THE HONORABLE JOHN E. BRIDGES

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CHELAN COUNTY

TIMOTHY BORDERS, et al. Plaintiff, v. KING COUNTY, et al. Defendant	No. 05-2-00027-3 **AMICUS CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON**

I. IDENTITY AND INTEREST OF ACLU

The American Civil Liberties Union of Washington (ACLU) is a non-profit, non-partisan civil liberties organization dedicated to the preservation and defense of constitutional rights and liberties, including the right to vote. For a number of years the ACLU has worked on the problems associated with re-enfranchisement of felons. Amicus has given legal advice and direct representation to many citizens of Washington seeking to navigate the often complex procedures involved in regaining the right to vote following a felony conviction. Amicus is currently serving as counsel in Madison v. State, No. 04-2-33414-4 (King County Superior Court

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2004), a case challenging the constitutionality of Washington laws that condition re-enfranchisement on ability to pay legal financial obligations. It also submitted an amicus brief in Farrakhan v. Locke, 338 F.3d 1009 (9th Cir. 2003), a case challenging aspects of Washington's felon disenfranchisement laws under the federal Voting Rights Act. Through these efforts, the ACLU has accumulated significant knowledge of the statutory requirements of re-enfranchisement, and is familiar with the challenges often faced in obtaining evidence of re-enfranchisement from government records. It created a publication for the general public explaining how felons may regain the right to vote in Washington, which has been distributed by not only the ACLU itself, but also by governmental bodies including the Secretary of State and several county auditors.

The ACLU supports neither party, and this brief takes no position as to what constitutes an "illegal vote" for the purposes of the election contest statute. This brief is submitted to provide the Court with an overview and history of the statutes that govern the disenfranchisement and re-enfranchisement of convicted felons in Washington, and to provide insight into how those statutes operate in practice. Amicus hopes that this background will aid the Court as it considers evidence relating to alleged illegal votes cast for governor in the November 2004 election.

II. DISCUSSION

The trial of this election contest will require the Court to determine, based primarily on review of government records, whether certain people were disenfranchised as the result of a felony conviction and if so, whether their right to vote was later restored. Under current Washington law, answering those questions is a complicated task. For any given felon, the disenfranchisement and re-enfranchisement process will vary depending on the nature of the conviction, when and where the conviction occurred, and certain factors that will be unique to

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each case. Washington's statutory scheme relating to felon re-enfranchisement has changed frequently, including significant amendments in 2002, 2003, and 2004. Responsibility for crucial portions of the process is divided among a number of agencies that do not always communicate well with each other. The relevant official records are dispersed amongst many different local and state governmental bodies -- each having its own policy with regard to the retention of records. This brief seeks to provide the Court with guidance as it confronts these complexities.

A. Convictions Not Resulting in Disenfranchisement

Not all criminal convictions result in disenfranchisement in Washington. The Washington Constitution disenfranchises "persons convicted of infamous crime unless restored to their civil rights." Wash. Const. art. IV, §3. RCW 29A.04.079 defines "infamous crime" as "a crime punishable by death in the state penitentiary or imprisonment in a state correctional facility." Felonies are the only crimes punishable by incarceration in state prison. RCW 9A.20.021(1). This means that the Court may encounter other types of convictions that do not lead to the loss of the right to vote.

1. Juvenile Adjudications

Convictions in juvenile court "shall in no case be deemed a conviction of a crime." RCW 13.04.240, RCW 13.40.240. For this reason, findings of guilt in juvenile courts are called "adjudications" rather than "convictions." RCW 13.04.450. Adjudications in juvenile court are hence not "infamous crimes" that lead to disenfranchisement.

2. Misdemeanor Convictions

Misdemeanors are punishable by incarceration in a county jail, not in a state prison, RCW 9.94A.190(1), so they are not "infamous crimes" that lead to disenfranchisement.

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3. Felony Convictions Reversed After Trial

Persons whose felony convictions were reversed as a result of direct appeal, personal restraint petition (state habeas), or federal habeas petition are not convicted of infamous crime, and hence are not disenfranchised. It may go without saying, but the presence in a court file of a judgment of conviction would not be proof of disenfranchisement if that conviction were subsequently overturned on appeal or in a post-conviction proceeding. In those cases, there will be no certificate of discharge in the trial court file, since there was nothing to discharge.

Amicus is aware of a persistent problem in Washington resulting from the lack of a uniform method of recording reversals in trial court files. Upon initial conviction, a judgment and sentence will always be added to the file. By statute, the initial felony conviction is reported to the state patrol for its criminal records database, RCW 10.97.045, and to the county auditor for removal from the voter rolls, RCW 10.64.021, RCW 29A.08.520 and RCW 29A.08.540. But there is no standardization in how trial court files record the fact of reversal on appeal or habeas. Most often, the trial court file will contain the mandate from the state appellate court. (Amicus is not familiar with the process for notifying state trial courts when a conviction is overturned through federal habeas proceedings.) Mandates are sometimes worded in ambiguous fashion, not always indicating on their face the ultimate disposition of the criminal charge, e.g., "REVERSED in part, AFFIRMED in part, and REMANDED for further proceedings". Depending on county practice, and depending on the next steps taken by the prosecutor after issuance of the mandate, there may or may not be a later document in the court file expressly stating that the charge ultimately resulted in no conviction. There is no statute requiring notification of the state patrol or the county auditor when a previously entered conviction is reversed, and these agencies are understandably reluctant to attempt independent legal interpretation of the mandate.

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Amicus has participated in numerous stakeholders' meetings with the State Patrol, the Office of the Administrator of the Courts, and judges' associations to discuss how reversals of convictions can be accurately noted in court files and the databases that rely on them, but there is currently no solution in place. For purposes of the election contest, the net result is that for a criminal trial court file that contains a conviction, a notice of appeal, and then an ambiguous mandate, it may be necessary to read the appellate court decision to determine whether the conviction was upheld and the person disenfranchised.

B. Re-enfranchisement Procedures for Washington Convictions

Washington has several different statutory procedures for re-enfranchisement. In most cases, the date of conviction will determine which procedure applies. This section of the brief is therefore organized chronologically to track the various statutory amendments affecting the issue.

1. Pre-SRA Felonies

Criminal sentencing in Washington was thoroughly revamped by the Sentencing Reform Act of 1981 (SRA), RCW 9.94A. Before the SRA, the length of a felony sentence was largely determined by the Parole Board, which had discretion, within a statutory maximum sentence, to determine when a defendant was sufficiently rehabilitated to be released from prison, and then released from supervised parole in the community. The SRA replaced this regime with a determinate sentencing scheme. See generally, David Boerner & Roxanne Lieb, "Sentencing Reform in the Other Washington," 28 Crime & Justice 71 (2001). The SRA governs the sentences for crimes committed after July 1, 1984. RCW 9.94A.905.

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a) Pre-SRA Sentences Completed Under the Indeterminate Sentence Review Board

For offenders sentenced prior to the SRA, but who served time during the SRA era, re-enfranchisement occurs when the Indeterminate Sentence Review Board (ISRB) issues a final order of discharge. The ISRB has the discretion to issue a final order of discharge if it determines that a discharge "is not incompatible with the best interests of society and the welfare of the paroled individual." RCW 9.96.050. The ISRB must issue a final order of discharge three years from the date of parole, unless a discharge has already been issued or the parolee is on suspended or revoked status. RCW 9.96.050.

Once the ISRB approves the issuance of the certificate of discharge, it is distributed to the offender, the auditor for the county in which the offender was sentenced and to the Department of Corrections (DOC). RCW 9.96.050. The department of corrections is required to maintain a database containing the names of all felons who have been issued certificates of discharge under this procedure. RCW 9.96.050. There is no statutory requirement that the sentencing court receive notice of the discharge or a copy of the certificate of discharge.

b) Pre-SRA Deferred and Suspended Sentences

In some pre-SRA cases, the defendant was given a deferred or suspended sentence rather than a prison term. RCW 9.92.060, RCW 9.95.200, RCW 9.95.210. In these cases the sentencing court, rather than the ISRB, has the power to restore civil rights. RCW 9.96.050 (referring to "prisoners on parole."); RCW 9.92.066 (suspended sentences); RCW 9.95.240 (deferred sentences). For suspended sentences, RCW 9.92.066 specifically authorizes a defendant to apply to the sentencing court for restoration of civil rights. Pursuant to such application, the court may enter an order releasing the defendant "from all penalties and disabilities resulting from the offense or crime of which he or she has been convicted."

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RCW 9.92.066. The same language about releasing the defendant from "penalties and disabilities" appears in RCW 9.95.240, applicable to deferred sentences. Thus, court orders terminating suspended sentences or dismissing deferred sentences, in pre-SRA cases, should be considered orders restoring voting rights.

2. Felonies Under the SRA

If convicted under the SRA, civil rights are restored "when an offender has completed all requirements of the sentence, including any and all legal financial obligations." RCW 9.94A.637(1). Criminal sentences under the SRA include financial and nonfinancial requirements. The financial requirements are known collectively as legal financial obligations. RCW 9.94A.030(27) (definition of LFO). See also RCW 9.94A.505(4) & (7) (authority to impose LFO's as part of sentence); RCW 9.94A.753 (restitution collection procedures); RCW 9.94A.760 (LFO collection procedures); RCW 10.82.090(1) (interest on LFO's). The primary nonfinancial requirements are incarceration, RCW 9.94A.190, RCW 9.94A.505, and (for sentences imposed after the effective date of the Offender Accountability Act of 1999, RCW 9.94A.715, RCW 9.94A.850(5)) a period of community custody, both of which occur under the supervision of the DOC.

For the vast majority of disenfranchised felons no longer in custody, payment of LFO's is the single obstacle to discharge. Exact figures are hard to come by, but at a minimum there are tens of thousands of Washingtonians who have completed their terms of DOC supervision but are disenfranchised due to unpaid LFO's. Jill E. Simmons, "Beggars Can't Be Voters," 78 Wash. L. Rev. 297, 305-06 (2003). Furthermore, because responsibility for tracking LFO payments has historically been divided among different entities, many felons who are eligible for discharge may have difficulty procuring the necessary proof of their eligibility. A series of recent statutory

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changes addresses different portions of the problem, but each is an incomplete fix for the felon seeking re-enfranchisement.

a) SRA Provisions on Re-Enfranchisement From 1981 to 2002

The original version of the current RCW 9.94A.637 read in relevant part: "When an offender has completed the requirements of the offender's sentence, the sentencing courts shall discharge the offender and provide the offender with a certificate of discharge." Laws of 1981, ch. 137, § 22 (formerly RCW 9.94A.220, renumbered as part of the major recodification of the SRA that occurred in Laws of 2001, ch. 10, § 6). The original statute left a significant gap, since there was no mechanism for the sentencing court to learn that the sentence had been completed. The section was therefore amended to clarify that upon completion of all requirements of the sentence, "the secretary [of the department of corrections] or the secretary's designee shall notify the sentencing court, which shall discharge the offender and provide the offender with a certificate of discharge." Laws of 1984, c. 209, § 14.

The DOC has accurate knowledge of when a felon is incarcerated or in DOC-supervised community custody, and of LFO payments made directly to the DOC. But for many years, responsibility for tracking LFO payments for released felons was divided between DOC and the sentencing courts. Under former RCW 9.94A.145 (now RCW 9.94A.760), the sentencing court could at any time collect payments towards the criminal judgment. In addition, DOC was responsible for collecting LFO's for up to ten years after release. After ten years, the DOC's non-custodial supervision of the felon would end, and any further LFO collection would be the sole responsibility of the court. DOC uses the term "termination " for the moment it ceases supervision of a felon and closes its file on LFO collections. The LFO obligation would survive the DOC's termination of supervision, and many conscientious felons would continue to make LFO payments directly to the courts. If a felon took 12 years to pay all LFO's, the court clerk

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could file a satisfaction of judgment, but the court would not enter a certificate of discharge, because the court was to discharge the defendant only upon notification from the DOC, and the DOC had terminated supervision and made no further notifications.

This problem was greatly exacerbated in recent years. As the prison population grew, the DOC became overburdened by the obligation of collecting LFO payments for felons no longer under its supervision. Although the practice was not contemplated by statute, DOC dealt with this pressure by terminating supervision of felons with remaining LFO obligations long before ten years had elapsed. Through public disclosure requests, amicus has learned that the DOC would routinely issue notices of termination of supervision to felons with remaining LFO obligations only a few years after they completed the nonfinancial requirements of sentence. DOC officials have explained that the agency would only continue supervision for the full ten years if it believed the felon was likely to pay. If, in the DOC's judgment, the felon was likely to remain indigent, continued supervision for financial purposes would be futile and the file was terminated.

In practice, the timing of DOC termination orders is even more haphazard than this rationale would suggest. The ACLU has seen several cases where termination orders were entered after a satisfaction of judgment was already on file. In these cases, a court file that should have a certificate of discharge instead had only a satisfaction of judgment and a DOC termination notice. In one case, supervision was terminated less than three years after sentencing, only to have the defendant discover seven years later that he had not been discharged because he owed $0.77 for which he had not been billed.

During these years, the fact of DOC termination would find its way into court files in various formats, varying from county to county and over time. They may not have the phrase "Termination" in the caption, and the fact of termination is often revealed only in the text. See

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Exhibit A (sample from 1987), Exhibit B (sample from 2003). Whatever its form, the presence of a termination notice in a court file without a certificate of discharge is a signal that more investigation is needed to determine whether the felon has completed all requirements of sentence and is eligible for discharge.

b) 2002 Amendments to the SRA

In recent years the legislature has begun to address some of the mechanical problems that result from linking re-enfranchisement with LFO payment. The first such bill addressed the problem that some felons who had completed all requirements of their sentence never knew that they had been re-enfranchised. Laws of 2002, ch. 16, § 2 created the current RCW 9.94A.637(1)(a), which requires the sentencing court to provide a copy of the certificate of discharge directly to the defendant, in addition to placing it in the court file. However, the court's obligation under this section would exist only if the completion of sentence occurred "while [the defendant is] under the custody and supervision of the department." Id. It did not affect the vast majority of felons who could not afford to pay off their LFO's until after they were released from DOC custody and supervision.

c) 2003 Amendments to the SRA

A major revision of the laws related to LFO collection was enacted in 2003. Laws of 2003, ch. 379. This law amended RCW 9.94A.760(4) to clarify that the DOC's role in collecting LFO's would end upon completion of incarceration and community custody. This eliminated the ten-year post-release period of overlapping DOC and court responsibility for LFO's. While the defendant is under DOC supervision, payments made to the DOC are reported to the court clerk. Payments made after supervision is terminated are made directly to the court clerk. (The clerk also has concurrent jurisdiction to enforce any civil restitution judgment obtained by crime victims while the defendant is incarcerated.)

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The 2003 amendments also altered the discharge statute. The legislature added RCW 9.94A.637(1)(b) to deal with persons who completed paying LFO's after they were released from DOC supervision. Subsection .637(1)(b)(i) calls for the DOC to issue a notice of termination to the defendant and the clerk upon completion of nonfinancial obligations of sentence. This is often referred to as a "5990 Notice," after the original bill number for the amendment. Subsection .637(1)(b)(ii) calls for the clerk to notify the sentencing court when a defendant for whom the DOC has provided notification of completion of nonfinancial conditions subsequently fulfills the financial conditions. At that time the court is to discharge the defendant and provide a certificate of discharge.

This system is already showing signs of trouble. RCW 9.94A.637(1)(b)(i) calls for the DOC to notify the county clerk "that the offender has completed all nonfinancial requirements of the sentence." However, the DOC's standard 5990 Notice does not contain this language, instead saying that the felon does not "meet the criteria for continued supervision by the Department of Corrections." Exhibit C. At least one county clerk tells amicus that where the 5990 Notice is ambiguous about completion of nonfinancial requirements, the clerk will not consider it sufficient to trigger notification to the court under subsection .637(1)(b)(ii) when the felon completes payment. Overall, amicus is uncertain how the new statutory procedure is being implemented, and whether it generates certificates of discharge for all felons who are eligible for them.

d) 2004 Amendments to the SRA

If every responsible agency does its part correctly, the 2002 and 2003 amendments to the discharge statute will -- at least in theory -- result in certificates of discharge for each person who completes all requirements of their SRA sentences after the latter amendment. They do not provide any relief for the felons who paid their LFO's before 2003 but after they were released

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from DOC supervision. The court file would not necessarily contain any equivalent of a .637(1)(b)(i) notice that the felon had completed nonfinancial requirements, so the clerk would not place any significance, for discharge purposes, on the fact that the LFO judgment had been satisfied. For these people, there was simply no statutory mechanism to obtain certificates of discharge, even though they were eligible for discharge. The ACLU seriously contemplated class-action litigation on behalf of these people, a suit that could have alleged violations of constitutional due process and the Voting Rights Act of 1965, 42 U.S.C. § 1971(a)(2)(B).

Fortunately, the legislature recently added the current RCW 9.94A.637(1)(c) to the discharge statute. Laws of 2004, ch. 121, § 2. This section allows a defendant who has completed all requirements of sentence but who has not been discharged to make a petition to the court. The burden is on the defendant to "provide the court with verification" that the nonfinancial portions of sentence are completed. Id. That verification, combined with the clerk's verification that LFO's have been paid, may be presented to the court as grounds for discharge. In practice, the county prosecutors act as gatekeepers for the process since in most counties they have a say in noting post-trial motions with the sentencing court.

Unlike the earlier system, the amended statute at least creates a mechanism for persons eligible for discharge to obtain a certificate of discharge. But the new petition process is neither simple nor foolproof. At the outset, there is no obligation on the part of any government entity to notify affected felons that the petition process is available to them. This has led to eligible felons not receiving certificates of discharge. For example, several counties recently cancelled the registrations of some alleged illegal voters identified in this litigation. Some of the cancelled registrations were for people eligible for discharge because they had completed all financial and nonfinancial requirements of their sentences. They had no certificates of discharge in their files, and were not aware that a petition process was available to them to procure the certificate.

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Persons who are able to learn about the petition process still face the obstacle of demonstrating to the Court that they have completed the nonfinancial portions of their sentence. Typically, this information resides with the DOC, and it closes most of its files upon termination of supervision. Many people who have attempted to obtain proof from DOC that they had finished the nonfinancial requirements of sentence have been told that that information is not available because the file has been archived or destroyed. DOC has also given misinformation about re-enfranchisement, such as telling one individual that he needed to petition the Bureau of Alcohol, Tobacco, and Firearms. In practice, people in this situation are best able to pursue their .637(1)(c) petitions only by retaining counsel who can prepare the necessary declarations and negotiate with the county prosecutors to have the petition placed before the sentencing court. The expense and labor involved poses a significant barrier for many affected people.

e) Summary of Re-Enfranchisement Under the SRA

The methods for persons convicted under the SRA to be re-enfranchised have changed over the years. Even after many statutory changes, there are still many people who have completed all terms of their SRA sentences and are eligible for discharge, but whose court files will contain no certificate of discharge. Amicus believes there are thousands of people in this category statewide. While the recent amendments to the SRA are important improvements to the system, it remains far from perfect. Sentencing courts enter discharges only when they receive the right combination of information from the DOC, the clerk, or the defendant, providing many opportunities for individuals to fall through the cracks.

One such story shows the fragility of the system. A defendant who contacted ACLU had been sentenced in March 2002 to a felony sentence consisting of community service hours plus $625 in LFO's. The defendant made a final LFO payment to the clerk on June 10, 2003, but the satisfaction of judgment was not entered until June 26, 2003. Meanwhile, the Court received

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notice of DOC termination on June 23, 2003. That document did not contain the language required by RCW 9.94A.637(1)(b)(i) expressly stating that the defendant had completed all nonfinancial requirements of sentence. It did, however, contain the handwritten note "strike and term per CCO [community corrections officer] -- CSH [community service hours] done." Exhibit B. The defendant had completed all requirements of sentence, but due to the close overlap in the dates, the process for securing a certificate of discharge was never activated. DOC did not notify the court that all requirements of sentence were complete under .637(1)(a), because it was unaware that the judgment had been satisfied. The clerk did not notify the court that nonfinancial and financial requirements were completed under .637(1)(b), because the legislation was so new and because of deficiencies in the .637(1)(b)(i) notice. The defendant could not put the pieces together for the court through a .637(1)(c) petition, because the process did not yet exist.

As the 2004 election approached, the defendant called the county department of records and elections and explained her situation. She was told that she was eligible to register since she had completed her community service and paid her fines. She voted in 2004. In March 2005, the county cancelled her registration for lack of a certificate of discharge. ACLU is helping the defendant procure the certificate that should have been entered in 2003, so that she can re-register and vote in the future.

Not every SRA conviction poses as many problems as this one, but the potential clearly exists under the current statutory scheme. The 2005 session of the legislature is currently considering a number of competing bills to amend the system further. See HB 1358 (titled "Regarding Recidivism Reduction Through Discharge of Convicted Felons"), HB 2062 (titled "Tracking the Voter Registration of Former Felons"); and SB 5039. Even if enacted, these bills are unlikely to have any retroactive effect on this court's decision in the election contest.

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3. Pardons by the Governor

The governor has authority to grant pardons and restore civil rights to persons convicted of felonies in Washington either before or after the implementation of the SRA. RCW 9.96.010, RCW 9.96.020, RCW 9.96.030. This power is discretionary. Id. When restoration is ordered as a result of a pardon, the secretary of state must transmit a duly certified copy of the order to the superior court. Id.

C. Re-Enfranchisement Procedures for Non-Washington Felonies

The re-enfranchisement procedure for persons convicted of felonies in other jurisdictions takes a different path. There are no cases on point that consider whether out-of-state felony convictions are disenfranchising "infamous crimes" under RCW 29A.04.079. Persons seeking to register to vote in Washington must sign an oath including the words: "I am not presently denied my civil rights as a result of being convicted of a felony," RCW 29A.08.230, and this is assumed to include out-of-state felonies.

1. Federal Felony Convictions

Although the state has no authority to issue a pardon for a federal offense, it may selectively restore the right to vote in the state. To procure a restoration of voting rights after a federal felony, the defendant must successfully petition the state clemency and pardons board. If the petition is granted, the board may issue a certificate restoring the right to vote and run for elective office. To be effective, the certificate must be filed with the secretary of state. RCW 9.94A.885. There is no statutory requirement for the certificate be filed with the sentencing court or any Washington court, or given to any county auditor.

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2. Other State Felony Convictions

Felons convicted in other states would only be disenfranchised in Washington if they are disenfranchised in their home states. Thus, people who move to Washington after release from custody in another state need to discover the rules of the convicting state. Two states (Maine and Vermont) never disenfranchise felons. Some states disenfranchise felons permanently, but most restore the right to vote at some point after conviction and release from incarceration. Some states issue a document evidencing restoration of voting rights, but in other states the restoration is accomplished by operation of law. Elections officials in Washington are not necessarily aware of these rules in other states. For example, the ACLU assisted a person convicted of a felony in Texas who completed his incarceration and parole there, moved to Washington, and sought to register to vote. A county elections official refused to process his registration application, demanding proof of re-enfranchisement in Texas, but Texas issues no certificates and restores voting rights by operation of law. Only after ACLU intervened to explain Texas law was the voter allowed to register.

In addition, the Washington clemency and pardons board can also restore Washington voting rights to persons with felony convictions in other states. The procedure is the same as described above for federal convictions.

D. Records Indicating Restoration of Voting Rights

The numerous paths to re-enfranchisement make it is impossible to rely on any single source of information to determine conclusively whether any given convicted felon has had his or her civil rights restored in Washington. This section of the brief examines the sources of documents most likely to be presented as evidence in the election contest, and notes how those files might or might not reflect restoration of a person's right to vote.

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1. Court Files

Court files will be the best place to start, and in some cases they will be sufficient on their own. A court file will record the fact of a disenfranchising conviction. It may also contain a certificate of discharge. However, as described above, evidence in a court file other than a certificate of discharge may also indicate restoration of the right to vote. This would include a mandate from a court of appeals indicating that the conviction was reversed, or a notice from the secretary of state indicating that the governor has issued a pardon. The court file may also show that the person was eligible for a certificate of discharge, such as in cases where a file contains a termination of supervision and a satisfaction of judgment.

Significantly, a person may be re-enfranchised or eligible to be re-enfranchised without this fact being recorded in the court file. There is no statutory requirement that a sentencing court be notified in the case of those who have their voting rights restored by the ISRB under RCW 9.96.050 (certificate of discharge sent to the offender, the county auditor, and the DOC) or the clemency and pardons board under RCW 9.94A.885 (certificate of restoration sent to the secretary of state).

2. County Auditor Records

The county auditor maintains the list of currently registered voters, RCW 29A.08.105, and is responsible for striking persons from that list upon felony convictions, RCW 29A.08.520, and keeping a record of persons stricken for that reason, RCW 29A.08.540. For a number of reasons, a county auditor's list of stricken felon voters cannot be presumed to be authoritative.

In theory, the auditor will only be notified when a certificate of discharge is issued by the sentencing court pursuant to RCW 9.94A.637 or by the ISRB pursuant to RCW 9.96.050. The auditor is not notified if a conviction is reversed on appeal, because that involves no discharge. In addition, the county auditor need not be notified if an individual's civil rights are restored by

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the clemency and pardon board, RCW 9.94A.885(2), the governor, RCW 9.96.030, or by court upon termination of a pre-SRA suspended sentence, RCW 9.92.066.

In practice, county clerks do not always fulfill the statutory obligation to send certificates of discharge from the courts to the county auditors under RCW 9.94A.637. Last year the ACLU learned through public disclosure requests that at least seven of Washington's 39 county election offices had not received any certificates of discharge from their respective courts. In one county, the auditor had only a handful of certificates of discharge in its possession when ACLU made its public disclosure request in early 2005. Shortly thereafter, the auditor notified ACLU that the superior court had just sent a package containing several hundred certificates not previously provided to the auditor.

3. Department of Corrections Records

Per RCW 9.94A.637(2), the DOC is required to keep a database of the names of all felons who have been issued a certificate of discharge from either a sentencing court pursuant to RCW 9.94A.637 or the ISRB pursuant to RCW 9.96.050. This database should contain not only names, but also the date of discharge, the date of conviction and the offense. However, this database also has significant limits. The statute mandating creation of a DOC database was not enacted until 2002, so it is unclear whether it is a full historical record. Since it tracks certificates of discharge, it will not record other types of re-enfranchising events, such as reversal of a conviction on appeal, termination of a suspended sentence or dismissal of a deferred sentence, pardon by the governor, or action by the ISRB or clemency and pardons board.

4. Secretary of State Records

In the future, the secretary of state will establish a comprehensive database of legally registered voters. RCW 29A.08.651 (enacted to comply with the federal Help America Vote Act of 2002, P.L. 107-252). In the meantime, the secretary of state has limited information on hand

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about re-enfranchisement. By statute, the secretary of state is notified of re-enfranchisement only when voting rights are restored by either the governor or the clemency and pardons board. RCW 9.96.020; RCW 9.94A.885(2). The secretary of state need not be notified if restoration of voting rights occurs by any other means.

5. State Patrol Records

There are no statutory requirements that any information relating to the restoration of voting rights be communicated to the State Patrol. As such, these records cannot be relied upon to make a determination as to whether a particular convicted felon has had their civil rights restored. In addition, amicus is aware of many instances where the state patrol database failed to record the fact that convictions were overturned on appeal. The state patrol historically has failed to accurately record when some felony convictions were vacated or expunged after discharge. State v. Breazeale, 144 Wn.2d 829, 31 P.3d 1155 (2001).

III. CONCLUSION

The Washington legislature has announced that "an individual's right to vote is a hallmark of a free and inclusive society and that it is in the best interests of society to provide reasonable opportunities and processes for an offender to regain the right to vote after completion of all of the requirements of his or her sentence." Laws of 2002, ch. 16, § 1. Reality does not match this legislative goal. Even for persons who have completed all requirements of their sentence, the path to re-enfranchisement is filled with complex legal procedures, changing requirements and government agencies whose primary attention is focused on other issues. Understanding the system is challenging for attorneys, and is no doubt bewildering to persons without legal training.

Widespread confusion and misinformation may have resulted in some disenfranchised citizens improperly registering and voting. Most did so not for sinister motives, but because they

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misunderstood or were misinformed about their rights. Defendants are not told at the time of sentencing that their right to vote is affected. The DOC has no policies on advising felons about the state's re-enfranchisement procedure. According to news accounts of recent hearings to cancel voter registrations, most mistakenly believed that their voting rights were legally restored at the end of incarceration and community custody, some were incorrectly told as much by government officials, and some never understood that they had lost their right to vote in the first place. Brad Shannon, "County voter may face fraud charge," The Olympian (April 15, 2005); Jim Haley, "Felon explains why he cast vote," The [Everett] Herald (April 14, 2005); Lewis Kamb, "Felons testify about election voting," Seattle Post-Intelligencer (March 19, 2005).

Amicus hopes that the information submitted in this brief will aid the court as it sifts through the results of the state's flawed re-enfranchisement process.

DATED this 20th day of April, 2005.

AMERICAN CIVIL LIBERTIES UNION
OF WASHINGTON

By:

____

Nancy L. Talner, WSBA #11196
Aaron H. Caplan, WSBA #22525

Attorneys for Amicus

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EXHIBIT A

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

[redacted]

Defendant.

NO. [redacted]

ORDER MODIFYING SENTENCE AND WARRANT OF COMMITMENT (SENTENCING REFORM ACT)

FILED
DEC 21 AM 9:44
SUPERIOR COURT CLERK
SEATTLE, WASHINGTON

HEARING

The court considered a motion for an order modifying sentence for the defendant, on 12/18, 1987.

Present were:

Defendant: _____

Defendant's Attorney: _____

Deputy Prosecuting Attorney _____

Other: _____

The court considered: [ ] the violations listed on the Notice of Sentence Modification Hearing dated: _____, 19___; and/or [ ] _____.

FINDINGS

The court FINDS that:

The defendant has [X] willfully [ ] not willfully violated the requirements or conditions of sentence as follows:

1. [X] Failing to make required payments toward his/her court-ordered financial obligations.

2. [ ] Failing to complete court-ordered community service hours.

3. [X] Failing to report to his/her corrections officer monthly as instructed.

4. [ ] Absconding from community supervision before _____ and remaining as absconder until his/her recent arrest.

5. [ ]

COMMITMENT ISSUED DEC 21 1987

DEC 21 1987
COPY TO SENTENCING GUIDELINES COMMISSION

POSTED

NORM MALENG
Prosecuting Attorney
W554 King County Courthouse
Seattle, Washington 98104
583-2200

2.0

ORDER AND WARRANT OF COMMITMENT

It is ORDERED that:

I.

[N] The sentence entered on 1/2/87 is still in effect but modified in the following manner:

All Supervision is terminated

II.

Confinement is IMPOSED. The defendant shall serve 20 days of total/partial confinement in the King County Jail.

[ ] Work release authorized if eligible.

[N] Credit is given for 5 days served.

III.

IT IS FURTHER ORDERED that the King County Department of Adult Detention shall receive the defendant for classification, confinement and placement as ordered in the Order of Confinement.

DONE IN OPEN COURT this 18 day of Dec, 1987.

JUDGE

Presented by:

12/18/87
Deputy Prosecuting Attorney

Approved as to form:

Attorney for Defendant

NORM MALENG
Prosecuting Attorney
W554 King County Courthouse
Seattle, Washington 98104
583 2200

EXHIBIT B

CERTIFIED COPY
CERTIFIED COPY TO COUNTY JAIL
JUN 23 2003

FILED
03 JUN 23 AM 11:35
KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

34

Sentencing Judge(s): George T. Mattson

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. [redacted] Defendant. [redacted]

NO. [redacted]

ORDER MODIFYING SENTENCE AND JAIL COMMITMENT (9.94A.200)

(CLERK'S ACTION REQUIRED)

The following willful violations of the sentence having been admitted or proven: ( ) Failure to Report; ( ) Failure to Comply with Financial Obligations; ( ) Failure to perform _____ hours of Community Service; ( ) Failure to provide Department of Corrections with change of address; _____;

IT IS ORDERED that the sentence(s) previously entered is(are) still in effect but modified in the following manner:

(X) **ALL SUPERVISION** by the Department of Corrections IS **TERMINATED**;

( ) Supervision shall continue and the defendant shall report to a Community Corrections Officer within 72 hours of release from custody; any community supervision or community placement time is tolled during non-reporting period and custody time; _____;

( ) Trust fees and interest (except for restitution) are waived.

( ) The defendant shall provide Community Corrections Officer with current financial information.

( ) The defendant shall serve _____ days in the King County Jail to commence no later than _____, work release / home detention is authorized if eligible. This sentence ( ) does not ( ) does convert _____ hours into jail time, leaving _____ remaining to be performed by _____.

( ) If defendant provides the following proof of compliance _____ by _____ the defense attorney may present an order to quash jail time.

( ) No sanction will be imposed for the violation(s) found by the court. The Defendant is admonished to comply with the conditions of supervision as imposed by the court at the time of sentencing and as directed by the Department of Corrections. **Further violations will result in a jail sanction.**

X Strike and term per CCO -- CSH done. _____;

Norm Maleng
Prosecuting Attorney
W 554 King County Courthouse
Seattle, Washington 98104-2312
(206) 296-9000

DONE IN OPEN COURT on *June 20, 2003.*

Judge for Sentencing Judge(s)

Presented by:

Deputy Prosecuting Attorney

Attorney for Defendant

Norm Maleng
Prosecuting Attorney
W 554 King County Courthouse
Seattle, Washington 98104-2312
(206) 296-9000

EXHIBIT C

STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS

5990 NOTICE TO OFFENDER

OFFENDER NAME: [redacted]	DOC NUMBER: [redacted]

Per RCW 9.94A, the listed cause(s) do not meet the criteria for continued supervision **BY** the Department of Corrections. Any conditions of supervision imposed by the Department of Corrections are no longer in effect. The Court(s) will be notified of your supervision status.

Under RCW 9.94A, you are still subject to certain Court imposed conditions and requirements:
The Court has ordered you to pay legal financial obligations, including any accrued interest. You are required to make monthly payments to the county clerk on any outstanding legal financial obligations under the following cause numbers and in the amounts listed (contact the County Clerk if no payment amount entered):

COUNTY CLERK/CAUSE NUMBER	COUNTY CLERK ADDRESS	TOTAL AMOUNT ORDERED	MONTHLY PAYMENT SCHEDULE
1. [redacted]		$[redacted]	$10
2. /		$	$
3. /		$	$
4. /		$	$

- Payments should be made in the form of a Money Order or certified check and include the cause number listed above on all payments.
- Your contact information will be provided to the Office of the Administrator for the Courts and the County Clerk of jurisdiction for purposes of billing, monitoring and collection of Legal Financial Obligations. Report any change of address to the County Clerks office(s).
- Abide by any conditions of the Judgment and Sentence.
- Do not leave the United States without a court order.
- Protection Orders and No Contact Orders related to the above listed cause(s) remain in effect unless modified by the Court.
- Firearms: You have been convicted of a felony, and are prohibited by law from owning, possessing, receiving, shipping or transporting a firearm, ammunition, or explosives. This prohibition extends to every sort of gun, rifle, or explosive device or similar device including the frame or receiver of firearms. You should seek legal advice if you wish to possess a firearm after you are discharged from supervision.

☐ DOC REPORTING OBLIGATION STATUS: Report to Department of Corrections for remaining active cause(s).

If you have any questions, please contact your Community Corrections Officer.

A Warren — Community Corrections Officer/Records Staff
7-13-04 — Date
OMNU — Location/Facility

Distribution: **ORIGINAL:** Offender **COPY:** Central File/Field File

The contents of this document may be eligible for public disclosure. Social Security Numbers are considered confidential information and will be redacted in the event of such a request. *This form is governed by Executive Order 00-03, RCW 42.17, and RCW 40.14.*