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No. 95012-1

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent

v.

WAYLON JAMES HUBBARD
Petitioner.

SUPPLEMENTAL AMICUS CURIAE BRIEF OF THE AMERICAN
CIVIL LIBERTIES UNION OF WASHINGTON, WASHINGTON
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,
WASHINGTON DEFENDER ASSOCIATION, CIVIL SURVIVAL,
AND PUBLIC DEFENDER ASSOCIATION

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I. IDENTITY AND INTEREST OF AMICI

The ACLU is a statewide, nonpartisan, nonprofit organization of over 80,000 members and supporters, dedicated to the preservation of civil liberties and civil rights. The ACLU strongly supports efforts to reduce the harmful consequences arising out of the criminal justice system, including supporting efforts to reduce barriers to reentry. It has worked for years on both policy and legal advocacy to reduce these barriers. It has also participated as *amicus* in numerous Washington cases on reentry issues and on many other criminal justice related issues.

Civil Survival is an organization formed to advance the rights of formerly incarcerated individuals. The organizational goal is to create a framework and structure within which formerly incarcerated individuals can lead and effect change through advocacy efforts. The organization teaches the community about the importance of using individual voices and experiences to educate policy makers, with the goal of breaking the cycle of homelessness and poverty. Civil Survival leads practical workshops on community organizing and offers legal educational materials to assist formerly incarcerated and other marginalized groups in navigating key areas of reentry, including the area of employment for those with prior convictions. Civil Survival's interest as amicus is in increasing employment access for formerly incarcerated individuals.

The Public Defender Association (PDA) advances social and racial equity and community health through reform of the criminal justice system. Grounding reform in a public health and safety framework, PDA develops new strategies and implements models that improve on conventional responses to crime and public order issues. In collaboration with community and government partners, PDA uses policy advocacy, organizing, litigation, and public education to achieve their goals. PDA advocates on behalf of individuals who are currently or may be involved with the criminal justice system. PDA has engaged in initiatives that increase reentry success for individuals engaged in the criminal justice system and PDA's interest here is in successful reentry through access to employment for those individuals.

WACDL is a nonprofit association of over 1100 attorneys practicing criminal defense law in Washington State. As stated in its bylaws, WACDL's objectives include "to protect and insure by rule of law those individual rights guaranteed by the Washington and Federal Constitutions, and to resist all efforts made to curtail such rights." WACDL has filed numerous *amicus* briefs in the Washington appellate courts. Many members of WACDL assist their clients in obtaining CODs and vacation orders in their own cases and have been actively involved in legislative efforts such as Ban the Box.

The Washington Defender Association (WDA) is a nonprofit association representing over 1200 public defenders and 30 defender offices, including criminal defense attorneys, investigators, and others throughout the state of Washington. WDA and its members are committed to supporting and improving indigent defense. A primary purpose of WDA is to improve the administration of justice and stimulate efforts to remedy inadequacies in substantive and procedural law that contribute to injustice. For many years, WDA has been involved in issues related to reducing the impact of conviction on individuals and their families and improving policy and systems to support individuals going through reentry. WDA and its members have previously been granted leave to file amicus briefs on many issues related to criminal defense and representation of the indigent. WDA has approved the filing of this supplemental amicus curiae brief.¹

II. STATEMENT OF THE CASE²

Petitioner Hubbard pled guilty to possession of stolen property on October 29, 2004. The Department of Corrections (DOC) later terminated its supervision of Mr. Hubbard, and certified that at the time he had

¹ This Court granted ACLU-WA and WACDL's motion to participate as amicus in this case on November 28, 2017. The other listed organizations are joining this brief.

² The facts are based on the parties' briefs which cite to the applicable portion of the record.

completed 55 of the 120 community service hours ordered as part of his sentence. Completion of the remainder of the community service hours was then attested to by Shelley Steveson. By February 25, 2013, it is undisputed that Mr. Hubbard had completed all of the terms of his sentence, including paying off his legal financial obligations (LFOs). Mr. Hubbard's petition for a Certificate of Discharge (COD) included evidence of his completion of sentence terms by February 25, 2013, and requested that the COD be dated effective as of that date.

The trial court did that, but the Court of Appeals reversed and this Court has granted review.

III. ISSUE ADDRESSED BY AMICUS BRIEF

Whether RCW 9.94A.637 authorizes an effective date for a certificate and order of discharge that is the date for which there is verification that a defendant has satisfied the conditions of the sentence, as the trial court concluded, or whether instead the effective date is the much later date when the court received notice of sentence completion, which would increase the barriers to reentry contrary to numerous important public policies.

IV. ARGUMENT

1. RCW 9.94A.637(1)(c) authorizes the trial court to issue a Certificate of Discharge with an effective date that is the date of completion of the sentence conditions.

The Court of Appeals' interpretation of a remedial statute places an unjustified roadblock in the path of formerly convicted persons who are trying to navigate their way back into society. This Court should apply the same reasonable interpretation of RCW 9.94A.637 that the trial court applied, and allow an effective date that is the date for which there is verification of sentence completion.

Petitioner Hubbard's briefs and Amici's prior brief explain how there is ample authority supporting an effective date at the point of sentence completion. Nowhere does the statutory language preclude an effective date as of the date of completion of the sentence. In fact, the title of RCW 9.94A.637, "Discharge *upon completion of sentence . . .*" (emphasis added) strongly supports that the effective date be the date of sentence completion. The statute clearly authorizes the sentencing court to issue the COD upon receiving from a defendant like Mr. Hubbard, "not subject to supervision by the department or []not [having] complete[d] the requirements while under supervision of the department," "verification of the completion of the sentence conditions other than the payment of legal financial obligations." RCW 9.94A.637(1)(c). Mr. Hubbard provided

precisely the verification of sentence completion described in the statute.

“The fundamental purpose of statutory interpretation is to ascertain and carry out the intent of the legislature considering the statute as a whole.” *State v. Murray*, 187 Wn.2d 115, 124, 384 P.3d 1150 (2016) (citing *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9–10, 43 P.3d 4 (2002)). *Accord Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010); *Matter of Eaton*, 110 Wn.2d 892, 898, 757 P.2d 961 (1988). The plain meaning of RCW 9.94A.637, read as a whole and especially in conjunction with RCW 9.94A.640, indicates the legislative intent was to allow formerly convicted persons to begin the clearance of their record as soon as they had completed the obligations of the sentence. As this Court recognized in *Lake*, 169 Wn.2d at 526 (internal quotations and citations omitted), the statute must be viewed in context, including “related provisions, and the statutory scheme as a whole.” Allowing a COD to have an effective date which matches the actual date of sentence completion is both reasonable and authorized.

Confirming this is a reasonable interpretation, the statute does not specify what the effective date of the Certificate should be. It does not say the effective date is only the much later effective date when the court is presented with the appropriate proof. It merely says the court shall “provide the offender with a certificate of discharge by issuing the

certificate to the offender in person....” There is nothing in the statute that prohibits the court from issuing a COD which reflects the verified completion date of the sentence, rather than the date that the motion is filed with the court requesting the discharge. Since the statute is silent on the issue of what the effective date should be (an argument that is not disputed by the Pacific County Prosecutor), reaching the conclusion that the effective date should be the date on which sentence conditions were completed does not constitute a “rewrite” of the statute. Indeed, the prosecutor’s own brief states that “RCW 9.94A.637 permits offenders to obtain a certificate of discharge (COD) when they have completed their sentence conditions.” Resp. Supp. Br. at 3.

Even if the statute is subject to more than one reasonable interpretation as to whether the effective date should be the date of sentence completion or some later date, any statutory ambiguity should be interpreted in light of the rule of lenity, in favor of the formerly convicted person and the earlier effective date. *See, e.g., City of Seattle v. Winebrenner*, 167 Wn.2d 451, 462, 219 P.3d 686 (2009).

2. Interpreting RCW 9.94A.637(1)(c) to authorize only a later effective date, as the prosecution requests and the Court of Appeals approves, would cause numerous harms.

Interpreting RCW 9.94A.637 in a reasonable manner, with an effective date at the point of verified sentence completion, is an issue of

critical importance for those seeking to overcome the effects of a criminal conviction because of the function of a COD in Washington's sentencing scheme. The issuance of a COD restores the rights lost as a result of a felony conviction, but perhaps more importantly, the effective date of the COD starts the clock³ for when the formerly incarcerated individual may move to vacate his conviction under RCW 9.94A.640. Under RCW 9.94A.640, the ability to vacate a conviction flows from the entry of a COD, which is based on the completion of sentence conditions. It makes sense that the waiting period for a vacate commences with the actual time that the individual completed their sentence, because this is the only objective evidence available that an individual has complied with the court's orders and is on the road to rehabilitation. But, interpreting RCW 9.94A.637(1)(c) in the manner that the Pacific County prosecutor advocates would have the effect of invalidating the five or ten year time period under the vacate statutory scheme by lengthening the amount of time that individuals must wait between the time that they completed their sentence conditions and the time that they may file a motion to vacate their conviction. For example, Mr. Hubbard would have to wait an additional three years over and above the statutory waiting period, to

³ The clock runs for five or ten years, depending on whether a Class C or Class B felony is involved.

vacate his conviction.

Vacation is important because the former offender may then reply in the negative to queries about his criminal history, backed by the statute's assurance that "all penalties and disabilities" resulting from the conviction are removed and that he or she may state "[f]or all purposes, including responding to questions on employment applications... that the offender has never been convicted of that crime." Clearance of the record of conviction is an important goal for a successful reentry into society after a conviction. A delay in the effective date of the issuance of the COD, through no fault of the offender, is a huge impediment to this goal. The statute should not be construed to place such an artificial obstacle in the way of the former offender.

It is the experience of *Amici* that many formerly convicted persons find themselves in the same situation as Mr. Hubbard, left to navigate the complexities of RCW 9.94A.637 and its convoluted paths to obtaining a COD, often without an attorney. He had not completed all his community service while still under DOC supervision, but was well on his way to doing so. He subsequently did so, but there was no governmental entity responsible for notifying the court that the non-financial part of the sentence had been completed. By the time he had paid off his financial obligations in 2013, the clerk was under no duty to notify the court that the

case was ready for consideration for a COD. Consequently, although Mr. Hubbard would have been eligible for a COD in February of 2013, no action was taken by the court until April of 2016, after he filed his petition for relief.

This is not, in the experience of *Amici*, an unusual situation. A client may have been eligible to get a COD several years earlier, based on completion of both the financial and non-financial obligations, but he or she was unaware of what to do to accomplish this feat. Many members of WACDL have, as a component of their practice, provided assistance to clients who are eligible for a COD, but who were never told they were eligible until they discussed the matter with a lawyer. Until the decision in this case, there was no obstacle for a Superior Court to issue a COD which recognized as its effective date the date of the actual completion of the sentence. Indeed, throughout Washington, prosecutors routinely agree to, and courts regularly approve, COD effective dates that reflect the verified date of sentence completion, confirming that the earlier effective date is both a reasonable interpretation of the statute and consistent with the public interests at stake. This effective date is often several years earlier than when the motion for the Certificate is filed, as was true in Mr. Hubbard's case. There is no basis to deny him the earlier effective date of February 25, 2013.

The longstanding practice among prosecutors and Superior Courts regarding treating the date of completion of the sentence as the effective date of the COD promotes the purposes of the COD and vacation statutes: the reintegration of former offenders into the fabric of society. The existence of this longstanding practice also suggests that until the Court of Appeals' decision in this case, there was no serious doubt about the authority of Superior Court judges to issue CODs which reflected the actual date of completion of a sentence.⁴

In contrast to the reasonable interpretation of the statute which supports a COD effective date of sentence completion, the Pacific County prosecutor's insistence that a COD can only be made effective on the date the court is *informed* about the completion of the sentence is at odds with the rest of the statute. While the statute is rightly concerned with actual

⁴ The Legislature has been content to allow the established practice of COD effective dates reflecting date of sentence completion to continue for decades. While the New Hope Act, H.B. 2890, 65th Leg., Reg. Sess. (Wash. 2018), introduced in the 2018 legislative session, would have amended the COD statute to make even clearer that an effective date of sentence completion was authorized, the issue of the COD effective date was only one small part of the bill; it covered several other topics which drew opposition. Although failure to pass remedial legislation in the face of a Court of Appeals decision may sometimes be construed as legislative acquiescence to the court decision (*see, e.g., State v. Stalker*, 152 Wn. App. 805, 813, 219 P.3d 722 (2009)), that conclusion would be inappropriate here. The Court of Appeals decision was filed just a few months prior to the short 2018 Legislative session. Given the time constraints and the fact that 1,410 bills were introduced in addition to the 2,236 bills introduced in the prior session, it is unsurprising, and not at all a reflection of the Legislature's view of COD effective dates, that the New Hope Act (which was introduced for the first time in the 2018 session) did not achieve passage.

completion of the sentence requirements as a pre-condition to the issuance of a COD, there is nothing to suggest that its effective date is tied to *notification* rather than the actual completion of the sentence. The prosecutor's briefing in this case provides no policy reason why the Superior Court should not recognize the date of sentence completion as the effective date of the COD. In fact, an interpretation of RCW 9.94A.637(1)(c) that allows a court to date a COD as of the actual sentence completion date incentivizes individuals to complete their sentence conditions as soon as possible in order to take advantage of the vacate remedy. This interpretation thus promotes important public interests.

However, interpreting the statute to impose a later effective date under (1)(c) results in an *unreasonable* interpretation; defendants who commit more serious felonies and are thus eligible for CODs under (1)(a) and (b) can get earlier effective dates, while defendants with less serious felonies and less onerous sentence conditions are saddled with a *later* effective date and *later* access to the benefits of a vacate. Since RCW 9.94A.637(1)(c) itself does not bar a superior court from dating a COD as of the date of sentence completion, and the reentry policy behind CODs and vacates dictates that the completion date be applied, this Court should find that the superior court correctly dated Mr. Hubbard's COD as of the

time that he had completed his sentence conditions.

3. Mr. Hubbard's interpretation of RCW 9.94A.637(1)(c) is consistent with the reentry policy of the state of Washington and an alternative interpretation would have harmful ramifications for justice-involved individuals.

In the state of Washington, vacating a conviction is the only method by which justice-involved individuals can represent that they do not have a conviction when they are applying for jobs, or looking for housing. The longer it takes for individuals to obtain a COD, the longer it takes for them to vacate their convictions, and the longer and harder the road to reentry is for those with conviction records.⁵ The Pacific County prosecutor's interpretation of RCW 9.94A.637(1)(c) would transform a statute from one that is intended to relieve the burdens imposed on justice-involved individuals, to one that instead exacerbates those burdens.

The possession of a non-vacated prior conviction is a crucial factor for the justice-involved individual undergoing the process of reentering their community. Past convictions are used as a proxy to determine the

⁵ Dan Satterberg, the Prosecuting Attorney of King County, in testifying in support of the New Hope Act, recognized the important public interests served by removing barriers to reentry and reducing the effects of the consequences of a criminal record. Video Recording: *New Hope Act: Report from Statewide Reentry Council Before House Public Safety Comm.*, 65th Leg., at 52:20 (Jan. 23rd, 2018), available at <https://www.tvw.org/watch/?clientID=9375922947&eventID=2018011322&eventID=2018011322&startStreamAt=2036&stopStreamAt=4591&autoStartStream=true>.

level of risk posed by individuals in both the housing⁶ and employment contexts⁷, and to exclude formerly incarcerated individuals from employment and housing opportunities. This is true despite current research that shows risk levels dip drastically once four to seven years have lapsed, post-conviction.⁸ And, without the foundational support of housing and employment, the reentry process is fraught with the possibility of recidivism.⁹ The earlier opportunity for individuals to vacate, and therefore state openly that they have never been convicted of the crime, is therefore of critical importance for those whose primary barrier to accessing housing and employment is a prior conviction history. In contrast, interpreting RCW 9.94A.637(1)(c) in a way that has the effect of lengthening the amount of time that individuals have to wait before

⁶ Merf Ehman & Anna Reosti, *Tenant Screening in an Era of Mass Incarceration: A Criminal Record is No Crystal Ball*, NYU Journal of Legislation and Public Policy Quorum (Mar. 2015); *The Importance of Stable Housing for Formerly Incarcerated Individuals*, 40 Hous. Law Bulletin 60 (Feb. 2010).

⁷ Beth Avery & Phil Hernandez, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies* (Nat'l Emp't Law Project, April 2018).

⁸ Kurlychek et. al, *Scarlet Letters & Recidivism: Does an Old Criminal Record Predict Future Criminal Behavior?*, 5 Journal of Criminology & Pub. Policy 483, 483-504 (Sept. 2006).

⁹ Le'Ann Duran et al., The Council of State Gov'ts Justice Ctr., *Integrated Reentry and Employment Strategies: Reducing Recidivism and Promoting Job Readiness* (Sept. 2013), available at http://csgjusticecenter.org/wp-content/uploads/2013/09/Final.Reentry-and-Employment.pp_.pdf; Jocelyn Fontaine, *Examining Housing as a Pathway to Successful Reentry: A Demonstration Design Process* (Nov. 2013), available at <https://www.urban.org/sites/default/files/publication/24206/412957-Examining-Housing-as-a-Pathway-to-Successful-Reentry-A-Demonstration-Design-Process.PDF>.

they are eligible to vacate prior convictions only serves to exacerbate an already excruciating reentry process.

Individuals with prior felony convictions face numerous barriers during reentry and it is the policy of the state of Washington to ease those barriers. This policy is in unity with Mr. Hubbard's interpretation of RCW 9.94A.637(1)(c), which contains absolutely no language precluding a court from issuing a COD utilizing the date on which he completed his sentence conditions.

V. CONCLUSION

The rights of thousands of former offenders in this state are at stake in this case, and their ability to become productive Washingtonians after having fully paid their debt to society would be severely undermined if the Court of Appeals' ruling were affirmed. The Court of Appeals' decision should be reversed.

Respectfully submitted this 14th day of May, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2018, I caused to be served the foregoing
*Supplemental Amicus Curiae Brief of Amici Curiae American Civil
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