STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP594-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LEEVAN ROUNDTREE,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND POSTCONVICTION DECISION AND ORDER ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DAVID A. HANSHER, PRESIDING

RESPONSE BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

The State reframes and reorders the issues as follows:

1. Under Wisconsin's guilty plea waiver rule, a defendant who pleads guilty for violating a criminal statute forfeits the opportunity to mount an as-applied constitutional challenge to that statute.[1] Leevan Roundtree pleaded guilty to violating Wisconsin's felon-in-possession statute and then sought to challenge the constitutionality of that statute as applied to him. Did Roundtree's guilty plea cause him to waive or forfeit his opportunity to raise that claim?

The circuit court said, "Yes."

This Court should affirm.

2. In *Pocian*, this Court held that Wisconsin's felon-in-possession statute is not unconstitutional for permanently depriving a nonviolent felon of the right to bear arms.[2] Does *Pocian* foreclose Roundtree's claim that Wisconsin's felon-in-possession statute is unconstitutional as applied to him—based on his underlying felony of failure to pay child support—by permanently depriving him of the right to bear arms?

The circuit court said, "Yes."

This Court should affirm.

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[1] *State v. Cole*, 2003 WI 112, ¶ 43, 264 Wis. 2d 520, 665 N.W.2d 328.

[2] *State v. Pocian*, 2012 WI App 58, 341 Wis. 2d 380, 814 N.W.2d 894.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. The parties' briefs should adequately set forth the relevant facts and legal analysis.

Publication may be warranted to clarify that *Class v. United States*, 138 S. Ct. 798 (2018), does not affect Wisconsin's guilty plea waiver rule, if this Court reaches that issue.

Publication is not warranted based on the merits of the as-applied challenge, which is controlled by *Pocian*.

INTRODUCTION

A Wisconsin defendant who enters a guilty plea to a crime cannot later mount an as-applied constitutional challenge to the underlying criminal statute. The Supreme Court's decision in *Class*, which addressed whether constitutional challenges fit into the exceptions to the federal guilty plea waiver rule as provided in Rule 11, does not affect Wisconsin's guilty plea waiver rule. Therefore, Roundtree has forfeited his as-applied challenge to the felon-in-possession statute by his guilty plea, and this Court may deny Roundtree relief on that basis.

In any event, Roundtree's as-applied challenge is controlled by *Pocian*, which holds that Wisconsin's felon-in-possession statute is not unconstitutional to the extent that it applies to nonviolent felons. Thus, even if this Court sees fit to reach Roundtree's constitutional claim, he is not entitled to relief.

STATEMENT OF THE CASE

The State charged Roundtree with possession of a firearm by a felon, after police found a revolver and bullets in his home pursuant to a search warrant. (R. 1:1.) Roundtree had a felony conviction from 2003 involving two

counts of failure to pay child support. (R. 1:1.) After police found the gun, Roundtree admitted that he was a convicted felon and that he knew he could not have a firearm. (R. 1:1.) Roundtree told police that he purchased the gun—which police learned had been stolen in Texas—"from a kid on the street" a year earlier and that he did not know it had been stolen. (R. 1:1.)

Roundtree entered a guilty plea. (R. 18:1.) The court sentenced him to 18 months' initial confinement and 18 months' extended supervision. (R. 18:1.) The court at sentencing was primarily concerned with the fact that Roundtree chose to buy the gun from a kid on the street. (R. 47:14.) It noted that guns and their illegal sales are "a huge problem for our community" and that Roundtree's actions "sort of encourage[] this unfortunate commerce that we have in this community that has caused so much pain and loss of life." (R. 47:14–15.) It further expressed concern that Roundtree, at sentencing, asserted that he did not know that he could not have a gun, despite his statement to the contrary in the complaint. (R. 47:17.) The court did not believe Roundtree's claim of ignorance: "I think you knew that you couldn't have a gun as a convicted felon. And I think that's why you bought it from the kid on the streets." (R. 47:16–17.)

Roundtree filed a postconviction motion, arguing that the felon-in-possession statute was unconstitutional as it applied to him, based on his nonviolent underlying felony of failure to pay child support. (R. 29.) The postconviction court denied the motion, holding that Roundtree, by his guilty plea, waived his constitutional challenge. (R. 40:2.) It declined to disregard the guilty plea waiver rule because the merits of his claim appear to be foreclosed by *Pocian*. (R. 40:2–3.)

Roundtree appeals.

ARGUMENT

I. By his guilty plea, Roundtree waived his opportunity to mount an as-applied challenge to the constitutionality of the felon-in-possession statute.

Whether Roundtree's guilty plea relinquished his right to appeal the constitutionality of his statute of conviction on an as-applied basis is a question of law that this Court reviews de novo. *See State v. Kelty*, 2006 WI 101, ¶ 13, 294 Wis. 2d 62, 716 N.W.2d 886.

A. Under Wisconsin's guilty plea waiver rule, a guilty plea waives (or forfeits) an as-applied constitutional challenge to the statute of conviction.

With a few exceptions not relevant here, a valid guilty or no contest plea waives all nonjurisdictional defenses to a conviction, including constitutional violations. *See State v. Riekkoff*, 112 Wis. 2d 119, 122–23, 332 N.W.2d 744 (1983). Courts refer to this as the guilty plea waiver rule, although it is more accurately described as a rule of forfeiture. *See Kelty*, 294 Wis. 2d 62, ¶ 18 & n.11.

In Wisconsin, whether a guilty plea forecloses review of a claim that the defendant was convicted of violating an unconstitutional statute depends on whether the challenge is facial or as-applied. The guilty plea waiver rule does not foreclose a facial constitutional challenge because that type of challenge involves an issue of subject matter jurisdiction. *See State v. Cole*, 2003 WI 112, ¶ 46, 264 Wis. 2d 520, 665 N.W.2d 328; *see also State v. Olson*, 127 Wis. 2d 412, 420, 380 N.W.2d 375 (Ct. App. 1985) ("A statute, unconstitutional on its face, is void from its beginning to the end . . . .") (quoting *State ex rel. Comm'rs of Pub. Lands v. Anderson*, 56 Wis. 2d 666, 672, 203 N.W.2d 84 (1973)).

An as-applied challenge, in contrast, raises a non-jurisdictional defect that may be waived. *See Cole*, 264

Wis. 2d 520, ¶ 46. For example, in *Cole*, Cole pleaded guilty to Wis. Stat. § 941.23, which prohibited his carrying a concealed weapon, and he raised an as-applied constitutional challenge in a motion for postconviction relief. *Id.* The supreme court held that as a result of his plea, Cole "waived the opportunity to challenge the constitutionality of" section 941.23 as applied to him. *Id.*

So too, here. Roundtree pleaded guilty to the felon-in-possession statute, and he raised no constitutional challenge to it until his postconviction proceedings. He therefore forfeited his as-applied challenge, and the Court may deny it on that basis.

B. *Class* has no effect on Wisconsin's guilty plea waiver rule.

Roundtree contends that *Class v. United States*, 138 S. Ct. 798 (2018), changes Wisconsin's longstanding guilty plea waiver rule to provide that defendants who plead guilty retain the right to appeal with an as-applied constitutional challenge to the statute of conviction. (Roundtree's Br. 15–18.) Roundtree is wrong.

Class involved a federal criminal defendant who entered an unconditional guilty plea under Federal Rule of Criminal Procedure 11. He then challenged the statute of conviction, which bars individuals from carrying a firearm on Capitol grounds, as violating the Second Amendment and violating the due process fair-notice requirement. *Class*, 138 S. Ct. at 802. The question before the Supreme Court was "whether a guilty plea by itself bars a federal criminal defendant from challenging the constitutionality of the statute of conviction on direct appeal." *Id*. at 803.

The Court held that Class's guilty plea did not waive his constitutional claims on direct appeal because they "challenge the Government's power to criminalize Class' (admitted) conduct. They thereby call into question the Government's power to 'constitutionally prosecute'" him.

Class, 138 S. Ct. at 805. Moreover, the Court held, nothing in Rule 11 prevented Class from raising the claims simply based on his guilty plea. *Id.* at 805–07.

Class does not impact Wisconsin's guilty plea waiver rule. By the Court's own words, the question presented was whether a *federal* criminal defendant's guilty plea, pursuant to Federal Rule of Criminal Procedure 11 waived his constitutional challenges to the statute of conviction. *Class*, 138 S. Ct. at 803.

Further, it is not clear from the Court's decision whether it considered Class's claims to be facial, as applied, or a combination of the two. But the Court's distinction between a constitutional challenge calling into question the Government's power to prosecute and one that does not echoes the jurisdictional distinction between facial and as-applied challenges. To wit, a facial challenge, is one that "strip[s] the government of its ability to enter a conviction against any defendant." *United States v. Phillips*, 645 F.3d 859, 863 (7th Cir. 2011). In contrast, an as-applied challenge "does not dispute the court's power to hear cases under the statute; rather it questions the court's limited ability to enter a conviction in the case before it." *Id.* (citing *Blackledge v. Perry*, 417 U.S. 21, 30 (1974)). Wisconsin courts, in developing the guilty plea waiver rule, have long applied that distinction between facial challenges implicating the court's jurisdiction, and nonjurisdictional as-applied challenges.[3]

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[3] *See, e.g.*, *Cole*, 264 Wis. 2d 520, ¶ 46; *State v. Trochinski*, 2002 WI 56, ¶ 34 n.15, 253 Wis. 2d 38, 644 N.W.2d 891; *State v. Molitor*, 210 Wis. 2d 415, 419, 565 N.W.2d 248 (Ct. App. 1997); *see also State ex rel. Skinkis v. Treffert*, 90 Wis. 2d 528, 538, 280 N.W.2d 316 (Ct. App. 1979) (facial constitutional challenge renders statute void and deprives court of power to convict any defendant for violating it).

Accordingly, *Class* does not appear to affect Wisconsin's guilty plea waiver rule, which is not based in Rule 11. Nor does the *Class* holding overturn the facial/as-applied distinction in the guilty plea waiver context. Indeed, although there are few cases from other courts assessing *Class*, at least one state court has understood Class's holding to be limited to facial constitutional claims. *See, e.g.*, *In re N.G.*, Nos. 121939 & 121961, 2018 WL 3768306, at *7, *11 (Ill. Aug. 9, 2018) (concluding that, based on *Class*, "[d]efendants convicted under a *facially* unconstitutional statute may challenge the conviction at any time, even after a guilty plea, because the State or Government had no power to impose the conviction to begin with" (emphasis added)).

Thus, *Class* did nothing to change Wisconsin's guilty plea waiver rule. Roundtree has forfeited his as-applied challenge.

C. This Court should otherwise decline to exercise its power to address Roundtree's as-applied challenge.

Like the general rule of waiver, the guilty plea waiver rule is a rule of administration and does not involve a court's power to address the issues raised. *See Kelty*, 294 Wis. 2d 62, ¶ 18. Specifically, this Court may decline to apply the rule "particularly if the issues are of state-wide importance or resolution will serve the interests of justice and there are no factual issues that need to be resolved." *State v. Tarrant*, 2009 WI App 121, ¶ 6, 321 Wis. 2d 69, 772 N.W.2d 750 (quoted source omitted). Roundtree asks this Court to disregard his forfeiture and address the merits of his as-applied challenge because "[g]un 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." (Roundtree's Br. 18.)

If the questions Roundtree raised were of first impression, their answers would be of statewide importance.

But this Court has squarely answered them by holding in *Pocian* that it is constitutional for the Legislature to prohibit individuals who have committed nonviolent felonies from possessing firearms. *See State v. Pocian*, 2012 WI App 58, ¶ 13, 341 Wis. 2d 380, 814 N.W.2d 894. Accordingly, this Court should apply the guilty plea waiver rule, deem Roundtree's claim forfeited, and affirm.

II. Even if this Court reaches the merits, *Pocian* controls and defeats Roundtree's claim.

A. Standard of review

This Court reviews de novo whether the felon-in-possession statute is unconstitutional as applied to Roundtree. *See Pocian*, 341 Wis. 2d 380, ¶ 6. This Court presumes that statutes are constitutional; therefore, "a party attempting to argue a statute is unconstitutional carries a heavy burden." *Id.* (citing *State v. Smith*, 2010 WI 16, ¶ 10 n.9, 323 Wis. 2d 377, 780 N.W.2d 90). "In an as-applied challenge, the challenger must prove that the statute as-applied to him or her is unconstitutional beyond a reasonable doubt." *Id.* (citing *Smith*, 323 Wis. 2d 377, ¶ 9). The statute must survive this Court's intermediate scrutiny, under which "a law 'is valid only if substantially related to an important governmental objective.'" *Id.* ¶ 11 (quoted source omitted).

Roundtree asserts that based on *State v. Herrmann*, 2015 WI App 97, ¶ 11, 366 Wis. 2d 312, 873 N.W.2d 257, "a law that is challenged on Second Amendment grounds is *not* presumed constitutional" and that the State has the burden of proving its constitutionality. (Roundtree's Br. 6). This Court in *Herrmann* reached that conclusion in part based on language in *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008).

In the State's view, the *Herrmann* court conflated the following two things: (1) the general presumption of constitutionality in these cases and the proponent's burden

to overcome that presumption, and (2) the government's relative burden—within the intermediate-scrutiny mode of analysis—of showing the law's substantial relation to an important governmental interest. *See Pocian*, 341 Wis. 2d 380, ¶ 14. The *Herrmann* court also disregarded language in *Heller* stating that nothing in its opinion should be understood to cast doubt on the presumption of constitutionality of "longstanding prohibitions on the possession of firearms by felons." *Heller*, 554 U.S. at 626–27.

In any event, the *Pocian* court "applied the correct standard" in denying Pocian's as-applied challenge. *Herrmann*, 366 Wis. 2d 312, ¶ 12 n.5. Because *Pocian* dictates rejection of Roundtree's claim, the language in *Herrmann* is not relevant to the analysis.

B. *Pocian* holds that Wisconsin's felon-in-possession statute is constitutional as applied to defendants who have been convicted of nonviolent felonies.

Wisconsin Stat. § 941.29(2) (2013–14)[4] provides that a person who has been convicted of a felony in Wisconsin "who possesses a firearm is guilty of a Class G felony." In essence, section 941.29(2) imposes on all convicted felons a lifetime ban on firearms possession. This Court has at least twice issued published decisions upholding the lifetime firearms ban against constitutional challenges.[5] *See Pocian*, 341 Wis. 2d 380, ¶¶ 12, 15; *State v. Thomas*, 2004 WI App 115, ¶ 23, 274 Wis. 2d 513, 683 N.W.2d 497.

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[4] In the 2015–16 version of the Wisconsin Statutes, this provision is Wis. Stat. § 941.29(1m)(a).

[5] Just before counsel filed this brief, this Court rejected a similar as-applied challenge to the felon-in-possession law based on the defendant-appellant's nonviolent prior felony conviction for OWI. *State v. Culver*, No. 2016AP2160-CR (Wis. Ct. App. Aug. 29, 2018) (R-App. 101–23). *Culver* is authored and recommended for publication.

In *Thomas*, Thomas was charged under section 941.29; his past felony conviction was for fleeing. 274 Wis. 2d 513, ¶ 3. Thomas raised several challenges, including an as-applied claim alleging that banning all convicted felons from possessing firearms violated equal protection because the statute did not distinguish between violent and nonviolent felons. *Id.* ¶¶ 30–31.

In rejecting Thomas's claim, this Court discussed and adopted the reasoning of three non-Wisconsin cases; of those, this Court quoted *State v. Brown*, 571 A.2d 816 (Me. 1990), extensively. *Thomas*, 274 Wis. 2d 513, ¶ 34. In particular, the *Brown* court reasoned that "[o]ne who has committed *any* felony has displayed a degree of lawlessness that makes it entirely reasonable for the legislature, concerned for the safety of the public it represents, to want to keep firearms out of the hands of such a person." *Brown*, 571 A.2d at 821 (emphasis added). Therefore, "[l]abeling [a person's] preexisting felony status the product of a 'nonviolent' crime obscures its seriousness as well as the very real threat to public safety created by his continued misconduct, a threat that might well be aggravated by the availability of a firearm." *Id.* Hence, given Brown's past disregard for the law, "a legislative determination that he is an undesirable person to possess a firearm is entirely reasonable and consonant with the legitimate exercise of police power for public safety." *Id.* Based on "the logic and persuasive quality" of that reasoning, the *Thomas* court likewise rejected Thomas's as-applied claim. *Thomas*, 274 Wis. 2d 513, ¶ 36.

In *Pocian*, Pocian had been convicted in 1986 of writing forged checks, and in 2008 was charged and convicted under section 941.29 after he attempted to register deer he had shot while hunting. 341 Wis. 2d 380, ¶¶ 3, 4. Pocian raised facial and as-applied challenges to section 941.29 as violating the Second Amendment in light of the United States Supreme Court's decisions in *Heller* and

McDonald v. City of Chicago, 561 U.S. 742 (2010) (plurality opinion). *Id.* ¶ 7. Specifically, Pocian argued that the statute was facially overbroad to the extent that it categorially banned felons from possessing firearms and, alternatively, it was unconstitutional as applied to him, a nonviolent felon. *Id.* ¶¶ 2, 8, 13.

In resolving the facial challenge, this Court followed *Heller* in employing intermediate scrutiny (*Thomas* had used rational basis review), and rejected Pocian's overbreadth challenge. It noted that "[n]o state law banning felons from possessing guns has ever been struck down," that "no federal ban on felons possessing guns has been struck down in the wake of *Heller*," and that "[t]he Seventh Circuit recently held that it is constitutional to categorically ban felons from possessing guns." *Pocian*, 341 Wis. 2d 380, ¶ 12 (citing *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010)). Agreeing with those precedents, the Court suggested that if Pocian wanted to change the law, "the proper route is through the legislature." *Id.*

This Court likewise rejected Pocian's as-applied challenge, again applying intermediate scrutiny: "The governmental objective of public safety is an important one, and we hold that the legislature's decision to deprive Pocian of his right to possess a firearm is substantially related to this goal." *Pocian*, 341 Wis. 2d 380, ¶ 15. The Court reasoned that the Framers "[tied] the right to bear arms . . . to the concept of a virtuous citizenry and that, accordingly, the government could disarm 'unvirtuous citizens.'" *Id.* (quoting *United States v. Yancey*, 621 F.3d 681, 684–85 (7th Cir. 2010)). The Legislature therefore had the right to deprive all "unvirtuous citizens"—i.e., both violent and nonviolent felons—of the right to possess firearms. *See id.* In Pocian's case, the Legislature had deemed his past crimes were felonies, and as a result, he "has legislatively lost his right to possess a firearm." *Id.*

C. *Pocian* controls Roundtree's case.

In short, this Court in *Pocian* rejected the argument that Wisconsin's law disarming felons cannot be constitutionally applied to nonviolent felons. *Pocian* binds the Court in this case.

Indeed, this Court held that *Pocian* directed its decision in a case similar to Roundtree's, *State v. Rueden*, No. 2011AP1034-CR, 2012 WL 2036008 (Wis. Ct. App. June 7, 2012) (unpublished) (A-App. 104–06). There, Rueden asserted that Wis. Stat. § 941.29 was unconstitutional as applied to him because his prior felony was a nonviolent, five-year-old conviction for felony theft when he stole his employer's automobile from a shed. In rejecting Rueden's claim, this Court stated that "[w]e need not discuss the specifics" of Rueden's as-applied challenge because "we are bound by our recent *Pocian* decision"; "*Pocian* plainly controls" Rueden's as-applied challenge. *Id.* ¶¶ 6, 9 (A-App. 105).

Hence, applying *Pocian* to the facts here, the resolution is simple: the Legislature may disarm felons based on their status as "unvirtuous citizens." The Legislature has deemed Roundtree's past conviction—failure to pay child support—a felony. Thus, Roundtree has lost his right to possess a firearm. As the *Pocian* court explained, if Roundtree "wants to change the law, the proper route is through the legislature." *Pocian*, 341 Wis. 2d 380, ¶ 12.[6]

Roundtree argues that his conviction for felony failure to pay child support does not fit into the historical

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[6] This Court recently reinforced *Pocian*'s holding in *Culver*. *See Culver*, slip op. ¶ 45 (explaining that in *Pocian*, this Court "plainly" held that "[v]iolent or not, felons can be constitutionally deprived of the right to bear arms" and that that holding bound its rejection of Culver's claim) (R.-App. 122).

understanding of "virtuous citizenry" and the government's ability to disarm those individuals. (Roundtree's Br. 13.) But other than to point to an apparent debate in a Third Circuit case about whether an unvirtuous citizen means someone who committed a past felony or is limited to someone likely to pose a danger to the public, he does not explain why a felony-level failure to pay child support is excluded from the category of "unvirtuous citizens" who have committed nonviolent felonies.

He also argues that his underlying conviction and his felon-in-possession conviction is less of a threat to public safety and therefore not comparable to those in *Pocian* and *Rueden*. (Roundtree's Br. 13–15.) To start, Roundtree misreads *Pocian* and *Rueden* if he believes this Court is inviting defendants to mount as-applied challenges to the felon-in-possession statute by fact-matching their underlying nonviolent felony against others.

Indeed, in rejecting Pocian's as-applied challenge, this Court did not delve into the facts of Pocian's underlying felony (uttering a forged writing by cashing $1500 in stolen checks), other than to note that "[w]hile Pocian did not utilize physical violence in the commission of his three felonies, he did physically take his victim's property." *Pocian*, 341 Wis. 2d 380, ¶ 15. But the Court also went on to say that regardless of the lack of violence of Pocian's crimes, the government may disarm felons based on their status as "unvirtuous citizens," and the Legislature has deemed it a felony to forge and cash stolen checks. *Id.* Thus, under *Pocian*, a felony is a felony; no analysis into its relative "unvirtuousness" is needed.

And nothing in this Court's decision in *Rueden* suggests that courts considering these as-applied challenges should rank or compare the violence in nonviolent felonies. To start, the *Rueden* court explained that in *Pocian*, the

court "did not delve into the particular facts of the underlying nonviolent felony when rejecting the as-applied challenge." *Rueden*, 2012 WL 2036008, ¶ 10 (A-App. 105). But even so, the *Rueden* court wrote, Rueden's underlying crime and possession charge put him "plainly in no better position than Pocian." *Id.* Hence, while *Rueden* discussed the facts of the felony and possession convictions, the court was simply saying that Rueden could not factually distinguish his case from *Pocian*, even if he wanted to. Further, as Roundtree points out, there are all manner of nonviolent offenses that are deemed felonies. (Roundtree's Br. 8.) It is not reasonable to read *Pocian* as an invitation to parties and courts to debate the relative virtuousness of the underlying crime every time someone convicted of a nonviolent felony seeks to challenge the felon-in-possession statute.

Roundtree writes that *Pocian*'s holding does not resolve his claim because an as-applied challenge requires courts to review the particular defendant's circumstances. (Roundtree's Br. 14 n.4). Accordingly, he attempts to re-invent the analysis from scratch, despite the *Pocian* court's having already completed those analytical steps and reaching its holding that the felon-in-possession statute is constitutional as-applied to nonviolent felons. (Roundtree's Br. 8–11.) But Roundtree provides nothing explaining why the Legislature could not fairly designate failure to pay child support a felony, or why that crime is so distinguishable from any other nonviolent felony that subjecting offenders to a lifetime ban on firearms is unconstitutional. Rather, he seems to be arguing, generally, that nonviolent felons should be excluded from the felon-in-possession statute. Again, *Pocian* resolved that question.

Finally, even if this Court were to fact-match Roundtree's crimes to Pocian's, Roundtree cannot succeed. Pocian's prior felony was 24 years old and involved uttering

$1500 in forged checks. His possession conviction stemmed from his shooting two deer with his father's gun; he was caught when he registered the deer with DNR. *Pocian*, 341 Wis. 2d 380, ¶¶ 2, 4. Here, Roundtree's prior felonies were more recent (12 years old). Moreover, he was convicted of two felony counts and was ordered to pay arrears totaling $2500 to the custodial parent.[7] That Roundtree effectively *kept* $2500 that was for his children's upkeep is not readily distinguishable from Pocian's *taking* $1500 in others' money.

And, Roundtree's felon-in-possession charge involved police recovering a stolen firearm that Roundtree admitted buying from a kid on the street (though he denied knowing it was stolen). As the circuit court observed, Roundtree's choice to purchase the gun in that manner encouraged such illegal sales, which in turn spawn violence. In all, if Pocian's circumstances supported a need for public protection and justified a lifetime ban on his possessing a firearm, Roundtree's circumstances certainly do, even more so.

In sum, even if Roundtree has not forfeited his as-applied challenge by his guilty plea, *Pocian* controls and directs affirmance of the judgment of conviction.

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[7] Wisconsin Court System Circuit Court Access, https://wcca.wicourts.gov, *State of Wisconsin v. Leevan Rountree*, Milwaukee County Case No. 2003CF2243 (last visited August 21, 2018). This Court may take judicial notice of CCAP entries. *Kirk v. Credit Acceptance Corp.*, 2013 WI App 32, ¶ 5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522.

CONCLUSION

This Court should affirm the judgment of conviction.

Dated this 30th day of August, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,040 words.

_____
SARAH L. BURGUNDY
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 30th day of August, 2018.

_____
SARAH L. BURGUNDY
Assistant Attorney General

Supplemental Appendix
State of Wisconsin v. Leevan Roundtree
Case No. 2018AP594-CR

SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

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, 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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SARAH L. BURGUNDY
Assistant Attorney General

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SARAH L. BURGUNDY
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