

SECOND AMENDMENT LITIGATION CHECKLIST

- **Charged offense?**
 - CPWL (D.C. Code § 22-4504(a))
 - CPWL outside the home or place of business: 5 years
 - CPWL having been previously convicted of a felony: 10 years
 - UF (D.C. Code § 7-2502.01)
 - UA (D.C. Code § 7-2506.01)
 - Felon-in-possession (D.C. Code § 22-4503(a)(2))
- **Date of alleged offense?**
 - Before 7/16/08
 - General ban on registration of pistols: D.C. Code § 7-2502.02(a)(4)
 - General ban on licensing of pistols: D.C. Mun. Reg. § 24-2304.15
 - 7/16/08 to 9/16/08: Firearms Control Emergency Amendment Act of 2008
 - Permits registration of a pistol (revolver) for use in self-defense within the home
 - Creates exception to license requirement for carrying a registered pistol within the home
 - Creates exceptions to trigger-lock requirement, including for “reasonably perceived threat of immediate harm to a person within the registrant’s home”
 - 9/16/08 to date: Second Firearms Control Emergency Amendment Act of 2008
 - Permits registration of a pistol for use in self-defense within the home
 - Amends definition of machine gun so that semiautomatics can be registered as pistols
 - Creates exception to license requirement for carrying a registered pistol:
 - within the registrant’s home
 - while used for lawful recreation purpose
 - while kept at registrant’s place of business
 - while being transported for lawful purpose as expressly authorized by statute
 - Repeals trigger-lock requirement but creates trigger-lock “policy”
 - Makes it a misdemeanor to keep loaded firearm where a person should reasonably know that a minor (under age 16) is likely to access the firearm without permission.
 - Repeals First Emergency Act
 - Pending congressional approval: Firearms Control Temporary Amendment Act of 2008 (same as Second Firearms Control Emergency Amendment Act of 2008)
- **Type of firearm?**
 - Pistol? § 7-2502.02(a)(4)
 - Revolver?
 - Semiautomatic?
 - Rifle or shotgun?
 - Sawed-off shotgun? § 7-2502.02(a)(1)
 - Machine gun? § 7-2502.02(a)(2)
 - Short-barreled rifle? § 7-2502.02(a)(3)
- **Does client have a prior felony conviction? Is client on probation?**
 - If so, what felony?
 - If so, how old?
- **Is client a juvenile?**
- **Inside or outside the home?**
- **Concealed carrying?**
- **During the commission of a violent crime?**

LEGAL ISSUES

1. Is client's **conduct** protected by the Second Amendment?

- Does client have a Second Amendment right to carry the **type of firearm** he carried?

See 128 S. Ct. at 2817 (“[T]he sorts of weapons protected were those ‘in common use at the time.’ We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons’”).

- Does client's **felony conviction** exclude him from the Second Amendment's protection?

See id. at 2816-17 (“[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons . . .”).

But see id. at 2790-91 (reasoning that “the people” protected by the Second Amendment are the same as “the people” protected by the First and Fourth Amendments); *id.* at 2826-27 (Stevens, J., dissenting) (“[T]he class of persons protected by the First and Fourth Amendments is *not* so limited [to “law-abiding, responsible citizens”]; for even felons (and presumably, irresponsible citizens as well) may invoke the protections of those constitutional provisions.”).

- Does client's **juvenile status** exclude him from the Second Amendment's protection?

- Does client have a right to carry the firearm **outside the home**?

- It would be illogical for the prefatory clause to refer to militia activities (necessarily outside the home) if the operative clause protected only a right within the home. *See id.* at 2789 (“Logic demands that there be a link between the stated purpose and the command. . . . That requirement of logical connection may cause a prefatory clause to resolve an ambiguity in the operative clause.”).

- Core of Second Amendment right is self-defense, which is not limited to the home. *See id.* at 2846 (Stevens, J., dissenting) (“Given the presumption that most citizens are law-abiding, and the reality that the need to defend oneself may suddenly arise in a host of locations outside the home, I fear that the District's policy choice may well be just the first of an unknown number of dominoes to be knocked off the table.”).

- Historical evidence that early Americans exercised the right outside the home.

- Does client have a right to carry the firearm for a **purpose** other than self-defense? (Who bears the burden of proving the purpose?)

- Does client have a right to carry the firearm in the **manner** alleged by the government?

- Concealed? 128 S. Ct. at 2816.

- During commission of a violent crime? 128 S. Ct. at 2816.

2. Does application of the relevant statute **violate** client's Second Amendment rights?

3. Is the relevant statute **facially invalid**?

- Strict scrutiny?
- Overbreadth?

4. Can client invoke the Second Amendment if he **never tried** to register or license the firearm?

5. If Second Amendment issue was not raised at trial, what **standard of review** applies on appeal?