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SUPREME COURT NO. 95083-1

COA NO. 75441-6-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EDGAR DENNIS, III

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON FOR KING COUNTY

King County Cause No. 16-2-08936-4 SEA

The Honorable Julie Spector, Judge

SUPPLEMENTAL BRIEF OF APPELLANT EDGAR DENNIS

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I. INTRODUCTION

Mr. Dennis spent sixteen consecutive years in our community without being convicted of a crime (i.e., 1998–2014); thus, his past felony criminal history long “washed”¹ and the minimum threshold of at least five consecutive conviction-free years for restoration of his firearms right more than satisfied.² Yet, when he petitioned for such restoration in 2016, the superior court denied the request because in 2014 Mr. Dennis had been convicted of a non-disqualifying³ simple misdemeanor.

This case asks the question: When, pursuant to RCW 9.41.040(4)(a)(ii)(A), must the “five or more consecutive years” in the community without a conviction occur—*immediately preceding* the petition for restoration or *at any time*? Division One agreed with the State’s “when,” interpreting the statute to read “immediately preceding” even though those words were not used by the legislature. The message from that decision to Mr. Dennis and all similarly situated persons who seek restoration is to petition as soon as they meet the five-year minimum threshold because spending many years conviction-free (and one’s felony criminal history washing out) means nothing if convicted of a non-disqualifying offense in year 16, 20, 25, or so on, prior to filing a petition.

¹ See RCW 9.94A.525.

² See RCW 9.41.040(4)(a)(ii)(A).

³ The term “non-disqualifying” is used to indicate convictions that do not result in the loss of the firearms right; meanwhile, “disqualifying” will indicate the opposite.

II. ASSIGNMENT OF ERROR

Division One erred when, after engaging in statutory interpretation, it held that RCW 9.41.040(4)(a)(ii)(A) required that Mr. Dennis’s “five or more consecutive years” without a conviction must occur *immediately preceding* the petition for restoration of his firearms right.

III. STATEMENT OF THE CASE

The Appellant refers this Court to its Petition for Review for the undisputed facts and procedural history. Petition for Review, p. 1–3.

IV. ARGUMENT

a. Division One erred when, after applying principles of statutory interpretation, it found that the “five or more consecutive years” without conviction must occur *immediately preceding* the petition.

i. The plain language of the statute supports the reading that the petitioner need not serve “five or more consecutive years” without being convicted *immediately preceding* the petition.

The “lodestar” of statutory interpretation is legislative intent. Mark DeForrest, *Washington Courts’ Use of Legislative History in Statutory Interpretation: An Overview with an Eye towards IFCA*, 49 Gonz. L. Rev. 437, 454 (2013), citing *State v. Armendariz*, 160 Wn.2d 106, 156 P.3d 201 (2007). Here, the query is: what did the legislature intend when it used the following language in the relevant portion of RCW 9.41.040(4)(a):

(ii)(A) 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)(a)(ii)(A).

As well-settled authority informs, the first step in statutory interpretation begins with a plain language analysis of the statute. “When possible, we derive legislative intent solely from the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole.” *State v. Evans*, 177 Wn.2d 186, 192, 298 P.3d 724 (2013) citing *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010); *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9–10, 43 P.3d 4 (2002).⁴ If the plain language is unambiguous, then the court does not need to perform statutory construction. *Ervin*, 169 Wn.2d at 192 citing *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003); *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994).

⁴ Issues of statutory interpretation are reviewed de novo. *Evans*, 177 Wn.2d at 191.

Chapter 9.41 RCW does not define certain relevant terms located within RCW 9.41.040(4)(a)(ii)(A); when this is the case, “we give the term ‘its plain and ordinary meaning unless a contrary legislative intent is indicated.’” *State v. Barnes*, 189 Wn.2d 492, 495, 403 P.3d 72 (2017) citing *State v. Jones*, 172 Wn.2d 236, 242, 257 P.3d 616 (2011). Such plain meaning is generally derived from the context of the entire statute along with related statutes; however, “[w]e may also determine the plain meaning of an undefined term from a standard English dictionary.” *Barnes*, 189 Wn.2d at 495–96; *State v. Sullivan*, 143 Wn.2d 162, 175, 19 P.3d 1012 (2001).⁵

The rest of chapter 9.41 RCW does not provide helpful context to the relevant provision, focusing on a variety of subjects, including carrying, delivering, dealing, purchasing, transferring, and surrendering firearms. *See generally* Chapter 9.41 RCW. The only other mention of restoration in the chapter is RCW 9.41.047 that outlines the criteria for restoration for those who have been committed for mental health treatment. *See State v. Swanson*, 116 Wn. App. 67, 76–78, 65 P.3d 343 (2003) (distinguishing RCW 9.41.047 and holding that the court’s role under RCW 9.41.040 is ministerial, not discretionary).

⁵ “In the absence of a statutory definition, we will give the terms its plain and ordinary meaning ascertained from a standard dictionary.” *Sullivan*, 143 Wn.2d at 175.

Furthermore, the context of RCW 9.41.040 itself is equally unenlightening; the statute is primarily penal in nature, outlining the definitions and degrees of unlawful possession of a firearm. *See generally* RCW 9.41.040. Nonetheless, certain terms used within RCW 9.41.040(4)(a)(ii)(A) in tandem with a related statute cited within the provision—RCW 9.94A.525—point us true north. Specifically, the use of the terms “or more” and “if” are particularly illuminating. Early in the relevant provision the legislature states one may petition for restoration “after five *or more* consecutive years” in the community without a conviction. RCW 9.41.040(4)(a)(ii)(A) (emphasis added). Later in the provision, the legislature chooses the word “if,” stating “*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.” *Id.* (emphasis added).

Both the State and Division One assert the use of “or more” indicates that the “five or more consecutive years” without conviction must be served immediately preceding the petition, citing to the washout provision of the Sentencing Reform Act, chapter 9.94A RCW for support. Opinion, p. 11–12. However, a more critical reading of the entire provision reveals that there is an important condition clause:

(ii)(A) 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)(a)(ii)(A) (emphasis added).

As Division One recognized, under RCW 9.94A.525, an offender's previous felonies will "washout" (and no longer be included in the offender score) after the passage of certain time. Opinion, p. 11. A class C felony is not counted in the offender score if "the offender [has] spent five consecutive years in the community without committing any crime that subsequently results in conviction." RCW 9.94A.525(2)(c). Significantly, for a class B felony the timing requirement is "ten consecutive years." RCW 9.94A.525(2)(b).

While "or" as used in RCW 9.41.040(4)(a)(ii)(A) creates a permissive reading of "or more," "if" is mandatory and emphasizes the condition that an offender's prior felony convictions must washout prior to the petition. The term "if" is defined as "so long as: on condition that." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1124 (1981). As used in this context, "or" is used as "a function word to indicate an alternative

between different or unlike things, states, or actions,” or a “choice between alternative things, states, or course.” *Id.* at 1585.⁶

While the State and Division One highlight that RCW 9.94A.525 does not use the phrase “or more” in its language,⁷ when one reads “or more” and the “if” emphasizing the washout clause together, the meaning of “or more” in the restoration provision becomes clear. Not every petitioner will be able to secure restoration after year five; in particular, those individuals who are awaiting class B felony history to washout will have to wait longer than five years. For example, if a petitioner’s disqualifying offense was a class C felony in 1998, but he or she also suffered a class B felony conviction in 1994, at year five (2003) this petitioner would still remain ineligible for restoration because the prior class B felony does not washout until 2004—so he or she falls into the “or more” category.⁸

The terms used within the provision coupled with the citation to RCW 9.94A.525 reveals why the legislature used the term “or more”; additionally, the plain language does not clearly establish legislative intent to the contrary. Division One’s reading of “or more” requires adding

⁶ In addition, the term “more” as used in this provision means “beyond a previously indicated number, amount, or length of time.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY at 1469 (1981).

⁷ The State and Division One assert that if the legislature did not intend for the “five or more consecutive years” to immediately precede the petition for restoration, then the legislature would have written RCW 9.41.040(4)(a)(ii)(A), like RCW 9.94A.525, without using “or more.” *See* Opinion, p. 9–11.

⁸ Notably, there is prior caselaw on the interpretation of “prior felony conviction” as used in RCW 9.41.040(4)(a)(ii)(A) that will be addressed in section (a)(iii) *infra*.

words—“immediately preceding”—that were omitted by the legislature. *See Sullivan*, 143 Wn.2d at 175 (“We do not add to or subtract from the clear language of a statute unless that is imperatively required to make the statute rational.”).

ii. The legislative history also bolsters Mr. Dennis’s interpretation that the “five or more consecutive years” without conviction may be served at any time prior to the petition.⁹

Division One held that its interpretation of RCW 9.41.040(4)(a)(ii)(A) was supported by legislative intent it gleaned from the 1995 Hard Time for Armed Crime Act (HTACA), highlighting the statement in the Act’s “Findings and Intent” section that “[c]urrent law [did] not sufficiently stigmatize the carrying and use of deadly weapons by criminals.” Opinion, p. 6–7. This investigation into legislative intent barely scrapes the surface of the legislative history because it ignores a complete reading of the HTACA, bill reports, former and later versions of the statute, and case law. *See e.g., Evans*, 177 Wn.2d at 199–203; *State v. Barbee*, 187 Wn.2d 375, 390–91, 386 P.3d 729 (2017); *Barnes*, 189 Wn.2d at 497–98. A careful reading of the HTACA shows that the primary concern of the legislature was penalizing the carrying and use of firearms during the commission of crimes. For example, the legislature added more deadly

⁹ When the plain language of a statute is clear, the court need not resort to the legislative history; however, it may do so for support of its plain language analysis. *See Barbee*, 187 Wn.2d at 390; *see also In re Cruze*, 169 Wn.2d 422, 431, 237 P.3d 274 (2010).

weapon enhancements and increased the seriousness level for some crimes. *See generally* Initiative 159, 54th Leg., Reg. Sess. (Wash. 1995); *see e.g., Barnes*, 189 Wn.2d at 498 (highlighting what the primary concern of the legislature was when the relevant bill in that case was drafted). Nevertheless, at the same time the legislature was stigmatizing this “carrying and use” of guns during crimes, for the first time, it provided a path to restoration for those convicted of certain offenses.

The title of the HTACA itself suggests that the primary focus of the legislature was to penalize armed crime— “An ACT relating to increasing penalties for armed crimes.” *Id.* at 443.¹⁰ Notably, the statement Division One relied upon as evidence of legislative intent is located in the “Findings” section of the Act. However, the “Intent” section explains what specific “carrying and use” the legislature intended to address: The legislature intended to “[s]tigmatize the carrying and use of any deadly weapons for all felonies with proper deadly weapon enhancements.” *Id.* at § 1 (1) and (2). Indeed, the majority of the Act covered newly increased penalties, including deadly weapon sentencing enhancements, oversight of

¹⁰ Although later legislative amendments to RCW 9.41.040 have narrower titles (though not entirely specific to restoration), it is worth noting, here, the single subject rule. “The title of a bill carries particular importance in Washington; the Washington Constitution provides that ‘[n]o bill shall embrace more than one subject, and *that shall be expressed in the title.*’” *Barnes*, 189 Wn.2d at 500 (Wiggins, J. concurring) (emphasis in original).

sentencing, and an expansion of the definitions of unlawful possession of a firearm. *See id.* at § 2–17.

The legislature’s bill reports further support that the primary concern was increased penalties for armed crime; the 1995 House Bill report focused on changes the Act made related to such penalties.¹¹ *See generally* H.B. REP. ON INITIATIVE 159, 54th Leg., Reg. Sess. (Wash. 1995); *see also* S.B. REP. ON INITIATIVE 159 and F.B. REP. ON INITIATIVE 159, 54th Leg., Reg. Sess. (Wash. 1995).

The bill reports also offer insight into the use of “or more” and “if” in the statute. The language used in the 1995 House Bill Report supports Mr. Dennis’s interpretation and the legislature’s emphasis on the “if” in the offender score clause of RCW 9.41.040(4)(a)(ii)(A).

The eligibility for restoring the right to possess a firearm is expanded. People with a previous conviction that subjects them to committing unlawful possession of a firearm can petition the court to re-gain their right to possess a firearm. The right can be restored if five or more consecutive years have passed without being convicted of a crime, *as long as 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.360.*¹²

¹¹ That the primary concern of the legislature was to penalize armed crime is further supported by this Court’s legislative history analysis of the HTACA in another context in *In re Cruze*, 169 Wn.2d at 431.

¹² As noted, the right to restoration was further expanded in 1995 at the same time the legislature was stigmatizing the carrying and use of firearms during the commission of crime, recognizing extremely limited past circumstances where restoration could be obtained. *See id.* at 3; *see also* LAWS OF 1935, ch. 172 § 4; LAWS OF 1961, ch. 124 § 3; LAWS OF 1983, ch. 232 § 2; LAWS OF 1992, ch. 168 § 2.

H.B. REP. ON INITIATIVE 159, at 7, 54th Leg., Reg. Sess. (Wash. 1995) (emphasis added).

Notably, at the same time the legislature added the relevant language to RCW 9.41.040(4)(a), it also amended language in former RCW 9.94A.360 (now RCW 9.94A.525) to read that committing any offense (not just a felony) would interrupt the washout period. LAWS OF 1995, ch. 316 § 1 (Wash. 1995); *see also* S.B. REP. on SUBSTITUTE HOUSE BILL 1140, 54th Leg., Reg. Sess. (Wash. 1995). This is important because the relevant language enacted by the HTACA in RCW 9.41.040(4)(a)(ii)(A) also included that a person could not be convicted of any crime during the “five or more consecutive years” period. This, coupled with the descriptions of the language in the bill reports, suggests that the legislature was primarily concerned that an offender’s prior criminal history should washout prior to restoration and so emphasized this condition in the restoration provision. It also rationally explains why the legislature inserted the words “or more” into the provision whereas it did not use this term in RCW 9.94A.525 as the State and Division One heavily emphasize in attempt to distinguish RCW 9.41.040(4)(a)(ii)(A).

Legislative history from 1996 also supports Mr. Dennis’s interpretation. During the 1996 legislative session, the legislature decided that convictions for all felonies and some domestic violence misdemeanor

offenses would result in the loss of the firearms right. *See* LAWS OF 1996, ch. 295 § 1. In its Final Bill Report, the legislature said:

In some cases, after five years in the community without a conviction or current charge for any crime, a person whose right to possess a firearm has been lost because of a criminal conviction may petition a court of record for restoration of the right. However, the person must also have passed the “washout” period under the Sentencing Reform Act before he or she may petition the court. Effectively, this means that a person with a conviction for a class A felony or any sex offense can never seek restoration of the right. Generally, in the case of a class B felony the washout period is 10 years, and in the case of a class C felony it is five years.

F.B. REP. ON SUBSTITUTE HOUSE BILL 2420, at 2, 54th Leg., Reg. Sess. (Wash. 1996).¹³

The legislative history supports Mr. Dennis’s interpretation of the statute and provides clarity to why “or more” would have been included in RCW 9.41.040(4)(a)(ii)(A)), rebutting Division One’s conclusion.

iii. If the statute is ambiguous, legislative history and canons of statutory construction support Mr. Dennis’s interpretation; at the bare minimum, there is no clearly established legislative intent to the contrary and the rule of lenity applies.

¹³ A previous version of the bill included the following language: “Restoration is automatic if: (1) two years elapsed since the date of conviction for a misdemeanor or gross misdemeanor; (2) *five years elapsed since the date of release from supervision for a class C felony*; and (3) *ten years elapsed from the date of release from supervision for a class B felony*. S.B. REP. ON SUBSTITUTE BILL 5081, at 2, 54th Leg., Reg. Sess. (Wash 1996) (emphasis added). It is noteworthy that part of this report’s suggested language contained direct parallels to the offender score statute. It also should be noted that this version of the bill was first considered in the 1995 session when the HTACA passed and was then reintroduced in 1996.

Where, after examination of the plain language of a statute, the court finds there is more than one reasonable interpretation, the statute is ambiguous. *City of Seattle v. Winebrenner*, 167 Wn.2d 451, 456, 219 P.3d 686 (2009). Nonetheless, a statute is not ambiguous merely because there is more than one conceivable interpretation. *State v. Hahn*, 83 Wn. App. 825, 831, 924 P.2d 392 (1996). Notably, in *Winebrenner*, the court did not have to add words, like Division One did in this case, to either party’s interpretation of “prior offense” in RCW 46.61.5055. *See Winebrenner*, 167 Wn.2d at 460–61. Here, however, in order for the State’s interpretation to be reasonable, we must read into the statute words that are not there— “immediately preceding.”

If this Court does find that the statute is ambiguous (as Divisions One and Two did), it should hold that the legislative history (as argued in section (a)(ii) *supra*) and canons of statutory construction support Mr. Dennis’s interpretation or, at the bare minimum, do not clearly establish legislative intent to the contrary.¹⁴

Our courts have applied the canon related to legislative omissions to statutes it finds unambiguous or ambiguous. First, this Court has

¹⁴ If a statute is ambiguous, the court must engage in statutory construction; courts look to legislative history and apply canons of statutory construction to discern legislative intent. If a penal statute remains ambiguous after this next step, it will only be interpreted adversely to the defendant if contrary legislative intent is clearly established. *See Evans*, 177 Wn.2d at 193; *Winebrenner*, 167 Wn.2d at 462; *Ervin*, 169 Wn.2d at 820.

previously stated, “We cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language. We assume the legislature ‘means exactly what it says.’” *Delgado*, 148 Wn.2d at 727 (quoting *Davis v. Dep’t of Licensing*, 137 Wn.2d 957, 964, 977 P.2d 554 (1999)). In *State v. Williams*, two defendants who had been charged with driving under the influence petitioned for deferred prosecutions under chapter 10.05 RCW. 62 Wn. App. 336, 337, 813 P.2d 1293 (1991). The issue was whether the statutes required the defendants to provide proof of liability insurance before a court could enter an order for deferred prosecution. *Id.* at 338. The State asserted that RCWs 10.05.140 and 10.05.160 required the defendant to provide such proof *before* the court granted the order. *Id.* at 338–39 (emphasis in original). Division Two rejected this assertion: “We disagree with this creation of an implied condition for deferred prosecution.” *Id.* at 339. The court went on to say, “If the Legislature had intended that the courts require proof of insurance as a pre-condition to deferred prosecution, it could and would have so provided in RCW 10.05.140.” *Id.*; see also e.g. *King County v. City of Seattle*, 70 Wn.2d 988, 425 P.2d 887 (1967) (refusing to read an exception into the statute before the court that was not present).

Here, Division One’s interpretation creates an improper implied condition that the relevant time period must occur immediately preceding

the petition; this requires adding words that have been omitted. A court may not correct this kind of legislative omission. *See In re Martin*, 163 Wn.2d 501, 512–13, 182 P.3d 951 (2008) (explaining three types of cases addressing legislative omissions: “an understandable omission, an omission creating an inconsistency, and an omission rendering the statute meaningless,” and describing the rare instances where a court may supply omitted language in the latter). Even if this Court finds the statute ambiguous, “In construing an ambiguous statute, courts may not read into it matters that are not in it and may not create legislation under the guise of interpreting a statute.” *State v. Watson*, 146 Wn.2d 947, 955–56, 51 P.3d 66 (2002). Division One itself has relied upon this cannon when asked to interpret the term “imprisonment” in RCW 10.73.170, finding that if the legislature intended to limit the term it knew how to do so. *State v. Slattum*, 173 Wn. App. 640, 656, 295 P.3d 788 (2013). “Where the Legislature omits language from a statute, intentionally or inadvertently, this court will not read into the statute the language it believes was omitted.” *Id.* at 655 (quoting *State v. Moses*, 145 Wn.2d 370, 374, 37 P.3d 1216 (2002)). The words “immediately preceding” were omitted by the legislature and should not be read into this statute.

Next, Mr. Dennis’s interpretation does not render any portion of the statute meaningless or superfluous—including the term “or more” (as

explained in sections (a)(i) & (ii) *supra*). “[A] court must not interpret a statute in any way that renders any portion meaningless or superfluous.” *State v. K.L.B.*, 180 Wn.2d 735, 742, 328 P.3d 886 (2014) (holding that a light-rail fare enforcement officer was not a “public servant” under the statute and that the State’s interpretation would render another phrase in the provision such that it would have “no separate meaning”); *see also State v. Roggenkamp*, 153 Wn.2d 614, 626–27, 106 P.3d 196 (2005). Contrary to Division One’s assertion, Mr. Dennis’s interpretation does not leave “or more” or any other term without separate meaning.

In addition, under the absurdity doctrine, Mr. Dennis’s interpretation does not create absurd results; rather, it is Division One’s interpretation that creates irrational and arbitrary results as argued in Mr. Dennis’s Petition for Review. *See* Petition for Review at 14–15. Mr. Dennis’s interpretation is not grossly unreasonable. In *Ervin*, the court, in interpreting whether the washout statute allowed an offender’s conviction-free period to go uninterrupted while in jail for a misdemeanor, referred to the definition of absurdity as “[t]he state or quality of being *grossly* unreasonable; esp., an interpretation that would lead to an unconscionable result, esp., one that . . . the drafter *could not* have intended.” *Ervin*, 169 Wn.2d at 824 (emphasis in original). The court then held, “Though both parties’ interpretations could lead to unlikely results, the circumstances in

which Ervin's interpretation will lead to unlikely results (i.e., all or a substantial portion of the offender's washout period is spent in jail on a misdemeanor) are far less frequent than the circumstances in which the State's interpretation will lead to unlikely results (i.e., a person spends a small amount of time in jail during the washout period [and the offender washout period is restarted as a result])." *Id.* at 825.

Here, it is absurd to interpret the statute to reward the petitioner who rushes to court for restoration as soon as year five is completed, but then proceeds to either have the same or far worse criminal history than Mr. Dennis. The probability of this "early bird" petitioner having future non-disqualifying criminal history is likely, and all that separates this petitioner from one like Mr. Dennis is timing. Significantly, Division One's interpretation does not prevent or "stigmatize" the hypothesized "harmful" behavior it perceives, i.e., "hundreds" of convictions for non-disqualifying misdemeanors; rather, it simply rewards the "early bird" petitioner.

Critically, even if Mr. Dennis's interpretation would allow an individual to commit "hundreds" of misdemeanor offenses immediately prior to the petition, that is not an absurd result. After 1996, our legislature had developed the perfect system: the only crimes that do not result in loss of the firearms right are the remaining misdemeanors the legislature declined to add to its carefully selected list. Further, the legislature also

decided when it would no longer hold an offender's past criminal history against him or her at future sentencing.¹⁵ Considering Mr. Dennis dangerous because of a non-disqualifying simple misdemeanor conviction that will not undo the completion of his washout period is grossly unreasonable.

Finally, Mr. Dennis's interpretation is commensurate with prior case law interpreting this provision and RCW 9.94A.525. In *Rivard*, this Court held that the use of "prior felony convictions" in the offender score clause of RCW 9.41.040(4)(a)(ii)(A) refers only to felonies that occurred prior to the disabling offense. *State v. Rivard*, 168 Wn.2d 775, 784, 231 P.3d 186 (2010). The court offered an example of where a prior felony conviction may still be scoring against the offender although he or she has satisfied the five consecutive years required in the earlier portion of the provision. *Id.* "Although he remained crime-free for the requisite five years for the purpose of his disabling felony, a prior conviction still included in his offender score delays his eligibility." *Id.*¹⁶

¹⁵ The stated purpose of the Sentencing Reform Act is similar to the findings and intent sections of the HTACA. See LAWS OF WASH. 1981, ch. 137 § 1.

¹⁶ Interestingly, a Division Two opinion predating *Rivard* came to a different conclusion about "prior felony conviction," holding that "[t]he legislature clearly intended for the trial court to look at the petitioner's criminal history when the petition was filed and not at the time of the disabling conviction," and, thus, counting the petitioner's disabling offense as such a prior. *State v. Mihali*, 152 Wn. App. 879, 924, 218 P.3d 922 (2009). Mr. Dennis's interpretation is rational under this interpretation as well.

In addition, Mr. Dennis's interpretation is also supported by Division One's decision in *State v. Hall* where it found that the requisite five years of no convictions in the washout context could occur at *any time* following the relevant felony conviction. 45 Wn. App. 766, 728 P.2d 616 (1986). The court found the language in former RCW 9.94A.360(12)—“if the offender has spent five years in the community and has not been convicted of any felonies since the last date of release from confinement . . .”—ambiguous. “It could be construed as requiring the defendant's 5-year ‘crime-free’ period to immediately follow the Class C felony in question. Alternatively, the statute could be interpreted to mean that any 5-year ‘crime-free’ period following a Class C felony acts to wash out the offense.” *Id.* at 768. The court held that the rule of lenity and evidence of legislative intent required that the statute be interpreted to require washout for a class C felony conviction if the defendant had five consecutive crime-free years at *any time* following the conviction. *Id.* at 769.

Statutory construction canons support Mr. Dennis's interpretation; at the bare minimum, there is not clearly established legislative intent to the contrary. If this Court finds that the statutory construction canons do not provide the answer, then the rule of lenity requires the statute be strictly construed in Mr. Dennis's favor. *See State v. Weatherwax*, 188 Wn.2d

139, 155, 393 P.3d 1054 (2017); *see also State v. Jacobs*, 154 Wn.2d 596, 603, 115 P.3d 281 (2005).¹⁷

V. CONCLUSION

For the aforementioned reasons here as well as in Mr. Dennis's Petition for Review, the Court should find that Division One erred when it interpreted RCW 9.41.040(4)(a)(ii)(A) to require that the "five or more consecutive years" without a conviction be served *immediately preceding* the petition for restoration. All stages of statutory interpretation support Mr. Dennis's interpretation and there is not clearly established legislative intent to the contrary.

Respectfully submitted this 31st day of January, 2018, for Appellant
Dennis,



Lauren McLane, WSBA# 40945



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¹⁷ Notably, RCW 9.41.040 is penal in nature as denial of restoration extends the time the petitioner may be subjected to prosecution for unlawful possession of a firearm. *See also Slattum*, 173 Wn. App. at 658 (the rule of lenity applies in the post-conviction context).

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EDGAR DENNIS III,

Appellant.

Case No. 95083-1

Return of Service

I Declare:

1. I am over the age of 18 years, and I am not a party to this action.
2. I served the following documents to (name) King County Prosecuting Attorney's Office – Records Unit/Post Conviction Unit - Laura Petregal:

➤ Supplement Brief of Appellant Edgar Dennis

3. The date, time and place of service were (if by mail refer to Paragraph 4 below):

Date: 11/31/18 Time:
10:30 a.m. p.m.

Address: W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104

4. Service was made:

- by delivery, in person to the person named in paragraph 2 above.
- by delivery to (name) Chantel Cretini (with Records), a person of suitable age and discretion residing at the respondent's usual abode.
- by publication as provided in RCW 4.28.100. (File Affidavit of Publication separately.)
- (check this box only if there is a court order authorizing service by mail) by mailing two copies postage prepaid to the person named in the order entered by the court on (date) _____ . One copy was mailed by ordinary first class mail, the other copy was sent by certified mail return receipt requested. (Tape return receipt below.) The copies were mailed on (date) _____ .
- (check this box only if there is a statute authorizing service by mail) by mailing a copy postage prepaid to the person requiring service by any form of mail requiring return receipt. (Tape return receipt below.) The copy was mailed on (date) _____ .

5. Service of Notice on Dependent of a Person in Military Service.

- The Notice to Dependent of Person in Military Service was served on mailed by first class mail on (date) _____ .
- Other: _____ .

6. Other: _____ .

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at (city) Seattle, (state) WA, on (date) 11/31/18

[Signature]
Signature

John Marlow
Print or Type Name

Fees: \$0.00
Service: \$0.00

Mileage	_____	\$0.00
Total	_____	\$0.00

(Tape Return Receipt here, if service was by mail.)

File the original Return of Service with the clerk. Provide a copy to the law enforcement agency where protected person resides if the documents served include a restraining order signed by the court.

**IN THE SUPREME COURT OF THE STATE OF
WASHINGTON**
COURT OF APPEALS of the STATE of WASHINGTON
County of King

EDGAR DENNIS III,

Petitioner/ Appellant,

vs.

STATE OF WASHINGTON

Respondent.

SUPREME COURT NO. 95083-1

COA NO. 75441-6-I

Return of Service

I Declare:

1. I am over the age of 18 years, and I am not a party to this action.
2. I served the following documents to (name) Edgar Dennis III

SUPPLEMENTAL BRIEF OF APPELLANT EDGAR DENNIS

3. The date, time and place of service were (if by mail refer to Paragraph 4 below):

Date: January 31, 2018

Time: 9:30 a.m.

Email Address: nina206510@gmail.com

By Appellant's agreement to
receive copy via email.

4. Service was made:
 by email to the person named in paragraph 2 above.

- by delivery to (name) _____, a person of suitable age and discretion residing at the respondent's usual abode.
- by publication as provided in RCW 4.28.100. (File Affidavit of Publication separately.)
- (check this box only if there is a court order authorizing service by mail) by mailing two copies postage prepaid to the person named in the order entered by the court on (date) _____. One copy was mailed by ordinary first class mail, the other copy was sent by certified mail return receipt requested. (Tape return receipt below.) The copies were mailed on (date) _____.
- (check this box only if there is a statute authorizing service by mail) by mailing a copy postage prepaid to the person requiring service by any form of mail requiring return receipt. (Tape return receipt below.) The copy was mailed on (date) _____.

5. Service of Notice on Dependent of a Person in Military Service.

- The Notice to Dependent of Person in Military Service was served on mailed by first class mail on (date) _____.
- Other: _____

6. Other: _____

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at (city) ROS MORNIEZ, (state) WA, on (date) 1-31-18.

Zenobia Pralt
Signature

Zenobia Pralt
Print or Type Name

Fees:	<u>\$0.00</u>
Service	<u>\$0.00</u>
Mileage	<u>\$0.00</u>
Total	<u>\$0.00</u>

(Tape Return Receipt here, if service was by mail.)

File the original Return of Service with the clerk. Provide a copy to the law enforcement agency where protected person resides if the documents served include a restraining order signed by the court.

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