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## Boren v. State Appellant's Reply Brief Dckt. 42522

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IN THE SUPREME COURT OF THE STATE OF IDAHO

BOB L. BOREN,	)	
	)	
Petitioner-Appellant,	)	NO. 42522
	)	
v.	)	CANYON COUNTY NO. CV 2012-9743
	)	
STATE OF IDAHO,	)	REPLY BRIEF
	)	
Respondent.	)	

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REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

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 Entered on ATS by \_\_\_\_\_

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## STATEMENT OF THE CASE

### Nature of the Case

On appeal, Mr. Boren argued that his trial counsel was ineffective for failing to file a motion to dismiss his charge for unlawful possession of a firearm because Idaho Code § 18-310 is unconstitutional as it treats interstate travelers who committed a criminal offense in another state or jurisdiction differently than other citizens of the state of Idaho were convicted of a felony offense within the state of Idaho, in violation of Article IV, § 2 of the United States Constitution, the Privileges and Immunities Clause of the Fourteenth Amendment, and the Equal Protection Clause.

The instant Reply Brief is necessary to address the State's argument that this Court should affirm the district court's order granting the State's motion for summary dismissal because: (1) Mr. Boren failed to address the district court's conclusion that his failure to plead out of state residency at the time of his convictions was fatal to his constitutional claims; (2) Mr. Boren's "complaints about I.C. § 18-310 . . . would not result in dismissal of his criminal case because striking down I.C. § 18-310, would not reinstate Boren's right to possess a firearm"; and (3) Mr. Boren has failed to allege facts that I.C. § "18-310 fails to pass a rational basis review." (Respondent's Brief, pp.7-19.) The State's remaining arguments on appeal are unavailing and adequately addressed in Mr. Boren's Appellant's Brief, which is incorporated herein by reference thereto.

### Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Boren's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

Did the district court err in dismissing Mr. Boren's Petition for Post Conviction Relief?

## ARGUMENT

### The District Court Erred In Dismissing Mr. Boren's Petition For Post Conviction Relief

#### A. Introduction

Mr. Boren contends his trial counsel rendered ineffective assistance of counsel by failing to motion to dismiss his unlawful possession of a firearm charge as it treats interstate travelers who committed a criminal offense in another state or jurisdiction differently than other citizens of the state of Idaho were convicted of a felony offense within the state of Idaho, in violation of Article IV, § 2 of the United States Constitution, the Privileges and Immunities Clause of the Fourteenth Amendment, and the Equal Protection Clause.

#### B. The District Court Erred In Dismissing Mr. Boren's Petition For Post Conviction Relief

##### 1. Whether Mr. Boren Was A Resident Of Nevada Or Oregon At The Time Of His Previous Convictions Is Not Relevant To Determine The Constitutionality Of I.C. § 18-310

In its Respondent's Brief, the State argues that this Court should affirm the district court's order granting the State's motion for summary disposition because Mr. Boren failed to address the district court's conclusion that his failure to plead out of state residency at the time of his convictions was fatal to his constitutional claims. (Respondent's Brief, pp.7-8.) Mr. Boren's residency at the time of his out of state convictions is irrelevant in determining whether I.C. § 18-310 is unconstitutional for creating fixed, permanent distinctions among Idaho citizens. *See Hooper v. Bernalillo,*



472 U.S. 612 (1985); *State v. Dickerson*, 142 Idaho 514 (Ct. App. 2006). In *Saenz*,<sup>1</sup> the United States Supreme Court recognized:

The “right to travel” discussed in our cases embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, **for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.**

*Id.* at 500 (emphasis added). The “right to travel is derived from Article IV, § 2 of the United States Constitution<sup>2</sup> as well as the additional protection the Privileges and Immunities Clause of the Fourteenth Amendment provides.” *Id.* at 500-503. The additional protection of the Fourteenth Amendment is clearly identified in section I, which states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

U.S. Const., amend. XIV, § 1. The U.S. Supreme Court has always held that the aforementioned clause protects those travelers’ right to be treated like other residents of a State when they travel to that State. *Id.* at 503. Thus, “a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bonâ fide* residence therein, with the same rights as other citizens of that State,” and “is not bound to cringe to any superior, or to pray for any act of grace, as a means of enjoying all the rights and privileges enjoyed by other citizens.” *Id.* (quoting *Slaughter-House Cases*, 16 U.S. (1 Wall.) 36, 80, 112-113 (1872)).

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<sup>1</sup> *Saenz v. Roe*, 526 U.S. 489 (1999).

<sup>2</sup> Article IV, § 2 of the United States Constitution provides that “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the Several States.”

The United States Supreme Court has found that a classification burdens the right to travel if it penalizes migration or creates “fixed, permanent distinctions” between residents of a state. See *Hooper*, 472 U.S. at 617. In *Hooper*, a New Mexico statute divided resident Vietnam veterans into two groups: those that resided in the state prior to May 8, 1976 were entitled to an exemption, while those who established residency after that date are not. *Id.* at 616-617. The Court observed that fixed, permanent distinctions between residents are not permissible because “[w]hen the state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection clause of the Fourteenth Amendment.” *Id.* at 617-618. In invalidating the statute creating the permanent distinctions between New Mexico residents, the *Hooper* Court concluded that the State failed to prove the statute was rationally related to an legitimate state purpose. *Id.* at 618.

Just as in *Hooper*, I.C. § 18-310 creates a fixed, permanent distinction between those Idaho residents committing one of the enumerated felonies in Idaho prior to July 1, 1991, and those committing one of the enumerated felonies in another state prior to July 1, 1991. Under the former, the Idaho resident receives an automatic reinstatement of his right possess a firearm, while under the later, the similarly situated Idaho resident continues to be deprived of his Second Amendment rights. To date, the State has failed to identify a legitimate purpose for the disparate treatment or how I.C. § 18-310(4) somehow rationally furthers the inconsistent treatment of Idaho residents based upon the location of the prior felony conviction.

2. Striking Down I.C. § 18-310(4) As Unconstitutional Would Result In The Dismissal Of Mr. Boren's Conviction For Felon In Possession Of A Firearm

In the Respondent's Brief, the State argues that Mr. Boren's "complaints about I.C. § 18-310 . . . would not result in dismissal of his criminal case because striking down I.C. § 18-310, would not reinstate Boren's right to possess a firearm." (Respondent's Brief, p.9.) The State is incorrect. Mr. Boren has argued that his trial counsel was ineffective for failing to file a motion to dismiss the felon in possession of a firearm charge because I.C. § 18-310, particularly paragraph (4), treats Idaho residents differently based upon the location of their pre-July 1, 1991 conviction. It is true the reviewing court will strike only the unconstitutional language from the statute. *United States v. Booker*, 543 U.S. 220, 227-229 (2005). Here, the unconstitutional portion of I.C. § 18-310 is paragraph (4), which treats Idaho residents differently based upon the jurisdiction of their prior felony conviction. Excising paragraph (4) from I.C. § 18-310 results in Mr. Boren's Second Amendment rights being automatically reinstated upon the "final discharge" of his pre-July 1, 1991 felony convictions, like all other similarly situated Idaho residents with Idaho felony convictions. See I.C. § 18-310(2)(kk).

Thus, contrary to the State's argument on appeal, Mr. Boren could not legally have been convicted of felon in possession of a firearm if his Second Amendment rights had previously been automatically reinstated and as such, his motion to dismiss the aforementioned charge would have been granted.

3. Mr. Boren Is Not Required To Prove I.C. § 18-310(4) Is Not Rationally Related To A State Interest

In its briefing, the State argues that Mr. Boren has failed to allege facts that I.C. § "18-310 fails to pass a rational basis review." (Respondent's Brief, pp.7-19.) First,

Mr. Boren is only required to prove disparate treatment in the application of a statute in this case, I.C. § 18-310. See *Hooper*, 472 U.S. at 616-618; *Dickerson*, 142 Idaho at 519-520. Here, Mr. Boren filed an Amended Petition for Post Conviction Relief and supporting affidavit arguing his trial counsel was ineffective for failing to file a motion to dismiss his charge for unlawful possession of a firearm because Idaho Code § 18-310 is unconstitutional as it violates Article IV, § 2 of the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment based upon its differential treatment of Idaho residents. (R., pp.15-28, 77-84.) Thus, to the extent this Court determines that I.C. § 18-310(4) creates a fixed, permanent distinction between similarly situated Idaho residents, Mr. Boren has met his initial burden. The question of whether the differential treatment is rationally related to a legitimate purpose is subject to the State identifying a legitimate purpose for the statute and showing that the statute's differential treatment is rationally related to that purpose. See *Dickerson*, 142 Idaho at 521-522 (evaluating and dispensing of the State's proposed rational relationship arguments and stating, "the classifications created by the statute are not rationally related to the purpose hypothesized by the State.")

Accordingly, in light of the foregoing, and those arguments submitted in Mr. Boren's Appellant's Brief, Mr. Boren asserts that the district court erred in granting the State's motion for summary disposition.

CONCLUSION

Mr. Boren respectfully requests that this Court find that his trial counsel was rendered ineffective assistance of counsel. Accordingly, Mr. Boren requests that this Court vacate his conviction for unlawful possession of a firearm.

DATED this 4<sup>th</sup> day of November, 2015.

A handwritten signature in black ink, appearing to read "Eric D. Fredericksen for:", written over a horizontal line.

ERIC D. FREDERICKSEN  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 4<sup>th</sup> day of November, 2015, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

BOB LESTER BOREN  
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JUNEAL C KERRICK  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

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EVAN A. SMITH  
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EDF/eas