

Relief from a Criminal Conviction (2018 edition)

Effect of Expunction

An order granting a petition for an expunction of an adult criminal matter has two basic effects. One, it requires deletion of records about the case. Two, it seeks to restore the petitioner to the status he or she had before the proceedings occurred. This discussion briefly describes those effects and their limitations; the discussion is not intended to be exhaustive.

Deletion of Records

Deletion of records is addressed by the specific expunction statute governing the criminal matter to be expunged and a generally applicable set of procedures on expunctions, G.S. 15A-150 through G.S. 15A-152. The deletion requirement applies to North Carolina's courts; state and local law enforcement agencies; Division of Motor Vehicles (DMV); Department of Public Safety, Combined Records Section; State Bureau of Investigation (SBI); and other state and local government agencies identified by the petitioner in the petition for an expunction. *See* AOC-CR-285 (Apr. 2018) (attachment to expunction petition for listing of additional state and local governments agencies that should receive expunction orders). On granting of an expunction, the clerk of court must transmit the order to these entities as well as provide a certified copy of the order to the petitioner. G.S. 15A-150(b). The SBI is responsible for forwarding the order to the Federal Bureau of Investigation. G.S. 15A-150(c). If a state or local agency fails to comply with an expunction order, a person may file a petition for writ of mandamus to compel compliance. *See infra* Appendixes: Frequently Asked Questions (Reconsideration and Enforcement of Expunction Orders).

Not all government records are subject to this deletion command. For example, DMV must expunge its records related to criminal proceedings in most instances but not all.[1] Despite the broad statutory mandate, an older decision held that a prosecutor's investigative file, which was not open to the public, was not subject to expunction.[2] An expunction order may not reach appellate records.[3] Most important, the North Carolina Administrative Office of the Courts (AOC) retains a confidential file of granted expunctions.[4] In addition to disclosing this information to the person who received the expunction, disclosure is permissible in the following circumstances.

- The AOC may disclose the expunction to a judge for the purpose of ascertaining whether a person charged with an offense previously received an expunction, which is a bar to a further expunction under some statutes. *See* G.S. 15A-151.
- As part of legislation enacted in 2017 expanding expunction opportunities, prosecutors have the right to obtain a defendant's prior expunctions from the AOC, effective for criminal records expunged on or after July 1, 2018. *See* G.S. 15A-151.5 (listing expunctions prosecutors have right to obtain), enacted by S.L. 2017-195 (S 445). The effective-date language appears to mean that the provision applies to expunction orders entered on or after July 1, 2018, which would include

petitions filed before or after that date. The statute provides that if a person is convicted of a new offense, an expunged conviction is admissible as a conviction for the purpose of determining the person's prior criminal record level for sentencing if convicted of a subsequent offense. (An expunged conviction does not count as a prior conviction, however, under relief statutes that bar relief if a person has a prior conviction. *See infra* Appendixes: Frequently Asked Questions (Expunged Convictions).) Prosecutors also may obtain information about expunged dismissals (although not acquittals), which presumably they may use in making plea decisions. *See* G.S. 15A-151.5.

- As part of earlier legislation expanding expunction opportunities, law enforcement agencies have the right to obtain information about expunctions of certain convictions for employment and certification purposes. *See* G.S. 15A-151(a)(4), (5), (6), as amended by S.L. 2011-278 (S 397) and S.L. 2012-191 (H 1023).

The expunction statutes also require private entities in the business of compiling and disseminating criminal history record information to delete information that has been expunged. *See* G.S. 15A-152(a). The AOC must provide a deletion notice to private entities to which the AOC has provided bulk extracts of criminal record data, and those entities in turn must provide a deletion notice to entities to which they have passed on the data. *See* G.S. 15A-150(d). The statutes do not require the AOC to give notice to private entities that receive criminal record data by other means, putting the onus on affected individuals to pursue other remedies. If a private entity continues to show criminal record information for which a person has received an expunction, a person may have remedies under the federal Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 *et seq.*, which covers criminal history information as well as credit information. *See also* G.S. 15A-152 (providing for civil liability for private entities not regulated by the FCRA or Gramm-Leach-Bliley Act). A person's rights under the FCRA and procedures to follow are beyond the scope of this guide.[5]

Restoration of Status

The expunction statutes express in various ways the principle that an expunction restores a person's status as if the proceeding had not occurred. Most expunction statutes state this principle explicitly. [6] Most also state that a person who receives an expunction may not thereafter be held under any provision of law to be guilty of perjury or otherwise giving a false statement for failing to acknowledge the expunged proceedings.[7]

Statutory changes enacted in 2013 sought to clarify and strengthen these protections. G.S. 15A-153 states that the purpose of an expunction is to clear the public record of any arrest, charge, or conviction that has been expunged; to enable the recipient of an expunction to omit reference to the expunged matters to potential employers and others; and to protect the recipient from any charge of perjury or the giving of a false statement. This statute prohibits employers and educational institutions, whether public or private, from asking applicants about expunged arrests, charges, and convictions and gives applicants the right not to provide information about expunged matters. An employer who violates these requirements is subject to a fine by the North Carolina Commissioner of Labor. The statute does not address other private entities, such as landlords. G.S. 15A-153 places additional restrictions on state and local governments. They may not ask applicants to disclose expunged information and, further, must specifically advise them that they have the right not to disclose expunged information.

For the most part, an expunction avoids collateral consequences imposed by North Carolina law. North Carolina governmental entities, such as licensing agencies, must abide by this rule. Newer expunction statutes direct agencies to reverse any administrative actions taken against a person based on criminal

charges or convictions if the person has obtained an expunction. See G.S. 15A-145.4(h); G.S. 15A-145.5(f); G.S. 15A-145.6(i). Limited exceptions exist for law enforcement agencies, which may consider expunctions of certain convictions for employment and certification purposes,[8] and for judges and prosecutors, who may consider expunged information for the purposes described under Destruction of Records, above.

North Carolina law does not specifically prohibit private entities from considering expunged information. Thus, although private employers and educational institutions may not inquire about expunged criminal proceedings, they still may be able to consider expunged information that they otherwise learn about. North Carolina law also does not control consideration of expunged information by other jurisdictions, which may or may not follow the same restrictions. Federal immigration law, for example, does not appear to recognize a North Carolina expunction as a basis for disregarding a criminal conviction.[9]

Finally, in the electronic age in which we live, digital remnants of information about expunged proceedings may remain publicly accessible, which rightly or wrongly entities may hold against a person. [10]

[1] Some statutes specifically require DMV to expunge records related to criminal charges. See G.S. 15A-145.1(b); G.S. 15A-145.2(a); G.S. 15A-145.7(c); G.S. 15A-147(d). Others effectively require the same, stating that state and local agencies must expunge their records as provided in G.S. 15A-150, the generally applicable statute on implementation of expunction orders. See G.S. 15A-145.4(g); G.S. 15A-145.5(e); G.S. 15A-145.6 (h). Two statutes create limited exceptions to DMV's obligation to expunge: G.S. 15A-145(c) and G.S. 15A-146(b) exclude civil revocations under G.S. 20-16.2 (willful refusal to submit to a chemical analysis) and civil revocations before civil or criminal charges based on the revocation are resolved. DMV also is not required to expunge records for which expunction is prohibited by certain federal motor vehicle laws. See G.S. 15A-151(c).

[2] See *State v. Jacobs*, 128 N.C. App. 559 (1998) (holding that G.S. 15A-146 did not require prosecutor's office to destroy its investigative files from dismissed case because the purpose of expunction is to clear the public record of entries and prevent a criminal record check from disclosing expunged entries); G.S. 15A-145.5(f) (providing that requirement that agencies expunge all records following expunction of older nonviolent felony does not apply to DNA records and samples in state DNA database; however, 2014 amendment to this subsection deleted exception for fingerprint records, making such records subject to expunction order); cf. G.S. 7B-2102(d) (stating that fingerprints and photographs of juveniles are not subject to expunction).

[3] See generally *State v. Oglesby*, 361 N.C. 550 (2007) (holding that General Assembly did not have authority to override rules of practice and procedure for appellate courts). A person may be able to make a motion to the appellate division to seal or limit access to records in a case that has otherwise been expunged. If a person appeals an order in an expunction case, the appellate court may be willing to allow the person to proceed under a pseudonym to protect the person's identity. See John Rubin, *Appeals of Expunction Decisions*, N.C. Crim. L., UNC Sch. of Gov't Blog (Oct. 10, 2017) (discussing steps by Court of Appeals to protect confidentiality of petitioner on expunction appeal). [The Court of Appeals withdrew the opinion discussed in this blog post and substituted *State v. J.C.*, ___ N.C. App. ___, 808 S.E.2d 154 (2017), *temp. stay allowed*, ___ N.C. ___, 806 S.E.2d 313 (2017); in issuing the new opinion, the court took the same steps to protect the petitioner's confidentiality.]

[4] For orders entered before December 1, 2017, the AOC maintained a confidential file of the names of the people who received an expunction. For orders entered on or after December 1, 2017, the AOC is required to maintain a confidential file of granted expunction petitions as well as the names of people who received an expunction. G.S. 15A-151(a), amended by S.L. 2017-195 (S 445).

[5] See generally Sharon M. Dietrich, *Ants Under the Refrigerator? Removing Expunged Cases from Commercial Background Checks*, Criminal Justice, Winter 2016, at 26 (discussing strategies for eliminating expunged information).

[6] See, e.g., G.S. 15A-145.5(c) (recognizing that effect of order is that “person be restored, in the contemplation of the law, to the status the person occupied before such arrest or indictment or information”). Similar language appears in statutes authorizing a discharge and dismissal. See *infra* Expunctions of Dismissals and Similar Dispositions: Types of Dismissals.

[7] See, e.g., G.S. 15A-145.5(d); see also 1 Kenneth S. Broun, Brandis & Broun on North Carolina Evidence § 98, at 349–50 (8th ed. 2018) (stating that a witness’s credibility may not be impeached by an expunged conviction); *State v. Seay*, 59 N.C. App. 667, 670 (1982) (recognizing this principle). *But cf.* *State v. Browning*, 177 N.C. App. 487 (2006) (holding that prosecutor could cross-examine defendant about false statements he made to police about offense for which he received deferred prosecution).

[8] Applicants for certification as a law enforcement officer must disclose convictions expunged under G.S. 15A-145.4, G.S. 15A-145.5, and G.S. 15A-145.6, and law-enforcement agencies may inquire about such expunctions for employment and certification purposes. See G.S. 15A-151(a)(4); G.S. 15A-153(c), (e). *But see* G.S. 17C-13(b) (allowing certifying commission to consider expunged felony convictions only); G.S. 17E-12(b) (to same effect). For a further discussion of these provisions, see *infra* Expunctions on Basis of Age: Nonviolent Felony Convictions for Offenses Committed before Age 18; Expunctions on Basis of Age: Older Nonviolent Misdemeanor and Felony Convictions; Expunctions of Other Offenses: Discharge and Dismissal or Conviction of Prostitution Offenses.

[9] See Sejal Zota & John Rubin, *Immigration Consequences of a Criminal Conviction in North Carolina* § 4.2E, Expungement (UNC School of Government, 2017). Individual state law governs whether another state honors relief granted in North Carolina. North Carolina courts do not have the authority to order another state to expunge a conviction from that state. See Wayne A. Logan, “*When Mercy Seasons Justice*”: *Interstate Recognition of Ex-Offender Rights*, 49 U.C. Davis L. Rev. 1 (2015). North Carolina may determine as a matter of North Carolina law the impact of an out-of-state conviction on a person’s rights in North Carolina. See, e.g., *infra* Firearm Rights after Felony Conviction; see also *Barker v. State*, 402 N.E.2d 550 (Ohio 1980) (recognizing that although Ohio courts did not have authority to order West Virginia to order expunction of conviction, Ohio courts had authority under Ohio statute allowing expunction of conviction in Ohio or another jurisdiction to order intrastate expunction, that is, expunction of records, and presumably associated effects, in Ohio).

[10] See John Rubin, *A Different Approach to “Collateral” Consequences of a Conviction*, N.C. Crim. L., UNC Sch. of Gov’t Blog (Nov. 15, 2018), *citing* Alessandro Corda, *Beyond Totem and Taboo: Toward a Narrowing of American Criminal Record Exceptionalism*, 30 Fed. Sentencing Rptr. 241 (2018) (discussing potential

reforms); Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, 2015 Wis. L. Rev. 321 (2015) (discussing potential reforms).

Accessibility

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