COURT OF APPEALS OF WISCONSIN
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Case No. 2012-CF-000093
Appeal No. 2014AP002701 CR

ROBERT J. STIETZ,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION AND SENTENCE ENTERED ON MAY 28, 2014 BY THE CIRCUIT COURT FOR LAFAYETTE COUNTY, THE HONORABLE JUDGE JAMES R. BEER PRESIDING

BRIEF OF DEFENDANT-APPELLANT ROBERT J. STIETZ

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STATEMENT OF ISSUES

1. Was Robert Stietz entitled to a jury instruction on self-defense where he testified he was in fear for his life when two armed strangers who had trespassed on his land accosted him and forcibly took his rifle from him and drew and pointed handguns at him?

The trial court answered no.

2. Was Robert Stietz entitled to a jury instruction regarding the wardens' trespassing on his farm?

The trial court answered no.

3. Was Stietz denied his right to a public trial when the trial court held the jury instructions conference behind closed doors in a downstairs conference room?

The trial court answered no.

4. Were Stietz' Second Amendment rights violated when he was arrested on his farm and prosecuted for refusing to be forcibly disarmed by two armed trespassers?

The trial court answered no.

5. Are Department of Natural Resources wardens "law enforcement officers" within the meaning of Sec. 941.20(1m), Stats.?

The trial court answered yes.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Publication is not necessary, as the determination of this appeal turns on well-settled principles of law. The appellant believes that oral argument may be helpful to understand some of the nuances of this case.

STANDARD OF REVIEW

The first two issues in this case, namely the trial court's refusal to give the defendant-appellant's requested jury instructions on self-defense and on trespassing, denied Stietz his Sixth Amendment right to present a defense, which is a question of constitutional fact which this Court reviews *de novo*. State v. Dodson, 219 Wis. 2d 65, 69-70, 580 N.W.2d 181 (1998); In Interest of Michael R.B., 175 Wis. 2d 713, 720, 499 N.W.2d 641 (1993), citing State v. Pulizzano, 155 Wis. 2d 633, 648, 456 N.W.2d 325 (1990).

Similarly, the third issue, whether Stietz was denied his right to a public trial, and the fourth issue, whether his Second Amendment rights were violated, are questions of constitutional fact which this Court should also review *de novo*. Id.

The final issue, whether conservation wardens are law enforcement officers under the applicable statute, is a question of

statutory construction which this Court reviews *de novo*. Phelps v. Physicians Insurance Co. of Wisconsin, Inc., 2009 WI 74, ¶ 36, 319 Wis. 2d 1, 768 N.W.2d 615.

STATEMENT OF THE CASE

This is an appeal from the judgment of conviction and sentence entered May 28, 2014, in the Circuit Court for LaFayette County, the Honorable James R. Beer, Judge presiding. (R.78a; R.92; App. 1-3)

Following a confrontation with two game wardens, Robert Stietz was charged with the following six criminal offenses:

Count No.	Description of Charge
1	First-degree recklessly endangering safety
2	Resisting or obstructing an officer
3	Resisting or obstructing an officer
4	Endanger safety/use of a dangerous weapon
5	Intentionally point firearm at a law enforcement officer
6	Intentionally point a firearm at a law enforcement officer

(R.7a) The case was tried to a jury, which acquitted Stietz on four of the counts (Counts 1, 2, 4 and 5) (R.59; R.60; R.62; R.63) and convicted him on Counts 3 and 6 (R.61; R.64), resisting or obstructing an officer, and intentionally pointing a firearm at a law enforcement officer. (R.78a; R.92; App. 1-3)

Prior to trial, Stietz filed a motion to dismiss the charges based

on his rights under the Second Amendment to the United States Constitution and Article I, § 8(1) of the Wisconsin Constitution. (R.14; R.15; App. 4-14) Following an evidentiary hearing and briefing, the trial court denied that motion. (R.103; R.20; R.21; R.22; R.27; R.28; R.29; R.30; R.34; App. 15) The case proceeded to a jury trial, at which Robert Stietz testified that he was walking his fenced-in property during gun deer season looking for trespassers when he encountered two strangers clad in blaze orange on his property. (R.113:92; App. 38) The encounter occurred when it was "fairly dark" (R.112:29), and Stietz testified that he did not know or recognize the two strangers. (R.113:92; App. 38) The strangers approached him and asked for his rifle. When Stietz refused to give it to them, they forcibly wrestled it away from him. One of the two strangers then drew a pistol on Stietz and Stietz responded by drawing his pistol on that person. (R.102:35-36; R.113:98-99; App. 44-45) Stietz maintained that he was fearful for his life and acting in self-defense to protect himself. (R113:99; App.45) Based on that testimony and Stietz' assertion of his right to self-defense, his counsel requested that the jury be given an instruction on self-defense, either WIS JI-CRIMINAL 800, 810 or an adaptation of those. (R.42; R.107:49-58; App. 22-27) The trial court refused the

requested self-defense instruction, precluding Stietz' trial counsel from arguing to the jury that he was acting in self-defense and precluding the jury from even considering that defense. (R.107:49-58)

The morning following the close of evidence, the trial court conducted the jury instruction conference in a downstairs conference room behind a closed door with no members of the public present. Stietz asserted that the closed jury instruction conference was a denial of his right to a public trial. (R.107:64; R.113:179) The trial court set forth inconsistent positions, first asserting that those proceedings were not closed, but then acknowledging the door was closed because of noise in the hallway and that the jury instructions conference "would have been unruly with about 40-60 people sitting in the courtroom at the time" and the trial court "would have been having deputies escort people out, arresting them for contempt, etc. for not remaining silent" and "I don't want to create a brouhaha upstairs in the courtroom or a commotion in the courtroom." (R.107:64)

Following the verdict, Stietz filed a Motion for Acquittal or a New Trial (R.67; App. 28-30). The trial court denied that motion and imposed a bifurcated sentence which included one year of initial confinement. (R.76; R.78a; R.92; App. 1-3, 31) Stietz will have

completed serving that portion of his sentence and will be released from custody on May 19, 2015.

STATEMENT OF FACTS

Robert Stietz was a 64 year old lifelong beef farmer with no prior criminal history. (R.81:2; R.113:101-102; App. 47-48) Together with his wife of 42 years, he owned and farmed a 40 acre parcel outside Gratiot and another 25 acre parcel approximately 12 miles away outside Lamont. (R.111:65-66) The latter parcel was completely enclosed by fence and used by Stietz and his wife for pasturing cattle and hunting. That parcel is north of Highway 81 and connected to that highway by an easement from the highway to the parcel's gate. (R.113:69-70, 73)

Trespassers on the uninhabited parcel were a common problem. (R.113:110-111, 138-139; App. 56-57, 84-85) On the last day of gun deer season, Sunday, November 25, 2012, Bob Stietz was walking his property to check for trespassers, and to check the fence lines since he was planning on pasturing a bull in that field after the close of hunting season. (R.113:136, 142-143; App. 82, 88-89) He was carrying a Weatherby rifle, with the safety on (R.111:193; R.113:92; App. 38), and was also carrying a .357 revolver (R.113:99, 107; App. 45, 53). The revolver was partially loaded but did not have a bullet in the

cylinder in front of the barrel for safety reasons. (R.113:113; App. 59) He was wearing a camouflage coat and hat. He was not wearing hunters blaze orange, although he did have a blaze orange vest with his back tag stuffed into one of his coat pockets. (R.113:108-109; App. 54-55)

Sunset that day was at 4:25 p.m. (R.112:9) The official end of hunting season was 20 minutes after sunset or 4:45 p.m. (R.112:10) As Stietz was heading back toward where he had parked his car along a fence line, two Department of Natural Resources conservation wardens, Frost and Webster, noticed a car sitting along a fence line approximately a quarter mile up into the field. (R.111:165) The wardens drove onto the property and stopped at the vehicle. The wardens did not know if the car had been abandoned or if it belonged to someone who might be hunting in the area. (R.111:166-167) One of the wardens peered into the car and saw an empty rifle case and some buck lure. (R.111:166-167) At the same time, 4:58 p.m. according to the records, the other warden checked the registration of the vehicle and learned that the Chevy sedan was registered to Bob and Sue Stietz. (R.111:169)

Curious, the wardens then decided to walk north onto the Stietz

farm. They walked through a cattle gate at approximately 5:03 p.m. and continued walking 100 yards or more north onto Stietz' land. (R.111:173-174; R.112:13) Meanwhile, Bob Stietz had spied blaze orange in the woods on his land and proceeded to walk toward the cattle gates at the southwest corner of the parcel. (R.113:92; App. 38) The wardens heard a stick snap and turned to see Stietz walking slowly to the west, pausing every few steps. (R.112:175) It was at least 45 minutes after sunset and was dark as the two wardens walked in the direction Stietz was heading to intercept him. In Warden Webster's words, when they saw Stietz, it was "very nearly completely dark." (R.111:177; R.112-145) Warden Frost testified that they were separated from Stietz by some brush about 20 yards away. (R.111:177) Warden Frost testified that he shined his flashlight on Stietz and announced from that distance that he was a conservation warden. (R.111:177) Stietz testified at the trial that there had been problems with trespassers and he was walking his property checking for trespassers. (R:113:93-94, 110) He had not heard the wardens announce themselves (R.113:122; App. 68) and, after the initial glimpse of blaze orange he had seen from 100 yards or so away, he first noticed them again when they shined the flashlight in his eyes from a

distance of 20 or 30 yards. (R.113:125, 141; App. 71, 87) He did not know who they were and assumed they were trespassing hunters. (R.113:92, 123; App. 38, 69) That assumption was consistent with the wardens' blaze orange jackets and their initial conversation upon approaching Stietz when Webster asked Stietz if he had seen any deer and he replied he had seen seven doe. (R.111:179) At that point, Stietz and the two wardens were standing within arms reach of each other. (R.111:179) Webster then asked Stietz if the rifle he was carrying was loaded and Stietz answered that it was. (R.111:180) Frost asked to see the rifle and Stietz refused. Frost asked again if he could see the firearm and stepped toward Stietz and reached for Stietz' firearm. (R.111:180) Frost immediately grabbed the rifle and drove his body towards Stietz trying to take the firearm away from Stietz. (R.111:181) The other warden joined the struggle and grabbed Stietz' rifle, with the barrel swinging around while they wrestled it away from him. (R.113:97; App. 43) Frost then wrestled the firearm away and ended up with it in his hands, falling away to the ground. (R.111:182) Frost then heard Webster yell something and saw him draw his firearm on Stietz. (R.102:35-36; R.111:183) In close succession after Webster drew his handgun, Stietz and Frost also drew their handguns at "about

the same time." (R.111:184) At that point, Warden Webster had his handgun pointed at Stietz' upper body with his arms extended at chin height and a two handed grip and a ready stance, as did Frost. (R.111:187) Stietz had his revolver pointed at Webster's upper torso, holding it in his right hand with his right elbow bent. (R.113:17-18, 99; App. 45) Robert Stietz testified that at that point he still did not know who these two people who had accosted him were. (R.113:114; App. 60)

A tense but polite standoff followed. (R.111:64-66; R.112:110; R.113:116; App. 62) The wardens told Stietz to drop his gun. Stietz answered by saying that they had drawn on him and he would drop his gun only after they dropped theirs. (R.113:116; App. 62) All agreed that Steitz stated that he was exercising his right to defend himself and his property. (R.112:111, 138; R.113:99; App. 45) Stietz and the wardens also agreed that no one raised their voice or made any threats or used any profanity during this standoff. (R.111:64-65; R.112:110; R.113:116; App. 62) After a minute or two of the mutual entreaties for the others to put their weapons down, Webster used the microphone on his collar to call LaFayette County Dispatch for assistance. (R.111:189; R.112:109; R.113:114; App. 60) All agreed that Stietz made no effort

to prevent that. (R.112:67; R.113:114; App. 60) Relieved that witnesses and assistance in the form of sheriff's deputies would soon arrive, Stietz testified at trial that that was the first point in time when he thought the men who were pointing their guns at him were officers of some sort. (R.113:114; App. 60)

Deputy Sheriff Broge arrived shortly at the scene in his squad car and shined his squad car's headlights on Stietz, Frost and Webster. (R.111:189; R.112:167) Deputy Broge initially walked to the area where the wardens were but then returned to his squad car for cover, as did the two DNR wardens. (R.112:168) Stietz did nothing to obstruct their movement to safe cover and, because the lights from the squad were shining on him, he was blinded and could no longer even see the wardens. (R.111:190) Shortly after the wardens retreated to the vehicle, Stietz lowered his gun hand, pointing it at the ground, and emptied the cartridges onto the ground. (R.111:193; R.112:169) Other deputies arrived and spoke with Bob Stietz and assured him he would not be gang tackled. (R.112:160-161) Stietz then placed his firearm on the ground and walked out to the squad, where he was placed in handcuffs by the deputies. (R.111:193) The standoff ended peaceably, with no shots having been fired.

Further facts will be set forth as necessary below.

ARGUMENT

I. ROBERT STIETZ WAS ENTITLED TO A SELF-DEFENSE JURY INSTRUCTION WHEN HE TESTIFIED HE WAS IN FEAR FOR HIS LIFE BECAUSE OF THE ACTIONS OF TWO ARMED STRANGERS WHO HAD TRESPASSED ON HIS LAND

Summary of Argument

Stietz testified he was in fear for his life when two armed strangers who had trespassed on his land accosted him and forcibly took his rifle from him and drew and pointed handguns at him. That evidence was more than sufficient to require the trial court to instruct the jury regarding self-defense.

Merits

A person is entitled to assert the privilege of self-defense when he reasonably believes that another person is unlawfully interfering with his person and in response he uses such force as he reasonably believes necessary to prevent or terminate that interference. Section 939.48(1), Stats.; WIS JI CRIMINAL 800; State v. Head, 2002 WI 99, ¶¶ 64-66, 255 Wis. 2d 194, 648 N.W.2d 413.

The United States Supreme Court has noted that:

> "The right to self-defense is the first law of nature."

District of Columbia v. Heller, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637, 644 (2008). Self-defense is universally recognized as an "inherent right." Id. The Supreme Court has since reaffirmed the unmistakable importance of the right of self-defense:

> "Self-defense is a basic right, recognized by many legal systems from ancient times to the present . . ."

McDonald v. City of Chicago, 561 U.S. 742, 744, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010).

In spite of the abundance of evidence entitling Stietz to a jury instruction on self-defense, the trial court refused to allow Stietz to present that defense. (R.107:49-58)

A. There is ample evidence in the record to require the defendant-appellant's requested self-defense instruction.

Wisconsin law establishes a minimal threshold at which an accused is entitled to a theory of self-defense jury instruction. The law requires only that the defendant produce "some" evidence in support of his privilege of self-defense. State v. Peters, 2002 WI App 243, ¶¶ 27-28 and n.4, 258 Wis. 2d 148, 653 N.W.2d 300. When determining whether the defendant has presented "some" evidence in support of self-defense, the trial court must consider the evidence in the light most favorable to the defendant. State v. Head, supra at 113. Wisconsin

cases make clear that evidence supporting a defense theory instruction may be "weak, insufficient, inconsistent or of doubtful credibility." The accused is entitled to a jury instruction on his theory of defense even if the supporting evidence is "slight." State v. Schuman, 226 Wis. 2d 398, 404 and n.3, 595 N.W.2d 86 (Ct. App. 1999).

There was abundant evidence at trial to support self-defense. Stietz himself testified that he had had ongoing problems with trespassers on his fenced in farmland, especially during deer hunting season. (R.113:92-104, 110-111, 136, 142-143; App. 38-50, 56-57, 82, 88-89) He was walking his land to check for trespassers, as well as to check the fence line since he would be pasturing cattle there after deer season. (R.113:136, 142-144; App. 82, 88-90) While walking his land, Stietz observed two strangers dressed in blaze orange trespassing on his land. (R.113:92; App. 38) The three met up by the cattle gate between Stietz' easement to the property and his farm property itself. As they approached each other, the strangers shined a flashlight into Stietz' eyes so he could not clearly see them. (R.111:177; R.113:125, 141; App. 71, 87) One of the two asked Stietz if he had seen any deer, to which he replied "seven." (R.111:179) Stietz testified that the strangers demanded his rifle and he refused to give it to them. (R.111:180;

R.113:95; App. 41) The two strangers then grabbed the rifle and forcibly wrestled it away from Stietz, with one of the men falling to the ground and the other pulling a handgun and pointing it at Stietz. (R.111:181-183; R.113:97; App. 43) Stietz testified that at that point he was fearful for his life and safety and drew his own pistol in response. (R.113:99; App. 45) A standoff ensued, with Stietz asking the two strangers to put down their handguns as they had drawn first and he would then put his down. (R.111:64-66; R.112:110; R.113:116; App. 62) Stietz testified at trial, and both of the conservation wardens present confirmed, that Stietz said he was doing what he felt necessary to protect himself. (R.112:111, 138; R.113:99; App. 45) Stietz testified and both wardens acknowledged in their testimony that Stietz never made verbal threats to shoot them, never tried to prevent them from calling for help, and never tried to prevent or discourage their retreat. (R.111:64-65; R.112:110; R.113:116; App. 62) That Stietz was acting in self-defense and that he reasonably believed his safety was in danger was the very issue that the jury should have been permitted to decide. That was the real controversy in question. Insofar as it hinged on Stietz' credibility, that too was a question that should have been resolved by the jury. State v. Coleman, 206 Wis. 2d 198, 213-214, 556

N.W.2d 701 (1996).

The fact that the jury acquitted Stietz on four of the six charged counts, where his testimony was at times in conflict with that of the wardens, strongly suggests that the jury did believe and did credit much or all of Stietz' testimony. Evidence presented at trial, including Stietz' testimony that he was in fear for his life, goes far beyond the "slight" or "some evidence" necessary to establish a defendant's right to an instruction on self-defense.

B. The denial of Stietz' request for a self-defense instruction deprived him of his right to present a defense.

Every person charged with a criminal offense has a fundamental constitutional right to present a defense under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, as well as Article 1, § 7 of the Wisconsin Constitution. The United States Supreme Court has repeatedly observed that few rights are more fundamental than that of an accused to present a defense. Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). The Supreme Court of Wisconsin has also frequently recognized the importance of the defendant's constitutional rights to present a defense, and that those rights trump even legislative enactments. State v. Dodson, 219 Wis. 2d 65, ¶¶ 35-36, 580 N.W.2d 181 (1998).

Stietz' defense, including his testimony and his counsel's trial preparation, were predicated in large part on the theory of self-defense. Stietz' counsel had requested WIS JI CRIMINAL 800, as well as two alternative self-defense formulations. (R.107:49-58) The trial court rejected all of those requests. (R.107:49-58) Consequently, in his closing argument to the jury, defense counsel was precluded from even discussing or arguing that Bob Stietz' conduct was privileged under the law of self-defense. That denial of Stietz' right to present a defense requires a reversal of his convictions.

II. THE TRIAL COURT ERRED IN REFUSING TO PERMIT EVIDENCE OF AND REFUSING TO GIVE A JURY INSTRUCTION REGARDING THE TRESPASSING BY THE CONSERVATION WARDENS

Summary of Argument

Stietz attempted to offer evidence that the wardens were trespassing, and requested a jury instruction on that trespass, but was rebuffed by the trial court. The trial court's determination denied Stietz his right to present a defense and to a fair trial, specifically denying him his ability to present evidence and have the jury consider whether the conservation wardens were acting in their official capacity and within the lawful scope of their authority.

Merits

The only counts on which the jury convicted Stietz were Count 3, a misdemeanor charge of resisting or obstructing an officer, and Count 6, a felony charge of endangering safety by use of a dangerous weapon: intentionally pointing a firearm at a law enforcement officer. (R.7a) To sustain the charges of resisting an officer (Count 3) and endangering safety by pointing a firearm at a law enforcement officer (Count 6), the State must prove that the conservation wardens were acting in their official capacity and within the lawful scope of their authority. WIS JI CRIMINAL 1765 (Count 3, elements 2 and 3), and WIS JI Crim. 1322A (Count 6, element 4). Actions are "unlawful" if tortious or expressly prohibited by the criminal law or both. See Section 939.48(6), Stats. The act of trespass and the use of unreasonable force by the wardens were certainly torts in addition to very likely being in violation of the Wisconsin Criminal Code. Section 943.13, Stats., trespass to land, prohibits any person from entering any enclosed, cultivated or undeveloped land of another without the express or implied consent of the owner or occupant. Section 943.13(1m)(a). A succinct definition of trespasser squarely applicable to the wardens in this case is found in WIS JI CIVIL 8012:

> "A person who enters or remains upon property in possession of another without express or implied consent is a trespasser."

Similarly, any force used by the wardens in excess of what is reasonably believed to be needed to accomplish certain lawful ends is "by definition unlawful." State v. Herriges, 155 Wis. 2d 297, 301-302, 455 N.W.2d 635 (Ct. App. 1990). It is beyond dispute that "there are circumstances where a police officer's use of force is unlawful [including] if he uses unnecessary and excessive force." State v. Mendoza, 80 Wis. 2d 122, 154, 258 N.W.2d 260 (1977). The forcible taking of Stietz' rifle which he was lawfully bearing is addressed in greater detail in Argument Section IV, infra.

When Stietz first observed the wardens, they were approximately 100 yards onto his property inside the fenced enclosure. (R.113:92, 125, 141; App. 38, 71, 87) The wardens had neither a search warrant nor consent to enter Stietz' fenced farm property or the easement serving it.

Because the conservation wardens were trespassing when they encountered Stietz, by definition they were not acting in an official capacity or within the lawful scope of their authority. The wardens were trespassing on Stietz' farm property. R.113:92-94, 123; App. 38-

40, 69) Both Webster and Frost admitted they were on Stietz' land, but neither ever articulated any legally justifiable reason for trespassing onto the property. They only testified that their curiosity prompted them to go onto the property because they had observed a car parked in a field. (R.111:166-167, 173-174; R.112:13) They did not articulate any reasonable suspicion to believe that any crime or other violation was being committed when they undertook to trespass on Stietz' property. By their own admission, they walked through the cattle gate onto Stietz' fully enclosed and fenced pastureland for a distance of some 100 yards. (R.111:173-174; R.112:13)

A. The conservation wardens were not acting with lawful authority because they trespassed on Stietz' land.

An officer engaged in a trespass loses his legal authority. See State v. Gaulke, 177 Wis. 2d 789, 792, 503 N.W.2d 330 (Ct. App. 1993), where the trial court dismissed violations of deer hunting regulations on the grounds that a conservation warden had "committed an unprivileged trespass on private land to issue the citations." Id. The Court of Appeals reversed, but only because the defendants there could not reasonably claim actual possession or good title to the land, and an action for trespass requires one or the other. That was not an issue with respect to the wardens going onto Stietz' own farmland.

Similarly, in State v. Barrett, 96 Wis. 2d 174, 291 N.W.2d 498 (1980), the court held that a deputy sheriff conducting a traffic stop in a neighboring county was not acting in his official capacity. Barrett held that once the deputy crossed the county line, he was no longer acting in his official capacity:

> "If a deputy sheriff crosses the county line of his employment, and if there are no circumstances of his employment extending his duty to act, then the attempt to exercise his powers as a peace officer outside of his county of employment is not within the scope of his employment."

Id. at 181. By analogy, once the conservation wardens crossed the line and trespassed onto Stietz' fenced in property, they were not acting with lawful authority.

DNR agents do not have carte blanche to enter the private property of another by virtue of their employment. The controlling statutory section, Chapter 29 of the Wisconsin Statutes, contains no such provision. Admittedly, while Section 29.924(5), Stats., does allow agents of the department to enter private lands in certain circumstances, none of those circumstances are present here (for example, there is no allegation that the trespass was motivated by a concern regarding a "dead or diseased animal). In any case, that provision – the only such statute possibly exempting the DNR agents from trespass – explicitly

requires DNR wardens to make "reasonable efforts to notify the owner or occupant" before entering – a clear acknowledgment of that individual's superseding privacy right and authority to exclude others, including agents of the State, if they so choose. State v. Kieffer, 217 Wis. 2d 531, 546, 577 N.W.2d 352 (1998). No such notification by the wardens was even attempted.

The entry is also not justifiable under the arrest provision of Section 29.921, Stats. That subsection grants a limited arrest power to DNR wardens when confronted with probable cause that certain offenses have been committed. However, the record discloses no probable cause to arrest Stietz at the time agents chose to trespass and, even if such probable cause existed, a warrantless entry into Stietz' private property to effectuate an arrest is itself constitutionally questionable. Payton v. New York, 445 U.S. 573, 590, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); State v. Ferguson, 2009 WI 50, ¶ 17, 317 Wis. 2d 586, 767 N.W.2d 187.

The Wisconsin Administrative Code is similarly lacking in authority permitting wardens to trespass on private property. In fact, at least one provision implicitly concedes that DNR agents are capable of trespass. WIS. ADMIN. CODE NR § 1.49(1). Case law also implicitly

acknowledges that DNR agents can be trespassers. See Miller v. City of Monona, No. 10-CV-221-wmc, slip op. (W.D. Wis. December 28, 2012) (rejecting the DNR's motion for summary judgment in context of an unlawful entry in part because there was no proof that either the regulatory scheme permitted the entry or that the owner had consented to what may well have been a trespass).

Lacking any lawful justification for their actions, the DNR wardens should be treated as trespassers and acting outside their authority as a matter of law, a conclusion that is supported by clearly established precedent. As early as 1948, the Wisconsin Supreme Court wrote:

> "The rule is that where an authority given by law is exceeded, the officer loses the benefit of his justification, and the law holds him a trespasser *ab initio* although to a certain extent he acted under the authority given."

Wallner v. Fidelity & Deposit Co. of Maryland, 253 Wis. 66, 70, 33 N.W.2d 215 (1948). That rule applies to these two wardens precisely. In entering fenced private land, they exceeded their authority and became trespassers, pure and simple, and lost their cloak of lawful authority.

B. The trial court's decision to preclude any reference to the wardens' trespass denied Stietz his Sixth Amendment right to present a defense.

In response to the State's Motion in Limine (R.48), the trial court entered an order forbidding counsel for Stietz from even characterizing the wardens' conduct as trespassing. (R.52:2) The trial court likewise refused to instruct the jury on the issue of trespass in spite of a wealth of evidence, including the wardens' own admissions, that they had trespassed on Stietz' land. (R.42; App. 22-24) These determinations by the trial court denied Stietz his Sixth Amendment right to present a defense insofar as it effectively denied his counsel the opportunity to challenge essential elements of Count 3 and Count 6, and precluded him from arguing that the wardens were not acting in their official capacity or within the lawful scope of their authority.[1]

The same authorities set forth in the preceding Section I.B. regarding the right to present a defense are applicable with respect to the trial court's failure to instruct on this issue.

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1 Although precluded by the trial court's rulings, excluding reference to trespass would have further undermined Stietz' ability to establish the reasonableness of his conduct as being self defense. An encounter with an armed trespasser, as opposed to a mere bypasser, is far more likely to engender fear for one's personal safety.

III. STIETZ WAS DENIED HIS RIGHT TO A PUBLIC TRIAL BECAUSE THE TRIAL COURT HELD THE JURY INSTRUCTIONS CONFERENCE BEHIND CLOSED DOORS IN A DOWNSTAIRS CONFERENCE ROOM

Summary of Argument

Every accused is guaranteed the right to a public trial. The trial court violated that important right by holding a part of the trial, namely the hearing on jury instructions, in a closed downstairs conference room with no notice to the public or public presence.

Merits

A. The Public Trial Right.

Both the state and federal constitutions guarantee an accused the right to a public trial in the Sixth Amendment to the United States Constitution and Article 1, § 7 of the Wisconsin Constitution. The importance of the public trial right is underscored by the additional and separate enactment of Section 757.14 of the Wisconsin Statutes. The Sixth Amendment right to a public trial is applicable to the states via the Fourteenth Amendment to the Constitution. In re Oliver, 333 U.S. 257, 273, 68 S.Ct. 499, 92 L.Ed. 682 (1948).

An accused's right to a public trial "reflects a concept fundamental to the administration of justice in this country." Estes v.

Texas, 381 U.S. 532, 588, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965) (Harlan, J., concurring).

> "The central aim of a criminal proceeding must be to try the accused fairly and [U.S. Supreme Court case law has] uniformly recognized the public trial guarantee as one created for the benefit of the defendant."

Waller v. Georgia, 467 U.S. 39, 46, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). In other words, "a fair trial is the objective, and "public trial" is an institutional safeguard for attaining it." Estes, supra at 588.

Indeed, the right to a public trial is a foundational principle of not only our judicial system but also our democratic system of government. The founders of this country were mindful of government abuses occurring within their recent generational memory and therefore saw the right to a public trial as a means of avoiding notorious historical injustices like the Spanish Inquisition and the Star Chamber. Oliver, supra at 269. The right to a public trial is also well-rooted in English common law and was an early inclusion in independence-era state constitutions. Id. at 266-267. The public trial guaranty is premised on the common-sense and democratic assumption that the exercise of State power requires close monitoring by fellow citizens. Thus:

> "[t]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on

> possible abuses of judicial power."

Id. at 270.

> "Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges, lawyers, witnesses and jurors will perform their respective functions more responsibly in an open court than in secret proceedings."

Estes, supra at 588. The practical benefits of "interested spectators" to the accused are many. Oliver, supra at 270, n.25. Moreover, bias, partiality, and all forms of "misconduct" are discouraged by the presence of citizen observers. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 559, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980). The presence of observers helps to ensure that State actors are acting ethically and responsibly.

1. Deprivation of the public trial right is a structural error requiring an automatic reversal.

Denial of an accused's right to a public trial is a "structural error." Johnson v. United States, 520 U.S. 461, 469, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (citing Waller, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984)). Structural errors are unique and found in "only a very limited class of cases." Id. Structural errors are so-called because their existence damages "the framework within which the trial proceeds." Arizona v. Fulminante, 499 U.S. 279, 310, 111 S.Ct. 1246,

113 L.Ed.2d 302 (1991). Structural errors are thus distinguished from errors "in the trial process itself." Johnson, supra at 469. Rather:

> "These errors deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for the determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.'"

Neder v. United States, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (quoting Rose v. Clark, 478 U.S. 570, 577-78, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986)) (ellipsis in original).

Structural errors effectively rob the proceedings of any legitimacy they might otherwise have, even when the proceedings are superficially 'fair.' Structural errors are therefore not amenable to harmless error analysis - they are presumptively harmful and can only be remedied via an automatic reversal. State v. Ndina, 2009 WI 21, ¶ 43, 315 Wis. 2d 653, 761 N.W.2d 612; Waller, supra at 49-50 & n.9; Neder, supra at 8. Importantly, even though "the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance" that does not mean they are not real. Waller, supra at 49, n. 9. A deprivation of the right to a public trial distorts the legal process, leaving it unable to reliably function. As a result, even apparently *valid* convictions must yield to the "'great, though intangible, societal loss

that flows' from closing courthouse doors." Id. (quoting People v. Jones, 47 N.Y.2d 409, 416, 391 N.E.2d 1335 (1979)).

B. Stietz' right to a public trial was violated in this case.

1. A closure occurred that implicates the values served by the Sixth Amendment.

Wisconsin courts utilize a two-step analytical process in examining whether a public trial violation has occurred. First, this Court must determine "whether the closure at issue implicates the Sixth Amendment right to a public trial." Ndina, supra at ¶ 46. The Wisconsin Supreme Court has therefore suggested that "trivial" closures do not implicate the Sixth Amendment right to a public trial. Id. ¶ 48-49. Thus, even when a proceeding that should be held open to the public is 'unjustly' closed, a public trial violation will not automatically result. Id. In adopting this apparent exception to what is otherwise a fundamental constitutional right, Ndina cites to other jurisdictions that have formulated a similar rule. Id.[2] The Wisconsin Supreme Court has therefore held that an accused's public trial rights

2 Importantly, the idea that some closures are trivial, and thus that a defendant's public trial rights do not effectively matter depending on other factual considerations, has never been ratified by the United States Supreme Court. It is worth noting that the holding in Ndina is called into question by Presley v. Georgia, where the Court unanimously held that the accused's public trial right was violated when a single spectator was removed during voir dire. Presley v. Georgia, 558 U.S. 209, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010).

are only triggered when a closure "implicate[s] the values served by the Sixth Amendment." Id. (quoting United States v. Perry, 479 F.3d 885, 890 (D.C. Cir. 2007)). The Wisconsin Supreme Court lists four values served by the Sixth Amendment in relation to the public trial right:

- "to ensure a fair trial;"
- "to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions;"
- "to encourage witnesses to come forward; and"
- "to discourage perjury."

Id. (quoting Peterson v. Williams, 85 F.3d 39, 43 (2d. Cir. 1996)). However, "[t]hese four values do not necessarily represent an exhaustive list of the values served by the Sixth Amendment right to a public trial." Ndina, supra at ¶ 49, n.25.

Following the close of evidence, the trial court announced its intention to hold a jury instruction conference the following morning and stated that it intended to relocate this stage of the trial to somewhere other than the courtroom where all prior proceedings had been held. (R.113:179)

The Court also stated that it did not "want to do [the jury instruction conference] in the open when we have a crowd of people here." (R.113:179) The rationale given by the trial court for moving

the jury instructions conference out of the courtroom and behind a closed door is inexplicable given that the trial had proceeded for four days up to that point with no hint of any disturbance or disruption by anyone in attendance. That supposed concern of the trial court was never explained on the record. Although the State proposed a conference room as a location, no specific decision was made on the record in public about where the conference would be held, whether it would be accessible to the public, what the seating arrangements for spectators would be (or if they were even welcome) or any other logistical details.

The jury instruction conference was held early the next day in a small conference room a floor down from the courtroom (R.70:13-14), the room apparently proposed by the State. Importantly, while the relocation was discussed as a possibility the previous evening (with no actual decision being made), the actual move was suddenly effectuated on the morning of the conference without further justification or explanation or notice to the public. As trial counsel recorded in a near-contemporaneous written brief challenging that move:

> "On the last morning of trial, the Court announced to counsel for both parties off the record that it was moving the jury instruction conference to a small conference room one floor down from the courtroom. When defense counsel asked why and

> raised a public trial concern, the Court explained in substance that there were too many spectators in the courtroom and that the Court was concerned about disruption."

(R.70:13-14) The jury instruction conference then occurred on the record in that small conference room, without notice to spectators in the courtroom. Thus, while the trial had been consistently attended by at least "40 to 60" spectators, no notice was given to those spectators as to how that obviously interested community could continue following the trial proceedings. (R.107:64)

While the initial objection from trial counsel (made at the time the move was announced) was not recorded, trial counsel did renew that objection on the record:

> "And the second thing I need to say is earlier this morning, first thing this morning when we were off the record and discussing where to have the jury instruction conference, I did not mean to be picking a fight with Your Honor about that. I just–and I don't have the law clear in my head on this point, but I did have concern and do that a jury instruction conference on the record may be a critical stage in the proceedings. Now, Mr. Stietz has been here, but the public has not been."

(R.107:63-64) Trial counsel's objection, however, was summarily dismissed by the Court. (R.107:64) The trial court insisted that the door had been open for at least part of the proceeding and, had a news reporter asked to attend, they would have been allowed to do so.

(R.107:64) As a purported justification for the closure, the trial court asserted that the jury instruction conference would have been "unruly" and that, by moving the conference, he had hoped to avoid a "brouhaha" in the courtroom:

> "Now, my problem would be - - is I would have been having deputies escort people out, arresting them for contempt, etc., for not remaining silent, and I don't want to create a brouhaha upstairs in the courtroom or a commotion in the courtroom."

(R.107:64) The trial court's excuse for removing the proceedings from the open public courtroom is farfetched given that there had been no disruptions or disturbances at any previous point in the trial, and given that the jury instructions conferences are not typically the most emotionally charged part of a trial.

Clearly, this is a constitutionally cognizable closure. The proceedings were intentionally moved from the courtroom itself, where many spectators had been regularly attending during the entire trial, to a conference room in a part of the courthouse reserved for administrative functions, a room within the county clerk's office. (R.113:179) The location of the proceedings was not disclosed to spectators, who were numerous, and there is no evidence that the trial court made *any* effort to inform likely spectators that the proceedings had been moved and that spectators were welcome. In fact, the trial

court's statements on the record conclusively demonstrate in the trial court's view that spectators *were not* welcome. (R.113:179) Any spectators present for the trial court's closing remarks the day prior to the conference would have received a clear and distinct message: Stay out.

Although a door was left open for *part* of the proceedings, the trial court eventually closed it. (R.107:64) There is no evidence that any potential spectator, who upon finding their way to the lower level, would be able to discern that behind this door there existed a public proceeding that he or she was freely permitted to observe. As noted, the trial court's express purpose in moving the proceeding was to avoid spectators and to hold the proceedings out of the "open." (R.113:179) The trial court's statements from the bench in that regard were an unmistakable further signal communicating that intent to any potential spectator. This closure impinged on those values the Sixth Amendment right to a public trial is intended to serve. The jury instruction conference was not just an administrative exercise; rather, it was a lively continuation of the ongoing trial between Stietz and the State. Issues were debated on the record that zeroed in on the heart of the legal controversies. These debates shaped the ultimate jury

instructions, which are legally significant in and of themselves, impacted the framing of the case in trial counsel's closing arguments, and therefore impacted the resulting verdict.

For example, extensive debate was had regarding proposed instructions as to the wardens' right to be present on the land in question. (R.107:30) To resolve the dilemma, a bargain was struck: trial counsel should avoid making certain statements in his closing argument, and in return, an instruction he felt was legally problematic would not be used. (R.107:30-31) Throughout the conference, the trial court expressed legal opinions, made important rulings, and candidly commented on issues central to the legal controversy at issue. Perhaps the most important thing that occurred during this conference was the trial court's decision to rule against Stietz regarding a self-defense instruction – a decision that had devastating impact on the defense case and which necessarily precluded the jury from considering that critical issue in its deliberations. (R.107:56)

Above all, the public trial right is intended to bring the scrutiny of citizen observers to bear on State actors. It is this scrutiny that is one very reliable means of ensuring a "fair trial" – the first of four factors identified by the Wisconsin Supreme Court. Ndina, supra at ¶ 49. At

the same time, this scrutiny is also closely linked to the second Ndina factor – ensuring that judges and prosecutors act responsibly. Id. Both are at play in the context of a jury instruction conference, especially a jury instruction conference like this one where there were sharp disputes over significant trial issues. The trial court was required to make a series of decisions that had a direct impact on the fairness and legitimacy of Stietz' trial. Citizen scrutiny of this process is no less essential here than it is at voir dire or at a suppression hearing – two types of proceedings to which the U.S. Supreme Court has held that the public trial right applies. Waller, supra at 47; Presley, supra at 213.

While no court of this State has grappled with this particular issue – whether the public trial right applies to a jury instruction conference – the decisions of the United States Supreme Court support the inclusion of the public trial right to cover a jury instruction conference as they evince a consistent broadening of the right to include procedures such as voir dire and suppression hearings. The only court in the nation to confront the issue – the Washington Court of Appeals – held that no public trial violation occurred so long as objections to the jury instructions were restated in open court. Washington v. Burdette, 313 P.3d 1235, 1238, 1242-43, 178 Wn. App.

183 (Wash. App. 2013). That did not occur here. No effort was made by the trial court to restate or discuss any of the objections to jury instructions in open court.

Finally, the jury instruction conference certainly is a critical stage of the trial for purposes of a companion Sixth Amendment trial guaranty, the right to counsel. State v. Anderson, 2006 WI 77, ¶¶ 68-69, 291 Wis. 2d 673, 717 N.W.2d 74; State v. Mills, 107 Wis. 2d 368, 371, 320 N.W.2d 38 (Ct. App. 1982); United States v. Morrison, 946 F.2d 484, 503 (7th Cir. 1991). As both provisions are intended to ensure fair trials, it makes sense that a critical stage for the purposes of the right to counsel should also be a proceeding at which the public is allowed to attend.

2. The closure was not justified.

Once this Court determines that a closure has occurred, it must then assess whether "the closure was justified under the circumstances of the case." Ndina, supra at ¶ 46. Closure is justified if four conditions are met:

> "(1) the party who wishes to close the proceedings must show an overriding interest which is likely to be prejudiced by a public trial, (2) the closure must be narrowly tailored to protect that interest, (3) alternatives to closure must be considered by the trial court, and (4) the court must make findings sufficient to support the closure."

Id. at ¶ 56 (quoting State v. Vanness, 2007 WI App 195, ¶ 9, 304 Wis. 2d 692, 738 N.W.2d 154). Here, the trial court made the decision to close the proceedings based on an unsupported fear of creating a "brouhaha" or a "commotion." (R.107:64) So strong was the trial court's fear, apparently, that it indicated that arrests for contempt would result if not for the relocation of the jury instruction conference. (R.107:64) However, there is no evidence in the record that any such disruptions or riotous behavior occurred or were likely to occur during the course of the entire trial, even with as many as 60 spectators present. (R.70:14) Because those spectators had avoided causing any commotion during the entire length of the trial, the trial court's alleged justification is little more than baseless speculation, *not* a concrete identification of an"overriding interest." No alternatives were considered and no findings – aside from the trial court's spurious remarks – were made to support the closure. Because the closure at issue clearly fails the requisite four-prong test, it was constitutionally impermissible.

IV. STIETZ' SECOND AMENDMENT RIGHTS TO KEEP AND BEAR ARMS WERE VIOLATED WHEN HE WAS FORCIBLY DISARMED BY TWO CONSERVATION WARDENS WHO HAD TRESPASSED ON HIS LAND

Summary of Argument

The Second Amendment confers a right on every American citizen to peaceably bear arms. Robert Stietz was lawfully and peaceably carrying a rifle and pistol on his farmstead while checking for trespassers. He was committing no crime and the conservation wardens had no lawful authority to forcibly disarm him. Their actions in doing so violated Stietz' Second Amendment rights and precludes his prosecution.

Merits

The Second Amendment to the United States Constitution states:

> "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 United States Supreme Court has conclusively ruled that this amendment confers a right to individual citizens. District of Columbia v. Heller, 554 U.S. 570, 595, 625-26, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). In other words, the United States Supreme Court has confirmed that the Second Amendment confers robust protections to private citizens wishing to possess and carry arms for the purposes of

defending their persons or property. McDonald v. City of Chicago, 561 U.S. 742, 767, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010). This rejuvenated conception of the Second Amendment is applicable to the states via the Fourteenth Amendment. Id. "Self-defense is a basic right" and "individual self-defense is the central component of the Second Amendment Right." Id. at 767 (citations omitted). Indeed, both Heller and McDonald, read in tandem, make clear that an individual's right to defend his property while bearing arms is "fundamental" and "deeply-rooted" in our nations' legal traditions and history. Id.

The Wisconsin Constitution provides like protections for firearm owners, giving citizens of this state the right to "keep and bear arms for security, defense, hunting, recreation or any other lawful purpose." WIS. CONST. ART. 1 § 25. The Wisconsin Supreme Court has held that this provision is "intended to grant a fundamental individual right." State v. Cole, 2003 WI 112, ¶ 20, 264 Wis. 2d 520, 665 N.W.2d 328.

A. Stietz had the right to possess a firearm at his property and to resist the unlawful attempts of trespassing agents of the State to forcibly deprive him of that right.

Although the federal constitution grants an individual the right to possess a firearm, that right is "not unlimited." Heller, supra at 626. Nothing in the record suggests, however that Stietz was disqualified

from possessing a firearm for any reason or that his possession of a firearm fell within those exceptions contemplated in Heller. He was not a felon and was not mentally ill. (R.27:16) Id. He also was not carrying firearms in "sensitive places" such as a school or government building. (R.27:16) Id. Rather, Stietz was lawfully carrying a rifle while patrolling for trespassers on his farm. Stietz was exercising his fundamental constitutional right to possess a firearm in furtherance of "the inherent right of self-defense" which includes the right to defend his property. McDonald, supra at 767 (citations omitted). Stietz' conduct was at the core of constitutionally protected behavior. (R.27:16)

B. The game wardens had no legal justification for seizing Stietz or for trying to forcibly disarm him.

There was no reasonable suspicion that Stietz had been unlawfully hunting, thus negating any justification for stopping and questioning Stietz. Deer hunting hours had just ended at the time the wardens observed Stietz' vehicle. (R.112:10)

In any case, while it was "possible" that the person connected to that car and that gear could have still been hunting, there was no law against hunting other game after dark, only against hunting deer. Section 29.337, Stats. At the same time, the wardens had no way of

knowing how much of a trek this "possible" deer hunter had to complete before returning to his car. The wardens heard no gunshots that would indicate hunting was ongoing. (R.27:17; R.103:20-21, 26) Upon sighting Stietz, it was clear that he was not carrying a deer carcass or in possession of a drag rope. (R.R.27:17; R.103:26; R.110:26) Stietz was not wearing blaze orange, as a deer hunter would. (R.103:13; R.113:108-109; App. 54-55) At the time they encountered Stietz, he had a lawful right to possess his weapon, hunt small critters, and to scout for trespassers. Importantly, he denied hunting deer. (R.27:17; R.103:13-14) Most damningly, the wardens observed Stietz behaving in a manner inconsistent with deer hunting but consistent with his stated purpose – checking for trespassers. (R.103:12-15) On the basis of these facts, there can be no serious argument that there were "specific, articulable facts and reasonable inferences from those facts" that Stietz had committed or was about to commit a crime or otherwise violate the hunting regulations. State v. Guzy, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987) (citations omitted). At best, the wardens had a mere hunch that Stietz could have been hunting, and that alone is legally insufficient. Id.

Lacking reasonable suspicion, there certainly was nothing

remotely resembling probable cause at the time the DNR wardens made contact with Stietz. See Section 968.07(1)(d), Stats.; Molina v. State, 53 Wis. 2d 662, 670, 193 N.W.2d 874 (1972); Virginia v. Moore, 553 U.S. 164, 173, 128 S.Ct. 1598, 170 L.Ed.2d 559 (2008). There was therefore no legal justification for the wardens to attempt to forcibly disarm Stietz.

C. Stietz cannot be lawfully prosecuted for refusing to be forcibly disarmed at gunpoint by trespassing agents of the State.

Simply put, if the Second Amendment means anything, it means that Stietz cannot be prosecuted for his refusal to submit to being disarmed by two armed trespassers who sought unlawfully to arrest him and to take his guns. This is a distinct inquiry from the self-defense argument advanced in the foregoing Section I. Instead, the narrow question for this Court is as follows: Where Stietz was exercising both a federal and state constitutional right to keep and bear arms, may the State prosecute him for not relinquishing that constitutional right upon demand of armed trespassers? The answer is obviously no. Stietz had no duty to surrender his Second Amendment rights, to submit to being disarmed on spurious demand of armed trespassers even if they were conservation wardens. A constitutional right would be illusory if a

citizen was required to surrender it on demand of state agents when, as here, those agents were without lawful authority and were themselves lawbreakers. This is really not quite so radical as the State or the trial court made it out to be when the matter was litigated in the trial court. (R.103) After all, it is well-settled law that a state may not burden the exercise of a constitutional right with penalties. Griffin v. California, 380 U.S. 609, 614, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); United States v. Jackson, 390 U.S. 570, 572, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968); Wilkie v. Robbins, 551 U.S. 537, 555-56, 127 S.Ct. 2588, 168 L.Ed.2d 389 (2007); Fuller v. Oregon, 417 U.S. 40, 54, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974).

Plainly, then, the State may not impose a direct criminal sanction to punish constitutionally protected conduct. United States v. Goodwin, 457 U.S. 368, 372, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982); Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978); North Carolina v. Pearce, 395 U.S. 711, 723-24, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); Estep v. United States, 327 U.S. 114, 126-27, 66 S.Ct. 423, 90 L.Ed. 567 (1946) (Murphy, J., concurring). At all times, Stietz was merely exercising his constitutional right to bear arms for the purpose of self-protection. It was the wardens' actions in

forcibly wrestling Stietz' rifle away from him that was unlawful. See Mendoza, supra at 154. When armed agents of the State persisted in breaking the law, by trespassing and attempting to seize and forcibly disarm him without legal justification, Stietz' individual constitutional rights take precedence and he cannot be prosecuted for lawful exercise of those rights. Accordingly, the criminal charges and ensuing convictions must be vacated.

V. DNR WARDENS ARE NOT "LAW ENFORCEMENT OFFICERS" UNDER SECTION 941.20(1m)(b) OF THE WISCONSIN STATUTES

Summary of Argument

Wisconsin Statute Section 941.20(1m)(b) criminalizes pointing a firearm at specified law enforcement officers. The DNR wardens involved in this case are not included within the statutory definition of that section, so there can be no violation of that statute with respect to the DNR conservation wardens.

Merits

A. Legal background.

Stietz' sole felony conviction in this case stems from count six of the information alleging that he pointed a firearm at a "law enforcement officer." (R.7a; R.78a; R.92) This count of conviction

cannot stand because DNR conservation wardens do not fit into the category of "law enforcement officers" as that term is used in this statute. Unexplained quirk of legislative drafting or no, the fact remains that the conduct at issue has not been expressly criminalized. Accordingly, the underlying conviction cannot stand. The statutory language in question is as follows:

> "Whoever intentionally points a firearm at or towards a law enforcement officer, a fire fighter, an emergency medical technician, a first responder, an ambulance driver, or a commission warden who is acting in an official capacity and who the person knows or has reason to know is a law enforcement officer, a fire fighter, an emergency medical technician, a first responder, an ambulance driver, or a commission warden is guilty of a Class H felony."

Section 941.20(1m)(b), Stats. The language is precise and identifies several discrete types of public agents. Notably, "commission wardens" are included but conservation wardens are not.[3]

The statute does not define "law enforcement officer" further, even though it does define both an "emergency medical technician" and a "first responder." See Sections 941.20(1m)(a)(1) & (2), Stats.

Section 941.20(1m)(b), Stats., is not applicable to "DNR conservation wardens" for two reasons beyond the failure of the

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3 As defined in Section 939.22(5), Stats., a commission warden is a "conservation warden employed by the Great Lakes Indian Fish and Wildlife Commission." DNR wardens act pursuant to distinct statutory authority and are expressly denominated as "conservation wardens." See Section 23.10, Stats.

legislature to expressly include them. First, they are employed by the Department of Natural Resources, an agency distinctly different in nature from agencies normally considered law enforcement agencies, such as local police departments or county sheriffs. The Wisconsin Department of Natural Resources' own mission statement contains not even a hint that it is a law enforcement agency.[4] Secondly, DNR conservation wardens do not have broad powers of arrest for any violation of law. To the contrary, their powers of arrest are circumscribed and limited. See Section 23.11(4), Stats. Conservation wardens are even explicitly prohibited by Section 29.921(5), Stats., from conducting any investigations for violations of state law with a few narrow exceptions.

As tempting as it may be to import other definitions and concepts into this statute, this Court should resist the State's invitation to do so. Appellate courts are simply not allowed to expand and rewrite the criminal law. In interpreting statutory language, it is axiomatic that

4 That statement provides: "Our Mission - To protect and enhance our natural resources: our air, land and water; our wildlife, fish and forests and the ecosystems that sustain all life. To provide a healthy, sustainable environment and a full range of outdoor opportunities. To ensure the right of all people to use and enjoy these resources in their work and leisure. To work with people to understand each other's views and to carry out the public will. And in this partnership consider the future and generations to follow." http://dnr.wi.gov/about/mission.html

this Court "may not substitute its judgment for that of the legislature." State v. Steffes, 2013 WI 53, ¶ 21, 347 Wis. 2d 683, 832 N.W.2d 101 (quoting City of Menasha v. WERC, 2011 WI App 108, ¶ 18, 335 Wis. 2d 250, 802 N.W.2d 531) (quotations and brackets omitted).

Rather, the "legislature is presumed to enact statutory provisions with full knowledge of the existing laws." Glinski v. Sheldon, 88 Wis. 2d 509, 519-520, 276 N.W.2d 815 (1979). When interpreting the law as written by the legislature, this Court should exercise restraint and assume that "the legislature chose its terms carefully and precisely to express its meaning." Ball v. District No. 4, Area Board of Vocational, Technical & Adult Education, 117 Wis. 2d 529, 539, 345 N.W.2d 389 (1984); State v. Hemp, 2014 WI 129, ¶ 31, 856 N.W.2d 811, 2014 Wisc. LEXIS 949. In other words, this Court is required to assume that the legislature knew what it was doing when it drafted the statute in question and meant what it said. Presumably the legislature knew that it was including commission wardens but not including DNR conservation wardens. This Court should not endeavor to "fix" omissions that, while curious, are nonetheless the product of conscious legislative choice.

B. The criminal statute in question must be strictly construed against the State.

Wisconsin courts have recognized without exception that "it is a well-known canon of construction that a criminal statute must be strictly construed in favor of the accused." State v. Wrobel, 24 Wis. 2d 270, 275, 128 N.W.2d 629 (1964). Conversely, in interpreting a criminal statute, the courts must construe it strictly against the State. Criminal statutes must be construed strictly to precisely define and to afford notice of what the criminal law prohibits. State v. Manthey, 169 Wis. 2d 673, 686, 487 N.W.2d 44 (Ct. App. 1992). Both Wrobel and Manthey applied that canon of interpretation to vacate convictions of alleged violations that were not included within the statutory definition involved. Applying this bedrock rule of strict construction of criminal statutes, this Court must reject the State's efforts to broaden and graft terms into the statute. Stietz' actions involving DNR wardens cannot properly be the basis for criminal liability and the conviction under count six must be voided.

C. A comparative analysis of other statutes supports Stietz' reading.

It is clear from looking at other, similar statutes that the legislature knows how to include the DNR in a statute when it wishes

to do so. For example, in the statute prohibiting resisting or obstructing an officer, the legislature purposefully selected broad language which, in turn, clearly and unmistakably includes DNR conservation wardens in its broad definition of an "officer." Section 946.41(2)(b), Stats.

The two statutes also have distinctly different definitional approaches: the resisting statute is all-encompassing in its apparent classificatory scheme. The authors' chosen words place a broad spectrum of public actors within the category of "officers." Compare this comprehensive approach to the tack taken in Section 941.20(1m)(b), Stats., where the legislature instead enumerates a circumscribed list of particular public actors rather than using open-ended words and phrases. The legislature has taken pains to include commission wardens, ambulance drivers, and first responders in Section 941.20(1m)(b), Stats., while, at the same time, conspicuously excluding DNR conservation wardens from its list. Assuming, as one must, that the legislature knew what it was doing when it drafted this language, the exclusion of DNR conservation wardens cannot be glossed over.

This omission, whatever its underlying motivation or causation, is fatal to the State's position. "Under the doctrine of expressio unius

est exclusio alterius, "the express mention of one matter excludes other similar matters [that are] not mentioned."" FAS, LLC v. Town of Bass Lake, 2007 WI 73, ¶ 27, 301 Wis. 2d 321, 733 N.W.2d 287 (quoting Perra v. Menomonee Mut. Ins. Co., 2000 WI App 215, ¶ 12, 239 Wis. 2d 26, 619 N.W.2d 123). Applying this canon of construction, the Court is left with no other choice than to conclude that if the legislature meant to include DNR conservation wardens within the scope of Section 941.20, Stats., it would have done so expressly. Importantly, the statutory enumeration in question is discrete and not set off by any signal words that would permit a broader reading. Beaver Dam Community Hospitals, Inc. v. City of Beaver Dam, 2012 WI App 102, ¶ 14, 344 Wis. 2d 278, 822 N.W.2d 491, review denied, 2013 WI 22, 346 Wis. 2d 283, 827 N.W.2d 374 (if the legislature intended to convey the impression that this was a partial list or an otherwise expandable category it would have used a phrase like "including" before enumerating the specific public actors in question).

The plain language of Section 941.20(1m)(b), Stats., or a reasonable construction in accordance with established norms of statutory construction, requires the conclusion that DNR conservation wardens are not within its definitional scope.

CONCLUSION

Based upon the record herein and the foregoing authorities and arguments, Robert Stietz respectfully requests that this Court enter an order reversing and vacating the convictions on Counts 3 and 6 and remanding this matter to the Circuit Court for further proceedings.

Dated this 19th day of March, 2015.

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CERTIFICATION ON FORM

I hereby certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c), Stats., for a brief and appendix produced with a proportional serif font. The length of this brief is 10,748 words.

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CERTIFICATION OF COMPLIANCE
WITH RULE 809.19(12), STATS.

I hereby certify that I have submitted an electronic copy of this brief, excluding the Appendix, which complies with the requirements of Section 809.19(12), Stats.

I further certify that the electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

_____

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CERTIFICATION REGARDING APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Section 809.19(2)(a), Stats., and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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APPENDIX

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