STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

CASE NO. 2011AP1035-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THOMAS M. POCIAN,

Defendant-Appellant.

REPLY BRIEF 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

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I. **The State Cannot Carry Its Burden Of Demonstrating That Wisconsin's Felon-In-Possession Law Withstands Constitutional Muster In The Face of Pocian's Overbreadth And As-Applied Challenges**.

A. Standards Of Review.

The State concedes that intermediate scrutiny is appropriate. *See* State's Brief at 22, 28. Nevertheless, because Wisconsin's felon-in-possession law invades the core of the Second Amendment right, Pocian continues to assert that strict scrutiny is required; despite the State's arguments to the contrary. *See* Pocian's Brief-In-Chief at 8; State's Brief at 22. Strict scrutiny requires the State to show that its law is narrowly tailored to advance a compelling State interest. *In Re Gwenevere T.*, 2011 WI 30, ¶ 52, 333 Wis. 2d 273, 797 N.W.2d 854.

Even this Court rejects strict scrutiny, it must apply intermediate scrutiny. The Seventh Circuit has already considered the analogous[1] federal felon-in-possession law and required the government to meet intermediate scrutiny. *U.S. v. Williams*, 616 F.3d 685, 692 (2010). Under intermediate scrutiny, the government's 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*.

Further, for clarity's sake, Pocian has brought constitutional challenges to Wisconsin's felon-in-possession statute for being 1) overbroad, in that a substantial number of its applications are unconstitutional; and 2) unconstitutional as applied to Pocian himself, on the facts presented to the Court. The State bears the burden of demonstrating that its law is

[1] The federal counterpart, 18 U.S.C. § 922(g)(1), excludes a number of business-related felonies.

not overbroad under heightened scrutiny. *Williams*, 616 F.3d at 692. Because Pocian also raised an as-applied challenge, heightened scrutiny must still be met, and a court must also not presume that the State has applied the law in a constitutional manner. *Gwenevere*, 2011 WI 30, ¶ 48.

B. Felons Are Not Categorically Barred From The Protections Of The Second Amendment.

The State argues that felons are categorically unprotected by the Second Amendment. *See* State's Brief at 16. Understandably, the State relies heavily on the following dicta from *Heller*, which was made without citation or support, to support its contention: "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons. . ." 554 U.S. at 626.

However, this dicta is historically dubious and must not be interpreted to mean that felons are categorically barred from the protections of the Second Amendment. *See* Pocian's Brief-In-Chief at 8-9 n.2 (Providing a lengthier discussion of the criticisms levied towards the *Heller* dicta). One judge remarked that the *Heller* dicta "[falls] far short of the legal heavy lifting normally required to justify criminally punishing the exercise of an enumerated constitutional right." *U.S. v. Skoien*, 614 F.3d 638, 646 (7th Cir. 2010) (Sykes, J., dissenting).

As evidence of the dubiousness of the *Heller* dicta, if prohibitions on felons possessing firearms are "longstanding," then why was the first federal statute disqualifying all felons from possessing firearms not enacted until 1968? Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 698 (2009). Likewise, Wisconsin's felon-in-possession statute is far from "longstanding"—it was enacted in 1982. This information is important because, as *Heller* recognized, "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them . . ." *Heller*, 554

U.S. at 634-635. In short, there is no evidence[2] to suggest that felons were understood to be outside the scope of the Second Amendment when it was ratified.

The *Heller* majority not only explained that its dicta was merely presumptive, s*ee infra* at 6, but also suggested that the Court would welcome the opportunity to actually explain the dicta's historical basis:

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

Id. at 635. Therefore, contrary to the State's position, individuals who have been convicted of a felony are not, under the historical analyses used by the *Heller* Court and its progeny, unprotected by the Second Amendment. It follows that the Second Amendment protects felons from unconstitutionally overbroad laws.

C. Overbreadth Is A Cognizable Second Amendment Doctrine.

The State argues that the overbreadth doctrine is only available in the First Amendment context. *See* State's Brief at 3. Although the overbreadth doctrine has been generally applied in the First Amendment context, a number of courts have recognized that overbreadth is a cognizable Second Amendment doctrine. *State v. Thomas*, 2004 WI App 115, ¶¶ 19-23, 274 Wis. 2d 513, 683 N.W.2d 497; *U.S. v. Williams*, 616 F.3d 685, 693 (7th Cir. 2010) (the federal analogue "may be subject to an overbreadth challenge at some point because of its

[2] The State, at pages 20 and 24, cites language from two law review articles that contended that the right to keep and bear arms was limited to "virtuous" citizens. Even if these contentions are true, the concept of "virtue" is so dynamic and vague that it renders the concept illusory, especially considering that the scope of an enumerated constitutional right is at issue.

disqualification of all felons, including those who are non-violent . . ..").

This recognition is supported by *Heller* itself, which numerously likened the Second Amendment to the First Amendment:

> There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment's right of free speech was not . . . Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.

Heller, 554 U.S. at 595 (emphasis in original). "Obviously, the [rational basis] test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech . . . or the right to keep and bear arms." *Id*. at 628 n. 27. "Just as the First Amendment protects modern forms of communications . . . the Second Amendment extends [to anything resembling arms], even those that were not in existence at the time of the founding." *Id*. at 582. Similarly: "Like the First, [the Second Amendment] is the very *product* of an interest-balancing by the people . . ." *Id*. at 635 (emphasis in original).

Because the First and Second Amendments share many similarities, it follows that First Amendment doctrines, such as overbreadth, are applicable in the context of the Second Amendment. The Seventh Circuit recognized this:

> Both *Heller* and *McDonald* suggest that First Amendment analogues are more appropriate [than the City of Chicago's posited "undue burden" test] . . . and on the strength of that suggestion, we and other circuits have already begun to adapt First Amendment doctrine to the Second Amendment context . . .

Ezell v. City of Chicago, 651 F.3d 684, 706-707 (7th Cir. 2011) (citations omitted).

The State also argues that Pocian's overbreadth claim fails because there are possible constitutional applications of Wisconsin's felon-in-possession law. *See* State's Brief at 4. However, the State's argument overlooks a second type of facial challenge under "which a law may be overturned as impermissibly overbroad because a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'" *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n. 6 (2008) (citations omitted). Pocian has clearly brought the second type of facial challenge.

Pocian has never argued that there are no possible applications of the felon-in-possession law that would be constitutional; rather, he has maintained that the law is unconstitutional because it does not distinguish between violent and non-violent felons and because its prohibitions extend for a lifetime. *See* Pocian's Brief-in-Chief at 13.

Thus, Pocian's overbreadth claim is not doomed because the felon-in-possession law may be applied constitutionally in some situations. Rather, because Wisconsin's felon-in-possession law disarms all felons completely and permanently, a substantial number of its applications are unconstitutional.

D. Even If This Court Interprets *Heller* To Bar An Overbreadth Challenge, Pocian's As-Applied Challenge Must Be Considered.

The State argues that the *Heller* dicta compels the conclusion that a facial challenge to a felon-in-possession law must fail. *See* State's Brief at 8. However, *Heller* noted that its dicta was merely presumptive: "We identify these **presumptively** lawful

regulatory measures only as examples . . ." *Id*. at 627 n. 26 (emphasis added).

Numerous courts have held that this language from *Heller* does not prevent an as-applied challenge. In *Williams*, a Seventh Circuit panel that included former Justice O'Connor stated:

> [T]he government does not get a free pass simply because Congress has established a "categorical ban"; it still must prove that the ban is constitutional, a mandate that flows from *Heller* itself. *Heller* referred to felon disarmament bans only as "presumptively lawful," which, by implication, means that there must exist the possibility that the ban could be unconstitutional in the face of an as-applied challenge. Therefore, putting the government through its paces in proving the constitutionality of § 922(g)(1) is only proper.

616 F.3d 685, 692 (2010). Putting the government through its paces requires the State to prove, at a minimum, that applying the felon-in-possession law to Pocian advances public safety "by means substantially related to that objective." 616 F.3d at 692.

The Third Circuit agreed: "By describing the felon disarmament ban as "presumptively" lawful, the Supreme Court implied that the presumption may be rebutted." *U.S. v. Barton*, 633 F.3d 168, 173 (3rd Cir. 2011) (internal citations omitted).

The court then explained that a challenger could rebut the presumption by:

> Present[ing] facts about himself and his background that distinguish his circumstances from those of persons historically barred from Second Amendment protections. For instance, a felon convicted of a minor, non-violent crime might show that he is no more dangerous than a typical law-abiding citizen. Similarly, a court might find that a felon whose crime of conviction is decades-old poses no continuing threat to society.

Id. at 174. Pocian, who was convicted of a minor, non-violent crime decades ago, has presented this Court with everything the *Barton* court suggested would rebut the presumption.

E. Pocian Is Distinguishable From All The Challengers Cited By the State.

Furthermore, Pocian is starkly different from the challengers cited by the State. Consider:

The challenger in *Williams* was convicted of three counts of distributing narcotics and one count of possessing narcotics with intent to deliver, along with one count of possessing a firearm as a felon. *Williams*, 616 F.3d at 689. Williams's prior felony was a robbery in which a victim required sixty-five stitches. *Id* at 693.

The challenger in *Rozier* had three prior convictions for delivering cocaine, one prior conviction for delivering marijuana, and one cocaine possession conviction. *U.S. v. Rozier*, 598 F.3d 768, 769 n. 1 (11th Cir. 2010). Police officers executed a search warrant at Rozier's home and "discovered crack cocaine, marijuana, $7,000, and ammunition. A .38 caliber revolver was found buried in a shallow hole in the backyard." *Id*. at 769.

The challenger in *Dornin* had a history of "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." *People v. Dornin*, 2011 WL 1085310, *4 (Cal. App. 4th Dist.)

The challenger in *Everist* was in possession of five guns and had prior felonies for bank robberies. *U.S. v. Everist*, 368 F.3d 517, 518-520. (5th Cir. 2004).

The challenger in *Vongxay* was arrested outside a nightclub known for gang violence in possession of a loaded handgun concealed in his waistband. *U.S. v. Vongxay*, 594 F.3d 1111, 1113 (9th Cir. 2010). Vongxay struggled with officers, who needed a taser to effectuate

Vongxay's arrest. *Id*. at 1113-1114. Vongxay had two prior felony convictions for car burglary and one for drug possession. *Id*. at 1114.

Presented with these factual scenarios, it would not be unreasonable to conclude that these challengers posed a threat to public safety and that a law barring them from possessing a firearm was substantially related to or narrowly tailored[3] to achieve that objective. That is far from the case here.

F. Applying Wisconsin's Felon-In-Possession Law To Pocian Does Not Advance Public Safety.

Wisconsin's felon-in-possession law does not pass constitutional muster because its application to Pocian is neither substantially related to nor narrowly tailored to advance public safety.

Pocian is not a violent felon, nor has he ever shown any propensity to misuse firearms. Pocian was convicted 25 years ago for forging checks while a teenager. His convictions—plural—are for three different checks forged in the same course of conduct and charged in the same complaint. The allegations underlying his convictions contain no suggestions of violence, threats of violence, or the use of weapons. He is, in short, not a violent felon. Thus, the public interest in safety is not advanced by forever prohibiting Pocian from possessing a firearm.

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[3] The State spends nearly three pages of its brief discussing two cases that are wholly irrelevant to Pocian's challenges because they applied a rational-basis test to find a felon-in-possession law constitutional. *See* State's Brief at 25-28 (discussing *State v. Thomas*, 2004 WI App 115, and *State v. Brown*, 571 A.2d 816 (Me. 1990)). The language from these cases provides no guidance to the Court, as almost every firearm regulation would withstand rational-basis scrutiny. The *Heller* Court even remarked that "[D.C.'s] law, like almost all laws, would pass rational-basis scrutiny." 554 U.S. at 628 n. 27. Theoretically, only a law that facially forbade firearm possession by a member of a protected class (like gender or race) would be without a rational basis.

Regarding the State's questions about decisions future courts will have to make about other felons convicted of different crimes with different histories and backgrounds, Pocian places his faith in the judicial branch to carefully balance the peoples' interest in public safety against an individual's constitutional rights on a case-by-case basis.

Also, it is important to note that Pocian stands *accused* of being a felon in possession of a firearm. The State, despite the presumption of innocence, repeatedly asserts, *see* State's Brief at 33 and 35, that Pocian violated the felon in possession statute. The State's language also begs the question—so what? Even if Pocian stood here convicted, his argument is that the felon-in-possession law cannot be constitutionally applied to him. If this law cannot be constitutionally applied to him, it makes no difference what posture the case is in.

Moreover, Pocian's argument is that Wisconsin's felon-in-possession law could not have been applied to him at any time after his convictions for a non-violent felony. Even if he had used a firearm to hunt after his convictions—which requires speculation outside the record (and many felons likely hunt with bows)—his right to do so was enshrined in 1791. Thus, assuming *arguendo* that the State's speculation (that Pocian hunted with a firearm) is true, it is irrelevant.

The State faults Pocian for not seeking a pardon. First, as Pocian stated in his brief-in-chief, pardons are rarely granted. Pocian's Brief-In-Chief at 15 n. 15. Second, leaving pardons as the only method for protecting constitutional rights raises serious equal protection concerns. Two similarly situated individuals seeking pardons from different governors will find themselves subject to different standards of review or practice by the different governors or pardon commissions. Staking constitutional rights to the caprices of political winds is not an appropriate or constitutional method to determine the scope of an individual's rights.

The State also faults Pocian for not seeking declaratory relief prior to being charged criminally. As above, the mechanism Pocian utilizes to challenge the constitutionality of this law is irrelevant to question of whether this law is constitutional as applied to Pocian.

The State stretches and contorts the facts to present Pocian as a gun-toting career criminal. In reality, Pocian committed a financial crime when he was a teenager. He is now a grown man, a law-abiding citizen caught in an unconstitutionally wide net set by the legislature.

CONCLUSION

For the reasons stated above and the reasons stated in Pocian's Brief-In-Chief, this Court should reverse the circuit court's order denying Pocian's motion to dismiss and dismiss this prosecution with prejudice.

Respectfully submitted this 14th day of November, 2011.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. (Rule) § 809.19 for a brief produced with a proportional serif font. The length of this brief is 2,771 words.

Dated this 14th day of November, 2011.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that: (1) I have submitted an electronic copy of this brief, 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.

Dated this 14th day of November, 2011.

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