SUPREME COURT NO. 90608-4
COA NO. 67816-7-I

IN THE SUPREME COURT OF WASHINGTON

CITY OF SEATTLE,

Respondent,

v.

WAYNE EVANS,

Petitioner.

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

The Honorable Patrick Oishi, Judge

PETITION FOR REVIEW

CASEY GRANNIS
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES (CONT'D)

Page

A. IDENTITY OF PETITIONER

Wayne Evans asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Evans requests review of the published decision in State v. Wayne Evans, Court of Appeals No. 67816-7-I (slip op. filed June 30, 2014), attached as appendix A.

C. ISSUE PRESENTED FOR REVIEW

Whether the Seattle ordinance that 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?

D. STATEMENT OF THE CASE

A Seattle police officer 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, the officer 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

[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.

passenger. 1RP 126-27, 129-30. The officer directed 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 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 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. The Court of Appeals likewise affirmed the conviction,

holding the ordinance did not violate either the federal or state constitutional right to bear arms. Slip op. at 1-2. Evans seeks review.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. WHETHER THE SEATTLE ORDINANCE PROHIBITING CITIZENS FROM CARRYING KNIVES FOR THE PURPOSE OF SELF-DEFENSE VIOLATES THE CONSTITUTIONAL RIGHT TO BEAR ARMS IS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW AND IS OF SUBSTANTIAL PUBLIC IMPORTANCE.

The heart of the constitutional right to bear arms is the ability of citizens to use weapons for the lawful purpose of self-protection. District of Columbia v. Heller, 554 U.S. 570, 628, 630, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008); see also McDonald v. City of Chicago, 561 U.S. 742, 130 S. Ct. 3020, 3026, 177 L. Ed. 2d 894 (2010) (Second Amendment right is fully applicable to the States). Heller held a legislative ban on handgun possession in the home violates the Second Amendment, as does the prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense. Heller, 554 U.S. at 635.

But Heller did not decide the full scope of the right to bear arms, including the question of whether the right extends beyond the home. Heller has set off a firestorm of debate in courts around the country on whether or under what circumstances the right to bear arms extends to

carrying arms in public for the purpose of self-protection. Evans's case squarely presents that issue.

Further, Heller set forth a comprehensive analytical framework for determining what constitutes a bearable "arm" under the Second Amendment. Heller, 554 U.S. at 581-85, 627. Evans's case presents this Court with an opportunity to determine, in light of Heller, whether knives constitute arms under both the federal and state constitutions. Heller was a gun case, not a knife case, but its analysis of what constitutes an "arm" necessarily guides the question of whether fixed-blade knives of the type carried by Evans qualify as such. Fixed-blade knives are common. The question of whether they can be constitutionally banned when carried in public for self-protection affects the millions of people who live in or visit Seattle.

In addition, as noted by the Court of Appeals, the level of scrutiny applicable to a restriction challenged under the Second Amendment remains unsettled. Slip op. at 8. And it is an open question of what standard is to be applied to restrictions that do not fall into the category of presumptively lawful regulations under article I, section 24. See State v. Jorgenson, 179 Wn.2d 145, 155-56, 312 P.3d 960 (2013) (applying reasonable regulation standard to a statute comparable to "presumptively constitutional" regulations identified by Heller). Evans's case presents the

opportunity to clarify what kind of standard or level of scrutiny is applicable to legislative restrictions that are not presumptively lawful under the Second Amendment and article I, section 24.

Whether 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 is a significant question of constitutional law under RAP 13.4(b)(3) and is of substantial public interest under RAP 13.4(b)(4).

a. Fixed-Blade Knives Qualify As Bearable Arms Under The Second Amendment And Article I, Section 24.

In deciding whether the ordinance violated the Washington constitution, the Court of Appeals felt constrained to follow the decision in City of Seattle v. Montana, 129 Wn.2d 583, 919 P.2d 1218 (1996). Slip op. at 5-6. The vitality of Montana, however, has been sapped by the U.S. Supreme Court's decision in Heller. The time has come for the constitutionality of the Seattle knife ordinance to be re-examined.

Montana is a plurality decision. After finding the ordinary knives at issue did not constitute "arms" under article I, section 24, the lead opinion consisting of four justices agreed the Seattle ordinance is a reasonable regulation. Montana, 129 Wn.2d at 590-91, 596 (Talmadge, J., lead opinion). The lead opinion treated the interpretation of "arms" under

article I, section 24 to be commensurate with the Second Amendment, declining to reach the argument that the Washington provision provided greater protection than its federal counterpart in the absence of a Gunwall[2] analysis. Id. at 591.

Five justices in two separate opinions concurred in the result on the basis that the knives in question (a small paring knife and a filleting knife) were not "arms" for the purposes of article I, section 24. Id. at 599-601 (Alexander, J. concurring, Durham, C.J., concurring). Justice Alexander's concurrence stressed the ordinance could not be considered constitutional so as to prohibit the carrying of "arms" for purposes of self-defense. Id. at 600-01. Justice Alexander chided the lead opinion for "gloss[ing] over a seeming anomaly: the ordinance exempts from its scope the carrying of knives while engaged in hunting, fishing, the culinary arts, and other lawful occupations, activities not protected by the constitution, yet does not exempt from its scope the carrying of arms for the purpose recognized in the state constitution, self-defense." Id. at 601. In a separate concurrence, Chief Justice Durham believed it "unwise to speculate about the boundaries of the 'reasonable regulation' limit on the constitutional right to bear arms in self-defense." Id. at 599.

---

[2] State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986) (setting forth the factors for evaluating whether an issue merits independent state constitutional interpretation).

Montana was decided before the U.S. Supreme Court in Heller clarified what constitutes a bearable "arm" under the Second Amendment. "Supreme Court application of the United States Constitution establishes a floor below which state courts cannot go to protect individual rights." 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 only instruments *made on purpose* to fight with are arms, and opined "ordinary culinary utensils or fishing knives" do not qualify. Montana, 129 Wn.2d at 591. Heller rejected the notion that only instruments made on purpose to fight with qualify as arms: "The term was applied, then as now, to weapons that were not specifically designed for military use and were not employed in a military capacity." Heller, 554 U.S. at 581. Heller recognizes "arms" encompass all common weapons that were used for the purpose of confrontation. Id. at 581-84, 627. "Like firearms, a knife can be carried by an individual and used as a weapon. Of course, some knives, like some firearms, are better suited to this purpose than others, but all knives and all firearms can be possessed, carried, and used in case of confrontation." David B. Kopel, Clayton E. Cramer, Joseph Olson, Knives and the Second Amendment, 47 U. Mich. J. of Law Reform 167, 191 (2013). Ordinary

fixed-blade knives served multiple purposes during frontier times, one of which was the particular purpose of fighting and defending oneself in the case of confrontation. Harold L. Peterson, American Knives 19, 21, 29, 32, 56, 63-65, 70 (1958). Standard carving or kitchen knives were used for a variety of purposes, including defense from Indian raids. Id. at 21. The expansive definition of "arms" set forth in Heller renders the narrow concept of arms in Montana obsolete.

Justice Alexander's concurrence in Montana distinguished between certain kinds of fixed-blade knives (small paring knife and filleting knife) that were unworthy of protection and other kinds of fixed-blade knives that were to be deemed bearable arms ("fighting knives" such as bowie knives and swords). Montana, 129 Wn.2d at 601 & n.2. Heller, however, clarified that arms are not limited to a particular design of an instrument. Heller, 554 U.S. at 582 ("the Second Amendment extends, prima facie, to all instruments that constitute bearable arms"). The class of arms cognizable under the Second Amendment encompasses the sorts of instruments that were common and could be used for self-defense in the event of confrontation. Id. at 581-84, 627. A distinction that exalts the form of a weapon over its capacity to serve as a weapon in times of confrontation does not make constitutional sense.

The Second Amendment broadly guarantees "the individual right to possess and carry weapons in case of confrontation." Id. at 592. Evans chose a fixed-blade "kitchen" knife to use in self-defense. That kind of knife is a common, convenient, cheap and effective weapon in case of confrontation. It necessarily qualifies as a bearable arm under article I, section 24 because it qualifies as such under the Second Amendment.

b. As Applied, The Seattle Ordinance Is Unconstitutional Under Article I, Section 24.

This Court last addressed a challenge to a restriction on the right to bear arms under article I, section 24 in Jorgenson. Jorgenson concluded article I, section 24 "should be interpreted separately from the Second Amendment to the federal constitution." Jorgenson, 179 Wn.2d at 153. But that separation is not absolute. Article I, section 24 cannot afford less protection than the Second Amendment. Sieyes, 168 Wn.2d at 292.

Evans's case affords this Court an opportunity to clarify the standard or level of scrutiny to be applied to arms restriction legislation that is not presumptively lawful. According to Jorgenson, the right to bear arms guaranteed by the Washington Constitution is subject to reasonable regulation pursuant to the State's police power. Jorgenson, 179 Wn.2d at 155. Heller and McDonald left this police power "largely intact" in recognizing the continued validity of "presumptively lawful" firearm

regulations, such as those banning felons and the mentally ill from possessing guns. Id. at 155-56. Jorgenson thus retained the balancing of interest approach for presumptively lawful restrictions, where the public benefit from the regulation is balanced against the degree to which it frustrates the purpose of the constitutional provision. Id. at 156.

Jorgenson addressed a challenge to the constitutionality of RCW 9.41.040(2)(a)(iv), which proscribes the ownership, possession, or control of any firearm by a person who is "free on bond or personal recognizance pending trial, appeal, or sentencing for a serious offense as defined in RCW 9.41.010." Id. at 148-49. The trial judge released Jorgenson on bond after finding probable cause to believe he committed first degree assault in shooting someone. Id. at 149. While released on bond, Jorgenson was found with two guns in his car by police officers investigating the discharge of a firearm. Id. Jorgenson was subsequently convicted of violating RCW 9.41.040(2)(a)(iv). Id. In applying its "reasonable regulation" standard, the Court in Jorgenson deferred to the legislature's finding that certain crimes justify "limited restriction" of firearms under RCW 9.41.040(2)(a)(iv). That restriction was reasonably necessary and did not violate article I, section 24 as applied to Jorgenson because the trial court found probable cause to believe Jorgenson had shot someone. Id. at 157-58.

Unlike in Jorgenson, Evans has not shown himself to use weapons for a criminal purpose. The Seattle ordinance might be constitutional if it were limited to such offenders. But it is not. It applies to everyone, including the law abiding. Unlike Jorgenson, Evans's case does not involve "presumptively constitutional" legislation of the type identified by Heller. The Heller Court identified "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" as examples of "presumptively lawful regulatory measures" controlling ownership of firearms. Heller, 554 U.S. at 626-27 & n.26.

The Seattle knife ordinance is not presumptively constitutional as applied here. The ordinance is not limited to felons or those that have otherwise shown themselves to be untrustworthy of safely handling weapons through criminal action. The ordinance is not limited to the mentally ill. The ordinance is not limited to "sensitive" areas such as a school or government building. Evans, for his part, is not a felon. Nothing in the record shows he has any criminal history involving unlawful use of weapons. And he did not carry his knife into a "sensitive" area, such as a park or school.

While it could be argued that a restriction on the carrying of a *concealed* weapon is a presumptively lawful regulation, Evans's argument does not turn on whether there is a constitutional right to carry a concealed knife in public. Seattle makes it unlawful for a person to carry "dangerous knives," whether concealed or unconcealed. SMC 12A.14.080(B). The City charged Evans with violating that provision. CP 88. The jury's general verdict did not specify whether it found Evans guilty of carrying a concealed knife or an unconcealed knife. CP 71, 81. To the extent concealment is relevant to the constitutional analysis, it cannot be used to defeat Evans's challenge because the jury may have convicted Evans of carrying an unconcealed knife. See Stromberg v. California, 283 U.S. 359, 367-68, 51 S. Ct. 532, 75 L. Ed. 1117 (1931) (if the jury has been instructed to consider more than one ground for conviction, one of which proves to be unconstitutional, and returns a general verdict, the verdict must be set aside because it is impossible to determine the jury rested its verdict on the constitutional ground).

Because the knife ordinance, as applied, cannot be considered presumptively constitutional, it is appropriate to look to the nature and extent of the burden imposed by the ordinance on the right to bear arms. Sieyes, 168 Wn.2d at 295. 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 themselves is a short blade knife that must be opened before it can be used, i.e., a small pocketknife. The shorter blade and crucial time lost in having to open the blade up when suddenly faced with an attacker make it a poor weapon for self-protection.

The unrebutted evidence in this record is that Evans carried the knife for the purpose of self-protection. 1RP 147. There is no evidence that he was looking for a fight or bent on causing mayhem. He did not go about menacing others with the knife. He had the knife in case he needed to defend himself while he went about his life in the neighborhood where he had been attacked. As applied to the facts of this case, the Seattle ordinance violates article I, section 24.

c. As Applied, The Seattle Ordinance Is Unconstitutional Under The Second Amendment.

The Court of Appeals recognized that whether the Seattle ordinance violates the Second Amendment is a matter of first impression. Slip op. at 1. Heller did not decide whether the right to bear arms extends to carrying a weapon in public.

In the wake of Heller, courts in other jurisdictions are in conflict on whether the right to bear arms extends beyond the home. Compare Peruta v. County of San Diego, 742 F.3d 1144, 1166, 1169, 1172 (9th Cir. 2014) (holding responsible, law-abiding citizens have right to bear arms outside the home for the lawful purpose of self-defense under the Second Amendment); Moore v. Madigan, 702 F.3d 933, 936-42 (7th Cir. 2012) (holding Chicago ordinance banning guns in public violated the Second Amendment: "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."); People v. Aguilar, 377 Ill. Dec. 405, 2 N.E.3d 321, 411-12 (Ill. 2013) (statute that categorically prohibited the possession and use of an operable firearm for self-defense outside the home violated Second Amendment) with Mack v. United States, 6 A.3d 1224, 1234-37 (D.C. Ct. App. 2010) (under "plain error" standard, no Second Amendment right to carry weapons outside the home); Williams v. State, 417 Md. 479, 481, 496-99, 10 A.3d 1167 (Md.) (statute prohibiting wearing, carrying, or transporting a handgun outside of one's home without a permit was outside the scope of the Second Amendment), cert. denied, 132 S. Ct. 93, 181 L. Ed. 2d 22 (2011).

The Court of Appeals assumed, for the purposes of its opinion, that the Second Amendment right to bear arms includes "some right" to bear arms outside of the home for the purpose of self-defense. Slip op. at 7. The assumption should be law. The Ninth Circuit in Peruta recently conducted an extensive textual and historical analysis in concluding the right to bear arms extends beyond the home. Peruta, 742 F.3d at 1150-66, 1173-75. Peruta is backed up by the common sense observation that "[t]he interest in self-protection is as great outside as inside the home." Moore, 702 F.3d at 936. 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. 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.

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.

Notwithstanding Evans's argument to the contrary, the Court of Appeals applied intermediate scrutiny in upholding the Seattle ordinance

because the restriction did not ban all knives. Slip op. at 8 and n.28. But its application amounts to no real scrutiny at all. Citing the lead opinion in Montana, the Court of Appeals trumpeted public safety and crime prevention as compelling government interests sufficient to uphold the ordinance's constitutionality. Slip op. at 9-10 (citing Montana, 129 Wn.2d at 592-93). The Court of Appeals' reliance on Montana is misplaced because the lead opinion in Montana applied the "reasonable regulation" standard, not intermediate scrutiny. Montana, 129 Wn.2d at 591-94.

As pointed out in Peruta, under intermediate scrutiny, deference is given only to the legislature's judgment regarding whether there was a "real harm" amounting to an important government interest and "whether [the statutory provisions at issue] will alleviate it in a material way." Peruta, 742 F.3d at 1177 (citing Turner Broadcasting System, Inc. v. FCC (Turner II), 520 U.S. 180, 195, 117 S. Ct. 1174, 137 L. Ed. 2d 369 (1997)). But no deference is given when assessing "the fit between the asserted interests and the means chosen to advance them." Peruta, 742 F.3d at 1177 (quoting Turner II, 520 U.S. at 213). Instead, the government is required to prove that the legislation did not burden the right "'substantially more . . . than is necessary to further' [the government's legitimate] interests." Peruta, 742 F.3d at 1177 (quoting Turner II, 520 U.S. at 214). The Seattle ordinance does not meet that standard.

Comparison to Jorgenson is instructive. In that case, the Court recognized RCW 9.41.040(2)(a)(iv) substantially relates to the State's important interest in restricting potentially dangerous persons from using firearms "because it forbids only persons charged with specific serious offenses from possessing firearms, and only while released on bond or personal recognizance." Jorgenson, 179 Wn.2d at 162. The legislature's attempt to keep guns from potentially dangerous persons while released on bail was justified as applied to Jorgenson because, while released on bond after a judge had found probable cause to believe he had shot someone, Jorgenson was found with two guns in his car by police officers investigating the discharge of a firearm. Id. at 162-63.

The Court acknowledged the statute "substantially impedes a person from exercising the right to self-defense," but deemed some categorical disqualifications to be permissible when applied to persons who have been shown to be untrustworthy with weapons. Id. at 163. The Court thus held "as applied here, the temporary restriction on Jorgenson's right to bear arms after a trial court judge found probable cause to believe he had shot someone does not violate the Second Amendment." Id.

The factors considered by the Court in upholding the constitutionality of RCW 9.41.040(2)(a)(iv) lead to a different result when applied to the Seattle ordinance at issue in Evans's case. First, Seattle's

ban on the carrying of fixed-blade knives for the purpose of self-defense is not temporary. It is permanent. There is no temporal limitation in SMC 12A.14.080(B). Second, unlike Evans's case, Jorgenson did not involve a self-defense issue as applied to the facts of the case. Evans brings an as applied challenge to the Seattle ordinance. The uncontroverted evidence is that Evans carried the knife for the purpose of self-protection after being attacked — the purpose for bearing an arm that lies at the heart of the Second Amendment. 1RP 147. Third, there is no indication in this record that Evans has shown himself to be untrustworthy with knives or any other weapon. There is a lack of substantial nexus between the City's interest in the knife ban as applied to Evans's conduct.

The Court of Appeals nevertheless upheld the Seattle ordinance because "[i]t does not destroy the right to bear arms in public under the guise of regulating it. This ordinance prohibits carrying a concealed or unconcealed dangerous knife or carrying a concealed deadly weapon. It does not ban all knives, nor does it ban firearms." Slip op. at 10.

That reasoning fails. 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." Heller, 554 U.S. at 629. A

citizen's choice of the weapon used for self-defense is entitled to respect. Id. at 628-29. Under the Court of Appeals reasoning, the handgun restriction at issue in Heller should have survived constitutional scrutiny because not all kinds of guns were banned and a person could still use a knife for self-defense in the home. Heller struck down the legislation even though other kinds of weapons were still available for self-protection. The same fate awaits the Seattle ordinance at issue here.

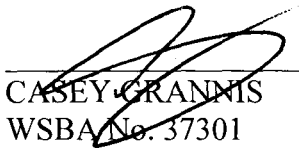
F. CONCLUSION

For the reasons stated above, Evans requests that this Court grant review.

DATED this 30th day of July 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CITY OF SEATTLE, Respondent, v. WAYNE EVANS, Petitioner.	)	NO. 67816-7-I DIVISION ONE PUBLISHED OPINION FILED: June 30, 2014

LEACH, J. — On this discretionary review of Wayne Evans's conviction for unlawful use of weapons, we must decide the constitutionality of Seattle Ordinance 12A.14.080 under both article I, section 24 of the Washington State Constitution and the Second Amendment to the United States Constitution. Evans contends that Seattle's prohibition on carrying a fixed-blade knife in public violates his federal and state constitutional right to bear arms. Our state Supreme Court's City of Seattle v. Montana[1] decision, rejecting a similar challenge to the same ordinance under the Washington Constitution, requires rejection of Evans's state constitutional claim. As a matter of first impression, we hold that as applied in this case, Seattle's prohibition on carrying a fixed-blade knife in public did not violate Evans's federal constitutional right to bear arms and affirm his conviction.

[1] 129 Wn.2d 583, 919 P.2d 1218 (1996).

FACTS

Seattle Police Officer Michael Conners discovered the knife at issue after a traffic stop. Conners stopped Evans for speeding. The smell of marijuana, coupled with furtive movements by Evans and his passenger, made Conners apprehensive about his own safety. He directed Evans to get out of the vehicle and asked Evans if he had any weapons on him.

Evans told Conners that he had a knife in his front right pants pocket. Conners took from that pocket a fixed-blade kitchen knife in a plastic sheath. Conners arrested Evans for possessing a fixed-blade knife. Evans said that he had been "jumped" before in the same neighborhood and that he carried the knife for protection.

The city of Seattle (City) charged Evans under Seattle Municipal Code (SMC) 12A.14.080, which makes it unlawful to carry a dangerous knife. Evans challenged the constitutionality of this ordinance in light of the United States Supreme Court's decision in District of Columbia v. Heller.[2] The trial court rejected this challenge. A jury convicted Evans as charged. Evans appealed to the superior court, which affirmed his conviction.

Evans petitioned this court for discretionary review. On October 10, 2012, we granted Evans's motion for discretionary review of his conviction "to the extent that he challenges the constitutionality of Seattle Municipal Code 12A.14.080."

[2] 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).

STANDARD OF REVIEW

We review constitutional issues de novo.[3] "This court will presume a legislative enactment constitutional and, if possible, construe an enactment so as to render it constitutional."[4] Because this case does not involve First Amendment freedoms, we determine only if SMC 12A.14.080 is unconstitutional as applied to the facts of this case.[5]

ANALYSIS

Evans claims that SMC 12A.14.080 unconstitutionally infringes upon his right to bear arms under article I, section 24 of the Washington Constitution and the Second Amendment to the United States Constitution. This ordinance makes it unlawful for a person knowingly to "[c]arry 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."[6] A "dangerous knife" is "any fixed-blade knife and any other knife having a blade more than three and one-half inches (3 1/2") in length."[7] A "fixed-blade knife" includes "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."[8]

---

[3] State v. Jorgenson, 179 Wn.2d 145, 150, 312 P.3d 960 (2013) (citing State v. Sieyes, 168 Wn.2d 276, 281, 225 P.3d 995 (2010)).

[4] Jorgenson, 179 Wn.2d at 150 (citing Montana, 129 Wn.2d at 589-90).

[5] State v. Carver, 113 Wn.2d 591, 599, 781 P.2d 1308 (1989) (citing State v. Worrell, 111 Wn.2d 537, 541, 761 P.2d 56 (1988)).

[6] SMC 12A.14.080(B).

[7] SMC 12A.14.010(C).

[8] SMC 12A.14.010(D).

The ordinance includes the following exemptions:

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.[9]

Article I, section 24 of the Washington Constitution 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 to the United States Constitution states, "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."

"Where feasible, we resolve constitutional questions first under our own state constitution before turning to federal law.[10] Evans invites us to apply recent United States Supreme Court Second Amendment jurisprudence to reject the Washington Supreme Court's interpretation of article I, section 24. This invitation ignores our state

---

[9] SMC 12A.14.100.

[10] Jorgenson, 179 Wn.2d at 152.

Supreme Court's binding determination "that the state and federal rights to bear arms have different contours and mandate separate interpretation."[11]

In Montana, our Supreme Court addressed a similar challenge to SMC 12A.14.080 under article I, section 24. The four justices signing the lead opinion concluded that this ordinance does not violate the state constitution because it is a "reasonable police regulation."[12] Two justices concurred in the result on the basis that the defendants' "ordinary knives" were not "arms" for purposes of article I, section 24 and considered it unwise "to speculate about the boundaries of the 'reasonable regulation' limit on the constitutional right to bear arms in self-defense."[13] Three other justices agreed that the defendants' knives were not arms but believed that the ordinance unreasonably restricted a citizen's state constitutional right to carry arms for self-defense.[14] Montana did not involve a challenge under the Second Amendment.

When a divided court decides a case and no single rationale explaining the result enjoys the assent of a majority, the narrowest ground upon which a majority agreed represents the court's holding.[15] Applying this rule, the narrow decision that the defendants' "ordinary knives" were not "arms" for purposes of article I, section 24, represents Montana's holding. Evans offers no meaningful distinction between his knife and those at issue in Montana. Although the City does not respond to Evans's argument that his knife qualifies as "arms," this failure does not alter the precedential

---

[11] Jorgenson, 179 Wn.2d at 152.
[12] Montana, 129 Wn.2d at 599.
[13] Montana, 129 Wn.2d at 599-600.
[14] Montana, 129 Wn.2d at 600-01.
[15] State v. Valdez, 167 Wn.2d 761, 775, 224 P.3d 751 (2009).

authority of Montana. Therefore, Evans's knife was not "arms" for purposes of article I, section 24 and was not afforded any protected status.

We next turn to Evans's Second Amendment challenge. Primarily, he relies upon Heller, decided after our Supreme Court decided Montana. There, the United States Supreme Court struck down a District of Columbia ordinance prohibiting possession of handguns in the home, declaring that the Second Amendment guarantees "the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[16] This right applies to states through the Fourteenth Amendment to the United States Constitution.[17]

However, the Heller Court qualified its decision, emphasizing that "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."[18] The Court also stated,

> [N]othing 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.[19]

Since the Supreme Court decided Heller, it has not defined the full scope of an individual's Second Amendment right.

---

[16] Heller, 554 U.S. at 635.

[17] McDonald v. City of Chicago, 561 U.S. 742, 130 S. Ct. 3020, 3050, 177 L. Ed. 2d 894 (2010); Sieyes, 168 Wn.2d at 291 (Second Amendment protects an individual right to bear arms from state interference through the due process clause of the Fourteenth Amendment).

[18] Heller, 554 U.S. at 635.

[19] Heller, 554 U.S. at 626-27.

As a result, state courts and lower federal courts have struggled to decide the extent, if any, that Second Amendment rights extend beyond the home.[20] We assume, for purposes of this opinion, that the Second Amendment right to bear arms includes some right to bear arms outside of the home for purposes of self-defense.[21] We also assume that Evans's knife qualifies as "arms" under the Second Amendment.

In Heller, the Supreme Court "declin[ed] to establish a level of scrutiny for evaluating Second Amendment restrictions."[22] It reasoned, "Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to "keep" and use for protection of one's home and family,' would fail constitutional muster."[23] The Court rejected a "rational

---

[20] The Second, Third, and Fourth Circuits have assumed the Second Amendment has some application outside the home, without deciding the issue. See Drake v. Filko, 724 F.3d 426, 431 (3d Cir. 2013); Kachalsky v. County of Westchester, 701 F.3d 81, 89 (2d Cir. 2012); Woollard v. Gallagher, 712 F.3d 865, 876 (4th Cir. 2013). Those courts concluded, however, that because Heller described the "core" of the right to bear arms as the "right of law-abiding, responsible citizens to use arms in defense of hearth and home," Heller, 554 U.S. at 635, any right of armed self-defense outside the home would be outside the "core" of the Second Amendment. Drake, 724 F.3d at 430-31; Kachalsky, 701 F.3d at 93-94; Woollard, 712 F.3d at 876. The Seventh and Ninth Circuits have disagreed with that analysis. After reviewing the historical record, those courts found that the "core" of the Second Amendment right extends to armed self-defense outside the home. Peruta v. County of San Diego, 742 F.3d 1144, 1166 (9th Cir. 2014); Moore v. Madigan, 702 F.3d 933, 936-37 (7th Cir. 2012). Accordingly, both courts concluded that the firearms regulations at issue were unconstitutional without reference to a level of scrutiny. Peruta, 742 F.3d at 1175-76; Moore, 702 F.3d at 941.

[21] See Peruta, 742 F.3d at 1155 ("[M]any of the same cases that the Heller majority invoked as proof that the Second Amendment secures an individual right may just as easily be cited for the proposition that the right to carry in case of confrontation means nothing if not the general right to carry a common weapon outside the home for self-defense.").

[22] Heller, 554 U.S. at 634.

[23] Heller, 554 U.S. at 628-29 (footnote and citation omitted) (quoting Parker v. District of Columbia, 478 F.3d 370, 400 (D.C. Cir. 2007)).

basis scrutiny" as too low a standard[24] and also rejected an "interest-balancing" approach.[25]

The level of scrutiny (if any) applicable to an arms restriction challenged under the Second Amendment remains unsettled.[26] Evans argues that we should apply strict scrutiny, but he fails to cite any authority establishing this as the appropriate standard. Following Heller, courts have generally applied intermediate scrutiny to evaluate Second Amendment restrictions.[27] We apply intermediate scrutiny to evaluate SMC 12A.14.080 under the Second Amendment.[28]

---

[24] Heller, 554 U.S. at 629 n.27.

[25] Heller, 554 U.S. at 634-35. The court reasoned,

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.

Heller, 554 U.S. at 634.

[26] Jorgenson, 179 Wn.2d at 159.

[27] See Jorgenson, 179 Wn.2d at 160-61 (applying intermediate scrutiny to uphold statute limiting person's right to possess arms when charged with a serious offense); Drake, 724 F.3d at 436-40 (applying intermediate scrutiny to uphold requirement of "justifiable need" to carry handgun in public); Schrader v. Holder, 704 F.3d 980, 989-91 (D.C. Cir. 2013) (applying intermediate scrutiny to uphold prohibition on person convicted of misdemeanor from possessing a firearm); Woollard, 712 F.3d at 876 (applying intermediate scrutiny to uphold requirement of "good and substantial reason" for a permit to carry, wear, or transport a handgun in public); Heller v. District of Columbia, 670 F.3d 1244, 1256-57, 1261-62 (D.C. Cir. 2011) (applying intermediate scrutiny to statutes requiring registration of firearms and prohibiting assault weapons); United States v. Booker, 644 F.3d 12, 25-26 (1st Cir. 2011) (applying intermediate scrutiny to law prohibiting domestic violence misdemeanor offender from possessing a firearm), cert. denied, 132 S. Ct. 1538 (2012); United States v. Chester, 628 F.3d 673, 683 (4th Cir. 2010) (same); United States v. Skoien, 614 F.3d 638, 641-42 (7th Cir. 2010) (same), cert. denied, 131 S. Ct. 1674 (2011); United States v. Marzzarella, 614 F.3d 85, 99 (3d Cir. 2010) (applying intermediate scrutiny to uphold statute prohibiting possession of handgun with an obliterated serial number), cert. denied, 131 S. Ct. 958 (2011); United States v. Reese, 627 F.3d 792, 802 (10th Cir. 2010) (applying intermediate scrutiny to uphold law prohibiting possession of firearm by person subject to domestic violence protection order), cert. denied, 131 S.

"A law survives intermediate scrutiny if it is substantially related to an important government purpose."[29] Phrased differently, a Seattle ordinance burdening an individual's Second Amendment rights "passes constitutional muster if it is substantially related to the achievement of an important government interest."[30]

Evans contends that SMC 12A.14.080 is unconstitutional even applying intermediate scrutiny because this ordinance has no temporal limitation, Evans carried the knife for self-defense purposes, and Evans was not "untrustworthy." But public safety and crime prevention are compelling government interests.[31] In Montana, the court determined,

> SMC 12A.14.080 furthers a substantial public interest in safety, 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. It addresses the reality of life in our state's largest city, where at all hours residents must step outside their homes and workplaces and mingle with numerous

---

Ct. 2476 (2011); United States v. Miller, 604 F. Supp. 2d 1162, 1171-72 (W.D. Tenn. 2009) (applying intermediate scrutiny and upholding federal felon-in-possession statute); People v. Mitchell, 209 Cal. App. 4th 1364, 1374, 148 Cal. Rptr. 3d 33 (2012) (applying intermediate scrutiny to uphold statute prohibiting carrying concealed dirk or dagger), review denied (Jan. 23, 2013). But see United States v. Engstrum, 609 F. Supp. 2d 1227, 1231-35 (D. Utah 2009) (applying strict scrutiny to law prohibiting domestic violence offenders from possessing firearms).

[28] Jorgenson, 179 Wn.2d at 160-62. Although the court in Jorgenson applied this standard on the basis that the firearm restriction at issue was limited in the scope of affected persons and its duration, we conclude that the ordinance at issue here is a limited restriction applying only to certain types of knives. Thus, intermediate scrutiny is appropriate.

[29] Jorgenson, 179 Wn.2d at 162 (citing Sieyes, 168 Wn.2d at 294 n.18).

[30] Kachalsky, 701 F.3d at 96.

[31] United States v. Salerno, 481 U.S. 739, 748-50, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).

> strangers in public places. Unfortunately, street crime involving knives is a daily risk.[32]

Evans relies upon Moore v. Madigan,[33] where the United States Court of Appeals for the Seventh Circuit stated, "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.' Confrontations are not limited to the home." The court in Moore struck down an Illinois law that prohibited carrying guns in public, with limited exceptions. The court explained,

> A blanket prohibition on carrying gun[s] in public prevents a person from defending himself anywhere except inside his home . . . . Illinois has lots of options for protecting its people from being shot without having to eliminate all possibility of armed self-defense in public.
>
> Remarkably, Illinois is the only state that maintains a flat ban on carrying ready-to-use guns outside the home.[34]

Here, SMC 12A.14.080 does not "eliminate all possibility of armed self-defense in public." It does not destroy the right to bear arms in public under the guise of regulating it.[35] This ordinance prohibits carrying a concealed or unconcealed dangerous knife or carrying a concealed deadly weapon. It does not ban all knives, nor does it ban firearms. Therefore, Moore does not support Evans's position.

---

[32] Montana, 129 Wn.2d at 592-93; see also State v. Spencer, 75 Wn. App. 118, 124, 876 P.2d 939 (1994) ("People have a strong interest in being able to use public areas without fearing for their lives.").

[33] 702 F.3d 933, 935-36 (7th Cir. 2012) (alteration in original) (citation omitted) (quoting Heller, 554 U.S. at 592).

[34] Moore, 702 F.3d at 940 (citation omitted).

[35] See Heller, 554 U.S. at 628-29.

Because SMC 12A.14.080 is substantially related to Seattle's important interest in public safety, we hold that it survives intermediate scrutiny. This ordinance limits the availability of fixed-blade knives in public places while including adequate exemptions to limit its effect on innocent conduct.

CONCLUSION

Because Evans fails to show that prohibiting him from carrying a concealed fixed-blade kitchen knife in public violates his right to bear arms under either article I, section 24 of the Washington State Constitution or the Second Amendment to the United States Constitution, we affirm his conviction.

Leach, J.

WE CONCUR:

Spearman, C.J.

Grosse, J.P.T.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SEATTLE, Respondent, v. WAYNE EVANS, Petitioner.	)	SUPREME COURT NO. _____ COA NO. 67816-7-I

DECLARATION OF SERVICE

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

THAT ON THE 30TH DAY OF JULY, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RICHARD GREENE
SEATTLE CITY ATTORNEY
P.O. BOX 94667
SEATTLE, WA 98124

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

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF JULY, 2014.

X_____