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Court of Appeals
Division II
State of Washington

No. 96072-1

No. 50623-8

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JERRY L. BARR,
Appellant

vs.

SNOHOMISH COUNTY SHERIFF,
Respondent.

RESPONDENT
SNOHOMISH COUNTY SHERIFF'S RESPONSE BRIEF

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I. INTRODUCTION

Appellant, Jerry L. Barr, contends that the trial court erred in finding that his two prior Class A felony convictions made him ineligible to possess a firearm under state and federal law, and denying his application for writ of mandamus.[1] The decision below, however, was correct, and this appeal should be denied.

The trial court correctly concluded Appellant is prohibited from possession of firearms by the plain language of RCW 9.41.040 and 18 U.S.C § 922. Appellant urges the Court to incorrectly find that RCW 13.50.260 is an alternative firearm restoration statute. The Court should decline to adopt Appellant's argument because RCW 9.41.040 and 18 U.S.C § 922 unambiguously prohibit Class A felons, like the Appellant, from restoring firearm rights, regardless of whether the offense is sealed.

Because the Appellant is prohibited from possession of a firearm, the Sheriff properly denied Appellant's CPL application, and the trial court's decision denying Appellant's petition for Writ of Mandamus was

[1] The Sheriff recognizes that an order sealing these juvenile convictions was entered by the King County Superior Court. Since there is no dispute that the Appellant's prior convictions are Class A felonies, the Sheriff will only refer to the convictions as Class A felonies. The details of Appellant's Class A felony convictions are contained in the record developed before the Thurston County Superior Court.

proper. This Court should affirm the trial court decision and dismiss this action.

II. FACTS RELEVANT TO MOTION

On March 23, 1992, Jerry L. Barr was convicted in King County Juvenile Court of a Class A felony.[2] Clerk's Papers (CP) 25. On October 22, 1992, Appellant was again convicted in King County Juvenile Court of a Class A felony. CP 28. Appellant has various other criminal convictions that are not at issue in this case. *See* CP 20-21. It is not disputed that as a result of being convicted of the Class A felonies, Appellant lost his right to possess firearms.

In September 2016, Appellant moved to seal the two Class A felony convictions pursuant to RCW 13.50.260, which provides for the sealing of juvenile court records in certain circumstances. CP 25-27; 28. The King County Juvenile Court granted the motions to seal. *Id.* In addition, with respect to each Class A conviction, the King County Juvenile Court entered an "Order on Respondent's Firearm Rights" and found that "so long as this case remained sealed, the offenses in Finding #1 do not prohibit respondent from possession firearms under RCW 9.41.040." CP 55-56.

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[2] Title 13 RCW refers to juvenile findings of guilt as adjudications. Because RCW 9.41.040(3) includes juvenile adjudications in its definition of "conviction," the Sheriff will refer to adjudications as convictions, unless context requires otherwise.

On November 15, 2016, Appellant applied to the Snohomish County Sheriff's Office for a concealed pistol license ("CPL"). CP 57. The application included submission of a complete set of fingerprints. RCW 9.41.070(4). The Sheriff's Office processed the application and conducted a records check through the Department of Licensing, WACIS and NCIC. RCW 9.41.070(2)(a). The purpose of the records check was to determine whether Appellant was prohibited from possessing a firearm under Washington State law or under federal law -- and therefore ineligible to be issued a CPL. *Id.*

The Appellant's fingerprint submission and records check identified Appellant's two Class A felonies.[3] The checks also indicated that both Class A felonies were sealed.

Notwithstanding the fact that the Class A felony convictions were sealed, on November 23, 2016, pursuant to RCW 9.41.070(2)(b), the Sheriff's Office denied Appellant's CPL application because he was convicted of two Class A felonies, and therefore was prohibited from possessing a firearm under RCW 9.41.040 and 18 U.S.C. § 922(g)(1). *See* RCW 9.41.070(1)(a); CP 57.

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[3] The fingerprint and records checks also identified other criminal history that was either not firearm prohibitive, or where firearm rights had been restored. These offenses were not used as a basis for denying Appellant a CPL, so they are not listed here.

Appellant filed a writ of mandamus action in Thurston County Superior Court seeking a judicial order directing the Sheriff to issue him a CPL. The Superior Court agreed with the Sheriff that Appellant's Class A felony convictions make him ineligible to possess a firearm or have a CPL and denied Appellant's action. CP 80-81. Appellant appealed the trial court decision to this Court. CP 82-85.

III. ARGUMENT

A. Standard Of Review

A Court of Appeals reviews a trial court's denial of a writ of mandamus de novo as a question of law. *See Land Title of Walla Walla, Inc. v. Martin,* 117 Wn. App. 286, 288-89, 70 P.3d 978 (2003).

B. Appellant is Not Entitled to A Writ of Mandamus

Mandamus is an extraordinary writ. *Walker v. Munro,* 124 Wn.2d 402, 407, 879 P.2d 920 (1994). Appellant's burden of proof is high. An individual seeking a writ of mandamus must show that (1) the party subject to the writ has a clear duty to act; (2) the petitioner has no plain, speedy, and adequate remedy in the ordinary course of law; and (3) the petitioner is beneficially interested. RCW 7.16.160, .170. Further, the duty to act must be ministerial in nature rather than discretionary. *Brown v. Owen*, 165 Wn.2d 706, 725, 206 P.3d 310 (2009).

As explained more fully below, Appellant cannot meet the high burden required for mandamus. As a matter of law, the Sheriff has no duty to issue him a CPL. To the contrary, the Sheriff's duty is to deny Appellant

a CPL because Appellant is prohibited from possessing a firearm or being issued a CPL.

C. State and Federal Law Prohibit Appellant from Possessing Firearms.

Appellant contends that he is not prohibited from possession of a firearm under state or federal law because the Class A felony convictions that revoked his right to possess a firearm have been sealed. This is incorrect. Appellant's Class A felony convictions continue to render him ineligible to possess or restore his firearm rights, regardless of whether those convictions are subsequently sealed. Because he remains prohibited under both state and federal law, he is barred from being issued a CPL. The trial court properly denied Appellant's Petition for Writ of Mandamus.

1. Appellant is Prohibited From Possessing or Restoring of His Firearm Right By State Law -- RCW 9.41.040.

Washington state prohibits felons from possessing firearms. It is a felony, specifically "unlawful possession of a firearm in the first degree," for a person who has been convicted of a "serious offense" to possess a firearm.[4] RCW 9.41.040(1). A Class A felony is a "serious offense." RCW 9.41.010(3), (23).

[4] It is "unlawful possession in the second degree" if the person possesses a gun and has been convicted of any other felony not considered a "serious offense." RCW 9.41.040(2).

Washington applies the statutory prohibition to persons with both adult convictions and juvenile adjudications, and applies regardless of subsequent action in the underlying criminal offense. A person has been "convicted":

> ... at such time as a plea of guilty has been accepted, or a verdict of guilty has been filed, notwithstanding the pendency of any future proceedings including but not limited to sentencing or disposition, post-trial or post-fact-finding motions, and appeals. Conviction includes a dismissal entered after a period of probation, suspension or deferral of sentence, and also includes equivalent dispositions by courts in jurisdictions other than Washington state.

RCW 9.41.040(3). In other words, Washington's firearm statute defines conviction to include any crime where plea of guilty has been accepted or a verdict of guilty has been filed, regardless of any subsequent relief.

RCW 9.41.040(3) and (4) provide the exclusive mechanism for individuals to restore lost firearm rights. RCW 9.41.070, the concealed pistol application statute, confirms that RCW 9.41.040(3) and (4) are the only Washington statutes whereby an individual can restore firearm rights. RCW 9.41.070(1)(g) provides: "No person convicted of a felony may have his or her right to possess firearms restored or his or her privilege to carry a concealed pistol restored, unless the person has been granted relief from

disabilities by the attorney general under 18 U.S.C. § 925(c), or RCW 9.41.040 (3) or (4) applies."

RCW 9.41.040(3) states that a person shall "not be precluded from possession of a firearm if the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted . . . ." And RCW 9.41.040(4) allows for petitions to a court of record to have the right to possess a firearm restored. But, RCW 9.41.040(4)(a) explicitly prohibits restoration of firearm rights to persons convicted of either sex offenses or a Class A felony.

Appellant was convicted of two Class A felonies. As a consequence of those convictions, it became unlawful for Appellant to possess a firearm. Moreover, because the convictions were Class A felonies, Appellant is prohibited from restoring his firearm rights by RCW 9.41.040(4).[5]

a. Sealing Does Not Restore Firearm Rights.

RCW 13.50.260 provides a process for a juvenile convicted of a felony offense to seal his/her criminal record. RCW 13.50.260 does not contain any provision that mentions or implies that sealing impacts firearm rights. RCW 13.50.260(3) and (4) allow an individual convicted of a

[5] The only way for Appellant to restore his firearm rights is by a gubernatorial pardon with a finding of rehabilitation. RCW 9.41.040(3).

juvenile Class A felony to seal his/her juvenile record if the following criteria are met:

> (i) Since the last date of release from confinement, including full-time residential treatment, if any, or entry of disposition, the person has spent five consecutive years in the community without committing any offense or crime that subsequently results in an adjudication or conviction;
>
> (ii) No proceeding is pending against the moving party seeking the conviction of a juvenile offense or a criminal offense;
>
> (iii) No proceeding is pending seeking the formation of a diversion agreement with that person;
>
> (iv) The person is no longer required to register as a sex offender under RCW 9A.44.130 or has been relieved of the duty to register under RCW 9A.44.143 if the person was convicted of a sex offense;
>
> (v) The person has not been convicted of rape in the first degree, rape in the second degree, or indecent liberties that was actually committed with forcible compulsion; and
>
> (vi) The person has paid the full amount of restitution owing to the individual victim named in the restitution order, excluding restitution owed to any insurance provider authorized under Title 48 RCW.
>
> RCW 13.50.260(4)(a).

If the court enters an order sealing the juvenile court record, "the proceedings in the case shall be treated as if they never occurred, and the subject of the records may reply accordingly to any inquiry about the events, records of which are sealed." RCW 13.50.260(6)(a).

Once sealed, the official juvenile court record, the social file, and other records relating to the case are "protected from examination by the public." *See* GR 15(4). Sealed files are not obliterated or made permanently irretrievable. The court and juvenile justice agencies retain their files, but future inspection is only allowed with permission of the court. RCW 13.50.260(7).

While the files and records related to the conviction are obscured from public view, criminal justice agencies are still able to access and review sealed juvenile information. The Administrative Office of the Court ensures that the Superior Court Judicial Information System provides prosecutors access to information on the existence of sealed juvenile records. RCW 13.50.260(8)(c). The Washington State Patrol provide criminal justice agencies access to sealed juvenile records information, including the nature and type of conviction that has been sealed. RCW 13.50.260(8)(d).

In addition, any subsequent adjudication of a juvenile offense, or charging of an adult felony offense automatically nullifies the sealing order. RCW 13.50.260(8)(a). Since the juvenile conviction is automatically unsealed by the charging of a new felony, should the individual be convicted of the new offense, the juvenile conviction would be included in the defendant's offender score. RCW 9.94A.525(2)(a) and (g).

Read in context of the statue as a whole, RCW 13.50.260 treats the convictions "as if they never occurred" for certain purposes, but not all purposes. The language directing that sealed juvenile records be "treated as if they never occurred" allows an individual to respond in the negative regarding his or her criminal history, and to prevent state agencies from giving out information on sealed juvenile records. But sealing a juvenile conviction has no effect on the availability of an individual's criminal history to the courts, prosecutors and law enforcement. See RCW 13.50.260(8). It simply cannot be said that the conviction "does not exist" for all purposes – clearly, it does.

b. Appellant's Reliance on Nelson Is Misplaced

Appellant relies on *Nelson v. State,* 120 Wn. App. 470, 85 P.3d 912 (2003) to argue that he is entitled to restoration of firearm rights after sealing his juvenile conviction. This reliance is misplaced. *Nelson* was decided before relevant statutory amendments to RCW 13.50.260. Therefore, *Nelson* doesn't apply.

In *Nelson v. State*, this Court held that an order expunging a juvenile criminal conviction meant that the petitioner was not prohibited from possessing a firearm under RCW 9.41.040. *Nelson*, 120 Wn. App. at 481 ("We conclude that RCW 9.41.040 does not make it unlawful for Nelson to carry a firearm so long as he has no convictions other than those

expunged."). The case deals explicitly with an order expunging a juvenile record under a prior version of RCW 13.50.260, not an order to seal a juvenile record under the current statute. *Nelson*, 120 Wn.App. at 473-74 (quoting the applicable order as having "vacated" and "expunged" the record).

First, it not clear that *Nelson* applied to Class A felony juvenile convictions. The *Nelson* opinion identifies Nelson's crimes as "serious offenses," but does not address whether the crimes fit into the exclusion from restoration of firearm rights in RCW 9.41.040. *Nelson*, 120 Wn.App at 473.

Appellant suggests that the Court should simply assume that Nelson's felonies were Class A felonies, but this argument is based on conjecture. Appellant's Opening Brief, Footnote 7. Many Class B felonies qualify as a "serious offense." For example, a conviction for Child molestation in the second degree, Promoting prostitution in the first degree, Drive-by shooting, certain violation of the uniform controlled substances act, and "any other class B felony offense with a finding of sexual motivation" are included in the definition of "serious offense." RCW 9.41.010(23)(a)-(p). Because the *Nelson* Court identified Nelson's crimes as "serious offenses" and noted other provisions of RCW 9.41.040, this

Court could infer that the *Nelson* Court reviewed all provisions of the respective statutes and determined that RCW 9.41.040(4) did not apply.

Second, *Nelson* involved a prior version of RCW 13.50.260. Prior to 2014, once a juvenile conviction was sealed, agencies could not view information about the sealed conviction because the WSP electronic criminal history database was prohibited from *"obtaining or including any information about the conviction"* in the database. *See former* RCW 13.50.050(13) (emphasis added). In 2014, the Legislature recodified RCW 13.50.050 into RCW 13.50.260. Laws of 2014, Ch. 175. The Legislature deleted the prohibition on retaining information about a sealed juvenile conviction. *Id.* And the Legislature added a requirement that the Administrative Office of the Court ensure that the Superior Court Judicial Information System provide prosecutors access to information on the *existence* of sealed juvenile records. Laws of 2014 Ch. 175, §4; RCW 13.50.260(8)(c). In 2015, the legislature added a requirement that the "Washington state patrol shall ensure that the Washington state identification system provides criminal justice agencies access to sealed juvenile records information." Law of 2015 Ch. 265, §3; RCW 13.50.260(8)(d).

Appellant claims that the Legislature's decision to retain the language allowing sealed juvenile conviction to be "treated as if they never

occurred," is acceptance of the *Nelson* decision. This is not the case. The rule of statutory construction involving legislative acquiescence is that "[t]he Legislature is deemed to acquiesce in the interpretation of the court if *no change* is made for a substantial time after the decision." *State v. Coe,* 109 Wn.2d 832, 846, 750 P.2d 208 (1988). As described above, the Legislature made significant changes to RCW 13.50.260 after *Nelson* was decided. The enhanced access to sealed juvenile convictions shows that the Legislature did not intend these convictions to be non-existent for all purposes.

Appellant acknowledges these legislative amendments, but fails to assign them any meaning. In fact, these legislative enactments render the *Nelson* analysis obsolete. In *Nelson,* the Court was presented with a statutory scheme that had the effect of completely screening sealed convictions from view. Once sealed, no officer or agency could obtain any information about the existence of a sealed juvenile conviction. As a result the Court was able to find that sealing Nelson's conviction entitled Nelson to RCW 9.41.040(3)'s rebuttable presumption that he had not been previously convicted of a crime. *Nelson*, 120 Wn. App. at 480.

Under the current statutory scheme, while sealed juvenile proceedings are to "be *treated* as if they never occurred," they nonetheless remain intact for certain purposes. RCW 13.50.260 allows access to sealed

proceedings to specific groups – including the courts, prosecutors, and law enforcement. *See* RCW 13.50.260(8)(c)-(d). RCW 13.50.260(8)(d) ensures that the sealed criminal record is still accessible to law enforcement—the agencies charged with reviewing Concealed Pistol License applications and Pistol Transfers. *See* RCW 9.41.070.

Here, because of the 2014 and 2015 statutory amendments expanding access to sealed juvenile records and conviction information, Appellant cannot take advantage of the rebuttable presumption that his convictions did not occur. Law enforcement has a record of the convictions. Further, the record is located in a databased that the Sheriff is required by statute to search any time an individual applies for a CPL. *See* RCW 9.41.070. The argument that sealed juvenile convictions must be treated for all purposes as if they do not exist, is a farce, because even the sealing statute does not treat them that way.

Unlike in 2003 when *Nelson* was decided, there are multiple records revealing the juvenile charges and dispositions. *Nelson*'s holding is limited to its facts and not applicable here.

c. Appellant's Reading of RCW 9.41.040 and RCW 13.50.260 Conflict with Principles of Statutory Construction

i. Principles of Statutory Construction

When interpreting a statute, a courts primary objective is "to discern and implement the intent of the legislature." *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 305, 268 P.3d 892 (2011) (citation omitted). "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *In re Pierce*, 173 Wn.2d 372, 378, 268 P.3d 907 (2011) (citation omitted). Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole, including related statutes. *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007); *State, Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 10-12, 43 P.3d 4 (2002). "If the plain language is subject to only one interpretation, [the court's] inquiry ends because plain language does not require construction." *HomeStreet, Inc. v. State, Dept. of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009) (citations omitted); *see also In re Schneider*, 173 Wn.2d 353, 363, 268 P.3d 215 (2011) ("[i]n the absence of ambiguity, we will give effect to the plain meaning of the statutory language") (citation omitted). "Where the plain language of the statute is subject to more than one

reasonable interpretation, it is ambiguous." *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007) (citation omitted). When a statute is ambiguous, a court may "resort to principles of statutory construction, legislative history, and relevant caselaw to assist [the court] in discerning legislative intent." *Cockle v. Department of Labor and Industries*, 142 Wn.2d 801, 808, 16 P.3d 583 (2001) (citation omitted). Courts "will not construe a statute in a manner that creates an absurd result." *In re Pierce*, 173 Wn.2d 372, 378, 268 P.3d 907 (2011) (citation omitted).

ii. Appellant's Reading Conflicts with the Plain Language of RCW 9.41.040 and RCW 13.50.260

The statutory provisions at issue in this case are plain on their face. RCW 9.41.040(4) specifically prohibits the restoration of firearm rights to individuals convicted of a Class A felony. RCW 13.50.260 allows a juvenile to seal past criminal convictions. Properly read, these two statutes do not conflict because they address two separate issues; firearm possession and sealing of files. The Court should reject Appellant's argument that RCW 13.50.260 creates a means for juvenile Class A felons to avoid application of RCW 9.41.040.

iii. Appellant's Reading of RCW 9.41.040 and RCW 13.50.260 Violates the General-Specific Rule

According to the rules of statutory construction, when there is a conflict between the language of statutes, the court should give preference

to the more specific statute. *See, e.g.*, *In re Estate of Kerr*, 134 Wn.2d 328, 335, 949 P.2d 810 (1998) (specific statute will prevail over a general statute -- "the general-specific rule").

Assuming that the court found a conflict, RCW 13.50.260 is a general statute for sealing juvenile records. RCW 9.41.040 is a specific statute that defines the circumstances under which the right to possess a firearm may be lost and regained. The general-specific rule of construction favors the more specific statute (here, RCW 9.41.040) over the more general one. Thus, RCW 13.50.260 should not be read to provide an alternative statutory basis for restoring firearm possession rights.

RCW 9.41.040 is the exclusive means to regain firearm rights. The court should not accept Appellant's invitation to render RCW 9.41.040's bar to his regaining firearm rights meaningless.

iv. Appellant's Reading of RCW 9.41.040 Conflicts with Legislative History

As noted above, if this Court finds that RCW 9.41.040 and RCW 13.50.260 are ambiguous, the Court may use the legislative history to determine the Legislature's intent. While the language is plain and reference to legislative history therefore unnecessary, Appellant's reading of the statutes is not supported by legislative history.

RCW 9.41.040 specifically addresses the unlawful possession of firearms by certain persons. In 1994, RCW 9.41.040 was reenacted and amended. 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." Violence Reduction Programs Act, ch. 7, § 101,

1994 Wash. Laws 1st Spec. Sess. 2196, 2197. The legislature also found "violence is abhorrent to the aims of a free society and that it can not be tolerated." *Id.* Accordingly, the legislation attempted to reduce "the unlawful use of and access to firearms." *Id.*

RCW 9.41.040(4) was again amended as part of the Hard Time for Armed Crime Act in 1995. Laws of 1995, ch. 129, § 16. The findings explained that the law as it previously stood was not adequately deterring the possession of firearms by felons. *Id.* The amendments to RCW 9.41.040 provided that persons convicted of a Class A felony or sex offense, such as Appellant, would not be able to petition for a restoration of their firearm rights.

Accordingly, allowing Appellant to possess firearms would be contrary to the intention of the legislature to hinder the possession of firearms by individuals convicted of Class A felonies.

v. Appellant's Interpretation of RCW 9.41.040 and RCW 13.50.260 Leads to Practical Difficulties and Absurd Results

The interpretation of RCW 9.41.040 and RCW 13.50.260 that Appellant requests would lead to practical difficulties and absurd results. In construing a statute, the Court should avoid a reading that produces absurd results.

Appellant's approach ignores the practical difficulties that would result from treating RCW 13.50.260 as a firearm restoration statute. If an individual who has a sealed juvenile conviction is ever adjudicated as a juvenile or charged with a new felony the sealed file is *automatically*

unsealed. RCW 13.50.260(8). Does this mean that firearm rights are also automatically revoked? Who is required to provide notice of the revocation to law enforcement, the defendant, or other necessary parties? What will happen to any Concealed Pistol License issued to the defendant?

Presumably, under this system, defendants simply bear the risk that they will not be arrested and charged with unlawful possession of a firearm. This risk is untenable. The ability to have notice of one's rights is as important to individuals as it is to law enforcement tasked with enforcing the law.

The process of revoking and restoring firearm rights is based on principles of notice and due process. Installing a vacillating system of revocation and restoration of firearm rights -- where one day you have them and one day you don't -- without any judicial process, is absurd.

vi. Appellant's Interpretation Conflicts with the Opinion of the Washington State Attorney General.

In 2002, the Attorney General of Washington issued an opinion on the ability of persons convicted of Class A felonies to restore their firearm rights. While not controlling, opinions of the Attorney General are entitled to considerable weight. *Washington Fed'n of State Employees, Council 28, AFL-CIO v. Office of Fin. Mgmt.*, 121 Wn. 2d 152, 164, 849 P.2d 1201 (1993).

The Attorney General was asked, "If a person is convicted of a Class A felony, or one of the enumerated crimes listed in RCW 9.41.040(4), is there any statutory procedure for restoring such a person's

right to possess a firearm?" Op. Att'y Gen. 2002 No. 4. The Attorney General responded:

> From the wording of this question, we understand its meaning to be: For persons who are not eligible to petition a court for restoration of firearm possession rights because they were convicted of one or more of the crimes enumerated in RCW 9.41.040(4), is there any other procedure for regaining these rights? From the discussion above relating to your first question, we conclude that there is only one potential avenue of redress under current statutory law. That is pardon by the governor with a specific finding of rehabilitation or of innocence. As noted earlier, persons in this category are not defined as "convicted" for purposes of RCW 9.41.040 and therefore are no longer within the statute's prohibition.
>
> *Id.*

In other words, the Washington Attorney General has concluded that under Washington statutes there is no method for restoring firearm rights, other than a pardon, for those offenses enumerated as exclusions in RCW 9.41.040(4).

2. <u>Appellant is Prohibited From Possessing a Firearm By Federal Law – 18 U.S.C § 922(g)(1).</u>

In addition to being prohibited by Washington state law, Appellant is also federally prohibited from possessing a firearm. The federal Gun Control Act makes it unlawful for any person convicted of a felony crime to own or possess a firearm. 18 U.S.C § 922(g)(1). What constitutes a conviction of such a crime is determined in accordance with the law of the

jurisdiction in which the proceedings were held. 18 U.S.C § 921(a)(20). In Washington, a juvenile felony adjudication is considered a "conviction" for purposes of Washington law and the federal Gun Control Act. RCW 9.41.040(3) provides in relevant part:

> ... [A] person has been "convicted", whether in an adult court *or adjudicated in a juvenile court*, at such time as a plea of guilty has been accepted, or a verdict of guilty has been filed, notwithstanding the pendency of any future proceedings including but not limited to sentencing or disposition, post-trial or post-fact-finding motions, and appeals. Conviction includes a dismissal entered after a period of probation, suspension or deferral of sentence, and also includes equivalent dispositions by courts in jurisdictions other than Washington state.
>
> (emphasis added).

Once "convicted," under federal law, the conviction remains a firearm prohibitor until the "conviction has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." 18 U.S.C § 921(a)(20).

Appellant has not argued that the sealing pursuant to RCW 13.50.260 pardons or restores Appellant's civil rights. Appellant's

argument is that the order sealing a juvenile record "expunges or sets aside"[6] an otherwise prohibiting felony conviction. Appellant is wrong. Federal Courts have consistently held that in order to qualify as an "expungement or set aside," the state procedure must "completely remove the effects of the conviction in question." *Wyoming ex rel. Crank v. United States,* 539 F.3d 1236, 1245 (10th Cir. 2008). Because sealing pursuant to RCW 13.50.260 does not remove all effects of the conviction, it does not qualify as an expungement or set aside under federal law.

In *Wyoming ex rel. Crank v. United States*, supra, the Tenth Circuit found that the Wyoming statute that "expunged" convictions of domestic violence misdemeanors for the sole purpose of firearm restoration, but did not destroy the conviction records, and continued to allow law enforcement agencies to access those records for criminal enforcement purposes, was too limited to qualify as a 18 U.S.C § 921(a)(20) "expungement." *Crank* at 1246. The Court held that Congress intended the state procedure to "completely remove the effects of a prior misdemeanor conviction" and that the Wyoming statute at issue failed to do so. *Crank* at 1249.

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[6] "Expungement" and "set aside" mean the same thing for purposes of the federal ban. *Wyoming ex rel. Crank v. United States,* 539 F.3d 1236, 1244-1245 (10th Cir. 2008).

In reaching its decision, *Crank* relied in part on *Jennings v. Mukasey,* 511 F.3d 894 (9th Cir.2007), a Ninth Circuit decision. In *Jennings*, a firearms dealer sought to reverse the denial of his application for a federal firearms license due to his prior criminal conviction. The Ninth Circuit found that the California statute that permitted "expunged" convictions to be taken into account in any subsequent prosecution did not "expunge" the petitioner's conviction for purposes of 18 U.S.C. 921(a)(33). The court in *Jennings* explained because the state court relief granted from the prior conviction was not complete—just as the sealing order here does not grant complete relief—it did not meet the terms of the federal statute. *Jennings*, at 900-901.

Although both *Crank* and *Jennings* dealt with domestic violence convictions rather than felony convictions, 18 U.S.C. § 921(a)(33)(B) is substantially similar to 18 U.S.C. § 921(a)(20). *See also Crank*, 539 F.3d at 1246 n.11. Thus, the *Crank* and *Jennings* decisions are equally applicable to the ban for felony convictions, like the one at issue in this case.

18 U.S.C. § 921(a)(20) requires that a state procedure completely remove the effects of a felony conviction. At best, the sealing provided by RCW 13.50.260 is partial. If the individual re-offends, the sealed conviction becomes unsealed. RCW 13.50.260(8). And like in *Crank* and *Jennings*, the conviction is not destroyed, remains available to law enforcement and is

automatically unsealed by the charging of a new felony. Should a defendant be convicted of the new offense, the juvenile felony is included in the defendant's offender score. RCW 9.94A.525(2)(a) and (g). Sealing a conviction pursuant to RCW 13.50.260 fails to meet the 18 U.S.C. § 921(a)(20) standard for expungement.

Because Appellant's felony convictions are sealed, but not "expunged or set aside," his Class A felony convictions still prohibit him for possessing a firearm under federal law.[7]

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[7] On August 29, 2017, the United States District Court Western District of Washington issued a summary judgment order in *Siperek v. United States*, No. C17-5169 BHS, 2017 WL 3721775 (W.D. Wash. Aug. 29, 2017) finding that a sealed Class A felony conviction was a "conviction" under Washington law, regardless of whether it was sealed, but that sealing constituted an "expungement" under federal law. This decision holds no legal precedent not binding on this court, but may be entitled to great weight. *Delex Inc. v. Sukhoi Civil Aircraft Co.*, 193 Wn. App. 464, 473, 372 P.3d 797 (2016). The FBI may still appeal.

Furthermore, the trial court's decision in *Siperrek* is in error because it clearly conflicts with *Crank* and *Jennings*. The decision also conflicts with the plain language of RCW 13.50.260 is not an expungement. General Rule 15(3) treats "[a] motion or order to expunge shall be treated as a motion or order to destroy" and "To destroy means to *obliterate* a court record or file in such a way as to make it permanently irretrievable." The plain language of RCW 13.50.260 clearly shows that sealing a juvenile conviction does not "obliterate" or "destroy" the conviction.

D. The Sheriff is Required to Deny a CPL to Any Prohibited Person.

RCW 9.41.070(1)(a) requires the Sheriff's Office to deny a CPL to any individual "ineligible to possess a firearm under the provisions of RCW 9.41.040 or 9.41.045, or is prohibited from possessing a firearm under federal law;."

Once the Sheriff's Office identified Appellant's two prohibiting Class A felony convictions it was required by law to deny the CPL application. Thus, the Sheriff' fulfilled his legal obligation and there is no basis to issue a writ of mandamus.

E. Appellant is Not Entitled to Attorney's Fees

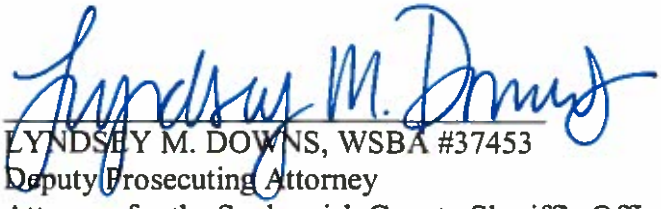
Only a person granted a writ of mandamus is entitled to recover reasonable attorney's fees and costs. RCW 9.41.0975. Since the Sheriff acted appropriately by denying Appellant's CPL, a fee award is not warranted.

IV. CONCLUSION

Both state a federal law prohibit Appellant from possessing a firearm. The Snohomish County Sheriff properly performed his legal duty to deny an ineligible person a CPL. Appellant cannot meet his burden for issuance of a writ of mandamus. This Court should uphold the trial court's decision and dismiss this action.

Respectfully submitted on October 3, 2017.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 

LYNDSEY M. DOWNS, WSBA #37453
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Attorney for the Snohomish County Sheriff's Office

DECLARATION OF SERVICE

I, Kathy Murray, hereby certify that on October 3, 2017, I served a true and correct copy of the foregoing Response Brief of Snohomish County Sheriff upon the person/persons listed herein by the following means:

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

SIGNED at Everett, Washington, this 3rd day of October, 2017.

Print: Kathy Murray
Legal Assistant

SNOHOMISH COUNTY PROSECUTING ATTORNEY - MUNI

October 03, 2017 - 4:13 PM

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