

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
8/19/2020 4:04 PM  
BY SUSAN L. CARLSON  
CLERK

SUPREME COURT NO. 98921-4

NO. 79943-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

---

---

STATE OF WASHINGTON,

Respondent,

v.

ALEXIS HERNANDEZ

Petitioner.

---

---

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

The Honorable Leroy McCullough, Judge  
The Honorable Michael R. Scott, Judge

---

---

PETITION FOR REVIEW

---

---

KEVIN A. MARCH  
Attorney for Petitioner

NIELSEN KOCH, PLLC  
1908 East Madison  
Seattle, WA 98122  
(206) 623-2373

**TABLE OF CONTENTS**

	Page
A. <u>IDENTITY OF PETITIONER/COURT OF APPEALS DECISION</u> .....	1
B. <u>ISSUE PRESENTED FOR REVIEW</u> .....	1
C. <u>STATEMENT OF THE CASE</u> .....	1
D. <u>ARGUMENT IN SUPPORT OF REVIEW</u> .....	2
1. <b>The felony firearm registration statute is subject         to a vagueness challenge because it lengthens a         criminal sentence and requires affirmative conduct         on the part of the registrant</b> .....	2
2. <b>The court of appeals decision conflicts with <i>Baldwin</i></b> .....	6
E. <u>CONCLUSION</u> .....	8

**TABLE OF AUTHORITIES**

Page

**WASHINGTON CASES**

State v. Bahl  
164 Wn.2d 739, 193 P.3d 678 (2008)..... 6

State v. Baldwin  
150 Wn.2d 448, 78 P.3d 1005 (2003)..... 6, 7, 8

State v. Nguyen  
191 Wn.2d 671, 425 P.3d 847 (2018)..... 6

State v. T.J.S.-M.  
193 Wn.2d 450, 441 P.3d 1181 (2019)..... 3

**FEDERAL CASES**

Beckles v. United States  
\_\_\_ U.S. \_\_\_, 137 S. Ct. 886, 197 L. Ed. 2d 145 (2017)..... 3, 5

Johnson v. United States  
576 U.S. 591, 135 S. Ct. 2551, 192 L. Ed 2d 569 (2015)..... 3, 5, 6, 7

**RULES, STATUTES AND OTHER AUTHORITIES**

18 U.S.C. § 924..... 4

Armed Career Criminal Act of 1984 ..... 4

RAP 13.4..... 6, 8

RCW 9.41.330 ..... 1, 4, 5

RCW 9.41.333 ..... 3, 5

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Alexis Olguin Hernandez, the appellant below, seeks review of the court of appeals decision, State v. Hernandez, noted at \_\_\_ Wn. App. 2d \_\_\_, 2020 WL 4049771, No. 79943-6-I (Jul. 20, 2020).

B. ISSUE PRESENTED FOR REVIEW

Is the felony firearm registration statute, RCW 9.41.330, subject to an attack on Fourteenth Amendment due process vagueness grounds when its requirements are imposed as part of a criminal sentence?

C. STATEMENT OF THE CASE

The state charged Hernandez with second degree unlawful possession of a firearm and unlawful possession of methamphetamine. CP 1-2. Hernandez pleaded guilty to the firearm charge. CP 9-37; RP 10-15. The prosecution agreed to dismiss the drug charge. CP 33; RP 3.

The parties agreed to recommend a nine-month standard range sentence. CP 37. At sentencing, Hernandez objected to registration under RCW 9.41.330, the felony firearm registration statute. CP 39-40; RP 19-22.

The trial court imposed the agreed recommendation of nine months. RP 22; CP 44. With regard to felony firearm registration, the trial court stated, “in light of the fact that this is Mr. Hernandez’s second unlawful possession matter, I think that constitutes criminal history justifying the

Court in exercising its discretion to require firearm registration, so I am requiring that.” RP 22-23; see also CP 43, 49.

Hernandez appealed. CP 51-62. He contended that the felony firearm registration statute does not provide sufficient standards of definiteness and therefore leads to ad hoc, arbitrary, and/or discriminatory imposition. He thus contended that the registration statute was void for vagueness and should be stricken from his judgment and sentence. Br. of Appellant, 2-8.

The state seemingly does not disagree on the standardless nature of the statute, given that it did not address these contentions. Instead, the state and the court of appeals liken the felony firearm registration statute to a “sentencing guideline” such that, in their view, the registration statute is not subject to a challenge on due process vagueness grounds at all. Br. of Resp’t, 2-9; Slip op., 4-6.

D. ARGUMENT IN SUPPORT OF REVIEW

1. **The felony firearm registration statute is subject to a vagueness challenge because it lengthens a criminal sentence and requires affirmative conduct on the part of the registrant**

Hernandez agrees that sentencing guidelines that pertain to the length of the trial court’s permissible sentencing discretion within a particular statutory range are not subject to a vagueness attack. This was the holding of

Beckles v. United States, \_\_\_ U.S. \_\_\_, 137 S. Ct. 886, 197 L. Ed. 2d 145 (2017), involving a vagueness challenge to advisory federal sentencing guidelines. The Washington Supreme Court recently held the same with respect to the juvenile disposition statutes. State v. T.J.S.-M., 193 Wn.2d 450, 461-62, 441 P.3d 1181 (2019).

However, the felony firearm registration requirement is not a sentencing guideline about the permissible term of incarceration, as was at issue in Beckles and T.J.S.-M. The felony firearm registration requirement is a component of a criminal sentence that, when imposed, augments the length of the sentence and the mandates of the sentence. It requires registrants to physically appear at the sheriff's office following any term of incarceration to personally register and requires them to maintain registration and a current address on at least an annual basis for a four-year period. RCW 9.41.333(6)–(8). If the registrant fails to comply with any aspect of the registration requirements, the registrant faces additional prosecution and incarceration. RCW 9.41.335. Because it fixes additional time and effort to the sentence, the felony firearm offender registration statute is subject to a challenge on Fourteenth Amendment due process vagueness grounds.

The registration requirement at issue in this case is more like Johnson v. United States, 576 U.S. 591, 135 S. Ct. 2551, 192 L. Ed 2d 569 (2015), than like Beckles. In Johnson, the Court confirmed that the void for

vagueness doctrine “appl[ies] not only to statutes defining elements of crimes, but also to statutes fixing sentences.” 576 U.S. at 596. The sentencing court under review in Johnson was required to determine under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. § 924, whether Johnson had three or more “violent felon[ies]” which were defined as “conduct that presents a serious potential risk of physical injury to another.” Johnson, 576 U.S. at 593-94. If the sentencing court answered this question in the affirmative, then the maximum 10-year sentence was converted into a sentence of a minimum of 15 years with a maximum of life. Id. at 593. After concluding that the language of the statute led to arbitrary results, the Court held that the statute in question “both denies fair notice to defendants and invites arbitrary enforcement by judges. Increasing a defendant’s sentence under the clause denies due process of law.” Johnson, 576 U.S. at 597.

Likewise, increasing a defendant’s sentence under the felony firearm registration statute, RCW 9A.41.330, also denies due process of law. The statute tells the sentencing court to consider criminal history, whether the person had a previous not guilty by reason of insanity (NGRI) finding, and evidence of a propensity of violence. RCW 9A.41.330(2)(a)–(c). Where, as here, defendants have no NGRI finding or history of violence, the trial court may impose the requirement based solely on criminal history. This statute is

even more standardless than the statute at issue in Johnson. It invites nothing but arbitrary enforcement depending on what any given judge thinks about any given criminal history. Under the statute, a judge would be every bit as justified in imposing the registration requirement on a defendant without any criminal history than on a defendant with a lengthy and violent criminal history. The firearm registration statute is completely standardless. Beckles itself recognized that laws “must specify the range of available sentences” with sufficient clarity. 137 S. Ct. at 892. RCW 9.41.330 fails to do so.

Like Johnson, the registration statute serves to lengthen the time and effect of the criminal penalty. Hernandez was sentenced to a nine-month standard range sentence. CP 44; RP 22. But for the registration requirement, he would be finished with his sentence now. However, based on the arbitrary registration requirement imposed without ascertainable standards, Hernandez must register and maintain at least annual in-person registration for a four-year period. RCW 9.41.333(6)–(8). This increases the impact of the criminal sentence: Hernandez is still under state surveillance today because of his sentence. The registration requirement also augments the requirements of the sentence: Hernandez must perform affirmative conduct as a result of the arbitrarily imposed requirement.

In this way, the requirement is more like other sentencing conditions, which are surely subject to vagueness attack. See, e.g., State v. Nguyen, 191



Wn.2d 671, 425 P.3d 847 (2018); State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008). The sentencing court certainly has broad discretion in fashioning crime-related conditions that prescribe or proscribe certain conduct—or not—but conditions that are imposed are still subject to attacks on account of their vagueness. Similarly, the firearm registration requirement imposed requires affirmative conduct and is therefore subject to claims that the requirement is vague because it is imposed arbitrarily.

The felony firearm registration statute is not a mere sentencing guideline about the discretionary length of a term of incarceration. It is a substantive sentencing requirement that increases the length and the requirements of a criminal sentence. Consistent with Johnson, the statute is subject to an attack based on vagueness. This is an important constitutional question that should be reviewed by the Washington Supreme Court pursuant to RAP 13.4(b)(3).

**2. The court of appeals decision conflicts with *Baldwin***

Review is also appropriate under RAP 13.4(b)(1) because the court of appeals decision conflicts with State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003). In Baldwin, this court recognized that the void for vagueness doctrine applied to law that prescribe or proscribe conduct rather than laws that “merely provide directives that judges should consider when imposing sentences.” Id. at 458.

The felony firearm registration statute does more than provide mere directives to guide the length of sentence imposed. The statute prescribes conduct: as discussed, persons subjected to the requirement must personally register repeatedly for a four-year period. The statute also proscribes conduct: the failure to comply with the registration requirements carries criminal liability. Because application of the felony firearm registration statute prescribes and proscribes actual conduct, Baldwin holds that it is subject to a vagueness challenge.

The court of appeals distinguished Baldwin because “Hernandez’s attack is not focused on the registration requirement itself. Instead, he challenges the statute that gives the sentencing court discretion to impose this requirement.” Slip op., 7. But Hernandez *does* challenge the registration requirement itself on the basis that it is imposed in a standardless and arbitrary fashion. More to the point, applying the court of appeals’ reasoning would require Johnson to be decided differently. Indeed, in Johnson, there was no vagueness in the result of the vague statute’s application: the sentence increased from a 10-year maximum to a 15-year minimum. 576 U.S. at 593. Still, the statute providing the authority for this result was itself still subject to vagueness attack. Id. at 596-97. The distinction drawn by the court of appeals to distinguish the “prescribes conduct” or “proscribes conduct” aspect of Baldwin holds no water.

By removing a statutory sentencing requirement that prescribes and proscribes conduct from the realm of vagueness scrutiny, the court of appeals decision conflicts with Baldwin on a constitutional question. Review under RAP 13.4(b)(1) and (3) is therefore merited.

E. CONCLUSION

Because Hernandez satisfies RAP 13.4(b)(1) and (3) review criteria, review should be granted.

DATED this 19th day of August, 2020.

Respectfully submitted,

NIELSEN KOCH, PLLC

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

KEVIN A. MARCH, WSBA No. 45397  
Office ID No. 91051  
Attorneys for Petitioner



**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
ALEXIS OLGUIN HERNANDEZ,  
  
Appellant.

No. 79943-6-I  
  
DIVISION ONE  
  
UNPUBLISHED OPINION

HAZELRIGG, J. — Alexis O. Hernandez appeals a condition of sentence after his conviction for unlawful possession of a firearm in the second degree. At sentencing, the court required him to register as a felony firearm offender pursuant to RCW 9.41.330(1), which gives a court discretion to impose the registration requirement based on an offender’s criminal history. Hernandez claims the statute is void for vagueness because it lacks ascertainable standards for determining what criminal history justifies imposition of the requirement. Because the statute does not define criminal conduct or fix a sentence, it is not subject to a vagueness challenge. Accordingly, we affirm.

**FACTS**

Alexis Hernandez entered a guilty plea to unlawful possession of a firearm in the second degree for an offense that occurred on April 3, 2018. Hernandez had five prior felony convictions, including a 2017 conviction for unlawful possession of a firearm in the second degree and a 2015 conviction for attempting

to elude a police officer. At sentencing, the State recommended the court order Hernandez to register as a felony firearm offender under RCW 9.41.330(1). Hernandez opposed the request. The court ordered Hernandez to comply with the registration requirement based on his criminal history, noting that this was his second conviction for unlawful possession of a firearm. Hernandez timely appealed.

### DISCUSSION

Hernandez claims that RCW 9.41.330, which gives courts discretion to require a person convicted of a felony firearm offense to comply with registration requirements, is unconstitutionally vague because it lacks sufficient standards to guide the court's discretion to impose it based on criminal history. The State contends that because the statute is a sentencing guideline, it is not subject to a vagueness challenge.

A vagueness analysis encompasses two due process concerns: (1) a criminal statute must be specific enough to give citizens fair notice of what conduct is proscribed, and (2) laws must provide ascertainable standards of guilt to protect against arbitrary arrest and prosecution. State v. Baldwin, 150 Wn.2d 448, 458, 78 P.3d 1005 (2003). Both prongs of the analysis focus on laws that prohibit or require conduct. Id. In Baldwin, the court held that sentencing guideline statutes that give courts discretion to impose an exceptional sentence were not subject to a vagueness challenge, concluding that the due process concerns underlying such a challenge “have no application in the context of sentencing guidelines.” Baldwin, 150 Wn.2d at 459. The court recognized that “[f]undamental to both statutes being

challenged is the notion that a court is free to exercise discretion in fashioning a sentence,” and “[t]he guidelines are intended only to structure discretionary decisions affecting sentences; they do not specify that a particular sentence must be imposed.” Baldwin, 150 Wn.2d at 460-61. Thus, the court concluded: “[s]ince nothing in these guideline statutes requires a certain outcome, the statutes create no constitutionally protectable liberty interest.” Id. at 461.

RCW 9.41.330 permits a trial court to order persons convicted of a felony firearm offense to comply with the registration requirements in RCW 9.41.333. The statute requires that a person subject to the registration requirement must provide certain basic information for their identification and location, as well as information about the registerable offense, to the local sheriff’s office in the county where they reside. RCW 9.41.333. The statute further allows the sheriff to seek additional documentation and photograph or fingerprint the registrant, imposes time limits on registration upon release from custody or sentencing, establishes annual renewal of registration up to a maximum of four years, and sets out procedures for change of residence during the period of registration. Id. RCW 9.41.330 provides in relevant part:

- (1) On or after June 9, 2016, except as provided in subsection (3) of this section, whenever a defendant in this state is convicted of a felony firearm offense or found not guilty by reason of insanity of any felony firearm offense, the court must consider whether to impose a requirement that the person comply with the registration requirements of RCW 9.41.333 and may, in its discretion, impose such a requirement.
- (2) In determining whether to require the person to register, the court shall consider all relevant factors including, but not limited to:
  - (a) The person's criminal history;

- (b) Whether the person has previously been found not guilty by reason of insanity of any offense in this state or elsewhere; and
- (c) Evidence of the person's propensity for violence that would likely endanger persons.

Hernandez contends that the statute provides no standards to guide its discretion to impose the requirement based on criminal history. He argues that “[a] trial court may decide a particular criminal history may warrant registration or the trial court may not, all within its own arbitrary whims.” Hernandez points out that the trial court here relied on the fact that he had a prior conviction for felony possession of a firearm in the second degree even though nothing in his criminal history suggested a propensity for violence.

We agree with the State that RCW 9.41.330 is a sentencing guideline and is not subject to a vagueness challenge. The statute does not specify that a particular sentence must be imposed or require a certain outcome. Rather, it provides a sentencing court discretion to impose the registration requirement when one is convicted of a felony firearm offense: it directs the court to consider whether to impose the registration requirement “whenever a defendant in this state is convicted of a felony firearm offense,” and provides that the court “may, in its discretion, impose such a requirement.” RCW 9.41.330 (1). Thus, under Baldwin, it is not subject to a vagueness challenge. 150 Wn.2d at 461.

We similarly rejected a vagueness challenge to RCW 9.41.330 in an unpublished decision in State v. Miller, noted at 195 Wn. App. 1026, 2016 WL 4087307 (August 1, 2016), and concluded:

As with the sentencing guideline statutes at issue in Baldwin, the statute herein grants a court discretion in determining whether to



impose the registration requirement on felony firearm offenders. See RCW 9.41.330. Our Supreme Court has never indicated a need to revisit its holding in Baldwin. The Baldwin decision controls our analysis. The sentencing statute at issue is not subject to a facial void for vagueness challenge.

We adopt and apply that reasoning here.<sup>1</sup> See also State v. Brush, 5 Wn. App. 2d 40, 63, 425 P.3d 545 (2018) (holding that “Baldwin remains good law,” and rejecting vagueness challenge to statutory aggravating factors).

Nonetheless Hernandez contends that Baldwin conflicts with United States Supreme Court precedent, citing Johnson v. United States, where the Court held that the vagueness doctrine applies “not only to statutes defining elements of crimes, but also to statutes fixing sentences.” \_\_\_U.S.\_\_\_, 135 S. Ct. 2551, 2556-57, 192 L. Ed. 2d 569 (2015). In Johnson, the Court considered a vagueness challenge to a provision of the Armed Career Criminal Act (ACCA) that imposes an increased prison term when a defendant has three prior convictions for a “violent felony,” a term defined by the statute’s residual clause to include any felony that “involves conduct that presents a serious potential risk of physical injury to another.” 135 S. Ct. at 2555-56. The district court concluded that a conviction for unlawful possession of short-barreled shotgun qualified as a violent felony. The Court reversed, concluding:

We are convinced that the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges. Increasing a defendant's sentence under the clause denies due process of law.

135 S. Ct. at 2557.

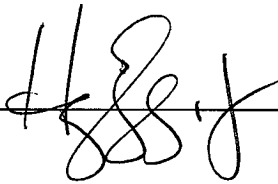
---

<sup>1</sup> Miller addressed the former version of RCW 9.41.330, which did not include the mandatory provision in sections (3) and (4) of the current statute. Hernandez’s challenge is to RCW 9.41.330(1) and (2), which is virtually identical to the former version of the statute.

But in a later case, Beckles v. United States, \_\_\_ U.S. \_\_\_, 137 S. Ct. 886, 197 L. Ed. 2d 145 (2017), the Court rejected a vagueness challenge to a United States Sentencing Guideline containing a residual clause identical to the ACCA's residual clause at issue in Johnson. The Court reiterated that two kinds of laws are subject to vagueness challenges: ones that define criminal offenses and ones that fix the permissible sentences for criminal offenses. 137 S. Ct. at 892. The Court then distinguished the ACCA, which required sentencing courts to increase the term beyond the statutory maximum, from the Sentencing Guidelines, which "merely guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range." Id. As the Court pointed out, "no party to this case suggests that a system of purely discretionary sentencing could be subject to a vagueness challenge," and "if a system of unfettered discretion is not unconstitutionally vague, then it is difficult to see how the present system of guided discretion could be." 137 S. Ct. at 893-94. Thus, the Court concluded, "[b]ecause they merely guide the district courts' discretion, the Guidelines are not amenable to a vagueness challenge." Id.

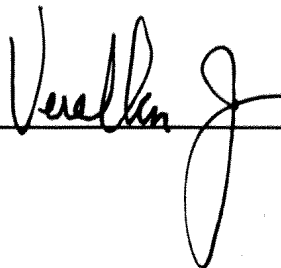
Likewise here, RCW 9.41.330 does not fix the permissible sentences for felony firearm offenses. Rather, it merely guides a sentencing court in exercising its discretion to impose the registration requirement upon conviction of a felony firearm offense. Accordingly, it is not subject to a vagueness challenge. See also State v. DeVore, 2 Wn. App. 2d 651, 664-65, 413 P.3d 58 (2018) (rejecting vagueness challenge to statutory aggravating factor, citing Beckles and distinguishing Johnson).

Citing Baldwin, Hernandez further contends that RCW 9.41.330(3) is subject to a vagueness challenge because it “proscribe[s] or prescribe[s] conduct” by requiring one to register and maintain registration for a four year period. See Baldwin, 150 Wn.2d at 458. Thus, he contends the statute is more like other sentencing conditions that are subject to vagueness challenges. But unlike vagueness challenges to sentencing conditions, Hernandez’s attack is not focused on the registration requirement itself. Instead, he challenges the statute that gives the sentencing court discretion to impose this requirement. As discussed above, because this statute simply guides a sentencing court in deciding whether to impose this requirement, it is not subject to a vagueness challenge. We affirm.



---

WE CONCUR:



---



---

**NIELSEN KOCH P.L.L.C.**

**August 19, 2020 - 4:04 PM**

**Filing Petition for Review**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** Case Initiation  
**Appellate Court Case Title:** State of Washington, Respondent v. Alexis O. Hernandez, Appellant (799436)

**The following documents have been uploaded:**

- PRV\_Petition\_for\_Review\_20200819160205SC770857\_7769.pdf  
This File Contains:  
Petition for Review  
*The Original File Name was State v. Alexis Hernandez 79943-6-I.Pet.pdf*

**A copy of the uploaded files will be sent to:**

- Sloanej@nwattorney.net
- donna.wise@kingcounty.gov
- nielsene@nwattorney.net
- paoappellateunitmail@kingcounty.gov

**Comments:**

Appellant's address is unknown to Attorney at this time.

---

Sender Name: Jamila Baker - Email: Bakerj@nwattorney.net

**Filing on Behalf of:** Kevin Andrew March - Email: MarchK@nwattorney.net (Alternate Email: )

Address:  
1908 E. Madison Street  
Seattle, WA, 98122  
Phone: (206) 623-2373

**Note: The Filing Id is 20200819160205SC770857**