

## Expunction Relief for “Doughnut Hole” Youth

Much of the conversation at one of the first [Juvenile Jurisdiction Advisory Committee](#) meetings I attended centered on “doughnut hole” youth. The meeting participants were discussing the long pause between when raise the age legislation passed in June of 2017 until the time it would take effect in December of 2019. Many 16- and 17-year-old youth would continue to be convicted in criminal court for things that the legislature had already determined should be juvenile offenses for youth their age. Caught in between passage and implementation, these kids were in the “doughnut hole.” The legislature included a remedy for these youth, and many others, in the [Second Chance Act \(S562\)](#) that was ratified on June 17, 2020. Certain misdemeanor and Class H and I felony convictions for offenses committed before raise the age took effect and when the person was 16 or 17, can now be expunged. This new expunction opportunity is available to any person with an existing conviction from the age of 16 or 17 that would now fall under juvenile jurisdiction and not just the young people who were caught in the doughnut hole.

### Who is eligible for this new expunction?

S562 creates a new provision in the Criminal Procedure Act, G.S. 15A-145.8 “Expunction of records for offenders under the age of 18 at the time of commission of certain misdemeanors and felonies upon completion of the sentence.” To be eligible for expunction under this provision, the person must meet the following three criteria:

- Have a record of conviction for an eligible offense,
- Committed the eligible offense at age 16 or 17 and prior to December 1, 2019, and
- Served any active sentence, period of probation, and post-release supervision ordered for the offense and not be subject to any order for restitution or civil judgment that represents amounts ordered for restitution for the offense.

### Eligible offenses

Convictions eligible for this new expunction include convictions for misdemeanors and Class H and Class I felony offenses *committed before December 1, 2019* except for:

- Violations of the motor vehicle laws under Chapter 20 and
- Offenses that require registration as a sex offender, even if the person is not currently required to register.

This structure largely mirrors the structures that shape new juvenile court jurisdiction under raise the age. Effective December 1, 2019, original jurisdiction for all offenses committed at age 16 and 17, other than Chapter 20 motor vehicle offenses, lies in juvenile court. [G.S. 7B-1501\(7\)b](#). Matters that begin in juvenile court and allege any Class A – Class G felony committed at age 16 or 17 must be transferred for prosecution in the criminal system following a finding of probable cause or

the return of an indictment related to the Class A – Class G felony offense. [G.S. 7B-2200.5\(a\)](#). While it is possible for any matter initially transferred to superior court for criminal prosecution to be remanded back to juvenile court for adjudication pursuant to [G.S. 7B-2200.5\(d\)](#), the overarching structure of raise the age places matters containing Class A – Class G felony offenses committed at ages 16 and 17 in criminal court. Mirroring this structure for offenses that continue to fall under criminal jurisdiction, any Chapter 20 conviction and any conviction for a Class A – Class G felony committed at age 16 or 17 is not eligible for expunction under S562.

Matters that allege only Class H or Class I felony offenses committed at age 16 or 17 may be transferred to criminal court for prosecution under raise the age, but that transfer is discretionary following a finding of probable cause and a transfer hearing. [G.S. 7B-2200.5\(b\)](#). Matters that allege only misdemeanor offenses committed at age 16 or 17 must be handled in the juvenile system, as there is no statutory mechanism for transfer of these matters to criminal court. The expunction that is available under S652 includes these offenses that now may be and must be treated as juvenile matters.

The S562 exclusion from expunction for offenses for which registration as a sex offender is required does not mirror any provision included in the statutory changes that implemented raise the age. The law regarding original juvenile jurisdiction and mandatory transfer to superior court does not include any consideration of whether or not the offense is one for which registration pursuant to [Article 27A](#) of Chapter 14 of the General Statutes is required.

There is no limit on the number of offenses eligible for expunction under S562. The new G.S. 15A-145.8(d) states that a person convicted of multiple offenses is eligible to have those convictions expunged if they meet all the requirements of the new statute.

### **Age requirement**

S562 creates a process for expunction for eligible offenses that were committed before December 1, 2019, when raise the age took effect, and when the person was age 16 or 17. There are two important points here. First, the eligibility for an expunction relates to the date that the offense was *committed*, not the date of the conviction. Some proceedings related to offenses committed before December 1, 2019 are still pending today. If those proceedings result in convictions and the person convicted eventually meets all the requirements of this new expunction statute, that conviction will become eligible for expunction.

The second important point is that S562 is not limited to the “doughnut hole” youth. Any person with a conviction for an eligible offense, committed prior to December 1, 2019 and when they were 16 or 17, is eligible for expunction. That conviction could have happened between the time raise the age passed and was implemented, or it could have happened 50 years ago. S562 is not limited to convictions that occurred in the gap between raise the age passage and implementation.

## **Sentence and restitution completion**

Expunction of these eligible offenses will only be available after the person has served any active sentence, period of probation, and any post-release supervision ordered for the offense. In addition, the person requesting expunction cannot have any restitution orders in place for the offense or any outstanding civil judgments that represent amounts ordered for restitution for the offense.

## **Process for expunction of convictions for offenses committed at 16 and 17**

S562 outlines a specific process for these new expunctions. A petition for expunction under the new G.S. 15A-145.8 can be filed either by the person with the conviction on their record or by the district attorney. The petition should be filed in the county where the conviction occurred and must be on a form approved by the Administrative Office of the Courts. There is a \$175 filing fee when filed by the petitioner unless the petitioner is indigent. There is no filing fee if filed by the district attorney.

If the petition is filed by the person with the conviction, it must be served on the district attorney in the court where the conviction occurred. The district attorney then has 30 days to file any objection to the petition. The district attorney must also make his or her best efforts to contact any victim to notify them of the request for expunction before the date of the hearing. The victim has a right to be present at the hearing on the victim's request and the court is required to consider the views and concerns of the victim at the hearing.

The new G.S. 15A-145.8(d) requires a hearing on the petition for expunction. The court is required to order the expunction if the court finds that:

- The offense was a misdemeanor or Class H or I felony eligible for expunction;
- The offense was committed prior to December 1, 2019 and when the person was age 16 or 17;
- Any active sentence, period of probation, and post-release supervision ordered for the offenses was completed; and
- The person has no restitution orders for the offense or outstanding civil judgments representing amounts ordered for restitution for the offense.

While G.S. 15A-145.8(c) provides the district attorney the opportunity to object to any request for expunction under this statute and expressly requires consideration of the views and any concerns that the victim may express, the new statute requires that the court order expunction if the four findings above are made. The court order must include that the conviction be expunged from court records and also direct all law enforcement agencies, the Division of Adult Correction and Juvenile Justice, the Division of Motor Vehicles, and any other state or local agencies identified by the petitioner as bearing record of the expunged conviction to expunge their record of conviction. The

clerk is required to notify any included state and local agencies and to forward the order of expunction to the Administrative Office of the Courts.

### **Prosecutors and law enforcement continue to have access to the conviction for certain purposes**

Any conviction expunged pursuant to the new process in S562 remains available under certain circumstances. Pursuant to the amendment of [G.S. 15A-151.5](#), prosecutor access to expunged files, prosecutors will be able to access the expunged convictions:

- For calculation of prior record level and prior conviction level if convicted of a subsequent offense;
- As a basis for indictment for a habitual offense pursuant to [S. 14-7.1](#) (habitual felons) or [G.S. 14-7.26](#) (habitual breaking and entering status offender);
- When conviction of a prior offense raises the offense level of a subsequent offense;
- To determine eligibility for relief under [S. 90-96\(a\)](#) (conditional discharge for first offense); and
- When permissible in a criminal case under [Rule 404\(b\)](#) (admissibility of other crimes) or [Rule 609](#) (impeachment by evidence of conviction of crime) of the North Carolina Rules of Evidence.

Under certain circumstances, some law enforcement officials will be able to access the record of these new expungements contained in the confidential file for expungements maintained by the Administrative Office of the Courts. [G.S. 15A-151\(a\)\(4\), -\(5\), and -\(6\)](#). Allowable disclosures are:

To State or local law enforcement for employment purposes only;  
To the NC Criminal Justice Education and Training Standards Commission for certification purposes only; and  
To the North Carolina Sheriff's Education and Training Standards Commission for certification purposes only.

### **Next steps**

S562 was presented to the Governor on June 18, 2020. If it becomes law, it contains a retroactive effective date of December 1, 2019 for these new expunction provisions. The Administrative Office of the Courts will be required to develop and disseminate a new form for these purposes by September 1, 2020. I do not know precisely how many people will become eligible for expunction on enactment, but the scope of the new provisions is broad. Making this opportunity a reality in people's lives will require filing a petition, potentially paying a fee, and participating in a hearing. Many stakeholders came together to support passage of the Second Chance Act and the continued help of those stakeholders will be needed for people to know the opportunity is available and to access its benefits.