

ALLOW EXPUNCTION OF ONE FELONY OR TWO MISDEMEANORS

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House Bill 5545 (reported from committee as Substitute H-1)

Sponsor: Rep. Tom Leonard

Committee: Judiciary

First Analysis (10-31-14)

BRIEF SUMMARY: Public Act 213 of 1965 provides for the setting aside (or expunging) of convictions under certain circumstances. House Bill 5545 would amend the act 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.
- Eliminate the provision allowing a felony or a misdemeanor to be expunged if the individual had no more than two "minor offenses."
- Add to the list of offenses that may not be expunged, by including fourth-degree CSC.
- Allow a conviction for fourth-degree CSC to be expunged under certain circumstances if the conviction occurred before the bill's enactment.
- 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.
- Revise a prohibition on divulging information regarding an expunged conviction to exempt a victim.
- 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:

Expunction, or expungement, refers to the ability of a person who has been convicted of certain crimes to apply to a court to have that conviction "set aside" and the public record of that conviction closed to public access (i.e., criminal history background checks for employment). Generally speaking, under Michigan law, a person who has one felony conviction or one misdemeanor conviction, and no more than two convictions for a minor offense, can apply to have that felony or misdemeanor conviction expunged. A minor offense is one that carries a maximum term of imprisonment of 90 days, a maximum fine of \$1,000, and that was committed by a person not more than 21 years of age. Not all applications for expungement are granted, and convictions for certain crimes are not eligible to be set aside; for instance, murder, rape, traffic offenses, and certain crimes involving child pornography are examples of criminal convictions that will stay on a person's record forever.

Critics of Michigan's current expunction policy say it is one of the harshest in the nation and doesn't fit with current research findings. For example, research supports that appropriate treatment or participation in certain types of programs can have a significant impact on reducing the likelihood that a person will commit a new crime. Assignment to specialty courts – which provide intensive judicial oversight and often require participation in a treatment program – are helping many to overcome substance use disorders or to get appropriate care for a mental illness and also appear to reduce the likelihood of recidivism. New evidence-based strategies for assessing a prisoner's recidivism risk is providing parole boards with important information when deciding if parole is appropriate. Initial data on the Michigan Prisoner ReEntry Initiative (MPRI), which provides parolees with support services such as finding housing and employment, also appears to be having a positive impact on recidivism.

A strong predictor of staying on the straight and narrow is the ability to find housing and employment. Lack of either or both are associated with a higher risk of reoffending. Yet, recent state and federal policies that, among other things, prohibit persons with certain convictions from obtaining occupational licenses, working in certain fields, obtaining food stamps under the SNAP program, being eligible for student loans, or living in certain areas greatly impact the ability of ex-offenders to find gainful employment. Moreover, many large or national employers have policies that prohibit employing anyone with a felony conviction regardless of the nature of the offense, how old the offense is, and if the person has demonstrated being rehabilitated.

A 2008 Pew Center on the States paper found that more than one in 100 adults in the US are incarcerated, with "one in every 53 people in their 20s behind bars." (Pew Center on the States, *One in 100: Behind Bars in America 2008*) Such data is important because most of those people will be released and reintegrated into society; most do not pose a risk, or pose low risk, of reoffending; and because current public policies that keep those people from getting a job or a place to live increase their risk of reoffending.

Some believe that one way to address the issue to take another look at the state's expunction statute. Often a person's brush with the law centers on one bad day, or one bad period of time. It is not uncommon for a person convicted of a felony offense to also be charged with, and convicted of, one or two lesser offenses arising out of the same event. Or maybe someone violated the law on a couple of occasions in a short period of time. The point is, many ex-offenders find that though told they can have a second chance if they turn their lives around, the reality is that their past continues to thwart them from moving forward. If the state's expunction laws were to be broadened slightly, to allow more individuals who demonstrate a crime-free life to be eligible to have one or two of their mistakes wiped off the public record, then recidivism rates may continue to drop and stay down as ex-offenders are able to find viable employment and good housing. Victim's advocates, however, say it is also important to maintain protections for victims and the general public by not creating free passes for those committing the types of crimes that tend to be crimes of repetition, such as domestic violence or sexual assaults.

Over the past decade, there have been at least six previous attempts to amend the expunction statute. Stakeholders across the criminal justice system, including the courts, prosecutors, defense attorneys, the ACLU-MI, and advocates for victims and for ex-offenders have provided input on the bill under discussion. Though total agreement on every issue has not been reached, there is wide agreement that the current statute is outdated and should be broadened to broaden eligibility to apply to have a criminal conviction set aside.

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. In addition, a person may apply to have a felony or a misdemeanor conviction expunged even if that person also has a conviction for one or two minor offenses.

A "minor offense" is defined to mean a misdemeanor or ordinance violation for which the maximum term of imprisonment is 90 days, for which the maximum fine does not exceed \$1,000, 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.

House Bill 5545 would amend Public Act of 213 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.
- The bill would delete the provision allowing a person to apply to expunge a felony or misdemeanor if the person had one or two minor offenses and would also delete the definition of "minor offense."

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 several changes to the list of convictions a person could not apply to have set aside, or that a judge could not set aside:

- Add a violation or attempted violation of criminal sexual conduct in the fourth degree. (If the conviction occurred before the bill took effect, the person could apply for an expunction *if* the person did not have any other convictions other than not more than two minor offenses.
- Add a violation or attempted violation of second degree child abuse or a violation or attempted violation of Dominick's law – committing second degree child abuse in the presence of another child.
- 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.)
- Add a violation of Chapter LXVIIA (Human Trafficking) or Chapter LXXXIII-A (Michigan Anti-Terrorism Act).
- 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 they are assigned youthful trainee status under the Holmes Youthful Trainee Act (HYTA). In "deferral and dismissal" and HYTA cases, although 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, 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 5545 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 would have to 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 exempt the victim from the prohibition on divulging information about a conviction set aside under Section 3 and from the related criminal penalties. For the purposes of this provision, "victim" would mean any individual who suffers direct or threatened physical, financial, or emotional harm as the result of the offense that was committed by the applicant.

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 even then 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 include 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 and notification to victims

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, who would retain the right to appear at any proceeding concerning that conviction and 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 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.)

MCL 780.621, 780.623, and 780.624

BACKGROUND INFORMATION:

The bill is similar to House Bill 4186; that bill was previously reported by the Criminal Justice Committee and is awaiting House floor action. 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 (defined as a misdemeanor with a maximum term of imprisonment of 90 days, a maximum fine of less than \$1,000, and committed when the person not more than 21 years).

ARGUMENTS:

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 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 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 few 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 unemployable 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.

For:

Critics say that one reason the current law is inadequate is 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 5545 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:

The bill addresses a problem arising from the current ban on disclosing information about an expunction by exempting a victim from the current provision that criminalizes the act of divulging, using, or publishing information concerning a conviction expunged under the act. Apparently, this provision has become problematic in that it appears to say that a family in which one member was a crime victim cannot even speak about the crime to one other once the offender successfully has the conviction set aside. It is doubtful this was the intent when this language was originally placed in the statute.

For:

Under the bill, a conviction for criminal sexual conduct (CSC) in the fourth degree would no longer be eligible for expunction. Since many sex crimes are pled down (meaning that the offender was originally charged with a higher level offense that would have resulted in a longer prison sentence and a longer period of registration as a sex offender), many who advocate for sexual assault victims feel this is an appropriate change.

Response:

While it is common to apply changes to criminal statutes *prospectively* – meaning that the changes apply only to offenses occurring after the statutory change, the bill would instead effectively prohibit expunction for many convictions of fourth-degree CSC that occurred in the past. This is because the bill conditions eligibility for expunction on having no more than two "minor offenses" in addition to the fourth-degree CSC. As previously stated in the analysis, there are few crimes that have a maximum term of imprisonment of 90 days, and even then, restricting the commission of those crimes to when the person was 21 or younger further limits who would qualify to apply for a set aside. Practically speaking, only those who had no other criminal conviction could qualify once the bill becomes law.

As to the argument regarding too many offenders pleading to lesser charges and essentially getting a "free-pass" by later expunging a first-time CSC 4 offense, it should be noted that many prosecutors "charge high" initially, and then accept plea deals when it becomes apparent that evidence to support the higher charge is non-existent.

In addition, based on the law at the time, some persons may have pled for various reasons to fourth-degree CSC even though the contact was consensual, such as to spare a girlfriend or a boyfriend the pain of a trial if the charges had been initiated by the victim's parent. Passage of this bill would now render them ineligible for expunction if they have an additional misdemeanor on their records. Had they known they would not be eligible for a set aside, they may have gone to trial rather than accept a plea.

Further, CSC 4 is a crime of sexual *contact*, not penetration. As a high misdemeanor offense, it already has serious consequences because it has a maximum sentence of two years and can therefore be counted as a felony for certain purposes – including if applying for expunction under House Bill 5545 for that or another offense. Thus, if a

person had a felony property crime conviction and a misdemeanor conviction for fourth-degree CSC, neither conviction would qualify for expunction under the bill as the person would be deemed as having two felony convictions. And, even if expunged, the state's public sex offender registry would contain that information. Thus, even if the law continued to allow expunction of fourth-degree CSC offenders would still be subject to serious consequences.

Lastly, because of the he said/she said nature of some incidents, it is appropriate that expunction for fourth-degree CSC be continued. As stated many times, current law does not require an offense to be set aside just because an ex-offender asks; only those who can demonstrate to a court that they have earned this second chance may find their wish granted. A person who can demonstrate that he or she is not a sexual predator should not have to live forever under the stigma of a sex offense.

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 some circumstances, a person may have to wait longer under the bill before being eligible to apply for an expunction. Currently, a person need only wait five years from sentencing or five years after being released from jail or prison. Conceivably, a person could still be on parole at that point. The bill clarifies the five-year waiting period begins not just after sentencing or serving the full jail or prison term, whichever occurred last, but after any period of probation or parole served after release from incarceration. This should be a sufficient time period to demonstrate to the court a change in behavior.

As to viewing the expunction of two misdemeanors as being lenient, or a felony if the person also had no more than two misdemeanor convictions, 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 of 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. And, 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:

The following entities testified or indicated support for the bill on 6-5-14 and/or 10-2-14:

Michigan Judges Association
State Bar of Michigan
Michigan Coalition to End Domestic and Sexual Violence
Prosecuting Attorneys Association of Michigan

The Criminal Defense Attorneys of Michigan indicated a neutral position on the Committee-passed version of the bill. (10-2-14)

The ACLU of Michigan indicated opposition to the Committee-passed version of the bill. (10-2-14)

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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.