DOCKET NO. CR12-0101640-S	:	SUPERIOR COURT
	:	
STATE OF CONNECTICUT	:	JUDICIAL DISTRICT OF TOLLAND
	:	AT ROCKVILLE (G.A. #19)
V.	:	
	:	
CRISTOPHER PETERSON	:	JULY 15, 2013

MOTION FOR RECUSAL AND DISQUALIFICATION OF JUDGE[1]

The Defendant Christopher Peterson, by and through his undersigned counsel and pursuant to Connecticut Practice Book (P.B.), § 1–22(a),[2] hereby moves to disqualify The Honorable Edward J. Mullarkey from presiding at trial in the above-captioned matter.

In support the Defendant offers:

I. THE COURT'S *SUA SPONTE* INQUIRY OF DEFENDANT'S COUNSEL RE: THE SECOND AMENDMENT, SLAVERY, AND SHAME

[1] Admitted to the Connecticut Bar in 1993, this is undersigned counsel's first motion, in federal or state court, written or oral, for recusal or disqualification of a judge.

[2] P.B. § 1-22(a) provides: "A judicial authority shall, upon motion of either party or upon its own motion, be disqualified from acting in a matter if such judicial authority is disqualified from acting therein pursuant to Canon 3(c) of the Code of Judicial Conduct ..." "'[C]anon 3 of the Code of Judicial Conduct requires a judge to disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned.'" Ajadi v. Commissioner of Correction, 280 Conn. 514, 527 (2006).

A. Jury Selection

In the course of jury selection on Thursday, July 11, 2013, the Court raised, *sua sponte* and on the record, the content of a 1998 University of California at Davis Law Review article entitled *The Hidden History of the Second Amendment*, to inquire whether undersigned counsel for the Defendant was aware of the history of the Second Amendment as it relates to anti-federalists, ratification of the United States Constitution, and passage of the Bill of Rights. See Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. Davis L. Rev. 309 (1998).

In response to the Court's inquiry, an inquiry that was not made to the prosecutor, regarding knowledge of the content of Professor Bogus's article, undersigned counsel admitted a lack of knowledge. The instant trial does not implicate the Second Amendment nor has the Second Amendment been raised[3] except to the extent that the Court has raised undersigned counsel's involvement in firearms and Second Amendment civil rights cases and media coverage.[4]

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[3] The criminal matter before the Court is a misdemeanor trial. Previously, the Defendant was charged with six counts of criminal possession of a firearm but the charges were dismissed after undersigned counsel obtained proof that the Defendant is not a felon.

[4] For recent examples, see Matthew Kauffman, *Gun Board Member Charts Own Path*, Hartford Courant, June 23, 2013 at http://articles.courant.com/2013-06-23/news/hc-gunboard-kuck-0624-20130623_1_state-police-state-board-board-meetings/2 ("[Doe's] attorney at the hearing was

At approximately 3:20 p.m. on Thursday, July 11, 2013, after the Court's initial comments about the Professor Bogus article, the Court recessed for an afternoon break, stood, and spoke. However, prior to speaking the Court confirmed with the court monitor that his comments would not be recorded. The Court then stated, as he stood at the bench, that those who support the Second Amendment should be "ashamed."[5] No reference was made to our state

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Rachel M. Baird of Torrington, a prominent firearms-rights lawyer in the state; Matthew Kauffman and Dave Altimari, *Hundreds Gain Gun Permits Despite Police Rejection*, Hartford Courant, June 23, 2012 at http://www.courant.com/news/connecticut/hc-gun-permits-20130622,0,1847793.story ("Rachel Baird, a lawyer who frequently represents clients with cases before the board, said that situation is appropriate because applicants have no formal opportunity to make their case to the local officials."); David Owens, *Lawsuit Seeks to End $50 Fee for Gun Permits*, Hartford Courant, June 10, 2013 at http://articles.courant.com/2013-06-10/news/hc-gun-license-fees-0607-20130606_1_state-police-gun-permits-state-criminal-history-record; Associated Press, "*Guns ordered returned to Connecticut Suspect in Threats*, Norwich Bulletin, May 28, 2013 at http://www.norwichbulletin.com/news/x514114075/Judge-orders-guns-returned-to-suspect-in-threats#axzz2XQbXg81X; Eric Parker, *Local police depts. want more say with issuing permits*, WFSB Channel 3, April 29, 2013 at http://www.wfsb.com/story/22108142/local-police-depts-want-more-say-with-issuing-pistol-permits; Jay Stapleton, *Lawyers Have Little Success Fighting Gun Seizure Warrants*, Connecticut Law Tribune, January 25, 2012 at http://www.ctlawtribune.com/PubArticleCT.jsp?id=1202585866233&Lawyers_Have_Little_Success_Fighting_Gun_Seizure_Warrants_.

[5] Professor Bogus uses the word "shame" to explain why there is no direct support in historical writing for his theory that the Second Amendment arises from a compromise between the North and the South. See id. at 373 ("The evidence that the Second Amendment was written to assure the South that the federal government would not disarm its militia is, I suggest, considerable. However, the evidence is almost entirely circumstantial. Madison never expressly stated that he wrote the Second Amendment for that purpose. If the thesis is sound, why is no direct evidence to be found supporting it?"); see also id. at 372 ("Bargaining over slavery produced a sense of

constitution or whether those who support Article 1, § 15 of our state constitution need be "ashamed." See Kuck v. Danaher, 600 F.3d 159, 165 (2d Cir. 2010) ("Yet the Connecticut Constitution establishes a clear liberty interest in a permit to carry a firearm-an interest that is highly valued by many of the state's citizens.") (citing Conn. Const. art. I, § 15 ("Every citizen has a right to bear arms in defense of himself and the state.")).

Other comments[6] not relevant to the proceedings but directed presumably to undersigned counsel's involvement in firearms and Second Amendment civil rights cases and media coverage include:

- The Court's reflection on whether undersigned counsel will be "Annie Oakley" or "Bonnie Parker."; and
- The Court's response to undersigned counsel's statement that a Vernon Police Department detective who had been subpoenaed to testify at a motion hearing for Friday, July 12, 2013, was unavailable; the Court commented that undersigned counsel should know a lot of people in Wyoming.[7]

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shame on both sides. Northerners felt shame for becoming complicit in the slave system. For Southerners, the issue was more complex and confused, but even staunch defenders of the system struggled with a sense of disgrace.").

[6] The Court's inquiry included a remark that the Court would speak slowly as undersigned counsel is a graduate of Yale Law School.

[7] According to the New York Times:
"In Wyoming, home to some of the country's least restrictive gun regulations, a bill to exempt the state from any new gun-control laws sailed through the Republican-controlled House by a vote of 46 to 13 and is now headed to the State Senate. The measure, called the Firearm Protection Act, declares that any new gun-control laws or executive orders that ban

B. Professor Carl T. Bogus[8] and Newtown

According to Professor Bogus:

> More than a dozen years ago, I wrote an article titled The Hidden History of the Second Amendment. It got a fair amount of attention at the time. Some historians endorsed it – at least to the extent of saying they found its thesis plausible and deserving of attention – including Garry Wills and Don Higginbotham from the University of North Carolina, who specializes in military history of the colonial and Revolutionary eras. But, frankly, the article did not get the kind of attention that I thought it deserved.

See *EDMUND: A Blog with a Burkean Point of View* at http://www.carltbogus.com/edmund-a-blog/72-the-hidden-history-of-the-second-amendment-redux. Professor Bogus attributes the surge in the 1998 article's popularity to Newtown:

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semiautomatic weapons or limit ammunition clip sizes are 'unenforceable' in Wyoming. Any federal agent who tries to enforce gun-control measures would be guilty of a felony punishable by five years in prison and a $5,000 fine. It also allows the state's attorney general to defend Wyoming residents prosecuted for violating federal gun laws." Jack Healy, *Some States Push Measure to Repel New U.S. Gun Laws*, N.Y. Times, Feb. 7, 2013 at http://www.nytimes.com/2013/02/08/us/some-states-try-to-repel-new-federal-gun-laws.html?_r=0.

[8] Professor Bogus has been or is currently on the National Advisory Panel for the Violence Policy Center, the Board of Governors for Handgun Control, Inc., and the Board of Directors for the Center to Prevent Handgun Violence. He is diametrically opposed to the position held by organizations such as the National Rifle Association that the right to keep and bear arms is an individual right and works through organizations to ban handguns and increase regulation of firearm ownership.

> To my surprise, the recent massacre in Newtown ignited a resurgence of interest in The Hidden History of the Second Amendment. During one week recently, it was the fourth most-downloaded article from the Social Science Research Network, which contains more than 300,000 articles. Even more surprising, as far as I can tell this resurgence in interest is taking place not primarily among scholars but among people from all walks of life, who – learning about it from social media or radio shows – are taking the initiative to find, download, and read a heavily-footnoted, 99-page law review article.

Id. This interest has surged primarily from non-academics who have learned about the article from social media or radio shows despite the rejection by the United States Supreme Court of the article's premise that the Second Amendment right to keep and bear arms is a collective, not an individual, right. See District of Columbia v. Heller (U.S. 2008) and McDonald c. City of Chicago (U.S. 2010).

C. *The Hidden History of the Second Amendment*

The thesis of the article is that the history of the Second Amendment is founded in a compromise that provided the southern states some comfort that their ability to suppress slave insurrections would not be infringed upon by the federal government's disarmament of state militias or through other means. See id. at 407 ("The Second Amendment takes on an entirely different complexion when instead of being symbolized by a musket in the hands of the minuteman, it is associated with a musket in the hands of the slave holder."). The article cited favorably by the Court states:

- “The Second Amendment is part of the reason that the United States tolerates a level of carnage and terror unparalleled in any other nation at peace.” Id. at 314.

- “According to this view, the Second Amendment grants people a right to keep and bear arms only within the state-regulated militia. In contrast, those who advocate an "individual rights" theory believe that the Second Amendment grants individuals a personal right to keep and bear arms. This model has long been advocated by the firearm industry, shooting organizations, and political libertarians.” Id. at 317.

- “One of Virginia's main concerns was that the federal government would abolish or directly interfere with the slave system.” Id. at 327.

- “Even more chilling than emancipation was the prospect of continuing the slave system but weakening the white population's control over the slave population.” Id. at 331.

- “However, Mason's main concern was not the creation of a standing army but the preservation of the militia. Mason personally owned three hundred slaves. He understood the critical role of the militia in preserving the slave system.” Id. at 349.

- “But it was at Richmond that concerns about slave control and federal authority over the militia were united, producing a new rationale for a right to bear arms.” Id. at 358.

Professor Bogus is an outspoken proponent of an interpretation, rejected by the United States Supreme Court, that the Second Amendment right to keep and bear arms is a collective, not an individual, right.[9]

[9] See Robert Willing, *Case could shape future of gun control*, USA Today, Aug. 27, 1999 at **http://www.saf.org/EmersonUSA1.html** ("Clearly, the reference to 'militia' is there for a reason," Bogus says. If the Amendment's drafters had "wanted an individual right, they wouldn't have needed to qualify it. That first (clause) is all-important. They're saying, 'Because there's a need for a militia, we're bringing up the subject of arms.”) (external quotation marks omitted).

In Heller, Professor Bogus was amicus counsel for 15 professional history/legal academics who filed a brief supporting the District of Columbia's handgun ban. The United States Supreme Court rejected the District of Columbia's ban finding that Second Amendment rights attach to the individual, a clear and unequivocal rejection of Professor Bogus's position. In his article, Professor Bogus attributes the bulk of Second Amendment academic writing supporting an interpretation of individual rights to:

> A small band of true believers who belong not merely to the individual rights school of thought but a particular wing commonly called "insurrectionist theory." The leader of this band is Stephen P. Halbrook, who, with the support of tens of thousands of dollars in NRA grants, has written no less than two books and thirteen law review articles advocating this particular theory of the Second Amendment. Insurrectionist theory is premised on the idea that the ultimate purpose of an armed citizenry is to be prepared to fight the government itself.

Id. at 318-19.

Professor Bogus proceeds in his 1998 article to admit:

> While, as a general matter, mainstream scholars have only a cold disdain for the work of insurrectionist theorists, at least three prominent constitutional scholars -Sanford Levinson of the University of Texas, Akhil Reed Amar of Yale, and William Van Alstyne of Duke-have recently joined the insurrectionist school, giving it a respectability it did not previously enjoy.

Id. at 320.

Finally, while Professor Bogus was amicus counsel for 15 professional history/legal academics who filed a brief supporting the District of Columbia's handgun ban in Heller, Attorney Halbrook, leader of the group described by Professor Bogus's as a "small band of true believers" drafted an amicus brief in support of Heller for 55 members of the United States Senate, the President of the United States Senate, and 250 members of the House of Representatives.[10] The United States Supreme Court ruled in favor of Heller (supported by Attorney Halbrook) and against the District of Columbia (supported by Professor Bogus) ban on handguns.

II. LEGAL STANDARD

A. Standard of Law for Recusal and Disqualification

Connecticut Practice Book (P.B.), § 1–22(a) provides in relevant part:

> A judicial authority shall, upon motion of either party or upon its own motion, be disqualified from acting in a matter if such judicial authority is disqualified from acting therein pursuant to Canon 3(c) of the Code of Judicial Conduct ..."

"'[C]anon 3 of the Code of Judicial Conduct requires a judge to disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned.'" Ajadi v.

[10] See Amicus Brief at http://www.nraila.org/heller/proamicusbriefs/07-290_amicus_congress.pdf.

Commissioner of Correction, 280 Conn. 514, 527 (2006). The standard for determining whether a judge should recuse himself or herself pursuant to Canon 3(c) is well established.

> The standard to be employed is an objective one, not the judge's subjective view as to whether he or she can be fair and impartial in hearing the case. ... Any conduct that would lead a reasonable [person] knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned is a basis for the judge's disqualification ... The standard for appellate review of whether the facts require disqualification is whether the court's discretion has been abused.

Sabatasso v. Hogan, 90 Conn.App. 808, 825–26, cert. denied, 276 Conn. 923 (2005).

The Court's express statement that those who support the Second Amendment should be "ashamed" and other comments indicating a focus on undersigned counsel's involvement in firearms issues compellingly leads a reasonable person to conclude that the Court's impartiality might reasonably be questioned.

The Court is aware, not through undersigned counsel but through means external to the proceeding, of undersigned counsel's involvement in firearms and Second Amendment civil rights cases and issues. The Court expressly cites to an article that holds, contrary to two decisions by the United States Supreme Court, the Second Amendment as a collective, not individual, right.

In holding that those who support the Second Amendment should be "ashamed" the Court demonstrates a lack of fairness and impartiality in this case where undersigned counsel

appears on behalf of the Defendant. In reviewing Professor Bogus's article cited favorably by the Court this "shame" arises from the purported foundation of the Second Amendment in the southern states' demand that some assurance be given that their militias would not be disarmed, disbanded, or deployed in exchange for agreement to ratify the United States Constitution. Undersigned counsel's "shame" would apparently arise from defending individuals and bringing causes of action in reliance upon the Second Amendment or in representing individuals who "shamefully" support the Second Amendment because to do so supports slavery.

The impact on the Defendant in the instant action is a reasonable and intractable belief that undersigned counsel cannot represent the Defendant before a judge who finds his counsel "shameful" for her reliance on the Second Amendment as interpreted by the United States Supreme Court, and not Professor Bogus, and treats her accordingly, including comparisons to Annie Oakley[11] and Bonnie Parker.[12] The Defendant is so impacted that he raises as a reasonable belief founded in what he has witnessed in the courtroom that he cannot receive a fair trial from

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[11] "Annie Oakley was an American sharpshooter and exhibition shooter." See http://en.wikipedia.org/wiki/Annie_Oakley.

[12] "Bonnie Elizabeth Parker (October 1, 1910 – May 23, 1934) and Clyde Chestnut Barrow (March 24, 1909 – May 23, 1934) were well-known American outlaws, robbers, and criminals who traveled the Central United States with their gang during the Great Depression. … With her sassy photographs, Bonnie supplied the sex-appeal, the oomph, that allowed the two of them to transcend the small-scale thefts and needless killings that actually comprised their criminal careers." See http://en.wikipedia.org/wiki/Bonnie_and_Clyde.

any judge in Connecticut at this time due to the events of December 14, 2012, in Newtown, events that have popularized the 1998 article by Professor Bogus cited favorably by the Court. The Defendant has been unnerved by the Court's animus toward undersigned counsel and the Second Amendment, as well as the Court's reliance on a 1998 law review article that is contrary to the law of the land as expressed in the United States Supreme Court decisions Heller and McDonald which provide, jointly, that the Second Amendment individual right to keep and bear arms is a right incorporated through the Fourteenth Amendment to the states, including Connecticut.[13]

Finally, undersigned counsel has been unduly and unfairly distracted from competently representing the Defendant as a consequence of the Court's comments and Defendant's concerns

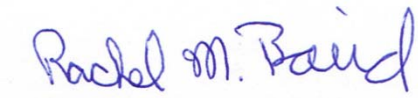
[13]After appearing before the Court on June 27, 2013, the Defendant expressed concerns to undersigned counsel following the Court's comments directed toward the Defendant's father's military service. The Defendant's father retired from active-duty United States Army service at the rank of E-7. He served an extended tour of duty in Vietnam from October 1968 through April 1970 logging 250 combat flight hours as a crew member on a UH-1C Huey Gunship. For combat related service, he was awarded 21 Air Medals, a Bronze Star, and other combat related decorations. The Court's comments, on the record and in the presence of the parties, the Defendant's father, court personnel, and members of the public challenged the father's military combat experience, firearms experience, and knowledge of firearms. A request for a transcript of the June 27, 2013, hearing date has been pending since July 3, 2013, and undersigned counsel's office understands that the transcript will be ready on July 16, 2013. Undersigned counsel did not intend to move for recusal or disqualification based solely on the June 27, 2013, commentary because such a motion must be considered with import and filed as a last resort and, although shocking, the Court's June 27, 2013, comments may have been overcome by a lack of further concerns. Unfortunately, for the reasons stated herein those concerns have been exacerbated by the Court's comments on July 10, 11, and 12, 2013, during jury selection and hearing.

arising from those reckless, demeaning, and defamatory comments resulting in an inability to adequately prepare for trial while addressing the Defendant's reasonable concerns, reviewing the "heavily-footnoted, 99-page law review article" brought to undersigned counsel's attention by the Court as an important article to read, contacting Attorney Stephen P. Halbrook referenced by Professor Bogus as the "leader" of the "small band of true believers who belong not merely to the individual rights school of thought but a particular wing commonly called 'insurrectionist theory'" id. at 318-19, and preparing this motion. See attached response from Attorney Holbrook to Attorney Baird's inquiry regarding the credibility of the 1998 article drafted by professor Bogus and favourably cited by the Court.

III. CONCLUSION

For the foregoing reasons and arguments of law, the Defendant respectfully moves for recusal and disqualification of The Honorable Edward J. Mullarkey from further proceedings in the above-captioned matter.

DEFENDANT
CHRISTOPHER PETERSON

BY: 

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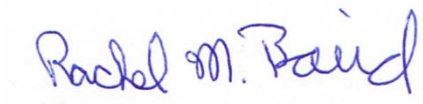
ORDER

The Court, upon due consideration, hereby order the Defendant's motion
GRANTED / DENIED.

_____
Judge of the Superior Court

CERTIFICATION OF SERVICE

I HEREBY CERTIFY THAT the foregoing Motion for Recusal and Disqualification of Judge was transmitted by email on July 15, 2013, to Assistant State's Attorney Reed Durham in Rockville, Connecticut.



_____
Rachel M. Baird
Commissioner of the Superior Court

Rachel Baird

From: PROTELL@aol.com [mailto:PROTELL@aol.com]
Sent: Thursday, July 11, 2013 11:07 PM
To: rbaird@rachelbairdlaw.com
Cc: protell@aol.com
Subject: Re: CT State Court Judge

Hi Rachel,

The most prominent early demand for recognition of the right to keep and bear arms was in the northern states. My book The Founders' Second Amendment book goes into great detail on the reasons for ratification of the Second Amendment, which was inspired by the British disarming of the Americans, not slavery. The first state to declare the right to keep and bear arms was Pennsylvania, in 1776. Other states to do so in that time period were North Carolina, Vermont, and Massachusetts.

When the state ratification conventions considered the proposed Constitution without a Bill of Rights in 1787-88, a bill of rights with the right to bear arms was proposed by Samuel Adams in the Massachusetts convention, by the Dissent of the Minority in the Pennsylvania convention, and by the entire New Hampshire convention. When the Virginia convention debated the issue, George Mason recalled how the British sought to disarm the Americans. New York, North Carolina, and Rhode Island joined in the demand for what became the Second Amendment.

Slavery was never mentioned in the above context. It was the denial of the right to bear arms to all that supported slavery, not the Second Amendment. As shown in my book Securing Civil Rights, the framers of the Fourteenth Amendment sought to correct this by extending the right to all, including African Americans.

Steve

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