

To: New Jersey Law Revision Commission
From: Jayne J. Johnson
Re: Provisions governing expungement of juvenile adjudications – N.J.S. 2C:52-4.1
Date: September 11, 2017

MEMORANDUM

This Memorandum provides a status update and the additional research requested by the Commission regarding the project proposing revisions to N.J.S. 2C:52-4.1, which governs the expungement of juvenile adjudications.

In July 2016, Staff presented a Revised Draft Tentative Report proposing revisions based on the *In re D.J.B.* decision of the New Jersey Supreme Court, where the Court considered the statutes governing juvenile adjudications.¹

The Commission, after considering the Report and the feedback received, requested additional research concerning the interplay between the juvenile and adult expungement statutes, and suggested incorporating references to other statutes which address expungement of adult convictions or issues involving expungement of juvenile dispositions.

During the past year, expungements were the focus of Legislative activity and several state appellate decisions.² The Legislature, in a bipartisan effort led by the Governor to extend the “Opportunity to Compete” – also known as the ‘Ban the Box’ measure, crafted a trio of bills aimed at easing the process for expunging juvenile adjudications and adult convictions.

The pending legislation, however, does not reconcile the legislative intent of N.J.S. 2C:52-4.1 with its plain language meaning, as identified by the *In re D.J.B.* decision. The Commission proposes statutory revisions based on the *In re D.J.B.* decision, clarifying N.J.S. 2C:52-4.1, to ensure that the individuals who were intended to benefit from the statutory provisions are able to expunge their records.

This Memorandum includes the revisions suggested by the Commission when this project was last considered. Staff seeks approval and any further guidance from the Commission concerning the proposed statutory revisions.

¹ 216 N.J. 433 (2014).

² *In re T.B.*, no. A-1518-16T1, A-1517-16T1, A-1516-16T1 (App. Div. Aug. 1, 2017); *In re Velazquez*, no. A-788-6T1 (App. Div. July 28, 2017).

Background

A. Adult expungement provisions

N.J.S. 2C:52-1 *et seq.* provides for the expungement of adult convictions, violations and arrests in accordance with various requirements and timeframes:

1. Indictable offenses (N.J.S. 2C:52-2): Crimes are expungeable after 10 years if the individual has not been convicted of a prior or subsequent crime and has had no more than two disorderly persons adjudications. This provision enumerates crimes that may not be expunged under any circumstances, such as criminal homicide and other violent crimes, and contains additional specificity regarding the expungement of drug related convictions. This section also prohibits expungement of a conviction for an individual holding public office if the crime “involved or touched” the public office.

2. Disorderly and Petty Disorderly Persons offenses (N.J.S. 2C:52-3): Offenses are expungeable after 5 years if the individual has not been convicted of a prior or subsequent crime and has had no more than another three disorderly persons adjudications.

3. Ordinances (N.J.S. 2C:52-4): Violations are expungeable after 2 years if the individual has not been convicted of a prior or subsequent crime and has had no more than two disorderly persons adjudications.

In each instance, the expunged records are not destroyed but are inaccessible except in the following limited circumstances:

- The Violent Crimes Compensation Board may review the records in conjunction with a filed claim.³
- Superior Court may permit inspection of the records where the subject matter is the object of litigation or judicial proceedings (they may not be used for impeachment, but may be used for sentencing after establishing).⁴
- A judge may use the records in determining whether to grant a person’s application for supervisory treatment or a diversion program.⁵
- A judge, prosecutor, probation department or Attorney General may use the records in conjunction with setting bail, the presentence report or sentencing.⁶
- A parole board may use the records in evaluating granting of parole.⁷
- The Department of Corrections may use the records in the classification, evaluation and assignment to correctional facilities.⁸

³ N.J. STAT. ANN. 2C:52-18 (West 2017).

⁴ N.J. STAT. ANN. 2C:52-19 (West 2017).

⁵ N.J. STAT. ANN. 2C:52-20 (West 2017).

⁶ N.J. STAT. ANN. 2C:52-21 (West 2017).

⁷ N.J. STAT. ANN. 2C:52-22 (West 2017).

Unless otherwise provided by law, upon an order of expungement shall deem the acts not to have occurred.⁹ The petitioner is not obligated to disclose expunged convictions, except in connection with a subsequent expungement request, in requesting supervisory treatment or diversion for subsequent criminal charges, or in seeking employment with the judiciary or law enforcement.¹⁰

B. Juvenile expungement petitions

New Jersey's original expungement statute did not provide a process for the expungement of juvenile delinquency adjudications. The Legislature subsequently adopted N.J.S. 52-4.1 to remedy this oversight. Subsection a. of N.J.S. 2C:52-4.1 permits an individual to expunge a juvenile delinquency adjudication in the same manner as that of an adult record and directly cross-references to the applicable provision of N.J.S. 2C:52-2 to 52-4.¹¹

Subsection b. of N.J.S. 2C:52-4 permits an individual to expunge an entire record or delinquency adjudications provided:

- Five years have elapsed;
- The individual has not been convicted of any crimes or disorderly offenses in the five years preceding the petition;
- The individual was not adjudged delinquent for an act that would be ineligible for expungement if committed by an adult;
- The individual has not had an adult criminal conviction expunged; and
- The individual has not had adult criminal charges dismissed pursuant to participation in a diversion program.

Subsection b. represents an expansive and simplified option as it imposes a five-year waiting period irrespective of the nature of the violation, and does not limit the number of adjudications that may be expunged. Indeed, the only instance in which an individual might utilize the individualized expungement option of subsection a. is if he or she is seeking expungement of an ordinance violation and finds the shorter two-year waiting period provided by N.J.S. 2C:52-4 beneficial.

The New Jersey Supreme Court held that juvenile delinquency adjudication is not a “prior or subsequent crime,” and does not prohibit the expungement of an adult conviction provided that the other applicable statutory requirements are satisfied.

⁸ N.J. STAT. ANN. 2C:52-23 (West 2017).

⁹ Interpreting the phrase “[u]nless otherwise provided by law,” the New Jersey Supreme Court has determined that an expungement order does not relieve the mandatory forfeiture of public employment pursuant to N.J.S. 2C:51-2. *In re D.H.*, 204 N.J. 7 (2010).

¹⁰ N.J. STAT. ANN. 2C:52-27 (West 2017).

¹¹ N.J. STAT. ANN. 2A:4A-22a. (West 2017) - A juvenile is defined in the New Jersey Code of Juvenile Justice as “an individual who is under the age of 18 years,” while a “young offender” is defined in N.J.S. 2C:52-5 as “an individual who is under the age of 21 years.”

In practice, attorneys, both prosecutors and criminal defense attorneys, informed Staff that generally an individual files one petition requesting the expungement of various juvenile adjudications and/or adult violations. One practitioner further explained that these petitions are considered as filed, and if granted, they are not deterred by the interpretation of N.J.S. 52-4.1 a.(1); specifically, an individual can expunge his or her entire juvenile record while simultaneously expunging one or more adult convictions.

Contrary to practice, one practitioner added that the existing statutory language under N.J.S. 2C:52-4.1 b.(4) may be interpreted to imply that an individual with an adult conviction must consider a previous juvenile adjudication as a “prior or subsequent crime” which prohibits expungement of the adult conviction:

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

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

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

C. Case History

In its *In re D.J.B.* decision, the New Jersey Supreme Court considered the interplay of the statutes governing juvenile adjudications and adult offenses, specifically whether a petitioner’s prior juvenile delinquency adjudications bar the expungement of the individual’s adult convictions pursuant to N.J.S. 2C:52-2.

The facts of the case present a compelling narrative. Petitioner D.J.B. had several criminal dispositions, including the following juvenile adjudications and adult offenses:

- 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.¹²

N.J.S. 2C:52-4.1(a) provides the circumstances under which a juvenile disposition may be expunged:

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.

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)

With respect to D.J.B.'s expungement request, the State maintained, and the trial and appellate court agreed, that the final paragraph of N.J.S. 2C:52-4.1(a) applied to the entirety of

¹² 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.

the expungement statute.¹³ 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:52-2.¹⁴

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 intended only to apply to the portion of the statute governing the expungement of juvenile adjudications.¹⁵ 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.¹⁶

The Commission project seeks to clarify N.J.S. 2C:52-4.1 to:

- reflect the *In re D.J.B.* holding that an individual with a juvenile criminal history may have an adult criminal conviction expunged; and
- provide for the established practice where an individual contemporaneously files a petition to expunge a juvenile history with an adult expungement petition.

Legislative Activity

Both houses of the New Jersey Legislature passed a series of bills removing barriers and encouraging job opportunities for individuals, like D.F.B., who want to expunge their criminal history.¹⁷ The bills revise the timeframes and requirements of the statutes governing the expungement of criminal convictions and juvenile adjudications.

¹³ *In re D.J.B.*, 216 N.J. at 438-39.

¹⁴ *Id.* at 439-40.

¹⁵ *Id.* at 443.

¹⁶ *Id.* at 448.

¹⁷ Along with the trio of Senate bills, the following bills concerning expungement of criminal records are pending during this 2016-2017 Legislative Session:

- A1620 (Referred to the Assembly Human Service Committee) - Requires law enforcement to be notified of an application to expunge mental commitment record
- A1848 (Referred to Assembly Judiciary Committee) - Eliminates certain prohibitions to expungement of criminal records
(Currently, N.J.S.2C:52-6 provides that a person can apply for expungement of an arrest or charge at any time following the disposition of proceedings in cases where the arrest or charge did not result in a conviction.
 - However, if the charges were dismissed pursuant to a program of supervisory treatment, conditional discharge, or conditional dismissal, the person must wait six months before applying for expungement of the arrest or charge. This bill

The most comprehensive reforms come from a trio of bills, crafted in a bipartisan effort led by the Governor, to extend the 2014 “Opportunity to Compete” measure - S3306, S3307, and S3308 were introduced in the Senate and released by the Senate Judiciary Committee to:

- prohibit employment discrimination based upon expunged criminal records,
- increase the number of convictions that can be expunged while accelerating expungements, and
- reduce the waiting period to expunge an entire juvenile record.

While S3308 reduces the waiting period under N.J.S. 2C:52-4.1 from a five to a three-year period, the introduced bills do not clarify the provisions under N.J.S. 2C:52-4.1, as identified in the *In re D.J.B.* decision, particularly whether an individual with a juvenile criminal history may have an adult criminal conviction expunged. Moreover, the pending legislation does not provide additional statutory support for the established practice allowing an individual to contemporaneously file an adult expungement petition with a filing to expunge a juvenile history.

would eliminate the waiting period and allow the person to apply for expungement at any time following the disposition of proceedings.

- In addition, subsection f. of N.J.S. 2C:52-14 bars expungement of a conviction if, prior to or subsequent to that conviction, criminal charges against the person were dismissed following completion of a supervisory treatment or other diversion program.
- This bill would eliminate the bar on expungement under these circumstances and allow the person to petition the court for expungement of the conviction.)
- S536 - Requires law enforcement be notified of application to expunge mental commitment record. Introduced to Senate, referred to Senate Health, Human Svcs and Senior Citizens Comm.
- S536 (Referred to Senate Health, Human Services and Senior Citizens Committee) - Requires law enforcement be notified of application to expunge mental commitment record.
- S1906/A1881 (Referred to the Senate Judiciary Committee) – Establishes a pilot program in Paterson authorizing non-disclosure of records of certain expungements.
- S3006 (Released from the Senate Judiciary Committee) – prohibits certain employment discrimination based upon expunged criminal records.
- S3307 (Released from the Senate Judiciary Committee) – Revises procedures for expunging criminal and other records and information, including the shortening of certain waiting periods for expungement eligibility and increasing the number of convictions which may be expunged.

With respect to criminal convictions for the sale, distribution, or possession with intent to sell marijuana or hashish - the bill amends the expungement law to establish general expungement eligibility for a low-level offender consistent with how such an offender’s crime is graded under the State’s Criminal Code

Conclusion

The bills introduced during the current legislative session expand the reach of the provisions governing expungement of juvenile dispositions and adult convictions. The pending legislation, however, does not reconcile the legislative intent of N.J.S. 2C:52-4.1 with its plain language meaning, as identified by the *In re D.J.B.* decision.

The Commission proposes statutory revisions based on the *In re D.J.B.* decision, clarifying N.J.S. 2C:52-4.1 to ensure that the individuals who were intended to benefit from the statutory provisions are able to expunge their records.

This Memorandum includes the revisions suggested by the Commission when this project was last considered. Staff seeks approval and any further guidance from the Commission concerning the proposed statutory revisions.

Appendix¹⁸

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

a. ~~Any person adjudged a juvenile delinquent may have such~~ juvenile delinquency adjudications may be expunged as follows:

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

For the expungement of a delinquency adjudication, all delinquent acts shall be classified as if the act had been committed by an adult, and subject to expungement pursuant to either a.(1), a.(2), or a.(3) above.

b. ~~Additionally, any~~ A person's ~~who has been adjudged a juvenile delinquent may have his~~ entire record of delinquency adjudications may be expunged only if all of the provisions in this subsection are met:

(1) Five years have elapsed since the final discharge of the person from (a) legal custody or supervision or ~~5 years have elapsed~~ (b) after the entry of any other court order not involving custody or supervision, ~~except that~~ provided the five-year period shall not include periods of post-incarceration supervision

¹⁸ Subsection a. was previously drafted 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.~~

~~b. Additionally, any a. A person's who has been adjudged a juvenile delinquent may have his~~ entire record of delinquency adjudications may be expunged if provided all of the provisions in this section are met:

Text in **grayscale** – reflects changes incorporating comments and suggestions provided by the Commission when this project was last considered during the July 2016 Commission meeting.

pursuant to ~~section 25 of P.L.1982, c. 77 (C.N.J.S. 2A:4A-44)~~, shall not be considered in calculating the five year period for purposes of this paragraph;

(2) ~~The person~~ 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~~ five years prior to the filing of the petition, and no proceeding or complaint is pending seeking such a conviction or adjudication, ~~except that provided the five-year period shall not include periods of post-incarceration supervision pursuant to section 25 of P.L.1982, c. 77 (C. N.J.S. 2A:4A-44)~~, shall not be considered in calculating the five year period for purposes of this paragraph; and

(3) ~~The person~~ He has never been adjudged a juvenile delinquent due to on the basis of commission of an act which is ineligible for expungement pursuant to N.J.S. 2C:52-2 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 may have charges of acts of juvenile delinquency expunged, pursuant to the provisions of N.J.S. 2C:52-6, if the charges were 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:52-6.¹⁹

¹⁹ Letter from Akil Roper, Esq., Chief Counsel Legal Services of New Jersey to Susan G. Thatch, Counsel to the NJLRC (July 15, 2016) (enclosed, on file with the NJLRC). In response to a comment received from the LSNJ and the suggestions of the Commission during the July 2016 Commission meeting, the language below in **bold-type** was removed from subsection b.2, ensuring that the revisions do not suggest an extension of the period of ineligibility for juvenile adjudications. The previous draft language provided that:

~~The person~~ 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, **had juvenile adjudications or criminal charges dismissed following completion of a supervisory treatment or other diversion program, or been discharged from a term of special probation** during the 5 years prior to the filing of the petition, . . .

The previous draft also added a new subsection d. which incorporated the procedural requirements that were removed with deleted portions of subsection a. The added provision is no longer needed, due to the restructuring of subsection a. in this draft:

d. A person petitioning for expungement of juvenile adjudications pursuant to this section shall present an expungement application to the Superior Court in the county in which the adjudication for the delinquency was adjudged, which contains a duly verified petition as provided in N.J.S. 2C:52-7 for the juvenile adjudication(s) sought to be expunged, praying that the adjudication, or adjudications if applicable, and all records and information pertaining thereto be expunged. The petition for each adjudication appended to an application shall comply with the requirements set forth in N.J.S. 2C:52-1 et seq.