IN THE SUPREME COURT OF MISSISSIPPI

STATE OF MISSISSIPPI	**PETITIONER**
v.	**No. 2013-M-01220**
ROBERT SHULER SMITH, DISTRICT ATTORNEY FOR HINDS COUNTY, MISSISSIPPI, *et al*.	**RESPONDENTS**

BRIEF OF THE MAGNOLIA BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS ROBERT SHULER SMITH, DISTRICT ATTORNEY FOR HINDS COUNTY, ET AL.

ORAL ARGUMENT REQUESTED

On Appeal from the
Circuit Court of Hinds County, Miss.
No. 251-13-595

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Miss. R. App. P. 28(a)(1), the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. State of Mississippi, *Petitioner*
2. Attorney General James Hood and Assistant Attorney General Harold E. Pizzetta, III, *Counsel for Petitioner*
3. Robert Shuler Smith, District Attorney of Hinds County; Tyrone Lewis, Sheriff of Hinds County; Jerry Moore, John Brown, Lawrence Funches, Bennie C. Buckner, Constables of Hinds County; Willie Simmons, Sollie Norwood, John Horhn, and Hillman Frazier, *Respondents*
4. Lisa M. Ross, *Counsel for Respondents*
5. The Magnolia Bar Association, *Amicus Curiae*
6. Latrice Westbrooks and David Neil McCarty, *Counsel for Amicus Curiae*
7. The Honorable Winston L. Kidd, *of the Hinds County Circuit Court*

So CERTIFIED, this the 6th day of August, 2013.

Respectfully submitted,

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Introduction

It is undisputed that House Bill 2 unravels nearly two centuries of established law regarding the rights of some Mississippians to bear arms. The Legislature's dramatic revision of HB2, and the resulting challenge to those changes by Law Enforcement officials and individuals from Hinds County, Mississippi, can only be properly understood by examining the legal history of the right to bear arms in Mississippi.

It is a fiction to assume that the right to bear arms has always been enjoyed in an unlimited fashion by the populace. As a paramount matter, the right has always been balanced against an overriding mandate to ensure the public safety. Further, for many decades, the right to bear arms was not allowed to African-Americans or to females. It is only through acknowledging the facts of our shared history that we in the 21st century can properly assess the impact of HB2 on modern society.

I. Four Constitutions and Four Rights, but Not Shared by All.

The right to bear arms has greatly expanded and contracted through the four Constitutions in place since our State's founding in 1817. Over the past two centuries, the right has also contained important limitations. Most notably, the right to bear arms was not enjoyed by all citizens until the late 20th century.

The right was first codified in 1817 in our original Declaration of Rights. "Every citizen has a right to bear arms in defence of himself and the State." Miss. Const. of 1817, Art. I. Sec. 23. The right to bear arms was therefore limited in three key ways: for defense, and then only of the body or in service to Mississippi itself.

The right to bear arms was also limited by the extremely narrow group of persons who were considered a "citizen" in 1817. At the time, this would have excluded everyone but "free,

white male person of the age of twenty-one years or upwards . . . ." Miss. Const. of 1817, Art. III. Sec. 1.

We must acknowledge that at the time, our Constitution allowed the ownership of other humans; indeed, a special section was reserved in order to prevent freedom from passing to those enslaved. *See* Miss. Const. of 1817, Art. VI Sec. 1 ("The General Assembly shall have no power to pass laws for the emancipation of slaves"). A nineteen year old African-American female then would not have in any way retained, enjoyed, or been able to exercise the "right to bear arms" in the earliest days of our State. Even a free, white male over the age of 21 was required to own land to run for state office. Miss. Cons. of 1817, Art. III. Sec. 7; Art. IV, Sec. 3. The right to bear arms did not extend to any measure of the entirety of the populace.

Nor were those enslaved in Mississippi treated with any measure of legal respect or rights, let alone the right to carry a pistol or sword with which they might protect themselves. The opposite were true—that if a slave escaped, she would be hunted down. Indeed, state law at the time "expressly confers the right; and the policy of the country, makes it the duty of every citizen to arrest a runaway slave." *Thompson v. Young*, 1 George 17, 1855 WL 3957, *1 (Miss. Err. App. 1855). "It follows therefore, necessarily, that if any person, in essaying to capture a runaway, shall meet with resistance, he may lawfully oppose force to force . . . ." *Id*.

It is an utter fiction to pretend that since the inception of our State that all were vested in some sort of unbounded right to carry arms, when many Mississippians were not even allowed to travel without fear of detention and attack.

In the second Constitution from 1832, similar language on the right to bear arms was retained, although theoretically broadened: "Every citizen has a right to bear arms in defence of himself and of the state." Miss. Const. of 1832, Art. I Sec. 23. The changing of the case from the more proper and specific title of "State" to the lower case "state" could be seen as a broadening

of what exactly a citizen was allowed to protect. The 1817 language would seem to limit the right to Mississippi alone, while 1832's use of the latter "state" could be seen as an empowerment to defend the nation, other states, or perhaps even a county or municipality.

As in 1817, the right to bear arms would not have extended to those who were not a "free white male person of the age of twenty-one years or upwards." Miss. Const. of 1832, Art. III Sec. 1 (defining qualified electors). Vast numbers of Mississippians remained in legal and constitutionally assured bondage. Miss. Const. of 1832, Art. VI Sec. 1.

In 1868, Mississippi's post-Civil War Constitution simultaneously broadened and narrowed the right. "All persons shall have a right to keep and bear arms for their defence." Miss. Const. of 1868, Art. I Sec. 15. The right expanded from only citizens to "All persons." However, the right also narrowed considerably; a person no longer had the right to bear arms in defence of the State or state, but only "for their defence."

For the first time, and in the wake of the Civil War, this noble document theoretically covered *all* Mississippians, and not just those who were free, white, and male: "All persons resident in this State, citizens of the United States, are hereby declared citizens of the State of Mississippi." Miss. Const. of 1868, Art. I Sec. 1. Therefore for the first time since the founding of our State in 1817, it was assured that women, African-Americans, Native Americans, and "All persons" had the right to bear arms.[1]

The modern Constitution of 1890 contains the fourth and final pronouncement on the right to bear arms, and it again broadened and limited the right. "The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons." Miss. Const. of 1890, Art. 3 Sec. 12.

[1] Still, women did not have the right to vote. Miss. Const. of 1868, Art. VII Sec. 2.

Therefore the right was again limited from "All persons" back to the original understanding that only "citizens" had the ability to bear arms. The right was also broadened back to the 1832 levels where a citizen was allowed to defend the "state." The ambiguity of the earlier meaning of the word state was resolved: a person had the right to bear arms "in aid of the civil power when thereto legally summoned." A "civil power" is broader than just the State, but before bearing arms in defense of the civil power there first had to be a legal call to arms. Third, for the first time the right was broadened to allow a person to bear arms specifically in defense of "home . . . or property."

Joined with the prior existing rights to defend the person, the 1890 Constitution established a quartet that could legally be defended: self, home, property, and civil power. The right was also clarified that a citizen had the right to "keep" these arms in defense of the quartet.

The right could not be questioned; by whom, it was not stated, but the broad statement indicates that neither State nor citizen could question one's right to keep and bear arms in defense of the quartet.

Yet there was an unprecedented and extremely specific limitation to the right: "the legislature may regulate or forbid carrying concealed weapons." Therefore while the quartet could rightfully be defended by a citizen, the Legislature retained the power to determine *how* the right could be exercised. This regulatory power was so extreme that the legislative branch could even forbid the citizenry from carrying concealed weapons. As will be shown, it did just that.

Just as with the Constitution of 1868, the rights were extended to "All persons resident in this State, citizens of the United States, are hereby declared citizens of the State of Mississippi." Miss. Const. of 1890, Art. 3 Sec. 8.

Unlike the dates when we know that free, landed, white males received the right to bear arms, we do not have precise dates for when African-Americans received this right. We can triangulate from other sources. It cannot be contested that deep into the 20th century that Mississippi refused the franchise to a large segment of her population, and likewise refused to acknowledge that her black citizens were the equal of white.

While this institutional denial of equality was not wholly cured, we do know that the "[a]fter the passage of the 1965 Voting Rights Act, by 1967 61.8 percent of Mississippi's black electorate was registered to vote—a stunning achievement." Myrlie Evers-Williams & Manning Marable, *The Autobiography of Medgar Evers: A Hero's Life and Legacy Revealed through His Writings, Letters, and Speeches*, 295 (Basic Civitas Books 2005). Greater access to elected office was still denied until 1979, when "federal courts ordered Mississippi to redraw districts to permit more African Americans to be elected." *Id*. This assurance of the right to vote just 46 years ago carried with it sibling rights of assembly, speech, and the right to bear arms.

Through this process, it can be seen that the right to bear arms in Mississippi was never static, but has expanded and contracted in many ways since the State's founding in 1817. It is also clear that the right was not some mythical freedom granted to all the day Mississippi came into being, but was carefully limited both in the scope of its reach and its application to a diverse populace. The right to bear arms may also have only been possessed by some Mississippians within the last 50 years.

II. The Legislature Values Public Safety over the Right to Bear Arms.

The evolution of the right to bear arms in our Four Constitutions parallels the longstanding regulation of guns and their use in the law of Mississippi. The State's past Codes are riddled with an extreme Legislative hostility to the use of guns, and an attempt to maximize the safety of public spaces and schools.

In large part, this was due to the young Territory's insistence that it would not be a frontier outpost—and as a result, would not tolerate the "inhuman, injurious, and detestable practice of duelling . . . ." Code 1816, Art. 29 Sec. XXXIX. Dueling was a pervasive scourge in the Territory. "This barbarous and savage conduct has of late obtained a great degree of prevalence, to the destruction of the lives of some valuable members of society, and involving the feelings of others, who, from principle and respect for the laws of their country, will not engage in this pernicious practice . . . ." Code 1816, Art. 29 Sec. XXXIX.

As one philosopher would have it, prior to these laws, our Territory was "in a condition of Warre, wherein every man to every man, for want of a common Power to keep them all in awe, is an Enemy . . . ." Thomas Hobbes, *Leviathan*, ch. XV at 204 (Penguin 1985). It was in this state of nature, "where every man is Enemy to every man," that dueling grew so popular. *Leviathan*, ch. XIII at 186. In such a state of war there was "no place for Industry, because the fruit thereof is uncertain," likewise "no Culture . . . no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short."*Leviathan*, ch. XIII at 186.

The Mississippi Founders were determined to pull the Territory from this state of perpetual misery, and this desire drove the earliest bans on guns, which evolved as the direct antecedents on today's bans on concealed weaponry. Dueling, which came "from a false sense of honor," was so widespread that from the inception of the State there were multiple bans on the act, its encouragement, assistance, and in some cases even talking about it. *See* Code 1816, Art.

29 Sec. XXXIX, XL (planning a duel the same as having a duel), XLI (anybody who duels or assists a duel shall be charged with wilful murder if there is a death).[2]

This dedication to preserving public safety carried forward once Mississippi became a State. While in 1816 dueling was generally banned, there was little specificity about what weaponry was banned. A precursor to the concealed carry law arose in 1857, when the Legislature laid out a list of hardware which forbidden from use in not just duels, but in "fighting" in general. *See* Code 1857, Sec. XVII Art. 54. Article 54 banned the use of a "any rifle, shot-gun, sword, sword-cane, pistol, dirk, bowie-knife, dirk-knife, or any other deadly weapon" in a fight occurring "in any village, city, town, or other public place . . . ." Code 1857, Sec. XVII Art. 54.

In 1857, not only could one not use these weapons in a fight, one could also not openly carry them in certain circumstances. It was illegal for a person "having or carrying any dirk, dirk-knife, sword, sword-cane, or other deadly weapon" to "in the presence of three or more persons, exhibit the same in a rude, angry, or threatening manner, not in necessary self-defence," or to "in any manner, unlawfully use the same in any fight or quarrel . . . ." Code 1857, Sec. XVII Art. 54; *see Gamblin v. State*, 45 Miss. 65 (Miss. 1871) (affirming conviction for same).

The Code of 1857 also maintained in force the prohibition against duels. *See generally* Code of 1857, Sec. XVII, Arts. 51-53. The dueling ban was strengthened to the point that it was illegal to be a "second, aid, or surgeon" to a duel, and even to "send, deliver, or cause to be sent or delivered, any challenge, written or verbal, in this State, to any person, to fight a duel out of this State," or to leave the State to fight a duel. Code of 1857, Sec. XVII, Arts. 52-53.

[2] Even if no one died from the duel, those involved—including anybody that simply helped the duel to occur—would suffered devastating penalties if convicted. Code 1816, Art. 29 Sec. XXXIX. A year in jail, a fine of $1,000 dollars (or about $13,000 in 2013 money), and a permanent bar from "any office of honor, profit or trust, under the government of this territory" for five years. Code 1816, Art. 29 Sec. XXXIX. If a person died during a duel, and the survivor were convicted, he would receive the death penalty. Code 1816, Art. 29 Sec. XLI.

As a reminder, the Constitution in force at the time only allowed that "Every citizen has a right to bear arms in defence of himself and of the state," with those citizens likely only including landholding free white males. Miss. Const. of 1832, Art. I Sec. 23.

While generally the laws were focused on public safety about guns, in at least one notable example from 1857, the State sought to honor God by prohibiting the use of firearms. "If any person shall be found hunting with a gun, on the Sabbath, he shall, on convicted thereof, be fined not less than five, nor more than twenty dollars." Code of 1857, Sec. XLVIII Art. 229.

Clearly, under the first two Constitutions and earliest Codes of Law, the right to bear arms was extremely limited.

III. The Modern Ban on Concealed Weapons Commences in 1880.

The Revised Code of 1880 contained the first statute to explicitly ban concealed weapons, although with notable caveats. "Any person, not being threatened with, or having good and sufficient reason to apprehend an attack, or travelling (not being a tramp) or setting out on a journey, or a peace officer, or deputy, in discharge of his duties, who carries concealed, in whole or in part, any bowie knife, pistol, brass or metalic knuckles, slung-shot, or other deadly weapon of like kind or description, shall be deemed guilty of a misdemeanor . . . ." Code of 1880, Ch. 77 § 2985.[3]

The Concealed Carry law therefore banned *any* concealment of a weapon, no matter how minor.[4] The intent of the 1880 Concealed Carry laws were clear: to maximize public safety in

[3] A "slung-shot" under the terms of this statute would not be the slingshot of modern times, but closer to what we envision as the sling used by David in his defeat of Goliath. *See* 1 Samuel 17:49-50. One source believes they "were widely used by criminals and street gang members in the 19th Century," as slung-shots were "easy to make, silent, and very effective, particularly against an unsuspecting opponent," giving the weapons "a dubious reputation, similar to that carried by switchblade knives in the 1950s, and they were outlawed in many jurisdictions." Wikipedia, *Slungshot*, "As a weapon," http://en.wikipedia.org/wiki/Slungshot.

[4] The wide-ranging series of laws adopted that year also banned selling one of the listed weapons "to any minor or person intoxicated, knowing him to be a minor in a state of intoxication . . . ." Code of 1880, Ch. 77 § 2986. It was likewise explicitly illegal for a father to allow a "son under the age of sixteen years to carry concealed, in whole or part, any weapon" listed in Section 2985. Code of 1880, Ch. 77 § 2987. It was also illegal for "[a]ny student of any

society in general and school in specific. It also regulated within the family by prohibiting fathers from allowing their sons to carry concealed. It repeatedly pried concealed weapons away from school age children, by criminalizing both their sale and even placing legal penalties on teachers who knew their students were armed.

The 1880 Concealed Carry law was also strict in what a concealed weapon might be. It was not simply a weapon completely concealed on a person—like in the belt behind a coat—but any of those deadly weapons "concealed, in whole or in part . . . ." Therefore if a person had "brass or metalic knuckles" even sticking just a bit into her purse or pocket, she would be guilty of carrying a concealed weapon. Any concealment of any type was illegal.

It is important to note that the 1880 Concealed Carry statute did not differentiate specially between pistols or swords or "metalic" knuckles—all were a "deadly weapon," and all were tightly regulated. The gun held no special place in the hearts of the Mississippi Legislature of 1880. It was public safety which was held sacred, not the metal and brass knives and pistols which might threaten the public.

In 1890 Mississippi enacted the last of her Four Constitutions, and the 1892 Code further clarified the ban on concealed weapons. "Any person who carries concealed, in whole or in part any bowie-knife, dirk-knife, butcher-knife, pistol, brass or metallic knuckles, slung-shot, sword, or other deadly weapon of like kind of description, shall be guilty of a misdemeanor . . . ." Code of 1892, § 1026. There were similar defenses as in 1880 allowed to why a person might be carrying concealed. Code of 1892, § 1027.[5]

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university, college, or school" to "carry concealed, in whole or in part," any of the above weapons—and "any teacher, instructor or professor who shall knowingly, suffer or permit any such weapon to be carried by any student or pupil" would suffer a misdemeanor along with the pupil. Code of 1880, Ch. 77 § 2988.

[5] It was likewise still illegal in 1892 as in 1880 "to sell, give, or lend" to a minor or drunk "any deadly weapon" which could be concealed. Code of 1892, § 1028. The penalty of a father giving "any son under the age of sixteen" a weapon which could be concealed was again retained, as was the "college prohibition." Code of 1892, §§ 1029-30.

Even under the 1890 Constitution—with its modern powers to protect the quartet of self, home, property, and civil power—it was still illegal to publically carry a pistol or firearm in certain circumstances. *See* Code of 1892, § 1031 (banning display of a weapon "in a rude, angry, or threatening manner, not in necessary self-defense" when in the presence of "three or more persons").

Dueling was still banned and prohibited in all its forms, even if one simply taunted another for refusing to duel. Code of 1892, §§ 1036-1041. It was likewise still illegal to use a pistol in a fight. Code of 1892, §1041. Simply because the right to bear arms had expanded somewhat did not mean that the Legislature was going to allow a return to a state of nature and war in its wake.

In the decades since, the concealed carry law and ban on threatening public display of weapons was not heavily modified—until 2013. *See* Hemingway's Annotated Code of 1917, § 827 (ban on "concealed, in whole or in part" of "any bowie knife, dirk knife, butcher knife, pistol, brass or metallic knuckles, slungshot, sword or other deadly weapon of like kind of description"), § 836 (ban on exhibition of pistol in "rude, angry, or threatening manner"); Miss. Code of 1830, §853 (banning of concealed weapons), §860 (ban on exhibition of deadly weapons); Miss. Code of 1942 § 2079 (ban on carrying concealed weapons "in whole or in any part"), §2086 (prohibition on display of "any deadly weapon" as above).

Throughout the past 197 years, the Legislature has tightly controlled when a pistol or deadly weapon could be carried or used, and at all times was focused on maximizing the safety of the public and the public streets. Since 1880, when the precursor to the modern concealed carry law was first enacted, the Legislature has always banned carrying any deadly weapon when it was "concealed in whole or in part." That public safety measure existed 133 years until eviscerated by HB2.

IV. The Supreme Court Safeguarded the Public over the Right to Bear Arms.

In accord with the Legislature's goal of protecting public safety, the Supreme Court has long taken an unforgiving eye towards violation of the concealed carry law, even when the results were harsh. For the purpose of the law was to save lives: "The statute was enacted in the interest of the preservation of life, by affixing the stigma of the law of the land to him who carries a concealed pistol, loaded or unloaded, except in the cases allowed by the statute." *State v. Bollis*, 73 Miss. 57, 19 So. 99, 100 (Miss. 1895).

As one justice stated, "[t]he evil that was intended by forbidding the carrying of concealed weapons was to prevent carrying weapons on the person into crowds or in places that would endanger public security, and prevent or minimize breaches of the peace and unnecessary killings." *Clark v. City of Jackson*, 155 Miss. 668, 124 So. 807, 808 (Miss. 1929) (Ethridge, P.J., concurring).

Simply put, there is a limit on the right to bear arms. As put forth by the Petitioner in the past, "The State contends that the right to keep and bear arms is not absolute and is subject to the reasonable legislative exercise of the police powers of the State." *James v. State*, 731 So.2d 1135, 1137 (Miss. 1999) (holding the statute which prohibits possession of firearms by felons as constitutional).

In the 1895 case of *Bollis*, a man had argued that his concealed pistol was unloaded, and so it could not be considered deadly. *Id*. The Supreme Court vehemently disagreed: "nothing could be easier than to carry the pistol in one pocket, and the cartridges in another, and, when desired, load quickly, and take life." *Id*. To allow such a construction would gut the concealed carry law, which was meant to preserve life. *Id*.

In one of the other early examinations of the law, the Court made clear that it was a "strict liability" law—it was the fact of the violation that mattered, regardless of intent. *Strahan v. State*, 68 Miss. 347, 8 So. 844, 844 (Miss. 1891).

The facts in *Strahan* were unfair by most standards: the defendant "was indicted for carrying concealed weapons," but only after he had been given a pistol by the sheriff of Covington County for the express purpose of repairing the gun. *Id*.[6] Poor Strahan was arrested after he had repaired the pistol, and then "put it in his pocket . . . for the purpose of conveying it to the sheriff." *Id*. When he pulled the gun from its concealed place "to be handed to the sheriff," he was arrested—one assumes by the lawman himself. *Id*. He was then convicted for a violation of the concealed carry law. *Id*.

The unfortunate repairman appealed, arguing that his intent was not to conceal a deadly weapon. *Id.* The Supreme Court refused to reconsider the conviction. *Id*. "The defendant did the act forbidden by the statute, which makes the prohibited fact and not the intent criminal." *Id*.

The Court had a history of narrowly construing the law. Just a few years before *Strahan*, it had declared that "[t]he right reserved by the statute to carry concealed weapons is co-extensive only with the conditions prescribed by the statute; and, when these conditions cease, the right ceases also." *McGuirk v. State*, 64 Miss. 209, 1 So. 103, 104 (Miss. 1887) (affirming conviction when "It is quite apparent that the weapon was carried by appellant, not as a precaution against an apprehended attack," but "being carried home from . . . where it had been previously left by him").

Until 2013, the concealed weapons law was a clear and "strict liability" statute. If any part of a weapon was concealed, the law was violated. *See Martin v. State*, 93 Miss. 764, 47 So. 426, 427 (Miss. 1908). As the Court established over a century ago, "if a person carry a deadly

[6] The facts are included in the Southern Reporter, but are not part of the Court's opinion, as was sometimes the custom in this period.

weapon, and only a part of it is concealed, the other part being visible, he is guilty of carrying a concealed weapon, within the meaning of the statute." *Id*.

In *Martin*, the Supreme Court made clear that "[t]he use of the words in the statute, 'in whole or in part,' does not constitute any essential description of the offense named by the statute, but it is merely defining what is meant by concealment." *Id*. In other words, until 2013, "concealed" was simply and clearly defined as "in whole or in part."

The understanding of what "carrying" meant was interpreted just as broadly as the word "concealed." In one 1929 case, a man was arrested for the concealed carry of a pistol; he argued it was neither, since it was simply under his feet in the floorboard of a car. *Clark v. City of Jackson*, 124 So. at 808. As one might expect at this point, the Supreme Court was unimpressed. *Id*.

For the pistol "was lying in the foot of the car, with both of his feet on it in an effort to conceal it; his person was therefore in contact with the pistol, which was easily accessible to appellant—he had only to bend his body in order to reach down and take the pistol in his hand." *Id*. This was "carrying," which the Court defined as "where the weapon is so carried that it is readily accessible, and available for use." *Id*.

Despite the harsh results it might bring, the statute was therefore extremely easy for both law enforcement and the citizenry to understand. Like a speeding limit set at 55 miles per hour, one understood that at 56 miles per hour the law was violated. Likewise, law enforcement understood that in nearly every single case, a partially visible "deadly weapon" was illegal, and that the person carrying it was subject to arrest. The century old definition of the what "concealed" and "carrying" meant made the law easy to enforce and understand.

Nor would an invocation of the general right to bear arms provide a defense to a violation of the concealed weapons law. At the turn of the 20th century, one man argued that his

conviction for carrying a concealed weapon was invalid because he was actually defending his home. It was undisputed "that Jim Wilson had carried a pistol in his pants pocket in his home or residence." *Wilson v. State*, 81 Miss. 404, 33 So. 171, 171 (Miss. 1903). Although the Court was thrillingly brief in its recitation of facts and law in those days, the posture of the case is clear that Jim was arrested for carrying a concealed weapon—that "he had [a] pistol in his pocket at his own home . . . ." *Id*.

Jim "attempted to justify his action under section 12 of the constitution," which allowed him to defend his home and property—the section still in force today. *Id*. According to Jim, he was trying to defend some chickens, because the day before he thought "one or two of the chickens were taken," and someone had also broken a window. *Id*. at 171-72. His attorney argued that the broken windows and stolen chickens were enough to show that while Jim may have carried the gun in his pocket, it was for a legitimate reason—the defense of his home and property. *Id*. at 172.

The Court disagreed, and dismissed the defense as based on "vague and uncertain evidence . . . ." *Id*. The blanket invocation of the Constitution in light of the evidence was "too indefinite to constitute a defense of any sort." *Id*. Ultimately, "[t]he law will not base a right of action or defense upon mere possibilities, one or more." *Id*.

The *Wilson* case was a landmark in Mississippi law. It clearly ruled that the Legislature might even ban a citizen from having a concealed weapon on their own property, regardless of the language of the Constitution. Hemingway's Annotated Code of 1917 agreed, stating that *Wilson* meant that the concealed weapons "section is constitutional and under it one can not carry a concealed weapon in his own home." *See also annotations in* Miss. Code Ann. of 1930, at §853; Miss. Code Ann. of 1942, §2079.

After it was well established that the Constitution of 1890 did not inherently afford the right to have a concealed weapon at the home, in 1991 the Legislature amended the statute to allow the practice. *See* 1991 Miss. Laws Ch. 609 (S.B. 2102); *James*, 731 So.2d at 1138.

The Court's institutional protection of public safety is repeated throughout cases of this era. Two years after *Wilson*, a man was arrested and convicted in Chickasaw County for the violation of an Okolona city ordinance banning concealed weaponry. *Rosaman v. City of Okolona*, 85 Miss. 583, 37 So. 641, 641 (Miss. 1905). The Court made clear that "[t]he city of Okolona had, as it legally might have, an ordinance denouncing a penalty against carrying concealed weapons . . . ." *Id*.

The defendant "was a nonresident of this state, and came to Okolona for the purpose of employing hands for a railroad company." *Id*. He was eventually arrested for "enticing away laborers," and had secreted his pistol away on his person. *Id*. Defendant Rosaman tried to argue that he was subject to one of the exceptions to the law at the time—that he was in the midst of travel. *Id*. at 641-42. Nonetheless, the Supreme Court refused to reconsider the conviction. *Id*. at 642.

For Rosaman "had the right to carry his pistol to Okolona, which was his point of destination, and might be regarded as a traveler until he reached his room"—but the moment he ceased traveling, he lost the special exception to the concealed carry law. *Id*. Otherwise, there would be a perverse defense that a man who was traveling indefinitely or for "weeks or months" might claim an exception to the law. *Id*. The Court would not allow this, and so strictly construed the concealed carry law. *Id*.

CONCLUSION

It is only through understanding the evolution of the right to bear arms, and which citizens possessed it, that we can understand how HB2 affects the 21st century society.

Filed this the 6th day of August, 2013,

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, David McCarty, certify that I have served a copy of the above and foregoing document to the following via filing with the MEC electronic filing system:

Ms. Kathy Gillis, Clerk
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The Trial Court

Honorable Winston L. Kidd
HINDS COUNTY CIRCUIT JUDGE

THIS, the 6th day of August, 2013.

s/ David Neil McCarty
DAVID NEIL McCARTY