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MAY 31 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 28756-4

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

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STATE OF WASHINGTON,

Respondent,

v.

YASIN AHMED IBRAHIM,

Appellant.

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

The Honorable C. James Lust

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APPELLANT'S REPLY BRIEF

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## I. ARGUMENT

### 1. Equal Protection Violations

Respondent persists in its intellectually lazy attempts to argue the constitutionality of a manifestly unconstitutional statute by comparison with purportedly “similar” statutes, without acknowledging the critical differences therein. Mr. Ibrahim was not convicted of being a felon in unlawful possession of a firearm pursuant to 18 U.S.C. § 922(g). Nor was he convicted of violating the version of RCW 9A.02.020 upheld (barely) by the Washington Supreme Court in *State v. Hernandez-Mercado* in 1994.<sup>1</sup> Yes, since the United States Supreme Court decided *District of Columbia v. Heller*<sup>2</sup>, in 2008, federal courts have upheld the constitutionality of § 922(g). But *no* federal courts, since 1886, have ever held that the equal protection clause allows discrimination against lawfully admitted aliens.

18 U.S.C. §922(g)(5) makes it unlawful for any *illegal* alien in the United States to possess any firearm. It was precisely for the purpose of bringing Washington State law into line with the U.S. Constitution, 18 U.S.C. §922(g) and the law in the other 49 states of the union, that the Washington State Legislature, in

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<sup>1</sup> 124 Wn.2d 368, 879 P.2d 283 (1994).

<sup>2</sup> 554 U.S. 570, 128 S.Ct. 2783 (2008).

direct response to a lawsuit, repealed RCW 9.41.170, a statute discriminating against lawful resident aliens, and enacted RCW 9.41.171, a statute making the licensing requirements applicable *only* to those aliens here illegally or unlawfully.<sup>3</sup>

None of the cases cited by Respondent relating to 18 U.S.C. §922(g) has any relevance to the issues raised in this appeal. They deal primarily with the prohibition of firearm possession by convicted felons. Respondent's unsupported contention that "the regulation of guns possessed by non-citizens is no different" is just that—unsupported, in error, and in direct contradiction to decades upon decades of federal constitutional jurisprudence. Mr. Ibrahim was not a convicted felon. He was

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<sup>3</sup> In 2008, the National Rifle Association and the Second Amendment Foundation filed suit against the State of Washington in the United States District Court for the Western District of Washington. *National Rifle Association v. Washington*, C08-1613 RSM, alleging that RCW 9.41.170 violated the Second and Fourteenth Amendments and the Equal Protection Clause. An agreed order granting the plaintiff's motion for a permanent injunction was entered on January 27, 2009. *Id.*, Docket #32. RCW 9.41.171 became effective on July 26, 2009. Four days later, a proposed agreed order dismissing all claims was filed. *Id.*, Docket #37. The order was signed and the case dismissed on August 11, 2009. *Id.* Docket #38.

here lawfully and he is entitled to the same Constitutional protections as a United States citizen.

Respondent also attempts to rely on the 1994 case of *Hernandez-Mercado, supra*. But *Hernandez-Mercado* interpreted RCW 9.41.170<sup>4</sup> prior to its amendment in 1996, which extended the prohibition to any *non-U.S. citizen*. Prior to this amendment, RCW 9.41.170 applied only to those aliens who had not declared an intention to become a citizen of the United States.<sup>5</sup>

RCW 9.41.170 may have been constitutional prior to 1996.<sup>6</sup> And its successor statute, 9.41.171 may be constitutional now. But from 1996 through its repeal in 2009, the statute violated equal protection.

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<sup>4</sup> In 1994, RCW 9.41.170 read, in pertinent part: It shall be unlawful for any person who is not a citizen of the United States, or who has not declared his intention to become a citizen of the United States, to carry or have in his possession at any time any shotgun, rifle, or other firearm, without first having obtained a license from the director of licensing... (Emphasis added).

<sup>5</sup> The Declaration of Intention requirement ended in 1952. (June 27, 1952, ch. 477, title III, ch. 2, Sec. 334, 66 Stat. 254; Pub. L. 97-116, Sec. 15(b).

<sup>6</sup> The *Hernandez-Mercado* court thought it was a close call. *Id.* at 380.

Respondent persists also in ignoring Mr. Ibrahim's Equal Protection argument that his status as a lawful permanent resident provided him at the time of the alleged offense with the very same constitutional protections as those afforded to a United States citizen. The Second Amendment to the U.S. Constitution guarantees "the individual right to possess and carry weapons in case of confrontation. *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 2797 (2008). It protects "the right of the people to keep and bear Arms" *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265, 110 S.Ct. 1056 (1990). It is fully applicable to the States. *McDonald v. Chicago*, 561 U.S. \_\_\_\_ (2010).

"[T]he people' protected by the ... Second [Amendment] ... refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community. *Verdugo-Urquidez*, 494 U.S. at 265 (quoted with approval in *District of Columbia v. Heller*, 128 S.Ct. at 2791). Aliens enjoy certain constitutional rights. *Id.* at 270. "[O]nce an alien *lawfully enters and resides in this country* he becomes invested with the rights guaranteed by the Constitution to all people within our

borders.") *Id.* at 271 (Emphasis added). "Aliens who are lawfully present in the United States are among those 'people' who are entitled to the protection of the Bill of Rights ...." *Id.* at 279 (Stevens, J., concurring).

Because Mr. Ibrahim is a lawfully admitted permanent legal resident of the United States, the denial of his right to bear arms under the Second Amendment may not be abridged. Since RCW 9.41.170 (repealed) does just that—abridges this fundamental right *on the sole basis of his alienage*—it violates his rights under the Second Amendment, made applicable to the State of Washington by the Due Process Clause of the Fourteenth Amendment.

The Fourteenth Amendment provides,  
[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*It has long been settled, and it is not disputed here, that the term "person" in this context encompasses lawfully admitted resident aliens, as well as citizens of the United States, and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886); Truax v. Raich, 239 U.S. 33, 39 (1915); Takahashi v. Fish & Game Comm'n, 334 U.S. at 420.*

*Graham v. Richardson*, 403 U.S. 365, 371 (1971)(Emphasis added).

"[C]lassifications based on alienage ... are inherently suspect and subject to close judicial scrutiny." *Id.* at 372; *United States v. Lopez-Flores*, 63 F. 3d 1468, 1473 (9th Cir. 1995)("State alienage classifications create a 'suspect class' to which we apply strict scrutiny."). "*Takahashi* and *Graham* stand for the broad principle that 'state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress.'" *Toll v. Moreno*, 458 U.S. 1,12-13 (1982).

Respondent seeks to rely on the savings clause contained in RCW 10.01.040 to counter Mr. Ibrahim's argument that his continued prosecution pursuant to a repealed statute also violates his constitutional right to equal protection. But the Supreme Court of Washington addressed the effect of SRA amendments that downgrade crimes from a felony to a misdemeanor in the case of *State v. Wiley*, 124 Wn.2d 679 (1994). The court distinguished "between a change in the elements of a crime, which does not change the status of a prior conviction, and the . . . reclassification of an entire crime, which does ...":

[W]hen the Legislature modifies the elements of a crime, it refines its description of the behavior that constitutes the crime. This does not make defendants convicted of the earlier crime any less culpable; instead, it clarifies the evidence required to prove the crime.

On the other hand, when the Legislature downgrades an entire crime, it has judged the specific criminal conduct less culpable. By reclassifying a crime without substantially altering its elements, the Legislature concludes the criminal conduct at issue deserves more lenient treatment. The reclassification of a crime is no mere refinement of elements, but rather a fundamental reappraisal of the value of punishment.

*Id.* at 686-87.

When the Legislature completely decriminalizes certain behavior, as it did in this case, equal protection demands that a defendant may not be convicted of an offense that is no longer a crime.

## **2. Due Process Violation.**

Once again, Respondent either misunderstands or deliberately ignores the tenor of Mr. Ibrahim's argument. It is not the fact that an amended witness list was filed in an untimely manner that forms the core of the governmental misconduct. Mr. Ibrahim objects to the "double teaming" by the

trial court and the prosecution that led to the amended witness list.

The state was allowed to amend its witness list in direct response to the superior court judge stating, on the record:

Well, I've reviewed the file and I don't know how the state is going to prove his nationality, because there is nobody from immigration listed on this witness list.

The basic unfairness of allowing the state to take action in accordance with a statement made from the bench and file an Amended List of Witnesses, is manifest. The failure of the state to properly analyze and prepare its case in a timely manner is tantamount to mismanagement. But it is the coupling of this mismanagement with the intemperate remarks of the trial court judge that strikes at the very heart of the of our criminal justice system and so undermines the proper functioning of the adversarial process as to require dismissal pursuant to CrR 8.3(b). *See, Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052 (1984).

### 3. Fourth Amendment Violation.

Once again, the state chooses to focus on the alleged reasonableness of the detention and to ignore the illegality of the frisk.

An officer may frisk a detainee for weapons if the officer has *reasonable grounds to believe that person is armed and presently dangerous*. *State v. Broadnax*, 98 Wn. 2d 289, 283-284, 655 P. 2d 96 (1982)(emphasis added); *State v. Hobart*, 94 Wn. 2d 437, 441, 617 P. 2d 429 (1980). *A general suspicion will not suffice*. *State v. Lennon*, 94 Wn. App. 573 (1999).

There was no testimony at the suppression hearing that could possibly support the trial court's finding that the arresting officers had reasonable grounds to believe that Mr. Ibrahim was armed and presently dangerous. There was no testimony that Officer Miller even suspected that Mr. Ibrahim was armed and presently dangerous. In fact, the only testimony regarding any such suspicion was by Officer Miller, who testified that he told Mr. Ibrahim and another individual with him to keep their hands in plain view "because I didn't know if they had any weapons on them or anything like that." RP 14, ll. 23-24. Unless a detainee

dangerous, the weapons frisk was not allowed under the clearly established law, as set forth in *Broadnax* and *Lennon*, and it was a clear abuse of discretion for the trial court deny Mr. Ibrahim's Motion to Suppress pursuant to CrR. 3.6.

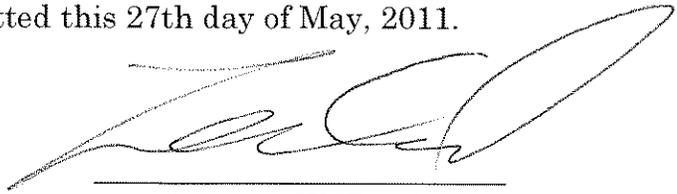
## II. CONCLUSION

The statute under which Mr. Ibrahim was prosecuted was facially unconstitutional. A defendant in a criminal proceeding is entitled to insist that his conduct be judged in accordance with a rule that is constitutionally valid," *United States v. Bozarov*, 974 F.2d 1037, 1040 (9th Cir.1992) (internal quotations omitted). Furthermore the statute discriminated against Mr. Ibrahim on the basis of his membership in a protected class. It is subject to strict scrutiny, and violates his right to equal protection both as a legal permanent resident alien and as someone subject to prosecution following the repeal of a criminal statute.

The actions of the trial court in advising the state how to heal the infirmities in its case and then allowing the state to do just that in violation of its prior rulings, violated Mr. Ibrahim's right to due process.

Finally, at the time of his seizure, there was no reasonable safety concern that Mr. Ibrahim was armed and dangerous. As such, it was error for the trial court to deny Mr. Ibrahim's motion to suppress.

Respectfully submitted this 27th day of May, 2011.

A handwritten signature in black ink, appearing to be 'Lee Edmond', written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the date listed below, I served by United States Mail one copy of the foregoing Appellant's Reply Brief pleading on the following:

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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

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I hereby certify that on the date listed below, I served by United States Mail one copy of  
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