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COA NO. 67816-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

CITY OF SEATTLE,

Respondent,

v.

WAYNE EVANS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Patrick Oishi, Judge

AMENDED BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENT OF ERROR

The Seattle knife ordinance that appellant was convicted of violating is unconstitutional under the Second Amendment of the United States Constitution and article I, section 24 of the Washington Constitution.

Issue Pertaining to Assignment of Error

Whether appellant's conviction for violating SMC 12A.14.080(B) must be reversed because that ordinance, which prohibits carrying any "dangerous knife" without regard to whether such knife is carried for the purpose of self-defense, violates the constitutional right to bear arms under the Second Amendment of the United States Constitution and article I, section 24 of the Washington Constitution?

B. STATEMENT OF THE CASE

Seattle police officer Michael Conners was on patrol when he saw a car driven by Wayne Evans at 23rd Avenue and East Union Street. 1RP[1] 116-17, 120. After following the car for a few blocks, Officer Conners stopped Evans for speeding. 1RP 120, 128-29. He claimed concern for his safety because he smelled marijuana and noticed furtive movements by Evans and his passenger. 1RP 126-27, 129-30. The officer directed

[1] The verbatim report of proceeding is referenced as follows: 1RP - 9/15/10 and 9/16/10; 2RP - 7/29/11 and 9/23/11.

Evans to exit the vehicle and asked if he had any weapons. 1RP 131, 136-37. Evans said he had a knife in his pocket. 1RP 137. The officer recovered a fixed-blade "kitchen" knife in a plastic sheath. 1RP 137-38. Evans was arrested. 1RP 138. The officer later asked Evans why he carried the knife. 1RP 147. Evans said he carried the knife for protection "because he got jumped . . . out in the Central District." 1RP 147.

The City of Seattle charged Evans in Seattle Municipal Court with the "unlawful use of weapons by knowingly carrying a dangerous knife on his/her person, or knowingly carrying any deadly weapon other than a firearm concealed on his/her person," in violation of SMC 12A.14.080(B). CP 88.

SMC 12A.14.080(B) provides "It is unlawful for a person knowingly to: . . . Carry concealed or unconcealed on his or her person any dangerous knife, or carry concealed on his or her person any deadly weapon other than a firearm[.]"

The ordinance defines "dangerous knife" as "any fixed-blade knife and any other knife having a blade more than three and one-half inches (3 1/2") in length." SMC 12A.14.010(C). "Fixed-blade knife" means "any knife, regardless of blade length, with a blade which is permanently open and does not fold, retract or slide into the handle of the knife, and includes any dagger, sword, bayonet, bolo knife, hatchet, axe, straight-edged razor,

or razor blade not in a package, dispenser or shaving appliance." SMC 12A.14.010(D).

SMC 12A.14.100 sets forth several exceptions to the prohibition:

> The proscriptions of Section 12A.14.080 B relating to dangerous knives shall not apply to:
>
> A. A licensed hunter or licensed fisherman actively engaged in hunting and fishing activity including education and travel related thereto; or
>
> B. Any person immediately engaged in an activity related to a lawful occupation which commonly requires the use of such knife, provided such knife is carried unconcealed; provided further that a dangerous knife carried openly in a sheath suspended from the waist of the person is not concealed within the meaning of this subsection;
>
> C. Any person carrying such knife in a secure wrapper or in a tool box while traveling from the place of purchase, from or to a place of repair, or from or to such person's home or place of business, or in moving from one (1) place of abode or business to another, or while in such person's place of abode or fixed place of business.

The municipal court rejected Evans's argument that the ordinance violated the constitutional right to bear arms. 1RP 98. The case proceeded to trial, where the jury was instructed that it needed to find Evans "carried a dangerous knife on his or her person" in order to convict. CP 81. A jury convicted Evans for the crime of "Unlawful Use of Weapons as charged." CP 71.

The superior court affirmed on appeal. CP 55-56; 2RP 36-38. This Court granted Evans's motion for discretionary review on whether the ordinance violates the constitutional right to bear arms.

C. ARGUMENT

1. THE SEATTLE ORDINANCE PROHIBITING CITIZENS FROM CARRYING KNIVES FOR THE PURPOSE OF SELF-DEFENSE VIOLATES THE CONSTITUTIONAL RIGHT TO BEAR ARMS.

The heart of the constitutional right to bear arms is the ability of citizens to use weapons for the lawful purpose of self-protection. The need for self-defense arises outside the home just as often as it does inside the home. The Seattle ordinance forbidding citizens to carry fixed-blade knives for self-defense in public violates the right to bears arms under the federal and state constitutions. It criminalizes constitutionally protected behavior. Evans's conviction for violating the ordinance must therefore be reversed.[2]

a. Standard of Review

The constitutionality of an ordinance is an issue of law reviewed de novo. Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 114, 937 P.2d 154; 943 P.2d 1358 (1997). The party challenging an ordinance must

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[2] Undersigned counsel would like to acknowledge the contribution of Joshua Kellemen (Associated Counsel for the Accused) for ideas and secondary authority incorporated into this brief.

demonstrate it is unconstitutional beyond a reasonable doubt. City of Spokane v. Douglass, 115 Wn.2d 171, 177, 795 P.2d 693 (1990). This standard is satisfied where the reviewing court is convinced the ordinance is unconstitutional after a "searching legal analysis." School Districts' Alliance for Adequate Funding of Special Educ. v. State, 170 Wn.2d 599, 605, 244 P.3d 1 (2010).

b. The Right To Bear Arms Includes The Right To Bear Knives In Self-Defense Under The Federal 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." The United States Supreme Court recently addressed the right to bear arms in District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).

Heller held the District of Columbia's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense. Heller, 554 U.S. at 635. Heller involved guns, not knives, but Heller's broad definition of what constitutes "arms" under the Second Amendment shows knives likewise qualify as arms.

The definition of "arms" was the same in the 18th century as today. Id. at 581. Colonial-era dictionaries defined the term as "weapons of

offense, or armour of defense" as well as "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." Id. Just as the First Amendment protects modern forms of communications and the Fourth Amendment applies to modern forms of search, "the Second Amendment extends, prima facie, to *all instruments* that constitute bearable arms, even those that were not in existence at the time of the founding." Id. at 582 (emphasis added).

To "keep" arms means to have or possess a weapon. Id. at 582-83. To "bear" arms means to carry a weapon for the particular purpose of confrontation. Id. at 584. To "bear arms" thus means to "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." Id. (quoting Muscarello v. United States, 524 U.S. 125, 143, 118 S. Ct. 1911, 141 L. Ed. 2d 111 (1998) (Ginsburg, J, dissenting)) (internal quotation marks omitted).

"[T]he conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service, who would bring *the sorts of lawful weapons that they possessed at home* to militia duty." Heller, 554 U.S. at 627 (emphasis added). The right to bear arms, however, "did not refer only to carrying a weapon in an

organized military unit" but also included doing so as part "of the natural right of defense." Id. at 585.

The term "arms" thus includes "weapons that were not specifically designed for military use and were not employed in a military capacity." Id. at 581. The sorts of weapons protected under the Second Amendment were those "in common use at the time." Id. at 627 (quoting United States v. Miller, 307 U.S. 174, 179, 59 S. Ct. 816, 83 L. Ed. 1206 (1939)).

The Court's expansive definition of "arms" comfortably covers knives, including the fixed-blade knives addressed in the Seattle dangerous knife ordinance. The knife is an instrument constituting a bearable arm. With its pointed tip and cutting edge, it is a weapon capable of being used for offensive and defensive purposes in times of confrontation. The fixed-blade knife in particular has a long history of being employed for both military and non-military purposes, including the lawful purpose of self-protection.

"During the American colonial era every colonist had a knife. As long as a man was required to defend his life, to obtain or produce his own food or to fashion articles from raw materials, a knife was a constant necessity." State v. Delgado, 298 Or. 395, 401, 692 P.2d 610 (Or. 1984) (holding ban on possessing or carrying switch-blade knife violated Article I, section 27 of the Oregon Constitution) (citing Harold L. Peterson, Arms

and Armour in Colonial America, 1526-1783 (1956); Harold L. Peterson, American Knives (1958); Harold L. Peterson, Daggers and Fighting Knives of the Western World (1968)).

In the course of explaining its conception of "arms," the Court in Heller quoted the Oregon Supreme Court's decision in State v. Kessler: "In the colonial and revolutionary war era, [small arms] weapons used by militiamen and weapons used in defense of person and home were one and the same." Heller, 554 U.S. at 624-25 (quoting State v. Kessler, 289 Or. 359, 368, 614 P.2d 94 (Or. 1980) (citing George C. Neumann, Swords and Blades of the American Revolution 6-15, 252-254 (1973)). The Oregon Supreme Court recognized "A colonist usually had only one gun which was used for hunting, protection, and militia duty, plus a hatchet, sword, *and knife*." Kessler, 289 Or. at 368 (emphasis added). The term "arms" was not limited to firearms, but included several hand carried weapons commonly used for defense, including knives. Id. (citing Neumann, Swords and Blades of the American Revolution at 6-15, 252-254; Warren Moore, Weapons of the American Revolution 8 (1967)).

The kinds of knives employed in self-defense in the 18th and 19th centuries came in a variety of designs, many of which would qualify as fixed-blade knives under the Seattle ordinance. One such knife was a "dirk," which was a "large all-purpose knife equally useful for meals or

battle." Peterson, American Knives at 19. Frontiersmen carried fixed-blade knives as well: "On the frontier, . . . there was almost constant danger of Indian raids. Hunting and trapping and primitive conditions made a large knife a constant necessity. Often *standard carving or kitchen knives* were fitted with a sheath, but many homemade knives were also produced." Id. at 21 (emphasis added).

Another kind of fixed-blade knife, the "bowie knife," became widely used in the 19th century. Id. at 32, 56. Although popular with the lawless element prevalent in frontier areas, law-abiding citizens in those same areas needed the knife for protection. Id. at 29. The bowie knife's popularity declined after the Civil War, but cowboys and buffalo hunters continued to carry it. Id. at 56.

Bowie knives were by no means the only kinds of knives carried in the American West. Id. at 63. "The trappers and traders, the mountain men, who explored the Rockies and braved the Sioux and Blackfoot in search of beaver," used simple butcher or carving knives (including "Green River" knives) before and after the bowie knife was invented. Id. at 63-65. Such knives were among "the most popular knives in the winning of the West." Id. at 70.

As noted above, the sorts of weapons protected under the Second Amendment are commonly used weapons, in contrast with the historical

tradition of prohibiting the carrying of "dangerous and unusual weapons." Heller, 554 U.S. at 627. The Second Amendment thus excludes weapons that were not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns. Id. at 625.

As shown above, fixed-blade knives were typically possessed by law-abiding citizens for lawful purposes in the 18th and 19th centuries and continue to be so used today. Recent FBI statistics show knives are the second most common type of weapon used in justifiable homicides by a private citizen, behind handguns but ahead of rifles, shotguns, and other weapons.[3]

Moreover, knives are less dangerous than guns. "[G]uns are about five times more deadly than knives, given that an attack with some kind of weapon has occurred." United States v. Skoien, 614 F.3d 638, 642 (7th Cir. 2010) (citing Franklin E. Zimring, Firearms, Violence, and the Potential Impact of Firearms Control, 32 J.L. Med. & Ethics 34 (2004)). Consistent with common sense, an overwhelming array of studies show firearms are used much more often in the commission of violent crime and that firearms cause much more damage when actually used on a person. See David B. Kopel et al., Knives and the Second Amendment 32-34,

[3] http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/expanded-homicide-data-table-15 (accessed 4/22/13).

Univ. of Mich. J.L. Reform (forthcoming) (collecting studies), at http://ssrn.com/abstract=2238223. Yet guns qualify as arms under the Second Amendment. Heller, 554 U.S. at 628-29. Knives are not unusual weapons and they are less dangerous than guns. Knives must be also protected arms under the Second Amendment.

c. The Right To Bear Arms Includes The Right To Bear Knives In Self-Defense Under The Washington Constitution.

Before Heller, the Washington Supreme Court addressed a constitutional challenge to SMC 12A.14.080(B) in City of Seattle v. Montana, 129 Wn.2d 583, 919 P.2d 1218 (1996). Four justices in Montana concluded the ordinance was constitutional and opined in dicta that the "ordinary knives" at issue there did not qualify as "arms" under article I, section 24 of the Washington Constitution in the absence of a Gunwall[4] analysis. Id. at 590-91 (Talmadge, J., lead opinion). Five justices in two separate opinions concurred in the result on the basis that the knives in question were not "arms" for the purposes of article I, section 24. Id. at 599-601. (Alexander, J. concurring, Durham, C.J., concurring).

[4] State v. Gunwall, 106 Wn.2d 54, 58, 720 P.2d 808 (1986) (setting forth six nonexclusive neutral criteria to consider in determining whether our state constitutional provision should be considered independently to afford greater protection than its federal counterpart).

The expansive definition of "arms" set forth in Heller renders the narrow concept of arms in Montana obsolete. United States Supreme Court precedent interpreting the Second Amendment establishes the minimum protection of the right. State v. Sieyes, 168 Wn.2d 276, 292, 225 P.3d 995 (2010). The definition of what constitutes a bearable arm under the Second Amendment must therefore, at minimum, be read into article I, section 24.

The lead opinion in Montana believed "[o]nly '[i]nstruments *made on purpose* to fight with are called *arms*,'" and opined in dicta that "ordinary culinary utensils or fishing knives" do not qualify. Montana, 129 Wn.2d at 591 (quoting State v. Nelson, 38 La. Ann. 942, 946, 58 Am. Rep. 202 (La. 1886)). By that logic, a hunting rifle would not qualify as an arm because it was made for the purpose of hunting, not fighting. Heller precludes that limited way of thinking about arms.[5]

Justice Alexander's concurring opinion in Montana drew an even finer distinction between certain kinds of fixed-blade knives (bowie

[5] See, e.g., Heller, 554 U.S. at 590 ("Quaker frontiersmen were forbidden to use arms to defend their families, even though '[i]n such circumstances the temptation to seize a hunting rifle or knife in self-defense . . . must sometimes have been almost overwhelming.") (quoting Peter Brock, Pacifism in the United States (1968); id. at 599 ("The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting.").

knives) that qualified as "arms" and other fixed-blade knives that in his view did not qualify (small paring knife and filleting knife). Montana, 129 Wn.2d at 601 and n.2.

That kind of arbitrary line drawing does not survive Heller. Heller makes clear that the class of arms constitutes the *sorts* of instruments that were commonly used for self-defense. Heller, 554 U.S. at 581-84, 627. Arms are not limited to a particular design of an instrument. See id. at 582 ("the Second Amendment extends, prima facie, to *all instruments* that constitute bearable arms") (emphasis added). The Second Amendment broadly guarantees "the individual right to possess and carry weapons in case of confrontation." Heller, 554 U.S. at 592. Evans chose a fixed-blade "kitchen" knife to use in self-defense. That kind of knife is convenient, readily available and an effective weapon in case of confrontation. A distinction that exalts form over function does not make sense. If a fixed-blade knife is capable of cutting flesh, it is capable of being used for the purpose of self-protection during confrontation, whether it be a knife purposely made for fighting or an ordinary kitchen knife.

Heller recognizes "arms" encompass all weapons in common use that were used for the purpose of confrontation. Heller, 554 U.S. at 581-84, 627. Ordinary fixed-blade knives served multiple purposes, one of which was the particular purpose of fighting and defending oneself in the

case of confrontation. Peterson, American Knives at 19, 21, 29, 32, 56, 63-65, 70. That the same knife was used for multiple purposes instead of the exclusive purpose of fighting does not make that instrument any less of an "arm." A person could gut a fish or gut a weapon-wielding attacker in self-defense using the same knife. This makes perfect sense, given the rugged existence of those on the frontier and the reality of limited means necessitating an efficient use of finite resources.

On the frontier, standard carving or kitchen knives, for example, were used for a variety of purposes, including defense from Indian raids. Id. at 21. Such experiences were not limited to the 18th century. Major conflicts between settlers and Indians occurred as late as the 1850's inside the Washington Territory. Dorothy O. Johansen & Charles M. Gates, Empire of the Columbia 246-58 (2d ed. 1957). The Washington Territory was largely frontier land throughout much of the 19th century. As of 1860, the Washington Territory only had a population of 11,594, a large proportion of which came from areas that had just emerged from the frontier. Robert W. Johannsen, The Frontier, the Union, And Stephen A. Douglas 33 (1989). It was not until the 1880's, shortly before Washington achieved statehood, that rapid urbanization took place, marking a transition from wild frontier to cities. Johansen & Gates, Empire of the

Columbia at 3; Robert F. Utter & Hugh D. Spitzer, Washington State Constitution 13 (2011).

Neither should we lose sight of the historical fact that Article I, section 24 of the Washington Constitution derives from the right to bear arms provision in the Oregon Constitution. Utter & Spitzer, Washington State Constitution at 12, 45. Hand-carried weapons such as knives are considered "arms" under the Oregon Constitution. Delgado, 298 Or. at 401-03; Kessler, 289 Or. at 368. The history of using a variety of fixed-blade knives as weapons of confrontation and defense during the 18th and 19th centuries supports that conclusion. Peterson, American Knives at 19, 21, 29, 32, 56, 63-65, 70. The Oregon Supreme Court's description of what constitutes an arm comports with the Heller analysis and reinforces the conclusion that knives are "arms" under the Washington Constitution.

d. The Second Amendment Right To Bear Arms Exists Beyond The Home Because The Need For Self-Defense Is As At Least As Pressing Outside The Home As It Is Inside.

The central issue in the present case is whether the right to bear arms for the purpose of self-defense exists beyond the four walls of the home. The reasoning of Heller leads to the conclusion that the right to bear arms lives beyond the home because the core reason for the right is self-protection. The need for self-protection arises outside the home just

as it does inside. There is no justifiable way to cabin the right to bear arms to the home.

The right to bear arms under the Second Amendment is an individual right. Heller, 554 U.S. at 595. "[T]he inherent right of self-defense has been central to the Second Amendment right." Id. at 628. The text of the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." Id. at 592. The core right is to bear arms for the "lawful purpose of self-defense." Id. at 630.

Following Heller, the United States Supreme Court held the Second Amendment was applicable to the states in McDonald v. City of Chicago, __U.S. __, 130 S. Ct. 3020, 3050, 177 L. Ed. 2d 894 (2010). The Court in McDonald described the holding in Heller as follows: "the Second Amendment protects the right to keep and bear arms for the purpose of self-defense." McDonald, 130 S. Ct. at 3026.

Heller recognized a Second Amendment right to protect oneself not only from private violence, but also from public violence. See Heller, 554 U.S. at 594 (stating that, by the time of the founding, the right to have arms was "understood to be an individual right protecting against both public and private violence."). When the Court acknowledged the Second Amendment right is not unlimited, it listed laws forbidding the carrying of firearms in "sensitive" places such as schools and government buildings as

presumptively lawful regulations. Id. at 626-27. "If the Second Amendment right were confined to self-defense *in the home*, the Court would not have needed to express a reservation for 'sensitive places' outside of the home." United States v. Masciandaro, 638 F.3d 458, 468 (4th Cir.) (Niemeyer, J, separate opinion), cert. denied, 132 S. Ct. 756, 181 L. Ed. 2d 482 (2011)).

In the wake of Heller, a number of courts have nonetheless refused to recognize the right to bear arms includes the bearing of arms outside the home for purposes of self-defense.[6] In Moore v. Madigan, however, the Seventh Circuit held a Chicago ordinance that banned guns in public violated the Second Amendment. Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012). Moore is a faithful application of the reasoning and principles established in Heller.

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[6] See, e.g., Mack v. United States, 6 A.3d 1224, 1234-37 (D.C. Ct. App. 2010) (upholding defendant's conviction for carrying a dangerous weapon (concealed ice pick) under "plain error" standard, believing neither Heller nor McDonald plainly endorsed a right to carry weapons outside the home); People v. Williams, 964 N.E.2d 557, 569-71 (Ill. Ct. App. 2011) (law criminalizing the open carrying of a loaded rifle outside of one's home, land or fixed place of business did not violate Second Amendment under intermediate scrutiny test); Williams v. State, 417 Md. 479, 481, 497-99, 10 A.3d 1167 (Md.) (statute prohibiting wearing, carrying, or transporting a handgun, without a permit and outside of one's home, was outside of the scope of the Second Amendment), cert. denied, 132 S. Ct. 93, 181 L. Ed. 2d 22 (2011).

Moore rightly recognized "[t]he Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside." Moore, 702 F.3d at 942. "Heller repeatedly invokes a broader Second Amendment right than the right to have a gun in one's home, as when it says that the amendment 'guarantee[s] the individual right to possess and carry weapons in case of confrontation.'" Id. at 935-36 (quoting Heller, 554 U.S. at 592). "Confrontations are not limited to the home." Moore, 702 F.3d at 936.

Both Heller and McDonald recognize the need for defense of self, family, and property is most acute in the home, "but that doesn't mean it is not acute outside the home." Id. at 935. "[T]he interest in self-protection is as great outside as inside the home." Id. at 941. Given the reality of frontier life and the danger from hostile Indians, "a right to keep and bear arms for personal self-defense in the eighteenth century could not rationally have been limited to the home." Id. at 936. Twenty-first century Illinois has no hostile Indians, but a Chicagoan is vulnerable to attack on a sidewalk in a rough neighborhood. Id. at 937. "A blanket prohibition on carrying gun[s] in public prevents a person from defending himself anywhere except inside his home; and so substantial a curtailment of the right of armed self-defense requires a greater showing of

justification than merely that the public might benefit on balance from such a curtailment, though there is no proof it would." Id. at 940.

The same reasoning applies to Evans's case. Evans had previously been attacked in the Central District neighborhood of Seattle. 1RP 147. Evans was in that same neighborhood when the officer stopped him at 23rd Avenue and East Union and found him armed for self-protection. 1RP 116-17, 120. Evans's interest in self-protection as he went about his affairs in that area was as great as it was in the refuge of his home.

"To confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in Heller and McDonald." Moore, 702 F.3d at 937. The animating principle behind the right to bear arms under the Second Amendment is the right to bear a weapon for the purpose of self-defense. The need for self-defense arises in public as often, if not more often, than it does in the home. That is as true today as it was during the frontier days of yore. Id. at 936-37. The constitutionality of Seattle's "dangerous knife" ordinance, which criminalizes the carrying of fixed-blade knives in public for the purpose of self-defense, must be judged in light of the core importance of self-defense underlying the right to bear arms.

e. The Seattle Ordinance Criminalizing The Carrying Of Fixed-Blade Knives Violated Evans's Second Amendment Right To Bear Arms.

The Court in Heller determined under any of the standards of scrutiny that have been applied to enumerated constitutional rights, banning handguns used for the protection of one's home and family failed constitutional muster. Heller, 554 U.S. at 628-29. It rejected a rational basis test for determining the constitutionality of the handgun ban at issue. Id. at 629 n.27. The Court also emphatically rejected an "interest-balancing" approach that would uphold the constitutionality of an arms restriction on the ground that governmental interests, on balance, outweigh an individual's right to bear arms. Id. at 634-35. The Second Amendment itself "is the very product of an interest-balancing by the people" — one which the courts are not at liberty to rebalance to reach a desired outcome. Id. at 635.

The Court was aware of the problem of handgun violence in this country, "[b]ut the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home." Id. at 636. The majority in Heller thus dispensed with any inquiry into whether the law was necessary to serve a compelling or even substantial government

interest in preventing death and crime, though dissenting justices argued the ban served such interests. See id. at 693-99 (Breyer, J., dissenting).

As set forth in section 1. d., supra, the core right to bear arms for the purpose of self-defense includes the right to do so in public. Yet the Seattle ordinance prohibits the carrying of fixed-blade knives outside the home for the purpose of self-defense. SMC 12A.14.080(B). The Second Amendment takes that policy choice off the table as a solution to the problem of violence in an urban area because it materially burdens the core right of bearing arms for the purpose of self-defense.

Sieyes is instructive. That case involved a constitutional challenge to a criminal statute prohibiting juveniles from possessing firearms except in certain circumstances. Sieyes, 168 Wn.2d at 279. The Washington Supreme Court rejected the challenge because Sieyes "fail[ed] to provide convincing authority supporting an original meaning of the Second Amendment, which would grant all children an unfettered right to bear arms."[7] Id. at 295.

Evans is an adult, not a child. But of more interest is how the Court assessed the constitutionality of the statute in light of the Second Amendment. Following Heller, the Court declined to analyze the statute

[7] The Court declined to decide whether article I, section 24 of the Washington Constitution provides greater protection due to inadequate briefing of the requisite factors. Sieyes, 168 Wn.2d at 293-94.

under a strict or intermediate level of scrutiny,[8] but rather "look[ed] to the Second Amendment's original meaning, the traditional understanding of the right, and the burden imposed on children by upholding the statute." Sieyes, 168 Wn.2d at 295 (citing Eugene Volokh, Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda, 56 UCLA L. Rev. 1443, 1449 (2009)).

The Second Amendment's original meaning and traditional understanding have already been addressed in Heller and set forth in this brief in sections C. 1. b., c. and d., supra. We must now look to the burden imposed on those like Evans who seek to provide for their self-protection in public by carrying a fixed-blade knife.

The burden is material. The dangerous knife ordinance restricts the core right to bear arms in self-defense. It prevents Evans, and others within the city limits, from carrying a fixed-blade knife of any length, a folding knife longer than three and one half inches, or a switchblade knife for the purpose of self-defense. SMC 12A.14.080(A), (B); SMC 12A.14.010(C), (D), (H). What Evans and others are left with to defend

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[8] "Under middle level, or 'intermediate scrutiny' analysis, a law is upheld if substantially related to an important government purpose." Sieyes, 168 Wn.2d at 295 n.18. "A law will pass the most intensive level of scrutiny, 'strict scrutiny,' if necessary to achieve a compelling government purpose — proof the law is the least restrictive means of achieving the purpose." Id.

themselves is a short blade knife that must be opened before it can be used, i.e., a small pocketknife. The shorter blade and the crucial seconds lost in having to open the blade up with two hands when suddenly faced with an attacker make it a poor, ineffective weapon for self-protection. Heller recognized a citizen's choice of the weapon used for self-defense is entitled to respect. Heller, 554 U.S. at 628-29.

An ordinance that falls short of a complete ban does not make it constitutional. The same kind of reasoning was rejected in Heller: "It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed." Id. at 629.

The right to bear arms under the Second Amendment is not unlimited. Id. at 595, 626. But Evans's conduct does not fall within any of the limitations recognized in Heller.

Heller did 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*." Id. at 595. There is no right "to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." Id. at 626.

Evans, however, did not carry his knife for any purpose whatsoever or any kind of confrontation whatsoever. The unrebutted evidence in this record is that he carried the knife for the purpose of self-protection — the purpose for bearing an arm that lies at the heart of the Second Amendment. 1RP 147. There is no evidence that Evans was looking for a fight or was bent on causing mayhem. He did not go about menacing others by brandishing the knife or threatening others with it. He simply had the knife in case he needed to defend himself while he went about his life in public.

Heller further noted "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." Heller, 554 U.S. at 626-27.

Evans is not a felon. He is not mentally ill. He did not carry his knife into a "sensitive" area such as a school or government building. He had the knife on his person while he drove his car. 1RP 128-31, 136-37. He carried his knife for the purpose of self-protection. 1RP 147. That is a lawful purpose under the Second Amendment. See Heller, 554 U.S. at

628 ("the inherent right of self-defense has been central to the Second Amendment right" and is a "lawful purpose"). The Seattle ordinance criminalizes that conduct. That is why it is unconstitutional.

The Seattle ordinance sets forth a number of situations where the carrying of a fixed-blade knife is lawful. SMC 12A.14.100. For example, a "dangerous knife" may be carried for hunting, fishing and for activities related to a lawful occupation that commonly require the use of such knife. SMC 12A.14.100(A), (B).

But those exceptions do not render the ordinance constitutional. Hunting, fishing and the accomplishment of ordinary tasks are not fundamental rights. The missing exception is the one that is guaranteed by the Second Amendment — the right to carry a knife in self-defense. It is nonsensical to argue, as the City does, that a list of exceptions in the ordinance operates to render the ordinance's prohibition constitutional where there is no exemption for the very activity — the bearing of arms for self-defense — that the Second Amendment protects.

If a level of scrutiny is to be applied to the ordinance, then strict scrutiny is appropriate. Strict scrutiny applies to "laws burdening fundamental rights or liberties." State v. Haq, 166 Wn. App. 221, 253-54, 268 P.3d 997, review denied, 174 Wn.2d 1004, 278 P.3d 1111 (2012). The United States Supreme Court in McDonald recognized the right to

bear arms for the purpose of self-defense was among those fundamental rights necessary to our system of ordered liberty and deeply rooted in this nation's history and tradition. McDonald, 130 S. Ct. at 3036-37, 3042. In the wake of Heller, Washington courts likewise recognize the right to bear arms is a fundamental right. Sieyes, 168 Wn.2d at 287; State v. Ibrahim, 164 Wn. App. 503, 514, 269 P.3d 292 (2011).

Legislation that infringes a fundamental right is constitutional only if it furthers a compelling state interest and is narrowly drawn to serve such interest. In re Pers. Restraint of Young, 122 Wn.2d 1, 26, 857 P.2d 989 (1993); State v. Williams, 144 Wn.2d 197, 211, 26 P.3d 890 (2001). If the complaining party demonstrates strict scrutiny is the proper test under the facts, then the burden shifts to the party seeking to uphold the challenged law to show that the restrictions serve a compelling state interest and are the least restrictive means for achieving it. Fusato v. Washington Interscholastic Activities Ass'n, 93 Wn. App. 762, 768, 970 P.2d 774 (1999).

The knife ordinance has been described as furthering a "substantial public interest in safety" because it conceivably addresses "the threat posed by knife-wielding individuals and those disposed to brawls and quarrels, through reducing the number and availability of fixed-blade knives in public places in Seattle." Montana, 129 Wn.2d at 592. A

substantial interest is not good enough under strict scrutiny. A compelling interest is required. Young, 122 Wn.2d at 26; Williams, 144 Wn.2d at 211.

There is no viable basis on which to argue that the government's interest in preventing harm to people in public is greater than its interest in preventing harm to people in the home. Heller, in striking down the ban on operable handguns in the home, declared that such a ban would not survive any level of scrutiny, including strict scrutiny. Heller, 554 U.S. at 628-29. Yet plenty of people inside the home, including a good many victims of domestic violence, are killed, maimed and threatened by home dwellers with guns. See id. at 693-95 (Breyer, J., dissenting). The government undoubtedly has an interest in preventing or lessening that kind of harm to people inside their homes. But in Heller, that undeniable interest did not trump the right to bear arms inside the home.

The same holds true in the context of carrying a knife for the purpose of self-defense in public. The safety of people in public areas is no less worthy of protection than the safety of people inside the home. The well being of people is of equal value in both spheres. The distinction between inside the home and outside the home collapses in this respect.

Nor is the ordinance narrowly tailored to achieve its interest. "To be narrowly tailored, there must be an evidentiary nexus between a law's purpose and effect." State v. J.D., 86 Wn. App. 501, 508, 937 P.2d 630

(1997). The City has provided no evidentiary nexus for the knife ordinance.

The lead opinion in Montana conceived an interest on behalf of the City in upholding the knife ordinance, relying on a presumption that "the legislation was passed with respect to any state of facts which could be reasonably conceived to warrant the legislation." Montana, 129 Wn.2d at 592-93. That mode of analysis looks like a rational basis test, where a law will be upheld if any state of facts reasonably may be conceived to justify it.[9] Not even the City claims the knife ordinance is merely subject to a rational basis test. A conceivable relationship between the invoked interest and the constitutional infringement is not good enough under strict scrutiny.

Further, the ordinance fails even in the abstract. Again, the knife ordinance has been described as furthering a "substantial public interest in safety" in addressing "the threat posed by knife-wielding individuals and those disposed to brawls and quarrels, through reducing the number and availability of fixed-blade knives in public places in Seattle." Montana, 129 Wn.2d at 592. Yet those who happen to be carrying a knife for a

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[9] See Seeley v. State, 132 Wn.2d 776, 795, 940 P.2d 604 (1997) (rational basis test requires only that the means employed by the statute be rationally related to legitimate state goals and courts "may assume the existence of any necessary state of facts which it can reasonably conceive.").

purpose recognized as lawful under the ordinance may also be a person "disposed to brawls and quarrels." Montana's reference to knife-wielding individuals, meanwhile, is directed at those who are using knives for a criminal purpose, not self-defense.

Where state action impinges on the exercise of fundamental constitutional rights, the state must choose the least restrictive alternative available. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 51, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973); State v. Alphonse, 142 Wn. App. 417, 440-41, 174 P.3d 684 (2008). Less restrictive means are available here. The ordinance carves out various exceptions based on the *purpose* for which one carries a knife. SMC 12A.14.100. The City has deemed those certain purposes worthy of protection from criminal punishment. The knife ordinance could make an exception for carrying knives in public for the purpose of self-defense. The ordinance is not narrowly tailored to achieve its goal because those who carry knives only for the purpose of self-defense present no appreciable danger to other innocents.

The danger stems not from the knife, but the criminal mindset of those who carry a knife to threaten or attack others. See Delgado, 298 Or. at 400 ("It is not the design of the knife but the use to which it is put that determines its 'offensive' or 'defensive' character."). The prohibition is not

narrowly tailored to affect only those who present an active danger to other law-abiding citizens of the city. The ordinance criminalizes the conduct of those who carry knives for the sole purpose of self-protection from others who pose a danger, including those who happen to be carrying a knife for a lawful purpose under the ordinance but who also happen to be hotheaded or drunk enough to attack another with that same knife in the heat of the moment.

The ordinance is rife with exceptions that allow people to carry knives for benign purposes and a gun for any purpose,[10] diminishing the credibility of any claim that the ordinance is narrowly tailored. See Rickert v. State, Public Disclosure Com'n, 161 Wn.2d 843, 853-54, 168 P.3d 826 (2007) (exemption in statute regulating political speech for candidates' false speech diminished the credibility of State's asserted interest and demonstrated the law was not narrowly tailored to serve alleged interest in preserving the integrity of elections).

Self-defense is as much a lawful reason to carry a knife as it is to hunt or carve an apple with one. See Montana, 129 Wn.2d at 596 ("use of a knife in a restaurant or park to peel an apple would not be proscribed"). And it is the one purpose that is guaranteed as a fundamental right under the Second Amendment.

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[10] SMC 12A.14.080(B), (C), SMC 12A.14.100.

Further, knives are much less dangerous than guns, yet the Seattle ordinance allows people to carry guns about with near impunity. The threat to public safety posed by gun-wielding individuals and those who carry guns that are disposed to brawls, quarrels and drunkenness is surely greater than their knife carrying counterparts. Yet the ordinance does not apply to those who carry guns for any reason while criminalizing the actions of those who carry knives for self-defense.

The disparity in treatment undermines the rationality of the ordinance, to say nothing of its inability to further a compelling state interest through the least restrictive means available. The City's conceivable interest in public safety is severely compromised by allowing people to roams its streets with guns. The City cannot put the genie back in the bottle by restricting less dangerous knives. The City does not even allow people to procure a license to carry "dangerous knives" in public as a less restrictive alternative to banning such knives when carried for the purpose of self-defense.

f. The Seattle Ordinance Criminalizing The Carrying Of Fixed-Blade Knives Violated Evans's Right To Bear Arms Under The Washington Constitution.

The Seattle knife ordinance also violates the right to bear arms under article I, section 24 of the Washington Constitution because it criminalizes the carrying of a fixed-blade knife for the purpose of self-

defense. The Second Amendment analysis set forth above compels this conclusion. Even if it doesn't, the Washington Constitution provides greater protection for the right to bear arms and renders the ordinance unconstitutional.

In arguing to the contrary, the City relies on the Washington Supreme Court's decision in Montana. But Montana is a plurality decision. "A plurality opinion has limited precedential value and is not binding on the courts." In re Pers. Restraint of Isadore, 151 Wn.2d 294, 302, 88 P.3d 390 (2004). Montana does not control the issue raised by Evans for this reason alone.

Furthermore, "Supreme Court application of the United States Constitution establishes a floor below which state courts cannot go to protect individual rights." Sieyes, 168 Wn.2d at 292; accord Orion Corp. v. State, 109 Wn.2d 621, 652, 747 P.2d 1062 (1987); State v. Chrisman, 100 Wn.2d 814, 817, 676 P.2d 419 (1984). "When the United States Supreme Court decides an issue under the United States Constitution, all other courts must follow that Court's rulings." State v. Radcliffe, 164 Wn.2d 900, 906, 194 P.3d 250 (2008).

The United States Supreme Court decisions in Heller and McDonald change the requisite legal analysis in a way that renders Montana and the line of cases it relies upon obsolete. The lead opinion in

Montana employed a balancing of interests test to determine the Seattle ordinance was a "reasonable regulation" and "reasonable limitation" under the State's police power. Montana, 129 Wn.2d at 593-94. According to the lead opinion, "[t]his analysis requires balancing the public benefit from the regulation against the degree to which it frustrates the purpose of the constitutional provision." Id. at 594. The lead opinion cited previous precedent for the proposition that this was the correct standard in assessing restrictions on the right to bear arms and concluded "the burden imposed on innocent people carrying fixed blade knives is far outweighed by the potential harm of other people carrying such knives concealed or unconcealed." Id. at 593-94, 596.

The Washington Supreme Court in Sieyes did not employ this standard, declaring "[d]espite this court's occasional rhetoric about 'reasonable regulation' of firearms, we have never settled on levels-of-scrutiny analysis for firearms regulations." Sieyes, 168 Wn.2d at 295 n.20. Instead, the Court looked to the burden imposed by upholding the restriction. Id. at 295.

As recognized by Sieyes, the United States Supreme Court explicitly rejected an interest-balancing standard in assessing whether a government restriction on the right to bear arms passes constitutional muster. Id.; Heller, 554 U.S. at 634-35. The standard employed in

Montana can no longer be employed consistent with United States Supreme Court precedent.

And, as set forth in section 1. e., supra, the ordinance violates the Second Amendment. It therefore necessarily violates article I, section 24 because the state constitution cannot provide lesser protection than the federal constitution. Sieyes, 168 Wn.2d at 295.

If the ordinance is constitutional under the Second Amendment, then a Gunwall analysis is appropriate to show the Washington Constitution provides broader protection. In Gunwall, the Court set forth six "nonexclusive neutral" criteria to consider in determining whether our state constitutional provision should be considered independently to afford greater protection than its federal counterpart. State v. Gunwall, 106 Wn.2d 54, 58, 720 P.2d 808 (1986). The six factors are (1) the textual language of the state constitution; (2) significant differences in the texts of parallel provisions of the federal and state constitutions; (3) constitutional history; (4) preexisting state law; (5) differences in structure between the federal and state constitutions; and (6) matters of particular state interest or local concern. Gunwall, 106 Wn.2d at 58.

The Court in Montana did not subject article I, section 24 to a Gunwall analysis in addressing the constitutionality of SMC 12A.14.080(B). The following Gunwall analysis is provided to show

article I, section 24 calls for independent analysis and provides greater protection in the context of this case.

- The textual language of the state constitution and significant differences in the text of the federal and state constitutions.

A material difference in the language of the two constitutions allows for a more expansive interpretation of the Washington Constitution. Gunwall, 106 Wn.2d at 65. The textual language of article 1, section 24 of the Washington Constitution differs significantly from that of the Second Amendment of the United States Constitution.

Article 1, section 24 provides: "The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men."

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."

This Court has explained the text of the Washington Constitution may provide "cogent grounds for a decision different from that which would be arrived at under the Federal Constitution," such as when the language of the Washington Constitution is "more explicit." Gunwall, 106 Wn.2d at 61. Such is the case here.

Unlike the Second Amendment, "Article I, section 24 plainly guarantees an individual right to bear arms." Sieyes, 168 Wn.2d at 292. It took the United States Supreme Court over 200 years to read an individual right into the Second Amendment. Heller, 554 U.S. at 595. That individual right existed in the plain language of the Washington constitution from its inception. "It is reasonable to assume that the men who drafted the Washington Constitution, many of whom were lawyers, were well aware of these linguistic differences and their likely effect on the future legal interpretation of their work, and that they therefore intended to create such differences." Utter & Spitzer, Washington State Constitution at 12.

In addition, the plain language of article 1, section 24 expressly protects the right to bear arms for the purpose of self-defense. Heller read the core right to bear arms for self-protection into the Second Amendment, but it is not plainly found in the language of the federal constitution. Where the federal constitution is interpreted to include a right that does not explicitly reside in the federal text, the explicit incorporation of that same right into the text of the Washington Constitution favors independent interpretation. State v. Martin, 171 Wn.2d 521, 529-30, 252 P.3d 872 (2011). The first two Gunwall factors support an independent state interpretation of article 1, section 24.

- Constitutional history.

"Factor three of the Gunwall analysis instructs us to consider the constitutional history of the provision to determine whether the framers of the Washington constitution intended to confer different protection than is offered by the federal constitution." Grant County Fire Protection Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791, 807, 83 P.3d 419 (2004).

The Washington Declaration of Rights was largely based on W. Lair Hill's proposed constitution, which took the Oregon Constitution as its model. Utter & Spitzer, Washington State Constitution at 12. The language for the general right to bear arms section was borrowed from the Hill draft and the Oregon Constitution. Id. at 45. This supports an interpretation of Article 1, section 24 that is independent of the Second Amendment.

Furthermore, during the Washington Constitutional Convention, delegate E.H. Sullivan[11] made a motion "to add a provision against carrying concealed weapons." Beverly Paulik Rosenow, The Journal of the Washington State Constitutional Convention, 1889, with Analytical

[11] Sullivan was a lawyer who lived in Colfax. He had served as a prosecuting attorney for Whitman County for two years. Rosenow, Journal of the Washington State Constitutional Convention at 486.

Index by Quentin Shipley Smith 512-13 (1999 reprint). That motion lost. Id.

Rejection of a concealed weapon prohibition in the constitutional provision is significant because it supports the right to bear arms for self-defense in public places. Home dwellers are not ordinarily understood to carry concealed weapons while inside their own homes, where there is no need to conceal them. Prohibitions on carrying concealed weapons are aimed at preventing them being carried in the public domain. The drafters' rejection of a concealed weapon exception to article I, section 24 shows the drafters intended the right to bear arms for self-defense to extend beyond the home.

"The history of the adoption of a particular state constitutional provision may reveal an intention that will support reading the provision independently of federal law." Gunwall, 106 Wn.2d at 61. If the Second Amendment is interpreted to exclude the right to carry weapons for self-defense in public, the refusal of the drafters of the Washington Constitution to incorporate a concealed weapons exception to the right to bear arms shows article I section 24 gives broader protection in this regard.

- Preexisting state law.

Preexisting law, including statutory law, can "help to define the scope of a constitutional right later established." Id. at 62. "This factor

requires us to consider the degree of protection that Washington State has historically given in similar situations." Grant County Fire Protection, 150 Wn.2d at 809.

As noted in Montana, Washington has a long history of regulating arms, including knives. Montana, 129 Wn.2d at 595 n.3.[12] The territorial and legislative history of criminalizing the carrying of concealed weapons must be read in light of the constitutional history in which the drafter's specifically rejected a provision in article I, section 24 to prohibit concealed weapons. Rosenow, Journal of the Washington State Constitutional Convention at 512-13.

The former version of what is now RCW 9.41.250 did not allow people to "furtively carry, or conceal any dagger, dirk, *knife*, pistol, or other dangerous weapon." Laws of 1909, ch. 249 § 265 (emphasis added). The legislature, however, deleted "knife" as one of the weapons a person

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[12] See, e.g., 1881 Territorial Code of Washington, § 929 (misdemeanor to carry concealed weapon); Hill's Code, Vol. II (1891), § 166 (prohibiting carrying a "concealed weapon," defined as "a revolver, pistol, or other fire-arms, or any knife (other than an ordinary pocket knife), or any dirk or dagger, sling-shot, or metal knuckles, or any instrument by the use of which injury could be inflicted"); Ballinger's Code, Vol. II (1897), § 7084 (prohibiting carrying "concealed weapon, consisting of either a revolver, pistol, or other fire-arms, or any knife . . . or any dirk or dagger, sling-shot, or metal knuckles, or any instrument by the use of which injury could be inflicted"); Pierce's Code (1912) § 8835 (gross misdemeanor to "furtively carry, or conceal any dagger, dirk, knife, pistol, or other dangerous weapon"); Remington Compiled Statutes (1927), § 2517 (same).

is prohibited from furtively carrying or concealing in 1957, while retaining a prohibition on "any dagger, dirk, pistol, or other dangerous weapon." RCW 9.41.250 (Laws of 1957, ch. 93 § 1).

The deletion of "knife" from the statute demonstrates a legislative intent to cease criminalization of carrying concealed knives in general. See WR Enterprises, Inc. v. Dep't of Labor and Indus., 147 Wn.2d 213, 222, 53 P.3d 504 (2002) ("when a material change is made in the wording of a statute, a change in legislative purpose must be presumed."); John H. Sellen Constr. Co. v. Dep't of Revenue, 87 Wn.2d 878, 883, 558 P.2d 1342 (1976) ("the legislature does not engage in unnecessary or meaningless acts, and we presume some significant purpose or objective in every legislative enactment."); cf. State v. Myles, 75 Wn. App. 643, 645, 879 P.2d 968 (1994) (finding paring knife qualified as "dangerous weapon" under RCW 9.41.250, without reference to legislative history), rev'd on other grounds, 127 Wn.2d 807, 903 P.2d 979 (1995).

Our state, meanwhile, has no legislative history of prohibiting the carrying of knives in a non-concealed manner. The Seattle ordinance, however, criminalizes carrying dangerous knives in both a concealed and an unconcealed manner. SMC 12A.14.080(B) ("It is unlawful for a person knowingly to: . . . Carry concealed or unconcealed on his or her person

any dangerous knife, or carry concealed on his or her person any deadly weapon other than a firearm[.]").

The Washington Supreme Court has previously noted the individual right to bear arms under article I, section 24 may be broader than the Second Amendment, but had not yet determined our provision's "distant reaches" when the United States Supreme Court decided Heller. Sieyes, 168 Wn.2d at 292. To the extent pre-Sieyes case law can be read as disfavoring a more protective reading of article I, section 24, this can be explained by the failure of previous courts to do any rigorous analysis of how the right to bear arms under our state constitution should be assessed.

Before Sieyes, Washington courts often declared the right to bear arms under article I section 24 was subject to reasonable regulation by the State under its police power. See, e.g. State v. Krantz, 24 Wn.2d 350, 353, 164 P.2d 453 (1945); Second Amendment Found. v. City of Renton, 35 Wn. App. 583, 586, 668 P.2d 596 (1983) (citing Krantz, 24 Wn.2d at 353); Morris v. Blaker, 118 Wn.2d 133, 144, 821 P.2d 482 (1992) (citing Krantz, 24 Wn.2d at 353); State v. Spencer, 75 Wn. App. 118, 122, 876 P.2d 939 (1994) (citing State v. Rupe, 101 Wn.2d 664, 707 n. 9, 683 P.2d 571 (1984) (citing Krantz, 24 Wn.2d at 353)), review denied, 125 Wn.2d 1015, 890 P.2d 20 (1995).

All of these cases rely on Krantz for the proposition. Krantz was decided long before the advent of the Gunwall analysis. The Court in Krantz made no effort to independently analyze article I, section 24. Instead, as support for its single-sentence claim that the right to bear arms under article I section 24 was merely subject to "reasonable" regulation by the State, Krantz cited to Miller, an old United States Supreme Court case that has been superseded by Heller,[13] and old cases from other states decided under the Second Amendment or state constitutions that contained markedly different language from our own. Krantz, 24 Wn.2d at 353; see State v. Schelin, 147 Wn.2d 562, 590-93, 55 P.3d 632 (2002) (Sanders, J., dissenting) (analyzing sources of Krantz "heresy"). Cases following Krantz simply repeated the reasonable regulation mantra as a matter of rote without further analysis.

The Court's recent decision in Sieyes represents a turning of the tide in this respect. It declined to employ the old "reasonable regulation" standard. Sieyes, 168 Wn.2d at 295 and n.20. Whereas earlier cases indicated the right to bear arms under article I section 24 was subject to the State's police power, Sieyes inverted the relationship: "In Washington

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[13] See Heller, 554 U.S. at 625 ("We . . . read Miller to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.").

the police power is subject to all the rights specified in our Declaration of Rights, including the constitutional right of the individual citizen to keep and bear arms. We are not at liberty to disregard this text: 'The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise.'" Id. at 293 (quoting Wash. Const. art. I, § 29).

As the Washington Supreme Court's most recent pronouncement on the right to bear arms, Sieyes signals a marked shift in how the right to bear arms under article I section 24 is viewed. It is now viewed with respect, whereas before it was often treated as an enemy of the people to be suppressed under the talismanic invocation of a reasonable exercise of state police power.

- Differences in structure between federal and state constitutions.

This factor always supports construing state constitutional provisions independently because "the United States Constitution is a grant of limited power to the federal government, while the state constitution imposes limitations on the otherwise plenary power of the state." State v. Foster, 135 Wn.2d 441, 458-59, 481, 957 P.2d 712 (1998). "[T]he explicit affirmation of fundamental rights in our state constitution may be seen as a guarantee of those rights rather than as a restriction on them." Gunwall, 106 Wn.2d at 62.

- Matters of particular state interest and concern.

Gunwall framed the relevant question as follows: "Is the subject matter local in character, or does there appear to be a need for national uniformity?" Id. at 62. The only need for national uniformity on the right to bear arms is the establishment of a minimum floor of protection of the right under the federal constitution, which has already been established by Heller. The United States Supreme Court in Heller and McDonald did not give any indication that it expects the states to act in lockstep when it comes to the question of providing *greater* protection for the right to bear arms under state laws.

Certainly the City of Seattle would argue it has a local policy concern at stake here. The State of Washington as a whole has an interest in how far the right to bear arms under its constitution will be deemed to reach in light of concerns about the safety of its citizens. Factor six favors an independent interpretation of article 1, section 24 in this case.

Considered as a whole, the Gunwall factors favor independent analysis. Factors 1, 2 and 3 in particular demonstrate article I, section 24 provides greater protection of the right to carry arms for self-protection in public. The plain language of the text, in combination with the constitutional history showing the drafters specifically rejected a proposal to include a prohibition on carrying concealed weapons in article I, section

24, supports Evans's argument that the knife ordinance at issue here is unconstitutional in prohibiting the carrying of fixed-bade knives for the purpose of self-defense in public.

"Our objective is to define the constitutional principle in accordance with the original understanding of the ratifying public so as to faithfully apply the principle to each situation which might thereafter arise." Malyon v. Pierce County, 131 Wn.2d 779, 799, 935 P.2d 1272 (1997). "Appropriate constitutional analysis begins with the text and, for most purposes, should end there as well." Malyon, 131 Wn.2d at 799. "If the text is unambiguous, courts will give effect to the plain meaning of the language." Dress v. Dep't of Corrections, 168 Wn. App. 319, 331, 279 P.3d 875 (2012) (citing State v. Costich, 152 Wn.2d 463, 470, 98 P.3d 795 (2004)).

"[T]here is quite explicit language about the 'right of the individual citizen to bear arms in defense of himself.' This means what it says. From time to time, people in the West had to use their weapons to defend themselves and were not interested in being disarmed." Sieyes, 168 Wn.2d at 292 (quoting Hugh Spitzer, Bearing Arms in Washington State 9 (Proceedings of the Spring Conference, Washington State Association of Municipal Attorneys (Apr. 24, 1997)).

"[I]f a constitutional provision is plain and unambiguous on its face, then no construction or interpretation is necessary or permissible.'" City of Woodinville v. Northshore United Church of Christ, 166 Wn.2d 633, 650, 211 P.3d 406 (2009) (quoting Anderson v. Chapman, 86 Wn.2d 189, 191, 543 P.2d 229 (1975)). The reviewing court cannot disregard the plain meaning of the constitutional text. City of Bothell v. Barnhart, 156 Wn. App. 531, 536, 234 P.3d 264 (2010) (citing Washington State Motorcycle Dealers Ass'n v. State, 111 Wn.2d 667, 674, 763 P.2d 442 (1988)). That axiom applies to article I section 24 as much as it does to any other constitutional provision. Sieyes, 168 Wn.2d at 293.

Only two textual exceptions qualify the scope of the right to keep and bear arms in the Washington Constitution: (1) the right exists only in the context of an individual's "defense of himself, or the state" and (2) the right does not authorize "individuals or corporations to organize, maintain or employ an armed body of men." Id. (quoting Wash. Const. art. I, § 24). "[T]he mandatory provision in article I, section 24 is strengthened by its two textual exceptions to the otherwise textually absolute right to keep and bear arms." Sieyes, 168 Wn.2d at 293 (citing Robert F. Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 U. Puget Sound L. Rev. 491,

509–10 (1984) (explaining "the express mention of one thing in a constitution implies the exclusion of things not mentioned").

It is only by an extraordinary disregard of the plain language of the text that one is able to conclude a law that criminalizes the bearing of arms in self-defense in no way violates the constitutional provision that explicitly protects the right to bears arms in self-defense. Under the ordinance, a person can lawfully use a "dangerous knife" to peel an apple on a public street. See Montana, 129 Wn.2d at 596. But that same person cannot lawfully use that knife for the purpose of self-defense if attacked in the same location.

The City's argument in support of the ordinance boils down to a single conclusion: that when the drafters of the constitution unambiguously provided "[t]he right of the individual citizen to bear arms in defense of himself . . . shall not be impaired," what they really meant was that the right of the individual citizen to bear arms in defense of himself can be impaired. Such a construction violates "basic constitutional precepts that the constitution means what it says, and when it is not ambiguous there is nothing for the courts to construe." Washington State Motorcycle Dealers Ass'n., 111 Wn.2d at 674.

g. The Conviction Must Be Reversed.

The Seattle knife ordinance, in criminalizing the carrying of a fixed-blade knife in public, violates the right to bear arms under the Second Amendment and article I, section 24. A person cannot be convicted of violating an unconstitutional legislative enactment. State v. Immelt, 173 Wn.2d 1, 13-14, 267 P.3d 305 (2011) (reversing conviction for violating county noise ordinance because ordinance was unconstitutional); State v. Carnahan, 130 Wn. App. 159, 164, 122 P.3d 187 (2005) (defendant could not be convicted under statute which had been declared unconstitutional). Evans's conviction for violating the unconstitutional knife ordinance must therefore be reversed and the charge dismissed with prejudice.

D. CONCLUSION

For the reasons set forth, Evans requests reversal of the conviction and dismissal of the charge with prejudice.

DATED this 24 day of June 2013

Respectfully Submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

CITY OF SEATTLE,	)	
Respondent,	)	
v.	)	COA NO. 67816-7-I
WAYNE EVANS,	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13TH DAY OF JUNE, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **AMENDED BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WAYNE EVANS
17010 12TH AVE CTE E
SPANAWAY, WA 98387

SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF JUNE, 2013.

X Patrick Mayovsky