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STATE OF WASHINGTON
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BY SUSAN L. CARLSON
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NO. 95083-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EDGAR DENNIS, III,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. INTRODUCTION

RCW 9.41.040(4)(a)(ii)(A) permits certain felons to restore their right to possess firearms if they have spent five or more consecutive years in the community without being convicted of any crime. The legislature intended that a person petitioning for his firearms rights has remained a law-abiding citizen and had no recent convictions.

B. ISSUES PRESENTED FOR REVIEW

Does the plain language of RCW 9.41.040(4)(a)(ii)(A) require a five-year crime-free period to immediately precede a petition to restore firearms rights?

C. STATEMENT OF THE CASE

The petitioner, Edgar Dennis, has a criminal history involving robbery, assault and drugs. He was convicted of multiple felonies from 1991 through 1998. Each of these felonies resulted in the loss of his right to possess firearms. After these crimes, he went well over five years with no new convictions. However, in 2014, he was convicted of negligent driving in the first degree.

On April 18, 2016, Dennis filed a petition to reinstate his firearms rights under RCW 9.41.040(4). See CP at 1. At the time of the petition, Dennis had the following criminal convictions that prohibited possession of firearms under RCW 9.41.040(4): assault in the third degree (1991), robbery in the second degree (1991), two violations of the uniform controlled substances act (1991), and assault in the third degree (1998). CP at 21-22. Dennis failed to disclose his 2014 negligent driving in the first degree conviction in his petition to the King County Superior Court. CP 21-22.

On April 27, 2016, the State objected to Dennis's petition for restoration because Dennis had not remained crime-free for the five-year period preceding his petition. CP 21-28. The State argued that the 2014 negligent driving conviction made Dennis ineligible to petition. CP 47-48. The Superior Court denied Dennis's petition for restoration of his right to possess a firearm. CP at 47-48.

Dennis appealed the Superior Court's ruling to the Court of Appeals which held that RCW 9.41.040(4)(a)(ii)(A) reflects the legislature's intent to require at least five consecutive conviction-free years immediately preceding a petition for restoration of firearms rights. State v. Dennis, 200 Wn. App. 654, 662, 402 P.3d

943 (2017). Division One's holding in this case conflicts with Division Two's holding in Payseno v. Kitsap County, 186 Wn. App. 465, 346 P.3d 784 (2015), which held that the five-year crime-free period could be any five-year period.

D. ARGUMENT

1. RCW 9.41.040(4)(a)(ii)(A) PLAINLY PROVIDES THAT A PERSON MUST BE CRIME-FREE FOR THE FIVE YEARS IMMEDIATELY PRECEDING HIS ATTEMPT TO RESTORE FIREARMS RIGHTS.

Once convicted of a felony, a person loses the right to possess firearms. RCW 9.41.040. However, if a defendant has not been convicted of a sex offense, a Class A felony, or any felony with a maximum sentence of 20 years or more, he or she may eventually petition a court to restore the right. RCW 9.41.040 clearly identifies at what point in time people can petition to restore firearms rights. The restoring court has no duty other than ensuring the basic pre-petition statutory requirements are met. State v. Swanson, 116 Wn. App. 67, 78, 65 P.3d 343 (2003).

RCW 9.41.040(4) determines who may have firearms rights restored. It provides in relevant part:

(4)(a) . . .
if a person is prohibited from possession of a firearm
. . . the individual may petition a court of record to
have his or her right to possess a firearm restored:

. . .
(ii)(A) If the conviction . . . was for a felony offense,
after five or more consecutive years in the community
without being convicted . . . 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).

The plain import of this provision is to require firearms rights
not be restored to someone who continues to commit crimes.

The issue before this court is one of statutory interpretation
and is reviewed de novo. State v. Argueta, 107 Wn. App. 532, 536,
27 P.3d 242 (2001); Stuckey v. Dep't of Labor & Indus., 129 Wn.2d
289, 295, 916 P.2d 399 (1996).

The purpose of statutory interpretation is "to determine and
give effect to the intent of the legislature." State v. Evans, 177
Wn.2d 186, 298 P.3d 724 (2013) (citing State v. Sweany, 174
Wn.2d 909, 914, 281 P.3d 305 (2012)). Plain language that is not
ambiguous does not require construction. Evans, 177 Wn.2d at
192. A court determines a statute's plain language by looking at
the text of the statute in question as well as the context of the

statute, related provisions and the statutory scheme as a whole.

State v. Larson, 184 Wn.2d 843, 848, 365 P.3d 740 (2015).

“A statute is ambiguous if it can reasonably be interpreted in two or more ways, but it is not ambiguous simply because different interpretations are conceivable.” Berger v. Sonneland, 144 Wn.2d 91, 105, 26 P.3d 257 (2001). Only when more than one interpretation of the plain language is reasonable does the court engage in statutory construction. Evans, 177 Wn.2d at 192-93. The courts are not “obliged to discern any ambiguity by imagining a variety of alternative interpretations.” State v. Keller, 143 Wn.2d 267, 276-77, 19 P.3d 1030 (2001) (quoting Telepage, Inc. v. Tacoma Dep’t of Financing, 140 Wn.2d 599, 607, 998 P.2d 884 (2000)).

The rule of lenity applies only if a statute is ambiguous, legislative history does not reveal the correct interpretation, and the suggested interpretation does not lead to strained or absurd results. State v. Radan, 143 Wn.2d 323, 330, 21 P.3d 255, 258 (2001). If a statute is unambiguous, however, the rule of lenity is inapplicable. Id. (citing State v. McGee, 122 Wn.2d 783, 787, 864 P.2d 912 (1993); Chapman v. United States, 500 U.S. 453, 463-64, 111 S. Ct. 1919, 114 L. Ed. 2d 524 (1991)).

In the current case, the King County Superior Court had only to look at whether Dennis was eligible to petition for restoration. The determination of eligibility came solely from a review of criminal history. Dennis was convicted of negligent driving in the first degree, a misdemeanor, in 2014. For this reason he was not eligible to petition for restoration.

- a. The Court Must Examine RCW 9.41.040(4) Within The Entire Context And Scheme Of The Statute And Must Give Effect To All The Language In The Statute.

When interpreting a statute, a court first looks at the surrounding statutory language to determine the legislature's intended meaning and the scope of a particular provision. Larson, 184 Wn.2d at 849. A doubtful term or phrase in a statute or ordinance takes its meaning from associated words and phrases. Id. (citing Burns v. City of Seattle, 161 Wn.2d 129, 148, 164 P.3d 475 (2007)). Courts must interpret a statute to give effect to all language, so as to render no portion meaningless or superfluous. Rivard v. State, 168 Wn.2d 775, 783, 231 P.3d 186 (2010). See also Citizens All. for Prop. Rights Legal Fund v. San Juan Cty., 184 Wn.2d 428, 440, 359 P.3d 753, 760 (2015).

Applying these principles of construction, RCW 9.41.040(ii)(A) must be read as a whole and must give effect to all the language. When the court reads section (4)(ii)(A) as a clause, including all the words, there is no ambiguity. The provision says that an individual may petition the court 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. This reading gives effect to all the language. The language “five or more consecutive years” has no effect unless the five years must immediately precede the petition. (*italics added*). If the Legislature had simply intended any five-year period to qualify, it would have simply required a “five year period” and omitted the “or more consecutive years.” Dennis’s argument that any period of five crime-free years qualifies him to restore his rights, ignores this primary rule of statutory construction.

Comparable provisions in other statutes support this interpretation. In the washout provisions of the SRA for example, the Legislature clearly said “five years” was required for a Class C felony to wash, and the Legislature set a start date for the five years. RCW 9.94A.525. Thus, if the Legislature had intended to

limit the five-year crime-free period for restoration to just any five-year period, they certainly knew how to do that. By using the phrase “five or more consecutive years,” the Legislature has signaled that the crime-free period immediately precede the filing of the petition. Otherwise, there really would be no use for the “or more” language.

Allowing a petition after any crime-free period, despite recent convictions, also renders the language about “pending cases” meaningless. The Payseno, the court focused solely on a crime-free “period” and did not consider the language that also prohibits persons from petitioning while they have any *pending* crimes. This interpretation fails to give effect to all the language in the statute. Instead, under the analysis in Payseno, this language becomes superfluous because even if those pending crimes resulted in convictions they would allow restoration of firearms rights.

b. Allowing Restoration After Any Five-Year Crime-Free Period Would Produce Absurd Results.

Statutes must be interpreted to avoid absurd results.

Larson, at 851 (citing State v. Alvarado, 164 Wn 2d 556, 562, 192 P.3d 345 (2008)). A court is to assume the Legislature does not

intend absurdities. State v. Vela, 100 Wn.2d 636, 641, 673 P.2d 185 (1983); Larson, at 851.

The interpretation of RCW 9.41.040(4) offered by Dennis does not survive a common sense examination. Under Dennis's interpretation, the five-year crime-free period does not need to occur immediately prior to the petition. However, a reading of RCW 9.41.040(4) that allows any five-year crime-free period would lead to strained, if not absurd results.

For example, suppose a defendant commits a Class C felony in 2000, has five crime-free years, files a petition in 2015, but has a pending misdemeanor charge at that time. Under an interpretation that allows restoration at any point in time after a five-year period (as Dennis suggests), the defendant is not eligible to have his rights restored because of the pending misdemeanor charge, but the day after he is convicted or acquitted of the misdemeanor, he is eligible for reinstatement. It would be absurd for the Legislature to prevent someone from possessing a firearm while a misdemeanor charge is pending, but to permit restoration immediately upon conviction of the same misdemeanor charge. In other words, a person "accused" of a misdemeanor does not have the right to possess a firearm, but a person actually "convicted" of

the same misdemeanor does have the right to possess a firearm. This absurdity is avoided by recognizing that the crime-free five year period must immediately precede the motion to restore rights.

One might argue that prohibiting a petition while a crime is pending serves to make sure that a person does not have their right restored only to immediately lose it upon a new conviction. However, the statute does not limit pending charges to only those convictions that would result in the loss of firearms rights. RCW 9.41.040(4) disallows a person to petition when *any* crime is pending. The only logical reading assumes that the Legislature did not want courts to restore firearm rights while any new conviction was imminent. Dennis's proposed interpretation would defeat the purpose of the five-year crime-free period, which is to ensure that guns are available only to law-abiding citizens.

Moreover, under Dennis's interpretation, a defendant could have hundreds of misdemeanor convictions (including assaults, DUIs, harassment) since his five-year crime-free period ended and, so long as he has no "pending" charge at the time of the petition, he must be given the right to possess a firearm. These absurd results were clearly not intended by the Legislature.

c. Legislative History Also Supports The Plain Reading Of RCW 9.41.040(4).

There is no need to resort to interpretive tools such as legislative history because the language, text and related provisions establish that RCW 9.41.040(4)(a)(ii)(A) is unambiguous. However, even the legislative history of the statute in question supports the state's plain reading of the statute. RCW 9.41.040 was amended in 1995 as part of the Hard Time for Armed Crime Act. Hard Time for Armed Crime Act, ch. 129, § 1, 1995 Wash. Laws 443, 444. The Act intended to deter criminals from possessing and using firearms during commission of crimes. State v. Thomas, 113 Wn. App. 755, 760, 54 P.3d 719 (2002); State v. Berrier, 110 Wn. App. 639, 649-50, 41 P.3d 1198 (2002). Specifically:

In 1994, RCW 9.41.040 was reenacted and amended. RCW 9.41.040(4) was again amended as part of the 1995 Hard Time for Armed Crime Act, Initiative 159. Laws of 1995, ch. 129, § 16. The legislative "Findings and Intent" included the statement that "[c]urrent law [did] not sufficiently stigmatize the carrying and use of deadly weapons by criminals." Laws of 1995, ch. 129, § 1. Before the legislature imposed the five-year crime-free period requirement, the legislature found that "increasing violence in our society causes great concern for the immediate health and safety of our citizens and our social institutions." Laws of 1994, 1st Spec. Sess., ch. 7, § 101, at 2197. (Emphasis added). (Footnotes omitted).

Payseno v. Kitsap Cty., 186 Wn. App. 465, 471-72, 346 P.3d 784, 787-88 (2015) (footnote omitted).

The legislative finding that current law does not sufficiently stigmatize the use of firearms by criminals, “expresses that the Act was intended to keep guns out of the hands of criminals who continue to commit crimes, including offenses that do not themselves disqualify firearm possession.” State v. Dennis, 200 Wn. App. 654, 662, 402 P.3d 943. The history indicates that lawmakers want petitioners to come to court with “clean hands” when they are seeking to possess a gun. This “finding of intent” shows that the Legislature intended to keep guns away from those who *continue* to commit crimes, not simply those who manage to refrain from committing crimes for some five-year period.

d. There Has Been No Legislative Acquiescence.

One of the fundamental rules of statutory construction is that the failure of the Legislature to change a statute after a line of court decisions has construed the statute, amounts to acquiescence by the Legislature in the construction given by the court. Dennis relies upon City of Federal Way v. Koenig, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009), which states the presumption “that the legislature is

aware of judicial interpretations of its enactments and takes its failure to amend a statute following a judicial decision interpreting that statute to indicate legislative acquiescence in that decision.” Id. at 348. But legislative acquiescence does not apply here for several reasons.

First, Koenig is distinguishable because after a full 23 years of legislative inaction, it could be presumed that the legislature had acquiesced. In the current case, only a little more than two years has passed since Payseno was decided. The legislature is deemed to acquiesce in the interpretation of the court when no change is made for a **substantial** time after the decision. See State v. Coe, 109 Wn.2d 832, 846, 750 P.2d 208 (1988) [emphasis added]. A mere two years is not a substantial period of time following a single appellate court decision that would permit the conclusion that the legislature had acquiesced in the court’s interpretation.

Since Payseno was decided in 2015, the legislature has amended RCW 9.41.040 without clarifying the ambiguity, but the amendments were only part of larger bills directed at rehabilitation

of juveniles and sexual assault protection orders and only addressed technical matters unrelated to the issue in this case.¹

2. EQUAL PROTECTION IS NOT AT ISSUE.

In his Petition for Review, Dennis argued that RCW 9.41.040(4) is arbitrarily applied to and thus unconstitutional. He argues that the construction of the statute as interpreted by Division One violates equal protection. Dennis argues that the interpretation offered by the State supports an arbitrary application of RCW 9.41.040(4)(a) because a petitioner who files his petition earlier in time but is later convicted of the same subsequent offenses as Dennis, could retain his firearms rights that he restored earlier. However, this is not arbitrary or irrational and does not violate equal protection.

This Court should review only the issue of statutory construction of RCW 9.41.040(4) and not issues raised for the first time in the petition. Dennis did not raise nor develop this issue at

¹ In 2016 and 2017, it amended chapters with bills respectively entitled "Juvenile Offenders-Rehabilitation and Reintegration" and "Sexual Assault Protections Orders-Duration-Renewal-Modification," which changed discrete provisions related to juvenile offenders and sexual assault protection orders. ENGROSSED SUBSTITUTE H.B. 2906, 64TH Leg. Reg. Sess. (Wash 2016); ENGROSSED SUBSTITUTE S.B. 5256, 65TH Leg. Reg. Sess (Wash 2017). Dennis, 200 Wn. App. at 662-63, fn.4.

the Court of Appeals and therefore it is too late to raise it for the first time in this petition. This Court does not generally consider issues raised for the first time in a petition for review. State v. Halstien, 122 Wn.2d 109, 130, 857 P.2d 270 (1993). An issue not raised or briefed in the Court of Appeals should not be considered by this Court. Id.

RCW 9.41.040 addresses at what point in time a defendant may petition to restore his firearms rights. A reviewing court's duty is ministerial and only requires a review of the defendant's criminal history at the time of the petition. The court cannot look to "what might happen in the future." It can only look at the petitioner's criminal history and how long the petitioner has been crime-free at the time of the petition. If a petitioner qualifies, the court must restore. The legislature could have made the right to possess firearms automatic at the exact moment that five crime-free years have passed but it did not because it wanted the court to ensure that when a defendant was asking for the right to possess a gun after being disqualified from doing so, the petitioner had nothing recent and nothing pending.

Equal protection analysis utilizes one of three standards of review, depending upon the nature of the classification under

review. State v. Shawn P., 122 Wn.2d 553, 859 P.2d 1220 (1993). The most deferential standard of review is the rational basis test. Id. If a classification does not involve a suspect or semi-suspect class, such as race or gender, and does not threaten a fundamental right, then the rational basis test applies. Id. Because physical liberty is an important right, but not a fundamental one, the rational basis test applies to criminal statutes that do not involve suspect or semi-suspect classes. State v. Manussier, 129 Wn.2d 652, 673, 921 P.2d 473 (1996) (applying rational basis test to the Persistent Offender Accountability Act); State v. Coria, 120 Wn.2d 156, 171, 839 P.2d 890 (1992) (applying rational basis test to school bus route sentence enhancement).

Under the rational basis test, a legislative classification will be upheld unless it rests on grounds wholly irrelevant to the achievement of a legitimate state objective. Shawn P., 122 Wn.2d at 561. Statutes are presumed constitutional, and the party challenging a statute as violating equal protection bears the burden of overcoming that presumption. Id. The party must show the statute is unconstitutional beyond a reasonable doubt. Id. Only rarely will a statute fail to survive rational basis review.

More v. Washington State Dept. of Retirement Systems, 133 Wn.
App. 581, 137 P.3d 73 (2006).

Because requiring felons to come to court with “clean hands,” and no recent convictions or pending criminal matters is rationally related to the legitimate state objective of keeping guns out of the hands of criminals, it does not violate equal protection.

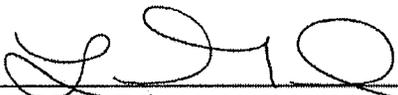
E. CONCLUSION

The Court of Appeals decision should be affirmed.

DATED this 2nd day of February, 2018.

Respectfully submitted,

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