FILED February 07, 2025 08:14 AM Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. RUDY NINO PARRAS, Defendant-Appellant Petitioner on Review.	Crook County Circuit Court Case No. 19CR11103 CA A174543 S070409

PETITIONER'S REPLY BRIEF ON THE MERITS

Petition to review the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court
for Crook County
Honorable Daina A Vitolins, Judge

Opinion Filed: June 7, 2023
Author of Opinion: Joyce, J.
Before: Aoyagi, Presiding Judge, and Joyce, Judge, and Jacquot, Judge

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TABLE OF CONTENTS

Summary of Argument 1

Argument 2

I. The possibility that some felons may successfully petition for restoration of their constitutional rights to bear arms does not alter the permanent nature of ORS 166.270. 2

II. This court does not measure the constitutionality of a law under Article I, section 27, with modern understandings of reasonableness, but against the framers' intent. 7

III. The state's historical examples of invidious abridgements of the right to bear arms do not represent principles on which this court may deny fundamental rights today. 11

CONCLUSION...15

TABLE OF AUTHORITIES

Cases

Bentley v. Multnomah Cnty. Sheriff's Office,
297 Or App 609, 443 P3d 743 (2019)...5

District of Columbia. v. Heller,
554 US 570, 128 S Ct 2783, 171 L Ed 2d 637 (2008).....................................5

Dred Scott v. Sanford,
60 US 393, 15 L Ed 691 (1857) 13

Hertz v. Clackamas County Sheriff's Office,
337 Or App 436, __ P3d __ (Jan 23, 2025) 3, 5

Kanter v. Barr,
919 F3d 437, 459 (7th Cir 2019)....................18

Lange v. California,
594 US 295, 141 S Ct 2011, 210 L Ed 2d 486 (2021)....................18

McDonald v. Chicago,
561 US 742, 130 S Ct 3020, 177 L Ed 2d 894 (2010)....................6

New York State Rifle & Pistol Ass'n v. Bruen,
597 US 1, 142 S Ct 2111, 213 L Ed 2d 387 (2022).................... 6, 7, 14, 18

Newman v. Marion Cnty. Sheriff's Office,
328 Or App 686, 538 P3d 895, 898 (2023)....................5

Range v. Attorney Gen. United States,
124 F4th 218, 229-30 (3d Cir 2024)....................15

State v. Althouse,
359 Or 668, 375 P3d 475 (2016)....................4

State v. Christian,
354 Or 22, 307 P3d 429 (2013).................... 7, 9, 10, 11

State v. Hamann,
363 Or 264, 422 P3d 193 (2018)....................4

State v. Hirsch/Friend,
338 Or 622, 114 P3d 1104 (2005).................... 7, 8, 9, 10, 11, 14

State v. Rodriguez/Buck,
347 Or 46, 217 P3d 659 (2009)....................4

State v. Sanders,
343 Or 35, 163 P3d 607 (2007)....................3

United States v. Daniels,
124 F4th 967, 163 P3d 607 (2007)....................15

United States v. Williams,

113 F4th 637, 647 (6th Cir 2024)....................5, 6

Constitutional Provisions and Statutes

US Const, Amend II.................... 1, 5, 6, 13, 14, 15

Or Const, Art I, Sect 27 1

ORS 166.270.................... 1, 2, 3, 4, 6, 7, 8, 9, 18

ORS 166.274.................... 2, 3, 5, 6, 7

ORS 21.135....................7

ORS 498.222....................17

Other Authorities

Columbus Crisis, *Ni**er Wisdom at a Premium*, State's Rights Democrat, 1 ..14

former Or Const, Art I, § 35, *repealed* 1926 13

General Laws of Oregon, Misc Laws, ch XXII, § 1, p 613 (Deady & Lane 1843–1872)....................12

APPELLANT'S REPLY BRIEF

Summary of Argument

Defendant replies to three of the state's arguments in support of his position that as applied to a person with multiple drug-related felony convictions and a prior felon-in-possession conviction ORS 166.270, violates the Article I, section 27, of the Oregon Constitution and the Second Amendment to the United States Constitution.

First, the state's reliance on the possibility that felons may successfully petition to restore their rights to bear arms is too tentative to negate the permanent effect of ORS 166.270's firearm ban.

Second, the state misreads this court's caselaw as foreclosing his arguments under Article I, section 27. Neither of the two cases upon which the state relies address as-applied challenges, much less resolve the as-applied issue here.

Third, the state's reliance on historical laws that perpetuated invidious discrimination in denying minorities from possessing firearms in misplaced. They are not analogues that can uphold felon disarmament today. The bigotry that shaped and motivated those laws is a cloud that blocks all meaningful enlightenment about how that generation understood the limits of the right to bear arms.

Argument

I. The possibility that some felons may successfully petition for restoration of their constitutional rights to bear arms does not alter the permanent nature of ORS 166.270.

As the state observes, ORS 166.274 permits a person otherwise barred from possessing a firearm to petition for relief from that bar, provided that the person has not served a felony sentence within one year of the application and the person has not been "convicted of a person felony, as that term is defined in the rules of the Oregon Criminal Justice Commission, or the statutory counterpart to a person felony in any other jurisdiction, if the offense involved the use of a firearm or a deadly weapon * * *." ORS 166.274(11).

To obtain relief, an eligible felon must "demonstrate[], by clear and convincing evidence, that the petitioner does not pose a threat to the safety of the public or the petitioner." ORS 166.274(7). The Court of Appeals has identified six nonexclusive factors that a court should consider when it evaluates whether a felon has made that showing, including whether the felon has shown remorse and the felon's reasons for seeking restoration. *Hertz v. Clackamas County Sheriff's Office*, 337 Or App 436, 440–41, __ P3d __ (Jan 23, 2025)).

The state argues that the effect of ORS 166.274 is that ORS 166.270's firearm ban is "not necessarily permanent," and thus, are analogous to historical examples of temporary, status-based restrictions. Resp BOM at 51-52.

Defendant acknowledges that ORS 166.274 creates the possibility that, on the reviewable facts of this case, defendant could obtain relief from the indefinite bar that ORS 166.270 imposes. But for three reasons, the existence of that possibility should not undercut this court's treatment of ORS 166.270 as a permanent ban. *Cf. State v. Sanders*, 343 Or 35, 41, 163 P3d 607 (2007) ("Felony offenders *permanently* lose their state (and, perhaps, federal) constitutional right to bear arms as a consequence of conviction." (citing ORS 166.270) (emphasis added)). First, this court has not generally treated the existence of other potential sources of relief as lessening the impact of an already-imposed criminal consequence. For example, when reviewing the proportionality of a sentence under Article I, section 16, of the Oregon Constitution, this court has not used the possibility of clemency or a pardon as mitigation when it has evaluated a punishment's severity. *See State v. Rodriguez/Buck*, 347 Or 46, 58-59, 217 P3d 659 (2009) (providing factors for proportionality analysis). Nor has the analogous possibility of parole been the deciding factor that moves then needle of proportionality. *See State v. Althouse*,

359 Or 668, 688, 375 P3d 475 (2016) ("We are not persuaded that, on these facts, the absence of the possibility of parole makes defendant's life sentence unconstitutionally disproportionate."). That is not to say that the potential existence of relief is always irrelevant to the purpose, scope, or even constitutionality of a restriction. *See State v. Hamann*, 363 Or 264, 275, 422 P3d 193 (2018) (holding that permanent revocation of driving privileges was remedial in nature in part because a "'permanent' revocation is not entirely permanent if the court determines that a particular person has successfully effected long-term behavioral changes and can once again be allowed driving privileges without posing a significant danger to society"). But the possibility of relief subject to a felon's satisfaction of conditions precedent does not support treating ORS 166.270 as if it creates a temporary ban when in fact, it lacks a durational limitation.[1]

Second, withholding the right to bear arms on account of a person's felon status is inconsistent with the individual nature of the right, and thus, this court should be reluctant to accord much weight to the possibility of restoration after

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[1] Court of Appeals opinions suggest that felons seeking relief are unlikely to prevail until at least a decade after they complete their sentence. *See Hertz*, 337 Or App at 441-44 (more than 30 years); *Newman v. Marion Cnty. Sheriff's Office*, 328 Or App 686, 696, 538 P3d 895, 898 (2023) (more than 25 years); *Bentley v. Multnomah Cnty. Sheriff's Office*, 297 Or App 609, 615-16, 443 P3d 743 (2019) (about 15 years).

an indefinite period of time. Unlike civic rights, such as the right to vote or serve on a jury, the right to bear arms is "an *individual* right unconnected to any other civic activity." *United States v. Williams*, 113 F4th 637, 647 (6th Cir 2024) (emphasis in original). And unlike civic rights, a state may not deny other fundamental individual rights on account of a person's felon status. *Williams*, 113 F4th at 647. ("A felon might lose the right to vote. But that does not mean the government can strip them of their right to speak freely, practice the religion of their choice, or to a jury trial."). *Bruen* cautioned that the Second Amendment is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *New York State Rifle & Pistol Ass'n v. Bruen*, 597 US 1, 70, 142 S Ct 2111, 213 L Ed 2d 387 (2022) (quotation omitted). Thus, the abstract possibility of a future restoration of a fundamental right should carry far less analytical weight than a similarly abstract restoration of a civic right, like voting, or civic privilege, like driving.

Finally, the hurdles that a person subject to ORS 166.270 must clear to obtain relief under ORS 166.274 are themselves onerous to a constitutionally significant degree. Requiring a person to prove, by clear and convincing evidence, his moral worthiness and need to enjoy Second Amendment rights is itself a substantial burden on the right to bear arms that would violate the Second Amendment were the state to require it of felons and non-felons alike. *See Bruen*, 590 US at 70 (invalidating New York requirement that required an

open-carry permit applicant establish a "special need" for a firearm). But ORS 166.274 imposes additional burdens. A person may only apply once per year, which could be quite a long time for a person who develops a pressing, justifiable need to possess a firearm for self-defense. And litigating the petition itself takes time and requires a petitioner to pay fees. *See* ORS 166.274(5)(b), (8), (9) (requiring a court to dispose of a petition within 15 days; requiring a petitioner to pay a $281 filing fee under ORS 21.135; and allowing the state police to charge a "reasonable fee" to enter and maintain information from a successful petition); *Bruen*, 597 US at 39 n 9 ("[W]e do not rule out constitutional challenges * * * where, for example, lengthy wait times in processing license applications or exorbitant fees deny ordinary citizens their right to public carry."). Moreover, if a court denies the petition, it then forwards that information to the state police for entry into their criminal history files. ORS 166.274(5)(a). Thus, ORS 166.274 places disenfranchised felons in the unenviable position of risking that, even if they can afford to pursue a petition to restore their rights, they may lose that litigation and be subject to additional police scrutiny for having even made the attempt. Therefore, the potential availability of relief under ORS 166.274 is not a basis to treat ORS 166.270 as imposing something meaningfully short of permanently disenfranchising defendants with multiple prior drug felonies.

II. This court does not measure the constitutionality of a law under Article I, section 27, with modern understandings of reasonableness, but against the framers' intent.

The state contends that *State v. Hirsch/Friend*, 338 Or 622, 651, 114 P3d 1104 (2005), and *State v. Christian*, 354 Or 22, 33, 307 P3d 429 (2013), foreclose defendant's as-applied challenge under Article I, section 27. State's BOM at 16. But the state misapprehends those cases and what answering the question on review requires.

Hirsch/Friend resolved a facial overbreadth challenge to ORS 166.270. Thus, it was not a pure facial challenge that required the court to declare ORS 166.270 to be unconstitutional in all applications. *Id.* at 628-30. Instead, it was a claim that the statute swept so broadly that it could not be construed to avoid impinging on constitutionally protected conduct. *Id*. However, the defendant's argument was that "the legislature is without authority to prohibit possession categorically as to *all* felons," and had the court agreed, it would have invalidated ORS 166.270 on its face and in its entirety. *Id*. at 626 (emphasis in original).

Hirsch/Friend disagreed with the defendant. It concluded that the framers of Article I, section 27, did not intend to deprive the legislature of the authority to restrict certain groups that threatened public safety from exercising their right to bear arms. *Id*. at 676. But that authority is "not so broad as to be unlimited." *Id*. at 677. The legislature "is not free to designate any group

without limitation as one whose membership may not bear arms." *Id*. Rather, "*any* restriction must satisfy the purpose of that authority in the face of Article I, section 27: the protection of public safety." *Id* (emphasis added). And the court held that ORS 166.270 met that standard because it was "consistent with the historical underpinnings of the right"; it demonstrated a "common * * * objective of protecting the public from identifiable threats to the public safety, such as serious criminal conduct and various harms resulting from the possession of arms (*e.g.*, shooting within town limits)." *Id*. at 678.

Hirsch/Friend did not hold that ORS 166.270 is constitutional as applied to any prior felony, regardless of whether that felony would have been even remotely familiar to the framers of Article I, section 27. *See Christian*, 354 Or at 36 ("Indeed, *Hirsch/Friend* could be easily misread as authority for asserting overbreadth challenges whenever any statute, on its face, impinges on conduct protected by any constitutional provision."). *Hirsch/Friend* did not address the issue that this case presents: whether *some* felonies, specifically drug offenses, are too tenuously related to the public-safety purposes of Article I, section 27, to survive an as-applied challenge. And to resolve that question, this court should apply the same analytical model that it applied *in Hirsch/Friend*: an examination of the historical underpinnings of Article I, section 27. Except unlike *Hirsch/Friend*, this court need not address whether, as a general matter, the framers of Article I, section 27, intended to grant the legislature the

authority to disenfranchise felons. Rather, it is examining whether the framers intended that grant of authority under Article I, section 27, to apply to *all* felons, regardless of the connection between the felony and the public safety purpose of Article I, section 27.

Christian weakened *Hirsch/Friend* in that it disallowed facial overbreadth challenges. 354 Or at 40. But it did not disturb *Hirsch/Friend*'s holding that Article I, section 27, did not authorize the legislature unfettered authority to designate a class of people as outside Article I, section 27's authority. *Id*. ("*Hirsch/Friend* otherwise remain[s] good law."). And it did not disavow the historical mode of analysis that defendant employs here. Rather, it addressed different questions altogether. Namely, it resolved the validity of overbreadth challenges and the *facial* validity of a Portland City Ordinance that restricted carrying concealed weapons. And, regarding the latter, this court concluded only that "it cannot be argued that 'there can be no reasonably likely circumstances in which application of [the ordinance] would pass constitutional muster.'" *Id.* at 41 (alteration in original).

The state incorrectly claims that *Christian* and *Hirsch/Friend*—both cases that did *not* address as-applied challenge—established the following test for reviewing as-applied challenges:

> "Under the test from *Hirsch/Friend* and *Christian* there are two considerations in determining whether the legislature's restriction on the right to bear arms is reasonable: (1) does the law

> reasonably seek to promote public safety, and (2) does the restriction unduly frustrate the right to armed self-defense? *Christian*, 354 Or at 33."

State's BOM at 16.

That "test" is the state's product, not the court's. The section of *Christian* that the state cites did not create an analytical model. It derives from this court's review of prior case law where this court stated:

> "Because the right to bear arms is not an absolute right, our Article I, section 27, holdings reflect a judicial recognition that the legislature has wide latitude to enact specific regulations restricting the possession and use of weapons to promote public safety. We have consistently acknowledged the legislature's authority to enact reasonable regulations to promote public safety as long as the enactment does not unduly frustrate the individual right to bear arms for the purpose of self-defense as guaranteed by Article I, section 27. In the United States generally, it has been recognized that the right to bear arms is not absolute and that the exercise of legislative authority reasonably restricting the right to bear arms to promote public safety is constitutionally permissible."

Christian, 354 Or at 33-34.

That does not amount to an announcement that "reasonableness" is the standard by which this court evaluates restrictions on the right to bear arms. And this court's use of the "unduly frustrates" phrasing did not purport to be the second stage of any "test" that *Hirsch/Friend* and *Christian* created to resolve as-applied challenges. In short, neither *Hirsch/Friend* nor *Christian* address, much less foreclose, the as-applied challenge that defendant raises here.

III. The state's historical examples of invidious abridgements of the right to bear arms do not represent principles on which this court may deny fundamental rights today.

In support of both its state and federal arguments, the state offers historical examples of discriminatory laws that, despite being unconstitutional today, illustrate the general principle that the framers of the state and federal constitutions countenanced disarmament of groups that threatened public order or safety. Resp BOM at 24-25, 36-40. The state is incorrect. Those discriminatory laws reflect the deep bigotry of those eras, from which one cannot tease out an applicable constitutional principle today.

For example, the state relies on an 1868 Oregon law that provided that "every white male citizen" is "entitled" to hold firearms for their own "use and defense" and that such firearms would "be exempt from execution." *Id*. at 26-27 (quoting General Laws of Oregon, Misc Laws, ch XXII, § 1, p 613 (Deady & Lane 1843–1872) (effective Oct 1868)). The state contends that that law shows that "any 'entitlement' to possess firearms for the purposes of self-defense was not universal * * *." Resp BOM at 27.

The state's example does not work for many reasons that illustrate the general problems with relying on those kinds of invidious historical examples. First, on its face, the law does not disenfranchise anyone: it *guarantees* an entitlement to White men and takes the extra step of exempting their particular

firearms from "execution." One is left to infer that because the 1868 legislature seemed to exclude non-white people from that statutory entitlement, the

founding generation—more than 20 years earlier— did not intend Article I, section 27, to prevent the legislature from designating broad swaths of the population as ineligible for such rights (for public safety reasons). That is purely speculative, stacking inferences beyond the horizon.

Second, it ignores the broader historical context. Even if the law's existence demonstrates that the people that statute excluded were similarly bereft of Constitutional protection, reliance on that example misses the significance of the fact that the law was enacted in October of 1868. 1868 was three years after the Civil War, when the United States was enacting the Reconstruction Amendments, an era that witnessed the bloody destruction of the constitutional norms of the antebellum era, such as the three-fifths compromise and *Dred Scott v. Sanford*, 60 US 393, 15 L Ed 691 (1857). In particular, October 1868 was a mere three months after the ratification of the Fourteenth Amendment, which guaranteed citizenship and equality under the law to the former slaves.

The Fourteenth Amendment was a direct assault on the then-shared Oregonian vision of a white-only society. It invalidated Oregon's now-

infamous constitutional provision that banned Black people from entering the state. *See former* Or Const, Art I, § 35, *repealed* 1926. And Oregonians were aware of it. For example, Oregon newspapers ran front-page letters that decried "ni***rs * * * framing a Constitution for the white race." Columbus Crisis, *Ni**er Wisdom at a Premium*, State's Rights Democrat, 1 (Mar 14, 1868).

Viewed in its historical context, the cited provision of the Deady Code tells us more about that generation's views of Article I, section 35, of the constitution than Article I, section 27. Oregonians of the time, much like the Framers before them (who enacted the three-fifths compromise, US Const, Art I, § 2), viewed minorities as less human than whites (for the Framers, explicitly 60% less). Thus, it is impossible to discern whether legislatures understood these laws to be exercises of the constitutional authority to deny firearms to public-safety threats or whether they did not even consider that question because the affected minorities occupied a space beyond Constitutional cognizance. The most one can draw from the law at issue is that it illustrates that gun possession was of such primary importance to early Oregonians that even conviction of a crime would not result in their forfeiture (from white men, at least). *Hirsch/Friend*, 338 Or at 651-52. That supports defendant's argument.

Similar problems beset the state's efforts to draw analogies from Founding-era disarmament laws to support its argument under the Second

Amendment. The "how" and "why" that *Bruen* and *Rahimi* require are not relevantly similar. As the Third Circuit recently explained:

> "Apart from the fact that those restrictions based on race and religion now would be unconstitutional under the First and Fourteenth Amendments, the Government does not successfully analogize those groups to [petitioner] Range. That Founding-era governments disarmed groups they distrusted like Loyalists, Native Americans, Quakers, Catholics, and Blacks does nothing to prove that Range is part of a similar group today. And any such analogy would be far too broad. For instance, as the Government notes, colonial laws disarmed Loyalists for helping the British army or 'bearing arms against' the Continental Congress. The colonies reasonably feared that Loyalists might take up arms again. But there is no such basis to fear that Range is disloyal to his country."

Range v. Attorney Gen. United States, 124 F4th 218, 229-30 (3d Cir 2024) (en banc) (quotation and citation omitted)) (reversing conviction under 18 USC § 922 because it violated Second Amendment as applied to a felon); *cf.* *United States v. Daniels*, 124 F4th 967, 978 (5th Cir 2025) (reversing conviction under 18 USC § 922 that violated Second Amendment as applied to a controlled-substance user).

The "whys" of the state's historical analogues are too attenuated and unclear to justify a Second Amendment intrusion. The state does not answer whether racist disarmament laws reflected Second Amendment understandings or were an unrelated byproduct of the pervasive prejudice of the era. It does not explain how laws that disarmed enemies in the volatile era that immediately followed the Revolutionary War is analogous to disarmament of felons who

have existed in our communities from the founding era to the present day. And the state cannot answer why, if the Framers countenanced disarming any perceived threat to public order or safety, and felons categorically presented and still present such a threat, the framers did not enact a single law that imposed a categorical ban on felons possessing firearms, despite the fact that the historical record shows that such ideas were considered but never adopted.

Additionally, historical examples of status-based disarmament are dissimilar to felon disarmament in perhaps the most significant way: in the historical examples, the characteristics that the legislatures used to disarm the class existed *independently* of a legislature's designation. Ethnic, racial, and religious minorities, as well as Loyalists, exist because they share geographic, genetic, cultural, or historical traits. "Felons" are a purely legislative creation. The distinction is critical because if the scope of a constitutional right tracks legislative definitions, then legislatures can define away the right, deleting constitutional limits on their authority.

Consider the following example. This court agrees with the state's proposed rule that "[u]nder Article I, section 27, the legislature may enact reasonable regulations to promote public safety as long as the enactment does not unduly frustrate the individual right to bear arms for the purpose of self-defense." State's BOM at 2. And this court agrees that the legislature may prohibit felons from possessing firearms because the legislature may

"reasonably regard firearm possession by persons who have been convicted of felonies as a risk to public safety[.]" Resp BOM at 2. The legislature passes a law that bars any person who intentionally transports a live fish without a permit from possessing firearms. This court invalidates that law because the fish transporters are not risks to public safety. The legislature then makes the intentional transport of a live fish without a permit a crime punishable by more than one year in prison. *See* ORS 498.222(4)(a) (providing that the intentional or knowing transportation of a live fish without a permit is a Class C Felony). Now, the fish transporters are lawfully barred from possess firearms, despite Article I, section 27, and this court's *still-valid* decision to the contrary. Because legislatively defined classes are not relevantly similar to classes that exist independently, the state's historical analogues are unpersuasive.

In sum, the state's failure to produce relevantly similar historical evidence reflects the simple truth that at the framing of both the Oregon and United States Constitutions, the right of a free citizen to possess a gun for self-defense was so fundamental that it was inconceivable for a legislature to deny it on account of a legislatively created designations.

There must be a limit to what felonies permit disarmament and those limits must at least be cognizable to the founding generations. Those generations had a "good deal narrower" understanding of a felony, limited to only the most serious person crimes of violence that were punishable by death.

Lange v. California, 594 US 295, 311, 141 S Ct 2011, 210 L Ed 2d 486 (2021). Drug-related and felon-in-possession felonies were completely unknown to the founding era. They are not relevantly similar to the crimes for which death was the penalty. *See Kanter v. Barr*, 919 F3d 437, 459 (7th Cir 2019) *abrogated by Bruen*, 597 US 1 (Barrett, J.) (discussing common-law felonies). And they are not crimes of violence that might support a temporary disarmament. Accordingly, applying ORS 166.270 to the facts of this case violated both the state and federal constitutions.

CONCLUSION

This court should reverse the trial court's denial of defendant's motion for judgment of acquittal.

Respectfully submitted,

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