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STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT III

Case No. 2015AP53-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

Cory S. Herrmann,

Defendant-Appellant.

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ON APPEAL FROM JUDGMENT OF CONVICTION ENTERED IN CIRCUIT  
COURT FOR OUTAGAMIE COUNTY

The Honorable Dee R. Dyer, Presiding

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BRIEF & APPENDIX OF PLAINTIFF-RESPONDENT

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05/30/2015

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BRIEF & APPENDIX OF PLAINTIFF-RESPONDENT

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**QUESTIONS PRESENTED**

1. Is the ban on switchblade knives, codified in Wis. Stat. § 941.24, facially constitutional as it relates to the right to keep and bear arms as guaranteed under U.S. Const. amend II and Wis. Const. Art. I, § 25?

The Circuit Court answered: Yes.

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2. Is the ban on switchblade knives, codified in Wis.

Stat. § 941.24, constitutional as applied to Mr.

Herrmann?

The circuit court answered: Yes.

#### **POSITION ON ORAL ARGUMENT AND PUBLICATION**

The State believes the issues raised can be adequately set out in the briefing and oral argument is unnecessary. The State believes review by a single judge is appropriate.

#### **STATEMENT OF THE CASE**

The State agrees with Herrmann's recitation of the facts of the case and of the procedural history of the case.

#### **STANDARD OF REVIEW**

A challenge to the constitutionality of a statute is a question of law the court is to review de novo. State v. Baron, 2009 WI 58, ¶ 10, 318 Wis. 2d 60, 769 N.W.2d 34.

**ARGUMENT**

**WISCONSIN'S PROHIBITION AGAINST POSSESSION OF SWITCHBLADE  
KNIVES VIOLATES NEITHER THE DUE PROCESS CLAUSE OF THE  
FOURTEENTH AMENDMENT NOR THE SECOND AMENDMENT TO THE UNITED  
STATES CONSTITUTION.**

The Second Amendment does not confer a right "to keep and carry any weapon whatsoever in any manner whatsoever for whatever purpose." District of Columbia v. Heller, 554 U.S. 570. The Second Amendment right extends only to certain types of weapons. *Id.* The Second Amendment "does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes such as short-barreled shotguns." *Id.* It prohibits carrying "dangerous and unusual weapons." *Id.* The Supreme Court in Heller struck down a law that would make it impermissible to have a handgun that was not disassembled or bound by trigger lock. In doing so, the Supreme Court discussed how handguns are a class of arms that is "overwhelmingly chosen by American society for that lawful purpose." *Id.*

Switchblades are not a similar class of arms. In 1958, the United States government made it illegal to introduce, transport, or distribute any switchblade in interstate commerce. Further, the government prohibited the manufacturing, sale, or possession of switchblades with

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specific jurisdictions. See 15 U.S.C. 1241-1245. Numerous states have held the possession of switchblade knives illegal including Wisconsin and Michigan. Numerous other states have found the possession of switchblade knives illegal with minor exceptions for things such as hunting including Illinois and Minnesota.

The constitutionality of statutes prohibiting the possession of switchblades has been upheld in numerous courts and numerous states. See Lacy v State, 903 N.E. 2d 486 (Ind. Ct. App. 2009); Crowley Cutlery, Co. v. United States, 849 F.2d 573 (7<sup>th</sup> Cir. 1988); State v. Darynani, 774 So. 2d 855 (Fl. Ct. App. 2000); United States v. Nelsen, 859 F.2d 1318 (3<sup>rd</sup> Cir. 1988).

In Crowley Cutlery Co. v. United States, *supra*, the United States Court of Appeals for the Seventh Circuit upheld 15 USC 1241-1245. The Court found little difficulty upholding the federal prohibition against importing switchblade knives for the purpose of sale or distribution of switchblade knives in interstate commerce, with Judge Posner reasoning, "switchblade knives are more dangerous than regular knives because they are more readily concealable and hence more suitable for criminal use." Crowley, 849 F.2d 573 at 278. Posner further stated, "it is



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rational to ban [switchblade knives], and not regular knives as well." *Id.*

In Nelson, *supra*, the defendant - incidentally, the owner of the Crowley Cutlery Company - was prosecuted for violating 15 USC 1241-45. The defendant challenged the statute in much the same way as this defendant, arguing in part that the court should

examine the legislative history to determine the "goals" of the statute in question, explore every conceivable alternative for accomplishing those goals, and nullify the decision of Congress if the least restrictive method of achievement was not chosen.

The Third Circuit "refuse[d] this invitation," stating:

The power to decide the appropriate scope of economic and social regulation lies with the legislature, not with the courts. See Ferguson v. Skrupa, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963); \*1320 Williamson v. Lee Optical, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955); United States v. Caroline Products Co., 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 1234 (1938); West Coast Hotel v. Parrish, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937). So long as Congress has a reasonable basis for enacting a statute, we will not invalidate it under a due process analysis.

We are satisfied that Congress did have a reasonable basis for passing the Switchblade Knife Act. Congress stated its reasons for adopting the statute quite plainly. Switchblade knives were increasingly being used for criminal purposes, especially by young gang members. Some states had tried to regulate or ban the knives, but easy access to knives from other states through the mail order business continually

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frustrated such efforts. Congress decided to stop this interstate flow totally by using the commerce power. See S.Rep. No. 1980, 1958 U.S.Code Cong. & Admin.News at 3436-37. It did so in the face of objections that the new law would penalize legitimate users and unduly intrude into the regulatory powers of the states. See *id.* at 3438-40 (statements of Attorney General Rogers and Secretary of Commerce Weeks). Since Congress carefully considered all aspects of the problem, including the potential drawbacks of its solution, we cannot say that the final decision was irrational. We therefore reject Nelsen's substantive due process claim.

*Id.* at 1319-20.

As noted by the circuit court, Herrmann has not, and cannot, demonstrate why the ban on switchblade or spring-assisted knives infringes on his right to keep and bear arms. (8:5) The ban advances a rational concern of the State. Much like automatic firearms, short-barreled shotguns, or so-called "spring guns," the ban prohibits possession of a weapon found by the legislature to be more readily concealed, more capable of damage, and more associated with criminal activity than ordinary versions of the weapons.

Finally, Herrmann points out what he sees as a trend in various states repealing their bans on switchblade knives, and asks the court to conclude from this that Wisconsin should not criminalize possession of switchblade knives. The fact that some states are repealing their bans

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on switchblade knives does not at all affect the  
constitutionality of the ban on switchblades in those  
states in the first place. It merely reflects the changing  
value systems of those select states.

### **CONCLUSION**

The right to bear arms is "not absolute and subject to reasonable regulation." State v. Hamden, 2003 WI 113, 264 Wis. 2d. 433. Although Herrmann claims the Wisconsin Constitution and the United States Constitution do not permit an absolute proscription of mere possession of such arms, the United States Supreme Court held in Heller and previous cases the government may ban the possession of certain classes of "dangerous and unusual weapons." Switchblade knives are dangerous weapons that are more likely to be used for an unlawful purpose; thus, the government may regulate or even prohibit the possession and use of switchblade knives without infringing upon the defendant's Second Amendment rights. The circuit court ruled properly that Wis. Stat. § 941.24 was constitutional both facially and as applied to Mr. Herrmann, and this court should agree and uphold the conviction in Count One.

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Respectfully submitted this First day of June 2015.

By: \_\_\_\_\_  
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STATE OF WISCONSIN - VS - Cory S. Herrmann

**CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 10 pages.

Dated: January 20, 2010

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**CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY**

I certify that on May 30, 2015, this brief or appendix was delivered to a third-party commercial carrier for delivery to the Clerk of the Court of Appeals within 3 calendar days. I further certify that the brief or appendix was correctly addressed.

Date: May 30, 2015

Signature: \_\_\_\_\_

**APPELLANT'S BRIEF APPENDIX CERTIFICATION**

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 s. 809.19(2)(a) and that contains:

- (1) a table of contents;
- (2) relevant trial court record entries;
- (3) the findings or opinion of the trial court; and
- (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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.

Dated: June 1, 2015

Signature:

**Note: This certification should be appended to the appendix.**

CERTIFICATE OF COMPLIANCE  
WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This 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.

Dated this 1<sup>st</sup> day of June, 2015.

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