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SUPREME COURT NO. \_\_\_\_\_

COURT OF APPEALS NO. 60552-6-1

**FILED**  
JAN 21 2009

CLERK OF SUPREME COURT  
STATE OF WASHINGTON

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

**R. P. H.**  
Petitioner.

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STATE OF WASHINGTON

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ANSWER TO PETITION FOR REVIEW

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 Third Avenue  
Seattle, Washington 98104

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**A. IDENTITY OF RESPONDENT**

The Respondent, the State of Washington, asks this Court to deny the petition for review as the petitioner raises issues that are not properly before this Court

**B. THE COURT OF APPEALS OPINION**

The Court of Appeals decision at issue is State v. Hunter, \_\_\_ Wn. App. \_\_\_, 195 P.3d 556 (Oct. 20, 2008).

**C. STATEMENT OF THE CASE**

The defendant used physical force to rape his six-year-old sister on multiple occasions. CP 37-39. The defendant also used physical force to rape his eleven-year-old sister. CP 1-2. On December 14, 2000, the defendant pled guilty to rape in the first degree, a single count encompassing both victims. CP 3-7, 67.

As a collateral consequence of his conviction for a Class A sex offense--a "serious offense" as defined by law, it became unlawful for the defendant to possess a firearm.<sup>1</sup> See, RCW 9.41.040(1)(a); RCW 9.41.010(12) and RCW 9.41.010(11).

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<sup>1</sup> While the defendant makes various references to his actual sentence, this case does not involve a condition of sentence that the defendant not possess a firearm. Sentencing prohibitions are governed by RCW 13.40.160. Here, what prevents the defendant from possessing a firearm is his status as a felon convicted of a "serious offense;" an event that occurred at the time of his plea to rape in the first degree. See RCW 9.41.040(1)(a); In re Ness, 70 Wn. App. 817, 823-24, 855 P.2d 1191 (1993).

On August 7, 2007, a hearing was held after the defendant filed a petition seeking to relieve himself of the requirement that he register as a sex offender, and a separate petition seeking to have his right to possess a firearm restored. RP 12-30. The defendant sought to restore his right to possess a firearm subsection (4)(b)(i) of RCW 9.41.040. CP 30. The defendant believed that if he was felony free for five years, the court was required to reinstate his right to possess a firearm. RP 28. The court agreed to relieve the defendant of the requirement that he continue to register as a sex offender, but declined to reinstate the defendant's right to possess a firearm. RP 25-27; CP 41-42. The court indicated that it would entertain a motion to reconsider, if the defendant provided the court with case law supporting his theory that the court was required to reinstate his right to possess a firearm. RP 28.

On August 17, 2007, the defendant filed a motion to reconsider, and argued in his brief that the court was required to allow him the right to possess a firearm under subsection (4) of RCW 9.41.040. CP 43. The State submitted a response brief and argued in its brief that the defendant had not met the requirements of subsection (4) and therefore the court could not restore the

defendant's right to possess a firearm. CP 47-51. The court signed an order denying the defendant's motion to reconsider. CP 57.

**D. THIS COURT SHOULD DENY REVIEW.**

In considering whether to accept review, this Court should be conscious of the fact that the defendant is raising a constitutional issue that is not properly before this Court, and is attempting to raise many issues that were not raised before the trial court.

**1. THE SECOND AMENDMENT.**

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." While the defendant's case was pending before the Court of Appeals, the United States Supreme Court issued an opinion in District of Columbia v. Heller, 128 S.Ct. 2783, \_\_\_ U. S. \_\_\_, 171 L.Ed.2d 637 (2008), a case involving the Second Amendment and firearm restrictions imposed by the District of Columbia. The defendant now asks this Court to find that the Second Amendment should apply to the states. The defendant is in the wrong court to ask for such relief.

The United States Supreme Court has never held--in Heller, nor any other case--that the Second Amendment means anything more than that Congress shall not infringe upon the right to bear arms. Heller, 128 S.Ct. at 2812-13. To the contrary, the Supreme Court has repeated stated that the Second Amendment does not apply to the States. See United States v. Cruikshank, 92 U.S. 542, 23 L.Ed 588 (1875) (holding that the Second Amendment applies only to the Federal Government), also Presser v. Illinois, 116 U.S. 252, 265, 6 S.Ct. 580, 29 L.Ed. 615 (1886); Miller v. Texas, 153 U.S. 535, 538, 14 S.Ct. 874, 38 L.Ed 812 (1894). While Justice Scalia questioned the limited analysis done in Cruikshank, he noted that "[o]ur later decisions<sup>2</sup>. . .reaffirmed that the Second Amendment applies only to the Federal Government." Heller, at 2813 n. 23.

The United States Supreme Court is the final arbiter of controversies arising under the Federal Constitution and their decision is binding on this Court. State v. Chrisman, 100 Wn.2d 814, 816, 676 P.2d 419 (1984); State v. Laviollette, 118 Wn.2d 670, 826 P.2d 684 (1992), overruled on other grounds, State v. Calle, 125 Wn.2d 769, 888 P.2d 155 (1995). The defendant's request that

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<sup>2</sup> Referring to Presser v. Illinois, 116 U.S. 252 and Miller v. Texas, 153 U.S. 535.

this Court find that the Second Amendment applies to him is contrary to United States Supreme Court precedent, and is misguided. Only the United States Supreme Court can make such a finding; a finding that would require the Supreme Court to overrule its own precedent.<sup>3</sup>

## **2. ISSUES NOT RAISED BEFORE THE TRIAL COURT.**

The defendant asks this court to find that comments the trial court made at the time he was sentenced somehow constitute "res judicata, collateral estoppel and issue preclusion," and thus in some manner, he must have his right to possess a firearm restored. It is unclear how the defendant believes these concepts are applicable, whether he contends the prosecutor is barred from making certain arguments, that reviewing courts are barred from making certain findings, or that the court that denied the defendant's motion for reinstatement was somehow required to act in a specific manner. In any event, these issues were never raised in the trial court.

In addition, the defendant claims that when the trial court relieved him of the requirement that he had to register as a sex offender, he obtained the equivalent of a "certification of

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<sup>3</sup> In his petition, the defendant does not assert any claims under the Washington Constitution.

rehabilitation" and was entitled to have his right to possess a firearm restored under subsection (3) of RCW 9.41.040. Like the res judicata et al issue, this issue was never raised before the trial court. The one and only issue raised and decided by the trial court was whether or not the court would reinstate the defendant's right to possess a firearm pursuant to subsection (4) of RCW 9.41.040.

This Court should not accept review on issues that were never raised before the trial court, and which the trial court never had an opportunity to rule.

**E. CONCLUSION**

This Court should deny the defendant's petition for review, or in the alternative, limit the acceptance of the petition to the single issue raised in the trial court--whether the court should have reinstated the defendant's right to possess a firearm under subsection (4) of RCW 9.41.040.

DATED this 4 day of December, 2008.

RESPECTFULLY submitted,

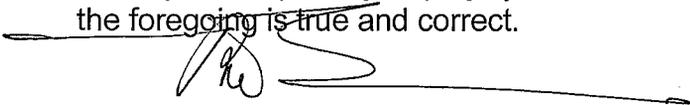
DANIEL T. SATTERBERG  
King County Prosecuting Attorney

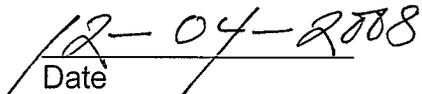
By: Dennis J. McCurdy  
DENNIS J. McCURDY, WSBA 21975  
Senior Deputy Prosecuting Attorney  
Attorneys for the Respondent

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 Neil Fox, the attorney for the appellant, at 1008 Western Ave Suite 302, Seattle WA 98104, containing a copy of the Respondent's Answer to Petition, in STATE V. HUNTER, Court of Appeals Cause No. 60552-6--I, Supreme Court Cause No. \_\_\_\_\_ in the Supreme Court, 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