

Legislative Analysis



CRIMINAL RECORD EXPUNCTION: EXPAND ELIGIBILITY

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House Bill 4186 (Substitute H-1)
Sponsor: Rep. Stacey Erwin Oakes
Committee: Criminal Justice

First Analysis (5-28-13)

BRIEF SUMMARY: House Bill 4186 would amend Public Act 213 of 1965, which provides for the setting aside (or expunging) of convictions under certain circumstances, to do the following:

- Allow a felony to be expunged if an individual had no more than two misdemeanor convictions.
- If an individual had no more than two misdemeanor convictions, allow either or both to be expunged.
- Add to the list of offenses that may not be expunged.
- Revise the time limitations for filing an application to expunge a conviction.
- Revise the information required to be included on an application for expunction.
- Maintain current victim notification provisions, including the right of the victim to appear at any proceeding regarding the expunction application and the right to make an oral or written statement.
- Delete a criminal penalty for divulging information regarding an expunged conviction.
- Define terms.

FISCAL IMPACT: For a similar bill last session, it was determined that the legislation 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.

The bill would likely not have a significant fiscal impact on the Department of State Police. Per statute, the cost for processing the fingerprints and application to set aside an adult conviction is \$50. This bill does not alter the amount of the fee.

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 must 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. A criminal record has other social and economic impacts as well. Unemployment or underemployment due to a criminal record force 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), and a person could still have a felony or misdemeanor set aside if the person's record included no more than two minor offenses (a minor offense is one that has a maximum term of imprisonment of 90 days and that was committed when the person was 21 years old or younger). The person 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, or vice versa, 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.

Compared to other states, Michigan has one of the most restrictive expungement laws. Many in the legal profession, including judges, criminal attorneys, prosecutors, and advocates, believe that the current expungement policy hinders people from rebuilding their lives. If more of those who have demonstrated the ability to reform were able to obtain gainful employment and housing, the negative affects on their families and communities could be mitigated.

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. Public Act 64 of 2011 expanded this provision to apply it also to a person who had two minor offenses in addition to the felony or misdemeanor the person was applying to expunge; a "minor offense" is defined to mean a misdemeanor or ordinance violation for which the maximum term of imprisonment is 90 days and that was committed when the person was 21 years of age or younger. However, not all convictions are eligible to be set aside, as described later in the content summary, such as convictions for traffic offenses or felonies carrying life sentences.

The bill would revise the above provision 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.

Convictions not eligible to be set aside

Not all felony or misdemeanor convictions are eligible to be expunged. 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); for offenses involving child sexually abusive materials; for offenses involving the use of a computer to commit numerous crimes including soliciting sex with a minor, stalking, causing death by explosives, or swatting; or for a traffic offense.

The bill would make three changes to the list of convictions that could not be set aside:

- (1) Add criminal sexual conduct in the fourth degree.
- (2) Add a felony conviction for domestic violence **if** the person has a prior misdemeanor conviction for domestic violence. ("Domestic violence" would mean that term as defined in the domestic violence statute, MCL 400.1501.)
- (3) Specify that a "traffic offense" includes, but is not limited to, a conviction for operating while intoxicated. "Operating while intoxicated" would mean a violation of the drunk and drugged driving laws listed in Sections 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.

Deferral/dismissals as misdemeanor convictions

Currently, some misdemeanor offenses allow a first-time offender to have the conviction deferred; if the offender successfully completes probation, the charges are dismissed. In addition, offenders between the ages of 17 and 21 may be eligible to have misdemeanor and/or felony convictions deferred and dismissed if assigned youthful trainee status under the Holmes Youthful Trainee Act (HYTA). Though the person was not "convicted" of the crime, a non-public record of the deferral and dismissal is retained by law enforcement agencies. In addition, a deferral and dismissal is sometimes counted as a prior offense for the purposes of sentencing. The bill would consider such a deferral and dismissal (whether for a misdemeanor or a felony offense) as a misdemeanor when determining a person's eligibility for expunction of a different felony or misdemeanor.

The offenses described in the bill that would count as a misdemeanor conviction even though the charge was deferred and dismissed 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 (dismissals related to completion of drug treatment program).
- Offenses under 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.
- A dismissal under any other Michigan law or of one of its political subdivisions similar in nature and applicability to these that provides for the deferral and dismissal of a felony or misdemeanor charge.

Application for expunction

The act requires certain information, such as a certified record of each conviction to be set aside, to be included with the application for setting aside a conviction, as well as several statements. The bill would revise the information currently required to be on one of those statements and require an additional statement as follows:

- A statement that the applicant had not been convicted of an offense other than the conviction or convictions sought to be set aside as a result of the application and any nondisqualifying convictions described in subsection (1)(a). (Currently, this statement requires the applicant to state that he or she had not been convicted of an offense other than the conviction being sought to be set aside and not more than two minor offenses, if applicable.)
- A statement listing all actions enumerated in subsection (2) that were initiated against the applicant and have been dismissed.

[Subsection (1)(a) pertains to the one or two misdemeanor convictions that a person may have and still be eligible to apply to set aside a felony. Subsection (2) pertains to offenses which were deferred and dismissed.]

Time limitations for filing an application

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 4186 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.

Further, 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.

Divulging Information Regarding an Expunged Record

Currently, a person other than the applicant who knows or should have known that a conviction was set aside under Section 3 of the act may not divulge, use, or publish information concerning the set aside. A violation is a misdemeanor punishable by imprisonment for not more than 90 days and/or a fine of not more than \$500. The bill would delete the criminal penalty.

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 verify whether 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 but only 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 court would still have to determine that the expunction was warranted and consistent with the public welfare.

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 specified in the act and to forward them electronically. (This change in the statute 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.)

Definitions

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.)

The bill would delete the definition of "minor offense".

MCL 780.621, 780.623, and 780.624

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 five legislative sessions. House Bill 5493 in the 2003-2004 session and House Bill 4327 in the 2005-2006 session were passed by the House but failed to see action in the Senate. House Bill 5213 in the 2007-2008 session, House Bill 4405 from 2009-2010, and House Bill 4106 of last session were reported from committee but died on the House floor.

Senate Bill 159 of the 2011-2012 legislation session, which became Public Act 64 of 2011, expanded eligibility for expunction so that a person could 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. Others may be unemployed because of federal mandates for certain occupations.

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 rather than society continuing to pay to support them.

The current law is inadequate because it is not unusual for a single transgression to result in multiple charges and convictions. Even a minor misdemeanor conviction makes a person ineligible to have a felony or misdemeanor for a separate offense expunged, whether the events happened at the same time or years apart. Though Public Act 64 of 2011 enabled adult offenders to set aside a felony or misdemeanor if they had one or two minor misdemeanor offenses, that act defined "minor misdemeanor" as 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, if any, have been eligible to avail themselves of that act's provisions. If the intent is to get those working who have turned their lives around, House Bill 4186 would have a broader impact while still preserving public safety and victims' rights. 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 that is being considered 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.

Further, as is the law currently, certain serious felonies (for instance, rape or murder) and any traffic offenses would remain on a person's record. And, the bill would expand the crimes for which a conviction could not be expunged to include criminal sexual conduct in the fourth degree or a felony domestic violence conviction if the person also had a misdemeanor domestic violence conviction. This latter provision is important because perpetrators of domestic violence tend to repeat their battering behaviors.

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. Though eligibility to apply for expunction would be expanded, only a few hundred ex-offenders may become eligible under the new provisions by some estimates. Thus, the bill applies to the most deserving of ex-offenders - those with a low number of offenses who have demonstrated that they have been rehabilitated.

Applicability would be limited somewhat because the bill will also count all of a person's convictions when determining eligibility to apply for an expunction. An offense that did not result in a conviction because it was deferred and the charges dismissed after the successful completion of probation would still be counted as a misdemeanor and thus could make a person ineligible for consideration under the bill if the deferred and dismissed convictions put the person over the one felony/two misdemeanor limit.

For:

The bill eliminates a current provision that criminalizes the act of divulging, using, or publishing information concerning a conviction set aside under the act. Apparently, this provision has become problematic in that it even applies to a victim. Thus, a family in which one member was a crime victim cannot even speak about the crime to each other once the offender successfully had the conviction expunged. It would seem that this was not the intent when this language was originally placed in the statute.

Response:

To eliminate the provision prohibiting divulging information about an expunged offense may have other unintended consequences. Many statutes that protect nonpublic information have similar criminal penalties for unlawful disclosure, but these are generally directed at current and past employees of the agency or agencies having access to such information in the scope of employment. Usually people are free to disclose personal information if they choose to do so. If a victim is currently prevented from speaking of what happened just because the offender was able to set aside the conviction, that can be easily addressed by an amendment narrowing the applicability of the ban on disclosure. To eliminate the criminal penalty altogether may violate the intent and spirit of the expungement provision -- which is to make a conviction that was set aside a nonpublic record.

Against:

Some view the bill as being soft on crime – protecting the rights of the criminal over the rights of law-abiding citizens. If all a person has is one conviction, current law allows it 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, including judges and prosecutors, say the bill is not "soft on crime." In fact, a person would have to wait longer under the bill 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. 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, the bills are far from applying to career criminals. Sometimes a person is charged with more than one crime arising from a single transaction. So, one bad day of poor decisions can ruin a person's life forever. Or, due to immaturity, the company they keep, or substance abuse, they may commit a couple low-level crimes close together. Judges are able to make a distinction between a person who represents a danger to society and a person who made a one-time, or two-time, mistake. Some states even allow all the convictions arising out of a single transaction to be counted as just one conviction for the purposes of determining eligibility under their expunction laws.

Moreover, diversion programs are a fairly recent addition to the criminal justice system. They simply were not available to many until recently. Further, restrictions on occupational licenses or eligibility to work in some professions based on a person's criminal history are also relatively new. Therefore, some men and women in their forties and fifties, who have been crime free for decades, are still unable to overcome hurdles created by more recent policies. For those still facing discrimination in employment and housing two and three decades later, the bill represents the hope of truly being able to put their pasts behind them.

POSITIONS:

Representatives of the following entities testified in or indicated support for the bill:

The Clinton County Prosecutor (5-8-13)
The State Bar of Michigan (5-8-13) and (5-15-13)
The Prosecuting Attorneys Association of Michigan (5-8-13)
The ACLU of Michigan (5-8-13) and (5-15-13)
The Department of State Police (5-8-13)
The Prisons and Corrections Section of the State Bar of Michigan (5-8-13)
The Criminal Defense Attorneys of Michigan (5-8-13) and (5-15-13)
The Michigan District Judges Association (5-8-13)
The Michigan Judges Association (5-8-13)

A representative of the Office of Attorney General testified that the office is neutral on the bill. (5-8-13)

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Mark Wolf

■ 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.