NO. 94457-1
COA NO. 74779-7-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOAQUIN GARCIA,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

Respondent, the State of Washington, asks this Court to deny the petition for review.

B. COURT OF APPEALS OPINION

The Court of Appeals decision at issue is State v. Garcia, No. 74779-7-I, filed April 3, 2017 (published at ___ Wn. App. ___, ___ P.3d ___, 2017 WL 1293480).

C. STATEMENT OF THE CASE

The relevant facts are set forth in the briefing before the Court of Appeals.

D. ARGUMENT

Garcia's petition should be denied because it depends on an oft-repeated but factually incorrect statement about the record in this case, and because it relies on a flawed characterization of State v. Breitung, 173 Wn.2d 393, 267 P.3d 1012 (2011). Review is simply not warranted.

1. GARCIA'S PETITION RELIES ON INCORRECT ASSERTIONS ABOUT KEY PREDICATE FACTS.

Garcia continues to falsely assert that "there were no disputed facts" in this case. See Petition For Review (PFR) at 2, 10, 12, 13. He makes this assertion because it allows him to incorrectly frame the procedural posture of this case.

Garcia asserts that "pretrial dismissal ... is an appropriate remedy" when "there is no dispute that the State has failed to notify a person orally and in writing of a firearm prohibition, and there is no dispute regarding the evidence, or lack of evidence, that could support 'otherwise' knowledge of the firearm prohibition." PFR at 8. Garcia repeats here the same false assertion that he made below — that the facts were not in dispute.

As the record shows, and the court of appeals addressed in its decision, while there was no affirmative evidence in existence of in-court notice at the time of the predicate juvenile conviction in 1994, the State did *not* concede that the juvenile court failed to notify Garcia. Instead, the State insisted — correctly — that Garcia had the burden of affirmatively proving to a factfinder that he did not receive notice. And the State was additionally prepared to rebut his affirmative defense with significant additional evidence that he long

had actual knowledge of his firearm prohibition. See Brief of Appellant (BOA) at 5-10; Reply Brief at 6-7; Published Opinion (Opinion) at 7-9. That included, among other things, his statements to police and to his girlfriend expressly acknowledging the prohibition. Pivotal facts are hotly disputed.

2. GARCIA MISCHARACTERIZES THE HOLDING IN BREITUNG.

Garcia continues to erroneously assert that Breitung held that "a defendant cannot be convicted of UPFA unless *the State* can prove he was provided notice." See PFR at 10, 12. This assertion portrays this point as a legal question left open by Breitung. It is mistaken. Breitung specifically and unequivocally stated, "Lack of notice under RCW 9.41.047(1) is an affirmative defense, *which Breitung must establish* by a preponderance of the evidence" and "ignorance of the law is generally not a defense, and a convicted felon's knowledge that his right to firearm ownership is prohibited is *not an element* of the crime of unlawful possession of a firearm." 173 Wn.2d at 402-03 (italics added).

This case does not present a significant, unresolved legal question for this Court. The court of appeals decided the case consistently with, and guided by, the plain language of Breitung.[1]

Secondly, Garcia argues that the "the pertinent time period" for "otherwise knowledge" is also an open legal question that this Court should resolve. PFR at 8, 13. But that, too, is premised on a mischaracterization of the facts and the burden of proof.

Even assuming, for the sake of argument, that it is true that Garcia did not receive oral or written notice in court in 1994, it was still his burden to prove lack of notice — plus his lack of actual knowledge — to a factfinder. The facts were disputed, making a pretrial dismissal improper. So even if the "pertinent time period" were a real legal question, it would not matter here, because the trial court still erred when it found Garcia's affirmative defense was met as a matter of law and dismissed the charge pretrial.

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[1] Garcia, for the first time here, argues that "the Breitung defense does not operate as a garden variety affirmative defense." PFR at 12. That argument was not asserted below. Instead, Garcia argued that a criminal defendant may generally "advance an affirmative defense as a matter of law" in a Knapstad motion. Brief of Respondent (BOR) at 7. As the State pointed out in its reply brief, Garcia had no valid authority for such a rule in criminal law. Reply Brief at 5-6. This Court should not take up the question of whether a "Breitung defense" is "garden variety" or not because an "issue not raised or briefed in the Court of Appeals will not be considered by this court." State v. Halstien, 122 Wn.2d 109, 130, 857 P.2d 270 (1993); see also Fisher v. Allstate Ins. Co, 136 Wn.2d 240, 252, 961 P.2d 350 (1998) ("This court does not generally consider issues raised for the first time in a petition for review.").

Nonetheless, Garcia asserts that when this Court unanimously said, in plain language, that the "record evidences a lack of actual knowledge on Breitung's part," and based its reversal on the fact that Breitung "did not otherwise have notice of the prohibition against possession of firearms," it really meant that "the 'otherwise' knowledge or notice must be contemporaneous to, or at least roughly contemporaneous to, the predicate conviction." Breitung, 173 Wn.2d at 404; PFR at 13, 16. Garcia now petitions this Court to accept review in order to establish this convoluted and puzzlingly vague rule as guidance to future trial and appellate courts. This Court should decline. Breitung is clear; no additional guidance is needed.

The opinion of the court of appeals in this case was soundly made consistent with this Court's clear, unambiguous and unanimous decision in Breitung. It is not in conflict with this Court. There is no other valid reason to accept review under RAP 13.4 because Breitung already settled the arguments at issue. This Court should deny the petition for review.

E. CONCLUSION

The Court should deny Garcia's petition.

DATED this 5TH day of May, 2017.

Respectfully submitted,

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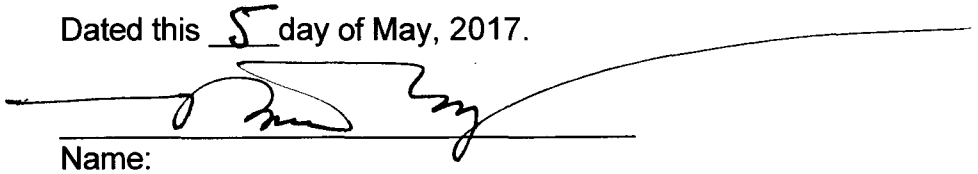
Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jennifer Winkler, the attorney for the petitioner, at Winklerj@nwattorney.net, containing a copy of the ANSWER TO PETITION FOR REVIEW in State v. Joaquin David Garcia, Cause No. _____ (COA# 74779-7), in the Supreme Court, for the State of Washington.

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

Dated this 5 day of May, 2017.



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