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BILL ANALYSIS

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Senate Bill 1177 (Substitute S-1 as reported)
Sponsor: Senator Mike Rogers
Committee: Judiciary

Date Completed: 11-6-96

RATIONALE

Public Act 213 of 1965 allows a person who is convicted of not more than one offense to file an application with the convicting court to have the conviction set aside. An expunction application may not be filed until five years after the imposition of the sentence for the conviction or five years following completion of any term of imprisonment for that conviction, whichever occurs later. The Act provides that a person may not apply to have set aside, and a judge may not set aside, a conviction for a felony for which the maximum punishment is life imprisonment. The Act also specifies that, if the court determines that the applicant's circumstances and behavior from the date of conviction to the filing of the application warrant setting aside the conviction, and that expunging the conviction from the applicant's record is consistent with the public welfare, the court may order the conviction set aside.

Two separate panels of the Michigan Court of Appeals have held that, in determining whether to grant a petition for expunction, a court may not decide the issue based solely on the nature of the offense, but must consider the applicant's behavior and circumstances since the conviction. Some people believe that, although it may be appropriate to provide for a legal option to have a sole criminal conviction purged from a person's record several years after a violation if the convicted person has turned his or her life around, it is not appropriate to allow the expunction of certain criminal sexual conduct (CSC) convictions. They contend that, due to the serious and sensitive nature of those crimes and the apparent lack of success in rehabilitating persons who commit CSC offenses, the law should prohibit the expunction of CSC felonies. (See **BACKGROUND** for a discussion of the Court of Appeals cases.)

CONTENT

The bill would amend Public Act 213 of 1965 to prohibit the expunction of a conviction for first-, second-, or third-degree CSC, assault with intent to commit CSC, or an attempt to commit a felony for which the maximum punishment is imprisonment for life. The bill would add the CSC offenses and an attempt to commit a life-maximum offense to the provision prohibiting expunction of a conviction for a life-maximum offense.

MCL 780.621

BACKGROUND

People v *Boulding*, 160 Mich App 156 (1986)

Wiley C. Boulding petitioned the Circuit Court for Kent County to have the record of his 1977 conviction for fourth-degree CSC expunged. The applicant had originally been charged with third-degree CSC. Boulding testified that he had been in no legal trouble, had been employed, and was seeking employment at the time of the expunction application. The prosecuting attorney, although in opposition to the petition, acknowledged the applicant's exemplary character since the conviction. The court denied Boulding's expunction application, based on the prosecutor's objections and the nature of the offense. Despite the fact that fourth-degree CSC is a misdemeanor involving sexual contact, rather than sexual penetration, the court, in the expunction hearing, characterized the offense as a "forcible rape".

The Michigan Court of Appeals disagreed with the lower court, stating: "The nature of the offense itself does not preclude the setting aside of an offender's record. Therefore, that reason standing alone is insufficient to deny the petition." The

Court also held that a plain language reading of the expunction statute "requires a balancing of factors, specifically a determination of the 'circumstances and behavior' of a petitioner balanced against the 'public welfare'". The matter was remanded to the circuit court "because of the insufficiency of the court's ruling".

People v *Rosen*, 201 Mich App 621 (1993)

Although the case did not involve a CSC offense, the Michigan Court of Appeals relied on *Boulding* in overturning the decision of the Circuit Court for Lenawee County to deny Nikki Rosen's petition to have a 1986 conviction for possession of cocaine expunged from her record. Although Rosen's conviction was for possession, rather than delivery, of cocaine, the amount involved apparently was "fairly large" and she had originally been convicted of delivery. The delivery conviction was overturned on appeal and Rosen agreed to a plea on a possession charge. At the time of the plea agreement, the prosecutor agreed not to object to a motion to expunge the conviction if Rosen completed her probation successfully. Consequently, the prosecutor's successor did not take a position on the petition for expunction.

In denying the applicant's request for expunction, the circuit court cited the seriousness of "substance abuse cases", particularly the trafficking of illegal controlled substances. The judge expressed an opinion that the offense was "really a delivery" but the defendant "was allowed to plead guilty to possession", and that the matter should remain on the record so that prospective employers could be aware of Rosen's conviction.

In remanding the case to the circuit court, the Michigan Court of Appeals cited the ruling in *Boulding* that the nature of the offense, alone, cannot preclude the setting aside of the conviction. Since, in *Rosen*, it was clear that the circuit court "denied the motion solely because of the nature of defendant's offense", the Court of Appeals found it necessary to remand the petition "for a proper determination, after consideration of the circumstances and behavior of defendant since her conviction and the public welfare".

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Although the Michigan Court of Appeals has ruled that the nature of a crime cannot stand alone as a determining factor in a court's denial of a petition to set aside a conviction, some offenses are so serious and sensitive that convictions for them should not be allowed to be expunged. Indeed, Public Act 213 of 1965 excludes from eligibility for expunction any felony for which the maximum punishment is imprisonment for life. Given the nature of the crimes, CSC felonies should be included in the exception to the expunction statute.

Expunction provisions presumably were enacted to allow a person who had committed a youthful indiscretion and, later, turned his or her life around, to make amends and clear the slate on his or her criminal record. Some crimes, such as robbery or breaking and entering, are typically committed by young offenders and a clean record over a period of years may be a good indication that the person will not turn back to criminal activity. This is not the case with sexual offenders, however, and they simply pose too great a risk to allow their convictions to be set aside. It is a generally held belief in the criminal justice field that sexual offenders are the least rehabilitatable of all criminals and that sex crimes are not as limited to youthful offenders as are other crimes. While it may be uncommon to find a 50- or 60-year-old breaking into homes, for instance, apparently it is not unusual for an older offender to continue to commit sexual offenses. In addition, due to their sensitive nature, sex crimes are among the least reported violations. Consequently, even a review of a sex offender's "circumstances and behavior" since conviction, as required by Public Act 213, may not reveal an accurate depiction of his or her activities.

While a conviction for first-degree CSC already may not be expunged, because it is a life-maximum offense, from a public safety standpoint, convictions for the felonies of second- and third-degree CSC, as well as assault with intent to commit CSC, also should be excluded from eligibility for expunction. Allowing the expunction of those offenses may place children in danger. If those sexual assault violations are expunged from a person's criminal record, a potential employer cannot determine whether an applicant has a history of molesting children, for instance. A criminal history check on a person applying for a job as a teacher or day care worker, or on a person wishing to volunteer for a children's

organization such as the Boy Scouts or a youth sports league, would turn up no indication that the applicant had been convicted of a sex crime if his or her record had been expunged. Even a law enforcement officer or court could not reveal that information, as disclosure of an expunged conviction is a criminal violation under Public Act 213.

Supporting Argument

Allowing the expunction of sex offenses poses problems with other provisions of law. For instance, Michigan recently enacted the Sex Offenders Registration Act, requiring the long-term registration with law enforcement of anyone convicted of certain sexual offenses. A person whose CSC offense is expunged could avoid the requirements of that law. In addition, Michigan law contains provisions for enhanced sentencing of people convicted of subsequent felonies. If a sex offender's record is expunged, he or she could avoid punishment under those habitual offender provisions. The bill would prevent sex offenders from escaping enhanced sentences and the recently enacted registration requirements.

Response: The bill is unnecessary from this perspective. Public Act 213 currently provides that if an expunged conviction is for a listed offense under the Sex Offenders Registration Act, the applicant is still considered to have been convicted of the offense for purposes of that Act's registration requirements. Public Act 213 also allows use of a nonpublic record of expunction and the set aside conviction for purposes of a court's determination of the sentence to be imposed upon conviction for a subsequent offense punishable as a felony or by more than one year's imprisonment.

Legislative Analyst: P. Affholter

FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

Fiscal Analyst: B. Baker
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