People v. Zondorak: California's Attack on the Second Amendment

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On October 21, 2013, the California Court of Appeal published a decision[1] that attempts to undermine and render impotent the decision of the United States Supreme Court in *District of Columbia v. Heller*.[2]

In *People v. Zondorak*, California's "assault weapons" ban[3] was challenged as violative of the Second Amendment to the United States Constitution. The *Zondorak* court found, however, that California's ban was constitutional and in doing so gutted the holding of *Heller* by using a test that not only was not part of *Heller*, its application in *Zondorak* contradicts the words and essence of the *Heller* decision.

In *Heller*, the United States Supreme Court found that the Second Amendment to the United States Constitution protects the pre-existing right of individuals to keep and bear firearms in their homes.

Subsequent to the *Heller* decision, the Third Circuit Court of Appeals in *United States v. Marzzarella*[4] created a two-part test to determine the level of scrutiny that would apply for Second Amendment cases. The *Marzzarella* test first asks whether a law burdens a right protected by the Second Amendment. If the answer is that the conduct is not protected by the Second

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1 People v. Zondorak, 163 Cal. Rptr. 3d 491 (Cal. Ct. App. 2013).

2 District of Columbia v. Heller, 554 U.S. 570 (2008).

3 CAL. PENAL CODE § 30605 (West 2013). Under this law, a long list of enumerated weapons that have cosmetic, but not functional, similarities to military weapons are banned. *See* CAL. PENAL CODE § 30510 (West 2013). In addition to the enumerated list of banned "assault weapons," Section 30515 bans any firearm that has certain aesthetic features that are similar to military weapons, such as pistol grips and collapsible stocks, and further defines as an assault weapon any centerfire rifle that has a fixed magazine with a capacity of more than ten rounds.

4 United States v. Marzzarella, 614 F.3d 85 (3d Cir. 2010).

Amendment, the law is presumably valid. If, however, the conduct is protected by the Second Amendment, the *Marzzarella* test requires that the law be reviewed under the *Heller* standard of scrutiny.

While *Heller* explicitly failed to provide a level of scrutiny to be used for Second Amendment cases, leaving it for future courts to determine whether strict scrutiny or intermediate scrutiny would be proper, the *Heller* Court did explicitly reject rational basis scrutiny.[5] So, at the very least, any Second Amendment case, even one using the *Marzzarella* test, has to employ nothing less than intermediate scrutiny.

The *Zondorak* court facially relied upon the *Marzzarella* test,[6] and then misconstrued, misused, and contradicted that test to blatantly disregard the *Heller* decision.

In *Marzzarella*, the Third Circuit used *United States v. Miller*[7] as a threshold for ascertaining whether there was a Second Amendment right at issue. *Miller*, as explained by Justice Scalia in *Heller*, held that the Second Amendment right does not extend to "those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."[8]

The shotgun involved in the *Miller* case was not a typical shotgun. In fact, the shotgun in *Miller* was produced by J. Stevens Arms Company, which legally sold shotguns in great numbers. What made the *Miller* shotgun the subject of litigation was the fact that Mr. Miller had sawed a portion of the barrel off of the shotgun, resulting in the barrel being less than eighteen inches in length.[9] Even that would not have been illegal had Mr. Miller registered the weapon and paid the appropriate tax on it.[10] Thus, the *Miller* case did not ban shotguns generally or even J. Stevens Arms Company shotguns in particular. In fact, the *Miller* case did not even ban shotguns that had been altered to shorten their barrels to less than eighteen inches. All *Miller* did was to allow the government to require that such altered shotguns be registered.[11]

Miller, to the extent it exempts any weapon from the protections of the Second Amendment, must be read as Justice Scalia stated in *Heller*: It is an exemption from the general

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5 *Heller*, 554 U.S. at 628 n.27.

6 The *Marzzarella* test, in many regards, is a whole-cloth construct. Nothing in *Heller* ever hinted at such a test being appropriate.

7 United States v. Miller, 307 U.S. 174 (1939).

8 *Heller*, 554 U.S. at 625.

9 *Miller*, 307 U.S. at 175.

10 *Id.*

11 *Id.*

proposition that the Second Amendment codifies the pre-existing right of the people to keep arms.[12] That is, unless a weapon is so out of the ordinary as to be a weapon primarily used for unlawful purposes, such as a shotgun that has been altered to allow it to be concealed and used for indiscriminate fire, obviating its utility as a sport, hunting, or self-defense arm,[13] it is a weapon that is protected by the Second Amendment. *Heller* makes it clear that *Miller* did not stand for the proposition that entire classes of commonly used firearms could be banned.

The *Marzzarella* court was true to this standard. In *Marzzarella*, the weapon under consideration was a mass-produced handgun that had been altered to remove its serial number. The law at issue in *Marzzarella* was not a ban on handguns generally or the model of handgun that had its serial number removed in particular. What was banned in *Marzzarella* was the removal of serial numbers from a weapon.[14]

Furthermore, in *Marzzarella*, the court did not find that a handgun with its serial number removed was not protected by the Second Amendment. In fact, the *Marzzarella* court determined that the altered weapon was presumably protected by the Second Amendment and, thus, the law had to be reviewed using intermediate scrutiny. The *Marzzarella* court stated that while an outright ban on a class of weapons would likely be subject to strict scrutiny, a ban on alterations to individual weapons that did not otherwise negatively impact the availability of such weapons would be subject to the lower intermediate scrutiny review.[15]

In *Zondorak*, however, the California court ignored the *Marzzarella* test that it claimed to be relying upon, and concluded that the AK-style rifle at issue was not protected by the Second Amendment. In other words, the *Zondorak* court sidestepped *Heller* by mysteriously concluding that there was no Second Amendment issue involved in a case regarding a ban on a class of firearms.

To arrive at this unsupportable conclusion, the *Zondorak*

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12 *Heller*, 554 U.S. at 592.

13 *See* United States v. Upton, 512 F.3d 394, 404 (7th Cir. 2008), where the court explained why sawed-off shotguns are not protected by the Second Amendment:

> People do not shorten their shotguns to hunt or shoot skeet. Instead, the shortened barrel makes the guns easier to conceal and increases the spread of the shot when firing at close range—facts that spurred Congress to require the registration of all sawed-off shotguns, along with other dangerous weapons like bazookas, mortars, pipe bombs, and machine guns.

Clearly, a mass-produced, semi-automatic rifle such as an AR- or AK-style rifle that is used for sport, hunting, and defense purposes is not akin to a pipe bomb or mortar.

14 *Marzzarella*, 614 F.3d at 100–01.

15 *Id.* at 97.

court equated AK- and AR-style rifles with sawed-off shotguns,[16] and presumably, bazookas, mortars, pipe bombs, and machine guns.[17] This was nothing less than the bastardization beyond recognition of the first prong of the *Marzzarella* test, as it treated an entire class of commonly used weapons as though they were specific weapons that had been individually and illegally altered.

This treatment is without any support under *Miller* or *Marzzarella* and, in fact, clearly contradicts both cases. It is beyond question that, under *Miller* and related case law, a rifle that is mass produced for retail sale and that is used throughout the nation by millions of hunters, target shooters, and homeowners, cannot be excluded from the protections of the Second Amendment unless it has been altered to make it dangerous and unusual.

Ignoring this, the *Zondorak* court relied upon outdated California case law[18] to erroneously conclude that AK-style rifles are not in common use by hunters and target shooters and went so far as to state that an AK- or AR-style rifle is "only slightly removed from M-16 type weapons,"[19] notwithstanding the fact that the similarities are primarily cosmetic and not functional.

The *Zondorak* court based its opinion, in part, by analogizing to restrictions on speech that are allowed under the First Amendment,[20] and then conflating the dangers posed by fully automatic weapons with the non-automatic capability of AR- and AK-style semiautomatic rifles. If the *Zondorak* court's logic that a cosmetic similarity is tantamount to a functional similarity were applied to First Amendment case law, celebrated and award winning films such as *Titanic*, *American Beauty*, and *Traffic*, and classic literature such as *Romeo and Juliet*, would all be banned as child pornography. In fact, however, under *Ashcroft v. Free Speech Coalition*,[21] that type of logic was found to be fatally flawed and such bans were determined to be unconstitutional.[22]

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16 *Zondorak*, 163 Cal. Rptr. 3d at 498.

17 *See Marzzarella*, 614 F.3d at 95.

18 The *Zondorak* court repeatedly referred to People v. James, 94 Cal. Rptr. 3d 576 (Cal. Ct. App. 2009), a California court decision that contained fatal flaws in that it relied upon California legislative findings pertaining to the dangers and unusual nature of "assault weapons" that have since been debunked. Because *James* is at odds with *Marzzarella* and *Heller* in that it does not examine the subject law with the proper level of scrutiny, it is inapplicable in *Zondorak* for purposes of the Second Amendment. The *Zondorak* court impermissibly found that an entire class of common firearms in lawful use by law-abiding citizens was not protected by the Second Amendment simply because such weapons share a cosmetic similarity to military weapons.

19 *Zondorak*, 163 Cal. Rptr. 3d at 497.

20 *Id.* at 493.

21 Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

22 *Id.* at 258. In *Ashcroft*, the Supreme Court found a law that banned simulations of child pornography to be overbroad and in violation of the protections provided by the First

Since the expiration of the 1994 federal "assault weapons" ban in 2004, millions of AR- and AK-style rifles have been sold in the United States and only a few states have instituted bans on such weapons. AR- and AK-style rifles are not only common, they are available in a range of calibers and configurations, making them quite popular for use in everything from varmint control to big game hunting.[23]

Consequently, the *Zondorak* court erred in ending its inquiry by concluding that the AK-style rifle at issue was not subject to the protections of the Second Amendment. Had the *Zondorak* court followed the *Marzzarella* test, as it claimed it was doing, it would have reviewed the law using, at a minimum, intermediate scrutiny.

The *Zondorak* court simply concluded that AK-style rifles subject to the California ban are "at least as dangerous and unusual as the short-barreled shotgun [under *Miller*]," but based this conclusion on cosmetic similarities only. The *Zondorak* court did not engage in any substantive analysis to arrive at this faulty conclusion.

To wit, in California, there is an "assault weapons" law that bans enumerated AR- and AK-style rifles. For example, Colt AR-15 series rifles are banned. However, rifles of the same style and overall functioning as the Colt AR-15, that are made from receivers that are not listed in the California law, are not illegal. Thus, millions of Californians legally own and use AR- and AK-style rifles that are built on "off list lower receivers" using "bullet buttons."[24] An off list lower AR is identical to a banned AR-15, other than the words engraved on the receiver.

In addition, there is a separate ban on "high capacity magazines," defined as any magazine that holds more than ten

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Amendment. The *Ashcroft* court specifically differentiated conduct that only had a facial similarity to prohibited conduct from the prohibited conduct itself. The California assault weapons ban at issue in *Zondorak* is based on cosmetic features. Thus, when comparing permissible Second Amendment prohibitions and First Amendment prohibitions, a commercially available AK- or AR-style rifle is to an M-16 as simulated child pornography is to actual child pornography.

23 *See, e.g.*, Mike Schoby, *How to Select the Perfect Hunting AR*, PETERSON'S HUNTING (June 11, 2013), http://www.petersenshunting.com/2013/06/11/how-to-choose-the-perfect-hunting-ar/.

24 *See generally* Memorandum of Points and Authorities in Support of Motion to Dismiss at 1, Haynie v. Harris, 2011 WL 5038357 (N.D. Cal. 2011) (Nos. C 10-1255, CV 11-2493 SI), available at http://ia700507.us.archive.org/10/items/gov.uscourts.cand.225676/gov.uscourts.cand.225676.26.1.pdf, where California's Attorney General stipulated that a semi-automatic rifle produced with an off list lower and a bullet button would not be considered an assault weapon for purposes of California law. The heart of any AR- or AK-style rifle is the receiver, upon which the trigger assembly, bolt assembly, barrel, and stock are affixed. There are no substantive differences between an off list lower receiver and a banned lower receiver; the other components that affix to the lower receiver are identical as between a banned rifle and a legal rifle.

rounds of ammunition.[25] Because there is a superseding limit on the number of rounds that any weapon can hold, any distinction between a banned AR/AK-style rifle built on a listed lower receiver and a legal AR/AK-style rifle built on an off list lower receiver is cosmetic at most. Both rifles fire the same ammunition at the same rate of fire with the same velocity for any particular configuration. If the California assault weapons ban were to be ruled unconstitutional, the high capacity magazine ban would still limit the number of rounds that could be fired to ten, exactly the same as with an off list lower rifle that is currently legal in California.

Therefore, there is no basis to conclude that an AK-style rifle subject to California's assault weapons ban is not protected by the Second Amendment under *Miller*. Furthermore, assuming that the *Marzzarella* test is not violative of *Heller*, California's assault weapons ban should have been subject to a strict scrutiny review, since it affects an entire class of weapon.

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25 CAL. PENAL CODE § 32310 (West 2013). This ban was enacted in 2000, eleven years after the original Roberti-Ross Assault Weapons Control Act of 1989, and thus was not taken into consideration when the original "assault weapons" ban was debated and enacted. Consequently, even an "assault weapon," if legalized in California, would now be subject to the ten round magazine limitation, which means that it would be functionally different (and presumably less dangerous) than the "assault weapons" that were considered under the original ban in 1989 and discussed in the *Zondorak* opinion.