

No. 11-_____

IN THE
SUPREME COURT OF THE UNITED STATES

SAMUEL LOWERY,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent.

**On Petition For A Writ of Certiorari
To The District Of Columbia
Court of Appeals**

PETITION FOR A WRIT OF CERTIORARI

ENID HINKES
231 Parker Street, N.E.
Washington, D.C. 20002
877-649-8626
ehinkes@aol.com

Counsel for Petitioner

QUESTION PRESENTED

Whether the “right to keep and bear arms” protected by the Second Amendment of the United States Constitution as enunciated in *District of Columbia v. Heller*, 554 U.S. _____, 128 S.Ct. 2783, 171 L.Ed. 637 (2008) applies retroactively to a person who possessed a handgun in his own home without a registration certificate that was not obtainable at that time by ordinary, law-abiding citizens; and had not asserted his Second Amendment right at a trial held prior to *Heller*.

As both *Heller* and *McDonald v. City of Chicago*, 130 S. Ct. 3020; 177 L. Ed. 2d 894 (2010) were civil cases, the issue of retroactivity to criminal cases was not directly addressed.

PARTIES TO THE PROCEEDINGS

Petitioner Samuel Lowery was the defendant and appellant below and a resident of the District of Columbia. Respondent is the United States of America, initiated the prosecution. and was the appellee below. There are no corporate entities involved in this case.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDINGS.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	v
PETITION FOR A WRIT OF CERTIORARI.....	1
DECISIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS.....	1
STATEMENT OF THE CASE.....	2
I. Legal Background and Proceedings in the Courts Below.....	2
II. Statement of the Facts.....	6
REASONS FOR GRANTING THE PETITION.....	7
1. THERE IS A NEED FOR CLARIFICATION OF THE RETROACTIVE APPLICATION OF <i>HELLER</i> AND <i>MCDONALD</i> TO PRIOR CRIMINAL CONVICTIONS UNDER THE STATUTES VOIDED BY THESE DECISIONS.....	7
A. Whether The Statutory Scheme Voided By <i>Heller</i> Under Which Petitioner Was Convicted Was Facially Invalid Or Invalid As Applied.....	9
B. If <i>Heller</i> Found The Statutory Scheme Was Invalid As Applied, The Court Should Clarify For The Lower Courts The Legal And Factual Standards To Be Applied In Determining Whether A Person Is Been An Ordinary Citizen Entitled To The Protection of the Second Amendment.....	12
II. THERE IS A CONFLICT IN THE FEDERAL CIRCUIT COURTS AND THE DISTRICT OF COLUMBIA COURT OF APPEAL AS TO WHETHER UNDER	

THE PLAIN ERROR TEST OF *OLANO V. UNITED STATES*, THE GOVERNMENT

iv

SHOULD BEAR THE BURDEN OF PROOF AS TO WHETHER SUBSTANTIAL
RIGHTS WERE AFFECTED WHERE THE SOURCE OF PLAIN ERROR IS A
SUPERVENING DECISION.....15

CONCLUSION.....18

CERTIFICATE OF SERVICE

APPENDIX

Opinion of the District of Columbia Court of Appeals (App. A)

Order of the District of Columbia Court of Appeals (App. A)

District of Columbia Code Sec. 7-2501.01 (App. C)

District of Columbia Code Sec. 7-2502.01 (App. C)

District of Columbia Code Sec. 7-2502.02 (App...C)

District of Columbia Code Sec. 7-2502.03 (App. C)

District of Columbia Code Sec. 7-2502.04 (App. C)

Opinion of the District of Columbia Court of Appeals in
Plummer v. United States (App. D)

TABLE OF AUTHORITIES

CASES FROM THIS COURT

	Page
<i>District of Columbia v. Heller</i> , 554 U.S. ____, 128 S.Ct. 2783, 171 L.Ed. 637 (2008)	<i>passim</i>
<i>Johnson v. United States</i> , 520 U.S. 461; 117 S. Ct. 1544; 137 L.Ed. 2d 718 (1997).....	14,17
<i>Loadholt v. Massachusetts</i> , 131 S. Ct. 459; 178 L.Ed 2d 282 (2010)	7
<i>Maloney v. Rice</i> , 130 S. Ct. 3541; 177 L. Ed. 1119 (2010)	7
<i>McDonald v. City of Chicago</i> , 130 S. Ct. 3020; 177 L. Ed. 2d 894 (2010)	<i>passim</i>
<i>United States v. Booker</i> , 543 U.S.220, 160 L. Ed. 2d 621, 125 S. Ct. 738 (2005)	16
<i>United States v. Frady</i> , 456 U.S. 152, 163, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982)	17
<i>United States v. Olano</i> , 507 U.S. 725; 113 S. Ct. 1770; 123 L. Ed. 2d 508 (1993)	<i>passim</i>
<i>United States v. Salerno</i> , 481 U.S. 739; 107 S. Ct. 2095; 95 L. Ed. 2d 697 (1987)	9
<i>Wharton v. Bockting</i> , 549 U.S. 406; 127 S. Ct. 1173, 167 L. Ed. 2d 1 (2007)	17

CASES FROM OTHER COURTS

<i>Commonwealth v. Loadholt</i> , 456 Mass. 411; 923 N.E. 2d 1037 (2010)	8
<i>Lowery v. United States</i> , 3 A3d 1169 (D.C. 2010)	<i>passim</i>
<i>Maloney v. Cuomo</i> , 554 F3d 56 (2d Cir. N.Y. 2009)	8

<i>Parker v. District of Columbia</i> , 478 F3d 370 (DC Cir. 2007).....	3
<i>Plummer v. United States</i> , 983 A2d 323 (D.C. 2009).....	<i>passim</i>
<i>Sandridge v. United States</i> , 520 A2d 1057 (D.C. 1987), <i>cert denied</i> , 484 U.S. 868 (1987)....	2,3,14

vi

Page

<i>United States v. Baumgardner</i> , 85 F3rd 1305 (8 th Cir. 1996).....	16
<i>United States v. Crosby</i> , 397 F3d 103 (2d cir. 2005).....	16
<i>United States v. Gonzalez-Huerta</i> , 403 F3rd 727 (10 th Cir. 2005).....	16
<i>United States v. Kramer</i> , 73 F3rd 1067 (11 th Cir 1996).....	16
<i>United States v. Paladino</i> , 401 F3d 471 (7 th Cir. 2005)	16
<i>United States v. Viola</i> , 35 F 3 rd 37 (2d Cir. N.Y. 1994) , <i>cert denied</i> , 131 L. Ed. 2d 148, 115 S. Ct. 1270 (1995).....	5,15,16

STATUTES

7 D.C. Code Sections 2501 et seq.....	<i>passim</i>
---------------------------------------	---------------

PETITION FOR A WRIT OF CERTIORARI

Petitioner Samuel C. Lowery respectfully petitions for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals.

DECISIONS BELOW

The decision of the District of Columbia Court of Appeals in *Samuel C. Lowery v. United States*, No. 06-CM-1195, decided September 9, 2010, appears at Appendix A of the petition, pp. 1-6, and is reported at *Samuel C. Lowery v. United States*, 3 A3d 1169 (D.C. 2010). The April 14, 2011 unpublished order of the District of Columbia Court of Appeals denying *en banc* rehearing of *Samuel C. Lowery v. United States*, *Id.* appears at Appendix B, p. 7.

STATEMENT OF JURISDICTION

The District of Columbia Court of Appeals denied *en banc* review of their decision in *Samuel C. Lowery v. United States*, *Id.*, on April 14, 2011. This Court has jurisdiction under 28 U.S.C. Sec. 1257 (a) & (b).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Second Amendment to the United States Constitution proves: “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.

Relevant provisions of the laws of the District of Columbia are reprinted in Appendix C, pp. 7-17.

STATEMENT OF THE CASE

Legal Background and Proceedings in the Courts Below

Prior to this Court's decision in *District of Columbia v. Heller, supra*, persons who possessed a firearm in their own home were prosecuted on the charge of unauthorized possession of an unregistered firearm or attempted unauthorized possession of an unregistered firearm, a violation of 7 D.C. Code 7502.01 (a). (App. C-11-12). The charges carried penalties up to a year and 180 days respectively.

The District of Columbia statute criminally required all firearms to be registered. It prohibited, however, anyone from registering a pistol after September 24, 1976, with very limited exceptions for organizations employing special police officers; and a clause granting retired city police officers a right to register not subject to the other restrictions of the sections. 7 D.C. Code 2502.02(a)(4) and (b). (App. C- pp.13). The statute then listed numerous requirements for registration of the firearms that could be registered. 7 D.C. Code 7-2502.03. (App. C pp. 14-17). The registration requirements related to criminal history, mental and alcoholic history, eyesight, physical defects, and knowledge of District firearms laws.

Under the District's voided statute, petitioner and any other ordinary citizens born after September 24, 1976 were absolutely prohibited from possessing a handgun; those born before were permitted to possess a handgun only if they had registered it before that date.

The controlling case in the District of Columbia Court of Appeals on Second Amendment rights prior to *Heller* was *Sandridge v. United States*, 520 A2d 1057 (D.C. 1987), *cert denied*, 484 U.S. 868 (1987), which upheld the handgun ban on the basis that the Second Amendment

recognized only a “collective right” that protected militias and not individual citizens.

Petitioner was arrested on June 13, 2006 and was charged with one count of attempted possession of an unregistered firearm in violation of 7 D.C. Code Section 2502.01¹ (a). No other charges were filed. Petitioner did not file a Second Amendment challenge to the prosecution. He was found guilty on September 27, 2006 after a bench trial.

Petitioner filed a timely appeal. During the pendency of the appeal, the United States Court of Appeals for the District of Columbia decided *Parker v. District of Columbia*, 478 F3d 370 (DC Cir. 2007) in which the court found that the District of Columbia prohibition on the registration of handguns, and hence the mere possession of handguns in the home, was a violation of the Second Amendment. Petitioner requested that the District of Columbia Court of Appeals hold his appeal in abeyance pending a decision by this Court.

After *Parker*, and prior to *Heller*, the District of Columbia Court of Appeals again addressed Second Amendment claims and rejected the reasoning of *Parker*, stating that *Sandridge v. United States*, *supra*, was still the controlling authority in the District of Columbia Court of Appeals.

After this Court’s decision in *Heller*, petitioner filed his brief with the District of Columbia Court of Appeals claiming that *Heller* had found that the statute under which he was prosecuted violated his Second Amendment constitutional right to possess a handgun in his home; and that if the plain error rule of *United States v. Olano*, 507 U.S. 725; 113 S. Ct. 1770;

1. Under District of Columbia Law, Unauthorized Possession of an Unregistered Firearm carries a maximum penalty of one year and the person is therefore entitled to a jury trial. Attempted Possession of an Unregistered Firearm carries a maximum penalty of 180 days and is not entitled to a jury trial under District of Columbia law. Almost all misdemeanors are charged by the United States Attorney’s office as attempts, and are therefore tried by the judge.

123 L. Ed. 2d 508 (1993) was applicable to petitioner, each of the four prong of *Olano* had been satisfied.

On November 12, 2009, the District of Columbia Court of Appeals decided *Plummer v. United States*, 983 A2d 323 (D.C. 2009) (App. D. pp. 18-31). In 2004, prior to trial, Plummer had filed a motion to dismiss his indictment for carrying a pistol without a license and unregistered firearm on Second Amendment grounds, which the trial court denied. The Court of Appeals held that both the unregistered firearm and the carrying a pistol without a license statutes were not facially invalid, but invalid “as applied.” “Here the District’s statutes requiring licensing and registration of pistols or handguns have a legitimate and significant penal purpose.” *Id.* at 338. The court stated that when determining whether a law is facially invalid, it should be careful not to speculate about hypothetical or imaginary cases, or to prematurely interpret statutes on the basis of factually barebones records. The court concluded that in the *Plummer* case it did not have “the kind of record that enables us to consider a wide range of situations and circumstances in which the statutes at issue here might apply. *Id.* at 338. Citing its previous decisions in post-*Heller* cases, the court stated that although *Heller* found that the District had enacted what amounted to a ban on handgun possession in the home that violates the Second Amendment, “That does not mean that any of the particular statutes at issue here is facially invalid. *Id.* at 339.

The court found that Plummer preserved and had standing to raise the Second Amendment issues as a defense to the criminal charges against him by moving to dismiss the indictment, even though he did not attempt to obtain a registration and certificate for his handgun prior to his arrest. Quoting *Heller*, that a person could be “disqualified from the exercise of their

Second Amendment rights”, the Court of Appeals remanded the case for the trial court to determine whether Plummer would have been disqualified from obtaining a registration certificate under the then existing requirements of *D.C. Code Sec. 7-2502.03*, which applied to the registration of firearms, including a determination of age, criminal history, mental capacity,² and vision. Plummer filed a Petition for Rehearing and Rehearing *En Banc*, which was denied.

On June 28, 2010, this Court issued its decision in *McDonald v. Chicago, supra*, which stated that the Court had “struck down” the District of Columbia law banning the possession of handguns in the home. It also ruled the Second Amendment applied to the states.

On September 9, 2010, the Court of Appeals issued its decision in *Samuel C. Lowery v. United States, supra*. In a 2-1 decision, the majority reiterated the decision in *Plummer* that *Heller* had not found the unregistered firearm statute facially invalid. It then applied the “plain error” standard of *United States v. Olano, supra*.

In applying the “plain error” standard of *Olano*, the court, again citing its prior decisions, found that petitioner had not demonstrated that the constitutional error was “plain” as it applied to him. The court rejected the Second Circuit rule in *United States v. Viola, 35 F3rd 37, 42 (2d Cir 1994)*. Under the *Viola* rule, where the source of plain error is a supervening decision, the government bears the burden of showing a lack of prejudice to the defendant.

Although the record showed that Lowery had no prior criminal convictions and was twenty-five years old, the court found that it did not establish that he could have met the other requirements for registering a firearm, such as those pertaining to mental health history, prior

2. The qualifications for registration of firearms in 2006 were found at 7 *D.C. Code 2502.03*, Appendix C pp. 14-16).

adjudication for firearm negligence, and vision. The majority then concluded that “Because appellant has not shown on the present record that he lawfully could have registered a firearm, he has not shown that the statute was unconstitutionally applied to him.” The court did not remand as it had in *Plummer* on the grounds that doing so “would violate the plain error rule and precedent by shifting from appellant the burden of demonstrating plain error on the existing record.”

The court also stated it would not erect a presumption that a defendant is an “ordinary citizen” entitled to exercise Second Amendment rights unless disqualifying information affirmatively appears on the record, as that would also “amount to shifting the burden on plain error review”.

The dissent pointed out that had a defendant in appellant’s shoes, “with preternatural foresight”, tried to make the necessary record at a pre-*Heller* trial, the court would almost certainly not allowed him to do so, as evidence of his ability to comply with the registration requirements was not relevant. The dissent argued that the case should be remanded as in *Plummer*, stating that “absent any apparent reason why appellant would have been disqualified from exercising his *Second Amendment* rights, there exists a reasonable probability that his conviction was unconstitutional. And such a conviction undoubtedly calls into serious question the fairness, integrity and public reputation of the judicial proceeding.”

Petitioner Lowery filed a Petition for Rehearing and Rehearing *En Banc*, which was denied by Order dated April 19, 2011.

Statement of the Facts

On June 13, 2006, eight deputy marshals came to the apartment petitioner Samuel

Lowery was living in to evict the person from whom he was subletting the apartment for non-

7

payment of rent. At the bench trial, the marshals testified that a handgun was found under the mattress of the bed in the apartment. The District of Columbia records showed that the gun had not been registered. Petitioner was found to be in constructive possession of the gun. The court found petitioner guilty of attempted possession of an unregistered firearm.

The court records showed that petitioner was twenty-five years old at the time. At sentencing on the same day as the trial, it was determined that petitioner had no prior convictions.

No mental health issues were raised during the course of the proceedings in the case.

REASONS FOR GRANTING THE PETITION

1. THERE IS A NEED FOR CLARIFICATION OF THE RETROACTIVE APPLICATION OF *HELLER* AND *MCDONALD* TO PRIOR CRIMINAL CONVICTIONS UNDER THE STATUTES VOIDED BY THESE DECISIONS.

Both *District of Columbia v. Heller, supra*, and *McDonald v. City of Chicago, supra*, were originally filed as civil cases by persons seeking to assert their rights to possess a handgun under the Second Amendment right to keep and bear arms, but did not wish to risk criminal fines or imprisonment for asserting those rights.

In both cases there was similar statutory schemes: registration was required to possess a handgun in the home for self-defense, and ordinary citizens were not permitted to register a handgun. *Heller* applied solely to the District of Columbia. The jurisdictions involved in *McDonald* were the city of Chicago, Illinois, and the village of Oak Park, Illinois.

Subsequent to *McDonald*, the Court has decided two cases applying *McDonald*: *Loadholt v. Massachusetts*, 131 S. Ct. 459; 178 L.Ed 2d 282 (2010); and *Maloney v. Rice*, 130 S. Ct. 3541; 177 L. Ed. 1119 (2010). In both cases, the Court reversed and remanded without comment

for further consideration by the lower courts in light of *McDonald v. Chicago*, *supra*. In *Maloney*, the case was brought as a civil action. See *Maloney v. Cuomo*, 554 F3d 56 (2d Cir. N.Y. 2009). *Loadholt* was a criminal case, but the state court had dismissed the pre-*McDonald* Second Amendment claims on the grounds that Second Amendment did not apply to the states. See *Commonwealth v. Loadholt*, 456 Mass. 411; 923 N.E. 2d 1037 (2010),

There are other cities that have had virtual bans on operable handguns in the home by private persons, including New York City and San Francisco. There may be additional smaller municipalities. Criminal penalties are imposed for violations.

In light of the *Heller* and *McDonald* decisions, it can be reasonably anticipated that persons who have been convicted of criminal possession of handguns in their own home will seek to vacate those convictions. This case presents an opportunity for the Court to clarify the application of *Heller* and *McDonald* to prior criminal convictions under the voided statutes and to instruct the lower courts on the standards for vacating prior convictions.

The District of Columbia Court of Appeals in *Plummer v. United States*, *supra*, and the instant case, *Lowery v. United States*, *supra*, held that *Heller* had found the District statutory scheme invalid as applied, not facially invalid. The District Court further ruled that since petitioner failed to raise a Second Amendment challenge in his trial held prior to both *Parker v. United States*, *supra*, and *District of Columbia v. Heller*, *supra*, and had not made a record that showed that he was fully eligible under all of the District's registration regulations to register a firearm, he was precluded by *United States v. Olano*, *supra* from having the case remanded to make that record.

This case presents the following sub-issues to the Court:

A. Whether The Statutory Scheme Voided By *Heller* Under Which Petitioner Was Convicted Was Facially Invalid Or Invalid As Applied.

In *United States v. Salerno*, 481 U.S. 739; 107 S. Ct. 2095; 95 L. Ed. 2d 697 (1987), the Court reiterated the standard of a facial challenge to a legislative Act, that the challenger must establish that no set of circumstances exists under which the Act would be valid.” The Court further pointed out that the violation of the Due Process Clause claim that was made was insufficient as “The fact that the ...Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an ‘overbreadth’ doctrine outside the limited context of the First Amendment. at 745. The Court of Appeals in *Plummer v. United States*, *supra*, adopted the language of *Salerno*.

The *Heller* and *McDonald* decisions did not directly state whether the statutory schemes used to prohibit the possession of handguns were facially invalid or invalid as applied. Because of the form of the District’s statutory scheme, and the statements of *Heller* allowing for reasonable regulation, there is the potential for confusion as to whether *Heller* found the statutory scheme facially invalid or only invalid as applied. The question is left as to whether the sections of the statute prohibiting the registration of pistols along with criminal penalties for unregistered firearms constituted a facially invalid violation of the Second Amendment; or did the existence of the requirements for registration, left intact, render the statutory scheme only invalid as applied, leaving further questions as to what would constitute a finding that the statute was invalid as applied to a person convicted under the voided section. It would appear that a statute which stated that no person in the District of Columbia shall possess a pistol (with certain exceptions) and penalizing the possession would be facially invalid under *Heller*. The prohibition on regis-

tration of pistols along with the penalty for non-registration of 7 *D.C. Code* 2502.02 (a)(4) and with 7 *D.C. Code* 2502.01 accomplished the same end as a statute that had an outright ban on ordinary citizens possessing a handgun in the home. The District of Columbia Court of Appeals, however, interpreted the extant registration requirement and qualifications under 7 *D.C. Code* 2502.03 as the basis for finding that *Heller* declared the statutory scheme as invalid as applied.

The same questions will arise other jurisdictions that sought prohibition through registration and permit requirements. A clarification from this Court as to whether to address the prior convictions under the facially invalid or invalid as applied would assist the state courts in the correct application of *McDonald* and in the development of their case law in this unfolding area of Second Amendment rights.

Heller used the words that the handgun ban was “struck down”; and *McDonald* stated that in *Heller* “we struck down a District of Columbia law that banned the possession of handguns in the home.” That wording notwithstanding, the District of Columbia Court of Appeals looked to the Courts statements about regulations and the facts that the licensing requirements were not addressed, and found that *Heller* did not find the statutes facially invalid, but only invalid as applied.

In *Heller*, the Court stated that the right secured by the Second Amendment is not unlimited, and that nothing in the 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.” *supra* at 2816.

But other than the prohibition on registering a handgun, *Heller* did not address the

licensing requirement. “Before this Court petitioners have stated that ‘if the handgun ban is struck down and respondent registers a handgun, he could obtain a license, assuming he is not otherwise disqualified,’ by which they mean if he is not a felon and is not insane.(cit. omitted).” The Court stated that the respondents were not challenging the licensing law unless it would be enforced in an arbitrary and capricious manner. The Court then stated it was not addressing the licensing requirement. at 2819.

Using the statements in *Heller* that the decision did not invalidate prohibitions against felons and the mentally ill possessing handguns as well as the statement that it was not addressing the licensing requirement, the Court of Appeals intertwined the unaddressed regulations with the prohibition section of the statute to reach their conclusion that *Heller* did not find the statute facially invalid. Based on the Court of Appeals decisions, a determination is needed as to whether the separate and unaddressed qualifications for registration are germane to determining whether the statute was facially invalid or invalid as applied.

The District of Columbia Court of Appeals relied on *Heller*’s references to the potential limitations on the Second Amendment rights and the District’s total statutory scheme in reaching its conclusions that the unregistered firearm was not facially invalid. The Court of Appeals pointed to the legitimate and significant penal purpose of the statutes requiring the licensing and registration of pistols or handguns. The court had stated that it would not speculate about hypothetical or imaginary cases or prematurely interpret statutes based on factually barebones records, and that the *Plummer* case did not have the kind of record that enabled it to consider the wide range of situations and circumstances in which the statutes at issue might apply. *Supra* at 338. The *Plummer* court also held that even if the overbreadth doctrine were available, the

appellant would not have been able to sustain his burden on the record from the text of the law and the actual fact that substantial overbreadth existed.

Since *Heller* predated *McDonald* by two years, it is yet unknown whether the state courts will adopt the reasoning of *Plummer* and *Lowery* in deciding the appeals of pre-*McDonald* convictions.

B. If *Heller* Found The Statutory Scheme Was Invalid As Applied, The Court Should Clarify To The Lower Courts The Legal And Factual Standards To Be Applied In Determining Whether A Person Is Been An Ordinary Citizen Entitled To The Protection of the Second Amendment.

If the statutory scheme voided by *Heller* was invalid as applied, a further determination would need to be made as to under which circumstances a person convicted under the voided scheme could avail himself of the protection of the Second Amendment, and under which circumstances could the District of Columbia and state courts find him outside the Amendment's protection.

(a) If the statute is invalid as applied, whether a showing on the record that a person had no criminal convictions, was of legal age, was competent to stand trial, and there was no indication of mental incompetency or illness is sufficient under *Heller* and *McDonald* to demonstrate the statute was invalid as applied to him: or may the lower court require proof that the person would have otherwise qualified under the firearm registrations regulations in effect at the time of the conviction.

The Court of Appeals declined to presume petitioner was an "ordinary citizen".

The case presents an opportunity to define an "ordinary citizen" for the purposes of *Heller* and *McDonald*, and to establish the criteria that a person must establish in order to be con-

sidered and “ordinary citizen” or which criteria a court may use to exclude a defendant or appellant as an “ordinary citizen.”

(b) Under the plain error rule of *Olano*, whether there is a failure to meet the four prongs of *Olano* if the person convicted of possessing a handgun prior to *Parker* and *Heller* did not make an objection under the Second Amendment, and did not present evidence at trial that he would have been able to register a firearm under the regulations then in effect.

Whether *Olano* requires that, to meet the burden that he was prejudiced and that substantial rights were affected, a person convicted of possessing a handgun prior to *Parker* and *Heller*, may be required on appeal to have introduced evidence at trial that he was in compliance with the registration requirements for firearms when that evidence would have been inadmissible as irrelevant under the prevailing law at the time of the trial; or whether such requirement is a violation of due process and basic fairness.

If the statute under which petitioner was convicted was not facially invalid, this case presents an opportunity to define how the four prongs of *Olano* are to be applied to this and similar statutory schemes which banned handguns through the use of registration requirements.

The decision of the District of Columbia Court of Appeals requires that a person convicted of possession of an unregistered firearm who has not raised the Second Amendment issue at trial, must have made a record at trial that he would have been otherwise qualified to register a firearm at the time of the possession.

Under *Olano*, before an appellate court can correct an error not raised at trial, there must

be (1) error (2) that is “plain,” and (3) that “affects substantial rights.” If all three conditions are
14

met then the appellate court may exercise its discretion to notice a forfeited error, but only (4) the error “seriously affects the fairness, integrity, or public reputation of judicial proceedings.

Johnson v. United States, 520 U.S. 461; 117 S. Ct. 1544; 137 L.Ed. 2d 718 (1997).

The Court of Appeals decision did not clarify which prongs of *Olano* petitioner failed to meet, as it spoke of the four prongs, and stated that petitioner failed to meet his burden under the *Olano* standard. Under the decision, petitioner could only have made a record that *Heller* applied to him by having put on evidence at trial that he would have been qualified to register a firearm. At the time of his trial, *Sandridge v. United States*, *supra*, was settled law in the District of Columbia, and it would have been frivolous for petitioner to seek to present evidence to the trial court that he qualified to register a firearm that could not be registered, and the evidence would have been inadmissible as irrelevant. Similarly, a certificate from the police that he was eligible to register a firearm would have been irrelevant, and not obtainable since he could not register the firearm. As petitioner, like the District of Columbia Court of Appeals, did not foresee the change in the law and therefore did not raise a Second Amendment issue at trial, a requirement that he had to present the irrelevant evidence would essentially eliminate plain error review under these circumstances.

In addition to the *Olano* issues, the requirement that a person have made a frivolous attempt to present evidence deemed irrelevant at the time in order to assert his Second Amendment right, raises issues of both due process and basic fairness.

- II. THERE IS A CONFLICT IN THE FEDERAL CIRCUIT COURTS AND THE DISTRICT OF COLUMBIA COURT OF APPEAL AS TO WHETHER, UNDER THE PLAIN ERROR TEST OF *OLANO V. UNITED STATES*, THE GOVERNMENT SHOULD BEAR THE BURDEN OF PROOF AS TO WHETHER SUBSTANTIAL RIGHTS WERE AFFECTED WHERE THE SOURCE OF PLAIN ERROR IS A SUPERVENING DECISION.

The District of Columbia Court of Appeals decision in this case, applying *Olano*, rejected the “*Viola* rule”, a decision in the Second Circuit of the United States Court of Appeal. There is a conflict in the different circuits as to whether the *Viola* rule should be adopted and the burden of proof as to *Olano*’s third prong of “substantial rights were affected” should be shifted to the government when the source of plain error is a supervening decision. The Court should accept this case in order to resolve the conflict among the circuits.

In *United States v. Viola*, 35 F 3rd 37 (2d Cir. N.Y. 1994) , *cert denied*, 131 L. Ed. 2d 148, 115 S. Ct. 1270 (1995) the Second Circuit placed the burden of proof as to the “substantial rights” or “prejudice” prong in those cases where “the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified.” The court held that in such cases, when a supervening decision alters settled law, special considerations apply, and shifted the burden onto the government. “When a supervening decision alters settled law, the burden of persuasion as to prejudice (or more precisely, lack of prejudice) is borne by the government, and not the defendant.” *Id* at

The court reasoned that when a supervening decision alters settled law, a defendant clearly has no duty to object to something based on firmly established authority. “He cannot be said to have ‘forfeited a right’ by not making an objection, since at the time of trial, no

right existed.” At 42. Imposing such a duty would encourage frivolous objections and appeals. When the source of plain error is a supervening decision, the defendant has not been derelict in failing to object at trial, so there is no reason to shift the burden of proving prejudice to the defendant.

The Eight Circuit found *Viola* persuasive, but deferred any decision on burden-shifting. *United States v. Baumgardner*, 85 F3d 1305, 1309 n.2 (8th Cir. 1996).

In *United States v. Paladino*, 401 F3d 471 (7th Cir. 2005) the Seventh Circuit adopted a policy of remand to determine whether the judge would have given a different sentence in cases reviewed under the plain error doctrine after *United States v. Booker*, 543 U.S. 220, 160 L. Ed. 2d 621, 125 S. Ct. 738 (2005). Its reasoning was that the best way to determine if the judge would have given a different sentence but for the voided sentencing restrictions was to ask the judge.

Two circuits and the District of Columbia Court of Appeals have rejected the *Viola* rule. In addition to this case, *Viola* has been not been adopted in *United States v. Gonzalez-Huerta*, 403 F3d 727, 734-735, (10th Cir. 2005); and *United States v. Kramer*, 73 F3d 1067, 1074 (11th Cir 1996).

In *Gonzalez-Huerta*, the Tenth Circuit Court explicitly rejected the limited remand approach of *United States v. Crosby*, 397 F3d 103 (2d cir. 2005) and *United States v. Paladino*, 401 F3d 471 (7th Cir. 2005) as inconsistent with plain error doctrine. The *Kramer* court also decided that the burden to prove substantial rights were affected in plain error review where there was a supervening decision was on the appellant. The concurring decision urged that the

circuit adopt the Second Circuit standard.

The *Viola* rule addresses the problem arising from changes in the law that are not non-watershed procedural rules as in *Wharton v. Bockting*, 549 U.S. 406; 127 S. Ct. 1173, 167 L. Ed. 2d 1 (2007). Neither *Olano* nor *Johnson v. United States*, *supra*, addressed the third prong of proof of prejudice when a supervening decisions alters settled law. *Johnson* held that the second prong, that the error was “plain” to be satisfied if the error was plain at time of review. *Viola* looked to the reasoning behind the forfeiture of unasserted rights, to encourage the assertion of rights at the trial stage, and found that this justification would not be applicable when the prevailing law at the time of trial recognized no such rights. Where there were no recognized rights to forfeit, there would be no evidentiary reason or justification to introduce evidence to show that the defendant would be prejudiced by the denial of the rights. Rather than assist in judicial economy, it would encourage frivolous and unnecessary motions and objections.

The rejection of *Viola* has been based on precedent and “the need of all trial participants to seek a fair and accurate trial the first time around.” *Lowery v. United States*, *supra*, at 1174-1175 quoting *United States v. Frady*, 456 U.S. 152, 163, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982); and the “time of a judge.” *Lowery v. United States*, *Id.* at 1175.

In light of the differing standards in the application of *Olano*, the facts in this case present an appropriate opportunity do address the burden of proof for prejudice where a supervening decision alters settled law.

CONCLUSION

This case presents an opportunity for this Court to address the retroactivity of the Second Amendment rights enunciated in *Heller* and *McDonald* as applied to convictions for possession of firearms which occurred prior to those decisions ; and to establish uniform standards for review of those cases for the District of Columbia, the Circuit Courts and the states.

Petitioner respectfully prays that the Court grant the petition.

Respectfully submitted,

Enid Hinkes
231 Parker Street, N.E.
Washington D.C. 20002
877-649-8626

No. 11-_____

**IN THE
SUPREME COURT OF THE UNITED STATES**

SAMUEL LOWERY,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent.

CERTIFICATE OF SERVICE

Enid Hinkes, Counsel of Record for Petitioner, hereby avers that on July 13, 2011 she served the enclosed Motion to Proceed *In forma Pauperis* and Petition for Writ of *Certiorari* on every person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The persons served are:

Donald B. Verilli, Jr., Esq.
Solicitor General of the United States
Office of the Solicitor General
for the United States
Room 5614
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

Roy W. McLeese, III, Esq.
Chief, Appellate Division
Office of the United States Attorney
for the District of Columbia
Room 8104
555 – 4th Street, N.W.
Washington, D.C. 20530

ENID HINKES
231 Parker Street, N.W.
Washington, D.C. 20002
877-649-8626

ehinkes@aol.com

No. 11-_____

IN THE
SUPREME COURT OF THE UNITED STATES

SAMUEL LOWERY,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner Samuel Lowery, by and through his attorney, Enid Hinkes, moves the court for leave to file the attached Petition for Writ of *Certiorari* without prepayment of costs and to proceed *in forma pauperis*.

Petitioner has previously filed his appeal *in forma pauperis* in the District of Columbia Court of Appeal, and was qualified to receive court appointed counsel under the District of Columbia Criminal Justice Act in both the District of Columbia Court of Appeals and the Superior Court of the District of Columbia.

Petitioner's affidavit in support of this motion is attached hereto.

Respectfully submitted,

ENID HINKES
Counsel of Record
231 Parker Street, N.E.
Washington, D.C. 20001
877-649-8626
ehinkes@aol.com

No. 11-_____

IN THE
SUPREME COURT OF THE UNITED STATES

SAMUEL LOWERY,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent.

**On Petition For A Writ of Certiorari
To The District Of Columbia
Court of Appeals**

APPENDIX

ENID HINKES
231 Parker Street, N.E.
Washington, D.C. 20002
877-649-8626
ehinkes@aol.com

TABLE OF CONTENTS

	Page
Opinion of the District of Columbia Court of Appeals – App. A.....	1
Order of the District of Columbia Court of Appeals (App. B).....	2
District of Columbia Code Sec. 7-2501.01 (App. C).....	8
District of Columbia Code Sec. 7-2502.01 (App. C).....	11
District of Columbia Code Sec. 7-2502.02 (App..C).....	13
District of Columbia Code Sec. 7-2502.03 (App. C).....	14
District of Columbia Code Sec. 7-2502.04 (App. C).....	17
Opinion of the District of Columbia Court of Appeals in <i>Plummer v. United States</i> (App. D).....	18

