


Expungement & Beyond


Understanding and Addressing Criminal Records.



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The Council on
Crime and Justice

EXPUNGEMENT




 WHAT ARE CRIMINAL RECORDS?

- Bureau of Criminal Apprehension (BCA)
- Minnesota Court Information System (MNCIS)
- Police Department
- City Attorney
- Sheriff's Department
- County Attorney
- State Attorney General
- Department of Corrections
- Department of Human Services

- Private data-miners
- Private theft databases

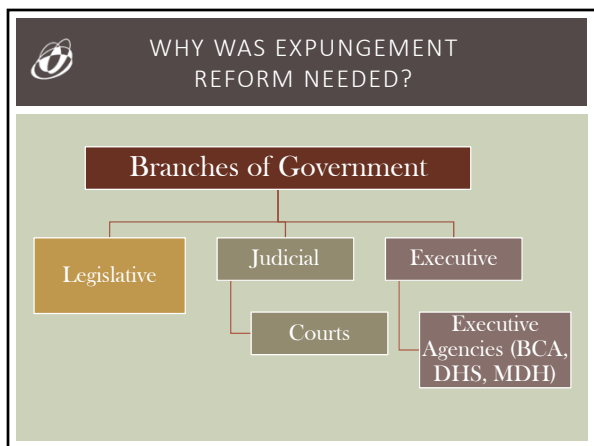
 **WHAT RECORDS SAY**

- Levels:
 - Felony
 - Gross Misdemeanor
 - Misdemeanor
 - Petty Misdemeanor
- Dispositions
 - Arrest
 - Dismissal
 - Continuance for Dismissal
 - Stay of Adjudication
 - Stay of Imposition
 - Stay of Execution
 - Executed Sentence
 - Acquittal

 **Basics of Expungement Law**

- Court-ordered sealing of government-held records
- Not destruction of a record


- Sealed records may be opened for future investigation and prosecution, and for background checks for law enforcement positions.



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 **STATUTORY EXPUNGEMENT**


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 **INHERENT AUTHORITY EXPUNGEMENT**


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 **STATUTORY EXPUNGEMENT (YESTERDAY)**


Minn. Stat. §609A.02 Subd. (3) only included:

1. Certain controlled substance offenses.
2. Juveniles prosecuted as adults.
3. Certain criminal proceedings not resulting in conviction.
 - All charges in the case resolved entirely in the petitioner's favor without any plea or admission of guilt

 **STATUTORY EXPUNGEMENT (TODAY= YESTERDAY + ADDITIONS)**

All categories that used to qualify for statutory expungement still do ("Yesterday"). Today, Minn. Stat. §609A.02 Subd. (3) has expanded to include:

4. Stays of Adjudication & Diversion; 1 year after completion of sentence if crime free
5. Convictions for petty misdemeanors & misdemeanors; 2 years after discharge of sentence if crime free
6. Gross misdemeanors; 4 years after discharge of sentence if crime free
7. Select non-violent felonies; 5 years after discharge of sentence if crime free

 **WHAT FELONIES ARE COVERED?**

50 non-violent felonies from the 2 lowest levels of the Sentencing Guidelines, including:

- 5th degree drug possession and sale
- Criminal damage to property if less than \$1000
- Aggravated forgery
- Various fraud offenses
- Check forgery if less than \$2500
- Theft if less than \$5000



Stay of Imposition – Felony or Not?

Minn. Stat. 609.13 Subd. 1(2):

Felony conviction is deemed to be for a misdemeanor if the imposition of the prison sentence is stayed, the defendant is placed on probation, and the defendant is thereafter discharged without a prison sentence.

State v. Franklin: holding implies it's a misdemeanor but footnote implies it's a felony (A13-1129, MN Supreme Court, March 11, 2015)



WHAT ABOUT JUVENILE RECORDS?

Old Law, Minn. Stat. § 260B.198 subd. 6:

- The court “may expunge an adjudication of delinquency at any time that it deems advisable.”
- *In re Welfare of J.J.P.* in 2013 determined that this only allowed for sealing of actual court order adjudicating delinquency.



NEW EXPUNGEMENT LAW JUVENILE RECORDS

Clarifies that 260B.198 Subd. (6) includes all records relating to the arrest and delinquency proceedings.

What about everyone else?

Benefits of a judicial records expungement:

- The order is better than nothing, and if it is well drafted, could help your client with job interviews, housing applications, etc.
- Update the BCA records. Send a demand letter to the BCA with the expungement order. Minn. Stat. §13.01, §13.04
- Safe Hiring – limits employer’s liability. Minn. Stat. §181.981


The BCA Fix

Minn. Criminal History - Offender Details			
9913			
Court:	CARVER DIST COURT	Court File #:	[REDACTED]
Controlling Agency:	CHASKA PD	Case #:	94014761
Disposition:	Convicted	Conviction Level:	Misdemeanor
Statute:	256.98	Statute Description:	Wrongfully Obtaining Assistance-Theft
QOC:	Probational - 5Y		
Sentence(s):	Probational - 5Y		
Fine(s):			
Conviction 2 of 2 * ↙ THE SUBJECT OCCUPIES THE DATA BECAUSE SHE WAS GRANTED EXPUNGEMENT OF JUDICIAL RECORD ON 06/06/2013 IN MCLEOD CD DISTRICT COURT			
Disposition Date: 12/29/2006			
Custody Institution Assigned To:			
Probation Institution Assigned To: BLUE EARTH DEPT OF CORRECTIONS			
To:			
Court:	MCLEOD DIST COURT	Court File #:	[REDACTED]
Controlling Agency:	HUTCHINSON PD	Case #:	00021163
Disposition:	Convicted	Conviction Level:	Misdemeanor
Statute:	609.631.2(1)	Statute Description:	Check Forgery-Make or Alter a Check
QOC:	Probational - 3Y		
Sentence(s):	Probational - 3Y		
Fine(s):			

Alternatives to Expungement


Agency Relief

- Work with the remedies available through the agency that may have issued an adverse decision your client.
 - Department of Human Services/Department of Health Disqualification Appeals (Minn. Stat. §245C; DHS Fair Hearings, Minn. Stat. §256.045; OAH Hearings (Minn. R. 1400.510-1400.8400)
 - Professional Board Licensure Appeals (varies based on board)
 - Public Housing/ Section 8 Denial Appeals
- Write letters to employer explaining reasons and benefits of plea bargain.


 **Alternatives to Expungement**

Pardon Extraordinary

- Minn. Stat. §638
- <http://www.doc.state.mn.us/boardofpardons/default.htm> (Board of Pardons website)
- MN Board of Pardons may grant a “pardon extraordinary” 5-10 years after discharge of sentence.
- Benefit: sets aside and nullifies the conviction; eliminates DHS/MDH disqualifications based on convictions; seals public BCA record and adds “pardoned” note to file.
- Drawback: does not *seal* the record.

 **OVERALL PROCESS**


- Prepare Petition
- File and Serve Petition
- Wait 60 days – possible objections
- Court Hearing and Order
- Wait 60 days – appeals period
- Order is Final!

 **PREPARING THE PETITION**


- Gather documents about the offense
 - BCA record –public and private records from BCA
 - Law enforcement – police or sheriff
 - Court records – look up and print records at a courthouse

WRITING THE PETITION


<p>How is your record harming you? Can you prove it?</p> <ul style="list-style-type: none">▪ Lost an existing job▪ Cannot get hired▪ Turned down for housing▪ Higher damage deposit because of your record▪ Disqualified from volunteering▪ Disqualified for professional license▪ Application for retail license refused	<p>How have you rehabilitated yourself?</p> <ul style="list-style-type: none">▪ Did you complete school? Do you want to go to school?▪ Holding down a job? What are your career plans?▪ Did you go through drug or alcohol treatment? Going to meetings?▪ Are you involved in your community? Attending religious services? Volunteering?▪ Did you pay all restitution?
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 **WRITING THE PETITION**


- Affidavits or letters of support
 - People who knew you then and know you now and can talk about how you have changed
 - People in your career field who will verify how difficult it is to get a job with a record
 - If in AA or NA – sponsors
 - Vocational counselors, social workers, job coaches
 - Pastors, ministers, imams
 - Former or current coworkers (be careful here)

 **BURDEN OF PROOF**


- Burden of proof varies depending on how case was resolved:
 - Resolved in Favor, Stay of Adjudication and Diversion cases with no guilty plea
 - Not Resolved in Favor – guilty plea, Alford plea, admission to elements of offense

 **BURDEN OF PROOF**


Resolved in Favor, Stay of Adjudication and Diversion cases with no guilty plea:
"The court shall grant the petition to seal the record unless the agency or jurisdiction whose records would be affected establishes by clear and convincing evidence that the interests of the public and public safety outweigh the disadvantages to the petitioner of not sealing the record."
609A.03 Subd. 5

 **BURDEN OF PROOF, STANDARD**

Not Resolved in Favor – guilty plea, Alford plea, admission to elements of offense:
"expungement of a criminal record is an extraordinary remedy to be granted only upon clear and convincing evidence that it would yield a benefit to the petitioner commensurate with the disadvantages to the public and public safety of:
(1) sealing the record; and
(2) burdening the court and public authorities to issue, enforce, and monitor an expungement order."
609A.03 Subd. 5

 **STANDARD FOR EXPUNGEMENT**

Benefit ≥ Harm





Other Tips

- Always ask for DHS records to be expunged: If not included in the expungement order DHS can access the expunged record and will receive notice of its existence when they request BCA records. See. §245C.08 and §609A.03 subd. 7a,
- When case was resolved in your clients favor the burden is on the state to show a “unique or particularized harm to the public”. State v.RHB 821 NW2d 817 (Minn. 2012)
- Advise clients to collect evidence early: Denial letters, job application log, character letters, treatment certificates.
- Help client take responsibility and don’t re-litigate the case

HOW DOES THE COURT DECIDE?

Factors the court will consider:

- nature and severity of the crime
- the risk the petitioner poses to individuals or society
- the length of time since the crime occurred
- steps taken by the petitioner toward rehabilitation following the crime
- aggravating or mitigating factors relating to the crime
- reasons for the expungement, including the petitioner’s attempts to obtain employment, housing, or other necessities
- petitioner’s criminal record
- petitioner’s record of employment and community involvement
- recommendations of interested law enforcement, prosecutorial, and corrections officials
- recommendations of victims or whether victims were minors
- amount, if any, of restitution outstanding
- other factors deemed relevant by the court.



REASONS FOR DENIAL

- Minn. Stat. § 609A.02 Subd. 4
 - Court may not seal records of an offense for which the petitioner is required to register as a predatory offender
- Owing to the court
 - Fines
 - Warrants
- Factors
 - Violent v. non-violent
 - Felony, gross misdemeanor, misdemeanor, petty
 - Time since the offense; clean history
- Traffic Offenses
 - Generally not subject to expungement


 Council on Crime and Justice
Support for People with Records


CRIMINAL RECORDS INFORMATION
(612) 353-3024
records@crimeandjustice.org
www.criminalrecordsaftermath.com

Criminal Records Seminars: First Tuesday of each month at the Minneapolis Urban League.


Second Chance Saturdays: Third Saturday of each month.

OTHER BACKGROUND
CHECK LAWS




 RELEVANT LAWS

- Safe Hiring
- Ban the Box
- Fair Credit Reporting Act
- Title VII of the Civil Rights Act


 **SAFE HIRING**

- Criminal records *may not* be admitted if:
 - the position did not expose others to a greater risk of harm than that created by the employee’s general interaction with the public, or that created by employment in general;
 - the record had been sealed or pardoned; or
 - the record did not result in a criminal conviction.

Minn. Stat. § 181.981

 **“BAN THE BOX”**

An employer may not inquire into or consider the criminal record of a job applicant until the applicant has been selected for an interview.



Minn. Stat. 364.021


Image from Goodwill / Easter Seals

For violations that occur in 2014:
 First violation = written warning
 If not remedied within 30 days, up to a \$500 fine (\$500 / mo)


For violations that occur in 2015:
 For employers that employ 10 or fewer persons at a site, up to \$100 for each violation (\$100 / mo)

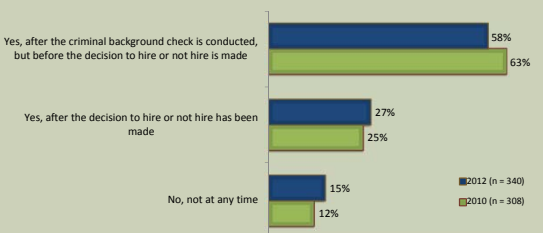
For employers that employ 11 to 20 persons at a site, up to \$500 for each violation (\$500 / mo)

For employers that employ more than 20 persons at one or more sites, up to \$500 for each violation (\$2,000 / mo)

 **FCRA - THE PROCESS**


- Must obtain permission
- Must provide pre-adverse action notice - with a copy of the report!
- Must provide consumer reporting agency's contact information

 Do you allow job candidates, in certain circumstances, the opportunity to explain the results of their criminal background check that might have an adverse effect on an employment decision?




Response	2012 (n = 340)	2010 (n = 308)
Yes, after the criminal background check is conducted, but before the decision to hire or not hire is made	58%	63%
Yes, after the decision to hire or not hire has been made	27%	25%
No, not at any time	15%	12%


Slide adapted from July 19, 2012 SHRM presentation titled: Background Checking: The Use of Criminal Background Checks in the Hiring Process

 **EEOC: TITLE VII**


- Title VII prohibits employment discrimination based on race, color, religion, sex, or national origin.
- Enforced by the EEOC - guidelines are recommended policies to help employers establish **fair and defensible** screening practices consistent with Title VII of the Civil Rights Act.

 **CIVIL RIGHTS ACT - THE SUBSTANCE**


- Should not use arrest records alone
- Should not use blanket bans
- Should engage the record
 - Includes consideration of nature and severity, time since offense, relationship to job, and rehabilitation

 **PEPSI TO PAY \$3.1 MILLION**

- An investigation by the EEOC found reasonable cause to believe that Pepsi's background check policy was a tool for discrimination



- Between 2006 and 2010, more than 300 black applicants were denied employment based on arrest records

 **QUESTIONS?**

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NOTE: The content of this document is intended for general educational purposes only, and is not legal advice. It is not exhaustive or specific. Those seeking legal advice should contact an attorney.
