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Court of Appeals
Division II
State of Washington

No. 96072-1

No. 50623-8

IN THE WASHINGTON STATE COURT OF APPEALS, DIVISION II

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Jerry L Barr, Appellant

vs.

Snohomish County Sheriff's Office, Respondent

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# Appellant's Reply Brief

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## ARGUMENT

The Sheriff's argument that "[a]ppellant urges the Court to incorrectly find that RCW 13.50.260 is an alternative firearm restoration statute" misses the point. Response at 1. At no point has Mr. Barr ever argued, either in this Court or below, that RCW 13.50.260 is a firearm restoration statute. Rather, the argument is that sealing a juvenile offense under that statute nullifies the conviction for all purposes, including firearms. This Court in *Nelson v. State*, 120 Wn. App. 470, 85 P.3d 912 (2003) has already so held. The Sheriff wants to pretend either like *Nelson* never happened or that the legislature has abrogated *Nelson*. Neither of those scenarios is true. Since Mr. Barr has no class A convictions and is not prohibited by state or federal law from possessing a firearm, he is entitled to a concealed pistol license under RCW 9.41.070.

The Sheriff also points out that RCW 9.41.040(3) defines "conviction" as any plea of guilty "notwithstanding the pendency of any future proceedings" and then argues that this means that *no matter what happens later, the plea or finding of guilty is a conviction forever*. Response at 6. This is a strained and incorrect reading of the language. First, the use of the word "pendency" implies some sort of future proceeding already scheduled at the time of the plea or some ongoing action. This is the legislature signaling that the firearm prohibition

attaches when the guilty finding is entered, and not later, such as at sentencing, or after the direct appeal becomes final, etc. It does not mean that a finding of guilty is a conviction forever. This is obvious because the legislature included exceptions for pardons, annulments, certificates of rehabilitation, restoration under subsection (4), etc. All of those are also "future proceedings." Mr. Barr's guilty finding never happened because it's been sealed and a sealed juvenile offense is treated as though it never occurred.

The Sheriff then argues that "the language directing that sealed juvenile records be 'treated as if they never occurred' is only for certain purposes," Response at 10, but does not cite any authority whatsoever for that proposition. By its plain terms, the language requiring a sealed juvenile offense to be treated as though it never occurred has no limitations of any kind. Likewise, just because a law enforcement agency can see the fact of an offense does not mean that the offense has any legal value or that it can be used against the offender. The Sheriff makes baseless extrapolations.

The Sheriff attempts to argue that subsequent statutory amendments of the juvenile sealing statute render *Nelson* obsolete. Response at 10. But the Sheriff misplaces the emphasis of those amendments. What the legislature *failed to amend* subsequent to *Nelson* is

far more important than the amendments regarding what agency has access to what records. The holding in *Nelson* is premised on the language of now RCW 13.50.260(6)(a) that says a sealed juvenile offense is to be treated as though it never occurred. This is the operative language in *Nelson* and it has not changed. The legislature's broadening of who has access to what records has zero effect on how those records are legally treated. If the legislature intended to overrule *Nelson*, it would have addressed it squarely, as it did when it overruled *State v. R.P.H.*, 173 Wn.2d 199, 265 P.3d 890 (2011).

Finally, the Sheriff argues that 1) Mr. Barr's interpretation violates principles of statutory construction; 2) leads to practical difficulties and absurd results; and 3) conflicts with the Attorney General's opinion. Response at 15-20. Mr. Barr's interpretation relies on the plain language of both statutes. RCW 9.41.040 prohibits firearm possession by someone convicted of a class A felony, but Mr. Barr was never convicted of a class A felony because the language of the sealing statute allows it to be treated as though it never occurred. The statutes are harmoniously reconciled. Any "practical difficulties" or "absurd results" are all hypotheticals and would be for the legislature to fix anyway. This Court can't deny the statutory plain language and its own precedent just because the Sheriff makes an amorphous argument about "practical difficulties." If anything,

permanently denying an individual convicted as a child the constitutional right to possess a firearm is the absurd result. The Attorney General's opinion does not add anything new to the discussion; all it says is that a person convicted of a class A felony cannot have his or her firearm rights restored absent a pardon. But Mr. Barr was not convicted of a class A felony because it has been sealed, rendering the Attorney General's opinion redundant and unhelpful.

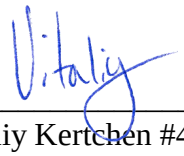
Regarding federal law, if an offense is not a conviction under state law, it is not a conviction under federal law. At least one federal trial court judge has already ruled that a sealed juvenile offense is not a conviction under Washington state law for the purposes of the federal firearm statute, 18 U.S.C. § 922. Response at 24, n.7. The Sheriff argues in that footnote that the federal court committed error, but all this Court needs to do is resolve the state law issue. When this Court reaffirms its previous ruling in *Nelson* that a sealed juvenile offense is not a conviction under RCW 9.41.040, that will also resolve the issue under federal law.

Since Mr. Barr has no class A conviction and is not prohibited by state or federal law from possessing a firearm, he is entitled to a concealed pistol license under RCW 9.41.070.

## CONCLUSION

Based on the foregoing, this Court should reverse the trial court's denial of Mr. Barr's petition to restore firearm rights.

Respectfully submitted,



Vitaliy Kertchen #45183
Date: 10/13/17

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

Respectfully submitted,

Vitaliy Kertchen #45183
Date: 10/13/17
Place: Tacoma, WA

## KERTCHEN LAW, PLLC

## October 13, 2017 - 8:01 AM

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