

STATE OF WISCONSIN
IN SUPREME COURT

No. 2004AP2989-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

SCOTT K. FISHER,

Defendant-Respondent.

ON CERTIFICATION FROM THE COURT OF
APPEALS ON APPEAL FROM A JUDGMENT OF
DISMISSAL ENTERED IN THE JACKSON COUNTY
CIRCUIT COURT, THE HONORABLE
JOHN A. DAMON, PRESIDING

BRIEF AND APPENDIX OF
PLAINTIFF-APPELLANT

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Certification

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STATEMENT ON ORAL ARGUMENT AND
PUBLICATION

As in any case important enough to merit this court's review, oral argument and publication of the court's decision are warranted.

STATEMENT OF THE ISSUE

Is Wis. Stat. § 941.23, which criminalizes the carrying of a concealed weapon, unconstitutional as applied to the defendant tavern owner who carried a concealed handgun in his vehicle at a time when he was not transporting cash from the business?

The trial court held that the statute is unconstitutional as applied to the defendant's conduct. The court of appeals certified the question to the supreme court.

STATEMENT OF THE CASE

This is an appeal by the State of Wisconsin from a judgment of the Jackson County Circuit Court dismissing a charge of carrying a concealed weapon against defendant-respondent Scott K. Fisher. The circuit court dismissed the charge based on its determination that the statute that prohibits carrying a concealed weapon, Wis. Stat. § 941.23, is unconstitutional as applied to Fisher's conduct.

According to the criminal complaint, Fisher drove his pickup truck to the DNR Service Center in Black River Falls at about 4:00 p.m. on December 20, 2003 (2:1; A-Ap. 101). Fisher approached DNR Warden Daniel Schultz and said that he was looking for another warden (*id.*). Fisher said that he was upset because he had received a citation in the mail earlier that day (*id.*).

Fisher told Warden Schultz that his truck had been stolen from his place of business and that when he reported the theft he informed the police that his truck contained three loaded firearms (*id.*). He said that he had received a citation for the loaded firearms and that he believed that he should not have received that citation (*id.*).

Fisher told Warden Schultz that he owned the Cozy Corner bar and that he regularly carries large amounts of cash (*id.*). He stated that he always carried a loaded firearm with him and said to Schultz, "to be honest with you, I have a loaded handgun in the truck right now" (*id.*).

Warden Schultz asked Fisher where the gun was located (*id.*). Fisher opened the driver's door and retrieved a .40 caliber semi-automatic handgun from the

center console in the front seat of the truck (*id.*). The gun was loaded with nine rounds in its magazine and an additional round chambered (*id.*). Schultz seized the weapon along with another loaded magazine and a box of .40 caliber ammunition that were lying beside the gun in the center console (*id.*).

A criminal complaint was filed charging Fisher with one count of carrying a concealed weapon (CCW) (2:1-2; A-Ap. 101-02). In a pretrial motion, Fisher asserted a constitutional defense to the charge based on Article I, Section 25, of the Wisconsin Constitution and this court's decision in *State v. Hamdan*, 2003 WI 113, 264 Wis. 2d 433, 665 N.W.2d 785 (16; 17).

The court held a hearing on that motion at which Fisher was the sole witness (29:7-26; A-Ap. 109-24). Fisher testified that he is the owner and operator of the Cozy Corner tavern in Black River Falls, where he generally works at night (29:8; A-Ap. 110). He often has large sums of cash on hand at the tavern and typically has at least two thousand dollars at the end of the night's business (29:12-13; A-Ap. 114-15).

Fisher testified that he leaves some cash in a safe at the tavern at the end of the night to be available when the business opens the next morning and that on most nights, usually four or five times a week, he takes the remaining proceeds with him (29:13-14; A-Ap. 115-16). Some nights he takes the money directly to the bank to deposit it, and other nights he takes the money home and deposits it the next day (29:14-15; A-Ap. 116-17).

At the time of his arrest on the CCW charge, Fisher was not transporting money from his business (29:20; A-Ap. 127). Rather, Fisher was attending to personal business and was on his way to McDonald's when he decided to pull into the DNR office to speak with the warden (29:20-21; A-Ap. 122-23).

Fisher kept the gun loaded, with the safety on, in the vehicle's unlocked center console (29:16, 18; A-Ap. 118, 120). Fisher testified that he kept the gun in the vehicle at times when he did not need it to protect cash from his business because it did not "seem practical" to remove the when he was not transporting cash (29:20; A-Ap. 122). He does not take the gun into the bar and said that his tavern patrons would not like it if they saw him with a holstered firearm (29:22, 24; A-Ap. 124, 126). He acknowledged that nothing prevented him from not carrying the gun in the vehicle until such time as he was actually transporting cash or from carrying the gun in a holster while he was driving (29:20-21; A-Ap. 122-23).

Fisher considers himself to be at risk of being robbed while transporting cash from his business to the bank or to his home (29:15; A-Ap. 117). Fisher himself has never been robbed (29:21, 23; A-Ap. 123, 125), but he testified that four local businesses had been robbed "within the last year or so": "Tubby Krueger operates downtown, he was knocked on the head and was robbed personally. The Quick Cash in Black River was robbed at gunpoint, the Dairy Way was robbed at gunpoint and shots exchanged there, and the Frame Shop downtown, that was armed [robbery] by gunpoint" (29:15; A-Ap. 117).

Fisher testified that his vehicle had been stolen about a week and a half prior to his arrest on the CCW charge. He had left his vehicle running outside the bar at 2:45 a.m. to let it warm up before going home, and when he went back outside, the vehicle was gone (29:8, 18; A-Ap. 110, 120). (*id.*). Fisher reported the theft to the police and informed them that there were four guns in the vehicle – the .40 caliber handgun, a shotgun, a .22 rifle, and a .22 pistol – three of which were loaded (29:9, 17-18; A-Ap. 111, 119-20). That report led to Fisher being cited for transporting a loaded firearm (*id.*).

Fisher testified that he had worked for the Department of Corrections for four-and-a-half years

(29:16; A-Ap. 118). In that position, he was qualified in weapons and underwent yearly training in weapons and the use of force (29:16-17; A-Ap. 118-19).

Based on Fisher's testimony, which it found to be credible, the trial court ruled that Fisher's interest in having a weapon to protect himself outweighed the State's interest in enforcing the CCW statute and that concealing the weapon was Fisher's only reasonable means of exercising his right to bear arms (29:41-46; A-Ap. 143-48). The court found it irrelevant that Fisher was not carrying money from the business at the time of the offense because "a lot of these crimes are unpredictable" and "[w]e don't know when and where someone is going to be subject to an assault" (29:43; A-Ap. 145). Fisher's interest in carrying a concealed gun for security outweighed the State's interest in enforcing the statute, the court concluded, because Fisher "pose[d] no threat as far as anyone says" (29:45-46; A-Ap. 147-48). The court further found that the alternatives of carrying the gun in an open holster or keeping the gun encased in the vehicle were not reasonable (29:46; A-Ap. 148).

The court asked the State whether it could show probable cause that Fisher had an unlawful purpose when he carried the concealed weapon (29:47; A-Ap. 149). The State informed the court that it had no evidence of any such purpose (29:47-48; A-Ap. 149-50). The court then granted Fisher's motion to dismiss the charge and entered a judgment of dismissal (20:1; 29:48; A-Ap. 125, 150).

ARGUMENT

This case presents a single issue: is Wisconsin's statutory prohibition against carrying a concealed weapon, Wis. Stat. § 941.23, unconstitutional as applied to defendant-respondent Scott K. Fisher's conduct of carrying a concealed, loaded handgun in his vehicle? The circuit court held that because Fisher, a tavern owner, sometimes carries a large quantity of cash in his vehicle,

the CCW statute was unconstitutional as applied to his conduct even though he was not carrying any money from the business at the time of the offense.

The trial court's ruling on this issue of law was in error. Two years ago, in *State v. Cole*, 2003 WI 112, 264 Wis. 2d 520, 665 N.W.2d 328, this court held that the CCW statute was not unconstitutional as applied to an individual who kept loaded handguns in a car for self-defense. The public safety concerns that underlie *Cole's* holding that "[t]he right to bear arms is clearly not rendered illusory by prohibiting an individual from keeping a loaded weapon hidden either in the glove compartment or under the front seat in a vehicle," *id.* at ¶49, apply with equal force in this case. The fact that Fisher sometimes transports cash receipts from his business in his vehicle does not make this case comparable to *State v. Hamdan*, 2003 WI 113, 264 Wis. 2d 433, 665 N.W.2d 785, in which the court held that a store owner had a constitutional right to carry a concealed weapon in his store, as Fisher was not carrying his business receipts at the time of his offense but was running personal errands. Accordingly, the State asks that the circuit court's judgment dismissing this case be reversed.

I. THE STATE CONSTITUTIONAL
RIGHT TO BEAR ARMS
PROVIDES A DEFENSE TO A
CHARGE OF CARRYING A
CONCEALED WEAPON ONLY IN
LIMITED CIRCUMSTANCES.

Wisconsin's concealed weapons statute provides that "[a]ny person except a peace officer who goes armed with a concealed and dangerous weapon is guilty of a Class A misdemeanor." Wis. Stat. § 941.23. Wisconsin has had a concealed weapons law since 1872, and the law has remained substantively unchanged since 1878. See *Cole*, 264 Wis. 2d 520, ¶8.

In 1998, the citizens of this state adopted an amendment to the Wisconsin Constitution that created Wis. Const. art. I, § 25, which provides that “[t]he people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose.” See *Cole*, 264 Wis. 2d 520, ¶9. The impact of the right to bear arms amendment on enforcement of the CCW statute was the subject of two decisions issued by this court on the same day, *Cole* and *Hamdan*. Those decisions provide the framework for analyzing Fisher’s claim that the CCW statute is unconstitutional as applied to his conduct.

A. The *Cole* decision.

In *Cole*, the court considered both facial and as-applied challenges to the CCW statute under Article I, Section 25. The defendant in *Cole* was a passenger in a car that was pulled over for motor vehicle violations. See *Cole*, 264 Wis. 2d 520, ¶3. During a search of the vehicle, officers found marijuana in Cole’s pocket and loaded pistols in the glove compartment and beneath the driver’s seat. See *id.* Cole told police that he carried the pistol found in the glove compartment for protection. See *id.*

The court rejected Cole’s argument that the right to bear arms amendment rendered the CCW statute unconstitutional on its face. See *id.* at ¶¶8-44. The court held that while Article I, Section 25, creates a fundamental individual right to keep and bear arms, that right is not absolute, but is subject to a reasonable exercise of the state’s police power. See *id.* at ¶¶20, 24-26. The court concluded that “the CCW statute is a reasonable regulation on the time, place, and manner in which the right to bear arms may be exercised” and that the statute “does not unreasonably infringe upon a citizen’s ability to exercise the right.” *Id.* at ¶28. The court held that there is a “compelling state interest in protecting the public from the hazards involved with certain types of weapons, such as guns.” *Id.* at ¶43.

The court also rejected Cole's claim that the CCW statute was unconstitutional as applied to him. The court found that Cole had waived his as-applied challenge by pleading no contest to the charge. *Id.* at ¶46. Nevertheless, the court addressed the merits of that claim. Noting that the police had seized two loaded weapons from the interior of a vehicle, one inside the glove compartment and the other hidden under the front seat of the vehicle, the court held that "[w]hatever the outer reaches of application of the CCW statute might be in light of the new constitutional amendment, this fact scenario does not fall within them." *Id.* at ¶49. "The right to bear arms is clearly not rendered illusory by prohibiting an individual from keeping a loaded weapon hidden either in the glove compartment or under the front seat in a vehicle." *Id.* at ¶49.

The court observed that the reasons supporting the facial validity of the statute applied with equal force to the specific facts underlying Cole's as-applied challenge. *Id.* The court acknowledged the legitimacy of Cole's reason for carrying the weapon – that he had been the victim of a brutal beating when he was younger and did not feel safe in the neighborhood. *Id.* at ¶48. Nevertheless, the court pointed out, there was no evidence of any threat at or near the time Cole was arrested. *Id.*

The court held that public safety concerns support reasonable restrictions on bearing arms, and found that the risk of accidents "certainly" justified restrictions on transporting loaded weapons. *Id.* at ¶49. Under the circumstances of the case, where "Cole had two loaded weapons within reach and completely hidden from the view of others," the court concluded, "the CCW statute may be enforced without impeding the constitutional right to bear arms." *Id.*

B. The *Hamdan* decision.

The court reached a different conclusion in *Hamdan*, holding that the CCW statute was unconstitutional as applied to the defendant's conduct in that case. Hamdan owned and operated a grocery and liquor store in a high-crime neighborhood in Milwaukee. *See Hamdan*, 264 Wis. 2d 433, ¶¶7-8. In the previous six years, the store had been the target of four armed robberies and the site of two fatal shootings. *Id.* at ¶8. On one occasion, an armed assailant held a gun to Hamdan's head and pulled the trigger, but the weapon misfired. *Id.* On another occasion, Hamdan shot and killed an armed robber in self-defense. *Id.*

Hamdan kept a handgun under the store's front counter during store hours for security. *Id.* at ¶9. He was carrying the gun in his pocket at closing time when officers conducting a license check of the store asked him if he kept a gun in the store. *Id.* at ¶¶1-3. He was charged with carrying a concealed weapon after he answered in the affirmative and pulled the gun from his pocket. *Id.* at ¶3.

This court held that application of the CCW statute to Hamdan's conduct was unconstitutional because it "effectively disallowed the reasonable exercise of Hamdan's constitutional right to keep and bear arms for the lawful purpose of security." *Id.* at ¶6. The court rejected Hamdan's suggestion that it should retreat from previous decisions that had broadly interpreted the CCW statute and had narrowly applied statutory and common law defenses to CCW charges. *Id.* at ¶¶20-37. The court held, however, that while the new constitutional amendment did not affect its prior interpretations of the CCW statute, "it did create an obligation to protect rights guaranteed by the amendment." *Id.* at ¶38.

The court reaffirmed that the CCW statute is valid on its face as "a reasonable exercise of the police power" that "serves many valuable purposes in promoting public safety." *Id.* at ¶53. Among those purposes are to

discourage individuals from acting violently on impulse, *id.* at ¶54; to give notice to people, including law enforcement officers, that the individual with whom they are dealing is armed with a dangerous weapon, *id.* at ¶55; to avoid “facilitat[ing] the commission of crime by creating the appearance of normality and catching people off guard,” *id.*; and “the preservation of life, by affixing the stigma of the law of the land to him who carries a concealed pistol, loaded or unloaded, except in the cases allowed by the statute,” *id.* at ¶56 (quoted source omitted).

The court found that “[n]one of these rationales is particularly compelling when applied to a person owning and operating a small store.” *Id.* at ¶57. Although a shopkeeper is not immune from acting on impulse, the court said, “he or she is less likely to do so in a familiar setting in which the safety and satisfaction of customers is paramount and the liability for mistake is nearly certain.” *Id.* There is less need in these circumstances for innocent customers or visitors to be notified that the owner of a business possesses a weapon, the court added, because “[a]nyone who enters a business premises, including a person with criminal intent, should presume that the owner possesses a weapon, even if the weapon is not visible.” *Id.* A shopkeeper is not likely to use a concealed weapon to facilitate his own crime of violence in his own store, the court stated, and the stigma of the law is inapplicable when the public expects a shopkeeper to possess a weapon for security. *Id.*

Thus, the court concluded, “[t]he purposes of a concealed carry prohibition are often less compelling in settings in which the person bearing the concealed weapon is an owner of the property on which he or she goes armed,” the court said. *Id.* at ¶59. The court quoted with approval the observation of a New York court that “the criminality of gun possession is mitigated in the two places where an otherwise law-abiding person is likely to spend most of his time and to deserve the greatest expectation of personal security: his home and his

workplace.” *Id.* at ¶58 (quoting *People v. Buckmire*, 638 N.Y.S.2d 883, 885 (N.Y. Sup. Ct. 1995)).

On the other side of the balance, the court noted that the constitutional amendment protects the right to keep and bear arms for, among other purposes, security. *Id.* at ¶65. That term does not implicate an imminent threat, the court stated, but “connotes a persistent state of peace.” *Id.* at ¶66. The domain “most closely associated with a persistent state of peace is one’s home or residence,” the court observed, “followed by other places in which a person has a possessory interest. A person is less likely to rely on public law enforcement for protection in these premises and is more likely to supply his own protection.” *Id.*

The court stated that “a citizen’s desire to exercise the right to keep and bear arms for purposes of security is at its apex when undertaken to secure one’s home or privately owned business.” *Id.* at ¶67. The court concluded, therefore, that “[i]f the constitutional right to keep and bear arms for security is to mean anything, it must, as a general matter, permit a person to possess, carry, and sometimes conceal arms to maintain the security of his private residence or privately operated business, and to safely move and store weapons within these premises.” *Id.* at ¶68.

The court further held that in circumstances in which the State’s interest in restricting the right to keep and bear arms is minimal and the private interest in exercising the right is substantial, regulations limiting the constitutional right to bear arms must leave some realistic alternative means to exercise the right. *Id.* at ¶71. The court concluded that “[r]equiring a storeowner who desires security *on his own business property* to carry a gun openly in a holster is simply not reasonable.” *Id.* at ¶73.

The final element to a constitutional challenge to an application of the CCW statute, the court held, is

whether the defendant was carrying the concealed weapon for a lawful purpose. *Id.* at ¶76. That element is required because Article I, Section 25, expressly limits the right to keep and bear arms to “lawful purposes.” *Id.* Accordingly, “[c]arrying a concealed weapon for an unlawful purpose, even if a defendant were able to satisfy the two other tests for an unreasonable restriction, is not protected by the amendment.” *Id.*

Hamdan thus establishes that there are three elements to an as-applied challenge to a concealed carry charge:

- A weighing of “the public interest in enforcing the CCW statute against an individual’s interest in exercising the right to keep and bear arms by carrying a concealed weapon,” *id.* at ¶69;

- An assessment “whether an individual could have exercised the right in a reasonable, alternative manner that did not violate the statute,” *id.*; and

- A factual determination whether the defendant carried a concealed weapon for an unlawful purpose, *see id.* at ¶¶76-77.

The first two elements present legal questions, while the third presents a question of fact. *See id.* at ¶¶86-87.

Applying these principles to *Hamdan*’s case, the court held that “*Hamdan*’s interests in maintaining a concealed weapon in his store and carrying it personally during an unexpected encounter with visitors substantially outweighed the State’s interest in enforcing the concealed weapons statute.” *Id.* at ¶81. The court explained:

Hamdan exercised the right to keep and bear arms under circumstances in which the need to exercise this right was substantial. He owned a grocery store in a high crime neighborhood and his store had been the site of past robberies and

homicides. Hamdan himself had been a crime victim at the store. Hamdan had concerns not only for himself but also for his family and customers. He had good reason to anticipate future crime problems at the store and a need to provide his own security to deal with the problems. Acting on this need, Hamdan kept a handgun under the counter near the cash register but safely stored the weapon when the business was closed. Hamdan's transport of the weapon in his pocket on the night in question was incidental to his normal safe handling and storage of the firearm in his store. Meanwhile, the State's interests in prohibiting Hamdan from carrying a concealed weapon in his small store, under the circumstances on the night the police officers visited his store, were negligible. The police knew that Hamdan's store was a crime target and that Hamdan kept a weapon for protection. There is no evidence that Hamdan was prone to act irresponsibly or impulsively, and he was unlikely to do so in his own store. Therefore, enforcement of the CCW statute on these facts would seriously frustrate the constitutional right to keep and bear arms for security but advance no discernible public interest.

Id. at ¶82.

The court further held that Hamdan "had no reasonable means of keeping and handling the weapon in his store except to conceal it." *Id.* at ¶83.

In the normal course of business, Hamdan concealed the weapon in an area that was accessible to him but inaccessible to the public. It would have been dangerous and counterproductive to openly display the weapon during business hours, and requiring him to do so would have seriously impaired his right to bear arms for security. When Hamdan was unexpectedly summoned to come to the front of the store at a time when he was closing up for the night, he had the option of putting the handgun in his pocket or leaving the handgun in the back room without knowing who had come into the store and whether his security was threatened. Carrying the handgun openly when he went back into the store would have shocked his visitors, seriously

threatened his safety, and was not a reasonable option.

Id.

With regard to the third element, the court noted that Hamdan had not been allowed to present his defense in the circuit court. *Id.* at ¶84. The court therefore remanded the case with directions that the case be dismissed unless the State showed probable cause that Hamdan had an unlawful purpose when he was carrying the concealed weapon. *Id.*

C. The procedure for evaluating
an as-applied challenge to a
concealed carry charge.

Hamdan also established the procedure by which trial courts should determine the elements of a constitutional defense to a CCW charge. The first two elements of the defense present legal questions that must be raised by the defense and resolved by the trial court prior to trial. *Id.* at ¶86. Thus, the court held, a defendant who seeks to invoke a constitutional defense must “secure *affirmative* answers to the following legal questions before he or she is entitled to raise a constitutional defense.” *Id.* at ¶86. “Affirmative answers to these questions will require a court to conclude that the State’s enforcement of the CCW statute constituted an unreasonable and unconstitutional impairment of the right to keep and bear arms as granted in Article I, Section 25 of the Wisconsin Constitution.” *Id.*

The first question the court must decide is whether, “under the circumstances, . . . the defendant’s interest in concealing the weapon to facilitate exercise of his or her right to keep and bear arms substantially outweigh[s] the State’s interest in enforcing the concealed weapons statute?” *Id.* Because “[t]he State generally has a significant interest in prohibiting the carrying of concealed weapons,” the defendant “must have been exercising the right to keep and bear arms under circumstances in which

the need to do so was substantial” to satisfy this element. *Id.*

The second question for the court is whether “the defendant conceal[ed] his or her weapon because concealment was the only reasonable means under the circumstances to exercise his or her right to bear arms?” *Id.* “Put differently, did the defendant lack a reasonable alternative to concealment, under the circumstances, to exercise his or her constitutional right to bear arms?” *Id.*

If the trial court “approves a constitutional defense” based on its affirmative answers to these two legal questions, the factual issue of the defendant’s purpose becomes relevant. *Id.* at ¶87. Whether the defendant had a lawful purpose is determined at trial: “The State can overcome a court-approved constitutional defense only if it asserts, and then proves at trial, that the defendant had an unlawful purpose at the time he or she carried the concealed weapon.” *Id.* Whether the defendant had an unlawful purpose, defined as an intent to use the weapon in furtherance of the commission of a crime, is a question of fact that is submitted to the trier of fact along with separate, traditional instructions on the crime of carrying a concealed weapon. *Id.*

If the jury answers that the defendant did not intend the unlawful purpose specifically alleged by the State, then it will not need to answer the other questions posed in the jury instructions for the CCW offense, as the defendant’s conduct remains constitutionally protected. *Id.* at ¶88. However, if any unlawful purpose is proven, the jury then must address the elements of the CCW offense. *Id.*

II. THE CCW STATUTE IS CONSTITUTIONAL AS APPLIED TO FISHER’S CONDUCT.

At the pretrial hearing on Fisher’s motion, the State acknowledged that it had no evidence that Fisher had any

unlawful purpose when he carried a concealed weapon in his truck (29:47-48; A-Ap. 149-50). Accordingly, the only elements of the constitutional defense that this court need address are the first two: whether the public interest in enforcing the CCW statute was substantially outweighed by Fisher's interest in exercising the right to keep and bear arms by carrying a concealed weapon; and whether Fisher concealed his weapon because "concealment was the only reasonable means under the circumstances" to exercise his right to bear arms. *Hamdan*, 264 Wis. 2d 433, ¶86. Fisher may prevail on his defense only if the answer to both questions is yes. *Id.*

Both of those questions are legal questions. *Id.* This court reviews questions of law *de novo*, without deference to the trial court. See *State v. Vanmanivong*, 2003 WI 41, ¶17, 261 Wis. 2d 202, 661 N.W.2d 76.

- A. Fisher's interest in carrying a concealed weapon did not substantially outweigh the public interest in enforcing the CCW statute.

When examining whether the public interest in enforcing the CCW statute was substantially outweighed by Fisher's interest in carrying a concealed weapon under the circumstances presented in this case, the obvious points of comparison are the two factual scenarios presented in *Hamdan* and *Cole*. In its certification, the court of appeals stated that the facts of this case "appear to fall somewhere in between those of *Cole* and *Hamdan*." Certification at 6 (A-Ap. 131). In the State's view, the facts of this case are not at all similar to those of *Hamdan* and are, in most important respects, comparable to those of *Cole*.

To be sure, as the court of appeals observed, "Fisher is a businessman with an interest in protecting himself and his money, as in *Hamdan*. . . ." *Id.* But unlike Mr. Hamdan, Fisher was not on his business

premises when he was arrested for carrying a concealed handgun. Indeed, Fisher was not engaged in any business related activity at all at the time of the offense. Fisher was going to a McDonald's and running personal errands, not carrying his business receipts, when he stopped in at the DNR office to discuss a citation he had received. Fisher's interest in security at that point was no different than that of any other person in the community who was running errands or engaged in other personal business that Saturday afternoon.

In his court of appeals brief, Fisher argued that his situation is comparable to that of the grocery store owner in *Hamdan* because his "vehicle is an extension of his business, used for carrying the cash deposits from his tavern." Fisher's court of appeals brief at 10. Even if Fisher's vehicle could be described as an "extension of his business" when he is actually carrying the cash receipts in it, that is not what he was doing at the time of this offense. Thus, even if Fisher would have had a constitutional defense to a CCW charge had he been carrying his business receipts at the time of his arrest, that is of no import under the circumstances that led to his arrest in this case.

Fisher dismisses the State's reliance on the fact that he was not transporting money for the business or otherwise engaged in any business-related activity as a "red herring" because his arrest came two hours before he was to start work. See Fisher's court of appeals brief-in-chief at 11. But there is nothing in the record to suggest that it would even have been inconvenient, much less impractical, for Fisher to have stopped at his home to pick up his gun before heading into work.

The trial court likewise found it unimportant that Fisher was not carrying money at the time, reasoning that a would-be robber would not know when Fisher was carrying cash from the business: "I don't know if the criminals are that smart to know when to hit him" (29:43; A-App. 145). But even a not particularly bright robber is

unlikely to think that a tavern owner out running errands at 4:00 p.m. on a Saturday afternoon would be a desirable target for a robbery because bars are a cash business. There is no reason to believe that Fisher was more likely to be the object of an armed robbery attempt than anyone else who was going about their business in Black River Falls that afternoon. As in *Cole*, Fisher “has presented no evidence of any threat at or near the time he was arrested.” *Cole*, 264 Wis. 2d 520, ¶48.

The State does not mean to suggest that it believes that Fisher would have a viable constitutional defense had he been transporting his business receipts at the time of his arrest. While Fisher’s interest in exercising the right to bear arms by carrying a concealed weapon would be greater in those circumstances, the compelling public interest in enforcing the CCW statute against persons who carried concealed, loaded handguns in their vehicles is not diminished. But that issue is not before the court, as the merits of an “as applied” challenge to a CCW charge are assessed by considering the facts of the particular case, not hypothetical facts in other situations. See *Hamdan*, 264 N.W.2d 433, ¶43; see also *Cole*, 264 Wis. 2d 530, ¶47 (“We see no need to examine the assortment of restrictions that may apply to transporting a weapon in a vehicle, because under the facts of this case, the constitutional right to bear arms has clearly not been infringed.”).¹

In the State’s view, the fact that Fisher was carrying a concealed handgun in his pickup truck, rather than in his business or home, is the critical fact that distinguishes this case from *Hamdan* and makes it

¹In *State v. Dundon*, 226 Wis. 2d 654, 594 N.W.2d 780 (1999), this court held that the manager of a business did not have a statutory or common law privilege to carry a concealed weapon when he transported cash receipts from the business to the bank. The right to bear arms amendment was not implicated in *Dundon* because the offense took place prior to the adoption of the amendment. See *id.* at 657-58; *State v. Gonzales*, 2002 WI 59, ¶30, 253 Wis. 2d 134, 645 N.W.2d 264.

comparable to *Cole*, because the public interest in enforcing the CCW statute is particularly strong when a loaded firearm is carried in a vehicle. The *Hamdan* court stressed its conclusion that the dangers associated with carrying a concealed weapon are at their least when an individual is carrying the weapon on his or her own premises. See *Hamdan*, 264 N.W.2d 433, ¶¶58-68. Conversely, *Cole* held that the public safety concerns associated with transporting a loaded, concealed handgun within a person's reach in a vehicle outweigh the individual's interest in carrying a concealed handgun in a vehicle for security. See *Cole*, 264 Wis. 2d 530, ¶¶48-49.

As noted above, the court in *Hamdan* discussed several of important public interests further by the CCW statute: (1) "carrying a concealed weapon permits a person to act violently on impulse, whether from anger or fear," *Hamdan*, 264 N.W.2d 433, ¶54; (2) "[n]otice of the presence of a dangerous weapon permits people, including law enforcement officers, to act accordingly," *id.*, ¶55; (3) "concealed weapons facilitate the commission of crime by creating the appearance of normality and catching people off guard," *id.*; and (4) "affixing the stigma of the law of the land" to those who illegally carry concealed weapons promotes the preservation of life, *id.*, ¶56. The court found that "[n]one of these rationales is particularly compelling when applied to a person owning and operating a small store." *Id.* at ¶57. A shopkeeper is less likely to act on impulse in the familiar setting of his store, "in which the safety and satisfaction of customers is paramount and the liability for mistake is nearly certain." *Id.* There is a diminished need for innocent customers to be placed on notice that the business owner possesses a weapon because "[a]nyone who enters a business premises, including a person with criminal intent, should presume that the owner possesses a weapon, even if the weapon is not visible." *Id.* Nor is a shopkeeper likely to use a concealed weapon to facilitate his own crime of violence in his own store. *Id.*

Those concerns *do* apply, however, when an individual carries a concealed weapon off of his or her own business or residential premises, especially when carrying the concealed weapon in a vehicle. As demonstrated by the all too common instances of “road rage” in which an enraged motorist has vented his anger by pointing or firing a gun he was carrying in his vehicle, motorists who are subjected to the stresses and frustrations of driving are more likely than shopkeepers to react impulsively and violently.² Additionally, as the court noted in *Cole*, there is a danger that a loaded weapon will discharge if the vehicle is involved in an accident. See *Cole*, ¶49. That danger was heightened in this case because Fisher kept his loaded pistol in the console of his truck rather than in a case designed to properly secure the firearm.

The presence of concealed, loaded weapons in vehicles also presents significant dangers to law enforcement officers. It is well recognized that “traffic stops may be dangerous encounters” for police officers. *Maryland v. Wilson*, 519 U.S. 408, 413 (1997). The Supreme Court noted in *Wilson* that “[i]n 1994 alone, there were 5,762 officer assaults and 11 officers killed during traffic pursuits and stops.” *Id.* (citing Federal Bureau of Investigation, *Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted* 71, 33 (1994)). Regrettably, that situation has not improved. In 2003, the most recent year for which FBI-compiled statistics are available, there were 6,431 police officer assaults and 14

²See, e.g., *Clemmons v. Wolfe*, 377 F.3d 322, 324 (3rd Cir. 2004); *Cochrane v. McGinnis*, 160 F. Supp. 2d 447, 448-49 (E.D.N.Y. 2001), *aff’d* 50 Fed. Appx. 478 (2nd Cir. 2002); *People v. Rodriguez*, 77 Cal. Rptr. 2d 676, 678 (Cal. Ct. App. 1998); *Cobb v. Langworthy*, 909 So. 2d 416, 418 (Fla. Dist. Ct. App. 2005); *State v. Cutler*, 785 So. 2d 1288, 1288-89 (Fla. Dist. Ct. App. 2001); *State v. Bodden*, 756 So. 2d 1111, 1112 (Fla. Dist. Ct. App. 2000); *Tolliver v. State*, 546 S.E.2d 525, 526 (Ga. 2001); *State v. Plaisance*, 745 So. 2d 784, 786 (La. Ct. App. 1999); *State v. Vang*, 700 N.W.2d 491, 493 (Minn. Ct. App. 2005); *State v. Gheen*, 41 S.W.3d 598, 600-01 (Mo. Ct. App. 2001); *State v. Fowler*, 785 P.2d 808, 810 (Wash. 1990).

officers feloniously killed during traffic pursuits and stops. See Federal Bureau of Investigation, *Uniform Crime Reports: Law Enforcement Officers Killed & Assaulted/2003* 21, 67 (2004) (available online at <http://www.fbi.gov/ucr/ucr.htm#leoka>).³ People who carry guns in automobiles present a far greater danger to police officers than do shop owners who carry guns in their stores.

The Illinois Appellate Court recognized the dangers that carrying loaded firearms in a vehicle pose to the public and to law enforcement officers when it rejected a constitutional challenge to a state statute that prohibits carrying an uncased, loaded, and immediately accessible firearm in a vehicle. See *People v. Grant*, 791 N.E.2d 100 (Ill. App. Ct. 2003). The Illinois statute provides that a person commits the offense of aggravated unlawful use of a weapon when he or she knowingly “[c]arries on or about his or her person or in any vehicle or concealed on or about his or her person except when on his or her land or in his or her abode or fixed place of business any pistol, revolver . . . or other firearm” and, among other possible aggravating factors, “the firearm possessed was uncased, loaded and immediately accessible at the time of the offense.” *Id.* at 110. The Illinois Appellate Court rejected the defendant’s argument that the statute violates due process because it “requires only a mental state of knowing, without further requiring a culpable mental state and results in innocent conduct being criminalized,” holding that the requirement of a mental state of knowledge was sufficient to meet due process requirements *Id.* at 108, 111. The court further held that the statute was rationally related to a legitimate state goal.

[I]t is clear that the goal of the legislature in enacting the aggravated unlawful use of a weapon statute . . . was to allow the State to seek a harsher penalty for

³The court may take judicial notice of official governmental publications. *Clifford v. Colby School Dist.*, 143 Wis. 2d 581, 588, 421 N.W.2d 852 (Ct. App. 1988).

any person in the State of Illinois, who does not fall under a specific exemption, from carrying a loaded weapon in the passenger compartment of his or her vehicle because of the inherent dangers to police officers and the general public. This is so even if the person carrying the weapon has no criminal objective.

* * *

Unfortunately we live in a world where innocent victims are shot at through the windows of passing vehicles, where drivers experiencing "road rage" shoot at other drivers on our thoroughfares, and where the safety of a police officer effectuating a routine traffic stop is compromised by the presence of accessible, loaded weapons. When one has a loaded weapon immediately accessible, he or she can use that weapon at a moment's notice and place other unsuspecting citizens in harm's way. This is precisely the type of evil that the statute in question here was designed to prevent.

Id.

Although the constitutional provisions at issue in the Illinois case and this case differ, the states' interests in enforcing their statutory prohibitions against loaded, accessible firearms in vehicles are the same. The public safety interest in protecting the lives of police officers and other individuals provides a compelling reason for enforcement of the CCW statute under these circumstances.

In his court of appeals brief, Fisher argued that the State's interest in prohibiting him from carrying a concealed weapon in his vehicle is "negligible" because the police knew that he kept a weapon in his vehicle from their prior contact with him and there was no evidence that he was prone to act irresponsibly or impulsively. Fisher's court of appeals brief-in-chief at 11. If anything, however, the fact that Fisher was known to keep loaded firearms in his vehicle would heighten a police officer's apprehension and concern for his or her safety in approaching Fisher's vehicle. Moreover, if police

knowledge were sufficient to diminish the State's interest in enforcing the CCW statute, a person could create a constitutional defense against a future CCW charge by notifying the police that he or she keeps a gun in his or her vehicle.

The State's compelling interest in enforcing the CCW statute against individuals who carry concealed, loaded weapons in their vehicles outweighs Fisher's interest in carrying a concealed weapon in his truck. In its certification to this court, the court of appeals stated that Fisher "keeps a loaded gun in the glove compartment of his car for protection because he routinely makes large cash deposits in a high-crime neighborhood," Certification, at 1 (A-Ap. 126); *see also id.* at 6 (A-Ap. 131) ("Fisher was arrested for concealing his gun . . . in a car in a high-crime area"). The court of appeals apparently based its characterization of the locale of Fisher's offense on Fisher's anecdotal testimony about four robberies of businesses in Black River Falls within "the last year or so" (29:15; A-Ap. 117), and perhaps because Fisher's vehicle had been stolen when he left it running outside the bar at closing time (29:16; A-Ap. 118).

While the State does not challenge Fisher's testimony, the court of appeals' characterization of downtown Black River Falls as "high-crime" area is something of a stretch. For 2003, the year in which Fisher committed this offense and the most recent year for which the FBI has provided crime statistics for cities with a population of under 10,000 and nonmetropolitan counties with a population of under 25,000, there were a total of six violent crimes known to law enforcement in the city of Black River Falls (no murders, one forcible rape, one robbery and four aggravated assaults) and eight violent crimes reported by the Jackson County Sheriff's Department (one murder, one forcible rape, no robberies, and six aggravated assaults). *See Federal Bureau of Investigation, Crime in the United States/2003, Tables 8A & 10A (2004) (A-Ap. 136, 141) (available online at*

<http://www.fbi.gov/ucr/03cius.htm>). The crime rates in Black River Falls and Jackson County do not appear to differ appreciably from other Wisconsin cities and counties of similar population. *See id.*

In his court of appeals brief, Fisher suggests that the facts of his case are similar to that in *Hamdan*. *See* Fisher's court of appeals brief at 9. But the crime rates in Black River Falls and the neighborhood in Milwaukee where Mr. Hamdan's store is located are not remotely comparable. "According to Milwaukee police data, there had been at least three homicides, 24 robberies, and 28 aggravated batteries reported that year in the small census tract that included Hamdan's store." *Hamdan*, 264 Wis. 2d 433, ¶8. That census tract was but one of 218 such tracts in the city of Milwaukee. *Id.* at ¶8 n.3. Given that disparity, Fisher's interest in carrying a concealed handgun for security pales in comparison to Hamdan's.

If Black River Falls is categorized as a "high crime" area for purposes of a constitutional defense, there are few areas of the state that would not deserve that designation. Moreover, even if Black River Falls truly were a high crime area, carrying a concealed, loaded handgun in a vehicle could not be justified on that basis. This court held in *Cole* that even though the defendant had a legitimate concern for his safety in the Milwaukee neighborhood in which he was an automobile passenger, that generalized security concern did not support a constitutional defense to a CCW charge based on the carrying of a loaded handgun in the car's glove compartment. *See Cole*, 264 Wis. 2d 520, ¶¶48-49.

Fisher's interest in carrying a concealed weapon in his vehicle is further diminished by the fact that he apparently found it unnecessary to go armed when he carried the business's cash from the tavern to his vehicle. Fisher presumably is more likely to be robbed when he is carrying his cash receipts from the tavern to his truck than when is driving with the cash in the truck. Yet Fisher testified that he does not take his pistol into the bar, but

keeps it in the console of his truck at all times (29:18, 22; A-Ap. 120, 124).

As the following passages from *Hamdan* illustrate, the fact that the defendant in *Hamdan* was on his own property was central to the *Hamdan* court's determination that the defendant's interest in carrying a concealed weapon outweighed the State's interest in enforcing the CCW statute:

- "As one court recently observed, 'the criminality of gun possession is mitigated in the two places where an otherwise law-abiding person is likely to spend most of his time and to deserve the greatest expectation of personal security: his home and his workplace.'" *Hamdan*, 264 Wis. 2d 433, ¶58 (citation omitted).

- "The purposes of a concealed carry prohibition are often less compelling in settings in which the person bearing the concealed weapon is an owner of the property on which he or she goes armed." *Id.*, ¶59.

- "[M]any states have recognized, either by case law or statute, a special intersection between the right to bear arms and the protection of one's own property. For example, one state court has held that a citizen enjoys a common law right to carry a concealed weapon in the citizen's own home." *Id.*, ¶ 61

- "The unreasonableness of applying certain gun regulations when they prohibit sensible conduct on one's own property is commonly recognized." *Id.*, ¶63.

- "The importance of being able to exercise the right to bear arms in the setting of one's own property is implied by the language of Article I, Section 25." *Id.*, ¶64.

- "[A] citizen's desire to exercise the right to keep and bear arms for purposes of security is at its apex when

undertaken to secure one's home or privately owned business. *Id.*, ¶67.

- "If the constitutional right to keep and bear arms for security is to mean anything, it must, as a general matter, permit a person to possess, carry, and sometimes conceal arms to maintain the security of his private residence or privately operated business, and to safely move and store weapons within these premises." *Id.*, ¶68

- "Requiring a storeowner who desires security *on his own business property* to carry a gun openly or in a holster is simply not reasonable." *Id.*, ¶73.

Fisher was not at his place of business when he was arrested for carrying a concealed weapon. Rather, he was driving around Black River Falls in his truck, engaged in personal business, when he drove onto DNR property with a loaded, concealed handgun in the console (29:21; A-Ap. 123). Under the facts of this case, the public interest in enforcing the CCW statute outweighs Fisher's interest in carrying a concealed weapon. Fisher's constitutional defense must, therefore, be rejected as a matter of law. *See Hamdan*, 264 Wis. 2d 433, ¶86.

B. Fisher had a reasonable alternative to carrying a concealed weapon.

Even if the court were to agree with Fisher that his interest in security substantially outweighs the State's interest in enforcing the CCW statute, he can prevail on his constitutional defense only if he demonstrates that he had no reasonable alternative means of exercising his right to bear arms for security than carrying his gun in a concealed manner. *See Hamdan*, 264 Wis. 2d 433, ¶86. Fisher has not shown that he had no reasonable alternative to carrying a loaded gun concealed in the console of his truck.

State law provides an approved method for transporting a firearm in a vehicle: the gun must be “unloaded and encased.” Wis. Stat. § 167.31(2)(b).⁴ Carrying a firearm in that statutorily prescribed manner substantially mitigates the safety concerns that underlie the prohibition against carry a concealed weapon. At the same time, if the need to use the pistol for protection were to arise, Fisher could quickly remove it from the case and load it by inserting its magazine.

In *Hamdan*, this court held that the defendant had no reasonable means of keeping and handling the weapon in his store except to conceal it. *See Hamdan*, 264 Wis. 2d 433, ¶83. Unlike a storekeeper who might alarm his customers were he to openly carry a holstered weapon, Fisher could comply with § 167.31(2)(b) without causing alarm and without significantly impairing his right to bear arms for security.

When it rejected an as-applied challenge to the CCW statute in *Cole*, this court held that the state constitutional right to bear arms is not violated by prohibiting an individual from keeping a loaded weapon hidden in a vehicle: “The right to bear arms is clearly not rendered illusory by prohibiting an individual from keeping a loaded weapon hidden either in the glove compartment or under the front seat in a vehicle.” *See Cole*, 264 Wis. 2d 520, ¶49. The court should reach the same conclusion here.

⁴Violations of this safety statute are subject to a forfeiture of not more than \$100. *See* Wis. Stat. § 167.31(2)(e).

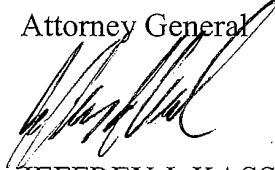
CONCLUSION

For the reasons stated above, the court should reverse the judgment of the circuit court dismissing this case.

Dated this 14th day of November, 2005.

Respectfully submitted,

PEGGY A. LAUTENSCHLAGER
Attorney General



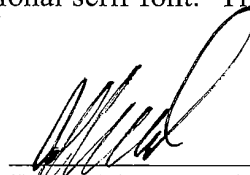
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,420 words.



JEFFREY J. KASSEL
Assistant Attorney General

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State of Wisconsin

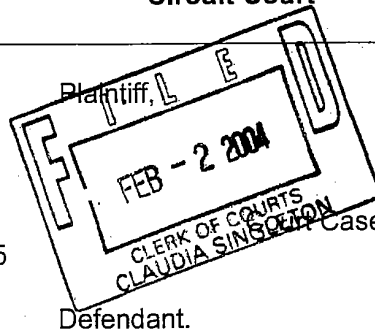
Circuit Court

Jackson County

STATE OF WISCONSIN

-vs.-

Scott K. Fisher
43 Main Street
Black River Falls, WI 54615
DOB: 02/01/1974



Criminal Complaint

Case No.: 04 CM 26

Defendant.

George M. Clark, being first duly sworn, states that:

Count 1: CARRYING A CONCEALED WEAPON

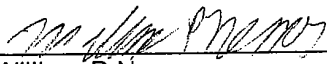
The above-named defendant on December 20, 2003, in the City of Black River Falls, Jackson County, Wisconsin, did go armed with a concealed and dangerous weapon, contrary to sec. 941.23, Wis. Stats., a Class A Misdemeanor, and upon conviction may be fined not more than Ten Thousand Dollars (\$10,000), or imprisoned not more than nine (9) months, or both.

PROBABLE CAUSE: and prays that said defendant be dealt with according to law and that the basis for the complainant's charge of such offense is: That your complainant has read a report from the Wisconsin Department of Natural Resources which states that on December 20, 2003 at about 4:00 p.m. DNR Officer Daniel Schultz arrived at the DNR Service Center in the City of Black River Falls, County of Jackson, State of Wisconsin. While seated in his patrol vehicle Officer Schultz observed a silver Chevrolet pickup truck with Wisconsin personalized truck plate of COZY CR approach and stop slightly behind Schultz's patrol vehicle. He observed the lone occupant of this vehicle to be Scott K. Fisher. Schultz exited his vehicle as Fisher exited his vehicle. Fisher approached Schultz. Schultz asked Fisher if he could help him. Fisher stated he was looking for John Bronsdon, a DNR Warden. Fisher stated he was upset because he had received a citation in the mail earlier that day. He stated that he had had his truck stolen from his place of business and upon reporting the theft he informed officers that his truck contained three loaded firearms. He had received a citation for the loaded firearms and believed he should not have received this citation. Fisher stated that he owned the Cozy Corner Bar and that he regularly carries large amounts of money. He stated that he always carried a loaded firearm with him and stated "to be honest with you, I have a loaded handgun in the truck right now." Schultz asked Fisher where the handgun was located. Fisher opened his driver's door, reached in and opened a center console in the front seat of the truck and retrieved a stainless steel .40 caliber Smith and Wesson semi-automatic handgun, serial number VCE5238. The firearm was loaded with nine rounds in its magazine with an additional round chambered. Schultz seized this firearm along with another loaded magazine, a box of .40 caliber ammunition and an unidentified cartridge. These were lying beside the handgun in the center console.

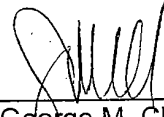
9.28.04 Fay to P. Mills - 7531
A-App. 101

STATE OF WISCONSIN - VS - Scott K. Fisher

Subscribed and sworn to before me,
and approved for filing on:
January 29, 2004



William P. Nemer 1018425
Special Prosecutor for Jackson County



George M. Clark
Complainant

STATE OF WISCONSIN: CIRCUIT COURT: JACKSON COUNTY:

STATE OF WISCONSIN,

Plaintiff,

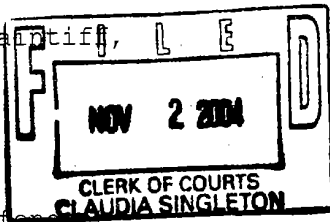
(Pretrial Motion)

-vs-

Case #: 04-CM-26

SCOTT FISHER,

Defendant.



ORIGINAL

The above-entitled matter coming on to be heard before the Honorable John A. Damon, judge of the above-named court, without a jury, on the **1st day of October, 2004**, commencing at the hour of 3:00 p.m., in the courthouse in the City of Whitehall, County of Trempealeau, State of Wisconsin.

APPEARANCES:

WILLIAM P. NEMER, Special Prosecuting Attorney, Trempealeau County Courthouse, 36245 Main Street, Whitehall, Wisconsin 54773, appeared representing the Plaintiff.

PAUL MILLIS, of the firm of SKOLOS & MILLIS, S.C., PO Box 219, Black River Falls, Wisconsin 54615, appeared representing the Defendant.

The defendant, Scott Fisher, was also present.

I N D E X

WITNESS

PAGE

SCOTT FISHER

Direct Examination by Mr. Millis 7:15

Cross-Examination by Mr. Nemer17:15

Redirect Examination by Mr. Millis .. 22:6, 26:3

Recross-Examination by Mr. Nemer 24:6

OBJECTIONS

By Mr. Nemer 10:10, 26:8

By Mr. Millis 18:20, 25:3

1 THE COURT: This is State of Wisconsin
2 versus Scott Fisher, 2004-CM-26. We have
3 William Nemer for the State of Wisconsin acting
4 as special prosecutor in this Jackson County
5 case, and then Paul Millis is here as the
6 attorney for Scott Fisher. This is set for a
7 jury trial next Thursday. We have some motions
8 here. I thought the more interesting one was
9 the constitutional defense one, and maybe let's
10 do that one first because I don't see the
11 suppression as taking much time.

12 MR. MILLIS: We're withdrawing that, your
13 Honor.

14 THE COURT: Okay. That makes it even
15 easier. All right. So let me just take a
16 second here because I read it this morning and
17 I have to refresh my memory, but the new jury
18 instruction, I think 1335A, talks about the
19 process and the notes. I just want to read
20 that again. Let me take a moment.

21 MR. NEMER: I believe it's on Page 4 of
22 that instruction.

23 THE COURT: I've got it right in front of
24 me. Thanks, Mr. Nemer.

25 MR. NEMER: Yeah.

1 THE COURT: I see, okay. Well, I'll just
2 read this and before -- so I make sure that
3 everyone is under the same understanding. This
4 is all from a case that came up last year that
5 was cited in Mr. Millis' brief, State versus
6 Hamdan, 2003 WI 113 and 264 Wis. 2d 433 of the
7 Wisconsin Supreme Court case from 2003. And in
8 that case I believe the facts were a concealed
9 weapon in a grocery store in Milwaukee that was
10 held that there was a constitutional defense to
11 having a concealed weapon under the theory that
12 the new amendment to the constitution allowed
13 keeping a firearm for security purposes. And
14 so then reading what the jury instruction notes
15 say, because of Hamdan it says, first, by
16 pretrial motion, which has been filed by
17 Mr. Millis, they must show first that
18 Mr. Fisher's interest in concealing the weapon,
19 that under the circumstances his interest in
20 concealing the weapon to facilitate exercise of
21 his or her right to keep and bear arms outweigh
22 the interest of the state in enforcing the
23 concealed weapon statute; and second, that
24 Mr. Fisher concealed his weapon because
25 concealment was the only reasonable means under

1 the circumstances to exercise his right to bear
2 arms, and then it talks about in the note it
3 says, "The right to keep and bear arms for
4 purposes of security is at its apex when
5 undertaken to secure one's home or privately
6 owned business. Conversely, the State's
7 interest in prohibiting concealed weapons is
8 least compelling in these circumstances," and
9 goes on.

10 And then the constitutional right it says
11 is -- yeah, this is the interesting language I
12 think, it says at Page 67 it says, "If the
13 constitutional right to keep and bear arms for
14 security is to mean anything, it must, as a
15 general matter, permit a person to possess,
16 carry, and sometimes conceal arms to maintain
17 the security of his private residence or
18 privately operated business, and to safely move
19 and store weapons within these premises." Then
20 I'm supposed to find if the trial court finds
21 he's satisfied these requirements, the state
22 must, and then it says "still at the pretrial
23 stage," which I guess is now, "assert and show
24 probable cause to believe that the defendant
25 had an unlawful purpose at the time he or she

1 carried the concealed weapon. And then if it's
2 supported by evidence, then at trial the
3 unlawful purpose is to be submitted to the
4 jury. So -- and that's what the instruction
5 says. Is that your understanding, Mr. Millis,
6 of the way we have to do this, just the Court
7 is to examine whether or not -- or you need to
8 present evidence that he needed to do this?

9 MR. MILLIS: That's correct, your Honor.

10 THE COURT: And then the burden would
11 shift to the state if he showed that they
12 had -- that he had an unlawful purpose,
13 probable cause to show an unlawful purpose?

14 MR. NEMER: Well --

15 THE COURT: Go ahead. Now is the time to
16 tell me before I start listening to things.

17 MR. NEMER: The way you put it, I mean,
18 obviously he's got to show more than he had a
19 purpose. He has to show that his interest in
20 concealing the weapon outweigh the state's
21 interest in enforcing the concealed weapon
22 statute, and then he had to show the
23 concealment is the only reasonable means, it
24 isn't just that he has a reason.

25 THE COURT: Right, and then the burden

1 will shift to you to show probable cause that
2 he had an unlawful purpose in carrying it,
3 right?

4 MR. NEMER: If you're satisfied that
5 he's --

6 THE COURT: I mean, that's step three if
7 step one and two are met?

8 MR. NEMER: Yeah. I guess that is.

9 THE COURT: Go ahead, Mr. Millis.

10 MR. MILLIS: Your Honor, we'd call Scott
11 Fisher.

12 SCOTT FISHER,
13 after having been first duly sworn on oath, testifies
14 and says as follows:

15 DIRECT EXAMINATION

16 BY MR. MILLIS:

17 Q You are Scott Fisher?

18 A Yes.

19 Q Where do you live?

20 A 43 Main.

21 Q Black River Falls?

22 A Black River Falls, Wisconsin.

23 Q That's in Jackson County, correct?

24 A Yes.

25 Q What's your occupation?

1 A I am a -- well, I'm a bar owner as well as I have
2 five rentals, five different tenants.

3 Q But your primary occupation is the owner and
4 operator of the Cozy Corner tavern in Black River
5 Falls?

6 A Yes.

7 Q You understand that you've been charged with
8 carrying a concealed weapon, is that correct?

9 A Yes.

10 Q And can you tell the Court what events led to you
11 being charged with carrying a concealed weapon?

12 A About a week and a half prior to being arrested for
13 carrying a concealed weapon, all I generally work at
14 the bar is nights. About a week and a half prior to
15 that, I worked one night and went outside to start
16 up my vehicle because it was December, went outside,
17 retrieved my vehicle, pulled it around to the side
18 of the building and started it up -- well, left it
19 running, went back inside the bar to let the vehicle
20 warm up and when I went back outside to get in it
21 and go home the vehicle was gone.

22 Q What did you do when you realized your vehicle was
23 gone?

24 A At that time I called up to the sheriff's department
25 and informed them that my vehicle was stolen and

1 they sent down a city officer, Officer Noack.

2 Officer Noack came in and I informed him that my
3 vehicle was stolen and I told him that if they were
4 to catch up with them they were to use caution
5 because I had a loaded gun in the vehicle, and he
6 left and I went home. Later that morning I was
7 called and notified by Officer Haldeman, Deputy
8 Haldeman, that I would be receiving a citation in
9 the mail for transporting a loaded firearm.

10 Q Did you, in fact, receive a citation for that
11 offense then?

12 A About a week and a half after the fact, yes.

13 Q And that would have been about December 20th of
14 2003?

15 A Yes.

16 Q On the same date that you received the citation, did
17 you make contact with a DNR warden?

18 A Yes.

19 Q How did it come about that you made contact with a
20 DNR warden?

21 A I was actually on my way to McDonald's and seen the
22 DNR vehicle pull into the DNR office so I pulled in
23 there and found Warden Schultz. When he got out of
24 his vehicle, I got out of mine and I approached him
25 and I asked him if he knew how I could get ahold of,

1 I can't think --

2 Q Warden Bronsdon?

3 A Warden Bronsdon.

4 Q Scott, let me step back one second.

5 A Yes.

6 Q Did you make a specific trip out to the DNR station
7 on that date to contest the citation?

8 A That --

9 Q -- or were you on your way to --

10 MR. NEMER: I'm going to ask -- well,
11 let's not -- I'm going to object. I don't want
12 him leading the witness. Ask him where he was
13 going. I think he's --

14 THE COURT: I think he's already testified
15 that he was going to McDonald's, that's what I
16 heard.

17 THE WITNESS: Yup.

18 THE COURT: Go ahead.

19 Q (By Mr. Millis, continuing) When you made contact
20 then with Warden Schultz, what happened?

21 A He informed me that he didn't know how to get ahold
22 of Bronsdon. He said he hadn't seen him in several
23 days, asked if there was something he could help me
24 with, and I explained the situation of my truck
25 being stolen, me being issued a citation for

1 transporting loaded firearms and I basically told
2 him I didn't agree with that because I informed the
3 officers on my own that the guns were there for
4 their own safety.

5 Q Did you inform Warden Schultz the reason why you had
6 the weapons in your vehicle?

7 A I told him that I own a bar and that at different
8 times I am carrying large amounts of cash with me.

9 Q What happened after that?

10 A I informed Warden Schultz that I had a gun in my
11 vehicle, a loaded gun in my vehicle, and after
12 telling him that he asked to see it, at which time I
13 opened up my truck door, opened up my console,
14 removed the pistol from the center console, set it
15 on the seat pointing it away from him and me and
16 backed up as not to alarm him.

17 Q Did he give you any direction as far as how to
18 handle the weapon when you removed it from your
19 vehicle?

20 A No.

21 Q Did he direct you to move back away from the
22 vehicle?

23 A No.

24 Q You just did that on your own?

25 A Yes.

1 Q What happened after that?

2 A When I stepped back, he had stepped in, grabbed the
3 pistol, pulled the slide back I believe to check,
4 there was one -- there was one shell in the tube,
5 and at that time he said he would be back and he
6 went to his truck.

7 Q Did one of the city officers then come up there and
8 assist Warden Schultz?

9 A Yes, Officer --

10 Q Taylor?

11 A -- Dean Taylor.

12 Q And you were subsequently arrested for concealing an
13 armed weapon?

14 A Yes.

15 Q How long have you owned the Cozy Corner tavern?

16 A A couple of months shy of five years.

17 Q And is it common for you to have large sums of cash
18 on hand at the tavern?

19 A Yes.

20 Q That's just the nature of the business, correct?

21 A You need your money to start each day, you need your
22 change for the daily operations, you got your sales,
23 you got other things going on, yes.

24 Q Typically how much cash would you have in the tavern
25 by the end of the night?

- 1 A No less than a couple of thousand.
- 2 Q And what do you do with that cash upon closing?
- 3 A A certain amount of it stays at the tavern for
- 4 whoever opens up in the morning. They need the
- 5 money for the till, they need money to make change,
- 6 but the proceeds from the night generally go home
- 7 with me.
- 8 Q The cash that remains at the tavern, where do you
- 9 place that?
- 10 A I have a floor safe that I lock that in.
- 11 Q And how big of a floor safe is it?
- 12 A A foot by foot and a half. Small.
- 13 Q Is it one of these household Sentry safes --
- 14 A Yes.
- 15 Q -- that are very transportable?
- 16 A Yes.
- 17 Q Why don't you keep the balance of your cash in that
- 18 floor safe when you close the tavern?
- 19 A As small as the safe is, it can be removed. I don't
- 20 want -- if I'm going to lose money, I don't want to
- 21 lose any more than I have to.
- 22 Q Is it safe to say that you operate on a slim margin
- 23 in operating your bar?
- 24 A A slim margin?
- 25 Q Meaning that you rely on your profits to keep your

1 business afloat?

2 A Most definitely.

3 Q And if you were robbed and cash was stolen from you,
4 it would substantially affect your ability to
5 continue your business?

6 A Yes.

7 Q Do you transport the excess proceeds from your bar
8 each night?

9 A Not every night.

10 Q Why not?

11 A If it was not that busy one night, I may just throw
12 that money in the safe and deposit money the next
13 day along with the next day's proceeds.

14 Q Do you know on any given night how much cash you
15 will end up having by the end of the night?

16 A No.

17 Q So on any given night do you know whether you will
18 be transporting the cash from your tavern?

19 A No.

20 Q Approximately how many nights a week do you actually
21 transport cash from your tavern in your vehicle?

22 A Four or five.

23 Q And where do you take it?

24 A Some nights I'll run it directly up to the bank and
25 deposit it, other times I'll take it home with me

1 and deposit it the next day.

2 Q Do you believe there's a risk in transporting the
3 cash from your bar in your vehicle to either the
4 bank or to your residence?

5 A Definitely.

6 Q Why is that?

7 A Black River might be a small town but within the
8 last year or so we've had -- well, Tubby Krueger
9 operates downtown, he was knocked on the head and
10 was robbed personally. The Quick Cash in Black
11 River was robbed at gunpoint, the Dairy Way was
12 robbed at gunpoint and shots exchanged there, and
13 the Frame Shop downtown, that was armed by gunpoint.
14 So there's -- any time you're dealing with cash,
15 you're going to be dealing with the threat of
16 somebody wanting it and trying to take it.

17 Q In your experience is it pretty well known that bars
18 deal in a substantial amount of cash?

19 A Everybody knows bars have cash. When you're paying
20 two dollars a drink over a 10, 12-hour period, yeah,
21 there's a lot of cash in the end.

22 Q And typically what time of night do you close your
23 bar?

24 A I close my bar all the time, which is 2 a.m. or 2:30
25 a.m. on the weekends.

1 Q That wasn't a test, by the way. Have you been the
2 victim of a crime within the recent past?

3 A Yes.

4 Q And that was when your vehicle was stolen?

5 A I had my vehicle stolen from downtown.

6 Q And was it determined who stole your vehicle?

7 A Yes.

8 Q Who was that?

9 A Tyrone Decorah.

10 Q And where is Tyrone Decorah today?

11 A He was killed in a knife fight out at the Indian
12 mission.

13 Q Do you take any precautions in maintaining your
14 weapon in your vehicle?

15 A Well, I -- yes. The gun is loaded, the gun is
16 always on safety, and to me I keep it in the console
17 because it makes more sense than keeping it on the
18 seat. If I keep it on the seat, that window can be
19 broken and the gun stolen easily. So it's out of
20 sight and so, like I say, it's not accessible to
21 nobody. My vehicle is always locked with the
22 exception of one December night warming it up.

23 Q Have you had training in the handling of guns?

24 A Yes. I've done four-and-a-half years working for
25 the Department of Corrections at which time I

1 started -- we had to undergo weapons training every
2 year thereafter, we had to be qualified in weapons
3 and you always had to every -- every year you had
4 to -- I don't know how to term it, requalify -- not
5 requalify but stay up on the, you know, the force
6 continuum as far as the right to -- you know, what
7 force is needed, what warrants the use of firearms,
8 so on and so forth.

9 Q So not only have you had training in the use of
10 handling firearms but you've also had training in
11 the use of force?

12 A Yes.

13 MR. MILLIS: That's all I have, your
14 Honor.

15 CROSS-EXAMINATION

16 BY MR. NEMER:

17 Q You know it's a fairly fundamental safety statute in
18 this state that guns in vehicles are supposed to be
19 cased and unloaded, correct?

20 A Yes.

21 Q And despite that, when your vehicle was stolen, you
22 had your vehicle unlocked and you had a number --
23 you didn't just have this 40 caliber handgun in
24 there, you had a shotgun and a .22 rifle and a .22
25 pistol, right?

1 A There were four guns in there, yes.

2 Q And they were all loaded?

3 A All but the .22 pistol was not.

4 Q But the shotgun was?

5 A Yes.

6 Q And the rifle was?

7 A Yes.

8 Q So -- and those were all left in an unlocked
9 vehicle?

10 A It was at quarter to 3 in the morning, yes.

11 Q And unattended apparently because it got stolen?

12 A Yes.

13 Q So when you say that in the course of business you
14 keep the handgun in the center console of your
15 vehicle inaccessible to the public in your motion,
16 that's not quite true, is it?

17 A The pistol remains in the console at all times, yes.

18 Q Yeah, but -- but you had other weapons that were
19 accessible to the public, weren't they?

20 MR. MILLIS: Your Honor, I'm going to
21 object. I don't see the relevance of the
22 number of weapons in the vehicle on December
23 10th when this charge arises out of an incident
24 on December 20th. If he wants to ask about the
25 number of weapons in the vehicle on December

1 20, I don't have any objection.

2 THE COURT: I'll sustain that objection.

3 MR. NEMER: I'd like to explain why. He's
4 asserting in his motion that he keeps the
5 handgun inaccessible to the public. He's
6 obviously keeping guns in his vehicle at other
7 times when they're accessible to the public and
8 it's relevant

9 THE COURT: Well, sorry, I'm sustaining
10 the objection. We're talking about the time he
11 was arrested for.

12 Q (By Mr. Nemer, continuing) The console, is that
13 locked?

14 A The console?

15 Q Yeah.

16 A It don't have the capability of being locked.

17 Q Someone can get in your truck or vehicle and they
18 can get at the gun, right?

19 A If they gain access to the vehicle, yes.

20 Q Okay. Now, you could have carried this gun in the
21 holster, couldn't you, when you were driving your
22 vehicle?

23 A On my person or --

24 Q Yeah.

25 A Yes.

1 Q There was nothing that was preventing that?

2 A No.

3 Q And it wouldn't have been like being in the store
4 where people might be offended by seeing you
5 carrying a gun because they wouldn't see you driving
6 down the street and they seen you had a gun
7 holstered, would they?

8 A No.

9 Q Now, you say you were going to McDonald's when you
10 stopped at the DNR to talk to them about the
11 citations, correct?

12 A Yes.

13 Q So you weren't transporting money to your home or to
14 a bank at that time, were you?

15 A I had to work that night..

16 Q You didn't answer my question. You weren't
17 transporting money to your bank or your home at that
18 time, were you?

19 A No.

20 Q So you were keeping the gun at times in your vehicle
21 when you really weren't needing it to protect your
22 cash from your business, correct?

23 A I don't unload it because say driving to work
24 unloading it and then getting in my vehicle at the
25 end of the night and loading it don't seem practical

1 to me so I leave it loaded.

2 Q There's nothing that prevents you from not putting

3 the gun in the car until such time as you're

4 actually transporting cash, is there?

5 A No.

6 Q Now, let's -- just so we're clear, this incident

7 where you have this gun, it was in the truck, it was

8 not on your property, it was on DNR property,

9 correct?

10 A At the time --

11 Q At the time you got it seized.

12 A Yes.

13 Q You were not on your property, you weren't at your

14 business, basically you were going off and going to

15 McDonald's and taking care of other personal

16 business at the time, correct?

17 A Yes.

18 Q Have you ever been held up?

19 A No.

20 Q So if I got this correct -- well, never mind. What

21 time did you come to work that day?

22 A I had to work at 6.

23 Q Okay. So you weren't even starting work yet?

24 A No.

25 Q Going to McDonald's and on your way to McDonald's

1 you went to the DNR?

2 A Yes.

3 MR. NEMER: I have nothing further.

4 MR. MILLIS: Briefly, your Honor?

5 THE COURT: Yeah, go ahead.

6 REDIRECT EXAMINATION

7 BY MR. MILLIS:

8 Q Mr. Fisher, how practical would it be for you to
9 carry a holstered firearm between your vehicle and
10 into your bar and back to secure it in that manner?

11 A To me it don't seem practical. For one, I don't
12 know the -- to my knowledge carrying a loaded
13 firearm in town on your side, I guess I didn't think
14 that was allowed but --

15 Q What effect would that have with your patrons if
16 they saw you with a holstered firearm?

17 A That would not go over at all.

18 Q The gun is maintained in your property though,
19 correct, you keep it in your truck?

20 A Yes.

21 Q It's not the DNR's truck, right?

22 A Yes.

23 Q And you use your truck for business purposes, right?

24 A Yes.

25 Q To transport your cash receipts from your bar?

1 A Yes.

2 Q And that's probably one of your most vulnerable
3 times, correct?

4 A As far as I'm concerned, yes.

5 Q And most susceptible to be a victim of a crime?

6 A Yes.

7 Q You said that you haven't been a victim of a holdup,
8 correct?

9 A Correct.

10 Q Are you familiar with any other bars that have
11 experienced violence or been a victim of any violent
12 crime?

13 A It was just here last week that one of the
14 bartenders in here -- or from Whitehall had their
15 throat cut by somebody walking out of the bar, I
16 believe it was leaving the bar.

17 MR. NEMER: In what city was that?

18 THE WITNESS: I believe that was Whitehall
19 here, was it not?

20 MR. NEMER: News to us.

21 Q (By Mr. Millis, continuing) You're familiar with an
22 incident somewhere in the local area?

23 A Yes.

24 Q Where what happened?

25 MR. NEMER: Well, this is -- I think

1 unless he's got some news report or
2 something --

3 THE COURT: I've heard what he says. He's
4 worried about it from what he's been hearing.

5 MR. MILLIS: Sure. That's all I have.

6 CROSS-EXAMINATION

7 BY MR. NEMER:

8 Q You could -- there's no reason why you can't carry
9 the gun in a holster in the vehicle and then remove
10 it from the holster and once you're in your bar keep
11 it concealed, is there?

12 A Once again, walking into my bar with a holster and a
13 gun --

14 Q Okay. Then let me ask you this, is there any reason
15 why once you got back to your bar and you feel safe
16 you couldn't take your gun out and put it in a case
17 so people wouldn't see it?

18 A Once again, like I say, walking into the bar even
19 with a gun in a case don't work.

20 Q Do you take the gun into the bar?

21 A No.

22 Q So that's not even an issue, is it, whether someone
23 is going to see you with it in a holster? If you
24 were in your car with it holstered and when you got
25 to your destination and tavern if you then put it in

1 a case in your vehicle, there's no reason why you
2 couldn't do that, is there?

3 MR. MILLIS: Sorry, I'm going to object to
4 the form of the question.

5 THE COURT: I think it's argumentative.
6 Maybe you can phrase it as a question instead
7 of a statement, so I'll sustain.

8 MR. NEMER: All right.

9 Q (By Mr. Nemer, continuing) The -- there's nothing
10 that prevents you from keeping the gun in the
11 holster while you're in the vehicle, correct?
12 People aren't going to see it if that's a concern --

13 A Correct.

14 Q -- while you're driving? And when you get to your
15 destination, you say you don't take the gun into the
16 tavern anyway so there's no reason why you couldn't
17 take the gun out of your holster and then properly
18 case it as the law provides, is there?

19 A No, there isn't.

20 Q Pardon?

21 A There is no reason.

22 Q That's right. You don't have to keep it loaded,
23 uncased in your console in order to transport it, do
24 you?

25 A No.

1 Q Okay.

2 MR. NEMER: Nothing further.

3 REDIRECT EXAMINATION

4 BY MR. MILLIS:

5 Q Is there some security reason why you do? I mean,
6 why do you keep a loaded gun in your truck, why are
7 we here?

8 MR. NEMER: I think he's already answered.

9 THE COURT: Overruled. He can answer, go
10 ahead.

11 A To protect my life and my property, that is the
12 reason why I carry a gun. I've never been -- never
13 been arrested for knocking off stores or selling
14 drugs or anything. I'm a law-abiding citizen. I
15 run a respectable bar, which both of you know
16 because both of you have been in there. It's a
17 nice -- it's a nice place. I'm not out causing
18 trouble, I'm just out to protect what is mine and
19 I'm not going to let anybody take my money or
20 threaten my life so that is why I do what I do.

21 MR. MILLIS: That's all I have, Judge.

22 THE COURT: Thank you, sir.

23 MR. NEMER: I have no witnesses at this
24 time. I'd like to argue but since it's his
25 motion I guess Mr. Millis should go first.

1 THE COURT: Thank you, Mr. Nemer.

2 Mr. Millis, what would you like to say? Go
3 ahead.

4 MR. MILLIS: Well, your Honor, we
5 submitted a brief that I hope was helpful to
6 the Court. I'm --

7 THE COURT: Yes, it was very helpful.

8 MR. NEMER: A brief?

9 THE COURT: Yeah, that's what I had on the
10 brief.

11 MR. NEMER: I didn't receive a brief.

12 THE COURT: Oh. Well, we've got plenty of
13 time. You can take your time and read it. I
14 appreciated having it.

15 MR. NEMER: My fax number is not
16 apparently the one you've been sending it to,
17 but if you did a brief, I did not receive it.

18 THE COURT: Shows 538-4400.

19 MR. NEMER: That's not our fax number.

20 THE COURT: Whose is that?

21 MR. NEMER: That's the clerk of courts.

22 THE COURT: Did you bring one over to him?

23 MR. NEMER: I have not seen anything.

24 THE COURT: All right. I've got one here.

25 MR. NEMER: Well, this is -- and I

1 apologize to the Court.

2 THE COURT: No need to apologize. I
3 appreciated Mr. Millis doing the work. On my
4 own I read the Hamdan matter and he followed
5 through with it, so that's fine. I'm giving
6 you a chance to read it. Obviously you've
7 brought a case into court. You're going to
8 cite the same thing?

9 MR. NEMER: I'm going to cite a case --
10 well --

11 THE COURT: The Cole case maybe?

12 MR. NEMER: Exactly.

13 THE COURT: That's the same thing, so I
14 read that one, too, so you can have a minute
15 and read it. Cole involved a drug transport
16 case, so I read that one.

17 MR. NEMER: Cole involved guns in a
18 vehicle where a person expressed fear of
19 being --

20 THE COURT: He had drugs in it if I recall
21 correctly. Okay. You take your time and read
22 it and let us know when you're ready.

23 (A brief recess was taken.)

24 THE COURT: Okay, go ahead.

25 MR. MILLIS: Thanks, Judge. As I was

1 saying, I hope our brief was helpful in this
2 case.

3 THE COURT: Oh, yes.

4 MR. MILLIS: And I don't want to restate
5 everything I put in there, and I think we all
6 know what the Hamdan case says and the whole
7 dynamics of the carrying a concealed weapon
8 statute, vis-a-vis, the constitutional
9 amendment that was passed in November of '98
10 that allows individuals or citizens of the
11 state of Wisconsin to keep and bear arms for
12 their security. The Hamdan case, when that was
13 decided, carved out an exception to what used
14 to be a strict liability statute, the carrying
15 a concealed weapon act. It sets forth a
16 certain test that must be followed in
17 determining whether or not we can raise the
18 constitutional defense under Hamdan. The first
19 prong of it is the Court must answer
20 affirmatively that the defendant must have been
21 exercising the right to keep and bear arms
22 under circumstances in which the need to do so
23 was substantial. I believe the testimony that
24 has been put on the record so far does require
25 the Court to find that Mr. Fisher had a

1 substantial need to carry -- or to exercise his
2 right to carry and bear arms. He operates a
3 successful cash business in downtown Black
4 River Falls. It's well known he deals in cash,
5 it's well known that taverns deal with a lot of
6 cash, they're open late in the evening where
7 crime is more prone to happen. I think that's
8 common knowledge. Even though we are in Black
9 River Falls, we all -- you choose where you
10 live and I certainly wouldn't want to choose to
11 live in a high-crime area raising the family I
12 have, but Black River Falls is also susceptible
13 to crime and it's happened there and happened
14 by the Frame Shop just up the street from the
15 Cozy Corner was robbed by gunpoint. Tubby
16 Krueger's store, which is a block and a half
17 from Mr. Fisher's bar, he was knocked out by
18 some instrument which has left him now in a
19 nursing home. The Quick Cash Loans, which is
20 across the bridge from downtown Black River
21 Falls, was robbed by gunpoint, the Dairy Way at
22 the time it was closing was the subject of a
23 shootout, if you can believe that, it's right
24 in Black River Falls. So there is crime,
25 there's a level of risk that's involved in

1 operating a business there. There's a level of
2 risk that has increased because you're dealing
3 with a cash business.

4 Mr. Fisher, in the normal course of his
5 business, feels it is more secure for him to
6 transport his cash from his bar to either the
7 bank at closing time or to his residence. He
8 could keep it in a safe there, that's not the
9 issue here, and just to remind you, the safe
10 that he does have is a small safe that is very
11 transportable. So there's alternatives that he
12 could do but under the constitutional amendment
13 it gives him the right to bear arms for his own
14 security.

15 I think it's important to note, your
16 Honor, under 941.237 the legislature has almost
17 acknowledged that fact. They've acknowledged
18 that tavern owners have a substantial need to
19 bear arms in their tavern, that's an exception
20 to 941.237. Transporting his cash in the
21 normal course of business is just as vulnerable
22 or more vulnerable than operating the bar
23 itself. So he's more likely to be the subject
24 of a crime when he's transporting it rather
25 than being in the store itself, and the

1 legislature has already acknowledged that, that
2 tavern owners we know work late at night,
3 you're a cash business, you're susceptible to
4 crime and we want you to be protected, we want
5 you to have the ability to have a weapon in
6 your tavern. This is not a stretch. His truck
7 is an extension of his business. If he was a
8 taxi cab driver, I guess the query would be is
9 that their business? Is that their property
10 where they can have a weapon in their vehicle?
11 Certainly seems to me that they're operating
12 their business in their taxi cab just as
13 Mr. Fisher. He's continuing the operation of
14 his business when he transports his cash to
15 either his bank or to his residence.

16 The second prong of the test, your Honor,
17 did the defendant lack reasonable alternatives
18 to concealment under the circumstances to
19 exercise his constitutional right to bear arms.
20 There's always an alternative to carrying a
21 concealed weapon, there's no doubt about that,
22 but the issue is, is there a reasonable
23 alternative. The testimony that we have so far
24 anyways is there isn't a reasonable
25 alternative. The reasonable alternative that

1 was proffered is carry a gun in the holster
2 between the bar and truck and have it in a
3 holster while you're in the truck. That's not
4 a reasonable alternative.

5 THE COURT: Can I ask, if he had a
6 holstered, loaded weapon, wouldn't he still be
7 in violation of their other citation he got for
8 having an uncased gun?

9 MR. MILLIS: Transporting -- I believe he
10 would be, yeah.

11 THE COURT: Okay.

12 MR. NEMER: I have a different --

13 MR. MILLIS: If that's what they're
14 offering as an alternative, you're engaged in
15 some other illegal activity and it's certainly
16 not one of the reasonable alternatives.

17 THE COURT: You'll get your chance,
18 Mr. Nemer, and you can argue. I'm asking
19 Mr. Millis at this point.

20 MR. MILLIS: Certainly, your Honor.
21 Obviously, if the alternative is for you to
22 engage in another illegal act, that's not
23 reasonable. For you to avoid being charged
24 with carrying a concealed weapon, you have to
25 violate a different either ordinance or

1 statute, that's not a reasonable alternative.
2 He's taken the precautions, he keeps it in the
3 center console, his doors are locked, it's out
4 of view, out of -- and it's not accessible to
5 the public. He's had training in how to use a
6 weapon, he's had training in the proper use of
7 force. I think under the circumstances, and
8 that's what Hamdan says, these are facts
9 specific, case-specific determinations. Under
10 the circumstances of this case, I think both of
11 those prongs have to be answered in the
12 affirmative.

13 THE COURT: So when you read Hamdan, they
14 said the store owner can have one because he's
15 protecting their property and they carved out
16 that, and this in your mind would be just a
17 logical extension of their trying to interpret
18 when a person can carry a weapon for security
19 which is allowed by the amendment to the
20 constitution, and they haven't come through
21 since Hamdan with any other instructions as to
22 what it meant?

23 MR. MILLIS: They haven't, your Honor. I
24 know the state is going to argue the Cole case
25 but --

1 THE COURT: That was challenging the whole
2 constitutionality of the entire statute is the
3 way I understood it, and it also had different
4 facts that don't seem to be applicable here,
5 but I agree with you there.

6 MR. MILLIS: That's all I have.

7 THE COURT: Okay. Thank you. Mr. Nemer?

8 MR. NEMER: What the Court is being asked
9 to do is basically issue Mr. Fisher a license
10 to carry a gun. What's happened here is the
11 argument is the Hamdan case --

12 THE COURT: I'm not sure about that. I
13 think it's case-specific as to whether when he
14 was stopped and had this loaded weapon in his
15 console, was he exercising his right under the
16 constitution or is he violating the concealed
17 weapon law?

18 MR. NEMER: Yeah, and if you say that he
19 wasn't -- that he was privileged, basically
20 you're giving him a license to carry. Let me
21 explain why. First of all --

22 THE COURT: That sounds broader than
23 what's being asked for here.

24 MR. NEMER: May I just --

25 THE COURT: I think -- well, I can

1 interrupt you. I interrupted Mr. Millis.
2 What's good for him is good for you. So I'm
3 confused, when you say I'm giving him a license
4 to carry an arm, explain that better.

5 MR. NEMER: Sure. What happened here is
6 there's no testimony he was transporting cash.
7 He's saying he has a compelling need to carry
8 this gun concealed in order to protect himself
9 while he's transporting cash. That's not what
10 he was doing. What he was doing was going to
11 the DNR, he was on his way to McDonald's, he
12 hadn't even started work and he was on his way
13 to McDonald's and he stopped at the DNR to
14 complain about getting citationed for uncased
15 firearms.

16 The situation here is not the same as
17 Hamdan. Hamdan was a person's personal
18 business. Do you notice the Court in Hamdan
19 said personal business or home? They were not
20 extending it out into the world and basically
21 when you start putting guns into vehicles,
22 you're taking it out into interactions outside
23 the intimacy of the home or of a place of
24 business. That's personally owned by a person.
25 In fact, the legislature recognizes guns in

1 vehicles don't go together sometimes. In the
2 sense that it's illegal to have a loaded gun in
3 a vehicle, it's illegal to have an uncased gun
4 in a vehicle. In addition, it's -- it enhances
5 shooting into a vehicle or house if you do it
6 from a vehicle, it's a more serious felony.

7 Now, if the defendant is going to want to
8 argue that he could have carried this gun, he
9 could have done it without violating a criminal
10 statute, albeit he would have been violating a
11 forfeiture. He does that anyway when the gun
12 is loaded. He could have holstered it. He's
13 not like the situation in Hamdan where they
14 said well, if you walk around in your store
15 with a holster that's going to freak people
16 out. People aren't going to see a holster if
17 you're driving in the vehicle. It's not the
18 same situation. This isn't a situation where
19 he really wasn't using it as part of his
20 business. He was -- wants to keep the gun in
21 the vehicle. Does this mean he gets to drive
22 it to Mitchell Field too? I don't think so.
23 And without him at least showing that he was
24 actively involved in this compelling need that
25 he asserts at the time of the violation, I

1 don't think he's entitled to an extension of
2 the constitutional privilege to protect his
3 activity. He's not in his business, he's not
4 even in part of his transaction of his
5 business. He simply keeps the gun in there all
6 the time because it's convenient for when he is
7 transporting cash.

8 The Cole Case I think -- I grant you Cole
9 was making a broader argument, but I think you
10 can read between the lines. The Court doesn't
11 like the fact that a merchant got it for CCW
12 when he put a gun in his pocket in his own
13 store. They've got a different attitude to
14 somebody who's cruising around with loaded
15 handguns in their vehicle, and it doesn't
16 matter whether he had a little bit of
17 marijuana, Mr. Cole. The point is that a .380
18 was in the glove box and a 45 under the seat
19 and Mr. Cole argued that he also was fearful of
20 crime and he'd had a bad experience where he
21 had been beaten, so I think we're really
22 playing with fire if we're extending these
23 exceptions beyond the very tight exception that
24 the Supreme Court gave us in Hamdan, which
25 basically places where you'd almost never have

1 this violation reported anyway because people
2 aren't going to know about a CCW violation in
3 the home and they're not going to know about it
4 in a business for the most part. Where you get
5 into real problems is when you go out into the
6 world, and that's what's happening here. He
7 wasn't making a beeline for the bank or his
8 home to deposit cash. He's basically tooling
9 around Black River Falls on his way to
10 McDonald's and stops at the DNR to complain
11 about the violation he's got and he's got his
12 gun loaded with a round chamber concealed in
13 the vehicle at that time and that gets beyond
14 what Hamdan is allowing, and he did not have to
15 conceal it in order to protect himself.

16 THE COURT: All right. Well --

17 MR. MILLIS: Your Honor, can I just
18 respond real briefly?

19 THE COURT: Yeah, I don't care.

20 MR. MILLIS: I don't think you can read
21 Hamdan and say these are the only exceptions
22 because it's a fact-specific case. In fact, if
23 you read Hamdan, and they set out that example
24 that I cited in my brief, for instance, an
25 order to keep --

1 THE COURT: Could I get the brief back
2 from Mr. Nemer?

3 MR. NEMER: Sure.

4 THE COURT: You probably filed the
5 original in Black River anyway, didn't you?

6 MR. MILLIS: I'm sure I did.

7 THE COURT: Okay. Go ahead, where are you
8 looking at?

9 MR. MILLIS: I would be on Page 3, the
10 second cite there, that the Court in Hamdan set
11 forth an example where it said, "For instance,
12 in order to keep and bear arms for the purpose
13 of securing one's own property, a weapon must
14 be kept somewhere and may need to be handled or
15 moved, all within the weapon owner's property."
16 Mr. Fisher's weapon was within his own
17 property. They're not limiting this to just
18 real property, a building, it's to any property
19 of the weapon owner's that he has, as long as
20 it's within the weapon owner's property, he's
21 using it for security purposes. Clearly he is.
22 He testified that he was on his way to work, he
23 had to work that night, that's why he had the
24 weapon in his vehicle. So again, I don't think
25 that Hamdan can be read as limited as what the

1 state is arguing.

2 MR. NEMER: Does the property mean his
3 pants, too, so he can carry it basically --

4 THE COURT: You said Hamdan, he had it in
5 his pants.

6 MR. NEMER: I meant the defendant, if he
7 was walking around, if the property is the
8 issue, you could say that anybody -- if you
9 extend property to motor vehicles that are
10 going out into the world?

11 THE COURT: That's the issue.

12 MR. NEMER: Then you can say well, my
13 pants are my property and, therefore, I can
14 carry a gun in my pants to protect my property.

15 THE COURT: I think, Mr. Nemer, we have to
16 stick to the facts that we have in front of us.
17 That's an interesting theory of him driving to
18 Mitchell Field and him walking out with a gun
19 in his pants pocket. We better stick with the
20 facts here. If somebody in another case wants
21 that to be extended, that's something else, but
22 I'm just going to deal with the facts here and
23 I don't know what this opens the door to if I
24 go along with Mr. Millis. All I can do is go
25 along. There's a lot of irony here. A victim

1 of a crime ends up with a citation for carrying
2 a cased weapon when he goes to ask about gee, I
3 was just victimized, my vehicle was stolen and
4 now I get this citation in the mail. He gets a
5 criminal charge for having this loaded weapon
6 in the car. This is irony. And then on top of
7 it, the facts, I'll find -- and I found that
8 Mr. Fisher's testimony is entirely credible,
9 that he's trained in corrections apparently,
10 had experience in corrections, and trained in
11 the use of firearms, that he owns a bar for
12 over five years and has substantial cash that
13 he carries back and forth and is fearful based
14 on the crimes that have occurred even just in
15 the very recent past in Black River Falls that
16 he outlined in his testimony where people have
17 been subject of violent crimes and particularly
18 worried because of his nature of his business,
19 and he said the nature of his business he ends
20 up with at least he said probably on average at
21 least \$2,000 at the end of the night and he has
22 to take that back and forth either to the bank
23 or at home at night and the small safe that's
24 in the bar is not a good location for it.

25 Part of the problem here is where there's

1 some common sense. Mr. Nemer says it's
2 predictable times where you might be subject to
3 attack. Well, unfortunately, a lot of these
4 crimes are unpredictable. We don't know when
5 and where someone is going to be subject to an
6 assault, and this fellow, according to his
7 testimony, believes that he needs to have a
8 firearm to protect himself in his vehicle
9 because that's when he's transporting back and
10 forth with the money. Now, whether or not the
11 person -- we almost have to read the person
12 who's going to commit the crime. He's just
13 going to McDonald's now with his truck and he's
14 not on his way to -- he testified later that
15 day he was going right on to work at the tavern
16 at 6 and that's why he had the pistol in the
17 console, but we have to say oh, yeah, the
18 criminal -- or the person who intends to harm
19 him, yeah, knows this is a time that he doesn't
20 have money so I'm not going to attack him now,
21 I'm only going to attack him when he has money.
22 I don't know if the criminals are that smart to
23 know when to hit him. Anyway, so he was
24 trained, he thought he needed it, and he uses
25 the vehicle to carry proceeds. Now, the

1 first -- for carrying the proceeds of his bar.
2 And so first, does he have an interest to
3 facilitate his right to exercise his right to
4 bear arms; and then in the same Hamdan case
5 there at 264 Wis. 2d 433 at 477 they talk about
6 what it meant in the constitutional amendment
7 by needing a gun for security, and it said,
8 "The common understanding of "security" does
9 not implicate an imminent threat. Rather, it
10 connotes a persistent state of peace. We
11 believe the domain most closely associated with
12 a persistent state of peace is one's home or
13 residence," which apparently the state agrees
14 with, "followed by other places in which a
15 person has a possessory interest. A person is
16 less likely to rely on public law enforcement
17 for protection in these premises and is more
18 likely to supply his own protection. In fact,
19 a person who takes no initiative to provide
20 security in these private places is essentially
21 leaving security to chance. Firearms ownership
22 has long been permitted in Wisconsin. We infer
23 that the inclusion in the amendment of the
24 right to bear arms for security was intended
25 "to include a personal right to bear arms to

1 protect one's person, family, or property
2 against unlawful injury and to secure from
3 unlawful interruption the enjoyment of life,
4 limb, family, and property subject to
5 reasonable regulation." Then in this case
6 itself there's the grocery store owner could
7 have it.

8 Now, whether because he carried it in his
9 car he seemed to have an interest in having a
10 weapon to protect himself. Now, the theory the
11 state proposes is that -- oh, and that this is
12 outweighed by the enforcement in forming the
13 concealed weapon statute. The state's interest
14 in enforcing the concealed weapon statute would
15 be to prevent someone from pursuing the weapon
16 to commit some crime, and I'm not sure that
17 they've indicated that this person, weighing
18 the two, that it would give no weight at all to
19 why we pass this constitutional amendment if he
20 couldn't use it for protection. That's what he
21 did. Then the second step -- so -- so I think
22 he did have this interest and it outweighs the
23 state's interest in enforcing the concealed
24 weapon statute and, second, particularly in
25 this incident where the defendant poses no

1 threat as far as anyone says and then the
2 defendant concealed his weapon because
3 concealment was the only reasonable means of
4 exercising his right to bear arms. I'm not --
5 the state argues well, he could have had it
6 holstered even though if he holstered it, a
7 loaded weapon, it would only be a forfeiture
8 violation. It wasn't something he could do and
9 he could holster it, walk to and from the bar
10 to the parking lot. Somehow the idea of him --
11 I agree. I thought Mr. Fisher was credible
12 that the idea of him walking around with an
13 open-holstered weapon in downtown Black River
14 was not a valid method of a reasonable means to
15 exercise his right to bear arms and when you
16 compare it to keeping it in a closed box in his
17 vehicle, that doesn't give ready access to
18 people. So I think those requirements have
19 been met and that this was the only reasonable
20 means under the circumstances. So under the
21 constitution that they passed would only have
22 meaning and under the Court's ruling in Hamdan
23 to allow someone, particularly in this
24 particular circumstance, to have a weapon to
25 protect himself, the bar owner carrying a

1 substantial amount of cash, he doesn't know
2 when they might be after him, especially since
3 this is his vehicle, that according to his own
4 testimony it's the one vehicle he uses all the
5 time for business purposes for carrying the
6 cash, so I'll allow defense but now it turns
7 over to the -- and found that they met both
8 requirements that are outlined in 1335A of the
9 jury instructions.

10 So now the burden is on the state to show
11 there's probable cause to believe that he had
12 an unlawful purpose that he carried the
13 concealed weapon.

14 MR. NEMER: Well, the state doesn't have a
15 reason to believe he was planning to assault
16 someone or anything of that kind. I don't
17 believe I can -- I believe that's what that
18 means, is that he can't be using it as a
19 concealed weapon for the purpose of using it to
20 harm someone, threaten someone, or for purposes
21 of committing a robbery. So the only crime
22 that we were dealing with here was the CCW
23 itself. So I think the state does not have
24 evidence that he was planning on doing anything
25 with it illegal beyond carrying it the way

1 concealed as alleged in the criminal complaint.

2 THE COURT: All right.

3 MR. NEMER: The state is not going to
4 present evidence that he was doing anything
5 illegal beyond a concealed weapon.

6 THE COURT: Okay.

7 MR. MILLIS: Given that, your Honor --

8 THE COURT: I don't know what you can do
9 then.

10 MR. MILLIS: I guess we'd move to dismiss
11 the charges.

12 MR. NEMER: And the state -- well, we'll
13 not be arguing -- well, at this point the state
14 is going to have to consider appealing the
15 Court's decision.

16 THE COURT: I don't mind that. I'm
17 just -- that's fine. I think it's an
18 interesting one. I hope it goes up.

19 MR. NEMER: Procedurally the state doesn't
20 have evidence that he was going to do something
21 else.

22 THE COURT: I'll grant the motion to
23 dismiss based on what I allowed to happen.

24 MR. NEMER: Obviously the motion goes only
25 to his criminal charge?

1 MR. MILLIS: Yeah.

2 THE COURT: Does he still have the
3 citation?

4 MR. NEMER: He has the citation for the
5 first incident.

6 MR. MILLIS: He'll be before McAlpine on
7 Wednesday.

8 THE COURT: I don't have that one?

9 MR. NEMER: That's right.

10 THE COURT: So as far as the jury trial on
11 Thursday then, that's resolved -- or done for
12 now --

13 MR. NEMER: Done for now.

14 THE COURT: -- or depending on what
15 happens?

16 MR. NEMER: It's done for now.

17 THE COURT: As long as it's likely that we
18 might see -- the 3rd District might see this,
19 do you need any other fact findings that
20 basically the Court can supply at this level?

21 MR. NEMER: I don't know I guess.

22 THE COURT: I thought the testimony was
23 credible he testified to, and we just had the
24 one witness.

25 MR. MILLIS: Thank you, Judge.

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THE COURT: Yup.

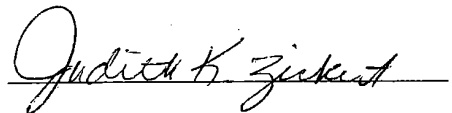
(The proceedings came to a close at
approximately 2:39 p.m.)

1 STATE OF WISCONSIN)

2 COUNTY OF TREMPLEALEAU)

3 I, Judith K. Zickert, Official Court Reporter
4 for the County of Trempealeau and the Seventh Judicial
5 Administrative District, State of Wisconsin, duly
6 appointed and qualified, do hereby certify that I
7 reported the foregoing matter, and that the foregoing
8 transcript has been carefully compared by me with my
9 stenographic notes as taken by me in machine shorthand,
10 and by me thereafter transcribed, and that it is a true
11 and correct transcript of the proceedings had in said
12 matter to the best of my knowledge.

13
14 Dated this 1st day of November, 2004.

15 
16
17 Judith K. Zickert, RMR, CRR

STATE OF WISCONSIN

CIRCUIT COURT

JACKSON COUNTY

For Official Use Only

State of Wisconsin vs. Scott K. Fisher

**Judgment of
Dismissal/Acquittal**

Date of Birth: 02-01-1974

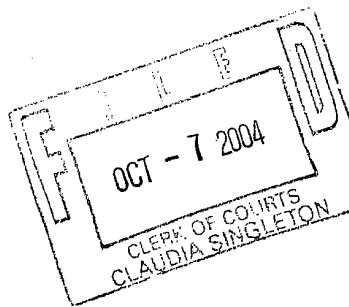
Case No.: 2004CM000026

IT IS ADJUDGED the charge(s) against the defendant is disposed of as follows:

Count	Offense Charged	Statute Number	Dispo Date	Disposition
1	Carrying a Concealed Weapon	941.23	10-01-2004	Dismissed /De Motion

IT IS ORDERED the defendant is discharged and any bond posted not otherwise forfeited is to be returned.

BY THE COURT:



A handwritten signature in cursive script, appearing to read "Claudia Singleton".

Circuit Court Judge/Circuit Court Commissioner/Clerk of Circuit Court

10-07-2004

Date

Appeal No. 2004AP2989-CR

Cir. Ct. No. 2004CM26

WISCONSIN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

SCOTT K. FISHER,

DEFENDANT-RESPONDENT.

FILED

Jun 02, 2005

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Dykman, Vergeront and Lundsten, JJ.

This appeal raises an issue of first impression regarding the constitutionality of WIS. STAT. § 941.23 (2003-04)¹—which prohibits the carrying of concealed weapons in this state—as applied to the owner of a business when away from his business property. More specifically, the question presented is whether the concealed weapon statute can be enforced against a tavern owner who keeps a loaded gun in the glove compartment of his car for protection because he routinely makes large cash deposits in a high-crime neighborhood. We certify this appeal because we believe it presents an opportunity to provide needed clarification of the standard recently set forth in *State v. Cole*, 2003 WI 112, 264

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Wis. 2d 520, 665 N.W.2d 328, and *State v. Hamdan*, 2003 WI 113, 264 Wis. 2d 433, 665 N.W.2d 785, for evaluating as-applied challenges to the concealed weapon statute. In particular, we believe clarification is needed as it relates to the availability of “security interest” justification when a person is away from that person’s home or business.

Because the proper interpretation of *Cole* and *Hamdan* are at the center of this certification, we begin with a discussion of their facts and holdings. *Cole* and *Hamdan* are a pair of companion cases addressing the continued enforceability of Wisconsin’s concealed weapon statute in light of the enactment of article I, section 25 of the Wisconsin Constitution, which provides: “The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose.” In *Cole*, the Wisconsin Supreme Court held that the preexisting concealed weapon statute was not rendered unconstitutional on its face by the constitutional amendment because the statute represented “a reasonable regulation on the time, place, and manner in which the right to bear arms may be exercised.” *Cole*, 264 Wis. 2d 520, ¶28. Although the court concluded that Cole had waived any as-applied challenge, it went on to briefly explain why Cole’s generalized assertion that he did not feel safe in the neighborhood as the result of a brutal beating he had once received was insufficiently specific to warrant carrying a loaded gun with him for self-defense as the passenger in a car. *Id.*, ¶¶46, 48. In the course of its discussion, the court noted the possibility of accidents posed by the transport of loaded weapons and stated: “The right to bear arms is clearly not rendered illusory by prohibiting an individual from keeping a loaded weapon hidden either in the glove compartment or under the front seat in a vehicle.” *Id.*, ¶49.

In *Hamdan*, the Wisconsin Supreme Court held that the concealed weapon statute could not be constitutionally applied to the owner of a family-run grocery store who kept a loaded gun under the counter near the cash register. *Hamdan*, 264 Wis. 2d 433, ¶82. Hamdan had been in the process of putting his weapon away for the night near closing time when two police officers entered the store and eventually discovered that Hamdan had the gun in his trouser pocket. *Id.*, ¶¶1-3. The court set forth the following test:

A defendant who challenges on constitutional grounds a prosecution for carrying a concealed weapon will be required to secure *affirmative* answers to the following legal questions before he or she is entitled to raise a constitutional defense. First, under the circumstances, did the defendant's interest in concealing the weapon to facilitate exercise of his or her right to keep and bear arms substantially outweigh the State's interest in enforcing the concealed weapon statute? ... Second, ... did the defendant lack a reasonable alternative to concealment, under the circumstances, to exercise his or her constitutional right to bear arms?

Id., ¶86. If the defendant secures affirmative answers to these two questions, he or she is entitled to raise a constitutional defense to the jury, and the state must then prove at trial that the defendant actually had an unlawful purpose in concealing the weapon in order to obtain a conviction. *Id.*, ¶87.

Applying the two-part test, the court reasoned that Hamdan did not need to face the sort of imminent threat required to assert the privilege of self-defense in order to have a legitimate security interest at his place of business, noting that people are generally less likely to rely upon law enforcement for protection on their own premises. *Id.*, ¶66. The court emphasized several times that a person's expectation of personal security is greatest on his or her own property, particularly in a home or place of business, quoting extensively from cases from other jurisdictions on that point. *Id.*, ¶¶58-67. The court further

determined that Hamdan's interest in concealing a weapon in his grocery store was substantial because his store was located in a high crime neighborhood and had been the site of past violence. *Id.*, ¶82. Hamdan himself had also been a crime victim, and "had good reason to anticipate future crime problems at the store and a need to provide his own security to deal with the problems." *Id.*

Conversely, the court deemed the State's interest in prohibiting Hamdan from concealing a weapon in his store to be "negligible." *Id.*, ¶82. The court noted three generally-accepted public benefits from concealed weapon statutes: (1) "carrying a concealed weapon permits a person to act violently on impulse, whether from anger or fear"; (2) "[n]otice of the presence of a dangerous weapon permits people, including law enforcement officers, to act accordingly," whereas concealment of a weapon "facilitate[s] the commission of crime by creating the appearance of normality and catching people off guard"; and (3) "affixing the stigma of the law of the land" to those who illegally carry concealed weapons may promote the preservation of life. *Id.*, ¶¶ 53-56. The court was not persuaded that any of these potential rationales was particularly compelling as applied to Hamdan, explaining:

Although a shopkeeper is not immune from acting on impulse, he or she is less likely to do so in a familiar setting in which the safety and satisfaction of customers is paramount and the liability for mistake is nearly certain. There is less need in these circumstances for innocent customers or visitors to be notified that the owner of a business possesses a weapon. Anyone who enters a business premises, including a person with criminal intent, should presume that the owner possesses a weapon, even if the weapon is not visible. A shopkeeper is not likely to use a concealed weapon to facilitate his own crime of violence in his own store. The stigma of the law is inapplicable when the public expects a shopkeeper to possess a weapon for security.

Id., ¶57. Thus, the court concluded that Hamdan's interest in keeping a concealed weapon in his store substantially outweighed the State's interest in prohibiting him from having a concealed weapon there. *Id.*, ¶82.

The court further concluded that Hamdan had no reasonable means of keeping his gun in his store except to conceal it. *Id.*, ¶83. In discussing this element, the court noted that a weapon must necessarily be kept somewhere and handled and moved at various times. *Id.*, ¶72. It further reasoned that requiring a shopkeeper to openly display a weapon kept for security "fails the litmus test of common sense," because it could frighten customers and create additional dangers by making the gun more accessible to children, assailants, or others. *Id.*, ¶¶73-74. Accordingly, the court held that Hamdan had established a basis to raise his constitutional right to keep and bear arms for security as a defense to the charge of carrying a concealed weapon, and it remanded the case to the circuit court with directions that, if the State could show probable cause to show that Hamdan had an unlawful purpose when carrying the concealed weapon, the matter should proceed to trial.

We turn now to the facts of the present case. Scott Fisher owned and operated a tavern. Four or five nights a week he would bring home several thousand dollars in receipts to deposit at the bank. One night, Fisher's car was stolen from outside the tavern. When Fisher called the police to report the theft, he also cautioned them that there was a loaded gun in the car.² He was notified the next day that he would be receiving a citation for transporting a loaded firearm in

² It appears from Fisher's hearing testimony that there may also have been several other weapons in the vehicle at the time it was stolen, but they are not at issue on this appeal.

a vehicle. See WIS. STAT. § 167.31(2)(b) (requiring that firearms being transported in vehicles must be both unloaded and enclosed in a suitable case).

About a week and a half later, Fisher complained about the citation to a DNR official. He explained that he had the gun in his car because he carried large amounts of cash from the tavern. During the conversation, Fisher disclosed that he still had the gun in his car. After the DNR official verified that there was a loaded gun in the console of Fisher's car, the official summoned the police, who arrested Fisher for carrying a concealed weapon contrary to WIS. STAT. § 941.23.

Fisher challenged the constitutionality of applying the concealed weapon statute in these circumstances. At a pretrial hearing, Fisher testified that, in addition to his own experience as a crime victim, he was aware of several armed robberies that had occurred in the area of his tavern during the past year. Fisher asserted he believed he was at risk for robbery due to the large amounts of cash he carried. He further explained that he felt it made sense to keep the gun in the console because if the gun were openly displayed on the seat of the car, someone could break the car's window and take it.

The facts of this case appear to fall somewhere in between those of *Cole* and *Hamdan*. In *Hamdan*, where the prosecution violated the constitution, the defendant was a business person inside his business establishment. In *Cole*, where prosecution did not violate the constitution, the defendant was a non-business person with a concealed gun in a car in a high-crime neighborhood. Here, Fisher is a businessman with an interest in protecting himself and his money, as in *Hamdan*, but Fisher also was arrested for concealing his gun, not in his business establishment, but in a car in a high-crime area, as in *Cole*. We will

now more specifically explain why various statements in *Hamdan* and *Cole* leave much room for doubt as to the proper result in this case.

We first note that the language in *Cole*, 264 Wis. 2d 520, ¶49, is quite broad when explaining that a legitimate public concern over the possibility of accidental shootings justifies restricting the transport of loaded weapons in vehicles and that prohibiting individuals from keeping loaded weapons in a glove compartment does not render the right to bear arms illusory. It is not apparent whether that discussion in *Cole* is meant to foreclose constitutional challenges to prosecutions for carrying a concealed firearm in the glove compartment of a vehicle.

If not, and if a constitutional defense based on the right to bear arms may still be available on a case-by-case basis to individuals carrying loaded firearms in the glove compartments of vehicles, is such a defense limited to the grounds of actual self-defense? This question arises because the court in *Cole* found the defendant's assertion that he had been a crime victim and did not feel safe in the neighborhood insufficiently specific or imminent to invoke a self-defense claim, but did not explain why such an assertion would not provide the defendant with a legitimate need for security. *Cole*, 264 Wis. 2d 520, ¶48. In contrast, the court in *Hamdan* explicitly cited the defendant's status as a crime victim and location in a high-crime neighborhood in support of a legitimate need for security in his store. Was the only reason a security interest was viewed as a valid justification in *Hamdan*, but not *Cole*, that the defendant in *Cole* failed to properly preserve and argue the issue? Or were the continual references in *Hamdan* to the security interest being strongest in a person's home or business meant to limit the availability of a security justification to those places?

“Security” is a broad concept that could arise in a myriad of situations. See *Hamdan*, 264 Wis. 2d 433, ¶145 and n. 48 (Abrahamson, C.J., concurring). If an individual may cite security as the basis for carrying a loaded firearm in a vehicle, is there any further guidance the Supreme Court could give on how to analyze such claims? For instance, should the constitutional right be interpreted liberally or narrowly?

In sum, we believe that further clarification on the scope and availability of the constitutional security justification would be helpful to both this court and trial courts.

U.S. Department of Justice
Federal Bureau of Investigation



CRIME
VIOLENT CRIME | MURDER AND NONNEGLIGENT MANSLAUGHTER | FORCED RAPE | ROBBERY | AGGRAVATED
ASSAULT | PROPERTY CRIME | BURGLARY | LARCENY-THEFT | MOTOR VEHICLE THEFT | ARSON | HATE CRIME

IN THE UNITED STATES | 2003

Release Date: October 27, 2004

Table 8A

**Offenses Known to Law Enforcement
by City under 10,000 in Population, 2003**

City by state	Violent crime											Property crime			
	Population	Violent crime	Murder and non-negligent manslaughter	Forcible rape	Robbery	Aggravated assault	Property crime	Burglary	Larceny-theft	Motor vehicle theft	Arson ¹	Property crime			
ALABAMA															
Abbeville	2,950	14	0	0	0	0	14	91	19	66	6	0			
Adamsville	4,967	54	0	1	10	43	311	41	251	19	1	0			
Aliceville	2,553	1	0	0	0	1	3								
Andalusia	8,654	47	0	9	8	30	687	109	556	22	34	0			
Arab	7,309	12	0	3	4	5	620	108	478	9	1	0			
Ardmore	1,077	1	0	0	0	1	18	8							
Argo	1,823	2	0	0	0	2	42	17	23	2	2	0			
Ashford	1,851	2	0	0	0	2	24	8	14	2	0				
Ashland	1,935	0	0	0	0	0	14	5	9	0					
Atmore	7,581	87	1	9	8	69	527	115	395	17	14	0			
Attalla	6,463	60	0	1	4	55	286	41	231	2	2	0			
Autaugaville	843	3	0	0	0	3	39	15	22	2					
Bay Minette	7,833	51	1	2	9	39	330	45	277	8					
Bayou La Batre	2,772	34	0	4	8	22	429	149	255	25					
Bear Creek	1,025	6	1	0	0	5	29	8	21	0	0	0			
Berry	1,230	1	0	0	1	0	14	6	6	2					
Blountsville	1,814	1	0	0	0	1	46	14	29	3					
Boaz	7,665	18	0	6	2	10	662	88	548	26					
Brantley	910	1	0	0	0	1	7	0	6	1					
Brent	4,952	22	0	3	2	17	57	15	41	1					
Brewton	5,401	88	2	4	10	72	377	72	290	15					
Bridgeport	2,717	9	0	1	0	8	122	20	91	11					
Brighton	3,561	45	0	0	10	35	187	63	88	36					
Brilliant	736	0	0	0	0	0	4	0	3	1					
Brookside	1,381	0	0	0	0	0	1	0	1	0					
Brundidge	2,304	8	0	0	3	5	92	24	67	1					
Butler	1,868	2	0	0	0	2	26	16	10	0					
Camp Hill	1,237	8	1	2	0	5	26	6	16	4					
Carbon Hill	2,070	21	0	0	1	20	78	24	47	7					
Cedar Bluff	1,481	0	0	0	0	0	34	13	18	3					
Centre	3,259	1	0	0	0	1	48	17	31	0					
Centreville	2,458	23	0	0	3	20	69	6	61	2					
Chatom	1,185	3	0	0	0	3	24	3	17	4					
Cherokee	1,216	1	0	0	1	0	6	2	2	2					

WISCONSIN

Algoma	3,318	2	0	0	0	0	0	2	89	13	73	3
Altoona	6,678	5	0	0	3	0	0	2	151	44	102	5
Amery	2,879	25	0	0	0	0	0	25	131	17	107	7
Antigo	8,438	28	0	0	0	0	0	28	411	45	355	11
Arcadia	2,366	3	0	0	0	0	0	3	74	14	55	5
Ashland	8,568	12	0	0	0	0	0	9	383	42	325	16
Bayfield	615	4	0	0	0	0	0	4	14	1	13	0
Bayside	4,540	2	0	0	0	1	1	1	32	4	28	0
Beloit Town	7,373	5	0	0	1	1	3	3	218	45	163	10
Berlin	5,290	10	1	0	0	0	9	9	192	19	166	7
Black River Falls	6,225	6	0	1	1	1	4	4	152	15	125	12
Blair	1,282	3	0	0	0	0	3	3	30	4	26	0
Bloomer	3,304	2	0	0	0	0	2	2	59	10	48	1
Bloomfield	5,678	9	0	0	0	2	7	7	96	21	66	9
Boscobel	3,242	1	0	0	0	0	1	1	23	6	17	0
Boscobel	2,971	0	0	0	0	0	0	0	13	0	13	0
Brillion	3,140	1	0	0	0	1	1	0	23	5	16	2
Brodhead	6,428	12	0	1	0	0	11	11	184	22	158	4
Brookfield Township	6,526	4	0	0	0	0	4	4	89	17	70	2
Burlington Town	1,875	5	0	0	0	0	5	5	75	9	55	11
Butler	1,926	0	0	0	0	0	0	0	15	1	14	0
Campbellsport	590	0	0	0	0	0	0	0	5	0	5	0
Chenequa	3,695	11	0	4	0	0	7	7	67	10	54	3
Chilton	1,382	0	0	0	0	0	0	0	19	2	17	0
Cleveland	4,678	5	0	0	2	0	3	3	201	21	173	7
Clintonville	3,638	4	0	2	0	0	2	2	84	1	77	6
Colby-Abbotsford	4,709	2	0	0	0	0	2	2	112	14	92	6
Columbus	1,426	0	0	0	0	0	0	0	35	6	29	0
Cornell	8,325	9	0	1	0	0	8	8	162	15	144	3
Cottage Grove	1,952	6	0	0	0	0	6	6	52	8	42	2
Crandon	2,141	0	0	0	0	0	0	0	32	4	28	0
Cuba City	2,301	2	0	0	0	1	1	1	69	3	60	6
Cumberland	843	0	0	0	0	0	0	0	7	2	5	0
Dane	1,632	2	0	0	0	0	2	2	43	9	32	2
Darien	2,404	2	0	0	0	1	1	1	53	7	40	6
Darlington	1,963	1	0	1	1	0	0	0	41	5	33	3
Deerfield	7,897	11	0	3	0	0	8	8	193	16	170	7
DeForest	6,751	5	0	0	0	1	4	4	97	13	82	2
Delafield	8,234	12	0	2	2	2	8	8	443	36	395	12
Delavan	4,599	1	0	0	0	0	1	1	160	28	125	7
Delavan Town	1,999	0	0	0	0	0	0	0	24	5	19	0
Denmark	4,508	13	0	2	0	0	11	11	109	17	87	5
Dodgeville	1,935	1	0	0	0	0	1	1	12	2	9	1
Durand	1,741	1	0	0	1	0	0	0	5	0	5	0
Eagle Village												

Edgar	1,381	1	0	1	0	0	0	0	1	0	0	12	2	8	2
Edgerton	4,947	5	0	0	0	0	0	0	0	0	5	152	7	136	9
Eleva	633	0	0	0	0	0	0	0	0	0	0	13	4	7	2
Elkhart Lake	1,034	0	0	0	0	0	0	0	0	0	0	14	0	14	0
Elkhorn	7,864	15	0	0	0	0	0	0	4	3	8	209	23	180	6
Ellsworth	3,031	1	0	0	0	0	0	0	0	0	1	109	21	86	2
Elm Grove	6,335	1	0	0	0	0	0	0	0	0	0	135	31	101	3
Elroy	1,560	3	0	0	0	0	0	0	0	0	3	37	9	25	3
Evansville	4,254	15	0	0	0	0	0	0	0	0	15	18	10	7	1
Fall Creek	1,248	0	0	0	0	0	0	0	0	0	0	17	6	10	1
Fennimore	2,364	0	0	0	0	0	0	0	0	0	0	43	8	35	0
Fontana	1,863	6	0	0	0	0	0	0	0	0	6	46	8	38	0
Fox Lake	1,475	0	0	0	0	0	0	0	0	0	0	23	2	21	0
Fox Point	7,006	4	0	0	0	0	0	0	0	2	2	95	13	77	5
Frederic	1,269	8	0	0	0	0	0	0	0	1	7	78	6	69	3
Geneva Town	4,120	1	0	0	0	0	0	0	1	0	0	95	6	89	0
Genoa City	2,291	0	0	0	0	0	0	0	0	0	0	42	18	24	0
Grantsburg	1,402	0	0	0	0	0	0	0	0	0	0	28	7	21	0
Green Lake	1,119	2	0	0	0	0	0	0	0	0	2	23	1	22	0
Hallie	4,740	1	0	0	0	0	0	0	1	0	0	179	18	156	5
Hartland	8,579	7	0	0	0	0	0	0	2	0	5	106	17	86	3
Hazel Green	1,184	5	0	0	0	0	0	0	0	0	5	16	1	14	1
Hillsboro	1,314	0	0	0	0	0	0	0	0	0	0	28	0	28	0
Holmen	6,779	4	0	0	0	0	0	0	1	0	3	146	24	114	8
Horton	3,752	6	0	0	0	0	0	0	2	0	4	89	8	79	2
Hortonville	2,433	1	0	0	0	0	0	0	0	0	0	56	6	48	2
Hudson	9,792	15	1	0	0	0	0	0	0	8	6	550	49	471	30
Hurley	1,782	8	0	0	0	0	0	0	0	0	8	73	8	57	8
Independence	1,260	1	0	0	0	0	0	0	0	0	1	25	7	18	0
Iron Ridge	1,007	3	0	0	0	0	0	0	0	1	2	28	11	16	1
Jackson	5,484	5	0	0	0	0	0	0	2	1	2	49	8	40	1
Jefferson	7,360	6	1	0	0	0	0	0	0	0	5	237	13	212	12
Juneau	2,486	0	0	0	0	0	0	0	0	0	0	41	7	33	1
Kewaskum	3,379	4	0	0	0	0	0	0	2	0	2	74	3	68	3
Kewaunee	2,791	2	0	0	0	0	0	0	0	0	2	47	1	46	0
Kiel	3,469	0	0	0	0	0	0	0	0	0	0	74	5	69	0
Kohler	1,926	0	0	0	0	0	0	0	0	0	0	61	0	59	2
Lac du Flambeau	3,088	16	0	0	0	0	0	0	3	0	13	212	33	153	26
Ladysmith	3,897	10	0	0	0	0	0	0	4	0	6	113	15	89	9
Lake Delton	2,370	11	0	0	0	0	0	0	1	0	10	474	26	431	17
Lake Geneva	7,290	16	0	0	0	0	0	0	6	1	9	283	25	258	0
Lake Mills	4,905	2	0	0	0	0	0	0	2	0	0	92	7	85	0
Lancaster	4,000	4	0	0	0	0	0	0	1	0	3	61	20	40	1
Lodi	2,941	1	0	0	0	0	0	0	0	0	0	75	6	66	3
Luxemburg	2,071	0	0	0	0	0	0	0	0	0	0	5	0	5	0
Maple Bluff	1,348	0	0	0	0	0	0	0	0	0	0	9	1	7	1
Marathon City	1,605	0	0	0	0	0	0	0	0	0	0	24	5	19	0

Marion	1,292	10	0	2	0	8	36	5	31	0
Markesan	1,383	2	0	0	0	2	56	12	43	1
Marshall Village	3,570	2	0	2	0	0	59	6	51	2
Mauston	3,926	7	0	2	0	5	114	16	94	4
Mayville	5,049	5	0	0	0	5	50	8	41	1
McFarland	6,925	3	0	0	0	3	144	9	132	3
Medford	4,294	2	0	0	0	1	155	14	139	2
Milton	5,159	2	0	0	1	1	83	5	73	5
Mineral Point	2,555	2	0	0	0	2	45	4	39	2
Minocqua	4,876	6	0	0	0	6	171	17	152	2
Mondovi	2,634	4	0	0	4	0	20	4	15	1
Monona	8,078	13	0	2	9	2	410	19	385	6
Mosinee	4,122	0	0	0	0	0	104	19	82	3
Mount Horeb	6,078	13	0	1	1	11	214	19	195	0
Mukwonago	6,481	5	2	0	2	1	164	14	147	3
Neillsville	2,721	2	0	0	0	0	80	27	52	1
New Glarus	2,090	0	0	0	0	0	44	7	36	1
New Holstein	3,296	1	0	0	0	1	81	10	71	0
New Lisbon	1,435	3	0	0	1	2	42	8	32	2
New London	7,100	2	0	1	1	0	236	17	211	8
New Richmond	6,771	1	0	1	0	0	219	20	180	19
Niagara	1,851	12	0	0	0	12	18	7	11	0
North Fond du Lac	4,762	6	0	2	1	3	111	7	90	14
North Hudson	3,647	1	0	1	0	0	32	9	23	0
Oconomowoc Town	7,631	3	0	1	0	2	72	18	52	2
Oconto	4,778	9	0	1	1	7	231	14	205	12
Oconto Falls	2,847	15	0	3	1	11	91	10	73	8
Omro	3,202	0	0	0	0	0	102	5	96	1
Oregon	7,918	2	0	0	0	2	178	13	157	8
Osceola	2,597	4	0	0	0	4	64	20	42	2
Osseo	1,668	10	0	0	0	10	59	12	45	2
Palmyra	1,782	7	0	3	0	4	68	4	63	1
Park Falls	2,642	3	0	1	0	2	55	14	40	1
Pepin	934	3	0	1	0	2	12	0	7	5
Peshigo	3,373	4	0	1	0	0	96	17	71	8
Pewaukee	8,615	4	0	2	0	2	143	15	126	2
Platteville	9,914	30	0	3	3	24	321	20	295	6
Plymouth	8,102	1	0	1	0	0	179	8	165	6
Poynette	2,392	2	0	0	0	2	51	2	49	0
Prescott	3,820	2	0	0	0	2	196	27	162	7
Princeton	1,490	1	0	0	0	1	50	2	45	3
Reedsburg	8,059	6	0	3	1	2	356	24	321	11
Rhineland	7,840	11	0	3	0	8	221	24	190	7
Richland Center	5,177	9	0	5	0	4	159	8	145	6
Ripon	6,752	4	0	4	0	0	188	27	154	7
Rothschild	4,880	1	0	1	0	0	117	21	95	1
Sauk Prairie	4,170	12	0	0	0	12	202	7	194	1

Saukville	4,125	2	0	0	0	0	2	138	14	123	1
Shawano	8,296	8	0	3	3	2	2	644	63	567	14
Sheboygan Falls	6,864	5	0	1	0	4	4	138	8	128	2
Silver Lake	2,393	8	0	0	0	8	8	37	3	34	0
Siren	998	9	0	0	1	-8	1	43	9	31	3
Slinger	4,122	3	0	2	3	153	20	130	3	130	3
Sparta	8,802	21	0	5	3	13	190	162	21	162	7
Spencer	1,922	1	0	0	0	1	14	2	2	12	0
Spooner	2,717	1	0	0	0	1	108	86	18	86	4
Spring Green	1,442	3	0	0	0	3	34	31	3	31	0
Stanley	1,875	1	0	0	0	1	41	8	3	33	0
St. Croix Falls	2,065	3	0	0	0	3	78	68	8	68	2
St. Francis	8,932	7	0	2	5	0	296	263	18	263	15
Strum	992	1	0	0	0	1	27	6	6	17	4
Sturgeon Bay	9,534	2	0	0	1	1	175	14	14	157	4
Sturtevant	5,310	3	0	0	2	1	98	5	5	85	8
Summit	5,025	0	0	0	0	1	29	9	9	20	0
Theresa	1,271	1	0	0	0	1	38	3	3	28	7
Thiensville	3,205	11	0	3	1	7	23	4	4	18	1
Tomah	8,550	34	0	4	4	26	349	68	68	274	7
Tomahawk	3,809	5	0	0	0	5	192	33	33	155	4
Town of East Troy	3,830	2	0	0	0	2	46	8	8	35	3
Town of Madison	7,073	47	3	7	21	16	411	80	80	303	28
Trempealeau	1,417	0	0	0	0	0	8	3	3	5	0
Twin Lakes	5,257	4	0	0	0	4	118	16	16	95	7
Valders	1,000	1	0	0	0	1	10	0	0	9	1
Verona	9,016	34	3	1	3	27	214	9	9	200	5
Viroqua	4,376	3	0	0	0	3	110	24	24	82	4
Walworth	2,454	6	0	3	0	3	70	6	6	63	1
Washburn	2,324	10	0	2	0	8	41	1	1	39	1
Waunakee	9,591	3	0	0	0	3	91	19	19	70	2
Wautoma	2,137	3	0	0	1	2	65	6	6	58	1
Westby	2,109	0	0	0	0	0	32	3	3	24	5
West Milwaukee	4,162	19	0	1	10	8	148	34	34	90	24
West Salem	4,858	2	0	0	0	2	136	20	20	111	5
Whitehall	1,639	1	0	0	0	1	48	10	10	38	0
Williams Bay	2,565	2	1	0	0	1	36	5	5	31	0
Winneconne	2,444	4	0	0	0	4	36	7	7	26	3
Wisconsin Dells	2,433	16	0	2	2	12	320	15	15	300	5
Woodruff	1,980	11	0	0	0	11	62	6	6	55	1
WYOMING											
Afton	1,790	11	0	1	0	10	26	4	4	20	2
Baggs	361	2	0	0	0	2	2	0	0	2	0
Basin	1,218	6	0	1	0	5	40	15	15	24	1
Buffalo	4,105	16	0	0	0	16	153	21	21	129	3

Table 10A

Offenses Known to Law Enforcement

by Nonmetropolitan County under 25,000 in Population, 2003

[The data shown in this table do not reflect county totals but are the number of offenses reported by the sheriff's office or county police department.]

County by state	Violent crime				Property crime				Arson ¹
	Murder and non-negligent man-slaughter	Forcible rape	Robbery	Aggravated assault	Property crime	Burglary	Larceny-theft	Motor vehicle theft	
ALABAMA									
Barbour	1	0	0	0	1	19	4	12	3
Butler	36	0	0	5	31	186	59	113	14
Cherokee	0	0	0	0	0	173	59	97	17
Clarke	33	1	1	2	29	95	50	40	5
Clay	11	0	2	0	9	114	17	89	8
Cleburne	8	1	1	2	4	236	77	114	45
Coffee	19	0	4	1	14	252	108	138	6
Conecuh	3	0	0	0	3	52	8	41	3
Coosa	60	1	4	2	53	180	65	99	16
Crenshaw	12	0	4	1	7	157	46	98	13
Dale	9	0	1	0	8	135	42	83	10
Fayette	51	0	1	1	49	172	44	109	19
Franklin	28	1	2	2	23	124	42	75	7
Lamar	6	0	0	2	4	35	12	20	3
Macon	34	1	2	7	24	376	139	193	44
Marengo	21	2	2	4	13	145	54	81	10
Marion	9	0	1	0	8	108	40	56	12
Monroe	51	0	0	0	51	79	37	38	4
Perry	9	0	0	2	7	101	48	44	9
Pickens	5	1	1	0	3	37	15	17	5
Pike	8	0	0	1	7	96	38	53	5
Randolph	36	0	4	3	29	253	82	145	26
Tallapoosa	22	0	6	6	10	215	92	114	9
Washington	11	1	2	1	7	127	67	41	19
Wilcox	7	1	1	0	5	39	14	14	11
Winston	12	1	4	0	7	202	83	115	4
ARIZONA									
Graham	23	0	0	1	22	252	56	175	21
Greenlee	17	0	0	0	17	65	23	42	0
La Paz	56	0	1	3	52	456	86	339	31
Santa Cruz	4	1	1	2	0	205	62	107	36

Mingo	0	0	0	0	0	0	0	0	2	0	0	2	0
Monroe	8	0	0	0	0	0	8	28	3	24	1	0	0
Nicholas	34	2	4	0	0	0	28	347	91	221	35	3	3
Pocahontas	4	0	0	0	0	0	4	43	26	16	1	0	0
Randolph	7	0	2	0	0	0	5	27	15	10	2	0	0
Ritchie	6	0	0	0	0	0	6	35	10	20	5	3	3
Roane	12	1	0	1	1	10	10	108	26	73	9	2	2
Summers	13	0	1	1	1	11	11	44	20	18	6	2	2
Taylor	0	0	0	0	0	0	0	30	6	23	1	0	0
Tucker	8	0	0	0	0	0	8	18	2	15	1	0	0
Tyler	2	0	0	0	0	0	2	17	14	3	0	2	2
Upshur	10	2	0	0	0	0	8	76	23	45	8	3	3
Wyoming	8	0	0	0	0	0	8	111	89	17	5	0	0

WISCONSIN

Bayfield	44	1	3	1	39	203	71	117	15	15	15	15	15
Buffalo	5	0	0	1	4	120	39	72	9	9	9	9	9
Burnett	7	0	0	0	7	325	185	108	32	32	32	32	32
Crawford	0	0	0	0	0	132	15	109	8	8	8	8	8
Door	0	0	0	0	0	224	45	172	7	7	7	7	7
Florence	5	0	1	0	4	146	70	71	5	5	5	5	5
Forest	4	0	2	0	2	253	86	146	21	21	21	21	21
Green	5	0	3	0	2	173	49	106	18	18	18	18	18
Green Lake	7	0	4	0	3	106	32	71	3	3	3	3	3
Iron	2	0	0	0	2	64	20	43	1	1	1	1	1
Jackson	8	1	1	0	6	274	71	188	15	15	15	15	15
Juneau	15	1	2	1	11	260	108	127	25	25	25	25	25
Lafayette	8	0	3	0	5	127	25	79	23	23	23	23	23
Langlade	16	1	1	0	14	241	110	120	11	11	11	11	11
Lincoln	6	3	0	1	2	187	105	71	11	11	11	11	11
Marquette	13	0	2	1	10	239	80	144	15	15	15	15	15
Menominee	5	0	1	0	4	100	19	76	5	5	5	5	5
Monroe	16	0	1	0	15	222	58	153	11	11	11	11	11
Oneida	20	0	5	2	13	355	101	232	22	22	22	22	22
Pepin	4	0	0	0	4	18	11	5	2	2	2	2	2
Price	3	0	0	0	3	101	31	68	2	2	2	2	2
Richland	26	0	0	0	26	135	47	83	5	5	5	5	5
Rusk	43	0	0	0	43	254	74	170	10	10	10	10	10
Sawyer	10	0	3	1	6	466	217	193	56	56	56	56	56
Taylor	11	0	4	0	7	109	40	63	6	6	6	6	6
Trempealeau	2	0	1	1	0	142	46	86	10	10	10	10	10
Vernon	15	0	0	0	15	165	54	101	10	10	10	10	10
Vilas	10	0	2	2	6	384	59	309	16	16	16	16	16
Washburn	13	0	2	1	10	154	77	68	9	9	9	9	9
Waushara	11	0	1	0	10	313	60	240	13	13	13	13	13

STATE OF WISCONSIN

IN SUPREME COURT

No. 2004AP2989-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

SCOTT K. FISHER,

Defendant-Respondent.

ON CERTIFICATION FROM THE COURT OF APPEALS
ON APPEAL FROM A JUDGMENT OF DISMISSAL ENTERED
IN THE JACKSON COUNTY CIRCUIT COURT, THE HONORABLE
JOHN A. DAMON, PRESIDING

BRIEF AND APPENDIX OF
DEFENDANT-RESPONDENT

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STATE OF WISCONSIN

IN SUPREME COURT

No. 2004AP2989-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

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JOHN A. DAMON, PRESIDING

BRIEF AND APPENDIX OF
DEFENDANT-RESPONDENT

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether Wis. Stat. § 941.23, which criminalizes the carrying of a concealed weapon, is unconstitutional as applied to the defendant-respondent Mr. Fisher as an infringement of his right to keep and bear arms for security when transporting cash for his business in a vehicle in a high crime neighborhood.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is requested by the defendant-respondent Mr. Fisher. Publication of the court's decision is warranted because the issues raised are of statewide importance and one of first impression interpreting the interaction of §941.23 of the Wisconsin Statutes and Article I, Section 25 of the Wisconsin Constitution.

STATEMENT OF CASE

The defendant-respondent, Scott Fisher (hereinafter "Mr. Fisher"), was the owner and operator of the Cozy Corner tavern in downtown Black River Falls, Wisconsin.¹ (R29:8; R-Ap. 110). Mr. Fisher had owned the tavern for approximately six years. (R29:12; R-Ap. 114). It was common for Mr. Fisher to have large sums of cash on hand at the tavern. (*Id.*). Some of this cash would remain at the tavern to be available for conducting business the following morning. (R29:13; R-Ap. 115). The remaining balance of the cash would go home with Mr. Fisher. (*Id.*). There was a small floor safe at the tavern in which to secure money. (*Id.*). However, that small safe was very transportable and, as such, could be easily removed from the tavern. (*Id.*).

Mr. Fisher generally worked nights at his tavern. (R29:8; R-Ap. 110). The tavern closed at 2 a.m. on weeknights and at 2:30 a.m. on weekend nights. (R29:15; R-Ap. 117). Mr. Fisher would transport cash, at night, from his tavern approximately four or five nights a week. (R29:14; R-Ap. 116). Because of the

¹ Mr. Fisher has since sold his tavern.

unpredictability of the tavern business, Mr. Fisher did not know in advance whether or not he would be transporting cash on a particular night, or what the sum of any such transportation would be. (*Id.*). Mr. Fisher would either deliver the cash to the bank or take it home with him, at which point the cash would be deposited the next day. (R29:14-15; R-Ap. 116-117).

Within the previous year, from the date in which Mr. Fisher was arrested for carrying a concealed weapon, at least four separate robberies had occurred in Black River Falls, Wisconsin. (R29:15; R-Ap. 117). One such incident involved Mr. Robert "Tubby" Krueger, an owner/operator of an auto repair station, in downtown Black River Falls, who was hit over the head and subsequently robbed. (*Id.*). On another occasion, the Quick Cash store in Black River Falls was robbed at gunpoint. (*Id.*). Still another incident occurred at the Dairy Way in Black River Falls, when, it too, was robbed at gunpoint, with gunshots being exchanged. (*Id.*). The fourth occurrence took place at The Frame Shop in downtown Black River Falls, where it also was robbed at gunpoint. (*Id.*).

Mr. Fisher, himself, was a victim of crime approximately one-and-one-half weeks prior to the incident in which Mr. Fisher was charged with carrying a concealed weapon. (R29:8, R-Ap. 110). On that particular occasion, Mr. Tyrone Decorah stole Mr. Fisher's vehicle from outside his tavern. (R29:16; R-Ap. 118). Mr. Decorah was subsequently killed in a knife fight outside of Black River Falls. (*Id.*).

Mr. Fisher worked for the Department of Corrections for four-and-one-half years. (*Id.*). In that capacity, it was necessary for Mr. Fisher to be qualified in weapons handling, and as such, he underwent weapons training every year that he worked for the Department of Corrections. (R29:16-17; R-Ap. 118-119). Mr. Fisher was also trained in the use of force during his employment with the Department. (*Id.*).

On December 20, 2003, at approximately 4:00 p.m., Mr. Fisher went to the Department of Natural Resources' (DNR) office in Black River Falls, to discuss with a DNR warden a citation that had been issued to him. Mr. Fisher informed the warden that he had a loaded firearm in his vehicle. (R29:11; R-Ap. 113). When asked by the warden to see the firearm, Mr. Fisher complied by opening his vehicle door, opening the center console, removing the weapon from the console, and thereafter setting it on the seat, pointing it away from the warden, and then backed up in such a manner so as to not alarm the warden. (*Id.*). Mr. Fisher was thereafter arrested, without incident, for carrying a concealed weapon. (R2; R-Ap. 101-102).

Prior to trial, Mr. Fisher filed a motion to allow him to raise a constitutional defense. (R16). The trial court heard the motion on October 1, 2004, and ruled that Mr. Fisher would be allowed to raise the constitutional defense. The State of Wisconsin conceded that it had no evidence that Mr. Fisher was carrying the concealed weapon for any unlawful purpose; (R29:47-48; R-Ap. 149-150)

therefore, the trial court dismissed the charges against Mr. Fisher. (R20; R-Ap. 154) The court of appeals certified the question to the Supreme Court.

ARGUMENT

I. ART. I, SECT. 25 OF THE WISCONSIN CONSTITUTION
CONFERS UPON THE PEOPLE THE RIGHT TO KEEP AND BEAR
ARMS FOR SECURITY PURPOSES.

The sole issue before the court is whether Wis. Stat. §941.23, which prohibits the carrying of concealed weapons (“CCW statute”), is unconstitutional as an infringement of the defendant-respondent Mr. Fisher’s right to keep and bear arms for security where Mr. Fisher is a tavern owner in a high crime neighborhood who regularly carries large sums of cash in his vehicle for deposit. In prior procedural postulate, the circuit court in Jackson County held that the CCW statute as applied to Mr. Fisher was unconstitutional to his conduct of carrying a concealed weapon in his vehicle. The circuit court based its holding on the fact that Mr. Fisher was a tavern owner who regularly carried large sums of cash in his vehicle. The court further found that despite the fact that Mr. Fisher was not carrying business cash receipts in his vehicle on the day he was arrested for violating the CCW statute, his conduct was reasonable given his prior weapons training, he was the victim of a crime in the recent past, and that he had reason to question his security because of recent criminal activity in Black River Falls. (29:42; R-Ap. 144).

Article I, section 25 of the Wisconsin Constitution was adopted by the people of this state for inclusion as an amendment in 1998. Wis. Const. Art. I, §25, states that “the people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose.” The meaning of “security” is unclear. However, determining the exact definition of security is not necessarily critical to interpreting the amendment because the plain language of the amendment indicates that the list of enumerated purposes is illustrative, not exclusive.”² Existing somewhat incongruously is Wisconsin’s concealed weapons statute which provides that “any person except a peace officer who goes armed with a concealed and dangerous weapon is guilty of a Class A misdemeanor.” Wis. Stat. §941.23. In 2002, this court heard and ruled upon *State v. Cole* and *State v. Hamdan*. It is these two particular cases that provide the legal backbone for the ongoing debate between the defendant-respondent Mr. Scott Fisher and the plaintiff-appellant the State of Wisconsin.

A. State v. Hamdan

This court held in *Hamdan*, that the State’s police power must yield, in this case, to Hamdan’s reasonable exercise of the constitutional right to keep and bear arms for security. See *Hamdan*, 264 Wis. 2d 433, ¶6. The defendant, Mr. Hamdan, owned a grocery store in Milwaukee, Wisconsin. *Id.* at ¶1. Hamdan’s store was located in a high-crime neighborhood. *Id.* at ¶8. Violent crimes had

² Jeffrey Monks, Comment, The End of Gun Control or Protection Against Tyranny?: The Impact of the New Wisconsin Constitutional Right to Bear Arms on State Gun Control Laws, 2001 Wis. L. Rev. 249, 272, “Acknowledging the ambiguity of the term “for security”, questioning whether it should be interpreted as security of the state or security of self and home.”

been committed both inside and immediately outside of Hamdan's grocery store. *Id.* at ¶8. Because of the violent crime, Hamdan kept a handgun in his store, near the cash register under the counter, for personal and customer safety as well as to secure his property. *Id.* at ¶9. Later in the evening, the night after Thanksgiving, Hamdan was in the process of locking up his store when plain-clothes officers entered the store in order to conduct a license check. *Id.* at ¶2-3. Prior to the officers' entrance, Hamdan, while closing up the store, had placed the gun in the waistband of his pants. *Id.* at ¶3. The officers asked Hamdan if he kept a gun in the store, and if so, where it was located. *Id.* at ¶3. Hamdan answered that, yes, he kept a gun in the store and pulled the gun from his waistband. *Id.* at ¶3. Hamdan was subsequently charged for carrying a concealed weapon in violation of Wis. Stat. § 941.23. *Id.* at ¶4.

This court held that the CCW statute as applied to Hamdan's conduct was unconstitutional as it "effectively disallowed the reasonable exercise of Hamdan's constitutional right to keep and bear arms for the lawful purpose of security." *Id.* at ¶6. This court thereby concluded that Hamdan's conviction for carrying a concealed weapon was unconstitutional and, therefore, his conviction must be reversed. *Id.* at ¶84. In so holding, this court acknowledged that, "this right when exercised within one's own business and supported by a factual determination that no unlawful purpose motivated concealment of the weapon, will usually provide a constitutional defense to a person who is charged with violating the CCW statute." *Id.* at ¶6.

This court premised its holding on two legal conclusions, *Id.* at ¶80, which have become the basis for a two-part test in determining whether a defendant may raise a constitutional defense to a CCW arrest. *See Id.* at ¶86. A defendant who is challenging his or her prosecution for carrying a concealed weapon is required to first secure affirmative answers to the following two legal questions before that defendant is entitled to raise a constitutional defense. *Id.* at ¶86. First, under the circumstances, did the defendant's interest in concealing the weapon to facilitate exercise of his or her right to keep and bear arms substantially outweigh the State's interest in enforcing the concealed weapons statute? *Id.* Second, did the defendant conceal his or her weapon because concealment was the only reasonable means under the circumstances to exercise his or her right to bear arms? *Id.* A defendant must raise this possible defense, by motion, before trial; thereafter the court is required to resolve the two legal questions prior to trial. *Id.* "Affirmative answers to these questions will require a court to conclude that the State's enforcement of the CCW statute constituted an unreasonable and unconstitutional impairment of the right to keep and bear arms as granted in *Article I, Section 25 of the Wisconsin Constitution.*" *Id.* If the court approves the defendant's constitutional defense, the issue of unlawful purpose then becomes relevant. *Id.* at ¶87. Whether the defendant had an unlawful purpose in carrying the concealed weapon is a question of fact. *Id.* Unlawful purpose is defined as the "intent to use the weapon in furtherance of the commission of a crime." *Id.* The question of fact should be submitted to the trier of fact along with separate, traditional jury

instructions applicable to the crime of carrying a concealed weapon. *Id.* If the trier of fact finds that the defendant did not intend the unlawful purpose, as alleged by the State, the defendant's conduct therein remains constitutionally protected. *Id.* at 88. Consequently, there will be no need to reach the questions posed in the jury instructions for the CCW offense. *Id.* Conversely, the trier of fact must address such questions if any unlawful purpose is proven. *Id.*

B. State v. Cole

The defendant Cole was convicted under Wis. Stat. §941.23 when police officers pulled over the vehicle in which he was a passenger because the vehicle had a defective brake lamp and an expired registration. *See Cole*, 264 Wis. 2d 520, ¶3. In searching the vehicle, officers discovered two loaded concealed weapons therein. *Id.* at ¶1. Officers also found marijuana in Cole's pocket. *Id.* at ¶3. Cole claimed that he was carrying the weapons for self-defense because when he was younger he was the victim of a brutal beating and thus did not feel safe in the neighborhood. *Id.* at ¶48. Cole pled guilty to charges of violating the CCW statute, along with drug charges, and was convicted. *Id.* at ¶4. Cole subsequently filed a motion to vacate his conviction alleging that the CCW statute was an unconstitutional infringement of his constitutional right to bear arms. *Id.* at ¶5. His motion was denied on the ground that the CCW statute was constitutional. *See Id.* Cole appealed and this court accepted certification. *Id.* at ¶2.

This court held that the state constitutional right to bear arms is fundamental. *Id.* at ¶20. The court went on to note, however, that this

fundamental right is not absolute and is subject to a reasonable exercise of the State's police power. *Id.* at ¶24-26. The test to be employed is whether or not the restriction upon the carrying of the concealed weapon is a reasonable exercise of the State's inherent police power. *Id.* at 26. The application of this test necessitates the balancing of the authority of the State to enact legislation for the health, safety, and welfare of the public against the individual's constitutional right to bear arms. *Id.* at 28. In *Cole*, this court concluded that the CCW statute was a reasonable regulation on the time, place, and manner in which the right to bear arms may be exercised. *Id.* Because the State's interest outweighed Cole's right to keep and bear arms it did not "unreasonably infringe" on his ability to exercise his fundamental right. *Id.*

II. THE CCW STATUTE CONSTITUTES AN UNREASONABLE AND UNCONSTITUTIONAL IMPAIRMENT OF SCOTT FISHER'S RIGHT TO KEEP AND BEAR ARMS AS GRANTED IN ART. I, SECT. 25 OF THE WISCONSIN CONSTITUTION.

A. Mr. Fisher was exercising his right to keep and bear arms under circumstances in which the need to do so was substantial.

The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose. *Wis. Const. Art. I § 25* (2003).

The state constitutional right to bear arms is fundamental, but it is not absolute. *State v. Cole*, 2003 WI 112, 264 Wis. 2d 520, 665 N.W.2d. 328. The standard of review for challenges to statutes allegedly in violation of *Wis. Const. Art. I, § 25*, is whether the statute is a reasonable exercise of police power. *Id.* at ¶26. As espoused in *Cole*, “the reasonableness test focuses on the balance of the interests at stake, rather than merely on whether any conceivable rationale exists under which the legislature may have concluded the law could promote the public welfare.” *Id.* at 27. Article I, Section 25 does not establish an unfettered right to bear arms. *See, Hamdan* at ¶41. The State retains the power to impose regulations on weapons that are reasonable, including therein a general prohibition on the carrying of concealed weapons. *Id.* at ¶41. That being said, the State may not apply these regulations in situations that “functionally disallow the exercise of the rights conferred under Article 1, Section 25.” *Id.* As this court stated in *Hamdan*, a particular need for vigilance arises in circumstances where a person’s need to exercise his or her fundamental right is most pronounced. *Id.* Surely, such a need is most clearly pronounced in circumstances involving personal and proprietary security. The nature of Mr. Fisher’s business dictates that a constant level of security be in place at all times. In order for Mr. Fisher to achieve this security, it is necessary that he employ his fundamental right to bear arms. This realization has in fact been codified since 1993 in Wis. Stat. § 941.237 whereby the legislature apparently acknowledged the increased threat that tavern owners face

by allowing tavern owners, their employees, and agents to go armed on the premise of the tavern. *See* §941.237.

In the *State of New York v. Buckmire*, 167 Misc. 2d 581, 638 N.Y.S.2d 883 (N.Y. Sup. Ct. 1995), the New York Legislature had “determined that the criminality of gun possession is mitigated in the two places where an otherwise law-abiding person is likely to spend most of his time and to deserve the greatest expectation of personal security: his home and his workplace.” Similarly, this court found that the right to keep and bear arms for security, as a general matter, must permit a person to possess, carry and sometimes conceal arms to maintain the security of a private residence or privately operated business, and to safely move and store weapons within those premises. *See Hamdan*, 2003 WI 113, 264 Wis. 2d 433, 665 N.W.2d 785. *See also State v. Cole*, 2003 WI 112, 264 Wis. 2d 520, 665 N.W.2d 328. Mr. Fisher was carrying a concealed weapon in his vehicle for security purposes; specifically, to secure his privately operated business cash receipts. Mr. Fisher’s need to exercise his fundamental right is most pronounced when he is in his vehicle. Mr. Fisher’s vehicle is a mere extension of his business because it is incidental to the business’s retention of profits. His need for security was warranted given the late hour of the night, the large sums of cash, and perhaps most notably, the fact that he was transporting cash in an area that had been the scene of a number of armed robberies and/or attempted armed robberies within the preceding year. It is counterintuitive to say that Mr. Fisher may have a concealed

weapon in his tavern, but as soon as he leaves the tavern with his business cash deposits, he is no longer entitled to provide for his or his business's security. Such unsound logic would be akin to this court in *Hamdan* finding that even though Mr. Hamdan was entitled to keep a concealed weapon under his counter for security purposes, he was not allowed to carry the gun in his pocket, as incidental to his normal [safe] handling, when closing the store for the night. *See Hamdan* at ¶82.

The CCW statute does not mention, either explicitly or implicitly, any exception for the protection of one's home or business; nor does it define 'place of business.' *See* § 941.23. Likewise, Article I, Section 25 does not specifically state that an individual has the right to keep and bear arms within his or her home or private business. It does however, impliedly endorse and allow for such protection of these areas by the inclusion of the word 'security.'³ Moreover, this court in *Hamdan, supra*, did explicate that the right to keep and bear arms for security, and sometimes conceal, included one's privately operated business. *See Hamdan* ¶59. "The purposes of a concealed carry prohibition are often less compelling in settings in which the person bearing the concealed weapon is an owner of the property on which he or she goes armed." *Id.* at ¶59. Here, Mr. Fisher's vehicle is an extension of his privately operated tavern. The vehicle is Mr. Fisher's property, as are the cash receipts he transports within. In the *State of New York v. Santiago*,

³ *See, Hamdan* at ¶64. *See also* Monks, 2001 *Wis. L. Rev.* 249, 272, "Because the amendment allows for "any. . .lawful purpose," using arms for self-defense, defense of one's home or business, or the common defense, should all be protected, as each is a lawful purpose, recognized both in statutes and in the common law."

74 Misc. 2d 10; 343 N.Y.S.2d 805 (N.Y. Sup. Ct. 1971), the defendant, a taxicab driver, was charged with possession of a .38 automatic Beretta that was concealed within a cigar box that was used as a holding receptacle for the day's cash receipts. The trial court for New York County found that defendant's taxicab was his "place of business."⁴ The only Wisconsin statutory definitions of 'place of business' are found in Wis. Stat. §§ 139.75(6) and 343.60(4).⁵

Mr. Fisher is not asking the court to recognize his vehicle as his 'place of business,' but rather to acknowledge it as a normal extension thereof. Transporting his cash in the normal course of business is just as vulnerable, if not more vulnerable, than operating the tavern itself. (R29:31; R-Ap. 133). Thus, he is more likely to be the subject of a crime when he is transporting cash. The legislature has already acknowledged that tavern owners have a substantial need to bear arms in their tavern with the codification of §941.237. (R29:31; R-Ap. 133). This is so because tavern owners generally work late at night, the tavern is a known cash business, and as such, tavern owners are susceptible to crime. (R29:32; R-Ap. 134). The same rationale behind the codification of §941.237

⁴ See, *Santiago* at ¶806. See also *People v. Santana*, 77 Misc.2d 414, 354 N.Y.S.2d 387 (1974); *People v. Anderson*, 74 Misc.2d 415, 344 N.Y.S.2d 15 (1973), in which the courts found that guns seized from taxicabs were the driver's possession within their places of business within the meaning of N.Y. Penal Code § 265.05(2) (1965) providing that possession of firearms shall constitute a misdemeanor if it takes place in a person's place of business, not a felony.

⁵ §139.60 "Tobacco Products Tax"; 139.60(6) place of business means any place where tobacco products are sold, manufactured, stored or kept for the purpose of sale or consumption, including any vessel, vehicle, airplane, train or vending machine. §343.60 "Licensing of Driver Schools and Instructions"; 343.60(4) place of business means the location at which the driver school is conducted.

supports Mr. Fisher's position. His vehicle is an extension of his business. Mr. Fisher is simply continuing the operation of his business when he transports his cash to either his bank or his residence. (R29:32; R-Ap. 134). Because his vehicle is incident to the normal business operation, Mr. Fisher is entitled to secure his property through exercising his fundamental right to keep and bear arms.

This court in *Hamdan*, utilized a balancing test in weighing the State's authority to exercise its police power to protect the welfare of its citizens against the conflicting rights of the individual to keep and bear arms for lawful purposes. *See Hamdan* at ¶45. This court held that "only if the public benefit in this exercise of the police power is substantially outweighed by an individual's need to conceal a weapon in the exercise of the right to bear arms will an otherwise valid restriction on that right be unconstitutional as applied." *Id.* Mr. Hamdan's need substantially outweighed the State's interest. *Id.* at ¶81. In reaching this conclusion this court reasoned:

Hamdan exercised the right to keep and bear arms under circumstances in which the need to exercise this right was substantial. He owned a grocery store in a high crime neighborhood and his store had been the site of past robberies and homicides. Hamdan himself had been a crime victim at the store. Hamdan had concerns not only for himself but also for his family and customers. He had good reason to anticipate future crime problems at the store and a need to provide his own security to deal with the problems. Acting on this need, Hamdan kept a handgun under the counter near the cash register but safely stored the weapon when the business was closed. Hamdan's transport of the weapon in his pocket on the night in question was incidental to his normal safe handling and storage of the firearm in his store. Meanwhile, the State's interests in prohibiting Hamdan from carrying a concealed weapon in his small store, under the circumstances on the night the police officers visited his store, were negligible. The police knew that Hamdan kept a weapon for protection. There was no evidence that Hamdan was prone to act irresponsibly or impulsively, and he was unlikely to do so in his own store. Therefore, enforcement of the CCW statute on these facts would seriously frustrate the

constitutional right to keep and bear arms for security but advance no discernible public interest.

Id. at ¶82.

The case at bar is similar to *Hamdan* not only factually, but also in that Mr. Fisher's need substantially outweighs the State's interest. Mr. Fisher is the owner of a tavern in downtown Black River Falls, Wisconsin. There had been a number of armed robberies or attempted armed robberies in Black River Falls within the preceding year of the date that Mr. Fisher was arrested for violating the CCW statute. Mr. Fisher himself had been the victim of a crime a mere week-and-one-half prior to the incident leading to his arrest for violating the CCW statute. In fact, the individual that committed the crime against Mr. Fisher was subsequently killed in a knife fight just outside of Black River Falls. Based on the foregoing incidents, Mr. Fisher had good reason to anticipate that future crime would afflict him or his business. Because of this, Mr. Fisher had a bona fide need to provide for his own security and that of his business. This need is at its apex when Mr. Fisher is transporting large sums of cash, late at night, from his tavern. Acting on this very need, Mr. Fisher kept a handgun in the center console of his vehicle. The handgun was safely stored with its safety on, and it was not visible to the public. As Mr. Fisher testified, the gun was out of sight so it would not be accessible to others. (R29:16; R-Ap. 118). Whereas, if the gun were kept on the dash or on the car seat, the window could be easily broken and the gun stolen. (R29:32; R-Ap.

134). Therefore, Mr. Fisher's concealment of his handgun was completely warranted and necessary.

Furthermore, the State's interest in prohibiting Mr. Fisher from carrying a concealed weapon in his vehicle, under the circumstances here, are negligible. Mr. Fisher is not a criminal. Rather, he is a businessman who has an inherent interest in securing his business property. Mr. Fisher has had extensive training in firearms. (R29:16-17; R-Ap. 118-119). He diligently and routinely puts the safety on the weapon. He places the weapon in the center console of his vehicle to ensure that it is secured when the vehicle is moving. Moreover, Mr. Fisher voluntarily informed the police that he carries a weapon for security purposes in his vehicle. When he turned the weapon over to the DNR warden, he took all necessary precautions such as informing the warden that he was reaching for a loaded weapon, placing it on the vehicle's seat pointing the barrel away from himself and the warden, and backed up slowly so as to not alarm the warden. (R29:11; R-Ap. 113). Mr. Fisher's only interest in carrying a weapon in his vehicle is for security of his business and self. To that end, the law grants him the ability to exercise his fundamental right to bear arms.

The police were certainly aware that a crime spree had transpired in Black River Falls within the preceding year; and specifically, that it appeared to target local businesses around and near Mr. Fisher's tavern. (R29:15; R-Ap. 117). Given the fact that other small business owners were not secure in their business premises, Mr. Fisher had little reason to believe that his vehicle, an extension of

his business, would be free from unwarranted criminal acts. The State makes light of the fact that in 2003, the year Mr. Fisher was charged with violating the CCW statute, there were a total of six violent crimes in the city of Black River Falls and eight such crimes reported in Jackson County.⁶ Yet, given the fact that Black River Falls has a population of under four-thousand (4,000) people, (R-Ap. 163) six violent crimes within a central, localized area, within the time span of one year, certainly creates an indelible sense of fear and lack of security in the home and business owners in that proximity. It was that very lack of security that Mr. Fisher was trying to combat and protect himself and his business against. In order to achieve this desired security, it was necessary for Mr. Fisher to regularly have his handgun in his vehicle. Although Mr. Fisher knew why he had to protect himself, he did not know when such protection would be necessary. (R29:43; R-Ap. 145). Therefore, he kept the handgun in the center console to ensure his continued security. This court in *Hamdan* found a very similar approach to security appealing:

The common understanding of “security” does not implicate an imminent threat. Rather, it connotes a persistent state of peace. We believe the domain most closely associated with a persistent state of peace is one’s home or residence, followed by other places in which a person has a possessory interest. A person is less likely to rely on public law enforcement for protection in these premises and is more likely to supply his own protection. In fact, a person who takes no initiative to provide security in these private places is essentially leaving security to chance.

⁶ See, the State’s supreme court brief-in-chief at 23, citing the Federal Bureau of Investigation, Crime in the United States/2003, Tables 8A & 10A (2004) at (A-Ap. 136, 141).

See Hamdan at ¶66. Mr. Fisher was exercising his right to his security on the day he stopped at the DNR office to discuss his citation. The State focuses on the fact that, at that time, approximately 4:00 p.m., Mr. Fisher was not working or transporting cash. *See*, the State's supreme court brief-in-chief at 17. The State goes on to state that, "Fisher's interest in security at that point was no different than that of any other person in the community who was running errands or engaged in other personal business that Saturday afternoon." *Id.* at 17. Yet, Mr. Fisher *was* different from those other individuals because he was a business owner who routinely carried large sums of cash in his vehicle. Mr. Fisher's arrest was in close proximity to the time that he was to start work at 6:00 p.m. His weapon was in his vehicle because he was on his way to work. Simply because he made stops prior to starting his shift does not transform him from an otherwise law abiding citizen into a criminal.

As in *Hamdan*, there was no evidence that Mr. Fisher was prone to act irresponsibly or impulsively. In fact, Mr. Fisher had several years of training on the use of firearms and in the use of force in his employment with the Wisconsin Department of Corrections. (R29:16-17; R-Ap. 118-119). This very fact negates the State's contention that its interest in curtailing "road rage" outweighs Mr. Fisher's need to exercise his right to keep and bear arms for his security. *See*, the State's supreme court brief-in-chief at 20. Furthermore, the State had no evidence Mr. Fisher was engaged in unlawful conduct. In the cases cited by the State,

which deal with “road rage”⁷, all of the defendants therein appear to act impulsively, certainly imprudently, when confronted with contentious traffic situations. Such is not the case with Mr. Fisher. Because of his training in firearms and use of force, Mr. Fisher is less likely to act impulsively when using weapons. Moreover, any interest Mr. Fisher would have in engaging in such behavior is nonexistent as his sole interest is in protecting his property. In fact, the State conceded they had absolutely no evidence that Mr. Fisher was engaged in any type of unlawful conduct. (R29:47-48; R-Ap. 149-150).

The State further contends that there is a danger that a loaded weapon will discharge if the vehicle is involved in an accident. *See*, the State’s supreme court brief-in-chief citing *Cole* at ¶49. This remote possibility does not *substantially* outweigh Mr. Fisher’s right to keep and bear arms for his security; nor does the State’s argument that “traffic stops may be dangerous encounters for police officers.”⁸ There is no dispute that some traffic stops present dangerous encounters for police officers, but as Justice Stevens articulates in his dissent in *Maryland v. Wilson*, 519 U.S. 408 at 418, “the number of stops in which an officer is actually at risk is dwarfed by the far greater number of routine stops.” Here, Mr. Fisher voluntarily told police officers of the existence of the gun in his vehicle. (R29:9; R-Ap. 111). Moreover, Mr. Fisher is not a criminal and has no reason to interfere with or cause harm to the police. Similarly, because of his

⁷ *See* the State’s supreme court brief-in-chief at 20, footnote 2.

⁸ *See* the State’s supreme court brief-in-chief at 20, citing *Maryland v. Wilson*, 519 U.S. 408, 413 (1997).

extensive training in firearms, Mr. Fisher does not pose a real threat to any officer who may pull him over.

As in *Hamdan*, the enforcement of the CCW statute on these facts would seriously frustrate Mr. Fisher's constitutional right to keep and bear arms for security while advancing no discernible public interest.

B. Mr. Fisher Lacked A Reasonable Alternative To Concealment,
Under The Circumstances, To Exercise His Constitutional Right To
Bear Arms.

In *Cole, supra*, the CCW statute withstood a facial challenge to its constitutionality under Art. I, § 25 of the Wisconsin Constitution. Yet, in *Hamdan*, this court recognized that there are circumstances in which a strict application of the CCW statute may result in an unreasonable limitation of the individual's constitutional rights. See *Hamdan* at ¶5. Like Hamdan, Mr. Fisher had no reasonable means of keeping and handling his weapon except to conceal it in the center console of his truck. This court in concluding that Hamdan did not have any such reasonable means found that:

In the normal course of business, Hamdan concealed the weapon in an area that was accessible to him but inaccessible to the public. It would have been dangerous and counterproductive to openly display the weapon during business hours, and requiring him to do so would have seriously impaired his right to bear arms for security. When Hamdan was unexpectedly summoned to come to the front of the store at a time when he was closing up for the night, he had the option of putting the handgun in his pocket or leaving the handgun in the back

room without knowing who had come into the store and whether his security was threatened. Carrying the handgun openly when he went back into the store would have shocked his visitors, seriously threatened his safety, and was not a reasonable option.

Hamdan at ¶83.

Mr. Fisher kept the weapon in a location that was not accessible to the public – in the center console of his locked vehicle. This was a secure location in which to keep the weapon as opposed to placing it on the dash or the passenger seat where it could easily fall. It would have been counterproductive to require Mr. Fisher to carry his weapon openly in his vehicle, and if he had done so, his right to bear arms for security would have been seriously impaired. Open visibility of the weapon would invite would be gun robbers to break into his vehicle. More importantly, pedestrians on the street would have seen the gun and become nervous and frightened much the same way they would have been had Mr. Fisher carried a holstered weapon on his person while walking down the street or in his tavern. The State's suggestion that he wear a holster, and place the weapon therein, while operating his vehicle is also not a reasonable alternative. This would require Mr. Fisher to remove the holster every time he exited his vehicle. Such an activity would be highly visible and bothersome to pedestrians for the reasons stated above. Perhaps most importantly, this would be in contravention of statutory law that disallows the transporting of loaded weapons. Wis. Stat.

§167.31.⁹ Thus, such a practice is clearly not reasonable because reasonableness presupposes lawfulness.

On the day in which Mr. Fisher was arrested for violating the CCW statute, he had the option of not putting the weapon in his car without knowing when or where he might be attacked. As the circuit court correctly reasoned, numerous crimes are unpredictable and it seems unlikely that at any given moment would be robbers would know whether or not Mr. Fisher was transporting cash. (R29:43; R-Ap. 145). Therefore, not putting the weapon in his vehicle was not an option as Mr. Fisher's security would have been seriously compromised and threatened. The State's suggestion that Mr. Fisher carry an unloaded weapon in a case, as a reasonable alternative, would eviscerate his fundamental right to keep and bear arms for security. Therefore, carrying an unloaded weapon openly in his vehicle is also not a reasonable alternative.

Mr. Fisher has no reasonable alternative available to him because Wisconsin does not have in place a license system whereby qualified classes of individuals are legally allowed to carry concealed weapons. Wis. Stat. §941.237, in conjunction with the ruling in *Hamdan*, effectively does no good in the present situation. Yes, the exception to the CCW statute for tavern owners provides that that class of individuals may provide for their business security, but only when they are located on the premises of their taverns. The moment Mr. Fisher steps

⁹ §167.31(2)(b) provides for the approved method for transporting firearms in a vehicle: unloaded and encased. §167.31(2)(e) violations of this section are subject to a forfeiture of not more than \$100.

outside of his tavern and enters his vehicle his right to bear arms for his security is effectively disallowed. Unfortunately, this is the precise moment when he is most vulnerable.

The state constitutional right to bear arms for security is fundamental. *See Cole*, 264 Wis. 2d 520, ¶20. The CCW statute is a prohibition on how weapons may be borne and as such has been held a valid exercise of the State's police power.¹⁰ Yet, even though this court has repeatedly held that the CCW statute is constitutional, in the present situation, it cannot be applied to the particular behavior of Mr. Fisher without implicating his right to bear arms. Mr. Fisher's right substantially outweighs any interest of the State for the simple reason that the State cannot provide Mr. Fisher with a reasonable alternative by which to lawfully secure his property.

CONCLUSION

The holding in *Hamdan*, *supra*, is not as limited as the State asserts in its brief. Under the facts of this case, Mr. Fisher's interest in carrying a concealed weapon in the course of his business "substantially outweighs" the State's interest in enforcing the CCW statute.

For the reasons stated herein, the court should affirm the judgment of the circuit court.

¹⁰ Monks, 2001 Wis. L. Rev. 249, 299, §941.23 is not "a blanket prohibition that prevents an individual from bearing arms, but only how they may be borne."

Dated this 2nd day of December, 2005.

Respectfully Submitted,

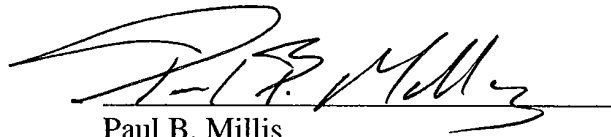
SKOLOS & MILLIS, S.C.

A handwritten signature in black ink, appearing to read 'P.B. Millis', with a long horizontal flourish extending to the right.

Paul B. Millis
Attorney for Defendant-Respondent
State Bar No. 1027097
P.O. Box 219
Black River Falls, WI 54615
715/284-9421

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief produced with a proportional font. The length of this brief is 6,151 words.

A handwritten signature in black ink, appearing to read 'P.B. Millis', with a long horizontal flourish extending to the right.

Paul B. Millis
Attorney for Defendant-Respondent

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State of Wisconsin

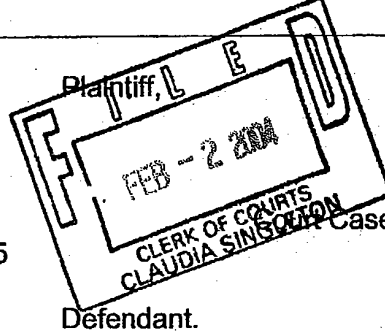
Circuit Court

Jackson County

STATE OF WISCONSIN

-vs.-

Scott K. Fisher
43 Main Street
Black River Falls, WI 54615
DOB: 02/01/1974



Criminal Complaint

Case No.: 04 CM 26

Defendant.

George M. Clark, being first duly sworn, states that:

Count 1: CARRYING A CONCEALED WEAPON

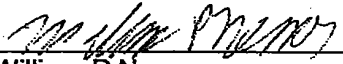
The above-named defendant on December 20, 2003, in the City of Black River Falls, Jackson County, Wisconsin, did go armed with a concealed and dangerous weapon, contrary to sec. 941.23, Wis. Stats., a Class A Misdemeanor, and upon conviction may be fined not more than Ten Thousand Dollars (\$10,000), or imprisoned not more than nine (9) months, or both.

PROBABLE CAUSE: and prays that said defendant be dealt with according to law and that the basis for the complainant's charge of such offense is: That your complainant has read a report from the Wisconsin Department of Natural Resources which states that on December 20, 2003 at about 4:00 p.m. DNR Officer Daniel Schultz arrived at the DNR Service Center in the City of Black River Falls, County of Jackson, State of Wisconsin. While seated in his patrol vehicle Officer Schultz observed a silver Chevrolet pickup truck with Wisconsin personalized truck plate of COZY CR approach and stop slightly behind Schultz's patrol vehicle. He observed the lone occupant of this vehicle to be Scott K. Fisher. Schultz exited his vehicle as Fisher exited his vehicle. Fisher approached Schultz. Schultz asked Fisher if he could help him. Fisher stated he was looking for John Bronsdon, a DNR Warden. Fisher stated he was upset because he had received a citation in the mail earlier that day. He stated that he had had his truck stolen from his place of business and upon reporting the theft he informed officers that his truck contained three loaded firearms. He had received a citation for the loaded firearms and believed he should not have received this citation. Fisher stated that he owned the Cozy Corner Bar and that he regularly carries large amounts of money. He stated that he always carried a loaded firearm with him and stated "to be honest with you, I have a loaded handgun in the truck right now." Schultz asked Fisher where the handgun was located. Fisher opened his driver's door, reached in and opened a center console in the front seat of the truck and retrieved a stainless steel .40 caliber Smith and Wesson semi-automatic handgun, serial number VCE5238. The firearm was loaded with nine rounds in its magazine with an additional round chambered. Schultz seized this firearm along with another loaded magazine, a box of .40 caliber ammunition and an unidentified cartridge. These were lying beside the handgun in the center console.

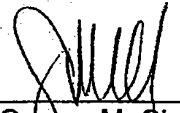
R-Ap. 101

STATE OF WISCONSIN - VS - Scott R. Fisher

Subscribed and sworn to before me,
and approved for filing on:
January 29, 2004



William P Nemer 1018425
Special Prosecutor for Jackson County

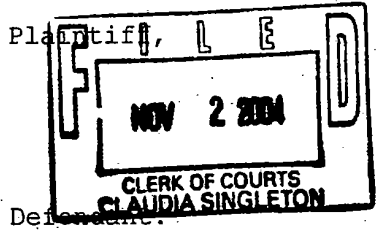


George M. Clark
Complainant

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STATE OF WISCONSIN: CIRCUIT COURT: JACKSON COUNTY:

STATE OF WISCONSIN,



(Pretrial Motion)

Case #: 04-CM-26

-vs-
SCOTT FISHER,

Defendant:

ORIGINAL

The above-entitled matter coming on to be heard before the Honorable John A. Damon, judge of the above-named court, without a jury, on the 1st day of October, 2004, commencing at the hour of 3:00 p.m., in the courthouse in the City of Whitehall, County of Trempealeau, State of Wisconsin.

APPEARANCES:

WILLIAM P. NEMER, Special Prosecuting Attorney, Trempealeau County Courthouse, 36245 Main Street, Whitehall, Wisconsin 54773, appeared representing the Plaintiff.

PAUL MILLIS, of the firm of SKOLOS & MILLIS, S.C., PO Box 219, Black River Falls, Wisconsin 54615, appeared representing the Defendant.

The defendant, Scott Fisher, was also present.

I N D E X

WITNESS

PAGE

SCOTT FISHER

Direct Examination by Mr. Millis 7:15

Cross-Examination by Mr. Nemer 17:15

Redirect Examination by Mr. Millis .. 22:6, 26:3

Recross-Examination by Mr. Nemer 24:6

OBJECTIONS

By Mr. Nemer 10:10, 26:8

By Mr. Millis 18:20, 25:3

1 THE COURT: This is State of Wisconsin
2 versus Scott Fisher, 2004-CM-26. We have
3 William Nemer for the State of Wisconsin acting
4 as special prosecutor in this Jackson County
5 case, and then Paul Millis is here as the
6 attorney for Scott Fisher. This is set for a
7 jury trial next Thursday. We have some motions
8 here. I thought the more interesting one was
9 the constitutional defense one, and maybe let's
10 do that one first because I don't see the
11 suppression as taking much time.

12 MR. MILLIS: We're withdrawing that, your
13 Honor.

14 THE COURT: Okay. That makes it even
15 easier. All right. So let me just take a
16 second here because I read it this morning and
17 I have to refresh my memory, but the new jury
18 instruction, I think 1335A, talks about the
19 process and the notes. I just want to read
20 that again. Let me take a moment.

21 MR. NEMER: I believe it's on Page 4 of
22 that instruction.

23 THE COURT: I've got it right in front of
24 me. Thanks, Mr. Nemer.

25 MR. NEMER: Yeah.

1 THE COURT: I see, okay. Well, I'll just
2 read this and before -- so I make sure that
3 everyone is under the same understanding. This
4 is all from a case that came up last year that
5 was cited in Mr. Millis' brief, State versus
6 Hamdan, 2003 WI 113 and 264 Wis. 2d 433 of the
7 Wisconsin Supreme Court case from 2003. And in
8 that case I believe the facts were a concealed
9 weapon in a grocery store in Milwaukee that was
10 held that there was a constitutional defense to
11 having a concealed weapon under the theory that
12 the new amendment to the constitution allowed
13 keeping a firearm for security purposes. And
14 so then reading what the jury instruction notes
15 say, because of Hamdan it says, first, by
16 pretrial motion, which has been filed by
17 Mr. Millis, they must show first that
18 Mr. Fisher's interest in concealing the weapon,
19 that under the circumstances his interest in
20 concealing the weapon to facilitate exercise of
21 his or her right to keep and bear arms outweigh
22 the interest of the state in enforcing the
23 concealed weapon statute; and second, that
24 Mr. Fisher concealed his weapon because
25 concealment was the only reasonable means under

1 the circumstances to exercise his right to bear
2 arms, and then it talks about in the note it
3 says, "The right to keep and bear arms for
4 purposes of security is at its apex when
5 undertaken to secure one's home or privately
6 owned business. Conversely, the State's
7 interest in prohibiting concealed weapons is
8 least compelling in these circumstances," and
9 goes on.

10 And then the constitutional right it says
11 is -- yeah, this is the interesting language I
12 think, it says at Page 67 it says, "If the
13 constitutional right to keep and bear arms for
14 security is to mean anything, it must, as a
15 general matter, permit a person to possess,
16 carry, and sometimes conceal arms to maintain
17 the security of his private residence or
18 privately operated business, and to safely move
19 and store weapons within these premises." Then
20 I'm supposed to find if the trial court finds
21 he's satisfied these requirements, the state
22 must, and then it says "still at the pretrial
23 stage," which I guess is now, "assert and show
24 probable cause to believe that the defendant
25 had an unlawful purpose at the time he or she

1 carried the concealed weapon. And then if it's
2 supported by evidence, then at trial the
3 unlawful purpose is to be submitted to the
4 jury. So -- and that's what the instruction
5 says. Is that your understanding, Mr. Millis,
6 of the way we have to do this, just the Court
7 is to examine whether or not -- or you need to
8 present evidence that he needed to do this?

9 MR. MILLIS: That's correct, your Honor.

10 THE COURT: And then the burden would
11 shift to the state if he showed that they
12 had -- that he had an unlawful purpose,
13 probable cause to show an unlawful purpose?

14 MR. NEMER: Well --

15 THE COURT: Go ahead. Now is the time to
16 tell me before I start listening to things.

17 MR. NEMER: The way you put it, I mean,
18 obviously he's got to show more than he had a
19 purpose. He has to show that his interest in
20 concealing the weapon outweigh the state's
21 interest in enforcing the concealed weapon
22 statute, and then he had to show the
23 concealment is the only reasonable means, it
24 isn't just that he has a reason.

25 THE COURT: Right, and then the burden

1 will shift to you to show probable cause that
2 he had an unlawful purpose in carrying it,
3 right?

4 MR. NEMER: If you're satisfied that
5 he's --

6 THE COURT: I mean, that's step three if
7 step one and two are met?

8 MR. NEMER: Yeah. I guess that is.

9 THE COURT: Go ahead, Mr. Millis.

10 MR. MILLIS: Your Honor, we'd call Scott
11 Fisher.

12 SCOTT FISHER,
13 after having been first duly sworn on oath, testifies
14 and says as follows:

15 DIRECT EXAMINATION

16 BY MR. MILLIS:

17 Q You are Scott Fisher?

18 A Yes.

19 Q Where do you live?

20 A 43 Main.

21 Q Black River Falls?

22 A Black River Falls, Wisconsin.

23 Q That's in Jackson County, correct?

24 A Yes.

25 Q What's your occupation?

- 1 A I am a -- well, I'm a bar owner as well as I have
2 five rentals, five different tenants.
- 3 Q But your primary occupation is the owner and
4 operator of the Cozy Corner tavern in Black River
5 Falls?
- 6 A Yes.
- 7 Q You understand that you've been charged with
8 carrying a concealed weapon, is that correct?
- 9 A Yes.
- 10 Q And can you tell the Court what events led to you
11 being charged with carrying a concealed weapon?
- 12 A About a week and a half prior to being arrested for
13 carrying a concealed weapon, all I generally work at
14 the bar is nights. About a week and a half prior to
15 that, I worked one night and went outside to start
16 up my vehicle because it was December, went outside,
17 retrieved my vehicle, pulled it around to the side
18 of the building and started it up -- well, left it
19 running, went back inside the bar to let the vehicle
20 warm up and when I went back outside to get in it
21 and go home the vehicle was gone.
- 22 Q What did you do when you realized your vehicle was
23 gone?
- 24 A At that time I called up to the sheriff's department
25 and informed them that my vehicle was stolen and

1 they sent down a city officer, Officer Noack.
2 Officer Noack came in and I informed him that my
3 vehicle was stolen and I told him that if they were
4 to catch up with them they were to use caution
5 because I had a loaded gun in the vehicle, and he
6 left and I went home. Later that morning I was
7 called and notified by Officer Haldeman, Deputy
8 Haldeman, that I would be receiving a citation in
9 the mail for transporting a loaded firearm.
10 Q Did you, in fact, receive a citation for that
11 offense then?
12 A About a week and a half after the fact, yes.
13 Q And that would have been about December 20th of
14 2003?
15 A Yes.
16 Q On the same date that you received the citation, did
17 you make contact with a DNR warden?
18 A Yes.
19 Q How did it come about that you made contact with a
20 DNR warden?
21 A I was actually on my way to McDonald's and seen the
22 DNR vehicle pull into the DNR office so I pulled in
23 there and found Warden Schultz. When he got out of
24 his vehicle, I got out of mine and I approached him
25 and I asked him if he knew how I could get ahold of,

1 I can't think --

2 Q Warden Bronsdon?

3 A Warden Bronsdon.

4 Q Scott, let me step back one second.

5 A Yes.

6 Q Did you make a specific trip out to the DNR station
7 on that date to contest the citation?

8 A That --

9 Q -- or were you on your way to --

10 MR. NEMER: I'm going to ask -- well,
11 let's not -- I'm going to object. I don't want
12 him leading the witness. Ask him where he was
13 going. I think he's --

14 THE COURT: I think he's already testified
15 that he was going to McDonald's, that's what I
16 heard.

17 THE WITNESS: Yup.

18 THE COURT: Go ahead.

19 Q (By Mr. Millis, continuing) When you made contact
20 then with Warden Schultz, what happened?

21 A He informed me that he didn't know how to get ahold
22 of Bronsdon. He said he hadn't seen him in several
23 days, asked if there was something he could help me
24 with, and I explained the situation of my truck
25 being stolen, me being issued a citation for

- 1 transporting loaded firearms and I basically told
2 him I didn't agree with that because I informed the
3 officers on my own that the guns were there for
4 their own safety.
- 5 Q Did you inform Warden Schultz the reason why you had
6 the weapons in your vehicle?
- 7 A I told him that I own a bar and that at different
8 times I am carrying large amounts of cash with me.
- 9 Q What happened after that?
- 10 A I informed Warden Schultz that I had a gun in my
11 vehicle, a loaded gun in my vehicle, and after
12 telling him that he asked to see it, at which time I
13 opened up my truck door, opened up my console,
14 removed the pistol from the center console, set it
15 on the seat pointing it away from him and me and
16 backed up as not to alarm him.
- 17 Q Did he give you any direction as far as how to
18 handle the weapon when you removed it from your
19 vehicle?
- 20 A No.
- 21 Q Did he direct you to move back away from the
22 vehicle?
- 23 A No.
- 24 Q You just did that on your own?
- 25 A Yes.

1 Q What happened after that?

2 A When I stepped back, he had stepped in, grabbed the

3 pistol, pulled the slide back I believe to check,

4 there was one -- there was one shell in the tube,

5 and at that time he said he would be back and he

6 went to his truck.

7 Q Did one of the city officers then come up there and

8 assist Warden Schultz?

9 A Yes, Officer --

10 Q Taylor?

11 A -- Dean Taylor.

12 Q And you were subsequently arrested for concealing an

13 armed weapon?

14 A Yes.

15 Q How long have you owned the Cozy Corner tavern?

16 A A couple of months shy of five years.

17 Q And is it common for you to have large sums of cash

18 on hand at the tavern?

19 A Yes.

20 Q That's just the nature of the business, correct?

21 A You need your money to start each day, you need your

22 change for the daily operations, you got your sales,

23 you got other things going on, yes.

24 Q Typically how much cash would you have in the tavern

25 by the end of the night?

- 1 A No less than a couple of thousand.
- 2 Q And what do you do with that cash upon closing?
- 3 A A certain amount of it stays at the tavern for
- 4 whoever opens up in the morning. They need the
- 5 money for the till, they need money to make change,
- 6 but the proceeds from the night generally go home
- 7 with me.
- 8 Q The cash that remains at the tavern, where do you
- 9 place that?
- 10 A I have a floor safe that I lock that in.
- 11 Q And how big of a floor safe is it?
- 12 A A foot by foot and a half. Small.
- 13 Q Is it one of these household Sentry safes --
- 14 A Yes.
- 15 Q -- that are very transportable?
- 16 A Yes.
- 17 Q Why don't you keep the balance of your cash in that
- 18 floor safe when you close the tavern?
- 19 A As small as the safe is, it can be removed. I don't
- 20 want -- if I'm going to lose money, I don't want to
- 21 lose any more than I have to.
- 22 Q Is it safe to say that you operate on a slim margin
- 23 in operating your bar?
- 24 A A slim margin?
- 25 Q Meaning that you rely on your profits to keep your

- 1 business afloat?
- 2 A Most definitely.
- 3 Q And if you were robbed and cash was stolen from you,
4 it would substantially affect your ability to
5 continue your business?
- 6 A Yes.
- 7 Q Do you transport the excess proceeds from your bar
8 each night?
- 9 A Not every night.
- 10 Q Why not?
- 11 A If it was not that busy one night, I may just throw
12 that money in the safe and deposit money the next
13 day along with the next day's proceeds.
- 14 Q Do you know on any given night how much cash you
15 will end up having by the end of the night?
- 16 A No.
- 17 Q So on any given night do you know whether you will
18 be transporting the cash from your tavern?
- 19 A No.
- 20 Q Approximately how many nights a week do you actually
21 transport cash from your tavern in your vehicle?
- 22 A Four or five.
- 23 Q And where do you take it?
- 24 A Some nights I'll run it directly up to the bank and
25 deposit it, other times I'll take it home with me

1 and deposit it the next day.

2 Q Do you believe there's a risk in transporting the
3 cash from your bar in your vehicle to either the
4 bank or to your residence?

5 A Definitely.

6 Q Why is that?

7 A Black River might be a small town but within the
8 last year or so we've had -- well, Tubby Krueger
9 operates downtown, he was knocked on the head and
10 was robbed personally. The Quick Cash in Black
11 River was robbed at gunpoint, the Dairy Way was
12 robbed at gunpoint and shots exchanged there, and
13 the Frame Shop downtown, that was armed by gunpoint.
14 So there's -- any time you're dealing with cash,
15 you're going to be dealing with the threat of
16 somebody wanting it and trying to take it.

17 Q In your experience is it pretty well known that bars
18 deal in a substantial amount of cash?

19 A Everybody knows bars have cash. When you're paying
20 two dollars a drink over a 10, 12-hour period, yeah,
21 there's a lot of cash in the end.

22 Q And typically what time of night do you close your
23 bar?

24 A I close my bar all the time, which is 2 a.m. or 2:30
25 a.m. on the weekends.

1 Q That wasn't a test, by the way. Have you been the
2 victim of a crime within the recent past?

3 A Yes.

4 Q And that was when your vehicle was stolen?

5 A I had my vehicle stolen from downtown.

6 Q And was it determined who stole your vehicle?

7 A Yes.

8 Q Who was that?

9 A Tyrone Decorah.

10 Q And where is Tyrone Decorah today?

11 A He was killed in a knife fight out at the Indian
12 mission.

13 Q Do you take any precautions in maintaining your
14 weapon in your vehicle?

15 A Well, I -- yes. The gun is loaded, the gun is
16 always on safety, and to me I keep it in the console
17 because it makes more sense than keeping it on the
18 seat. If I keep it on the seat, that window can be
19 broken and the gun stolen easily. So it's out of
20 sight and so, like I say, it's not accessible to
21 nobody. My vehicle is always locked with the
22 exception of one December night warming it up.

23 Q Have you had training in the handling of guns?

24 A Yes. I've done four-and-a-half years working for
25 the Department of Corrections at which time I

1 started -- we had to undergo weapons training every
2 year thereafter, we had to be qualified in weapons
3 and you always had to every -- every year you had
4 to -- I don't know how to term it, requalify -- not
5 requalify but stay up on the, you know, the force
6 continuum as far as the right to -- you know, what
7 force is needed, what warrants the use of firearms,
8 so on and so forth.

9 Q So not only have you had training in the use of
10 handling firearms but you've also had training in
11 the use of force?

12 A Yes.

13 MR. MILLIS: That's all I have, your
14 Honor.

15 CROSS-EXAMINATION

16 BY MR. NEMER:

17 Q You know it's a fairly fundamental safety statute in
18 this state that guns in vehicles are supposed to be
19 cased and unloaded, correct?

20 A Yes.

21 Q And despite that, when your vehicle was stolen, you
22 had your vehicle unlocked and you had a number --
23 you didn't just have this 40 caliber handgun in
24 there, you had a shotgun and a .22 rifle and a .22
25 pistol, right?

1 A There were four guns in there, yes.

2 Q And they were all loaded?

3 A All but the .22 pistol was not.

4 Q But the shotgun was?

5 A Yes.

6 Q And the rifle was?

7 A Yes.

8 Q So -- and those were all left in an unlocked
9 vehicle?

10 A It was at quarter to 3 in the morning, yes.

11 Q And unattended apparently because it got stolen?

12 A Yes.

13 Q So when you say that in the course of business you
14 keep the handgun in the center console of your
15 vehicle inaccessible to the public in your motion,
16 that's not quite true, is it?

17 A The pistol remains in the console at all times, yes.

18 Q Yeah, but -- but you had other weapons that were
19 accessible to the public, weren't they?

20 MR. MILLIS: Your Honor, I'm going to
21 object. I don't see the relevance of the
22 number of weapons in the vehicle on December
23 10th when this charge arises out of an incident
24 on December 20th. If he wants to ask about the
25 number of weapons in the vehicle on December

1 20, I don't have any objection.

2 THE COURT: I'll sustain that objection.

3 MR. NEMER: I'd like to explain why. He's
4 asserting in his motion that he keeps the
5 handgun inaccessible to the public. He's
6 obviously keeping guns in his vehicle at other
7 times when they're accessible to the public and
8 it's relevant

9 THE COURT: Well, sorry, I'm sustaining
10 the objection. We're talking about the time he
11 was arrested for.

12 Q (By Mr. Nemer, continuing) The console, is that
13 locked?

14 A The console?

15 Q Yeah.

16 A It don't have the capability of being locked.

17 Q Someone can get in your truck or vehicle and they
18 can get at the gun, right?

19 A If they gain access to the vehicle, yes.

20 Q Okay. Now, you could have carried this gun in the
21 holster, couldn't you, when you were driving your
22 vehicle?

23 A On my person or --

24 Q Yeah.

25 A Yes.

1 Q There was nothing that was preventing that?

2 A No.

3 Q And it wouldn't have been like being in the store
4 where people might be offended by seeing you
5 carrying a gun because they wouldn't see you driving
6 down the street and they seen you had a gun
7 holstered, would they?

8 A No.

9 Q Now, you say you were going to McDonald's when you
10 stopped at the DNR to talk to them about the
11 citations, correct?

12 A Yes.

13 Q So you weren't transporting money to your home or to
14 a bank at that time, were you?

15 A I had to work that night.

16 Q You didn't answer my question. You weren't
17 transporting money to your bank or your home at that
18 time, were you?

19 A No.

20 Q So you were keeping the gun at times in your vehicle
21 when you really weren't needing it to protect your
22 cash from your business, correct?

23 A I don't unload it because say driving to work
24 unloading it and then getting in my vehicle at the
25 end of the night and loading it don't seem practical

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- 1 to me so I leave it loaded.
- 2 Q There's nothing that prevents you from not putting
- 3 the gun in the car until such time as you're
- 4 actually transporting cash, is there?
- 5 A No.
- 6 Q Now, let's -- just so we're clear, this incident
- 7 where you have this gun, it was in the truck, it was
- 8 not on your property, it was on DNR property,
- 9 correct?
- 10 A At the time --
- 11 Q At the time you got it seized.
- 12 A Yes.
- 13 Q You were not on your property, you weren't at your
- 14 business, basically you were going off and going to
- 15 McDonald's and taking care of other personal
- 16 business at the time, correct?
- 17 A Yes.
- 18 Q Have you ever been held up?
- 19 A No.
- 20 Q So if I got this correct -- well, never mind. What
- 21 time did you come to work that day?
- 22 A I had to work at 6.
- 23 Q Okay. So you weren't even starting work yet?
- 24 A No.
- 25 Q Going to McDonald's and on your way to McDonald's

1 you went to the DNR?

2 A Yes.

3 MR. NEMER: I have nothing further.

4 MR. MILLIS: Briefly, your Honor?

5 THE COURT: Yeah, go ahead.

6 REDIRECT EXAMINATION

7 BY MR. MILLIS:

8 Q Mr. Fisher, how practical would it be for you to
9 carry a holstered firearm between your vehicle and
10 into your bar and back to secure it in that manner?

11 A To me it don't seem practical. For one, I don't
12 know the -- to my knowledge carrying a loaded
13 firearm in town on your side, I guess I didn't think
14 that was allowed but --

15 Q What effect would that have with your patrons if
16 they saw you with a holstered firearm?

17 A That would not go over at all.

18 Q The gun is maintained in your property though,
19 correct, you keep it in your truck?

20 A Yes.

21 Q It's not the DNR's truck, right?

22 A Yes.

23 Q And you use your truck for business purposes, right?

24 A Yes.

25 Q To transport your cash receipts from your bar?

1 A Yes.

2 Q And that's probably one of your most vulnerable
3 times, correct?

4 A As far as I'm concerned, yes.

5 Q And most susceptible to be a victim of a crime?

6 A Yes.

7 Q You said that you haven't been a victim of a holdup,
8 correct?

9 A Correct.

10 Q Are you familiar with any other bars that have
11 experienced violence or been a victim of any violent
12 crime?

13 A It was just here last week that one of the
14 bartenders in here -- or from Whitehall had their
15 throat cut by somebody walking out of the bar, I
16 believe it was leaving the bar.

17 MR. NEMER: In what city was that?

18 THE WITNESS: I believe that was Whitehall
19 here, was it not?

20 MR. NEMER: News to us.

21 Q (By Mr. Millis, continuing) You're familiar with an
22 incident somewhere in the local area?

23 A Yes.

24 Q Where what happened?

25 MR. NEMER: Well, this is -- I think

1 unless he's got some news report or
2 something --

3 THE COURT: I've heard what he says. He's
4 worried about it from what he's been hearing.

5 MR. MILLIS: Sure. That's all I have.

6 CROSS-EXAMINATION

7 BY MR. NEMER:

8 Q You could -- there's no reason why you can't carry
9 the gun in a holster in the vehicle and then remove
10 it from the holster and once you're in your bar keep
11 it concealed, is there?

12 A Once again, walking into my bar with a holster and a
13 gun --

14 Q Okay. Then let me ask you this, is there any reason
15 why once you got back to your bar and you feel safe
16 you couldn't take your gun out and put it in a case
17 so people wouldn't see it?

18 A Once again, like I say, walking into the bar even
19 with a gun in a case don't work.

20 Q Do you take the gun into the bar?

21 A No.

22 Q So that's not even an issue, is it, whether someone
23 is going to see you with it in a holster? If you
24 were in your car with it holstered and when you got
25 to your destination and tavern if you then put it in

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1 a case in your vehicle, there's no reason why you
2 couldn't do that, is there?

3 MR. MILLIS: Sorry, I'm going to object to
4 the form of the question.

5 THE COURT: I think it's argumentative.
6 Maybe you can phrase it as a question instead
7 of a statement, so I'll sustain.

8 MR. NEMER: All right.

9 Q (By Mr. Nemer, continuing) The -- there's nothing
10 that prevents you from keeping the gun in the
11 holster while you're in the vehicle, correct?
12 People aren't going to see it if that's a concern --

13 A Correct.

14 Q -- while you're driving? And when you get to your
15 destination, you say you don't take the gun into the
16 tavern anyway so there's no reason why you couldn't
17 take the gun out of your holster and then properly
18 case it as the law provides, is there?

19 A No, there isn't.

20 Q Pardon?

21 A There is no reason.

22 Q That's right. You don't have to keep it loaded,
23 uncased in your console in order to transport it, do
24 you?

25 A No.

1 Q Okay.

2 MR. NEMER: Nothing further.

3 REDIRECT EXAMINATION

4 BY MR. MILLIS:

5 Q Is there some security reason why you do? I mean,
6 why do you keep a loaded gun in your truck, why are
7 we here?

8 MR. NEMER: I think he's already answered.

9 THE COURT: Overruled. He can answer, go
10 ahead.

11 A To protect my life and my property, that is the
12 reason why I carry a gun. I've never been -- never
13 been arrested for knocking off stores or selling
14 drugs or anything. I'm a law-abiding citizen. I
15 run a respectable bar, which both of you know
16 because both of you have been in there. It's a
17 nice -- it's a nice place. I'm not out causing
18 trouble, I'm just out to protect what is mine and
19 I'm not going to let anybody take my money or
20 threaten my life so that is why I do what I do.

21 MR. MILLIS: That's all I have, Judge.

22 THE COURT: Thank you, sir.

23 MR. NEMER: I have no witnesses at this
24 time. I'd like to argue but since it's his
25 motion I guess Mr. Millis should go first.

1 THE COURT: Thank you, Mr. Nemer.

2 Mr. Millis, what would you like to say? Go
3 ahead.

4 MR. MILLIS: Well, your Honor, we
5 submitted a brief that I hope was helpful to
6 the Court. I'm --

7 THE COURT: Yes, it was very helpful.

8 MR. NEMER: A brief?

9 THE COURT: Yeah, that's what I had on the
10 brief.

11 MR. NEMER: I didn't receive a brief.

12 THE COURT: Oh. Well, we've got plenty of
13 time. You can take your time and read it. I
14 appreciated having it.

15 MR. NEMER: My fax number is not
16 apparently the one you've been sending it to,
17 but if you did a brief, I did not receive it.

18 THE COURT: Shows 538-4400.

19 MR. NEMER: That's not our fax number.

20 THE COURT: Whose is that?

21 MR. NEMER: That's the clerk of courts.

22 THE COURT: Did you bring one over to him?

23 MR. NEMER: I have not seen anything.

24 THE COURT: All right. I've got one here.

25 MR. NEMER: Well, this is -- and I

1 apologize to the Court.

2 THE COURT: No need to apologize. I
3 appreciated Mr. Millis doing the work. On my
4 own I read the Hamdan matter and he followed
5 through with it, so that's fine. I'm giving
6 you a chance to read it. Obviously you've
7 brought a case into court. You're going to
8 cite the same thing?

9 MR. NEMER: I'm going to cite a case --
10 well --

11 THE COURT: The Cole case maybe?

12 MR. NEMER: Exactly.

13 THE COURT: That's the same thing, so I
14 read that one, too, so you can have a minute
15 and read it. Cole involved a drug transport
16 case, so I read that one.

17 MR. NEMER: Cole involved guns in a
18 vehicle where a person expressed fear of
19 being --

20 THE COURT: He had drugs in it if I recall
21 correctly. Okay. You take your time and read
22 it and let us know when you're ready.

23 (A brief recess was taken.)

24 THE COURT: Okay, go ahead.

25 MR. MILLIS: Thanks, Judge. As I was

1 saying, I hope our brief was helpful in this
2 case.

3 THE COURT: Oh, yes.

4 MR. MILLIS: And I don't want to restate
5 everything I put in there, and I think we all
6 know what the Hamdan case says and the whole
7 dynamics of the carrying a concealed weapon
8 statute, vis-a-vis, the constitutional
9 amendment that was passed in November of '98
10 that allows individuals or citizens of the
11 state of Wisconsin to keep and bear arms for
12 their security. The Hamdan case, when that was
13 decided, carved out an exception to what used
14 to be a strict liability statute, the carrying
15 a concealed weapon act. It sets forth a
16 certain test that must be followed in
17 determining whether or not we can raise the
18 constitutional defense under Hamdan. The first
19 prong of it is the Court must answer
20 affirmatively that the defendant must have been
21 exercising the right to keep and bear arms
22 under circumstances in which the need to do so
23 was substantial. I believe the testimony that
24 has been put on the record so far does require
25 the Court to find that Mr. Fisher had a

1 substantial need to carry -- or to exercise his
2 right to carry and bear arms. He operates a
3 successful cash business in downtown Black
4 River Falls. It's well known he deals in cash,
5 it's well known that taverns deal with a lot of
6 cash, they're open late in the evening where
7 crime is more prone to happen. I think that's
8 common knowledge. Even though we are in Black
9 River Falls, we all -- you choose where you
10 live and I certainly wouldn't want to choose to
11 live in a high-crime area raising the family I
12 have, but Black River Falls is also susceptible
13 to crime and it's happened there and happened
14 by the Frame Shop just up the street from the
15 Cozy Corner was robbed by gunpoint. Tubby
16 Krueger's store, which is a block and a half
17 from Mr. Fisher's bar, he was knocked out by
18 some instrument which has left him now in a
19 nursing home. The Quick Cash Loans, which is
20 across the bridge from downtown Black River
21 Falls, was robbed by gunpoint, the Dairy Way at
22 the time it was closing was the subject of a
23 shootout, if you can believe that, it's right
24 in Black River Falls. So there is crime,
25 there's a level of risk that's involved in

1 operating a business there. There's a level of
2 risk that has increased because you're dealing
3 with a cash business.

4 Mr. Fisher, in the normal course of his
5 business, feels it is more secure for him to
6 transport his cash from his bar to either the
7 bank at closing time or to his residence. He
8 could keep it in a safe there, that's not the
9 issue here, and just to remind you, the safe
10 that he does have is a small safe that is very
11 transportable. So there's alternatives that he
12 could do but under the constitutional amendment
13 it gives him the right to bear arms for his own
14 security.

15 I think it's important to note, your
16 Honor, under 941.237 the legislature has almost
17 acknowledged that fact. They've acknowledged
18 that tavern owners have a substantial need to
19 bear arms in their tavern, that's an exception
20 to 941.237. Transporting his cash in the
21 normal course of business is just as vulnerable
22 or more vulnerable than operating the bar
23 itself. So he's more likely to be the subject
24 of a crime when he's transporting it rather
25 than being in the store itself, and the

1 legislature has already acknowledged that, that
2 tavern owners we know work late at night,
3 you're a cash business, you're susceptible to
4 crime and we want you to be protected, we want
5 you to have the ability to have a weapon in
6 your tavern. This is not a stretch. His truck
7 is an extension of his business. If he was a
8 taxi cab driver, I guess the query would be is
9 that their business? Is that their property
10 where they can have a weapon in their vehicle?
11 Certainly seems to me that they're operating
12 their business in their taxi cab just as
13 Mr. Fisher. He's continuing the operation of
14 his business when he transports his cash to
15 either his bank or to his residence.

16 The second prong of the test, your Honor,
17 did the defendant lack reasonable alternatives
18 to concealment under the circumstances to
19 exercise his constitutional right to bear arms.
20 There's always an alternative to carrying a
21 concealed weapon, there's no doubt about that,
22 but the issue is, is there a reasonable
23 alternative. The testimony that we have so far
24 anyways is there isn't a reasonable
25 alternative. The reasonable alternative that

1 was proffered is carry a gun in the holster
2 between the bar and truck and have it in a
3 holster while you're in the truck. That's not
4 a reasonable alternative.

5 THE COURT: Can I ask, if he had a
6 holstered, loaded weapon, wouldn't he still be
7 in violation of their other citation he got for
8 having an uncased gun?

9 MR. MILLIS: Transporting -- I believe he
10 would be, yeah.

11 THE COURT: Okay.

12 MR. NEMER: I have a different --

13 MR. MILLIS: If that's what they're
14 offering as an alternative, you're engaged in
15 some other illegal activity and it's certainly
16 not one of the reasonable alternatives.

17 THE COURT: You'll get your chance,
18 Mr. Nemer, and you can argue. I'm asking
19 Mr. Millis at this point.

20 MR. MILLIS: Certainly, your Honor.
21 Obviously, if the alternative is for you to
22 engage in another illegal act, that's not
23 reasonable. For you to avoid being charged
24 with carrying a concealed weapon, you have to
25 violate a different either ordinance or

1 statute, that's not a reasonable alternative.
2 He's taken the precautions, he keeps it in the
3 center console, his doors are locked, it's out
4 of view, out of -- and it's not accessible to
5 the public. He's had training in how to use a
6 weapon, he's had training in the proper use of
7 force. I think under the circumstances, and
8 that's what Hamdan says, these are facts
9 specific, case-specific determinations. Under
10 the circumstances of this case, I think both of
11 those prongs have to be answered in the
12 affirmative.

13 THE COURT: So when you read Hamdan, they
14 said the store owner can have one because he's
15 protecting their property and they carved out
16 that, and this in your mind would be just a
17 logical extension of their trying to interpret
18 when a person can carry a weapon for security
19 which is allowed by the amendment to the
20 constitution, and they haven't come through
21 since Hamdan with any other instructions as to
22 what it meant?

23 MR. MILLIS: They haven't, your Honor. I
24 know the state is going to argue the Cole case
25 but --

1 THE COURT: That was challenging the whole
2 constitutionality of the entire statute is the
3 way I understood it, and it also had different
4 facts that don't seem to be applicable here,
5 but I agree with you there.

6 MR. MILLIS: That's all I have.

7 THE COURT: Okay. Thank you. Mr. Nemer?

8 MR. NEMER: What the Court is being asked
9 to do is basically issue Mr. Fisher a license
10 to carry a gun. What's happened here is the
11 argument is the Hamdan case --

12 THE COURT: I'm not sure about that. I
13 think it's case-specific as to whether when he
14 was stopped and had this loaded weapon in his
15 console, was he exercising his right under the
16 constitution or is he violating the concealed
17 weapon law?

18 MR. NEMER: Yeah, and if you say that he
19 wasn't -- that he was privileged, basically
20 you're giving him a license to carry. Let me
21 explain why. First of all --

22 THE COURT: That sounds broader than
23 what's being asked for here.

24 MR. NEMER: May I just --

25 THE COURT: I think -- well, I can

1 interrupt you. I interrupted Mr. Millis.
2 What's good for him is good for you. So I'm
3 confused, when you say I'm giving him a license
4 to carry an arm, explain that better.

5 MR. NEMER: Sure. What happened here is
6 there's no testimony he was transporting cash.
7 He's saying he has a compelling need to carry
8 this gun concealed in order to protect himself
9 while he's transporting cash. That's not what
10 he was doing. What he was doing was going to
11 the DNR, he was on his way to McDonald's, he
12 hadn't even started work and he was on his way
13 to McDonald's and he stopped at the DNR to
14 complain about getting citationed for uncased
15 firearms.

16 The situation here is not the same as
17 Hamdan. Hamdan was a person's personal
18 business. Do you notice the Court in Hamdan
19 said personal business or home? They were not
20 extending it out into the world and basically
21 when you start putting guns into vehicles,
22 you're taking it out into interactions outside
23 the intimacy of the home or of a place of
24 business. That's personally owned by a person.
25 In fact, the legislature recognizes guns in

1 vehicles don't go together sometimes. In the
2 sense that it's illegal to have a loaded gun in
3 a vehicle, it's illegal to have an uncased gun
4 in a vehicle. In addition, it's -- it enhances
5 shooting into a vehicle or house if you do it
6 from a vehicle, it's a more serious felony.

7 Now, if the defendant is going to want to
8 argue that he could have carried this gun, he
9 could have done it without violating a criminal
10 statute, albeit he would have been violating a
11 forfeiture. He does that anyway when the gun
12 is loaded. He could have holstered it. He's
13 not like the situation in Hamdan where they
14 said well, if you walk around in your store
15 with a holster that's going to freak people
16 out. People aren't going to see a holster if
17 you're driving in the vehicle. It's not the
18 same situation. This isn't a situation where
19 he really wasn't using it as part of his
20 business. He was -- wants to keep the gun in
21 the vehicle. Does this mean he gets to drive
22 it to Mitchell Field too? I don't think so.
23 And without him at least showing that he was
24 actively involved in this compelling need that
25 he asserts at the time of the violation, I

1 don't think he's entitled to an extension of
2 the constitutional privilege to protect his
3 activity. He's not in his business, he's not
4 even in part of his transaction of his
5 business. He simply keeps the gun in there all
6 the time because it's convenient for when he is
7 transporting cash.

8 The Cole Case I think -- I grant you Cole
9 was making a broader argument, but I think you
10 can read between the lines. The Court doesn't
11 like the fact that a merchant got it for CCW
12 when he put a gun in his pocket in his own
13 store. They've got a different attitude to
14 somebody who's cruising around with loaded
15 handguns in their vehicle, and it doesn't
16 matter whether he had a little bit of
17 marijuana, Mr. Cole. The point is that a .380
18 was in the glove box and a 45 under the seat
19 and Mr. Cole argued that he also was fearful of
20 crime and he'd had a bad experience where he
21 had been beaten, so I think we're really
22 playing with fire if we're extending these
23 exceptions beyond the very tight exception that
24 the Supreme Court gave us in Hamdan, which
25 basically places where you'd almost never have

1 this violation reported anyway because people
2 aren't going to know about a CCW violation in
3 the home and they're not going to know about it
4 in a business for the most part. Where you get
5 into real problems is when you go out into the
6 world, and that's what's happening here. He
7 wasn't making a beeline for the bank or his
8 home to deposit cash. He's basically tooling
9 around Black River Falls on his way to
10 McDonald's and stops at the DNR to complain
11 about the violation he's got and he's got his
12 gun loaded with a round chamber concealed in
13 the vehicle at that time and that gets beyond
14 what Hamdan is allowing, and he did not have to
15 conceal it in order to protect himself.

16 THE COURT: All right. Well --

17 MR. MILLIS: Your Honor, can I just
18 respond real briefly?

19 THE COURT: Yeah, I don't care.

20 MR. MILLIS: I don't think you can read
21 Hamdan and say these are the only exceptions
22 because it's a fact-specific case. In fact, if
23 you read Hamdan, and they set out that example
24 that I cited in my brief, for instance, an
25 order to keep --

1 THE COURT: Could I get the brief back
2 from Mr. Nemer?

3 MR. NEMER: Sure.

4 THE COURT: You probably filed the
5 original in Black River anyway, didn't you?

6 MR. MILLIS: I'm sure I did.

7 THE COURT: Okay. Go ahead, where are you
8 looking at?

9 MR. MILLIS: I would be on Page 3, the
10 second cite there, that the Court in Hamdan set
11 forth an example where it said, "For instance,
12 in order to keep and bear arms for the purpose
13 of securing one's own property, a weapon must
14 be kept somewhere and may need to be handled or
15 moved, all within the weapon owner's property."
16 Mr. Fisher's weapon was within his own
17 property. They're not limiting this to just
18 real property, a building, it's to any property
19 of the weapon owner's that he has, as long as
20 it's within the weapon owner's property, he's
21 using it for security purposes. Clearly he is.
22 He testified that he was on his way to work, he
23 had to work that night, that's why he had the
24 weapon in his vehicle. So again, I don't think
25 that Hamdan can be read as limited as what the

1 state is arguing.

2 MR. NEMER: Does the property mean his
3 pants, too, so he can carry it basically --

4 THE COURT: You said Hamdan, he had it in
5 his pants.

6 MR. NEMER: I meant the defendant, if he
7 was walking around, if the property is the
8 issue, you could say that anybody -- if you
9 extend property to motor vehicles that are
10 going out into the world?

11 THE COURT: That's the issue.

12 MR. NEMER: Then you can say well, my
13 pants are my property and, therefore, I can
14 carry a gun in my pants to protect my property.

15 THE COURT: I think, Mr. Nemer, we have to
16 stick to the facts that we have in front of us.
17 That's an interesting theory of him driving to
18 Mitchell Field and him walking out with a gun
19 in his pants pocket. We better stick with the
20 facts here. If somebody in another case wants
21 that to be extended, that's something else, but
22 I'm just going to deal with the facts here and
23 I don't know what this opens the door to if I
24 go along with Mr. Millis. All I can do is go
25 along. There's a lot of irony here. A victim

1 of a crime ends up with a citation for carrying
2 a cased weapon when he goes to ask about gee, I
3 was just victimized, my vehicle was stolen and
4 now I get this citation in the mail. He gets a
5 criminal charge for having this loaded weapon
6 in the car. This is irony. And then on top of
7 it, the facts, I'll find -- and I found that
8 Mr. Fisher's testimony is entirely credible,
9 that he's trained in corrections apparently,
10 had experience in corrections, and trained in
11 the use of firearms, that he owns a bar for
12 over five years and has substantial cash that
13 he carries back and forth and is fearful based
14 on the crimes that have occurred even just in
15 the very recent past in Black River Falls that
16 he outlined in his testimony where people have
17 been subject of violent crimes and particularly
18 worried because of his nature of his business,
19 and he said the nature of his business he ends
20 up with at least he said probably on average at
21 least \$2,000 at the end of the night and he has
22 to take that back and forth either to the bank
23 or at home at night and the small safe that's
24 in the bar is not a good location for it.

25 Part of the problem here is where there's

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1 some common sense. Mr. Nemer says it's
2 predictable times where you might be subject to
3 attack. Well, unfortunately, a lot of these
4 crimes are unpredictable. We don't know when
5 and where someone is going to be subject to an
6 assault, and this fellow, according to his
7 testimony, believes that he needs to have a
8 firearm to protect himself in his vehicle
9 because that's when he's transporting back and
10 forth with the money. Now, whether or not the
11 person -- we almost have to read the person
12 who's going to commit the crime. He's just
13 going to McDonald's now with his truck and he's
14 not on his way to -- he testified later that
15 day he was going right on to work at the tavern
16 at 6 and that's why he had the pistol in the
17 console, but we have to say oh, yeah, the
18 criminal -- or the person who intends to harm
19 him, yeah, knows this is a time that he doesn't
20 have money so I'm not going to attack him now,
21 I'm only going to attack him when he has money.
22 I don't know if the criminals are that smart to
23 know when to hit him. Anyway, so he was
24 trained, he thought he needed it, and he uses
25 the vehicle to carry proceeds. Now, the

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1 first -- for carrying the proceeds of his bar.
2 And so first, does he have an interest to
3 facilitate his right to exercise his right to
4 bear arms; and then in the same Hamdan case
5 there at 264 Wis. 2d 433 at 477 they talk about
6 what it meant in the constitutional amendment
7 by needing a gun for security, and it said,
8 "The common understanding of "security" does
9 not implicate an imminent threat. Rather, it
10 connotes a persistent state of peace. We
11 believe the domain most closely associated with
12 a persistent state of peace is one's home or
13 residence," which apparently the state agrees
14 with, "followed by other places in which a
15 person has a possessory interest. A person is
16 less likely to rely on public law enforcement
17 for protection in these premises and is more
18 likely to supply his own protection. In fact,
19 a person who takes no initiative to provide
20 security in these private places is essentially
21 leaving security to chance. Firearms ownership
22 has long been permitted in Wisconsin. We infer
23 that the inclusion in the amendment of the
24 right to bear arms for security was intended
25 "to include a personal right to bear arms to

1 protect one's person, family, or property
2 against unlawful injury and to secure from
3 unlawful interruption the enjoyment of life,
4 limb, family, and property subject to
5 reasonable regulation." Then in this case
6 itself there's the grocery store owner could
7 have it.

8 Now, whether because he carried it in his
9 car he seemed to have an interest in having a
10 weapon to protect himself. Now, the theory the
11 state proposes is that -- oh, and that this is
12 outweighed by the enforcement in forming the
13 concealed weapon statute. The state's interest
14 in enforcing the concealed weapon statute would
15 be to prevent someone from pursuing the weapon
16 to commit some crime, and I'm not sure that
17 they've indicated that this person, weighing
18 the two, that it would give no weight at all to
19 why we pass this constitutional amendment if he
20 couldn't use it for protection. That's what he
21 did. Then the second step -- so -- so I think
22 he did have this interest and it outweighs the
23 state's interest in enforcing the concealed
24 weapon statute and, second, particularly in
25 this incident where the defendant poses no

1 threat as far as anyone says and then the
2 defendant concealed his weapon because
3 concealment was the only reasonable means of
4 exercising his right to bear arms. I'm not --
5 the state argues well, he could have had it
6 holstered even though if he holstered it, a
7 loaded weapon, it would only be a forfeiture
8 violation. It wasn't something he could do and
9 he could holster it, walk to and from the bar
10 to the parking lot. Somehow the idea of him --
11 I agree. I thought Mr. Fisher was credible
12 that the idea of him walking around with an
13 open-holstered weapon in downtown Black River
14 was not a valid method of a reasonable means to
15 exercise his right to bear arms and when you
16 compare it to keeping it in a closed box in his
17 vehicle, that doesn't give ready access to
18 people. So I think those requirements have
19 been met and that this was the only reasonable
20 means under the circumstances. So under the
21 constitution that they passed would only have
22 meaning and under the Court's ruling in Hamdan
23 to allow someone, particularly in this
24 particular circumstance, to have a weapon to
25 protect himself, the bar owner carrying a

1 substantial amount of cash, he doesn't know
2 when they might be after him, especially since
3 this is his vehicle, that according to his own
4 testimony it's the one vehicle he uses all the
5 time for business purposes for carrying the
6 cash, so I'll allow defense but now it turns
7 over to the -- and found that they met both
8 requirements that are outlined in 1335A of the
9 jury instructions.

10 So now the burden is on the state to show
11 there's probable cause to believe that he had
12 an unlawful purpose that he carried the
13 concealed weapon.

14 MR. NEMER: Well, the state doesn't have a
15 reason to believe he was planning to assault
16 someone or anything of that kind. I don't
17 believe I can -- I believe that's what that
18 means, is that he can't be using it as a
19 concealed weapon for the purpose of using it to
20 harm someone, threaten someone, or for purposes
21 of committing a robbery. So the only crime
22 that we were dealing with here was the CCW
23 itself. So I think the state does not have
24 evidence that he was planning on doing anything
25 with it illegal beyond carrying it the way

1 concealed as alleged in the criminal complaint.

2 THE COURT: All right.

3 MR. NEMER: The state is not going to
4 present evidence that he was doing anything
5 illegal beyond a concealed weapon.

6 THE COURT: Okay.

7 MR. MILLIS: Given that, your Honor --

8 THE COURT: I don't know what you can do
9 then.

10 MR. MILLIS: I guess we'd move to dismiss
11 the charges.

12 MR. NEMER: And the state -- well, we'll
13 not be arguing -- well, at this point the state
14 is going to have to consider appealing the
15 Court's decision.

16 THE COURT: I don't mind that. I'm
17 just -- that's fine. I think it's an
18 interesting one. I hope it goes up.

19 MR. NEMER: Procedurally the state doesn't
20 have evidence that he was going to do something
21 else.

22 THE COURT: I'll grant the motion to
23 dismiss based on what I allowed to happen.

24 MR. NEMER: Obviously the motion goes only
25 to his criminal charge?

1 MR. MILLIS: Yeah.

2 THE COURT: Does he still have the
3 citation?

4 MR. NEMER: He has the citation for the
5 first incident.

6 MR. MILLIS: He'll be before McAlpine on
7 Wednesday.

8 THE COURT: I don't have that one?

9 MR. NEMER: That's right.

10 THE COURT: So as far as the jury trial on
11 Thursday then, that's resolved -- or done for
12 now --

13 MR. NEMER: Done for now.

14 THE COURT: -- or depending on what
15 happens?

16 MR. NEMER: It's done for now.

17 THE COURT: As long as it's likely that we
18 might see -- the 3rd District might see this,
19 do you need any other fact findings that
20 basically the Court can supply at this level?

21 MR. NEMER: I don't know I guess.

22 THE COURT: I thought the testimony was
23 credible he testified to, and we just had the
24 one witness.

25 MR. MILLIS: Thank you, Judge.

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1 THE COURT: Yup.

2
3 (The proceedings came to a close at
4 approximately 2:39 p.m.)
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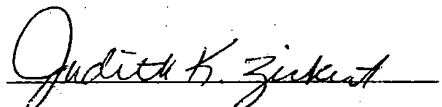
R. Ap. 152

1 STATE OF WISCONSIN)

2 COUNTY OF TREMPPEALEAU)

3 I, Judith K. Zickert, Official Court Reporter
4 for the County of Trempealeau and the Seventh Judicial
5 Administrative District, State of Wisconsin, duly
6 appointed and qualified, do hereby certify that I
7 reported the foregoing matter, and that the foregoing
8 transcript has been carefully compared by me with my
9 stenographic notes as taken by me in machine shorthand,
10 and by me thereafter transcribed, and that it is a true
11 and correct transcript of the proceedings had in said
12 matter to the best of my knowledge.

13
14 Dated this 1st day of November, 2004.

15
16 
17 Judith K. Zickert, RMR, CRR

STATE OF WISCONSIN

CIRCUIT COURT

JACKSON

COUNTY

For Official Use Only

State of Wisconsin vs. Scott K. Fisher

**Judgment of
Dismissal/Acquittal**

Date of Birth: 02-01-1974

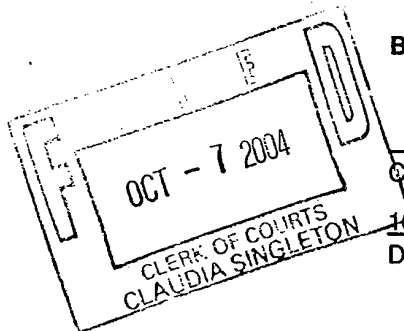
Case No.: 2004CM000026

IT IS ADJUDGED the charge(s) against the defendant is disposed of as follows:

Count	Offense Charged	Statute Number	Dispo Date	Disposition
1	Carrying a Concealed Weapon	941.23	10-01-2004	Dismissed /De Motion

IT IS ORDERED the defendant is discharged and any bond posted not otherwise forfeited is to be returned.

BY THE COURT:



Claudia Singleton
Circuit Court Judge/Circuit Court Commissioner/Clerk of Circuit Court
10-07-2004
Date

Appeal No. 2004AP2989-CR

Cir. Ct. No. 2004CM26

**WISCONSIN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

SCOTT K. FISHER,

DEFENDANT-RESPONDENT.

FILED

Jun 02, 2005

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Dykman, Vergeront and Lundsten, JJ.

This appeal raises an issue of first impression regarding the constitutionality of WIS. STAT. § 941.23 (2003-04)¹—which prohibits the carrying of concealed weapons in this state—as applied to the owner of a business when away from his business property. More specifically, the question presented is whether the concealed weapon statute can be enforced against a tavern owner who keeps a loaded gun in the glove compartment of his car for protection because he routinely makes large cash deposits in a high-crime neighborhood. We certify this appeal because we believe it presents an opportunity to provide needed clarification of the standard recently set forth in *State v. Cole*, 2003 WI 112, 264

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Wis. 2d 520, 665 N.W.2d 328, and *State v. Hamdan*, 2003 WI 113, 264 Wis. 2d 433, 665 N.W.2d 785, for evaluating as-applied challenges to the concealed weapon statute. In particular, we believe clarification is needed as it relates to the availability of “security interest” justification when a person is away from that person’s home or business.

Because the proper interpretation of *Cole* and *Hamdan* are at the center of this certification, we begin with a discussion of their facts and holdings. *Cole* and *Hamdan* are a pair of companion cases addressing the continued enforceability of Wisconsin’s concealed weapon statute in light of the enactment of article I, section 25 of the Wisconsin Constitution, which provides: “The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose.” In *Cole*, the Wisconsin Supreme Court held that the preexisting concealed weapon statute was not rendered unconstitutional on its face by the constitutional amendment because the statute represented “a reasonable regulation on the time, place, and manner in which the right to bear arms may be exercised.” *Cole*, 264 Wis. 2d 520, ¶28. Although the court concluded that Cole had waived any as-applied challenge, it went on to briefly explain why Cole’s generalized assertion that he did not feel safe in the neighborhood as the result of a brutal beating he had once received was insufficiently specific to warrant carrying a loaded gun with him for self-defense as the passenger in a car. *Id.*, ¶¶46, 48. In the course of its discussion, the court noted the possibility of accidents posed by the transport of loaded weapons and stated: “The right to bear arms is clearly not rendered illusory by prohibiting an individual from keeping a loaded weapon hidden either in the glove compartment or under the front seat in a vehicle.” *Id.*, ¶49.

In *Hamdan*, the Wisconsin Supreme Court held that the concealed weapon statute could not be constitutionally applied to the owner of a family-run grocery store who kept a loaded gun under the counter near the cash register. *Hamdan*, 264 Wis. 2d 433, ¶82. Hamdan had been in the process of putting his weapon away for the night near closing time when two police officers entered the store and eventually discovered that Hamdan had the gun in his trouser pocket. *Id.*, ¶¶1-3. The court set forth the following test:

A defendant who challenges on constitutional grounds a prosecution for carrying a concealed weapon will be required to secure *affirmative* answers to the following legal questions before he or she is entitled to raise a constitutional defense. First, under the circumstances, did the defendant's interest in concealing the weapon to facilitate exercise of his or her right to keep and bear arms substantially outweigh the State's interest in enforcing the concealed weapon statute? ... Second, ... did the defendant lack a reasonable alternative to concealment, under the circumstances, to exercise his or her constitutional right to bear arms?

Id., ¶86. If the defendant secures affirmative answers to these two questions, he or she is entitled to raise a constitutional defense to the jury, and the state must then prove at trial that the defendant actually had an unlawful purpose in concealing the weapon in order to obtain a conviction. *Id.*, ¶87.

Applying the two-part test, the court reasoned that Hamdan did not need to face the sort of imminent threat required to assert the privilege of self-defense in order to have a legitimate security interest at his place of business, noting that people are generally less likely to rely upon law enforcement for protection on their own premises. *Id.*, ¶66. The court emphasized several times that a person's expectation of personal security is greatest on his or her own property, particularly in a home or place of business, quoting extensively from cases from other jurisdictions on that point. *Id.*, ¶¶58-67. The court further

X determined that Hamdan's interest in concealing a weapon in his grocery store was substantial because his store was located in a high-crime neighborhood and had been the site of past violence. *Id.*, ¶82. Hamdan himself had also been a crime victim, and "had good reason to anticipate future crime problems at the store and a need to provide his own security to deal with the problems." *Id.*

Conversely, the court deemed the State's interest in prohibiting Hamdan from concealing a weapon in his store to be "negligible." *Id.*, ¶82. The court noted three generally-accepted public benefits from concealed weapon statutes: (1) "carrying a concealed weapon permits a person to act violently on impulse, whether from anger or fear"; (2) "[n]otice of the presence of a dangerous weapon permits people, including law enforcement officers, to act accordingly," whereas concealment of a weapon "facilitate[s] the commission of crime by creating the appearance of normality and catching people off guard"; and (3) "affixing the stigma of the law of the land" to those who illegally carry concealed weapons may promote the preservation of life. *Id.*, ¶¶ 53-56. The court was not persuaded that any of these potential rationales was particularly compelling as applied to Hamdan, explaining:

Although a shopkeeper is not immune from acting on impulse, he or she is less likely to do so in a familiar setting in which the safety and satisfaction of customers is paramount and the liability for mistake is nearly certain. There is less need in these circumstances for innocent customers or visitors to be notified that the owner of a business possesses a weapon. Anyone who enters a business premises, including a person with criminal intent, should presume that the owner possesses a weapon, even if the weapon is not visible. A shopkeeper is not likely to use a concealed weapon to facilitate his own crime of violence in his own store. The stigma of the law is inapplicable when the public expects a shopkeeper to possess a weapon for security.

Id., ¶57. Thus, the court concluded that Hamdan's interest in keeping a concealed weapon in his store substantially outweighed the State's interest in prohibiting him from having a concealed weapon there. *Id.*, ¶82.

The court further concluded that Hamdan had no reasonable means of keeping his gun in his store except to conceal it. *Id.*, ¶83. In discussing this element, the court noted that a weapon must necessarily be kept somewhere and handled and moved at various times. *Id.*, ¶72. It further reasoned that requiring a shopkeeper to openly display a weapon kept for security "fails the litmus test of common sense," because it could frighten customers and create additional dangers by making the gun more accessible to children, assailants, or others. *Id.*, ¶¶73-74. Accordingly, the court held that Hamdan had established a basis to raise his constitutional right to keep and bear arms for security as a defense to the charge of carrying a concealed weapon, and it remanded the case to the circuit court with directions that, if the State could show probable cause to show that Hamdan had an unlawful purpose when carrying the concealed weapon, the matter should proceed to trial.

We turn now to the facts of the present case. Scott Fisher owned and operated a tavern. Four or five nights a week he would bring home several thousand dollars in receipts to deposit at the bank. One night, Fisher's car was stolen from outside the tavern. When Fisher called the police to report the theft, he also cautioned them that there was a loaded gun in the car.² He was notified the next day that he would be receiving a citation for transporting a loaded firearm in

² It appears from Fisher's hearing testimony that there may also have been several other weapons in the vehicle at the time it was stolen, but they are not at issue on this appeal.

“Security” is a broad concept that could arise in a myriad of situations. See *Hamdan*, 264 Wis. 2d 433, ¶145 and n. 48 (Abrahamson, C.J., concurring). If an individual may cite security as the basis for carrying a loaded firearm in a vehicle, is there any further guidance the Supreme Court could give on how to analyze such claims? For instance, should the constitutional right be interpreted liberally or narrowly?

In sum, we believe that further clarification on the scope and availability of the constitutional security justification would be helpful to both this court and trial courts.

**FINAL POPULATION CENSUS TOTALS FOR
2004**

FOR JACKSON COUNTY

TOWN OF:

Adams	1302
Albion	1133
Alma	1038
Bear Bluff	119
Brockway	2692
City Point	184
Cleveland	466
Curran	387
Franklin	337
Garden Valley	407
Garfield	607
Hixton	629
Irving	659
Knapp	297
Komensky	416
Manchester	716
Melrose	420
Millston	142
North Bend	405
Northfield	569
Springfield	608

VILLAGE OF:

Alma Center	458
Hixton	444
Melrose	519
Merrillan	582
Taylor	514

CITY OF:

Black River Falls	3627
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TOTAL19,677

Jackson County consists of 1001 square miles and
640,000 acres.

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STATE OF WISCONSIN
IN SUPREME COURT

No. 2004AP2989-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

SCOTT K. FISHER,

Defendant-Respondent.

ON CERTIFICATION FROM THE COURT OF
APPEALS ON APPEAL FROM A JUDGMENT OF
DISMISSAL ENTERED IN THE JACKSON COUNTY
CIRCUIT COURT, THE HONORABLE JOHN A. DAMON,
PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT

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STATE OF WISCONSIN
IN SUPREME COURT

No. 2004AP2989-CR

STATE OF WISCONSIN,
Plaintiff-Appellant,
v.
SCOTT K. FISHER,
Defendant-Respondent.

ON CERTIFICATION FROM THE COURT OF
APPEALS ON APPEAL FROM A JUDGMENT OF
DISMISSAL ENTERED IN THE JACKSON COUNTY
CIRCUIT COURT, THE HONORABLE JOHN A. DAMON,
PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT

ARGUMENT

Fisher devotes much of his argument to a discussion of his need to carry a concealed weapon for security while transporting the cash receipts from his business. That is an interesting but ultimately irrelevant argument, because that was not what Fisher was doing when he was arrested. The issue before the court is whether, under the circumstances of this offense – Fisher’s carrying a loaded handgun in the console of his truck at 4:00 in the afternoon while he was attending to personal business and not carrying his business receipts – Fisher had a constitutional right to violate the CCW statute. The answer to that narrow question, which is the only question raised by Fisher’s as-applied challenge, is “no.”

I. FISHER HAS NOT SHOWN THAT HIS INTEREST IN CARRYING A CONCEALED WEAPON SUBSTANTIALLY OUTWEIGHED THE PUBLIC INTEREST IN ENFORCING THE CCW STATUTE.

The crux of Fisher's claim that his constitutional right to carry a concealed weapon outweighed the State's interest in enforcing the CCW statute is his contention that he needs to keep a handgun in his vehicle for security when transporting his business receipts. Fisher argues that he

was carrying a concealed weapon in his vehicle for security purposes; specifically, to secure his privately operated business cash receipts. Mr. Fisher's need to exercise his fundamental right is most pronounced when he is in his vehicle. Mr. Fisher's vehicle is a mere extension of his business because it is incidental to the business's retention of profits. His need for security was warranted given the late hour of the night, the large sums of cash, and perhaps most notably, the fact that he was transporting cash in an area that had been the scene of a number of armed robberies and/or attempted armed robberies within the preceding year. It is counterintuitive to say that Mr. Fisher may have a concealed weapon in his tavern, but as soon as he leaves the tavern with his business cash deposits, he is no longer entitled to provide for his or his business's security.

Fisher's brief at 12-13.

Had Fisher been carrying his business receipts at the time of his arrest, those might be reasonable arguments to make, though the State might argue should such a case ever arise that its interest in enforcing the CCW statute still outweighed the tavern owner's interest in carrying a concealed weapon in his vehicle. But whether Fisher would have a viable constitutional defense to a CCW charge had he, at the time of this offense, been transporting "large sums of cash" from his business receipts at a "late hour of the night," *id.*, is entirely irrelevant to the issue before this court, as Fisher's offense occurred during the daytime when he was not

transporting his business receipts. The validity of an “as applied” constitutional defense to a CCW charge is determined by an assessment of the particular facts of the case, not hypothetical facts in other situations. *See State v. Hamdan*, 2003 WI 113, ¶ 43, 264 Wis. 2d 433, 665 N.W.2d 785.

In a similar vein, Fisher argues that the legislature, in exempting tavern owners from the prohibition in Wis. Stat. § 941.237 against carrying a handgun in a tavern, recognized the substantial need of tavern owners to bear arms in their place of business.¹ *See* Fisher’s brief at 14. That exception, he contends, reflects a legislative recognition that tavern owners are susceptible to crime because taverns are a cash business and tavern owners generally work late at night. *See id.* The rationale underlying the exception for tavern owners in § 941.237 applies to his situation, Fisher argues, because “[h]is vehicle is an extension of his business” when his is transporting his business cash to his bank or his residence. *Id.* at 13-14. But even if Fisher’s truck could be considered an “extension of his business” when he transports the business’s receipts in it, it cannot reasonably bear that label when Fisher is using it to run personal errands hours before starting work.

Fisher attempts to justify his carrying of a concealed weapon in a vehicle while out running personal errands at 4:00 p.m. (29:21; A-App. 123) by arguing that “[h]is weapon was in his vehicle because he was on his way to work.” Fisher’s brief at 19. Fisher explains:

Mr. Fisher was exercising his right to his security on the day he stopped at the DNR office to discuss his citation. The State focuses on the fact that, at that time, approximately 4:00 p.m., Mr. Fisher was not working or transporting cash. *See*, the State’s supreme court brief-in-chief at 17. The State goes on to state that, “Fisher’s interest in security at that point was no different than that

¹In *State v. Mata*, 199 Wis. 2d 315, 321, 544 N.W.2d 578 (Ct. App. 1996), which was decided before the adoption of Wis. Const. art. I, § 25, the court of appeals held that while Wis. Stat. § 941.237 excepts tavern owners and employees from the prohibition against carrying a handgun in a tavern, the statute does not permit a tavern owner to carry a concealed handgun in a tavern.

of any other person in the community who was running errands or engaged in other personal business that Saturday afternoon.” *Id.* at 17. Yet, Mr. Fisher was different from those other individuals because he was a business owner who routinely carried large sums of cash in his vehicle. Mr. Fisher’s arrest was in close proximity to the time that he was to start work at 6:00 p.m. His weapon was in his vehicle because he was on his way to work. Simply because he made stops prior to starting his shift does not transform him from an otherwise law abiding citizen into a criminal.

Id.

Fisher’s contention that “[h]is weapon was in his vehicle because he was on his way to work” is not supported by the record. There is nothing in the record to back Fisher’s assertion that he was “on his way to work” at the time of his arrest. Fisher testified that he was attending to personal business and “on his way to McDonald’s” when he decided to pull into the DNR office (29:9, 20-21; A-Ap. 111, 122-23; R-Ap. 111, 122-23). He did not start work until two hours later (2:1; 29:21; A-Ap. 101, 123; R-Ap. 101, 123). Nor is there anything in the record to support Fisher’s claim that the reason that he had his gun in the truck at the time of his arrest is that he was on his way to work. To the contrary, Fisher testified that he kept the gun in the console of his vehicle “at all times” (29:18; A-Ap. 120; R-Ap. 120).

In its opening brief, the State argued that there is nothing in the record to suggest that it would have been impractical for Fisher to have stopped at his home to pick up his gun before heading into work.² In his response brief, Fisher does not point to any facts that might support such a claim. Nor does he offer any argument why he could not left the gun in his home or at his business when he was not

²Fisher testified that he lives at 43 Main St. in Black River Falls (29:7; A-Ap. 109; R-Ap. 109). The location of Fisher’s business, the Cozy Corner Tavern, is identified in the record only as “downtown Black River Falls” (17:1). A website maintained by the Black River Area Chamber of Commerce lists 43 Main St. as the address of the Cozy Corner Tavern. See <http://www.blackrivercountry.net/mtavern.htm> (last visited Dec. 14, 2005).

transporting his business receipts. His testimony at the motion hearing demonstrates that there was no need for him to carry the gun in his car at all times simply because he transports cash a few times a week.

Q [by the Assistant District Attorney] . . . You weren't transporting money to your bank or your home at that time, were you?

A [by Mr. Fisher] No.

Q So you were keeping the gun at times in your vehicle when you really weren't needing it to protect your cash from your business, correct?

A I don't unload it because say driving to work unloading it and then getting in the vehicle at the end of the night and loading it don't seem practical to me so I leave it loaded.

Q There's nothing that prevents you from not putting the gun in the car until such time as you're actually transporting cash, is there?

A No.

(29:20-21; A-Ap. 122-23; R-Ap. 122-23.)

Fisher grounds his need to carry a concealed weapon at the time of the offense on a generalized, omnipresent need for security. He argues that the "crime spree" sweeping Black River Falls "creates an indelible sense of fear and lack of security in the home and business owners in that proximity." Fisher's brief at 17, 18. To achieve a sense of security, Fisher contends, it was necessary "to regularly have his handgun in his vehicle." *Id.* He kept the handgun in the vehicle at all times, Fisher says, because "[a]lthough [he] knew why he had to protect himself, he did not know when such protection would be necessary. (R29:43; R-Ap. 145)." Fisher's brief at 18.

Fisher's record citation is telling. He cites not to his testimony at the hearing, but to the trial court's explanation of why it believed that it did not matter that Fisher was not

carrying cash receipts at the time of the offense – that criminals are not smart enough “to know when to hit him” (29:43; A-Ap. 145; R-Ap. 145). Yet Fisher did not testify that he feared being robbed at times other than when he was carrying his business receipts (29:7-26; A-Ap. 109-128; R-Ap. 109-28). Nowhere in his testimony did Fisher claim that he had any concerns about his security while on his way to McDonald’s that afternoon (*id.*). Fisher’s assertion in his brief that “it was necessary for [him] to regularly have his handgun in his vehicle” to “achieve this desired security,” Fisher’s brief at 18, is not supported by the record.

Moreover, in *State v. Cole*, 2003 WI 112, 264 Wis. 2d 520, 665 N.W.2d 328, this court rejected the contention that a generalized interest in security justifies carrying a concealed handgun in a vehicle. *Id.* at ¶¶ 48-49. The offense in *Cole* took place in Milwaukee, *id.* at ¶ 3, a city with a substantially greater incidence of violent crime than Black River Falls. If the defendant in *Cole* did not have a constitutional right to carry a concealed weapon based on his generalized security concerns, neither did Fisher.

Fisher also argues that the State’s interest in enforcing the CCW statute is diminished because he is “not a criminal” and, because he received firearms and use-of-force training in his previous job at the Department of Corrections, he is not “prone to act irresponsibly or impulsively.” Fisher’s brief at 19, 20. The State agrees that, apart from his violation of the CCW statute, there is no evidence that Fisher has any history of criminal conduct. And while there is no evidence that Fisher’s training as a former DOC employee makes him “less likely to act impulsively when using weapons,” *id.* at 20, when driving, the State nevertheless agrees that there is nothing in the record to suggest that Fisher is prone to act irresponsibly or impulsively. But that does not significantly diminish the State’s interest in enforcing the CCW law in a setting in which, by its very nature, the carrying of loaded and concealed weapons presents a greater risk of harm than would be present in a person’s own home or business.

Fisher also argues that the “remote possibility” of an accidental discharge of his weapon “does not *substantially* outweigh” his right to keep and bear arms for security. Fisher’s brief at 20. Fisher has the test backwards. The State need not show that its interest in enforcing the CCW substantially outweighs Fisher’s right to bear arms for security. Rather, Fisher must show that his “interest in concealing the weapon to facilitate exercise of his . . . right to keep and bear arms substantially outweigh[s] the State’s interest in enforcing the concealed weapons statute[.]” *Hamdan*, 264 Wis. 2d 433, ¶ 86. Moreover, his contention that the dangers posed by carrying a loaded weapon in a vehicle are too remote to justify enforcement of the CCW statute ignores this court’s holding in *State v. Cole*, 2003 WI 112, 264 Wis. 2d 520, 665 N.W.2d 328, to the contrary.

The reasons supporting “facial” validity of the statute apply with equal force to the specific facts of this case. Public safety concerns support reasonable restrictions. In *West Virginia Division of Natural Resources v. Cline*, 488 S.E.2d 376, 382-83 (W. Va. 1997), the Supreme Court of Appeals of West Virginia upheld a restriction on the transport of loaded weapons as a reasonable regulation of the manner in which weapons could be transported. There the court noted particularly the possibility of accidents. *Id.* Such dangers certainly support restrictions on loaded weapons.

Id. at ¶ 49.

Fisher’s contention that the State’s interest in enforcing the statute is diminished because he “voluntarily told police officers of the existence of the gun in his vehicle,” Fisher’s brief at 20, is similarly unpersuasive. Fisher told police that he had guns in his truck when he reported it stolen and disclosed to the DNR warden that he had the handgun in question in his truck while discussing the resulting citation for transporting loaded firearms (29:9, 11; A-Ap. 111, 113; R-Ap. 111, 113). There is nothing in the record to suggest that Fisher makes it a practice to alert every police officer he encounters while driving that he has a loaded gun in his vehicle. But even if that were Fisher’s habit, that would not eliminate an officer’s

concerns about interacting with a motorist who has a loaded gun within easy reach.

Fisher has not demonstrated that his interest in exercising the right to keep and bear arms by carrying a concealed weapon substantially outweighs the public interest in enforcing the CCW statute. *See Hamdan*, 264 Wis. 2d 433, ¶ 86. Accordingly, this court should reject his claim that the statute is unconstitutional as applied to his conduct.

II. FISHER HAS NOT SHOWN THAT HE
HAD NO REASONABLE
ALTERNATIVE TO CARRYING A
CONCEALED WEAPON.

The court need not reach the question whether Fisher had no reasonable alternative means to exercise his right to bear arms other than by carrying a concealed weapon unless it first concludes that his interest in carrying a concealed weapon substantially outweighs the State's interest in enforcing the CCW statute. *See Hamdan*, 264 Wis. 2d 433, ¶ 86. Should the court reach the second prong of the *Hamdan* inquiry, however, it should find that Fisher has not shown that he had no reasonable alternative at the time of his offense to carrying a loaded gun concealed in the console of his truck.

In its opening brief, the State suggested that Wis. Stat. § 167.31(2)(b), which requires that firearms transported in a vehicle be unloaded and encased, provided a reasonable alternative to carrying a concealed and loaded gun in the vehicle's console. The State argued that carrying a gun in that manner would mitigate safety concerns while accommodating Fisher's need for protection because Fisher could quickly remove it from the case and load it should the need arise. In response, Fisher simply asserts that that is not a reasonable alternative, but does not explain why. His entire argument on this point is the following:

The State's suggestion that Mr. Fisher carry an unloaded weapon in a case, as a reasonable alternative, would

eviscerate his fundamental right to keep and bear arms for security. Therefore, carrying an unloaded weapon openly in his vehicle is also not a reasonable alternative.

Fisher's brief at 23.

The State does not believe that this conclusory assertion satisfies Fisher's burden of demonstrating that he lacked a reasonable alternative to carrying a loaded and concealed gun as a means of exercising his right to bear arms for security. Furthermore, even if it would not be reasonable for Fisher to comply with Wis. Stat. § 167.31(2)(b) while he was transporting his business receipts, Fisher has not explained why complying with the statute would have been unreasonable when he was *not* doing that. The heightened threat to Fisher's security that, he contends, requires immediate access to a loaded weapon while transporting cash from the business was not present at 4:00 p.m. when he stopped in at the DNR office on his way to McDonald's. Fisher has not shown that, at the time of his offense, "the only reasonable means under the circumstances" to exercise his right to bear arms, *see Hamdan*, 264 Wis. 2d 433, ¶ 86, was to carry a loaded pistol in the console of his vehicle.³

Fisher has not carried his burden under either prong of the two-part showing required by *Hamdan*. This court should hold, therefore, that the CCW statute is constitutional as applied to Fisher's conduct.

³Fisher also argues that "[t]he State's suggestion that he wear a holster, and place the weapon therein, while operating his vehicle is also not a reasonable alternative." Fisher's brief at 22. Although the State made that suggestion in the circuit court (29:9; A-Ap. 139; R-Ap. 139), it does not make it here.

CONCLUSION

For the reasons stated above and in the State's opening brief, the court should reverse the judgment of the circuit court dismissing this case.

Dated this 19th day of December, 2005.

Respectfully submitted,

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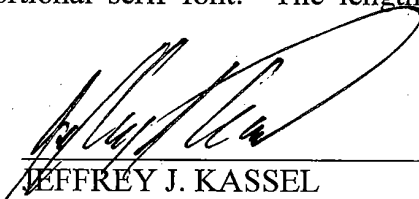
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this brief is 2,925 words.



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STATE OF WISCONSIN

IN SUPREME COURT

No. 2004AP2989-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

SCOTT K. FISHER,

Defendant-Respondent

ON CERTIFICATION FROM THE COURT OF APPEALS
ON APPEAL FROM A JUDGMENT OF DISMISSAL ENTERED
IN THE JACKSON COUNTY CIRCUIT COURT, THE HONORABLE
JOHN A. DAMON, PRESIDING

AMICUS CURIAE BRIEF OF
NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.
IN SUPPORT OF DEFENDANT-RESPONDENT

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STATEMENT OF INTEREST OF AMICUS CURIAE

The National Rifle Association of America, Inc. (“NRA”) is a not-for-profit membership corporation with 4.2 million individual members and 10,700 affiliated clubs and associations nationwide. Its purposes include protection of the right to possess, transport, and carry arms for self defense; to promote public safety; to train police, soldiers, and citizens in marksmanship and gun safety; to promote the shooting sports; and to promote hunter safety.

The NRA has a strong interest in upholding the rights of its members and all citizens to keep and bear arms as protected in the constitutions of each State. In addition to the Wisconsin Rifle and Pistol Association and numerous affiliated clubs in Wisconsin, the NRA has thousands of members who reside in Wisconsin or who travel to Wisconsin for hunting, competitions, training, and other lawful activity involving firearms. The NRA

has a keen interest in protecting the rights of its members and ensuring that they are in compliance of the law, including in the context of the carrying and transportation of firearms in motor vehicles. Since in our highly mobile society firearms are carried and transported in vehicles countless times every day, NRA members have a stake in how this case is resolved.

This interest is extraordinarily significant at this time in that the NRA will hold its annual convention in Milwaukee, Wisconsin, during May 17-23, 2006. In 2005, the NRA convention in Houston drew nearly 60,000 attendees. The NRA regularly litigates and files *amicus curiae* briefs in firearms law cases nationwide. This brief seeks to assist the Court by providing analysis of precedents not set forth in the briefs of the parties, and is desirable in order to apprise the Court of the views of America's leading organization representing law-abiding firearm owners.

ARGUMENT

Introduction

Wis. Const., Art. I, § 25, enacted in 1998, provides: “The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose.” However, W.S.A. § 941.23 states: “Any person except a peace officer who goes armed with a concealed and dangerous weapon is guilty of a Class A misdemeanor.” The issue is “whether the concealed weapon statute can be enforced against a tavern owner who keeps a loaded gun in the glove compartment of his car for protection because he routinely makes large cash deposits in a high-crime neighborhood.” *State v. Fisher*, 2005 WL 1300725, *1 (Wis. App. 2005).

The above should be answered in the negative. First, the right to bear arms for security is a fundamental right which must be construed broadly. Second, where the right to bear arms for

security is exercised in a motor vehicle, no alternative to concealment exists.

I. THE RIGHT TO BEAR ARMS MUST BE CONSTRUED BROADLY.

The Court of Appeals posed the following jurisprudential question:

“Security” is a broad concept that could arise in a myriad of situations. . . . If an individual may cite security as the basis for carrying a loaded firearm in a vehicle, is there any further guidance the Supreme Court could give on how to analyze such claims? For instance, should the constitutional right be interpreted liberally or narrowly?

Fisher, 2005 WL 1300725, *4.

The answer is clear. “Such a constitutional expression of the will of the people is to be liberally construed.” *State v. Legrand*, 77 Wis.2d 520, 526, 253 N.W.2d 505 (1977). Terminology “couched as it necessarily must or ought to be, in a document such as a constitution, in broad and general terms, should have a liberal construction looking toward virility rather

than impotency.” *Id.* n.5, quoting *State ex rel. Ekern v. City of Milwaukee*, 190 Wis. 633, 638, 209 N.W. 860, 861 (1926). “[I]t is clearly judicial duty to liberally construe . . . such an expression of the will of the people, whatever might be our opinion as individuals of the wisdom or value . . . of such an amendment.” *State ex rel. Ekern, id.*

“[O]rdinarily words in the constitution ‘do not receive a narrow, contracted meaning, but are presumed to have been used in a broad sense, with a view of covering all contingencies.’” *State ex rel. Graves v. Williams*, 99 Wis.2d 65, 298 N.W.2d 392 (1980). Unwritten exceptions to a right must be narrowly construed, for “Courts cannot supply what they deem to be unwise omissions from the Constitution.”¹ *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 125 N.W. 961, 966 (1910).

¹See *State v. Hamdan*, 264 Wis.2d 433, 492, 665 N.W.2d 785 (2003) (Bablitch, J., concurring) (avoiding interpretation that “renders the constitutional amendment a sham by reading into it the words ‘unless concealed’”).

These principles apply above all to constitutional rights.

“This constitutional protection must not be interpreted in a hostile or niggardly spirit.” *Ullmann v. United States*, 350 U.S. 422, 426 (1956). “As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion. . . . To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it.” *Id.* at 428-29.

Some constitutional rights are not “in some way less ‘fundamental’ than” others, but “each establishes a norm of conduct” which must be honored “to no greater or lesser extent than any other inscribed in the Constitution.” *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982). “[W]e know of no principled basis on which to create a hierarchy of constitutional values” *Id.*

The Wisconsin Bill of Rights recognizes no such hierarchy when it characterizes fundamental liberties as “the right” of “the people.” *Compare* “The people have the right to keep and bear arms for security,” Wis. Const., Art. I, § 25, with “The right of the people peaceably to assemble,” *id.*, § 4, and “The right of the people to be secure . . . against unreasonable searches and seizures,” *id.*, § 11.

“Fundamental rights are those which are either explicitly or implicitly based in the Constitution.” *State v. Martin*, 191 Wis.2d 646, 652, 530 N.W.2d 420 (1995). “If a statute affects a ‘fundamental right’ . . . , we review the statute with ‘strict scrutiny.’” *Id.* at 651-52. “Under strict scrutiny, we require the statute to be narrowly drawn to further a compelling government interest.” *Matter of Guardianship of Ruth E.J.*, 196 Wis.2d 794, 802, 540 N.W.2d 213 (1995).

This Court should expand its analysis of fundamental

rights consistent with the above. *State v. Cole*, 264 Wis.2d 520, 537, 665 N.W.2d 328 (2003), found that “the state constitutional right to bear arms is fundamental,” but rejected strict scrutiny or intermediate scrutiny. *Cole* found the test to be whether “the restriction upon the carrying of concealed weapons is a reasonable exercise of the State’s inherent police powers,” but added: “Such a test should not be mistaken for a rational basis test. The explicit grant of a fundamental right to bear arms clearly requires something more, because the right must not be allowed to become illusory.”² *Id.* at 540.

As a constitutional right, bearing arms must be accorded heightened scrutiny. *City of Lakewood v. Pillow*, 180 Colo. 20, 23, 501 P.2d 744 (1972), invalidated an ordinance, under that

²“The reasonableness test focuses on the balance of the interests at stake, rather than merely on whether any conceivable rationale exists under which the legislature may have concluded the law could promote the public welfare.” *Id.* at 541. *But see id.* at 558 (Abrahamson, C.J., concurring) (“I am not persuaded that there is any difference between rational basis test and the majority opinion’s ‘reasonable exercise of police power’ test.”).

State's arms guarantee, which made it "unlawful for a person to possess a firearm in a vehicle or in a place of business for the purpose of self-defense." "Even though the governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Id.*

State ex rel. City of Princeton v. Buckner, 180 W.Va. 457, 377 S.E.2d 139 (1988), held regarding a concealed pistol in a vehicle that "a total proscription" of carrying a weapon without a license "operates to impermissibly infringe upon this constitutionally protected right to bear arms for defensive purposes."³ *Id.* at 462. Even activities subject to the police power "may not be achieved by means which sweep unnecessarily broadly and thereby invade the realm of protected

³*See also id.* at 461 (precedent implied "that a constitutional guarantee or right to keep and bear arms would subject laws regulating protected arms to the same standard of scrutiny given laws regulating first amendment freedoms.").

freedoms, such as the right to keep and bear arms” *Id.* at 467.

While the above decisions suggest the “least restrictive alternative” test of strict scrutiny, this Court in *Hamdan* crafted an “any reasonable alternative” test, which is readily applicable to this case:

First, under the circumstances, did the defendant’s interest in concealing the weapon to facilitate exercise of his or her right to keep and bear arms substantially outweigh the State’s interest in enforcing the concealed weapons statute? . . . Second, did the defendant conceal his or her weapon because concealment was the only reasonable means under the circumstances to exercise his or her right to bear arms? Put differently, did the defendant lack a reasonable alternative to concealment, under the circumstances, to exercise his or her constitutional right to bear arms?

264 Wis.2d at 489-90.

Here, Scott Fisher had a clear interest in carrying the weapon in his motor vehicle which substantially outweighed the State’s interest. The firearm was to provide security for making

bank deposits for a lawful business in an area in which serious crimes had been committed, and Mr. Scott posed no threat to the police or other citizens. As the following demonstrates, no alternative to concealment existed if he was to exercise his right to bear arms for security in a vehicle, the only realistic method of regularly transporting cash deposits to the bank.⁴

II. NO ALTERNATIVE TO CONCEALMENT EXISTS WHERE THE RIGHT TO BEAR ARMS FOR SECURITY IS EXERCISED IN A MOTOR VEHICLE.

The right to bear arms for security is not forfeited when one enters a motor vehicle. However, under Wisconsin precedent, a firearm in a vehicle is inherently concealed, even

⁴*Kellogg v. City of Gary*, 562 N.E.2d 685, 694 (Ind. 1990), held about the right to bear arms for self-defense:

This interest is one of liberty to the extent that it enables law-abiding citizens to be free from the threat and danger of violent crime. There is also a property interest at stake, for example, in protecting one's valuables when transporting them, as in the case of a businessman who brings a sum of cash to deposit in his bank across town.

when visible to persons looking inside. The prohibition on going armed with a concealed weapon is unconstitutional as applied to a person who is genuinely bearing arms for security in a vehicle.

“The driver of an automobile goes armed . . . when he has a dangerous weapon within reach on a shelf in back of his seat.” *Mularkey v. State*, 201 Wis. 429, 230 N.W. 76, 77 (1930). “Absolute invisibility to other persons is not indispensable to concealment.” *Id.* See *State v. Asfoor*, 75 Wis.2d 411, 435, 249 N.W.2d 529 (1977) (pistol on floorboard).

However, *State v. Walls*, 190 Wis.2d 65, 72-73, 526 N.W.2d 765, 767-68 (Ct. App. 1994), held that a handgun was “indiscernible to ordinary observation” even though “the police officers did observe the gun lying on the front seat.” The police reported that “‘upon checking the auto the gun was lying on the seat’ clearly in plain view.” *Id.* at 70. Even though “the

handgun was observable to anyone looking into the automobile,” *Walls* held it to be concealed. *Id.* Yet if the test requires observation by people outside of a vehicle traveling at night, it could only be met by mounting the gun on the front hood like a classic Cadillac figurine and shining a light on it.

A person may transport an unloaded, encased firearm in a vehicle. *Id.* at 69 n.2, citing W.S.A. § 167.31(2)(b). But that precludes bearing arms for security.

While *Walls* was decided before adoption of Art. I, § 25, after adoption this Court agreed that “a person who carries a weapon in a car with the weapon in plain view on the front seat may have nonetheless unlawfully concealed the weapon.” *State v. Dundon*, 226 Wis.2d 654, 661 n.7, 594 N.W.2d 780 (1999).

“The adoption of Article I, Section 25 did not affect prior judicial interpretations of the CCW statute . . . , but it did create an obligation to protect rights guaranteed by the amendment.”

Hamdan, 264 Wis.2d at 458-59. “The State may not apply these regulations in situations that functionally disallow the exercise of the rights conferred under Article I, Section 25. . . . The prohibition of conduct that is indispensable to the right to keep (possess) or bear (carry) arms for lawful purposes will not be sustained.”⁵ *Id.* at 461.

The term “security” connotes “a persistent state of peace” rather than “an imminent threat,” and “the domain most closely associated with a persistent state of peace is one’s home or residence, *followed by other places in which a person has a possessory interest*. . . . In fact, a person who takes no initiative to provide security in these private places is essentially leaving security to chance.” *Hamdan, id.* at 477-78 (emphasis added).

⁵The term “bear arms” applies to carrying a firearm on the person or in a vehicle. *Muscarello v. United States*, 524 U.S. 125, 126, 130 (1998). “Surely a most familiar meaning is [in] the Constitution’s Second Amendment (‘keep and *bear* Arms’)” *Id.* at 143 (Ginsburg, J., dissenting).

One such important place in modern life is in a motor vehicle. The prohibition here bans bearing arms for security in a motor vehicle, in violation of the rule that “regulations limiting a constitutional right to keep and bear arms must leave some realistic alternative means to exercise the right.” *Id.* at 480.

Hamdan found keeping the weapon in the open, such as in a visible holster or on the wall, not to be a *realistic* alternative. *Id.* at 480. Because carrying a firearm in a vehicle is considered concealed per se, there is no alternative method, realistic or unrealistic, of bearing arms for security in a vehicle.

Cole involved a defendant with marijuana in his pocket and loaded pistols in the glove box and under the driver’s seat. 264 Wis.2d at 526. “We see no need to examine the assortment of restrictions that may apply to transporting a weapon in a vehicle, because under the facts of this case, the constitutional right to bear arms has clearly not been infringed.” *Id.* at 556. It

was noted that “Cole has presented no evidence of any threat at or near the time he was arrested.” *Id.* at 557. Yet this relates more to bearing arms for “defense” than “security,” which connotes “a persistent state of peace” rather than “an imminent threat.” *Hamdan*, 264 Wis.2d at 477.

Cole foregoes creation of a broad rule: “Whatever the outer reaches of application of the CCW statute might be in light of the new constitutional amendment, this fact scenario does not fall within them.” 264 Wis.2d at 557. It also notes that the firearms at issue were loaded, creating a danger of accidents,⁶ and reiterates that the right to bear arms was not violated “under these specific circumstances.” *Id.* at 558. Yet the pistol in *Hamdan* must have been loaded, suggesting tension between the

⁶*Cole* cited *State ex rel. West Virginia Division of Natural Resources v. Cline*, 200 W.Va. 101, 106-07, 488 S.E.2d 376 (1997), but that case only upheld a law regulating transport of loaded firearms by hunters, “since transportation of a loaded firearm is not a lawful method of hunting with firearms.”

two decisions. That tension is reduced by limiting *Cole* to its facts – the defendant was carrying a illegal drug, use of which could have resulted in an accidental discharge of the firearm, and he was in a neighborhood he considered to be dangerous, without asserting any need to be there.

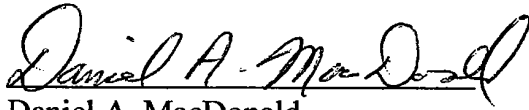
By contrast, Scott Fisher was bearing arms for security, and was acting lawfully as a responsible citizen. Far from being a threat to law enforcement officials, he openly volunteered that he was carrying a firearm. He possessed his firearm in his vehicle to protect bank deposits from a lawful business, and in no way was a danger to the public.

CONCLUSION

This Court should hold that W.S.A. § 941.23 is unconstitutional as applied to a person who is bearing arms for security in a vehicle and is otherwise acting lawfully, and should affirm the judgment of the circuit court.

Dated this 16th day of December, 2005.

Respectfully submitted,

A handwritten signature in cursive script that reads "Daniel A. MacDonald". The signature is written in dark ink and is positioned above the printed name.

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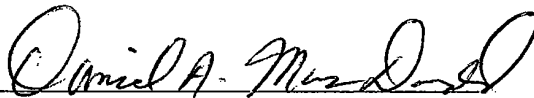
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CERTIFICATION

I certify that this brief conforms to the rules contained in WI Stat §§809.19(8)(b) and (c) for a brief produced using the following font:

Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2796 words.

MOHS, MACDONALD, WIDDER &
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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case No. 04-2989-CR

STATE OF WISCONSIN,
Plaintiff-Appellant,

v.

SCOTT K. FISHER,
Defendant-Respondent.

ON APPEAL FROM AN ORDER ENTERED IN THE
JACKSON COUNTY CIRCUIT COURT, THE
HONORABLE JOHN A DAMON, PRESIDING

BRIEF AND APPENDIX OF
PLAINTIFF-APPELLANT

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case No. 04-2989-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

SCOTT K. FISHER,

Defendant-Respondent.

ON APPEAL FROM AN ORDER ENTERED IN THE
JACKSON COUNTY CIRCUIT COURT, THE
HONORABLE JOHN A DAMON, PRESIDING

BRIEF OF PLAINTIFF-APPELLANT

STATEMENT OF THE ISSUES

Did the trial court err when it held that the defendant-respondent Scott Fisher, under the facts of this case, could raise a constitutional defense under State v. Hamdan, 2003 WI 113, 264 Wis. 2d 433, 665 N.W. 2d 785 that he had the right to go armed with a concealed handgun? The trial court ruled that Fisher under Hamdan could raise a constitutional defense based on Article 1, Section 25 of the Wisconsin Constitution.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary. Publication of the Court's decision is warranted because the issue raised in this case is one of first impression and is of statewide importance in interpreting sec. 941.23, Stats. and Article 1, Section 25 of the Wisconsin Constitution.

STATEMENT OF THE CASE

This case is before the Court on appeal of the plaintiff-appellant, the State of Wisconsin, from the trial court's order granting the defendant-respondent Fisher's motion to raise a constitutional defense based on Article 1, Section 25 of the Wisconsin Constitution to a charge of going armed with a concealed and dangerous weapon, contrary to sec. 941.23, Stats.

On February 2, 2004, Fisher was charged with going armed with a concealed weapon, contrary to sec. 941.23, Stats. This was alleged to have occurred on December 20, 2003 in the City of Black River Falls, Jackson County. (2; A-Ap. 101-102) Trial was scheduled for October 7, 2004. (10) On September 29, 2004, Fisher filed a motion to allow him to raise a constitutional defense based on Article 1, Section 25 of the Wisconsin Constitution. (16; A-Ap. 103-104) The trial court held a hearing on the motion on October 1, 2004. (29; A-Ap.105-155)

Fisher testified that he was a tavernkeeper and that he had his truck stolen about a week and one-half prior to being arrested for carrying a concealed weapon. He reported the vehicle stolen and informed police that there was a loaded gun in the vehicle. He testified that later that morning he was informed by a sheriff's deputy that he would be receiving a citation for transporting a loaded firearm in the vehicle. Fisher stated that on December 20, 2003 he was on his way to McDonald's and saw a DNR

vehicle pull into the DNR Office in Black River Falls. He made contact with Warden Schultz. Fisher explained the situation with his truck being stolen and receiving the citation. He testified that he told the warden that he had a tavern and at different times carried large amounts of cash. He informed Schultz that he had a loaded gun in his vehicle at that time. After Schultz asked to see the gun, Fisher opened the console in his truck and removed a pistol. The warden checked the pistol, opening the slide, and determined that there was a round chambered. Schultz called a police officer to the scene who arrested Fisher for going armed with a concealed weapon. (29:7-12; A-Ap. 111-116)

Fisher testified that he commonly had large amounts of cash at his tavern and that he generally transported large sums to his home at the end of the night. Fisher testified that there had been robberies in the Black River Falls area in the preceding year, and that he kept a loaded handgun in the console, out of sight in his vehicle. (29:12-16; A-Ap. 116-120)

On cross-examination, Fisher stated he was not transporting cash when he drove to the DNR Office with the loaded handgun in his vehicle console. (29:20; A-Ap. 124) Fisher stated that it did not seem practical to remove the gun when he was not transporting cash, although he could have waited to put the loaded gun in his vehicle until he was actually transporting cash. (29:20-21; A-Ap. 124-125) He stated that he had not started working on the day he stopped at the DNR Office and that he was on his way to a McDonald's. (29:21-22; A-Ap. 125-126) Fisher also testified that he could have carried the gun in a non-concealed holster, rather than loaded and uncased and in the console. (22:19; A-Ap. 123)

At the conclusion of the hearing, the trial court ruled that Fisher would be permitted to present the constitutional defense, stating that Fisher's interest in his protection outweighed the State's interest in enforcing the carrying concealed weapon statute. The State conceded that it had no evidence that Fisher was planning to use the concealed weapon for an additional illegal purpose and,

therefore, the court dismissed the carrying concealed weapon charge. (24:41-48; A-Ap. 145-152; 20; A-Ap. 156)

ARGUMENT

Fisher successfully argued to the trial court that the holding in State v. Hamdan applied to the facts of his case. Because the facts in this case were significantly, and in fact fundamentally, different from Hamdan, Hamdan should not have been applied by the trial court.

I. THE HAMDAN RULING DOES NOT APPLY TO CONCEALED CARRY IN A VEHICLE OFF OF FISHER'S PROPERTY.

In State v. Hamdan, the Wisconsin Supreme Court reconciled the requirements of sec. 941.23, Stats. with the rights granted under Article 1, Section 25 of the Wisconsin Constitution to keep and bear arms for security defense, hunting, recreation, or any other lawful purpose. The Court held that the State had broad police power to regulate the use of firearms, notwithstanding Article 1, Sec. 25 of the Wisconsin Constitution. Id. at ¶ 39. The Wisconsin Constitution does not establish an unconditional right to bear arms. Id. at ¶ 41. It nonetheless ruled that the courts may limit the broad application of the carrying concealed weapon statute in those circumstances in which such limitation is necessary to narrowly accommodate the constitutional right to keep and bear arms for lawful purposes. Id. at ¶ 39. The Court said that “when an exercise of the State’s police power implicates the constitutional right to keep and bear arms, the validity of the exercise is measured by the reasonableness of the restriction on the asserted right”. Id. at ¶ 44. “In analyzing reasonableness, one must balance the conflicting rights of an individual to keep and bear arms for lawful purposes against the authority of the State

to exercise its police power to protect the health, safety and welfare of its citizens”. Id. at ¶ 45. The Court noted that reasons for prohibiting concealed weapons to be carried included the State’s interest in preventing a person to act violently on impulse, placing people on notice when they were dealing with an individual who was carrying a dangerous weapon and promoting safety by affixing the stigma of the law to a person who violated the concealed carry statute. Id. at ¶¶ 54 to 56. The Court did not find any of these reasons very compelling in the case of a person owning and operating a small business. Such shopkeepers were less likely to act on impulse in a familiar setting, and customers would likely assume that there could be a weapon on the premises, even if not visible. The legal stigma of carrying a concealed weapon was "inapplicable" since the public would expect the small business person to possess a weapon for security reasons. Id. at ¶ 57.

The Court went on to find “if the constitutional right to keep and bear arms for security is to mean anything, it must, as a general matter, permit a person to possess, carry and sometimes conceal arms to maintain the security of his private residence or privately operated business, and to safely move and store weapons within these premises”. Id. at ¶ 68. The Court determined that a “citizen’s desire to exercise the right to keep and bear arms for purposes of security is at its apex when undertaken to secure one’s home or privately owned business”. Id. at ¶ 67. The Court recognized that the purposes of a concealed carry ban are often less compelling in settings in which the person carrying the concealed weapon is an owner of the property on which he or she goes armed. Id. at ¶ 59.

The Court also examined whether an individual could have exercised the right in a reasonable alternative manner that did not violate the statute. Id. at ¶ 69. In Hamdan, the Court found that unconcealed open carry of the firearm in a business setting was impractical. Id. at ¶ 74.

The facts in the present case differ sharply from those in Hamdan. Fisher was not carrying his concealed weapon in his home or privately owned business. Instead, he went armed with a weapon concealed in the console of the vehicle he was operating. He was not on his own property, but had driven to a DNR Office while on his way to a McDonald's. Unlike Hamdan, Fisher was not in a business setting or conducting his business at the time of the alleged violation. He was not transporting money to or from his business at the time. Fisher's concealed carry differed fundamentally from Hamdan's in that he was not going armed in a place where the State had the least compelling interest in prohibiting concealed weapons, but rather where the State had its most compelling interest in enforcing the carrying concealed weapon statute, to-wit: public roads, government offices, and other public places. Although Fisher claimed he felt he needed a concealed weapon to protect himself, there was no evidence (unlike Hamdan) that he had been robbed either in his business place or while transporting cash. It appears that his carrying loaded firearms in his vehicle predated the operation of his vehicle without his consent a week and one-half before the carrying concealed weapon incident. (29:9; A-App. 113) A general fear of crime does not justify concealed carry in a vehicle. State v. Cole, 2003 WI 112, 264 Wis. 2d 520, ¶ 48, 665 N.W. 2d 328. "The right to bear arms is clearly not rendered illusory by prohibiting an individual from keeping a loaded weapon either in the glove compartment or under the front seat in a vehicle." *Id.* at ¶ 49. The Supreme Court has thus differentiated between concealed carry on one's own premises and concealed carry out in the "world". The reason for distinguishing the situations is not hard to fathom; a person has a compelling interest in providing security to his home or privately owned business. It is impractical to enforce carrying concealed weapon laws in such an intimate place without sometimes leading to absurd results. Conversely, concealed carry in a vehicle by definition takes the weapon into places and interactions outside the intimacy and control of the home or private place of business. The fact that weapons can be particularly dangerous in vehicles is recognized by the legislature in its statute requiring that firearms transported

in vehicles must be both unloaded and cased. See sec. 167.31(2)(b), Stats. The danger of accidental discharge is an additional reason to prohibit concealed carry in a vehicle. The legislature has also determined that discharging a firearm from a vehicle on a highway or public parking lot is a felony under some circumstances. See sec. 941.20(3)(a), Stats. The reasons for banning concealed weapons which the Court found unconvincing in a small store are very compelling when the concealed carry is done in a vehicle moving about public places.

Fisher's argument for permitting his concealed carry of a firearm is especially unconvincing in light of the fact that he was not working or carrying cash at the time of the violation. To accept Fisher's argument that he needed a concealed gun to protect himself and that it was impractical to remove the weapon when not in possession of business cash would essentially grant him permission to carry a concealed gun wherever and whenever he chose. The trial court seemed to believe Fisher should be able to carry a concealed gun even when not in possession of business cash. (29:43, 47; A-Ap. 147, 151) If the Supreme Court in Hamdan felt that the constitutional right under Article 1, Section 25 granted such a right to business owners, they could have easily said so. Instead, they fashioned a very narrow exception to the concealed carry law for the home and privately owned business place.

II. FISHER COULD HAVE EXERCISED
HIS CONSTITUTIONAL RIGHT TO
BEAR ARMS WITHOUT
VIOLATING THE CARRYING
CONCEALED WEAPON STATUTE.

Even if Fisher's argument that his need for security outweighed the State's interest in enforcing the carrying concealed weapon law is accepted, he failed to show that he could not have exercised the right in a reasonable alternative way that did not violate the carrying a concealed weapon statute. Fisher could have carried his

gun unconcealed in his vehicle. Unlike a storekeeper with a holstered gun, Fisher could have transported the weapon in his vehicle without it being blatantly obvious to the public and causing undue alarm. He could have carried the gun in an unconcealed case on the dash, for example. The weapon could be lawfully transported as long as it was cased, unloaded, and unconcealed. A gun case by its appearance alerts the public that a weapon is present, but is probably not going to shock the public as an open display of a weapon would be. The testimony indicates that the weapon Fischer carried was a semi-automatic pistol; such a weapon could quickly be removed from its case and loaded by inserting its magazine, thereby insuring that it could be used effectively for protection. In any event, the weapon did not have to be concealed in order to be used in the vehicle. In fact, one can argue that concealing the weapon in a vehicle as opposed to carrying it in open view in a case made it less accessible and useful for self-defense purposes.

CONCLUSION

State v. Hamdan did not authorize Fisher to go armed with a concealed handgun in his vehicle in public places. For the reasons stated above, the Court should reverse the ruling of the trial court permitting Fisher to raise the constitutional defense.

Dated this 7 day of January, 2005.


WILLIAM P. NEMER
Assistant District Attorney
(Special Prosecutor)
State Bar No. 1018425

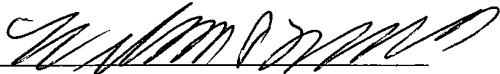
Attorney for Plaintiff-Appellant

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,357 words.

Dated this 7 day of January, 2005.



William P. Nemer
Assistant District Attorney
(Special Prosecutor)

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STATE OF WISCONSIN

Plaintiff,

-VS.-

Criminal Complaint

Scott K. Fisher

43 Main Street

Black River Falls, WI 54615

DOB: 02/01/1974

Court Case No.: 04 CM 26

Defendant.

George M. Clark, being first duly sworn, states that:**Count 1: CARRYING A CONCEALED WEAPON**

The above-named defendant on December 20, 2003, in the City of Black River Falls, Jackson County, Wisconsin, did go armed with a concealed and dangerous weapon, contrary to sec. 941.23, Wis. Stats., a Class A Misdemeanor, and upon conviction may be fined not more than Ten Thousand Dollars (\$10,000), or imprisoned not more than nine (9) months, or both.

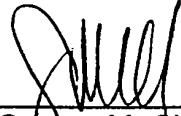
PROBABLE CAUSE: and prays that said defendant be dealt with according to law and that the basis for the complainant's charge of such offense is: That your complainant has read a report from the Wisconsin Department of Natural Resources which states that on December 20, 2003 at about 4:00 p.m. DNR Officer Daniel Schultz arrived at the DNR Service Center in the City of Black River Falls, County of Jackson, State of Wisconsin. While seated in his patrol vehicle Officer Schultz observed a silver Chevrolet pickup truck with Wisconsin personalized truck plate of COZY CR approach and stop slightly behind Schultz's patrol vehicle. He observed the lone occupant of this vehicle to be Scott K. Fisher. Schultz exited his vehicle as Fisher exited his vehicle. Fisher approached Schultz. Schultz asked Fisher if he could help him. Fisher stated he was looking for John Bronsdon, a DNR Warden. Fisher stated he was upset because he had received a citation in the mail earlier that day. He stated that he had had his truck stolen from his place of business and upon reporting the theft he informed officers that his truck contained three loaded firearms. He had received a citation for the loaded firearms and believed he should not have received this citation. Fisher stated that he owned the Cozy Corner Bar and that he regularly carries large amounts of money. He stated that he always carried a loaded firearm with him and stated "to be honest with you, I have a loaded handgun in the truck right now." Schultz asked Fisher where the handgun was located. Fisher opened his driver's door, reached in and opened a center console in the front seat of the truck and retrieved a stainless steel .40 caliber Smith and Wesson semi-automatic handgun, serial number VCE5238. The firearm was loaded with nine rounds in its magazine with an additional round chambered. Schultz seized this firearm along with another loaded magazine, a box of .40 caliber ammunition and an unidentified cartridge. These were lying beside the handgun in the center console.

STATE OF WISCONSIN - VS - Scott K. Fisher

Subscribed and sworn to before me,
and approved for filing on:
January 29, 2004



William P Nemer 1018425
Special Prosecutor for Jackson County



George M. Clark
Complainant

STATE OF WISCONSIN

CIRCUIT COURT

SEP 29 2004 JACKSON COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

SCOTT FISHER,

Defendant.

CLERK OF COURTS
CLAUDIA SINGLETON

Case No. 04-CM-

**MOTION TO ALLOW THE DEFENDANT TO RAISE A CONSTITUTIONAL
DEFENSE BASED ON ARTICLE I, SECTION 25 OF THE WISCONSIN
CONSTITUTION.**

The Defendant, SCOTT FISHER, appearing specially by his attorney, SKOLOS & MILLIS, S.C. by Paul B. Millis and reserving his right to challenge the Court's jurisdiction, moves the Court for an order allowing Defendant to raise a constitutional defense based on Article I, Section 25 of the Wisconsin Constitution and State v. Hamden, 2003 WI 113, 264 Wis. 2d 433, 665 N.W. 2d 785.

In furtherance of said motion, Defendant asserts:

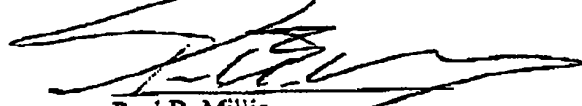
- a. Defendant is a business owner in the City of Black River Falls, WI, operating a tavern, Cozy Corner.
- b. This type of business requires the Defendant to maintain large sums of cash in transacting business.
- c. In the normal course of business the Defendant removes the cash from his business and transports it to his residence to secure it.
- d. The Defendant had recently been a victim of a crime in the neighborhood of his business as an individual had stolen his vehicle.
- e. The Defendant felt a need to provide for his own security to deal with any potential problems in handling the large sums of cash in the normal course of his business.
- f. Acting on this need the Defendant kept a handgun in the center console of this vehicle.
- g. When the Defendant moved the handgun from his vehicle it would be unloaded.
- h. The Defendant was not prone to act irresponsibly or impulsively with regard to the handgun in his vehicle.
- i. That enforcement of the §941.23, Wis. Stats on these facts would seriously frustrate the Defendant's constitutional right to keep and bear arms for security as set forth in Article I, Section 25 of the Wisconsin Constitution.

- j. The Defendant had no reasonable means of keeping and handling the weapon in his truck except to conceal it.
- k. In normal course of his business the Defendant would keep the handgun in the center console of his truck – inaccessible to the public.
- l. Openly displaying the handgun would shock those that the Defendant encountered – seriously impairing his right to bear arms for security.
- m. The State has not asserted nor will it provide evidence that the Defendant possessed a concealed weapon for an unlawful purpose.

WHEREFORE, the Defendant is moving the Court to allow Defendant to raise a constitutional defense pursuant to Article I, Section 25 of the Wisconsin Constitution.

Dated this 29th day of September, 2004.

SKOLOS & MILLIS, S.C.



Paul B. Millis
Attorney for the Defendant
P.O. Box 219
Black River Falls, WI 54615
715/284-9421
State Bar No. 1027097

1 STATE OF WISCONSIN: CIRCUIT COURT: JACKSON COUNTY:

2 -----
3 STATE OF WISCONSIN,

4 Plaintiff,

(Pretrial Motion)

5 -vs-

Case #: 04-CM-26

6 SCOTT FISHER,

7 Defendant.

COPY

8 -----
9 The above-entitled matter coming on to be heard
10 before the Honorable John A. Damon, judge of the
11 above-named court, without a jury, on the **1st day of**
12 **October, 2004**, commencing at the hour of 3:00 p.m., in
13 the courthouse in the City of Whitehall, County of
14 Trempealeau, State of Wisconsin.

15 -----
16 APPEARANCES:

17 WILLIAM P. NEMER, Special Prosecuting Attorney,
18 Trempealeau County Courthouse, 36245 Main Street,
19 Whitehall, Wisconsin 54773, appeared representing the
20 Plaintiff.

21 PAUL MILLIS, of the firm of SKOLOS & MILLIS,
22 S.C., PO Box 219, Black River Falls, Wisconsin 54615,
23 appeared representing the Defendant.

24
25 The defendant, Scott Fisher, was also present.

I N D E X

WITNESS

PAGE

SCOTT FISHER

Direct Examination by Mr. Millis 7:15

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OBJECTIONS

By Mr. Nemer 10:10, 26:8

By Mr. Millis 18:20, 25:3

1 THE COURT: This is State of Wisconsin
2 versus Scott Fisher, 2004-CM-26. We have
3 William Nemer for the State of Wisconsin acting
4 as special prosecutor in this Jackson County
5 case, and then Paul Millis is here as the
6 attorney for Scott Fisher. This is set for a
7 jury trial next Thursday. We have some motions
8 here. I thought the more interesting one was
9 the constitutional defense one, and maybe let's
10 do that one first because I don't see the
11 suppression as taking much time.

12 MR. MILLIS: We're withdrawing that, your
13 Honor.

14 THE COURT: Okay. That makes it even
15 easier. All right. So let me just take a
16 second here because I read it this morning and
17 I have to refresh my memory, but the new jury
18 instruction, I think 1335A, talks about the
19 process and the notes. I just want to read
20 that again. Let me take a moment.

21 MR. NEMER: I believe it's on Page 4 of
22 that instruction.

23 THE COURT: I've got it right in front of
24 me. Thanks, Mr. Nemer.

25 MR. NEMER: Yeah.

1 THE COURT: I see, okay. Well, I'll just
2 read this and before -- so I make sure that
3 everyone is under the same understanding. This
4 is all from a case that came up last year that
5 was cited in Mr. Millis' brief, State versus
6 Hamdan, 2003 WI 113 and 264 Wis. 2d 433 of the
7 Wisconsin Supreme Court case from 2003. And in
8 that case I believe the facts were a concealed
9 weapon in a grocery store in Milwaukee that was
10 held that there was a constitutional defense to
11 having a concealed weapon under the theory that
12 the new amendment to the constitution allowed
13 keeping a firearm for security purposes. And
14 so then reading what the jury instruction notes
15 say, because of Hamdan it says, first, by
16 pretrial motion, which has been filed by
17 Mr. Millis, they must show first that
18 Mr. Fisher's interest in concealing the weapon,
19 that under the circumstances his interest in
20 concealing the weapon to facilitate exercise of
21 his or her right to keep and bear arms outweigh
22 the interest of the state in enforcing the
23 concealed weapon statute; and second, that
24 Mr. Fisher concealed his weapon because
25 concealment was the only reasonable means under

1 the circumstances to exercise his right to bear
2 arms, and then it talks about in the note it
3 says, "The right to keep and bear arms for
4 purposes of security is at its apex when
5 undertaken to secure one's home or privately
6 owned business. Conversely, the State's
7 interest in prohibiting concealed weapons is
8 least compelling in these circumstances," and
9 goes on.

10 And then the constitutional right it says
11 is -- yeah, this is the interesting language I
12 think, it says at Page 67 it says, "If the
13 constitutional right to keep and bear arms for
14 security is to mean anything, it must, as a
15 general matter, permit a person to possess,
16 carry, and sometimes conceal arms to maintain
17 the security of his private residence or
18 privately operated business, and to safely move
19 and store weapons within these premises." Then
20 I'm supposed to find if the trial court finds
21 he's satisfied these requirements, the state
22 must, and then it says "still at the pretrial
23 stage," which I guess is now, "assert and show
24 probable cause to believe that the defendant
25 had an unlawful purpose at the time he or she

1 carried the concealed weapon. And then if it's
2 supported by evidence, then at trial the
3 unlawful purpose is to be submitted to the
4 jury. So -- and that's what the instruction
5 says. Is that your understanding, Mr. Millis,
6 of the way we have to do this, just the Court
7 is to examine whether or not -- or you need to
8 present evidence that he needed to do this?

9 MR. MILLIS: That's correct, your Honor.

10 THE COURT: And then the burden would
11 shift to the state if he showed that they
12 had -- that he had an unlawful purpose,
13 probable cause to show an unlawful purpose?

14 MR. NEMER: Well --

15 THE COURT: Go ahead. Now is the time to
16 tell me before I start listening to things.

17 MR. NEMER: The way you put it, I mean,
18 obviously he's got to show more than he had a
19 purpose. He has to show that his interest in
20 concealing the weapon outweigh the state's
21 interest in enforcing the concealed weapon
22 statute, and then he had to show the
23 concealment is the only reasonable means, it
24 isn't just that he has a reason.

25 THE COURT: Right, and then the burden

1 will shift to you to show probable cause that
2 he had an unlawful purpose in carrying it,
3 right?

4 MR. NEMER: If you're satisfied that
5 he's --

6 THE COURT: I mean, that's step three if
7 step one and two are met?

8 MR. NEMER: Yeah. I guess that is.

9 THE COURT: Go ahead, Mr. Millis.

10 MR. MILLIS: Your Honor, we'd call Scott
11 Fisher.

12 SCOTT FISHER,
13 after having been first duly sworn on oath, testifies
14 and says as follows:

15 DIRECT EXAMINATION

16 BY MR. MILLIS:

17 Q You are Scott Fisher?

18 A Yes.

19 Q Where do you live?

20 A 43 Main.

21 Q Black River Falls?

22 A Black River Falls, Wisconsin.

23 Q That's in Jackson County, correct?

24 A Yes.

25 Q What's your occupation?

1 A I am a -- well, I'm a bar owner as well as I have
2 five rentals, five different tenants.

3 Q But your primary occupation is the owner and
4 operator of the Cozy Corner tavern in Black River
5 Falls?

6 A Yes.

7 Q You understand that you've been charged with
8 carrying a concealed weapon, is that correct?

9 A Yes.

10 Q And can you tell the Court what events led to you
11 being charged with carrying a concealed weapon?

12 A About a week and a half prior to being arrested for
13 carrying a concealed weapon, all I generally work at
14 the bar is nights. About a week and a half prior to
15 that, I worked one night and went outside to start
16 up my vehicle because it was December, went outside,
17 retrieved my vehicle, pulled it around to the side
18 of the building and started it up -- well, left it
19 running, went back inside the bar to let the vehicle
20 warm up and when I went back outside to get in it
21 and go home the vehicle was gone.

22 Q What did you do when you realized your vehicle was
23 gone?

24 A At that time I called up to the sheriff's department
25 and informed them that my vehicle was stolen and

1 they sent down a city officer, Officer Noack.
2 Officer Noack came in and I informed him that my
3 vehicle was stolen and I told him that if they were
4 to catch up with them they were to use caution
5 because I had a loaded gun in the vehicle, and he
6 left and I went home. Later that morning I was
7 called and notified by Officer Haldeman, Deputy
8 Haldeman, that I would be receiving a citation in
9 the mail for transporting a loaded firearm.

10 Q Did you, in fact, receive a citation for that
11 offense then?

12 A About a week and a half after the fact, yes.

13 Q And that would have been about December 20th of
14 2003?

15 A Yes.

16 Q On the same date that you received the citation, did
17 you make contact with a DNR warden?

18 A Yes.

19 Q How did it come about that you made contact with a
20 DNR warden?

21 A I was actually on my way to McDonald's and seen the
22 DNR vehicle pull into the DNR office so I pulled in
23 there and found Warden Schultz. When he got out of
24 his vehicle, I got out of mine and I approached him
25 and I asked him if he knew how I could get ahold of,

1 I can't think --

2 Q Warden Bronsdon?

3 A Warden Bronsdon.

4 Q Scott, let me step back one second.

5 A Yes.

6 Q Did you make a specific trip out to the DNR station
7 on that date to contest the citation?

8 A That --

9 Q -- or were you on your way to --

10 MR. NEMER: I'm going to ask -- well,
11 let's not -- I'm going to object. I don't want
12 him leading the witness. Ask him where he was
13 going. I think he's --

14 THE COURT: I think he's already testified
15 that he was going to McDonald's, that's what I
16 heard.

17 THE WITNESS: Yup.

18 THE COURT: Go ahead.

19 Q (By Mr. Millis, continuing) When you made contact
20 then with Warden Schultz, what happened?

21 A He informed me that he didn't know how to get ahold
22 of Bronsdon. He said he hadn't seen him in several
23 days, asked if there was something he could help me
24 with, and I explained the situation of my truck
25 being stolen, me being issued a citation for

1 transporting loaded firearms and I basically told
2 him I didn't agree with that because I informed the
3 officers on my own that the guns were there for
4 their own safety.

5 Q Did you inform Warden Schultz the reason why you had
6 the weapons in your vehicle?

7 A I told him that I own a bar and that at different
8 times I am carrying large amounts of cash with me.

9 Q What happened after that?

10 A I informed Warden Schultz that I had a gun in my
11 vehicle, a loaded gun in my vehicle, and after
12 telling him that he asked to see it, at which time I
13 opened up my truck door, opened up my console,
14 removed the pistol from the center console, set it
15 on the seat pointing it away from him and me and
16 backed up as not to alarm him.

17 Q Did he give you any direction as far as how to
18 handle the weapon when you removed it from your
19 vehicle?

20 A No.

21 Q Did he direct you to move back away from the
22 vehicle?

23 A No.

24 Q You just did that on your own?

25 A Yes.

1 Q What happened after that?

2 A When I stepped back, he had stepped in, grabbed the
3 pistol, pulled the slide back I believe to check,
4 there was one -- there was one shell in the tube,
5 and at that time he said he would be back and he
6 went to his truck.

7 Q Did one of the city officers then come up there and
8 assist Warden Schultz?

9 A Yes, Officer --

10 Q Taylor?

11 A -- Dean Taylor.

12 Q And you were subsequently arrested for concealing an
13 armed weapon?

14 A Yes.

15 Q How long have you owned the Cozy Corner tavern?

16 A A couple of months shy of five years.

17 Q And is it common for you to have large sums of cash
18 on hand at the tavern?

19 A Yes.

20 Q That's just the nature of the business, correct?

21 A You need your money to start each day, you need your
22 change for the daily operations, you got your sales,
23 you got other things going on, yes.

24 Q Typically how much cash would you have in the tavern
25 by the end of the night?

- 1 A No less than a couple of thousand.
- 2 Q And what do you do with that cash upon closing?
- 3 A A certain amount of it stays at the tavern for
- 4 whoever opens up in the morning. They need the
- 5 money for the till, they need money to make change,
- 6 but the proceeds from the night generally go home
- 7 with me.
- 8 Q The cash that remains at the tavern, where do you
- 9 place that?
- 10 A I have a floor safe that I lock that in.
- 11 Q And how big of a floor safe is it?
- 12 A A foot by foot and a half. Small.
- 13 Q Is it one of these household Sentry safes --
- 14 A Yes.
- 15 Q -- that are very transportable?
- 16 A Yes.
- 17 Q Why don't you keep the balance of your cash in that
- 18 floor safe when you close the tavern?
- 19 A As small as the safe is, it can be removed. I don't
- 20 want -- if I'm going to lose money, I don't want to
- 21 lose any more than I have to.
- 22 Q Is it safe to say that you operate on a slim margin
- 23 in operating your bar?
- 24 A A slim margin?
- 25 Q Meaning that you rely on your profits to keep your

1 business afloat?

2 A Most definitely.

3 Q And if you were robbed and cash was stolen from you,
4 it would substantially affect your ability to
5 continue your business?

6 A Yes.

7 Q Do you transport the excess proceeds from your bar
8 each night?

9 A Not every night.

10 Q Why not?

11 A If it was not that busy one night, I may just throw
12 that money in the safe and deposit money the next
13 day along with the next day's proceeds.

14 Q Do you know on any given night how much cash you
15 will end up having by the end of the night?

16 A No.

17 Q So on any given night do you know whether you will
18 be transporting the cash from your tavern?

19 A No.

20 Q Approximately how many nights a week do you actually
21 transport cash from your tavern in your vehicle?

22 A Four or five.

23 Q And where do you take it?

24 A Some nights I'll run it directly up to the bank and
25 deposit it, other times I'll take it home with me

1 and deposit it the next day.

2 Q Do you believe there's a risk in transporting the
3 cash from your bar in your vehicle to either the
4 bank or to your residence?

5 A Definitely.

6 Q Why is that?

7 A Black River might be a small town but within the
8 last year or so we've had -- well, Tubby Krueger
9 operates downtown, he was knocked on the head and
10 was robbed personally. The Quick Cash in Black
11 River was robbed at gunpoint, the Dairy Way was
12 robbed at gunpoint and shots exchanged there, and
13 the Frame Shop downtown, that was armed by gunpoint.
14 So there's -- any time you're dealing with cash,
15 you're going to be dealing with the threat of
16 somebody wanting it and trying to take it.

17 Q In your experience is it pretty well known that bars
18 deal in a substantial amount of cash?

19 A Everybody knows bars have cash. When you're paying
20 two dollars a drink over a 10, 12-hour period, yeah,
21 there's a lot of cash in the end.

22 Q And typically what time of night do you close your
23 bar?

24 A I close my bar all the time, which is 2 a.m. or 2:30
25 a.m. on the weekends.

1 Q That wasn't a test, by the way. Have you been the
2 victim of a crime within the recent past?

3 A Yes.

4 Q And that was when your vehicle was stolen?

5 A I had my vehicle stolen from downtown.

6 Q And was it determined who stole your vehicle?

7 A Yes.

8 Q Who was that?

9 A Tyrone Decorah.

10 Q And where is Tyrone Decorah today?

11 A He was killed in a knife fight out at the Indian
12 mission.

13 Q Do you take any precautions in maintaining your
14 weapon in your vehicle?

15 A Well, I -- yes. The gun is loaded, the gun is
16 always on safety, and to me I keep it in the console
17 because it makes more sense than keeping it on the
18 seat. If I keep it on the seat, that window can be
19 broken and the gun stolen easily. So it's out of
20 sight and so, like I say, it's not accessible to
21 nobody. My vehicle is always locked with the
22 exception of one December night warming it up.

23 Q Have you had training in the handling of guns?

24 A Yes. I've done four-and-a-half years working for
25 the Department of Corrections at which time I

1 started -- we had to undergo weapons training every
2 year thereafter, we had to be qualified in weapons
3 and you always had to every -- every year you had
4 to -- I don't know how to term it, requalify -- not
5 requalify but stay up on the, you know, the force
6 continuum as far as the right to -- you know, what
7 force is needed, what warrants the use of firearms,
8 so on and so forth.

9 Q So not only have you had training in the use of
10 handling firearms but you've also had training in
11 the use of force?

12 A Yes.

13 MR. MILLIS: That's all I have, your
14 Honor.

15 CROSS-EXAMINATION

16 BY MR. NEMER:

17 Q You know it's a fairly fundamental safety statute in
18 this state that guns in vehicles are supposed to be
19 cased and unloaded, correct?

20 A Yes.

21 Q And despite that, when your vehicle was stolen, you
22 had your vehicle unlocked and you had a number --
23 you didn't just have this 40 caliber handgun in
24 there, you had a shotgun and a .22 rifle and a .22
25 pistol, right?

1 A There were four guns in there, yes.

2 Q And they were all loaded?

3 A All but the .22 pistol was not.

4 Q But the shotgun was?

5 A Yes.

6 Q And the rifle was?

7 A Yes.

8 Q So -- and those were all left in an unlocked
9 vehicle?

10 A It was at quarter to 3 in the morning, yes.

11 Q And unattended apparently because it got stolen?

12 A Yes.

13 Q So when you say that in the course of business you
14 keep the handgun in the center console of your
15 vehicle inaccessible to the public in your motion,
16 that's not quite true, is it?

17 A The pistol remains in the console at all times, yes.

18 Q Yeah, but -- but you had other weapons that were
19 accessible to the public, weren't they?

20 MR. MILLIS: Your Honor, I'm going to
21 object. I don't see the relevance of the
22 number of weapons in the vehicle on December
23 10th when this charge arises out of an incident
24 on December 20th. If he wants to ask about the
25 number of weapons in the vehicle on December

1 20, I don't have any objection.

2 THE COURT: I'll sustain that objection.

3 MR. NEMER: I'd like to explain why. He's
4 asserting in his motion that he keeps the
5 handgun inaccessible to the public. He's
6 obviously keeping guns in his vehicle at other
7 times when they're accessible to the public and
8 it's relevant

9 THE COURT: Well, sorry, I'm sustaining
10 the objection. We're talking about the time he
11 was arrested for.

12 Q (By Mr. Nemer, continuing) The console, is that
13 locked?

14 A The console?

15 Q Yeah.

16 A It don't have the capability of being locked.

17 Q Someone can get in your truck or vehicle and they
18 can get at the gun, right?

19 A If they gain access to the vehicle, yes.

20 Q Okay. Now, you could have carried this gun in the
21 holster, couldn't you, when you were driving your
22 vehicle?

23 A On my person or --

24 Q Yeah.

25 A Yes.

1 Q There was nothing that was preventing that?

2 A No.

3 Q And it wouldn't have been like being in the store
4 where people might be offended by seeing you
5 carrying a gun because they wouldn't see you driving
6 down the street and they seen you had a gun
7 holstered, would they?

8 A No.

9 Q Now, you say you were going to McDonald's when you
10 stopped at the DNR to talk to them about the
11 citations, correct?

12 A Yes.

13 Q So you weren't transporting money to your home or to
14 a bank at that time, were you?

15 A I had to work that night.

16 Q You didn't answer my question. You weren't
17 transporting money to your bank or your home at that
18 time, were you?

19 A No.

20 Q So you were keeping the gun at times in your vehicle
21 when you really weren't needing it to protect your
22 cash from your business, correct?

23 A I don't unload it because say driving to work
24 unloading it and then getting in my vehicle at the
25 end of the night and loading it don't seem practical

- 1 to me so I leave it loaded.
- 2 Q There's nothing that prevents you from not putting
- 3 the gun in the car until such time as you're
- 4 actually transporting cash, is there?
- 5 A No.
- 6 Q Now, let's -- just so we're clear, this incident
- 7 where you have this gun, it was in the truck, it was
- 8 not on your property, it was on DNR property,
- 9 correct?
- 10 A At the time --
- 11 Q At the time you got it seized.
- 12 A Yes.
- 13 Q You were not on your property, you weren't at your
- 14 business, basically you were going off and going to
- 15 McDonald's and taking care of other personal
- 16 business at the time, correct?
- 17 A Yes.
- 18 Q Have you ever been held up?
- 19 A No.
- 20 Q So if I got this correct -- well, never mind. What
- 21 time did you come to work that day?
- 22 A I had to work at 6.
- 23 Q Okay. So you weren't even starting work yet?
- 24 A No.
- 25 Q Going to McDonald's and on your way to McDonald's

1 you went to the DNR?

2 A Yes.

3 MR. NEMER: I have nothing further.

4 MR. MILLIS: Briefly, your Honor?

5 THE COURT: Yeah, go ahead.

6 REDIRECT EXAMINATION

7 BY MR. MILLIS:

8 Q Mr. Fisher, how practical would it be for you to
9 carry a holstered firearm between your vehicle and
10 into your bar and back to secure it in that manner?

11 A To me it don't seem practical. For one, I don't
12 know the -- to my knowledge carrying a loaded
13 firearm in town on your side. I guess I didn't think
14 that was allowed but --

15 Q What effect would that have with your patrons if
16 they saw you with a holstered firearm?

17 A That would not go over at all.

18 Q The gun is maintained in your property though,
19 correct, you keep it in your truck?

20 A Yes.

21 Q It's not the DNR's truck, right?

22 A Yes.

23 Q And you use your truck for business purposes, right?

24 A Yes.

25 Q To transport your cash receipts from your bar?

1 A Yes.

2 Q And that's probably one of your most vulnerable
3 times, correct?

4 A As far as I'm concerned, yes.

5 Q And most susceptible to be a victim of a crime?

6 A Yes.

7 Q You said that you haven't been a victim of a holdup,
8 correct?

9 A Correct.

10 Q Are you familiar with any other bars that have
11 experienced violence or been a victim of any violent
12 crime?

13 A It was just here last week that one of the
14 bartenders in here -- or from Whitehall had their
15 throat cut by somebody walking out of the bar, I
16 believe it was leaving the bar.

17 MR. NEMER: In what city was that?

18 THE WITNESS: I believe that was Whitehall
19 here, was it not?

20 MR. NEMER: News to us.

21 Q (By Mr. Millis, continuing) You're familiar with an
22 incident somewhere in the local area?

23 A Yes.

24 Q Where what happened?

25 MR. NEMER: Well, this is -- I think

1 unless he's got some news report or
2 something --

3 THE COURT: I've heard what he says. He's
4 worried about it from what he's been hearing.

5 MR. MILLIS: Sure. That's all I have.

6 CROSS-EXAMINATION

7 BY MR. NEMER:

8 Q You could -- there's no reason why you can't carry
9 the gun in a holster in the vehicle and then remove
10 it from the holster and once you're in your bar keep
11 it concealed, is there?

12 A Once again, walking into my bar with a holster and a
13 gun --

14 Q Okay. Then let me ask you this, is there any reason
15 why once you got back to your bar and you feel safe
16 you couldn't take your gun out and put it in a case
17 so people wouldn't see it?

18 A Once again, like I say, walking into the bar even
19 with a gun in a case don't work.

20 Q Do you take the gun into the bar?

21 A No.

22 Q So that's not even an issue, is it, whether someone
23 is going to see you with it in a holster? If you
24 were in your car with it holstered and when you got
25 to your destination and tavern if you then put it in

1 a case in your vehicle, there's no reason why you
2 couldn't do that, is there?

3 MR. MILLIS: Sorry, I'm going to object to
4 the form of the question.

5 THE COURT: I think it's argumentative.
6 Maybe you can phrase it as a question instead
7 of a statement, so I'll sustain.

8 MR. NEMER: All right.

9 Q (By Mr. Nemer, continuing) The -- there's nothing
10 that prevents you from keeping the gun in the
11 holster while you're in the vehicle, correct?
12 People aren't going to see it if that's a concern --

13 A Correct.

14 Q -- while you're driving? And when you get to your
15 destination, you say you don't take the gun into the
16 tavern anyway so there's no reason why you couldn't
17 take the gun out of your holster and then properly
18 case it as the law provides, is there?

19 A No, there isn't.

20 Q Pardon?

21 A There is no reason.

22 Q That's right. You don't have to keep it loaded,
23 uncased in your console in order to transport it, do
24 you?

25 A No.

1 Q Okay.

2 MR. NEMER: Nothing further.

3 REDIRECT EXAMINATION

4 BY MR. MILLIS:

5 Q Is there some security reason why you do? I mean,
6 why do you keep a loaded gun in your truck, why are
7 we here?

8 MR. NEMER: I think he's already answered.

9 THE COURT: Overruled. He can answer, go
10 ahead.

11 A To protect my life and my property, that is the
12 reason why I carry a gun. I've never been -- never
13 been arrested for knocking off stores or selling
14 drugs or anything. I'm a law-abiding citizen. I
15 run a respectable bar, which both of you know
16 because both of you have been in there. It's a
17 nice -- it's a nice place. I'm not out causing
18 trouble, I'm just out to protect what is mine and
19 I'm not going to let anybody take my money or
20 threaten my life so that is why I do what I do.

21 MR. MILLIS: That's all I have, Judge.

22 THE COURT: Thank you, sir.

23 MR. NEMER: I have no witnesses at this
24 time. I'd like to argue but since it's his
25 motion I guess Mr. Millis should go first.

1 THE COURT: Thank you, Mr. Nemer.

2 Mr. Millis, what would you like to say? Go
3 ahead.

4 MR. MILLIS: Well, your Honor, we
5 submitted a brief that I hope was helpful to
6 the Court. I'm --

7 THE COURT: Yes, it was very helpful.

8 MR. NEMER: A brief?

9 THE COURT: Yeah, that's what I had on the
10 brief.

11 MR. NEMER: I didn't receive a brief.

12 THE COURT: Oh. Well, we've got plenty of
13 time. You can take your time and read it. I
14 appreciated having it.

15 MR. NEMER: My fax number is not
16 apparently the one you've been sending it to,
17 but if you did a brief, I did not receive it.

18 THE COURT: Shows 538-4400.

19 MR. NEMER: That's not our fax number.

20 THE COURT: Whose is that?

21 MR. NEMER: That's the clerk of courts.

22 THE COURT: Did you bring one over to him?

23 MR. NEMER: I have not seen anything.

24 THE COURT: All right. I've got one here.

25 MR. NEMER: Well, this is -- and I

1 apologize to the Court.

2 THE COURT: No need to apologize. I
3 appreciated Mr. Millis doing the work. On my
4 own I read the Hamdan matter and he followed
5 through with it, so that's fine. I'm giving
6 you a chance to read it. Obviously you've
7 brought a case into court. You're going to
8 cite the same thing?

9 MR. NEMER: I'm going to cite a case --
10 well --

11 THE COURT: The Cole case maybe?

12 MR. NEMER: Exactly.

13 THE COURT: That's the same thing, so I
14 read that one, too, so you can have a minute
15 and read it. Cole involved a drug transport
16 case, so I read that one.

17 MR. NEMER: Cole involved guns in a
18 vehicle where a person expressed fear of
19 being --

20 THE COURT: He had drugs in it if I recall
21 correctly. Okay. You take your time and read
22 it and let us know when you're ready.

23 (A brief recess was taken.)

24 THE COURT: Okay, go ahead.

25 MR. MILLIS: Thanks, Judge. As I was

1 saying, I hope our brief was helpful in this
2 case.

3 THE COURT: Oh, yes.

4 MR. MILLIS: And I don't want to restate
5 everything I put in there, and I think we all
6 know what the Hamdan case says and the whole
7 dynamics of the carrying a concealed weapon
8 statute, vis-a-vis, the constitutional
9 amendment that was passed in November of '98
10 that allows individuals or citizens of the
11 state of Wisconsin to keep and bear arms for
12 their security. The Hamdan case, when that was
13 decided, carved out an exception to what used
14 to be a strict liability statute, the carrying
15 a concealed weapon act. It sets forth a
16 certain test that must be followed in
17 determining whether or not we can raise the
18 constitutional defense under Hamdan. The first
19 prong of it is the Court must answer
20 affirmatively that the defendant must have been
21 exercising the right to keep and bear arms
22 under circumstances in which the need to do so
23 was substantial. I believe the testimony that
24 has been put on the record so far does require
25 the Court to find that Mr. Fisher had a

1 substantial need to carry -- or to exercise his
2 right to carry and bear arms. He operates a
3 successful cash business in downtown Black
4 River Falls. It's well known he deals in cash,
5 it's well known that taverns deal with a lot of
6 cash, they're open late in the evening where
7 crime is more prone to happen. I think that's
8 common knowledge. Even though we are in Black
9 River Falls, we all -- you choose where you
10 live and I certainly wouldn't want to choose to
11 live in a high-crime area raising the family I
12 have, but Black River Falls is also susceptible
13 to crime and it's happened there and happened
14 by the Frame Shop just up the street from the
15 Cozy Corner was robbed by gunpoint. Tubby
16 Krueger's store, which is a block and a half
17 from Mr. Fisher's bar, he was knocked out by
18 some instrument which has left him now in a
19 nursing home. The Quick Cash Loans, which is
20 across the bridge from downtown Black River
21 Falls, was robbed by gunpoint, the Dairy Way at
22 the time it was closing was the subject of a
23 shootout, if you can believe that, it's right
24 in Black River Falls. So there is crime,
25 there's a level of risk that's involved in

1 operating a business there. There's a level of
2 risk that has increased because you're dealing
3 with a cash business.

4 Mr. Fisher, in the normal course of his
5 business, feels it is more secure for him to
6 transport his cash from his bar to either the
7 bank at closing time or to his residence. He
8 could keep it in a safe there, that's not the
9 issue here, and just to remind you, the safe
10 that he does have is a small safe that is very
11 transportable. So there's alternatives that he
12 could do but under the constitutional amendment
13 it gives him the right to bear arms for his own
14 security.

15 I think it's important to note, your
16 Honor, under 941.237 the legislature has almost
17 acknowledged that fact. They've acknowledged
18 that tavern owners have a substantial need to
19 bear arms in their tavern, that's an exception
20 to 941.237. Transporting his cash in the
21 normal course of business is just as vulnerable
22 or more vulnerable than operating the bar
23 itself. So he's more likely to be the subject
24 of a crime when he's transporting it rather
25 than being in the store itself, and the

1 legislature has already acknowledged that, that
2 tavern owners we know work late at night,
3 you're a cash business, you're susceptible to
4 crime and we want you to be protected, we want
5 you to have the ability to have a weapon in
6 your tavern. This is not a stretch. His truck
7 is an extension of his business. If he was a
8 taxi cab driver, I guess the query would be is
9 that their business? Is that their property
10 where they can have a weapon in their vehicle?
11 Certainly seems to me that they're operating
12 their business in their taxi cab just as
13 Mr. Fisher. He's continuing the operation of
14 his business when he transports his cash to
15 either his bank or to his residence.

16 The second prong of the test, your Honor,
17 did the defendant lack reasonable alternatives
18 to concealment under the circumstances to
19 exercise his constitutional right to bear arms.
20 There's always an alternative to carrying a
21 concealed weapon, there's no doubt about that,
22 but the issue is, is there a reasonable
23 alternative. The testimony that we have so far
24 anyways is there isn't a reasonable
25 alternative. The reasonable alternative that

1 was proffered is carry a gun in the holster
2 between the bar and truck and have it in a
3 holster while you're in the truck. That's not
4 a reasonable alternative.

5 THE COURT: Can I ask, if he had a
6 holstered, loaded weapon, wouldn't he still be
7 in violation of their other citation he got for
8 having an uncased gun?

9 MR. MILLIS: Transporting -- I believe he
10 would be, yeah.

11 THE COURT: Okay.

12 MR. NEMER: I have a different --

13 MR. MILLIS: If that's what they're
14 offering as an alternative, you're engaged in
15 some other illegal activity and it's certainly
16 not one of the reasonable alternatives.

17 THE COURT: You'll get your chance,
18 Mr. Nemer, and you can argue. I'm asking
19 Mr. Millis at this point.

20 MR. MILLIS: Certainly, your Honor.
21 Obviously, if the alternative is for you to
22 engage in another illegal act, that's not
23 reasonable. For you to avoid being charged
24 with carrying a concealed weapon, you have to
25 violate a different either ordinance or

1 statute, that's not a reasonable alternative.
2 He's taken the precautions, he keeps it in the
3 center console, his doors are locked, it's out
4 of view, out of -- and it's not accessible to
5 the public. He's had training in how to use a
6 weapon, he's had training in the proper use of
7 force. I think under the circumstances, and
8 that's what Hamdan says, these are facts
9 specific, case-specific determinations. Under
10 the circumstances of this case, I think both of
11 those prongs have to be answered in the
12 affirmative.

13 THE COURT: So when you read Hamdan, they
14 said the store owner can have one because he's
15 protecting their property and they carved out
16 that, and this in your mind would be just a
17 logical extension of their trying to interpret
18 when a person can carry a weapon for security
19 which is allowed by the amendment to the
20 constitution, and they haven't come through
21 since Hamdan with any other instructions as to
22 what it meant?

23 MR. MILLIS: They haven't, your Honor. I
24 know the state is going to argue the Cole case
25 but --

1 THE COURT: That was challenging the whole
2 constitutionality of the entire statute is the
3 way I understood it, and it also had different
4 facts that don't seem to be applicable here,
5 but I agree with you there.

6 MR. MILLIS: That's all I have.

7 THE COURT: Okay. Thank you. Mr. Nemer?

8 MR. NEMER: What the Court is being asked
9 to do is basically issue Mr. Fisher a license
10 to carry a gun. What's happened here is the
11 argument is the Hamdan case --

12 THE COURT: I'm not sure about that. I
13 think it's case-specific as to whether when he
14 was stopped and had this loaded weapon in his
15 console, was he exercising his right under the
16 constitution or is he violating the concealed
17 weapon law?

18 MR. NEMER: Yeah, and if you say that he
19 wasn't -- that he was privileged, basically
20 you're giving him a license to carry. Let me
21 explain why. First of all --

22 THE COURT: That sounds broader than
23 what's being asked for here.

24 MR. NEMER: May I just --

25 THE COURT: I think -- well, I can

1 interrupt you. I interrupted Mr. Millis.
2 What's good for him is good for you. So I'm
3 confused, when you say I'm giving him a license
4 to carry an arm, explain that better.

5 MR. NEMER: Sure. What happened here is
6 there's no testimony he was transporting cash.
7 He's saying he has a compelling need to carry
8 this gun concealed in order to protect himself
9 while he's transporting cash. That's not what
10 he was doing. What he was doing was going to
11 the DNR, he was on his way to McDonald's, he
12 hadn't even started work and he was on his way
13 to McDonald's and he stopped at the DNR to
14 complain about getting citationed for uncased
15 firearms.

16 The situation here is not the same as
17 Hamdan. Hamdan was a person's personal
18 business. Do you notice the Court in Hamdan
19 said personal business or home? They were not
20 extending it out into the world and basically
21 when you start putting guns into vehicles,
22 you're taking it out into interactions outside
23 the intimacy of the home or of a place of
24 business. That's personally owned by a person.
25 In fact, the legislature recognizes guns in

1 vehicles don't go together sometimes. In the
2 sense that it's illegal to have a loaded gun in
3 a vehicle, it's illegal to have an uncased gun
4 in a vehicle. In addition, it's -- it enhances
5 shooting into a vehicle or house if you do it
6 from a vehicle, it's a more serious felony.

7 Now, if the defendant is going to want to
8 argue that he could have carried this gun, he
9 could have done it without violating a criminal
10 statute, albeit he would have been violating a
11 forfeiture. He does that anyway when the gun
12 is loaded. He could have holstered it. He's
13 not like the situation in Hamdan where they
14 said well, if you walk around in your store
15 with a holster that's going to freak people
16 out. People aren't going to see a holster if
17 you're driving in the vehicle. It's not the
18 same situation. This isn't a situation where
19 he really wasn't using it as part of his
20 business. He was -- wants to keep the gun in
21 the vehicle. Does this mean he gets to drive
22 it to Mitchell Field too? I don't think so.
23 And without him at least showing that he was
24 actively involved in this compelling need that
25 he asserts at the time of the violation, I

1 don't think he's entitled to an extension of
2 the constitutional privilege to protect his
3 activity. He's not in his business, he's not
4 even in part of his transaction of his
5 business. He simply keeps the gun in there all
6 the time because it's convenient for when he is
7 transporting cash.

8 The Cole Case I think -- I grant you Cole
9 was making a broader argument, but I think you
10 can read between the lines. The Court doesn't
11 like the fact that a merchant got it for CCW
12 when he put a gun in his pocket in his own
13 store. They've got a different attitude to
14 somebody who's cruising around with loaded
15 handguns in their vehicle, and it doesn't
16 matter whether he had a little bit of
17 marijuana, Mr. Cole. The point is that a .380
18 was in the glove box and a 45 under the seat
19 and Mr. Cole argued that he also was fearful of
20 crime and he'd had a bad experience where he
21 had been beaten, so I think we're really
22 playing with fire if we're extending these
23 exceptions beyond the very tight exception that
24 the Supreme Court gave us in Hamdan, which
25 basically places where you'd almost never have

1 this violation reported anyway because people
2 aren't going to know about a CCW violation in
3 the home and they're not going to know about it
4 in a business for the most part. Where you get
5 into real problems is when you go out into the
6 world, and that's what's happening here. He
7 wasn't making a beeline for the bank or his
8 home to deposit cash. He's basically tooling
9 around Black River Falls on his way to
10 McDonald's and stops at the DNR to complain
11 about the violation he's got and he's got his
12 gun loaded with a round chamber concealed in
13 the vehicle at that time and that gets beyond
14 what Hamdan is allowing, and he did not have to
15 conceal it in order to protect himself.

16 THE COURT: All right. Well --

17 MR. MILLIS: Your Honor, can I just
18 respond real briefly?

19 THE COURT: Yeah, I don't care.

20 MR. MILLIS: I don't think you can read
21 Hamdan and say these are the only exceptions
22 because it's a fact-specific case. In fact, if
23 you read Hamdan, and they set out that example
24 that I cited in my brief, for instance, an
25 order to keep --

1 THE COURT: Could I get the brief back
2 from Mr. Nemer?

3 MR. NEMER: Sure.

4 THE COURT: You probably filed the
5 original in Black River anyway, didn't you?

6 MR. MILLIS: I'm sure I did.

7 THE COURT: Okay. Go ahead, where are you
8 looking at?

9 MR. MILLIS: I would be on Page 3, the
10 second cite there, that the Court in Hamdan set
11 forth an example where it said, "For instance,
12 in order to keep and bear arms for the purpose
13 of securing one's own property, a weapon must
14 be kept somewhere and may need to be handled or
15 moved, all within the weapon owner's property."
16 Mr. Fisher's weapon was within his own
17 property. They're not limiting this to just
18 real property, a building, it's to any property
19 of the weapon owner's that he has, as long as
20 it's within the weapon owner's property, he's
21 using it for security purposes. Clearly he is.
22 He testified that he was on his way to work, he
23 had to work that night, that's why he had the
24 weapon in his vehicle. So again, I don't think
25 that Hamdan can be read as limited as what the

1 state is arguing.

2 MR. NEMER: Does the property mean his
3 pants, too, so he can carry it basically --

4 THE COURT: You said Hamdan, he had it in
5 his pants.

6 MR. NEMER: I meant the defendant, if he
7 was walking around, if the property is the
8 issue, you could say that anybody -- if you
9 extend property to motor vehicles that are
10 going out into the world?

11 THE COURT: That's the issue.

12 MR. NEMER: Then you can say well, my
13 pants are my property and, therefore, I can
14 carry a gun in my pants to protect my property.

15 THE COURT: I think, Mr. Nemer, we have to
16 stick to the facts that we have in front of us.
17 That's an interesting theory of him driving to
18 Mitchell Field and him walking out with a gun
19 in his pants pocket. We better stick with the
20 facts here. If somebody in another case wants
21 that to be extended, that's something else, but
22 I'm just going to deal with the facts here and
23 I don't know what this opens the door to if I
24 go along with Mr. Millis. All I can do is go
25 along. There's a lot of irony here. A victim

1 of a crime ends up with a citation for carrying
2 a cased weapon when he goes to ask about gee, I
3 was just victimized, my vehicle was stolen and
4 now I get this citation in the mail. He gets a
5 criminal charge for having this loaded weapon
6 in the car. This is irony. And then on top of
7 it, the facts, I'll find -- and I found that
8 Mr. Fisher's testimony is entirely credible,
9 that he's trained in corrections apparently,
10 had experience in corrections, and trained in
11 the use of firearms, that he owns a bar for
12 over five years and has substantial cash that
13 he carries back and forth and is fearful based
14 on the crimes that have occurred even just in
15 the very recent past in Black River Falls that
16 he outlined in his testimony where people have
17 been subject of violent crimes and particularly
18 worried because of his nature of his business,
19 and he said the nature of his business he ends
20 up with at least he said probably on average at
21 least \$2,000 at the end of the night and he has
22 to take that back and forth either to the bank
23 or at home at night and the small safe that's
24 in the bar is not a good location for it.

25 Part of the problem here is where there's

1 some common sense. Mr. Nemer says it's
2 predictable times where you might be subject to
3 attack. Well, unfortunately, a lot of these
4 crimes are unpredictable. We don't know when
5 and where someone is going to be subject to an
6 assault, and this fellow, according to his
7 testimony, believes that he needs to have a
8 firearm to protect himself in his vehicle
9 because that's when he's transporting back and
10 forth with the money. Now, whether or not the
11 person -- we almost have to read the person
12 who's going to commit the crime. He's just
13 going to McDonald's now with his truck and he's
14 not on his way to -- he testified later that
15 day he was going right on to work at the tavern
16 at 6 and that's why he had the pistol in the
17 console, but we have to say oh, yeah, the
18 criminal -- or the person who intends to harm
19 him, yeah, knows this is a time that he doesn't
20 have money so I'm not going to attack him now,
21 I'm only going to attack him when he has money.
22 I don't know if the criminals are that smart to
23 know when to hit him. Anyway, so he was
24 trained, he thought he needed it, and he uses
25 the vehicle to carry proceeds. Now, the

1 first -- for carrying the proceeds of his bar.
2 And so first, does he have an interest to
3 facilitate his right to exercise his right to
4 bear arms; and then in the same Hamdan case
5 there at 264 Wis. 2d 433 at 477 they talk about
6 what it meant in the constitutional amendment
7 by needing a gun for security, and it said,
8 "The common understanding of "security" does
9 not implicate an imminent threat. Rather, it
10 connotes a persistent state of peace. We
11 believe the domain most closely associated with
12 a persistent state of peace is one's home or
13 residence," which apparently the state agrees
14 with, "followed by other places in which a
15 person has a possessory interest. A person is
16 less likely to rely on public law enforcement
17 for protection in these premises and is more
18 likely to supply his own protection. In fact,
19 a person who takes no initiative to provide
20 security in these private places is essentially
21 leaving security to chance. Firearms ownership
22 has long been permitted in Wisconsin. We infer
23 that the inclusion in the amendment of the
24 right to bear arms for security was intended
25 "to include a personal right to bear arms to

1 protect one's person, family, or property
2 against unlawful injury and to secure from
3 unlawful interruption the enjoyment of life,
4 limb, family, and property subject to
5 reasonable regulation." Then in this case
6 itself there's the grocery store owner could
7 have it.

8 Now, whether because he carried it in his
9 car he seemed to have an interest in having a
10 weapon to protect himself. Now, the theory the
11 state proposes is that -- oh, and that this is
12 outweighed by the enforcement in forming the
13 concealed weapon statute. The state's interest
14 in enforcing the concealed weapon statute would
15 be to prevent someone from pursuing the weapon
16 to commit some crime, and I'm not sure that
17 they've indicated that this person, weighing
18 the two, that it would give no weight at all to
19 why we pass this constitutional amendment if he
20 couldn't use it for protection. That's what he
21 did. Then the second step -- so -- so I think
22 he did have this interest and it outweighs the
23 state's interest in enforcing the concealed
24 weapon statute and, second, particularly in
25 this incident where the defendant poses no

1 threat as far as anyone says and then the
2 defendant concealed his weapon because
3 concealment was the only reasonable means of
4 exercising his right to bear arms. I'm not --
5 the state argues well, he could have had it
6 holstered even though if he holstered it, a
7 loaded weapon, it would only be a forfeiture
8 violation. It wasn't something he could do and
9 he could holster it, walk to and from the bar
10 to the parking lot. Somehow the idea of him --
11 I agree. I thought Mr. Fisher was credible
12 that the idea of him walking around with an
13 open-holstered weapon in downtown Black River
14 was not a valid method of a reasonable means to
15 exercise his right to bear arms and when you
16 compare it to keeping it in a closed box in his
17 vehicle, that doesn't give ready access to
18 people. So I think those requirements have
19 been met and that this was the only reasonable
20 means under the circumstances. So under the
21 constitution that they passed would only have
22 meaning and under the Court's ruling in Hamdan
23 to allow someone, particularly in this
24 particular circumstance, to have a weapon to
25 protect himself, the bar owner carrying a

1 substantial amount of cash, he doesn't know
2 when they might be after him, especially since
3 this is his vehicle, that according to his own
4 testimony it's the one vehicle he uses all the
5 time for business purposes for carrying the
6 cash, so I'll allow defense but now it turns
7 over to the -- and found that they met both
8 requirements that are outlined in 1335A of the
9 jury instructions.

10 So now the burden is on the state to show
11 there's probable cause to believe that he had
12 an unlawful purpose that he carried the
13 concealed weapon.

14 MR. NEMER: Well, the state doesn't have a
15 reason to believe he was planning to assault
16 someone or anything of that kind. I don't
17 believe I can -- I believe that's what that
18 means, is that he can't be using it as a
19 concealed weapon for the purpose of using it to
20 harm someone, threaten someone, or for purposes
21 of committing a robbery. So the only crime
22 that we were dealing with here was the CCW
23 itself. So I think the state does not have
24 evidence that he was planning on doing anything
25 with it illegal beyond carrying it the way

1 concealed as alleged in the criminal complaint.

2 THE COURT: All right.

3 MR. NEMER: The state is not going to
4 present evidence that he was doing anything
5 illegal beyond a concealed weapon.

6 THE COURT: Okay.

7 MR. MILLIS: Given that, your Honor --

8 THE COURT: I don't know what you can do
9 then.

10 MR. MILLIS: I guess we'd move to dismiss
11 the charges.

12 MR. NEMER: And the state -- well, we'll
13 not be arguing -- well, at this point the state
14 is going to have to consider appealing the
15 Court's decision.

16 THE COURT: I don't mind that. I'm
17 just -- that's fine. I think it's an
18 interesting one. I hope it goes up.

19 MR. NEMER: Procedurally the state doesn't
20 have evidence that he was going to do something
21 else.

22 THE COURT: I'll grant the motion to
23 dismiss based on what I allowed to happen.

24 MR. NEMER: Obviously the motion goes only
25 to his criminal charge?

1 MR. MILLIS: Yeah.

2 THE COURT: Does he still have the
3 citation?

4 MR. NEMER: He has the citation for the
5 first incident.

6 MR. MILLIS: He'll be before McAlpine on
7 Wednesday.

8 THE COURT: I don't have that one?

9 MR. NEMER: That's right.

10 THE COURT: So as far as the jury trial on
11 Thursday then, that's resolved -- or done for
12 now --

13 MR. NEMER: Done for now.

14 THE COURT: -- or depending on what
15 happens?

16 MR. NEMER: It's done for now.

17 THE COURT: As long as it's likely that we
18 might see -- the 3rd District might see this,
19 do you need any other fact findings that
20 basically the Court can supply at this level?

21 MR. NEMER: I don't know I guess.

22 THE COURT: I thought the testimony was
23 credible he testified to, and we just had the
24 one witness.

25 MR. MILLIS: Thank you, Judge.

1 THE COURT: Yup.

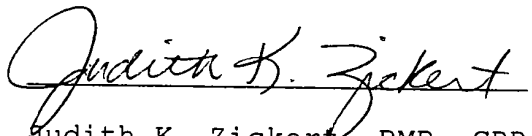
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3 (The proceedings came to a close at
4 approximately 2:39 p.m.)
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1 STATE OF WISCONSIN)

2 COUNTY OF TREMPLEALEAU)

3 I, Judith K. Zickert, Official Court Reporter
4 for the County of Trempealeau and the Seventh Judicial
5 Administrative District, State of Wisconsin, duly
6 appointed and qualified, do hereby certify that I
7 reported the foregoing matter, and that the foregoing
8 transcript has been carefully compared by me with my
9 stenographic notes as taken by me in machine shorthand,
10 and by me thereafter transcribed, and that it is a true
11 and correct transcript of the proceedings had in said
12 matter to the best of my knowledge.

13
14 Dated this 1st day of November, 2004.

15
16 
17 Judith K. Zickert, RMR, CRR

STATE OF WISCONSIN

CIRCUIT COURT

JACKSON COUNTY

For Official Use Only

State of Wisconsin vs. Scott K. Fisher

**Judgment of
Dismissal/Acquittal**

Date of Birth: 02-01-1974

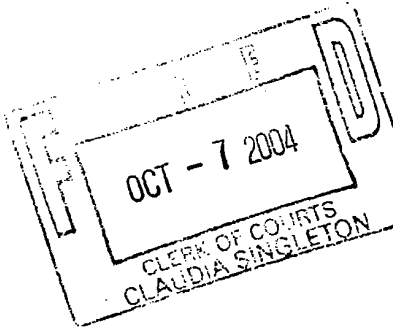
Case No.: 2004CM000026

IT IS ADJUDGED the charge(s) against the defendant is disposed of as follows:

Count	Offense Charged	Statute Number	Dispo Date	Disposition
1	Carrying a Concealed Weapon	941.23	10-01-2004	Dismissed /De Motion

IT IS ORDERED the defendant is discharged and any bond posted not otherwise forfeited is to be returned.

BY THE COURT:



Claudia Singleton
Circuit Court Judge/Circuit Court Commissioner/Clerk of Circuit Court

10-07-2004
Date

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case No.: 04-2989-CR
Circuit Court Case No. 04-CM-26

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

SCOTT K. FISHER,

Defendant-Respondent.

DEFENDANT-RESPONDENT'S BRIEF AND APPENDIX

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY,
THE HONORABLE JOHN A. DAMON, PRESIDING

SKOLOS & MILLIS, S.C.

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Attorney for Defendant-Respondent
Wis. State Bar No. 1027097
107 Main Street, P.O. Box 219
Black River Falls, WI 54615
(715) 284-9421

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is requested by the Defendant-Respondent. Publication of the court's decision is warranted because the issues raised is of statewide importance and one of first impression interpreting the interaction of §941.23 of the Wisconsin Statutes and Article I, Section 25 of the Wisconsin Constitution.

STATEMENT OF CASE

The defendant, Scott Fisher ("Fisher"), was the owner and operator of the Cozy Corner tavern in Black River Falls, WI¹. (R29:8; R.Ap. 1). Mr. Fisher had owned the tavern for approximately six years. (R29:12; R.Ap. 2). It was common for Mr. Fisher to have large sums of cash on hand at the tavern. (R29:12; R.Ap. 2). Some of the cash remains at the tavern to be available for conducting business the next morning. (R29:13; R.Ap. 3). The balance of the cash goes home with Mr. Fisher. (R29:13; R.Ap. 3). Mr. Fisher has a small safe to secure the money in at the tavern. (R29:13; R.Ap. 3). The safe is very transportable and can be easily removed from the tavern. (R29:13; R.Ap. 3).

¹ Mr. Fisher has since sold his tavern.

Mr. Fisher generally works at the bar at night. (R29:8; R.Ap. 1). The bar closes at 2 a.m. during the week and 2:30 a.m. on weekends. (R.29:15; R.Ap. 4). Mr. Fisher transports cash from the bar approximately four or five nights a week. (R29:14; R.Ap. 5). Mr. Fisher did not know on any given night how much cash he would have at the end of the night or whether cash would be transported from the bar on any given night. (R29:14; R.Ap. 5). Mr. Fisher delivers the cash to the bank or takes it home with him to be deposited the following day. (R29:14-15; R.Ap. 4-5).

At least four separate robberies had occurred in Black River Falls, WI, within the previous year from the date in which Mr. Fisher was arrested for carrying a concealed weapon. (R29:15; R.Ap. 4). Tubby Krueger, the owner/operator of an auto repair station in Black River Falls, WI, was knocked on the head and robbed. (R.29:15; R.Ap. 5). The Quick Cash store in Black River Falls, WI, was robbed at gunpoint. (R.29:15; R.Ap. 5). The Dairy Way in Black River Falls, WI, was robbed at gunpoint with shots being exchanged. (R29:15; R.Ap. 5). The Frame Shop in downtown Black

River Falls, WI, was robbed at gun point. (R.29:15; R.Ap. 5).

Mr. Fisher was a victim of a crime approximately 1 ½ weeks prior to the incident in which Mr. Fisher was charged with carrying a concealed weapon. (R.29: 8,16; R.Ap. 1,6). On that occasion Mr. Fisher's vehicle was stolen from outside of his tavern by Tyrone Decorah. (R.29:16; R.Ap. 6). Mr. Decorah was later killed in a knife fight just outside of Black River Falls, WI. (R.29:16; R.Ap. 6).

Mr. Fisher worked for the Department of Corrections for four-and-a-half years. (R.29:16; R.Ap. 6). In that capacity Mr. Fisher had to be qualified in weapons and underwent weapons training every year he worked for DOC. (R.29:16-17; R.Ap. 6-7). Mr. Fisher was also trained in the use of force during his employment with DOC. (R.29:16-17; R.Ap. 6-7).

On December 20, 2003, at approximately 4:00 p.m., Mr. Fisher went to the Department of Natural Resources office in Black River Falls, WI, to discuss with a DNR warden a citation that was issued to him. Mr. Fisher informed the warden that he had a loaded firearm in his

vehicle. (R.29:11; R.Ap. 8). When asked to see the firearm by the warden, Mr. Fisher opened his vehicle door, opened the console, removed the pistol from the center console, set it on the seat pointing it away from the warden and backed up in a manner so as to not alarm the warden. (R.29:11; R.Ap. 8). Mr. Fisher was thereafter arrested without incident for carrying a concealed weapon.

Prior to trial Mr. Fisher filed a motion to allow him to raise a constitutional defense. (R.16). The Trial Court heard the motion on October 1, 2004, and ruled that Fisher would be allowed to raise the constitutional defense. The State conceded that it had no evidence that Mr. Fisher was carrying the weapon for an unlawful purpose, therefore the trial court dismissed the charges against Mr. Fisher. (R. 29:47-48; R.Ap. 9-10).

ARGUMENT

THE CCW STATUTE CONSTITUTED AN UNREASONABLE AND UNCONSTITUTIONAL IMPAIRMENT OF SCOTT FISHER'S RIGHT TO KEEP AND BEAR ARMS AS GRANTED IN ARTICLE I, SECT. 25 OF THE WISCONSIN CONSTITUTION.

The citizens of the State of Wisconsin adopted Article I, Sec. 25 of the Wisconsin Constitution in November, 1998. It provides:

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

The Wisconsin Supreme Court found that the state constitutional right to bear arms is fundamental. State v. Cole, 2003 WI 112, ¶ 20, 264 Wis.2d 520, 537, 665 N.W.2d 328. The Court recognized it is a rare occurrence for the state constitution's Declaration of Rights to be amended. Id. Article I, Section 25 explicitly grants a right to bear arms. Id.

Prior to the enactment of Article I, Sec. 25, the Wisconsin carrying a concealed weapon law, sec. 941.23, Wis. Stats., was essentially a strict liability offense. State v. Hamdan, 2003 WI 113, ¶ 48, 264 Wis. 2d 433, 465, 665 N.W.2d 785. However, with the adoption of Article I, Section 25, the Supreme Court has held that regulations limiting a constitutional right to keep and bear arms must leave some realistic alternative means to exercise the right. Id. at ¶ 71.

In analyzing the state of the CCW statute in light of the enactment of Article I, Section 25, the Court recognized that "an individuals constitutional right to keep and bear arms for security, when exercised within one's own business and supported by a factual determination that no unlawful purpose motivated concealment of the weapon, will usually provide a constitutional defense to a person who is charged with violating the CCW statute." Id. at ¶ 6. Article I, 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." 'Security' was not defined by the amendment nor is it given any specific meaning elsewhere under Wisconsin law. Id. at ¶ 65. Supreme Court found that the common understanding of "security" does not implicate an imminent threat. Rather, it connotes a persistent state of peace. Id. at ¶ 66. The Supreme Court believed that the domain most closely associated with a persistent state of peace is one's home or residence, followed by other places in which a person has a possessory interest. Id. at ¶ 66. The

Supreme Court concluded that a citizen's desire to exercise the right to keep and bear arms for purposes of security is at its apex when undertaken to secure one's home or privately owned business. Id. at ¶ 67.

Hamdan involved a grocery store owner in Milwaukee, WI. Id. at ¶ 1. The defendant kept a handgun under the counter near his cash register in his store. Id. Plain clothed officers entered his store on the day after Thanksgiving to conduct a license check. Id. at ¶ 2-3. The officers asked the defendant if he kept a gun in the store and where it was located. Id. at ¶ 3. The defendant removed the gun from his waistband where he had placed it prior to the officers arrival and while in the process of closing the store. Id. The defendant was subsequently charged with carrying a concealed weapon. Id. at ¶ 4.

The Court concluded that Hamdan had a constitutional right to keep and bear arms for the lawful purpose of security at the time he carried his concealed weapon, that his conviction for carrying a concealed weapon was unconstitutional, and his conviction must be reversed. Id. at ¶ 84. In reaching

its holding the Court reached two legal conclusions, Id. at ¶ 80, that became the basis of its two part test in determining whether a defendant may raise a constitutional defense to a CCW arrest. See Id. at ¶ 86. A defendant must secure affirmative answers to the following legal questions before the defendant is entitled to raise a constitutional defense. Id. First, under the circumstances, did the defendant's interest in concealing the weapon to facilitate exercise of his right to keep and bear arms substantially outweigh the State's interest in enforcing the concealed weapons statute? Id. Second, did the defendant conceal his weapon because concealment was the only reasonable means under the circumstances to exercise his right to bear arms? Id.

1. Mr. Fisher was exercising his right to keep and bear arms under circumstances in which the need to do so was substantial.

In Hamdan, the Court concluded that, under the circumstances, Hamdan's interest in maintaining a concealed weapon in his store and carrying it personally during an unexpected encounter with visitors

substantially outweighed the State's interest in enforcing the concealed weapons statute. Id. at ¶ 81.

In reaching this conclusion the Court found:

Hamdan exercised the right to keep and bear arms under circumstances in which the need to exercise this right was substantial. He owned a grocery store in a high crime neighborhood and his store had been the site of past robberies and homicides. Hamdan himself had been a crime victim at the store. Hamdan had concerns not only for himself but also for his family and customers. He had good reason to anticipate future crime problems at the store and a need to provide his own security to deal with the problems. Acting on this need, Hamdan kept a handgun under the counter near the cash register but safely stored the weapon when the business was closed. Hamdan's transport of the weapon in his pocket on the night in question was incidental to his normal safe handling and storage of the firearm in his store. Meanwhile, the State's interests in prohibiting Hamdan from carrying a concealed weapon in his small store, under the circumstances on the night the police officers visited his store, were negligible. The police knew that Hamdan's store was a crime target and that Hamdan kept a weapon for protection. There is no evidence that Hamdan was prone to act irresponsibly or impulsively, and he was unlikely to do so in his own store. Therefore, enforcement of the CCW statute on these facts would seriously frustrate the constitutional right to keep and bear arms for security but advance no discernible public interest.

Id. at ¶ 82.

The facts before this court are similar to the facts in Hamdan. Scott Fisher is the owner of a tavern in Black River Falls, WI. There had been a number of armed robberies or attempted armed robberies in Black River Falls within the preceding year of the date that Mr. Fisher was arrested under the CCW statute. Mr.

Fisher himself had been the victim of a crime a mere week and one-half prior to the incident leading to his arrest for violating the CCW statute. In fact, the individual that committed the crime against Mr. Fisher was later killed in a knife fight just outside of Black River Falls. Mr. Fisher had good reason to anticipate crime problems. There was a need for Mr. Fisher to provide his own security. He carried large sums of cash from his business and transported the same in his vehicle at 2:00 a.m. in the morning.

Mr. Fisher's vehicle is an extension of his business, used for carrying the cash deposits from his tavern. The legislature has recognized the increase threat that tavern owners face by allowing tavern owners, their employees and agents to go armed on the premises of the tavern. See §941.237(3)(d), *Wis. Stats.* It is counterintuitive to say Mr. Fisher may have a concealed weapon in his tavern but as soon as he leaves the tavern with his business cash deposits he is no longer entitled to provide for his own security. Acting on this need, Mr. Fisher kept a handgun in the center console of his vehicle, safely stored out of

sight of the public and with the safety on. In this case Mr. Fisher was arrested at approximately 4:00 p.m. He was to start work at 6:00 p.m. The State makes hay out of the fact that Mr. Fisher wasn't at work or transporting cash at the time of his arrest. However, this is a red herring - the arrest was in close proximity to the time that Mr. Fisher was to start work. This fact should not preclude him from raising his fundamental, constitutional right to bear arms for his security.

The State's interest in prohibiting Mr. Fisher from carrying a concealed weapon in his vehicle under the facts in this case is also negligible. The police were certainly aware of the crime spree involving armed criminals that had occurred within the previous year of this incident. The police knew Mr. Fisher kept a weapon in his vehicle from prior contact with Mr. Fisher. There is no evidence that Mr. Fisher was prone to act irresponsibly or impulsively. In fact, Mr. Fisher had years of training on the use of firearms and the use of force through his employment with the Department of Corrections. As in Hamdan, the

enforcement of the CCW statute on these facts would seriously frustrate Mr. Fisher's constitutional right to keep and bear arms for security but advance no discernible public interest.

2. Mr. Fisher lacked a reasonable alternative to concealment, under the circumstances, to exercise his constitutional right to bear arms.

The Hamdan Court also concluded that Hamdan had no reasonable means of keeping and handling the weapon in his store except to conceal it. Id. at ¶ 83. In reaching this conclusion the Court found:

In the normal course of business, Hamdan concealed the weapon in an area that was accessible to him but inaccessible to the public. It would have been dangerous and counterproductive to openly display the weapon during business hours, and requiring him to do so would have seriously impaired his right to bear arms for security. When Hamdan was unexpectedly summoned to come to the front of the store at a time when he was closing up for the night, he had the option of putting the handgun in his pocket or leaving the handgun in the back room without knowing who had come into the store and whether his security was threatened. Carrying the handgun openly when he went back into the store would have shocked his visitors, seriously threatened his safety, and was not a reasonable option.

Id. at ¶ 83.

As in Hamdan, Mr. Fisher had no reasonable means of keeping and handling the weapon except to conceal it in the center console of his truck. Mr. Fisher kept

the weapon in a location that was not accessible to the public - in the center console of his locked vehicle. As in Hamdan, it would have been counterproductive to require Mr. Fisher to carry his weapon openly in his vehicle. Carrying the weapon openly by placing the weapon on the seat or on the dash would have seriously threatened Mr. Fisher's safety and that of the public in the event the weapon slid off the seat or dash and accidentally discharged. The State's suggestion that Mr. Fisher carry an unloaded weapon in a case, as a reasonable alternative, would eviscerate the fundamental right of Mr. Fisher to keep and bear arms for security. Carrying the gun openly in his vehicle is not a reasonable alternative.

CONCLUSION

The holding in Hamdan is not as limited as the State asserts in its brief. The Chief Justice recognized the broader application of the Hamdan case in her dissent wherein she stated:

The majority not only concludes that for the right to bear arms to mean anything it must mean that a person can conceal arms to "maintain the security of his private residence or privately operated business," but also that the constitutional right to bear arms in Wisconsin further protects the right of any other person to carry a concealed weapon if a court

determines that the person's interest in carrying a concealed weapon "substantially outweighs" the State's interest in enforcing the concealed weapons statute. The number of individuals who can fit under the umbrella is large.

Id. at ¶ 145. Mr. Fisher's interest in carrying a concealed weapon in the course of his business "substantially outweighs" the State's interest in enforcing the CCW statute under the facts of this case. For the reasons stated herein, the Defendant-Respondent respectfully requests the trial courts decision be affirmed.

Respectfully submitted this 4th day of February, 2005.

Skolos & Millis, S.C.

BY:

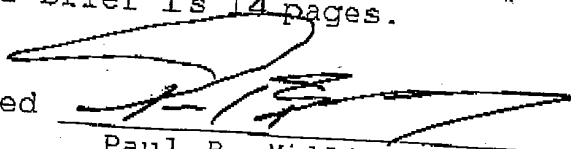


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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19 (8)(b) and (c) for a brief and appendix produced with a monospace font. The length of this brief is 14 pages.

Signed


Paul B. Millis

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1 A I am a -- well, I'm a bar owner as well as I have
2 five rentals, five different tenants.

3 Q But your primary occupation is the owner and
4 operator of the Cozy Corner tavern in Black River
5 Falls?

6 A Yes.

7 Q You understand that you've been charged with
8 carrying a concealed weapon, is that correct?

9 A Yes.

10 Q And can you tell the Court what events led to you
11 being charged with carrying a concealed weapon?

12 A About a week and a half prior to being arrested for
13 carrying a concealed weapon, all I generally work at
14 the bar is nights. About a week and a half prior to
15 that, I worked one night and went outside to start
16 up my vehicle because it was December, went outside,
17 retrieved my vehicle, pulled it around to the side
18 of the building and started it up -- well, left it
19 running, went back inside the bar to let the vehicle
20 warm up and when I went back outside to get in it
21 and go home the vehicle was gone.

22 Q What did you do when you realized your vehicle was
23 gone?

24 A At that time I called up to the sheriff's department
25 and informed them that my vehicle was stolen and

1 Q What happened after that?

2 A When I stepped back, he had stepped in, grabbed the
3 pistol, pulled the slide back I believe to check,
4 there was one -- there was one shell in the tube,
5 and at that time he said he would be back and he
6 went to his truck.

7 Q Did one of the city officers then come up there and
8 assist Warden Schultz?

9 A Yes, Officer --

10 Q Taylor?

11 A -- Dean Taylor.

12 Q And you were subsequently arrested for concealing an
13 armed weapon?

14 A Yes.

15 Q How long have you owned the Cozy Corner tavern?

16 A A couple of months shy of five years.

17 Q And is it common for you to have large sums of cash
18 on hand at the tavern?

19 A Yes.

20 Q That's just the nature of the business, correct?

21 A You need your money to start each day, you need your
22 change for the daily operations, you got your sales,
23 you got other things going on, yes.

24 Q Typically how much cash would you have in the tavern
25 by the end of the night?

- 1 A No less than a couple of thousand.
- 2 Q And what do you do with that cash upon closing?
- 3 A A certain amount of it stays at the tavern for
- 4 whoever opens up in the morning. They need the
- 5 money for the till, they need money to make change,
- 6 but the proceeds from the night generally go home
- 7 with me.
- 8 Q The cash that remains at the tavern, where do you
- 9 place that?
- 10 A I have a floor safe that I lock that in.
- 11 Q And how big of a floor safe is it?
- 12 A A foot by foot and a half. Small.
- 13 Q Is it one of these household Sentry safes --
- 14 A Yes.
- 15 Q -- that are very transportable?
- 16 A Yes.
- 17 Q Why don't you keep the balance of your cash in that
- 18 floor safe when you close the tavern?
- 19 A As small as the safe is, it can be removed. I don't
- 20 want -- if I'm going to lose money, I don't want to
- 21 lose any more than I have to.
- 22 Q Is it safe to say that you operate on a slim margin
- 23 in operating your bar?
- 24 A A slim margin?
- 25 Q Meaning that you rely on your profits to keep your

1 and deposit it the next day.

2 Q Do you believe there's a risk in transporting the
3 cash from your bar in your vehicle to either the
4 bank or to your residence?

5 A Definitely.

6 Q Why is that?

7 A Black River might be a small town but within the
8 last year or so we've had -- well, Tubby Krueger
9 operates downtown, he was knocked on the head and
10 was robbed personally. The Quick Cash in Black
11 River was robbed at gunpoint, the Dairy Way was
12 robbed at gunpoint and shots exchanged there, and
13 the Frame Shop downtown, that was armed by gunpoint.
14 So there's -- any time you're dealing with cash,
15 you're going to be dealing with the threat of
16 somebody wanting it and trying to take it.

17 Q In your experience is it pretty well known that bars
18 deal in a substantial amount of cash?

19 A Everybody knows bars have cash. When you're paying
20 two dollars a drink over a 10, 12-hour period, yeah,
21 there's a lot of cash in the end.

22 Q And typically what time of night do you close your
23 bar?

24 A I close my bar all the time, which is 2 a.m. or 2:30
25 a.m. on the weekends.

1 business afloat?

2 A Most definitely.

3 Q And if you were robbed and cash was stolen from you,
4 it would substantially affect your ability to
5 continue your business?

6 A Yes.

7 Q Do you transport the excess proceeds from your bar
8 each night?

9 A Not every night.

10 Q Why not?

11 A If it was not that busy one night, I may just throw
12 that money in the safe and deposit money the next
13 day along with the next day's proceeds.

14 Q Do you know on any given night how much cash you
15 will end up having by the end of the night?

16 A No.

17 Q So on any given night do you know whether you will
18 be transporting the cash from your tavern?

19 A No.

20 Q Approximately how many nights a week do you actually
21 transport cash from your tavern in your vehicle?

22 A Four or five.

23 Q And where do you take it?

24 A Some nights I'll run it directly up to the bank and
25 deposit it, other times I'll take it home with me

1 Q That wasn't a test, by the way. Have you been the
2 victim of a crime within the recent past?

3 A Yes.

4 Q And that was when your vehicle was stolen?

5 A I had my vehicle stolen from downtown.

6 Q And was it determined who stole your vehicle?

7 A Yes.

8 Q Who was that?

9 A Tyrone Decorah.

10 Q And where is Tyrone Decorah today?

11 A He was killed in a knife fight out at the Indian
12 mission.

13 Q Do you take any precautions in maintaining your
14 weapon in your vehicle?

15 A Well, I -- yes. The gun is loaded, the gun is
16 always on safety, and to me I keep it in the console
17 because it makes more sense than keeping it on the
18 seat. If I keep it on the seat, that window can be
19 broken and the gun stolen easily. So it's out of
20 sight and so, like I say, it's not accessible to
21 nobody. My vehicle is always locked with the
22 exception of one December night warming it up.

23 Q Have you had training in the handling of guns?

24 A Yes. I've done four-and-a-half years working for
25 the Department of Corrections at which time I

1 started -- we had to undergo weapons training every
2 year thereafter, we had to be qualified in weapons
3 and you always had to every -- every year you had
4 to -- I don't know how to term it, requalify -- not
5 requalify but stay up on the, you know, the force
6 continuum as far as the right to -- you know, what
7 force is needed, what warrants the use of firearms,
8 so on and so forth.

9 Q So not only have you had training in the use of
10 handling firearms but you've also had training in
11 the use of force?

12 A Yes.

13 MR. MILLIS: That's all I have, your
14 Honor.

15 CROSS-EXAMINATION

16 BY MR. NEMER:

17 Q You know it's a fairly fundamental safety statute in
18 this state that guns in vehicles are supposed to be
19 cased and unloaded, correct?

20 A Yes.

21 Q And despite that, when your vehicle was stolen, you
22 had your vehicle unlocked and you had a number --
23 you didn't just have this 40 caliber handgun in
24 there, you had a shotgun and a .22 rifle and a .22
25 pistol, right?

1 transporting loaded firearms and I basically told
2 him I didn't agree with that because I informed the
3 officers on my own that the guns were there for
4 their own safety.

5 Q Did you inform Warden Schultz the reason why you had
6 the weapons in your vehicle?

7 A I told him that I own a bar and that at different
8 times I am carrying large amounts of cash with me.

9 Q What happened after that?

10 A I informed Warden Schultz that I had a gun in my
11 vehicle, a loaded gun in my vehicle, and after
12 telling him that he asked to see it, at which time I
13 opened up my truck door, opened up my console,
14 removed the pistol from the center console, set it
15 on the seat pointing it away from him and me and
16 backed up as not to alarm him.

17 Q Did he give you any direction as far as how to
18 handle the weapon when you removed it from your
19 vehicle?

20 A No.

21 Q Did he direct you to move back away from the
22 vehicle?

23 A No.

24 Q You just did that on your own?

25 A Yes.

1 substantial amount of cash, he doesn't know
2 when they might be after him, especially since
3 this is his vehicle, that according to his own
4 testimony it's the one vehicle he uses all the
5 time for business purposes for carrying the
6 cash, so I'll allow defense but now it turns
7 over to the -- and found that they met both
8 requirements that are outlined in 1335A of the
9 jury instructions.

10 So now the burden is on the state to show
11 there's probable cause to believe that he had
12 an unlawful purpose that he carried the
13 concealed weapon.

14 MR. NEMER: Well, the state doesn't have a
15 reason to believe he was planning to assault
16 someone or anything of that kind. I don't
17 believe I can -- I believe that's what that
18 means, is that he can't be using it as a
19 concealed weapon for the purpose of using it to
20 harm someone, threaten someone, or for purposes
21 of committing a robbery. So the only crime
22 that we were dealing with here was the CCW
23 itself. So I think the state does not have
24 evidence that he was planning on doing anything
25 with it illegal beyond carrying it the way

D A 109

1 concealed as alleged in the criminal complaint.

2 THE COURT: All right.

3 MR. NEMER: The state is not going to
4 present evidence that he was doing anything
5 illegal beyond a concealed weapon.

6 THE COURT: Okay.

7 MR. MILLIS: Given that, your Honor --

8 THE COURT: I don't know what you can do
9 then.

10 MR. MILLIS: I guess we'd move to dismiss
11 the charges.

12 MR. NEMER: And the state -- well, we'll
13 not be arguing -- well, at this point the state
14 is going to have to consider appealing the
15 Court's decision.

16 THE COURT: I don't mind that. I'm
17 just -- that's fine. I think it's an
18 interesting one. I hope it goes up.

19 MR. NEMER: Procedurally the state doesn't
20 have evidence that he was going to do something
21 else.

22 THE COURT: I'll grant the motion to
23 dismiss based on what I allowed to happen.

24 MR. NEMER: Obviously the motion goes only
25 to his criminal charge?

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case No. 04-2989-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

SCOTT K. FISHER,

Defendant-Respondent.

ON APPEAL FROM AN ORDER ENTERED IN THE
JACKSON COUNTY CIRCUIT COURT, THE
HONORABLE JOHN A DAMON, PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ARGUMENT

Despite Fisher's claim that the CCW statute unreasonably impairs his rights under Article 1, Section 25 of the Wisconsin Constitution, the facts of record in this case and the case law show his need to carry a concealed weapon to facilitate the exercise of his right to keep and bear arms did not substantially outweigh the State's interest in enforcing the concealed weapon statute. Furthermore, he had reasonable alternatives to bearing the weapon concealed in the console of his truck.

UNDER THE CIRCUMSTANCES,
FISHER'S INTEREST IN
CONCEALING HIS WEAPON DID
NOT SUBSTANTIALLY OUTWEIGH
THE STATE'S INTEREST IN
ENFORCING THE CONCEALED
WEAPONS STATUTE.

Fisher claims that the facts in the present case are similar to those in State v. Hamdan, 2003 WI 113, 264 Wis. 2d 433, 665 N.W. 2d 785. However, in Hamdan the concealed carry occurred in Hamdan's privately owned business and was "incidental to his normal safe handling and storage of the firearm in his store". Id. at ¶ 82. In addition, the police were aware of the weapon's presence in Hamdan. Id. at ¶ 82.

While Fisher argues he was a crime victim and needed to protect his own security, there is a fundamental difference from the Hamdan case, in that Fisher went armed beyond his own premises, that is, driving around with a loaded, concealed pistol in the console of his truck. This by definition would take him to places and personal encounters beyond the narrow privately owned business setting Hamdan envisioned. Fisher tries to sidestep this fundamental difference by arguing his vehicle was an extension of his business used to carry cash from his tavern. This ignores that at the time of the violation Fisher was not transporting cash from the business; he was going to McDonald's and stopped to question the DNR citation he received. (29:20-21; A-Ap. 124-125) In other words, he was going about personal business. The truck was simply a means of transport, not an integral part of his business operation or premises. In any event, to accept the vehicle as the equivalent of the privately owned business in Hamdan would essentially grant Fisher a license to carry a gun wherever and under whatever circumstances he chose. It is Fisher, not the State, who is raising a "red herring" argument, trying to twist the narrow CCW exception in Hamdan to cover concealed carry by a business operator under virtually any circumstances.

Contrary to Fisher's assertion, the State has a substantial interest in prohibiting concealed carry in a vehicle. Traffic stops can be very dangerous for police; a concealed deadly weapon increases this danger unreasonably. Fisher's alleged proficiency in safely handling firearms apparently did not prevent him from leaving loaded firearms in a vehicle where a car thief could easily access them. (29:8-9; A-Ap. 112-113) The police became aware of the handgun when Fisher informed a warden of its presence. (29:11-12; A-Ap. 115-116) Firearms in vehicles are inherently dangerous. The legislature recognized this by requiring guns be unloaded and cased when transported. See Sec. 167.31(2)(b), Stats. There is a fundamental difference between concealed carry in the intimate controlled setting of a privately owned business and concealed carry in a vehicle that will be driven on highways and to government buildings and other public places. These are areas in which, unlike the home, an individual is more likely to rely on public law enforcement for protection and less likely to supply his own protection. Hamdan at ¶ 66. Fisher argues that it is counterintuitive to say that he may have a concealed weapon in his tavern, but not when he leaves the tavern. In fact, this is exactly the implication of Hamdan, that is, that effective assertion of the constitutional right under Article 1, Section 25 in a privately owned business requires permitting the concealed carry of a weapon, whereas concealed carry among the general public (such as in a vehicle) is entitled to less constitutional protection. Hamdan states that "a citizen's desire to exercise the right to keep and bear arms for purposes of security is at its apex when undertaken to secure one's own home or privately owned business. Conversely, the State's interest in prohibiting concealed weapons is least compelling in these circumstances...." Id. at ¶ 67. The clear implication is that the converse is true, that the right to keep and bear arms becomes less compelling when taken farther away from the home or privately owned business. The CCW statute becomes more compelling as the citizen enters the public arena.

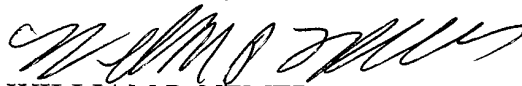
FISHER COULD HAVE EXERCISED
HIS CONSTITUTIONAL RIGHT TO
BEAR ARMS WITHOUT
VIOLATING THE CARRYING
CONCEALED WEAPON STATUTE.

Fisher's assertion that, like Hamdan, he had no reasonable means of keeping and handling the weapon except to conceal it is not supported by the facts in this case. Fisher could have taken steps to secure the weapon in his vehicle by affixing its case (for example with Velcro or a similar securing system) in plain view so as to avoid it sliding off the dash. The fact that Fisher admits a loaded gun in a vehicle is inherently dangerous supports the State's interest in keeping guns unloaded and in plain view when being transported. At a bare minimum, the gun did not have to be concealed to exercise the right to bear arms; police carry unconcealed weapons in vehicles as a matter of course.

CONCLUSION

For the reasons stated above and in the State's brief-in-chief, the court should reverse the order of the circuit court.

Dated this 18th day of February, 2005.



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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 951 words.

Dated this 18th day of February, 2005.

A handwritten signature in black ink, appearing to read 'William P. Nemer', written over a horizontal line.

William P. Nemer
Assistant District Attorney
(Special Prosecutor)