

NO. 82557-2

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

R.P.H.,

Appellant.

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SUPPLEMENTAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>SUMMARY OF ARGUMENT</u>	3
D. <u>ARGUMENT</u>	5
1. THE TRIAL COURT PROPERLY DECLINED TO REINSTATE R.P.H.'S RIGHT TO POSSESS A FIREARM UNDER SUBSECTION (4) OF RCW 9.41.040.	5
a. With A Prior Class A Sex Offense, R.P.H. Was Ineligible For Reinstatement Under Subsection (4) Of RCW 9.41.040.	5
b. Trial Courts Have The Discretion To Deny Felons The Ability To Possess A Firearm.....	11
2. R.P.H. CANNOT AVAIL HIMSELF OF SUBSECTION (3) OF RCW 9.41.040.....	13
3. AS A CONVICTED FELON, R.P.H. CANNOT AVAIL HIMSELF OF THE PROTECTIONS OF THE SECOND AMENDMENT.	19
4. A RATIONAL BASIS EXISTS FOR THE LEGISLATURE TO PROHIBIT A CLASS OF FELONS, THOSE HAVING COMMITTED CLASS A FELONY OR SEX OFFENSES, FROM POSSESSING A FIREARM FOR LIFE ABSENT THE FELON MEETING THE REQUIREMENTS OF RCW 9.41.040(3).	23

5.	A JUDGE'S MISCONCEPTION ABOUT THE LAW CANNOT BE USED TO FORCE ANOTHER JUDGE TO DO AN UNLAWFUL ACT.	28
E.	<u>CONCLUSION</u>	30

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

City of New Orleans v. Dukes, 427 U.S. 297,
96 S. Ct. 2513, 49 L. Ed. 2d 511 (1976).....26

Dickerson v. New Banner Inst., Inc., 460 U.S. 103,
103 S. Ct. 986, 74 L. Ed. 2d 845 (1983).....27

District of Columbia v. Heller, ___ U.S. ___,
128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008)..... 19-22, 25-26

Engquist v. Oregon Dept. of Agriculture, 553 U.S. 591,
128 S. Ct. 2146, 170 L. Ed. 2d 975 (2008).....25

Heller v. Doe by Doe, 509 U.S. 312,
113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993).....25, 26

Lewis v. United States, 445 U.S. 55,
100 S. Ct. 915, 63 L. Ed. 2d 198 (1980).....20

McDonald v. City of Chicago, ___ U.S. ___,
130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010).....19, 26

N.Y. City Transit Auth. v. Beazer, 440 U.S. 568,
99 S. Ct. 1355, 59 L. Ed. 2d 587 (1979).....26

New York v. Ferber, 458 U.S. 747,
102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982).....20

United States v. Anderson, 559 F.3d 348,
352 (5th Cir.), cert. denied,
129 S. Ct. 2814 (2009).....23

United States v. Emerson, 270 F.3d 203
(5th Cir. 2001), cert. denied, 122 S.Ct. 2362 (2002).....21, 22

United States v. Marzzarella, 614 F.3d 85
(3rd Cir. 2010)20, 22, 25

<u>United States v. Pagan</u> , 721 F.2d 24 (2 nd Cir. 1983).....	17
<u>United States v. Rozier</u> , 598 F.3d 768 (11 th Cir.), cert. denied, 130 S. Ct. 3399 (2010).....	22
<u>United States v. Skoien</u> , 614 F.3d 638 (7 th Cir. 2010)	26
<u>United States v. Staten</u> , 2010 WL 3476110 (S.C.W.Va. 2010)	25
<u>United States v. Vongxay</u> , 594 F.3d 1111 (9 th Cir.), cert. denied, 2010 WL 2801462 (2010).....	22
<u>United States v. Yancey</u> , 2010 WL 3447736 (7 th Cir. 2010)	27
 <u>Washington State:</u>	
<u>Amunrud v. Board of Appeals</u> , 158 Wn.2d 208, 143 P.3d 571 (2006)	26
<u>Brown v. City of Yakima</u> , 116 Wn.2d 556, 807 P.2d 353 (1991)	23
<u>Buchanan v. International Broth. of Teamsters</u> , 94 Wn.2d 508, 617 P.2d 1004 (1980)	11
<u>City of Seattle v. Montana</u> , 129 Wn.2d 583, 919 P.2d 1218 (1996)	23
<u>Council House, Inc. v. Hawk</u> , 136 Wn. App. 153, 147 P.3d 1305 (2006)	12
<u>DeHeer v. Seattle Post-Intelligencer</u> , 60 Wn.2d 122, 372 P.2d 193 (1962)	29
<u>Fusato v. Washington Interscholastic Activities Ass'n</u> , 93 Wn. App. 762, 970 P.2d 774 (1999).....	24, 25

<u>Lakemont Ridge Homeowners Ass'n v. Lakemont Ridge Ltd.</u> , 156 Wn.2d 696, 131 P.3d 905 (2006).....	5, 9
<u>Matter of Sietz</u> , 124 Wn.2d 645, 880 P.2d 34 (1994)	16
<u>Puget Sound Nat. Bank v. State Dept. of Revenue</u> , 123 Wn.2d 284, 868 P.2d 127 (1994)	16
<u>Robb v. City of Tacoma</u> , 175 Wash. 580, 28 P.2d 327 (1933)	12
<u>Smith v. State</u> , 118 Wn. App. 464, 76 P.3d 769 (2003)	5, 8, 11, 15
<u>State v. Blum</u> , 121 Wn. App. 1, 85 P.3d 373 (2004)	29
<u>State v. Broadaway</u> , 133 Wn.2d 118, 942 P.2d 363 (1997)	12
<u>State v. Fast</u> , 90 Wn. App. 952, 954 P.2d 954, <u>rev. denied</u> , 136 Wn.2d 1023 (1998).....	11
<u>State v. Graham</u> , 116 Wn. App. 185, 64 P.3d 684 (2003)	5, 7, 9, 11, 27
<u>State v. Heiskell</u> , 129 Wn.2d 113, 916 P.2d 366 (1996)	25
<u>State v. J. M.</u> , 144 Wn.2d 472, 28 P.3d 720 (2001)	20
<u>State v. J.P.</u> , 149 Wn.2d 444, 69 P.3d 318 (2003)	6, 9
<u>State v. Krantz</u> , 24 Wn.2d 350, 164 P.2d 453 (1946)	21
<u>State v. Leavitt</u> , 107 Wn. App. 361, 27 P.3d 622 (2001)	28

<u>State v. Locati</u> , 111 Wn. App. 222, 43 P.3d 1288 (2002)	29
<u>State v. Manussier</u> , 129 Wn.2d 652, 921 P.2d 473 (1996)	24
<u>State v. Masangkay</u> , 121 Wn. App. 904, 91 P.3d 140 (2004), <u>rev. granted</u> , 153 Wn.2d 1017 (2005).....	14, 15
<u>State v. McCollum</u> , 88 Wn. App. 977, 947 P.2d 1235 (1997), <u>rev. denied</u> , 137 Wn.2d 1035 (1999).....	16
<u>State v. Nakatani</u> , 109 Wn. App. 622, 36 P.3d 1116 (2001)	5, 7, 11
<u>State v. Nelson</u> , 120 Wn. App. 470, 85 P.3d 912 (2004)	14
<u>State v. R.P.H.</u> , 147 Wn. App. 177, 195 P.3d 556 (2008)	3
<u>State v. Phillips</u> , 65 Wn. App. 239, 828 P.2d 42 (1992)	13
<u>State v. Radan</u> , 143 Wn.2d 323, 21 P.3d 255 (2001)	15, 17, 18
<u>State v. Schmitt</u> , 143 Wn.2d 658, 23 P.3d 462 (2001)	6
<u>State v. Sieyes</u> , 168 Wn.2d 276, 225 P.3d 995 (2010)	26
<u>State v. Stannard</u> , 109 Wn.2d 29, 742 P.2d 1244 (1987)	9
<u>State v. Stevens</u> , 137 Wn. App. 460, 153 P.3d 903 (2007), <u>rev. denied</u> , 162 Wn.2d 1012 (2008).....	29

<u>State v. Swanson</u> , 116 Wn. App. 67, 65 P.3d 343, <u>rev. denied</u> , 150 W.2d 1006 (2003).....	12
<u>State v. Tully</u> , 198 Wash. 605, 89 P.2d 517 (1939)	21
<u>State v. Watson</u> , 160 Wn.2d 1, 154 P.3d 909 (2007)	30
<u>State v. Young</u> , 89 Wn.2d 613, 574 P.2d 1171 (1978)	29
<u>State v. Zornes</u> , 78 Wn.2d 9, 475 P.2d 109 (1970)	9
 <u>Other Jurisdictions:</u>	
<u>Baker v. State</u> , 747 N.E.2d 633, <u>transfer denied</u> , 716 N.E.2d 414 (2001)	22
<u>Posey v. Kentucky</u> , 185 S.W.3d 170, <u>cert. denied</u> , 127 S.Ct. 85 (2006).....	22
<u>State v. Banta</u> , 15 Conn. App. 161, 554 A.2d 1226, <u>cert. denied</u> , 209 Conn. 815 (1988)	22
<u>State v. Hirsch</u> , 177 Or. App. 441, 34 P.3d 1209 (2001), <u>affirmed</u> , 338 Or. 622 (2005).....	22
<u>State v. Winkelman</u> , 2 Ohio App.3d 465 (1981).....	22

Constitutional Provisions

Washington State:

Const. art. 1, § 24.....	20
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Statutes

Federal:

18 U.S.C § 92227
18 U.S.C. § 502117

Washington State:

Laws of 1995, ch. 129, § 19, 12
Laws of 1995, ch. 129, § 169
Laws of 2003, ch. 53, § 2611
Laws of 2005, ch. 453, § 111
RCW 9.41.0105
RCW 9.41.040 *passim*
RCW 9.41.0423
RCW 9.41.22524
RCW 9.94.04024
RCW 9.94A.0306, 24
RCW 9.94A.5257, 10
RCW 9.95.2406
RCW 9A.32.03024
RCW 9A.32.05524
RCW 9A.36.01124

RCW 9A.40.020	24
RCW 9A.44.040	24
RCW 9A.44.073	6, 24
RCW 9A.44.140	18
RCW 9A.48.020	24
RCW 13.40.160	2
RCW 13.50.050	14
RCW 43.43.830	16, 17

Other Jurisdictions:

Cal. Penal Code § 4852.01	17
Cal. Penal Code § 4852.07	17

Rules and Regulations

Washington State:

ER 609	15, 17
RAP 2.5	13

Other Authorities

Don B. Kates, Jr., Handgun Prohibition and the Original Meaning of the Second Amendment, 82 Mich. L.Rev. 204 (1983)	22, 23
Glenn Harlan Reynolds, A Critical Guide to the Second Amendment, 62 Tenn. L.Rev. 461 (1995)	22

A. ISSUES PRESENTED

1. R.P.H. was convicted of first-degree rape of a child, a Class A sex offense. R.P.H. is thus prohibited under RCW 9.41.040, from possessing a firearm. Does RCW 9.41.040(4) require a trial court to permit a felon who has committed a Class A felony or sex offense to possess a firearm based only on the felon having spent five crime-free years in the community?

2. R.P.H. was relieved of the requirement that he register as a sex offender. Is this the equivalent of a "certificate of rehabilitation" that allows R.P.H. to possess a firearm?

3. Can convicted felons avail themselves of the protections of the Second Amendment, and if so, are the Legislature's limitations on allowing convicted felons to possess guns constitutional?

4. Can a judge's arguable misstatement of the law bind another judge at a future hearing?

B. STATEMENT OF THE CASE

On October 20, 2000, R.P.H. was charged with two counts of first-degree rape of a child for repeatedly and forcefully raping his six-year-old sister, and for forcefully raping his eleven-year-old sister. CP 1-2, 37-39, 64-66. R.P.H. was 13 years old at the time. Id.

On December 14, 2000, R.P.H. pled guilty to a single count of first-degree child rape--the single count encompassing both victims, with the State agreeing to recommend a Special Sex Offender Disposition Alternative (SSODA), pursuant to RCW 13.40.160. CP 3-7, 67. At the time of his plea, R.P.H. was notified in writing that as a result of pleading guilty to a felony offense, his status had changed, and that he could no longer possess a firearm unless his right to do so was restored. CP 5.

On January 12, 2001, R.P.H. received a suspended sentence of 15 to 36 weeks under a SSODA. CP 11. As a separate condition of sentence and pursuant to RCW 13.40.160, R.P.H. was ordered not to possess any weapons. CP 10, 14; RP¹ 8. R.P.H. was also informed that, as a collateral consequence of being convicted of a felony offense, he could not possess a firearm until and unless his right to do so was restored. CP 15; RP 8.

On August 7, 2007, a hearing was held after R.P.H. 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. R.P.H.'s petition seeking to restore his right to possess a firearm was brought under RCW 9.41.040(4)(b)(i). CP 30.

¹ The verbatim report of proceedings consists of one volume, hereinafter RP, encompassing the sentencing hearing held on January 12, 2001, and a hearing on August 7, 2007, in which R.P.H. sought to reinstate his right to possess a firearm.

Finding that future registration would not serve the purposes of the sex offender registration statute, the court relieved R.P.H. of the requirement that he register as a sex offender. RP 25-27; CP 41-42. The court declined to reinstate R.P.H.'s right to possess a firearm, expressing concern about the seriousness of the underlying conviction and the number of driving offenses R.P.H. had incurred since his sentencing. RP 25-27; CP 41-42. R.P.H.'s motion to reconsider was also denied. CP 43-46, 57.

R.P.H. appealed, and the Court of Appeals rejected his arguments. See State v. R.P.H., 147 Wn. App. 177, 195 P.3d 556 (2008). Additional facts are included in the sections to which they pertain.

C. SUMMARY OF ARGUMENT

R.P.H.'s first claim involves a question of statutory interpretation. He asserts that RCW 9.41.040(4) required the trial court to reinstate² his right to possess a firearm because he had remained crime free in the community for five years. The State responds that because R.P.H.'s felony conviction was for a Class A sex offense, this five-year crime-free provision does not apply.

² In reality, R.P.H. has never had a full right to possess a firearm. He was 13 years old when he committed a felony offense. As a 13-year-old, R.P.H. had only a limited right to possess a firearm. See RCW 9.41.040(2)(a)(iii); RCW 9.41.042.

In the alternative, R.P.H. asserts that when the trial court rescinded the requirement that he register as a sex offender, this was tantamount to a "certificate of rehabilitation" and that this gives him the right to possess a firearm under RCW 9.41.040(3). The State responds that there is no such thing as a "certificate of rehabilitation" in Washington, and that the Legislature did not intend to confer on sex offenders a right to possess a firearm that is not available to others convicted of felony offenses.³

Next, R.P.H. raises a constitutional challenge. Specifically, he claims that persons convicted as juveniles for felony offenses enjoy greater protections under the Second Amendment than do persons convicted as adults, and that it is unconstitutional to impose a lifetime ban on the possession of a firearm for Class A sex offenses committed as a juvenile. This is incorrect. The Second Amendment protects only the right to bear arms that existed at the time of the Amendment's ratification, a right that felons did not possess. Further, the statute does not impose a lifetime ban as alleged, and the statute's prohibitions are clearly a rational exercise of Legislative power.

Finally, the sentencing judge implied that R.P.H. might be able to get his right to possess a firearm reinstated. However, no authority

³ This issue is not properly before the Court, as R.P.H. never raised this claim in the trial court. In the interest of brevity, the State relies on section C 3 of the Brief of Respondent.

supports R.P.H.'s argument that a subsequent court was required to violate the law and reinstate his right to possess a firearm based on the comments of the sentencing judge.

D. ARGUMENT

1. THE TRIAL COURT PROPERLY DECLINED TO REINSTATE R.P.H.'S RIGHT TO POSSESS A FIREARM UNDER SUBSECTION (4) OF RCW 9.41.040.

R.P.H. contends that he met the requirements for reinstatement of his right to possess a firearm under RCW 9.41.040(4) and therefore the trial court was required to reinstate his right to possess a firearm. This is incorrect. Because R.P.H.'s underlying conviction was a sex offense and a Class A felony, he was ineligible for reinstatement under RCW 9.41.040(4). See Smith v State, 118 Wn. App. 464, 76 P.3d 769 (2003); State v. Graham, 116 Wn. App. 185, 64 P.3d 684 (2003); State v. Nakatani, 109 Wn. App. 622, 36 P.3d 1116 (2001). Additionally, even if he was eligible, the trial court had the discretion to deny reinstatement.

a. With A Prior Class A Sex Offense, R.P.H. Was Ineligible For Reinstatement Under Subsection (4) Of RCW 9.41.040.

Statutory interpretation is a question of law that the court reviews de novo. Lakemont Ridge Homeowners Ass'n v. Lakemont Ridge Ltd., 156 Wn.2d 696, 698, 131 P.3d 905 (2006). The primary objective in

interpreting any statute is to discern and implement the intent of the legislature. Id. The starting point must always be the statute's plain language and ordinary meaning. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

R.P.H. was convicted of first-degree child rape, a sex offense and a Class A felony. RCW 9A.44.073(2); RCW 9.94A.030(42). As a collateral consequence of his conviction--not his sentence--it became unlawful for R.P.H. to possess a firearm. RCW 9.41.040(1)(a)⁴; State v. Schmitt, 143 Wn.2d 658, 676 n.74, 23 P.3d 462 (2001) (loss of the right to possess a firearm is a collateral consequence of a conviction).

When R.P.H. sought to restore his right to possess a firearm, he did so under RCW 9.41.040(4)(b)(i). In pertinent part, the statute provides that:

[⁵] 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

⁴ RCW 9.41.040(1)(a) makes it illegal for any person previously convicted of any "serious offense" to possess a firearm. "Serious offense" includes any "crime of violence." RCW 9.41.010(16). "Crime of violence" includes any Class A felony. RCW 9.41.010(3).

⁵ The first sentence, not reproduced here, pertains to prior convictions that were pre-SRA convictions (pre-1984), wherein the offender received a probationary sentence on a felony and a later vacation of the conviction under RCW 9.95.240. It is the second sentence and following language that is pertinent here.

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:

(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;

RCW 9.41.040(4)(b)(i).

Subsection (4) comes into play at the time a person moves to restore his right to possess a firearm. By its very terms, the person is already prohibited from possessing a firearm and is seeking to have that status changed.⁶ Thus, if at the time a petition for reinstatement is filed a person has a disqualifying conviction (a sex offense that prohibits firearm ownership, a Class A felony or a felony with a maximum sentence of at least 20 years), he cannot reinstate his right to possess a firearm under subsection (4). Nakatani, supra (Nakatani's robbery conviction carried a 20-year maximum sentence and thus he was prohibited from reinstatement under subsection (4)); Graham, supra (Graham's sex offense, existing prior

⁶ Under the statute, a prior conviction is not the only thing that bars a person from possessing a firearm. Persons under eighteen years of age are prohibited from possessing a firearm except under specific circumstances; persons pending trial, appeal or sentencing for a serious offense are similarly prohibited, as are persons who have been involuntarily committed for mental health treatment. See RCW 9.41.040(2)(a)(ii), (iii) and (iv).

to the time of his petition, bars reinstatement under subsection (4)); Smith, supra (Smith's sex offense--his sole conviction--barred reinstatement under subsection (4)).

Read in a straightforward manner, the plain language of RCW 9.41.040(4)(b)(i) dictates that "prior" refers to acts occurring prior to the filing of a petition for reinstatement. R.P.H. nevertheless asserts that all cases that so hold are incorrect. He claims that "prior conviction" does not refer to a conviction existing prior to the petition for reinstatement. Rather, R.P.H. asserts, "prior conviction" refers to a conviction existing prior to the conviction that is the basis for the petition. Under R.P.H.'s theory, a person convicted only of second-degree murder can obtain reinstatement of his right to possess a firearm under subsection (4), but a person with a second-degree murder conviction who subsequently commits second-degree theft cannot (regardless of the perceived dangerousness of either person).

R.P.H.'s interpretation leads to the absurd result that the Legislature intended to allow a convicted murderer to possess a firearm unless the murderer happens to commit a subsequent felony, regardless of how minor the subsequent offense may be. This seems contrary to the

stated purposes of the "Hard Time for Armed Crime" statute,⁷ a statute with the stated intent to stigmatize the use and possession of firearms by convicted felons. Laws of 1995, ch. 129, § 1; Graham, at 189-90; State v. Zornes, 78 Wn.2d 9, 13, 475 P.2d 109 (1970) (the primary objective of statutory construction is to carry out the Legislature's intent); State v. Stannard, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987) (unlikely, absurd or strained results are to be avoided).

Other rules of statutory construction also support the conclusion that persons such as R.P.H. are not eligible for reinstatement under subsection (4). It is a long-standing principle that a court will not interpret a statute so as to render other language within the statute superfluous. Lakemont, 156 Wn.2d at 699. Statutes must be construed so that all the language used is given effect, with no portion rendered meaningless or superfluous. J.P., 149 Wn.2d at 450. R.P.H.'s interpretation renders a portion of the statute meaningless and superfluous.

Under R.P.H.'s interpretation of the second sentence of subsection (4), a person is ineligible for reinstatement only if he has committed a felony subsequent to having been convicted of a prior sex offense, Class A felony or felony conviction carrying at least a 20-year maximum sentence.

⁷ Subsection (4) of RCW 9.41.040 was enacted as part of the 1995 Hard Time for Armed Crime Act. Laws of 1995, ch. 129, § 16.

However, such a person would already be ineligible for reinstatement under other language contained in the same subsection.

Subsection (4)(b)(i) provides that reinstatement is possible only "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." However, subsection (2)(a) of RCW 9.94A.525 provides that "[c]lass A and sex prior felony convictions shall always be included in the offender score." As a result, under subsection (4)(b)(i) of RCW 9.41.040, a person with a prior sex offense or Class A felony, and a subsequent felony, would always be ineligible for reinstatement under subsection (4) because the prior offense would have counted in the offender score for the subsequent offense. Thus, R.P.H.'s interpretation of the second sentence of subsection (4) renders the language of subsection (4)(b)(i) meaningless and superfluous.

Instead, the interpretation that best effectuates the legislative intent, and is true to the language of the statute, is that subsection (4)(b)(i) is intended to limit in time, but not prohibit, recidivists from regaining the right to possess a firearm; however, when a person has committed certain offenses--Class A felonies, sex offenses, or felonies with a maximum sentence of at least 20 years--the Legislature intends that these persons are not eligible for reinstatement at all under subsection (4)--whether they

commit a subsequent felony or not. At least three courts have interpreted RCW 9.91.040 consistently with this position. See Smith, supra; Graham, supra; Nakatani, supra. The Legislature is presumed to be familiar with prior judicial construction of its acts, and the failure of the Legislature to amend a statute after it has been judicially construed indicates an intent to concur in that construction.⁸ Buchanan v. International Broth. of Teamsters, 94 Wn.2d 508, 617 P.2d 1004 (1980).

b. Trial Courts Have The Discretion To Deny Felons The Ability To Possess A Firearm.

R.P.H. also contends that no matter how dangerous a convicted felon is, if that felon meets the minimal requirements of subsection (4)-- the passage of time in the community with no further felony convictions-- the judge has no discretion to deny reinstatement. The Legislature could not have intended this result.

Nowhere in subsection (4) did the Legislature state that the trial court "shall" reinstate a convicted felon's right to possess a firearm. If the Legislature wanted to use mandatory language, it would have, just as it did in other portions of the act. See State v. Fast, 90 Wn. App. 952, 956, 954 P.2d 954 (weapons enhancements "shall" not run concurrently with any

⁸ The Legislature amended RCW 9.41.040 in 2003 (Laws of 2003, ch. 53, § 26) and in 2005 (Laws of 2005, ch. 453, § 1). On neither occasion did the Legislature amend the statute to distinguish the judiciary's prior interpretation of the statute. This acquiescence demonstrates that the courts' prior interpretation of the statute is correct.

other enhancements), rev. denied, 136 Wn.2d 1023 (1998). Where the Legislature uses permissive language in one provision and mandatory language in a similar, related provision, the court will presume the Legislature intended different results. Council House, Inc. v. Hawk, 136 Wn. App. 153, 159, 147 P.3d 1305 (2006); Robb v. City of Tacoma, 175 Wash. 580, 587-88, 28 P.2d 327 (1933) (the Legislature knows when to use the word "shall").⁹

The stated intent of the Hard Time for Armed Crime Act is to deter criminals from possessing deadly weapons during the commission of crimes and to stigmatize the possession of firearms by criminals. Laws of 1995, ch. 129, § 1. Considering these purposes, it seems unlikely that the public¹⁰ or the Legislature intended to totally divest trial courts of even minimal discretion when considering whether to allow a dangerous convicted felon to possess a gun.

⁹ Although the Court of Appeals in State v. Swanson, 116 Wn. App. 67, 65 P.3d 343, rev. denied, 150 Wn.2d 1006 (2003) with minimal analysis, found that the trial court does not possess any discretion, the Court did not discuss the rules of statutory construction listed above. As the dissent in Swanson stated, the very fact that the statute provides that a defendant "may petition" the court, and there is no mandatory language requiring reinstatement, shows that the trial court possesses discretion to deny a request. Swanson, 116 Wn. App. at 79.

¹⁰ In enacting the Hard Time for Armed Crime Act, the Legislature enacted public Initiative 159 without change. State v. Broadaway, 133 Wn.2d 118, 125, 942 P.2d 363 (1997).

**2. R.P.H. CANNOT AVAIL HIMSELF OF
SUBSECTION (3) OF RCW 9.41.040.**

R.P.H. claims that when the trial court relieved him of the requirement that he register as a sex offender, this was necessarily the equivalent of a "certificate of rehabilitation," and therefore the trial court was required to reinstate his right to possess a firearm under subsection (3) of RCW 9.41.040.¹¹ This factual, non-constitutional issue was never raised below, and thus R.P.H. is barred from raising the issue for the first time on appeal. RAP 2.5; State v. Phillips, 65 Wn. App. 239, 243, 828 P.2d 42 (1992). In any event, Washington courts do not have the authority to issue "certificates of rehabilitation," and a court granting a sex offender relief from the requirement that he register as such is not the equivalent of a certificate of rehabilitation.¹²

In pertinent part, RCW 9.41.040(3) provides:

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

¹¹ In other words, according to the defendant, *every* sex offender who is relieved from registering as a sex offender can possess a gun.

¹² To accept the defense theory would mean that sex offenders possess a right that no other convicted felon in the State of Washington possesses--the ability to possess a gun based on obtaining the equivalent of a certificate of rehabilitation.

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.

RCW 9.41.040(3) (emphasis added).

Subsection (3) of RCW 9.41.040 defines what does and does not constitute a conviction for purposes of the Unlawful Possession of a Firearm statute.¹³ Subsection (3) provides that, when a case has been dismissed after a period of probation, suspension or deferral of sentence, the case is still considered a conviction under RCW 9.41.040. However, subsection (3) does provide a number of exceptions--including a certificate of rehabilitation. (see emphasized language in statute above).

There is no such thing as a "certificate of rehabilitation" under Washington law. See State v. Masangkay, 121 Wn. App. 904, 91 P.3d

¹³ See e.g., State v. Nelson, 120 Wn. App. 470, 85 P.3d 912 (2004). Nelson had his prior conviction expunged under RCW 13.50.050. The reviewing court determined that Nelson's expunged conviction no longer counted as a conviction for RCW 9.41.040 purposes.

140 (2004), rev. granted, 153 Wn.2d 1017 (2005);¹⁴ Smith, supra. The language of subsection (3) was borrowed from Evidence Rule 609(c). State v. Radan, 143 Wn.2d 323, 330, 21 P.3d 255 (2001); Masangkay, 121 Wn. App. at 911. Under subsection (3) (and ER 609), Washington courts will respect "certificate[s] of rehabilitation" and "other equivalent procedure[s]" from other jurisdictions. Radan, 143 Wn.2d at 335; Masangkay, at 911 (under ER 609(c), both the state and federal evidentiary rules acknowledge the existence of jurisdictions that have statutory provisions authorizing courts to issue certificates of rehabilitation). There is no "equivalent procedure" in Washington. Radan, at 335 ("the Legislature's use of the phrase 'other equivalent procedure' suggests the Legislature intended some deference to the practices of **other jurisdictions**, as long as the practice involved a finding of rehabilitation") (emphasis added).

If the Legislature had wanted to create a document called a "certificate of rehabilitation," it would have done so. If the Legislature had wanted courts to treat certain Washington convictions as non-convictions under RCW 9.41.040(3), it would have identified the "equivalent procedures" existing in Washington under which courts could

¹⁴ The Supreme Court docket indicates that after the Court accepted review, Masangkay voluntarily withdrew his appeal.

do so. If the Legislature had wanted the relief from sex offender registration to constitute an "equivalent procedure," it would have said so. See Matter of Sietz, 124 Wn.2d 645, 651, 880 P.2d 34 (1994) (if the Legislature had wanted certain prior convictions to be counted separately, it would have said so); Puget Sound Nat. Bank v. State Dept. of Revenue, 123 Wn.2d 284, 289, 868 P.2d 127 (1994) (if the Legislature wished to prohibit the assignment of claims against the State, the Legislature would have enacted a State anti-assignment act); State v. McCollum, 88 Wn. App. 977, 989, 947 P.2d 1235 (1997) (the court will not read into a statute provisions that are not there), rev. denied, 137 Wn.2d 1035 (1999).

In any event, even if the Legislature intended certain types of rulings by Washington courts to be "equivalent" to a "certificate of rehabilitation," providing a sex offender relief from sex offender registration is not an equivalent procedure. A certificate of rehabilitation in other states--and equivalent acts under subsection (3) of RCW 9.41.040--all contemplate that in some manner the conviction is no longer treated as a full conviction. See RCW 43.43.830¹⁵ (a conviction in which a person

¹⁵ In pertinent part, RCW 43.43.830 provides:

"Conviction record" means "conviction record" information as defined in RCW 10.97.030 and 10.97.050 relating to a crime committed by either an adult or a juvenile. It does not include a conviction for an offense that has been the subject of an expungement, pardon, annulment, **certificate of rehabilitation, or other equivalent procedure** based on a finding of the rehabilitation of the person convicted, or a conviction that has been the subject of a pardon, annulment, or

has received a certificate of rehabilitation or equivalent is not considered a conviction under Washington law); Radan, supra (recognizing procedure in Montana whereby person convicted received an actual discharge and restoration of civil rights); United States v. Pagan, 721 F.2d 24, 29-30 (2nd Cir. 1983) (a discharge and finding of rehabilitation under 18 U.S.C. § 5021 renders a conviction inadmissible under ER 609); see also Cal. Penal Code § 4852.01-4852.07 (allowing for a certificate of rehabilitation and unconditional pardon).

RCW 43.43.830 contains the exact same pertinent language as RCW 9A.04.040(3). If, as R.P.H. claims, relieving a convicted sex offender of the requirement that he register as a sex offender necessarily means that person has received the equivalent of a certificate of rehabilitation, then relief from registering necessarily means the sex conviction is no longer considered a conviction under RCW 43.43.830. There is no support for the proposition that the Legislature sought to allow convicted sex offenders this unique opportunity to expunge their convictions when other convicted felons cannot.

other equivalent procedure based on a finding of innocence. It does include convictions for offenses for which the defendant received a deferred or suspended sentence, unless the record has been expunged according to law.

RCW 43.43.830(4) (emphasis added).

Further, to qualify as an equivalent to a certificate of rehabilitation, "RCW 9A.41.040 unambiguously requires a finding of rehabilitation." Radan, at 335. R.P.H. argues that the trial court necessarily made a finding of rehabilitation when it relieved him of the requirement to register as a sex offender. This is incorrect.

A convicted sex offender may petition the court to be relieved of the duty to register as a sex offender under certain circumstances. The relevant provisions are as follows:

An offender having a duty to register under RCW 9A.44.130 for a sex offense or kidnapping offense committed when the offender was a juvenile may petition the superior court to be relieved of that duty. The court shall consider the nature of the registerable offense committed, and the criminal and relevant noncriminal behavior of the petitioner both before and after adjudication, and may consider other factors.

.....

The court may relieve the petitioner of the duty to register for a sex offense or kidnapping offense that was committed while the petitioner was under the age of fifteen if the petitioner (i) has not been adjudicated of any additional sex offenses or kidnapping offenses during the twenty-four months following the adjudication for the offense giving rise to the duty to register, and (ii) proves by a preponderance of the evidence that future registration of the petitioner will not serve the purposes of RCW 9A.44.130, 10.01.200, 43.43.540, 46.20.187, 70.48.470, and 72.09.330.

RCW 9A.44:140(4)(b).

The statute does not require a finding of rehabilitation and there was no such ruling here. In fact, the court specifically found that R.P.H.'s

conduct in incurring multiple traffic infractions showed R.P.H. was not yet of the character wherein the court was willing to allow him to possess a gun. Relief from registering means only that continued registration would not serve the purposes of the sex offender registration statute; it does not mean that a person has been rehabilitated.

3. AS A CONVICTED FELON, R.P.H. CANNOT AVAIL HIMSELF OF THE PROTECTIONS OF THE SECOND AMENDMENT.

The Second Amendment provides that "[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." The Supreme Court recently held that the Second Amendment did not create an individual right to bear arms; that the right already existed. District of Columbia v. Heller, ___ U.S. ___, 128 S. Ct. 2783, 2798, 171 L. Ed. 2d 637 (2008). The very text of the Amendment, the Court stated "implicitly recognizes the pre-existence of the right and declares only that the right 'shall not be infringed.'"¹⁶ Id. Thus, the right to bear arms "is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument

¹⁶ Through the Fourteenth Amendment, the Second Amendment applies to both acts of Congress and State enacted laws. McDonald v. City of Chicago, ___ U.S. ___, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010).

for its existence." Id. at 2797. It is "a pre-existing right" that does not belong to all persons. Id. at 2798.¹⁷

Courts employ a two-pronged approach to Second Amendment challenges. First, the court must determine whether the challenged law imposes a burden on conduct falling within the scope of the protections of the Second Amendment. See United States v. Marzzarella, 614 F.3d 85 (3rd Cir. 2010).¹⁸ If it does not, inquiry under the Second Amendment ends. Id. If it does, then the law must be evaluated under a specific level of scrutiny to determine whether the law impermissibly restricts the existing right. Id.

R.P.H. does not contest that the State had the lawful right to prohibit him, as a convicted felon, from possessing a firearm. See Lewis v. United States, 445 U.S. 55, 67, 100 S. Ct. 915, 63 L. Ed. 2d 198 (1980) ("Congress' judgment that a convicted felon...is among the class of persons who should be disabled from dealing in or possessing firearms because of

¹⁷ The same would be true under Article 1, § 24. The language, "[t]he right to the individual citizen to bear arms in defense of himself, or the state, shall not be impaired," shows that Article 1, § 24 did not create a right, but recognized a pre-existing right, which felons did not possess.

¹⁸ In this regard, the court in Marzzarella recognized, as did the Court in Heller, the similarity with First Amendment challenges wherein certain types of speech are not protected by the First Amendment. Id. For example, it is well accepted that child pornography and true threats receive no First Amendment protections. See New York v. Ferber, 458 U.S. 747, 763-64, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982); State v. J. M., 144 Wn.2d 472, 28 P.3d 720 (2001).

potential dangerousness is rational");¹⁹ State v. Tully, 198 Wash. 605, 89 P.2d 517 (1939) (all "authorities" support the proposition that the State can prevent felons from possessing a firearm), accord State v. Krantz, 24 Wn.2d 350, 353, 164 P.2d 453 (1946); 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); 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 and the mentally ill").

In this regard, R.P.H. is not challenging subsections (1) and (2) of RCW 9.41.040. Rather, R.P.H. is trying to use the Second Amendment to obtain a right to possess a firearm, even though he is a convicted felon--an issue that implicates subsections (3) and (4). However, under common law and the law of the States at the time of ratification of the Second Amendment, convicted felons did not have a right to possess a firearm; thus, because the scope of the Second Amendment protects only against government infringement on an existing right, and felons do not possess this right, R.P.H. cannot avail himself of Second Amendment protections.²⁰

¹⁹ The Court in Lewis upheld the far broader federal law prohibiting felons and some misdemeanants from possessing a firearm. See U.S.C § 922(g).

²⁰ In determining the scope of the existing right that the Second Amendment protects, the Court looked at State constitutions that preceded the ratification of the Amendment, the

This is consistent with pre and post Heller cases holding that felons were not endowed with the natural right to possess firearms. See United States v. Emerson, 270 F.3d 203, 227 n. 21 (5th Cir. 2001) (citing numerous authorities documenting the fact that "violent criminals, children, and those of unsound mind" were never conferred with the right to bear arms); State v. Hirsch, 177 Or. App. 441, 34 P.3d 1209 (2001) ("Felons simply did not fall within the benefits of the common law right to possess arms") (quoting Don B. Kates, Jr., Handgun Prohibition and the Original Meaning of the Second Amendment, 82 Mich. L.Rev. 204, 266 (1983)), affirmed, 338 Or. 622 (2005); Glenn Harlan Reynolds, A Critical Guide to the Second Amendment, 62 Tenn. L.Rev. 461, 480 (1995) (reporting that felons did not historically possess a right to possess arms); Marzzarella, supra (if the right to bear arms for felons did not exist at the time of ratification, it follows that the Second Amendment provides no protection for felons).²¹

constitutions of these States being co-existent with the scope of the Second Amendment. Heller, at 2793, 2802. See e.g., Posey v. Kentucky, 185 S.W.3d 170 ("finding nothing in the [Kentucky] constitution" that confers felons with a right to possess a firearm), cert. denied, 1275 S.Ct. 85 (2006); State v. Winkelman, 2 Ohio App.3d 465 (1981) (Ohio lawfully prohibits convicted felons from possessing firearms); Baker v. State, 747 N.E.2d 633 (prohibiting felons from possessing a firearm does not violate the Indiana Constitution), transfer denied, 716 N.E.2d 414 (2001); State v. Banta, 15 Conn. App. 161, 554 A.2d 1226 Connecticut lawfully can prohibit adult and juvenile felons from possessing firearms), cert denied, 209 Conn. 815 (1988).

²¹ See also United States v. Rozier, 598 F.3d 768, 770 (11th Cir.), cert. denied, 130 S. Ct. 3399 (2010); United States v. Vongxay, 594 F.3d 1111, 1118 (9th Cir.), cert. denied, 2010

In short, the Second Amendment prohibits the government from infringing on the right to bear arms that existed at the time of ratification of the Amendment. Because convicted felons did not possess such a right, the Second Amendment provides no protection for this class of persons, including R.P.H. As such, R.P.H.'s constitutional challenge ends.

4. A RATIONAL BASIS EXISTS FOR THE LEGISLATURE TO PROHIBIT A CLASS OF FELONS, THOSE HAVING COMMITTED CLASS A FELONY OR SEX OFFENSES, FROM POSSESSING A FIREARM FOR LIFE ABSENT THE FELON MEETING THE REQUIREMENTS OF RCW 9.41.040(3).

Once a statute has been enacted, it is presumed constitutional, and the heavy burden of proving it unconstitutional lies with the party challenging its validity. Brown v. City of Yakima, 116 Wn.2d 556, 559, 807 P.2d 353 (1991). It is not enough to argue the propriety of enacting a particular law; rather, "the party challenging it must prove it violates the Constitution beyond a reasonable doubt." City of Seattle v. Montana, 129 Wn.2d 583, 589, 919 P.2d 1218 (1996).

WL 2801462 (2010); United States v. Anderson, 559 F.3d 348, 352 (5th Cir.), cert. denied, 129 S. Ct. 2814 (2009), also, Don B. Kates, Jr., Handgun Prohibition and the Original Meaning of the Second Amendment, 82 Mich. L.Rev. 204, 266 (1983) (felon firearm dispossession laws "cannot seriously be questioned on a theory that felons are included within 'the people' whose right to arms is guaranteed by the Second Amendment. Felons simply did not fall within the benefits of the common law right to possess arms").

The Legislature has chosen to treat different classes of felons differently when it comes to their ability to reinstate their right to possess a firearm. Specifically, the Legislature has created a system whereby criminals committing the most serious crimes face a correspondingly more onerous burden in being able to possess a gun in the future. For misdemeanors, a criminal defendant can get his firearm rights restored in as little as three years. RCW 9.41.040(4)(b)(ii). For most felony offenses, the time period is as little as five years. RCW 9.41.040(4)(b)(i). For felons committing the State's most serious offenses, Class A felony offenses²² and sex crimes,²³ the time period can be life unless the felon can meet the requirements of RCW 9.94.040(3). RCW 9.41.040(4). This is a proper exercise of Legislative authority.

There are three levels of judicial scrutiny. Strict scrutiny applies only when a government action threatens a fundamental right or affects a suspect class. State v. Manussier, 129 Wn.2d 652, 672-73, 921 P.2d 473 (1996). Intermediate scrutiny applies when a non-fundamental but important right or a semi-suspect classification is affected. Fusato v.

²² Class A offenses include, among other crimes, murder (RCW 9A.32.030 and 050), homicide by abuse (RCW 9A.32.055), first-degree rape (RCW 9A.44.040), first-degree assault (RCW 9A.36.011), first-degree kidnapping (RCW 9A.40.020), use of a machine gun in commission of a felony (RCW 9.41.225), first-degree arson (RCW 9A.48.020), and first-degree rape of a child (RCW 9A.44.073).

²³ Sex offenses include, among other crimes, rape, child molestation, rape of a child, and communicating with a minor for immoral purposes. See RCW 9.94A.030(45).

Washington Interscholastic Activities Ass'n, 93 Wn. App. 762, 767, 970 P.2d 774 (1999). Rational basis applies when the statutory classification neither involves a suspect or semi-suspect class nor threatens a fundamental or important right. State v. Heiskell, 129 Wn.2d 113, 123-24, 916 P.2d 366 (1996).

Felons attempting to obtain the right to possess guns cannot be said to be a suspect or semi-suspect class. Therefore, a rational basis test would be applicable here.²⁴ See Heller, 128 S. Ct. 2783, 2818 (citing Engquist v. Oregon Dept. of Agriculture, 553 U.S. 591, 128 S. Ct. 2146, 2153-54, 170 L. Ed. 2d 975 (2008)) (rational-basis scrutiny is a mode of analysis used to prohibit irrational laws under the constitution).

Under rational basis review, a statute is "accorded a strong presumption of validity." Heller v. Doe by Doe, 509 U.S. 312, 319, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993). The "burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." Doe by Doe, 509 U.S. at 320. Moreover, a state has no obligation to produce evidence to sustain the rationality of the legislation. Id. "[A] legislative choice is not subject to courtroom fact-finding and

²⁴ Even were the Court to find the Second Amendment implicated here, cases since Heller have applied, at most, an intermediate level of scrutiny, not strict scrutiny as R.P.H. argued below. See e.g. Marzarella, *supra*; United States v. Staten, 2010 WL 3476110 (S.C.W.Va. 2010). In any event, the statutory scheme here survives under all three levels of scrutiny.

may be based on a rational speculation unsupported by evidence or empirical data." Id. at 320; see also, City of New Orleans v. Dukes, 427 U.S. 297, 303, 96 S. Ct. 2513, 49 L. Ed. 2d 511 (1976) (rational basis review does not authorize "the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations").

Under the rational basis test, a law will be upheld if it is rationally related to a legitimate government purpose. State v. Sieyes, 168 Wn.2d 276, 295, 225 P.3d 995 (2010) (citing N.Y. City Transit Auth. v. Beazer, 440 U.S. 568, 99 S. Ct. 1355, 59 L. Ed. 2d 587 (1979)). In determining whether a rational relationship exists, a court may assume the existence of any necessary state of facts which it can reasonably conceive in determining whether a rational relationship exists between the challenged law and a legitimate state interest. Amunrud v. Board of Appeals, 158 Wn.2d 208, 222, 143 P.3d 571 (2006).

Categorical firearms bans are permissible. See United States v. Skoien, 614 F.3d 638 (7th Cir. 2010). The Legislature is not limited to enacting case-by-case exclusions. Id. Heller and McDonald confirmed that "prohibitions on the possession of firearms by felons" are "presumptively lawful." McDonald, 130 S. Ct. at 3027; Heller, 128 S. Ct. at 2816-17 n. 26.

Like 18 U.S.C. § 922, the Federal Firearms statute, RCW 9.41.040 was enacted to keep guns out of the hands of "presumptively risky people." See Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 112 n. 6, 103 S. Ct. 986, 74 L. Ed. 2d 845 (1983); Graham, at 189-90. The protection of citizens from violent harm is "without doubt an important" objective. United States v. Yancey, 2010 WL 3447736 (7th Cir. 2010). Once guns are taken out of the hands of convicted felons, the Legislature has created an enumerated list of specific requirements that allows convicted felons to again possess a firearm based on their perceived future dangerousness corresponding with the seriousness of the class of crime committed. This reflects the Legislature's determination that persons convicted of crimes of lesser severity can be considered rehabilitated if they can demonstrate law-abiding behavior over a specific period of time. For persons committing murders, rapes, violent assaults--the State's most heinous crimes--the Legislature has seen fit to substantially limit their ability to possess a gun. For these felons--constitutionally prohibited from possessing a firearm based on their own volitional criminal conduct--the Legislature has said they can possess a firearm only after receiving a pardon, annulment, certificate of rehabilitation or other equivalent procedure. RCW 9.41.040(3). Keeping weapons out of the hands of dangerous persons is certainly a compelling State interest. For the

Legislature to substantially limit the ability of felons who have committed the State's most serious crimes from possessing firearms in the future is not wholly irrational. Thus, R.P.H.'s challenge fails.

5. A JUDGE'S MISCONCEPTION ABOUT THE LAW CANNOT BE USED TO FORCE ANOTHER JUDGE TO DO AN UNLAWFUL ACT.

R.P.H. contends that because Judge Julie Spector implied at his sentencing hearing that he could have his right to possess a firearm restored, at a subsequent hearing, due process required Judge Carol Schapira to reinstate his right to possess a firearm even though to do so would violate the law. This argument has no merit.

First, Judge Spector never ruled that R.P.H. could get his right to possess a firearm restored. At most, the judge merely implied that it was possible that at some future date he might be able to get his rights restored. See RP 8-10.

Second, it is true that the Due Process Clause can be used as a shield in a criminal case where a defendant has reasonably relied to his detriment on misleading advice by the government about what conduct the government has proscribed. See e.g., State v. Leavitt, 107 Wn. App. 361, 27 P.3d 622 (2001) (unlawful possession of a firearm conviction reversed where defendant obtained a firearm after court failed to inform him he

could not possess a firearm and he relied on Department of Corrections' actions suggesting his actions were lawful). However, there can be no due process defense where there has been no detrimental reliance upon the misadvice of a government official. See State v. Locati, 111 Wn. App. 222, 43 P.3d 1288 (2002) (rejecting defense where community corrections officer told convicted felon he could possess a firearm, but two police officers later told him this was incorrect); State v. Stevens, 137 Wn. App. 460, 153 P.3d 903 (2007) (Stevens prohibited from relying on due process defense because there was no evidence he was misled or relied on government misstatements in unlawfully possessing a firearm), rev. denied, 162 Wn.2d 1012 (2008); State v. Blum, 121 Wn. App. 1, 85 P.3d 373 (2004) (Blum was not misled by any State agent about right to possess a firearm, thus reliance upon Due Process Clause was misplaced).

No case law has held that the Due Process Clause can be used as a sword to force a judge to do an act not permissible under the law.²⁵ In fact, the premise underlying the Due Process Clause is that no person should be held criminally responsible for conduct that he could not

²⁵ Where no authority is cited in support of a proposition, the court is not required to search out authority, but may assume that counsel, after diligent search, has found none. Courts ordinarily will not give consideration to such alleged errors unless it is apparent without further research that the assignments of error presented are well taken. State v. Young, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (citing DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).

reasonably understand was proscribed. State v. Watson, 160 Wn.2d 1, 7, 154 P.3d 909 (2007). Thus, regardless of what R.P.H. may have been told at sentencing, he cannot now use the Due Process Clause in the manner he seeks because he has committed no crime in reasonable reliance upon the misadvice of a government official. To the contrary, R.P.H. brought his motion to reinstate his right to possess a firearm based upon the very fact that he *knew* it was unlawful for him to possess a firearm. And there is nothing in the Due Process Clause that supports his claim that the Clause can be used as a sword to force a subsequent judge to do an unlawful act based on a misstatement made by another judge.

E. CONCLUSION

For the reasons cited above, this Court should affirm the trial court's denial of R.P.H.'s request to be able to possess a firearm.

DATED this ____ day of October, 2010.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the petitioner, Neil M. Fox, containing a copy of the Supplemental Brief of Respondent, in STATE V. R.P.H., Cause No. 82557-2, in the Supreme Court of 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.

Dennis McCurdy
Name [_____
Done in Seattle, Washington

9/16/10 _____
Date