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STATE OF WASHINGTON
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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NO. 90645-9

STATE OF WASHINGTON

Respondent,

vs.

MARK FRANCIS OWENS

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR JEFFERSON COUNTY
Cause Number: 12-1-00005-6
The Honorable Craddock Verser

RESPONDENT'S REPLY TO PETITION FOR REVIEW

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Date: August 20, 2014

ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED.. 4

 a. Conflict Claim 4

 b. Significant Constitutional Issue Claim 5

IV. CONCLUSION..... 6

TABLE OF AUTHORITIES

	<u>Page</u>
Washington Supreme Court Cases	
<i>State v. Maciolek</i> , 101 Wn.2d 259, 676 P.2d 996 (1984)	5, 6
Washington Appeals Court Cases	
<i>State v. Haley</i> , 35 Wn.App. 96, 665 P.2d 1375 (1983).....	4
<i>State v. Smith</i> , 118 Wn.App. 480, 93 P.3d 877 (2003)	4

I. INTRODUCTION

Under RAP 13.4(b) a Petition for Review will be accepted by the Supreme Court only:

1. If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
2. If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
3. If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
4. If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Mr. Owens petition argues his petition should be admitted under subsections 2 and 3. He argues that the courts of appeal have conflicting decisions regarding RCW 9.41.270. However, this is incorrect. They all agree that the exception to RCW 9.41.270 only applies in the place of abode. He also argues that the RCW violates his right to bear arms and his right to privacy. This is also incorrect since these rights are unaffected by RCW 9.41.270. Mr. Owens' Petition does not qualify under these subsections and should be denied.

II. STATEMENT OF THE CASE

On September 3, 2011, Jefferson County Sheriff's Deputy Tamura responded to a 911 call reporting a domestic violence assault at 10044 Center Road. VRP 100. On arriving at the scene,

Deputy Tamura observed a man exit the house carrying a rifle. VRP 103. He identified himself as a Sheriff's Deputy and ordered the man to put the gun on the ground. VRP 103. The man ignored him, walked to a garage holding the rifle in a ready position and hid behind a car parked outside of the garage. VRP 103-105. A standoff ensued and eventually ended with no shots fired. Examination of the weapon showed it was loaded with several bullets, including one in the chamber, ready to fire. VRP 109-110.

Mr. Owens was charged with two counts of domestic violence assault in the fourth degree, obstructing a law enforcement officer, and unlawfully displaying a firearm.

Jury trial followed and during the trial the 911 call was played for the jury. On the recording Mr. Owens is heard to say "You call the cops? Are they coming here? Well good. I'll get the gun." VRP 203.

Moments later he was observed by Deputy Tamura carrying the 30-30 rifle he was convicted of unlawfully displaying. VRP 144. Cole Owens testified that the 30-30 rifle in question belonged to his father, the Defendant, Mark Owens. VRP 53-54.

Following conclusion of testimony and after excusing the jury, the court addressed proposed jury instructions. The State proposed WPIC 133.40 for a "to convict" instruction. VRP 227.

Defense Counsel objected to this instruction and suggested a non-WPIC version that included the affirmative defense stated in RCW 9.41.270(3). VRP 228. The court rejected the Defense Counsel version and selected WPIC 133.40 because there was no evidence that the offense occurred in the Defendant's place of abode. VRP 229-230.

Mr. Owens was convicted of unlawful display of a firearm on December 28, 2011, and the firearm ordered forfeited.

Mr. Owens filed a motion to reconsider the sentence, which the District Court denied.

Mr. Owens timely filed a RALJ appeal.

The Jefferson County Superior Court heard arguments on May 4, 2012, and issued a Memorandum Opinion in favor of Mr. Owens filed on July 13, 2012. The Superior Court reversed his conviction and remanded the case to the District Court for further action.

The State timely filed a petition for review which the Court of Appeals granted. The Court of Appeals reversed the Superior Court and reinstated Mr. Owens' conviction.

Mr. Owens filed a petition for review with this court.

III. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

Mr. Owens argues the Court of Appeals decision is in conflict with another Court of Appeals decision and that this case presents a significant constitutional question. These are incorrect.

a. Conflict Claim

Mr. Owens was convicted of violating RCW 9.41.270, which prohibits carrying or displaying a firearm in a manner or under circumstances that warrants alarm for the safety of other persons. It also provides an affirmative defense that the statute shall not apply to a person while in his or her place of abode.

Mr. Owens argues Division II's decision conflicts with Division III's decision in *State v. Haley*, 35 Wn.App. 96, 665 P.2d 1375 (1983). In *Haley*, Division III reasoned that a deck built onto a house satisfied the in his or her place of abode exception. Division II's decision agreed with Division I's decision in *State v. Smith*, 118 Wn.App. 480, 93 P.3d 877 (2003) that a backyard did not meet the "in his or her place of abode" exception. All three Divisions agree that one may only

display a dangerous weapon in an intimidating manner while in their place of abode.

Mr. Owens' argument that the key issue is whether the display occurred in a private area is unavailing. As this court noted in *State v. Maciolek*, 101 Wn.2d 259, 676 P.2d 996 (1984), the statutes' purpose was to prevent someone from displaying dangerous weapons so as to reasonably intimidate members of the public. Not to prevent intimidation *in public*.

If the legislature had intended to permit intimidation from a private place, it would have put that provision in RCW 9.41.270. It did not. The exception is clear: *in* your place of abode.

The Court of Appeals decision was in accord with settled law in Washington. This petition is without merit and should be denied.

b. Significant Constitutional Issue Claim

Mr. Owens seeks to expand his right to keep and bear arms and his right to privacy in the curtilage of his house to allow him to display a firearm so as to intimidate people outside of his house. There is nothing in either constitution which

permits a person to intimidate others with a weapon either privately or in public.

This Court previously determined that RCW 9.4.270 was constitutional in *State v. Maciolek*, 101 Wn.2d 259, 676 P.2d 996 (1984).

RCW 9.41.270 does not interfere with a person's right to keep and bear arms under either the federal or state constitution. Nor does it interfere with a person's right to privacy. It only prohibits threatening other people with a dangerous weapon outside of your home.

The Court of Appeals decision did not interfere with Mr. Owens' rights under either the federal or Washington constitution. This petition is without merit and should be denied.

IV. CONCLUSION

The State respectfully requests that this Court deny Mr. Owens' petition for review.

Respectfully submitted this 20th day of August, 2014.

SCOTT ROSEKRANS
Jefferson County Prosecuting Attorney



By: Thomas A. Brotherton, WSBA # 37624
Deputy Prosecuting Attorney

OFFICE RECEPTIONIST, CLERK

To: Wendy Davis
Subject: RE: Case No. 90645-9 State of Washington respondent, vs. Mark Francis Owens

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To: OFFICE RECEPTIONIST, CLERK
Subject: Case No. 90645-9 State of Washington respondent, vs. Mark Francis Owens

Attached, please find Case No. 90645-9 State of Washington respondent, vs. Mark Francis Owens, Respondents Reply to Petition for Review by Tom Brotherton, Deputy Prosecuting Attorney, WSBA #37624 for Scott Rosekrans, Jefferson County Prosecuting Attorney.

Thank you,

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