

# EXPUNGING, VACATING AND SEALING CRIMINAL RECORDS



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## **DISCLAIMER**

These materials are designed to provide general information regarding expungement, vacation and sealing of criminal court records in the State of Washington. The reader is cautioned that the status, rules, and cases discussed in these materials may be subject to interpretation and change. These materials are not intended and should not be construed as legal advice.

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## Expunging, Vacating and Sealing

### Criminal Records in Washington

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#### I. Introduction

These materials are designed to provide general information regarding the laws, governing expunging, vacating and sealing criminal court and justice agency records in the state of Washington.<sup>1</sup>

#### A. Key Terms Defined

Criminal records may be expunged, vacated or sealed. These terms have their own special meaning and cannot be used interchangeably.

- Expungement means deleting *non-conviction data* from *criminal justice agency* files under **RCW 10.97.060**.<sup>2</sup>
- Vacating means obtaining a court order that releases the applicant from “all penalties and disabilities” resulting from a prior criminal conviction.<sup>3</sup> RCW 9.96.060 governs misdemeanors and RCW 9.94A.640 governs felonies.

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<sup>1</sup> The materials discuss the laws governing vacation of convictions **on or after July 1, 1984 in Washington state courts only**.

<sup>2</sup> RCW 10.97.030(2) defines “*non-conviction data*” as all information relating to a charge or arrest which does not lead to a conviction or other disposition adverse to the subject.

<sup>3</sup> The Washington state legislature intended to prohibit all adverse consequences of a dismissed (or vacated) conviction, with the only exception being use in a subsequent criminal case. *State v. Breazeale*, 144 Wn.2d 829 (2001). Even in a subsequent criminal case, however, the vacated conviction cannot be used to calculate offender score or sentence.

- Sealing means obtaining a court order that restricts public access to court records under Washington Court General Rule (GR) 15.

B. Reasons to Expunge, Vacate or Seal

The “collateral consequences” of a criminal conviction may include loss of benefits or opportunities in many areas including housing, education and employment. By expunging, vacating and/or sealing, these collateral consequences may be mitigated.

C. Washington Court Forms

The Washington Courts website<sup>4</sup> provides several forms that may be used to prepare motions to seal or vacate including:

- *Motion to Vacate Felony Conviction;*
- *Petition to Obtain Felony Certificate of Discharge;*<sup>5</sup>
- *Motion to Seal Juvenile Court Record; and*
- *Motion to Seal Court Record Under GR 15.*

NOTE: There is no state form to vacate misdemeanor or gross misdemeanor conviction.

II. Expunging Non-Conviction Data Under RCW 10.97.060

A. Background

The Washington State Patrol Identification and Criminal History Section (WASIS) is the official keeper of “criminal history information (CHI)” in the state of Washington. CHI includes record of any court conviction and “non-conviction data,” including fingerprints, photographs, citations, warrants and other material collected in cases which started with

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<sup>4</sup> <http://www.courts.wa.gov>

<sup>5</sup> A Certificate and Order of Discharge (COD) issued by a court under RCW 9.94A.637 confirms that all terms and conditions of a felony judgment and sentence have been satisfactorily completed. The issuance of a COD restores “all civil rights lost by operation of law upon conviction” and must be obtained **before** a felony conviction is vacated under RCW 9.94A.640. The issuance of a COD does not authorize the offender to deny any conviction occurred. That requires a vacation. COD’s are not used in misdemeanor cases, but the applicant is still required to show satisfactory completion of all terms of sentence imposed including payment of any fines and performance of any community service.

an arrest or charges but never ended with a conviction or other adverse disposition. **RCW 10.97.060** establishes the procedure to expunge or delete such *non conviction data* from WASIS or any other criminal justice agency file in order to avoid public release.<sup>6</sup>

Any person may obtain an “unofficial” copy of their criminal history information from the WSP in the form of a WATCH report at <http://watch.wsp.wa.gov>. This service costs \$10.00 and requires a credit card. An “official” report of criminal history requires submission of two official fingerprint cards and a \$25.00 money order to Criminal History Section, Washington State Patrol, PO Box 42633, Olympia, WA 98504-2633.

#### B. Expungement Procedure

The process of expunging non-conviction data starts with a written request to the WSP or other criminal justice agency. The agency must search its files and respond to the request in writing.<sup>7</sup>

#### C. Requirements

In order to qualify for expungement of non-conviction data, the applicant must show:

- At least **2 years** have passed since the date of *favorable disposition*; or
- At least **3 years** have passed from the date of the arrest, citation or warrant, which did not result in any conviction; and
- The case is currently inactive and the applicant is not a fugitive from justice.

**NOTE:** The criminal justice agency still has the *discretionary authority* to deny the request for expungement of non-conviction data if:

- the favorable disposition was a *deferred prosecution* or *similar diversion*; or
- the applicant has any prior felony or gross misdemeanor conviction; or
- the applicant has been subsequently arrested for or charged with some other crime.

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<sup>6</sup> RCW 10.97.060 covers “criminal history record information” held by “criminal justice agencies.” The statute does not apply to court records. *See State v. Young*, 152 Wn. App 186 (2009).

<sup>7</sup> A form request for expungement of non-conviction data is attached as Exhibit 7. The WSP is required to make the form available to the public under WAC 446-20-130

#### D. Right to Judicial Review

Anyone may challenge the accuracy or completeness of their “criminal history information” kept by WASIS. The WSP must explain in writing any refusal to purge, amend or supplement the record as requested and must explain the procedure for obtaining judicial review of its decision under **RCW 43.43.730**.<sup>8</sup>

### III. Vacating Felony Convictions Under RCW 9.94A.640<sup>9</sup>

#### A. Background

The purpose of the vacating statutes is to “encourage and contribute” to the rehabilitation and re-integration of criminal offenders.<sup>10</sup> This includes attempting to mitigate barriers to employment caused by a criminal record.<sup>11</sup>

The vacation of a felony conviction releases the offender “from all penalties and disabilities resulting from the offense.” **RCW 9.94A.640(3)**. The person may subsequently deny the conviction ever occurred in response to an inquiry from a potential employer or anyone else.<sup>12</sup> Once served with a court order of vacation, the WSP is not

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<sup>8</sup> See *State v Breazeale*, 144 Wn 2d 829 (2001) and WAC 446-10-160.

<sup>9</sup> See Form Vacation of Record of Felony Conviction, CR 08.0960 (07/2011) , Exhibit 2.

<sup>10</sup> RCW 9.96A.010.

<sup>11</sup> *Id.*

<sup>12</sup> **RCW 9.94A.640(3)** states that:

*“Once the court vacates a record of conviction under subsection (1) of this section, the fact that the offender has been convicted of the offense shall not be included in the offender’s criminal history for 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.”*

required to destroy or purge the record of conviction, but is required to stop its further public dissemination.<sup>13</sup>

**NOTE:** Vacating a felony conviction does not result in the automatic sealing, redaction or destruction of any court records. Sealing, redaction or destruction of court records requires a separate motion and court order issued under **GR 15**.<sup>14</sup>

#### B. Procedure

In order to vacate a class B or C felony conviction, the offender must first obtain a **Certificate of Discharge** under **RCW 9.94A.637**.<sup>15</sup> A Certificate of Discharge restores all civil rights lost by operation of law upon conviction (except for restoration of right to possess firearms) but does not authorize the person to deny the conviction occurred.

In order to obtain a Certificate of Discharge, the offender must prove that all sentencing requirements, including all financial obligations, have been fully satisfied.<sup>16</sup> The court may refuse to issue a Certificate of Discharge if there is *any* unpaid financial obligation.<sup>17</sup>

After obtaining the Certificate of Discharge, and after waiting the required amount of time, the applicant may then file a motion to vacate the conviction under **RCW 9.94A.640** in the same court using the same cause number.

#### C. Requirements

- 1) Convictions for “**violent offenses**” as defined by **RCW 9.94A.030**, or “**crimes against persons**” as defined by **RCW 43.43.830**, **cannot be vacated** under **RCW 9.94A.060**.<sup>18</sup>

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<sup>13</sup> *State v. Riley*, 143 Wn. App. 41 (2007).

<sup>14</sup> See Section V, Sealing Court Records Under GR 15.

<sup>15</sup> A Class A felony conviction cannot be vacated under existing law.

<sup>16</sup> A Class A felony conviction cannot be vacated under existing law. The 5 or 10 year wait period to vacate a felony conviction does not start until the applicant obtains a Certificate of Discharge.

<sup>17</sup> The duty to pay a legal financial obligation (LFO) may be subject to a Statute of Limitations defense. See *State v. Gossage*, 165 Wn. 2d 1 (2008).

- 2) The applicant is disqualified if he has any **criminal charges pending** or has been **convicted of a new crime** since the date of discharge under **RCW 9.94A.637**.<sup>19</sup>
- 3) A **Class B Felony** cannot be vacated until at least **10 years** have passed from the date of discharge, under **RCW 9.94A.637**;
- 4) A **Class C Felony** cannot be vacated until at least **5 years** have passed, from the date of discharge under **RCW 9.94A.637**;
- 5) A **Class C felony** described in **RCW 46.61.502 (6)** or **46.61.504 (6)** cannot be vacated until at least **10 years** have passed from the date discharge under **RCW 9.94A.637**.

#### IV. Vacating Misdemeanor Convictions Under RCW 9.96.060

##### A. Background

The vacation of a misdemeanor/gross misdemeanor conviction releases the offender “from all penalties and disabilities resulting from the offense.” The person may thereafter deny the conviction ever occurred in response to an inquiry from a potential employer or anyone else.<sup>20</sup>

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<sup>18</sup> See definitions of “violent offense” in RCW 9.94A.030 and “crimes against the person” in RCW 43.43.830, included as Exhibits 24 and 25..

<sup>19</sup> A misdemeanor conviction, that has been vacated under RCW 9.96.060, does not count as a “new crime.” *State v. Smith*, 158 Wn. App 401 (2010). Multiple felony convictions may be vacated so long as there is no new conviction since the dates of discharge. There is no restriction of one felony vacation per lifetime as with misdemeanors.

<sup>20</sup> **RCW 9.96.060(3)** states that:

*“Once the court vacates a record of conviction under subsection (1) of this section, the person shall be released from all penalties and disabilities resulting from the offense and the fact that the person has been convicted of the offense shall not be included in the person’s criminal history for purposes of determining a sentence in any subsequent conviction. For all purposes, including responding to questions on employment or housing applications, a person whose conviction has been vacated under subsection (1) of this section may state that he or she has never been*

**NOTE:** Vacating a conviction does not alone result in the physical destruction or sealing of any court records. Sealing or destruction of court records requires a separate court order issued under **GR 15**.

**B. Procedure**

A motion to vacate a misdemeanor/gross misdemeanor conviction is filed in the court where the conviction was entered.

**C. Eligibility Requirements**

- No subsequent criminal convictions;
- No criminal charges pending;
- No prior conviction vacated;<sup>21</sup>
- The conviction is NOT for:
  - a sex offense under **RCW 9A.44**
  - obscenity or pornography under **RCW 9.68**
  - sexual exploitation of children under **RCW 9.68A**
  - violent offenses under **RCW 9.94A.030**
  - driving a vehicle or train or exerting physical control under the influence under **RCW 46.61.504, RCW 46.61.502, or RCW 9.91.020**; and
- At least 3 years have passed since the applicant has successfully satisfied and/or completed all of the terms of sentence, including the full payment of any financial obligations, or 5 years have passed since successful completion of all the terms of sentence, if the conviction involved *domestic violence* then:
- The applicant must provide written notification to the prosecutor's office and provide that to the court;

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*convicted of that crime. Nothing in this section affects or prevents the use of an offender's prior conviction in a later criminal prosecution."*

<sup>21</sup> This means that someone with multiple misdemeanor convictions can usually vacate the last one only.

- The applicant must have no prior domestic violence convictions and must sign an affidavit confirming no prior domestic violence convictions;
- The applicant must not be currently restrained, been restrained in the last 5 years by a DV protection order, no contact order, civil anti-harassment order, or a civil order restraining contact.

## V. Sealing Court Records Under GR 15

### A. Background

A court order vacating a criminal conviction is placed in the court file and a copy sent by the court clerk to the Washington State Patrol. Once it receives the court order, the WSP is prohibited from disseminating information regarding the conviction except to law enforcement or to a prosecutor for use in a subsequent criminal prosecution.<sup>22</sup>

Obtaining a court order vacating a criminal conviction does not erase or seal the court records, however. Consequently, an ex-offender may legally deny the existence of a vacated conviction but then be contradicted by public court records. This is why a motion to vacate a conviction is sometimes paired with or followed by a motion to seal the court record under GR 15.

### B. Procedure

GR 15 gives courts the discretionary authority to seal<sup>23</sup> court records when permitted by statute or when justified by compelling privacy or safety concerns that outweigh the public interest in open courts. This balancing test is not easy to pass because the public's interest in or right of access to open courts is guaranteed by Article 1, Section 10 of the Washington State Constitution.

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<sup>22</sup> Consequently, a vacated conviction should *not* appear in a WSP WATCH Report.

<sup>23</sup> To "seal" means "to protect from examination by the public or non-authorized court personnel." GR15 (b)(1).

The court is required to weigh five *Ishikawa* factors before sealing court records in the absence of specific statutory authority:<sup>24</sup>

- 1) Does sealing further “a serious and imminent threat to some important interest?”<sup>25</sup>
- 2) Has the public been given an opportunity to object to the proposed sealing?
- 3) Is sealing the least restrictive means of protecting the compelling right or interest at issue?
- 4) Is the order to seal only as broad in scope and duration as necessary to serve its purpose?<sup>26</sup>
- 5) Has the court weighed the competing interests and based its decision on specific findings of fact and conclusions of law?

#### C. Destroying Court Records Under GR 15

If a court record is “sealed,” then public access to the record is restricted. The records are not themselves physically destroyed.

“To destroy means to obliterate a court file, case, document, or material in such a way as to make it permanently irretrievable.”<sup>27</sup> Courts cannot destroy their own records unless expressly authorized to by statute.<sup>28</sup>

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<sup>24</sup> See Hundtofte v. Encarnacion, 169 Wn. App. 498 (2012); Seattle Times Co. v Ishikawa 97 Wn. 2d 30 (1982); State v. Waldon, 148 Wn. App. 952 (2009) (the *Ishikawa* factors have served as “the benchmark constitutional analysis regarding attempts to restrict access to courtroom processing or records” for thirty years).

<sup>25</sup> The mere *possibility* of prejudice alone is insufficient to prove imminent risk of harm. See State v. McEnry, 124 Wn. App 918 (Div. 2 2004). (Court refused to seal vacated record of conviction because the applicant feared but could not prove public access might harm his ability to obtain employment or credit). But see, Indigo Real Estate Services v. Rousey 151 Wn. App 941 (2004).

<sup>26</sup> The order must apply for a limited period of time with the burden on the applicant to justify continued sealing.

<sup>27</sup> GR 15(b)(2)

*”The distinction between destroying and sealing a criminal record is critical. The destruction of criminal records, with its attendant impact on future criminal proceedings, clearly relates to an offender’s punishment and reformation and is therefore ‘uniquely within the legislature’s domain.’ On the other hand, the sealing of a criminal record is procedural. No substantive rights of either the State, as prosecutor, or the defendant are affected. The ability of the State to use sealed convictions in future criminal proceedings is not impinged, as it is when records are destroyed. The sole effect of sealing is on the public’s right of access to the files.”<sup>29</sup>*

## VI. Sealing Juvenile Records<sup>30</sup>

### A. Background

After a person is convicted of a crime in juvenile court, that conviction remains on his criminal record until it is sealed by a court.<sup>31</sup> Unsealed juvenile convictions, like adult convictions, are accessible to the public and can be used to increase a person’s sentence on any subsequent offenses. **RCW 13.50.050** outlines a procedure for sealing juvenile records. This process has the same effect as vacating an adult conviction, except that the sealing of a juvenile record may be reversed if the person is subsequently convicted of another juvenile offense or charged with an adult felony.

### B. Procedure

The person seeking to seal his juvenile record must first obtain a copy of his criminal history and then file a motion to seal the records pursuant to RCW 13.50.050 (11) and (12) in the county associate with his case.

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<sup>28</sup> GR 15(c)(1)(A). *State v. Gilkinson*, 57 Wn. App. At 864, 866 (1990).

<sup>29</sup> *State v. Noel*, 101 Wn. App. 623 (2000), citing *State v. Gilkinson*, 57 Wn. App. 864, 866 (1990).

<sup>30</sup> This section was prepared with the assistance of Attorney Lisa Mulligan.

<sup>31</sup> Different rules apply to deferred dispositions and diversions.

C. Requirements

- 1) The applicant is disqualified if he has any **criminal charges or diversions pending**.
- 2) A conviction for **Rape 1, Rape 2 or Indecent Liberties with forcible compulsion** (with facts to support actual use of force) cannot be sealed.
- 3) A **Class A offense** cannot be sealed until at least **5 years** have passed from the date of discharge under **RCW 13.50.050**.
- 4) A **Class B offense, C offense, or any misdemeanor offense** cannot be sealed until at least **2 years** have passed since the date of discharge under **RCW 13.50.050**.
- 5) The applicant is not required to register as a sex offender under **RCW 9A.44.130** or has been relieved of the duty to register under **RCW 9A.44.143**.
- 6) Full restitution has been paid.

VII. Restoration of Gun Rights

Petitions to restore the right to own or possess firearms under **RCW 9.41.040** and **9.41.047** are outside the scope of these materials. Note, however, that the vacation of a conviction does not automatically restore the right to own or possess firearms if the right was previously taken away by a court in a criminal case.

## GENERAL INFORMATION

1. A Guide to Sealing and Destroying Court Records, Vacating Convictions, and Deleting Criminal History Records, (08/2010)
2. Vacation of Record of Felony Conviction, CR 08.0930, (07/2011)
3. Instructions for Vacating Misdemeanor and Gross Misdemeanor Convictions, CrRLJ 09.0300, (06/2002)
4. Obtaining a Certificate of Discharge WPF 08.0670 (7/2007)

## CHECKLISTS

5. Checklist: Vacating Misdemeanor and Gross Misdemeanor Convictions
6. Checklist: Vacating Felony Convictions
7. Checklist: Sealing Juvenile records
8. Checklist: Expunging Non-Conviction Data

WASHINGTON COURT FORMS

9. Petition for Certificate and Order of Discharge WPF CR 08.0600 (12/2010)
10. Motion to Seal Juvenile Records WPF JU 10.0300 (6/2010)
11. Motion to Vacate Misdemeanor/Gross Misdemeanor Conviction CRLJ 09.0200  
(10/2001)
12. Motion to Vacate Felony Conviction CR 08.0900 (07/2011)

A. WASHINGTON STATUTES

- RCW 10.97.060 (Expunging Non-Conviction Data)
- RCW 13.50.050 and 13.50.150 (Sealing Juvenile Records)
- RCW 9.96.060 (Vacating Misdemeanor Convictions)
- RCW 9.94A.637 (Obtaining “Discharge” Upon Felony Sentence Completion)
- RCW 9.94A.640 (Vacating Felony Convictions)
- RCW 9.94A.030 (Definition of Violent Crimes)
- RCW 43.43.830 (Definition of Crimes Against Persons)
- RCW 9A.44 (Sex Offenses)
- RCW 9.68A.011 (Definition of “Sexual Exploitation of Children”)
- Chapter 9.96A RCW (Restoration of Employment Rights)

B. WASHINGTON COURT RULES

General Rule (GR) 15