



Legal and Legislative  
Services Division

**Peter E. Powell**  
Legal and Legislative Administrator

PO Box 2448, Raleigh, NC 27602  
T 919 890-1300 F 919 890-1914

## MEMORANDUM

**TO:** Clerks of Superior Court

**FROM:** Troy D. Page  
Associate Counsel

**DATE:** September 24, 2010

**RE:** 2010 Expunction Changes and New/Amended Forms

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In its 2009 and 2010 sessions, the General Assembly enacted a number of changes to the statutes for expunction of criminal records. This memorandum describes:

- Changes to the expunction statutes and their effective dates;
- Changes to expunction procedures for the clerk of superior court; and
- Changes to the current forms for expunctions and the creation of three new forms.

There were no legislative changes to the process for expunction of non-criminal records (e.g., juvenile delinquency records under G.S. 7B-3200), so this memorandum concerns only expunction of criminal records under Article 5 of Chapter 15A of the General Statutes.

### Legislative Background

The changes to the expunction statutes were enacted over a series of three session laws: two in 2009, and one in 2010:

- S.L. 2009-577 (House Bill 1329, consolidate expunction statutes), effective December 1, 2009  
<http://www.ncleg.net/Sessions/2009/Bills/House/PDF/H1329v7.pdf>
- S.L. 2009-510 (Senate Bill 262, expunctions/purge online databases), effective October 1, 2010  
<http://www.ncleg.net/Sessions/2009/Bills/Senate/PDF/S262v7.pdf>
- S.L. 2010-174 (House Bill 726, clarify expunctions), effective October 1, 2010  
<http://www.ncleg.net/Sessions/2009/Bills/House/PDF/H726v5.pdf>

Session Law (S.L.) 2009-577 (HB 1329) did what its short title says: it consolidated all criminal expunction statutes under Article 5 of Chapter 15A by re-codifying expunction provisions from other chapters of the General Statutes.<sup>1</sup> The bill also made some minor substantive changes to the affected statutes, such as clarifying G.S. 15A-145(a) to provide that eligibility for expunction depends on the petitioner's age at the time of the commission of the offense, rather than the age at the time of conviction. Finally, HB 1329 added an entirely new expunction proceeding for certain old misdemeanor larceny convictions, G.S. 15A-145(d1).<sup>2</sup>

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<sup>1</sup> G.S. 14-50.30 (gang expunctions), G.S. 90-96 (certain drug expunctions) and G.S. 90-113.14 (toxic vapors expunctions). Note that the conditional discharge provisions for gang and drug offenses remain in G.S. 14-50.29, 90-96, and 90-113.14. Only the expunction provisions were re-codified.

<sup>2</sup> Form AOC-CR-267 was adopted effective December 1, 2009, for petitions under G.S. 15A-145(d1).

S.L. 2009-510 (SB 262) made more extensive changes to the expunction statutes. Most of the changes in that act were drafted in an attempt to address the proliferation of criminal records in the private sector, and particularly the disclosure of previously expunged records by private companies that are in the business of providing criminal background checks for employment, housing, educational admission, etc. Specifically, S.L. 2009-510 made the following changes, effective October 1, 2010:

- Consolidating the clerks' process for reporting expunctions and conditional discharges to the Administrative Office of the Courts (NCAOC) under a single statute, G.S. 15A-150, including a requirement that the clerk report *all* expunctions to the NCAOC.
- Expanding the scope of expunction orders to cover agencies not previously required by statute to expunge their records, notably the Department of Correction and the Division of Motor Vehicles. G.S. 15A-150(b). S.L. 2010-174 added an exception for certain DMV records for which expunction would be prohibited by federal law. G.S. 15A-151(c).
- Requiring expunction by certain private background-checking companies that receive criminal justice data from State or local agencies. G.S. 15A-152(a).
- Creation of a civil cause of action against certain background-checking companies for persons injured by the disclosure of a previously-expunged case. G.S. 15A-152(c).
- Allowing a person with a prior expunction to receive verification of the prior expunction from the NCAOC and other agencies (as part of a civil action against a background-checking company). G.S. 15A-152(d) (and (e), enacted by S.L. 2010-174).

S.L. 2009-577 and S.L. 2009-510 were ratified on the same day, but neither act accounted for changes made by the other. In addition, a late-session drafting error caused a number of provisions that were adopted in committee for S.L. 2009-510 to be omitted from the final version.

To reconcile the two bills and to enact the provisions omitted from S.L. 2009-510, the General Assembly passed S.L. 2010-174 (HB 726) in the short session of 2010.<sup>3</sup> S.L. 2009-510, as amended by S.L. 2010-174, makes procedural changes to almost every expunction statute in Chapter 15A. Both acts are effective October 1, 2010. As a result, all of the NCAOC's expunction forms have been revised, and three new forms have been adopted.

With one exception, the legislative changes taking effect on October 1, 2010, do not change the substantive aspects of expunction. There are no changes to the offenses that may be expunged, to the effect of prior convictions on expunctions, or to any other criterion for expunction.

The one exception was a technical correction to the new misdemeanor larceny expunction of G.S. 15A-145(d1). As enacted by S.L. 2009-577, G.S. 15A-145(d1) contained conflicting criteria for how many years must have passed before the petitioner could petition for expunction. Some parts of the subsection specified a period of 15 years since conviction, but other parts specified that the court needed to find a period of good behavior for only 10 years in order to grant the petition. S.L. 2010-174 amended subsection (d1) to correct the 10-year references to 15 years.

The remainder of this memorandum discusses the procedural changes for expunctions that take effect on October 1, 2010, and the changes to NCAOC forms and processes to account for the legislative changes.

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<sup>3</sup> S.L. 2010-174, § 16, also contained a technical change to a provision for sex offender registration for certain out-of-state convictions. That change has nothing to do with the expunction process, and therefore is not discussed further in this memorandum. For information on the change to sex offender registration, see Jamie Markham, 2010 Legislation Affecting Sentencing, Corrections, and Detention (UNC School of Government, August 2010), at the following link: <http://sogweb.sog.unc.edu/blogs/ncclaw/wp-content/uploads/2010/08/2010-Legislation-Affecting-Sentencing-Corrections-and-Detention-21.pdf>.

## Expunction Changes Effective October 1, 2010

This section describes changes to the filing and routing of petitions, the processing of orders when those petitions are granted, and NCAOC's verification of prior expunctions.

This section describes only the changes to the current expunction process as a result of the recent legislation. This memo does not explain the entire expunction process in detail. As a more comprehensive guide, the NCAOC's Court Services Division (CSD) has published a new "Expunction Guide for Clerks," which incorporates the procedural changes described below.<sup>4</sup> Clerks with specific questions about the processes covered by that guide should contact their Court Services Analyst (CSA) or the NCAOC's Records Officer at (919) 890-1341.

Note that the changes to the petition filing process are effective for petitions filed on or after October 1, 2010. Changes for granted expunction orders apply to orders entered on or after October 1, 2010, regardless of when the petition was filed. These effective dates are noted below in each section.

### I. Petition Filing and Pre-Hearing Process

**Effective Date:** The changes described here for filing and processing of an expunction petition apply to **all expunction petitions filed on or after October 1, 2010.**<sup>5</sup>

#### A. Clerk/law enforcement affidavits have been replaced by SBI/NCAOC record checks

1. Prior to October 1, 2010, several expunction statutes required affidavits by the clerk of superior court, sheriff, and chief of police (when applicable), that the petitioner had no subsequent criminal activity since the offense that was the subject of the expunction petition.

Effective October 1, 2010, the affidavits by the clerk, sheriff, and chief will no longer be required. They will be replaced by a criminal record check by the Department of Justice's State Bureau of Investigation (SBI) and a search of the confidential record of expunctions by the NCAOC:

"An application on a form approved by the Administrative Office of the Courts requesting and authorizing a name-based State and national criminal record check by the Department of Justice using any information required by the Administrative Office of the Courts to identify the individual and a search of the confidential record of expunctions maintained by the Administrative Office of the Courts. The application shall be forwarded to the Department of Justice and to the Administrative Office of the Courts, which shall conduct the searches and report their findings to the court."<sup>6</sup>

2. Only certain statutes require SBI/NCAOC record checks.  
The record checks described above are required for expunction petitions under the following statutes. The "application" for the record checks is pre-printed on the corresponding NCAOC form for each provision.

For Expunction Under...	... Petitioner Must Use:
G.S. 15A-145(a)	AOC-CR-264
G.S. 15A-145(d1)	AOC-CR-267
G.S. 15A-145.1	AOC-CR-269
G.S. 15A-145.2(a)	AOC-CR-266
G.S. 15A-145.3(a)	AOC-CR-268

3. NCAOC form is required for expunctions that require SBI/NCAOC record checks.  
The amended statutes require that the application be "on a form approved by the Administrative Office of the Courts" and include "any information required by the Administrative Office of the

<sup>4</sup> The guide is posted on the NCAOC intranet at: <https://cis1.nccourts.org/intranet/aoc/clerks/records.jsp>. The guide can be reached on the NCAOC intranet (<https://cis1.nccourts.org>) by selecting the "Clerks of Court" link from the menu column on the left side of the homepage, and then the "Records and Recordkeeping" link from the menu column on the left side of the subsequent page.

<sup>5</sup> S.L. 2010-174, § 17.

<sup>6</sup> G.S. 15A-145(a)(4a), 15A-145(d1)(4a), 15A-145.1(a)(4a), 15A-145.2(a)(3a), and 15A-145.3(a)(3a).

Courts to identify the individual.”<sup>7</sup> Other than the forms listed in the table above, there is no form “approved by the Administrative Office of the Courts” for this purpose.

For other expunction provisions, there is no statutory requirement that a petitioner use an NCAOC form. However, petitioners should be urged to use the NCAOC forms, because each form contains the necessary allegations, instructions, and orders for the corresponding expunction statute.

4. Other affidavits are still required.

Other affidavits required by certain expunction statutes, such as affidavits of good character, are still required. The SBI and NCAOC record checks replace **only** the affidavits of the clerk, sheriff, and chief of police. There are no NCAOC forms for the other affidavits.

B. Send only one copy to the SBI and NCAOC.

For petitions that must be routed to the SBI and NCAOC, **send only one copy**. The clerk should urge petitioners who route their own petitions to the SBI to do the same. In the past, a common practice in some counties and by certain attorneys has been to send multiple copies of a petition to the SBI and NCAOC. This has resulted in significant delays in processing expunction petitions.

II. Processing Granted Expunction Orders

**Effective Date:** The changes described here apply to **all expunction orders granted on or after October 1, 2010**, regardless of when the petition was filed.<sup>8</sup>

A. Expunction orders are sent to multiple agencies.

1. As enacted by S.L. 2009-510 and amended by S.L. 2010-174, the new G.S. 15A-150 provides that, upon the entry of an order to expunge, the clerk must provide a certified copy to the following agencies, each of which must expunge their records of the expunged case or charge:
  - a. the sheriff, chief of police, or other arresting agency;
  - b. the Division of Motor Vehicles (DMV)<sup>9</sup> and Department of Correction (DOC); and
  - c. any State or local agency identified by the petitioner on the petition form as bearing a record of the offense that has been expunged.
2. The clerk must send the certified copies of all expunction orders to **all** of the listed agencies, regardless of whether or not the clerk thinks the agency has a record of the case. Each agency will determine whether or not it has a record to expunge as a result of the order.
3. The arresting agency will notify the SBI, which will in turn notify the Federal Bureau of Investigation (FBI) of the expunction.<sup>10</sup>
4. The clerk does **not** notify private entities like background-checking companies, even if named on the petition. The private entities will be notified by the State and local agencies that provide them with criminal justice data.

B. Send copies of all expunctions to NCAOC.

Effective October 1, 2010, the clerk must provide a certified copy of **all** granted expunction orders to the NCAOC.<sup>11</sup> Prior to October 1, 2010, some expunction statutes did not require that the NCAOC keep a record of those expunctions in its confidential index. That is no longer the case; as of October 1, 2010, every expunction in the State must be reported to the NCAOC and retained in the confidential record of expunctions granted.

C. Clerk’s certification of notice to other agencies is required.

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<sup>7</sup> *Id.*

<sup>8</sup> S.L. 2010-174, § 17.

<sup>9</sup> As noted earlier, the DMV may not expunge records for which expunction would be prohibited by federal law. G.S. 15A-151(c).

<sup>10</sup> G.S. 15A-150(c).

<sup>11</sup> G.S. 15A-150(a).

1. Prior to October 1, 2010, the NCAOC's expunction forms have provided space for the clerk to certify only that an order is a true and complete copy of the order entered. For orders entered on or after that date, merely certifying the order as a true copy will be insufficient.
2. For orders entered on or after October 1, 2010, the clerk must provide to the NCAOC certification that (i) the copy is a true copy, and (ii) that notice was given to all of the agencies described above, in compliance with G.S. 15A-150. This additional certification of notice to the affected agencies is necessary in order for the NCAOC to provide verification of that notice on the clerk's behalf. See section III, below.
3. All of the NCAOC's expunction forms have been amended so that the clerk's certification section provides the necessary certification of notice to the affected agencies. For expunction orders entered on older expunction forms (which lack the pre-printed fields for certification of notice to other agencies), see section 2.3.2.2. of "Expunction Guide for Clerks."<sup>12</sup>
4. Because the certification of notice to other agencies is required by statute, the NCAOC will return to the clerk for re-certification any expunction order that lacks a complete certification and the clerk's seal.

III. Verification of certain expunctions can be requested from NCAOC.

- A. As enacted by S.L. 2009-510 and amended by S.L. 2010-174, the new G.S. 15A-152(d) allows certain persons with prior expunctions to apply to the NCAOC for verification of their expunctions.
- B. G.S. 15A-152(d) also requires that the NCAOC provide verification "that notice of the expunction was made in accordance with G.S. 15A-150," which includes the clerk's notice to other agencies to expunge their records. Because the clerk will destroy the original expunction order along with the expunged file, the certified copy sent to the NCAOC will be the only record that such notice was given. The NCAOC can provide this verification on the clerk's behalf only if the clerk has provided certification of notice to the affected agencies, as described above.
- C. Verification of an expunction can be provided **only** in certain situations involving disclosure of the expunction by a private background-checking company. Verification can **not** be provided for other purposes, like immigration applications, for delivery to other agencies that were not named in the original order, or just for the petitioner's personal records.
- D. Citizens asking how to obtain verification of prior expunctions should be directed to form AOC-G-260 on the NCAOC website (see below). Side Two of the form includes instructions for its use.

**Amended Expunction Forms Available October 1, 2010**

To account for the legislative and procedural changes described above, the NCAOC's Forms Committee has amended all of the current forms for expunction of criminal records and has adopted three new forms required by the new and amended expunction statutes. All of the forms listed below will be available on the NCAOC's website on October 1, 2010, and may be found by searching by the form number at <http://www.nccourts.org/Forms/FormSearch.asp>.

Expunction Statute (N.C.G.S.)	AOC Form	Expunction Statute (N.C.G.S.)	AOC Form
15A-145(a)	AOC-CR-264	15A-145.3	AOC-CR-268
15A-145(a) (instructions)	AOC-CR-264I	15A-145.3 (instructions)	AOC-CR-268I
15A-145(d1)	AOC-CR-267	15A-146	AOC-CR-264
15A-145(d1) (instructions)	AOC-CR-267I	15A-146 (instructions)	AOC-CR-264I
15A-145.1	*AOC-CR-269	15A-147	AOC-CR-263
15A-145.1 (instructions)	*AOC-CR-269I	15A-148	None <sup>13</sup>
15A-145.2	AOC-CR-266	15A-149	AOC-CR-265
15A-145.2 (instructions)	AOC-CR-266I	15A-152(d) <sup>14</sup>	*AOC-G-260

\* New form.

<sup>12</sup> On the NCAOC intranet at: <https://cis1.nccourts.org/intranet/aoc/clerks/records.jsp>.

<sup>13</sup> G.S. 15A-148 applies only to a limited and rare circumstance for expunction of certain DNA records, so no form has been developed.

<sup>14</sup> This is the new form for verification of a prior expunction. This form is submitted to the NCAOC, not to the clerk.

