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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP594-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LEEVAN ROUNDTREE,

Defendant-Appellant-Petitioner.

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

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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ARGUMENT

I. Wisconsin's lifetime firearm ban for all felons is unconstitutional as applied to Mr. Roundtree, who was convicted over ten years ago of failure to pay child support, a nonviolent felony.

A. Introduction.

The Second Amendment confers an "individual right to keep and bear arms." *District of Columbia v. Heller*, 554 U.S. 570, 598 (2008). Central to this right is the right to possess a firearm to defend one's self, one's family, and one's property. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036 (2010).

In his brief-in-chief, Mr. Roundtree, who kept a gun in his bedroom for the protection of his home and family, argued that Wisconsin's lifetime firearm ban for all felons is unconstitutional as applied to him.

At the beginning of its response brief, the state observes that "[t]his Court presumes that statutes are constitutional." (State's Br. at 4).

However, this overlooks that a law challenged on Second Amendment grounds is *not* presumed constitutional and the burden is on the government to establish the law's constitutionality. *See State v. Herrmann*, 2015 WI App 97, ¶ 11, 366 Wis. 2d 312, 873 N.W.2d 257; *Heller*, 554 U.S. at 628 n.27 (2008)).

In this case, as discussed in Mr. Roundtree's brief-in-chief and below, the state has failed to meet its burden to establish that Wis. Stat. § 941.29 is constitutional as applied to Mr. Roundtree. The state has not introduced sufficient evidence to show that Mr. Roundtree poses a public safety concern, and, therefore, no justification exists to permanently deprive him of his fundamental right to keep and bear arms for self-defense. As a result, Wis. Stat. § 941.29 is not narrowly tailored to the state's interest in public safety, nor it is substantially related to achieving that interest.[1]

[1] As the state acknowledges, the United States Supreme Court has not identified the applicable level of judicial scrutiny that should be used to determine whether a law is unconstitutional under the Second Amendment. (State's Br. at 19). Given that Wis. Stat. § 941.29 completely strips an individual of his rights, this Court should apply strict scrutiny. However, even if this Court applies an intermediate scrutiny standard, the state cannot meet its burden. (*See* Roundtree Br. at 11-14).

B. Statutes categorically banning felons from possessing firearms for life are subject to individualized as-applied constitutional challenges.

The state asks this Court to bar Second Amendment as-applied challenges to the constitutionality of Wis. Stat. § 941.29. (State's Br. at 9-18, 21). This Court should reject this approach and instead follow the Third, Fourth, Seventh, Eighth, and D.C. Circuits and leave the door open for individualized as-applied challenges. *See Kanter v. Barr*, 919 F.3d 437, 442-43 (7th Cir. 2019).

First, in *Heller*, the United States Supreme Court referred to felon disarmament bans only as presumptively lawful. 554 U.S. at 598. As the Seventh Circuit has observed, this, by implication, means that the presumption may be rebutted. *United States v. Williams*, 616 F.3d 685, 692 (7th 2010).

Second, historically, only people who demonstrated a proclivity for violence or whose possession of guns would otherwise threaten public safety were excluded from the Second Amendment's scope. (*See* Roundtree Br. at 16-17).

The state notes that some courts have found that the right to bear arms was "tied to the concept of a virtuous citizenry and that, accordingly, the government could disarm 'unvirtous citizens.'" (State's Br. at 21).

However, even if an "unvirtuous citizen" includes all individuals convicted of a felony, the term felony in common law applied "only to a few very serious, very dangerous offenses such as murder, rape, arson, and robbery." *See* Kates & Cramer, *Second Amendment Limitations & Criminological Considerations*, 60 HASTINGS L.J. 1339, 1362 (2009); *see also*, *Binderup v. Attorney Gen. United States of Am.*, 836 F.3d 336 (3d Cir. 2016) (en banc) (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).

Third, as the state acknowledges, circuit courts are routinely called upon to make individualized findings in highly fact-intensive situations. (State's Br. at 13). Courts impose criminal punishments, decide whether it is in the best interests of a child to terminate parental rights, and determine whether an individual is dangerous for the purposes of a civil commitment. And, in fact, in Wisconsin, courts are tasked in other contexts with deciding whether individuals may possess firearms. *See* Wis. Stat. § 941.29(8) (a court may exempt an individual who has been adjudicated delinquent from the firearm ban if the court finds he is not "likely to act in a manner dangerous to public safety"); Wis. Stat. § 51.20(13)(cv) (an individual who has been civilly committed may possess a firearm if the court determines he is not likely to act in a manner

dangerous to public safety and that granting the petition would not be contrary to public interest).

Fourth, the fact that the Wisconsin legislature has determined that all felons should be disarmed does not save the constitutionality of the statute. As the Court stated in *Heller*, "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures . . . think that scope to broad." 554 U.S. at 634-35. Moreover, it is the duty of the courts "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

In addition, contrary to the state's arguments, allowing individualized as applied challenges would be consistent with the approach previously taken in the Wisconsin Court of Appeals. As the state admits, *Culver*, *Pocian*, and *Rueden*, all discussed the particular facts of each defendant. *See State v. Culver,* 2018 WI App 55, ¶ 47, 348 Wis. 2d 222, 918 N.W.2d 103 (stating in its rejection of an as-applied challenge that the defendant was previously convicted of a "plainly dangerous offense"); *State v. Pocian*, 2012 WI App 58, ¶ 15, 341 Wis. 2d 380, 814 N.W.2d 894 (stating in its rejection of an as-applied challenge that the defendant did not utilize physical violence, but did take his victim's property); *State v. Rueden*, No. 2011AP1034-CR, (WI App June 7, 2012) (unpublished) (Roundtree Br. App. 109-11) (stating in its rejection of an as-applied challenge that the defendant's prior offense involved going onto another person's property and stealing from a shed, and his

current charge involved stealing a handgun and selling it).

Thus, this Court should permit Second Amendment as applied challenges to Wis. Stat. § 941.29.

C. Mr. Roundtree is distinguishable from individuals historically barred from Second Amendment protections.

The state argues that it has an interest in preventing gun violence. (State's Br. at 23-27).

However, disarming Mr. Roundtree does not in any way advance public safety. Mr. Roundtree's failure to pay child support, which took place more than ten years ago, did not involve any physical or violent act that implicates public safety concerns. Likewise, this case also did not involve any physical or violent act. Mr. Roundtree was not walking around town with a gun in his pocket, nor was he transporting it in a vehicle. Rather, the handgun was found in his home under his mattress. (1:1).

In support of its argument, the state points to some statistical data, including a Wisconsin Department of Corrections study. (State's Br. at 25-27). However, the Wisconsin study examined offenders who were released from *prison*. (State's Br. at 25-27). Mr. Roundtree was given probation for his failure to pay child support. (47:5). Moreover, in general, statistics are not helpful as they lump individuals together. They do not consider Mr.

Roundtree's individual characteristics. *See generally*, *Kanter*, 919 F.3d at 467-68 (Barrett, J., *dissenting*).

The state also suggests that Mr. Roundtree is similarly situated to the defendant in *Pocian*, who stole $1500 in others' money, and the defendant in *Rueden* who stole items from a person's shed, including a firearm. *Pocian*, 2012 WI App 58, ¶ 3; *Rueden*, No. 2011AP1034-CR, (WI App June 7, 2012) (unpublished) (Roundtree Br. App. 109-11). However, there is a significant difference between taking someone else's property and failing to pay child support. Taking someone else's property requires overt and purposeful action; the other requires inaction.[2]

Mr. Roundtree's conduct does not logically support forever barring him from possessing a firearm to protect himself and his home. 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. As a result, Wis. Stat. § 941.29 as applied to Mr. Roundtree is not narrowly tailored to the state's interest in public safety, nor is it substantially related to achieving that interest.

[2] The state asserts that Mr. Roundtree "illegally purchased a gun" from someone on the street. (State's Br. at 2). However, the state does not cite any statute that criminalizes the purchase of a gun from someone on the street, nor is there any indication in the record that Mr. Roundtree was charged for this action.

Lastly, the state observes that Mr. Roundtree may seek a pardon from the Governor's office if he believes that his circumstances warrant an individual exemption to the firearms ban. (State's Br. at 15-16). However, while a pardon may restore an individual's right to own under federal law, it is not clear whether a pardon does in fact provide relief from the firearm ban under Wisconsin law.

Wis. Stat. § 941.29(5)(a) lifts the firearm ban for any person who has obtained a pardon *and* has been expressly authorized to possess a firearm under 18 U.S.C. app. § 1203 (1982). 18 U.S.C. app. § 1203 no longer exists. It was repealed in 1986. Yet, approximately 36 years later, the legislature has not updated the statute and Wis. Stat. § 941.29(5)(a) continues to refer to 18 U.S.C. app. § 1203. Thus, it does not appear that Wis. Stat. § 941.29(5)(a) provides a functional mechanism for relief from the firearms ban imposed upon felons under Wisconsin law. *See Moran v. Wisconsin Department of Justice*, 2019 WI App 38, ¶¶ 15-18, 388 Wis. 2d 193, 932 N.W.2d 430). And, even if a pardon standing alone provides relief from the firearm ban, in 2015, when Mr. Roundtree was charged in this case, the governor's office was not granting pardons.[3]

[3] *See* https://madison.com/wsj/news/local/govt-and-politics/hundreds-of-requests-for-pardons-remain-unreviewed-by-scott-walkers-office/article_eda7f5d0-94b2-11e2-ae42-001a4bcf887a.html (last visited June 17, 2020); *see also* https://www.channel3000.com/walker-says-no-last-minute-pardons-coming/ (last visited June 17, 2020) (observing that (continued)

Regardless, the existence of a possibility of a pardon does not save the constitutionality of the statute.

D. This Court should not apply waiver to Mr. Roundtree's as-applied challenge.

In *Class v. United States*, 138 S. Ct. 798 (2018), the United States Supreme Court held that claims that challenge the Government's power to criminalize the defendant's admitted conduct survive a guilty plea. *Id.* at 805. As in *Class*, Mr. Roundtree admits to the alleged conduct (possessing a gun), but challenges the state's power to criminalize this conduct.

The state argues that the holding in *Class* is limited to federal cases. While the Court states at one point that "[t]he question is whether a guilty plea by itself bars a federal criminal defendant from challenging the constitutionality of the statute of conviction on direct appeal," the state overlooks that at other points the Court describes the issue more broadly. *See id.* at 801-02 ("Does a guilty plea bar a *criminal defendant* from later appealing his conviction on the ground that the statute of conviction violates the Constitution?" (emphasis added)); *see also id.* at 803 (stating that a petition was filed asking to decide "whether in pleading guilty a *criminal defendant* inherently waives the right to

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former governor Scott Walker did not pardon anyone over his eight years as governor).

challenge the constitutionality of his statute of conviction" (emphasis added)).

The state also asserts that *Class's* language "echoes" the distinction recognized in Wisconsin between facial and as applied challenges. (State's Br. at 35). However, the defendant in *Class* raised both facial and as applied arguments and the Court did not distinguish between them. *Class*, 138 S. Ct. at 801; *see also id.* at 813 n.4 (Alito, J., dissenting).[4]

Finally, even if this Court disagrees with Mr. Roundtree's analysis regarding the implications of *Class* and finds waiver, this Court should still decide Mr. Roundtree's argument on the merits, as gun ownership rights and the right to protect oneself and one's family are important issues that have statewide impact.

[4] The state notes that the Court of Appeals recently held in *State v. Jackson*, 2020 WI App 4, ¶ 9, 390 Wis. 2d 402, 938 N.W.2d 639 (petition for review pending), that *Class* does not change Wisconsin's guilty plea waiver rule. Mr. Roundtree respectfully asserts that *Jackson* was wrongly decided. *Jackson*, in a single paragraph of analysis, reasons that Wisconsin's guilty plea waiver rule is not changed because "it is not clear in *Class* whether the defendant's challenge was a facial or as applied challenge." *Id.* As stated above, the defendant in *Class* raised both a facial and an as applied claim.

CONCLUSION

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

Dated this 17th day of June, 2020.

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 2,188 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 17th day of June, 2020.

Signed:

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KAITLIN A. LAMB