S-1612.1

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**SUBSTITUTE SENATE BILL 5272**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**State of Washington 65th Legislature 2017 Regular Session**

**By** Senate Law & Justice (originally sponsored by Senators Saldaña, Hasegawa, Ranker, Chase, Hunt, Darneille, Wellman, Keiser, Cleveland, Takko, and Kuderer)

AN ACT Relating to vacating convictions arising from offenses committed as a result of being a victim of trafficking, promoting prostitution, or promoting commercial sexual abuse of a minor; amending RCW 9.96.070; and reenacting and amending RCW 9.96.060.

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

**Sec.**  RCW 9.96.060 and 2014 c 176 s 1 and 2014 c 109 s 1 are each reenacted and amended to read as follows:

(1) Every person convicted of a misdemeanor or gross misdemeanor offense who has completed all of the terms of the sentence for the 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 tests prescribed in subsection (2) of this section, the court may in its discretion vacate the record of conviction 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) An applicant may not have the record of conviction for a misdemeanor or gross misdemeanor offense 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;

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

(c) 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 has had a subsequent alcohol or drug violation within ten years of the date of arrest for the prior offense;

(d) 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);

(e) The applicant 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 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) The applicant has previously had a conviction for domestic violence. 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) The applicant 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) 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;

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

(g) The offender has been convicted of a new crime in this state, another state, or federal court since the date of conviction;

(h) The applicant has ever had the record of another conviction vacated; or

(i) The applicant is currently restrained, or has been restrained within five years prior to the vacation application, 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.

(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) 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. Nothing in this section affects or prevents the use of an offender's prior conviction in a later criminal prosecution.

(6) All costs incurred by the court and probation services shall be paid by the person making the motion to vacate the record unless a determination is made pursuant to chapter 10.101 RCW that the person making the motion is indigent, at the time the motion is brought.

(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.

**Sec.**  RCW 9.96.070 and 2014 c 109 s 2 are each amended to read as follows:

(1) In order to vacate a record of conviction for a prostitution offense pursuant to RCW 9.96.060(3) as a result of being a victim of trafficking, RCW 9A.40.100, the applicant must prove each of the following elements by a preponderance of the evidence:

(a)(i) The applicant was recruited, harbored, transported, provided, obtained, bought, purchased, or received by another person;

(ii) The person who committed any of the acts in (a)(i) of this subsection against the applicant acted knowingly or in reckless disregard for the fact that force, fraud, or coercion would be used to cause the applicant to engage in a sexually explicit act or commercial sex act; and

(iii) The applicant's conviction record for prostitution and other convictions under RCW 9.96.060(3)(b), if applicable, resulted from such acts; or

(b)(i) The applicant was recruited, harbored, transported, provided, obtained, bought, purchased, or received by another person;

(ii) The person who committed any of the acts in (b)(i) of this subsection against the applicant acted knowingly or in reckless disregard for the fact that the applicant had not attained the age of eighteen and would be caused to engage in a sexually explicit act or commercial sex act; and

(iii) The applicant's record of conviction for prostitution and other convictions under RCW 9.96.060(3)(b), if applicable, resulted from such acts.

(2) In order to vacate a record of conviction for a prostitution offense pursuant to RCW 9.96.060(3) as a result of being a victim of promoting prostitution in the first degree, RCW 9A.88.070, the applicant must prove each of the following elements by a preponderance of the evidence:

(a)(i) The applicant was compelled by threat or force to engage in prostitution;

(ii) The person who compelled the applicant acted knowingly; and

(iii) The applicant's conviction record for prostitution and other convictions under RCW 9.96.060(3)(b), if applicable, resulted from the compulsion; or

(b)(i) The applicant has a mental incapacity or developmental disability that renders the applicant incapable of consent;

(ii) The applicant was compelled to engage in prostitution;

(iii) The person who compelled the applicant acted knowingly; and

(iv) The applicant's record of conviction for prostitution and other convictions under RCW 9.96.060(3)(b), if applicable, resulted from the compulsion.

(3) In order to vacate a record of conviction for a prostitution offense pursuant to RCW 9.96.060(3) as a result of being a victim of promoting commercial sexual abuse of a minor, RCW 9.68A.101, the applicant must prove each of the following elements by a preponderance of the evidence:

(a)(i) The applicant had not attained the age of eighteen at the time of the prostitution offense;

(ii) A person advanced commercial sexual abuse or a sexually explicit act of the applicant at the time he or she had not attained the age of eighteen;

(iii) The person committing the acts in (a)(ii) of this subsection acted knowingly; and

(iv) The applicant's record of conviction for prostitution and other convictions under RCW 9.96.060(3)(b), if applicable, resulted from any of the acts in (a)(ii) of this subsection.

(b) For purposes of this subsection (3), a person:

(i) "Advanced commercial sexual abuse" of the applicant if, acting other than as a minor receiving compensation for personally rendered sexual conduct or as a person engaged in commercial sexual abuse of a minor, he or she causes or aids a person to commit or engage in commercial sexual abuse of a minor, procures or solicits customers for commercial sexual abuse of a minor, provides persons or premises for the purposes of engaging in commercial sexual abuse of a minor, operates or assists in the operation of a house or enterprise for the purposes of engaging in commercial sexual abuse of a minor, or engages in any other conduct designed to institute, aid, cause, assist, or facilitate an act or enterprise of commercial sexual abuse of a minor;

(ii) "Advanced a sexually explicit act" of the applicant if he or she causes or aids a sexually explicit act of a minor, procures or solicits customers for a sexually explicit act of a minor, provides persons or premises for the purposes of a sexually explicit act of a minor, or engages in any other conduct designed to institute, aid, cause, assist, or facilitate a sexually explicit act of a minor.

(4) In order to vacate a record of conviction for a prostitution offense pursuant to RCW 9.96.060(3) as a result of being a victim of trafficking in persons under the trafficking victims protection act of 2000, 22 U.S.C. Sec. 7101 et seq., the applicant must prove each of the following elements by a preponderance of the evidence:

(a) The applicant was induced by force, fraud, or coercion to engage in a commercial sex act and the record of conviction for prostitution and other convictions under RCW 9.96.060(3)(b), if applicable, resulted from the inducement; or

(b) The applicant was induced to engage in a commercial sex act prior to reaching the age of eighteen and the record of conviction for prostitution and other convictions under RCW 9.96.060(3)(b), if applicable, resulted from the inducement.

(5) Any motion for vacation of a conviction under RCW 9.96.060(3) and this section must be supported by the sworn testimony of the applicant at a hearing before the court.

**--- END ---**