Vacation and Expungement and Sealing, Oh My!

A primer on post-conviction matters.

BY VITALIY KERTCHEN

In common dialogue, the term "expungement" has come to mean removal of a criminal conviction from one's criminal history. Whether it is prospective clients calling for help in achieving an expungement, or members of the public posting questions on how to go about expunging their record on community question-and-answer websites like Avvo, the term has become entrenched in both the public and the defense attorney's vernacular.

However, the term "expungement" is a legal term of art and means something entirely different than how it is used day to day. Contrary to simply removing a criminal conviction from one's criminal history, "expungement" refers to the outright deletion and destruction of a court record or file in a way that makes it irretrievable.[1] This distinction is far from simply being semantic. Because of Washington's duality of access to criminal history records, this distinction becomes crucial in what the client expects and what you as the lawyer can deliver.

This piece aims to serve as a primer on vacating, expunging, sealing, redacting, deleting nonconviction data, and other post-conviction matters.

Duality of Access

In Washington, the public may access criminal history records in one of two ways. The first is to go straight to the source: the courthouse where the allegation was filed and adjudicated. The second is to go to the Washington State Patrol (WSP), the state's statutorily-mandated criminal history records repository.[2] Due to technological advancements, information pertaining to criminal history may be accessed from either source instantaneously. WSP maintains a public website where anyone's conviction record information may be accessed by the public for a ten dollar fee.[3] Court records are also instantaneously searchable using the Judicial Information System, which is available to anyone with a computer.[4] This duality of access to criminal history is important to keep in mind during the rest of this article because certain post-conviction options affect the type of information subject to dissemination, the source of access to the information, and the overall result to the client. This duality of access and the limitations it imposes on what you're able to accomplish for a client should be fully explained during consultation (and maybe even in writing), in order to avoid any client dissatisfaction in the future.

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Washington State Patrol

The WSP may disseminate without restriction two types of records:

1. Conviction records; and
2. Any information pertaining to an incident occurring within the last twelve months still pending in the courts.[5]

A conviction record is information relating to an incident that has led to a conviction or "other disposition adverse to the subject."[6] A disposition is adverse if it includes any disposition of charges other than a decision not to prosecute, an outright dismissal, or an acquittal.[7] Dismissals following a period of probation, suspension, or deferral of sentence count as adverse dispositions.[8] Therefore, a dismissal following a deferred sentence remains a conviction record and subject to unrestricted dissemination.

Judicial Information System

The Judicial Information System (JIS) allows the public to browse court records electronically without

having to visit the courthouse. It consists of both district and municipal court information, as well as superior court records (SCOMIS). The records are generally limited to the nature of the charge, the violation date, the name of the defendant, the status of proceedings, dispositions, dates when documents are filed, and synopses of what occurred at each hearing. The JIS system does not allow for viewing of any source documents filed with the court, such as pleadings.[9] JIS does not play by the same rules as WSP. Only sealed records are not subject to public scrutiny within JIS, regardless of ultimate disposition.[10]

Expungement

Expungement refers to the deletion and destruction of a court record or file.[11] Courts are prohibited from ordering the destruction of court records absent express statutory authority.[12] Adult criminal court records are not subject to destruction.[13] Juvenile criminal records are subject to destruction only under certain narrow conditions.[14] Thus, when clients reach out to a criminal defense attorney asking for help in seeking an "expungement," what they are usually asking for is help in vacating their criminal conviction.

Vacation

Two different statutes control vacating a criminal conviction. RCW 9.96.060 prescribes the prerequisites[15] for vacation of a misdemeanor or a gross misdemeanor. The general requirements for non-DV offenses are:

- there are no pending charges in any court;
- no new convictions since the date of conviction for the crime sought to be vacated;
- the offender has never had the record of another conviction vacated;[16]
- at least three years have passed since the offender completed the terms of the sentence, including any probation and financial obligations; and
- the offender is not restrained by

Legislative History - Misdemeanor Vacation

Until 2001, misdemeanors — unlike many felonies — could not be vacated at all in Washington. This changed when the state legislature passed a misdemeanor sealing bill that, in its original version, was drafted by WACDL's Sealing and Vacation Task Force (Mark Muenster and Nancy Talner, co-chairs). The task force, along with our then-lobbyist Sherry Appleton (now Rep. Appleton) and the WACDL/WDA Legislative Committee worked to pass this bill. However, legislators who opposed the bill, and whose support was needed to pass it, insisted that it be for first-time offenders only, hence the restriction on vacating more than one misdemeanor.

While we went along with this change to get the misdemeanor vacation bill passed, we have been working since then for legislation to allow vacation of more than one misdemeanor; Rep. Appleton has sponsored this legislation more than once.

And we have been working every year since the passage of the misdemeanor vacation bill in 2001 to try to restrict the access of negative information available in the court system about clients. This year, for instance, the WACDL Sealing & Vacation Task Force drafted a "ban the box" bill that would have prevented employers from pre–screening potential employees by the use of "nonconviction data," which we defined to include vacated convictions.

Previous WACDL/WDA legislative efforts to restrict access to criminal history information by including courts in the definition of "criminal justice agencies" subject to RCW 10.97 have also been defeated by a coalition that included the court clerks and the large news organizations.

WACDL and WDA have also supported reform of GR 15, the court rule regarding sealing. The current proposed revision to the rule addresses some of the concerns laid out in this article, but not in a particularly satisfactory way, since it superimposes upon the rule the criteria from the *Ishikawa* case regarding the analytically different situation of court rule closure.

— Mark Muenster & Teresa Mathis

a DV protection order, no-contact order, anti-harassment order, or civil restraining order at the time of application or within five years prior.

For DV crimes, the term of good behavior increases to five years, and the offender may not have a previous conviction for domestic violence. Some crimes, such as violent offenses,[17] DUIs, and certain sex offenses do not qualify for vacation at all.

RCW 9.94A.640 controls felony offenses. The rules for felonies are mostly the same as misdemeanors. Class A felonies, DUIs, violent offenses,[18] and "crimes against persons"[19] may not be vacated. There is no restriction regarding protection orders. Class B felonies may be vacated ten years after the date of discharge and class C felonies five years after the date of discharge.[20]

There is something peculiar about how the legislature decided to word the felony and misdemeanor statutes. By the misdemeanor statute's express language, a misdemeanor is not vacatable if the offender has had a previous conviction vacated. However, there is no such restriction for felony convictions. Thus, an offender with multiple felony convictions may be able to vacate all of them (assuming each qualifies for vacation), so long as he or she start with the most recent conviction and work backward.[21] However, a misdemeanant may only vacate the most recent conviction. [*Editor's note:* see the sidebar for info about how this ended up being the law.] At least one court has dealt with this discrepancy by deferring to the legislature: "Presumably, the legislature was aware that no such restriction existed with respect to the vacation of felonies and chose not to amend RCW 9.94A.640."[22]

Both the misdemeanor and felony statutes state that when an offender secures vacation, the offender is "released from all penalties and disabilities" and that conviction may no longer appear on the offender's criminal history.[23] When asked, the offender may answer that he or she has never been convicted of that crime. The vacated conviction may be used against the offender only in a later criminal prosecution.

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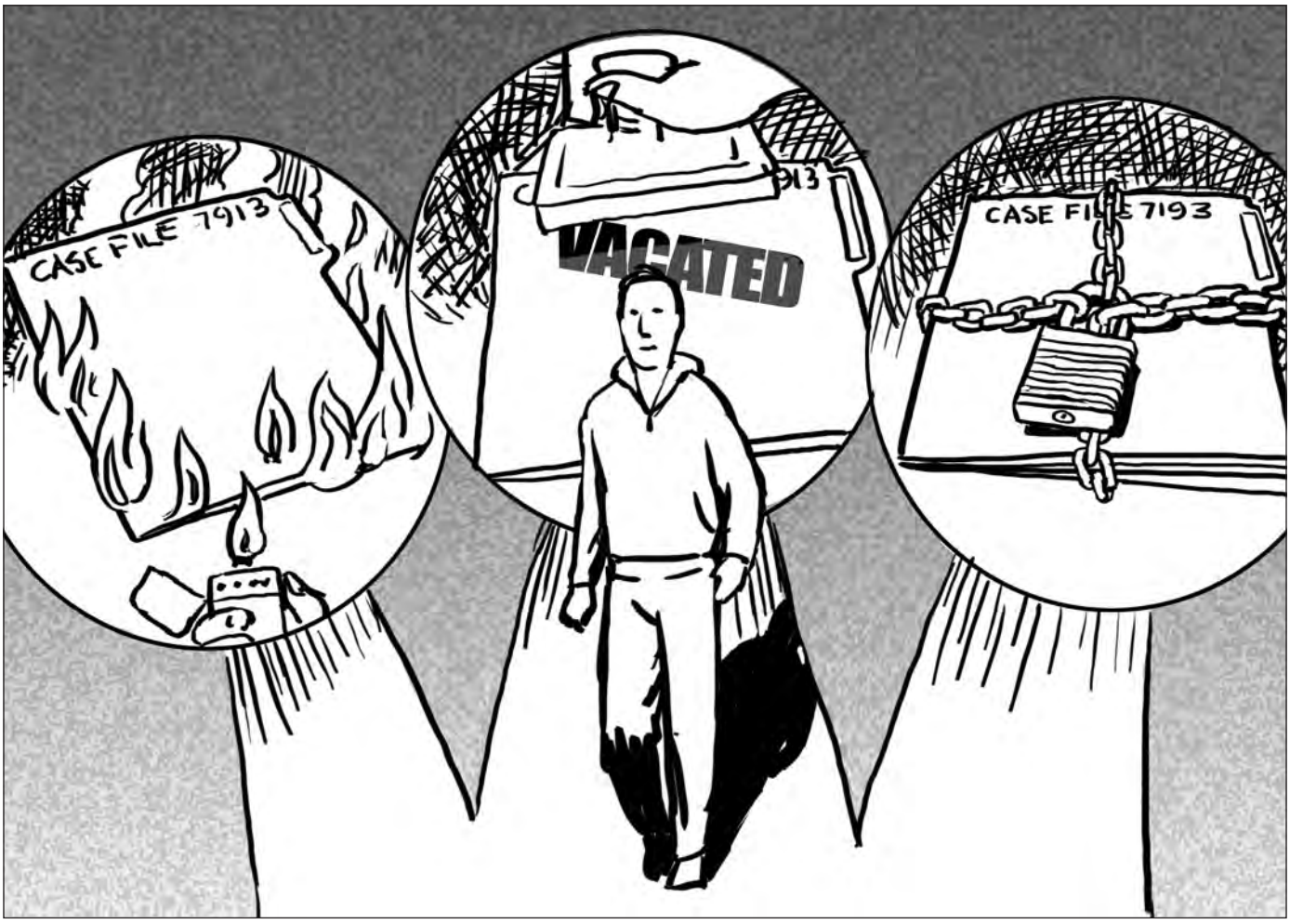
Thus, when a conviction is vacated, that conviction no longer appears on the WSP's WATCH report. However, the court record continues to exist and continues to show up in JIS. The disposition changes from "guilty" to "vacated," but it appears nonetheless. Considering the relative ease with which this information may be accessed from the luxury of one's home or office, the statutes' proclamation that the offender is "released from all penalties and disabilities" and may answer that he or she has never been convicted of that crime is mostly legislative delusion.

Sealing/Redacting

To prevent the problem in the previous paragraph, an offender must seek sealing or redacting of the court record pursuant to GR 15. However, this presents a couple of significant challenges. First, the court must consider certain rule-imposed factors and balance the movant's privacy or safety concerns against the public's interest.[24] Second, if the court makes it past the rule-imposed limitations, it must then consider certain constitutional factors. This is so because the state constitution guarantees that "[j]ustice in all cases shall be administered openly."[25] The landmark state case balancing this guarantee of the public's right of access with an individual's privacy is *Seattle Times Co. v. Ishikawa*.[26] Whenever a court entertains a motion to seal, it must balance the so-called "*Ishikawa* factors" before it may order a record sealed.[27] Courts have already held that general employment[28] and housing[29] concerns are not sufficient grounds to seal a court record.

Third, even if the court orders the entire record sealed, the public continues to have access to court indices that show the existence of the file. The information available via indices varies depending on whether the conviction is also vacated. If not, the information available via indices is "limited" to case number, name of parties, the nature of the charge, and a notation that the case has been sealed.[30] If the court both vacates and seals the conviction, the indices will show the case number, case type (with DV designation, if present), defendant's name, and an indication that the conviction has been vacated.[31] Since this is all the information that a potential employer or landlord would want in the first place, the use of the word "limited" appears to be mostly judicial delusion. There is one bright side: although court indices continue to show the existence of the record, sealed records may not be disseminated via JIS.[32] This makes data gather-



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ing significantly more difficult.

Fourth, a court may not seal a record when redacting it will adequately resolve the movant's concerns.[33] Redacting a record replaces one or more original documents within the public file with redacted copies, and the originals are then sealed.[34]

Finally, for-profit companies specializing in background checks and "people-mining" often scour the information stored inside JIS and transfer it to their own servers while that information remains publically accessible. Thus, information contained in a court record sealed pursuant to court order may continue to haunt a person with little recourse.

Deleting Nonconviction Data

Nonconviction data consists of information relating to an incident that has not led to a conviction or other adverse disposition and is not actively pending before a court.[35] According to RCW 10.97.060, nonconviction data becomes subject to deletion after at least two years passes since the data became nonconviction data because of a favorable disposition,[36] or three years from date of arrest for which a conviction was not obtained.[37] A criminal justice agency may refuse to delete nonconviction data only if the disposition was a deferred prosecution or "similar diversion,"[38]

the applicant has a prior conviction for a felony or gross misdemeanor, or the applicant has been arrested or charged with another crime during the intervening period.[39] However, the statute explicitly recognizes the authority of any court to order the modification or deletion of nonconviction data through judicial proceedings. Nonconviction data may not be disseminated freely like conviction records, but may be disseminated in certain narrow circumstances, such as when criminal justice agencies share information with one another.[40] Because of how narrowly nonconviction data is used, an application to delete it is of limited value.

Restoring Firearm Rights

Restoration of firearm rights is a separate process and does not automatically occur without a separate petition regardless of any other post-conviction relief. Briefly, a person prohibited from possessing a firearm due to a conviction for a disqualifying offense may apply to either the sentencing court or the court in his or her county of residence for restoration of the right to possess firearms.[41] A person is eligible for restoration so long as he or she has not been convicted or found not guilty by reason of insanity of a sex offense, any class A felony,[42] or any crime with a maximum sentence of at least twenty years.[43] For felonies, the person must be crime-free for five consecutive years.[44] For misdemeanors and gross misdemeanors, the person must be crime-free for three consecutive years.[45] Vacating the conviction is not a prerequisite to restoring firearm rights.

Juvenile Offenses

Historically, RCW 13.50.050 has governed access to juvenile court records. However, the legislature and governor have recently approved a significant amendment to RCW 13.50[46] The portion of RCW 13.50.050 that used to spell out the rules regarding deleting, sealing, and redacting juvenile court records will now be recodified as a new RCW section.[47] The new law also clearly expresses the legislature's intent when it comes to juvenile records:

> The legislature declares it is the policy of the state of Washington that the interest in juvenile rehabilitation and reintegration constitutes compelling circumstances that outweigh the public interest in continued availability of juvenile court records. The legislature intends that juvenile court proceedings be openly administered but, except in limited circumstances, the records of these proceedings be closed when the juvenile has reached the age of eighteen and completed the terms of disposition.

The new law appears to create two separate standards for sealing juvenile records, one standard if the sealing occurs pursuant to subsection (1), and a different standard if sealing occurs pursuant to subsection (3). Under subsection (1), the law requires juvenile courts to hold regular sealing hearings and to schedule these hearings on its own initiative after certain conditions occur.[48] At these hearings, the law requires courts to routinely seal records "pursuant to requirements of this subsection," unless there is an objection to sealing or the court finds a compelling reason not to seal, in which case a contested hearing is scheduled.[49] Absent an objection or a compelling reason not to seal, the court will seal the record if the offense is not a "most serious offense,"[50] a sex offense,[51] or a drug offense,[52] and the juvenile has completed the terms and conditions of the sentence, including financial obligations.[53]

If the juvenile court record has not already been sealed pursuant to subsection (1), then subsection (3) allows the affected party to file a motion to seal.[54] In such a case, the old rules apply: no pending cases seeking a conviction or diversion agreement, the offender is no longer required to register as a sex offender (if sex offense), and full restitution has been paid.[55] For class A felonies, the offender must have spent five consecutive years crime free, and also cannot have a conviction for rape in the first or second degree or indecent liberties actually committed with forcible compulsion.[56] For all other offenses, the statute requires two consecutive crime-free years.[57] Juvenile court records are deleted automatically per the statute, so long as the requirements are met: the offender is at least eighteen, the offender's criminal history consists entirely of one diversion agreement or counsel and release entered on or after June 12, 2008; at least two years have passed since completion of the agreement or counsel and release; no pending criminal

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charges; and no restitution is owing.[58]

As a practical matter, juvenile courts have not historically required extensive briefing on *Ishikawa* factors prior to granting motions to seal so long as the person making the motion met the statutory requirements. That may be changing soon, as the King County Prosecutor's Office currently has an appeal pending on just that question in Division I.[59] The state argues that the *Ishikawa* factors apply equally to juvenile records as they do to adult criminal records. With the legislature's proclamation of intent (block quoted above), it is clearly trying to signal to the courts that it wants full control over how courts treat juvenile records. However, the legislature's proclamation is likely toothless. The attempt at controlling what courts do with records may be a violation of the separation of powers. Furthermore, the state constitution currently does not impart any authority to the legislature over controlling access to records. Since constitutional interpretation is exclusively within the control of the courts, the legislature's intent will likely have little impact absent significant reform.

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Needed Reform

The most important aspect of long-term reform on access to criminal information is amending the state constitution. Article I, section 10 was written in 1889 and has not been touched since. Technological advancements and changes in the last 125 years necessitate corresponding changes in the way we treat access to sensitive information. Policy decisions regarding access to court records should be taken out of the judiciary's hands and placed in the hands of the legislature.

The legislature is the best forum to debate the pros and cons of what kind of information is available to whom, when, and why. The legislature is also better equipped to gauge voter consensus on issues relating to access to criminal records, by subjecting the debate to referendum and initiative powers. That is not to say that an open and transparent judiciary is not a vital institution to fair administration of justice, but the legislature should have more oversight. To that end, Article I, section 10 should be amended to read that, although justice in all cases shall continue to be administered openly, the legislature is granted constitutional authority to govern access to post-disposition court records. The legislature can then create a framework of rules that would control the dissemination of criminal records. Such a system would streamline the process by doing away with the duality of access problem and create uniformity in how criminal records are treated.

Conclusion

I hope this article is useful as a primer on post-conviction matters. In today's information age, stupid one-time mistakes can lead to lifelong consequences for people who do not deserve them. The current system of criminal history dissemination is archaic and has not adapted to present-day realities. Comprehensive and drastic reform is ultimately needed to bring Washington's current system into the twenty-first century.

Vitaliy Kertchen is a lawyer and CPA; he runs Kertchen Law + CPA, PLLC, focusing on business, tax, criminal defense, commercial, professional liability, and appellate matters. You can reach him at 425-638-2963 or vitaliy@klawcpa.com.

Notes

1. GR 15(b)(3).
2. RCW 43.43.700.
3. "Washington State Access to Criminal History," Washington State Patrol, https://fortress.wa.gov/wsp/watch/
4. RCW 2.68; Judicial Information System Committee Rules (JISCR); http://www.courts.wa.gov/jislink/
5. Washington State Criminal Records Privacy Act, RCW 10.97.050(1)-(2). Certain statutes expand WSP's ability to disseminate criminal history information when it shares that information with other criminal justice agencies, health care facilities, and under other circumstances beyond the scope of this article. See generally RCW 43.43.830-834; 10.97.050(3)-(6).
6. RCW 10.97.030(3).
7. RCW 10.97.030(4).
8. Id.
9. Although some counties, such as Pierce and King, do allow this feature for a fee through a separate online application maintained by each county.
10. JISCR 15(b).
11. GR 15(b)(3).
12. GR 15(h).
13. Administrative Office of the Courts, *A Guide to Sealing and Destroying Court Records, Vacating Convictions, and Deleting Criminal History Records*

(State of Washington: August 2010), http://www.courts.wa.gov/newsinfo/content/GuideToCrimHistoryRecords.pdf.

14. RCW 13.50.050(17).
15. Although there are certain prerequisites to vacating both misdemeanors and felonies, the decision on whether to grant a motion to vacate is ultimately discretionary with the sentencing court.
16. It is not clear whether this refers only to previous vacations for misdemeanors, or if it includes felonies.
17. Defined by RCW 9.94A.030(54).
18. Id.
19. As defined in RCW 43.43.830. RCW 43.43.830 does not actually define "crime against persons," but rather "crime against children or other persons." RCW 43.43.830(7).
20. To be discharged, the offender must complete all conditions of his or her sentence, including legal financial obligations. Often, an offender will not receive a certificate of discharge after completion of all sentence conditions. This is usually remedied by moving the sentencing court for a certificate of discharge dated nunc pro tunc to the day the offender satisfied all conditions of the sentence.
21. A vacated conviction does not count as a conviction for a new crime that would bar vacation of a previous conviction. *State v. Smith*, 158 Wn. App. 501, 246 P.3d 812 (2010).
22. Id. at 512.
23. The term "released from all penalties and disabilities" does not reinstate the right to possess firearms. See the firearms restoration portion of the article, *infra*.
24. GR 15(c)(2)(A)-(F).
25. Const. art. I, § 10.
26. 97 Wn.2d 30, 640 P.2d 716 (1982).
27. *State v. Waldon*, 148 Wn. App. 952, 202 P.3d 325 (2009).
28. *State v. McEnry*, 124 Wn. App. 918, 103 P.3d 857 (2004). The facts in *McEnry* actually were not very persuasive in McEnry's favor. He had a steady job for approximately twenty years, did not anticipate his employer performing any sort of background check, and he owned a home so he had no concerns about housing denials. Thus, the court reasoned that without identification of a more specific threatened interest, general employment concerns are insufficient. Better facts may fare better in result.
29. *Hundtofte v. Encarnacion*, 169 Wn. App. 498, 280 P.3d 513 (2012). This case technically dealt with a redaction rather than an order to seal, but applied an identical analysis.
30. GR 15(c)(4).
31. GR 15(d). It is unclear whether "case type" simply indicates that the case was criminal in nature, or if it also specifies the nature of the charge.
32. JISCR 15(b).
33. GR 15(c)(3).
34. GR 15(c)(6).
35. RCW 10.97.030(2).
36. The RCW does not define the term "favorable disposition."
37. Presumably, this language is referring to a case that has been pending for at least three years with no disposition.
38. Again, not defined.
39. RCW 10.97.060(1)-(3).
40. See generally RCW 10.97.050(3)-(6).
41. RCW 9.41.040(4)(a).
42. As an aside, if the class A felony was charged in juvenile court, the person may first ask that the record be sealed, and then apply for restoration of firearm rights. *Nelson v. State*, 120 Wn. App. 470, 85 P.3d 912 (2003). See the juvenile sealing section, *infra*.
43. RCW 9.41.040(4)(a).
44. RCW 9.41.040(4)(a)(ii)(A).
45. RCW 9.41.040(4)(a)(ii)(B).
46. Laws of 2014, ch. 175. This law is effective June 12, 2014.
47. As of this writing, the official codification has not taken place, so I do not know what the exact citation will be. However, the new rules are located in Laws of 2014, ch. 175, § 4.
48. Laws of 2014, ch. 175, § 4(1)(a),(b). The hearing must be scheduled after the latest of the following events occur: the juvenile turns eighteen, anticipated completion of juvenile's probation, or anticipated release of juvenile from confinement/completion of parole. Id. § 1(b).
49. Id.
50. Defined by RCW 9.94A.030.
51. Defined by RCW 9A.44.
52. Defined by RCW 9.94A.030.
53. Laws of 2014, ch. 175, § 4(1)(c).
54. Laws of 2014, ch. 175, § 4(3).
55. Id. § 4.
56. Id. § 4(4)(a).
57. Id. § 4(4)(b).
58. Originally RCW 13.50.050(17)(a)(i). Now will be recodified as a new section pursuant to Laws of 2014, ch. 175, § 5.
59. *State v. S.J.C.*, No. 69154-6-I, Washington State Court of Appeals, Division I.

WACDL Amicus Committee

WACDL's Amicus Committee files amicus curiae briefs in cases of importance to the defense bar. If you are working on a case where amicus support might be helpful, please contact one of the co-chairs of the Amicus Committee:

Suzanne Elliott
206-623-0291
suzanne@suzanneelliottlaw.com

Lila Silverstein
206-587-2711
lila@washapp.org