STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2018AP2324-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

THOMAS MICHAEL BARRETT,

Defendant-Appellant.

REPLY BRIEF 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 MICHAEL BARRETT,
Defendant-Appellant.

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

A. The statute is not presumed constitutional, and the State bears the burden to establish its constitutionality.

In his brief-in-chief, Barrett cited to ***State v. Herrmann*** for the standards applicable to Second-Amendment challenges.[1] In ***Herrmann***, the Court of Appeals explained the standards as follows: "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."[2] While the State acknowledges the existence of ***Herrmann***, it would have this Court ignore it and apply the general rule that statutes enjoy a presumption of constitutionality.[3] The State's justification for ignoring ***Herrmann*** is that the case allegedly conflates a "general presumption of constitutionality" with "the government's relative burden [] within the intermediate-scrutiny mode of analysis[.]"[4] This is incorrect. ***Herrmann*** takes its cue from ***Ezell v. City of Chicago***,[5] which

[1] Def. Br. at 17, *citing* ***State v. Herrmann***, 2015 WI App 97, ¶ 11, 366 Wis. 2d 312, 873 N.W.2d 257.
[2] ***Herrmann***, ¶ 11 (internal citations omitted).
[3] State's Br. at 10.
[4] *Id.* at 10–11.
[5] ***Ezell v. City of Chicago***, 651 F.3d 684 (7th Cir. 2011).

discusses the applicable standards of review at length. It explains that the first step in the analysis is to determine whether the statute regulates activity that falls within the scope of the Second Amendment's protection.[6] On this threshold question, the Seventh Circuit Court of Appeals observed that it was up to the government to establish that the conduct falls *outside* the scope of the amendment—not on the challenger to overcome a presumption of constitutionality.[7]

If the government fails to establish that the regulated activity is outside the scope of the Second Amendment, the next step is applying a form of means-end scrutiny.[8] Here, as the State would apparently concede, the government bears the burden of satisfying either intermediate or strict scrutiny.[9]

The ***Herrmann*** court did not conflate the first and second steps of the analysis. At each step, the government bears the burden of proof—first on the question of whether the challenged statute falls within the scope of the constitutional protections, and second on means-ends analysis.

[6] ***Id.***, 651 F.3d at 702.
[7] ***Id***. at 702–703.
[8] ***Id***. at 703.
[9] ***Herrmann***, ¶ 11; State's Br. at 10–11.

B. The possession of firearm silencers is protected by the federal and state constitutions.

The State argues that a firearm silencer is not within the scope of the Second Amendment because it is not a weapon.[10] Barrett set forth in his brief-in-chief the rationale for treating components of firearms in the same manner under the law as firearms themselves, and that will not be repeated here.[11] However, even if the State is correct that a firearm silencer is not itself an "arm" for constitutional purposes, the State has failed to account for the fact that the state and federal constitutions protect more than the mere possession of specific items—they also protect certain activities. A restriction on the possession of a firearm silencer creates an unconstitutional burden on those activities.

In ***Ezell***, the Seventh Circuit Court of Appeals recognized that the right to possess firearms "implies a corresponding right to acquire and maintain proficiency in their use[.]"[12] In ***Ezell***, this was applied to a ban on firing ranges within city limits.[13] Of course a firing range is not itself a weapon; the issue was that a ban on firing ranges would burden the exercise of the right to bear arms, and thus still fall within

[10] State's Br. at 13–16.
[11] Def. Br. at 19–20.
[12] ***Ezell***, at 704.
[13] ***Id.*** at 690.

the scope of the Second Amendment. As Barrett noted in his brief-in-chief, silencers are most commonly used for target practice—that is, in the acquisition and maintenance of firearm proficiency.[14] The State has not responded to Barrett's argument that the restriction on the possession of firearm silencers impermissibly burdens his right to bear arms in this way.

Furthermore, the State has not responded to Barrett's argument that the Wisconsin constitution recognizes a broader protection than the Second Amendment. The Wisconsin constitution protects the right to keep and bear arms for "hunting, recreation, or any other lawful purpose."[15] This is a category of constitutionally protected activity not explicitly recognized by the Second Amendment, and, as Barrett argued in his brief-in-chief, firearm silencers are commonly used in hunting and recreationally.[16] The statute thus also runs afoul of the Wisconsin constitution by burdening the right to bear arms for hunting and recreation.

[14] Def. Br. at 20–21.
[15] Wis. Const. art. I, § 25.
[16] Def. Br. at 21–22.

C. The mere existence of a federal licensing process does not satisfy either level of means-ends scrutiny; the State has not offered any evidence to satisfy its burden of proof under either intermediate or strict scrutiny.

The State correctly notes that Wisconsin's ban on the possession of firearm silencers contains an exception for a person who has satisfied the "licensing and registration requirements under 26 U.S.C. 5801 to 5872."[17] The State argues that because there a citizen of Wisconsin can theoretically comply with the federal licensing and registration requirements, the Wisconsin statute is therefore constitutional.[18]

The State's argument is flawed because it has failed to present any evidence from which a court might determine that the statute, even with this exception, passes either intermediate or strict scrutiny. If intermediate scrutiny is to be applied, the State has the burden to demonstrate that (1) its objective is an important one, and (2) that this objective is advanced by a means substantially related to that objective.[19] If the State's argument is that the statute passes this test, the State would have to present some evidence that the federal licensing scheme is substantially related to its objective. Certainly some licensing schemes may be constitutional, but some may not. The

[17] Wis. Stat. § 941.298(3)(c).
[18] State's Br. 16–19.
[19] ***Herrmann***, 2015 WI App 97, ¶ 11, *citing* ***United States v. Williams***, 616 F.3d 685, 692 (7th Cir. 2010).

State should be able to show, for example, that it is not unreasonably burdensome to comply with the licensing scheme, that it is in fact possible for an ordinary citizen to obtain a license, and that the manner by which licenses are approved and denied is not arbitrary, but has some connection to the State's important policy objectives.

The State has made no effort to meet this burden. The plain language of the federal statute does not provide the type of detail that would be needed for a court to make a ruling on the constitutionality of Wisconsin's statute. The federal statute provides for a tax on importers, manufacturers, and dealers in firearms, as well as a special tax upon the transfer of firearms.[20] It also provides for a process by which a firearm can be transferred, which includes the filing of paperwork, the payment of the tax, and, crucially, the approval of the Secretary of the Treasury or his or her delegate.[21] The registration statute also requires authorization from the Secretary or his or her delegate to "import, make, or transfer" the firearm.[22]

The burden of proof lies with the State to establish the constitutionality of the statutory scheme; if it is the State's position that the existence of this federal licensing and registration scheme saves the Wisconsin statute from unconstitutionality, then the State

[20] 26 U.S.C. §§ 5801, 5811. Note that for purposes of federal law, a firearm silencer is considered a firearm. 26 U.S.C. § 5845(a).
[21] 26 U.S.C. § 5812.
[22] 26 U.S.C § 5841(c).

should have presented evidence on that subject. But the State chose not to do so. The record before this Court thus contains no information about the licensing and registration process. How cumbersome is the application process? How does the Secretary approve and deny applications, and on what basis? To answer these questions would require the presentation of evidence related to the policies and practices of the Secretary of the Treasury. This Court cannot meet its burden of proof by just pointing to the existence of a federal licensing and registration protocol. One cannot simply assume from the fact that a licensing and registration protocol *exists* that the details of the protocol are substantially related to an important government objective.

D. The State has failed to respond to Barrett's argument that a statute that would criminalize the possession of a non-functional firearm silencer is unconstitutional as applied.

Barrett argued in his brief-in-chief that even if the statute was not facially unconstitutional, it was unconstitutional as it was applied to him.[23] Specifically, Barrett argued that no legitimate government interest would be substantially advanced by the prohibition of an item that does not actually diminish the report of a gunshot by any appreciable degree.[24] The State did not respond to this argument. This

[23] Def. Br. at 29.
[24] *Id*. at 29–31.

Court should take the State's non-response as a concession of this point and find that, even if the statute is facially valid, it is unconstitutional when applied to the possession of an item that does not actually function as a firearm silencer.[25]

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

A. The forfeiture doctrine should not be applied.

The State argues that Barrett forfeited his right to argue a claim of outrageous government conduct by not raising it earlier in the circuit court.[26] Specifically, it argues that in order to get around any forfeiture claim, Barrett should have raised the outrageous government conduct issue through the vehicle of ineffective assistance of prior counsel.[27] The State then—though it acknowledges that Barrett did raise ineffective assistance of counsel—faults Barrett for failing to develop the ineffective assistance of counsel claim in the circuit court.[28]

What the State omits from its argument is that the reason Barrett did not develop an ineffective assistance of counsel claim in the circuit

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[25] ***Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).
[26] State's Br. at 25.
[27] *Id.* at 26–27
[28] *Id*.

court is that the State did not argue forfeiture before the circuit court but engaged the issue on the merits.[29] The lower court's decision, likewise, was on the merits, with no mention of forfeiture.[30]

There is thus some irony in the State's current position—it could reasonably be said that the State forfeited its forfeiture argument. The State argues that this Court should not have to engage with the merits of Barrett's claim—even though, below, both the State and the circuit court did exactly that. The State argues that Barrett should have developed his claim of ineffective assistance of counsel in the lower court—when the only reason that the claim was not developed was because the State chose to engage the issue on the merits. Surely the circuit court would have found it to be a fairly ridiculous waste of time for Barrett to insist on a hearing on ineffective assistance of counsel when the State was willing to engage with the issue on the merits. Had the State chosen to argue forfeiture before the circuit court, *then* Barrett would have developed the issue of ineffectiveness. But it is disingenuous for a party to take a position below that makes the development of an argument unnecessary and then claim on appeal that it should prevail due to the failure of its opponent to develop that very argument.

[29] R. 153.
[30] R. 156.

The forfeiture doctrine is not absolute: the Court "may … decide a constitutional question not raised below if it appears in the interests of justice to do so[.]"[31] Given the history outlined above, and given the importance of the constitutional rights to due process and compulsory process, it is in the interests of justice for this Court to proceed on the merits. If the Court is disinclined to do so, it would be appropriate, given the State's failure to object on forfeiture grounds below, to remand for the development of the ineffective assistance of counsel claim.

B. The State's arguments concerning outrageous government conduct rely on misreadings of the record or misunderstandings of the applicable legal standards.

Several of the State's arguments related to whether Wait was intimidated into not testifying rely on erroneous readings of the record or erroneous understandings of the applicable legal standards.

First, the State characterizes the letter from Grieve as not conveying a threat from the prosecution: "Grieve did not assert that any law enforcement agency planned to file charges against Wait; Grieve was alerting him that several agencies were contemplating doing so."[32] This is a mischaracterization of Greive's letter—he did not advise Wait that several law enforcement agencies were

[31] ***Bradley v. State***, 36 Wis. 2d 345, 359 (1967).
[32] State's Br. at 31.

contemplating charges, he said that "a number of individuals, to include the Milwaukee County District Attorney, John Chisholm, contemplated making an arrest for criminal charges against you" and threatened the reinstigation of "this same decision-making process" should Wait testify in Barrett's case.[33]

Second, the State characterizes what happened as "alerting the defendant's trial counsel that a witness who has possibly committed criminal acts may be prosecuted for those acts[.]"[34] It then claims that this is not misconduct, citing to ***State v. Koller*** for the proposition that it is acceptable for a court to warn a witness that he has the right to not incriminate himself.[35] That is not what occurred in this case. Grieve did not warn Wait that the State could use his own testimony against him if he testified; he warned Wait that the "decision-making process" about issuing criminal charges would be "may be reinstigated"—not as the result of the *content* of his testimony, but as the result of his *choice to testify* in Barrett's case.[36]

Third, the State claims that Wait was willing to testify at several hearings leading up to the trial as evidence that he was not intimidated.[37] This argument ignores the procedural posture of this

[33] R. 148:38.
[34] State's Br. at 31.
[35] State's Br. at 31; *citing* ***State v. Koller***, 87 Wis. 2d 253, 281, 274 N.W.2d 651 (1979).
[36] R. 148:38.
[37] State's Br. at 31.

issue. Barrett requested an evidentiary hearing on his claim of outrageous government conduct; the circuit court denied a hearing, and Barrett now appeals. An evidentiary hearing is necessary when "the party requesting the hearing raises a significant, disputed factual issue."[38] When determining whether to grant a hearing, the Court must determine whether the defense has "allege[d] facts which, *if true*, would entitle the defendant to relief[.]"[39]

The issue, therefore, is not the resolution of competing claims or inferences, but of determining whether Barrett has alleged facts that—*if true*—would entitle him to relief. Barrett presented the circuit court with Wait's affidavit, alleging that he was intimidated by the State's threat.[40] If the State felt that Wait's affidavit was untrue, then it could present evidence relevant to that point at an evidentiary hearing. Only upon allowing both sides to fully develop the factual record would it be appropriate for the circuit court to make credibility determinations. But no evidentiary hearing was ever held. It is therefore necessary to assume that the facts alleged by Barrett were entirely true; the only issue is whether, assuming those facts to be true, Barrett would have

[38] ***United States v. Sophie***, 900 F.2d 1064, 1070 (7th Cir. 1990).
[39] ***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).
[40] R. 138:41.

been entitled to relief. If so, he should have at least been granted an evidentiary hearing on the issue.

Fourth, the State argues that Barrett would not have benefited from Wait's testimony at trial because his testimony would have been contradicted by other evidence.[41] This argument is highly speculative—there is no way of knowing how Wait's testimony would have played out and how the jury would have interpreted it. At best, it suggests that further development of the record would have been necessary to address the issue of any possible prejudice.

[41] State's Br. at 32.

CONCLUSION

For the above reasons, as well as those in Barrett's brief-in-chief, Barrett's conviction should be reversed on the grounds that the statute under which he was prosecuted is unconstitutional, either facially or as applied. Barrett's conviction should also be reversed on the grounds of outrageous government conduct; in the alternative, the case should be remanded to the circuit court for further proceedings on the issue of whether the conviction was the result of outrageous government conduct.

Dated at Madison, Wisconsin, July 10, 2019.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

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Dated: July 10, 2019

Signed,

_____

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