



WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

Memo No. 1

TO: MEMBERS OF THE SPECIAL COMMITTEE ON EXPUNCTION OF CRIMINAL RECORDS

FROM: William Ford, Senior Staff Attorney, and Don Dyke, Chief of Legal Services

RE: Laws on Expunction and Removal of Records Relating to Criminal Proceedings

DATE: September 19, 2006

INTRODUCTION

This Memo was prepared for the Joint Legislative Council's Special Committee on Expunction of Criminal Records, which is directed to study the circumstances under which records relating to civil forfeiture and criminal proceedings may be expunged by Wisconsin courts and other record custodians. The circumstances to be considered include whether a record subject is a first offender, the age of the record subject, the time that has elapsed since the proceeding was commenced or the record subject was convicted, and the nature or seriousness of the crime or violation.

This Memo provides initial background information on current Wisconsin laws relating to expunction or removal of records that relate to criminal proceedings. It is recognized that the Special Committee's charge is broader in scope than the subject of this Memo; additional information, both on the topic of this Memo and other topics, will be provided as needed during the Special Committee's deliberations.

Under Wisconsin's "open records law" [subch. II, ch. 19, Stats.], most records maintained by state and local government agencies are open to the public and any member of the public has a right to inspect a record and to make or receive a copy of it. Records of criminal proceedings maintained by state and local law enforcement agencies and by the courts, with few exceptions (e.g., prosecutors' case files), are public records. Another exception is that, under s. 938.396, Stats., law enforcement and court records involving juveniles are confidential and may not be disclosed to the general public.

Currently, two computerized criminal history databases exist under which any member of the public can obtain access to criminal records pertaining to an adult. One is the Consolidated Court

Automation Programs (CCAP), under which free electronic access to circuit court records is provided to the public via the Wisconsin Circuit Court Access (WCCA) website. The second is the computerized criminal history database maintained by the Crime Information Bureau (CIB) at the Wisconsin Department of Justice, under which, for a fee, any person can ask for a criminal background check on another person. [s. 165.84, Stats.]

The remainder of this Memo describes s. 973.015, Stats., which is the state statute under which certain court records may be expunged. This statute is likely to be a focus of deliberations by the Special Committee.* In addition, the Memo describes s. 165.84 (1), Stats., which provides a procedure for removing certain information from the computerized criminal history database maintained by the CIB.

EXPUNCTION OF CERTAIN COURT RECORDS

When Expunction May Occur

Section 973.015, Stats., provides for the expunction of court records under certain limited circumstances. The statute reads as follows:

973.015 Misdemeanors, special disposition. (1) (a) Subject to par. (b), when a person is under the age of 21 at the time of the commission of an offense for which the person has been found guilty in a court for violation of a law for which the maximum penalty is imprisonment for one year or less in the county jail, the court may order at the time of sentencing that the record be expunged upon successful completion of the sentence if the court determines the person will benefit and society will not be harmed by this disposition. This subsection does not apply to information maintained by the department of transportation regarding a conviction that is required to be included in a record kept under s. 343.23 (2) (a).

(b) The court shall order at the time of sentencing that the record be expunged upon successful completion of the sentence if the offense was a

*Another statute, s. 938.355 (4m), Stats., authorizes and, in one circumstance requires, a court to expunge the court's record of a delinquency adjudication involving a juvenile. That statute is set forth below. As noted in the text of this Memo, court records of a delinquency adjudication are generally confidential under s. 938.396, Stats.

938.355 (4m) EXPUNGEMENT OF RECORD. (a) A juvenile who has been adjudged delinquent under s. 48.12, 1993 stats., or s. 938.12 may, on attaining 17 years of age, petition the court to expunge the court's record of the juvenile's adjudication. Subject to par. (b), the court may expunge the record if the court determines that the juvenile has satisfactorily complied with the conditions of his or her dispositional order and that the juvenile will benefit from, and society will not be harmed by, the expungement.

(b) The court shall expunge the court's record of a juvenile's adjudication if it was the juvenile's first adjudication based on a violation of s. 942.08 (2) (b), (c), or (d), and if the court determines that the juvenile has satisfactorily complied with the conditions of his or her dispositional order. Notwithstanding s. 938.396 (2), the court shall notify the department promptly of any expungement under this paragraph.

violation of s. 942.08 (2) (b), (c), or (d), and the person was under the age of 18 when he or she committed it.

(2) A person has successfully completed the sentence if the person has not been convicted of a subsequent offense and, if on probation, the probation has not been revoked and the probationer has satisfied the conditions of probation. Upon successful completion of the sentence the detaining or probationary authority shall issue a certificate of discharge which shall be forwarded to the court of record and which shall have the effect of expunging the record. If the person has been imprisoned, the detaining authority shall also forward a copy of the certificate of discharge to the department.

In order for court records relating to an offense to be expunged under s. 973.015, Stats.:

1. The person must be *under 21 years of age* at the time he or she committed the offense.
2. The offense must be classified as a *misdemeanor* under Wisconsin law. The statute does not cover ordinance violations, state civil forfeitures, or felonies.
3. The person must have been *convicted* of the misdemeanor. If the charges are dismissed or the person is not otherwise convicted, the statute does not apply.
4. The court must determine that *the person will benefit and society will not be harmed* by the expungement.
5. The court must order expungement *at the time of sentencing*. After the person has been sentenced, the statute does not apply.
6. The person must *successfully complete the sentence*. The person successfully completes the sentence if he or she has not been convicted of a subsequent offense and, if the person was on probation, the probation was not revoked and the conditions of probation were satisfied.

If the court orders expunction and the person successfully completes the sentence, the detaining or probationary authority is required to issue a certificate of discharge which is forwarded to the court of record and has the effect of expunging the record.

When the court record is expunged, the clerk of court must: (1) remove any paper index and non-financial court record and place them in the case file; (2) electronically remove any automated non-financial record, except the case number; (3) seal the entire case file; and (4) destroy expunged court records in accordance with the provisions of the Wisconsin Supreme Court rules relating to court records. [SCR (Supreme Court Rule) 72.06.]

Section 973.015 is the only authority for the expunction of Wisconsin criminal records. A pardon does not expunge criminal records. The attorney general has opined that circuit courts do not have inherent authority to order expunction of criminal records. 70 Op. Atty. Gen. 115 (1981).

Effect of Expungement

The consequences of having a court record expunged include the following:

1. The record of the conviction is removed from the WCCA. The response to a request for the record will be that no record has been found. No reference is made to the fact the record was expunged. [Director of State Courts, Policy on Disclosure of Public Information over the Internet, Appendix 1.]
2. The record cannot be considered at a subsequent sentencing, is not available for repeater sentence enhancement, and cannot be used to attack the credibility of the person if he or she is called as a witness in a subsequent court proceeding. [*State v. Anderson*, 160 Wis. 2d 435; 466 N.W.2d 681 (1991), and *State v. Leitner*, 253 Wis. 2d 449, 646 N.W.2d 341 (2002).] Expunction under s. 973.015, Stats., applies to court records only. Prosecutors and law enforcement agencies are not required to destroy their records relating to an expunged conviction. Therefore, the records maintained by law enforcement agencies, including the CIB and district attorneys, are not affected when a court record is expunged.

In addition, the fact that a record of conviction has been expunged under s. 973.015, Stats., does not relieve a person from answering “yes” to a question from a prospective employer of whether he or she has ever been convicted of a crime. Under s. 111.322, Stats., an employer may not discriminate against an employee or a prospective employee on the basis of the person’s conviction record unless the circumstances of the offense for which the person was convicted substantially relate to the circumstances of a particular job. Section 111.32 (3), Stats., broadly defines a “conviction record” to include information that a person has been convicted of any felony, misdemeanor or other offense [s. 111.32 (3), Stats.] This broad definition would appear to encompass a conviction that has been expunged. Because of the “substantial relationship” exception, an employer may legally ask an employee or prospective employee about past convictions, including, it would seem, expunged convictions.

REMOVAL OF INFORMATION FROM RECORDS OF CRIME INFORMATION BUREAU AND WCCA

CIB Database

The CIB maintains a computerized criminal history database that contains detailed information of arrests, arrest charges, prosecution, court findings and sentences and state correctional systems admissions and releases for Wisconsin. All information in the CIB’s database is based on submission of arrest fingerprint cards by law enforcement agencies.

Section 165.84 (1), Stats., provides a procedure to have information removed from the CIB database under certain circumstances. The statute provides: “Any person arrested or taken into custody and subsequently released without charge, or cleared of the offense through court proceedings, shall have any fingerprint record taken in connection therewith returned upon request.”

In order to qualify for removal under s. 165.84 (1), Stats., all offenses reported on the arrest fingerprint card must have been disposed of by the person being released without charge (or not prosecuted) or the person being cleared of the offenses through court proceedings. This would include dismissal of the case by the prosecutor or judge or acquittal by a judge or jury. The dismissal of only

some of the offenses but convictions on others precludes the removal of the record under the statute. Convictions of lesser offenses included in those reported on the arrest fingerprint card also preclude removal of the record. Completion of a first offender program which results in no prosecution or dismissal qualifies for removal under the statute. Expunction under s. 973.015, Stats., does not qualify for removal.

The Department of Justice has developed a form which a person may use to request removal of information from the CIB database. Removal of information from the CIB database has no effect on the availability of the same information from court files (including CCAP) or police records. However, if the arrest information being removed from the CIB database was reported to the Federal Bureau of Investigation (FBI), the Department of Justice will notify the FBI to remove the information from its files.

WCCA

As indicated previously, if a criminal case is expunged under s. 973.015, Stats., reference to the case is removed from the WCCA. In addition to removal of the record of a criminal case following expunction, the Director of State Courts Policy on Disclosure of Public Information Over the Internet provides that records on the WCCA are retained for a specified period of time, depending on the nature of the case. After the minimum retention period is reached for a case, the case is no longer accessible through the WCCA.

The minimum retention period for cases on the WCCA is linked to ch. SCR 72, Retention and Maintenance of Court Records (distributed to committee members under separate cover). Until recently, the WCCA retention policy provided that case information was retained on the WCCA for a minimum of 10 years, or the minimum period established for that case type by Supreme Court Rule, whichever was longer. The revised retention policy no longer includes the minimum 10-year retention period but directly links the WCCA retention period in all cases to the ch. SCR 72 retention period (unless there is an active warrant or appeal or money owed the court). The new policy will be implemented in the near future.

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