STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2015AP000053-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

REPLY BRIEF OF DEFENDANT-APPELLANT

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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.

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 confers a fundamental individual right to keep and bear arms for protection or defense of hearth and home. *See also* ***McDonald v. City of Chicago, Ill.***, 561 U.S. 742, 778, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010). Statutes which infringe upon fundamental rights must survive either strict or intermediate constitutional scrutiny. Under strict scrutiny analysis it is the government's burden to prove the challenged regulation is necessary to serve a compelling state interest and is narrowly tailored to achieve that end. Under intermediate scrutiny the government must prove the challenged regulation serves an important state interest and the means it employs are substantially related to the achievement of that interest. As fully established in Mr. Herrmann's brief-in-chief, the state did not and cannot meet its burden in this case.

The state's four-page argument does not meaningfully engage the issues this case presents. The state seems to be asking this court to ignore controlling United States Supreme Court precedent, and instead rely on pre-***Heller*** law wherein courts resolved constitutional challenges to laws regulating arms by application of mere interest balancing or rational

basis constitutional scrutiny. The primary cases upon which the state relies, ***Crowley Cutlery, Co. v. United States***, 849 F.2d 573 (7th Cir. 1988), and ***State v. Hamdan***, 2003 WI 113, 264 Wis. 2d 433, 665 N.W.2d 785, have little to no bearing on the Second Amendment issue presented here. ***Crowley*** involved a due process challenge to a regulation under the Commerce Clause. It did not present a Second Amendment issue or any issue implicating any other fundamental right. Consequently, the ***Crowley*** court properly ruled that the challenged regulation easily cleared the extraordinary low bar that is rational basis scrutiny.

Hamdan, too, is inapposite. The interest-balancing approach employed by the Wisconsin Supreme Court in pre-***Heller*** cases such as ***Hamdan*** is no longer good law. In ***Heller*** the 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. But what is clear after ***Heller*** is that state regulation of arms can no longer be upheld on the basis of mere rational basis analysis or interest balancing. Consequently, ***Hamdan*** is no longer good law.

The state below and on appeal presents no evidence or argument in the context of the relevant standard or analytical framework for resolving government regulation of a fundamental rights. The choice to ignore strict or intermediate scrutiny analysis likely stems from the reality that under any rational application of these standards Mr. Herrmann prevails. Like the statute at issue in ***Heller***, the statute at issue here imposes a complete ban on a Second Amendment-protected category of arms.[1] Like the statute in ***Heller***, the statute at issue here was enacted to address at least perceived public safety concerns, reduce crime and save lives. Yet, the ***Heller*** Court ruled that an absolute prohibition of a Second Amendment-protected category of arm "held and used for self-defense in the home" is, as a policy choice, "off the table." ***District of Columbia v. Heller***, 554 U.S. at 636.

As established in Mr. Herrmann's brief-in-chief and the scholarly articles cited therein, the federal law regulating automatic knives and the state prohibition laws which followed were largely symbolic. (Brief-in-chief at pp. 15-18). Ample data establishes that only a very small percentage of automatic knives were used for any sort of criminal purpose. Crime statistics establish that banning automatic knives did not reduce crime, and that lifting the bans has not increased crime. This type of arguably rational but largely symbolic regulation may be constitutionally sound for general commercial regulation, but it is insufficient to pass

[1] The state's claim that the ***Heller*** court "struck down a law that would make it impermissible to have a handgun that was not disassembled or bound by trigger lock" is factually wrong. The statute actually completely banned handguns and required "residents to keep their lawfully owned firearms, such as registered long guns, 'unloaded and disassembled or bound by a trigger lock or similar device.'" ***District of Columbia v. Heller***, 554 U.S. at 575.

constitutional muster for a regulation that infringes on a fundamental constitutional right.

Because the state in its brief does not really develop any cogent argument, response is challenging. The state posits "Herrmann has not, and cannot, demonstrate why the ban on switchblade or spring-assisted knives infringes on his right to keep and bear arms." Aside from the fact that is the state, not Mr. Herrmann, who bears the burden to prove that Wis. Stat. § 941.24 does not violate the Second Amendment, it is puzzling that the state would not understand that a statute imposing a complete prohibition on a Second Amendment-protected weapon is not an infringement of the Second Amendment right to keep and bear arms. There can be no greater infringement than the absolute ban § 941.24 imposes whereby anyone who "manufactures, sells or offers to sell, transports, purchases, possesses or goes armed" with an automatic knife is guilty of a crime.

If what the state is attempting to argue is that the Second Amendment is not violated because Mr. Herrmann could have chosen a different weapon or arm to protect himself in his home, the Court in ***Heller*** expressly rejected that argument. ***District of Columbia v. Heller***, 554 U.S. at 629. It is not the government's place to dictate which Second Amendment-protected weapon a person must chose or use for protection, particularly in defense of hearth and home. Just as is true for firearms, the state could enact laws imposing reasonable time and place regulation (e.g. ban them in schools, bars, or government buildings) and restrict certain persons (e.g. felons) from possessing automatic knives. But just as Washington D.C.'s complete ban of handguns violates the Second Amendment, so too does Wisconsin's complete ban on automatic knives.

The state's claim that "Herrmann points out what he sees as 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" is both a straw-man argument and a red herring. (State's brief p. 8). Mr. Herrmann's argument has nothing to do with trends; it has to do with clearly established and controlling constitutional law. That other states after ***Heller*** and ***McDonald*** recognized constitutional infirmity in their laws and resolved the problem through legislative action is all well and good, but it is not something upon which Mr. Herrmann relies and is not an available remedy for Mr. Herrmann in this case. The Second Amendment to the United States Constitution, as interpreted by ***Heller*** and ***McDonald***, controls this issue and is the basis for the requested relief.

By referencing "automatic firearms, short-barreled shotguns, or so-called 'spring-guns'" the state may be attempting to infer that the automatic knives Wisconsin bans are not subject to Second Amendment protection. But the state fails to develop that argument, or cite any case or authority to support it. And, for the reasons articulated in Mr. Herrmann's brief-in-chief at pp. 11-14, such an argument would be meritless. Spring-assisted or automatic knives have been in existence since before enactment of the Second Amendment and are unquestionably a category of arm protected under the Second Amendment.

In the end, if Washington D.C.'s indirect ban of a category of weapon (handguns) violates the Second Amendment, then Wisconsin's direct ban of a far less dangerous category of weapon must for legal, logical and common sense reasons also be found to violate the Second

Amendment. Consequently, Mr. Herrmann asks that this court rule Wis. Stat. § 941.24 to be facially unconstitutional, and thus void, and for that reason vacate Mr. Herrmann's conviction under that statute.

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.

The state's brief does not address this issue in any meaningful way. Mr. Herrmann believes that Wis. Stat. § 941.24 is unconstitutional on its face. However, at minimum, for the reasons articulated in Mr. Herrmann's brief-in-chief at pp. 22-25, the statute is unconstitutional as applied where the stipulated facts establish Mr. Herrmann possessed his knife in his home for self-protection purposes. There is no conceivable argument or justification for ruling that a ban on handguns for protection in the home violates the Second Amendment, but a ban on a less dangerous category of arm possessed by millions of otherwise law abiding people does not.

CONCLUSION

Mr. Herrmann asks that this court rule that Wis. Stat. § 941.24 is unconstitutional on its face because its 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 state's interest its automatic knife prohibition statute is minimal and is far outweighed by Mr. Herrmann's fundamental Second Amendment right to keep and bear his Second Amendment-protected arm of choice for protection in his home.

Dated this 15th day of June, 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 1,712 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 15th day of June, 2015.

Signed:

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