

EXPUNGEMENT PROCESS AMENDMENTS

2013 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Eric K. Hutchings

Senate Sponsor: Howard A. Stephenson

LONG TITLE

General Description:

This bill provides a process by which drug-related offenses may be expunged.

Highlighted Provisions:

This bill:

- ▶ creates a process to expunge drug-related offenses by adding another felony and misdemeanor offense to the list of those that can be expunged;
- ▶ requires the petitioner to be free of illegal substance abuse and successfully managing any substance addiction;
- ▶ clarifies the difference between a pardon and expungement; and
- ▶ makes technical corrections.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

77-27-1, as last amended by Laws of Utah 2010, Chapter 110

77-40-102, as last amended by Laws of Utah 2012, Chapter 136

77-40-103, as enacted by Laws of Utah 2010, Chapter 283

77-40-105, as last amended by Laws of Utah 2012, Chapters 136 and 145

77-40-106, as enacted by Laws of Utah 2010, Chapter 283

77-40-107, as enacted by Laws of Utah 2010, Chapter 283

30 **77-40-108**, as renumbered and amended by Laws of Utah 2010, Chapter 283

31 **77-40-109**, as renumbered and amended by Laws of Utah 2010, Chapter 283

32 **77-40-110**, as enacted by Laws of Utah 2010, Chapter 283

33 ENACTS:

34 **77-27-5.1**, Utah Code Annotated 1953



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

37 Section 1. Section **77-27-1** is amended to read:

38 **77-27-1. Definitions.**

39 As used in this chapter:

40 (1) "Appearance" means any opportunity to address the board, a board member, a
41 panel, or hearing officer, including an interview.

42 (2) "Board" means the Board of Pardons and Parole.

43 (3) "Commission" means the Commission on Criminal and Juvenile Justice.

44 (4) "Commutation" is the change from a greater to a lesser punishment after
45 conviction.

46 (5) "Department" means the Department of Corrections.

47 (6) "Expiration" occurs when the maximum sentence has run.

48 (7) "Family" means persons related to the victim as a spouse, child, sibling, parent, or
49 grandparent, or the victim's legal guardian.

50 (8) "Hearing" means an appearance before the board, a panel, a board member or
51 hearing examiner, at which an offender or inmate is afforded an opportunity to be present and
52 address the board, and encompasses the term "full hearing."

53 (9) "Location," in reference to a hearing, means the physical location at which the
54 board, a panel, a board member, or a hearing examiner is conducting the hearing, regardless of
55 the location of any person participating by electronic means.

56 (10) "Open session" means any hearing before the board, a panel, a board member, or a
57 hearing examiner which is open to the public, regardless of the location of any person

58 participating by electronic means.

59 (11) "Panel" means members of the board assigned by the chairperson to a particular
60 case.

61 (12) "Pardon" is an act of grace [~~by an appropriate authority exempting a person from~~
62 that forgives a criminal conviction and restores the rights and privileges forfeited by or because
63 of the criminal conviction. A pardon releases an offender from the entire punishment
64 prescribed for a criminal offense and from disabilities that are a consequence of the criminal
65 conviction. A pardon reinstates any civil rights lost as a consequence of conviction or
66 punishment for a [~~crime~~] criminal offense.

67 (13) "Parole" is a release from imprisonment on prescribed conditions which, if
68 satisfactorily performed by the parolee, enables the parolee to obtain a termination of his
69 sentence.

70 (14) "Probation" is an act of grace by the court suspending the imposition or execution
71 of a convicted offender's sentence upon prescribed conditions.

72 (15) "Reprieve or respite" is the temporary suspension of the execution of the sentence.

73 (16) "Termination" is the act of [~~an appropriate authority~~] discharging from parole or
74 concluding the sentence of imprisonment prior to the expiration of the sentence.

75 (17) "Victim" means:

76 (a) a person against whom the defendant committed a felony or class A misdemeanor
77 offense, and regarding which offense a hearing is held under this chapter; or

78 (b) the victim's family, if the victim is deceased as a result of the offense for which a
79 hearing is held under this chapter.

80 Section 2. Section **77-27-5.1** is enacted to read:

81 **77-27-5.1. Board authority to order expungement.**

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

85 (2) An expungement order, issued by the board, has the same legal effect and authority

86 as an order of expungement issued by a court, pursuant to Title 77, Chapter 40, Utah
87 Expungement Act.

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

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

91 **77-40-102. Definitions.**

92 As used in this chapter:

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

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

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

101 (4) "Certificate of eligibility" means a document issued by the bureau stating that the
102 criminal record which is the subject of a petition for expungement is eligible for expungement.

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

105 (6) "Department" means the Department of Public Safety established in Section
106 53-1-103.

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

108 (a) Subsection 58-37-8(2), except any offense under Subsection 58-37-8(2)(b)(i),
109 possession of 100 pounds or more of marijuana, any offense enhanced under Subsection
110 58-37-8(2)(e), violation in a correctional facility or Subsection 58-37-8(2)(g), driving with a
111 controlled substance illegally in the person's body and negligently causing serious bodily injury
112 or death of another;

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

114 (c) Section 58-37b-6, possession or use of an imitation controlled substance; or
 115 (d) any local ordinance which is substantially similar to any of the offenses described
 116 in this Subsection (7).

117 ~~[(7)]~~ (8) "Expunge" means to seal or otherwise restrict access to the petitioner's record
 118 of arrest, investigation, detention, or conviction held by an agency.

119 ~~[(8)]~~ (9) "Jurisdiction" means a state, district, province, political subdivision, territory,
 120 or possession of the United States or any foreign country.

121 ~~[(9)]~~ (10) "Petitioner" means a person seeking expungement under this chapter.

122 ~~[(10)]~~ (11) "Traffic offense" means all offenses in the following parts and all local
 123 ordinances that are substantially similar to the offenses:

- 124 (a) Title 41, Chapter 6a, Part 3, Traffic-control Devices;
- 125 (b) Title 41, Chapter 6a, Part 6, Speed Restrictions;
- 126 (c) Title 41, Chapter 6a, Part 7, Driving on Right Side of Highway and Passing;
- 127 (d) Title 41, Chapter 6a, Part 8, Turning and Signaling for Turns;
- 128 (e) Title 41, Chapter 6a, Part 9, Right-of-Way;
- 129 (f) Title 41, Chapter 6a, Part 10, Pedestrians' Rights and Duties;
- 130 (g) Title 41, Chapter 6a, Part 11, Bicycles, Regulation of Operation;
- 131 (h) Title 41, Chapter 6a, Part 12, Railroad Trains, Railroad Grade Crossings, and
- 132 Safety Zones;
- 133 (i) Title 41, Chapter 6a, Part 13, School Buses and School Bus Parking Zones;
- 134 (j) Title 41, Chapter 6a, Part 14, Stopping, Standing, and Parking;
- 135 (k) Title 41, Chapter 6a, Part 15, Special Vehicles;
- 136 (l) Title 41, Chapter 6a, Part 16, Vehicle Equipment;
- 137 (m) Title 41, Chapter 6a, Part 17, Miscellaneous Rules; and
- 138 (n) Title 41, Chapter 6a, Part 18, Motor Vehicle Safety Belt Usage Act.

139 Section 4. Section **77-40-103** is amended to read:

140 **77-40-103. Expungement procedure overview.**

141 The process for the expungement of records under this chapter regarding the arrest,

142 investigation, detention, and conviction of a petitioner [~~in this state~~] is as follows:

143 (1) The petitioner shall apply to the bureau for a certificate of eligibility for
144 expungement and pay the application fee established by the department.

145 (2) Once the eligibility process is complete, the bureau shall notify the petitioner.

146 (3) If the petitioner is qualified to receive a certificate of eligibility for expungement,
147 the petitioner shall pay the issuance fee established by the department.

148 (4) The petitioner shall file the certificate of eligibility with a petition for expungement
149 in the court in which the proceedings occurred. If there were no court proceedings, or the court
150 no longer exists, the petition may be filed in the district court where the arrest occurred.

151 (5) The petitioner shall deliver a copy of the petition and certificate to the prosecutorial
152 office that handled the court proceedings. If there were no court proceedings, the copy of the
153 petition and certificate shall be delivered to the county attorney's office in the jurisdiction
154 where the arrest occurred.

155 (6) If an objection to the petition is filed by the prosecutor or victim, a hearing shall be
156 set by the court and the prosecutor and victim notified of the date.

157 (7) If the court requests a response from Adult Probation and Parole and a response is
158 received, the petitioner may file a written reply to the response within 15 days of receipt of the
159 response.

160 (8) An expungement may be granted without a hearing if no objection is received.

161 (9) Upon receipt of an order of expungement, the petitioner shall deliver copies to all
162 government agencies in possession of records relating to the expunged matter.

163 Section 5. Section **77-40-105** is amended to read:

164 **77-40-105. Eligibility for expungement of conviction -- Requirements.**

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

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

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

169 (i) a capital felony;

- 170 (ii) a first degree felony;
- 171 (iii) a violent felony as defined in Subsection 76-3-203.5(1)(c)(i);
- 172 (iv) felony automobile homicide;
- 173 (v) a felony violation of Subsection 41-6a-501(2); or
- 174 (vi) a registerable sex offense as defined in Subsection 77-41-102(16);
- 175 (b) a criminal proceeding is pending against the petitioner; or
- 176 (c) the petitioner intentionally or knowingly provides false or misleading information
- 177 on the application for a certificate of eligibility.

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

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

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

- 187 (i) 10 years in the case of a misdemeanor conviction of Subsection 41-6a-501(2) or a
188 felony conviction of Subsection 58-37-8(2)(g);
- 189 (ii) seven years in the case of a felony;
- 190 (iii) five years in the case of [a] any class A misdemeanor or a felony drug possession
191 offense;
- 192 (iv) four years in the case of a class B misdemeanor; or
- 193 (v) three years in the case of any other misdemeanor or infraction.

194 (4) The bureau may not issue a certificate of eligibility if, at the time the petitioner
195 seeks a certificate of eligibility, the bureau determines that the petitioner's criminal history,
196 including previously expunged convictions, contains any of the following:

- 197 (a) two or more felony convictions other than for drug possession offenses, each of

198 which is contained in a separate criminal episode;

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

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

205 (d) five or more convictions other than for drug possession offenses of any degree
206 whether misdemeanor or felony, excluding infractions and any traffic offenses, each of which
207 is contained in a separate criminal episode.

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

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

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

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

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

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

222 [~~5~~] (7) If, prior to May 14, 2013, the petitioner has received a pardon from the Utah
223 Board of Pardons and Parole, the petitioner is entitled to a certificate of eligibility for all
224 pardoned crimes.

225 Section 6. Section **77-40-106** is amended to read:

226 **77-40-106. Application for certificate of eligibility -- Fees.**

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

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

232 (c) Regardless of whether the petitioner is prosecuted, the bureau may deny a
233 certificate of eligibility to anyone providing false information on an application.

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

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

240 (c) If the petitioner meets all of the criteria under Section 77-40-104 or 77-40-105, the
241 bureau shall issue a certificate of eligibility to the petitioner which shall be valid for a period of
242 90 days from the date the certificate is issued.

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

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

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

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

253 (d) An issuance fee may not be assessed against a petitioner who qualifies for a

254 certificate of eligibility under Section 77-40-104 unless the charges were dismissed pursuant to
255 a plea in abeyance agreement under Title 77, Chapter 2a, Pleas in Abeyance, or a diversion
256 agreement under Title 77, Chapter 2, Prosecution, Screening, and Diversion.

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

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

261 Section 7. Section **77-40-107** is amended to read:

262 **77-40-107. Petition for expungement -- Prosecutorial responsibility -- Hearing --**
263 **Standard of proof -- Exception.**

264 (1) The petitioner shall file a petition for expungement and the certificate of eligibility
265 in the court specified in Section 77-40-103 and deliver a copy of the petition and certificate to
266 the prosecuting agency.

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

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

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

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

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

279 (i) the reasons probation was terminated; and

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

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

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

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

290 (b) The petitioner, the prosecuting attorney, the victim, and any other person who has
291 relevant information about the petitioner may testify at the hearing.

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

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

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

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

299 (b) the statutory requirements have been met; [~~and~~]

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

303 [~~(c)~~] (d) it is not contrary to the interests of the public to grant the expungement.

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

306 Section 8. Section **77-40-108** is amended to read:

307 **77-40-108. Distribution of order -- Redaction -- Receipt of order --**

308 **Administrative proceedings -- Bureau requirements.**

309 (1) (a) [~~The petitioner~~] A person who receives an order of expungement under this

310 chapter or Section 77-27-5.1 shall be responsible for delivering a copy of the order of
311 expungement to all affected criminal justice agencies and officials including the court, arresting
312 agency, booking agency, prosecuting agency, Department of Corrections, and the bureau.

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

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

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

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

325 (5) Unless ordered by a court to do so, a government agency or official may not divulge
326 identifying information regarding the petitioner contained in a record of arrest, investigation,
327 detention, or conviction after receiving an expungement order.

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

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

332 (7) An order of expungement may not:

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

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

338 (c) remove any evidence relating to the petitioner including records of arrest, which the
339 administrative body has used or may use in these proceedings.

340 ~~[(8) The bureau shall provide clear written directions to the petitioner along with a list
341 of agencies known to be affected by the order of expungement.]~~

342 Section 9. Section **77-40-109** is amended to read:

343 **77-40-109. Retention and release of expunged records -- Agencies.**

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

346 (2) Employees of the bureau may not divulge any information contained in its index to
347 any person or agency without a court order unless specifically authorized by statute. The
348 following organizations may receive information contained in expunged records upon specific
349 request:

- 350 (a) the Board of Pardons and Parole;
- 351 (b) Peace Officer Standards and Training;
- 352 (c) federal authorities, unless prohibited by federal law;
- 353 (d) the Division of Occupational and Professional Licensing; and
- 354 (e) the State Office of Education.

355 (3) The bureau may also use the information in its index as provided in Section
356 53-5-704.

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

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

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

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

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

369 (6) Records released under this chapter are classified as protected under Section
370 63G-2-305 and are accessible only as provided under Title 63G, Chapter 2, Part 2, Access to
371 Records.

372 Section 10. Section **77-40-110** is amended to read:

373 **77-40-110. Use of expunged records -- Individuals -- Use in civil actions.**

374 Records expunged under this chapter or Section [77-40-104 or 77-40-105] 77-27-5.1
375 may be released to or viewed by the following individuals:

376 (1) the petitioner;

377 (2) a law enforcement officer who was involved in the case, for use solely in the
378 officer's defense of a civil action arising out of the officer's involvement with the petitioner in
379 that particular case; and

380 (3) parties to a civil action arising out of the expunged incident, providing the
381 information is kept confidential and utilized only in the action.