IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
	)	
v.	)	I.D. No. 1004021962
	)	
	)	
WILLIAM S. GRIFFIN,	)	
	)	
Defendant	)	
	)	
	)	
	)	

Submitted: March 17, 2011
Decided: May 16, 2011

On Defendant's Motion for Judgment of Acquittal.
DENIED.

MEMORANDUM OPINION

Daniel B. McBride, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

Bradley V. Manning, Esquire, Assistant Public Defender, Office of the Public Defender, Wilmington, Delaware, Attorney for Defendant.

COOCH, R.J.

INTRODUCTION

Defendant William S. Griffin's Motion for Judgment of Acquittal arises from his November 30, 2010 conviction of, *inter alia*, Carrying a Concealed Deadly Weapon. This charge was predicated on Defendant's possession of a kitchen knife, concealed in the side of his boot, at the time he was forcibly removed from his residence by the Wilmington Police because 1) he acted belligerently during the police response to a report of a domestic dispute; and 2) he was wanted on a capias involving an unrelated matter.

The sole issue under consideration is whether the right to keep and bear arms contained in Article I, Section 20 of the Delaware Constitution creates a so-called "home-possession" exception to the general prohibition on carrying a concealed deadly weapon without a license found in 11 Del. C. § 1442, and if such an exception would apply to Defendant's instant conviction. Although this issue is discrete, it implicates significant constitutional, statutory interpretation, and public policy concerns. After review of the facts and the law, this Court concludes that, assuming, without deciding, that the Delaware Constitution requires a "home-possession exception" to 11 Del. C. § 1442, as applied to Defendant's actions, such exception would not implicate the instant conviction. Accordingly, Defendant's Motion for Judgment of Acquittal is **DENIED**.

FACTS AND PROCEDURAL HISTORY

After a jury trial in Superior Court, Defendant was convicted of Resisting Arrest with Force or Violence, Carrying a Concealed Deadly Weapon, and Criminal Mischief.[1] These charges arose from an incident on April 28, 2010 in which Wilmington Police responded to a report of a domestic dispute between Defendant and his girlfriend.[2] Although it is undisputed that Defendant's girlfriend was the named lessee of the townhouse and that Defendant's name did not appear on the lease, Defendant testified that he cohabitated with his girlfriend at this residence for about four years.[3] Though it was apparently Defendant's girlfriend's mother who called the

[1] Defendant was found not guilty of Assault Second Degree, the lead charge.
[2] State's Resp. of Mar. 17, 2011 at 1.
[3] Trial Transcript of Nov. 24, 2010 at 4 [hereinafter "Tr. at ___"].

police, Defendant does not dispute that, upon the police officers' arrival, his girlfriend requested that he be removed from the residence.[4]

The responding officers apparently had been informed before their arrival that Defendant had refused to leave the residence, despite his girlfriend's multiple requests, and that Defendant was belligerent.[5] It is undisputed that the responding officers were informed that Defendant may have been armed with a knife.[6] It is likewise undisputed that the responding officers learned before arriving that Defendant was wanted on a capias from Justice of the Peace Court, though the reason for the capias is unclear.[7]

Defendant was in the basement at the time the police arrived and initially disobeyed the officers' commands to come upstairs, but he eventually complied and was handcuffed and frisked inside the residence; Defendant admits that he became "mouthy" with the officers inside the house, and that he kicked over a lamp as the officers walked him out of the house.[8] Defendant physically resisted arrest, resulting in a struggle between Defendant and the officers.[9] Defendant was taken to a police vehicle; the State concedes that Defendant did not voluntarily leave the residence, but was instead forcibly, though lawfully, removed by the police.[10] During his trial, Defendant testified in his own defense and admitted that, during the struggle outside of the house, he bit one of the officers.[11] However, Defendant claimed that he bit the officer in self defense, allegedly because he was handcuffed at the time and the officers were "slamming" and "banging" his face against the police vehicle.[12]

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[4] Tr. at 61-63.
[5] State's Resp. of Mar. 17, 2011 at 1.
[6] *Id.*; Def.'s Memorandum in Support of Motion for Judgment of Acquittal at 2.
[7] State's Resp. of Mar. 17, 2011 at 1; Def.'s Memorandum in Support of Motion for Judgment of Acquittal at 2. Defendant testified that he had been in Family Court on the day the capias was issued, and that, at that time, he did not know there was an outstanding capias. Tr. at 66.
[8] State's Resp. of Mar. 17, 2011 at 1; Tr. at 13.
[9] *Id.*
[10] *Id.* at 2.
[11] Tr. at 17.
[12] *Id.* at 15; *see also id.* at 38 ("I did bite him. Yes, I did, but they both had me. I was in cuffs being abused by the cops. Okay? What else-what else could I do? Because they're kicking off on me and everything.").

Defendant was then taken to Wilmington Hospital for treatment of possible injuries sustained in the struggle.[13] While at the hospital, the police discovered a knife concealed in Defendant's sock.[14] During trial, Defendant testified that he was in the basement packing his belongings in anticipation of a separation from his girlfriend, and that he had a "steak" knife in his pocket, to be used in the packing and unpacking of boxes.[15] Further, Defendant testified that the police inquired about a weapon when completing the pat down search in the house; Defendant stated that he told them he had a knife in his pantleg and shook his foot to so indicate.[16] However, Defendant's testimony on this point was contradicted by the testimony of Officer Patrick Bartolo; Officer Bartolo testified that, when asked about possessing a knife, Defendant stated that the knife was in the basement, and that two other officers, Officers Michael Coleman and Colmery, searched the basement for the knife.

During its deliberations, the jury sent a note to the Court regarding the Carrying a Concealed Deadly Weapon charge. The note stated "Clarification re Carrying a Concealed Deadly Weapon in the home."[17] After conferring with counsel regarding the note's potential implication of any "home-possession" issue (an issue not raised prior to the jury's note), this Court referred the jury to the instruction for this particular count, together with all other jury instructions.[18] It is not clear to what extent, if any, the jury's verdict can be interpreted as convicting Defendant for carrying the knife while outside the residence versus while inside the residence, or in both situations.

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[13] State's Resp. of Mar. 17, 2011 at 1.
[14] *Id.*
[15] Tr. at 6.
[16] *Id.* at 11. Defendant further alleged that the reason the knife was not discovered during the pat down inside the home is that another officer was "yanking" him out of the home. *Id.* at 77 ("This guy never even finished the pat down because the other one's yanking me out of there.").
[17] *See* Jury Note of Nov. 30, 2010 (Exhibit No. 2).
[18] Trial Transcript of Nov. 30, 2010 at 16 ("And now, with respect to the second note about carrying a concealed deadly weapon, I respond to your note simply by saying that I refer you, again, to the law as stated in the jury instruction on that particular count, as well as to all of the other jury instructions in this case."). After discussions with the Court, counsel agreed that, if Defendant was convicted, the "home-possession" issue would be the subject of post-trial briefing via a Motion for Judgment of Acquittal. *Id.* at 9.

After the jury returned its verdict, Defendant made an oral motion for judgment of acquittal on the Carrying a Concealed Deadly Weapon count. This Court reserved decision on the motion and ordered briefing from the parties.

STANDARD OF REVIEW

The requirements for a motion for judgment of acquittal are set forth in Superior Court Criminal Rule 29. For a motion made after the jury has returned its verdict, Rule 29(c) controls; it provides, in pertinent part:

> If the jury returns a verdict of guilty. . .a motion for judgment of acquittal may be. . .renewed within 7 days after the jury is discharged. . . .If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal.

When reviewing a defendant's motion for judgment of acquittal, the Court must view the evidence and all legitimate inferences in the light most favorable to the State.[19] Pursuant to Rule 29(a), a defendant's motion may only be granted "if the evidence is insufficient to sustain a conviction of such offense or offenses."[20]

In the instant case, Defendant does not challenge the sufficiency of the evidence, nor does he contend that §1442 is unconstitutional in all instances; rather, Defendant challenges the constitutionality of § 1442 as it was applied to his carrying a concealed deadly weapon inside the residence. Thus, the applicable standard of review is multi-faceted. With respect to a constitutional challenge to a statute, there is a "strong judicial presumption" in favor of the constitutionality of a legislative enactment.[21] Legislative acts "should not be disturbed except in clear cases, and then only upon weighty considerations."[22]

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[19] *Vouras v. State*, 452 A.2d 1165, 1169 (Del. 1982) (citations omitted).
[20] *See also id.* ("The motion may be granted only if the State has presented insufficient evidence to sustain a guilty verdict.").
[21] *Opinion of the Justices*, 425 A.2d 604, 605 (Del. 1981); *see also Justice v. Gatchell*, 325 A.2d 97, 102 (Del. 1974) ("Every presumption is in favor of the validity of a legislative act and all doubts are resolved in its favor; and if the question of the reasonable necessity for regulation is fairly debatable, legislative judgment must be allowed to control.") (citations omitted).
[22] *Klein v. Nat'l. Pressure Cooker Co.*, 64 A.2d 529, 532 (Del. 1949). The Supreme Court of Delaware has acknowledged that the standard of review when assessing the

When possible, the Court should construe a statute "so as to avoid unnecessary constitutional infirmities."[23]

Taken together, this Court reviews the constitutionality of § 1442, as applied to Defendant's conviction, with a "strong judicial presumption" that it is not in conflict with Article I, Section 20 of the Delaware Constitution, and Defendant bears the heavy burden of establishing that § 1442 is unconstitutional, either on its face or as applied to him.[24] Further, in considering the context of Defendant's conviction under § 1442, the Court must view all evidence and legitimate inferences in the light most favorable to the State;[25] this is particularly significant given that, in a challenge to the constitutionality of a statute as applied to a particular defendant, the factual backdrop is crucial.

DISCUSSION

A. By Its Terms, 11 Del. C. § 1442 Prohibited Defendant's Carrying the Deadly Weapon in a Concealed Manner in the Residence.

Under 11 Del. C. § 1442, "A person is guilty of carrying a concealed deadly weapon when the person carries concealed a deadly weapon upon or

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constitutionality of a statute has been expressed in "varying but consonant" terms. *Wilmington Med. Ctr., Inc. v. Bradford*, 382 A.2d 1338, 1342 (Del. 1978) ("Such self-imposed limitation has been expressed by this Court in varying but consonant terms: Legislative acts should not be disturbed except in clear cases, and then only upon weighty considerations; a legislative enactment is cloaked with a presumption of constitutionality and should not be declared invalid unless its invalidity is beyond doubt."). Notwithstanding the "varying" terms, at bottom, it is clear that the proponent of a constitutional challenge bears the burden of proffering "weighty considerations" that overcome a statute's "strong judicial presumption" of constitutionality. *See supra* note 21. The substance and application of this standard was very recently reaffirmed by the Supreme Court of Delaware in a case challenging the constitutionality of the "Child Victims Act" under Article I, Section 9 of the Delaware Constitution. *Sheehan v. Oblates of St. Francis de Sales*, 2011 WL 592186, *6 (Del. 2011) ("When our 'review is of a constitutional nature, there is a strong presumption that a legislative enactment is constitutional.' We resolve all doubts in favor of the challenged legislative act.") (citations omitted).

[23] *Richardson v. Wile*, 535 A.2d 1346, 1350 (Del. 1988) (citations omitted).

[24] *Opinion of the Justices*, 425 A.2d at 605 (Del. 1981).

[25] *Vouras*, 452 A.2d at 1169 (citations omitted).

about the person without a license to do so as provided by § 1441 of this title."[26] Pursuant to the pertinent provisions of 11 Del. C. § 222(5),

> "Deadly Weapon" includes a. . .knife of any sort (other than an ordinary pocketknife carried in a closed position), switchblade knife. . .or any "dangerous instrument", as defined in paragraph (4) of this section, which is used, or attempted to be used, to cause death or serious physical injury. For the purpose of this definition, an ordinary pocketknife shall be a folding knife having a blade not more than 3 inches in length.

The question of whether a weapon is "upon or about" the person is a factual determination for the jury; "upon" the person "implies physical contact," but bodily contact is not necessary for an individual to be carrying a weapon "about" the person.[27] With respect to carrying a weapon "about" the person, "the key to whether a concealed deadly weapon may be deemed to be 'about' the person should be determined by considering the immediate availability and accessibility of the weapon to the person."[28] A weapon is concealed if it is "hidden from the ordinary sight of another person. . .[meaning] the casual and ordinary observation of another in the normal associations of life."[29] Accordingly, the relevant portion of the instant jury instruction for this count read as follows:

> Delaware law defines the offense of Carrying a Concealed Deadly Weapon, in pertinent part, as follows:
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> * * *
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> The defendant carried the weapon. In other words, the defendant had control of the weapon upon or about his person. Actual possession is not required. Whether the weapon was about his person should be determined by considering whether the weapon was immediately available and accessible to the defendant. In determining the issue of accessibility, it should be considered whether the defendant would have had to appreciably change his

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[26] Defendant does not contend that he held the necessary license at the time, pursuant to 11 Del. C. § 1441.

[27] *See Dubin v. State*, 397 A.2d 132, 134 (Del. 1979) (citations omitted).

[28] *Id.*

[29] *Robertson v. State*, 704 A.2d 267, 268 (Del. 1997) (quoting *Ensor v. State*, 403 So.2d 349, 354 (Fla. 1981). Indeed, a weapon may be "concealed" within the meaning of § 1442 even if it is "easily discoverable through routine police investigative techniques" and would be considered to be in "plain view" for search and seizure purposes. *Id.*

> position in order to reach the weapon, and how long it would have taken the defendant to reach the weapon if he was provoked; and [t]he weapon was concealed. A weapon is concealed if it is so situated upon or about the person carrying it as not to be discernible by those who would come near enough to see it in the usual associations of life by ordinary observation. Absolute invisibility is not required.[30]

In this case, it is undisputed that Defendant had a knife that was not an "ordinary pocketknife carried in a closed position" in the side of his boot, an area where the knife was unquestionably "hidden from the ordinary sight of another person. . . ."[31] The knife was in physical contact with Defendant, lodged in an article of clothing that Defendant was wearing at the time; consequently, it was "upon" his person, as contemplated in § 1442, and the jury so found. Although Defendant testified that he placed the steak knife in his boot because it apparently ripped through his pocket, and that he was only in possession of the knife for purposes of unpacking and packing boxes, this is of no consequence vis-à-vis the terms of 11 Del. C. § 1442. Simply put, in the absence of the requisite license, Defendant carried a "deadly weapon. . .upon or about"[32] his person, and the weapon was in his boot, hidden from the sight of an ordinary observer. Thus, Defendant's conduct was proscribed by 11 Del. C. § 1442.[33]

B. The Prohibitions Contained in § 1442 Must be Viewed *vis-a-vis* the Rights Protected by Article I, Section 20 of the Delaware Constitution.

Article I, Section 20 of the Delaware Constitution states: "A person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use." Section 20 was added to the Delaware Constitution via amendment that was initially approved in 1986 and finally approved on April 16, 1987.[34] The synopsis to House Bill 554, which ultimately effectuated this constitutional amendment, reads simply: "This is the first leg of a constitutional amendment that explicitly protects the traditional lawful right to keep and bear arms."

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[30] Jury Instructions, "Carrying a Concealed Deadly Weapon" (Docket No. 24).
[31] *Id.*
[32] 11 Del. C. § 1442.
[33] Indeed, Defendant does not dispute this point; instead, the sole argument advanced by Defendant is that Article I, Section 20 excepts such conduct from liability under § 1442.
[34] 66 Del. Laws, ch. 10.

The Supreme Court of Delaware has considered Article I, Section 20 in the context of 11 Del. C. § 1442. In *Smith v. State*,[35] the Supreme Court noted that the 1986 amendment adding Section 20 to the Delaware Constitution "contains no language that entitles a person to conceal the weapon he carries." According to the Supreme Court, Section 20 "did not impact the statutory privilege to carry a concealed weapon. . . ." and the burden of proving licensure to carry a deadly weapon properly rested on the defendant.[36] However, in *Smith*, the Defendant was in possession of a loaded handgun while on a public street in Wilmington; the issue of home possession was not before the Court.[37]

This Court has previously observed that an individual is not entitled to a license to carry a concealed deadly weapon, pursuant to 11 Del. C. § 1441, as a matter of right; rather, approving an application is within the discretion of the Superior Court.[38] Notably, with respect to Article I, Section 20 of the Delaware Constitution, this Court stated that "'the right to keep and bear arms' does not of necessity require that such arms may be kept concealed. 11 Del.C. § 1441 relates only to the carrying of concealed deadly weapons; and as such is supported by a legitimate State interest."[39]

The oldest available Delaware case discussing an exception for the concealed carrying of deadly weapons in one's home seems to be *State v. Gagliota*,[40] a 1923 decision of the Court of General Sessions of Delaware. In holding that there is no "home-possession" exception, the Court stated:

> The offense charged in the statute is carrying the weapon concealed about his person. The statute is general in its terms as to locality, and there is no provision excepting the defendant's house or other place. While the question has not heretofore arisen in this state, the courts of other jurisdictions have passed directly upon it. From the almost uniform current of the law, [the Court is] convinced that unless there is an exception in the statute, it is no defense that the weapons were carried only in the defendant's own

[35] 882 A.2d 762, *3 (Del. 2005).
[36] *Id.*
[37] *Id.*
[38] *In re McIntyre*, 552 A.2d 500, 501-02 (Del. Super. Ct. 1988).
[39] *Id.* at 501 n.1. *See also In re Wolstenholme*, 1992 WL 207245, *2 (Del. Super. Ct. 1992) ("[T]he right to bear arms, which is guaranteed by the Constitution of the State of Delaware, does not include a right to carry a concealed deadly weapon.") (citing *McIntyre*, 552 A.2d at 501).
[40] 32 Del. 360 (Del. Ct. Gen. Sessions 1923).

> house and that it is not the province of the court to restrict or change the phraseology of the statute.[41]

Given that the instant challenge is predicated on Article I, Section 20 of the Delaware Constitution, and that *Gagliota* was decided over sixty years ago and prior to the adoption of Article I, Section 20, *Gagliota* has little, if any, continuing precedential value. Indeed, it appears that the *Gagliota* Court was requested to create a *sui generis* "home-possession" exception to the then-relevant statute, because there is no indication that the defendant's argument was predicated on any other state constitutional provision, statute, or authority; prior to the inclusion of Article I, Section 20, Delaware had no state constitutional provision protecting a right to keep and bear arms. By contrast, the instant Defendant specifically contends that an subsequent amendment to the Delaware Constitution is the source of a "home-possession" exception.

Defendant's assertion that there is a "home-possession" exception for the carrying of concealed deadly weapons in one's residence inherent in Article I, Section 20 has been recently considered, but not decided, by the Supreme Court of Delaware secondary to the adoption of Article I, Section 20. In *Dickerson v. State*,[42] the defendant became belligerent with a police officer, who had responded to the defendant's trailer after a neighbor reported that the defendant was brandishing a firearm during a dispute.[43] The defendant voluntarily came to the doorway of his trailer, but did not exit the trailer; despite being ordered by the responding officer to show his hands and indicate whether he had any weapons, the defendant remained very argumentative and refused to provide responsive answers.[44] The responding officer testified that he was apprehensive about the possibility that the defendant was concealing a weapon underneath his untucked shirt; accordingly, the officer drew his sidearm and ordered the defendant to show his hands.[45] The defendant ignored the officer, stepped down from his trailer, and began walking towards his vehicle; the officer then physically restrained the defendant, and a struggle ensued.[46] After the defendant was restrained, a pat down search revealed that

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[41] *Id.*
[42] 975 A.2d 791 (Del. 2009).
[43] *Id.* at 793.
[44] *Id.*
[45] *Id.*
[46] *Id.*

the defendant was carrying a .38 caliber handgun in his rear pocket, concealed underneath his untucked shirt.[47]

As a result of this incident, the defendant was convicted in this Court of Carrying a Concealed Deadly Weapon; in turn, the defendant appealed his conviction of Carrying a Concealed Deadly Weapon, arguing that Article I, Section 20 of the Delaware Constitution created an exception for carrying a concealed deadly weapon in one's own home.[48] The Supreme Court framed the argument raised by the defendant as a question of whether Delaware should follow the holding of *State v. Stevens*,[49] a case decided by the Court of Appeals of Oregon, Oregon's intermediate appellate court; *Stevens* held that Oregon's state constitutional provision protecting the right to keep and bear arms necessarily created a "home-possession" exception to Oregon's statutory prohibition on the concealed carrying of deadly weapons.

The facts of *Stevens* are very similar to the instant case. In *Stevens*, the defendant was convicted of carrying a concealed switchblade in his home; the Oregon statute at issue addressed the carrying of concealed weapons other than firearms.[50] The defendant's conviction arose from an incident in which the police executed an arrest warrant at his home; the defendant was handcuffed, frisked, and taken to a police vehicle.[51] Upon reaching the vehicle, the police again frisked the defendant, this time discovering a switchblade knife in the defendant's back pocket.[52] At the defendant's trial, the arresting officer testified that the arrest for carrying a concealed weapon was "predicated on defendant's having carried the switchblade in his pocket both inside and outside the house."[53] Just as in the instant case, the State conceded that the defendant did not voluntarily leave his residence, but was forcibly removed by the arresting officers.[54]

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[47] *Id.*
[48] *Id.* at 795.
[49] 833 P.2d 318 (Or. Ct. App. 1992).
[50] OR. REV. STAT. § 166.240(1) (2011) ("Except as provided in subsection (2) of this section, any person who carries concealed upon the person any knife having a blade that projects or swings into position by force of a spring or by centrifugal force, any dirk, dagger, ice pick, slungshot, metal knuckles, or any similar instrument by the use of which injury could be inflicted upon the person or property of any other person, commits a Class B misdemeanor.").
[51] *Stevens*, 833 P.2d at 319.
[52] *Id.*
[53] *Id.*
[54] *Id.*

The Oregon Constitution similarly protects the private possession of "arms;" specifically, Article I, Section 27 of the Oregon Constitution provides: "The people shall have the right to bear arms for the defence of themselves, and the State, but the Military shall be kept in strict subordination to the civil power." Indeed, if anything, the terms of the protections found in Article I, Section 27 of the Oregon Constitution are narrower and less explicit than those found in Article I, Section 20 of the Delaware Constitution.

Given this constitutional provision, the Court of Appeals of Oregon held that, while the State may prohibit the concealed carrying of weapons in public, the statute may not reach the carrying of weapons inside one's own home. Consequently, the Court held that the trial court erred in denying the defendant's motion for acquittal; the Court of Appeals reasoned as follows:

> [W]e conclude that, in the case at bar, ORS 166.240 was applied unconstitutionally. First, the simple act of carrying a concealed switchblade within one's own home is not the type of unrestrained rights-exercising that "poses a clear threat" to *public* safety and that can therefore be regulated. Second, the state's interpretation would restrict the manner in which one could carry a legal weapon from room to room within one's home and would inhibit an act that is so intrinsic to ownership and self-defense that it would unreasonably interfere with the exercise of one's constitutional right to *possess* the switchblade. We therefore hold that ORS 166.240 applies only to the carrying of concealed weapons outside one's own home.[55]

Further, given that the defendant was forcibly removed from his home and did not leave the home via a voluntary act, the Court held that the defendant could not be convicted for possessing the knife in public.[56]

Returning to *Dickerson*, the Supreme Court of Delaware explicitly did not reach the issue of whether to follow or adopt *Stevens*; the *Dickerson* Court held that, because the defendant voluntarily left his trailer, he carried the weapon outside his home and, consequently, his conviction under § 1442 could be predicated on his presence outside of his trailer.[57] The *Dickerson* Court reasoned:

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[55] *Id.* (citations omitted).
[56] *Id.* at 320 ("By entering a home and taking a person outside, the state cannot transform a lawful private act into a public offense.").
[57] *Dickerson*, 975 A.2d 791.

> Assuming, without deciding, that Dickerson had a right to carry a concealed weapon inside his own home, the issue is whether Dickerson had any legal excuse for taking the concealed gun outside his trailer. **Specifically, did Dickerson leave his trailer voluntarily or was he forcibly removed from the trailer by** [the arresting officer]? Dickerson argues that he was under arrest when [the arresting officer] first showed up at his door, therefore was compelled by [the arresting officer] to leave his trailer, and that such compulsion excuses his criminal liability.
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> Dickerson's argument fails because it conflates being under arrest with being forced to leave his trailer. A person is "seized" within the meaning of the Fourth Amendment (and, therefore, is under arrest), where a reasonable person would not feel free to leave under all the circumstances surrounding the incident. Even if a reasonable person would not have felt free to leave, that does not establish that Dickerson was compelled to step outside his trailer. Dickerson points to no evidence that [the arresting officer] compelled him to do that. The evidence establishes only that [the arresting officer] asked Dickerson to: (1) explain the earlier incident between him and Frank; (2) show his hands; and (3) state whether he had any weapons. Dickerson could have answered [the arresting officer's] questions from inside his trailer. **Dickerson voluntarily left his trailer while carrying a concealed handgun. He therefore cannot establish a colorable defense to Carrying a Concealed Deadly Weapon.**[58]

Thus, the existence and scope of a Delaware constitutional "home-possession" exception to § 1442 remains unsettled. Nonetheless, it is clear that, if such an exception exists, it is quite narrow, as the language in *Dickerson* makes clear that any such exception could apply only while an individual was within his home; the individual would again be fully susceptible to criminal liability under § 1442 the instant that person voluntarily left the confines of the home, regardless of how brief or fleeting of a departure from the home.[59]

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[58] *Id.* at 796 (emphasis added).

[59] Also, the existence of any such exception raises the question of what constitutes an individual's "home," for purposes of the exception. Treatises construing statutory exceptions to carrying a concealed deadly weapon indicate that, generally, the exception is implicated if one "lives on" the premises at issue. *See, e.g.*, 94 C.J.S. *Weapons* § 26 ("A person is at his or her home or on his or her own premises, so as to be exempt from a statutory prohibition against the carrying or possession of weapons, if he or she lives on the premises and has exclusive possession, without respect to whether he or she has legal title thereto. . .[t]he exception is ordinarily satisfied if the person lives on the premises

C. Assuming, Without Deciding, Article I, Section 20 Provides a "Home-Possession Exception," It Would Not Apply to Defendant.

1. The Interplay Between § 1442 and Article I, Section 20.

Delaware's law regarding the possession of a concealed weapon within one's home is somewhat anomalous in that Delaware has both a statute that broadly and absolutely prohibits the carrying of concealed weapons anywhere and anytime (unless the individual is duly licensed, pursuant to § 1441), while at the same time maintaining a state constitutional right to keep and bear arms for defense, hunting, and recreation. Of the fifty states, forty-two have constitutional provisions that protect an individual right to keep and bear arms.[60] Most states appear simply to confer a home or place of business

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and has exclusive possession or some degree of actual dominion or control of that part of the premises on which the alleged offense was committed.") (citations omitted).

[60] *See* Adam Winkler, *The Reasonable Right to Bear Arms*, 17 STAN. L. & POL'Y. REV. 597, 598 (2006) ("Nearly every state in the union has a constitutional provision guaranteeing the right to bear arms (forty-four states), and most of those states (forty-two) apply their arms provisions to protect an individual right."). For a complete listing and analysis (as of 2006) of each state's present and previous constitutional provisions regarding the right to keep and bear arms, see Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191 (2006). Thus, even if accurate, the State's assertion that there is "almost universal consensus among state courts that a 'home possession' exception does not exist unless it is explicitly called for in the statute" appears beside the point. State's Resp. of Mar. 17, 2011 at 2. Indeed, as discussed *infra* note 62, the fact that the majority of states address this issue by statute highlights the anomaly of Delaware's current approach; states with a statutory exception would presumably avoid the instant issue because, to the extent their respective state constitutions protect a right to keep and bear arms for self defense, their statutory prohibitions on concealed carrying of weapons would be inapplicable to Defendant's instant conduct. Some of the cases cited by the State to support its foregoing contention do not appear to be on point. For example, *State v. McDuffie*, 739 P.2d 989 (N.M. Ct. App. 1987), the first case cited by the State, was a case in which the defendant unsuccessfully challenged the application of New Mexico's concealed weapon's status on equal protection grounds, arguing that the statute "impermissibly distinguishes between rich and poor in that home and vehicle owners may properly conceal weapons," but "poor" people who do not own vehicles or residences may not; beyond the implicit acknowledgement of a statutory exception for an individual's home, this case did not analyze or discuss the applicability of a "home-possession" exception. Similarly, *Sherrod v. State*, 484 So.2d 1279 (Fla. Dist. Ct. App. 1986) was a case in which the Florida District Court of Appeal analyzed case law on when an individual is "in his home" and

possession exception by statute.[61] In general, such statutes specifically address the carrying of a firearm, rather than the more generic concept of "deadly weapon" contemplated in 11 Del. C. § 1442.[62]

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held that Florida's statutory exception for carrying a concealed weapon in one's home did not apply to a defendant who carried the weapon in the parking lot of his apartment complex; the Court further held that the legislature's failure to define the phrase "at his home" did not render the statute void for vagueness. Again, beyond the necessary application of Florida's statutory exception, the *Sherrod* Court did not endeavor to pronounce or acknowledge a general rule that "home-possession" exceptions could not apply in the absence of a statute. Indeed, the Florida statute was the only issue before the Court; the defendant did not advance a state or federal constitutional argument for the creation or extension of a "home-possession" exception.

[61] *See, e.g.*, N.J. STAT. ANN. § 2C:39-6(e) ("Nothing in [the statute prohibiting the carrying of a weapon without a permit] shall be construed to prevent a person keeping or carrying about his place of business, residence, premises or other land owned or possessed by him, any firearm. . . ."); 18 PA.C.S.A. § 6106(a)(1)(2011) ("Except as provided in paragraph (2), any person who carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license under this chapter commits a felony of the third degree.") (emphasis added); MD. CODE ANN., Criminal Law, § 4-203(b)(6)(2010) ("This section does not prohibit. . . the wearing, carrying, or transporting of a handgun by a person on real estate that the person owns or leases or where the person resides or within the confines of a business establishment that the person owns or leases."); *Peoples v. State*, 287 So.2d 63 (Fla. 1973) (holding that Florida's statutory exception for possessing arms at one's home or place of business found in Florida Statute § 790.25(3)(n) encompasses the carrying of a concealed weapon while in one's home or place of business); CAL. CRIMINAL CODE § 12026(b) (2010) ("No permit or license to purchase, own, possess, keep, or carry, either openly or concealed, shall be required of any citizen of the United States or legal resident over the age of 18 years who resides or is temporarily within this state. . .to purchase, own, possess, keep, or carry, either openly or concealed, a pistol, revolver, or other firearm capable of being concealed upon the person within the citizen's or legal resident's place of residence, place of business, or on private property owned or lawfully possessed by the citizen or legal resident.") (emphasis added). It should be noted that § 12026(b) appears slated to be superseded by § 25605 as of January 1, 2012, which, according to the Law Revision Commission Comments, "continues former Section 12026 without substantive change"; MICH. COMP. LAWS § 750.227(2) (2011) ("A person shall not carry a pistol concealed on or about his or her person. . .except in his or her dwelling house, place of business, or on other land possessed by the person, without a license to carry the pistol as provided by law. . . ."); OHIO REV. CODE ANN. § 2923.12(C)(1)(d) (2011) ("[The section prohibiting the concealed carrying of weapons] does not apply to any of the following. . . A person's storage or possession of a firearm, other than a firearm described in divisions (G) to (M) of section 2923.11 of the Revised Code, in the actor's own home for any lawful purpose."); IND. CODE 35-47-2-1 (2011) ("[A] person shall not carry a handgun in any

vehicle or on or about the person's body, except in the person's dwelling, on the person's property or fixed place of business, without a license issued under this chapter being in the person's possession."); TENN. CODE ANN. 39-17-1308(a)(3) (2010) ("It is a defense to the application of [the statute prohibiting the carrying of concealed weapons] if the possession or carrying was. . .[a]t the person's (A) Place of residence; (B) Place of business; or (C) premises."); N.H. REV. STAT. § 159:4 (2011) ("No person shall carry a loaded pistol or revolver in any vehicle or concealed upon his person, except in his dwelling, house or place of business, without a valid license therefor as hereinafter provided."); MASS. GEN. LAWS ch. 269, § 10 (2010) ("Whoever, except as provided or exempted by statute, knowingly has in his possession; or knowingly has under his control in a vehicle; a firearm, loaded or unloaded, as defined in section one hundred and twenty-one of chapter one hundred and forty without. . .being present in or on his residence or place of business. . . shall be punished by imprisonment in the state prison. . . ."); R.I. GEN. LAWS 11-47-8(a) (2010) ("No person shall, without a license or permit issued as provided [by statute], carry a pistol or revolver in any vehicle or conveyance or on or about his or her person whether visible or concealed, except in his or her dwelling house or place of business or on land possessed by him or her or as provided in §§ 11-47-9 and 11-47-10."); REV. CODE WASH. ANN. 9.40.050(1)(a) (2011) ("Except in the person's place of abode or fixed place of business, a person shall not carry a pistol concealed on his or her person without a license to carry a concealed pistol."); N.C. GEN. STAT. § 14-269(a)-(a1) (2010) ("It shall be unlawful for any person willfully and intentionally to carry concealed about his person any bowie knife, dirk, dagger, slung shot, loaded cane, metallic knuckles, razor, shurikin, stun gun, or other deadly weapon of like kind, except when the person is on the person's own premises. . . It shall be unlawful for any person willfully and intentionally to carry concealed about his person any pistol or gun except in the following circumstances: (1) The person is on the person's own premises."); N.M. STAT. 30-7-2(a)(1) (2010) ("Unlawful carrying of a deadly weapon consists of carrying a concealed loaded firearm or any other type of deadly weapon anywhere, except in the following cases: in the person's residence or on real property belonging to him as owner, lessee, tenant or licensee."); ILL. COMP. STAT. § 5/24-1(a)(4) (2010) ("A person commits the offense of unlawful use of weapons when he knowingly:. . . . Carries or possesses in any vehicle or concealed on or about his person except when on his land or in his own abode, legal dwelling, or fixed place of business, or on the land or in the legal dwelling of another person as an invitee with that person's permission, any pistol, revolver, stun gun or taser or other firearm. . . ."); TEX. PENAL CODE ANN. § 46.02(a) (2009) ("A person commits an offense if the person intentionally, knowingly, or recklessly carries on or about his or her person a handgun, illegal knife, or club if the person is not: (1) on the person's own premises or premises under the person's control; or (2) inside of or directly en route to a motor vehicle that is owned by the person or under the person's control.").

Three states avoid this issue altogether by simply neither prohibiting nor requiring a permit for the carrying a concealed deadly weapon. *See* ALA. STAT. ANN. § 11.61.220(a) (2010) (Alaska permits adults to carry a concealed deadly weapon without a permit; it is a criminal offense to fail to immediately inform a peace officer that one is carrying a concealed deadly weapon, or to carry the concealed deadly weapon into the residence of

another without an adult resident's express consent); ARIZ. REV. STAT. § 13-3102(A) (Arizona does not prohibit or regulate the carrying of a concealed weapon in general; a person commits "misconduct involving weapons" if he carries a deadly weapon "in furtherance of a serious offense. . .a violent crime. . .or any other felony offense," or if he or she does not accurately answer a law enforcement officer's inquiry as to whether he or she is carrying a concealed deadly weapon); 13 V.S.A. § 4003 (2011) (Vermont neither prohibits nor regulates the carrying of a concealed deadly weapon in general; rather, a person is guilty of a criminal offense only if he carries a deadly weapon "with the intent or avowed purpose of injuring a fellow man. . . .").

Notably, in at least two states, Texas and North Carolina, the state constitutional provisions regarding the right to keep and bear arms seem explicitly to preclude the possibility of a constitutional "home-possession" exception, while nonetheless protecting an individual right to keep and bear arms. *See* N.C. CONST. art. I, § 30 ("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; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. **Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice**.") (emphasis added); T.X. Const. art. I, § 23 ("Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; **but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime**.") (emphasis added). However, this is likely of no practical significance in these states, because both Texas and North Carolina recognize a "home-possession" exception by statute, as set forth in the preceding paragraph.

[62] *See generally id.* Given that the instant weapon was a "steak" knife that Defendant was apparently using for packing and unpacking boxes, there could be a colorable argument that it would not be within the purview of "keep[ing] and bear[ing] arms for the defense of self, family, home and State, and for hunting and recreational use." Indeed, the connotations of a right to keep and bear arms for defense, hunting, and recreation seem to be that such "arms" would generally be firearms. However, this Court will not assign an unduly narrow definition to the term "arms," as contained in Article I, Section 20 of the Delaware Constitution. Rather, this Court finds the view articulated by the Supreme Court of the United States to be persuasive; that is, that the term "arms" encompasses "all instruments that constitute bearable arms." *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008) (holding that the Second Amendment to the United States Constitution protects an individual right to keep and bear arms, and observing that the "18th-century meaning is no different from the meaning today. The 1773 edition of Samuel Johnson's dictionary defined 'arms' as 'weapons of offence, or armour of defence'. . . . the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.") (quoting SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (Richard Bentley 1773) (1755)). A knife, even if a "steak" knife, appears to be a "bearable arm" that could be utilized for offensive or defensive purposes.

In the absence of Article I, Section 20 of the Delaware Constitution, § 1442 would indisputably be valid as applied to Defendant.[63] However, the

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[63] *See* 94 C.J.S. *Weapons* § 16 ("Where a statute prohibits carrying or having possession of a weapon. . .making no exception as to locality, it is generally held to be unlawful to carry or posess [sic] such a prohibited weapon anywhere, even in one's own premises. However, some jurisdictions whose constitutions protect the right to keep and bear arms in self-defense hold that even general statutes criminalizing the carrying of weapons cannot reach the carrying of a weapon in one's own home.") (citing *State v. Stevens*, 833 P.2d 318 (Or. Ct. App. 1992)). Though not argued by Defendant, this Court recognizes that a challenge to § 1442, as applied to Defendant, could conceivably have been predicated on the Second Amendment of the United States Constitution, given that the Second Amendment was relatively recently incorporated as against the states. *See McDonald v. Chicago*, 130 S.Ct. 3020 (2010) (holding that the right to keep and bear arms is incorporated against state and local governments via the Fourteenth Amendment). However, the extent to which the Second Amendment applies to the concealed carrying of weapons, as opposed to the possession of weapons within the home, remains unclear. *See, e.g.*, *Peruta v. County of San Diego*, 2010 WL 5137137, *8 (S.D. Cal. 2010) (holding that, given the government's "substantial interest in reducing the number of concealed handguns in public," the Second Amendment does not foreclose the State from requiring individuals to demonstrate a "bona fide need" to carry a concealed handgun); *Dorr v. Weber*, 741 F. Supp.2d 993, 1005 (N.D. Iowa 2010) ("[The challengers of the denial of their right to carry a concealed handgun] have not directed the court's attention to any contrary authority recognizing a right to carry a concealed weapon under the Second Amendment and the court's own research efforts have revealed none. Accordingly, a right to carry a concealed weapon under the Second Amendment has not been recognized to date."); Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1523-24 (2009) ("For over 150 years, the right to bear arms has generally been seen as limited in its scope to exclude concealed carry. Constitutional provisions enacted after this consensus emerged were likely enacted in reliance on that understanding. If *Heller* is correct to read the Second Amendment in light of post-enactment tradition and not just Founding-era original meaning, this exclusion of concealed carry would be part of the Second Amendment's scope as well.") (citations omitted). *But see id.* at 1524 (arguing that "the sense that concealed carry was the behavior of criminals" is no longer valid, and, consequently, "a ban on concealed carry should indeed be seen as a presumptively unconstitutional substantial burden on self-defense.") (citations omitted).

Likewise, while not articulated in Defendant's moving papers, Defendant's conviction under § 1442 might have been challenged on Fourteenth Amendment grounds, although the result would be unchanged. In *Lawrence v. Texas*, the United States Supreme Court held that the broad prohibition of intimate sexual contact between persons of the same sex could not constitutionally be applied in the confines of one's own home. *Lawrence v. Texas*, 539 U.S. 558 (2003) ("Liberty protects the person from unwarranted government

more difficult question presented by Defendant's motion is whether, and to what extent, Article I Section 20 necessarily creates a "home-possession" exception. As stated, the State concedes that Defendant did not voluntarily leave his residence, and liability for any criminal offense requires a voluntary act.[64]

Given the instant case's factual backdrop, it necessarily follows that Defendant's conviction is predicated on his concealed carrying of the knife while within his residence.[65] Thus, the issue of liability under § 1442 for strictly "home-possession" is squarely presented in this case, in contrast to *Dickerson*, *supra*.[66]

2. Defendant's Conviction is Outside the Scope of Any Potential "Home-Possession" Exception Created by Article I, Section 20.

This Court recognizes the breadth of Article I, Section 20 of the Delaware Constitution; by its terms, Section 20 protects an individual right to "keep and bear arms" for self defense, defense of family, defense of the State,

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intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home."). However, in *Lawrence*, the Supreme Court observed that the statute at issue "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id.* at 578. Conversely, the need to regulate the possession and carrying of deadly weapons provides a considerably stronger state interest for § 1442. *See In re McIntyre*, 552 A.2d 501, 502 n.1 (Del. Super. Ct. 1988) ("11 Del.C. § 1441 relates only to the carrying of concealed deadly weapons; and as such is supported by a legitimate State interest."). Indeed, in this case, the application of § 1442 to Defendant's conduct furthers the "weighty" state interest of protecting responding police officers who lawfully enter a private residence in the performance of their duties. *See State v. Henderson*, 906 A.2d 232, 242 (Del. 2005) (noting the "weighty" public interest in protecting police officer safety) (quoting *Maryland v. Wilson*, 519 U.S. 408, 413-14 (1997)). Thus, for purposes of the instant motion, this Court notes that § 1442 does not impinge any federal constitutional rights.

[64] 11 Del. C. § 242 ("A person is not guilty of an offense unless liability is based on conduct which includes a voluntary act or the omission to perform an act which the person is physically capable of performing."). Notably, the Delaware Criminal Code with Commentary confirms that the voluntary act requirement applies equally to strict liability offenses. *See* 11 Del. C. § 252 cmt. (1973) ("[O]ffenses of strict liability are not exempted from the requirement that there be a voluntary act.").

[65] The jury's note, while not dispositive, further supports this conclusion. *See supra* text accompanying note 17.

[66] *See supra* text accompanying note 58.

hunting, and recreational purposes. Indeed, a review of analogous provisions in other states discloses that the protections in Article I, Section 20 are more explicit and extensive than many other states' counterparts.[67] Nonetheless, even when taking the broadest possible view of Article I, Section 20's protection and assuming, but not deciding, that Article I, Section 20 necessitates a "home-possession," under the facts of this case, Defendant would not be in the purview of such an exception.[68]

The issue of whether a statutory prohibition on carrying concealed weapons, even in one's own home, is irreconcilable with a state constitutional right to keep and bear arms appears to be infrequently raised in other jurisdictions, given the widespread adoption of statutes that confer

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[67] *Compare* DE. CONST. art. I, § 20 ("A person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use.") *and* AK. CONST. art. I, § 9 ("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. The individual right to keep and bear arms shall not be denied or infringed by the State or a political subdivision of the State."); ARK. CONST. art. 2, § 5 ("The citizens of this State shall have the right to keep and bear arms, for their common defense."); MI. CONST. art. 1, § 6 ("Every person has a right to keep and bear arms for the defense of himself and the state."); PA. CONST. art. I, § 21 ("The right of the citizens to bear arms in defence of themselves and the State shall not be questioned.").

[68] At the same time, this Court rejects the State's argument that the Defendant does not fit the exception merely because the residence was titled to Defendant's girlfriend. *See* State's Resp. of Mar. 17, 2011 at 4 ("[N]onetheless the defendant failed to show that he fits the exception. . . .[t]he testimony during trial showed that he was arrested in another's home, that of [Defendant's girlfriend]."). Though Defendant testified that his name was not on the lease to this residence, the State has not disputed that Defendant resided at this address for four years. Defendant did testify that the instant incident occurred while he was packing his belongings in anticipation of a separation from his girlfriend, but it remains that, at the time of this incident, Defendant was continuing his four year residency with his girlfriend at this address. Consistent with the overwhelming majority of state statutes and secondary authority regarding a "home-possession" exception, such an exception would apply to the location where an individual resides, and not strictly to property to which the individual has legal title. *See supra* note 61; C.J.S. *Weapons* § 26 ("A person is at his or her home or on his or her own premises, so as to be exempt from a statutory prohibition against the carrying or possession of weapons, if he or she lives on the premises and has exclusive possession, without respect to whether he or she has legal title thereto. . .[t]he exception is ordinarily satisfied if the person lives on the premises and has exclusive possession or some degree of actual dominion or control of that part of the premises on which the alleged offense was committed."). This Court also observes (for what it's worth) that Defendant testified that his then-girlfriend was now his "fiancée." Tr. at 3.

an exception for carrying a weapon in one's residence or place of business. Nonetheless, at least two other states have addressed similar challenges to concealed weapons prohibitions based on statutes that, like § 1442, do not provide a "home-possession" exception. As discussed *supra*, the Court of Appeals of Oregon concluded that an unqualified statutory prohibition on the carrying of concealed weapons, even in one's own home, was irreconcilable with a state constitutional provision protecting the bearing of arms in self-defense. More recently, in *State v. Hamdan*,[69] the Supreme Court of Wisconsin similarly held that Wisconsin's universal and unqualified statutory prohibition on the concealed carrying of firearms was irreconcilable with a then-recent amendment to the Wisconsin Constitution, Article I, Section 25, which provides: "The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose." In so concluding, the Supreme Court of Wisconsin provided a thorough analysis of the rationale underlying the application of "home-possession" exception. This Court finds the rationale expressed in *Hamdan* persuasive and, accordingly, applies it to Defendant's motion.

In *Hamdan*, the defendant owned and operated a grocery store.[70] After closing hours, he removed the handgun that he kept under the counter, near the cash register, and carried it into a back room for storage; while the defendant was in the back room, two plainclothes police officers entered the store.[71] The defendant's son pressed a buzzer to summon the defendant, and the defendant placed the handgun in his pocket before returning to the store counter.[72] The officers informed the defendant that they were conducting a "license check;" the defendant produced his licenses, which apparently were satisfactory to the officers.[73] Thereafter, the officers inquired as to whether the defendant kept a gun in the store, and, if so, where the gun was kept.[74] The defendant candidly

[69] 665 N.W.2d 785 (Wis. 2003).
[70] *Id.* at 789.
[71] *Id.* The opinion indicates that the defendant kept the gun in the store due to safety and protection concerns; the defendant's store had previously been the target of four armed robberies, and that the defendant had previously shot and killed an armed robber in self-defense. *Id.* at 791.
[72] *Id.*
[73] *Id.* Although not clarified in the *Hamdan* opinion, the context suggests that the officers were checking retail or vendor licenses of some sort.
[74] *Id.*

acknowledged that he did, and produced the handgun from his pocket; the officers confiscated the handgun but did not arrest the defendant at that time.[75]

The defendant was subsequently charged with carrying a concealed weapon, in violation of Wisconsin's statute prohibiting the concealed carrying of a "dangerous weapon."[76] After being convicted under this statute, the defendant appealed based on "as applied" challenge to the statute's constitutionality in light of Article I, Section 25 of the Wisconsin Constitution, adopted only one year before the incident giving rise to the defendant's conviction.[77] An "as applied" constitutional challenge is "a claim that the operation of a statute is unconstitutional in a particular case," in contrast to a "facial challenge," which asserts that "the statute may rarely or never be constitutionally applied."[78]

As adopted in 1998, Article I, Section 25 of the Wisconsin Constitution reads: "The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose." The *Hamdan* Court acknowledged that Section 25 did not establish an "unfettered" right to keep and bear arms, but also noted that the "prohibition of conduct that is indispensable to the right to keep (possess) or bear (carry) arms for lawful purposes will not be sustained."[79] Thus, the *Hamdan* Court found that the proper standard of review was via a "reasonableness" balance between the rights protected by Article I, Section 25 and the State's authority to protect the safety and welfare of its citizens.[80]

The *Hamdan* Court similarly observed the unique tension created by a constitutional right to keep and bear arms and an unqualified statutory prohibition on the concealed carrying of weapons. Indeed, in Wisconsin, there are apparently no circumstances under which an individual may carry a concealed deadly weapon;[81] there is apparently no process by which an

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[75] *Id.*
[76] *Id.* at 789-90; WIS. STAT. § 941.23 (2011) ("Any person except a peace officer who goes armed with a concealed and dangerous weapon is guilty of a Class A misdemeanor.").
[77] *Hamdan*, 665 N.W. 2d at 447-48.
[78] 16 C.J.S. *Constitutional Law* § 187.
[79] *Id.* at 461.
[80] *Id.* at 463.
[81] WIS. STAT. § 941.23 (2011); *Hamdan*, 665 N.W.2d at 801 ("However, Wisconsin remains one of only six states that generally disallow any class of ordinary citizens to

individual may receive a permit to carry a concealed deadly weapon, as a qualified Delaware resident may do pursuant to 11 Del. C. § 1441. Consistent with this Court's observations with respect to § 1442's lack of an exception for carrying weapons within one's home, the *Hamdan* Court stated that "the interaction between Wisconsin's [Carrying Concealed Weapon] statute and the state constitution's right to bear arms is anomalous, if not unique [among the various states' approaches to the concealed carrying of weapons within the home]."[82]

The *Hamdan* Court examined *State v. Stevens*, *supra*, and adopted its reasoning.[83] Additionally, in holding that Wisconsin's Carrying Concealed Weapon statute was unconstitutional as applied to the defendant, the Court stated:

> [W]e conclude that a citizen's desire to exercise the right to keep and bear arms for purposes of security is at its apex when undertaken to secure one's home or privately owned business. Conversely, the State's interest in prohibiting concealed weapons is least compelling in these circumstances, because application of the CCW statute "has but a tenuous relation to alleviation" of the State's acknowledged interests. As stated recently by the New Hampshire Supreme Court, "If the restriction of a private right is oppressive, while the public welfare is enhanced only [to a] slight degree, the offending statute is void as an invalid exercise of the police power." We believe that the CCW statute, by virtue of its application under the facts of this case, suffers from this infirmity.
>
> If the constitutional right to keep and bear arms for security is to mean anything, it must, as a general matter, permit a person to possess, carry, and sometimes conceal arms to maintain the security of his private residence or privately operated business, and to safely move and store weapons within these premises.[84]

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lawfully carry concealed weapons.") (citations omitted). In the time since *Hamdan* was decided, the number of states that disallow ordinary citizens from lawfully carrying concealed weapons has been reduced to two, Wisconsin and Illinois. *See* WIS. STAT. § 941.23 (2011); ILL. COMP. STAT. § 5/24-1(a)(4) (2010) ("A person commits the offense of unlawful use of weapons when he knowingly:. . . . Carries or possesses in any vehicle or concealed on or about his person except when on his land or in his own abode, legal dwelling, or fixed place of business, or on the land or in the legal dwelling of another person as an invitee with that person's permission, any pistol, revolver, stun gun or taser or other firearm. . . .").

[82] *Hamdan*, 665 N.W. at 803.

[83] *Id.* at 805.

[84] *Id.* at 808 (citations omitted).

At the same time, the *Hamdan* Court limited the scope of the "home-possession" exception by requiring the assessment of "whether an individual could have exercised the right in a reasonable, alternative manner that did not violate the statute."[85] Put differently, "[i]n circumstances where the State's interest in restricting the right to keep and bear arms is minimal and the private interest in exercising the right is substantial, an individual needs a way to exercise the right without violating the law."[86] As applied to the defendant in *Hamdan*, the Court found that the statute did not leave him a reasonable alternative;[87] the Court reasoned that requiring the defendant to leave his handgun in plain view to comply with the Carrying Concealed Weapon statute "fails the litmus test of common sense" by "alert[ing] criminals to the presence of the weapon and frighten[ing] friends and customers," thereby making the firearm more accessible to "children, assailants, strangers, and guests."[88]

This Court finds the limitations expressed in *Hamdan* to be persuasive. That is, assuming without deciding that Article I, Section 20 of the Delaware Constitution contains a "home-possession" exception, a defendant would only be within such an exception if the application of § 1442 foreclosed the exercise of the right to keep and bear arms in a "reasonable, alternative manner that did not violate the statute."[89] The application of § 1442 to Defendant's conduct is not an unreasonable limitation or prohibition on his exercise of the right to keep and bear arms

Further, the *Hamdan* Court held that Wisconsin's "home-possession" exception is predicated on a "substantial" private interest in exercising the right to keep and bear arms versus a "minimal" state interest in restricting the right.[90] This Court also finds this aspect of *Hamdan* to be persuasive. As

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[85] *Id.*
[86] *Id.*
[87] *Id.* at 809 ("Requiring a storeowner who desires security *on his own business property* to carry a gun openly or in a holster is simply not reasonable."); *see also* Volokh, *supra* note 63, at 1521 ("To be sure, any discussion of open carry rights has a certain air of unreality. In many places, carrying openly is likely to frighten many people, and to lead to social ostracism as well as confrontations with the police.") (citing *Hamdan*, 665 N.W.2d 785).
[88] *Id.* at 802. The *Hamdan* Court also noted that leaving a firearm openly displayed could subject an individual to liability under WIS. STAT. § 948.55 (2011), Wisconsin's child access prevention law, which imposes criminal liability for recklessly leaving or storing a loaded firearm within "reach or easy access" of a child under the age of 14 years.
[89] *Hamdan*, 665 N.W. at 808.
[90] *Id.*

applied to Defendant in this case, § 1442 serves the substantial interest of protecting police officers, such as those in this case, who are lawfully within a residence in response to a domestic disturbance report.[91] At the same time, an individual does not have a "substantial" interest in carrying a concealed deadly weapon while belligerently defying lawful police orders and resisting a lawful arrest, even if such conduct is confined to the individual's home.[92] Subduing and arresting a hostile, noncompliant suspect who is carrying a concealed deadly weapon obviously presents dire risks to police officers.[93] As with other constitutional rights, the protections of Article I, Section 20 must be balanced against competing public policy concerns, including police officer safety.[94] In this case, the balance of interests articulated in *Hamdan* is reversed: the application of § 1442 in the context of an appropriate police response to a domestic disturbance report, outstanding capias, and belligerent suspect, notwithstanding the fact that the incident occurred within the suspect's residence, furthers a "substantial" State interest while impairing only the "minimal" private interest in carrying a concealed deadly weapon in one's home during the course of forcefully resisting a lawful arrest.[95] Consequently, even if Article I, Section 20 encompasses a "home-possession" exception to § 1442, any such exception would cease to apply at the commencement of the instant confrontation with the police, thereby rendering Defendant's concealed carrying of the knife during this confrontation fully susceptible to criminal liability under § 1442 .

In short, given the facts of this case, Defendant has failed to carry the burden of overcoming the "strong judicial presumption" that §1442 is not in violation of Article I, Section 20 of the Delaware Constitution.[96] Consistent

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[91] Defendant does not dispute that his girlfriend, the named lessee of the residence, told the police officers that she wanted him removed from the residence. Tr. at 63.

[92] By his own admission, Defendant gave the police a "tongue lashing" and was "telling [the police] how much jerks they are, you guys are idiots, A-holes" because he felt that his home was "one place [he could] speak [his] mind." Tr. at 12-15.

[93] *See, e.g.*, David S. Chase, *Who is Secure?: A Framework for Arizona v. Gant*, 78 FORDHAM L. REV. 2577, 2597 (2010) ("Police officers have an inherently dangerous job, and an arrest presents an extremely unsafe situation. Indeed, between 1999 and 2008, 122 of the 530 police officers in the United States who were feloniously killed were killed during an arrest situation.") (citations omitted).

[94] *See, e.g.*, *Arizona v. Gant*, 129 S.Ct. 1710, 1721 (2009) (holding that a suspect's Fourth Amendment rights will yield to "genuine safety or evidentiary concerns encountered during the arrest of a vehicle's occupant. . . .").

[95] *Hamdan*, 665 N.W.2d at 808.

[96] *See Opinion of the Justices*, 425 A.2d at 605 (Del. 1981).

with Delaware law regarding constitutional challenges, this Court will construe § 1442 "so as to avoid unnecessary constitutional infirmities."[97] Thus, assuming, without deciding, that Article I, Section 20 confers a "home-possession" exception, such an exception would not be applicable to Defendant's conduct.

3. Analysis of the Constitutionality of § 1442 as Potentially Applied to Other Instances of "Home-Possession" is Inapposite.

Finally, Defendant asserts that the literal application of § 1442 could create a "paradox;"[98] under both 11 Del. C. § 603[99] and 11 Del. C. § 1456,[100] an individual may incur criminal liability for leaving a firearm accessible to a minor or failing to prevent a minor from gaining access to a firearm, but the storage of the firearm in a locked container is a defense to such criminal liability. Given that a firearm stored in a portable, lockable container might well be considered "hidden from the ordinary sight of another person. . .[meaning] the casual and ordinary observation of another in the normal associations of life,"[101] if an individual was to transport such a container, even from room to room in his own home, this might be considered to be carrying a deadly weapon "about" the person.[102] In turn, an individual

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[97] *Richardson v. Wile*, 535 A.2d 1346, 1350 (Del. 1988) (citations omitted).
[98] Def.'s Memorandum in Support of Motion for Judgment of Acquittal at 3.
[99] "A person is guilty of reckless endangering in the second degree when. . . .Being a parent, guardian, or other person legally charged with the care or custody of a child less than 18 years old, the person knowingly, intentionally or with criminal negligence acts in a manner which contributes to or fails to act to prevent the unlawful possession and/or purchase of a firearm by a juvenile. . . .It shall also be an absolute defense to this paragraph if the person had locked the firearm in a key or combination locked container and did not tell or show the juvenile where the key was kept or what the combination was."
[100] "A person is guilty of unlawfully permitting a minor access to a firearm when the person intentionally or recklessly stores or leaves a loaded firearm within the reach or easy access of a minor and where the minor obtains the firearm and uses it to inflict serious physical injury or death upon the minor or any other person. It shall be an affirmative defense to a prosecution under this section if: The firearm was stored in a locked box or container or in a location which a reasonable person would have believed to be secure from access to a minor. . . .").
[101] *Robertson v. State*, 704 A.2d 267, 268 (Del. 1997) (quoting *Ensor v. State*, 403 So2d. 349, 354 (Fla. 1981).
[102] *See, e.g.*, *Dubin v. State*, 397 A.2d 132, 134 (Del. 1979) (holding that "the key to whether a concealed deadly weapon may be deemed to be 'about' the person should be

who is merely seeking to maintain a weapon for self and home defense while simultaneously complying with Delaware's child access prevention laws may run afoul of a literal application of § 1442.

The instant motion challenges the constitutionality of § 1442 as applied to this particular Defendant. Therefore, just as the Supreme Court of Wisconsin confined its review of the *Hamdan* defendant's "as applied" challenge to the specific facts of that case, this Court will consider only "the facts of [Defendant's] case, not hypothetical facts in other situations."[103] Nonetheless, this Court notes that a conviction premised upon the hypothetical scenario presented by Defendant seems more likely to be deemed as foreclosing an individual from exercising his or her rights under Article I, Section 20, without providing for the exercise of the right to keep and bear arms in a "reasonable, alternative manner that did not violate the statute."[104]

CONCLUSION

For the reasons stated above, as applied to the instant conviction, Defendant has failed to carry the burden of overcoming the "strong judicial presumption" of constitutionality with which this Court must review § 1442.[105] Consequently, assuming, without deciding, that Article I, Section 20 of the Delaware Constitution confers a "home-possession" exception to § 1442,

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determined by considering the immediate availability and accessibility of the weapon to the person.").

[103] *Hamdan*, 665 N.W.2d at 799. *See also Am. Paving Co. v. Dir. of Revenue*, 377 A.2d 379, 381 (Del. Super. Ct. 1977) ("[T]he case law is clear that this Court need not assess the constitutional validity of a statute as applied to a hypothetical situation.") (citations omitted).

[104] *Id.* at 808. This Court also notes that, were Defendant's suggested paradox to arise in an actual case (rather than merely posited as a hypothetical), a question arises as to whether § 1442, which traces its origins back to 1972, was at least partially repealed by implication with the enactment of § 1456 in 1994. Although repeal by implication is not favored, the foregoing scenario illustrates a situation in which the statutory provisions may be simultaneously applied in such a way as to be "irreconcilably inconsistent, repugnant to each other, or lead to absurd, unjust, or mischievous results," the criteria for finding a statutory repeal by implication. *David S.W. v. State*, 509 A.2d 1100, 1102 (Del. 1986) (citation omitted).

[105] *See Opinion of the Justices*, 425 A.2d at 605.

Defendant's conviction under §1442 is nonetheless constitutional.[106] Accordingly, Defendant's Motion for Judgment of Acquittal is **DENIED**.

IT IS SO ORDERED. Sentencing on all charges will follow promptly.

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Richard R. Cooch, R.J.

oc: Prothonotary

[106] Having found that the facts of Defendant's conviction would be beyond the scope of any potential "home-possession" exception, this Court need not reach the issue of whether Defendant's carrying of this specific weapon would otherwise be protected under Article I, Section 20 of the Delaware Constitution. However, the Court notes that, given Defendant's testimony that he was carrying the knife to pack and unpack boxes, it is arguable that he was not keeping or bearing this knife for "the defense of self, family, home and State, and for hunting and recreational use." DE. CONST. art. I, § 20.