

# Legislative Analysis



## ALLOW EXPUNCTION OF ONE FELONY OR TWO MISDEMEANORS

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**House Bill 5545**

**Sponsor: Rep. Tom Leonard**

**Committee: Judiciary**

**Complete to 6-4-14**

## A SUMMARY OF HOUSE BILL 5545 AS INTRODUCED 5-6-14

### 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.
- 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.

### Detailed Summary:

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 (MCL 780.621, 780.623, and 780.624) 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 that could not be set aside:

- Add criminal sexual conduct in the fourth degree.
- Add second degree child abuse and add a 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 assigned youthful trainee status under the Holmes Youthful Trainee Act (HYTA). In such 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 for setting aside a conviction, 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

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 could still 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.)

#### **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.

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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.