

**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.¹

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.

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.² 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.³ 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.⁴ Similarly, as part of earlier legislation expanding

1. 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, 2016 ed.).

2. 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.

3. G.S. 15A-151.

4. 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 Sch. of Gov’t Blog (Aug. 1, 2017).

expunction opportunities, law enforcement agencies gained the right to obtain information about expunctions of certain convictions for purposes of employment and certification purposes.⁵ Despite the broad statutory mandate to expunge records, North Carolina case law also may not require destruction of criminal investigative files if not open to the public.⁶

These exceptions probably do not undermine the confidentiality of expunctions (although expunged information has been known to be shared with entities that otherwise 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.⁷ 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.

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.⁸ The expunction statutes also state that a person who receives an expunction may not be held to be guilty of perjury or giving a false statement for failing to acknowledge expunged proceedings.⁹ 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.¹⁰

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

5. S.L. 2012-191; S.L. 2011-278.

6. 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).

7. See G.S. 15A-150(d), G.S. 15A-152.

8. 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).

9. 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).

10. G.S. 15A-153(a).

does not address other private entities, such as landlords.¹¹ 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.¹²

An expunction eliminates almost all collateral consequences imposed or authorized by North Carolina law. North Carolina governmental entities, such as licensing agencies, must abide by this rule, except law enforcement agencies may consider expunctions of certain convictions for purposes of employment and certification.¹³ North Carolina law does not prohibit private entities from considering expunged information. Thus, although private employers and educational institutions may not inquire about expunged criminal proceedings, they may still consider expunged information that they otherwise learn about. North Carolina law also does not control other jurisdictions' consideration of expunged information. For example, federal immigration law does not appear to recognize a North Carolina expunction as a basis for disregarding a criminal conviction.¹⁴

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

1. If the offense was committed before age 22, drug-related misdemeanors and simple drug possession felonies.
2. If the offense was before age 18, misdemeanors.
3. If the offense was before age 18, "nonviolent" felonies and misdemeanors.
4. If 10 years after conviction or completion of the person's sentence, "nonviolent felonies"; if 5 years, "nonviolent" misdemeanors (referred to here as "older" offenses for simplicity).

As the above list indicates, all of the conviction-based expunctions are age-based. The first three categories require that the person have been young 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.¹⁵ The total number of

11. G.S. 15A-153(c).

12. G.S. 15A-153(d).

13. 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).

14. 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).

15. 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 last six years according to the AOC report.

expunged convictions has increased in the last 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 2016-17.¹⁶ The number should rise again this year and in succeeding years because the General Assembly reduced the waiting period from 15 to 10 years for felony convictions and from 10 to 5 years for misdemeanor convictions.¹⁷

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 continues to contain 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 of the categories of conviction expunctions also have prior conviction and expunction bars, which limit eligibility for relief. Generally, a prior felony or misdemeanor conviction (other than for a traffic offense) as well as a prior expunction of a conviction precludes relief.¹⁸

Expunction of dismissals. Most of the expunctions in North Carolina are of dismissals (including acquittals). Over 10,000 expunctions of dismissals were ordered in fiscal year 2016-17 and over 60,000 were ordered in the last six years.¹⁹ 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.²⁰

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 received a previous expunction.²¹ Thus, a person could receive only one expunction of

16. North Carolina Administrative Office of the Courts, [2017 Expunctions Report](#) at 2 (Sept. 1, 2017).

17. See note 4 *supra*.

18. These bars are not as strict for expunctions of low-level drug convictions when the person committed the offenses before age 22, the first category in the above list. G.S. 15A-145.2(c); G.S. 15A-145.3(c).

19. North Carolina Administrative Office of the Courts, [2017 Expunctions Report](#) at 2 (Sept. 1, 2017).

20. 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, 2016 ed.).

21. G.S. 15A-146.

a dismissal for life under that statute, regardless of the reason for the dismissal.²² 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.²³

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 18.²⁴ Sometimes the eligibility criteria within a single expunction statute are stated inconsistently, further muddying the availability of relief.

Procedurally, although the AOC has developed form petitions and orders for expunctions,²⁵ 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 more difficult for statewide legal services programs to provide expunction representation.

No expunctions are automatic in North Carolina, including for dismissals and low-level misdemeanor convictions. The affected person must file a petition for relief (except for expunctions of DNA records, which must be requested by the prosecutor).²⁶ Further, all of 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

22. 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).

23. See note 4 *supra*.

24. Compare G.S. 15A-145.5 with G.S. 15A-145.4.

25. The expunction statutes now require that petitioners use AOC-approved forms. See note 4 *supra*.

26. See G.S. 15A-148 (expunction of DNA records).

proceedings necessarily take place after the criminal case and counsel's representation have ended.

North Carolina's Certificate of Relief Procedure

North Carolina law imposes numerous collateral consequences based on a criminal conviction.²⁷ In recognition of the importance of mitigating those consequences, North Carolina enacted a certificate of relief procedure in 2011,²⁸ patterned after the Uniform Collateral Consequences of Conviction Act. The offenses covered and the eligibility conditions are narrow, however, limiting the opportunities for relief.

Requirements. The basic requirements for obtaining a certificate 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.²⁹

Thus, if a person has three convictions from one session of court, the person is ineligible for a certificate of relief even if all of 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 probably bar expunction of the misdemeanor conviction.)

North Carolina law imposes a waiting period of 12 months after completion of the person's sentence, including any period of probation.³⁰

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.³¹ 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

27. 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).

28. S.L. 2011-265.

29. G.S. 15A-173.2

30. *Id.*

31. G.S. 15A-173.1 (definitions section).

specifically identified by the judge.³² 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 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.³³ 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.³⁴ 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.³⁵

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 in the bail bondsman example above, use vague terms such as crime of "moral turpitude " and "dishonesty," which are subject to varying interpretations. Few statutes contain explicit factors guiding the exercise of discretion, such as a requirement that the conviction have a nexus or connection to the licensing or other decision. They also do not indicate why some convictions result in a mandatory consequence, why some result only in a

32. G.S. 15A-173.3 (exclusions section).

33. G.S. 58-71-80(b), (b2).

34. G.S. 58-71-80(a).

35. G.S. 15A-173.5.

discretionary consequence, and why some are relevant at all. Many statutes contain no end date on consideration of a conviction.

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 limiting consideration of criminal convictions altogether.

Diversions and Other Decriminalization Efforts in North Carolina

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.³⁶ 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.³⁷

Neither type of diversion is considered a conviction in North Carolina because neither ends with an adjudication of guilt.³⁸ Generally, a pre-plea diversion is more favorable to a person from a collateral consequence standpoint because the person is never adjudicated guilty.³⁹ The matter is therefore less likely to be viewed as a conviction by outside entities.⁴⁰

Previously, North Carolina limited post-plea diversions to specific offenses, primarily low-level drug offenses.⁴¹ In 2014, the North Carolina General Assembly expanded post-plea diversions to all misdemeanors and low-level felonies.⁴² Pre-plea diversions are likewise available for such offenses.⁴³ 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.

36. G.S. 15A-1341(a1).

37. *See, e.g.*, G.S. 15A-1341(a4).

38. Most of North Carolina’s 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).

39. *See State v. Baker*, ___ N.C. App. ___, 786 S.E.2d 432 (2016) (unpublished).

40. 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).

41. *See* G.S. 90-96.

42. G.S. 15A-1341(a4).

43. 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.

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 to the North Carolina General Assembly that it reclassify several misdemeanors 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. 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.⁴⁴

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, the magistrate may issue criminal charges without involvement by a law enforcement officer or prosecutor.⁴⁵ 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.⁴⁶ (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.⁴⁷

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.⁴⁸

Conclusion

In recent years, North Carolina has gradually expanded its laws to mitigate the impact of collateral consequences from a criminal conviction. North Carolina likely will continue to enact changes, and additional study and data would help the effectiveness of such reforms.

44. See John Rubin, [Appointment of Counsel for Class 3 Misdemeanors](#) (UNC School of Government, Nov. 2013).

45. See Jeff Welty, [Private Citizens Initiating Criminal Charges](#), N.C. Crim. L., UNC Sch. of Gov't Blog (Apr. 9, 2015).

46. G.S. 15A-304(b), revised by S.L. 2017-176.

47. G.S. 7A-38.5(e).

48. G.S. 15A-301(b1), (b2); G.S. 14-19.20.