

No. 34851-2-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON,

Respondent

v.

KASI LYNN SLEATER,

Appellant

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR BENTON COUNTY

NO. 05-1-00637-8

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BRIEF OF RESPONDENT

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## I. INTRODUCTION

In October 2016, the defendant, Kasi Sleater, moved the Benton County Superior Court for an order vacating the record of a 2006 felony conviction for Unlawful Possession of a Controlled Substance (methamphetamine) (hereinafter the “2006 felony conviction”). Ms. Sleater’s motion was brought pursuant to RCW 9.94A.640.

Under RCW 9.94A.640(1) and (2), an offender may not have the record of a felony conviction vacated if she fails even one of several tests prescribed by statute. For example, under one of the tests, an offender may not have the record of conviction vacated if she has been convicted of a new crime since the date she was discharged under RCW 9.94A.637. *See* RCW 9.94A.640(2)(d).

In Ms. Sleater’s case, she was discharged on the 2006 felony conviction on May 22, 2008. One week later, on May 29, 2008, she was convicted of a new crime (hereinafter the “2008 felony conviction”). Consequently, she is disqualified under RCW 9.94A.640(2)(d) from vacating the record of her 2006 felony conviction, unless or until her 2008 felony conviction is vacated or otherwise cleared. For this reason, the trial court denied Ms. Sleater’s Motion to Vacate Felony at a hearing on October 26, 2016.

Ms. Sleater now appeals the trial court's denial of her motion. Her sole argument on appeal is that the trial court erroneously interpreted RCW 9.94A.640(2)(d). She contends that under the plain language of the statute only offenders who, since the date of discharge for the offense to be vacated, both (1) commit a "new crime" and (2) are convicted of the "new crime" are disqualified from vacating the record of conviction. She argues that because the 2008 felony conviction was committed prior to the date of discharge for the 2006 felony conviction, she has not been convicted of a "new crime" within the meaning of the statute. This interpretation, however, is not supported by a plain reading of the statute, the provision's context within the statute, or the broader statutory scheme. As such, this Court should affirm the decision of the trial court and deny the appeal.

## **II. RESPONSE TO ASSIGNMENTS OF ERROR**

- A. The trial court properly denied Ms. Sleater's Motion to Vacate Felony under RCW 9.94A.640.
- B. The trial court properly interpreted and applied RCW 9.94A.640 to the facts of the case in concluding that Ms. Sleater does not qualify to vacate the record of her 2006 felony conviction because she was convicted of a new crime after the date of discharge on the offense to be vacated.

### III. STATEMENT OF FACTS

Defendant Kasi Sleater was convicted of violating Washington's Uniform Controlled Substances Act, Chapter 69.50 RCW, on two occasions a little over two years apart: (1) on February 8, 2006, in Benton County Superior Court Cause No. 05-1-00637-8 (hereinafter the "2006 felony conviction"); and (2) on May 29, 2008, in Benton County Superior Court Cause No. 08-1-00529-5 (hereinafter the "2008 felony conviction"). CP 1-10, 53-62. Ms. Sleater's 2006 felony conviction was for Unlawful Possession of a Controlled Substance (methamphetamine) in violation of RCW 69.50.4013(1), a class C felony. CP 1-10. The 2008 felony conviction was for Unlawful Possession with Intent to Manufacture or Deliver a Controlled Substance (methamphetamine) in violation of RCW 69.50.401(2)(b), a class B felony. CP 53-62.

In approximately May 2008, Ms. Sleater completed all sentence conditions for her 2006 felony conviction. CP 38-42. Ms. Sleater consequently received a Certificate and Order of Discharge pursuant to RCW 9.94A.637 for the 2006 felony conviction, which was effective May 22, 2008.<sup>1</sup> CP 66-67.

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<sup>1</sup> A Certificate and Order of Discharge issued pursuant to RCW 9.94A.637 was originally entered in Cause No. 05-1-00637-8 on January 18, 2012. CP 11. However, in 2016, the defendant sought and obtained an Amended Certificate and Order of Discharge which established a retroactive effective date of May 22, 2008. CP 66-67.

At about the same time that Ms. Sleater was being discharged on the 2006 felony conviction, Ms. Sleater committed and was convicted of the 2008 offense. CP 53-62. The 2008 felony offense was committed on May 15th, one week before the effective date of discharge on the 2006 felony conviction, and two weeks later, on May 29th, Ms. Sleater pleaded guilty and was convicted. CP 50, 53-62. In calculating Ms. Sleater's sentence for the 2008 felony conviction, the sentencing court considered her prior criminal history, including her 2006 felony conviction. CP 55. Ms. Sleater was sentenced to 22 months confinement and ordered to pay legal financial obligations. CP 56-57.

Eight years later, on October 12, 2016, Ms. Sleater filed a motion pursuant RCW 9.94A.640 in Benton County Superior Court to vacate the record of her 2006 felony conviction. CP 15-16. In support of her motion, Ms. Sleater declared that she had not been convicted of any "new crime" in any jurisdiction since the date she was discharged under RCW 9.94A.637. CP 16. The State opposed Ms. Sleater's motion to vacate the record of her 2006 felony conviction on the basis that the 2008 felony conviction constituted a disqualifying "new crime" under the statute. CP 17-44.

A hearing on Ms. Sleater's motion was held on October 26, 2016. RP at 1. Following oral argument, the trial court entered an order denying

Ms. Sleater's motion. RP at 1. The basis for the trial court's decision was that Ms. Sleater had been convicted of a new crime – the 2008 felony conviction – since the effective date of discharge on the 2006 felony conviction and, consequently, she did not meet the requirements of RCW 9.94A.640 for vacation. CP 64; RP at 2. Ms. Sleater now appeals this decision.

#### **IV. ARGUMENT**

##### **A. Standard of Review.**

When an action turns on the correct interpretation of a statute, the standard of review is de novo. *Scheib v. Crosby*, 160 Wn. App. 345, 350, 249 P.3d 184 (2011) (citing to *Johnson v. Kittitas Cnty.*, 103 Wn. App. 212, 216, 11 P.3d 862 (2000)). The sole issue on appeal is the correct interpretation of RCW 9.94A.640(2)(d). Accordingly, the standard of review is de novo.

##### **B. Motions to Vacate under RCW 9.94A.640.**

A person who has been convicted of a felony offense may apply to the sentencing court to vacate the record of conviction. *See* RCW 9.94A.640. When a request to vacate is granted, the fact that a person was convicted of an offense will not be included in her criminal history for purposes of determining a sentence in a subsequent conviction, and she will be released from all penalties and disabilities resulting from the

offense. *Id.* Furthermore, when submitting an employment application, she may state that she has never been convicted of that crime. *Id.* Statutory mechanisms allowing a person to vacate the record of a conviction are in essence “. . . 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, 31 P.3d 1155 (2001) (quoting *Matsen v. Kaiser*, 74 Wn.2d 231, 237, 443 P.2d 843 (1968) (Hamilton, J., concurring)).

To qualify for such relief, an applicant must be deserving. First, the applicant must have been discharged under RCW 9.94A.637. A certificate of discharge, which has the effect of restoring a person’s civil rights, is granted to offenders who have completed all requirements of their sentences, including all legal financial obligations. RCW 9.94A.637(1). Second, the applicant must meet all of the tests prescribed in RCW 9.94A.640(2). This section provides:

(2) *An offender may not have the record of conviction cleared if:* (a) There are any criminal charges against the offender pending in any court of this state or another state, or in any federal court; (b) the offense was a violent offense as defined in RCW 9.94A.030; (c) the offense was a crime against persons as defined in RCW 43.43.830; (d) *the offender has been convicted of a new crime in this state, another state, or federal court since the date of the offender’s discharge under RCW 9.94A.637;* (e) the offense is a class B felony and less than ten years have passed since the date the applicant was discharged under RCW

9.94A.637; (f) the offense was a class C felony, other than a class C felony described in RCW 46.61.502(6) or 46.61.504(6), and less than five years have passed since the date the applicant was discharged under RCW 9.94A.637; or (g) the offense was a class C felony described in RCW 46.61.502(6) or 46.61.504(6).

RCW 9.94A.640(2) (emphasis added). If an applicant fails to meet even one of these tests, she does not qualify to have the record of conviction cleared and the sentencing court is not authorized to grant her request to vacate. RCW 9.94A.640(1) and (2).

Here, Ms. Sleater motioned the trial court under RCW 9.94A.640 for an order vacating the record of her 2006 felony conviction and the trial court determined that it lacked authority to grant the order, because Ms. Sleater had been convicted of a “new crime,” the 2008 felony conviction, since the date of her discharge. The trial court’s interpretation of RCW 9.94A.640 is supported by the unambiguous, plain language of the statute.

**1. The plain language of RCW 9.94A.640(2)(d) unambiguously supports the trial court’s interpretation of “new crime.”**

The purpose of statutory interpretation is “to determine and give effect to the intent of the legislature.” *State v. Evans*, 177 Wn.2d 186, 192, 298 P.3d 724 (2013) (quoting *State v. Sweany*, 174 Wn.2d 909, 914, 281 P.3d 305 (2012)). When possible, legislative intent is derived solely from the plain language enacted by the Legislature, considering the text of the

provision in question, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole. *Id.* at 192; *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010); *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9–10, 43 P.3d 4 (2002). If the plain language of the statute is unambiguous, then the court's inquiry is at an end and the statute will be enforced in accordance with its plain meaning. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

**a. The text of RCW 9.94A.640(2)(d).**

Washington courts employ traditional rules of grammar in discerning the plain language of the statute. *State v. Bunker*, 169 Wn.2d 571, 578, 238 P.3d 487 (2010). Additionally, any statutory term that is left undefined should be given its “usual and ordinary meaning and courts may not read into a statute a meaning that is not there.” *Burton v. Lehman*, 153 Wn.2d 416, 422-23, 103 P.3d 1230 (2005) (quoting *State v. Hahn*, 83 Wn. App. 825, 832, 924 P.2d 392 (1996)). If the undefined statutory term is not technical, the court may refer to the dictionary to establish the meaning of the word. *Burton*, 153 Wn.2d at 423; *Heinsma v. City of Vancouver*, 144 Wn.2d 556, 564, 29 P.3d 709 (2001). With respect to the present appeal, a plain reading of the terms and syntax of RCW 9.94A.640(2)(d) establishes that a disqualifying “new crime” is a crime for which the offender was

convicted since the date of her discharge, even if the crime was committed prior to the date of discharge.

Since neither the phrase, “new crime,” nor the individual words are defined in RCW 9.94A.640, the Court should give the words their “usual and ordinary” meanings. *Burton*, 153 Wn.2d at 422. Additionally, because the terms are not technical, the Court may look to the dictionary for guidance in establishing their meaning in the statute’s context. *Id.* at 423.

The phrase “new crime” comprises an adjective, “new,” and the noun it modifies, “crime.” The word “new” (in adjective form) has different contextual meanings: (1) Not old or recent; (2) never used or worn before; (3) just found or learned; (4) unfamiliar; (5) different from the former or the old; (6) recently arrived or established; (7) rejuvenated; and (8) currently fashionable. *See The American Heritage Dictionary*, Houghton Mifflin Company, 4th Ed. (2001), at 571. Of these eight meanings, only (1) and (5) logically modify or describe the word “crime” in the context of the statute. The word “crime” is a noun that, in this context, means an act committed or omitted in violation of the law. *See The American Heritage Dictionary*, Houghton Mifflin Company, 4th Ed. (2001), at 208. Thus, considering the usual and ordinary meanings of these two words with reference to their dictionary definitions, the statutory term “new crime” plainly means: (1) a not old, or a recent, act committed or

omitted in violation of the law; or (2) an act committed or omitted in violation of the law that is different from the former or the old. Absent any other modifying or qualifying phrase or word, the term simply orients the reader to two types of crimes: an old or former crime, and a recent or different crime. Distinguishing between these two types of crimes makes sense in the context of the statute, particularly given the purpose of the sentence in which the term is found.

The sentence in RCW 9.94A.640(2), “[a]n offender may not have the record of conviction cleared if [...] (d) the offender has been convicted of a new crime in this state, another state, or federal court since the date of the offender’s discharge under RCW 9.94A.637 . . . .” (emphasis added), is a conditional sentence. It contains both a main clause (the consequence) and a conditional clause. As is the nature of a conditional sentence, it establishes that the consequence will occur if the conditions stated in the latter part of the sentence are true.

The object of the sentence’s main clause is the “record of conviction,” which inherently relates to a crime committed by the offender at an earlier point in time. RCW 9.94A.640(2). The record of this old or former crime, and its resultant conviction, is what the offender seeks to vacate and, for this reason, it is the focal point (temporally and thematically) of the entire sentence, as well as the inquiry into whether the

offender qualifies for vacation. Use of the term “new crime” in this conditional clause thus serves to distinguish any recent or different crime from the old or former crime for which vacation is sought.

Not only the usual and ordinary meaning of the term “new crime,” but also the syntax of the sentence support this interpretation. Again, the full sentence is: “An offender may not have the record of conviction cleared if . . . (d) *the offender has been convicted of a new crime in this state, another state, or federal court since the date of the offender’s discharge under RCW 9.94A.637 . . .*” RCW 9.94A.640(2) (emphasis added). In the conditional clause of the sentence (italicized above), its two most basic components are the subject and verb:

<b>the offender</b>	<b>has been convicted</b>
<i>subject</i>	<i>verb</i>

The focus of this clause is therefore “the offender” (the person or thing that is being discussed) having been “convicted” (the action, state, or occurrence being described). Put differently, if the offender has been convicted, as described in the clause, she does not qualify for vacation.

The remaining components of the clause are all prepositional phrases that modify the verb. They are as follows:

- (1) *of a new crime;*
- (2) *in this state, another state, or federal court; and*

- (3) *since* the date of the offender's discharge under  
RCW 9.94A.637.<sup>2</sup>

A prepositional phrase is a unit of grammar that modifies. In the conditional clause, the three prepositional phrases following the subject and verb are all adverb phrases that modify the verb “convicted.” This is clear because, for example, it would not make sense for the third phrase to modify the second – “since the date of the offender’s discharge” does not describe “federal court” or “state.” The three phrases thus modify the verb, and in effect, the offender has not just been “convicted,” she has been convicted *of a new crime*, she was convicted *in this state, another state, or federal court*, and she was convicted *since the date of the offender’s discharge under RCW 9.94A.637*. These three phrases provide the what, where, and when of what it means to have been convicted. Consequently, they set up three elements or conditions that must be met in order for the condition being described, “the offender has been convicted,” to result in the consequence set forth in the main clause – disqualification.

Ms. Sleater’s contention that the third prepositional phrase (“since the date of the offender’s discharge”) modifies the first prepositional phrase (“of a new crime”) is not supported by the grammatical

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<sup>2</sup> The phrases “of the offender’s discharge” and “under RCW 9.94A.637” are also prepositional phrases; however, unlike the preceding adverb phrases, these phrases are

organization of the sentence. First, as described above, the two prepositional phrases are clearly adverb phrases that modify the verb “convicted.” Second, the two phrases are separated by yet another adverb phrase, which also modifies the verb “convicted.” Third, if the drafter’s intent had been to modify what constitutes a “new crime,” an adjective phrase could have been inserted into the first phrase. For example, in the third prepositional phrase, two adjective phrases were used to specify the relevant “date” – the date is that *of the offender’s discharge* and the discharge is *under RCW 9.94A.637*. This approach could have been used in the first prepositional phrase as well, for example, by specifying that the new crime was *committed after the date of discharge* or that the crime was *new as of the date of discharge*. This approach was not taken, though.

Finally, without an attendant verb, modifying the term “new crime” with the prepositional phrase “since the date of the offender’s discharge” is grammatically awkward. Ms. Sleater suggests that the phrases can be read together as “a new crime . . . since the date of the offender’s discharge.” *See* Appellant’s Brief at 5. Although a “new crime” can be *committed, charged, or planned* since a particular date, inclusion of some verb is crucial. Without it, the noun-adverb modification is confusing and strained.

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adjective phrases – “of the offender’s discharge” modifies the noun, “the date,” and

In sum, a plain reading of the term “new crime” supports the trial court’s interpretation that a disqualifying “new crime” is one for which the offender was convicted since the date of discharge, even if the crime was committed prior to that date.

**b. The statutory scheme for vacating convictions.**

The statutory scheme for vacating criminal convictions further supports the trial court’s plain language interpretation of RCW 9.94A.640(2)(d). The two statutes most relevant to an understanding of this scheme are RCW 9.94A.640 (governing felony vacates) and RCW 9.96.060 (governing misdemeanor vacates). The two statutes have a number of similar provisions with respect to an applicant’s subsequent criminal activity or convictions. For instance, under both statutes, an offender may not have the record of a conviction cleared if:

- She has any pending criminal charges at the time of her application;
- Less than a requisite period of time (three, five, or 10 years) has passed since she completed the terms and conditions of her sentence, including any financial obligations; or

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“under RCW9.94A.637” modifies the noun “discharge.”

- She has been convicted of a new crime either since the date she was discharged (felony) or since the date of the conviction (misdemeanor/gross misdemeanor).

*See* RCW 9.94A.640(2) and 9.96.060(2). Unlike for felonies, an offender may only vacate one misdemeanor or gross misdemeanor. *See* RCW 9.96.060(2)(h). Although the requirements governing felony and misdemeanor vacates are located in separate statutes under separate titles, in practice, an offender may have both misdemeanor and felony convictions she wishes to vacate and her eligibility to do so is ultimately determined by both statutes.

A number of general principles are evident from the structure and operation of these two statutes. First, whether a conviction may be vacated depends on when it occurred. More recent convictions are generally eligible for vacation before prior convictions. An offender may not have the record of a conviction cleared if she has been convicted of a new crime since a given date or if she has any criminal charges pending at the time she applies to vacate the record of conviction (presumably, in the event that the criminal charge leads to a disqualifying conviction). *See* RCW 9.94A.640(2) and 9.96.060(2). This scheme suggests that the Legislature intended for more recent crimes and convictions to be vacated before older ones.

Second, offenders whose criminal activities have decreased in severity and/or who have stopped committing crimes are rewarded. For example, a person who is first convicted of a felony and then a misdemeanor may vacate both convictions, whereas a person who is convicted of a misdemeanor and then a felony may only vacate the felony. *See* RCW 9.94A.640(2) and 9.96.060(2)(h). As another example, offenders must wait a certain period of time and have no criminal convictions during that waiting period in order to vacate. *See* RCW 9.94A.640(2) and 9.96.060(2). Failing to remain crime-free restarts the clock. Similarly, an offender who commits a class B felony must wait longer, 10 years, than a person who commits a class C felony, five years. *See* RCW 9.94A.640(2)(e) and (f). Again, this scheme suggests that the Legislature intended for deserving offenders, who have decreased the severity of their crimes and stopped their criminal activities, ought to be rewarded, as opposed to an offender such as Ms. Sleater who continued to commit crimes and whose criminal activity increased in severity from a class C felony conviction in 2006 to a class B felony conviction in 2008. *See Breazeale*, 144 Wn.2d at 837.

Finally, a determination of an offender's eligibility based upon the new crime's conviction date provides a bright line for sentencing courts and offenders. Under both RCW 9.94A.640(2) and RCW 9.96.060(2), a

sentencing court is only authorized to vacate a conviction if the offender has not been convicted of a new crime either since the date of the offender's discharge or since the date of conviction. If a "new crime" only disqualifies the offender when she both committed the crime and was convicted of the crime after the relevant date, her eligibility for vacation would hinge on determining two dates: the date of commission and the date of conviction of the new crime. The date of commission, however, may be ambiguous, particularly if the criminal conduct occurred over the course of a period of time. In contrast, the date of conviction can be easily and quickly discerned from the court record. As such, requiring an inquiry into the new crime's date of commission, as proposed by Ms. Sleater, creates an unnecessary and possibly confusing requirement for courts, prosecutors, and offenders. *See* Appellant's Brief at 5. Moreover, such a requirement does nothing to further the purposes of the statutory scheme that recent convictions ought to be addressed before older convictions and that deserving offenders who have ended or decreased the severity of their criminal activity ought to be rewarded. For these reasons, an interpretation of the term "new crime" that creates a bright line rule (eligibility based on a single date of conviction) ensures that courts fairly and consistently determine an offender's eligibility and that such a determination is in accordance with the statutory scheme and legislative intent.

**2. Rule of Lenity.**

The rule of lenity is applied only when the Legislature's intent is lacking. *In re Pers. Restraint of Bowman*, 109 Wn. App. 869, 875-76, 38 P.3d 1017 (2001). As discussed above, the language of RCW 9.94A.640(2)(d), and in particular the term "new crime," is plain and unambiguous. The Legislature's intent is therefore not lacking and application of the rule of lenity is unwarranted. *Contra* Appellant's Brief at 8.

**V. CONCLUSION**

For the foregoing reasons, the State respectfully requests this Court affirm the trial court's order denying Ms. Sleater's Motion to Vacate Felony.

**RESPECTFULLY SUBMITTED** this 1st day of May, 2017.

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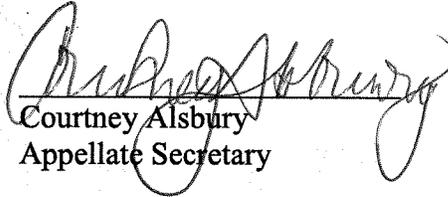
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