

11-660(L)

To Be Argued By:
STEPHEN B. REYNOLDS/PAUL A. MURPHY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 11-660 (L)
11-1888(CON)

UNITED STATES OF AMERICA,
Appellee,

-vs-

ALAN ZALESKI,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The district court (Burns, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on February 22, 2011. (GA21). On February 14, 2011, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). (GA21). On April 21, 2011 the district court issued a ruling relating to the disposition of certain uncharged firearms and ammunition. (GA22, 437). On April 29, 2011, the defendant filed a timely notice of appeal of that ruling pursuant to Fed. R. App. P. 4(b). (GA22). The appeals were thereafter consolidated. This Court has appellate jurisdiction pursuant to 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

**Statement of Issues
Presented for Review**

1. Did the district court err when it denied Zaleski's motion to suppress and ruled that a request for a suspect to consent to a search, even after he has asked to speak to a lawyer, is not an interrogation under *Miranda*? Did the district court clearly err in finding that Zaleski's consent was voluntary in any event?
2. Did the district court properly reject the defendant's efforts to introduce evidence of his purported membership in the Connecticut unorganized militia and correctly conclude that his possession of the charged weapons was not protected by the Second Amendment?
3. Was the district court's sentence reasonable?
4. Did the district court properly reject the defendant's post-conviction motion for the return of seized but uncharged weapons to a third party or for the government to compensate him for the value thereof?

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11-1888(CON)

UNITED STATES OF AMERICA,
Appellee,

-vs-

ALAN ZALESKI,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The defendant, Alan Zaleski, was convicted at trial in March 2009 for his possession of an arsenal of weapons, silencers, grenades and improvised explosive devices (“IEDs”) that were found at his home in Berlin, Connecticut, in 2006. Zaleski came to the attention of law enforcement after a utility company tree services worker went to Zaleski’s rural and heavily wooded property to cut back some trees from power lines and tripped over one of several trip-

wires on the property, triggering a device that detonated and caused him permanent hearing loss in one ear. After obtaining written consents to search from Zaleski, as well as state and federal search warrants, officers spent three days systematically searching Zaleski's property, the cabin in which he lived, and a number of out-buildings and vehicles.

During the search of Zaleski's property, agents seized a vast number of weapons that Zaleski had secreted away on the property, including machine guns; silencers; fragmentation grenades; chemical grenades; smoke grenades; and various IEDs. Zaleski also possessed over 67,000 rounds of live ammunition, and voluminous components for making additional grenades, IEDs and bombs. Zaleski's property was also found to contain trip wires and booby traps to repel intruders, including camouflaged boards on the ground with nails sticking up through them. Zaleski also possessed anarchist and domestic terrorism-related literature, as well as dozens of how-to books on making bombs, IEDs, converting semi-automatic weapons to fully automatic weapons, and making homemade silencers.

Zaleski moved to suppress the evidence seized during the search and his post-arrest statements to the police. The district court denied his motion.

After a three-day trial, a jury found Zaleski guilty of fifteen counts of unlawfully possessing machine guns, in violation of 18 U.S.C. §§ 922(o)

and 924(a)(2); one count of unlawfully possessing a firearm with an obliterated serial number, in violation of 18 U.S.C. §§ 922(k) and 924(a)(1)(B); and eleven counts charging the unlawful possession of a sawed-off shotgun, silencers, grenades and IEDs, in violation of 26 U.S.C. §§ 5841, 5861(D) and 5871. On February 3, 2011, the district court sentenced Zaleski to 101 months, in the middle of the applicable Guidelines range.

Zaleski now appeals his conviction and sentence, claiming that: (1) his motion to suppress should have been granted; (2) the district court erred by refusing to allow him to present evidence to the jury that the Second Amendment entitled him to possess the weapons charged; (3) his sentence was unreasonable; and (4) the court erred in its ruling regarding the disposition of certain seized but uncharged weapons. As discussed below, Zaleski's claims are meritless and the judgment should be affirmed.

Statement of the Case

On October 18, 2006, a federal grand jury returned a thirty-count indictment charging Zaleski with the unlawful possession of unregistered weapons, silencers, grenades and IEDs, all in violation of 26 U.S.C. § 5861(d). (GA3-4, 166-68).

In December 2006 and February 2007, Zaleski moved to suppress the physical evidence seized. (GA4, 5, 169-79).

On April 2, 2008, after multiple hearings, the district court (Ellen Bree Burns, J.) denied Zaleski's motion to suppress. (GA10, 201-27).

On June 3, 2008, a federal grand jury returned a superseding indictment against Zaleski, charging him with: fifteen counts of unlawful possession of various machine guns, in violation of 18 U.S.C. §§ 922(o) and 924(a)(2); one count of unlawful possession of a firearm with an obliterated serial number, in violation of 18 U.S.C. §§ 922(k) and 924(a)(1)(B); and fourteen counts of unlawful possession of unregistered weapons (namely a sawed-off shotgun, silencers, grenades and IEDs), in violation of 26 U.S.C. §§ 5841, 5861(d) and 5871. (GA11, 241-44).

On May 2, 2008 and September 22, 2008, Zaleski filed motions to dismiss the indictment, claiming that the prosecution violated the Second Amendment. (GA13, 228, 256-73).

The district court denied Zaleski's motions to dismiss on June 30, 2008 and October 16, 2008. (GA13, 245, 274-82).

On March 27, 2009, the jury found Zaleski guilty on 28 counts. (GA329-36, 2162-69).

On February 3, 2011, Zaleski was sentenced to 101 months in prison, followed by three years of supervised release. Judgment entered February 22, 2011. (DA8-9; GA21, 2242-44).

On February 14, 2011, Zaleski filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). (GA21; DA6).

On March 3, 2011, the district court held a hearing regarding the disposition of certain seized but uncharged weapons, and on April 21, 2011, it issued a written ruling. (GA22, 437-48).

On April 29, 2011, Zaleski filed a timely notice of appeal of that ruling pursuant to Fed. R. App. P. 4(b) and the appeals were thereafter consolidated. (GA22).

Zaleski is currently serving his sentence.

**Statement of Facts and Proceedings
Relevant to this Appeal¹**

A. The Search of Zaleski's Property

On August 9, 2006, a tree cutter working for a local utility company contacted law enforcement after discovering “trip wires” on Zaleski’s rural and heavily wooded property. The contractor had previously tripped over one of the trip-wires, triggering a device that detonated and caused him permanent hearing loss in one ear. (GA201, 500-07, 1559-62; PSR ¶4).

Bomb technicians, using binoculars from a public road, were able to see at least one trip wire, a passive infrared device, a motion sensor, and a wire leading from the motion sensor to the residence. (GA202, 508-10, 691, 942). To the officers, these devices appeared to be “booby traps.” (GA942). The agents did not enter the property and, due to safety concerns, they decided to set up road blocks and locate the homeowner before approaching any of the devices. (GA202, 695, 942-43).

Zaleski eventually arrived at a roadblock and indicated that he lived at the property. (GA202-03, 456-60, 517-18). An officer explained to Zaleski that there was a potentially hazardous sit-

¹ Because Zaleski makes no challenge to the sufficiency of the evidence at trial, but rather challenges the district court’s ruling on his motion to suppress, this factual recitation is based primarily on the suppression record.

uation ahead, and that he could not let Zaleski pass. The officer asked Zaleski to “hang tight,” while another officer came to speak with him. (GA203, 459-60). During this whole exchange, Zaleski remained in his truck. (GA460).

When the other officer arrived, he explained to Zaleski, who was still in his truck, that several “bomb techs” wanted to ask him some questions about trip wires that were on his property. (GA203, 517-18).² Zaleski said he would be willing to talk to the bomb technicians. (GA203, 518). An officer asked Zaleski if he would mind traveling to his residence in a cruiser, because of the emergency crews that were located on the roadway. *Id.* Zaleski agreed to do so, and was seated in the rear. *Id.* The cruiser was equipped with air conditioning, which the officer used all the time. (GA519).

Upon arrival, Zaleski spoke with a state trooper bomb technician. Zaleski was outside the cruiser, and was not restrained in any way. (GA697-99, 944-46). Zaleski stated that the trip wires were connected to rat traps containing percussion caps, such that anyone tripping the wire would cause the bale of the trap to snap

² Although this portion of the district court’s finding of facts begins, “What happened next is disputed,” (GA203), as set forth below, the district court ultimately credited the government’s version of the events. Accordingly, the government cites to and relies on this portion of the district court’s factual findings, in addition to underlying transcript citations.

shut, resulting in a loud explosion. (GA204, 946-48; PSR ¶7). The trooper explained that the bomb technicians wanted to render the booby traps safe. (GA948). Zaleski agreed and volunteered that he had similar percussion caps in his truck. (GA204, 948-49). The trooper asked if he could search Zaleski's truck, and Zaleski agreed. (GA204, 949). An officer then drove Zaleski back to the traffic post in his cruiser, while the trooper and another bomb technician followed. (GA204, 949-50).

Once back at the traffic post, Zaleski was let out of the cruiser, and was free to walk around the area. (GA209, 523, 704-05, 950). Officers then presented Zaleski with a consent-to-search form for his truck, which Zaleski voluntarily signed. (GA40, 208, 523-24, 526, 528, 705-06, 951-52). Zaleski waited in the general area as the search transpired. (GA209, 530-31, 952-53). Zaleski never complained about heat exhaustion or dehydration, (GA208, 531, 713-14, 723, 974-75, 1157-58), nor was Zaleski ever told that he would be given water only if he gave consent. (GA542-43, 953-54). Rather, Zaleski was allowed to roam the area, and he settled on a roadside covered in shade. (GA209, 713-14, 953-54, 1108, 1112-13).

The search of Zaleski's truck yielded not only the percussion caps, but also a small-diameter steel pipe with two matching end caps, which the bomb technicians recognized as standard components to make a "pipe bomb." (GA209, 706, 708-09, 954-55).

The discovery of these items significantly heightened the bomb technicians' concerns about the explosive devices on Zaleski's property. (GA712, 955-56). Accordingly, officers asked Zaleski for consent to search his residence, as a matter of public safety. (GA209, 532-33, 712-13, 955-56). Zaleski asked for a telephone so that he could contact a lawyer. (GA209, 533, 956). In response, one of the officers gave his cell phone to Zaleski. (GA209, 534, 715, 956). After Zaleski used the phone, the phone's battery went dead. The trooper then gave his phone to Zaleski. (GA209, 534, 717, 956-57). Eventually, Zaleski stated that he was unable to get in touch with a lawyer. (GA209, 535). The officers asked Zaleski to return with them to the base of his driveway, so they could examine the devices further from there. (GA210, 960).

The officers and Zaleski then returned to the head of Zaleski's driveway, this time with Zaleski driving his own truck. (GA210, 536-37, 722, 960-61). Zaleski continued to speak with officers, while standing freely in the road near his driveway. (GA210, 538, 961). The officers reiterated their concern for public safety. (GA210, 723-24, 962). During this conversation Zaleski expressed a single concern: that he had an "unregistered gun" on the property, and he asked if that would be a problem. (GA210, 724, 962). Believing that Zaleski was referring to a handgun for which he lacked a "carry permit," a trooper informed Zaleski that, in Connecticut, it was not illegal to possess an unregistered handgun in one's home.

(GA210, 724-25, 962-64). When asked whether he had any explosives in his residence, Zaleski said no. (GA964).

Zaleski then consented to a search of his residence. (GA41, 210, 539, 725, 964-65). Officers prepared a written consent form, and Zaleski signed it. (GA41, 210, 539-40, 725-26, 964-65; GX31).

Zaleski joined the officers on the search, pointing out various devices to bomb technicians who cautiously proceeded down the driveway in advance of the defendant. (GA210, 726-27, 965-66; GX75-77).

When Zaleski unlocked his door and allowed officers inside his cluttered cabin, (GA210, 730-31, 967; GX78-81), they observed machine guns, silencers, guns and gun parts scattered throughout the residence. (GA210, 732, 736-37, 968-69; GX103-07). When officers asked Zaleski (again) whether there were any explosives in the cabin, Zaleski stated that he had a military CS chemical grenade. (GA969-70). Zaleski pointed out the grenade, which was located near military-style body armor and other military equipment. (GA970; GX86). Next to the CS grenade, officers found a black cardboard canister containing a live fragmentation grenade. (GA972-73; GX86). Upon finding the live grenades, the officers decided to exit the premises for safety reasons, obtain a warrant for the entire property, and proceed in a more cautious manner. (GA211, 737-38, 974).

Over the next several days, state and federal search warrants were executed (GA42-165), and painstaking “render safe procedures” were employed at Zaleski’s property. (GX22a-30a, 117-120, 125-29, 139-48). Officers uncovered an arsenal of fully-automatic machine guns, silencers, grenades, bomb making materials, and IEDs secreted away on the property, including in abandoned trailers, outbuildings and several old vehicles. (GA730, 740-41; GX84, 85, 87, 90, 109). Among other things, officers seized the following: 28 pistols; 18 rifles; 20 machine guns; 10 IEDs; 3 shotguns; 5 silencers; 1 hand grenade; 68 inert rockets/grenades; 6 smoke grenades; 27 booby traps; 225 percussion caps; 1 mortar device; and 3 pieces of body armor. (GA66-165, PSR ¶12). Several weapons had been deliberately concealed. For example, a length of PVC piping that had been sealed shut on both ends and labeled “welding rods,” was found to contain a sawed-off shotgun and shotgun ammunition. (GX17a).

Officers also found numerous expended rounds and “bullet traps” in Zaleski’s basement, which appeared to have been used to test fire weapons. (GA1747-49; GX110-13).

Officers also recovered numerous IEDs and components for making bombs including, a mortar tube (GX89); pipe bomb components (GX93); IEDs (GX108); numerous grenade-making components (GX121); ammonium nitrate and liquid nitro high performance fuel—components for a bomb mixture known as “ANFO” (GX122). Offic-

ers also seized more than 67,000 rounds of ammunition (GX98, 99, 116), including armor-piercing ammunition (GX130).

The resulting list of items seized was 96 pages long. (GA66-165, 740-41; GX88, 89, 92-96, 98-108, 117-124, 130-138).

Officers also recovered dozens of how-to books on making bombs, converting semi-automatic weapons to fully automatic weapons, and making homemade silencers. (GA66-69, 1909-28; GX35-70; PSR ¶11). Officers also found paraphernalia and literature relating to domestic terrorism, anti-Semitism, white power and Nazism. (PSR ¶11).

B. Zaleski's Post-Arrest Statements

After finding the live grenades in Zaleski's residence, officers arrested Zaleski on state charges of reckless endangerment. (GA211, 649). Following his arrest, officers interviewed Zaleski at a local police department. (GA211, 1119, 1121, 1127, 1132). Officers asked Zaleski if he wished to speak with them, and he said that he did. (GA211, 1128). Officers reviewed a notice of rights form with Zaleski, who stated that he understood. (GA211, 1128, 1875). When Zaleski said that he did not want to contact an attorney because he would not be able to get in touch with one, officers asked Zaleski if he wanted to try again. (GA211, 1128-29). When Zaleski said "no," an officer asked him whether he would like a phone book so he could find an attorney.

(GA211, 1129). Again he said “no.” (GA1129). Zaleski then agreed to waive his rights and speak with the officers. (GA211, 1129). In doing so, Zaleski signed the rights form, witnessed by officers. (GA211, 1130-31, 1177, 1182, 1875-77; GX32).

Zaleski stated that he set up percussion caps as early warning devices around his property as a deterrence system to keep “kids” and others from trespassing on his property. (GA1877-78). Zaleski also admitted that he had a large number of firearms and that he held no special licenses for possessing them. (GA1880-81). Zaleski admitted to possessing on his property: a Thompson fully automatic submachine gun, a .45 caliber Army Grease Gun, a fully automatic AR-10, several rifles, Lugers, a high-powered Browning, a Maxim, AR-15’s, MAC 9, 10 and 11 assault weapons, a 50 millimeter Russian mortar tube, explosive powders, grenade bodies and parts, fragmentation grenades; fuses; smoke grenades; and tear gas grenades. In an International Scout vehicle that Zaleski was rebuilding, he admitted that there was a sawed-off, double-barreled shotgun in a PVC pipe sealed and marked “welding rods.” Zaleski also stated that there was ammunition on the property for all of the previously mentioned weapons. (GA1881-84).

During the interview Zaleski “said that he hadn’t realized how much he had amassed,” (GA1887), and as “it dawned on him how much he had,” he said “[t]his is really bad, isn’t it.” (GA1887-88).

C. Zaleski's Motion to Suppress

After he was indicted on federal weapons charges, Zaleski moved to suppress his post-arrest statements and the physical evidence seized at his property in August 2006. (GA169-179, 187-200). Zaleski claimed that he never voluntarily consented to the searches. (GA198-200). Rather, Zaleski claimed in a sworn affidavit that he was involuntarily locked in the back of a hot cruiser with the windows up; he was told that he would not be provided with any water until he consented to searches; and that he was suffering from the beginning stages of heat exhaustion when he ultimately provided consent. *Id.* Zaleski made similar claims while testifying at the suppression hearings. *See, e.g.*, (GA1212-19, 1271-74).

On April, 2, 2008, the district court denied Zaleski's motion to suppress. (GA201-27). The court found "the government witness' testimony . . . to be more credible than Zaleski's version"; that "[t]he account Zaleski gave on the stand was inconsistent"; and that Zaleski's "demonstrated willingness to exaggerate [wa]s an additional reason to doubt Zaleski's credibility." (GA206). The court concluded that Zaleski's consent was voluntary and rejected a claim that consent was obtained after Zaleski had invoked his right to counsel. (GA217-18).

D. The Pre-Trial, Trial and Sentencing Proceedings

On May 2 and September 22, 2008, Zaleski filed motions to dismiss, claiming that the prosecution violated his Second Amendment rights. (GA256-73).

On June 30 and October 16, 2008, the district court denied Zaleski's motions to dismiss in written rulings. (GA274-82).

On March 9 and 16, 2009, Zaleski filed trial memoranda seeking to present evidence and have the jury decide whether (1) he was a member of Connecticut's unorganized militia; (2) he possessed his weapons as a militia member; (3) the weapons had a reasonable relationship to a well regulated militia, and (4) the Second Amendment therefore barred his prosecution. (GA311-18).

On March 17, 2009, Zaleski filed another motion to dismiss the indictment, claiming that the prosecution violated his rights under the Religious Freedom Restoration Act of 1993 (the "RFRA"), because he possessed the weapons charged consistent with certain religious beliefs. (GA327-28).

On March 18, 2009, the court held an evidentiary hearing at which Zaleski testified in support of his RFRA claim. Following oral argument, the court denied Zaleski's claims under the RFRA, and ordered that he would be precluded from introducing evidence about, or hav-

ing the jury decide, his Second Amendment claims. (GA1407-1543).

On March 27, 2009, a jury found Zaleski guilty on 28 counts. (GA329-36, 2162-69).³

At sentencing on February 3, 2011, the district court sentenced Zaleski to 101 months in prison. (DA6, 8-9; GA2242-44).

E. The Disposition of the Uncharged Weapons

On December 2, 2009, the court issued an order forfeiting the weapons that were the subject of the counts of conviction. (GA339-43). The forfeited weapons, however, were but a fraction of those seized from Zaleski. (GA438).

On October 14, 2010, the government moved for an order authorizing the destruction of the uncharged items, and it requested that the order be stayed until Zaleski exhausted any appeal. (GA406).

On December 27, 2010, Zaleski filed an opposition urging the court to (1) transfer the items to a family member or licensed firearms dealer who could sell them on Zaleski's behalf; or (2) order an appraisal so Zaleski could recover damages from the government. (GA420-32).

On April 21, 2011, the court ruled that neither Zaleski nor the government was entitled to

³ On March 26, 2009, the government voluntarily dismissed counts 22 and 23 of the superseding indictment. (GA16).

the relief they sought. (GA437-48). The court held that Zaleski, a convicted felon, could not designate an agent to receive and sell the non-forfeited items on his behalf, because such an arrangement would amount to constructive possession in violation of 18 U.S.C. § 922(g). (GA441-42). The court also held that sovereign immunity prohibited Zaleski from recovering money damages for property that could not be returned to him. The court also rejected Zaleski's claim that a failure to return the property to him or to provide compensation for its value would violate the Takings Clause. (GA444).

The court also rejected the government's request for relief reasoning that, so long as Zaleski was a convicted felon, he was not entitled to the non-forfeited items and therefore an order was not required for the government to dispose of the uncharged items. (GA447, n.3).

Summary of Argument

1. The district court properly denied Zaleski's motion to suppress. Even though Zaleski's consent to search his residence was obtained after he requested the opportunity to speak to a lawyer, it is well settled that a request for a suspect to consent to a search is not an interrogation under *Miranda*. The district court did not clearly err in finding that Zaleski's consent was voluntary in any event.

2. The Second Amendment to the Constitution afforded no protection to Zaleski's posses-

sion of the machine guns, sawed-off shotgun, silencers and IEDs. The Supreme Court has held that the Second Amendment provides an individual right to bear arms, but it made clear that the right is not unlimited. The right is restricted to particular types of weapons. Specifically, it covers arms that were “in common use at the time” the Second Amendment was enacted, and does not cover “weapons not typically possessed by law-abiding citizens for lawful purposes.” *District of Columbia v. Heller*, 554 U.S. 570, 625-27 (2008). Indeed, the Court specifically referenced short-barreled shotguns and M-16 machine guns as being excluded from the scope of the Second Amendment’s protection. These are two of the types of weapons Zaleski was charged with possessing in this case. Moreover, even if the Court were to conclude that the Second Amendment were implicated here, the pertinent statutes easily satisfy the applicable intermediate-scrutiny standard.

Zaleski’s contention that he should have been allowed to offer evidence at trial that he was, by statute, a member of Connecticut’s unorganized militia, and therefore his possession of the military-grade weapons was related to the maintenance of the militia, is meritless. The Second Amendment analysis was a question for the district court not the jury, so there was no abuse of discretion in refusing to permit Zaleski to offer such evidence to the jury. Moreover, the Second Amendment simply does not afford Zaleski any special protection merely because he was techni-

cally a member of the Connecticut unorganized militia. The Supreme Court specifically rejected the contention that the amendment protects the possession of “weapons that are most useful in military service.” 554 U.S. at 627.

3. The district court’s sentence was procedurally and substantively reasonable. The sentence rested on a proper calculation of the guidelines range and reflected the factors outlined in 18 U.S.C. § 3553(a). The court considered written submissions from the parties, the arguments and comments of counsel including the 3553(a) factors, the statement of the defendant, the presentence report, and after careful consideration, reasonably and properly concluded that a sentence in the middle of the Guideline range was appropriate. The district court’s passing reference to the vast library of anti-Semitic literature owned by Zaleski was not unlawful, as it related to the district court’s view, supported by the record, that Zaleski exhibited some anti-social tendencies, and was in direct rebuttal to defense counsel’s arguments at sentencing that Zaleski was not anti-social.

4. Zaleski is not entitled to the return of the uncharged weapons or compensation for their value. A convicted felon cannot have weapons returned to him, whether directly or indirectly, as it would violate federal law. Zaleski should also not be permitted to obtain the value of weapons that he is no longer able to legally possess. Sovereign immunity bars the court from ordering the United States to pay money damages to

Zaleski for property that cannot be returned to him and the fundamental purpose of the Takings Clause is in no way violated here because Zaleski, not the public, should be made to bear the collateral consequences of his conduct.

Argument

I. The district court properly denied Zaleski's motion to suppress.

A. Relevant facts

After he was indicted on federal weapons charges, Zaleski moved to suppress his post-arrest statements and the physical evidence seized at his property in August 2006, claiming that he never voluntarily consented to the searches. (GA169-179, 187-200). Rather, Zaleski claimed in a sworn affidavit that he was involuntarily locked in the back of a hot cruiser; he was told that he would not be provided with any water until he gave consent to search; and that he was suffering from the beginning stages of heat exhaustion when he ultimately provided consent. *Id.*

Zaleski made similar claims while testifying at the suppression hearing. *See, e.g.*, (GA1212-15, 1271-74) (Zaleski, locked in hot police car; suffering from heat stroke; begging to be let go and shouting that he was “dying”); (GA1215-17) (officers repeatedly stated: give us consent and we will give you water); (GA1217) (Zaleski's dehydration so intense that he believed he needed an IV). Zaleski also insisted that he did not sign

a written consent for the search of his truck and denied that the signature on the consent form was his. (GA1217-19).

With respect to the search of his home, according to Zaleski, he was told that things would “go better” for him if he consented to a search, and that a warrant was already on the way. (GA1233-34). Zaleski claimed that even though he did not want the officers to go into his home, he told them that it was okay to do so. (GA1235). Zaleski insisted that he did not sign the consent form for his residence, either, and that the signature on the form was not his. *Id.*

On April 2, 2008, the district court denied Zaleski’s motion to suppress. (GA201-27). The court found “the government witness’ testimony . . . to be more credible than Zaleski’s version.” (GA206). The court found that: “Zaleski seemed unable to recount the sequence of events precisely”; “[t]he account Zaleski gave on the stand was inconsistent”; and Zaleski’s “demonstrated willingness to exaggerate [wa]s an additional reason to doubt Zaleski’s credibility.” *Id.* The court reasoned:

In order to credit Zaleski’s testimony, the Court would, in effect, have to find that four police officers from different agencies conspired to testify falsely about a large number of details. The Court does not find this to have been the case.

(GA207).

The court also rejected Zaleski's claims that the officers coerced consent and forged his signature:

The Court does not . . . credit Zaleski's self-serving testimony that he did not sign a form consenting to the search of his truck. This event was observed by three of the witnesses who testified at the hearing.

* * *

Zaleski . . . signed a form consenting to a search of his house . . . Again, in testimony the Court does not credit, Zaleski claimed that he never signed this form.

(GA207-10). The court also "d[id] not credit Zaleski's testimony that he was confined by himself in the back of a stationary police car and . . . began to suffer from heatstroke"; and found Zaleski's "claims that he needed intravenous fluids and that he was afraid he would suffer the same fate as Randy Weaver to be, at best, exaggerations." (GA213). The district court therefore rejected "Zaleski's claims that he was coerced by the police into giving consent by coercive tactics that involved trading water for consent to search." (GA213-14).

Finding Zaleski's consent voluntary, the court reasoned:

Zaleski was not handcuffed prior to giving consent. The police officers did not draw their guns; nor did they make any threats or use physical force. Zaleski was allowed

to walk around more or less freely when he was not in the police car. Prior to giving his consent, Zaleski's encounter with the police had been relatively brief. He gave his consent in a public place rather than at a police station. Furthermore, before consenting to the search of his house—where the vast majority of the physical evidence was found—Zaleski was allowed to drive his own truck. All of these factors suggest that, even if Zaleski had been seized within the meaning of the Fourth Amendment, the circumstances in which he was seized were not sufficiently coercive to have caused him to give his consent involuntarily.

(GA215-16); *see also* (GA217) (“Zaleski knew he could refuse consent.”). The court concluded that Zaleski's consent “was given in ‘an atmosphere of relative calm . . . conducive to the making of a knowing and intelligent decision’” (GA216) (citing *United States v. Mapp*, 476 F.2d 67, 78 (2d Cir. 1973)), and that it “was neither the result of coercion nor ‘a mere acquiescence in a show of authority.’” (GA217) (citing *United States v. Wilson*, 11 F.3d 346, 351 (2d Cir. 1993)).

The court also rejected Zaleski's argument that his consent was obtained after he had invoked his right to counsel. The court reasoned that Zaleski could not have invoked his Sixth Amendment right to counsel because that right attaches only on the initiation of adversarial

proceedings. (GA218) (citing *United States v. Gouveia*, 467 U.S. 180, 187 (1984)). Moreover, even assuming *arguendo* that Zaleski invoked his Fifth Amendment right to counsel, a constitutional violation did not occur because a request for consent to search does not constitute interrogation within the meaning of *Miranda*. (GA218) (citing *United States v. McClellan* 165 F.3d 535, 544 (7th Cir. 1999); *United States v. Rodriguez-Garcia*, 983 F.2d 1563, 1568 (10th Cir. 1993)).

B. Governing law and standard of review

A warrantless search or seizure does not violate the Fourth Amendment if “the authorities have obtained the voluntary consent of a person authorized to grant such consent.” *United States v. Elliot*, 50 F.3d 180, 185 (2d Cir. 1995); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

To determine whether consent to search is voluntarily given, a court must examine “the totality of all the circumstances” to ascertain whether the consent “was a product of that individual’s free and unconstrained choice, rather than a mere acquiescence in a show of authority.” *United States v. Garcia*, 56 F.3d 418, 422 (2d Cir. 1995) (citations and internal quotation marks omitted); *accord Schneckloth*, 412 U.S. at 226-27. “So long as the police do not coerce consent, a search conducted on the basis of consent is not

an unreasonable search.” *Garcia*, 56 F.3d at 422 (citing *Schneckloth*, 412 U.S. at 228).

Whether an individual has voluntarily given consent is a fact-based inquiry. *United States v. Peterson*, 100 F.3d 7, 11 (2d Cir. 1996); *United States v. Gandia*, 424 F.3d 255, 265 (2d Cir. 2005). The government bears the burden of showing that consent was freely and voluntarily given. *United States v. Buettner-Janusch*, 646 F.2d 759, 764 (2d Cir. 1981).

Factors to consider when assessing whether a defendant’s “will was overborne” include, *inter alia*, the age, intelligence, and education level of the defendant; whether the defendant is aware of his right to refuse consent; the length of the detention and the prolonged nature of any questioning; whether the defendant was threatened by any further action if he denied consent; whether law enforcement officers displayed a weapon; whether the defendant was under any physical restraint; and whether any physical punishment or deprivation occurred. *Schneckloth*, 412 U.S. at 226; *United States v. Hernandez*, 5 F.3d 628, 633 (2d Cir. 1993); *United States v. Marin*, 669 F.2d 73, 83 (2d Cir. 1982). No single factor is dispositive. *Schneckloth*, 412 U.S. at 226-27.

A suspect’s consent may be solicited and properly obtained, even after the defendant has invoked his or her *Miranda* rights. See *United States v. Busic*, 592 F.2d 13, 22 (2d Cir. 1978). This is because “a request for consent to search

is not an interrogation within the meaning of *Miranda* because the giving of such consent is not a self-incriminating statement.” *United States v. McClellan*, 165 F.3d 535, 544 (7th Cir. 1999); *see also United States v. LaGrone*, 43 F.3d 332, 335 (7th Cir. 1994); *United States v. Hidalgo*, 7 F.3d 1566, 1568 (11th Cir. 1993); *United States v. Smith*, 3 F.3d 1088, 1098 (7th Cir. 1993); *United States v. Rodriguez-Garcia*, 983 F.2d 1563, 1568 (10th Cir. 1993); *Cody v. Solem*, 755 F.2d 1323, 1330 (8th Cir. 1985); *Smith v. Wainwright*, 581 F.2d 1149, 1152 (5th Cir. 1978); *United States v. Lemon*, 550 F.2d 467, 472 (9th Cir. 1977); *United States v. Faruolo*, 506 F.2d 490, 495 (2d Cir. 1974); *but see United States v. Fleming*, 31 F. Supp. 2d 3, 5 n.3 (D.D.C. 1998).

In reviewing the denial of a suppression motion, this Court reviews the district court’s conclusions of law *de novo*, and its findings of fact for clear error, taking those facts in the light most favorable to the government. *United States v. Lucky*, 569 F.3d 101, 105-106 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 1878 (2010); *United States v. Watson*, 404 F.3d 163, 166 (2d Cir. 2005). “The district court’s finding that consent was given voluntarily will not be overturned unless it is clearly erroneous.” *Peterson*, 100 F.3d at 11 (citing *Hernandez*, 5 F.3d at 632).

C. Discussion

Zaleski states that “[t]he issue in this appeal is whether the fact that police continued to question Mr. Zaleski after he was detained under the Fourth Amendment and after he had made a clear and unequivocal request for a lawyer under the Fifth Amendment, renders his consent invalid under the Fourth Amendment.” Def. Br. 15. Accordingly, Zaleski’s sole challenge to the district court’s suppression ruling is that his consent was improperly obtained after he had invoked his Fifth Amendment right to counsel.

Zaleski’s claim is without merit because even assuming that Zaleski was in custody, a request that a suspect consent to a search does not constitute an interrogation. *See McClellan*, 165 F.3d at 544; *LaGrone*, 43 F.3d at 337; *Hidalgo*, 7 F.3d at 1568; *Smith*, 3 F.3d at 1098 (“[A] consent to search is not a self-incriminating statement and, therefore, a request to search does not amount to interrogation. . . . This view comports with the view taken by every court of appeals to have addressed the issue.”); *Rodriguez-Garcia*, 983 F.2d at 1568 (“Every federal circuit court which has addressed the *Miranda* issue presented here has reached the conclusion that a consent to search is not an incriminating statement.”); *Cody*, 755 F.2d at 1330 (“Simply put, a consent to search is not an incriminating statement. [The suspect’s] consent, in and of itself, is not evidence which tends to incriminate him. While the search taken pursuant to that consent disclosed incrimi-

nating evidence, this evidence is real and physical, not testimonial.”); *Smith*, 581 F.2d at 1152 (“A consent to search is not a self-incriminating statement; ‘[i]t is not in itself evidence of a testimonial or communicative nature.’”) (quoting *Lemon*, 550 F.2d at 472); *Faruolo*, 506 F.2d at 495 (“There is no possible violation of fifth amendment rights since the consent to search is not evidence of a testimonial or communicative nature.”) (quotations omitted)).

Moreover, the district court’s finding that Zaleski’s consent was voluntary was well supported by the record and based on a careful analysis of all the relevant factors. As the district court found: Zaleski was not handcuffed; officers did not make any threats or use physical force; Zaleski was allowed to walk around freely when he was not in the cruiser; Zaleski’s encounter with the police had been relatively brief; Zaleski gave his consent in a public place; Zaleski had been allowed to drive his own truck; and Zaleski knew he could refuse consent. (GA215-16); *see also* (GA518) (Zaleski seated in his own truck and agreed to travel to his residence in cruiser); (GA697-99, 946) (defendant outside cruiser and not restrained in any way); (GA523, 704-05, 950) (Zaleski out of cruiser and walking around freely); (GA713-14, 953-54) (Zaleski roamed the area and settled on a side of the road that was covered in shade)). Indeed, one officer testified that upon her arrival at the scene, Zaleski was walking around so freely that she believed him to be another officer. (GA1108). As the district court

properly held, all of these factors suggest that, even if Zaleski had been seized within the meaning of the Fourth Amendment, the circumstances in which he was seized were not sufficiently coercive to have caused him to give his consent involuntarily.

The officers in this case responded to a dangerous situation with appropriate restraint. Even after learning that a utility worker had been injured by an explosive device on Zaleski's property, they cordoned off the area, awaited Zaleski's arrival, and obtained his written and voluntary consent before entering his property. After entering Zaleski's residence and seeing the type of weapons Zaleski possessed, the officers withdrew and obtained both state and federal search warrants before initiating the three day search that followed. The officers' actions were not only eminently reasonable, but also well within the dictates of Fourth Amendment jurisprudence.

II. The district court properly rejected Zaleski's efforts to introduce evidence of his purported membership in the Connecticut unorganized militia because his possession of the charged weapons was not protected by the Second Amendment.

Zaleski argues that the district court erred when it refused his request to present evidence to the jury to the effect that he was a member of Connecticut's unorganized militia which, accord-

ing to him, gave him a right under the Second Amendment to possess the firearms and other weapons charged in the Superseding Indictment. Def. Br. 16-27. The district court correctly concluded that Zaleski's possession of machine guns, a sawed-off shotgun, silencers and explosive devices were not protected by the Second Amendment, and thus it was not error to reject his proffered evidence of membership in Connecticut's unorganized militia.

A. Relevant facts

The superseding indictment charged Zaleski with thirty counts of possession of unlawful weapons. Specifically, the indictment charged Zaleski with possession of machine guns, with unlawful possession of a machine gun with an obliterated serial number, and with possession of unregistered firearms, consisting of a sawed-off shotgun, grenades, silencers and improvised explosive devices.

Zaleski filed a motion to dismiss, arguing essentially that the weapons he possessed were ordinary military equipment, and thus were protected by the Second Amendment. (GA228-34). The motion relied principally on *United States v. Miller*, 307 U.S. 174 (1939). (GA232-33).

While Zaleski's motion was pending, the Supreme Court issued its ruling in *District of Columbia v. Heller*, 554 U.S. 570 (2008). The district court thereafter denied Zaleski's motion to dismiss, relying on *Heller's* rejection of the no-

tion that *Miller* stood for the proposition that any weapon useful for military purposes was protected by the Second Amendment. (GA247-50). The district court noted *Heller*'s conclusion that the Second Amendment did not protect "those weapons not typically possessed by law-abiding citizens for lawful purposes, like short-barreled shotguns." (GA248) (quoting *Heller*, 554 U.S. at 625). According to the district court, "[i]t cannot seriously be contended that any of the array of weapons Zaleski is alleged to have possessed are of the sort 'typically possessed by law-abiding citizens for lawful purposes.'" (GA249-50). "The possession and use of machine guns, homemade silencers, hand grenades and improvised explosive devices are highly unusual, and therefore, these weapons do not fall within the protections of the Second Amendment." (GA250).

Zaleski thereafter filed a new motion to dismiss based on the Second Amendment. (GA256). In that motion, he sought to distinguish *Heller* and *Miller*, and once again asked the court to dismiss the case, claiming that his possession of the various weapons charged in the indictment was protected by the Second Amendment.

The district court once again denied the motion based on its conclusion that, pursuant to the Supreme Court's holding in *Heller*, the Second Amendment did not bar this prosecution. The court again noted that the Second Amendment protects only weapons in common use at the

time of the drafting of the amendment that were used for lawful purposes such as self-defense. (GA280-81). The district court agreed with the conclusions drawn by the Eighth and Ninth Circuits that machine guns and short-barreled shotguns were not protected by the Second Amendment. *Id.* It drew the same conclusion with respect to the other weapons charged in the superseding indictment:

Silencers are the tools of assassins. Improvised explosive devices are indiscriminate killers that have no place in a safe society. These are “particularly dangerous” weapons to which the Second Amendment does not apply.

(GA281).

Having lost both motions to dismiss, Zaleski then filed a trial brief in which he effectively resurrected his original argument, namely, that his possession of the weapons charged in the indictment was related his statutory membership in Connecticut’s unorganized militia and was covered by the Second Amendment because the weapons were useful in militia service. (GA312-13, 1392-94, 1532-34). He contended that the Second Amendment right he was asserting was based on his statutory inclusion in the militia and was distinct from the individual Second Amendment right the Supreme Court recognized in *Heller*. The district court rejected this contention. (GA1534).

The district court's conclusion was correct. The Second Amendment affords no protection to the defendant to possess the dangerous weapons charged in the superseding indictment.

B. Governing law and standard of review

This court reviews a district court's legal conclusions *de novo*, including those regarding the constitutionality of a statute. See *United States v. Weingarten*, 632 F.3d 60, 63-64 (2d Cir. 2011); *United States v. Stewart*, 590 F.3d 93, 109 (2d Cir. 2009), *cert denied*, 130 S. Ct. 1924 (2010). In contrast, the court applies an abuse of discretion standard of review to a district court's decision to admit or exclude evidence. See *United States v. Kozeny*, -- F.3d --, 2011 WL 6184494 at *12 (2d Cir., Dec. 14, 2011); *United States v. Massino*, 546 F.3d 123, 127-28 (2d Cir. 2008).

1. The Supreme Court's decision in *District of Columbia v. Heller*

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. Amend. II. In *Heller*, the Supreme Court held that the District of Columbia's handgun ban, which generally prohibited any person from possessing a handgun and required that any other lawfully owned firearm be kept unloaded and disassembled or bound by a trigger-lock while in the home, violated the individual right

to keep and bear arms protected by the Second Amendment. *See Heller*, 554 U.S. at 595, 628-36. The Supreme Court found that the individual right existed without regard to an individual's service in the militia, and noted that the focal point of the right was "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635; *see United States v. Chapman*, -- F.3d --, 2012 WL 11235 at *2 (4th Cir., Jan. 4, 2012) (noting that the "core" right is the right of responsible, law-abiding citizens to protect the hearth and home).

"Like most rights, the right secured by the Second Amendment is not unlimited." *Heller*, 554 U.S. at 626. "From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* The Supreme Court wrote that certain well-recognized restrictions on the possession of firearms were consistent with its holding, noting that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-27. *See also United States v. Stuckey*, 317 Fed. Appx. 48, 50 (2d Cir. 2009) (rejecting argument that 18 U.S.C. § 922(g)(1), pro-

hibiting convicted felons from possessing firearms, is unconstitutional under *Heller*).

The Supreme Court also recognized that the Second Amendment has never been construed to protect “the carrying of ‘dangerous and unusual weapons.’” *Heller*, 554 U.S. at 627. This issue was more specifically identified in the Court’s analysis of its prior decision in *United States v. Miller*, 307 U.S. 174 (1939). See *Heller*, 554 U.S. at 621-25.

In *Miller*, the defendants had been indicted under the National Firearms Act of 1934 for transporting in interstate commerce an unregistered sawed-off shotgun. See *Miller*, 307 U.S. at 175. The *Miller* Court held that the sawed-off shotgun at issue there was not among the types of arms protected by the Second Amendment “[i]n the absence of any evidence tending to show that possession or use of a ‘shotgun having a barrel of less than eighteen inches in length’ at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia.” *Id.* at 178. The Court in *Miller* added that “[c]ertainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.” *Id.*

The *Heller* Court explained that the *Miller* decision turned on the fact that the type of weapon at issue there—a sawed-off shotgun—was not eligible for Second Amendment protection. *Heller*, 554 U.S. at 622. The *Heller* Court found

that “*Miller* stands only for the proposition that the Second Amendment right, whatever its nature, *extends only to certain types of weapons.*” *Id.* at 623 (emphasis added). The *Heller* Court then expanded on what types of weapons were protected under the Second Amendment, writing:

We may as well consider at this point (for we will have to consider eventually) what types of weapons *Miller* permits. Read in isolation, *Miller*’s phrase “part of ordinary military equipment” could mean that only those weapons useful in warfare are protected. *That would be a startling reading of the opinion, since it would mean that the National Firearms Act’s restrictions on machineguns (not challenged in Miller) might be unconstitutional, machineguns being useful in warfare in 1939.* We think that *Miller*’s “ordinary military equipment” language must be read in tandem with what comes after: “[O]rdinarily when called for [militia] service [able-bodied] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.” The traditional militia was formed from a pool of men bringing arms “in common use at the time” for lawful purposes like self-defense. “In the colonial and revolutionary war era, [small-arms] weapons used by militiamen and weapons used in defense of person and home were one and the same.” Indeed,

that is precisely the way in which the Second Amendment’s operative clause furthers the purpose announced in its preface. We therefore read *Miller* to say only that *the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns*. That accords with the historical understanding of the scope of the right.

Id. at 624-25 (emphasis added) (internal citations omitted).

2. Application of the Second Amendment right articulated in *Heller*

Since *Heller*, circuit courts reviewing various gun-control provisions have articulated a two-step process for deciding whether they violate the Second Amendment. Specifically, the courts look first at whether the restriction “impinges upon a right protected by the Second Amendment.” *Heller v. District of Columbia*, -- F.3d --, 2011 WL 4551558 at *5 (D.C. Cir., Oct. 4, 2011); see *United States v. Carter*, -- F.3d --, 2012 WL 207067 at *3 (4th Cir. Jan. 23, 2012); *Ezell v. City of Chicago*, 651 F.3d 684, 701-04 (7th Cir. 2011); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 2476 (2011); *United States v. Marzarella*, 614 F.3d 85, 89 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 958 (2011); *c.f. Nordyke v. King*, 644 F.3d 776, 783-86 (9th Cir. 2011) (divided panel

requires a “substantial burden” on Second Amendment right before applying heightened scrutiny). The inquiry is at an end if the court finds that the Second Amendment is inapplicable. Only if there is some infringement on the right secured by the Second Amendment, does the court move to the second step of examining whether the regulation at issue passes constitutional muster. *See Heller*, 2011 WL 4551558 at *5 (citing cases).

In cases where courts have moved to the second step of the analysis, they have generally applied the standard of intermediate scrutiny to restrictions that affect the Second Amendment right. *See Carter*, 2012 WL 207067 at *4-5 (intermediate scrutiny applied to statute criminalizing possession of a firearm while being an unlawful user of marijuana); *Heller*, 2011 WL 4551558 at *9 & *14 (intermediate scrutiny applied to gun registration laws and to ban on assault weapons and large-capacity magazines); *Marzzarella*, 614 F.3d at 97-98 (intermediate scrutiny applied to 18 U.S.C. § 922(k) making it illegal to possess a firearm with an obliterated serial number); *United States v. Skoien*, 614 F.3d 638, 640-42 (7th Cir. 2010) (en banc) (intermediate scrutiny applied to statute criminalizing possession of firearm by a domestic violence offender), *cert. denied*, 131 S. Ct. 1674 (2011). This is the correct standard where, as here, the restrictions at issue do not prohibit the core Second Amendment right of a law-abiding citizen to possess a handgun in the home for self-

defense, but merely regulate the types of weapons that may be lawfully possessed or the class of persons who may keep them. *See Marzzarella*, 614 F.3d at 97; *Chapman*, 2012 WL 11235 at *4; *Heller*, 2011 WL 4551558 at *9-10, *14; *Reese*, 627 F.3d at 801-02.

Intermediate scrutiny typically requires some showing that the challenged law is “substantially related to an important governmental objective.” *See, e.g., Clark v. Jeter*, 486 U.S. 456, 461 (1988). While the standard has been articulated in several ways, “[t]hey all require the asserted governmental end to be more than just legitimate, either ‘significant,’ ‘substantial,’ or ‘important,’” and “[t]hey generally require the fit between the challenged regulation and the asserted objective be reasonable, not perfect.” *Marzzarella*, 614 F.3d at 98.

Machine guns, short-barreled shotguns, silencers and explosive devices are precisely the type of dangerous and unusual weapons that the Supreme Court made clear in *Heller* are not protected by the Second Amendment. Several other circuit courts have reached this very conclusion in cases like this one involving weapons that were not “in common use at the time” the Second Amendment was enacted and which are not “typically possessed by law-abiding citizens for lawful purposes,” but rather amount to “dangerous and unusual weapons.” *Heller*, 554 U.S. at 624-25, 627. These courts have concluded that the Second Amendment affords no protection for

such weapons. See *United States v. Tagg*, 572 F.3d 1320, 1326-27 (11th Cir. 2009) (holding that unregistered pipe bombs were not protected by the Second Amendment); *Hamblen v. United States*, 591 F.3d 471, 474 (6th Cir. 2009) (holding that the Second Amendment did not protect the defendant's possession of unregistered machine guns, noting that the defendant's claim was "directly foreclosed" by *Heller*'s conclusion that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes"), *cert. denied*, 130 S. Ct. 2426 (2010); *United States v. Fincher*, 538 F.3d 868, 873-74 (8th Cir. 2008) (rejecting Second Amendment protection for machine guns and unregistered sawed-off shotgun); see also *Marzzarella*, 614 F.3d at 94 (holding that the possession of weapon in the home is not protected by the Second Amendment in all circumstances because "the Supreme Court has made clear the Second Amendment does not protect" weapons like machine guns, short-barreled shotguns or any other dangerous and unusual weapon).

In *Fincher*, for example, the Eighth Circuit held that the defendant's possession of an unregistered machine gun and an unregistered sawed-off shotgun was not protected by the Second Amendment right recognized in *Heller*. See *Fincher*, 538 F.3d at 874. The Eighth Circuit concluded:

[U]nder *Heller*, [the defendant's] possession of the guns is not protected by the Second Amendment. Machine guns are not in common use by law-abiding citizens for lawful purposes and therefore fall within the category of dangerous and unusual weapons that the government can prohibit for individual use.

Id.

C. Discussion

1. The charged weapons are not protected by the Second Amendment.

Zaleski effectively concedes that his possession of the charged weapons is not covered by the individual Second Amendment right articulated in the Supreme Court's *Heller* opinion by arguing that, instead, his possession was protected by virtue of his statutory inclusion in the class of Connecticut citizens deemed to be members of the unorganized militia. *See* Def. Br. 23. Zaleski's failure to make even a modicum of effort to claim that his possession of the charged weapons was somehow protected by the individual right articulated in *Heller* speaks volumes. The Supreme Court made abundantly clear in *Heller* that the Second Amendment affords no protection for the types of dangerous and unusual weapons at issue here. They are not the kinds of weapons customarily possessed by law-abiding citizens for lawful purposes.

Machine guns are military hardware designed to fire multiple rounds with a single pull of the trigger, and are precisely the types of weapons that, like the M-16s referred to by the Supreme Court in *Heller*, are not protected by the Second Amendment. *Heller*, 554 U.S. at 627; see *Heller*, 2011 WL 4551558 at *15. Likewise, *Heller* specifically noted that short-barreled shotguns are not the types of weapons typically possessed by law-abiding citizens for lawful purposes, and therefore are not covered by the Second Amendment. *Heller*, 554 U.S. at 625.

As for the silencers and explosives, the district court here found that “[s]ilencers are the tools of assassins,” and that “[i]mprovised explosive devices are indiscriminate killers that have no place in a safe society.” (GA281). Other courts have reached similar conclusions. See *Tagg*, 572 F.3d at 1326-27 (pipe bombs are not protected by the Second Amendment); *United States v. Perkins*, 2008 WL 4372821 at *4 (D. Neb. Sept. 23, 2008) (silencers are not protected by the Second Amendment). Zaleski does not challenge any of the district court’s factual findings as being clearly erroneous. See *United States v. Williams*, 23 F.3d 629, 635 (2d Cir. 1994) (findings of fact reviewed under clearly erroneous standard).

Because the weapons at issue are not covered by the individual right protected by the Second Amendment—as Zaleski effectively concedes—there is no reason to move to the second step of the analysis to determine whether the statutory

restrictions at issue survive constitutional scrutiny. Tellingly, Zaleski makes no argument in this regard.

2. The applicable restrictions on possession of the charged weapons would survive constitutional scrutiny.

But even if Zaleski somehow could show that his Second Amendment rights were implicated by the prohibitions on the possession of the weapons at issue, the pertinent statutes plainly would survive intermediate scrutiny. Zaleski does not argue otherwise.

The government has important safety and law enforcement interests in keeping machine guns, sawed-off shotguns, silencers, explosives and unmarked weapons out of general circulation.

For instance, in enacting the current version of the National Firearms Act, 26 U.S.C. §§ 5801, *et seq.*, Congress found, among other things, that “short-barreled rifles are primarily weapons of war and have no appropriate sporting use or use for personal protection.” *United States v. Gonzales*, 2011 WL 5288727 at *5 (D. Utah Nov. 2, 2011) (quoting S. Rep. No. 90-1501, at 28 (1968)); *see United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517 (1992) (Souter, J.) (“It is of course clear from the face of the [National Firearms] Act that the NFA’s object was to regulate certain weapons likely to be used for

criminal purposes, just as the regulation of short-barreled rifles, for example, addresses a concealable weapon likely to be so used.”). Common sense and experience clearly reflect that the other types of firearms Zaleski possessed are similarly dangerous, as the district court found when it wrote that “[s]ilencers are the tools of assassins,” and that “[i]mprovised explosive devices are indiscriminate killers that have no place in a safe society.” (GA281).

Even under the more exacting strict scrutiny standard, some restrictions on speech may be justified “based solely on history, consensus, and simple common sense.” *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (internal quotation omitted); *see also City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 451 (2002) (Kennedy, J., concurring) (“very little evidence is required”); *id.* at 452-53 (regulations [on adult bookstores] may rest, in part, on “common experience” and inference); *Chapman*, 2012 WL 11235 at *4 (based on the legislative history of the statute, the relevant case law and common sense, the court held that the government had established that it had a substantial governmental objective in 18 U.S.C. § 922(g)(8)).

Public safety is a primary obligation of the government. In addition, the statutory limitations at issue serve the government’s interest in crime prevention, which the Supreme Court has recognized is a compelling interest. *See United States v. Salerno*, 481 U.S. 739, 749-50 (1987).

The statutes at issue are narrowly tailored to promote these important governmental interests, and do not prevent all gun possession. Instead, they simply place beyond reach certain highly dangerous weapons as well as untraceable ones not bearing a serial number. None of the weapons at issue here is the type normally possessed by law-abiding citizens for lawful purposes like self defense.

The case law post-*Heller* bears this out. For instance, the D.C. Circuit recently upheld a ban on semi-automatic assault weapons after conducting an intermediate-scrutiny analysis. *Heller*, 2011 WL 4551558 at *15-16. The D.C. Circuit's analysis reflects the fact that semi-automatic assault rifles like the AR-15s at issue there are even less dangerous than automatic weapons like the machine guns Mr. Zaleski possessed. *Id.* at *15. So if a ban on semi-automatic weapons survives constitutional scrutiny, surely a ban on the more dangerous automatic weapons also would survive such scrutiny.

Likewise, the Third Circuit in *Marzzarella* upheld 18 U.S.C. § 922(k), prohibiting possession of a firearm with an obliterated serial number, after conducting an intermediate-scrutiny analysis. The court held that the statutory requirement served an important or substantial governmental interest in law enforcement and was reasonably tailored to accomplishing that interest. *See* 614 F.3d at 97-98. The only reason the *Marzzarella* court even reached the interme-

diate-scrutiny analysis was because the case involved a handgun possessed in the home. *See id.* at 95. Here, in contrast, the weapon with the obliterated serial number was a machine gun. For the reasons already articulated, the Second Amendment does not even apply. But, even if it did, the statutory restriction certainly would survive constitutional scrutiny, as the government has an important law enforcement interest in making sure that untraceable weapons are not in circulation. *See id.* at 97-98.

3. Zaleski does not have broader Second Amendment protection by virtue of his statutory inclusion in the unorganized militia.

Zaleski tries distinguishing *Heller* by arguing that he was authorized to possess those highly dangerous and uncommon weapons because, under Connecticut statute, he was a member of the unorganized militia. In doing so, he relies on a number of cases that pre-date *Heller* and ignores the plain language of *Heller* rejecting the notion that membership in a militia is sufficient to qualify one for Second Amendment protection for military-grade weapons.

As an initial matter, Zaleski's argument that the district court committed error by not permitting him to introduce evidence at trial of his membership in the unorganized militia is simply wrong. As the court in *Fincher* noted when faced with this same argument, "[t]he role of the jury is to decide facts, not legal issues," and

“[a]ccordingly, the district court did not err in prohibiting Fincher from arguing or presenting evidence regarding a question of law to the jury.” 538 F.3d at 872. The same holds true here, and, as such, this Court should reject Zaleski’s claim of error.

Moreover, to the extent Zaleski contends that the district court should have dismissed the indictment based on his proffered information about his statutory membership in the unorganized militia, that too is fatally flawed in light of *Heller*. In *Heller*, the Supreme Court rejected the notion that its prior decision in *Miller*, the case on which Zaleski principally relies, turned on whether the weapons at issue were for military or non-military use. *See Heller*, 554 U.S. at 621-22. The Court held instead that *Miller* was based on the fact that “the *type of weapon at issue* was not eligible for Second Amendment protection.” *Id.* at 622 (emphasis in original). The Supreme Court further rejected the notion that “only those weapons useful in warfare are protected,” noting that “[t]hat would be a startling reading of the [*Miller*] opinion, since it would mean that the National Firearms Act’s restrictions on machineguns (not challenged in *Miller*) might be unconstitutional, machineguns being useful in warfare in 1939.” *Id.* at 624.

The Supreme Court recognized in *Heller* that “[i]t may be objected that if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the Second

Amendment right is completely detached from the prefatory clause” concerning a well regulated militia. *Id.* at 627. But the Court went on to note that “the conception of the militia at the time of the Second Amendment’s ratification was the body of all citizens capable of military service, who would bring the sorts of *lawful weapons that they possessed at home* to militia duty.” *Id.* at 627 (emphasis added). The Court also recognized that “[i]t may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large.” *Id.* But it plainly dismissed this as a basis for contending that the Second Amendment must therefore be read to permit the possession of any type of military-grade weapon in order to satisfy the interest in preserving a well regulated militia. The Court found that “the fact that modern developments have limited the degree of fit between the prefatory clause [of the Second Amendment] and the protected right cannot change our interpretation of the right.” *Id.* at 627-28.

In short, the Supreme Court rejected the very argument Zaleski makes here—*i.e.*, that there is a right for a member of the unorganized militia to maintain dangerous and unusual weapons if they may be useful in warfare because they would have a relationship to the maintenance of the militia. The maintenance of the militia is protected by the Court’s protection of those weapons commonly used by law-abiding citizens for lawful purposes. Those are the weapons that the

Supreme Court notes that militia members would bring with them to militia duty. That those may not be the most effective military weapons to use in modern warfare does not, in the Supreme Court's view, create a reason why the Second Amendment would offer protection to dangerous or unusual weapons. *See Heller*, 554 U.S. at 627-28.

The Eighth Circuit, in an opinion issued weeks after the Supreme Court's decision in *Heller*, rejected a similar argument by a defendant who was convicted of possessing a machine gun and an unregistered short-barreled shotgun. *See Fincher*, 538 F.3d at 872-73. Fincher claimed that his possession of the weapons was related to his membership in the Washington County Militia ("WCM"). He testified outside the presence of the jury that "the purpose of the WCM is to ensure the militia can operate as effectively militarily as possible in a time of state emergency and that the WCM has regular meetings and training sessions for its members." *Id.* at 871.

In analyzing the defendant's Second Amendment argument, the Eighth Circuit noted that, by virtue of an Arkansas statute similar to the Connecticut statute relied on by the defendant here, Fincher was technically a member of Arkansas' unorganized militia. *Id.* at 873. The *Fincher* court first looked to a pre-*Heller* case holding that "'technical' membership in a state militia (e.g., membership in an 'unorganized' state militia) . . . is not sufficient to satisfy the

‘reasonable relationship test’—*i.e.*, that the possession of weapons was “reasonably related to a well regulated militia.” *Id.* at 872 (internal quotations omitted). Because Fincher was a member of the unorganized militia, rather than the organized militia, the court held that his “possession of firearms [was], as a matter of law, not reasonably related to a well regulated militia and [was] thus not protected by the Second Amendment.” *Id.* at 873. Significantly, the *Fincher* court then proceeded to analyze the Second Amendment right the Supreme Court had then recently articulated in *Heller* and confirmed its conclusion that the defendant did not have a Second Amendment right to possess a machine gun and an unregistered short-barreled shotgun. *Id.* at 873-74.

In the end, the Supreme Court’s decision in *Heller* negates Zaleski’s argument that he has a Second Amendment right to possess the dangerous and unusual weapons he was charged with possessing because of his statutory inclusion in the unorganized militia. As such, the district court’s denial of his motions to dismiss and refusal to permit him to introduce evidence of his militia membership were correct.⁴

⁴ For the same reason that the Second Amendment affords no protection to the weapons charged in this case, the Court should summarily reject Zaleski’s somewhat unclear argument, made for the first time on appeal, that the National Firearms Act’s taxation of firearms is an unconstitutional violation of his

III. The district court's sentence was reasonable.

A. Relevant facts

On February 3, 2011, Zaleski was sentenced to 101 months in prison. (DA6, 8-9; GA2242-44).

Zaleski's Guidelines were calculated in the Pre-Sentence Report as follows: The base offense level under U.S.S.G. § 2K2.1 was 18. Six levels were added under § 2K2.1(b)(1)(C) because 28 weapons were involved. Two additional levels were added under § 2K2.1(b)(3)(B) because the offense involved destructive devices. Four more levels were added under § 2K2.1(b)(4)(B) because the offense involved a firearm with an obliterated serial number. Section 2K2.1(b), however, capped the total offense level at 29. Because the PSR found a two-point adjustment for obstruction appropriate, and no credit for acceptance of responsibility, the total adjusted offense level was 31. (PSR ¶¶21-32).

A total offense level 31 with a criminal history category I (PSR ¶¶33-37), resulted in an ap-

Second Amendment rights. *See* Def. Br. 54-55. Zaleski has no Second Amendment rights in the charged firearms, so the National Firearms Act can in no way infringe on his rights. Moreover, Zaleski forfeited any such argument by raising it for the first time on appeal, and he certainly cannot satisfy the standard for plain error. *See United States v. Yu-Leung*, 51 F.3d 1116, 1121-22 (2d Cir. 1995).

plicable Guidelines range of 108-135 months. (PSR ¶79).

At Zaleski's sentencing on February 3, 2011, the district court—well versed in the evidence and the overall record from having presided over years of litigation and the trial—heard extensive argument from counsel before reaching its determination of an appropriate sentence for Zaleski.

During a conference in chambers that preceded the sentencing, the court announced: “it’s my intention, and I’ll let the government argue against this, of course, but I am going to give the Defendant an acceptance of responsibility credit, and I am going to not use [the] obstruction of justice enhancement.” (GSA6).

At the sentencing hearing, the district court first addressed the calculation of the Guidelines. The court noted that the Guidelines, as calculated by the PSR, resulted in a range of 108 to 135 months. (GA2186). The court noted however, that “there is an issue with respect to the increase for obstruction of justice and for no credit for acceptance of responsibility, and I would like to hear from the parties, on the record, as to their position on those two issues.” *Id.* The court then heard argument by the parties on both adjustments. (GA2186-2204).

The court then confirmed that Zaleski had read the PSR; had discussed it with his attorney; and that defense counsel had answered any and all questions Zaleski had about the PSR.

(GA2204). The court then confirmed that, other than the issues regarding the calculation of the Guidelines, there were no factual disputes regarding the PSR. (GA2204-05).

The court then stated that it was prepared to proceed with the sentencing, and invited both defense counsel and Zaleski to speak. (GA2205).

Defense counsel argued that: (1) guns were viewed differently in different parts of the country (GA2205-08); (2) the case was outside the heartland of a typical firearms possession case (GA2208-09); (3) Zaleski did not possess the weapons in relation to any other crimes, such as crimes of violence or narcotics trafficking (GA2209); (4) the court should consider “incremental punishment,” and a sentence of 8 or 9 years was too high for a first time offender (GA2210-11); and (5) the offense level was overstated (GA2216).

Defense counsel also argued that the court-ordered psychological evaluation indicated that Zaleski presented a low risk of dangerousness or recidivism. (GA2211-16). Defense counsel also raised concerns about sentencing disparity, relying on cases elsewhere that involved purportedly similar conduct, but resulted in sentences significantly lower than Zaleski’s Guidelines. (GA2217-20). Counsel concluded by requesting that the court sentence Zaleski to time served. (GA2220).

The court then invited Zaleski to speak, and he did. (GA2221). The court then noted letters it

had received on Zaleski's behalf, and it also heard from a friend of Zaleski's. (GA2222).

The government then responded to Zaleski's arguments and specifically addressed the § 3553(a) factors that supported a sentence within a range of 108 to 135 months, including the following: the nature, circumstances and seriousness of the offense; the need to impose just punishment; the need to protect the public and promote respect for the law; the history and characteristics of the defendant; and the importance of promoting general and specific deterrence. (GA2223-37). The government also addressed the results of the psychological evaluation and the defendant's sentencing disparity arguments. (GA2232-37). Defense counsel was given the opportunity to respond. (GA2237-39).

The court then ruled that it would impose the obstruction-of-justice enhancement, but also give Zaleski credit for acceptance of responsibility:

With respect to the calculation of the guidelines, and specifically, to the question of obstruction of justice, which I believe is appropriate, given the testimony that I found unable to accept during the hearings, I think that is an appropriate adjustment of two points. However, I'm also going to give the Defendant the two-point reduction for acceptance of responsibility because he has never denied that he was in possession of these weapons, and I

think that that will be reflected in my accepting his acceptance of responsibility.

His position is that under the Constitution he was entitled to have these, but he's never denied actual possession.

(GA2242). With these rulings, the court found an offense level of 29 and a criminal history category of I. (GA2242). The court then proceeded to impose sentence:

So I have an adjusted Offense Level of 29, Criminal History Category of I, with a 87 to 108 months guideline range as a result, and I think that given the facts of this case, I am inclined to sentence the Defendant to the top of that range, 108 months.

First of all, I'm concerned about, obviously, the volume of weapons we are dealing with here.

I'm also concerned about some things that we know about this gentleman. He had that trip wire on his property, and that was designed to keep the children away. Now, the utility man tripped it and lost his hearing. Lord knows what would have happened to the children.

Furthermore, apparently those boards with the nails sticking up were also designed to prevent other people coming in, including probably the children, because the Defendant himself said he had the trip wire there to keep the children off his

property. That's a concern. I think that's an antisocial position; as well as the vast library of anti-semitic literature which he had. I think we're dealing with a gentleman who has some antisocial tendencies.

Certainly . . . I remember the day that the weapons were brought into the courtroom, and I think I, as well as the members of the jury, were stunned by the accumulation of those weapons; that they were very disturbing indeed.

So, as I say, I am concluding that an appropriate guideline range is 87 to 108 months . . . [a]nd I believe the top of the range is appropriate.

(GA2242-43).

After defense counsel raised a question whether the Bureau of Prisons would credit seven months Zaleski had spent in state custody, the court made a downward revision to 101 months to address that concern. (GA2244).

B. Governing law and standard of review

After the Supreme Court's holding in *United States v. Booker*, 543 U.S. 220 (2005), which rendered the Sentencing Guidelines advisory rather than mandatory, a sentence satisfies the Sixth Amendment if the sentencing judge "(1) calculates the relevant Guidelines range, including any applicable departure under the Guidelines system; (2) considers the calculated Guidelines range, along with the other § 3553 factors; and

(3) imposes a reasonable sentence.” *United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir. 2006); *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005).

Consideration of the Guidelines range requires a sentencing court to calculate the range and put the calculation on the record. *Fernandez*, 443 F.3d at 29. The requirement that the district court consider the § 3553(a) factors, however, does not require the judge to precisely identify the factors on the record or address specific arguments about how the factors should be implemented. *Id.*; *Rita v. United States*, 551 U.S. 338, 356-59 (2007) (affirming a brief statement of reasons by a district judge who refused downward departure; judge noted that the sentencing range was “not inappropriate”). There is no “rigorous requirement of specific articulation by the sentencing judge.” *Crosby*, 397 F.3d at 113; *see also Fernandez*, 443 F.3d at 30 (“[N]o robotic incantations are required to prove the fact of consideration, . . . and we will not conclude that a district judge shirked her obligation to consider the § 3553(a) factors simply because she did not discuss each one individually or did not expressly parse or address every argument relating to those factors that the defendant advanced.”) (footnote and internal quotation omitted). Indeed, a court’s reasoning can be inferred by what the judge did in the context of what was argued by the parties and contained in the PSR. *See United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005) (“As long as the judge is aware of

both the statutory requirements and the sentencing range or ranges that are arguably applicable, and nothing in the record indicates misunderstanding about such materials or misperception about their relevance, we will accept that the requisite consideration has occurred.”). Thus, this Court “presume[s], in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged her duty to consider the statutory factors [under § 3553(a)].” *Fernandez*, 443 F.3d at 30.

This Court reviews a sentence for reasonableness. *See Rita*, 551 U.S. at 341; *Fernandez*, 443 F.3d at 26-27. The reasonableness standard is deferential and focuses “primarily on the sentencing court’s compliance with its statutory obligation to consider the factors detailed in 18 U.S.C. § 3553(a).” *United States v. Canova*, 412 F.3d 331, 350 (2d Cir. 2005). This Court does not substitute its judgment for that of the district court. Rather, reasonableness review is akin to a “deferential abuse-of-discretion standard.” *Gall v. United States*, 552 U.S. 38, 52 (2007); *see also Fernandez*, 443 F.3d at 27. This Court has noted that “in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances.” *Id.*; *see also Rita*, 551 U.S. at 346-51 (courts of appeals may apply presumption of reasonableness to a sentence within the applicable Sentencing Guidelines range).

Review to determine whether a sentence is “reasonable” involves both “an examination of the length of the sentence (substantive reasonableness) as well as the procedure employed in arriving at the sentence (procedural reasonableness).” *United States v. Johnson*, 567 F.3d 40, 51 (2d Cir. 2009). To impose a procedurally reasonable sentence, a district court must “(1) normally determine the applicable Guidelines range, (2) consider the Guidelines along with the other factors under § 3553(a), and (3) determine whether to impose a Guidelines sentence or a non-Guidelines sentence.” *United States v. Villafuerte*, 502 F.3d 204, 206-07 (2d Cir. 2007). Procedural errors arise where the district court miscalculates the Guidelines; treats them as mandatory; does not adequately explain the sentence imposed; does not properly consider the § 3553(a) factors; or deviates from the Guidelines without explanation. *See Johnson*, 567 F.3d at 51-52.

A sentencing court’s legal application of the Guidelines is reviewed *de novo*, while the court’s underlying factual findings are reviewed for clear error, acknowledging the lesser standard of proof at sentencing of preponderance of the evidence. *United States v. Cossey*, 632 F.3d 82, 86 (2d Cir. 2011).

C. Discussion

1. The district court's passing reference to Zaleski's anti-Semitic literature was not improper.

Zaleski argues that the district court improperly sentenced him based on a view that he was anti-Semitic, in violation of U.S.S.G. § 5H1.10. This claim is without merit.

First, the record does not support the claim that the court believed Zaleski was anti-Semitic or that it sentenced him based on any such abstract belief. Rather, the court's passing reference to "the vast library of anti-semitic literature" related to its view that Zaleski had some "anti-social tendencies":

Furthermore, apparently those boards with the nails sticking up were also designed to prevent other people coming in, including probably the children, because the Defendant himself said he had the trip wire there to keep the children off his property. That's a concern. I think that's an antisocial position; as well as the vast library of anti-semitic literature which he had. I think we're dealing with a gentleman who has some antisocial tendencies.

(GA2243).

Second, this Court has held in any event that a sentencing court may consider evidence regarding a defendant's beliefs or associational activity so long as it is relevant to the issues in-

volved in the sentencing proceeding. *See United States v. Kane*, 452 F.3d 140, 142-43 (2d Cir. 2006) (citing *Dawson v. Delaware*, 503 U.S. 159, 164-65 (1992)). A defendant’s beliefs “may be relevant to show motive . . . analyze a statutory aggravating factor . . . illustrate future dangerousness or potential recidivism . . . or rebut mitigating evidence that the defendant proffers.” *Id.* at 143 (citations omitted).

Here, the district court referenced Zaleski’s “library of anti-semitic literature” only when noting its belief that Zaleski exhibited some anti-social positions and tendencies—factors which (1) bore upon Zaleski’s potential for future dangerousness and potential recidivism, and (2) rebutted mitigating evidence the defendant relied upon from the psychological evaluation indicating that he was not anti-social.

Prior to sentencing, the court had ordered a psychological evaluation to include “an assessment of Mr. Zaleski’s dangerousness to himself or others.” (GSA1-2). Although the report found that Zaleski did not have an anti-social personality (*See Psychological Evaluation (“Report”)* at 14, attached to PSR) and was “not anti-social as shown on the PCL-R and by his history,” (Report at 18), the report found that Zaleski “showed characteristics that include social avoidance” (Report at 16).

At sentencing, when addressing Zaleski’s risk of recidivism and future dangerousness, (GA2212), defense counsel expressly and repeat-

edly argued, as a basis for sentencing mitigation—and indeed, in support of a request for time served—that Zaleski was not antisocial. See (GA2213) (“Zaleski does not have an antisocial personality and/or psychopathy”); *id.* (“he’s not antisocial”); (GA2214) (“He is not antisocial.”); *id.* (“He’s not antisocial and he’s not psychotic. Those are the people that you have to worry about.”).

The psychological report and the PSR, however, expressly tied Zaleski’s intolerance of others and his anti-social tendencies to the question of future dangerousness and recidivism. Specifically, the evaluation noted that Zaleski exhibited personality characteristics that suggested an inability or unwillingness to conform his conduct to the law which, in turn, suggested a risk of recidivism. For example, when asked whether he understood the court’s concern about the risk for violence:

Mr. Zaleski gave a disjointed answer that included both common concerns about violation of the Second Amendment and vague worries about the current state of the government. This was the only time in the evaluation sessions when he showed strong emotion and disorganized thinking.

* * *

The tenor of this discussion was unlike that . . . on the rest of the testing. First, his demeanor was intense and emotional, at times even tearful. He spoke with con-

viction. Second, his answers were disorganized and disjointed. He was hard to follow and even on redirection, he did not answer questions directly

Overall his behavior on this topic indicated his strong focus as well as the idiosyncratic and emotional place that these issues have for him That he has no distance from his point of view, cannot reflect on how others view him, and cannot articulate his position to serve his goals indicates that his thinking is impaired.

(Report at 9-10).

Significantly, the report went on to note that “[w]ith his defenses and his lack of psychological introspection, [Zaleski] cannot examine his own behavior or consider ways to change it.” *Id.* at 14. The personality assessment concluded that “[o]verall, Mr. Zaleski’s personality characteristics indicate a mixed personality style that reaches the level of a disorder with the primary features or suspiciousness, intolerance of others, and social isolation.” *Id.* The Report concluded:

[Zaleski’s] collection of weapons and the steps he [took] to guard his property are unusual . . . the benefit of a psychological assessment in predicting future risk is limited. The experience of law enforcement and justice will be more relevant in determining whether Mr. Zaleski presents a profile associated with high risk.

Id. at 18.

On that question, the PSR concluded that because “Mr. Zaleski believes he did nothing wrong . . . and believes he had every right to possess the firearms in question,” Zaleski “may pose a high risk of recidivism due to his beliefs that he is allowed to possess the weapons he was convicted of possessing.” (PSR ¶¶91-92).

The district court’s passing reference to Zaleski’s “library of anti-semitic literature” as additional evidence of his “anti-social tendencies” was not in reference to abstract beliefs, but rather bore upon questions of intolerance, social isolation and lack of introspection—all of which directly rebutted Zaleski’s claims that he was not anti-social, that he therefore presented a low risk of recidivism, and that he therefore deserved a sentence of time served. *See Kane*, 452 F.3d at 143; *see also United States v. Brown*, 479 F.2d 1170, 1174-75 (2d Cir. 1973) (court properly considered defendant’s “expressed sympathy with the political and social views of the Black Panther party” as relevant to whether the defendant posed a future threat); *United States v. Tampico*, 297 F.3d 396, 402-03 (5th Cir. 2002) (evidence may be relevant to show future dangerousness or potential recidivism); *Dawson*, 503 U.S. at 167 (evidence may be relevant to rebut mitigating evidence that the defendant proffers). “By confining” its remark “to the particular character issue[] that [Zaleski] raised, the Court avoided considering [Zaleski’s] abstract beliefs

for the irrelevant and impermissible purpose of showing general moral reprehensibility.” *Kane*, 452 F.3d at 143; *see also Dawson*, 503 U.S. at 166-67.⁵

2. The district court did not plainly err in imposing the enhancement for obstruction of justice.

Zaleski also challenges the enhancement for obstruction of justice claiming that the court (1) unfairly changed course after announcing an initial inclination not to impose the enhancement; and (2) failed to make sufficient findings to support it. Both claims are unavailing.

First, although the court initially announced its inclination not to impose the obstruction enhancement, when doing so, it expressly stated that it would “let the government argue against this, of course.” (GSA6). That is precisely what occurred. (GA2186-92). During argument, the government specifically referenced the numerous places in the court’s suppression ruling

⁵ Zaleski claims that the district court found Zaleski to be an “anti-social individual,” contrary to the findings of the psychological evaluation. Def. Br. 37-38. The record belies this assertion. The district court did not find that Zaleski was “anti-social,” but rather that Zaleski exhibited some “anti-social tendencies.” (GA2243). The record supported such a finding, as the psychological report found that Zaleski “showed characteristics that include social avoidance” (Report at 16) and “suspiciousness, intolerance of others, and social isolation” (Report at 14).

where it had expressly found Zaleski's account to be incredible. (GA2191, 2200-04). The government also noted that in a case involving allegations of unlawful possession, Zaleski's motion was certainly material, as it would otherwise have been case dispositive. (GA2191-92). Defense counsel argued against the enhancement. (GA2194-98). The court ultimately decided, based on its findings in the suppression ruling, that the obstruction enhancement was appropriate. (GA2242). *See United States v. Giraldo*, 80 F.3d 667, 680 (2d Cir. 1996) (obstruction enhancement properly applied for false statements at suppression hearing).

Second, the district court's findings were sufficient to impose the obstruction enhancement because they incorporated by reference the court's detailed findings set forth in its ruling on the motion to suppress. Moreover, because Zaleski did not object to the district court's alleged failure to make more specific findings, this claim is reviewed for plain error. *See, e.g., United States v. Reyes*, 557 F.3d 84, 87 (2d Cir. 2009).

Under the law of this Circuit, an obstruction enhancement is warranted when a defendant provides information under oath "concerning a material matter, with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory." *United States v. Dunnigan*, 507 U.S. 87, 94 (1993). In *United States v. Lincecum*, 220 F.3d 77, 80 (2d Cir. 2000), this Court stated:

Where the district court finds that the defendant has clearly lied in a statement made under oath, the court need do nothing more to satisfy *Dunnigan* than point to the obvious lie and find that the defendant knowingly made a false statement on a material matter.

Id.

When imposing the enhancement, the district court did not plainly err because it incorporated its ruling on the motion to suppress by reference:

With respect to the calculation of the guidelines, and specifically to the question of obstruction of justice, which I believe is appropriate, *given the testimony that I found unable to accept during the hearings*, I think that is an appropriate adjustment of two points.

(GA2242) (emphasis added). In that ruling, the court repeatedly and expressly found that it “did not credit” Zaleski’s testimony, *see, e.g.*, (GA207-08, 210, 213); that Zaleski’s account was “inconsistent” (GA207); and that Zaleski had a “demonstrated willingness to exaggerate,” which was “an additional reason to doubt Zaleski’s credibility.” *Id.* Zaleski’s testimony at the suppression hearing was also material—it was offered in support of a case-dispositive motion to suppress claiming that he had involuntarily consented to a search of his property following allegedly coercive police tactics. Finally, the court’s ruling highlighted that Zaleski’s conduct was willful

and that it could not have been the result of confusion or mistake. *See, e.g.*, (GA207) (“The Court does not, for example, credit Zaleski’s self-serving testimony that he did not sign a form consenting to the search . . . [t]his event was observed by three of the witnesses who testified at the hearing.”).

Because Zaleski made numerous false statements under oath, because those statements were not the result of confusion or mistake, and because those statements were material to his potentially case-dispositive motion to suppress, the district court did not plainly err in imposing the two point enhancement for obstruction of justice. *See Giraldo*, 80 F.3d at 680.

3. The sentence was procedurally and substantively reasonable.

Finally, Zaleski faults the district court for failing to expressly discuss the factors set forth in 18 U.S.C. § 3553(a) or to explain its reasons for denying Zaleski’s requests for a downward departure or non-Guidelines sentence of time served. Because Zaleski did not object to the district court’s alleged failure to make more specific findings on the § 3553(a) analysis or his requests for a downward departure, these claims are also reviewed for plain error. *See, e.g., Reyes*, 557 F.3d at 87. A review of the record confirms that the district court did not plainly err, and that its sentence was procedurally and substantively reasonable.

Zaleski's sentence was procedurally reasonable. The district court heard the parties' arguments regarding acceptance of responsibility and the obstruction enhancement, heard from the government as it addressed the § 3553(a) factors, heard defense counsel's arguments regarding downward departures or a non-Guidelines sentence, heard from the defendant, and calculated the defendant's Guidelines range. The district court ultimately found "that an appropriate guideline range is 87 to 108 months . . . [a]nd I believe the top of the range is appropriate." (GA2243). The district court imposed a sentence of 101 months to ensure that Zaleski received credit for 7 months spent in state custody. In imposing sentence, the district court stated twice that it was "appropriate" and included among its reasons the volume of weapons and the danger to the community—noting that a member of the public had already been injured at Zaleski's property. Nothing further was required. *See, e.g., Rita*, 551 U.S. at 356-59; *Fernandez*, 443 F.3d at 30 ("[N]o robotic incantations are required to prove the fact of consideration, . . . and we will not conclude that a district judge shirked her obligation to consider the § 3553(a) factors simply because she did not discuss each one individually or did not expressly parse or address every argument relating to those factors that the defendant advanced.") (footnote and internal quotation omitted); *Fleming*, 397 F.3d at 100.

Zaleski's sentence was substantively reasonable as well. Zaleski had amassed and secreted

away on his property an arsenal of dangerous weapons including machine guns, grenades and IEDs. Zaleski also had an extensive supply of explosives and other materials for making additional grenades, bombs and IEDs. Moreover, a member of the public had already been injured at Zaleski's property when he tripped over a tripwire, triggered a device and suffered permanent hearing loss. Zaleski's sentence was also squarely within the Guideline range calculated by the court—which included a reduction for acceptance of responsibility, notwithstanding the fact that Zaleski's case was contested through and including trial. This is simply not “an exceptional case[] where the trial court's decision cannot be located within the range of permissible decisions.” *Cavera*, 550 F.3d at 189 (internal quotation omitted).

Accordingly, this Court should decline Zaleski's invitation to substitute its judgment for that of the district court. *Fernandez*, 443 F.3d at 27; *Kane*, 452 F.3d at 145; *Fleming*, 397 F.3d at 100.

IV. Zaleski is not entitled to the return of the seized, but uncharged items, or to be compensated for their value.

A. Relevant facts

On December 2, 2009, the court issued an order forfeiting the weapons that were the subjects of the counts of conviction. (GA339-43). The forfeited weapons, however, were but a fraction of the items seized from Zaleski, and the government continues to store the non-forfeited items in a large, secure storage container at the Connecticut FBI. (GA438).

On October 14, 2010, the government moved for an order under the All Writs Act authorizing the destruction of the firearms, ammunition, destructive devices, body armor and the parts to make such items, which had been seized but not charged in the criminal case. The government requested that the order be stayed until Zaleski exhausted any appeal. (GA406).

The government argued that because the defendant was now a convicted felon, he was forbidden from possessing the uncharged items. The government argued against allowing a third party to take possession of, or to sell the items on Zaleski's behalf, due to both public safety reasons and public policy concerns about a felon profiting from items he could not legally possess. (GA406-14).

On December 27, 2010, Zaleski filed an opposition to the government's motion and requested

the property's return under Fed. R. Crim P. 41(g). (GA420-32). Zaleski conceded that the government could not return the items to him so long as he is a convicted felon, but argued that he was entitled to the value of any items that he lawfully possessed prior to his conviction. Zaleski urged the court to (1) transfer custody of the items to his family or to a licensed, third party firearms dealer known to Zaleski, who could sell the items on his behalf; or (2) order an appraisal so that Zaleski could recover money damages from the government. *Id.*

On March 3, 2011, the district court heard oral argument (GA22) and, on April 21, 2011, it issued a ruling. The court concluded that neither Zaleski nor the government was entitled to the relief sought. (GA437-48).

Relying on case law from the Second, Eighth and Eleventh Circuits, the court held that Zaleski could not designate an agent to receive and sell the non-forfeited items on his behalf, because such an arrangement would amount to constructive possession in violation of 18 U.S.C. § 922(g). (GA441-42) (citing *United States v. Gaines*, 295 F.3d 293, 300 (2d Cir. 2002); *United States v. Howell*, 425 F.3d 971, 977 (11th Cir. 2005); *United States v. Felici*, 208 F.3d 667, 670 (8th Cir. 2000)).

The court also held that Zaleski was not entitled to recover money damages because "it is settled law in the Second Circuit that sovereign immunity bars a federal court from ordering the

United States to compensate for property that cannot be returned pursuant to Rule 41(g).” (GA442-43) (citing *Adeleke v. United States*, 335 F.3d 144, 150 (2d Cir. 2004)). Because Zaleski is a convicted felon, the court reasoned, the non-forfeited items were unavailable for return under Rule 41(g). (GA443).

The court also rejected Zaleski’s claim under the Takings Clause:

[T]he fundamental purpose of the Takings Clause is not in any way violated. Zaleski has been held to account for felonious conduct by a jury of his peers. It is because of his criminal conduct, not the government’s decision to prosecute him for it, that Zaleski finds himself in a class of persons who may not possess the 922(g) items. A convicted felon, such as Zaleski, bears sole responsibility for the consequences of his conviction, both direct and collateral . . . It would work a complete inequity to require the government to compensate Zaleski for property that he cannot possess by virtue of his criminal conviction.

(GA444).

The court also rejected the government’s request for relief. The court stated that the All Writs Act empowers federal courts to grant relief only under extraordinary circumstances. The court reasoned that such relief was not necessary here because:

So long as Zaleski is a convicted felon, he is not entitled to the return of the non-forfeited items in any form whatsoever, and he is jurisdictionally barred from recovering money damages from the government.

(GA447, n.3). The court noted that although it had “decline[d] to grant its imprimatur to the government’s proposed course of action, this [wa]s not to say the government may not proceed as it has suggested in its proposed order.” *Id.*

B. Governing law and standard of review

Zaleski appeals the district court’s denial of his request for the return of the property pursuant to Rule 41(g). The question whether a convicted felon is entitled to the return of, or compensation for, firearms, ammunition, explosive materials, destructive devices, body armor and the parts to make such items, when such materials were lawfully possessed prior to his felony convictions, is a question of first impression in this Circuit.

A motion to return seized property under Rule 41(g) is a motion in equity, in which courts will determine all the equitable considerations in order to make a fair and just decision. *See, e.g., De Almeida v. United States*, 459 F.3d 377, 382 (2d Cir. 2006) (noting that [a] Rule 41(g) motion is an equitable remedy . . .”). Generally, this Court reviews a district court’s legal conclusions

de novo, see *United States v. Selioutsky*, 409 F.3d 114, 119 (2d Cir. 2005), and its findings of fact for clear error, see *United States v. Cuevas*, 496 F.3d 256, 267 (2d Cir. 2007).

C. Discussion

Zaleski claims that the district court erred when it denied his motion for the return of the seized but uncharged firearms, ammunition, explosives, destructive devices, body armor and the parts to make such items, pursuant to Rule 41(g). Although the district court also denied the government's motion for an order permitting their destruction under the All Writs Act, Zaleski also faults the district court for noting that the government could destroy these items without compensating Zaleski.

Zaleski conceded below that the items cannot be returned to him, but argues that the items "should be transferred either to his family members or to a third party and sold and the proceeds paid to Mr. Zaleski's benefit." Def. Br. 49. Alternatively, he argues, "if this Court finds that the items should be destroyed, Mr. Zaleski requests that the otherwise legal items be inventoried and appraised such that he might use that appraised value in a civil suit for his monetary loss based upon this 'taking' by the government." *Id.* This Court should reject Zaleski's claims.

Courts have uniformly held that firearms, ammunition, destructive devices and the parts to make such items cannot be returned directly to a

convicted felon because doing so would violate 18 U.S.C. § 922(g). *See, e.g., United States v. Roberts*, 322 Fed. Appx. 175, 176 (3d Cir. 2009); *United States v. Howell*, 425 F.3d 971, 975-77 (11th Cir. 2005); *United States v. Smith*, 142 Fed. Appx. 100, 102 (3d Cir. 2005); *United States v. Headley*, 50 Fed. Appx. 266, 267 (6th Cir. 2002); *United States v. Felici*, 208 F.3d 667, 670 (8th Cir. 2000); *United States v. Bagley*, 899 F.2d 707, 708 (8th Cir. 1990); *United States v. Oleson*, 2008 WL 2945458 at *2-3 (N.D. Iowa 2008); *United States v. Parsons*, 472 F. Supp. 2d 1169, 1174 (N.D. Iowa 2007); *United States v. Wacker*, 903 F. Supp. 1412, 1414-14 (D. Kan. 1995); *see also* 18 U.S.C. § 922(g)(1); 18 U.S.C. §§ 921(a)(3), (4) & (17)(a) (defining “firearm,” “destructive device” and “ammunition”).

The Circuits and lower courts are divided, however, on the question of transfer to third parties or compensation. *See, e.g., Roberts*, 322 Fed. Appx. at 176; *Smith*, 142 Fed. Appx. at 102; *Howell*, 425 F.3d 971; *Felici*, 208 F.3d at 670; *Headley*, 50 Fed. Appx. at 267-68; *United States v. Craig*, 896 F. Supp. 85, 89 (N.D.N.Y. 1995); *Oleson*, 2008 WL 2945458 at *2; *Wacker*, 903 F. Supp. at 1414-15; *United States v. Miller*, 588 F.3d 418 (7th Cir. 2009); *United States v. Rodriguez*, 2011 WL 5854369 (W.D. Tex. 2011); *Cooper v. City of Greenwood*, 904 F.2d 302 (5th Cir. 1990); *United States v. Brown*, 754 F. Supp. 2d 311 (D.N.H. 2010); *United States v. Approximately 627 Firearms*, 589 F. Supp. 2d 1129,

1140 (S.D. Iowa 2008); *Parsons*, 472 F. Supp. 2d at 1173-78.

The district court properly rejected Zaleski's request for transfer to a third party or compensation for the uncharged items, and properly held that the government is entitled to dispose of these items upon Zaleski's conviction becoming final. Zaleski is not entitled to have the weapons transferred to a family member or any other third party—whether to be held in trust for him, or to be sold for his benefit—because such circumstances would amount to constructive possession. It is well settled in this Circuit that 18 U.S.C. § 922(g) makes it illegal for a convicted felon to have either actual or constructive possession of prohibited items. *See, e.g., United States v. Gaines*, 295 F.3d 293, 300 (2d Cir. 2002). Although this Court has not specifically addressed whether a convicted felon who designates an agent to sell § 922(g) items would be deemed to have constructive possession, several other courts, including the Third, Sixth, Eighth and Eleventh Circuits have so held. *See Roberts*, 322 Fed. Appx. at 176; *Smith*, 142 Fed. Appx. at 102; *Howell*, 425 F.3d 971; *Felici*, 208 F.3d at 670; *Headley*, 50 Fed. Appx. at 267-68; *Craig*, 896 F. Supp. at 89 (N.D.N.Y. 1995); *Oleson*, 2008 WL 2945458 at *2; *Wacker*, 903 F. Supp. at 1414-15; *but see Miller*, 588 F.3d 418; *Rodriguez*, 2011 WL 5854369; *Cooper*, 904 F.2d 302; *Brown*, 754 F. Supp. 2d 311; *Approximately 627 Firearms*, 589 F. Supp. 2d at 1140; *Parsons*, 472 F. Supp. 2d at 1173-78.

That Zaleski may have been in lawful possession of some of the items at the time of their seizure and his arrest is of no moment. As the Eleventh Circuit has stated:

The fact that the defendant was in lawful possession and was not a convicted felon when he acquired the . . . firearms is irrelevant. 18 U.S.C. § 922(g) was specifically designed to serve public policy and prevent convicted felons from having either constructive or actual possession of firearms. The statute was designed to work retroactively, and once an individual becomes a felon, he will be in violation of 18 U.S.C. § 922 if found to be in possession of a firearm. Obviously, the courts cannot participate in a criminal offense by returning firearms to a convicted felon.

Howell, 425 F.3d at 977; *see also id.* at 976 (“Requiring a court to return firearms to a convicted felon would not only be in violation of a federal law, but would be contrary to the public policy behind the law.”); *see also Roberts*, 322 Fed. Appx. at 177.

Because Zaleski is now a convicted felon, he is also not entitled to be compensated for the value of the seized but uncharged weapons. First, “to allow [the defendant] to reap the economic benefit from ownership of weapons which it is illegal for him to possess would make a mockery of the law.” *Bagley*, 899 F.2d at 708. Second, the United States should not be obli-

gated to act as a convicted felon's auctioneer and should not be obliged to confer a benefit on a felon by selling weapons as his agent. Third, weapons are inherently different than other types of property and given the government's obvious and compelling interests in public safety, the government should not be placed in the untenable situation of effectively putting firearms back on the street, lest one of those weapons is subsequently used in a crime or violent act. Fourth, were the government required to compensate Zaleski for the value of the weapons in the absence of such a sale, the United States Treasury would otherwise be out of pocket that amount, improperly placing the burden of collateral consequences for Zaleski's conduct on the public, rather than Zaleski himself. Public policy should not support such a result.

Moreover, as the district court properly recognized, an order or a suit for money damages to compensate Zaleski for the value of the weapons would implicate sovereign immunity. It is well settled in this Circuit that "sovereign immunity bars a federal court from ordering the United States to compensate for property that cannot be returned pursuant to Rule 41(g)." *Adeleke*, 355 F.3d at 150. Rule 41(g) "does not permit courts to order the United States to pay money damages when, for whatever reason, property is not available for Rule 41(g) return." *Id.* As set forth above, the weapons are not available to return under Rule 41(g) because Zaleski is a convicted felon.

The district court also properly rejected Zaleski's claim that the Tucker Act, 28 U.S.C. § 1346(a)(2), serves as a waiver of sovereign immunity, and that Zaleski may therefore recover damages for an alleged unconstitutional "taking" of his property. Zaleski is incorrect, however, that the destruction of the uncharged items would work an unconstitutional taking of his property. As the district court properly held: "[t]he flaw with this claim is that the government will not, in the Constitutional sense, take his property." (GA443-44). According to the Supreme Court, the Takings Clause is intended "to prevent the government 'from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *E. Enters. v. Apfel*, 524 U.S. 498, 522 (1998) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). The fundamental purpose of the Takings Clause is in no way violated by failing to compensate Zaleski for the seized but uncharged firearms, ammunition, explosives, destructive devices, body armor and the parts to make such items. As the district court properly held:

Zaleski has been held to account for felonious conduct by a jury of his peers. *It is because of his criminal conduct, not the government's decision to prosecute him for it, that Zaleski finds himself in a class of persons who may not possess § 922(g) items.* A convicted felon, such as Zaleski, bears sole responsibility for the conse-

quences of his conviction, both direct and collateral . . . It would work a complete inequity to require the government to compensate Zaleski for property that he cannot possess by virtue of his criminal conviction. Zaleski, not the public, must bear the burdens of his conviction.

(GA444) (emphasis added); *see also Roberts*, 322 Fed. Appx. at 176-77 (affirming denial of defendant's motion for return of property and granting of government's motion to destroy firearms; defendant not entitled to weapons' return, to transfer to a third party, or to proceeds from their sale); *Headley*, 50 Fed. Appx. at 267-68 (defendant not entitled to the return of weapons to himself or third party; government's motion to destroy firearms and ammunition properly granted); *Bagley*, 899 F.2d at 708 (defendant not entitled to return of weapons to himself or third party, or to the proceeds of a sale thereof).

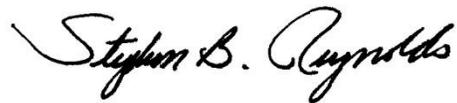
Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

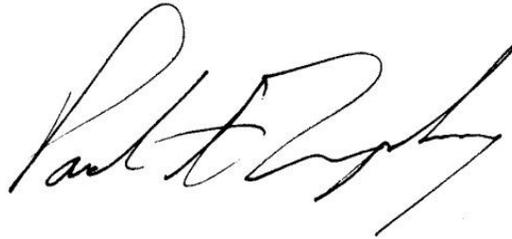
Dated: January 30, 2012

Respectfully submitted,

DAVID B. FEIN
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT



STEPHEN B. REYNOLDS
ASSISTANT U.S. ATTORNEY

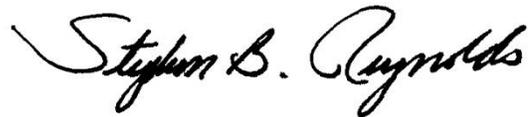


PAUL A. MURPHY
ASSISTANT U.S. ATTORNEY

Sandra S. Glover
Assistant United States Attorney (of counsel)

**Federal Rule of Appellate Procedure
32(a)(7)(C) Certification**

This is to certify that the foregoing brief complies with the 18,000-word limitation authorized by order of this Court dated January 19, 2012. The brief is calculated by the word processing program to contain approximately 17,945 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

A handwritten signature in black ink, reading "Stephen B. Reynolds". The signature is written in a cursive style with a large initial 'S' and a long, sweeping underline.

STEPHEN B. REYNOLDS
ASSISTANT U.S. ATTORNEY

Addendum

18 U.S.C. §921. Definitions

(a) As used in this chapter--

....

(3) The term “firearm” means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

(4) The term “destructive device” means--

(A) any explosive, incendiary, or poison gas--

(i) bomb,

(ii) grenade,

(iii) rocket having a propellant charge of more than four ounces,

(iv) missile having an explosive or incendiary charge of more than one-quarter ounce,

(v) mine, or

(vi) device similar to any of the devices described in the preceding clauses;

(B) any type of weapon (other than a shotgun or a shotgun shell which the Attorney General finds is generally recognized as particularly suitable for sporting purposes) by whatever name known which will, or which may be readily converted to, expel a projectile by the

action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; and

(C) any combination of parts either designed or intended for use in converting any device into any destructive device described in subparagraph (A) or (B) and from which a destructive device may be readily assembled.

The term “destructive device” shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of title 10; or any other device which the Attorney General finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting, recreational or cultural purposes.

....

(17)(A) The term “ammunition” means ammunition or cartridge cases, primers, bullets, or propellant powder designed for use in any firearm.

(B) The term “armor piercing ammunition” means--

(i) a projectile or projectile core which may be used in a handgun and which is constructed entirely (excluding the presence of traces of other substances) from one or a combination

of tungsten alloys, steel, iron, brass, bronze, beryllium copper, or depleted uranium; or

(ii) a full jacketed projectile larger than .22 caliber designed and intended for use in a handgun and whose jacket has a weight of more than 25 percent of the total weight of the projectile.

(C) The term “armor piercing ammunition” does not include shotgun shot required by Federal or State environmental or game regulations for hunting purposes, a frangible projectile designed for target shooting, a projectile which the Attorney General finds is primarily intended to be used for sporting purposes, or any other projectile or projectile core which the Attorney General finds is intended to be used for industrial purposes, including a charge used in an oil and gas well perforating device.

18 U.S.C. §922. Unlawful Acts

(k) It shall be unlawful for any person knowingly to transport, ship, or receive, in interstate or foreign commerce, any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered or to possess or receive any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered and has, at any time, been shipped or transported in interstate or foreign commerce.

.....

(o)(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

(2) This subsection does not apply with respect to--

(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

18 U.S.C. §924. Penalties

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929, whoever--

....

(B) knowingly violates subsection . . . (k) . . . of section 922;

....

shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection . . . (o) of section 922 shall be fined as provided in

this title, imprisoned not more than 10 years, or both.

26 U.S.C. §5841. Registration of Firearms

(a) Central registry.--The Secretary shall maintain a central registry of all firearms in the United States which are not in the possession or under the control of the United States. This registry shall be known as the National Firearms Registration and Transfer Record. The registry shall include--

- (1) identification of the firearm;
- (2) date of registration; and
- (3) identification and address of person entitled to possession of the firearm.

(b) By whom registered.--Each manufacturer, importer, and maker shall register each firearm he manufactures, imports, or makes. Each firearm transferred shall be registered to the transferee by the transferor.

(c) How registered.--Each manufacturer shall notify the Secretary of the manufacture of a firearm in such manner as may by regulations be prescribed and such notification shall effect the registration of the firearm required by this section. Each importer, maker, and transferor of a firearm shall, prior to importing, making, or transferring a firearm, obtain authorization in such manner as required by this chapter or regulations issued thereunder to import, make, or

transfer the firearm, and such authorization shall effect the registration of the firearm required by this section.

(d) Firearms registered on effective date of this Act.--A person shown as possessing a firearm by the records maintained by the Secretary pursuant to the National Firearms Act in force on the day immediately prior to the effective date of the National Firearms Act of 1968 shall be considered to have registered under this section the firearms in his possession which are disclosed by that record as being in his possession.

(e) Proof of registration.--A person possessing a firearm registered as required by this section shall retain proof of registration which shall be made available to the Secretary upon request.

26 U.S.C. §5861. Prohibited Acts

It shall be unlawful for any person—

. . . .

(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record

26 U.S.C. §5871. Penalties

Any person who violates or fails to comply with any provision of this chapter shall, upon conviction, be fined not more than \$10,000, or be imprisoned not more than ten years, or both.