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No. 67816-7-I

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

CITY OF SEATTLE,
Respondent,

vs.

WAYNE EVANS,
Petitioner.

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENT OF ERROR

Defendant has not established that Seattle's ordinance prohibiting carrying a concealed fixed-blade knife violates either the 2nd Amendment or article 1, section 24 of the Washington constitution.

B. ISSUES PRESENTED FOR REVIEW

1. Has defendant established that Seattle's ordinance prohibiting carrying a concealed fixed-blade knife violates the 2nd Amendment? (Assignment of Error 1)

2. Has defendant established that Seattle's ordinance prohibiting carrying a concealed fixed-blade knife violates article 1, section 24 of the Washington constitution? (Assignment of Error 1)

C. STATEMENT OF THE CASE

At approximately 8:50 p.m. on February 27, 2010, Seattle Police Officer Michael Conners stopped a car driven by defendant for speeding. The officer first saw the car driving at a speed that appeared to be greater than the 30 mph speed limit. RP I (RP I is the Report of Proceedings of the September 15-16, 2010 trial) at 117-20. He visually estimated the speed of the car at 45 mph, RP I at 120-21,

and paced the car for six blocks also at 45 mph. RP I at 124-26 & 148. When Officer Conners turn on his police car's emergency lights, both defendant and his passenger looked over their shoulders at him through the back window. RP I at 126 & 157. Defendant and his passenger also were reaching under or placing something under the front seat and reaching towards the glove box. RP I at 127 & 151. Officer Conners was concerned that they were concealing or reaching for a weapon. RP I at 127. Defendant drove another two blocks after the officer turned on his police emergency lights, which also caused Officer Conners to be concerned about the occupants of the car having a weapon. RP I at 128.

When Officer Conners approached defendant's car, he smelled burnt marijuana, which further caused him concern about defendant's behavior because other substances frequently are added to marijuana that could cause the person smoking it to act erratically and violently. RP I at 129-30. Defendant was wearing a bulky, puffy jacket, which could conceal a weapon, RP I at 134, and the pockets of the jacket appeared to be weighted down, which also suggested to the officer that defendant might be carrying a weapon. RP I at 134-

35. Officer Conners asked defendant if he had any weapons on him, and defendant said he had a knife in his pocket. RP I at 136-37. The officer retrieved a fixed-blade knife from defendant's pocket. RP I at 137 & 152. Defendant told the officer that he carried the knife for protection. RP I at 147. Defendant was convicted of Unlawful Use of Weapons.

Defendant appealed, contending that the ordinance prohibiting his conduct was unconstitutional, the evidence was not sufficient to support his conviction, the trial court should have instructed the jury on the exceptions to the prohibition on carrying a dangerous knife, the trial court should have suppressed the knife obtained from a warrantless search of his person and the trial court should not have admitted testimony regarding the reasons the officer searched him. The superior court rejected each of these contentions and affirmed defendant's conviction. This court accepted review solely with respect to the constitutionality of the ordinance.

D. ARGUMENT

Defendant has not established that Seattle's ordinance prohibiting carrying a concealed fixed-blade knife is unconstitutional.

Defendant contends that the prohibition on carrying a concealed fixed-blade knife violates his right to bear arms for self-defense under both the federal[1] and state constitutions.[2] As he does not assert any 1st Amendment freedom, the court should consider only whether the ordinance is unconstitutional as applied to the facts of the case.[3] A legislative enactment, including a municipal ordinance, is presumed to be constitutional, and the party challenging

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[1] The 2nd 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.

[2] Article 1, 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.

[3] *State v. Carver*, 113 Wn.2d 591, 599, 781 P.2d 1308, 789 P.2d 306 (1989); *In the Matter of the Dependency of C.B.*, 79 Wn. App. 686, 689, 904 P.2d 1171 (1995), *review denied*, 128 Wn.2d 1023 (1986); *Seattle v. Yeager*, 67 Wn. App. 41, 44, 834 P.2d 73 (1992), *review denied*, 123 Wn.2d 1027 (1993).

it has the burden of proving its unconstitutionality beyond a reasonable doubt.[4]

> [T]he "beyond a reasonable doubt" standard used when a statute is challenged as unconstitutional refers to the fact that one challenging a statute must, by argument and research, convince the court that there is no reasonable doubt that the statute violates the constitution. The reason for this high standard is based on our respect for the legislative branch of government as a co-equal branch of government, which, like the court, is sworn to uphold the constitution. We assume the Legislature considered the constitutionality of its enactments and afford some deference to that judgment. Additionally, the Legislature speaks for the people and we are hesitant to strike a duly enacted statute unless fully convinced, after a searching legal analysis, that the statute violates the constitution.[5]

Seattle Municipal Code (SMC) 12A.14.080(B) states that "[i]t is unlawful for a person knowingly to . . . carry concealed or unconcealed on his or her person any dangerous knife." A dangerous knife is defined as "any fixed-blade knife and any other knife having a blade more than three and one-half inches (3 ½") in

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[4] *Seattle v. Montana*, 129 Wn.2d 583, 589, 919 P.2d 1218 (1996); *State v. Spencer,* 75 Wn. App. 118, 121, 876 P.2d 939 (1994), *review denied*, 125 Wn.2d 1015 (1995).

[5] *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998).

length."[6] The ordinance contains several exemptions for recreational, work-related and personal uses of a dangerous knife.[7]

1. Defendant has not established that Seattle's ordinance violates the 2nd Amendment.

Defendant contends that the 2nd Amendment grants him the right to carry a concealed fixed-blade knife in public. Cases from the early days of the nation rejected such a notion.[8] As the court in *Louisiana v. Smith*[9] noted:

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[6] SMC 12A.14.010(A) & (B).

[7] SMC 12A.14.100 provides:

The proscriptions of Section 12A.14.080B 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.

[8] *See Arkansas v. Buzzard,* 4 Ark. 18 (1842) (holding that statute prohibiting the wearing of any pistol, dirk, butcher or large knife, or a sword in a cane, concealed as a weapon, unless upon a journey, does not violate 2nd Amendment); *Nunn v. Georgia*, 1 Ga. 243 (1846) (upholding constitutionality of statute prohibiting bowie-knives, dirks, spears from being sold, or secretly kept about the person); *Louisiana v. Jumel*, 13

> [The 2nd Amendment] was never intended to prevent the individual States from adopting such measures of police as might be necessary, in order to protect the orderly and well disposed citizens from the treacherous use of weapons not even designed for any purpose of public defence, and used most frequently by evil-disposed men who seek an advantage over their antagonists, in the disturbances and breaches of the peace which they are prone to provoke.

The Supreme Court has stated, admittedly in dicta, that the 2nd Amendment "is not infringed by laws prohibiting the carrying of concealed weapons."[10]

Defendant insists, however, that the Supreme Court's recent decisions in *District of Columbia v. Heller*[11] and *McDonald v.*

La.Ann. 399 (1858) (statute prohibiting carrying concealed weapon does not violate 2nd Amendment); *see also Alabama v. Reid*, 1 Ala. 612 (1840) (holding that statute prohibiting carrying a concealed knife does not violate constitutional provision that "Every citizen has the right to bear arms in defence of himself and the State."); *Andrews v. Tennessee*, 50 Tenn. 165 (1871) (prohibition on carrying a dirk, swordcane or Spanish stiletto does not violate constitutional provision "That the citizens of this State have a right to keep and bear arms for their common defense."); *Fife v. Arkansas*, 31 Ark. 455 (1876) (holding that statute prohibiting carrying any pistol of any kind whatever, or any dirk, butcher or Bowie knife, or sword or spear in a cane, brass or metal knucks, or razor, as a weapon does not violate constitutional provision that "The citizens of this State shall have the right to keep and bear arms for their common defense.").

[9] 11 La.Ann. 633 (1856).

[10] *Robertson v. Baldwin*, 165 U.S. 275, 282, 17 S.Ct. 326, 41 L.Ed. 715 (1897).

[11] 554 U.S. 570, 128 S. Ct. 2783, 171 L.Ed.2d 637 (2008).

Chicago[12] change everything – a paradigm shift, as it were. In *Heller*, the Court addressed weapons laws that "totally ban[ned] handgun possession in the home" and "require[d] that any lawful firearm in the home be disassembled or bound by a trigger lock at all times, rendering it inoperable."[13] The Court observed that "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban."[14] The Court held:

> [T]he District'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. Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it *in the home.*[15]

The court noted that the right secured by the Second Amendment, like most rights, is not unlimited, and its decision did not cast doubt on longstanding prohibitions on the possession of weapons by certain persons or the carrying of weapons in certain

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[12] ___ U.S. ___, 130 S. Ct. 3020, 177 L.Ed.2d 894 (2010) (plurality opinion).

[13] *Heller*, 128 S. Ct. at 2817.

[14] *Heller*, 128 S. Ct. at 2818.

[15] *Heller,* 128 S. Ct. at 2821-22 (emphasis added).

places.[16] The limited nature of the *Heller* decision was reiterated in *McDonald*, which involved a suit by "Chicago residents who would like to keep handguns in their homes for self-defense, but are prohibited from doing so by Chicago's firearms laws."[17] The court stated that the central holding in *Heller* was that "the Second Amendment protects a personal right to keep and bear arms for lawful purposes, *most notably for self-defense within the home*."[18] In *McDonald*,[19] the court held that the Second Amendment right recognized in *Heller* applies to the states through the Fourteenth Amendment so as to invalidate this total ban on the possession of handguns. But again, the court in *McDonald*[20] noted:

> It is important to keep in mind that *Heller*, while striking down a law that prohibited the possession of handguns in the home, recognized that the right to keep and bear arms is not "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."

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[16] *Heller*, 128 S. Ct. at 2816-17.
[17] *McDonald*, 130 S. Ct. at 3026.
[18] *McDonald*, 130 S. Ct. at 3044 (emphasis added).
[19] 130 S. Ct. at 3050.
[20] 130 S. Ct. at 3047 (citation omitted).

Seattle's ordinance does not violate the right to bear arms under *Heller* and *McDonald* as it does not restrict the use of a fixed-blade knife in the home for the purpose of self defense. The ordinance expressly provides that it "shall not apply to . . . any person carrying such knife . . . in such person's place of abode."[21] Unlike the restrictions in *Heller*, Seattle's ordinance does not forbid *possession* of knives at all and does not forbid the use of a knife in the home. The ordinance is a valid restraint under the Second Amendment because it does not infringe on defendant's right to use a knife in his home for self defense.

> Treating the home as special and subject to limited state regulation is not unique to firearm regulation; it permeates individual rights jurisprudence. For instance, in *Stanley v. Georgia*, the Court held that in-home possession of obscene materials could not be criminalized, even as it assumed that public display of obscenity was unprotected. While "the States retain broad power to regulate obscenity [ ] that power simply does not extend to mere possession by the individual in the privacy of his own home." Similarly, in *Lawrence v. Texas*, the Court emphasized that the state's efforts to regulate private sexual conduct between consenting adults is especially suspect when it intrudes into the home: "Liberty protects the person from unwarranted government intrusions into a dwelling or other private

[21] SMC 12A.14.100(C).

> places. In our tradition the State is not omnipresent in the home."
>
> But while the state's ability to regulate firearms is circumscribed in the home, "outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense." There is a longstanding tradition of states regulating firearm possession and use in public because of the dangers posed to public safety.[22]

Neither *Heller* nor *McDonald* determined a particular standard for evaluating a Second Amendment challenge. The courts considering this question almost always have applied the level of intermediate scrutiny.[23] *Heller* did not explicitly embrace the right to

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[22] *Kachalsky v. County of Westchester*, 701 F.3d 81, 94-95 (2nd Cir. 2012), *cert. denied*, 133 S.Ct. 1806 (2013) (citations omitted).

[23] *Drake v. Filko*, 724 F.3d 426, 436-40 (3rd Cir. 2013) (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 v. Gallagher*, 712 F.3d 865 (4th Cir. 2013) (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 statues requiring registration of firearms and prohibiting assault weapons); *United States v. Booker*, 644 F.3d 12, 25-26 (1st Cir. 2011), *cert. denied*, 132 S.Ct. 1538 (2012) (applying intermediate scrutiny to law prohibiting domestic violence misdemeanor offender from possessing a firearm); *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), *cert. denied*, 131 S.Ct. 1674 (2011) (same); *United States v. Marzzarella*, 614 F.3d 85, 99 (3rd Cir. 2010), *cert. denied*, 131 S.Ct. 958

bear arms as fundamental,[24] and the federal circuits have uniformly agreed that this right is not fundamental.[25]

Under the intermediate scrutiny test, the court considers whether the regulation is substantially related to an important government objective, *i.e.*, the underlying policy objective of the statute is "important" and the statute is "substantially related" to achieving such a goal.[26] The government's interest in preventing

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(2011) (applying intermediate scrutiny to uphold statute prohibiting possession of handgun with an obliterated serial number); *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010), *cert. denied*, 131 S.Ct. 2476 (2011) (applying intermediate scrutiny to uphold law prohibiting possession of firearm by person subject to domestic violence protection order); *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).; *California v. Mitchell*, 209 Cal.App.4th 1364, 1374, 148 Cal.Rptr.3d 33 (2012), *review denied* (2013) (applying intermediate scrutiny to uphold statute prohibiting carrying concealed dirk or dagger); *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).

[24] *See United States v. Darrington*, 351 F.3d 632, 635 (5th Cir. 2003), *cert. denied*, 541 U.S. 1080 (2004) (judicial intent to classify an individual right as a "fundamental right" should be conveyed by explicit use of that precise constitutional terms of art).

[25] *See, e.g., Olympic Arms v. Buckles,* 301 F.3d 384, 388-89 (6th Cir. 2002); *United States v. Hancock,* 231 F.3d 557, 565-66 (9th Cir. 2000), *cert. denied*, 532 U.S. 989 (2001); *Gillespie v. Indianapolis,* 185 F.3d 693, 709 (7th Cir. 1999), *cert. denied*, 528 U.S. 1116 (2000); *United States v. Toner,* 728 F.2d 115, 128 (2d Cir. 1984).

[26] *Clark v. Jeter*, 486 U.S. 456, 461, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988).

crime is both legitimate and compelling.[27] As the court in *State v. Spencer*[28] noted with respect to RCW 9.41.270, which prohibits carrying a firearm or knife in a manner warranting alarm in others, "[p]eople have a strong interest in being able to use public areas without fearing for their lives."

Prohibiting the carrying of dangerous knives in public plainly serves this purpose. As the court noted in *Seattle v. Montana*:[29]

> 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 strangers in public places. Unfortunately, street crime involving knives is a daily risk.
>
> . . .
>
> Given the reality of modern urban life, Seattle has an interest in regulating fixed blade knives to promote public safety and good order. Seattle may decide fixed blade knives are more likely to be carried

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[27] *United States v. Salerno,* 481 U.S. 739, 750-51, 107 S. Ct. 2095, 95 L.Ed.2d 697 (1987); *Schall v. Martin*, 467 U.S. 253, 104 S.Ct. 2403, 2410, 81 L.Ed.2d 207 (1984) ("legitimate and compelling state interest" in protecting the community from crime cannot be doubted); *see also Miller*, 604 F. Supp. 2d at 1171 (importance of crime prevention cannot be doubted, and it has been mentioned by courts in a variety of contexts).

[28] 75 Wn. App. at 124.

[29] 129 Wn.2d at 592 & 596.

> for malevolent purposes than for self-defense, and 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. The harm of carrying concealed knives is even more manifest.

The harm caused by knife violence has been well-documented.[30] The risk of a surprise attack exists even if the weapon bearer originally intends to use the weapon only for legitimate self-defense.[31]

> When dangerous weapons are readily available, death or serious injury too often result. One who carries a knife, a pistol, or an ice pick may think that he will use it only in lawful self-defense. But threats, violence, and other unsettling events may occur without warning. People who are startled or upset may overreact, lose their tempers, or make poor judgments under stress. Even when they start out with good intentions, persons who carry items capable of inflicting death or great bodily injury may use them in ways and in situations that are not justified—with grave results.[32]

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[30] *See* Bureau of Justice Statistics (2009), Weapon Use by Offense Type, *available at* http://www.bjs.gov/index.cfm?ty=tp&tid=43 (finding that in 2009, a knife was used in 6% of violent crime, 8% of rape/sexual assault, 9% of robberies and 5% of simple/aggravated assault).

[31] *Mitchell*, 209 Cal.App.4th at 1375.

[32] *Mack v. United States*, 6 A.3d 1224, 1232 (D.C. App. 2010) (no 2nd Amendment right to carry ice pick outside the home for self-defense).

Reducing the number and availability of fixed blade knives in public places, while exempting the legitimate carrying of such knives by sportsmen and for work, is directly related to an important government interest. The ordinance satisfies the intermediate scrutiny test.

Even courts that have held that the right to bear arms is fundamental under the state constitution have not applied strict scrutiny to weapons regulations. In *Klein v. Leis*,[33] the court held that although the Ohio constitutional right to bear arms[34] was fundamental,[35] a prohibition on carrying a concealed weapon did not unconstitutionally infringe that right.[36] Similarly, in *Wisconsin v. Cole*,[37] the court held that although the Wisconsin constitutional right to bear arms[38] was fundamental, a prohibition on carrying a

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[33] 99 Ohio St.3d 537, 795 N.E.2d 633, 636-38 (2003).

[34] Section 4, article I of the Ohio constitution provides:

The people have the right to bear arms for their defense and security.

[35] 795 N.E.2d at 636-37.

[36] 795 N.E.2d at 638.

[37] 264 Wis.2d 520, 665 N.W.2d 328 (2003).

[38] Article 1, section 25 of the Wisconsin constitution provides:

The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose.

concealed and dangerous weapon was not subject to strict scrutiny.[39] The court concluded that the "statute is a reasonable regulation on the time, place, and manner in which the right to bear arms may be exercised. It does not unreasonably infringe upon a citizen's ability to exercise the right."[40] That case also concerned a defendant who was in a car that was stopped for a traffic violation and claimed he had the concealed weapon for protection,[41] but the court doubted the legitimacy of his fear because he did not assert that he had the weapon in response to any specific or imminent threat at or near the time of arrest.[42] Defendant likewise did not articulate to Officer Conners any specific and imminent threat that would warrant his need to carry the concealed fixed-blade knife.

Decisions after *Heller* do not suggest that carrying a dangerous knife in public is constitutionally-protected behavior. In *Wooden v. United States*,[43] the court held that the Second Amendment does not protect the carrying of a knife for self-defense

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[39] 665 N.W.2d at 336.
[40] 665 N.W.2d at 339.
[41] 665 N.W.2d at 330-31.
[42] 665 N.W.2d at 346.

outside the home.[44] In *Lacy v. Indiana*,[45] the court held that a statute prohibiting possession of a switchblade did not violate a provision of the Indiana constitution that "the people shall have the right to bear arms, for defense of themselves and the State." In *California v. Mitchell*,[46] the court held that a statute prohibiting carrying a concealed dirk or dagger does not violate the Second Amendment. Other courts have overwhelmingly rejected the claim that the Second Amendment affords a right to carry a weapon in a public place.[47]

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[43] 6 A.3d 833, 840-41 (D.C. Ct. App. 2010).

[44] *See also Mack*, 6 A.3d at 1234-36.

[45] 903 N.E.2d 486 (Ind. App.), *transfer denied*, 915 N.E.2d 991 (2009).

[46] 209 Cal.App.4th at 1373-79.

[47] *United States v. Masciandaro*, 638 F.3d 458 (4th Cir.), *cert. denied*, 132 S.Ct. 756 (2011); *Gamble v. United States*, 30 A.3d 161, 164-66 (D.C. App. 2011); *California v. Ellison*, 196 Cal.App.4th 1342, 1346-51, 128 Cal.Rptr.3d 245 (2011); *Massachusetts v. Perez*, 80 Mass.App.Ct. 271, 281-82, 952 N.E.2d 441 (2011); *Williams v. Maryland*, 417 Md. 479, 10 A.3d 1167, *cert. denied*, 132 S.Ct. 93 (2011); *United States v. Hart*, 726 F.Supp.2d 56, 60 (D. Mass. 2010), *affirmed*, 674 F.3d 33 (1st Cir.), *cert. denied*, 133 S.Ct. 228 (2012); *California v. Villa*, 178 Cal. App. 4th 443, 450, 100 Cal. Rptr.3d 463 (2009), *review denied* (2010); *Kansas v. Knight*, 44 Kan. App.2d 666, 681-86, 241 P.3d 120 (2010), *review denied* (2011); *California v. Flores*, 169 Cal.App.4th 568, 576, 86 Cal.Rptr.3d 804 (2008), *review denied* (2009); *New York v. Perkins*, 62 A.D.3d 1160, 880 N.Y.S.2d 209, 210, *leave to appeal denied*, 13 N.Y.3d 748, 914 N.E.2d 1020 (2009); *see also Hightower v. City of Boston*, 693 F.3d 61, 73 (1st Cir. 2012) (government may regulate the carrying of concealed weapons outside of the home); *Oregon v. Smoot*, 97 Or. App. 255, 775 P.2d 344

Wyoming v. McAdams,[48] concerned possession of a concealed knife by the defendant, who said she had the knife for protection, but the court held that the prohibition on concealed weapons did not violate the state constitutional right to bear arms.[49] The court noted with respect to the defendant's perceived need to have the knife for self defense:

> We are cognizant of the fact that our concealed deadly weapons statute imposes some limitation on a person's right to bear arms in defense of himself; but, when balanced against the object of the statute, we do not find the limitation unreasonable, particularly when we recognize that it is not always necessary, nor is it always lawful, to use deadly force in one's own defense.[50]

Moore v. Madigan,[51] relied on by defendant, appears to be the only case rejecting a restriction on carrying a firearm outside the home, and the court noted that "[r]emarkably, Illinois is the *only* state that maintains a flat ban on carrying ready-to-use guns outside

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(1989) (upholding constitutionality of statute prohibiting carrying concealed switchblade).

[48] 714 P.2d 1236, 1236 (Wyo.1986).

[49] 714 P.2d at 1237-38.

[50] 714 P.2d at 1238.

[51] 702 F.3d 933 (7th Cir. 2012).

the home."[52] Defendant has not sustained his burden of proving, beyond a reasonable doubt, that Seattle's prohibition on carrying a concealed fixed-blade knife violates the 2nd Amendment.

2. Defendant has not established that Seattle's ordinance violates Article 1, section 24 of the Washington constitution.

Defendant also contends that the state constitution grants him the right to carry a concealed fixed-blade knife in public. This argument was rejected in *Seattle v. Montana*.[53] In the course of holding that SMC 12A.14.080 does not violate the right to bear arms under the state constitution, the court noted that "Seattle has not enacted a complete prohibition on possession and carrying knives, . . . but has instead regulated the carrying, transport, and use of knives."[54] The court stated:

> First, the ordinance does not forbid *possession* of knives. Under the terms of the ordinance, possession of fixed blade knives at home or a place of business is permitted. Even use of a knife in a restaurant or park to peel an apple would not be proscribed. *Carrying* a

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[52] *Moore*, 702 F.3d at 940 (emphasis in original).

[53] 129 Wn.2d 583 at 595 ("Montana and McCullough asset that SMC 12A.14.080 is an unreasonable exercise of police power that adversely impacts their right to self-defense").

[54] *Montana*, 129 Wn.2d at 595-96.

> fixed blade knife is banned by the ordinance, unless a person is doing so for hunting or fishing purposes, for work, or to and from home or work. Moreover, the ordinance does not regulate common pocket or traditional Scout knives whose blades fold.[55]

Subsequent decisions of Washington courts have not cast doubt on the validity of Seattle's dangerous knife ordinance. In *State v. Sieyes*,[56] the court upheld a conviction for unlawful possession of a firearm by a juvenile under RCW 9.41.040(2)(a)(iii). In holding that this statute does not infringe on the constitutional right to bear arms, the court noted that the defendant had failed to provide convincing authority supporting an original meaning of the Second Amendment that would grant all children an unfettered right to bear arms.[57] Defendant likewise points to no authority granting him an unfettered right to carry a concealed fixed-blade knife in public.

In *Warden v. Nickels*,[58] the court held that an administrative rule prohibiting carrying or displaying a firearm in certain Seattle park facilities did not violate the state constitution. Citing *Montana*,

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[55] *Montana*, 129 Wn.2d at 595 (emphasis in original).
[56] 168 Wn.2d 276, 225 P.3d 995 (2010).
[57] *Sieyes*, 168 Wn.2d at 295.
[58] 697 F. Supp. 2d 1221, 1228-30 (W.D. Wash. 2010).

the court noted that "*Sieyes* left undisturbed existing Washington precedent that "the right to bear arms in art.1, § 24 is not absolute, but instead is subject to 'reasonable regulation' by the State under its police power."[59] Again, the court in *Montana* determined that, given the reality of modern urban life, Seattle has an interest in regulating fixed-blade knives to promote public safety and good order and that this ordinance was a reasonable arms regulation and not unconstitutional.

Defendant's argument that the state constitutional right to bear arms provides greater protection than does the federal constitution regarding his carrying of a concealed fixed-blade knife might be significant had *Montana* been based on the Second Amendment, but it was not. *Montana* addressed only article 1, section 24 of the state constitution and concluded that Seattle's prohibition on carrying a dangerous knife does not violate that provision.[60]

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[59] *Warden*, 697 F. Supp. 2d at 1229.
[60] *See Montana*, 129 Wn.2d at 589-96.

The criteria articulated in *State v. Gunwall*[61] do not demonstrate that the state constitution extends broader rights than does the federal constitution to carry a concealed fixed-blade knife in public. The text of article 1, section 24 prohibiting the private employment of an armed body of men shows that the right to bear arms is limited. As the court in *Arizona v. Moerman*,[62] stated concerning an identical provision of the Arizona constitution:

> plain wording [of the constitution right to bear arms] demonstrates that the right is not absolute and implies that some qualification is permissible. Indeed, its very language suggests that people do not have the right to bear arms in any manner and under all circumstances in Arizona.

The language of the 2nd Amendment, on the other hand, contains no express limitation on the right to bear arms. Looking solely at the text of each constitutional provision does not lead to a conclusion that the Washington constitution affords a greater right to bear arms than does the federal constitution.

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[61] 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).

[62] 182 Ariz. 255, 895 P.2d 1018, 1022 (Ariz.App. 1994), *review denied* (1995).

With respect to the history of the state constitution, defendant argues that the rejection of a proposed amendment to Article 1, section 24 to prohibit carrying a concealed weapon shows that the framers intended to allow carrying a concealed knife in public. Such an argument is contrary to the rule of construction that a court will not speculate as to the reason the legislature rejects a proposed amendment.[63] Also, a quite similar argument failed in *Moerman*,[64] which held that the rejection of proposals to the Arizona constitution's right to bear arms to authorize the legislature to regulate or prohibit carrying a concealed weapon showed that the framers intended the right to be absolute.

As the court noted in *Montana*,[65] Washington has a long history of regulating weapons including knifes. Defendant's assertion that Washington has no history of regulating unconcealed knives does him no good as the knife he carried was obviously concealed. Defendant's claim that the 1957 amendment to RCW

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[63] *See In the Matter of the Personal Restraint of Andress*, 147 Wn.2d 602, 611, 56 P.3d 981 (2002); *Seattle v. Williams*, 128 Wn.2d 341, 354 n. 14, 908 P.2d 359 (1995).

[64] 895 P.2d at 1021-22.

9.41.250 shows that the legislature intended to allow the carrying of a concealed knife ignores the continued prohibition on carrying a concealed dagger or dirk – a fixed-blade knife.[66] This amendment also added to the list of prohibited weapons a switchblade knife.[67] The obvious intent of this statutory amendment was to clarify that pocket knives are not prohibited.

For more than a century, the court has been declaring that article 1, section 24 is subject to the state's police power regulation.[68] Defendant's claim that the court in *Sieyes* abandoned this standard seems to be drawing an unwarranted conclusion from the court's determination not to employ a level-of-scrutiny analysis.[69]

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[65] 129 Wn.2d at 595 n 3.

[66] *State v. Leatherman*, 100 Wn.App. 318, 323-24,997 P.2d 929 (2000) (fixed-blade knife with a straight blade sharpened on both sides is a dagger); *see also California v. Ruiz*, 88 Cal.App. 502, 263 P. 836, 837 (1928) (dagger is any straight knife, except what is commonly known as a "pocket knife").

[67] Laws of 1957, chapter 93, section 1.

[68] *See State v. Gohl*, 46 Wash. 408, 410, 90 P. 259 (1907) (a constitutional guaranty of certain rights to the individual citizen does not place such rights entirely beyond the police power of the state); *State v. Krantz*, 24 Wn.2d 350, 353, 164 P.2d 453 (1946) (it has long been recognized that this constitutional guarantee is subject to reasonable regulation by the state under its police power).

[69] *See Sieyes*, 168 Wn.2d at 295 ("We follow *Heller* in declining to analyze RCW 9.41.040(2)(a)(iii) under any level of scrutiny.")

With respect to structural differences between the federal and state constitutions, both the 2nd Amendment and article 1, section 24 guarantee an individual right to bear arms.[70] This criteria does not suggest differing interpretations of these constitutional provisions`.

The regulation of knives is a matter of local concern. The legislature seems to have recognized the absence of any need for statewide uniformity with respect to knives as it has preempted only the regulation of firearms.[71] While displaying and using a dangerous knife might be acceptable in a rural environment, such display and use in a highly-urban environment is not. Analysis of the *Gunwall* criteria does not show that article 1, section 24 extends broader rights to Washington citizens than does the 2nd Amendment.

Defendant has not sustained his burden of proving, beyond a reasonable doubt, that Seattle's prohibition on carrying a concealed

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[70] *Sieyes*, 168 Wn.2d at 282 & 292.

[71] *See* RCW 9.41.290, which provides, in pertinent part:

The state of Washington hereby fully occupies and preempts the entire field of firearms regulation within the boundaries of the state, including the registration, licensing, possession, purchase, sale, acquisition, transfer, discharge, and transportation of firearms, or any other element relating to firearms or parts thereof, including ammunition and reloader components.

fixed-blade knife violates article 1, section 24 of the Washington constitution.

E. CONCLUSION

Based on the foregoing argument, the superior court's decision affirming defendant's conviction should be affirmed.

Respectfully submitted this 11th day of October, 2013.

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

CITY OF SEATTLE, Respondent, **vs.** **WAYNE EVANS,** Petitioner.	))))))))	**No. 67816-7-I** **CERTIFICATE OF PROOF OF SERVICE**

I am an Assistant City Attorney representing respondent in this case. On October 11, 2013, I served a true copy of the Brief of Respondent on counsel for petitioner by mailing the same to counsel, postage prepaid, at the following address:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 11th day of October, 2013 at Seattle, Washington.

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