

Legislative Analysis



REVISE CRITERIA FOR EXPUNCTION OF CRIMINAL RECORD

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

House Bill 5213 (Substitute H-1)
Sponsor: Rep. Andy Coulouris
Committee: Judiciary

First Analysis (4-22-08)

BRIEF SUMMARY: The bill would allow, under certain circumstances, a person to apply to have a felony conviction expunged even if he or she had also been convicted of one or two misdemeanor offenses, and 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 to 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 have an indeterminate fiscal impact for the Department of State Police. The cost for processing fingerprints is \$54 and this bill would change the requirement for an applicant from submitting two sets of fingerprints to submitting one set of fingerprints to the State Police. It is unknown how many applicants would submit their fingerprints to the State Police for this purpose. This bill also requires the State Police to forward an electronic copy of the applicant's fingerprints to the FBI and this could generate some staff costs and other administrative costs.

THE APPARENT PROBLEM:

Michigan law allows a person with only one criminal conviction to 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 expungement. However, if a person has two misdemeanor convictions, even if those were for minor, nonviolent offenses, he or she is not eligible to have either of those convictions expunged, and so may be affected for a lifetime.

It is estimated that 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. Even a misdemeanor conviction for a non-violent offense can keep a person from receiving an occupational license under state law. In addition, many ex-offenders are denied housing, 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. Lack of employment also results in many of these people being forced to apply for state aid and decreases the ability of non-custodial parents to pay child support.

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 one or two minor misdemeanor offenses, or allow a person with only one or two misdemeanors 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 can apply to the court for an order setting aside the conviction. However, 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 5213 would amend Public Act 213 (MCL 780.621) to instead allow 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. For purposes of eligibility only under this provision, a traffic offense would not constitute a misdemeanor, except for violations of the drunk driving laws.
- 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.

The bill would keep the current exclusion for a felony offense that is punishable by life imprisonment (which includes CSC in the 1st degree); for 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 for traffic offenses.

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 5213 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 the imposition of the sentence or the completion of the probation or parole imposed for that felony or misdemeanor, or at least five years after completing imprisonment, whichever occurred later.

When misdemeanors cannot be set aside. If a person was convicted of more than one misdemeanor for any of the following crimes, he or she would not be allowed to apply to set aside any of those convictions, and a judge could not set aside a misdemeanor conviction:

** A crime in which the victim was a spouse, a former spouse, an individual with whom he or she has had a child in common, an individual with whom he or she has or has had a dating relationship, or an individual residing or who had resided in the same household.

("Dating relationship" would mean that term as defined in Section 2950 of the Revised Judicature Act.)

** A conviction for assault and battery (including a domestic violence-related assault and battery); aggravated assault; misdemeanor stalking; threats or assaults against a person who works for the Department of Human Services, known as Lisa's Law; various assaultive crimes against a pregnant woman; indecent exposure; and child abuse.

Also, a person could not apply to set aside, and a judge could not set aside, any misdemeanor conviction if a person had been convicted of two misdemeanors and in addition to those convictions had had one or more additional actions previously dismissed under a number of statutory provisions that allow for the deferral and dismissal of charges.

These provisions 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 assignment of youthful trainees; assault on a spouse, former spouse, individual with a child in common, person in a dating relationship, or household resident; and 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; and Section 430 of the Penal Code, which deals with health professionals working under the influence of alcohol or controlled substances. Included in the types of misdemeanors that couldn't be expunged under the bill would be a conviction of "any other law of this state or of a political subdivision of this state similar to those listed that provides for the deferral and dismissal of a felony or misdemeanor charge."

Definition of Misdemeanor. The bill would define a "misdemeanor" as being a violation of a state penal law that is not a felony; 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; a local ordinance in this state that substantially corresponds to certain misdemeanors listed in the bill that is not a felony; a violation of the law of another state or political subdivision of another state substantially corresponding to listed Michigan misdemeanors that is not a felony; and a similar violation of federal law. "Felony" would mean a violation of a state penal law punishable by imprisonment for more than one year or expressly designated by law to be a felony. (Under this definition, and only for the purpose of an application to have a conviction set aside, a misdemeanor punishable by up to two years imprisonment would be treated like a felony conviction.)

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. (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.)

Repealer. The bill would repeal Section 4 of the act which provides that only one conviction can be 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 both of the previous two legislative sessions - House Bill 4327 in the 2005-2006 session and House Bill 5493 in the 2003-2004 session. Both bills were passed by the House but failed to see action in the Senate.

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. 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. It is easy to see how the poverty and homelessness experienced by some with criminal records can affect not just them, but their families and society as a whole. In addition, unemployment and homelessness raise the risk for reoffending.

Many who have tried to turn their lives around have felt thwarted by the stigma attached to their criminal records. Others have been plagued by a single action from long ago. Expungement offers these people an opportunity to turn their lives around and be productive members of society.

Expunction of serious crimes, such as murder and most sex crimes, would still be prohibited under the bill. Important safeguards built into the existing law would also remain unchanged. Therefore, prosecutors, the attorney general, and victims of assaultive crimes would still be notified of an application for an expunction and could object. Expunction would not be automatic upon application; as is the case now, a court must determine the merit of each application.

House Bill 5213 will, however, provide hope and an incentive for more individuals (those with two misdemeanor convictions or a felony and up to two misdemeanors) to make better decisions and life choices. It will facilitate successful reentry into society, lessen the burden on state agencies to provide aid to those unable to find jobs, decrease

homelessness, decrease recidivism rates, and increase the ability for noncustodial parents to comply with child support orders. Therefore, the bill represents a win/win measure for society as well as for the individual who has since turned his or her life around.

For:

Currently, a person can apply to have his or her criminal record wiped clean only if he or she has only one eligible felony or misdemeanor offense. Many advocates feel this is unfair because it is common for a single transgression to result in more than one criminal charge and conviction. Also, a person who had a felony conviction from long ago would be ineligible to apply for expunction today if he or she were convicted more recently for a minor misdemeanor offense or even for some traffic-related offenses. The law needs to be changed, especially considering the impediments for housing and employment created by not being able to expunge a felony or misdemeanor conviction from long ago simply because of having a couple of minor misdemeanor convictions.

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, he or she would have to wait (1) five years from sentencing or after completing a term of imprisonment, or (2) five years after a term of probation or parole ends (which occurs after sentencing or release from jail or prison), whichever is later. 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 expungement of two misdemeanors as being lenient, sometimes a person is charged with more than one crime arising from a single transaction. And under the bill, certain crimes that tend to be repetitive, such as domestic violence, stalking, and child abuse would be treated differently. A person could only have one such crime expunged from his or her record in a lifetime; if the person already had two convictions of any of the listed crimes, then neither of those could be expunged. In this way, a distinction can be drawn 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.

Against:

To avoid lengthy and costly trials at taxpayers' expense, or to spare victims the agony of sitting through a trial, many offenders are offered plea bargains. Plea bargains allow an offender to admit guilt, but to a lesser offense. For instance, the offense may have been for a crime that could not be expunged under either current law or the bill, or perhaps the prosecutor dropped any multiple charges that could have been added. Therefore, a plea deal could allow one offender to have his or her record wiped clean in the future when a person committing the same crime or crimes who was convicted at trial of the original charge or charges, or who had never been offered a plea deal, would remain ineligible. In a nutshell, it means that some who are guilty of a heinous offense that would make them ineligible for expunction could have their records wiped clean in time merely by having accepted a plea bargain. It seems unfair to victims to allow this.

Response:

It is true that many sentences result from plea agreements rather than conviction at trial, and that the pled-down offense could be eligible for expunction whereas the initial charge would not. However, this is true currently. The bill merely expands eligibility to a person with a felony and not more than two misdemeanors, or to a person with two misdemeanors - instead of one felony or one misdemeanor conviction. As always, expunging a criminal record is a privilege; it is not automatic and is at a judge's discretion. The judge would be able to review the elements of the crime, and victims would still retain the right to have input into the judge's decision.

POSITIONS:

Representatives of the following entities testified in support of the bill on 4-16-09:

Prosecuting Attorneys Association of Michigan (PAAM)
Willy E. Thompson Fellowship Program
Mt. Calvary Baptist Church

The State Bar of Michigan supports the bill, as does the State Bar's Committee on Justice Initiatives, Criminal Jurisprudence and Practice Committee, Criminal Law Section, and Prisons and Corrections Section. (4-16-08)

The Michigan Department of Corrections is neutral on the bill. (4-16-08)

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Ben Gielczyk
Bethany Wicksall
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.