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9
10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE EASTERN DISTRICT OF CALIFORNIA
12

13 UNITED STATES OF AMERICA,) No. CR-S-08-250 LKK
14)
Plaintiff,)
15)
v.) NOTICE OF MOTION TO DISMISS AND
16) MOTION TO DISMISS INDICTMENT AS
CORWIN BROWN,) UNCONSTITUTIONAL UNDER SECOND
17) AND FIFTH AMENDMENTS
Defendant.)
18) Date: April 21, 2009
Time: 9:15 a.m.
19) Judge: Hon. Lawrence K. Karlton

20 TO: LAWRENCE BROWN, Acting United States Attorney, and
21 PHILIP FERRARI, Assistant United States Attorney:

22 **PLEASE TAKE NOTICE** that on April 21, 2009, at 9:15 a.m., or as soon thereafter as the matter
23 may be heard, before the Honorable Lawrence K. Karlton, United States District Judge, defendant
24 CORWIN BROWN will move this court for an order dismissing the indictment as unconstitutional under
25 the Second and Fifth Amendment to the United States Constitution.
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Corwin Brown, by and through undersigned counsel, hereby moves this Court to dismiss the
3 indictment in this case, charging one violation of 18 U.S.C. §922(g). The application of 18 U.S.C. §922(g)
4 to Mr. Brown violates his Second Amendment right to bear arms, as explained by the Supreme Court in
5 *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

6 Because 18 U.S.C. §922(g) does not require that the Government prove any willful violation of the
7 law, it allows for the unconstitutional deprivation of Mr. Brown’s liberty without due process of law, in
8 violation to the Fifth Amendment of the U.S. Constitution. *See Lambert v. California*, 355 U.S. 225
9 (1957); *Morrisette v. United States*, 342 U.S. 246 (1952).

10
11 **I. INTRODUCTION**

12 Mr. Brown is charged in a one-count indictment with violating 18 U.S.C. §922(g), criminalizing
13 the possession of firearms and ammunition by people who have been convicted of crimes “punishable by
14 imprisonment for a term exceeding one year.” In Mr. Brown’s case, the indictment alleges that he
15 purchased ammunition from a sporting goods store. Mr. Brown is not charged with possessing a firearm,
16 and neither firearms nor ammunition were found when the search warrant was executed in this case.

17 In February 2008, Mr. Brown was a completely free man. He was neither on parole, probation, nor
18 any other type of criminal justice supervision. He was not facing any criminal charges, there were no open
19 warrants for his arrest, and there were no injunctions or restraining orders against him. Mr. Brown is
20 charged with this felony because 18 U.S.C. §922(g) prohibits the possession of ammunition by people
21 with any prior felony convictions, and provides for a penalty of up to ten years in prison for possession of
22 either ammunition or firearms.

23 In August 2007, the Sacramento City Council passed a local ordinance requiring businesses to
24 keep logs of ammunition sales. Sacramento, Cal., Code §5.66 (2008). Purchasers of ammunition were
25 legally required to provide a name, address, date of birth, government-issued identification, signature, and
26 right thumb print. *Id.* §5.66.020. The Sacramento County Sheriff’s Department designed a form to be used
27 by qualifying businesses when collecting information.

28 Unlike the ATF 4473 Form, which businesses must use when selling *firearms*, the Sacramento
Corwin Brown Motion to Dismiss

1 County ammunition form does not require buyers to certify that they are not convicted felons. The form
2 does not contain an admonition that people with prior felony convictions cannot purchase ammunition.
3 The Sacramento County ammunition ordinance does not require businesses to inform purchasers that
4 felons are prohibited from purchasing ammunition, nor does it require businesses to inquire about
5 purchasers' criminal histories.

6 On May 20, 2008, the Sacramento County Sheriff's Department executed a search warrant at 596
7 De Mar Road, in Sacramento, California, which is Mr. Brown's home. The search warrant affidavit
8 alleged that the ammunition purchase form, coupled with Mr. Brown's prior felony record, established
9 probable cause that firearms or ammunition would be found in his home three months later. The sheriffs
10 did not find firearms or ammunition in Mr. Brown's house, and Mr. Brown's wife informed them that Mr.
11 Brown did not own any firearms.

12 The sheriffs interrogated Mr. Brown at the Sacramento County Jail. During that interrogation, Mr.
13 Brown expressed surprise that he was being criminally charged with purchasing ammunition. He told the
14 officers he did not know he was prohibited from buying ammunition.

15
16 **II. THE INDICTMENT VIOLATES MR. BROWN'S SECOND AMENDMENT RIGHT TO POSSESS
17 AMMUNITION FOR SELF-DEFENSE.**

18 "A well regulated militia, being necessary to the security of a free state, the right of the
19 people to keep and bear arms, shall not be infringed." U.S. CONST., AMEND. II.

20 The United States Supreme Court held that there is a Second Amendment right to possess
21 handguns for lawful self-defense in *District of Columbia v. Heller*, 128 S. Ct. 2783, 2818 (2008). It also
22 rejected the District of Columbia's "prohibition against rendering any lawful firearm in the home operable
23 for the purpose of immediate self-defense." *Id.* at 2822. Possession of ammunition is necessary to render a
24 firearm operable, so it follows that *Heller* recognizes a right to possess handgun ammunition for lawful
25 self-defense.

26 **A. Courts should subject restrictions on firearm and ammunition possession to strict
27 scrutiny.**

28 *Heller* clarified that handgun and ammunition possession fall within the scope of the Second
Amendment. The Second Amendment right belongs to "the people," and it "shall not be infringed."

1 U.S. Const., Amend. II. A law that deprives an entire class of citizens of their Second Amendment
2 rights forever, as 18 U.S.C. §922(g) does, should be “subjected to more exacting judicial scrutiny,”
3 *United States v. Carolene Products Co.*, 304 U.S. 144, 152, n.4 (1938).

4 The majority in *Heller* declined to apply rational-basis scrutiny to the law at issue in the case.
5 128 S. Ct. at 2818, n. 27. The Court also rejected an “interest-balancing approach” to analysis of
6 Second Amendment issues, finding that the inclusion of the right in the Constitution “takes out of
7 the hands of government—even the Third Branch of Government—the power to decide on a case-
8 by-case basis whether the right is *really worth* insisting upon.” *Id.* at 2821 (emphasis in original).

9 In an already infamous phrase of dictum, the Court wrote that “nothing in our opinion should be
10 taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the
11 mentally ill.” *Id.* at 2816—17. Ironically, however, that dictum appears just one page after the
12 following admonition: “It is inconceivable that we would rest our interpretation of the basic
13 meaning of any guarantee in the Bill of Rights upon such a footnoted dictum in a case where the
14 point was not at issue and was not argued.” *Id.* at 2816 n.25 (discussing *Lewis v. United States*, 445
15 U.S. 55 (1980)). *Heller* was not a convicted felon and the constitutionality of laws prohibiting the
16 possession of firearms by felons was not at issue in that case. Dictum suggesting the
17 constitutionality of such laws, therefore, should not govern the interpretation of the meaning of the
18 Second Amendment right to keep and bear arms.

19 The “longstanding prohibitions on the possession of firearms by felons” cannot be found in the
20 historical record.¹ The first federal law prohibiting felons from *receiving* firearms was passed in
21 1961, and the first federal ban on possession was passed in 1968. *See* Marshall, *supra* note 1, at 698
22 n.15 & 16. No state court addressed the constitutionality of a prohibition on firearm possession by
23 felons until 1939, *see State v. Tully*, 89 P.2d 517 (Wash. 1939); at that time, only eleven states had
24 any prohibitions on firearm possession by felons, and all of those states limited the prohibition to
25 those convicted of “crimes of violence.” *See* Marshall, *supra* note 1, at 705. The majority opinion in
26

27
28 ¹For an extensive discussion of this issue, see C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?* 32 HARV. J. LAW & PUB. POL'Y 695, 698–707 (Winter 2009).

1 *Heller* includes an extensive historical analysis of the common law concept of the right to “keep and
2 bear arms,” 128 S. Ct. at 2792–98, a history of state analogs to the Second Amendment, *id.* at
3 2802–04, a review of “post-ratification commentary,” *id.* at 2805–07, and a review of “post-civil
4 war legislation,” *id.* at 2809–11. There is no similar historical support for the implication that the
5 Founders acknowledged, or that the Second Amendment necessarily includes, a lifetime exception
6 for people convicted of felonies.

7 Nothing in the text of the Second Amendment indicates that citizens can be completely deprived
8 of the right for life. The Court should evaluate, therefore, whether the prohibition included in 18
9 U.S.C. §922(g) serves a compelling state interest, and is narrowly tailored to serve that interest in
10 the least restrictive manner possible.

11 **B. The absolute prohibition on ammunition possession cannot survive strict scrutiny.**

12 The main government interest discussed in *Heller* is the interest in minimizing handgun
13 violence. The government cannot establish that 18 U.S.C. §922(g)(1) is narrowly tailored to serve
14 that interest, nor can it establish that there is no less restrictive means of advancing that purpose.

15 The regulatory scheme established by §922(g)(1) lacks coherence. It prohibits possession of
16 ammunition or firearms by anyone “who has been convicted in any court of, a crime punishable by
17 imprisonment for a term exceeding one year.” 18 U.S.C. §922(g)(1). The prohibition applies
18 regardless of whether the conviction involved a crime of violence or use of a firearm. The
19 prohibition applies regardless of the sentence imposed following the prior conviction. The
20 prohibition applies regardless of how much time elapses between the conviction and the possession.
21

22 Congress exempted certain convictions from the prohibition, however. Convictions in foreign
23 courts do not qualify under §922(g)(1), *see Small v. United States*, 125 S. Ct. 1752, 1758, 544 U.S.
24 385 (2005). State misdemeanors that are punishable by two years of imprisonment do not qualify.
25 18 U.S.C. §921(a)(20)(B). State and federal “offenses pertaining to antitrust violations, unfair trade
26 practices, restraints of trade, or other similar offenses relating to the regulation of business
27 practices” do not qualify, 18 U.S.C. §921(a)(20)(A). Convictions that have been expunged or set
28 aside, or for which a person has been pardoned or had civil rights restored do not qualify, 18 U.S.C.

1 §921(a)(20)(B), but a federal conviction for which a person's civil rights have been restored by his
2 home state qualifies, despite the fact that there is no federal provision for civil rights restoration.
3 *Beecham v. U.S.*, 114 S. Ct. 1669, 1672, 511 U.S. 368 (1994).

4 This regulatory scheme is not narrowly tailored to prevent violence. Crimes that result in the
5 permanent loss of one's enumerated Second Amendment right to possess firearms for self-defense
6 include: bribery in sporting contests, 18 U.S.C. § 224, failure to pay child support obligations, 18
7 U.S.C. § 228, mutilation of coins, 18 U.S.C. § 331, unlawful solicitation of political contributions,
8 18 U.S.C. § 602, falsely claiming to be member of the Red Cross, 18 U.S.C. § 917, e-mail
9 "spamming," 18 U.S.C. § 1037, mailing lottery tickets, 18 U.S.C. § 1302, and importation of
10 obscene materials, 18 U.S.C. §1462. State criminal codes contain countless other non-violent felony
11 offenses that could lead to a lifetime deprivation of liberty. *See, e.g., Posey v. Commonwealth*, 185
12 S.W.3d 170, 187 n.5 (Ky. 2006) (Scott, J., dissenting in part, and listing Kentucky felonies,
13 including mining violations and failure of sports agents to notify colleges of contact with athletes).

14 Even if one can justify the lifetime prohibition on *firearm* possession by people convicted of
15 felonies, a lifetime prohibition on *ammunition* possession is even less narrowly tailored to prevent
16 violence. A person cannot cause any violence with ammunition alone. Sentencing someone to ten
17 years in prison for possession of ammunition, absent any evidence of an unlawful purpose or intent
18 to do violence, sweeps far more broadly than the Supreme Court's fundamental rights jurisprudence
19 has previously allowed. *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444 (1969) (holding statute
20 prohibiting the advocacy of violence unconstitutional). Under § 922(g)'s ammunition provision, for
21 example, a person could be sent to prison for ten years for buying shotgun shells for her hunter-
22 husband while at a sporting goods store, or for buying ammunition for his disabled father who owns
23 a lawful firearm for self-defense in the home.

24
25 The indictment should be dismissed because 18 U.S.C. § 922(g) unconstitutionally deprives Mr.
26 Brown of his Second Amendment rights.

27 **III. THE INDICTMENT VIOLATES DUE PROCESS BY PUNISHING INNOCENT CONDUCT WITHOUT**
28 **REQUIRING PROOF THAT MR. BROWN KNEW HE WAS COMMITTING A CRIME.**

1 “The contention that an injury can amount to a crime only when inflicted by intention is no
2 provincial or transient notion. It is as universal and persistent in mature systems of law as belief in
3 freedom of the human will and a consequent ability and duty of the normal individual to choose
4 between good and evil.” *Morrisette v. United States*, 342 U.S. 246, 250 (1952).

5 Even if the Court agrees with the government that Congress can permanently deprive Mr. Brown of
6 his Second Amendment rights because of his prior convictions, the Court should dismiss the indictment
7 because it allows a jury to convict Mr. Brown without any evidence that he knew he was committing a
8 crime by purchasing ammunition. *See Lambert v. California*, 355 U.S. 225 (1957) (overturning a California
9 law punishing the failure of a convicted felon to register her presence in Los Angeles within five days).

10 The Ninth Circuit has previously rejected our argument with respect to firearms. *See United States*
11 *v. Hancock*, 231 F.3d 557 (9th Cir. 2000); *United States v. Kafka*, 222 F.3d 1129 (9th Cir. 2000); *United*
12 *States v. Indelicato*, 800 F.2d 1482 (9th Cir. 1986); and *United States v. Allen*, 699 F.2d 453 (9th Cir. 1982).
13 None of these cases dealt with the possession of ammunition alone. In these cases, the Court distinguished
14 its opinions from *Lambert* in two general ways: first, by holding that *Lambert* only applies to passive
15 conduct, and that firearm possession is not passive conduct; and second, by holding that restraining orders
16 should put people on notice that they are subject to extraordinary regulation.

17 **A. Constitutionally protected conduct should be treated like “passive conduct.”**

18 *Heller* has changed the lens through which courts must view statutes prohibiting possession of
19 firearms and ammunition. Even assuming that Congress had a compelling reason to deprive people
20 of their Second Amendment rights, § 922(g) must be viewed as a statute that criminalizes conduct
21 that would be constitutionally protected but for the fact of the defendant’s prior convictions. It
22 should be treated similarly to a law prohibiting people from expressing controversial political
23 opinions, from associating with other people with felony convictions, or from refusing to speak to
24 police officers or submit to searches. One can imagine a legislature’s desire to curtail First, Fourth,
25 and Fifth Amendment rights based on a belief that certain people’s exercise of those rights is more
26 dangerous or more likely to result in criminal conduct. *Lambert* requires notice before criminalizing
27 “passive conduct” because due process requires “an opportunity to avoid the consequences of the
28 law or to defend any prosecution brought under it.” 355 U.S. at 230. But when the constitution

1 reflects our belief that a citizen has the right to engage in certain conduct, it offends due process to
2 require that he refrain from that conduct or suffer criminal penalties.

3 Even before *Heller*, the Supreme Court recognized that firearm possession does not put citizens
4 on notice that they are subject to regulation. *See Staples v. United States*, 511 U.S. 600 (1994). In
5 holding that the statute prohibiting possession of an unlicensed firearm required proof that the
6 defendant knew the item possessed was covered by the statute, the Court noted:

7 we question whether regulations on guns are sufficiently intrusive that they impinge upon
8 the common experience that owning a gun is usually licit and blameless conduct. *Id.* at 613.
9 Contrary to the Ninth Circuit's suggestion in *Hancock* and *Kafka*, the Supreme Court held that "guns
10 can generally be owned in perfect innocence," 511 at 611. Ammunition sales are even less regulated,
11 as evidenced by the fact that until February 2008, one could purchase ammunition at a sporting goods
12 store without presenting any identification or completing any paperwork.

13 Neither the Supreme Court nor the Ninth Circuit has had the occasion to rule on the
14 constitutionality of a law criminalizing conduct that would otherwise be protected as the exercise of
15 an enumerated constitutional right. When the Ninth Circuit decided *Kafka*, *Hancock*, *Indelicato*,
16 and *Allen*, the Supreme Court had not yet clarified the individual right to keep and bear arms
17 explained in *Heller*.

18 **B. Having a prior felony record does not subject a person to greater regulation.**

19 If Congress can deprive Second Amendment rights from individuals because of the mere fact
20 of prior felony convictions, that power is unique in constitutional law. The Supreme Court has held
21 that the constitution allows permanent deprivation of life or liberty as *punishment* for a felony
22 offense. *See Harmelin v. Michigan*, 501 U.S. 957 (1991); *Gregg v. Georgia*, 428 U.S. 153 (1976).
23 The Court has allowed states to deprive citizens of the right to vote based on prior convictions,
24 because "the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth
25 Amendment." *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974). The Court has never held that solely
26 because of a felony conviction, Congress or a legislature can deprive a citizen of an enumerated
27 constitutional right permanently. With respect to firearms in particular, courts have held that even
28

1 after felony convictions, people retain their Fifth Amendment *property* rights to the firearms. *See*
2 *Serio v. Baltimore County*, 115 F.Supp.2d 509, 515–16 (D.Md. 2000)(citing *Cooper v. City of*
3 *Greenwood*, 904 F.2d 302, 304–06 (5th Cir. 1990); *United States v. Seifuddin*, 820 F.2d 1074,
4 1078–79 (9th Cir. 1987); *Covington v. Winger*, 562 F.Supp. 115, 123–24 (W.D.Mich. 1983)).

5 Unlike people subject to restraining orders, who have recently been informed by courts that their
6 liberty is restricted, the fact of a prior felony conviction does not subject a person who has
7 completed his or her sentence to greater regulation. That finding is implicit in *Lambert*, which
8 never suggested that Lambert should have known that her residency or whereabouts were subject to
9 greater regulation because of her felony record. While it is true that people are often ineligible for
10 benefits, employment, housing, and other opportunities because of prior felony convictions, it is
11 almost universally true that they are given notice of ineligibility and required to affirm that they
12 have not previously been convicted before obtaining those benefits.

13 In this case, however, no notice was given to Mr. Brown that he was prohibited from purchasing
14 ammunition. The ATF Form 4473, which a purchaser of a firearm must complete, requires the
15 purchaser to certify that he has not been convicted of a felony *and* warns him that it is illegal for a
16 person who has been convicted of a felony to purchase a firearm. Ex. A. The Sacramento County
17 ammunition form, however, requires no such certification and contains no such warning. Ex. B.
18 There is no sign at the Big 5 Sporting Goods Store indicating that a person with a felony conviction
19 cannot purchase ammunition. Yet Mr. Brown faces the prospect of spending ten years in prison
20 after providing his true name, address, thumb print, and identification in connection with the alleged
21 purchase of one box of ammunition.

22 **C. The indictment unconstitutionally deprives Mr. Brown of liberty without due process of**
23 **law because it criminalizes innocent and constitutionally protected conduct.**

24 The Supreme Court has interpreted many statutes to require proof that the defendant knew he
25 was committing a crime. *See Ratzlaf v. United States*, 510 U.S. 135 (1994) (requiring knowledge
26 that structuring transactions was illegal); *Staples v. United States*, 511 U.S. 600 (1994) (requiring
27 knowledge that the weapon was a machine gun); *Liparota v. United States*, 471 U.S. 419 (1985)
28 (requiring knowledge that food stamps were being used unlawfully); *Morrisette v. United States*,

1 342 U.S. 246 (1952) (requiring knowledge that property belonged to another). It has done this to
2 avoid allowing people to lose their liberty for conduct that is “not inevitably nefarious,” *Ratzlaf* at
3 135, “apparently innocent,” *Liparota* at 426, or “not blameworthy.” *Morrisette* at 252.

4 If this indictment does not require the government to prove that Mr. Brown knew he was
5 committing a crime by allegedly purchasing ammunition, and does not allow ignorance as a
6 defense, it is for the reason stated in *Morrisette*:

7 The purpose and obvious effect of doing away with the requirement of a guilty intent
8 is to ease the prosecution’s path to conviction, to strip the defendant of such benefit as
9 he derived at common law from innocence of evil purpose, and to circumscribe the
freedom heretofore allowed juries. 342 U.S. at 263.

10 The government seeks to deprive Mr. Brown of his liberty because it alleges he engaged in conduct
11 that the Second Amendment protects and that he did not know was illegal. Like Ms. Lambert, he
12 did not have an opportunity to avoid the consequences of the law, and the statute deprives him of
13 the one defense he has to the prosecution.

14 For all of the above reasons, Mr. Brown respectfully requests that the indictment be dismissed as an
15 unconstitutional violation of his Second and Fifth Amendment rights.

16
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18 Dated: March 23, 2009

19 Respectfully submitted,

20 DANIEL J. BRODERICK

21 Federal Defender

22 /s/ Lauren Cusick

23 LAUREN CUSICK

24 Assistant Federal Defender

25 Attorney for Defendant

26 CORWIN BROWN
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