



## Using the New Second Chance Expungement Law

Minn. Stat. § 609A.02

Submitted by Chris Hanrahan, Resource Attorney

After months of anticipation, the new Second Chance Expungement Law is set to take effect in just over one month. In fact, petitioners serving and filing their pleadings on or after the date of this Tip will be scheduling hearings after the effective date. The new law brings substantive and procedural change to expungement practice and raises some questions. This Tip will identify and discuss ambiguities in the law that attorneys should address when representing clients in criminal expungement proceedings.

### Pleadings and Notice

**Pleadings:** The current expungement petition available on the Minnesota courts' website does not include grounds for relief available under the new law. Paragraph nine in the current petition lists the existing grounds for statutory expungement under Minn. Stat. § 609A.02, which are the first three checkboxes in the form. Checking the fourth box suggests that the petitioner is seeking limited relief under the inherent authority of the court. The new law provides additional grounds for seeking statutory expungement that are not listed in the current form. To request statutory relief under the new law, write in the grounds for expungement in place of the check boxes. The courts expect to publish new forms before the end of November. Because we are working to reprogram the Hot Docs online tool through Law Help Interactive, it is not updated with the new forms or new law, so be sure to alter the pleadings to meet your needs until we complete the updates.

**Effective Date:** Because the language setting the effective date of the new provisions of the statute does not contain the familiar "for actions commenced on or after" language, there is debate about what law will apply to cases with hearings scheduled after the effective date but where the petitioner served and filed the pleadings before the effective date. It is safest to serve and file the pleadings after January 1, 2015, but there is a potential argument in favor of the alternative course of action.

To resolve this conflict, we can borrow an argument from appellate law. Minnesota courts have recognized the general rule that "a court is to apply the law in effect at the time it renders its decision, unless doing so would alter rights that had matured or become unconditional, would impose new and unanticipated obligations on a party, or would work some other injustice due to the nature and identity of the parties."<sup>1</sup> Because the new law will be in effect when the judge makes his/her decision, absent facts favoring application of one of the exceptions, the judge should apply the new law after January 1, 2015. Though the new law should hardly come as a surprise to the agencies involved in a criminal expungement case, provide notice of the proposed grounds for relief in the petition, proposed order, and consider writing a cover letter or legal memorandum.

**Prosecutor Agreement:** Under the new law, if the prosecutor agrees, the defendant can obtain an expungement without filing a petition.<sup>2</sup> The new law does not establish the procedure to seek this relief. The provision appears to limit the types of case that qualify to those that would otherwise qualify for expungement under the statute. The judge also has discretion whether to grant the expungement regardless of the agreement. If you are helping a client with expungement, try contacting the prosecutor's office to negotiate an expungement before beginning the lengthy petition process. Many prosecutors in the Twin Cities metro area have not established procedures for this remedy, so be prepared to lead the stipulation process and to propose your own pleadings.

<sup>1</sup> *McClelland v. McClelland*, 393 N.W.2d 224, 226-27 (Minn. App. 1986), citing *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 717-720 (1974).

<sup>2</sup> Minn. Stat. § 609A.025.

## Wait Periods

**Wait Periods:** The new grounds for relief come with wait periods. For example, a petitioner may qualify for expungement of a misdemeanor conviction if s/he “has not been convicted of a new crime for at least two years since discharge of the sentence for the crime.”<sup>3</sup> The wait time can be read in two ways: 1) the petitioner can qualify for expungement after two years have passed since discharge of the sentence of his/her latest crime, or 2) the petitioner can only qualify for expungement if he/she is not convicted of another crime within two years of discharge of the sentence for the original crime. The first reading reads a modifier into the statute that is not written. The second reading would achieve the absurd result of providing for expungement of only the latest in a series of offenses that occurred less than two years apart. Because of the ambiguity, the wait period should be read to effectuate the legislative intent, which is to provide an expungement remedy after the petitioner has demonstrated the ability to remain law abiding for a minimum period of time. Beware of alternate readings and be prepared to argue for the interpretation that benefits your client.

**Traffic Offenses’ Effect on Wait Periods:** The wait periods in the new law relate to charges or convictions of a new ‘crime.’ Under Minnesota law, a ‘crime’ is defined as “conduct which is prohibited by statute and for which the actor may be sentenced to imprisonment, with or without a fine.”<sup>4</sup> Many traffic offenses cannot be punished by imprisonment, so would not qualify as crimes and would not appear to toll the waiting period. However, the new law uses the word crime fairly loosely, providing for expungement if “the petitioner was convicted of or received a stayed sentence for a petty misdemeanor or misdemeanor and has not been convicted of a new *crime* for at least two years since discharge of the sentence for the *crime*.” The second instance of the word ‘crime’ refers to the petty misdemeanor or misdemeanor the petitioner wants expunged. Because a petty misdemeanor is not a crime by definition,<sup>5</sup> this provision appears to use the term ‘crime’ loosely and could be read to include traffic offenses or other petty misdemeanors that resulted in conviction during the wait period. Also note that the judge will consider whether the petitioner owes fines or is on probation as factors in expungement of even unrelated cases, so be sure that the petitioner has satisfied obligations to the court before arguing that the offenses should not toll the wait period.

## Grounds for Relief

**Diversion:** Under current case law, petitioners who resolved their cases by completing a diversion program may seek statutory expungement if the case was “resolved in the petitioner’s favor.” This entitles the petitioner to a presumption in favor of expungement and allows the petitioner to file without paying a filing fee. Whether a case is resolved in favor of the petitioner depends upon whether the petitioner admitted guilt on the record or admitted facts that would support a finding of guilt in order to participate in diversion.<sup>6</sup> However, the new law provides separate statutory grounds for expungement of diversion cases. These cases qualify only after one year has passed, with no new charges, since completion of the diversion program and require payment of a filing fee.<sup>7</sup> Both the new and current provisions give the petitioner a rebuttable presumption in favor of expungement and shift the burden to the state to show why the records should remain public.

The new provision either replaces the current ‘resolved in favor’ case law as it relates to diversion cases, or it provides new statutory grounds for expungement of the diversion cases that were not resolved in favor of the petitioner under existing case law. If your client has successfully completed diversion but is seeking to file within one year of completion, or if your client cannot obtain a fee waiver and cannot pay filing fees, be prepared to argue that the case qualifies for expungement as a criminal proceeding resolved in favor of your client. The availability of diversion programs enables prosecutors to settle many cases without going to trial, so altering the existing negotiation framework may work against their interests in addition to those of the petitioner; consider seeking the prosecutor’s agreement to expunge the records under the new provision discussed above.

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<sup>3</sup> Minn. Stat. § 609A.02 Subd. 3 (a) (3).

<sup>4</sup> Minn. Stat. § 609.02 Subd. 1.

<sup>5</sup> Minn. Stat. § 609.02 Subd. 4a.

<sup>6</sup> *State v. J.Y.M.*, N.W.2d 139, 142 (Minn. App. 2006).

<sup>7</sup> Minn. Stat. § 609A.02 Subd. 3 (a) (2).

**Stays of Imposition:** Under Minn. Stat. § 609.135, the level of an offense may drop from a felony to a gross misdemeanor or misdemeanor upon discharge of the sentence. During the stay, the defendant is considered convicted of the felony, but after discharge, the defendant stands convicted of the lower level offense. The State has argued in other cases involving this disposition that the underlying conduct, not the ultimate conviction level, should rule. However, in a recent published Minnesota Court of Appeals opinion, the Court ruled that the ultimate conviction level would be used for calculating a person's criminal history score.<sup>8</sup> Under the same reasoning, because the legislature was writing the new law after the existence of Minn. Stat. § 609.135 when it provided for expungement of a conviction of a misdemeanor or gross misdemeanor, it included those that dropped from a felony conviction. Because this decision involves calculation of a criminal history score, not expungement, be prepared to argue why the judge should use the reasoning from this case to expungement.

**Cases Involving Domestic Abuse, Stalking, etc.:** The new law excludes expungement of convictions in cases that involved domestic abuse, sexual assault, violation of an order for protection or restraining order, and stalking. This legislature included this temporary provision (it expires on July 15, 2015) to enable the legislature to craft expungement of these cases in such a way to allow access to the records for the victims when needed to protect their safety. It is unclear when a conviction will be considered a crime involving the conduct described. A conviction for domestic assault, stalking, etc. stands at one end of the spectrum, on its face appearing to involve the prohibited conduct. On the other end would be a case where the police report alleged that the petitioner engaged in the prohibited conduct, but the prosecutor did not charge any offenses related to the conduct and the conviction is for a charge that does not involve the prohibited conduct. It is unclear where the courts will draw the line. If you decide to file for expungement of a case that includes a police report or charge related to the prohibited conduct, prepare an argument for why the exclusion does not apply.

## Updates

The interpretation of the new Second Chance Expungement Law will evolve through practice in the courts. VLN works to monitor the courts' decisions and volunteers' outcomes. Please feel free to contact me with new ambiguities or with information about the courts' resolution of any of these ambiguities.

**Contact Chris Hanrahan at (612) 752-6649 or via email at [chris@vlmn.org](mailto:chris@vlmn.org).**

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<sup>8</sup> *State v. Michael David Franklin*, A13-1129 (May 27, 2014).