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SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
Respondent,

v.

ISABELITA HAWKINS,  
Petitioner.

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AMICI CURIAE MEMORANDUM OF  
WASHINGTON DEFENDER ASSOCIATION,  
PUBLIC DEFENDER ASSOCIATION,  
AMERICAN CIVIL LIBERTIES UNION OF  
WASHINGTON, I DID THE TIME, KING COUNTY  
DEPARTMENT OF PUBLIC DEFENSE, LEGAL VOICE and  
PIONEER HUMAN SERVICES IN SUPPORT OF REVIEW

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## **I. INTRODUCTION**

Vacating a conviction is a necessary step towards economic opportunity and full reintegration into the community. Vacating enables people who have been convicted (who are disproportionately Black, Indigenous, and other people of color (BIPOC)) to shed the stigma of criminal conviction and move on with their lives. But, absent any guidance on the appropriate exercise of judicial discretion to grant a motion to vacate, RCW 9.94A.640 burdens the ability to vacate convictions and invites implicit bias into judicial decision-making because it lacks criteria to guide a court's analysis. This will disproportionately harm BIPOC people—especially Black women.

Further, the trial court erred in denying Ms. Hawkins' motion to vacate based solely on the probable cause statement and wholly disregarding unrefuted evidence of rehabilitation. The legislature's intent to provide full reintegration into the community's socio-economic fabric is frustrated by a vacate process that is arbitrary, lacks standards, and results in



individuals that the legislature has made eligible for reintegration unable to do so. Review of the Court of Appeals decision affirming the trial court is in the public interest. RAP 13.4(b)(4).

## **II. IDENTITY OF AMICI**

The identity and interests of amici Washington Defender Association, Public Defender Association, American Civil Liberties Union of Washington, Legal Voice, I Did the Time, King County Department of Public Defense, and Pioneer Human Services are more fully set out in the Motion to File an Amicus Curiae Memorandum, filed contemporaneously with this Memo.

## **III. STATEMENT OF THE CASE**

Amici adopt and incorporate by reference the Procedural History and Statement of the Facts set forth in Ms. Hawkins' petition for review.

## **IV. ARGUMENT**

**A. The public has an interest in ensuring that RCW 9.94A.640 is interpreted to prevent implicit bias and unequal outcomes**

RCW 9.94A.640 fails to provide any guidance on how judges should exercise discretion to grant or deny a motion to vacate. It also fails to provide petitioners with any guidance as to the evidence they can provide to ensure they can finally remove the stigma of conviction. This unfettered statutory discretion—without guidance from the Court—invites implicit bias into judicial decision making regarding who can access vacatur and who cannot.

Implicit bias against Black people in the criminal legal system is well documented. Jerry Kang, et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1136 (2012) (citing See Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. Personality & Soc. Psychol. 876 (2004)). This includes stereotyping Black people as violent and criminal. *Id.* Using the Implicit Association Test (IAT), researchers found that judges possess the same level of implicit

bias against African Americans as most lay adults. Judge Andrew J. Wistrich and Jeffrey John Rachlinski, *Implicit Bias in Judicial Decision Making How It Affects Judgment and What Judges Can Do About It*, Chapter 5: American Bar Association, Enhancing Justice (2017), available at <https://ssrn.com/abstract=2934295>.

“For a single defendant, these biases may surface for various decisionmakers repeatedly in policing, charging, bail, plea bargaining, pretrial motions, evidentiary motions, witness credibility, lawyer persuasiveness, guilt determination, sentencing recommendations, sentencing itself, appeal, and so on. Even small biases at each stage may aggregate into a substantial effect.” Kang, *supra* at 1151.

In Washington state, the Task Force on Race and the Criminal Justice System found that “[r]ace and racial stereotypes play a role in the judgments and decision-making of human actors within the criminal justice system. The influence of such bias is subtle and often undetectable in any given case, but its effects are significant, cumulative, and observable over time.

When policymakers determine policy, when official actors exercise discretion, and when citizens proffer testimony or jury service, bias often plays a role.” Research Working Group, Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington’s Criminal Justice System*, 87 Wash.L.Rev. 1 (2012).

Almost a decade later, little has improved. “As measured by all felony sentences in 2018, 2019, and 2020, Black people were 2.7x more likely to be convicted than White people in each of those years. Indigenous people in those same years ranged from being 1.5x to 1.7x more likely to be convicted than White people.” Race and the Criminal Justice System, Task Force 2.0., *Race and Washington's Criminal Justice System: 2021 Report to the Washington Supreme Court*, Fred T. Korematsu Center for Law and Equality, 116, (2021) available at [https://digitalcommons.law.seattleu.edu/korematsu\\_center/116](https://digitalcommons.law.seattleu.edu/korematsu_center/116).

Black women are subject to implicit bias—based on race and gender—and are disproportionately impacted throughout the

entire criminal legal system. In Washington, Black women and other women of color are overrepresented in prison and jail populations. Washington State Supreme Court Gender and Justice Commission, *2021 Gender Justice Study Report* (2021) available at [https://www.courts.wa.gov/subsite/gjc/documents/2021\\_Gender\\_Justice\\_Study\\_Report.pdf](https://www.courts.wa.gov/subsite/gjc/documents/2021_Gender_Justice_Study_Report.pdf). From arrests, pretrial bail decisions, to prosecutorial charging decisions, racial disparities exist. The outcomes of these seemingly facially neutral decisions impact plea deals and sentencings, and have led to harsher outcomes for Black people. *Id.*

Against this backdrop, the absence of guidance on RCW 9.94A.640 opens the door to the continuation of implicit racial bias and racial disproportionality. This Court has called upon legal professionals to “develop a greater awareness of our own conscious and unconscious biases in order to make just decisions in individual cases, and we can administer justice and support court rules in a way that brings greater racial justice to our system

as a whole.” Supreme Court of Washington, *Letter to Members of the Judiciary and Legal Community* (June 4, 2020), available at

<https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf>.

This case presents an opportunity for the Court to provide guidance that will prevent continued bias and disproportionate impacts on Black, Indigenous and People of color, particularly Black women.

**B. The public interest supports clear pathways to vacating convictions**

Decades of overcriminalization has made the United States the world leader in incarceration and arrests. Rebecca Vallas, Melissa Boteach, Rachel West, et al., *Removing Barriers to Opportunity for Parents With Criminal Records and Their Children: A Two-Generation Approach*, Center for American Progress, (2015), available at

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[report2.pdf?\\_ga=2.156788603.1727782455.1633024676-1201751002.1631132083](#). By 2019, over 2 million Washingtonians had a criminal conviction, and 1.3 million people were eligible to vacate their criminal conviction. Colleen Chien, Zuyan Huang, Jacob Kuykendall, and Katie Rabago, *The Washington State Second Chance Expungement Gap* (2020), available at: <https://digitalcommons.law.scu.edu/facpubs/971>. Racial disparities are also reflected in those who have criminal history records: Black Washingtonians reflect 4.2 percent of the general population but 11 percent of Washingtonians with a criminal record, and 15 percent of Washingtonians with a felony record. *Id.*

In the past 40 years, there has been a proliferation of collateral consequences of involvement with the criminal legal system including lifelong impact on employment, occupational licensing, housing, financial aid, job training, parenting, and public benefits – all of which are necessary sources of economic security. U.S. Commission on Civil Rights, *Collateral*

*Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities*, (2019) available at <https://www.usccr.gov/files/pubs/2019/06-13-Collateral-Consequences.pdf>.

The negative impact of a criminal record is particularly acute for Black women, like Ms. Hawkins. Women who have conviction history already face steeper barriers to employment than men: women are more likely to be caregivers, and more likely to need child-care resources and other public benefits to enter the workplace. Joni Hersch & Erin E. Meyers, *The Gendered Burdens of Conviction and Collateral Consequences on Employment*, 45 J. Legis. 171 (2018). Within the entire employment sector, women, overall, are more likely to seek employment in professions where occupational licenses are conferred, and subsequently women who have a criminal background are more likely to be denied employment. *Id.*

The result of the criminal legal system's targeting of Black women is that Black women face the highest rate of



unemployment among those who are formerly incarcerated. *Id.* Women have access to fewer vocational training programs and resources while incarcerated than men that could lead to employment options upon reentry back into the community. *Id.* Indeed, where 18.4 percent of formerly incarcerated white men are unemployed, the rate is 43.6 percent for formerly incarcerated Black women. *Id.* The unemployment rate for formerly incarcerated women is between five to six times greater than their corresponding demographic group in the general population. *Id.*

Vacating convictions provides a necessary pathway to economic security. RCW 9.94A.640, like its pre-Sentencing Reform Act counterpart RCW 9.95.240, “is a legislative expression of public policy . . . [that] a deserving offender [is restored] to his [or her] preconviction status as a full-fledged citizen.” *State v. Breazeale*, 144 Wn.2d 829, 837, P.3d 1155 (2001). Evidence from other states indicates that people who are able to vacate their convictions increase the odds of being

employed and earning higher wages, suggesting “that those with expunged records gain access to more and better-paying jobs.”

J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV.L.REV. 8 (2020).

Given the public interest in the successful reentry of people returning from prisons and jails, the public interest strongly favors clarifying the criteria for vacating criminal records.

**C. The Trial Court’s overreliance on the probable cause allegations despite years of unrefuted rehabilitative success by Ms. Hawkins demonstrates the need to guide judicial discretion in this area**

RCW 9.94A.010(5) identifies that a central purpose of our state’s sentencing scheme is to “[o]ffer the offender an opportunity to improve himself or herself[.]” Because the ongoing consequences of a criminal conviction unquestionably impede one’s ability to “improve him or herself,” the legislature has provided for the vacatur of criminal convictions in order to serve this overriding purpose, and has established explicit eligibility criteria for vacating a criminal conviction.

The untethered discretion afforded to judges in RCW 9.94A.640 contravenes this intent because a judicial officer could summarily deny any eligible petition for any conceivable reason, such as holding an entire class of offenses unworthy (including those that the legislature has deemed eligible),<sup>1</sup> or forever deny the motion based on the underlying facts, no matter how much other evidence supports vacatur—which is what happened to Ms. Hawkins. This strips individuals of the opportunity the legislature sought to afford them—the right to demonstrate that the punishment imposed on them should end and that they should no longer be subject to the collateral consequences of a fully served punishment.

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<sup>1</sup> Some crimes, such as Class A felonies, cannot be vacated. RCW 9.94A.640. But the Legislature has authorized vacatur for most offenses. *Id.* Moreover, the Legislature has clearly evidenced an intent to *expand* eligibility to vacate assault crimes. *See* Laws of 2019, ch. 331 (expanding eligibility to vacate assault 2 and assault 3 crimes).

Next, the overriding reliance on the probable cause statement here highlights the need for guiding standards. While the Court of Appeals recently indicated that it may be legally permissible for the court to review the probable cause materials (*State v. Kopp*, 15 Wn. App. 2d 281, 475 P.3d 517 (2020)), the probable cause statement is a necessarily incomplete and often hastily drafted document intended for purposes wholly unrelated to vacatur. Probable cause statements are created as investigations are ongoing in order to provide a legal basis for arrest, detention, or imposition of conditions of release. *See, e.g.*, CrR 2.2(a)(2) (court “shall determine probable cause based on an affidavit” or other means); CrR 3.2.1 (within 48 hours of warrantless arrest Court must find probable cause in manner provided by CrR 2.2(a)). The individual arrested has no ability to object to any of the allegations made in the probable cause statement, as it is simply drafted by law enforcement, submitted to the prosecuting attorney, and filed with the court.

Third, given the known harms of a criminal conviction, overreliance on documents that were created pre-charging in a future rehabilitative setting essentially extends punishment based on the very facts which informed the sentence in the first instance—a sentence which the individual has necessarily satisfied in full before making the request to vacate. In setting the sentence—a judicially determined appropriate punishment for the underlying facts—the court considered the probable cause certification.

Here, the court relied on those facts to determine exactly what debt Ms. Hawkins owed to society, and Ms. Hawkins has fully repaid that debt. To rely on those same facts now to deny Ms. Hawkins full-fledged participation in society, unguided by any standards, results essentially in extension of the punishment which she has already fully satisfied. At a minimum, these are questions of substantial public interest that should be determined by the Supreme Court, RAP 13.4(b)(4), and constitutional interests may be involved as well, RAP 13.4(b)(3).

## V. CONCLUSION

If RCW 9.94A.640 allows unfettered discretion to deny a vacate, it creates significant injustice harming the public interest, through implicit bias and the use of documents prepared for charging to preclude consideration of ample evidence of rehabilitation. Instead, the Court should rely subsequent information untethered to the probable cause statement. For the above-reasons, amici curiae join the Petitioner Ms. Hawkins and respectfully move this Court to grant review.

DATED this 5th day of October, 2021.

Respectfully submitted,

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**Filing Petition for Review**

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