



## June 2014 Tip of the Month

### Expungement Law Update: New Tools to Provide Second Chances

Submitted by Chris Hanrahan, VLN Resource Attorney

Minnesotans are facing one of the toughest housing markets and employment markets since we started tracking the statistics. Criminal records prevent people from competing for jobs or obtaining safe, affordable housing and force them to rely on public assistance to survive. Expungement provides a second chance for those who have rehabilitated, allowing them to become productive members of our community.

On May 14, 2014, Governor Dayton signed HF 2577, new expungement legislation, nearly a year after the Minnesota Supreme Court issued two decisions that constrained the courts' ability to grant full expungement for a vast majority of cases. The new law is effective on January 1, 2015 and dramatically changes expungement.

#### Current Expungement Law

There are two grounds for seeking expungement: Minnesota Statutes and the courts' inherent authority. Until last year, either could provide the relief that petitioners sought: to seal public access to all government-held records. After the Minnesota Supreme Court's decision last May in *State v. M.D.T.*<sup>1</sup>, only statutory expungement provides a meaningful remedy. Citing separation of powers concerns, the Court ruled that the courts' inherent authority is limited to expungement of records kept within the judicial branch, with limited exceptions.<sup>2</sup> This means that under its inherent authority, a court cannot order executive branch agencies, such as the Bureau of Criminal Apprehension (BCA), to seal their records. Because employers, landlords, and background check companies frequently access records in both branches, inherent authority expungement does little to alleviate the records' burden on low-income petitioners.

Minnesota law currently provides three grounds for statutory expungement of adult criminal records: 1) certain first time drug possession offenses resolved under specified statutes; 2) offenses committed by juveniles that were prosecuted in adult court; and 3) cases resolved in favor of the defendant.<sup>3</sup> These dispositions represent only a minute fragment of criminal records in the population. Less than ten percent of records that VLN clients are seeking to expunge currently qualify for statutory expungement.

The juvenile code provides an additional ground for expungement of juvenile offenses. Specifically, the law allows a judge to expunge a juvenile adjudication of delinquency at any time s/he "deems advisable."<sup>4</sup> In another decision from last May, the Court construed this statute narrowly, saying that the judge only has authority to order executive branch agencies to seal their records of a judicial order adjudicating the youth delinquent, but no other records associated with the case.<sup>5</sup> The practical impact of juvenile expungement became negligible, because arrest records were still available after an expungement, meaning the case could still turn up on background checks.

#### Legislative Action

The new legislation will expand Minn. Stat. § 609A.02 to provide new grounds for statutory expungement of adult records. Petitioners seeking relief under the new law can seek orders expunging all government-held records of qualifying cases. Perhaps the most significant change is that the court can now expunge convictions for petty misdemeanors, misdemeanors, gross misdemeanors, and some felonies. The statute will also clear up a

<sup>1</sup> *State v. M.D.T.*, 831 N.W.2d 276 (Minn. 2013)

<sup>2</sup> One widely recognized exception is to remedy a constitutional violation.

<sup>3</sup> Minn. Stat. § 609A.02

<sup>4</sup> Minn. Stat. § 260B.198 Subd. 6

<sup>5</sup> *In re the Matter of the Welfare of J.J.P.*, 831 NW 2d 260 (Minn. 2013)

somewhat confusing distinction between cases resolved in favor of the petitioner and cases that were ultimately dismissed but not currently considered resolved in favor of the petitioner. In addition to providing new grounds for expungement, the new law will allow prosecutors to agree to expungement, eliminating the need to go through the full petition process. Under the new legislation, more than half of the people seeking expungement assistance from VLN will be able to obtain relief.

The legislature also improved expungement for juvenile records. Instead of limiting juvenile record expungement to adjudications of delinquency, the rewritten subdivision of Minn. Stat. 260B.198 (Subd. 6) allows expungement of “all records relating to delinquency.” This eliminates the strange inconsistency where juveniles prosecuted in adult court could achieve a full expungement, when juveniles who remained in the more rehabilitative juvenile delinquency system could not get full relief. The new provision also clarifies that all records can be expunged, not simply the adjudication itself, meaning that the petitioner will be able to clear arrest and other records at the Bureau of Criminal Apprehension and other executive agencies. This legislation will bring expungement law into conformity with the rehabilitative goals of the juvenile justice system, allowing those who have changed their lives to move past their youthful mistakes and achieve success as adults.

### Key Provisions

**Stays of Adjudication and Diversion:** The petitioner qualifies for expungement if s/he has successfully completed the terms of the stay of adjudication or diversion and at least one year has passed with no new charges against the petitioner.

If the petitioner meets both requirements, the burden shifts to the state to prove by clear and convincing evidence that the record should not be expunged.

**Petty Misdemeanors and Misdemeanors\*:** The court can expunge petty misdemeanor and misdemeanor convictions if the petitioner has not been convicted of a new crime for at least two years since the discharge of the sentence for the crime.

**Gross Misdemeanors\*:** The court can expunge a gross misdemeanor conviction if the petitioner has not been convicted of a new crime for at least four years since discharge of the sentence for the crime.

**Felonies:** The court can expunge certain listed felony convictions if the petitioner has not been convicted of a new crime for at least five years since discharge of the sentence for the crime.

**\* Crimes Involving Domestic Abuse:** The petitioner cannot seek statutory expungement for petty misdemeanor, misdemeanor, or gross misdemeanor convictions that involved domestic abuse, sexual assault, violation of an order for protection, or violation of harassment restraining order. This provision has a sunset provision, expiring on July 15, 2015. The legislature may address this issue next session.

**No Petition if the Prosecutor Agrees:** If the prosecutor agrees to expungement of a criminal record, the subject will not need to file a petition. The judge still has ultimate authority to expunge the record, but is obligated to expunge it unless the public interests in retaining the record outweigh the disadvantages to the subject in not expunging the record. The key caveat is that this provision only applies to cases that could otherwise be expunged under the new § 609A.02.

**Factors:** Instead of relying on the five “*H.A. Factors*”<sup>6</sup> the courts have been using when deciding whether to expunge a case, the legislature has introduced a list of twelve factors the judges must now consider. The factors are: 1) the nature and severity of the underlying crime; 2) the risk, if any, the petitioner poses to individuals or society; 3) the length of time since the crime occurred; 4) the steps taken by the petitioner toward rehabilitation following the crime; 5) aggravating or mitigating factors relating to the underlying crime, including the petitioner’s level of participation and context and circumstances of the underlying crime; 6) the reasons for the expungement, including the petitioner’s attempts to obtain employment, housing, or other necessities; 7) the petitioner’s criminal record; 8) the petitioner’s record of employment and community involvement; 9) the

---

<sup>6</sup> *State v. H.A.*, 716 N.W.2d 360, 364 (Minn. App. 2006)

recommendations of interested law enforcement, prosecutorial, and corrections officials; 10) the recommendations of victims or whether the victims of the underlying crime were minors; 11) the amount, if any, of restitution outstanding, past efforts made by the petitioner toward payment, and the measures in place to help ensure completion of restitution payment after expungement of the record if granted; and 12) other factors deemed relevant by the court.

## Tips

**To Wait or Not to Wait:** You will need to make a case by case decision when considering whether to file now or to wait for the new law, but these guidelines can help when advising your client.

If a client qualifies for statutory expungement now, the new law will not provide a greater remedy, so it makes sense to file now. As we near 2015, you may want to consider seeking the prosecutor's agreement to expunge the record, avoiding the considerable time the petition process takes.

If a client does not qualify for statutory expungement now but will under the new statute, consider whether filing under the new law will be more beneficial than filing under the court's inherent authority now. While many clients communicate an urgent desire for expungement, the petition process takes a minimum of four months, so it is not an immediate remedy; waiting for a full, meaningful remedy is often a better choice. If the client is applying for jobs that require approval from the Department of Human Services (DHS), and the offense could disqualify him/her, inherent authority expungement will likely not help, so wait to file under the new statute.

If the client does not now and will not qualify for statutory expungement under the new law, you may file at any time. Separation of powers doctrine presumes that the legislature cannot abrogate the courts' inherent authority. However, due to the extensive legislation of expungement under the new law, the courts may constrict their use of inherent authority expungement. This reasoning may favor filing for inherent authority expungement now.

**Crime-Free Time Periods:** While the new provisions specify the minimum length of time the client must be crime-free before filing for expungement, judges will still consider all the expungement factors, such as the client's full criminal history and the time since the offense. Be sure to advise clients that, though the law allows for expungement of the record, the time period is not a guarantee of expungement after it has passed and s/he may need to wait depending on the strengths and weaknesses of the case considering all the new factors.

**DHS Checks:** Clients who have been denied positions because of DHS background checks can use the new statute to request expungement of the DHS records. If DHS is specifically named in the expungement order, then the department is prohibited by statute from using the expunged record as the basis for a disqualification.<sup>7</sup> However, judges consider the public interest in DHS having access to the record when deciding whether to grant expungement, and may decline to seal DHS records even while granting an expungement of court and BCA records. In such circumstances, the new legislation will enable expunged records to be 'flagged' when DHS conducts a check on someone who has gotten an expungement that was not directed to DHS, allowing DHS to seek a court order opening the record for its investigation. Expungement will be helpful, but it will not always guarantee that a person can get a DHS licensed job.

**Practice Tools:** As a VLN volunteer, you have access to many resources to help you provide pro bono criminal expungement services. Notably, you can use Hot Docs, which is an online tool that generates all necessary pleadings by guiding you step-by-step through providing necessary information in a fill-in-the-blank format. We will be updating Hot Docs and other resources to enable you to easily transition to helping pro bono clients under the new law.

**The new law is going to have a significant impact on our community, allowing people to move past their mistakes to rejoin the workforce and live in safe housing. If you would like to help low-income clients take advantage of the legislation, contact Chris Hanrahan at (612) 752-6649 or via email at [chris@vlmn.org](mailto:chris@vlmn.org).**

---

<sup>7</sup> See Minn. Stat. 245C.08 subd. 1 (b).