett Kavanaugh as consistent with the controlling cases of *Heller* and *McDonald*, which views we believe will ultimately prevail against the many lower court cases which ignore *Heller* and *McDonald*. In his dissent in *Heller v. District of Columbia*, 670 F3d 1244, 1269 (D. C. Cir. 2011), he stated:

> "In my judgment, both D.C.'s ban on semi-automatic rifles and its gun registration requirement are unconstitutional under Heller. In Heller, the Supreme Court held that handguns – the vast majority of which today are semi-automatic – are constitutionally protected because they have not traditionally been banned and are in common use by law-abiding citizens. There is no meaningful or persuasive constitutional distinction between semi-automatic handguns and semiautomatic rifles. Semi-automatic rifles, like semi-automatic handguns, have not traditionally been banned and are in common use by law-abiding citizens for self-defense in the home, hunting, and other lawful uses. Moreover, semiautomatic handguns are used in connection with violent crimes far more than semi-automatic rifles are. It follows from Heller's protection of semi-automatic handguns that semi-automatic rifles are also constitutionally protected and that D.C.'s ban on them is unconstitutional. (By contrast, fully automatic weapons, also known as machine guns, have traditionally been banned and may continue to be banned after Heller.)" *Id.* at 1269-1270.

He continued:

> "More to the point for purposes of the Heller analysis, the Second Amendment as construed in Heller protects weapons that have not traditionally been banned and are in common use by law-abiding citizens. Semi-automatic rifles have not traditionally been banned and are in common use today, and are thus protected

under Heller. The first commercially available semi-automatic rifles, the Winchester Models 1903 and 1905 and the Remington Model 8, entered the market between 1903 and 1906. See JOHN HENWOOD, THE 8 AND THE 81: A HISTORY OF REMINGTON'S PIONEER AUTOLOADING RIFLES 5 (1993); JOHN HENWOOD, THE FORGOTTEN WINCHESTERS: A HISTORY OF THE MODELS 1905, 1907, AND 1910 SELF-LOADING RIFLES 2-6 (1995). (The first semi-automatic shotgun, designed by John Browning and manufactured by Remington, hit the market in 1905 and was a runaway commercial success. See HENWOOD, 8 AND THE 81, at 4.) Other arms manufacturers, including Standard Arms and Browning Arms, quickly brought their own semi-automatic rifles to market. See id. at 64-69. Fiveshot magazines were standard, but as early as 1907, Winchester was offering the general public ten-shot magazines for use with its .351 caliber semi-automatic rifles. See HENWOOD, THE FORGOTTEN WINCHESTERS 22-23. Many of the early semi-automatic rifles were available with pistol grips. See id. at 117-24. These semi-automatic rifles were designed and marketed primarily for use as hunting rifles, with a small ancillary market among law enforcement officers. See HENWOOD, 8 AND THE 81, at 115-21. . . . Semi-automatic rifles remain in common use today, as even the majority opinion here acknowledges. See Maj. Op. at 30 ("We think it clear enough in the record that semiautomatic rifles . . . are indeed in 'common use,' as the plaintiffs contend."). According to one source, about 40 percent of rifles sold in 2010 were semi-automatic. See NICHOLAS J. JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY ch. 1 (forthcoming 2012). The AR-15 is the most popular semiautomatic rifle; since 1986, about two million semi-automatic AR-15 rifles have been manufactured. J.A. 84 (Declaration of Firearms Researcher Mark Overstreet). In 2007, the AR-15 alone accounted for 5.5 percent of firearms and 14.4 percent of rifles produced in the United States for the domestic market. Id. A brief perusal of the website of a popular American gun seller underscores the point that semi- 36 automatic rifles are quite common in the United States. See, e.g., CABELA'S, http://www.cabelas.com. Semi-automatic rifles are commonly used for self-defense in the home, hunting, target shooting, and competitions. J.A. 137 (Declaration of Firearms Expert Harold E. Johnson). And many hunting guns are semi-automatic. Id. . . . What is more, in its 1994 decision in Staples, the Supreme Court already stated that semi-automatic weapons "traditionally have been widely accepted as lawful possessions." 511 U.S. at 612. Indeed, the precise weapon at issue in Staples was the AR-15. The AR-15 is the quintessential semi-automatic rifle that D.C. seeks to ban here. Yet as the Supreme Court noted in Staples, the AR-15 is in common use by law-abiding citizens and has traditionally been lawful to possess." *Id.* at 1286-1288.

A. INTERMEDIATE SCRUTINY IS NOT THE APPROPRIATE STANDARD FOR CHALLENGES TO BANS ON SEMIAUTOMATIC RIFLES.

This case involves the possession of a rifle in common use for self-defense. As with other fundamental rights, strict scrutiny should apply. In that event, for the reasons previously stated, the law fails as it goes far beyond the parameters marked out by *Heller* as to when a state can ban weapons. Even under intermediate scrutiny, the statute fails but for similar reasons. Assuming for the sake of argument that *Heller* would permit a licensing process wherein a citizen could *quickly and cheaply* secure a rifle unless he or she was a felon or mentally ill, New York's regime goes far beyond that by banning these rifles entirely.

The lenient standard of intermediate scrutiny merely smuggles a political ideology, progressivism, into constitutional law by other words, e.g., intermediate scrutiny. To illustrate the point, notice that all that is required to affirm a gun law is to show *any* possibility that a statute might prevent *any* harm, *or*, that the right to bear arms might lead to a single tragedy. In other words, the progressive fix is in and *all laws* are upheld and none is vacated, just as would be predicted by imagining the ideology of progressivism masquerading as a constitutional principle. See, e.g., *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 252 (2d Cir. 2015) (applying a very loose intermediate scrutiny standard and giving deference to the alleged but rarely proven "predictive judgments of the legislature," and upholding the core of the SAFE Act in the face of zero evidence that it will do more good than harm.)

The cases that lightly cast aside the Second Amendment have ignored the true purpose of the Second Amendment: to ensure popular sovereignty, the right of revolution, and to deter government tyranny and mass murder. It should be noted here

that the Amendment *has worked* in that regard as no coups d'etat have occurred nor has the federal government engaged in mass murder against its own citizens as has occurred in many other countries throughout history. Since the intermediate scrutiny test completely ignores the purpose of the Second Amendment, its application in this and other cases would be erroneous. In fact, by opening the door to essentially unlimited restrictions on the private ownership of handguns, it explicitly violates the purpose of the Second Amendment which is to allow the citizenry to arm itself against central government tyranny which the Founders had seen throughout history, both recent and ancient.

The notion that the right to bear arms is fundamentally designed to allow citizens to defend themselves against governmental tyranny has become a taboo in Second Amendment cases, however, it is explicitly recognized in *Heller:*

> "Thus, the right secured in 1689 as a result of the Stuarts' abuses was by the time of the founding understood to be an individual right protecting against both public and private violence. And, of course, what the Stuarts had tried to do to their political enemies, George III had tried to do to the colonists. In the tumultuous decades of the 1760's and 1770's, the Crown began to disarm the inhabitants of the most rebellious areas. That provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms. A New York article of April 1769 said that "[i]t is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defence." A Journal of the Times: Mar. 17, New York Journal, Supp. 1, Apr. 13, 1769, in Boston Under Military Rule 79 (O. Dickerson ed. 1936); see also, e.g., Shippen, Boston Gazette, Jan. 30, 1769, in 1 The Writings of Samuel Adams 299 (H. Cushing ed. 1968). They understood the right to enable individuals to defend themselves. As the most important early American edition of Blackstone's Commentaries (by the law professor and former Antifederalist St. George Tucker) made clear in the notes to the description of the arms right, Americans understood the "right of self-preservation" as permitting a citizen to "repe[l] force by force" when "the intervention of society in his behalf, may be too late to prevent an injury." 1 Blackstone's Commentaries 145–146, n. 42 (1803) (hereinafter Tucker's Blackstone). See also W. Duer, Outlines of the Constitutional Jurisprudence of the United States 31–32 (1833)." *District of Columbia v. Heller*,

128 S. Ct. 2783, 2798–99 (2008); see also, *Kasler v. Lockyer*, 2 P.3d at 602 (2000) (Brown, J., concurring) ("Extant political writings of the period repeatedly expressed a dual concern: facilitating the natural right of self-defense and assuring an armed citizenry capable of repelling foreign invaders and quelling tyrannical leaders.").

James Madison, who helped draft the Second Amendment, was quite explicit about the true purpose of the right to bear arms in Federalist No. 46, published the year before the Amendment was proposed:

> "Extravagant as the supposition is, let it however be made. Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the federal government; still it would not be going too far to say, that the State governments, with the people on their side, would be able to repel the danger. The highest number to which, according to the best computation, a standing army can be carried in any country, does not exceed one hundredth part of the whole number of souls; or one twenty-fifth part of the number able to bear arms. This proportion would not yield, in the United States, an army of more than twenty-five or thirty thousand men. To these would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. It may well be doubted, whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the last successful resistance of this country against the British arms, will be most inclined to deny the possibility of it. Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of. Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms. And it is not certain, that with this aid alone they would not be able to shake off their yokes. But were the people to possess the additional advantages of local governments chosen by themselves, who could collect the national will and direct the national force, and of officers appointed out of the militia, by these governments, and attached both to them and to the militia, it may be affirmed with the greatest assurance, that the throne of every tyranny in Europe would be speedily overturned in spite of the legions which surround it."

In other words, the people, using their right to bear arms, would defeat the federal government in a shooting war if necessary.

The cases that casually ignore the Second Amendment and its unambiguous history as explained above do so by smuggling in the modern, extra-constitutional ideology of *progressivism*, which presumes, without a scintilla of evidence or logic that legislation can magically solve problems and at zero cost. Again, the Second Amendment does not enact progressivism. Indeed, it bans progressivism when it comes to arms!

The dismissive attitude of the New York state courts toward the Second Amendment is exemplified by a case cited by *Chomyn v. Boller*, 137 AD3d 1705 (4th Dept. 2016). There, the Fourth Department summarily rejected petitioner's Second Amendment contentions without any discussion, citing cases which themselves did not address the issues raised in this case, *Matter of Cuda v Dwyer*, 107 AD3d 1409 (4th Dept. 2013); or that give them only a cursory review. *Matter of Kelly v Klein*, 96 AD3d 846 (2nd Dept. 2012). Incredibly, *Cuda* cites a 1985 case decided before *Heller* and *McDonald*. This perfectly exemplifies the state's cavalier attitude toward a fundamental right. See, *Matter of Demyan v Monroe*, 108 AD2d 1004, 1005 [1985]).

New York gun laws and court decisions have never come to terms with the legal revolution created by *Heller* and *McDonald*. They have simply ignored those cases. Those cases declare the right to bear arms to be a fundamental right which can only be regulated under limited conditions such as commission of a felony or mental illness. New York's ban on some kinds of semiautomatic rifles is in clear conflict with that right.

Those statutes should be declared unconstitutional and the defendant's convictions should be reversed.

CONCLUSION

The judgment of conviction should be reversed and vacated and the indictment dismissed with prejudice. See Points I, III, IV, and VI, above. Alternatively, the case should be remanded for a new trial. See, Points II and V, above.

Respectfully submitted,

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