No. _____

In The

Supreme Court of the United States

RICHARD C. DELACY,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

On Petition for Writ of Certiorari
to the Court of Appeal of the State of California,
First Appellate District, Division One

Petition for a Writ of Certiorari

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QUESTIONS PRESENTED

1. Whether the California court erred by holding, in conflict with several Circuit Courts, that the "presumptively lawful" language in footnote 26 of this Court's *Heller* decision created a safe harbor exempting restrictions on Second Amendment rights from any level of heightened judicial scrutiny?

2. Whether the California court erred in holding that an Equal Protection challenge to discriminatory classifications that affect the fundamental right to keep and bear arms is subject merely to rational basis scrutiny.

LIST OF PARTIES

Rule 14.1(b) Statement:

Because the caption of the case contains the names of all the parties, no list of parties to the proceeding is given. No corporate entities are involved in this case, and no Rule 29.6 disclosure statement is required.

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The opinion of the California Court of Appeals of the State of California is reported at *People v. Delacy,* 192 Cal.App.4th 1481 (Cal. App. 2011), and reprinted here as Appendix A, Pet. App. 1a. A copy of the trial court's minute order is at Pet. App. 56a. On June 10, 2011 the California Supreme Court declined to review the case. (The Honorable Joyce L. Kennard thought the petition should have been granted.) Pet. App. 55a.

STATEMENT OF JURISDICTION

On February 25, 2011, the California Court of Appeals affirmed the judgment of the trial court convicting Petitioner of four counts of unlawful possession of firearms and one count of unlawful possession of ammunition, rejecting Petitioner's challenge that the California statutes under which he was convicted were unconstitutional under the Second Amendment (as made applicable to the States by the Fourteenth Amendment) and the Fourteenth Amendment's Equal Protection Clause. Pet. App. 2a, 15a, 25a. Petitioner's petition for review by the California Supreme Court was denied on June 8, 2011. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment to the Constitution of the United States provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

The Fourteenth Amendment to the Constitution of the United States provides, in relevant part:

> No State shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person the equal protection of the laws.

Section 242 of the California Penal Code provides, in relevant part:

> Battery defined. A battery is any willful and unlawful use of force or violence upon the person of another.

Section 12021(c)(1) of the California Penal Code provides, in relevant part:

> . . . any person who has been convicted of a misdemeanor violation of [numerous penal code sections, including Section 242], and who, within 10 years of the conviction, owns, purchases, receives, or has in his or her possession or under his or her custody or control, any firearm is guilty of a public offense, which shall be punishable by imprisonment in a county jail not exceeding one year or in the state prison, by a fine not exceeding one thousand dollars ($1,000), or by both that imprisonment and fine. The court, on forms prescribed by the Department of Justice, shall notify the department of persons subject to this subdivision. . . .

Section 12316(b) of the California Penal Code provides, in relevant part:

> (1) No person prohibited from owning or possessing a firearm under Section 12021 . . . of

this code . . . shall own, possess, or have under his or her custody or control, any ammunition or reloaded ammunition.

(2) For purposes of this subdivision, "ammunition" shall include, but not be limited to, any bullet, cartridge, magazine, clip, speed loader, autoloader, or projectile capable of being fired from a firearm with a deadly consequence. "Ammunition" does not include blanks.

(3) A violation of paragraph (1) of this subdivision is punishable by imprisonment in a county jail not to exceed one year or in the state prison, by a fine not to exceed one thousand dollars ($1,000), or by both the fine and imprisonment.

STATEMENT OF THE CASE

Petitioner Robert Delacy, a life-long hunter, was convicted in 2006 of misdemeanor battery under California Penal Code § 242,[1] for conduct that did not involve a firearm or indeed any deadly weapon.[2] He was sentenced to probation. Unbeknownst to him, under Penal Code § 12021(c)(1), that misdemeanor conviction triggered a ten-year ban on possession of firearms and ammunition.

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[1] All code sections refer to the California Penal Code unless otherwise indicated.

[2] Under California law, a "battery" involves *any* intentional, unlawful and harmful contact by one person with the person of another. *Garcia v. City of Merced*, 637 F.Supp.2d 731 (E.D. Cal. 2008).

During two probation searches of his residence a year and a half later, law enforcement discovered three hunting rifles, a shotgun, and some shotgun shells. Pet. App. 3a-4a. Petitioner was then charged and convicted in 2009 after a bench trial of four felony counts of prohibited person in possession of a firearm in violation of Penal Code § 12021(c)(1). Pet. App. 4a; 57a. He was also convicted after a parallel jury trial of one felony count of unlawful possession of ammunition in violation of Penal Code § 12316(b)(1). Pet. App. 4a.[3]

Prior to the bench trial, Petitioner moved to dismiss all four firearm possession counts on Second Amendment grounds as interpreted by *District of Columbia v. Heller*, 554 U.S. 570 (2008). The trial court denied the motion. Pet. App. 4a; 56a.

Petitioner was sentenced on both matters on June 16, 2009. He was assessed fines and fees and was placed on formal probation for a period of three years. *Id.* Nevertheless, the firearm possession convictions turned the life-long misdemeanant hunter into an accidental felon, with a lifetime prohibition on exercising his fundamental Second Amendment rights. *See* 18 U.S.C. § 922(g)(1).

Petitioner filed timely notices of appeal in both matters on August 14, 2009 and the cases were consolidated before the California Court of Appeal. While the appeal was pending, this Court decided *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010),

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[3] The jury acquitted Petitioner on a second count, for possession of stolen property.

holding that the Second Amendment was applicable to the States.

On February 25, 2011, the Court of Appeal affirmed Petitioner's convictions in a split decision, with Justice Robert Dondero dissenting. The majority opinion by Acting Presiding Justice Sandra Margulies rejected Petitioner's Second Amendment and Equal Protection challenges to California Penal Code § 12021(c)(1). Pet. App. 1a-2a, 15a, 23a-24a.[4]

A petition for review was filed with the California Supreme Court on March 29, 2011. That petition was denied on June 8, 2011 over the dissent of Associate Justice Joyce Kennard. Pet. App. 55a.

REASONS FOR GRANTING THE WRIT

California Penal Code § 12021(c)(1) prohibits for ten years the possession of firearms by persons convicted of a wide range of misdemeanor offenses, including a simple battery under Penal Code § 242. Other than two exceptions not applicable to Petitioner,[5] there is no relief from this ten-year deprivation of one's Second Amendment rights.

The California appellate court below treated footnote 26 in this Court's *Heller* decision as creating an

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[4] Petitioner did not raise a Second Amendment or Equal Protection challenge to his conviction for ammunition possession in violation of Penal Code § 12316(b)(1); that conviction is therefore no longer at issue.

[5] Section 12021(c)(2) offers a one-time petition for relief that is available only to peace officers convicted of certain misdemeanors, and section 12021(c)(3) exempts California residents whose predicate offense was added to Section 12021(c)(1) *after* their conviction.

absolute safe harbor in which certain restrictions on Second Amendment rights, such as prohibitions on the possession of firearms by felons, would not receive *any* judicial scrutiny. It then unilaterally expanded that safe harbor to uphold, without scrutiny, possession bans for those convicted of *misdemeanors*, not just those convicted of felonies. Pet. App. 13a-14a. Not only does the decision below exacerbate an existing conflict among the lower courts, it rather dramatically expands the list of "presumptively lawful" restrictions referenced in *Heller* footnote 26, even assuming this Court intended that *obiter dictum* to create a safe harbor at all.

Several other courts have adopted the *Delacy* approach, and there is no reason to believe that they will stop employing one version or another of *Delacy's* "safe harbor" theory to uphold burdensome restrictions or bans on Second Amendment rights, absent this Court's intervention. Until that time, citizens will continue to be stripped of their fundamental rights and, in many cases, become "accidental felons" for not having realized that they forfeited their Second Amendment rights for some minor misdemeanor offense and had to rid themselves of their hunting rifles, shotguns, and other lawful arms or face felony charges.

Because *Delacy* both exemplifies and examines the circuit split over footnote 26, it provides an excellent vehicle for this Court to intercede and provide guidance to federal and state courts now being inundated with these cases.

The court below also upheld the statute against Petitioner's Equal Protection challenge by applying rational basis review, Pet. App. 15a-24a, conflicting

with the Seventh and Fourth Circuits and rejecting this Court's explicit statement in *Heller* that some level of heightened scrutiny was applicable to claims arising out of the right to keep and bear arms. Resolution of the standard of review issue, left unresolved in *Heller* and *McDonald*, is warranted.

I. The California Court's "Safe Harbor" Ruling Conflicts with Several Circuit Courts.

Ever since this Court's landmark holding in *Heller* just three years ago that the Second Amendment recognizes and protects an individual right to keep and bear arms, critics of that decision have been trying to limit its reach by arguing that it should be narrowly confined to its facts. *See, e.g.*, Darrell A.H. Miller, *Guns As Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278 (2009); Michael C. Dorf, *Does Heller Protect A Right to Carry Guns Outside the Home?*, 59 SYRACUSE L. REV. 225, 231-33 (2008).

Their efforts have yielded several splits among the lower courts. Some courts have held, for example, that the right is limited to self-defense within the home, while others have recognized that *Heller* recognizes a broader right. *Compare Gonzalez v. Vill. of W. Milwaukee*, No. 09-0384, 2010 WL 1904977 at *4 (E.D. Wis. May 11, 2010) ("The Supreme Court has never held that the Second Amendment protects the carrying of guns outside the home"), *with United States v. Masciandaro*, 638 F.3d 458, 468 (4th Cir. 2011) ("there is a plausible reading of *Heller* that the Second Amendment provides [a constitutional right to possess a loaded handgun for self-defense outside the home], at least in some form").

This case presents two additional lower court splits. The first is whether the "presumptively lawful" language in footnote 26 of the *Heller* opinion creates a scrutiny-free "safe harbor" for not only the listed restrictions on Second Amendment rights but those the lower court determines to be analogous to them, or whether the courts are required to assess the constitutionality of even the listed restrictions and determine whether the presumption has been rebutted. That issue pits the court below, together with the U.S. Courts of Appeals for the Third, Eighth, Ninth, and Eleventh Circuits, against the Courts of Appeals for the First, Fourth, Seventh, and Tenth Circuits.[6]

The language in *Heller* that has given rise to this lower court split, what one federal circuit judge described as "a morass of conflicting lower court opinions," is as follows:

> Although we do not undertake an exhaustive historical 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 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. [fn 26]

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[6] The second, addressed in Part III below, concerns the appropriate standard of review, a question left open in both *Heller* and *McDonald*.

> [fn 26] We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.

Heller, 554 U.S. at 626-27 and n.26; *see also United States v. Chester*, 628 F.3d 673, 688-89 (4th Cir. 2010) (Davis, J., concurring in judgment) ("*Heller* has left in its wake a morass of conflicting lower court opinions regarding the proper analysis to apply to challenged firearms regulations").

The court below interpreted this language as if it were central to the holding of *Heller*, allowing it to forgo any further constitutional analysis. Specifically, the court below held:

> We do not agree that *Heller* intended to open felon-in-possession prohibitions and similar categorical weapons possession bans to constitutional means-end scrutiny. On the contrary, following virtually all other federal and California appellate courts, we read *Heller*'s 'presumptively lawful' language to do just the opposite. Accordingly, if section 12021, subdivision (c)(1) falls within the 'presumptively lawful' regulations of *Heller*, as [*People v. Flores*, 169 Cal.App.4th 568 (Cal. App. 2008)] held, it is immune from means-end scrutiny.

Pet. App. 13a. The U.S. Courts of Appeals for the Eighth, Ninth, and Eleventh Circuits share this view.

The Eleventh Circuit noted in *United States v. Rozier*, for example, that "[t]his language suggests that statutes disqualifying felons from possessing a firearm *under any and all circumstances* do not offend the Second Amendment." *United States v. Rozi-*

er, 598 F.3d 768, 771 (11th Cir. 2010) (*per curiam*) (emphasis added), *cert. denied*, 130 S. Ct. 3399 (2010). As a result, it held without any further analysis that "statutory restrictions of firearm possession, such as § 922(g)(1) [the federal felon-dispossession statute],[7] are a constitutional avenue to restrict the Second Amendment right of certain classes of people." *Id.*

The Ninth Circuit likewise upheld Section 922(g)(1) after determining that the *Heller* language cited above was integral to *Heller*'s holding and that, as a result, "felons are categorically different from the individuals who have a fundamental right to bear arms." *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 294 (2010).

More significantly, like the California appellate court below, two Circuits have added new categories to this Court's "presumptively lawful" list by simply asserting that the categories were analogous, without engaging in any independent constitutional analysis. The Eighth Circuit, for example, upheld the federal drug user-dispossession statute, 18 U.S.C. § 922(g)(3), after finding that it was "the type of 'longstanding prohibition[ ] on the possession of firearms' that *Heller* declared presumptively lawful."

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[7] This provision of federal law does not actually mention "felons." Rather, it bars firearms possession by those convicted of a "crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. 922(g)(1). Another provision exempts from that that class of crimes certain non-violent "business practice" offenses and State misdemeanors punishable by two years or less. 18 U.S.C. § 921(a)(20).

United States v. Seay, 620 F.3d 919, 925 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 1027 (2011). The Eleventh Circuit upheld 18 U.S.C. § 922(g)(9), which dispossesses those who have been convicted of a "misdemeanor crime of domestic violence," because it found "no reason to exclude § 922(g)(9) from the list of longstanding prohibitions on which *Heller* does not cast doubt." *United States v. White*, 593 F.3d 1199, 1205-06 (11th Cir. 2010).[8]

In stark contrast, the First, Fourth, Seventh and Tenth Circuits treat the "presumptively lawful" language as merely *dicta*, "precautionary language" that does not alleviate the lower courts from conducting a thorough analysis of the suspect law's effect on the fundamental right recognized in *Heller*.

The leading opinion on this side of the circuit split is the Seventh Circuit's decision in *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (*en banc*), *cert. denied*, 131 S. Ct. 1674 (2011). "We do not think it

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[8] The cases cited above represent the proverbial tip of the iceberg in the split concerning *Heller*'s footnote 26. By our count there are nearly 120 decisions relying on the "presumptively lawful" language from *Heller,* the majority of which uphold restrictions with little if any analysis. For those following the *Delacy* position summarily upholding restrictions, *see, e.g.*, *United States v. Tanis*, No. 05-CR-117, 2010 WL 2196445 (M.D. Pa. May 26, 2010) (upholding felon-dispossession statute, § 922(g)(1)); *United States v. Korbe*, No. 09-CR-05, 2010 WL 2404394 (W.D. Pa. June 9, 2010) (slip opinion) (upholding drug user-dispossession statute, § 922(g)(3)); *United States v. Flores*, No. 10-CR-178, 2010 WL 4720223 (D. Minn. Nov. 15, 2010) (upholding illegal immigrant-dispossession statute, § 922(g)(5)); *State v. Knight*, 44 Kan. App. 2d 666 (Kan. Ct. App. Oct. 8, 2010) (upholding concealed weapon ban as presumptively lawful under *Heller*).

profitable to parse these passages of *Heller* as if they contained an answer to the question whether § 922(g)(9) [the misdemeanor domestic violence dispossession state] is valid," noted Judge Easterbrook for the *en banc* court. "They are precautionary language. Instead of resolving questions such as the one we must confront, the Justices have told us that the matters have been left open." *Id.* The Seventh Circuit upheld the statute against Skoien's constitutional challenge only after subjecting it to heightened scrutiny. *Id. See also United States v. Yancey*, 621 F.3d 681, 683 (7th Cir. 2010) (upholding § 922(g)(3), the drug-user dispossession provision, after a similarly extensive analysis); *United States v. Booker*, 644 F.3d 12 (1st Cir. 2011) (upholding § 922(g)(9) only after applying the methodology employed by the Seventh Circuit in *Skoien*); *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010) (same); *cf. United States v. Rene E.*, 583 F.3d 8 (1st Cir. 2009), *cert. denied*, 130 S. Ct. 1109 (2010) (upholding § 922(x), the juvenile delinquent dispossession statute, after a similarly comprehensive analysis).

More significantly, the Seventh Circuit in *United States v. Williams,* 616 F.3d 685 (7th Cir. 2010), applied that same methodology to Section 922(g)(1), the very kind of felon-dispossession statute that *Heller* described as "presumptively lawful." "[T]he government does not get a free pass simply because Congress has established a 'categorical ban,'" the court held. "[I]t still must prove that the ban is constitutional." The "presumptively lawful" language in *Heller*, "by implication, means that there must exist the possibility that the ban could be unconstitutional in the face of an as-applied challenge." *Id.* at 692. The Court then subjected even that "presumptively law-

ful" statute to intermediate scrutiny before upholding it.

The Fourth Circuit likewise refused to treat the "presumptively lawful" language in *Heller* as createng a "safe harbor" for felon-dispossession and analogous statutes as "[s]ome courts" have done, explicitly taking issue with the Eleventh Circuit's summary approach in *White*, one of the cases upon which the court below relied, as "approximating rational-basis review, which has been rejected by *Heller*." *Chester*, 628 F.3d at 679. It then applied a two-part analysis, first holding that the class of "domestic-violence misdemeanants" disposed of firearms by § 922(g)(9) did not fall outside the protections of the Second Amendment, then concluding that the government had not carried its burden of establishing, with evidence, "a reasonable fit between the important object of reducing domestic gun violence and § 922(g)(9)'s permanent disarmament of all domestic-violence misdemeanants. *Id.* at 681-83. The court then remanded for the district court to determine whether the government could meet its burden under intermediate scrutiny. *Id.* at 683.[9]

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[9] Other lower courts following this approach include, *e.g.*, *United States v. Pettengill*, 682 F.Supp.2d 49 (D. Me. 2010) (subjecting misdemeanor domestic violence dispossession statute to intermediate scrutiny before denying motion to dismiss possession indictment); *United States v. Walker*, 709 F.Supp.2d 460 (E.D. Va. 2010) (same, and acknowledging the lower court split); *United States v. Hendrix*, No. 09-CR-56, 2010 WL 1372663 (W.D. Wis. Apr. 6, 2010) (subjecting the drug-user dispossession statute, § 922(g)(3), to a multi-part analysis before upholding its constitutionality); *GeorgiaCarry.Org, Inc. v. Georgia*, 764 F.Supp.2d 1306, 1317 (M.D. Ga. 2011) (dismissing challenge to prohibition on possession of weapons in a place of

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The Third Circuit splits the atom of this disagreement among the circuit courts. After noting the circuit split on this issue, the Third Circuit held "that *Heller*'s list of 'presumptively lawful' regulations is not dicta." *United States v. Barton*, 633 F.3d 168, 171-72 (3d Cir. 2011) (citing *United States v. Scroggins,* 599 F.3d 433, 451 (5th Cir. 2010); *United States v. McCane,* 573 F.3d 1037, 1047 (10th Cir. 2009) (Tymkovich, J., concurring); and *United States v. Skoien,* 614 F.3d 638, 640 (7th Cir.2010) (en banc) for the position that the *Heller* language was *dicta*, and *United States v. Rozier,* 598 F.3d 768, 771 n.6 (11th Cir.2010), and *United States v. Vongxay,* 594 F.3d 1111, 1115 (9th Cir.2010), for the position that it was "not dicta"). The court then upheld the federal felon-dispossession statute, 18 U.S.C. § 922(g)(1), against Barton's facial challenge without further analysis. *Id.* at 172.

The Third Circuit undertakes a more searching inquiry, though, when assessing restrictions not specifically mentioned in *Heller*. *See United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010) (considering § 922(k)'s prohibition on unmarked weapons), *cert. denied*, 131 S. Ct. 958 (2011). And most significantly for the present case, it employed that methodology in *Barton* to the "as applied" challenge of the felon-dispossession statute itself. "*Heller*'s statement regarding the presumptive validity of felon gun dispossession statutes does not foreclose Barton's as-applied challenge," it held. "By describing the felon disarmament ban as 'presumptively' lawful, . . . the

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worship under intermediate scrutiny after deciding to "lay aside the Heller list").

Supreme Court implied that the presumption may be rebutted." *Barton*, 633 F.3d at 173.

The methodology employed by the Third Circuit in considering Barton's "as applied" challenge demonstrates the significance of this split among the courts, for it would be outcome dispositive in this case. "To raise a successful as-applied challenge," the Third Circuit held, "Barton must present facts about himself and his background that distinguish his circumstances from those of persons historically barred from Second Amendment protections." The examples the Court then gave are telling: 1) "a felon convicted of a minor, non-violent crime might show that he is no more dangerous than a typical law-abiding citizen"; or 2) "a court might find that a felon whose crime of conviction is decades-old poses no continuing threat to society." *Barton*, 633 F.3d at 174.

Had the court below engaged in that inquiry, it would undoubtedly have been compelled to conclude that the *misdemeanor* conviction at issue was an insufficient basis for depriving Delacy of his Second Amendment right to keep and bear arms, given the Third Circuit's discussion that even non-violent *felonies* would be insufficient.

In short, because of footnote 26, "*Heller* has left in its wake a morass of conflicting lower court opinions regarding the proper analysis to apply to challenged firearms regulations." *Chester*, 628 F.3d at 688-89 (Davis, J., concurring in judgment). Not since "Footnote Four" in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), has so much attention and case law been generated in such a short period of time concerning a footnote from this Court. This

Court has already acknowledged that further consideration of this issue would be necessary. *Heller,* 554 U.S. at 635 ("there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us"). Because the different methodologies that have been applied as a result of footnote 26 have outcome-determinative consequences here, this case is an ideal vehicle for the next step in this Court's developing Second Amendment jurisprudence.

II. *Delacy*'s Assessment of Second Amendment Rights Undermines *Heller.*

More is at stake than a mere methodological disagreement among the lower courts, for the decisions on the *Delacy* side of the split undermine the fundamental right to keep and bear arms recognized by this Court in *Heller* and *McDonald*. *Delacy* and the decisions it follows view the right to arms as little more than the Castle Doctrine[10] combined with the

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[10] Defending hearth and home is a principle often referred to as the "castle doctrine." As Judge Cardozo explained in *People v. Tomlins*, 213 N.Y. 240 (Ct. App. 1914):

> It is not now, and never has been the law that a man assailed in his own dwelling, is bound to retreat. If assailed there, he may stand his ground, and resist the attack.. . . That there is, in such a situation, no duty to retreat is, we think, the settled law in the United States as in England. It was so held by the United States Supreme Court in *Beard v. United States* (158 U.S. 550 [1895]).

Tomlins, 213 N.Y. at 243. The "castle doctrine" has long been recognized in the context of Fourth Amendment, *see, e.g.*, *Semayne's Case*, 5 Co. Rep. 91a, 77 Eng. Rep. 194 (K. B. 1603), - *continued* -

inherent right to self-defense. They see a right that encompasses only "immediate" self-defense, and only within the home. One is left wondering what, if any, additional rights are afforded by their version of the Second Amendment. After all, even felons and horse thieves are entitled to armed self-defense when attacked. *See, e.g., People v. King*, 22 Cal.3d 12, 24 (Cal. 1978) (felon may lawfully use another's firearm in self-defense); *Starr v. United States*, 153 U.S. 614, 623 (1894) (alleged horse thief could defend himself against sheriff who fired upon him without first identifying himself).

That view of the Second Amendment bears little resemblance to the fundamental right described in *Heller* and *McDonald*. *Heller* described the right to keep and bear arms as one of the "venerable, widely understood liberties codified in the Bill of Rights. *Heller*, 554 U.S. at 605. And *McDonald* rests its conclusion that the right to keep and bear arms for self defense is fundamental on a thorough review of the historical record surrounding adoption of the Fourteenth Amendment, from the debates in the 39th Congress, to post-ratification evidence, to contemporaneous legal treatises. *See McDonald*, 130 S.Ct. at 3041-42 (citing, *e.g.*, 39th Cong. Globe 1182 (Sen. Pomeroy); 40th Cong. Globe 1967 (Rep. Stevens); T. FARRAR, MANUAL OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA § 118, p. 145 (1867) (reprint 1993); J. POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES § 239, pp. 152-153 (3d ed. 1875)). From this voluminous source

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cited with approval in *Payton v. New York*, 445 U.S. 573, 592 n.44 (1980).

material, it found it "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." *Id.* at 3042.

Moreover, this Court in *McDonald* also specifically rejected the view "that the Second Amendment should be singled out for special – and specially unfavorable – treatment." *Id.* at 3043. It refused "to treat the right recognized in *Heller* as a second-class right . . . ." *Id.* at 3044. Yet that is precisely what *Delacy* does by assuming that a relatively recent law abrogating one's fundamental right to arms based on a misdemeanor offense is *per se valid* based on dictum in *Heller* concerning the presumptive validity of longstanding felon-dispossession laws.

In sum, *Delacy* undermines the important holdings by this Court in *Heller* and *McDonald*, and ignore the Second Amendment's mandate that "the right of the people to keep and bear Arms shall not be infringed." These courts, in effect, have done exactly what this Court declared unacceptable: they have exercised their power "to decide on a case-by-case basis whether the right is *really worth* insisting upon"–and decided it's not. *See Heller*, 554 U.S. at 634-35. But as this Court made very clear in *Heller*, "it is not the role of this Court to pronounce the *Second Amendment* extinct. *Id.* at 636. Even less do the lower courts have such authority. Certiorari is warranted to elaborate more on the scope of the fundamental right recognized in *Heller* and *McDonald*.

III. Contrary to *Heller* and in Conflict with Other Lower Courts, the Court Below Applied Rational Basis Review to Delacy's Equal Protection Claim.

Section 12021, subdivision (c) on its face deprives those convicted of certain California misdemeanors of the fundamental right to keep arms for self-defense, while permitting persons convicted of equivalent, or even more serious, offenses in other states or countries to fully exercise that right. There is not any legitimate governmental interest, much less an *important* or a *compelling* one, served by such a discriminatory classification.

Conceivably, a person could enter California from neighboring Nevada with misdemeanor convictions for stalking[11] and ultimately battering a victim,[12] and lawfully own firearms, while those, like Petitioner, convicted of a simple battery in California are prohibited from doing so. One could also commit any of the following offenses in another state, such as Vermont or Louisiana, come to California, and still be able to lawfully own firearms (unlike Petitioner): battery on a police officer,[13] stalking,[14] assault on a

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[11] A stalking conviction in Nevada can garner a six month maximum sentence depending on the circumstances involved. *See* Nev. Rev. Stat. Ann. § 200.575-1(a) and § 193.150-1.

[12] A battery conviction in Nevada can garner a six month maximum sentence depending on the circumstances involved. *See* Nev. Rev. Stat. Ann. § 200.481-2(a) and §193.150-1.

[13] La. Rev. Stat. Ann. § 14:34.2B(1).

[14] La. Rev. Stat. Ann. § 14:40.2B.(1)(a).

vulnerable adult,[15] burning a cross or a religious symbol with intent to terrorize or harass another,[16] or even a hate crime.[17] Yet the court below rejected Petitioner's Equal Protection challenge, assessing that statutory discrimination under mere rational basis review.

This Court in *Heller* explicitly rejected rational basis as the standard for reviewing Second Amendment claims. "Obviously," it held, "[rational-basis scrutiny] could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms. *Heller*, 554 U.S. at 628 n.27 (citing *Carolene Products Co.*, 304 U.S. at 152 n.4).

When assessing Equal Protection claims involving enumerated constitutional rights, this Court likewise applies heightened scrutiny. Indeed, strict scrutiny typically applies to government classifications that "impinge on personal rights protected by the Constitution." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *see also Hussey v. City of Portland*, 64 F.3d 1260, 1265 (9th Cir. 1995) ("Where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized" (quoting *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966), and citing *Kra-*

[15] Vt. Stat. Ann. tit. 13, § 1376(b).

[16] Vt. Stat. Ann. tit. 13, § 1456.

[17] Vt. Stat. Ann. tit. 13, § 1455(1).

mer v. Union Free School Dist., 395 U.S. 621, 628-29 (1969)).

In assessing Petitioner's Equal Protection claim under mere rational basis review, the court primarily relied on the Ninth Circuit's holding in *Vongxay*, and explicitly rejected the heighted scrutiny that the Fourth and Seventh Circuits applied to the Second Amendment claims in *Chester* and *Skoien*, respectively.

In short, as this Court recognized in *Heller* and again in *McDonald*, the appropriate standard of review remains to be settled. With the court below highlighting the different standards that have been applied by the lower courts, this case presents a good vehicle for this Court to address that unresolved question.

CONCLUSION

This Court in two landmark decisions described a robust Second Amendment right, an enumerated, fundamental, pre-existing right, and lower courts are bound to protect it from infringement. Determining the parameters of that protection, sorting out permissible "regulations" from impermissible "prohibitions" will no doubt take time and effort. But lower courts cannot bypass the important constitutional analysis that is required simply by relying on variations of *Delacy's* "safe harbor" and employing little more than rational basis scrutiny to uphold limitations on Second Amendment rights. Doing so puts people's Second Amendment rights at risk and undermines this Court's decisions in *Heller* and *McDonald*.

This Court should grant this Petition for a Writ of Certiorari to resolve the open questions about the "presumptively lawful" language in *Heller* and the appropriate standard of review to be applied.

Respectfully submitted,

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APPENDIX

Appendix A: Opinion of the Court of Appeal

Filed 2/25/11

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE, *Plaintiff and Respondent,* v. RICK CHARLES DELACY, *Defendant and Appellant.*	A125803 (Napa County Super. Ct. Nos. CR142103, CR142660)

Defendant Rick Charles Delacy was convicted of four counts of unlawful possession of firearms and one count of unlawful possession of ammunition. (Pen. Code,[1] §§ 12021, subd. (c)(1), 12316, subd. (b)(1).) He challenges the constitutionality of section 12021, subdivision (c)(1), which prohibits the possession of firearms by persons convicted of specified

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II.D., II.E., and II.F.

[1] All statutory references are to the Penal Code unless otherwise indicated.

misdemeanors, contending it violates the Second Amendment right bear arms and equal protection. He also argues his conviction under section 12316, subdivision (b)(1) must be reversed because the trial court declined to instruct the jury on a mistake of fact defense and failed to answer adequately a jury question as to the mental state element required for conviction. Finally, defendant claims certain fees and fines should be stricken from the trial court's sentencing minute order because the trial court did not orally impose them at the sentencing hearing. We affirm.

I. BACKGROUND

Defendant's crimes were charged in two informations, arising from two separate incidents. In case No. CR142103 (the firearm case), defendant was charged with four felony counts of unlawful firearm possession. (§ 12021, subd. (c)(1).) The amended information alleged defendant's possession of firearms was unlawful because he had been convicted within the past 10 years of misdemeanor battery under section 242, one of the misdemeanors enumerated in section 12021, subdivision (c)(1).[2]

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[2] Section 12021 restricts firearm possession by specified categories of persons, including felons and certain misdemeanants. (§ 12021, subds. (a), (c).) With exceptions not relevant here, section 12021, subdivision (c)(1) provides "any person who has been convicted of a misdemeanor violation of Section 71, 76, 136.1, 136.5, or 140, subdivision (d) of Section 148, Section 171b, paragraph (1) of subdivision (a) of 171c, 171d, 186.28, 240, 241, 242, 243, 243.4, 244.5, 245, 245.5, 246.3, 247, 273.5, 273.6, 417, 417.6, 422, 626.9, 646.9, 12023, or 12024, subdivision (b) or (d) of Section 12034, Section 12040, subdivision (b) of Section 12072, subdivision (a) of former Section 12100, Section

- *continued* -

In case No. CR142660 (the ammunition case), defendant was charged with one felony count of unlawful possession of ammunition (§ 12316, subd. (b)(1))[3] and one count of receiving stolen property (§ 496, subd. (a)). The unlawful possession charge contained allegations that defendant's possession of ammunition was unlawful because of his prior conviction and that defendant was on bail or on his own recognizance in case No. CR142103, at the time of the offense.

The firearms and ammunition were discovered during two probation searches of defendant's home in April and October 2008. During the first search, officers found four firearms, including a Remington 700, a Winchester 100, a Benelli Black Eagle, and a Savage Arms 110. When confronted, defendant told the officers, "There ain't nothing wrong with me having guns." Defendant later testified he possessed the guns for hunting. The second search uncovered shot-

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12220, 12320, or 12590, or Section 8100, 8101, or 8103 of the Welfare and Institutions Code, any firearm-related offense pursuant to Sections 871.5 and 1001.5 of the Welfare and Institutions Code, or of the conduct punished in paragraph (3) of subdivision (g) of Section 12072, and who, within 10 years of the conviction, owns, purchases, receives, or has in his or her possession or under his or her custody or control, any firearm is guilty of a public offense, which shall be punishable by imprisonment in a county jail not exceeding one year or in the state prison, by a fine not exceeding one thousand dollars ($1,000), or by both that imprisonment and fine. . . ."

[3] Section 12316, subdivision (b)(1) provides: "No person prohibited from owning or possessing a firearm under Section 12021 or [other specified statutes] shall own, possess, or have under his or her custody or control, any ammunition or reloaded ammunition."

gun shells in a camouflage bag in defendant's bedroom closet and in two storage tubs in the garage. Defendant told deputies the shells were for hunting.

Prior to trial in the firearm case, defendant moved to dismiss the information on the ground section 12021, subdivision (c)(1) violated the Second Amendment right to bear arms, as interpreted in the United States Supreme Court's decision in *District of Columbia v. Heller* (2008) 554 U.S. 570 [128 S.Ct. 2783] (Heller). The trial court denied the motion, relying on *People v. Flores* (2008) 169 Cal.App.4th 568 (*Flores*), in which the court rejected a post-*Heller* challenge to section 12021, subdivision (c)(1).

The two cases were tried separately, beginning with a jury trial in the ammunition case in January 2009. The jury found defendant guilty of unlawful possession of ammunition and found true the special allegation defendant committed the offense while on bail or on his own recognizance in case No. CR142103. He was acquitted of the receiving stolen property charge. In March 2009, after the parties waived jury trial in the firearm case, the court found defendant guilty on the four charges of unlawful firearm possession. At a consolidated sentencing hearing, imposition of sentence was suspended, and defendant was placed on three years' probation.

II. DISCUSSION

A. Heller

Defendant renews his Second Amendment argument, contending section 12021, subdivision (c)(1) is unconstitutional under *Heller*.

The Second Amendment to the United States Constitution provides: "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." In *Heller*, the Supreme Court held the Second Amendment protects an individual right .to possess and carry weapons in case of confrontation," unconnected with service in a militia. (*Heller, supra*, 128 S.Ct. at p. 2797; see also pp. 2817–2818, 2821–2822.) The court struck down a District of Columbia law effectively banning the possession of handguns in the home. (*Id.* at pp. 2817–2819.)

More recently, in *McDonald v. City of Chicago* (2010) ____ U.S. ____ [130 S.Ct. 3020] (*McDonald*), the court held the Second Amendment right recognized in Heller is "fully applicable to the States." (Id. at p. 3026 (plur. opn. of Alito, J.); id. at pp. 3058, 3088 (conc. opn. of Thomas, J.).) A plurality of the *McDonald* court concluded the Second Amendment right applies to the states because it is "fundamental" to the American "scheme of ordered liberty" and is therefore incorporated in the due process clause of the Fourteenth Amendment. (*McDonald*, at pp. 3036, 3050 (plur. opn. of Alito, J.).) In a concurring opinion, Justice Thomas agreed with the plurality's characterization of the Second Amendment right as "fundamental." (*Id.* at p. 3059 (conc. opn. of Thomas, J.).)

Although it struck down the District of Columbia handguns ban, *Heller* recognized and affirmed certain traditional limitations on the right to bear arms. As the court noted, the Second Amendment does not grant "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." (*Heller, supra*, 128 S.Ct. at p. 2816.) *Heller*

identified an expressly nonexclusive list of "presumptively lawful regulatory measures," stating "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 pp. 2816–2817 & fn. 26; accord, *McDonald, supra*, 130 S.Ct. at p. 3047 (plur. opn. of Alito, J.) [reiterating these categories of permissible firearm regulations].) In so doing, *Heller* recognized that some individuals, presumably including felons and the mentally ill, may be "disqualified" from exercising Second Amendment rights. (*Heller*, at pp. 2816–2817, 2822 ["Assuming that *Heller* is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home"].)

B. The Second Amendment Claim

The *Flores* court relied on *Heller's* express authorization of statutes disqualifying felons from exercising Second Amendment rights to uphold the constitutionality of section 12021, subdivision (c). Although recognizing the defendant in *Flores* had been convicted of a misdemeanor, rather than a felony, the court held, "We find this [distinction] unconvincing. If, as *Heller* emphasizes, the Second Amendment permits the government to proscribe the possession of a firearm by any felon (including nonviolent offenders), we can see no principled argument that the government cannot also add certain misdemeanants, particularly those who have committed an assault by

'means of force likely to produce great bodily injury.' [Citation.] The public interest in a prohibition on firearms possession is at its apex in circumstances, as here, where a statute disarms persons who have proven unable to control violent criminal impulses. [Citations.] Consequently, we do not read *Heller* to undermine the constitutionality of *Flores's* section 12031 [sic: 12021] conviction." (*Flores, supra*, 169 Cal.App.4th at p. 575.)

Defendant argues we should apply strict constitutional scrutiny to strike down section 12021, subdivision (c)(1), contrary to the approach of *Flores*.[4] In holding the District of Columbia handgun ban unconstitutional, *Heller* declined to specify the standard of constitutional scrutiny applicable when a defendant challenges legislation on the ground it violates the Second Amendment right to bear arms, holding the D.C. ban would fail "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights.. (*Heller, supra*, 128 S.Ct. at pp. 2817–2818, fn. omitted.) The court did, however, imply that some elevated level of scrutiny was appropriate by rejecting the "rational-basis" test as too lenient. As the court reasoned in a footnote, "If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." (*Id.* at pp. 2817–2818, fn. 27.)

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[4] When strict scrutiny applies, a law is constitutional only if it is "necessary to achieve a compelling state interest." (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200.)

For purposes of constitutional analysis under *Heller*, however, there is a significant difference between the D.C. handgun ban and Penal Code section 12021. The D.C. statute was one of general application that did not fit within the traditional regulations described by *Heller* as "presumptively lawful." (*Heller*, *supra*, 128 S.Ct. at pp. 2816–2817, fn. 26.) In contrast, as *Flores* held, section 12021 is analogous to a prohibition on felon weapon possession, a type of restriction expressly listed by *Heller* as untouched by its holding. Relying on this reasoning, both California and federal decisions have upheld the type of "presumptively lawful" regulations identified in *Heller*, including prohibitions on firearm possession by certain "disqualified" persons, without applying constitutional scrutiny that balances the objectives of the statute against the means used to accomplish those ends. In *United States v. Vongxay* (9th Cir. 2010) 594 F.3d 1111 (*Vongxay*), for example, the court determined that because *Heller* held that prohibitions on possession of weapons by felons are presumptively lawful, "felons are categorically different from the individuals who have a fundamental right to bear arms." (*Vongxay*, at p. 1115, fn. omitted.) Accordingly, the court upheld the federal felon-in-possession statute (18 U.S.C. § 922(g)(1)), against Second Amendment challenge without applying means-end scrutiny. (*Vongxay*, at p. 1115.) Earlier federal decisions had used the same rationale in upholding felon- and misdemeanant-in-possession statutes, also without applying means-end scrutiny. (E.g., *United States v. White* (11th Cir. 2010) 593 F.3d 1199, 1205–1206; *U.S. v. Rene E.* (1st Cir. 2009) 583 F.3d 8, 12–16 [possession by minor]; In re United States (10th Cir. 2009) 578 F.3d 1195, 1200; *U.S. v.*

McCane (10th Cir. 2009) 573 F.3d 1037, 1047; U.S. v. Anderson (5th Cir. 2009) 559 F.3d 348, 352.)

In *People v. Yarbrough* (2008) 169 Cal.App.4th 303, 312–314 (*Yarbrough*), this court rejected a Second Amendment challenge to the prohibition on carrying concealed firearms in section 12025, subdivision (a)(2), based on Heller's approval of certain traditional regulations. We stated: "Treating as criminal defendant's concealment of a firearm under his clothing on a residential driveway that was not closed off from the public and was populated with temporary occupants falls within the 'historical tradition' of prohibiting the carrying of dangerous weapons in publicly sensitive places." (*Yarbrough*, at p. 314.) This was also the implicit reasoning of *Flores*, which did not apply means-end scrutiny in upholding section 12021, subdivision (c)(1). (*Flores, supra*, 169 Cal.App.4th at pp. 574–576; see also *People v. Villa* (2009) 178 Cal.App.4th 443, 445–448; *People v. James* (2009) 174 Cal.App.4th 662, 674–677.)

The Third Circuit Court of Appeal analyzed the issue at more length in evaluating title 18 United States Code section 922(k), which prohibits the possession of weapons with obliterated serial numbers. (*United States v. Marzzarella* (3d Cir. 2010) 614 F.3d 85 (*Marzzarella*).) Analyzing *Heller's* intent in holding certain categories of statutes unaffected by the Second Amendment, *Marzzarella* noted there were two possible explanations. *Heller* could have meant that the categories are presumptively lawful either "because they regulate conduct outside the scope of the Second Amendment" or "because they pass muster under any standard of scrutiny." (*Marzzarella,* at p. 91.) Settling on the first alternative, the court con-

cluded the "better reading" is "that these longstanding limitations are exceptions to the right to bear arms." (*Ibid.*, fn. omitted.) Applying this reasoning, the court held, "The endorsement [in *Heller*] of prohibitions as opposed to regulations, whose validity would turn on the presence or absence of certain circumstances, suggests felons and the mentally ill are disqualified from exercising their Second Amendment rights." (*Id.* at pp. 91–92, fn. omitted.)[5]

The lower appellate courts were therefore generally unanimous in rejecting the application of means-end scrutiny to statutes disqualifying felons and certain misdemeanants from weapons possession until an en banc decision of the Seventh Circuit Court of Appeal, *United States v. Skoien* (7th Cir. 2010) 614 F.3d 638 (*Skoien*) and, more recently, *United States v. Chester* (4th Cir., Dec. 30, 2010, No. 09-4084) __ F.3d __ [2010 U.S. App. Lexis 26508] (*Chester*), which follows *Skoien*. In *Skoien*, the court considered the constitutionality under *Heller* of title 18 United States Code, section 922(g)(9), a statute prohibiting persons convicted of misdemeanor domestic violence from possessing weapons, framing the question as "whether Congress is entitled to adopt categorical disqualifications [on weapons possession]." (*Skoien*, at p. 639.) The court rejected reliance on *Heller's* declaration of presumptive validity for longstanding prohibitions, holding this was "precautionary lan-

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[5] Despite its holding, *Marzzarella* ultimately applied means-end scrutiny to section 922(k) of title 18 of the United States Code because the court was uncertain whether the ban on possession of altered weapons fit within the categories listed as exempt by *Heller*. (*Marzzarella, supra*, 614 F.3d at pp. 93–95.)

guage," intended only to "warn readers not to treat *Heller* as containing broader holdings than the Court set out to establish." (*Skoien*, at p. 640.) Following its own analytical route (*id.* at pp. 641–643), *Skoien* concluded that it was possible for a "categorical limit on the possession of firearms" to be constitutional (*id.* at p. 641). On the basis of footnote 27 of *Heller*, however, the court held that a valid categorical limit must satisfy more than a rational basis test. (*Skoien*, at p. 641.) Applying what it characterized as "some form of strong showing ('intermediate scrutiny,' many opinions say)," the court upheld the statute after finding it "substantially related to an important governmental objective." (*Id.* at p. 641.)

We conclude the *Skoien* approach gives too little weight to the "presumptively lawful" language of *Heller*. While *Skoien* is certainly correct the court intended to make clear through this language that its decision was limited in scope, the court was also intent on making clear what those limits are. There is no ambiguity in the language; *Heller* states, "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 other types of traditional weapons regulation.[6] (*Heller*, supra, 128 S.Ct. at pp. 2816–2817, italics added.) As *Marzzarella* held, Heller intended by this language to put cer-

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[6] In any event, *Skoien* ultimately upheld the statute under consideration, a limited federal misdemeanant firearms disability statute, against the Second Amendment challenge. (*Skoien, supra,* 614 F.3d at pp. 643–645.) It therefore provides no support for concluding that section 12021, subdivision (c)(1) is invalid, regardless of the type of scrutiny applied.

tain recognized prohibitions outside the ambit of the Second Amendment right it had delineated. (*Marzzarella*, supra, 614 F.3d at p. 91.) Emphasizing these limits, *Marzzarella* described the right outlined in *Heller* as "the right of law-abiding citizens to possess non-dangerous weapons for self-defense in the home." (*Marzzarella*, at p. 92, fn. omitted, italics added.) Stated otherwise, the right announced in *Heller* does not render invalid otherwise lawful statutes of the types enumerated. Further, because the court's enumeration of traditional regulations was expressly noted to be nonexclusive, other, similar prohibitions are unaffected as well, as *Flores* held.

The limitations of the *Skoien* approach were rapidly made clear by a subsequent decision of the same court. In *United States v. Williams* (7th Cir. 2010) 616 F.3d 685 (*Williams*), the court considered the constitutionality of the federal felon-in-possession ban (18 U.S.C. § 922(g)(1)). Rather than relying on the safe harbor for laws banning possession by felons in *Heller*, the court applied the intermediate scrutiny analysis it had previously adopted in *Skoien*. (*Williams*, at pp. 692–693.) Although the statute readily survived a facial challenge under that standard, the court concluded *Heller's* reference to traditional regulations as only "'presumptively lawful'" means such statutes are also subject to felon-by-felon "as applied" challenges. (*Williams*, at p. 693.) It therefore considered whether the defendant's prior felony was such as to justify a prohibition on his personal possession of firearms. While *Williams* upheld application of the statute because the defendant had been convicted of a "violent felony" (*id.* at p. 694), its approach raises the possibility that the federal felon-in-possession statute is invalid in the Seventh Cir-

cuit to the extent it prohibits persons convicted of nonviolent felonies from possessing weapons. (See *Williams*, at p. 693 ["we recognize that [18 U.S.C.] § 992(g)(1) may be subject to an overbreadth challenge at some point because of its disqualification of all felons, including those who are non-violent"].) The language of *Heller* gives no hint of such flexibility.

We do not agree that *Heller* intended to open felon-in-possession prohibitions and similar categorical weapons possession bans to constitutional means-end scrutiny. On the contrary, following virtually all other federal and California appellate courts, we read *Heller's* "presumptively lawful" language to do just the opposite. Accordingly, if section 12021, subdivision (c)(1) falls within the "presumptively lawful" regulations of *Heller*, as *Flores* held, it is immune from means-end scrutiny.

As discussed above, *Flores* found subdivision (c)(1) of section 12021 to be presumptively lawful under *Heller* because "we can see no principled argument that the government cannot also add certain misdemeanants, particularly those who have committed an assault by 'means of force likely to produce great bodily injury.' [Citation.] The public interest in a prohibition on firearms possession is at its apex in circumstances, as here, where a statute disarms persons who have proven unable to control violent criminal impulses." (*Flores, supra*, 169 Cal.App.4th at p. 575; see similarly *In re United States, supra*, 578 F.3d at p. 1200 [*Heller* categories also include those convicted of misdemeanor domestic violence because the conviction demonstrates a propensity for use of physical violence against others]; *United States v. White*, supra, 593 F.3d at p. 1206 [same].) Defendant

distinguishes *Flores*, contending the portion of subdivision (c)(1) banning persons convicted of misdemeanor battery from possessing weapons is not within the *Heller* exemption because misdemeanor battery requires only a "simple touching" and "does not necessarily entail violence," in contrast to the predicate assault in *Flores*.[7] We disagree with the characterization of battery as a nonviolent offense. Battery is "any willful and unlawful use of force or violence upon the person of another." (§ 242.) As the trial court noted in denying defendant's motion to dismiss, battery, like assault, "presents a threat to public safety." As *Flores* held, if the Second Amendment permits the government to prohibit all felons (including nonviolent offenders) from possessing firearms, there is no reason the government cannot also prohibit firearm possession by misdemeanants who have shown a propensity to commit violence against others.[8]

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[7] Defendant characterizes this as an "as applied" challenge. We conclude section 12021, subdivision (c)(1) is immune to such challenges if it is within the *Heller* safe harbor. Further, defendant has made no showing as to the nature or magnitude of the force he used in connection with his predicate offense.

[8] Defendant also makes what he characterizes as a "facial" constitutional challenge, but it fails because it does not assert " ' "[the] statute is invalid on its face and . . . incapable of any valid application." ' " (*Yarbrough, supra,* 169 Cal.App.4th at p. 311.) As discussed above, he claims only that section 12021, subdivision (c)(1) cannot constitutionally be applied to any person convicted of a "nonviolent misdemeanor." He does not argue section 12021, subdivision (c)(1) cannot constitutionally be applied to a person convicted of a violent misdemeanor, such as the defendant in *Flores*. (See *Flores, supra,* 169 Cal.App.4th at pp. 574–575.)

Finally, contrary to defendant's argument, we do not find any inconsistency or irrationality in the California rule permitting a person who is generally prohibited from possessing a firearm to use one in self-defense. (See *People v. King* (1978) 22 Cal.3d 12, 24 (*King*).) As defendant acknowledges, the *King* rule does not permit such a disqualified person to possess a firearm in anticipation of using it one day in self-defense. (See *People v. McClindon* (1980) 114 Cal.App.3d 336, 339–340.) Instead, *King* only recognized "when a member of one of the affected classes is in imminent peril of great bodily harm or reasonably believes himself or others to be in such danger, and without preconceived design on his part a firearm is made available to him, his temporary possession of that weapon for a period no longer than that in which the necessity or apparent necessity to use it in self-defense continues, does not violate section 12021." (*King*, at p. 24.) This limited exception to the general rule prohibiting firearm possession by persons convicted of certain crimes does not render section 12021, subdivision (c)(1) irrational or otherwise unconstitutional, nor does it bolster defendant's efforts to bring himself within the holding in *Heller*. As discussed above, *Heller* protects a right to keep and bear arms for self-defense in the home for persons who are not otherwise disqualified from possessing firearms. (See *Heller*, supra, 128 S.Ct. at pp. 2816–2817 & fn. 26, p. 2822.) Under section 12021, subdivision (c)(1), defendant is disqualified from exercising Second Amendment rights.

C. Equal Protection

Defendant next argues section 12021, subdivision (c)(1) violates equal protection because it prohibits

firearm possession by persons convicted of the California misdemeanors specified in the statute, but not by persons convicted of similar offenses in other jurisdictions. In contrast to this subdivision, the provision of section 12021 barring firearm possession by convicted felons, subdivision (a)(1), applies to any person convicted of a felony .under the laws of the United States, the State of California, or any other state, government, or country. . . ." Defendant argues "[t]here is no reason to believe that persons convicted of the specified California misdemeanors are any more likely to commit anti-social acts with firearms than persons who have committed equivalent offenses out of state."

We note defendant did not raise an equal protection challenge in the trial court. His motion to dismiss the firearm charges raised only a Second Amendment challenge to section 12021, subdivision (c)(1). The Attorney General, however, does not argue defendant forfeited his equal protection argument. We conclude defendant did not forfeit this argument, and we will consider it on the merits, because "the issue is still one of law presented by undisputed facts in the record before us that does not require the scrutiny of individual circumstances, but instead requires the review of abstract and generalized legal concepts—a task that is suited to the role of an appellate court. [Citations.] We also confront the issue to avert any claim of inadequate assistance of counsel." (See *Yarbrough, supra*, 169 Cal.App.4th at pp. 310–311.)

"The crux of the constitutional promise of equal protection is that persons similarly situated shall be treated equally by the laws. [Citation.] However, nei-

ther clause [of the United States or California Constitutions] prohibits legislative bodies from making classifications; they simply require that laws or other governmental regulations be justified by sufficient reasons. The necessary quantum of such reasons varies, depending on the nature of the classification." (*In re Evans* (1996) 49 Cal.App.4th 1263, 1270 (Evans).) "In considering whether state legislation violates the Equal Protection Clause . . . , we apply different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. [Citations.] Classifications based on race or national origin, [citation] and classifications affecting fundamental rights [citation], are given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy." (*Clark v. Jeter* (1988) 486 U.S. 456, 461.) "[M]ost legislation challenged under the equal protection clause is evaluated merely for the existence of a 'rational basis' supporting its enactment. [Citations.] Under the latter analysis, the question is whether the classification bears a fair relationship to a legitimate public purpose." (*Evans*, at p. 1270; see similarly *People v. McKee* (2010) 47 Cal.4th 1172, 1211, fn. 14.)

In the absence of a suspect class or a fundamental right, defendant's equal protection challenge to section 12021 would be evaluated under the rational basis test. In *Evans*, for example, the court considered an equal protection challenge to the provisions of section 12021, subdivision (c)(1) permitting certain individuals to seek relief from the statute's prohibi-

tion on firearm possession. (*Evans*, supra, 49 Cal.App.4th at pp. 1269–1274.) In holding the classification should be analyzed under the rational basis test, the *Evans* court explained strict scrutiny is inapplicable because "[t]he classification of misdemeanants does not involve a typically suspect classification such as race or sex" and "[t]he private right to bear arms is not a 'fundamental' right'" under the Second Amendment. (Evans, at p. 1270.)

The United States Supreme Court's recent Second Amendment jurisprudence has called into question the latter conclusion. Following its determination in *Heller* that the right to bear arms is a private right guaranteed by the Second Amendment (*Heller*, supra, 128 S.Ct. at p. 2797), the court held in *McDonald* that this right is "fundamental" for purposes of incorporation in the due process clause of the Fourteenth Amendment. (See *McDonald, supra*, 130 S.Ct. at pp. 3036, 3050 (plur. opn. of Alito, J.); see also id. at p. 3059 (conc. opn. of Thomas, J.).) Because section 12021, subdivision (c)(1) deprives certain misdemeanants of this right for a period of 10 years, it could be argued that the statute "affects" a fundamental right and, for that reason, is subject to strict scrutiny under traditional doctrine. (E.g., *Clark v. Jeter, supra*, 486 U.S. at p. 461.)

This issue was addressed recently by the Ninth Circuit in *Vongxay, supra*, 594 F.3d 1111, in which the defendant raised an equal protection challenge to the federal felon-in-possession statute. (*Id.* at p. 1118.) The court rejected the defendant's argument that strict scrutiny should apply, reasoning the statute did not affect a fundamental right because the defendant belonged to the class of persons who may

be disqualified from exercising Second Amendment rights under *Heller*. As the Ninth Circuit explained: "[T]he Supreme Court has purposefully differentiated the right to bear arms generally from the more limited right held by felons. [Citation.] Therefore, whatever standard of review the Court implicitly applied to Heller's right to keep arms in his home is inapplicable to *Vongxay*, a felon who was explicitly excluded from *Heller's* holding." (*Vongxay*, at p. 1118.) The *Vongxay* court accordingly applied pre-*Heller* case law, specifically Lewis v. United States (1980) 445 U.S. 55, that had established rational basis as the standard of scrutiny for equal protection challenges relating to the right to bear arms. (*Vongxay*, at pp. 1118–1119; see similarly *Warden v. Nickels* (W.D.Wash. 2010) 697 F.Supp.2d 1221, 1226–1227 [applying rational basis test to equal protection claim regarding weapons possession].) We find the *Vongxay* analysis persuasive and follow it here. Because misdemeanants subject to section 12021, subdivision (c)(1) are disqualified to the same extent as felons from exercising Second Amendment rights (*Flores, supra*, 169 Cal.App.4th at p. 575), they can claim no "fundamental" right that would invoke elevated scrutiny under the equal protection clause. As a result, the statute is subject only to a rational basis analysis.

We find no basis for applying intermediate scrutiny under the authority of *Skoien* and *Chester*, the primary authorities cited by the dissent. As discussed above, *Skoien* rejected, wrongly in our view, any consideration of the presumption of lawfulness afforded certain traditional regulations by *Heller*. The dissent fails to mention *Heller's* singling out of certain traditional regulations as presumptively law-

ful, let alone to explain why section 12021, subdivision (c)(1) does not fall within those categories.[9] Yet even if we accept *Skoien* on its own terms, it would not require the application of intermediate scrutiny in the context of an equal protection challenge, as the dissent concludes. *Skoien* and *Chester* featured Second Amendment challenges to the federal weapons possession ban for persons convicted of misdemeanor domestic violence. The defendants in *Skoien* and *Chester* raised no claims under the Fifth or Fourteenth Amendments, which contain the guarantee of equal protection. Had equal protection claims been raised, these courts may well have applied a different level of scrutiny than they applied to the Second Amendment claims, since the respective claims arise under different constitutional provisions and are subject to different governing authority. In any event, because no equal protection claim was made in *Skoien* and *Chester*, these decisions provide no authority for applying elevated scrutiny to defendant's equal protection claim here.[10]

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[9] In footnote 3, the dissent notes that "*Heller* seems to have no quarrel with felon restrictions," implying that *Heller*'s disqualification reaches only felon-in-possession statutes, not those affecting misdemeanants. As noted above, we agree with *Flores*, *supra*, 169 Cal.App.4th 568, 575, that the reasoning in *Heller* that insulates felon-in-possession statutes applies as well to statutes governing misdemeanants.

[10] Ultimately, application of heightened scrutiny is not essential to the equal protection analysis of the dissent. Because the dissent concludes there is no rational basis for excluding out-of-state misdemeanants from section 12021, subdivision (c)(1), its analysis would find the statute unconstitutional wholly apart from *Heller* and the Second Amendment.

Having settled the level of scrutiny, we turn to the substance of the argument. Under the rational basis test, the question is whether the Legislature's differing treatment of similarly situated groups bears a fair relationship to a legitimate public purpose. (See *Evans, supra*, 49 Cal.App.4th at p. 1270.) We find two separate rational bases for the failure of section 12021, subdivision (c)(1) to include out-of-state misdemeanants. Critical to both these justifications is the widely varying nature of misdemeanor crimes. It is no accident that section 12021 precludes all felons, regardless of the nature or jurisdiction of their felony, from possessing guns (*id.*, subd. (a)(1)), but does not similarly preclude all misdemeanants. Instead, subdivision (c)(1) carefully enumerates the particular misdemeanors that disqualify a person from weapons possession. The Legislature has made a judgment that all crimes serious enough to be classified as felonies are serious enough to justify depriving persons committing those crimes of the right to bear arms. Conversely, the careful discrimination among misdemeanor crimes in subdivision (c)(1) reflects the Legislature's recognition that not all misdemeanors, which vary widely in substance and seriousness, suggest that the violator cannot responsibly possess weapons.

This diversity has two consequences. First, it raises the concern that other jurisdictions might not treat misdemeanor crimes, or at least some misdemeanor crimes, with the same level of due process afforded in California. California law restricts possession of firearms by persons convicted of the misdemeanors enumerated in section 12021, subdivision (c)(1) only after providing representation by counsel (see *Rodriguez v. Municipal Court* (1972) 25

Cal.App.3d 521, 527 [defendant charged with any misdemeanor has right to counsel under California Constitution]) and notice of the weapons restriction (§ 12021, subd. (d)(2)). Such protections, particularly the latter requirement, may not be afforded in other jurisdictions.[11]

Second, the diversity makes identifying parallel misdemeanors in other states a daunting task. Enumerating the misdemeanors subject to the section 12021 ban for each state individually, as subdivision (c)(1) does for California, would be difficult, if not impossible, because it requires the careful parsing of the criminal codes of 49 other states. The Legislature cannot be required to scrutinize each state's laws to determine whether misdemeanors exist that are identical to the California misdemeanors listed in subdivision (c)(1). In theory, the Legislature could have identified general classes of out-of-state misdemeanors subject to the ban. By identifying individual misdemeanors in subdivision (c)(1), however, the Legislature has already indicated that listing general classes of misdemeanors is not a satisfactory approach. If that were sufficient, the Legislature

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[11] The dissent argues there was no evidence in the record that defendant was provided the required warning at the time of his conviction. Whether defendant was personally afforded the warnings, however, is irrelevant to the equal protection argument. Provision of the warning is required by statute in California, but it would likely not be provided in other jurisdictions. This distinction alone provides a rational basis for the Legislature's failure to include out-of-state convictions in the statute, regardless of whether defendant personally received the required warning.

could have listed general classes for California misdemeanors rather than specifically enumerating them. Further, even if the Legislature could identify general categories of out-of-state misdemeanors, the elements of the offenses may differ among the states, making it difficult for an offender to know whether a particular out-of-state misdemeanor is included in a category subject to the ban, and thereby raising issues of due process. (See *U.S. v. Moore* (7th Cir. 2008) 543 F.3d 891, 897.) In short, as a practical matter it would be difficult for the Legislature to extend section 12021, subdivision (c)(1) to misdemeanor crimes committed in other states in a fair and equitable manner.[12]

Both of these concerns, the protection of a defendant's due process rights and the difficulty of crafting effective legislation, constitute legitimate governmental concerns that are sufficient to justify the Legislature's decision not to include out-of-state misdemeanants under section 12021. Accordingly, the

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[12] The dissent cites two decisions finding statutes unconstitutional because they made distinctions that were not supported by a rational basis. (*Walgreen Co. v. City and County of San Francisco* (2010) 185 Cal.App.4th 424; *Doe v. Saenz* (2006) 140 Cal.App.4th 960.) Our decision is not in conflict with either of these decisions, which feature considerably different circumstances. In *Walgreen,* the court held that a local ordinance banning tobacco sales in traditional pharmacies but not other retail stores containing a pharmacy made an irrational distinction. (*Id.* at pp. 437–444.) In *Saenz,* the court found irrational a statute that disqualified persons who committed potentially nonviolent crimes from working in community care facilities but not persons convicted of more serious, violent crimes. (*Id.* at pp. 991–993.)

statute does not deny defendant equal protection of the laws by excluding such persons.[13]

In this connection, we note the United States Supreme Court has upheld federal firearm disability law sentencing enhancements despite recognizing they can result in different enhancements for similar circumstances, depending upon the state of the defendant's original conviction. In *Logan v. United States* (2007) 552 U.S. 23, the defendant argued his sentence enhancement under section 924(e)(1) of title 18 of the United States Code was invalid because his prior conviction would have been disregarded had he been convicted in certain other states. (*Logan*, at p. 26.) After reviewing the statutory history, the court upheld the enhancement, concluding Congress had a valid reason for structuring the statute in the manner it selected. (*Id.* at pp. 35–36.) In the same way, the different consequences from in-state and out-of-state misdemeanor convictions under section 12021, subdivision (c)(1) must be upheld because our Legislature could have had valid reasons for its legislative decision.

D. The Mistake of Fact Instruction

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[13] A conclusion that the failure to include out-of-state misdemeanants is not supported by a rational basis would have ramifications beyond section 12021, subdivision (c)(1), since it suggests that other statutes relying only on in-state convictions are similarly invalid. Most notable among these is section 12021, subdivision (e), which precludes firearms possession by juveniles who have committed certain California offenses.

1. Background

Prior to the jury trial in the ammunition case, defendant submitted a proposed jury instruction on the defense of mistake of fact. Defendant argued he did not know it was unlawful for him to possess ammunition because the judge in his 2006 battery case told him he could continue to possess guns during hunting season.[14] The trial court declined to give the requested instruction. The court noted unlawful possession of ammunition under section 12316, subdivision (b)(1) is a general intent crime, which requires proof the defendant knew he possessed ammunition, but does not require proof the defendant knew it was illegal to possess ammunition.

During the jury trial, defendant testified he was an avid hunter and typically kept 1,000 rounds of ammunition on hand. Defendant testified he entered a plea of no contest to battery in 2006. He testified

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[14] Defendant's proposed instruction, which was based on CALCRIM No. 3406, stated: "The defendant is not guilty of Possession of Ammunition, as charged in Count One if he did not have the intent or mental state required to commit the crime because he reasonably did not know a fact or reasonably and mistakenly believed a fact. [¶] If the defendant's conduct would have been lawful under the facts as he reasonably believed them to be, he did not commit Possession of Ammunition, as charged in Count One. [¶] If you find that the defendant believed that the Court had allowed him [to] possess ammunition during hunting season and if you find that belief was reasonable, he did not have the specific intent or mental state required for Possession of Ammunition, as charged in Count One. [¶] If you have a reasonable doubt about whether the defendant had the specific intent or mental state required for Possession of Ammunition, as charged in Count One, you must find him not guilty of that crime."

the firearms that were seized from his home in the April 2008 search were registered.

During defendant's direct testimony, the trial court, consistent with its pretrial ruling, sustained relevancy objections to questions about whether the probation order or the probation department in the battery case notified defendant he could not possess guns or ammunition.

2. Analysis

On appeal, defendant contends the trial court erred by refusing to give the mistake of fact instruction. Defendant claims he was entitled to the instruction because the judge in the battery case told him he could possess guns during hunting season, and because he received no notice he would be prohibited from possessing guns and ammunition for 10 years. We disagree.

We note initially defendant is incorrect in asserting the evidence in the jury trial in the ammunition case supports his argument he was told he could possess guns during hunting season. Defendant cites to his counsel's argument in the subsequent court trial in the firearm case, at which defendant testified he understood his plea in the battery case did not preclude him from possessing guns during hunting season.[15] As noted above, the trial court sustained rele-

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[15] In the court trial in the firearm case, defendant testified he discussed his firearms with the judge in the 2006 battery case, and a resulting "stipulation" (which is not in the record) restricted his possession of guns to hunting season. He did not testify the judge in the battery case or anyone else told him the

- *continued* -

vancy objections to this line of questioning in the jury trial. There was no evidence supporting this argument in the jury trial.

In any event, defendant was not entitled to a mistake of fact instruction based on his alleged lack of notice of the 10-year prohibition on possession of firearms and ammunition resulting from his battery conviction. The relevant ammunition statute, section 12316, subdivision (b)(1), does not state notice of illegality is an element of the crime. The firearm statute, section 12021, provides the court shall, at the time a judgment of conviction of a felony or enumerated misdemeanor is imposed, give notice to the defendant of the prohibition on firearm possession resulting from the conviction; however, the statute expressly specifies "[f]ailure to provide the notice shall not be a defense to a violation of this section." (§ 12021, subd. (d)(2).) As a result of his battery conviction, defendant was prohibited under section 12021, subdivision (c)(1) from possessing firearms for 10 years, regardless of whether he received notice of the prohibition. (§ 12021, subds. (c)(1), (d)(2).) And, because he was "prohibited from owning or possessing a firearm under Section 12021," he was also prohibited from owning or possessing ammunition. (§ 12316, subd. (b)(1).)

Defendant's asserted lack of knowledge of the illegality of his possession of ammunition was a mistake of law, not a mistake of fact. "'For criminal liability to attach to an action, the standard rule is that

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statutes prohibiting possession of firearms and ammunition by certain convicted criminals did not apply to him.

"there must exist a union, or joint operation of act and intent, or criminal negligence.'" [Citation.] Generally, the prosecution must prove some form of guilty mental state. [Citation.] A defendant may refute guilt by showing a mistake of fact disproving criminal intent. [Citation.] A person is usually considered incapable of committing a crime if he or she 'committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent.' (Pen. Code, § 26.) . . . '"'"At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which the person is indicted an innocent act, has always been held to be a good defense.'"'" [Citation.]" (*People v. Meneses* (2008) 165 Cal.App.4th 1648, 1661.) "In determining whether a defendant's mistaken belief disproves criminal intent, the courts have drawn a distinction between mistakes of fact and mistakes of law. [Citation.] While a mistake of fact usually is a defense, a mistake of law usually is not. It is commonly said that ignorance of the law is no excuse. [Citation.]" (*Ibid.*)

In *People v. Snyder* (1982) 32 Cal.3d 590 (*Snyder*), the Supreme Court held a defendant's asserted mistake as to her legal status as a felon was a mistake of law, not a mistake of fact, and therefore provided no defense to a charge of being a felon in possession of a firearm. (*Id.* at pp. 592–593.) The Snyder court stated: "[L]ack of actual knowledge of the provisions of Penal Code section 12021 [the firearm statute] is irrelevant; the crucial question is whether the defendant was aware that he was engaging in the conduct proscribed by that section." (*Id.* at p. 593.) Similarly, here, defendant's asserted mistake as to whether his misdemeanor battery conviction made it unlawful for

him to possess guns or ammunition was a mistake of law, not a mistake of fact.

A mistake of law is not a defense to a general intent crime. (*People v. Vineberg* (1981) 125 Cal.App.3d 127, 137.) As the trial court instructed, and as defendant concedes, possession of ammunition, the crime defined in section 12316, subdivision (b)(1), is a general intent crime; a general intent to commit the proscribed act is sufficient to sustain a conviction. (See *Snyder, supra*, 32 Cal.3d at p. 592 [possession of firearm under § 12021]; *People v. Spirlin* (2000) 81 Cal.App.4th 119, 130 [same]; *People v. Jeffers* (1996) 41 Cal.App.4th 917, 922 (*Jeffers*) [same].) Accordingly, defendant's alleged mistake was not a defense to the charge of unlawful possession of ammunition under section 12316, subdivision (b)(1).

Finally, defendant argues he was entitled to a mistake of fact instruction based on *People v. Bray* (1975) 52 Cal.App.3d 494 (*Bray*), but that case is distinguishable. In *Bray*, the defendant entered a plea of guilty in Kansas to being an accessory after the fact and was placed on two years' summary probation, which he successfully completed. (*Id.* at p. 496.) The defendant subsequently sought to register to vote in California, stated he was uncertain whether he had been convicted of a felony, and filled out an explanatory form about the Kansas offense; he was permitted to vote. (*Ibid.*) The defendant later applied for a job as a security guard. On the application he stated he had not been convicted of a felony and explained the circumstances of his arrest and probation in Kansas. (*Ibid.*) The state Bureau of Collection and Investigative Services registered him as a guard. (*Ibid.*) On subsequent job applications he stated his un-

certainty as to his status while explaining the circumstances of his arrest and probation. (*Id.* at p. 497.) After the defendant was convicted of being a felon in possession of a concealable firearm, the Court of Appeal held under these unusual circumstances the trial court had erred in refusing to instruct the jury on .mistake or ignorance of fact and knowledge of the facts which make the act unlawful,. i.e., the defendant did not know his prior offense was a felony. (*Id.* at pp. 495, 499.)

The *Bray* court stated such instructions are not required every time a defendant claims he did not know he was a felon. (*Bray*, supra, 52 Cal.App.3d at p. 499.) The court emphasized the defendant had been "convicted in Kansas of what for California is an unusual crime," and "on more than one occasion had been led to believe by state regulatory agencies he was not a felon." (*Ibid.*) The court stated: "It is only in very unusual circumstances such as these that the giving of these instructions is necessary." (*Ibid.*) In *Snyder*, the Supreme Court distinguished *Bray*, noting the defendant in Snyder "made no attempt to inform government officials of the circumstances of her conviction or to seek their advice regarding her correct legal status." (*Snyder, supra*, 32 Cal.3d at pp. 594–595.)

Here, in contrast to the defendant in *Bray*, who did not know and was unable to determine whether he had been convicted of a felony, defendant did not allege he had any misunderstanding as to the nature of his prior conviction. He did not claim he was unaware he had been convicted of misdemeanor battery, nor did he claim the judge in the battery case or anyone else misled him about that fact. Indeed, defen-

dant testified in both the ammunition case and the firearm case about his battery conviction. Defendant also did not argue he obtained the ammunition after making a full disclosure of his battery conviction to governmental officials and receiving assurances the conviction did not prohibit him from possessing ammunition. Instead, defendant's only alleged misunderstanding was as to the statutorily mandated consequences of his battery conviction, i.e., defendant allegedly was unaware sections 12021, subdivision (c)(1) and 12316, subdivision (b)(1) prohibit (for 10 years) possession of firearms and ammunition by persons convicted of misdemeanor battery. This alleged misunderstanding was a mistake of law and provided no defense to the charges against defendant. (See *Snyder, supra*, 32 Cal.3d at pp. 592–593.)

E. The Jury's Question

1. Background

During the jury's deliberations in the ammunition case, the jury sent the following question to the court: "Is it a requirement of conviction in Count 1 [the ammunition charge] that [defendant] knew that it was a violation of his probation to possess ammunition?" After a discussion with counsel, the court sent a written response to the jury: "Knowledge that it is unlawful to possess ammunition is not an element of the crime charged in Count 1."

2. Analysis

Defendant contends the trial court's response to the jury's question was incomplete and inadequate. We disagree.

Without citation to the record, defendant continues to assert he was told by the judge in the battery case he could lawfully possess guns and ammunition despite his misdemeanor battery conviction (which, under the governing statutes, disqualified him from possessing guns and ammunition, see §§ 12021, subd. (c)(1), 12316, subd. (b)(1)). Defendant states: "[Defendant] was told by his first judge that he could lawfully possess guns and ammunition notwithstanding his misdemeanor battery conviction. As such, he had no knowledge his possession of the ammunition was unlawful. The trial judge should have so instructed the jury." However, as discussed above, there was no evidence on this point in the jury trial in the ammunition case. Defendant testified only about this issue in the subsequent court trial in the firearm case. The trial judge was not obligated to instruct the jury about the alleged significance of testimony defendant had not yet given.[16]

Defendant also argues "a lack of knowledge of the contraband nature of the ammunition should be a defense." Defendant contends the court should have instructed the jury on this point and was required to "cite the jury to what the prosecutor had to prove and whether [defendant's] lack of intent to commit a crime undermined the offense charged." However,

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[16] As noted above, even in the subsequent court trial, defendant's testimony did not go as far as he now asserts. Defendant testified he discussed his firearms with the judge in connection with his plea in the battery case, and a "stipulation" was entered restricting his possession of guns to hunting season. He did not testify the judge told him the firearm and ammunition laws did not apply to him or were suspended by his plea deal or his probation order in the battery case.

when counsel discussed with the trial court the appropriate response to the jury's question, defendant did not raise the argument a lack of knowledge of the contraband nature of the ammunition should be a defense. Instead, defense counsel stated only that defendant had not violated his probation.

In any event, the court's response was appropriate. The jury appears to have been confused about the relationship between the conditions of defendant's probation in the battery case and the elements of the ammunition charge. Defendant's probation status was not an element of the ammunition charge. The trial court responded by correctly instructing the jury that knowledge it is unlawful to possess ammunition was not an element of the crime charged; as discussed above, possession of ammunition under section 12316, subdivision (b)(1) is a general intent crime. (See *Snyder, supra*, 32 Cal.3d at p. 592 [possession of firearm]; *People v. Spirlin*, supra, 81 Cal.App.4th at p. 130 [same]; *Jeffers, supra*, 41 Cal.App.4th at p. 922 [same].) A general intent to commit the proscribed act, i.e., to possess ammunition, is sufficient. No specific intent is required. Accordingly, it was not necessary to prove defendant knew it was unlawful to possess ammunition.

The *Jeffers* case, on which defendant relies, does not support his argument. In Jeffers, the defendant was convicted of being a felon in possession of a firearm after he delivered a box wrapped in a paper bag to a gun store at the request of a friend. The defendant claimed he was not aware the box contained a gun. (*Jeffers*, *supra*, 41 Cal.App.4th at pp. 919–922.) The appellate court held the trial court erred by failing to instruct on general criminal intent and refus-

ing to give the defendant's pinpoint instruction on his defense he had no knowledge he was in possession of a gun. (*Id.* at pp. 920–921, 922–925.) Because of the lack of a general intent instruction, "the jury reasonably could have believed the only issue to be decided was whether defendant had knowledge a gun was in the package even if that knowledge was not acquired until he arrived at the gun shop and even if possession was not intentional." (*Id.* at p. 924.)

Here, in contrast, the trial court did instruct the jury on general criminal intent.[17] (See *People v. Padilla* (2002) 98 Cal.App.4th 127, 135–136 [*Jeffers* was not controlling where trial court instructed on general criminal intent].) Moreover, in contrast to the facts in *Jeffers*, defendant did not claim he did not know he possessed, or did not intend to possess, the ammunition in his house.

F. The Sentence

1. Background

Prior to sentencing, a probation officer prepared a presentence report recommending defendant be placed on probation for three years in both the fire-

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[17] The instruction, based on CALCRIM No. 252, stated in relevant part: "The crimes charged in Counts One and Two require proof of the union or joint operation of act and wrongful intent. The following crimes required general criminal intent: Possession of ammunition, as charged in Count One . . . . For you to find a person guilty of these crimes, that person must not only commit the prohibited act, but must do so with wrongful intent. A person acts with wrongful intent when he or she intentionally does a prohibited act on purpose. However, it is not required that he or she intend to break the law. . . ."

arm case and the ammunition case, under specified terms and conditions. The listed conditions included payment of: (1) court security fees of $80 in the firearm case ($20 for each count of conviction) and $20 in the ammunition case (§ 1465.8); (2) a restitution fine of $200 in each case (§ 1202.4); and (3) a probation revocation restitution fine of $200 in each case, to be suspended unless probation is revoked (§ 1202.44).

At the sentencing hearing, defendant's counsel objected to certain items in the presentence report, including the calculation of custody credits. After hearing argument from counsel, the court suspended imposition of sentence in both the firearm case and the ammunition case, and placed defendant on probation for three years. The court orally ordered defendant to pay a presentence report fee of $560, and an annual supervision fee not to exceed $240 (§ 1203.1b). In addition, as to both cases, the court stated it was granting probation under the terms and conditions specified in the presentence report (with certain modifications not relevant to this appeal). As to each case, the court asked defendant if he had read and agreed to comply with the conditions of probation in the presentence report. Defendant stated he had read the conditions and agreed to comply with them.[18]

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[18] As to the firearm case, the following colloquy occurred: "THE COURT: . . . [¶] . . . [¶] Mr. Delacy, have you read all of the conditions of probation in this report? [¶] THE DEFENDANT: Yes, ma'am, I have. [¶] THE COURT: Do you agree to comply with those conditions? [¶] THE DEFENDANT: Yes, I will."

The court clerk issued a minute order in each case. Each minute order states defendant was placed on probation for three years under the terms and conditions in the probation officer's report. Attached to each minute order is the relevant list of terms and conditions from the report, including the court security fees, restitution fines and probation revocation restitution fines, all in the amounts recommended in the report. Each minute order also states: "Defendant advises the Court he understands and accepts the terms and conditions of probation."

2. *Analysis*

On appeal, defendant claims the court security fees, restitution fines and probation revocation fines must be stricken from the trial court's sentencing minute orders because the trial court did not orally impose those fines at the sentencing hearing. Defendant relies on *People v. Zackery* (2007) 147 Cal.App.4th 380 (*Zackery*). In *Zackery*, the court applied the rule that "[w]here there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls." (*Id.* at p. 385, citing *People v. Mitchell* (2001) 26 Cal.4th 181, 185–186.) The court found the record was —replete with errors‖: the trial court clerk's minutes stated defendant had entered a plea of no contest to a charge on which he had never changed his not guilty plea or been convicted; the trial court erroneously imposed a sentence on that charge; and the minutes and abstract of judgment included several fines and fees the trial court had not orally imposed at sentencing, including a restitution fine (§ 1202.4) and a parole revocation restitution fine (§ 1202.45). (*Zackery,* at pp.

384–387.) The court ordered these fines and fees stricken from the sentencing minutes. (*Id.* at pp. 388–389, 393.) The court stated the practical reason for requiring imposition of a restitution fine in the presence of the defendant is that the trial court can decline to impose the fine —if it finds compelling and extraordinary reasons for not doing so and states the reasons on the record. (§ 1202.4, subd. (b).) When a restitution fine is imposed in the absence of the defendant, the defendant has no opportunity to address the propriety of imposing the fine or its amount.[19] (*Zackery*, at pp. 388–389.)

Zackery is distinguishable, and there is no basis for striking the fees and fines challenged by defendant. First, the court security fee is mandatory; section 1465.8 provides it "shall" be imposed in every conviction. (§ 1465.8, subd. (a)(1).) When a trial court does not orally impose a mandatory fee or fine, the error is jurisdictional and is subject to later correction in the minutes or the abstract of judgment, or even on appeal. (See *People v. Talibdeen* (2002) 27 Cal.4th 1151, 1153, 1157; *People v. Barriga* (1997) 54 Cal.App.4th 67, 69–70.) Accordingly, even if the trial court had not orally imposed the court security fee by incorporating the conditions in the presentence report, the trial court had authority to add this mandatory fee to the minute orders.

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[19] Section 1202.4, subdivision (b) requires imposition of a restitution fine of between $200 and $10,000 for a felony conviction, unless the court "finds compelling and extraordinary reasons for not doing so, and states those reasons on the record." The probation revocation fine at issue here (and the parole revocation fine at issue in *Zackery*) must be imposed in the same amount as the restitution fine. (§§ 1202.44, 1202.45.)

Second, although the restitution fine and the probation revocation restitution fine are not mandatory in every conviction (as the trial court can decline to impose them if it finds compelling and extraordinary reasons for not doing so and states the reasons on the record, see § 1202.4, subd. (f)), those fines were also properly imposed in this case. There was no conflict between the sentence orally pronounced by the trial court and the subsequent minute order. At most, the court's oral pronouncement of sentence was incomplete, and only in the sense that it incorporated by reference the terms and conditions in the presentence report (with which the parties were familiar), including the restitution fine and the probation revocation restitution fine. Moreover, defendant and his counsel had the opportunity to address the propriety of imposing the restitution fine (and the corresponding probation revocation restitution fine) at the sentencing hearing. Defendant's counsel had reviewed the presentence report and objected to other items in the report, but did not object to the fines and fees recommended in the report as terms of probation. And, defendant personally assured the court he had reviewed all the terms and conditions of probation and agreed to comply with them. The reasoning in *Zackery* is thus inapposite.

We also note, in the probation context, conditions may be included in an order of probation that were not orally communicated to the defendant personally by the court. "[P]robation is an act of clemency which imposes no penalties unless the conditions of probation are broken [citation]. The fact a person is granted probation, rather than a pardon, gives rise to the implication there are conditions."|| (*People v. Thrash* (1978) 80 Cal.App.3d 898, 901.) Accordingly,

"'conditions [of probation] need not be spelled out in great detail in court as long as the defendant knows what they are; to require recital in court is unnecessary in view of the fact the probation conditions are spelled out in detail on the probation order and the probationer has a probation officer who can explain to him the contents of the order.' [Citation.]" (*In re Frankie J.* (1988) 198 Cal.App.3d 1149, 1155; see also *In re Pedro Q.* (1989) 209 Cal.App.3d 1368, 1373.) Here, defendant stated he had reviewed the terms and conditions of his probation and agreed to comply with them.

Assuming the trial court should have pronounced the amounts of the fines orally, any error is reviewed pursuant to the harmless error standard for noncapital sentencing errors. (See *People v. Price* (1991) 1 Cal.4th 324, 492, superseded by statute on other grounds as stated in *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1161–1162; *People v. Sanchez* (1994) 23 Cal.App.4th 1680, 1685.) Reversal is required only when the reviewing court, after careful examination of the entire case, is of the opinion there is a reasonable probability a result more favorable to the appealing party would have been reached absent the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) On this record, there is no evidence defendant's fines would have been different had the court pronounced them orally rather than by reference to the presentence report. As noted above, defendant was aware of the conditions of probation recommended in the presentence report, including the amounts of the fines, and he agreed to comply with them. Further, the amounts imposed by the court were the minimum amounts permitted by the governing statutes. (§§ 1202.4, subd. (b)(1) [$200 is minimum restitution

fine], 1202.44 [probation revocation fine is to be imposed in same amount as restitution fine].) Finally, the court noted defendant had been involved in "a mini crime spree" in the past few years for reasons the court did not understand; the court stated it was placing defendant on probation to give him the opportunity "one last time" to live "in a law-abiding way." The court warned defendant he would likely face prison if he got into trouble again. This record provides no evidence the court would have found extraordinary and compelling circumstances justifying waiving the minimum fines imposed on defendant.

II. DISPOSITION

The judgment is affirmed.

Margulies, Acting P.J.

I concur:

Banke, J.

A125803
People v. Delacy

DONDERO, J.

I respectfully dissent.

My objection to the majority will focus on the analysis of the equal protection issue in the opinion. I do not need to discuss defendant's Second Amend-

ment challenge to the statute because, in my opinion, Penal Code section 12021, subdivision (c),[20] cannot withstand scrutiny under the equal protection clause of the Fourteenth Amendment.

This is a case where defendant sustained a misdemeanor conviction in California for a violation of section 242 (battery) in 2006. He was placed on probation. In April 2008, while conducting a probation search, officers found four rifles in defendant's home. They were a Remington 700, a Winchester 100, a Benelli Black Eagle, and a Savage Arms 110. The defendant claimed he used the rifles for hunting game. He testified accordingly. He also represented to the officers he was never advised he could not possess weapons for hunting purposes. He was subsequently charged with a violation of section 12021, subdivision (c)(1), a felony, because he had previously been convicted of the misdemeanor battery offense in California within the past 10 years. The equal protection dilemma posed by section 12021, subdivision (c) is that it only imposes its consequences on persons who have sustained a conviction for certain enumerated misdemeanors in California. A conviction for similar misdemeanor conduct in other jurisdictions imposes no comparable consequence to a convicted individual.

"'The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' [Citations]" (*People v. Hofsheier* (2006) 37

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[20] All statutory references will be to the California Penal Code unless otherwise stated.

Cal.4th 1185, 1199 [39 Cal.Rptr.3d 821, 129 P.3d 29], emphasis in original; see also *People v. Dial* (2004) 123 Cal.App.4th 1116, 1120 [20 Cal.Rptr.3d 573]; *People v. Calhoun* (2004) 118 Cal.App.4th 519, 529 [13 Cal.Rptr.3d 166].) "The 'similarly situated' prerequisite simply means that an equal protection claim cannot succeed, and does not require further analysis, unless there is some showing that the two groups are sufficiently similar with respect to the purpose of the law in question that some level of scrutiny is required in order to determine whether the distinction is justified." (*People v. Nguyen* (1997) 54 Cal.App.4th 705, 714 [63 Cal.Rptr.2d 173].) "Persons who are similarly situated must be treated alike. [Citation.] There is, however, no requirement that persons in different circumstances must be treated as if their situations were similar." (*People v. McCain* (1995) 36 Cal.App.4th 817, 819 [42 Cal.Rptr.2d 779].) "This initial inquiry is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.' [Citation.]" (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253 [127 Cal.Rptr.2d 177, 57 P.3d 654].) "In other words, we ask at the threshold whether two classes that are different in some respects are sufficiently similar with respect to the laws in question to require the government to justify its differential treatment of these classes under those laws." (*People v. McKee* (2010) 47 Cal.4th 1172, 1202 [104 Cal.Rptr.3d 427, 223 P.3d 566].)

The majority seems to agree that section 12021, subdivision (c)(1) creates a classification among persons similarly situated, and a glaring classification it is. The statute makes it a felony for a person who previously was convicted of specific California mis-

demeanors, to possess a firearm within 10 years of that conviction. Several of the enumerated crimes are wobblers, and if a person was convicted of these crimes as felonies, then the person would be charged under section 12021, subdivision (a), a statute that makes felony convictions in California or any other state or federally based jurisdiction a predicate for felony prosecution for possession of a firearm. The equal protection dilemma posed by section 12021, subdivision (c) is that it only imposes its consequences on persons who have sustained a conviction for certain enumerated misdemeanors in California. A conviction for similar misdemeanor conduct in other jurisdictions imposes no comparable consequence to a convicted individual.

However, persons who come to California after being convicted of a misdemeanor-like battery in another state can lawfully possess a firearm without a fear of felony prosecution. Only persons who sustain a conviction of California Penal Code section 242, for example, face potential felony prosecution.

Thus, for purposes of creating a felony offense for possession of a firearm that would otherwise be lawful, the statute treats differently defendants who have committed prior misdemeanor offenses in California, and those who have committed the same prior offenses in other states, with only the former incurring criminal sanctions. This is disparate treatment for similar conduct distinguished only by the fortuity of the geographical place of commission.[21]

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[21] To further illustrate the point: A resident of Truckee, California, who is convicted of a qualifying misdemeanor battery offense, then some years later is found in possession of fire- *- continued -*

In the recent decision of *People v. Hofsheier, supra,* 37 Cal.4th 1185, the court found violative of equal protection a statutory scheme which imposed mandatory registration under section 290 for a person convicted of consensual oral copulation under section 288a, subdivision (b)(1) (voluntary sexual act with a minor 16 years or older) but discretionary registration for a person convicted of consensual sexual intercourse under section 261.5. In each instance the criminal conduct is by law consensual, but the conviction of one triggers the mandatory lifetime registration requirement, while the other permits discretionary registration if the sentencing judge determines it is appropriate. Under our notion of equal protection of the laws, the state must advance "some rationality in the nature of the class singled out" for particular criminal prosecution. (*Rinaldi v. Yeager* (1966) 384 U.S. 305, 308–309 [16 L.Ed.2d 577, 86 S.Ct. 1497].) Otherwise, the state would be allowed to discriminate between persons similarly situated by classifying their conduct under different criminal statutes. (*Lawrence v. Texas* (2003) 539 U.S. 558, 582 [156 L.Ed.2d 508, 123 S.Ct. 2472] (conc. opn. of O'Connor, J.).)

Also, in *People v. McKee,* the defendant challenged his involuntary commitment as a sexually violent predator (SVP) under Welfare & Institutions Code section 6600 *et. seq.* He claimed it violated his equal protection rights because persons committed

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arms, is subject to a *felony* conviction under section 12021, subdivision (c); in contrast, a resident of Reno, Nevada, 31 miles away, who is convicted of the same misdemeanor offense, and years later becomes a resident of Truckee, California, may possess the same firearms with no criminal penalty.

under the SVP determinations are treated less favorably than individuals similarly situated under civil commitment statutes like NGI and MDO. The court remanded defendant's case back to the trial court because the claim had "merit" and required further review. (*People v. McKee, supra,* 47 Cal.4th 1172, 1196.) The court reasoned that persons civilly committed under SVP, NGI or MDO pose substantial harm to the community. Yet, SVP commitments, especially as a result of Proposition 83, enjoy less opportunity to challenge the designation under the statutory scheme. Conceding the statutory differences between civil commitments under SVP's and MDO's, the court observed, "the identification of [these] differences does not explain why one class should bear a substantially greater burden in obtaining release from commitment than the other." (*People v. McKee, supra,* at p. 1203.)

Here, the defendant's underlying offense is misdemeanor battery in violation of section 242. The facts and circumstances of the underlying conviction are not presented in the record of this case. We cannot determine if the predicate misdemeanor offense involved a weapon of any type, or whether the offense involved any facts which suggested a weapons preclusion order was proper. It was a probation sentence, and we do know the conditions of probation did not specifically preclude possession of any weapons. The defendant did testify he understood he could possess the rifles in issue for hunting purposes. He was not impeached in his cross-examination with any documents or transcript challenging his belief he could keep weapons in his home. We also know that if the defendant had been convicted of the equivalent

of section 242 in Arizona or Nevada, for example, this possession case would not be on review now.

In summary, we have a situation where similarly situated persons, i.e., persons convicted of battery in California, and persons convicted of battery in any other state—both persons currently living in California—would result in disparate consequences because of where the individual suffered his misdemeanor conviction. This satisfied first prerequisite for a meritorious claim under the equal protection clause, a classification that affects two similarly situated groups in an unequal manner. (*Cooley v. Superior Court, supra,* 29 Cal.4th 228, 253; *In re Eric J.* (1979) 25 Cal.3d 522, 530 [159 Cal.Rptr. 317, 601 P.2d 549].)

We turn to an examination of the second level of equal protection analysis. " 'In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment . . . we apply different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. [Citations.] Classifications based on race or national origin . . . and classifications affecting fundamental rights . . . are given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy. [Citations.]' (*Clark v. Jeter* (1988) 486 U.S. 456, 461 [100 L.Ed.2d 465, 108 S.Ct. 1910]; see also *Manduley* [*v. Superior Court* (2002)] 27 Cal.4th [537,] 571 [33 Cal.Rptr.2d 10, 41 P.3d 3] ["equal protection provisions in the California Constitution" "have been gen-

erally thought . . . to be substantially [the] equivalent of the equal protection clause of the Fourteenth Amendment to the United States Constitution." '||(Fn. omitted.)].)" (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836–837 [16 Cal.Rptr.3d 420, 94 P.3d 551].)

With the recent rulings by the United States Supreme Court interpreting the Second Amendment, namely, *District of Columbia v. Heller* (2008) 554 U.S. 570 [171 L.Ed.2d 637, 128 S.Ct. 2783] (*Heller*), and *McDonald v. City of Chicago, Ill.* (2010) 561 U.S. ___ [177 L.Ed.2d 894, 130 S.Ct. 3020], courts must now consider what standard of review is constitutionally mandated in the evaluation of gun control legislation. As the majority in *Heller* observed: "Obviously, the [rational basis] test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or *the right to keep and bear arms*. . . . If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect."|| (*Heller, supra,* at p. 679, fn. 27, emphasis added.) It appears that the rational basis test may not apply to such review in light of *Heller's* warning that constitutional rights guaranteed by the Second Amendment need to be assessed by a standard more elevated than rational basis. Indeed, the federal courts have recently indicated the test is one of heightened or intermediate scrutiny. (*United States v. Skoien* (7th Cir. 2010) 614 F.3d 638, 641 (en banc) [federal prosecution under 18 U.S.C. §922(g)(9) illegal possession of a firearm after being previously

convicted of a crime of domestic violence]; *United States v. Marzzarella* (3d Cir. 2010) 614 F.3d 85, 96 [federal conviction, 18 U.S.C. § 922(k) possession of a handgun with obliterated serial number]; *United States v. Chester* (4th Cir. 2010) 628 F.3d 673 [federal domestic violence misdemeanor evaluated under intermediate scrutiny]; *Peruta v. County of San Diego* (S.D.Cal. 2010) 678 F.Supp.2d 1046, 1057–1058.).[22] This conclusion makes sense. While Second Amendment rights are not evaluated by strict scrutiny standards like regulations involving race, speech or alienage, they are enumerated specifically in the Constitution and considered as fundamental and individual. (See generally, *Clark v. Jeter, supra,* 486 U.S. 456, 461.) "To withstand intermediate scrutiny, a statutory classification must be *substantially* re-

[22] The majority refers to *United States v. Vongxay* (9th Cir. 2010) 594 F.3d 1111 for support on the issue of equal protection. However, that case dealt with the federal felon-in-possession statute. (*Id.* at p. 1118.) *Heller* seems to have no quarrel with felon restrictions. Additionally, as noted, almost all federal courts have opted to require an intermediate or heightened scrutiny analysis in this area. "Previously, the Supreme Court used the rational basis standard of review to uphold a predecessor felon in possession statute against a Due Process claim. [*Lewis v. United States* (1980) 445 U.S. 55 (63 L.Ed.2d 198, 100 S.Ct. 915).] . . . . [S]everal courts suggest that the intermediate test is now applicable when evaluating a *Heller*-based equal protection challenge. (*See United States v. Schultz,* 2009 WL 35225 at *5; see also *United States v. Bledsoe* No. SA08-CR-13(2), 2008 WL 3538717 (W.D.Tx. Aug. 8, 2008).) This court agrees that [the statute] should be reviewed under intermediate scrutiny.‖ (*United States v. Radencich* (N.D.Ind. Jan. 20, 2009, No. 3:08-CR-00048(01)RM) 2009 WL 127648.) Importantly, *Vongxay* did not face a felony statute that criminalized only individuals convicted in one state, while excusing the same classes of convicted persons in all the other states.

lated to an important governmental objective." (*Ibid.*, emphasis added.)

Since this case involves the Second Amendment right of an individual to possess a firearm, as discussed above, the standard of review is intermediate or heightened scrutiny, a discussion absent in the majority opinion. Additionally, while *Heller* indicates there may be historical grounds for precluding convicted felons or mentally ill persons from possessing firearms, there is no evidence that individuals convicted of misdemeanors were precluded historically from possessing guns and rifles. Indeed, the value and necessity of rifles from the musket to the Winchester is almost mythical in the nation's saga. Also, the weapons here were rifles located in the defendan's home. Consequently, we are not dealing with issues concerning a restriction on possession of firearms in a public place or location. Furthermore, we do not have an issue of commercial transactions in weapons where the state may wish to license such conduct. Based on this record, we cannot say the defendant used any weapons in a violent act, domestic or otherwise, or a transaction involving illegal substances. Nor is there evidence in this record the defendant was engaged in violent conduct previously, save a violation of section 242. The only evidence we have in this record is the defendant had certain rifles in his home which he used for hunting purposes, and which he believed he had the right to possess for such purposes.

Consequently, I believe under the heightened scrutiny required for a restriction of a Second Amendment right, the government cannot justify

this statute under the equal protection clause of the Fourteenth Amendment.

Indeed, I can go further, without conceding the issue of scrutiny. Even if the rational relationship test is the proper standard of review here, the government cannot present a reasonably conceivable state of facts that could provide a rational basis for the classification. (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 481–482 [97 Cal.Rptr.2d 334, 2 P.3d 581].) If there are no plausible reasons for the classification, the classification must fail. (*FCC v. Beach Communications, Inc.* (1993) 508 U.S. 307, 313 [124 L.Ed.2d 211, 113 S.Ct. 2096].) For example, a drug store owner properly challenged a county ordinance that banned the sale of tobacco products at drugstores but not at grocery stores or "big box" stores containing licensed pharmacies on equal protection grounds. (*Walgreen Co. v. City and County of San Francisco* (2010) 185 Cal.App.4th 424, 439 [110 Cal.Rptr.3d 498].) And a statutory licensing scheme that imposes greater employment restrictions on care providers who had first degree burglary and second degree robbery convictions while not imposing the same on those convicted of murder, voluntary manslaughter, mayhem, or crimes involving the use of a handgun was also found to violate the equal protection clause. (*Doe v. Saenz* (2006) 140 Cal.App.4th 960, 991–992 [45 Cal.Rptr.3d 126].)

It simply cannot be considered a valid argument that individuals convicted of the enumerated misdemeanors in section 12021, subdivision (c) are more likely to use firearms improperly than those who commit similar crimes in the other states or federal jurisdictions and now reside in California. Geogra-

phy does not determine dangerousness or likelihood of felonious behavior; yet that is the singular basis for the classification in section 12021, subdivision (c).

The majority argues that California provides due process protections such as the appointment of counsel and admonitions that advise California defendants they could be prosecuted for a felony if they possess firearms after the misdemeanor conviction. As to the latter contention, there is no evidence the defendant here was ever advised he could not possess any firearm as a result of his battery conviction. The evidence of such admonition would be easy to establish with a transcript of the battery plea or sentencing. Yet the record is silent on this battery prior. In fact, the only evidence in this record is the defendant believed he could keep his rifles in his home, as he testified. Regarding the appointment of counsel argument, we need to acknowledge all states, under the Fourteenth Amendment, are obligated to provide a defendant the right to counsel when one's liberty is at issue. (*Argersinger v. Hamlin* (1972) 407 U.S. 25, 37 [32 L.Ed.2d 530, 92 S.Ct. 2006]; *Gideon v. Wainwright* (1963) 372 U.S. 335, 341 [9 L.Ed.2d 799, 83 S.Ct. 792].) Alternatively, this record does not reflect defendant had the assistance of counsel when he was convicted of the misdemeanor prior. And even if the record established defendant had been duly advised of the consequences of possession of a firearm imposed by section 12021, subdivision (c), the admonishment would not cure the equal protection violation associated with the disparate treatment given to California and out-of-state misdemeanants. (*See People v. McKee, supra,* 47 Cal.4th 1172, 1203–1207 [providing certain "guarantees" does not necessarily satisfy equal protection requirements].)

It is also true the problems we discuss here can be easily resolved with legislative action. The Congress has previously determined that federal law should preclude persons previously convicted of a crime involving domestic violence from possessing a firearm. Under title 18 United States Code section 922(g)(9), it is a crime for any person "who has been convicted in any court of a misdemeanor crime of domestic violence . . . [to] possess in or affecting commerce, any firearm or ammunition." Under section 921(a)(33)(A), the term "'misdemeanor crime of domestic violence'" means an offense that "is a misdemeanor under Federal, State, or Tribal law," and has an element of the use or attempted use of physical force or the threatened use of a deadly weapon on a particular group like a spouse, parent or partner. (Fn. omitted.) In other words, a broad definition of the class of crimes of other jurisdictions would resolve the equal protection issues of this statute. (*United States v. Hayes* (2009) 555 U.S. ___ [172 L.Ed.2d 816, 129 S.Ct. 1079].) Additionally, this was the approach used by the California Legislature in Penal Code section 12021, subdivision (a), dealing with prior felony convictions that serve as a predicate for prohibiting subsequent firearm possession. As section 12021, subdivision (a)(1), states: "Any person who has been convicted of a felony under the laws of the United States, the State of California, *or any other state, government, or country*, . . . is guilty of a felony." (Emphasis added.) Clearly, the fix to this equal protection problem is simple and has been done by our Legislature as well as the Congress. The two statutes indicated above avoid the equal protection issue and allow for similarly situated classes of convicted misdemeanants to be equally and fairly treated.

The majority contends this suggested fix would require local prosecutors to review statutes and records from other states or jurisdictions before they could make charging decisions. However, that review has already been adopted by federal prosecutors in the case of title 18 United States Code section 922(g) cases and the California Legislature has obligated prosecutors to assess "felony" convictions in "any other state, government or country" under section 12021, subdivision (a). Again, we are focusing on an enumerated right that is entitled to heightened scrutiny before it may be regulated by the Legislature. It is not a simple restriction on commercial behavior that is reviewed by the rational basis test. And, the burden to check records from other states is little enough to ask where failure to do so unequally subjects only those with California prior misdemeanor convictions to felony prosecution. In my view, the majority has not established a satisfactory and legally valid basis to discriminate, for purposes of the right to keep and bear arms, between similarly situated persons, previously convicted of a similar misdemeanor in California and another state, who then reside in this state.

Therefore, this conviction must be reversed because section 12021, subdivision (c)(1), is unconstitutional.

Dondero, J.

People v. Dalacy, A125803

Trial Court: Napa County Superior Court

Trial Judge: Hon. Diane M. Price

Counsel:

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Gerald A. Engler, Assistant Attorney General, Martin S. Kaye and Laurence K.
Sullivan, Deputy Attorneys General, for Plaintiff and Respondent.

Appendix B: Denial of Petition for Review by Supreme Court of California

Court of Appeal, First Appellate District,
Division One - No. A125803

S191745

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE,

Plaintiff and Respondent,

v.

RICK CHARLES DELACY,

Defendant and Appellant.

The petition for review is denied.

Kennard, J., is of the opinion the petition should be granted.

CANTIL-SAKAUYE
Chief Justice

Appendix C: Superior Court Minute Order

SUPERIOR COURT OF CALIFORNIA
COUNTY OF NAPA

MINUTE ORDER

Case: People vs. Delacy, Rick Charles
Judge: Diane Price
Courtroom: Department G
Event: Jury Trial – No T/W Felony
PID#: 99102513-11

Case #: CR142103
Event Date: 03-30-09
Clerk: R. Charles
Reporter: Benite Duncan, #6715
Cite/Report # 08-06043

Appearances:
L. Hafenstein, Deputy District Attorney
C. Spieckerman, Counsel for Defendant who is present

All parties waive jury trial in this matter.

Pursuant to stipulation of counsel, the Court receives the Preliminary Hearing transcript dated November 26, 2008 along with Exhibit 1 of same date.

The Court DENIES Defendant's Motion to Dismiss the information as fully stated on the record.

Court stands in recess until 1:30 pm this date.

Court resumes at 1:30 pm with all parties present as heretofore stated.

The Court has reviewed the Preliminary Hearing transcript dated November 26, 2008 along with Exhibit 1 of same date.

Officer Ritzie Tolentino is duly sworn and testifies before the Court on behalf of the People.

PEOPLE REST.

Rick Delacy is duly sworn and testifies before the Court on his own behalf,

DEFENDANT RESTS.

Court hears arguments of counsel and the matter is submitted.

The Court finds Defendant is GUILTY of counts one, two, three and four of the Information as fully stated on the record this date.

Court orders this matter referred to Probation for a sentencing report and recommendation, and matter continued to April 30, 2009 at 8:30 am in Courtroom E for Sentencing.

Defendant ordered to appear.

No. 11-

IN THE
Supreme Court of the United States

RICHARD C. DELACY,
Petitioner,

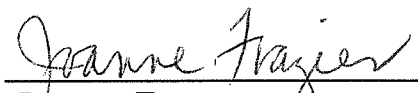
v.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

AFFIDAVIT OF SERVICE

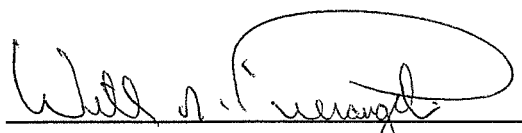
I HEREBY CERTIFY that all parties required to be served, have been served, on this 6th day of September, 2011, in accordance with Supreme Court of the United States Rule 29.3, three (3) copies of the foregoing **PETITION FOR A WRIT OF CERTIORARI** by placing said copies in the U.S. Mail, first class postage prepaid, addressed as listed below:

Kamala D. Harris, *Attorney General*
Dane R. Gillette, *Chief Assistant Attorney General*
Gerald A. Engler, *Assistant Attorney General*
Office of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102



JOANNE FRAZIER
BYRON S. ADAMS
1615 L Street, NW, Suite 100
Washington, DC 20036
(202) 347-8203

Sworn to and subscribed before me this 6th day of September, 2011.



WILLIAM R. PIERANGELI
NOTARY PUBLIC
District of Columbia

My commission expires April 30, 2014.

No. _____

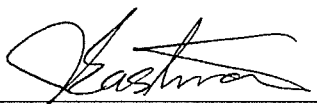
Richard C. Delacy v. People of the State of California

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the Petition for Writ of Certiorari contains 5,224 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 6, 2011.



JOHN C. EASTMAN