

No. 05-4170

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2007

JOSH HULL,

Petitioner,

v.

ADAM HUMPHRIES, ATTORNEY GENERAL FOR THE STATE OF FLORABAMA,

Respondent.

On Writ of Certiorari to the Twelfth Circuit Court of Appeals

BRIEF FOR THE RESPONDENT

September 19, 2007

Exam # 0137
Counsel for Respondent

2007 Runner-up
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QUESTIONS PRESENTED

Whether the Second Amendment endows an individual with a constitutional right to bear a handgun for personal defense, and, if so, whether FLORABAMA CODE § 9-19.02 infringes upon the protections of the Second Amendment?

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv
STATEMENT OF THE CASE.....	1
SUMMARY OF THE ARGUMENT.....	2
ARGUMENT.....	4
I. Because the Second Amendment Does Not Apply to the States, FLORABAMA CODE § 9-19.02 Does Not Infringe upon the Protections of the Second Amendment.....	4
A. According to Supreme Court precedent, the Second Amendment limits the federal government, not the states.....	4
B. Legislative history and the development of the "right to keep and bear arms" indicate that the Second Amendment limits arms regulation by the federal government, not the states.....	6
C. Because the Second Amendment limits only the federal government, the states may freely regulate handgun ownership, regardless of whether the Second Amendment confers a collective or individual right to bear arms.....	7
II. The Second Amendment Does Not Guarantee an Individual Right to Possess a Handgun for Personal Defense.....	8
A. The district court's failure to consider adequately the prefatory phrase of the Second Amendment led the court to conclude wrongly that the Second Amendment protects an individual right to own a handgun.....	8
B. The district court failed to observe well-established precedent that rejected the individual rights model of arms ownership.....	9
C. Petitioner fails to show that possession of a handgun is reasonably related to the preservation or efficiency of a well regulated militia.....	10
III. Even Under an Individual Rights Model of Gun Ownership, FLORABAMA CODE § 9-19.02 Does Not Violate Petitioner's Second Amendment Right.....	11
CONCLUSION.....	13

TABLE OF AUTHORITIES

Cases:	Page
<i>Bach v. Pataki</i> 408 F.3d 75 (2d Cir. 2005).....	5
<i>Burton v. Sills</i> 248 A.2d 521 (1968).....	6
<i>City of Cleburn v. Cleburn Living Ctr.</i> 473 U.S. 432 (1985).....	12
<i>Eckert v. Pennsylvania</i> 331 F. Supp. 1361 (D.C. Pa. 1971).....	5
<i>Gitlow v. New York</i> 268 U.S. 652 (1925).....	5
<i>Heller v. Doe</i> 509 U.S. 312 (1993).....	12
<i>Holmes v. Jennison</i> 39 U.S. 540 (1840).....	8
<i>Hull v. Humphries</i> 987 F.3d 1 (12th Cir. 2006).....	8
<i>Lewis v. United States</i> 445 U.S. 55 (1980).....	11
<i>Love v. Pepersack</i> 47 F.3d 120 (4th Cir. 1995).....	5
<i>Malloy v. Hogan</i> 378 U.S. 1 (1964).....	5
<i>New Orleans v. Dukes</i> 427 U.S. 197 (1976).....	12
<i>Peoples Rights Organization v. City of Columbus</i> 152 F.3d 522, 538 (6th Cir. 1998).....	5
<i>Presser v. Illinois</i> 116 U.S. 252 (1885).....	4, 5

<i>Quilici v. Morton Grove</i> 695 F.2d 261 (7th Cir. 1982).....	5
<i>United States v. Rybar</i> 103 F.3d 273 (3d Cir. 1996).....	11
<i>Silviera v. Lockyer</i> 312 F.3d 1052 (9th Cir. 2002).....	8
<i>United States v. Cruikshank</i> 92 U.S. 542 (1876).....	5
<i>United States v. Emerson</i> 270 F.3d 203 (2001).....	9-10
<i>United States v. Johnson</i> 441 F.2d 1134 (5th Cir. 1971).....	10
<i>United States v. Miller</i> 307 U.S. 174 (1939).....	2, 6, 9-11
<i>United States v. Williams</i> 446 F.2d 486 (5th Cir. 1971).....	10
Constitutions:	
U.S. CONSTITUTION.....	4, 6-8
PA. CONSTITUTION (1776).....	7
VT. CONSTITUTION (1777).....	7
Code Provisions:	
FLORABAMA CODE § 9-19.02.....	1-4, 7, 11-13
FLORABAMA CODE § 5-0205.....	1
Miscellaneous:	
ANNALS OF CONGRESS.....	6
Clayton E. Cramer, <i>For the Defense of Themselves and the State: The Original Intent and Judicial Interpretation of the Right to Keep and Bear Arms</i> (1994).....	7
Warren Freedman, <i>The Privilege to Keep and Bear Arms</i> (1989).....	7

STATEMENT OF THE CASE

This case concerns a state's right to regulate the possession of certain dangerous firearms. Over the last twenty years, the state of Florabama experienced a drastic increase in gun violence in two of its major cities, Tallaloosa and Birlardo. The rise in violence, primarily related to urban gangs using handguns, has devastated Florabama. Because Florabama is mostly comprised of three expansive, metropolitan areas—Tallaloosa, Birlardo, and Browning—the rise in gun violence in two of those cities has vastly impacted the state. Even the remaining rural areas have been largely abandoned out of fears related to the urban gangs. Officials fear the rash of gun violence will continue to spread north into Browning, the only area of the state left unshaken by the urban gang epidemic.

In response to the far-reaching effects of handgun-related violence and the concern that the violence would continue to grow and spread into metropolitan Browning, Florabama enacted FLORABAMA CODE § 9-19.02. The code provision prohibits registration of certain weapons commonly used for unlawful purposes, including handguns, except to currently assigned or retired law enforcement officers. The statute curtails the use of handguns since FLORABAMA CODE § 5-0205 prohibits a person from carrying a pistol without a valid registration certificate. In this way, FLORABAMA CODE § 9-19.02 targets the negative effects wrought by urban gangs by criminalizing the possession of a handgun, thus interfering with the instrumentalities of violence and fear-mongering.

Petitioner, whose Browning apartment was burglarized twice, wishes to register a handgun in Florabama for personal defense. Adam Humphries, Florabama's Attorney General, denied Petitioner's request to register a Glock 17.40 caliber handgun. In doing so, Humphries

followed FLORABAMA CODE § 9-19.02. Petitioner filed suit in the District Court for the District of Northern Florabama at Browning under 42 U.S.C. § 1983. He contended that he had a right to possess firearms in the home for self-defense. Petitioner asked the court to declare § 9-19.02 unconstitutional and enjoin its application. The suit was filed on February 17, 2004, and the District Court found in Petitioner's favor. Adam Humphries appealed the judgment to the United States Court of Appeals for the Twelfth Circuit. On November 11, 2006, the Circuit Court overturned the judgment of the District Court. This appeal results.

SUMMARY OF THE ARGUMENT

FLORABAMA CODE § 9-19.02 does not infringe the Second Amendment protections of the right to keep and bear arms. First and foremost, as the Supreme Court has consistently held that the Second Amendment limits just the federal government, the ability of states to regulate arms is not limited by Second Amendment protections. Regardless of whether the Second Amendment endows a collective or individual right to bear arms, the Florabama statute does not contravene Petitioners right "to keep and bear arms" because the Second Amendment does not apply to state statutes.

Even if the Court finds that the Second Amendment is incorporated against the states, the Second Amendment does not guarantee an individual right to keep and bear arms. Rather, the Second Amendment protects an individual right to keep and bear arms if, and only if, the individual can demonstrate a reasonable relationship between his possession of an arm and the preservation or efficiency of a militia. Both the plain language of the Second Amendment and this Court's opinion in *United States v. Miller*, 307 U.S. 174 (1939), support this interpretation of

the right to keep and bear arms. Because Petitioner has failed to demonstrate a "reasonable relationship" between owning a handgun and the preservation or efficiency of a militia, his ownership of the gun is not protected by the Second Amendment. Therefore, the Court should find that FLORABAMA CODE § 9-19.02 does not infringe the sophisticated individual right endowed by the Second Amendment.

In the alternative, should the Court find that the Second Amendment endows an individual right to keep and bear arms, the Florabama statute still does not violate the right to keep and bear arms guaranteed by the Second Amendment. Whether the Court reviews FLORABAMA CODE § 9-19.02 according to a "rational basis" or "strict scrutiny" standard of review, Florabama's compelling interest in public safety makes the statute constitutionally valid.

ARGUMENT

I. Because the Second Amendment Does Not Apply to the States, FLORABAMA CODE § 9-19.02 Does Not Infringe upon the Protections of the Second Amendment.

A. According to Supreme Court precedent, the Second Amendment limits the federal government, not the states.

FLORABAMA CODE § 9-19.02 does not infringe upon the protections of the Second Amendment because the amendment limits only federal legislative efforts, and therefore does not preclude state regulation of firearms. Though Petitioner contends that FLORABAMA CODE § 9-19.02 is a violation of his right to keep and bear arms, relevant case law and legislative history suggest otherwise.

The Second Amendment provides that "[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. For years, the Supreme Court has found consistently that states may regulate the possession of arms by individual Americans. This finding, time and again, was based on the Court's understanding that the Second Amendment prohibited Congress—not the states—from interfering with the right to keep and bear arms. In *Presser v. Illinois*, 116 U.S. 252 (1885), the Court held the state had the power to regulate private, para-military organizations because the Second Amendment "is a limitation only upon the power of Congress and the National government, and not upon that of the States." 116 U.S. at 265.¹

¹ While finding that the Second Amendment limits only interference by the federal government with the possession of arms, Justice Woods hinted that there might be a limit to the states' power to prohibit firearm possession. He

The *Presser* court relied on *United States v. Cruikshank*. 116 U.S. at 265 (citing *United States v. Cruikshank*, 92 U.S. 542 (1876)). In *Cruikshank*, the Court found the Second Amendment was only enforceable against the federal government. The Court stated the right to bear arms "is not a right granted by the Constitution," and that the Second Amendment's declaration that it "shall not be infringed" "means no more than that it shall not be infringed by Congress." *United States v. Cruikshank*, 92 U.S. at 591-92.

Presser and *Cruikshank* remain good law today.² Though *Presser* and *Cruikshank* were decided before the Supreme Court adopted the selective incorporation doctrine in 1925,³ this Court has consistently found the Second Amendment does not apply to the states through the Fourteenth Amendment.⁴ Thus, the power of states to regulate arms possession remains untempered by the Second Amendment.

noted, however, that this restriction was not imposed by the Second Amendment, but was a product of the "prerogative of the general government, as well as of its general powers," to maintain public security. *Presser v. Illinois*, 116 U.S. at 265-66. This comports with an earlier statement in *Presser* that the right to keep and bear arms is not "in any manner dependent upon [the Second Amendment] for its existence." *Id.* at 265. Thus, any limits on state power to regulate firearms are not imposed by the Second Amendment and are therefore beyond the scope of this inquiry.

² Several recent circuit court decisions have affirmed *Presser* and *Cruikshank*, finding that the Second Amendment restricts only the federal government. See, e.g., *Bach v. Pataki* 408 F.3d 75 (2d Cir. 2005) ("Second Amendment's 'right to keep and bear arms' imposes a limitation only of federal, not state, legislative efforts."); *Eckert v. Pennsylvania*, 331 F. Supp. 1361 (D.C. Pa. 1971) (aff'd without opinion 474 F.2d 1339 (3d Cir. 1973) (cert. denied 410 U.S. 989)) (noting that the function of the Second Amendment is to prevent only the Federal Government from infringing the right to bear arms); *Quilici v. Morton Grove*, 695 F.2d 261 (7th Cir. 1982) ("Second Amendment does not apply to states.").

³ See *Gitlow v. New York*, 268 U.S. 652 (1925) (holding that States must observe First Amendment free speech protections).

⁴ See, e.g., *Malloy v. Hogan*, 378 U.S. 1, 4 n.2 (1964) (listing provisions in the Bill of Rights that, according to the Supreme Court of the United States, do not apply to the states through the Fourteenth Amendment). For additional federal cases finding that the Due Process Clause of the Fourteenth Amendment does not incorporate the Second Amendment see *Peoples Rights Organization v. City of Columbus*, 152 F.3d 522, 538 n.18 (6th Cir. 1998) ("[T]he restrictions of the Second Amendment operate only upon the Federal Government.") (citing *Presser v. Illinois* and *United States v. Cruikshank*); *Love v. Pepersack*, 47 F.3d 120, 123 (4th Cir. 1995) ("The Second Amendment does not apply to the States.") (citing *Presser v. Illinois* and *United States v. Cruikshank*) (cert. denied 516 U.S. 813 (1995)).

B. Legislative history and the development of the "right to keep and bear arms" indicate that the Second Amendment limits arms regulation by the federal government, not the states.

Furthermore, the development of the right to keep and bear arms indicates the Second Amendment was intended to be enforceable against only the federal government. In particular, the legislative history of the Second Amendment indicates that the drafters intended the amendment as a means of protection against congressional interference. Originally, the Second Amendment was to be inserted into Article I, §9 between clauses three and four.⁵ That the drafters of the Constitution contemplated incorporating the language of the Second Amendment into a provision detailing limits on congressional powers is strong evidence that the Second Amendment is a limitation on the powers of Congress exclusively, and does not bear on state power to regulate firearms.

Additionally, the historical background of the Second Amendment demonstrates that it is unlikely that the Second Amendment was meant to limit states' power to regulate firearms. The Second Amendment was a product of the states' general distrust of standing armies and their desire to protect their sovereignty.⁶ In the early days of the American Revolution, the British Army attempted to disarm colonial militias in order to quell the insurrection. In the wake of this experience, the Second Amendment was drafted as an accommodation to the Anti-federalists; it was meant to guard against congressional intrusions on state sovereignty. It represented an

⁵ See 1 ANNALS OF CONG. 451 (Joseph Gales, ed., 1790).

⁶ See *United States v. Miller*, 307 U.S. 174, 179 (1939) ("The sentiment of the time strongly disfavored standing armies."); *Burton v. Sills*, 248 A.2d 521 (1968) ("[T]he colonists believed that standing armies were acceptable only in extraordinary circumstances and under control of civil authorities, and that a militia was the proper organ for defense of the individual states.").

accommodation between the Federalists and the states' rights advocates by providing a means of protection against external threats while reducing the need for a strong central army.⁷

Though some commentators contend that the Second Amendment was drafted as more than a protection against a strong central government, these claims—based largely on similar "right to keep and bear arms" provisions in state constitutions—fail to consider key differences between those provisions and the Second Amendment.⁸ While many of the state constitutions stated that individuals may keep arms "for defence of *themselves* and the state," such a guarantee of an individual right notably has been omitted from the Second Amendment, which focuses on common defense ("the security of a free state").⁹

C. Because the Second Amendment limits only the federal government, the states may freely regulate handgun ownership, regardless of whether the Second Amendment confers a collective or individual right to bear arms.

Supreme Court precedent and the history of the Second Amendment clearly indicate that States are not limited by the Second Amendment. It follows that the Second Amendment does not impose restrictions on state regulation of firearms. Thus, FLORABAMA CODE § 9-19.02 does not infringe upon the protections of the Second Amendment.

⁷ See Warren Freedman, *The Privilege to Keep and Bear Arms* 44-45 (1989) ("One of the many problems confronting the delegates to the convention in Philadelphia was how to reconcile the fear of a standing army . . . with the need to defend the fledgling nation.").

⁸ See Clayton E. Cramer, *For the Defense of Themselves and the State: The Original Intent and Judicial Interpretation of the Right to Keep and Bear Arms* 31 (1994) ("Those constitutions adopted before the Bill of rights can tell us what sense 'the right to keep and bear arms' had in the political vocabulary of the time.").

⁹ Emphasis added. Compare PA. CONST. XIII (1776) ("[T]he people have a right to bear arms for the defence of themselves and the state . . .") and VT. CONST. ch. I, §9 (1777) ("[t]he people have a right to bear arms for the defence of themselves and the State . . .") with U.S. CONST. amend. II ("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.").

II. The Second Amendment Does Not Guarantee an Individual Right to Possess a Handgun for Personal Defense.

A. The district court's failure to consider adequately the prefatory phrase of the Second Amendment led the court to conclude wrongly that the Second Amendment protects an individual right to own a handgun.

In concluding that the Second Amendment protects an individual right to bear arms, the district court violated an elementary rule of constitutional construction. In *Holmes v. Jennison*, 39 U.S. 540 (1840), the Court explained that all constitutional words must be given their due force. 39 U.S. at 570-71. By finding an individual right to bear arms in the operative phrase¹⁰ before analyzing the prefatory phrase at all, the district court effectively rendered meaningless the words, "A well regulated Militia, being necessary to the security of a free State." See *Hull v. Humphries*, 987 F.3d 1, 5 (12th Cir. 2006).

The Second Amendment's first thirteen words are not mere afterthoughts. The legislature drafted every word and turn of phrase with painstaking care, and the amendment was ratified only after lengthy debate and numerous revisions. The meaning of the Second Amendment is in the interplay between carefully chosen words and phrases. Consequently, one must evaluate both the prefatory phrase and operative phrases in order to ascertain the nature of the guaranteed right. See *id.*; *Silviera v. Lockyer*, 312 F.3d 1052, 1086 (9th Cir. 2002) ("After conducting our analysis of the meaning of the words employed in the amendment's two clauses, and the effect of

¹⁰ See U.S. Const. amend. II ("the right of the people to keep and bear Arms shall not be infringed").

their relationship to each other, we concluded that the language and structure of the amendment strongly support the collective rights view.").

Reading the entire provision together, the meaning of the Second Amendment is clear. Articulated by the prefatory phrase, the Second Amendment's purpose – to insure the continuance of the militia system – speaks to the collective nature of the guaranteed right.¹¹ This understanding is commensurate with the legislative history and development of the Second Amendment. *See* discussion *supra* Part I.B.

B. The district court failed to observe well-established precedent that rejected the individual rights model of arms ownership.

The district court unwisely relied on *Emerson* to support its decision. In 2001, the Fifth Circuit held that the Second Amendment protects an individual right to keep and bear arms. *See United States v. Emerson*, 270 F.3d 203, 260 (2001). The Supreme Court, however, decided in 1939 that "in the absence of any evidence tending to show that possession or use of a shotgun . . . has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument." *United States v. Miller*, 307 U.S. 174, 178 (1939). In light of *Miller*, it is clear that the Fifth Circuit's decision in *Emerson* is inconsistent with Supreme Court precedent. *Emerson* held that there is an individual right to keep and bear arms. *See* 270 F.3d at 260. *Miller*, in contrast, found there is an individual right to keep and bear arms only if bearing said arms is reasonably related to the preservation of a militia. *Miller*, 307 U.S. at 178. In the instant case,

¹¹ *See U.S. v. Miller*, 307 U.S. 174, 178 (1939) ("With obvious purpose to assure the continuation and render possible the effectiveness of [militias] the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.").

had the district court conformed to Supreme Court precedent, it would have required Petitioner to demonstrate a reasonable relationship between the possession of the handgun and the preservation of a militia in order to find an individual right to keep and bear arms.

Petitioner's reliance on *Emerson* is also unwise since the *Emerson* court made its decision in the face of adverse precedent. Not only did the Fifth Circuit fail to adhere to the Supreme Court's decision in *Miller*, but it also neglected to heed two earlier Fifth Circuit opinions, both of which held that the Second Amendment does not guarantee an individual right to possess firearms. See *United States v. Williams*, 446 F.2d 486, 487 (5th Cir. 1971); *United States v. Johnson*, 441 F.2d 1134, 1136 (5th Cir. 1971).¹² While Circuit Courts are not bound by their prior decisions, *Emerson's* sudden departure from the principle of *stare decisis* makes it susceptible to criticism.

C. Petitioner fails to show his possession of a handgun is reasonably related to the preservation or efficiency of a well regulated militia.

Miller established that individuals have the right to bear arms. This right, however, is conditioned on a showing that the possession of that weapon is reasonably related to the preservation of a militia. Petitioner wants a handgun for self-defense. Petitioner has not argued his possession of a handgun would be somehow reasonably connected with the preservation of a militia. While a court might empathize with Petitioner's desire to defend his household, in light of *Miller*, the Petitioner has no constitutional right to a handgun.

¹² Both *Williams* and *Johnson* were decided after *Miller*, a 1939 case. Presumably, these cases represented recognition by the Fifth Circuit of the precedent set by the Supreme Court in *Miller*. This implied acceptance of mandatory authority makes the Fifth Circuit's holding in *Emerson* puzzling.

Miller established by implication that some individuals have the right to bear arms. 307 U.S. at 178. In order to attain this right, the individual must show that possession of a weapon is reasonably related to the preservation or efficiency of a militia." *See Id.*; *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980) ("[T]he Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well-regulated militia.'). The *Miller* court described a militia as "comprised [of] all males physically capable of acting in concert for the common defense And further, that ordinarily when called for service these men [are] expected to appear bearing arms supplied by themselves and of the kind in common use at the time." 307 U.S. at 179.

In the instant case, Petitioner never maintains he is part of a militia. Rather, he claims that he needs a handgun to guard against future burglaries. Therefore, he has not successfully demonstrated that his possession of a handgun is reasonably connected with the preservation or efficiency of a militia. *See United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996) (quoting *Miller*, 307 U.S. at 178). In light of *Miller*, FLORABAMA CODE § 9-19.02 does not infringe the protections of the Second Amendment because Petitioner has no constitutional right to a handgun.

III. Even Under an Individual Rights Model of Gun Ownership, FLORABAMA CODE § 9-19.02 Does Not Violate Petitioner's Second Amendment Right.

Even if the Court finds that Petitioner has a constitutional right to possess a weapon for self-defense, FLORABAMA CODE § 9-19.02 withstands Petitioner's challenge to the constitutionality of the provision. Where a statute regulating social or economic matters, courts

traditionally give states a great deal of latitude so long as the provision is reasonably related to a valid governmental interest. *See New Orleans v. Dukes*, 427 U.S. 197, 304 (1976) ("[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations."). As an exercise of the state's police power, the Florabama statute at issue was intended to ameliorate crime and violence and improve the quality of life in Florabama. Because FLORABAMA CODE § 9-19.02 is rationally related to serving this valid, socio-economic interest, it does not violate Petitioner's Second Amendment right.

The "rational basis" test described above is the appropriate standard of review because the statute at issue does not include inherently suspect classifications or implicate a fundamental right, either of which would necessitate a heightened standard of review. *See Heller v. Doe*, 509 U.S. 312, 318-19 (1993) (stating that review under the "strict scrutiny" standards is appropriate only in limited circumstances). The statute plainly does not include inherently suspect classifications. Also overwhelming evidence indicates that the Second Amendment is not a fundamental right, such as the fact that the Court has heretofore declined to incorporate the Second Amendment against the states. *See* discussion Part I.A.

Should the Court find that the Second Amendment is a fundamental right, however, FLORABAMA CODE § 9-19.02 is still constitutional under the strict scrutiny standard. When a statute implicates a fundamental constitutional right, the statute may be upheld where the government is able to demonstrate that the provision is necessary to achieve a "compelling state interest." *See City of Cleburn v. Cleburn Living Ctr.*, 473 U.S. 432, 440 (1985) ("[Strict scrutiny] is due when state laws impinge on personal rights guaranteed by the Constitution."). Florabama has experience a significant and widespread rise in violence as a result of handgun use. FLORABAMA CODE § 9-19.02 was the natural and necessary response. Florabama's interest

in protecting the welfare of its citizenry is certainly compelling. Because the statute thus passes the strict scrutiny test, FLORABAMA CODE § 9-19.02 does not violate the right to keep and bear arms guaranteed by the Second Amendment and held by Petitioner.

CONCLUSION

For the aforementioned reasons, the Respondent requests that this Honorable Court affirm the decision of the Twelfth Circuit Court of Appeals.

Respectfully submitted,

Exam # 0137