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**SECOND SUBSTITUTE HOUSE BILL 2793**

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**State of Washington 66th Legislature 2020 Regular Session**

**By** House Appropriations (originally sponsored by Representatives Hansen and Irwin)

AN ACT Relating to vacating criminal records; reenacting and amending RCW 9.96.060; adding a new chapter to Title 10 RCW; and creating a new section.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec.**  (1) Except as provided in section 4(2) of this act, beginning July 1, 2022, the administrative office of the courts shall develop an automated process by which criminal convictions are reviewed to determine whether those convictions should be scheduled for administrative vacation hearings under section 2 of this act. The process must:

(a) Review convictions beginning at the earliest period for which electronic court records are reliable, provided that the review applies to all convictions beginning no later than January 1, 2000;

(b) Rely upon records available to the administrative office of the courts through judicial information systems;

(c) Determine whether a defendant is currently incarcerated for a criminal offense, and whether available records indicate that he or she is precluded from qualifying to vacate his or her misdemeanor conviction under RCW 9.96.060 (2)(b) or (5)(a) or his or her felony conviction RCW 9.94A.640(2), provided that:

(i) If applicable, whether a person is currently incarcerated for a criminal offense is determined by reviewing the term of confinement reflected in the judgment and sentence document for his or her most recent criminal conviction;

(ii) If applicable, whether a person completed his or her sentencing conditions, excluding legal financial obligations, and satisfied the waiting period under RCW 9.96.060(2)(b) (vi)(D) or (vii) or 9.94A.640(2) (e) or (f) is determined by adding the waiting period to the terms of confinement and community custody reflected in the applicable judgment and sentence document; and

(iii) If applicable, the period for which a person must not have been convicted of any new criminal offense under RCW 9.96.060(2)(b)(viii) or 9.94A.640(2) (c) or (d) is determined based on the date of the query conducted by the administrative office of the courts, rather than the date of application;

(d) Notify sentencing courts to schedule an administrative vacation hearing for any defendant where a review of available court records does not indicate that the defendant is precluded from qualifying to vacate his or her conviction; and

(e) Review records and provide notifications on a monthly or quarterly basis, as determined by the administrative office of the courts.

(2) The administrative office of the courts shall develop a process by which a person seeking to vacate his or her conviction may submit an inquiry with supporting information and documentation to assist or otherwise expedite the review under subsection (1) of this section.

NEW SECTION. **Sec.**  (1) When a sentencing court receives notice from the administrative office of the courts under section 1 of this act regarding a defendant potentially qualifying to vacate his or her conviction, the court shall set an administrative vacation hearing.

For the purposes of conducting proceedings under this section, the requirements under RCW 9.96.060 (2)(b) and (5)(a) apply to misdemeanors and the requirements under RCW 9.94A.640(2) apply to felonies, except a defendant is not required to: File a petition or application; provide notice to relevant parties; or appear at an administrative or contested hearing.

(2) At an administrative vacation hearing, the court shall determine whether to vacate the conviction based on the requirements for the particular offense under RCW 9.96.060 (2)(b) or (5)(a) or 9.94A.640(2). The defendant is presumed to meet the requirements and the court shall vacate the conviction, unless court records indicate that the defendant does not meet the requirements or unless the prosecutor objects on the basis that the defendant does not meet the requirements or that the defendant is currently incarcerated for a criminal offense, in which case the court shall set a contested hearing to be conducted on the record. The contested hearing must be set no sooner than eighteen days after notice of the contested hearing has been provided to the defendant.

(3) At a contested hearing, the court shall vacate the record, unless the court determines the defendant does not meet the requirements under RCW 9.96.060 (2)(b) or (5)(a) or 9.94A.640(2) or determines that he or she is currently incarcerated for a criminal offense. If the court determines the defendant is not currently eligible, but is likely to become eligible in the future, the court may set a subsequent administrative vacation hearing at an appropriate date determined by the court.

(4)(a) If the court vacates a conviction under this section, it shall achieve the vacation by: (i) Withdrawing the plea of guilty and entering a plea of not guilty, or if the defendant was convicted after a plea of not guilty, setting aside the verdict of guilty; and (ii) dismissing the information or indictment against the defendant and vacating the judgment and sentence.

(b) If the court vacates a conviction under this section, it is processed in the same manner and has the same effect as provided under RCW 9.96.060 (6) and (7) for a misdemeanor or RCW 9.94A.640(3) for a felony.

(5) Regardless of whether a hearing under this section has previously occurred or is scheduled at a future date, nothing in this section prohibits a defendant from applying to the court to: Vacate a conviction under RCW 9.96.060 or 9.94A.640; or seal his or her conviction or vacation records under court rules.

(6) Beginning July 1, 2022, sentencing courts shall conduct regularly scheduled vacation hearings to carry out the requirements of this section. However, sentencing courts within the county selected for the pilot program in section 4 of this act must begin conducting scheduled vacation hearings by July 1, 2021.

NEW SECTION. **Sec.**  (1) Beginning July 1, 2022, the administrative office of the courts shall regularly collect and report the following information with respect to convictions where notifications were sent to sentencing courts under section 1 of this act:

(a) The number of convictions where notifications were sent;

(b) The number of convictions where the sentencing court scheduled an administrative hearing within ninety days of receiving the notification;

(c) The number of convictions where the court vacated the conviction at an administrative hearing;

(d) The number of convictions where the court set a contested hearing;

(e) The number of convictions where the court vacated the conviction at a contested hearing;

(f) The number of convictions where the court denied vacation of the conviction at a contested hearing; and

(g) Other data deemed relevant by the administrative office of the courts.

(2) The requirement to regularly report information under this section may be satisfied by: Including the information in publicly available caseload reports; or submitting a quarterly or annual report to the governor and appropriate committees of the legislature.

NEW SECTION. **Sec.**  (1)(a) The administrative office of the courts shall evaluate:

(i) The requirements of sections 1 and 2 of this act and determine the types of data currently available to assess eligibility under RCW 9.96.060 (2)(b) and (5)(a) and 9.94A.640(2);

(ii) Any additional types of information that should be reported to sentencing courts or directly to the administrative office of the courts to improve the reliability of notifications provided under section 1 of this act;

(iii) Any additional types of information that should be reported through judicial information systems by clerks and court administrators to improve the reliability of notifications provided under section 1 of this act; and

(iv) Any changes to laws, policies, or practices or additional resources necessary to improve the reliability of notifications provided under section 1 of this act.

(b) The administrative office of the courts, in consultation with courts of general jurisdiction and limited jurisdiction, shall also establish an implementation plan for complying with the requirements of section 1 of this act. The implementation plan shall include the pilot program required under subsection (2) of this section. The implementation plan may establish criteria for prioritizing potentially qualifying defendants, and may also include a phased process by which to notify courts of any defendants meeting the requirements for convictions occurring prior to July 1, 2022, or for the county participating in the pilot program under subsection (2) of this section, prior to July 1, 2021, so as to not hinder sentencing courts with excessive notices and directives to schedule hearings.

(2) The administrative office of the courts shall, in consultation with courts of general jurisdiction and limited jurisdiction, conduct a pilot program, from July 1, 2021, through June 30, 2022, for carrying out the requirements of section 1 of this act for convictions from a single county. The administrative office of the courts shall consult with courts of general and limited jurisdiction and other appropriate entities to select the county for the pilot program. The sentencing courts within the county selected for the pilot program shall comply with the requirements of section 2 of this act, and further provide information to the administrative office of the courts necessary for the reporting requirement under subsection (4) of this section. The pilot program must be designed in a manner so as to implement the same process statewide beginning July 1, 2022.

(3) In conducting the evaluation and pilot program required under this section, the administrative office of the courts may consult with county clerks and court administrators, judges, prosecuting attorneys, defense attorneys, the department of corrections, county and city departments, and any other entities with relevant records.

(4) The administrative office of the courts shall report to the governor and the appropriate committees of the legislature, as follows:

(a) A preliminary report with findings required under subsection (1) of this section and an initial implementation plan for the pilot program under subsection (2) of this section must be submitted by December 1, 2020;

(b) A status update of the pilot program and a statewide implementation plan must be submitted by December 1, 2021; and

(c) A final report on the pilot program, including a summary of applicable data under section 3 of this act and other findings and recommendations, and a status update on statewide implementation must be submitted by December 1, 2022.

**Sec.**  RCW 9.96.060 and 2019 c 400 s 1, 2019 c 331 s 4, and 2019 c 46 s 5010 are each reenacted and amended to read as follows:

(1) When vacating a conviction under this section, the court effectuates the vacation by: (a)(i) Permitting the applicant to withdraw the applicant's plea of guilty and to enter a plea of not guilty; or (ii) if the applicant has been convicted after a plea of not guilty, the court setting aside the verdict of guilty; and (b) the court dismissing the information, indictment, complaint, or citation against the applicant and vacating the judgment and sentence.

(2)(a) Every person convicted of a misdemeanor or gross misdemeanor offense may apply to the sentencing court for a vacation of the applicant's record of conviction for the offense. If the court finds the applicant meets the requirements of (b) of this subsection, the court may in its discretion vacate the record of conviction.

(b) Except as provided in subsections (3), (4), and (5) of this section, ((~~an applicant~~)) a defendant may not have the record of conviction for a misdemeanor or gross misdemeanor offense vacated if any one of the following is present:

((~~(a)~~)) (i) The ((~~applicant~~)) defendant has not completed all of the terms of the sentence for the offense;

((~~(b)~~)) (ii) There are any criminal charges against the ((~~applicant~~)) defendant pending in any court of this state or another state, or in any federal or tribal court, at the time of application;

((~~(c)~~)) (iii) The offense was a violent offense as defined in RCW 9.94A.030 or an attempt to commit a violent offense;

((~~(d)~~)) (iv) The offense was a violation of RCW 46.61.502 (driving while under the influence), 46.61.504 (actual physical control while under the influence), 9.91.020 (operating a railroad, etc. while intoxicated), or the offense is considered a "prior offense" under RCW 46.61.5055 and the ((~~applicant~~)) defendant has had a subsequent alcohol or drug violation within ten years of the date of arrest for the prior offense or less than ten years has elapsed since the date of the arrest for the prior offense;

((~~(e)~~)) (v) The offense was any misdemeanor or gross misdemeanor violation, including attempt, of chapter 9.68 RCW (obscenity and pornography), chapter 9.68A RCW (sexual exploitation of children), or chapter 9A.44 RCW (sex offenses), except for failure to register as a sex offender under RCW 9A.44.132;

((~~(f)~~)) (vi) The ((~~applicant~~)) defendant was convicted of a misdemeanor or gross misdemeanor offense as defined in RCW 10.99.020, or the court determines after a review of the court file that the offense was committed by one family member or household member against another, or the court, after considering the damage to person or property that resulted in the conviction, any prior convictions for crimes defined in RCW 10.99.020, or for comparable offenses in another state or in federal court, and the totality of the records under review by the court regarding the conviction being considered for vacation, determines that the offense involved domestic violence, and any one of the following factors exist:

((~~(i) The applicant~~)) (A) If the defendant is requesting a vacation through an application, the defendant has not provided written notification of the vacation petition to the prosecuting attorney's office that prosecuted the offense for which vacation is sought, or has not provided that notification to the court;

((~~(ii)~~)) (B) The ((~~applicant~~)) defendant has two or more domestic violence convictions stemming from different incidents. For purposes of this subsection, however, if the current application is for more than one conviction that arose out of a single incident, none of those convictions counts as a previous conviction;

((~~(iii)~~)) (C) The ((~~applicant~~)) defendant has signed an affidavit under penalty of perjury affirming that the applicant has not previously had a conviction for a domestic violence offense, and a criminal history check reveals that the applicant has had such a conviction; or

((~~(iv)~~)) (D) Less than five years have elapsed since the person completed the terms of the original conditions of the sentence, including any financial obligations and successful completion of any treatment ordered as a condition of sentencing;

((~~(g)~~)) (vii) For any offense other than those described in ((~~(f)~~)) (vi) of this subsection, less than three years have passed since the person completed the terms of the sentence, including any financial obligations;

((~~(h)~~)) (viii) The offender has been convicted of a new crime in this state, another state, or federal or tribal court in the three years prior to the vacation application; or

((~~(i)~~)) (ix) The ((~~applicant~~)) defendant is currently restrained by a domestic violence protection order, a no-contact order, an antiharassment order, or a civil restraining order which restrains one party from contacting the other party or was previously restrained by such an order and was found to have committed one or more violations of the order in the five years prior to the vacation application.

(3) Subject to RCW 9.96.070, every person convicted of prostitution under RCW 9A.88.030 who committed the offense as a result of being a victim of trafficking, RCW 9A.40.100, promoting prostitution in the first degree, RCW 9A.88.070, promoting commercial sexual abuse of a minor, RCW 9.68A.101, or trafficking in persons under the trafficking victims protection act of 2000, 22 U.S.C. Sec. 7101 et seq. may apply to the sentencing court for vacation of the applicant's record of conviction for the prostitution offense. An applicant may not have the record of conviction for prostitution vacated if any one of the following is present:

(a) There are any criminal charges against the applicant pending in any court of this state or another state, or in any federal court, for any crime other than prostitution; or

(b) The offender has been convicted of another crime, except prostitution, in this state, another state, or federal court since the date of conviction. The limitation in this subsection (3)(b) does not apply to convictions where the offender proves by a preponderance of the evidence that he or she committed the crime as a result of being a victim of trafficking, RCW 9A.40.100, promoting prostitution in the first degree, RCW 9A.88.070, promoting commercial sexual abuse of a minor, RCW 9.68A.101, or trafficking in persons under the trafficking victims protection act of 2000, 22 U.S.C. Sec. 7101 et seq., according to the requirements provided in RCW 9.96.070 for each respective conviction.

(4) Every person convicted prior to January 1, 1975, of violating any statute or rule regarding the regulation of fishing activities, including, but not limited to, RCW 75.08.260, 75.12.060, 75.12.070, 75.12.160, 77.16.020, 77.16.030, 77.16.040, 77.16.060, and 77.16.240 who claimed to be exercising a treaty Indian fishing right, may apply to the sentencing court for vacation of the applicant's record of the misdemeanor, gross misdemeanor, or felony conviction for the offense. If the person is deceased, a member of the person's family or an official representative of the tribe of which the person was a member may apply to the court on behalf of the deceased person. Notwithstanding the requirements of RCW 9.94A.640, the court shall vacate the record of conviction if:

(a) The applicant is a member of a tribe that may exercise treaty Indian fishing rights at the location where the offense occurred; and

(b) The state has been enjoined from taking enforcement action of the statute or rule to the extent that it interferes with a treaty Indian fishing right as determined under *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), or *Sohappy v. Smith*, 302 F. Supp. 899 (D. Oregon 1969), and any posttrial orders of those courts, or any other state supreme court or federal court decision.

(5)(a) Every person convicted of a misdemeanor marijuana offense, who was twenty-one years of age or older at the time of the offense, ((~~may apply to the sentencing court for a vacation of the applicant's~~)) qualifies to have his or her record of conviction for the offense vacated by the sentencing court. A misdemeanor marijuana offense includes, but is not limited to: Any offense under RCW 69.50.4014, from July 1, 2004, onward, and its predecessor statutes, including RCW 69.50.401(e), from March 21, 1979, to July 1, 2004, and RCW 69.50.401(d), from May 21, 1971, to March 21, 1979, and any offense under an equivalent municipal ordinance.

(b) If ((~~an applicant qualifies~~)) a qualifying defendant applies to the sentencing court under this subsection, the court shall vacate the record of conviction.

(6)(a) Except as provided in (c) of this subsection, once the court vacates a record of conviction under 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 this section may state that he or she has never been convicted of that crime. However, nothing in this section affects the requirements for restoring a right to possess a firearm under RCW 9.41.040. Except as provided in (b) of this subsection, nothing in this section affects or prevents the use of an offender's prior conviction in a later criminal prosecution.

(b) When a court vacates a record of domestic violence as defined in RCW 10.99.020 under this section, the state may not use the vacated conviction in a later criminal prosecution unless the conviction was for: (i) Violating the provisions of a restraining order, no-contact order, or protection order restraining or enjoining the person or restraining the person from going on to the grounds of or entering a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location (RCW 10.99.040, 10.99.050, 26.09.300, 26.10.220, 26.26B.050, 26.44.063, 26.44.150, 26.50.060, 26.50.070, 26.50.130, 26.52.070, or 74.34.145); or (ii) stalking (RCW 9A.46.110). A vacated conviction under this section is not considered a conviction of such an offense for the purposes of 27 C.F.R. 478.11.

(c) A conviction vacated on or after July 28, 2019, qualifies as a prior conviction for the purpose of charging a present recidivist offense as defined in RCW 9.94A.030 occurring on or after July 28, 2019.

(7) The clerk of the court in which the vacation order is entered shall immediately transmit the order vacating the conviction to the Washington state patrol identification section and to the local police agency, if any, which holds criminal history information for the person who is the subject of the conviction. The Washington state patrol and any such local police agency shall immediately update their records to reflect the vacation of the conviction, and shall transmit the order vacating the conviction to the federal bureau of investigation. A conviction that has been vacated under this section may not be disseminated or disclosed by the state patrol or local law enforcement agency to any person, except other criminal justice enforcement agencies.

NEW SECTION. **Sec.**  This act may be known and cited as the Washington clean slate act.

NEW SECTION. **Sec.**  Sections 1 through 4 of this act constitute a new chapter in Title 10 RCW.

**--- END ---**