STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2011AP1035-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THOMAS M. POCIAN,

Defendant-Appellant.

ON APPEAL FROM A NON-FINAL ORDER ENTERED IN THE WASHINGTON COUNTY CIRCUIT COURT, THE HONORABLE TODD K. MARTENS, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

J.B. VAN HOLLEN
Attorney General

JEFFREY J. KASSEL
Assistant Attorney General
State Bar No. 1009170

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
kasseljj@doj.state.wi.us

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. Publication of the court's opinion is warranted because the issues raised in this case have not been addressed in any Wisconsin decision. [1]

[1]Similar claims have been raised in another case now before the court of appeals, *State v. Daniel Lee Rueden, Jr.*, no. 2011AP1035-CR (in briefing).

STATEMENT OF THE CASE

Given the nature of the arguments raised in the brief of defendant-appellant Thomas M. Pocian, the State exercises its option not to present a statement of the case. *See* Wis. Stat. (Rule) 809.19(3)(a). The relevant facts and procedural history will be discussed in the argument section of this brief.

ARGUMENT

Pocian is charged with one count of being a felon in possession of a firearm, in violation Wis. Stat. § 941.29(2)(a) (9:1). Pocian moved to dismiss the charge on the grounds that the felon-in-possession statute is unconstitutionally overbroad and unconstitutional as applied to him under the Second Amendment (14:1-10; A-Ap. 201-10). After the circuit court denied the motion (17:1-4; A-Ap. 401-04), the court of appeals granted Pocian's motion for leave to appeal that non-final order.

Pocian argues on appeal that the felon-in-possession statute is unconstitutional as applied to him because his predicate felony convictions were for a non-violent crime, forgery, for which he was convicted in 1986. He also argues that the statute is overbroad because it permanently disqualifies all felons, including nonviolent felons.

Although Pocian does not expressly state that he is challenging the felon-in-possession statute on its face, an overbreadth challenge is a type of facial challenge to the constitutionality of a statute. *See Lounge Management, Ltd. v. Town of Trenton,* 219 Wis. 2d 13, 20, 580 N.W.2d 156

(1998). However, because "[a]n overbreadth challenge to a statute invokes the protections of the First Amendment of the United States Constitution," *Larson v. Burmaster*, 2006 WI App 142, ¶26, 295 Wis. 2d 333, 720 N.W.2d 134, "the overbreadth doctrine has no application outside the First Amendment context." *Id.*, ¶27.

Although the overbreadth doctrine does not apply to Pocian's Second Amendment challenge, the State nevertheless will explain why the felon-in-possession statute is valid on its face and why the statute may be applied to individuals convicted of nonviolent felonies without running afoul of the Second Amendment. The State will then address Pocian's specific claim that the statute is unconstitutional as applied to him.

I. THE FELON-IN-POSSESSION STATUTE IS FACIALLY VALID UNDER THE SECOND AMENDMENT.

The legal underpinning for Pocian's challenges to the felon-in-possession statute comes from the decisions of the United States Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008), which held that the Second Amendment confers an individual right to keep and bear arms, and *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010), which held that the Second Amendment is applicable to the States under the Fourteenth Amendment. Neither of those decisions supports an argument that Wisconsin's felon-in-possession statute is unconstitutional on its face, for two reasons.

First, legislative enactments are generally entitled to a presumption of constitutionality. *State v. Cole*, 2003 WI 112, ¶11, 264 Wis. 2d 520, 665 N.W.2d 328. In light of that "strong presumption," a party challenging the constitutionality of a statute must "prove that the statute is unconstitutional beyond a reasonable doubt." *Id*. In a facial challenge to the constitutionality of a statute, the "'challenger must establish, beyond a reasonable doubt, that there are no possible applications or interpretations of the statute which would be constitutional.'" *Id*., ¶30 (quoted source omitted).

Pocian does not argue, nor could he reasonably argue, that there are no possible applications of felon-in-possession statute that would be constitutional. To the contrary, he argues that the statute is unconstitutional because it does not distinguish between predicate felonies that involve the use of force and violence and those that are nonviolent. *See* Pocian's brief at 13. Pocian's tacit concession that the statute may be applied to violent felons dooms his facial challenge because it acknowledges that there are many felons to whom the statute may be applied without violating the Second Amendment.

Second, while the Supreme Court in *Heller* recognized that the Second Amendment confers an individual right to keep and bear arms, the Court explicitly stated that its decision does not cast doubt on the constitutionality of felon-in-possession statutes. The court said:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in

> any manner whatsoever and for whatever purpose. For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, *nothing in our opinion should be taken to cast doubt on 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, or laws imposing conditions and qualifications on the commercial sale of arms.[26]
>
> ---
>
> [26]We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exclusive.

Id. at 626-27 & n.26 (emphasis added; citations omitted).

Pocian dismisses that passage as dictum. *See* Pocian's brief at 8 n.2. However, as he acknowledges, *see id*., the Supreme Court reaffirmed that statement in *McDonald*:

> It is important to keep in mind that *Heller,* while striking down a law that prohibited the possession of handguns in the home, recognized that the right to keep and bear arms is not "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as "prohibitions on the possession of firearms by felons and the mentally ill," "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." We repeat those

> assurances here. Despite municipal respondents' doomsday proclamations, incorporation does not imperil every law regulating firearms.

McDonald, 130 S.Ct. at 3047 (citations omitted) (plurality opinion).[2]

Pocian asserts that "[s]ince *Heller*, a number of judges and commentators have thoughtfully called into question the validity [of] the *Heller* dictum." Pocian's brief at 9 n.2.[3] More relevant,

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[2]Justice Thomas did not join the four justice plurality opinion in *McDonald* because he disagreed with plurality's conclusion that the Second Amendment is made applicable to the States through the Fourteenth Amendment's Due Process Clause. Instead he argued that the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause. *See McDonald*, 130 S.Ct. at 3059 (Thomas, J., concurring). Because Justice Thomas was a member of the *Heller* majority, and because his disagreement with the *McDonald* plurality concerned only the rationale for applying the Second Amendment to the States, the fact that the plurality opinion in *McDonald* garnered only four votes does not mean that *Heller* passage regarding the validity of felon-in-possession statutes does not continue to represent the view of a majority of the Court.

[3]In support of that assertion, Pocian's brief cites a law review article written by Professor Carlton Larson. Pocian's brief at 9 n.2. While Professor Larson examined the historical basis for *Heller*'s pronouncement, he also stated that

> [a]lthough these exceptions are arguably dicta, they are dicta of the strongest sort. The Court describes these exceptions as "presumptively lawful regulatory measures," and it is hard to imagine the Court invalidating them in a future case. For all practical purposes, these issues have been decided—and decided in favor of constitutionality.

however, is the fact that, since *Heller*, nine federal courts of appeals have addressed facial challenges to the federal felon-in-possession statute, 19 U.S.C. § 922(g)(1), and all but one of those courts have found the *Heller* language dispositive. *See United States v. Barton*, 633 F.3d 168, 170-72 (3rd Cir. 2011); *United States v. Rozier*, 598 F.3d 768, 770-71 (11th Cir.) (per curiam), *cert. denied*, 130 S.Ct. 3399 (2010); *United States v. Vongxay*, 594 F.3d 1111, 1114-15 (9th Cir.), *cert. denied*, 131 S.Ct. 294 (2010); *United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir.), *cert denied*, 131 S.Ct. 158 (2010); *United States v. Stuckey*, 317 Fed. Appx. 48, 50 (2nd Cir. 2009); *United States v. Khami*, 362 Fed. Appx. 501, 507-08 (6th Cir.), *cert. denied*, 130 S.Ct. 3345 (2010); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir.), *cert. denied*, 130 S.Ct. 1686 (2009); *United States v. Irish*, 285 Fed. Appx. 326, 327 (8th Cir. 2008).[4]

Carlson F.W. Larson, *Four Exceptions in Search of a Theory*: District of Columbia v. Heller *and Judicial* Ipse Dixit, 60 Hastings L.J. 1371, 1372 (2009) (14:15).

[4]The outlier is the Fourth Circuit. In *United States v. Pruess*, 416 Fed. Appx. 274 (4th Cir. 2011), the Fourth Circuit rejected the district court's conclusion that the *Heller* language foreclosed a facial challenge to the federal felon-in-possession statute. Instead, it remanded the case to the district court so that court could perform the two-prong analysis set forth in *United States v. Chester,* 628 F.3d 673 (4th Cir. 2010), a case involving a challenge to the federal statute prohibiting firearms possession by persons convicted of a misdemeanor crime of domestic violence. Under that analysis, a district court "must first determine whether the right sought to be regulated is within the scope of the Second Amendment's protection—that is '[i]n accordance with the historical understanding of the scope of the right.'" *Pruess*, 416 Fed. Appx. at 275. If the district court finds that the right is protected by the Second Amendment, the court must then apply intermediate scrutiny to determine whether there is a reasonable fit between the challenged regulation and a substantial government objective. *Id*.

In *McCane*, for example, the Tenth Circuit relied on the *Heller* language when it summarily rejected the defendant's challenge to the felon-in-possession statute.

> McCane first argues that in light of the Supreme Court's decision in *Heller,* in which the Court held that the Second Amendment provides an individual with a right to possess and use a handgun for lawful purposes within the home, 128 S.Ct. at 2822, § 922(g) violates the Second Amendment. The Supreme Court, however, explicitly stated in *Heller* that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." 128 S.Ct. at 2816–17; *see also United States v. Anderson,* 559 F.3d 348, 352 & n. 6 (5th Cir.2009) (rejecting the argument that § 922(g) is unconstitutional in light of *Heller*).

McCane, 573 F.3d at 1047.

The federal courts of appeals have not agreed on whether the passage in *Heller* is dicta. They do agree, however, that regardless of how that language is characterized, it forecloses the argument that a felon-in-possession statute is facially invalid under the Second Amendment. As the Third Circuit has explained:

> Barton argues that the Supreme Court's discussion of the presumptive lawfulness of felon gun dispossession statutes is mere dicta. . . . This argument is not without force, as three of our sister courts of appeals have characterized the "presumptively lawful" language in *Heller* as dicta. *See United States v. Scroggins,* 599 F.3d 433, 451 (5th Cir. 2010); *United States v. McCane,* 573 F.3d 1037, 1047 (10th Cir. 2009) (Tymkovich, J., concurring); (en banc). Even so, these courts relied on the *Heller* "dicta" to reaffirm the constitutionality of § 922(g)(1).

> *See Skoien,* 614 F.3d at 639; *Scroggins,* 599 F.3d at 451; Moreover, two circuit courts of appeals have recognized that "[t]o the extent that this portion of *Heller* limits the Court's opinion to possession of firearms by law-abiding and qualified individuals, it is not dicta." *United States v. Rozier,* 598 F.3d 768, 771 n. 6 (11th Cir. 2010); *see also United States v. Vongxay,* 594 F.3d 1111, 1115 (9th Cir. 2010) ("Courts often limit the scope of their holdings, and such limitations are integral to those holdings.").
>
> We agree with the Second and Ninth Circuits that *Heller*'s list of "presumptively lawful" regulations is not dicta. As we understand *Heller,* its instruction to the District of Columbia to "permit [Heller] to register his handgun [and to] issue him a license to carry it in the home," was not unconditional. *See Heller,* 554 U.S. at 647, 128 S.Ct. 2783. Rather, it was made expressly contingent upon a determination that Heller was not "disqualified from the exercise of Second Amendment rights." *Id.* The District of Columbia could comply with the Supreme Court's holding either: (1) by finding that Heller was "disqualified from the exercise of Second Amendment rights" under a "presumptively lawful" regulation (such as a felon dispossession statute); or (2) by registering Heller's handgun and allowing him to keep it operable in his home. *Id.* Accordingly, the Supreme Court's discussion in *Heller* of the categorical exceptions to the Second Amendment was not abstract and hypothetical; it was outcome-determinative.

Barton, 633 F.3d at 171-72.

In *Khami*, the Sixth Circuit explained why, even though it deemed the passage in *Heller* dicta, *Heller* nevertheless required rejection of the defendant's Second Amendment challenge to the felon-in-possession statute.

> "[This Court has] noted that [we] are obligated to follow Supreme Court dicta, particularly when there is no substantial reason for disregarding it, such as age or subsequent statements undermining its rationale." *United States v. Marlow,* 278 F.3d 581, 588 n. 7 (6th Cir.2002) (citing *Gaylor v. United States,* 74 F.3d 214, 217 (10th Cir.1996) ("this court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements"); *accord McCoy v. Mass. Inst. of Tech.,* 950 F.2d 13, 19 (1st Cir.1991) ("federal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings . . ."). The dicta in *Heller* carries significant weight in our analysis, especially since Defendant appears to be raising a facial challenge to this statute, which would require the Defendant to argue that the felon-in-possession statute is unconstitutional as applied to all felons covered by the statute. *See United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) (in a facial challenge, "the challenger must establish that no set of circumstances exists under which the Act would be valid.").

Khami, 362 Fed. Appx. at 508. The court concluded that because "*Heller* indicates that its holding does not bring into question the constitutionality of § 922(g)(1), and this Court has not been presented with any convincing argument that its dicta should not be very persuasive in this case," the defendant's challenge to the statute lacked merit. *Id.*

The Eleventh Circuit found that it made no difference whether or not the *Heller* language is characterized as dicta, because in either case that language was dispositive.

> Rozier argues that this language in *Heller* is merely dicta and we should not give it full weight of authority. First, to the extent that this portion of *Heller* limits the Court's opinion to possession of firearms by *law-abiding* and *qualified* individuals, it is not dicta. *See Denno v. Sch. Bd. of Volusia Cty., Fla.,* 218 F.3d 1267, 1283 (11th Cir.2000) ("*Dictum* may be defined as a statement *not necessary* to the decision and having no binding effect." (emphasis added)). Second, to the extent that this statement is superfluous to the central holding of *Heller,* we shall still give it considerable weight. *See Peterson v. BMI Refractories,* 124 F.3d 1386, 1392 n. 4 (11th Cir.1997) ("[D]icta from the Supreme Court is not something to be lightly cast aside.").

Rozier, 598 F.3d at 771 n.6; *see also*, *United States v. Miller*, 604 F.Supp.2d 1162, 1167 (W.D. Tenn. 2009) (stating with regard to *Heller* that "[i]t would be disingenuous . . . to claim that a clear statement of law from the highest court of the land, though announced in dicta, amounts to no more than a casual suggestion"); *cf.*, *Zarder v. Humana Ins. Co.,* 2010 WI 35, ¶58, 324 Wis. 2d 325, 782 N.W.2d 682 (court of appeals may not dismiss language from a Wisconsin Supreme Court opinion as dicta).

Pocian suggests that this court should apply the analysis used by the Seventh Circuit in *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011), to analyze the constitutionality of the felon-in-possession statute. *See* Pocian's brief at 7-8. Under that analysis, the first question is whether the activity is "categorically unprotected by the Second Amendment." *Ezell*, 651 F.3d at 704. If it is not, the court applies heightened scrutiny to the law. *Id*. at 706.

The ordinance challenged in *Ezell* "mandate[d] one hour of range training as a prerequisite to lawful gun ownership, yet at the same time prohibit[ed] all firing ranges in the city." *Id*. at 689-90. Because the court found that target practice was not "wholly outside the Second Amendment as it was understood when incorporated as a limitation on the States," the court applied heightened scrutiny to the ordinance. *Id*. at 706.

The ordinance at issue in *Ezell* did not involve one of the laws enumerated in *Heller*, nor was it remotely similar to one of those laws. Laws prohibiting felons from possessing guns, in contrast, are one of the enumerated exceptions in *Heller*. For that reason, even if this court were to conclude that *Ezell* provides the appropriate method for analyzing Second Amendment challenges, there is no need in this case to proceed to the second step of an *Ezell*-type analysis.

One of the cases cited with approval by *Ezell*, *see id*. at 703-04, the Third Circuit's decision in *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010), *cert. denied*, 131 S.Ct. 958 (2011), makes that point. In *Marzzarella*, the court considered the constitutionality of the federal statute that prohibits possession of a handgun with an obliterated serial number. *Id*. at 87. The court held that *Heller* "suggests a two-pronged approach to Second Amendment challenges. First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." *Id*. at 89. "If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny." *Id*.

With respect to the first prong of the analysis, the Third Circuit noted that *Heller* held that "the right protected by the Second Amendment is not unlimited." *Id*. at 90. The court noted that under *Heller*, the right does not extend to all types of weapons, but "only to those typically possessed by law-abiding citizens for lawful purposes." *Id*. (citing *Heller*, 554 U.S. at 625). The court also noted that *Heller* listed "several other valid limitations on the right similarly derived from historical prohibitions," such as the prohibition on the possession of firearms by felons, as presumptively lawful regulatory measures. *Id*. at 91.

The Third Circuit concluded that the regulatory measures identified in *Heller* as "presumptively lawful" constitute "exceptions to the Second Amendment guarantee." *Id*. at 91. The court explained:

> We recognize the phrase "presumptively lawful" could have different meanings under newly enunciated Second Amendment doctrine. On the one hand, this language could be read to suggest the identified restrictions are presumptively lawful because they regulate conduct outside the scope of the Second Amendment. On the other hand, it may suggest the restrictions are presumptively lawful because they pass muster under any standard of scrutiny. Both readings are reasonable interpretations, but we think the better reading, based on the text and the structure of *Heller,* is the former – in other words, that these longstanding limitations are exceptions to the right to bear arms. Immediately following the above-quoted passage, the Court discussed "another important limitation" on the Second Amendment-restrictions on the types of weapons individuals may possess. *Heller,* 128 S.Ct. at 2817. The Court made clear that

> restrictions on the possession of dangerous and unusual weapons are not constitutionally suspect because these weapons are outside the ambit of the amendment. ("[T]he Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes. . . ."). By equating the list of presumptively lawful regulations with restrictions on dangerous and unusual weapons, we believe the Court intended to treat them equivalently – as exceptions to the Second Amendment guarantee.

Id. (footnote omitted).

The California Court of Appeal similarly has concluded that a court need not engage in a means-ends analysis with regard to the firearms prohibitions enumerated in *Heller*. *See People v. Delacy*, 122 Cal. Rptr. 3d 216 (Cal. Ct. App. 2011), *petition for cert. filed*, 80 U.S.L.W. 3117 (U.S. Sept. 6, 2011) (No. 11-290). The court explained why the approach taken by the Seventh Circuit in *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc), *cert denied*, 131 S.Ct. 1674 (2011), in a case involving a challenge to the federal law prohibiting gun possession by persons convicted of misdemeanor crimes of domestic violence, an offense not specifically mentioned in *Heller*, is inappropriate when determining whether the offenses listed in *Heller* are valid under the Second Amendment.

> We conclude the *Skoien* approach gives too little weight to the "presumptively lawful" language of *Heller*. While *Skoien* is certainly correct the court intended to make clear through this language that its decision was limited in scope, the court was also intent on making clear *what those limits are.* There is no ambiguity in the language; *Heller*

> states, "*nothing in our opinion should be taken to cast doubt* on longstanding prohibitions on the possession of firearms by felons and the mentally ill" or other types of traditional weapons regulation. As *Marzzarella* held, *Heller* intended by this language to put certain recognized prohibitions outside the ambit of the Second Amendment right it had delineated. Emphasizing these limits, *Marzzarella* described the right outlined in *Heller* as "the right of *law-abiding* citizens to possess non-dangerous weapons for self-defense in the home." Stated otherwise, the right announced in *Heller* does not render invalid otherwise lawful statutes of the types enumerated.

Delacy, 122 Cal. Rptr. 3d at 223 (citations and footnote omitted).

In the face of a substantial body of case law affirming the validity of felon-in-possession statutes, Pocian does not cite a single post-*Heller* case (or pre-*Heller* case, for that matter) in which a court has held that a felon-in-possession statute violates the Second Amendment. Pocian has not carried his burden of demonstrating that Wisconsin's felon-in-possession statute is facially invalid under the Second Amendment.

II. THE FELON-IN-POSSESSION STATUTE IS CONSTITUTIONAL AS APPLIED TO NONVIOLENT FELONS, INCLUDING POCIAN.

A. The statute is constitutional as applied to nonviolent felon's based on *Heller*'s categorical exclusion of felons from those entitled to the rights guaranteed by the Second Amendment.

Since *Heller*, there have been many cases in which the defendant has raised an as-applied challenge to a felon-in-possession statute under the Second Amendment. The State's research has not yielded a single case in which the court has agreed with that claim. *See United States v. Ligon*, 2010 WL 4237970, *5 (D. Nev. 2010) ("The court is unable to find any case where it was held that § 922(g)(1) – or any other subsection of § 922(g) – was unconstitutional as applied.").

Some courts have rejected as-applied challenges based on *Heller*'s pronouncement about the validity of felon-in-possession statutes. In *United States v. Schultz*, 2009 WL 35225 (N.D. Ind. 2009), for example, the court rejected an as-applied challenge brought by a defendant whose felony conviction was for failure to pay child support.

> The Supreme Court's clear instructions make irrelevant the fact (as asserted by the Defendant) that the statute in this case is more restrictive than the laws at issue in *Heller*, or that the Defendant's Class D felony conviction was for a non-violent offense (failure to pay child support), is twenty years old, and resulted in a term of

> probation. The Supreme Court did not make an exception for certain kinds of felony convictions or certain circumstances. There is no wiggle room to distinguish the present case from the Supreme Court's blanket statement.

Id. at *2.

In *People v. Dornin*, 2011 WL 1085310 (Cal. Ct. App. 2011), the California Court of Appeal rejected an as-applied challenge to that state's felon-in-possession statute brought by a defendant whose felony convictions were for forgery, commercial burglary, and evading arrest in a motor vehicle. *Id*. at *2. Based on *Heller*'s categorical language, the court declined to apply heightened scrutiny to the application of the statute.

> Defendant nevertheless argues the statutes he was convicted of violating do not withstand strict scrutiny or intermediate scrutiny since they were not narrowly tailored to a compelling interest or substantially related to an important governmental objective. He claims the statutes are overbroad as applied to defendant because the purpose of the statutes is the prevention of gun-related violence. Since defendant is a nonviolent felon, the statutes barring gun and ammunition possession by felons should not apply to him.
>
> We disagree. The *Heller* court, however, specifically declined to determine which level of scrutiny should apply to restrictions on an individual's right to bear arms. Instead, the court concluded that certain "longstanding prohibitions" simply survive Second Amendment scrutiny. [The California statute] prohibiting felons, including nonviolent felons, from bearing arms, fall within this category of prohibitions

> which are permitted despite the right to bear arms afforded by the Second Amendment.

Id. at *4 (citation omitted.)[5]

At least two federal courts of appeals have held that felon-in-possession statutes may be applied to nonviolent felons without violating the Second Amendment. Several years before *Heller*, the Fifth Circuit held that the Second Amendment creates an individual right to possess and bear firearms. *See United States v. Emerson,* 270 F.3d 203, 260 (5th Cir. 2001). The Fifth Circuit subsequently upheld the validity of the federal felon-in-possession statute against a Second Amendment. *See United States v. Everist*, 368 F.3d 517, 519 (5th Cir. 2004). In *Everist*, the court discussed why felon-in-possession statutes need not be limited to individuals whose felonies were violent.

> Irrespective of whether his offense was violent in nature, a felon has shown manifest disregard for the rights of others. He may not justly complain of the limitation on his liberty when his possession of firearms would otherwise threaten the security of his fellow citizens. *See* [*Emerson*, 270 F.3d at 261] (noting that "it is clear that felons, infants and those of unsound mind may be prohibited from possessing firearms"). Accordingly,

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[5]In addition to relying on the *Heller* language, the court also discussed the defendant's individual history, noting that "[e]ven though defendant does not have a history of committing violent felony offenses, he does have a history of committing felony crimes, including evading arrest in a motor vehicle and commercial burglary, as well as a history of committing misdemeanor offenses, which include fighting in public and threatening to commit a crime with intent to terrorize. Such crimes demonstrate a serious disregard for the law, as well as moral depravity, a propensity for violence, and dishonesty." *Dornin*, 2011 WL 1085310 at *4.

> § 922(g)(1) represents a limited and narrowly tailored exception to the freedom to possess firearms, reasonable in its purposes and consistent with the right to bear arms protected under the Second Amendment. Everist's constitutional challenge to fails.

Id.

In a post-*Heller* case, the Fifth Circuit held that *Everist* remained an accurate statement of the law. *See Scroggins*, 599 F.3d at 451 (noting that "[p]rior to *Heller*, this circuit had already recognized an individual right to bear arms, and had determined that criminal prohibitions on felons (violent or nonviolent) possessing firearms did not violate that right," and that "we have reaffirmed our prior jurisprudence on this point since *Heller* was decided"). Similarly, in *Vongxay*, the Ninth Circuit cited *Everist* with approval when it held that the federal felon-in-possession statute was constitutional as applied to a nonviolent felon. *See Vongxay*, 594 F.3d at 1117 (stating that pre-*Heller* Fifth Circuit cases "are particularly instructive for post-*Heller* analysis because, even before *Heller*, the Fifth Circuit held that the Second Amendment guarantees an individual right to possess guns").

Vongxay rejected an as-applied challenge brought by a defendant whose felony convictions consisted of "three previous, non-violent felony convictions: two for car burglary and one for drug possession." *Id.* at 1114. The Ninth Circuit held that *Heller*'s language about long-standing restrictions on gun possession meant that *Heller* did not render the federal statute unconstitutional. *Id.* at 1115. After discussing *Everist* with approval, the court noted that "to date, 'no court that has examined *Heller* has found

18 U.S.C. § 922(g) constitutionally suspect.'" *Id*. at 1117 (quoted source omitted).

The court then discussed the historical justifications for excluding felons from the right guaranteed by the Second Amendment.

> Denying felons the right to bear arms is also consistent with the explicit purpose of the Second Amendment to maintain "the security of a free State." Felons are often, and historically have been, explicitly prohibited from militia duty.
>
> Finally, we observe that most scholars of the Second Amendment agree that the right to bear arms was "inextricably . . . tied to" the concept of a "virtuous citizen[ry]" that would protect society through "defensive use of arms against criminals, oppressive officials, and foreign enemies alike," and that "the right to bear arms does not preclude laws disarming the unvirtuous citizens (i.e. criminals). . . ." Don B. Kates, Jr., *The Second Amendment: A Dialogue,* 49 Law & Contemp. Probs. 143, 146 (1986); *see also* Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment,* 62 Tenn. L. Rev. 461, 480 (1995) (noting that felons "were excluded from the right to arms" because they were "deemed incapable of virtue").

Id. at 1117-18 (some citations omitted).

The Ninth Circuit acknowledged that "the historical question has not been definitively resolved." *Id*. at 1118. Nevertheless, without applying any form of heightened scrutiny, the court concluded that the federal statute "does not violate the Second Amendment as it applies to Vongxay, a convicted felon." *Id.*

The State believes that these cases rightly concluded that *Heller*'s language precludes as-

applied challenges to felon-in-possession statutes because the regulatory measures identified in *Heller* as "presumptively lawful" constitute "exceptions to the Second Amendment guarantee." *Marzzarella*, 614 F.3d at 91. But even if *Heller* itself does not foreclose outright all as-applied challenges, the application of such statutes to nonviolent felons, including Pocian, does not violate the Second Amendment.

B. The felon-in-possession statute is valid under an intermediate scrutiny analysis as applied to nonviolent felons.

As Pocian notes, *see* Pocian's brief at 7, the Supreme Court in *Heller* rejected the rational basis test but declined to specify the level of judicial scrutiny to be applied to gun laws. *See Heller*, 554 U.S. at 628 n.27, 634-35. Pocian argues that the court should apply strict scrutiny to Wis. Stat. § 941.29. *See* Pocian's brief at 8. However, he does not cite any case that has applied that level of scrutiny to a felon-in-possession statute or any other gun law. *See id.* at 10-11. Moreover, in his motion to dismiss, Pocian asserted that the circuit court should apply intermediate scrutiny to his claim (14:7; A-Ap. 207).

The State's research has discovered only one case in which a court has used strict scrutiny to evaluate an as-applied challenge to a felon-in-possession charge. *See Ligon*, 2010 WL 4237970, *6. It did so, however, as an alternate ground for its decision, after it first held that "strict scrutiny does not apply." *Id*. Even applying strict scrutiny, the court in *Ligon* held that the federal felon-in-

possession was constitutional as applied to the defendant notwithstanding "the fact that neither defendant's history nor his felonies were violent." *Id.* The court held that because courts that have rejected facial Second Amendment challenges to § 922(g)(1) were "aware that many felonies are not violent," "the fact that neither defendant's history nor his felonies were violent does not render § 922(g)(1) unconstitutional as applied to him." *Id.*

Pocian's argument that "[s]trict scrutiny is required," Pocian's brief at 8, is unsupported by any post-*Heller* case law. Other courts that have applied heightened scrutiny to gun laws following *Heller* have used intermediate scrutiny. *See United States v. Chester,* 628 F.3d 673, 682-83 (4th Cir. 2010) (rejecting strict scrutiny and applying intermediate scrutiny to the federal statute prohibiting possessing a firearm after conviction of a misdemeanor crime of domestic violence); *Marzzarella*, 614 F.3d at 96-97 (rejecting strict scrutiny and applying intermediate scrutiny to the federal statute prohibiting possessing a handgun with an obliterated serial number); *United States v. Williams*, 616 F.3d 685 (7th Cir.), *cert. denied*, 131 S.Ct. 805 (2010) (applying intermediate scrutiny in an as-applied challenge to the federal felon-in-possession statute). If this court were to apply a means-end analysis to Pocian's as-applied challenge, it should apply intermediate rather than strict scrutiny.

In *Marzzarella*, the Third Circuit noted that although intermediate scrutiny standards have been stated in differing language, "they essentially share the same substantive requirements. They all require the asserted governmental end to be more than just legitimate, either "significant," "substantial," or "important," and "the fit between the challenged regulation and the asserted

objective be reasonable, not perfect." *Marzzarella*, 614 F.3d at 98. The regulation need not be the least restrictive means of serving the interest, but may not burden the right more than is reasonably necessary. *Id.*; *see also Brandmiller v. Arreola*, 199 Wis. 2d 528, 536, 533, 544 N.W.2d 894 (1996) (under an intermediate scrutiny analysis, the challenged regulation must be narrowly tailored to meet a significant governmental objective); *Williams*, 616 F.3d at 692 (intermediate scrutiny of federal felon-in-possession law requires the government to demonstrate that its objective is an important one and that its objective is advanced by means substantially related to that objective).

In *Williams*, the Seventh Circuit rejected the defendant's as-applied challenge to his felon-in-possession conviction. The court agreed that the government's stated objective of keeping firearms "out of the hands of violent felons, who the government believes are often those most likely to misuse firearms," was an important objective. *Williams*, 616 F.3d at 693. The court concluded that in light of the violent nature of the defendant's predicate felony, the government had met its burden of showing that its means was substantially related to that objective. *Id*. at 692-93. In dictum, the court added that "§ 922(g)(1) may be subject to an overbreadth challenge at some point because of its disqualification of all felons, including those who are non-violent," but that "that is not the case for Williams." *Id*. at 693.

In a case decided after *Williams*, the Seventh Circuit explained why it is permissible to prohibit nonviolent felons from possessing firearms as well. *See United States v. Yancey*, 621 F.3d 681 (7th Cir. 2010). The issue in *Yancey* was the constitutionality of the federal law that prohibits gun possession by habitual drug users.

The court observed that "[k]eeping guns away from habitual drug abusers is analogous to disarming felons." *Id*. at 684 The court noted it had "already concluded that barring felons from firearm possession is constitutional." *Id*. (citing *Williams,* 616 F.3d at 693-94). Although scholars "continue to debate the evidence of historical precedent for prohibiting criminals from carrying arms," the court said, "it cannot be disputed that states were regulating firearms as early as the nineteenth century." *Id*. Accordingly, the court stated, "[w]hatever the pedigree of the rule against even nonviolent felons possessing weapons (which was codified in federal law in 1938), most scholars of the Second Amendment agree that the right to bear arms was tied to the concept of a virtuous citizenry and that, accordingly, the government could disarm 'unvirtuous citizens.'" *Id*. (quoting *Vongxay,* 594 F.3d at 1118).

"As we've explained in a different context," the *Seventh Circuit* said, "most felons are nonviolent, but someone with a felony conviction on his record is more likely than a nonfelon to engage in illegal and violent gun use." *Id*. (citing *United States v. Lane,* 252 F.3d 905, 906 (7th Cir. 2001)). "Thus, while felon-in-possession laws could be criticized as 'wildly overinclusive' for encompassing nonviolent offenders, every state court in the modern era to consider the propriety of disarming felons under analogous state constitutional provisions has concluded that step to be permissible." *Id*. (citing Adam Winkler, *Scrutinizing the Second Amendment,* 105 Mich. L. Rev. 683, 721 (2007)).

Pocian acknowledges that Wisconsin's felon-in-possession statute serves an important governmental interest in public safety. *See* Pocian's brief at 12. That concession is

appropriate. *See State v. Coleman*, 206 Wis. 2d 199, 210, 556 N.W.2d 701 (1996) ("the legislative purpose behind § 941.29(2) is the protection of public safety. . . . Specifically, § 941.29(2) is aimed at keeping firearms away from felons, because the legislature has determined that felons are more likely to misuse firearms."); *State v. Thiel*, 188 Wis. 2d 695, 707-08, 524 N.W.2d 641 (1994) ("Section 941.29, Stats., was not enacted to punish convicted felons but rather to protect public safety. The restriction on a convicted felon's ability to possess firearms comes about incident to firearm regulation out of concerns of public safety."). The State will focus its discussion, therefore, on the fit between the statute's objective and its prohibition on firearm possession by all felons, violent or nonviolent.

In *State v. Thomas*, 2004 WI App 115, 274 Wis. 2d 513, 683 N.W.2d 497, this court rejected a variety of constitutional challenges to Wis. Stat. § 941.29 brought by a defendant whose prior felony had been for fleeing an officer, a conviction that "did not involve violence." *See id.* at ¶¶3, 30. Thomas argued that the "status of [a] felon is not necessarily rationally related to a proclivity to violence or endangering safety which arguably might underlie the gun possession law." *Id.*, ¶30.

Applying a rational basis analysis, the court rejected that claim. *Id.* at ¶¶30-36. While that holding is not controlling when applying heightened scrutiny, the *Thomas* court's discussion is nonetheless informative.

The court stated that "[a]lthough Wisconsin courts have not addressed this precise issue, we need not look far to find both federal and state cases that have consistently found a rational relationship between statutes forbidding

possession of firearms by any and all convicted felons and the legitimate state purpose of protecting the public from the misuse of firearms." *Id*., ¶31. The court discussed several such cases, including the decision of the United States Supreme Court in *Lewis v. United States,* 445 U.S. 55 (1980), which upheld the prohibition in 18 U.S.C. § 1202(a)(1) against the possession of firearms by a person convicted of any felony. The court noted that in *Lewis*, the Supreme Court "rejected the claim that a conflict existed between due process and the provision that did not distinguish between violent and nonviolent felonies." *Thomas*, 274 Wis. 2d 513, ¶32.

Thomas observed that the Supreme Court specifically found in *Lewis* that "Congress sought to rule broadly – to keep guns out of the hands of those who have demonstrated that they may not be entrusted with a firearm without becoming a threat to society." *Id*. The court further noted that in *Lewis*, the Supreme Court held that "'Congress could rationally conclude that any felony conviction . . . is a sufficient basis on which to prohibit the possession of a firearm" and that "[t]his Court has recognized repeatedly that a legislature constitutionally may prohibit a convicted felon from engaging in activities far more fundamental than the possession of a firearm.'" *Id*. (quoting *Lewis*, 455 U.S. at 66). One of the activities to which the Court was referring is voting. *See Lewis*, 455 U.S. at 66 (citing *Richardson v. Ramirez*, 418 U.S. 24 (1974).

Thomas also quoted extensively from the decision of the Maine Supreme Judicial Court in *State v. Brown,* 571 A.2d 816 (Me. 1990). In *Brown*, the court rejected a challenge to Maine's felon-in-possession statute under the state constitutional right to bear arms brought by a

defendant whose prior felony was for "operating a vehicle after revocation of the license of a habitual motor vehicle offender." *Thomas*, 274 Wis. 2d 513, ¶34. The Maine Supreme Judicial Court explained why the felon-in-possession statute may be properly applied to those convicted of nonviolent felonies.

> Statutes . . . prohibiting possession of firearms by a felon regardless of the nature of the underlying felony, have never been found constitutionally deficient. These statutes bear a rational relationship to the legitimate governmental purpose of protecting the public from the possession of firearms by those previously found to be in such serious violation of the law that imprisonment for more than a year has been found appropriate. . . . One who has committed any felony has displayed a degree of lawlessness that makes it entirely reasonable for the legislature, concerned for the safety of the public it represents, to want to keep firearms out of the hands of such a person.
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> * * *
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> Labeling his preexisting felony status the product of a "nonviolent" crime obscures its seriousness as well as the very real threat to public safety created by his continued misconduct, a threat that might well be aggravated by the availability of a firearm. Defendant has demonstrated a disregard for the law to such an extent that, as applied to him, a legislative determination that he is an undesirable person to possess a firearm is entirely reasonable and consonant with the legitimate exercise of police power for public safety.

Id. at ¶35 (quoting *Brown*, 571 A.2d at 821).

As these cases explain, an individual who has committed a felony has demonstrated a high

level of disregard for the law and a heightened threat to public safety by continued misconduct, regardless of whether that felony was violent. As the Seventh Circuit has recognized, "most felons are nonviolent, but someone with a felony conviction on his record is more likely than a nonfelon to engage in illegal and violent gun use." *Yancey*, 621 F.3d at 684. Accordingly, applying the felon-in-possession statute to all felons, including those whose prior offenses were nonviolent, withstands intermediate scrutiny because application of the statute to nonviolent felons is substantially related to the statute's public safety objective.

C. The statute is constitutional as applied to Pocian.

Turning to the facts of this case, the State again notes that Pocian does not dispute that the felon-in-possession statute serves an important governmental interest in public safety. *See* Pocian's brief at 12. Under an intermediate scrutiny analysis, therefore, the question is whether barring Pocian from possessing a firearm is substantially related to that objective. *See Williams*, 616 F.3d at 693.

Pocian says that the answer to that question is "no" because his only felony convictions are for a nonviolent crime, forgery, and because those convictions occurred twenty-five years ago, when he was a teenager. *See* Pocian's brief at 10-12. At first blush, he presents a sympathetic case. However, Pocian's felony convictions did not arise from a momentary lapse in judgment. According to the criminal complaint, Pocian and a friend, Keith

Fritz, asked a fourteen-year-old girl for a book of blank checks she had stolen (14:12). Over a period of three weeks, Pocian forged eight of those stolen checks (14:12). Pocian and Fritz split the money and went to Florida for a vacation, where they spent it all (*id.*). Pocian was ordered to pay restitution of $1,462.50 (14:13).[6]

Pocian asserts that "[s]ince his conviction in 1986, Pocian has been an upstanding citizen," and that he has "stayed out of trouble, and peaceably pursued his passion—hunting." Pocian's brief at 2. His assertion that he has "stayed out of trouble" since his 1986 conviction is not entirely accurate, as he stated in his motion to dismiss that he was convicted in June of 1988 of disorderly conduct (14:2; A-Ap. 202). Pocian's motion did not describe the circumstances that led to that conviction.

More importantly, while Pocian may not have been convicted of any crimes since 1988, it is far from clear that he has been a law-abiding citizen. Pocian stated in his motion to dismiss that "[h]unting is a family tradition, passed on by Pocian's father to Pocian, who has since passed the passion for hunting to his two adult children. The Department of Natural Resources has annually granted Pocian a deer hunting license, both before and after his felony conviction" (*id.*).

Although Pocian's motion is conspicuously vague on the matter, it is difficult to avoid drawing the inference that Pocian has regularly

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[6]Pocian states in his brief that he was "sentenced to three years' probation and ordered to pay back all the money that was taken." Pocian's brief at 1. The judgment of conviction recites that the court imposed concurrent sentences of three years on each of the three forgery counts, stayed those sentences, and placed Pocian on three years of probation (14:11).

hunted, presumably with a firearm, since he was convicted of a felony in 1986. If that is the case, that means that Pocian has repeatedly flouted the felon-in-possession statute, which was on the books at the time of his felony conviction, *see* Wis. Stat. § 941.29(1)(a) (1985-86), and has continued to prohibited him from possessing firearms ever since.

Pocian could not have reasonably believed during that period that he had a constitutional right to possess a firearm notwithstanding his felony conviction. The State has been unable to find any pre-*Heller* Wisconsin decision that suggested that the Second Amendment guarantees an individual's right to keep and bear arms. Prior to *Heller*, the Seventh Circuit had expressly rejected the argument that the Second Amendment provides an individual right to possess arms. *See Skoien*, 587 F.3d at 806-07 (citing *Gillespie v. City of Indianapolis,* 185 F.3d 693 (7th Cir. 1999)). Indeed, no federal court of appeals held that the Second Amendment confers an individual right to keep and bear arms until the Fifth Circuit did so in 2001 in *Emerson*. *See Emerson*, 270 F.3d at 227 ("In undertaking this analysis, we are mindful that almost all of our sister circuits have rejected any individual rights view of the Second Amendment."). And, as discussed above, no court in the post-*Heller* era has found that a felon-in-possession statute violates the Second Amendment on its face or as applied.

Pocian's claim that he has a constitutional right to possess a firearm notwithstanding his felony convictions raises important questions that Pocian does not attempt to answer. What other "nonviolent" felonies should be exempted from the prohibition against firearm possession by a

convicted felon? Theft? A theft may be nonviolent – if force or a threat of force is used, the offense is a robbery, *see* Wis. Stat. § 943.32(1) – but it is a felony if the value of the property stolen exceeds $2,500. *See* Wis. Stat. § 943.20(3)(bf). Are persons convicted of nonviolent thefts constitutionally entitled to carry a firearm? What about burglary? A burglary of a business that is closed for the night or of an unoccupied motor home may be nonviolent, but it is a felony. *See* Wis. Stat. § 943.10(1m). Is someone who has been convicted of a burglary that did not involve any violence constitutionally entitled to possess a firearm?

Pocian also finds it significant that it has been twenty five years since he was convicted of a felony. *See* Pocian's brief at 12. But how much time must pass before the Second Amendment requires that a convicted felon regain the right to possess a firearm? Five years? Ten years? Twenty years? Pocian does not say.

The answers to those questions are important. If this court were to agree with Pocian, individuals whose felony convictions were for crimes other than forgery and whose convictions occurred less than twenty-five years previously doubtless will claim that they, too, have a Second Amendment right to carry a firearm notwithstanding their disqualifying felony conviction. But Pocian does not explain how a court should judge their claims.

There is procedure by which convicted felons may seek a determination that they do no longer present a sufficient risk to society that they may carry a firearm. The right to possess a firearm may be restored by a gubernatorial pardon. *See*

Wis. Stat. § 941.29(5)(a).[7] Pocian contends that the pardon power does not provide a "meaningful" opportunity for felons to regain their right to keep and bear arms because "only" 604 pardons were granted between 1979 and 2003. Pocian's brief at 15 & n.15 (footnote omitted) (citing Donald Leo Bach, *To Forgive, Divine*: *The Governor's Pardoning Power*, Wis. Lawyer, Feb. 2005).

That number says little about the likelihood that someone in Pocian's situation would be granted a pardon. The article cited by Pocian lists a number of factors that are considered by the governor and the pardon advisory board in deciding whether to grant executive clemency. *See Bach*, *supra*, at pp. 63-64. They include: 1) "[n]ature of the crime"; 2) "[p]assage of time since conviction"; 3) "[p]unishment served without problem"; 4) "[s]potless conduct since the crime, plus substantial indication of a productive life, that is, a complete turnabout from criminal conduct"; 5) "[n]eed"; 6) "[s]upport of the community"; 7) "[c]hance of returning to criminal

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[7]That subsection provides that the felon-in-possession statute does not apply to an individual who "[h]as received a pardon with respect to the crime or felony specified in sub. (1) and has been expressly authorized to possess a firearm under 18 USC app. 1203." Wis. Stat. § 941.25(a). 18 U.S.C. app. § 1203 relieved from the federal firearms disability "any person who has been pardoned by . . . the chief executive of a State and has expressly been authorized by the . . . chief executive . . . to receive, possess, or transport in commerce a firearm." *See* 78 Op. Atty. Gen. 22, 23 (1989).

18 U.S.C. app. § 1203 was repealed in 1986. *See id*. In 1989, the Wisconsin Attorney General issued a formal opinion to the governor stating that pardons granted after the effective date of the repeal of 18 U.S.C. app. § 1203 give the recipient the right to receive, possess, or transport in commerce firearms unless the pardon expressly provides otherwise. *See* at 26.

conduct"; 8) "[p]osition of the district attorney"; 9) "[p]osition of the judge"; 10) "[i]nput from victims and other people"; and 11) "[s]incerity of the applicant/ attention to the pardon application." *Id*.

Pocian's description of his life since his felony conviction portrays an individual who would appear to have a better chance than most for obtaining a pardon. If he wanted to regain the legal right to carry a firearm, he should have pursued that option rather than waiting until he got caught violating the law and asserting a constitutional defense.

In his brief, Pocian cites a case in which the North Carolina Supreme Court held that that state's felon-in-possession statute was unconstitutional as applied under the North Carolina constitution. *See* Pocian's brief at 11 n.3, citing *Britt v. State*, 681 S.E.2d 320 (N.C. 2009). Like Pocian, Britt's felony convictions were for nonviolent offenses that occurred more than two decades earlier. *See Britt*, 681 S.E.2d at 547. Unlike Pocian, however, Britt did not violate the felon-in-possession statute and raise a constitutional defense to a criminal charge; he brought a civil action seeking a declaration that he had a constitutional right to possess a firearm. *See id*. at 322.[8]

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[8]*Britt* is also distinguishable from this case factually because Britt lawfully possessed a firearm for seventeen years after he finished serving his felony sentence. Britt was convicted in 1979 of felony possession with intent to sell methaqualone and had lawfully possessed a firearm between 1987, when his civil rights, including his right to possess firearms, were restored, and 2004, when the legislature enacted a law prohibiting possession of firearms by felons without regard to the date of conviction or completion of sentence. *See Britt*, 681 S.E.2d at 322-23. The court held that "[b]ased on the facts of plaintiff's crime, his long post-conviction history of respect for the law, the

The North Carolina Supreme Court held that the state felon-in-possession statute was unconstitutional as applied to Britt under the state constitutional right to bear arms. *See id.* at 323. In a dissenting opinion, Justice Patricia Timmon-Goodson observed that Britt's case exemplified the aphorism that hard cases make bad law. *See id.* at 325 (Timmon-Goodson, J., dissenting). Justice Timmon-Goodson observed that while Britt "may be a sympathetic plaintiff," the court's decision "opens the floodgates wide" to "an inevitable wave of individual challenges" to statutory prohibitions on possession of firearms by disqualified persons. *Id.* The proper remedy for Britt and other convicted felons, she wrote, does not come from the judicial branch.

> Although the majority stands up for Mr. Britt and other convicted felons who will now undoubtedly seek judicial exemption from N.C.G.S. § 14-415.1, this is a policy matter and determination best left to the executive or legislative branches. Mr. Britt may seek relief from the General Assembly through contact with individual legislators or from the Governor by way of a conditional or unconditional pardon. *See* N.C. Const. art. III, § 5, cl. 6; N.C.G.S. §§ 13-1 to 13-4. (2007). The majority resists judicial restraint in an effort to fashion an individual exception for Mr. Britt. I believe this Court should properly resist such temptation and affirm the decision of the Court of Appeals.

Id.

Pocian's felony convictions demonstrated a disregard for the law serious enough to warrant

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absence of any violence by plaintiff and the lack of any exception or possible relief from the statute's operation," the statute was "an unreasonable regulation, not fairly related to the preservation of public peace and safety." *Id.* at 323.

its classification by the legislature as a felony. By continuing to hunt after being convicted of three felonies without pursuing the remedy available to him that could have restored his right to lawfully possess a firearm, Pocian has demonstrated an ongoing disregard of the law. The Second Amendment provides no shield for Pocian's violation of the felon-in-possession statute.

CONCLUSION

For the reasons stated above, the court should affirm the order denying Pocian's motion to dismiss.

Dated this 26th day of October, 2011.

J.B. VAN HOLLEN
Attorney General

JEFFREY J. KASSEL
Assistant Attorney General
State Bar No. 1009170

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
kasseljj@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,965 words.

_____
Jeffrey J. Kassel
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 26th day of October, 2011.

_____
Jeffrey J. Kassel
Assistant Attorney General