

# Bar Briefs

Official Publication of the Macomb County Bar Association

March 2015

## Left Hand



Volume 33

Number 08

# The New Michigan Expungement Statute

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On January 15, 2015 Michigan gained a new expungement statute with the enactment of Public Act 463 of 2014 amends 213 PA 1965. PA 213 of 1965 allowed a single conviction to be set aside and be included on the nonpublic record and was considered one of the most stringent expungement statutes in the country. Or, as I like to call it, “The Only Recourse for the One Big Dumb Mistake I Made In My Life- Statute.” This article is largely excerpted from the Act and its Fiscal Analysis.<sup>1</sup> I suggest the members of the Bar fully acquaint themselves with the requirements and definitions of the Expungement Application to Set Aside a Conviction under the new Act to first determine if the petitioner qualifies for expungement.

Expunction, or expungement, refers to the ability of a person who has been convicted of certain crimes to apply to a court to have the conviction “set aside” and the public record of that conviction closed to public access (i.e., criminal history background checks for employment).

The theory was that after an individual had done their time, his debt to society was paid. The reality for many one-mistake felon ex-offenders is that society will never forgive or forget. For example, employers who will not hire, denial of occupational licenses, federal exclusions, landlords that will not rent, et. al. Hence a cycle of increased unemployment, poverty and homelessness, resulting in recidivism or in the least public assistance.

The new law will enable some previously ex-offenders to have a clean slate. Generally speaking, under the new Michigan Law, a person who has one felony conviction and two misdemeanor convictions can apply to have that felony conviction expunged. A person with two misdemeanor convictions may apply to have one or both expunged, five (5) years after imposition of the sentence, completion of probation, discharge from parole or completion of imprisonment, whichever is longer. This time requirement was lengthened under the new Act.

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; 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 including OWI. “Operating while intoxicated” would mean a violation of the drunk and drugged driving laws listed in Section 625 and 625m (commercial drivers) of the Michigan Vehicle Code or any substantially corresponding local ordinance, tribal, law of another state, or federal law.

A conviction cannot be set aside for 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 could not be set aside. A felony conviction for domestic violence could not be set aside if the person has a prior misdemeanor conviction for domestic violence. (“Domestic violence” would mean that term as defined in the domestic violence statute.<sup>2</sup>) A violation of Chapter LXVII-A (Human Trafficking) or Chapter LXXXIII-A (Michigan Anti-Terrorism Act) could not be set aside.

Most significantly, previous Deferral/Dismissals are counted as misdemeanor convictions in determining eligibility for expunction. Currently, some misdemeanor offenses allow a first-time offender to have the conviction deferred; if the offender successfully completes probation, the charges are dismissed. The Act would consider such a deferral and dismissal as a misdemeanor when determining a person’s eligibility for expunction of a different felony or misdemeanor. Specifically: Dismissals under Section 703 of the Michigan Liquor Control Act (purchase, possession, and consumption for a minor).<sup>3</sup> Section 1070(1)(b)(i) or 1209 of the Revised Judicature Act (dismissals related to completion of drug treatment program)<sup>4</sup> Offenses under the Code of Criminal Procedure dealing with assignment of youthful trainees<sup>5</sup>, domestic violence<sup>6</sup>, or cases of delayed sentencing. Section 7411 of the Public Health Code relating to first time drug offenses.<sup>7</sup> 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.<sup>8</sup> Section 430 of the Penal Code, which deals with health professionals working under the influence of alcohol or controlled substances.<sup>9</sup> 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.

A misdemeanor is essentially defined as an offense punishable by imprisonment for not more than one (1) year or a fine that is not a civil fine. Thus, a two (2) year misdemeanor is defined as a felony.

A felony is essentially defined by the penal code as a felony in this state or another state that is punishable by more than one (1) year imprisonment.

Procedurally the Act still requires fingerprint cards and notice to the Michigan State Police, Attorney General, Prosecuting Attorney and the victim. As used in this section, "VICTIM" means any individual who suffers direct or threatened physical, financial, or emotional harm as the result of the offense that was committed by the applicant. But the Petitioner must also affirm, "I have 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 non-disqualifying convictions," and declare what they are. Realistically, if any of the above notified parties object, it is unlikely to be granted. All decisions whether to grant the request are still entirely discretionary with the original trial court.

The nonpublic record maintained under subsection (2) of the Act is exempt from disclosure under the Freedom of Information Act, 1976 PA 442.<sup>10</sup>

In this age of hyper social media and convictions on the internet by gossip and character assassination, the Act does provide for which I affectionately call the "Hater's Penalty Provision." That is if a person, other than the applicant or a victim, who knows or should have known that a conviction was set aside under this section and who divulges, uses or publishes information concerning a conviction set aside under this section is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more that \$500.00 or both.

Expungement cases are not for the faint of heart and have discouraging ramifications. If for any reason the petition is denied, it cannot be filed again for three (3) years. Notably due diligence should be exercised before filing an Expungement Application and its required supplements due to the increasingly detailed specificity of the qualifications/exclusions. It has been my experience the qualifying requirements and exclusions are strictly applied.

For the relatively few people who qualify and are granted expungement, it would have to be clearly deserving. Thus, the new Michigan Expungement Statute more aptly may be entitled "My One Big Dumb Mistake Statute" as I believe it is more accurately comparable to a judicial version of Executive Clemency after serving a jail term. But the real benefit of the statute is to those who have made one (1) big mistake in their lives and it gives them a small flicker of hope for judicial redemption. The following entities testified or indicated support for the bill that became PA 463: The Michigan Judges Association, State Bar of Michigan, Michigan Coalition to End Domestic and Sexual Violence and Prosecuting Attorneys Association of Michigan.

#### CITATIONS

<sup>1</sup> MCL 780.621 and MCL 780.623

*House Fiscal Agency*

*HB 4186 Analysis*

*House Fiscal Agency*

*Susan Stutzky: Legislative Analyst*

*Mark Wolf: Fiscal Analyst*

<sup>2</sup> MCL 400.1501

<sup>3</sup> *Minor in Possession MCL 436.1703*

<sup>4</sup> *Drug Tribunal Court MCL 600.1070 (1)(B)(i) or 600.1209 (veterans)*

<sup>5</sup> *Holmes Youthful Trainee Act MCL 762.13*

<sup>6</sup> *Spouse Abuse Act MCL 769.4 A*

<sup>7</sup> *Controlled Substance Act MCL 333.7411*

<sup>8</sup> *Parental Kidnaping Act MCL 750.350a*

<sup>9</sup> *Health Professionals Practicing Under the Influence MCL 750.430*

<sup>10</sup> *MCL 15.231 to 15.246*

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