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NO. 60552-6-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

R. P. H.

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CAROL SCHAPIRA

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

Patrick Hunter has a prior conviction for rape of a child in the first degree--a sex offense and class A felony. Being a convicted felon, Hunter is ineligible to possess a firearm. Hunter sought and was denied a request to reinstate his right to possess a firearm. Should this Court agree that Hunter is not eligible for reinstatement under RCW 9.41.040(4), that he has not obtained an equivalent to a "certificate of rehabilitation" under RCW 9.41.040(3), and that his other related claims are not properly before this Court and should be denied?

B. STATEMENT OF THE CASE

On October 20, 2000, Hunter, was charged with two counts of rape of a child in the first degree. CP 1-2. While Hunter refers to himself as merely having engaged in sexual intercourse with his two sisters, the certification for determination of probable cause indicates that he repeatedly and physically forced his youngest sister to engage in various sex acts against her will. CP 37-39, 64-66. The assaults began when his sister was only six years old, and they continued until his sister disclosed the abuse four months after she turned seven. CP 37. These acts of rape constitute the

factual basis for Count I. CP 1, 37-38, 64-66. Hunter also physically forced his eleven-year-old sister to engage in a sex act. This act of rape constitutes the factual basis for Count II. CP 1-2, 39, 66. Hunter was a thirteen-year-old teenager at the time he raped his sisters.

On December 14, 2000, Hunter pled guilty to an amended information charging a single count of first-degree child rape, the single count encompassing both victims. CP 3-7, 67. The State agreed to recommend a Special Sex Offender Disposition Alternative (SSODA), pursuant to RCW 13.40.160. CP 5. Hunter was also notified in his written plea that as a result of pleading guilty to a felony offense, his status changed; he could no longer possess a firearm unless his right to do so was restored. CP 5.

On January 12, 2001, Hunter received a suspended sentence of 15 to 36 weeks pursuant to a SSODA. CP 11. As a condition of sentence and pursuant to RCW 13.40.160, Hunter was ordered not to possess any weapons. CP 10, 14; RP¹ 8. Hunter was also informed that, as a collateral consequence of being

¹ The verbatim report of proceedings consists of one volume, hereinafter RP, encompassing the sentencing hearing occurring on January 12, 2001, and a hearing on August 7, 2007, in which Hunter sought to reinstate his right to possess a firearm.

convicted of a felony offense, he could not possess a firearm until and unless his right to do so was restored. CP 15; RP 8.

On August 7, 2007, a hearing was held after Hunter filed a petition seeking to relieve himself of the requirement that he register as a sex offender, and a separate petition seeking to have his right to possess a firearm restored. RP 12-30. Hunter's petition seeking to restore his right to possess a firearm was brought under RCW 9.41.040(4)(b)(i). CP 30.

Finding that future registration would not serve the purposes of the sex offender registration statute, the court agreed to relieve Hunter of the requirement that he register as a sex offender. RP 25-27; CP 41-42. At the same time, the court declined to reinstate Hunter's right to possess a firearm, expressing concern about the seriousness of the underlying conviction and the number of driving offenses Hunter had incurred since his sentencing. RP 25-27; CP 41-42.

Hunter believed that, if he met the time limit and conviction free requirements of RCW 9.41.040(4)(b)(i), the court was required to reinstate his right to possess a firearm, regardless of any concerns the court might have about the propriety of so doing. RP 28. The court disagreed, but indicated it would entertain a motion

to reconsider if Hunter provided the court with applicable case law.
RP 28.

On August 17, 2007, Hunter filed a motion to reconsider, citing State v. Swanson, 116 Wn. App. 69, 65 P.3d 343, rev. denied, 150 Wn.2d 1006 (2003). CP 43-46. In the motion, Hunter argued that he met the requirements of RCW 9.41.040(4)(b)(i) and therefore, under Swanson, the court was required to reinstate his right to possess a firearm. CP 43-46.

The State submitted a response brief, citing State v. Graham, 116 Wn. App. 185, 64 P.3d 684 (2003). CP 47-51. In the response brief, the State argued that Hunter did not meet the prerequisites for filing a petition under RCW 9.41.040(4)(b)(i), and therefore Hunter was ineligible for reinstatement. CP 47-51. Hunter replied, arguing that the trial court was not bound by Graham, and that Graham was decided incorrectly. CP 52-56.

On August 31, 2007, the court signed an order denying Hunter's motion to reconsider. CP 57. The order did not specify a reason for its ruling.

Additional facts are included in the sections to which they belong.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY DECLINED TO REINSTATE HUNTER'S RIGHT TO POSSESS A FIREARM UNDER SUBSECTION (4) OF RCW 9.41.040.

Hunter contends that (1) he met the requirements for reinstatement of his right to possess a firearm under RCW 9.41.040(4), and (2) the trial court was required to reinstate his right to possess a firearm, regardless of any concerns the court may have had in allowing Hunter to possess a gun. This is incorrect. A trial court does have some discretion about whether to allow a convicted felon to again possess a firearm, and in any event, with Hunter's underlying conviction being a sex offense and a class A felony, Hunter was ineligible for reinstatement under RCW 9.41.040(4). See State v. Smith, 118 Wn. App. 464, 76 P.3d 769 (2003); Graham, 116 Wn. App. 185; State v. Nakatani, 109 Wn. App. 622, 36 P.3d 1116 (2001).

a. With A Prior Class A Sex Offense, Hunter Was Ineligible For Reinstatement Under Subsection (4) Of RCW 9.41.040.

Statutory interpretation is a question of law that the court reviews de novo. Lakemont Ridge Homeowners Ass'n v. Lakemont Ridge Ltd., 156 Wn.2d 696, 698, 131 P.3d 905 (2006). The primary

duty in interpreting any statute is to discern and implement the intent of the legislature. Id. The starting point must always be the statute's plain language and ordinary meaning. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

Hunter was convicted of rape of a child in the first degree, a sex offense and a class A felony. RCW 9A.44.073(2); RCW 9.94A.030. As a collateral consequence of his conviction--not his sentence--it became unlawful for Hunter to possess a firearm.² RCW 9.41.040(1)(a); In re Ness, 70 Wn. App. 817, 823-24, 855 P.2d 1191 (1993) (loss of the right to possess a firearm is a collateral consequence of a conviction), rev. denied, 123 Wn.2d 1009 (1994); accord, State v. Schmitt, 143 Wn.2d 658, 676 n.74, 23 P.3d 462 (2001).

When Hunter sought to restore his right to possess a firearm, he did so under RCW 9.41.040(4)(b)(i). In pertinent part, the statute provides that:

Notwithstanding any other provisions of this section, if a person is prohibited from possession of a firearm under subsection (1) or (2) of this section and has not previously been convicted or found not guilty by

² RCW 9.41.040(1)(a) makes it illegal for any person previously convicted of any "serious offense" to possess a firearm. "Serious offense" is defined as any "crime of violence." RCW 9.41.010(12). "Crime of violence" is defined as any class A felony. RCW 9.41.010(11).

reason of insanity of a sex offense prohibiting firearm ownership under subsection (1) or (2) of this section 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:

(b)(i) 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)(b)(i).

Subsection (4) comes into play at the time a person moves to restore his right to possess a firearm. By its very terms, the person is already prohibited from possessing a firearm and is seeking to have that status changed. Thus, as interpreted by this Court, if at the time a petition for reinstatement is filed a person has a disqualifying conviction (a sex offense that prohibits firearm ownership, a class A felony or a felony with a maximum sentence of at least 20 years), the person cannot reinstate his right to possess a firearm under subsection (4). Nakatani, 109 Wn. App. 622, 625 (Nakatani's robbery conviction carried a 20-year maximum

sentence and thus he was prohibited from reinstatement under subsection (4)); Graham, 116 Wn. App. 185 (Graham's sex offense, existing prior to the time of his petition, bars reinstatement under subsection (4)); Smith, 118 Wn. App. 464 (relying in part on an Attorney General Opinion, the court of appeals agrees that Smith's sex offense--his sole conviction--bars reinstatement under subsection (4)). Read in a straightforward manner, the plain language of RCW 9.41.040(4)(b)(i) dictates that "prior" refers to acts occurring prior to the filing of a petition for reinstatement. After all, unless a person files a petition for reinstatement on the very day of his conviction, all convictions referred to in the statute are necessarily prior convictions.

Hunter asserts that all cases holding as stated above are incorrect. Specifically, he claims that "prior conviction" does not refer to a conviction existing prior to the petition for reinstatement. Rather, Hunter asserts, "prior conviction" refers to a conviction existing prior to yet another conviction that itself is prior to the filing of a petition. By way of example, under Hunter's theory, a person convicted of murder in the second degree can petition for and obtain reinstatement of his right to possess a firearm under subsection (4), but a person with a murder in the second degree

conviction who subsequently commits theft in the second degree cannot (regardless, according to Hunter, of the perceived dangerousness of either person).

Hunter's interpretation leads to the strained and absurd result that the Legislature intended to allow a convicted murderer to possess a firearm unless the murderer happens to commit a subsequent felony, regardless of how minor the subsequent offense may be. This seems contrary to the stated purposes of the "Hard Time for Armed Crime" statute,³ a statute with the stated intent to stigmatize the use and possession of firearms by convicted felons. Laws of 1995, ch. 129, § 1; Graham, 116 Wn. App. at 189-90; State v. Zornes, 78 Wn.2d 9, 13, 475 P.2d 109 (1970) (the primary objective of statutory construction is to carry out the legislature's intent); State v. Stannard, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987) (unlikely, absurd or strained results are to be avoided).

Other rules of statutory construction also support the conclusion that persons such as Hunter are not eligible for reinstatement under subsection (4). It is a long-standing principle that a court will not interpret a statute so as to render other

³ Subsection (4) of RCW 9.41.040 was enacted as part of the 1995 Hard Time for Armed Crime Act. Laws of 1995, ch. 129, § 16.

language within the statute superfluous. Lakemont, 156 Wn.2d 696, 699. Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous. J.P., 149 Wn.2d 444, 450. Hunter's interpretation of RCW 9.41.040(4)(b)(i) renders a portion of the statute meaningless and superfluous.

Under Hunter's interpretation of the first sentence of subsection (4), a person is not eligible for reinstatement if he has committed a felony subsequent to a prior sex offense, class A felony or felony conviction carrying at least a 20-year maximum sentence. However, such a person would already not be eligible for reinstatement under other language contained in the same subsection.

Subsection (4)(b)(i) provides that reinstatement is possible only "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 9.94A.525 supplies the rules for calculating a defendant's offender score. Subsection (2)(a) of RCW 9.94A.525 provides that "[c]lass A and sex prior felony convictions shall always be included in the offender score." As a result, under subsection (4)(b)(i) of RCW 9.41.040, a person with a prior sex

offense or class A felony, and a subsequent felony, would never be able to reinstate his right to possess a firearm under subsection (4). Thus, Hunter's interpretation of the first sentence of subsection (4) renders the language of subsection (4)(b)(i) meaningless and superfluous.

Instead of an interpretation that renders the language in the first sentence of subsection (4) meaningless and superfluous, the interpretation that best effectuates the legislative intent, and is true to the language of the statute, is that subsection (4)(b)(i) is intended to prohibit recidivists from possessing a firearm, but that when a person has committed certain offenses--class A felonies, sex offenses, or felonies with a maximum sentence of at least 20 years--the Legislature intends that these persons are not eligible for reinstatement at all under subsection (4), whether they commit a subsequent felony or not.

Finally, at least three courts have interpreted RCW 9.94.040 consistently with the State's position here. See Smith, 118 Wn. App. 464; Graham, 116 Wn. App. 185; Nakatani, 109 Wn. App. 622. The Legislature is presumed to be familiar with prior judicial construction of its acts, and the failure of the Legislature to amend a statute after it has been judicially construed indicates an intent to

concur in that construction. Buchanan v. International Broth. of Teamsters, 94 Wn.2d 508, 617 P.2d 1004 (1980); State v. Fenter, 89 Wn.2d 57, 70, 569 P.2d 67 (1977). The Legislature amended RCW 9.41.040 in 2003 (see Laws of 2003, ch. 53, § 26) and again in 2005 (see Laws of 2005, ch. 453, § 1). On neither occasion did the Legislature amend the statute so as to distinguish the judiciary's interpretation of the statute that first occurred in 2001.⁴ The Legislature's seven years of acquiescence demonstrates that the courts' prior decisions interpreting RCW 9.41.040(4) are correct.

b. The Trial Court Has Some Discretion To Deny A Convicted Felon The Right To Possess A Firearm.

Hunter contends that no matter how dangerous a judge believes a convicted felon to be, if that felon meets the minimal requirements of subsection (4)--the passage of time and no further felony convictions--the judge has absolutely no discretion and must allow that person the right to possess a firearm. The Legislature could not have intended this result.

Nowhere in subsection (4) did the Legislature state that the trial court "shall" reinstate a convicted felon's right to possess a

⁴ Nakatani was decided in 2001, Smith and Graham in 2003.

firearm. If the Legislature wanted to use mandatory language, it would have, just as it did in other portions of the act. See State v. Fast, 90 Wn. App. 952, 956, 954 P.2d 954 (1998) (weapons enhancements "shall" not run concurrently with any other enhancements), rev. denied, 136 Wn.2d 1023 (1998). Where the Legislature uses permissive language in one provision and mandatory language in a similar, related provision, the court will presume the Legislature intended different results. Council House, Inc. v. Hawk, 136 Wn. App. 153, 159, 147 P.3d 1305 (2006); Robb v. City of Tacoma, 175 Wash. 580, 587-88, 28 P.2d 327 (1933) (the Legislature knows when to use the word "shall").⁵ As the dissent in Swanson noted, the very fact that the statute provides that a defendant "*may petition*" the court, and there is no mandatory language *requiring* the court to reinstate the right to possess a firearm, indicates that the Legislature intended to give the trial court some discretion when considering whether a convicted felon should be able to possess a firearm. Swanson, 116 Wn. App. at 79.

The stated intent of the Hard Time for Armed Crime Act is to deter criminals from possessing deadly weapons during the

⁵ The majority in Swanson does not address these rules of statutory construction.

commission of crimes and to stigmatize the possession of firearms by criminals. Laws of 1995, ch. 129, § 1. Considering these purposes, it seems unlikely that the public⁶ or the Legislature intended to totally divest trial courts of some discretion when considering whether to allow a convicted felon the ability to again possess a gun.

2. STATES CAN LAWFULLY PROHIBIT CONVICTED FELONS FROM POSSESSING FIREARMS.

Hunter claims that it is unconstitutional to prohibit felons from ever possessing a firearm, a claim that amounts to a challenge to subsection (1) of RCW 9.41.040. This issue is not properly before this Court.⁷ In addition, it cannot be disputed that states have the authority to prohibit convicted felons from possessing firearms.

a. HUNTER'S CLAIM IS NOT PROPERLY BEFORE THIS COURT.

As a general rule, an appellate court will not entertain issues raised for the first time on appeal. RAP 2.5; State v. Phillips, 65

⁶ In enacting the Hard Time for Armed Crime Act, the Legislature enacted public Initiative 159 without change. State v. Broadaway, 133 Wn.2d 118, 125, 942 P.2d 363 (1997).

⁷ Moreover, the premise of Hunter's claim is erroneous. Hunter is not prevented from ever possessing a firearm. He is merely ineligible for reinstatement under subsection (4) of RCW 9.41.040. The ability to possess a firearm exists for Hunter, and all other convicted felons, under subsection (3) of RCW 9.41.040.

Wn. App. 239, 243, 828 P.2d 42 (1992). There is a limited exception to this general rule. An appellate court "may" review errors that are alleged to be both manifest and constitutional.⁸

State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

Further, where an issue could have been raised in a first appeal, a party may not raise the issue in a second appeal. State v. Sauve, 100 Wn.2d 84, 666 P.2d 894 (1983). Finally, there are time bars upon both direct appeals and personal restraint petitions, the limits of which are far exceeded here. See e.g., RAP 3.2(e); RCW 10.73.090.

Loss of the right to possess a firearm is a collateral consequence of a conviction, not a direct consequence. In re Ness, 70 Wn. App. 817, 823-24; see also State v. Jamison, 105 Wn. App. 572, 591-92, 20 P.3d 1010 (deportation may be an absolute certainty result of plea, but it is still a collateral consequence that the trial court has no control) rev. denied, 144 Wn.2d 1018 (2001).

⁸ The court determines whether an error is manifest constitutional error by applying a four-step process: the court determines (1) whether the alleged error is in fact a constitutional issue; (2) whether the error is manifest; that is, whether it had 'practical and identifiable consequences'; (3) the court next addresses the merits of the constitutional issue; and (4) finally, the court passes upon whether the error was harmless. Lynn, 67 Wn. App. at 345.

When Hunter pled guilty and was sentenced in 2001, he never argued that banning him from possessing a firearm was unconstitutional. He never filed a direct appeal or a personal restraint petition arguing that such a ban was unconstitutional. Additionally, when Hunter petitioned for reinstatement of his right to possess a firearm in August of 2008, he never raised a constitutional challenge to the ban upon his right to possess a firearm. Hunter is raising this issue for the first time in an appeal of a denial of his motion for reinstatement under RCW 9.41.040(4), a motion raised seven plus years after his sentencing, and a motion having to do with reinstatement, not prohibition of firearm rights. This issue is a target gone by and is not properly before this Court. This assignment of error is not reviewable as a matter of law.

b. It Is Constitutionally Permissible To Prohibit Convicted Felons From Possessing Firearms.

Once a statute has been enacted, it is presumed constitutional, and the heavy burden of proving it unconstitutional lies with the party challenging its validity. Brown v. City of Yakima, 116 Wn.2d 556, 559, 807 P.2d 353 (1991); City of Seattle v. Lewis, 70 Wn. App. 715, 717, 855 P.2d 327 (1993), rev. denied, 123 Wn.2d 1011 (1994). It is not enough to argue the propriety of enacting a particular law; rather, "the party challenging it must prove it violates the Constitution beyond a reasonable doubt." City of Seattle v. Montana, 129 Wn.2d 583, 589, 919 P.2d 1218 (1996) (citing State v. Myles, 127 Wn.2d 807, 812, 903 P.2d 979 (1995)).

Citizens have a right to bear arms under both the Second Amendment and Article 1, § 24 of the Washington State Constitution. This right is not absolute. "It has long been recognized that this constitutional guarantee is subject to reasonable regulation by the state under its police powers." State v. Krantz, 24 Wn.2d 350, 353, 164 P.2d 453 (1946) (citing United States v. Miller, 307 U.S. 174, 59 S. Ct. 816, 83 L. Ed. 1206 (1939)). Both the United States Supreme Court and the Washington Supreme Court have held that it is constitutional to

prohibit convicted felons from possessing firearms. See Lewis v. United States, 445 U.S. 55, 67, 100 S. Ct. 915, 63 L. Ed. 2d 198 (1980); State v. Tully, 198 Wash. 605, 89 P.2d 517 (1939); Krantz, 24 Wn.2d 350.

In Tully, the defendant argued that Washington's Uniform Firearms Act was unconstitutional because the act made it a crime for him to possess a firearm after having been convicted of a "crime of violence." The Supreme Court rejected Tully's argument, stating that all authorities were contrary to Tully's claim. Tully, 198 Wash. at 607. The Supreme Court reaffirmed this position in State v. Krantz, supra.

The United States Supreme Court has upheld the far more restrictive federal law prohibiting felons and some misdemeanants from possessing firearms. See 18 U.S.C. § 922(g). "Congress' judgment that a convicted felon, even one whose conviction was allegedly uncounseled, is among the class of persons who should be disabled from dealing in or possessing firearms because of potential dangerousness is rational." Lewis, 445 U.S. at 67; see also United States v. Pfeifer, 371 F.3d 430 (8th Cir. 2004) (statute prohibiting possessing firearm after being convicted of misdemeanor crime of domestic violence does not violate the

constitution); United States v. Price, 328 F.3d 958 (7th Cir. 2003); United States v. Cole, 276 F.Supp.2d 146 (D.D.C. 2003); Moyer v. Secretary of Treasury, 830 F.Supp. 516 (W.D.Mo. 1993).

Hunter raped two young girls, one just six years old. He committed a crime that is defined as a sex offense, a violent offense and a class A felony. As a result of his conviction, just as with every other person committing violent sex crimes, Hunter cannot possess a firearm until his right to do so is restored, a right that exists under subsection (3) of RCW 9.41.040. Hunter claims it is unreasonable for the Legislature to prohibit persons convicted of sex offenses, violent offenses or class A felonies from possessing a firearm. Hunter cites to no court in any state that has ever so held, and the State has found none. Where no authority is cited in support of a proposition, the court is not required to search out authority, but may assume that counsel, after diligent search, has found none. Courts ordinarily will not give consideration to such errors unless it is apparent without further research that the assignments of error presented are well taken. State v. Young, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978), (citing DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).

Hunter also says that because he was a juvenile when he raped his sisters, somehow the statute making it unlawful for him to possess a firearm is unconstitutional. This assertion has no merit and is again unsupported by any case law. There is nothing in the constitution that prohibits the Legislature from banning persons convicted of violent sex offenses from possessing a firearm merely because they have not yet reached the age of 18. Indeed, it is perfectly reasonable for the Legislature to believe a 17-year-old and an 18-year-old, both committing violent sex offenses, should not possess a firearm.

**3. HUNTER CANNOT AVAIL HIMSELF OF
SUBSECTION (3) OF RCW 9.41.040.**

Hunter claims that he obtained an equivalent to a "certificate of rehabilitation" and therefore the trial court should have reinstated his right to possess a firearm under subsection (3) of RCW 9.41.040. Specifically, Hunter claims that, when the court relieved him of the requirement that he register as a sex offender, this was necessarily equivalent to a certificate of rehabilitation and the court was thus required to reinstate his right to possess a firearm. This factual, non-constitutional issue was never raised below, and thus, Hunter is barred from raising the issue for the first time on appeal.

See Phillips, 65 Wn. App. at 243; Lynn, 67 Wn. App. at 345. In addition, a court granting a sex offender relief from the requirement that he register as a sex offender is not the equivalent of a certificate of rehabilitation.

a. **Hunter's Claim Under Subsection (3) Is Not Properly Before This Court.**

In pertinent part, RCW 9.41.040(3) provides:

Notwithstanding RCW 9.41.047 or any other provisions of law, as used in this chapter, a person has been "convicted", whether in an adult court or adjudicated in a juvenile court, at such time as a plea of guilty has been accepted, or a verdict of guilty has been filed, notwithstanding the pendency of any future proceedings including but not limited to sentencing or disposition, post-trial or post-factfinding motions, and appeals. Conviction includes a dismissal entered after a period of probation, suspension or deferral of sentence, and also includes equivalent dispositions by courts in jurisdictions other than Washington State. **A person shall not be precluded from possession of a firearm if the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted or the conviction or disposition has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.** Where no record of the court's disposition of the charges can be found, there shall be a rebuttable presumption that the person was not convicted of the charge.

RCW 9.41.040(3) (emphasis added).

In Hunter's petition to the trial court, he specifically referenced the requirements for reinstatement under subsection (4) of RCW 9.41.040. CP 30. At the hearing on his petition, Hunter sought reinstatement only under subsection (4). See RP 17, 28-30. When the court exercised its discretion and denied Hunter's motion, Hunter claimed that under subsection (4) the court had no discretion, that the court was required to reinstate his right to possess a firearm, and that he would provide supporting case law and file a motion to reconsider. RP 30.

In his Motion for Reconsideration, Hunter's argument was specifically limited to whether the court had any discretion under subsection (4) to deny reinstatement.⁹ CP 44-46. The only mention of subsection (3) in any argument or pleading was contained in a footnote in Hunter's Reply to State's Opposition to Motion for Reconsideration. CP 56. However, in citing subsection (3), Hunter was not asking the court to rule under this subsection. Rather, the reference was used to support Hunter's statutory interpretation argument under subsection (4), that the Legislature

⁹ See e.g., Hunter's issue statement: "If the parties have agreed that the Respondent has met the statutory requirements of the restoration of firearm rights [which are contained in subsection (4)], may the court exercise its discretion and consider other factors in denying the petition for restoration of firearm rights?" CP 44.

intended that all persons be eligible for reinstatement in some manner. See CP 55-56. Hunter never asked the court to find that he had obtained an equivalent to a certificate of rehabilitation or that his right to possess a firearm should be reinstated under subsection (3). There being no applicable exception allowing this issue to be raised for the first time on appeal, this Court should not consider this claim.

b. Hunter Has Not Received An Equivalent To A Certificate Of Rehabilitation.

Hunter claims that when the court relieved him of the requirement that he register as a sex offender, the court necessarily found that he had received the equivalent of a certificate of rehabilitation. This argument must be rejected. Washington courts do not have the authority to issue a "certificate of rehabilitation," or an equivalent. Washington courts will recognize such certificates, or their equivalents, only from other jurisdictions. In any event, a court granting a sex offender relief from the requirement that he register as a sex offender is not the equivalent of a certificate of rehabilitation.

Subsection (3) of RCW 9.41.040 defines what does and does not constitute a conviction for purposes of the Unlawful

Possession of a Firearm statute.¹⁰ Subsection (3) provides that, when a case has been dismissed after a period of probation, suspension or deferral of sentence, the case is still considered a conviction under RCW 9.41.040. Subsection (3) does provide for certain exceptions wherein a prior offense will not be considered a conviction under the statute. Specifically, "[a] person shall not be precluded from possession of a firearm if the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted or the conviction or disposition has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence." RCW 9.41.040(3).

There is no such thing as a "certificate of rehabilitation" under Washington law. See State v. Masangkay, 121 Wn. App. 904, 91 P.3d 140 (2004), rev. granted, 153 Wn.2d 1017 (2005);¹¹ Smith, 118 Wn. App. 464. The language of subsection (3) was

¹⁰ See e.g., State v. Nelson, 120 Wn. App. 470, 85 P.3d 912 (2004). Nelson had his prior conviction expunged under RCW 13.50.050. This Court determined that Nelson's expunged conviction no longer counted as a conviction under RCW 9.41.040.

¹¹ The Supreme Court docket indicates that after the Court accepted review, Masangkay voluntarily withdrew his appeal.

borrowed from Evidence Rule 609(c). State v. Radan, 143 Wn.2d 323, 330, 21 P.3d 255 (2001); Masangkay, 121 Wn. App. at 911. Under subsection (3) (and ER 609), Washington courts will respect "certificate[s] of rehabilitation" and "other equivalent procedure[s]" from other jurisdictions. Radan, 143 Wn.2d at 335; Masangkay, 121 Wn. App. at 911 (under ER 609(c), both the state and federal evidentiary rules acknowledge the existence of certain jurisdictions that have statutory provisions authorizing courts to issue certificates of rehabilitation). But there is no "equivalent procedure" in Washington. Radan, 143 Wn.2d at 335 ("the Legislature's use of the phrase 'other equivalent procedure' suggests the Legislature intended some deference to the practices of **other jurisdictions**, as long as the practice involved a finding of rehabilitation") (emphasis added).

If the Legislature had wanted to create a document called a "certificate of rehabilitation," it would have done so. If the Legislature had wanted courts to treat certain Washington convictions as non-convictions under RCW 9.41.040(3), it would have identified the "equivalent procedures" existing in Washington where courts could do so. If the Legislature had wanted the relief from sex offender registration to constitute an "equivalent

procedure" to a certificate of rehabilitation, it would have said so. See Matter of Sietz, 124 Wn.2d 645, 651, 880 P.2d 34 (1994) (if the Legislature had wanted certain multiple prior convictions to be counted separately, it would have done so); Puget Sound Nat. Bank v. State Dept. of Revenue, 123 Wn.2d 284, 289, 868 P.2d 127 (1994) (if the Legislature wished to prohibit the assignment of claims against the State, the Legislature would have enacted a state anti-assignment act); State v. McCollum, 88 Wn. App. 977, 989, 947 P.2d 1235 (1997) (the court will not read into a statute provisions that are not there, nor will the court modify a statute by construction), rev. denied, 137 Wn.2d 1035 (1999).

In any event, even if the Legislature intended certain types of rulings by Washington courts to be "equivalent" to a "certificate of rehabilitation," providing a sex offender relief from sex offender registration is not an equivalent procedure. A certificate of rehabilitation in other states--and equivalent acts under subsection (3) of RCW 9.41.040--all contemplate that in some manner the conviction is no longer treated as a full conviction. See RCW

43.43.830¹² (a conviction in which a person has received a certificate of rehabilitation or equivalent is not considered a conviction); Radan, 143 Wn.2d 323 (recognizing procedure in Montana whereby person convicted received an actual discharge and restoration of civil rights); United States v. Pagan, 721 F.2d 24, 29-30 (2nd Cir. 1983) (a discharge and finding of rehabilitation under 18 U.S.C. § 5021 renders a conviction inadmissible under ER 609); see also Cal. Penal Code § 4852.01-4852.07 (allowing for a certificate of rehabilitation and unconditional pardon).

RCW 43.43.830 uses the exact same language as RCW 9.41.040(3). If, as Hunter claims, relieving a convicted sex offender of the requirement that he register as a sex offender necessarily means that person has received the equivalent of a certificate of

¹² In pertinent part, RCW 43.43.830 provides:

"Conviction record" means "conviction record" information as defined in RCW 10.97.030 and 10.97.050 relating to a crime committed by either an adult or a juvenile. It does not include a conviction for an offense that has been the subject of an expungement, pardon, annulment, **certificate of rehabilitation, or other equivalent procedure** based on a finding of the rehabilitation of the person convicted, or a conviction that has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence. It does include convictions for offenses for which the defendant received a deferred or suspended sentence, unless the record has been expunged according to law.

RCW 43.43.830(4) (emphasis added).

rehabilitation, then relief from registering also necessarily means the conviction is no longer considered a conviction under RCW 43.43.830. There is no support for the proposition that the Legislature sought to allow convicted sex offenders this unique opportunity to expunge their convictions when other convicted felons cannot.

Relieving a convicted sex offender of the requirement that he must register as a sex offender does not in any way affect the underlying conviction. Any and all ramifications of that conviction still exist, except for the registration requirement. Thus, relieving a defendant of the registration requirement is not equivalent to a certificate of rehabilitation.

Further, to qualify as an equivalent to a certificate of rehabilitation, "RCW 9.41.040 unambiguously requires a finding of rehabilitation." Radan, 143 Wn.2d at 335 (internal quotations omitted). The Supreme Court recognized a limited exception allowing for some deference for "other jurisdictions" wherein their practice necessarily includes a finding of rehabilitation.

Hunter argues that the court necessarily made a finding of rehabilitation when it relieved him of the requirement to register as a sex offender. This is incorrect.

A convicted sex offender may petition the court to be relieved of the duty to register as a sex offender under certain circumstances. See RCW 9A.44.140. The relevant provisions here are as follows:

(4) An offender having a duty to register under RCW 9A.44.130 for a sex offense or kidnapping offense committed when the offender was a juvenile may petition the superior court to be relieved of that duty. The court shall consider the nature of the registerable offense committed, and the criminal and relevant noncriminal behavior of the petitioner both before and after adjudication, and may consider other factors.

.....

(b) The court may relieve the petitioner of the duty to register for a sex offense or kidnapping offense that was committed while the petitioner was under the age of fifteen if the petitioner (i) has not been adjudicated of any additional sex offenses or kidnapping offenses during the twenty-four months following the adjudication for the offense giving rise to the duty to register, and (ii) proves by a preponderance of the evidence that future registration of the petitioner will not serve the purposes of RCW 9A.44.130, 10.01.200, 43.43.540, 46.20.187, 70.48.470, and 72.09.330.

RCW 9A.44.140(4).

There was no finding of rehabilitation here. In fact, just the opposite. The court specifically found that Hunter's conduct in incurring multiple traffic infractions showed Hunter was not yet of the character wherein the court was willing to allow him to possess

a gun. Further, Hunter's own expert did not say Hunter was rehabilitated and not a risk to reoffend, just that he was a low risk to commit another sex offense. Relief from registering only means that continued registration would not serve the purposes of the sex offender registration statute; it does not mean that a person is completely rehabilitated.

4. A JUDGE'S INCORRECT STATEMENT ABOUT THE LAW CANNOT BE USED TO FORCE ANOTHER JUDGE TO DO AN ACT NOT PERMISSIBLE UNDER THE LAW.

Hunter contends that at his sentencing hearing, Judge Julie Spector said that he could have his right to obtain a firearm restored, and therefore, under the due process clause, Judge Carol Schapira was required to reinstate Hunter's right to possess a firearm even if to do so violates the law. This argument has no merit. The due process clause can be used as a shield in a criminal case wherein a defendant has reasonably relied to his detriment on misleading advice by the government about what conduct the government has proscribed. The due process clause cannot be used as a sword to force a judge to do an act not permissible under the law.

Hunter's argument is premised upon the notice requirement of the due process clause. The due process clause of the fourteenth amendment to the United States Constitution requires statutes to provide fair notice of the conduct they proscribe.¹³ State v. Watson, 160 Wn.2d 1, 6, 154 P.3d 909 (2007). The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed. Watson, 160 Wn.2d at 7. Ignorance of the law is generally not a defense to a criminal charge. State v. Minor, 162 Wn.2d 796, 802, 174 P.3d 1162 (2008). A narrow exception exists where a defendant has reasonably relied to his detriment upon a government entity that provided affirmative, misleading information. Minor, 162 Wn.2d at 802-04; State v. Locati, 111 Wn. App. 222, 43 P.3d 1288 (2002); State v. Leavitt, 107 Wn. App. 361, 27 P.3d 622 (2001).¹⁴

¹³ U.S. CONST. amend. XIV, § 1 provides that "nor shall any state deprive any person of life, liberty, or property, without due process of law."

¹⁴ In Leavitt, the court listed the following elements of a due process claim: (1) that the alleged statement was actually made; (2) that it was an official statement, rather than an informal opinion; (3) that the statement was in writing; (4) that the person or entity issuing the statement had actual or apparent authority to do so; (5) that the defendant actually relied on the official statement in violating the law; (6) that this reliance was in good faith; (7) that this reliance was reasonable; and (8) that either the specific intent was an element of the offense or the misrelied-on law was later properly adjudicated as wrong. Leavitt, 107 Wn. App. at 369 n.9.

Regardless of what Hunter may have been told at sentencing in a conversation he had with Judge Spector, he cannot avail now himself of the due process clause in the manner he seeks. Hunter has committed no crime in reasonable reliance upon the misadvice of a government official. To the contrary, Hunter brought his motion to reinstate his right to possess a firearm based upon the very fact that he *knew* it was unlawful for him to possess a firearm. See Locati, supra (rejecting defense where community corrections officer initially told convicted felon he could possess a firearm, but two police officers later told him this was incorrect); State v. Stevens, 137 Wn. App. 460, 468-69, 153 P.3d 903 (2007) (Stevens cannot rely on the due process clause as a defense because there was no evidence he was misled or relied upon government statements or omissions in unlawfully possessing a firearm), rev. denied, 162 Wn.2d 1012 (2008); State v. Blum, 121 Wn. App. 1, 5, 85 P.3d 373 (2004) (Blum was not misled by any state agency about right to possess a firearm, thus reliance upon due process clause is misplaced); cf. Leavitt, supra (court reversed conviction for unlawful possession of a firearm where Leavitt obtained a firearm in detrimental reliance upon the court in underlying predicate conviction failing to inform him he could not

possess a firearm and Department of Corrections' actions suggesting Leavitt could lawfully possess a firearm after one year).

Instead of relying upon the due process clause as a defense to a criminal charge as permitted by the courts, Hunter seeks a different remedy. Hunter claims that under the due process clause, he can force a judge to do an act not permissible under the law. Hunter cites no authority for this proposition. Courts ordinarily will not give consideration to such claims. Young, 89 Wn.2d at 625. Our legal system is based on the foundation that an independent, unbiased, and competent judiciary will interpret and apply the laws that govern us. In re Disciplinary Proceeding Against Michels, 150 Wn.2d 159, 173-74, 75 P.3d 950 (2003). There is nothing in the due process clause that allows the clause to be used as a sword, to force a judge to act in a manner not permissible under the law, simply because another judge may have made an inaccurate statement about the law.¹⁵

¹⁵ Judge Spector never actually informed Hunter that she would reinstate his right to possess a firearm. Rather, the judge merely implied that it was possible at some future date to have his right to possess a firearm reinstated. See RP 8-10.

D. CONCLUSION

For the reasons cited above, this Court should affirm the trial court's denial of Hunter's petition to reinstate his right to possess a firearm.

DATED this 18 day of June, 2008.

Respectfully submitted,

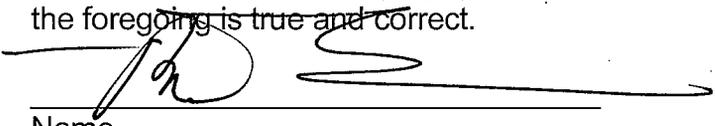
DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Liza Burke, the attorney for the appellant, at Cohen & Iaria, 1008 Western Ave. Suite 302, Seattle WA 98104, containing a copy of the Brief of Respondent, in STATE V. HUNTER, Cause No. 60552-6-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington

06/18/2008
Date

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