

FILED
SUPREME COURT
STATE OF WASHINGTON
11/30/2018 1:08 PM
BY SUSAN L. CARLSON
CLERK

NO. 96072-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JERRY L BARR, III

Respondent,

v.

SNOHOMISH COUNTY SHERIFF,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

MARK K. ROE
Prosecuting Attorney

LYNDSEY M. DOWNS, WSBA No. 37453
Deputy Prosecuting Attorney
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Avenue
Everett, Washington 98201-4046
(425)388-6330 Fax: (425)388-6333
ldowns@snoco.org

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ISSUES PRESENTED.....1

III. FACTS OF THE CASE.....1

IV. ARGUMENT2

 A. A JUVENILE CONVICTION SEALED PURSUANT TO RCW
 13.50.260 MUST BE CONSIDERED A “CONVICTION” FOR
 PURPOSES OF THE STATE FIREARM STATUTE, RCW 9.41.040.....2

 1. A Plain Reading Of RCW 9.41.040(3)’s Definition Of “Conviction”
 Includes Sealed Juvenile Convictions.2

 2. Other Washington Cases Interpreting Juvenile Convictions And
 Firearms Have Viewed Juvenile Convictions As “Convictions.”3

 3. RCW 13.50.260 Does Not Expunge A Juvenile Conviction.....4

 4. Nelson Does Not Control The Outcome Of This Case.....6

 5. The Court Is Required To Harmonize RCW 13.50.260 And RCW
 9.41.040.9

 i. The citizens of Washington and the Legislature have stressed the
 importance of reducing access to and unlawful use of firearms by felons. 10

 ii. The Legislature has stressed the importance of providing confidentiality
 to juvenile records.....13

 iii. Barr’s interpretation of RCW 13.50.260 and RCW 9.41.040 fails to
 harmonize the policy goals of both statutes.....13

 iv. The Sheriff’s interpretation of RCW 13.50.260 and RCW 9.41.040
 effectuates the statutes’ legislative intent14

 6. RCW 9.41.040 Is Constitutional As Applied To Juveniles.15

B. A JUVENILE CONVICTION SEALED PURSUANT TO RCW 13.50.260 MUST BE CONSIDERED A “CONVICTION” FOR PURPOSES OF THE FEDERAL FIREARM STATUTE.16

1. Washington Law Treats Juvenile Adjudications As “Convictions.”16

2. Barr’s Convictions Have Not Been Expunged.17

i. In order to qualify as an “expungement” the state procedure must “completely remove the effects of the conviction in question.”17

ii. RCW 13.50.260 does not completely remove the effects of the conviction because the record of the conviction is not destroyed, law enforcement agencies can access the conviction, and the conviction can be used in any subsequent prosecution.....17

V. CONCLUSION.....20

TABLE OF AUTHORITIES

WASHINGTON CASES

Anderson v. State, Dep't of Corr., 159 Wn.2d 849, 154 P.3d 220 (2007) .10
Barr v. Snohomish Cty. Sheriff, 4 Wn. App.2d 85, 428 P.3d 1171 (2018).3,
6, 8, 11, 19
Elovich v. Nationwide Ins. Co., 104 Wn.2d 543, 707 P.2d 1319 (1985).....3
Lakemont Ridge Homeowners Ass'n v. Lakemont Ridge Ltd., 156 Wn.2d
696, 131 P.3d 905 (2006).....10
Nelson v. State, 120 Wn. App. 470, 85 P.3d 912 (2003).....3, 6, 7, 8
Safeco Ins. Companies v. Meyering, 102 Wn.2d 385, 687 P.2d 195 (1984)
.....9, 10
State v. Cofield, 403 P.3d 943 (2017).....10
State v. Frame, No. 50014-1-II, 2018 WL 33607434
State v. Gilkinson, 57 Wn. App. 861, 790 P.2d 1247 (1990)8
State v. Hunter, 147 Wn. App. 177, 195 P.3d 556 (2008), *rev'd on other*
grounds15
State v. J.P., 149 Wn.2d 444, 69 P.3d 318 (2003).....10
State v. Landrum, 66 Wn. App. 791, 832 P.2d 1359 (1992)10
State v. R.P.H., 173 Wn.2d 199, 265 P.3d 890 (2011)4, 10
State v. Rawls, 114 Wn. App. 719, 60 P.3d 113 (2002)7
State v. Schmidt, 143 Wn.2d 658, 23 P.3d 462 (2001).....15
State v. T.K., 139 Wn.2d 320, 987 P.2d 63 (1999).....8
State v. Tejada, 93 Wn. App. 907, 971 P.2d 79 (1999).....10
Weyerhaeuser Co. v. Tri, 117 Wn.2d 128, 814 P.2d 629 (1991)10

FEDERAL CASES

Jennings v. Mukasey, 511 F.3d 894 (9th Cir. 2007)18, 19, 20
Siperek v. United States, 270 F. Supp. 3d 1242 (W.D. Wash. 2017) ..17, 20
Wyoming ex rel. Crank v. United States, 539 F.3d 1236 (10th Cir. 2008)
.....17, 18, 19

OTHER CASES

People v. Frawley, 82 Cal. App. 4th 784, 98 Cal. Rptr. 2d 555 (2000)18

WASHINGTON STATUTES

Laws of 1979, ch. 155, § 8.....13
Laws of 1992, ch. 205, § 101(2).....11
Laws of 1992, ch. 205, § 118.....11
Laws of 1994, ch. 7, § 101.....12, 15
Laws of 1995, ch. 129, § 16.....12
Laws of 1996, ch. 295, § 2.....12
Laws of 1997, ch. 338, § 40.....7, 9

Laws of 2001, ch. 49, § 1–2.....	8, 9
Laws of 2014, ch. 175, §4.....	7
Laws of 2015, ch. 261, §8.....	9
Laws of 2015, ch. 265, § 3(6).....	7
Laws of 2015, ch. 265, § 3(6)(c)	7
RCW 9.41	9, 11, 13
RCW 9.41.040	passim
RCW 9.41.040(3).....	2, 3, 4, 17
RCW 9.41.040(4).....	2, 3, 4, 12
RCW 9.41.070(4)(a).....	4
RCW 9.41.070	3, 6, 8, 19
RCW 9.94A.525(2)(a)	6, 19
RCW 9.94A.525(2)(g).....	6, 19
RCW 13	2
RCW 13.50	13
RCW 13.50.050	7, 8, 9, 13
RCW 13.50.050(10).....	7
RCW 13.50.050(11).....	7, 8
RCW 13.50.050(12).....	7
RCW 13.50.050(13).....	7
RCW 13.50.050(16).....	7
RCW 13.50.050(17).....	7
RCW 13.50.050(18).....	7
RCW 13.50.050(19).....	7
RCW 13.50.260	passim
RCW 13.50.260(6)(a)	5
RCW 13.50.260(8).....	19
RCW 13.50.260(8)(c).....	6, 19
RCW 13.50.260(8)(d).....	6, 19

COURT RULES

GR 14.1(a)	4
GR 15(b)(4)	5
GR 15(3).....	4

OTHER AUTHORITIES

18 U.S.C. § 921(a)(20).....	17
18 U.S.C. § 922(g)(1)	16, 20
18 U.S.C. § 921(a)(20)	16, 17
18 U.S.C. § 921(a)(33)	18
18 U.S.C. § 925(c).....	3
5 Oxford English Dict. (2d ed.1989)	4

S. Rep. No. 1097, 90th Cong., 2d Sess. 28 (1968)16
Webster's 9th New Collegiate Dict. (1984)4

I. INTRODUCTION

By arguing that RCW 13.50.260 expunges juvenile convictions, Jerry L. Barr seeks to bypass the statutory process to restore firearms rights set forth in RCW 9.41.040. The Court of Appeals, in ruling for Barr, erroneously held that sealing Barr’s convictions resulted in an “expungement” of the convictions. The Court of Appeals thereby expanded the meaning of RCW 13.50.260 and rendered portions of RCW 9.41.040 meaningless.

This Court should reverse and restore the statutory scheme as the Legislature intended it—giving meaning to firearms restoration provisions that protect the public from serious felons and to provisions that ensure the confidentiality of juvenile records.

II. ISSUES PRESENTED

1. Is a sealed juvenile conviction considered a “conviction” for purposes of the state firearm statute?
2. Is a sealed juvenile conviction considered a “conviction” for purposes of the federal firearm statute?

III. FACTS OF THE CASE

The facts of this case are detailed in the Sheriff’s Petition for Review, filed with this Court on July 12, 2018.

IV. ARGUMENT

A. A JUVENILE CONVICTION SEALED PURSUANT TO RCW 13.50.260 MUST BE CONSIDERED A “CONVICTION” FOR PURPOSES OF THE STATE FIREARM STATUTE, RCW 9.41.040.

1. A Plain Reading Of RCW 9.41.040(3)’s Definition Of “Conviction” Includes Sealed Juvenile Convictions.

RCW 9.41.040(3) defines “conviction”¹ for purposes of firearms possession. 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.

A “convicted” individual may nevertheless remove his/her conviction from the firearms definition of “conviction” through the processes set forth in RCW 9.41.040(3) and RCW 9.41.040(4). The first of these requires that:

... 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 or the conviction or disposition has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

¹ 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.

RCW 9.41.040(3).

The second of these, RCW 9.41.040(4), allows a court to restore firearm rights. Barr cannot seek restoration pursuant to RCW 9.41.040(4), because it explicitly prohibits judicial restoration of firearm rights to a person convicted of a class A felony.² Barr seeks to bypass this provision.

Simply put, Washington’s definition of conviction for firearms purposes applies to a person convicted of certain crimes until “the person has been granted relief from disabilities by the secretary of the treasury under 18 U.S.C. Sec. 925(c), or RCW 9.41.040 (3) or (4) applies.” RCW 9.41.070. By its plain language, this includes sealed juvenile convictions.

2. Other Washington Cases Interpreting Juvenile Convictions And Firearms Have Viewed Juvenile Convictions As “Convictions.”

Washington Courts’ jurisprudence supports the reading that juvenile convictions are convictions under the firearm restoration statute. In *R.P.H.*, this Court held that an order relieving a juvenile convicted of

² The Attorney General reached the same conclusion in Op. Att’y Gen. 2002 No. 4. While the Attorney General’s opinion is not controlling, it can be given considerable weight. *Elovich v. Nationwide Ins. Co.*, 104 Wn.2d 543, 550, 707 P.2d 1319 (1985). The Court of Appeals discounted the Attorney General’s opinion as “not useful” because it did not have the benefit of the *Nelson v. State* decision. *Barr v. Snohomish Cty. Sheriff*, 4 Wn. App.2d 85, 105, 428 P.3d 1171 (2018). There is no dispute however, the statutes analyzed in *Nelson* were available to the Attorney General at the time of the opinion. Nonetheless, the Attorney General did not reach the same conclusion as *Nelson*.

Rape of a Child from an obligation to register as a sex offender constituted an “equivalent procedure” under RCW 9.41.040(3) because it was based on a finding of rehabilitation.³ *State v. R.P.H.*, 173 Wn.2d 199, 203-05, 265 P.3d 890, 892-93 (2011).

Further, in *State v. Frame*, No. 50014-1-II, 2018 WL 3360743, at ___ (Wash. Ct. App. July 10, 2018) (unpublished), the court held that “the juvenile court erred in granting Frame’s petition because RCW 9.41.040(4)(a) generally prohibits a person convicted of a sex offense from petitioning for the restoration of firearm rights and *no exception to that prohibition applies here.*” (emphasis added); See GR 14.1(a).

3. RCW 13.50.260 Does Not Expunge A Juvenile Conviction.

Expungement, if granted, results in the complete destruction of a criminal record. Washington General Rule 15(3) provides that “[a] motion or order to expunge shall be treated as a motion or order to destroy.” “To destroy means to *obliterate* a court record or file in such a way as to make it permanently irretrievable.” *Id.* Additionally, the dictionary definition of “expunge” means “to strike out, obliterate ... efface completely: DESTROY” (Webster’s 9th New Collegiate Dict. (1984), p. 439) or “blot out, erase ... wipe out, ... annihilate, annul ... put an end to.” 5 Oxford English Dict. (2d ed.1989, p. 588). After expungement, all traces of the

³ RCW 13.50.260 contains no finding of rehabilitation that would allow this

criminal record vanish, and no indication is left behind that information has been removed.

Sealing does not destroy a record but prohibits the public from accessing it. “To seal means to protect from examination by the public and unauthorized court personnel. A motion or order to delete, purge, remove, excise, erase, or redact shall be treated as a motion or order to seal.” GR 15(b)(4). Unlike an expungement, sealing does not completely obliterate a record. Sealing removes the record from the public’s view and restricts--but does not eliminate--access by a limited group of government agencies.

The Court of Appeals decision confuses “expungement” with “sealing.” RCW 13.50.260 provides convicted juveniles with the opportunity to seal, but not expunge, their records. Once sealed “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). In practice, this means that a juvenile with a sealed conviction may, without committing perjury, answer “no” to a question asking whether he or she has a felony record. The records of the conviction cannot be located or viewed by the public, potential employers, landlords, or schools.

Court to view sealing as an “equivalent procedure.”

Sealed records are accessed by criminal justice agencies, however.⁴ Further, any subsequent adjudication of a juvenile offense, or charging of an adult felony offense, automatically nullifies the seal, allowing the conviction to be seen by the public and used to calculate the defendant's offender score if convicted again. RCW 9.94A.525(2)(a) and (g).

In sum, the plain language of RCW 13.50.260 shows that sealing a juvenile conviction, and the direction that the sealed conviction be treated as if it "never occurred," is not equivalent to an "expungement."

4. Nelson Does Not Control The Outcome Of This Case.

Barr and the Court of Appeals mistakenly rely on *Nelson v. State*, 120 Wn. App. 470, 85 P.3d 912 (2003), to conclude that sealing a juvenile conviction pursuant to RCW 13.50.260 results in an "expungement" and de facto restoration of firearm rights. *Barr Supp. Brief* at 1; *Barr v. Snohomish Cty. Sheriff*, 4 Wn. App.2d 85, 103, 428 P.3d 1171 (2018). The 1997, 2014, and 2015 amendments to RCW 13.50.260 belie this interpretation, demonstrating the Legislature's continued differentiation between sealing and expungement.

⁴ The Superior Court Judicial Information System (JIS), available to courts, prosecutors and clerks, includes sealed juvenile convictions. RCW 13.50.260(8)(c). The Washington State Patrol (WSP) criminal history database also includes sealed juvenile convictions. RCW 13.50.260(8)(d). The WSP database is available to all state and federal law enforcement agencies. The WSP database is the same database that the Sheriff is required by statute to search any time an individual applies for a concealed pistol license. *See* RCW 9.41.070.

Before 1997, former RCW 13.50.050 provided a process to “expunge” a juvenile criminal record. A juvenile could have his or her record sealed after two years, and destroyed when the juvenile reached 23 years of age. RCW 13.50.050(10)-(13), (16)-(17), (19) (1992). A person 18 years of age or older whose criminal history consisted of only one referral for diversion could have his or her record destroyed if two years had elapsed since completion of the diversion agreement. RCW 13.50.050(18)(1992).

When a conviction was expunged, it ceased to exist and could not be used for any purpose. *Nelson*, 120 Wn. App. 470, 479, citing *State v. Rawls*, 114 Wn. App. 719, 723, 60 P.3d 113, 115 (2002). In 1997 the Legislature eliminated nearly all avenues for expungement of juvenile criminal convictions. Laws of 1997, ch. 338, § 40. Instead, as discussed above, the Legislature allowed sealing.

As the Legislature all but eliminated expungement, it increased access to juvenile criminal conviction for law enforcement agencies through amendments in 2014 and 2015. Laws of 2014, ch. 175, §4 (allowing prosecutors to access sealed juvenile records; Laws of 2015, ch. 265, § 3(6)(including sealed juvenile criminal history in the WSP database); Laws of 2015, ch. 265, § 3(6)(c)(allowing Department of Licensing access and ability to release information related to sealed

convictions to comply with federal law and regulation). Notably, the legislature did not change the Sheriff's duties pursuant to RCW 9.41.070 at the same time. These amendments were not addressed, nor could they have been, by *Nelson*.

The 1997 amendment eliminating expungement did not apply to *Nelson* because of the particular timeline of events in his case.⁵ *Id.* *Nelson* therefore was able to obtain an order that provided that “the information, judgment and record against Jeffrey C. Nelson are sealed and expunged.” *Nelson*, 120 Wn. App. 470, 474. Any sealing petition filed after July 1997, such as the one at issue in this case, is not an expungement because it is subject to the 1997, 2001, 2014 and 2015 amendments.⁶

Barr argues that the legislature has implicitly assented to *Nelson's* reasoning by not amending the sealing statute in response. *Barr Supp. Brief* at 5-10; *Barr*, 4 Wn. App 2d 85, 101 (2018). Legislative

⁵ *Nelson* received an order sealing and destroying/expunging his juvenile record pursuant to RCW 13.50.050(11)(1992) in April 2000. *Nelson*, 120 Wn. App. 470, 473. *Nelson* was allowed to obtain expungement under the pre-1997 version of RCW 13.50.050 because he had completed the statutory conditions for sealing and expungement before July 1997, when the 1997 legislation took effect. *Nelson*, 120 Wn. App. 470, 473 (2003) n.3; *See also*, *State v. T.K.*, 139 Wn.2d 320, 987 P.2d 63 (1999). In 2001, the Legislature clarified that the 1997 amendment applied to all petitions to seal filed on or after July 1, 1997. Laws of 2001, ch. 49, § 1-2.

⁶ Absent a specific statutory grant of authority, a court lacks authority to order expungement of a defendant's criminal record. *State v. Gilkinson*, 57 Wn. App. 861, 866, 790 P.2d 1247 (1990).

acquiescence did not occur here. First, *Nelson*'s analysis applied to a pre-1997 version of RCW 13.50.050, so unlike in *R.P.H.*, the Legislature had already amended RCW 13.50.050 twice and removed the expungement process used in *Nelson*. See Laws of 1997, ch. 338, § 40; Laws of 2001, ch. 49, § 1–2; Laws of 2015, ch. 261, §8. Second, the Legislature has since amended RCW 13.50.260 to expand criminal justice agency access to sealed records. In light of these considerations, and particularly in the context of the robust statutory scheme for firearm restoration found in chapter 9.41 RCW, legislative acquiescence has not occurred.⁷

The Court of Appeals focused exclusively on the requirement that convictions be “treated as if they never occurred,” and failed to adequately consider the 1997, 2001, 2014, or 2015 legislative amendments. If the Court of Appeals had properly read the “as if they never occurred” language in the context of the subsequent statutory amendments, it would have concluded, correctly, that *Nelson* is inapplicable.

5. The Court Is Required To Harmonize RCW 13.50.260 And RCW 9.41.040.

Where statutes relate to the same subject matter, the Court “must read them as a unified whole to the end that a harmonious statutory scheme evolves which maintains the integrity of the respective statutes.”

⁷ If this Court does find legislative acquiescence, it “is not conclusive, but is merely one factor to consider” when interpreting a statute. *Safeco Ins. Companies*

Anderson v. State, Dep't of Corr., 159 Wn.2d 849, 861, 154 P.3d 220, 226 (2007); *State v. Tejada*, 93 Wn. App. 907, 911, 971 P.2d 79 (1999).

“When two statutes apparently conflict, the rules of statutory construction direct the court to, if possible, reconcile them so as to give effect to each provision.” *State v. Landrum*, 66 Wn. App. 791, 796, 832 P.2d 1359 (1992). “Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *State v. Cofield*, 403 P.3d 943, 946 (2017).

Statutory interpretation and construction is a question of law subject to de novo review. *R.P.H.*, 173 Wn.2d 199, 202 (2011). The primary duty in interpreting any statute is to discern and implement the intent of the legislature. *Lakemont Ridge Homeowners Ass'n v. Lakemont Ridge Ltd.*, 156 Wn.2d 696, 698, 131 P.3d 905 (2006). The starting point must always be the statute’s plain language and ordinary meaning. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

i. The citizens of Washington and the Legislature have stressed the importance of reducing access to and unlawful use of firearms by felons.

A fundamental rule of statutory construction is that the court must interpret legislation consistently with its stated goals. *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 140, 814 P.2d 629 (1991). The Court of Appeals

v. Meyering, 102 Wn.2d 385, 392, 687 P.2d 195 (1984).

erroneously concludes that there is no “clear indication from the legislature demanding” that sealed convictions be treated as “convictions” under RCW 9.41.040. *Barr*, 4 Wn. App.2d 85, 103. In fact, the Legislature and the people of Washington have amended chapter 9.41 RCW numerous times, each time stressing the importance of reducing unlawful use and access to firearms by convicted persons.

In 1992, the legislature amended chapter 9.41 RCW to extend the prohibition on possessing firearms to certain juveniles. Laws of 1992, ch. 205, § 118. The Legislature’s intent was to establish “a system capable of having primary responsibility for, being accountable for, and responding to the needs of youthful offenders” and “that youth, in turn, be held accountable for their offenses and that both communities and the juvenile courts carry out their functions consistent with this intent.” Laws of 1992, ch. 205, § 101(2). To effectuate these policies, the Legislature declared the “handling of juvenile offenders by communities whenever consistent with public safety” an important purpose of this chapter. *Id.*

In 1994, the Legislature reenacted and amended RCW 9.41.040 to provide that both adults and juveniles who had previously been convicted of a serious offense (including class A felonies) were prohibited from possessing any firearm. The Legislature made abundantly clear:

The legislature finds that the increasing violence in our society causes great concern for the immediate health and safety of our citizens and our social institutions. Youth violence is increasing at an alarming rate and young people between the ages of fifteen and twenty-four are at the highest risk of being perpetrators and victims of violence. Additionally, random violence, including homicide and the use of firearms, has dramatically increased over the last decade.

The legislature finds that violence is abhorrent to the aims of a free society and that it can not be tolerated. *State efforts at reducing violence must include changes in criminal penalties, reducing the unlawful use of and access to firearms, increasing educational efforts to encourage nonviolent means for resolving conflicts, and allowing communities to design their prevention efforts.*

...

It is the immediate purpose of [this chapter] to ... (3) increase the severity and certainty of punishment for youth and adults who commit violent acts.

Laws of 1994, 1st Sp. Sess., ch. 7, § 101 (emphasis added).

In 1995, RCW 9.41.040(4) was amended as part of the Hard Time for Armed Crime Act, Initiative 159. Laws of 1995, ch. 129, § 16. The “Findings and Intent” included the statement that “[c]urrent law [did] not sufficiently stigmatize the carrying and use of deadly weapons by criminals.” *Id.*, at § 1. In 1996, the Legislature again amended RCW 9.41.040, expanding the list of firearm prohibiting offenses to “any felony.” Laws of 1996, ch. 295, § 2.

ii. The Legislature has stressed the importance of providing confidentiality to juvenile records.

The requirement that sealed juvenile proceedings “be treated as if they never occurred” was contained in the Legislature’s original enactment of RCW 13.50.050 in 1979, prior to the application of chapter 9.41 RCW to juvenile offenses. Laws of 1979, ch. 155, § 8.

The legislative history of RCW 13.50.260 reveals the Legislature’s intent to hold juveniles accountable for their actions and to provide enhanced confidentiality for juvenile court records, promoting rehabilitation and reintegration into society. When it amended chapter 13.50 RCW in 2014, the Legislature found that juvenile court records should be closed because “[w]hen juvenile court records are publicly available, former juvenile offenders face substantial barriers to reintegration, as they are denied housing, employment, and education opportunities on the basis of these records.” *Id.* Conspicuously absent from the legislative history of RCW 13.50.050 or RCW 13.50.260 is any suggestion that the Legislature intended for sealing criminal conviction records to result in the restoration of firearm rights.

iii. Barr’s interpretation of RCW 13.50.260 and RCW 9.41.040 fails to harmonize the policy goals of both statutes.

Barr’s interpretation of RCW 13.50.260 ignores the legislative history of both statutes and degrades chapter 9.41 RCW’s purpose and

application. Under Barr's theory, any juvenile convicted of a criminal offense (except rape first degree, rape second degree, or indecent liberties actually committed with forcible compulsion) would simply seal his or her conviction to regain access to firearms, a result prohibited by RCW 9.41.040 and contrary to the policy goals of the statute.

Barr's position rewrites the firearm restoration statute by stripping out its application to juveniles. The legislative amendments to RCW 9.41.040, however, make clear that the Legislature intended those provisions to apply to juveniles. This Court must assume that the Legislature meant precisely what it said.

iv. The Sheriff's interpretation of RCW 13.50.260 and RCW 9.41.040 effectuates the statutes' legislative intent.

The interpretation that best effectuates the legislative intent of RCW 13.50.260 and RCW 9.41.040, is that the entry of a sealing order has no effect—either direct or collateral—on the separate process for restoration of firearms rights. Harmonizing the sealing statute and the firearms restoration statute is the only way to give full expression to the policies underlying both legislative mandates. It allows juveniles to maintain the confidentiality of their records and avoid the “substantial barriers to reintegration ... as they are denied housing, employment, and education opportunities on the basis of these records” without sacrificing

the public safety goal of protecting the public from firearm violence. Laws of 2014, Ch. 175, §1. Laws of 1994, 1st Sp. Sess., ch. 7, § 101.

6. RCW 9.41.040 Is Constitutional As Applied To Juveniles.

Barr, for the first time, argues that “affirming the Court of Appeals allows the Court to avoid difficult constitutional questions in the future.” *Barr’s Supp. Brief* at 12. The constitutional question Barr appears to reference is whether the Legislature may create a “lifetime prohibition on the possession of a firearm” for juveniles. *Id.* at 13. This question is not properly before the Court.

In any case, this Court has already ruled that the legislature may terminate the right to possess firearms after a defendant is convicted. *State v. Schmidt*, 143 Wn.2d 658, 677–78, 23 P.3d 462 (2001). This Court rejected a similar argument in *State v. Hunter*, 147 Wn. App. 177, 195 P.3d 556 (2008), *rev’d on other grounds*, finding that “none of the cases to which Hunter cites support his contention that those persons convicted as juveniles of felony offenses enjoy greater protections under the Second Amendment than do persons convicted as adults.” *State v. Hunter*, 147 Wn. App. 177, 192, 195 P.3d 556, 563 (2008). This Court should similarly reject Barr’s untimely and meritless argument.

B. A JUVENILE CONVICTION SEALED PURSUANT TO RCW 13.50.260 MUST BE CONSIDERED A “CONVICTION” FOR PURPOSES OF THE FEDERAL FIREARM STATUTE.

Federal law prohibits the possession of a firearm by any person “who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year.” 18 U.S.C. §922(g)(1). Congress enacted that disqualification in 1968 based on its determination that the “ease with which” firearms could be acquired by “criminals ... and others whose possession of firearms is similarly contrary to the public interest.” S. Rep. No. 1097, 90th Cong., 2d Sess. 28 (1968). Congress has also specified that a conviction is not considered a “conviction” for purposes of federal firearm law if the conviction has been “expunged,” “set aside,” or if the person “has been pardoned or has had civil rights restored.” 18 USC 921(a)(20).

Barr’s Supplemental Brief does not address whether a sealed juvenile conviction is a “conviction” under federal law. While Barr’s felony convictions are sealed, they are not “expunged,” “set aside,” or “pardoned,” and must be treated as “convictions” under federal law.

1. Washington Law Treats Juvenile Adjudications As “Convictions.”

What constitutes a conviction is determined in accordance with the law of the jurisdiction in which the proceedings were held. 18 USC 921(a)(20). As previously demonstrated, in Washington, a juvenile

adjudication is considered a “conviction” for purposes of Washington law and federal law. *See* RCW 9.41.040(3); *see also Siperek v. United States*, 270 F. Supp. 3d 1242, 1249 (W.D. Wash. 2017).

2. Barr’s Convictions Have Not Been Expunged.

18 USC 921(a)(20) sets out four ways an otherwise qualifying conviction is excluded from consideration as a conviction under federal firearms law: expungement, pardon, setting aside, or restoration of civil rights. 18 U.S.C. § 921(a)(20). Only two of the four exclusions are relevant in the present case: setting aside and expungement.⁸ The term “expungement” encompasses convictions that have been both expunged and set aside. *See Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1245 (10th Cir. 2008).

i. In order to qualify as an “expungement” the state procedure must “completely remove the effects of the conviction in question.”

In order to qualify as an “expungement” under federal law the state procedure must “completely remove the effects of the conviction in question.” *Crank*, 539 F.3d 1236, 1245 (10th Cir. 2008). In *Crank*, the Tenth Circuit found that a Wyoming statute “expunging” a domestic violence conviction for the sole purpose of firearms restoration did not meet the federal qualification for “expungement.” *Crank*, 539 F.3d 1236,

1246 (10th Cir. 2008) (not expungement because conviction records not destroyed and law enforcement agencies continued to access the records). The Court held that Congress intended that state procedure completely remove the effects of a prior misdemeanor conviction to qualify as an “expungement” under federal law. *Crank*, 539 F.3d 1236, 1249 (10th Cir. 2008).

In reaching its decision, *Crank* relied in part on *Jennings v. Mukasey*, 511 F.3d 894 (9th Cir. 2007). 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).⁹ The court explained that, 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.

⁸ Barr does not argue that the sealing pursuant to RCW 13.50.260 pardons or restores Barr’s civil rights.

⁹ Citing *People v. Frawley*, 82 Cal. App. 4th 784, 98 Cal. Rptr. 2d 555, 560 (2000), the Ninth Circuit in *Jennings* noted that allowing a prior conviction to be used in a subsequent prosecution “precludes any notion that the term ‘expungement’ accurately describes the relief allowed by the statute.” *Frawley*, 82 Cal. App. 4th 784, 792.

ii. RCW 13.50.260 does not completely remove the effects of the conviction because the record of the conviction is not destroyed, law enforcement agencies can access the conviction, and the conviction can be used in any subsequent prosecution.

Similar to the state statutes at issue in *Crank* and *Jennings*, RCW 13.50.260 seals a juvenile conviction and allows it to be “treated as if it never occurred.” Sealing limits public access but ensures the criminal record is still accessible to law enforcement—the agencies charged with regulating firearm purchases. *See* RCW 13.50.260(8)(c)-(d); RCW 9.41.070. Like the “sweeping limitation” present in the *Jennings* and *Frawley* cases, sealed juvenile convictions in Washington can be used in any subsequent felony prosecution. RCW 13.50.260(8); RCW 9.94A.525(2)(a) and (g). Thus, under Washington law, sealing a juvenile conviction pursuant to RCW 13.50.260 provides partial, but not complete, relief.

The Court of Appeals attempts to distinguish *Jennings* from the Washington juvenile sealing process by explaining that the California statute required an ex-offender to disclose the conviction in response to any direct question contained in any questionnaire or application for licensure. *Barr*, 4 Wn. App.2d 85, 108-109. This interpretation ignores the Ninth Circuit’s focus on the fact a California conviction may be used in any subsequent prosecution; the Ninth Circuit described this as a

“sweeping limitation” on the relief provided. *Jennings*, 511 F.3d 894, 899 (2007).

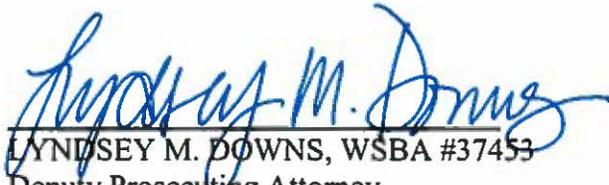
In *Siperek v. United States*, 270 F. Supp. 3d 1242 (W.D. Wash. 2017), appeal dismissed, No. 17-35881, 2017 WL 7052208 (9th Cir. Dec. 1, 2017), the federal court reviewed the issue that is before this Court: whether a sealed juvenile conviction is a “conviction” under federal firearm law. The Court found “a juvenile offense [] can constitute a ‘conviction’ under 18 U.S.C. § 922(g)(1), even if Washington law requires that a sealed juvenile offense be ‘treated as *if* it never occurred.’” *Siperek*, 270 F. Supp. 3d 1242, 1249. The *Siperek* court, like the Court of Appeals in this case, then mistakenly relied on *Nelson* to conclude that sealing pursuant to RCW 13.50.260 results in an “expungement.” The Court also observed that there remains “a question as to whether the sealing of a juvenile record indeed constitutes a full expungement” because it may be used in subsequent prosecutions. *Siperek*, 270 F. Supp. 3d 1242, 1251. The Court’s acknowledgement that RCW 13.50.260 does not “fully expunge” a juvenile conviction is an admission of its error.

V. CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Court of Appeals.

RESPECTFULLY SUBMITTED on November 30, 2018.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 
LYNDESEY M. DOWNS, WSBA #37453
Deputy Prosecuting Attorney
Attorney for Petitioner Snohomish County Sheriff

DECLARATION OF DOCUMENT
FILING AND E-SERVICE

I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years, and not a party to this action. The undersigned certifies that on the 30th day of November, 2018, I caused to be served, via the Washington State Appellate Court's Portal System, a true copy of the Supplemental Brief of Petitioner upon the parties listed below:

Vitaliy Kertchen; vitaliy@kertchenlaw.com

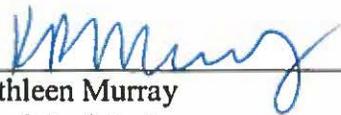
Attorney for Respondent

Schoen Parnell; schoen_parnell@comcast.net;
info@parnelldefense.com.

Attorney for Purported Amicus Curiae WACDL

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

Dated this 30th day of November, 2018, at Everett, WA.



Kathleen Murray
Legal Assistant
Snohomish County Prosecuting Attorney's Office

SNOHOMISH COUNTY PROSECUTING ATTORNEY - MUNI

November 30, 2018 - 1:08 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 96072-1
Appellate Court Case Title: Jerry L. Barr III v. Snohomish County Sheriff
Superior Court Case Number: 17-2-02519-1

The following documents have been uploaded:

- 960721_Supplemental_Pleadings_20181130130050SC078696_9561.pdf
This File Contains:
Supplemental Pleadings
The Original File Name was SuppBrfPet.pdf

A copy of the uploaded files will be sent to:

- diane.kremenich@snoco.org
- info@parnelldefense.com
- schoen_parnell@comcast.net
- vitaliy@kertchenlaw.com

Comments:

Sender Name: Kathy Murray - Email: kmurray@co.snohomish.wa.us

Filing on Behalf of: Lyndsey Marie Downs - Email: ldowns@snoco.org (Alternate Email: kmurray@snoco.org)

Address:
3000 Rockefeller Ave.
M/S 504
Everett, WA, 98201
Phone: (425) 388-6350

Note: The Filing Id is 20181130130050SC078696