



Understanding the New "Expungement" Law

NOVEMBER 16, 2016



Background

- It is estimated that 1 in 3 Americans has a criminal record
- Despite laws passed to limit the use of records employers, landlords, colleges and others often deny opportunities using a persons prior record as the excuse.



Why change access to criminal records?

- ▶ 87 % of employers do background checks before hiring making criminal records a leading contributor to unemployment in PA
- ▶ Estimates say that connecting 100 formerly convicted residents with jobs produces \$55 million in earnings over their lifetime

What is Expungement?

- ▶ Definition found in 9102 of Title 42
- ▶ (1) To remove information so that there is no trace or indication that such information existed;
- ▶ (2) to eliminate all identifiers which may be used to trace the identity of an individual, allowing remaining data to be used for statistical purposes; or
- ▶ (3) maintenance of certain information required or authorized under the provisions of section 9122(c) (relating to expungement), when an individual has successfully completed the conditions of any pretrial or post trial diversion or probation program.

42 Pa. C.S. Section 9122

- ▶ Prior Law (before November 2016)
- ▶ Expungement as complete removal from a persons record

Expungement specifically 9122(a)

- ▶ 9122 (a) specifically
- ▶ 18 months have elapsed and no action is pending
- ▶ Order of Court
- ▶ STOP program completion

Expungement 9122(b)

9122 (b) generally

- ▶ Over the age of 70 and free from arrest within 10 years
- ▶ Dead 3 years
- ▶ Petition for removal of summary offense with no criminal activity within 5 years

Offenses prohibited from expungement

- ▶ (b.1) Prohibition.--A court shall not have the authority to order expungement of the defendant's arrest record where the defendant was placed on Accelerated Rehabilitative for a violation of any offense set forth in any of the following where the victim is under 18 years of age:
 - ▶ Section 3121 (relating to rape).
 - ▶ Section 3122.1 (relating to statutory sexual assault).
 - ▶ Section 3123 (relating to involuntary deviate sexual intercourse).
 - ▶ Section 3124.1 (relating to sexual assault).



Precluded from expungement

- ▶ Section 3125 (relating to aggravated indecent assault).
- ▶ Section 3126 (relating to indecent assault).
- ▶ Section 3127 (relating to indecent exposure).
- ▶ Section 5902(b) (relating to prostitution and related offenses).
- ▶ Section 5903 (relating to obscene and other sexual materials and performances).

Expungement - forms

- ▶ Expungement of Summary offenses-- Rule 490
- ▶ Expungement of Court Cases – Rule 790
- ▶ Forms found at:
www.pacourts.us/forms/for-the-public

Expungement - caselaw

- ▶ Wallace (Pa. 2014)-

 - no right for inmate to file for expungement while incarcerated

- ▶ Hanna (Pa. Super. 2010)-

 - Decision to grant or deny expungement lies within the discretion of the trial court which must balance the competing interests of petitioner and Commonwealth.

 - Standard of review is abuse of discretion

Expungement- caselaw

- ▶ Giulian (Pa. 2016)

 - 9122 covers three distinct areas of expungement

 - must-** 9122 (a)

 - never-** 9122 (b.1)

 - may-** 9122 (b)

 - defendant not statutorily barred from expungement, must consider Wexler factors

Expungement- caselaw

- ▶ Lutz (Pa. Super. 2001)

if the charges were dismissed as part of a plea agreement then not entitled to expungement of the charges

- ▶ Wexler (Pa. 1981)

Balancing test to determine the individuals right to be free from harm attendant to maintenance of the arrest record against the Commonwealths interest in preserving the record

Expungement - caselaw

- ▶ Wexler- eligibility for expungement

 - dismissal v. Nol Pross

 - plea agreement v. Implicit admission

- ▶ Wexler "factors"

 - Strength of C's case, reason to retain records, age, record, employment history, length of time between arrest and petition and **specific adverse consequences the petitioner may endure should expunction be denied**

Pardon

- ▶ Act by the Governor of PA that erases your conviction from your criminal record
- ▶ Prior to November 2016, the ONLY way a felony or misdemeanor can be eliminated; these convictions CANNOT be expunged

Pardon

- ▶ Process may take several years
- ▶ Costs? \$8.00 for the application, \$25.00 for filing fee, \$10.00 for prior record and \$10.00 for a certified copy of your driving record.
- ▶ Incidental copies of documents and postage may also be required



Pardon- who can apply?

- ▶ Anyone is eligible but usually those who have a minor offense of more than 5 years or a serious offense of more than 10 years are the majority of those granted
- ▶ Rule of thumb- the longer you have stayed out of trouble the better chance of obtaining a pardon

Pardon- how do I apply?

- ▶ Send a short letter to the Board of Pardons requesting a hearing

333 Market Street, 15th floor

Harrisburg, PA 17126-0333

- ▶ Enclose a cashier's check or money order for \$8.00 and a business sized envelope with \$1.30 of postage



Pardon-what you will need

- ▶ Copy of PSP certified record
- ▶ Copy of certified driving record
- ▶ Passport sized photograph



Pardon- what you will need

- ▶ Conviction information
 - place, date, judge, offense
 - copies of disposition information
- ▶ Letters of recommendation
- ▶ Awards and/or diplomas and certificates



Pardon- what you must include

- ▶ Details of the crime
- ▶ Conduct since the offenses were committed
- ▶ Why you should be pardoned
 - Affects housing, employment, eligibility for schooling



Pardon- what happens next?

- ▶ After about **two years** the Pennsylvania Board of Probation and Parole will send an agent to interview and gather important information
- ▶ It is important that the applicant be as cooperative as possible; explain rather than refuse to answer questions posed by the investigating agent

Pardon-application review

- ▶ Application is reviewed by committee:
Lt. Governor, Attorney General, victim representative,
corrections expert and psychologist
- ▶ 2 members of the board must agree, if they do then a hearing will be granted
- ▶ Determination usually takes about **one year**



Pardon- decision

- ▶ If no hearing is granted, application is DENIED
- ▶ If hearing is granted, will be held within a few months



Pardon- hearing process

- ▶ If hearing is granted, applicant must appear in Harrisburg in person
- ▶ Hearings last 15 minutes and are open to the public
- ▶ Can have an attorney to represent applicant
- ▶ May bring witnesses to speak on applicants behalf

Pardon- hearing

- ▶ The board will ask about:
 - remorse for crimes
 - likelihood of committing crimes in the future
 - any other arrests on criminal record
 - reasons for the request
 - how it may affect employment, housing....



Pardon- decision

- ▶ Vote is taken at the end of the hearing on all cases presented
- ▶ Applicant needs 3 of 5 members to vote in support of a pardon
- ▶ If 3 of 5 approve, recommendation sent to the Governor



Pardon-outcome

- ▶ Governor makes the final decision on pardon
- ▶ Generally the Governor has followed the Board's recommendation
- ▶ Decision can take up to **one year**

Pardon- Granted

- ▶ If the pardon is granted, applicant must then apply for the expungement of the record in the county where the offense was committed
- ▶ Copy of the document signed by the Governor must be attached to the petition for expungement in county where the offense was committed

Act 5

- ▶ Effective November 14, 2016 Pennsylvania will allow certain old and minor misdemeanor convictions to be "sealed" or subject to limited access
- ▶ Sealing differs from expungement- the charge is not completely eliminated but will not be available to employers and landlords

Act 5- legal consequences

- ▶ Law enforcement and state licensing agencies can still access the information, but the public cannot
- ▶ Act 5 specifically says that applicants **do not** have to disclose sealed convictions to employers, landlords, etc..

Act 5- Eligible Offenses

- ▶ Misdemeanor 2 or 3 or ungraded misdemeanors punishable by no more than 2 years in jail
- ▶ Free from arrest or conviction for a period of 10 years from confinement or supervision which ever is later
- ▶ Examples:
 - theft, DUI, drug offenses, disorderly conduct, prostitution; simple assault **ONLY** if an M3

Act 5 - Disqualifiers

- ▶ **May not have ever been convicted of:**
 - any felony offenses
 - any misdemeanor 1
 - 4 or more misdemeanors
 - Simple assault (M2 or greater)
 - any** offense that requires SORNA

Act 5 – Procedure

- ▶ AOPC creating a form petition
new rule 791 to govern sealing orders
- ▶ Copy served within 10 days on DA's office
- ▶ DA has 30 days to file objections to the petition

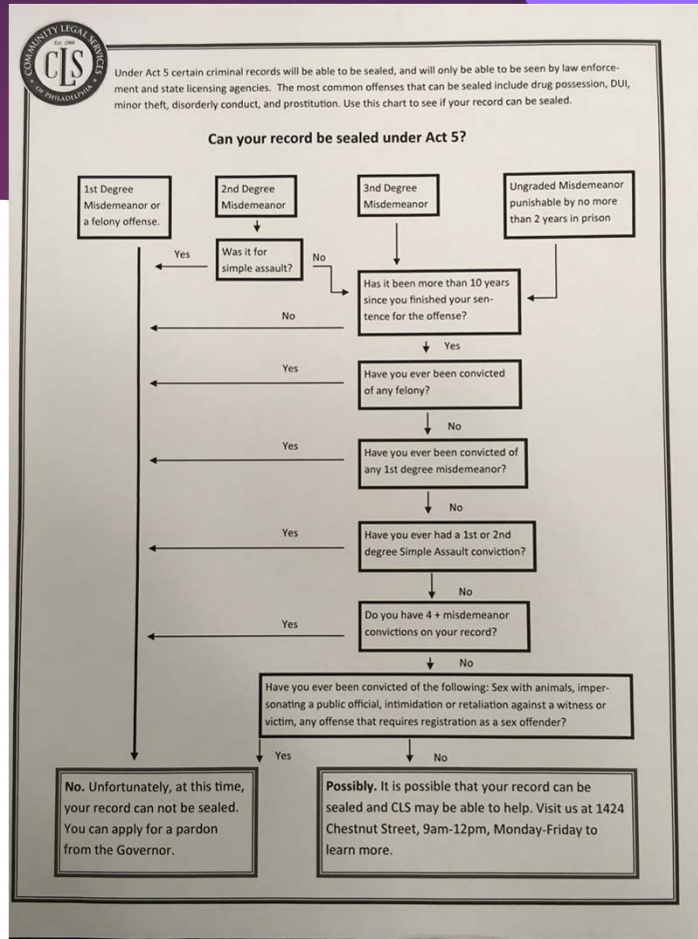
Act 5- Procedure

- ▶ If case has both a conviction that can be sealed and charges were dropped
 - it could be eligible for both partial expungement and sealing
 - should file separate petitions for each

Act 5- Procedure

- ▶ Still have outstanding fines and costs?
 suggest pay remaining debt prior to filing
- ▶ Filing fee \$132.00
 IFP filings may be considered

Act 5 eligibility



Future efforts? "Clean Slate"

- ▶ Clean Slate Bill- Senate Bill 1197

 - pending legislation to increase eligible offenses

 - automatic sealing from general public/websites

 - 10 years without subsequent felony/misdemeanor conviction

 - 5 years for summary offenses

 - 7 years for juvenile adjudication

Clean Slate

- ▶ No petition required
- ▶ Charges not leading to conviction receive limited access 60 days after disposition of charges
- ▶ Limited access of the other categories within 30 days of eligibility
- ▶ DA can petition court to remove limited access after conviction of subsequent summaries



Clean Slate

- ▶ Expungement or limited access of offenses cannot prohibit employment under Federal laws
- ▶ Licensing agencies shall not use the information in consideration of an application for a license, certification, registration or permit.