No. 21-910

In the Supreme Court of the United States

DAVID ZAITZEFF,

Petitioner,

v.

CITY OF SEATTLE,

Respondent.

On Petition for a Writ of Certiorari to the Washington State Court of Appeals, Division One

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The city of Seattle has a municipal code. This code prohibits the public carry of knives by ordinary, law-abiding citizens, speaking of knives which are "fixed blade" or of blade length greater than 3.5 inches.

The Seattle law is enforced against those who are merely in their cars or passing through.

David Zaitzeff is a repeat victim of crime who has worn and desires to carry (by means of wearing in a sheath, that is) a fixed blade knife or sword in Seattle. Crimes have been committed against Zaitzeff at Greenlake, in other parts of Seattle and in other cities. After unjust conviction, Zaitzeff presents three questions:

1. Whether the Second Amendment allows the government to prohibit ordinary law abiding citizens from carrying fixed blade knives, or knives of a specific blade length, when outside the home for self-defense?

2. Whether the *ex post facto* designation of Greenlake Park as a "sensitive area" by the Washington state appeals court is within its power and constitutional?

3. Whether the trial court violated my right to present a defense by precluding, *in limine*, the evidence and discussion of the elements of a defense of necessity, doing so on the basis that the threat was generalized rather than specific to that day?

LIST OF PROCEEDINGS

Supreme Court of Washington
No. 99734-9
David Zaitzeff, *Petitioner* v. City of Seattle, *Respondent.*
Date of Final Order: September 22, 2021

Court of Appeals of the State of Washington
No. 80436-7-I
David Zaitzeff, *Petitioner* v. City of Seattle, *Respondent.*
Date of Final Opinion: April 5, 2021

King county Superior Court
No. 19-1-02010-1 SEA
David Zaitzeff, *Appellant* v. City of Seattle, *Respondent.*
Date of Final Order: August 19, 2019

Municipal Court of the City of Seattle
No. 637319
The City of Seattle, *Plaintiff* v.
David Zaitzeff, *Defendant.*
Date of Final Order: January 2, 2019

It should also be noted that Zaitzeff had filed 3 different suits in federal court, in the Western district of Washington, at various times, and with various facts for standing, and to have struck down SMC 12A.14.080(B).

The first two of these suits were brought in federal court long before police had seized his sword in May 2018. The first two of these suits were both dismissed based on the allegation that Zaitzeff lacked standing. The city and the federal courts alleged that Zaitzeff had not been arrested or prosecuted for wearing a sword or knife. Based on that and given the city's claims of having no intention of prosecuting him for such conduct, Zaitzeff had no standing to sue to protect second amendment protection against the frivolous Seattle weapons law!

The city of Seattle and the federal courts in Washington contended that I must both break the law and be arrested or prosecuted in order to have standing to sue.

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case, within the meaning of Sup. Ct. R. 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

One very important remaining question in Second Amendment law is the right of people to bear weapons outside of their homes, weapons of their choosing, even if such weapons are not limited to rifles or handguns. This question includes the carry of knives, but it also includes carry of items such as stun guns as in *Caetano v. Massachusetts*, 136 S.Ct. 1027 (2016).

State and federal courts are severely, openly split on the topic of the right to carry such weapons in public.

Petitioner Zaitzeff asks that this Court reverse and remand the decision of the Washington state appeals court affirming the constitutionality of SMC 12A.14.080(B) as applied to knives and the decision of the Seattle Municipal court affirming the constitutionality of SMC 12A.14.080(B). Petitioner Zaitzeff also asks that this Court reverse the *ex post facto* decision of the Washington state appeals court to designate Greenlake Park a "sensitive area," thereby eliminating the Second Amendment protections of those who walk or pass within in it.

Petitioner Zaitzeff asks that the court declare that petitioner Zaitzeff had the right to present at trial, to a jury, all information and testimony that would support the defense of necessity, contrary to the decision of the trial court judge.

OPINIONS BELOW

The following opinions as found below need to be reversed and the case remanded:

The decision of the Seattle Municipal court affirming the constitutionality of SMC 12A.14.080(B) in case #637319, in a pre-trial hearing of date 11/08/18.

The decision of the trial court judge to prevent petitioner Zaitzeff from preventing any information or evidence supporting the defense of necessity, in case #637319, in motions *in limine* on the day of trial, date 01/02/19.

The decision of the Superior court judge affirming these two rulings, case #19-1-02010-1 SEA of date 08/19/19.

The decision of the Washington state appeals court, affirming the constitutionality of SMC 12A.14. 080(B), and further declaring that Greenlake Park is a "sensitive area" like a courthouse or school, and affirming the denial of petitioner Zaitzeff's right to present evidence for the defense of necessity, case #80436-7-1 dated 04/05/21, App.5a.

JURISDICTION

The Washington state court of appeals issued its judgment April 5, 2021. On September 22, 2021, the Washington state Supreme Court made their notice

that they would not hear the case further. This court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL TEXT, STATUTORY PROVISIONS, AND OTHER AUTHORITIES INVOLVED

A. Verbatim Text of Constitutional and Statutory Provisions

1. Constitutional Provisons

U.S. Const. amend. II

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const. amend. VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .

U.S. Const. amend. XIV

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law;

U.S. Const. Article 1, § 10

> No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in

payment of debts; pass any bill of attainder, *ex post facto* law . . .

2. Seattle Statutes

Seattle City Charter, Article IV, § 1A— Legislative Power, Where Vested

The legislative powers of The City of Seattle shall be vested in a Mayor and City Council . . .

Seattle Municipal Code 12A.14.080(B)

It is unlawful for a person to: . . .

B. Knowingly carry concealed or unconcealed on such person any dangerous knife, or carry concealed on such person any deadly weapon other than a firearm.

Seattle Municipal Code 12A.14.080(C)

C. Knowingly possess a firearm in any stadium or convention center operated by a city, county, or other municipality, except that such restriction shall not apply to:

1. Any pistol in the possession of a person licensed under RCW 9.41.070 or exempt from the licensing requirement by RCW 9.41.060, or
2. Any showing, demonstration, or lecture involving the exhibition of firearms.

3. Other Related Statutes

Berkeley Municipal Code 13.68
13.68.010—Dangerous weapon-Defined.

As used in this chapter, "dangerous weapon" means and includes, but is not limited to:

A. Any knife having a blade three inches or more in length, or any snap-blade or spring-blade knife regardless of the length of the blade;

[. . .]

F. Any "taser public defender" or other similar electronic immobilizer which causes, by means of an electrical current, a person to experience muscle spasms and extreme pain, followed by unconsciousness. (Ord. 4814-NS § 1, 1975: Ord. 2881-NS § 1, 1947)

13.68.020—Dangerous weapon—
Carrying prohibited—Exceptions.

It is unlawful for any person to carry upon their person or to have in their possession or under their control any dangerous weapon; provided, that it shall be a defense to any prosecution for a violation of this section if, at the time of the alleged violation, the instrument or device alleged to be a dangerous weapon was in good faith carried upon the person of the accused or was in good faith in their possession or control for use in their lawful occupation or employment or for the purpose of lawful recreation; and provided further, that the provisions of this section shall not apply to the commission of any act which is made a

public offense by any law of this state. (Ord. 2881-NS § 2, 1947)

RCW 9.41.251
Dangerous weapons—Application of restrictions to law enforcement . . .

(1) RCW 9.41.250 does not apply to:

(a) The possession or use of a spring blade knife by a general authority law enforcement officer, firefighter or rescue member, Washington state patrol officer, or military member, while the officer or member: . . .

B. Excerpts from Opinions Below and Other Authorities

1. Authorities Related to the Carrying Dangerous Weapons

Craig v. Boren, 429 U.S. 1990, 204 (1976).

"[T]he showing offered by the appellees does not satisfy us that sex represents a legitimate, accurate proxy for the regulation . . . "

From *D.C. v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008)

"When used with 'arms,' however, the term [bear] has a meaning that refers to carrying for a particular purpose—confrontation."

Id. at 2793

"[W]e find that they guarantee the individual right to possess and carry weapons in case of confrontation."

Id. at 2828.

> "In numerous instances, 'bear arms' was unambiguously used to refer to the carrying of weapons outside of an organized militia."
>
> "It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed."

Id. at 2818.

> " . . . the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding . . . "
>
> "The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is <u>really worth</u> insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all."

Id. at 2821.

> "A right to bear arms thus implies a right to carry a loaded gun outside the home . . . [A] right to keep and bear arms for personal self-defense in the eighteenth century could not rationally have been limited to the home."

Moore v. Madigan, 702 F.3d 933, 936 (7th Cir. 2012)

2. Excerpts of Other Court Precedents or Authorities

"[W]e can find no general right to carry arms into the public square for self-defense."—*Zaitzeff v. Seattle*—the Washington state appeals court, page 12, #80436-7-1, found in App.18a, line 15, quoting an earlier decision

"Seattle may decide fixed blade knives are more likely to be carried for malevolent purposes than for self-defense, and the burden imposed on innocent people carrying fixed blade knives is far outweighed by the potential harm of other people carrying such knives concealed or unconcealed." Wash state Appeals court in *Zaitzeff v. Seattle*, quoting an earlier decision, found at App.16a, line 1.

"[W]e consider only 'whether the challenged laws are substantially related to the achievement of that governmental interest.'" . . . *i.e.* public safety. Wash state Appeals court, App.20a, quoting an earlier decision.

"[T]he sensitive area distinction also appl[ies] here [in Greenlake Park] . . . " Wash state Appeals court, App.20a, line 23.

"Almost all national survey estimates indicate that defensive gun uses by victims are at least as common as offensive uses by criminals . . . "— CDC Report, *Be Informed: Gun Control*, 2013, as cited at justfacts.com/guncontrol, App.73a

STATEMENT OF THE CASE

A. Factual Background

Zaitzeff has been a victim of a number of crimes in a variety of locations and venues. These crimes have taken place in Seattle, in other cities, in some parks and in locations other than parks. These crimes include assault and robbery.

In certain years of his life, Zaitzeff has gone for walks on many days for exercise, recreation and fun. Desiring to reduce or deter crimes committed against him, Zaitzeff at times began to wear or carry a fixed blade knife or sword, on some days, on some walks while in Mercer Island or Seattle.

Zaitzeff believed that the Seattle law prohibiting the carry of knives was not constitutional. He filed 2 different suits in federal court to have SMC 12A.14 struck down as unconstitutional. Both were dismissed on the basis that Zaitzeff lacked standing, and based on the claim of the city that it had no intention of prosecuting Zaitzeff for the crime of wearing a knife or the sword, though in fact the city possessed photos and his admission to wearing or carrying such knives or swords on various days in Seattle. Photos of Zaitzeff bearing the sword in Seattle are part of the record in one of the federal lawsuits, dismissed due to lack of standing.

Zaitzeff walked while wearing the sword on his belt a number of times in 2017 at Greenlake. He did so, repeatedly, without crime or any fearful incident. Greenlake is a park many persons use for going for a

walk or run. Greenlake is and has been the location of crimes against Zaitzeff and against other members of the public.

The city of Seattle has a number of homeless encampments, many of which have existed as such for years. They are generally tolerated by the city and not cleared. These homeless encampments have been the source, location or nexus of a number of crimes. These crimes include drug use, drug dealing, and robbery. Crimes taking place in or adjacent to the Seattle homeless encampments include rape, assaults, and several notorious murders.

As for if and when any given homeless encampment in Seattle will be cleared, it is unknown.

Greenlake Park is the site of one of the largest and most notorious of the Seattle homeless encampments. The homeless encampment at Greenlake Park has existed for a number of years and it has now become a source of many news articles and petitions to the city to have it cleared up. News stories re the Greenlake homeless encampment include reports of tests alleging that untreated sewage has fouled the water of the lake. Greenlake residents believe that Greenlake has become more unsafe than ordinary suburbs due to the homeless encampment, resulting crime and drug use.

Crimes credibly alleged to be taking place at the homeless encampment of Greenlake include illegal drug use, drug dealing and prostitution. Moreover, the anti-social behavior at the homeless encampment of Greenlake has included reckless fire setting, or fire starting, resulting in destruction of property and danger to life.

Zaitzeff has personally witnessed several fights taking place among apparently homeless persons in Seattle. These fights took place in his presence, while Zaitzeff was merely on one of Zaitzeff's many walks in the city of Seattle. There is video showing open air illegal drug use taking place in Seattle on youtube Zaitzeff has seen.

Zaitzeff while on walks has also observed public defecation on the streets of Seattle by persons who appeared to him to be homeless. Zaitzeff has not threatened, assaulted or interacted with such persons, other than having been assaulted on at least one occasion by such. He is simply reporting some of the environment that an ordinary passerby will experience while in Seattle driving or on a walk, often, within a few yards of you as you are passing by.

Zaitzeff has neither threatened nor attempted to harm or clean up the homeless encampment or the homeless persons of the homeless encampment.

Zaitzeff mentions the Greenlake homeless encampment because the Washington state court in 2021 ruled that Greenlake is a sensitive area, precluding the application of Second Amendment protections.

On May 2, 2018, a person saw Zaitzeff on one of his walks and called 911. Police came and spoke with Zaitzeff and seized the sword. A few months later, the city filed a charge of carrying a weapon against him, based on his peacefully wearing a sheathed sword. Zaitzeff has walked in a wide number of locations in either Seattle or Mercer Island with the sword, and the walk May 2, 2018 was at Greenlake Park.

The sword was not brandished or waved at anyone. The sword was not used to commit any crimes, nor to

intimidate, coerce, rob or assault anyone. (If it matters, and if it helps, Zaitzeff was wearing his sword in a sheath, on his belt. The sword was not hanging from his neck, but the belt with the sheath had a strap that went up and over one of Zaitzeff's shoulders. As for why the police report claims the sword was hanging from my neck, it was bad human error on the part of police. Please note also that I spoke with both men and women on my walk that day and all those with whom I had conversations were people who initiated conversations with me.)

B. Procedural History

The city later sent Zaitzeff a summons to appear to face the charge of wearing the sword in public. Zaitzeff appeared. Zaitzeff by his attorney objected to the charge on the basis that the sword was a protected arm and that the SMC 12A.14.080(B) could not constitutionally applied to it and any other weapons like it.

Zaitzeff himself holds that SMC 12A.14.080(B) is unconstitutional on its face. Seattle police do not make any distinction between kitchen knives and military grade or hunting knives. In December 2015, the Washington state Supreme court ruled that knives which are designed for cooking are not constitutionally protected, but that knives which are designed for fighting may be, hypothetically. The Supreme court of Washington implied (2015) that it would later take up the question when the question was properly presented by a criminal conviction of a person wearing or bearing a fighting knife in public.

Because of the Wash state Supreme court ruling that some knives are not constitutionally protected as arms, Zaitzeff's attorney did not attack the SMC

12A.14.080(B) facially. He attacked it as applied generally to military or hunting knives and swords.

There was a hearing in November 2018 and the Seattle Municipal court ruled that SMC 12A.14.080(B) is constitutional and that the sword of Zaitzeff was not protected by the Second Amendment.

With that ruling, both sides prepared for trial. Among preparations was Zaitzeff hope and plan to present evidence to establish the defense of necessity. His wearing the sword prevented crime rather than caused it.

At the trial there were motions *in limine*. The city moved to have the judge prevent Zaitzeff from presenting any and all evidence that would establish any or all of the elements of the defense of necessity.

The judge granted the motion of the prosecution, based on asking Zaitzeff if he was in fact being threatened with specific, identifiable known threats on the date on which his sword was seized by police.

Although there was the general risk of robbery and assault against Zaitzeff, Zaitzeff did not have any advance knowledge of any certain assault or robbery against him taking place on that particular day!

So he answered that he knew of no specific threats against him, on that particular day.

On that basis, and at the urging of the prosecution, the trial court judge precluded all discussion, evidence and testimony which would establish elements of the defense of necessity.

The judge then did a bench trial with the evidence solely of the police report. The judge found Zaitzeff

guilty and sentenced him to a number of hours of community service and several years of probation.

Zaitzeff's attorney appealed the rulings. The court hearing the first appeal was King county Superior court. The judge affirmed the doubtful rulings and affirmed the conviction.

Zaitzeff's attorney appealed again, this time to the Washington state court of appeals. The Washington state court of appeals agreed to hear the case.

The Washington state court of appeals ruled that the sword was a protected arm. However, the court also reasoned or concluded that no one has the right to bear weapons in public, of any type. The Washington Appeals court quotes the ruling of another court to the effect that no one has the right to bear arms of any type anywhere! The Washington state appeals court approves of this ruling!

Based on the idea that no one has the right to bear weapons in public, the appeals court then applied intermediate scrutiny to the case. The court says, "Seattle may decide fixed blade knives are more likely to be carried for malevolent purposes than for self-defense, and the burden imposed on innocent people carrying fixed blade knives is far outweighed by the potential harm of other people carrying such knives . . . " App.16a.

Additionally, the appeals court, then, without evidence or legislative enactment, at the urging of the prosecution, then declared that Greenlake Park was a "sensitive area." Even if the anti-weapons-carry law itself was found generally unconstitutional, it would be applied to Zaitzeff, and any others who walk at Greenlake Park!

Even if Zaitzeff is right on the Second Amendment protecting his right to bear the sword, he is still guilty! Ha, ha! App.20a.

Zaitzeff's attorney petitioned the Wash state Supreme Court for review. The Washington state Supreme court declined to hear the case further. The Wash Supreme court notified all of their refusal to hear 09/22/21.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE OPEN AND ACKNOWLEDGED STATE & FEDERAL COURT SPLIT ON WHETHER THE SECOND AMENDMENT PROTECTS THE RIGHT TO BEAR KNIVES, AND OTHER WEAPONS, OF ONE'S OWN CHOOSING, OUTSIDE THE HOME.

This Court has stated that the Second Amendment guarantees the right to possess and carry weapons in case of confrontation. *See D.C. v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008). The federal appeals court in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), explicitly says that these rights necessarily include the right to bear weapons in public and not merely at home.

In distinction to this, the Washington state court of appeals quotes with approval a court ruling that there is no right to carry weapons in public. *Heller* clearly says that members of the public have the right to carry weapons. "[W]e find that they guarantee the individual right to possess and carry weapons in case of confrontation."

It appears that that sentence and several like it, from the *Heller* decision, are completely omitted from the decision of the Washington Appeals Court! The Appeals court somehow did not notice that *Heller* says we have the right to carry weapons! Are the Washington courts blind? Did the court not wish to discuss it?

Note that either before 1984 or at least since 1984, in Oregon, people have had the acknowledged right to bear knives and swords. There is therefore a clear contradiction between Washington and Oregon on the topic of the right to carry knives. *See Oregon v. Delgado*, 692 P.2d 610 (1984) if it is helpful, clearly analyzing the knives as weapons and concluding that they are and were 2nd amendment protected.

The appeals court applied intermediate scrutiny to the case. The court does so without requiring any evidence from the city to establish the case of the city. The appeals court reasons as if the assertions of the city about knives or the danger of knife crime is true, but there is no evidence to establish the assertions of the city.

The court quotes an earlier court saying Seattle may do whatever it wishes when it comes to banning the carry of knives.

The law of Seattle constitutes a total ban on the carry, for self-defense, by nearly all law abiding persons of fixed bladed knives and swords. As a total ban on one type of weapons hypothetically protected by the Second Amendment, strict scrutiny should be applied and not intermediate scrutiny. However, even by intermediate scrutiny the law fails.

The city of Seattle has provided no evidence that its people are safer due to a ban on the carry of fixed

bladed knives. The city has no such evidence. None is cited, proposed or suggested by the Washington state appeals court. The appeals court simply says that the city of Seattle can choose to imagine whatever it likes, and then abrogate the exercise of Second Amendment rights based on imagination, decree and supposition! Such decree and supposition will later be applied to handguns and to stun guns. In fact, it is already being done.

II. SMC 12A.14.080(B) Robs People of Their Second Amendment Rights.

Zaitzeff and many others have personal reasons for not wanting to carry a handgun in public and perhaps to not even own a handgun. Zaitzeff, and many others like him, wish to choose from a variety of weapons that might or might not include a handgun. These may be a knife, sword, stun gun, pepper spray or other weapons.

The reasons for preferring a knife or stun gun to a firearm are numerous for significant segment of the population. The survey shows that in fact, of those who are crime victims, those who bear the knife or spray in self-defense outnumber those who carry a gun.

Some will prefer a knife for the reasons of cost, weight, possible liability due to mistake or error and to prevent minors, elderly with dementia at home or robbers from taking the gun and misusing it.

It should not be thought that such weapons are so ineffective as to not be protected by the 2nd amendment. A few years ago a man with pepper spray took down and disarmed an active shooter on a college campus in Seattle. A man might think of knives as being useless, but for Dun Meng, while he was forced

to drive around after being carjacked by the Tsarnaev brothers, a knife might have been useful.

The text, history and tradition of the Second Amendment and this Court's binding precedents indicate that carrying a weapon of whatever reasonable type outside the home is protected. This right is not limited to rifles or handguns. This right placed in the Second Amendment includes the right to bear a knife or sword.

Knives and swords have been used as weapons for thousands of years. There is no doubt that they have been and were recognized as weapons and as such, are protected by Second Amendment. Knives and swords were essential to building civilization in many areas prior to gunpowder. There is however a clear dispute about whether or not states and cities have the power to forbid the public carry of knives. The state and federal courts are split.

Now, note that Washington state has a law against people possessing or bearing switchblade knives, which they call spring-bladed knives. Yet Washington state also makes an exception to the law in favor of police and firefighters, because the state knows that those knives will be essential at times for self-defense, or to save life in time of fire or in case of car accident. The state does not trust the public with them, but they do trust the police, because they know. Those knives—and knives in general—save lives!! *See* RCW 9.41.251

In times of self-defense, fire or car accident, your knife will save your life, although it is certain that in some cases an ordinary folding knife will not! And, a fixed bladed knife or a spring-bladed knife will!!

The question of knives is not exclusive only to Zaitzeff. It is not exclusive to Seattle. Others have been prosecuted under the SMC in a variety of cases in which they were carrying knives or a sword for self defense.

Moreover, Seattle is not the only city to forbid the carry of a knife, or stun gun, in public.

The city of Berkeley, California is one of the many which also forbid the carry of the vast majority of makes of knives.

The ruling by the court of appeals means either that no one has any particular right to bear arms, including knives and stun guns or it means that they and other courts will decide who has the right on a case by case basis, and on a knife by knife basis, on a block by block basis.

Now note that the city of Santa Cruz has no law against the wearing or carrying of knives per se in public. It does not have any problems in particular, worse than those of Seattle, which has the SMC 12A. 14.080(B).

Santa Cruz has a beach and by the beach there is a boardwalk and a sidewalk. Some people sell trinkets, food, clothing and other goodies on the sidewalk by the beach of Santa Cruz on warm sunny days.

Among them is a man who sells various fixed bladed knives.

Yet no one claims that Santa Cruz or the Santa Cruz beach is dramatically less safe than Seattle because of the lack of a law forbidding the wearing of a knife, or because of the proximity to a man with a table of fixed blade knives!

III. SCM 12A.14.080(B) DOES NOT PROMOTE PUBLIC SAFETY.

The city of Seattle has presented no evidence that the ban on the carry of knives compared with either general carry or the carry after obtaining a required permit promotes public safety. Even a kid in high school would make the educated guess that depriving the Medici family in Florence in 1478 of the right to bear matchlocks or knives would have diminished their safety—and public safety—and not promote it. If the Medicis had been deprived of the right to bear knives or sword for their defense, after the assassination of Giuliano de Medici in 1478, his brother would then have been Lorenzo the Dead rather than Lorenzo the Magnificent.

The book ARMED AND CONSIDERED DANGEROUS has had a number of editions. It is for sale on Amazon and it has research which is cited at justfacts.com. This book includes the results of one or several surveys of prisoners in prison after convictions for crimes of violence. As cited at the website justfacts.com, about 1/3 of prisoners in prison for violent crime, in about 1982, had been scared off, wounded or captured by an armed victim and about 2/3 of such prisoners knew personally other criminals who were similarly stopped by fear of an armed victim or the use of force by an armed victim.

This court has reviewed the case of Jaime Caetano and read of one such instance. There are thousands of others. There are hundreds of thousands of others. The cities of Seattle and of Berkeley deny the right of law abiding citizens to deter or stop crime, by means of knives, while out in public.

In 2007 the Gallup polling organization polled people on the topic of weapons and self-defense and self-defensive actions. The Gallup polling group found that 12% of respondents said that they carried or had carried a knife for self-defense. Gallup further broke up the respondents by whether or not they had been a victim of crime. Of those who had been victims of crimes, 20% of Americans report having worn or carried a knife to prevent, deter or stop future crimes against them, twice the number as those who had not been a victim of crime.

The number of those carrying knives for self-defense is likely to have been much higher, were it not for the laws in some cities or states making the carry of knives for self-defense illegal or making it far more cumbersome and/or liable to subject persons to prosecution for error.

IV. THE RULING AND REASONING OF THE WASHINGTON STATE APPEALS COURT, IF IT STANDS, WILL DESTROY SECOND AMENDMENT PROTECTIONS FOR GUNS AND FOR THE STUN GUNS SUCH AS JAIME CAETANO CARRIED.

In order for one of this Court's recent precedents, *Caetano*, to be effective, for Zaitzeff and for others like Jaime Caetano, the Second Amendment right must be recognized as effective both in the home and also out in public, for both firearms and for other protected weapons.

The city of Berkeley also forbids the public carry of electronic taser type guns. In other words, if the events of Jaime Caetano (2008-2016) had taken place in Berkeley, California rather than in Massachusetts,

Jaime Caetano would have been prosecuted and convicted for public carry of a stun gun.

The ruling and reasoning of the Washington state appeals court is a noxious weed. It will, if left unchecked, destroy the rights to carry guns and to carry stun guns.

At times this court ponders reversing precedent and whether it is needed. The Washington Appeals court ruling is so bad that it is reversing part of *Heller*, simply by ignoring the relevant sentences cited from it.

There are in America a variety of religious, sexual and social minorities and there are battered women. To deny them the right to carry a weapon of their choosing is to sentence them to being beaten or killed.

V. GREENLAKE PARK IS NOT A "SENSITIVE AREA." A COURT DESIGNATING IT AS SUCH IS NOT CONSTITUTIONAL, RIDICULOUS AND CREATES *EX POST FACTO* LAW.

A. Making New Designations of Sensitive Areas as Sensitive Is a Legislative Function and Not a Judicial Power.

In the past 50 years there are various state legislatures, county and city councils which have defined or designated certain areas as sensitive, even if the phrase "sensitive areas" was not used. We even have an example of this in SMC 12A.14.080(C) which is the law of Seattle as it relates to stadiums and the convention center.

This law as written by the city council and in some states, the legislature has drawn up laws against guns and weapons in courtrooms, or, in schools.

And in every case known to Zaitzeff, it has been Congress or a legislature or council which has drawn up such a law, and such laws have had an effective date.

Designating new areas as sensitive areas is not a judicial power any more than is declaring that sections of the Rocky Mountains are national parks. That is a power of Congress or various legislatures and councils.

The only case even somewhat related is a court finding that the post office buildings are a part of the federal buildings in which weapons are prohibited. The federal court in that case did not make a new designation of a new area as being sensitive!

B. Even If Designating Sensitive Areas as Sensitive Is a Judicial Power, It Cannot Be Done in a Way That Creates *Ex Post Facto* Law.

The Appeals court was dealing with a law that they know or suspect is going to be found unconstitutional. We know it from their intentional or careless omission of many relevant sentences of the *Heller* decision. They and the city attorney aim to avoid further review of the law by claiming that Greenlake Park is sensitive area in which the 2nd Amendment does not apply any more than it would in the local courthouse! But they have made that designation, about Greenlake Park, in 2021, which is 3 years after the events leading to the conviction of Zaitzeff for

bearing the sword! SMC 12A.14.080 already contains a section for sensitive areas and Greenlake Park is not listed there!

If Washington courts can make new designations of new areas as sensitive areas, without legislative warrant or the section of existing law, such as SMC 12A.14.080(C), no one can reliably bear weapons in public without endless risk of arbitrary prosecution!

C. If Designating Sensitive Areas as Sensitive Is a Judicial Power, Then It Merits Judicial Review of Its Constitutionality *De Novo*.

If designating areas as sensitive areas is a judicial power, then, Zaitzeff requests that this Court review the designation made by the Washington state appeals court. Let this Court make an independent determination if Greenlake Park is a "sensitive area."

D. Designating Greenlake Park as a Sensitive Area Is Ridiculous.

If there is a meaningful Second Amendment it would surely apply when walking in a park used for a homeless encampment, with the alleged drug use, dirty needles, drug dealing, shootings and homicides. Greenlake Park is not the site of any homicides known to Zaitzeff, but homicides and shootings have taken place at a number of the similar Seattle homeless encampments. Greenlake has been the site of robbery and reckless fires.

A search for Greenlake homeless Seattle arson brings up more articles with edifying reading. One story, quite fun, is of some homeless encampment

people who set fire to a propane tank. That took place 2 or 3 miles from Greenlake. At Greenlake, the homeless encampment people have merely set fires which then burned the tents and property of the other homeless encampers. The Greenlake homeless encampment people have not yet progressed to burning propane tanks.

We should perhaps remember von Rundstedt, the German general, in the movie A BRIDGE TOO FAR. After being told he had never lost a battle, von Rundstedt says "I'm still young. Give me time."

Some of the news articles specific to Greenlake Park report that untreated sewage has been fouling the water of the lake. This is the same area that the appeals court tells us, by judicial fiat, in a declaration in 2021, *ex post facto*, that it is a sensitive area.

Now, in the *Heller* decision, Scalia wrote and this Court affirmed that enumerating the rights places them beyond endless *ad hoc* determinations as to whether or not they apply! *Heller* at 2862.

Yet now, the city of Seattle has had a court declare or imply that because minors are at times present at Greenlake, the usual protections of the Second Amendment shall not apply! Many adults are also present.

Greenlake Park is not exclusive to minors nor is it primarily for minors.

SMC 12A.14.080(B) is itself unconstitutional and no law at all. It can only be sustained, if sustained at all, by means of *ex post facto* additions to it, and the claim that any number of people were carrying a knife in the same vicinity as some minors! But that is true of every block in Seattle!

Now, the whole city of Seattle, block by block, is in limbo and it will be for years, for the Second Amendment, for knives. It is in neither heaven nor hell, if this court tolerates a lower court designating Greenlake Park, the site a large homeless encampment and a playground, as a sensitive area *ex post facto*!

VI. SMC 12A.14.080(B) Is Not Constitutional Under Intermediate Scrutiny.

The Washington state appeals court reasons from intermediate scrutiny and the claim that the SMC promotes public safety to the immediate conclusion that it is constitutional.

But this is not correct reasoning, because of *Craig v. Boren*, 429 U.S. 190 (1976). As every law student knows, in *Craig v. Boren* the court examined a law allegedly promoting public safety by forbidding men under 21 from buying 3.2% beer. The law was supposed to function to prevent drunk driving and car accidents by young men!

The state of Oklahoma defended its law with a series of statistical studies and proofs that young drivers got killed or in car accidents more frequently than older drivers, that men did so more frequently than women, and that men under 21 were arrested for drunk driving about 10 times more frequently than women under 21!

This court, in its 7 to 2 in its decision, said, "The appellees [have] introduced a variety of statistical surveys . . . [There are] obvious methodological problems . . . if maleness is to serve as a proxy for drinking and driving, a correlation of 2% [is not sufficient] . . . " *Craig v. Boren.*

Back in 1976 this Court put four paragraphs of a decision to summarize, review and critique the statistical evidence put forward by Oklahoma. After the paragraphs, they say, It is not enough.

Today, there are zero paragraphs, because Seattle has provided zero evidence.

If people are allowed carry knives, the correlation of knife carry with actual crime will be less than 5%, just as it is in Santa Cruz every single day of the year. Just as it is in Oregon every day of the year!

Craig v. Boren establishes the idea that the mere invocation of "public safety" is not sufficient to justify laws which suppress fundamental rights. The court is within its rights and duty to ask for proof or evidence of a supposed public safety benefit, if it must measure by intermediate scrutiny. In the case of *Craig v. Boren*, the proof was insufficient, speculative and/or too small to justify suppressing equal treatment under the law.

The state of Oregon has allowed for unrestricted "open carry" of knives before or since 1984 and the decision of *State v. Delgado*. No one today alleges that 5% of those who carry knives openly in Oregon are in fact guilty of knife crime, assault and robbery!

Carrying a knife in public is not a good proxy for knife crime, just as being male and under 21 is not a suitable proxy for drunk and careless driving! We know it, from Oregon and from Santa Cruz.

VII. ZAITZEFF HAD THE RIGHT TO PRESENT A DEFENSE OF NECESSITY.

Now, in addition to the questions of how the Second Amendment should prevent the city of Seattle

from enforcing its unjust weapons law, the trial court has prevented Zaitzeff from presenting the defense of necessity at trial, by preventing him from bringing it up or any evidence that would support it.

The basis for this foreclosure by the court was that Zaitzeff, though he had been threatened and victimized in the past, did not know of a specific individual threat against him likely to take place on the exact same day as the day on which the police confronted him and seized his sword.

Now consider the case of Jaime Caetano. You folks consider her previously being beaten and threatened by an abusive former boyfriend or husband while in rendering a decision as related to her breaking the law of Massachusetts re the possession of her stun gun.

Did Jaime Caetano have the right to present to a jury the defense of necessity, including her previously having been beaten or threatened?

What of Kristin Evans, if she were repeatedly threatened by Stacy? Would Kristin Evans, who is seen in news a few days ago being thrown around in a home by the football player Zac Stacy, have had the right to have presented a defense of necessity, if she chooses to carry a knife or stun gun? According to the prosecution and the city of Seattle, the answer is no.

You only have the right, they say, to present the defense of necessity and its elements if the criminals who mean to beat or rob you let you know in advance the day on which they will attack you!

Now, today, there are people who at times break the law in some way as part of an environmental or climate change protest. A few years ago Katherine Gun

in the UK shared a memo or information about the US and UK seeking information by which to blackmail members of the UN security council to get them to pass a 2nd UN resolution authorizing the invasion of Iraq. Katherine Gun sought to present and various environmental activists can and do present a defense of necessity.

At times it is successful. At times it is not. In the case of Katherine Gun, the possible "defense of necessity" was so strong that the UK dropped the case against her for disclosing "official secrets."

Yet Katherine Gun was not stopping a war that was going to take place on the exact same day as her disclosure of the memo about the desire of US intelligence for information that would lead to blackmailing the members of the UN security council!

It is frivolous to say that some threats and risk must be known with certainty to be taking place on the exact same day.

In the petition for review written by Noah Weil my lawyer on the topic of the defense of necessity, he wrote that allowing the presentation of all the evidence is necessary and helpful, if for no other reason than to establish the record upon appeal.

He wrote some paragraphs with some citations which I will quote below, although some of the citations are of state cases rather than federal cases.

Also, understand that some of the evidence that would have been presented at trial, if it had been allowed, was that Zaitzeff was caretaker for an elderly parent suffering from apparent dementia. Also, the city of Seattle has a group of performers called the

Seafair pirates. These persons dress and act as pirates and they walk and menace people at parades and they also are a part of the annual Seafair landing.

The Seafair pirates carry swords, or, they have done so at times in the past. There are photos of the Seafair pirates with fixed blade knives and swords, while walking in Seattle during a parade!

Presenting the good or harm done by various actions, such as those of William Penn and John Peter Zenger, to the jury, was a necessary part of the juries being able to find for the defendants. And, if Katherine Gun had been put on trial in the UK for violating the Official Secrets act, whether or not her actions had done good or harm would have been considered, as part of the defense she give, of necessity.

VIII. THE PETITIONER'S SIXTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE TRIAL COURT RULED *IN LIMINE* THAT MR. ZAITZEFF COULD NEITHER PUT ON HIS DEFENSE NOR EVIDENCE IN SUPPORT OF HIS DEFENSE.

At the trial level Mr. Zaitzeff gave notice of his intent to use the necessity defense. The City objected to the instruction itself and evidence relating to the defense *in limine.*

The trial court inquired whether there was a person "imminently threatening" Mr. Zaitzeff, and the answer was there was not.

The trial court then ruled that "[T]he necessity defense isn't available to you."

Mr. Zaitzeff objected and the trial court requested an offer of proof.

Mr. Zaitzeff explained he had been previously assaulted and had police reports to substantiate those past assaults.

The Court of Appeals, in affirming this ruling *in limine*, conflicted with past Court of Appeals decisions and review should be granted pursuant to RAP 13.4(b)(2). *See State v. Ward*, 8 Wn. App.2d 365, 438 P.3d 588 (2019), *review denied*, 193 Wn.2d 1031 (2019).

Here the motion granted by the trial court did not just exclude the defense itself *in limine* but all evidence related to that defense. That ruling fundamentally implicated Mr. Zaitzeff's right to present a defense. Because the ruling swept not just an affirmative defense but also the presentation of records and argument, it also prevented a proper record from being created. *See also Olsen v. Allen*, 42 Wn. App. 417, 420, 710 P.2d 822 (1985) (Trial courts must make records sufficient to allow meaningful appellate review). The Court of Appeals, in affirming this trial court ruling, conflicted with United States Supreme Court and published Court of Appeals decisions.

CONCLUSION

SMC 12A.14.080(B) is in blatant conflict with both the 2nd Amendment and with several sentences in *Heller*.

Greenlake Park in Seattle is not a sensitive area and courts lack the authority to designate new areas as sensitive.

Because Zaitzeff had the right to present evidence, argument and reasoning for the defense of necessity, the Washington state court decisions should be reversed and remanded.

Zaitzeff prays the court. Let Giuliano and Lorenzo de Medici, Jaime Caetano and Kristin Evans say Amen!

Respectfully submitted,

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