



NEW JERSEY STATE BAR ASSOCIATION

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March 26, 2024

Hon. Glenn A. Grant
Acting Administrative Director of the Courts
Hughes Justice Complex
25 W. Market Street/P.O. Box 037
Trenton, NJ 08625-0037

Hon. Matthew Platkin
New Jersey Attorney General
Hughes Justice Complex
25 W. Market Street/P.O. Box 080
Trenton, NJ 08625-0080

RE: Recommendations for Improvements to the Expungement Process

Dear Judge Grant and Attorney General Platkin:

Members of the New Jersey State Bar Association (NJSBA) are concerned about a genuine crisis with the expungement of criminal records, particularly the swift expungement of records that was anticipated as part of cannabis reform. As you are likely aware, cannabis expungement laws were promulgated by the Legislature with the interest of social justice at its core. The goal of the law was to clear the record of anyone who was charged or convicted of certain marijuana or hashish offenses before recreational use of marijuana and hashish was legalized. The expungement process, though, has been plagued by delays, which has negatively affected employment, housing and a host of other potential opportunities and benefits for those the new law was meant to assist.

As background, the sweeping changes to New Jersey's expungement laws enacted as part of cannabis reform in 2019 included the unveiling of an electronic system to process expungements; regrading of certain marijuana convictions allowing for immediate expungement upon meeting certain requirements; and reducing the waiting period to expunge both indictable and disorderly person's convictions. In 2021, the New Jersey Supreme Court ordered the automatic expungement of over 360,000 records, specifically including those records for solely cannabis related offenses.

Nearly three years later, despite these changes, the handling of expungements remains a labyrinthine process, often differing from county to county. As practitioners on all sides of the expungement system, our members continue to experience issues that frustrate the goals of the legislation and negatively impact residents and the newly created cannabis marketplace.

There are several areas of concern that the NJSBA suggests require attention:

I. Lack of Uniformity in Application of the Statute

Despite efforts by the Administrative Office of the Courts, specifically Directive #05-23 issued on March 13, 2023, there is a lack of uniformity in the application and interpretation of the expungement statute across counties. NJSBA members cite numerous examples of inconsistencies in handling expungements across counties. To begin with, there does not seem to be uniform agreement in what offenses are eligible for expungement. For example, some counties interpret those with convictions under N.J.S.A. 2C:33-2.1 (wandering for the purpose of unlawfully obtaining CDS) as eligible for an expedited expungement under N.J.S.A. 2C:52-5.1, while other counties do not.

In addition, counties have different requirements to meet a new statutory standard, compelling circumstances, when considering an expungement of a third- or fourth-degree controlled dangerous substance conviction under N.J.S.A. 2C:52-2(c)(3). While information about the nature of the offense and the applicant's character and conduct since conviction was necessary under the previous public interest standard, the revised statute states that,

In determining whether compelling circumstances exist for the purposes of paragraph (1) of this subsection, a court may consider the amount of any court-ordered financial assessment imposed, the person's age at the time of the offense or offenses, the person's

financial condition and other relevant circumstances regarding the person's ability to pay.

Despite the new standards, in some counties, prosecutors continue to seek letters of support from family members and supervisors, along with evidence of rehabilitation. In other counties, prosecutors find satisfaction in an argument detailing the applicant's rehabilitative journey following a conviction. Directive #05-23 guided judges and court personnel in the practicalities of implementing the new standard, but additional guidance is needed to address the inconsistent and outdated proof requirements that still occur in some counties.

Another area in need of guidance is in the processing of Clean Slate Expungement petitions. Pursuant to N.J.S.A. 2C:52-5.3, an applicant,

...may present an expungement application to the Superior Court pursuant to this section if the person has been convicted of one or more crimes, one or more disorderly persons or petty disorderly persons offenses, or a combination of one or more crimes and offenses under the laws of this State, unless the person has a conviction for a crime which is not subject to expungement pursuant to subsection b. or c. of N.J.S.A. 2C:52-2. The person may present an application pursuant to this section regardless of whether the person would otherwise be ineligible pursuant to subsection e. of N.J.S.A. 2C:52-14 for having had a previous criminal conviction expunged, or due to having been granted an expungement pursuant to this or any other provision of law.

In some counties, prosecutors refrain from objecting to such petitions when an applicant has one indictable offense, several disorderly persons violations, and municipal ordinance infractions, provided that 10 years have elapsed since release, payment of fines, or completion of parole/probation. Meanwhile, in other counties, prosecutors raise objections and insist on the petition being re-filed as a regular expungement petition. This stems from the presence of a singular indictable offense alongside multiple disorderly persons offenses and municipal ordinance violations. Guidance is needed to ensure prosecutors properly allow expungement applications that are consistent with what the statute permits.

Finally, the handling of the payment of fines varies in counties, as well. N.J.S.A. 2C:52-3(b)(1), provides in pertinent part that, "if fines and or restitution have not been satisfied due to reasons other than "willful noncompliance" then, at the time of the expungement, the court can convert remaining monies owed to a civil

judgement and carry on with the expungement.” In some counties, however, an applicant is required to prove that non-payment of a fine was not willful by proffering testimony at a hearing separate from the expungement hearing. This is not required under the statute and can be burdensome to the applicant, posing an unnecessary barrier to expungement.

II. Backlogs and State Police Access to E-Courts

There is an enormous backlog in processing expungement petitions across the state. N.J.S.A. 2C:52-9 requires a hearing date be set not more than 60 days after the filing of a petition. Some counties routinely process expungements in a timely manner, while delays of up to 24 months can occur in others, who claim a lack of sufficient resources to comply with the statute. Consideration should be given to providing additional resources to those offices with significant backlogs.

Furthermore, the timeframe for the New Jersey State Police (NJSP) to process expungement orders and seal an individual’s criminal record is significantly long and can take up to two years after an order is granted. The prolonged delays are now the subject of a class action lawsuit filed by the Office of the Public Defender. The NJSBA is not involved in the lawsuit, but has some recommendations to alleviate some of the delays complained of.

The NJSP sets forth the following on their official website,

The Expungement Unit ensures an individual's right to privacy with the sealing and expunging of all criminal records ordered by the court, pursuant to N.J.S.A. 2C:52-1, *et seq.*, N.J.S.A. 2C:35-14m, and N.J.S.A. 2C:44-1.1. *The unit is responsible for reviewing petitions and court orders to determine if they conflict with the intent of the law.*

The unit also reviews and disseminates expunged records for criminal justice agencies, pursuant to N.J.S.A. 2C:52-27c.

In order to carry out their duties, the attorneys for the state police need access to the state’s online expungement portal to access each applicant’s file and review any objections that may have been submitted by the prosecutor. The lack of access to the portal prevents the state police from addressing litigants who have duplicate names, reviewing a petitioner’s entire file, accessing the Party Court History Report, and reviewing any additional material submitted by the applicant or court personnel. Permitting access to the case jacket will help to expedite the review process.

III. NJSP Secondary Review of Petitions is Inappropriate

NJSBA members have been advised that the NJSP conducts a secondary review of expungement petitions after the receipt of a signed court order granting the petition before sealing the record to ensure accuracy. This secondary level of review, however, is in conflict with and violative of N.J.S.A. 2C:52-11 which states,

If, prior to the hearing, there is no objection from those law enforcement agencies notified or from those offices or agencies which are required to be served under 2C:52-10, and no reason, as provided in section 2C:52-14, appears to the contrary, the court may, without a hearing, grant an order directing the clerk of the court and all relevant criminal justice and law enforcement agencies to expunge records of said disposition including evidence of arrest, detention, conviction and proceedings related thereto.

This secondary level of review may also be violative of the separation of powers clause because determining eligibility for expungement is a function of the Judiciary and has already been completed by the time an expungement petition is granted. There is also a statutory mechanism if a petition was subsequently discovered to have been granted in error. Within five years, the NJSP, through the county prosecutor could file a motion to vacate pursuant to N.J.S.A. 2C:52-26.

Because of the potential constitutional implications, and the availability of an alternative way to raise issues about an expungement granted in error, the NJSBA requests that the secondary review process be immediately ended.

IV. Expungements for Foreign Nationals

The immigration courts and immigration agencies do not recognize or extend comity to state expungements for foreign nationals. The foreign national has the burden of proving the exact status of their criminal record through court certified documentation. Pursuant to the Immigration and Nationality Act, the entry of a plea at any time, even if the matter has been dismissed, vacated, and expunged, equates to a conviction, unless there is explicit language that the plea itself has been vacated. Therefore, foreign nationals who have had their criminal records expunged through the cannabis reform process must apply to the Superior Court to vacate the expungement in order to obtain these crucial records in support of immigration relief from removal or an immigration benefit. The automatic expungement process has caused court and agency delays with significant expense to foreign nationals

who are required to vacate the expungement through the very courts that granted the expungement.

Based on the foregoing, the NSBA recommends that consideration be given to taking these steps to help alleviate concerns with the expungement process and streamline the procedure for the benefit of all:

1. Issue a directive from the Administrative Office of the Courts addressing the most frequent inconsistencies across counties which will be helpful in maintaining uniformity in the application of the law.
2. Direct additional funding to the county prosecutor's offices to increase staff working on expungements, perhaps apportioning some of the \$15 million dollars that was granted by the Legislature in 2019 to facilitate expungement reform.
3. Grant the state police attorneys separate credentials for each county's expungement records portal.
4. End the NJSP's secondary review process described above.
5. Amend the language in the Supreme Court's July 1, 2021 Order to add that it specifically vacates any pleas associated with the matter being expunged. This will alleviate the need for foreign nationals to reopen the expungements in order to retrieve documents for their immigration matters.
6. In the alternative, provide foreign nationals with notice of any impending expungement and an opportunity to "opt-out" of the automatic expungements.
7. Create a streamlined procedure for those foreign nationals who have had their criminal records expunged through this process and must apply to the Superior Court to vacate the expungement to obtain records in support of immigration relief from removal or an immigration benefit.

The NJSBA, whose members represent a diverse range of litigants spanning from individuals with past criminal charges to applicants seeking involvement in the burgeoning New Jersey cannabis industry, respectfully requests that action be taken on the above recommendations as soon as possible to benefit the residents of New Jersey consistent with the goals of the cannabis reform. The NJSBA stands ready to assist in that effort in any way it can.

Thank you for your consideration.

Sincerely,

A handwritten signature in blue ink, appearing to read "Tim McGoughran".

Timothy F. McGoughran, Esq.
President

cc: William H. Mergner Jr., Esq., NJSBA President-Elect
Angela C. Scheck, NJSBA Executive Director