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No. 66072-1-I

**COURT OF APPEALS,  
DIVISION I,  
OF THE STATE OF WASHINGTON**

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**In re the Petition of  
KEVIN MICHAEL OLSON, Appellant  
STATE OF WASHINGTON, Respondent**

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**BRIEF OF APPELLANT**

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## **INTRODUCTION**

The statute that permits criminal offenders to restore their right to possess firearms relies in part on the offender-score provisions of the Sentencing Reform Act to determine whether the offender is eligible for restoration of firearm rights. Incorporation of the offender-score provision in the firearms statute creates a conflict in statutory terms. The conflict led to the Superior Court's erroneous denial of Appellant Kevin Michael Olson's petition for restoration of firearm rights. A 2010 decision of the Supreme Court resolves this conflict in Mr. Olson's favor. Mr. Olson therefore respectfully requests that this court reverse the trial-court decision and remand for issuance of an order restoring his right under Washington law to possess firearms.

## **ASSIGNMENT OF ERROR**

The trial court erred in denying Mr. Olson's petition for restoration of firearm rights.

## **STATEMENT OF THE CASE**

Mr. Olson was convicted in 1995 of Attempted Robbery First Degree, a Class B felony, and in 1999 of Community Custody Escape, a Class C felony. CP 1. The convictions prohibit Mr. Olson from firearm possession. Mr. Olson filed a petition for

restoration of firearm rights on November 25, 2009, pursuant to RCW 9.41.040(4), and asserted his eligibility for restoration under that statute. CP 1-6. After reviewing Mr. Olson's petition, the State advised Mr. Olson that it would oppose the petition. Mr. Olson then filed a memorandum of law in support of the petition (filed on July 15, 2010). CP 7-46. The judge designated to consider the petition advised counsel that the court would make a decision based on written submissions, without oral argument. On August 13, 2010, the State filed a memorandum objecting to Mr. Olson's request for relief. CP 47-50. Mr. Olson filed a memorandum in strict reply on August 16, 2010. CP 51-54. The trial court entered its order on August 31, 2010. CP 55. The trial court's order consists of a single sentence, as follows: "It is hereby ordered that denied at this time, pursuant to *St. v. Rivard*" (sic). CP 55. Mr. Olson filed a Notice of Appeal on September 30, 2010. CP 56-58.

## **ARGUMENT**

### **1. The standard of review is de novo.**

This appeal requires the court to interpret a statute. Statutory interpretation is a question of law subject to de novo review. *State v. Williams*, 158 Wn.2d 904, 908, 148 P.3d 993 (2006).

**2. A court may restore firearm-possession rights to eligible offenders.**

RCW 9.41.040(4) establishes the criteria which a criminal offender must meet in order to have firearm rights restored. Of the four criteria, Mr. Olson indisputably meets all but the fourth. The first criterion is that the person petitioning for restoration of rights must have no conviction for any Class A felony or sex offense. RCW 9.41.040(4). The second is that the petitioner must have spent five years in the community without convictions (or three years if the disabling offense was a misdemeanor). RCW 9.41.040(4)(b)(i). Third, the petitioner must not be currently charged with a criminal offense. RCW 9.41.040(4)(b)(i). The State does not dispute that Mr. Olson meets these three criteria.

The fourth criterion also appears in RCW 9.41.040(4)(b)(i). The petitioner must have “no prior felony convictions that prohibit the possession of a firearm counted as part of the offender score under RCW 9.94A.525 . . . .” This provision of the firearm statute requires a court to incorporate the offender-score analysis described in RCW 9.94A.525, and the attempt to incorporate one into the other creates a conflict within RCW 9.41.040(4), at least in

Mr. Olson's case. The parties' dispute focuses on this aspect of the eligibility analysis.

**3. Only those with convictions for Class A felonies and sex offenses are permanently ineligible for restoration of firearm rights.**

RCW 9.41.040(4) explicitly rules out restoration of firearm rights for any person convicted of a Class A felony or sex offense.

The statute recites:

[I]f 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 reason of insanity of a sex offense . . . 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:

RCW 9.41.040(4). The quoted text is followed immediately by text describing the other eligibility criteria. This qualification also has been recited in case law: "[I]f a person prohibited from possessing a firearm under [RCW 9.41.040(1)] has not previously been convicted of a sex offense or a class A felony, that person may petition to have his right to possess firearms restored." Rivard v. State, 168 Wn.2d 775, 782, 231 P.3d 186 (2010). The firearm statute does not impose such a permanent restriction for Class B or C felonies (unless they are sex offenses) or non-felonies.

The State's position below was that although Mr. Olson has no conviction for a Class A felony or sex offense, he is forever barred from firearm possession because his Class B felony conviction (for Attempted Robbery First Degree) must be scored as a Class A felony<sup>1</sup> which, in most sentencing scenarios, will produce an offender score because Class A felonies are not subject to the "wash-out" provisions of the offender-score scheme.

Here lies the conflict. While RCW 9.41.040(4) plainly rules out restoration of rights for anyone with a Class A or sex-offense conviction, but not for other types of offenses, the offender-score analysis imported from the sentencing statute introduces a conflicting situation when the petitioner has a Class B conviction for an attempted Class A felony. If the Class B conviction is treated like a Class A conviction, the Class B offender can never be eligible for restoration of firearm rights. This conflict is resolved, however, when the offender-score issue is treated as the Supreme Court illustrated in Rivard.

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<sup>1</sup> "Score prior convictions for felony anticipatory offenses (attempts, criminal solicitations, and criminal conspiracies) the same as if they were convictions for completed offenses." RCW 9.94A.525(4).

**4. The offender-score analysis under the firearms statute is purely hypothetical because there is no ‘present conviction.’**

Before turning to the solution offered by Rivard, the offender-score calculation must be clearly understood. The offender-score calculation is a component of the SRA’s determinate-sentencing scheme. To calculate an offender score, a court preparing to sentence a felony offender examines the offender’s criminal history and assigns point values for prior convictions. (See RCW 9.94A.525.) For any given crime, the higher the offender score, the longer the sentence for that particular offender.

Calculating an offender score presupposes the existence of a current criminal prosecution and a “present conviction,” which is a term used throughout RCW 9.94A.525. The starting point for any offender-score calculation is the nature of the present conviction (i.e., the offense for which the court is preparing to sentence). The offender score depends substantially on the present conviction. For example, if the present conviction is for a violent offense, prior violent felonies count for two points, but if the present conviction is for a non-violent offense, prior violent felonies count for only one point. See RCW 9.94A.525(7)-(8). Without a present conviction, it is not possible to calculate an offender score.

When a person with a felony record petitions for restoration of firearm rights, there is no present conviction. That is because no restoration petition is permitted if there are pending criminal charges or if there has been a conviction within the previous five years. RCW 9.41.040(4)(b)(i). Since there is no present conviction, and since the petitioner is not being sentenced, there can be no true offender score.

Even though no true offender score is possible, it would violate the principles of statutory construction to argue that the offender-score provision in Subsection (4)(b)(i) is therefore meaningless.

When construing a statute we read the statute in its entirety. Each provision must be viewed in relation to other provisions and harmonized, if at all possible. Statutes must be construed so that all language is given effect with no portion rendered meaningless or superfluous. The court must also avoid constructions that yield unlikely, strange or absurd consequences.

State v. Keller, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001). Thus, since it is not possible to calculate a true offender score, and since the provision must not be regarded as meaningless, the offender score mentioned in Subsection (4)(b)(i) must be hypothetical.

**5. The hypothetical offender-score analysis is a mechanism to delay restoration of firearm rights for offenders with multiple convictions.**

Rivard v. State, 168 Wn.2d 775, 231 P.3d 186 (2010), resolves the conflict arising in Mr. Olson's case from the hypothetical offender-score analysis under Subsection (4)(b)(i). Rivard pleaded guilty in 1997 to vehicular homicide, a Class B felony at the time of the offense. Id. at 777. He had no other criminal history. Id. at 778. During 2006 he petitioned for restoration of firearm rights.<sup>2</sup> Id. at 778. The State argued that the phrase "prior felony convictions" appearing in Subsection (4)(b)(i) included the disabling offense (i.e., Rivard's only conviction). Id. at 783. Under that analysis, Rivard's 1997 Class B conviction would not wash out for 10 years, and his 2006 petition for restoration of firearm rights was premature. The Supreme Court held, however, that the term "prior felony convictions" refers to convictions which occurred prior to the "disabling offense." Id. at 784. In Rivard's case, he had no prior felony convictions and therefore no obstacle to the restoration of his rights.

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<sup>2</sup> A major issue in Rivard (not relevant to this case) was the reclassification of vehicular homicide to a Class A felony between the time of Rivard's conviction and the time of his petition for restoration of rights. The court held that despite the reclassification his conviction should be treated as a Class B felony, as it was classified at the time of his offense. Thus he was not disqualified from restoration of rights due to a Class A felony record. Rivard, 168 Wn.2d at 782.

To illustrate the correct analysis under Subsection (4)(b)(i), the Rivard decision provided the following example:

Under this reading, a court does not ask whether the disabling offense is included in the offender score. Instead, the court looks only at felonies committed prior to that offense. For example, if a felon had, in addition to a six-year-old disabling felony, another Class B felony conviction from seven years ago, that individual would be ineligible to petition for the restoration of firearm rights for another three years pursuant to RCW 9.94A.525, or until he had remained crime-free in the community for 10 years after the Class B felony conviction. Although he had remained crime-free for the requisite five years for the purpose of the disabling felony, a prior conviction still included in his offender score delays his eligibility.

Id. at 784. Thus, the effect of the offender-score analysis in Subsection (4)(b)(i) is to extend the waiting period for firearm restoration for offenders with more than one conviction.

When properly understood as a mechanism to delay, not deny, restoration of firearm rights, the offender-score analysis does not conflict with the provision of RCW 9.41.040(4) prohibiting restoration only for Class A felony offenders and sex offenders. When properly analyzed under Subsection (4)(b)(i), Mr. Olson's Class B felony conviction is treated as any other Class B felony conviction would be treated, and it ceased to be "counted as part of the offender score" for purposes of the restoration-of-rights

eligibility analysis 10 years after his release. If, as the State argued below, Mr. Olson's conviction for Attempted Robbery First Degree "will always score" (CP 49) then the hypothetical offender-score analysis of Subsection (4)(b)(i) is in conflict with other portions of Subsection (4) which permit restoration of rights for offenders who have no Class A or sex-offense convictions. When the offender-score provision is construed as a delay mechanism, all portions of RCW 9.41.040(4) are given effect, nothing is rendered meaningless or superfluous, and the statute's provisions are harmonized.

**6. Even when treated as the State argued below, the offender-score analysis can produce a situation in which Mr. Olson would have no prior felony convictions counted as part of the offender score.**

Even if Mr. Olson's Class B conviction should be treated like a Class A conviction in the eligibility analysis, as the State argued below, there is at least one situation in which Mr. Olson's Class B felony would not score. The State's assertion that Mr. Olson's Class B conviction "will always score" is not correct.

For example, if Mr. Olson were being sentenced today for Escape from Community Custody neither of his prior felony convictions would score. Under the offender-score statute, "If the present conviction is for Escape from Community Custody, RCW

72.09.310, count only prior escape convictions in the offender score.” RCW 9.94A.525(14) (emphasis supplied). For Mr. Olson, the prior Class B conviction for Attempted Robbery First Degree would not score because everything except Escape convictions is explicitly excluded from the calculation. His prior Class C conviction for Escape from Community Custody would not score because it washed out in 2004, five years after his last date of confinement. CP 8, 26, 28. See RCW 9.94A.525(1)(c) (providing that prior Class C felonies are excluded from the offender score when the offender has five conviction-free years following his release from confinement).

Thus, even when the offender-score analysis is treated according to the State’s argument below (in which Mr. Olson’s Class B conviction scores as a Class A) it is possible to hypothesize a situation in which Mr. Olson would have no prior felony convictions “counted as part of the offender score.”

Of course it also is possible to hypothesize situations in which Mr. Olson’s Class B conviction would count as part of the offender score. Subsection (4)(b)(i) offers no guidance about which hypothetical offender score should be used in analyzing a

petitioner's eligibility to restore firearm rights. Such guidance is found in the principles of statutory construction.

**7. As a remedial provision, RCW 9.41.040(4) must be given a liberal interpretation favoring restoration of Mr. Olson's firearm rights.**

Although Subsection (4)(b)(i) does not suggest which hypothetical offender score should be used if proceeding under the State's preferred method of analyzing eligibility, the principle of liberal construction resolves the issue in Mr. Olson's favor. "A remedial statute is one which relates to practice, procedures and remedies, and is applied retroactively when it does not affect a substantive or vested right. 'A 'right' is a legal consequence deriving from certain facts, while a remedy is a procedure prescribed by law to enforce a right.'" State v. McClendon, 131 Wn.2d 853, 861, 935 P.2d 1334 (1997), quoting Dep't of Retirement Systems v. Kralman, 73 Wn. App. 25, 33, 867 P.2d 643 (1994). RCW 9.41.040(4) prescribes the procedure by which an eligible offender may restore his statutory and constitutionally protected right to possess firearms. Subsection (4) is, therefore, a remedial statute. A remedial statute must be liberally construed so as to give effect to its purpose. State v. Breazeale, 144 Wn.2d 829, 838, 31 P.3d 1155 (2001).

Accordingly, the court must give a liberal construction to Subsection (4) to effect its purpose of restoring firearm rights to eligible applicants. When applied to the question of which hypothetical offender score to use, liberal construction requires the analysis which favors restoration of Mr. Olson's rights.

The principle of liberal construction also buttresses Mr. Olson's position regarding interpretation of Subsection (4)(b)(i). When the statute is liberally construed, the purpose of the offender-score analysis is to delay, not deny, restoration of firearm rights, and Subsection (4)(b)(i) does not prohibit restoration of rights for individuals convicted of attempted Class A offenses.

**8. Legislative history supports the interpretation of RCW 9.41.040(4)(b)(i) advocated by Mr. Olson.**

A court interpreting a statute "must discern and implement the intent of the legislature." State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). When statutory language is subject to more than one reasonable interpretation, a court may resort to legislative history as an aid to discerning legislative intent. Christensen v. Ellsworth, 162 Wn.2d 365, 373, 173 P.3d 228 (2007).

The legislative history regarding RCW 9.41.040 favors Mr. Olson's interpretation of the statute. Subsection (4)(b)(i) of RCW

9.41.040 was enacted as part of the 1995 Hard Time for Armed Crime Act. Initiative 159; Laws of 1995, ch. 129. Although the act focused on increasing penalties for armed offenders, it also expanded eligibility for restoration of firearm rights. While there is scant legislative history on this point, the House Bill Report published in the Journal of the House of Representatives contains the following passage: “The eligibility for restoring the right to possess a firearm is expanded.” House Bill Report, HI 159, p. 6, House Journal (1995) (emphasis supplied). CP 43.

The act’s expansion of restoration eligibility added text to what is now codified as RCW 9.41.040(4). Prior to the 1995 Hard Time for Armed Crime Act, restoration of rights was available only for felony offenders who received a dismissal following probation under the pre-SRA sentencing statutes (excluding restoration altogether for those convicted of violent offenses, burglary, extortion, drug offenses, and anyone sentenced under the SRA). Restoration also was available under RCW 9.41.047 to those who had lost their rights due to three convictions for DUI / BUI. Upon enactment of the Hard Time for Armed Crime Act, the possibility of restoration was extended to anyone convicted of a felony, excluding only those with convictions for sex offenses or Class A

felonies. Initiative 159; Laws of 1995, ch. 129, § 16. In the 1996 session, the Legislature again amended RCW 9.41.040(4), adding a provision allowing those convicted of domestic violence misdemeanors to petition for restoration of rights. Laws of 1996, ch. 295, § 2.

Under the State's interpretation of Subsection (4)(b)(i), which was enacted as part of the 1995 initiative, an entire class of offenders would be added to the list of those who may never restore firearm rights, a restriction which would go well beyond the legislative intent of the citizens and the Legislature.

The Legislature's statement of findings and intent (Laws of 1995, ch. 129, § 1) does not even mention the restoration-of-rights amendments contained in Hard Time for Armed Crime Act. The only discussion of the restoration issue appears in the House Bill Report, previously cited. In the sentence describing those who may never have rights restored, the House Bill Report identifies only those with convictions for Class A and sex offenses. CP 44.

The legislative trend, exemplified by the statutory amendments in 1995 and 1996, has been to increase eligibility for firearms possession. The State's argument below bucks that trend.

The interpretation advocated by Mr. Olson is congruent with the legislative trend.

### CONCLUSION

Mr. Olson has no conviction for any Class A felony or sex offense and therefore RCW 9.41.040(4) does not prohibit him from seeking restoration of his right to possess firearms. He meets all of the eligibility criteria and is entitled to have his right restored. Mr. Olson requests that this court reverse the trial court's decision denying his petition for restoration of rights, and remand the case for entry of an order restoring his right to possess firearms under Washington law in accordance with RCW 9.41.040(4).

Respectfully submitted: DEC. 13, 2010

The Rainier Law Group, PLLC



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**Certificate of Service**

On December 13, 2010, I sent a copy of the Brief of Appellant to counsel for the State of Washington via ABC Legal Messengers, for same-day delivery, addressed to:

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I declare under penalty of perjury that the foregoing is true and correct. Signed at Bellevue, Washington, on the date written below.

Dec. 13, 2010  
Date

  
David M. Newman