

66373-9

66373-9

NO. 66373-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ALI DIVSAR,

Appellant.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I
2011 SEP 12 PM 2:02

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE HELEN HALPERT

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DENNIS J. McCURDY
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>ISSUE PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. PROCEDURAL FACTS.....	1
2. SUBSTANTIVE FACTS.....	3
C. <u>ARGUMENT</u>	5
1. THIS ISSUE IS NOT PROPERLY BEFORE THE COURT.....	5
2. THE CHARGING DOCUMENT INCLUDED ALL THE ESSENTIAL ELEMENTS OF THE CRIME CHARGED.....	11
D. <u>CONCLUSION</u>	26

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Apprendi v. New Jersey, 530 U.S. 466,
120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) 14, 15, 18

Blakely v. Washington, 542 U.S. 296,
124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) 15, 18

District of Columbia v. Heller, 554 U.S. 570,
128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) 19, 20, 21, 25

Harker v. New York, 170 U.S. 189,
18 S. Ct. 573, 42 L. Ed 1002 (1898) 9

McDonald v. Chicago, ___ U.S. ___,
130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) 19, 20, 21

Swartz v. Burger, 412 F.3d 1008
(8th Cir. 2005) 17

Swartz v. Mathes, 291 F.Supp.2d 861
(N.D. Iowa, 2003) 17

United States v. Emerson, 270 F.3d 203,
(5th Cir. 2001), cert. denied,
122 S. Ct. 2362 (2002) 25

United States v. Hayes, 555 U.S. 415,
129 S. Ct. 1079, 172 L. Ed. 2d 816 (2009) 12, 18

United States v. Lewitzke, 176 F.3d 1022
(7th Cir.), cert. denied,
120 S. Ct. 267 (1999) 24

United States v. Luedtke, 589 F.Supp.2d 1018
(E.D.Wis. 2008) 24

United States v. Pfeifer, 371 F.3d 430
(8th Cir. 2004) 17

<u>United States v. Salerno</u> , 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).....	23
<u>United States v. Tooley</u> , 717 F.Supp.2d 580 (S.D.W.Va. 2010)	23, 24, 25
<u>United States v. Walker</u> , 709 F.Supp.2d 460 (E.D.Va. 2010).....	24
<u>United States v. White</u> , 593 F.3d 1199 (11 th Cir. 2010)	24
 <u>Washington State:</u>	
<u>City of Auburn v. Brooke</u> , 119 Wn.2d 623, 836 P.2d 212 (1992).....	12
<u>City of Seattle v. Pullman</u> , 82 Wn.2d 794, 514 P.2d 1059 (1973).....	22
<u>Diversified Indus. Dev. Corp. v. Ripley</u> , 82 Wn.2d 811, 514 P.2d 137 (1973), <u>rev. denied</u> , 153 Wn.2d 1005 (2005).....	11
<u>Homes Unlimited, Inc. v. Seattle</u> , 90 Wn.2d 154, 579 P.2d 1331 (1978).....	22
<u>In re Ness</u> , 70 Wn. App. 817, 855 P.2d 1191 (1993), <u>rev. denied</u> , 123 Wn.2d 1009 (1994).....	8, 16
<u>In re Stranger Creek</u> , 77 Wn.2d 649, 466 P.2d 508 (1970).....	17
<u>Madison v. State</u> , 161 Wn.2d 85, 163 P.3d 757 (2007).....	10
<u>Morris v. Blaker</u> , 118 Wn.2d 133, 821 P.2d 482 (1992).....	21, 22
<u>Second Amendment Foundation v. City of Renton</u> , 35 Wn. App. 583, 668 P.2d 596 (1983)	22

<u>State v. Clark</u> , 129 Wn.2d 805, 920 P.2d 187 (1996).....	19
<u>State v. Cosner</u> , 85 Wn.2d 45, 530 P.2d 317 (1975).....	12, 13
<u>State v. Davis</u> , 119 Wn.2d 657, 835 P.2d 1039 (1992).....	13, 14
<u>State v. Eckblad</u> , 152 Wn.2d 515, 98 P.3d 1184 (2004).....	21
<u>State v. Felix</u> , 125 Wn. App. 575, 105 P.3d 427, <u>rev. denied</u> , 155 Wn.2d 1003 (2005).....	11, 12, 18
<u>State v. Glas</u> , 147 Wn.2d 410, 54 P.3d 147 (2002).....	21
<u>State v. Goodman</u> , 108 Wn. App. 355, 30 P.3d 516 (2001), <u>rev. denied</u> , 145 Wn.2d 1036 (2002).....	18
<u>State v. Gunwall</u> , 106 Wn.2d 54, 720 P.2d 808 (1986).....	21
<u>State v. Hunter</u> , 147 Wn. App. 177, 195 P.3d 556 (2008), <u>rev. granted</u> , 169 Wn.2d 1005 (2010).....	9
<u>State v. Kjorsvik</u> , 117 Wn.2d 93, 812 P.2d 86 (1991).....	12
<u>State v. Krantz</u> , 24 Wn.2d 350, 164 P.2d 453 (1945).....	22, 25
<u>State v. O.P.</u> , 103 Wn. App. 889, 13 P.3d 1111 (2000).....	18
<u>State v. Powell</u> , 167 Wn.2d 672, 223 P.3d 493 (2009).....	14

<u>State v. Recuenco</u> , 163 Wn.2d 428, 180 P.3d 1276 (2008).....	11, 12, 14, 17, 19
<u>State v. Ross</u> , 152 Wn.2d 220, 95 P.3d 1225 (2004).....	7
<u>State v. Schmidt</u> , 143 Wn.2d 658, 23 P.3d 462 (2001).....	8, 9, 11, 15-20
<u>State v. Sieyes</u> , 168 Wn.2d 276, 225 P.3d 995 (2010).....	22
<u>State v. Spencer</u> , 75 Wn. App. 118, 876 P.2d 939 (1994), <u>rev. denied</u> , 125 Wn.2d 1015 (1995).....	21
<u>State v. Sweeney</u> , 125 Wn. App. 77, 104 P.3d 46 (2005).....	7
<u>State v. Thorne</u> , 129 Wn.2d 736, 921 P.2d 514 (1996).....	19
<u>State v. Tully</u> , 198 Wash. 605, 89 P.2d 517 (1939).....	22, 25
<u>State v. Weyrich</u> , 163 Wn.2d 554, 182 P.3d 965 (2008).....	10
<u>State v. Winston</u> , 135 Wn. App. 400, 144 P.3d 363 (2006).....	12, 18
<u>State v. Yates</u> , 161 Wn.2d 714, 168 P.3d 359 (2007).....	12
<u>Superior Asphalt & Concrete Co. v. Dep't of Labor & Indus.</u> , 121 Wn. App. 601, 89 P.3d 316 (2004).....	10, 11
<u>Walker v. Munro</u> , 124 Wn.2d 402, 879 P.2d 920 (1994).....	10

Constitutional Provisions

Federal:

U.S. Const. amend. II..... 19, 20, 21, 22, 24, 25
U.S. Const. amend. VI 12
U.S. Const. amend. XIV 21

Washington State:

Const. art. I, § 22..... 12
Const. art. I, § 24..... 19, 20, 21
Const. art. VI, § 3 9

Statutes

Federal:

18 U.S.C. § 922..... 17, 24

Washington State:

RCW 9.41.040..... 1, 2, 6, 8, 9, 20, 23
RCW 9.41.047..... 2, 7
RCW 9A.36.041 2, 13
RCW 13.40.020..... 7
RCW 13.40.0357..... 7
RCW 42.04.020..... 9

Rules and Regulations

Washington State:

RAP 2.2.....	6, 10
RAP 2.3.....	10

Other Authorities

142 Cong. Rec. S8831-06.....	24, 25
Carla Stover, <u>Domestic Violence Research: What Have We Learned and Where Do We Go From Here</u> , 20 J. of Interpersonal Violence (2005).....	24
Don B. Kates and Clayton E. Kramer, <u>Second Amendment Limitations and Criminological Considerations</u> , 60 Hastings L. J.....	25
Fox and Zawitz, <u>Homicide Trends in the United States</u> , Bureau of Justice Statistics (2007)	24
Persistent Offender Accountability Act	19
United States Department of Justice, <u>Reconsidering Domestic Violence Recidivism: Individual and Contextual Effects of Court Dispositions and Stake in Conformity</u> (2001)	24

A. ISSUE PRESENTED

The defendant was convicted of fourth-degree assault after he punched and shoved his stepfather. Under RCW 9A.04.040, certain persons are prohibited from possessing a firearm--this includes felons, certain misdemeanants, persons having been involuntarily committed for mental health treatment, juveniles, and persons free on bond or personal recognizance for a serious offense. The defendant claims that the trial court had no authority to prohibit him from possessing a firearm because all the "essential elements" of the crime were not included in the Information. Specifically, the defendant claims that the Information should have included an element specifying the domestic relationship between he and his stepfather. Should this Court reject the defendant's argument because this issue is not properly before the Court and the defendant's claim is in conflict with United States Supreme Court, Washington Supreme Court and this Court's case law?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was charged in juvenile court with fourth-degree assault. CP 1. The Information read as follows:

I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse Ali E Divsar AKA Ali Ay of the crime of Assault in the Fourth Degree - Domestic Violence, committed as follows:

That the respondent, Ali E Divsar AKA Ali Ay, in King County, Washington on or about March 22, 2010, did intentionally assault Eraj Divsar,

Contrary to RCW 9A.36.041, and against the peace and dignity of the State of Washington.

CP 1.

The defendant was tried by the court, the Honorable Judge Helen Halpert presiding. He was found guilty as charged. CP 11. The defendant was placed on four months community supervision, ordered to perform 24 hours of community service, and, among other conditions of sentence applicable during his community supervision, he was ordered to neither use nor possess a weapon. CP 18-23. At the time of his sentencing (November 17, 2010), the court--as required by statute--notified the defendant of a certain collateral consequence of his conviction, specifically, in writing, the court notified the defendant that;

Pursuant to RCW 9.41.047 and RCW 9.41.040, you are not permitted to possess a firearm until your right to do so is restored by a court of record. You are

further notified that you must immediately surrender any concealed pistol license.

CP 25.

2. SUBSTANTIVE FACTS

Eraj and Sebahat Divsar have been married for 12 years.

RP¹ 20. The defendant, Ali Divsar, is Eraj's 18-year-old stepson.

RP 21. The three live together in the same home, along with Eraj's nine-year-old son. RP 21.

Eraj has had domestic violence issues with the defendant in the past, with the defendant once attacking Eraj with a knife.

RP 38. The defendant had also been placed on probation for a prior domestic violence incident. RP 74. Officers instructed Eraj that if he had more trouble with the defendant, that he should just back away and call the police. RP 24.

On March 22, 2010, Eraj arrived home with his young son and heard the defendant lifting weights and loudly swearing, using "F words," upstairs in his bedroom. RP 21-23. Eraj went up to the defendant's room to tell him to calm down and stop swearing.

¹ The verbatim report of proceedings consists of one volume (hereinafter RP) encompassing the following dates: 10/12/10, 10/19/10, 10/28/10 and 11/17/10.

RP 21, 28. Eraj knocked on the door and then entered the defendant's bedroom. RP 23. The defendant was standing right behind the door. RP 23. Swearing, the defendant punched Eraj in the stomach and then pushed him back. RP 24, 35-36. Remembering what the police had instructed him to do, Eraj backed out of the room and called the police. RP 24.

When the police arrived, two officers went up to the defendant's bedroom, knocked on the door and announced their presence. RP 45-46. The defendant responded, "Fuck you." 2RP 46. Officers then entered the room and found the defendant lying on his bed. 2RP 46. The defendant refused to stand and became "very resistive" when the officers attempted to place him in handcuffs. 2RP 46-47. It wasn't until one of the officers threatened to use his Taser that the defendant finally complied with the officers' requests. 2RP 47-48.

At trial, the defendant claimed that he never even touched Eraj. RP 69, 81. He professed that he was merely up in his room lifting weights when one of the weights "kind of fell" onto the floor. RP 72. He said Eraj must have thought that he had dropped the weight on purpose and that Eraj entered his room very angrily. RP 72, 82. The defendant said that he did no more than simply

hold up his hand, tell Eraj to back off, and that after four or five seconds, Eraj left his room. RP 72, 82. The next thing he knew, there were police officers at his bedroom door. RP 73. In rebuttal, one of the officers testified that the defendant had admitted to him that he had pushed Eraj. RP 94.

The court found that the defendant's testimony was not credible and entered a finding of guilty. RP 109. At sentencing, it was noted that the defendant has a prior deferred for assaulting Eraj. RP 112-13.

Additional facts are included in the sections they pertain.

C. ARGUMENT

1. THIS ISSUE IS NOT PROPERLY BEFORE THE COURT.

The defendant argues that the trial court could not legally prohibit him from possessing a firearm. This issue is not properly before the court. The prohibition challenged by the defendant is not the result of a court order, it is a collateral consequence of a conviction, and the defendant has neither requested his right to

possess a firearm be restored nor been charged with illegally possessing a firearm. Thus, there is no court ruling to challenge.

A person can be charged with illegally possessing a firearm under certain circumstances. As pertinent herein, RCW

9.41.040(2)(a) provides that:

A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the second degree, if ... the person owns, has in his or her possession, or has in his or her control any firearm...[a]fter having previously been convicted ... of any felony not specifically listed as prohibiting firearm possession under subsection (1) of this section, or any of the following crimes when committed by one family or household member against another, committed on or after July 1, 1993: Assault in the fourth degree, coercion, stalking, reckless endangerment, criminal trespass in the first degree, or violation of the provisions of a protection order or no-contact order restraining the person or excluding the person from a residence...

RCW 9.41.040(2)(a). The defendant has not been charged with, or convicted, of unlawfully possessing a firearm. If he had been charged or convicted, he could properly file an appeal.

In addition, if there was a trial court order in this case, it too could be appealed under RAP 2.2. But while the defendant refers to a trial court order prohibiting him from possessing a firearm, no

such order exists.² Specifically, the defendant refers to CP 25, the Notice of Ineligibility to Possess Firearm. Def. br. at 3-4. This is not a court order. This is simply a notification provided by the court as required by statute. See State v. Sweeney, 125 Wn. App. 77, 84, 104 P.3d 46 (2005); RCW 9.41.047(1)(a). It does not disable the defendant's right to possess a firearm. The statute merely provides that a person be "notified" he or she is prohibited from possessing a firearm either because he or she has previously been convicted of a particular crime or he or she has been committed for mental health treatment by a court.³

Instead of by court order, as a collateral consequence of certain convictions--not as a condition of sentence or by court

² It should be noted that the defendant does not appear to be contesting the sentencing court's imposition of a condition of his supervision that he possess no weapons. See CP 20. Sentencing conditions in juvenile court are imposed pursuant to RCW 13.40.020(17) and RCW 13.40.0357. Here, on November 17, 2010, the court imposed four months of community supervision during which time the defendant was ordered to "[n]either use nor possess any weapons." CP 19-20. Even were the defendant challenging this condition, the issue would now be moot as he has long since completed his term of supervision. See State v. Ross, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004) (A case is moot "if a court can no longer provide effective relief").

³ The statute provides that a defendant be notified at the time of conviction, not sentencing, but the standard practice is to provide notice at sentencing. See RCW 9.41.047(1)(a).

order--certain persons are prohibited from possessing a firearm. See RCW 9.41.040(1) and (2); 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. Schmidt, 143 Wn.2d 658, 676, 23 P.3d 462 (2001) ("the prohibitions of the firearms statute impose a disability and present a threat of criminal punishment if violated, the prohibitions do not amount to punishment for a prior conviction, nor do they alter the standard of punishment applicable to those crimes"). It is the person's "status," an event that occurs at the time of conviction, not sentencing, that may render a person ineligible to possess a firearm. Schmidt, 143 Wn.2d at 676; RCW 9.41.040 ("a person has been 'convicted'...at such time as a plea of guilty has been accepted, or a verdict of guilty has been filed"). This is consistent with the entire statute that creates a prohibition of firearm possession based on a person's status. For example, under the statute, persons who have been previously involuntarily committed for mental health treatment, or persons under age 18,

are prohibited from possessing a firearm. RCW 9.41.040(2)(a)(ii) and (iii).⁴

If a person believes they have a right to possess a firearm or the person seeks to restore their right to possess a firearm, that person can always file a petition with the superior court. This is exactly what the defendant did in State v. Hunter, 147 Wn. App. 177, 195 P.3d 556 (2008), rev. granted, 169 Wn.2d 1005 (2010). Like the defendant here, Hunter was convicted of an offense in juvenile court, and as a collateral consequence of that conviction, he was prohibited from possessing a firearm. Hunter then filed a petition with the trial court seeking to reinstate his right to possess a firearm. When the trial court denied his motion, Hunter appealed the trial court's order. See Hunter, 147 Wn. App. at 180. That is what the defendant is required to do here.

There are any number of collateral consequences that may follow from a conviction, including the loss of the right to vote, the loss of the right to drive, and even certain immigration

⁴ This is no different than the many other collateral consequences of a conviction. Schmidt, 143 Wn.2d at 681. Certain convictions result in persons losing their right to vote (Const. art. VI, § 3), their right to hold office (RCW 42.04.020), or their right to obtain a medical license (Harker v. New York, 170 U.S. 189, 191-92, 18 S. Ct. 573, 42 L. Ed 1002 (1898)).

consequences. The State has found no case wherein a defendant has been allowed to file a direct appeal challenging the collateral consequence of the conviction.⁵ Instead, the defendant is required to seek a trial court remedy first. Madison v. State,⁶ is directly on point. In Madison, three defendants convicted of various felony offenses lost their right to vote as a collateral consequence of their convictions. In order to seek redress, they filed a complaint for declaratory relief in the trial court. Madison, 161 Wn.2d at 90. The trial court ruled on the motion and the losing party appealed. That did not happen here.

Currently there is no decision of the trial court, no trial court ruling for this Court to review, affirm or reverse. In other words, there does not seem to be any issue reviewable under RAP 2.2 or RAP 2.3. It is well established that Washington appellate courts do not issue advisory opinions. See Walker v. Munro, 124 Wn.2d 402, 414, 879 P.2d 920 (1994); see also Superior Asphalt & Concrete Co. v. Dep't of Labor & Indus., 121 Wn. App. 601, 606, 89 P.3d 316

⁵ There are certainly cases wherein appeals have been allowed when the claim is that trial counsel did not properly inform a defendant of the consequences of a conviction, but that is not the case here. See, e.g., State v. Weyrich, 163 Wn.2d 554, 182 P.3d 965 (2008) (appeal from the defendant being misinformed of the consequences of his plea).

⁶ 161 Wn.2d 85, 163 P.3d 757 (2007).

(2004) (absent an actual case or controversy, a reviewing court steps into the prohibited area of advisory opinions (citing Diversified Indus. Dev. Corp. v. Ripley, 82 Wn.2d 811, 815, 514 P.2d 137 (1973), rev. denied, 153 Wn.2d 1005 (2005))). Because there is no trial court ruling or trial court order, and this Court does not issue advisory opinions, the defendant's appeal and his claim that the trial court could not legally prohibit him from possessing a firearm should be dismissed.

2. THE CHARGING DOCUMENT INCLUDED ALL THE ESSENTIAL ELEMENTS OF THE CRIME CHARGED.

The defendant relies on the "essential elements" rule and State v. Recuenco,⁷ for his argument that the trial court did not have the authority to prohibit him from possessing a firearm.⁸ The defendant's reliance on the essential elements rule and Recuenco, is misguided. This issue is governed by Schmidt, supra, and State v. Felix, 125 Wn. App. 575, 105 P.3d 427, rev. denied, 155 Wn.2d

⁷ Referring to State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008).

⁸ As stated above, the trial court did not prohibit the defendant from possessing a firearm. The following argument is made in the event this Court finds the issue is properly before the court.

1003 (2005). See also United States v. Hayes, 555 U.S. 415, 129 S. Ct. 1079, 172 L. Ed. 2d 816 (2009) (upholding the federal firearms statute where the prior conviction was a domestic violence misdemeanor), and State v. Winston, 135 Wn. App. 400, 144 P.3d 363 (2006).

The essential elements rule requires that the charging document, or "Information," contain all the essential elements of a crime alleged. Recuenco, 163 Wn.2d at 434; State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). "Elements" are the facts that the State must prove beyond a reasonable doubt to establish that the defendant committed the charged crime. Recuenco, at 434-35. An element is "essential" if its "specification is necessary to establish the very illegality of the behavior." State v. Yates, 161 Wn.2d 714, 757, 168 P.3d 359 (2007) (internal citations omitted).

The essential elements rule is based on the right to a jury trial under article I, section 22 and the Sixth Amendment. City of Auburn v. Brooke, 119 Wn.2d 623, 627-28, 836 P.2d 212 (1992). The rule is intended to afford notice to an accused of the nature and cause of the accusation against him. Kjorsvik, 117 Wn.2d at 97; State v. Cosner, 85 Wn.2d 45, 50-51, 530 P.2d 317 (1975).

The defendant was convicted of assault in the fourth degree, with the crime being designated as a domestic violence offense.

CP 1. Under the statute, a "person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another." RCW 9A.36.041. "Intent" is a court implied element of the crime. State v. Davis, 119 Wn.2d 657, 662, 835 P.2d 1039 (1992).

Here, in defining the elements of the crime, the charging document read as follows:

That the respondent, ALI E DIVSAR AKA ALI AY, in King County, Washington on or about March 22, 2010, did intentionally assault Eraj Divsar,

Contrary to RCW 9A.36.041, and against the peace and dignity of the State of Washington.

CP 1.

In meeting the requirements of the essential elements rule, "compliance should take the form of pleading by statutory language and citation of the statute or statutes upon which they are proceeding." Cosner, 85 Wn.2d at 51. That was done in this case. The Supreme Court has previously ruled that the language contained in the Information herein satisfies the essential elements

rule in charging a defendant with having committed the crime of assault in the fourth degree. Davis, 119 Wn.2d at 663.

Still, based on Recuenco, the defendant contends that the State had to include in the Information the "element" of domestic violence because of the "enhanced punishment" that resulted from his conviction. Def. br. at 5. The defendant's argument does not follow from Recuenco.

It is true that a sentencing enhancement, such as a deadly weapon or firearm allegation, must be included in the Information. Recuenco, 163 Wn.2d at 434-35.⁹ Specifically, as held in Recuenco, in charging a firearm enhancement, the State must plead--and prove to a jury beyond a reasonable doubt--that the offender was armed with a firearm during the commission of the underlying offense. Id.

Recuenco follows from a number of United States Supreme Court cases. In Apprendi v. New Jersey, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory

⁹ Similarly, in State v. Powell, 167 Wn.2d 672, 223 P.3d 493 (2009), a majority of the justices of the Supreme Court (the four justice dissent and two person concurring opinion) held that under Blakely and Apprendi, exceptional sentence aggravating circumstances-- facts that must be proved to a jury beyond a reasonable doubt--must be charged in the Information.

maximum must be submitted to a jury, and proved beyond a reasonable doubt.” 530 U.S. 466, 489-90, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The Court’s subsequent decision in Blakely v. Washington, reaffirmed the holding of Apprendi.

This case requires us to apply the rule we expressed in Apprendi v. New Jersey. “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”

542 U.S. 296, 124 S. Ct. 2531, 2536, 159 L. Ed. 2d 403 (2004).

The defendant's reliance upon this line of cases is misguided. The Supreme Court has previously ruled that the fact that a collateral consequence may result from a conviction does not make that consequence a penalty. See Schmidt, 143 Wn.2d at 676. If a consequence is not a penalty (let alone a penalty above the statutory maximum as in Blakely et al) the essential elements rule, and the cases interpreting the rule, simply do not apply. Schmidt, not cited by the defendant, is directly on point.

Schmidt was convicted of a felony offense in 1988. At the time of his conviction, the law did not make it illegal for him to possess a rifle as a consequence of his conviction, although the law did prohibit him from possessing other firearms. In 1994, the

law changed, making it illegal for persons with a felony conviction from possessing a rifle. In 1997, Schmidt was found in possession of a rifle and convicted of unlawful possession of a firearm based on his 1988 conviction. He appealed, arguing that application of the 1994 amendments to the firearm statute to him violated the *ex post facto* clauses of the United States Constitution and the Washington Constitution. The *ex post facto* clauses "prohibit enactment of any law which imposes punishment for an act which was not punishable when committed, or which increases the quantum of punishment after the offense was committed." Schmidt, 143 Wn.2d at 672-73.

Critical to determination of whether an *ex post facto* violation exists is whether or not the complained of disability is in fact "punishment" for a past act. Schmidt, at 673-74. The Supreme Court held contrary to the defendant's position here. Specifically, the Court held that, "[a]lthough the prohibitions of the firearms statute impose a disability and present a threat of criminal punishment if violated, the prohibitions do not amount to punishment..." Schmidt, at 676 (citing with approval Ness, 70 Wn. App. at 823-24) (loss of the right to possess a firearm is a collateral consequence of pleading guilty to a crime--not a penalty).

The Court came to this determination despite Schmidt and the dissent pointing out that the right to possess a firearm is a fundamental right.

Even the fact that the right to bear arms is a constitutional right does not make the restriction of that right punitive in nature because the restriction is merely a collateral disability incidental to the underlying felony conviction.

Schmidt, at 681 (Justice Madsen concurring).

The defendant has neither distinguished Schmidt, nor shown that it is "incorrect and harmful." See In re Stranger Creek, 77 Wn.2d 649, 466 P.2d 508 (1970) (the doctrine of stare decisis dictates that the court will not change a rule of law absent a showing that the established rule is clearly wrong and harmful).¹⁰ A disability resulting from a conviction, the inability to possess a firearm, does not constitute punishment and thus the defendant's reliance upon Recuenco et al and the essential elements rule is misguided. This is the very conclusion this Court has reached in prior decisions of the Court.

¹⁰ The decision in Schmidt is consistent with the federal court's interpretation of 18 U.S.C. § 922(g)(9), which prohibits possession of a firearm by a person previously convicted of a misdemeanor crime of domestic violence. See United States v. Pfeifer, 371 F.3d 430, 436-37 (8th Cir. 2004); see also Swartz v. Mathes, 291 F.Supp.2d 861, 866-68 (N.D. Iowa, 2003) (discussing the plethora of cases finding the same), aff'd by, Swartz v. Burger, 412 F.3d 1008 (8th Cir. 2005).

In Felix, supra, this Court ruled that a conviction for a domestic violence misdemeanor offense does not implicate Apprendi, Blakely, *et al.* As pertinent here, Felix was convicted of fourth-degree assault against his girlfriend. On appeal, he claimed that because the offense was a domestic violence offense, he was subject to additional punishment and thus he could raise a challenge under Blakely, *et al.* This Court rejected Felix's claim that the domestic violence nature of the crime needed to be pled and proved because the conviction resulted in a revocation of his right to possess a firearm. Felix, 125 Wn. App. at 580-81. In accord with Schmidt, supra, this Court held that the fact that a crime is committed within a domestic relationship, and that there may be collateral consequences as a result, does not expand the punishment for the offense and therefore a challenge based on Blakely and Apprendi cannot be made. Id.¹¹ Without punishment

¹¹ See also Winston, supra; State v. Goodman, 108 Wn. App. 355, 30 P.3d 516 (2001), rev. denied, 145 Wn.2d 1036 (2002); and State v. O.P., 103 Wn. App. 889, 13 P.3d 1111 (2000), rejecting similar claims. In Hayes, supra, the United States Supreme Court held that under the federal firearms statute, making it illegal for domestic violence misdemeanants to possess a firearm, the domestic violence relationship did not need to be an element charged in the underlying prior conviction.

being imposed beyond the statutory maximum, the defendant's essential elements/Recuenco argument fails.¹²

In a last gasp, the defendant claims that because the right to possess a firearm is an individual fundamental right under article I, section 24 and the Second Amendment--per District of Columbia v. Heller,¹³ and McDonald v. Chicago,¹⁴ the prohibition on possessing a firearm is punishment that the trial court can not impose. The defendant's argument is unavailing. While Heller and McDonald recognized for the first time that there exists an individual right to possess a firearm under the Second Amendment, Washington has always recognized this right under the state constitution. In fact, this issue was directly addressed in Schmidt, supra, wherein both the majority and concurrence indicated that the fact that the right to bear arms is a individual fundamental right did not make a

¹² This is consistent with cases addressing similar arguments in regards to other consequences of a conviction. On multiple occasions, the Supreme Court has held that the constitution does not require that consequences far more severe than argued here need to be pled in an Information. For example, the Supreme Court rejected the claim that under the essential elements rule a person subject to his "3rd strike" under the Persistent Offender Accountability Act needed to be charged with such in the Information. State v. Thorne, 129 Wn.2d 736, 777-84, 921 P.2d 514 (1996). Even when the State seeks the death penalty, the Supreme Court has found that there is no constitutional requirement that this fact be included in the Information. State v. Clark, 129 Wn.2d 805, 811, 920 P.2d 187 (1996).

¹³ 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).

¹⁴ ___ U.S. ___, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010).

restriction upon possessing a firearm punitive in nature. See Schmidt, 143 Wn.2d at 676-77 (majority opinion), 681 (Madsen concurring) (rejecting the dissents argument based on article I, section 24).

In any event, Heller and McDonald provide nothing new to this argument. The Second Amendment did not create a right to possess a firearm. Heller, 128 S. Ct. at 2798. The very text of the Amendment, "implicitly recognizes *the preexistence* of the right and declares only that the right 'shall not be infringed.'" Id. (emphasis added). The right to bear arms, the Court added, "is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence." Id. at 2797. It is "a pre-existing right" that does not belong to all persons. Id. at 2798.

Similarly, the language of article I, section 24 shows that the state constitution is intended to protect a preexisting right. The defendant does not argue that the Second Amendment provides some level of protection greater than article I, section 24, therefore existing case law regarding article I, section 24 governs here.

In this regard, while the defendant does not appear to challenge the constitutionality of RCW 9.41.040 directly, had he done so his argument would fail. The constitutionality of a statute is

reviewed de novo. State v. Eckblad, 152 Wn.2d 515, 518, 98 P.3d 1184 (2004). The court will presume that a statute is constitutional and it will make every presumption in favor of constitutionality. State v. Glas, 147 Wn.2d 410, 422, 54 P.3d 147 (2002). The party challenging the statute has the burden of proving that it is unconstitutional beyond a reasonable doubt. State v. Spencer, 75 Wn. App. 118, 121, 876 P.2d 939 (1994), rev. denied, 125 Wn.2d 1015 (1995).

Article I, section 24 recognizes that individuals of this state have the right to bear arms, but this right is not absolute.¹⁵ Morris v. Blaker, 118 Wn.2d 133, 144, 821 P.2d 482 (1992). "It has long been recognized that this constitutional guarantee is subject to

¹⁵ It is unclear why the defendant conducts a Gunwall analysis. See State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986) (analysis used to compare scope of protection of federal and state constitutional provisions). Prior to 2008 and Heller, the Supreme Court had never interpreted the Second Amendment as protecting an individual right to possess a firearm. Prior to 2010 and McDonald, the Supreme Court had never interpreted the Fourteenth Amendment as incorporating the Second Amendment individual rights upon the states. Therefore, unlike search and seizure law, for example, prior to 2010, there was no body of Second Amendment case law to distinguish that recognized an individual right to possess a firearm. Instead, there is over 100 years of case law history interpreting and applying article I, section 24. In addition, with neither the Second Amendment nor article I, section 24 creating a right to possess a firearm, the provisions protect the very same right, the common law right to possess a firearm.

reasonable regulation by the state under its police power." State v. Krantz, 24 Wn.2d 350, 353, 164 P.2d 453 (1945).¹⁶

The reasonable regulation test requires that the regulation be reasonably necessary to protect the public safety, health, morals and general welfare and be substantially related to the legitimate ends sought to be achieved. Second Amendment Foundation, 35 Wn. App. at 587 (citing Homes Unlimited, Inc. v. Seattle, 90 Wn.2d 154, 158, 579 P.2d 1331 (1978)). If the regulated area exceeds the scope of the police power authority, or if the law's prohibitions do not have a real and substantial relationship to the government's interest, the law is unconstitutional. City of Seattle v. Pullman, 82 Wn.2d 794, 799-800, 514 P.2d 1059 (1973).¹⁷

¹⁶ In Blaker, the Supreme Court upheld a statute that required the immediate revocation of the right to possess a concealed firearm where the person had been involuntarily committed. In Krantz, the Supreme Court upheld that a statute that made it illegal for a person to possess a short firearm if they had been previously convicted of a crime of violence. In Second Amendment Foundation v. City of Renton, 35 Wn. App. 583, 668 P.2d 596 (1983), the court upheld an ordinance that prohibited a person from possessing a firearm on premises where alcohol is served. In State v. Tully, 198 Wash. 605, 89 P.2d 517 (1939), the Supreme Court upheld the unlawful possession of a firearm statute from constitutional challenge as a reasonable regulation under the state's police powers.

¹⁷ The State recognizes that there is an ongoing debate as to the level of scrutiny to apply under Second Amendment jurisprudence. See, e.g., State v. Sieves, 168 Wn.2d 276, 294-95, 225 P.3d 995 (2010). This Court need not resolve that debate here as the statute in question would survive under any level of scrutiny.

The right to bear arms after having been convicted of a misdemeanor domestic violence offense is minimally impacted. In fact, it is the least onerous provision under the statute. In just three years a defendant's right to possess a firearm can be restored. RCW 9.41.040(4)(b)(ii). For certain offenses, the prohibition lasts for life. See RCW 9.41.040(4). During at least a portion of the three years, a domestic violence offender is likely to be on supervision and is likely to be required to undergo domestic violence treatment (if not alcohol, drug and/or mental health treatment).

On the other hand, the public safety aspect of reducing firearm access to persons convicted of acts of domestic violence can hardly be debated. The Supreme Court has held that "the safety" of citizens is not merely "substantial" but "compelling." United States v. Salerno, 481 U.S. 739, 750, 754-55, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). In United States v. Tooley, 717 F.Supp.2d 580 (S.D.W.Va. 2010), the court recited multiple sources demonstrating both the recidivist nature of domestic violence and the actual violence and fatality associated with domestic violence

offenders.¹⁸ One study, for example, shows that the recidivism rate for domestic violence offenses can be as high as 80%. Tooley, at 595 (citing Carla Stover, Domestic Violence Research: What Have We Learned and Where Do We Go From Here, 20 J. of Interpersonal Violence, 448, 450 (2005)). Another study shows that within just three years (ironically the length of the prohibition here), 17% of domestic violence offenders were re-arrested for another domestic violence offense. Tooley, at 595 (citing United States Department of Justice, Reconsidering Domestic Violence Recidivism: Individual and Contextual Effects of Court Dispositions and Stake in Conformity, 6 (2001)). The firearm statistics regarding domestic violence are even more compelling.

In 2005, there were over 800 domestic violence homicides in the United States. Tooley, at 595 (citing Fox and Zawitz, Homicide Trends in the United States, Bureau of Justice Statistics (2007)). In addition, each year there are over 150,000 domestic violence incidents involving a firearm. Tooley, at 595 (citing 142 Cong. Rec.

¹⁸ Tooley involved a Second Amendment challenge to the federal firearms statute (18 U.S.C. § 922(g)(9)), a statute that makes it illegal to possess a firearm if a person has been convicted of a misdemeanor domestic violence offense. The court upheld the statute from constitutional challenge, as have many other courts in the federal system. See, e.g., United States v. Walker, 709 F.Supp.2d 460 (E.D.Va. 2010); United States v. Luedtke, 589 F.Supp.2d 1018 (E.D.Wis. 2008); United States v. Lewitzke, 176 F.3d 1022 (7th Cir.), cert. denied, 120 S. Ct. 267 (1999); United States v. White, 593 F.3d 1199 (11th Cir. 2010).

S8831-06). And "a history of domestic violence was present in 95.8% of the intrafamily homicides studied." Tooley, at 595 (citing Don B. Kates and Clayton E. Kramer, Second Amendment Limitations and Criminological Considerations, 60 Hastings L. J. 1339, 1342).

The necessity of keeping firearms out of the hands of domestic violence offenders is clearly of paramount importance. For a misdemeanor, the prohibition lasts for a minimal amount of time. Felons, even for nonviolent offenses such as forgery or possession of stolen property, are prohibited from possessing a firearm for a much longer period of time. And yet, there is no question that the government's ability to dispossess a felon's right to possess a firearm is constitutional.¹⁹ In domestic violence situations, where the need is even greater and the prohibition here less onerous, the statute's constitutionality is certain.

¹⁹ See Heller, 128 S. Ct. at 2816-17 ("nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons") Tully, supra, (all "authorities" support the proposition that the State can prevent felons from possessing a firearm); accord, Krantz, supra; United States v. Emerson, 270 F.3d 203, 227 n.21 (5th Cir. 2001) (felons do not have the right to possess a firearm), cert. denied, 122 S. Ct. 2362 (2002).

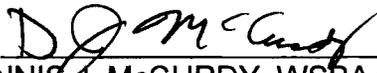
D. **CONCLUSION**

For the reasons cited above, this Court should reject the defendant's arguments.

DATED this 9 day of September, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
DENNIS J. McCURDY, WSBA #21975
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

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 Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. DAVSAR, Cause No. 66373-9-1, 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

Date

