

HOUSE BILL No. 4106

January 18, 2011, Introduced by Reps. Oakes, Lipton, Kowall, Liss, Meadows, Kandrevas, Olumba, Haveman, Cavanagh, Irwin, Santana and Womack and referred to the Committee on Judiciary.

A bill to amend 1965 PA 213, entitled

"An act to provide for setting aside the conviction in certain criminal cases; to provide for the effect of such action; to provide for the retention of certain nonpublic records and their use; to prescribe the powers and duties of certain public agencies and officers; and to prescribe penalties,"

by amending sections 1, 3, and 4 (MCL 780.621, 780.623, and 780.624), section 1 as amended by 2002 PA 472, section 3 as amended by 1994 PA 294, and section 4 as added by 1982 PA 495.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 1. (1) Except as provided in ~~subsection (2)~~ **THIS SECTION**,
2 a person ~~who is convicted of not more than 1 offense~~ may file an
3 application with the convicting court for the entry of an order
4 setting aside ~~the conviction.~~ **1 OR MORE CONVICTIONS AS FOLLOWS:**

5 **(A) A PERSON WHO IS CONVICTED OF NOT MORE THAN 1 FELONY**
6 **OFFENSE AND NOT MORE THAN 2 MISDEMEANOR OFFENSES MAY PETITION THE**
7 **CONVICTING COURT TO SET ASIDE THE FELONY OFFENSE. FOR PURPOSES OF**

1 ELIGIBILITY ONLY UNDER THIS SUBDIVISION, A TRAFFIC OFFENSE DOES NOT
2 CONSTITUTE A MISDEMEANOR, EXCEPT FOR A VIOLATION OF OPERATING WHILE
3 INTOXICATED.

4 (B) A PERSON WHO IS CONVICTED OF NOT MORE THAN 2 MISDEMEANOR
5 OFFENSES AND NO OTHER FELONY OR MISDEMEANOR OFFENSES MAY PETITION
6 THE CONVICTING COURT OR THE CONVICTING COURTS TO SET ASIDE 1 OR
7 BOTH OF THE MISDEMEANOR CONVICTIONS. FOR PURPOSES OF ELIGIBILITY
8 ONLY UNDER THIS SUBDIVISION, A TRAFFIC OFFENSE DOES NOT CONSTITUTE
9 A MISDEMEANOR, EXCEPT FOR A VIOLATION OF OPERATING WHILE
10 INTOXICATED.

11 (C) A PERSON WHO IS NOT CONVICTED OF A FELONY OFFENSE BUT WHO
12 IS CONVICTED OF NOT MORE THAN 1 MISDEMEANOR OFFENSE FOR CAUSING
13 DAMAGE OR INJURY TO ANOTHER PERSON OR TO PROPERTY MAY PETITION THE
14 CONVICTING COURT TO SET ASIDE THAT MISDEMEANOR CONVICTION. FOR
15 PURPOSES OF ELIGIBILITY ONLY UNDER THIS SUBDIVISION, A TRAFFIC
16 OFFENSE DOES NOT CONSTITUTE A MISDEMEANOR, EXCEPT FOR A VIOLATION
17 OF OPERATING WHILE INTOXICATED.

18 (2) A person shall not apply to have set aside, and a judge
19 shall not set aside, a conviction for ~~a~~ANY OF THE FOLLOWING:

20 (A) A felony for which the maximum punishment is life
21 imprisonment or an attempt to commit a felony for which the maximum
22 punishment is life imprisonment. ~~7-a conviction for a~~

23 (B) A violation or attempted violation of section 520c, 520d,
24 or 520g of the Michigan penal code, 1931 PA 328, MCL 750.520c,
25 750.520d, and 750.520g. ~~7-or a conviction for a~~

26 (C) A traffic offense, INCLUDING, BUT NOT LIMITED TO, A
27 CONVICTION FOR OPERATING WHILE INTOXICATED.

(D) A FELONY IN WHICH THE VICTIM IS A SPOUSE, A FORMER SPOUSE, AN INDIVIDUAL WITH WHOM THE PERSON HAS HAD A CHILD IN COMMON, AN INDIVIDUAL WITH WHOM THE PERSON HAS OR HAS HAD A DATING RELATIONSHIP, OR AN INDIVIDUAL RESIDING OR HAVING RESIDED IN THE SAME HOUSEHOLD AS THE PERSON, IF THE PERSON HAS A PRIOR MISDEMEANOR CONVICTION IN WHICH THE VICTIM IS A SPOUSE, A FORMER SPOUSE, AN INDIVIDUAL WITH WHOM THE PERSON HAS HAD A CHILD IN COMMON, AN INDIVIDUAL WITH WHOM THE PERSON HAS OR HAS HAD A DATING RELATIONSHIP, OR AN INDIVIDUAL RESIDING OR HAVING RESIDED IN THE SAME HOUSEHOLD AS THE PERSON.

(3) An application shall ~~not ONLY~~ be filed ~~until at least 5~~ OR MORE years ~~following imposition~~ AFTER WHICHEVER OF THE FOLLOWING EVENTS OCCURS LAST:

(A) IMPOSITION of the sentence FOR THE CONVICTION THE APPLICANT SEEKS TO SET ASIDE.

(B) COMPLETION OF PROBATION IMPOSED for the conviction that the applicant seeks to set aside. ~~or 5 years following completion~~

(C) DISCHARGE FROM PAROLE IMPOSED FOR THE CONVICTION THAT THE APPLICANT SEEKS TO SET ASIDE.

(D) COMPLETION of any term of imprisonment IMPOSED for ~~that~~ THE conviction, ~~whichever occurs later~~ THAT THE APPLICANT SEEKS TO SET ASIDE.

(4) IF A PETITION UNDER THIS ACT IS DENIED BY THE CONVICTING COURT, A PERSON SHALL NOT FILE ANOTHER PETITION CONCERNING THE SAME CONVICTION OR CONVICTIONS WITH THE CONVICTING COURT UNTIL 3 YEARS AFTER THE DATE THE CONVICTING COURT DENIES THE PREVIOUS PETITION.

(5) ~~(4) The~~ AN application UNDER THIS SECTION is invalid

1 unless it contains the following information and is signed under
2 oath by the person whose conviction is to be set aside:

3 (a) The full name and current address of the applicant.

4 (b) A certified record of ~~the~~**EACH** conviction that is to be
5 set aside.

6 (c) A statement that the applicant has not been convicted of
7 an offense other than the ~~one~~**CONVICTION OR CONVICTIONS** sought to
8 be set aside as a result of this application **AND ANY**
9 **NONDISQUALIFYING CONVICTIONS DESCRIBED IN THIS SECTION.**

10 (D) **A STATEMENT LISTING ALL ACTIONS ENUMERATED IN SUBSECTION**
11 **(12) THAT WERE INITIATED AGAINST THE APPLICANT AND HAVE BEEN**
12 **DISMISSED.**

13 (E) ~~(d)~~A statement as to whether the applicant has previously
14 filed an application to set aside this **CONVICTION OR THESE**
15 **CONVICTIONS** or any other conviction and, if so, the disposition of
16 the application.

17 (F) ~~(e)~~A statement as to whether the applicant has any other
18 criminal charge pending against him or her in any court in the
19 United States or in any other country.

20 (G) ~~(f)~~A consent to the use of the nonpublic record created
21 under section 3 to the extent authorized by section 3.

22 (6) ~~(5)~~The applicant shall submit a copy of the application
23 and ~~2 complete sets~~**1 COMPLETE SET** of fingerprints to the
24 department of state police. The department of state police shall
25 compare those fingerprints with the records of the department,
26 including the nonpublic record created under section 3, and shall
27 forward a ~~a~~**AN ELECTRONIC COPY OF THE** complete set of fingerprints to

1 the federal bureau of investigation for a comparison with the
2 records available to that agency. The department of state police
3 shall report to the court in which the application is filed the
4 information contained in the department's records with respect to
5 any pending charges against the applicant, any record of conviction
6 of the applicant, and the setting aside of any conviction of the
7 applicant and shall report to the court any similar information
8 obtained from the federal bureau of investigation. The court shall
9 not act upon the application until the department of state police
10 reports the information required by this subsection to the court.

11 (7) ~~(6)~~—The copy of the application submitted to the
12 department of state police under subsection ~~(5)~~—(6) shall be
13 accompanied by a fee of \$50.00 payable to the state of Michigan
14 ~~which~~ **THAT** shall be used by the department of state police to
15 defray the expenses incurred in processing the application.

16 (8) ~~(7)~~—A copy of the application shall be served upon the
17 attorney general and upon the office of ~~the~~ **EACH** prosecuting
18 attorney who prosecuted the crime **OR CRIMES THE APPLICANT SEEKS TO**
19 **SET ASIDE**, and an opportunity shall be given to the attorney
20 general and to the prosecuting attorney to contest the application.
21 If ~~the~~ **A** conviction was for an assaultive crime or a serious
22 misdemeanor, the prosecuting attorney shall notify the victim of
23 the assaultive crime or serious misdemeanor of the application
24 pursuant to section 22a or 77a of the **WILLIAM VAN REGENMORTER** crime
25 victim's rights act, 1985 PA 87, MCL 780.772a and 780.827a. The
26 notice shall be by first-class mail to the victim's last known
27 address. The victim has the right to appear at any proceeding under

1 this act concerning that conviction and to make a written or oral
2 statement.

3 (9) ~~(8)~~—Upon the hearing of the application the court may
4 require the filing of affidavits and the taking of proofs as it
5 considers proper.

6 (10) ~~(9)~~—If the court determines that the circumstances and
7 behavior of the applicant from the date of the applicant's
8 conviction **OR CONVICTIONS** to the filing of the application warrant
9 setting aside the conviction **OR CONVICTIONS** and that setting aside
10 the conviction **OR CONVICTIONS** is consistent with the public
11 welfare, **AT THE COURT'S DISCRETION** the court may enter an order
12 setting aside the conviction **OR CONVICTIONS**. The setting aside of a
13 conviction **OR CONVICTIONS** under this act is a privilege and
14 conditional and is not a right.

15 (11) **EXCEPT AS PERMITTED UNDER SUBSECTION (1)(C), A PERSON**
16 **SHALL NOT APPLY TO SET ASIDE, AND A JUDGE SHALL NOT SET ASIDE, ANY**
17 **CONVICTION IF THE PERSON IS CONVICTED OF 2 MISDEMEANORS AND HAS HAD**
18 **AN ACTION DISMISSED UNDER 1 OF THE FOLLOWING:**

19 (A) **SECTION 703 OF THE MICHIGAN LIQUOR CONTROL CODE OF 1998,**
20 **1998 PA 58, MCL 436.1703.**

21 (B) **SECTION 1070(1)(B)(i) OF THE REVISED JUDICATURE ACT OF**
22 **1961, 1961 PA 236, MCL 600.1070.**

23 (C) **SECTION 13 OF CHAPTER II, SECTION 4A OF CHAPTER IX, OR**
24 **SECTION 1 OF CHAPTER XI OF THE CODE OF CRIMINAL PROCEDURE, 1927 PA**
25 **175, MCL 762.13, 769.4A, AND 771.1.**

26 (D) **SECTION 7411 OF THE PUBLIC HEALTH CODE, 1978 PA 368, MCL**
27 **333.7411.**

1 (E) SECTION 350A OR 430 OF THE MICHIGAN PENAL CODE, 1931 PA
2 328, MCL 750.350A AND 750.430.

3 (F) ANY OTHER LAW OF THIS STATE OR OF A POLITICAL SUBDIVISION
4 OF THIS STATE SIMILAR TO THOSE LISTED IN THIS SUBSECTION THAT
5 PROVIDES FOR THE DEFERRAL AND DISMISSAL OF A FELONY OR MISDEMEANOR
6 CHARGE.

7 (12) ~~(10)~~ As used in this section:

8 (a) "Assaultive crime" means that term as defined in section
9 9a of chapter X of the code of criminal procedure, 1927 PA 175, MCL
10 770.9a.

11 (B) "DATING RELATIONSHIP" MEANS THAT TERM AS DEFINED IN
12 SECTION 2950 OF THE REVISED JUDICATURE ACT OF 1961, 1961 PA 236,
13 MCL 600.2950.

14 (C) "FELONY" MEANS EITHER OF THE FOLLOWING, AS APPLICABLE:

15 (i) FOR PURPOSES OF THE OFFENSE TO BE SET ASIDE, FELONY MEANS A
16 VIOLATION OF A PENAL LAW OF THIS STATE THAT IS PUNISHABLE BY
17 IMPRISONMENT FOR MORE THAN 1 YEAR OR THAT IS DESIGNATED BY LAW TO
18 BE A FELONY.

19 (ii) FOR PURPOSES OF IDENTIFYING A PRIOR OFFENSE, FELONY MEANS
20 A VIOLATION OF A PENAL LAW OF THIS STATE, OF ANOTHER STATE, OR OF
21 THE UNITED STATES THAT IS PUNISHABLE BY IMPRISONMENT FOR MORE THAN
22 1 YEAR OR IS EXPRESSLY DESIGNATED BY LAW TO BE A FELONY.

23 (D) "INDIAN TRIBE" MEANS AN INDIAN TRIBE, INDIAN BAND, OR
24 ALASKAN NATIVE VILLAGE THAT IS RECOGNIZED BY FEDERAL LAW OR
25 FORMALLY ACKNOWLEDGED BY A STATE.

26 (E) "MISDEMEANOR" MEANS A VIOLATION OF ANY OF THE FOLLOWING:

27 (i) A PENAL LAW OF THIS STATE, ANOTHER STATE, AN INDIAN TRIBE,

1 OR THE UNITED STATES THAT IS NOT A FELONY.

2 (ii) AN ORDER, RULE, OR REGULATION OF A STATE AGENCY THAT IS
3 PUNISHABLE BY IMPRISONMENT FOR NOT MORE THAN 1 YEAR OR A FINE THAT
4 IS NOT A CIVIL FINE, OR BOTH.

5 (iii) A LOCAL ORDINANCE OF A POLITICAL SUBDIVISION OF THIS STATE
6 SUBSTANTIALLY CORRESPONDING TO A CRIME LISTED IN SUBPARAGRAPH (i) OR
7 (ii) THAT IS NOT A FELONY.

8 (iv) A VIOLATION OF THE LAW OF ANOTHER STATE OR POLITICAL
9 SUBDIVISION OF ANOTHER STATE SUBSTANTIALLY CORRESPONDING TO A CRIME
10 LISTED UNDER SUBPARAGRAPH (i) OR (ii) THAT IS NOT A FELONY.

11 (v) A VIOLATION OF THE LAW OF THE UNITED STATES SUBSTANTIALLY
12 CORRESPONDING TO A CRIME LISTED UNDER SUBPARAGRAPH (i) OR (ii) THAT
13 IS NOT A FELONY.

14 (F) "OPERATING WHILE INTOXICATED" MEANS A VIOLATION OF ANY OF
15 THE FOLLOWING:

16 (i) SECTION 625 OR 625M OF THE MICHIGAN VEHICLE CODE, 1949 PA
17 300, MCL 257.625 AND 257.625M.

18 (ii) A LOCAL ORDINANCE SUBSTANTIALLY CORRESPONDING TO A
19 VIOLATION LISTED IN SUBPARAGRAPH (i) .

20 (iii) A LAW OF AN INDIAN TRIBE SUBSTANTIALLY CORRESPONDING TO A
21 VIOLATION LISTED IN SUBPARAGRAPH (i) .

22 (iv) A LAW OF ANOTHER STATE SUBSTANTIALLY CORRESPONDING TO A
23 VIOLATION LISTED IN SUBPARAGRAPH (i) .

24 (v) A LAW OF THE UNITED STATES SUBSTANTIALLY CORRESPONDING TO
25 A VIOLATION LISTED IN SUBPARAGRAPH (i) .

26 (G) ~~(b)~~—"Serious misdemeanor" means that term as defined in
27 section 61 of the WILLIAM VAN REGENMORTER crime victim's rights

1 act, 1985 PA 87, MCL 780.811.

2 (H) ~~(e)~~ "Victim" means that term as defined in section 2 of
3 the **WILLIAM VAN REGENMORTER** crime victim's rights act, 1985 PA 87,
4 MCL 780.752.

5 Sec. 3. (1) Upon the entry of an order ~~pursuant to~~ **UNDER**
6 section 1, the court shall send a copy of the order to the
7 arresting agency and the department of state police.

8 (2) The department of state police shall retain a nonpublic
9 record of the order setting aside a conviction and of the record of
10 the arrest, fingerprints, conviction, and sentence of the applicant
11 in the case to which the order applies. Except as provided in
12 subsection (3), this nonpublic record shall be made available only
13 to a court of competent jurisdiction, an agency of the judicial
14 branch of state government, **THE DEPARTMENT OF CORRECTIONS**, a law
15 enforcement agency, a prosecuting attorney, the attorney general,
16 or the governor upon request and only for the following purposes:

17 (a) Consideration in a licensing function conducted by an
18 agency of the judicial branch of state government.

19 (b) To show that a person who has filed an application to set
20 aside a conviction has previously had a conviction set aside
21 ~~pursuant to~~ **UNDER** this act.

22 (c) The court's consideration in determining the sentence to
23 be imposed upon conviction for a subsequent offense that is
24 punishable as a felony or by imprisonment for more than 1 year.

25 (d) Consideration by the governor if a person whose conviction
26 has been set aside applies for a pardon for another offense.

27 (e) Consideration by **THE DEPARTMENT OF CORRECTIONS OR** a law

1 enforcement agency if a person whose conviction has been set aside
2 applies for employment with the **DEPARTMENT OF CORRECTIONS OR** law
3 enforcement agency.

4 (f) Consideration by a court, law enforcement agency,
5 prosecuting attorney, or the attorney general in determining
6 whether an individual required to be registered under the sex
7 offenders registration act, **1994 PA 295, MCL 28.721 TO 28.736**, has
8 violated that act, or for use in a prosecution for violating that
9 act.

10 (3) A copy of the nonpublic record created under subsection
11 (2) shall be provided to the person whose conviction is set aside
12 under this act upon payment of a fee determined and charged by the
13 department of state police in the same manner as the fee prescribed
14 in section 4 of the freedom of information act, ~~Act No. 442 of the~~
15 ~~Public Acts of 1976, being section 15.234 of the Michigan Compiled~~
16 ~~Laws~~ **1976 PA 442, MCL 15.234.**

17 (4) The nonpublic record maintained under subsection (2) is
18 exempt from disclosure under the freedom of information act, ~~Act~~
19 ~~No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246~~
20 ~~of the Michigan Compiled Laws~~ **1976 PA 442, MCL 15.231 TO 15.246.**

21 (5) Except as provided in subsection (2), a person, other than
22 the applicant, who knows or should have known that a conviction was
23 set aside under this section and who divulges, uses, or publishes
24 information concerning a conviction set aside under this section is
25 guilty of a misdemeanor punishable by imprisonment for not more
26 than 90 days or a fine of not more than \$500.00, or both.

27 Sec. 4. A person may have only 1 **FELONY** conviction **OR NOT MORE**

1 **THAN 2 MISDEMEANOR CONVICTIONS** set aside ~~under this act~~ **AS PROVIDED**
2 **IN SECTION 1.**