STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2018AP594-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LEEVAN ROUNDTREE,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and the Decision and Order Denying Postconviction Relief Entered in the Milwaukee County Circuit Court, the Honorable David A. Hansher, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

Like many people, Leevan Roundtree kept a gun in his bedroom for the protection of his home and his family. He was not supposed to possess a gun because fourteen years ago, he was convicted in two cases of failure to pay child support, which are felony offenses. Under the sweeping language of WIS. STAT. § 941.29(2)(2015)[1], all persons convicted of a felony—even those involving no physical violence—are banned from possessing firearms the rest of their lives. The ban has no time limit and the statute contains no mechanism by which a person may petition for the return of their constitutional right to keep and bear arms. The state conceded that applying this lifetime ban to someone like Mr. Roundtree seems "unfair," where Mr. Roundtree had committed no other felonies and "has not been a problem for society at large." (46:6-7). Thus, the issues in this case are:

1. Whether WIS. STAT. § 941.29(2) is unconstitutional as applied to a person convicted of failure to pay child support?

The postconviction court denied Mr. Roundtree's motion. It declined to set aside the guilty plea waiver rule and noted, "there has arguably been a resolution of the issues raised," citing to this Court's decision in ***State v. Pocian***, 341 Wis. 2d 380 (Ct. App. 2012). (40:2-3; App.102-103).

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[1] Mr. Roundtree was convicted under WIS. STAT. § 941.29(2). Since then, the legislature repealed and renumbered subsection (2) to (1m)(a), leaving the language essentially the same. *See* 2015 Wisconsin Act 109. Unless otherwise indicated, all statutes in the brief refer to the statutes in place at the time of Mr. Roundtree's offense, October 30, 2015. (1).

2. Whether after ***Class v. United States***, __U.S.__, 138 S.Ct. 798 (2018), a guilty plea waives a claim that the statute of conviction is unconstitutional as applied?

The postconviction court said yes. It concluded, "***Class*** did not involve an as-applied constitutional challenge to the statute of conviction, as here, and nothing in that decision calls into question the application of Wisconsin's guilty plea waiver rule to the defendant's as-applied challenge. Consequently, the court finds that by entering a guilty plea in this case, the defendant waived his constitutional challenge to his conviction under section 941.29(2), Stats." (40:2-3; App.102).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Roundtree welcomes oral argument should it be helpful to this Court. Publication is appropriate as a decision in this case involves an issue of substantial and continuing public interest. WIS. STAT. § 809.23(1)(a)5. Counsel is unaware of any cases challenging the constitutionality of WIS. STAT. § 941.29(2) as applied to an individual previously convicted of a non-violent failure to pay child support felony. Likewise, she is unaware of any Wisconsin case addressing the United States Supreme Court's recent decision in ***Class v. United States*** and whether as applied challenges survive a guilty plea in Wisconsin.

STATEMENT OF FACTS

According to the criminal complaint, on October 30, 2015, the Milwaukee police executed a search warrant at Mr. Roundtree's home. (1:1). A revolver and bullets were found in his bedroom, underneath his mattress. (1:1). The state

charged Mr. Roundtree with one count of possession of a firearm by a felon, contrary to WIS. STAT. § 941.29(2). (1:1). It alleged that Mr. Roundtree had previously been convicted in Milwaukee County case 2003-CF-2243, of two felony counts of failure to support a child (120+ days). (1:1-2).

Mr. Roundtree pled guilty on January 5, 2016, to the single count as charged. (46; 18). At his subsequent sentencing hearing, the state noted:

> Our office's general position is that, if you are a felon and you have a gun, absen[t] extraordinary circumstances, we recommend prison. It's appropriate given the nature of these offenses.
>
> And, perhaps, you can make the argument that it's unfair to Mr. Roundtree that the general problem of guns that we have in our town rubs off on him a little bit; but it does. We have a huge gun problem here. And the rule is, if you are a convicted felon whether it's for child support or murder, it doesn't matter, you can't have a gun.
>
> …
>
> *So, Mr. Roundtree has not been a problem for society at large; it's a problem for his kids*. He's not paying his child support. But that's something that I'm assuming since those cases haven't come back up, I'm assuming or guessing that he [has] … taken care of that.

(47:6-7)(emphasis added).

The defense noted Mr. Roundtree, age 47 at the time of sentencing, was an older individual and was not "young and reckless." (47:10). Defense counsel argued Mr. Roundtree "did not have a lengthy habitual criminal record. His prior felony is for failure to pay child support which, in itself, is not an inherently dangerous crime. He has not engaged in considerable acts of violence. Mr. Roun[d]tree has

six (6) kids. Unfortunately, he did not uphold to [sic] his father responsibilities in these kinds of cases." (47:7).

The Honorable William S. Pocan sentenced Mr. Roundtree to 18 months of initial confinement and 18 months of extended supervision. (47:19; 18:1).

Mr. Roundtree filed a postconviction motion, arguing that Wisconsin's felon-in-possession-of-a-firearm statute was unconstitutional as applied to him. (29). The postconviction court ordered briefing, after which it entered an order holding the postconviction motion in abeyance pending a decision in ***Class v. United States***, __U.S.__, 138 S.Ct. 798 (2018), in which the United States Supreme Court was considering whether a guilty plea inherently waives a defendant's right to challenge the constitutionality of his statute of conviction. (30; 33).

After the United States Supreme Court decided ***Class***, the postconviction court determined Mr. Roundtree waived his constitutional challenge to his conviction by entering a guilty plea. (40:2; App.102). In addition, the postconviction court explained that, given this Court's previous holding in ***State v. Pocian***, 2012 WI App 58, 341 Wis. 2d 380, 814 N.W.2d 894, it was not persuaded to put aside the guilty plea waiver rule. (40:2-3; App.102-103).

This appeal follows. Additional facts will be included as necessary below.

ARGUMENT

I. Wisconsin's lifetime firearm ban for all felons is unconstitutional as applied to Mr. Roundtree, who was convicted of non-violent failure to pay child support felonies.

A. Standard of review and applicable law.

WISCONSIN STAT. § 941.29(2) provides that a person convicted of a felony in this state:

> is guilty of a Class G felony if he or she possesses a firearm under any of the following circumstances:
>
> (a) The person possesses a firearm subsequent to the conviction for the felony or other crime, as specified in sub. (1)(a) or (b).

Thus, Wisconsin's felon-in-possession-of-a-firearm statute bars a person convicted of *any* felony from possessing a firearm after that conviction—forever. WIS. STAT. § 941.29(2). The statute contains no time limit for a felon's firearm dispossession, nor does it provide any mechanism by which a felon may petition for their rights in the future. WIS. STAT. § 941.29(2). Rather, a person who possesses a firearm at any time, if they have ever been convicted of any kind of felony, is always subject to a Class G felony in Wisconsin, which carries a maximum possible penalty of ten years in the Wisconsin state prison system, and/or a $25,000 fine. WIS. STAT.§§ 941.29; 939.50(3)(g).

The Second Amendment to the United States Constitution states that, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Similarly, the Wisconsin Constitution provides that "[t]he

people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose." WIS. CONST. art. 1, § 25.

The constitutionality of a statute is a question of law which this Court reviews de novo.[2] ***State v. Baron***, 2009 WI 58, ¶10, 318 Wis. 2d 60, 769 N.W.2d 34.

Usually, courts presume the constitutionality of a statute. *See* ***State v. Alger***, 2015 WI 3, ¶22, 360 Wis. 2d 193, 858 N.W.2d 346. However, a law that is challenged on Second Amendment grounds is *not* presumed constitutional. ***State v. Herrmann***, 2015 WI App 97, ¶11, 366 Wis. 2d 312, 873 N.W.2d 257 (citing ***Ezell v. City of Chicago***, 651 F.3d 684, 706 (7th Cir. 2011); ***District of Columbia v. Heller***, 554 U.S. 570, 628 n.27 (2008)). Rather, the state has the burden of establishing the law's constitutionality. ***Id.***

B. This Court should apply intermediate scrutiny.

In 2008, the United States Supreme Court held that the Second Amendment protects an individual right to keep and bear arms for the purpose of self-defense. ***Heller***, 554 U.S. at 592, 598. Two years later, the Court held that this right was

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[2] For purposes of clarity, Mr. Roundtree notes his sole argument on appeal is that the felon in possession of a firearm statute is unconstitutional as applied to him. An as-applied claim challenges the constitutionality of a statute as it relates to the facts "of a particular case or to a particular party." ***State v. Smith***, 2010 WI 16, ¶10 n.9, 323 Wis. 2d 377, 780 N.W.2d 90.

Mr. Roundtree did not raise a facial constitutional challenge to the felon in possession of a firearm statute in his postconviction motion; nor does he raise that claim on appeal. A facial constitutional challenge argues the statute in question is unconstitutional on its face, meaning it is unconstitutional under all circumstances. ***Id.***

applicable to the States by virtue of the Fourteenth Amendment. ***McDonald v. City of Chicago***, 561 U.S. 742, 750, 778 (2010). In ***McDonald***, the Supreme Court recognized that the Second Amendment protects more than simply an interest in firearms—it guards the inherent right to defend one's self, family, and property. ***Id.*** at 766. Further, this right applies to handguns. ***Id.***

Neither ***Heller*** nor ***McDonald*** identified the level of judicial scrutiny that should be used to determine whether a law is unconstitutional under the Second Amendment. While ***Heller*** specifically rejected the rational basis test and an interest-balancing test, it did not specify what level of analysis is appropriate. 554 U.S. at 628 n.27, 634-35.

Intermediate scrutiny requires the state to demonstrate that the challenged statute serves an important government interest, and that the means used are substantially related to achieving that interest. ***United States v. Skoien***, 614 F.3d 638, 641-42 (7th Cir. 2010); *see also* ***Williams***, 616 F.3d at 692. To survive intermediate scrutiny, it is not enough for the government to assert that it has a legitimate public interest; rather, "the government must demonstrate 'that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.'" ***State v. Herrmann***, 2015 WI App 97, ¶11, 366 Wis. 2d 312, 873 N.W.2d 257 (citation omitted).

As demonstrated below, even under an intermediate scrutiny standard,[3] the government cannot meet its burden to establish that WIS. STAT. § 941.29(2) is constitutional as

[3] In ***State v. Pocian***, 2012 WI App 58, 341 Wis. 2d 380, 814 N.W.2d 894, this Court applied an intermediate level of scrutiny to an as-applied challenge to the felon in possession of a firearm statute.

applied to Mr. Roundtree. *See* ***United States v. Chester***, 628 F.3d 673, 676, 683 (4th Cir. 2010).

C. Wisconsin's lifetime firearm dispossession for felons is unconstitutional as applied to persons convicted of non-violent felonies such as failing to pay child support.

The Wisconsin Supreme Court has explained that the purpose of WIS. STAT. § 941.29 is "the protection of public safety…because the legislature has determined that felons are more likely to misuse firearms." ***State v. Coleman***, 206 Wis. 2d 199, 210, 556 N.W.2d 701 (1996). Notably, there are hundreds of crimes that amount to felonies in Wisconsin: adultery; income tax evasion; theft of farm-raised fish, twice; releasing an animal three times without authorization; graffiti; unlawful use of a recording device in a motion picture theater, twice; falsifying business documents; forgery; interrupting a funeral possession, twice. In contrast to WIS. STAT. § 941.29, other Wisconsin statutes sensibly distinguish between violent and non-violent felonies. *See, e.g.*, WIS. STAT. § 941.291, which prohibits persons convicted of a violent felony from possessing body armor; *see also* WIS. STAT. §§ 301.048(2)(bm)1.a, 973.017(5)(a)2.

In both ***Heller*** and ***McDonald***, the United States Supreme Court struck down laws banning the possession of handguns in the home. Both cases acknowledged that the Second Amendment is not unlimited. In *dictum*, the ***Heller*** court noted, "although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill." ***Heller***, 554 U.S. at 626. It added, "we identify these *presumptively* lawful

regulatory measures only as examples; our list does not purport to be exhaustive." ***Id.*** at 626, n.26 (emphasis added). But, it warned, "since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field…. And there will be time enough to expound upon historical justifications for the exceptions we have mentioned if and when those exceptions come before us." ***Id.*** at 635.

Since ***Heller***, other courts have examined whether this presumption of lawfulness can be rebutted. *See* ***Britt v. North Carolina***, 363 N.C. 546, 681 S.E.2d 320 (2009) (holding that a state statute prohibiting convicted felons from possessing a firearm was unconstitutional as applied to a man convicted thirty years before of a non-violent felony drug charge); ***United States v. Williams***, 616 F.3d 685, 693 (7th Cir. 2010)("By describing the felon disarmament ban as presumptively lawful, the Supreme Court implicated that the presumption may be rebutted."); ***Binderup v. Attorney Gen. United States of Am.***, 836 F.3d 336, 356–57 (3d Cir. 2016)(holding that the misdemeanor offenses at issue were not serious enough to strip the defendants of their Second Amendment rights under the federal firearm statute); ***United States v. Moore***, 666 F.3d 313, 320 (4th Cir. 2012); ***United States v. Duckett***, 406 Fed. Appx. 185, 187 (9th Cir. 2010) (Ikuta, J., concurring); ***United States v. McCane***, 573 F.3d 1037, 1049-50 (10th Cir. 2009) (Tymkovich, J., concurring); ***Baysden v. State***, 718 S.E.2d 699 (N.C. Ct. App. 2011).

Likewise, ***Heller***'s use of the term "longstanding," with respect to prohibitions on the possession of firearms by felons, has also been the subject of much debate. Although some sources support the proposition, more recent authorities have not found strong evidence of "longstanding" prohibitions on the possession of firearms by felons. *See*

McCane, 573 F.3d at 1047-50 (Tymkovich, J., concurring) (Citing Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1374 (2009); Kevin Marshall, *Why Can't Martha Stewart Own a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 709-10, 714 (2009)).

Felons were widely allowed to possess firearms until the twentieth century. Marshall, *supra*, 708-13. Indeed, the first federal statute disqualifying all felons from possessing firearms was enacted in 1961. And, the initial federal felony dispossession laws only applied to a select group of crimes including "murder, manslaughter, rape, mayhem, aggravated assault…robbery, burglary, housebreaking, and attempt to commit any of these crimes." Marshall, p.729-30. *See* Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 HASTINGS L.J. 1339, 1362 (2009)(Noting the early common law definition of "felony applied only to a few very serious, very dangerous offenses such as murder, rape, arson, and robbery.").

Wisconsin enacted WIS. STAT. § 941.29, the felon in possession statute, in 1982. ***State v. Thomas***, 2004 WI App 115, ¶5, 274 Wis. 2d 513, 683 N.W.2d 497 (challenging § 941.29 prior to ***Heller*** and ***McDonald***). The incongruous effects of the statute's sweeping language became clear:

> One man beats his wife, harming her physically and emotionally and traumatizing their children who witness the assault. He may, however, *only* have committed battery, a misdemeanor punishable by less than one year in jail. Another man enters a garage to steal a shovel; he has committed burglary, punishable by years in prison.
>
> One woman drives while intoxicated, threatening the lives of countless citizens. Under Wisconsin's drunk driving laws—the weakest in the nation—she has

> committed a *non-criminal* offense if it is her first, or only a misdemeanor unless it is her fifth (or subsequent) offense. Another woman, however, forges a check; she has committed a felony.
>
> The felony/misdemeanor statutory designations are replete with anomalies such as these….

274 Wis. 2d 513, ¶¶47-49 (Schudson, J., concurring)(footnote omitted).

Since ***Heller*** and ***McDonald***, this Court has twice addressed whether Wisconsin's felon-in-possession statute unconstitutionally fails to distinguish between violent and non-violent crimes rendering all individuals, regardless of type of felony, subject to a lifetime ban from the possession of firearms. ***Pocian***, 341 Wis. 2d 380, and ***State v. Rueden***, No.2011AP1034-CR, unpublished slip op. (WI App June 7, 2012) (App.104-106).

In ***Pocian***, the defendant had been convicted of three counts of uttering a forged writing, which were class C felonies. WIS. STAT. § 943.38(2)(1985-86). Subsequently, he shot two deer and registered them with the Department of Natural Resources. As a result, he was convicted of being a felon in possession of a firearm. ***Id.***, ¶4. He raised both facial and as applied challenges to WIS. STAT. § 941.29.

Applying intermediate scrutiny, this Court denied ***Pocian's*** facial challenge, concluding that, "[b]y keeping guns out of the hands of felons…WIS. STAT. §941.29 is substantially related to the important governmental objective of enhancing public safety." ***Id.***, ¶¶11-12. Regarding ***Pocian's*** as-applied challenge, this Court held:

> While Pocian did not utilize physical violence in the commission of his three felonies, *he did physically take*

> *his victim's property*. Additionally, 'most scholars of the Second Amendment agree that the right to bear arms was tied to the concept of a virtuous citizenry and that, accordingly, the government could disarm 'unvirtuous citizens.' The legislature has determined that Pocian's crimes are felonies. As such, Pocian has legislatively lost his right to possess a firearm.

Id., ¶15 (citation omitted; emphasis added). This Court examined whether the government could show that the law was substantially related to an important governmental interest, and concluded, "[t]he governmental objective of public safety is an important one, and … the legislature's decision to deprive Pocian of his right to possess a firearm is substantially related to that goal." ***Id.***, ¶¶14-15.

Shortly thereafter, this Court rejected the similar facial and as-applied challenges raised in ***Rueden***, citing its decision in ***Pocian***. ***Rueden***, No.2011AP1034-CR, unpublished slip op., ¶6 (App.105). Specifically addressing the as-applied challenge, this Court explained:

> [I]n terms of the underlying facts, Rueden is plainly in no better position than Pocian. Pocian was charged with being a felon in possession of a firearm after he went hunting using his father's gun, shot two deer, and registered them with the DNR. Pocian's prior felony conviction, more than twenty years earlier, had been for uttering about $1,500 in forged checks. In contrast, *Rueden's prior offense involved going onto another person's property and stealing from a shed. Rueden's gun possession charge involved stealing a handgun and selling it. If anything, the circumstances here indicate a greater need for public protection.*

Id., ¶10 (citations omitted; emphasis added)(App.105).

Here, unlike in ***Pocian*** and ***Rueden***, the permanent dispossession of Mr. Roundtree's right to possess a firearm does not advance the government's goal of public safety, but unconstitutionally deprives him of his right to keep and bear arms for self-defense. Mr. Roundtree's felon-in-possession offense was predicated on his convictions, over ten years earlier, for failing to pay court-ordered child support. The postconviction court here observed "there is nothing virtuous about a person who fails to fulfill his court-ordered child support obligations." (40:3; App.103). Yet, this suggestion misconstrues the historical understanding of a "virtuous citizenry" and the government's ability to disarm "unvirtuous citizens." *See* ***United States v. Yancey***, 621 F.3d 681, 684-85 (7th Cir. 2010). Whether the definition of an "unvirtuous citizen" applies beyond violent offenders and includes non-violent or non-dangerous individuals is a subject of ongoing debate. *Compare, e.g.*, ***Binderup***, 836 F.3d at 348 (concluding that an "unvirtuous citizen" includes "any person who has committed a serious criminal offense, violent or non-violent") *with* ***Binderup***, 836 F.3d at 367-70 (Hardiman, J., concurring in part and concurring in the judgments) (concluding that an "unvirtuous citizen" only extends to those who were likely to commit violent offenses or pose a danger to the public).

Further, neither Mr. Roundtree's underlying convictions nor his felon-in-possession conviction are comparable to those in ***Pocian*** and ***Rueden***. In both those cases, this Court delved into the specific facts of the defendants' underlying felony offenses, as well as the facts of their felon-in-possession convictions. And, in both those cases, this Court determined that those facts justified the application of the felon-in-possession charge, because the defendants' offenses implicated public safety concerns: Pocian physically took a victim's property was physically

taken in one instance, and later used a gun to shoot deer; Rueden had first gone onto another person's property and stolen from a shed, and later had stolen a handgun.[4]

Mr. Roundtree's failure to pay child support, in contrast, did not involve any physical or violent act that implicates public safety concerns. His predicate offenses make him no more likely than the typical citizen to commit a crime of violence. The record lacks any details regarding the circumstances of his failure to pay child support, other than showing that this conduct was isolated to 2003, when both cases for failing to pay child support arose. (1:1-2). Likewise, Mr. Roundtree's felon-in-possession charge arose in the course of the execution of a search warrant where no other charges were issued in connection with that investigation. (1:1-2). Mr. Roundtree was not walking around town with a gun in his pocket, nor was he transporting it in a vehicle. Rather, the unloaded handgun was found in his residence, under his mattress. (1:1).

Mr. Roundtree, who committed non-violent felonies fifteen years ago, should not be treated equal to felons convicted of violent felonies. He is not contesting the wrongfulness of his failure to pay child support; rather, he asserts that this conduct does not logically support forever barring him from possessing a firearm to protect himself and his home—particularly when considering the underlying purpose of WIS. STAT. § 941.29(2). See ***Coleman***, 206

[4] Notably, because this is an as-applied challenge to the constitutionality of the application of WIS. STAT. § 941.29(2) to a particular person under particular circumstances, ***Pocian***'s holding does not preclude Mr. Roundtree's argument, nor does it "arguably" resolve the issues raised, as the postconviction court suggested. (40:2; App.102). *See* ***Smith***, 323 Wis. 2d 377, ¶10 n.9.

Wis. 2d at 210 (describing public safety as the goal of the felon dispossession statute). Mr. Roundtree poses no danger to public safety, and therefore, no justification exists to permanently deprive him of his fundamental right to keep and bear arms for self-defense. See ***Heller***, 554 U.S. at 635 (the core of the Second Amendment right is the right of a law-abiding, responsible citizen to use arms in defense of hearth and home).

This Court should conclude that WIS. STAT. § 941.29(2) is unconstitutional as applied to Mr. Roundtree, and it should vacate his conviction.

II. In light of the United States Supreme Court's decision in ***Class v. United States***, __U.S.__, 138 S.Ct. 798 (2018), Mr. Roundtree did not waive his as-applied challenge to the constitutionality of WIS. STAT. § 941.29(2) by pleading guilty.

In 2017, the United States Supreme Court granted a petition for certiorari in ***Class v. United States***, in which the question presented asked whether a guilty plea inherently waived a defendant's right to challenge the constitutionality of his statute of conviction. At that time, there was a three-way federal circuit split on the question, with three circuit courts of appeal holding that constitutional challenges are waived by a guilty plea, five circuit courts of appeal holding such challenges are not waived, and three circuit courts of appeal, including the Seventh Circuit, holding that only as-applied, but not facial challenges are waived by a guilty plea.[5]

[5] The D.C. Circuit, the First Circuit, and the Tenth Circuit hold that a guilty plea inherently waives all constitutional challenges to the statute of conviction. *See* ***United States v. Delgado-Garcia,*** 374 F.3d 1337, 1340 (D.C. Cir. 2004); ***United States v. Diaz-Doncel***, 811 F.3d (continued)

In ***Class***, the defendant entered a guilty plea, and later appealed his conviction, challenging whether the statute of his conviction violated his Second Amendment Rights, as applied to him. *See* 2017 WL 3049334, p.5, 8 (Brief of Government, filed June 17, 2017)(describing petitioner's arguments on appeal, including the argument that "the federal statute under which petitioner had been convicted… 'violates the Second Amendment, *as applied* to a law-abiding adult citizen's right to keep legally-owned firearms in his vehicle parked in an unsecured, publicly-accessible parking lot' on the Capitol Grounds.")(emphasis added).

Class was convicted of 40 U.S.C. § 5104(e), which makes it a crime to possess a firearm on the United States Capitol grounds. 138 S.Ct. at 1-2. He did not preserve in writing his right to appeal the constitutionality of § 5104(e), pursuant to Federal Rule 11(a)(2). 138 S.Ct. at 2, 9. However, on appeal, he argued in part that his constitutional claims survived his guilty plea on the theory that they, like double

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517, 518 n.2 (1st Cir. 2016); ***United States v. De Vaughn***, 694 F.3d 1141 (10th Cir. 2012).

Then, the Third, Fifth, Sixth, Ninth, and Eleventh Circuits hold that a guilty plea does not inherently waive a defendant's right to challenge his statute of conviction, whether the challenge is facial or as-applied. *See* ***United States v. Whited***, 311 F.3d 259, 260, 262 (3d Cir. 2002); ***United States v. Knowles***, 29 F.3d 947, 952 (5th Cir. 1994); ***United States v. Skinner***, 25 F.3d 1314, 1316-17 (6th Cir. 1994); ***United States v. Sandsness***, 988 F.2d 970, 971-72 (9th Cir. 1993); ***United States v. Palacios-Casquete***, 55 F.3d 557 (11th Cir. 1995).

Lastly, the Fourth, Seventh, and Eighth Circuits hold that facial, but not as-applied challenges to a statute can survive a guilty plea. *See* ***United States v. Aranda***, 612 F.Appx. 177, 178 n.1 (4th Cir. 2015); ***United States v. Kelly***, 102 F.Appx. 838 (4th Cir. 2004); ***United States v. Phillips***, 645 F.3d 859, 863 (7th Cir. 2011); ***United States v. Seay***, 620 F.3d 919 (8th Cir. 2010).

jeopardy and vindictive prosecution claims, do not involve a factual challenge to his guilt. 2017 WL 2130307 p.22-44 (Brief of Petitioner, filed May 12, 2017).

The United States Supreme Court determined that Class' guilty plea did not automatically preclude his challenge to the constitutionality of the statute under which he was convicted. ***Class***, 138 S.Ct. at 3,7,11.

Yet, the postconviction court here described ***Class*** as involving a "*facial* challenge to a federal firearms statute under the Second Amendment and the Due Process Clause." (40:2; App.102). It held that Mr. Roundtree waived his constitutional challenge to his conviction by entering a guilty plea in this case because, "***Class*** did not involve an *as-applied* constitutional challenge to the statute of conviction, as here, and nothing in that decision calls into question the application of Wisconsin's guilty plea waiver rule to the defendant's as-applied constitutional challenge." (40:2; App.102)(emphasis added).

The postconviction court was wrong. The United States Supreme Court explicitly held that Mr. Class "may pursue his constitutional *claims* on direct appeal." 138 S.Ct. at 11 (emphasis added). The Court did not confine its holding to facial challenges. In his dissent, Justice Alito noted Mr. Class' "Second Amendment argument is that banning firearms in the Maryland Avenue parking lot of the Capitol Building goes too far, at least *as applied* to him specifically." 138 S.Ct. at 12-13 n.4 (Alito, J. dissenting)(emphasis added); *see also* ***Class v. United States***, 2017 WL 3049334, p.5, 8 (Brief of Government, filed June 17, 2017). Accordingly, the guilty plea waiver rule does not preclude Mr. Roundtree's claims, and Mr. Roundtree's argument should be resolved on the merits. *See* ***United States v. Reed***, 2018 WL 1790606

p.29-30 (Brief of Government, filed April 12, 2018)(where defendant raised as-applied challenge for the first time on appeal, the Government agrees that the argument is not waived because ***Class*** permits as-applied constitutional challenges after a guilty plea).

However, even if this Court disagrees with Mr. Roundtree about the holding of ***Class***, this Court should decline to apply the guilty plea waiver rule and decide Mr. Roundtree's argument on the merits.[6] The guilty plea waiver rule is a rule of judicial administration, and courts may decline to apply the waiver rule "particularly if the issues are of state-wide importance." ***State v. Tarrant***, 2009 WI App 121, ¶6, 321 Wis. 2d 69, 772 N.W.2d 750. Gun ownership rights and the right to protect oneself and one's family are undeniably important issues; as is the question of the application of WIS. STAT. § 941.29(2) to a person with dated, non-violent felonies for failure to pay child support.

[6] Mr. Roundtree notes that ***Pocian*** was before this Court as an interlocutory appeal from a denied motion to dismiss. 341 Wis. 2d 380, ¶5. However, in ***Rueden***, the defendant entered a guilty plea and raised his constitutional challenges on appeal. No.2011AP1034-CR, unpublished slip op., ¶¶7-8 (App.105). This Court declined to apply the guilty plea waiver rule and addressed Rueden's arguments on the merits because it determined addressing the issue served the interests of justice—even though ***Pocian*** had already been decided. ***Id.*** (citing ***State v. Tarrant***, 2009 WI App 121, ¶6, 321 Wis. 2d 69, 772 N.W.2d 750) (App.105).

CONCLUSION

For the reasons stated above, Mr. Roundtree respectfully requests that this Court issue an order vacating his conviction.

Dated this 6th day of June, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,457 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 6th day of June, 2018.

Signed:

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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 § 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 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 this 6th day of June, 2018.

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