No. 03-1140

In the Supreme Court of the United States

ALEXANDER CALOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

1. Whether the confiscation of petitioner's weapons pursuant to an emergency protective order was an unlawful seizure under the Fourth Amendment or a deprivation of property without due process under the Fifth Amendment.

2. Whether an emergency protective order, entered at a proceeding in which petitioner appeared through counsel and requested an extension of time, was issued after a "hearing" under 18 U.S.C. 922(g)(8)(A).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 13a-20a) is reported at 340 F.3d 428. The opinion of the district court (Pet. App. 1a-12a) is reported at 172 F. Supp. 2d 900.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 2003. A petition for rehearing was denied on November 5, 2003. Pet. App. 21a. The petition for a writ of certiorari was filed on February 3, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner

was convicted of possession of a firearm while subject to a domestic violence protection order, in violation of 18 U.S.C. 922(g)(8) (Count 1), and possession of an unregistered rifle with a barrel length of less than 16 inches, in violation of 26 U.S.C. 5861(d) (Count 2). He was sentenced to 24 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 13a-20a.

1. On February 9, 2001, petitioner's wife sought an ex parte Emergency Protective Order (EPO) against petitioner. The petition for the EPO averred that petitioner had struck his spouse with a metal curtain rod on her right arm and left leg; that he had thrown a hammer at her, bruising her right ankle; and that their 19-month-old daughter had witnessed the violence from her crib. The petition also recited that petitioner had hit his spouse's face with his fist, had pulled a gun on her, and on numerous occasions had threatened to kill her and "inferred jeopardy" to their child. C.A. App. 49. On February 9, 2001, the Harrison County District Court issued an ex parte EPO, effective through February 12, 2001, that ordered petitioner not to contact his wife, to vacate the marital residence, and "not to possess any firearms, turn all firearms into [Harrison County] Sheriff's Office." *Id.* at 264; Pet. App. 14a. The EPO indicated that the firearms prohibition was necessary "[i]n order to assist in eliminating future acts of domestic violence and abuse." C.A. App. 264. The EPO also summoned petitioner to appear at a hearing on February 12, 2001, to respond to the domestic violence allegations in the EPO petition. *Ibid.* The EPO was served on petitioner at the marital residence on the evening of February 9, 2001, by two Harrison County deputy sheriffs. Petitioner directed the deputy sheriffs to his gun collection and allowed them to retrieve a

number of guns, including a Bushmaster .223 caliber rifle with an eleven and one-half inch barrel. Pet. App. 14a.

On February 12, 2001, a hearing occurred with petitioner present. At the hearing, petitioner's retained counsel made a limited appearance to request an extension of time. The court granted petitioner's request and extended the EPO until February 21, 2001. Pet. App. 2a, 14a. The EPO recited that petitioner had been provided "notice and opportunity to be heard" and that the court "having reviewed the petition and being sufficiently advised finds that the allegations indicate an immediate and present danger of domestic violence and abuse." C.A. App. 44. The EPO, in addition to the terms of the first EPO, restrained petitioner from coming into the city of Cynthiana except to see his attorney and for court appearances, and required him to stay away from his wife's place of employment and his daughter's daycare. Pet. App. 14a & n.1; Gov't C.A. Br. 3-4.

On February 14, 2001, petitioner violated the EPO by returning to the marital residence. Petitioner's wife reported the violation to the Harrison County Sheriff's Office. The deputy sheriffs who responded to the complaint observed petitioner leaving the residence and arrested him. They searched his vehicle and found four handguns. Petitioner's counsel later reported the presence of a fifth handgun in the impounded vehicle. Pet. App. 14a-15a.

2. On July 12, 2001, a federal grand jury indicted petitioner on one count of possessing a firearm while subject to a domestic violence restraining order, in violation of 18 U.S.C. 922(g)(8) (Count 1), and one count of possessing a firearm with a barrel length of less than 16 inches that was not registered to him in the National

Firearms Registration and Transfer Record, in violation of 26 U.S.C. 5861(d) (Count 2).

a. Section 922(g) of Title 18 provides that specified categories of persons may not "ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition." Section 922(g)(8) imposes that prohibition on any person

> who is subject to a court order that—
>
> (A) was issued after a hearing of which such person received actual notice and at which such person had an opportunity to participate;
>
> (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear or bodily injury to the partner or child; and
>
> (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
>
> (ii) by its terms explicitly prohibits the use, attempted use or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury[.]

18 U.S.C. 922(g)(8).

Petitioner moved to dismiss Count One of the indictment on the ground that the court order mentioned in the indictment, the EPO issued on February 12, 2001, and in effect through February 21, 2001, was not issued after a hearing as required by 18 U.S.C. 922(g)(8)(A). Pet. App. 4a. The district court rejected petitioner's claim that Section 922(g)'s prohibition was triggered

only after a defendant has had a hearing on the merits of the issuance of a final domestic violence order. The court concluded that the plain language of Section 922(g)(8)(A) requires only a "court order * * * issued after a *hearing* of which such person received actual notice, and at which such person had an *opportunity* to participate." Pet. App. 5a (quoting 18 U.S.C. 922(g)(8)(A)). The court found that the fact that petitioner's counsel only made a limited appearance on February 12, 2001, and convinced the court to grant an extension of time did not alter the conclusion that a hearing occurred and that petitioner had an "opportunity to participate." *Id.* at 7a. The court further explained that "[s]uch a 'hearing on the merits' requirement would allow a defendant/respondent subject to an EPO order to forestall federal firearm charges by moving to continue the hearing, or merely failing to show up for the hearing." *Ibid.*

b. Petitioner also moved to suppress the Bushmaster gun seized on February 9, 2001, on the ground that its confiscation constituted a warrantless seizure in violation of the Fourth Amendment, and, in the alternative, that such seizure without a prior hearing violated due process. C.A. App. 54-57. The district court denied the motion. As to petitioner's Fourth Amendment challenge, the court found that Kentucky law provided broad authority for a judge entertaining an ex parte domestic violence petition to enter any order necessary to protect the victim pending the later hearing on the merits, and that the Harrison District Court was acting within the framework of that law when it ordered the seizure of the firearms and petitioner's removal from the marital residence. Pet. App. 8a-9a. The court found that "[t]he EPO thus necessarily includes the authority for the sheriff's department to

enter the house to enforce" the EPO, and that "the deputy sheriffs were acting pursuant to a valid search warrant * * * when the Bushmaster weapon was seized." *Id.* at 9a.

As to petitioner's due process challenge, the district court applied the balancing test articulated by this Court in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), for determining the propriety of a pre-hearing seizure of property. The court found that Kentucky's interest in protecting victims of domestic abuse from further injury or loss of life outweighed petitioner's interest in maintaining possession of his firearms until a hearing, and that the risk of an erroneous deprivation of petitioner's property rights was slight. Pet. App. 10a-11a.

Following the denial of his motions to dismiss and to suppress, petitioner proceeded to trial and was convicted on both counts.

3. The court of appeals affirmed. Pet. App. 13a-20a. The court affirmed the district court's denial of petitioner's motion to dismiss the indictment, holding that the EPO upon which his prosecution under Section 922(g)(8) was based was issued after a hearing. Pet. App. 15a-18a. The court found that to trigger Section 922(g)(8)'s firearm disability, the statute "straightforwardly requires that the subject of the court order be given actual notice of the proceeding and an opportunity to participate." Pet. App. 17a. The court found that the actual notice requirement was satisfied by the summons written into the EPO served on petitioner on February 9, 2001. *Ibid.* The court found that "[t]he opportunity to participate requirement [was] satisfied because [petitioner] could have presented reasons why the court should not enter an order finding that he posed a credible threat to the safety of his wife or child at the February 12 court proceeding." *Ibid.*

The court also affirmed the district court's denial of petitioner's motion to suppress, rejecting petitioner's Fourth Amendment and Fifth Amendment due process challenges to the February 9, 2001, pre-hearing seizure of the Bushmaster gun. Pet. App. 18a-20a. The court determined that it had no occasion to consider whether an EPO requiring the removal of an alleged domestic abuser and his firearms from the home amounted to a valid search warrant under the Fourth Amendment. The court concluded that petitioner's claim failed on "narrower grounds" because petitioner "does not argue that the deputy sheriffs' entry into his residence and retrieval of his guns * * * was done without his permission." *Id.* at 19a. The court observed that petitioner at trial had testified that "he complied with the order, albeit reluctantly, and that he helped the deputies pack up his firearms." *Ibid.*

The court also rejected petitioner's due process challenge to the seizure of his firearms. Pet. App. 19a-20a. The court held that, in balancing the respective private and government interests, the district court had appropriately assigned greater weight to the State's interest in protecting an alleged domestic violence victim from gun violence and possible death than to petitioner's pre-hearing loss of possession of his firearms. *Id.* at 19a.

ARGUMENT

1. Petitioner contends (Pet. 7-11) that the pre-hearing seizure of his weapon on February 9, 2001, violated the Fourth Amendment and his Fifth Amendment Due Process rights. The court of appeals correctly rejected those claims.

a. Petitioner argues (Pet. 8-9) that the February 9, 2001, EPO did not constitute a search warrant under the Fourth Amendment. That issue is not properly

presented in this case because the court of appeals correctly declined to reach it. As the court explained, petitioner did not argue that the officers lacked his permission to enter his residence to retrieve his weapon. Pet. App. 19a. Rather, petitioner allowed the officers who served the order on him to enter his home, directed them to his gun collection, and allowed them to retrieve his weapons. Petitioner testified at trial that "he complied with the order, albeit reluctantly" and "helped the deputies pack up his firearms." *Ibid.* Furthermore, Deputy Sheriff Paul Olin testified that the officers had petitioner's "complete consent" to search the house. C.A. App. 116. Under those circumstances, the entry to obtain the weapons was justified by consent, whether or not the EPO independently functioned as a warrant.

b. Petitioner also argues (Pet. 9-11) that the February 9, 2001, pre-hearing seizure of his weapon deprived him of his property without notice and an opportunity to be heard, in violation of his due process rights. The court of appeals correctly rejected that contention.

Due process requires the government to provide notice and a meaningful opportunity to be heard when it deprives a person of a property interest protected by the Constitution. *Mathews* v. *Eldridge*, 424 U.S. at 333; *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Due process, however, "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews*, 424 U.S. at 334 (quoting *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895 (1961)). Rather, it "calls for such procedural protections as the particular situation demands." *Ibid.* (quoting *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972)). The requirements of due process do not always require a

pre-deprivation opportunity to be heard, but may be satisfied through a post-deprivation hearing in cases in which there is a need for prompt governmental action. See *United States* v. *James Good Real Prop.*, 510 U.S. 43, 53 (1993); *FDIC* v. *Mallen*, 486 U.S. 230, 240 (1988); *Parratt* v. *Taylor*, 451 U.S. 527, 539 (1981); *Fuentes* v. *Shevin*, 407 U.S. 67, 82 (1972).

The Court has held that pre-hearing seizures requiring "either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process." *Parratt*, 451 U.S. at 539. The balancing test set forth in *Mathews*, 424 U.S. at 335, looks to the private interest affected by the government action, the risk that the procedure used will result in an erroneous deprivation of such interest and the probable value of additional or other procedural safeguards, and the government's interest and burdens that additional procedural requirements would entail.

The court of appeals correctly concluded that the government's interest in protecting a victim of domestic violence from further violence and potential death strongly outweighed petitioner's interest in the right to enjoy his firearm collection during the three-day period between the February 9 seizure and the scheduled February 12 hearing. There was no serious risk in the circumstances of this case that petitioner would be erroneously deprived of his property rights. Petitioner's wife had sworn under oath that petitioner had struck her with a metal curtain rod and hammer, hit her in the face with his fist, pulled a gun on her, threatened

to kill her on numerous occasions, and "inferred jeopardy" to their child. C.A. App. 49.[1]

Petitioner was provided a meaningful opportunity to contest any deprivation of property both on February 12, 2001, and when another hearing was held on March 7, 2001, in which a final Domestic Violence Order was issued against petitioner. Pet. App. 2a. Given the necessity of quick action to remove petitioner's weapons, the pre-hearing seizure was constitutional. See, *e.g.*, *Dixon* v. *Love*, 431 U.S. 105 (1977) (upholding state's summary revocation of driver's license for repeated traffic offenses); *Ewing* v. *Mytinger & Casselberry, Inc*, 339 U.S. 594 (1950) (upholding summary pre-hearing seizure and destruction of misbranded drugs); *North American Cold Storage Co.* v. *City of Chicago*, 211 U.S. 306 (1908) (upholding pre-hearing seizure and destruction of unwholesome food because the possibility of erroneous destruction was outweighed by the public health emergency and the owner could recover damages in a later action); *Miller* v. *City of Philadelphia*, 174 F.3d 368 (3d Cir. 1999) (upholding child custody proceedings by *ex parte* order where child's safety endangered); *Jordan* v. *Jackson*, 15 F.3d 333, 343 (4th Cir. 1994) ("requirements of process may be delayed where emergency action is necessary to avert imminent harm to a child * * * provided that adequate post-

[1] Petitioner argues (Pet. 10) that his right to possess his firearm was protected by the Second Amendment. Petitioner waived that contention, however, by not raising it before the court of appeals. Moreover, petitioner's contention of a heightened interest in possessing his firearm is belied by his actions at the February 12, 2001, hearing that was held three days following retrieval of the weapon by the officers. Far from contesting the deprivation of the firearm, petitioner sought a postponement of the hearing.

deprivation process to ratify the emergency action is promptly accorded").[2]

2. Petitioner also renews his contention (Pet. 11-13) that the EPO that formed the basis for his prosecution under 18 U.S.C. 922(g)(8) was not issued after a hearing. That claim lacks merit and does not warrant review.

Section 922(g)(8)'s imposition of a firearm disability on a person who is subject to a restraining order requires only that the subject of the court order be given actual notice of the proceeding and an opportunity to participate. Here, petitioner received notice of the February 12, 2001, hearing in the form of the summons that was served on him on February 9, 2001. And, when petitioner appeared in court on February 12, 2001, he had the opportunity to present reasons why the court should not enter an order finding that he posed a credible threat to the safety of his wife and child. Indeed, petitioner's counsel actively participated at the February 12, 2001, hearing by seeking permission for petitioner to enter the marital residence to obtain personal items. Also, the court ordered petitioner to surrender his state permit to carry a concealed weapon, advised petitioner that he was to stay

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[2] Petitioner's reliance (Pet. 10-11) on *James Daniel Good Real Property*, *supra*, is misplaced. That decision held that, absent exigent circumstances, a residence cannot be seized by the government without affording the owner notice and an opportunity to be heard. See 510 U.S. at 52-54. The Court relied in part on the conclusion that the heightened interest in controlling one's home, *id.* at 53-54, outweighed the limited interest of the government in effectuating a pre-hearing seizure, *id.* at 56-59. Here, the opposite is true: the government's interest in ensuring that petitioner did not use his weapon to injure or kill his wife or child greatly outweighed his interest in his personal property.

out of Harrison County except to see his attorney, and told him that he might have to use another doctor temporarily because petitioner's wife worked at the local hospital. *Ibid.* Petitioner was certainly afforded an opportunity at that proceeding to argue that such safety precautions were unnecessary because he posed no threat to his wife.

Despite petitioner's contrary assertion (Pet. 12-13), the decision below does not conflict with the Fifth Circuit's decision in *United States* v. *Spruill*, 292 F.3d 207 (2002). In holding that the requirements of Section 922(g)(8) had not been met in that case, the court relied on the facts that no court proceeding occurred or was even scheduled before the issuance of the protective order. Rather, the subject of the order, who was illiterate and unrepresented by counsel, was simply presented with a prepared order at the District Attorney's Office and told where to sign if he agreed to the order. 292 F.3d at 209-212. And, consistent with the decision below, the Fifth Circuit in *United States* v. *Banks*, 339 F.3d 267 (2003), held that the hearing requirement in Section 922(g)(8)(A) is met when the defendant's "hearing was set for a particular date, he received notice of its * * *, and he appeared with his attorney on the date of his hearing," *id.* at 273, even when the protective order was entered without a contested hearing on the merits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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