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*of the COURTS*

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## MEMORANDUM

**TO:** Superior Court Judges  
District Court Judges  
Clerks of Superior Court  
District Attorneys  
Public Defenders

**FROM:** Troy Page  
Assistant Legal Counsel

**DATE:** November 9, 2012

**RE:** 2012 Expunction Changes - New Expunction Statute and Amendments - S.L. 2012-191

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During its 2012 short session, the General Assembly enacted S.L. 2012-191 (HB 1023, Expunction/Nonviolent Offenses), effective December 1, 2012.<sup>1</sup> The bill makes four substantive changes to the expunction statutes:

- It enacts a new expunction statute, G.S. 15A-145.5, "Expunction of certain misdemeanors and felonies; no age limitation," discussed below;
- It amends G.S. 15A-145.4, "Expunction of records for first offenders who are under 18 years of age at the time of the commission of a nonviolent felony," to make conforming changes in light of the new G.S. 15A-145.5;
- It repeals G.S. 15A-145(d1), an expunction provision specific to older convictions for misdemeanor larceny (because its substance is covered by the new G.S. 15A-145.5);<sup>2</sup> and
- It amends G.S. 15A-146, "Expunction of records when charges are dismissed or there are findings of not guilty," to add G.S. 15A-145.4 and the new G.S. 15A-145.5 to the list of prior expunctions that will disqualify a petitioner for a subsequent expunction under G.S. 15A-146.

The new statute, G.S. 15A-145.5, is effective December 1, 2012, without qualification. *I.e.*, petitions under the new statute may not be filed until that date, but its provisions apply retroactively to older cases that occurred prior to the effective date, not just to offenses or convictions occurring on or after December 1. The changes to G.S. 15A-145.4, 15A-145, and 15A-146 are effective December 1, 2012, for "petitions filed on or after that date, but petitions filed prior to that date are not abated" by S.L. 2012-191.<sup>3</sup>

The repeal of G.S. 15A-145(d1) and the change to G.S. 15A-146 are self-explanatory, so the remainder of this memorandum concerns only the new G.S. 15A-145.5 and the changes to G.S. 15A-145.4.

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<sup>1</sup> The full text of S.L. 2011-278 is available online at: <http://www.ncleg.net/Sessions/2011/Bills/House/PDF/H1023v5.pdf>.

<sup>2</sup> The petition and order form for G.S. 15A-145(d1), AOC-CR-267, and accompanying instruction sheet, AOC-CR-267I, will be discontinued and removed from the NCAOC website effective December 1.

<sup>3</sup> S.L. 2011-191, § 8. *I.e.*, petitions filed prior to December 1 under G.S. 15A-145(d1) may proceed to hearing and a ruling; petitions filed under G.S. 15A-145.4 prior to that date are governed by the list of excluded offenses in that statute as originally enacted (not by the amended list mentioned in the 2<sup>nd</sup> bullet above); and petitions under G.S. 15A-146 filed prior to December 1 are not barred by a previous expunction under G.S. 15A-145.4 granted since that statute's enactment in December 2011.

### **G.S. 15A-145.5, Expunction of certain misdemeanors and felonies; no age limitation.**

The new G.S. 15A-145.5 will permit the expunction of: (i) convictions<sup>4</sup> of (ii) “nonviolent misdemeanors” and/or “nonviolent felonies” (defined in the statute), (iii) regardless of the age of the offender at the time of the offense(s).<sup>5</sup>

As stated in their catch lines, the primary distinction between the new G.S. 15A-145.5 and last year’s G.S. 15A-145.4 (Expunction of records for first offenders who are under 18 years of age at the time of the commission of a nonviolent felony),<sup>6</sup> is that the newer G.S. 15A-145.5 is not limited to offenses committed prior to a particular age. There are, however, several significant procedural differences between the two statutes. This memo focuses only on the procedural features of the new G.S. 15A-145.5; petitioners and court officials interested in the substantive features of the new statute should review the bill at the link above.

The Administrative Office of the Courts (NCAOC) has adopted a new expunction petition form and accompanying instruction sheet for the new expunction under G.S. 15A-145.5. Because the new statute requires that the petitioner request record checks by the State Bureau of Investigation (SBI) and the NCAOC “on a form approved by the Administrative Office of the Courts,” all petitions under G.S. 15A-145.5 must be filed on the new petition form. Both forms will be available online on December 1, 2012, at <http://www.nccourts.org/Forms/FormSearch.asp>. The new forms are:

- AOC-CR-281, Petition And Order Of Expunction Under G.S. 15A-145.5.
- AOC-CR-281I, Instructions For Petition And Order Of Expunction Under G.S. 15A-145.5.

#### No Duty to Notify Offenders of Eligibility

One clear contrast between the new G.S. 15A-145.5 and last year’s G.S. 15A-145.4 is that G.S. 15A-145.4 requires the court or probationer officer to notify a person convicted of a nonviolent felony committed prior to age 18 of the offender’s potential future eligibility for the expunction under that statute.<sup>7</sup> The new G.S. 15A-145.5 contains no such obligation, so the court and correctional officers have no duty to advise convicted offenders of the possibility of future expunction under the new statute.

#### Processing Expunction Petitions under G.S. 15A-145.5

Procedurally, the new expunction proceeding under G.S. 15A-145.5 is similar to the pre-2011 statutes that permitted expunction of convictions, with some (but not all) of the unique procedural variations that first appeared in 2011 with G.S. 15A-145.4. The basic procedure of G.S. 15A-145.5 is described below. Any text in quotation marks appears in G.S. 15A-145.5, unless otherwise noted.

- The person applying for expunction must petition the court in the county of conviction (“where the person was convicted”).<sup>8</sup>
- The petition may not be filed “earlier than 15 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.”<sup>9</sup>

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<sup>4</sup> The plural “convictions” does not mean that the statute permits multiple expunction petitions over time. The statute will, however, permit expunction of multiple convictions pursuant to a single petition if, among other criteria, they occurred in the same session of court. G.S. 15A-145.5(b).

<sup>5</sup> The remainder of this memorandum concerns the procedural features of G.S. 15A-145.5 and amendments to 15A-145.4. Petitioners and practitioners should review the relevant statutes for their specific substantive requirements for eligibility. The clerks of superior court and the NCAOC cannot advise petitioners on any questions of eligibility for expunction; all such questions must be addressed to the court before which the petition is pending.

<sup>6</sup> See memo of November 22, 2011, “New Expunction for Non-Violent Felonies Prior to Age 18, G.S. 15A-145.4,” on the NCAOC intranet for Judicial Branch personnel at <https://cis1.nccourts.org/intranet/aoc/legalservices/legalmemos/criminal.jsp>.

<sup>7</sup> G.S. 15A-145.4(i).

<sup>8</sup> If a petition is filed in the wrong county (or in apparent error on any other procedural feature described in this memo, like the waiting period described in the next bullet), the clerk of superior court should not refuse the filing. The clerk’s role in the expunction process is ministerial, only. Any question about the validity of the petition is for the parties and the court to address at the hearing.

<sup>9</sup> The text of the 15-year waiting period in G.S. 15A-145(c) is ambiguous. As it appears in the first paragraph of subsection (c), the waiting period would appear to be “[i] 15 years after the date of conviction or [ii] when any [punishment] has been served, whichever is later.” However, the required findings for the court to grant the petition (later in subsection (c)) provide that the court must find that the petitioner “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” (emphasis added), which appears to require that the petitioner must complete any active sentence, period of probation or post-release supervision, and then wait 15 years before filing the petition. Compare G.S. 15A-145.1(a) (making clear that its

- The fee for an expunction petition under G.S. 15A-145.5 is \$175.00. The fee must be paid prior to the hearing of the petition, unless the petitioner is permitted to proceed as an indigent.
- The petitioner must provide various affidavits of character and conduct. The required affidavits are similar to the other expunction statutes for convictions and are listed in G.S. 15A-145.5(c).<sup>10</sup>
- Before any hearing, the expunction petition must be routed through the SBI for a criminal history check. In addition to the criminal history check, the SBI's report for a petition under G.S. 15A-145.5 also must provide the court with the results of "a search ... for any outstanding warrants on [sic] pending criminal cases."<sup>11</sup>
- After the SBI record check, the petition will be routed to the NCAOC for a check of prior expunctions. A prior expunction under any of a list of specified expunction statutes will disqualify the petitioner for an expunction under G.S. 15A-145.5.<sup>12</sup>
- Upon return of the reports from the SBI and NCAOC, the petitioner must request a hearing on the petition. It is the responsibility of the petitioner to determine when the AOC-CR-281 has been returned and to ask the clerk or DA to schedule the petition for hearing; the clerk is under no obligation to notify the petitioner of its return.
- The petition must be served on the district attorney at least 30 days before any hearing on the petition. The new G.S. 15A-145.5 requires that the district attorney "shall make his or her best efforts to contact the victim, if any, to notify the victim of the request for expunction prior to the date of the hearing."
- The clerk should not schedule the hearing until at least 30 days after the district attorney was served with the petition.<sup>13</sup> Like other expunction statutes, G.S. 15A-145.5(c) provides that the court may require an investigation by a probation officer into the petitioner's conduct since the conviction,<sup>14</sup> so the clerk should consult with the local judges who hear expunction petitions about whether or not the clerk should account for any such investigations when scheduling hearings.
- The court may grant the expunction if the court finds that the petitioner meets all of the requirements listed in G.S. 15A-145.5(c) (as listed in the bill linked on the first page of this memo and on Side Two of the AOC-CR-281).
- After the court's order on the petition, whether granted or denied, the clerk should process the order as provided for other expunctions.<sup>15</sup>
  - As with most expunction statutes, G.S. 15A-145.5(e) provides that, when the petition is granted, the court shall order "that the conviction be expunged from the records of the court and direct all law enforcement agencies bearing record of the same to expunge their records of the conviction. The clerk shall notify State and local agencies of the court's order, as

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2-year waiting period applies only to the date of conviction, so a petitioner under that statute may file the petition for expunction of certain gang offenses immediately upon completion of the sentence, if that occurs later than the 2-year anniversary of the conviction) and G.S. 15A-145.4(c) (containing the same ambiguity for its 4-year waiting period as the new G.S. 15A-145.5 does for the 15-year period, but without the additional language concerning the court's required findings).

<sup>10</sup> There are no AOC forms for the affidavits.

<sup>11</sup> Although G.S. 15A-145.5(c)(4) refers to a search for outstanding warrants "on" pending cases, this appears to be a typographical error. The required findings for the court to grant the petition (later in subsection (c)) provide that the petitioner have no outstanding warrants "or" pending criminal cases. The comparable provision in G.S. 15A-145.4(c)(4) also uses "or." Consequently, the new AOC-CR-281 directs that the SBI provide the court with a report of outstanding warrants "or" pending criminal cases.

<sup>12</sup> A petitioner under G.S. 15A-145.5 will be disqualified by a prior expunction under G.S. 15A-145, 15A-145.1, 15A-145.2, 15A-145.3, 15A-145.4, or 15A-145.5.

<sup>13</sup> Similar to other expunction statutes, G.S. 15A-145.5(c) also provides that, "The district attorney shall have 30 days [after service of the petition] in which to file any objection thereto and shall be duly notified as to the date of the hearing of the petition. Upon good cause shown, the court may grant the district attorney an additional 30 days to file objection to the petition." Other than the basic requirement of at least a 30-day delay between service of the petition on the district attorney and the hearing, the significance of the provision for written objections is unclear, given that the court is to rule on the petition "after [a] hearing," and the statute does not limit the State's participation at the hearing to only those objection(s) filed in advance.

<sup>14</sup> Like most other expunction statutes, G.S. 15A-145.5 leaves this additional investigation by a probation officer to the court's discretion. Contrast G.S. 15A-154.4(d)(1), which provides for petitions under that statute that the court "shall" require a probation officer to investigate the petitioner's conduct during the four years following conviction for the offense that is the subject of the petition.

<sup>15</sup> See section 2.3 of the NCAOC Court Services Division's "Expunction Guide for Clerks," at: <https://cis1.nccourts.org/intranet/aoc/clerks/records.jsp>.

provided in G.S. 15A-150.” This includes filing a certified copy of the granted petition with the NCAOC.

- In addition to the regular notice by the clerk to the agencies specified in G.S. 15A-150 and others listed on the petition, G.S. 15A-145.5(f) further provides that “Any other applicable State or local government agency shall expunge from its records entries made as a result of the conviction ordered expunged under this section upon receipt from the petitioner of an order entered pursuant to this section. The agency shall also reverse any administrative actions taken against a person whose record is expunged under this section as a result of the charges or convictions expunged” (emphasis added).
  - Therefore the petitioner may provide additional copies to any State or local agency that may have a record of the proceeding. Court officials may wish to encourage practitioners and petitioners to obtain multiple certified copies of any expunction order granted under G.S. 15A-145.5,<sup>16</sup> because the original order will be destroyed along with the court’s file when the clerk expunges the record. Once the original has been destroyed, the courts cannot provide any further copies.
  - This additional expunction provision for orders provided by the petitioner does not apply “to the Department of Justice for DNA records and samples stored in the State DNA Database and the State DNA Databank or to fingerprint records.”

### **Law Enforcement Access to Expunctions under G.S. 15A-145.5**

In general, disclosures from the confidential expunction records of the NCAOC are limited to judges of the General Court of Justice (when reviewing a petitioner’s eligibility for expunction) and to prior expunction petitioners involved in civil litigation against private entities that disseminate criminal background information for compensation. G.S. 15A-151(a).

In 2011, S.L. 2011-278 amended G.S. 15A-151 to provide that the NCAOC may disclose records of prior expunctions under G.S. 15A-145.4 to (i) State and local law enforcement agencies, for employment purposes, and (ii) the North Carolina Criminal Justice Education and Training Standards Commission and the North Carolina Sheriffs’ Education and Training Standards Commission for certification of officers. S.L. 2012-191 further amended those same provisions to provide that the NCAOC also may disclose to the named law enforcement entities records of expunctions under the new G.S. 15A-145.5.

The clerk of superior court may not disclose information about prior expunctions under G.S. 15A-145.4 and G.S. 15A-145.5 to law enforcement agencies or the two commissions; any such disclosure must come from the NCAOC, only. Law enforcement agencies with questions about disclosure of expunctions under the two statutes should consult with their legal counsel or human resources departments. The form for such requests, the AOC-CR-280 (currently titled “Law Enforcement Application For Verification Of Expunction Under G.S. 15A-145.4”), will be amended to reflect a request for information on prior expunctions under both statutes.<sup>17</sup>

### **Amendments to G.S. 15A-145.4**

In addition to enacting G.S. 15A-145.5, S.L. 2012-191 made a few clarifying and conforming amendments to G.S. 15A-145.4. First, the list of ineligible offenses in G.S. 15A-145.4(a) was amended to remove some redundant provisions and references to statutes for which expunction under the statute was a logical impossibility,<sup>18</sup> to clarify prior text that suggested the expunction depended on the offense originally charged (rather than the offense of conviction), and to allow expunction of certain drug convictions that otherwise would be ineligible for expunction, if the disposition of those charges was an indefinite prayer for judgment continued (PJC).<sup>19</sup>

<sup>16</sup> Note that the clerk must charge for certified copies. G.S. 7A-308.

<sup>17</sup> The amended version will be available on December 1, 2012, at <http://www.nccourts.org/Forms/FormSearch.asp>.

<sup>18</sup> *E.g.*, as enacted in 2011, the statute prohibited expunction of a conviction under G.S. 14-190.6, employing or permitting a minor to assist in certain obscenity offenses, but that offense can be committed only by a person 18 years of age or older, while expunction under G.S. 15A-145.4 is available only for offenses committed prior to age 18, making the statute’s exclusion from eligibility superfluous.

<sup>19</sup> See G.S. 15A-145.4(a)(5), as amended by S.L. 2012-191. Note that G.S. 15A-145.4, effective December 1, 2012, will be the only expunction statute that provides explicitly for expunction of a charge that ended with a PJC. The list of ineligible offenses in the new G.S.

Second, S.L. 2012-191 amended G.S. 15A-145.4(b) to clarify the eligibility of multiple convictions for expunction. As enacted in 2011, subsection (b) provided that multiple convictions for “nonviolent felonies” from the same session of court would be eligible for conviction, so long as none of the offenses that were the subject of the petition were “alleged to have occurred after the person had already been charged and arrested for the commission of a nonviolent felony” (emphasis added). Because “charged and arrested” could constitute two separate events on different dates, subsection (b) was ambiguous about the expunction eligibility of certain convictions based on the date of commission when compared to the date(s) of charge and arrest for other offenses in the petition.

Effective for petitions filed on or after December 1, 2012, S.L. 2012-191 amends subsection (b) to clarify that offenses are eligible for expunction as part of a multiple-conviction petition, so long as they were not alleged to have occurred after the petitioner was “served with criminal process” (replacing “charged and arrested”) for the commission of another offense.<sup>20</sup>

## **Conclusion**

Court officials with questions about G.S. 15A-145.4 and G.S. 15A-145.5 not addressed by this memorandum or by the “Expunction Guide for Clerks” should contact their Court Services Analyst for assistance.

Petitioners and attorneys with questions about the new expunction statute or amendments to other statutes should be directed to consult with private counsel or to review S.L. 2012-191 (and the AOC-CR-281 and its instruction sheet, once posted on the NCAOC website on December 1). Please do not advise petitioners or attorneys to contact the NCAOC for advice about the expunction statutes. The NCAOC cannot provide legal advice to private litigants or their counsel. This includes questions about whether or not a particular petitioner or record is eligible for expunction; any questions of eligibility must be resolved by the court before which the petition is presented.

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15A-145.5 largely mirrors the list in the amended G.S. 15A-145.4, but the newer statute’s exclusion of the same drug convictions from eligibility for expunction does not provide this exception for PJs. The eligibility of a PJ for expunction, generally, is unclear. For an analysis of the question, see “Can You Expunge a PJ?” on the UNC School of Government’s Criminal Law Blog, at: <http://nccriminallaw.sog.unc.edu/?p=1453>.

<sup>20</sup> The new G.S. 15A-145.5 applies the same standard, allowing expunction of multiple convictions if none of the offenses is alleged to have occurred after the petitioner had already been “served with criminal process” for a nonviolent felony or nonviolent misdemeanor.

