



NEW JERSEY LAW REVISION COMMISSION

Draft Tentative Report Relating to N.J.S. 2C:52-4.1(a) - Expungement

September 8, 2015

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” *N.J.S. 1:12A-8.*

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **October 31, 2015.**

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

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Executive Summary

In an act of statutory grace, the New Jersey Legislature provides rehabilitated individuals the opportunity to expunge juvenile delinquency dispositions and adult criminal convictions pursuant to the provisions of N.J.S. 2C:52-2 and 2C:52-4.1(a). However, the interplay between these two provisions is unclear and may cause unnecessary confusion for those seeking expungement of previous offenses, particularly regarding the effect of juvenile adjudications on a petition for the expungement of an adult conviction.

In July 2015, the Commission authorized work on a project proposing revisions to N.J.S. 2C:52-2 to reflect the New Jersey Supreme Court's interpretation of New Jersey expungement provisions in the recently published *In re D.J.B.*¹

Background

In its decision *In re D.J.B.*, the New Jersey Supreme Court decided whether a petitioner's prior juvenile delinquency adjudications bar the expungement of his adult convictions pursuant to N.J.S. 2C:52-2.

The facts of the case present a compelling narrative. Petitioner D.J.B. had a history with the law, including the following juvenile and criminal dispositions:

- 11/1993 (age 16) – Adjudicated delinquent for third degree burglary
- 03/1994 (age 16) – Adjudicated delinquent for third degree burglary
- 04/1994 (age 17) – Adjudicated delinquent for multiple consolidated counts
- 11/1996 (age 19) – Guilty plea to fourth degree offense for receipt of stolen property
- 09/1999 (age 22) – Two disorderly person offenses for contempt

In the years that followed, D.J.B. pursued a more law-abiding path; he married and had three children, and was successfully employed in the insurance industry. In 2011, recognizing that these records would prevent him from starting his own insurance brokerage firm and coaching baseball in his municipality's little league, D.J.B. petitioned for the expungement of his juvenile and criminal adjudications.

The trial court ordered the expungement of D.J.B.'s three juvenile adjudications, but declined to order the expungement of his adult conviction and disorderly person offenses stating "[t]he combination of N.J.S.A. 2C:52-4.1(a) and N.J.S.A. 2C:52-2 serve to prevent a petitioner with an indictable crime from obtaining expungement if that petitioner has a prior juvenile record." The Appellate Division affirmed.²

¹ 216 N.J. 433 (2014).

² The Court noted that in *In re J.B.*, 426 N.J. Super. 496 (App. Div. 2012), a different appellate panel addressed a similar question and reached the opposite conclusion.

In analyzing the Legislature’s intent, the Court focused on the interplay between two provisions of New Jersey’s expungement law.

Enacted in 1979, N.J.S. 2C:52-2 provides for the expungement of indictable adult convictions:

In all cases, except as herein provided, wherein a person has been convicted of a crime under the laws of this State **and who has not been convicted of any prior or subsequent crime**, whether within this State or any other jurisdiction, and has not been adjudged a disorderly person or petty disorderly person on more than two occasions may, after the expiration of a period of 10 years from the date of his conviction . . . present a duly verified petition . . . praying that such conviction and all records and information pertaining thereto be expunged. (Emphasis added)

The 1979 legislation failed to provide a comparable method for the expungement of juvenile adjudications.³ To address the oversight, in 1980 the Legislature enacted N.J.S. 2C:52-4.1(a) permitting expungement of these juvenile records by providing as follows:

a. Any person adjudged a juvenile delinquent may have such adjudication expunged as follows:

(1) Pursuant to N.J.S.2C:52-2, if the act committed by the juvenile would have constituted a crime if committed by an adult;

(2) Pursuant to N.J.S.2C:52-3, if the act committed by the juvenile would have constituted a disorderly or petty disorderly persons offense if committed by an adult; or

(3) Pursuant to N.J.S.2C:52-4, if the act committed by the juvenile would have constituted an ordinance violation if committed by an adult.

For purposes of expungement, any act which resulted in a juvenile being adjudged a delinquent shall be classified as if that act had been committed by an adult. (Emphasis added).

With respect to D.J.B.’s expungement request, the State maintained, and the trial and appellate court agreed, that the final paragraph of 2C:52-4.1(a) applied to the entirety of the expungement statute.⁴ This interpretation effectively converts a juvenile adjudication into a “prior or subsequent crime” barring expungement of an adult conviction pursuant to N.J.S. 2C:52-2.⁵

After carefully analyzing the expungement law’s legislative intent and history, as well as relevant rules of statutory construction, the New Jersey Supreme Court rejected the trial and appellate courts’ reading of the statute and held that the final paragraph of 2C:52-4.1(a) was

³ *In re J.B.*, 426 N.J. Super. 496, 502 (App. Div. 2012).

⁴ *In re D.J.B.*, 216 N.J. 433,438-9 (2014).

⁵ *Id.* at 439-40.

intended only to apply to the portion of the statute governing the expungement of juvenile adjudications.⁶ Accordingly, the Court held that D.J.B.’s juvenile adjudications did not constitute “prior crimes” which would automatically prevent the expungement of his adult conviction.⁷

Analysis

State expungement statutes vary greatly both procedurally and in the scope of relief.⁸ New Jersey’s first expungement provisions were enacted in 1931; these early provisions were consolidated and expanded upon in 1979, and subsequently codified as Chapter 52 of New Jersey’s Code of Criminal Justice.⁹ Over the years, Chapter 52 has been amended numerous times, including the 1980 enactment of N.J.S. 2C:52-4.1(a) which expanded expungement relief to juvenile delinquency adjudications. While the statute is designed to offer rehabilitated individuals a second chance, no reprieve is provided for those convicted of the most egregious crimes.¹⁰ After satisfying the various statutory requirements, an individual is presumptively entitled to have his or her records expunged.¹¹

Each legislative session brings bills designed to further delineate the parameters of expungement and other aspects of criminal rehabilitation. Most recently, the New Jersey Assembly has passed several bills addressing expungement, including those that would (1) reduce the expungement waiting time for criminal and disorderly person offenses,¹² (2) provide expungement to victims of identity theft,¹³ and (3) create an Expungement Study Commission.¹⁴ Each bill remains pending in the New Jersey Senate.

Beyond the purview of Chapter 52, the New Jersey Legislature has recently reaffirmed its commitment to second chances by enacting legislation popularly referred to as “ban the box,” requiring an employer to “consider a job candidate’s qualifications first, without the stigma of a

⁶ *Id.* at 443.

⁷ *Id.* at 448.

⁸ Anna Kessler, *Excavating Expungement Law: A Comprehensive Approach*, 87 *TEMPLE L. REV.* 403, 417 (2015) (asserting that “expungement legislation varies widely from state to state.”). The availability of federal expungement can vary based upon the deciding Circuit. *See generally*, Fruquan Mouzon, *Forgive Us Our Tresspasses: The Need for Federal Expungement Legislation*, 39 *U. MEM. L. REV.* 1 (2008).

⁹ *State v. A.N.J.*, 98 N.J. 421, 425 (1985).

¹⁰ N.J.S. 2C:52-2 92015)

¹¹ *In re Kollman*, 210 N.J. 557, 568 (2012); *In re J.N.G.*, 244 N.J.Super 605, 607 (App. Div. 1990)

¹² Along with other modifications, A.B. 206 and pending S.B. 2633 would reduce the waiting period for the expungement of a criminal conviction from ten years to five years and would reduce the waiting period for the expungement of a disorderly person offense from five years to three years. The bill also grants automatic expungement to those who graduate from the Drug Court program and provides for the expungement of a dismissal, acquittal, or discharge without a conviction or finding of guilt.

¹³ A.B. 1662 (2014).

¹⁴ A.B. 1815 (2014) (creating the “Expungement Waiting Period Reduction Study Commission”).

conviction record.”¹⁵ Echoing the principals underpinning Chapter 52, N.J.S. 34:6B-13 is intended “to assist people with criminal records to reintegrate into the community, become productive members of the workforce, and to provide for their families and themselves.”¹⁶

The legislative goals advanced by Chapter 52 and other similar legislation have a historical basis and growing contemporary significance.¹⁷ Yet *In re D.J.B.*, and most recently, *In re J.S.*,¹⁸ demonstrate that the expungement statute is sometimes unclear, with legislative intent that is difficult to glean.¹⁹

Conclusion

For a reformed offender meeting the statutory prerequisites, expungement provides social redemption and relief from many of the collateral consequences attaching to the criminal act.²⁰ Recognizing that many individuals petitioning for expungement may be self-represented, the Administrative Office of the Courts’ website provides a “pro se expungement kit” and directs the individual to “review the applicable provisions of N.J.S.A. 2C:52-1 through N.J.S.A. 2C:52-32 to determine if you are eligible” for expungement.²¹ While the Court’s decision in *In re D.J.B.* provides a key interpretation of New Jersey’s expungement law, the statute as written remains “concededly, unclear on its face.”²² Accordingly, the Commission proposes a modest revision

¹⁵ Michelle Natividad Rodriguez, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, NAT’L EMPLOYMENT LAW PROJ. (July 1, 2015), referring to N.J.S. 34:6B-11 *et seq.* (designated the “Opportunity to Compete Act”).

¹⁶ Compare N.J.S. 34:6B-12(j) (2015) with N.J.S. 2C:52-32 (stating that the chapter “shall be construed with the primary objective of providing relief to the one-time offender who has led a life of rectitude and disassociated himself with unlawful activity . . .”).

¹⁷ See, e.g., Binyamin Appelbaum, *Out of Trouble, but Criminal Records Keep Men Out of Work*, N.Y. TIMES (Feb. 28, 2015), available at http://www.nytimes.com/2015/03/01/business/out-of-trouble-but-criminal-records-keep-men-out-of-work.html?_r=0 (asserting that “10 percent of nonincarcerated men had felony records in 2010, up from 4 percent in 1980.”)

¹⁸ 2015 WL 4714653 (Aug. 10, 2015). With respect to the expungement petition of J.S., the N.J. Supreme Court split 5-2 on the statutory interpretation of the phrase “prior or subsequent crime” contained in N.J.S. 2C:52-2(a). Justice Patterson’s majority opinion relied upon a plain language reading of the statute. Rejecting the dissents’ argument that the statute should be liberally construed, Justice Patterson opined that “[i]f the Legislature determines that expungement should be available to such individuals, it can amend the statute to clarify its intent in that regard.” *Id.* at 1.

¹⁹ In addition to harmonizing the internal provisions of Chapter 52, the N.J. Supreme Court has also been called upon to reconcile the expungement statute and the Rehabilitated Convicted Offenders Act. See *In re D.H.*, 204 N.J. 7 (2010).

²⁰ The degree of social redemption achieved through expungement is questionable in light of modern technology when “getting out of Google’s grip is harder than clearing the legal record.” Clay Calvert & Jerry Bruno, *When Cleansing Criminal History Clashes with the First Amendment and Online Journalism: Are Expungement Statutes Irrelevant in the Digital Age?*, 19 COMM. LAW CONSPPECTUS 123, 137 (2010) (quoting journalist Paul Silva). Nevertheless, the collateral consequences of criminal convictions remain significant; the National Inventory of the Collateral Consequences of Conviction identifies approximately 1,072 discretionary or mandatory collateral consequences under New Jersey law.

²¹ New Jersey Courts, HOW TO EXPUNGE YOUR CRIMINAL AND/OR JUVENILE RECORD 1 (2014), available at http://www.judiciary.state.nj.us/prose/10557_expunge_kit.pdf.

²² *In re J.B.* at 507.

consistent with the Court's interpretation to provide enhanced statutory clarity for pro se petitioners.

Appendix

N.J.S. 2C:52-4.1 Juvenile delinquent; expungement of adjudications and charges

a. Any person adjudged a juvenile delinquent may have such adjudication expunged as follows:

(1) Pursuant to N.J.S.2C:52-2, if the act committed by the juvenile would have constituted a crime if committed by an adult;

(2) Pursuant to N.J.S.2C:52-3, if the act committed by the juvenile would have constituted a disorderly or petty disorderly persons offense if committed by an adult; or

(3) Pursuant to N.J.S.2C:52-4, if the act committed by the juvenile would have constituted an ordinance violation if committed by an adult.

For purposes of expungement of a delinquency adjudication, any act which resulted in a juvenile being adjudged a delinquent shall be classified as if that act had been committed by an adult.

b. Additionally, any person who has been adjudged a juvenile delinquent may have his entire record of delinquency adjudications expunged if:

(1) Five years have elapsed since the final discharge of the person from legal custody or supervision or 5 years have elapsed after the entry of any other court order not involving custody or supervision, except that periods of post-incarceration supervision pursuant to section 25 of P.L.1982, c. 77 (C.2A:4A-44), shall not be considered in calculating the five-year period for purposes of this paragraph;

(2) He has not been convicted of a crime, or a disorderly or petty disorderly persons offense, or adjudged a delinquent, or in need of supervision, during the 5 years prior to the filing of the petition, and no proceeding or complaint is pending seeking such a conviction or adjudication, except that periods of post-incarceration supervision pursuant to section 25 of P.L.1982, c. 77 (C.2A:4A-44), shall not be considered in calculating the five-year period for purposes of this paragraph;

(3) He was never adjudged a juvenile delinquent on the basis of an act which if committed by an adult would constitute a crime not subject to expungement under N.J.S.2C:52-2;

(4) He has never had an adult conviction expunged; and

(5) He has never had adult criminal charges dismissed following completion of a supervisory treatment or other diversion program.

c. Any person who has been charged with an act of delinquency and against whom proceedings were dismissed may have the filing of those charges expunged pursuant to the provisions of N.J.S.2C:52-6.