The following draft is excerpted from the forthcoming 2015 edition of Relief from a Criminal Conviction: A Digital Guide to Expunctions, Certificates of Relief, and Other Procedures in North Carolina, by John Rubin. The 2012 edition of the Relief Guide may be viewed at www.sog.unc.edu/node/2588.

Appendix D: Frequently Asked Questions

This part of the guide provides answers to frequently asked questions about expunctions, certificates of relief, and other mechanisms for obtaining relief from a criminal conviction in North Carolina. Many questions are not specifically resolved by the North Carolina relief statutes. The answers reflect the interpretations of the author, John Rubin.

Waiting Periods

For expunction statutes that impose a waiting period based on when a person was convicted *and* completed his or her sentence, how should the waiting period be construed?

This guide's view is that all of the statutes of this type can be construed consistently. All of the expunction provisions for convictions contain a waiting period, and most involve a two-part formulation—essentially, that the defendant may not file an expunction petition until the later of two events: (i) the passage of a specified number of years since the date of the conviction or (ii) completion of the defendant's sentence. Under this formulation, a person always must wait the specified number of years after the date of conviction before petitioning for an expunction; if the person has not completed his or her sentence within that time, he or she must wait any additional time it takes to complete the sentence. Some of the statutes state this approach clearly, others do not. The view of this guide is that the slight difference in wording among the statutes is not substantive and that the above description is the correct approach for all of the statutes with a two-part waiting period.

The two statutes with the clearest language are G.S. 15A-145 on expunctions of misdemeanors committed before age 18 or age 21 and G.S. 15A-145.1 on expunctions of gang offenses committed before age 18. Both incorporate roman numerals, like those above, into the waiting period language to make the requirements clear. Thus, G.S. 15A-145 states that a petition cannot be filed "earlier than: (i) two years after the date of the conviction, or (ii) the completion of any period of probation, whichever occurs later. . . ." The General Assembly added the roman numerals as part of a technical corrections bill in 2008, S.L. 2008-187, sec. 35 (S 1632). Before then, the statute stated that a petition could not be filed "earlier than two years after the date of the conviction or any period of probation, whichever occurs later. . . ." This phrasing was potentially unclear because it could be interpreted as requiring a defendant to wait two years after the date of conviction *and* the period of probation. The problem with that interpretation is that it made the language about the date of conviction superfluous. A person always completes his or her sentence, including probation, sometime after the date of his or her conviction; therefore, a person would always have to wait two years after completing probation. By adding the roman numerals, the General Assembly clarified that it intended to require the defendant to wait two years after the date of conviction and to wait longer *only* if he or she had not completed probation. That the General Assembly made the change in a technical corrections bill indicates that it did not consider the change substantive and that it had the same intent before the addition of the roman numerals.

G.S. 15A-145.1 contains the same clarifying roman numerals. That statute was enacted by the General Assembly in 2009 when it consolidated the expunction statutes. The General Assembly imported the waiting-period language, including the roman numerals, from the expunction provisions in the gang offense statute, G.S. 14-50.30. The General Assembly enacted the gang offense statute in 2008, the same year it made the technical correction to G.S. 15A-145, described above. This sequence suggests that the drafters of the expunction provisions in the 2008 gang statutes were aware of the potential ambiguity in the waiting-period language and were careful to include clarifying roman numerals.

The expunction statutes enacted after 2008 do not use roman numerals. In this guide's view, those statutes do not reflect an intent by the General Assembly to depart from the above approach; rather, they reflect that the drafters in later years did not recognize the potential ambiguity of not having roman numerals. Similar phrasing appears in two of the statutes: G.S. 15A-145.4, which was enacted in 2011 and allows expunction of nonviolent felonies committed before age 18; and G.S. 15A-145.5, which was enacted in 2012 and allows expunction of older nonviolent misdemeanors and nonviolent felonies. G.S. 15A-145.4(c) states that an expunction petition "may not be filed earlier than four years after the date of the conviction or when any active sentence, period of probation, and post-release supervision has been served, whichever occurs later." G.S. 15A-145.5(c) contains the same language except that the waiting period is 15 years. This guide's view is that the language requires the defendant to wait the specified number of years after conviction and, if the defendant has not completed his or her sentence within that time, any additional time it takes to complete the sentence. The defendant does not have to wait the specified number of years after the date of conviction *and* the completion of the defendant's sentence, an interpretation that would render the conviction language superfluous.

G.S. 15A-145.5(c) contains additional language that may cause confusion. It states toward the end of the subsection that the court may grant an expunction petition if the person "was convicted of, *and completed any sentence received for*, the nonviolent misdemeanor or nonviolent felony at least 15 years prior to the filing of the petition" (italics added). This passage appears to be an awkward restatement of the two conditions discussed above. The statute would have been clearer had the sentence-completion requirement been placed at the end of the phrase rather than in the middle; however, because the sentence-completion requirement is set off by commas, it can be read as a separate requirement, with the 15-year waiting period applicable to the conviction date only. *Cf.* 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47:26 (7th ed. 2014) (observing that where a sentence contains several antecedents and several consequents, courts apply the words to the subjects to which, by context, they seem most properly to relate). This interpretation would make the passage consistent with the rest of the statute as well as the General Assembly's previous approach to two-part waiting periods.

A final statute on expunction of prostitution offenses, passed in 2014 as part of a much larger act on sex trafficking, contains the same ambiguity. It requires that "at least three years have passed since the date of conviction or the completion of any active sentence, period of probation, and post-release supervision, whichever occurs later." G.S. 15A-145.6(b)(2)b. As with other recent statutes, the provision appears to be an awkward statement of the two-part waiting period intended by the General Assembly and, in this guide's view, should be read as requiring the petitioner to wait until either (i) three years have passed since the date of conviction or (ii) completion of his or her sentence, whichever occurs later.

Expunged Convictions

Does an expunged conviction count as a prior conviction under statutes barring relief based on a prior conviction?

No. The purpose of an expunction, stated in various ways in the expunction statutes, is to restore a person to the status he or she occupied before conviction of the offense. An expunged conviction therefore does not constitute a conviction for purposes of determining whether a person has a prior disqualifying conviction. However, many expunction statutes provide that a prior expunction of a particular kind disqualifies a person from obtaining another expunction. For that reason, a prior expunction, if made a disqualifier by the particular statute, would preclude a person from obtaining another expunction.

Other relief statutes operate similarly. For example, a person may obtain a certificate of relief for two prior convictions if the person otherwise meets the criteria for relief. An expunged conviction, because it has been expunged, does not constitute a disqualifying conviction. In addition, a prior expunction does not disqualify a person from obtaining a certificate of relief because, in contrast to many of the expunction statutes, the certificate of relief statute does not list expunctions as disqualifiers.

No Contest Pleas

May a person obtain an expunction of a conviction based on a no contest plea? Does a conviction based on a no contest plea count as a prior conviction under statutes barring relief based on a prior conviction?

For convictions on or after July 1, 1975, a conviction based on a no contest plea is both subject to expunction and a bar to expunction of other matters if the plea is for an offense specified by the expunction statute. For convictions before July 1, 1975, the answer to each question may diverge.

In North Carolina, a person may be convicted of a criminal offense in three ways: by pleading guilty, by pleading no contest, or by pleading not guilty and being found guilty by a judge or jury. If a person enters a no contest plea, the person neither admits nor denies guilt, which limits the use of the criminal conviction in a later civil lawsuit against the person for the conduct alleged in the criminal case. *See* Michael G. Okun & John Rubin, Employment Consequences of a Criminal Conviction in North Carolina, POPULAR GOV'T, Winter 1998, at n.65 and accompanying text. In other respects, a conviction based on a no-contest plea is like other criminal convictions, at least for convictions on or after July 1, 1975. That year, the General Assembly revised the law to require the court to find a factual basis for the criminal charges before accepting a no contest plea and entering a judgment of conviction. S.L. 1973-1286 (H 256) (adding G.S. 15A-1022(c) requiring such a finding). Thus, on or after that date, a conviction based on a no contest plea includes an adjudication of guilt.

Before July 1, 1975, the court in a criminal case could impose a judgment and sentence based on a no-contest plea but could not adjudicate the person guilty; without an adjudication of guilt, "there was not a conviction to be used in another case." *Davis v. Hiatt*, 326 N.C. 462, 466 (1990) (reviewing case law and finding that after change in law a conviction based on a no-contest plea counted as a conviction in later proceeding to revoke a driver's license); *State v. Outlaw*, 326 N.C. 467, 468–69 (1990) (reviewing case law). The conviction should still be subject to expunction because the record will still show that the person has a conviction and will be viewed as such by private employers, landlords, and others. In light of the above decisions, however, the conviction would not appear to constitute a prior conviction for purposes of a prior-conviction bar because it does not involve an adjudication of guilt.

Prayer for Judgment Continued (PJC)

May a person obtain an expunction of a "true" PJC? Does a PJC count as a prior conviction under statutes barring relief based on a prior conviction?

A person should be able to obtain an expunction of a true PJC under the same circumstances authorized for expunction of a final judgment of conviction, both for policy reasons and under the language of the statutes. The treatment of a PJC for purposes of determining whether it is a bar to relief is not necessarily the same, however. The answer depends on the language of the particular statute and the cases interpreting it.

Generally. A true PJC occurs when a defendant has pled guilty or has been found guilty and the court indefinitely continues the case without entering judgment. Although no judgment of conviction is entered, a true PJC is the final disposition in the case.

At one time the effect of a PJC had a more settled meaning. It was viewed as a way for a judge, in the exercise of discretion, to lessen the impact of a criminal proceeding. By withholding judgment in a case that he or she considered appropriate, a judge could keep a person from having a conviction and bearing the attendant consequences. *See, e.g., Barbour v. Scheidt*, 246 N.C. 169 (1957) (recognizing that PJC is proper where court is satisfied, by reason of extenuating circumstances, sufficient cause, or question of law, that public justice does not require judgment and sentence), In *Smith v. Commonwealth*, 113 S.E. 707, 709–10 (Va. 1922), cited with approval in *Barbour*, the court explained the distinction between a guilty verdict and a judgment of conviction following a determination of guilt. A guilty verdict allows further action in the proceedings, such as entry of judgment and sentence. It also triggers the opportunity for relief, such as a pardon. To trigger punitive consequences in other proceedings, however, the "great weight of authority" requires that a judgment of conviction be entered.

Beginning in the 1990s, North Carolina law began to shift. In a series of cases, the North Carolina appellate courts began treating a true PJC as a conviction for purposes of other proceedings. *See, e.g., State v. Sidberry*, 337 N.C. 779 (1994) (concluding that State could impeach defendant with PJC as a conviction under N.C. Evidence Rule 609); *Britt v. North Carolina Sheriffs' Educ. and Training Standards Comm'n*, 348 N.C. 573 (1998) (deferring to commission's interpretation that PJC constituted conviction and upholding revocation of deputy sheriff's certification); *State v. Hatcher*, 136 N.C. App. 524 (2000) (allowing true PJC to be used as prior conviction under structured sentencing for new offense). *Cf. State v. Southern*, 314 N.C. 110 (1985) (holding under Fair Sentencing Act that true PJC could not be used as prior conviction). As a result of these rulings, a PJC may seem beneficial to a person who receives it but often carries the consequences of a criminal conviction.

The North Carolina courts have continued to recognize that, if the applicable laws so provide, a PJC does *not* constitute a conviction for purposes of other proceedings. *See, e.g., Florence v. Hiatt*, 101 N.C. App. 539 (1991) (recognizing that true PJC did not constitute final conviction under statute authorizing DMV to suspend or revoke a person's driving privileges). Recent court decisions as well as legislative changes, discussed further below, have reinforced this possibility, recognizing circumstances in which a true PJC should not be treated as a conviction.

Expunction of PJC. Both policy reasons and the pertinent statutory language support expunction of a true PJC. Although it does not result in a judgment of conviction, a true PJC carries many of the same criminal and civil consequences, such as greater punishment in a subsequent criminal case or loss of an employment license as indicated by the rulings above. Expunction of a PJC can therefore be as important to a person as expunction of a final judgment of conviction. It seems unlikely that the General Assembly would have intended for a person who receives a PJC, which essentially is an act of judicial leniency, to be worse off than a person who receives a judgment and sentence.

The wording of the expunction statutes also supports this approach. For example, G.S. 15A-145 allows expunction of a misdemeanor conviction if the person "pleads guilty to or is guilty of a misdemeanor other than a traffic violation." The statute does not require a judgment of conviction. This language corresponds to the procedure for a PJC, in which a person pleads guilty to or is found guilty of the offense and the court withholds entry of judgment. Other expunction statutes likewise authorize expunction when a person pleads guilty or is found guilty. *See* G.S. 15A-145.1(a) (gang offense); G.S. 15A-145.2(c) (controlled substance and drug paraphernalia offenses); G.S. 15A-145.3(c) (toxic vapors offense); G.S. 15A-145.4(c) (nonviolent felony committed before age 18).

Some of the newer expunction statutes do not specifically refer to guilty pleas or findings of guilt. *See* G.S. 15A-145.5 (older felonies and misdemeanors); G.S. 15A-145.6 (prostitution offenses). Instead, they refer generally to expunction of a conviction. Since these statutes were intended to expand the right to an expunction, and they do not include clear language to the contrary, this guide's view is that the General Assembly intended for them to be construed consistently with the other relief statutes and allow expunctions of PJCs in the same circumstances as judgments of conviction. *See supra* Overview: Interpreting Relief Statutes (discussing importance of considering overall legislative scheme in construing language in individual statutes within the scheme).

Prior PJC as potential bar. For the sake of consistency, it would be simpler to interpret the impact of a PJC in the same way throughout the relief statutes; however, both the General Assembly and the courts have identified circumstances in which a PJC should not be treated as a conviction, particularly in recent years. In some instances, the law says so explicitly; in others, the courts have reached this result through interpretation. For purposes of determining whether a PJC bars relief or triggers adverse consequences, the relief statutes can be divided into three basic categories.

One category of statutes expressly provides that a PJC bars relief. The statute authorizing restoration of firearm rights is an example. It requires the court to deny relief if, among other things, the petitioner has received a prayer for judgment continued for a misdemeanor crime of violence (G.S. 14-415.4(e)(6)) or a prayer for judgment continued for a felony. G.S. 14-415.4(e)(7).

A second category of statutes provides for the opposite result. The most prominent example is in Chapter 20 of the General Statutes, which only treats a PJC as a conviction for Chapter 20 purposes, such as driver's license consequences, if it is a person's third PJC within a five-year period or involves a person with a commercial driver's license or an offense in a commercial motor vehicle. G.S. 20-4.01(4a). A recently enacted example is the statute on expunction of a nonviolent felony committed before age 18. It provides that certain drug offenses are not "nonviolent felonies" and therefore are not eligible for expunction; however, in 2012 (in S.L. 2012-191 (H 1023)), the General Assembly amended the statute to provide that PJCs for otherwise excluded drug offenses *are* eligible for expunction. G.S. 15A-145.4(a)(6).

Some statutes do not specifically refer to PJCs, but the courts have found that other language or principles exempt them from the consequences that follow a conviction. In *Walters v. Cooper,*

___ N.C. App. ___, 739 S.E.2d 185 (2013), *aff'd per curiam*, ___ N.C. ___, 748 S.E.2d 144 (2013), the court recognized that the sex offender registration statutes define a "reportable conviction," which triggers registration obligations, as a "final conviction." Because a PJC—in *Walters* for misdemeanor sexual battery—is not a final conviction, it does not trigger those obligations. *See also Little v. Little*, ___ N.C. App. ___, 739 S.E.2d 876 (2013) (holding that collateral estoppel principles did not permit court to rely on PJC for assault as basis for issuing domestic violence protective order because PJC is not a final judgment).

The third and by far largest category of relief statutes is silent about the effect of a PJC, stating generally that a prior conviction of certain offenses is a disqualifier. Most of the relief statutes discussed in this guide fall into this third category. *See, e.g.,* G.S. 15A-145.4(c) (allowing expunction if person "has not previously been convicted" of specified offenses). On the one hand, the trend in the law has been to treat general references to convictions as including PJCs. Under this approach, a PJC would be a bar under relief statutes stating generally that a conviction is a bar. On the other hand, recent cases have looked more closely at the particular language at issue—for example, in the cases cited above, at the requirement that the conviction be "final." The relief statutes do not use that term but do employ different language in describing the matters subject to expunction and the prior matters that bar expunction. For the former, most of the statutes refer to findings of guilt and guilty pleas, with or without a judgment of conviction. For the latter, the statutes refer to convictions. No appellate decisions have addressed the impact of a prior PJC in the context of relief statutes, but the policies furthered by those statutes may support an interpretation that effectuates a judge's act of leniency in granting a PJC and makes relief more widely available.

Other determinations called PJCs. The discussion above concerns a true PJC. Sometimes, however, a court will call its order a PJC even when it imposes conditions amounting to punishment. Unlike a true PJC, such an order is considered a judgment of conviction. *See State v. Popp*, 197 N.C. App. 226, 228 (2009) (holding that a PJC with conditions amounting to punishment "loses its character as a PJC and becomes a final judgment"). A PJC that constitutes a judgment of conviction is subject to expunction like any other conviction. It also may bar relief under statutes that make a prior conviction a disqualifier. If the latter situation occurs, a person may need to pursue other relief, such as a motion for appropriate relief to vacate the conviction.

In some instances, the court may continue a case for sentencing after an adjudication of guilt. Such an order is neither the final disposition in the case nor a judgment of conviction. A person therefore would have to wait until the court enters judgment and sentence before seeking an expunction. The adjudication of guilt, however, may bar relief or trigger adverse consequences without entry of judgment. *See, e.g., State v. Sidberry*, 337 N.C. 779 (1994) (allowing State to impeach defendant under N.C. Evidence Rule 609 where defendant pled guilty and court continued case for sentencing).

Traffic Violations and Driving While Impaired (DWI)

Can a DWI be expunged? Is a prior DWI conviction a bar to relief under statutes barring relief based on a conviction other than a traffic violation?

The answer to both questions depends in many instances on the interpretation of the term "traffic violation," which is used in several relief statutes. The term appears to encompass misdemeanor DWIs. Some statutes allow an expunction or other relief for a misdemeanor DWI, but most do not, either because the statutes provide relief for other kinds of offenses or exclude relief for a traffic violation. Under statutes that bar relief because of a conviction other than a traffic violation, a misdemeanor DWI conviction does not appear to be a bar to relief. The questions below address these matters.

What is a "traffic violation"? Does it include misdemeanor DWIs?

Several North Carolina relief statutes use the term "traffic violation," but none define the term. No appellate decisions have addressed the issue. With those qualifiers, the soundest interpretation appears to be that the General Assembly intended for the term "traffic violation," wherever it appears in the relief statutes, to include misdemeanor DWIs. Several interrelated reasons support this interpretation.

First, the term "traffic violation" most likely refers to violations of Chapter 20 of the North Carolina General Statutes, the chapter that the General Assembly dedicated to regulation of traffic matters. Chapter 20 provides a certain and readily identifiable set of offenses, allowing for consistent results. Some Chapter 20 violations do not involve traffic matters in the customary sense, and some statutes in other chapters could be considered as involving traffic matters, but it seems unlikely that the General Assembly intended for the courts to engage in a statute-by-statute and case-by-case determination of whether an offense is or is not a traffic violation. In light of the volume of expunction requests received by the courts each year, the General Assembly more likely intended the practical approach of using Chapter 20 as the source for traffic violations.

Second, the term refers to traffic crimes, not infractions. All of the relief statutes except one employ terminology used for criminal offenses, such as determinations of "guilt" and "convictions." (Different terminology—determinations and findings of "responsibility"—applies to infractions.) The one statute that refers to infractions involves a non-traffic matter that is no longer an infraction—possession of alcohol before December 1, 1999, in violation of G.S. 18B-302(i). *See* G.S. 15A-146 (allowing expunction of dismissal or finding of not responsible for infraction under previous version of G.S. 18B-302(i); statute was revised to allow this relief when General Assembly, in S.L. 1999-406 (H 1135), increased violation to misdemeanor).

Third, the wording of the relief statutes suggests that, when used, the term "traffic violation" refers to misdemeanors only, not felonies. One of the earliest relief statutes, G.S. 15A-145, demonstrates this approach, allowing a person to obtain an expunction for conviction of an offense before age 18 if, among other things, the person "has not previously been convicted of any felony, *or misdemeanor other than a traffic violation*, under the laws . . . ." (italics added). The commas setting off the italicized phrase show that the General Assembly intended to link the terms "misdemeanor" and "traffic violation." G.S. 15A-146, allowing expunction of dismissals, reflects the same approach. Originally, that statute barred relief if the person had been convicted of a felony or misdemeanor other than a traffic violation. S.L. 1979-61 (H 44). The General Assembly later revised G.S. 15A-146 to remove the misdemeanor conviction bar. The statute

now bars relief for any felony conviction, with no exception for traffic violations. Later relief statutes are not as precise in their phrasing and punctuation but still link misdemeanors and traffic violations by placing the terms next to each other. For example, G.S. 15A-145.1 allows an expunction if, among other things, the person "has not previously been convicted of any felony or misdemeanor other than a traffic violation . . . ." Similar language appears in other expunction statutes (G.S. 15A-145.2(a)(1); G.S. 15A-145.3(a)(1); G.S. 15A-145.4(b)) as well as in the certificate of relief statute. G.S. 15A-173.2(a). More problematic are newer expunction statutes, such as G.S. 15A-145.5, which use the terms "felony" and "misdemeanor" in no particular order. G.S. 15A-145.5(c) states that a person may obtain an expunction if he or she "has no other misdemeanor or felony convictions, other than a traffic violation." The statute reverses the order, in subdivision (1) of G.S. 15A-145.5(c), stating that the petition must show that the person "has not been convicted of any other felony or misdemeanor, other than a traffic violation . . . ." In this guide's view, this ambiguous phrasing should be construed in light of the General Assembly's overall approach—that the term "traffic violation" refers to misdemeanors only. *See* 3 NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION §§ 47:15, 47:35 (7th ed. 2014) (observing that courts have disregarded or transposed punctuation to effectuate legislative intent as well as transposed words or phrases where necessary to give a statute meaning, make it consistent throughout, or correct inadvertent phrasing).

Fourth, a DWI is a misdemeanor violation of Chapter 20. *See* G.S. 20-138.1(d) (so stating). Unlike most misdemeanors, a DWI does not have a specific classification, but in other contexts courts have treated it as a Class 1 misdemeanor. *See State v. Armstrong*, 203 N.C. App. 399 (2010); *State v. Gregory*, 154 N.C. App. 718 (2002). *Gregory*, on which *Armstrong* relies, was decided before cases holding that an offense's maximum sentence is determined by the maximum sentence that the particular defendant could receive, not the maximum for the offense generally. *See, e.g.*, *Blakely v. Washington*, 542 U.S. 296 (2004) (establishing general rule); *State v. Speight*, 359 U.S. 602 (2005) (applying *Blakely* to DWI sentencing), *vacated on other grounds*, 126 S. Ct. 2977 (2006). As a result of those decisions, a DWI conviction at Levels Three, Four, or Five, which carries a maximum sentence from 60 days to six months (*see* G.S. 20-179(i), (j), (k)), might be considered a Class 2 misdemeanor. *See* G.S.14-3(a) (stating that offense without specific classification under structured sentencing is Class 1 misdemeanor if maximum punishment is more than six months and Class 2 misdemeanor if maximum punishment is more than 30 days and not more than six months). Such an interpretation would not change the analysis here. No cases have specifically addressed the classification of a DWI sentenced at Aggravated Level One, which carries a sentence of up to three years. *See* G.S. 20-179(f3). Although the maximum sentence is beyond the typical outer limit for misdemeanors (two years), it may be considered a Class 1 misdemeanor under the above authorities.

Last, the North Carolina relief statutes do not exempt DWIs from the term "traffic violation." Proposed legislation, discussed below, would preclude expunction of DWIs, but it does not define traffic violation in a way that excludes DWIs. *Compare People v. Bosma*, 465 N.W.2d 24 (Mich. Ct. App. 1990) (finding that impaired driving is traffic offense for purposes of applying Michigan's expunction statutes) *with State v. Yackley*, 539 N.E.2d 1118 (Ohio 1989) (recognizing that Ohio expunction statutes provide that "minor traffic convictions" are not a bar to relief but impaired driving is a bar).

What relief is available for DWIs?

Under current law, three statutes allow relief for misdemeanor traffic violations, including DWIs: G.S. 15A-145.5 (expunction of older nonviolent felonies and nonviolent misdemeanors), G.S. 15A-146 (expunction of dismissals), and G.S. 15A-173.2 (certificate of relief). The statutes allow this result because the list of offenses subject to relief is broad enough to cover traffic violations *and* only certain traffic violations are excluded from the list. Proposed legislation, discussed below, would eliminate the possibility of an expunction of a DWI conviction but would not affect the other two statutes.

Relief under G.S. 15A-145.5. This statute allows for the expunction of older convictions for "nonviolent" misdemeanors and felonies. The meaning of a nonviolent offense is determined by what it is not. G.S. 15A-145.5(a) defines an offense as nonviolent if it is not a Class A through G felony, a Class A1 misdemeanor, or one of a number of offenses specified in the statute, such as an offense requiring sex offender registration. Consequently, Class H and I felonies and Class 1 through 3 misdemeanors can be expunged as long as they are not among the offenses specifically excluded from relief. *See generally Kyprianides v. Martin*, ___ N.C. App. ___, 763 S.E.2d 17 (2014) (unpublished) (finding that because conviction for misdemeanor cruelty to animals was not Class A1 misdemeanor and did not fall into excluded categories, it could be expunged under G.S. 15A-145.5). A DWI is treated as a Class 1 misdemeanor (see previous questions) and is not on the list of excluded offenses in G.S. 15A-145.5. The only traffic offenses on the excluded list are felony offenses involving a commercial vehicle.

Only convictions that are at least 15 years old may be expunged under G.S. 15A-145.5, a far longer waiting period than for other expunctions under North Carolina law. The length of this waiting period limits the effect of an expunction on a later DWI prosecution. A 15-year-old DWI conviction cannot be used as the basis for a felony prosecution of habitual DWI or as a grossly aggravating factor in a misdemeanor DWI prosecution because the applicable statutes set a shorter look-back period for prior convictions. *See* G.S. 20-138.5 (for habitual DWI, look-back period is 10 years); G.S. 20-179(c)(1) (for grossly aggravating factor, look-back period is seven years). An expunction would limit use of a prior DWI conviction as a regular aggravating factor, which affects whether a person receives a Level Three, Four, or Five punishment for a misdemeanor. *See* G.S. 20-179(d)(5) (for regular aggravating factor, prior DWI conviction may be more than seven years old).

A pending House bill, H 273, would revise G.S. 15A-145.5, among other statutes, to disallow expunctions of DWI convictions regardless of their age. The bill, which would apply to petitions filed *or* pending on or after July 1, 2015, has passed the House and is before the Senate. A pending Senate bill, S 570, likewise would disallow expunctions of DWI convictions under G.S. 15A-145.5, effective when it becomes law; it has passed the Senate and is before the House. Two other bills introduced in the Senate, S 362 and S 626, would shorten the waiting period to five years for expunction of a misdemeanor under G.S. 15A-145.5. The Senate bills would not change the current treatment of DWI convictions and thus would have the effect of allowing expunctions of DWI convictions before the end of the look-back periods discussed above. These bills did not pass the Senate before the crossover deadline but might be taken into account when the other bills are considered.

Relief under G.S. 15A-146 and G.S. 15A-173.2. G.S. 15A-146 allows expunctions of dismissals and acquittals, and G.S. 15A-173.2 authorizes certificates of relief following convictions. Neither excludes traffic violations, including DWI charges and convictions, from relief.

Other statutes. G.S. 15A-145.4 allows for expunctions of convictions for "nonviolent" felonies committed before age 18. Because the statute limits relief to Class H and I felonies, it does not allow expunction of a misdemeanor DWI conviction. Pending House Bill 273, discussed above, would bar relief for any felony offense involving impaired driving.

G.S. 15A-145 is currently unclear about the availability of an expunction for a misdemeanor DWI conviction. It allows an expunction of a misdemeanor other than a traffic violation if committed before age 18. Under the approach suggested here, the statute would not allow expunction of a misdemeanor DWI conviction because it is a traffic violation. A legislative change in 2007 creates some uncertainty, however. In 2007, the General Assembly amended G.S. 15A-146 to require DMV to expunge any civil license revocation as a result of a criminal charge that was dismissed or for which the defendant was acquitted if the court orders an expunction of the criminal charge. S.L. 2007-509 (S 301). The term "civil license revocation" is generally understood to refer to the immediate license revocation required by G.S. 20-16.5 when a person is charged with a DWI or other implied-consent offense. (G.S. 15A-146 excludes a license revocation under G.S. 20-16.2, which occurs if a person refuses to submit to a chemical analysis when charged with an implied-consent offense.) The General Assembly appears to have enacted the provision in response to an opinion by the North Carolina Attorney General that an expunction of a dismissal under G.S. 15A-146 does not require DMV to expunge a civil license revocation. *See* Opinion Letter by North Carolina Attorney General to Mike Bryant, Driver License Section, N.C. Division of Motor Vehicles (June 13, 2001). As part of the same 2007 legislation, the General Assembly added a similar provision to G.S. 15A-145, in subsection (c), requiring DMV to expunge any civil license revocation resulting from a criminal charge if the court expunges the misdemeanor conviction. The change to G.S. 15A-146 does not present any difficulties. Under that statute, the court may order an expunction of a dismissal of a DWI; it therefore makes sense for the order to extend to other records resulting from the dismissed charge, such as a civil license revocation. The change to G.S. 15A-145 is more problematic. There are three possible interpretations.

One interpretation is that the addition of subsection (c) to G.S. 15A-145 did not affect the expunctions available under that statute. A person has the right to have a civil license revocation expunged only if he or she obtains an expunction of the underlying charge. Under the approach suggested here, a person cannot obtain an expunction of a misdemeanor DWI conviction under G.S. 15A-145 because the statute disallows expunctions of traffic violations. This interpretation reflects the main reason for the legislation—to override the Attorney General's opinion on expunction of DMV records following expunction of a dismissal under G.S. 15A-146.

A second interpretation is that the change implicitly created an exception to the bar on expunging traffic violations in G.S. 15A-145. Stated another way, G.S. 15A-145(a) disallows expunctions of traffic violations, but G.S. 15A-145(c) overrides this provision by allowing an expunction of a civil license revocation and, implicitly, a DWI conviction. This interpretation would give subsection (c) greater meaning.

A third interpretation is that the General Assembly intended, by G.S. 15A-145(c), to express the view that the term "traffic violation" does not include DWI and other implied-consent offenses. In other words, wherever used in the relief statutes, traffic violation includes all Chapter 20 offenses except implied-consent offenses. Under this interpretation, a DWI could be expunged under G.S. 15A-145, but it would be a bar to expunctions under all of the statutes that require the petitioner to be free of misdemeanor convictions other than traffic violations. This seems the least likely possibility because it gives the narrow reference to civil revocations in one subsection of one statute a meaning not expressed elsewhere in the relief statutes.

Pending House Bill 273, discussed above, would resolve this issue. It would amend G.S. 15A-145 to provide that "[n]othing in this section shall be interpreted to allow the expunction of any offense involving impaired driving as defined in G.S. 20-4.01(24a)."

Does a misdemeanor DWI conviction bar relief?

Whether a DWI conviction bars relief is a simpler question to address. All of the expunction statutes that bar relief because of a prior misdemeanor conviction provide that a traffic violation is not a bar. The certificate of relief statute has the same wording. None of the statutes define traffic violation in a way that excludes misdemeanor DWI convictions. A misdemeanor DWI conviction therefore should not be a bar to relief.

Offenses Subject to Sex Offender Registration

Can an offense subject to sex offender registration be expunged?

The answer depends on the offense and type of disposition. A felony conviction is not subject to expunction, whether or not the person is currently required to register. A misdemeanor conviction may be subject to expunction in limited circumstances; whether the expunction would terminate ongoing registration obligations is not clear. A dismissal or diversion (deferred prosecution or discharge and dismissal) is subject to expunction.

Felony convictions. The only statutes that potentially could apply to felony convictions subject to sex offender registration are G.S. 15A-145.4, which allows expunction of felonies committed before age 18, and G.S. 15A-145.5, which allows expunction of older felonies and misdemeanors. Both statutes expressly exclude offenses subject to registration, however, "whether or not the person is currently required to register." Thus, the statutes bar expunctions both for people who are currently required to register and for people who have completed their registration requirements.

It is unclear whether the statutes bar expunctions for people who were never required to register but were convicted of an offense that would require registration if committed now—for example, a person who was convicted of and completed his or her sentence before the sex offender registration statutes took effect. Other statutes use more precise language to indicate whether "pre-registration" offenses continue to trigger consequences. *Compare* G.S. 14-415.4(a)((2)d. (disallowing restoration of firearm rights for an offense "for which the offender must register," which indicates that the disqualification applies only if the person currently must register) *with*

G.S. 15A-1345(b1) (providing that a probationer who is arrested for a probation violation and is determined to be a danger is not entitled to release pending a revocation hearing if he or she has been convicted of an offense "that would have required registration but for the effective date of the law establishing the Sex Offender and Public Protection Registration Program," which indicates that the restriction applies to pre-registration offenses). If not expunged, a pre-registration offense would count as a prior offense in determining whether a person is a recidivist and subject to lifetime registration on conviction of a subsequent offense. *See State v. Wooten*, 194 N.C. App. 524 (2008) (holding that pre-registration offense counts as prior offense for this purpose).

G.S. 15A-145.4(a)(5) and G.S. 15A-145.5(a)(4) also bar expunction of convictions of some offenses of a sexual nature that are not subject to registration. Offenses of a sexual nature that are not excluded from relief and are not subject to registration, such as crime against nature, are subject to expunction if the person otherwise meets the criteria for expunction.

Misdemeanors. One statute, G.S. 15A-145, allows expunction of a conviction of a misdemeanor subject to sex offender registration, such as misdemeanor sexual battery under G.S. 14-27.5A, if the offense was committed before age 18. The reason is that the statute contains no exclusion for offenses subject to sex offender registration, in contrast to G.S. 15A-145.4 and G.S. 15A-145.5, which disallow expunction of such offenses.

A further question is how an expunction relates to registration consequences. If a person's registration obligations have ended, an expunction should operate like other expunctions. It should preclude use of the conviction in future proceedings because it restores the person to the status he or she occupied before the conviction. It also should reach all records of the conviction, including registration records, because an order of expunction applies to sheriffs, who maintain registration information at the local level, and the Department of Public Safety, which maintains registration information at the state level through the State Bureau of Investigation (SBI). *See* G.S. 15A-150(b) (listing agencies subject to expunction order).

The impact of an expunction is not as clear if a person is still required to register. It may terminate registration obligations because, under North Carolina law, an expunction nullifies the conviction's effect. Federal guidelines for the Sex Offender Registration and Notification Act (SORNA), on which North Carolina and other state laws are drawn, are consistent with this approach. They provide that the sealing of a criminal record, if it limits the public availability of a record "but does not deprive it of continuing legal validity," does not affect the registration obligations arising from a conviction. U.S. Dept. of Justice, Office of the Attorney General, National Guidelines for Sex Offender Registration and Notification at 15, 73 Fed. Reg. 38030, 38050 (July 2, 2008). Other states that have addressed the issue have found that an expunction extinguishes the obligation to register because its effect is to treat the person as not having been convicted. *See State v. Divine*, 246 P.3d 692 (Kan. 2011); *State v. Fletcher*, 974 A.2d 188 (Del. 2009) (so holding for expunged delinquency adjudication); *cf. Doe v. Brown*, 99 Cal. Rptr. 3d 209 (Cal. App. 2009) (finding that relief under California statute, which is generally available to anyone who successfully completes probation, does not relieve person of registration obligations because relief does not expunge conviction in sense that it renders conviction a legal nullity; registration statute also provides that relief does not remove registration obligations).

A counter argument is that the procedures for petitioning to terminate registration, which among other things impose a minimum 10-year waiting period, override the expunction procedures in G.S. 15A-145, which impose a two-year waiting period only. The difficulty with this argument is that the statutes do not directly conflict. *See Fletcher*, 974 A.2d at 19395 (holding that registration and expunction procedures provide alternative mechanisms for terminating registration for person adjudicated delinquent for offenses committed when under age 18). The North Carolina General Assembly appeared to recognize the possibility that an expunction could extinguish registration obligations by specifically providing that a person could not obtain an expunction of a felony committed before age 18 (under G.S. 15A-145.4) or an older felony or misdemeanor (under G.S. 15A-145.5) if the offense is subject to registration. The General Assembly did not deny the opportunity for expunction relief to a youthful offender who committed a misdemeanor subject to registration before the age of 18.

Another counter argument is that G.S. 14-208.6C provides that registration may be discontinued only if the conviction requiring registration is reversed, vacated, or set aside, or if the registrant has been granted an unconditional pardon of innocence. This statute is not as absolute as it appears, however, for registration is also discontinued if a court grants a petition to terminate. An expunction may have the same effect. *See Divine*, 246 P.3d at 694 (holding that amendment of registration statutes to preclude courts from terminating registration did not override impact of expunction, which extinguished conviction and its effects as matter of law).

Dismissals and diversions. G.S. 15A-146 contains no restriction on the types of charges subject to expunction if dismissed. It therefore allows expunction of dismissals of charges that would require sex offender registration if they resulted in a conviction.

A person may obtain a deferred prosecution or discharge and dismissal for an offense subject to sex offender registration if it is a misdemeanor or Class H or I felony; the statutes contain no exclusion for such offenses. G.S. 15A-1341(a1), (a4). These dispositions are subject to expunction as dismissals under G.S. 15A-146. *See supra* Expunctions of Dismissals and Similar Dispositions: Types of Dismissals. Neither a deferred prosecution nor a discharge and dismissal constitutes a final conviction; therefore, expunction of those dispositions creates no conflict with any registration obligations. *See generally Walters v. Cooper*, ___ N.C. App. ___, 739 S.E.2d 185 (2013), *aff'd per curiam*, ___ N.C. ___, 748 S.E.2d 144 (2013) (holding that PJC, not being a final conviction because the court has not entered judgment, does not trigger registration obligations). Decisions from other states requiring registration for similar dispositions are not applicable to North Carolina because their statutes specifically require registration. *See State v. Perkins*, 13 P.3d 344 (Idaho Ct. App. 2000) (requiring registration in case in which court withheld judgment and dismissed charges following a successful period of probation because Idaho statutes require registration for person adjudicated guilty, whether judgment is entered or withheld).

Wrongful registration information. If a person believes that he or she is wrongfully being required to register—for example, the person believes the offense is not one subject to registration—the person may file a declaratory relief action to terminate registration obligations. If the court grants declaratory relief and holds that the person is not required to register, the court may or may not have the authority to order the expunction of erroneously obtained registration

information. *See supra* Sex Offender Registration and Monitoring Obligations: General Considerations.

Expunction from Another State

Does an expunction from another state bar an expunction in North Carolina?

No. The North Carolina statutes barring an expunction because of a prior expunction are worded in two ways, neither of which includes out-of-state expunctions.

One approach bars an expunction if a person has a prior expunction as shown by the confidential records of the North Carolina Administrative Office of the Courts (AOC). *See* G.S. 15A-145.4. The AOC's confidential records contain expunctions under North Carolina law only, not expunctions from other states. *See* G.S. 15A-150(a) (listing expunctions clerks of court must report to AOC); G.S. 15A-151(a) (stating that confidential AOC record consists of expunctions identified in G.S. 15A-150).

The other approach bars an expunction if a person has received an expunction under specified North Carolina statutes. *See* G.S. 15A-145.2(c); G.S. 15A-145.3(c); G.S. 15A-145.5(c); G.S. 15A-146(a). These statutes do not list expunctions under other state laws as bars.

Criminal Contempt

May a person obtain an expunction of an adjudication of criminal contempt? Does an adjudication of criminal contempt count as a prior conviction under statutes barring relief based on a prior conviction?

Because an adjudication of criminal contempt may be viewed as a conviction of a crime and therefore carry the same adverse collateral consequences, it may be subject to expunction. If subject to expunction, it would likely be treated as a misdemeanor because of the limited sentence length. G.S. 5A-12 (imposing sentence from 30 days to six months); *see also* G.S. 14-3 (treating misdemeanor without classification as Class 3 misdemeanor if sentence is 30 days or less and as Class 2 misdemeanor if sentence is more than 30 days and six months or less).

In contrast, an adjudication of criminal contempt is probably not a bar to relief. Although it may carry the adverse collateral consequences that follow from a conviction of a crime, the courts do not view it in the same light. *See State v. Reaves*, 142 N.C. App. 629 (2001) (holding that adjudication of criminal contempt is not a prior conviction for purposes of sentencing in later case); *Blue Jeans Corp. v. Amalgamated Clothing Workers of America*, 275 N.C. 503, 508 (1969) (stating that adjudication of criminal contempt is sui generis—that is, one of a kind). If a person obtains an expunction of an adjudication of criminal contempt, however, the expunction would count as a bar under statutes barring an expunction if the person has a prior expunction.

Probation Violations

May a person obtain an expunction of a probation violation? Does a probation violation bar relief?

If a person obtains an expunction of a conviction or other proceeding in which the person was on probation, the expunction should cover any probation violations connected with the case. In other words, a person does not specifically request an expunction of the probation violation; rather, the person obtains an expunction of the entire proceeding, including any probation violations.

None of the relief statutes make a probation violation a bar to an expunction or other relief. Nor is a probation violation a conviction, so it does not disqualify a person from relief on that ground. Many of the statutes, however, require that the person show that he or she has been of "good moral character" for a period of time after the proceeding. *See, e.g.,* G.S. 15A-145.4(e). A probation violation, depending on its basis, may bear on that question.

Reconsideration and Enforcement of Expunction Orders

If the State Bureau of Investigation (SBI) disagrees with an expunction order, may it contest the order? How?

Some background information about the expunction process is helpful in addressing this question. When the court receives an expunction petition, it generally must obtain a criminal record check from the SBI. In providing the criminal record check, the SBI sometimes expresses its opinion about whether the person qualifies for an expunction; however, the ultimate decision about whether to grant an expunction remains with the court.

The question here is whether the SBI may contest an order after the court grants it. Like other executive branch agencies, the SBI may not unilaterally refuse to comply with an order of a court. It may be able to contest and has contested an expunction order, however, even when the district attorney has not appealed the order and the time for appeal has expired. The procedure in such cases is unclear. If the SBI or other agency fails to comply with an expunction order and fails to ask the court to reconsider it, a person can file a petition for a writ of mandamus to compel compliance.

Reach of expunction order. Expunction orders apply broadly to state and local agencies. G.S. 15A-150(b) lists the agencies that must comply with an expunction order. The list includes the arresting agency, Division of Motor Vehicles (DMV), Division of Adult Correction (DAC, formerly Department of Correction or DOC), and Department of Public Safety, which includes the SBI. Individual expunction statutes contain similar language.

An agency subject to an expunction order may not unilaterally refuse to comply with the order. *Hamilton v. Freeman*, 147 N.C. App. 195 (2001), announced the basic rule on compliance with court orders by executive agencies. In this class action suit, the plaintiffs alleged that the

Department of Correction had modified sentences imposed by the court in criminal cases if it determined that the sentences were unlawful. For example, DOC converted sentences ordered by the court to run concurrently into consecutive sentences if DOC determined that concurrent sentences were not permissible. The court held that DOC could not unilaterally refuse to implement a sentence ordered by the court, even if unlawful. By unilaterally altering court-ordered sentences, DOC "usurped the power of the judiciary, thereby violating separation of powers." *See also State v. Bowes*, 159 N.C. App. 18 (2003) (holding that limited privilege granted by court was binding on DMV, even if contrary to law, and statute authorizing DMV to invalidate privilege violated separation of powers), *vacated per curiam*, 360 N.C. 55 (2005). (Because the Supreme Court did not specify its reasons for vacating the court of appeals' decision in *Bowes*, the question of whether the General Assembly may grant an executive agency the power to override a court's determination remains unsettled.)

Reconsideration of order. The local district attorney represents the State's interest in expunction and other relief proceedings. Generally, the statutes require that the district attorney receive notice of the proceedings. (G.S. 15A-146, which governs expunction of dismissals, is the only relief statute that does not specifically require notice to the district attorney.) If the district attorney does not timely appeal a court's expunction order, reconsideration of the order is limited.

In some instances, the SBI has written the judge when it has concerns about the validity of an order, in effect asking the judge to reconsider the order. *See generally Hamilton v. Freeman*, 147 N.C. App. at 200 (trial court directed DOC [now DAC] to notify sentencing judge in writing within reasonable time if it believed that sentence was unlawful); G.S. 20-179.3(k) (statute requires DMV to notify court if it concludes that limited driving privilege is unlawful); Jamie Markham, *DAC's Auditing Authority*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Apr. 21, 2015) (discussing what are sometimes known as *Hamilton v. Freeman* letters by DAC in response to purportedly unlawful sentences); Meredith Smith, *Clerks, Adoptions and Division Review (Part 1)*, ON THE CIVIL SIDE, UNC SCH. OF GOV'T BLOG (Feb. 4, 2015) (discussing propriety of letters by DSS in response to adoption order by clerks of court). If such requests are permissible in expunction cases, the procedure to follow and grounds for the request are unclear. If an expunction proceeding is considered a civil matter, Rule 60 of the North Carolina Rules of Civil Procedure allows a party to make a motion to set aside a judgment for certain reasons only. Thus, the court may set aside a judgment if void but not for mere errors of law. *See, e.g., Windham Distributing Co. v. Davis*, 72 N.C. App. 179, 18182 (1984) (stating principle); *see also Whitfield v. Wakefield*, 51 N.C. App. 124, 127 (1981) (motion under Rule 60 "cannot be used as a substitute" for appeal). Rule 60 also sets timelines for motions to set aside a judgment—one year for certain grounds, within a reasonable time for others. As with other motions, the petitioner should receive notice and an opportunity to be heard before the court rules. If the SBI has not given notice to the petitioner, the court should give notice before reconsidering an expunction order.

The SBI, through the Attorney General's Office, has also obtained appellate review of expunction orders, after expiration of the time for appeal, by petitioning for a writ of certiorari. *See, e.g., State v. Frazier*, 206 N.C. App. 306 (2010) (Attorney General raised challenge initially in trial court five months after entry of order and, following denial of challenge, petitioned for

writ of certiorari to review underlying expunction order); *In re* Robinson, 172 N.C. App. 272 (2005) (Attorney General petitioned for certiorari of trial court's expunction order, without making initial motion in trial court, approximately 18 months after entry of order). A writ of certiorari is "an extraordinary remedial writ to correct errors of law," allowable in the appellate court's discretion. *State v. Simmington*, 235 N.C. 612, 613 (1952). Neither *Frazier* nor *Robinson* addresses the circumstances in which a writ of certiorari is appropriate, but implicitly the court found in each case that the circumstances justified consideration of the State's petition. *See also In re Spencer*, 140 N.C. App. 776 (2000) (allowing State's petition for writ of certiorari to review expunction of drug conviction for offense committed when person was older than statutory age limit). In *Frazier*, the trial court relied on the expunction statutes for gang offenses to order expunction of a felony conviction of accessory after the fact to murder, an offense not covered by the gang statutes; the court of appeals did not reach this issue because it found another error—that the gang statutes, enacted in 2008 and effective for offenses committed thereafter, did not apply to the petitioner's 1998 conviction. In *Robinson*, the trial court ordered the expunction of dismissals of six separate charges over a span of six years; the court of appeals reversed the order on the ground that the expunction statutes, as then written, did not allow expunction of multiple unrelated charges dismissed over a period of time. (The General Assembly subsequently amended G.S. 15A-146 to allow expunction of multiple dismissals in a 12-month period.) Lesser errors may be insufficient for a court to revisit an expunction order after a long delay, with the accompanying disruption of multiple agencies having to reconstruct destroyed records, among other things. The dissenting judge in *Robinson* expressed concern in particular about the impact on the petitioner of having a conviction reappear on his or her record after taking action in reliance on it being expunged. 172 N.C. App. at 280.

Enforcement of order. If an agency has not complied with an expunction order and has not sought reconsideration, a person may file a petition for writ of mandamus to compel compliance. In *Frazier*, the petitioner filed a motion in the trial court to enforce its previous expunction order, but a petition for writ of mandamus may be the more appropriate remedy because its purpose is to compel an entity to perform duties imposed by law. *See generally* 2 NORTH CAROLINA DEFENDER MANUAL § 35.7A, Mandamus (2d ed. 2012); *see also State v. Bowes*, 159 N.C. App. 18, 23 (2003) (dissent states that mandamus is the proper remedy to compel public officials to comply with ministerial duty imposed by law).

Offense Class

If a statute allows relief for a conviction of a certain offense class, and the General Assembly has increased the offense class since the conviction, which offense class applies—the offense class in effect at the time of conviction or the offense class at the time of the petition for relief?

The statutes do not specifically say, but the General Assembly appears to have intended for the offense class at the time of conviction to control. This issue arises with G.S. 15A-145.4, which allows expunction of Class H and I felony convictions for offenses committed before age 18; G.S. 15A-145.5, which allows expunction of convictions of Class H and I felonies and Class 1, 2, or 3 misdemeanors; and G.S. 15A-173.2, which allows a certificate of relief for convictions of

Class G, H, and I felonies and any class of misdemeanor. Two main reasons support this conclusion.

First, the most natural reading of the statutes allowing relief for a conviction of a particular class of offense is to look at the offense class at the time of conviction. The reason is that the person's conviction was for that class of offense. When the General Assembly has wanted to depart from this approach and have the court look at the current offense class, it has expressly provided for that result. For purposes of sentencing a person for a new offense, which depends in large part on a person's prior record, "the classification of a prior offense is the classification assigned to that offense at the time the offense for which the offender is being sentenced is committed." G.S. 15A-1340.14(c). None of the relief statutes contain this type of language. Its absence suggests that the General Assembly intended for the offense class of conviction to control.

Second, policy reasons support this conclusion. Usually, offense classes tend to increase over time. *Cf.* Jeff Welty, *Growth of Chapter 14*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Oct. 13, 2013) (discussing growth of crimes in North Carolina). The remedial purpose of relief statutes could be thwarted by utilization of the increased offense class rather than the actual class of offense for which the person was convicted.

Expunction of Misdemeanor Conviction and Dismissal

Can a person obtain an expunction of a misdemeanor conviction under G.S. 15A-145 and an expunction of a dismissal under G.S. 15A-146?

Yes, if done in the right order. A person would first obtain expunction of the dismissal under G.S. 15A-146, which does not make a misdemeanor conviction a bar. The person then would obtain an expunction of the misdemeanor conviction under G.S. 15A-145, which does not make an expunction under G.S. 15A-146 a bar. For example, if a person is charged with a felony and a misdemeanor, the felony is dismissed, and the person is convicted of the misdemeanor, the person may use the above procedure to expunge the entire matter. *See also* Expunctions of Dismissals and Similar Dispositions: Dismissal or Finding of Not Guilty of Misdemeanors, Felonies, and Certain Infractions (discussing eligibility for expunction of dismissal of felony charge if person has been convicted of misdemeanor).

A single AOC form, AOC-CR-264, includes both expunctions under G.S. 15A-145 and G.S. 15A-146. This suggests that a person could file for both expunctions simultaneously. Doing so would be more efficient and would give the person no more relief than the law allows. However, it is not clear how simultaneous expunctions would be viewed. It could be claimed that the person is ineligible for an expunction under G.S. 15A-146 because relief is unavailable under that statute if the person has received an expunction under G.S. 15A-145. The safest course therefore may be to proceed sequentially as described above.

A person can simultaneously request an expunction of both a dismissal and a conviction for certain drug-related offenses under G.S. 15A-145.2 and G.S. 15A-145.3 if the person otherwise meets the criteria in those statutes. Those statutes do not make an expunction of a conviction a bar to expunction of a dismissal, and vice versa.

Expunction of Felony Conviction and Dismissal

Can a person obtain an expunction of a felony conviction under G.S. 15A-145.5 and an expunction of a dismissal under G.S. 15A-146?

A person can obtain an expunction of a felony conviction under G.S. 15A-145.5, regardless of whether the person has had charges dismissed in the past, but may not be able to obtain an expunction of the dismissal. G.S. 15A-146 does not allow expunction of a dismissal if a person has a felony conviction. *See supra* Expunctions of Dismissals and Similar Dispositions: Dismissal or Finding of Not Guilty of Misdemeanors, Felonies, and Certain Infractions (discussing felony conviction bar under G.S. 15A-146). A person cannot avoid this bar by first obtaining an expunction of the felony conviction under G.S. 15A-145.5, which eliminates the legal effect of the conviction, because G.S. 15A-146 also bars an expunction if the person has obtained an expunction under G.S. 15A-145.5.

If a felony conviction and dismissal occur in the same case, a court might construe G.S. 15A-145.5 as allowing a person to proceed under that statute for an expunction of the entire case. Such an approach would avoid the odd result of allowing an expunction of the entire case if a person is convicted of two felonies, which G.S. 15A-145.5(b) expressly allows, but not allowing an expunction of the entire case if a person is convicted of one felony and obtains dismissal of the other felony. For drug offenses, the General Assembly has allowed an expunction of both a felony conviction and dismissal if the person otherwise meets the criteria of the statute. *See* G.S. 15A-145.2.