STATE OF WISCONSIN

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

DISTRICT I

Case No. 2024AP000358 CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

BERNABE GONZALEZ

Defendant-Respondent.

ON APPEAL FROM A JUDGMENT OF DISMISSAL ENTERED IN MILWAUKEE CIRCUIT COURT, THE HONORABLE ANDERSON GANSNER, PRESIDING

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-APPELLANT

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REPLY ARGUMENT

In *Bruen*, the Supreme Court created a test when facing challenges to laws that facially challenge the rights afforded in the Second Amendment. The Court indicated that the State may satisfy the test by showing a "historical analogue, not a historical twin" to the challenged law. *N.Y.S. Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct., 2111, 213 L. Ed. 2d 387 (2022). In the past few years, lower courts have struggled to apply this test. The Supreme Court acknowledged as much in *Rahimi*, noting "some courts have misunderstood the methodology." *Rahimi*, No. 22-915, 2024 WL 3074728, at *6.

In applying the *Bruen* methodology, *Rahimi* supports the validity of Wisconsin's prohibition on intoxicated possession of a firearm, Wis. Stat. § 941.20(1)(b).[1]

I. Under *Rahimi,* Wisconsin's Prohibition on Intoxicated Possession of a Firearm is Valid.

The Second Amendment allows for "more than just those regulations identical to ones found in 1791. Holding otherwise would be as mistaken as applying the protections of the right only to muskets and sabers." *United States v. Rahimi*, No. 22-915, 2024 WL 3074728, at *6. *Id*. *Rahimi* stressed that the Second Amendment does not prevent the State from passing firearm regulations; doing so would create a law "trapped in amber" and unable to adapt to modern times. *Id*.

Rahimi evaluated a challenge to the federal gun prohibition related to domestic violence protection orders. 18 U.S.C. § 922(g)(8). In 2020, a Texas judge granted a domestic violence restraining order against Rahimi. *Rahimi* at *4. The judge determined that Rahimi posed "a credible threat" to the physical safety of another. *Id*. Rahimi's gun

[1] *Rahimi* was recently decided. Typically, the State would file a "Citation of Supplemental Authority" letter pursuant to Wis. Stat. § 809.19(10); however, here, Mr. Gonzalez's counsel has already acknowledged its awareness of *Rahimi* and argued the matter in its Response to the State's request for a modification of the briefing schedule, filed on 6-27-2024. Thus, the State will integrate *Rahimi* into this Reply Argument.

license was suspended for two years. *Id*. Shortly thereafter, Rahimi was arrested for aggravated assault with a deadly weapon. *Id*. Rahimi was suspected of being involved in numerous other crimes in addition. *Id*. When a search warrant was executed on Rahimi's residence, police found a firearm and ammunition. *Id*. Rahimi was arrested and charged under 18 U.S.C. § 922(g)(8) for unlawful possession of a firearm.

Rahimi challenged 18 U.S.C. § 922(g)(8), arguing that the firearm prohibition, pursuant to *Bruen*, was not historically analogous to other laws. After reviewing the history of relevant laws and rejecting Rahimi's claims, the Supreme Court affirmed *Bruen*, finding historically analogous laws on two fronts: "Taken together, the surety and going armed laws confirm what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed." *Id*. at *9.

The Court held that the State's burden to show a historically analogous law is not impossibly high. Rather, a law is historically analogous where it is "relevantly similar" to the challenged law. *Id*., citing *Bruen*, 597 U.S. at 24, 28-29. To be relevantly similar, a modern law must be "consistent with the principles that underpin our regulatory tradition."[2]

Rahimi establishes that courts should seek relevantly similar principles, not search for historical laws so similar as to effectively be sister statutes. *Rahimi* lays the foundation for this Court to find that the Wisconsin legislature's decision to prohibit dangerous persons from possessing firearms—such as inebriated people—is constitutional.

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[2] The defense claims the "general societal problem of intoxicated use of firearms existed at the founding and indeed for as long as both firearms and alcohol have coexisted." (Gonzalez Br. at 18, citing R. 20 at 17, 29). The defense suggests the proper standard should be "distinctly similar". (Gonzalez Br. at 33). That is wrong. The standard this Court must use to evaluate Wisconsin's law is whether it is "relevantly similar" to historical laws. *Bruen*, 597 U.S at 28-29.

A. The same principles and sentiments of the Historical Laws presented in this case bear resemblance to Wisconsin's Prohibition on Intoxicated Possession of Firearms.

Rahimi affirms the State's position: That *Bruen* calls for an examination of the underlying principles of a historical law analogue to discern its meaning, intent, and sentiments. This examination helps to define the value of the historically analogous law. The State's position in its initial trial level brief—and argued more forcefully in its motion for reconsideration—is that the meaning, intent, and sentiments of the historical examples prohibiting intoxicated people from possessing firearms demonstrate that, even before this nation's founding, state governments passed laws to restrict inebriated people from accessing firearms. State legislatures evidently believed inebriated persons posed a greater danger than sober people. The sentiment behind these laws is symmetrical: Public protection. Keep firearms away from drunken, high, and intoxicated people.

The State cited over a dozen laws spanning the 17th-20th centuries sharing the same objective as Wisconsin's 1883 prohibition. The circuit court's own diligent research yielded at least four state laws prohibiting inebriated persons from possessing firearms, from the nation's founding-early 1800's. R. 21 at 9. Distinguishing each (R.20; R.21), the circuit court found none "distinctly similar" to Wisconsin's prohibition.

The circuit court's analysis bore resemblance to the dissent's approach in *Rahimi*.[3] Where Justice Thomas found similarities to historical analogues, he imposed a higher burden than that advanced by

[3] The *Rahimi* dissent concedes that surety laws "shared a common justification with § 922(g)(8). *Rahimi*, No. 22-915, 2024 WL 3074728, at *41 (Thomas dissenting). "There is little question that surety laws applied to the threat of future interpersonal violence." *Id*. However, the dissent expressed concern that the burden imposed by 922(g)(8) is far higher because it "strips an individual of his Second Amendment right" entirely. *Id*. The Wisconsin law prohibits firearm possession for a matter of hours until a person regains sobriety.

the other eight justices. *Rahimi*, No. 22-915, 2024 WL 3074728, at *41 (Thomas dissenting).

In rejecting the dissent's approach, a "sister" statute is unnecessary. Rather than distinguishing and rejecting each historical law example, *Rahimi* favors an examination of historical examples for similar meaning, intent, and sentiments.

Like the circuit court, Gonzalez attempts to distinguish the state's "now-ancient" laws from the founding / civil-war eras.

B. Wisconsin's Prohibition on Intoxicated Possession of Firearms is similar in application to the Federal Domestic Abuse Protection Order Prohibition.

Like Wisconsin's prohibition, *Rahimi* held that individuals who "pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." *Rahimi*, No. 22-915, 2024 WL 3074728, at *11. *Rahimi* justified prohibiting people subject to domestic violence restraining orders, supported with an analogous history of "going armed" laws. *Id*., at *2. *Rahimi* cited laws prohibiting "riding or going armed, with dangerous or unusual weapons, [to] terrify[ ] the good people of the land." *Id*., citing 4 Blackstone 149. *Rahimi* found historical support for a temporary firearms ban on those who "pose a credible threat to the physical safety of another". Id, at *4.

Drunk drivers are "dangerous" because they risk harm to our communities. That danger is why drunk driving is illegal. If drunk drivers are too "dangerous" to drive, then prohibiting them from possessing firearms is a no brainer.

Wisconsin's intoxicated possession prohibition is also far less onerous and restrictive on a person's Second Amendment right than the prohibition related to those subjected to restraining orders. The majority, and even Justice Thomas' dissent, gives great weight to the length of the deprivation of the right. For intoxicated individuals, the prohibition only lasts for a matter of hours. That temporal limitation is far less onerous a burden.

II. The State neither forfeited nor waived the arguments made to this Court.

The defense seeks to wipe from the record every argument and law cited by the State in its Motion for Reconsideration (see Gonzalez' Br. 21-25, 28-31, 42). The defense further seeks to declare that the circuit court's consideration of its own independent research does not count. Gonzalez' Br. at 28. The defense cites to no tangible support in the record.

The State forfeited/waived nothing. The State forfeits/waives nothing. At no time did or does the State forfeit/waive any claim, argument, or issue.

The defense claims the State cannot make these arguments in briefing to this court. It cites caselaw limiting parties from raising additional arguments *on appeal*. *Id*. at 22, citing *State v. Rogers*, 196 Wis. 2d 817, 826, 539 N.W.2d 897 (Ct. App. 1995).

The defense misapplies *Rogers*. This Court is not hearing these arguments for the first time. The circuit court heard them. It reviewed and responded to the State's Motion for Reconsideration on the merits on October 16, 2023 (*Supra* R. 21), over the defense's objection. R. 12. The circuit court articulated a thorough response to the State's arguments, carefully considering the caselaw and arguments cited. See *Supra* R. 21. Because these arguments were considered on the merits, this Court may now consider them. The defense cites no law that says otherwise.

While the defense may attack the propriety of the circuit court's decision to consider the State's Motion for Reconsideration,[4] fact remains that the circuit court deemed the State's Motion for Reconsideration as appropriate, and made its decision on the merits.

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[4] Trial counsel claimed, without a statutory cite, that parties need a court's permission to file motions for reconsideration. R.12 at 1. However, this is confusing because, on appeal, counsel asked this Court to reconsider its own decision to extend the State's request for additional time to file this brief (without requesting permission of this Court to do so). Gonzalez' Response to MXT to file BRY.

The defense could have appealed the circuit court's decision to hear the merits of the State's Motion for Reconsideration. Perhaps, in choosing not to appeal, the defense has so waived the issue. The circuit court made its decision to hear the arguments and address them on their merits. R. 21 at 3-6. It is from that record that the State has properly sought to appeal.

III. Mr. Gonzalez is not a law-abiding member of "The People".

Discrediting the State's argument that Mr. Gonzalez was not acting as a member of "The People" falls short. First, he confusingly states that *Heller's* limitations on the Second Amendment right—which the *Heller* decision notes only applies to "law-abiding, responsible citizens"—does not mean what the Court said it means. *District of Columbia v. Heller,* 554 U.S. 570, 635 (2008). However, in doing so, the defense highlights the very reasons why the Second Amendment right does not extend to this context.

A. *Heller* supports the notion that Mr. Gonzalez is not a member of "The People".

The defense tries to slippery-slope the State's argument by claiming that "those who impede traffic by slow speeds … or fail to yield to a pedestrian at an uncontrolled intersection" could now be criminally charged when in possession of a firearm. This position depreciates what *Heller* said, while significantly undervaluing the dangerous nature of drunk driving cases.

First, *Heller* never provided a limitation upon what laws are presumptively valid. *Heller* simply established a floor for the *minimum* amount of exceptions. The Supreme Court acknowledged that *some* of the presumptively valid restrictions are those on felons and the mentally ill. *Heller*, 554 U.S. at 626. No language in *Heller* implies that presumptively valid exceptions cannot be expanded and applied elsewhere (say, to the context of Intoxicated Possession of Firearms). There are significant and relevant similarities between restrictions on the mentally ill and restrictions pertaining to Wisconsin's intoxicated possession prohibition. Those similarities support applying *Heller's* logic to this context..

Second, the defense goes to great lengths to remind this Court repeatedly that first offense drunk driving in Wisconsin results in a civil penalty. It is true that drunk driving offenses differ from other areas of crime where a habitual criminality enhancer must be charged to increase exposure to higher penalties. Operating While Intoxicated offenses increase from civil to misdemeanor to felony penalties as the driver repeats the dangerous behavior. Even so, the *what* of the crime, the action itself, can be identical from the first incident to the fourth. In statute, the fourth offense is a felony, while the first is not. This makes drunk driving unusual in criminal law, but it does not make any gradation of the conduct less dangerous.

B. Mr. Gonzalez's CCW permit does not make him a member of "The People".

The defense seemingly believes that Mr. Gonzalez' CCW permit makes him a member of "The People" in the Second Amendment context. (Gonzalez Br. at 12, 20, 27). This belief is misplaced.

The State would agree that Mr. Gonzalez's "CCW permit means that he completed a firearms training safety course and passed a background check run by the State" (Gonzalez' Br. at 12; R. 20:8); however, this also means that Mr. Gonzalez was required to pass a Firearm Safety Course.

In Wisconsin, the materials required to be taught in such courses are established by the Wisconsin Department of Justice. Relevant here, all certified CCW classes are required to teach Wisconsin's law regarding Tavern and Alcohol consumption with a CCW. On page 31 of the Wisconsin Department of Justice Firearm Safety Course,[5] all permit holders learn:

> It is a crime to carry a firearm while under the influence of an intoxicant… It is a class A misdemeanor (9 months jail and/or $10,000 fine) for any person, whether or not

[5] "Firearms Safety Course: A Training Guide For Concealed and Carry Licenses" is publicly available / accessible: https://www.doj.state.wi.us/sites/default/files/dles/ccw/student-manual.pdf

> they are a licensee, to go armed with a firearm while under the influence of an intoxicant, or with a detectable amount of any restricted controlled substance in the bloodstream.
>
> (Internal citations omitted; please see State's Appendix).

In submitting that he has a lawful CCW permit, Mr. Gonzalez openly admits that he completed training which taught him that it is a crime "to go armed with a firearm while under the influence of an intoxicant…" Thus, he knowingly violated the laws of Wisconsin when he made the conscious decision to have a firearm in his possession when he drank to the point of intoxication.

IV. Actual Possession and Constructive Possession are relevantly similar.

Throughout Mr. Gonzalez's brief, he asserts that there is a significant difference between constructive possession and actual possession. *Gonzalez'* Br. at 8, 28, 33-42. However, possession is possession. "An item is in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item." Wis. JI-CRIMINAL 920. Additionally, whether a defendant possessed the firearm is an issue for the finder of fact at trial, and Mr. Gonzalez fails to show any case or case law to suggest that actual possession and constructive possession are not relevantly similar. The State would submit that they are. Prohibiting intoxicated people from possessing firearms, whether at the founding of our nation or in 2024, seeks to achieve the same goal. That goal is relevant and similar to today.

CONCLUSION

The State respectfully asks this Court to reverse the lower court decision and remand the matter for further proceedings.

Dated this 31st day of July, 2024.

Respectfully submitted,

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Electronically signed by:

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,999 words.

Dated this 31st day of July, 2024.

Electronically Signed by:

Kyle J. Elderkin
KYLE J. ELDERKIN
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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 31st day of July, 2024.

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