STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2015AP53-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CORY S. HERRMANN,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE OUTAGAMIE COUNTY CIRCUIT COURT, THE HONORABLE DEE R. DYER, PRESIDING

BRIEF OF THE ATTORNEY GENERAL

BRAD D. SCHIMEL
Attorney General

JEFFREY J. KASSEL
Assistant Attorney General
State Bar No. 1009170
Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
kasseljj@doj.state.wi.us

TABLE OF CONTENTS

CASES CITED

Page

Page

Page

STATUTES CITED

CONSTITUTIONAL PROVISION

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2015AP53-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CORY S. HERRMANN,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE OUTAGAMIE COUNTY CIRCUIT COURT, THE HONORABLE DEE R. DYER, PRESIDING

BRIEF OF THE ATTORNEY GENERAL

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Attorney General does not request oral argument. Publication of the court's decision is warranted because this is a case of first impression regarding the constitutionality of Wis. Stat. § 941.24.

STATEMENT OF THE CASE

Given the nature of the arguments raised in the brief of defendant-appellant Cory S. Herrmann, the Attorney General exercises his option not to present a statement of the case. *See* Wis. Stat. § (Rule) 809.19(3)(a). The relevant facts and procedural history will be discussed in the argument section of this brief.

ARGUMENT

Herrmann was convicted following a trial on stipulated facts of possession of a switchblade knife and possession of drug paraphernalia (10:1; A-Ap. 101). He argues on appeal that the statute prohibiting possession of a switchblade, Wis. Stat. § 941.24(1), is unconstitutional on its face and as applied to him. Because Herrmann has not carried his burden of demonstrating beyond a reasonable doubt that the statute is unconstitutional on its face or as applied, the court should affirm the judgment of conviction.

I. STANDARD OF REVIEW.

"A facial challenge to a statute alleges that the statute is unconstitutional on its face and thus is unconstitutional under all circumstances." *State v. Pocian*, 2012 WI App 58, ¶6, 341 Wis. 2d 380, 814 N.W.2d 894. "An as-applied challenge, conversely, is a claim that a statute is unconstitutional as it relates to the facts of a particular case or to a particular party." *Id.*

A challenge to the constitutionality of a statute is a question of law that the court reviews de novo. *See id*. Because the court presumes statutes are constitutional, a party attempting to argue that a statute is unconstitutional carries a heavy burden. *Id.* In a facial challenge, the challenger must establish, beyond a reasonable doubt, that there are no possible applications or interpretations of the statute that would be constitutional. *Id*. In an as-applied challenge, the challenger must prove that the statute as applied to him or her is unconstitutional beyond a reasonable doubt. *Id.*

II. THE SWITCHBLADE STATUTE IS FACIALLY VALID.

A. The court should apply intermediate scrutiny.

A threshold issue posed by Herrmann's facial challenge to the constitutionality of Wis. Stat. § 941.24 is the level of scrutiny that the court should apply. In the only published Wisconsin case that addresses the level of scrutiny to be applied when a statute is challenged on Second Amendment grounds, this court applied intermediate scrutiny to both facial and as-applied challenges to the felon-in-possession statute. *See Pocian*, 341 Wis. 2d 380, ¶¶11, 14.

Herrmann contends that the level of judicial scrutiny varies depending on the nature of the statute. He argues that "content-based regulations are presumptively invalid and get strict scrutiny analysis while time, place and manner regulations

are subject to intermediate scrutiny." Herrmann's brief at 9. That means, he says, that "statutes that place a severe burden on the core Second Amendment right of armed self-defense (e.g. a total ban on Second Amendment-protect conduct or category of arms) must survive strict scrutiny analysis," while "[s]tatutes 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." *Id*.

Citing *Ezell v. City of Chicago,* 651 F.3d 684 (7th Cir. 2011), Herrmann says that Wis. Stat. § 941.24 "arguably should be analyzed using strict scrutiny" because it "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." Herrmann's brief at 15. The court should reject Herrmann's suggestion that it apply strict scrutiny.

Ezell's value as persuasive authority for applying strict scrutiny is diminished by the fact that the court was divided on the issue of the level of scrutiny to be applied. *See Ezell*, 651 F.3d at 713 (Rovner, J., concurring) ("I write separately because the majority adopts a standard of review on the range ban that is more stringent than is justified by the text or the history of the Second Amendment."). And while many of the federal circuits have considered the possibility that strict scrutiny could

be applied to statutes that severely burden the exercise of Second Amendment rights, most federal circuits "have applied intermediate scrutiny when considering challenges to laws which impact the Second Amendment right." *Norman v. State*, 159 So. 3d 205, 221-22 (Fla. Dist. Ct. App. 2015) (collecting cases); *see also State v. Murillo*, 347 P.3d 284, 288 (N.M. Ct. App. 2015) ("Given only general direction by the Supreme Court, federal circuits have developed a consensus to the extent that some form of intermediate scrutiny is appropriate.").

Our supreme court has held that "[n]ot every governmental burden on fundamental rights must survive strict scrutiny." *Brandmiller v. Arreola*, 199 Wis. 2d 528, 541, 544 N.W.2d 894 (1996). The Tenth Circuit has provided a persuasive explanation for why intermediate scrutiny rather than strict scrutiny is appropriate when assessing Second Amendment challenges.

> Intermediate scrutiny makes sense in the Second Amendment context. The right to carry weapons in public for self-defense poses inherent risks to others. Firearms may create or exacerbate accidents or deadly encounters, as the longstanding bans on private firearms in airports and courthouses illustrate. The risk inherent in firearms and other weapons distinguishes the Second Amendment right from other fundamental rights that have been held to be evaluated under a strict scrutiny test, such as the right to marry and the right to be free from viewpoint discrimination, which can be exercised without creating a direct risk to others. Intermediate scrutiny appropriately places the burden on the government to justify

> its restrictions, while also giving governments considerable flexibility to regulate gun safety.

Bonidy v. U.S. Postal Serv., 790 F.3d 1121, 1126 (10th Cir. 2015).

Even thought the Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008), did not hold that the District of Columbia's handgun ban was subject to strict scrutiny, *see id*. at 634, Herrmann argues that Wisconsin's ban on switchblade possession should be subject to strict scrutiny because, like the handgun ban invalidated in *Heller*, the switchblade statute imposes an absolute prohibition on a "Second Amendment-protected category of arms 'held and used for self-defense in the home.'" Herrmann's brief at 15 (quoting *Heller*, 554 U.S. at 636). Herrmann's attempt to equate the District of Columbia's ban on handgun possession with Wisconsin's ban on switchblade possession is flawed.

The statute at issue in *Heller* "totally ban[ned] handgun possession in the home." *Heller*, 554 U.S. at 628. The problem with that ban, the Court held, is that "the inherent right of self-defense has been central to the Second Amendment right." *Id*. The effect of the handgun ban was "a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose." *Id*. "Under any of the standards of scrutiny that we have applied to enumerated constitutional rights," the Court concluded, "banning from the home 'the most preferred firearm in the nation to "keep" and use for protection of one's home and family,' would

fail constitutional muster." *Id*. at 628-29 (citation omitted).

Unlike the District of Columbia's total ban on handguns, Wisconsin law does not impose a total ban on possessing knives. Individuals may possess and carry a variety of other commonly available knives that may be used for self-defense: fixed blade hunting knifes, kitchen knives, and folding knives that do not open automatically. Section 941.24(1) bans only a "mere subset" of small, easily carried knifes. *See Murillo*, 347 P.3d at 290. Wisconsin's ban on one type of knife is not comparable to the District of Columbia's ban on all handguns.

Even under the Herrmann's criteria, therefore, Wisconsin's switchblade statute is not subject to strict scrutiny. Accordingly, this court should apply intermediate scrutiny to the statute.

B. The statute is facially valid.

Under intermediate scrutiny, a law "'is valid only if substantially related to an important governmental objective.'" *Pocian*, 341 Wis. 2d 380, ¶ 11(quoting *United States v. Skoien,* 614 F.3d 638, 641 (7th Cir. 2010) (en banc)). Wisconsin's switchblade prohibition is constitutional under this test.

"Like most rights, the right secured by the Second Amendment is not unlimited." *Heller*, 554 U.S. at 626. "From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id*.

The State's research has yielded three cases, all cited in Herrmann's brief, that involve challenges to state statutes prohibiting the possession of switchblades. All of those cases involved challenges brought under their respective state constitutional right-to-bear-arms provision; two of the three cases held that the statute was valid. *See Lacy v. State*, 903 N.E.2d 486, 489-93 (Ind. Ct. App. 2009) (statute valid as applied); *Murillo*, 347 P.3d at 289-90 (statute constitutional on its face); *State v. Delgado*, 692 P.2d 610, 614 (Or. 1984) (en banc) (statute unconstitutional on its face).

Although all of these cases were decided under the applicable state constitutional provision, the *Murillo* decision is particularly instructive because it discusses *Heller* and applies intermediate scrutiny based on other courts' post-*Heller* application of that test. *See Murillo*, 347 P.3d at 287-89. Applying the same intermediate scrutiny test that Wisconsin courts apply – whether the statute "is substantially related to an important government purpose," *id*. at 289 – the court held that the switchblade ban is constitutional. *See id*. at 289-90.

The court began its discussion by noting that "[t]his analysis typically requires an evidentiary basis developed at trial, but in this case Defendant did not raise his facial challenges below, leaving this Court without the benefit of the typical evidentiary record." *Id*. at 289 n.2. But because "[o]ther cases have addressed the issue," the court said, "rather than remanding this case to district court, we can address Defendant's arguments based on case law." *Id*.

The court then explained why the switchblade statute is constitutional under an intermediate scrutiny analysis.

> We turn now to an analysis of Section 30–7–8 through the lens of intermediate scrutiny. To survive a challenge under intermediate scrutiny, the government must show that the statute is substantially related to an important government purpose. The State argues that the purpose of the statute is to protect the public from the danger of potentially-lethal surprise attacks posed by switchblade knives. As the State points out, our Supreme Court has stated that the switchblade is "designed for quick use in a knife fight." *Nick R.*, 2009–NMSC–050, ¶ 23, 147 N.M. 182, 218 P.3d 868. It is, "by design and use, almost exclusively the weapon of the thug and the delinquent." *Precise Imp. Corp. v. Kelly*, 378 F.2d 1014, 1017 (2d Cir. 1967). The purpose of the legislation—protection of the public from the surprise use of a dangerous weapon utilized in large part for unlawful activity—is an important governmental purpose. Prohibiting the possession of this weapon is, of course, substantially related to this narrow, but important, purpose.

Id. at 289 (footnote and one citation omitted).

The court then addressed the defendant's argument that "although regulation of switchblades might be permissible, the categorical ban instituted by Section 30–7–8 is unconstitutional." *Id*. at 289-90. The court disagreed, stating 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." *Id*. at 290. And, the court added, "[u]ltimately, Defendant's point is semantic and beside the point." *Id*.

> The real issues are: (1) the degree of the burden placed on the right to keep and bear arms, which, in this case, is unsubstantial and (2) the distance from the core of the right, which, in this case, is remote. The fact that the statute effects a categorical ban is not, of itself, decisive. *See Skoien*, 614 F.3d at 641 ("Categorical limits on the possession of firearms would not be a constitutional anomaly.").

Id.

The court also rejected the defendant's argument that the statute was invalid because "it banned switchblades while leaving unregulated other equally dangerous or more dangerous knives." *Id*. at 290. The court said that "[w]hether other knives also warrant regulation is a question for the Legislature." *Id*. "The question we face under intermediate scrutiny is whether the prohibition on switchblade knives serves an important purpose. For reasons we have already stated, we think it does." *Id*. Because it was "not satisfied beyond a reasonable doubt that the Legislature violated Article II, Section 6 of the New Mexico Constitution in enacting" the statute, the court "uph[e]ld the legislation against Defendant's challenge." *Id*.

The State agrees with the *Murillo* court's analysis and asks this court to follow it.

Unsurprisingly, Herrmann disagrees with *Murillo*. He argues that *Murillo* "ignores and contradicts *Heller*, and is simply wrong" because

Heller precludes banning categories of weapons. Herrmann's brief at 19. But other courts, including the Seventh Circuit, have held that *Heller* does not foreclose categorical prohibitions on the possession of weapons. *See Skoien*, 614 F.3d at 641. And, as discussed above, Wisconsin's ban on one type of knife is not comparable to the District of Columbia's total ban on handguns. *See supra*, p. 7.

Herrmann also challenges *Murillo*'s court's discussion of the dangerousness of switchblades. *Murillo* is hardly an outlier in that regard, however. In *Crowley Cutlery Co. v. United States*, 849 F.2d 273 (7th Cir. 1988), the Seventh Circuit rejected a due process challenge to the federal Switchblade Knife Act. Writing for the court, Judge Richard Posner explained why it was rational to ban switchblade knives:

> Switchblade knives are dangerous, and the due process clause does not forbid the banning of dangerous products. "Congress is free to exclude from interstate commerce articles whose use in the states for which they are destined it may reasonably conceive to be injurious to the public health, morals or welfare." Switchblade knives are more dangerous than regular knives because they are more readily concealable and hence more suitable for criminal use. So it is rational to ban them, and not regular knives as well. It would be absurd to suggest that the only lawful method of banning switchblade knives would be to ban all knives, including we suppose the plastic knives provided on airlines and in prison cafeterias.

Id. at 278 (citation omitted).

When it likewise rejected a challenge to the federal switchblade statute, the Second Circuit quoted the report of the Senate Committee on Interstate and Foreign Commerce recommending passage of the statute:

> "In supporting enactment of this measure, however, your committee considers that the purpose to be achieved goes beyond merely aiding States in local law enforcement. The switchblade knife is, by design and use, almost exclusively the weapon of the thug and the delinquent. Such knives are not particularly adapted to the requirements of the hunter or fisherman, and sportsmen generally do not employ them. It was testified that, practically speaking, there is no legitimate use for the switchblade to which a conventional sheath or jackknife is not better suited. This being the case, your committee believes that it is in the national interest that these articles be banned from interstate commerce." S. Rep. No. 1980, 85th Cong., 2d Sess., reprinted in 2 U.S. Code Cong. & Ad. News 1958, at 3435-37.

Precise Imports Corp. v. Kelly, 378 F.2d 1014, 1017 (2d Cir. 1967). More recently, the Indiana Court of Appeals agreed with that assessment of the dangerousness of switchblades when it upheld Indiana's switchblade ban. *See Lacy*, 903 N.E.2d at 490.

Never mind those decisions, Herrmann says. "Any claim that automatic knives are primarily owned and used by criminals is empirically verifiable and demonstrably false," he asserts, and he's got the law review articles to prove it. *See* Herrmann's brief at 17-20. But this court is not the place to make a fact-driven argument in the first

instance. "The court of appeals cannot find facts." *Kovalic v. DEC Int'l*, 186 Wis. 2d 162, 172, 519 N.W.2d 351 (Ct. App. 1994) (citing *Wurtz v. Fleischman*, 97 Wis. 2d 100, 107 n. 3, 293 N.W.2d 155 (1980)).

In a similar vein, Herrmann argues that Wisconsin's switchblade statute encompasses "a wide array of utility knives sold openly at stores like Home Depot or Sears" and "include[s] knives found in any reasonably well-stocked tool box or generally on any construction job site." Herrmann's brief at 13. There are two problems with that argument.

First, Herrmann is asking this court to determine that these knives operate in a manner prohibited by Wis. Stat. § 941.24 based on their description on a website. *See* Herrmann's brief at 13 & n.8. More problematically, he is asking the court to act as a factfinder, which it cannot do.

Second, even assuming that these utility knives fit the definition of a switchblade under the Wisconsin statute, home improvement is not one of the core purposes of the Second Amendment. According to *Heller*, the Second Amendment serves three purposes: protecting militias, hunting, and self-defense, with self-defense as "the *central component* of the right" to keep and bear arms. *See Heller* 554 U.S. at 599; *see also id.* at 646 (Stevens, J., dissenting) ("Unlike the Court of Appeals, the Court does not read that phrase to create a right to possess arms for 'lawful, private purposes.' Instead, the Court limits the Amendment's protection to the right 'to possess and carry weapons in case of confrontation.'") (citation omitted); *United States v. Lahey*, 967 F. Supp. 2d 731, 752 (S.D.N.Y. 2013) ("According to the

Supreme Court in *Heller*, the Second Amendment serves three purposes: protecting militias, hunting, and self-defense."). Any effect of Wis. Stat. § 941.24 on the right to possess home improvement tools does not implicate core Second Amendment rights. [1]

Herrmann contends that the Oregon Supreme Court reached the correct conclusion when it held that that state's ban on automatic knives violated the state constitution. *See* Herrmann's brief at 18. The New Mexico Court of Appeals provided a cogent explanation in *Murillo* of why the Oregon decision is not persuasive authority.

> We . . . decline to follow the reasoning of the *Delgado* court. *Delgado* focused most of its analysis on whether knives are "arms," concluding that they are, in fact, protected under the Oregon Constitution. [*Delgado*, 692 P.2d.] at 611–14. Having determined that switchblade knives are "arms," the *Delgado* court held, with minimal further analysis and without reference to a level of scrutiny, that the Oregon statute was unconstitutional. *See id.* at 614. ("[T]his decision does not mean that individuals have an unfettered right to possess

[1]In a footnote, Herrmann notes that Wis. Const. Art. I, sec. 25 guarantees the right of the people to keep and bear arms "for security, defense, hunting, recreation or any other lawful purpose." *See* Herrmann's brief at 5 n.2. But he expressly declines to develop a separate argument based on the Wisconsin Constitution. *See id.* Because this court does not consider undeveloped arguments, especially undeveloped constitutional arguments, the court should not consider whether a statute prohibiting certain home improvement tools violates the Wisconsin Constitution. *See Cemetery Services v. Department of Regulation and Licensing*, 221 Wis. 2d 817, 831, 586 N.W.2d 191 (Ct. App. 1998); *State v. Flynn*, 190 Wis. 2d 31, 58, 527 N.W.2d 343 (Ct. App. 1994).

> or use constitutionally protected arms in any way they please.... [T]he problem here is that [the challenged statute] absolutely proscribes the mere possession or carrying of such arms. This the constitution does not permit."). Because our courts apply a standard of scrutiny when analyzing constitutional claims, which the Oregon court did not in *Delgado*, we are not persuaded by its decision.

Murillo, 347 P.3d at 289; *see also Lacy*, 903 N.E.2d at 491-92 (rejecting *Delgado*'s reasoning). Notably, both *Murillo* and *Lacy* were decided after *Heller*.

Herrmann also argues that "whether handguns are more effective or popular than automatic knives, or whether other types of arms are allowed as alternatives, is irrelevant." Herrmann's brief at 20. That is so, he contends, because "*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." *Id*. (citing *Heller*, 554 U.S. at 629).

That is not what *Heller* holds. The portion of *Heller* to which Herrmann cites addresses the District of Columbia's ban on handguns. *See Heller*, 554 U.S. at 629. But neither *Heller* nor *McDonald v. City of Chicago*, 561 U.S. 742 (2010), which held that Second Amendment applies to the States, prohibit all categorical limitations on the right to keep and bear arms. As the Seventh Circuit noted in a recent decision upholding a city's ban on possession of semi-automatic assault weapons and large capacity magazines,

> *Heller* does not purport to define the full scope of the Second Amendment. The Court

> has not told us what other entitlements the Second Amendment creates or what kinds of gun regulations legislatures may enact. Instead the Court has alerted other judges, in *Heller* and again in *McDonald*, that the Second Amendment "does not imperil every law regulating firearms." *McDonald*, 561 U.S. at 786 (plurality opinion); *Heller*, 554 U.S. at 626–27 & n. 26. Cautionary language about what has been left open should not be read as if it were part of the Constitution or answered all possible questions. It is enough to say, as we did in *Skoien*, 614 F.3d at 641, that at least some categorical limits on the kinds of weapons that can be possessed are proper, and that they need not mirror restrictions that were on the books in 1791.

Friedman v. City of Highland Park, 784 F.3d 406, 410 (7th Cir. 2015), *petition for cert. filed* July 27, 2015 (No. 15-133). Writing for the majority in *Friedman*, Judge Frank Easterbrook explained why the Supreme Court's Second Amendment jurisprudence and principles of federalism allows state and local governments some latitude in regulating weapons.

> *McDonald* holds that the Second Amendment creates individual rights that can be asserted against state and local governments. But neither it nor *Heller* attempts to define the entire scope of the Second Amendment—to take all questions about which weapons are appropriate for self-defense out of the people's hands. *Heller* and *McDonald* set limits on the regulation of firearms; but within those limits, they leave matters open. The best way to evaluate the relation among assault weapons, crime, and self-defense is through the political process and scholarly debate, not by parsing ambiguous passages in the Supreme Court's

> opinions. The central role of representative democracy is no less part of the Constitution than is the Second Amendment: when there is no definitive constitutional rule, matters are left to the legislative process. See *McCulloch v. Maryland,* 4 Wheat. 316, 17 U.S. 316, 407 (1819).
>
> Another constitutional principle is relevant: the Constitution establishes a federal republic where local differences are cherished as elements of liberty, rather than eliminated in a search for national uniformity. *McDonald* circumscribes the scope of permissible experimentation by state and local governments, but it does not foreclose *all* possibility of experimentation. Within the limits established by the Justices in *Heller* and *McDonald,* federalism and diversity still have a claim. Whether those limits should be extended is in the end a question for the Justices.

Id. at 412.

Wisconsin's switchblade ban is substantially related to an important government purpose of "protect[ing] the public from the danger of potentially-lethal surprise attacks posed by switchblade knives." *Murillo*, 347 P.3d at 289. Herrmann has not provided a factual record upon which this court can or should second-guess the legislature's judgment about the dangerousness of these knives. The court should conclude, therefore, that Herrmann has not carried his burden of proving beyond a reasonable doubt that Wis. Stat. § 941.24 is unconstitutional on its face.

III. THE SWITCHBLADE STATTUE IS CONSTITUTIONAL AS APPLIED TO HERRMANN.

Herrmann alternatively argues that Wis. Stat. § 941.24 is unconstitutional as applied to his possession of a switchblade in his home for self-defense. As Herrmann correctly states, *see* Herrmann's brief at 22, the court should assess his as-applied challenge "by considering the facts of his case, not hypothetical facts in other situations." *State v. Hamdan*, 2003 WI 113, ¶43, 264 Wis. 2d 433, 665 N.W.2d 785.

The factual basis for Herrmann's as-applied argument is slim. He asserted in his motion to dismiss that he has no prior convictions, is not in a gang, does not use the switchblade for offensive purposes, and that he possessed the switchblade in his home for his protection (5:2). The parties stipulated to those facts for purposes of the bench trial at which Herrmann was convicted (16:2-4; A-Ap. 109-11).

In *Hamdan*, our supreme court held that the prior version of Wisconsin's concealed carry statute was unconstitutional under Article I, Section 25 of the Wisconsin Constitution as applied to a store owner who carried a concealed pistol in his store. *See Hamdan*, 264 Wis. 2d 433, ¶¶67-74. As Herrmann notes, *see* Hermann's brief at 22, the court held 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. . . . ." *Hamdan*, 264 Wis. 2d 433, ¶67 (quoted source

omitted). The court held that the CCW statute, "by virtue of its application under the facts of this case, suffers from this infirmity." *Id*.

The supreme court held in *Hamdan* that when applying intermediate scrutiny in an as-applied constitutional challenge, "the test for whether statutes or ordinances that restrict a fundamental right are constitutional is whether they leave 'open ample alternative channels by which the citizen may exercise' the affected right." *Hamdan*, 264 Wis. 2d 433, ¶70 (quoting *Brandmiller*, 199 Wis. 2d at 541). That test requires the court to "assess whether an individual could have exercised the right in a reasonable, alternative manner that did not violate the statute." *Id*., ¶69. The court explained its holding as follows:

> In circumstances where the State's interest in restricting the right to keep and bear arms is minimal and the private interest in exercising the right is substantial, an individual needs a way to exercise the right without violating the law. We hold, in these circumstances, that regulations limiting a constitutional right to keep and bear arms must leave *some* realistic alternative means to exercise the right.

Id., ¶71.

The court found that "[r]equiring a storeowner who desires security *on his own business property* to carry a gun openly or in a holster is simply not reasonable." *Id*., ¶73. "Such practices," the court said, "would alert criminals to the presence of the weapon and frighten friends and customers.

Likewise, requiring the gun owner to leave a handgun in plain view in his or her store so that he or she avoids a CCW charge fails the litmus test of common sense." *Id*. "As a practical matter," the court observed, "the storeowner who keeps a firearm for security must have the gun within easy reach. Requiring a storeowner to openly display weapons as the only available means of exercising the right to keep and bear arms for security is impractical, unsettling, and possibly dangerous." *Id*., ¶74.

The court said that "[i]f the State prosecutes a storeowner for having a concealed weapon within easy reach, it is strongly discouraging the use of firearms for security and is practically nullifying the right to do so. Such a prosecution is very likely to impair the constitutional right to bear arms for security." *Id*. "[R]equiring the continuous, open carrying of a firearm in one's business would effectively eviscerate Article I, Section 25. . . ." *Id*., ¶75.

Herrmann argues that Wisconsin's switchblade statute likewise is a "restriction of a private right [that] is oppressive." Herrmann's brief at 23. He asserts that "[m]yriad reasons exist why Mr. Herrmann and others would chose a spring-assisted knife over far more dangerous arms such as a handgun, which clearly cannot be banned. . . ." *Id*. But that assertion rests on the erroneous premise that the only choices are a handgun and a switchblade knife. That premise is false because Wis. Stat. § 941.24 does not prohibit possession of other types of knives for self-defense. And the reasons why other individuals would prefer a switchblade are irrelevant, as Herrmann's as-applied challenge is

assessed "by considering the facts of his case, not hypothetical facts in other situations." *Hamdan*, 264 Wis. 2d 433, ¶43.

Herrmann argues that 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." Herrmann's brief at 24. But the record is devoid of any explanation of why Herrmann chose a switchblade rather than some other type of knife. Did he believe that he could not reasonably exercise his right to use a knife for self-defense with a knife other than a switchblade? Or did he choose a switchblade rather than some other of knife that he could use for defensive purposes because a spring-opening knife is more fun to operate? The record is silent on this point.

The switchblade statute would be unconstitutional as applied to Herrmann only if he had no realistic alternative means to exercise his right to possess and carry a knife for defense. *See Hamdan*, 264 Wis. 2d 433, ¶71. It is Herrmann's burden to establish beyond a reasonable doubt that the switchblade ban has that effect on him. *See Pocian*, 341 Wis. 2d 380, ¶8. Because Herrmann has failed to meet that burden, the court should reject his as-applied challenge.

CONCLUSION

For the reasons stated above, the court should affirm the judgment of conviction.

Dated this 28th day of September, 2015.

BRAD D. SCHIMEL
Attorney General

JEFFREY J. KASSEL
Assistant Attorney General
State Bar No. 1009170

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
kasseljj@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,975 words.

_____

Jeffrey J. Kassel
Assistant Attorney General

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 28th day of , 2015.

_____

Jeffrey J. Kassel
Assistant Attorney General