



Written by [Bob Adelman](#) on April 30, 2014

## Could Drake v. Jerejian Be the Next Big Gun Case?

On Friday, the Supreme Court [will consider](#), for the third time, whether or not to review a case concerning the right to carry firearms outside the home. The court first met on April 18 and then again on April 25 to review the Third Circuit Court's decision from New Jersey. If the Supreme Court agrees to look at it, *Drake v. Jerejian* could be the most important Second Amendment case since the court's decisions in *Heller* and *McDonald*.



The lawsuit was originally brought by Jeffrey Muller, a New Jersey resident and business owner who was kidnapped and beaten in a bizarre case of mistaken identity. When Muller then applied for a concealed carry permit, he was denied for failing to show, under New Jersey law, "justifiable need" for such protection. He sued the state, and when his application to carry was then approved, John Drake took his place as lead plaintiff.

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Drake has a fairly high-risk profession: restocking ATMs in the middle of the night with large quantities of cash. He drives from location to location in his car, scurries out to refill each machine, and then hurries on to the next location, hoping to avoid those who recognize him as a prime target for robbery, or worse. Drake applied for his own concealed carry permit, with the blessing of his town's chief of police, but he was turned down.

New Jersey legislators, anti-gun almost to the man, seized the lack of clarity in the Supreme Court's decisions in *Heller* and *McDonald* to keep in force draconian restrictions on the right to carry that have kept all but 1,100 permits from being issued in a state with nine million people. Those restrictions require an applicant to prove a "justifiable need" for protection which has been interpreted as meaning an urgent, immediate, and provable threat of violence. As Drake put it: "It seems unreasonable to me to have to wait until [I'm] beaten up or shot at to get a permit!"

Under New Jersey law, even if he were to be granted a permit, it would remain good for only two years, after which he would have to go through the process again.

In the two prior decisions, *Heller* and *McDonald*, the Supreme Court affirmed "the individual right to possess and carry weapons in the case of confrontation" and applied that to state and local governments as well. What the court failed to do was to clarify whether such possession applied outside the home. The lack of clarity in *Heller* was enough for New Jersey to keep its present law in place. Said the court: "Nothing in our opinion should be taken to cast doubt on longstanding prohibitions [already in place at the state level]," calling "the possession of firearms by felons and the mentally ill ... presumptively lawful."

The Third Circuit tossed Drake's suit, adding,

We are not inclined to address [the original meaning of the Second Amendment] by engaging in a round of full-blown historical analysis....



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[Besides], New Jersey’s legislators could not have known that they were burdening Second Amendment conduct [when they passed the original law].

This decision stands alone, however, against two other appellate court decisions — *Moore v. Madigan* in Illinois and *Peruta v. County of San Diego* in California — that followed the Supreme Court’s decisions and struck down state laws inhibiting citizens’ rights to carry in those states. This has given great encouragement to friends of the court supporting Drake by urging the court to clarify and resolve the conflicting decisions.

Damon Root, writing in *Reason*, explained, “This clear split among the circuits should be addressed by the Supreme Court. Either the Second Amendment includes the right to carry arms outside the home ... or it does not. The Court needs to pick a side.”

Alan Gura, the lead attorney in both the *Heller* and *McDonald* cases, said there’s danger if the court decides on Friday to let the Third Circuit Court decision stand:

We’ve seen courts [such as the Third Circuit] rubberstamp just about any kind of [state] law that violates the Second Amendment.

Unless the Supreme Court decides to enforce its pronouncements [in *Heller* and *McDonald*], the Second Amendment will apply only to the extent that some lower courts are willing to honor Supreme Court precedent.

There’s more danger to letting the Third Circuit Court decision ride than this, however, as recognized by Wyoming’s Governor Matt Mead, who observed:

If the current decision stands, states providing greater protections than New Jersey under the Second Amendment may be preempted by future federal action.

The decision out of New Jersey impacts the right to keep and bear arms outside the home. So I felt it was necessary to have [my] attorney general support a petition to the Supreme Court to hear this case.

Larry Pratt and his Gun Owners of America have joined with Wyoming, noting that, if left standing, the New Jersey law turns the Second Amendment on its head: “New Jersey [treats] firearm possession as a privilege granted by the civil authorities [and this] is in no way consistent with the inherent right to keep and bear arms vested in the People.”

Pratt added: “In New Jersey, carry permits are like honest politicians — they are rumored to exist, but few have ever actually been seen. An ordinary person may be granted a permit only if he can prove to the satisfaction of a judge that his life is in grave danger.”

Alan Gottlieb, the executive vice president of the Second Amendment Foundation, thinks the time is ripe for the court to resolve the matter and clarify, once and for all, the issue of carrying outside the home: “This issue seems to beg for a definitive ruling that settles the question for the entire nation. We have divisive lower court opinions on a fundamental civil right that require resolution, and there’s only one place this can happen.”

There are two factors mitigating in favor of the Supreme Court taking a hard look at *Drake*: one, the fact that the court is considering the case for the third time on Friday; two, the court looks at only about two percent of the cases presented to it for review. As Root noted, “That *Drake* keeps kicking around suggests that somebody on the Court has taken a serious interest in hearing the case and is pushing for extra consideration among the nine members before a final vote is held on whether or not to accept it.”



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Rumors are that Justice Antonin Scalia is the one pushing for the court to hear *Drake*. If the Supreme Court lets the Third Circuit Court's decision remain in place, it not only sets a dangerous precedent but also provides encouragement for other states suffering under anti-gun politicians to enact similar laws. It would also potentially jeopardize current states (such as Wyoming, where no permits are required) which have given much greater protection to their citizens than has New Jersey.

On the other hand, if the high court takes on *Drake* and rules in a manner consistent with rulings in *Moore* and *Peruta*, Second Amendment supporters across the land will be able to breathe more easily, knowing, for the time being at least, that the Second Amendment means what it says, at home as well as outside the home.

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