

ESB 5561: Concerning the restoration of the right to possess a firearm.

February 14, 2022

Washington State House of Representatives
Civil Rights & Judiciary Committee

Re: ESB 5561

Dear Members of the Committee:

I write today in opposition to Engrossed Senate Bill 5561, concerning the restoration of the right to possess a firearm. I am writing on behalf of myself, my clients, the Washington Association of Criminal Defense Lawyers, the Washington Defender Association, and reintegration activists everywhere.

Restoration of firearm rights is the bread and butter of my legal practice and to date, I have helped over five thousand people restore their firearm rights in every corner of this state. I am the leading firearms 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, litigated and won key decisions in state and federal appellate courts, and have a unique perspective on what works.

Engrossed Senate Bill 5561 fails because it reduces access to justice and politicizes a topic that is already too political. It tightens the criteria for eligibility without a rational explanation as to how these changes will improve public safety. Instead, the bill enacts arbitrary, unnecessary, and unclear rules. There is no evidence that the current version of the firearm restoration statute is unsustainable or compromises public safety. Indeed, the current version has remained substantively unchanged for twenty-five years. In that time, courts have issued dozens of decisions on the proper application and interpretation of the statute, leading to a robust body of law. This creates stability and predictability, which provides direction for applicants, lawyers, and judges. Why are the proponents of ESB 5561 trying to repeal and replace something that is not broken?

Because this bill is borne out of nothing more than a prosecutorial desire to make it harder for peaceable citizens to exercise a core constitutional right. If it passes, it will result in further alienation of already marginalized populations. Individuals who want to be law-abiding citizens, capable of exercising fundamental rights. In an era when legislative efforts have repeatedly focused on rehabilitation and reducing barriers to re-entry, ESB 5561 takes a step backward for no reason other than one scary four-letter word: guns. The Second Amendment is not a second-class right. Reintegration and restoration of rights must include firearm rights, or it means nothing at all.

Below, I expound on these concepts by providing specific instances of why ESB 5561 fails.

1. **ESB 5561 reduces access to justice.** Foremost, ESB 5561 reduces access to justice by significantly increasing the fee an attorney must charge a client for a restoration of firearm rights. State and federal firearm laws are inordinately complicated. Doing the job correctly requires specific expertise, beyond just possessing a license to practice law. It cannot be learned from a book. It can be honed only through years of practice and thousands of cases. By changing the standard for restoration from mandatory to discretionary and enacting arbitrary barriers, ESB 5561 significantly increases the amount of work necessary for a successful restoration. Increased work requires increased fees. Increased fees marginalize lower-income populations, who are already the most likely to need their firearm rights restored in the first instance. My clients consist overwhelmingly of honest workers, who are just trying to put their past behind them. They want the ability to protect their family and participate in time-honored traditions with their children, like hunting. If I must tell them that my fee is now three to five times higher than it was last year, that spells the end of the line for them. There are typically no legal aid services available for this type of work. Applicants must hire private counsel or they are on their own. Most lawyers can't even do this work properly, what hope do applicants have on their own?

The increase in work on the defense side is only one side of the equation. Prosecutors across the state will also need to devote more time to these cases, at a time when resources are already scarce and caseloads are high. Most offices have only one or two prosecutors working on these matters, and only in between other daily duties. They can get away with that because review of firearm restoration cases is currently a straight-forward matter. But ESB 5561 complicates the process, so offices will need to pull prosecutorial resources from other matters, leading to a *reduction* in public safety. Likewise, judges currently spend little to no time on these cases because the standards are set by law and it's a yes/no question. With ESB 5561, judges will have to devote considerable parts of their brimming dockets to hearing these matters, further log jamming the court system.

If ESB 5561 passes, what was once a relatively straightforward and affordable process is now a resource quagmire for all parties involved.

2. **ESB 5561 politicizes an apolitical branch.** The courts are an apolitical branch of government, and must remain that way. ESB 5561's approach of giving the courts discretion must be soundly and summarily rejected. Firearms are already a very political issue. In a state like Washington where judges are elected, giving the courts discretion will wreak havoc on the stability and predictability of this process. The bill does not explain how a judge is supposed to decide whether a person is rehabilitated or what constitutes rehabilitation. It will lead to uneven results where judges in more conservative parts of the state may be more friendly than judges in more liberal parts of the state, leading to unjust results based on nothing more than geography.

Prosecutors are also elected, which may also lead to uneven and unjust results. Some prosecutors may play ball; others may not. Prosecutors who wish to take a hardline stance will have unfettered discretion and no incentive to cooperate. That means many

or most firearm restorations will be contested, leading to a strain on resources and inequitable outcomes (see above).

Finally, the Washington Supreme Court has found that implicit racial bias is pervasive in our justice system. Giving prosecutors and judges discretion in these matters only invites more implicit racial bias.

3. ESB 5561 imposes arbitrary rules and does not improve public safety.

- a. Requiring no convictions in the five-year period prior to restoration is shortsighted. If an applicant's criminal history consists solely of a felony in 1985 and a misdemeanor for driving on a suspended license in 2020, that applicant gets no credit for those thirty-five years of crime-free behavior. A misdemeanor for driving on a suspended license is the most minor charge, the most common charge, has no victim, is often a crime of poverty, and is not an indicator of dangerousness. Yet, the bill does not account for any of this and instead imposes a categorical ban on restoration for another five years.
- b. Requiring the absence of any protection orders in the five years prior to restoration is untenable and inherently unfair. Protection orders can be issued on an ex-parte basis without the respondent's knowledge or ability to contest the order. A vexatious petitioner can keep filing ex-parte orders that end up dismissed, the respondent could not restore firearm rights, and would have no recourse whatsoever. Additionally, termination of a protection order requires a judicial finding that the respondent has proven that he or she is unlikely to resume acts of domestic violence. Why would the respondent be required to wait *another* five years after this judicial determination?
- c. Requiring proof of completion of sentence requirements sounds logical but may simply be impossible. How would an applicant go about proving compliance with sentence conditions completed ten, twenty, or thirty years ago? At the very least, the bill should include the same type of escape clause as the legislature created in 2019 for certificates of discharge under RCW 9.94A.637(4) and allow a judge to waive the requirement upon a showing of good cause.

For these reasons and even more that are unmentioned out of respect for brevity, ESB 5561 must be rejected. I remain committed and available for further consultation with members of this committee and the legislature. I can be reached at vitaliy@kertchenlaw.com or 253-905-8415.

Sincerely,

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