STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

CASE NO. 2011AP1035-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THOMAS M. POCIAN,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

On Appeal From a Non-Final Order Denying Defendant's Motion To Dismiss, Entered in the Washington County Circuit Court, The Honorable Todd K. Martens, Presiding

---

MARTIN E. KOHLER
State Bar No. 1016725
CRAIG S. POWELL
State Bar No. 1046248
GEOFFREY R. MISFELDT
State Bar No. 1065770

KOHLER & HART, S.C.
Attorneys for Defendant-Appellant
735 North Water Street, Suite 1212
Milwaukee, Wisconsin 53202
Telephone: (414) 271-9595

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

ISSUES PRESENTED

Pocian presents the following issues for review:

1. Is Wisconsin Statute § 941.29 unconstitutional as applied to Pocian, a non-violent felon?

   The circuit court answered no.

2. Is Wisconsin Statute § 941.29 overbroad because it applies to all felons, without consideration of the individual's propensity to misuse firearms and because it has no time limitations?

   The circuit court answered no.

This case presents an issue of statutory and constitutional interpretation that is reviewed *de novo*. *State v. Stenklyft*, 2005 WI 71, ¶ 7, 281 Wis. 2d 484, 697 N.W.2d 769 (citation omitted).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Pocian requests oral argument and believes that publication of the Court's opinion is warranted, as addressing the novel issues presented will likely result in an opinion that enunciates a new rule of law that modifies or clarifies existing rules, and because this case is of substantial and continuing public interest.

STATEMENT OF THE CASE AND FACTS

In the fall of 1985, Thomas Pocian had just turned 18 years old. In September of that year, Pocian's older friend obtained some stolen blank checks from a friend at a party. Instead of handling the situation with maturity and responsibility, Pocian and his friend wrote out a number of the checks to cash and kept the money. All together, they took less than $1,500 dollars. (R.14:2.; App. 202.) For his offense, Pocian was sentenced to three years' probation and ordered to pay the money back. (*Id.*) Although he successfully completed probation and paid back all the money that was taken (*id.*), Pocian received a much greater punishment the day he was sentenced. As a convicted felon, Wisconsin law banned him from having any gun for the rest of his life.

Since his conviction in 1986, Pocian has been an upstanding citizen. (*Id.*) He has raised two children to adulthood, started his own business, stayed out of trouble, and peaceably pursued his passion—hunting. (*Id.*)

Pocian began hunting at age 12. (*Id.*) Hunting is a family tradition, passed on by Pocian's father to Pocian, who has since passed the passion for hunting to his two children. (*Id.*) The Department of Natural Resources has annually granted Pocian a deer hunting license, both before and after his felony conviction. (*Id.*)

When Pocian was sentenced in 1986, the Second Amendment lay dormant—its meaning and scope had remained mostly undefined for nearly 200 years, leaving state and federal courts with little interpretive guidance. As of 1986, the Supreme Court had heard fewer than a half-dozen cases implicating the Second Amendment[1].

However, the landscape changed in 2008, when the United States Supreme Court decided *Heller v. District of Columbia*, 554 U.S. 570. The Court there held that the Second Amendment protects an individual right to keep and bear arms. *See generally id.* In so holding, the Court overturned a firearm ban that had long existed in the District of Columbia, a federal enclave. The States' power to regulate firearms was next—in 2010, the Supreme Court ruled that, like the federal government, States could not infringe upon the rights guaranteed to citizens by the Second Amendment. *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

---

[1] *See Heller v. District of Columbia*, 554 U.S. 570, 619-627 (2008) (noting that the Court's decision was not foreclosed by any of its Second Amendment precedents, of which the Court cited three. The most recent interpretation occurred nearly 70 years prior to *Heller*, in *United States v. Miller*, 307 U.S. 174 (1939). The two other cases where the Supreme Court interpreted the Second Amendment prior to *Heller* were *United States v. Cruikshank*, 92 U.S. 542 (1875) and *Presser v. Illinois*, 116 U.S. 252 (1886)).

Although *Heller* and *McDonald* changed the landscape and provided some guidance, they have left much of the contouring undefined. Since *Heller* and *McDonald*, no appellate court in this State, as of August 13, 2011, has addressed the questions Pocian presents. To the extent Wisconsin appellate courts have previously addressed similar challenges, such as in *State v. Thomas*, those decisions relied upon a standard rendered invalid by *Heller*.

Nevertheless, there is a body of law developing in the Seventh Circuit that is applicable to the case here. Among those cases is *United States v. Williams*, 616 F.3d 685 (2010). Borrowing from principles in *Heller* and *McDonald*, *Williams* upheld the federal felon firearm ban against an as-applied constitutional challenge, finding that the government was able to withstand intermediate scrutiny on the facts presented to the court. *Williams*, 616 F.3d at 693.

Pocian asserts that Wisconsin's lifetime felon firearm ban cannot withstand a faithful application of the *Williams* intermediate level of scrutiny to the facts presented to this Court, much less strict scrutiny. Pocian further asserts that Wisconsin's felon firearm ban is overbroad and sweeps far too broadly because it has no temporal restrictions and does not distinguish between non-violent and violent felony offenders.

PROCEDURAL HISTORY

The prosecution alleges that on November 29, 2008, 22 years after Pocian's lone felony conviction, Pocian registered two deer he shot with a gun belonging to his father. (R.1:1; App. 101.) In a criminal complaint filed September 30, 2010, Pocian was charged with one count of being a felon in possession of a firearm in violation of Wis. Stat. § 941.29. (*Id.*)

On December 1, 2010, Pocian waived his right to a preliminary hearing and was bound over for trial. The following day, the State filed a one-count information with an identical charge to the criminal complaint.

(R.9.) At his arraignment on February 10, 2011, Pocian entered a not guilty plea.

On February 24, 2011, Pocian filed a motion to dismiss, arguing that the prosecution infringed upon his fundamental right to keep and bear arms for hunting and self-defense provided by the Wisconsin and federal constitutions. (R.14:1-10; App. 201-210.)

On April 5, 2011, the State replied to Pocian's motion by letter, arguing that the Second Amendment protects the right to self-defense, that *Heller* suggested felon firearm bans would pass constitutional muster, that Pocian could excise his firearm disability by other means, and that Wis. Stat. § 941.29 is a reasonable restriction on the right to keep and bear arms. (R.16:1-3; App. 301-303.)

On April 7, 2011, the circuit court heard Pocian's motion to dismiss, took the matter under advisement and indicated it would issue a written decision by April 29, 2011.

On April 29, 2011, the circuit court issued a written decision denying Pocian's motion. (R.17:1-4; App. 401-404.) The circuit court held that legislative acts are presumed to be constitutional and that Wis. Stat. § 941.29 is an exercise of the State's police power. (R.17 at 1-4; App. at 401-404.) The court further found that although the right to keep and bear arms is fundamental, the right is "subject to reasonable restrictions under the State's police power." (R.17: 1-4 at 2; App. at 402.) The circuit court did not address whether Wis. Stat. § 941.29 could withstand enhanced scrutiny, either intermediate or strict. (*See generally* R.17; App. 401-404.)

On May 4, 2011, Pocian notified the circuit court that he would be seeking permissive appellate review of its decision. The circuit court indicated that it would remove the May 9, 2011 trial date from its calendar only if Pocian petitioned for permissive review.

On May 6, 2011, Pocian filed a petition for leave to appeal the circuit court's decision denying his motion to dismiss. (R.19.) Thereafter, the circuit court removed the trial date from its calendar and proceedings in the circuit court have been stayed.

On May 18, 2011, the State, by the Attorney General, responded to Pocian's petition for leave to appeal. (R.23.) In its response, the State did not oppose Pocian's petition for interlocutory review. (*Id.* at 1-2.)

On May 23, 2011, this Court granted Pocian's petition for leave to appeal. (R.24; App. 501-502.)

ARGUMENT

I. Wisconsin Statute § 941.29 Is Unconstitutional As Applied To Pocian.

A. Introduction.

Wisconsin's lifetime ban on firearm possession by all felons is overbroad and unconstitutional as applied to Pocian because it interferes with the fundamental right to keep and bear arms guaranteed by the Second Amendment to the United States Constitution and the Wisconsin Constitution.

The Second Amendment provides: "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. This individual right to keep and bear arms is fully applicable against the power of the states. *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). In 2008, the United States Supreme Court recognized that the right to bear arms was an "ancient right" valued by citizens at the time of the nation's founding for self-defense and hunting. *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008).

In addition to the Second Amendment, the people of Wisconsin enjoy protection by virtue of the State Constitution. Article I, Section 25 of the Wisconsin Constitution provides that: "[t]he people have the right

to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose." WIS. CONST., art. I, § 25 (1998). The rights created by Article I, Section 25 are fundamental. *State v. Thomas*, 2004 WI App 115, ¶ 20, 274 Wis. 2d 513, 683 N.W. 2d 497, *rev. denied*, 2004 WI 138, 276 Wis. 2d 28, 689 N.W. 2d 56.

A person convicted of any felony in Wisconsin is forever barred from "possess[ing] a firearm subsequent to the conviction for the felony . . . ." Wis. Stat. § 941.29(1)(a) & (2)(a). A violation of section 941.29 subjects the person to up to ten years in prison and a fine of up to $25,000. § 941.29(2). The Wisconsin Supreme Court has recognized that the purpose of section 941.29 is: "the protection of public safety . . . because the legislature has determined that felons are more likely to misuse firearms." *State v. Coleman*, 206 Wis. 2d 199, 210, 556 N.W. 2d 701 (1996). This stated purpose cannot logically extend to Pocian, nor does it support a blanket prohibition on the exercise of the fundamental constitutional right to keep and bear arms by all felons, including non-violent felons.

B. This Court Should Apply, At A Minimum, Intermediate Scrutiny.

Because no Wisconsin appellate court has yet addressed a constitutional challenge to a firearms regulation since *Heller* and *McDonald*, this Court should utilize the Seventh Circuit's analyses, which are set forth below. The Seventh Circuit has already considered a constitutional challenge to the federal firearm ban on felons and concluded that the federal ban must meet at least intermediate scrutiny. *United States v. Williams*, 616 F.3d 685, 692 (2010).

In 2004, the Wisconsin Court of Appeals decided *State v. Thomas*, concluding, among other things, that section 941.29 was "a reasonable limitation on the constitutional right to bear arms." 2004 WI App 115 at ¶ 23. Within the holding was a footnote that listed a dozen decisions from other states finding a "rational relationship" between felon firearm bans and a

"legitimate state purpose" of protecting the public. *Id.* at ¶ 23 n. 5. This language suggests the court employed "rational basis review" to an overbreadth challenge of section 941.29. *See State v. Smith*, 2010 WI 16, ¶ 12, 323 Wis. 2d 377, 780 N.W. 2d 90. This standard is now invalid and must be revisited in light of *Heller*.

In *Heller*, the United States Supreme Court unequivocally stated that rational basis review was not the correct standard of review for firearm regulations: "[i]f all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." *Heller,* 540 U.S. at 628 n. 27. *Heller* also rejected the proposition that the scope of the right to keep and bear arms could be determined by interest balancing. *Id.* at 634-635.

Although *Heller* stated that rational basis was not the correct standard of scrutiny for firearms regulations, it did not offer its own standard. Carlton F.W. Larson, *Four Exceptions in Search of a Theory:* District of Columbia v. Heller *and Judicial* Ipse Dixit, 60 Hastings L.J. 1371 (2009). Instead, the Court concluded that the District of Columbia's handgun ban violated "any of the standards of scrutiny that we have applied to enumerated constitutional rights." *Heller*, 540 U.S. at 628-629. Accordingly, the task of articulating standards fell upon state and federal courts. As of August 13, 2011, no Wisconsin appellate decision has cited either *Heller* or *McDonald*. Because Wisconsin courts have not yet addressed this issue, this Court may consider other jurisdictions for authority. *See Thomas*, 2004 WI App 115, ¶ 36 n. 7.

Turning to other jurisdictions, the Seventh Circuit has developed a test for determining whether a firearm regulation violates the individual right to keep and bear arms guaranteed by the Second Amendment. According to the Seventh Circuit, courts should make a two-part inquiry, asking: (1) whether the restriction is of a constitutionally protected activity in the first place; and

(2) if so, whether the restriction survives enhanced scrutiny. *Ezell v. City of Chicago*, __ F.3d ___, No. 10-3525, 2011 WL2623511, *12-13 (7th Cir. July 6, 2011); *U.S. v. Williams*, 616 F.3d 685, 691-692 (7th Cir. 2010).

If a law severely burdens the right to keep and bear arms because it proscribes activity close to the core of the right, the law requires "an extremely strong public-interest justification and a close fit between the government's means and its end." *Ezell*, 2011 WL 2623511 at *17. In *Ezell*, the court considered a Second Amendment challenge to a Chicago ordinance that mandated range training as a prerequisite to lawful gun ownership, yet prohibited firing ranges in the city. *Id.* at *1. The Court found that the right to maintain one's proficiency with a firearm was an "important corollary to the meaningful exercise of the core right to possess firearms for self-defense." *Id.* at *17. Noting that the ordinance was close to the core of the right to keep and bear arms, the court used a standard it called "not quite 'strict scrutiny.'" *Id.*

Wisconsin's lifetime ban on firearm possession by felons places a more severe burden on individuals than the Chicago ordinance because an individual convicted of a felony may never own or possess a firearm to defend himself, his family, or his home. Thus, strict scrutiny is required.

Alternatively, if this Court rejects strict scrutiny, it must apply intermediate scrutiny. The Seventh Circuit has already considered a felon firearm possession ban and required the government to meet intermediate scrutiny. *Williams*, 616 F.3d at 692. In *Williams*, the court declined to definitively answer the initial inquiry[2],

[2] The "threshold inquiry" is a difficult one, as noted in *Williams*, because of dictum in *Heller*. In *Heller*, the Court stated, without citation: "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons . . . ." *Heller*, 540 U.S. at 626. However, as aptly noted in *Williams*, research about whether felons were barred from possessing firearms at the time of founding is "inconclusive at best." 616 F. 3d at 692 (quotation omitted). Regardless, the

whether firearm possession by felons is a protected activity. The court moved on to the second part of the

---

Supreme Court has reaffirmed its dictum without further explanation. *McDonald*, 130 S. Ct. at 3047. Lower courts deciding issues similar to those raised here have often cursorily referred to and relied on "*Heller's* now-famous dictum" to deny challenges to permanent felon firearm bans. *Williams*, 616 F.3d at 691 (Language of the panel, which included former Justice O'Connor, to refer to the grounds upon which the lower court denied William's motion).

However, the *Heller* dictum deserves a closer look, as the Court itself disclaimed:

> [S]ince this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field… And there will be time enough to expound upon historical justifications for the exceptions we have mentioned if and when those exceptions come before us.

Heller, 540 U.S. at 635.

Since *Heller*, a number of judges and commentators have thoughtfully called into question the validity the *Heller* dictum. "My first point is that the felon dispossession dictum may lack the 'longstanding' historical basis that *Heller* ascribes to it." *United States v. McCane*, 573 F.3d 1037, 1048 (10th Cir. 2009) (Tymkovich, J., concurring). "The only problem with these politically understandable yet poorly briefed and supported assurances in dicta is that . . . a lifetime ban on any felon possessing any firearm is not "longstanding" in America." Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 697 (2009). "*Heller* referred to felon disarmament bans only as 'presumptively lawful,' which, by implication, means that there must exist the possibility that the [federal felon firearm] ban could be unconstitutional in the face of an as-applied challenge." *Williams*, 616 F.3d at 692. "[S]o far as I can determine, no colonial or state law in eighteenth-century American formally restricted the ability of felons to own firearms." Larson, 60 Hastings L.J. at 1374. "The Founding generation had no laws limiting gun possession by the mentally ill, nor laws denying the right to people convicted of crimes. Bans on ex-felons possessing firearms were first adopted in the 1920s and 1930s, almost a century and a half after the Founding." Adam Winkler, *Heller's Catch-22*, 56 UCLA L. Rev. 1551, 1563 (2009).

inquiry, and asked whether the government could prove that its ban satisfied "some form of strong showing." *Id.* The *Williams* court referred to this "strong showing" as a form of intermediate scrutiny. *Id.* Under intermediate scrutiny, the regulation fails unless "its objective is an important one and . . . its objective is advanced by means substantially related to that objective." *Id.* The government bears the burden of proof. *Id.*

Given the United States Supreme Court's unequivocal statement that rational basis review is not the appropriate standard to apply in constitutional challenges to gun laws, the standard articulated in *State v. Thomas* cannot be valid for a constitutional challenge and must be revisited. Further, *Heller*'s failure to articulate a standard has left no controlling case law for this court on the issue of the appropriate standard to apply. Accordingly, this court should apply either strict scrutiny or the intermediate scrutiny test articulated in by the Seventh Circuit in *Williams*.

C. As Applied To Pocian, Wisconsin Statute § 941.29 Cannot Withstand Either Intermediate Or Strict Scrutiny.

Regardless of whether strict or intermediate scrutiny is applied, Wis. Stat. § 941.29 does not pass constitutional muster as applied to Pocian.

Assuming the state's proffered objective is, as stated in *Coleman*, public safety, and that this objective is important, the state cannot prove that public safety is advanced by forever barring Pocian from possessing a firearm. The 1986 forgery conviction is his only felony. He was sentenced to probation and successfully completed his sentence. Since that time, Pocian has been a law-abiding and contributing member of society—raising children and owning a business. Pocian has had ample opportunity to "misuse firearms," (notably with the State's apparent blessing through the issuance of hunting tags to him) but has not done so,

further eviscerating the State's blanket judgment about felons. *See Coleman*, 206 Wis. 2d at 210.

Pocian is also starkly different from the challenger in *Williams*, who was convicted of one count of distributing marijuana, two counts of distributing cocaine, one count of possession with intent to deliver crack cocaine, and one count of possessing a firearm as a felon. 616 F.3d at 689. Williams's prior felony was for a robbery in which a victim required sixty-five stitches. *Id* at 693. In *Williams*, the government's proffered objective was "to keep firearms out of the hands of violent felons, who the government believes are often those most likely to misuse firearms." *Id*. That proffered objective was substantially related to Williams's case because of "Williams's own violent past." *Id.*

Although it found the government sustained its burden, the *Williams* court made a number of statements inviting a challenge from a non-violent felon. *Id.* "Although we recognize that [the federal firearm ban on felons] may be subject to an overbreadth challenge at some point because of its disqualification of all felons, including those who are non-violent, that is not the case for Williams." *Id.* Similarly, "Williams, as a violent felon, is not the ideal candidate[3] to challenge the constitutionality of [the federal firearm ban on felons]." *Id*. Pocian, on the other hand, is the ideal candidate.

[3] *Williams* is not the only court to question the validity of lifetime gun possession bans on all felons, even non-violent felons. *See McCane*, 573 F.3d at 1049–50 (Tymkovich, J., concurring); *U.S. v. Abner*, 2009 WL 103172,*1 (M.D. Ala. Jan. 14, 2009); *see also*, *as to state constitutional guarantees*, *Britt v. State*, 681 S.E.2d 320 (N.C. 2009) (a nonviolent felon whose crime was long in the past regained his state constitutional right to keep and bear arms); *Wilson v. State*, 207 P.3d 565, 570 (Ak. 2009) (Mannheimer, J., dissenting) (the state constitutional right to keep and bear arms limited the state's power to disarm felons in some situations); *Posey v. Commonwealth*, 185 S.W.3d 170, 183-185 (Ky. 2006) (Scott, J., concurring in part and dissenting in part) (same).

Pocian was convicted 25 years ago for forging checks while a teenager. The allegations underlying the conviction contain no suggestions of violence or use of weapons. He is, in short, not a violent felon. The public is not safer because Pocian has been completely and permanently disarmed; nevertheless, Pocian's felony conviction operates as a bar to him possessing a firearm for any purpose. Wis. Stat. § 941.29.

Because Pocian falls under the felon firearm possession ban, the state must show, at a minimum, that the statute's objective is an important one and that the objective is advanced by means substantially related to that objective.

If public safety is the objective, then some sort of individualized determination that a person is likely to misuse firearms would be the substantially-related or narrowly-tailored means by which the state would advance its objective. No such showing can be convincingly made about Pocian. Accordingly, Wis. Stat. § 941.29 is unconstitutional as applied to Pocian.

II. In Addition To Being Unconstitutional As Applied To Pocian, Wisconsin Statute § 941.29 Is Unconstitutionally Overbroad Because It Completely and Permanently Disarms All Felons, Including Non-Violent Felons.

A. Standard of Review.

"A statute is overbroad when its language, given its normal meaning, is so sweeping that its sanctions may be applied to constitutionally protected conduct which the state is not permitted to regulate." *State v. Neumann*, 179 Wis. 2d 687, 711, 508 N.W.2d 54 (Ct. App. 1993) (quotation omitted). An overbreadth challenge allows a court to consider hypothetical situations in which the statute may be applied in an unconstitutional manner. *See Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973).

B. Wisconsin Statute § 941.29 Is Overbroad Because It Applies To All Felons Without Regard To The Nature Of Their Offense And Because It Contains No Time Limitations.

In addition to being unconstitutional as applied to Pocian, Wisconsin Statute § 941.29 is also overbroad because it is neither narrowly-tailored nor substantially-related to public safety and because its prohibition extends for a lifetime. The law prohibits a non-violent felon with a lengthy history of respect for the law post-conviction and a lack of violent history from exercising his or her right to keep and bear arms for self-defense and hunting. This contradicts the Supreme Court's finding that hunting and self-defense were important "ancient right[s]" of concern to citizens at the time of founding. *Heller*, 540 U.S. at 599.

Wisconsin Statute § 941.29 makes no distinction whatsoever between crimes involving the use of force and violence and crimes that are non-violent. Judge Schudson highlighted this point in *Thomas*:

> One man beats his wife, harming her physically and emotionally and traumatizing their children who witness the assault. He may, however, *only* have committed battery, a misdemeanor punishable by less than one year in jail. Another man enters a garage to steal a shovel; he has committed a burglary, punishable by years in prison.
>
> One woman drives while intoxicated, threatening the lives of countless citizens. Under Wisconsin's drunk driving laws-the weakest in the nation-she has committed a *non-criminal* offense if it is her first, or only a misdemeanor unless it is her fifth (or subsequent) offense. Another woman, however, forges a check; she has committed a felony.
>
> The felony/misdemeanor statutory designations are replete with anomalies such as these. . . .

Thomas, 2004 WI App 115, ¶¶ 47-49 (Schudson, J., concurring) (footnote omitted) (emphasis in original).

In Wisconsin, "felony" defines hundreds of crimes, ranging from first degree intentional homicide, punishable by life in prison, to a second offense of interrupting a funeral procession, with a maximum term of incarceration of 18 months. Felonies may result from issuing worthless checks greater than $2,500[4]; stealing trade secrets[5]; loan sharking[6]; forgery[7]; falsifying business documents[8]; twice stealing cable[9]; twice stealing cell phone service[10]; twice videotaping a movie without consent[11]; causing injury by negligent handling of fireworks[12]; mail fraud[13]; or identity theft.[14]

The expansiveness of the term "felony" is further illustrated by the fact that Wisconsin has nine different classifications of felonies, with nine separate ranges of punishment. Regardless, Wis. Stat. § 941.29 treats all types of felonies the same—no matter the type of felony, all individuals are subject to a lifetime ban on the possession of firearms.

Other Wisconsin laws make a logical distinction between violent and non-violent felonies. For example, the prohibition on possessing body armor is limited to persons who have been convicted of a violent felony. Wis. Stat. § 941.291. *See also* Wis. Stat. § 301.048(2)(bm)1.a.; Wis. Stat. § 973.017(5)(a)(2).

Consequently, because the term "felony" includes such a vast assortment of crimes—non-violent and violent—Wis. Stat. § 941.29 has no logical or rational relationship to public safety. Prohibiting the use of firearms by an individual who has committed a non-violent felony, such as forging checks, does not further

---

[4] § 943.24(2).
[5] § 943.205.
[6] § 943.28.
[7] § 943.38.
[8] § 943.39.
[9] § 943.45(3)(d).
[10] § 943.455(4)(d).
[11] § 943.49(2)(b)(2).
[12] § 940.24(1).
[13] § 943.89.
[14] § 943.201 & § 943.203.

public safety, but unconstitutionally infringes upon the individual's right to keep and bear arms.

Wis. Stat. § 941.29's overbreadth is worsened by the fact that it has no time limitations. Individuals convicted many years earlier of a single non-violent felony have no meaningful[15] opportunity to regain their right to keep and bear arms for defense of self, family, and home. Nor can these individuals ever hunt with a firearm, something about one in ten Wisconsinites[16] do. The lack of a temporal limitation also contradicts the Supreme Court's determination that the commission of a felony by a juvenile is not necessarily a predictor of their danger to the public decades later. *See generally Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 130 S. Ct. 2011 (2010).

Thus, because Wisconsin Statute § 941.29 disarms all felons completely and permanently, without regard for the particular felon's propensity to misuse firearms, the offense of conviction, or the individual's law-abiding behavior after conviction, it is overbroad and violates the Second Amendment and the Wisconsin Constitution.

---

[15] *See* Donald Leo Bach, *To Forgive, Divine:* The Governor's Pardoning Power, February 2005 Wisconsin Lawyer, Vol. 78, No. 2. (Noting that in the 25 years between 1979 and 2003, only 604 pardons had been granted.)

[16] Compare http://quickfacts.census.gov/qfd/states/55000.html, accessed February 24, 2011. (Estimated 2009 population of Wisconsin: 5,654,774.) with http://dnr.wi.gov/org/caer/cs/reports/2004/deerreport2004.htm, accessed February 24, 2011.
(Gun deer licenses sold to Wisconsin residents in 2004: 615,841. Between 1994 and 2004, these numbers ranged from a low of 585,741 in 2002 to a high of 656,546 in 1995.)

CONCLUSION

Because this prosecution violates rights guaranteed to Pocian by the federal and State constitutions, this Court should reverse the circuit court's order and dismiss this prosecution with prejudice. Further, Wisconsin Statute § 941.29 is overbroad because it completely and permanently disbars non-violent felons, and this Court should accordingly find that Wisconsin Statute § 941.29 violates the federal and State constitutions.

Respectfully submitted this 15th day of August, 2011.

KOHLER & HART, SC
Attorneys for Defendant-Appellant

_/s/ Geoffrey R. Misfeldt_____
MARTIN E. KOHLER
State Bar No. 1016725
CRAIG S. POWELL
State Bar No. 1046248
GEOFFREY R. MISFELDT
State Bar No. 1065770

P.O. ADDRESS:
First National Bank Building
735 North Water Street, Suite 1212
Milwaukee, Wisconsin 53202
Telephone: (414) 271-9595
Facsimile: (414) 271-3701

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. (Rule) § 809.19 for a brief produced with a proportional serif font. The length of this brief is 4,710 words.

Respectfully submitted this 15th day of August, 2011.

KOHLER & HART, SC
Attorneys for Defendant-Appellant

/s/ Geoffrey R. Misfeldt
MARTIN E. KOHLER
State Bar No. 1016725
CRAIG S. POWELL
State Bar No. 1046248
GEOFFREY R. MISFELDT
State Bar No. 1065770

APPENDIX

App.

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, as a part of this brief, is an appendix that complies with Wis. Stat. (Rule) 809.19 (2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Respectfully submitted this 15th day of August, 2011.

KOHLER & HART, SC
Attorneys for Defendant-Appellant

_/s/ Geoffrey R. Misfeldt_____
MARTIN E. KOHLER
State Bar No. 1016725
CRAIG S. POWELL
State Bar No. 1046248
GEOFFREY R. MISFELDT
State Bar No. 1065770

CERTIFICATE OF
COMPLIANCE WITH RULE
809.19 (12)

I hereby certify that:

(1) I have submitted an electronic copy of this brief, including the appendix, which complies with the requirements of § 809.19 (12). I further certify that:

(2) This electronic brief is identical in content to the printed for of the brief filed as of this date.

(3) 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.

Respectfully submitted this 15th day of August, 2011.

KOHLER & HART, SC
Attorneys for Defendant-Appellant

_/s/ Geoffrey R. Misfeldt_____
MARTIN E. KOHLER
State Bar No. 1016725
CRAIG S. POWELL
State Bar No. 1046248
GEOFFREY R. MISFELDT
State Bar No. 1065770