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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

*Court of Appeals No. 36296-5-III*

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STATE OF WASHINGTON, Respondent,

v.

VICTOR JAMES MATHIS, Petitioner.

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**PETITION FOR REVIEW**

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### **I. IDENTITY OF PETITIONER**

Victor James Mathis requests that this court accept review of the decision designated in Part II of this petition.

### **II. DECISION OF THE COURT OF APPEALS**

Petitioner seeks review of the decision of the Court of Appeals filed on August 20, 2019, affirming the Klickitat County Superior Court's denial of his motion to dismiss charges of unlawful possession of a firearm when the State did not prove a constitutionally valid predicate felony conviction. A copy of the Court of Appeals' unpublished opinion is attached hereto.

### **III. ISSUES PRESENTED FOR REVIEW**

1. Whether, when Victor James Mathis denied that he was the person named in the State's records admitted to prove a prior felony conviction, Mathis could not also assert that the State failed to prove the prior conviction was constitutionally adequate when the records failed to establish facially that the conviction resulted from a knowing, intelligent, and voluntary guilty plea.
2. What constitutes an adequate colorable, fact-specific argument that a prior conviction is constitutionally invalid?

#### **IV. STATEMENT OF THE CASE**

For purposes of this petition, the applicable facts are set forth in the Court of Appeals' opinion. After police responded to a report of a fight at Victor Mathis's home, Mathis voluntarily admitted that there were guns in the house and police recovered them. *Opinion*, at 1-2.

Subsequently, the State identified a 1991 felony conviction from Georgia under the name "Victor Lewis James" that the State attributed to Mathis. *Opinion*, at 1-2. The State charged Mathis with unlawfully possessing the firearms as the result of the felony conviction, and Mathis alleged that he was not the person named in the conviction documents. *Opinion*, at 2.

Notwithstanding the defense of mistaken identity, Mathis also challenged the sufficiency of the evidence at the close of the State's case. *Opinion*, at 2-3. He contended that because the documents of conviction from Georgia did not show that the person named in them was advised of the rights he gave up by entering a guilty plea, they did not prove a prior conviction that was constitutionally adequate. *Opinion*, at 3. The trial court denied Mathis's motion to dismiss, holding that the conviction records were *prima facie* constitutionally valid and Mathis did not present any contradictory evidence that they were invalid. *Opinion*, at 3-4. A jury subsequently convicted him and the trial court sentenced him to 102 months in prison. *Opinion*, at 4.

In affirming the trial court, the Court of Appeals concluded that Mathis did not present a colorable, fact-specific argument for invalidity because his primary defense was that he was not the person named in the Georgia conviction records. *Opinion*, at 7. Consequently, the Court of Appeals held that the burden never shifted to the State to prove the conviction constitutionally valid. *Opinion*, at 7-8.

Mathis now requests that this Court accept review and decide whether an individual who denies being the subject of the prior conviction used as a predicate offense can present an adequate colorable, fact-specific argument that the prior conviction is invalid because of deficiencies present on the face of the conviction documents.

#### **V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

Under RAP 13.4(b)(3) and (4), review will be accepted if a significant question of law under the Constitution of the State of Washington or of the United States is involved, or if the petition involves an issue of substantial public interest that should be determined by the Supreme Court. Both factors are satisfied in the present case.

Use of a prior conviction that was obtained without necessary constitutional protections to impose a new criminal sanction causes the defendant to suffer again the constitutional deprivation. *Burgett v. Texas*,

389 U.S. 109, 115, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967). This principle, which arises from due process considerations, ensures that an accused has received all constitutional protections due before suffering future consequences arising as a result of the conviction. In light of this concern, no reason supports requiring an accused to admit to a prior conviction in a subsequent prosecution in order to challenge its constitutional validity when the validity or invalidity can be determined from the face of the documents.

Since this Court's decision in *State v. Swindell*, 93 Wn.2d 192, 197, 607 P.2d 852 (1980), the State has been required to prove a constitutionally valid prior conviction as an essential element of unlawfully possessing a firearm under RCW 9.41.040. In *Swindell*, the defendant alleged that his prior conviction by guilty plea had been coerced by the prosecuting attorney. *Id.* at 197-98. Because the prosecuting attorney engaged in plea negotiations with the defendant without his attorney being present, the *Swindell* Court held that the prior conviction was not constitutionally valid beyond a reasonable doubt. *Id.* at 199.

A few years later, this Court revisited the State's burden to prove a prior conviction in an unlawful possession of a firearm charge in *State v. Gore*, 101 Wn.2d 481, 681 P.2d 227 (1984). In *Gore*, the defendant's

prior conviction was reversed on appeal for insufficient evidence after he had been convicted under RCW 9.41.040. *Id.* at 482-83. Revisiting the language of the statute and the jurisprudence requiring constitutional validity of prior convictions that the State seeks to use to prove a new crime, the *Gore* Court reaffirmed that principles of due process and application of the rule of lenity require that the State must prove a constitutionally valid predicate conviction in a prosecution under RCW 9.41.040. *Id.* at 483-86.

Subsequently, in *State v. Summers*, 120 Wn.2d 801, 812, 846 P.2d 490 (1993), reaffirmed that

a defendant may raise a defense to [a Uniform Firearms Act] prosecution by alleging the constitutional invalidity of a predicate conviction, and second, upon doing so, the State must prove beyond a reasonable doubt that the predicate conviction is constitutionally sound. In raising this defense, the defendant bears the initial burden of offering a colorable, fact-specific argument supporting the claim of constitutional error in the prior conviction. Only after the defendant has made this initial showing does the State's burden arise.

In *Summers*, this Court allowed the defendant to challenge the constitutional validity of a prior conviction based upon jury instructions that failed to accurately set forth the State's burden to disprove self-defense, even though the defendant's conviction had been reviewed and affirmed on appeal, when he argued the new self-defense standard was



established in a subsequently-decided case that applied retroactively to his conviction. *Id.* at 812. There, in light of the trial court’s instructions to the jury and the prosecuting attorney’s arguments, the *Summers* Court concluded that a correct instruction on the law may have affected the jury’s verdict, so the prior conviction could not be used to support a conviction for unlawfully possessing a firearm. *Id.* at 820-22.

In these cases, the Court has demonstrated a willingness to look beyond the facial validity of the conviction documents and evaluate the factual circumstances surrounding the plea or the trial. But nothing in these decisions requires that the “colorable, fact-specific argument supporting the claim of constitutional error in the prior conviction” either requires the defendant to stipulate to the prior conviction or requires him to assert facts beyond the facts present in the conviction documents. *Summers*, 120 Wn.2d at 812.

Here, Mathis’s argument was fact-specific because it pointed to deficiencies in the State’s evidence. Nothing in the State’s proof established that the conviction resulted from a knowing, intelligent, and voluntary guilty plea, made after full advisement and consideration of his rights. *See Opinion*, at 3. Because *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), prohibits inferring a voluntary

waiver of rights from a silent record, by failing to present proof of a knowing and intelligent waiver of rights leading to the judgment of conviction, the State failed to meet its burden to establish a constitutionally valid predicate conviction. The Court of Appeals, explaining only that Mathis denied being the person convicted in the prior case, nevertheless concluded that his argument “did not satisfy his initial burden of making a colorable, fact-specific argument to show constitutional invalidity of the plea.” *Opinion*, at 7.

Because the purpose of requiring a constitutionally valid prior conviction is to ensure that constitutional errors are not multiplied in effect through subsequent prosecutions, the Court of Appeals’ summary conclusion that Mathis’s argument was insufficiently fact-specific is nonsensical. A constitutional error is still impermissibly renewed in a future prosecution when it is applied to convict an individual who denies being the culprit. Under the Court of Appeals’ opinion, the defendant must choose between denying the prior conviction, and therefore waiving a challenge to its constitutional validity even when the invalidity is facially apparent, or the defendant must relieve the State of its burden of proving his identity in order to hold it to its burden to prove the prior conviction constitutionally valid. A defendant is not required to choose which elements the State is required to prove – “It is a fundamental

precept of criminal law that the prosecution must prove every element of the crime charged beyond a reasonable doubt.” *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002) (plurality opinion).

*Swindell* held that a constitutionally valid prior conviction is an essential element of the charge of unlawfully possessing a firearm. 93 Wn.2d at 197. Consequently, the State bears the burden of proof. The *Summers* requirement that the defendant present a colorable, fact-specific argument for invalidity should not require the defendant to waive the State’s obligation to prove his identity, and an argument of invalidity based upon the face of the conviction documents relied upon by the State should be adequate to trigger the State’s burden. Deciding this issue implicates important constitutional questions concerning the State’s burden of proof in a prosecution under RCW 9.41.040 and will clarify the defendant’s procedural requirements to challenge constitutional validity in future prosecutions for unlawful firearm possession. Accordingly, review is appropriate under RAP 13.4(b)(3) and (4) and should be granted.

**VI. CONCLUSION**

For the foregoing reasons, the petition for review should be granted under RAP 13.4(b)(3) and (4) and this Court should enter a ruling that the State failed to meet its burden to prove a constitutionally valid prior conviction as required to convict Mathis of unlawfully possessing a firearm under RCW 9.41.040.

RESPECTFULLY SUBMITTED this 19 day of September,  
2019.

TWO ARROWS, PLLC

A handwritten signature in black ink, appearing to read "Andrea Burkhart", written over a horizontal line.

ANDREA BURKHART, WSBA #38519  
Attorney for Petitioner

## DECLARATION OF SERVICE


I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Petition for Review upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Victor Mathis, DOC #410734  
Coyote Ridge Corrections Center  
PO Box 769  
Connell, WA 99326

David Quesnel  
David Matthew Wall  
Klickitat County Prosecuting Attorney  
205 S Columbus Ave Rm 106  
Goldendale, WA 98620-9054

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

Signed this 19 day of September, 2019 in Kennewick, Washington.

  
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Andrea Burkhart

**FILED**  
**AUGUST 20, 2019**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

STATE OF WASHINGTON,	)	No. 36296-5-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
VICTOR JAMES MATHIS,	)	
	)	
Appellant.	)	

PENNELL, A.C.J. — Victor James Mathis appeals his Klickitat County convictions for two counts of first degree unlawful possession of a firearm. Mr. Mathis contends the evidence was insufficient to support the convictions because the State failed to prove the essential element of a constitutionally valid predicate felony conviction. We affirm.

FACTS AND PROCEDURE

Mr. Mathis was charged with the unlawful firearm possession counts after police responded to a call reporting a fight in progress at Mr. Mathis's home. One participant told officers that Mr. Mathis had pointed a rifle at him. Mr. Mathis admitted there were guns in the house. He turned over a .30-06 rifle to officers that night. A subsequent criminal history check revealed that Mr. Mathis had prior felony convictions in Georgia

**APPENDIX**

that precluded him from possessing firearms. Police then obtained a warrant to search Mr. Mathis's home and recovered a .22-caliber rifle. At the time the warrant was executed, Mr. Mathis initially told an officer it was not him but his brother who was convicted of offenses in Georgia. The officer testified at trial that Mr. Mathis admitted later in the conversation that he had been convicted of burglary and armed robbery in Georgia.

To establish the prior conviction element of first degree unlawful possession of a firearm, the State introduced certified copies of documents from the State of Georgia showing that "Victor Lewis James" had been convicted of several felonies. Included in these documents was a "Final Disposition" dated April 17, 1991, showing a conviction by guilty plea to 10 counts, including armed robbery (count 1) and possession of firearm by convicted felon (count 10). Ex. 8.1.<sup>1</sup> The State's expert fingerprint examiner testified that Mr. Mathis's fingerprints taken during the booking process in the current case conclusively matched those of the person convicted of the Georgia crimes.

Mr. Mathis nevertheless denied that he was "Victor Lewis James" or that he had been convicted of the Georgia crimes. At the close of the State's case, Mr. Mathis moved

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<sup>1</sup> A Final Disposition entered on February 23, 1990, shows that "Victor Lewis James" was also convicted in Georgia of burglary pursuant to a guilty plea. The burglary conviction gave rise to the 1991 possession of firearm by convicted felon conviction. *Id.*

for dismissal of the charges against him on grounds that the State failed to prove the constitutionally valid predicate conviction element of unlawful possession of a firearm. His counsel reasoned that although the final disposition document in Exhibit 8.1 is akin to a judgment and sentence, and references a guilty plea, it did not also contain a guilty plea statement or any other document indicating the defendant acknowledged understanding the constitutional rights given up entering into the plea. Counsel maintained that the State had not proved anybody named on that Final Disposition, “be it Victor Lewis James or Victor James Mathis, was convicted of the offense beyond a reasonable doubt, or even at this point in time in the light most favorable to the [S]tate, because they cannot show, again, that it’s constitutionally valid.” Report of Proceedings (RP) (Aug. 8, 2018) at 124-25. Counsel further argued that “since the time of my opening [statement], this whole case is whether or not Mr. Mathis was convicted,” and dismissal was warranted because the State provided no evidence that Mr. Mathis was ever convicted of a felony or given notice, or acquired actual knowledge, that he could not possess a firearm. RP (Aug. 9, 2018) at 137-38.

The court denied Mr. Mathis’s motion to dismiss. It reasoned that the State presented prima facie evidence of a constitutionally valid armed robbery conviction from Georgia absent any contradictory evidence from the defense, and the Georgia conviction



for possession of firearm by a convicted felon was prima facie evidence that Mr. Mathis had actual knowledge of his inability to possess a firearm.

Mr. Mathis testified at trial. He said he had never gone by any other name, and denied being convicted of any felony in Georgia or being fingerprinted there. Mr. Mathis claimed “Victor Lewis James,” the person convicted and fingerprinted in Georgia, was actually his twin brother from the same father but a different mother. *Id.* at 145. Mr. Mathis also admitted to possessing the .30-06 and .22-caliber rifles that were the subject of the current charges.

A jury found Mr. Mathis guilty as charged of two counts of first degree unlawful possession of a firearm. The trial court imposed concurrent high-end 102-month sentences on each count. This appeal follows.

#### ANALYSIS

Mr. Mathis contends sufficient evidence did not support his convictions for first degree unlawful possession of a firearm because the State failed to prove a constitutionally valid predicate felony conviction. In contrast to Mr. Mathis’s trial testimony, his counsel states that for purposes of this appeal it is now assumed that the prior Georgia convictions of Victor Lewis James were properly attributed to the appellant, Victor James Mathis.

In reviewing a challenge to the sufficiency of the evidence, we view the evidence and all reasonable inferences in a light most favorable to the State to determine whether

any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that a trier of fact can draw from the evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Under RCW 9.41.040(1)(a), a person is guilty of first degree unlawful possession of a firearm if the person owns or has in his or her possession a firearm, after having previously been convicted of any serious offense. Here, it is undisputed that armed robbery in Georgia is a crime of violence that is equivalent to a serious offense in Washington, as currently defined in RCW 9.41.010(24)(a), (o).<sup>2</sup>

RCW 9.41.040 requires a constitutionally valid predicate (serious offense) conviction. *State v. Gore*, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984); *State v. Swindell*, 93 Wn.2d 192, 196-97, 607 P.2d 852 (1980). The existence of a constitutionally valid prior conviction is an essential element of the offense, one the State must prove beyond a reasonable doubt. *Swindell*, 93 Wn.2d at 196-97. A defendant may raise a defense to a firearm possession charge by challenging the constitutional validity of the predicate conviction. *State v. Summers*, 120 Wn.2d 801, 811-12, 846 P.2d 490 (1993). This

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<sup>2</sup> At the time of Mr. Mathis's offense conduct, this definition was found at former RCW 9.41.010(21)(a), (o) (2015).

includes the ability to challenge the present use of a prior conviction based on a guilty plea that allegedly did not meet the constitutional voluntariness criteria of *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). *Swindell*, 93 Wn.2d at 196-97 (citing *State v. Holsworth*, 93 Wn.2d 148, 607 P.2d 845 (1980)).

In raising this defense, “the defendant bears the initial burden of offering a colorable, fact-specific argument supporting the claim of constitutional error in the prior conviction.” *Summers*, 120 Wn.2d at 812. Such a challenge is not considered an attempt to invalidate the judgment, as is the case in a direct appeal or personal restraint petition. “Rather, [the] defendant seeks to foreclose the *prior* conviction’s *present* use to establish an essential element of RCW 9.41.040.” *Id.* at 810 (quoting *Swindell*, 93 Wn.2d at 196). Once this showing has been made, the burden shifts to the State to prove beyond a reasonable doubt that the predicate conviction is constitutionally sound. *Id.* at 812; *Swindell*, 93 Wn.2d at 196-97. The State’s burden arises only after the defendant has made the initial showing. *Summers*, 120 Wn.2d at 812; *State v. Reed*, 84 Wn. App. 379, 384–85, 928 P.2d 469 (1997).

Mr. Mathis contends his case is controlled by *Swindell*, where the Washington Supreme Court reversed and dismissed a conviction for unlawful possession of a firearm because Mr. Swindell’s largely unchallenged testimony during a motion in limine about the details of his guilty plea to the predicate offense had placed in question the plea’s

voluntariness, and the State then failed to establish beyond a reasonable doubt the constitutional validity of the plea. *Swindell*, 93 Wn.2d at 197-99.

Mr. Mathis asserts that he met *Swindell's* requirement to challenge the constitutional validity of the predicate Georgia conviction when he argued in his motion to dismiss that the State's evidence failed to establish that he entered a knowing and voluntary plea. He then argues under *Boykin* that a voluntary waiver cannot be inferred from a silent record. Mr. Mathis concludes that because the evidence failed to show a voluntary and therefore constitutionally valid plea to the predicate conviction, the State's proof was insufficient and his convictions must be reversed and dismissed. *Boykin*, 395 U.S. at 243-44. These arguments miss the mark.


Unlike in *Swindell*, Mr. Mathis did not offer any colorable, fact-specific argument that his 1991 Georgia plea to armed robbery (and possession of a firearm by a convicted felon) was constitutionally invalid. Instead, throughout trial Mr. Mathis completely denied being the person convicted of the armed robbery (and other Georgia felonies) and he made only an unsupported conclusory assertion that whoever was convicted in Georgia did not enter a constitutionally valid guilty plea *because no plea document was included with the 1991 Final Disposition*. In contrast to *Swindell*, this tactical approach by Mr. Mathis did not satisfy his initial burden of making a colorable, fact-specific argument to show constitutional invalidity of the plea. Thus, the burden never shifted to the State to

prove beyond a reasonable doubt that the predicate Georgia conviction for armed robbery shown on the 1991 Final Disposition was constitutionally sound. *Summers*, 120 Wn.2d at 812. The certified copy of the Final Disposition for armed robbery in Exhibit 8.1 sufficed as proof that Mr. Mathis had been convicted of a qualifying serious offense. The jury rejected Mr. Mathis's testimony to the contrary—a determination that we do not review.

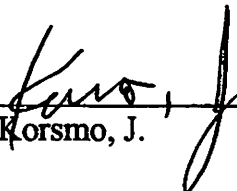
Viewing the evidence in the light most favorable to the State, any rational trier of fact could have found Mr. Mathis guilty beyond a reasonable doubt of the two counts of first degree unlawful possession of a firearm. RCW 9.41.040(1)(a); *Green*, 94 Wn.2d at 221.

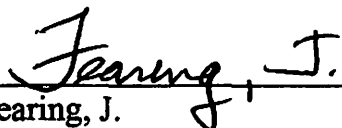
The convictions are affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

  
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Pennell, A.C.J.

WE CONCUR:

  
\_\_\_\_\_  
Korsmo, J.

  
\_\_\_\_\_  
Fearing, J.

**BURKHART & BURKHART, PLLC**

**September 19, 2019 - 9:18 AM**

**Transmittal Information**

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