STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2018 AP 2324-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

THOMAS M. BARRETT,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED
ON DECEMBER 3, 2018, IN THE CIRCUIT COURT
FOR MILWAUKEE COUNTY, THE HONORABLE
T. CHRISTOPHER DEE, PRESIDING

Respectfully submitted,

THOMAS M. BARRETT,
Defendant-Appellant.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

STATEMENT OF THE ISSUES

I. Is Wis. Stat. § 941.298 an unconstitutional infringement of Barrett's constitutional right to keep and bear arms, either facially or as-applied?

TRIAL COURT ANSWERED: NO

II. Is Wis. Stat. § 941.298 void for vagueness?

TRIAL COURT ANSWERED: NO

III. Was Barrett's conviction the result of outrageous government conduct?

TRIAL COURT ANSWERED: NO

STATEMENT ON PUBLICATION

This appeal raises issues of law that remain undeveloped and of significant public interest, particularly the issues concerning the Second Amendment to the United States Constitution and Article I, § 25, of the Wisconsin Constitution. Not only is the narrow question raised by this appeal (the constitutionality of Wis. Stat. § 941.298) an issue of first impression, but Wisconsin law remains unsettled as to the correct level of scrutiny that courts are to apply when analyzing the constitutionality of a statute under either the Second Amendment or Article I, § 25, of the Wisconsin Constitution. Defendant-appellant therefore asserts that this Court's opinion would be suitable for publication under Wis. Stat. § 809.23(1)(a)1 and 4.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issues being raised on appeal.

STATEMENT OF THE CASE AND FACTS

In August of 2011, Michael Bond, then a confidential informant working with the City of Milwaukee Police Department and the Federal Bureau of Alcohol, Tobacco, Firearms, and Explosives, pressured Thomas M. Barrett into purchasing an alleged firearm silencer.[1] Barrett was a practicing attorney with a recreational interest in firearms.[2] He was 52 years old at the time, with no criminal record, and had no propensity or desire to become involved in criminal activity.[3]

In contrast, Michael Bond had a minimum of twenty criminal convictions. Most recently, a federal court indicted him for heading a two-year-long conspiracy to distribute over one-thousand kilograms of marijuana.[4] Bond's interaction with Barrett occurred after he had pled guilty, but before he had been sentenced.[5]

At trial, Bond testified that, during the time when the interaction with Barrett occurred, he was "cooperating with law enforcement."[6] He explained: "My idea of cooperating with law enforcement officers is doing things to try and get time off my case."[7]

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[1] R. 1:1–2; 184:64–78.
[2] R. 101:2, 8; 184:62–3.
[3] R. 101:2–3, 8.
[4] R. 184, 24; 101:8.
[5] R. 184, 25–27.
[6] *Id.* at 25.
[7] *Id*.

Bond testified that he "did everything in my power to get everything chopped down."[8] Bond was initially facing 188 to 235 months in federal prison.[9] Because of his "cooperation," Bond's sentence was apparently "chopped down" to a mere twenty-four months.[10]

Barrett's trial counsel thus aptly characterized Bond as a highly motivated "commissioned salesperson."[11] Bond contacted Barrett repeatedly in early August of 2011 about selling some guns and what he indicated might be a silencer.[12] Barrett was not looking to buy a silencer,[13] but ultimately arranged to meet with Bond to purchase a Glock pistol.[14]

When Barrett met with Bond, Barrett found the location to be "disconcerting" and suspected that Bond was carrying a concealed weapon.[15] When Bond showed him the items that he had for sale, Barrett saw two different handguns, one with a barrel attachment, but no Glock.[16] Barrett testified that his heart was pounding, and that at this point he "thought [he] was being set up to be robbed, because too many things weren't adding up."[17] Barrett attempted to just buy one

[8] *Id*. at 28.
[9] R. 101: 8.
[10] *Id.*
[11] R. 180: 126.
[12] R. 184: 64–65.
[13] *Id.* at 64, 67.
[14] *Id*. at 66–67.
[15] *Id*. at 71–73.
[16] *Id*. at 73.
[17] *Id*.

of the pistols without the barrel attachment, but Bond insisted that he had to buy everything.[18] Barrett testified that Bond "wouldn't take no for an answer."[19] Ultimately, Barrett agreed to buy the pistols and to "take the [alleged silencer] and dispose of it."[20] Barrett was arrested before he was able to leave the meeting site.[21]

Barrett was charged in the Milwaukee County Circuit Court with one count of Possession of a Firearm Silencer, in violation of Wis. Stat. § 941.298, a felony.[22] Barrett, through counsel, challenged the constitutionality of Wis. Stat. § 941.298, alleging that it was an unconstitutional infringement on his right to bear arms under the Second Amendment to the United States Constitution and Article I, § 25 of the Wisconsin Constitution.[23] He also challenged the statute as void for vagueness.[24] After briefing, the circuit court, the Honorable Charles F. Kahn, Jr., presiding, issued an oral ruling on Barrett's motion.[25] The court held that silencers are "not arms" for purposes of the federal and state constitutions, and went on to find that the statute

[18] *Id*. at 76.
[19] *Id*.
[20] *Id*.
[21] *Id*. at 78.
[22] R. 1:1.
[23] R. 8.
[24] *Id.*
[25] R. 165:5, 16.

is "perfectly constitutional."[26] The court did not specifically address Barrett's vagueness argument.[27]

Barrett filed a second motion and brief, again raising the issue of vagueness, both as a facial challenge and as applied to Barrett.[28] The circuit court, the Honorable J.D. Watts, presiding, issued a written decision denying this motion.[29] With respect to the facial challenge, the court held that Barrett failed to establish that there are no possible applications or interpretations of the statute that would be constitutional.[30] With respect to the as-applied challenge, the court held that Barrett lacked standing for this claim, because—according to the court—Barrett's conduct was clearly proscribed by the language of the statute.[31] The court further held that Barrett had reasonable notice of the conduct prohibited by the statute.[32]

In the process of preparing his trial defense, Barrett's counsel retained the services of private investigator Gary L. Wait.[33] According to Wait's affidavit, Wait made contact with a Mark Gierczak in April of 2012 and made it known that he was interested in selling copper

[26] *Id.*
[27] R. 165.
[28] R. 49.
[29] R. 54.
[30] *Id.* at 6.
[31] *Id.*
[32] *Id.* at 7.
[33] R. 148:40.

wire.[34] Gierczak provided Michael Bond with Wait's telephone number, and Bond contacted Wait.[35] Wait indicated that Bond "continually steer[ed] [their] conversations to the subject of guns."[36] Although Wait claimed to have no interest in buying or selling firearms, "Bond persistently offered numerous inducements" for Wait to engage in these transactions.[37] Wait reported that, over the course of several weeks, Bond "persistently [and] continually tried to induce me into committing gun crimes by steering and switching the subject of our conversations from the copper wire to the subject of guns, despite my giving Bond no previous indication that I would sell guns[.]"[38] Wait was able to provide detailed descriptions of many of these conversations, and some were in fact recorded by the law enforcement officers with whom Bond was working.[39]

On May 8, 2012 Wait and Bond met in person.[40] Wait had the intention of serving Bond with a subpoena; Bond, with the assistance of law enforcement, believed he was conducting another sting operation like the one he had conducted with Barrett.[41] The State took

[34] *Id.*
[35] *Id*.
[36] *Id.*
[37] *Id.*
[38] *Id*. at 35–6.
[39] *Id*.
[40] R. 164:6–7.
[41] *Id.*

issue with Wait's covert operation[42] and moved to quash the subpoena.[43] Apparently, this incident also triggered some type of criminal investigation into Wait's conduct. One of Barrett's attorneys, Thomas Grieve, documented the following encounter in a letter to Wait, dated May 2, 2013:

> After a brief off-the-record discussion with Assistant District Attorney Megan Williamson, it is my understanding that a number of individuals, to include the Milwaukee County District Attorney, John Chisholm, contemplated making an arrest for criminal charges against you with respect to the investigation and service of process that you undertook of the then confidential informant, Mr. Michael Bond. Further, it is my understanding that this same decision-making process may be reinstigated should you testify in Mr. Barrett's case.[44]

Attorney Grieve further commented that he found "the possibility that criminal charges could arise against a witness of mine" to be "very concerning[.]"[45] Wait was intimidated by this threat, and "became apprehensive about testifying in Mr. Barrett's case[.]"[46] Barrett moved for a preliminary ruling that evidence of Wait's interactions with Bond be admissible at trial under Wis. Stat. § 904.04(2) as evidence of Bond's motive and plan to use high-pressure tactics to induce individuals into illegal transactions.[47] The Court ruled that,

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[42] *Id.*
[43] R. 21.
[44] R. 148:38.
[45] *Id*.
[46] R. 148:40–41.
[47] R. 48.

subject to foundational issues, Wait's testimony would be admissible.[48] Despite this ruling, Wait did not testify for Barrett at trial.[49]

At trial, the government called A.T.F. Agent Michael Powell for the purpose of establishing that the device Barrett possessed was in fact a silencer.[50] Agent Powell testified that he had test-fired five shots from a handgun with no attachment, and five additional shots from the same gun with the item used in the sting operation attached to the gun.[51] Then, using a "very, very sensitive" $30,000 sound meter, he measured the average decibel output from each shot and compared them.[52] Agent Powell reported that the "silencer" reduced the sound of the gunshot from 149.72 decibels to 142.46 decibels.[53] Agent Powell testified that the gunshot with the alleged silencer attached was still "louder than a rock concert."[54] He testified that it would be "painful" to the ear and that he would not fire the "silenced" handgun without hearing protection.[55]

Barrett was convicted at trial of violating Wis. Stat. § 941.298(2). He filed a postconviction motion, alleging (1) that the

[48] R. 177:24–25.
[49] R. 184:123.
[50] R. 181:23.
[51] *Id*. at 33.
[52] *Id*. at 50.
[53] *Id*. at 51–52.
[54] *Id*. at 52.
[55] *Id*. at 52–53.

statute unconstitutionally infringed on his right to keep and bear arms, both facially and as applied, (2) that the statute was unconstitutionally vague, both facially and as applied, and (3) that his conviction was the result of outrageous government conduct.[56] The circuit court, the Honorable T. Christopher Dee presiding, issued a decision and order partially denying the motion and ordering briefing.[57] In this initial decision and order, the court denied the first two claims without further analysis, indicating merely that the postconviction motion did not persuade the court to disturb the previous rulings by Judges Kahn and Watts.[58] The court ordered a briefing schedule with respect to Barrett's claim of outrageous government conduct.[59]

The State filed a brief regarding the claim of outrageous government conduct.[60] In that brief, it argued, *inter alia*, that the factual claims made in Barrett's postconviction motion lacked credibility, while at the same time urging the circuit court to deny the motion without an evidentiary hearing.[61] Barrett responded with by pointing out that, under ***State v. Nelson*** and ***State v. Bentley***, when determining whether to order a postconviction evidentiary hearing,

[56] R. 148.
[57] R. 149.
[58] *Id.* at 2.
[59] *Id.* at 3.
[60] R. 153.
[61] *Id.* at 7–9.

the question is whether the defense has "allege[d] facts which, *if true*, would entitle the defendant to relief[.]"[62] Barrett argued that the State should not be permitted to argue that the facts alleged in Barrett's motion are untrue while simultaneously urging the circuit court to deny the parties a chance to present evidence on the truth of the claims.[63] The circuit court issued a decision and order denying this portion of Barrett's postconviction motion without a hearing, and then issued a final order.[64] Barrett now appeals.[65]

[62] R. 155, 4, *citing* ***State v. Nelson***, 54 Wis. 2d 489, 497–98, 195 Wis. 2d 629 (1972) (emphasis supplied). *See also* ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996); ***State v. Velez***, 224 Wis. 2d 1, 589 N.W.2d 9 (1999).
[63] *Id.* at 5–6.
[64] R. 156; 158.
[65] R. 159.

ARGUMENT

I. WISCONSIN'S STATUTE GOVERNING THE POSSESSION OF FIREARM SILENCERS IS AN UNCONSTITUTIONAL INFRINGEMENT ON THE RIGHT TO KEEP AND BEAR ARMS

A. Standard of Review

The constitutionality of a statute presents a question of law that is reviewed *de novo*.[66] When a statute is challenged on the basis that it infringes on the constitutional right to keep and bear arms, the statute is not presumed constitutional, and the burden of proving the statute to be constitutional lies with the State.[67]

B. Applicable Law

Barrett was tried and convicted under Wis. Stat. § 941.298,[68] which provides in relevant part as follows:

> (1) In this section, "firearm silencer" means any device for silencing, muffling or diminishing the report of a portable firearm, including any combination of parts, designed or redesigned, and intended for use in assembling or fabricating such a device, and any part intended only for use in that assembly or fabrication.
>
> (2) Whoever sells, delivers or possesses a firearm silencer is guilty of a Class H felony.

The Second Amendment to the United States Constitution reads: "A well regulated Militia, being necessary to the security of a

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[66] ***State v. Herrmann***, 2015 WI App 97, ¶ 6, 366 Wis. 2d 312, 873 N.W.2d 257.
[67] ***Id.*** ¶ 11 (internal citations omitted).
[68] Wis. Stat. § 941.298 (2017–18); Hereafter, "the statute."

free State, the right of the people to keep and bear Arms, shall not be infringed." In ***District of Columbia v. Heller***, the Supreme Court held that the Second Amendment guarantees individual citizens the right to keep and bear arms.[69] This right applies to the states through the Fourteenth Amendment's due process clause.[70] In addition, the Wisconsin Constitution guarantees that "The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose."[71] This is a "straightforward declaration of an *individual* right to keep and bear arms *for any lawful purpose*."[72]

Following ***Heller***, state and federal courts have generally adopted a two-step approach to Second Amendment challenges.[73] First, a court must determine whether "the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee."[74] If the Court determines that the conduct burdens the challenger's constitutional right to keep and bear arms, then it must "evaluate the law under some form of ends-means scrutiny."[75]

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[69] ***District of Columbia v. Heller***, 554 U.S. 570, 635 (2008).
[70] ***McDonald v. Chicago***, 561 U.S. 742, 778 (2010).
[71] Wis. Const. art. I, § 25.
[72] ***Wisconsin Carry, Inc. v. City of Madison***, 2017 WI 19, ¶ 10, 373 Wis. 2d 543, 892 N.W.2d 233 (emphasis supplied.)
[73] ***Herrmann***, 2015 WI App 97, ¶ 9.
[74] ***Id***. *citing* ***United States v. Marzzarella***, 614 F.3d 85, 89 (3d Cir. 2010).
[75] ***Id***.

C. The statute burdens constitutionally protected activity.

The statute imposes a burden on the constitutional right to keep and bear arms in two ways: first, the statute directly bans the possession of an item that fits the definition of an "arm"; second, the statute imposes a burden on the constitutional right to engage in activities encompassed by the right to keep and bear arms. In addition, the statute burdens activities specifically protected by the Wisconsin Constitution. Finally, the exceptions to the scope of the Second Amendment noted in ***Heller***—namely, those for certain longstanding restrictions and for particularly dangerous or unusual weapons—do not apply to the possession of a firearm silencer.

The ***Heller*** Court defined the phrase "keep and bear arms" to mean "to possess and carry weapons[.]"[76] It noted that the definition of "arms" was not limited to weapons employed in a military capacity, nor was it limited to weapons that were in existence in the 18th Century.[77] Therefore, the Second Amendment generally guarantees the right of individuals to possess firearms. While at first blush, the fact that a silencer itself cannot propel a projectile at a target would seem to belie its classification as an arm, the legal definition of arms or weapons typically encompasses firearm components, attachments,

[76] ***Heller***, 554 U.S. at 592.
[77] ***Id***. at 2791–92.

and modifications. For example, federal statute defines the term "firearm" as including such instruments as frames, receivers, and silencers or mufflers.[78]

This policy is sensible; if the definition of a firearm did not encompass components or parts, a felon seeking to illegally possess or traffic in firearms could evade prosecution by simply keeping his or her firearms in two or more easily-assembled pieces. But what is sauce for the goose is sauce for the gander—just as a felon cannot avoid prosecution by keeping his firearm disassembled, neither does a law-abiding gun owner lose his or her constitutional protections whenever his or her firearm happens to be disassembled. In short, because silencers are legally recognized as a type of "arm" or "firearm," a ban on the possession of silencers falls within the scope of the Second Amendment.

Furthermore, the Second Amendment encompasses more than a right to physically possess certain objects—it encompasses a right to engage in certain activities. In ***Ezell v. City of Chicago***, the Seventh Circuit Court of Appeals held that "[t]he right to possess firearms…implies a corresponding right to acquire and maintain proficiency in their use[.]"[79] The ***Ezell*** court found a ban on firing

[78] 18 U.S.C. § 921(a)(3).
[79] ***Ezell v. City of Chicago***, 651 F.3d 684, 704 (7th Cir. 2011).

ranges within city limits to be an infringement on the plaintiffs' Second Amendment rights.[80] A ban on silencers likewise infringes on the right of citizens to acquire and maintain proficiency in the use of firearms. As one commentator has explained:

> The most common use of silencers is for target practice. Those who compete in competitive shooting practice every day. Use of a silencer allows a person to set up a shooting range in his or her basement without making noise to disturb the neighbors. It is also said that using a silenced firearm is helpful for first-time shooters to get used to firing a weapon, because first-time shooters often are disturbed by the loud noise.[81]

While the "central component of the Second Amendment is the right to keep and bear arms for defense[,]"[82] Wisconsin's Constitution recognizes a broader right, including the right to keep and bear arms for "hunting, recreation or any other lawful purpose."[83] Silencers are popular in the hunting of small animals such as rabbits or squirrels: "a silenced weapon will allow a hunter to shoot many animals in a field without scaring away others."[84] Silenced weapons can also be useful for shooting pests in residential areas or inside buildings.[85] A ban on the possession of silencers thus infringes on a Wisconsin citizen's right to bear arms for hunting.

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[80] ***Id***. at 690.
[81] R. 148:21, 24; *citing* Paul A. Clark, *Criminal Use of Firearm Silencers*, WESTERN CRIM. REV. 44, 47 (2007).
[82] ***Ezell***, 651 F.3d at 704 (internal punctuation and citation omitted).
[83] Wis. Const. art. I, § 25.
[84] R. 148:24.
[85] *Id.*

Wisconsin also recognizes a right to possess weapons for "recreation or any other lawful purpose."[86] Some people "simply collect exotic weapons, and many people seem to make [silencers] for the same reason people build model airplanes and ships in bottles."[87] While the Second Amendment may not reach this far, the Wisconsin Constitution does. If the final clause of Article I, § 25 has any meaning, it would be that Wisconsin has enshrined a *constitutional right* to possess weapons that may be interesting, curious, or have some purely recreational value, but which have *no* direct utility for security, defense, or hunting. While silencers do have uses in these areas, the mere absence of utility for security, defense, or hunting would not be a sufficient reason to exclude a silencer from constitutional protection in Wisconsin.

Heller recognized that the right to keep and bear arms "is not unlimited."[88] The Court gave its approval to some restrictions, such as "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings[.]"[89] In contrast, the statute at issue here does not bar certain persons from possessing silencers or from carrying them in sensitive places—it is a

[86] Wis. Const. art. I, § 25.
[87] R. 148:24.
[88] ***Heller***, 554 U.S. at 626.
[89] ***Id***.

complete ban on law-abiding citizens from possessing silencers for any purpose. The statute is thus not the type of regulation that ***Heller*** contemplated as being outside the scope of the Second Amendment's protection.

Finally, ***Heller*** suggested that "dangerous and unusual weapons" fall outside the scope of the Second Amendment.[90] This is a conjunctive test—meaning that a weapon must be both dangerous *and* unusual to be subject to prohibition.[91] While "dangerous" has not been precisely defined, it must at a minimum require that the item is more dangerous than a common firearm—because "[i]f ***Heller*** tells us anything, it is that firearms cannot be categorically prohibited just because they are dangerous."[92] Unlike a machine gun or a grenade, a firearm silencer is not inherently dangerous—by itself it is harmless, and its attachment to a common handgun does not make the handgun any more dangerous. As to the question of whether it is "unusual," a court should not merely compare the prevalence of the item in question to the prevalence of handguns, or else "a State would be free to ban *all* weapons *except* handguns[.]"[93] Silencers may be legally owned in some states with a permit and the payment of a fee to the

[90] ***Id***. at 627.
[91] ***Caetano v. Massachusetts***, 136 S. Ct. 1027, 1031 (Alito, J., concurring) (2016).
[92] ***Id***.
[93] ***Id***. at 1032.

federal government. In 2007, it was estimated that "more than 60,000 Americans legally possess and use silencers."[94] An item with such widespread legal civilian use should not be categorically defined as "dangerous and unusual."

For the above reasons, the possession of a firearm silencer falls within the scope of the right to keep and bear arms under both the federal and state constitutions. Once it has been determined that there is a burden on constitutionally protected activity, the next step is to apply a form of means-end scrutiny.

D. Either intermediate or strict scrutiny must be applied, under either of which the State bears the burden of proving that the statute is constitutional.

The right to keep and bear arms is a fundamental right, "reflecting our understanding that it finds its protection, but not its source, in our constitutions."[95] Three levels of scrutiny are commonly used by courts in analyzing the constitutionality of a statute: "rational basis," "intermediate scrutiny," and "strict scrutiny."[96] In ***Heller***, the Supreme Court declared that the rational basis standard was not

[94] R. 148:24.
[95] ***Wisconsin Carry***, 2017 WI 19, ¶ 9.
[96] ***Herrmann***, 2015 WI App 97, ¶ 10.

appropriate in Second Amendment challenges but declined to settle whether intermediate or strict scrutiny should be applied.[97]

Wisconsin has not firmly settled the question of whether intermediate or strict scrutiny should be applied in Second-Amendment challenges.[98] In ***Ezell***, the Seventh Circuit Court of Appeals explained that an analogy may be drawn to Federal First-Amendment caselaw.[99] The court stated that content-based regulations are presumptively invalid and receive strict scrutiny analysis, while time, place, and manner regulations are subject to intermediate scrutiny.[100] Thus, statutes that place a severe "content" burden on the right to keep and bear arms—such as a total ban on some item or activity—must survive strict scrutiny analysis.[101] Statutes that merely regulate Second-Amendment rights, such as by limiting rights of particularly dangerous persons (*e.g*. felons or the mentally ill), or the right to keep and bear arms in sensitive places (*e.g*. schools or government buildings), are subject to intermediate scrutiny.[102]

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[97] ***Id***., *citing* ***United States v. Chester***, 628 F.3d 673, 676, (4th Cir. 2010); ***Heller***, 554 U.S. at 628, n.27.
[98] ***Herrmann***, 2015 WI App 97, ¶ 10.
[99] ***Ezell***, 651 F.3d at 707.
[100] ***Id.***
[101] *See e.g.*, ***Bateman v. Perdue***, 881 F. Supp. 2d 709 (E.D. N.C. 2012).
[102] ***Heller***, 554 U.S. at 626–27; ***McDonald***, 561 U.S. at 786; ***Ezell***, 651 F.3d at 708.

Here, the statute is in the form of a "content" restriction. It does not bar certain people from possessing silencers or from carrying them into certain places. It completely prohibits silencers. The Court should therefore apply strict scrutiny. However, since the law in this area is unsettled, this brief will address the standards of both intermediate and strict scrutiny.

To pass intermediate scrutiny, the government has the burden of establishing (1) that its objective is an important one, and (2) that this objective is advanced by a means substantially related to that objective.[103] This requires a showing that the harms the government seeks to alleviate are "real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[104] "Notably, a law challenged on Second Amendment grounds is not presumed constitutional, and the burden is on the government to establish the law's constitutionality."[105]

On the other hand, "To survive strict scrutiny, the State has the burden to show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'"[106] As

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[103] ***Herrmann***, 2015 WI App 97, ¶ 11, *citing* ***United States v. Williams***, 616 F.3d 685, 692 (7th Cir. 2010).
[104] ***Id.***, *citing* ***Turner Broad. Sys., Inc. v. F.C.C.***, 512 U.S. 622, 644 (1994).
[105] ***Id***. (citations omitted).
[106] ***State v. Baron***, 2009 WI 58, ¶ 45, 318 Wis. 2d 60, 769 N.W.2d 34; *citing* ***Boos v. Barry***, 485 U.S. 312, 321 (1988).

with intermediate scrutiny, the law is not presumed constitutional, and the burden of proof lies with the State.[107]

E. The statute is facially unconstitutional.

Under either intermediate or strict scrutiny, the government bears the burden of presenting evidence that the statute addresses a "real, not merely conjectural" harm, and that the statute in fact is effective in addressing that harm.[108] The government did not present *any* evidence detailing either the government's interest or the effectiveness of the statute.

With respect to the government's interest, the government has the burden of proving either that the government's interest is "important" or "compelling," depending on whether the level of scrutiny is intermediate or strict, respectively. This interest must be "real, not merely conjectural[.]"[109] The government failed to submit any evidence whatsoever detailing any important or compelling interest the State carries in banning firearm silencers. Any arguments the State made on this point were unsupported by evidence, and thus the very definition of conjectural. Therefore, on this prong alone, the State cannot satisfy either intermediate or strict scrutiny.

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[107] ***Herrmann***, 2015 WI App 97, ¶ 11.
[108] ***Id.***, *citing* ***Turner Broad. Sys., Inc.***, 512 U.S. at 644.
[109] ***Id.***

Turning to the second prong, the State must also present evidence proving that the statute is either substantially related to advancing the government's interest (under intermediate scrutiny) or narrowly tailored to achieve the government's interest (under strict scrutiny). Again, the burden is on the State. To begin with strict scrutiny, it is apparent that the statute is not narrowly tailored. As explained above, silencers may be used for a number of lawful purposes, and the statute makes no attempt to tailor the prohibition to whatever uses of silencers the State may have an interest in regulating.

Under intermediate scrutiny, the broad definition of what constitutes a silencer results in the banning of items that have no substantial relationship to any important government interest that may exist. The statute prohibits, for example, possessing an item intended for use as a silencer that does not actually diminish the report of a firearm. Even if the State has a compelling interest in preventing citizens from diminishing the report of a firearm, that interest is in no way advanced by banning items that have no practical effect. There is no substantial relationship between banning functionally useless items like the one in this case and discouraging citizens from buying devices which actually diminish a firearm's report.

Under either level of scrutiny, the government failed to present evidence pertaining to the government's objective and the effect that

the statute purports to have on that objective. Since the government failed to meet its burden of demonstrating that the statute is constitutional, the circuit court should have found the statute to be facially unconstitutional. This Court should therefore reverse.

F. The statute is unconstitutional as applied to Barrett.

Even if the statute is constitutional in some circumstances, it is not constitutional as it was applied to Barrett. The item Barrett was convicted of possessing (which was provided to him by the government) would have been wholly useless as a firearm silencer. According to the government's own witness at trial, the "silencer" reduced the sound of a handgun from 149.72 decibels to 142.46 decibels.[110] In relative terms, this reduction of 7.26 decibels represents a 4.8% decrease in the report of the firearm. But in absolute terms, Agent Powell testified that the "silenced" gunshot was still "louder than a rock concert," would be "painful" to the ear, and would still necessitate hearing protection.[111] For comparison, the "silenced" gunshot would also be louder than a motorcycle (100 dBA), someone

[110] R. 181:51–52.
[111] *Id*. at 52–53.

shouting in your ear (111 dBA), a football stadium (117 dBA), an air raid siren (130 dBA), or an airplane taking off (140 dBA).[112]

If the government has any legitimate interest in prohibiting the possession of firearm silencers, the relevant interest would have to be some sort of interest in preventing individuals from committing undetected acts of violence by appreciably diminishing the audible report from a gunshot. Even under intermediate scrutiny, the application of the statute to the item at issue in Barrett's case does not pass muster. The item Barrett possessed was, for all practical purposes, non-functional. Any criminal attempting to elude detection would find that his gun was still painfully loud—louder than a rock concert. The alleged silencer would do him no good, and no legitimate government interest would be substantially advanced by the prohibition of this specific item.

Put another way, the only utility of a firearm silencer is its utility in suppressing the sound output from a gunshot. A silencer serves no other purpose. Thus, a government ban on firearm silencers is necessarily directed towards the goal of prohibiting individuals from reducing the sound output of gunshots. Barrett never possessed an item that was capable of effectively reducing the sound output of a

[112] Sound Effects Decibel Level Chart, https://www.creativefieldrecording.com/2017/11/01/sound-effects-decibel-level-chart/ (last visited Mar. 22, 2019).

gunshot; thus, Barrett's conduct did not come within the scope of the government's interest in prohibiting silencers. Under any level of scrutiny, the government has failed to prove that it had any rational justification for infringing on Barrett's constitutional rights. The statute is therefore unconstitutional as applied to Barrett, and this Court should reverse.

G. To the extent that prior counsel inadequately raised this issue, prior counsel provided Barrett with ineffective assistance of counsel.

As set forth above, Barrett filed two pre-trial motions challenging the constitutionality of the statute.[113] In his postconviction motion, Barrett again raised constitutional issues, and further asserted that to the extent that any defect existed in the manner in which the constitutional issues were raised pre-trial, Barrett would have received ineffective assistance of trial counsel.[114] In its rulings on Barrett's postconviction motion, the circuit court did not find any procedural defects in the manner of Barrett raising or preserving his constitutional challenges, and accordingly no hearing was held pursuant to ***Strickland v. Washington*** or ***State v. Machner***.[115]

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[113] R. 8; 49.
[114] R. 148:10.
[115] R. 149; 156; 158; ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (1979).

To the extent that any defect is found based on the adequacy of trial counsel's previous filings, Barrett asserts that his prior counsel performed deficiently, and that he was prejudiced as a result.[116] Failing to properly raise a meritorious constitutional challenge to the statute would fall below an objective standard of reasonable representation. Since a finding that the statute was unconstitutional would have precluded Barrett's conviction, he was certainly prejudiced by any such lapse on the part of his prior counsel.

II. WISCONSIN'S STATUTE GOVERNING THE POSSESSION OF FIREARM SILENCERS IS VOID FOR VAGUENESS.

In addition to being an unconstitutional infringement on the right to keep and bear arms, the statute is also impermissibly vague.

A. Standard of Review

Whether a statute is constitutional is a question of law reviewed *de novo*.[117] In the context of whether a statute is void for vagueness, the challenging party must demonstrate that the statute is void beyond a reasonable doubt.[118]

[116] ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).
[117] ***State v. Colton M.***, 2015 WI App 94, ¶ 6, 366 Wis. 2d 119, 875 N.W.2d 642.
[118] ***Id.***

B. Applicable Law

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.[119] Laws must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so he may act accordingly.[120] A vague law impermissibly delegates basic policy matters to law enforcement, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.[121] The degree of vagueness that the Constitution tolerates depends in part on the nature of the enactment.[122] Courts have less tolerance for enactments with criminal penalties, because the consequences of imprecision are more severe than with civil penalties.[123]

C. The statute is impermissibly vague.

The statute makes it a felony to possess, *inter alia*, "any device for silencing, muffling or diminishing the report of a portable firearm[.]" This definition fails to give citizens fair notice of what types of items are prohibited, leaving that resolution to be done on an

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[119] *See* ***Grayned v. Rockford***, 408 U.S. 104, 108 (1972).
[120] ***Id***.
[121] ***Id***. at 108–09.
[122] *See* ***Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.***, 455 U.S. 489, 498 (1982).
[123] ***Id***. at 499.

ad hoc basis by the courts. First, the statute fails to provide that the report of the firearm be diminished to any specific degree, or that the diminished report be noticeable or detectible to the unassisted human ear. Thus, a citizen may be convicted of a felony for being in possession of an item that he or she does not believe diminishes the report of a firearm, but which a specialist using audio equipment might be able to determine does diminish the report by a few decibels. This lack of definition makes it impossible for law-abiding citizens to know whether their behavior may run afoul of the statute.

Second, the statute's prohibition on any device "for silencing" is highly ambiguous. It could be interpreted as criminalizing the possession of an item that does not actually diminish the report of a firearm to *any* degree, so long as it is "*for* silencing" the report of a firearm. This then begs the question of *who* must intend that the item is "for silencing." Does it require that the person in possession of the item intended to employ the device as a silencer, even if the item did not work? Does it require the manufacturer of the item to have manufactured it for use as a silencer, even if the person in possession of the item does not know it?

The statute does not answer these questions, leaving it to the courts to make case-by-case decisions. This demonstrates beyond a reasonable doubt that the statute is impermissibly vague. This Court

should reverse the circuit court, declare the statute unconstitutionally vague, and reverse Barrett's conviction.

III. BARRETT'S CONVICTION WAS THE RESULT OF OUTRAGEOUS GOVERNMENT CONDUCT.

By inducing Barrett to take possession of the alleged silencer and by intimidating one of his key trial witnesses, the government engaged in outrageous and offensive conduct. This conduct violated Barrett's due process and compulsory process rights, and his conviction should be reversed as a result.

A. Standard of Review

The question of whether a criminal defendant's due process or compulsory process rights have been violated is a question of constitutional law reviewed *de novo*.[124]

B. Applicable Law

The claim of "outrageous government conduct" has its origins in ***United States v. Russell***, where the Supreme Court held that government conduct could be "so outrageous that due process principles would absolutely bar the government from invoking

[124] ***State v. Loomis***, 2016 WI 68, ¶ 29, 371 Wis. 2d 235, 881 N.W.2d 749; ***State v. O'Brien***, 2014 WI 54, ¶ 16, 354 Wis. 2d 753, 850 N.W.2d 8.

judicial processes to obtain a conviction."[125] This claim was recognized in Wisconsin state courts in ***State v. Steadman***.[126] To prevail on such a claim, a defendant must assert that the government conduct violated a specific constitutional right, and that the prosecution "violate[s] fundamental fairness [and is] shocking to the universal sense of justice[.]"[127]

The justification for such a rule was set forth by the Third Circuit Court of Appeals in ***United States v. West***:

> But when the government's own agent has set the accused up in illicit activity by supplying him with narcotics and then introducing him to another government agent as a prospective buyer, the role of government has passed the point of toleration. Moreover, such conduct does not facilitate discovery or suppression of ongoing illicit traffic in drugs. It serves no justifying social objective. Rather, it puts the law enforcement authorities in the position of creating new crime for the sake of bringing charges against a person they had persuaded to participate in wrongdoing.[128]

The court in ***United States v. Twigg***, in attempting to distill the general principles from a number of relevant cases, noted that in those cases where outrageous government conduct was not found, it was because "the Government did not sow the seeds of criminality and

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[125] ***United States v. Russell***, 411 U.S. 423, 431–32 (1973).
[126] ***State v. Steadman***, 152 Wis. 2d 293, 448 N.W.2d 267 (Ct. App. 1989).
[127] ***State v. Albrecht***, 184 Wis. 2d 287, 296–97, 516 N.W.2d 776 (Ct. App. 1994), *citing* ***Steadman***, 152 Wis. 2d at 302, *and* ***State v. Hyndman***, 170 Wis. 2d 198, 208–09, 488 N.W.2d 111 (Ct. App. 1992) (internal punctuation omitted).
[128] ***United States v. West***, 511 F.2d 1083, 1085 (3d Cir. 1975).

lure the defendant into a conspiracy."[129] Thus, the claim of outrageous government conduct should be applicable where criminal activity is not ongoing or previously contemplated by the defendant, but where the government "sow[s] the seeds of criminality and lure[s] the defendant into a conspiracy" or where law enforcement "create[s] new crime for the sake of bringing charges against a person they had persuaded to participate in wrongdoing."[130]

A successful outrageous government conduct claim requires a finding of government activities "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction."[131] This requires a finding that the government violated a specific constitutional right,[132] and may further require a finding that the government was "enmeshed" in criminal activity.[133]

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[129] ***United States v. Twigg***, 588 F.2d 373, 380 (3d Cir. 1978), *distinguishing* ***United States v. Leja***, 563 F.2d 244 (6th Cir. 1977) *and* ***United States v. Smith***, 538 F.2d 1359 (9th Cir. 1976).

[130] ***Id.***; ***West***, 511 F.2d at 1085.

[131] ***Russell***, 411 U.S. at 431–32.

[132] ***Albrecht***, 184 Wis. 2d at 296–97 (internal citations omitted).

[133] ***State v. Gibas***, 184 Wis. 2d 355, 360, 516 N.W.2d 785 (Ct. App. 1994). While ***Gibas*** suggests that the government being "enmeshed" in criminal activity is a requirement for an outrageous government conduct claim, its authority for this is ***State v. Steadman***, which only held that a due process concern "may arise when the government itself was so enmeshed in the criminal activity that prosecution of the defendant was held to be repugnant to the American criminal justice system." ***Steadman***, 152 Wis. 2d at 301. The ***Steadman*** Court thus recognized this "enmeshment" to be a *possible* basis for finding outrageous government conduct but did not hold that it is the *exclusive* basis for such a claim.

In addition to violating Barrett's due process rights, the government also violated his right to compulsory process. The Sixth Amendment guarantees criminal defendants the right to compulsory process; if the government arbitrarily prevents a defendant from presenting a witness in his or her favor, this right may be violated.[134] For example, a prosecutor deliberately having one witness arrested prior to trial, with the effect of two other witnesses being intimidated into not testifying, has been found to be a constitutional violation.[135]

C. The government engaged in outrageous and unconstitutional conduct in targeting Barrett, pressuring him into committing a crime, and intimidating one of his witnesses.

Barrett's sentencing memorandum eloquently described the fundamental injustice of his case:

> This case puts into stark contrast two very different lives. Barrett's life is one of service and achievement with no suggestion of criminal behavior until this case at the age of fifty-three. The life of Michael Bond, on the other hand, is one of abject criminality and antisocial behavior.[136]

After discussing Bond's sentence reduction from fifteen to nineteen years down to twenty-four months, the memorandum continues:

> In a very real sense, then, the government in this case urges the court to take some of those years in prison that Michael Bond has truly earned, and

[134] ***Gibas***, 184 Wis. 2d at 363, *citing* ***Washington v. Texas***, 388 U.S. 14, 23 (1967).
[135] ***Bray v. Peyton***, 429 F.2d 500 (4th Cir. 1970).
[136] R. 101:8. Barrett was actually fifty-two at the time of his arrest.

> assign them to Thomas Barrett. This is disturbing to all those who possess a sense of justice and fair play. This is not something the court should condone.[137]

While these arguments were made in the context of a sentencing hearing, the principles echo those on display in the caselaw regarding outrageous government conduct. The government should be in the business of addressing ongoing criminal activity, not in the business of "creating new crime for the sake of bringing charges against a person [the government] persuaded to participate in wrongdoing."[138] There is absolutely no evidence that Barrett was in the business of illegal arms deals or was seeking to enter that business. He repeatedly indicated that he was not interested in purchasing a silencer, and only did so after a government agent pressured him and put him in a position that he found frightening and uncomfortable.[139] On the balance sheet, the government went through a great deal of trouble to turn a law-abiding man into a felon for the sake of letting a wholesale drug dealer shave years off his prison sentence. This surely "violate[s] fundamental fairness [and is] shocking to the universal sense of justice[.]"[140]

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[137] *Id.*
[138] ***West***, 511 F.2d at 1085.
[139] R. 184:64–76.
[140] ***Albrecht***, 184 Wis. 2d at 296–97.

Below, the State argued that the government was not "enmeshed" in criminal activity.[141] While it is questionable whether this "enmeshment" is really a requirement for a claim of outrageous government conduct, Barrett has certainly satisfied this test. In ***Gibas***, the Court of Appeals held that the government was not "enmeshed" when the State "did not create nor was it involved in the incident which led to the charges against Gibas."[142]

In contrast, the crime allegedly committed by Barrett was entirely conceived by the government. The government released Bond from custody, arranged for him to target Barrett—who had no demonstrated predisposition to commit illegal arms transactions—procured an alleged silencer, arranged a meeting, and pressured Barrett into taking possession of the item. The entire criminal enterprise was orchestrated by the government from start to finish. Had the government not hatched this scheme, released Bond from custody, and provided him with an alleged silencer, there would not have been a crime. To the extent that it is a necessary finding that the government was enmeshed in the criminal activity, this Court should find that it was so enmeshed.

In ruling on this claim, the circuit court indicated in a footnote that it would not "relitigate" Barrett's trial defense of entrapment—

[141] R. 153:7.
[142] ***Gibas***, 184 Wis. 2d at 362.

this despite acknowledging that entrapment and outrageous government conduct are legally distinct concepts.[143] The circuit court refused to conduct any further analysis of this portion of Barrett's claim.

The government compounded its malfeasance by intimidating Wait, one of Barrett's key witnesses. A key issue at trial was whether Barrett was "induced" into purchasing the alleged silencer, and, if so, whether such inducement was "excessive." Wait would have testified about Bond's high-pressure tactics, which would have corroborated Barrett's testimony and tended to support the defense's claim of excessive inducement.[144] But the government threatened Wait with criminal prosecution if he testified, thus keeping Wait off the witness stand.[145]

Attorney Grieve's letter shows that the government did not advise Wait against committing perjury or similar crimes that could stem from the *content* of any testimony he might offer.[146] A warning from the government against obstructing justice or committing perjury is unobjectionable. But Grieve explicitly documented (1) that

[143] R. 156:4. Entrapment is fundamentally a factual and subjective issue determined by a jury, whereas outrageous government conduct is a more objective constitutional claim determined by the Court. *See* ***State v. Saternus***, 127 Wis. 2d 460, 470, 381 N.W.2d 290 (1986).
[144] R. 148:35.
[145] *Id.* at 38–9.
[146] *Id.*

the elected District Attorney himself had been considering filing charges against Wait—not in connection with any purportedly false testimony he might give in the future, but in connection with his previous investigation of and service of process on Bond; (2) that said criminal charges had not, to date, been issued; (3) that "this *same* decision-making process may be reinstigated" if Wait were to testify for Barrett.[147] This was a clear and direct threat conveyed by the State, through Attorney Grieve, to Wait. And it was effective.

The circuit court found against Barrett, noting that the State did not "take any action against Wait to prevent him from testifying."[148] If the circuit court intended this as a factual finding, it is clearly erroneous. The letter from Grieve, which the circuit court expressly accepted as authentic,[149] documents action by the government directed against Wait—a message, conveyed through defense counsel, that if Wait testified the District Attorney would reinstigate his consideration of whether to issue charges against Wait for an earlier incident.[150] The circuit court also held that this did not constitute government conduct since the message was relayed through defense counsel.[151] The circuit court failed to explain why a threat by the

[147] *Id.* at 38 (emphasis supplied).
[148] R. 156:3.
[149] *Id.* at 2, n.1.
[150] R. 148:38–9.
[151] R. 156:3.

government ceases to be a threat if conveyed through a third party. Certainly, a threat *by Grieve* against Wait would not be government conduct; but that is not what happened. It is clear from Grieve's letter that he was not *himself* threatening Wait; rather, he was relaying the substance of his conversation with the Assistant District Attorney.

The circuit court also seems to have reasoned that, since no charges were ever issued against Wait, he was not subject to any actual intimidation.[152] This holding defies logic. Wait was told that he may face criminal charges if he testified in Barrett's case. Assuming the State intended to intimidate Wait, it would make no sense to issue charges against Wait *before* he testified. Once the charges had been issued, the State's leverage would be gone and Wait would have no reason not to testify. The only effective way of maintaining this leverage against Wait would be to not issue charges against Wait *unless* he testified. Since the threat was effective, and Wait never testified, of course the State never issued criminal charges against him. The lack of criminal charges is not, as Court seems to have determined, evidence that there was no intimidation—it is evidence that the State's intimidation was successful.

Taken as a whole, the government's conduct with respect to Barrett was so outrageous as to violate fundamental principles of

[152] R. 156:3–4.

fairness and justice. The government allowed and encouraged Bond to induce a law-abiding citizen into felonious conduct that he had no desire or predisposition to involve himself in, and then thwarted Barrett's attempt to defend himself by intimidating one of his key witnesses at trial. The appropriate remedy is a reversal of Barrett's conviction.[153]

[153] *See* ***Twigg***, 588 F.2d at 382.

CONCLUSION

The statute under which Barrett was prosecuted is an unconstitutional infringement on his state and federal right to keep and bear arms, both facially and as applied. Under either intermediate or strict scrutiny, it should be declared unconstitutional and Barrett's conviction should be reversed. Barrett's conviction should also be reversed on the basis that the statute is void for vagueness. Finally, Barrett's conviction should be reversed on the grounds that it was the result of outrageous government conduct.

Dated at Madison, Wisconsin, _____, 2019.

Respectfully submitted,

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TABLE OF CONTENTS