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NO. 94457-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JOAQUIN GARCIA,

Petitioner.

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**SUPPLEMENTAL BRIEF OF RESPONDENT**

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**A. INTRODUCTION AND SUMMARY OF ARGUMENT**

In 1994, our state legislature enacted a comprehensive measure to combat an alarming rise in armed violence, declaring that reducing unlawful access to firearms was vital to public safety. In doing so, it also ensured that felons get notice when they lose their gun rights, so a person is not prosecuted if he is ignorant of the prohibition.

Since then, this Court has fashioned a remedy for violation of the notice statute, focusing on the purpose of the law — actual notice. A defendant facing an unlawful gun-possession charge now may plead an affirmative defense of lack of notice, requiring him to prove that he had neither notice nor actual knowledge of the firearm prohibition. This procedure maintains the proper burden of proof, and it honors the legislature's intent of protecting both gun rights and society.

Garcia, however, proposes an untenable procedure that would do the opposite. In his case, the trial court dismissed his gun-possession charge pretrial because the State could not affirmatively prove that the defendant received notice in court 23 years ago — regardless of overwhelming evidence of Garcia's actual knowledge. This procedure improperly shifts the burden of proof to the State, defeats legislative intent and effectively grants immunity to people like Garcia — dangerous armed felons. This Court should affirm the court of appeals.

**B. ISSUE PRESENTED**

In a prosecution for unlawful possession of a firearm, is it erroneous for a trial court to dismiss the charge with prejudice pretrial under CrR 8.3(c) because the State cannot prove that the defendant was notified of his firearm prohibition at the time of his predicate conviction, regardless of significant evidence that Garcia had long known of his prohibition at the time he illegally possessed a loaded handgun?

**C. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

Joaquin David Garcia was charged by amended information in King County Superior Court with unlawful possession of a firearm in the first degree (UPFA-1).<sup>1</sup> CP 46-48. The State alleged that on November 5, 2014, Garcia possessed a handgun despite previously having been convicted of rape of a child in the first degree. CP 46. Pretrial, Garcia filed a motion to “Prohibit Use Of Juvenile Conviction As A Predicate Offense.” CP 11-22, 526-33. The trial court granted the motion and dismissed the charge with prejudice. CP 537. The State timely appealed. CP 538-40. The court of appeals reversed. State v. Garcia, 198 Wn. App. 527, 393 P.3d 1243 (April 3, 2017). This Court granted review.

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<sup>1</sup> The information also charged five other counts: (2) Felony Harassment — Domestic Violence; (3) Tampering With a Witness – Domestic Violence; (4 and 5) Domestic Violence Misdemeanor Violation of a Court Order; (6) Unlawful Possession of a Firearm in the Second Degree. CP 46-48. Those charges are stayed pending the outcome here.

## 2. SUBSTANTIVE FACTS

### a. Unlawful Possession Of A Firearm In The First Degree.

On November 5, 2014, Garcia's girlfriend told a doctor at a charity clinic in South Seattle that Garcia had threatened her the previous night and was presently in the waiting room, armed with a handgun. CP 4. When Seattle police arrived, Garcia acknowledged that he had a handgun holstered on his right hip, under his coat. Id. He claimed, "This is her gun and I am just carrying it for her. She knows I can't carry again." Id. Garcia admitted that he was a convicted felon and could not carry a gun. Id. The officers found a loaded .40-caliber, semiautomatic Ruger pistol inside his waistband. Id.

Officers interviewed a frightened L.B. in the clinic exam room. CP 5. She said that she wanted to leave Garcia but feared for her safety. Id. The previous evening, she and Garcia had argued over an unfamiliar phone number on her phone and Garcia accused her of seeing someone else. Id. Shortly thereafter, the couple were watching a television crime drama in which a man shot his girlfriend for infidelity. Id. Garcia turned to L.B. and said, "You can expect that to happen to you." Id.

L.B. told the officers that Garcia kept two additional handguns in her home, which were under her name because of Garcia's felony record. Id. The police advised L.B. to turn in the guns. Id.

After police read Garcia his rights, Garcia made several comments, recorded on patrol-car video, admitting that he knew that as a convicted felon he was prohibited from possessing firearms. Id. In fact, Garcia had numerous felony convictions, including a 1994 conviction in King County juvenile court for rape of a child in the first degree. CP 3, 6, 146-48.

b. Exclusion Of Predicate And Dismissal.

Garcia did not announce an affirmative defense pretrial. CP 545. Instead, he filed a Defense Motion To Prohibit Use Of Juvenile Conviction As A Predicate Offense the week before trial. RP 8-9<sup>2</sup>; CP 11, 546-47. Garcia argued that the 1994 child-rape conviction should be excluded, resulting in dismissal of the UPFA-1 charge, because "Mr. Garcia did not receive notice of the loss of the right to possess firearms at the time of his 1994 conviction."<sup>3</sup> CP 20. The written records of the juvenile-court conviction did not mention firearm rights, and the

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<sup>2</sup> The verbatim report of proceedings consists of one volume of transcribed pretrial hearings on January 20 and 26, 2016 and February 24, 2016.

<sup>3</sup> While Garcia has also been convicted of unlawful possession of a firearm in the second degree, assault in the third degree, attempting to elude, rape of a child in the third degree and failure to register as a sex offender, none of those felonies is a "serious offense" under RCW 9.41.010(18). Garcia was charged with UPFA-2 in Count Six based on all those predicates.

juvenile-court clerk was unable to find the audio recordings of Garcia's 1994 hearings. CP 81; RP 27. Garcia asserted that this absence of evidence of notice proved that his statutory "right to notice was thus violated" under RCW 9.41.047(1).<sup>4</sup>

However, Garcia did not assert that the juvenile court actually had failed to advise him of his loss of rights at the time of the predicate offense, or that he was actually unaware of his firearm prohibition at the time he possessed the handgun, or that he had been affirmatively misled by the juvenile court to believe he could possess guns. CP 20-23, 80, 527-31; RP 16-28, 30.

Garcia's argument, in a nutshell, was that because the State could not now prove whether the juvenile court gave him formal notice in 1994, then the child-rape conviction could never be used as a predicate offense for any unlawful possession of a firearm charge. CP 20-23, 527-31; RP 16-28. All subsequent notice and actual knowledge of the prohibition was immaterial, Garcia averred.

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<sup>4</sup> The State had sought the audio records from Garcia's juvenile-court guilty plea, sentencing and subsequent revocation of a special sex-offender disposition alternative. CP 81; RP 27.

The State did not concede that Garcia was not given notice in court in 1994, but agreed that it could not prove it either way with the partial, 21-year-old juvenile-court records. RP 38. However, the State maintained that the burden remained with Garcia to prove to the jury, as an affirmative defense, both that he was not notified in court and did not actually know of his prohibition. CP 95-98; RP 35-39. The State argued that it should be allowed to defeat the affirmative defense with the evidence of Garcia's own admissions and actions showing longstanding actual knowledge. CP 95-98; RP 35-39. The State also noted that Garcia's proposed procedure improperly imposed notice as an additional element for the State to prove. RP 35.

The State presented conviction records showing that between 1994 and the date of the charged offense, Garcia signed at least half a dozen formal advisements of his loss of firearm rights while being sentenced for his more-recent felonies. See e.g., CP 262, 277, 316, 349, 366, 444; RP 36. Moreover, in 1998, Garcia was charged in Pierce County Superior Court with Unlawful Possession of a Firearm in the First Degree based on the 1994 child-rape conviction as the predicate offense. CP 239; RP 32-33. Garcia subsequently pleaded guilty to Unlawful Possession of a Firearm in the Second Degree, and stated as a fact to support the

conviction, “I was also convicted of a felony in 1994.” CP 229, 233.<sup>5</sup> The State argued that it should be allowed to introduce all this evidence to a jury to rebut Garcia’s affirmative defense. RP 36.

Nonetheless, the trial court proposed that because the missing audio record meant the State could not prove whether notice was given in court in 1994, then the motion to dismiss became a question of law instead of factual question for the jury. RP 38. When the trial court asked the State whether it agreed that it was a question of law, the State disagreed: “I think the defense still needs to meet their burden, your honor, and provide something which would indicate that Mr. Garcia never affirmatively received notice.” RP 38. Yet the trial court then said, “I am hearing both parties agree that this really is a question of — at this point a question of law; that is if this court concludes that the statute makes — mandates that notice needs to be given at the time, then the defense motion should be granted, dismissing count 1 at this time.” RP 40.

Subsequently, the court granted the defense motion and dismissed the charge. The trial court concluded that any subsequent notice or actual

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<sup>5</sup> Garcia’s 1998 guilty plea shows that the conviction was for unlawful firearm possession while underage, rather than while having a prior felony conviction. CP 229. That does not change the relevance of his “paragraph 11” statement of facts in support of the conviction that “I was also convicted of a felony in 1994” because it demonstrates that Garcia knew at least as early as 1998 that the 1994 rape conviction affected his gun rights. CP 233. Regardless of whether that document alone conclusively proved actual knowledge, the State should have been permitted to present it to a factfinder as part of its evidence of actual knowledge.

knowledge was irrelevant, and because there was no evidence that Garcia “was at the time of the underlying conviction informed of his prohibition regarding possessing a firearm,” then “as a matter of law, we need not at this stage conclude that this is any longer a matter of fact, and that it is — that it would become Mr. Garcia’s burden of proof.” RP 61. In its written order, the trial court concluded:

As a matter of law, at the time of the underlying conviction and sentencing in question Mr. Garcia did not receive the statute’s mandated written or oral notice of his ineligibility to possess firearms as required by RCW 9.41.047(1). The proper remedy for this violation is exclusion of that proposed predicate offense.

CP 542-43.

c. Court Of Appeals Reversal.

On appeal, the State argued that the trial court erred by (1) adopting a *per se* rule that the State’s failure to prove in-court notice in 1994 required exclusion of the predicate offense and dismissal regardless of the State’s evidence of actual knowledge and (2) dismissing the charge pretrial in a CrR 8.3(c) motion rather than requiring Garcia to prove an affirmative defense at trial. Brief of Appellant (BOA) at 10-21; Reply Brief (RB). Garcia responded that it was proper for the trial court to dismiss the charge because “[l]ack of evidence of written notification plus [a] silent record as to oral notification establishes the affirmative defense.” Brief of Respondent (BOR) at 12.

The court of appeals agreed with the State, concluding that lack of notice is an affirmative defense that may not be decided on a CrR 8.3(c) motion but should have been a question for the jury, and that lack of in-court notice is not grounds for dismissal *per se* because the State is entitled to overcome the affirmative defense with evidence of Garcia's actual knowledge. Garcia, 198 Wn. App. at 533-36.

Garcia's petition for review continued to incorrectly claim that "there were no disputed facts," and contended that this Court has created a special kind of affirmative defense for unlawful gun-possession cases that puts the burden on the State to prove notice pretrial. Petition For Review at 12-13.

**D. ARGUMENT**

**THE TRIAL COURT SHOULD HAVE REQUIRED GARCIA TO PROVE HIS LACK-OF-NOTICE AFFIRMATIVE DEFENSE TO THE JURY; THE STATE MAY REBUT THE DEFENSE WITH EVIDENCE OF ACTUAL KNOWLEDGE.**

In 1994, a front-and-center issue for our state legislature was a dramatic increase in "random violence, including homicide and the use of firearms" that "causes great concern for the immediate health and safety of our citizens and our social institutions." LAWS OF 1994, ch. 7, § 101. Our lawmakers declared that "violence is abhorrent to the aims of a free society and that it cannot be tolerated." Id. Their response was a comprehensive package of new laws aimed at improved public health and

safety and designed to “increase the severity and certainty of punishment for youth and adults who commit violent acts.” Id. Part of those “[s]tate efforts at reducing violence must include” harsher penalties and “reducing the unlawful use of and access to firearms,” the legislature declared. Id.

Within that effort, the legislature “balanced the concern with escalating violence, which some commentators blamed on the ‘ready availability of firearms,’ with the concern that restricting firearm availability will infringe upon the right of a law-abiding citizen to keep and bear arms.” State v. Minor, 162 Wn.2d 796, 803, 174 P.3d 1162 (2008) (citing Final Bill Report on Engrossed Second Substitute H.B. (ESSHB) 2319, 53d Leg., Reg. Sess. (Wash.1994)) (emphasis added). It enacted RCW 9.41.047(1), which provides for notice of firearm prohibition to be given at the time of a conviction, because of “concern with addressing the problem of violence without interfering with a citizen’s right to possess and use firearms.” Id. In other words, the legislature aimed to ensure that otherwise law-abiding citizens are not prosecuted for illegal gun possession if they are truly unaware that it is illegal for them to have guns.

RCW 9.41.047(1) states:

At the time a person is convicted ... of an offense making the person ineligible to possess a firearm ... the [convicting court] shall notify the person, orally and in writing, that the person ... may not

possess a firearm unless his or her right to do so is restored by a court of record.

However, the legislature did not enact a remedy for a violation of RCW 9.41.047(1). Minor, 162 Wn.2d at 803.

In 2008, in Minor, this Court interpreted the notice statute's "unequivocal mandate" of oral and written notice to mean that "the legislature regarded *such notice* of deprivation of firearms rights as substantial." 162 Wn.2d at 803 (emphasis added). Because the legislature had enacted no remedy for a violation, this Court created a remedy "*consistent with the purpose* of the statutory requirement." Id. at 803-04 (emphasis added).

Minor's predicate offense for his gun-possession charge was a prior burglary, but the juvenile court had failed to check the paragraph pertaining to firearm rights. Id. at 800. Still, this Court conspicuously declined to hold that the failure to notify Minor of his firearm prohibition at the time of the conviction merited reversal *per se*, though it certainly could have done so. Id. at 804. Instead, this Court recognized that "[i]gnorance of the law is generally not a defense, and Washington case law provides that knowledge of the illegality of firearm possession is not an element of the crime." Id. at 802. The deciding factor was that the lack of a checkmark had "affirmatively represented to Minor that those

paragraphs did not apply to him.” Id. Minor also had argued that “the mere fact that he was in possession of the firearm ... shows reliance on the court’s failure” to notify him — i.e., he asserted an actual lack of knowledge of the prohibition. Id. at 801. This Court’s holding in Minor focused on the effect that a violation of RCW 9.41.047(1) had on actual notice.

To emphasize this, Justice Madsen concurred separately in Minor to clarify that “failure to check a box on a preprinted order on adjudication form will not always result in reversal” because ignorance of the law is no defense. Id. at 805 (Madsen., J. concurring). “[I]f the individual has actual knowledge of the law or actual notice of the loss of firearm rights, *in whatever form*, the individual cannot legitimately claim he or she justifiably believes that firearm rights were not lost and therefore cannot claim to have been misled,” Madsen wrote. Id. (emphasis added). Justice Madsen pointed to State v. Carter,<sup>6</sup> in which a defendant’s challenge to a juvenile predicate failed because “in the interim between the juvenile offense and the possession charge the defendant had been convicted of a felony and notified at that time that he was disqualified from possessing firearms.” Id. at 806 (citing Carter, 127 Wn. App. at 721). Madsen concluded:

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<sup>6</sup> 127 Wn. App. 713, 112 P.3d 561 (2005).

Individuals who have actual knowledge of the law or actual notice of the loss of firearm rights cannot show they were affirmatively misled by the failure to advise of the loss of firearm rights, and they are not entitled to reversal of an adjudication or conviction of unlawful possession of a firearm.

Id.

Three years later, this Court squarely addressed “the issue left open by Minor,” which was “whether failure to comply with RCW 9.41.047(1) alone warrants reversal.” State v. Breitung, 173 Wn.2d 393, 401-02, 267 P.3d 1012 (2011). In other words, the question was whether a failure to provide in-court notice of the firearm prohibition, orally and in writing, requires reversal *per se*, which is what Garcia is arguing now. Just as in Minor, the Breitung court declined to create such a rigid *per se* rule, though it certainly could have done so.

In Breitung, the court of appeals had held:

[T]hat where a convicting court has failed to give the mandatory notice directed in RCW 9.41.047(1) *and there is no evidence that the defendant has otherwise acquired actual knowledge of the firearm possession prohibition that RCW 9.41.047(1) is designed to impart*, the defendant’s subsequent conviction for unlawful possession of a firearm is invalid and must be reversed.

State v. Breitung, 155 Wn. App. 606, 624, 230 P.3d 614 (2010) (emphasis added).

This Court agreed, reiterating that ignorance generally is no excuse and that notice is not an element for the State to prove. Breitung, 173 Wn.2d at 403. This Court again looked to a remedy for a violation of

RCW 9.41.047(1) that was “*consistent with the purpose* of the statutory requirement.” Id. at 402. It concluded that the court of appeals was correct: “Breitung was entitled to notice, *and in its absence*, to reversal.” Id. at 403. The focus of this Court remained on the purpose of the notice statute: actual notice.

To that end, this Court established that “[I]ack of notice under RCW 9.41.047(1) is an affirmative defense,” which a defendant “must establish by a preponderance of the evidence.” Id. Breitung had “affirmatively established that the predicate court failed to notify him of his firearm prohibition as required by RCW 9.41.047(1).” Id. But that alone was not dispositive. Instead, this Court held:

The State did not establish that Breitung *otherwise had knowledge* of the law or notice of the firearm prohibition. On the contrary, the record evidences *a lack of actual knowledge* on Breitung’s part. *Based on this record*, we conclude Breitung was not notified of his firearm prohibition as required under RCW 9.41.047(1) *and did not otherwise have notice of the prohibition against possession of firearms. Absent that notice*, he is entitled to reversal of the unlawful possession of firearms conviction.

Breitung, 173 Wn.2d at 404 (emphasis added).

If this Court preferred a *per se* rule that made subsequent notice and actual knowledge irrelevant, it could have created one. Then it would not have needed to consider whether Breitung “otherwise had knowledge of the law or notice of the firearm prohibition,” and if there was “actual

knowledge on Breitung's part." But this Court firmly anchored its holding "on this record" of genuine absence of any notice. This Court again stressed that a defendant is entitled "to notice," which is consistent with the purpose of RCW 9.41.047(1).

Following Breitung, then, the proper procedure for asserting the affirmative defense of lack of notice is this:

First, a defendant would give notice of such a defense (Garcia has never done so). See CrR 4.7(b)(2)(xiv). Then he would have to concede that the elements of first-degree unlawful possession of a firearm have been met. "An affirmative defense admits the defendant committed a criminal act but pleads an excuse for doing so." State v. Fry, 168 Wn.2d 1, 7, 228 P.3d 1 (2010). "An affirmative defense does not negate any elements of the charged crime." Id.

Next, "an affirmative defense places a burden of proof on the defendant, thus shaping the defense by introducing elements it must prove." State v. Cristine, 177 Wn.2d 370, 378, 300 P.3d 400 (2013). The defendant has a burden to present "evidence to support that theory." State v. Fisher, 185 Wn.2d 836, 848, 374 P.3d 1185 (2016). This evidence may come from whatever source that tends to show that the defendant is entitled to the instruction, including the State's evidence. Id. at 849-50. "A defendant may not, however, point to the State's absence of evidence

in order to satisfy her burden.” Id. at 850. “Allowing a defendant to point to what essentially amounts to the absence of rebuttal evidence to an affirmative defense adds additional elements to the crime the State must prove.” Id. at 851. If the burden of production is met, the defendant must then meet the additional burden of persuading *the factfinder* by a preponderance of the evidence that the elements of the affirmative defense are met. Id. at 849. This procedure applies to *all* affirmative defenses. Id. at 851. That means Garcia must present actual evidence of some kind to prove to a factfinder at trial that he did not receive notice in 1994 and did not have actual knowledge of the prohibition when he unlawfully possessed the loaded handgun.

Lastly, in keeping with Breitung’s focus on actual knowledge, the State would be allowed to rebut the affirmative defense by presenting evidence that the defendant knew that he was prohibited from possessing firearms. In Garcia’s case, that means the State should have been given the chance to present evidence to the jury, such as Garcia’s admission of actual knowledge to the police, his use of his girlfriend as a straw buyer, and the documents showing that he had been notified of his prohibition several times as he accrued felony convictions.

This procedure makes sense legally, because it does not improperly create an additional element for the State to prove and it adheres to this

Court's recent affirmation of the proper burdens in *all* affirmative defenses in Washington. See Fisher, 185 Wn.2d at 851. It also makes good sense as a matter of justice and public safety, because it remains consistent with Breitung's focus on the purpose of the notice statute — actual notice as opposed to pleading technicalities. This procedure protects those law-abiding gun owners who are truly unaware that they are prohibited from possessing guns, without creating a loophole that allows fully aware armed felons to walk free.

On the other hand, the strained procedure that Garcia posits would do the opposite. First, as the court of appeals here correctly determined, a trial court may not dismiss a case under CrR 8.3 by finding an affirmative defense has been met. Under CrR 8.3, the trial court determines whether the State's facts establish a *prima facie* case of guilt as a matter of law. State v. Knapstad, 107 Wn.2d 346, 356-57, 729 P.2d 48 (1986). But notice of firearm prohibition is not an element of the offense, and this affirmative defense does not negate any element. So this affirmative defense, by definition, acknowledges that the State meets its *prima facie* burden as a matter of law.

Second, Breitung is unequivocal that the burden of proof in an affirmative defense of lack of notice rests with the defendant. 173 Wn.2d at 403. So the trial court may not dismiss the charge because the State

fails to present evidence of notice. See Fisher, 185 Wn.2d at 850-51 (“[a]llowing a defendant to point to what essentially amounts to the absence of rebuttal evidence to an affirmative defense adds additional elements to the crime the State must prove.”). Garcia’s proposed procedure would improperly add notice as an additional element for the State to prove. And he simply is incorrect that absence of evidence is evidence of absence.

In his petition for review, Garcia asserts that “the Breitung defense does not operate as a garden variety affirmative defense.” PFR at 12. But Garcia, both here and below, has entirely ignored Fisher, which clarified in no uncertain terms that the defendant’s burdens for affirmative defenses apply to *all* affirmative defenses, “even in cases of self-defense, in which the State bears the burden of proof.” 185 Wn.2d at 850-51. Garcia’s proposed procedure would run entirely counter to Fisher and to the fundamentals of affirmative defenses. If this Court in Breitung wished for lack of prohibition notice to be something other than a “garden variety” affirmative defense, then it would not have stated plainly, “Lack of notice under RCW 9.41.047(1) is an affirmative defense, which Breitung must establish by a preponderance of the evidence.” 173 Wn.2d at 403.

Third, in order to arrive at his proposed procedure, Garcia has repeatedly offered a contorted reading of the holding in Breitung to

portray it as a *per se* rule. Garcia cannot avoid the fact that the court in Breitung based its holding “on this record” of a “lack of actual knowledge on Breitung’s part” and that “he did not otherwise have notice of the prohibition against possession of firearms.” Id. at 404. So Garcia has continued to argue that “the ‘otherwise’ knowledge or notice must be contemporaneous to, or at least roughly contemporaneous to, the predicate conviction.” BOR at 15; PFR at 16. This reading is based on nothing. If this Court wished for such a rule, it would have said so, instead of plainly basing its holding on “a lack of actual knowledge.” Id. Garcia’s reading does not uphold Breitung’s focus on the *purpose* of the notice statute — imparting actual knowledge.

Finally, Garcia’s proposed procedure would frustrate justice and the very intent of the 1994 legislature in passing tough anti-violence legislation. In every case of unlawful possession of a firearm, the State would have to produce, as a prerequisite to trial, the detailed written documents and verbatim oral records of the proceedings of any predicate conviction,<sup>7</sup> however old or far away it was. If those records were unavailable or inadequate, for whatever reason, then the case would be dismissed, no matter how strong the evidence that the defendant had a gun

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<sup>7</sup> Or finding of not guilty by reason of insanity, or civil commitment order for mental health treatment. RCW 9.41.047(1); RCW 9.41.040.

and knew it was a crime. And it would also mean that any felon, however dangerous, who was convicted before the enactment of the notice statute — or in a state without such a rule — could never be prosecuted for possessing a gun, even if it were indisputable that he knew it was illegal.

Garcia was entitled to plead an affirmative defense of lack of notice. But he had the burden of proving it to a jury, and the State was entitled to rebut it with the overwhelming evidence that Garcia has known for decades that he may not possess guns. The court of appeals properly reversed the trial court's dismissal of the gun charge.

**E. CONCLUSION**

For all the foregoing reasons, the State respectfully asks this Court to affirm the decision of the court of appeals.

DATED this 2<sup>ND</sup> day of November, 2017.

Respectfully submitted,

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