

# Relief from a Criminal Conviction in North Carolina: Forgetting, Forgiving, and Forgoing



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In recent years, North Carolina has cautiously expanded the opportunities for relief from the potential consequences of a criminal conviction. North Carolina “forgets” through expunctions; “forgives” through certificates of relief; and “forgoes” primarily through pre-plea and post-plea diversions.<sup>1</sup>

## I. North Carolina’s Approach to Expunctions

North Carolina has several, separate statutes authorizing expunctions of different types of criminal cases. The types of cases that may be expunged and the criteria a person must meet are narrow, although they have been broadened recently. The impact of an expunction is broad from a legal standpoint, but as with all expunctions there are practical impediments to eliminating previously public information.

### A. Destruction of Records

Under North Carolina law, an expunction has two principal effects. The first is that an order of expunction requires the destruction of most physical and electronic records about the case.<sup>2</sup> The deletion requirement applies to North Carolina’s courts; state and local law enforcement agencies; the Division of Motor Vehicles; the Department of Public Safety, which includes corrections and probation; other government agencies identified by the petitioner in the petition for an expunction; and private entities in the business of compiling and disseminating criminal history information.

The main exceptions from the requirement concern judges, prosecutors, and law enforcement agencies. The North Carolina Administrative Office of the Courts (AOC) retains a confidential file of the names of people who have received an expunction, which the AOC may disclose to a judge for purposes of the judge’s determination whether a person has a prior expunction that bars an additional expunction.<sup>3</sup> As part of 2017 legislation expanding expunction opportunities, prosecutors likewise have the right to obtain this information from the AOC if a person is charged with a subsequent offense.<sup>4</sup> Similarly, as part of earlier legislation expanding expunction opportunities, law enforcement agencies gained the right to obtain information about expunctions of certain convictions for employment and certification purposes.<sup>5</sup> Despite the broad statutory mandate to expunge records, North Carolina case

law also may not require destruction of some criminal investigative files if not open to the public.<sup>6</sup>

These exceptions probably do not undermine the confidentiality of expunctions (although expunged information may sometimes make its way to entities that do not have the right to the information). A bigger concern involves the continued availability and circulation of criminal record information notwithstanding an expunction order. Under North Carolina’s expunction statutes, the AOC provides a deletion notice to commercial entities to which the AOC has provided bulk extracts of data, and those entities in turn must provide a deletion notice to entities to which they have provided the data.<sup>7</sup> North Carolina law does not specify that notice be provided to private entities that receive criminal record data by other means, putting the onus on affected individuals to pursue other remedies. Further, remnants of electronic information about criminal proceedings may continue to be present and publicly accessible.

### B. Restoration of Rights

The second impact of an expunction under North Carolina law, expressed in various ways in the expunction statutes, is that an expunction restores a person’s status as if the proceeding had never occurred.<sup>8</sup> The expunction statutes also state that a person who receives an expunction may not be held to be guilty of perjury or of giving a false statement or failing to acknowledge expunged proceedings.<sup>9</sup> As stated in one statute, the purpose of an expunction is to clear the public record of any arrest, charge, or conviction that has been expunged; to enable the recipient of an expunction to omit reference to the expunged matters to potential employers and others; and to protect the recipient from any charge of perjury or the giving of a false statement.<sup>10</sup>

Statutory changes enacted in 2013 strengthened these protections by prohibiting private employers and educational institutions from asking applicants about expunged arrests, charges, and convictions and giving applicants the right not to provide such information. The statute does not address other private entities, such as landlords.<sup>11</sup> The statute is broader with respect to state and local government entities. They may not ask applicants to disclose expunged information and, further, must specifically advise applicants that they have the right not to disclose expunged information.<sup>12</sup>

An expunction eliminates almost all collateral consequences imposed or authorized by North Carolina law.

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North Carolina governmental entities, such as licensing agencies, must abide by this rule, except that law enforcement agencies may consider expunctions of certain convictions for purposes of employment and certification.<sup>13</sup> Newer expunction statutes direct agencies to reverse any administrative actions taken against a person based on criminal charges or convictions if the person has obtained an expunction.<sup>14</sup>

North Carolina law does not specifically prohibit private entities from considering expunged information. Thus, although private employers and educational institutions may not inquire about expunged criminal proceedings, they may still be able to consider expunged information that they otherwise learn about. North Carolina law also does not control other jurisdictions' consideration of expunged information. Federal immigration law, for example, does not appear to recognize a North Carolina expunction as a basis for disregarding a criminal conviction.<sup>15</sup>

### C. Expunction of Convictions

North Carolina has several statutes authorizing expunctions of different types of criminal convictions. The four main categories are as follows:

1. If the offense was committed before age twenty-two, drug-related misdemeanors and simple drug possession felonies.
2. If the offense was before age eighteen, misdemeanors.
3. If the offense was before age eighteen, "nonviolent" felonies and misdemeanors.
4. If ten years after conviction or completion of the person's sentence, "nonviolent felonies"; if five years, "nonviolent" misdemeanors (referred to as "older" offenses for simplicity).

As this list indicates, all the conviction-based expunctions are age based. The first three categories require that the person was below a certain age when he or she committed the offense; they also impose a relatively short waiting period. The last category imposes a longer waiting period.

In fiscal year 2016–17, of the nearly 12,500 orders granting an expunction, only 800 or so were for convictions, which is attributable to the narrow eligibility criteria.<sup>16</sup> The total number of expunged convictions has increased in the past few years because of the General Assembly's authorization of expunction of older nonviolent felonies and misdemeanors without regard to the age of the person at the time of the offense, the fourth category in the above list. According to AOC data, the total number of expunged convictions rose by over 300 in 2013 after the General Assembly authorized this type of expunction. That number has continued to rise as awareness of the provision has grown, with over 500 expunctions in fiscal year 2016–17.<sup>17</sup> The number should rise again this year and in succeeding years because the General Assembly reduced the waiting period from fifteen to ten years for felony

convictions and from fifteen to five years for misdemeanor convictions.<sup>18</sup>

The other criteria to expunge an older offense continue to limit the potential for relief. The definition of "nonviolent" felonies and misdemeanors that may be expunged contains several exclusions. To be eligible for an expunction, an offense may not fall into one of several categories. For example, only the lowest two felony classifications in North Carolina, class H and I felonies, may be expunged. Also excluded are specific types of offenses, regardless of their classification. For example, a person may not obtain an expunction of a conviction of breaking and entering a building; an offense containing assault as an element; an offense involving methamphetamine, heroin, and in some circumstances cocaine; or an impaired driving offense.

All the categories of conviction expunctions also have prior conviction and expunction bars, which limit eligibility for relief. Generally, relief is unavailable if a person has a prior felony or misdemeanor conviction (other than for a traffic offense) or a prior expunction.<sup>19</sup>

### D. Expunction of Dismissals

Most of the expunctions in North Carolina are of dismissals, including acquittals—in other words, cases that end without a conviction and result in non-conviction records. Over 10,000 expunctions of dismissals were ordered in fiscal year 2016–17 and over 60,000 were ordered in the preceding six years.<sup>20</sup> North Carolina's expunction statutes allow expunctions of all types of dismissals (although the statutes could be clearer on this point). Dismissals of charges are most often by prosecutors, with or without conditions. Dismissals also may be by a judge in various ways, most often after a person fulfills the conditions of a post-plea diversion.<sup>21</sup>

Expunctions of dismissals are likely to increase significantly. The principal statute allowing expunction of dismissals has required that the person not have a prior felony conviction *and* not have previously received an expunction.<sup>22</sup> Thus, a person could receive only one expunction of a dismissal for life under that statute, regardless of the reason for the dismissal.<sup>23</sup> Legislation enacted in 2017 removes the prior expunction bar. Now, as long as the person does not have a felony conviction, the person may obtain an expunction of a dismissal an unlimited number of times. The legislation applies to expunction petitions filed on or after December 1, 2017, meaning that people who were barred from getting an expunction of a dismissal because of a prior expunction are now eligible for relief.<sup>24</sup>

### E. Other Potential Obstacles to Relief

North Carolina's expunction scheme is complicated, substantively and procedurally. On the substantive side, each type of expunction has its own eligibility criteria. Although the criteria from one statute to the next are similar, they are not identical. For example, a felony conviction for breaking and entering is excluded from the definition of "nonviolent" felonies eligible for expunction under the statute

allowing expunction of older offenses. But it is not excluded from the definition of “nonviolent” felonies under the statute allowing expunction of felonies committed before a person turned eighteen.<sup>25</sup> Sometimes the eligibility criteria within a single expunction statute are stated inconsistently, muddying the availability of relief.

Procedurally, although the AOC has developed form petitions and orders for expunctions,<sup>26</sup> the process for moving an expunction through the court system varies across North Carolina. Thus, some counties require that the petitioner, rather than the clerk of court or other official, obtain a judge’s signature authorizing a criminal record check, the first step in the expunction process; at least one county charges an additional fee for processing beyond the statutory filing fee; some counties always hold a hearing on the petition, even for uncontested petitions, requiring an appearance by the petitioner or counsel; some counties rarely hold hearings and may deny petitions without affording the petitioner an opportunity to be heard. These variations make local court knowledge critical and make it more difficult for people to handle expunctions pro se and for statewide legal services programs to provide expunction representation.

No expunctions are automatic in North Carolina, including for dismissals and low-level misdemeanor convictions except for dismissals by the court or prosecutor based on identity theft or mistaken identity.<sup>27</sup> The affected person must file a petition for relief, including for dismissals.

Further, all the conviction expunction statutes impose a waiting period, which effectively precludes indigent defense counsel in the criminal case from handling the expunction because the expunction proceedings are necessarily initiated after the criminal case and counsel’s representation have ended. A person may file for an expunction of a dismissal immediately on conclusion of the case, but relief is not immediate. Although the principal statute for expunging a dismissal no longer makes a prior expunction a bar to relief, and therefore no longer requires the court to request the AOC to review its files for prior expunctions, the applicable forms still direct the court to initiate a criminal record check by the State Bureau of Investigation, which can take months.<sup>28</sup>

## II. North Carolina’s Certificate of Relief Procedure

North Carolina law imposes numerous collateral consequences based on a criminal conviction.<sup>29</sup> In recognition of the importance of mitigating those consequences, North Carolina enacted a certificate of relief procedure in 2011,<sup>30</sup> patterned after the Uniform Collateral Consequences of Conviction Act. The offenses covered and the eligibility conditions are narrow, however, limiting the opportunities for relief.

### A. Requirements

The basic requirements for obtaining a certificate of relief are similar to the requirements for obtaining an expunction

in North Carolina, although the details differ. A person may obtain a certificate of relief if he or she has been convicted of a combination of up to two misdemeanors and class G, H, or I felonies (the three lowest felony classifications in North Carolina) in one session of court. The person cannot have any other convictions.<sup>31</sup>

Thus, if a person has three convictions from one session of court, the person is ineligible for a certificate of relief even if all the convictions are misdemeanors and low-level felonies. If a person has two convictions, each from a different session of court, the person is also ineligible for a certificate of relief. For example, a person who is convicted of misdemeanor shoplifting and is later convicted of a low-level felony would be ineligible for a certificate of relief for the felony because of the misdemeanor conviction. (The person probably could not avoid this result by seeking an expunction of the misdemeanor, which then would no longer count as a conviction under North Carolina law, because the felony conviction would generally bar expunction of the misdemeanor conviction.)

North Carolina law imposes a waiting period of twelve months after completion of the person’s sentence, including any period of probation.<sup>32</sup> The law does not provide for entry of a general or limited certificate of relief at sentencing.

### B. Effect of Certificate of Relief

If granted, a certificate of relief affects two types of collateral consequences: *collateral sanctions*, defined as penalties, disabilities, or disqualifications imposed by operation of law; and *disqualifications*, defined as penalties that an agency, official, or court may impose based on the conviction.<sup>33</sup> In other words, collateral sanctions are those that are mandatory in the absence of a certificate of relief (or other relief), while disqualifications are those that a board or commission has the discretion to impose. A certificate of relief relieves the person of all mandatory collateral sanctions, with certain exceptions, such as sex offender registration requirements, firearm disqualifications, and those specified by the judge.<sup>34</sup> Although a certificate of relief does not eliminate discretionary disqualifications based on the conviction, a board or commission may consider a certificate favorably in deciding whether to impose the disqualification.

An example of a collateral sanction in North Carolina is a statute requiring the Commissioner of Insurance to deny or revoke a person’s license to work as a bail bondsman if the person has been convicted of a felony at any time or of a misdemeanor drug offense within 24 months of a license application.<sup>35</sup> An example of a disqualification is a licensing statute permitting but not requiring the Commissioner of Insurance to deny or revoke a bail bondsman’s license for, among other reasons, conviction of a crime involving dishonesty, breach of trust, or moral turpitude.<sup>36</sup> If the person successfully utilizes the certificate-of-relief procedure, the Commissioner may consider the person’s prior conviction in making a licensing decision, but a prior conviction is not an automatic bar.

Another effect of a certificate of relief under North Carolina law is that it limits the liability of a person who works with someone who receives a certificate of relief. The applicable statute provides that a certificate of relief bars a judicial or administrative action alleging lack of due care by a person who transacts business with the recipient of the certificate.<sup>37</sup>

### C. Impact of Law

North Carolina has little data on the impact of the certificate-of-relief law. Unlike with expunctions, the AOC does not track the number of certificates granted each year, in part because the current court data system does not have a dedicated field for recording such orders. Local court personnel must enter the orders as free text, which are difficult to compile and analyze.

Anecdotal information from trainings and consultations with judicial officials and attorneys suggests that the procedure is not heavily utilized, which could be attributable to several factors. The narrowness of the eligibility criteria may have limited the number of petitions. Also, the certificate-of-relief procedure is relatively new and its potential benefits may not be well known.

Concerns also have been expressed that a certificate of relief does not sufficiently limit discretion in the consideration of a criminal conviction. Many North Carolina statutes imposing collateral consequences, as in the bail bondsman example above, use vague terms such as crime of “moral turpitude” and “dishonesty,” which are subject to varying interpretations. They also do not indicate why some convictions result in a mandatory consequence, why some result only in a discretionary consequence, and why some are relevant at all. Many statutes contain no end date on consideration of a conviction. Legislation enacted in 2013 places some limits on the denial of an occupational license based on a criminal record, precluding automatic denial of a license unless authorized by the statute governing the particular licensing board; and requiring consideration of certain factors, such as a nexus between the crime and duties to be performed by the licensee, for discretionary occupational licensing decisions.<sup>38</sup>

For private entities, no statewide law limits consideration of criminal convictions. Some local governments may have implemented “ban-the-box” requirements, limiting questions about convictions during the early stage of applications. The author is unaware of any local laws that forbid consideration of criminal convictions altogether.

## III. Diversions and Other Decriminalization Efforts in North Carolina

### A. Diversions

North Carolina law authorizes both pre-plea and post-plea diversions. With a pre-plea diversion, called a “deferred prosecution” in North Carolina, the defendant does not plead guilty and the court does not find the defendant guilty.<sup>39</sup> With a post-plea diversion, called a “conditional

discharge” or “discharge and dismissal,” the court accepts the defendant’s guilty plea or finds the defendant guilty, then vacates the plea or finding at the end of the proceeding.<sup>40</sup>

Neither type of diversion is considered a conviction in North Carolina because neither ends with an adjudication of guilt.<sup>41</sup> Generally, a pre-plea diversion is more favorable from a collateral-consequences standpoint because the person is never adjudicated guilty.<sup>42</sup> The matter is therefore less likely to be viewed as a conviction by other entities.<sup>43</sup>

Previously, North Carolina limited post-plea diversions to specific offenses, primarily low-level drug offenses.<sup>44</sup> In 2014, the North Carolina General Assembly expanded post-plea diversions to all misdemeanors and low-level felonies (except impaired driving offenses).<sup>45</sup> Pre-plea diversions are likewise available for such offenses.<sup>46</sup> As with expunctions and certificates of relief, a person must meet specified criteria to be eligible, including not having a prior conviction of a felony and certain misdemeanors.

### B. Other Decriminalization Efforts

Less successful have been efforts to decriminalize offenses by reclassifying misdemeanors as infractions, which are noncriminal violations of the law in North Carolina. The North Carolina Office of Indigent Defense Services (IDS), which oversees indigent defense in North Carolina, proposed that several misdemeanors be reclassified as infractions, both to reduce potential collateral consequences and to save costs on indigent defense representation. Under North Carolina law, a person does not have a right to appointed counsel for an infraction. The General Assembly decriminalized some offenses recommended by IDS, but for the most part it reduced the offenses to class 3 misdemeanors, the lowest misdemeanor classification in North Carolina, and eliminated the possibility of imprisonment for the offenses except when the defendant has a longer criminal record.<sup>47</sup> As a result, defendants ordinarily face no imprisonment for class 3 misdemeanors and, because they face no possibility of imprisonment, have no right to appointed counsel under North Carolina law. The defendant still faces collateral consequences if convicted, however, because a class 3 misdemeanor remains a crime.<sup>48</sup>

More successful have been legislative efforts to slow the issuance of criminal charges in citizen-initiated cases. Under North Carolina law, an alleged victim of a crime may appear before a magistrate and present evidence of a crime, usually through his or her sworn testimony. If the magistrate finds probable cause, he or she may issue criminal charges without involvement by a law enforcement officer or prosecutor.<sup>49</sup> In recent years, the North Carolina General Assembly has limited both the issuance and adjudication of citizen-initiated charges. Now a magistrate may not issue criminal charges unless the citizen-complainant presents his or her testimony by written affidavit or an exception applies, such as corroborating law-enforcement investigation.<sup>50</sup> (By unwritten policy, magistrates never issue felony charges based on citizen testimony alone.) If

citizen-initiated misdemeanor charges are issued, the cases are initially directed to mediation unless an exception applies.<sup>51</sup>

No state law requires that law enforcement agencies defer or refrain from initiating charges. Prosecutor approval is also not required for the issuance of charges except in narrow types of cases, such as charges against school employees and obscenity offenses.<sup>52</sup>

#### IV. Conclusion

In recent years, North Carolina has gradually expanded its laws to mitigate the impact of collateral consequences from a criminal conviction. “Forgetting” through expunctions appears to remain the most popular form of relief, both in the General Assembly and among the public. “Forgiving” through certificates of relief is more difficult to assess because the procedure is relatively new and information about its use is limited. As North Carolina considers further changes to its relief laws, additional data and study about the impact of relief procedures could help the effectiveness of reform efforts.

#### Notes

<sup>1</sup> For a comprehensive review of North Carolina’s relief laws, see John Rubin, *Relief from a Criminal Conviction: A Digital Guide to Expunctions, Certificates of Relief, and Other Procedures in North Carolina* (UNC School of Government, 2017 ed.).

<sup>2</sup> This result is mandated by the specific expunction statute governing the matter to be expunged, see, e.g., N.C. Gen. Stat. § 15A-145(c) [hereinafter G.S.], as well as a generally applicable set of procedures on expunctions. G.S. 15A-150 through G.S. 15A-152.

<sup>3</sup> G.S. 15A-151.

<sup>4</sup> 2017 N.C. Sess. Laws 195 [hereinafter S.L.]. For a further discussion of these changes, see John Rubin, *Expanded Expunction Opportunities*, N.C. Crim. L., UNC School of Government Blog (Aug. 1, 2017).

<sup>5</sup> S.L. 2012-191; S.L. 2011-278.

<sup>6</sup> See *State v. Jacobs*, 128 N.C. App. 559 (1998) (holding that order to expunge dismissed charge did not require prosecutor’s office to destroy its investigative files because the purpose of expunction is to clear the public record of entries and prevent a criminal record check from disclosing expunged entries).

<sup>7</sup> See G.S. 15A-150(d), G.S. 15A-152.

<sup>8</sup> See, e.g., G.S. 15A-145.5(c) (recognizing that effect of order is that “person be restored, in the contemplation of the law, to the status the person occupied before such arrest or indictment or information”).

<sup>9</sup> See, e.g., G.S. 15A-145.5(d); see also 1 Kenneth S. Broun, Brandis & Broun on North Carolina Evidence § 98, at 341–42 (7th ed. 2011) (stating that a witness’s credibility may not be impeached by an expunged conviction); *State v. Seay*, 59 N.C. App. 667, 670 (1982) (recognizing this principle). *But cf.* *State v. Browning*, 177 N.C. App. 487 (2006) (holding that prosecutor could cross-examine defendant about false statements he made to police about offense for which he received deferred prosecution).

<sup>10</sup> G.S. 15A-153(a).

<sup>11</sup> G.S. 15A-153(c).

<sup>12</sup> G.S. 15A-153(d).

<sup>13</sup> See G.S. 15A-145.4 (felony offenses committed before age 18); G.S. 15A-145.5 (older felonies and misdemeanors); G.S. 15A-145.6 (prostitution offenses).

<sup>14</sup> See G.S. 15A-145.4(h); G.S. 15A-145.5(f); G.S. 15A-145.6(i).

<sup>15</sup> See Sejal Zota & John Rubin, *Immigration Consequences of a Criminal Conviction in North Carolina* § 4.2E, *Expungement*, at 4–6 (UNC School of Government, Sept. 2017).

<sup>16</sup> North Carolina Administrative Office of the Courts, 2017 Expunctions Report at 2 (Sept. 1, 2017). North Carolina law also allows expunctions of some gang and prostitution offenses. See G.S. 15A-145.1 (gang offenses); G.S. 15A-145.6 (prostitution offenses). These provisions are rarely invoked, with a total of eight expunctions granted in the past six years according to the AOC report.

<sup>17</sup> North Carolina Administrative Office of the Courts, 2017 Expunctions Report at 2 (Sept. 1, 2017).

<sup>18</sup> See note 4 *supra*.

<sup>19</sup> These bars are not as strict for an expunction of a low-level drug conviction if the person committed the offense before age 22, the first category in the above list. G.S. 15A-145.2(c); G.S. 15A-145.3(c).

<sup>20</sup> North Carolina Administrative Office of the Courts, 2017 Expunctions Report at 2 (Sept. 1, 2017).

<sup>21</sup> For a discussion of the different types of dismissals in North Carolina and the basis for expunging them, see “Types of Dismissals” in John Rubin, *Relief from a Criminal Conviction: A Digital Guide to Expunctions, Certificates of Relief, and Other Procedures in North Carolina* (UNC School of Government, 2017 ed.).

<sup>22</sup> G.S. 15A-146.

<sup>23</sup> If the person received several dismissals during a single session of court or arising out of a single transaction or occurrence, or the offenses were allegedly committed within a 12-month period, a person could expunge all of the dismissals. See Opinion Letter by North Carolina Attorney General to James J. Coman, SBI Director (Oct. 13, 1995) (discussing multiple dismissals if they arose out of the same transaction or occurrence or were consolidated for trial or judgment); G.S. 15A-146(a1) (stating 12-month rule before 2017 amendments).

<sup>24</sup> See note 4 *supra*.

<sup>25</sup> Compare G.S. 15A-145.5 with G.S. 15A-145.4.

<sup>26</sup> The expunction statutes now require that petitioners use AOC-approved forms. See note 4 *supra*.

<sup>27</sup> See G.S. 15A-147(a1). For expunction of DNA records, the affected person need not file for an expunction, but a petition still must be filed by the prosecutor. G.S. 15A-148.

<sup>28</sup> See AOC-CR-264 (Dec. 2017). The statute on expunging dismissals, G.S. 15A-146, continues to make a prior felony conviction a bar to relief but does not specifically require a record check by the SBI. At the time a case is dismissed, the courts may be able to determine whether a person has a disqualifying felony conviction without a record check by the SBI, but they may be reluctant to do so given that the AOC form directs that one be conducted.

<sup>29</sup> For a compilation of the collateral consequences of a North Carolina criminal conviction, see John Rubin & Jeffrey Austin, *Collateral Consequences Assessment Tool (C-CAT)* (UNC School of Government, 2017).

<sup>30</sup> S.L. 2011-265.

<sup>31</sup> G.S. 15A-173.2

<sup>32</sup> *Id.*

<sup>33</sup> G.S. 15A-173.1 (definitions section).

<sup>34</sup> G.S. 15A-173.3 (exclusions section).

<sup>35</sup> G.S. 58-71-80(b), (b2).

<sup>36</sup> G.S. 58-71-80(a).

<sup>37</sup> G.S. 15A-173.5.

<sup>38</sup> G.S. 93B-8.1. These restrictions do not apply to law enforcement licensing commissions.

<sup>39</sup> G.S. 15A-1341(a1).

<sup>40</sup> See, e.g., G.S. 15A-1341(a4).

<sup>41</sup> Most North Carolina post-plea diversion statutes state explicitly that a post-plea diversion does not constitute a conviction.

See G.S. 14-50.29(c) (gang offense); G.S. 14-204(b)(7) (prostitution offense); G.S. 14-458.1(c) (cyberbullying offense); G.S. 90-96(a) (drug offense); G.S. 90-113.14(a) (toxic vapor and drug paraphernalia offenses). The newest post-plea diversion statute, for class H and I felonies and misdemeanors of any class, states that any plea of guilty or finding of guilt is withdrawn if the person completes the terms of the discharge and dismissal. G.S. 15A-1341(a6). Until a person completes a post-plea diversion, the proceeding may count as a conviction. See *State v. Hasty*, 133 N.C. App. 563 (1999) (holding that person who pled guilty and was on probation pending a discharge and dismissal had a prior conviction for purposes of sentencing for new offenses committed during the period of probation).

<sup>42</sup> See *State v. Baker*, \_\_\_ N.C. App. \_\_\_, 786 S.E.2d 432 (2016) (unpublished).

<sup>43</sup> For example, federal immigration authorities consider a post-plea diversion in North Carolina a conviction but not necessarily a pre-plea diversion. See Sejal Zota & John Rubin,

Immigration Consequences of a Criminal Conviction in North Carolina § 4.2A, Deferred Prosecution; § 4.2C, 90-96 and 15A-1341 Deferrals (UNC School of Government, Sept. 2017).

<sup>44</sup> See G.S. 90-96.

<sup>45</sup> G.S. 15A-1341(a4).

<sup>46</sup> G.S. 15A-1341(a1). Prosecutors also have the discretion to enter into informal deferred prosecution agreements, not subject to statutory requirements and without involvement of the court.

<sup>47</sup> See S.L. 2013-360, sec. 18B.13–18B.15, as amended by S.L. 2013-385, sec. 4–6.

<sup>48</sup> See John Rubin, Appointment of Counsel for Class 3 Misdemeanors (UNC School of Government, Nov. 2013).

<sup>49</sup> See Jeff Welty, Private Citizens Initiating Criminal Charges, N. C. Crim. L., UNC School of Government Blog (Apr. 9, 2015).

<sup>50</sup> G.S. 15A-304(b), revised by S.L. 2017-176.

<sup>51</sup> G.S. 7A-38.5(e).

<sup>52</sup> G.S. 15A-301(b1), (b2); G.S. 14-19.20.

## Expanded Forgiveness of a Criminal Conviction

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Earlier this year, I had the opportunity to participate in a national roundtable, sponsored by the American Law Institute and National Conference of State Legislatures, on current and possible approaches to relieving the consequences of a criminal conviction. We considered three basic approaches: “forgetting” convictions by expunging them or limiting access to information about them; “forgiving” convictions through, among other things, certificates of relief, also known as certificates of rehabilitation; and “forgoing” convictions by diverting matters before conviction or decriminalizing them altogether. In its recently-completed legislative session, the North Carolina General Assembly expanded the forgiveness approach by making it easier to get a certificate of relief. Read on for more about this relatively new relief mechanism. If you’re interested in approaches elsewhere, the papers submitted by the various scholars and practitioners invited to the roundtable were recently published in the Federal Sentencing Reporter, available [here](#). You can read my paper about North Carolina [here](#).

**Effect of a certificate of relief.** In 2011, the North Carolina General Assembly enacted its first certificate of relief law. A major effect of a certificate of relief is that it converts mandatory collateral consequences into discretionary ones. See G.S. 15A-173.2. Although the conviction is not expunged, this relief can be significant. For example, some statutes provide for automatic revocation of a person’s occupational license. See, e.g., G.S. 58-71-80 (revocation of bail bond license mandatory for felony conviction at any time and misdemeanor drug conviction in previous 24 months). If the person has obtained a certificate of relief, the licensing authority may but is not required to revoke the person’s license based on the conviction. Further, for the many consequences that are discretionary when a person has a criminal conviction, the licensing authority may consider the certificate favorably in making a licensing decision. Some consequences are unaffected by a certificate of relief, such as sex offender registration requirements and firearm prohibitions. See G.S. 15A-173.3.

A certificate of relief also provides protection against potential liability for a business or person that works with the recipient of a certificate of relief. The law provides that the certificate bars a lawsuit for lack of due care by the business or person. See G.S. 15A-173.5.

**Expanded eligibility.** The eligibility criteria for obtaining a certificate of relief have been narrow. Until now a person could obtain a certificate of relief only if he or she had two or fewer convictions in a single session of court. G.S. 15A-173.2. If a person had more than two convictions or two convictions from different sessions of court, even for minor offenses many years ago, the person would be ineligible for a certificate of relief.

In [S.L. 2018-79](#) (H 774), the General Assembly expanded eligibility by allowing a person to obtain a certificate of relief if he or she has three or fewer Class H or I felony convictions as well as any misdemeanor convictions. If the felony convictions occurred during the same session of court, the convictions will count as a single conviction. Thus, a person who has been convicted of Class H or I felonies at three or fewer sessions of court is eligible for a certificate of relief, as is a person who is convicted of a misdemeanor at any time. The legislation contracts eligibility in one important respect. A person will no longer be eligible for a certificate of relief if convicted of a Class G (or higher class) felony. The changes apply to petitions filed on or after December 1, 2018, meaning that once the law takes effect a person may obtain a certificate of relief for convictions that occurred before or after that date.

The application process remains largely the same. A judge decides whether the person meets the above criteria as well as other conditions, including that the person is engaged in or seeking to engage in a lawful occupation or activity and does not pose an unreasonable risk to public safety or any person. G.S. 15A-173.2. Under the revised statute, the prosecutor provides the judge with the person's criminal history. Further, the revised statute provides that a certificate of relief is automatically revoked if the person is subsequently convicted of a felony or misdemeanor other than a traffic violation. Because of the broader eligibility criteria, however, a subsequent conviction would not preclude a judge from later issuing another certificate of relief if the person makes a sufficient showing that one is appropriate.

The act makes other small changes to the process. Among other things, it imposes a \$50 filing fee, due on filing of the petition for a certificate of relief unless the person is indigent.

**Impact of changes.** Little data is currently available on use of the certificate-of-relief procedure in North Carolina. My impression from trainings and consultations with judicial officials and attorneys is that the procedure is not heavily utilized. The narrowness of the eligibility criteria may have limited the number of petitions. Also, the procedure is relatively new and its potential benefits may not be well known.

People also may have concerns that "forgiving" through a certificate of relief is not as effective as "forgetting" through an expunction. While a certificate of relief issued by a judge is a signal of rehabilitation, it does not remove a criminal conviction from public view and does not preclude a public or private entity from denying someone an opportunity because of a criminal conviction. Cf. G.S. 93B-8.1 (with certain exceptions, directing occupational licensing boards to consider specified factors before denying license based on conviction). Many people therefore prefer that a conviction be expunged even if remnants may still be accessible in the information age in which we live.

Still, a certificate of relief may be helpful in some circumstances and, with the expanded eligibility criteria, may be obtainable when an expunction is not. It is one part of an overall strategy by policymakers to help people regain their footing and reintegrate into society. (For a discussion of the employment challenges facing people who have a criminal conviction, see the recent monograph from the North Carolina Sentencing and Policy Advisory Commission, [Study of Employment Collateral Consequences in North Carolina](#) (June 2018).)