

HB0274S01 compared with HB0274

~~{deleted text}~~ shows text that was in HB0274 but was deleted in HB0274S01.

Inserted text shows text that was not in HB0274 but was inserted into HB0274S01.

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Representative Angela Romero proposes the following substitute bill:

HUMAN TRAFFICKING MODIFICATIONS

2017 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Angela Romero

Senate Sponsor: ~~{~~ Wayne A. Harper

LONG TITLE

General Description:

This bill modifies provisions regarding human trafficking.

Highlighted Provisions:

This bill:

- ▶ authorizes the court to vacate a conviction for specified offenses if the individual convicted is found to have acted under force, fraud, or coercion;
- ▶ provides the process by which an individual may petition the court for vacatur of a conviction for specified crimes; and
- ▶ makes technical corrections.

Money Appropriated in this Bill:

None

Other Special Clauses:

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None

Utah Code Sections Affected:

AMENDS:

76-5-308, as last amended by Laws of Utah 2016, Chapter 231

77-22-2.5, as last amended by Laws of Utah 2015, Chapter 99

77-38-15, as enacted by Laws of Utah 2014, Chapter 140

77-40-112, as renumbered and amended by Laws of Utah 2010, Chapter 283

~~ENACTS:~~

~~§ **76-2-501, Utah Code Annotated 1953**~~

~~—— **76-2-502, Utah Code Annotated 1953**~~

~~—— **76-2-503, Utah Code Annotated 1953**~~

~~§ **78B-9-104**, as last amended by Laws of Utah 2010, Chapter 153~~

~~**78B-9-106**, as last amended by Laws of Utah 2010, Chapter 48~~

~~**78B-9-107**, as last amended by Laws of Utah 2008, Chapters 288, 358 and renumbered
and amended by Laws of Utah 2008, Chapter 3~~

~~**78B-9-108**, as last amended by Laws of Utah 2008, Chapter 288 and renumbered and
amended by Laws of Utah 2008, Chapter 3~~

ENACTS:

77-40-108.5, Utah Code Annotated 1953

Be it enacted by the Legislature of the state of Utah:

Section 1. Section ~~{76-2-501}~~**76-5-308** is ~~{enacted to read:~~

Part 5. Victim Vacatur of Convictions

~~—— **76-2-501. Definitions:**~~

~~—— As used in this part:~~

~~—— (1) "Conviction" means judgment by a criminal court on a verdict or finding of guilt
after a trial, a plea of guilt, or a plea of nolo contendere.~~

~~—— (2) "Official documentation" means:~~

~~—— (a) any stipulation provided by the prosecuting agency having jurisdiction over the
petitioner's offense of conviction;~~

~~—— (b) a copy of an approval notice or enforcement certification generated from a federal~~

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~~immigration proceeding that shows the petitioner has been granted nonimmigrant status as a victim of human trafficking; or~~

~~—— (c) a copy of a certification letter from the United States Department of Health and Human Services that shows the petitioner has been certified as a victim of human trafficking under the Trafficking Victims Protection Act of 2000;~~

~~—— (3) "Petitioner" means a person convicted of any offense listed in Subsection 76-2-502(2);~~

~~—— Section 2. Section 76-2-502 is enacted to read:~~

~~—— **76-2-502. Victim vacatur:**~~

~~—— (1) Notwithstanding any provisions of Title 77, Chapter 40, Utah Expungement Act, after the entry of a conviction under the provisions of Subsection (2) and pursuant to the procedures established in Section 76-2-503, the court in which a conviction was entered may vacate a conviction if the petitioner is found to have acted under force, fraud, or coercion as defined in Section 76-5-308;~~

~~—— (2) A person convicted of any of the following offenses may petition for vacatur under this part:~~

~~—— (a) Section 58-37-8, possession of a controlled substance;~~

~~—— (b) Section 74-10-1304, aiding prostitution;~~

~~—— (c) Section 76-6-206, criminal trespass;~~

~~—— (d) Section 76-6-413, theft;~~

~~—— (e) Section 76-6-502, possession of forged writing or device for writing;~~

~~—— (f) Sections 76-6-602 through 76-6-608, retail theft;~~

~~—— (g) Subsection 76-6-1105(2)(a)(i), unlawful possession of another's identification document;~~

~~—— (h) Section 76-9-702, lewdness;~~

~~—— (i) Section 76-10-1302, prostitution; or~~

~~—— (j) Section 76-10-1313, sexual solicitation;~~

~~—— Section 3. Section 76-2-503 is enacted to read:~~

~~—— **76-2-503. Vacatur of victim's conviction:**~~

~~—— (1) A petitioner or the prosecuting government agency with jurisdiction over the petitioner's conviction may file a motion for vacatur in the court of conviction;~~

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~~—— (2) Upon the filing of a motion for vacatur, the court of conviction shall set a hearing to review the motion within a reasonable time, but not less than 60 days after the filing of the motion.~~

~~—— (3) At the hearing, the moving party shall show by clear and convincing evidence that the petitioner committed the offense of conviction under force, fraud, or coercion, as defined in Section 76-5-308.~~

~~—— (4) (a) The moving party may show that the petitioner acted under force, fraud, or coercion, as defined in Section 76-5-308, through official documentation showing that the petitioner acted under force, fraud, or coercion at the time of the offense for which the petitioner is seeking vacatur.~~

~~—— (b) Official documentation shall create a rebuttable presumption that the petitioner acted under force, fraud, or coercion, but is not required to establish the grounds for granting a motion for vacatur under this section.~~

~~—— (5) (a) If the court finds, by clear and convincing evidence, that the petitioner acted under force, fraud, or coercion, the court shall grant the motion for vacatur.~~

~~—— (b) If the court does not find that the petitioner acted under force, fraud, or coercion, the court shall deny the motion for vacatur.~~

~~—— (6) In accordance with Utah Rules of Criminal Procedure, Rule 3, the moving party shall provide notice of all motions under this section to:~~

~~—— (a) the prosecuting agency with jurisdiction over the conviction;~~

~~—— (b) the court of conviction; and~~

~~—— (c) any victim of the original offense who is entitled to notice, pursuant to Section 77-38-3.~~

~~—— (7) Upon granting a motion for vacatur, the court shall:~~

~~—— (a) vacate the conviction;~~

~~—— (b) strike the adjudication of guilt; and~~

~~—— (c) issue an order for vacatur of the record of the criminal proceedings.~~

~~—— (8) The provisions of this section apply retroactively to all arrests and convictions regardless of the date on which the arrests were made or convictions were entered.~~

~~—— Section 4. Section 76-5-308 is } amended to read:~~

76-5-308. Human trafficking -- Human smuggling.

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(1) An actor commits human trafficking for forced labor or forced sexual exploitation if the actor recruits, harbors, transports, obtains, patronizes, or solicits a person through the use of force, fraud, or coercion [~~by means of~~], which may include:

- (a) threatening serious harm to, or physical restraint against, that person or a third person;
- (b) destroying, concealing, removing, confiscating, or possessing any passport, immigration document, or other government-issued identification document;
- (c) abusing or threatening abuse of the law or legal process against the person or a third person;
- (d) using a condition of a person being a debtor due to a pledge of the debtor's personal services or the personal services of a person under the control of the debtor as a security for debt where the reasonable value of the services is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined; [~~or~~]
- (e) using a condition of servitude by means of any scheme, plan, or pattern intended to cause a person to believe that if the person did not enter into or continue in a condition of servitude, that person or a third person would suffer serious harm or physical restraint, or would be threatened with abuse of legal process[-]; or

(f) creating or exploiting a relationship where the person is dependent on the actor.

(2) (a) Human trafficking for forced labor includes forced labor in industrial facilities, sweatshops, households, agricultural enterprises, and any other workplace.

(b) Human trafficking for forced sexual exploitation includes all forms of forced commercial sexual activity, [~~including~~] which may include the following conduct when the person acts under force, fraud, or coercion:

- (i) [~~forced~~] sexually explicit performance[-];
- (ii) [~~forced~~] prostitution[-];
- (iii) [~~forced~~] participation in the production of pornography[-];
- (iv) [~~forced~~] performance in strip clubs[-]; and
- (v) [~~forced~~] exotic dancing or display.

(3) A person commits human smuggling by transporting or procuring the transportation for one or more persons for a commercial purpose, knowing or having reason to know that the person or persons transported or to be transported are not:

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- (a) citizens of the United States;
- (b) permanent resident aliens; or
- (c) otherwise lawfully in this state or entitled to be in this state.

Section ~~5~~2. Section 77-22-2.5 is amended to read:

77-22-2.5. Court orders for criminal investigations for records concerning an electronic communications system or service or remote computing service -- Content -- Fee for providing information.

(1) As used in this section:

(a) (i) "Electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photooptical system.

(ii) "Electronic communication" does not include:

(A) any wire or oral communication;

(B) any communication made through a tone-only paging device;

(C) any communication from a tracking device; or

(D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds.

(b) "Electronic communications service" means any service which provides for users the ability to send or receive wire or electronic communications.

(c) "Electronic communications system" means any wire, radio, electromagnetic, photooptical, or photoelectronic facilities for the transmission of wire or electronic communications, and any computer facilities or related electronic equipment for the electronic storage of the communication.

(d) "Internet service provider" has the same definition as in Section 76-10-1230.

(e) "Prosecutor" has the same definition as in Section 77-22-2.

(f) "Remote computing service" means the provision to the public of computer storage or processing services by means of an electronic communications system.

(g) "Sexual offense against a minor" means:

(i) sexual exploitation of a minor as defined in Section 76-5b-201 or attempted sexual exploitation of a minor;

(ii) a sexual offense or attempted sexual offense committed against a minor in violation

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of Title 76, Chapter 5, Part 4, Sexual Offenses;

(iii) dealing in or attempting to deal in material harmful to a minor in violation of Section 76-10-1206; ~~or~~

(iv) enticement of a minor or attempted enticement of a minor in violation of Section 76-4-401~~[-]; or~~

(v) human trafficking of a child in violation of Section 76-5-308.5.

(2) When a law enforcement agency is investigating a sexual offense against a minor, an offense of stalking under Section 76-5-106.5, or an offense of child kidnapping under Section 76-5-301.1, and has reasonable suspicion that an electronic communications system or service or remote computing service has been used in the commission of a criminal offense, a law enforcement agent shall:

(a) articulate specific facts showing reasonable grounds to believe that the records or other information sought, as designated in Subsections (1)(c)(i) through (v), are relevant and material to an ongoing investigation;

(b) present the request to a prosecutor for review and authorization to proceed; and

(c) submit the request to a magistrate for a court order, consistent with 18 U.S.C. 2703 and 18 U.S.C. 2702, to the electronic communications system or service or remote computing service provider that owns or controls the Internet protocol address, websites, email address, or service to a specific telephone number, requiring the production of the following information, if available, upon providing in the court order the Internet protocol address, email address, telephone number, or other identifier, and the dates and times the address, telephone number, or other identifier was suspected of being used in the commission of the offense:

(i) names of subscribers, service customers, and users;

(ii) addresses of subscribers, service customers, and users;

(iii) records of session times and durations;

(iv) length of service, including the start date and types of service utilized; and

(v) telephone or other instrument subscriber numbers or other subscriber identifiers, including any temporarily assigned network address.

(3) A court order issued under this section shall state that the electronic communications system or service or remote computing service provider shall produce any records under Subsections (2)(c)(i) through (v) that are reasonably relevant to the investigation

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of the suspected criminal activity or offense as described in the court order.

(4) (a) An electronic communications system or service or remote computing service provider that provides information in response to a court order issued under this section may charge a fee, not to exceed the actual cost, for providing the information.

(b) The law enforcement agency conducting the investigation shall pay the fee.

(5) The electronic communications system or service or remote computing service provider served with or responding to the court order may not disclose the court order to the account holder identified pursuant to the court order for a period of 90 days.

(6) If the electronic communications system or service or remote computing service provider served with the court order does not own or control the Internet protocol address, websites, or email address, or provide service for the telephone number that is the subject of the court order, the provider shall notify the investigating law enforcement agency that it does not have the information.

(7) There is no cause of action against any provider or wire or electronic communication service, or its officers, employees, agents, or other specified persons, for providing information, facilities, or assistance in accordance with the terms of the court order issued under this section or statutory authorization.

(8) (a) A court order issued under this section is subject to the provisions of Title 77, Chapter 23b, Access to Electronic Communications.

(b) Rights and remedies for providers and subscribers under Title 77, Chapter 23b, Access to Electronic Communications, apply to providers and subscribers subject to a court order issued under this section.

(9) Every prosecutorial agency shall annually on or before February 15 report to the Commission on Criminal and Juvenile Justice:

(a) the number of requests for court orders authorized by the prosecutorial agency;

(b) the number of orders issued by the court and the criminal offense, pursuant to Subsection (2), each order was used to investigate; and

(c) if the court order led to criminal charges being filed, the type and number of offenses charged.

Section ~~6~~3. Section **77-38-15** is amended to read:

77-38-15. Civil action against human traffickers and human smugglers.

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(1) A victim of a person that commits the offense of human trafficking or human smuggling under Section 76-5-308, human trafficking of a child under Section 76-5-308.5, or aggravated human trafficking or aggravated human smuggling under Section 76-5-310, may bring a civil action against that person.

(2) (a) The court may award actual damages, compensatory damages, punitive damages, injunctive relief, or any other appropriate relief.

(b) The court may award treble damages on proof of actual damages if the court finds that the person's acts were willful and malicious.

(3) In an action under this section, the court shall award a prevailing victim reasonable attorney fees and costs.

(4) An action under this section shall be commenced no later than 10 years after the later of:

(a) the day on which the victim was freed from the human trafficking or human smuggling situation;

(b) the day on which the victim attains 18 years of age; or

(c) if the victim was unable to bring an action due to a disability, the day on which the victim's disability ends.

(5) The time period described in Subsection (4) is tolled during a period of time when the victim fails to bring an action due to the person:

(a) inducing the victim to delay filing the action;

(b) preventing the victim from filing the action; or

(c) threatening and causing duress upon the victim in order to prevent the victim from filing the action.

(6) The court shall offset damages awarded to the victim under this section by any restitution paid to the victim under Title 77, Chapter 38a, Crime Victims Restitution Act.

(7) A victim may bring an action described in this section in any court of competent jurisdiction where:

(a) a violation described in Subsection (1) occurred;

(b) the victim resides; or

(c) the person that commits the offense resides or has a place of business.

(8) If the victim is deceased or otherwise unable to represent the victim's own interests

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in court, a legal guardian, family member, representative of the victim, or court appointee may bring an action under this section on behalf of the victim.

(9) This section does not preclude any other remedy available to the victim under the laws of this state or under federal law.

Section ~~{7}4~~. Section 77-40-108.5 is enacted to read:

77-40-108.5. Distribution for order for vacatur.

(1) A person who receives an order for vacatur under ~~{Sections 76-2-502 and 76-2-503}~~ ~~Subsection 78B-9-108(2)~~ shall be responsible for delivering a copy of the order for vacatur to all affected criminal justice agencies and officials including the court, arresting agency, booking agency, prosecuting agency, Department of Corrections, and the bureau.

(2) In order to complete delivery of the order for vacatur to the bureau, the petitioner shall complete and attach to the order for vacatur an application for a certificate of eligibility for expungement, including identifying information and fingerprints, as provided in Subsection 77-40-103(1).

(3) The bureau shall treat the order for vacatur and attached certificate of eligibility for expungement the same as a valid order for expungement under Section 77-40-108, except as provided in this section.

(4) Unless otherwise provided by law or ordered by a court of competent jurisdiction to respond differently, a person who has received a vacatur of conviction under ~~{Sections 76-2-502 and 76-2-503}~~ ~~Section 78B-9-104(9)(1)~~, may respond to any inquiry as though the conviction did not occur.

(5) The bureau shall forward a copy of the order for vacatur to the Federal Bureau of Investigation.

(6) An agency receiving an order for vacatur shall delete the petitioner's identifying information contained in records in the agency's possession relating to the incident for which vacatur is ordered.

(7) A government agency or official may not divulge information or records that have been deleted regarding the petitioner for vacatur contained in a record of arrest, investigation, detention, or conviction after receiving an order for vacatur to any person or agency, except for the petitioner for vacatur.

(8) The bureau may not count vacated convictions against any future expungement

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eligibility.

Section ~~{8}~~5. Section 77-40-112 is amended to read:

77-40-112. Penalty.

~~[Any person who willfully violates any prohibition in this chapter is guilty of a class A misdemeanor unless the prohibition specifically indicates a different penalty.]~~ Any person who knowingly or intentionally discloses any identifying information from any record of conviction that has been pardoned, expunged, or vacated, unless allowed by law, is guilty of a class A misdemeanor.

†

Legislative Review Note

~~Office of Legislative Research and General Counsel~~ Section 6. Section 78B-9-104 is amended to read:

78B-9-104. Grounds for relief -- Retroactivity of rule.

(1) Unless precluded by Section 78B-9-106 or 78B-9-107, a person who has been convicted and sentenced for a criminal offense may file an action in the district court of original jurisdiction for post-conviction relief to vacate or modify the conviction or sentence upon the following grounds:

(a) the conviction was obtained or the sentence was imposed in violation of the United States Constitution or Utah Constitution;

(b) the conviction was obtained or the sentence was imposed under a statute that is in violation of the United States Constitution or Utah Constitution, or the conduct for which the petitioner was prosecuted is constitutionally protected;

(c) the sentence was imposed or probation was revoked in violation of the controlling statutory provisions;

(d) the petitioner had ineffective assistance of counsel in violation of the United States Constitution or Utah Constitution;

(e) newly discovered material evidence exists that requires the court to vacate the conviction or sentence, because:

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(i) neither the petitioner nor petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or post-conviction proceeding, and the evidence could not have been discovered through the exercise of reasonable diligence;

(ii) the material evidence is not merely cumulative of evidence that was known;

(iii) the material evidence is not merely impeachment evidence; and

(iv) viewed with all the other evidence, the newly discovered material evidence demonstrates that no reasonable trier of fact could have found the petitioner guilty of the offense or subject to the sentence received; or

(f) the petitioner can prove entitlement to relief under a rule announced by the United States Supreme Court, the Utah Supreme Court, or the Utah Court of Appeals after conviction and sentence became final on direct appeal, and that:

(i) the rule was dictated by precedent existing at the time the petitioner's conviction or sentence became final; or

(ii) the rule decriminalizes the conduct that comprises the elements of the crime for which the petitioner was convicted.

(g) the petitioner committed any of the following offenses while subject to force, fraud, or coercion, as defined in Section 76-5-308:

(i) Section 58-37-8, possession of a controlled substance;

(ii) Section 74-10-1304, aiding prostitution;

(iii) Section 76-6-206, criminal trespass;

(iv) Section 76-6-413, theft;

(v) Section 76-6-502, possession of forged writing or device for writing;

(vi) Sections 76-6-602 through 76-6-608, retail theft;

(vii) Subsection 76-6-1105(2)(a)(i), unlawful possession of another's identification document;

(viii) Section 76-9-702, lewdness;

(ix) Section 76-10-1302, prostitution; or

(x) Section 76-10-1313, sexual solicitation.

(2) The court may not grant relief from a conviction or sentence unless the petitioner establishes that there would be a reasonable likelihood of a more favorable outcome in light of

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the facts proved in the post-conviction proceeding, viewed with the evidence and facts introduced at trial or during sentencing.

(3) The court may not grant relief from a conviction based on a claim that the petitioner is innocent of the crime for which convicted except as provided in Title 78B, Chapter 9, Part 3, Postconviction Testing of DNA, or Part 4, Postconviction Determination of Factual Innocence. Claims under Part 3, Postconviction Testing of DNA or Part 4, Postconviction Determination of Factual Innocence of this chapter may not be filed as part of a petition under this part, but shall be filed separately and in conformity with the provisions of Part 3, Postconviction Testing of DNA or Part 4, Postconviction Determination of Factual Innocence.

Section 7. Section 78B-9-106 is amended to read:

78B-9-106. Preclusion of relief -- Exception.

(1) A person is not eligible for relief under this chapter upon any ground that:

(a) may still be raised on direct appeal or by a post-trial motion;

(b) was raised or addressed at trial or on appeal;

(c) could have been but was not raised at trial or on appeal;

(d) was raised or addressed in any previous request for post-conviction relief or could have been, but was not, raised in a previous request for post-conviction relief; or

(e) is barred by the limitation period established in Section 78B-9-107.

(2) (a) The state may raise any of the procedural bars or time bar at any time, including during the state's appeal from an order granting post-conviction relief, unless the court determines that the state should have raised the time bar or procedural bar at an earlier time.

(b) Any court may raise a procedural bar or time bar on its own motion, provided that it gives the parties notice and an opportunity to be heard.

(3) (a) Notwithstanding Subsection (1)(c), a person may be eligible for relief on a basis that the ground could have been but was not raised at trial or on appeal, if the failure to raise that ground was due to ineffective assistance of counsel[-]; or

(b) Notwithstanding Subsections (1)(c) and (1)(d), a person may be eligible for relief on a basis that the ground could have been but was not raised at trial, on appeal, or in a previous request for post-conviction relief, if the failure to raise that ground was due to force, fraud, or coercion as defined in Section 76-5-308.

(4) This section authorizes a merits review only to the extent required to address the

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exception set forth in Subsection (3).

Section 8. Section 78B-9-107 is amended to read:

78B-9-107. Statute of limitations for postconviction relief.

(1) A petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued.

(2) For purposes of this section, the cause of action accrues on the latest of the following dates:

(a) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken;

(b) the entry of the decision of the appellate court which has jurisdiction over the case, if an appeal is taken;

(c) the last day for filing a petition for writ of certiorari in the Utah Supreme Court or the United States Supreme Court, if no petition for writ of certiorari is filed;

(d) the entry of the denial of the petition for writ of certiorari or the entry of the decision on the petition for certiorari review, if a petition for writ of certiorari is filed;

(e) the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based; or

(f) the date on which the new rule described in Subsection 78B-9-104(1)(f) is established.

(3) The limitations period is tolled for any period during which the petitioner was prevented from filing a petition due to state action in violation of the United States Constitution, or due to physical or mental incapacity, or for claims arising under Subsection 78B-9-104(1)(g), due to force, fraud, or coercion as defined in Section 76-5-308. The petitioner has the burden of proving by a preponderance of the evidence that the petitioner is entitled to relief under this Subsection (3).

(4) The statute of limitations is tolled during the pendency of the outcome of a petition asserting:

(a) exoneration through DNA testing under Section 78B-9-303; or

(b) factual innocence under Section 78B-9-401.

(5) Sections 77-19-8, 78B-2-104, and 78B-2-111 do not extend the limitations period established in this section.

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Section 9. Section 78B-9-108 is amended to read:

78B-9-108. Effect of granting relief -- Notice.

(1) If the court grants the petitioner's request for relief, except requests for relief under Subsection 78B-9-104(1)(g), it shall either:

(a) modify the original conviction or sentence; or

(b) vacate the original conviction or sentence and order a new trial or sentencing proceeding as appropriate.

(2) If the court grants the petitioner's request for relief under Subsection 78B-9-104(1)(g), the court shall:

(a) vacate the original conviction and sentence; and

(b) order the petitioner's records expunged pursuant to Section 77-40-108.5.

[~~(2)~~] (3) (a) If the petitioner is serving a felony sentence, the order shall be stayed for five days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial or sentencing proceedings, appeal the order, or take no action.

(b) If the respondent fails to provide notice or gives notice at any time during the stay period that it intends to take no action, the court shall lift the stay and deliver the order to the custodian of the petitioner.

(c) If the respondent gives notice of intent to appeal the court's decision, the stay provided for by Subsection (2)(a) shall remain in effect until the appeal concludes, including any petitions for rehearing or for discretionary review by a higher court. The court may lift the stay if the petitioner can make the showing required for a certificate of probable cause under Section 77-20-10 and URCP 27.

(d) If the respondent gives notice that it intends to retry or resentence the petitioner, the trial court may order any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary.