Consolidated №s
11 CF 492 and 11 CF 730

DISTRICT OF COLUMBIA
COURT OF APPEALS

JAMES ROGER THORNE

Appellant

v.

UNITED STATES OF AMERICA

Appellee

APPELLANT'S OPENING BRIEF

Matthew August LeFande
Attorney at Law PLLC
4585 North 25th Road
Arlington VA 22207
Phone (202) 657-5800
Fax (202) 318-8019
matt@lefande.com
D.C. Bar Number 475995
Attorney for the Appellant

Parties and Counsel

Appellant – James Roger Thorne, a resident of Maryland. Mr. Thorne was represented by Seth L. Schrager at trial.

Appellee – United States of America represented by the United States Attorney's Office.

Table of contents

I. Table of Authorities

Cases

Authorities upon which we chiefly rely are marked with asterisks.

Statutes

Treatises

Legislative Documents

Other Documents

II. Statement of issues presented for review

Where the Appellant is an armed peace officer in Virginia with statutory powers of arrest, he is exempt from District of Columbia weapons prohibitions by operation of the categorical exemptions provided in the District of Columbia Code.

Where the Appellant is a peace officer in Virginia exercising state actor arrest authority on behalf of the Commonwealth, he is exempt from District of Columbia weapons prohibitions by operation of the Law Enforcement Officers' Safety Act (LEOSA). 18 U.S.C. § 926B.

The Superior Court's application of District of Columbia weapons prohibitions against Appellant, a duly appointed peace officer who has met all training and regulatory requirements under Virginia law and permitted by such law to carry firearms in the course of his duties, is not a permissible regulation of firearms under the Second Amendment.

III. Statement of the case

On August 25, 2010, the Appellant was charged by information with Carrying a Pistol without a License Outside the Home following his arrest by Metropolitan Police Officers in the District of Columbia. J.A. 1-3. On September 14, 2010, the Appellant was indicted by a Grand Jury with

Carrying a Pistol without a License Outside the Home, Possession of Unregistered Firearm and Unlawful Possession of Ammunition. J.A. 4-5. The Appellant pled not guilty.

On January 3, 2011, the Appellant, by counsel, moved to dismiss all counts, asserting statutory exemptions to the charges afforded to him by virtue of his status as an armed peace officer in Virginia. J.A. 6-24.[1] The government filed an Opposition. J.A. 32-37. On March 7, 2011, the Superior Court denied the Appellant's Motion to Dismiss, asserting that the Appellant was not entitled to these exemptions. J.A. 48-62.

On March 21, 2011, the Superior Court tried the Appellant on the indicted charges. The Appellant stipulated to being in possession of a loaded pistol within the District of Columbia outside the home, reserving his rights to appeal the Superior Court's denial of his asserted statutory exemptions. The Superior Court found the Appellant guilty on all three counts and imposed a suspended sentence. J.A. 65-66. The Appellant made a timely notice of appeal. J.A. 67.

[1] The memoranda of law related to the Motion to Dismiss were included in the Joint Appendix at the request of the United States Attorney.

IV. Introduction

As set forth by the United States Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008) there is an individual right to keep and bear firearms in the District of Columbia, subject to some forms of regulation. Such regulation may deny possession of firearms to unsuitable persons, but must afford non-disqualified citizens the ability to, *inter alia*, defend themselves in confrontation. District of Columbia law has long afforded police officers exemptions from its weapons prohibitions, regardless of whether such officers' authority was derived from District of Columbia, federal or another state's law. The Superior Court's denial of these exemptions to the Appellant by an unduly narrow reading of the categories of officers afforded such exemptions renders the District of Columbia regulation of firearms unjustified and in deprivation of the Appellant's inalienable rights under the Second Amendment.

V. Statement of facts

On August 13, 2008, the Appellant, James Roger Thorne, was appointed a Special Conservator of the Peace for a period of four years by the Circuit Court for the City of Alexandria as provided by Code of Virginia § 19.2-13. J.A. 25-27. Officer Thorne's Order of Appointment provides

that Thorne "shall have all the powers, functions, duties, responsibilities, and authority of any other conservator of the peace when [Thorne] is engaged in the performance of duties, as a special conservator of the peace…" J.A. 26. Officer Thorne's Order of Appointment further provides that Thorne's powers as a Special Conservator of the Peace shall be exercised throughout the territorial limits of the City of Alexandria. J.A. 26-27. Officer Thorne's Order of Appointment further provides that Thorne is authorized to carry a firearm in the performance of his duties as a Special Conservator of the Peace. J.A. 27.

On June 26, 2009, Officer Thorne was appointed as a Special Conservator of the Peace for four years by the Circuit Court of Fairfax County. J.A. 28-30. Officer Thorne's Fairfax Order of Appointment provides that Thorne "shall have all the powers, functions, duties, responsibilities, and authority of any other conservator of the peace when [Thorne] is engaged in the performance of duties as a special conservator of the peace…" J.A. 28-29. Officer Thorne's Fairfax Order of Appointment requires him to carry a court-issued identification card or a badge, which may display the title "police", while in the performance of his duties. J.A. 29. Officer Thorne's Fairfax Order of Appointment further provides that his powers as a Special Conservator of the Peace may be exercised throughout

the territorial limits of Fairfax County. *Id*. Officer Thorne's Fairfax Order of Appointment further provides that Thorne is authorized to carry a firearm in the performance of his duties as a Special Conservator of the Peace. *Id*.

Each and all of the terms of Officer Thorne's respective Orders of Appointment have remained continuously in effect to the present day. For all times relevant to this case, Officer Thorne met all standards required by his employing agency for regular qualification with a firearm.

Officer Thorne's employer is a Criminal Justice Agency for the Commonwealth of Virginia under Code of Virginia § 9.1-101.

Officer Thorne was arrested without a warrant on August 25, 2010 and charged with Carrying a Pistol Without a License, outside home or business, in violation of D.C. Code § 22-4504(a), Possession of an Unregistered Firearm, in violation of D.C. Code § 7-2502.01(a), and Unlawful Possession of Ammunition, in violation of D.C. Code § 7-2506.01(3). The Government's evidence shows that Officer Thorne was in possession of, and produced on demand, his government-issued photographic police identification at the time of his arrest. J.A. 31.[2] The

[2] The police report narrative demonstrates no nefarious activity whatsoever leading up to Thorne's arrest. Thorne was offering information to responding Metropolitan Police officers about a gunshot he had just heard when he identified himself as a police officer. J.A. 2.

Government alleges the firearm carried by Officer Thorne was a Glock. J.A. 2. Glock firearms are manufactured in Smyrna, Georgia and shipped and/or transported in interstate and/or foreign commerce.

There is no allegation that Officer Thorne was under the influence of alcohol or another intoxicating or hallucinatory drug or substance at the time of his arrest. Officer Thorne was not under the influence of alcohol or another intoxicating or hallucinatory drug or substance at the time of his arrest.

There is no allegation that Officer Thorne was prohibited by Federal law from receiving a firearm at any time relevant to this case. Officer Thorne was not prohibited by Federal law from receiving a firearm at any time relevant to this case.

There is no allegation that Officer Thorne was on private or government property that restricted the possession of firearms at the time of his arrest. Officer Thorne was not on private or government property that restricted the possession of firearms at the time of his arrest.

There is no allegation that Officer Thorne was the subject of any disciplinary action by his employer agency at the time of his arrest. Officer Thorne was not the subject of any disciplinary action by his employer agency at the time of his arrest.

There is no allegation that Officer Thorne possessed any machine gun (as defined by 26 U.S.C. § 5845) at the time of his arrest. Officer Thorne did not possess any machine gun at the time of his arrest. There is no allegation that Officer Thorne possessed any firearm silencer or destructive device (as defined by 18 U.S.C. § 921) at the time of his arrest. Officer Thorne did not possess any firearm silencer or destructive device at the time of his arrest.

Officer Thorne has no other criminal record of any kind.

VI. Argument

Both District of Columbia and federal law provide broad exemptions for law enforcement officers from the weapons prohibitions of the District of Columbia Code. The powers granted to Officer Thorne by the Virginia Circuit Courts bring him into both the statutory and common law definitions of a law enforcement officer for the purposes of these exemptions. Where Officer Thorne has demonstrated his statutory arrest authority upon public space and his authority to carry firearms in the performance of official duties, he has met his burden of demonstrating his exemption from the laws under which he was charged.

1. **Standard of Review**

Given the lack of contested facts in this case, Officer Thorne's claimed exemptions to D.C. Code §§ 7-2502.01 and 22-4504 are purely a question of statutory construction and application requiring *de novo* review. *District of Columbia v. Fitzgerald*, 953 A.2d 288, 299 (D.C. 2007) (citing *District of Columbia v. Morrissey*, 668 A.2d 792, 796 (D.C. 1995)). Officer Thorne's constitutional challenges to these statutes *as applied* to him also warrant *de novo* review. *Gamble v. United States*, 2011 D.C. App. LEXIS 615 at 7, n.6 (D.C. Oct. 27, 2011) (citing *In re Warner*, 905 A.2d 233, 237 (D.C. 2006); *Farina v. United States*, 622 A.2d 50, 55 n.7 (D.C. 1993); *United States v. Rene E.*, 583 F.3d 8, 11-16 (1st Cir. 2009); *State v. Knight*, 218 P.3d 1177, 1187-90 (Kan. Ct. App. 2009)).

2. **Officer Thorne is a law enforcement agent of the Commonwealth of Virginia and therefore exempt from D.C. Code §§ 7-2502.01 and 22-4504.**

D.C. Code § 7-2502.01 and § 22-4505 provide blanket exceptions for law enforcement officers under any circumstances.

> (b) Subsection (a) of this section shall not apply to:
>
> (1) Any law enforcement officer or agent of the District or the United States, or any law enforcement officer or agent of the government of any state or subdivision thereof…

D.C. CODE § 7-2502.01.

> The provisions of § 22-4504 shall not apply to marshals, sheriffs, prison or jail wardens, or their deputies, policemen or other duly appointed law enforcement officers…

D.C. CODE § 22-4505(a).

Officer Thorne is a law enforcement agent of the Commonwealth of Virginia. He has been appointed by both the Circuit Court of the City of Alexandria and the Circuit Court of Fairfax County as a Special Conservator of the Peace. J.A. 25-30. These orders of appointment provide that Thorne "shall have all the powers, functions, duties, responsibilities and authority of any other conservator of the peace". J.A. 26, 28.

A Conservator of the Peace is an official authorized to preserve and maintain the public peace. BLACK'S LAW DICTIONARY 306 (6th ed. 1990). Under Virginia law, Conservators of the Peace include state judges, state prosecutors, magistrates and

> any special agent or law-enforcement officer of the United States Department of Justice, National Marine Fisheries Service of the United States Department of Commerce, Department of Treasury, Department of Agriculture, Department of Defense, Department of State, Office of the Inspector General of the Department of Transportation, Department of Homeland Security, and Department of Interior; any inspector, law-enforcement official or police personnel of the United States Postal Inspection Service; any United States marshal or deputy United States marshal whose duties involve the enforcement of the criminal laws of the United States; any officer of the Virginia Marine Police; any criminal investigator of the Department of Professional and Occupational Regulation, who meets

> the minimum law-enforcement training requirements established by the Department of Criminal Justice Services for in-service training; any criminal investigator of the United States Department of Labor; any special agent of the United States Naval Criminal Investigative Service, any special agent of the National Aeronautics and Space Administration, and any sworn municipal park ranger, who has completed all requirements under § 15.2-1706…

CODE OF VIRGINIA § 19.2-12.

Contrary to the unfounded conclusions of the Metropolitan Police officers who arrested Thorne, the Virginia Court of Appeals has plainly stated that Conservators of the Peace are not private security guards. *See Frias v. Commonwealth*, 34 Va. App. 193, 200 (2000) ("Furthermore, appellant contends that a common law definition of 'conservator of the peace' exists which encompasses 'registered armed security officers.' Appellant cites no authority for this assertion. We find none.") The law enforcement power of a Virginia Conservator to arrest without a warrant is expressly set forth by Virginia law.

> Every conservator of the peace shall have authority to arrest without a warrant in such instances as are set out in §§ 19.2-19 and 19.2-81. Upon making an arrest without a warrant, the conservator of the peace shall proceed in accordance with the provisions of § 19.2-22 or § 19.2-82 as the case may be.

CODE OF VIRGINIA § 19.2-18. Section 19.2-81 is the operative code section which grants warrantless arrest authority to members of the Virginia State Police, a Virginia Sheriff or the members of "any duly constituted police

force" of any county, city or town of the Commonwealth.[3] A Special Conservator of the Peace has the authority to issue a court summons on behalf of the Commonwealth for such criminal offenses so provided. *Id*. § 19.2-74.

As do many others, the Metropolitan Police Department and the United States Attorney's Office misunderstand the authority of a Conservator of the Peace. *See, e.g.*, *Terrell v. Petrie*, 763 F.Supp. 1342, 1347 (E.D.Va. 1991) (claiming, without any authority in support and contrary to the express terms of the Code of Virginia cited *supra*, that "conservators of the peace have limited powers"). To the contrary, the Conservator of the Peace is the most ancient and established office of law enforcement from which all other forms are derived.

> The king is mentioned as the first. Then come the chancellor, the treasurer, the high steward, the master of the rolls, the chief justice ant the justices of the King's-bench, all the judges in their several courts, sheriffs, coroners, constables; and some are said to be conservators by tenure, some by prescription, and others by commission.

Entick v. Carrington, 19 Howell's STATE TRIALS, 1029, 1061 (1765).

[3] This is the fundamental authority of any law enforcement officer, the statutory authority to make a warrantless arrest beyond common law limitations. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 343-345 (2001). Compare the analogous D.C. CODE § 23-581.

The Commonwealth of Virginia's adaptation of the ancient common law office of Conservator of the Peace was described by the Virginia Supreme Court in 1923:

> The office of conservators of the peace is a very ancient one, and their common law authority to make police inspection, without a search warrant, extends throughout the territory for which they are elected or appointed, as the case may be, in private as well as in public places, and upon private as well as public property, unless inhibited from entry for such purpose without a search warrant by some rule of the common law, or by the Constitution, or by statute. It was provided in EDW. III, ch. 15, that "in every shire of the realm good men and lawful, which are no maintainers of evil nor barretors [*sic*] in the county, shall be assigned to keep the peace;" of which it was said that this "was as much as to say that in every shire the King himself should place special eyes and watches over the people, that should be both willing and wise to foresee, and should be also enabled with meet authority to repress all intention of uproar and force even in the first seed thereof and before that it should grow up to any offer of danger." This was but declaratory of the common law authority of conservators of the peace. That authority could not have been at all efficiently exercised if a search warrant had had to be first obtained before any entry could have been lawfully made upon any land in private tenure. And while the duties and powers of police officers are, in modern times, largely defined and regulated by statute, it is elementary that the common law may be relied on to supply many incidents (of their powers), "and others are based on what may be necessarily implied from the powers expressly conferred."

McClannan v. Chaplain, 136 Va. 1, 12-13 (1923) (internal citations and notations omitted). *See also Muscoe v. Commonwealth*, 86 Va. 443, 447 (1890) ("By the general laws of the state, which upon this subject, are, for the most part, the common law, a constable may, *virtute officii*, without warrant, arrest for felony, or upon reasonable suspicion of felony, and for

misdemeanors committed in his presence, and take the offender before a magistrate to be dealt with according to law.")

While Sheriffs and Constables are repeatedly referenced in the common law as law enforcement officers, the terms "police" or "police officer" are relatively recent in origin.

> While the old writers do not, in express terms, speak of *police officers* as among those who have the right as conservators of the peace to make arrests without warrant, they do refer to *a class of officers*, conservators of the peace, as having that right. It is said in 1 East's PLEAS OF THE CROWN, 314, "With regard to such ministers of justice who in right of their offices are conservators of the peace, and in that right alone interpose in the case of riots and affrays, it is necessary, in order to make the offence of killing them amount to murder, that the parties concerned should have some notice of the intent with which they interpose. If the officer be within his proper district and known, or but generally acknowledged to bear the office he assumes; or if in order to keep the person he produces his staff of office or any other known ensign of authority," etc. This is a declaration of the rights of conservators of the peace, and we take it that when new officers of that class are created they come within the reason of the principle, and should have the same protection as those formerly existing.

State v. Bowen, 17 S.C. 58, 61-62 (1882) (emphasis in original).

> As conservator of the peace in his county or bailiwick, he is the representative of the king, or sovereign power of the State for that purpose. He has the care of the county, and, though forbidden by *magna charta* to act as a justice of the peace in trial of criminal cases, he exercises all the authority of that office where the public peace was concerned. He may upon view, without writ or process, commit to prison all persons who break the peace or attempt to break it; he may award process of the peace, and bind any one in recognizance to keep it. He is bound, *ex officio*, to pursue and take all traitors, murderers, felons, and other misdoers, and commit them to jail for safe custody

South v. Md., 59 U.S. (18 How.) 396, 401 (1856) (citing 1 Blackstone's COMMENTARIES 343; 2 Hawk, P.C.C. 8, § 4).

> …where an individual… acts as a conservator of the peace, he… represents the sovereign power of the State for that purpose, and is entitled to all the immunities of such sovereign; and that the right to hold the State, or its duly delegated agents, responsible for a failure to conserve the peace, rests only upon express statute, and does not exist otherwise.

State use of Cocking v. Wade, 87 Md. 529 (1898) (citing *State v. Mayor and City Council of N. O.*, 109 U.S. 285 (1883); *M. & C. C. of Balto. v. Poultney*, 25 Md. 107 (1866); *M. & C. C. of Hagerstown v. Dechert*, 32 Md. 369 (1870); *M. & C. C. of Hagerstown v. Sehner*, 37 Md. 180 (1872)).

Virginia Special Conservators of the Peace are appointed "upon the showing of a necessity for the security of property *or the peace*". CODE OF VIRGINIA § 19.2-13 (emphasis added).

> Sheriffs are, *ex officio*, conservators of the peace within their respective counties, and it is their duty, as well as that of all constables, coroners, marshals and other peace officers, to prevent every breach of the peace, and to suppress every unlawful assembly, affray or riot which may happen in their presence.

City of Chicago v. Morales, 527 U.S. 41, 108 (1999) THOMAS, J., *dissenting* (quoting J. Crocker, DUTIES OF SHERIFFS, CORONERS AND CONSTABLES § 48, 33 (2d ed. rev. 1871)).

> Police officers are not, and have never been, simply enforcers of the criminal law. They wear other hats -- importantly, they have long been vested with the responsibility for preserving the public peace.

> *See, e.g.*, O. Allen, DUTIES AND LIABILITIES OF SHERIFFS 59 (1845) ("As the principal conservator of the peace in his county, and as the calm but irresistible minister of the law, the duty of the Sheriff is no less important than his authority is great"); E. Freund, POLICE POWER § 86, p. 87 (1904) ("The criminal law deals with offenses after they have been committed, the police power aims to prevent them. The activity of the police for the prevention of crime is partly such as needs no special legal authority"). Nor is the idea that the police are also peace officers simply a quaint anachronism. In most American jurisdictions, police officers continue to be obligated, by law, to maintain the public peace.

Id., 527 U.S. at 106-107 (citing ARK. CODE ANN. § 12-8-106(b) (Supp. 1997) ("The Department of Arkansas State Police shall be conservators of the peace"); DEL. CODE ANN. Tit. IX, § 1902 (1989) ("All police appointed under this section shall see that the peace and good order of the State . . . be duly kept"); ILL. COMP. STAT. ANN. ch. 65, § 5 11-1-2(a) (Supp. 1998) ("Police officers in municipalities shall be conservators of the peace"); LA. REV. STAT. ANN. § 40:1379 ("(West) Police employees . . . shall . . . keep the peace and good order"); MO. REV. STAT. § 85.561 (1998) ("Members of the police department shall be conservators of the peace, and shall be active and vigilant in the preservation of good order within the city"); N. H. REV. STAT. ANN. § 105:3 (1990) ("All police officers are, by virtue of their appointment, constables and conservators of the peace"); ORE. REV. STAT. § 181.110 (1997) ("Police to preserve the peace, to enforce the law and to prevent and detect crime"); 351 PA. CODE Art. V, ch. 2, § 5.5-200 ("The Police

Department . . . shall preserve the public peace, prevent and detect crime, police the streets and highways and enforce traffic statutes, ordinances and regulations relating thereto"); TEXAS CODE CRIM. PROC. ANN., Art. § 2.13 (Vernon 1977) ("It is the duty of every peace officer to preserve the peace within his jurisdiction"); VT. STAT. ANN., Tit. 24, § 299 (1992) ("A sheriff shall preserve the peace, and suppress, with force and strong hand, if necessary, unlawful disorder"); CODE OF VIRGINIA § 15.2-1704(A) (Supp. 1998) ("The police force . . . is responsible for the prevention and detection of crime, the apprehension of criminals, the safeguard of life and property, the preservation of peace and the enforcement of state and local laws, regulations, and ordinances")).

Officer Thorne's police powers in Virginia are derived from the same code section as a State Trooper or a Deputy Sheriff, Code of Virginia § 19.2-81 (applicable to Conservators of the Peace by operation of Code of Virginia § 19.2-18), and extend throughout the jurisdiction of the City of Alexandria and Fairfax County.[4] J.A. 25-30. As a court appointed agent of the State with statutory powers of arrest extending throughout his jurisdiction, Thorne

[4] By virtue of these two appointments, Thorne's law enforcement jurisdiction encompasses an area more than six times the size and nearly double the population of that of the District of Columbia's Metropolitan Police Department.

clearly meets the definition of a "duty appointed law enforcement officer" for the purposes of District of Columbia law.[5]

3. Officer Thorne is exempt from District of Columbia firearms laws by operation of LEOSA.

> Notwithstanding any other provision of the law of any State or any political subdivision thereof, an individual who is a qualified law enforcement officer and who is carrying the identification required by subsection (d) may carry a concealed firearm that has been shipped or transported in interstate or foreign commerce…

18 U.S.C. § 926B(a).

For Thorne to be afforded protection under 18 U.S.C. § 926B, also known as the Law Enforcement Officers' Safety Act (LEOSA), he need only satisfy each of the following provisions: (1) be an "employee of a governmental agency" who has a photographic identification issued by that agency; and (2) have "statutory powers of arrest" and authorization by law to prevent, detect, investigate, or prosecute violations of law or supervise those who do so; and (3) agency authorization to carry a firearm on-duty and meet the standards, if any, of his agency "to regularly qualify in the use of a firearm." 18 U.S.C. § 926B. Notwithstanding any of the above, LEOSA will

[5] If the Court finds that Thorne is exempt under D.C. Code § 7-2502.01(b), he is therefore also exempt from D.C. Code § 7-2506.01(3) and may lawfully possess the ammunition for his pistol. *Timus v. United States*, 406 A.2d 1269, 1275 (D.C. 1979).

not apply if at the time of arrest the person (4) was the subject of any disciplinary action by his agency; (5) was under the influence of any substance; or (6) was prohibited by federal law from possessing a weapon. *Id*.[6]

To the extent this Court must ascertain Congressional intent in this instance, LEOSA is merely one of many amendments to the Gun Control Act, and the United States Supreme Court has held that federal gun laws are to be given their broadest permissible application. *Scarborough v. United States*, 431 U.S. 563, 575 (1977). That prescription now includes LEOSA.

The U.S. House of Representatives Report 108-560 stated that it was Congress' intent to (1) establish parity between state and local law enforcement officers and their federal counterparts who can carry nationwide, (2) provide an additional unpaid homeland security force composed of off-duty and retired law enforcement officers, and (3) enable such officers to defend themselves and their families against criminals. H.R.

[6] The government made no argument whatsoever before the trial court refuting Thorne's claimed exemption under LEOSA. J.A. 58, n.4. This Court should deem any new rationale from the government for such opposition waived on appeal. *See United States Dep't of State v. Ray*, 502 U.S. 164, 171-172 (1991) (citing *Ray v. United States Dep't of Justice*, 725 F. Supp. 502, 505 (S.D. Fla. 1989)); *Vaughn v. Rosen*, 523 F.2d 1136, 1143 (D.C. Cir. 1975) (appeals court would not consider rationale for applying exemption not raised in district court).

REP. No. 560, 108th Cong., 2nd Sess. 2004 at 3-4. With that legislative intent in mind, LEOSA was drafted to apply broadly to protect all law enforcement officers and retired law enforcement officers *regardless of title* so long as they meet all of the law's criteria. *See id*. at 54, 55 (bill applies to "many peace officers that you would not think of as peace officers," for example, park police, transit police, corrections officers, "not just police and sheriff, anybody with arresting powers, game and fisheries, probation and parole officers, and everybody else").

By virtue of the employment of Special Conservators of the Peace, themselves law enforcement agents of the Commonwealth, the company employing them itself becomes a state "Criminal Justice Agency" by operation of Virginia law.

> "Criminal justice agency" means (i) a court or any other governmental agency or subunit thereof which as its principal function performs the administration of criminal justice and any other agency or subunit thereof which performs criminal justice activities, but only to the extent that it does so; (ii) for the purposes of Chapter 23 (§ 19.2-387 *et seq*.) of Title 19.2, *any private corporation or agency which, within the context of its criminal justice activities employs officers appointed under § 15.2-1737, or special conservators of the peace* or special policemen appointed under Chapter 2 (§ 19.2-12 *et seq*.) of Title 19.2, provided that (a) such private corporation or agency requires its officers, special conservators or special policemen to meet compulsory training standards established by the Criminal Justice Services Board and submits reports of compliance with the training standards and (b) the private corporation or agency complies with the provisions of Article 3 (§ 9.1-126 *et seq*.) of this chapter, but only to

> the extent that the private corporation or agency so designated as a criminal justice agency performs criminal justice activities;

CODE OF VIRGINIA § 9.1-101 (emphasis added).

For more than seventy years, the Virginia Supreme Court has consistently held that a peace officer in the employment of a private company remains an agent of the Commonwealth when in the performance of pubic duties.

> For many years, private employers have employed special officers pursuant to special officer statutes, *see* CODE [OF VIRGINIA] § 56-353; *Norfolk & W. Ry. Co. v. Haun*, 167 Va. 157, 160-62 (1936), or, as in this case, cooperative agreements between police departments and private employers, pursuant to Code § 15.2-1712. Not surprisingly then, this Court has considered a number of cases involving the liability of a private company for the tortious acts of an off-duty police officer occurring while the officer was in the employ of the private company. As the City contends, this Court has acknowledged that a person who is a police officer is not precluded from also acting in the capacity of an agent or employee of a private employer. *Clinchfield Coal Corp. v. Redd*, 123 Va. 420, 431 (1918). However, this Court has consistently held that, when considering tort liability, it is a factual question whether the officer was acting as an employee of the private employer or as a public officer enforcing a public duty when the wrongful conduct occurred. *Id*. at 431, 435; *accord Glenmar Cinestate, Inc. v. Farrell*, 223 Va. 728, 735 (1982); *Norfolk Union Bus Terminal, Inc. v. Sheldon*, 188 Va. 288, 294-95 (1948); *Haun*, 167 Va. at 160-61, 165, 167. We most recently reaffirmed this principle in *Godbolt v. Brawley*, 250 Va. 467, 472-73 (1995).

City of Alexandria v. J-W Enters., Inc., 279 Va. 711, 717 (2010) (parallel citations omitted).

> "[T]he test is: in what capacity was the officer acting at the time he committed the acts for which the complaint is made? If he is engaged

> in the performance of a public duty such as the enforcement of the general laws, his employer incurs no vicarious liability for his acts, even though the employer directed him to perform the duty. On the other hand, if he was engaged in the protection of the employer's property, ejecting trespassers or enforcing rules and regulations promulgated by the employer, it becomes a jury question as to whether he was acting as a public officer or as an agent, servant, or employee."

J-W Enters. at 718 (quoting *Godbolt*, 250 Va. at 472-73).[7]

The Fourth Circuit applied this Virginia Supreme Court caselaw to a 42 U.S.C. § 1983 tort claim specifically against a private employer of a Special Conservator of the Peace appointed under Code of Virginia § 19.2-13.

> Because Austin presented no evidence that Gatewood acted other than in her capacity as a public officer in effecting Austin's July 14, 1994 arrest and assisting with the prosecution, Paramount cannot be held vicariously liable with respect to Austin's claims for false arrest (July 14, 1994) and malicious prosecution. *See Glenmar*, 292 S.E.2d at 369 ("If [the officer was] engaged in the performance of a public duty such as the enforcement of the general laws, his employer incurs no vicarious liability for his acts. . . ."). We conclude, therefore, that Paramount was entitled to judgment as a matter of law on both claims.

Austin v. Paramount Parks, Inc., 195 F.3d 715, 731-732 (4th Cir. 1999).

Regardless of the employer, a Conservator of the Peace remains a representative of the sovereign state in the performance of his law enforcement functions.

> The police officers of a city are not regarded as servants or agents of the municipality. They are conservators of the peace, and exercise many of the functions of sovereignty; they are appointed and paid by the municipality as a convenient mode of exercising the functions of government; they assist the city in the performance of its governmental duties, and not in the discharge of its proprietary obligations.

Hall v. Shreveport, 157 La. 589, 594 (1925).

In one of the few criminal cases decided upon an interpretation of LEOSA, *New York v. Rodriguez*, 2917/06 (N.Y. Sup. Ct. 2006), the New York Supreme Court examined the applicability of LEOSA to a Pennsylvania constable. The constable was found to not be "personnel of the judicial system… considered 'independent contractors' with respect to the Court system" but still entitled to protection under LEOSA. *Rodriguez* at 7.

> As noted by the Pennsylvania Supreme Court, "a constable is a known officer charged with conservation of the peace, and whose business it is to arrest those who have violated it…It is the constable's job to enforce the law and carry it out, just the same as the job of district attorney's [*sic*], sheriffs and police generally" (*see* [*In re Act 147 of 1990*, 598 A.2d 985, 990 (Pa. 1991)] (citations omitted)).

Id. at 7-8.

> Constables and deputy constables do not have uniforms and they are not provided with municipal vehicles but rather use their own private cars (*see* [*Commonwealth v. Roose*, 690 A.2d 268, 269 (Pa. Super. Ct.

---

[7] The Superior Court completely ignored this *controlling* caselaw when it asserted that "[t]o the extent Mr. Thorne carries out governmental functions, he does so as the employee of a private company." J.A. 60.

> 1997)]). They are not paid a salary by any municipal subdivision as police and sheriffs are, but are more like independent contractors whose pay is on a per job basis (*see* 13 P.S. §§ 63-75; [*Roose*, 690 A.2d at 269]). They are not considered State employees in order to receive legal representation when sued in connection with their duties (*see* [*Roose*, 690 A.2d at 269]). No one supervises constables in the way a police chief supervises police officers or a sheriff supervises deputies. No municipality is responsible for their actions in the way a city, borough or township is responsible for its sheriff's office. In fact, the Pennsylvania Supreme Court has found unconstitutional legislation which attempted to place constables under the supervisory authority of the courts (*see In re Act 147 of 1990*, [598 A.2d 985]).
>
> Despite being termed an "independent contractor" by the Courts, it appears that, with respect to the work done by a constable for a court, the constable is performing "judicial duties" and is in fact "employed" by the court, district justice or judge which engaged his services… Thus, there appears merit to defendant's argument that he is a government employee within the meaning of the term as it is used in 18 U.S.C. § 926B.

Id. at 12-13.

> Thus, the fact that the Pennsylvania courts have full power to remove Pennsylvania State Constables from their positions and the fact that they are elected officials, conflicts with the People's theory that Pennsylvania State Constables are not government employees.

Id. at 13. *See also Seattle Opera v. NLRB*, 292 F.3d 757, 762 (D.C. Cir. 2002) (quoting BLACK'S LAW DICTIONARY 525 (6th ed.) (an employee is a "person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed")).

Compare Officer Thorne's status where he is appointed to office by the Circuit Court, he takes police action solely on behalf of the State and he is subject to revocation by the Courts. CODE OF VIRGINIA § 19.2-13. If a Pennsylvania Constable as an independent contractor is entitled to protection under LEOSA, then a Virginia Special Conservator of the Peace, employed by a Virginia Criminal Justice Agency, is also so entitled.

A primary purpose of LEOSA was to relieve peace officers from strained construction of firearms statutes by prosecutors and the courts. *See, e.g., United States v. Savoy*, D.C. Super. Ct. Crim. No. F-5748-98 (2001) THE DAILY WASHINGTON LAW REPORTER, Vol. 129, Num. 89, 877 (member of United States Postal Police not a "police officer" for purpose of (old) D.C. Code § 22-3205); *Middleton v. United States*, 305 A.2d 259, 261-262 (D.C. 1973) (uniformed officer of United States Federal Protective Service not covered by exemption); *Kopko v. Miller*, 892 A.2d 766 (Pa. 2006) (Sheriff not law enforcement officer under Pennsylvania law).

Given the broad powers of arrest given to Special Conservators of the Peace within the Code of Virginia, it is self-evident that they, and their employers, act as agents of the Commonwealth in performing inherently governmental functions. This is no different than such corporations as the Washington Metropolitan Airports Authority, the Washington Metropolitan

Area Transit Authority, and Amtrak, all operating non-governmental police forces with inherent governmental agency authority. *See, e.g.*, 18 U.S.C. § 926B(f).[8] Indeed, this very courthouse is presently guarded by employees of a private security company under contract with the United States Marshals Service Office of Court Security, who like Officer Thorne, are clothed with governmental law enforcement agency authority. Privately employed United States Marshals are a particularly poignant demonstration of "the exercise by a private entity of powers traditionally exclusively reserved to the [government]." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974).

The performance of an exclusively governmental function by Thorne and his employer could only occur with the Commonwealth's authorization to act in its place – the very definition of agency. Thus, Thorne is an agent of the state government and his employer is properly an agency of the state

[8] This 2010 amendment to LEOSA adding Amtrak, the Federal Reserve and federal executive office police officers to its definition of "qualified law enforcement officer[s]", does in no way undermine Officer Thorne's present claim of exemption. *See Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1081-1082 (2011) ("Post-enactment legislative history… is not a legitimate tool of statutory interpretation" (citations omitted)). LEOSA was indeed vigorously debated prior to enactment, largely on Tenth Amendment grounds, with numerous amendments offered in committee. *See* H.R. REP. No. 560, *supra*. This counsel is unable to find <u>any</u> debate regarding the definition of a "governmental agency" within the record or further elucidation regarding its intended meaning.

government, as expressly recognized by Code of Virginia § 9.1-101. As a law enforcement agent for the Commonwealth of Virginia, Officer Thorne meets the requirements for exemption under LEOSA.

4. District of Columbia weapons prohibitions as applied to Officer Thorne are in violation of the Second Amendment

This Court has recently re-asserted that *Heller*, *supra*, "did not 'invalidate any of the District's *individual* gun control laws[.]' *Smith v. United States*, 20 A.3d 759, 764 (D.C. 2011) (emphasis in *Smith*)." *Gamble* at 14. This Court has further rejected post-*Heller* facial challenges to such laws. *Paige v. United States*, 25 A.3d 74, 95 (D.C. 2011) (quoting *Lowery v. United States*, 3 A.3d 1169, 1176 (D.C. 2010) and citing *Pleasant-Bey v. United States*, 988 A.2d 496, 504 n.6 (D.C. 2010)). Officer Thorne herein instead challenges these laws *as applied* to him. Given his status as an armed peace officer in Virginia, a prohibition of carrying firearms necessary for the performance of his duties is a regulation infringing upon his Second Amendment right without furthering a compelling governmental interest.

By undermining his otherwise readily evident exemptions, the Superior Court has now necessarily undermined the primary legislative purposes of such exemptions as embodied in LEOSA.

> [LEOSA] was "designed to protect officers and their families from vindictive criminals, and to allow thousands of equipped, trained and certified law enforcement officers, whether on-duty, off-duty or retired, to carry concealed firearms in situations where they can respond immediately to a crime across state and other jurisdictional lines."

In re Casaleggio, 18 A.3d 1082, 1085 (N.J. Super. Ct. App. Div. 2011) (quoting S. REP. No. 108-29, at 4 (2003) and citing H.R. REP. No. 108-560, at 4 (noting that LEOSA "would allow current and retired police officers to carry a concealed weapon in any of the 50 States")).

LEOSA speaks to pretexts for firearms regulation which are simply inapplicable to law enforcement officers. First, and most obviously, by virtue of their official position, they are presumptively not "disqualified" from possessing firearms.

> In *Heller*, the Supreme Court held the Second Amendment protects "an individual right to keep and bear arms," 554 U.S. at 595, but not a right "to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose," *id*. at 626. More specifically, the Court held unconstitutional the District's "ban on handgun possession in the home" as well as its "prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense," *id*. at 635, noting "the inherent right of self-defense [is] central to the Second Amendment right," *id*. at 628. Therefore, unless the plaintiff was "disqualified from the exercise of Second Amendment rights" for some reason, such as a felony conviction, the District had to permit him to register his handgun. *Id*. at 635.

Heller v. District of Columbia, 2011 U.S. App. LEXIS 20130 at 3 (D.C. Cir. Oct. 4, 2011) (herein, *Heller* (2011)).

> In *Heller* the Supreme Court explained the Second Amendment "codified a *pre-existing*" individual right to keep and bear arms, 554 U.S. at 592, which was important to Americans not only to maintain the militia, but also for self-defense and hunting, *id*. at 599. Although "self-defense had little to do with the right's *codification*[,] it was the *central component* of the right itself." *Id*.
>
> Still, the Court made clear "the right secured by the Second Amendment is not unlimited," *id*. at 626, and it gave some examples to illustrate the boundaries of that right. For instance, the Court noted "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." *Id*. at 625 (citing *United States v. Miller*, 307 U.S. 174 (1939)). This limitation upon the right to keep and bear arms was "supported by the historical tradition of prohibiting the carrying of dangerous and unusual weapons." *Id*. at 627 (internal quotation marks omitted).

Heller (2011) at 15 (emphasis *sic*, parallel citations omitted).

> …nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Id. at 16 (quoting *Heller*, 554 U.S. at 626-627).

The *Heller* (2011) Court employed "as have other circuits, a two-step approach to determining the constitutionality of the District's gun laws." *Id*. at 16 (citing *Ezell v. City of Chicago*, 651 F.3d 684, 692-693 (7th Cir. 2011); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010)).

The first step determines if the regulations "impinge upon the Second Amendment right". *Heller* (2011) at 19. The *Heller* (2011) Court determined that the District of Columbia registration requirements do in fact infringe upon "the 'core lawful purpose' protected by the Second Amendment". *Id*. at 26 (quoting *Heller,* 554 U.S. at 630). For residents seeking registration of handguns for protection in their homes, there then is an analysis, employing intermediate scrutiny, as the registration requirements only cause an incidental burden on this kind of possession of firearms.

The instant case departs from *Heller* (2011) at this point. The District of Columbia registration requirements for Officer Thorne do "severely limit the possession of firearms". *Id*. at 32 (quoting *Marzzarella,* 614 F.3d at 97). While the "District of Columbia's [prior] handgun ban is an example of a law at the far end of the spectrum of infringement on protected Second Amendment rights", *Marzzarella*, 614 F.3d at 97 (citing *Heller,* 554 U.S. at 629 ("Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban[]")), absent his claimed exemptions, Officer Thorne is in the same or an even worse situation as the pre-June 2008 *Heller* plaintiffs. No provision of the District of Columbia firearm registration scheme permits a non-resident to register a handgun in the

District of Columbia. *See* D.C. CODE § 7-2502.02(a)(4).[9] *Compare Plummer v. United States*, 983 A.2d 323, 336-337 (D.C. 2009) (D.C. resident might have qualified to register his handgun post-*Heller*). Absent his claimed categorical exemption, there is no legal mechanism for Officer Thorne to lawfully possess a handgun in the District of Columbia, despite the fact that Thorne uses a handgun in his official duties in Alexandria and Fairfax, and must necessarily pass through the District of Columbia to get to his job from his home in Oxon Hill, Maryland.[10] As applied herein, District of Columbia law "permanently disarms an entire category of persons" within the District of Columbia. *Chester*, 628 F.3d at 680.

In this regard, the limitations on Officer Thorne's Second Amendment rights created by the refusal of the Superior Court to acknowledge his otherwise evident categorical exemption therefrom require that such limitations now be subject to strict scrutiny. "That is, a regulation that

---

[9] District of Columbia law has no provision for a police officer to register a firearm for use outside the home. It only affords a categorical exemption from such registration. *See supra*.

[10] Though not clearly delineated on the road, both directions of the Wilson Bridge pass through the District of Columbia. Officer Thorne's alternative routes to drive from Oxon Hill to Alexandria and avoid the District of Columbia would either be the American Legion Bridge between Montgomery County Maryland and Fairfax County Virginia, or the Governor Harry W. Nice Memorial Bridge between Charles County Maryland and King George County Virginia. It is self-evident that neither of these are practicable alternatives for his daily commute.

imposes a substantial burden upon the core right of self-defense protected by the Second Amendment must have a strong justification, whereas a regulation that imposes a less substantial burden should be proportionately easier to justify." *Heller* (2011) at 31 (citing *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 661 (1994)).[11] *See also Chester*, 628 F.3d at 683 (declaring strict scrutiny appropriate for deprivation of "core right identified in *Heller* – the right of a *law-abiding*, responsible citizen to possess and carry a weapon for self-defense") (emphasis in original).

The "safe passage" provision of the Firearm Owners' Protection Act, 18 U.S.C. § 926A (herein FOPA), does not somehow cure the District of Columbia's infringement upon Officer Thorne's right to self-defense. In

[11] Thorne asserts that he fares equally well under the intermediate scrutiny employed by the D.C. Circuit in *Heller* (2011). "[T]o pass muster under intermediate scrutiny the District must show [the regulations] are 'substantially related to an important governmental objective.'" *Heller* (2011) at 33 (quoting *Clark v. Jeter*, 486 U.S. 456, 461 (1988) and citing *United States v. Williams*, 616 F.3d 685, 692-94 (7th Cir. 2010)). "[T]he District must establish a tight 'fit' between the registration requirements and an important or substantial governmental interest, a fit 'that employs not necessarily the least restrictive means but ... a means narrowly tailored to achieve the desired objective.'" *Heller* (2011) at 33 (quoting *Bd. of Trs. v. Fox*, 492 U.S. 469, 480 (1989) and citing *Ward v. Rock against Racism*, 491 U.S. 781, 782-83 (1989) ("The requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation, and the means chosen are not substantially broader than necessary to achieve that interest")). *See also Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).

order for a person to avail themselves of the FOPA while passing through a "hostile" jurisdiction such as the District of Columbia, the firearm must not be loaded or "readily accessible or [] directly accessible from the passenger compartment of such transporting vehicle." *Id*. *See also* D.C. CODE § 7-2502.01(a)(3) (only valid for "recreational firearm-related activity"). As acknowledged by the Supreme Court, lack of access to a firearm renders it useless for the purpose of self-defense. *Heller*, 554 U.S. at 630.

And it is exactly this immediate self-defense that Officer Thorne seeks and is entitled to under the Constitution. The particular immediate need for self-defense by off-duty law enforcement officers such as Thorne is embodied in LEOSA. *See* H.R. REP. No. 560, *supra*, at 4 ("law enforcement officers often have to defend themselves outside their own State from criminals whom they have arrested.")[12] *See also id*. at 46 ("Criminals do not observe any jurisdictional lines when they seek revenge

[12] Officer Thorne easily distinguishes himself from *Gamble* on this point alone. *See Gamble* at 15-16, n.9.

against officers").[13] The District of Columbia's courts, including this one, cannot adjudicate around federal legislation simply because they don't agree with the factual conclusions upon which such laws are premised. *See, e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (legislature is "far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon legislative questions") (internal quotation

[13] These findings certainly distinguish the carrying of firearms by law enforcement officers from the purported "menace" to the public caused by ordinary law abiding citizens carrying concealed weapons. *Gamble* at 10 (quoting *Brown v. United States*, 30 F.2d 474, 475 (D.C. Cir. 1929)). *See also Gamble* at 11 (quoting the "free for all" suggested by Judge Puig-Lugo). Of course, actual experience and empirical data completely undermine these unfounded contentions. *See, e.g.*, Brief *Amicus Curiae* of the Heartland Institute in *McDonald* at 5-8 (Chicago gun control regime "utter failure"); Brief *Amicus Curiae* of the International Law Enforcement Educators and Trainers Association in *McDonald* at 12-22 (ending handgun prohibitions demonstrated to be no detriment to public safety).

marks omitted).[14]

The exemption language of both D.C. Code § 7-2502.01 and § 22-4505 appear to adequately address the issue of law enforcement officers' demonstrated need for immediate self-defense. Both make no differentiation between local or out-of-state officers and both afford such officers blanket immunity from the District's weapons prohibitions. However, judicial interpretation of the otherwise plain meaning of the terms employed therein has rendered such regulation unconstitutional, particularly in light of *Heller* (2011).

---

[14] Thorne challenges the government to demonstrate how a federal police officer assigned to a fixed post inside the White House or the U.S. Capitol may have a presumptively greater need for immediate self defense off-duty than a Special Conservator of the Peace such as Thorne assigned to patrol a low-income housing project in Virginia on an ongoing basis. It may bear out that such federal officers rarely or never make arrests in the course of their duties whereas arrests for narcotics or crimes of violence are a routine occurrence for the Conservator. If the government cannot demonstrate a rational relation to a legitimate state interest in its distinction of Officer Thorne from other law enforcement officers requiring immediate self defense, it has denied Thorne equal protection of the laws. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985); *New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976). "[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) (citations omitted). *See also Guillory v. County of Orange*, 731 F.2d 1379, 1383 (9th Cir. 1984) ("[a] law that is administered so as to unjustly discriminate between persons similarly situated may deny equal protection" citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Kuzinich v. County of Santa Clara*, 689 F.2d 1345, 1349 (9th Cir. 1983)).

In 2001, the Superior Court concluded that the definition of "law enforcement officer" for the purpose of exemptions from District of Columbia weapons laws did not include a member of the United States Postal Police.

> The District of Columbia Court of Appeals has consistently held that individuals whose job is primarily to protect property, rather than life, are not considered "police officers or other duly appointed law-enforcement officers" for the purposes of Section 22-3205. *McKenzie v. United States*, 158 A.2d 912, 914 (D.C. 1960), *Franklin v. United States*, 271 A.2d 784, 786 (D.C. 1970), *Timus v. United States*, 406 A.2d 1269, 1272 (D.C. 1979). Special police officers are not covered *Per Se* by Section 22-3205 because, by statute, they are appointed "for duty in connection with the property of" their employer. D.C. CODE ANN. § 4-114 (1981).
>
> …the critical question was whether, by his employment, defendant's primary responsibility as a "police officer" was the protection of life and therefore a "policeman or other duly appointed law-enforcement officer" as defined by Section 22-3205.

Savoy at 878, discussing predecessor to D.C. CODE § 22-4505. *See also Middleton*, 305 A.2d at 261-262 (uniformed officer of United States Federal Protective Service not covered by exemption).

The *Savoy* Court went on to consider if an officer had law enforcement powers throughout a jurisdiction, or only upon the property of the employer.

> Postal Service police officers have police powers only on United States Postal Service property and have only the powers of a citizen in enforcing District of Columbia law. 40 U.S.C. § 318.
> …

> Unlike municipal police officers, PPOs do not have jurisdiction over all property, public or private, within the physical boundaries of their jurisdiction.

Savoy at 880.

The Superior Court again employed this reasoning in denying Officer Thorne such categorical exemptions.

> Mr. Thorne's Orders of Appointment in both Alexandria and Fairfax make clear, on their face, that be may exercise his powers as a special conservator of the peace only when he is engaged in the performance of his duties for his employer and only in connection with his employer's services. The Alexandria Circuit Court Order of Appointment provides that Mr. Thorne shall have police powers "when the Appointee [Mr. Thorne] is engaged in the performance of duties, as a special conservator of the peace, for the Applicant [Alexandria Security Patrol Corporation], at or on the premises described in this application [which are the territorial limits of the City of Alexandria.]" *See* Def. Motion Att. A at 2. Similarly, the Fairfax County Circuit Court Order of Appointment limits Mr. Thorne's authority to "when the Appointee [Mr. Thorne] is engaged in the performance of duties as a special conservator of the peace... for the use in services contracted by Alexandria Security Patrol *only*...," and it further provides that Mr. Thorne's power "shall be exercised within the territorial limits of Fairfax County and only in connection with services provided by the Applicant [Alexandria Security Patrol Corporation]." *See* Def Motion Att. B at 2 (emphasis added). A corresponding limitation is that each of these appointments is automatically terminated "upon the termination of Appointee's employment with Applicant." These restrictions are consistent with Virginia regulations authorizing a registered special conservator of the peace to "[p]erform those duties authorized by the circuit court only while employed and in the jurisdiction of appointment." 6 Va. Admin. Code § 20-230-150(A)(7) (emphasis added); *see* 6 Va. Admin. Code § 20-230-10 (defining "performance of his duties" to mean "on duty").

J.A. 51-52.

This analysis may well have satisfied the Superior Court regarding its inquiry as to whether it was deciding Officer Thorne's case consistently with *Savoy,* but it does nothing to address whether the District of Columbia's weapons regulations afford Thorne personal self-defense as required by the Constitution.[15] The Superior Court does acknowledge what the government did not dispute; Officer Thorne has state-actor police powers and the authority to exercise them throughout the City of Alexandria and Fairfax County in the performance of his duties.

Officer Thorne previously distinguished *Savoy* by pointing out that District of Columbia Special Police Officers only have police powers upon their assigned private property and no general authority upon public space whereas Thorne has general police authority throughout two jurisdictions comprising over 422 square miles and a combined population of over 1.2

[15] As discussed herein, the evolution of gun control jurisprudence in the District of Columbia during the pendency of this case has indeed shifted the burden from Officer Thorne proving his exemption to the government having to demonstrate furtherance of a compelling interest through the regulation as applied to Thorne.

million people.[16] The Superior Court failed to address this distinction and instead appears to attempt to require an unnecessary omnipotent police power of Thorne. The Superior Court recites that District of Columbia law considers Metropolitan Police Officers to be on-duty at all times while in the District of Columbia. J.A. 53 (citing *Mattis v. United States*, 995 A.2d 223, 225-226 (D.C. 2010)). There are also criminal penalties for Metropolitan Police Officers failing to take police action for an offense committed in their presence. *District of Columbia v. Coleman*, 667 A.2d 811, 818, n.11 (D.C. 1995) (citing 6A DCMR § 200.4; D.C. CODE § 4-142 (1988) (now § 5-115.03); *Bauldock v. Davco Food Inc.*, 622 A.2d 28, 34 (D.C. 1993)). *See also* D.C. CODE § 5-121.05. What the Superior Court failed to recognize is that there are no statutory equivalents under Virginia law. *See, e.g.*, CODE OF VIRGINIA § 15.1-138 (1995) (repealed, reenacted as § 15.2-1704

[16] The Superior Court's *Savoy* analysis fails entirely on this point alone. Thorne has far broader police authority than a D.C. Special Police Officer. For the reasons stated above, the Court's characterization of it being "the same authority" is simply wrong. J.A. 50. The Superior Court's assertion that "[t]he employer of a D.C. SPO has the same flexibility to assign that SPO to work anywhere within the territorial limits of the District" is wrong as well. A D.C. SPO must obtain a separate commission and permission from the District of Columbia for each and every location where the SPO is to work. *See* 6A DCMR §§ 1100.2, 1100.3(a). The Superior Court's claim that Thorne does not have "roving authority" in his jurisdictions is not alleged by the government and contradicted by the plain language of his appointments and the statutes which empower him. J.A. 57.

removing all such language). By the Superior Court's reasoning in this regard, no Virginia municipal police officer could now be considered a "duly appointed law enforcement officer" under District of Columbia law.

The Superior Court therein offered a distinction without a difference, particularly in light of *Heller* (2011).[17] Because the government cannot demonstrate a compelling interest furthered by the application of the District of Columbia weapons prohibitions against officers such as Thorne, *Savoy* and *Middleton*, and those cases cited in support thereof, must now be overruled, if they are not already preempted by LEOSA, insofar as they infringe upon "the individual right to possess and carry weapons in case of confrontation." *Heller*, 554 U.S. at 592. "[T]he phrase 'presumptively lawful regulatory measures' suggests the possibility that one or more of these 'longstanding' regulations 'could be unconstitutional in the face of an as-applied challenge.'" *Chester*, 628 F.3d at 679 (quoting *Williams*, 616 F.3d at 692). "The government bears the burden of justifying its regulation in the context of heightened scrutiny review". *Chester*, 628 F.3d at 680.

[17] Like any other out of state officer, Thorne professes no police authority in the District of Columbia beyond that enumerated in D.C. Code § 23-582(b). Yet such authority is not a necessary element of either LEOSA or the District's own exemptions. Indeed, it is the very type of unofficial assistance by out of state officers recognized by LEOSA that Thorne was rendering to the Metropolitan Police at the time of his arrest. *See* J.A. 2.

a. The government's interest in preventing disqualified, untrained or otherwise unsuitable persons from carrying firearms is not served by application of D.C. Code §§ 7-2502.01 or 22-4504 against Thorne.

Among the "presumptively lawful regulatory measures recognized" by the *Heller* Court were "longstanding prohibitions on the possession of firearms by felons and the mentally ill". *Heller* (2011) at 16 (quoting *Heller* 544 U.S. at 626 and n.26). *See also Heller* (2011) at 27, n.* (mentioning a training requirement). District of Columbia law implicitly recognizes that this element of the District's firearms regulation is satisfied by presuming the sufficiency of the recruiting and vetting process of out of state police officers by their respective agencies. The District's laws make no requirement upon what it considers to be "duly appointed law enforcement officers" from out of state to prove that they are not criminals or mentally ill before granting them authority to carry firearms in the District of Columbia. The logic is obvious, if another state has granted a person general police powers, it is reasonable to assume that they have undergone a background investigation and training prior to such empowerment.

The Superior Court's distinction of Officer Thorne from such officers who are granted the exemption under District of Columbia law offers no

explanation as to how Thorne falls short in this particular regard.[18] The Superior Court has recognized his appointments, and has apparently read the relevant sections of Virginia law pertaining to Thorne's training[19], background investigation and appointment.

> A temporary registration may be issued in accordance with regulations established by the Criminal Justice Services Board while awaiting the results of a state and national fingerprint search. However, no person shall be issued a temporary registration until he has (i) complied with, or been exempted from the compulsory minimum training standards as set forth in this section, (ii) submitted his fingerprints on a form provided by the Department to be used for the conduct of a national criminal records search and a Virginia criminal history records search, and (iii) met all other requirements of this article and Board regulations. No person with a criminal conviction for a misdemeanor involving (a) moral turpitude, (b) assault and battery, (c) damage to real or personal property, (d) controlled substances or imitation controlled substances as defined in Article 1 (§ 18.2-247 *et seq*.) of Chapter 7 of Title 18.2, (e) prohibited sexual behavior as described in Article 7 (§ 18.2-61 *et seq*.) of Chapter 4 of Title 18.2, (f) firearms, or (g) any felony, shall be

---

[18] All this post-enforcement semantic dicing renders these statutes and exemptions impermissibly vague. The Fourteenth Amendment ensures that an individual need not "speculate as to the meaning of penal statutes" and is "entitled to be informed as to what the State commands or forbids". *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). *See also Hill v. Colorado*, 530 U.S. 703, 732 (2000); *Smith v. Goguen*, 415 U.S. 566, 572 (1974). Any ambiguity in a criminal statute must be resolved in favor of a defendant. *Little v. United States*, 709 A.2d 708, 714 (D.C. 1998) (quoting *United States v. Bass*, 404 U.S. 336, 348 (1971); *McBoyle v. United States*, 283 U.S. 25, 27 (1931)).

[19] Thorne's minimum annual in-service firearms training requirement is the same as the minimum annual in-service firearms training requirement for LEOSA retirees in Virginia. The District of Columbia has only a four hour initial training requirement and no annual in-service training requirement for its firearm registrants.

> registered as a special conservator of the peace. All appointments for special conservators of the peace shall become void on September 15, 2004, unless they have obtained a valid registration issued by the Department of Criminal Justice Services.

CODE OF VIRGINIA § 19.2-13 (B).

Where Thorne has met Virginia's strict requirements for suitability for appointment as a Special Conservator of the Peace and the Virginia Circuit Courts have so appointed him pursuant to such requirements, no lawful regulation of Thorne's Second Amendment right regarding his personal suitability to carry firearms is accomplished by application of D.C. Code §§ 7-2502.01 or 22-4504 against him.

b. The government's interest in regulating "dangerous and unusual weapons" is not served by application of D.C. Code §§ 7-2502.01 or 22-4504 against Thorne.

By the government's allegations, and by Officer Thorne's own stipulation, Thorne was found in the District of Columbia in possession of a Glock semi-automatic pistol. Not only is this type of pistol the standard issue of the Metropolitan Police Department and the City of Alexandria Police Department, but the specific model which Thorne carried, model 31, appears on <u>both</u> the Maryland Handgun Roster and the Massachusetts Firearm Roster employed by the Metropolitan Police Department to identify

"Handguns Not Determined to be Unsafe" under District of Columbia law. 24 DCMR §§ 2323.2(c), (d). *See* http://mpdc.dc.gov/mpdc/cwp/view.asp?a=1237&q=547431&pm=1 (accessed November 18, 2011).

Of course, it is not surprising that Officer Thorne's gun was an ordinary police firearm, given that he carried it in the performance of his duties in Virginia. The exemptions from District of Columbia weapons prohibitions for law enforcement officers implicitly acknowledge as much the same concept, yet these exemptions make no distinction or limitation regarding the carrying of "dangerous and unusual weapons" by such officers. *Heller*, 544 U.S. at 627. *See also* D.C. CODE § 22-4514(a) (exempting from prohibition of "machine guns, or sawed-off shotguns, and blackjacks" *inter alia*, "marshals, sheriffs, prison or jail wardens, or their deputies, policemen, or other duly-appointed law enforcement officers").

Where Thorne carried an ordinary police firearm of the type "typically possessed by law-abiding citizens for lawful purposes", *Heller*, 554 U.S. at 625, as used in the performance of his official duties, the application of D.C. Code §§ 7-2502.01 or 22-4504 against him serves no substantial governmental interest with regard to regulating "dangerous and unusual weapons".

c. The government's interest in regulating the carrying of concealed firearms is not served by application of D.C. Code §§ 7-2502.01 or 22-4504 against Thorne.

Officer Thorne was not charged with carrying a concealed firearm. Indeed, none of the charges upon which he was indicted and convicted required any element of concealment. The government's allegations are that Thorne approached Metropolitan Police Officers to assist in an investigation and identified himself as an officer. J.A. 2. The allegations further state that an officer observed that Thorne was carrying a firearm and that Thorne readily acknowledged such upon the officer's inquiry. *Id*. *Compare Plummer*, 983 A.2d at 326-327 (remarkably different factual allegations surrounding arrest).

The government's application of D.C. Code §§ 7-2502.01 or 22-4504 against Officer Thorne serves no substantial governmental interest with regard to regulating the concealment of firearms.[20]

[20] Of course, LEOSA provides specifically that law enforcement officers may carry *concealed* in all 50 states. District of Columbia law makes no limitation upon concealment for exempt law enforcement officers.

d. The government's interest in regulating firearms within "sensitive places" within the District of Columbia is not served by application of D.C. Code §§ 7-2502.01 or 22-4504 against Thorne.

No provision of District of Columbia law specifically prohibits exempted law enforcement officers from possessing firearms within the "sensitive places such as schools and government buildings" described in *Heller*, 554 U.S. at 626.

LEOSA does "permit private persons or entities to prohibit or restrict the possession of concealed firearms on their property; or prohibit or restrict the possession of firearms on any State or local government property, installation, building, base, or park." 18 U.S.C. §926B(b) (paragraph enumeration omitted). However, there is no allegation herein that Officer Thorne was present in such a place, or that he would have been otherwise in violation of these provisions if applied to him.

Absent evidence of such a violation, or some distinction regarding Officer Thorne's suitably as a law enforcement officer for the purposes of federal or District of Columbia law, the government's application of D.C. Code §§ 7-2502.01 or 22-4504 against Thorne serves no substantial governmental interest with regard to regulating firearms in such "sensitive places".

e. The government's interest in identifying potentially armed persons within the District of Columbia is not served by application of D.C. Code §§ 7-2502.01 or 22-4504 against Thorne.

Heller (2011) acknowledges that the government has an interest in maintaining records of persons who have firearms in the District of Columbia. *Heller* (2011) at 20-23. However, as already set forth above, there is no mechanism available for a non-resident to provide the District of Columbia with this information through the District's registration scheme for handguns. Further, there is no provision whatsoever for exempted law enforcement officers to do so.

However, Virginia already makes this information available to the District of Columbia regarding its Special Conservators of the Peace and its concealed handgun permit holders. Virginia law requires that the Virginia State Police enter information regarding a Special Conservator of the Peace's appointment and registration into the Virginia Criminal Information Network. CODE OF VIRGINIA § 19.2-13(E). Such information is then available to the District of Columbia through the National Law Enforcement Telecommunications system. *See id.* § 52-12.

Where District of Columbia law makes no requirement for registration or identification of armed out of state officers, yet Virginia law provides for such information regarding Special Conservators of the Peace to be available

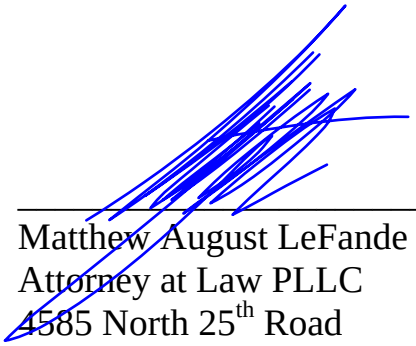
through the automated systems maintained by the Virginia State Police, the government's application of D.C. Code §§ 7-2502.01 or 22-4504 against Officer Thorne serves no substantial governmental interest with regard to identifying persons who may possess firearms.

VII. Conclusion

While it may be impossible to "exhaust" the list of potential lawful regulations the District of Columbia could impose upon an out of state police officer carrying firearms, *see Heller*, 554 U.S. at 627, n.26, this is not the Appellant's burden. As for those regulations already existing within the District's laws, the Appellant has amply demonstrated that no lawful governmental interest is furthered by distinguishing him from any other law enforcement officer for the purposes of the exemptions to D.C. Code §§ 7-2502.01 and 22-4504 and to distinguish him without such cause is to deprive him of a demonstrated need for immediate self defense as embodied by LEOSA.

For these reasons, and for such other reasons as the Court finds to be good and sufficient cause, the Superior Court's March 21, 2011 conviction of Officer Thorne should be VACATED and the matter DISMISSED WITH PREJUDICE.

Respectfully submitted, this fifth day of December, 2011,



Matthew August LeFande
Attorney at Law PLLC
4585 North 25th Road
Arlington VA 22207
Phone (202) 657-5800
Fax (202) 318-8019
matt@lefande.com
D.C. Bar Number 475995
Attorney for the Appellant

18 U.S.C. § 926B. Carrying of concealed firearms by qualified law enforcement officers

(a) Notwithstanding any other provision of the law of any State or any political subdivision thereof, an individual who is a qualified law enforcement officer and who is carrying the identification required by subsection (d) may carry a concealed firearm that has been shipped or transported in interstate or foreign commerce, subject to subsection (b).

(b) This section shall not be construed to supersede or limit the laws of any State that--
(1) permit private persons or entities to prohibit or restrict the possession of concealed firearms on their property; or
(2) prohibit or restrict the possession of firearms on any State or local government property, installation, building, base, or park.

(c) As used in this section, the term "qualified law enforcement officer" means an employee of a governmental agency who--
(1) is authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and has statutory powers of arrest;
(2) is authorized by the agency to carry a firearm;
(3) is not the subject of any disciplinary action by the agency which could result in suspension or loss of police powers;
(4) meets standards, if any, established by the agency which require the employee to regularly qualify in the use of a firearm;
(5) is not under the influence of alcohol or another intoxicating or hallucinatory drug or substance; and
(6) is not prohibited by Federal law from receiving a firearm.

(d) The identification required by this subsection is the photographic identification issued by the governmental agency for which the individual is employed as a law enforcement officer.

(e) As used in this section, the term "firearm"--
(1) except as provided in this subsection, has the same meaning as in section 921 of this title [26 USCS § 921];
(2) includes ammunition not expressly prohibited by Federal law or subject to the provisions of the National Firearms Act [26 USCS §§ 5801 et seq.]; and
(3) does not include--
(A) any machinegun (as defined in section 5845 of the National Firearms Act [26 USCS § 5845]);
(B) any firearm silencer (as defined in section 921 of this title [26 USCS § 921]); and
(C) any destructive device (as defined in section 921 of this title [26 USCS § 921]).

(f) For the purposes of this section, a law enforcement officer of the Amtrak Police Department, a law enforcement officer of the Federal Reserve, or a law enforcement or

police officer of the executive branch of the Federal Government qualifies as an employee of a governmental agency who is authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and has statutory powers of arrest.

D.C. Code § 7-2502.01. Registration requirements [Formerly § 6-2311]

(a) Except as otherwise provided in this unit, no person or organization in the District of Columbia ("District") shall receive, possess, control, transfer, offer for sale, sell, give, or deliver any destructive device, and no person or organization in the District shall possess or control any firearm, unless the person or organization holds a valid registration certificate for the firearm. A registration certificate may be issued:

…

(b) Subsection (a) of this section shall not apply to:

(1) Any law enforcement officer or agent of the District or the United States, or any law enforcement officer or agent of the government of any state or subdivision thereof, or any member of the armed forces of the United States, the National Guard or organized reserves, when such officer, agent, or member is authorized to possess such a firearm or device while on duty in the performance of official authorized functions;

…

(3) With respect to firearms, any nonresident of the District participating in any lawful recreational firearm-related activity in the District, or on his way to or from such activity in another jurisdiction; provided, that such person, whenever in possession of a firearm, shall upon demand of any member of the Metropolitan Police Department, or other bona fide law enforcement officer, exhibit proof that he is on his way to or from such activity, and that his possession or control of such firearm is lawful in the jurisdiction in which he resides; provided further, that such weapon shall be transported in accordance with § 22-4504.02; or

(4) Any person who temporarily possesses a firearm registered to another person while in the home of the registrant; provided, that the person is not otherwise prohibited from possessing firearms and the person reasonably believes that possession of the firearm is necessary to prevent imminent death or great bodily harm to himself or herself.

D.C. Code § 22-4504. Carrying concealed weapons; possession of weapons during commission of crime of violence; penalty [Formerly § 22-3204]

(a) No person shall carry within the District of Columbia either openly or concealed on or about their person, a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in § 22-4515…

D.C. Code § 22-4505. Exceptions to § 22-4504 [Formerly § 22-3205]

(a) The provisions of § 22-4504 shall not apply to marshals, sheriffs, prison or jail wardens, or their deputies, policemen or other duly appointed law enforcement officers, including special agents of the Office of Tax and Revenue, authorized in writing by the Deputy Chief Financial Officer for the Office of Tax and Revenue to carry a firearm while engaged in the performance of their official duties, and criminal investigators of the Office of the Inspector General, designated in writing by the Inspector General, while engaged in the performance of their official duties, or to members of the Army, Navy, Air Force, or Marine Corps of the United States or of the National Guard or Organized Reserves when on duty, or to the regularly enrolled members of any organization duly authorized to purchase or receive such weapons from the United States, provided such members are at or are going to or from their places of assembly or target practice, or to officers or employees of the United States duly authorized to carry a concealed pistol, or to any person engaged in the business of manufacturing, repairing, or dealing in firearms, or the agent or representative of any such person having in his or her possession, using, or carrying a pistol in the usual or ordinary course of such business, or to any person while carrying a pistol, transported in accordance with § 22-4504.02, from the place of purchase to his or her home or place of business or to a place of repair or back to his or her home or place of business or in moving goods from one place of abode or business to another.

…

Code of Virginia § 19.2-12. Who are conservators of the peace

Every judge and attorney for the Commonwealth throughout the Commonwealth and every magistrate within the geographical area for which he is appointed or elected, shall be a conservator of the peace. In addition, every commissioner in chancery, while sitting as such commissioner; any special agent or law-enforcement officer of the United States Department of Justice, National Marine Fisheries Service of the United States Department of Commerce, Department of Treasury, Department of Agriculture, Department of Defense, Department of State, Office of the Inspector General of the Department of Transportation, Department of Homeland Security, and Department of Interior; any inspector, law-enforcement official or police personnel of the United States Postal Inspection Service; any United States marshal or deputy United States marshal whose duties involve the enforcement of the criminal laws of the United States; any officer of the Virginia Marine Police; any criminal investigator of the Department of Professional and Occupational Regulation, who meets the minimum law-enforcement training requirements established by the Department of Criminal Justice Services for in-service training; any criminal investigator of the United States Department of Labor; any special agent of the United States Naval Criminal Investigative Service, any special agent of the National Aeronautics and Space Administration, and any sworn municipal park ranger, who has completed all requirements under § 15.2-1706, shall be a conservator of the peace, while engaged in the performance of their official duties.

Code of Virginia § 19.2-13. Special conservators of the peace; authority; jurisdiction; registration; bond; liability of employers; penalty; report

A. Upon the application of any sheriff or chief of police of any county, city, town or any corporation authorized to do business in the Commonwealth or the owner, proprietor or authorized custodian of any place within the Commonwealth, a circuit court judge of any county or city shall appoint special conservators of the peace who shall serve as such for such length of time as the court may designate, but not exceeding four years under any one appointment, upon a showing by the applicant of a necessity for the security of property or the peace and presentation of evidence that the person or persons to be appointed as a special conservator of the peace possess a valid registration issued by the Department of Criminal Justice Services in accordance with the provisions of subsection B. However, a judge may deny the appointment for good cause, and shall state the specific reasons for the denial in writing in the order denying the appointment. The order of appointment may provide that a special conservator of the peace shall have all the powers, functions, duties, responsibilities and authority of any other conservator of the peace within such geographical limitations as the court may deem appropriate within the confines of the county, city or town that makes application or within the county, city or town where the corporate applicant is located, limited, except as provided in subsection E, to the judicial circuit wherein application has been made, whenever such special conservator of the peace is engaged in the performance of his duties as such. The order may also provide that the special conservator of the peace is a "law-enforcement officer" for the purposes of Article 4 (§ 37.2-808 *et seq.*) of Chapter 8 of Title 37.2, or Article 16 (§ 16.1-335 *et seq.*) of Chapter 11 of Title 16.1. The order may also provide that the special conservator of the peace is authorized to use the seal of the Commonwealth in a badge or other credential of office as the court may deem appropriate. The order may also provide that the special conservator of the peace may use the title "police" on any badge or uniform worn in the performance of his duties as such. The order may also provide that a special conservator of the peace who has completed the minimum training standards established by the Department of Criminal Justice Services, has the authority to affect arrests, using up to the same amount of force as would be allowed to a law-enforcement officer employed by the Commonwealth or any of its political subdivisions when making a lawful arrest. The order also may (i) require the local sheriff or chief of police to conduct a background investigation which may include a review of the applicant's school records, employment records, or interviews with persons possessing general knowledge of the applicant's character and fitness for such appointment and (ii) limit the use of flashing lights and sirens on personal vehicles used by the conservator in the performance of his duties. Prior to granting an application for appointment, the circuit court shall ensure that the applicant has met the registration requirements established by the Criminal Justice Services Board.

B. Effective September 15, 2004, no person shall seek appointment as a special conservator of the peace from a circuit court judge without possessing a valid registration issued by the Department of Criminal Justice Services, except as provided in this section. Applicants for registration may submit an application on or after January 1, 2004. A

temporary registration may be issued in accordance with regulations established by the Criminal Justice Services Board while awaiting the results of a state and national fingerprint search. However, no person shall be issued a temporary registration until he has (i) complied with, or been exempted from the compulsory minimum training standards as set forth in this section, (ii) submitted his fingerprints on a form provided by the Department to be used for the conduct of a national criminal records search and a Virginia criminal history records search, and (iii) met all other requirements of this article and Board regulations. No person with a criminal conviction for a misdemeanor involving (a) moral turpitude, (b) assault and battery, (c) damage to real or personal property, (d) controlled substances or imitation controlled substances as defined in Article 1 (§ 18.2-247 *et seq*.) of Chapter 7 of Title 18.2, (e) prohibited sexual behavior as described in Article 7 (§ 18.2-61 *et seq*.) of Chapter 4 of Title 18.2, (f) firearms, or (g) any felony, shall be registered as a special conservator of the peace. All appointments for special conservators of the peace shall become void on September 15, 2004, unless they have obtained a valid registration issued by the Department of Criminal Justice Services.

C. Each person registered as or seeking registration as a special conservator of the peace shall be covered by (i) a cash bond, or a surety bond executed by a surety company authorized to do business in the Commonwealth, in a reasonable amount to be fixed by the Board, not to be less than $ 10,000, conditioned upon the faithful and honest conduct of his business or employment; or (ii) evidence of a policy of liability insurance or self-insurance in an amount and with coverage as fixed by the Board. Any person who is aggrieved by the misconduct of any person registered as a special conservator of the peace and recovers a judgment against the registrant, which is unsatisfied in whole or in part, may bring an action in his own name against the bond or insurance policy of the registrant.

D. Individuals listed in § 19.2-12, individuals who have complied with or been exempted pursuant to subsection A of § 9.1-141, individuals employed as law-enforcement officers as defined in § 9.1-101 who have met the minimum qualifications set forth in § 15.2-1705 shall be exempt from the requirements in subsections A through C. Further, individuals appointed under subsection A and employed by a private corporation or entity that meets the requirements of subdivision (ii) of the definition of criminal justice agency in § 9.1-101, shall be exempt from the registration requirements of subsection A and from subsections B and C provided they have met the minimum qualifications set forth in § 15.2-1705. The Department of Criminal Justice Services shall, upon request by the circuit court, provide evidence to the circuit court of such employment prior to appointing an individual special conservator of the peace. The employing agency shall notify the circuit court within 30 days after the date such individual has left employment and all powers of the special conservator of the peace shall be void. Failure to provide such notification shall be punishable by a fine of $ 250 plus an additional $ 50 per day for each day such notice is not provided.

E. When the application is made, the circuit court shall specify in the order of appointment the name of the sheriff or chief of police of the applicant county, city, town or the name of the corporation, business or other applicant and the geographic jurisdiction

of the special conservator of the peace. Court appointments shall be limited to the judicial circuit wherein application has been made. In the case of a corporation or other business, the court appointment may also include, for good cause shown, any real property owned or leased by the corporation or business, including any subsidiaries, in other specifically named cities and counties, but shall provide that the powers of the special conservator of the peace do not extend beyond the boundaries of such real property. Effective July 1, 2004, the clerk of the appointing circuit court shall transmit a copy of the order of appointment that shall specify the following information: the person's complete name, address, date of birth, social security number, gender, race, height, weight, color of hair, color of eyes, firearm authority or limitation as set forth in subsection F, date of the order, and other information as may be required by the Department of State Police. The Department of State Police shall enter the person's name and other information into the Virginia Criminal Information Network established and maintained by the Department pursuant to Chapter 2 (§ 52-12 *et seq*.) of Title 52. The Department of State Police may charge a fee not to exceed $ 10 to cover its costs associated with processing these orders. Each special conservator of the peace so appointed on application shall present his credentials to the chief of police or sheriff or his designee of all jurisdictions where he has conservator powers. If his powers are limited to certain areas owned or leased by a corporation or business, he shall also provide notice of the exact physical addresses of those areas. Each special conservator shall provide a temporary registration letter issued by the Department of Criminal Justice Services prior to seeking an appointment by the circuit court. Once the applicant receives the appointment from the circuit court the applicant shall file the appointment order with the Department of Criminal Justice Services in order to receive his special conservator of the peace photo registration card.

If any such special conservator of the peace is the employee, agent or servant of another, his appointment as special conservator of the peace shall not relieve his employer, principal or master, from civil liability to another arising out of any wrongful action or conduct committed by such special conservator of the peace while within the scope of his employment.

Effective July 1, 2002, no person employed by a local school board as a school security officer, as defined in § 9.1-101, shall be eligible for appointment as a conservator for purposes of maintaining safety in a public school in the Commonwealth. All appointments of special conservators of the peace granted to school security officers as defined in § 9.1-101 prior to July 1, 2002 are void.

F. The court may limit or prohibit the carrying of weapons by any special conservator of the peace initially appointed on or after July 1, 1996, while the appointee is within the scope of his employment as such.

Code of Virginia § 19.2-18. Powers and duties generally

Every conservator of the peace shall have authority to arrest without a warrant in such instances as are set out in §§ 19.2-19 and 19.2-81. Upon making an arrest without a

warrant, the conservator of the peace shall proceed in accordance with the provisions of § 19.2-22 or § 19.2-82 as the case may be.

Code of Virginia § 19.2-74. Issuance and service of summons in place of warrant in misdemeanor case; issuance of summons by special policemen and conservators of the peace

A. 1. Whenever any person is detained by or is in the custody of an arresting officer for any violation committed in such officer's presence which offense is a violation of any county, city or town ordinance or of any provision of this Code punishable as a Class 1 or Class 2 misdemeanor or any other misdemeanor for which he may receive a jail sentence, except as otherwise provided in Title 46.2, or § 18.2-266, or an arrest on a warrant charging an offense for which a summons may be issued, and when specifically authorized by the judicial officer issuing the warrant, the arresting officer shall take the name and address of such person and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice. Upon the giving by such person of his written promise to appear at such time and place, the officer shall forthwith release him from custody. However, if any such person shall fail or refuse to discontinue the unlawful act, the officer may proceed according to the provisions of § 19.2-82.

Anything in this section to the contrary notwithstanding, if any person is believed by the arresting officer to be likely to disregard a summons issued under the provisions of this subsection, or if any person is reasonably believed by the arresting officer to be likely to cause harm to himself or to any other person, a magistrate or other issuing authority having jurisdiction shall proceed according to the provisions of § 19.2-82.

2. Whenever any person is detained by or is in the custody of an arresting officer for a violation of any county, city, or town ordinance or of any provision of this Code, punishable as a Class 3 or Class 4 misdemeanor or any other misdemeanor for which he cannot receive a jail sentence, except as otherwise provided in Title 46.2, or to the offense of public drunkenness as defined in § 18.2-388, the arresting officer shall take the name and address of such person and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice. Upon the giving of such person of his written promise to appear at such time and place, the officer shall forthwith release him from custody. However, if any such person shall fail or refuse to discontinue the unlawful act, the officer may proceed according to the provisions of § 19.2-82.

3. Any person so summoned shall not be held in custody after the issuance of such summons for the purpose of complying with the requirements of Chapter 23 (§ 19.2-387 et seq.) of this title. Reports to the Central Criminal Records Exchange concerning such persons shall be made after a disposition of guilt is entered as provided for in § 19.2-390.

Any person refusing to give such written promise to appear under the provisions of this

section shall be taken immediately by the arresting or other police officer before a magistrate or other issuing authority having jurisdiction, who shall proceed according to provisions of § 19.2-82.

Any person who willfully violates his written promise to appear, given in accordance with this section, shall be treated in accordance with the provisions of § 19.2-128, regardless of the disposition of, and in addition to, the charge upon which he was originally arrested.

Any person charged with committing any violation of § 18.2-407 may be arrested and immediately brought before a magistrate who shall proceed as provided in § 19.2-82.

B. Special policemen of the counties as provided in § 15.2-1737, special policemen or conservators of the peace appointed under Chapter 2 (§ 19.2-12 *et seq*.) of this title and special policemen appointed by authority of a city's charter may issue summonses pursuant to this section, if such officers are in uniform, or displaying a badge of office. On application, the chief law-enforcement officer of the county or city shall supply each officer with a supply of summons forms, for which such officer shall account pursuant to regulation of such chief law-enforcement officer.

Code of Virginia § 19.2-81. Arrest without warrant authorized in certain cases

A. The following officers shall have the powers of arrest as provided in this section:

1. Members of the State Police force of the Commonwealth;

2. Sheriffs of the various counties and cities, and their deputies;

3. Members of any county police force or any duly constituted police force of any city or town of the Commonwealth;

4. The Commissioner, members and employees of the Marine Resources Commission granted the power of arrest pursuant to § 28.2-900;

5. Regular conservation police officers appointed pursuant to § 29.1-200;

6. United States Coast Guard and United States Coast Guard Reserve commissioned, warrant, and petty officers authorized under § 29.1-205 to make arrests;

7. The special policemen of the counties as provided by § 15.2-1737, provided such officers are in uniform, or displaying a badge of office;

8. Conservation officers appointed pursuant to § 10.1-115; and

9. Full-time sworn members of the enforcement division of the Department of Motor Vehicles appointed pursuant to § 46.2-217.

10. Special agents of the Department of Alcoholic Beverage Control.

B. Such officers may arrest without a warrant any person who commits any crime in the presence of the officer and any person whom he has reasonable grounds or probable cause to suspect of having committed a felony not in his presence.

Such officers may arrest without a warrant any person whom the officer has probable cause to suspect of operating any watercraft or motorboat while (i) intoxicated in violation of subsection B of § 29.1-738 or a substantially similar ordinance of any county, city, or town in the Commonwealth or (ii) in violation of an order issued pursuant to § 29.1-738.4 and may thereafter transfer custody of the person arrested to another officer, who may obtain a warrant based upon statements made to him by the arresting officer.

C. Any such officer may, at the scene of any accident involving a motor vehicle, watercraft as defined in § 29.1-712 or motorboat, or at any hospital or medical facility to which any person involved in such accident has been transported, or in the apprehension of any person charged with the theft of any motor vehicle, on any of the highways or waters of the Commonwealth, upon reasonable grounds to believe, based upon personal investigation, including information obtained from eyewitnesses, that a crime has been committed by any person then and there present, apprehend such person without a warrant of arrest. For purposes of this section, "the scene of any accident" shall include a reasonable location where a vehicle or person involved in an accident has been moved at the direction of a law-enforcement officer to facilitate the clearing of the highway or to ensure the safety of the motoring public.

D. Such officers may, within three hours of the alleged offense, arrest without a warrant at any location any person whom the officer has probable cause to suspect of driving or operating a motor vehicle, watercraft or motorboat while intoxicated in violation of § 18.2-266, 18.2-266.1, 46.2-341.24, or subsection B of § 29.1-738; or a substantially similar ordinance of any county, city, or town in the Commonwealth, whether or not the offense was committed in such officer's presence. Such officers may, within three hours of the alleged offense, arrest without a warrant at any location any person whom the officer has probable cause to suspect of operating a watercraft or motorboat in violation of an order issued pursuant to § 29.1-738.4, whether or not the offense was committed in such officer's presence.

E. Such officers may arrest, without a warrant or a capias, persons duly charged with a crime in another jurisdiction upon receipt of a photocopy of a warrant or a capias, telegram, computer printout, facsimile printout, a radio, telephone or teletype message, in which photocopy of a warrant, telegram, computer printout, facsimile printout, radio, telephone or teletype message shall be given the name or a reasonably accurate description of such person wanted and the crime alleged.

F. Such officers may arrest, without a warrant or a capias, for an alleged misdemeanor not committed in his presence when the officer receives a radio message from his

department or other law-enforcement agency within the Commonwealth that a warrant or capias for such offense is on file.

G. Such officers may also arrest without a warrant for an alleged misdemeanor not committed in their presence involving (i) shoplifting in violation of § 18.2-96 or 18.2-103 or a similar local ordinance, (ii) carrying a weapon on school property in violation of § 18.2-308.1, (iii) assault and battery, (iv) brandishing a firearm in violation of § 18.2-282, or (v) destruction of property in violation of § 18.2-137, when such property is located on premises used for business or commercial purposes, or a similar local ordinance, when any such arrest is based on probable cause upon reasonable complaint of the person who observed the alleged offense. The arresting officer may issue a summons to any person arrested under this section for a misdemeanor violation involving shoplifting.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

THE PEOPLE OF THE STATE OF NEW YORK,

: Indictment Number 2917/06

-against-

ARTHUR RODRIGUEZ,

Decision & Order

Defendant.

ZWEIBEL, J.:

The defendant is charged with Criminal Possession of a Weapon in the Third Degree, a violation of Penal Law § 265.02(4). The People allege in substance that on April 12, 2006, at approximately 7:30 p.m. in the vicinity of 1250 5th Avenue, New York, New York, the defendant possessed a loaded firearm in his vehicle. There does not seem to be any dispute over whether defendant possessed a loaded firearm. The defendant is a law enforcement officer, namely, a Pennsylvania Constable, authorized to carry a concealed weapon in Pennsylvania. The People concede that defendant is a constable. The only real issue in this case is whether by virtue of his status as a law enforcement officer, defendant was entitled to carry his weapon across State lines and therefore, is exempt from prosecution for a violation of Penal Law § 265.02(4) under either or both New York State and Federal law.

In order to flesh out the record on this issue, the Court, on October 20, 2006, held a hearing with respect to defendant's

motion to dismiss. The sole witness at the hearing was defendant, Manuel Rodriguez, who I found to be credible.[1]

Prior to defendant testifying, the Assistant District Attorney ("ADA") stated, that with respect to defendant's presence in New York County for service of a warrant, she was able to verify that there was an active September 2005 warrant from Pennsylvania for a person located in Kings County, New York. According to the ADA, she spoke to Pennsylvania Judge David Leh, who was the judge who signed the warrant on September 2, 2005, who further confirmed that the warrant was assigned thereafter to defendant.[2] However, Judge Leh was uncertain as to when and if defendant had attempted to execute the warrant.

The ADA also commented on the fact that in the Grand Jury, the arresting officers testified to being aware that defendant

---

[1]Although the People had approximately one month to prepare for this hearing, they apparently notified their officers the day prior to the hearing. Prior to sending through that notification, no one spoke to the officers or verified their availability. Needless to say, the officers did not appear nor did the People have any information as to the reason for the officers' failure to appear. In fact, the People did not know if the officers actually received the notifications. The Court denied the People's request for an adjournment because of the length of time the People had to prepare for the hearing, and because the People did not even know if the officers were available Monday.

[2]On cross-examination, when asked about when he received the assignment to execute the warrant in question, Constable Rodriguez did not remember the exact date that the warrant was issued nor could he state on what date he did what in his attempts to locate the person in the warrant and execute it.

was a Pennsylvania Constable and that his duties included serving Pennsylvania warrants.

Defendant testified that his name is Manuel Rodriguez, not Arthur Rodriguez as stated in the indictment, and that he is a Pennsylvania State Constable, employed by the Commonwealth of the State of Pennsylvania, as a sworn law enforcement officer.[3] According to Constable Rodriguez, this is his second term as an elected Constable. His duties include courtroom security, transporting prisoners, executing warrants, both criminal and civil, "PFA's", "standby", and service of court papers. The warrants are executed wherever they are issued. Constable Rodriguez is authorized to collect fines upon confirming the identity of the person so named in the warrant. According to the constable, constables, including himself, go outside the state to locate the person named in the warrant and to try to resolve it. Constables of Pennsylvania are authorized to carry a gun[4] and that he personally was authorized, qualified and certified to

---

[3]Constable Rodriguez denied on cross-examination that he ever told the officers who arrested him that his name was Arthur Rodriguez.

[4]Although authorized to carry a gun in Pennsylvania by virtue of their status as constables, constables are not issued weapons by the State of Pennsylvania but rather they purchase their own weapons. Defendant also admitted having a personal license in Pennsylvania to carry a firearm.

carry a weapon as a Pennsylvania State constable.[5]

Constable Rodriguez testified on cross-examination that he has two jobs and that one of those jobs is his full-time employment as a Constable in Pennsylvania. According to the Criminal Justice Administration ("CJA") form based on an interview of the defendant at the time of his arraignment, defendant also stated that his full-time profession was construction worker. Defendant also stated that he told the person from CJA that he was a Pennsylvania State Constable.

On April 12, 2006, at approximately 4:30/5:00 p.m., Constable Rodriguez was sitting in his legally parked car on 5th Avenue. He was waiting for his friend Aurora Flores to come down so that he could give her a lift on his way to Brooklyn to execute a warrant[6]. Constable Rodriguez intended to contact the person named in the Brooklyn warrant and see whether the warrant could be "expunged" there and then. After executing the Brooklyn warrant, Constable Rodriguez was going to go through the Holland Tunnel and head back to Pennsylvania, executing the other four

---

[5]The Court took judicial notice of the Statutes of Pennsylvania that do in fact exempt constables, as sworn law enforcement officers, from the licensing requirement and permits constables to carry a weapon without a license under the Pennsylvania Firearms Act, citing Title 18 of the Pennsylvania Statutes, section 6106,subdivision (b)(1) [18 Pa.C.S.A. § 6106(b)(1)].

[6]The warrant was for a summary offense, payment of a surcharge upon the person's named in the warrant having pled guilty to public drunkenness and misconduct.

warrants he had in his possession on that date along the way.

While he was waiting in his parked car, Constable Rodriguez was approached by police officers who came alongside his vehicle on the right side. Constable Rodriguez rolled down his window and the officers asked him "What you doing here? Can you-you have any identification because this looks like an unmarked car, out of state plates, Pennsylvania plates?" In response, Constable Rodriguez showed the officers his identification and shield.

According to Constable Rodriguez, the officers proceeded to block his car in its parking space. By this time, Ms. Flores had arrived and said "Let's go." Constable Rodriguez told her, "We can't go nowhere. These guys got me blocked in."

The officers then exited their vehicle and approached defendant on his left side and asked him for additional identification. Constable Rodriguez testified that no matter what form of identification he showed the officers, the officers told him that the identification was fake. Because of the officers scepticism with respect to defendant's identifications, Constable Rodriguez reached up and removed all the warrants he was executing from his visor. He showed the officers the warrants and informed them that they were issued by the State of Pennsylvania and that he is an authorized officer. The officers allegedly told him that the warrants were fake as well.

Constable Rodriguez also testified that Ms. Flores tried to tell the officers that his identification was not fake and that he was a Pennsylvania Constable. According to the constable, the officers told Ms. Flores to shut up.

The officers asked Constable Rodriguez whether he was carrying a weapon. Constable Rodriguez said yes. According to the constable, he was carrying a concealed weapon in a shoulder rig/holster under his shirt.

Constable Rodriguez stated that at the time of his arrest, he was acting in his official capacity as a Pennsylvania State Constable.

The Court notes that Penal Law 265.20(a)[11] specifically states that Penal Law § 265.02 does not apply to "[p]ossession of a firearm ... by a police officer or sworn peace officer of another state while conducting official business within the state of New York." Thus, if a constable is considered a peace officer in the State of Pennsylvania and defendant was conducting official business within the State of New York, he may be exempt from prosecution pursuant to Penal Law § 265.20(a)[11].

First, this Court must determine whether a constable is a "peace officer" in Pennsylvania. It is clear to this Court that constables are peace officers in Pennsylvania whose central functions and activities partake of exercising executive powers. Because constables are considered "related staff" who serve the

unified judicial system but are not personnel of the judicial system and are not supervised by the courts, they are considered "independent contractors" with respect to the Court system.

Statutes govern the election and qualifications of constables; the appointment and qualifications of deputies; the removal of constables; the duties and liabilities of constables; the fees of constables; and actions against constables or their sureties. The Court takes judicial notice of the various Pennsylvania statutes governing constables, including those in Title 13 of the Pennsylvania Commonwealth Statutes ("Pa.C.S.") section 40 through 46 and Tile 18 of the Pennsylvania Commonwealth Statutes ("Pa.C.S.") section 6106. In fact, 13 PS § 40 is entitled, "Peace Officers" and states that "Constables... shall perform all those duties authorized or imposed on them by statute." Additionally, according to the Supreme Court of the State of Pennsylvania, a "constable is a peace officer" (see In re Act 147 of 1990, 528 Pa., at 470, 598 A.2d, at 990). As noted by the Pennsylvania Supreme Court, "a constable is a known officer charged with conservation of the peace, and whose business it is to arrest those who have violated it. By statute in Pennsylvania, a constable may also serve process in some instances.... As a peace office, and as a process server, a constable belongs analytically to the executive branch of government, even though his job is obviously related to the

courts. It is the constable's job to enforce the law and carry it out, just the same as the job of district attorney's, sheriffs and the police generally" (see In re Act 147 of 1990, 528 Pa., at 470, 598 A.2d 985 [citations omitted]). In fact, Pennsylvania constables have the right in Pennsylvania to conduct warrantless arrests for felonies and breaches of the peace, including warrantless arrests for felony violations of the drug laws (see Commonwealth v. Taylor, 450 Pa. Super. 583, 596, 677 A.2d 846, 852 [Pa. 1996]). They also have statutory powers of arrest in certain situations (see e.g. 32 P.S. §582; 53 P.S. §13349). Moreover, they are exempt from the need to have a carry license for their weapon pursuant to 18 Pa.C.S. § 6106. Therefore, this Court finds that a Pennsylvania constable is a "peace officer" of another state as that term is used in Penal Law § 265.20(a)[11].

Second, this Court must determine whether defendant was in New York to conduct official business within the State of New York. According to defendant, he was in the State of New York on official Pennsylvania Court business. Allegedly, defendant was here to serve warrants, which he had in his possession at the time of his arrest, issued by the Pennsylvania courts. If defendant was in fact in New York on official business at the time of his arrest, it seems to this Court that he is exempt under State law from prosecution. Based on the officer's testimony, and there is nothing in the Grand Jury minutes, which

contradicts the officer's testimony, this Court finds that defendant was in New York on official business. This Court does not view as relevant the fact that he was legally parked while awaiting a friend to whom he had offered a lift on his way to Brooklyn to serve and/or collect on an active warrant.[7]

Apparently recognizing this might cast doubt on whether he was in New York County on official business, defendant argues that, pursuant to 18 U.S.C. §629B, he is permitted to carry a weapon across state lines and that the instant prosecution is pre-empted by the Federal statute. 18 U.S.C. § 926B, also known as H.R.218 or the Law Enforcement Officers Safety Act of 2004, states, in pertinent part:

> (a) Notwithstanding any other provision of the law of any State or any political subdivision thereof, an individual who is a qualified law enforcement officer and who is carrying the identification required by subsection (d) may carry a concealed firearm that has been shipped or transported in interstate or foreign commerce, subject to subsection (b)....
>
> (c) As used in this section, the term "qualified law enforcement officer" means an employee of a governmental agency who--
>
> (1) is authorized by law to engage in or supervise the prevention, detection, investigation,

---

[7]The Court notes that there is no indication in the Grand Jury minutes that defendant was not parked legally or that he was parked by a hydrant. In fact, it appears from the Grand Jury minutes that the officers did not approach defendant because of any illegality but rather because the officers believed that defendant's vehicle might be an unmarked police vehicle and that he might be an officer needing assistance.

> or prosecution of, or the incarceration of any person for, any violation of law, and has statutory powers of arrest;
>
> (2) is authorized by the agency to carry a firearm;
>
> (3) is not the subject of any disciplinary action by the agency;
>
> (4) meets standards, if any, established by the agency which require the employee to regularly qualify in the use of a firearm;
>
> (5) is not under the influence of alcohol or another intoxicating or hallucinatory drug or substance; and
>
> (6) is not prohibited by Federal law from receiving a firearm.
>
> (d) The identification required by this subsection is the photographic identification issued by the governmental agency for which the individual is employed as a law enforcement officer....

The Court notes that there is absolutely no case law or articles written about this statute apart from the Congressional Record statements at the time of its enactment. Thus, this is truly a case of first impression.

Looking at H.R. 218, in terms of the known facts in this case, the Court believes that defendant qualifies under it. As defendant points out, the office of the constable is mandated in the Pennsylvania State Constitution. Constables are elected, sworn law enforcement officers with mandatory training requirements and state powers to make an arrest, despite their lack of government funding. They are independent employees of the State of Pennsylvania whose identification cards are issued

by the County as a State identification. Additionally, they are paid for their services by the District Courts and/or the Comptroller's office.

The Court notes that the Grand Jury minutes reflect that defendant showed the arresting officers his badge and his official identification identifying him as a Pennsylvania constable, a fact that the officers themselves admit they verified. As already noted, the People basically concede that defendant is a constable.

Additionally, 42 Pa.C.S. § 2942 states that:

> [w]hile a constable is performing duties other than judicial duties, regardless of whether or not he is certified under this subchapter, he shall not in any manner hold himself out to be active as an agent, employee or representative of any court, district justice or judge.

The clear implication of this statute is that when a constable is performing judicial duties, he is an agent employee and/or representative of the court, district justice or judge assigning the judicial duties to him. In this case, the People independently verified, by speaking with the assigning judge, that the warrant defendant claimed to be serving was assigned to defendant and was still active. Thus, he was clearly performing a judicial duty.

Moreover, a constable is elected within an electoral district, i.e. a ward, borough or the like. The elected constable, with the approval of the court, appoints deputy

constables (see 13 P.S. § 21; Com. v. Roose, 456 Pa. Super. 238, 240, 690 A.2d 268, 269 [Pa. Sup. 1997]; aff'd 551 Pa. 410, 710 A.2d 1129 [Pa. 1998]). Constables and deputy constables do not have uniforms and they are not provided with municipal vehicles but rather use their own private cars (see Com. v. Roose, 456 Pa. Super., at 241, 690 A.2d, at 269). They are not paid a salary by any municipal subdivision as police and sheriffs are, but are more like independent contractors whose pay is on a per job basis (see 13 P.S. §§ 63-75; Com. v. Roose, 456 Pa. Super., at 240, 690 A.2d, at 269). They are not considered State employees in order to receive legal representation when sued in connection with their duties (see Com. v. Roose, 456 Pa. Super., at 240, 690 A.2d, at 269). No one supervises constables in the way a police chief supervises police officers or a sheriff supervises deputies. No municipality is responsible for their actions in the way a city, borough or township is responsible for its sheriff's office. In fact, the Pennsylvania Supreme Court has found unconstitutional legislation which attempted to place constables under the supervisory authority of the courts (see In re Act 147 of 1990, 528 Pa. 460, 598 A.2d 985 [Pa. 1991]).

Despite being termed an "independent contractor" by the Courts, it appears that, with respect to the work done by a constable for a court, the constable is performing "judicial duties" and is in fact "employed" by the court, district justice

or judge which engaged his services. Again, according to defendant's attorney, defendant was actively performing judicial duties at the time of his arrest as he was on his way to serve warrants within New York State which were in his possession at the time of his arrest. Thus, there appears merit to defendant's argument that he is a government employee within the meaning of the term as it is used in 18 U.S.C. § 926B.

Moreover, pursuant to 13 P.S. § 31 [Intemperance, neglect of duty, malfeasance or misfeasance, petition; verification; additional security], the Pennsylvania courts of quarter session

> ...also have full power, on petition of any citizen or citizens of said county, setting forth the complaint, and verified by affidavit, to inquire into the official conduct of any constable of said county ... and to decree the removal of such constable from office, and to appoint a suitable person to fill the vacancy...

Thus, the fact that the Pennsylvania courts have full power to remove Pennsylvania State Constables from their positions and the fact that they are elected officials, conflicts with the People's theory that Pennsylvania State Constables are not government employees.

Based on this analysis, the Court finds that defendant is an "employee of a government agency" as that phrase is used in 18 U.S.C. § 926B. The Court has reviewed all the other requirements listed under this section and finds that Pennsylvania constables come under the protection of 18 U.S.C. § 926B. Accordingly, the

motion to dismiss the instant indictment is granted.

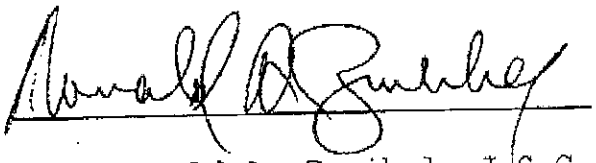
Moreover, looking at the legislative history behind this law, it seems that defendant, in his official capacity of constable and in performance of his statutorily authorized duties, was the type of individual the statute wanted preempted from prosecution. Congress drafted this legislation to help stop and deter crime throughout the country.

Assuming arguendo that Pennsylvania State Constables are "government employees," then defendant's prosecution is preempted by 18 U.S.C. § 926B, also known H.R. 218 or the Law Enforcement Officers Safety Act of 2004 appears to have merit. Accordingly, the motion for inspection and/or dismissal of the Grand Jury minutes, is granted to the extent that the Court has examined the Grand Jury minutes in camera and found the evidence before the Grand Jury to be legally insufficient. The People did not inform the Grand Jury that the instant prosecution was preempted if they found that the constable was here in the furtherance of his official duties or if he qualified as a law enforcement officer under H.R. 218. Accordingly, the motion to dismiss the indictment is granted.

Defendant's property, which was seized from him at the time of his arrest, is to be returned forthwith unless this Decision, Order and Judgment is stayed by virtue of the People filing an appeal from it in the Appellate Division, First Department.

This constitutes the decision, order and judgment of this Court.

ENTER:



Hon. Ronald A. Zweibel, J.S.C.

Dated: November 3, 2006

The Daily Washington LAW Reporter

Established in 1874

1895 Photo of Washington Law Reporter Co.'s composing room managed by Frank B. Croxen.

Volume 129 — Number 89 — Page 877
Tuesday, May 8, 2001

D.C. Superior Court

CRIMINAL LAW & PROCEDURE— POLICE

Postal Patrol Officer employed by U.S.Postal Service is not exempt from the law prohibiting carrying of concealed weapons (D.C.Code § 22-3204) because the job is primarily protecting property.

U.S. v SAVOY

D.C.Super.Ct.Crim No. F-5748-98 March 16,2001 Opinion per Natalia M. Ccombs Greene, J. *K.D. Clark for U.S. J.P. Byrd-Tillman for defendant.*

N.M.C. Greene, J.: This matter came before the Court on the Defendant's Oral Motion to Vacate Guilty Plea, Oral Motion for Reconsideration of Defendant's Motion to Dismiss and Oral Motion for Expungement of Records, made in open Court on October 27, 2000, the Defendant's Addendum to the Above Motions, filed on November 27, 2000, and the Government's Motion to Confirm that the Defendant is not Excepted from the District of Columbia's Gun Licensure Laws, filed on November 21, 2000.[1]

This case involves the strict firearms control laws in the District of Columbia and presents issues concerning the scope of the terms "police officer" and "law enforcement officer" as related to persons exempt from those laws. The Court examines these questions with respect to the facts presented in this case.

I.

The facts adduced during hearings on the motions and during the plea colloquy were essentially as follows. On August 8, 1998, defendant drove into the District of Columbia from Maryland for the purpose of driving a friend home. While doing so, defendant was involved in a minor motor vehicle crash in the 300 block of 37th Street in Southeast Washington. Following the crash, a verbal altercation ensued. During this verbal altercation, the driver of other vehicle[2] (hereinafter referred to as the "other driver") reached into his vehicle and opened the trunk of his car using a remote opening feature. Believing that the other driver might get a weapon from the trunk of his vehicle, defendant retrieved his United States Postal Service issued police badge and identification along with a Beretta semiautomatic pistol from his vehicle. Defendant ordered the other driver to step away from his vehicle. The other driver complied with defendant's commands, whereupon the defendant closed the trunk of the other driver's vehicle. Defendant then left the scene planning to contact the Metropolitan Police Department. In the meantime, the other driver flagged

Police — *Cont'd on page 878*

D.C. Court of Appeals

ATTORNEYS — DISCIPLINE

Attorney is suspended for 6 months nunc pro tunc followed by 2 years probation with conditions, Bar Counsel recommendation for requirement that attorney prove fitness is rejected under deferential standard.

IN RE JOSEPH A. LOPES

D.C.App.No. 97-BG-1927 April 12,2001 Opinion per Schwelb, J. (Farrell and Reid , JJ. concur) *M.E. Baurley for respondent. T.M. Tait, with J.E. Peters, for the Office of Bar Counsel. E.J. Branda, for the Board on Professional Responsibility.*

Schwelb, J: In a proposed simultaneous disposition of three District of Columbia disciplinary proceedings instituted by our Bar Counsel and one reciprocal discipline case that originated in Maryland, the Board on Professional Responsibility has recommended that Joseph A. Lopes be suspended from practice for six months, *nunc pro tunc* to July 29, 1998, and that his suspension be followed by a two-year period of probation, with conditions. Bar Counsel agrees that Lopes should be suspended for six months, but excepts to the recommended probation, arguing instead that as a condition of reinstatement following his suspension, Lopes should be required to demonstrate his fitness to practice law. Although Bar Counsel's position is not unreasonable, we apply our deferential standard of review and direct the imposition of discipline consistent with that recommended by the Board. ***.

LEGAL ANALYSIS

Bar Counsel takes issue with the Board's recommendation in two respects. First, according to Bar Counsel, "the Board erred in concluding that [Lopes] established *Kersey* [520 A2d 321 (1987)] style mitigation for any of his multiple instances of misconduct." Second, Bar Counsel challenges the recommended discipline; she asserts that Lopes should be required, at the conclusion of the six-month suspension

Discipline — *Cont'd on page 880*

TABLE OF CASES

"the primary duties of federal police officers are 'the preservation of peace; the prevention, detection, and investigation of crimes; the arrest or apprehension of violators; and the provision of assistance to citizens in emergency situations, including the protection of civil rights.'"

The Daily Washington Law Reporter

ISSN 1066—6095 A newspaper of general circulation. Published daily except Saturdays, Sundays and holidays by:
The Daily Washington Law Reporter Co.
1001 Connecticut Ave. N.W. Suite 238,
Washington, D.C. 20036-5504
(Entrance on K St.)
Phone: 202.331.1700 • Fax: 202.785.8476

Subscription Rates (Includes index): 1 Year: $229 • 2 Years: $438 • 3 Years: $647 • Single copy: $2 (Add sales tax in D.C.)

POSTMASTER:
Send change of address to:
The Daily Washington Law Reporter Co.,
1001 Connecticut Ave., N.W., Suite 238,
Washington, D.C. 20036-5504

Periodicals Postage Paid at Washington, D.C. (USPS 146-840)
Member—American Court and Commercial Newspapers, Inc.; National Newspaper Association

MICHAEL A. SCHUCHAT, Legal Editor
Elizabeth Lewis Enney, President
Kenneth Enney, Secretary
Donald J. Nichols, General Manager

This publication is printed using a Konica Force 60 printer.

Police

Continued from page 877

down a passing police car. After defendant returned to the scene, he was arrested and charged with carrying a pistol without a license.

II.

In his motions, defendant claimed that he was exempt from the law prohibiting the carrying of concealed weapons, D.C. Code Ann. § 22-3204 (1981) ("Section 22-3204"), because another statute, D.C. Code Ann. § 22-3205 (1981) ("Section 22-3205"), excepts "policemen or other duly appointed law-enforcement officers" from that provision.[3] At the time of the incident defendant was employed by the United States Postal Service as a "Postal Police Officer" and claimed that this job fell within the exemption outlined in Section 22-3205. The government contended that defendant, in his position, was actually equivalent to a special police officer and therefore did not fall within the exemption.

The Court agreed to hear arguments on the motions because the Court was concerned as to the legal validity of the defendant's guilty plea. Initially it was not clear that the defendant's position was that of a special police officer. One of the exhibits attached to defendant's sentencing memorandum was a letter from the Fraternal Order of Police National Labor Council No. 2 that indicated that defendant was a Postal Police Officer.[4] This Court therefore reviewed relevant case law to determine the scope of the terms at issue.

The District of Columbia Court of Appeals has consistently held that individuals whose job is primarily to protect property, rather than life, are not considered "police officers or other duly appointed law-enforcement officers" for the purposes of Section 22-3205. *McKenzie v. United States*, 158 A.2d 912, 914 (D.C. 1960), *Franklin v. United States*, 271 A.2d 784, 786 (D.C. 1970), *Timus v. United States*, 406 A.2d 1269, 1272 (D.C. 1979). Special police officers are not covered Per Se by Section 22-3205 because, by statute, they are appointed "for duty in connection with the property of" their employer. D.C. Code Ann. § 4-114 (1981).

If defendant was, in fact, a special police officer at the time of this incident, he would not fall within the exception found in Section 22-3205. *McKenzie v. United States*, 158 A.2d 912 (D.C. 1960). For purposes of Section 22-3204, the Court of Appeals has held that special police officers are law enforcement officers while on duty in the area of his or her assigned duty location or while travelling without deviation to and from the special police officer's place of employment immediately before or immediately after the period of actual duty.[5] *Franklin v. United States*, 271 A.2d 784, 785 (D.C. 1970), *Timus v. United States*, 406 A.2d 1269, 1272 (D.C. 1979). Only under those circumstances would a special police officer fall within the exemption found in Section 22-3205.

In his capacity as a Postal Service police officer, defendant is neither a special police officer as defined by District of Columbia law nor is he a member of a police department with statutory police powers in the District of Columbia. It therefore appeared, from arguments made and facts adduced at the hearing, that the critical question was whether, by his employment, defendant's primary responsibility as a "police officer" was the protection of life and therefore a "policeman or other duly appointed law-enforcement officer" as defined by Section 22-3205.

The defendant's job as a Postal Police Officer (hereinafter "PPO") is more akin to that of a special police officer than of a United States Park Police officer or Metropolitan Police Department officer. The Postal Service utilizes all of its PPOs for the protection of Postal Service property and the mails. The primary function of PPOs is not the preservation of life and the maintenance of law and order. Rather, PPOs control access to Postal Service facilities, escort the mails, and otherwise protect Postal Service property. Postal Service manuals refer to PPOs as a security force. Numerous Memoranda of Understanding between the PPO's labor union and the Postal Service explicitly state that no change in responsibility or authority took place from the time that the uniformed force was known as a security force to the force's present incarnation, the Postal Police.[6] The hierarchical structure of the Standard Position Description, *infra*, clearly indicates that the primary functions of a PPO involve physical security of property, loss prevention, and access control.

III.

In order to determine whether the defendant is exempt from Section 22-3204, the Court looked to the nature of the defendant's position. The job classification for the defendant's and other similar positions are set out in a United States Office of Personnel Management ("OPM") guide ("OPM Guide").[7] The defendant's OPM job classification is "GS-0083 Police Officer".

The OPM Guide provides that the primary duties of federal police officers are "the preservation of peace; the prevention, detection, and investigation of crimes; the arrest or apprehension of violators; and the provision of assistance to citizens in emergency situations, including the protection of civil rights."

Police — *Cont'd on page 879*

Recent Filings in DC Courts

D.C. SUPERIOR COURT
CIVIL DIVISION
NEW CASES
No., Parties, Action, Demand Amount & Plaintiff's Attorney

01-1101. D. Pindle v Aramark Corp.. Personan/al Tort: Negligence. Pro-se
01-1102. n/a
01-1103. Primus Automotive Financial Svcs. v L.A. Sinclair. Contract: Collection under $25,000.00. A.M. Hrehorovich
01-1104. Ford Motor Credit Co. v V.W. Strohman. Contract: Collection under $25,000.00. A.M. Hrehorovich
01-1105. n/a
01-1106. Primus Automotive Financial Svcs. v E.A. Gudger. Contract: Collection under $25,000.00. A.M. Hrehorovich
01-1107. n/a
01-1108. n/a
01-1109. A.A. Jefferson, et al. v J. Riddick, et al.. Personal Tort: Negligence, $500,000.00. Pro-se
01-1110. R.R. Jackson v District of Columbia. Personal Tort: Negligence, $500,000.00. Pro-se
01-1111. n/a
01-1112. n/a
01-1113. n/a
01-1114. n/a
01-1115. n/a
01-1116. M.P. Cheeks v MAIF. Contract: Breach of Contract. B.K. Cobbina
01-1117. Sullivan & Mitchell, PLLC, et al. v M. Tyree, et al.. Property Tort: Payment on a Forged Instrument. D.M. Schoenfeld
01-1118. n/a
01-1119. n/a
01-1120. M.A. Ramzan v Amalgamated Casualty Ins. Co., et al.. Contract: Breach of Contract. D.F. White
01-1121. n/a

Police

Continued from page 878

In an administrative decision, the OPM outlined four indicators to determine whether a job has a security-focused mission or a police-focused mission.[8] These indicators are: 1) the basic mission of the organization; 2) arrest authority; 3) training; and 4) patterns of work. As analyzed by the OPM, however, these factors are not dispositive of the issue as to whether the defendant was a policeman or other duly appointed law-enforcement officer under section 22-3205. *Middleton v. United States* 305 A.2d 259 (D.C. 1973). An examination of the factors outlined by the OPM Guide does, however, provide the Court with a useful algorithm for determining whether the defendant falls within the exemption as outlined in section 22-3205. Although the OPM finds that Postal Service police officers are police officers for purposes of job classification, for the reasons set out below, this Court finds that the defendant was not a policeman or other duly appointed law-enforcement officer under Section 22-3205 of D.C. Code.

The mission of the United States Postal Inspection Service's (hereinafter the "Inspection Service") uniformed arm is as follows:

> The purpose of the Security Force at any facility is security and protection. Security Force personnel should restrict their activities in all postal workroom areas to routine patrols, as specified in post instructions, and specific emergency requests by postal supervisors. All instances of Security Force personnel being in postal workroom areas, other than routine patrols called for by duty assignments and emergency situations, should be at the direction of the Security Supervisor.

U.S. Postal Service Postal Police Officer's Manual at 211 (1983). By contrast, the mission statement of the Metropolitan Police Department is "[t]o prevent crime and the fear of crime, as we work with others to build safe and healthy communities throughout the District of Columbia."

As detailed in an affidavit submitted in support of the government's opposition, the uniformed force of the Inspection Service was created in 1970 and at that time was referred to as the "Postal Security Force". The basic mission of the Postal Security Force "was to control access to postal facilities, provide protection of postal property and security for postal service-operated buildings." In 1971, that mission was expanded to include responsibility for "controlling access, maintaining order, preventing mail thefts, safeguarding customers and employees, and providing basic security for buildings operated by the Postal Service." In 1981, as a result of a collective bargaining agreement with the union representing the officers of the security force, the position title was changed from "Security Police Officer" to "Postal Police Officer". The parties agreed that this change did not augment or otherwise change the duties or authority for the members of this security force.[9]

In support of his argument that his position was that of a bona fide police officer, defendant relied upon the Standard Position Description for Postal Police Officers.[10] That portion of the description subsection entitled "Duties and Responsibilities" is reproduced below in its entirety because the language is instructive in divining the true nature of the defendant's employment.

> Performs a variety of duties related to the security of a postal installation, its buildings, employees, equipment, mail, and mail-in-transit, under the guidance and instruction of a security supervisor.
>
> Carries a firearm and exercises standard care required by the Inspection Service on firearms and use of reasonable force. Maintains assigned firearms in good conditions.
>
> Receives training in patrolling an assigned area on foot or by motor vehicle to maintain order and the general safeguarding of the facility, property, and employees. Prevents depredation, loss or damage of mail, by making observations in mail handling areas.
>
> Receives training in controlling access to buildings at an assigned post and enforces regulations requiring identification.
>
> As instructed, maintains a log of all incidents reported and a daily log of orders and basic information for the security force.
>
> As instructed, performs hourly checks: accounts for lost and found items, answers the telephone, and processes reports and inquiries.
>
> Responds to emergencies and other conditions, including burglaries and hold-ups, requiring immediate attention to maintain order and to prevent injury or theft to employees or property.
>
> Makes arrests and testifies in court on law violations within assigned authority.
>
> Performs other job related tasks in support of the primary duties.

The defendant specifically cited to numbers seven (7) and eight (8) to support his argument that his job is more analogous to that of a bona fide police officer. A fatal flaw in this argument, however, is that numbers one (1), three (3), four (4), five (5), and six (6) are most analogous to that of a special police officer whose primary

Police — *Cont'd on page 880*

Recent Filings in DC Courts *continued*

01-1122. R. Ageypong v J.N. Phillips. Personal Tort: Negligence, $100,000.00. B.F. Selig

01-1123. T.A. Kennerly, et al. v Douglas Dvlpt. Corp.. Contract: Collection over $25,000.00. B.M. Timian

01-1124. n/a

01-1125. Montague Plumbing & Heating Inc. v I.M. James, et al.. Contract: Interference, Personal Tort: Deceit, $500,000.00. P.A. Artis

01-1126. n/a

01-1127. n/a

01-1128. n/a

01-1129. Patuxent Flooring & Design, Inc. v United American, Inc., etal.. Contract: Collection under $25,000.00. D.B. Lamb

01-1130. District of Columbia, et al. v PSS & Assocs., inc.. Contract: Collection over $25,000.00. R. Herschthal

01-1131. First Select Corp. v M.L. Sweatt. Foreign Judgement. S.A. Kramer

01-1132. Bank of America v E.J. Rangel. Foreign Judgement. S.A. Kramer

01-1133. EMCC, Inc. v R. Emerson. Foreign Judgement. S.A. Kramer

01-1134. Discover Financial Svcs. v R.L. Williams. Foreign Judgement. S.A. Kramer

01-1135. MAIF v J.R.D. Cockrell, Jr.. Insurance/ Subrogation under $25,000.00. B. Rice

01-1136. n/a

01-1137. n/a

01-1138. F. Barnes v G. Bennett. Personal Tort: Automobile, $250,000.00. R.F. Silber

01-1139. n/a

01-1140. n/a

01-1141. B. Zeldis v Marriott Corp., et al.. Personal Tort: Personal Injury, $1 million. J. Strum

Police

Continued from page 879

mission is that of property protection. While both a special police officer and a Postal Police Officer may respond to emergencies, make arrests and testify in court, these are not their primary responsibilities.

An examination of the second prong of the OPM Guide's algorithm is also instructive. Federal police officers have the same police powers on federal property as do those officers given statutory police authority under District of Columbia law.[11] *See* 40 U.S.C. § 318 and D.C. Code. Ann. § 22-581 (1981). Postal Service police officers have police powers only on United States Postal Service property and have only the powers of a citizen in enforcing District of Columbia law. 40 U.S.C. § 318. Provisions do exist to extend statutory police powers found in D.C. Code Ann. § 23-581 (1981) to Postal Service Police Officers. D.C. Code Ann. § 4-192 (1981). The Postal Service can enter into a cooperative agreement with the Metropolitan Police Department coordinated through the United States Attorney for the District of Columbia to "assist the [Metropolitan Police] Department in carrying out crime prevention and law enforcement activities in the District of Columbia. *Id.* However, no such agreement between the Postal Service and the Metropolitan Police Department was in place at the time of defendant's arrest.[12]

A review of the third and fourth prongs of the OPM Guide's algorithm is instructive. United States Postal Service police officers receive approximately 10 weeks of training at the Federal Law Enforcement Training Center at Brunswick, Georgia. Special Police Officers, by contrast, receive approximately one (1) week of private training. Metropolitan Police Department officers receive 600 hours, or 15 weeks of training at the Maurice T. Turner, Jr. Institute of Police Science. From the record, it is impossible to determine the type of training received by Postal Police Officers. Specifically, the Court cannot determine whether the primary emphasis of the Postal Service training is on the protection of life or property. The OPM states that the pattern of work for security guards is oriented toward the protection of property while the work of police officers is oriented toward maintaining law and order. It is clear, however, from the record that the Postal Service employs Postal Police Officers for the primary purpose of securing Postal Service property and controlling access to said property.

Less important to this analysis is the physical jurisdiction of the PPOs. The physical jurisdiction of PPOs extends only to the physical boundaries of Postal Service property – property owned or controlled by the federal government. Unlike municipal police officers, PPOs do *not* have jurisdiction over all property, public or private, within the physical boundaries of their jurisdiction.

Because it cannot be shown that defendant's position as a PPO was akin to a policeman or other duly appointed law enforcement officer or that any agreement existed between the Metropolitan Police Department and the United States Postal Service pursuant to D.C. Code Section 4-192, the Court cannot conclude that defendant was exempt from the provisions of the District of Columbia's gun licensure laws. It may be said, however, that this conclusion presents some interesting questions given the state of the law and the apparent change in job title for this particular position. Although an interesting question, the Court must be guided by an honest analysis of the facts and the law.

Accordingly, it is this 16th day of March, 2001

ORDERED that Defendant's Motions are hereby DENIED. It is further

ORDERED that Government's Motion is hereby GRANTED. It is further

ORDERED that the Defendant's guilty plea, entered on October 3, 2000, stands.

SO ORDERED.

Endnotes

[1] Defendant, pursuant to a plea agreement with the government, pleaded guilty on October 3, 2000 to the charge of attempted carrying a pistol without a license, a lesser included offense to carrying a pistol without a license. The Court, prior to sentencing, invited the parties (after some discussion) to submit pleadings on the issue as to whether defendant might in fact be exempt from the District of Columbia gun licensure laws .

[2] The driver of the other vehicle was cited by Metropolitan Police Department officers for Following Another Vehicle Too Closely, in violation of 18 D.C.M.R. 2201.4.

[3] The defendant also claimed, in the alternative, that he was exempt from Section 3204 because he had intended to take the weapon to a pistol range for target practice before he was delayed and diverted into the District of Columbia. This defense is not discussed herein because: 1) the defendant's residence, where he apparently kept the weapon, and the firing range are located in Prince George's County, Maryland, and driving from the defendant's residence to the firing range would not normally necessitate passing through the District of Columbia; and 2) defendant did not advance this argument at the time of the hearing.

[4] The Fraternal Order of Police is a law-enforcement related labor union representing United States Postal Service police officers, among others; and is, according to the union, "the world's largest organization of sworn law enforcement officers".

[5] Special police officers in the District of Columbia are imputed to have a registration certificate for the

Police — *Cont'd on page 881*

Recent Filings in DC Courts *continued*

01-1142. In Re: Mahzad Essalat . Changing Name to Read: Mahzad Madeleine Essalat
01-1143. n/a
01-1144. US Bank Nat'l. Assn v C. James, et al.. Contract: Breach of Contract. H.N. Bierman
01-1145. n/a
01-1146. n/a
01-1147. US Bank Nat'l. Assn v E.A. Ferebee. Contract: Breach of Contract. H.N. Bierman
01-1148. B.L. Ripley v Washington Ctr., et al.. Personal Tort: Malpratice Medical, $10 million. B.H. Kim
01-1149. In Re: Jean Mikhail Meneses. Changing Name to Read: Michael Jean Menese
01-1150. Trinity College v A. Hill. Contract: Collection under $25,000.00. J.O. Curley

Police

Continued from page 880

employer-issued weapon and ammunition because their employers hold the registration certificate for the firearm and the ammunition. *See Timus v. United States*, 406 A.2d 1269, 1273 (D.C. 1979). Therefore, special police officers are not held liable for the crimes of possession of an unregistered firearm and possession of unregistered ammunition.

[6] Through collective bargaining, the Postal Service made changes to the uniformed service. On September 19, 1981, the Postal Service and the then Federation of Postal Security Police signed an agreement to change the name of the uniformed officers from "Security Police Officer" to "Postal Police Officer" and issue a new type of duty holster. On April 2, 1985, the two organizations signed an agreement issuing badges inscribed with the words "Postal Police Officer". On October 12, 1994, the Fraternal Order of Police and the Postal Service signed an agreement to change the graphics on their vehicles from "Security Force" to "Postal Police."

[7] Classification Programs Div., OPM, *Grade Evaluation Guide for Police and Security Guard Positions* (1988). Furthermore, previous administrative decisions are used to help classify positions.

[8] *See* 8 Digest of Significant Classification Decisions and Opinions 6 (U.S. Office of Personal Management 1986).

[9] Affidavit of Lawrence Katz at 3, *United States v. Savoy* (F-5748-98). *See also* Memorandum of Understanding (Sept. 19, 1981); Memorandum of Understanding between the United States Postal Service and Federation of Postal Police Officers (Apr. 2, 1985); Memorandum of Understanding between the United States Postal Service and Fraternal Order of Police National Labor Council, U.S.P.S. No. 2. (Oct. 12, 1994).

[10] Standard Position Description – Postal Police Officer (A), PPO-05 at 1 (Feb. 8, 1990).

[11] The government argues that postal service police officers are akin to special police officers "because of their limited authority to carry their service issued weapon." This argument is faulty. In *United States v. Pritchett*, the court noted that the District of Columbia Department of Corrections issued firearms to their officers only while on duty at the District of Columbia jail. 470 F.2d 455, 461 (D.C. Cir. 1972). In that case, the court found that District of Columbia corrections officers fall within the exemption outlined in § 22-3205. As Postal Service property, the Inspection Service's regulation of the use of their own firearms, badges, and identifications by employees does not impact upon District of Columbia weapons laws.

[12] Government's Motion to Confirm that the Defendant is not Excepted from the District of Columbia's Gun Licensure Laws at 25 (F-5478-98).

Discipline

Continued from page 877

recommended by the Board, to demonstrate his fitness for the practice of law. In the alternative, if the court declines to require proof of rehabilitation, then Bar Counsel asks us to impose conditions of probation more exacting and more intrusive than those proposed by the Board.

A. The standard of review.

In conformity with the applicable rule of court, our review of the Board's findings and recommendations is deferential: ***.

D.C. App. R. XI, § 9 (g)(1). The quoted rule "endorses the Board's exercise of broad discretion in handing out discipline that is subject only to a general review for abuse in that discretion's exercise." *In re Goffe*, 641 A.2d 458, 464 n.7 (D.C. 1994) (per curiam) (quoting *In re Haupt*, 422 A.2d 768, 771 (D.C. 1980) (per curiam)). The Board's recommended discipline comes to the court with a strong presumption in favor of its imposition. *Goffe, supra*, 641 A.2d at 463 (citing *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc)). "Generally speaking, if the Board's recommended sanction falls within a wide range of acceptable outcomes, it will be adopted and imposed." *Goffe, supra*, 641 A.2d at 463-64. "We must therefore, at the very least, accord respectful consideration to the Board's views." *In re Marshall*, 762 A.2d 530, 536 (D.C. 2000).

B. Kersey mitigation.

***. The *Kersey* issues have been vigorously contested before the Hearing Committee and the Board, and they have been ably briefed in this court. Without reciting in detail all of the relevant testimony, we are satisfied, upon careful consideration of the record as a whole, that the Board's analysis and recommendation are reasonable and consistent with our precedents. Under these circumstances, we must defer to the findings of the Board.

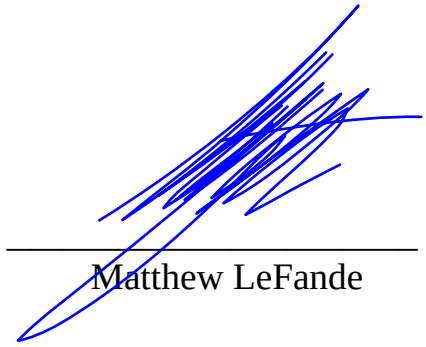
We begin our consideration of this issue with the first element of Lopes' burden under *Kersey*. It is substantially undisputed that, at the relevant times, Lopes was suffering from depression, a disability that has been held to warrant *Kersey* mitigation. *See, e.g., In re Peek*, 565 A.2d 627, 631-32 (D.C. 1989). Bar Counsel and counsel for the Board have energetically debated whether Lopes' depression was comparable to the depression suffered by the respondents in *Peek* and in some of our other cases. In our view, however, there was clear and convincing evidence to support the Board's finding that

Discipline — *Cont'd on page 882*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing Appeal Brief and Joint Appendix were served via United States Postal Service First Class Mail, postage prepaid, to the Appellee's counsel of record, this fifth day of December, 2011.

Roy. W. McLeese, III, Esq.
Assistant United States Attorney
555 4th Street NW #8104
Washington, DC 20001-2733



Matthew LeFande