

HOUSE BILL NO. 5120

October 16, 2019, Introduced by Reps. Robinson, Jones, Marino, Berman, Liberati, Garza, Cynthia Johnson, Byrd, Tyrone Carter, Warren, Sneller, Brenda Carter, Gay-Dagnogo, Peterson, Neeley, Elder, Cambensy, Brixie, Tate, Hammoud, Guerra, Kennedy, Wittenberg, Hope, Love, Coleman, Ellison, Manoogian, Lasinski, Haadsma, Anthony, Bolden, Yancey and Cherry and referred to the Committee on Judiciary.

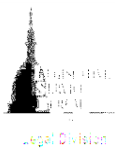
A bill to amend 1965 PA 213, entitled

"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 section 1 (MCL 780.621), as amended by 2016 PA 336.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 1. (1) Except as **otherwise** provided in this section, a
2 person who is convicted of not more than 1 offense may file an



1 application with the convicting court for the entry of an order
2 setting aside 1 or more convictions as follows:

3 (a) A person who is convicted of not more than 1 felony
4 offense and not more than 2 misdemeanor offenses may petition the
5 convicting court to set aside the felony offense.

6 (b) Except as provided in subdivision (c), a person who is
7 convicted of not more than 2 misdemeanor offenses and no other
8 felony or misdemeanor offenses may petition the convicting court or
9 the convicting courts to set aside 1 or both of the misdemeanor
10 convictions.

11 (c) A person who is convicted of a violation or an attempted
12 violation of section 520e of the Michigan penal code, 1931 PA 328,
13 MCL 750.520e, before January 12, 2015 may petition the convicting
14 court to set aside the conviction if the individual has not been
15 convicted of another offense other than not more than 2 minor
16 offenses. As used in this subdivision, "minor offense" means a
17 misdemeanor or ordinance violation to which all of the following
18 apply:

19 (i) The maximum permissible term of imprisonment does not
20 exceed 90 days.

21 (ii) The maximum permissible fine is not more than \$1,000.00.

22 (iii) The person who committed the offense is not more than 21
23 years old.

24 (2) A conviction that was deferred and dismissed under any of
25 the following, whether a misdemeanor or a felony, ~~shall be~~ **is**
26 considered a misdemeanor conviction under subsection (1) for
27 purposes of determining whether a person is eligible to have any
28 conviction set aside under this act:

29 (a) Section 703 of the Michigan liquor control code of 1998,



1 1998 PA 58, MCL 436.1703.

2 (b) Section 1070(1)(b)(i) or 1209 of the revised judicature act
3 of 1961, 1961 PA 236, MCL 600.1070 and 600.1209.

4 (c) Section 13 of chapter II or section 4a of chapter IX of
5 the code of criminal procedure, 1927 PA 175, MCL 762.13 and 769.4a.

6 (d) Section 7411 of the public health code, 1978 PA 368, MCL
7 333.7411.

8 (e) Section 350a or 430 of the Michigan penal code, 1931 PA
9 328, MCL 750.350a and 750.430.

10 (f) Any other law or laws of this state or of a political
11 subdivision of this state similar in nature and applicability to
12 those listed in this subsection that provide for the deferral and
13 dismissal of a felony or misdemeanor charge.

14 (3) A person shall not apply to have set aside, and a judge
15 shall not set aside, a conviction for any of the following:

16 (a) A felony for which the maximum punishment is life
17 imprisonment or an attempt to commit a felony for which the maximum
18 punishment is life imprisonment.

19 (b) A violation or attempted violation of section 136b(3),
20 136d(1)(b) or (c), 145c, 145d, 520c, 520d, or 520g of the Michigan
21 penal code, 1931 PA 328, MCL 750.136b, 750.136d, 750.145c,
22 750.145d, 750.520c, 750.520d, and 750.520g.

23 (c) A violation or attempted violation of section 520e of the
24 Michigan penal code, 1931 PA 328, MCL 750.520e, if the conviction
25 occurred on or after January 12, 2015.

26 (d) A traffic offense, including, but not limited to, a
27 conviction for operating while intoxicated.

28 (e) A felony conviction for domestic violence, if the person
29 has a previous misdemeanor conviction for domestic violence.



1 (f) A violation of former section 462i or 462j or chapter
2 LXVIIIA or chapter LXXXVIII-A of the Michigan penal code, ~~1938 PA~~
3 ~~321, 1931 PA 328~~, MCL 750.462a to 750.462h and 750.543a to
4 750.543z.

5 (4) A person who is convicted of a violation of section 448,
6 449, or 450 of the Michigan penal code, 1931 PA 328, MCL 750.448,
7 750.449, and 750.450, or a local ordinance substantially
8 corresponding to section 448, 449, or 450 of the Michigan penal
9 code, 1931 PA 328, MCL 750.448, 750.449, and 750.450, may apply to
10 have that conviction set aside if he or she committed the offense
11 as a direct result of his or her being a victim of a human
12 trafficking violation.

13 (5) An application under subsection (1) shall only be filed 5
14 or more years after whichever of the following events occurs last:

15 (a) Imposition of the sentence for the conviction that the
16 applicant seeks to set aside.

17 (b) Completion of probation imposed for the conviction that
18 the applicant seeks to set aside.

19 (c) Discharge from parole imposed for the conviction that the
20 applicant seeks to set aside.

21 (d) Completion of any term of imprisonment imposed for the
22 conviction that the applicant seeks to set aside.

23 (6) If a petition under this act is denied by the convicting
24 court, a person shall not file another petition concerning the same
25 conviction or convictions with the convicting court until 3 years
26 after the date the convicting court denies the previous petition,
27 unless the court specifies an earlier date for filing another
28 petition in the order denying the petition.

29 (7) An application under subsection (4) may be filed at any



1 time following the date of the conviction to be set aside. A person
2 may apply to have more than 1 conviction set aside under subsection
3 (4).

4 (8) An application under this section is invalid unless it
5 contains the following information and is signed under oath by the
6 person whose conviction is or convictions are to be set aside:

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

8 (b) A certified record of each conviction that is to be set
9 aside.

10 (c) For an application under subsection (1), a statement that
11 the applicant has not been convicted of an offense other than the
12 conviction or convictions sought to be set aside as a result of
13 this application and any nondisqualifying misdemeanor convictions
14 described in subsection (1)(a).

15 (d) A statement listing all actions enumerated in subsection
16 (2) that were initiated against the applicant and have been
17 dismissed.

18 (e) A statement as to whether the applicant has previously
19 filed an application to set aside this or other conviction and, if
20 so, the disposition of the application.

21 (f) A statement as to whether the applicant has any other
22 criminal charge pending against him or her in any court in the
23 United States or in any other country.

24 (g) If the person is seeking to have 1 or more convictions set
25 aside under subsection (4), a statement that he or she meets the
26 criteria set forth in subsection (4), together with a statement of
27 the facts supporting his or her contention that the conviction was
28 a direct result of his or her being a victim of human trafficking.

29 (h) A consent to the use of the nonpublic record created under



1 section 3 to the extent authorized by section 3.

2 (9) The applicant shall submit a copy of the application and 1
3 complete set of fingerprints to the department of state police. The
4 department of state police shall compare those fingerprints with
5 the records of the department, including the nonpublic record
6 created under section 3, and shall forward an electronic copy of a
7 complete set of fingerprints to the Federal Bureau of Investigation
8 for a comparison with the records available to that agency. The
9 department of state police shall report to the court in which the
10 application is filed the information contained in the department's
11 records with respect to any pending charges against the applicant,
12 any record of conviction of the applicant, and the setting aside of
13 any conviction of the applicant and shall report to the court any
14 similar information obtained from the Federal Bureau of
15 Investigation. The court shall not act upon the application until
16 the department of state police reports the information required by
17 this subsection to the court.

18 (10) The copy of the application submitted to the department
19 of state police under subsection (9) ~~shall~~**must** be accompanied by a
20 fee of \$50.00 payable to the state of Michigan that ~~shall~~**must** be
21 used by the department of state police to defray the expenses
22 incurred in processing the application.

23 (11) A copy of the application ~~shall~~**must** be served upon the
24 attorney general and upon the office of each prosecuting attorney
25 who prosecuted the crime or crimes the applicant seeks to set
26 aside, and an opportunity ~~shall~~**must** be given to the attorney
27 general and to the prosecuting attorney to contest the application.
28 If a conviction was for an assaultive crime or a serious
29 misdemeanor, the prosecuting attorney shall notify the victim of



1 the assaultive crime or serious misdemeanor of the application
2 under section 22a or 77a of the William Van Regenmorter crime
3 victim's rights act, 1985 PA 87, MCL 780.772a and 780.827a. The
4 notice ~~shall~~**must** be by first-class mail to the victim's last known
5 address. The victim has the right to appear at any proceeding under
6 this act concerning that conviction and to make a written or oral
7 statement.

8 (12) For an application under subsection (1), upon the hearing
9 of the application the court may require the filing of affidavits
10 and the taking of proofs as it considers proper.

11 (13) For an application under subsection (4), if the applicant
12 proves to the court by a preponderance of the evidence that the
13 conviction was a direct result of his or her being a victim of
14 human trafficking, the court may, subject to the requirements of
15 subsection (14), enter an order setting aside the conviction.

16 (14) If the court determines that the circumstances and
17 behavior of an applicant under subsection (1) or (4), from the date
18 of the applicant's conviction or convictions to the filing of the
19 application warrant setting aside the conviction or convictions,
20 and that setting aside the conviction or convictions is consistent
21 with the public welfare, the court may enter an order setting aside
22 the conviction or convictions.

23 (15) The setting aside of a conviction or convictions under
24 this act is a privilege and conditional and is not a right.

25 **(16) Beginning on January 1, 2020, a person convicted of 1 or**
26 **more of the following offenses for the possession or use of**
27 **marihuana may apply to set aside the conviction or convictions**
28 **under this subsection notwithstanding the requirements of**
29 **subsection (1):**



1 (a) A violation of section 7403(2)(d) of the public health
2 code, 1978 PA 368, MCL 333.7403.

3 (b) A violation of section 7404(2)(d) of the public health
4 code, 1978 PA 368, MCL 333.7404.

5 (c) A local ordinance of a political subdivision of this state
6 substantially corresponding to the misdemeanor offenses under
7 subdivisions (a) and (b).

8 (17) An application under subsection (16) must contain all of
9 the following information:

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

11 (b) A certified record of each conviction that is to be set
12 aside.

13 (18) A copy of the application under subsection (16) must be
14 served upon the agency that prosecuted the offense or offenses the
15 applicant seeks to set aside.

16 (19) A rebuttable presumption that a local ordinance
17 conviction sought to be set aside by an applicant is the
18 substantial equivalent of misdemeanor possession or use of
19 marihuana described under subsection (16)(a) and (b) arises upon
20 the filing of an application under subsection (16). The presumption
21 described in this subsection may be rebutted by the presentation of
22 evidence by the prosecuting agency that prosecuted the case that
23 demonstrates by a preponderance of the evidence that a local
24 ordinance conviction or convictions sought to be set aside by an
25 applicant are not the substantial equivalent of misdemeanor
26 possession or use of marihuana or are not related to marihuana in
27 an answer to the application. An answer made under this subsection
28 must be filed no later than 60 days from the date of service of the
29 application. If an answer is filed with the convicting court, the

1 answering party must serve the answer upon the other parties to the
2 matter.

3 (20) Upon the expiration of the 60-day period under subsection
4 (19), if the prosecuting agency has not filed an answer to the
5 application addressing the rebuttable presumption described in
6 subsection (19), the convicting court must within 21 days enter an
7 order setting aside the conviction or convictions and serve a copy
8 of the order upon the applicant, the arresting agency, the
9 prosecuting agency, and the department of the state police.

10 (21) If the prosecuting agency files an answer addressing the
11 rebuttable presumption in subsection (19), the convicting court
12 must promptly set the matter for a hearing no later than 30 days
13 from its receipt of the answer, and serve a notice of the hearing
14 upon the applicant. At the hearing the convicting court must decide
15 if the prosecuting agency has proven by a preponderance of the
16 evidence that a local ordinance conviction or convictions sought to
17 be set aside by an applicant are not the substantial equivalent of
18 misdemeanor possession or use of marihuana under sections 7403 or
19 7404 of the public health code, 1978 PA 368, MCL 333.7403 and
20 333.7404. After a hearing under this subsection, the court shall
21 enter an order denying or granting the application no later than 14
22 days after completion of the hearing and serve any written opinions
23 and orders, including an order setting aside the conviction or
24 convictions, upon the parties, including the department of state
25 police. The rules of evidence do not apply to a hearing under this
26 subsection.

27 (22) If an application to set aside a conviction or
28 convictions under subsection (16) is granted, the arresting agency
29 and the department of the state police shall maintain the nonpublic

1 record created under section 3 for use as authorized under section
2 3.

3 (23) If an application to set aside a conviction or
4 convictions is granted under subsection (16), the applicant may not
5 thereafter seek resentencing in another criminal case the applicant
6 was sentenced for during which the conviction or convictions at
7 issue were used in determining an appropriate sentence for the
8 applicant, whether or not the setting aside of the conviction or
9 convictions would have changed the scoring of a prior record
10 variable for purposes of the sentencing guidelines or otherwise.

11 (24) A party aggrieved by the ruling of the convicting court
12 considering an application under subsection (16) may seek a
13 rehearing or reconsideration under the applicable rules of the
14 convicting court or may file an appeal with the circuit court or,
15 if applicable, the court of appeals in accordance with the rules of
16 those courts.

17 (25) The setting aside of a conviction under subsection (16)
18 does not entitle the applicant to the return of any fines, costs,
19 or fees imposed as part of the applicant's sentence for the
20 conviction or convictions or of any money or property forfeited by
21 the prosecuting agency or any law enforcement agency as a result of
22 the conduct leading to the conviction or as a result of the
23 conviction itself.

24 (26) Beginning on January 1, 2020, a person convicted of 1 or
25 more of the following felony violations having to do with marihuana
26 may apply to have those convictions set aside under this subsection
27 notwithstanding the requirements of subsection (1):

28 (a) A violation of section 7401(2)(d)(iii) of the public health
29 code, 1978 PA 368, MCL 333.7401.



1 (b) A violation of any other section of law or under any
2 previously existing sections of the public health code, 1978 PA
3 368, MCL 333.1101 to 333.25211, that was substantially equivalent
4 to section 7401(2) (d) (iii) under the public health code, 1978 PA 368,
5 MCL 333.7401, as it existed on the effective date of the amendatory
6 act that added this subdivision. It is the applicant's burden under
7 this subdivision to demonstrate by a preponderance of the evidence
8 that the conviction or convictions sought to be set aside are
9 substantially equivalent to section 7401(2) (d) (iii) under the public
10 health code, 1978 PA 368, MCL 333.7401, as it existed on the
11 effective date of the amendatory act that added this subdivision.

12 (27) An application under subsection (26) must be made to the
13 convicting court and contain all of the following information:

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

15 (b) A certified record of each conviction that is to be set
16 aside.

17 (c) If applicable, any evidence satisfying the applicant's
18 burden under subsection (26) (b).

19 (28) A copy of the application under subsection (26) must be
20 served upon the agency that prosecuted the offense or offenses the
21 applicant seeks to set aside.

22 (29) A rebuttable presumption in favor of setting aside the
23 conviction or convictions arises upon the filing of an application
24 under subsection (26). The presumption under this subsection may be
25 rebutted upon the presentation of evidence by the prosecuting
26 agency that establishes by a preponderance of the evidence that the
27 setting aside of the conviction or convictions would not be
28 consistent with the interests of justice. A prosecuting agency may
29 contest an application under subsection (26) by filing an answer to



1 the application in the convicting court no later than 90 days from
2 the date of service of the application. If an answer is filed with
3 the convicting court, the filing party must serve the answer upon
4 the other parties to the matter.

5 (30) Upon the expiration of the 90-day period under subsection
6 (29), if the prosecuting agency has not filed an answer to the
7 application addressing, if applicable, the applicant's burden under
8 subsection (26) (b) or the rebuttable presumption described in
9 subsection (29), or both, the convicting court must within 21 days
10 upon finding, if applicable, that the applicant's burden under
11 subsection (26) (b) has been met, enter an order setting aside the
12 conviction or convictions and serve a copy of the order upon the
13 applicant, the arresting agency, the prosecuting agency, and the
14 department of the state police.

15 (31) If the prosecuting agency files an answer addressing the
16 applicant's burden in subsection (26) (b) or the rebuttable
17 presumption in subsection (29), or both, the convicting court must
18 promptly set the matter for a hearing no later than 60 days from
19 its receipt of the answer, and serve a notice of the hearing upon
20 the applicant and the prosecuting agency. At the hearing the
21 convicting court must decide if the applicant or the prosecuting
22 agency have met their burdens concerning the presumptions in
23 subsection (26) (b) and subsection (29). After a hearing under this
24 subsection, the court shall enter an order denying or granting the
25 application no later than 14 days after completion of the hearing
26 and serve any written opinions and orders, including an order
27 setting aside the conviction or convictions, upon the parties,
28 including the department of state police. The rules of evidence do
29 not apply to a hearing under this subsection.



1 (32) In determining whether the presumption in subsection (29)
2 has been rebutted by a preponderance of the evidence, the
3 convicting court may consider, but is not limited to, all of the
4 following factors:

5 (a) Whether the applicant's conviction was or convictions were
6 the result of a plea agreement between the prosecuting agency and
7 the applicant.

8 (b) Whether the applicant used or possessed firearms while he
9 or she committed the offense or offenses irrespective of whether
10 the applicant was charged or convicted of any firearm offenses.

11 (c) Whether the applicant's conduct leading to the conviction
12 or convictions involved minors irrespective of whether the
13 applicant was charged or convicted of any offenses involving
14 minors.

15 (d) Whether the applicant's conduct leading to the conviction
16 or convictions resulted in serious physical harm to any person or
17 persons.

18 (e) Whether the applicant's conduct leading to the conviction
19 or convictions demonstrates that the applicant was engaged in an
20 ongoing criminal enterprise, irrespective of whether the applicant
21 was charged or convicted of any offenses reflecting such conduct.

22 (33) Except as permitted in subsection (32), in determining
23 whether the prosecuting agency has overcome the presumption in
24 subsection (29), the convicting court shall not consider or use in
25 any manner the applicant's criminal history including the number of
26 prior convictions in the applicant's criminal history.

27 (34) If an application to set aside a conviction or
28 convictions under subsection (26) is granted, the arresting agency
29 and the department of the state police shall maintain the nonpublic

1 record created under section 3 for use as authorized under section
2 3.

3 (35) If an application to set aside a conviction or
4 convictions is granted under subsection (26), the applicant may not
5 thereafter seek resentencing in another criminal case the applicant
6 was sentenced for during which the conviction or convictions at
7 issue were used in determining an appropriate sentence for the
8 applicant, whether or not the setting aside of the conviction or
9 convictions would have changed the scoring of a prior record
10 variable for purposes of the sentencing guidelines or otherwise.

11 (36) A party aggrieved by the ruling of the convicting court
12 considering an application under subsection (26) may seek a
13 rehearing or reconsideration under the applicable rules of the
14 convicting court or may file an appeal with the circuit court or,
15 if applicable, the court of appeals in accordance with the rules of
16 those courts.

17 (37) The setting aside of a conviction under subsection (26)
18 does not entitle the applicant to the return of any fines, costs,
19 or fees imposed as part of the applicant's sentence for the
20 conviction or convictions or of any money or property forfeited by
21 the prosecuting agency or any law enforcement agency as a result of
22 the conduct leading to the conviction or as a result of the
23 conviction itself.

24 (38) ~~(16)~~—As used in this section:

25 (a) "Assaultive crime" means that term as defined in section
26 9a of chapter X of the code of criminal procedure, 1927 PA 175, MCL
27 770.9a.

28 (b) "Domestic violence" means that term as defined in section
29 1 of 1978 PA 389, MCL 400.1501.



1 (c) "Felony" means either of the following, as applicable:

2 (i) For purposes of the offense to be set aside, felony means a
3 violation of a penal law of this state that is punishable by
4 imprisonment for more than 1 year or that is designated by law to
5 be a felony.

6 (ii) For purposes of identifying a prior offense, felony means
7 a violation of a penal law of this state, of another state, or of
8 the United States that is punishable by imprisonment for more than
9 1 year or is designated by law to be a felony.

10 (d) "Human trafficking violation" means a violation of chapter
11 LXVIIIA of the Michigan penal code, 1931 PA 328, MCL 750.462a to
12 750.462h, **or former section 462i or 462j of that act.**

13 (e) "Indian tribe" means an Indian tribe, Indian band, or
14 Alaskan native village that is recognized by federal law or
15 formally acknowledged by a state.

16 (f) "Misdemeanor" means a violation of any of the following:

17 (i) A penal law of this state, another state, an Indian tribe,
18 or the United States that is not a felony.

19 (ii) An order, rule, or regulation of a state agency that is
20 punishable by imprisonment for not more than 1 year or a fine that
21 is not a civil fine, or both.

22 (iii) A local ordinance of a political subdivision of this state
23 substantially corresponding to a crime listed in subparagraph (i) or

24 (ii) that is not a felony.

25 (iv) A violation of the law of another state or political
26 subdivision of another state substantially corresponding to a crime
27 listed under subparagraph (i) or (ii) that is not a felony.

28 (v) A violation of the law of the United States substantially



1 corresponding to a crime listed under subparagraph (i) or (ii) that
2 is not a felony.

3 (g) "Operating while intoxicated" means a violation of any of
4 the following:

5 (i) Section 625 or 625m of the Michigan vehicle code, 1949 PA
6 300, MCL 257.625 and 257.625m.

7 (ii) A local ordinance substantially corresponding to a
8 violation listed in subparagraph (i).

9 (iii) A law of an Indian tribe substantially corresponding to a
10 violation listed in subparagraph (i).

11 (iv) A law of another state substantially corresponding to a
12 violation listed in subparagraph (i).

13 (v) A law of the United States substantially corresponding to
14 a violation listed in subparagraph (i).

15 (h) "Serious misdemeanor" means that term as defined in
16 section 61 of the William Van Regenmorter crime victim's rights
17 act, 1985 PA 87, MCL 780.811.

18 (i) "Victim" means that term as defined in sections 2, 31, and
19 61 of the William Van Regenmorter crime victim's rights act, 1985
20 PA 87, MCL 780.752, 780.781, and 780.811.

