January 18, 2023

Representative My-Linh Thai
House of Representatives

Re: Proposed Bill HB 1562

Dear Representative Thai:

I write this letter as a follow-up to the stakeholder meeting that was held on January 16 about HB 1562 regarding firearm rights. I write on behalf of myself and the Washington Association of Criminal Defense Lawyers (WACDL).

Firearm law is the bread and butter of my legal practice. I am the leading firearm rights lawyer in Washington state and have unmatched expertise in state and federal firearm laws. I have written articles, presented Continuing Legal Education programs to other lawyers, won key decisions in state and federal appellate courts, and have a unique perspective on the subject matter. I review all firearm-related proposed legislation for WACDL.

Thank you for including us in the stakeholder meeting. However, a one-hour meeting is not a sufficient forum to explain our complete viewpoint regarding the proposed bill. The purpose of this letter is twofold. First, I will expound on why arbitrarily imposing additional burdens on the restoration of firearm rights does nothing to advance public safety. Second, I will provide a detailed breakdown of HB 1562 and explain why the policies and choices therein are irrational, ill-advised, and harmful.

To start, a person who seeks the restoration of firearm rights is seeking the opposite of criminality. That is a universal truth. Anyone can purchase a gun illegally on the street. The people who choose instead to do what is necessary to own and possess firearms legally are making a choice to live a law-abiding life. The legislature should promote that choice, not make it more difficult to attain. The rules for restoration should be stern but not onerous. If we want people to attain a goal, we must make the goal realistic. A person who has had to bust and claw for the opportunity to restore rights will cherish them even more than a person who takes them for granted. These are not the people

917 S 10th St | Tacoma, WA 98405
253-905-8415 | vitaliy@kertchenlaw.com | kertchenlaw.com

that are responsible for the surge in gun violence and attacking them will not advance public safety.

Under current law, these people are at least three to ten years removed from that part of their lives, depending on the nature of their criminal history. They have often undergone treatment and significant life improvements. No one gets out of prison and immediately has their firearm rights restored. I thought this was obvious, but I point this out specifically because section 1(4) of HB 1562 says "Furthermore, homicide and suicide (by any means) are leading causes of death for returning residents after they are released from prison, especially soon after release." I repeat again: no one who is just released from prison has their firearm rights restored. A person getting out of prison (which necessarily requires a felony conviction) must wait a minimum of five consecutive years after release from confinement. If the person has prior convictions for a class B felony, the person must wait ten years instead of five. Thus, the penalties for continued criminality and for committing more serious crimes is already baked into the current version of the statute.

Notwithstanding the alleged studies cited in section 1 of HB 1562, there is no scientific support for the proposition that capriciously increasing the waiting period from five years to ten years will advance public safety. Doing so has no rational basis; it is borne only of animus toward the formerly incarcerated. During the stakeholder meeting, the bill was referenced multiple times as intending to "clarify" the restoration process. It is unclear if you truly believe that or if that is an attempt at downplaying the substance of the bill. The truth is that the proposed bill doesn't clarify anything that hasn't already been clarified by case law interpreting the current statute. The proposed bill contains substantive changes that will create significant barriers to restoration without explaining how those barriers will advance public safety. The bill will keep dreams of integration and constitutional equality at bay for more people and for longer periods of time.

If the legislature wishes to address the issue of gun violence, fund the schools. Fund after-school programs. Fund mental health treatment. Fund a solution to the homeless crisis. Fund substance abuse treatment. Fund free college. Fund job training. Fund racial equality. Address the roots that lead to violence and crime.

Having said that, the section that expands the universe of crimes that create a prohibition on firearm rights has room for compromise. It does make sense to impose a firearm "time out" on more misdemeanants until the individual can demonstrate sufficient law-abiding behavior to merit a return of those rights. But extending the prohibition for a decade or longer is not merited. In most cases, the punishment simply

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doesn't fit the crime and the punishment is not scientifically linked to recidivism. It shouldn't be easier to lose rights *and* harder to restore them.

Turning to the language of the bill itself, I offer the following comments.

Sections 1 and 2

No comments.

Section 3

(1)(a) and (2)(a) extend the crime of unlawful possession of a firearm to attempts at purchasing a firearm. This creates a felon out of a person who may legitimately not be trying to break the law but is simply ignorant of their status. Imagine a person who has a juvenile conviction twenty years ago for residential burglary. That person may have even had their record sealed, not knowing that sealing a juvenile record does not restore firearm rights. Under the proposed language, that person could then be charged with unlawful possession of a firearm in the first degree, which carries a minimum penalty of 15 months in prison!

Under current law, people who attempt to purchase a firearm when they are prohibited are prosecuted for gross misdemeanor crimes of false swearing and/or attempted unlawful possession of a firearm in the second degree. This is a proportional response to the crime committed. People who are inadvertently breaking the law do not need to face new felony charges. Firearm law is extremely complicated. Most lawyers don't even understand it without extensive specialization in the subject matter. It is unreasonable to expect the public at large to understand it to the point that any mistake is a new felony charge.

(2)(a)(i)(D) creates a whole host of new crimes that impose a prohibition on the possession of a firearm. The phrase "crime of domestic violence" presents two problems. One is that it is markedly different from the language in (2)(a)(i)(B). The language in (2)(a)(i)(B) requires that the crime be committed by one intimate partner or family or household member against another. In other words, the crime does not technically need to be designated as "domestic violence" in order to create a firearm prohibition. This prevents the loophole where a defendant may avoid the loss of firearm rights if the prosecutor amends the case from DV to non-DV to induce a guilty plea. The language in (2)(a)(i)(D) should track the language in (2)(a)(i)(B) to be uniform. The second problem is that this language encompasses too many crimes. Malicious mischief in the third degree (property damage) is not an indicator of violence and should not result in a

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firearm prohibition. Same with theft and a lot of other crimes that don't involve force, threat, or violence.

Additionally, inclusion of the crime of reckless endangerment is an overreach. A person can be charged with reckless endangerment for doing something as innocuous as popping a wheelie on a motorcycle. This is not an indication of a propensity for violence and should not result in a loss of firearm rights - especially for ten years as mandated by Section 4.

(2)(a)(i)(F) creates a crime for not complying with the provisions of an order to surrender weapons. The statutory scheme regarding surrender of firearms was found unconstitutional in *State v. Flannery* on November 2, 2022. This new crime is also unconstitutional.

Section 4

(1) carries over the current lifetime prohibitions on sex offenses, class A felonies, or any felony offense with a maximum sentence of at least 20 years. The language about felony offenses with a maximum sentence of at least 20 years is duplicative as that's already included in the prohibition on class A felonies. This language should be stricken as superfluous.

(2) states that a person can only proceed if he or she is not required to file a petition under RCW 9.41.047. But RCW 9.41.047(4) says that a person cannot proceed under .047 unless the person meets the requirements for restoration under section 4. So, if section 4 requires a person to petition first under .047 and .047 requires a person to petition first under section 4, a person who needs restorations under both .047 and section 4 would be ineligible to proceed under either.

(2)(b) creates three tiers of waiting periods - three years, five years, and ten years. The crimes included in the ten-year tier are too minor to justify such a long waiting period. Again, "crime of domestic violence" is mentioned. See the critique about this language on the previous page. The concept that a person can damage property during a verbal argument and lose firearm rights for ten years is completely egregious and disproportional. Same with reckless endangerment. The term "crime of violence" sounds on point at first, but not once you look at the definition of that term. Burglary 2 and residential burglary are not violent crimes, yet they are defined as "crimes of violence." Imagine a homeless person who is caught stealing from Walmart. He is subsequently trespassed from the store. When he returns in violation of the trespass order, he is

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charged with burglary 2. Now that person is facing a ten year ban due to nothing but poverty.

I propose getting rid of tiers and imposing a blanket five-year ban on all crimes with certain limited exceptions. Five years is a reasonable waiting period. Ten years is not. The limited exceptions will be for repeat domestic abusers (multiple DV assaults within a certain time) and for those felonies that come with a firearm or deadly weapon enhancement. In those situations, there will be a ten-year ban. This way, we're surgically targeting the most violent and dangerous individuals while allowing the rest a chance at redemption after five years. This also simplifies the process, since that's one of the bill's purported goals, and recognizes the impact of DV misdemeanors by upgrading the waiting period from three years to five.

(3)(b) requires completion of all sentence conditions except for nonrestitution fines and fees. This sounds good at first glance, but what is a person supposed to do when records of completion no longer exist? It is not reasonable to expect people to hold on to records for decades. The bill imposes a ten-year waiting period on most crimes and then also expects people to hold on to records for that long? Most people toss their records shortly after they are done with their sentence, expecting never to need that information again. They just assume that the courts are notified of completion, but that happens very rarely. The Department of Corrections is notoriously awful at tracking sentence requirements and providing the necessary information to the courts. Imagine having to track down proof of sentence completion from 1992. The treatment agencies won't have the records (or even be in business anymore), the Department of Corrections won't have them, the court won't have them, the petitioner won't have them. Now what? Coupled with the fact that (4)(e) requires the petitioner to prove eligibility by clear and convincing evidence, this creates an insurmountable hurdle. This requirement is simply unworkable.

(3)(c) requires no prior felony convictions that prohibit the possession of a firearm in other states. But this isn't as simple as it seems. Is an out-of-state felony a barrier to restoration if that felony prohibits firearm possession *in the other state* or if it prohibits firearm possession in Washington state? There are many scenarios where a felony conviction in the other state will not prohibit possession in that state, but will prohibit in Washington. And in that scenario, that one out-of-state crime is exactly why the petitioner needs his or her firearm rights restored to begin with. Many states have deferred sentence/deferred adjudication/withheld adjudication dispositions that don't count as prohibiting convictions in those states, but do count as prohibiting convictions in Washington state due to the unique way that Washington state law defines "conviction." Furthermore, this language is going to put Washington courts into the

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predicament of interpreting the laws of other states to determine if the petitioner is prohibited by that state. This imposes a completely unnecessary burden on all parties involved, including judges.
Additionally, the requirement that offender scores wash should be removed. Again, if the goal of this bill is to simplify the process, the concept of point washing is the number one source of confusion among petitioners, prosecutors, judges, and even defense lawyers.

(3)(d) requires that the petitioner not be a respondent to a full protection order in the last five years. Protection orders are issued like hot cakes and with the scantest possible due process protections. Respondents are not entitled to an attorney. Pinning a constitutional right on a process that affords almost no constitutional protections is not good policy. A person subject to a full protection order has already been in "time out" for at least one year and has already been the subject of a firearms surrender order. Protection orders can also be renewed by the petitioner at the petitioner's option. Imposing an additional five-year waiting period after expiration accomplishes nothing.

(3)(e) requires that the petitioner has not knowingly attempted to receive, access, or purchase firearms or acquire a CPL at any time as a prerequisite to restoration. But many people don't even realize they are prohibited from possession until after they get denied. At least half of the calls my office receives are from people who have been denied. We want people to realize their mistake and then have an avenue for legal relief. Punishing their mistake with a lifetime ban on restoration is terrible policy. No one goes into a dealer to legally purchase a firearm and subjects themselves to a background check knowing they are prohibited. They are often under the erroneous impression that convictions just "drop off" after a certain time, many of them think that juvenile convictions don't count, a lot of them don't realize that their out of state convictions could prohibit them in Washington, etc. The point is that their actions are borne of ignorance, not malice. This should not be punished with a lifetime ban. Some of these individuals are already punished by facing new criminal charges for false swearing and/or attempted unlawful possession of a firearm.

(3)(f) requires that law enforcement make certain determinations about the petitioner. Law enforcement should have no direct role in this process. Law enforcement is not comprised of lawyers and are not subject matter experts, no matter how much they may proclaim they are. Law enforcement may certainly work with prosecutors and supply information to the prosecutor, but the only participants to a firearms petition must be the judge, the prosecutor, and the petitioner. The police are not parties to the case. Law enforcement barely does a passable job with background checks as it is, they will create any excuse to deny a person their rights.

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(4)(a) requires that a court set a hearing no earlier than 45 days after the petition is filed. 90-99% of all firearm petitions are handled by agreement with the prosecutor and without the need for a hearing. The statute does not need to create arbitrary timelines for these hearings. Various court rules already control the way that court hearings are managed and scheduled. Hearings won't be needed in most cases. Requiring the courts to create docket space for all these hearings is only going to congest the courts without any necessity.

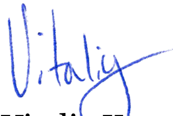
(4)(b)-(d) requires service on the prosecutor and places certain burdens on the prosecutor's office. I have no specific objection to any of these, except that the proponents of this bill may want to consult with prosecutor stakeholders because this sounds like a lot of extra work that prosecutors may not be equipped to handle due to the additional resources needed. Many prosecutor offices already treat firearm petitions as "backburner" matters that are reviewed when there's time. Adding these new responsibilities will likely strain resources.

(4)(e) requires that a court grant a petition only if the petitioner proves eligibility by clear and convincing evidence. This seems like blatant bias. Clear and convincing evidence is an exceptionally high burden of proof. Coupled with some of the other onerous requirements contained elsewhere in the bill, this virtually guarantees that very few people will have their petitions granted.

(4)(g) requires that an order restoring firearm rights be sent to DOL and NICS. DOL has nothing to do with firearm rights. It does not do background checks or provide any relevant information to any other agency regarding firearm rights. As of January 1, 2024, Washington State Patrol will run the central background check system for the entire state, so this paragraph should require that the order be sent to WSP and NICS.

Unless the bill undergoes radical revision, we will continue to oppose it at every turn.

Sincerely,



Vitaliy Kertchen
Attorney at Law

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