

SENATE BILL REPORT

ESSB 5180

As Amended by House, April 6, 2021

Title: An act relating to vacating certain convictions.

Brief Description: Vacating certain convictions.

Sponsors: Senate Committee on Law & Justice (originally sponsored by Senators Dhingra, Das, Hunt, Lias, Lovelett, Nguyen, Pedersen, Rolfes, Saldaña, Salomon, Stanford and Wilson, C.).

Brief History:

Committee Activity: Law & Justice: 2/01/21, 2/04/21 [DPS].

Floor Activity: Passed Senate: 2/24/21, 48-0.

Passed House: 4/6/21, 93-5.

Brief Summary of Engrossed First Substitute Bill

- Establishes a process for applying to vacate convictions for offenses that were committed as a result of being a victim of sex trafficking, prostitution, commercial sexual abuse of a minor, sexual assault, or domestic violence.

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: That Substitute Senate Bill No. 5180 be substituted therefor, and the substitute bill do pass.

Signed by Senators Pedersen, Chair; Dhingra, Vice Chair; Padden, Ranking Member; McCune, Assistant Ranking Member; Darneille, Holy, Kuderer, Salomon and Wagoner.

Staff: Tim Ford (786-7423)

Background: Vacating Misdemeanor or Gross Misdemeanor Conviction Records. A

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

person convicted of a misdemeanor or gross misdemeanor offense, who has completed all the terms of the sentence and has met other statutory criteria, may apply to the sentencing court for a vacation of the record of conviction. A conviction may not be vacated if:

- any criminal charges are pending against the applicant;
- the offense or attempted offense was violent;
- the offense was for driving under the influence, or actual physical control while under the influence, or the offense is a prior and the applicant has had a subsequent alcohol or drug violation within ten years of the date of arrest for the prior offense;
- the offense was any misdemeanor or gross misdemeanor sex offense, sexual exploitation of children, or pornography;
- the offense was for certain domestic violence offenses;
- the offender has subsequent convictions;
- the offender has had a prior conviction vacated; or
- the offender has a current restraining order in place.

If the court finds the applicant does not have any restrictions listed above, the court may vacate the record of conviction by permitting the applicant to:

- withdraw the guilty plea and enter a plea of not guilty; or
- if the applicant was convicted after a plea of not guilty, the court may set aside the guilty verdict, dismiss the complaint, and vacate the judgement and sentence.

A victim may apply to vacate prostitution offenses committed as a result of being a victim of trafficking, promoting prostitution in the first degree, promoting commercial sexual abuse of a minor, or of trafficking in persons under federal law. In addition to the restrictions listed above, in order to vacate a misdemeanor, or gross misdemeanor record of conviction for a prostitution offense as a result of being a victim of those crimes, the applicant must prove certain elements by a preponderance of evidence. The elements vary for each different crime against the victim, but generally require the victim to prove the person committing the offenses against the victim acted knowingly, and the applicant was compelled by threat, force, inducement, or coercion to engage in prostitution leading to a conviction.

Vacating Felony Conviction Records. A person convicted of a felony offense, who has completed all of the terms of the sentence and has met other statutory criteria, may apply to the sentencing court for a vacation of the record of conviction. A conviction may not be vacated if:

- any criminal charges are pending against the applicant;
- the offense or attempted offense was violent;
- the offense was against children or vulnerable adults;
- the offender has subsequent convictions since discharge;
- the offense was a class B felony and less than ten years have passed since discharge;
- the offense was a class C felony and less than five years have passed since discharge;
- or
- the offense was for driving under the influence, or actual physical control while under

the influence.

If the court finds the applicant does not have any restrictions listed above, the court may vacate the record of conviction by permitting the applicant to:

- withdraw the guilty plea and enter a plea of not guilty; or
- if the applicant was convicted after a plea of not guilty, the court may set aside the guilty verdict, dismiss the indictment, and release the offender from all penalties.

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. Once a court vacates a record of a felony conviction, the offense shall not be included in the offender's criminal history for purposes of determining a sentence in any subsequent conviction.

Summary of Engrossed First Substitute Bill: A victim of sex trafficking, prostitution, or commercial sexual abuse of a minor, sexual assault, or domestic violence may apply to vacate a record of conviction for a misdemeanor, gross misdemeanor, or a class B or C felony offense. The prosecutor of the county in which the victim was sentenced may exercise discretion to apply on the victim's behalf to vacate the victim's record of conviction. A prosecutor is not providing legal assistance on behalf of the victim when filing to vacate the victim's conviction.

A court may vacate the victim's record of conviction where:

- the applicant must provide an affidavit under penalty of perjury stating specific facts and circumstances proving, by a preponderance of evidence that the offense was committed as a result of being a victim of sex trafficking, prostitution, or commercial sexual abuse of a minor, domestic violence, or sexual assault;
- there are no criminal charges pending against the applicant for any offense other than prostitution;
- if the victim's offense is a misdemeanor, the offender has not been convicted of a new crime in the three years prior to the application to vacate the victim's record of conviction;
- if the victim's offense is a class C felony, the offender has not been convicted of a new offense in five years prior to the application to vacate the victim's record of conviction; or
- if the victim's offense is a class B felony, the offender has not been convicted of a new offense in ten years prior to the application to vacate the victim's record of conviction.

Certain convictions may not be vacated for:

- felony violent offenses;
- statutorily defined crimes against children and other persons;
- assault in the second or third degree if the conviction included a firearm, deadly

- weapon, or sexual motivation enhancement, or if the assault was committed against a law enforcement officer or peace officer; and robbery in the second degree if the conviction included a firearm, deadly weapon, or sexual motivation enhancement;
- driving under the influence or physical control of a vehicle under the influence;
 - gross misdemeanor or misdemeanor offenses related to obscenity, pornography, sexual exploitation of children, or other statutory sex offenses;
 - felony crimes of promoting prostitution in the first or second degree;
 - gross misdemeanor crimes of driving under the influence, and physical control of a vehicle under the influence; or
 - misdemeanor of patronizing a prostitute.

Proof of payment of the victim penalty assessment and payment of any restitution owed to any victim is required to vacate convictions.

Definitions are added to the Sentencing Reform Act of 1981 for a "victim of domestic violence," "victim of sex trafficking, prostitution, or commercial sexual abuse of a minor," and victim of sexual assault."

The act repeals state law for vacating gross misdemeanor, and misdemeanor prostitution offenses as a result of being:

- a victim of trafficking;
- a victim of promoting prostitution in the first degree;
- a victim of promoting commercial sexual abuse of a minor; or
- a victim of trafficking in persons under the Trafficking Victims Protection Act of federal law.

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Proposed Substitute: *The committee recommended a different version of the bill than what was heard.* PRO: Our statutes currently provide procedures for victims of sex trafficking to vacate their convictions after certain criteria are met, but the statute has inconsistencies with changes made to it over the years, and it is tough for survivors to navigate. Traditionally our justice system has not done a good job in understanding the trauma of survivors. This bill is about helping survivors reclaim their lives and move forward in a positive way. This process will be more efficient and effective to reach those goals.

This bill provides relief for the most marginalized in our justice system, survivors of gender

violence, domestic violence, sexual assault, and trafficking victims who have entered the criminal system often as a result of their victimization. I see this often with women of color. Prosecutors can help in that pathway, and this Legislature has permitted prosecutors to act on behalf of victims in other ways.

Survivors need to clear their record from many years ago so they can get housing and a job. That way they do not have to go back to crime. Many survivors say that no one ever helped me and that is why this bill needs to pass.

OTHER: I have a concern on the wording of the bill. The prosecutors do not represent the victim or there would be an ethical conflict of interest. Prosecutors can assist but not file on behalf of the victim who is a defendant.

Persons Testifying: PRO: David Martin, King County Prosecuting Attorney's Office; Doris O'Neal, Young Women's Christian Association; Kyle Wood, Washington State Office of the Attorney General.

OTHER: Russell Brown, Washington Association of Prosecuting Attorneys.

Persons Signed In To Testify But Not Testifying: No one.

EFFECT OF HOUSE AMENDMENT(S):

- Specifies that, once vacated, a qualifying victim's record of conviction is subject to provisions relating to: the victim's criminal history; disclosure of the conviction on housing and employment applications; protections against dissemination of the conviction by law enforcement; use of the conviction in a later criminal prosecution; and restoration of the right to possess a firearm.
- Specifies that a prosecutor who files a petition to vacate a record of conviction for a misdemeanor or gross misdemeanor on behalf of a qualifying victim is fulfilling an administrative function and is not providing legal advice or assistance.
- Provides that a qualifying victim may not vacate a record of conviction for any offense defined as a prior offense under the alcohol and drug violators penalty schedule.
- Provides that a family member of a homicide victim may apply to the sentencing court on behalf of the victim to vacate the victim's record of conviction for prostitution.
- Requires the sentencing court to vacate a homicide victim's record of conviction for prostitution upon the application of a qualified person.