

MARCH 12, 2007

WASHINGTON

I. Automatic Restoration of Rights:

Article VI, Section 3 of the Washington State Constitution provides that "[a]ll persons convicted of an infamous crime ... are excluded from the elective franchise." "Infamous crimes" are defined as those "punishable by death in the state penitentiary or imprisonment in a state correctional facility," Wash. Rev. Code § 29A.04.079, and have historically included only felonies. *See State v. Collins*, 124 P. 903 (Wa., 1912). Disenfranchised felony offenders in Washington remain ineligible to vote until they have completed all the requirements of their sentences, and have obtained certificates of discharge from the sentencing court under Wash. Rev. Code § 9.94A.637. A discharge may be issued only when the convicted person has completed "all requirements of the sentence, including any and all legal financial obligations." § 9.94A.637(4). (For pre-1984 offenses that involved a prison sentence, and certain sex offenses committed after 2001, certificate of discharge must be obtained from the Indeterminate Sentence Review Board.) A discharge under this section has "the effect of restoring all civil rights lost by operation of law upon conviction."

The Department of Corrections is responsible for notifying the court when an offender has completed the requirements of the sentence. Wash. Rev. Code § 9.94A.637. When an offender either is not subject to supervision by DOC or does not complete the requirements of the sentence 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. (Prior to 2003 amendments to § 9.94A.637, an offender discharged from supervision by DOC without paying costs and fines could never be discharged in the ordinary course, and thus could never regain the right to vote.)

The restoration system, while in theory automatic, has been characterized as "so bewildering that almost nobody negotiates it well."* The affirmative obligation to apply to the court for discharge and to pay all financial obligations stemming from conviction make restoration more onerous than analogous provisions of other states, where outstanding financial obligations are either waived or ignored. *See Jill Simmons, Note & Comment, Beggars Can't be Voters: Why Washington's Felon Re-enfranchisement Law Violates the Equal Protection Clause*, 78 WASH. L. REV. 297, 305-07 (2003). An offender who cannot pay his fine may petition the court for remission of all or part of the court fees and costs based upon

* Editorial, "Felon-voting laws confusing, ignored." *Seattle Times*, May 22, 2005. "You need a degree in government to figure it out," one official told the paper.

"manifest hardship." Wash. Rev. Code § 10.73.160(4). Alternatively, he may petition the governor to restore his civil rights or for pardon. *See United States v. Loucks*, 149 F.3d 1048, 1050 (9th Cir. 1998). The requirement that an offender pay all outstanding financial obligations before being permitted to vote has been held unconstitutional under both the federal and state constitutions. *See Madison v. Washington*, No. 04-2-33414-4 SEA (Sup. Ct., King Cty, March 37, 2006)**

Federal and out-of-state offenders must apply to the governor for restoration of rights.

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority*: Pardon power vested in Governor, subject to any restrictions imposed by the legislature. Wash. Const. art III, § 9. Governor must report to legislature every session on pardons granted, and reasons. Wash. Const. art III, § 11. Governor may (but is not required to) seek advice from State Clemency and Pardons Board. Wash. Rev. Code §§ 9.94A.880, 9.94A.885, 10.01.120. Governor may also grant restoration of rights without a pardon, which has the effect of discharging unpaid portion of fine. Wash. Rev. Code §§ 9.96.010, 9.96.020. The State Clemency and Pardons Board is composed of five members appointed by the governor to four-year terms, subject to confirmation by the senate. They receive no compensation, and staff is provided by the Governor's office. The board elects its own chairman from among its members.
- *Effect*: Pardon has effect of vacating conviction. Wash. Rev. Code. § 9.94A.030 ("A conviction may be removed from a defendant's criminal history only if it is vacated pursuant to Wash. Rev. Code §§ 9.96.060, 9.94A.640, 9.95.240, or a similar out-of-state statute, *or if the conviction has been vacated pursuant to a governor's pardon.*"); *see also* 1967 Wash. Att'y Gen. Op. No. 6; *State v. Cullen*, 127 P.2d 257, 259 (Wash. 1942)
- *Eligibility*: No requirements. Federal and out-of-state offenders may apply to Board for restoration of rights but not for pardon.
- *Process*: Hearing mandatory in all cases, majority rule. Application form at <http://www.cjpf.org/clemency/WashingtonApp.pdf>. Petition must be filed with Clemency and Pardons Board, which cannot recommend clemency until a public hearing has been held on the petition. The prosecuting attorney of the county where the conviction was obtained

** The Ninth Circuit held in *Farrakhan v. Washington*, 338 F.3d 1009, 1016 (9th Cir. 2003) that Washington's disenfranchisement provisions could be challenged as racially discriminatory under the Voting Rights Act, but the court of appeals rejected a specific challenge to the State's restoration scheme on standing grounds.

must be notified at least thirty days prior to the scheduled hearing, and the prosecuting attorney shall make reasonable efforts to notify victims, survivors of victims, witnesses, and the law enforcement agency or agencies that conducted the investigation, of the date and place of the hearing. Wash. Rev. Code § 9.94A.885(3).

- *Frequency of Grants:* About 25-40 petitions for pardon received each quarter, but the Governor's staff forwards few of these to the Board for hearing. Pardons have been rare in recent years (no more than 3-6 pardons granted each year for past decade). (Press accounts in December 2004 report that outgoing Gov Locke pardoned or commuted 48 people in final months, including at least one pardon to avoid deportation.). Source: Office of the Governor.
- *Contact:* Shelby Hultman, Legal Affairs Assistant, Office of the Governor, 360-902-4111. Shelby.Hultman@gov.wa.gov.

B. Judicial sealing or expungement of adult felony convictions:

- *Vacating Record of Conviction:* Wash. Rev. Code. § 9.94A.030 provides that “a conviction may be removed from a defendant's criminal history only if it is vacated pursuant to Wash Rev. Code §§ 9.96.060 [misdemeanors], 9.94A.640 [Class B and C felonies], 9.95.240 [probationary sentences], or a similar out-of-state statute, or if the conviction has been vacated pursuant to a governor's pardon.” Vacation unavailable for violent or sex offenses, including domestic violence.
 - *Class B and C felonies* (except crimes against the person, sex offenses) vacation available from sentencing court after satisfaction of an eligibility waiting period: 10 years for Class B felonies, five for Class C felonies. Wash. Rev. Code § 9.94A.640. Vacation unavailable for Class A felonies, or if person has charges pending or was convicted since offense for which vacation sought. Upon petition, if the court finds the offender eligible, court may clear the record of conviction by: (a) Permitting the offender to withdraw the offender's plea of guilty and to enter a plea of not guilty; or (b) if the offender has been convicted after a plea of not guilty, by the court setting aside the verdict of guilty; and (c) by the court dismissing the information or indictment against the offender.
 - *Probationary sentences:* After conviction of “any crime,” court may suspend or defer sentence, and place defendant on probation. Wash. Rev. Code §§ 3.66.067; 9.95.200. Upon successful completion of probation, or “at any time,” guilty plea may be withdrawn or conviction set aside, and defendant released of all penalties and disabilities, provided that, in subsequent prosecution conviction may

be pleaded and proved Wash. Rev. Code § 9.95.240(1). After the period of probation has expired, the defendant may apply to the sentencing court for a vacation of the defendant's record of conviction under § 9.94A.640. A conviction that has been vacated under this section may not be disseminated or disclosed by the state patrol or local law enforcement agency to any person, except other criminal justice enforcement agencies. § 9.95.240(2)(a) and (b).

- *Misdemeanor offenses.* Vacation also available for misdemeanor offenses under § 9.96.060, on same terms and to same effect as for felony offenses under § 9.94A.640 (above). Waiting period of three to five years following discharge.
- *Nonconviction records:* Nonconviction records in criminal justice agency files may be sealed administratively two years after disposition favorable to defendant. Criminal Records Privacy Act, Wash. Rev. Code § 10.97.060. Court has no jurisdiction to seal nonconviction records. *See State v. Shineman*, 94 Wash. App. 57 (1999). Agency may refuse to make deletion in the case of deferred prosecution (though court may vacate record of conviction, as describe above).
- *Effect of Vacation:* Once the court vacates a record of conviction:

[T]he fact that the offender has been convicted of the offense shall not be included in the offender's criminal history for 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.

Wash. Rev. Code § 9.94A.640 (1), (3). Record preserved for future criminal prosecutions. *See State v. Breazeale*, 994 P.2d 254 (Wash. Ct. App. 2000), *aff'd in part, rev'd in part*, 31 P.3d 1155 (Wash. 2001).

- *Firearms Restoration:* Vacation of sentence does not restore firearms rights. 1988 Wash. Att'y Gen. Op. No. 10. Wash. Rev. Code § 9.41.040 permits petition to court to restore firearms privileges. Persons sentenced to probation regain rights automatically if they have not previously been convicted of a sex offense prohibiting firearm ownership under subsection (1) or (2) of this section and/or any felony defined under any law as a class A felony or with a maximum sentence of at least twenty years, or both, the individual may petition a court of

record to have his or her right to possess a firearm restored. Eligibility in case of felony five years without conviction or pending charges, and no prior offenses prohibiting gun possession; for misdemeanor after three years. If a person is convicted of a crime for which Wash. Rev. Code § 9.41.040 prescribes no procedure for the restoration of firearm possession rights, the only available statutory remedy is a pardon by the governor with a finding either of innocence or of rehabilitation. 2002 Wash. Att’y Gen. Op. No. 4. Section 9.41.040(3) provides that possession of a firearm is not prohibited for someone who has a “certificate of rehabilitation.” This term is not defined, however, and Washington courts have been held to have no authority to issue such certificates. *See State v. Masangkay*, 91 P.3d 140, 141 (Wash. Ct. App. 2004) (Wash. Rev. Code § 9.41.040(3), which contains the "certificate of rehabilitation" language, cannot reasonably be interpreted as authorization for Washington courts to issue certificates of rehabilitation).

C. Administrative certificate: N/A

III. **Nondiscrimination in Licensing and Employment:**

Policy expressed in Wash Rev. Code ch. 9.96A (“Restoration of Employment Rights”)(1973):

“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.”

§ 9.96A.010. Most public employers and licensing agencies may not disqualify from employment or licensure solely because of conviction, but may consider a conviction only if 1) the conviction occurred within the last ten years; and 2) the crime “directly relates” to the employment or license sought. § 9.96A.020. Several important exceptions dealing with vulnerable adults and children: offenders who have committed “crimes against persons” and “crimes of financial exploitation” cannot work in nursing homes, adult family homes, and child care facilities. Wash. Rev. Code §§ 9.96A.060, 43.43.842. Law enforcement agencies do not have to comply with standards governing other public employees. § 9.96A.030 Individuals convicted of fraud may be barred from employment in county treasurer’s office; sex offenders may be barred from many positions in education, including teaching, even if more than 10 years have passed since conviction. § 9.96A.020. Schools districts are required to conduct records checks of all employees, as is the Department of Social and Health Services. Wash. Rev. Code § 28A.400.303.