

Legislative Analysis



REVISE CRITERIA FOR EXPUNCTION OF CRIMINAL RECORD

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House Bill 4405 as introduced
Sponsor: Rep. Andy Coulouris
Committee: Judiciary

First Analysis (6-17-09)

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 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 have an indeterminate fiscal impact on 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 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 those are for minor, nonviolent offenses.

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. Many national companies have iron-clad policies that exclude ex-felons from employment. Even a misdemeanor conviction for a non-violent offense can prevent a person from receiving an occupational license under state law. Many professions are now required by statute to do fingerprint checks on applicants and employees and refuse employment if the person had been convicted of certain crimes. 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.

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:

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.

Public Act 213 of 1965 provides a mechanism by which a person who has only one criminal conviction (a felony or a misdemeanor) 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 4405 would amend Public Act 213 (MCL 780.621, 780.623, and 780.624) 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.
- 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.

For purposes of eligibility only under either of these provisions, a traffic offense would not constitute a misdemeanor, except that a violation of the drunk driving laws (including operation of a commercial vehicle) or of a substantially corresponding local ordinance, law of an Indian Tribe, state law, or federal law would constitute a misdemeanor.

(For instance, a person who had been convicted of one felony and three misdemeanors with one of the misdemeanors being a traffic offense that was not related to driving under the influence or while impaired, would be eligible under the bill to petition to have the felony set aside. In another example, a person who had two misdemeanor convictions, but no felony convictions, could petition to have both expunged if both did not involve drunk driving; if one was for drunk driving, the person could petition to have the non-drunk driving conviction expunged. A person having three misdemeanor convictions, one of which was a non-drunk driving traffic offense and the other two being non-traffic

offenses, could petition to have either or both of the non-traffic convictions expunged because the non-DUI traffic offense would not count as a misdemeanor for purposes of eligibility under the bill; however, if the third misdemeanor did involve a drunk-driving conviction, the person would be ineligible to have any of the misdemeanors set aside.)

"Indian tribe" would mean an Indian tribe, Indian band, or Alaskan Native Village recognized by federal law or formally acknowledged by a state.

Definition of misdemeanor and felony. The bill would define a "misdemeanor" as being a violation of a state, federal, or tribal penal law that is not a felony; 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; a violation of 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 or federal penal law punishable by imprisonment for more than one year or expressly designated by law to be a felony. However, the bill specifies that this definition would not apply to the eligibility criteria for applying to have a felony conviction set aside.

When felonies cannot be set aside. The bill would keep the current exclusion for expunction of a felony offense 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. However, the bill would add to the list of offenses 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 or has had a dating relationship, or an individual residing or who had resided in the same household as the person. "Dating relationship" would mean that term as defined in Section 2950 of the Revised Judicature Act.)

When misdemeanors cannot be set aside. If a person was convicted of more than one misdemeanor for any of the following crimes, a conviction for violating or attempting to violate any of the following could not be set aside:

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

** 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.

When expungement does not apply. A person could not apply to set aside, and a judge could not set aside, any 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; Section 430 of the Penal Code, which deals with health professionals working under the influence of alcohol or controlled substances; and a conviction of 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.

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 4405 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, the completion of the probation or discharge from parole imposed for that felony or misdemeanor, or at least five years after completing imprisonment for that conviction, whichever occurred later.

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 would also require the applicant to include a statement listing all actions pertaining to discharge and dismissal enumerated in the bill that were initiated against the applicant but 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.

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 the previous three 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. Last session, House Bill 5213 was reported from committee but died on the House floor.

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. Others have been plagued by a single action from long ago.

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 expungement 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.

To illustrate the need for reform, the bill's sponsor related the story of a constituent who had been convicted at 17 years of age of armed robbery. Now in his late 40s, the man had been offered a good job with full benefits after years of being a "jobber" – hopping from one job to another. However, the company policy prohibited the hire of anyone with a felony conviction. The man was ineligible to apply for expunction because he also had one misdemeanor conviction on his driving record of operating while impaired.

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 4405 will, however, provide hope and an incentive for more individuals. Those with one or two misdemeanor convictions could apply to set aside one or both of the misdemeanors. A person with one felony conviction and no more than two misdemeanors could apply to have the felony removed. Doing so will enable these individuals 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, individuals can apply to have their criminal records wiped clean only if they have 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 had been 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 a criminal record.

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 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.

Against:

A few provisions of the bill remain problematic. For instance, the bill defines "felony", but then states that that definition does not apply to the type of felony convictions for which a person would be eligible to petition to have expunged. It is not clear what "felony" would mean in that instance.

In addition, there appears to be some incongruities regarding previous domestic violence convictions and eligibility to have other convictions expunged under the bill. Perpetrators of domestic violence tend to repeat their battering behaviors. Because it is a crime of repetition, some feel it is important to limit the number of "free passes" for perpetrators of domestic violence. Current law allows one charge of a misdemeanor assault involving domestic violence to be discharged and dismissed if probation conditions are successfully completed. This provides an opportunity to separate a one-time incident of bad conduct from a pattern of battering behaviors. However, as currently written, the bill could be read as allowing – in some instances – persons with multiple domestic violence convictions to have their slates wiped clean. Yet, a person with two non-domestic violence misdemeanor convictions would not be eligible to have either or both expunged if he or she previously had had one misdemeanor domestic violence charge discharged and dismissed.

POSITIONS:

The Department of Corrections indicated support for the bill. (5-13-09)

A representative of the Prosecuting Attorney's Association of Michigan testified in support of the bill. (5-13-09)

The Center for Civil Justice indicated support for the bill. (5-13-09)

The State Bar of Michigan supports the bill with the clarification that it does not expunge offenses from the driving record or any records maintained by the state's driver's licensing board. (6-17-09)

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■ 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.