

NO. 39392-1-II

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

STATE OF WASHINGTON,

Appellant,

v.

MARCUS CARTER,

Respondent.

STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION II  
09 OCT -8 AM 9:35  
BY                       
DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 99-1-01367-9

BRIEF OF APPELLANT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED October 7, 2009, Port Orchard, WA

Original +1 to the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402  
Copy to Defendant, pro se, listed at left

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## I. ASSIGNMENTS OF ERROR

1. The trial court erred in dismissing the present case as a matter of law pursuant to *State v. Knapstad* and in holding that the undisputed facts failed to establish a prima facie case against the Defendant.

2. The trial court erred in concluding as a matter of law that RCW 9.41.190's prohibition against possessing a machine gun did not apply to Carter.

3. The trial court erred in concluding as a matter of law that Carter's private possession of a machine gun qualified under RCW 9.41.190(2)(b)'s exception to the general prohibition against possession of machine gun.

4. The trial court erred in concluding as a matter of law that Carter was "licensed under federal law" as that phrase is used in RCW 9.41.190(2)(b).

5. The trial court erred in concluding as a matter of law that Carter was "engaged in the production, manufacture, repair, or testing of a machine" to be used or purchased by the armed forces or law enforcement as required under RCW 9.41.190(2)(b).

6. The trial court erred in concluding that RCW 9.41.190(2)(b) does not require technical compliance with federal law.

6. The trial court erred in concluding that RCW 9.41.190(2)(b) in any way authorized Carter to privately possess a machine gun.

7. The trial court erred in concluding that the State has the burden of proving the non-existence of a valid federal firearms license in order to prove the crime of possession of a machine gun under RCW 9.41.190.

## II. STATEMENT OF ISSUES

The defendant/respondent, Marcus Carter, brought a motion to dismiss the charge of possession of a machine gun. RCW 9.41.190(1) provides that it is unlawful for any person to own, buy, or have in possession or under control, any machine gun. An exception to this general prohibition is outlined in RCW 9.41.190(2), which provides:

This section shall not apply to:

(a) Any peace officer in the discharge of official duty or traveling to or from official duty, or to any officer or member of the armed forces of the United States or the state of Washington in the discharge of official duty or traveling to or from official duty; or

(b) A person, including an employee of such person if the employee has undergone fingerprinting and a background check, who or which is exempt from or licensed under federal law, and engaged in the production, manufacture, repair, or testing of machine guns, short-barreled shotguns, or short-barreled rifles:

(i) To be used or purchased by the armed forces of the United States;

(ii) To be used or purchased by federal, state, county, or municipal law enforcement agencies; or

(iii) For exportation in compliance with all applicable federal laws and regulations.

The State's evidence demonstrated that Carter personally and privately possessed a machine gun. Although Carter contested that the weapon was machine gun, he never argued or asserted that the weapon did not belong to him personally or that anyone else had a possessory interest in the gun. The trial court concluded that Carter was exempt for prosecution for the charged offense and that he qualified under RCW 9.41.190(2)(b) exception to the statute. This conclusion, however, was contrary to the prohibition against the private possession of machine guns found both in RCW 9.41.190 and in Chapter 44, Title 18 U.S.C (the law under which Carter held a federal firearm license). The following issues are presented:

1. Whether the trial court erred in dismissing the present case as a matter of law pursuant to *State v. Knapstad* and in holding that the undisputed facts failed to establish a prima facie case against the Defendant?
2. Whether the trial court erred in concluding as a matter of law that RCW 9.41.190's prohibition against possessing a machine gun did not apply to Carter?
3. Whether the trial court erred in concluding as a matter of law

that Carter's private possession of a machine gun qualified under RCW 9.41.190(2)(b)'s exception to the general prohibition against possession of machine gun?

4. Whether the trial court erred in concluding as a matter of law that Carter was "licensed under federal law" as that phrase is used in RCW 9.41.190(2)(b)?

5. Whether the trial court erred in concluding as a matter of law that Carter was "engaged in the production, manufacture, repair, or testing of a machine" to be used or purchased by the armed forces or law enforcement as required under RCW 9.41.190(2)(b)?

6. Whether the trial court erred in concluding that RCW 9.41.190(2)(b) does not require technical compliance with federal law?

6. Whether the trial court erred in concluding that RCW 9.41.190(2)(b) in any way authorized Carter to privately possess a machine gun?

7. Whether the trial court erred in concluding that the State has the burden of proving the non-existence of a valid federal firearms license in order to prove the crime of possession of a machine gun under RCW 9.41.190?

### III. STATEMENT OF THE CASE

#### A. PROCEDURAL HISTORY

Marcus Carter was charged by amended information filed in Kitsap County Superior Court with possession of an unlawful firearm (a machine gun). Prior to trial, the Superior Court dismissed the charge pursuant to *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).<sup>1</sup> This appeal followed.<sup>2</sup>

#### B. FACTS

The Supreme Court previously summarized the facts as follows:

Bruce Jackson and Frank Clark are criminal investigators with the Pierce County prosecutor's office. ... The defendant, Marcus Carter, was the chief instructor for Kitsap Rifle and Revolver Club and was certified by the Washington State Criminal Justice Training Commission to teach firearms training.

On May 15, 1999, Jackson and Clark attended a National Rifle Association certified firearms instructor class in Kitsap County taught by Carter. ... Carter brought out various firearms and set them on tables before the class. He

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<sup>1</sup> As the trial court noted, however, Carter himself never characterized the motion as a *Knapstad* motion. See CP 159. Rather, Carter specifically denied that his motion was "tantamount to a *Knapstad* motion." CP 129. Carter explained that a *Knapstad* motion is an argument that the State's evidence is insufficient, but that this was "not what the Accused has argued for his motion." CP 129.

<sup>2</sup> The procedural history of the present case is lengthy. Although this case was charged in 1999, the matter has never actually made it to trial. Rather, the present appeal is the third appeal in this case. The first appeal occurred after the trial court dismissed the case (after it had granted Carter's motion to suppress). That dismissal, however, was eventually overturned by the Washington Supreme Court. *State v. Carter*, 151 Wn.2d 118, 130, 85 P.3d 887 (2004). When the case eventually returned to the Superior Court, the Court again dismissed the case, this time pursuant to *State v. Knapstad*, and ordered that the case was to be dismissed with prejudice. The State appealed, and this Court then held that although the dismissal was proper, the dismissal should have been without prejudice. *State v. Carter*, 138 Wash.App. 350, 157 P.3d 420 (2007). Upon remand, the trial court again dismissed the case pursuant to *State v. Knapstad*, although the basis for the motion was different. This appeal, the third appeal in this case, then followed.

asked the students to familiarize themselves with the firearm of their choice and prepare a demonstration during which they would describe the proper handling and safety functions of the firearm. Among the firearms was an AR-15 owned by Carter. Jackson was very familiar with the AR-15 and chose that weapon to demonstrate to the class.

The AR-15 rifle is the semiautomatic, civilian version of the automatic, military M-16 rifle. An automatic weapon will continue to fire as long as the trigger is held, and is commonly known as a machine gun. It is generally illegal to own an M-16. RCW 9.41.190.

Jackson noticed that the safety lever on the AR-15 rotated into a position that corresponds to the automatic fire selection on an M-16. The AR-15 safety lever cannot rotate into this position without having been modified. Jackson also noticed that the lever had the silver color and the finish of an M-16, rather than the traditional charcoal-black color of an AR-15. Jackson suspected that the AR-15 had been modified to allow it to fire automatically. He operated the firing mechanism and determined the weapon was capable of automatic fire. Jackson showed the gun to Clark, who concurred with Jackson's observations.

Jackson then opened the gun by removing a pin that allows the gun to pivot open. Jackson noticed immediately that a small aluminum block called an autosear had been added. An autosear, which prevents an automatic gun from jamming, is not available for purchase. Jackson asked Carter if the gun had been modified and Carter admitted that it had. As Jackson began to close the gun, Carter removed the autosear from the gun and put it in his pocket.

After class when the other students had left, Jackson and Clark approached Carter about the rifle. Carter admitted that he had put M-16 parts in the rifle to replace those AR-15 parts that were designed for semiautomatic operation, specifically identifying the bolt carrier, hammer, selector switch, and autosear. Carter admitted that the rifle could fire in fully automatic mode. With the gun still in their possession, Jackson and Clark told Carter that it was a felony to own such a weapon.

Carter then denied that the gun was illegal and insisted that the gun would not fire in a full-automatic mode. Carter wanted to demonstrate it to Jackson and Clark if they would let him take it to the range with a loaded magazine. Carter went to his car to collect some ammunition. Carter then engaged in what Jackson and Clark described as furtive movements. Carter began rummaging through items in the backseat of his car, and then returned to the classroom, and called out to another man that he needed a punch, a straight steel pin that would disable the autosear. Jackson told Carter that he would not be allowed to destroy or modify the autosear.

Jackson and Clark testified to feeling that the situation was quickly getting out of control and that Carter was very agitated and antagonistic. Carter grabbed the gun from Clark's hands and walked briskly back to his car. Jackson and Clark noticed a loaded 30-round magazine for the rifle in Carter's rear pocket. As Carter kneeled on the front seat in his car and fumbled with metal objects on the floor, Jackson saw that Carter had a loaded pistol under his shirt. Jackson told Carter that he felt Carter was posing a potentially lethal hazard to them. Jackson told Carter to turn around and bring his hands into view, which Carter failed to do. Jackson and Clark then gave Carter a choice: either he give them the rifle and autosear and they would give him a receipt for it and submit it for testing to the Washington State Patrol Crime Lab, or they would call the police. Carter delayed, so Clark placed a 911 call and asked that a deputy be sent. When Carter discovered the call had been made, he relinquished the rifle and autosear, and Jackson and Clark gave Carter a receipt. A deputy arrived, who asked Jackson and Clark to maintain custody of the AR-15. Jackson and Clark filed a report on the incident.

*Carter*, 151 Wn.2d at 122-24; *see also* CP 2, CP Exhibit 2 (pages 1-13). The weapon was also tested by the State to confirm that it did in fact operate as a fully automatic machine gun. CP Exhibit 5, 8.

Prior to trial Carter filed a motion to dismiss in which he challenged the court's jurisdiction and argued that he entitled by federal law to possess a machine gun. CP 54. Carter specifically argued that he held a firearms license which allowed him to possess or own a fully automatic weapon. CP 58.<sup>3</sup> Carter then argued that RCW 9.41.190 states that it is not unlawful for a person to possess a machine gun if the person is licensed under federal law and engaged in the repair or testing of machine guns to be used or purchased by armed forces or law enforcement. CP 54-55.

The State filed a written response arguing that the facts alleged by Carter were insufficient to support a defense to the charged offense, and Carter submitted a reply brief. CP 69, 128.

On April 7, 2009, the trial court held a hearing on Carter's motion to dismiss. RP 4/07/09 1-53. At the hearing the State pointed out that page 8 of Exhibit 2 (the "summary report") stated that Carter had acknowledged that the rifle in question was his own personal rifle. RP 4/07/09 34, 36. The State also pointed out that Title 18 did not authorize Carter to privately own or possess a machine gun. RP 4/07/09 34, 36. The trial court denied Carter's motion on a different basis, noting that Carter had not shown that he was

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<sup>3</sup> Carter attached a copy of his license, which was a license issued pursuant to Chapter 44, Title 18, United States Code. CP 64. The license specifically states that the holder of the license is authorized to engage in business "within the limitations of Chapter 44, Title 18 United States Code." CP 64.

“engaged in the repair of machine guns for the armed forces or law enforcement.” RP 4/07/09 46-48.

On April 24, Carter filed a “supplemental” to his motion to dismiss which included two affidavits indicating that Carter had previously worked on machine guns for law enforcement and the military. CP 135-38. The State then filed a response incorporating the exhibits admitted at the April 7 hearing, and argued that although Carter had a firearms license under Chapter 44, Title 18 of the United States Code, 18 U.S.C. §922(o) specifically stated that it was unlawful for a person to privately possess a firearm, and that the State’s evidence showed that Carter privately possessed the gun at issue (as Carter had admitted this fact). CP 139. The State also pointed out that its evidence showed that Carter had also admitted that he did not possess a license to possess machine guns. CP 140. The State also pointed out that Carter’s affidavits did not claim that the gun at issue was owned by the armed forces or law enforcement. CP 140.

The trial court then addressed Carter’s motion at a hearing on May 1, 2009. See RP 5/01/09 6-21. At the hearing the State argued that Carter was not exempt from RCW 9.41.190 since Carter’s license did not allow him to privately possess a machine gun and that the gun at issue was not being worked on on behalf of the armed forces or law enforcement. RP 5/01/09 13-14.

The trial court ultimately issued a written memorandum opinion followed by and amended memorandum opinion. CP 148, 159. The trial court held that RCW 9.41.190(2)(b) does “not require technical compliance with federal law,” and that Carter was exempt from prosecution because he had a federal firearms license and had been engaged in the repair or testing of other machine guns for the armed forces or law enforcement. CP 163-64. The court rejected the State’s argument that the statute required Carter to be licensed to privately possess the actual machine gun at issue. CP 161-64. The court, therefore, granted Carter’s motion to dismiss. CP 154, 164.

#### IV. ARGUMENT

**A. THE TRIAL COURT ERRED IN CONCLUDING THAT RCW 9.41.190(2)(B) AUTHORIZES A PERSON TO PRIVATELY POSSESS A MACHINE GUN AS LONG AS THAT PERSON HAS A FEDERAL LICENSE OF SOME KIND AND HAS PREVIOUSLY WORKED ON A GOVERNMENT OWNED MACHINE GUN, AS THE TRIAL COURT’S INTERPRETATION VIOLATED THE LEGISLATURE’S INTENT, AS DEMONSTRATED THROUGH THE LANGUAGE OF THE STATUTE, TO MAKE IT UNLAWFUL FOR ANYONE TO PRIVATELY POSSESS A MACHINE GUN.**

The trial court determined that Carter was exempt from prosecution for his private possession of a machine gun because he had a federal license allowing him to repair government owned machine guns and because he had

previously repaired government owned machine guns. CP 159-64. The trial court's construction of the statute, however, is contrary to the intent of the legislature, as demonstrated by the statute, to make it unlawful for a person to privately possess a machine gun. The dismissal should therefore be reversed.

Appellate courts review a trial court's statutory interpretation *de novo* as a question of law. *State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 66 (2002). Statutory construction begins by reading the text of the statute or statutes involved. *State v. Roggenkamp*, 153 Wn.2d 614, 106 P.3d 196, 199 (2005). If the language is unambiguous, a reviewing court is to rely solely on the statutory language. *Roggenkamp*, 106 P.3d at 199. Where statutory language is amenable to more than one reasonable interpretation, it is deemed to be ambiguous. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). Legislative history, principles of statutory construction, and relevant case law may provide guidance in construing the meaning of an ambiguous statute. *Roggenkamp*, 106 P.3d at 199. The Court's primary duty in interpreting any statute is to discern and implement the intent of the legislature. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Statutes must be construed to effect their purpose and to avoid strained or absurd results. *State v. Stannard*, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987).

In the present case, Carter was charged with possessing a machine gun

in violation of RCW 9.41.190. In addition, Carter acknowledged that the gun in question was his personal rifle, and there has been no allegation that the gun ever belonged to a governmental agency. See, CP 62; Exhibit 2, page 8; Exhibit 3, page 72; Exhibit 4, page 21.

RCW 9.41.190(1) provides, *inter alia*, that it is unlawful for any person to manufacture, own, buy, sell, loan, furnish, transport, or have in possession or under control, any machine gun; or any part designed and intended solely and exclusively for use in a machine gun or in converting a weapon into a machine gun.

The general prohibition against the possession of machine guns, however, has several exceptions. First, RCW 9.41.190(2) provides that the general prohibition shall not apply to members of the armed forces or law enforcement officers in the discharge of their official duties. Secondly, RCW 9.41.190(2)(b) provides that the general prohibition shall also not apply to a person who “is exempt from or licensed under federal law, and engaged in the production, manufacture, repair, or testing of machine guns” to be used or purchased by the armed forces or a law enforcement agency.<sup>4</sup>

The issue presented in Carter’s motion to dismiss, therefore, was

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<sup>4</sup> RCW 9.41.190(3) provides that it shall be an affirmative defense that the machine gun was acquired prior to July 1, 1994, and is possessed in compliance with federal law. Carter, however, has never made any claim that this section applies to his case.

whether Carter qualified under RCW 9.41.190(2)(b). The State argued below that the statute's plain language meant simply that it was not unlawful to possess a machine gun if a defendant had a federal license allowing him or her to privately possess a machine gun and if the defendant was engaged in the production, manufacture, repair, or testing of that machine gun to be used or purchased by the armed forces or a law enforcement agency.

The trial court, however, concluded that the statute meant that it was not unlawful to privately possess a machine gun as long as the defendant had a license allowing him to repair machine guns owned by the government and as long as the defendant had at some recent time been engaged in the production, manufacture, repair, or testing of some machine gun other than the machine gun in question. For the reasons outlined below, the trial court's interpretation was incorrect.

1. ***The language of RCW 9.41.190 demonstrates that the intent of the legislature was, among other things, to make it unlawful for a person to privately possess a machine gun.***

The legislative intent with respect to machine guns in RCW 9.41.190(1) is clear. In that section, the legislature stated that it is unlawful for any person to own, buy possess or control a machine gun. At least one Washington court has previously addressed the legislative intent behind this statute. In *State v. Padilla*, 95 Wn. App. 531, 534, 978 P.2d 1113, *review denied*, 139 Wn.2d 1003 (1999), the Court explained that the legislative

intent behind RCW 9.41 was clear:

The plain language of the prohibitions in RCW Chapter 9.41 demonstrates the Legislature's clear goals of keeping all firearms out of the hands of certain individuals and certain firearms out of the hands of all individuals.

*Padilla*, 95 Wn. App. at 534-35. This statutory intent is carried out by the plain language of the statute.

The legislature, however, crafted two very narrow exceptions to the general prohibition on the possession of machine guns. First, the legislature created an exception for law enforcement officers and members of the armed services in the discharge of their official duties (or traveling to their official duties). RCW 9.41.190(2)(a). Second, the legislature created an exception for those licensed under federal law who produce, manufacture, repair, or test machine guns for the armed forces or law enforcement. RCW 9.41.190(2)(b). It is this second exception that is at issue in the present case.

As the State argued below, the plain language of RCW 9.41.190 is amenable to only one reasonable interpretation; namely, that it is unlawful for a person to possess a machine gun unless: (1) that person is exempt or federally licensed to possess that machine gun; and (2) the possession is tied to that person's being engaged in the production, manufacture, repair or testing of machine guns to be used or purchased by the armed forces or a law enforcement agency.

This common sense reading of the statute makes sense and effectuates the obvious legislative intent. For example, a gunsmith who is federally licensed to repair machine guns may physically possess a machine gun belonging to a law enforcement agency in his or her shop where the repairs are being made since both prongs of the above exception are met.

That same gunsmith, however, may not “borrow” that government owned machine gun, take it out of his shop, and use it for target shooting for his own pleasure (or use it to go hunting, etc). In such a scenario, the possession would be unlawful despite the federal license since by his or her engaging in a personal use of the machine gun that gunsmith could not in any way be properly characterized as being “engaged in the production, manufacture, repair or testing of machine guns.”

Similarly, a gunsmith who is not federally licensed to possess and/or repair a machine gun may not lawfully possess or repair a government owned machine gun (since the first prong of the test is not satisfied). Finally, a gunsmith who is not federally licensed to privately possess a machine gun may not privately possess such a firearm, since both prongs of the above test would not be satisfied.

The facts of the present case fall under this final scenario. Carter’s private possession of a machine gun violated the only reasonable

interpretation of RCW 9.41.190; namely, that it is unlawful for a person to possess a machine gun unless: (1) that person is exempt or federally licensed to possess that machine gun; and (2) the possession is tied to that person's being engaged in the production, manufacture, repair or testing of machine guns to be used or purchased by the armed forces or a law enforcement agency. In short, Carter violated RCW 9.41.190 because Carter privately possessed a machine gun without a license authorizing him to privately possess a machine gun, and because Carter's private possession of a machine gun was not properly characterized as being an act that was engaged in the production, manufacture, repair or testing of machine guns to be used or purchased by the armed forces or a law enforcement agency.

**2. *Carter does not qualify under the RCW 9.41.190(2)(b) exception because Carter was not "exempt from or licensed under federal law" to privately possess a machine gun.***

Carter claimed below, and the State did not dispute, that at the relevant time Carter possessed a federal license under Chapter 44, Title 18 of the United States Code. CP 56, 64. Carter submitted a copy of this license as part of his motion to dismiss. CP 64. The license itself authorizes Carter to engage in the business of being a "dealer in firearms other than destructive devices," but the license itself plainly states that Carter is "licensed to engage in the business specified in this license, within the limitations of Chapter 44, Title 18, United States Code, and the regulations issued thereunder." CP 64.

Chapter 44, Title 18 of the United States Code contains a number of limitations. Most importantly for the present case, 18 U.S.C. § 922(o) makes it unlawful to privately possess a machine gun and states as follows:

(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

(2) This subsection does not apply with respect to--

(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

Courts that have examined the scope of 18 U.S.C. §922(o) have applied its plain language and found that the statute prohibits the private possession of machine guns that were not lawfully possessed before May 9, 1986. *See e.g., Farmer v. Higgins*, 907 F.2d 1041 (11<sup>th</sup> Cir.1990)(“[S]ection 922(o) prohibits the private possession of machine guns not lawfully possessed before May 19, 1986); *U.S. v. Warner*, 5 F.3d 1378 (10<sup>th</sup> Cir. 1993)(same); *United States v. Aiken*, 974 F.2d 446, 449 (4th Cir.1992)(“Congress made it illegal for anyone other than government personnel to possess ... a machine gun in 1986, 18 U.S.C. § 922(o)(1)”). In short, the only relevant exception to 18 U.S.C. §922(o)’s general prohibition on the possession of machine guns is possession by (or under the authority of) the government. This exception

does not apply in the present case since Carter admitted that the weapon was his personal rifle.

The trial court below, however, held that “Carter has established that he maintained a Title 18 license which allowed him to deal in, i.e., repair machine guns.” While Carter’s federal license might have allowed him to repair government owned machine guns at the request of the government, it is indisputable that Carter’s license did not authorize him to privately possess a machine gun, since 18 U.S.C. 922(o) specifically prohibits the private possession of machine guns. Carter’s possession of a Title 18 license, therefore, was irrelevant, since the Title 18 license did not authorize the private possession of a machine gun.

The trial court’s reasoning, however, appears to be that the language of RCW 9.41.190(2)(b) only requires that a defendant possess a federal license of any kind, not an actual license to possess a private machine gun and that RCW 9.41.190(2)(b) does not require technical compliance with federal law. The trial court’s interpretation of RCW 9.41.190(2)(b) leads to absurd results. Under the trial court’s reasoning, possession of a federal driver’s license would be sufficient. Under any reasonable interpretation of the statute, the requirement that the defendant be “exempt from or licensed under federal law” cannot mean that the defendant is only required to be licensed to drive. Similarly, the fact that a defendant is licensed to repair

government owned machine guns does not establish that he or she is licensed to privately possess machine guns, especially when the same statute that the license is issued under specifically prohibits the private possession of a machine gun.

As Carter admitted that the rifle in question was his own private rifle, the evidence (when viewed in a light most favorable to the State) demonstrated that Carter unlawfully possessed a machine gun in violation of RCW 9.41.190. The fact that Carter held a license under Chapter 44, Title 18 of the United States Code was irrelevant, since 18 U.S.C. § 922(o) outlaws the private possession of machine guns.

3. ***Carter does not qualify under the RCW 9.41.190(2)(b) exception because Carter was not “engaged in the production, manufacture, repair, or testing of machine guns” to be used or purchased by the armed forces or a law enforcement agency when he privately possessed a machine gun.***

In addition to requiring that a person be “exempt from or licensed under federal law,” the exception outlined in RCW 9.41.190(2)(b) also requires that a person be “engaged in the production, manufacture, repair, or testing of machine guns” to be used or purchased by the armed forces or a law enforcement agency in order to qualify for the exception. Viewing the evidence in a light most favorable to the State, the evidence showed that Carter was not “engaged in the production, manufacture, repair, or testing of

machine guns” when he privately possessed the gun in question.

Carter argued below that he had at times repaired machine guns for governmental entities, and the State did not dispute this fact. Carter, however, did not allege that the gun in question belonged to a governmental entity or that he was repairing it or testing it for someone else; rather, Carter acknowledged that the gun in question was his own private rifle. CP 62; Exhibit 2, page 8; Exhibit 3, page 72; Exhibit 4, page 21.

The trial court below essentially interpreted the language RCW 9.41.190(2)(b) to authorize a person to privately own a machine gun as long as that person had, at some time, worked on some government owned machine other than the one he was charged with possessing. This conclusion, however, violates the legislative intent and leads to strained or absurd results.

For example, the language of RCW 9.41.190(2)(a) clearly provides that a member of armed services or law enforcement may only lawfully possess a machine gun in the discharge of official duties. Thus, a member of the armed forces or law enforcement may not take a government owned machine gun out hunting or target shooting for their own personal pleasure, nor may they privately possess a machine gun.

The trial court’s reading of the statutes would allow a gunsmith (who had a federal license of any kind and who occasionally works on machine

guns for the armed forces or law enforcement) to do exactly what members of the armed forces or law enforcement are not allowed to do: namely to take any machine gun, including a government owned machine out into the woods to hunt or shoot targets for recreation. Such a result makes no sense.

Rather, the only reasonable reading of RCW 9.41.190 is that it is unlawful to possess a machine gun except for two narrow exceptions. The first exception is for members of the armed forces or law enforcement who are discharging their official duties. Similarly, the second exception is for those people who possess a valid federal license allowing them to work on machine guns for the military or law enforcement and who are actually engaged in such work on a government owned machine gun. The statute does not create a blanket exception allowing such gunsmiths to privately possess machine guns, just as it does not allow members of the armed services or law enforcement to privately possess machine guns.

**B. THE TRIAL COURT ERRED IN CONCLUDING THAT THE STATE HAS THE BURDEN OF PROVING THE NON-EXISTENCE OF A VALID FEDERAL FIREARMS LICENSE IN ORDER TO PROVE THE CRIME OF POSSESSION OF A MACHINE GUN BECAUSE WASHINGTON COURTS HAVE LONG HELD THAT A DEFENDANT APPROPRIATELY BEARS THE BURDEN OF PROVING THE EXISTENCE OF A LICENSE THAT WOULD EXEMPT HIM OR HER FROM PROSECUTION.**

The trial court also erred when it concluded that that the exception outlined RCW 9.41.190(2)(b) was an element of the offense as opposed to an affirmative defense. CP 2-5. The State argued below that the statutory exception was an affirmative defense because the issue of whether a defendant possessed a license is something “uniquely with the control and knowledge of the defendant.” RP 4/07/09 38. The trial court, however, reached the opposite conclusion. As this is an issue that is likely to arise on remand, the State asks this Court to also address this issue.

Washington courts have previously addressed the issue of whether or not a defense is properly characterized as an affirmative defense when a statute exempts a defendant from prosecution if the defendant is validly licensed to engage in the prohibited activity. For instance, in *City of Seattle v. Parker*, 2 Wash.App. 331, 467 P.2d 858 (1970), the defendant was charged with violating an ordinance that made it unlawful for anyone to “carry a pistol concealed on his person, except when in his place of abode or fixed place of

business, without a license therefor as provided in RCW Chapter 9.41.” *Parker*, 2 Wn.App at 331. On appeal, Parker contended that the burden on proving the lack of a license belonged to the prosecution. *Id* at 332. The Court of Appeals held that a similar question had been considered and resolved decades earlier in *State v. Shelton*, 16 Wash. 590, 48 P. 258, 49 P. 1064 (1897). *Parker*, 2 Wn.App at 332. The *Parker* court noted that in *Shelton*, the court had held that the burden in such cases was on the defendant. *Parker*, 2 Wn.App at 331.

As explained in *Parker*, this rule is referred to as a “balancing of convenience” by some authorities. *Parker*, 2 Wn.App at 332-33, citing *Morrison v. California*, 291 U.S. 82, 54 S.Ct. 281, 78 L.Ed. 664 (1934); *Brown v. United States*, 66 A.2d 491 (D.C.Mun.App.1949). Further, where the facts lie more immediately within the knowledge of the defendant, the onus probandi should be his. *Parker*, 2 Wn.App at 333, citing *Rossi v. United States*, 289 U.S. 89, 53 S.Ct. 532, 77 L.Ed. 1051 (1933).

The *Parker* court also rejected the defendant’s claim that the burden of proof on the license issue should remain on the prosecution because the ordinance in question did not specify that the burden of proof was on the defendant on this issue, yet the ordinance did specifically place the burden of proof on the defendant with respect to other specified defenses. *Parker*, 2 Wn.App at 335. The Court of Appeals, however noted that a similar

argument was disposed of in *State v. Harding*, 108 Wash. 606, 185 P. 579 (1919), where the court, relying upon *Shelton*, stated,

So that decision seems to be an answer to the contention of counsel for the appellant that the burden of proof in such cases as to such question does not rest upon the accused, when the exception which he invokes for his protection is found in the statutory definition of the offense, or, as sometimes said, in the enacting clause, rather than in a separate exception or proviso. We are quite unable to see that the exception here involved is of any different nature, in so far as we are concerned with the question of the burden of proof, than where there is involved the question of burden of proof as to the accused possessing a license rendering him immune from prosecution. It would seem that the rule, which is sometimes called a rule of necessity, in view of the ease with which an accused person could produce proof of the fact which renders him immune-it being within his own knowledge and involving proof of a negative on the part of the state-has even stronger reasons for its support as applicable to the exception here involved. It seems to us, therefore, that the decision in that case is controlling here, unless we are to overrule it, which we are not inclined to do.

*Parker*, 2 Wn.App at 335-36, citing *Harding*, 108 Wash. At 608. The *Parker* court thus concluded that,

Neither precedent nor the temper of the times warrants our abandoning the reasoning in *Shelton*. Those who choose to carry concealed pistols must be prepared to demonstrate that they are licensed or exempted from the licensing requirement.

*Parker*, 2 Wn.App at 337.

Although the issue has not been recently addressed by any

Washington courts, other jurisdictions have recently reached similar conclusions and have held that defendants bear the burden of showing the existence of a license that would exempt them from prosecution under similar statutes. *See, e.g., Deshazier v. State*, 877 N.E.2d 200 (Ind. Ct. App. 2007)(Proof that a defendant did not possess a valid license is not an element of carrying a handgun without a license but, rather, is a defense for which the defendant bears the burden of proof); *Newman v. State*, 751 N.E.2d 265 (Ind. Ct. App. 2001)(Once the state proves that the defendant carried a handgun on or about his person, away from his dwelling or business, the burden shifts to the defendant to establish that he possessed a valid license); *Commonwealth v. Colon*, 866 N.E.2d 412 (2007)(Defendant had burden of showing that he had license to possess firearm and firearm identification card, in prosecution for possession of a firearm without a license and possession of a firearm or ammunition without firearm identification card); *Commonwealth v. Anderson*, 834 N.E.2d 1159 (2005)(On charge of unlawful possession of firearm, burden is on the defendant to come forward with evidence of a license).

In the present case, the State argued that the burden of proof regarding the existence of a firearms license should be on Carter because the issue “revolved around things that are uniquely within the control and knowledge of the defendant in this case.” RP 4/07/09 at 38. The trial court, however,

concluded that the legislature must have intended that the non-existence of the exception outlined RCW 9.41.190(2) was an element of the offense. CP 160. The trial appears to have based this conclusion on the fact that the exception outlined in RCW 9.41.190(3) was specifically designated as an affirmative defense, but the exceptions in RCW 9.41.190(2) did not contain the “affirmative defense” language. See CP 160. The trial court thus concluded that this “notable difference” indicated that the burden was on the disprove the exception outlined in subsection (2)(b). CP 160.

The trial court’s analysis, however, overlooked the other “notable difference” between 9.41.190(2)(b) and 9.41.190(3): namely that 9.41.190(2)(b) deals with the existence of a license, while 9.41.190(3) does not. Pursuant, to *Parker*, a statutory exception premised on the existence of a license is properly characterized as an affirmative defense. Thus, the legislature did not need to include language that 9.41.190(2)(b) was an affirmative defense. Furthermore, as the exception outlined in 9.41.190(3) (which is specifically denoted as an affirmative defense) was not premised on the existence of a license, and it would not have fallen under the purview of *Parker*. Thus, the legislature was required to include the affirmative defense language in 9.41.190(3). Furthermore, the trial court’s rationale mirrored the defendant’s argument in *Parker*, which the court squarely rejected. See, *Parker*, 2 Wn.App at 335-36, citing *Harding*, 108 Wash. At 608.

In short, as *Parker* explained, Washington law has long held that a defendant appropriately bears the burden in firearm cases of demonstrating that he or she is “licensed or exempted from the licensing requirement.” *Parker*, 2 Wn.App at 337.

The trial court in the present case, therefore, erred in concluding that the State has the burden of proving the non-existence of a valid federal firearms license in order to prove the crime of possession of a machine gun, and this Court should find that the statutory exemption outlined in RCW 9.41.190(2)(b) is an affirmative defense.

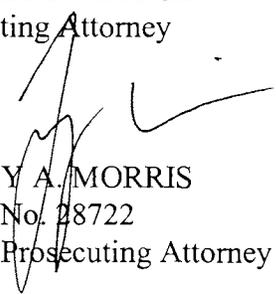
## V. CONCLUSION

For the foregoing reasons, the State urges this Court to reverse the trial court’s decision finding that Carter was exempt or otherwise not subject to RCW 9.41.190’s prohibition against the private possession of machine guns, and to reverse the trial court’s order of dismissal in the present case. In addition, the State urges this Court to find that the trial court erred in concluding that the State was required to prove, as an element of the offense, that Carter was not licensed to possess the machine gun at issue.

DATED October 7, 2009.

Respectfully submitted,

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