

Legislative Analysis



EXPUNCTION OF CRIMINAL RECORD: REVISE CRITERIA

Mitchell Bean, Director
Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

House Bill 4106 (Substitute H-4)
Sponsor: Rep. Stacy Erwin Oakes
Committee: Judiciary

First Analysis (6-8-11)

BRIEF SUMMARY: The bill would allow a person, under certain circumstances, to apply to have a felony conviction expunged even if that person had also been convicted of one or two misdemeanor offenses, and would allow a person convicted of not more than two misdemeanor offenses to apply for the expunction of either or both misdemeanors.

FISCAL IMPACT: The bill would have little to no fiscal impact on the Judiciary. Although there could be increased administrative time to process applications, it is not believed that this would increase costs to the state or local units of government.

HB 4106 would have an indeterminate fiscal impact on the Department of State Police. The cost of processing fingerprints is \$49.25. Of that amount, the State Police receives \$30 and the FBI receives \$19.25. It is unknown how many fingerprints would be submitted to the State Police for this purpose; however, some additional administrative costs may be incurred if fingerprints have to be retaken or if there are problems with fingerprints that are sent to the FBI.

THE APPARENT PROBLEM:

By some estimates, 30 percent of adult Americans have criminal records, and studies have shown that about two-thirds of employers will not knowingly hire a person with a past criminal conviction. Many national companies have iron-clad policies that exclude ex-felons from employment. Many professions are now required by state law to do fingerprint checks on applicants and employees and refuse employment if the person had been convicted of certain crimes. Even a misdemeanor conviction for a non-violent offense can prevent a person from receiving an occupational license under state law. In addition, many ex-offenders are denied housing and financial aid for schooling, even decades later.

These statistics are important because research reveals that unemployment and homelessness are major factors influencing whether a person convicted of a crime will commit another one. Unemployment or underemployment forces many of these people to apply for state aid and decreases the ability of non-custodial parents to pay child support.

Michigan law helps some former offenders. Currently, a person with only one criminal conviction may apply to have that conviction set aside (expunged), but he or she must

wait at least five years from the date of sentencing or the completion of imprisonment, whichever is later. Certain crimes, such as murder, rape, and traffic offenses are not eligible for expunction. However, if a person has a felony conviction and years later had a minor misdemeanor or a traffic misdemeanor such as reckless driving, the felony can never be expunged and the person may be negatively affected for a lifetime. A similar situation affects persons with two misdemeanors, even when one or both are for minor, nonviolent offenses.

Some people believe that the law should be changed so that a person could apply to have a felony offense removed from his or his record even if he or she had a minor misdemeanor offense, or allow a person with only two misdemeanor offenses to have his or her record wiped completely clean.

THE CONTENT OF THE BILL:

Public Act 213 of 1965 provides a mechanism by which a person who has only one criminal conviction (either a felony or a misdemeanor) can apply to the court for an order setting aside the conviction. A conviction cannot be set aside for a felony that is punishable by life imprisonment (or an attempt to commit such a felony), for a conviction for a violation or attempted violation of the criminal sexual conduct (CSC) statutes (with the exception of CSC in the fourth degree), or for a traffic offense.

House Bill 4405 would amend Public Act 213 (MCL 780.621, 780.623, and 780.624) to instead allow, with some exceptions, a person to file an application with the convicting court for an order setting aside one or more convictions as follows:

- A person convicted of one felony offense and not more than two misdemeanor offenses could petition to set aside the felony offense.
- A person convicted of not more than two misdemeanor offenses and no other felony or misdemeanor offenses could apply to have either or both of the misdemeanor convictions set aside.

However, for purposes of determining whether a conviction is eligible to be set aside, a traffic offense would not constitute a misdemeanor, except for a violation of operating while intoxicated. "Operating while intoxicated" would mean a violation of the drunk and drugged driving laws listed in Section 625 and 625m (commercial drivers) of the Michigan Vehicle Code or any substantially corresponding local ordinance, tribal law, law of another state, or federal law. The term would include a previous conviction of operating while intoxicated, operating while visibly impaired, operating with any bodily amount of a Schedule 1 drug or cocaine, or allowing an intoxicated, impaired, or drugged person to operate one's own vehicle. Thus, a conviction for any of these offenses would count as a misdemeanor conviction but could not be expunged.

Additional circumstances counted as misdemeanor convictions. Currently, some offenses allow a first-time offender to have the conviction deferred; if the offender successfully

completes probation, the charges are dismissed. Though the person was not "convicted" of the crime, a non-public record of the deferral and dismissal is retained by law enforcement agencies. The bill would consider such a deferral and dismissal as a misdemeanor when determining a person's eligibility for expunction of a different felony or misdemeanor.

The statutory provisions allowing for deferral and dismissal described in the bill include Section 703 of the Michigan Liquor Control Act (purchase, possession, and consumption by a minor); Section 1070(1)(B)(i) of the Revised Judicature Act (completion of drug treatment program); sections of the Code of Criminal Procedure dealing with (a) assignment of youthful trainees, (b) domestic violence, or (c) cases of delayed sentencing; Section 7411 of the Public Health Code relating to first time drug offenses; Section 350a of the Michigan Penal Code, which deals with the taking or retaining of a child by an adoptive or natural parent with the intent to conceal from another with parenting rights; Section 430 of the Penal Code, which deals with health professionals working under the influence of alcohol or controlled substances; or a dismissal under any other Michigan law or of one of its political subdivisions similar to these that provides for the deferral and dismissal of a felony or misdemeanor charge.

Definition of misdemeanor and felony. The bill would define a "misdemeanor" as being: (1) a violation of a Michigan, state, federal, or tribal penal law that is not a felony; (2) a violation of an order, rule, or regulation of a state agency that is punishable by imprisonment for not more than one year or a fine that is not a civil fine, or both; (3) a violation of a local ordinance in this state that substantially corresponds to (1) or (2) that is not a felony; (4) a violation of the law of another state or political subdivision of another state substantially corresponding to a violation listed in (1)-(3) that is not a felony; or a similar violation of (1) or (2) under federal law. "Indian tribe" would mean an Indian tribe, Indian band, or Alaskan Native Village recognized by federal law or formally acknowledged by a state.

"Felony" would mean either of the following, as applicable: (1) for purposes of the offense to be set aside, a violation of a Michigan penal law punishable by imprisonment for more than one year or expressly designated by law to be a felony; or, (2) for purposes of identifying a prior offense, a violation of a penal law of this state, of another state, or the U.S. that is punishable by imprisonment for more than one year or is expressly designated by law to be a felony. (Some crimes designated as a misdemeanor carry a maximum penalty of two years' imprisonment and so would be counted under this provision as a felony.)

When convictions cannot be set aside. Currently, a felony offense punishable by life imprisonment (which includes murder and criminal sexual conduct, CSC, in the 1st degree); convictions for CSC in the 2nd or 3rd degree or assault with the intent to commit CSC in the 1st, 2nd, or 3rd degree; and traffic offense convictions are not eligible to be set aside. The bill would not change this, but would specify that a "traffic offense" includes, but is not limited to, a conviction for operating while intoxicated.

In addition, the bill would add to the list of convictions that could not be set aside, a conviction that is a felony involving domestic violence **if** the person had a prior misdemeanor conviction for domestic violence. (This provision would pertain to convictions for crimes in which the victim is a spouse, a former spouse, an individual with whom the person has had a child in common, an individual with whom the person has or has had a dating relationship, or an individual residing or who had resided in the same household as the person.)

Time limitations. Currently, an application to set aside a conviction can be made five years after the sentence is imposed or five years after completion of any term of imprisonment imposed for that conviction, whichever is later.

House Bill 4106 would revise the time limitations. Under the bill, to set aside either a felony or misdemeanor conviction, a person would have to wait until at least five years after whichever of the following events related to the conviction to be set aside occurred last:

- Imposition of the sentence.
- Completion of probation.
- Discharge from parole.
- Completion of imprisonment.

Application for expunction. The act requires certain information to be included on the application for setting aside a conviction. The bill would make several revisions to these requirements; most are minor. However, the statement that the applicant has not been convicted of an offense other than the conviction or convictions sought to be set aside as a result of the application would have to include any nondisqualifying convictions described in the bill (the bill appears to refer to actions that were deferred and dismissed rather than to traffic offenses as did earlier versions). The bill would also require the applicant to include a statement listing all actions enumerated in the bill pertaining to deferral and dismissal that had been initiated against the applicant and have been dismissed.

If a petition to expunge a conviction is denied by the convicting court, the person must wait at least three years from the date of the denial before filing another petition concerning the same conviction or convictions, unless the court specified an earlier date in the order denying the petition.

Fingerprints. The bill would require an applicant to submit just one complete set of fingerprints to the Department of State Police instead of two as currently required and to forward them electronically. (This change reflects the current practice of the department to send a copy of the fingerprints to the Federal Bureau of Investigation via electronic transmission. Therefore, two sets are no longer needed.)

Who Can Access the Non-public Record. By law, the state police must retain a nonpublic record of the order setting aside a conviction and of the record of the arrest,

fingerprints, conviction, and sentence of the applicant in the case for which the order applies. This nonpublic record can only be made available to a court, an agency of the judicial branch of state government, a law enforcement agency, a prosecuting attorney, the attorney general, or the governor and only for purposes allowed by statute (for instance, to show that a person who has filed an application to set aside a conviction has previously had a conviction set aside).

The bill would expand access to the nonpublic records to the Department of Corrections to determine if a person applying for employment with the department had had a conviction set aside.

Retention of Safeguards. The bill would not affect safeguards currently contained in the law. A copy of the application for expunction would still have to be served on the attorney general and the office of the prosecutor who prosecuted the crime. The attorney general and local prosecutor would still have an opportunity to contest the application. A notice of the application would still have to be sent to the victim of an assaultive crime, and he or she could still appear at any proceeding concerning that conviction and could still make written or oral statements. The bill would clarify that it would be "at the court's discretion" to enter an order setting aside the conviction or convictions, but the court would still have to determine that the expunction was warranted and consistent with the public welfare.

BACKGROUND INFORMATION:

The issue of expanding eligibility for expunction of criminal convictions has been discussed for many years. Similar legislation was introduced in the previous four legislative sessions. House Bill 4327 in the 2005-2006 session and House Bill 5493 in the 2003-2004 session were passed by the House but failed to see action in the Senate. House Bill 5213 in the 2006-2007 session and House Bill 4405 from last session were reported from committee but died on the House floor.

Senate Bill 159 of the current session would also expand eligibility for expunction for some offenders. The bill, which has passed the Senate and is pending House floor action, would allow a person to apply to have a felony or a misdemeanor conviction expunged even if that person also had a conviction for one or two minor offenses committed when the person was 21 years of age or younger.

ARGUMENTS:

For:

The adage says that once a person has done his or her time, the debt to society has been paid. The reality for many ex-offenders, however, is that society will never forgive or forget. Many who have tried to turn their lives around have felt thwarted by the stigma attached to their criminal records. Just a couple stupid choices from long ago can plague a person for a lifetime.

Statistics reported in the media reveal that the majority of employers will not hire an ex-offender, and landlords routinely deny housing to those with criminal records—regardless of the nature of the crime or how long ago it occurred. State laws prevent some with prior criminal convictions from obtaining occupational licenses rather than deciding the merits of an application on a case-by-case basis. A cycle of poverty and homelessness can then ensue, affecting not just the person with the criminal record, but their families and society as a whole. Moreover, unemployment and homelessness raise the risk for reoffending. Even if they do not reoffend, without a reform of the expunction criteria, many of these folks will eventually need public assistance. Setting aside a conviction offers these people an opportunity to turn their lives around and be productive members of society.

The current law is inadequate because it is not unusual for a single transgression to result in multiple charges and convictions. For others, a misdemeanor traffic offense makes them ineligible to have a felony or misdemeanor for a separate offense expunged. Expanding eligibility for expunction will provide hope and an incentive for more individuals to take responsibility for their actions and begin their lives anew.

For:

It is important to understand what the bill will and will not do. The bill will not automatically erase all offenders' records, nor will it violate the rights of victims. As always, expunging a criminal record is a privilege; it is not automatic and is at a judge's discretion. Under the bill, a judge would still be able to review the elements of the crime leading to the conviction under consideration for expunction, and victims would still retain the right to have input into the judge's decision. Prosecutors, the attorney general, and victims of assaultive crimes would still be notified of an application for expunction and could object. As is the law currently, certain serious felonies (for instance, rape or murder) and any traffic offenses would remain on a person's record.

The bill will enable more offenders to petition for expunction of a conviction by allowing one felony to be expunged even if the person also had one or two misdemeanor convictions. One or two misdemeanor convictions could be expunged if that is all the convictions a petitioner had.

When counting how many misdemeanor convictions a person has, a traffic offense that resulted in a misdemeanor conviction would not be counted; the one exception is for a drunk or drugged driving conviction – that would still count as a misdemeanor. Even though the bill uses the term "driving while impaired", the term is defined to include all the unlawful drunk or drugged behaviors listed in Sections 625 and 625m of the vehicle code. Also counted as a misdemeanor is an offense that did not result in a conviction because the conviction was deferred and the charges dismissed after the successful completion of probation. Lastly, a felony domestic violence conviction could not be set aside if the person also had a misdemeanor domestic violence conviction. This is important because perpetrators of domestic violence tend to repeat their battering behaviors.

For:

House Bill 4106 has won the support of prosecutors, judges, and defense attorneys because it enables more individuals to turn their lives around and find employment yet provides broad discretion for judges to decide expunctions on a case-by-case basis. Senate Bill 159, by comparison, is too narrow in scope. That bill would apply to adult offenders wishing to set aside a felony or misdemeanor but who had one or two minor misdemeanor offenses. The bill defined "minor misdemeanor" to mean a misdemeanor punishable by no more than 90 days imprisonment and/or a fine of not more than \$1,000 committed when the person was 21 years of age or younger. Considering the age restriction and the fact that most misdemeanors, even non-violent ones, carry a 93-day maximum term of imprisonment, few would be eligible to avail themselves of that bill's provisions. If the intent is to get those working who have turned their lives around, House Bill 4106 would have the broadest impact while preserving public safety and victims' rights.

Against:

Some view the bill as being soft on crime – protecting the rights of the criminal over the rights of law-abiding citizens. Current law allows one crime to be expunged, and that should suffice, especially considering the number of diversion programs currently in place that allow a conviction to be deferred and then set aside if all probation conditions are met.

Response:

Proponents say the bill is not "soft on crime." In fact, a person would have to wait longer before being eligible to apply for an expunction in some situations. Currently, a person need only wait five years from sentencing or five years after being released from jail or prison. This means that a person could still be on parole or probation at the time he or she becomes eligible to apply to have the offense expunged. Under the bill, at the very least, every ex-offender would have to remain crime free for a period of at least five years. This should be a sufficient time period to demonstrate a change in behavior.

As to viewing the expunction of two misdemeanors as being lenient, sometimes a person is charged with more than one crime arising from a single transaction. Thus, a distinction could be made between a person who represents a danger to society and a person who made a one-time mistake. Moreover, diversion programs are a fairly recent addition to the criminal justice system. They simply were not available to many until recently. For those still facing discrimination in employment and housing two and three decades later, the bill represents hope of truly being able to put their pasts behind them.

POSITIONS:

The Criminal Defense Attorneys of Michigan supports the bill. (5-10-11)

The Prosecuting Attorneys Associations of Michigan supports the bill. (5-9-11)

The Michigan Judges Associations indicated support for the bill. (3-24-11)

The State Bar of Michigan has been on record for over six years supporting changes to the criteria allowing an individual to apply for criminal record expunction, but feels that House Bill 4106 and Senate Bill 244 (rather than Senate Bill 159) represent the version of expunction legislation most strongly requested by judges, prosecutors, defense attorneys, and civil law practitioners. (5-9-11)

The Michigan State Police indicated a neutral position on the bill. (3-24-11)

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Bob Schneider
Jan Wisniewski

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.