SUPREME COURT NO.

COA NO. 75441-6-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EDGAR DENNIS, III

Appellant.

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

King County Cause No. 16-2-08936-4 SEA

The Honorable Julie Spector, Judge

PETITION FOR REVIEW

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I. IDENTITY OF THE PETITIONER

Petitioner Edgar Dennis, the appellant, respectfully requests the Supreme Court to review the published decision of Division I of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

Appellant Edgar Dennis seeks review of the Court of Appeals, Division I, amended[1] published opinion entered on October 2, 2017. A copy of the opinion is attached in the Appendix.[2]

III. ISSUES PRESENTED FOR REVIEW

Issue One: Where there is more than one reasonable interpretation of the plain language of a statute and there is no clearly established interpretation based on statutory construction or legislative history, the rule of lenity must be applied. Should the rule of lenity be applied where traditional methods of statutory interpretation of RCW 9.41.040(4)(a)(ii)(A) (regarding restoration of firearm rights) do not clearly establish the Legislature's intent that the five or more consecutive years of being conviction-free must occur *immediately preceding* a petition for restoration of firearm rights and where Division I's interpretation creates arbitrary application of the statute?

Issue Two: Does Division I's interpretation of RCW 9.41.040(4)(a)(ii)(A) allow for improper interference of an individual's constitutional right to possess a firearm and, thus, should be rejected?

IV. STATEMENT OF THE CASE

[1] The first published Division I opinion was entered September 11, 2017, but then withdrawn and amended by its published opinion entered on October 2, 2017.
[2] Hereinafter it is referred to as the "Opinion."

On April 18, 2016, Mr. Dennis filed a petition to restore his firearms right pursuant to RCW 9.41.040(4)(a). Clerk's Papers 1-19.[3] That petition and a subsequent motion to reconsider were denied by the Superior Court because, although Mr. Dennis lived conviction-free in the community for approximately sixteen years after his felony convictions, he was convicted of a simple (non-disqualifying)[4] misdemeanor in 2014. CP 47-48, 143-44.

It is uncontested that Mr. Dennis was convicted of second degree robbery, third degree assault, and two counts of felony violation of the Uniform Controlled Substances Act (VUCSA) in 1991, and convicted of third degree assault in 1998. CP 5-11. As a result of these felony convictions, Mr. Dennis was disqualified from possessing a firearm. Thereafter, Mr. Dennis lived in the community for approximately sixteen years without any conviction; however, he did not petition for restoration of his firearms right during this lengthy period. In 2014, Mr. Dennis was convicted of a simple (non-disqualifying) misdemeanor, Negligent Driving in the first degree.[5] Subsequently, in

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[3] There is no Record of Proceedings as no oral argument took place at the trial court; the Clerk's Papers will be referred to as "CP."

[4] "Non-disqualifying" is used to modify the term misdemeanor where appropriate to indicate that such conviction does not result in the loss of one's right to possess a firearm.

[5] Both the State and Division I attempted to highlight that Mr. Dennis did not disclose his 2014 Negligent Driving in the first degree conviction in his petition; however, it appears the Washington State Patrol criminal background check did not capture this conviction in its report. *See* CP 5-11. Furthermore, because this conviction is both a simple

2016, Mr. Dennis submitted his petition for restoration, supporting his argument with *Payseno v. Kitsap County*, 186 Wn. App. 465, 346 P.3d 784 (2015)—mandatory authority over the Superior Court that the five or more consecutive conviction-free years under RCW 9.41.040(4)(a) need not be served immediately preceding the filing of a petition.

Mr. Dennis filed an appeal and Division I disagreed with the *Payseno* decision; it held that the rule of lenity did not apply as statutory interpretation "clearly established" the Legislature's intent that the five or more consecutive conviction-free years are to be served *immediately preceding* the petition.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Supreme Court should accept review because there is a direct conflict between two published decisions of the Court of Appeals as to whether statutory interpretation clearly establishes the Legislature's intent that the five or more consecutive conviction-free years must *immediately precede* the petition for restoration under RCW 9.41.040(4)(a)(ii)(A) or whether it does not and, therefore, the rule of lenity must be applied in favor of Mr. Dennis. *See* RAP 13.4(b)(2).

Division I's published opinion is in direct conflict with Division II's *Payseno* decision. *Payseno*, 186 Wn. App. 465. Courts should only interpret an ambiguous penal statute adversely to the defendant if statutory construction "clearly establishes" the Legislature intended

misdemeanor and a non-disqualifying conviction, it was not relevant to the court's inquiry if the trial court followed the mandatory authority of *Payseno*.

such an interpretation.[6] *City of Seattle v. Winebrenner*, 167 Wn.2d 451, 462, 219 P.3d 686 (2009); *State v. Evans*, 177 Wn.2d 186, 193, 298 P.3d 724 (2013).

At issue is the following language in RCW 9.41.040(4)(a) that states a person may petition the trial court for firearms restoration:

> If the conviction ... was for a felony offense, **after five or more consecutive years in the community without being convicted** ... or currently charged with any felony, gross misdemeanor, or misdemeanor crimes, if the individual has no prior felony convictions that prohibit the possession of a firearm counted as part of the offender score under RCW 9.94A.525.

RCW 9.41.040(4)(a)(ii)(A) (emphasis added).

In *Payseno*, Division II found that traditional methods of statutory interpretation, including legislative history and statutory construction, did not clearly establish that the Legislature intended that the five or more consecutive conviction-free years must be served immediately preceding the petition for restoration. *Payseno*, 186 Wn. App. at 471-72. Division II held that the legislative history for RCW 9.41.040 that could be gleaned consisted of only general, unhelpful intent statements. *Id.* at 472. The *Payseno* court further held that the Legislature is presumed to know the statutory scheme, the court will not read into a statute language it believes was omitted, and statutory

[6] The rule of lenity also applies in the post-conviction context. *State v. Slattum*, 173 Wn. App. 640, 658, 295 P.3d 788 (2013).

construction did not resolve the ambiguity. *Id.* at 472-73. Thereafter, Division II held the rule of lenity must be applied. *Id.*

On the other hand, Division I never reached the rule of lenity, applying some statutory interpretation methods to the State's favor; it held legislative history provided guidance, Mr. Dennis's interpretation allowed for absurd results, and that his interpretation rendered the phrase "or more" meaningless. Opinion, p. 6-12. This analysis, however, is not supported by Division I's interpretation of the general intent behind the Hard Time for Armed Crime Act of 1995 that amended RCW 9.41.040, i.e., "current law [does] not sufficiently stigmatize the carrying and use of firearms by criminals." Opinion, p. 6, citing *Payseno*, 186 Wn. App. at 471-72. Instead, Division I's interpretation rests on the arbitrariness of timing—the timing of when the petition for restoration is filed—and does not further the stigmatization of criminals possessing firearms. Division I's interpretation rewards the Mr. Dennis who petitions (and is restored) sooner, i.e., after year five of being conviction-free, but then that same Mr. Dennis still goes on to be convicted of his simple (non-disqualifying) misdemeanor at year sixteen. And then, hypothetically, he goes on to be convicted of the "hundreds" of simple (non-disqualifying) misdemeanors Division I referred to, but his firearms

right having been restored after year five remains intact because he luckily filed his petition right away. *See* Opinion, page 9. The takeaway is the instant Mr. Dennis should have just petitioned sooner than his simple (non-disqualifying) misdemeanor conviction.

It is timing alone that separates these two different petitioners, not a desire to honor the generally stated legislative intent Division I relied upon in interpreting this statute. To eliminate this arbitrariness, the Supreme Court should find that traditional methods of statutory interpretation do not clearly establish the Legislature's intent and that the rule of lenity applies. The Court should find that the relevant "precipitating event" for eligibility for restoration is when the petitioner meets the statutory requirements, not when he or she decides to file the petition—an approach that is supported by *State v. Swanson*, 116 Wn. App. 67, 65 P.3d 343 (2003), where the court held that a trial court's function under RCW 9.41.040(4)(a) is ministerial and it does not have discretion to deny restoration to a petitioner who has met all the statutory requirements. *See also, e.g., State v. T.K.*, 139 Wn.2d 320, 987 P.2d 63 (1999), overturned due to legislative action 2001 Wash. Legis. Serv. Ch. 49, July 22, 2001 (holding the "precipitating event" for application of RCW 13.50.050(11) in the juvenile sealing

context was the satisfaction of the statutory requirements, not the motion to seal).

i. There is no clear guidance from the divided Court of Appeals on whether a petitioner in similar circumstances satisfies the requirements of RCW 9.41.040(4)(a). *See* RAP 13.4(b)(4).

The court is the "final arbiter" of legislative intent and statutory construction. *Davis v. King County*, 77 Wn.2d 930, 934, 468 P.2d 679 (1970); *Short v. Clallam County*, 22 Wn. App. 825, 832, 593 P.2d 821 (1979). Here, the Court of Appeals does not agree and is divided in its statutory interpretation and application of the rule of lenity. Therefore, the Supreme Court should accept review under RAP 13.4(b)(2) as well as 13.4(b)(4), because this issue is now of substantial public interest—petitioners, litigants, and trial courts are left with no clear guidance of how to proceed under the statute in similar circumstances.

ii. The Court of Appeals published decision in this case is in direct conflict with Division II's published decision in *Payseno*.

The facts in *Payseno* are essentially the same as those in Mr. Dennis's case. Mr. Payseno was convicted of a felony VUCSA in March 2000 and a simple misdemeanor in June 2000. *Payseno*, 186 Wn. App. at 467-68. After serving his sentences, Mr. Payseno remained in the community for seven years conviction-free, surpassing the five-year requirement of RCW 9.41.040(4)(a). In February 2007 and May 2010, Mr. Payseno was

convicted of two non-disqualifying misdemeanors. *Id.* at 468. Thus, like Mr. Dennis, Mr. Payseno did not remain conviction-free for five years immediately preceding his petition for restoration.

In 2013, when Mr. Payseno petitioned for restoration, the State objected, asserting that Mr. Payseno's "five-year-crime-free period needed to immediately precede the filing of the petition." *Id.* The trial court denied his petition and Mr. Payseno appealed to Division II where he argued that once he remained crime free for five years after his felony conviction, the statute did not grant the trial court discretion to deny his petition. *Id.* at 468-69; RCW 9.41.040(4)(a)(ii)(A).

The *Payseno* court first found that the statutory language was ambiguous. "The statute could be interpreted to require a five-year-crime-free period immediately preceding a petition. Alternatively, it could be interpreted to require a five-year-crime-free period at *any* time prior to a petition so long as the other statutory requirements are met (no current charges or disqualifying convictions)." *Id.* at 471 (emphasis in original). To resolve this ambiguity the court considered the legislative history and intent, concluding that "[t]he legislature offered no statement illuminating whether the five-year-crime-free-period was meant to immediately precede a petition for firearms restoration." *Id.* at 472.

Next, the court considered applicable rules of statutory construction; it found that there was no language in the relevant part of the statute "that expressly requires that the five-year-crime-free period immediately precede the petition. This provides some support for Payseno's position." *Id.* at 473. However, the court concluded that there were no rules of construction that could definitely resolve the ambiguity, and because the court could not discern the Legislature's intent, it held that the statute was ambiguous as applied to the facts and that the rule of lenity applied. *See id.*, citing *Villanueva-Gonzalez*, 180 Wn.2d 975, 984, 329 P.3d 78 (2014).

Where Division I (in Mr. Dennis's case) agreed with Division II is that the statute was ambiguous. Opinion, p.5. However, Division I did not reach the rule of lenity; instead, it held that traditional methods of statutory construction "clearly established" that the Legislature's intent was that the five or more consecutive conviction-free years must be served immediately preceding the filing of the petition. Opinion, p. 2.

iii. The general legislative intent attributed to RCW 9.41.040 does not resolve the ambiguity of when the five or more consecutive conviction-free years must occur.

Division I found that the "findings and intent" section of the 1995 Hard Time for Armed Crime Act[7]—amending RCW 9.41.040(4)—that

[7] Hereinafter referred to as "the Act."

"[c]urrent law [did] not sufficiently stigmatize the carrying and use of deadly weapons by criminals" supported the State's interpretation. *See* Opinion, p. 6. The *Payseno* court, after reviewing the Act, found that "the legislative history reveal[ed] only general statements describing the purpose of RCW 9.41.040." *Payseno*, 186 Wn. App. at 472.

Significantly, the *Swanson* court also found that the Act did not "address firearm rights restoration in general or a court's discretion in the rights restoration context in particular. Thus, the Legislature's express findings and intent shed scant light on the issue that we face." *Swanson*, 116 Wn. App. at 71-72; *see also Winebrenner*, 167 Wn.2d at 462 (where legislative history for driving under the influence statute did not resolve ambiguity of phrase "prior offense"); *but cf. State v. Evans*, 177 Wn.2d at 199-203 (where the Supreme Court found legislative history specifically addressed the issue before it revealing the Legislature's intent). The issue before the *Swanson* court was whether a trial court had discretion to deny a petition for firearm restoration under RCW 9.41.040(4)(a) where the petitioner had met all the statutory requirements, but the court held that Mr. Swanson "was not a safe person in the community with a firearm." *Swanson*, 116 Wn. App. At 70. The *Swanson* court held that a court did not have this kind of discretion (in spite of the general intent statement of

the Act) and that the court served only a ministerial role once the requirements were satisfied. *Id.* at 78.

The Act's express findings and intent do not address firearm restoration, as *Swanson* highlighted, nor does it specifically address the timing of the five-year requirement in the statute. This broad legislative intent was improperly narrowed in its scope by Division I when it held the legislative history supported that the five-year requirement must occur immediately preceding the petition. In addition, the court's attempt to use the original version of the statute does not resolve the ambiguity. *See* Opinion, p. 7.[8]

iv. Application of the rule of lenity and Mr. Dennis's interpretation of RCW 9.41.040(4)(a) would not create absurd results; however, the outcome of Division I's interpretation would allow for arbitrary outcomes.

Following its legislative history analysis, Division I considered some other rules of statutory construction. First, the court addressed whether Mr. Dennis's interpretation would, as the State professed, create absurd

[8] That version of the statute contains the very same language "after five or more consecutive years in the community without being convicted" that the current statute contains, which is the source of the ambiguity. Indeed, a careful review of the legislative history and the Act reveals that the amendments made to RCW 9.41.040 by the Act added categories of petitioners, i.e., that a petitioner who suffered a felony conviction would be subject to the five-year requirement whereas a petitioner with a disqualifying misdemeanor conviction would be subject to a three-year requirement. *See* Senate Bill 5752, Senate Initiative 159, House Bill 1020, Senate Bill 5187, and Substitute House Bill 2420, 54th Legislature, 1995 and 1996 Regular Sessions. It did not, however, address when the five or three consecutive years of conviction-free time must occur.

results. As Division I stated, when courts construe a statute, "a reading that results in absurd results must be avoided because it will not be presumed that the legislature intended absurd results." Opinion, p. 9, citing *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (quoting *State v. Delgado*, 148 Wn.2d 723, 733, 63 P.3d 792 (2003)). Both the State and Division I assert that Mr. Dennis's interpretation of the statute would create absurd results because it would allow a person convicted of "hundreds" of misdemeanors after satisfying the five consecutive conviction-free years to restore his or her right to possess a firearm.

First, under Division I's interpretation, what separates Mr. Dennis from the petitioner who satisfies the court's criteria is timing alone. The petitioner that meets Division I's requirement could restore his or her right to possess a firearm after year five and then go on to commit these "hundreds" of misdemeanors—including simple misdemeanors like Driving While License Suspended in the third degree—and still be permitted to possess a firearm because these convictions are non-disqualifying in nature. If Mr. Dennis would have petitioned right after year five, rather than spending nearly sixteen years demonstrating that he can live in society crime-free (thereafter only to suffer a simple, non-disqualifying misdemeanor conviction), then he could have been restored and went on to have exactly the same criminal history and then the

hypothesized hundreds of future non-disqualifying misdemeanor convictions, all the while maintaining his constitutional right to possess a firearm.

Division I's interpretation does not honor the primary quest of statutory interpretation—"to determine and give effect to the intent of the legislature." *Evans*, 177 Wn.2d at 192, citing *State v. Sweany*, 174 Wn.2d 909, 914, 281 P.3d 305 (2012). The court's interpretation does not give effect to the Legislature's intent it gleaned from its historical analysis and, instead, in its effect, sets an arbitrary line distinguishing what is acceptable and what is not—based solely on the timing of the petition. On the other hand, Mr. Dennis's interpretation does give effect to the gleaned legislative intent as well as other constitutional parameters that have been previously set by our Legislature and solidified by case law.

Specifically, our Legislature has telegraphed what crimes (or commitments) it has determined will result in the removal of a person's right to possess a firearm, such as domestic violence offenses, felonies, and mental health commitments. *See generally* RCW 9.41.040, citing RCW 9.41, RCW 26.50, RCW 10.99, RCW 71.05, RCW 71.34, RCW 10.77, etc. Critically, the court plays no role in determining what crimes are of a certain nature such that convictions for those crimes result in the loss of a constitutional right. As the *Swanson* court stated, "The convicting

or committing court has no discretion to decide which crimes or commitments shall affect a person's firearm rights. This clear lack of discretion in the right *removal* context is consistent with the lack of discretion in the *restoration* context." *Swanson*, 116 Wn. App. at 75 (emphasis in original). Mr. Dennis's interpretation makes sense in light of this system of disqualifying and non-disqualifying crimes that has been previously established by our Legislature; it is that system that should reign over the petitioners who are separated by the timing of their petition, not Division I's interpretation of RCW 9.41.040(4)(a).

Division I also agreed with the State's argument that Mr. Dennis's interpretation would create absurd results in light of the phrase "currently charged" in the statute. Opinion, p.10. Yet, there is good reason, so recognized by Division I,[9] why a person who faces a pending criminal charge should be prohibited from restoration. Charges are always subject to amendment, including to a crime that would subject the defendant to loss of firearm rights upon conviction. Further, Washington Superior Court Criminal Rule 3.2 allows courts to impose pretrial conditions of release based on an assessment of the risk that the defendant will commit a

[9] At its footnote 5, Division I states: "In addition, we note that if the concern is the dangerousness of the person whose charges might be enhanced, imposing pretrial release conditions related to possession of firearms addresses such concern more precisely." It makes sense that a person who is "currently charged" would not be permitted to undergo a process that may ultimately end in prohibition of restoration.

violent offense. *See* CrR 3.2(d)(3). Mr. Dennis's interpretation embraces this phrase and remains reasonable alongside of it; contrary to Division I's belief, *see* Opinion, p. 10, there is good reason why a person who is facing pending charges (such as a domestic violence charge) may be treated more harshly than a person whose charges have been resolved and has been convicted of a simple, non-disqualifying misdemeanor (again, such as Driving While License Suspended in the third degree).

Finally, "the Legislature is presumed to be aware of judicial interpretations of its enactments" and failure to amend a statute following such interpretation indicates "legislative acquiescence" in that decision. *Soproni v. Polygon Apartment Partners*, 137 Wn.2d 319, FN 3, 971 P.2d 500 (1999).[10]

v. The phrase "or more" does not resolve the ambiguity and is not rendered superfluous or meaningless by application of the rule of lenity and Mr. Dennis's interpretation.

Next, Division I found that the use of the phrase "or more" in "after five or more consecutive years in the community without being convicted," supported the State's interpretation. RCW 9.41.040(4)(a)(ii)(A); *see also* Opinion, p. 11. The court stated that Mr.

[10] In 2016 and 2017, the Legislature amended RCW 9.41.040 with two bills, "Juvenile Offenders—Rehabilitation and Reintegration" and "Sexual Assault Protection Orders—Duration—Renewal—Modification," but it did not overturn *Payseno* by legislation. ENGROSSED SUBSTITUTE H.B. 2906, 64th Leg. Reg. Sess. (Wash. 2016); ENGROSSED SUBSTITUTE S.B., 65th Leg. Reg. Sess. (Wash. 2017).

Dennis's interpretation of "or more" was, essentially, too simple, rendering its use superfluous and meaningless. *See id.* Division I relies upon the State's reference to the "washout" provisions of the Sentencing Reform Act (SRA) for support. *Id.* This interpretation ignores a major difference between the washout provisions of the SRA and RCW 9.41.040(4)(a)—in the former scenario, convictions "wash" automatically without any procedural act, such as a petition or motion, required on the part of the petitioner in the latter context. As *Swanson* stated, there *is* some discretion within RCW 9.41.040(4)(a), belonging not to the court, but to the petitioner, i.e., whether to petition for restoration and when to so petition. *See Swanson*, 116 Wn. App. at 75.

The use of the phrase "or more," while perhaps simplified by Mr. Dennis's interpretation is not rendered superfluous or meaningless; there is no authority for Division I's belief that simplifying the phrase renders it meaningless under a statutory interpretation analysis. *See cf., State v. Rivard*, 168 Wn.2d 775,784, 231 P.3d 186 (2010) (where the court held the State's interpretation read the first condition of then subsection (4)(b)(i) right out of RCW 9.41.040). Also, Division I's interpretation violates one of its own statutory construction methods that it employed in its *Slattum* decision—"[w]here the Legislature omits language from a statute, intentionally or inadvertently, this court will not read into the

statute language that it believes was omitted." *Slattum*, 173 Wn. App. at 655 (quoting *State v. Moses*, 145 Wn.2d 370, 374, 37 P.3d 1216 (2002)). Similarly, here, the Legislature's omission of qualifying words, such as "immediately preceding" should not be read into the statute by Division I.

vi. The Supreme Court should apply the rule of lenity and find that the "precipitating event" is the satisfaction of the statutory requirements, not the timing and filing of the petition.

As *Payseno* held, "there are no particular rules of construction that definitely resolve the ambiguity." Therefore, the rule of lenity should be reached by the Supreme Court. "In construing an ambiguous criminal statute, the rule of lenity requires us to strictly construe a statute in favor of a criminal defendant ...." or in Mr. Dennis's case, strictly construe the statute in favor of a petitioner in a post-conviction setting. *Payseno*, 186 Wn. App. at 473; *see also Slattum*, 173 Wn. App. at 658.

Application of the rule of lenity does not allow for the arbitrary outcome of "the early bird gets the worm," where one petitioner is just quicker in filing the petition than another (as argued *supra*). In addition, it allows the disqualifying and non-disqualifying system already set in place by our Legislature to continue to operate. Mr. Dennis's interpretation of the statute is reasonable, does not create absurd results, and provides future guidance and clarity that the "precipitating event" in this

circumstance is satisfaction of the statutory requirements, not the filing of the petition. That the completion of the statutory requirements is the "precipitating event" is supported by *Swanson* where we are told that the trial court serves only a ministerial function without any discretion to deny the petition once the statutory requirements are met. *See Swanson*, 116 Wn. App. at 78; *see also e.g., State v. T.K.*, 139 Wn.2d 320, cited *infra*, (the "precipitating event" in analyzing whether a statute was retroactive or prospective in the juvenile sealing context was completion of the statutory requirements, not the filing of the motion to seal).

B. Division's I interpretation improperly interferes with a petitioner's constitutional right to possess a firearm. This presents a significant question of constitutional law under RAP 13.4(b)(3).

As the *Swanson* court stated, the Court's statutory interpretation of RCW 9.41.040(4)(a) should begin with CONST. art. I, § 24 "in mind." *Swanson*, 116 Wn. App. at 71. The right to possess firearms is a longtime, historically recognized constitutional right. "The Washington constitution commands that '[t]he right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired." CONST. art. I, § 24. In contrast to several other jurisdictions, a Washington citizen's right to bear arms is individual." *Swanson*, 116 Wn. App. at 71; *see also State v. Sieyes* 168 Wn.2d 276, 287-91, 225 P.3d 995 (2010) (recognizing the right to

bear arms is a fundamental right guaranteed by the U.S. Constitution and the Second Amendment, and applies to this state).[11] Although the right to bear arms is not absolute and may be subject to "reasonable regulation" by the State under its police power, *see City of Seattle v. Montana*, 129 Wn.2d 583, 593, 919 P.2d 1218 (1996), Division I's statutory interpretation supports an arbitrary application of RCW 9.41.040(4)(a) and, thereby, an improper interference of a petitioner's right to possess firearms. That interpretation renders RCW 9.41.040(4)(a) as applied to Mr. Dennis unconstitutional. What separates him from reinstating his constitutional right from the petitioner who satisfies Division I's interpretation is simply timing (as argued *supra*). This is not a "reasonable regulation" of the right to bear arms as it has little to do with protecting public safety or welfare when the petitioner who files his petition earlier than Mr. Dennis may still go on to have the same criminal history as Mr. Dennis or commit the same hundreds of hypothetical misdemeanors that Division I noted, but still have restored and maintained his right to possess a firearm. *See e.g., State v. Spiers*, 119 Wn. App 85, 95, 79 P.3d 30 (2003) (holding an ownership ban in former RCW 9.41.040(2)(a)(iv) was not

[11] *See also State v. Jorgenson*, 179 Wn.2d 145, 155, 312 P.3d 960 (2013) (after conducting a *Gunwall* analysis, finding that the state right should be interpreted separately and independently from the federal right).

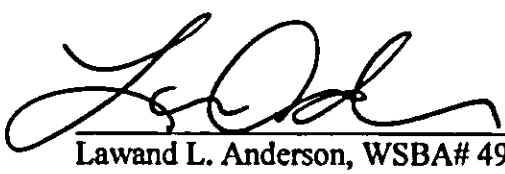
reasonably necessary to protect public safety).[12] In addition, application of Division I's interpretation violates equal protection where the petitioner who files the petition sooner, but goes on to have the same criminal history as Mr. Dennis is inappropriately favored. *See cf. State v. Reed*, 84 Wn. App. 379, 385-86, 928 P.2d 469 (1997) (equal protection was not violated where action was rationally related to a legitimate interest—sentencing improvements).

VI. CONCLUSION

For the aforementioned reasons, the Supreme Court should accept review under RAP 13.4(b)(2)(3), and (4).

Respectfully submitted this 3rd day of October, 2017, by the attorneys for the Appellant, Edgar Dennis.

Lauren D. McLane, WSBA# 40945



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[12] Citing to *Montana*, 129 Wn.2d at 592 ("A law is a reasonable regulation if it promotes public safety, health, or welfare, and bears a reasonable and substantial relation to accomplishing the purpose pursued.").

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant,	)	No. 75441-6-I
v.	)	DIVISION ONE
EDGAR DENNIS, III	)	AMENDED PUBLISHED OPINION
Respondent.	)	FILED: October 2, 2017

SPEARMAN, J. — To petition for restoration of firearm rights, RCW 9.41.040(4)(a)(ii)(A) requires five or more consecutive years in the community without a conviction. After losing his right to possess a firearm, Edgar Dennis III had no criminal convictions for 16 years. But in 2014, he was convicted of a misdemeanor. In 2016, he petitioned for restoration of his firearm rights, but the superior court denied the request. The court found that due to Dennis's 2014 conviction, he had not been without a conviction for the time period required by the statute.

On appeal, Dennis argues that because RCW 9.41.040(4)(a)(ii)(A) is ambiguous, we must apply the rule of lenity. Under that rule, he urges us to construe the statute such that any consecutive five year period without a criminal conviction is sufficient to satisfy the statute, even if the petitioner has one or more misdemeanor convictions within five years of filing the petition. We decline to apply the rule of lenity in this case because the rule is only applicable when

ambiguity remains after engaging in traditional methods of statutory interpretation. That is not the case here. Properly construed, RCW 9.41.040(4)(a)(ii)(A) reflects the legislature's intent to require at least five consecutive conviction-free years immediately preceding a petition for restoration of firearm rights. We affirm.

FACTS

Edgar Dennis III was convicted of second degree robbery, third degree assault, and two counts of felony violation of the Uniform Controlled Substances Act in 1991. As a result, he was disqualified from possessing a firearm. In 1998, Dennis was convicted of third degree assault. After serving his sentence, Dennis lived in the community for over 15 years without a conviction of any kind. Then in 2014, he was convicted of first degree negligent driving.[1]

In April 2016, Dennis petitioned the superior court to reinstate his right to possess a firearm. To restore firearm rights, RCW 9.41.040(4)(a)(ii)(A) requires five or more consecutive years in the community without a criminal conviction. In his petition, Dennis did not disclose his negligent driving conviction. The State objected to the petition and apprised the court of Dennis's recent misdemeanor. The State argued that Dennis's five-year conviction-free period must immediately precede his petition for restoration. The superior court denied Dennis's petition and motion for reconsideration. He appeals.

[1] A conviction for first degree negligent driving (a misdemeanor offense) does not disqualify a person from possessing a firearm. See RCW 9.41.040(1)(2). However, once the firearm rights are lost, a conviction of any offense, including a misdemeanor, may preclude the restoration of that right. See RCW 9.41.040(4)(a)(ii).

DISCUSSION

Dennis argues that the trial court erred by denying his petition to restore firearm rights. Relying on Payseno v. Kitsap County, 186 Wn. App. 465, 346 P.3d 784 (2015), he contends that RCW 9.41.040(4)(a)(ii)(A) is ambiguous as to whether he must have no convictions for five years immediately preceding the petition for restoration and that the rule of lenity requires us to strictly construe the statute in his favor. In Payseno, Division II of our court found that RCW 9.41.040(4)(a)(ii)(A) was ambiguous and that the legislative intent of the statute was unclear, even after resort to rules of statutory construction. The court applied the rule of lenity and strictly construed the statute in favor of the defendant. It held that any consecutive five year conviction-free period after the disqualifying crime satisfied the statute, even if the five year period immediately preceding the petition was not conviction free. Dennis urges us to follow Payseno.[2] The State contends Payseno is incorrectly decided and that we should decline to follow it.

The meaning of a statute is a question of law that we review de novo. Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). When possible, we derive the legislative intent of a statute solely from the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole. State v. Evans, 177 Wn.2d 186,

[2] Dennis cites In re Per. Restraint of Eddie D. Arnold, 198 Wn. App. 842, 396 P.3d 375 (2017) for its holding that we are bound by horizontal stare decisis to the decisions of our sister divisions. We respectfully disagree that Payseno dictates our holding in this case. Grisby v. Herzog, 190 Wn. App. 786, 808-811, 362 P.3d 763 (2015). (The doctrine of stare decisis does not preclude one panel from the court of appeals from stating a holding that is inconsistent with another panel within the same division.)

192, 298 P.3d 724 (2013) (citing State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d 354 (2010)). If more than one interpretation of the plain language is reasonable, then the statute is ambiguous and we must construe it. Id. We may then rely on rules of statutory construction, legislative history, and relevant case law to discern legislative intent. Ervin, 169 Wn.2d at 820. If, after applying rules of statutory construction, we conclude that a statute remains ambiguous, "the rule of lenity requires us to interpret the statute in favor of the defendant absent legislative intent to the contrary." City of Seattle v. Winebrenner, 167 Wn.2d 451, 462, 219 P.3d 686 (2009) (quoting State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281 (2005)). Thus, we will interpret an ambiguous penal statute adversely to the defendant only if statutory construction "clearly establishes" that the legislature intended such an interpretation. Id. The rule of lenity applies to statutes governing post-conviction proceedings. State v. Slattum, 173 Wn. App. 640, 658, 295 P.3d 788 (2013).

A person who loses his firearm rights as a result of a criminal conviction may petition for restoration of that right under certain circumstances. When considering a petition for restoration, the superior court's function is ministerial, not discretionary: it grants the petition once the petitioner has satisfied the requirements. State v. Swanson, 116 Wn. App. 67, 69, 65 P.3d 343 (2003). Among other requirements, a petitioner must have five or more consecutive years in the community without a conviction:

> [I]f a person is prohibited from possession of a firearm...and has not previously been convicted ... of a sex offense prohibiting firearm ownership ... and/or any felony defined under any law as a class A felony or with a maximum sentence of at least

> twenty years, or both, the individual may petition a court of record to have his or her right to possess a firearm restored:
> ....
> (ii)(A) If the conviction or finding of not guilty by reason of insanity was for a felony offense, **after five or more consecutive years in the community without being convicted** or found not guilty by reason of insanity or currently charged with any felony, gross misdemeanor, or misdemeanor crimes, if the individual has no prior felony convictions that prohibit the possession of a firearm counted as part of the offender score under RCW 9.94A.525 . . . .

RCW 9.41.040(4)(a) (emphasis added). The parties dispute whether the five consecutive conviction-free years must immediately precede the petition.

We begin with whether RCW 9.41.040(4)(a)(ii)(A) is ambiguous. "A statute is ambiguous ... when it is fairly susceptible to different, reasonable interpretations, either on its face or as applied to particular facts, and must be construed to avoid strained or absurd results." McGinnis v. State, 152 Wn.2d 639, 645, 99 P.3d 1240 (2004). After Dennis's 1998 disqualifying conviction, he had no additional convictions until 2014. Thus, Dennis had gone "five or more consecutive years" without being convicted of or "currently charged" with any criminal offense. RCW 9.41.040(4)(a)(ii)(A). But, because of his 2014 conviction, Dennis had not been conviction free for at least five years prior to filing his petition for restoration of his firearms right. On these facts, RCW 9.41.040(4)(a)(ii)(A) can reasonably be interpreted to require the conviction-free period to immediately precede Dennis' petition. It can also be interpreted to allow the conviction-free period to occur at any time prior to his petition. We conclude the statutory provision at issue is ambiguous.

We next determine whether statutory construction clearly establishes legislative intent that the conviction-free period must immediately precede the petition to restore firearms rights. We first turn to the legislative history of RCW 9.41.040:

> In 1994, RCW 9.41.040 was reenacted and amended. RCW 9.41.040(4) was again amended as part of the 1995 Hard Time for Armed Crime Act, Initiative 159.4 LAWS OF 1995, ch. 129, § 16. The legislative "Findings and Intent" included the statement that "**[c]urrent law [did] not sufficiently stigmatize the carrying and use of deadly weapons by criminals.**" LAWS OF 1995, ch. 129, § 1. Before the legislature imposed the five-year-crime-free period requirement, the legislature found that "increasing violence in our society causes great concern for the immediate health and safety of our citizens and our social institutions." LAWS OF 1994, 1st Spec. Sess., ch. 7, § 101, at 2197. The legislature also found that "violence is abhorrent to the aims of a free society and that it cannot be tolerated." Laws of 1994, 1st Spec. Sess., ch. 7, § 101, at 2197. (Emphasis added). (Footnotes omitted).

Payseno, 186 Wn. App. at 471–72. The Payseno court reasoned that these statements of purpose were general and did not help resolve the timing of the five year conviction-free period. But the State argues that there is meaning in the legislative finding that current law does not sufficiently stigmatize the use of firearms by criminals. We agree. The finding expresses that the Act was intended to keep guns out of the hands of criminals who continue to commit crimes, including offenses that do not themselves disqualify firearm possession. A person who has committed a disqualifying criminal offense and who continues to commit crimes falls squarely within the scope of this stated purpose. This supports the State's position that a person already convicted of a disqualifying

offense and who has, within five years preceding his petition, been convicted of another crime, may not have his firearms right restored.

The original text of the firearm restoration provision also supports the State's interpretation. When enacted, it read:

> [T]he individual may petition a court of record to have his or her right to possess a firearm restored:
> ...
> (b) After five or more consecutive years in the community without being convicted or currently charged with any felony, gross misdemeanor, or misdemeanor crimes, if the individual has no prior felony convictions that prohibit the possession of a firearm counted as part of the offender score under RCW 9.94A.360 [recodified as RCW 9.94A.525 (LAWS OF 2001, CH. 10, § 6)].

Initiative 159, § 16, at 461, 54th Leg., Reg. Sess. (Wash. 1995). A natural reading of the original phrasing is that one may petition after completing a conviction-free period of at least five years. Later amendments changed the application of this provision and obscured this meaning. In 1996, the legislature amended the provision so that it applied specifically to felons.[3] In 2005, it was amended to include people found guilty by reason of insanity. SUBSTITUTE H.B. 1687, 59th Leg., Reg. Sess. (Wash. 2005); SUBSTITUTE H.B. 2420, 54th Leg., Reg. Sess. (Wash. 1996) But these amendments did not alter the timing applicable to the five year conviction-free period. The original text indicates that the legislature intended for a petitioner to come to court with clean hands after at least five conviction-free years.

Relying on City of Federal Way v. Koenig, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009), Dennis argues that other subsequent legislative history shows that

[3] The amendment also provided that persons convicted of disqualifying non-felony offenses were subject to a three year conviction-free period.

the legislature has implicitly assented to Payseno. In that case, our Supreme Court stated its presumption "that the legislature is aware of judicial interpretations of its enactments and takes its failure to amend a statute following a judicial decision interpreting that statute to indicate legislative acquiescence in that decision." Id. at 348 (citing Soproni v. Polygon Apartments Partners, 137 Wn.2d 319, 327 n.3, 971 P.2d 500 (1990)). But legislative acquiescence is not decisive here for several reasons.

First, Koenig is distinguishable because in that case there were 23 years of legislative inaction following a judicial interpretation of a statute. Here, a mere two years has passed since Payseno was decided. See State v. Coe, 109 Wn.2d 832, 846, 750 P.2d 208 (1988) ("The Legislature is deemed to acquiesce in the interpretation of the court if no change is made for a substantial time after the decision.") Second, while in the time since Payseno was decided in 2015, the legislature has amended RCW 9.41.040 without clarifying the ambiguity, the amendments addressed technical matters unrelated to the issue in this case.[4] And third, even where evidence of legislative acquiescence is found, it "is not conclusive, but is merely one factor to consider" when interpreting a statute. Safeco Ins. Companies v. Meyering, 102 Wn.2d 385, 392, 687 P.2d 195 (1984) (citing Somer v. Woodhouse, 28 Wn. App. 262, 270, 623 P.2d 1164 (1981)). In light of these considerations, Dennis's legislative acquiescence argument is unpersuasive.

[4] In 2016 and 2017, it amended chapters with bills respectively entitled "Juvenile Offenders -- Rehabilitation and Reintegration" and "Sexual Assault Protection Orders -- Duration -- Renewal -- Modification", which changed discrete provisions related to juvenile offenders and

While legislative history does not definitively resolve the statutory interpretation question before us, it tends to support that the conviction-free period must immediately precede the petition.

We next consider any applicable rules of statutory construction. When we construe a statute, "'a reading that results in absurd results must be avoided because it will not be presumed that the legislature intended absurd results.'" State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (quoting State v. Delgado, 148 Wn.2d 723, 733, 63 P.3d 792 (2003)). Additionally, "'[s]tatutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.'" Id. (quoting Davis v. Dep't of Licensing, 137 Wn.2d 957, 963, 977 P.2d 554 (1999)).

The State argues that Dennis's interpretation allows a person convicted of hundreds of misdemeanors after a five year conviction-free period to recover his or her firearm rights. Dennis disputes that this is an absurd result. He argues that such was the intent of the legislature when it determined that a misdemeanor conviction for crimes would not result in the loss of firearm rights. We reject Dennis's argument because it addresses a different circumstance than that at issue in this case. Here, we are not concerned with whether a person should lose the right to possess a firearm, but whether a person, having lost that right, should have it restored. And the legislature has clearly stated that a misdemeanor conviction is sufficient to preclude restoration of that right.

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sexual assault protection orders. ENGROSSED SUBSTITUTE H.B. 2906, 64th Leg. Reg. Sess. (Wash. 2016); ENGROSSED SUBSTITUTE S.B. 5256, 65th Leg. Reg. Sess. (Wash. 2017).

We agree with the State that it makes no sense to interpret the statute to allow reinstatement of a person's firearms right when, in the five years preceding the petition, the person has shown an inability to live in society without committing any crimes. That person, after all, bears the burden of proving they are capable of living a crime free life in order to regain their firearms right. It would be illogical to conclude that the legislature intended that a petitioner with recent convictions could meet this burden just because he or she had previously managed five years without one.

The State argues that there are additional absurd results in light of the requirement that a petitioner not have any "current charges". The State proposes the example of a person who goes five years without a criminal conviction after losing firearm rights. Then, he is charged with a misdemeanor or non-disqualifying gross misdemeanor crime. While that charge is pending, RCW 9.41.040(4)(a)(ii)(A) prevents him from petitioning for restoration. But under Dennis's interpretation, he can petition for restoration the moment he is convicted of the crime. Dennis contends that it is not an absurd result because pending charges may be amended upward, so the charge may not reflect the dangerousness of the defendant. While this is true, the result of Dennis's interpretation is still to penalize a charged person more harshly than a convicted person.[5] Given the constitutional right to gun possession, we agree with the State

[5] In addition, we note that if the concern is the dangerousness of the person whose charges might be enhanced, imposing pre-trial release conditions related to possession of firearms addresses such a concern more precisely.

that it is unlikely that the legislature intended to deprive a person who is merely accused of a crime, only to relieve the prohibition upon conviction.

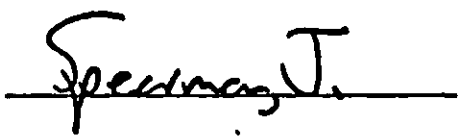
Giving effect to all the statutory language also supports the State's interpretation. The State argues for meaning in the words "or more" of the requirement that an individual have five *or more* consecutive crime-free years. Under Dennis's interpretation, the words "or more" would merely clarify that a person can petition the court for firearms restoration even if they spent six, seven, or nine years in the community without a conviction. This hardly needs clarifying, so Dennis's interpretation does not give effect to words "or more." We agree with the State that properly construed the term "five or more consecutive years" defines the period of time immediately before the petition is filed as the time when a petitioner must be conviction free in order for firearm rights to be restored.

The State also compares the "five years or more" language to the washout provision of the Sentencing Reform Act, chapter 9.94A RCW, which does not say "or more." Under the washout provision, a Class C Felony is not counted toward an offender score if "the offender spent five years in the community without committing any crime that subsequently results in a conviction." Former RCW 9.94A.525(2)(c) (2016). Comparing these two sections, the State argues that if the Legislature intended to allow firearm restoration after any five year period, they would have written RCW 9.41.040(4)(a)(ii)(A) like they did in RCW 9.94A.525. But by including the words "or more", the legislature must have intended those words to have some effect. Dennis's interpretation gives those

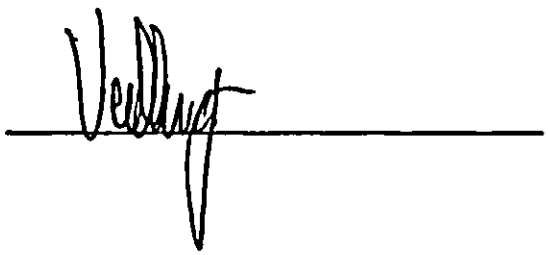
words no effect because it makes the restoration provision operate similarly to the washout provision. It would restore firearm rights simply by the passage of a minimum of five conviction-free years. But to give effect to the words "or more", we agree with the State that the required conviction-free period includes a minimum of five years plus whatever additional time precedes the filing of the petition to restore firearm rights.

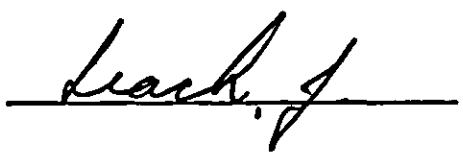
Based on our review of the legislative history of RCW 9.41.040(4)(a)(ii)(A) and application of the rules of statutory construction, we conclude the legislature intended the statute to require that a petition for restoration of firearm rights must be immediately preceded by five or more consecutive conviction-free years. Because the legislative intent is discernible, we need not apply the rule of lenity. We conclude that the trial court did not err in denying Dennis's petition for firearms restoration.

Affirmed.



WE CONCUR:





CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Edgar Dennis
2530 SW 322nd St
Federal Way, WA 98023

I certify that I personally delivered a copy of the Petition for Review to:

Laura Petregal, Prosecuting Attorney
King County Prosecutor's Office
516 3rd Ave, 5th Floor
Seattle, WA 98104-2390

I certify that I emailed a courtesy copy of the Petition for Review to the deputy prosecutor of record, Ms. Laura Petregal, at:

Laura.Petregal@kingcounty.gov

And I certify that I personally delivered and filed a copy of the Petition for Review with the Clerk of the Court of Appeals, Division I at:

Division One
One Union Square
600 University St.
Seattle, WA 98101-4170

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Des Moines, Washington, on October 3, 2017.

Zenobia Pratt, Legal Assistant for Lawand Anderson, WSBA# 49012
Attorney for Appellant/Petitioner