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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2015AP53-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CORY S. HERRMANN,

Defendant-Appellant.

On Notice of Appeal from a Judgment
Entered in the Outagamie County Circuit Court
the Honorable Dee R. Dyer, Presiding

BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

Page

ISSUES PRESENTED 1

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 1

STATEMENT OF THE CASE AND FACTS 2

ARGUMENT 5

I. Wisconsin's Absolute Prohibition of Spring-Assisted Knives and Other Knives Proscribed Under Wis. Stat. § 941.24 Violates Mr. Herrmann's and the People's Second Amendment Right to Keep and Bear Arms; the Total Ban of a Category of Arms Which the People have Right to Keep and Bear for Protection Renders the Statute Facially Unconstitutional, and Thus Void. 5

A. Standard of Review and Applicable Level of Constitutional Scrutiny. 7

B. Wisconsin Stat. § 941.24(1) Bans Arms of a Type the People Have a Second Amendment Right to Keep and Bear for self-defense or protection. 10

C. Constitutionality of Wis. Stat. § 941.24 in Light of ***Heller*** and ***McDonald***. 14

II. Because Mr. Herrmann Had a Fundamental Second Amendment Right to Keep and Bear Arms for Defense of Hearth and Home, Wis. Stat. § 941.24 is Unconstitutional As Applied to Mr. Herrmann's Conviction for Possessing a Spring-Assisted Knife in His Home for Self-Defense. 22

CONCLUSION 26

CASES CITED

Bateman v. Perdue,
881 F.Supp.2d 709 (E.D.N.C. 2012) 9

Boos v. Barry,
485 U.S. 312, 108 S.Ct. 1157,
99 L.Ed.2d 333 (1988) 9

Crowley Cutlery Co. v. United States,
849 F.2d 273 (7th Cir. 1988) 19

District of Columbia v. Heller,
554 U.S. 570, 128 S.Ct. 2783,
171 L.Ed.2d 637 (2008) 3, 6, 23

Ezell v. City of Chicago,
651 F.3d 684 (7th Cir. 2011) ..... 7 passim

In re Gilbert R.,
211 Cal. App. 4th 514 (2012) 13

Lacy v. State,
903 N.E.2d 486 (Ind. Ct. App. 2009) 17

McDonald v. City of Chicago, Ill.,
561 U.S. 742, 130 S.Ct. 3020,
177 L.Ed.2d 894 (2010) ..... 6 passim

State v. Baron,
2009 WI 58, 318 Wis. 2d 60, 769 N.W.2d 34..... 7, 9

State v. Cole,
2003 WI 112, 264 Wis. 2d 520,
665 N.W.2d 328 7

State v. DeCiccio,
315 Conn. 79, 105 A.3d 165 (Conn. 2014)..... 14

State v. Delgado,
298 Or. 395, 692 P.2d 610 (1984)..... 18

State v. Hamdan,
2003 WI 112, 264 Wis. 2d 433,
665 N.W.2d 785 ..... 8 passim

State v. Murillo,
__ P.3d __, 2015 WL 270053 (N.M. Ct. App.
Slip Op. issued Jan. 21, 2015)..... 17, 18, 19

State v. Wood,
2010 WI 17, 323 Wis. 2d 321,
780 N.W.2d 63 ..... 7, 22

Turner Broadcasting System Inc. v. F.C.C.,
512 U.S. 622, 114 S.Ct. 2445,
129 L.Ed.2d 543 (1994) 10, 16

U.S. v. Skoien,
614 F.3d 638 (2010) 9

United States v. Marzzarella,
614 F.3d 85 (3rd Cir. 2010) 7

United States v. Miller,
307 U.S. 174, 59 S.Ct. 816,
83 L.Ed. 1206 (1939) 10, 13

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

United States Constitution

First Amendment 7, 8, 9

Second Amendment ..... 1 passim

Fourteenth Amendment 2, 6

Wisconsin Constitution

Article I, Section 25 ..... 1, 2, 5

Wisconsin Statutes

941.24 ..... 1 passim

941.41 1

961.573(1) 2

Federal Militia Act, ch. 33, 1 Stat. 271 (1792) 11

OTHER AUTHORITIES CITED

Benson, Ragnar, *Switchblade: The Ace of Blades*,
Paladin Press (1989) 11

Crime in the United States 2013,
Expanded Homicide Table 11, FBI 16

Crime in the United States 2013, Table 19, FBI 16

David B. Kopel, Clayton E. Cramer & Joseph Edward Olson, *Knives and the Second Amendment*, U. Mich. J.L. Reform, p. 197, n. 156 [Vol. 47:1, Fall 2013].... 11, 13, 16

Erickson, Mark, *Antique American Switchblades*, Knause publications (2004)..... 11

Federal Anti-Switchblade Act of 1958..... 12, 17

Mike Markowitz, *Knife on a Stick: The Rise and Fall of the Bayonet*, Defense Media Network, February 18, 2013. (App. 161-66) 11

N.Y. Times, *Share of Homes With Guns Shows 4-Decade Decline*, March 9, 2013, http://www.nytimes.com/2013/03/10/us/rate-of-gun-ownership-is-down-survey-shows.html?_r=0 20

National Army Museum on line exhibit at http://www.nam.ac.uk/online-collection/detail.php?acc=1956-02-394-1 11

Op. Atty. Gen. 21-87, 1987..... 12

Paul A. Clark, *Criminal Use of Switchblades: Will the Recent Trend Towards Legalization Lead to Bloodshed?*, Connecticut Interest Law Journal, pp. 236-41 [Vol. 13.2, 2014] 12, 13, 17

Senate Judiciary Rep. No. 1429 (1958)..... 12

ISSUES PRESENTED

1. Is Wisconsin Stat. § 941.24, which imposes an absolute ban on all automatic or spring-assisted knives, facially unconstitutional in violation the people's right to keep and bear arms as guaranteed under U.S. Const. amend II, and Wis. Const. Art. I, § 25?

   The circuit court answered: "No."

2. Is Wisconsin Stat. § 941.41 unconstitutional as applied to Mr. Herrmann because it unreasonably infringes his constitutional right to keep and bear arms in defense of hearth and home?

   The circuit court answered: "No."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Herrmann believes that the issues raised can be adequately set out in the briefing and that oral argument is unnecessary. Although as a misdemeanor appeal this case would ordinarily be decided by one judge and thus be ineligible for publication, conversion to a three-judge panel and publication is warranted. This case will clarify whether Wisconsin's total ban on spring-assisted-folding and other common retractable-blade knives violates Mr. Herrmann's and the people's right to keep and bear arms as guaranteed by the Second Amendment to the United States Constitution and Article I, Section 25, of the Wisconsin Constitution.

STATEMENT OF THE CASE AND FACTS

On September 2, 2012, Cory Herrmann, while showing friends visiting his home a spring-assisted folding knife which Herrmann kept and carried in his home for protection, accidentally dropped the knife. (16:2-3, 5). As Mr. Herrmann attempted to catch it, he pinned the falling knife against his leg. (16:2-3). Mr. Herrmann's action in pinning the knife against his leg caused the knife to penetrate his skin, nicking his femoral artery. (16:3).

Mr. Herrmann with his leg bleeding walked to his bathroom and asked his friends to call 911. (2-2). Police officers accompanying an ambulance team found the knife with which Mr. Herrmann had caused his injury. The knife "was a spring-assisted folding knife with a 4-inch blade and a total length of 9 inches." (2:2). Police also found a second spring-assisted knife and a "glass water bong" in the home. (2:2).

On April 1, 2013, the state charged Mr. Herrmann with one count of possession of a switchblade knife, in violation of Wis. Stat. § 941.24(1), and one count of possession of drug paraphernalia, in violation of Wis. Stat. § 961.573(1). (2:1-2).

On July 5, 2013, Mr. Herrmann moved to dismiss count 1, possession of a switchblade, on the basis that Wis. Stat. § 941.24(1)'s total ban on possessing spring-assisted and other retractable-blade knives violates both the federal and Wisconsin constitutional guarantee of the people's right to keep and bear arms. U.S. Const. amends. II & XIV; Wis. Const. art. I, § 25. (5:1-6). Mr. Herrmann had no prior convictions, was not a gang member and possessed the knife in his own home for protection. (5:2). Mr. Herrmann argued

on the basis of the holding and analytical framework set forth in ***District of Columbia v. Heller***, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), and on cases interpreting ***Heller***, that Wis. Stat. § 941.24(1) is unconstitutional both on its face and as applied to Mr. Herrmann.

The state filed a written response. (7:1-5).

On December 18, 2013, the circuit court issued a written decision and order. (8:1-6). (App. 103-07). Citing pre-***Heller*** cases, the court stated the party challenging a statute bears the burden of proof, that statutes are presumed constitutional and that courts must indulge every presumption and resolve all doubt in favor of constitutionality. (8:2). The court stated that it "must balance the conflicting rights of an individual to keep and bear arms for lawful purposes against the authority of the State to exercise its police power to protect the health, safety and welfare of its citizens." (8:5). The court ruled that although Herrmann may have possessed the knife in his own home for self defense:

> This is not a sufficient reason to overcome the State's interest in protecting the health, safety and welfare of its citizens from a dangerous weapon. Herrmann could have easily used a non-prohibited weapon for his protection. The statutory ban on switchblade knives does not unreasonably impair Herrmann's right to keep and bear arms.

(8:5). Accordingly, the court denied Mr. Herrmann's motion to dismiss. (8:6).

On July 1, 2014, the case proceeded to a court trial on stipulated facts. (16:1-12). By stipulation, Mr. Herrmann informed the court that on September 2, 2012, he injured himself with a switchblade knife in his home in Appleton, Wisconsin. (16:2). The accident occurred while

Mr. Herrmann was showing his knife to a friend. (16:2-3). Mr. Herrmann dropped the knife and while trying to catch it accidentally stabbed himself in the leg, cutting his femoral artery. (16:3). Officers responding to a call for assistance found the knife Mr. Herrmann injured himself with, and also found a "glass bong." (16:3). It was further stipulated that "Mr. Herrmann is not in a gang and does not use the switchblade for any offensive purpose" and that Mr. Herrmann "possessed [the] switchblade in his own home for his own protection." (16:3). (App. 108-11).

The state agreed with the stipulated facts as presented. (16:4). Mr. Herrmann asked the court to find him not guilty; the state asked the court to find him guilty. (16:4). The court found Mr. Herrmann guilty on both counts. (16:6). The court imposed fines and costs for both convictions. (10:1; 16:10-11). (App. 101).

Mr. Herrmann timely filed a notice of intent to pursue postconviction relief (11:1), and later a notice of appeal. (12:1-2).

ARGUMENT

I. Wisconsin's Absolute Prohibition of Spring-Assisted Knives and Other Knives Proscribed Under Wis. Stat. § 941.24 Violates Mr. Herrmann's and the People's Second Amendment Right to Keep and Bear Arms; the Total Ban of a Category of Arms Which the People have Right to Keep and Bear for Protection Renders the Statute Facially Unconstitutional, and Thus Void.

Mr. Herrmann was charged with and convicted of possessing a spring-assisted folding knife, which he carried in his home for protection. (16:3). In Wisconsin it is illegal for any person, anywhere, for any reason to sell, purchase, possess or go armed with "any knife having a blade which opens by pressing a button, spring or other device in the handle, or by gravity or by a thrust or movement." Wis. Stat. § 941.24(1). Because Mr. Herrmann and the people of Wisconsin have a fundamental Second Amendment[1] right to keep and bear arms of the type categorically banned under § 941.24(1), Wisconsin Stat. § 941.24(1) is unconstitutional on its face.[2] Consequently, the statute is void and Mr. Herrmann's conviction for violating § 941.24(1) must be vacated.

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[1] U.S. Const. amend. II.

[2] The right to bear arms is also guaranteed by Wis. Const. Art. I, § 25, which provides: "The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose." Wisconsin's right-to-bear-arms provision cannot provide less protection or fewer rights than the federal constitution's Second Amendment. However, nor does it appear to provide greater protection or rights. The issues Mr. Herrmann raises are guaranteed by both, but for efficiency sake the brief will refer to the Second Amendment only.

The Second Amendment to the United States Constitution reads in its entirety:

> 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.

Until recently it was unclear whether the Second Amendment conferred any sort of fundamental or individual right, or whether it applied only to federal regulation of state militia. The issue is now resolved. In ***District of Columbia v. Heller***, 554 U.S. 570, 592, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), the Supreme Court ruled that the Second Amendment "codified a *pre-existing*" enumerated "individual right to possess and carry weapons in case of confrontation." (emphasis in original). The Court has declared the right to keep and bear arms to be "among those fundamental rights necessary to our system of ordered liberty." ***McDonald v. City of Chicago, Ill.***, 561 U.S. 742, 778, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010).

Rights guaranteed under the Second Amendment are applicable to the states by incorporation via the Fourteenth Amendment. *Id.* 561 U.S. at 791; U.S. Const. amend. XIV. Wisconsin Stat. § 941.24, which institutes a complete ban on an entire category of arms, must therefore be evaluated under the standards and analytic framework set forth in ***Heller*** and ***McDonald***, as well as in subsequent cases interpreting Second Amendment rights under those cases.

What has emerged from ***Heller*** and ***McDonald*** is "a two-pronged approach to Second Amendment challenges. First, [the court] ask[s] whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment guarantee…If it does not, [the] inquiry is complete. If it does, [the court] evaluate[s] the law under

some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid." (Citation omitted: footnote omitted) ***United States v. Marzzarella***, 614 F.3d 85, 89 (3rd Cir. 2010); *also see* ***Ezell v. City of Chicago***, 651 F.3d 684, 707 (7th Cir. 2011).

Application of that standard and analytical framework establishes that Wis. Stat. § 941.24 is unconstitutional on its face.

A. Standard of Review and Applicable Level of Constitutional Scrutiny.

A case challenging the constitutionality of a statute presents a question of law which this court reviews de novo. ***State v. Baron***, 2009 WI 58, ¶ 10, 318 Wis. 2d 60, 769 N.W.2d 34. A statute is unconstitutional on its face if it cannot be enforced under any circumstances. ***State v. Wood***, 2010 WI 17, ¶ 13, 323 Wis. 2d 321, 780 N.W.2d 63. A statute that is unconstitutional on its face is "void 'from its beginning to the end.'" *Id.*

Heller and ***McDonald*** categorically reject the method of analysis or level of scrutiny the Wisconsin Supreme Court applied when deciding pre-***Heller*** Second Amendment issues, and which the circuit court here erroneously utilized when denying Mr. Herrmann's motion to dismiss. (8:1-6). In ***State v. Cole***, 2003 WI 112, 264 Wis. 2d 520, 665 N.W.2d 328, the court stated "we do not agree…that strict scrutiny or intermediate scrutiny is required" in Second Amendment cases. *Id.* at ¶ 21. The court ruled that unlike statutes limiting First Amendment rights, statutes regulating Second Amendment rights are presumed constitutional. *Id.* at ¶¶ 12, 13. The court then applied the "relatively deferential" test that "focuses on the balance of interests at stake." *Id.* at ¶¶ 23, 27. The court stated under this interest-balancing approach "the

test has been whether the statute constitutes a 'reasonable regulation' in light of the state's police powers." *Id.* at ¶ 22. *See also* ***State v. Hamdan***, 2003 WI 112, 264 Wis. 2d 433, 665 N.W.2d 785, decided the same day.

In ***Heller*** the United States Supreme Court declared "We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach." 554 U.S. at 634. The Court noted protections enumerated under the First Amendment and stated "The Second Amendment is no different." *Id.* at 635. In ***McDonald*** the Court reaffirmed that in ***Heller*** "we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing." 561 U.S. at 785-86. The Court in ***Heller*** did not specify a particular level of scrutiny because "[u]nder any of the standards of scrutiny" the Court has "applied to enumerated constitutional rights," banning Second Amendment-protected arms "to 'keep' and use for protection of one's home and family…would fail constitutional muster." ***Heller***, 554 U.S. at 628-29.

The Court stated that "enshrinement of constitutional rights necessarily takes certain policy choices off the table." 554 U.S. at 636. What ***Heller*** takes off the table is "the absolute prohibition" of a category of Second Amendment-protected arms "held and used for self-defense in the home." *Id.* Accordingly, ***Heller*** and ***McDonald*** establish that statutes regulating Second Amendment rights must, depending upon circumstances satisfy or survive either strict scrutiny or intermediate scrutiny. ***Heller***, 554 U.S. at 628-29, 635; ***McDonald***, 561 U.S. at 785-86; *also see* ***Ezell v. City of Chicago***, 651 F.3d 684, 707 (7th Cir. 2011).

Under First Amendment analogues referenced in ***Heller*** and ***McDonald***, content-based regulations are presumptively invalid and get strict scrutiny analysis while time, place and manner regulations are subject to intermediate scrutiny. *See* ***Ezell v. City of Chicago***, 651 F.3d at 707. That is, statutes that place a severe burden on the core Second Amendment right of armed self-defense (e.g. a total ban on Second Amendment-protected conduct or category of arms) must survive strict scrutiny analysis. *See e.g.*, ***Bateman v. Perdue***, 881 F.Supp.2d 709 (E.D.N.C. 2012). Statutes that merely regulate rather than restrict core Second Amendment rights such as by limiting rights of particularly dangerous persons (e.g. felons or the mentally ill), or the right to keep and bear arms in sensitive places (e.g. schools or government buildings), or by imposing conditions or qualifications (e.g. requiring permits), are subject to intermediate scrutiny. ***Heller***, 554 U.S. at 626-27; ***McDonald***, 561 U.S. at 786; ***Ezell***, 651 F.3d at 708.

"To survive strict scrutiny, the State has the burden to show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" ***State v. Baron***, 2009 WI 58, ¶ 45, 318 Wis. 2d 60, 769 N.W.2d 34; quoting ***Boos v. Barry***, 485 U.S. 312, 321, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988). Intermediate scrutiny requires the state to establish that the challenged statute serves an important government interest and the means it employs are substantially related to the achievement of that interest. ***U.S. v. Skoien***, 614 F.3d 638, 641-42 (2010). Courts have repeatedly held that under intermediate scrutiny it is not enough for the government to assert that it has a legitimate public interest. Under intermediate scrutiny the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." ***Turner Broadcasting***

System Inc. v. F.C.C., 512 U.S. 622, 664, 114 S.Ct. 2445, 129 L.Ed.2d 543 (1994).

B. Wisconsin Stat. § 941.24(1) Bans Arms of a Type the People Have a Second Amendment Right to Keep and Bear for self-defense or protection.

Heller acknowledges that enumerated rights codified or conferred by the Second Amendment, while fundamental, are not unlimited. The right is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." 554 U.S. at 626. Citing ***United States v. Miller***, 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206 (1939), ***Heller*** acknowledges that "the Second Amendment right, whatever its nature, extends only to certain types of weapons." 554 U.S. at 623.

Heller rejected the argument that the Second Amendment applies to "only those arms in existence in the 18th century." 554 U.S. at 582. But ***Heller*** makes clear that any type of weapon or arm in common use or that could be used by militiamen or for private self-defense at the time of the Second Amendment's ratification is a type of arm afforded Second Amendment protection. 554 U.S. at 624-25. Thus, while modern multi-shot handguns which use metallic encased ammunition bear little technological resemblance to the muzzle-loaded black powder single-shot handguns in existence at the end of the 18th century, ***Heller*** makes clear that modern handguns are Second Amendment arms.

Automatic knives banned by Wis. Stat. § 941.24, including spring-assisted knives like Mr. Herrmann's, have

existed since at least the early 18th century.[3] With the exception of being made from better materials, modern spring-assisted knives utilize the same technology as their 18th century counterparts. *See* David B. Kopel, Clayton E. Cramer & Joseph Edward Olson, *Knives and the Second Amendment*, U. Mich. J.L. Reform, p. 197, n. 156 [Vol. 47:1, Fall 2013]. (App. 112-60). News stories and criminal cases from the 18th century reference knives with springs that hold them open. *Id.* The federal Militia Act of 1792 required all able-bodied white men between 18 and 45 to possess, among other items, "a sufficient bayonet." Militia Act, ch. 33, 1 Stat. 271 (1792). One common type of 18th century spring-assisted knife is what was, in effect, a spring-assisted switchblade bayonet attached to the barrel of a musket or handgun.[4]

By the late 19th century automatic knives, including switchblades, were mass produced in the U.S. and marketed to workers and outdoorsmen, with cheap versions sold as novelty items.[5] A military version was issued to paratroopers during World War II. *See Knives and the Second Amendment*,

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[3] Erickson, Mark, *Antique American Switchblades*, Knause publications (2004); Benson, Ragnar, *Switchblade: The Ace of Blades*, Paladin Press, pp. 1-14 (1989); Mike Markowitz, *Knife on a Stick: The Rise and Fall of the Bayonet*, Defense Media Network, February 18, 2013. (App. 161-66).

[4] *See e.g.* National Army Museum on line exhibit at http://www.nam.ac.uk/online-collection/detail.php?acc=1956-02-394-1 ("The blunderbuss was a popular weapon for defending homes and property in the 18th century and after 1770 began to be produced with a spring bayonet."). (App. 167-68); also see Ketland Blunderbuss at http://www.americanhistoricservices.com/ketland-blunderbuss.html (example of 18th century Blunderbuss bought in London by an American Soldier). (App. 169-70).

[5] Erickson, Mark, *Antique American Switchblades*, Knause publications (2004); Benson, Ragnar, *Switchblade: The Ace of Blades*, Paladin Press (1989).

Id. at pp. 175. (App. 120). Troops returning home with their U.S.-issued switchblades, or with the German Luftwaffe version or with the classic Italian-produced stiletto version picked up as a souvenir, as well as a run of popular Hollywood movies and one Broadway play, fueled a surge in popularity of switchblade knives, with 1.2 million switchblades purchased in the U.S. each year throughout the 1950's.[6] *Id.* at 175-76. (App. 120-21). This resulted in a federal legislative response in the federal Anti-Switchblade Act of 1958, which regulates but does not ban switchblades in the U.S., though it does ban switchblades in American Territories or Possessions (i.e. Puerto Rico). This in turn led many states, including Wisconsin, to enact statutory bans. *See* Paul A. Clark, *Criminal Use of Switchblades: Will the Recent Trend Towards Legalization Lead to Bloodshed?*, Connecticut Interest Law Journal, pp. 236-41 [Vol. 13.2, 2014]. (App. 171-225).

Wisconsin Stat. § 941.24 is titled "Possession of switchblade knife," but the types of knives made illegal to manufacture, sell, transport, purchase possess or go armed with is far broader than the stiletto switchblade of West Side Story fame. Specifically, § 941.24 bans "any knife having a blade which opens by pressing a button, spring or other devise in the handle or by gravity or by thrust or movement." The definition is far broader than that in the Federal Act. *See Op. Atty. Gen.* 21-87, 1987.

The Wisconsin statute basically bans all forms of automatic knife. That is, it bans any knife with a spring-assisted bias toward open that is released by a button or movement or action, or any knife that can be opened by gravity or by inertia from a thrust or action. *See e.g.*, *Knives*

[6] Senate Judiciary Rep. No. 1429, at 6 (1958).

and the Second Amendment, *Id.* at pp. 175-79. (App. 120-24). It includes a wide array of utility knives sold openly at stores likes Home Depot or Sears, such as the Husky Folding Lock-Back Utility Knife[7] or the Milwaukee Tool Fastback Spring Assisted Utility Knife.[8] It would include knives found in any reasonably well-stocked tool box or generally on any construction job site.[9]

The types of knives Wis. Stat. § 941.24(1) bans are currently legal to possess in the majority of states. *Criminal Use of Switchblades*, *Id.* at 219. (App. 171). Case law and common sense establish that the overwhelming majority of such knives "serve an important utility to many knife users, as well as firefighters, EMT personnel, hunters, fisherman and others." *Id.* at 227 (App. 179), quoting ***In re Gilbert R.***, 211 Cal. App. 4th 514, 516 (2012). The knives Wisconsin bans, both historically and currently, are overwhelmingly used by law-abiding persons for lawful purposes as tools and as a weapon or arm for self-protection. *Id.* at 271-73. (App. 223-25).

As noted above, ***Heller*** did not upset the Court's earlier decision in ***Miller*** where the Court ruled that "the Second Amendment does not protect those weapons not

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[7] Paul A. Clark, *Criminal Use of Switchblades: Will the Recent Trend Towards Legalization Lead to Bloodshed?*, Connecticut Interest Law Journal, pp. 224-25 [Vol. 13.2, 2014]. (App. 176-77).

[8] Found here: http://www.homedepot.com/p/Milwaukee-Fastback-Spring-Assisted-Serrated-Utility-Knife-48-22-1995/204494269. (App. 226-27).

[9] "An estimated 80% of pocketknives sold in the United States are designed to be opened one handed, usually by using the thumb to open the blade while the fingers of the same hand hold the handle. Virtually all of these knives could be considered a switchblade." Paul A. Clark, *Criminal Use of Switchblades: Id.* at p. 224 (App. 176).

typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." 554 U.S. at 625. ***Heller*** supports the "historical tradition" of prohibiting the carrying of such "dangerous and unusual weapons." *Id.* at 627. This would provide the justification, presumably, for a ban on modern militia weapons which might include fully automatic firearms or personal cruise missiles or personal tactical nuclear arms. But it cannot be applied to automatic knives, including spring-assisted knives like Mr. Herrmann's. *Cf.* ***State v. DeCiccio***, 315 Conn. 79, 86, 105 A.3d 165 (Conn. 2014) ("We agree, however, first that the second amendment protects the defendant's right to possess the dirk knife and police baton in his home, and, second, that the statute's complete ban on transporting those items between residences unduly burdens that right.").

The types of knives Wis. Stat. § 941.24(1) bans, including switchblades, gravity knives, butterfly knives and other automatic knives, are types of arms which for both historical and common use reasons are eligible for Second Amendment protection, and may be kept and borne for protection or self-defense of home and family.

C. Constitutionality of Wis. Stat. § 941.24 in Light of ***Heller*** and ***McDonald***.

The statute at issue in ***Heller*** specifically banned only one category of firearm, handguns; which would, then, include handguns possessed in one's home where "the need for defense of self, family and property is most acute." 554 U.S. at 574, 628. The statute was enacted to address legitimate public safety concerns, reduce crime and save lives. *Id*. at 693-94. The District of Columbia's decision to ban handguns no doubt stemmed from the fact that handguns are easy to conceal, are extremely dangerous and are often the

weapon or arm of choice for serious crimes such as homicide, armed robbery and aggravated assault.

Heller acknowledged "the problem of handgun violence," but concluded that "enshrinement" of a fundamental individual right to keep and bear arms in the Bill of Rights "takes certain policy choices off the table." *Id.* at 636. What is "off the table" is enacting any statute that imposes an "absolute prohibition of" a Second Amendment-protected category of arms "held and used for self-defense in the home." *Id.* The Court concluded that the Washington D.C. statute failed under either strict or intermediate scrutiny analysis because it was not one narrowly drawn to achieve a compelling state interest or one narrowly drawn to alleviate recited harms in a direct and material way.

Like the statute in ***Heller***, Wis. Stat. § 941.24 imposes an absolute prohibition on a Second Amendment-protected category of arms, even when, as in the case at bar, the arm is kept or carried in the home for self protection. Because Wis. Stat. § 941.24 imposes an absolute prohibition on the possession of a category of arms commonly used and fully protected under the Second Amendment, the statute represents a policy choice ***Heller*** declares must be "off the table." *Id.*

Because Wis. Stat. § 941.24 imposes an absolute prohibition, it arguably should be analyzed using strict scrutiny. ***Ezell v. City of Chicago***, 651 F.3d 684, 707-08 (7th Cir. 2011). However, as in ***Heller***, the statute at issue here "[u]nder any of the standards of scrutiny…would fail constitutional muster." 554 U.S. at 628-29. Consequently, regardless of whether strict or intermediate scrutiny applies, the state bears the burden proving Wis. Stat. § 941.24 does not impermissibly contravene rights enumerated under the

Second Amendment and must satisfy that burden with clear evidence and not with mere conjecture. ***Turner Broadcasting System Inc. v. F.C.C.***, 512 U.S. at 664.

Under the rationale of ***Heller***, if handguns may not be prohibited despite a clear and demonstrable public safety concern, it follows that a less dangerous category of arms may not be prohibited.

It is both self-evident and empirically true that handguns are a greater threat to public safety than spring-assisted knives and other knives Wis. Stat. § 941.24 absolutely prohibits. FBI crime statistics show that in 2013 firearms were used in 69% of all murders in the United States and handguns specifically in 47.2%.[10] All knives and cutting instruments combined totaled 12.2%. The same holds true for robberies and aggravated assaults. Handguns are the popular choice over all types of edged weapons, including fixed blade and automatic knives.[11]

It is both self-evident and empirically true that handguns are more dangerous than the category of knives banned by Wis. Stat. § 941.24. Data shows that "firearm injuries were 5.5 times more likely to result in death than knife wounds." *Knives and the Second Amendment*, *Id.* at 183. (App. 128). Thus, while a gun may arguably be the more effective arm when properly and appropriately used for protection or self-defense, the consequences of an accident with a gun are far more severe than those with an automatic knife.

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[10] *See Crime in the United States 2013, Expanded Homicide Table 11*, FBI. (App. 228-29)

[11] *See Crime in the United States 2013, Table 19*, FBI. (App. 230-31).

Proponents of automatic knife bans have argued or cited cases and Senate testimony referencing that automatic knives are "specifically 'designed for quick use in a knife fight,'" that because they are "readily concealable" they are more "suitable for criminal use," and that they are "by design and use, almost exclusively the weapon of the thug and the delinquent." ***State v. Murillo***, __ P.3d __, 2015 WL 270053 (N.M. Ct. App. Slip Op. issued Jan. 21, 2015) (App. 232-37). The court in ***Lacy v. State***, 903 N.E.2d 486 (Ind. Ct. App. 2009), citing legislative history relating to the Federal Anti-Switchblade Act of 1958 indicating:

> the 'problem of the use of switchblade and other quick-opening knives for criminal purposes has become acute during recent years—particularly by juvenile delinquents in large urban areas,' and that 'police chiefs, almost without exception, indicate that these weapons are on many occasions the instrument used by juveniles in the commission of robberies and assaults.'

Lacy, 903 N.E.2d at 490.

Any claim that automatic knives are primarily owned and used by criminals is empirically verifiable and demonstrably false. It was false at the time the Federal Anti-Switchblade Act was passed in 1958, and Wisconsin's statute was enacted in 1959, and remains false today. An analysis of crime data and sales figures establishes that "the use rate [of switchblades for crimes] is almost certainly well under 1%" and that "a more realistic estimate is that less than 1/10 of one percent of switchblades in circulation were used in crime." Paul A. Clark, *Criminal Use of Switchblades: Will the Recent Trend Towards Legalization Lead to Bloodshed?*, Connecticut Interest Law Journal, p. 238 [Vol. 13.2, 2014]. (App. 190).

The usefulness of automatic knives cannot seriously be disputed. Nor can the fact that they are ubiquitous, and that millions of lawful Americans use them for lawful purposes both as important tools and as a weapon or arm for self-defense. *Criminal Use of Switchblades*, *Id.* at 227, 233-34. (App. 179, 185-86). Thus, the claim in ***Murillo***, that automatic knives are "utilized in large part for unlawful activity" is at best conjecture, but is in reality simply wrong. ***Murillo***, Slip. Op. ¶ 13. (App. 235).

In this same vein, it is empirically verifiable that automatic knife bans enacted in the late 1950's were and are not regulations which alleviate in any sort of direct and material way the harms they set out to address (i.e. reduce crime or crime by knife-wielding thugs). That is, the drop in crime rates proponents promised never materialized. *Criminal Use of Switchblades*, *Id.* at 240. After 1958, violent crimes of all types sky-rocketed. *Id.* at 248. (App. 200). Although there is, of course, no way to know exactly what would have happened had switchblade bans not been enacted, analysis of crime data shows "no indication that the federal Anti-Switchblade Act (in conjunction with state bans) had any significant effect on violent crime across the country." *Id.* at 246. (App. 198).

The flip side of this point is instructive as well. If it were true that banning automatic knives should reduce violent crime in a direct and material way, lifting such a ban should then result in a quantifiable increase in violent crime. In 1984 Oregon's Supreme Court quite sensibly concluded their 1950's era automatic knife ban violated Oregon's state constitutional right to keep and bear arms. ***State v. Delgado***, 298 Or. 395, 692 P.2d 610 (1984). Oregon has a large number of knife manufacturers and by the late 1980's "switchblades

were quite common in Oregon." *Id.* at 252. Yet, after thorough analysis of crime statistics:

> The Oregon data suggests that the legalization of switchblades did not cause an increase in violent crime. The data is somewhat mixed for the first couple of years following legalization, but by the late 1980's and early 1990's, we see a clear decrease in violent crime overall, and a clear decrease in the rate of knife use in violent crime. Thus, the Oregon experiment indicates that the legalization of switchblades did not cause an increase in violent crime.

Criminal Use of Switchblades, Id. at 260. (App. 212).

Such generalized or speculative claims may have been sufficient to sustain a legislative policy choice to ban a Second Amendment-protected weapon or arm under the minimal and deferential rational basis scrutiny. And, in fact, challenges to switchblade bans were consistently sustained under the rational basis test. *e.g.* ***Crowley Cutlery Co. v. United States***, 849 F.2d 273 (7th Cir. 1988). But they cannot survive scrutiny when analyzed under heightened standard required under ***Heller*** and ***McDonald***.

Murillo states that "[w]hile the statute might be characterized as prohibiting an entire class of arms (switchblades), it might equally be characterized as a ban on a mere subset of a type of arms (knives) that is itself peripheral to self-defense or home security." ***Murillo***, Slip. Op. at ¶ 14. (App. 235). In doing so, ***Murillo*** ignores and contradicts ***Heller***, and is simply wrong. The statute declared unconstitutional in ***Heller*** did not ban all firearms, but rather it banned, in ***Murillo***'s words, "a mere subset of a type of firearms," namely handguns. Moreover, the notion that knives are "peripheral to self-defense or home security" ignores reality. ***Murillo***, *Id.*.

The fact is, only about 34% of all U.S. households have a gun of any kind.[12] Virtually every home has multiple knives, including pocketknives of which as many as 80% may be classified as automatic knives. *Criminal Use of Switchblades*, *Id.* at 224 (App. 176). Further, there are myriad reasons why a person might choose to carry an automatic knife rather than a gun for self defense in a home. An automatic knife is safer than a gun or a fixed blade knife and can be just as effective. For safety reasons people with children may not want guns around the house. People with limited financial resources who may not be able to afford a proper gun likely would be able to afford an effective $10 automatic knife. Finally, for people who are excluded from lawful gun ownership, an automatic knife may be the most effective arm available. For such people, an automatic knife is not merely "peripheral to self-defense or home security," it is an effective primary weapon or arm to keep and bear for self-defense and home security.

Moreover, whether handguns are more effective or popular than automatic knives, or whether other types of arms are allowed as alternatives, is irrelevant. ***Heller*** makes clear that it is not the government's place to decide what Second Amendment-protected arms a person may be permitted to use for self-defense and home security. 554 U.S. at 629. Consequently, the fact that other firearms were available to Mr. Heller, or as Judge Dyer noted in denying Mr. Herrmann's motion to dismiss "Herrmann could have easily used a non-prohibited weapon for his protection," has no bearing or impact on the constitutional analysis. (8:5).

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[12] *See*, N.Y. Times, *Share of Homes With Guns Shows 4-Decade Decline*, March 9, 2013, http://www.nytimes.com/2013/03/10/us/rate-of-gun-ownership-is-down-survey-shows.html?_r=0 (App. 238-42).

The Second Amendment states that the right of the people to keep and bear arms shall not be infringed. The amendment specifies "arms," not just firearms. While ***Heller*** does state that "handguns are the most popular weapon chosen by Americans for self-defense in the home," a curious point given that in most American homes there are no guns of any kind, ***Heller*** cannot be rationally read to create a hierarchy of arms or unique constitutional status for firearms. Firearms may have a better financed and more vocal lobby, but they are constitutionally indistinct from edged weapons or arms, which have their own rich history in American culture and are even more ubiquitous. Moreover, as noted in ***Heller***, the constitution permits and protects "extremely unpopular and wrongheaded" expressions of enumerated rights, as well as the popular and the wise. 554 U.S. at 635.

The statute banning handguns, which the ***Heller*** Court deemed violated the people's Second Amendment right to keep and bear arms, is practically and conceptually identical to the automatic knife ban statute Mr. Herrmann challenges here. For the same reasons the United States Supreme Court found Washington D.C.'s total ban of handguns to be unconstitutional, this court must find Wisconsin's total ban of automatic knives to be facially unconstitutional in violation of Mr. Herrmann's and the people's right to keep and bear arms for protection and self-defense.

Accordingly, Mr. Herrmann asks this court to rule Wis. Stat. § 941.24 to be unconstitutional on its face, and thus void, and for that reason Mr. Herrmann's conviction for unlawful possession of a spring-assisted knife is also void and must be vacated.

II. Because Mr. Herrmann Had a Fundamental Second Amendment Right to Keep and Bear Arms for Defense of Hearth and Home, Wis. Stat. § 941.24 is Unconstitutional As Applied to Mr. Herrmann's Conviction for Possessing a Spring-Assisted Knife in His Home for Self-Defense.

Mr. Herrmann was convicted for violating Wis. Stat. § 941.24, which makes it illegal in Wisconsin for anyone to possess any automatic or spring-assisted knife, anywhere, for any purpose. The degree to which the state's public safety or crime reduction interest is advanced by application of its automatic knife ban to home self-defense is at best minimal, while the infringement on Mr. Herrmann's Second Amendment right to keep and bear an automatic or spring-assisted knife is significant. Under such circumstances application of the statute to Mr. Herrmann for possessing his Second Amendment-protected spring-assisted knife in his home for self-defense, renders § 941.24 unconstitutional as applied.

In an as-applied challenge the court assesses the merits of the challenge by considering the facts of the particular case, not hypothetical facts. ***State v. Wood***, 2010 WI 17, ¶ 13, 323 Wis. 2d 321, 780 N.W.2d 63. In another as-applied right-to-bear-arms case, ***State v. Hamdan***, 2003 WI 113, 264 Wis. 2d 433, 665 N.W.2d 785, the court stated that "[i]f the restriction of a private right is oppressive, while the public welfare is enhanced only [to a] slight degree, the offending statute is void." *Id.* at ¶ 67 (citation omitted). The court noted the "tenuous relation to alleviation" of the state's acknowledged interests in Wisconsin's then existing concealed carry ban when applied to carrying concealed inside one's own home or business. *Id.* The court ruled that

by virtue of application of this principle to the facts in ***Hamdan*** (Mr. Hamdan was moving a handgun in his private business from one place to another), the CCW as applied to Mr. Hamdan "suffers from this infirmity." The court held that the statute was unconstitutional as applied to Mr. Hamdan. *Id.* at ¶¶ 67, 84.

In ***District of Columbia v. Heller***, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), the Court made clear that Second Amendment rights are "most acute" when exercised "for protection of one's home and family." 554 U.S. at 628. ***Hamdan*** echoes this point stating "[i]f 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…." ***Hamdan***, 264 Wis. 2d at 479 ¶ 68. Consequently, as was true for Mr. Hamdan in his private business, Mr. Herrmann's right to keep and bear arms was "at its apex" at the time relevant here because he was carrying his spring-assisted knife in his own home for protection or self-defense. *Id.* at ¶ 67.

Wisconsin's absolute prohibition is a "restriction of a private right [that] is oppressive." ***Hamdan***, *Id.* at ¶ 67. As discussed in detail in Issue I of this brief, *supra* at pp. __, automatic knives, including spring-assisted knives, are Second Amendment-protected arms widely possessed and used by law-abiding people for lawful purposes, both as a tool and as a defensive weapon. Myriad reasons exist why Mr. Herrmann and others would choose a spring-assisted knife over far more dangerous arms such as a handgun, which clearly cannot be banned as a weapon or arm available for defense of hearth and home for persons who possess Second Amendment rights.

Just as in ***Hamdan*** where the court concluded that it was "unreasonable for the State to impair Mr. Hamdan's right to bear arms by punishing him for carrying a concealed weapon" in his business, it is unreasonable for the state to impair Mr. Herrmann from exercising his Second Amendment right to keep and bear his Second Amendment-protected weapon of choice in his home for self-defense. ***Hamdan***, 264 Wis. 2d at 485 ¶ 80. Just as was true for Mr. Hamdan, Mr. Herrmann's interest in carrying a spring-assisted knife, which by any measure is less dangerous than a handgun he could lawfully have carried, "substantially outweighs" the state's interest in enforcing its automatic knife ban statute against Mr. Herrmann on the facts presented. ***Hamdan***, *Id.* at 485-86 ¶ 81.

Mr. Hamdan certainly could have open-carried his weapon as he possessed or moved it within his place of business. But the court in ***Hamdan*** concluded that it was "unreasonable" to make him do so. The court ruled it "would have been dangerous and counterproductive…and…would have seriously impaired his right to bear arms for security." 264 Wis. 2d at 488 ¶ 83. In this same vein, it would have been dangerous and counterproductive to require or only allow Mr. Herrmann to carry a more dangerous (e.g. firearm or unsheathed fixed-blade knife) or a less effective (e.g. sheathed fixed-blade knife) weapon, and doing so would have "seriously impaired his right to bear arms for security" in his home. *Id.*

Although unlike Mr. Hamdan, Mr. Herrmann had not previously had a gun pointed at his head or had not previously shot and killed an armed assailant. However, Second Amendment rights cannot be contingent upon the possessor of the right having first been a crime victim. Moreover, these types of experiences or circumstances may be relevant the

setting of a private business open to the general public, but cannot be conditions precedent to the Second Amendment right to keep and bear a Second Amendment-protected arm of one's choice in one's own private home.

The state and Mr. Herrmann stipulated that Mr. Herrmann possessed his spring-assisted knife in his home for the purpose of protection or self-defense. (16:2-3). Mr. Herrmann was not a convicted felon, was not mentally ill, was not in a gang, and was not using his knife for any unlawful purpose (other than by simply possessing it under Wisconsin's constitutionally infirm statute). *Id.*; (5:2). On the facts presented, the state's public safety and crime prevention interest is minimal or enhanced only to a slight degree when Wis. Stat. § 941.24 is applied, as here, in the context of defense of hearth and home. On the other hand, Mr. Herrmann's private right to carry a spring-assisted knife as his weapon of choice for home security is compelling, and the state's absolute prohibition, oppressive.

Under such circumstances, ***Hamdan*** holds that "the offending statute is void as an invalid exercise of police power." 264 Wis. 2d at 479 ¶ 67. Mr. Herrmann asks that this court rule, in accord with ***Hamdan***, that Wis. Stat. § 941.24 is unconstitutional as applied to Mr. Herrmann on the facts of this case. Consequently, Mr. Herrmann asks that this court vacate his conviction for possession of a spring-assisted knife under § 941.24.

CONCLUSION

Mr. Herrmann asks that this court rule that Wis. Stat. § 941.24 is unconstitutional on its face because its absolute prohibition of all automatic knives violates Mr. Herrmann's and the people's Second Amendment right to keep and bear arms for protection and self-defense. Or, at minimum, Mr. Herrmann asks that this court rule that Wis. Stat. § 941.24 is unconstitutional as applied to Mr. Herrmann because the states interest its automatic knife prohibition statute is minimal far outweighed by Mr. Herrmann's fundamental Second Amendment right to keep and bear is Second Amendment-protected arm of choice in his home for defense of hearth and home.

Dated this 30th day of April, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 6,839 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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.

Dated this 30th day of April, 2015.

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