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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 AND APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT ON PUBLICATION

Mr. Herrmann urges this court to issue a published decision to clarify Second Amendment rights for all people in Wisconsin. In at least one case a circuit judge has declared Wis. Stat. § 941.24 to be facially unconstitutional, without garnering an appeal from the state. *See* ***State v. William K. Aney***, Kenosha Co. Case No. 14-CM-1488 (Reply App. 119-32, motion and transcript). A published decision will ensure that Second Amendment rights are equally applied across the state.

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.

Citing language from ***Pocian v. State***, 2012 WI App 58, ¶ 6, 341 Wis. 2d 380, the Attorney General begins its brief with a concise statement of the rational basis standard of review test which presumes a statute to be constitutional and places the burden on the party challenging the statute to prove constitutional infirmity beyond a reasonable doubt. (AG's brief pp, 2-3). However, because § 941.24 infringes on a fundamental individual right the Attorney General concedes, as it must, that heightened (i.e. strict or intermediate) scrutiny applies. (AG's brief pp. 3-6). Under either strict or intermediate scrutiny a challenged regulation is presumed to be unconstitutional and the

government bears the burden to prove constitutionality under the relevant criteria. *See e.g.* ***Pocian***, at ¶ 14, ("under intermediate scrutiny the government must show…). The Attorney General then curiously devotes the balance of its brief to making what is essentially a rational basis argument concluding "Herrmann has not carried his burden of proving beyond a reasonable doubt that Wis. Stat. § 941.24 is unconstitutional on its face." (AG's brief p. 17).

Pocian decided whether in the aftermath of ***Heller*** and ***McDonald***[1] Wisconsin's felon-in-possession-of-a-firearm statute violated the Second Amendment. The standard of review was not an important issue in that case because both ***Heller*** and ***McDonald*** expressly ruled that the Court's decisions did not affect long-standing regulations such as those limiting gun rights of felons. *See* ***Heller***, 554 U.S. at 626-27; ***McDonald***, 561 U.S. at 786. ***Pocian***'s citation to two rational basis cases, but ultimately correct application of the intermediate scrutiny standard, does not alter binding Supreme Court precedent which places a heavy burden on the government to justify criminally punishing the exercise of an enumerated constitutional right. (*See* cases cited in Mr. Herrmann's opening brief, pp. 9-10); and those in David Hardy, *The Right to Arms and Standards of Review: A Tale of Three Circuits*, 46 Conn. L. rev. 1435 (Reply App. 133-34).

[1] ***District of Columbia v. Heller***, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008); ***McDonald v. City of Chicago, Ill.***, 561 U.S. 742, 778, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010).

The Attorney General's argument that this court should reject strict scrutiny because a case Mr. Herrmann cites, ***Ezell v. City of Chicago***, 651 F.3d 684 (7th Cir. 2011), drew a concurring opinion, should not persuade. (AG's brief pp. 4-6). ***Ezell*** struck down a gun permit requirement which mandated shooting-range training, but then banned shooting ranges. The majority applied strict scrutiny concluding the regulation impermissibly burdened the core right to keep Second Amendment-protected arms in one's home for protection. The concurrence utilized intermediate scrutiny because it viewed "regulation in training [to be] an area ancillary to a core right." *Id.* at 713. However, regardless of where the strict/intermediate line was drawn for that particular regulation, the two-step analytical framework for which Mr. Herrmann cites ***Ezell*** is firmly established and has been adopted in one form or another nearly everywhere. *See* David Hardy, *The Right to Arms and Standards of Review: A Tale of Three Circuits*, 46 Conn. L. rev. 1435. (Reply App. 138-45).

This two-step approach asks first whether a challenged law regulates conduct falling within the scope of the Second Amendment's guarantee. If it does not, the Second Amendment heightened-scrutiny analysis ends. If it does, then courts apply strict scrutiny to laws regulating the core right of law-abiding citizens to possess Second Amendment-protected arms in their home for protection, and apply intermediate

scrutiny for most non-core-right regulations. *Id.*; *also see* ***Heller v. District of Columbia***, _ F.3d _ (D.C. Cir. 2015)(***Heller** III*). (Reply App. 101-18).[2]

In ***Heller***, Justice Scalia's majority decision cites ***United States v. Miller***, 307 U.S. 174 (1939), to establish that while the Second Amendment applies to all arms in existence at the time of ratification (*i.e.* 1791 or 1868), it does not apply to regulation of "dangerous and unusual weapons" such as fully automatic or short-barreled guns. ***Heller*,** 554 U.S. at 627; *also see*, ***McDonald***, 561 U.S. at 767-68. Courts have cited this aspect of ***Heller*** to hold that other types of modern arms such as assault rifles and large-capacity magazines do not fall within Second Amendment protection and therefore can be regulated or banned. *See* ***Heller v. District of Columbia***, 670 F.3d 1244, 1260 (D.C. Cir. 2011) (***Heller** II*); ***Friedman v. City of Highland Park, Illinois***, 784 F.3d 406, 408 (7th Cir. 2015).

The Attorney General does not, because it cannot, argue that automatic knives such as the one Mr. Herrmann was convicted for possessing in his home for protection fall outside Second Amendment protection. As established in Mr. Herrmann's opening brief, automatic knives existed at the time of ratification and they are not "dangerous and unusual" weapons as contemplated in ***Heller***.

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[2] In the aftermath of the Supreme Court decision in ***Heller***, the District of Columbia enacted new gun control regulations. Two D.C. Circuit decisions, ***Heller v. District of Columbia***, 670 F.3d 1244, 1260 (D.C. Cir. 2011) (***Heller** II*), and ***Heller v. District of Columbia***, _ F.3d _ (D.C. Cir. 2015) (***Heller** III*), analyze those regulations, finding some violate the Second Amendment while others do not.

The Attorney General argues that strict scrutiny should not apply because ***Heller*** "did not did not hold the District of Columbia's handgun ban was subject to strict scrutiny." (AG's brief p. 6). This is true to a point because ***Heller*** held that a regulation which bans a person from possessing a Second Amendment-protected weapon in his or her home for protection, was "off the table" entirely. ***Heller***, 554 U.S. at 636. "Off the table" could rationally be construed as creating an absolute right. But Mr. Herrmann concedes the government has to be afforded an opportunity to justify its regulation but logically "off the table" is more akin to strict than to intermediate scrutiny.

The Attorney General's claim that most federal circuits apply intermediate scrutiny in Second Amendment cases is true. But that is because most cases involve challenges to time, place and manner regulation. The case the Attorney General cites to make its point is just such an example. In ***Bonidy v. U.S. Postal Serv.***, 790 F.3d 1121 (10th Cir. 2015), the issue before the court was whether the government could prohibit firearms on post office property, including the parking lot. The ***Bonidy*** court discussed whether ***Heller*** extended individual Second Amendment right outside the home, concluded it did, and then stated "If Second Amendment rights apply outside the home, we believe they should be measured by the traditional test of intermediate scrutiny" because the risk to the public is greater when people carry weapons outside their home. *Id.* at 1126. That is, the ***Bonidy*** court applied intermediate scrutiny only because the challenged statute did not regulate the core right to possess arms in one's home for protection. In this regard, ***Bonidy*** actually supports Mr. Herrmann's position.

The Attorney General posits that "Herrmann's attempt to equate the District of Columbia's ban on handgun possession with Wisconsin's ban on switchblade possession is flawed." (AG's brief p. 6). The District of Columbia's regulation did not ban all firearms, it banned a subset of firearms, handguns, because they are easily concealed and supposedly often used in crimes. Long guns, rifles and shotguns remained legal. Wisconsin's automatic knife ban statute mirrors this perfectly. Section 941.24 does not ban long or fixed-blade knives or even all folding knives, it just bans a subset of knives, automatic knives, presumably for the same reasons the District of Columbia banned handguns. The Attorney General, though, argues that "Unlike the District of Columbia's total ban on guns [which is not true], Wisconsin law does not impose a total ban on possessing knives…[therefore] Wisconsin's ban on one type of knife is not comparable to the District of Columbia's ban on all handguns." (AG's brief p. 7).

The analogy between the two regulations, each directed at a distinct but similar subset of Second Amendment-protected arms, is compelling. The Attorney General's logic on this point is flawed.

The issue Mr. Herrmann's case presents involves a regulation which burdens the core Second Amendment right of a law-abiding citizen to possess a Second Amendment-protected arm in his or her home for protection. The regulation, therefore, is properly analyzed under strict scrutiny and should be upheld only if it is found to be necessary to serve a compelling state interest and narrowly drawn to achieve that end. By choosing to not argue that § 941.24 survives strict scrutiny the Attorney General, at least tacitly, concedes it does not.

Should this court instead decide to apply intermediate scrutiny, the Attorney General's argument falls far short of meeting its burden under the relevant criteria for that standard. In order for a challenged provision to survive intermediate scrutiny, the government:

> …has to show, first, that it 'promotes a substantial government interest that would be achieved less effectively absent the regulation,' and second, that 'the means chosen are not substantially broader than necessary to achieve that interest.'…To meet the first requirement, the [government] must demonstrate that the harms to be prevented by the regulation 'are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.'

Heller v. District of Columbia, __ F.3d __ (D.C. Cir. 2015)(***Heller*** *III*)(internal citations omitted). (Reply App. 105).

The Attorney General argues that Wisconsin's automatic knife ban "is substantially related to an important government interest of 'protect[ing] the public from the danger of potentially-lethal surprise attacks posed by switchblade knives.'" (AG's brief p. 17). The Attorney General, however, produced no evidence and cites no relevant authority or data to establish that surprise attacks using automatic knives is, or was ever, a real and not merely conjectural harm, or that the ban has alleviated this supposed harm in a direct and material way. On the contrary, the Attorney General ignores that it was the state's burden to prove these points beyond a reasonable doubt and faults Mr. Herrmann for supplying the court with the facts and information necessary to decide the issue. (AG's brief p. 12).

The Attorney General ignores that this case is one directed at the core Second Amendment right to keep arms in one's home for protection. And, stating the obvious, the threat to the public of a surprise attack by a person possessing an automatic knife within his or her home is negligible to the point of non-existence. To the extent the Wisconsin legislature believes public harm from automatic knives warrants regulation outside the home, the legislature could enact reasonable time, place and manner regulations (e.g. require permits or limit possession in sensitive places). But as was true in ***Heller*** for handguns, Wisconsin cannot achieve this end by means of a total ban because doing so creates a regulation substantially broader than that necessary to achieve the end.

As noted above, the Attorney General criticizes Mr. Herrmann for providing the court information establishing that at the time Wisconsin's and other state's automatic knife bans were enacted such knives were, and are, overwhelmingly possessed by law-abiding citizens for lawful purposes and that enacting the bans had virtually no impact on crime or public safety. The FBI crime statistics and law review articles Mr. Herrmann cites do not contain facts that need be found, they contain information, data and facts that merely need be judicially noticed and are of a type courts deciding Second Amendment issues routinely rely. *See e.g.* ***Heller** II*, 670 F.3d 1244, passim; ***Heller** III*, passim; ***United States v. Skoien***, 614 F.3d 638 (7th Cir. 2010) (noting that "guns are about five times more deadly than knives"), and passim.

Judge Diane Sykes' dissent in ***Skoien*** is critical of the government for failing to engage in the "heavy legal lifting" necessary to "justify criminally punishing the exercise of an enumerated constitutional right," adding that the court having to supply the data on its own to be "an odd way to put the government to its burden." *Id.* pp. 646-47. The Attorney General's argument notwithstanding, when the government bears the burden of proof and fails to develop the record to carry its burden, the opposing party and court are not bound by the state's insufficiently developed record and argument when arguing and deciding the issue.

The Attorney General devotes much of its brief to parroting a New Mexico court of appeals decision, ***State v. Murillo***, 347 P.3d 284 (N.M. Ct. App. 2015), arguing it to be "particularly instructive." (AG's brief p. 8, passim). ***Murillo*** is not particularly helpful. The issue before the court in ***Murillo*** was not one directed at the core Second Amendment right to keep and bear arms in one's home for protection; Mr. Murillo was convicted of possessing and using a switchblade at a Wal-Mart store. Further, Mr. Murillo did not raise the issue below depriving the government of an opportunity to develop a record to justify infringement of the right with respect possession in a public place. Faced with undeveloped arguments the ***Murillo*** court relied on pre-***Heller*** federal commerce clause regulation cases which upheld under a rational basis test a federal law barring the sale or transport of switchblades across state lines.

In contrast to ***Murillo***, Mr. Herrmann was convicted for possessing a knife in his home for protection, he raised the issue in the circuit court allowing the state opportunity to develop the record to meet its burden, and the court has a fully developed argument, at least on the defense side. The half-century-plus-old congressional testimony cited in the pre-***Heller*** commerce clause cases the ***Murillo*** court relied upon is of no meaningful value. They contain not found facts but rather speculative assertions and conclusions which crime statistics and history have proven false (*See* Mr. Herrmann's brief pp. 17-19).

The Attorney General posits that Mr. Herrmann "argues that…*Heller* precludes banning categories of weapons. Herrmann's brief at 19." (AG's brief pp. 10-11). Mr. Herrmann did not make that claim "at 19" or anywhere else in his brief. Not all weapons garner Second Amendment protection and those that do not (e.g. fully automatic or short-barreled guns, assault rifles and guns with large-capacity clips) can be regulated or banned. Automatic knives do not fall into this category. The Attorney General's citation to ***Skoien*** on this point is curious in that ***Skoien*** is a felon-in-possession case; another case the Attorney General cites elsewhere, ***Friedman v. City of Highland Park, Ill.***, is a better example.

The Attorney General disputes that ***Heller*** and ***McDonald*** bar the government banning one type of arm if others are readily available. (AG's brief p. 15). The 7th Circuit in ***Friedman*** agrees with Mr. Herrmann on this point stating "*Heller* held that the availability of long guns does not save a ban on handgun ownership." 784 F.3d at 411. Hence, the Attorney General's and the ***Murillo*** court's point that automatic knives can be banned because fixed blade knives

would still be available is wrong. Neither the Wisconsin Attorney General nor a court should be able to dictate to a person which Second Amendment-protected arm they must choose to defend their home.

The Attorney General's effort to shift the burden and not engage within the controlling framework for heightened constitutional review is telling. Wisconsin's automatic knife ban is not a regulation necessary to serve a compelling state interest and narrowly drawn to achieve that end, nor does it employ means that are substantially related to achieving an important government interest. For these reasons, the Wis. Stat. § 941.24 is facially unconstitutional and thus, void.

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 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

This court should declare Wis. Stat. § 941.24 to be unconstitutional on its face because Wisconsin's complete ban of all automatic knives, even when possessed by law-abiding citizens in their home for protection, violates rights ensured by the Second Amendment. The total ban is not a regulation narrowly drawn to serve a compelling state interest, nor does it employ means that are substantially related to achieving an important government interest and the state has failed to carry its burden to prove otherwise. Wisconsin could probably impose reasonable time, place and manner regulation (e.g. require permits or limit how and where automatic knives can be carried in public places). But for the reasons stated by the United States Supreme Court in ***Heller*** and ***McDonald*** a total ban of this Second Amendment-protected category of weapon is unconstitutional.

Dated this 12th day of October, 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 2,984 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 12th day of October, 2015.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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

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

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