

No. 49029-3-II

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**COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION TWO**

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STATE OF WASHINGTON

Appellant,

v.

WAYLON JAMES HUBBARD,

Respondent.

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**BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES  
UNION OF WASHINGTON**

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## **I. IDENTITY AND INTEREST OF *AMICUS CURIAE***

The identity and interest of *Amicus Curiae* American Civil Liberties Union of Washington are set forth in the Motion for Leave to File, which accompanies this Brief.

## **II. ISSUE ADDRESSED BY *AMICUS CURIAE***

Whether the trial court correctly ruled that Mr. Hubbard's certificate of discharge should have an effective date of the date on which all available documents show he successfully completed all the conditions of his sentence, consistent with RCW 9.94A.637's language and intent, as well as this state's policy of reducing barriers to re-entry following completion of sentence requirements.

## **III. STATEMENT OF THE CASE**

The facts of the case are sufficiently presented by Respondent's brief, although a few bear repeating as they are relevant to the arguments below. Mr. Hubbard pled guilty to possession of stolen property in the second degree (a Class C felony) on October 29, 2004. His sentence consisted of 30 days of confinement—15 days of which were converted to 120 hours of community service—along with certain standard sentence conditions, such as submission to urinalysis and breathalyzer tests. Mr. Hubbard was initially under Department of Corrections (DOC) supervision, but that supervision ended on February 24, 2005. In August

2011, the community service provider with which he completed his community service requirement closed. Mr. Hubbard paid off his outstanding legal financial obligations (LFOs) and completed his community service by February 25, 2013.

To establish that he completed his community service, Mr. Hubbard's petition for a certificate of discharge included a declaration from the community service provider where he completed his community service, stating that despite its closure in 2011, Mr. Hubbard had definitely completed his ordered community service by February 25, 2013. Mr. Hubbard also swore under penalty of perjury that he completed his sentence conditions when he submitted a petition to discharge his sentence. Based on this evidence, the trial court dated the certificate of discharge February 25, 2013, the date Mr. Hubbard completed the terms of his sentence.

#### **IV. ARGUMENT**

For decades, RCW 9.94A.637 has provided that a certificate of discharge confirming completion of a felony sentence and restoring rights will be issued when a defendant comes forward and shows completion of all sentence requirements. The statute furthers this state's policy of enabling people who have served their sentences to reenter society and become productive members of their communities. The effective date on

the certificate of discharge is critical, because it begins the timeline to vacate the felony conviction—a key step for those with convictions to access housing and employment.

Mr. Hubbard is entitled to a certificate of discharge dated February 25, 2013, because the evidence shows that is the date by which he had completed all of his court-ordered sentence conditions. It is that date that is the most relevant under RCW 9.94A.637, and it is that date the court should employ for his certificate of discharge.

**A. The Language, Intent, and Legislative History of RCW 9.94A.637 Demonstrate the Legal Validity of the Trial Court’s Ruling that a Certificate of Discharge Should be Dated to Reflect the Date of Completion of All Sentencing Conditions**

Certificates of discharge should be dated to coincide with the date on which the sentence conditions in the case were completed. This conclusion is the only one consistent with the language, purpose, and history of RCW 9.94A.637.

**1. The Language of RCW 9.94A.637 Mandates that the Effective Date of the Certificate is the Date on Which the Conditions of the Original Sentence Were Completed.**

Washington’s certificate of discharge documents completion of a person’s sentence requirements and restores civil rights taken away as a result of a felony conviction, such as the right to be on a jury. RCW 9.94A.637 lays out the procedure for obtaining such a certificate. In Mr.



Hubbard's case, since he long ago completed DOC supervision, RCW

9.94A.637(1)(c) governs and states as follows:

When an offender who is subject to requirements of the sentence in addition to the payment of legal financial obligations either is not subject to supervision or does not *complete the requirements* while under supervision of the department, it is the offender's responsibility to provide the court with verification of the *completion of the sentence conditions* other than the payment of legal financial obligations. When an offender satisfies all legal financial obligations under the sentence, the county clerk shall notify the sentencing court that the legal financial obligations have been satisfied. When the court has received both notification from the clerk and adequate verification from the offender that the *sentence requirements have been completed*, the court shall discharge the offender and provide the offender with a certificate of discharge by issuing the certificate to the offender in person or by mailing the certificate to the offender's last known address.

RCW 9.94A.637(1)(c) (emphasis added).

The plain language of RCW 9.94A.637 repeatedly confirms that the goal of the statute is to issue a certificate of discharge upon "completion of the sentence conditions." RCW 9.94A.637(1)(c). RCW 9.94A.637 is entitled "Discharge upon completion of sentence," and every relevant subsection of RCW 9.94A.637 states that the certificate of discharge may issue only when "an offender has completed all requirements of the sentence" at issue. RCW 9.94A.637(1)(a), (b). Where, as here, the language is plain, the meaning of the statute should be derived from the wording of the statute itself. *Bellevue Fire Fighters Local 1604*,

*Intern. Ass'n of Fire Fighters, AFL-CIO, CLC v. City of Bellevue*, 100 Wn.2d 748, 750, 675 P.2d 592 (1984) (“Where statutory language is plain and unambiguous, the statute’s meaning must be derived from the wording of the statute itself.”) And here, the language makes clear that the only criterion differentiating a person who is eligible to receive a certificate of discharge from one who is not is whether the the terms of the sentence have been completed.

Further, the issuance of the certificate of discharge has never relied upon an evidentiary hearing of any kind; the certificate simply issues once the terms of the sentence are completed, adding force to the argument that the date of completion is the primary date with which the statute is concerned. RCW 9.94A.637(1)(c); RCW 9.94A.637(5) (stating that “a certificate of discharge is not based on a finding of rehabilitation”).

Because the purpose of the statute is to provide for the issuance of a certificate of discharge once an offender has completed the terms of their sentence, the state has no legitimate interest in refusing to issue a certificate that has an effective date of the date when the terms of the sentence were actually completed. Mr. Hubbard’s petition, signed under penalty of perjury, demonstrates that he completed the terms of his sentence by February 25, 2013, and that fact is undisputed. Because the completion of sentence conditions is the crucial element of RCW

9.94A.637(1)(c) the trial court correctly issued the certificate of discharge with a sentence completion date of February 25, 2013.

**2. The State's Argument is Contrary to the Intent of RCW 9.94A.637**

RCW 9.94A.637 states on its face that the issuance of a certificate of discharge is dependent on the completion of sentence conditions. The plain language of the statute is utterly consistent with the purpose of the statutorily created certificate of discharge, which is to enable ex-offenders who have completed the terms of their sentences to reenter society. Refusal to date the certificate of discharge on the date on which a person completed the terms of their sentence, using a much later date instead, is contrary to the intent of the statutory scheme.

The state's argument that the language of RCW 9.94A.637(1)(c) requires the certificate to be dated as of the petition is inconsistent with the purpose of the statute. Although RCW 9.94A.637(1)(c) requires verification from the individual that the non-financial sentence conditions have been met, requiring that a certificate be dated only on the day that a petition with verification is received by the court would elevate form over substance.

The State's reliance on *State v. Johnson* is misplaced. *State v. Johnson*, 148 Wn. App. 33, 197 P.3d 1221 (2008). Quite simply, the

record in Mr. Johnson's case did not reflect that Mr. Johnson had completed the terms and conditions of his sentence on his requested certificate issuance date. Here, in marked contrast, the record demonstrates that Mr. Hubbard did complete the terms of his sentence by February 25, 2013. Further, *Johnson* centers on RCW 9.94A.637(1)(a), a different subsection than is at issue here, one for people under DOC supervision—unlike Mr. Hubbard, who was no longer under DOC supervision and was therefore subject to the requirements of 9.94A.637(1)(c). *Id.*

The statutory scheme created by RCW 9.94A.637 functions to restore rights, in recognition of the need for these rights in order for ex-offenders to move forward with their lives. This Court should interpret the statute accordingly, and in line with the legislative intent of the statute to enable reentry as of the date when all sentence conditions were completed.

**3. The Legislative History of RCW 9.94A.637  
Demonstrates that the Addition of RCW 9.94A.637(1)(c)  
Was Not Intended to Make it More Cumbersome for  
Individuals to Obtain Their Certificates of Discharge.**

RCW 9.94A.637(1)(c), on which Mr. Hubbard relies for his certificate of discharge, was not intended by the legislature to create a procedural hurdle for individuals to obtain their certificates of discharge. In fact, subsection (1)(c) was added to RCW 9.94A.637 as part of a

separate effort to address waiver or reduction of interest on LFOs in the state of Washington. Laws of 2004, ch. 121, § 2<sup>1</sup>; H.B. Rep., S.S.B. 5168, 2004 Reg. Leg. Sess. Only later during the legislative session was the original bill amended in order to include the section at issue regarding certificates of discharge.

Two primary forces drove the addition of RCW 9.94A.637(1)(c) in 2003. First, responsibility for LFO collections was transferred that year to the court clerks. Second, also in 2003, legislation went into effect that eliminated supervision of most offenders who were in the lowest two risk categories, including individuals like Mr. Hubbard. H.B. Rep., S.S.B. 5168, 2004 Reg. Leg. Sess. These changes meant some people with outstanding sentence conditions and who still owed LFOs would be taken off supervision, and there was concern that they, like people who had longer supervision, needed a way to get a certificate documenting completion of their sentences and restoring their rights.

The legislature remedied this situation by adding the section of RCW 9.94A.637 at issue in Mr. Hubbard's case, primarily to ensure that there was a mechanism in place for unsupervised individuals who pay off their LFOs to obtain a certificate of discharge. There is nothing in the legislative history supporting an argument that would delay the date of the

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<sup>1</sup> S.B. 5168, which resulted in changes to RCW 9.94A.637 was entitled "Authorizing reduction of interest on legal financial obligations."

certificate of discharge to the date of the petition itself; the intent of the statute to issue certificates of discharge as of the dates that sentence conditions are completed remains undisturbed.

**B. The Certificate of Discharge is Part of an Integrated Statutory Scheme that Triggers the Ability to Vacate the Felony Conviction and Effectuates the Reentry Process**

In addition to the full restoration of civil rights, the certificate of discharge is a prerequisite to vacating a felony conviction, Washington's only procedure for "clearing the record of conviction." RCW 9.94A.640. The date on the certificate of discharge, confirming the completion date of the sentence, is the date that commences the waiting period that leads to vacating the conviction when the required number of crime-free years has passed. If the person seeking to vacate satisfies the waiting period and meets the other requirements of RCW 9.94A.640(2), they may petition the court to vacate their conviction.

The requirements to vacate are that they (1) do not have any criminal charges pending in this or any other state, (2) the conviction is not a violent offense as defined in RCW 9.94A.030, (3) the conviction is not a crime against persons as defined in RCW 43.43.830, (4) the person has not been convicted of a new crime since the date of discharge, (5) it has been at least five years since the date of discharge if the conviction is a

class C felony conviction<sup>2</sup>, and (5) it has been at least ten years since the date of discharge if the conviction is a class B felony conviction.

Satisfying these requirements takes a long time and the statute already reflects the legislature's determination of how long those with convictions should wait before being permitted to move forward; there is no justification or need for adding even more time as the State attempts to do here.

Vacating a felony conviction is a legal mechanism long provided by Washington's statutes, recognizing that those who have fully paid their debt to society by completing their sentences and remaining crime-free for years have the right to reenter society. Under the auspices of 9.94A.640, when the vacate process begun by obtaining the certificate of discharge is completed, a person may represent to the world that they were never convicted of the crime:

Once the court vacates a record of conviction under subsection (1) of this section, the fact that the offender has been convicted of the offense shall not be included in the offender's criminal history for the purposes of determining a sentence in any subsequent conviction, and the offender shall be released from all penalties and disabilities resulting from the offense. *For all purposes, including responding to questions on employment applications, an offender whose conviction has been vacated may state that the offender has never been convicted of that crime.* Nothing in this section affects or prevents the use of an offender's prior conviction in a later criminal prosecution.

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<sup>2</sup> Unless the class C felony is one described in RCW 46.61.504(6) or RCW 46.61.502(6)

RCW 9.94A.640(3) (emphasis added). This language has been a part of RCW 9.94A.060 since its inception and is strong evidence that as long ago as 1981, the legislature recognized the reentry barriers created by conviction history. Laws of 1981, ch. 137, § 23. Historically, the effect of a vacate order has been “to annul, set aside, cancel or rescind; to render an act void, as in ‘to vacate an entry of record or a judgment.’” *State v. Breazeale*, 99 Wn.App. 400, 408, 994 P.2d 254 (2000) (quoting Black’s Law Dictionary 1548 (6<sup>th</sup> ed.1990)).

Under RCW 9.95.240(2)(b), the entrance of an order to vacate by the Court also triggers a transmittal of that order to the Washington State Patrol identification section such that the State Patrol may update their criminal history records to reflect the vacate order, to update the FBI’s records for that person, and to prevent the dissemination of the vacated conviction. RCW 9.95.240(2)(b). An order to vacate, therefore, can limit the degree to which a person’s criminal history is circulated to those requesting criminal history records of individuals, such as background check companies<sup>3</sup>.

The statutes were designed so that the certificate of discharge works hand in hand with the process of vacating the conviction. Indeed,

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<sup>3</sup> See *infra*, notes 5, 6 and accompanying text.



when RCW 9.94A.637 first went into effect, section 22 (which created 9.94A.637) was immediately followed by the section creating the ability to vacate. Laws of 1981, ch. 137, §§22, 23. The two are inextricably linked, and the interpretation of both statutes that is adopted by the court should be one that best advances the legislative intent behind the statutory scheme as a whole. *Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1990) (stating that when discerning legislative intent, “the interpretation adopted should always be one which best advances the legislative purpose”).

The sooner an individual can obtain a certificate of discharge, the sooner that person can vacate their conviction and obtain the records benefits that flow from vacating, while at the same time society benefits from reentry of a person less burdened by the effects of a criminal record (discussed below).

**C. A Certificate of Discharge Date Reflecting Date of Sentence Completion, by Supporting the Ability to Vacate the Conviction Earlier, Reduces Barriers to Reentry Thereby Benefiting Both the Individual and Society At Large**

The state of Washington is explicitly committed to reentry and rehabilitation for those with prior convictions:

The legislature declares that it is the policy of the state of Washington to encourage and contribute to the rehabilitation of felons and to assist them in the assumption of the responsibilities of citizenship, and the opportunity to secure employment or to

pursue, practice or engage in a meaningful and profitable trade, occupation, vocation, profession or business is an essential ingredient to rehabilitation and the assumption of the responsibilities of citizenship.

RCW 9.96A.010.<sup>4</sup> The ability to vacate prior convictions is a critical step towards reentry for many individuals with a criminal history.

And reentry is already hard; it defies the statutes cited above to add another burden by giving the certificate the date asserted by the State.

There are few legal protections for people with prior convictions and many housing providers and employers rely heavily on criminal history to screen out potential tenants and employees. *See, e.g., Michelle Natividad Rodriguez & Maurice Emsellem, 65 Million “Need Not Apply,” The Case for Reforming Criminal Background Checks for Employment*, The Nat’l Employment Law Proj. (Mar. 2011), [http://www.nelp.org/content/uploads/2015/03/65\\_Million\\_Need\\_Not\\_Apply.pdf](http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf).<sup>5</sup> As a result, access to employment and housing, both of which are critical to post-conviction stability and lower likelihood of recidivism, is limited for those with criminal records. And this trend has only been

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<sup>4</sup> Governor Inslee also issued an executive order on April 26, 2016 on the importance of successful reentry, cementing the state’s position that successful reentry is to be effectuated by removing barriers to reentry and allowing it to occur as soon as possible. Exec. Order No. 16-05, Building Safe and Strong Communities through Successful Reentry (Apr. 26, 2016).

<sup>5</sup> According to this report by the National Employment Law Project (NELP), the results of a survey demonstrated that approximately 90 percent of companies routinely utilize commercial background checks to screen out employees with prior conviction histories.

excacerbated by the increasing availability of criminal history records.<sup>6</sup>

The long-lasting reentry barriers are even more difficult for people of color to surmount. Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. of Soc. 5, 937 (Mar. 2003) (demonstrating through a sociological research study, that when employers receive identical criminal record information from two applicants, one white and one African American, they are more likely to reject the applicant of colour).<sup>7</sup>

With this factual backdrop, the importance of the certificate of discharge and the date attached to the discharge becomes clear: a certificate dated with the date on which sentence conditions were completed permits people to vacate their convictions sooner, improving their access to housing and/or employment. And delaying the date of the certificate of discharge prolongs and perpetuates the unfair and discriminatory impact of prior convictions on people's lives.

Reentry to the housing and labor markets is essential not just for

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<sup>6</sup> Not only has criminal history become widely reported through background checks, assisted by the widespread availability of conviction records, individuals with criminal history face the additional hurdle that their history is frequently improperly or inaccurately reported. See The Nat'l Employment Law Proj., *The Wild West of Employment Background Checks: A Reform Agenda to Limit Conviction and Arrest History Abuses in the Digital Age*, (Aug. 2014), <http://www.nelp.org/content/uploads/2015/03/Wild-West-Employment-Background-Checks-Reform-Agenda.pdf>.

<sup>7</sup> For this exact reason, both the Equal Employment Opportunity Commission (EEOC) and Department of Housing and Urban Development (HUD) caution against the liberal use of conviction history in making employment and housing determinations; such usage results in a discriminatory impact on minority populations. See *infra* p. 16.

individual ex-offenders, but for society as a whole. Approximately 95% of those who have been incarcerated will be released back into their communities. *See* Michelle Natividad Rodriguez & Beth Avery, *The Consideration of Criminal Records in Hiring Decisions*, Nat'l Reentry Resource Ctr. (Oct. 2015), <https://csgjusticecenter.org/wp-content/uploads/2015/10/TheConsiderationofCriminalRecordsinHiringDecisions.pdf>. This amounts to more than 600,000 people returning to their communities every year—and finding themselves in a society that uses their criminal history as a controlling factor in deciding whether they can rent an apartment or get a job. *Id.*

The creation of a permanently unemployable and unhousable class is in no one's interests. A recent article by then-President Barack Obama in the *Harvard Law Review* summarises the massive scale of the reentry problem:

Beyond prison and sentencing reform, we need to do more as a country to help people who have served their time put their lives back on track. Not only is it the right thing to do, but giving former inmates the tools they need to lead law-abiding lives is also a direct investment in public safety. . . . The obstacles to this population finding gainful employment , obtaining public benefits, pursuing higher education, and reintegrating into the workforce are staggering. This means millions of Americans have difficulty even getting their foot in the door to try to get a job, much less actually hanging onto that job. That doesn't just deprive individuals of opportunity, it deprives business of talented workers, and it deprives communities in desperate need of more role models who are gainfully employed.

See Barack Obama, *Commentary: The President's Role in Advancing Criminal Justice Reform*, 130 Harv. L. Rev. 3, 811, 833 (2017). See also, U.S. Equal Emp't Opportunity Comm'n, *EEOC Enforcement Guidance: The Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, (Apr. 25, 2012), [https://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm#I](https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#I); U.S. Dep't of H.U.D., *Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions* (Apr. 4, 2016), [https://portal.hud.gov/hudportal/documents/huddoc?id=hud\\_ogcguidappfhastandcr.pdf](https://portal.hud.gov/hudportal/documents/huddoc?id=hud_ogcguidappfhastandcr.pdf) (EEOC and HUD guidances recognizing the harms flowing from a person's criminal history). An earlier date on the certificate of discharge, leading to earlier ability to vacate the conviction with its attendant records benefits, is exactly the kind of "tool [ex-offenders] need to lead law-abiding lives [and] is also a direct investment in public safety," as President Obama explained. Obama, *Commentary*, 130 Harv. L. Rev. at 833.

Although individuals are frequently turned away from opportunities because of their criminal histories, a series of studies consistently demonstrate that access to housing and employment reduces

recidivism. See, e.g., Christy Visser *et al.*, *Employment after Prison: A Longitudinal Study of Releasees in Three States*, Urban Institute (Oct. 20, 2008), <http://www.urban.org/research/publication/employment-after-prison-longitudinal-study-releasees-three-states>; Jocelyn Fontaine, *The Role of Supportive Housing in Successful Reentry Outcomes for Disabled Prisoners*, 15 *Cityscape: A Journal of Policy Development and Research* 53 (2013). Washington's statutes promoting earlier reentry are intended to avoid this insidious catch-22 as well as promote public safety, so that ex-offenders unable to find work or housing because of their conviction record are not driven further away from being productive members of society.

Pursuant to the authorities discussed above, there is overwhelming evidence that the consequences of the criminal justice system, including the records consequences that depend on the certificate of discharge and vacate process, affect people many years after their conviction. RCW 9.94A.637 appropriately addresses this problem by creating an integrated, reasonable, and plainly stated statutory system with a certificate of discharge dated with the date of sentence completion at its heart. This Court should give that system effect by affirming the trial court ruling.

## V. CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that the Court affirm the trial court's decision to make Mr. Hubbard's certificate of discharge effective as of the date on which the evidence showed he completed the terms of his sentence.

Respectfully submitted on January 23, 2017.

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**COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II**

No. 49029-3-II

**State of Washington v. Waylon James Hubbard**

**DECLARATION OF SERVICE**

I declare, under penalty of perjury, under the laws of the State of Washington, that on the date below, I caused to be served a copy of the Brief of *Amicus Curiae* American Civil Liberties Union of Washington via email and submission to the Division II JIS Link system to the following addresses with consent to electronic service:

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