

STATE OF NORTH CAROLINA **FILED** THE GENERAL COURT OF JUSTICE  
 COUNTY OF CASWELL 11 OCT 24 PM 12:35 SUPERIOR COURT DIVISION  
 CASE NO. 10CVS281

CASWELL COUNTY, C.S.C.

Richard M. Johnston,  
 Plaintiff

BY           *RMJ*          

vs.

) MEMORANDUM OF DECISION  
 ) AND JUDGMENT  
 )  
 )  
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 )  
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The State of North Carolina,  
 Defendant

This case came on for a hearing before the undersigned during the August 1, 2011, civil session of the Superior Court for North Carolina Judicial District 9A sitting in Person County, North Carolina, on the Defendant's Motion to Dismiss or Alternatively for Summary Judgment, and Plaintiff's Motion for Summary Judgment. The Plaintiff appeared in person and by counsel, Dan L. Hardway. The Defendant appeared by counsel, Special Deputy Attorney General John Aldridge, III.

Plaintiff, in this action, challenges the constitutionality of the North Carolina Felony Firearms Act, N.C. Gen. Stat. § 14-415.1, et seq., on its face and as applied to him, seeking declaratory and injunctive relief. Specifically, he challenges the statute on the grounds that: 1) the Act violates the Second and Fourteenth Amendments of the United States Constitution and Article I, §§ 19 and 30 of the North Carolina Constitution by depriving him of due process of law; 2) the Act is an *Ex Post Facto* law and/or a Bill of Attainder in violation of North Carolina Constitution Article I, § 16 and United States Constitution Article I, § 10; and 3) the Act violates the Fourteenth Amendment of the United States Constitution and Article I, § 19 of the North Carolina Constitution by depriving him of the equal protection of the law.

Defendant moves to dismiss the Complaint herein on the grounds that: 1) Plaintiff's

declaratory judgment action is not ripe for adjudication because Plaintiff has not exhausted his administrative remedy; 2) this Court lacks jurisdiction over the subject matter; 3) Plaintiff lacks standing to bring the action; 4) there is a lack of personal jurisdiction; and 5) Plaintiff has failed to state a claim upon which relief may be granted. The Defendant moves, in the alternative, for summary judgment.

The court has carefully considered all matters of record, including the motions of both parties, the extensive discovery and affidavits submitted in support of the motions, the memoranda of law submitted by the parties, arguments of counsel and legal authorities cited by counsel. Based upon such consideration, the court has concluded that Defendant's Motions should be denied and Plaintiff's Motion for Summary Judgment should be granted on the issue of liability.

#### **FACTS**

There are no material issues of fact herein. The following facts appear of record herein and are pertinent to this Memorandum of Decision and Judgment.

Plaintiff is a life-long resident of Caswell County. Plaintiff has been convicted of felonies in Caswell County, North Carolina, and Rockingham County, North Carolina. Plaintiff was found guilty of felonious receipt of stolen property and conspiracy to commit grand larceny in Rockingham County on January 27, 1978. Plaintiff pled no contest to fraudulent setting fire, conspiracy, false statement to procure, and conspiracy to receive, receiving, conspiracy to commit larceny and accessory before the fact in violation of N.C. Gen. Stat. §§ 14-65, 14-214, 14-71 and 14-5, in Caswell County on June 11, 1981. The charges were consolidated for purpose of judgment. The convictions all arose from events which occurred in 1976. The crimes for which Plaintiff was convicted did not involve either violence or the use of a firearm.

Plaintiff's rights to own a firearm were automatically restored by operation of N.C. Gen. Stat.

§ 14-415.1, and between the time of that restoration and the 2004 amendment of that statute, Plaintiff legally owned, possessed and used firearms in North Carolina. Plaintiff used firearms primarily for purposes of defense of himself, his home and his family. Plaintiff also used firearms for hunting and for defense of himself and his family while hunting. Plaintiff, in this time period, also worked with youth in his community, training them on how to properly and safely engage in hunting activities, including the safe and responsible use of firearms. During the years in which he legally possessed firearms, Plaintiff did so with no complaint from any source about his possession and use of firearms. After December 1, 2004, Plaintiff voluntarily divested himself of all firearms.

After his felony convictions, with the exception of routine traffic citations and two hunting citations, one of which was dismissed, Plaintiff has not been charged with any crime. Plaintiff is a farmer and has resided on his farm in Caswell County continuously since 1981. He is actively involved in his community and is considered by members of the community to be a valuable member of the community. He has served the community by serving on the Administrative Board of Parley United Methodist Church and on the Caswell County Planning Board. He donated land to the Department of Corrections for a correctional facility which was built in Caswell County in 1994. Plaintiff has raised three children to adulthood, one of whom is a lawyer and another is in law school.

Plaintiff is 69 years old. His wife is 66 years old. The farm where they live alone is located in a rural area of Caswell County at the end of a mile long dirt driveway. Plaintiff, in the past two years, has had to deal with situations where people who have been drinking come down his road to his house. He has been threatened on two different occasions in his own yard and has had to call law enforcement which can take up to twenty minutes to respond due to the remoteness of his farm. Plaintiff and his wife do not feel secure nor safe in their home without a firearm available with which to protect themselves.

Plaintiff has not attempted to own or possess a firearm since divesting himself of his firearms in 2004, because he wants to comply with the law and fears criminal prosecution if he does not comply. Were he to try, Plaintiff could not successfully acquire a firearm legally because the United States Department of Justice maintains a criminal records check system known as the National Instant Criminal Background Check Service (NICS), which firearms dealers are required to consult prior to selling a firearm to any person. The Defendant has advised NICS that no person who has been convicted of a felony in this state or in any other state is eligible to purchase a firearm in this state, regardless of prior restoration of that person's rights under prior law.

Plaintiff was informed by a Deputy Sheriff of Caswell County that, if he owned or possessed a firearm, he could be charged with a felony violation of N.C. Gen. Stat. § 14-415.1. Plaintiff is also aware of other prosecutions under the statute from news reports. Plaintiff, for the past 30 years has always sought to be a law-abiding citizen and is not willing to violate the law just to test it.

Persons in the community who have known the Plaintiff for long periods of time, including Caswell County Sheriff Michael Welch and Caswell County Assistant District Attorney Luann Wright Martin of are of the opinion that Plaintiff is a responsible, law-abiding citizen whose possession of a firearm would pose no danger to public safety.

#### **THE MOTION TO DISMISS**

The Defendant's arguments that this Court lacks personal jurisdiction was not addressed in Defendant's Memorandum of Law in Support of Defendant's Motion to Dismiss or Alternatively for Summary Judgment, nor in Defendant's oral argument and the ground is deemed abandoned.

Declaratory judgment actions are authorized by N.C. Gen. Stat. § 1-253, et. seq. While declaratory judgment is not generally available to restrain a criminal prosecution, *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 349, 323 S.E. 2d 294, 309 (1984), there is no prosecution pending

in this case. However, “a declaratory judgment action to determine the constitutionality of a criminal statute prior to prosecution is not completely barred.” *Malloy v. Cooper*, 356 N.C. 113, 114, 565 S.E. 2d 76 (2002). Here, as in *Malloy*, a declaratory judgment action is proper and is within the scope of the action permitted by statute. Here, as in *Malloy*, the parties interests are adverse and, as evidenced by the record, memoranda and arguments in this case, they are highly motivated to strongly advocate their respective positions. There is a “concrete and real controversy” and “plaintiff is not seeking an advisory opinion from this Court.” *Id.*, at 116. Plaintiff alleges that he suffers real and present deprivations of rights and liberties, as well as other damages, whether or not the State ever prosecutes him for a felony violation of N.C. Gen. Stat. § 14-415.1. Plaintiff correctly alleges that no other remedy than this action is available to him. In addition, here as in *Malloy*, Plaintiff has been informed by a representative of law enforcement that he is subject to prosecution if he possesses a firearm. Here, as in *Malloy*, “the basic requirement of a real controversy between parties with adverse interests is satisfied in this case.” *Id.* at 117. That controversy existed prior to and at the time the Complaint herein was filed.

Defendant also contends that N.C. Gen. Stat. § 14-415.4 provides the only method whereby a felon may seek restoration of firearms rights and that declaratory judgment should, therefore, not be available in this case because Plaintiff has not sought relief under that statute. N.C. Gen. Stat. § 14-415.4 does not provide any possible relief to Plaintiff herein because he has been convicted of more than one felony and the statute’s relief is limited to persons with no more than one felony conviction. Requiring Plaintiff to proceed under that statutory provision before being allowed to file this claim would be to require a futile act with a foregone conclusion, a requirement not imposed by any reasonable application of law. Plaintiff’s declaratory judgment action also challenges the constitutionality of this section of the Felony Firearms Act.

The “irreducible constitutional minimum” for standing is:

(1) ‘injury in fact’ – an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

*Neuse River Foundation, Inc., v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114 (2002), *disc. review denied*, 336 N.C. 675 (2003). In this case Plaintiff has lost his firearms and use of his real estate. He has lost a fundamental constitutional right and the ability to protect himself, his family and his home. He has also alleged economic loss and emotional and psychological stress as a result of the loss of his right to keep and bear arms. These losses are actual, concrete, particularized losses directly traceable to the threatened application of the Felony Firearms Act to Plaintiff. A favorable decision in this case can fully redress the injuries suffered by Plaintiff.

The Court finds that it does have subject matter jurisdiction in this case, that the Plaintiff has standing to bring this action, that declaratory judgment is proper and that the Plaintiff’s Complaint states a claim upon which relief may be granted. Defendant’s Motion to Dismiss is denied.

### **DUE PROCESS AND THE RIGHT TO KEEP AND BEAR ARMS**

The right to keep and bear arms has long been recognized in this state as an individual right protected by N.C. Const. art. 1, § 30. *State v. Kerner*, 181 N.C. 574, 107 S.E. 222 (1921). While that right may not be abolished by prohibition of firearms possession, it may be regulated by the state. *Id.*; *Britt v. State*, 363 N.C. 546, 681 S.E.2d 320 (N.C. 2009). The right to keep and bear arms has also been recognized by the United States Supreme Court as an individual right protected by the Second Amendment to the United States Constitution. *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783 (2008). In *McDonald v. Chicago*, 561 U.S. \_\_\_\_, 130 S. Ct. 3020, 177 L. Ed 2d 894 (2010), the Court held that the Second Amendment right to keep and bear arms is a fundamental

liberty interest protected by the Due Process Clause of the Fourteenth Amendment against infringement by state legislation. Due process of law is also secured to the people of this state by N.C. Const. art. I, § 19.

The Plaintiff argues that the Felony Firearms Act, on its face and as applied to him, violates his rights to keep and bear arms under the U.S. Const. amend. II, and N.C. Const. art. I, § 30. Plaintiff also argues that the Felony Firearms Act, on its face and as applied to him, violates his right to due process of law under U.S. Const. amends. V, XIV, and N.C. Const. art. I, § 19. Defendant argues that the Felony Firearms Act is valid both facially and as applied in this case.

### **Substantive Due Process**

Defendant argues that the Felony Firearms Act is a “presumptively lawful regulatory measure,” under *Heller*, that Plaintiff is not a responsible, law-abiding citizen entitled to the core right identified in *Heller* and, therefore, Plaintiff is not entitled to any Second Amendment protections because he is a convicted felon. Plaintiff argues that the Court’s use of the word, “presumptively,” is ambiguous and should not be considered to be a term meaning that all felon in possession laws are necessarily valid in all circumstances. Plaintiff also argues that N.C. Gen. Stat. § 14-415.4 is not a “longstanding prohibition” entitled to the presumption, if any, created by *Heller*. Plaintiff argues that he is a responsible, law-abiding citizen in spite of having been convicted of felonies.

Our Court of Appeals has upheld the Felony Firearms Act from a challenge to its constitutionality on substantive due process grounds. *State v. Whitaker*, 689 S.E.2d 395, 401, (N.C. App. 2009), *aff’d* 364 N.C. 404, 700 S.E.2d 215 (2010). That ruling is binding upon this Court and Plaintiff’s argument that the Act is unconstitutional on that ground is denied. Our state courts, and most federal courts that have addressed the issue have, however, allowed an attack on substantive

due process as applied to a plaintiff in a particular case.

The United States Supreme Court, in *Heller*, only addressed the issue of whether a felon can have any rights under the Second Amendment to the United States Constitution in passing. The Court observed, “Although we do not undertake an exhaustive analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons....” *Heller*, 128 S.Ct. at 2817. In a footnote, the Court referred to such “longstanding prohibitions” and other listed firearms restrictions as “presumptively lawful regulatory measures.” *Id.* at n. 26. Some courts have labeled this *dicta*, other courts have tried to construe it in a way that allowed the rejection of facial substantive due process challenges while allowing as applied challenges. *See, e.g., United States v. Chester*, 628 F.3d 673 (4th Cir. 2010); *United States v. Barton*, 633 F.3d 168 (3<sup>rd</sup> Cir., 2011); *United States v. Williams*, 616 F.3d 685 (10<sup>th</sup> Cir., 2010); *United States v. Marzzarella*, 614 F.3d 85 (3<sup>rd</sup> Cir., 2010); *United States v. Reese*, 627 F.3d 792 (10<sup>th</sup> Cir. 2010); *United States v. Skoien*, 614 F.3d 638 (7<sup>th</sup> Cir. 2010) (en banc).

The United States Court of Appeals for the Fourth Circuit in *Chester*, 628 F.3d at 680, considered a Second Amendment challenge to 18 U.S.C. § 922(g)(9) which prohibits possession of a firearm by a person convicted of a crime of domestic violence. After considering, and rejecting, arguments based upon the “presumptively lawful” language of *Heller*, the court held:

If the challenged regulation burdens conduct that was within the scope of the Second Amendment as historically understood, then we move to the second step of applying an appropriate form of means-end scrutiny. *Heller* left open the issue of the standard of review, rejecting only rational-basis review. Accordingly, unless the conduct at issue is not protected by the Second Amendment at all, the Government bears the burden of justifying the constitutional validity of the law.

*Id.* (internal citations omitted). The first issue to be addressed under *Heller* and *McDonald* is

whether the Second Amendment historically provided protection to felons. The Fourth Circuit went on to observe that “the historical data is not conclusive on the question of whether the founding era understanding was that the Second Amendment did not apply to felons”, *Id.*, and held “we are certainly not able to say that the Second Amendment, as historically understood, did not apply to persons convicted of domestic violence misdemeanors. We must assume, therefore, that Chester's Second Amendment rights are intact and that he is entitled to some measure of Second Amendment protection to keep and possess firearms in his home.” *Id.* at 681.

The issue of whether a felon has any rights under the Second Amendment has been directly addressed by both the Third Circuit and the Seventh Circuit. The decisions are instructive. In *Barton, supra*, the court held the federal Gun Control Act was not facially unconstitutional under a substantive due process analysis relying on the “presumptively valid” language of *Heller*, but went on to hold: “By describing the felon disarmament ban as ‘presumptively’ lawful, the Supreme Court implied that the presumption may be rebutted” in an as applied challenge. *Id.* at 173. Obviously, inherent in this holding, is a finding that individual felons still have Second Amendment rights and are entitled to some measure of protection. Citing *Britt*, the Third Circuit held:

To raise a successful as-applied challenge, Barton must present facts about himself and his background that distinguish his circumstances from those of persons historically barred from Second Amendment protections. For instance, a felon convicted of a minor, non-violent crime might show that he is no more dangerous than a typical law-abiding citizen. Similarly, a court might find that a felon whose crime of conviction is decades-old, poses no continuing threat to society.

*Barton*, at 174.

The Tenth Circuit has also found that felons have rights under the Second Amendment:

[T]he government does not get a free pass simply because Congress has established a “categorical ban”; it still must prove that the ban is constitutional, a mandate that flows from *Heller* itself. *Heller* referred to felon disarmament bans only as “presumptively lawful,” which, by implication, means that there must exist the

possibility that the ban could be unconstitutional in the face of an as-applied challenge.

*Williams*, 616 F.3d at 692. If the felon had no rights under the constitution there would be no possibility of an as-applied challenge.

The Court is of the opinion that felons do not lose their constitutional rights by virtue of being convicted of a felony. While Section 2 of the Fourteenth Amendment does allow states to deprive a convicted felon of his right to vote, it is questionable whether a state could do so under Section 1 of that Amendment did not the Amendment specifically allow it in Section 2. *Richardson v. Ramirez*, 418 U.S. 24, 94 S.Ct. 2655 (1974). As the United States Supreme Court in observed *Wolff v. McDonnell*, 418 U.S. 539, 556, 94 S.Ct. 2963, 2974 (1974):

[t]here is no iron curtain drawn between the Constitution and the prisons of this country. Prisoners have been held to enjoy substantial religious freedom under the First and Fourteenth Amendments. *Cruz v. Beto*, 405 U.S. 319(1972); *Cooper v. Pate*, 378 U.S. 546(1964). They retain right of access to the courts. *Younger v. Gilmore*, 404 U.S. 15(1971), aff'g *Gilmore v. Lynch*, 319 F.Supp. 105 (N.D.Cal.1970); *Johnson v. Avery*, 393 U.S. 483(1969); *Ex parte Hull*, 312 U.S. 546 (1941). Prisoners are protected under the Equal Protection Clause of the Fourteenth Amendment from invidious discrimination based on race. *Lee v. Washington*, 390 U.S. 333(1968). Prisoners may also claim the protections of the Due Process Clause. They may not be deprived of life, liberty, or property without due process of law. *Haines v. Kerner*, 404 U.S. 519(1972); *Wilwording v. Swenson*, 404 U.S. 249 (1971); *Screws v. United States* 325 U.S. 91 (1945).

While incarceration may result in restrictions of a felon's fundamental constitutional rights, and the exigencies of incarceration justifies total restriction of the felon's Second Amendment rights during the term of incarceration, the felony conviction does not divest the felon of the fundamental rights, restricted as they may be during incarceration, after release. Felons do not lose their First Amendment right to freedom of speech or their Sixth Amendment right to have an attorney represent them in subsequent criminal cases. Laws attempting to divest them of those rights would be struck

down as unconstitutional with very little debate. Our citizen's rights under the Second Amendment to the Constitution are fundamental liberty interests. Although our Supreme Court has not directly addressed the issue of whether a felon has rights under the Second Amendment of the Constitution, it has clearly held, in accord with the federal circuits cited above, that felons have rights under N.C. Const. art. I, § 30. Our Supreme Court found, in *Britt, supra*, that a convicted felon still had rights under that provision and that the Felony Firearms Act can be so unreasonable as applied to be a violation of those rights and, therefore, unconstitutional. The application of the Act to Barney Britt could not have been unconstitutional had plaintiff in that case had no rights protected by the Constitution. While a convicted felon's right to keep and bear arms may be regulated, he still has a fundamental right protected by the Second Amendment to the United States Constitution and Article 1, Section 30 of the Constitution of North Carolina.

The issue of firearms is a politically contentious one and felons are popularly perceived, whether correctly or not, to be a dangerous and disfavored class with little, if any, perception of individual differences among members of the class. They are certainly not a favored class to which heightened scrutiny would apply under equal protection standards. But it is often the popularly disfavored, stereotyped classes who are the most vulnerable to constitutional deprivations. The role of the Courts in these cases is to not be persuaded by the political winds, passions, and popular perceptions and stereotypes, but to apply the law and the Constitution as fairly and justly as possible.

Based on the foregoing, the Court is of the opinion that a person who has been convicted of a felony, or felonies, is not totally outside of the protections of the Second Amendment of the United States Constitution and Article I, Section 19 of the Constitution of North Carolina. Therefore, Plaintiff's rights are intact and he is entitled to some measure of protection of his constitutional right to keep and possess firearms.

The courts of our state are obliged to apply the guarantees of the United States Constitution to our citizens. *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 475, 515 S.E.2d 675, 692 (1999).

As our Supreme Court noted:

because the United States Constitution is binding on the states, the rights it guarantees must be applied to every citizen by the courts of North Carolina, so no citizen will be "accorded lesser rights" no matter how we construe the state constitution. For all practical purposes, therefore, the only significant issue for this Court when interpreting a provision of our state Constitution paralleling a provision of the United States Constitution will always be whether the state Constitution guarantees additional rights to the citizen above and beyond those guaranteed by the parallel federal provision. In this respect, the United States Constitution provides a constitutional floor of fundamental rights guaranteed all citizens of the United States, while the state constitutions frequently give citizens of individual states basic rights in addition to those guaranteed by the United States Constitution."

*Virmani, supra.* Defendant argues that our Supreme Court has applied a reasonableness standard to as-applied constitutional challenges to the Felony Firearms Act and that such standard must, therefore, provide as much protection to our citizens as is mandated by the Second Amendment. The federal cases applying *Heller*, however, clearly show that a higher standard of review is required under federal constitutional provisions.

The United States Supreme Court, itself, observed that a reasonableness standard was not appropriate in Second Amendment cases. *Heller*, 128 S. Ct. at 2817 n.27. Each of the federal circuits examined by this Court has applied an intermediate scrutiny standard. *See, e.g., Chester*, at 683("[W]e conclude that intermediate scrutiny is more appropriate..."); *Williams*, at 692; *Marzzarella*, 614 F.3d at 97; *Reese*, 627 F.3d at 801-02; *Skoien*, 614 F.3d at 641-42(declining to label the level of scrutiny being applied, but upholding § 922(g)(9) because "logic and data establish a substantial relation between" the subsection and an "important governmental objective"). These cases, however, all dealt with criminal defendants charged with a recent violation of the law who had

recent criminal charges on their records. All the decisions are clear that the defendants could not be categorized as “responsible, law-abiding” citizens based on the defendant’s recent conduct.

This case is substantially different. Plaintiff, in spite of his thirty year old felony convictions, has shown that he is a responsible, law-abiding citizen. Caswell County Sheriff Michael Welch and Assistant District Attorney LuAnn Wright Martin swore by affidavit that they have known Plaintiff for 20 and 15 years, respectively, and that Plaintiff is “a rehabilitated responsible law abiding citizen” whose “possession of a firearm would not constitute a danger to public safety.” John Satterfield testified by affidavit that he has known Plaintiff since 1984 and, “When he was allowed to own guns, he was very responsible and safe with them.... Richard is a changed man since his long ago felony charges, a change for the good. I believe that Richard ... greatly regrets some decisions made in those years. I do not think that Richard is a threat in any way to public safety.” Thomas Bernard testified by affidavit that he has known Plaintiff for the past 30 years and, “He has been a very responsible, law abiding and leading citizen of Caswell County after the problems he had when he was young.” Dr. Jason Byassee testified by affidavit that Plaintiff “was an example of the Christian faith and the American dream made right...The world would not be less safe for his possession and use of firearms now, it would be more.” George Ward, Jr., testified by affidavit that he has known Plaintiff his whole life and has worked with him on a one-on-one basis since 1998. He swore, “Mr. Johnston is a man of high character, dependable, very respectable in his dealings with people in the community and a responsible, law abiding citizen. Although, as we know, we all make mistakes, but as long as we learn from our mistakes and move our life in a more positive direction through church and civic involvement, we can overcome all challenges. I feel that Mr. Johnston, through personal decisions, has directed his life in a more positive manner. I would appreciate any assistance in allowing Mr. Johnston the privilege of carrying a firearm and enjoying the sport of hunting, and the

ability to protect himself, in his retirement years.”

The Defendant offered evidence from the law enforcement officer who investigated Plaintiff in the late 1970's leading to his felony convictions. Terry Johnson is now Sheriff of Alamance County and his affidavit offered opinions that Plaintiff “has habitually violated and shown disregard for the laws of North Carolina” and that “his remorse ... has been inconsistent and short lived.” Sheriff Johnson’s affidavit is based solely on his investigation, which occurred thirty or more years ago, and contains no allegations that Sheriff Johnson has any information regarding Plaintiff since that time. Plaintiff does not contest that he exhibited disregard for the law in the late 1970's. Defendant has offered no evidence that Plaintiff has been a responsible, law-abiding citizen since then.

Defendant argues that Plaintiff’s conviction of a hunting citation for taking bear over bait in 1995 in Hyde County, North Carolina, is evidence of continued disregard of the law. The Plaintiff, however, explained this 16 year old hunting citation in sworn interrogatory answers. The explanation is both reasonable and uncontradicted in the record and exhibits no disregard for the hunting laws and regulations of this State. The Court is also of the opinion that, based on the undisputed facts of record that this 1995 hunting citation does not indicate that the Plaintiff poses any threat to the public safety or, more specifically, poses any risk of committing a violent crime involving the use of a firearm.

While this Court is of the opinion that Plaintiff is a responsible, law-abiding citizen and his claim is, therefore, within the core right identified in *Heller* and strict scrutiny is the appropriate standard to be applied in this case, the Court is of the opinion that the state has failed to meet its burden of showing that the Felony Firearms Act is constitutional as applied to Plaintiff under any standard of scrutiny. Even if one were to presume, which this Court does not, that the Felony

Firearms Act is a lawful regulation, as urged by the Defendant, then Plaintiff has effectively rebutted that presumption. *Barton, supra; Britt, supra.*

Defendant argues that Plaintiff must meet the five considerations enumerated in *Britt* in order for the Court to find that the Act is unconstitutional as applied to a challenging plaintiff, including Plaintiff in this case. Our Supreme Court, in *Britt*, held:

“Based on the facts of plaintiff’s crime, his long post-conviction history of respect for the law, the absence of any evidence of violence by plaintiff, and the lack of any exception or possible relief from the statute’s operation as applied to plaintiff, the 2004 version of N.C.G.S. § 14-451.1 is an unreasonable regulation, not fairly related to the preservation of public peace and safety. In particular, it is unreasonable to assert that a nonviolent citizen who has responsibly, safely, and legally owned and used firearms for seventeen years is, in reality, so dangerous that any possession at all of a firearm would pose a significant threat to public safety.”

*Id.*, at 323. The Defendant argues that since Plaintiff has more than one felony conviction that the *Britt* holding does not apply and that the Act is not a denial of substantive due process as applied to Plaintiff. This Court, however, is of the opinion that Defendant’s argument elevates form over substance. The *Britt* decision clearly and unequivocally states that it is decided on the facts and circumstances of that particular case and that the criteria is whether such facts and circumstances indicate that the Plaintiff is “so dangerous that any possession at all of a firearm would pose a significant threat to public safety.” *Id.* In the case presently before the Court it is clear that Plaintiff Richard Johnston does not pose such a threat.

Our Supreme Court has said, in the context of considering whether the Felony Firearms Act is an *Ex Post Facto* law, “the General Assembly’s nonpunitive intent is to protect the public from future violent actions of those it has deemed by its classification of offenses to be either most dangerous or to have demonstrated a heightened disregard for the law.” *State v. Whitaker*, 364 N.C. 404, 700 S.E.2d 215, 218 (2010). The specific aim of the Act is to prevent crimes of violence by a

felon using a firearm. Our Supreme Court recognized that focus on dangerousness and the potential for violence in *Britt, supra*. The critical standard laid out in our Supreme Court's decision, in a substantive due process as-applied challenge, was whether the plaintiff making the challenge is, "in reality so dangerous that any possession of a firearm would pose a significant threat to public safety." No one challenges the fact that preventing felons from committing violent repeat offenses is a significant state interest. In this regard it should be noted that the purpose of this Act is clearly not a general, amorphous protection of public safety. *See, also, e.g., Chester, supra*, 628 F.3d at 691 (Davis, J., concurring) ("the purpose is to keep guns out of the hands of those who have demonstrated that 'they may not be trusted to possess a firearm without becoming a threat to society' .... More specifically ... the purpose is to keep firearms away from presumptively risky individuals with a demonstrated history of actual or attempted violence."); *Williams, supra*, 616 F.3d at 693 ("government's stated objective is to keep firearms out of the hands of violent felons, who the government believes are often those most likely to misuse firearms.") The specific aim of the Felony Firearms Act is to prevent violent felons from committing repeat offenses with the use of a firearm. The Act is narrowly focused in its aim. The Act is not, however, narrowly focused on, nor substantially related to, that aim in the method by which it seeks to achieve it.

The state has offered no evidence supporting its assertion that the Felony Firearms Act is narrowly drafted to further the interest at which it is aimed. Indeed, there is no evidence offered that the state's "objective is advanced by means substantially related to that objective." *Williams, supra*, 616 F.3d at 692. The Defendant argues that, by adding N.C. Gen. Stat. § 14-415.4 to the Felony Firearms Act in 2010, the General Assembly "took the *Britt* holding into consideration and created a narrowly tailored set of circumstances where a person's firearms rights are taken away without relief" and that the "narrow tailoring of the Act restricts firearms rights of those who disregard our

most serious laws repeatedly and therefore pose a greater risk to public safety.” Defendant’s Memorandum, at pp 15-16. The Defendant offers no support for the idea that old offenses, even if they are multiple offenses, equate to a propensity to present violence or a present significant threat to public safety. The Defendant offers no evidence that those felons who fall within the very strict and limited requirements of N.C. Gen. Stat. § 14-415.4 to qualify for restoration are the only felons who pose minimal risk of committing a firearm felony. The Defendant offers no evidence of why even those who do qualify for restoration under that section of the Act should be required to wait for 20 years before being eligible to apply for review of the divestiture of their fundamental constitutional right. The Act may be narrowly tailored in that it only allows a small group of citizens who have a fundamental right to keep and bear arms to seek judicial restoration of their rights. The Act is not narrowly tailored, however, to achieve the government’s stated aim while causing the least necessary infringement of the fundamental rights of the citizens of this State. This is because, among other reasons, the Act does not allow citizens who do not meet the narrow criteria of 14-415.4, any process whereby they may seek judicial review of whether they are presently potentially violent or pose a significant threat of committing a violent firearm felony – the specific threat to public safety at which the Act is aimed. This is true even though the felony convictions were not for a violent felony and there was no finding, either specifically or inherently in the conviction, that the felon posed any significant risk of committing future firearm violence. The Act automatically deprives any citizen convicted of even the most minor non-violent felony of her fundamental constitutional rights under the Second Amendment of the United States Constitution for a minimum of twenty years.

Plaintiff has directed the Court to government statistics and to scholarly research that would indicate that the Felony Firearms Act, as amended, in 2004, has had very little affect on firearm violence over all. The Defendant has offered no evidence that the Act, as amended, has had any

affect on recidivist firearm crimes. While the statistical evidence cited by Plaintiff is not a complete and comprehensive study of recidivism firearm violence, the burden of showing that the Act is narrowly tailored to further, or has a substantial relationship to, the end to served is on the Defendant. In this case the Defendant has offered no evidence showing that the Act has had an impact on recidivist firearm violence and has offered no persuasive alternative explanation of the statistical information cited by Plaintiff. Defendant has offered no evidence of any type that the Act has had any affect on recidivist firearm violence in this state.

In *Skoien, supra*, the government showed that 40 to 80 percent of domestic violence offenders would commit another act of domestic violence. 614 F.3d at 643. “There are three propositions...: first that domestic abusers often commit acts that would be charged as felonies... second that firearms are deadly in domestic strife; and third that persons convicted of domestic violence are likely to offend again....Data support all three of these propositions.” *Id.* at 644. In this case, the data does not support the idea that people who commit multiple non-violent felonies will be likely to recommit felonies thirty years after conviction.

The North Carolina Sentencing Policy and Advisory Committee reports, for the last reporting period available, indicates that an average of 1,227 felons are convicted annually for a crime of violence. *Correctional Program Evaluation: Offenders Placed on Probation or Released from Prison in Fiscal Year 2005/2006*, at 28, 36 (April 15, 2010). According to statistics maintained by the North Carolina Department of Justice, in the last reporting period available, a third (33.3%) of violent crimes committed in the state involve the use of a firearm. *Crime in North Carolina – 2009, Annual Summary Report of 2009 Uniform Crime Reporting Data*, 8 (N.C. Dept. Of Just., July, 2010) The Sentencing Policy and Advisory Committee reports do not track the number of convictions that were for crimes involving the use of a firearm. In comparison, the *2008-2009 North Carolina*

*Courts Annual Report* (N.C. Admin. Off. of the Courts, undated), shows that, at a minimum, 62,266 residents of North Carolina of North Carolina were found guilty of a felony in our Superior Courts. Of those some lost their fundamental right to protect themselves with the use of a firearm forever under the present statutory scheme. At a minimum, they all lost their fundamental right to protect themselves with the use of a firearm for at least twenty years. So, a minimum of 62,000 citizens a year lose their fundamental constitutional rights under the Act in an attempt to prevent an undetermined percentage of 1,227 recidivists committing a crime with a firearm. And there is no evidence that the tactic is effective. This is not a narrowly tailored law. The record in this case does not show a substantial relationship between the goal that this specific act seeks to achieve – preventing repeat firearm violence by convicted felons – and the sweeping denial of a great number of our citizen’s constitutional rights in its attempt to prevent those acts of violence.

The Act makes no reasonable or rational distinctions based upon the age of a felony although the available social science studies show that aged Old predicate felonies are not necessarily, or even generally, predictive of recidivism, let alone future violence. *See, e.g.*, Kurlycheck, M. C., Brame, R., & Bushway, S. D., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?* *Criminology & Pub. Pol’y.*, Aug. 2006, at 483 (“the risk of new offenses among those who last offended six or seven years ago begins to approximate (but not match) the risk of new offenses among persons with no criminal record”); Bushway, S. D. & Sweeten, G., *Abolish Lifetime Bans for Ex-Felons*, *Criminology & Pub. Pol’y.*, Nov., 2007, at 697 (“Older offenders and individuals who stay arrest-free for 7 years or more simply have very little risk for future crime, and this risk is similar to that of nonoffenders.”). The Act does not limit its aim to those felons who are likely to recommit violent felonies even though social science studies have shown that violent recidivism can be expected to be committed by reasonably identifiable classes of felons. *See, e.g.*,

*Evaluation*, at pp. 19-22 (App. p. 22-23) (discussing offender recidivism risk indicators); Ralph C. Serin, *Violent Recidivism in Criminal Psychopaths*, 20 *Law & Hum. Behav.* 207, (Apr., 1996); Glenn D. Walters, *Predicting Institutional Adjustment and Recidivism with the Psychopathy Checklist Factor Sources: A Meta-Analysis*, 27 *Law & Hum. Behav.* 541, (Oct., 2003); Tiffany Walsh & Zach Walsh, *The Evidentiary Introduction of Psychopathy Checklist-Revised Assessed Psychopathy in U.S. Courts: Extent and Appropriateness*, 30 *Law & Hum. Behav.* 493 (Aug., 2006).

The State has not met its burden to show either that there is a substantial relationship of the means used by the General Assembly in the Act to the government's admittedly significant interest or that the Act is narrowly tailored to achieve a compelling government interest. Plaintiff has shown that he is a rehabilitated felon under *Britt* and *Barton*. The Act is unconstitutional as applied to Plaintiff under Article I, Sections 19 and 30 of the Constitution of North Carolina. To the extent that the Act may be presumed to be a lawful regulatory measure, the presumption has been rebutted by Plaintiff. *Barton, supra*. The Act, as applied to Plaintiff is unconstitutional under the Second, Fifth and Fourteenth Amendments to the United States Constitution.

### **Procedural Due Process**

At oral argument in this case, Plaintiff advanced a procedural due process argument challenging the facial validity of the Felony Firearms Act. As the Court understands Plaintiff's argument, Plaintiff argues that: 1) citing *Craig v. Boren*, 429 U.S. 190, 198, 97 S.Ct. 451, 457 (1976) the Act improperly uses a felony conviction "as an inaccurate proxy for other, more germane bases of classification," such as dangerousness or risk to public safety; 2) there is no procedure incorporated into the criminal adjudication process to determine in advance whether a felon is, either presently or in the future, likely to be a threat to use a firearm in an act of violence and a person convicted of a felony has no notice or opportunity to be heard or present evidence on whether he

should be permanently, or for twenty years at a minimum, deprived of a fundamental constitutional right; and 3) the Act provides no process at all for a person who has been inaccurately presumed to pose a threat to commit a future act of armed violence to seek judicial review of that presumption that has deprived her of a fundamental right for a minimum of twenty years, or, in a substantial number of cases, for the person's entire life.

Our Court of Appeals considered a facial challenge to the validity of the Felony Firearms Act in *State v. Whitaker*, 689 S.E.2d 395, 401, (N.C. App. 2009), *aff'd* 364 N.C. 404, 700 S.E.2d 215 (2010), found the Act to be facially constitutional when challenged on substantive due process grounds. The case before the Court is different in that it presents a procedural due process challenge to the Act. The Court has found no case considering a procedural due process challenge to a felon gun control statute that has been considered and decided since *Heller* and *McDonald* held the Second Amendment protects fundamental constitutional rights of individuals. This is, therefore, a case of first impression.

Procedural due process arises under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and the law of the land provision of Article I, Section 19 of the Constitution of North Carolina. The Fifth Amendment guarantees that “[n]o person shall be deprived of life, liberty, or property without due process of law....” U.S. Const. amend. V. The Fourteenth Amendment similarly provides that no “State [shall] deprive any person of life, liberty, or property without due process of law....” U.S. Const. amend. XIV, § 1. Our State Constitution’s law of the land provision, which is interpreted to be synonymous with “due process of law,” *State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949), provides: “No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land.” N.C. Const. art. I, § 19.

Procedural due process requires that any government action that deprives a person of life, liberty, or property be implemented in a fair manner. *United States v. Salerno*, 481 U.S. 739, 747, 107 S.Ct. 2095 (1987); *State v. Thompson*, 349 N.C. 483, 508 S.E.2d 277, 282 (1998). Procedural due process is the "opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893 (1976); *Thompson, supra*, 508 S.E.2d at 286. The Supreme Court, in *Mathews*, recognized that different situations may require different procedural protections and enumerated factors that would effect the level of protection needed: "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Id.* Three distinct factors speak to the amount of procedural process due in a particular situation: "(1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of that interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and 3) the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail." *Id.* at 334-335.

The examination of a procedural due process claim involves two steps. First, this Court must determine whether there is a liberty or property interest which has been infringed by state action. If there is such an infringed interest, then this Court must determine whether "the procedures attendant upon that deprivation were constitutionally sufficient." *In re W.B.M.*, 690 S.E.2d 41, 48 (N.C. App., 2010).

Examples of protected liberty and property interests abound in the case law. *See, e.g., Mathews, supra* (Social Security disability benefits); *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586 (1971)(driver's license revocation); *In re W.B.M, supra* (listing on the child abuse responsible individuals list). The Felony Firearms Act directly and substantially impacts a fundamental

constitutional liberty interest: the right to keep and bear arms guaranteed to citizens under our constitutions. *Heller, supra; McDonald; supra; Britt, supra*. As discussed above, a felon does not lose his fundamental constitutional rights merely as a result of his conviction. The private interest affected by the Act is a fundamental constitutional liberty interest and is subject to due process protection.

Turning to the second step of the required analysis, the Court is of the opinion that there are presently no procedures attendant upon the deprivation of this fundamental liberty interest that are constitutionally sufficient. In this particular, it is important to note that our Court of Appeals and our Supreme Court have held that the liberty deprivation worked by the Felony Firearms Act is not additional punishment for the felony conviction which works the deprivation. It is, rather, a civil regulatory measure. *Whitaker, supra*, 700 S.E. 2d at 220; *State v. Johnson*, 169 N.C. App. 301, 307, 610 S.E.2d 739, 743-44 (2005). This civil deprivation is automatic upon conviction of a felony and provides no pre-deprivation hearing on the issues relating to the civil regulatory measure. The Felony Firearms Act currently provides no procedural mechanism by which a person subject to it may be heard on the issue of on her likelihood to commit future crimes of violence using a firearm before being deprived of her fundamental liberty interest. The Act also does not provide any mechanism of review post-conviction for most citizens convicted of a felony, and no citizen at all so convicted prior to twenty years after her civil rights are restored under N.C. Gen. Stat. § 13.1. This is does not meet the fundamental requirement of an opportunity to be heard “at a meaningful time and in a meaningful manner.” *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191 (1965).

While it may be argued that the criminal process itself provides all the procedural due process necessary, the Court does not find that argument persuasive in light of the *Matthews* factors, the civil

regulatory nature of the Felony Firearms Act that is distinct and separate from the criminal felony process, the tenuous connection between the narrow aim of the Act contrasted with its broad application to all felonies, the uniform length and totality of the deprivation worked by the act, and the lack of any clear evidence that all felony convictions are indicators of future potential violence involving a firearm so as to require such a deprivation. The criminal process does not adjudicate the issue of the continuing, or future, likelihood of a person convicted of a felony committing another violent felony by the use of a firearm and being, therefore, subject to a civil deprivation of a fundamental constitutional right. The convicted defendant has no opportunity to present evidence regarding whether he poses such a threat and is given no notice and opportunity to be heard on the statute's automatic imposition of a permanent civil disability. A judge presiding over a criminal case has no discretion to hear such evidence or to make any order affecting the civil ban enacted by the Felony Firearms Act. Hence, the criminal trial and sentencing process does not provide any procedural due process in regard to the civil disability imposed by the Felony Firearms Act.

Applying the *Matthews* factors to the Act, the private interest affected by the Act is a fundamental liberty interest of the citizens of this nation and state. "In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty." *McDonald*, 130 S. Ct. at 3042. The liberty interest affected by the Felony Firearms Act is of the highest order, an interest explicitly set forth in the enumerated rights retained by citizens in the Bill of Rights of the United States Constitution.

Applying the second *Matthews* factor, there is substantial risk that the Act can deprive a person who poses no threat to public safety of committing another crime with a firearm of the fundamental liberty interest protected by the Second Amendment. The State's interest in preventing

gun violence by felons is great, but not so great that it can justify depriving a large number of citizens who do not pose that threat of their right without either a hearing before the deprivation or a post-deprivation hearing at a meaningful time.

There are additional and substitute procedural safeguards which could go far towards preventing the erroneous civil deprivation, or continued civil deprivation, of a citizen's rights under the Second Amendment. For example, a felon's potential subjection to the civil disability could easily be dealt with in felony sentencing by findings of fact and rulings on the civil deprivation of the right after giving the felon an opportunity to be heard on the issue. An expansion of the persons allowed to ask for review, and a provision allowing such review at a meaningful time on the issue of whether the person poses a continuing threat to public safety, can satisfy a procedural due process requirement for a meaningful post-disqualification review. The fiscal and administrative burdens that these procedures would entail would not be great if the issue of future dangerousness and consequent civil deprivation of a fundamental liberty were dealt with in the sentencing phase of a trial or plea. The burden of an expanded procedure for review of a felon's continued dangerousness may only be excessive if all felons continue to be deprived of firearms rights by conviction alone. If, however, that deprivation is limited to those who are found to pose a continuing danger in the sentencing phase after having been given an opportunity to be heard on the issue, then the additional burden of allowing periodic review of the continuing validity of that determination should not be unduly burdensome for a government that seeks to preserve the fundamental rights of its citizens. The additional expenses for such review may properly be assessed to the applicant as filing fees and court costs to defray such expenses as there would be.

Turning to whether this procedural concern is enough to cause the Act to be unconstitutional on its face, it is noted that the standard for prevailing on a facial challenge is very high. "A person

who challenges the facial constitutionality of a legislative act must establish that no set of circumstances exists under which the act would be valid.” *In re W.B.M.*, 690 S.E.2d at 47 (N.C. App., 2010). At present, no felon has a pre-determination hearing on the civil disability imposed by the Act. Hence, there is no circumstance under which the Act is valid if a pre-determination hearing is required. In dealing with a fundamental liberty interest guaranteed by an enumerated right in the Constitution, there can be no question but that a pre-determination hearing is necessary before that right may be civilly taken. The Felony Firearm Act, in effect, creates an irrebuttable presumption that the felon is, and always shall be, a danger to society, or, more specifically, that he is a substantial risk to use a firearm in a future crime, without giving the person so labeled any opportunity to be heard at a meaningful time. In dealing with a fundamental constitutional right, this presumption is neither always error free nor necessary

The Defendant’s argument that 14-415.4 is narrowly tailored by the General Assembly to provide judicial review leading to possible restoration to those that the General Assembly has deemed worthy of such review misses the point. It is rare, in our nation’s jurisprudence, that a citizen has to have prior legislative approval of his worthiness to exercise a constitutional right. While great deference is due to legislative determinations, that deference is not a blank check allowing the legislature to create proxy classifications that deny procedural due process in regard to the deprivation of fundamental rights of a large number of citizens. Procedural due process requires that a person subject to loss of a liberty interest be provided an opportunity to be heard at a meaningful time. The Defendant has made no proffer of any evidence that would indicate that requiring even the non-violent felon wait twenty years before providing a hearing on the appropriateness of the loss of his liberty interest has any substantial relationship to the narrow aim of the Act.

While it is uncontested that the State has a significant interest in preventing gun violence by felons, that aim can be fulfilled by means other than depriving large numbers of citizens of this state of their fundamental liberty interest with no prior hearing on whether they are likely to be in the group at which the Act is aimed or any process by which that disqualifying presumption can be reasonably and timely reviewed. The court is, therefore, of the opinion that the North Carolina Felony Firearms Act is unconstitutional on its face under the Second, Fifth and Fourteenth Amendments to the United States Constitution and Article I, §§ 19 and 30 of the Constitution of North Carolina.

It should be clear that the Court is not hereby holding that the State cannot constitutionally regulate firearms possessions by felons. It may. But the Court has, and is, ruling that a felony conviction by itself does not divest felons of their fundamental constitutional rights. In order to constitutionally regulate this fundamental right under a civil regulatory scheme, the State must provide procedural due process both before the deprivation of the right and at substantially related times post-deprivation, so as to allow a review of the determination that the citizen suffering the deprivation is within the class of citizens who pose the threat addressed by the felon firearm prohibition. The citizen subject to such a deprivation must have an opportunity to be heard and to present evidence on the issue of whether he should be divested of, or continue to be divested of, that fundamental liberty interest. The present Felony Firearm Act, N.C. Gen. Stat. § 14-415.1, et seq., does not do this. Every citizen, regardless of prior convictions, is entitled to such due process of law. No citizen should ever be deprived of a fundamental constitutional right on any rationale without having an opportunity to be heard on that issue. The Court is not aware of any set of circumstances under which it is proper for any citizen to be permanently civilly deprived of any fundamental constitutional right without the opportunity to be heard and to present evidence on that civil

deprivation both pre- and post-deprivation. The Felony Firearms Act is, therefore, unconstitutional on its face.

Because of this ruling the Court finds it unnecessary to address the remaining arguments advanced by Plaintiff on the grounds of North Carolina Constitution Article I, § 16 and United States Constitution Article I, § 10 and the Equal Protection Clause. Consequently, although the issues of whether the Act, on its face and as applied, violates the Equal Protection Clause of the North Carolina and United States Constitutions, and the prohibitions on Ex Post Facto laws and Bills of Attainder, although fully briefed and argued, are not reached nor decided herein.

Based on the foregoing, the court concludes as follows:

- A. Plaintiff has presented a claim upon which relief may be granted.
- B. The Court has subject matter jurisdiction in the case and declaratory judgment is proper.
- C. Plaintiff has standing to bring this action.
- D. There are no disputed issues of fact material to the legal issues presented in this case.
- E. As a matter of law, the North Carolina Felony Firearms Act, as amended, is unconstitutional on its face and as applied to Plaintiff.

IT IS THEREFORE ORDERED THAT:

- 1. Defendants Motion to Dismiss is denied.
- 2. Defendants Motion for Summary Judgment is denied.
- 3. Plaintiff's Motion for Summary Judgment is granted only on the issue of the constitutionality of the Felony Firearms Act. The Court retains jurisdiction in this

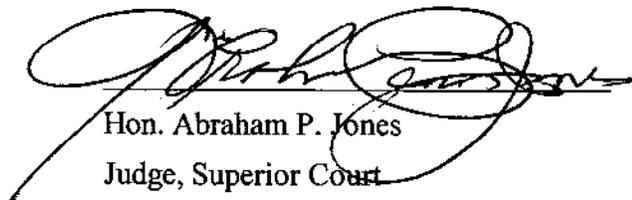
case to consider Plaintiff's claim to damages and for attorneys fees.

4. The Defendant is enjoined from interfering with Plaintiff's right to purchase, own, possess, or have in his custody, care or control any legal firearm.
5. The Defendant shall to recognize that Plaintiff's full right to purchase, own, possess, or have in his custody, care or control any and all legal firearms were fully restored by operation of law, and that such restoration has remained in full force and effect from the time it was granted to the present and continuing thereafter, until and unless, Plaintiff should be otherwise legally disqualified from exercising his constitutional rights to keep and bear arms.
6. The Clerk is shall send a certified copy of this order under seal to the North Carolina State Bureau of Investigation, and to the National Instant Criminal Background Check System of the Federal Bureau of Investigation of the United States Department of Justice.
7. Defendants shall cooperate with Plaintiff as necessary to notify the United States Department of Justice, and any division thereof, that Plaintiff has had his rights to own and possess firearms restored under the laws of this state and should not be on any list of persons prohibited to purchase, own, possess, or have in his custody, care or control any firearm and to request the U.S. Department of Justice to update the NICS to reflect that Plaintiff has full rights to purchase, own, possess, or have in his custody, care or control any legal firearm.
8. The Court shall retain jurisdiction of this case for further proceedings on what, if any, compensatory damages for violation of his constitutional rights, and for harm, loss

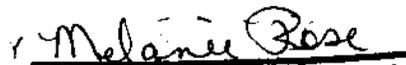
and damage suffered, should be awarded to Plaintiff.

9. Counsel for Plaintiff is directed to submit a fee petition to the Court on, or before, December 1, 2011, and serve a copy thereof on counsel for Defendant.
10. This case be set on the Person County civil docket on December 12, 2011, at 10:00 a.m. for consideration of Plaintiff's damages claim and whether Plaintiff's costs of this action, including reasonable attorney fees incurred by Plaintiff, are to be paid by the Defendant.
11. The holding of this Memorandum of Decision and Judgment that the Felony Firearms Act is unconstitutional on its face is stayed pending appeal by the Defendant. All other findings and orders of this Memorandum of Decision and Judgment are effective upon entry.

Enter this 24<sup>th</sup> day of October, 2011.

  
Hon. Abraham P. Jones  
Judge, Superior Court

A TRUE COPY  
CLERK OF SUPERIOR COURT  
CASWELL COUNTY

  
Melanee Rose  
Asst. Deputy Clerk Superior Court