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**COURT OF APPEALS OF WISCONSIN
DISTRICT III**

07-26-2018

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

**Appeal No. 2018AP000563
Circuit Court Case No. 2016CV000378**

JAMES P. MORAN,

Petitioner-Appellant,

v.

WISCONSIN DEPARTMENT OF JUSTICE,

Respondent-Respondent.

**ON APPEAL FROM THE FINAL DECISION
AND JUDGMENT ENTERED FEBRUARY 8, 2018 BY
THE CIRCUIT COURT FOR CHIPPEWA COUNTY, THE
HONORABLE JUDGE JAMES M. ISAACSON PRESIDING,
WHICH AFFIRMED THE ADMINISTRATIVE DECISION
OF THE WISCONSIN DEPARTMENT OF JUSTICE**

**REPLY BRIEF AND SUPPLEMENTAL APPENDIX
OF DEFENDANT-APPELLANT
JAMES P. MORAN**

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ARGUMENT

I. VIRGINIA’S RESTORATION OF ALL OF MORAN’S CIVIL RIGHTS CONSTITUTES A PARDON AS THAT TERM IS GENERALLY DEFINED

A. This Court Should Construe Section 941.29(5)(a), Stats., to Effectuate Its Intended Remedial Purpose.

Moran’s opening brief set forth authoritative definitions of pardon (Brief at p. 17) which the DOJ did not dispute in its response brief. The combination of actions by the Virginia governor and circuit court restoring all of Moran’s civil rights come squarely within those definitions of “pardon.” They are clearly acts of grace and clemency, releasing Moran from the prior collateral punishment for his conviction and restoring his civil rights.

The DOJ is in essence asking this Court to rewrite Section 941.29(5)(a), Stats, by inserting the word “gubernatorial” before “pardon.” This Court should not add such language to a legislative enactment.

B. The Position Asserted by the DOJ Would Entirely Void Section 941.29(5) of the Wisconsin Statutes.

It goes without saying that an administrative agency does not have the power to void a statutory enactment. Section 941.29(5) of the Wisconsin Statutes had as its undeniable purpose the restoration of the

right to possess a firearm to certain suitable persons who had been precluded from possessing a firearm by virtue of Section 941.29(1m)(b), Stats. Those classes of persons whose rights could be restored were persons who: a) received a pardon for the felony of conviction and who were expressly authorized to possession a firearm under 18 U.S.C. App. 1203; or b) have obtained relief from disabilities under 18 U.S.C. § 925(c). The narrow interpretation of that statute by the DOJ means that no person whosoever may obtain relief from the firearm disability because neither of the requisite federal laws referenced currently exist. 18 U.S.C. App. 1203 was repealed and replaced by 18 U.S.C. 921(a)(20), the Firearm Owners' Protection Act (FOPA), and 18 U.S.C. § 925(c) has been voided by congressional action. See Petitioner's Brief at 14-15. Under the DOJ's interpretation, Section 941.29(5), Stats., has simply been eradicated. That is in direct conflict with the intent of FOPA to expand the clarify the restoration of firearms rights to appropriate persons.

The DOJ cites a litany of authorities such as State v. Pocian, 2012 WI App 58, 341 Wis. 2d 380, 814 N.W.2d 894 and State v. Thomas, 2004 WI App 115, 274 Wis. 2d 513, 683 N.W.2d 497, which are wholly inapposite. They did not involve instances of persons who

had been pardoned or otherwise had their rights restored. Those cases focused on direct constitutional challenges to the validity of Section 941.29, Stats., an issue not before this Court.

C. The DOJ Mis-States Applicable Virginia Law.

At pages 7 and 8 of its brief, the DOJ excerpts portions of Virginia law and inaccurately asserts that “[t]he prohibitions in subsection A (firearms restrictions) shall not apply to . . . any person who has been pardoned.” Va. Code Ann. § 18.2-308.2.B. Virginia law provides for three distinct types of relief denominated as pardons: 1) a simple pardon; 2) an absolute pardon; and 3) a conditional pardon, none of which are available or would provide any relief to Moran. An official explanation of the Virginia pardon procedure and effect of each type of pardon published by the Commonwealth of Virginia is included in the Supplemental Appendix at 1-5.

The first of the three types of pardon, the Simple Pardon, does not restore the right to possess a firearm. The directions provide: “A simple pardon does not restore the right to possess a firearm. You must petition the appropriate Circuit Court pursuant to Va. Code Ann. § 18.2-308.2.” (Supp.App. 1, 4) The second type of pardon, a Conditional Pardon, is only available to persons who are currently

incarcerated and is what would generally be known as a commutation of sentence. Moran was never incarcerated, so he obviously does not qualify for this type of pardon. (Supp.App. 2-4) The third and final type of Virginia pardon is an Absolute Pardon and is available only in instances of actual innocence. Moran has made no such claim (he completed probation and paid full restitution), and is not eligible for an absolute pardon. (Supp.App. 3-4)

The DOJ does not dispute or provide any legal authority related to the authoritative definitions of “pardon” set forth at page 17 of Moran’s opening brief. The actions and official orders of the Commonwealth of Virginia restoring Moran’s rights falls squarely within those definitions of pardon.

II. THE DOJ’S DENIAL OF MORAN’S FIREARM RIGHTS CREATES A CONFLICT WHICH IS PREEMPTED BY FEDERAL LAW

The DOJ’s brief recognized the well-established doctrine of conflict preemption, which has its genesis in the Supremacy Clause of the United States Constitution. (DOJ Brief at p. 18) Conflict preemption was explained in M & I Marshall & Isley Bank v. Guar. Fin. MHC, 2011 WI App 82, ¶ 25, 334 Wis. 2d 173, 190-91, 800 N.W.2d 476, 484-85, which held that conflict preemption is found:

“when state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” de la Cuesta, 458 U.S. at 153, 102 S.Ct. 3014 (quoting Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed.2d 581 (1941)).

The courts must recognize the doctrine of conflict preemption when there is an actual conflict between federal and state law. Hazelton v. State Personnel Comm’n, 178 Wis. 2d 776, 787, 505 N.W.2d 793 (Ct. App. 1993) (citing Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 605, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991)). The actual conflict between FOPA and Section 941.29 of the Wisconsin Statutes was recognized by the Wisconsin Attorney General. 78 Op. Att’y Gen. 22, 22-26 (1989) (App. 16-20).

M&I went on to note the two instances where conflict preemption exists and must be recognized:

“A conflict will arise when compliance with both the federal and state laws is a physical impossibility or when a state law is a barrier to the accomplishment and execution of Congress objectives and purposes.” Hazelton, 178 Wis. 2d 787, 505 N.W.2d 793 (citing Mortier, 501 U.S. at 605, 111 S.Ct. 2476).”

M&I, supra at ¶ 25. Both of those circumstances are present here.

One of the indisputable objectives of Congress in enacting the Firearm Owners’ Protection Act was to ratify a state’s restoration of firearm rights to appropriate persons so as to enable them to exercise

their Second Amendment rights. It is broadly phrased to apply however those rights were restored, whenever any conviction was expunged, or set aside, or for which a person was pardoned or otherwise has had their civil rights restored. 18 U.S.C. § 921(a)(20).

The state law interpretation by the DOJ is a barrier to the accomplishment of the Congressional objectives under FOPA and other federal laws allowing hunting on federal lands within Wisconsin.

The federal government owns lands throughout the state of Wisconsin consisting of thousands and thousands of acres. Just one of those, the Chequamegon-Nicolet National Forest, consists of more than 1.5 million acres, and is described by the federal government as “a hunter’s paradise with abundant wildlife and excellent hunting opportunities.” <https://www.fs.usda.gov/activity/cnnf/recreation/hunting>. (Supp.App. 9-10) Another example is Fort McCoy, comprised of 60,000 acres, which is promoted and open to the general public for hunting purposes. <https://ftmccoy.isportsman.net>. (Supp.App. 6-8) Other federal lands within Wisconsin which encourage hunting include: Necedah National Wildlife Refuge (Supp.App. 11-12), Whittlesey Creek National Wildlife Refuge (Supp.App. 13-15), Trempealeau National Wildlife Refuge (Supp.App.

16-17), Fox River National Wildlife Refuge (Supp.App. 18-19), Leopold Wetland Management District (Supp.App. 20-21), Horicon National Wildlife Refuge (Supp.App. 22-23), and St. Croix Wetland Management District (Supp.App. 24-25) (see generally <https://www.fws.gov/refuges/hunting>) All of these properties are maintained and managed by the federal government and are actively promoted to the general public for hunting for big game, small game, deer, upland birds and migratory birds. Under federal law, including FOPA, it is perfectly legal for James Moran to possess a firearm and hunt on any of those properties. An irreconcilable conflict with state law arises because all of those properties are surrounded by state lands, making it impossible for Moran to comply with both the federal and state laws because the DOJ's position would preclude him from lawfully traversing state of Wisconsin land to access the federal lands where he can unquestionably legally hunt.

III. THE FULL FAITH & CREDIT CLAUSE REQUIRES WISCONSIN TO RECOGNIZE MORAN'S RESTORED CIVIL AND FIREARM RIGHTS

The DOJ's response in no way refutes the compelling full faith and credit arguments set forth in petitioner's opening brief. Addressing those arguments, the DOJ sidesteps the issues at hand and relies on

cases having no precedential value in Wisconsin from states where public policy regarding the right to keep and bear arms fundamentally differs from that of Wisconsin. Wisconsin public policy favors the recognition of Moran's restored civil rights. Article I, § 25 of the Wisconsin Constitution was adopted in 1998 and states:

“The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose.”

Forty-four states have similar state constitutional rights to bear arms. The states whose firearm restoration rights and procedures form the factual bases for the cases relied upon by the DOJ – California, New York and New Jersey – are *not* among those forty-four states; they are among the small minority of the six states that intentionally do not have a state constitutional right to bear arms. The public policies of those states are not in line with the public policy of Wisconsin when looking at citizens' firearm rights.

The Wisconsin Supreme Court declared that this is a fundamental right:

“[b]ased on the text of the constitution and the legislative history of the amendment . . . that Article I, Section 25 of the Wisconsin Constitution grants an individual, rather than a collective, right . . . **we accept the proposition that the right to bear arms amendment recognized a fundamental right.**”

State v. Cole, 2003 WI 112, ¶ 29, 264 Wis. 2d 520, 665 N.W.2d 328 (emphasis added). Moran is not asking this Court to substitute Wisconsin law with Virginia statutes, but instead to respect the Virginia Governor and Virginia Circuit Court’s actions and decisions as required by the Full Faith & Credit Clause of the United States Constitution and consistent with the Wisconsin Constitution.

A. The Foreign State Authorities Relied on by the DOJ are Not Binding Precedent and are Both Legally and Factually Distinguishable from Moran’s Case.

The DOJ cites cases from New Jersey and California, neither of which have any precedential value in this Court. Neither state holds public policy comparable to Wisconsin as it relates to firearms. Neither state includes the right to keep or bear arms in its state constitutions.

The California case addresses a violent offender, a person convicted of aggravated assault and therefore banned from possessing firearms. People v. Shear, 83 Cal. Rptr. 2d 707, 708 (Cal. Ct. App. 1999). Shear specifically notes that the state’s prohibition on felons possessing firearms was based on “the expression of [California]’s domestic policy.” California has never enacted a state constitutional right to keep and bear arms because it is not that state’s public policy. California has no provision in its state constitution that explicitly

guarantees an individual right to keep and bear arms. See Kasler v. Lockyer, 2 P.3d 581 (Cal. 2000) (holding that no “right to bear arms” exists under the California Constitution). California’s public policy relating to firearms is diametrically opposed to Wisconsin’s. This Court cannot give any weight to the holdings of that California court.

The New Jersey case cited, In re Winston, 101 A.3d 1120 (N.J. Super. Ct. App. Div. 2014), addresses a factual situation where the defendant, convicted of attempted assault and a criminal drug offense, received a certificate with specific wording: “This certificate shall NOT be deemed nor construed to be a pardon.” Id. at 1121. As explained above, the process and restoration of civil and firearm rights in Virginia must be construed in the same vein as a pardon. Nowhere in Moran’s Virginia restoration of rights is there any explicit disclaimer as existed in the New Jersey case (dealing with a New York certificate of relief). In fact, the Virginia court expressly granted Moran’s right to possess firearms. (App. 7-8) Both New York and New Jersey are among the very small minority of states (six out of fifty) that do not include a right to keep and bear arms in their state constitutions, unlike Wisconsin. This distinction is important and underscores the differences in public policy between Wisconsin and those two states. Winston has no

precedential value, nor can it provide any guidance to courts of this state.

B. The DOJ's Reliance on Blackwell v. Haslam, an Unpublished Tennessee Case, is Not Binding, is Distinguishable, and the Case Actually Supports Moran's Position.

The DOJ also relies on Blackwell v. Haslam, No. M2012-01991-COA-R3CV, 2013 WL 3379364 (Tenn. Ct. App., June 28, 2013) (unpublished), appended to its brief (R.App. 101-118). This case is certainly of no precedential value in this Court and involves facts that are sharply distinguishable from those before this Court. It is curious that the DOJ relied on this case as much of the Tennessee court's reasoning supports Moran's position. First, the defendant in the case was convicted of a violent drug felony and sentenced to five years in prison, whereas Moran's conviction was a nonviolent property crime resolved by probation and restitution.

Second, Tennessee statutes do not make any provision for restoration of firearm rights by virtue of a pardon or any other means for a violent drug felon. Rather, the state bans all felony drug offenders from ever possessing a firearm. Wisconsin public policy and statutes intentionally provide for exceptions to the prohibition of felons possessing firearms, including felony drug offenses.

Third, the holding is very narrow, relying solely on Tennessee’s *public policy exception* to the Full Faith & Credit Clause.

“[A] forum state may decline to accord full faith and credit to the judgment or public act of another state if it is (1) void due to a lack of personal or subject matter jurisdiction, (2) based upon fraud, or (3) ‘where enforcement of the judgment would violate the public policy of the forum state.’”

Id. at 6 (internal citations omitted). The Tennessee court held that the “public policy at issue [in Blackwell] is each state’s view of the restoration of firearm rights *for a convicted drug felon*, by executive pardon or otherwise.” Id. at 8. The court determined that Tennessee’s public policy against any restoration of firearm rights “for persons convicted of a felony involving force, violence, or a deadly weapon implicates public safety and arises out of Tennessee’s penal statutes.” Id. at 17.

The same cannot be said for the DOJ’s arguments. The DOJ has not articulated any Wisconsin public policy that is “so diametrically opposed so as to warrant” Wisconsin’s refusal to give full faith and credit to Virginia’s restoration of Moran’s firearm rights, especially where his sole offense involved neither drugs nor violence. See Id. at 15. Because the DOJ has not asserted a single public policy of Wisconsin that would be violated by the recognition of Moran’s

restored civil and firearm rights, it's arguments must fail. Blackwell further limited the very narrow exception to the Full Faith & Credit Clause:

“[A] forum state may decline to give full faith and credit to a sister state's judgment if doing so would be contrary to the forum state's fundamental interests: ‘There will be **extremely rare occasions** . . . when recognition of a sister State judgment would require too large a sacrifice by a State of its interests in a matter with which it is primarily concerned. On these **extremely rare occasions**, the policy embodied in full faith and credit will give way before the national policy that requires protection of the dignity and of the fundamental interests of each individual state.’”

Id. at 6-7. (emphasis added) (internal citation omitted). The DOJ, in its entire response, does not present any reason why recognizing Moran's restored rights would be contrary to Wisconsin's fundamental interests, nor does the DOJ give this Court any reason to believe Wisconsin would need to make “too large a sacrifice” by recognizing Moran's restored rights. The party “who invokes the public policy exception must identify the public policy that is offended by the foreign judgment and has a ‘stern and heavy’ burden.” Id. at 7.

“[T]he judgment of the court of another state does not necessarily violate the public policy of this State merely because the law upon which it is based is different from our law.”

Id. The DOJ has not met that heavy burden.

CONCLUSION

Virginia's full restoration of Moran's civil rights constitutes a pardon under common law definitions. The Wisconsin DOJ's denial of Moran's firearms rights is contrary to the Full Faith & Credit and Supremacy clauses of the United States Constitution. The DOJ's denial is contrary to Wisconsin public policy and creates a direct conflict with federal law. For those reasons, this Court should reverse the determination of the DOJ.

Respectfully submitted this 25th day of July, 2018.

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CERTIFICATION ON FORM

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c), Stats., for a brief produced with a proportional serif font. The length of this brief is 2,835 words.

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CERTIFICATION REGARDING 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 Section 809.19(2)(a), Stats., and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; 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.

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¹ The federal websites from which Supp.App. 11, 13, 16, 18, 20, 22 and 24 were obtained did not allow printing excerpts without the map of the western United States. The original website can be viewed at <https://fws.gov/refuges/hunting>.