

Representative Eric K. Hutchings proposes the following substitute bill:

EXPUNGEMENT AMENDMENTS

2017 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Daniel W. Thatcher

House Sponsor: Eric K. Hutchings

LONG TITLE

General Description:

This bill makes changes to provisions regarding expungements and pardons.

Highlighted Provisions:

This bill:

- ▶ adds definitions;
- ▶ prevents the dissemination of information regarding pardons and expungements by certain persons;
- ▶ specifies that infractions, traffic offenses, and certain minor offenses will not count towards expungement eligibility;
- ▶ allows for an increase in the number of convictions counted to be eligible for expungement; and
- ▶ allows the court during sentencing in a criminal prosecution to take into account if the level of the offense has been reduced since the defendant's conviction.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:



AMENDS:

76-3-402, as last amended by Laws of Utah 2012, Chapter 145

77-27-5.1, as last amended by Laws of Utah 2014, Chapter 199

77-40-102, as last amended by Laws of Utah 2014, Chapter 199

77-40-105, as last amended by Laws of Utah 2016, Chapter 185

77-40-106, as last amended by Laws of Utah 2013, Chapter 41

77-40-107, as last amended by Laws of Utah 2014, Chapter 263

77-40-108, as last amended by Laws of Utah 2013, Chapters 20 and 41

77-40-109, as last amended by Laws of Utah 2016, Chapter 144

77-40-112, as renumbered and amended by Laws of Utah 2010, Chapter 283

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **76-3-402** is amended to read:

76-3-402. Conviction of lower degree of offense -- Procedure and limitations.

(1) If at the time of sentencing the court, having regard to the nature and circumstances of the offense of which the defendant was found guilty and to the history and character of the defendant, and after having given any victims present at the sentencing and the prosecuting attorney an opportunity to be heard, concludes it would be unduly harsh to record the conviction as being for that degree of offense established by statute, the court may enter a judgment of conviction for the next lower degree of offense and impose sentence accordingly.

(2) (a) If the court suspends the execution of the sentence and places the defendant on probation, whether or not the defendant is committed to jail as a condition of probation, the court may enter a judgment of conviction for the next lower degree of offense:

~~[(a)]~~ (i) after the defendant has been successfully discharged from probation;

~~[(b)]~~ (ii) upon motion and notice to the prosecuting attorney;

~~[(c)]~~ (iii) after reasonable effort has been made by the prosecuting attorney to provide notice to any victims;

~~[(d)]~~ (iv) after a hearing if requested by either party ~~[under]~~ described in Subsection (2)~~[(c)]~~(a)(iii); and

~~[(e)]~~ (v) if the court finds entering a judgment of conviction for the next lower degree of offense is in the interest of justice.

(b) In making the finding in Subsection (2)(a)(v), the court shall consider as a factor in favor of granting the reduction that, subsequent to the defendant's conviction, the level of the offense has been reduced by law.

(3) (a) An offense may be reduced only one degree under this section, whether the reduction is entered under Subsection (1) or (2), unless the prosecutor specifically agrees in writing or on the court record that the offense may be reduced two degrees.

(b) In no case may an offense be reduced under this section by more than two degrees.

(4) This section does not preclude any person from obtaining or being granted an expungement of his record as provided by law.

(5) The court may not enter judgment for a conviction for a lower degree of offense if:

(a) the reduction is specifically precluded by law; or

(b) if any unpaid balance remains on court ordered restitution for the offense for which the reduction is sought.

(6) When the court enters judgment for a lower degree of offense under this section, the actual title of the offense for which the reduction is made may not be altered.

(7) (a) A person may not obtain a reduction under this section of a conviction that requires the person to register as a sex offender until the registration requirements under Title 77, Chapter 41, Sex and Kidnap Offender Registry, have expired.

(b) A person required to register as a sex offender for the person's lifetime under Subsection 77-41-105(3)(c) may not be granted a reduction of the conviction for the offense or offenses that require the person to register as a sex offender.

(8) As used in this section, "next lower degree of offense" includes an offense regarding which:

(a) a statutory enhancement is charged in the information or indictment that would increase either the maximum or the minimum sentence; and

(b) the court removes the statutory enhancement pursuant to this section.

Section 2. Section 77-27-5.1 is amended to read:

77-27-5.1. Board authority to order expungement.

(1) Upon granting a pardon, the board shall issue an expungement order, directing any criminal justice agency to remove the recipient's identifying information relating to the expunged convictions from its records.

(a) When a pardon has been granted, employees of the Bureau of Criminal Identification or employees of the Board of Pardons and Parole may not divulge any identifying information regarding the pardoned person to any person or agency, except for the pardoned person.

(b) The Bureau of Criminal Identification may not count pardoned convictions against any future expungement eligibility.

(2) An expungement order, issued by the board, has at least the same legal effect and authority as an order of expungement issued by a court, pursuant to Title 77, Chapter 40, Utah Expungement Act.

(3) The board shall provide clear written directions to the recipient along with a list of agencies known to be affected by the expungement order.

Section 3. Section **77-40-102** is amended to read:

77-40-102. Definitions.

As used in this chapter:

(1) "Administrative finding" means a decision upon a question of fact reached by an administrative agency following an administrative hearing or other procedure satisfying the requirements of due process.

(2) "Agency" means a state, county, or local government entity that generates or maintains records relating to an investigation, arrest, detention, or conviction for an offense for which expungement may be ordered.

(3) "Bureau" means the Bureau of Criminal Identification of the Department of Public Safety established in Section [53-10-201](#).

(4) "Certificate of eligibility" means a document issued by the bureau stating that the criminal record and all records of arrest, investigation, and detention associated with a case that is the subject of a petition for expungement is eligible for expungement.

(5) "Conviction" means judgment by a criminal court on a verdict or finding of guilty after trial, a plea of guilty, or a plea of nolo contendere.

(6) "Department" means the Department of Public Safety established in Section [53-1-103](#).

(7) "Drug possession offense" means an offense under:

(a) Subsection [58-37-8\(2\)](#), except any offense under Subsection [58-37-8\(2\)\(b\)\(i\)](#),

possession of 100 pounds or more of marijuana, any offense enhanced under Subsection 58-37-8(2)(e), violation in a correctional facility or Subsection 58-37-8(2)(g), driving with a controlled substance illegally in the person's body and negligently causing serious bodily injury or death of another;

(b) Subsection 58-37a-5(1), use or possession of drug paraphernalia;

(c) Section 58-37b-6, possession or use of an imitation controlled substance; or

(d) any local ordinance which is substantially similar to any of the offenses described in this Subsection (7).

(8) "Expunge" means to seal or otherwise restrict access to the petitioner's record held by an agency when the record includes a criminal investigation, detention, arrest, or conviction.

(9) "Jurisdiction" means a state, district, province, political subdivision, territory, or possession of the United States or any foreign country.

(10) "Minor regulatory offense" means any class B or C misdemeanor offense, as well as any local ordinance, except:

(a) any drug possession offense;

(b) Title 41, Chapter 6a, Part 5, Driving Under the Influence and Reckless Driving;

(c) Sections 73-18-13 through 73-18-13.6;

(d) those defined in Title 76, Utah Criminal Code; or

(e) any local ordinance that is substantially similar to those offenses listed in Subsections (10)(a) through (d).

~~[(10)]~~ (11) "Petitioner" means a person seeking expungement under this chapter.

~~[(11)]~~ (12) (a) "Traffic offense" means:

(i) all ~~[offenses in the following parts]~~ infractions, class B misdemeanors, and class C misdemeanors in Title 41, Chapter 6a, Traffic Code;

(ii) Title 53, Chapter 3, Part 2, Driver Licensing Act;

(iii) Title 73, Chapter 18, State Boating Act; and

(iv) all local ordinances that are substantially similar to ~~[the]~~ those offenses~~[:]~~.

~~[(a) Title 41, Chapter 6a, Part 3, Traffic-Control Devices;]~~

~~[(b) Title 41, Chapter 6a, Part 6, Speed Restrictions;]~~

~~[(c) Title 41, Chapter 6a, Part 7, Driving on Right Side of Highway and Passing;]~~

~~[(d) Title 41, Chapter 6a, Part 8, Turning and Signaling for Turns;]~~

150 ~~[(e) Title 41, Chapter 6a, Part 9, Right-of-Way;]~~
151 ~~[(f) Title 41, Chapter 6a, Part 10, Pedestrians' Rights and Duties;]~~
152 ~~[(g) Title 41, Chapter 6a, Part 11, Bicycles, Regulation of Operation;]~~
153 ~~[(h) Title 41, Chapter 6a, Part 12, Railroad Trains, Railroad Grade Crossings, and~~
154 ~~Safety Zones;]~~

155 ~~[(i) Title 41, Chapter 6a, Part 13, School Buses and School Bus Parking Zones;]~~
156 ~~[(j) Title 41, Chapter 6a, Part 14, Stopping, Standing, and Parking;]~~
157 ~~[(k) Title 41, Chapter 6a, Part 15, Special Vehicles;]~~
158 ~~[(l) Title 41, Chapter 6a, Part 16, Vehicle Equipment;]~~
159 ~~[(m) Title 41, Chapter 6a, Part 17, Miscellaneous Rules; and]~~
160 ~~[(n) Title 41, Chapter 6a, Part 18, Motor Vehicle Safety Belt Usage Act.]~~
161 (b) "Traffic offense" does not mean:
162 (i) Title 41, Chapter 6a, Part 5, Driving Under the Influence and Reckless Driving;
163 (ii) Sections 73-18-13 through 73-18-13.6; or
164 (iii) any local ordinance that is substantially similar to the offenses listed in
165 Subsections (12)(b)(i) and (ii).

166 Section 4. Section 77-40-105 is amended to read:

167 **77-40-105. Eligibility for expungement of conviction -- Requirements.**

168 (1) A person convicted of an offense may apply to the bureau for a certificate of
169 eligibility to expunge the record of conviction as provided in this section.

170 (2) A petitioner is not eligible to receive a certificate of eligibility from the bureau if:

171 (a) the conviction for which expungement is sought is:

172 (i) a capital felony;

173 (ii) a first degree felony;

174 (iii) a violent felony as defined in Subsection 76-3-203.5(1)(c)(i);

175 (iv) felony automobile homicide;

176 (v) a felony violation of Subsection 41-6a-501(2); or

177 (vi) a registerable sex offense as defined in Subsection 77-41-102(17);

178 (b) a criminal proceeding is pending against the petitioner; or

179 (c) the petitioner intentionally or knowingly provides false or misleading information
180 on the application for a certificate of eligibility.

(3) A petitioner seeking to obtain expungement for a record of conviction is not eligible to receive a certificate of eligibility from the bureau until all of the following have occurred:

(a) all fines and interest ordered by the court have been paid in full;

(b) all restitution ordered by the court pursuant to Section 77-38a-302, or by the Board of Pardons and Parole pursuant to Section 77-27-6, has been paid in full; and

(c) the following time periods have elapsed from the date the petitioner was convicted or released from incarceration, parole, or probation, whichever occurred last, for each conviction the petitioner seeks to expunge:

(i) 10 years in the case of a misdemeanor conviction of Subsection 41-6a-501(2) or a felony conviction of Subsection 58-37-8(2)(g);

(ii) seven years in the case of a felony;

(iii) five years in the case of any class A misdemeanor or a felony drug possession offense;

(iv) four years in the case of a class B misdemeanor; or

(v) three years in the case of any other misdemeanor or infraction.

(4) The bureau may not count infractions, traffic offenses, or minor regulatory offenses when determining expungement eligibility.

~~[(4)]~~ (5) The bureau may not issue a certificate of eligibility if, at the time the petitioner seeks a certificate of eligibility, the bureau determines that the petitioner's criminal history, including previously expunged convictions, contains any of the following, except as provided in Subsection (8):

(a) two or more felony convictions other than for drug possession offenses, each of which is contained in a separate criminal episode;

(b) any combination of three or more convictions other than for drug possession offenses that include two class A misdemeanor convictions, each of which is contained in a separate criminal episode;

(c) any combination of four or more convictions other than for drug possession offenses that include three class B misdemeanor convictions, each of which is contained in a separate criminal episode; or

(d) five or more convictions other than for drug possession offenses of any degree

whether misdemeanor or felony, ~~[excluding infractions and any traffic offenses,]~~ each of which is contained in a separate criminal episode.

~~[(5)]~~ (6) The bureau may not issue a certificate of eligibility if, at the time the petitioner seeks a certificate of eligibility, the bureau determines that the petitioner's criminal history, including previously expunged convictions, contains any of the following:

(a) three or more felony convictions for drug possession offenses, each of which is contained in a separate criminal episode; or

(b) any combination of five or more convictions for drug possession offenses, each of which is contained in a separate criminal episode.

~~[(6)]~~ (7) If the petitioner's criminal history contains convictions for both a drug possession offense and a non drug possession offense arising from the same criminal episode, that criminal episode shall be counted as provided in Subsection ~~[(4)]~~ (5) if any non drug possession offense in that episode:

(a) is a felony or class A misdemeanor; or

(b) has the same or a longer waiting period under Subsection (3) than any drug possession offense in that episode.

(8) If at least 10 years have elapsed from the date the petitioner was convicted or released from incarceration, parole, or probation, whichever occurred last, for all convictions, then each eligibility limit defined in Subsection (5) shall be increased by one.

~~[(7)]~~ (9) If, prior to May 14, 2013, the petitioner has received a pardon from the Utah Board of Pardons and Parole, the petitioner is entitled to an expungement order for all pardoned crimes pursuant to Section 77-27-5.1.

Section 5. Section 77-40-106 is amended to read:

77-40-106. Application for certificate of eligibility -- Fees.

(1) (a) A petitioner seeking to obtain an expungement for a criminal record shall apply for a certificate of eligibility from the bureau.

(b) A petitioner who intentionally or knowingly provides any false or misleading information to the bureau when applying for a certificate of eligibility is guilty of a class B misdemeanor and subject to prosecution under Section 76-8-504.6.

(c) Regardless of whether the petitioner is prosecuted, the bureau may deny a certificate of eligibility to anyone ~~[providing]~~ who knowingly provides false information on an

application.

(2) (a) The bureau shall perform a check of records of governmental agencies, including national criminal data bases, to determine whether a petitioner is eligible to receive a certificate of eligibility under this chapter.

(b) For purposes of determining eligibility under this chapter, the bureau may review records of arrest, investigation, detention and conviction that have been previously expunged, regardless of the jurisdiction in which the expungement occurred.

(c) If the petitioner meets all of the criteria under Section 77-40-104 or 77-40-105, the bureau shall issue a certificate of eligibility to the petitioner which shall be valid for a period of 90 days from the date the certificate is issued.

(d) If, after reasonable research, a disposition for an arrest on the criminal history file is unobtainable, the bureau may issue a special certificate giving determination of eligibility to the court.

(3) (a) The bureau shall charge application and issuance fees for a certificate of eligibility or special certificate in accordance with the process in Section 63J-1-504.

(b) The application fee shall be paid at the time the petitioner submits an application for a certificate of eligibility to the bureau.

(c) If the bureau determines that the issuance of a certificate of eligibility or special certificate is appropriate, the petitioner will be charged an additional fee for the issuance of a certificate of eligibility or special certificate unless Subsection (3)(d) applies.

(d) An issuance fee may not be assessed against a petitioner who qualifies for a certificate of eligibility under Section 77-40-104 unless the charges were dismissed pursuant to a plea in abeyance agreement under Title 77, Chapter 2a, Pleas in Abeyance, or a diversion agreement under Title 77, Chapter 2, Prosecution, Screening, and Diversion.

(e) Funds generated under this Subsection (3) shall be deposited in the General Fund as a dedicated credit by the department to cover the costs incurred in determining eligibility.

(4) The bureau shall provide clear written directions to the petitioner along with a list of agencies known to be affected by an order of expungement.

Section 6. Section 77-40-107 is amended to read:

77-40-107. Petition for expungement -- Prosecutorial responsibility -- Hearing -- Standard of proof -- Exception.

(1) The petitioner shall file a petition for expungement and the certificate of eligibility in the court specified in Section 77-40-103 and deliver a copy of the petition and certificate to the prosecuting agency. If the certificate is filed electronically, the petitioner or the petitioner's attorney shall keep the original certificate until the proceedings are concluded. If the original certificate is filed with the petition, the clerk of the court shall scan it and return it to the petitioner or the petitioner's attorney, who shall keep it until the proceedings are concluded.

(2) (a) Upon receipt of a petition for expungement of a conviction, the prosecuting attorney shall provide notice of the expungement request by first-class mail to the victim at the most recent address of record on file.

(b) The notice shall include a copy of the petition, certificate of eligibility, statutes and rules applicable to the petition, state that the victim has a right to object to the expungement, and provide instructions for registering an objection with the court.

(3) The prosecuting attorney and the victim, if applicable, may respond to the petition by filing a recommendation or objection with the court within ~~[30]~~ 35 days after receipt of the petition.

(4) (a) The court may request a written response to the petition from the Division of Adult Probation and Parole within the Department of Corrections.

(b) If requested, the response prepared by Adult Probation and Parole shall include:

(i) the reasons probation was terminated; and

(ii) certification that the petitioner has completed all requirements of sentencing and probation or parole.

(c) A copy of the response shall be provided to the petitioner and the prosecuting attorney.

(5) The petitioner may respond in writing to any objections filed by the prosecutor or the victim and the response prepared by Adult Probation and Parole within ~~[15]~~ 14 days after receipt.

(6) (a) If the court receives an objection concerning the petition from any party, the court shall set a date for a hearing and notify the petitioner and the prosecuting attorney of the date set for the hearing. The prosecuting attorney shall notify the victim of the date set for the hearing.

(b) The petitioner, the prosecuting attorney, the victim, and any other person who has

relevant information about the petitioner may testify at the hearing.

(c) The court shall review the petition, the certificate of eligibility, and any written responses submitted regarding the petition.

(7) If no objection is received within 60 days from the date the petition for expungement was filed with the court, the expungement may be granted without a hearing.

(8) The court shall issue an order of expungement if it finds by clear and convincing evidence that:

(a) the petition and certificate of eligibility are sufficient;

(b) the statutory requirements have been met;

(c) if the petitioner seeks expungement of drug possession offenses allowed under Subsection ~~77-40-105~~(5)(6), the petitioner is not illegally using controlled substances and is successfully managing any substance addiction; and

(d) it is not contrary to the interests of the public to grant the expungement.

(9) A court may not expunge a conviction of an offense for which a certificate of eligibility may not be or should not have been issued under Section 77-40-104 or ~~77-40-105~~.

Section 7. Section ~~77-40-108~~ is amended to read:

77-40-108. Distribution of order -- Redaction -- Receipt of order --

Administrative proceedings -- Bureau requirements.

(1) (a) A person who receives an order of expungement under this chapter or Section ~~77-27-5.1~~ shall be responsible for delivering a copy of the order of expungement to all affected criminal justice agencies and officials including the court, arresting agency, booking agency, prosecuting agency, Department of Corrections, and the bureau.

(b) A person who receives an order of expungement under Section ~~77-27-5.1~~, shall pay a processing fee to the bureau, established in accordance with the process in Section ~~63J-1-504~~, before the bureau's record may be expunged.

(2) Unless otherwise provided by law or ordered by a court of competent jurisdiction to respond differently, a person who has received an expungement of an arrest or conviction under this chapter or Section ~~77-27-5.1~~, may respond to any inquiry as though the arrest or conviction did not occur.

(3) The bureau shall forward a copy of the expungement order to the Federal Bureau of Investigation.

(4) An agency receiving an expungement order shall expunge the petitioner's identifying information contained in records in its possession relating to the incident for which expungement is ordered.

(5) Unless ordered by a court to do so, or in accordance with Subsection 77-40-109(2), a government agency or official may not divulge information or records which have been expunged regarding the petitioner contained in a record of arrest, investigation, detention, or conviction after receiving an expungement order.

(6) (a) An order of expungement may not restrict an agency's use or dissemination of records in its ordinary course of business until the agency has received a copy of the order.

(b) Any action taken by an agency after issuance of the order but prior to the agency's receipt of a copy of the order may not be invalidated by the order.

(7) An order of expungement may not:

(a) terminate or invalidate any pending administrative proceedings or actions of which the petitioner had notice according to the records of the administrative body prior to issuance of the expungement order;

(b) affect the enforcement of any order or findings issued by an administrative body pursuant to its lawful authority prior to issuance of the expungement order; ~~or~~

(c) remove any evidence relating to the petitioner including records of arrest, which the administrative body has used or may use in these proceedings~~[-]; or~~

(d) prevent an agency from maintaining, sharing, or distributing any record required by law.

Section 8. Section 77-40-109 is amended to read:

77-40-109. Retention and release of expunged records -- Agencies.

(1) The bureau shall keep, index, and maintain all expunged records of arrests and convictions.

(2) (a) Employees of the bureau may not divulge any information contained in its index to any person or agency without a court order unless specifically authorized by statute.

(b) The following organizations may receive information contained in expunged records upon specific request:

(i) the Board of Pardons and Parole;

(ii) Peace Officer Standards and Training;

(iii) federal authorities, ~~[unless prohibited]~~ only as required by federal law;
(iv) the Department of Commerce;
(v) the Department of Insurance;
(vi) the State Board of Education; and
(vii) the Commission on Criminal and Juvenile Justice, for purposes of investigating applicants for judicial office.

(c) A person or agency authorized by this Subsection (2) to view expunged records may not reveal or release any information obtained from the expunged records to anyone outside the court order or specific request, including distribution on a public website.

(3) The bureau may also use the information in its index as provided in Section [53-5-704](#).

(4) If, after obtaining an expungement, the petitioner is charged with a felony, the state may petition the court to open the expunged records upon a showing of good cause.

(5) (a) For judicial sentencing, a court may order any records expunged under this chapter ~~[or Section [77-27-5.1](#)]~~ to be opened and admitted into evidence.

(b) The records are confidential and are available for inspection only by the court, parties, counsel for the parties, and any other person who is authorized by the court to inspect them.

(c) At the end of the action or proceeding, the court shall order the records expunged again.

(d) Any person authorized by this Subsection (5) to view expunged records may not reveal or release any information obtained from the expunged records to anyone outside the court.

(6) Records released under this chapter are classified as protected under Section [63G-2-305](#) and are accessible only as provided under Title 63G, Chapter 2, Part 2, Access to Records.

Section 9. Section **77-40-112** is amended to read:

77-40-112. Penalty.

~~[Any person who willfully violates any prohibition in this chapter]~~ An employee or agent of an agency that is prohibited from disseminating information from expunged or pardoned records under Section [77-40-5.1](#) or [77-40-109](#) who knowingly or intentionally

398 discloses identifying information from the expunged or pardoned record that has been pardoned
399 or expunged, unless allowed by law, is guilty of a class A misdemeanor [~~unless the prohibition~~
400 ~~specifically indicates a different penalty~~].