

House Bill 2134

Introduced and printed pursuant to House Rule 12.00. Pre-session filed (at the request of Governor Kate Brown for Oregon State Police)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Defines "positive identification" for purposes of motion to set aside conviction, citation, charge or arrest. Requires prosecuting attorney to provide affidavit to Department of State Police explaining discrepancy between criminal history of movant and conviction, citation, charge or arrest that is subject of motion.

Directs court to ensure fingerprints of defendant are submitted to Department of State Police upon conviction for felony or misdemeanor. Specifies information that must accompany fingerprints.

A BILL FOR AN ACT

1
2 Relating to the identification of a person filing a motion to set aside; amending ORS 137.074 and
3 137.225.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1.** ORS 137.225 is amended to read:

6 137.225. (1)(a) Except as provided in paragraph (c) of this subsection, at any time after the lapse
7 of three years from the date of pronouncement of judgment, any defendant who has fully complied
8 with and performed the sentence of the court and whose conviction is described in subsection (5)
9 of this section by motion may apply to the court where the conviction was entered for entry of an
10 order setting aside the conviction. A person who is still under supervision, or who is still
11 incarcerated, as part of the sentence for the offense that is the subject of the motion has not fully
12 complied with or performed the sentence of the court.

13 (b) At any time after the lapse of one year from the date of any arrest, issuance of a criminal
14 citation or criminal charge, if no accusatory instrument was filed, or at any time after an acquittal
15 or a dismissal of the charge, the arrested, cited or charged person may apply to the court that would
16 have jurisdiction over the crime for which the person was arrested, cited or charged, for entry of
17 an order setting aside the record of the arrest, citation or charge. For the purpose of computing the
18 one-year period, time during which the person has secreted himself or herself within or without this
19 state is not included.

20 (c) A person whose sentence of probation was revoked may not apply to the court for entry of
21 an order setting aside the conviction for which the person was sentenced to probation for a period
22 of 10 years from the date of revocation.

23 (2)(a) A copy of the motion and a full set of the defendant's fingerprints shall be served upon
24 the office of the prosecuting attorney who prosecuted the crime or violation, or who had authority
25 to prosecute the charge if there was no accusatory instrument filed, and opportunity shall be given
26 to contest the motion. **The prosecuting attorney shall review the criminal history of the de-**
27 **endant using the Law Enforcement Data System to determine if there is any discrepancy**
28 **between the computerized criminal history and the conviction, arrest, citation or charge that**

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

1 **is the subject of the motion. Upon discovering such a discrepancy, the prosecuting attorney**
2 **shall prepare an affidavit explaining the discrepancy.** The fingerprint card with the notation
3 “motion for setting aside conviction,” or “motion for setting aside arrest, citation or charge
4 record” as the case may be, **and the affidavit, if applicable,** shall be forwarded to the Department
5 of State Police. Information resulting from the fingerprint search along with the fingerprint card
6 shall be returned to the prosecuting attorney.

7 (b) When a prosecuting attorney is served with a copy of a motion to set aside a conviction
8 under this section, the prosecuting attorney shall provide a copy of the motion and notice of the
9 hearing date to the victim, if any, of the crime by mailing a copy of the motion and notice to the
10 victim’s last-known address.

11 (c) When a person makes a motion under subsection (1)(a) of this section, the person must pay
12 a fee of \$80 to the Department of State Police. The person shall attach a certified check payable to
13 the Department of State Police in the amount of \$80 to the fingerprint card that is served upon the
14 prosecuting attorney. The office of the prosecuting attorney shall forward the check with the fin-
15 gerprint card to the Department of State Police.

16 (d) In addition to the fee established under paragraph (c) of this subsection, when a person
17 makes a motion under subsection (1)(a) of this section the person must pay the filing fee established
18 under ORS 21.135.

19 (e) The prosecuting attorney may not charge the defendant a fee for performing the require-
20 ments described in this section.

21 **(f) If the prosecuting attorney, after performing the review described in paragraph (a)**
22 **of this subsection, discovers that there is no record in the computerized criminal history of**
23 **the conviction, arrest, citation or charge that is the subject of the motion, the prosecuting**
24 **attorney may request that the Department of State Police update the computerized criminal**
25 **history of the defendant by submitting information sufficient to update the record to the**
26 **department in a manner determined by the department by rule.**

27 (3) Upon hearing the motion, the court may require the filing of such affidavits and may require
28 the taking of such proofs as the court deems proper. The court shall allow the victim to make a
29 statement at the hearing. Except as otherwise provided in subsection (12) of this section, if the court
30 determines that the circumstances and behavior of the applicant from the date of conviction, or from
31 the date of arrest, citation or charge as the case may be, to the date of the hearing on the motion
32 warrant setting aside the conviction, or the arrest, citation or charge record as the case may be,
33 the court shall enter an appropriate order that shall state the original arrest or citation charge and
34 the conviction charge, if any and if different from the original, date of charge, submitting agency
35 and disposition. The order shall further state that positive identification has been established by the
36 Department of State Police and further identified as to Department of State Police number or sub-
37 mitting agency number. Upon the entry of the order, the applicant for purposes of the law shall be
38 deemed not to have been previously convicted, or arrested, cited or charged as the case may be, and
39 the court shall issue an order sealing the record of conviction and other official records in the case,
40 including the records of arrest, citation or charge whether or not the arrest, citation or charge re-
41 sulted in a further criminal proceeding.

42 (4) The clerk of the court shall forward a certified copy of the order to such agencies as directed
43 by the court. A certified copy must be sent to the Department of Corrections when the person has
44 been in the custody of the Department of Corrections. Upon entry of the order, the conviction, ar-
45 rest, citation, charge or other proceeding shall be deemed not to have occurred, and the applicant

1 may answer accordingly any questions relating to its occurrence.

2 (5) The provisions of subsection (1)(a) of this section apply to a conviction for:

3 (a) A Class B felony, except for a violation of ORS 166.429 or any crime classified as a person
4 felony as that term is defined in the rules of the Oregon Criminal Justice Commission, only if:

5 (A)(i) Twenty years or more have elapsed from the date of the conviction sought to be set aside
6 or of the release of the person from imprisonment for the conviction sought to be set aside, which-
7 ever is later; and

8 (ii) The person has not been convicted of, arrested or criminally cited for or charged with any
9 other offense, excluding motor vehicle violations, after the date the person was convicted of the of-
10 fense sought to be set aside. Notwithstanding subsection (1) of this section, a conviction, arrest, ci-
11 tation or charge that has been set aside under this section shall be considered for the purpose of
12 determining whether this subparagraph is applicable; or

13 (B) The Class B felony is described in paragraphs (b) to (d) of this subsection.

14 (b) Any misdemeanor, Class C felony or felony punishable as a misdemeanor pursuant to ORS
15 161.705.

16 (c) An offense constituting a violation under state law or local ordinance.

17 (d) An offense committed before January 1, 1972, that, if committed after that date, would qualify
18 for an order under this section.

19 (6) Notwithstanding subsection (5) of this section, the provisions of subsection (1)(a) of this sec-
20 tion do not apply to a conviction for:

21 (a) Criminal mistreatment in the second degree under ORS 163.200 if the victim at the time of
22 the crime was 65 years of age or older.

23 (b) Criminal mistreatment in the first degree under ORS 163.205 if the victim at the time of the
24 crime was 65 years of age or older, or when the offense constitutes child abuse as defined in ORS
25 419B.005.

26 (c) Endangering the welfare of a minor under ORS 163.575 (1)(a), when the offense constitutes
27 child abuse as defined in ORS 419B.005.

28 (d) Criminally negligent homicide under ORS 163.145, when that offense was punishable as a
29 Class C felony.

30 (e) Assault in the third degree under ORS 163.165 (1)(h).

31 (f) Any sex crime, unless:

32 (A) The sex crime is listed in ORS 163A.140 (1)(a) and:

33 (i) The person has been relieved of the obligation to report as a sex offender pursuant to a court
34 order entered under ORS 163A.145 or 163A.150; and

35 (ii) The person has not been convicted of, found guilty except for insanity of or found to be
36 within the jurisdiction of the juvenile court based on a crime for which the court is prohibited from
37 setting aside the conviction under this section; or

38 (B) The sex crime constitutes a Class C felony and:

39 (i) The person was under 16 years of age at the time of the offense;

40 (ii) The person is:

41 (I) Less than two years and 180 days older than the victim; or

42 (II) At least two years and 180 days older, but less than three years and 180 days older, than
43 the victim and the court finds that setting aside the conviction is in the interests of justice and of
44 benefit to the person and the community;

45 (iii) The victim's lack of consent was due solely to incapacity to consent by reason of being less

1 than a specified age;

2 (iv) The victim was at least 12 years of age at the time of the offense;

3 (v) The person has not been convicted of, found guilty except for insanity of or found to be
4 within the jurisdiction of the juvenile court based on a crime for which the court is prohibited from
5 setting aside the conviction under this section; and

6 (vi) Each conviction or finding described in this subparagraph involved the same victim.

7 (7) Notwithstanding subsection (5) of this section, the provisions of subsection (1) of this section
8 do not apply to:

9 (a) A conviction for a state or municipal traffic offense.

10 (b) A person convicted, within the 10-year period immediately preceding the filing of the motion
11 pursuant to subsection (1) of this section, of any other offense, excluding motor vehicle violations,
12 whether or not the other conviction is for conduct associated with the same criminal episode that
13 caused the arrest, citation, charge or conviction that is sought to be set aside. A single violation,
14 other than a motor vehicle violation, within the last 10 years is not a conviction under this sub-
15 section. Notwithstanding subsection (1) of this section, a conviction that has been set aside under
16 this section shall be considered for the purpose of determining whether this paragraph is applicable.

17 (c) A person who at the time the motion authorized by subsection (1) of this section is pending
18 before the court is under charge of commission of any crime.

19 (8) The provisions of subsection (1)(b) of this section do not apply to:

20 (a) A person arrested or criminally cited for or charged with an offense within the three-year
21 period immediately preceding the filing of the motion for any offense, excluding motor vehicle vio-
22 lations, and excluding arrests, citations or charges for conduct associated with the same criminal
23 episode that caused the arrest, citation or charge that is sought to be set aside. An arrest, citation
24 or charge that has been set aside under this section may not be considered for the purpose of de-
25 termining whether this paragraph is applicable.

26 (b) An arrest or citation for driving while under the influence of intoxicants if the charge is
27 dismissed as a result of the person's successful completion of a diversion agreement described in
28 ORS 813.200.

29 (9) The provisions of subsection (1) of this section apply to convictions, arrests, citations and
30 charges that occurred before, as well as those that occurred after, September 9, 1971. There is no
31 time limit for making an application.

32 (10) For purposes of any civil action in which truth is an element of a claim for relief or affir-
33 mative defense, the provisions of subsection (3) of this section providing that the conviction, arrest,
34 citation, charge or other proceeding be deemed not to have occurred do not apply and a party may
35 apply to the court for an order requiring disclosure of the official records in the case as may be
36 necessary in the interest of justice.

37 (11) Upon motion of any prosecutor or defendant in a case involving records sealed under this
38 section, supported by affidavit showing good cause, the court with jurisdiction may order the reo-
39 pening and disclosure of any records sealed under this section for the limited purpose of assisting
40 the investigation of the movant. However, such an order has no other effect on the orders setting
41 aside the conviction or the arrest, citation or charge record.

42 (12) Unless the court makes written findings by clear and convincing evidence that granting the
43 motion would not be in the best interests of justice, the court shall grant the motion and enter an
44 order as provided in subsection (3) of this section if the defendant has been convicted of one of the
45 following crimes and is otherwise eligible for relief under this section:

- 1 (a) Abandonment of a child, ORS 163.535.
- 2 (b) Attempted assault in the second degree, ORS 163.175.
- 3 (c) Assault in the third degree, ORS 163.165.
- 4 (d) Coercion, ORS 163.275.
- 5 (e) Criminal mistreatment in the first degree, ORS 163.205.
- 6 (f) Attempted escape in the first degree, ORS 162.165.
- 7 (g) Incest, ORS 163.525, if the victim was at least 18 years of age.
- 8 (h) A bias crime in the first degree, ORS 166.165.
- 9 (i) Attempted kidnapping in the second degree, ORS 163.225.
- 10 (j) Attempted robbery in the second degree, ORS 164.405.
- 11 (k) Robbery in the third degree, ORS 164.395.
- 12 (L) Supplying contraband, ORS 162.185.
- 13 (m) Unlawful use of a weapon, ORS 166.220.
- 14 (13) As used in this section[,]:

15 **(a) “Positive identification” means a determination, based upon a comparison of finger-**
16 **prints or other equally reliable biometric identification techniques, that the subject of a re-**
17 **cord search is the same person as the subject of a criminal history record or records indexed**
18 **in the data system. “Positive identification” does not include identification based solely upon**
19 **a comparison of a person’s name or other nonunique identification characteristic, number**
20 **or combination of characteristics or numbers.**

21 **(b) “Sex crime” has the meaning given that term in ORS 163A.005.**

22 **(14) The Department of State Police may adopt rules to carry out the provisions of this**
23 **section.**

24 **SECTION 2.** ORS 137.074 is amended to read:

25 137.074. **(1)** When a person is convicted of a felony[, *a Class A misdemeanor or a sex crime, as*
26 *defined in ORS 163A.005,*] **or a misdemeanor**, the court shall ensure that the person’s fingerprints
27 [*have been taken*] **are submitted to the Department of State Police.** The law enforcement agency
28 attending upon the court is the agency responsible for obtaining the fingerprints. The agency at-
29 tending upon the court may, by agreement, arrange for another law enforcement agency to obtain
30 the fingerprints on its behalf.

31 **(2) The court shall ensure that the fingerprints submitted under subsection (1) of this**
32 **section are submitted in a manner that:**

33 **(a) Identifies, to the extent possible, the following information associated with the con-**
34 **viction:**

35 **(A) The crime or crimes for which the person was arrested;**

36 **(B) All charges listed on any criminal citation issued to the person; and**

37 **(C) The crime or crimes of conviction.**

38 **(b) Allows the department to determine whether the person is also the subject of a dis-**
39 **position report transmitted to the department under ORS 181A.175.**

40 **(3) The department may adopt rules to carry out the provisions of this section.**

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