

## Ohio Revised Code § 2923.12 and § 2923.16 are Unconstitutional

Per the holdings in *Heller*, *McDonald* and *Bruen*, Ohio Revised Code § 2923.12 and § 2923.16 must be repealed. Both those sections violate the Ohio and United States Constitutions on its face and as applied. On March 18, 1859<sup>1</sup> under the “Laws of Ohio” made “conceal carry” a crime, to wit: 56 v. 56, § 1, now R.C. § 2923.12. It appears that R.C. § 2923.16 was enacted in 1974, having a loaded firearm in a motor vehicle.

But sometime after 1910 G.C. § 12819 appears to have been used by the courts to rule carrying concealed in a motor vehicle a crime. See *Hart v. State*, 42 App. 501, 182 N.E. 534 (1932). (“Where defendant claimed that he did not have revolver, which was under his feet in taxicab, in his possession, evidence regarding former arrests for carrying concealed weapons held admissible.”) See also, *Schraeder v. State*, 28 App. 248, 162 N.E. 647 (1928) (“In prosecution under Section 12819, General Code, for carrying concealed weapon, evidence showing that revolver during chase of defendant was hidden in pocket attached to inside of left front door of automobile and was immediately beside defendant, who was driving the car, was sufficient to show that revolver was concealed about defendant's person and sustained conviction.”)

## Ohio Revised Code § 2923.12

As to R.C. 2923.12, conceal carry, *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008) said:

“At the time of the founding, as now, to “bear” meant to “carry.” See Johnson 161; Webster; T. Sheridan, *A Complete Dictionary of the English Language* (1796); 2 *Oxford English Dictionary* 20 (2d ed. 1989) (hereinafter *Oxford*). When used with “arms,” however, the term has a meaning that refers to carrying for a particular purpose—confrontation. In *Muscarello v. United States*, 524 U. S. 125 (1998), in the course of analyzing the meaning of “carries a firearm” in a federal criminal statute, Justice Ginsburg wrote that “[s]urely a most familiar meaning is, as the Constitution’s Second Amendment . . . indicate[s]: ‘wear, bear, or carry . . . upon the person or **in the clothing or in a pocket**, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.’” *Id.*, at 143 (dissenting opinion) (quoting *Black’s Law Dictionary* 214 (6th ed. 1990)). We think that Justice Ginsburg accurately captured the natural meaning of “bear arms.” (Emphasis added)

“From our review of founding-era sources, we conclude that this natural meaning was also the meaning that “bear arms” had in the 18th century. In numerous instances, “bear arms” was unambiguously used to refer to the carrying

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<sup>1</sup> Prior to 1876 Ohio had no "revised statutes" or "codes," only the Public Laws known as the “Laws of Ohio.” In effect, there was no easy way to find a law dealing with any certain subject matter. The first codification of the “Laws of Ohio” was the “Revised Statute (R.S.) of 1876.” The criminal “conceal carry” statute was codified at R.S. § 6892. Then in 1910 there was a recodification known as the “General Code,” G.C. § 12819 recodified criminal “conceal carry.” Then in 1953 the Ohio Revised Code was enacted and is in effect today.

of weapons outside of an organized militia. The most prominent examples are those most relevant to the Second Amendment: nine state constitutional provisions written in the 18th century or the first two decades of the 19th, which enshrined a right of citizens to “bear arms in defense of themselves and the state” or “bear arms in defense of himself and the state.”<sup>8</sup>

Footnote 8: “Ohio Const., Art. VIII, § 20 (1802), in 5 *id.*, at 2901, 2911 (“That the people have a right to bear arms for the defence of themselves and the State . . . ”);”

The Ohio Constitution of 1802, Art. VIII, § 20, said: “That the people have a right to bear arms for the defence [Sic] of themselves and the State; and as standing armies, in time of peace, are dangerous to liberty, they shall not be kept up, and that the military shall be kept under strict subordination to the civil power.”

Then the Ohio Constitution was reenacted in 1852, Art. I, § 4, which now says: “The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power.”

The 1852 version of the Ohio Constitution is in effect today and is still the law of Ohio as it relates to the right to keep and bear arms. But what is interesting is the 1852 version of the Ohio Constitution removed the Peoples’ duty to defend the state. With that said, Art. I, § 1 says: “All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and **protecting property**, and seeking and obtaining happiness and safety.” Not much different than Art. VIII, § 1 of the 1802 Constitution. Art. I, § 1 clearly supports Art. I, § 4 of the Ohio Constitution, including the protecting of property. (Emphasis added)

Black’s Law Dictionary, 2nd Edition (1910) is the same definition as the 6th Edition Justice Ginsburg quoted above.

Black’s Law Dictionary, 2nd Edition (1910):

“Carry arms or weapons. To wear, bear, or carry them upon the person or in the clothing or in a pocket, for the purpose of use, or for the purpose of being armed and ready for offensive or defensive action in case of a conflict with another person. *State v. Carter*, 36 Tex. 89; *State v. Roberts*, 39 Mo. App. 47 (1890); *State v. Murray*, 39 Mo. App. 128 (1890); *Moorefield v. State*, 5 Lea (Tenn.) 348 (1880); *Owen v. State*, 31 Ala. 389.”

*New York State Rifle & Pistol Association, Inc. v. Bruen* 142 S.Ct. 2111 (June 23, 2022) at page 23 reaffirms *Heller*’s holding by stating:

“Nothing in the Second Amendment’s text draws a home/public distinction with respect to the right to keep and bear arms. As we explained in *Heller*, the “textual elements” of the Second Amendment’s operative clause— “the right of the people to keep and bear Arms, shall not be infringed”—“guarantee the individual right to possess and carry weapons in case of confrontation.” 554 U. S., at 592. *Heller*

further confirmed that the right to “bear arms” refers to the right to “wear, bear, or carry . . . upon the person or **in the clothing or in a pocket**, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.”” (Emphasis added)

*Bruen* at page 8 held the following:

“In keeping with *Heller*, we hold that when the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation’s historical tradition may a court conclude that the individual’s conduct falls outside the Second Amendment’s “unqualified command.” *Konigsberg v. State Bar of Cal.*, 366 U. S. 36, 50, n. 10 (1961).”

Both *Heller* and *Bruen* makes it pretty clear that Conceal Carry of firearms fall in the meaning of the Second Amendment.

That being the case, the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms and they cannot. *Bruen* made it clear that as of 1791, carrying a firearm openly was lawful in every state, and so was carrying a concealed firearm. Which means Ohio’s modern-day regulation (R.C. § 2923.12) has no historical precursors; nothing analogous that can pass constitutional muster. As *Bruen* said at pages 57/58 “As in *Heller*, we will not “stake our interpretation of the Second Amendment upon a single law, in effect in a single [State], that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms for defense” in public. 554 U. S., at 632.”

As *Bruen* makes clear, there is no historical evidence disallowing concealed carry of firearms, effectually making it a crime. Ohio Revised Code § 2923.12 is unconstitutional and needs to be repealed.

### **Ohio Revised Code § 2923.16**

R.C. § 2923.16(B) No person shall knowingly transport or have a loaded firearm in a motor vehicle in such a manner that the firearm is accessible to the operator or any passenger without leaving the vehicle.

R.C. § 2923.16(C) No person shall knowingly transport or have a firearm in a motor vehicle, unless the person may lawfully possess that firearm under applicable law of this state or the United States, the firearm is unloaded, and the firearm is carried in one of the following ways:

Basically, G.C. § 12819, the precursor of R.C. § 2923.16, made it a crime to carry a loaded firearm in a Motor vehicle by judicial fiat. As noted above “conceal carry” under G.C. § 12819 was made a crime in 1859. However, there was no analogous provision in 1791 addressing concealing of arms. Because a prudent person would go armed, no matter how carried, for self-defense outside the home in case of confrontation. This is strongly confirmed by the historical background of the Second Amendment. See *Heller* 554 U.S. at 592.

This is affirmed in *Bruen*, at page 1, in its opening statement:

“In *District of Columbia v. Heller*, 554 U. S. 570 (2008), and *McDonald v. Chicago*, 561 U. S. 742 (2010), we recognized that the Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense. In this case, petitioners and respondents agree that ordinary, law-abiding citizens have a similar right to carry handguns publicly for their self-defense. We too agree, and now hold, consistent with *Heller* and *McDonald*, that the Second and Fourteenth Amendments protect an individual’s right to carry a handgun for self-defense outside the home.”

Yes, the Second and Fourteenth Amendments protect an individual’s right to carry a handgun for self-defense outside the home either on foot, by horseback, carriage or motor vehicle. Therefore, restricting functional firearms in motor vehicles makes “it impossible for citizens to use [their handguns] for the core lawful purpose of self-defense,” and is hence unconstitutional. See *Heller*, 554 U.S. at 630.

The Fourth Amendment says: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

A motor vehicle is an “effect”; private property. See *Wooley v. Maynard*, 430 U.S. 705 (1977) and *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. \_\_\_\_ (2015) citing *Wooley*. Also see *United States v. Jones*, 565 U.S. 400 (2012).

Yes, there is a warrantless exception in regards to motor vehicles. The Supreme Court first made warrantless exception in *Carroll v. United States*, 267 U.S. 132 (1925) (“Search without a warrant of an automobile, and seizure therein of liquor subject to seizure and destruction under the Prohibition Act, do not violate the Amendment, if made upon probable cause, i.e., upon a belief, reasonably arising out of circumstances known to the officer, that **the vehicle contains such contraband** liquor.”) (Emphasis added)

*Heller*, *McDonald* and *Bruen* makes it clear that the bearing of arms is a Constitutional protected right and, as such, the carrying of Arms openly or concealed cannot be classified as contraband.

And *Heller* and *Bruen* makes clear that to wear, bear, or carry them upon the person or in the clothing or in a pocket, for the purpose of use, or for the purpose of being armed and ready for

offensive or defensive action in case of a conflict with another person would apply to motor vehicles.

Ohio lawmakers understand this. Ohio applies the Castle Doctrine to motor vehicles. See R.C. §§ 2901.05 and 2901.09. But in *Beard v. United States*, 158 U.S. 550, 562, 15 S. Ct. 962, 966, 39 L. Ed. 1086 (1895) the United States Supreme Court relied on *Erwin v. State*, 29 Ohio St. 186 (1876) holding:

**“The defendant was where he had the right to be**, when the deceased advanced upon him in a threatening manner, and with a deadly weapon; and if the accused did not provoke the assault and had at the time reasonable grounds to believe and in good faith believed, that the deceased intended to take his life or do him great bodily harm, **he was not obliged to retreat, nor to consider whether he could safely retreat**, but was entitled to stand his ground and meet any attack made upon him with a deadly weapon, in such way and with such force as, under all the circumstances, he, at the moment, honestly believed, and had reasonable grounds to believe, was necessary to save his own life or to protect himself from great bodily injury.” (Emphasis added)

In other words, if a law-abiding person has a right to be there, by invitation or right, it being public and open to the public, or their home or motor vehicle, the person has no duty to retreat.

Therefore, R.C. 2923.16 is unconstitutional per *Heller* and *Bruen* and must be repealed.

### **Ohio Revised Code § 9.68**

On December 28, 2019 Ohio amended R.C. § 9.68. Part (A) now says:

“The individual right to keep and bear arms, being a fundamental individual right that predates the United States Constitution and Ohio Constitution, and being a constitutionally protected right in every part of Ohio, the general assembly finds the need to provide uniform laws throughout the state regulating the ownership, possession, purchase, other acquisition, transport, storage, carrying, sale, other transfer, manufacture, taxation, keeping, and reporting of loss or theft of firearms, their components, and their ammunition. The general assembly also finds and declares that it is proper for law-abiding people to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves or others. Except as specifically provided by the United States Constitution, Ohio Constitution, state law, or federal law, a person, without further license, permission, restriction, delay, or process, including by any ordinance, rule, regulation, resolution, practice, or other action or any threat of citation, prosecution, or other legal process, may own, possess, purchase, acquire, transport, store, carry, sell, transfer, manufacture, or keep any firearm, part of a firearm, its components, and its ammunition. Any such further license, permission, restriction, delay, or process interferes with the fundamental individual

right described in this division and unduly inhibits law-abiding people from protecting themselves, their families, and others from intruders and attackers and from other legitimate uses of constitutionally protected firearms, including hunting and sporting activities, and the state by this section preempts, supersedes, and declares null and void any such further license, permission, restriction, delay, or process.”

Based on the holdings in *Heller*, *McDonald* and *Bruen* a large portion of R.C. § 9.68 is in direct conflict with the United States Constitution and Ohio Constitution. The General Assembly acknowledged “The individual right to keep and bear arms, being a fundamental individual right that predates the United States Constitution and Ohio Constitution, and being a constitutionally protected right in every part of Ohio...” The General Assembly made it clear that they lacked authority to interfere with the Peoples’ right to keep and bear arms.

But then the General Assembly “finds the need to provide uniform laws throughout the state regulating the ownership, possession, purchase, other acquisition, transport, storage, carrying, sale, other transfer, manufacture, taxation, keeping, and reporting of loss or theft of firearms, their components, and their ammunition.” Based just on the unconstitutionality of R.C. § 2923.12 and § 2923.16, a large portion of what the General Assembly believes it has a right to regulate is in direct conflict with the holdings of *Heller*, *McDonald* and *Bruen* and needs to be repealed.

Then the General Assembly “also finds and declares that it is proper for law-abiding people to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves or others.” But statutorily it appears the laws of Ohio do not accord with the general assembly’s declaration. In other words, Ohio lawmakers are speaking out of both sides of their mouths.

Then the General Assembly declared “Except as specifically provided by the United States Constitution, Ohio Constitution, state law, or federal law, a person, without further license, permission, restriction, delay, or process, including by any ordinance, rule, regulation, resolution, practice, or other action or any threat of citation, prosecution, or other legal process, may own, possess, purchase, acquire, transport, store, carry, sell, transfer, manufacture, or keep any firearm, part of a firearm, its components, and its ammunition.” But there is the problem. Many state laws and federal laws are being found unconstitutional since the holdings of *Heller*, *McDonald* and *Bruen*. Under the circumstances removing “state law, or federal law” from the sentence would be the necessary thing to do.

And to the very last sentence “Any such further license, permission, restriction, delay, or process interferes with the fundamental individual right described in this division and unduly inhibits law-abiding people from protecting themselves, their families, and others from intruders and attackers and from other legitimate uses of constitutionally protected firearms, including hunting and sporting activities, and the state by this section preempts, supersedes, and declares null and void any such further license, permission, restriction, delay, or process.” Generally true, but the “legitimate uses of constitutionally protected **firearms**” needs to be corrected to comply with the Ohio and Federal Constitution. The term “firearm” should be “Arms.” And this paragraph applies throughout Ohio being applicable to both State lawmakers and local lawmakers.

*Heller* at page 592 said:

“[W]e find that they guarantee the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment. We look to this because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it “shall not be infringed.” As we said in *United States v. Cruikshank*, 92 U. S. 542, 553 (1876), “[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed . . . .”

Based on the above holding, there are many other state statutes that are in conflict with the holdings of *Heller*, *McDonald* and *Bruen* and need repealing. The term of art ‘Constitutional Carry’ is a misnomer; it misleads the public into believing something that is not true as it stands today. According to the State legislators’ own declaration true ‘Constitutional Carry’ is “The individual right to keep and bear arms, being a fundamental individual right that predates the United States Constitution and Ohio Constitution, and being a constitutionally protected right in every part of Ohio.” Meaning it must not be infringed. The General Assembly took an oath of office to uphold the Federal and State Constitutions. It’s now time the General Assembly take that oath seriously and repeal all those conflicting statutes still on the books.

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