

APPELLANT'S
REPLY
BRIEF

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STATE OF WASHINGTON

BY [Signature]
DEPUTY

SERVICE	Marcus Carter 13271 Wicks End Place SW Port Orchard, WA 98367
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Ste. 300, 950 Broadway
Tacoma WA 98402-4434

IN THE COURT OF APPEALS OF WASHINGTON
DIVISION II

THE STATE OF WASHINGTON,)	
)	No. 32514-4-II
Appellant,)	
)	STATE'S RESPONSE TO MOTION TO
v.)	DISMISS
)	
MARCUS CARTER,)	
)	
Respondent.)	

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I. IDENTITY OF MOVING PARTY

The appellant, STATE OF WASHINGTON, asks this Court for the relief designated in Part II of this motion.

II. STATEMENT OF RELIEF SOUGHT

The State respectfully asks that Carter’s motion to dismiss be denied.

III. FACTS RELEVANT TO MOTION

The relevant facts are set forth in the brief of appellant.



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IV. GROUNDS FOR RELIEF AND ARGUMENT

A. CARTER BEARS THE BURDEN OF ESTABLISHING BEYOND A REASONABLE DOUBT THAT THE STATUTE IS UNCONSTITUTIONAL.

Where the constitutionality of a statute is challenged, the statute is presumed to be constitutional and the burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt.¹ As the Supreme Court has explained, however, the “beyond a reasonable doubt” standard differs somewhat in the context of constitutionality issues from that traditionally used with regard to the State’s burden of proof in a criminal trial:

The “reasonable doubt” standard, when used in the context of a criminal proceeding as the standard necessary to convict an accused of a crime, is an evidentiary standard and refers to “the necessity of reaching a subjective state of certitude of the facts in issue.”²

In contrast, the “beyond a reasonable doubt” standard used when a statute is challenged as unconstitutional refers to the fact that one challenging a statute as unconstitutional, by argument and research, convince the court that there is no reasonable doubt that the statute violates the constitution. The reason for this high standard is based on our respect for the legislative branch of government as a co-equal branch of government, which, like the court, is sworn to uphold the constitution. We assume the Legislature speaks for the people and we are hesitant to strike a duly enacted statute unless fully convinced, after a searching legal analysis, that the statute violates the Constitution.^[2]

Carter has failed to meet his burden.

¹ *Island County v. State*, 135 Wn. 2d 141, 146, 955 P.2d 377 (1998).

² *Island County*, 135 Wn. 2d at 147 (citation omitted).



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2 **B. TO THE EXTENT CARTER ATTEMPTS TO**
3 **INCORPORATE TRIAL-COURT ARGUMENTS BY**
4 **REFERENCE, HIS CLAIMS MUST BE REJECTED.**

5 First, the State notes that Carter's attempt to "incorporate" by reference
6 arguments presented to the trial court,³ is improper and any such argument should be
7 rejected. Because allowing incorporation of trial memoranda would render the appellate
8 rules meaningless, the Supreme Court has held that "[s]uch an 'end run' around the
9 Rules of Appellate Procedure will not be sanctioned."⁴ One of the reasons cited is that it
10 would effectively exempt the party from the page limitations for brief.⁵ Issues that a
11 party has attempted to incorporate by reference to trial briefs or otherwise are therefore
12 deemed abandoned.⁶ Although Carter is proceeding *pro se*, the rules governing appeals
13 apply to *pro se* appellants to the same extent as they apply to attorneys.⁷ The State will
14 thus respond only to the arguments actually set forth in Carter's motion.
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19 **C. FACIAL VALIDITY OF THE STATUTE.**

20 Carter first claims that the statute under which he was charged is invalid on its
21 face.⁸ This claim appears to have a number of components (some of which do not
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24 ³ Motion at 2.

25 ⁴ *State v. Kalakosky*, 121 Wn.2d 525, 540 n. 18, 852 P.2d 1064 (1993); *U.S. West Communications, Inc.*
v. Utilities & Transp. Comm'n, 134 Wn.2d 74, 111-12, 949 P.2d 1337 (1997).

26 ⁵ *Holland v. Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290, *review denied*, 136 Wn.2d 1015 (1998).

27 ⁶ *Holland*, 90 Wn. App. at 538.

28 ⁷ *State v. Smith*, 104 Wn.2d 497, 508, 707 P.2d 1306 (1985); *Batten v. Adams*, 28 Wn. App. 737, 739,
626 P.2d 984, *review denied*, 95 Wn.2d 1033 (1981).

29 ⁸ Motion at 4.



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2 actually appear to be a facial challenge): that it violates the constitutional right to bear
3 arms;⁹ that it creates an impermissible “victimless” crime;¹⁰ that Carter was deprived of
4 due process because the Legislature has defined a machine gun as contraband;¹¹ that
5 Carter was compelled to give evidence against himself;¹² that he was deprived of due
6 process because he was charged by information rather than indictment;¹³ and that the
7 statute and/or proceedings in the Superior Court violated constitutional provisions
8 regarding freedom of religion,¹⁴ special privileges and immunities,¹⁵ cruel
9 punishment,¹⁶ the limitation on military power,¹⁷ *ex post facto* laws,¹⁸ and treason.¹⁹
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13 None of these contentions has merit.

14 ***1. Right to bear arms under the Washington Constitution***

15 Carter’s central thesis appears to be that RCW 9.41.190 violates the right to bear
16 arms provided for in Const. art. 1, § 24. Because, however, the rights conferred under
17 this section have consistently been construed to be subject to reasonable regulation, this
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20 ⁹ Motion at 5.

21 ¹⁰ Motion at 11-12.

22 ¹¹ Motion at 13.

23 ¹² Motion at 15.

24 ¹³ Motion at 14.

25 ¹⁴ Motion at 16.

26 ¹⁵ Motion at 17.

27 ¹⁶ Motion at 18.

28 ¹⁷ Motion at 18.

29 ¹⁸ Motion at 18.

¹⁹ Motion at 19.



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claim must fail.

The Washington constitutional provision concerning a citizen's right to carry arms in self-defense is unambiguous:

Right to Bear Arms. The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.^[20]

Rules of construction require that the language be given its ordinary meaning.²¹ The court may not engraft an exception where none is expressed in the constitution.²²

Nevertheless, it has long been recognized that the constitutional right to keep and bear arms is subject to reasonable regulation by the State under its police power.²³ This is because a constitutional guaranty of certain rights to the individual citizen does not place such rights entirely beyond the police power of the state.²⁴

Thus, regulations regarding handguns and possession of firearms by convicted felons have been upheld. "[I]t is clear handgun legislation in Washington is designed to

²⁰ Const. art. 1, § 24.
²¹ *State ex rel. Graham v. Olympia*, 80 Wn.2d 672, 676, 497 P.2d 924 (1972).
²² *State ex rel. O'Connell v. Port of Seattle*, 65 Wn.2d 801, 806, 399 P.2d 623 (1965).
²³ *State v. Radan*, 98 Wn. App. 652, 656, 990 P.2d 962 (1999), *reversed on other grounds*, 143 Wn.2d 323 (2001); *Morris v. Blaker*, 118 Wn.2d 133, 144, 821 P.2d 482 (1992); *Second Amendment Foundation v. Renton*, 35 Wn. App. 583, 586, 668 P.2d 596 (1983); *State v. Krantz*, 24 Wn.2d 350, 353, 164 P.2d 453 (1945); *State v. Gohl*, 46 Wash. 408, 410, 90 P. 259 (1907).
²⁴ *Gohl*, 46 Wash. at 410.



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2 prohibit and punish potentially dangerous felons from possessing handguns.”²⁵ “The
3 unlawful possession of a firearm statute reduces the danger or probability of danger that
4 is created when a felon is in possession of a firearm by making it a punishable
5 offense.”²⁶ The regulation of machine guns is similarly a proper exercise of the State’s
6 police power.
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9 Regulations enacted by the State in the exercise of its police powers must
10 nevertheless meet the judicial test of reasonableness. To pass constitutional muster, an
11 arms regulation must: (1) be a reasonable limitation, (2) be reasonably necessary to
12 protect public safety or welfare, and (3) be substantially related to the ends sought.²⁷
13

14 This analysis requires balancing the public benefit from the regulation against
15 the degree to which it frustrates the purpose of the constitutional provision.²⁸ The
16 constitutional text indicates the right is secured not because arms are valued per se, but
17 only to ensure self-defense or defense of state.²⁹ This suggests the constitutional right
18 should be viewed in such a light.³⁰
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21 In *Montana*, the Supreme Court noted that Courts in Washington have upheld
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24 ²⁵ *State v. Jeffrey*, 77 Wn. App. 222, 226, 889 P.2d 956 (1995).

25 ²⁶ *State v. Anderson*, 94 Wn. App. 151, 971 P.2d 585, 588 (1999), *reversed on other grounds*, 141 Wn.2d 357 (2001).

26 ²⁷ *Seattle v. Montana*, 129 Wn.2d 583, 594, 919 P.2d 1218 (1996); *Homes Unlimited, Inc. v. Seattle*, 90 Wn.2d 154, 158, 579 P.2d 1331 (1978); *Seattle v. Pullman*, 82 Wn.2d 794, 799, 514 P.2d 1059 (1973).

27 ²⁸ *Montana*, 129 Wn.2d at 594.

28 ²⁹ *Montana*, 129 Wn.2d at 594.

29 ³⁰ *Montana*, 129 Wn.2d at 594.



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2 various restrictions and prohibitions on the possession and carrying of firearms and
3 weapons. As early as 1939, the Court upheld the concealed weapons permit requirement
4 and a prohibition preventing those convicted of a violent crime from possessing a
5 pistol.³¹ The Court also gave significant weight to the fact that contemporaneously with
6 the adoption of art. 1, § 24 in 1889, legislative enactments regulated weapons.³²
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9 More recently, the courts have upheld a law making possession of firearm and
10 spotlight prima facie evidence of unlawfully hunting big game;³³ upheld a ban on
11 possession of weapons in penal institutions;³⁴ upheld an ordinance banning firearms in
12 certain places where alcohol is served;³⁵ and upheld the ancient proscription upon
13 carrying a firearm under circumstances that warrant alarm for the safety of others.³⁶ In
14 both *Second Amendment Foundation* and *Spencer*, the Court concluded the laws were
15 reasonable because they promoted substantial public interests in safety, and minimally
16 affected the right to bear arms in that they did not proscribe all carrying of a weapon.³⁷
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20 The regulation of machine guns is no different. These guns have a long history
21 of illegal uses by robbers and gangs, dating at least back to the days of prohibition. In
22 the event of “gang warfare” innocent bystanders are far more likely to be injured or
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25 ³¹ *Montana*, 129 Wn.2d at 594, citing *State v. Tully*, 198 Wash. 605, 89 P.2d 517 (1939).

26 ³² *Montana*, 129 Wn.2d at 594 n.3.

27 ³³ *State v. Walsh*, 123 Wn.2d 741, 750, 870 P.2d 974 (1994).

28 ³⁴ *State v. Barnes*, 42 Wn. App. 56, 708 P.2d 414 (1985)

29 ³⁵ *Second Amendment Found. v. Renton*, 35 Wn. App. 583, 586-87, 668 P.2d 596 (1983).

³⁶ *State v. Spencer*, 75 Wn. App. 118, 124, 876 P.2d 939 (1994), review denied, 125 Wn.2d 1015 (1995).



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2 killed by guns that spray a hail of bullets. Moreover, this provision minimally affects
3 the right to bear arms because it does not proscribe the possession of all firearms.
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5 Indeed, before Carter modified the gun in question to make it capable of continuously
6 firing, the gun was perfectly legal. Carter has not met his significant burden of showing
7 that RCW 9.41.190 violates art. 1, § 24; his claim should be rejected.
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9 **2. Right to bear arms under the United States Constitution**

10 Although Carter does not appear to predicate this claim on the federal
11 constitution, such a claim would also fail. First, the Second Amendment has not been
12 held to apply to the States.³⁸ Further, even if it did apply, the Ninth Circuit has held that
13 the Second Amendment creates a collective, not an individual right to bear arms, and
14 that individuals therefore lack standing under the Second Amendment to challenge
15 statutes such as the one at issue here.³⁹ Even under the “individual rights” view
16 espoused by the Fifth Circuit,⁴⁰ however, courts recognize that the right is “subject to
17 certain well-recognized exceptions.”⁴¹ Included among the exceptions is the possession
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22 ³⁷ *Spencer*, 75 Wn. App. at 124.

23 ³⁸ *Love v. Peppersack*, 47 F.3d 120, 123 (4th Cir.), *cert. denied*, 516 U.S. 813 (1995), *citing Presser v. Illinois*, 116 U.S. 252, 6 S. Ct. 580, 29 L. Ed. 615 (1886), and *United States v. Cruikshank*, 92 U.S. 542, 23 L. Ed. 588 (1876).

24 ³⁹ *Hickman v. Block*, 81 F.3d 98, 102 (9th Cir.), *cert. denied*, 519 U.S. 912 (1996); *see also Silveira v. Lockyer*, 312 F.3d 1052, 1066-67 (2002), *rehearing en banc denied*, 328 F.3d 567 (9th Cir. 2003), and *Nordyke v. King*, 319 F.3d 1185, 1191-92 (2003) *rehearing en banc denied*, 364 F.3d 1025 (9th Cir.), *cert. denied*, 125 S. Ct. 60 (2004); *accord, Love*, 47 F.3d at 124; *United States v. Bournes*, 339 F.3d 396, 397-98 (6th Cir. 2003), *cert. denied*, 540 U.S. 1113 (2004).

25 ⁴⁰ *See United States v. Emerson*, 270 F.3d 203, 229-60, *rehearing en banc denied*, 281 F.3d 1281 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002).

26 ⁴¹ *Emerson*, 270 F.3d at 261 n.62, *quoting Robertson v. Baldwin*, 165 U.S. 275, 17 S. Ct. 326, 329, 41 L. Ed. 715 (1897).



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2 of machine guns.⁴² This claim thus fails under the Second Amendment as well.

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4 **3. Information vs. indictment**

5 Carter claims that he was denied the right to due process because he was charged
6 by information rather than by indictment. This claim is without merit.

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8 The State of Washington abandoned its mandatory grand jury practice some 80
9 years ago.⁴³ While grand juries are still convened on rare occasions in Washington, the
10 vast majority of Washington prosecutions are instituted on information filed by the
11 prosecutor. The use of an information has been specifically authorized by the
12 Washington Constitution since 1889:

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15 Offenses heretofore required to be prosecuted by indictment may
16 be prosecuted by information, or by indictment, as shall be prescribed by
17 law.^[44]

18 This claim must therefore fail.

19 Further, although Carter again does not appear to predicate this claim on the
20 federal constitution, such a claim would also fail. Numerous cases, both state and
21 federal, establish that the United States Constitution does not mandate a grand jury
22 indictment to commence state a prosecution.⁴⁵

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25 ⁴² *United States v. Hale*, 978 F.2d 1016, 1019-20 (8th Cir.1992), *cert. denied*, 507 U.S. 997 (1993); *United*
26 *States v. Haney*, 264 F.3d 1161, (10th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002); *United States v.*
27 *Wright*, 117 F.3d 1265, 1272-74 (11th Cir.), *cert denied*, 522 U.S. 1007 (1997), *amended on other*
28 *grounds*, 133 F.3d 1412 (11th Cir.), *cert. denied*, 525 U.S. 894 (1998).

29 ⁴³ Laws 1909, ch. 87.

⁴⁴ Const. art. 1, § 25.

⁴⁵ *See, e.g., State v. Jeffries*, 105 Wn.2d 398, 423-24, 717 P.2d 722, *cert. denied*, 479 U.S. 922 (1986);
Jeffries v. Blodgett, 5 F.3d 1180, 1188 (9th Cir. 1993), *cert. denied*, 510 U.S. 1191 (1994).



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4. Other constitutional provisions and claims.

As noted above, Carter asserts that various other constitutional provisions and common-law principles are violated by the statute in question. None of these contentions, however is explained or supported by citation to authority.

As noted above, Carter bears the burden of establishing that he is entitled to the relief he seeks.⁴⁶ Carter’s failure to cite legal authority that establishes that the trial court erred or to provide any argument in support of his claim is grounds for summarily rejecting his contentions.⁴⁷ “Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.”⁴⁸ These principles are particularly germane when the question presented is the alleged unconstitutionality of a statute, as the Supreme Court has repeatedly noted:

Blilie also cites the due process clause as a basis for finding RCW 10.64.025 unconstitutional. However, he fails to undertake any analysis under the due process clause. Therefore, we do not address the due process clause because, as we have often stated: “[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.” *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) (quoting *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir.1970)).^[49]

Because Carter offers no meaningful analysis of these provisions, or how this statute or

⁴⁶ *Kane v. Smith*, 56 Wn.2d 799, 806, 355 P.2d 827 (1960).

⁴⁷ *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 203, 12 P.3d 603 (2000); *State v. Neely*, 113 Wn. App. 100, 108, 52 P.3d 539 (2002).

⁴⁸ *State v. Logan*, 102 Wn. App. 907, 911 n.1, 10 P.3d 504 (2000), quoting *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).



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2 prosecution violates them, his claims should be rejected.
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4 **D. VALIDITY OF THE STATUTE AS APPLIED**

5 Carter additionally contends that RCW 9.41.190 is unconstitutional as applied to
6 him. Much of this claim is based upon extra-record assertions and should be denied for
7 that reason alone. Moreover, even the matters for which record citations are supplied
8 reference materials that were filed by Carter in the Superior Court, but were not
9 subjected to any adversarial testing. In any event, his claims that the statute violates
10 constitutional equal-protection provisions and is vague lack merit.
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14 **1. Lack of factual basis**

15 Matters referred to in a brief by a defendant but not included in the record cannot
16 be considered on appeal.⁵⁰ Most of the factual assertions appearing in Carter's Motion
17 lack any citation to the record whatsoever. As such he fails to meet his burden of
18 proving that the statute is unconstitutional as applied because the claims lack *proper*
19 *factual support.*
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21

22 **2. Equal protection**

23 The Fourteenth Amendment to the United States Constitution provides in
24 pertinent part, "No state shall make or enforce any law which shall ... deny to any person
25 within its jurisdiction the equal protection of the laws." Similarly, article I, section 12 of
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28 ⁴⁹ *State v. Blilie*, 132 Wn.2d 484, 493 n.2, 939 P.2d 691 (1997).

29 ⁵⁰ *State v. Stevenson*, 16 Wn. App. 341, 345, 555 P.2d 1004 (1976), *review denied*, 88 Wn.2d 1008 (1977).



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the Washington State Constitution provides, “No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.” Our courts have held that these two provisions offer the same level of protection.⁵¹ The substance of equal protection is that “persons similarly situated with respect to the legitimate purpose of the law be similarly treated.”⁵² “Equal protection does not require that all persons be dealt with identically, but it does require that the distinction made have some relevance to the purpose for which the classification is made.”⁵³

No equal protection claim will stand unless the complaining person can first establish that he or she is similarly situated with other persons.⁵⁴ Carter avers that he is similarly situated to persons possessing a federal license to produce, repair or test machine guns, but for the his failure to meet the licensing requirement. This “but for” is significant, however. His claim is akin to an unlicensed driver claiming, for purposes of the no valid operator’s license statute, that he is he is a member of the same class as licensed drivers. Common sense says that the licensed and the unlicensed, where a license is required by law, are not members of the same class. Carter offers no authority to the contrary, and has thus failed to meet his burden of establishing that he is similarly

⁵¹ *Schoonover v. State*, 116 Wn. App. 171, 181-182, 64 P.3d 677 (2003).
⁵² *State v. Little*, 116 Wn. App. 346, 349, 66 P.3d 1099 (2003).
⁵³ *In re Personal Restraint of Stanphill*, 134 Wn.2d 165, 174, 949 P.2d 365 (1998).
⁵⁴ *See State v. Handley*, 115 Wn.2d 275, 290, 796 P.2d 1266 (1990).



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2 situated. No equal-protection scrutiny is thus warranted.

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4 Were Carter deemed to be similarly situated to those having valid federal
5 licenses, the next question would be the appropriate level of scrutiny to apply to the
6 distinction. Three tests are used to determine whether the constitutional right to equal
7 protection has been violated. Under the rational relationship test, a law is subjected to
8 minimal scrutiny and will be upheld “unless it rests on grounds wholly irrelevant to the
9 achievement of a legitimate state objective.”⁵⁵ Under the strict scrutiny test, a law will
10 be upheld only if it is shown to be necessary to accomplish a compelling state interest.⁵⁶
11 Under the intermediate or heightened scrutiny test, the challenged law must be seen as
12 furthering a substantial interest of the State.⁵⁷

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16 Strict scrutiny applies if an allegedly discriminatory statutory classification
17 affects a suspect class or a fundamental right.⁵⁸ Suspect classifications typically are
18 those based on race, alienage or national origin.⁵⁹ The Supreme Court has applied the
19 heightened scrutiny test when a classification affected both an important right (the right
20 to liberty) and a semi-suspect class not accountable for its status (the poor).⁶⁰ However,
21 when statute involves a physical liberty interest and does not involve a suspect class,
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25 ⁵⁵ *State v. Phelan*, 100 Wn.2d 508, 512, 671 P.2d 1212 (1983) (internal quotation omitted).

26 ⁵⁶ *Phelan*, 100 Wn.2d at 512.

27 ⁵⁷ *Phelan*, 100 Wn.2d at 512.

28 ⁵⁸ *State v. Schaaf*, 109 Wn.2d 1, 17, 743 P.2d 240 (1987).

29 ⁵⁹ *State v. Smith*, 117 Wn.2d 263, 277, 814 P.2d 652 (1991).

⁶⁰ *See Phelan*, 100 Wn.2d at 514.



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heightened security does not apply.⁶¹

Carter fails to address the level of scrutiny that should apply to his claim. The statute does not differentiate on the basis of any suspect class. The Supreme Court has held that a statute implicating the right to bear arms is subject to the rational relationship test.⁶² The State has located no state-law holding to the contrary. Nor does Carter offer any basis for departing from federal precedent. Strict scrutiny therefore should not be applied. Likewise, because no suspect class is involved intermediate scrutiny is also not appropriate. Carter’s claim should therefore be analyzed under the rational relationship test.

Under the rational relationship test, the Court asks whether: (1) the governmental action applies alike to all members within the designated class; (2) there are reasonable grounds to distinguish between those within and those without the class; and (3) the classification has a rational relationship to the legislative purpose.⁶³ Applying this standard, the Court presumes that the governmental action is constitutional “unless it rests on grounds wholly irrelevant to achievement of legitimate state objectives.”⁶⁴ The Court looks for any conceivable state of facts that might reasonably justify the

⁶¹ *State v. Manussier*, 129 Wn.2d 652, 673, 921 P.2d 473 (1996); *State v. Coria*, 120 Wn.2d 156, 171, 839 P.2d 890 (1992).
⁶² *Lewis v. United States*, 445 U.S. 55, 65 n.8, 100 S. Ct. 915, 63 L. Ed. 2d 198 (1980).
⁶³ *Convention Ctr. Coalition v. Seattle*, 107 Wn.2d 370, 378-79, 730 P.2d 636 (1986).
⁶⁴ *Tunstall v. Bergeson*, 141 Wn.2d 201, 226, 5 P.3d 691 (2000) (internal quotation omitted).



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classification.⁶⁵

Here, the statute differentiates between those who are licensed by the federal government to manufacture repair or test machine guns for use by the military, law enforcement or authorized export, and those who are not. Applying the three prongs of the rational relationship test, Carter's claim fails.

First, the statute applies alike to all members *within* the designated class. That is all licensed persons who meet the end-user requirements are exempt from prosecution under the statute. Those who are unlicensed are not.

Second, there are reasonable grounds to distinguish between those within and those without the class. Presumably the federal licensing standards are designed to ensure that individuals whose prior activities call into question their fitness to engage in the trade of machine guns do not engage in that trade.⁶⁶ Carter has not shown that there is no reasonable basis to distinguish between the licensed and unlicensed.

The classification has a rational relationship to the legislative purpose. Presumably, the legislative purpose of RCW 9.41.190 is to limit the general availability of machine guns. The legislature provided a specific exemption from legal liability for those who (1) are authorized by the federal government to engage in the manufacture repair or testing of machine guns *and* (2) who are engaging in these activities for the

⁶⁵ *Tunstall*, 141 Wn.2d at 226.

⁶⁶ *See* 18 U.S.C. § 923.



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2 purposes of supplying the military or law enforcement, or who are lawfully exporting
3 such guns. Since none of these activities would result in the general availability of
4 machine guns, it cannot be said that the exemption does not have a rational relationship
5 to the legislative purpose. Carter has thus failed to meet his burden of demonstrating
6 beyond a reasonable doubt that the statute violates his right to equal protection.
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9 *Olsen v. Delmore*,⁶⁷ upon which Carter relies, is not on point. In that case, the
10 statute was read by the Court to permit the State to charge a violation as a gross
11 misdemeanor or as a felony at the sole discretion of the prosecutor.⁶⁸ The statute thus
12 violated the equal protection clause because any “statute which prescribes different
13 punishments or different degrees of punishment for the same act committed under the
14 same circumstances by persons in like situations is violative of the equal protection
15 clause of the Fourteenth Amendment of the United States Constitution.” The present
16 statute permits no such discretion on the part of the State.. Any violation of the statute is
17 a felony.⁶⁹ Moreover, as already discussed, it does not treat similarly situated persons
18 differently.
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23 **3. Vagueness**

24 A penal law is void for vagueness if it does not define the criminal offense with
25 sufficient definiteness that ordinary people can understand what is proscribed, or if it
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28 ⁶⁷ *Olsen v. Delmore*, 48 Wn.2d 545, 295 P.2d 324 (1956).

29 ⁶⁸ *Olsen*, 48 Wn.2d at 550.

⁶⁹ RCW 9.41.190(4).



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2 does not provide ascertainable standards of guilt to protect against arbitrary
3 enforcement.⁷⁰ Persons of common intelligence must not be forced to guess at the
4 meaning of a penal statute.⁷¹ This test, however, does not demand impossible standards
5 of specificity or absolute agreement.⁷² Some amount of imprecision in the language of a
6 statute will be tolerated: because we are “condemned to the use of words, we can never
7 expect mathematical certainty from our language.”⁷³
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10 Unless First Amendment rights are implicated, the court considers only whether
11 the statute is sufficiently definite as applied to the defendant’s particular conduct.⁷⁴
12 Carter affirmatively asserts that his challenge is as applied. Even if he did not, he has
13 failed to identify any First-Amendment interest that is implicated by the statute. As
14 such, his claim must be analyzed as applied.⁷⁵
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17 Carter asserts that the average lay person would believe his conduct would have
18 been excepted from the statutory prohibition. Carter’s claim is disingenuous. The
19 exception is quite clear:
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21 This section shall not apply to:

22 * * *

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24 ⁷⁰ *Seattle v. Montana*, 129 Wn.2d 583, 596, 919 P.2d 1218 (1996).

25 ⁷¹ *Montana*, 129 Wn.2d at 597.

26 ⁷² *Coria*, 120 Wn.2d at 163.

27 ⁷³ *Robinson v. United States*, 324 U.S. 282, 286, 89 L. Ed. 2d 944, 65 S. Ct. 666 (1945); *see also State v. Smith*, 111 Wn.2d 1, 10, 759 P.2d 372 (1988).

28 ⁷⁴ *Montana*, 129 Wn.2d at 597.

29 ⁷⁵ *Montana*, 129 Wn.2d at 597.



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(b) A person ... who ... *is exempt from or licensed under federal law,* and engaged in the production, manufacture, repair, or testing of machine guns, short-barreled shotguns, or short-barreled rifles ...^[76]

Carter makes no claim that he is exempt from federal law, and concedes that he is not properly licensed. Other than his anecdotal claims regarding his “survey,”⁷⁷ he utterly fails to explain what is unclear about the statute. This claim should be rejected.

The second prong of a vagueness analysis is whether the statute invites inordinate discretion on the part of law enforcement authorities.⁷⁸ Law enforcement officials must have ascertainable enforcement standards.⁷⁹

Again, Carter declines to explain how this statutory provision fails to provide ascertainable enforcement standards as a *legal* matter. He spends considerable time emphasizing that the law enforcement officers were confused as to his right to possess a machine gun. As noted above, quite a bit of this “evidence” is not of record, and the remainder has not been subject to any adversarial testing. Nevertheless, even a cursory examination of the reports to which Carter refers reveals that law enforcement was not confused as to what conduct was prohibited. They were quite aware that a properly licensed individual could possess a machine gun. Rather, they were uncertain as to whether Carter was *in fact* properly licensed. The standard was clear; as is not unusual in a criminal investigation, however, all the facts were not immediately known. This

⁷⁶ RCW 9.41.190(2).

⁷⁷ Motion at 26.

⁷⁸ *Montana*, 129 Wn.2d at 597.



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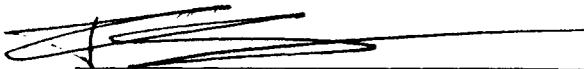
claim is thus also meritless and should be rejected.

V. CONCLUSION

For the foregoing reasons, Carter's motion to dismiss this appeal should be denied, and he should be instructed to file the brief of respondent, which was originally due in early July 2005, forthwith.

DATED September 16, 2005.

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⁷⁹ *Montana*, 129 Wn.2d at 597.

