APPENDIX TABLE OF CONTENTS

ORDER OF THE NEW JERSEY SUPREME COURT DENYING PETITION FOR CERTIFICATION (MAY 3, 2019)

SUPREME COURT OF NEW JERSEY

IN THE MATTER OF
THE APPEAL OF THE DENIAL OF
DOUGLAS F. CIOLEK'S APPLICATION
FOR A FIREARMS PURCHASER,

(DOUGLAS F. CIOLEK,)

Petitioner

082561

C-832 September Term 2018

A petition for certification of the judgment in A-003510-17 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs; and it is further

ORDERED that the notice of appeal is dismissed.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 30th day of April, 2019.

/s/ Heather J. Bate
Clerk of the Supreme Court

PER CURIAM OPINION OF THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION (FEBRUARY 1, 2019)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

IN THE MATTER OF
THE APPEAL OF THE DENIAL OF
DOUGLAS F. CIOLEK'S APPLICATION
FOR A FIREARMS PURCHASER

Docket No. A-3510-17T2

On Appeal from Superior Court of New Jersey,
Law Division, Morris County, Docket No. L-0017-22

Before: FUENTES and VERNOIA, Judges

Appellant Douglas F. Ciolek appeals from a March 14, 2018 Law Division order affirming the Township of Denville Police Department's rejection of his application for a permit to carry a handgun pursuant to N.J.S.A. 2C:58-4(c) and denying his summary judgment motion for an order declaring N.J.S.A. 2C:58-4(c) and (d) and N.J.A.C. 13:54-2.4(d) unconstitutional. On appeal, Ciolek argues that the "justifiable need" requirement for a permit to carry a handgun violates the Second Amendment of the United States Constitution and Article I, paragraph 1, of the New Jersey Constitution. Finding no merit to Ciolek's contentions, we affirm.

To obtain a New Jersey permit to carry a firearm, an applicant must "demonstrate[ ] that he [or she] is not subject to any of the disabilities set forth in [N.J.S.A.] 2C:58-3(c), that he [or she] is thoroughly familiar with the safe handling and use of handguns, and that he [or she] has a justifiable need to carry a handgun." N.J.S.A. 2C:58-4(c); *see also* N.J.S.A. 2C:58-4(d). In November 2017, the Denville Police Chief denied Ciolek's application for a permit to carry a handgun because Ciolek did "not demonstrate a justifiable need to carry a firearm in the State of New Jersey." Ciolek appealed the denial to the Law Division and filed a summary judgment motion requesting an order declaring that the statutory justifiable need requirement and regulation[1] requiring evidence of justifiable need violate the United States and New Jersey constitutions.

Following argument, the Law Division rendered a detailed oral opinion affirming the denial of Ciolek's carry permit application and denying his summary judgment motion. The court entered an order and this appeal followed.

On appeal, Ciolek presents the following arguments for our consideration:

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[1] In pertinent part, N.J.A.C. 13:54-2.4(d) requires that a private citizen's application for a permit to carry a handgun include a "a written certification of justifiable need to carry a handgun . . . detail[ing] the urgent necessity for self-protection, as evidenced by specific threats or previous attacks, which demonstrate a special danger to the applicant's life that cannot be avoided by means other than by issuance of a permit to carry a handgun."

POINT I

THE COURT ERRED BY FINDING THAT THE JUSTIFIABLE NEED PROVISIONS OF N.J.S.A 2C:58-4(c) & (d) and N.J.A.C. 13:54-2.4(d) DO NOT VIOLATE THE SECOND AMENDMENT OF THE UNITED STATES CONSTITUTION[.]

A. THE SECOND AMENDMENT IS AN IN[DI]VIDUAL RIGHT THAT APPLIES TO NEW JERSEY LAWS[.]

B. THE SECOND AMENDMENT RIGHT TO KEEP AND BEAR ARMS APPLIES IN NON-SENSITIVE PUBLIC AREAS WITHIN NEW JERSEY[.]

C. ASSUMING A PROPER STANDARD OF REVIEW IS EVEN NECESSARY, N.J.S.A. 2C:58-4(c) & (d) and N.J.A.C. 13:54-2.4(d) VIOLATE THE SECOND AMENDMENT OF THE UNITED STATES CONSTITUTION[.]

i. IF NECESSARY, THE STANDARD OF REVIEW SHOULD BE DERIVED FROM THE EXPRESS LANGUAGE OF THE SECOND AMENDMENT[.]

ii. IF THE COURT REJECTS SUB-POINT i, THEN ORDINARY STRICT SCRUTINY SHOULD APPLY, NOT INTERMEDIATE SCRUTINY[.]

a. UNITED STATES SUPREME COURT PRECEDENT AND OTHER FEDERAL CASE LAW REQUIRE STRICT SCRUTINY[.]

b. NEW JERSEY SUPREME COURT CASE LAW REQUIRES A STRICT SCRUTINY ANALYSIS[.]

c. THE PROSECUTOR'S RELIANCE ON THE NEW JERSEY CASES OF WHEELER, PANTANO, BURTON, CRESPO AND SICCARDI AND THEIR PROGENY IS WITHOUT MERIT AS THESE CASES ARE EITHER ERRONEOUSLY DECIDED OR IRRELEVANT[.]

d. INTERMED[IATE] SCRUTINY "BALANCING" HAS ALREADY BEEN REJECTED BY HELLER AND MCDONALD[.]

iii. EVEN UNDER INTERMEDIATE SCRUTINY, NEW JERSEY'S JUSTIFIABLE NEED PROVISIONS DO NOT PASS CONSTITUTIONAL MUSTER.

POINT II

THE COURT ERRED BY FINDING THAT THE JUSTIFIABLE NEED PROVISIONS OF N.J.S.A. 2C:58-4(c) & (d) and N.J.A.C. 13:54-2.4(d) DO NOT VIOLATE ARTICLE I, PARAGRAPH 1 OF THE NEW JERSEY CONSTITUTION[.]

A. THE RIGHT TO KEEP AND BEAR ARMS IS INHERENT IN AND PART OF THE NATURAL RIGHT TO SELF-DEFENSE PURSUANT TO ARTICLE 1 PARAGRAPH 1 OF THE NEW JERSEY CONSTITUTION.

B. ASSUMING A PROPER STANDARD OF REVIEW IS EVEN NECESSARY, N.J.S.A.

2C:58-4(c) & (d) and N.J.A.C. 13:54-2.4(d) VIOLATE ARTICLE I, PARAGRAPH 1 OF THE NEW JERSEY CONSTITUTION[.]

i. IF A STANDARD OF REVIEW IS EVEN REQUIRED, STRICT SCRUTINY IS THE NECESSARY STANDARD OF REVIEW IN THIS MATTER.

ii. EVEN UNDER INTERMEDIATE SCRUTINY, NEW JERSEY'S JUSTIFIABLE NEED PROVISIONS DO NOT PASS CONSTITUTIONAL MUSTER.

Ciolek does not dispute that he failed to make any showing of justifiable need as required by N.J.S.A. 2C:58-4(c) and (d) and N.J.A.C. 13:54-2.4(d). His arguments are limited to a challenge to the constitutionality of the "justifiable need" requirements of the statute and regulation.

Ciolek's arguments are without sufficient merit to warrant discussion in a written opinion, R. 2:11-3(e)(l)(E), and we affirm substantially for the reasons in the Law Division judge's thorough decision. We add only that the justifiable need requirement in N.J.S.A. 2C:58-4(c) and (d) has been found constitutional in *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013), *cert. denied sub nom. Drake v. Jerejian*, 572 U.S. 1100 (2014), and in our decision in *In re Wheeler*, 433 N.J. Super. 560 (App. Div. 2013). We find no basis in the record to depart from that well-reasoned precedent.

Affirmed.

BENCH RULING BY THE SUPERIOR COURT OF NEW JERSEY MORRIS COUNTY DENYING FIREARMS PERMIT (MARCH 14, 2018)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: CRIMINAL PART
MORRIS COUNTY, NEW JERSEY

IN THE MATTER OF
THE APPEAL OF THE DENIAL OF
DOUGLAS F. CIOLEK'S APPLICATION
FOR A FIREARMS PURCHASER

Docket No.: MRS-L-17-22
Transcript of Hearing

Before: Honorable Salem Vincent AHTO, J.S.C.

[March 14, 2018 Transcript, p. 3]

THE COURT: Mr. Ciolek, come on up. All right, this is in the matter of the application of Douglas Ciolek. Your appearances please?

MS. SOPKO: Good afternoon, Your Honor—or morning, Jacqueline Sopko on behalf of the State.

MR. CIOLEK: Good morning, Your Honor; Doug Ciolek, pro se plaintiff, applicant.

THE COURT: All right, Mr. Ciolek, be seated. As I understand it your—your memorandum or brief you're conceding that you don't meet the justifiable

need either in the version that preceded the April 3rd amendment or the April 3rd amendment; is that correct?

MR. CIOLEK: That is correct.

THE COURT: All right, so as far as the Chief or his investigator, you're conceding you do not meet the requirements. Your position really is that under the Second Amendment and Article 1, Paragraph 1 of the Jersey Constitution that is unconstitutional.

MR. CIOLEK: That is correct. And—and just to elaborate that, I—I'm hoping that we can all agree that, that is the only disqualifier in my application, the—

THE COURT: No, I want to—

MR. CIOLEK: —justifiable need.

THE COURT: —put it out on the record.

MR. CIOLEK: Yes, sir.

THE COURT: I—is it the only disqualifier?

MS. SOPKO: Yes, Judge; that's the only disqualifier at this time is the justif—the justifiable need requirement.

THE COURT: All right, I'll hear from you. Do you want to be heard at all?

MR. CIOLEK: No, in fact—

THE COURT: I know that—I know that you waived oral argument.

MR. CIOLEK: Yes, sir.

THE COURT: And I called you in only because if you wanted to say something, your brief is very thorough. It's very comprehensive.

MR. CIOLEK: Thank you.

THE COURT: You've cited a number of cases. I can't say I read them all, but I think I've read most of them to be honest with you. I had difficulty finding those cases that went back to 1833.

MR. CIOLEK: Me too.

THE COURT: Okay, well just so you know. Do you want to be heard at all?

MS. SOPKO: Yes, Your Honor, I do. As you're aware the 2C:58-4c states that an issue—permit to carry there must be a justifiable need. And as I said before the State is not contesting that Mr. Ciolek has any disabilities. He passed a background check; that was not the issue at all. It—the only issue is he does not have an urgent necessity for self-protection. There are no threats or previous attacks in his certification. He says that. He said that the—he—there's—he only wants this permit to carry for general self-defense. And that simply is not the threshold.

The—you know, the Second Amendment is not immune from reasonable limitations and that's in *Crespo*. This issue has already been litigated in *Wheeler*. And the New Jersey Supreme Court found that justifiable need passes constitutional review. This—this requirement prevents danger to the mun—to the community. It is a legitimate regulatory goal. It does not burden more conduct

than reasonably necessary to stir up the State's purpose.

And I just—I wanted to cite since Your Honor did mention, Mr. Ciolek cited two cases that he relies on; one was *Heller* and one was *McDonald*. I just wanted—

THE COURT: Well he relies upon more cases than that, but—

MS. SOPKO: Yes, but the two that in his supplementary brief he—

THE COURT: He starts out with *Heller I*, which was in 2008, and we're up to *Heller III* so far. And he—

MS. SOPKO: Right.

THE COURT: —cites to *McDonald* which was in 2010.

MS. SOPKO: Yes, and I just would like to say that in *Heller* it's not a right to keep and carry any weapon whatsoever in any manner whatsoever for whatever purpose. The Second Amendment has limitations. The States, through their police power, can have this limitation for a permit to carry. We're not restricting his rights to own his firearm in his place of business, nor his home. This is only for a permit to carry in the public.

If Your Honor has any other questions for me, I would submit.

THE COURT: No, this is a summary judgment application as a matter of fact. As Mr. Ciolek has indicated in response to my question, he has waived any oral argument on the matter. I brought the matter in. He concedes that he was denied a permit to carry a handgun by the Denville Chief

of Police. And he's taken—he's exercising his right to appeal and he's doing it by way of summary judgment.

I have extensive notes here and I'm going to refer to them if I can. It was necessitated by the comprehensive paperwork that I received. Mr. Ciolek challenges the constitutionality of New Jersey's justifiable need requirement as violative of the Second Amendment of the U.S. Constitution and Article 1, Paragraph 1 of the New Jersey Constitution.

He argues because the justifiable need requirement and any constitutional right to carry a handgun in the public is, in reality, non-existent in this State. He statistically points out some information. I understand where he says he got the statistics from. He even at one point points to a certification of Lieutenant Genova who formerly headed the Firearms Unit. He retired, then it was taken over by Lieutenant Reed (phonetic). And now it's being, I guess, supervised by Mazzagatti (phonetic).

But even though he finds that the justi—and this is his finding, not mine—justifiable need requirement in effect indicates that there is a non-existent requirement in this State that has to be met, but quite frankly there are people who are granted the right to carry in public as they establish a justifiable need.

I probably should point out that the justifiable need definition existed for the longest time in 2C: 58-4c and d. And it was amended—I believe it was April 3rd of 2017. As I recall that amendment, which liberalized quite frankly in my view

the definition of justifiable need to serious threats and reasonable, as I recall it, reasonable alternatives. I can cite the language specifically and perhaps I should.

Prior to April 3rd, a justifiable need was the urgent necessity for self-protection, as evidenced by specific threats or previous attacks which demonstrate a special danger to the applicant's life that cannot be avoided by means other than by issuance of a permit to carry a handgun.

On April 3rd that was amended and added "serious threats" to the circumstances that may demonstrate a special danger to the applicant's life that could be specified in the written certification of "justifiable need." In addition the revised regulation specifies that a permit to carry a handgun can be issued based on a special danger to the applicant's life that cannot be avoided by other reasonable means, other than be issuance of a permit to carry a handgun.

This basically was an effort by the former governor—Governor Christie—to modify and make it easier to satisfy the justifiable need. I know there is an Assembly Bill, 2758, that's been out of Committee I think earlier in the week—excuse me, maybe earlier in the month, which would place by statute right into the bill the former definition.

When the amendment was made back on April 3rd, 2017—now I'm just going from my memory, I believe the legislature instituted an action against the governor. And the current Attorney General, I also believe, has withdrawn opposition to that litigation. I don't know what's happened to the

litigation. If either one of you do, I'd be happy to get the information, but I really don't know.

But at any rate, Mr. Ciolek is familiar with the other definition that preceded the April 3rd amendment. And he's familiar with the current definition. And he candidly admits, "I can't satisfy either one." He's also familiar with the long-standing cases. He cites *In re Preis* in 118 N.J. 564. And he cites it for the proposition—and I've cited it many times—that generalized fears for personal safety are inadequate. So he's aware of that.

He's also aware of the *Siccardi* case in 59 N. J., that was the theater manager case; *In re Application of X*, that was the diamond dealer; *Riley v. State*, that was the doctors who worked in the urban hospitals; *In re Borinsky*, they were the fugitive recovery agents who were all denied permits to carry. My point is that Mr. Ciolek is familiar with the cases that normally are cases cited in these applications.

He has several arguments and one of the arguments is based upon the fact that the Second Amendment protects the right of an individual to keep and bear arms for self-defense. And there he cites the—what I'll call—*Heller I*, the 2008 decision. And there's a distinction between keep and bear arms. Anybody can keep a firearm or a handgun, I should say, in their residence. They can keep it in their place of business. Although quite frankly not everybody can use it.

I forget whether *Valentine* that he cited was the case where the handgun was in the business. But

the person that pulled the handgun was either the manager of the business and not the owner, and therefore the manager was not protected. But at any rate he said bear arms means just that, you have the right to bear arms for self-defense in public. Now there are some limitations; I'll get into them.

And he also cites McDonald, the 2010 case, basically indicating that the Second Amendment is made applicable to the States through the Fourteenth Amendment. And he still further says that the justifiable need requirement violates the U.S. Constitution that I mentioned and also Article 1, Paragraph 1 of the New Jersey Constitution.

He quotes in his brief the expressed language of Article 1, Paragraph 1, and unlike the Second Amendment in the Federal Constitution, the Second Amendment has language to the effect that it states the right of the people to keep and bear arms shall not be infringed. And he goes into what "infringed" means. Article 1, Paragraph 1 of the New Jersey Constitution is not that clear. It talks in terms of all persons are by nature free and independent and have certain natural and—and unalienable rights among which are those of enjoying and defending life and property, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

His argument is that by way of implication or interpretation or inference that makes Article 1, Paragraph 1 equivalent to the Second Amendment to the extent as it relates to the right to carry a firearm in public. As I've just pointed out the right

is not specifically stated in Article 1, Paragraph 1 as it is in the Second Amendment. But he indicates that it was contemplated and it's just a different way of expressing or describing self-defense.

He argues further that the right to self-defense is a natural right. It preexisted the Constitution. It's a—the Constitution is just a document that serves as a testament to protect that former natural right. And he goes back and he cites the Magna Carta. He cites cases and treatise going back to the 1700s and early 1800s. He quotes in *McDonald* that self-defense is a basic right recognized by many legal systems from ancient times to the present day.

He even does, as I recall, a comparison of other States and maybe that was in one of the treatise that he referenced, but as a comparison to other States. And he basically indicates that New Jersey is in a minority. Somehow or another I get the number eight States similar to New Jersey being in the minority. He does concede that New Jersey has a compelling interest in deterring crimes. But he says that's quite frankly geared more towards criminals. They're the ones that get the guns, not law-abiding citizens. Then he argues further, hey most criminals, even under the current law, would not qualify for a permit to carry.

He then goes on and in his brief for the most part talks about strict scrutiny. And he indicates strict scrutiny is the test that I should apply. I'm saying that because I'm going to deal with some cases that he has cited where it's not strict scrutiny; it's intermediate scrutiny that should be applied. And in his brief he does—he does, at

the end of the brief, maybe devote—and it's a 44-page brief with attachments. He does devote maybe to a page to intermediate scrutiny.

In making the strict scrutiny argument, he is indicating that New Jersey's statute is not narrow—narrowly tailored as it should be. And quite frankly he's saying that—well a person that meets the qualifications of—meets the qualifications from anybody that should apply for a firearm's purchaser identification card and one that has the necessary training, even under the current law, is all that is needed. So he emphasized that the statute—the justifiable need statute is not narrowly tailored.

He submits his criteria, not the legislature's as interpreted by our New Jersey Courts and a Federal Court, is what should control. If you have background checks and an-has reasonable training requirements, they're things that are already in existence, that's all that's needed. That's as narrow as you have to tailor the statute. I find from experience and I can't make this a basis of my decision and I do not for a reviewing court, the training should be substantially equivalent to that of the Police Training Commission. And I very often do not *see* anything nearly comparable.

But at any rate, he's familiar also with *Wheeler*. And he cites *Wheeler*. And he cites it to assist him in his argument. And *In re Wheeler* in 433 Super., the court ruled on—and it's an Appellate Division decision. The court—and it's a 2013 decision. The court ruled on the standard of review of a Second Amendment challenge to the justifiable need requirement. Our Appellate Division held

that intermediate scrutiny was the scrutiny to be applied, not strict scrutiny. And as I will indicate in a few minutes, *Heller*'s in accord with that as are other cases.

But our Appellate Division said intermediate scrutiny, not strict scrutiny, should apply and that the justifiable need provision was constitutional based on such an analysis. Mr. Ciolek indicates if I agree that *Wheeler* was correctly decided, then I must adhere to it and one of the points in his brief must be rejected. I could tell Mr. Ciolek he hasn't been in here before to my recollection. I have cited *Wheeler* and I have used *Wheeler* in other cases, so I obviously agree with Wheeler and I'm bound by it whether I disagree with it or not.

He argues to me further that *Heller*'s holding is not limited to the hearth and home. That—that's what he's been arguing throughout. What's the—*Heller* was a case where the District of Columbia—and by the way, *Wrenn* is a District of Columbia case. *Heller*'s a District of—a lot of these cases come out of the District of Columbia. And it's the same Chief of Police that seems to be on the target in all these cases.

But at any rate, I would agree with *Heller* to the extent that—you know what I mean, it's—it's not—you can't pass a law that a person can't have a weapon in their home—a handgun in their home. But that's—we're going beyond that right now.

Mr. Ciolek continues to argue that the right to personal security or the law of necessity, that natural lights—rights under Article 1, Paragraph

1 of New Jersey's Constitution include the right to keep and bear arms within the right of self-defense in non-sensitive public places. I've used "non-sensitive" more than once. And Mr. Ciolek concedes that there are some sensitive places such as government offices or schools. And *Heller* says that too that guns should not be allowed. But he goes on-aside from the strict scrutiny argument, he goes on and makes a number of other arguments again relying upon a number of cases that are really cases that follow, not by way of opinion, but follow by time *Heller* and *McDonald.*

Again he emphasized the—to keep firearms and to bear firearms, or handguns in this case, they're two different things. And if the founders of our country and the individuals that pass the Constitution wanted to say they were the same, they wouldn't have used two different words. "Keep" means to keep it. "Bear it" means to carry it. Again, self-defense is a natural right. It's not limited to a location such as a home or a business. He argues that it's a right of the individual.

He even went back, and I found with interest, he said George Washington carried a firearm. Thomas Jefferson carried a firearm—handgun. And he even designed his own—I can't think of the word, holster. I think he even mentioned that Patrick Henry on the way to court carried a handgun. That's how far back he's delved into the history.

He still says to me one canst—one constitutional right such as the Second Amendment should not be treated less favorably than another. And I think that argument came up when he was analogizing the First Amendment right to the

Second and others. He's saying to me that under the pretense of regulation, the justifiable need standard is in effect destroying the actual right. And again all you really need is a background check and some reasonable training and that's already in place.

When I looked at *Heller III*, *Heller III* brought forth—and *Heller III* was a 2015 decision. *Heller III* brought forth a number of general principles and I was kind of like why did I read the first two cases when all I had to do was read *Heller III* to get some of the information. But it references *Heller*, being the first decision, and it indicated in *Heller*, first we speak—we ask whether the law impinges upon Second Amendment rights. That is whether it has more than a de minimis effect on the right to keep and bear arms. Second, if it does, we evaluate it under the appropriate level of constitutional scrutiny.

And the court in *Heller III* said, "We determined that intermediate scrutiny, not strict scrutiny, is the proper yardstick because the laws do not severely limit the possession of firearms." I emphasize that because his argument to me or one of his arguments to me is I should apply strict and relying upon the cases he's relying upon, those cases indicated that intermediate scrutiny, not strict scrutiny, is the proper yardstick to use. Intermediate scrutiny had its genesis in the Supreme Court's equal protection and free speech —free speech jurisprudence.

For those that may not be familiar, intermediate scrut—scrutiny is the middle ground. It offers proper protection in the many instances in which

a statute adversely effects constitutionality protected interests, but warrants neither automatic condemnation such as str—strict scrutiny would imply, nor near automatic approval as is implicit in rational basis review. It is the middle ground. It essentially imposes a balancing test and that is the law is constitutional if the governmental interest outweighs the burden on the constitutional right and cannot be achieved by means that do not infringe rights as significantly.

I think it was the balancing thing that he was critical of in Justice Breyer's concurring view. But at any rate, intermediate would mean that the fit between the challenged regulation and the asserted rejection need only be reasonable not perfect. Mr. Ciolek indicates there is no fit between the two. And as we know from *Heller III*, the challenged law need not be the least restrictive or least intrusive means of achieving the government's interest.

But we also know that the nature of firearm regulation requires ample deference to the legislature. Now that's what the case law in the federal system says. That's what *Heller III* says. And I will quote, "The legislature is far better equipped than the judiciary to make sensitive public policy judgments, within constitutional, limits concerning the dangers in carrying firearms and the manner to combat those risks. Firearm policy is a complex and dynamic issue implicating vast amounts of data that the legislature is far better equipped to gather and ana—analyze."

In fact it went on and indicated the data that does exist is either incomplete or influenced by

partisanship. Scholars have reached few solid conclusions to date. There's data that exists to support both sides. And the court noted the difficulty lies in separating partisanship and underlying attitudes. To—quite frankly, as you read all these cases from the different Circuits, you really don't know until the Supreme Court speaks—and I'm talking about the United States Supreme Court—what the test really is. I can only go with what I have the test to be now, because in my view the Circuits are not even agreeing on the same thing.

I'm trying to think of a legal word to say that it's kind of very confusing. But at any rate, intermediate scrutiny is the flexible framework that allows for different perspectives and range of approaches. It does not require the single best disposition to a problem. And the *Heller III* court said, "The risk inherent in firearms and other weapons distinguishes the Second Amendment right from other fundamental rights." That doesn't mean, as I've already referenced, that the Second Amendment is not an important amendment or an amendment that is not favored or treated less favorably than other amendments.

The *Heller* court said, "The risk inherent in firearms and other weapons distinguishes it—the Second Amendment from other fundamental rights." And goes on to say, "The reality of gun violence means constitutional analysis should incorporate deference to the legislature." So they're really saying the legislature is better suited to handle this than we are. By the way, when

I'm talking about *Heller III*, we're in the Appellate Division in the federal system.

As a matter of fact talking about the courts and giving certain things to the legislature, the legislature being better equipped, there's a cite and a quotation from *United States v. Masciandaro*. It's the Fourth Circuit. It's a 2011 decision. And quoting from that, that court said, "This is serious business. We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights. If ever there was an occasion for restraint, this would seem to be it." Again that's in support of the legislature making certain decisions.

Heller again says to pass constitutional muster, it must promote a substantial governmental interest that would be achieved less effectively absent the regulation. And that the means chosen are not substantially broader than necessary to achieve that interest. Mr. Ciolek argues that yes, it is overly broad; substantially, in my view, it is not.

The harms to be prevented by the regulation must be real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way. And there are some examples in the decision. Ban on assault weapons is one that's in the governmental interest and is not protected by the Second Amendment.

Heller I indicated that long-standing firearm regulations are presumptively lawful. And in that regard Mr. Ciolek cites a case that—or cites a

circumstance where the case was an act—enacted in 1901. He says that's long-standing. In the federal case involving—of my Passaic brother in—in Passaic and one of my brother in—that was seated here in Morris County, that court—the Appellate Court in the federal system found that New Jersey has had these restrictions for 90 years, not as exactly worded. I think Mr. Ciolek pointed out that it was the 1966 enactment that should control, not the 90 years as found by the Federal Appellate Court.

But at any rate, we're given two intermediate scrutiny examples. One protecting police officers by enabling them to determine in advance whether guns may be present at a location. And two, aiding in crime control; that comes from *Heller* too. Obviously there's an interest in protecting police officers and there's an interest in promoting public safety. *Heller* does not dispute that these are substantial governmental interests.

Another case relied upon by Mr. Ciolek is the *Marzzarella* case. And it discusses *Heller I* and talks about the rights with respect to guns at the time of the ratification of the Constitution. So *Marzzarella* would go back to when our Federal Constitution was ratified. And the same cases—it's not limited to militia, because that appears also on the Second Amendment, because people could still hunt. And back then they did hunt; they hunted for food.

But *Marzzarella* says that the right protected by the Second Amendment is not unlimited, citing—amongst other things—*McDonald.* And it gives us some examples. It does not extend to all types

of weapons, only those to typically possessed by law-abiding citizens. And an example would be—and it's right in the decision—a short-barreled shotgun. That's not protected.

Other examples are prohibitions against felons, individuals who are mentally ill, carrying firearms in sensitive places, which Mr. Ciolek—he concedes to these things. And the sensitive places, as I've already mentioned, are schools and governmental buildings. But what's interesting the case stands for the proposition that the list is ex—is just an example; it's not exhaustive.

And it again emphasizes that *Heller* did not purport to fully define all the contours of the Second Amendment. And accordingly much of the scope of the right remains unsettled. Yes, I think I already mentioned that because the Circuits are not in agree—in agreement as to the interpretation and thus the extent of the protection that's been espoused in *Heller*.

As I recall *Marzzarella* was a case where there was a handgun that had the identifying information ground off. And the court said that unmarked firearms have a greater flexibility to be utilized in illegal activities. Then it gave an example that pipe bombs are not really protected under the Second Amendment because they have a tendency to be used in violent crimes on unsuspecting victims.

I read *Pantano—In re Pantano* in 429 Super. 478. And I reference really pages 486, 87—I guess through 480—I guess through 490. I did it because I thought that *Pantano* had been granted certi-

fication by our Supreme Court and then I believe I read that Justice Rabner indicated cert would not be granted. But *In re Pantano* is an Appellate Division decision. And in it our Appellate Division said, "New Jersey courts have failed to extend the holding of *Heller* beyond its possession within the home for self defense." It cites *In re Dubov* that the Prosecutor mentioned. It cites *Crespo v. Crespo*. And of course *Heller* was that District Court case that said you cannot totally prohibit handgun possession in a home.

But Heller left unanswered whether the Second Amendment's protections extend beyond the home. And that's where we're getting all this different case law from the Districts. But our Appellate Division said the State limitations on the right to carry were subject to intermediate scrutiny, which I've already addressed. The statutes are presumed constitutional. And absent a clear expression of law from the United States Supreme Court, our courts are not going to disturb settled law. And there's no clear indication that the United States Supreme Court had signaled the States to abandon its prior case law.

I've already pointed out *In re—In re Preis*, *Siccardi*, *X*, the doctors. I've pointed out all those cases that were contained in Mr. Ciolek's—he's familiar with them. In *Dubov*, talking about the *Heller* court—in *Dubov* the court said—talking about *Heller* again, "The Court expressly indicated that its holding did not require invalidation of statutes that require a license to purchase or possess a firearm." Well the real issue here is to bear in public places. But if we're dealing with long-

standing law, quite frankly I think it remains. But even *Marzzarella* said that the scope of the Second Amendment right remains unsettled.

So our court in the Appellate Division in *Pantano* said, "In sum, given the presumption of our law's constitutionality, the lack of clarity that the Supreme Court in *Heller* intended to extend the Second Amendment right to a state regulation of the right to carry outside the home, and the Second Circuit's explicit affirmation of a law similar to ours," they affirm. And find that the constitutional rights were not infringed.

And when they're talking about that federal decision, they are talking about *Drake v. Filko.* That's Judge Filko who sits in Passaic County—who sat in Passaic County. There was a Judge Jerejian who sits in Bergen. And Judge Manahan who sat here in Morris. And in *Drake v. Filko*, which quite frankly was a 2013 decision, *Marzzarella* was cited. Intermediate scrutiny was again the test. And New Jersey's justifiable need qualified in the *Filko* court as long-standing, presumptively lawful regulation. And presumptively lawful regulatory measures are exceptions to the Second Amendment guarantee.

And again that the justifiable need to publicly carry a handgun for self-defense is a presumptively lawful, long-standing license—licensing provision under the teachings of *Heller* and *Marzzarella.* And that it enjoys presumptively—presumptive constitutionality. And that there is not—not unbridled discretion given to officials because New Jersey's law are clear and specific. And it distinguishes again between strict scrutiny, which

Mr. Ciolek asked me to apply, and intermediate scrutiny, which I am applying.

And the finding is that the challenged law does not burden more conduct than is reasonably necessary. I can comment on—briefly on some cases cited by Mr. Ciolek. One of the recent that I *see* popping up is *Wrenn v. District of Columbia.* Again as I pointed out it's a District of Columbia case, the same chief. And the test was good reason, proper reason, whatever the circumstance may be. And that case is favorable to the "bear" definition.

But that court really indicated—since the applicant there was seeking injunctive relief, that based upon that record there was no testimony that it did not meet the intermediate scrutiny. And quite frankly I find that, that is not at all helpful to me or really to the argument of the applicant here.

In *Clark v. Jeter*, a case also cited, it was again intermediate scrutiny. And that's an older case. And that case really dealt with the State—of the Commonwealth of Pennsylvania that placed the statute of limitations of six—six years on paternity issues and that—that would be unreasonable. And that's what the court found.

Another case cited by Mr. Ciolek was *Washington v. Glucksberg.* That case was an assisted suicide case and strict scrutiny was applied. And that's where you got the narrowly tailored. And of course I've already found that intermediate scrutiny is what is applicable here.

So I think one of the reasons why Mr. Ciolek said he's waiving oral argument and I can decide it basically on the papers is because he knew

where I'd have to go with this decision and that's where I'm going. I would have to find that there's no genuine issue as to any material fact. And I'd have to base that on everything that I have before me and all the legitimate inferences that could possibly or permissibly be drawn there from.

And having said a lot of things, probably not interesting to everyone, but I'm going to deny the application for summary judgment. You can do whatever you feel is appropriate. I'll need an order to that effect.

MS. SOPKO: Your Honor, I will provide an order.

MR. CIOLEK: Thank you, Your Honor.

THE COURT: All right. You know Mr. Ciolek pointed out, Ms. Sopko, that you didn't really address the Article I, Paragraph 1 New Jersey Constitution argument. I mean I did, because the cases dealt with it. I didn't ask you, was that your intention?

MS. SOPKO: Your Honor, I was going to address it on the record today, but since Mr. Ciolek did not—since he waived oral argument, I decided it wasn't necessary.

THE COURT: All right. All right, thank you. And I'll—I'll—we'll either send that check—that money order back to you, I'll find out.

MR. CIOLEK: Okay; all right, thank you, Judge.

(Hearing concluded)

ORDER OF THE SUPERIOR COURT OF NEW JERSEY MORRIS COUNTY DENYING FIREARMS PERMIT (MARCH 14, 2018)

SUPERIOR COURT OF NEW JERSEY
MORRIS COUNTY–LAW DIVISION
CRIMINAL PART

IN THE MATTER OF THE APPEAL
OF THE DENIAL OF A NEW JERSEY PERMIT
TO CARRY A HANDGUN IN THE NAME OF

DOUGLAS F. CIOLEK, ESQ.

Order 17-22

Before: Honorable Salem Vincent AHTO, J.S.C.

THIS MATTER having been opened to the Court on March 14, 2018, upon application of Douglas Ciolek, Esq. *Pro Se* and Fredric M. Knapp, Esq., Morris County Prosecutor, on behalf of the State of New Jersey, with Assistant Prosecutor Jacqueline A. Sopko, Esq., appearing on behalf of the State and objecting to Petitioner's request, and the Court having reviewed the papers submitted, hearing testimony, and the Court having fully considered the matter;

IT IS on this 14th day of March, 2018,

ORDERED that Douglas P. Ciolek's appeal from the denial of his application for a Permit to Carry a

Handgun with the Township of Denville Police Department has been denied.

Summary Judgment Denied.

/s/ Hon. Salem Vincent Ahto
J.S.C. (Retired and
Temporarily Assigned on Recall)

RELEVANT STATUTORY PROVISIONS

N.J. STAT. § 2C:58-4
PERMITS TO CARRY HANDGUNS

c. Investigation and Approval

Each application shall in the first instance be submitted to the chief police officer of the municipality in which the applicant resides, or to the superintendent, (1) if the applicant is an employee of an armored car company, or (2) if there is no chief police officer in the municipality where the applicant resides, or (3) if the applicant does not reside in this State. The chief police officer, or the superintendent, as the case may be, shall cause the fingerprints of the applicant to be taken and compared with any and all records maintained by the municipality, the county in which it is located, the State Bureau of Identification and the Federal Bureau of Identification. He shall also determine and record a complete description of each handgun the applicant intends to carry.

> No application shall be approved by the chief police officer or the superintendent unless the applicant demonstrates that he is not subject to any of the disabilities set forth in 2C:58-3c., that he is thoroughly familiar with the safe handling and use of handguns, and that he has a justifiable need to carry a handgun.
>
> Each application form shall be accompanied by a written certification of justifiable need to carry a handgun, which shall be under oath and, in the case of a private citizen, shall specify in detail the urgent necessity for self-protection, as evidenced

by specific threats or previous attacks which demonstrate a special danger to the applicant's life that cannot be avoided by means other than by issuance of a permit to carry a handgun. Where possible, the applicant shall corroborate the existence of any specific threats or previous attacks by reference to reports of the incidents to the appropriate law enforcement agencies.

If the application is not approved by the chief police officer or the superintendent within 60 days of filing, it shall be deemed to have been approved, unless the applicant agrees to an extension of time in writing.

d. Issuance by Superior Court; Fee

If the application has been approved by the chief police officer or the superintendent, as the case may be, the applicant shall forthwith present it to the Superior Court of the county in which the applicant resides, or to the Superior Court in any county where he intends to carry a handgun, in the case of a non-resident or employee of an armored car company. The court shall issue the permit to the applicant if, but only if, it is satisfied that the applicant is a person of good character who is not subject to any of the disabilities set forth in subsection c. of N.J.S.2C:58-3, that he is thoroughly familiar with the safe handling and use of handguns, and that he has a justifiable need to carry a handgun in accordance with the provisions of subsection c. of this section. The court may at its discretion issue a limited-type permit which would restrict the applicant as to the types of handguns he may carry and where and for what purposes the handguns may be carried. At the time of issuance, the

applicant shall pay to the county clerk of the county where the permit was issued a permit fee of $20.

N.J. ADMIN. CODE § 13:54-2.4
APPLICATION FOR A PERMIT TO CARRY A HANDGUN

(d) Each application form shall also be accompanied by a written certification of justifiable need to carry a handgun, which shall be under oath and which:

1 In the case of a private citizen, shall specify in detail the urgent necessity for self-protection, as evidenced by specific threats or previous attacks, which demonstrate a special danger to the applicant's life that cannot be avoided by means other than by issuance of a permit to carry a handgun. Where possible, the applicant shall corroborate the existence of any specific threats or previous attacks by reference to reports of such incidents to the appropriate law enforcement agencies; or

2. In the case of employees of private detective agencies, armored car companies and private security companies, that:

i. In the course of performing statutorily authorized duties, the applicant is subject to a substantial threat of serious bodily harm; and

ii. That carrying a handgun by the applicant is necessary to reduce the threat of unjustifiable serious bodily harm to any person.

LETTER FROM CHIEF OF POLICE (NOVEMBER 21, 2017)

TOWNSHIP OF DENVILLE
DEPARTMENT OF POLICE
CHRISTOPHER WAGNER, CHIEF
1st Mary's Place
Denville, New Jersey 07834

Mr. Douglas F. Ciolek
4 North Ridge Road
Denville, NJ 07834

Dear Mr. Ciolek:

Please be advised that your application for a permit to carry a handgun has been disapproved.

The reason for this denial is based upon our findings during your background investigation and is issued in accordance with N.J.S.A. 2C:58-4, where a permit shall not be issued to an applicant who does not demonstrate a justifiable need to carry a firearm in the State of New Jersey.

If you wish to dispute the disapproval, you may contact the Superior Court in Morristown within 30 days of receiving this letter to file for an appeals hearing.

Sincerely,

/s/ Christopher Wagner
Chief of Police

LETTER FROM CIOLEK APPEALING AGAINST THE DECISION OF CHIEF OF POLICE (DECEMBER 18, 2017)

DOUGLAS F. CIOLEK, ESQ.
4 NORTH RIDGE ROAD
DENVILLE, NJ 07834
dciolek@rrjhlaw.com

The Honorable Stephen J. Taylor, P.J.Cr. (via hand delivery and CRRR mail)
Morris County Superior Court
Washington & Court Streets
P.O. Box 910
Morristown, NJ 07963
RE: In re Ciolek (Denial of permit to carry a handgun of Douglas F. Ciolek)

Docket No.

Dear Judge Taylor:

I am the applicant for a permit to carry a handgun whose application was denied by the Denville Chief of Police. Pursuant to N.J.S.A. 2C:58-4e, please accept this letter as my request for a hearing to appeal that determination. I was told by a courthouse employee that Your Honor serves as the judge who hears these appeals. If I am mistaken, would you or your staff be so kind as to forward this to the appropriate judge?

There is one more item that I need to raise with the court at this time. My argument at this hearing will include one based on the unconstitutionality of the justifiable need requirement of N.J.S.A. 2C:58-4c. I have a motion ready to be filed and served and can do so

as soon as I receive some type of docket number from the court. In the interim, may I ask of Your Honor whether I can file it immediately thereafter or if there will be some scheduling order in lieu of same?

Last, because of this motion, I am also providing notice to the Attorney General's office pursuant to R. 4:28-4(a)(1).

Thank you for your time and attention to this matter.

Respectfully submitted,

Douglas F. Ciolek, Esq.

cc:

Chief Christopher Wagner, Denville Police Dept.-CRRR & reg. mail
Fredric M. Knapp, Morris County Prosecutor-CRRR & reg. mail
Christopher Porrino, N.J. Attorney General-CRRR and reg. mail
Colonel Patrick Callahan, Acting Superintendent, N.J. State Police-CRRR & reg. mail

NOTICE OF MOTION FOR SUMMARY JUDGMENT (JANUARY 2, 2018)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MORRIS COUNTY

IN RE CIOLEK
(Denial of Application for Permit to Carry Handgun of Douglas F. Ciolek)

Docket No.: MRS-17-22

TO: Morris County Prosecutor's Office

ON NOTICE TO: Office of the Attorney General of New Jersey

PLEASE TAKE NOTICE that the undersigned will apply to the above named Court at the Morris County Superior Court, Morristown, New Jersey on the return date for the hearing in this matter or as soon as directed by the hearing judge, for an Order declaring N.J.S.A. 2C:58-4(c)&(d) and N.J.A.C. 13:54-2.4(d) unconstitutional and providing for the issuance of a permit to carry a handgun within the State of New Jersey.

PLEASE TAKE FURTHER NOTICE that in support of the within application, the undersigned shall rely upon the annexed Brief and Certification of Counsel.

PLEASE TAKE FURTHER NOTICE that the within application is made pursuant to R. 1:6-2(d) and the undersigned waives oral argument.

IN COMPLIANCE WITH RULE 6:1-4, the original of the within Notice of Motion is being sent to the Clerk of the Morris County Superior Court or the office of judge assigned to hear this matter for filing and a copy is being sent to our adversaries within the time prescribed by the Rules of Court.

Douglas F. Ciolek, Pro Se Plaintiff

By: /s/ Douglas F. Ciolek, Esq.

Dated: January 2, 2018