

# House Bill 2799

Sponsored by Representative NATHANSON (at the request of Richard Bonse)

## 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**.

Allows person convicted of certain felonies constituting delivery of controlled substance to apply for order setting aside conviction.

## A BILL FOR AN ACT

1  
2 Relating to orders setting aside convictions; amending ORS 137.225.

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

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

5 137.225. (1)(a) At any time after the lapse of three years from the date of pronouncement of  
6 judgment, any defendant who has fully complied with and performed the sentence of the court and  
7 whose conviction is described in subsection (5) of this section by motion may apply to the court  
8 where the conviction was entered for entry of an order setting aside the conviction; or

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

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

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

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

31 (d) In addition to the fee established under paragraph (c) of this subsection, when a person

**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 makes a motion under subsection (1)(a) of this section the person must pay the filing fee established  
 2 under ORS 21.135.

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

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

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

23 **(a) A Class A felony, if the crime constituted the delivery of a controlled substance as**  
 24 **described in ORS 475.752 to 475.980 and did not involve delivery of a controlled substance**  
 25 **within 1,000 feet of a school or delivery of a controlled substance to a minor.**

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

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

30 [(c)] **(d)** The crime of possession of the narcotic drug marijuana when that crime was punishable  
 31 as a felony only.

32 [(d)] **(e)** A crime punishable as either a felony or a misdemeanor, in the discretion of the court,  
 33 except for:

34 (A) Any sex crime; or

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

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

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

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

41 [(f)] **(g)** A violation, whether under state law or local ordinance.

42 [(g)] **(h)** An offense committed before January 1, 1972, that if committed after that date would  
 43 be:

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

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

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

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

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

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

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

10 (D) A violation.

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

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

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

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

22 (7) Notwithstanding subsection (5) of this section, the provisions of subsection (1)(a) of this sec-  
23 tion do not apply to:

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

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

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

30 (8) Notwithstanding subsection (5) of this section, the provisions of subsection (1)(a) of this sec-  
31 tion apply to a conviction for:

32 (a) A Class B felony described in subsection [(5)(a)] **(5)(b)** of this section only if:

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

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

41 **(B) The crime constituted the delivery of a controlled substance as described in ORS**  
42 **475.752 to 475.980 and did not involve delivery of a controlled substance within 1,000 feet of**  
43 **a school or delivery of a controlled substance to a minor.**

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

45 (A) The person has been relieved of the obligation to report as a sex offender pursuant to a

1 court order entered under ORS 181.832 or 181.833; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

40 (a) Abandonment of a child, ORS 163.535.

41 (b) Attempted assault in the second degree, ORS 163.175.

42 (c) Assault in the third degree, ORS 163.165.

43 (d) Coercion, ORS 163.275.

44 (e) Criminal mistreatment in the first degree, ORS 163.205.

45 (f) Attempted escape in the first degree, ORS 162.165.

- 1 (g) Incest, ORS 163.525, if the victim was at least 18 years of age.
- 2 (h) Intimidation in the first degree, ORS 166.165.
- 3 (i) Attempted kidnapping in the second degree, ORS 163.225.
- 4 (j) Attempted robbery in the second degree, ORS 164.405.
- 5 (k) Robbery in the third degree, ORS 164.395.
- 6 (L) Supplying contraband, ORS 162.185.
- 7 (m) Unlawful use of a weapon, ORS 166.220.
- 8 (14) As used in this section, "sex crime" has the meaning given that term in ORS 181.805.

9

---