

Enrolled
House Bill 3327

Sponsored by Representatives HARKER, KOTEK, Senator STEINER HAYWARD

CHAPTER

AN ACT

Relating to expungement; amending ORS 137.225 and 419A.262; and declaring an emergency.

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

SECTION 1. ORS 137.225, as amended by section 4, chapter 70, Oregon Laws 2012, is amended to read:

137.225. (1)(a) At any time after the lapse of three years from the date of pronouncement of judgment, any defendant 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; or

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

(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 record" as the case may be, shall be forwarded to the Department of State Police. Information resulting from the fingerprint search along with the fingerprint card shall be returned to the prosecuting attorney.

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

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

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

(3) Upon hearing the motion, the court may require the filing of such affidavits and may require the taking of such proofs as the court deems proper. The court shall allow the victim to make a statement at the hearing. Except as otherwise provided in subsection [(14)] (13) of this section, if the court determines that the circumstances and behavior of the applicant from the date of conviction, or from the date of arrest as the case may be, to the date of the hearing on the motion warrant setting aside the conviction, or the arrest record as the case may be, the court shall enter an appropriate order that shall state the original arrest charge and the conviction charge, if any and if different from the original, date of charge, submitting agency and disposition. The order shall further state that positive identification has been established by the Department of State Police and further identified as to Department of State Police number or submitting agency number. Upon the entry of the order, the applicant for purposes of the law shall be deemed not to have been previously convicted, or arrested as the case may be, and the court shall issue an order sealing the record of conviction and other official records in the case, including the records of arrest whether or not the arrest resulted in a further criminal proceeding.

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

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

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

(b) A Class C felony, except for criminal mistreatment in the first degree under ORS 163.205 when it would constitute child abuse as defined in ORS 419B.005 or any sex crime.

(c) The crime of possession of the narcotic drug marijuana when that crime was punishable as a felony only.

(d) A crime punishable as either a felony or a misdemeanor, in the discretion of the court, except for:

(A) Any sex crime; or

(B) The following crimes when they would constitute child abuse as defined in ORS 419B.005:

(i) Criminal mistreatment in the first degree under ORS 163.205; and

(ii) Endangering the welfare of a minor under ORS 163.575 (1)(a).

(e) A misdemeanor, including a violation of a municipal ordinance, for which a jail sentence may be imposed, except for endangering the welfare of a minor under ORS 163.575 (1)(a) when it would constitute child abuse as defined in ORS 419B.005 or any sex crime.

(f) A violation, whether under state law or local ordinance.

(g) An offense committed before January 1, 1972, that if committed after that date would be:

(A) A Class C felony, except for any sex crime or for the following crimes when they would constitute child abuse as defined in ORS 419B.005:

(i) Criminal mistreatment in the first degree under ORS 163.205; and

(ii) Endangering the welfare of a minor under ORS 163.575 (1)(a).

(B) A crime punishable as either a felony or a misdemeanor, in the discretion of the court, except for any sex crime or for the following crimes when they would constitute child abuse as defined in ORS 419B.005:

(i) Criminal mistreatment in the first degree under ORS 163.205; and

(ii) Endangering the welfare of a minor under ORS 163.575 (1)(a).

(C) A misdemeanor, except for endangering the welfare of a minor under ORS 163.575 (1)(a) when it would constitute child abuse as defined in ORS 419B.005 or any sex crime.

(D) A violation.

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

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

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

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

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

(a) Criminal mistreatment in the second degree under ORS 163.200 if the victim at the time of the crime was 65 years of age or older[; *and*].

(b) Criminal mistreatment in the first degree under ORS 163.205 if the victim at the time of the crime was 65 years of age or older.

~~[(8)]~~ (c) ~~[Notwithstanding subsection (5) of this section, the provisions of subsection (1)(a) of this section do not apply to]~~ Criminally negligent homicide under ORS 163.145, when that offense was punishable as a Class C felony.

~~[(9)]~~ (8) Notwithstanding subsection (5) of this section, the provisions of subsection (1)(a) of this section apply to a conviction for:

(a) A Class B felony described in subsection (5)(a) of this section only if:

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

~~[(b)]~~ (B) The person has not been convicted of or arrested for any other offense, excluding motor vehicle violations, after the date the person was convicted of the offense sought to be set aside. Notwithstanding subsection (1) of this section, a conviction or arrest that has been set aside under this section shall be considered for the purpose of determining whether this ~~[paragraph]~~ **subparagraph** is applicable.

(b) **A sex crime listed in ORS 181.830 (1)(a) if:**

(A) **The person has been relieved of the obligation to report as a sex offender pursuant to a court order entered under ORS 181.832 or 181.833; and**

(B) **The person has not been convicted of, found guilty except for insanity of or found to be within the jurisdiction of the juvenile court based on, a crime that a court is prohibited from setting aside under this section.**

(c) **A sex crime constituting a Class C felony, if:**

(A) **The person was under 16 years of age at the time of the offense;**

(B) **The person is less than three years older than the victim;**

(C) **The victim's lack of consent was due solely to incapacity to consent by reason of being less than a specified age;**

(D) **The victim was at least 12 years of age at the time of the offense;**

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

(F) **Each conviction or finding described in this paragraph involved the same victim.**

~~[(10)]~~ (9) The provisions of subsection (1)(b) of this section do not apply to:

(a) A person arrested within the three-year period immediately preceding the filing of the motion for any offense, excluding motor vehicle violations, and excluding arrests for conduct associated with the same criminal episode that caused the arrest that is sought to be set aside. An arrest that has been set aside under this section may not be considered for the purpose of determining whether this paragraph is applicable.

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

[(11)] (10) The provisions of subsection (1) of this section apply to convictions and arrests that occurred before, as well as those that occurred after, September 9, 1971. There is no time limit for making an application.

[(12)] (11) For purposes of any civil action in which truth is an element of a claim for relief or affirmative defense, the provisions of subsection (3) of this section providing that the conviction, arrest or other proceeding be deemed not to have occurred do not apply and a party may apply to the court for an order requiring disclosure of the official records in the case as may be necessary in the interest of justice.

[(13)] (12) Upon motion of any prosecutor or defendant in a case involving records sealed under this section, supported by affidavit showing good cause, the court with jurisdiction may order the reopening and disclosure of any records sealed under this section for the limited purpose of assisting the investigation of the movant. However, such an order has no other effect on the orders setting aside the conviction or the arrest record.

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

- (a) Abandonment of a child, ORS 163.535.
- (b) Attempted assault in the second degree, ORS 163.175.
- (c) Assault in the third degree, ORS 163.165.
- (d) Coercion, ORS 163.275.
- (e) Criminal mistreatment in the first degree, ORS 163.205.
- (f) Attempted escape in the first degree, ORS 162.165.
- (g) Incest, ORS 163.525, if the victim was at least 18 years of age.
- (h) Intimidation in the first degree, ORS 166.165.
- (i) Attempted kidnapping in the second degree, ORS 163.225.
- (j) Attempted robbery in the second degree, ORS 164.405.
- (k) Robbery in the third degree, ORS 164.395.
- (L) Supplying contraband, ORS 162.185.
- (m) Unlawful use of a weapon, ORS 166.220.

[(15)] (14) As used in this section, "sex crime" has the meaning given that term in ORS 181.594. **SECTION 2.** ORS 419A.262, as amended by section 1, chapter 23, Oregon Laws 2012, is amended to read:

419A.262. (1) An expunction proceeding shall be commenced in the county where the subject person resided at the time of the most recent termination.

(2) Upon application of either a person who is the subject of a record or a juvenile department, or upon its own motion, the juvenile court shall order expunction if, after a hearing when the matter is contested, it finds that:

- (a) At least five years have elapsed since the date of the person's most recent termination;
- (b) Since the date of the most recent termination, the person has not been convicted of a felony or a Class A misdemeanor;
- (c) No proceedings seeking a criminal conviction or an adjudication in a juvenile court are pending against the person;
- (d) The person is not within the jurisdiction of any juvenile court on the basis of a petition alleging an act or behavior as defined in ORS 419B.100 (1)(a) to (c) and (f) or 419C.005; and
- (e) The juvenile department is not aware of any pending investigation of the conduct of the person by any law enforcement agency.

(3)(a) Notwithstanding subsection (2) of this section, upon application of a person who is the subject of a record kept by a juvenile court or juvenile department, upon application of the juvenile department, or upon its own motion, the juvenile court, after a hearing when the matter is contested under subsection [(12)] (13) of this section, shall order expunction if it finds that:

(A) The application requests expunction of only that part of the person's record that involves a charge, allegation or adjudication based on conduct that if done by an adult would constitute the crime of prostitution under ORS 167.007; and

(B) The person was under 18 years of age at the time of the conduct.

(b) Except as provided in subsections [(12) and (13)] **(13) and (14)** of this section, there is no waiting period required before the juvenile court orders expunction under this subsection.

(4) In the case of an application by the juvenile department or of the court acting upon its own motion, expunction shall not be ordered if actual notice of expunction has not been given to the person in accordance with subsection [(11)] **(12)** of this section unless the person has reached 21 years of age.

(5) When a person who is the subject of a record kept by a juvenile court or juvenile department reaches 18 years of age, the juvenile court, after a hearing when the matter is contested, shall order expunction if:

(a) The person never has been found to be within the jurisdiction of the court; or

(b) The conditions of subsection (2) or (3) of this section have been met.

(6) Expunction shall not be ordered under this section if actual notice of expunction has not been given to the person in accordance with subsection [(11)] **(12)** of this section unless the person has reached 21 years of age.

(7) Subsections (5) and (6) of this section apply only to cases resulting in termination after September 13, 1975.

(8) Notwithstanding subsections (2), (3) and (5) to (7) of this section, upon application of a person who is the subject of a record kept by a juvenile court or juvenile department, upon application of the juvenile department, or upon its own motion, the juvenile court, after a hearing when the matter is contested, may order expunction of all or any part of the person's record if it finds that to do so would be in the best interests of the person and the public. In the case of an application by the juvenile department or of the court acting upon its own motion, expunction shall not be ordered if actual notice of expunction has not been given to the person in accordance with subsection [(11)] **(12)** of this section unless the person has reached 21 years of age.

(9) Notwithstanding ORS 419A.260 (1)(d)(J)(x), (xiii) or (xviii), a person who has been found to be within the jurisdiction of the juvenile court based on an act that if committed by an adult would constitute:

(a) Rape in the third degree under ORS 163.355, sodomy in the third degree under ORS 163.385 or sexual abuse in the third degree under ORS 163.415, or an attempt to commit those crimes, may apply for an order of expunction under this section. The court shall order expunction of the records in the case if, after a hearing when the matter is contested, the court finds that the person:

(A) Meets the requirements of subsection (2) of this section;

(B) Has been relieved of the obligation to report as a sex offender pursuant to a court order entered under ORS 181.832 or 181.833; and

(C) Has not been convicted of, found guilty except for insanity of or found to be within the jurisdiction of the juvenile court based on a crime listed in ORS 419A.260 (1)(d)(J), other than the adjudication that is the subject of the motion.

(b) A sex crime that is a Class C felony may apply for an order of expunction under this section. The court shall order expunction of the records in the case if, after a hearing when the matter is contested, the court finds that:

(A) The person meets the requirements of subsection (2) of this section;

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

(C) The person is less than three years older than the victim;

(D) The victim's lack of consent was due solely to incapacity to consent by reason of being less than a specified age;

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

(F) Each finding described in this paragraph involved the same victim; and

(G) The person has not been convicted of, found guilty except for insanity of or found to be within the jurisdiction of the juvenile court based on a crime listed in ORS 419A.260 (1)(d)(J) or an offense the court is prohibited from setting aside under ORS 137.225, other than the adjudication that is the subject of the motion.

[(9)] (10) When an expunction proceeding is commenced by application of the person whose records are to be expunged, the person shall set forth as part of the application the names of the juvenile courts, juvenile departments, institutions and law enforcement and other agencies that the person has reason to believe possess an expungible record of the person. The juvenile department shall provide the names and addresses of the juvenile courts, juvenile departments, institutions and law enforcement and other agencies that a reasonable search of department files indicates have expungible records.

[(10)] (11) When an expunction proceeding is commenced by application of the juvenile department or upon the court's own motion, the application or motion shall set forth the names and addresses of the juvenile courts, juvenile departments, institutions and law enforcement and other agencies that a reasonable search of department files indicates have expungible records and those provided by the subject person.

[(11)(a)] (12)(a) Notice and a copy of an application for expunction under subsections (2) to (8) of this section shall be given to:

(A) The district attorney of the county in which the expunction proceeding is commenced and the district attorney of each county in which the record sought to be expunged is kept; and

(B) The person who is the subject of the record if the person has not initiated the expunction proceeding.

(b) A district attorney who receives notice under this subsection shall notify the victim of the acts that resulted in the disposition that is the subject of the application for expunction and shall mail a copy of the application for expunction to the victim's last known address.

[(12)(a)] (13)(a) Within 30 days of receiving the notice of application for expunction under subsection [(11)] (12) of this section, a district attorney shall give written notice of any objection and the grounds therefor to the person whose records are to be expunged and to the juvenile court.

(b) Except as provided in subsection [(13)(c)] (14)(c) of this section, if no objection is filed the court may decide the issue of expunction either without a hearing or after full hearing under subsections [(13) to (16)] (14) to (17) of this section.

[(13)] (14) When an expunction is pending under subsections (2) to (8) of this section, the court may proceed with or without a hearing, except that:

(a) The court may not enter an expunction judgment without a hearing if a timely objection to expunction has been filed under subsection [(12)] (13) of this section;

(b) The court may not deny an expunction without a hearing if the proceeding is based on an application of the subject; and

(c) The court shall proceed without a hearing if:

(A) No objection is filed under subsection [(12)] (13) of this section;

(B) The application requests expunction of only that part of the person's record that involves a charge, allegation or adjudication based on conduct that if done by an adult would constitute the crime of prostitution under ORS 167.007; and

(C) The person was under 18 years of age at the time of the conduct.

[(14)(a)] (15)(a) Notice of a hearing on a pending expunction shall be served on the subject and any district attorney filing a timely objection under subsection [(12)] (13) of this section.

(b) When a district attorney receives notice of a hearing for expunction of a record concerning a youth or youth offender proceeding under ORS chapter 419C, if the victim of the acts that resulted in the disposition that is the subject of the application for expunction requests, the district attorney shall mail notice of the hearing to the victim's last-known address.

[(15)] (16) The court shall conduct a hearing on a pending expunction in accord with the provisions of ORS 419B.195, 419B.198, 419B.201, 419B.205, 419B.208, 419B.310, 419B.812 to 419B.839 and 419B.908. Rules of evidence shall be as in a hearing to establish juvenile court jurisdiction and as

defined in ORS 419B.310 (3) and 419C.400 (2). The burden of proof shall be with the party contesting expunction.

[(16)] (17) At the conclusion of a hearing on a pending expunction, the court shall issue judgment granting or denying expunction.

[(17)] (18) The juvenile court or juvenile department shall send a copy of an expunction judgment to each agency subject to the judgment. Upon receipt of a copy of the judgment, the agency shall comply and, within 21 days of the date of receipt, return the copy to the juvenile court or juvenile department with an indorsement indicating compliance.

[(18)] (19) When all agencies subject to an expunction judgment have indicated their compliance or in any event no later than six weeks following the date the judgment was delivered as required by subsection [(17)] (18) of this section, the juvenile court shall provide the person who is the subject of the record with a copy of the expunction judgment, a list of complying and noncomplying agencies, and a written notice of rights and effects of expunction. The juvenile court and juvenile department then shall expunge forthwith all records which they possess and which are subject to the judgment, except the original expunction judgment and the list of complying and noncomplying agencies which must be preserved under seal.

[(19)] (20) In addition to those agencies identified in ORS 419A.260 (1)(d), the juvenile, circuit, municipal and justice courts, and the district and city attorneys of this state, are bound by an expunction judgment of any juvenile court of appropriate jurisdiction in this state issuing an expunction judgment.

[(20)] (21) Upon entry of an expunction judgment, the contact that is the subject of the expunged record shall not be disclosed by any agency. An agency that is subject to an expunction judgment shall respond to any inquiry about the contact by indicating that no record or reference concerning the contact exists.

[(21)] (22) A person who is the subject of a record that has been expunged under this section may assert that the record never existed and that the contact, which was the subject of the record, never occurred without incurring a penalty for perjury or false swearing under the laws of this state.

[(22)] (23) Juvenile courts, by court rule or by order related to a particular matter, may direct that records concerning a subject person be destroyed. No records shall be destroyed until at least three years have elapsed after the date of the subject's most recent termination. In the event the record has been expunged, the expunction judgment and list of complying and noncomplying agencies may not be destroyed, but shall be preserved under seal. The destruction of records under this subsection does not constitute expunction.

[(23)] (24) An expunction judgment and list of complying and noncomplying agencies shall be released from confidentiality only on order of the court originating the expunction judgment, based on a finding that review of a particular case furthers compliance with the expunction provisions of this chapter.

[(24)] (25) A subject has a right of action against any person who intentionally violates the confidentiality provisions of this section. In the proceeding, punitive damages up to an amount of \$1,000 may be sought in addition to any actual damages. The prevailing party shall be entitled to costs and reasonable attorney fees.

[(25)] (26) Intentional violation of the confidentiality provisions of this section by a public employee is cause for dismissal.

[(26)] (27) A person who intentionally releases all or part of an expunged record commits a Class C misdemeanor.

SECTION 3. This 2013 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2013 Act takes effect on its passage.

Passed by House May 8, 2013

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Ramona J. Line, Chief Clerk of House

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Tina Kotek, Speaker of House

Passed by Senate June 5, 2013

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Peter Courtney, President of Senate

Received by Governor:

.....M,....., 2013

Approved:

.....M,....., 2013

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John Kitzhaber, Governor

Filed in Office of Secretary of State:

.....M,....., 2013

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Kate Brown, Secretary of State