



## NEW JERSEY LAW REVISION COMMISSION

### Revised Draft Tentative Report Relating to N.J.S. 2C:52-4.1(a) - Expungement

July 11, 2016

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” *N.J.S. 1:12A-8*.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **August 31, 2016**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

Susan G. Thatch, Counsel  
New Jersey Law Revision Commission  
153 Halsey Street, 7th Fl., Box 47016  
Newark, New Jersey 07102  
973-648-4575  
(Fax) 973-648-3123  
Email: [sgt@njlrc.org](mailto:sgt@njlrc.org)  
Web site: <http://www.njlrc.org>

## Executive Summary

In an act of statutory grace, the New Jersey Legislature provides rehabilitated individuals the opportunity to expunge juvenile delinquency dispositions and adult criminal convictions pursuant to the provisions of N.J.S. 2C:52-2 and 2C:52-4.1(a). However, the interplay between these two provisions is unclear and may cause unnecessary confusion for those seeking expungement of previous offenses, particularly regarding the effect of juvenile adjudications on a petition for the expungement of an adult conviction.

In July 2015, the Commission authorized work on a project proposing revisions to N.J.S. 2C:52-2 to reflect the New Jersey Supreme Court's interpretation of New Jersey expungement provisions in the recently published *In re D.J.B.*<sup>1</sup> At previous meetings, the Commission requested statutory language that would potentially clarify the statute; Staff has proposed some statutory revisions in the Appendix.

## Background

### A. Case history

In its decision *In re D.J.B.*, the New Jersey Supreme Court decided whether a petitioner's prior juvenile delinquency adjudications bar the expungement of his adult convictions pursuant to N.J.S. 2C:52-2.

The facts of the case present a compelling narrative. Petitioner D.J.B. had a history with the law, including the following juvenile and criminal dispositions:

- 11/1993 (age 16) – Adjudicated delinquent for third degree burglary
- 03/1994 (age 16) – Adjudicated delinquent for third degree burglary
- 04/1994 (age 17) – Adjudicated delinquent for multiple consolidated counts
- 11/1996 (age 19) – Guilty plea to fourth degree offense for receipt of stolen property
- 09/1999 (age 22) – Two disorderly person offenses for contempt

In the years that followed, D.J.B. pursued a more law-abiding path; he married and had three children, and was successfully employed in the insurance industry. In 2011, recognizing that these records would prevent him from starting his own insurance brokerage firm and coaching baseball in his municipality's little league, D.J.B. petitioned for the expungement of his juvenile and criminal adjudications.

The trial court ordered the expungement of D.J.B.'s three juvenile adjudications, but declined to order the expungement of his adult conviction and disorderly person offenses stating “[t]he combination of N.J.S.A. 2C:52-4.1(a) and N.J.S.A. 2C:52-2 serve to prevent a petitioner

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<sup>1</sup> 216 N.J. 433 (2014).

with an indictable crime from obtaining expungement if that petitioner has a prior juvenile record.” The Appellate Division affirmed.<sup>2</sup>

In analyzing the Legislature’s intent, the Court focused on the interplay between two provisions of New Jersey’s expungement law.

Enacted in 1979, N.J.S. 2C:52-2 provides for the expungement of indictable adult convictions:

In all cases, except as herein provided, wherein a person has been convicted of a crime under the laws of this State **and who has not been convicted of any prior or subsequent crime**, whether within this State or any other jurisdiction, and has not been adjudged a disorderly person or petty disorderly person on more than two occasions may, after the expiration of a period of 10 years from the date of his conviction . . . present a duly verified petition . . . praying that such conviction and all records and information pertaining thereto be expunged. (Emphasis added)

The 1979 legislation failed to provide a comparable method for the expungement of juvenile adjudications.<sup>3</sup> To address the oversight, in 1980 the Legislature enacted N.J.S. 2C:52-4.1(a) permitting expungement of these juvenile records by providing as follows:

a. Any person adjudged a juvenile delinquent may have such adjudication expunged as follows:

(1) Pursuant to N.J.S.2C:52-2, if the act committed by the juvenile would have constituted a crime if committed by an adult;

(2) Pursuant to N.J.S.2C:52-3, if the act committed by the juvenile would have constituted a disorderly or petty disorderly persons offense if committed by an adult; or

(3) Pursuant to N.J.S.2C:52-4, if the act committed by the juvenile would have constituted an ordinance violation if committed by an adult.

**For purposes of expungement, any act which resulted in a juvenile being adjudged a delinquent shall be classified as if that act had been committed by an adult.** (Emphasis added).

With respect to D.J.B.’s expungement request, the State maintained, and the trial and appellate court agreed, that the final paragraph of 2C:52-4.1(a) applied to the entirety of the expungement statute.<sup>4</sup> This interpretation effectively converts a juvenile adjudication into a “prior or subsequent crime” barring expungement of an adult conviction pursuant to N.J.S. 2C:52-2.<sup>5</sup>

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<sup>2</sup> The Court noted that in *In re J.B.*, 426 N.J. Super. 496 (App. Div. 2012), a different appellate panel addressed a similar question and reached the opposite conclusion.

<sup>3</sup> *In re J.B.*, 426 N.J. Super. 496, 502 (App. Div. 2012).

<sup>4</sup> *In re D.J.B.*, 216 N.J. 433,438-9 (2014).

<sup>5</sup> *Id.* at 439-40.

After carefully analyzing the expungement law’s legislative intent and history, as well as relevant rules of statutory construction, the New Jersey Supreme Court rejected the trial and appellate courts’ reading of the statute and held that the final paragraph of 2C:52-4.1(a) was intended only to apply to the portion of the statute governing the expungement of juvenile adjudications.<sup>6</sup> Accordingly, the Court held that D.J.B.’s juvenile adjudications did not constitute “prior crimes” which would automatically prevent the expungement of his adult conviction.<sup>7</sup>

## **B. New Jersey’s adult expungement provisions**

N.J.S. 2C:52-1 *et seq.* provides for the expungement of adult convictions, violations and arrests in accordance with various requirements and timeframes:

**1. Indictable offenses** (N.J.S. 2C:52-2): Crimes are expungeable after 10 years if the individual has not been convicted of a prior or subsequent crime and has had no more than two disorderly persons adjudications. This provision enumerates crimes that may not be expunged under any circumstances, such as criminal homicide and other violent crimes, and contains additional specificity regarding the expungement of drug related convictions. This section also prohibits expungement of a conviction for an individual holding public office if the crime “involved or touched” the public office.

**2. Disorderly and Petty Disorderly Persons offenses** (N.J.S. 2C:52-3): Offenses are expungeable after 5 years if the individual has not been convicted of a prior or subsequent crime and has had no more than another three disorderly persons adjudications.

**3. Ordinances** (N.J.S. 2C:52-4): Violations are expungeable after 2 years if the individual has not been convicted of a prior or subsequent crime and has had no more than two disorderly persons adjudications.

In each instance, the expunged records are not destroyed but are inaccessible except in the following limited circumstances:

- The Violent Crimes Compensation Board may review the records in conjunction with a filed claim.<sup>8</sup>
- Superior Court may permit inspection of the records where the subject matter is the object of litigation or judicial proceedings (they may not be used for impeachment, but may be used for sentencing after establishing guilt).<sup>9</sup>
- A judge may use the records in determining whether to grant a person’s application for supervisory treatment or a diversion program.<sup>10</sup>

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<sup>6</sup> *Id.* at 443.

<sup>7</sup> *Id.* at 448.

<sup>8</sup> N.J.S. 2C:52-18.

<sup>9</sup> N.J.S. 2C:52-19.

- A judge, prosecutor, probation department or Attorney General may use the records in conjunction with setting bail, the presentence report or sentencing.<sup>11</sup>
- A parole board may use the records in evaluating granting of parole.<sup>12</sup>
- The Department of Corrections may use the records in the classification, evaluation and assignment to correctional facilities.<sup>13</sup>

Unless otherwise provided by law, an order of expungement shall deem the acts not to have occurred.<sup>14</sup> As a result, a successful petitioner is not obligated to disclose expunged convictions, except in connection with a subsequent expungement request, in requesting supervisory treatment or diversion for subsequent criminal charges, or in seeking employment with the judiciary or law enforcement.<sup>15</sup>

### **C. New Jersey’s juvenile expungement provisions**

As noted in the case history, New Jersey’s original expungement statute did not provide a process for the expungement of juvenile delinquency adjudications and the Legislature subsequently adopted N.J.S. 52-4.1 to remedy this oversight. Subsection a. of 2C:52-4.1 permits an individual to expunge a juvenile delinquency adjudication in the same manner as that of an adult record and directly cross-references to the applicable provision of N.J.S. 2C:52-2 – 52-4.

In addition, subsection b. permits an individual to expunge an entire record or delinquency adjudications provided:

- Five years have elapsed;
- The individual has not been convicted of any crimes or disorderly offenses in the five years preceding the petition;
- The individual was not adjudged delinquent for an act that would be ineligible for expungement if committed by an adult;
- The individual has not had an adult criminal conviction expunged; and
- The individual has not had adult criminal charges dismissed pursuant to participation in a diversion program.

Subsection b. represents an expansive and simplified option as it imposes a five-year waiting period irrespective of the nature of the violation, and does not limit the number of adjudications that may be expunged. Indeed, the only instance in which an individual might

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<sup>10</sup> N.J.S. 2C:52-20.

<sup>11</sup> N.J.S. 2C:52-21.

<sup>12</sup> N.J.S. 2C:52-22.

<sup>13</sup> N.J.S. 2C:52-23.

<sup>14</sup> Interpreting the phrase “[u]nless otherwise provided by law,” the New Jersey Supreme Court has determined that an expungement order does not relieve the mandatory forfeiture of public employment pursuant to N.J.S. 2C:51-2. *In re D.H.*, 204 N.J. 7 (2010).

<sup>15</sup> N.J.S. 2C:52-27.

utilize the individualized expungement option of subsection a. is if he or she is seeking expungement of an ordinance violation and finds the shorter two-year waiting period offered in N.J.S. 2C:52-4 beneficial.

### Analysis

State expungement statutes vary greatly both procedurally and in the scope of relief.<sup>16</sup> New Jersey's first expungement provisions were enacted in 1931; these early provisions were consolidated and expanded upon in 1979, and subsequently codified as Chapter 52 of New Jersey's Code of Criminal Justice.<sup>17</sup> Over the years, Chapter 52 has been amended numerous times, including the 1980 enactment of N.J.S. 2C:52-4.1(a) which expanded expungement relief to juvenile delinquency adjudications. While the statute is designed to offer rehabilitated individuals a second chance, no reprieve is provided for those convicted of the most egregious crimes.<sup>18</sup> After satisfying the various statutory requirements, an individual is presumptively entitled to have his or her records expunged.<sup>19</sup>

Each legislative session advances bills designed to further delineate the parameters of expungement and other aspects of criminal rehabilitation. The Legislature has most recently passed a bill altering the timeframes and requirements for the expungement of adult convictions. A.206 proposed reduced waiting periods for expungement and also clarifies that an individual may bring multiple adult expungement petitions as part of one application.<sup>20</sup> However, this legislation does not modify N.J.S. 2C:52-4.1 and does not address the interplay between the adult and juvenile expungement provisions. The New Jersey Assembly has also passed legislation that permits the deletion of erroneous criminal records for victims of identity theft,<sup>21</sup> and that creates an Expungement Study Commission.<sup>22</sup>

In *In re D.J.B.*, the New Jersey Supreme Court clarified that a juvenile delinquency adjudication is not a "prior or subsequent crime," and does not prohibit the expungement of an adult conviction provided that the other applicable statutory requirements are satisfied. However, 2C:52-4.1 b. (4) and (5) imply that the converse is not true, providing:

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<sup>16</sup> Anna Kessler, *Excavating Expungement Law: A Comprehensive Approach*, 87 TEMPLE L. REV. 403, 417 (2015) (asserting that "expungement legislation varies widely from state to state."). The availability of federal expungement can vary based upon the deciding Circuit. *See generally*, Fruquan Mouzon, *Forgive Us Our Tresspasses: The Need for Federal Expungement Legislation*, 39 U. MEM. L. REV. 1 (2008).

<sup>17</sup> *State v. A.N.J.*, 98 N.J. 421, 425 (1985).

<sup>18</sup> N.J.S. 2C:52-2 (2015)

<sup>19</sup> *In re Kollman*, 210 N.J. 557, 568 (2012); *In re J.N.G.*, 244 N.J. Super. 605, 607 (App. Div. 1990)

<sup>20</sup> The legislation reduced the waiting time for indictable offenses from 10 years to five years; for disorderly offenses from 5 years to 3 years; and maintains the 2 year waiting period for municipal ordinances. The bill also permits the immediate expungement of arrest records upon dismissal, acquittal or discharge. The shortened timeframes were conditionally vetoed by the Governor and not adopted.

<sup>21</sup> A.B. 1662 (2014), *adopted as* P.L. 2015, c. 126.

<sup>22</sup> A.B. 1815 (2014) (creating the "Expungement Waiting Period Reduction Study Commission").

**b. Additionally, any person who has been adjudged a juvenile delinquent may have his entire record of delinquency expunged if:**

**(4) He has never had an adult conviction expunged;**

**(5) He has never had adult criminal charges dismissed following completion of a supervisory treatment or other diversion program.**

Staff has discussed the expungement process with attorneys experienced in this area. Practically speaking, an individual would file one petition requesting the expungement of various juvenile adjudications and/or adult violations. *In re D.J.B.* prohibits denying the expungement of an adult criminal conviction based upon the individual's juvenile history, but it is unclear whether 52-4.1 b.(4) is intended to bar the expungement of a juvenile history when one is contemporaneously seeking to expunge an adult conviction. One practitioner states that these contemporaneous petitions are granted and unaffected by N.J.S. 52-4.1 b.(4); specifically, an individual can expunge his or her entire juvenile record while simultaneously expunging one or more adult convictions.

In current practice, it is unclear what subsections b.(4) and b.(5) achieve or when they could be utilized. Juvenile delinquency adjudications necessarily conclude when an individual reaches adulthood, and become an encapsulated record. These subsections could create a potentially anomalous situation in the event a pro se individual expunges an adult conviction, but for some reason does not simultaneously request the expungement of his or her delinquency record; the individual would seemingly be barred from requesting such an expungement in the future.

Further, a commenter has noted that subsection a. is of limited utility in light of the Court's decision and proposed that the subsection be deleted. With respect to the previous Draft Tentative Report, the commenter stated:

Briefly addressing 2C:52-4.1a, the Commission's proposed changes may clarify the eligibility criteria in view of the decision in *In re D.J.B.*, but that section serves no function whatsoever in view of the language in subsection (b). As properly noted, the only time that individuals may utilize the expungement options of subsection (a) is when they are seeking an expungement of an ordinance violation. I think that subsection (a) should be deleted and the two-year ordinance expungement should be added to subsection (b).

The Commission discussed this suggestion at its June 19, 2016 meeting and concluded that this might be a useful modification. Accordingly, Staff proposes the revisions shown in the Appendix.

The legislative goals advanced by Chapter 52 and other similar legislation have a historical basis and growing contemporary significance.<sup>23</sup> Yet *In re D.J.B.*, and most recently, *In re J.S.*,<sup>24</sup> demonstrate that the expungement statute is sometimes unclear, with legislative intent that is difficult to glean.<sup>25</sup>

## Conclusion

For a reformed offender meeting the statutory prerequisites, expungement provides social redemption and relief from many of the collateral consequences attaching to the criminal act.<sup>26</sup> Recognizing that many individuals petitioning for expungement may be self-represented, the Administrative Office of the Courts' website provides a "pro se expungement kit" and directs the individual to "review the applicable provisions of N.J.S.A. 2C:52-1 through N.J.S.A. 2C:52-32 to determine if you are eligible" for expungement.<sup>27</sup> While the Court's decision in *In re D.J.B.* provides a key interpretation of New Jersey's expungement law, the statute as written remains "concededly, unclear on its face."<sup>28</sup> In accordance with the Commission's previous discussions, and feedback from various parties, Staff has proposed statutory revisions reflecting the holding of *In re D.J.B.* and clarifying the relationship between New Jersey's adult and juvenile expungement provisions.

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<sup>23</sup> See, e.g., Binyamin Appelbaum, *Out of Trouble, but Criminal Records Keep Men Out of Work*, N.Y. TIMES (Feb. 28, 2015), available at [http://www.nytimes.com/2015/03/01/business/out-of-trouble-but-criminal-records-keep-men-out-of-work.html?\\_r=0](http://www.nytimes.com/2015/03/01/business/out-of-trouble-but-criminal-records-keep-men-out-of-work.html?_r=0) (asserting that "10 percent of nonincarcerated men had felony records in 2010, up from 4 percent in 1980.")

<sup>24</sup> 2015 WL 4714653 (Aug. 10, 2015). With respect to the expungement petition of J.S., the N.J. Supreme Court split 5-2 on the statutory interpretation of the phrase "prior or subsequent crime" as it relates to multiple offenses committed within a short period of time. Justice Patterson's majority opinion relied upon a plain language reading of the statute. Rejecting the dissents' argument that the statute should be liberally construed, Justice Patterson opined that "[i]f the Legislature determines that expungement should be available to such individuals, it can amend the statute to clarify its intent in that regard." *Id.* at 1.

<sup>25</sup> In addition to harmonizing the internal provisions of Chapter 52, the N.J. Supreme Court has also been called upon to reconcile the expungement statute and the Rehabilitated Convicted Offenders Act. See *In re D.H.*, 204 N.J. 7 (2010).

<sup>26</sup> The degree of social redemption achieved through expungement is questionable in light of modern technology when "getting out of Google's grip is harder than clearing the legal record." Clay Calvert & Jerry Bruno, *When Cleansing Criminal History Clashes with the First Amendment and Online Journalism: Are Expungement Statutes Irrelevant in the Digital Age?*, 19 COMM. LAW CONSPPECTUS 123, 137 (2010) (quoting journalist Paul Silva). Nevertheless, the collateral consequences of criminal convictions remain significant; the National Inventory of the Collateral Consequences of Conviction identifies approximately 1,072 discretionary or mandatory collateral consequences under New Jersey law.

<sup>27</sup> New Jersey Courts, HOW TO EXPUNGE YOUR CRIMINAL AND/OR JUVENILE RECORD 1 (2014), available at [http://www.judiciary.state.nj.us/prose/10557\\_expunge\\_kit.pdf](http://www.judiciary.state.nj.us/prose/10557_expunge_kit.pdf).

<sup>28</sup> *In re J.B.* at 507.

## Appendix

### 2C:52-4.1. Juvenile delinquent; expungement of adjudications and charges

~~a. Any person adjudged a juvenile delinquent may have such adjudication expunged as follows:~~

~~(1) Pursuant to N.J.S.2C:52-2, if the act committed by the juvenile would have constituted a crime if committed by an adult;~~

~~(2) Pursuant to N.J.S.2C:52-3, if the act committed by the juvenile would have constituted a disorderly or petty disorderly persons offense if committed by an adult; or~~

~~(3) Pursuant to N.J.S.2C:52-4, if the act committed by the juvenile would have constituted an ordinance violation if committed by an adult.~~

~~For purposes of expungement, any act which resulted in a juvenile being adjudged a delinquent shall be classified as if that act had been committed by an adult.~~

~~b. Additionally, any a. A person's who has been adjudged a juvenile delinquent may have his entire record of delinquency adjudications may be expunged if provided all of the provisions in this section are met:~~

~~(1) Five years have elapsed since the final discharge of the person from (a) legal custody or supervision or 5 years have elapsed (b) after the entry of any other court order not involving custody or supervision, except that provided that the five-year period shall not include periods of post-incarceration supervision pursuant to section 25 of P.L.1982, c. 77 (C.2A:4A-44), shall not be considered in calculating the five year period for purposes of this paragraph;~~

~~(2) The person ~~He~~ has not been convicted of a crime, ~~or~~ a disorderly or petty disorderly persons offense, ~~or~~ adjudged a delinquent, ~~or~~ in need of supervision, had juvenile adjudications or criminal charges dismissed following completion of a supervisory treatment or other diversion program, or been discharged from a term of special probation during the 5 years prior to the filing of the petition, and no proceeding or complaint is pending seeking such a conviction or adjudication, except that provided that the five-year period shall not include periods of post-incarceration supervision pursuant to section 25 of P.L.1982, c. 77 (C.2A:4A-44), shall not be considered in calculating the five year period for purposes of this paragraph;and~~

~~(3) ~~He~~ The person ~~was~~ has never been (a) convicted of a crime which is ineligible for expungement pursuant to N.J.S. 2C:52-2 or (b) adjudged a juvenile delinquent ~~on the basis of due to the commission of an act which is ineligible for expungement pursuant to N.J.S. 2C:52-2~~ if committed by an adult ~~would constitute a crime not subject to expungement under N.J.S.2C:52-2;~~~~

~~(4) He has never had an adult conviction expunged; and~~

~~(5) He has never had adult criminal charges dismissed following completion of a supervisory treatment or other diversion program.~~

eb. Any person who has been charged with an act of delinquency which would have constituted a crime, disorderly persons offense, petty disorderly persons offense, or municipal ordinance violation if committed by an adult and against whom proceedings were dismissed may have the filing of those charges expunged pursuant to the provisions of N.J.S.2C:52-6.

c. A person may expunge a delinquent act which would have constituted an ordinance violation if committed by an adult pursuant to the provisions of N.J.S.2C:52-4.

d. A person petitioning for expungement of juvenile adjudications pursuant to this section shall present an expungement application to the Superior Court in the county in which the adjudication for the delinquency was adjudged, which contains a duly verified petition as provided in N.J.S. 2C:52-7 for the juvenile adjudication(s) sought to be expunged, praying that the adjudication, or adjudications if applicable, and all records and information pertaining thereto be expunged. The petition for each adjudication appended to an application shall comply with the requirements set forth in N.J.S. 2C:52-1 et seq.

#### COMMENT

These revisions seek to clarify the process for the expungement of juvenile adjudications. In *In re D.J.B.*, the State maintained that the existing statutory language made a delinquency adjudication a “prior or subsequent crime” barring the expungement of an adult conviction pursuant to N.J.S. 2C:52-2. The Supreme Court rejected this reading of the statute and construed the applicable language narrowly. The draft incorporates the phrase “delinquent act” used in applicable sections of Title 2A and removes gendered terms. This draft also reflects prosecutor feedback suggesting that subsection a. be deleted in its entirety. Subsection b. (previously subsection c.) has been retained as a person may petition for the expungement of dismissed charges at the time of dismissal pursuant to N.J.S. 2C:52-6. Subsection c. was retained from the previous subsection a. because a person may petition for the expungement of an ordinance violation after two years pursuant to N.J.S. 2C:52-4. Subsection d. is new and incorporates the procedural requirements for expungement found in N.J.S. 2C:52-2 and 2C:52-3 which are no longer incorporated by cross-reference when subsection a. is deleted.