STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No. 2016AP000765CR

GEORGE MALLUM III,

Defendant-Appellant..

APPELLANT'S BRIEF AND APPENDIX

ON APPEAL FROM A JUDGMENT OF CONVICTION AND SENTENCE
OF THE CIRCUIT COURT OF MILWAUKEE COUNTY
HON. MEL FLANAGAN, PRESIDING
AND FROM A POSTCONVICTION DECISION AND ORDER
HON. MICHELLE ACKERMAN HAVAS, PRESIDING
CIRCUIT COURT CASE NO. 2014CM003050

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TABLE OF CONTENTS

TABLE OF AUTHORITIES……iii

ISSUES……v

STATEMENTS ON ORAL ARGUMENT AND PUBLICATION……vii

STATEMENT OF THE CASE ……1

A. Procedural Facts ……2
B. Facts of the Case ……4

ARGUMENT……9

I. STANDARD OF REVIEW ……9

II. THE JUDGMENT OF CONVICTION ON COUNT 3 SHOULD BE REVERSED AND THE RELATED SENTENCING CONDITIONS VACATED BECAUSE COUNT 3 FOR DISORDERLY CONDUCT IS MULTIPLICITOUS OF COUNT 2 FOR DISORDERLY CONDUCT, SINCE THE JURY WAS NOT INSTRUCTED ON THE ELEMENTS OF THE CHARGE OF DOMESTIC ABUSE IN COUNT 3 AND THERE WAS NO VERDICT OF GUILT FOR DOMESTIC ABUSE ……10

III. BECAUSE MALLUM WAS NOT FOUND GUILTY OF DOMESTIC ABUSE OR OF A FELONY OR OF THREATENING TO USE A DANGEROUS WEAPON IT WAS ERROR FOR THE COURT TO ADD THE CONDITIONS TO HIS SENTENCE THAT HE COULD NOT HAVE A GUN FOR THE REST OF HIS LIFE……17

IV. SINCE MALLUM WAS NOT FOUND GUILTY OF DOMESTIC ABUSE, IT WAS ERROR FOR THE TRIAL COURT TO ORDER HIM TO PAY A DOMESTIC ABUSE SURCHARGE……24

V. IF MALLUM'S CONVICTION ON COUNT 3 IS NOT REVERSED AS MULTIPLICITOUS OF COUNT 2 OR, IF THE ERRONEOUS CONDITIONS OF MALLUM'S SENTENCE ARE NOT VACATED RELATED TO A LIFETIME BAN ON HAVING GUNS AND ON THE DOMESTIC ABUSE SURCHARGE, THEN THE COURT SHOULD DECLARE THAT 18 U.S.C.§ 922(g)(9) IS FACIALLY UNCONSTITUTIONAL AS A VIOLATION OF THE SECOND AMENDMENT OR IS UNCONSTITUTIONAL *AS APPLIED* IN THIS CASE.....25

VI. IF COUNT 3 IS NOT REVERSED OR THE CONDITION OF SENTENCING RELATED TO THE DOMESTIC ABUSE SURCHARGE IS NOT REVERSED, MALLUM ALSO CHALLENGES WIS.STAT. § 973.055, THE DOMESTIC ABUSE SURCHARGE STATUTE, FOR BEING UNCONSTITUTIONAL *AS APPLIED* IN THIS CASE.....30

CONCLUSION.....31

FORM AND LENGTH CERTIFICATION.....33

ELECTRONIC COPY CERTIFICATION.....34

APPENDIX CERTIFICATION.....35

APPENDIX TABLE OF CONTENTS.....36

TABLE OF AUTHORITIES

Cases

Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).....21,22

Blakely v. Washington, 542 U.S. 296, 303 (2004) 21

District of Columbia v. Heller, 554 U.S. 570 (2008) 1,26,28,29,31

Gillespie v. City of Indianapolis, 185 F.3d 693, (7th Cir. 1999) 25,26

In re Winship, 397 U.S. 358 (1970) 10

Jones v. United States, 526 U.S. 227 (1999) 21

Ring v. Arizona, 536 U.S. 584 (2002).....21

State v. Anderson, 219 Wis.2d 739, 580 N.W.2d 329 (1998).....13

State v. Eisch, 96 Wis.2d 25, 291 N.W.2d 800 (1980).....14

State v. Hill, 2016 WI App 29, 368 Wis.2d 243,
878 N.W.2d 709 24

State v. Koller, 2001 WI App. 253, 248 Wis.2d 259,
635 N.W.2d 838.....9,15

State v. Reynolds, 206 Wis.2d 356,
557 N.W.2d 821 (Ct. App. 1996).....9

United States v. Gaudin, 515 U.S. 506, (1995).....10

U.S. v. Booker, 543 U.S. 220.....9-10,21,22

U.S. v. Castleman, __ U.S.__, 134 S.Ct. 1405, (2014).....27,28

U.S. v. Skoien, 587 F.3d 803 (7th Cir. 2009).....26,29

Voisine v. United States, June 27, 2016, slip op.
at 2016 WL 3461559.....27,28

Statutes

18 USC § 921(a)(33)A.....29

18 USC § 922(g)(9).....1,18,19,20,25,26,27,28,30,31

Wis. Stat. § 809.30.....2

Wis. Stat. § 809.30(2)(f).....8

Wis. Stat, § 809.30(2)(h).....3

Wis. Stat. § 939.51(3)(b).....22

Wis. Stat. § 939.63.....11at fn3

Wis. Stat. § 939.63(1)(a).....11,fn3,19

Wis. Stat. § 944.201(1)(c).....19

Wis. Stat. § 947.01(1).....10,14,22,30

Wis. Stat. § 968.075(1)(a).....11

Wis. Stat. § 973.055.....1,24,30

Wis. Stat. § 990.001(6).....20

CONSTITUTIONS

U.S. Constitution, amend. II.....25,28,31

U.S. Constitution, amend. V.....9,13,25

Wisconsin Constitution, art. I, sec. 8(1).....9,13,25

ISSUES

1. Should the judgment of conviction on Count 3 for disorderly conduct be reversed because it is multiplicitous of Count 2 for disorderly conduct, based on failure of proof, since the court never instructed the jury on the additional charge of domestic violence for Count 3, the verdict form did not ask the jury about guilt on the additional charge, and the jury did not find guilt on the additional charge, but it is only that charge which might make the disorderly conduct in Count 3 non-multiplicitous of the disorderly conduct in Count 2.

TRIAL COURT ANSWER: The trial judge, Hon. Mel Flanagan, denied defendant's post-trial motions [R.61] "without deciding the merits."[R.30]. Her successor for the post-conviction Motion, Hon. Michelle Ackerman Havas, answered No to this question in her Decision and Order Denying Postconviction Relief [R.49] because defendant ordered only the transcripts necessary for the appeal and Judge Havas's Decision said she wanted additional transcripts from the case, but she did not issue an Order for additional transcripts.

2. Even if the judgment of conviction on Count 3 for disorderly conduct is not reversed for multiplicitousness, should the sentence condition ordering defendant-appellant not to have guns for life be reversed because the court did not instruct the jury on the additional charge for domestic abuse, the additional charge was not on the verdict form, and the jury did not find guilt on the additional charge.

TRIAL COURT ANSWER: The trial judge, Hon. Mel Flanagan, denied defendant's post-trial motion "without deciding the merits." [R.30]. Her successor, Hon. Michelle Ackerman Havas, did not address this question in her Decision and Order Denying Motion for Postconviction Relief [R.49], even though it was the main issue in the post-conviction motion [R.45, pp.1, 10-15, 18].

3. Even if the judgment of conviction on Count 3 for disorderly conduct is not reversed for multiplicitousness, should the sentencing condition ordering defendant-appellant to pay a domestic abuse surcharge be reversed because the

court did not instruct the jury on the additional charge for domestic abuse, the additional charge was not on the verdict form, and the jury did not find guilt on the additional charge.

TRIAL COURT ANSWER: The trial judge, Hon Mel Flanagan, denied defendant's post-trial motion "without deciding the merits."[R.30]. Her successor, Hon. Michelle Ackerman Havas did not consider this question in her Decision And Order Denying Motion for Postconviction Relief [R.49], even though it was a main issue in the postconviction Motion [R.45, pp.1,16,18].

4. Is it a violation of due process under both the U.S. Constitution, Amendment V, and the Wisconsin Constitution, Art.I, sec.8, to sentence defendant for a crime on which the jury was never instructed, which was never presented on the verdict form, and on which there was no guilty verdict?

TRIAL COURT ANSWER: The trial judge, Hon. Mel Flanagan, denied defendant's post-trial motion [R.61] "without deciding the merits." [R.30]. Her successor, Hon. Michelle Ackerman Havas, did not consider this question in her Decision And Order Denying Post-Conviction Relief [R.49], even though the argument was presented in the postconviction Motion [R.45, pp. 13-16].

5. Is 18 U.S.C.§922(g)(9), facially unconstitutional in light of the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), or unconstitutional *as applied* in this case because there was no jury verdict that Mallum was guilty of domestic abuse, and is Wis. Stat. § 973.055 also unconstitutional *as applied* because there was no jury verdict that Mallum was guilty of domestic abuse?

TRIAL COURT ANSWER: The trial judge, Hon. Mel Flanagan, denied defendant's post-trial motion [R.61] "without deciding the merits." [R.30]. Her successor, Hon. Michelle Ackerman Havas, did not consider these questions in her Decision and Order Denying Post-Conviction Relief [R.49], although the argument was presented in the postconviction Motion [R.45, pp. 16-18].

STATEMENT ON ORAL ARGUMENT

Defendant-Appellant requests oral argument.

STATEMENT ON PUBLICATION

The opinion in this matter should be published because this case meets the criteria for publication in Wis. Stat. § 809.23(1)(a) 2,4,&5. This case presents important constitutional issues and would also be the first Wisconsin case dealing with the application in Wisconsin of the federal Lautenberg Amendment, U.S.C.§922(g)(9).

However, because this case involved Class B misdemeanors, it is a one-judge appeal pursuant to Wis. Stat. §752.31(2)(f) and (3). Decisions by one court of appeals judge are not published, pursuant to Wis. Stat. §809.23(1)(b)4. Defendant – appellant filed a Motion for a three-judge panel under Wis. Stat. §809.41(1), but the court denied the Motion because it was filed two weeks after the Notice of Appeal was filed. Thus, for the decision to be published, it would require the chief judge either to change the denial of defendant's Motion for a three-judge panel, pursuant to 809.41(2), or to decide on the court's own Motion, pursuant to 809.41(3), to change this case to a three-judge appeal. Defendant-appellant requests the chief judge of the court to make this a three-judge case under either 809.41(2) or (3) and requests the panel to publish the opinion in this case.

STATEMENT OF THE CASE

Defendant-appellant, George Mallum III, appeals his judgment of conviction, his sentence, and the court's denial of his postconviction motion. Mallum asks the court of appeals to reverse his judgment of conviction on Count 3 because it is multiplicitous of Count 2. However, even if the court does not reverse the conviction on Count 3 for multiplicitousness, Mallum asks the court of appeals to vacate the following two sentencing conditions on due process grounds: (1) barring his ownership of guns for his lifetime, since there was no basis in law for the court to impose this condition because he was not found guilty of domestic abuse; and (2) ordering him to pay a domestic abuse surcharge, even though he was not found guilty of domestic abuse. In the alternative, Mallum argues that the lifetime ban on his possessing guns should be overturned because the Lautenberg Amendment, 18 U.S.C.922(g)(9), which imposes a lifetime ban on the possession of guns on those convicted of domestic abuse, is facially unconstitutional in light of ***District of Columbia v. Heller***, 554 U.S. 570 (2008), and is also unconstitutional *as applied* in his case. Additionally, as an alternative, the domestic abuse surcharge should be overturned because Wis. Stat. §973.055 is unconstitutional *as applied.*

A. Procedural Facts

On July 23, 2015, a jury found Mallum guilty of two Class B misdemeanor counts of disorderly conduct [R.28,29 and Ap.125-127],[1] and guilty of Use (possession) of a Dangerous Weapon while committing one of the misdemeanors. Trial Counsel, S.A. Schapiro, filed Post Trial Motions of Defendant and Brief [R.61] on August 19, 2015. The trial judge, Hon. Mel Flanagan, issued a Decision and Order Denying Post-Trial Motions [R.30] on August 26, 2015. The court denied the defendant's post-trial motions "without deciding the merits."[R.30]. The court mainly denied the motions because she said they were "premature" since sentencing had not taken place, and she concluded that the motions appeared to be more in the nature of postconviction motions filed pursuant to Wis. Stat., Rule 809.30. [R.30]

The sentencing hearing was held on October 15, 2015 [Ap.132-150] and the judgment of conviction was entered on October 27, 2015. [Ap.101-103].

After sentencing, the following documents were filed on October 22, 2015; (1) a signed Notice of Right to Seek Postconviction Relief [R.34]; (2) a Notice of Intent to Pursue Post-Conviction Relief [R.35]; and a letter from trial Counsel, Attorney S.A. Schapiro, to the Clerk of Courts, Criminal Division. [Ap.148]. That letter indicated to the clerk which transcripts Attorney Schapiro

[1]Record items in Appendix will be cited as Ap. The Record cite for Items in Appendix will be given in the Appendix Table of Contents. Cites only to the Record will be R.

had ordered for the postconviction motion and the appeal. Attorney Schapiro requested three transcripts: (1) the instructions to the jury in the A.M. of 7/23/15 [Christine Zapf, Reporter]; (2) the proceedings on receipt of the verdict in the P.M. of 7/23/15 [Katherine Nelson, Reporter]; and (3) the sentencing hearing on 10/15/15 [Patricia Frkovich, Reporter]. The last of those transcripts was filed by Christine Zapf on 2/5/16.

Attorney Schapiro was permitted to withdraw as counsel for the defendant in all appellate proceedings by an Order of the Court filed October 28, 2015. [R.38]. A second Notice of Intent to Pursue Post Dispositive Relief was filed on October 28, 2015. [R.37]. Undersigned counsel, Alex Flynn, came onto this case for the appeal and filed the postconviction motion on March 10, 2016 [R.45], which was within 60 days of the February 5, 2016 filing of the last requested transcript, pursuant to the requirements of Wis. Stat. § 809.30(2)(h). The motion asked the court to overturn the conviction on Count 3 as multiplicitous of Count 2, and to remove the sentencing condition ordering a lifetime ban on guns and the payment of a domestic abuse surcharge because Mallum was not found guilty of domestic abuse. It also raised constitutional issues related to the relevant statutes.

On March 11, Steven Cotter, a staff attorney in the circuit court's criminal division, wrote to undersigned counsel, Attorney Alex Flynn, saying

that the court needed a transcript of the motion hearing before Judge Flanagan on multiplicity before the postconviction motion would be decided, and also that it would be necessary for Alex Flynn to get an extension of time from the court of appeals for the circuit court to retain jurisdiction. [Ap.104]. On March 15, 2016, Alex Flynn responded that all the transcripts necessary for the appeal had been ordered and that, without a direct Order from the court requiring him to request an additional transcript, he could not risk acting outside the prescribed statutory time for appeal, based only on the letter from the staff attorney [Ap.105]. On March 23, 2016, Hon Michelle Ackerman Havas, who was the successor judge to Judge Flanagan in the trial court, then issued a Decision and Order Denying Postconviction Relief. [Ap. 105].

Notice of Appeal was filed in Circuit Court on April 12, 2016. A Motion to convert the case from a one-judge appeal to a three-judge appeal was filed on May 2, 2016. The Motion was denied, but said the court could decide in the future on its own Motion to change it to a three-judge case. The circuit court Record of the case was filed in the Court of Appeals on June 1, 2016.

B. Facts of the Case

George Mallum's wife called the police on June 30, 2014 when Mallum came home drunk and wanted to know why his gun was not in his drawer. He became loud and belligerent. She told him it was in the safe in another room

where their teenage grandson was sleeping. Mallum got his gun out of the safe and was yelling at his wife that he wanted the magazine for the gun. The grandson woke up. Mrs. Mallum slipped out of the room and called the police because she said she did not know if the gun was loaded or not. When the South Milwaukee police arrived, they entered the home and found Mallum sitting on a sofa with his arm around his grandson and the unloaded gun on the floor. The police arrested Mallum. He allegedly yelled an obscene comment about his wife as the police were taking him from the house, and perhaps also the same comment to a female police officer. (This summary is taken from the Amended Complaint [Ap.111], from the transcripts of trial testimony of Mallum's wife [R.55] and Mallum's grandson [R.54], and from the closing arguments of the D.A. [R.56, pp.20-28, 38-41] and of defense counsel [R.56, pp. 28-38]).

Mallum was charged with the following three counts in the Amended Complaint. [Ap. 110-111].

Count 1 - Endangering Safety By Use of a Dangerous Weapon (Pointing), Domestic Abuse

Count 2 - Disorderly Conduct, Use of a Dangerous Weapon

Count 3 - Disorderly Conduct, Domestic Abuse

The jury failed to return a verdict on Count 1 and that count was dismissed on the prosecutor's motion. [Ap. 101 & Ap.127, lines 5-10]. The jury found Mallum guilty of disorderly conduct and possession of a gun for count 2.

[R.28]. The jury also found Mallum guilty of count 3 [R.29], but they had not been instructed on domestic abuse [Ap.117-120], as they had been instructed for gun possession in Count 2 [Ap.117]. Moreover, there was no separate guilty verdict on domestic abuse for Count 3 [Ap. 127, lines 1-3 & R.29], as there had been for gun possession in Count 2 [Ap.126, lines 20-25 & R.28]. A judgment of conviction was entered against Mallum on both counts 2 and 3, including the domestic abuse charge for Count 3. [Ap. 101]. Mallum is appealing the conviction on count 3 on grounds that it is multiplicitous of count 2 because there is nothing to distinguish the disorderly conduct in count 3 from the disorderly conduct in count 2, since he was not found guilty of domestic abuse under count 3. He also appeals two sentencing conditions related to Count 3.

Mallum was sentenced on count 2 to 9 months (consecutive to count 3) in the House of Corrections and on Count 3 to 3 months (consecutive to count 2) in the House of Corrections. [Ap. 101]. Both sentences were stayed and defendant was given 2 years probation. [Ap. 101]. As part of the sentence, the court also issued conditions, two of which are challenged in this appeal. The first challenged condition is entitled "Firearms/Weapons Restrictions." [Ap. 102]. It stated that Mallum was to have "No firearms; weapons. No knives or weapons in his possession or on his person." [Ap. 102]. Mallum is not challenging this firearms and weapons prohibition as a condition of probation, but he is

challenging the second sentence of this condition: "48 [sic][2] USC Section 922(g)(9) prohibits possession of a firearm and/or ammunition after conviction of a misdemeanor crime of domestic violence." [Ap. 102]. Mallum challenges this section of the Firearms sentencing condition because he was not found guilty of a crime of domestic violence. The court also seemed to add a probation component to this lifetime ban on guns when the court stated at sentencing that the lifetime ban on guns "is a requirement under federal law. It's also a condition of your probation." [Ap. 145, lines 6-8]. Therefore, Mallum is also challenging this statement, insofar as it could be interpreted to mean that, even without the federal law, the court was imposing on him a lifetime ban on guns as a condition of his probation, without any Wisconsin statutory authority to do so.

A second sentencing condition Mallum is challenging in the judgment of conviction is entitled "Costs." He is challenging the provision ordering him to pay a domestic violence surcharge, [Ap. 102], because the jury did not find Mallum guilty of domestic violence or domestic abuse. [R.29].

Insofar as the Decision and Order Denying Motion for Postconviction Relief [R..49] is the appealable document in this case, as the final decision issued in the trial court, the court of appeals should be aware that this document did not address Mallum's entire postconviction motion. [*See* the Summary of

[2] The judgment of conviction is wrong in its cite of federal law. It should be 18 USC, not 48 USC.

Motion and Conclusion of the Motion at Ap. 106-107 and entire motion at R.45]. It was issued by the successor judge in this case, Hon. Michelle Ackerman Havas, who was not the judge for the trial and the sentencing and thus did not actually know anything about this case. Thus, the court of appeals should not limit its consideration in this case to the issue of multiplicitousness, which is the only issue from the postconviction motion that Judge Havas addressed.

Judge Havas's Decision denying the postconviction motion was unfair to Mallum as a response to the postconviction motion because it did not address the sentencing conditions issues in the postconviction motion, and it was based only on the fact that Mallum's appeal counsel refused the request of a staff attorney for additional transcripts. [Ap. 108, 109]. Yet, all the transcripts judged necessary for the appeal had been timely requested, and the time was long past under Wis. Stat. § 809.30(2)(f) which prescribes that a defendant "*shall*" request transcripts within 30 days of filing the Notice to Seek Postconviction Relief. Moreover, there is no provision in the statute for requesting an extension of this time period from the court of appeals, especially on the basis of merely a request from a staff attorney, and in the absence of any Order from the trial court for additional transcripts. Thus, Mallum requests the court of appeals to consider all the issues in this instant brief related to the judgment of conviction

and sentence and not to consider only the issue addressed in Judge Havas's Order, even if that is the appealable document in the case. Moreover, the court of appeals should consider all the issues because a final order brings forward the whole case and permits other issues from the case to be appealed.

ARGUMENT

I. STANDARD OF REVIEW

The first issue in this case is multiplicity, which comes under the prohibition of double jeopardy in both the Fifth Amendment to the United States Constitution and Art. 1, sec. 8(1) of the Wisconsin Constitution. The Wisconsin Court of Appeals has said, "Whether a multiplicity violation exists in a given case is a question of law that we review *de novo.* ***State v. Koller***, 2001 WI App. 253, ¶32, 248 Wis.2d 259, 635 N.W.2d 838, *citing* ***State v. Reynolds***, 206 Wis.2d 356, 363, 557 N.W.2d 821 (Ct. App. 1996).

The other issues in this case deal with sentencing. However, they involve constitutional issues and so cannot be reviewed under the traditional deferential standard of review for sentencing. The argument here is that there was sentencing without any finding of guilt on the elements of the crime. "It has been settled throughout our history that the Constitution protects every criminal defendant "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." ***U.S. v.***

Booker, 543 U.S. 220, 230 (2005), *citing* ***In re Winship***, 397 U.S. 358, 364 (1970). "It is equally clear that the 'Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged'." ***Booker***, 543 U.S. at 230, quoting ***United States v. Gaudin***, 515 U.S. 506, 511 (1995). These basic constitutional questions regarding two sentencing conditions in this case are issues of law which require *de novo* review.

II. THE JUDGMENT OF CONVICTION ON COUNT 3 SHOULD BE REVERSED AND THE RELATED SENTENCING CONDITIONS VACATED BECAUSE COUNT 3 FOR DISORDERLY CONDUCT IS MULTIPLICITOUS OF COUNT 2 FOR DISORDERLY CONDUCT, SINCE THE JURY WAS NOT INSTRUCTED ON THE ELEMENTS OF THE CHARGE OF DOMESTIC ABUSE IN COUNT 3 AND THERE WAS NO VERDICT OF GUILT FOR DOMESTIC ABUSE.

George Mallum was convicted of two counts of disorderly conduct in violation of Wis. Stat. §947.01(1). Each count for disorderly conduct had an additional charge added to it. This section of the brief concerns the additional charge of domestic abuse for Count 3, the failure of the trial court to instruct the jury on the elements of that charge, the lack of a verdict for that charge, and the punishment given at sentencing related to that charge. since no guilt was found by the jury for that charge. The conviction on Count 3 should be reversed

because, without that additional charge, Count 3 for disorderly conduct is multiplicitous of Count 2 for disorderly conduct.

Count 3 for disorderly conduct had added to it a charge for domestic abuse as a violation of Wis. Stat. § 968.075(1)(a). [Ap.110-111]. Count 2 had added to it a charge for Use (possession) of a Dangerous Weapon as a violation of Wis. Stat. 939.63(1)(a). [Ap.110]. The trial court gave the pattern jury instruction on both disorderly conduct and use (possession) of a dangerous weapon for Count 2 [3]. [Ap. p. 114, line 20 to p. 117, line 20]. The trial court repeated the exact, same instruction on disorderly conduct for Count 3, but the trial court gave no instruction to the jury for the charge of domestic abuse in Count 3. [Ap. p.117, line 20 to p. 120, line 10]. Moreover, the court told the jury at the start of instructing on Count 3 that the only difference between conduct in Count 2 and Count 3 was that Count 3 was "not while armed." [Ap. 117, lines 21-25]. The court did not say that the difference was also that Count 3 included the charge that the disorderly conduct involved domestic abuse. The difference of "not while armed" goes only to the additional charge in Count 2,

[3] It should be noted that there was no evidence that Mallum "used" a gun, which is the word contained in the title of Wis. Stat. § 939.63. There was only evidence that he "possessed" a gun while committing disorderly conduct, and "possession" during a crime is prohibited by subsection (1)(a) of Wis. Stat. § 939.63. The court correctly instructed the jury on "possession," not "use." An indication that Mallum only "possessed" a gun during the disorderly conduct incident, but did not "use" it, is the fact that the jury failed to return a guilty verdict on Count 1, "Intentionally Point Firearm at Person," which would have constituted "use" of a gun.

"Use (possession) of a Dangerous Weapon." It says nothing about any difference between the disorderly conduct in each count.

Also of note is the fact that the court likewise did not give any instruction on the additional charge of Domestic Abuse for Count 1 [Ap.113,line 13 to 114, line 19].[4] Thus, it cannot be argued that the jury knew the elements for Domestic Abuse when they considered Count 3 because they had already heard those elements in the instructions for Count 1.

Besides no separate jury instruction for the domestic abuse charge in Count 3, there was also no separate verdict question on the domestic abuse charge for Count 3, although there was a separate verdict question for the additional charge in Count 2. [Ap. 121-122 & R.28,29]. It should be noted, that the court used the verdict questions submitted by the State. [R.56,p.4,line 25 to page 5,line 8]. The State did not request a verdict question on domestic abuse which it should have done to meet its burden of proof on the additional charge of domestic abuse in Count 3.

Since the court did not instruct the jury on domestic abuse, it was impossible for the jury to find that Mallum violated the elements of the domestic abuse statute. Besides the verdict forms themselves [R.28,29], the transcript of

[4] Since Count 1 was eventually dismissed for lack of a verdict, it is irrelevant that the court did not instruct on the charge of domestic abuse for Count 1. Moreover, the State had apparently dismissed the domestic abuse charge in Count 1 before trial .[Ap. 132, lines 16-18].

the reading of the verdict, [Ap. 126-127], also shows that the jury did not find Mallum guilty of domestic abuse. The jury could not find Mallum guilty of domestic abuse because the jury did not know the elements it had to consider before a finding of guilt. Obviously, a court has to instruct on the additional charge for a Count, as well as on the main charge of the Count, since the court did instruct on the additional charge for Count 2.

Without a finding of guilt on the domestic abuse charge, there is nothing to distinguish the disorderly conduct in Count 2 and Count 3. One would have to guess at whether the jury had different conduct in mind when it found Mallum guilty of the disorderly conduct in Count 3 than it did when it found him guilty of the disorderly conduct in Count 2.

The Fifth Amendment of the United States Constitution and Art I, sec. 8(1) of the Wisconsin Constitution protect a person from double jeopardy. That is, they protect the person from being punished twice for the same offense. Double charging for one offense is known as the problem of multiplicity. In Wisconsin, there is a two part test for challenges involving multiplicity. The first prong looks to the question of whether the offenses are identical in law and fact; if they are NOT, the second prong looks to legislative intent. ***State v. Anderson***, 219 Wis.2d 739, 746, 580 N.W.2d 329 (1998). If there is an identity of law and fact among the offenses, as in this case, then the charges are multiplicitous and there is no need to consider legislative intent.

In the instant case, Counts 2 and Counts 3 both charge Mallum with disorderly conduct in violation of Wis. Stat. § 947.01(1). Thus, the two charges are identical in law. The "identical in fact" inquiry involves a determination of whether the charged acts are "separated in time or are of a significantly different nature." ***State v. Eisch***, 96 Wis.2d 25, 31, 291 N.W.2d 800 (1980). The disorderly conduct in Mallum's case did not involve acts separated in time. It involved a single course of conduct. To determine whether the two disorderly conduct charges were significantly different in nature, the question is whether "each requires 'a new volitional departure in the defendant's course of conduct." ***Eisch***, 96 Wis.2d at 36. In the instant case, there is no evidence of a new volitional departure but a single course of conduct which can be characterized as "disorderly." Moreover, the court gave the same jury instruction for disorderly conduct in both Count 2 and Count 3.

The State may argue that the additional charge listed in each count made each charge for disorderly conduct different in fact. However, since the State did not offer a verdict question on the additional charge for domestic abuse under Count 3, and the jury did not find guilt on domestic abuse, there is nothing to distinguish Count 3's disorderly conduct from the disorderly conduct in Count 2. Since the jury did not separately find guilt on domestic abuse, the crime of disorderly conduct is the same in Count 2 and Count 3.

The court of appeals has said that multiplicity challenges to charging are different from multiplicity challenges to proof. ***State v. Koller***, 2001 WI App. 253, ¶33, 248 Wis.2d 259, 635 N.W. 2d 838. In the instant case, Mallum's trial counsel raised double jeopardy challenges to the multiple *charging* for disorderly conduct in a Motion filed on July 13, 2015 before the trial [R.25]. The trial court apparently denied the challenge before trial.[5] Whether that is reversible error or not does not have to be decided because the multiplicity challenge in this appeal is not a multiplicity challenge to *charging*. It is a multiplicity challenge to *proof*. Trial counsel also raised a double jeopardy challenge after trial in the Post Trial Motion [R.61], which the court denied as premature. [R.30].

Perhaps the court was correct to deny any multiplicity challenge before trial, since the two counts for disorderly conduct were distinguished by the additional charge added to each, although Mallum does not concede the multiplicity in *charging* argument. However, the two counts are multiplicitous as to *proof* because the State failed to meet its burden to prove the additional

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[5]The notes on CCAP at 59 and 60 do not indicate how the court decided the double jeopardy challenge in the 7/13/15 Motion. No transcripts were ordered from the "status conference" and "further proceedings" on 7/20/15, listed at CCAP Numbers 59 and 60 (descending order) because unlike the argument on that motion before trial, the multiplicity challenge for this appeal does not concern multiplicity in charging, as will be explained below. The appeal concerns multiplicity for failure of proof, which could only be known after trial. The postconviction motion explained that difference. [R.45, p.9]. That is why Mallum's undersigned appeal counsel did not feel that additional transcripts were necessary (even if a request for additional transcripts still would have been timely), when staff attorney Steven Cotter requested additional transcripts after the postconviction motion was filed. [Ap. 108,109].

charge of domestic abuse in Count 3. The court used the verdicts the State submitted [Ap. 112a, line 20 to 112b, line 24], but the State did not even submit a jury verdict on domestic abuse. Thus, the State failed in its proof that the disorderly conduct in Count 3 was different in fact from the disorderly conduct in Count 2. The two charges are multiplicitous for failure of proof.

For all of the above reasons, the conviction on Count 3 should be reversed. This would make no difference in Mallum's two years of probation, which he is currently serving for both Counts 2 and 3. However, reversing Count 3 would remove the sentence of three months in the House of Corrections, which was stayed, but which Mallum would have to serve if probation would be revoked for any reason. It would also mean that Mallum had only one misdemeanor on his record for this incident, instead of two. Moreover, reversing Count 3 would remove the court's sentencing condition of a lifetime ban on guns, unless the court was applying that ban also to Count 2 (to be discussed below), although the court would have had no statutory authority to do that. Reversing Count 3 would also remove the sentencing condition of a surcharge for domestic violence. The lifetime ban on guns and the surcharge will be addressed separately below since those should be vacated, even if the conviction on Count 3 is not reversed for multiplicitousness, or even if it appears that the trial court was applying the lifetime gun ban to Count 2 as well as to Count 3.

III. BECAUSE MALLUM WAS NOT FOUND GUILTY OF DOMESTIC ABUSE OR OF A FELONY OR OF THREATENING TO USE A DANGEROUS WEAPON IT WAS ERROR FOR THE COURT TO ADD THE CONDITIONS TO HIS SENTENCE THAT HE COULD NOT HAVE A GUN FOR THE REST OF HIS LIFE.

Even if the conviction on Count 3 is not reversed, there were errors of law that occurred during the sentencing hearing. Two conditions which the court imposed should be vacated and the court should issue an Order for the trial court to rectify the problems caused by these errors.

There was a preliminary error that occurred at the sentencing hearing that came from the prosecutor. When discussing the fact that the defendant owned a number of guns that were found in the house after he was arrested, the prosecutor told the court, "Your Honor, obviously it's concerning that there were this many firearms located within the residence, given the domestic violence allegations and the fact the Defendant has now been convicted of a domestic violence offense." [Ap.133,line 22 to 134, line 1]. This is inexcusable misinformation given to the court by the prosecution at sentencing. The prosecutor knew that Mallum had not been found guilty of domestic violence or domestic abuse because the jury did not return a verdict on that. Moreover, it was no crime for Mallum to have guns in his home the night he was arrested. He had a right to those guns under the Second Amendment to the United States Constitution and he was not then subject to any court Order not to have guns.

At sentencing, Mallum's attorney objected to the court, as he had before trial [R.25], and in his August 19, 2015 Post-Trial Motions of Defendant and Brief [R.60], that Count 3 had no question to the jury about domestic abuse. [Ap.,135 lines 11-15]. The court's only response was "We are not going over this again. That's not a jury question." [Ap.135, lines 16-17]. Mallum's attorney also later raised this issue at sentencing a second and a third time. [Ap.136,lines 4-17 and 137, lines 5-6].

In imposing sentence, the court listed various conditions, among which the court stated, "Now you are to have no firearms in your possession. Are there any guns left in the house?" [Ap.144,lines 22-24]. Then the court added, "Well, under federal law, you cannot have a gun for the rest of your life…. And that is a requirement under federal law. It's also a condition of your probation." [Ap.145, lines 2-8]. The court's statements about federal law were erroneous because Mallum was not found guilty of domestic abuse. Furthermore, it is unclear whether the court was saying it was a probation condition that he could not have guns during the period of probation or also for the rest of his life.

It was error for the court to say that it was a federal requirement that Mallum not have a gun for the rest of his life. Federal law under 18 U.S.C.§ 922(g)(9) (known as the Lautenberg Amendment) prohibits a person from possessing guns for the rest of their life if they are convicted of even a *misdemeanor* of "domestic violence" which "has, as an element, the use or

attempted use of physical force" against persons such as a spouse and certain other persons with whom they live. However, Mallum was not convicted of domestic violence, or the similar state charge of domestic abuse, since the jury was not instructed on the elements of domestic abuse, the jury did not find him guilty of domestic abuse, and there was no evidence that he attempted to use physical force against anyone in the disorderly conduct incident for which he was convicted.

Federal law under 18 U.S.C.§ 922(g)(9) also prohibits a person from possessing guns for the rest of their life if they threaten to use a deadly weapon against a spouse or certain other persons with whom they live. However, in Count 2, on which the jury did find Mallum guilty of the additional charge of "possessing" a gun, that charge was not for "threatening to use" a gun. Of note is the fact that the jury did not find Mallum guilty of the charge in Count 1 that did deal with threatening to use a weapon, namely intentionally pointing a firearm at a person in violation of Wis. Stat. § 941.20(1)(c).

For Count 2's additional charge of "Use of a Dangerous Weapon," in violation of Wis. Stat. § 939.63(1)(a), the judge instructed the jury choosing the word "possess" a dangerous weapon in the pattern jury instruction. The court did not instruct the jury on "use" or "threatening to use" which are ways that are alternatives to "possess" that a person can violate Wis. Stat. § 939.63(1)(a). The statute states in the disjunctive, "If a person commits a crime while *possessing,*

using, or threatening to use a dangerous weapon…" [Emphasis added]. The jury instruction, WIS JI-Criminal 990, gave the court the option to instruct with the word "using," or "possessing," or "threatening to use" a dangerous weapon. The court in this case chose "possessing," not "using," or "threatening to use" [Ap.117, lines 5-20], although the instruction switches to the word "using" at the end of the instruction [App. 117, line 18], apparently because at that point the jury instruction is citing the exact title of the statute.

The statute's title is "Use of a Dangerous Weapon," but the Wisconsin Statutes explicitly state in § 990.001(6) that "titles to subchapters, sections, subsections, paragraphs, and subdivisions of the statutes and history notes are not part of the statutes." Thus, it is the court's use of the word "possessing" in the jury instruction which controls. Therefore, Mallum's conviction for "possessing a dangerous weapon" during the disorderly conduct does not qualify under 18 U.S.C.§ 922(g)(9) as "the threatened use of a deadly weapon" in a domestic situation. If Mallum had been convicted on Count 1 of intentionally pointing a firearm at a person, that possibly would have qualified him for the federal lifetime ban on guns (depending on the status of his grandson in his home), but he was not convicted on Count 1.

There is no basis in Mallum's convictions for disorderly conduct in either Count 2 or Count 3 for Mallum to be banned under federal law from having guns for the rest of his life. Mallum was not convicted of a felony, or of

domestic abuse, or of "the threatened use of a deadly weapon." Thus, the court was wrong to say at sentencing that it was a federal requirement that Mallum could not have a gun for the rest of his life.

The United States Supreme Court has found it unconstitutional to sentence a person for an alleged fact on which the jury did not find the person guilty. The Court has said that "[o]ther than the fact of a prior conviction, any fact that increases, the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." ***U.S. v. Booker,*** 543 U.S. 220, 227-228 (2005), *quoting* ***Apprendi v. New Jersey***, 530 U.S. 466, 490 (2000). It is not just jail time that is punishment. In the instant case, depriving Mallum of guns for his lifetime is also punishment.

Similarly, the Supreme Court had said, "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" ***Blakely v. Washington,*** 542 U.S. 296, 303 (2004)), *citing* ***Jones v. United States***, 526 U.S. 227 (1999); ***Apprendi v. New Jersey,*** 530 U.S. 466 (2000); and ***Ring v. Arizona***, 536 U.S. 584 (2002), All of these Supreme Court cases stand for the principle of law that Mallum could not be punished for domestic abuse or for threatening use of a dangerous weapon when such facts were not submitted to a jury and proved beyond a reasonable doubt and were not facts reflected in the jury verdict or admitted by Mallum.

Moreover, the Supreme Court said in ***Booker*** that the fact that the state court in ***Apprendi*** had "labeled the hate crime a 'sentence enhancement' rather than a separate criminal act was irrelevant for constitutional purposes." ***Booker,*** 543 U.S. at 231. Thus, it is irrelevant if the "domestic abuse" charge in Count 3 of the Amended Complaint against Mallum would be labeled a "charge enhancer" or "charge modifier." That charge still required submission to a jury and proof beyond a reasonable doubt for any sentence to be leveled against Mallum related to that charge.

For all of the above reasons, it was error for the court to impose a sentence condition on Mallum that he could not have guns for the rest of his life and to say that it was based on a federal requirement.

It was also error if the court meant to impose the condition of never having guns for the rest of his life, not as a requirement of federal law, but as a condition of Mallum's probation. The court did not have the authority to impose a sentence that is longer than that provided in the statutes for the offenses for which Mallum was convicted. As stated above, ***Apprendi v. New Jersey,*** 530 U.S. 466 (2000), stands for the proposition that punishment may not extend beyond the statutory maximum for an offense. In Wisconsin, the statutory maximum for the Class B misdemeanor of disorderly conduct is 90 days. Wis. Stat. §§ 947.01(1) and 939.51(3)(b). That penalty can be increased by 6 months if a person is convicted of a crime (e.g. disorderly conduct) while possessing a

dangerous weapon, as Mallum was in this case in Count 2. Thus, the court sentenced Mallum to 9 months in the house of corrections on Count 2 and to 3 months in the house of corrections on Count 3, with those sentences stayed and two years probation imposed. [Ap.141, line 25 to 142, line 13]. There is no Wisconsin statute that allows a court to also order not having guns for a lifetime in a misdemeanor case, beyond the end of the jail sentence or the probation sentence. The court was justified in imposing a probation condition of no guns during the entire time of probation, but the court was not authorized to extend that condition beyond the end of probation, if that is what the court meant when it said at Mallum's sentencing, "you cannot have a gun for the rest of your life…It's also a condition of your probation." [Ap.145, lines 2-3 and lines 7-8].

Even if the court of appeals does not dismiss Mallum's judgment of conviction on Count 3 for multiplicitousness, this condition in Mallum's sentence related to the lifetime ban on possessing guns should be vacated because it erroneously invokes federal law. And the sentencing condition needs to be clarified as to how the condition relates to probation. The court of appeals should affirmatively state that Mallum may have guns after probation and that any of his weapons still in the possession of the police should be returned to him at the end of his probation.

IV. SINCE MALLUM WAS NOT FOUND GUILTY OF DOMESTIC ABUSE, IT WAS ERROR FOR THE TRIAL COURT TO ORDER HIM TO PAY A DOMESTIC ABUSE SURCHARGE

A second error of law in sentencing occurred when the court sentenced Mallum to paying certain costs, fees, and assessments for this action, and the court explicitly said it would include the domestic "violence" surcharge.[6] [Ap.146, lines 2-4]. Again, Mallum was not convicted of domestic abuse, so there should have been no domestic "violence" or abuse surcharge ordered. Wis. Stat. § 973.055 provides for a domestic "abuse" surcharge of $100 upon the "conviction" of certain offenses related to domestic abuse. However, Mallum was not found guilty of domestic abuse. Therefore, he should not have been sentenced to pay a domestic abuse or "violence" surcharge and domestic abuse should not have been included in the judgment of conviction.

This surcharge is not a minor matter and does not simply involve a $100 fine. It has major consequences. The court of appeals recently stated in ***State v. Hill*** that a "person qualifies as a domestic abuse repeater if he or she was convicted, on 2 separate occasions, of a felony or a misdemeanor for which a court imposed a domestic abuse surcharge under s. 973.055(1)." ***State v. Hill***, 2016 WI App 29, ¶2, 368 Wis.2d 243, 246, 878 N.W.2d 709, 711. This surcharge becomes a trap law to allow a person to be charged as a repeater in the

[6]It is listed as a domestic "violence" surcharge on Mallum's judgment of conviction. [Ap 102]. However, that is an incorrect way to list it because the Wisconsin statute names it as a domestic "abuse" surcharge.

future, even though they were never found guilty of the underlying crime of domestic abuse. It should not be imposed unless a jury has found the person guilty of domestic abuse or the person has pled guilty to domestic abuse.

The court of appeals should also vacate this condition in Mallum's judgment of conviction and order that Mallum be reimbursed for any domestic abuse surcharge he has already paid.

V. IF MALLUM'S CONVICTION ON COUNT 3 IS NOT REVERSED AS MULTIPLICITOUS OF COUNT 2 OR, IF THE ERRONEOUS CONDITIONS OF MALLUM'S SENTENCE ARE NOT VACATED RELATED TO A LIFETIME BAN ON HAVING GUNS AND ON THE DOMESTIC ABUSE SURCHARGE, THEN THE COURT SHOULD DECLARE THAT 18 U.S.C.§ 922(g)(9) IS FACIALLY UNCONSTITUTIONAL AS A VIOLATION OF THE SECOND AMENDMENT OR IS UNCONSTITUTIONAL *AS APPLIED* IN THIS CASE

If the conviction on Count 3 is not reversed for multiplicitousness, then this case raises a constitutional issue of double jeopardy in violation of the Fifth Amendment of the United States Constitution and Art. I, sec. 8 of the Wisconsin Constitution.

If the erroneous sentencing conditions outlined above related to the lifetime ban on guns is not vacated, then 18 U.S.C.§ 922(g)(9) must be challenged as unconstitutional on its face because it violates Mallum's Second Amendment rights. In ***Gillespie v. City of Indianapolis***, 185 F.3d 693, 710-711 (7th Cir. 1999), the Seventh Circuit considered this challenge and concluded that the Second Amendment protected a collective right to have a well-regulated

militia and not an individual right to have guns. However, that was prior to the United States Supreme Court decision in ***District of Columbia v. Heller***, 554 U.S. 570 (2008), which held that the Second Amendment did protect the natural right of an individual to have guns for self-defense. Whether or not that is good or bad policy is not at issue here. Unless and until the Supreme Court reverses itself in ***Heller*** or Congress abolishes the Second Amendment, it is unconstitutional for a person like Mallum to be given a lifetime ban on guns, especially since he was not found guilty of domestic abuse.

In a more recent Seventh Circuit case than ***Gillespie***, which did come after the Supreme Court decision in ***Heller***, a man challenged his conviction under 18 USC §922(g)(9) as a violation of his Second Amendment rights. ***U.S. v. Skoien***, 587 F.3d 803 (7th Cir. 2009). He had been found with a gun after a conviction for domestic violence. The Seventh Circuit vacated his conviction. However, the court in ***Skoien*** did not vacate the conviction because they found 18 USC 922(g)(9) unconstitutional. They did not decide that issue. Instead, they decided that the constitutionality of the statute must be evaluated under an intermediate scrutiny test, not a rational basis or a strict scrutiny test. Under intermediate scrutiny, "The government 'bears the burden of justifying its restrictions, [and] it must affirmatively establish the reasonable fit' that the test requires." ***Skoien*** at 814 (citations omitted). The district court in ***Skoien*** had used a strict scrutiny test. The Seventh Circuit vacated the conviction but remanded the case to the

district court to decide the question of constitutionality using the intermediate scrutiny standard.

While ***Skoien*** did not decide the constitutional question it did say that 18 USC §922(g)(9) is "overinclusive." ***Skoien*** at 815. The court continued, "The firearms prohibition exists indefinitely; it contains no exceptions nor any basis for potential restoration of gun rights; and it does not require an individualized finding of risk that the domestic-violence misdemeanant might use a gun in a future offense." *Id.* These are some of the questions, the court of appeals should consider in deciding Mallum's argument that the statute is facially unconstitutional.

The Supreme Court has not dealt with the issue of whether 18 U.S.C.§ 922(g)(9) is unconstitutional under the Second Amendment. The Supreme Court mentioned this issue briefly in the case of ***U.S. v. Castleman***, ___ U.S.____, 134 S.Ct. 1405, 1416 (2014), where it said that Castleman had suggested that the federal statute implicated his constitutional right to keep and bear arms but had not developed the argument. Thus, the Supreme Court did not consider the argument. The Supreme Court also considered 18 U.S.C.§ 922(g)(9) in a decision it just issued on June 27, 2016, ***Voisine v. United States,*** slip op. at 2016 WL 3461559. However, that case did not deal with whether the federal law is unconstitutional in light of ***Heller***. Apparently, the issue was not even raised as it was in ***Castleman*** because the Supreme Court did not mention

constitutionality, as it had in ***Castleman***. In ***Voisine***, the question for the court was whether the federal law punished reckless acts of domestic violence as well as knowing and intentional acts of domestic violence. The Supreme Court concluded that it does. ***Voisine***, slip op. at 12.

The argument cannot be made that the Supreme Court obviously finds the statute constitutional since the Court ruled on the statute and upheld convictions under it in the ***Castleman*** and ***Voisine*** cases. Such an argument would ignore the fact that the Supreme Court does not reach out and take affirmative steps to consider the constitutionality of a statute. The question must be presented to the Court. Thus, 18 USC §922(g)(9) is ripe for a constitutional challenge under the Second Amendment.

Mallum requests the court of appeals to find that 18 U.S.C.§922(g)(9) is facially unconstitutional under the Second Amendment, in light of the conclusion in ***Heller,*** 554 U.S. 570, that the right to bear arms is an individual right under the Second Amendment to the U.S. Constitution.

Moreover, even if 18 U.S.C.§922(g)(9) is not facially unconstitutional, it is unconstitutional *as applied* in this case. The federal statute is unconstitutional *as applied* in Mallum's case because it has been used to impose a lifetime ban on Mallum from ever having guns, and yet Mallum was not found guilty of domestic abuse. Moreover, there were not even allegations that he used physical force against anyone, which is an element in the definition of "misdemeanor

crime of domestic violence" in 18 USC §921(a)(33)(A) required for the federal law in 18 USC 922(g)(9) to apply.

While ***Skoien*** did not decide the constitutional question, the opinion provides a very thoughtful analysis of the Supreme Court's ***Heller*** opinion. At one point the Seventh Circuit said: "the Supreme Court [in ***Heller***] emphatically identified the right of law-abiding citizens to possess arms for self-defense as the central concern of the Second Amendment." ***Skoien*** at 811. In the instant case of Mallum, there is evidence that self-defense was his central reason for having guns and was the reason he was disturbed the night he came home drunk and found that his wife had moved the gun from the drawer beside his bed and put it in the safe. At sentencing, Mallum said, "I'm afraid. I don't know why, but I'm afraid because I'm handicapped. I can't even lift a gallon of milk. I've got this feeling that somebody might break into my house and I have to know where that stuff [gun] is." [Ap. 137, lines 24 to 138, line 3]. He later reiterated this:

> I reach in my pocket to get my set of keys and my fingers and wrist to my back to my spinal column and my neck are in immense pain just from reaching in my pocket. I feel if I don't maintain a defensive posture somebody could kill me or somebody in my family… .The chance of a home invasion are probably one in ten thousand. But I don't want to be the one in ten thousand. I don't want to have to say, hey you muggers wait a minute, where did you [wife] put the gun. I'm going to the safe and unlock it and I'll be right back, do you mind holding on.
> [Ap. 140, lines 13-25].

Therefore, in light of ***Skoien*** and ***Heller***, 18 USC §922(g)(9) must be found unconstitutional *as applied* to Mallum in this case because his guns were for self-defense and so are protected by the Second Amendment.

VI. IF COUNT 3 IS NOT REVERSED OR THE CONDITION OF SENTENCING RELATED TO THE DOMESTIC ABUSE SURCHARGE IS NOT REVERSED, MALLUM ALSO CHALLENGES WIS.STAT. § 973.055, THE DOMESTIC ABUSE SURCHARGE STATUTE, FOR BEING UNCONSTITUTIONAL *AS APPLIED* IN THIS CASE.

The domestic abuse surcharge statute, Wis. Stat. § 973.055, is unconstitutional *as applied* in this case because there was no verdict of guilt for domestic abuse. The statute permits the court to impose a domestic abuse surcharge if a person is found guilty of disorderly conduct under 947.01(1) and "the court finds that the conduct constituting the violation… involved an act by the adult person against his or her spouse…" Mallum's case involved a jury trial and the jury did not find Mallum guilty of domestic abuse because they were not given a verdict that asked them whether he was guilty of domestic abuse. If the statute is saying that the court can find a fact that s not submitted to the jury in order to impose additional punishment, then the statute is unconstitutional *as applied.*

CONCLUSION

Because the jury was not instructed on domestic abuse, and was not given a verdict question on domestic abuse, and thus did not find Mallum guilty of domestic abuse, Mallum's conviction on Count 3 for disorderly conduct should be reversed as multiplicitous of Count 2's conviction for disorderly conduct and any court costs he has paid for conviction of Count 3 should be refunded to him. If the conviction on Count 3 is not reversed for multiplicity, at the very least, because the jury was not instructed on "domestic abuse" or "threatening to use a dangerous weapon," and no verdict was returned on either of those crimes, the sentencing conditions of a lifetime ban on Mallum having guns and on being required to pay the domestic abuse surcharge should be vacated. The court should also state that Mallum may have guns after his period of probation ends, that the police should return any of his guns in their possession after his probation ends, and should order that any domestic abuse surcharge he has paid be refunded to him.

In the alternative, the court of appeals should hold that 18 USC §922(g)(9) is facially unconstitutional in light of the Supreme Court's decision in ***District of Columbia v. Heller***, 554 U.S. 570 (2008), that the Second Amendment protects an individual right to bear arms. Or the court of appeals should hold that 18 USC §922(g)(9) is facially unconstitutional *as applied* to Mallum. Also, in the

alternative, the court of appeals should hold that Wis. Stat. §973.055 is unconstitutional *as applied* in Mallum's case.

Dated this _____ day of July, 2016.

_____

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (d) for a brief and appendix produced with a proportional serif font. The length of this brief is 8,648 words.

Dated: July ___6_____, 2016.

_____/s/_____
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I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 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: July___6____, 2016

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Signed:_____/s/_____
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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1)a table of contents; (2) the findings or opinions of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a); 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 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: July ___6____, 2016.

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APPENDIX TABLE OF CONTENTS

Judgment of Conviction [R.36].....101-103

Hon. Mel Flanagan's August 26, 2015 Decision and Order
Denying [Mallum's] Post-Trial Motions [R.30].....104
[Post-Trial Motion at R.61]

Hon Michelle Ackerman Havas's March 23, 2016
Decision and Order Denying Motion for
Postconviction Relief [R.49].....105

Excerpts from Postconviction Motion [R.45]
Summary of Motion and 106
Conclusion.....107

Letter from Staff Attorney Steven Cotter
to Mallum's Appeal Counsel, Alex Flynn [R.46].....108

Response Letter from Attorney Alex Flynn to
Staff Attorney Steven Cotter [R.48].....109

Amended Criminal Complaint [R.16].....110

Selections from July 23, 2015 A.M. Trial Transcript [R.56]
Jury Instructions and Reading of Verdict Forms
Cover, pp. 4, 5, 8-15, 42, 43, Signature page.....112

Selections from July 23, 2015 P.M. Trial Transcript [R.57]
Jury Verdicts
Cover, pp. 7-9, 14-15, Signature page.....124

Selections from October 15, 2015
Sentencing Hearing Transcript [R.58]
Cover, pp. 3,4,11,12,18,21-24,33-43, Signature page.....131

Trial Counsel's Letter Indicating Transcripts
Necessary for Appeal.....152