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September 10, 2019

Hon. Erin M. Peradotto, J.S.C.
Associate Justice of the Appellate Division
New York State Supreme Court
Appellate Division, Fourth Department
50 East Avenue, Suite 200
Rochester, New York 14604

RE: *People v Melquan Tucker*
Erie County Indictment No. 2016-1409
Docket No. KA 18-00147

Dear Justice Peradotto,

Argument of the above-entitled appeal was held on September 9, 2019, with the Hon. Gerald J. Whalen, P.J., J.S.C., presiding. The other Justices on the panel included Your Honor, Justice DeJoseph, and Justice NeMoyer. This post-argument submission is made to bring attention to several points raised by Your Honor and Justice NeMoyer at oral argument.

1. New York's criminalization of unlicensed in-home handgun possession must fail even if the Court chooses to analyze Mr. Tucker's Constitutional challenge under intermediate scrutiny.

It has long been the policy of New York Courts that Constitutional prerogatives may not be disregarded on the mere ground of expediency and convenience. Nor do New York Courts permit the overriding of a

Constitutional guarantee except as permitted by what is stated or implied in the Constitution itself. (*Gresser v O'Brien*, 146 Misc 909, 912 [Sup Ct NY County 1933], *affd* 263 NY 622 [1934] [“Guaranties vouchsafed by organic law may not be overridden except as permitted by the Constitution itself.”])

It is critical to emphasize that what is at issue is not that Mr. Tucker was convicted for possessing a handgun that he failed to register, but that he possessed a gun for which the state had not licensed him to possess. Under any standard of review, even rational basis review, the United States Supreme Court has made it clear that “A state may not impose a charge for the enjoyment of a right granted by the federal constitution” (*Murdock v Pennsylvania*, 319 US 105, 113 [1943]) While permit fees have been charged for other First Amendment activities, including public protests, the Supreme Court provides guidance for the crux of whether such permits are constitutional or unconstitutional: where a license acts as a precondition to constitutionally protected activity, the license is unlawful. (See *Swaggart Ministries v Bd of Equalization*, 493 US 378, 390 [1990])

New York’s handgun licensing scheme operates on a total ban of handguns unless the state has granted a licensee permission to possess such firearm in their home (referred to as a “premises permit”). This in effect converts the core Second Amendment liberty (in-home handgun possession for self-defense) into a licensed privilege. More to the point, the pistol permit license is a precondition to constitutionally protected activity. There is no controversy over whether Mr. Tucker was engaging in the exercise of a Constitutional right when he possessed a .22 caliber single action revolver in his home for self-defense. He did so without prior state permission that acted as a legal prerequisite to the exercise of his right.

Some legal- and policy-minded thinkers may personally feel that the allowance of American citizens to partake in unlicensed, in-home

handgun possession is an unfavored policy. However, the on-point case law considered together is indisputable and should fail any standard of review, intermediate or otherwise. This echoes the late Justice Scalia's majority opinion in *Heller* which stated, "the enshrinement of constitutional rights necessarily takes certain policy choices off the table" (District of Columbia v Heller, 554 US 570, 636 [2008]).

2. Mr. Tucker undoubtedly has standing to raise a Constitutional objection to his conviction.

Where a defendant in a criminal case challenges the constitutionality of a statute as part of his or her defense, inherent standing is triggered to review the constitutionality of the statute.

In the instant appeal, Mr. Tucker would not be charged with criminal possession but for the New York requirement that he obtain a license to possess a handgun in his dwelling. Should that statute be found unconstitutional, he could not be charged with criminal possession of an unlicensed handgun. Therefore, he is empowered with standing to challenge the constitutionality of New York's handgun licensing scheme for the in-home possession of handguns. Even then, the matter of constitutionality was litigated before the trial court.

CONCLUSION

Throughout history, various provisions of our sacred Bill of Rights have proven unpopular with the masses. In the Reconstruction Era, black codes were passed to deny freed African Americans their basic rights, especially the right to keep and bear arms which was crucial to their survival in the Ku Klux Klan dominated South. Today, the Second Amendment has proven to be a source of controversy, especially in the media.

Our Constitution was expressly designed to prevent against the majoritarian infringement of basic rights based upon the passions of the day. Majoritarian rule does not — nor ever has — legitimately defined the contours of a core fundamental right. History being our guide tells us that majoritarian rule will always execute Socrates because it is popular and he is not.

Respectfully submitted,



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Mr. Melquan Tucker