

No. 82557-2

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

R.P.H.,

Petitioner.

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SUPPLEMENTAL BRIEF OF PETITIONER

On Appeal from King County Superior Court, Juvenile Division,
The Hon. Julie Spector and Carol Schapira, Presiding

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A. SUPPLEMENTAL ISSUES

1. What should be the standard of review of state regulations of the right to bear arms?

2. Is an interpretation of RCW 9.41.040 that imposes a lifetime ban on firearms' rights for a child convicted of a sex offense constitutional?

B. SUPPLEMENTAL ARGUMENT

1. *Introduction*

A decade ago, when he was 13 years old, R.P.H. had sex with his sisters. R.P.H. successfully completed treatment and grew up. He now wishes to exercise his constitutional rights to possess firearms. Under the State's view of RCW 9.41.040,¹ no matter how many decades pass, and no matter his need for self-defense, R.P.H. can never legally possess a firearm – ever, even when he is 80 years old, living alone in a dangerous neighborhood, and needs a handgun for self-defense. According to the State, R.P.H. will always pay for his childhood error by being forever deprived of a fundamental constitutional right.

¹ As argued in the Court of Appeals, RCW 9.41.040 should be interpreted to allow R.P.H. to restore his firearms' rights, not only because he has obtained the equivalent of a certificate of rehabilitation under RCW 9.41.040(3), but also because he has not been "previously been convicted" of a sex offense under RCW 9.41.040(4). *See Rivard v. State*, 168 Wn.2d 775, 782-84, 231 P.3d 186 (2010). Moreover, as argued below, R.P.H. should have his rights restored because of the orders of the judge at the time of disposition.

In *State v. Sieyes*, 168 Wn.2d 276, 225 P.3d 995 (2010), this Court reviewed the constitutionality of RCW 9.41.040(2)(a)(iii)'s restrictions of gun rights to juveniles. The Court declined to adopt a level of scrutiny when reviewing state infringements of the right to bear arms, and instead held: "Instead we look to the Second Amendment's original meaning, the traditional understanding of the right, and the burden imposed on children by upholding the statute." 168 Wn.2d at 295. In this brief, R.P.H. asks this Court to depart from this holding, and adopt Justice J. Johnson's arguments in his dissent that the right to bear arms requires strict scrutiny. *Id.* at 297-306 (Johnson J. J., dissenting in part). However, even under the test set out by the Court, the lifetime ban on R.P.H.'s firearm rights is unconstitutional under U.S. Const. amends. 2 & 14 and Wash. Const. art. 1, § 24.

2. The Court Should Apply Strict Scrutiny

Sieyes follows the U.S. Supreme Court's lead in *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L.Ed.2d 637 (2008), by not adopting a level of scrutiny (although rejecting a rational basis test). This position has surface appeal because neither the Second Amendment nor Wash. Const. art. 1, § 24, contain within their strictures any language about "scrutiny" – strict, intermediate or otherwise. Of course, the First

Amendment contains no language about “strict scrutiny,” “compelling state interest,” “narrowly drawn restrictions,” “time, place and manner,” or “content neutrality.” Yet, these concepts are deeply ingrained in our jurisprudence, and the judicial tests used to evaluate the constitutionality of state regulation of speech are well-known and have been applied for years.

The Court in *Heller* specifically compared the core rights protected by the Second Amendment to those protected by the First Amendment. 128 S. Ct. at 2821. There would be a glaring doctrinal inconsistency not to apply the same level of strict scrutiny to state regulation of arms as is applied to speech. As Justice J. Johnson’s dissent in *Sieyes* makes clear, this Court has consistently utilized strict scrutiny wherever core constitutional rights are at stake. *Sieyes*, 168 Wn.2d at 303-04 & n. 32 (Johnson, J. J., dissenting). See also *In re Rainey*, 168 Wn.2d 367, 374, 229 P.3d 686 (2010) (“The extent to which a sentencing condition affects a constitutional right is a legal question subject to strict scrutiny.”). And, as Justice Johnson points out, other courts have utilized strict scrutiny (or at least intermediate scrutiny) in the wake of *Heller* to review Second Amendment cases. *Sieyes*, 168 Wn.2d at 302 & n.31 (Johnson, J. J., dissenting).

An interpretation of RCW 9.41.040 that imposed a lifetime firearm’s

ban a child convicted of a sex offense, who has gone through treatment, becomes an adult, and is rehabilitated, does not survive strict scrutiny. There is no compelling interest for imposing a lifetime ban from exercising a core constitutional right that “the Framers and ratifiers of the Fourteenth Amendment counted . . . among those fundamental rights necessary to our system of ordered liberty.” *McDonald v. City of Chicago*, ___ U.S. ___, 130 S. Ct. 3020, 3042, 177 L.Ed.2d 894 (2010).

The Court of Appeals justified a lifetime ban based on speculation about safety and deference to legislative judgment – “the lifetime ban applies only to the most dangerous of those felons, as defined by the legislature.” *State v. [R.P.H.]*, 147 Wn. App. 177, 192, 195 P.3d 556 (2008), *rev. granted sub nom. State v. R.P.H.*, 169 Wn.2d 1005 (2010). This conclusion is based on fear, the irrational fear that the commission of an intra-familial sex offense by a 13 year old child somehow makes that child dangerous decades into the future. Yet, studies actually show that recidivism rates for such offenders, particularly those who successfully complete treatment, are among the lowest.² Moreover, the Supreme Court has made it clear that “juvenile

² See Washington State Sentencing Guidelines Commission, *Recidivism of Juvenile Offenders FY 2007* (May 2008); J. Worling, A. Litteljohn, D. Bookalam, “20-Year Prospective Follow-Up Study of Specialized Treatment for Adolescents Who Offended Sexually,” 28 *Behav. Sci. Law*, 46-57 (2010).

offenders cannot with reliability be classified among the worst offenders.” *Roper v. Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L.Ed.2d 1 (2005). Imposing a lifetime deprivation of a core constitutional right on a child, whose brain and moral sense are only partially developed, runs contrary to the development of modern jurisprudence, which recognizes the special status of children who break the law. *See Roper v. Simmons*, 543 U.S. at 569-70; *Graham v. Florida*, ___ U.S. ___, 130 S. Ct. 2011, 2026, 176 L.Ed.2d 825 (2010).

The problem with a lifetime ban on the exercise of a core constitutional right is that it gives the child no opportunity ever to demonstrate rehabilitation (which R.P.H. already has done). As this Court held when questioning a blanket lifetime ban on contact with a child victim in a sex case, “what is reasonably necessary to protect the State's interests may change over time. Therefore, the command that restrictions on fundamental rights be sensitively imposed is not satisfied merely because, at some point and for some duration, the restriction is reasonably necessary to serve the State's interests. *The restriction's length must also be reasonably necessary.*” *In re Rainey*, 168 Wn.2d at 381 (emphasis added). *See also Graham v. Florida*, 130 S. Ct. at 2030 (“What the State must do, however,

is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”).

Here, an interpretation of RCW 9.41.040 that deprives forever a child of a fundamental constitutional right, without regard to his or her ability to demonstrate rehabilitation, does not survive strict scrutiny and therefore is unconstitutional under U.S. Const. amends. 2 & 14 and Wash. Const. art. 1, § 24.

3. *History Does Not Support a Lifetime Ban on R.P.H.’s Firearm Rights*

Even if strict scrutiny is not adopted, under the test set out in *Sieyes*, the Court of Appeals’ decision cannot be upheld. Historically, there is no support for depriving children of their firearm rights for the rest of their lives as a penalty for having sex with a younger sibling. In this analysis, modern practices – i.e the various state codes barring firearms to those convicted as juveniles of felonies cited by the Court of Appeals, [*R.P.H.*], 147 Wn. App. at 192 – is not the focus. Rather, the focus must be on the historical record, the original meaning of the constitutional protections of the right to bear arms and the traditional understanding of that right. *Sieyes*, 168 Wn.2d at 295.

To be sure, the Supreme Court has stated that its emerging jurisprudence on the Second Amendment was not meant to “cast doubt on

such longstanding regulatory measures as ‘prohibitions on the possession of firearms by felons and the mentally ill.’” *McDonald*, 130 S. Ct. at 3047, quoting *Heller*, 128 S. Ct. at 2816-17. However, not only were these statements dicta,³ but to resolve this case, this Court does not have to rule on the constitutionality of a statute that bans people with juvenile court adjudications or adult convictions from possessing firearms. R.P.H. is not arguing that the ban put into effect a decade ago, when he was 13 years old, is in any way unconstitutional. Rather, the issue is whether a ban on the exercise of a core constitutional right is constitutional if a statutory scheme is construed to extend that ban for life, after there is evidence of rehabilitation. The dicta in *Heller* and *McDonald* simply do not apply to this situation.

Additionally, the dicta in *Heller* and *McDonald* really has little bearing on R.P.H. since he is not a “felon.” He has a juvenile disposition, which, despite all of the changes of the juvenile system over the last few

³ In an *en banc* decision upholding the constitutionality of 18 U.S.C. § 922(g)(9), criminalizing possession of firearms by those with domestic violence convictions, the Seventh Circuit warned against reading too much into the dicta of *Heller*: “We do not think it profitable to parse these passages of *Heller* as if they contained an answer to the question whether § 922(g)(9) is valid. They are precautionary language. Instead of resolving questions such as the one we must confront, the Justices have told us that the matters have been left open.” *United States v. Skoien*, ___ F.3d ___ (No. 08-3770, 7th Cir. 7/13/10) (en banc).

years, is still not the same as an adult felony conviction.⁴

It is also apparent that at English common law, which must be consulted when exploring the meaning and scope of the Second Amendment, R.P.H. could not even have been convicted of sex offense. It is true that prior to the adoption of the juvenile court system in the early 20th Century, children charged with crimes were often treated as adults and, at common law, children as young as nine or ten could be sentenced to death. Blackstone, *Commentaries on the Laws of England*, Book IV, 23-24 (1769). Yet, at English common law, children under the age of 14 could not be convicted of sex offenses:

Under English common law, a child under the age of fourteen was conclusively presumed incapable of committing rape. See *Commonwealth v. Green*, 2 Pick. 380 (1824); *Regina v. Waite*, 2 Q.B. 600, 601 (1892). See also J.R. Nolan, Criminal Law § 646, at 470 (1976); 3 C. Torcia, Wharton's Criminal Law § 286, at 24 (14th ed. 1980). Though the origins of the presumption are unclear, the rationale most often stated is that males in England seldom reached puberty before age fourteen and that a boy who was not sexually mature could not commit the common law crime of rape. See,

⁴ See *State v. Michaelson*, 124 Wn.2d 364, 367, 878 P.2d 1206 (1994) (although a juvenile can be convicted of an offense, he cannot be convicted of a felony); *In re Frederick*, 93 Wn.2d 28, 30, 604 P.2d 953 (1980) (juvenile who commits an offense cannot be "convicted of a felony"); *In re Weaver*, 84 Wn. App. 290, 293, 929 P.2d 445 (1996) ("A juvenile offense is not a felony."); RCW 13.04.240 ("An order of court adjudging a child a juvenile offender or dependent under the provisions of this chapter shall in no case be deemed a conviction of crime.").

e.g., 3 C. Torcia, *supra* at 25.

Commonwealth v. A Juvenile, 399 Mass. 451, 452, 504 N.E.2d 1049 (1987).

Thus, at English common law, 13 year old R.P.H. would not have had a conviction for having sex with his younger sisters, and thus would never have suffered the consequences of a felony conviction, including loss of civic rights.

In the 19th Century, some American jurisdictions departed from the English irrebutable presumption that children under 14 lacked capacity to commit a sex crime, holding that the presumption could be overcome by physical evidence that the child had reached puberty. *See, e.g., Williams v. State*, 14 Ohio 222 (1846); *Gordon v. State*, 93 Ga.531, 21 S.E. 54 (1893); *State v. Jones*, 39 La. Ann. 935, 3 So. 57 (1887).⁵ On the other hand, some American jurisdictions followed the English precedent throughout the 19th Century, particularly those jurisdictions that followed English common law more closely than others. *See Foster v. Commonwealth*, 96 So. 306, 31 S.E. 503 (1898); *State v. Sam*, 60 N.C. (1 Win.) 300 (1864); *State v. Handy*, 4 Del (Harr.) 466 (1845).

⁵ The reason seemed to be some sort of misplaced pride that the American climate, as opposed to the "moist and cold climate of England," led to an earlier development of sexual capabilities. *Williams v. State*, 14 Ohio at 226-27.

It is not clear where Washington fell in this mix, since there is a dearth of authority in early Washington cases on the subject. It was not until the 1970s that published decisions began to appear dealing with prosecution of children for sex offenses.⁶ Washington, though, has always looked to common law, RCW 4.04.010, although it is not always clear the source of such law. *See Sayward v. Carlson*, 1 Wash. 29, 40-41, 23 P. 830 (1890).

However, even if the State can find evidence that 13 year old children were convicted of sex offenses in Washington in 1889 or at English common law, there is no historic record to support the conclusion that such people were then barred from firearm possession for the rest of their lives. While dicta in *Heller* and *McDonald* mentioned “longstanding” prohibitions on the possession of firearms by felons, such prohibitions actually are not “longstanding.”

With regard to children being barred from firearm ownership for the rest of their lives, the statute which included juvenile dispositions within the purview of RCW 9.41.040 was not adopted until 1992, over a hundred years after the adoption of Washington’s Constitution and over two centuries after

⁶ The first published decision discussing a child under 14 being charged with a sex offense that can be located is *Monroe v. Tielsch*, 84 Wn.2d 217, 525 P.2d 250 (1974). This is not to say that there were no such prosecutions before this time, but counsel has not located any such cases.

the adoption of the Second Amendment. Laws of 1992, ch. 205, § 118.⁷ RCW 9.41.040's current language is of very recent vintage and enjoys no historic pedigree.

Current scholarship is that there was a lack of any historic practice from the 18th and 19th Centuries of banning firearms from even adult felons. See C. Kevin Marshall, "Why Can't Martha Stewart Have a Gun," 32 *Harv. J. L. & Pub. Policy* 695 (2009). Notably, neither the Second Amendment nor Wash. Const. art. 1, § 24 contain within them felon exclusions. Compare U.S. Const. amend. 14, § 2 (noting the abridgement of the right to vote based upon "participation in rebellion, or other crime"); Wash. Const. art. VI, § 3 ("All persons convicted of infamous crime unless restored to their civil rights . . . are excluded from the elective franchise."). "Only four state constitutions had what might be considered Second Amendment analogues in 1791 – Massachusetts, North Carolina, Pennsylvania, and Vermont – and none of these provisions excluded persons convicted of a crime." *United States v. Skoien*, ___ F.3d ___ (No. 08-3770, 7th Cir. 7/13/10) (Sykes, J., dissenting).

⁷ See *In re Nelson*, 120 Wn. App. 470, 475, 85 P.3d 912 (2003) (holding that retroactive application of this statute did not violate ex post facto); *State v. McKinley*, 84 Wn. App. 677, 929 P.2d 1145 (1997) (setting out legislative history); Attorney General Opinion, 1987 No. 28 (12/17/87) (concluding that state law does not prohibit a person, convicted in juvenile court of a heinous felony, from purchasing or possessing a handgun or the issuance of a concealed weapons permit)

There were few, if any laws, stripping those convicted of crimes of firearm rights until the early 20th Century: “[O]ne can with a good degree of confidence say that bans on convicts possessing firearms were unknown before World War I.” C. Kevin Marshal, *supra* at 707.

At common law, those who committed crimes could be ordered to forfeit their property, including weapons, but were not then barred from reacquiring other weapons. *Id.* at 714-15. There were also procedures for stripping Catholics of arms, but these procedures were not absolute, allowed weapons for self-defense, and specifically provided a mechanism for restoration of rights upon swearing allegiance to the King. *Id.* at 721-23. During Revolutionary times, there were laws ordering the forfeiture of weapons belonging to Loyalists, and turning them over to the revolutionary armies. However, “[t]he laws also did not technically prohibit recusants from acquiring new arms (they read more like forfeiture laws than disabilities).” *Id.* at 724. Finally, there were laws in the South aimed at preventing freed blacks from possessing firearms, although these were met with skepticism by even southern courts, and ultimately such laws led to the adoption of the Fourteenth Amendment. *Id.* at 726-27.

In light of this historic record, the common law history that did not

allow 13 year old boys to be convicted of rape, and the very recent history of felon disqualification statutes (including the less than two decades of barring those with juvenile adjudications), it can safely be said that the original meaning of the Second Amendment and Wash. Const. art. 1, § 24, and the traditional understanding of the right to bear arms, support the conclusion that an interpretation of RCW 9.41.040 that imposes a lifetime ban on R.P.H., without regard to rehabilitation, is unconstitutional.

4. *State v. Gunwall*

In *Sieyes*, the Court noted that the appellant had not engaged in a state constitutional analysis, and thus did not reach issues under Wash. Const. art. 1, § 24. *Sieyes*, 168 Wn.2d at 293-94. However, the Court noted that in the past it had used occasionally used the “reasonable regulation” “rhetoric” but that this language was no longer appropriate. *Sieyes*, 168 Wn.2d at 295 n. 20.⁸ Thus, the Court in *Sieyes* has breathed new life into art. 1, § 24, jurisprudence, and it is now appropriate to analyze the state constitutional

⁸ As Justice Sanders pointed out in his dissent to the plurality opinion in *State v. Schelin*, 147 Wn.2d 562, 590, 55 P.3d 632 (2002) (Sanders, J., dissenting), past precedent citing to “reasonable regulation” and “police power” (called “heresy” by Justice Sanders) is traceable back only to 1945 and *State v. Krantz*, 24 Wn.2d 350, 353, 164 P.2d 453 (1945). While not using such dramatic language, the *Sieyes* Court has essentially written off the “reasonable regulation” and “police power” language as as “occasional rhetoric” and has announced that the Court has “never settled on levels-of-scrutiny analysis for firearms regulations.” *Sieyes*, 168 Wn.2d at 295 n. 20. Justice Sanders’ views in his dissent to *Schelin* are now the view of a majority of this Court.

right to bear arms under *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808

(1986).

a. **Gunwall Factors 1 and 2: Textual Language and Differences in Texts**

Wash. Const. art. 1, § 24 provides:

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.

U.S. Const. amend. 2 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.

As opposed to the Second Amendment, the Washington right explicitly mentions the right to bear arms in self-defense, and thus is arguably even more protective of this right than under federal law. In *State v. Rupe*, 101 Wn.2d 664, 706, 683 P.2d 571 (1984), this Court concluded that the language in the Second Amendment about militias limited that amendment in comparison to the broader language of art. 1, § 24.

Art. 1, § 24, also uses the term “impaired” as opposed to the Second Amendment’s use of the word “infringed.” “Impair” means to “to make or cause to become worse; diminish in ability, value, excellence, etc.; weaken

or damage”, while “infringe” means an “to commit a breach or infraction of; violate or transgress,” which is contemplated a more active violation. “Infringe” comes from the Latin *infringere*, which means to break or weaken, while “impair” comes from the Middle English *empairen*, which means “to make worse.” *The Random House Dictionary of the English Language*, Second Edition (Unabridged) (1987). The use of the word “impair” rather than “infringe” suggests that the right to bear arms under art. 1, § 24, is stronger than the Second Amendment, with the writers of the Washington provision desiring that there not be even impairments on that right.

Finally, it is important to note, as this Court did in *Sieyes*, that art. 1, § 24, contains within it only two textual exceptions: “First, the right exists only in the context of an individual’s ‘defense of himself, or the state.’ CONST. art. I, § 24. Second, the right does not authorize ‘individuals or corporations to organize, maintain or employ an armed body of men.’ *Id.* . . . We are not at liberty to disregard this text: ‘The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise.’ CONST. art. I, § 29. Moreover, the mandatory provision in article I, section 24 is strengthened by its two textual exceptions to the otherwise textually absolute right to keep and bear arms.” *Sieyes*, 168 Wn.2d at 293.

On the other hand, there are explicit provisions within the Washington Constitution that strip civic rights from those convicted of certain offenses. *See* Wash. Const. art. VI, § 3 (regarding voting rights). No such civic death provisions are included in art. 1, § 24.

The lack of any reference in the absolute words of art. 1, § 24, that exclude from its protections those with juvenile sex adjudications, and the use of the desire to prevent even “impairments” of that right, supports an interpretation of art. 1, § 24, that would disfavor limitations on gun ownership based upon a childhood charge of having sex with one’s younger sister.

b. Gunwall Factor 3 – Constitutional History

In *Rupe*, this Court looked to the Oregon Constitution for guidance as to how to understand Washington’s provision. 101 Wn.2d at 706-07. The Oregon Constitutional provision protecting the right to bear arms states:

The people have the right to bear arms for defence of themselves, and the State, but the Military shall be kept in strict subordination to the civil power.

Oregon Const. art. I, § 27. The Oregon Supreme Court thoroughly analyzed this provision, and traced its historic lineage in *State v. Kessler*, 289 Or. 359, 614 P.2d 94, 95-100 (1980). The Oregon court noted that art. I, § 27, shared

a common historical background with other state constitutional arms provisions drafted in the Revolutionary and post-Revolutionary War era, and had the following justifications: (a) a preference for a citizen militia over a standing army, (b) a deterrence of governmental oppression, and (c) the right to personal defense. 614 P.2d at 97.

Nothing in this background would support a lifetime ban on firearm ownership by someone with a childhood adjudication for a sex offense. If anything, this background would militate against such a ban, which would clearly interfere with the ability of people like R.P.H. to defend themselves, even at home with a small handgun, or to deter governmental oppression.

c. Gunwall Factor 4 – Pre-Existing State Law

As noted above, the state statute banning people with certain categories of juvenile adjudications (crimes of violence) from possessing certain types of firearms (pistols) was not adopted until 1992 (Laws of 1992, ch. 205, § 118) – over a hundred years after the adoption of the Washington State Constitution. There is no history of laws in this state imposing lifetime bans on firearm possession for people who committed offenses as children. Until 1992, children with juvenile “convictions” who then became adults were free to own firearms, without restriction. Thus, the pre-existing state law

strongly disfavors a lifetime ban on firearm possession by those rehabilitated adults with juvenile sex adjudications.

d. **Gunwall Factors 5 and 6– Structural Differences and State and Local Concern**

This Court has always concluded that the differences in structure between the state and federal constitutions “supports an independent state constitutional analysis in every case. Our consideration of this factor is always the same; that is that the United States Constitution is a *grant* of limited power to the federal government, while the state constitution imposes *limitations* on the otherwise plenary power of the state.” *State v. Foster*, 135 Wn.2d 441, 458-59, 957 P.2d 712 (1998). “Supreme Court application of the United States Constitution establishes a floor below which state courts cannot go to protect individual rights. But states of course can raise the ceiling to afford greater protections under their own constitutions.” *Sieyes*, 168 Wn.2d at 292.

This particularly the case with regard to right to bear arms. Until *Heller*, it was not clear that the Second Amendment protected individual rights, and until *Sieyes* and *McDonald*, it was not clear that the Second Amendment applied to the states. Therefore, by necessity, firearm laws have been a patchwork of state and federal regulations, and there has never been

uniformity between states.

While art. 1, § 24, is a strong guarantee of the right to bear arms, in contrast, some states have no provisions at all in their constitutions protecting the right to bear arms (California, Iowa, Maryland, Minnesota, New Jersey, New York). Other states have constitutional protections that differ in structure from Washington's. For instance, the Illinois Constitution's protection of the right bear arms makes it strictly conditioned on the police power (Ill. Const. art. I, § 22 – "Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed."). Other states condition the right to bear arms on regulation of the method of carrying such arms. *See, e.g.*, Louisiana Const. art. I, § 11 (provision protecting the right to bear arms "shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person." *See generally State v. Schelin*, 147 Wn.2d at 591-92 (Sanders, J., dissenting) (surveying other states' constitutional provisions). The contrasting lack of such limitations in Wash. Const. art. 1, § 24, not only is pertinent to some of the other *Gunwall* factors (i.e. the text), but also demonstrates the lack of a need for uniformity between states. Thus, these factors support an enhanced right to bear arms in Washington, one that would frown on a lifetime disqualification of R.P.H.

e. *Gunwall* – Conclusion

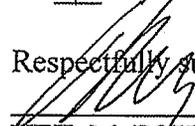
An analysis of the *Gunwall* factors leads to the conclusion that Wash. Const. art. 1, § 24, does not support a lifetime ban on firearm possession, even for self-defense, for a rehabilitated adult who once committed an intra-familial sex offense as a 13 year old child. Neither the near absolute language of Wash. Const. art. 1, § 24, with its limited exceptions, nor the history of firearms' regulation in Washington, nor the historic record support such a ban.

C. CONCLUSION

For the foregoing reasons, and for the reasons set out in all prior pleadings in this case, this Court should reverse the superior court and order that R.P.H.'s firearm rights be restored.

Dated this 11 day of October 2010.

Respectfully submitted,



NEIL M. FOX, WSBA NO. 15277
Attorney for Petitioner

STATUTORY APPENDIX

Ill. Const. art. I, § 22 provides:

Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed.

La. Const. art, I, § 11 provides:

The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person.

RCW 4.04.010 provides:

The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state.

RCW 9.41.040 provides:

(1) (a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.

(b) Unlawful possession of a firearm in the first degree is a class B felony punishable according to chapter 9A.20 RCW.

(2) (a) 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 does not qualify under subsection (1) of this section for the crime of unlawful possession of a firearm in the first degree and the person owns, has in his or her possession, or has in his or her control any firearm:

(i) After having previously been convicted or found not guilty by reason of insanity in this state or elsewhere 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 26.50.060, 26.50.070, 26.50.130, or 10.99.040);

(ii) After having previously been involuntarily committed for mental health treatment under RCW 71.05.320, 71.34.090, chapter 10.77 RCW, or equivalent statutes of another jurisdiction, unless his or her right to possess a firearm has been restored as provided in RCW 9.41.047;

(iii) If the person is under eighteen years of age, except as provided in RCW 9.41.042; and/or

(iv) If the person is free on bond or personal recognizance pending trial, appeal, or sentencing for a serious offense as defined in RCW 9.41.010.

(b) Unlawful possession of a firearm in the second degree is a class C felony punishable according to chapter 9A.20 RCW.

(3) Notwithstanding RCW 9.41.047 or any other provisions of law, as used in this chapter, a person has been "convicted", whether in an adult court or adjudicated in a juvenile court, at such time as a plea of guilty has been accepted, or a verdict of guilty has been filed, notwithstanding the pendency of any future proceedings including but not limited to sentencing or disposition, post-trial or post-factfinding motions, and appeals. Conviction includes a dismissal entered after a period of probation, suspension or deferral of sentence, and also includes equivalent dispositions by courts in jurisdictions other than Washington state. A person shall not be precluded from possession of a firearm if the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted or the conviction or disposition has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence. Where no record of the court's disposition of the charges can be found, there shall be a rebuttable presumption that the person was not convicted of the charge.

(4) Notwithstanding subsection (1) or (2) of this section, a person convicted or found not guilty by reason of insanity of an offense prohibiting the possession of a firearm under this section other than murder, manslaughter, robbery, rape, indecent liberties, arson, assault, kidnapping, extortion, burglary, or violations with respect to controlled substances under RCW 69.50.401 and 69.50.410, who received a probationary sentence under RCW 9.95.200, and who received a dismissal of the charge under RCW 9.95.240, shall not be precluded from possession of a firearm as a result of the conviction or finding of not guilty by reason of insanity. Notwithstanding any other provisions of this section, if 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 prohibiting firearm ownership

under subsection (1) or (2) of this section 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:

(a) Under RCW 9.41.047; and/or

(b) (i) If the conviction or finding of not guilty by reason of insanity was for a felony offense, after five or more consecutive years in the community without being convicted or found not guilty by reason of insanity or currently charged with any felony, gross misdemeanor, or misdemeanor crimes, if the individual has no prior felony convictions that prohibit the possession of a firearm counted as part of the offender score under RCW 9.94A.525; or

(ii) If the conviction or finding of not guilty by reason of insanity was for a nonfelony offense, after three or more consecutive years in the community without being convicted or found not guilty by reason of insanity or currently charged with any felony, gross misdemeanor, or misdemeanor crimes, if the individual has no prior felony convictions that prohibit the possession of a firearm counted as part of the offender score under RCW 9.94A.525 and the individual has completed all conditions of the sentence.

(5) In addition to any other penalty provided for by law, if a person under the age of eighteen years is found by a court to have possessed a firearm in a vehicle in violation of subsection (1) or (2) of this section or to have committed an offense while armed with a firearm during which offense a motor vehicle served an integral function, the court shall notify the department of licensing within twenty-four hours and the person's privilege to drive shall be revoked under RCW 46.20.265.

(6) Nothing in chapter 129, Laws of 1995 shall ever be construed or interpreted as preventing an offender from being charged and subsequently convicted for the separate felony crimes of theft of a firearm or possession of a stolen firearm, or both, in addition to being charged and subsequently convicted under this section for unlawful possession of a firearm in the first or second degree. Notwithstanding any other law, if the offender is convicted under this section for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, then the offender shall serve consecutive sentences for each of the felony crimes of conviction listed in this subsection.

(7) Each firearm unlawfully possessed under this section shall be a separate offense.

OR. Const. art. 1, § 27 provides:

The people shall have the right to bear arms for the defence of themselves, and the State, but the Military shall be kept in strict subordination to the civil power[.]

U.S. Const. amend. 1 provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. amend. 2 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.

U.S. Const. amend. 14, § 1 provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. 14, § 2 provides:

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Wash. Const. art. 1, § 24 provides:

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.

Wash. Const. art. 1, § 29 provides:

The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise.

Wash. Const. art. 1, § 32 provides:

A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government.

Wash. Const. art. VI, § 3 provides:

WHO DISQUALIFIED. All persons convicted of infamous crime unless restored to their civil rights and all persons while they are judicially declared mentally incompetent are excluded from the elective franchise.

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6 IN THE SUPREME COURT OF THE STATE OF WASHINGTON
7

8 STATE OF WASHINGTON,

9 Respondent,

10 v.

11 R.P.H.,

12 Petitioner.
13

No. 82557-2

CERTIFICATE OF SERVICE

14
15 I, Alexandra Fast, certify and declare that on the 11th day of October 2010, I deposited
16 into the United States mail with proper first class postage an envelope containing a copy of the
17 attached Supplemental Brief of Petitioner addressed to:

18 Dennis McCurdy
19 King County Prosecutor's Office
516 Third Ave. W-554
Seattle WA 98104

20 I certify or declare under penalty of perjury under the laws of the State of Washington
21 that the foregoing is true and correct.

22 10-11-2010
23 DATE AND PLACE


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25
26
27
28
ALEXANDRA FAST