



Tip of the Month – October 2008 Criminal Expungement Law Update

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It is increasingly difficult for persons with criminal records to obtain housing or employment. This Tip discusses the current law regarding expunging criminal records from court and executive branch records.

Criminal expungement petitions generally fall into two categories: those authorized specifically by statute (“statutory cases”) and those not specifically authorized by statute (“inherent authority” cases). Statutory cases fall under Chapter 609A and are limited to: certain controlled substance offenses; certain juveniles prosecuted as adults; and certain criminal proceedings not resulting in a conviction.²

“**Inherent authority**” cases include any case that does not fall specifically under Chapter 609A. This includes the vast majority of cases in which the defendant was convicted of a crime. Inherent authority cases are based on case law, most importantly *State v. C.A.*, 304 N.W. 2d 355 (Minn. 1981).

In *State v. C.A.*, the Minnesota Supreme Court stated that district courts have the inherent authority to expunge executive branch records in “appropriate circumstances.” The Court set forth a balancing test for “appropriate circumstances:” “whether the expungement will yield a benefit to the petitioner commensurate with the disadvantages to the public from the elimination of the record” *Id.* at 358.

One important distinction between statutory and inherent authority expungements is that under 609A the court clearly has the authority to seal all records of the case in both the judiciary branch and executive branch. The ability of the courts to seal executive branch records under inherent authority has not been so clear in recent years, but two recent appellate court cases point back to *State v. C.A.*, where the Court expressly recognized the inherent power of courts to expunge executive-branch records. *Id.* at 358.

State vs. S.L.H.

On September 4, 2008, the Minnesota Supreme Court decided *State vs. S.L.H.*, No. A06-1750 (Minn. 9/4/2008) (Minn. 2008). The Respondent sought expungement of all records related to her 1992 fifth degree felony drug possession charge and subsequent misdemeanor conviction. The Court found that “the district court did not err in declining to exercise inherent authority to expunge S.L.H.’s criminal records held outside the judicial branch.” *Id.* at 2. Some have read *S.L.H.* to infer the broad rule that the district courts do not have the inherent authority to order the sealing of executive branch records unless there has been a constitutional violation. A more careful reading of the case, however, makes it clear that the court did not intend to create such a broad rule. Justice Gildea, in writing for the three justice “majority” (Chief Justice Magnuson did not take part in the decision) stated that, “We need not use this case as a vehicle to comment further on the court of appeals’ conflicting rules because, as set forth below, a broad rule is not necessary for the resolution of this case”. *Id.* at 6, footnote 3. Additionally, Justice Paul

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² There are a number of appellate cases that clarify what “not resulting in a conviction” means, but generally speaking, it is anything for which the client did not plead guilty. In these cases, the burden of proof falls on the state to show why the expungement should not be granted.

Anderson, writing for the three concurring justices, said, “I am concerned that our inherent authority, as explained in *C.A.*, could in the future be construed more narrowly than it ought to be based on the wording of the majority opinion.” *Id.* at C-5. He then goes on to say that the majority’s analysis “is consistent with what we said in *C.A.* – our inherent authority to grant relief may extend to officials and institutions outside the judicial branch in “appropriate circumstances.” *Id.*

State vs. V.A.J.

After its decision in *S.L.H.*, and to further underscore the vitality of *C.A.*, the Court quickly issued an order in another expungement case. (Shortly after the Court had granted cert. for *S.L.H.*, it had also granted cert. for *State vs. V.A.J.* 744 N.W. 2d 674 (Minn. App. 2008), and stayed it pending the outcome of *S.L.H.*)

In *V.A.J.* the Respondent sought expungement of all records related to her 2000 misdemeanor theft conviction. The Court of Appeals held that the district court erred in concluding that it did not have inherent authority to order expungement of her record generated by the court but held by the BCA. The Court of Appeals in *V.A.J.* cited *C.A.* in stating that a court is not “precluded from sealing records controlled by other branches of government when doing so is necessary or conducive to providing a meaningful remedy for the petitioner.” *Id.* at 676, citing *State v. C.A.* at 359-60. On October 1 of this year, instead of remanding *V.A.J.* to the Court of Appeals for review under *S.L.H.*, the Court simply denied the State’s petition for further review. In other words, *V.A.J.* is still good law.

Conclusion

It was hoped that the Supreme Court was going to clarify inherent authority sealing of executive records once and for all with these recent cases. While the Court might have spoken with more clarity, a careful review of the recent cases, particularly in view of *State v. C.A.*, makes it clear that district courts have a lot of discretion based on the specific facts of the case, including the authority to expunge executive branch records in “appropriate circumstances.”

General Practice Tips

- Be sure to get your client’s private record from the Bureau of Criminal Apprehension (BCA), which is the record potential landlords or employers will check. The private BCA record can only be accessed in person or by request in writing. It is also best practice to get the court record from the courthouse itself; while many court records can now be accessed on MNCIS by clicking on the “access trial court records” tab of the Minnesota Courts website, this often does not show all non-conviction records.
- If your client’s expungement petition is granted, it is useful even if it does not extent to all records. Prepare your client to talk with potential landlords or employers explaining the significance of a court’s expungement order, even if the case still appears on the BCA. Also warn your client that records may still appear on commercial data harvester reports long after an expungement. Data harvesters should update their records, but many do not do so.
- If your client was arrested, but not charged, use Minn. Stat. 299C.11 to request all arrest records returned to the subject. (This applies if all charges were dismissed prior to a determination of probable cause if they had not been convicted of any felony or gross misdemeanor for a period of ten years prior to the end of the proceedings.) More information on this, along with form letters and a step-by-step tutorial, may be found on the state courts’ website at <http://www.mncourts.gov/district/4/?page=1197>.
- Be sure you serve (and your proposed order includes) all of the different agencies that may hold a copy of your client’s record(s). This includes Commissioner of the Minnesota Department of Human Services (DHS) so that DHS is not able to later access the record for licensing. See M.S. 609A.03 Subd. 7 (a) (3).