

Senate Bill 397

Sponsored by Senator PROZANSKI (at the request of Nike, Inc. and Metropolitan Public Defender) (Pre-session filed.)

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**.

Modifies procedure for filing motion to set aside conviction, arrest, citation or charge. Eliminates fees, fingerprinting and background check. Reduces waiting period for filing motion if person was revoked from probation, is seeking to set aside Class B felony or was convicted of other offense. Provides that court shall grant motion to set aside arrest, citation or charge, or motion to set aside conviction if no objection received. Modifies standard for granting motion over objection.

A BILL FOR AN ACT

Relating to expungement; amending ORS 137.223 and 137.225.

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

SECTION 1. ORS 137.225 is amended to read:

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

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

(c) A person whose sentence of probation was revoked may not apply to the court for entry of an order setting aside the conviction for which the person was sentenced to probation for a period of [10] **three**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

(d) A person filing a motion under this section is not required to pay the filing fee established under ORS 21.135 or any other fee, or to file a set of fingerprints.

(2)(a) A copy of the motion [*and a full set of the defendant's fingerprints*] shall be served upon the office of the prosecuting attorney who prosecuted the crime or violation, or who had authority to prosecute the charge if there was no accusatory instrument filed[, *and opportunity shall be given to contest the motion. The fingerprint card with the notation "motion for setting aside conviction," or "motion for setting aside arrest, citation or charge record" as the case may be, shall be forwarded to the Department of State Police. Information resulting from the fingerprint search along with the fin-*

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 *gerprint card shall be returned to the prosecuting attorney].*

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

6 **(c) The prosecuting attorney may object to a motion filed under subsection (1)(a) of this**
7 **section and shall notify the court and the person of the objection within 30 days of receiving**
8 **the motion.**

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

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

17 *[(e) (d) The prosecuting attorney may not charge the [defendant] **person** a fee for performing*
18 *the requirements described in this section.*

19 *[(3) Upon hearing the motion, the court may require the filing of such affidavits and may require*
20 *the taking of such proofs as the court deems proper. The court shall allow the victim to make a state-*
21 *ment at the hearing. Except as otherwise provided in subsection (12) of this section, if the court deter-*
22 *mines that the circumstances and behavior of the applicant from the date of conviction, or from the date*
23 *of arrest, citation or charge as the case may be, to the date of the hearing on the motion warrant setting*
24 *aside the conviction, or the arrest, citation or charge record as the case may be, the court shall enter*
25 *an appropriate order that shall state the original arrest or citation charge and the conviction charge,*
26 *if any and if different from the original, date of charge, submitting agency and disposition. The order*
27 *shall further state that positive identification has been established by the Department of State Police*
28 *and further identified as to Department of State Police number or submitting agency number. Upon*
29 *the entry of the order, the applicant for purposes of the law shall be deemed not to have been previously*
30 *convicted, or arrested, cited or charged as the case may be, and the court shall issue an order sealing*
31 *the record of conviction and other official records in the case, including the records of arrest, citation*
32 *or charge whether or not the arrest, citation or charge resulted in a further criminal proceeding.]*

33 **(3)(a) If an objection is received to a motion filed under subsection (1)(a) of this section,**
34 **the court shall hold a hearing, and may require the filing of such affidavits and may require**
35 **the taking of such proofs as the court deems proper. The court shall allow the victim to**
36 **make a statement at the hearing. Except as otherwise provided in paragraph (b) of this**
37 **section, the court shall grant the motion if, after taking into consideration the community's**
38 **interest in enabling the person to find employment and housing and to be free from the**
39 **stigma of a criminal record, it is in the best interests of justice to grant the motion. Upon**
40 **granting the motion, the court shall enter an appropriate order containing the original arrest**
41 **or citation charge, the conviction charge, if different from the original, the date of charge,**
42 **the submitting agency and the disposition of the charge. Upon the entry of the order, the**
43 **person for purposes of the law shall be deemed not to have been previously convicted, and**
44 **the court shall issue an order sealing the record of conviction and other official records in**
45 **the case, including the records of arrest, citation or charge.**

1 (b) If the person has been convicted of one of the following crimes and is otherwise eli-
 2 gible for relief under this section, the court shall grant the motion and enter an order as
 3 provided in paragraph (a) of this subsection unless the court makes written findings, by clear
 4 and convincing evidence, that granting the motion would not be in the best interests of jus-
 5 tice:

6 (A) Abandonment of a child, ORS 163.535.

7 (B) Attempted assault in the second degree, ORS 163.175.

8 (C) Assault in the third degree, ORS 163.165.

9 (D) Coercion, ORS 163.275.

10 (E) Criminal mistreatment in the first degree, ORS 163.205.

11 (F) Attempted escape in the first degree, ORS 162.165.

12 (G) Incest, ORS 163.525, if the victim was at least 18 years of age.

13 (H) A bias crime in the first degree, ORS 166.165.

14 (I) Attempted kidnapping in the second degree, ORS 163.225.

15 (J) Attempted robbery in the second degree, ORS 164.405.

16 (K) Robbery in the third degree, ORS 164.395.

17 (L) Supplying contraband, ORS 162.185.

18 (M) Unlawful use of a weapon, ORS 166.220.

19 (c) The court shall grant a motion filed under subsection (1)(b) of this section, or under
 20 subsection (1)(a) of this section if no objection to the motion is received, and shall enter an
 21 appropriate order containing the original arrest or citation charge, the conviction charge, if
 22 applicable and different from the original, the date of charge, the submitting agency and the
 23 disposition of the charge. Upon the entry of the order, the person for purposes of the law
 24 shall be deemed not to have been previously convicted, arrested, cited or charged, and the
 25 court shall issue an order sealing all official records in the case, including the records of
 26 arrest, citation or charge, whether or not the arrest, citation or charge resulted in a further
 27 criminal proceeding.

28 (d) The court shall delay by 45 days the entry of an order under this subsection con-
 29 cerning an arrest, citation or charge, if no accusatory instrument was filed.

30 (4) The clerk of the court shall forward a certified copy of the order to such agencies as directed
 31 by the court. A certified copy must be sent to the Department of Corrections when the person has
 32 been in the custody of the Department of Corrections. Upon entry of the order, the conviction, ar-
 33 rest, citation, charge or other proceeding shall be deemed not to have occurred, and the [applicant]
 34 person may answer accordingly any questions relating to its occurrence.

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

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

38 (A)(i) [Twenty] Seven years or more have elapsed from the date of the conviction sought to be
 39 set aside or of the release of the person from imprisonment for the conviction sought to be set aside,
 40 whichever is later; and

41 (ii) The person has not been convicted of[, arrested or criminally cited for or charged with] any
 42 other offense, excluding motor vehicle violations, [after the date the person was convicted of the of-
 43 fense sought to be] within the seven years before filing the motion to set aside. Notwithstanding
 44 subsection (1) of this section, a conviction[, arrest, citation or charge] that has been set aside under
 45 this section shall be considered for the purpose of determining whether this subparagraph is appli-

- 1 cable; or
- 2 (B) The Class B felony is described in paragraphs (b) to (d) of this subsection.
- 3 (b) Any misdemeanor, Class C felony or felony punishable as a misdemeanor pursuant to ORS
4 161.705.
- 5 (c) An offense constituting a violation under state law or local ordinance.
- 6 (d) An offense committed before January 1, 1972, that, if committed after that date, would qualify
7 for an order under this section.
- 8 (6) Notwithstanding subsection (5) of this section, the provisions of subsection (1)(a) of this sec-
9 tion do not apply to a conviction for:
- 10 (a) Criminal mistreatment in the second degree under ORS 163.200 if the victim at the time of
11 the crime was 65 years of age or older.
- 12 (b) Criminal mistreatment in the first degree under ORS 163.205 if the victim at the time of the
13 crime was 65 years of age or older, or when the offense constitutes child abuse as defined in ORS
14 419B.005.
- 15 (c) Endangering the welfare of a minor under ORS 163.575 (1)(a), when the offense constitutes
16 child abuse as defined in ORS 419B.005.
- 17 (d) Criminally negligent homicide under ORS 163.145, when that offense was punishable as a
18 Class C felony.
- 19 (e) Assault in the third degree under ORS 163.165 (1)(h).
- 20 (f) Any sex crime, unless:
- 21 (A) The sex crime is listed in ORS 163A.140 (1)(a) and:
- 22 (i) The person has been relieved of the obligation to report as a sex offender pursuant to a court
23 order entered under ORS 163A.145 or 163A.150; and
- 24 (ii) The person has not been convicted of, found guilty except for insanity of or found to be
25 within the jurisdiction of the juvenile court based on a crime for which the court is prohibited from
26 setting aside the conviction under this section; or
- 27 (B) The sex crime constitutes a Class C felony and:
- 28 (i) The person was under 16 years of age at the time of the offense;
- 29 (ii) The person is:
- 30 (I) Less than two years and 180 days older than the victim; or
- 31 (II) At least two years and 180 days older, but less than three years and 180 days older, than
32 the victim and the court finds that setting aside the conviction is in the interests of justice and of
33 benefit to the person and the community;
- 34 (iii) The victim's lack of consent was due solely to incapacity to consent by reason of being less
35 than a specified age;
- 36 (iv) The victim was at least 12 years of age at the time of the offense;
- 37 (v) The person has not been convicted of, found guilty except for insanity of or found to be
38 within the jurisdiction of the juvenile court based on a crime for which the court is prohibited from
39 setting aside the conviction under this section; and
- 40 (vi) Each conviction or finding described in this subparagraph involved the same victim.
- 41 (7) Notwithstanding subsection (5) of this section, the provisions of subsection (1) of this section
42 do not apply to:
- 43 (a) A conviction for a state or municipal traffic offense.
- 44 (b) A person convicted, within the [10-year] **three-year** period immediately preceding the filing
45 of the motion pursuant to subsection (1) of this section, of any other offense, excluding motor vehicle

1 violations, whether or not the other conviction is for conduct associated with the same criminal
2 episode that caused the arrest, citation, charge or conviction that is sought to be set aside. A single
3 violation, other than a motor vehicle violation, within the last [10] **three** years is not a conviction
4 under this subsection. Notwithstanding subsection (1) of this section, a conviction that has been set
5 aside under this section shall be considered for the purpose of determining whether this paragraph
6 is applicable.

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

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

10 *[(a) A person arrested or criminally cited for or charged with an offense within the three-year pe-*
11 *riod immediately preceding the filing of the motion for any offense, excluding motor vehicle violations,*
12 *and excluding arrests, citations or charges for conduct associated with the same criminal episode that*
13 *caused the arrest, citation or charge that is sought to be set aside. An arrest, citation or charge that*
14 *has been set aside under this section may not be considered for the purpose of determining whether this*
15 *paragraph is applicable.]*

16 *[(b)] an arrest or citation for driving while under the influence of intoxicants if the charge is*
17 *dismissed as a result of the person's successful completion of a diversion agreement described in*
18 *ORS 813.200.*

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

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

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

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

36 *[(a) Abandonment of a child, ORS 163.535.]*

37 *[(b) Attempted assault in the second degree, ORS 163.175.]*

38 *[(c) Assault in the third degree, ORS 163.165.]*

39 *[(d) Coercion, ORS 163.275.]*

40 *[(e) Criminal mistreatment in the first degree, ORS 163.205.]*

41 *[(f) Attempted escape in the first degree, ORS 162.165.]*

42 *[(g) Incest, ORS 163.525, if the victim was at least 18 years of age.]*

43 *[(h) A bias crime in the first degree, ORS 166.165.]*

44 *[(i) Attempted kidnapping in the second degree, ORS 163.225.]*

45 *[(j) Attempted robbery in the second degree, ORS 164.405.]*

1 *[(k) Robbery in the third degree, ORS 164.395.]*

2 *[(L) Supplying contraband, ORS 162.185.]*

3 *[(m) Unlawful use of a weapon, ORS 166.220.]*

4 *[(13)] (12)* As used in this section, “sex crime” has the meaning given that term in ORS 163A.005.

5 **SECTION 2.** ORS 137.223 is amended to read:

6 137.223. (1) A person who has been found guilty except for insanity of an offense for which, if
7 convicted, the person could apply for entry of an order setting aside the conviction pursuant to ORS
8 137.225, may by motion apply to the court for entry of an order setting aside the judgment finding
9 the person guilty except for insanity of the offense.

10 (2) A person described in subsection (1) of this section may file the motion to set aside a judg-
11 ment of guilty except for insanity any time after three years from the date of entry of the judgment
12 of guilty except for insanity, provided that:

13 (a) The person is no longer under the jurisdiction of the Psychiatric Security Review Board; and

14 (b) The person has no other findings of guilty except for insanity within the 10 years prior to
15 filing the motion and no convictions for offenses other than motor vehicle violations within the 10
16 years prior to filing the motion.

17 (3)(a) A copy of the motion and a full set of the defendant’s fingerprints shall be served upon
18 the office of the prosecuting attorney who prosecuted the offense and opportunity shall be given to
19 contest the motion. The fingerprint card with the notation “motion for setting aside judgment of
20 guilty except for insanity” shall be forwarded to the Department of State Police. Information re-
21 sulting from the fingerprint search along with the fingerprint card shall be returned to the prose-
22 cuting attorney.

23 (b) When a prosecuting attorney is served with a copy of a motion to set aside a judgment of
24 guilty except for insanity under this section, the prosecuting attorney shall provide a copy of the
25 motion and notice of the hearing date to the victim, if any, of the offense by mailing a copy of the
26 motion and notice to the victim’s last-known address.

27 (c) When a person files a motion under this section, the person must pay a fee of \$80 to the
28 Department of State Police. The person shall attach a certified check payable to the Department
29 of State Police in the amount of \$80 to the fingerprint card that is served upon the prosecuting at-
30 torney. The office of the prosecuting attorney shall forward the check with the fingerprint card to
31 the Department of State Police.

32 (d) In addition to the fee established under paragraph (c) of this subsection, the person must pay
33 the filing fee established under ORS 21.135.

34 (4)(a) Upon hearing the motion, the court may require the filing of such affidavits and may re-
35 quire the taking of such proofs as the court deems proper. The court shall allow the victim, if any,
36 to make a statement at the hearing.

37 (b) Except as otherwise provided in paragraph (c) of this subsection, if the court determines that
38 the circumstances and behavior of the person from the date of the judgment of guilty except for
39 insanity to the date of the hearing on the motion warrant the court granting the motion, the court
40 shall enter an order setting aside the judgment of guilty except for insanity.

41 (c) Unless the court makes written findings by clear and convincing evidence that granting the
42 motion would not be in the best interests of justice, the court shall grant the motion and enter an
43 order as provided in paragraph (b) of this subsection if the defendant was found guilty except for
44 insanity of an offense described in ORS 137.225 *[(12)] (3)(b)* and is otherwise eligible for relief under
45 this section.

1 (d) An order entered under this subsection shall state the original arrest charge and the charge
 2 for which the person was found guilty except for insanity. The order shall further state that positive
 3 identification has been established by the Department of State Police and further identified as to
 4 Department of State Police number or submitting agency number.

5 (5)(a) Upon the entry of an order under subsection (4) of this section:

6 (A) The person, for purposes of the law, shall be deemed not to have been previously found
 7 guilty except for insanity, and the court shall issue an order sealing the records of the case, in-
 8 cluding the records of arrest, whether or not the arrest resulted in a further criminal proceeding.

9 (B) The court shall inform the person that the person's right to possess, purchase or otherwise
 10 acquire a firearm remains prohibited under federal law.

11 (b) For purposes of this subsection, records of the case do not include medical records that are
 12 in the possession of the Psychiatric Security Review Board, including medical evaluations and re-
 13 ports submitted from other agencies concerning the status or compliance of the person.

14 (6) The clerk of the court shall forward a certified copy of the order entered under subsection
 15 (5) of this section to such agencies as directed by the court. A certified copy shall be sent to the
 16 Psychiatric Security Review Board. Upon entry of the order, the judgment of guilty except for in-
 17 sanity shall be deemed not to have been entered, and the person may answer accordingly any
 18 questions relating to its occurrence.

19 (7) For purposes of any civil action in which truth is an element of a claim for relief or affir-
 20 mative defense, the provisions of subsection (6) of this section providing that the judgment of guilty
 21 except for insanity be deemed not to have been entered do not apply and a party may apply to the
 22 court for an order requiring disclosure of the official records in the case as may be necessary in the
 23 interests of justice.

24 (8) Upon motion of any prosecutor or defendant in a case involving records sealed under this
 25 section, supported by affidavit showing good cause, the court with jurisdiction may order the reo-
 26 pening and disclosure of any records sealed under this section for the limited purpose of assisting
 27 the investigation of the movant. However, such an order has no other effect on the orders setting
 28 aside the judgment of guilty except for insanity.

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