No. 95083-1

No. 754416

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

EDGAR DENNIS III

V.

STATE OF WASHINGTON

APPELLANT'S REPLY BRIEF

Lauren McLane
Attorney for Appellant
WSBA# 40945
Padula & Associates
2320 130th Ave NE
Building E, Suite #250
Bellevue, WA, 98005

Lawand Anderson
Attorney for Appellant
WSBA# 49012
L.A. Law & Associates
22030 7th Ave S, Suite #103
Des Moines, WA, 98198

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TABLE OF CONTENTS

I. Argument.....1

a. The *Payseno* court was correct when it found that the "after five or more consecutive years in the community without being convicted" language in RCW 9.41.040(4)(a)(ii)(A) was ambiguous.....1

b. The use of statutory construction principles, such as referring to the phrases "currently charged" and "or more" within the statute does not resolve the ambiguity in the State's favor.....7

c. The legislative history or intent of RCW 9.41.040 does not remove the ambiguity; nor has the Legislature ventured to clarify the statute or its intent since *Payseno*.....12

d. This Court's application of the rule of lenity and adoption of Mr. Dennis's statutory interpretation will not lead to absurd results.....14

II. Conclusion.....17

III. Appendix

a. Second Substitute House Bill 2742, State of Washington, 61st Legislature, 2010 Regular Session.....A-1

TABLE OF AUTHORITIES

Table of Cases

State v. Evans, 177 Wn.2d 186, 298 P.3d 724 (2013).....1, 7, 14, 16

State v. Keller, 143 Wn.2d 267, 19 P.3d 1030 (2001).....4-6

State v. Moses, 145 Wn.2d 370, 37 P.3d 1216 (2002).....11

Payseno v. Kitsap County, 186 Wn. App. 465,
346 P.3d 784 (2015).....1, 4, 7-8, 12, 16

State v. Slattum, 173 Wn. App. 640, 295 P.3d 788 (2013).....7, 11

State v. Swanson, 116 Wn. App. 67, 65 P.3d 343 (2003).....10, 13, 16

Telepage, Inc. v. Tacoma Dep't of Financing, 140 Wn.2d 599, 998 P.2d

884 (2000).....4

City of Seattle v. Winebrenner, 167 Wn.2d 451,
219 P.3d 686 (2009).....2-4, 7, 12

Statutes

RCW 9.41.040.....1, 6-13, 15-17

RCW 46.61.5055.....2, 12

RCW 9.94A.030.....4

RCW 9.94A.360.....5-6

RCW 9.94A.525.....9

RCW 10.73.170.....11

RCW 26.50.....15

RCW 10.99.....15

RCW 71.05.....15

RCW 71.34.....15

RCW 10.77.....15

Court Rules

Washington Superior Court Criminal Rule (CrR) 3.2.....8-9

Other Authorities

House Bill 2906, State of Washington, 64th Legislature, 2016 Regular Session.....16

I. Argument

a. The *Payseno* court was correct when it found that the "after five or more consecutive years in the community without being convicted" language in RCW 9.41.040(4)(a)(ii)(A) was ambiguous.

The pertinent language in RCW 9.41.040(4)(a)(ii)(A) is ambiguous because it is subject to more than one reasonable interpretation. The first section of the State's brief appears to assert that the "after five or more consecutive years in the community without being convicted" language of the statute is not ambiguous based on the State's citation to case law regarding the determination of whether ambiguity exists. *See* Brief of Respondent, page 3. Thereafter, in section three of the brief, the State asserts: "When the court reads section (ii)(A) as a clause, there is no ambiguity." *See* Brief of Respondent, page 9. However, there is more than one reasonable interpretation of that language as held by *Payseno*—it could be interpreted to require a five-year-crime-free period immediately preceding the filing of the petition for restoration or to require that five-year period occur any time prior to the petition being filed. *See Payseno v. Kitsap County*, 186 Wn. App. 465, 471, 346 P.3d 784 (2015).

If there is more than one reasonable interpretation of the plain language of a statute, then the statute is ambiguous, and the court must engage in the principles of statutory construction. *See State v. Evans*, 177

Wn.2d 186, 192-93, 298 P.3d 724, (2013); *see also City of Seattle v. Winebrenner*, 167 Wn.2d 451, 456, 219 P.3d 686 (2009).

In *Winebrenner*, our state Supreme Court was tasked with interpreting a former version of our DUI penal statute—RCW 46.61.5055 (2009)—and what the phrase "prior offense *within seven years*" meant. *Winebrenner*, 167 Wn.2d at 456 (emphasis added). Both the former and current version of that statute punish offenders differently depending the offender's criminal history and how many "prior offenses" are within seven years of the current offense. The issue before the court was whether the phrase "within seven years" should be construed to mean the offense occurred within seven years before the current offense date or whether it occurred within seven years before the sentencing for the current offense. *Id.* at 457. In other words, was a prior offense only those "offenses that occurred before the current offense" or did a prior offense "encompass[] all offenses the defendant [had committed] before sentencing." *Id.* Although "prior offense" was defined in the statute, the term "prior" was not. *Id.*

The petitioners argued that "prior offense" plainly meant "an offense that occurred before the offense for which [the defendant was] being sentenced." *Id.* Meanwhile, the city argued that the legislature defined "prior offense," and "did not specify that the term was limited to offenses

occurring before the current offense." Much like what the State in this case suggests (i.e., that the Legislature knew how to articulate time limits in statutes based on its "washout" statutory scheme and could have done so in this case if it meant any five-year-crime-free period), the city in *Winebrenner* argued that if the Legislature wanted to specifically limit prior offenses to those that occurred before the current offense date, it would have done so by using the word "before" within the statute.

Citing to both the Court of Appeals and the trial court's two separate and distinct interpretations and opinions, the *Winebrenner* court held that both interpretations set forth by the parties had merit. Writing for the Court of Appeals, Judge Becker stated that the Legislature's definition of "prior offense" was clear as well as its definition of "within seven years," which the Court of Appeals construed to mean "the arrest for a prior offense occurred within seven years of the arrest for the current offense." *Id.* at 460-61. Meanwhile, King County Superior Court Judge Doyle had articulated an equally reasonable interpretation in the eyes of the Supreme Court; relying on the dictionary definition of "prior," she held "a prior offense within seven years must mean that the arrest for the prior offense preceded in time the arrest for the current offense, and was within seven years of the current offense." *Id.* at 461.

The Supreme Court held that each of the interpretations were reasonable and, therefore, concluded that the statutory language was ambiguous. *Id.* Similarly, in the instant case, the phrase "five or more consecutive years in the community" is subject to more the one reasonable interpretation.

The State cites to *State v. Keller*, 143 Wn.2d 267, 19 P.3d 1030 (2001), in its brief for the principle that courts are not "obliged to discern any ambiguity by imaging a variety of alternative interpretations." *See* Brief of Respondent, page 3, citing *Keller*, 143 Wn.2d at 276-77 (quoting *Telepage, Inc. v. Tacoma Dep't of Financing*, 140 Wn.2d 599, 607, 998 P.2d 884 (2000)). This court would be hard pressed to have to resort to imagining an interpretation of RCW 9.41.040(4)(a)(ii)(A) that is alternative to that supported by the State. There is a glaring and reasonable alternative interpretation as held by the *Payseno* court—that a person must remain crime free for a (or any) five-year period prior to petitioning for restoration, so long as the other eligibility requirements are satisfied. In *Keller*, our state Supreme Court was asked to interpret the former Persistent Offender statute; former RCW 9.94A.030(25) read:

> (25) "Persistent offender" is an offender who:
>
> (a) Has been convicted in this state of any felony considered a most serious offense; and

> (b) Has, before the commission of the offense under (a) of this subsection, been *convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.360;* provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted.

Keller, 143 Wn.2d at 274, citing former RCW 9.94A.030(25) (emphasis in original).

The question before the *Keller* court was whether the phrase "would be included in the offender score under 9.94A.360" referred to all other sections of chapter 9.94A RCW. *Id.* at 276. The Petitioner argued that his sentences for his two prior felony convictions were served concurrently and were counted as only one conviction for purposes of determining his offender score. *Id.* at 275. Thus, he asserted, under former RCW 9.94A.360(6)(c), those convictions should only count as one strike offense. *Id.* This position relied upon a narrow interpretation of the "would be included in the officer score under 9.94A.360" phrase in the statute. The Respondent argued that the Petitioner's two prior felony convictions, although the sentences were concurrent, should count as two strikes unless they "washed out" under RCW 9.94A.360(2), referring to another subsection of RCW 9.94A.360. In other words, the Respondent's

position relied upon a broader view of what subsections of the statute could be relied upon in making this determination.

The Supreme Court quickly dispensed with the argument that the statutory language was ambiguous.

> In this case the phrase "would be included in the offender score under RCW 9.94A.360" cannot reasonably be interpreted to mean anything but what it says. The phrase refers to the entire offender score statute, RCW 9.94A.360, and does not limit its application to one section or subsection. In this case, we must assume the Legislature meant exactly what it said. We conclude the statute is not ambiguous.

Id. at 277.

The *Keller* language is a useful example of language that is not ambiguous and, therefore, where the plain language of the statute would serve as the guidepost. The statute meant exactly what it said and could be interpreted no other way—it cited not just to one particular section or subsection of the offender score statute, as the court recognized, but to the entire statute. The was no other reasonable interpretation other than the entire statute could be consulted. In the instant case, from a plain reading of RCW 9.41.040(4)(a)(ii)(A), we do not receive that kind of plain meaning guidance from the Legislature. Therefore, RCW 9.41.040(4)(a)(ii)(A) is ambiguous, and we must proceed with principles of statutory construction, including a review of legislative history, and, if

necessary, apply the rule of lenity. Significantly, the lack of limiting language in the statute as to timing supports Mr. Dennis's interpretation.

b. The use of statutory construction principles, such as referring to the phrases "currently charged" and "or more" within the statute does not resolve the ambiguity in the State's favor.

The *Evans* court succinctly explained the guidelines for statutory interpretation:

> In sum, our interpretation of a penal statute will be either the only reasonable interpretation of the plain language; or, if there is no single reasonable interpretation of the plain language, then whichever interpretation is clearly established by statutory construction; or, if there is no such clearly established interpretation, then whichever reasonable and justifiable interpretation is most favorable to the defendant.

Evans, 177 Wn.2d at 193-94; *see also State v. Slattum*, 173 Wn. App. 640, 658, 295 P.3d 788 (2013) (the rule of lenity applies to statutory interpretation of statutes that do not provide for criminal sanctions).

Courts will interpret an ambiguous statute "adversely to the defendant only if statutory construction 'clearly establishes' that the legislature intended such an interpretation." *Evans*, 177 Wn.2d at 193 (citing *Winebrenner*, 167 Wn.2d at 462). The State asks this Court to find that the *Payseno* court did not adequately review the whole clause of RCW 9.41.040(4)(a)(ii)(A), referencing, in its brief, the use of the phrases "currently charged" and "or more" to supports its interpretation. *See* Brief of Respondent, pages 9-10. The *Payseno* court did, in fact, review (ii)(A)

as a clause throughout its opinion and also highlighted the superior court's position that it ultimately reversed: "The superior court construed the language in RCW 9.41.040(4)(a)(ii)(A) that the petitioner not be 'currently charged with any felony, gross misdemeanor or misdemeanor crimes' as requiring the petitioner to be crime free for the five-year period preceding the petition even if the subsequent criminal offense was not a disqualifying crime that impacted his firearm right." *Payseno*, 186 Wn. App. at 468.

The State suggests that the phrase "currently charged" would be rendered meaningless if Mr. Dennis's interpretation were to be accepted by this Court. *See* Brief of Respondent, pages 9 and 13. Yet, it provides little support for this bald, conclusory assertion. If the statute is interpreted such that a person may petition for restoration after any five-year-crime-free period, that does not render the "currently charged" language meaningless. There is a good reason why a person who faces a pending charge should be prohibited from petitioning for restoration. First, charges are always subject to amendment, including an amendment to a crime that would subject the defendant to loss of his or her firearm rights. Further, Washington Superior Court Criminal Rule 3.2 allows courts to impose pretrial conditions of release based on a risk that a defendant will commit a violent offense—these conditions include

prohibiting the defendant from possessing weapons, such as firearms during the pendency of the case. *See* CrR 3.2(d)(3). The plain meaning of "currently charged" can still be served if Mr. Dennis's interpretation is applied; it retains its meaning regardless of what interpretation of the relevant statutory language is accepted by this Court.

The State also asserts that the inserted language "or more" (i.e., "five or more consecutive years") within RCW 9.41.040(4)(a)(ii)(A) indicates that the Legislature's intent was for the person's five-year-crime-free period to immediately precede the filing of the petition. *See* Brief of Respondent, pages 10 and 13. It cites to the "washout" provisions of the Sentencing Reform Act (SRA) in support of this proposition where the Legislature stated "five years" was the time limit for a Class C felony to "wash" from an offender score. *See* Brief of Respondent, page 13, and RCW 9.94A.525. This argument, however, ignores the significant difference between the "washout" statutory process and that of RCW 9.41.040.

It is equally, if not more possible that the Legislature used the words "or more" in RCW 9.41.040(4)(a)(ii)(A) because it contemplated that a person may not petition a court for restoration of his or her firearm rights immediately after the end of a five-year-crime-free period. Thereby indicating that even if a person does not immediately petition the court, that right is not lost. The stark difference between the "washout" statute

and RCW 9.41.040 is that under RCW 9.41.040 an act by the petitioner is the impetus, i.e., the person must petition the court otherwise the right is not restored, for the court's action. In the "washout" context, the Class C felony that the State is referring to washes automatically without any procedural act, such as a petition or motion, on the part of the defendant.

Indeed, that there is discretion on the part of the petitioner under RCW 9.41.040 has already been recognized by our courts. In *State v. Swanson*, Division 2 held that a trial court's function in granting or denying a petition for restoration of firearms rights is ministerial, not discretionary. 116 Wn. App. 67, 78, 65 P.3d 343(2003). In its analysis, the *Swanson* court noted: "In fact, the only discretion that the statute contemplates belongs to the petitioning individual, and that discretion concerns his decision to petition the court in the first place. The provision states, *'the individual may petition* a court of record to have his or her right to possess a firearm restored." *Swanson*, 116 Wn. App. at 75 (citing RCW 9.41.040(4) (emphasis added)). There is good reason that the Legislature would have added "or more," and that language does not eliminate the reasonable statutory interpretation Mr. Dennis asks this Court to adopt.

The State asks this Court to read into the statutory language words—i.e., "immediately preceding"—that are simply not there. In statutory interpretation, courts frown upon reading into a statute the language it

believes was omitted. "Where the Legislature omits language from a statute, intentionally or inadvertently, this court will not read into the statute the language that it believes was omitted." *Slattum*, 173 Wn. App. at 655 (quoting *State v. Moses*, 145 Wn.2d 370, 374, 37 P.3d 1216 (2002)). In *Slattum*, the court was asked to interpret the meaning of the term "imprisonment" as used in RCW 10.73.170(1)—whether that meant imprisoned in jail or prison or some other form of restraint rather than actual incarceration. *Id.* at 649-50. The court highlighted that RCW 10.73.170 contained "no language limiting imprisonment to confinement in a jail or prison. The absence of limiting language in RCW 10.73.170 may indicate that the legislature intended to allow offenders like Slattum on community custody to petition for DNA testing." *Id.* at 656. Similarly, the Legislature's omission of qualifying words, such as "immediately preceding" within RCW 9.41.040(4)(a)(ii)(A) may indicate that Legislature intended to allow a person who was crime-free for any five-year period prior to the petition to be granted restoration of his or her firearm rights.

c. The legislative history or intent of RCW 9.41.040 does not remove the ambiguity; nor has the Legislature ventured to clarify the statute or its intent since *Payseno*.

As the *Payseno* court noted, the legislative history of RCW 9.41.040 provides only "general statements" describing the statute's purpose. *Payseno*, 186 Wn. App. at 472. These are the same general statements the State referenced in its brief. *See* Brief of Respondent, page 8. The *Payseno* court properly concluded that the Legislature did not offer any illuminating statements about when the five-year-crime-free period may be satisfied. *Payseno*, 186 Wn. App. at 472. Further, as previously stated in the Appellant's brief and referenced in its appendix, our Legislature has revisited RCW 9.41.040 after *Payseno*, but it has not sought to further clarify its intent or the applicable time period. *See* Brief of Appellant, page 10. The Legislature is presumed to have knowledge of *Payseno*; indeed, after the *Winebrenner* decision was released, in the 2010 session, the Legislature amended RCW 46.61.5055(14)(b) and (c) to read: "'Within seven years' means that the arrest for a prior offense occurred within seven years *before or after* the arrest for the current offense." *See* Second Substitute House Bill 2742, State of Washington, 61st Legislature, 2010 Regular Session, effective 01/01/11, http://lawfilesext.leg.wa.gov/biennium/2009-10/Pdf/Bills/Session%20Laws/House/2742-

S2.SL.pdf?cite=2010%20c%20269%20%C2%A7%204 (last visited January 4, 2017) (emphasis added).

Further, the *Swanson* court analyzed the Legislature's intent statements related to RCW 9.41.040 within the context of deciding whether a court had discretion to deny a petition to someone it believes is unsafe to possess a firearm. The *Swanson* court was unpersuaded that a trial court had such discretion based on the statute's legislative history or the findings and intent of the legislature related to the "Hard Time for Armed Crime Act." *Swanson*, 116 Wn. App. at 71. "The 'FINDINGS AND INTENT' section of the Act does not address the firearm rights restoration in general or a court's discretion in the rights restoration context in particular. Thus, the Legislature's express findings and intent shed scant light on the issue that we face." *Id.* 71-72.

A general desire to be tough on criminals who commit crimes with firearms, although wholly understandable, is insufficient to read into RCW 9.41.040(4)(a)(ii)(A) the words "immediately preceding." Where legislative history has been more direct and specific, courts have used that intent to resolve statutory ambiguity. For example, in *Evans*, to resolve any ambiguity as to whether corporations were protected under the identity theft statute, the court reviewed very specific and direct legislative

historical statements. *See Evans*, 177 Wn.2d at 199-202. Here, however, there is no direct or specific statement within the legislative history to resolve the ambiguity.

d. This Court's application of the rule of lenity and adoption of Mr. Dennis's statutory interpretation will not lead to absurd results.

Finally, the State asserts that construing the statute to Mr. Dennis's favor would render absurd results. *See* Brief of Respondent, pages 6-8. It makes two primary claims: (1) it is absurd to believe that the Legislature would prevent someone who had a pending misdemeanor from possessing a firearm, but that same person could obtain a firearm upon conviction and (2) it is absurd that a defendant could have hundreds of misdemeanor convictions (including assaults, DUIs, and harassment) and restore his or her right to possess a firearm if he or she had no pending charges. *See* Brief of Respondent, pages 708.

As previously stated, *supra*, there is good reason that a person facing a pending charge would not be permitted to restore his or her right to possess a firearm. And that reason can coexist with an interpretation of this statute in Mr. Dennis's favor. Often charges are increased or amended and pretrial conditions of release are imposed during the pendency of any case, including prohibition of possession of firearms. Further, so long as the person is not convicted of a crime that has been carefully considered

by our Legislature as a crime that requires removal of a person's right to a firearm, then it makes sense that upon conviction of that misdemeanor charge the person would be eligible for restoration.

As to the State's assertion that this would allow a person who has committed hundreds of misdemeanors to petition for restoration, it is correct. It would, indeed, so long as the conviction was for a crime that was not part of those crimes already carefully considered by our Legislature as a crime that should result in the loss of the right to a firearm. A person could be convicted of one hundred Driving While License Suspended charges, DUIs, Negligent Driving in the first degree charges, and so forth, so long as that crime did not result in the loss of his or her constitutional right to a firearm.

Our Legislature has telegraphed what crimes (or commitments) it has determined will result in the removal of a person's right to bear arms, such as domestic violence offenses, felonies, and mental health commitments. *See generally* RCW 9.41.040 (citing to RCW 9.41, RCW 26.50, RCW 10.99, RCW 71.05, RCW 71.34, RCW 10.77, etc.). It cannot go without mention that the Legislature has carefully selected these crimes and commitments in part because this involves the loss of a constitutional right. "The Washington constitution commands that '[t]he right of the individual citizen to bear arms in defense of himself, or the state, shall not

be impaired. CONST. art. I, § 24. In contrast to several other jurisdictions, a Washington citizen's right to bear arms is individual." *Swanson*, 116 Wn. App. at 71.

Critically, the court plays no role in determining what crimes are of a certain nature such that convictions for those crimes result in the loss of a constitutional right, such as the right to possess a firearm. "The convicting or committing court has no discretion to decide which crimes or commitments shall affect a person's firearm rights. This clear lack of discretion in the right *removal* context is consistent with the lack of discretion in the *restoration* context." *Swanson*, 116 Wn. App. at 75 (emphasis in original). It is not absurd that the person who gets convicted of a misdemeanor, whether it be once or a hundred times, may still petition the court for restoration if the requirements of RCW 9.41.040(4)(a)(ii)(A) are otherwise satisfied and the right to possess a firearm was not subject to removal because of that conviction.

Because there is more than one reasonable interpretation of the plain language and there is no clearly established interpretation based on statutory construction or legislative history, the rule of lenity applies. *See Evans*, 177 Wn.2d at 193-94. This Court should adopt the *Payseno* court's analysis and application of the rule of lenity, interpreting the statute to Mr. Dennis's favor—that the five-year-crime-free period may

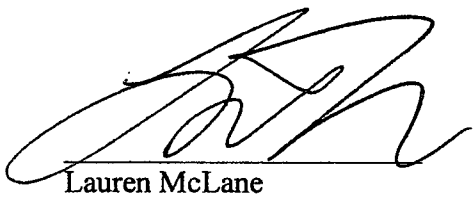
occur at any time prior to the filing of the petition. Mr. Dennis qualifies for restoration of his right to a firearm under RCW 9.41.040(4)(a)(ii)(A) as he remained crime-free from 1998-2014—16 years—and meets the other requirements enumerated within the statute.

II. Conclusion

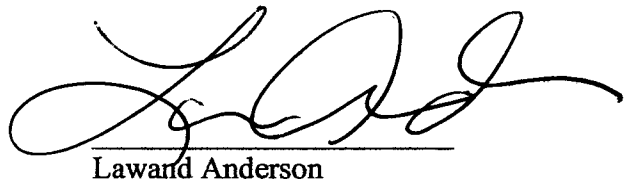
This Court should reverse the Superior Court's denial of Mr. Dennis's petition and remand the matter with instructions to sign an order restoring Mr. Dennis's firearm rights.

Dated this 5th day of January, 2017.

Respectfully submitted,



Lauren McLane
Attorney for Appellant
WSBA# 40945



Lawand Anderson
Attorney for Appellant
WSBA# 49012

APPENDIX

Second Substitute House Bill 2742, State of Washington, 61st Legislature, 2010 Regular Session, http://lawfilesext.leg.wa.gov/biennium/2009-10/Pdf/Bills/Session%20Laws/House/2742-S2.SL.pdf?cite=2010%20c%20269%20%C2%A7%204 (last visited January 4, 2017)