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## MEMORANDUM

TO: Superior Court Judges  
District Court Judges  
Clerks of Superior Court  
District Attorneys  
Public Defenders

FROM: NCAOC Office of General Counsel

DATE: 7 November 2017

SUBJECT: Expunction Law Changes Effective 1 December 2017

During the 2017 legislative long session, the General Assembly made a number of changes to the expunction provisions in Article 5 of Chapter 15A of the General Statutes, effective for expunction petitions filed on or after 1 December 2017.

The full text of the legislation, which is S.L. 2017-195 (SB 445), is available here:

<http://www.ncleg.net/Sessions/2017/Bills/Senate/PDF/S445v5.pdf>

This memorandum provides an overview of the changes enacted by this legislation. Some of the changes are procedural in nature: clarifying where the petition is filed and how it is routed; requiring the use of an NCAOC form; and clarifying the distribution of the final order. Other changes are more substantive: reducing the waiting period for certain expunctions; eliminating the prior expunction bar for certain expunctions; affording a person greater access to information regarding his or her own prior expunction; and allowing the use of certain expunged offenses for prior record level calculation purposes.

At the conclusion of this memorandum is an appendix that lists the specific changes to each expunction statute. Also listed are the forms associated with each expunction statute. The Criminal Forms Subcommittee has updated these forms to reflect the changes enacted by SB 445. The revised forms will be available for use on 1 December 2017.

### **Place of Filing**

**Effect of change:** Requires the petitioner to file in the county of conviction or the county of charge.

SB 445 amends G.S. 15A-145 (under 18 first offender misdemeanor expunction), G.S. 15A-145.1 (under 18 first offender gang offense expunction), G.S. 15A-145.4 (under 18 first offender nonviolent felony expunction), G.S. 15A-145.5 (nonviolent felony or nonviolent misdemeanor expunction), and G.S. 15A-

145.6 (prostitution offense expunction) to require that the person seeking the expunction file the petition in the court of the **county of conviction**.

The bill amends G.S. 15A-145.2 (under 21 first offender drug offense expunction) and G.S. 15A-145.3 (under 21 first offender toxic vapors offense expunction) to require that the person seeking the expunction file the petition in the court of the **county of charge**.

#### **Acceptance and Routing of Petition by Clerk**

**Effect of change:** Requires the petitioner to file with the clerk's office, which in turn will route the petition as appropriate.

SB 445 amends several expunction statutes to require that (i) the petitioner file the expunction petition with the clerk's office and (ii) the clerk's office then forward the petition to the NC Department of Public Safety (in practice, the State Bureau of Investigation) and the NCAOC for the criminal record and prior expunction searches. The expunction statutes amended in this manner are G.S. 15A-145 (under 18 first offender misdemeanor expunction), G.S. 15A-145.1 (under 18 first offender gang offense expunction), G.S. 15A-145.2 (under 21 first offender drug offense expunction), G.S. 15A-145.3 (under 21 first offender toxic vapors offense expunction), G.S. 15A-145.4 (under 18 first offender nonviolent felony expunction), G.S. 15A-145.5 (nonviolent felony or nonviolent misdemeanor expunction), and G.S. 15A-145.6 (prostitution offense expunction).

The bill amends four additional expunction statutes to require that (i) the petitioner file the expunction petition with the clerk's office and (ii) the clerk's office subsequently forward the petition to the NCAOC upon the entry of an expunction order. The expunction statutes amended in this way are G.S. 15A-146 (dismissal and not guilty expunction), G.S. 15A-147 (identify theft and mistaken identity expunction), G.S. 15A-148 (DNA expunction following dismissal on appeal or pardon), and G.S. 15A-149 (pardon of innocence expunction).

#### **Mandatory Use of NCAOC Form**

**Effect of change:** Requires the use of an NCAOC form for every expunction.

For those expunction statutes that currently do not require the use of an NCAOC form, SB 445 amends them to mandate that the petitioner use an NCAOC form. The expunction statutes amended in this manner are G.S. 15A-146 (dismissal and not guilty expunction) and G.S. 15A-148 (DNA expunction following dismissal on appeal or pardon). The bill also adds an NCAOC form requirement to G.S. 15A-147 (identify theft and mistaken identity expunction). Although G.S. 15A-147(a) already expressly required the use of an NCAOC form, SB 445 now imposes an NCAOC form requirement for the entire statute, meaning that an NCAOC form now is required for G.S. 15A-147(a1) as well.

For the most part, this portion of SB 445 simply conforms law to practice, because NCAOC forms already are available and regularly used for G.S. 15A-146 and G.S. 15A-147. There currently is not an NCAOC form for G.S. 15A-148, however, which prompted the Judicial Branch Criminal Forms Subcommittee to approve new form AOC-CR-284 for this purpose.

As noted earlier in this memorandum, the forms associated with the various expunctions statutes are listed in the appendix below.

### **Reduction of Waiting Period for Expunction of Nonviolent Felony or Nonviolent Misdemeanor**

**Effect of change:** Reduces the 15-year waiting period for expunctions under G.S. 15A-145.5.

G.S. 15A-145.5 allows for the expunction, without regard to the defendant's age at the time of the offense, of certain "nonviolent felonies" and "nonviolent misdemeanors," as those terms are defined in the statute.

Under current law, "[t]he petition shall not be filed earlier than 15 years after the date of the conviction or when any active sentence, period of probation, and post-release supervision has been served, whichever occurs later."

SB 445 reduces this waiting period to ten (10) years for a nonviolent felony, and five (5) years for a nonviolent misdemeanor: "The petition shall not be filed earlier than 10 years after the date of the conviction for a nonviolent felony or five years for a nonviolent misdemeanor or when any active sentence, period of probation, and post-release supervision has been served, whichever occurs later."

### **Elimination of Prior Expunction Bar for Dismissed or Not Guilty Expunction; Elimination of "Same 12-Month Period / Same Term" Language**

**Effect of change:** Makes changes to the eligibility requirements for an expunction under G.S. 15A-146, including the eligibility requirements for multiple offenses.

G.S. 15A-146 currently provides that a person may petition for the expunction of a charge that has been dismissed, or for which there has been a finding of not guilty or not responsible, if the person (i) "ha[s] not previously received an expungement under this section [i.e., G.S. 15A-146], G.S. 15A-145, 15A-145.1, 15A-145.2, 15A-145.3, 15A-145.4, or 15A-145.5," and (ii) "ha[s] not previously been convicted of any felony under the laws of the United States, this State, or any other state." SB 445 eliminates the requirement that the petitioner not previously have received an expunction.

For multiple charges, G.S. 15A-146 currently provides that "if a person is charged with multiple offenses and all the charges are dismissed, or findings of not guilty or not responsible are made, then a person may apply to have each of those charges expunged if the offenses occurred within the same 12-month period of time or if the charges are dismissed or findings are made at the same term of court." SB 445 eliminates the "same 12-month period / same term" limitation.

### **Notification of Combined Records and the SBI; Certified Copy to Petitioner**

**Effect of change:** Requires the clerk's office to provide separate copies to the SBI and Combined Records, as opposed to a single copy to DPS. Also expressly requires the clerk's office to send a certified copy to the petitioner, which the NCAOC interprets to mean that the clerk's office no longer should assess a G.S. 7A-308 copy fee for the petitioner's copy.

As currently written, G.S. 15A-150 requires the clerk to provide a single copy of each expunction order to the NC Department of Public Safety (DPS), with the expectation that DPS then will make whatever additional copies it deems necessary for internal distribution in order to effectuate the order.

SB 445 amends this statute to instead require the clerk's office to send two copies to DPS – one copy specifically directed to the Combined Records Section, and one copy specifically directed to the State Bureau of Investigation (SBI).

SB 445 also amends G.S. 15A-150 to direct the clerk to send a certified copy of the expunction order to the person who obtained the expunction. Because of this requirement, the NCAOC takes the view that the clerk should provide this copy to the defendant without charge because it is part of the “regular disposition” of the matter under G.S. 7A-308(b).

### **Access by an Individual to His or Her Own Expunction Information**

**Effect of change:** Expands the ability of a person to obtain information from the NCAOC regarding his or her own expunction.

Under current law, a person may obtain confirmation from the NCAOC of his or her own prior expunction only if the person is seeking that confirmation for litigation purposes under G.S. 15A-152.

Specifically, G.S. 15A-152 authorizes a person (i) to file a civil action against a private provider of criminal history information if that provider has improperly disseminated information about an expunged case involving the person, and (ii) prior to filing that action, to obtain from the NCAOC a certification that the record at issue was expunged and that proper notice of the expunction was given in accordance with G.S. 15A-150.

This limitation on disclosure is reflected in G.S. 15A-151(a)(2), which currently authorizes the NCAOC to disclose expunction information to an individual only when the person is “requesting confirmation of the person's own discharge or expunction, as provided in G.S. 15A-152.”

SB 445 expands G.S. 15A-151(a)(2) by removing this limitation. As amended by SB 445, G.S. 15A-151(a)(2) will authorize the NCAOC to disclose otherwise confidential expunction information “[u]pon request of a person requesting confirmation of the person's own discharge or expunction.” SB 445 leaves intact, however, the expunction request procedure for litigation purposes under G.S. 15A-152.

Accordingly, while an individual still may request and receive confirmation from the NCAOC of his or her own expunction for litigation purposes under G.S. 15A-152, a person now also will be able to request an expunction confirmation from the NCAOC for any reason.

This change applies to expunctions for which the person filed the expunction petition on or after 1 December 2017. So, if a person files an expunction petition on or after 1 December 2017 and obtains an expunction, the person later may request confirmation of that expunction from the NCAOC for any reason. For an expunction petition filed prior to 1 December 2017, it will continue to be the case that a defendant may obtain confirmation of expunction only if the defendant is seeking that confirmation for litigation purposes under G.S. 15A-152.

**Access by Prosecutors to Expunction Information, and Use of Expunction Information for Prior Record Calculation Purposes (for Expunctions on or after 1 July 2018)**

**Effect of change:** Allows district attorneys to access information on expunged cases from the NCAOC's expunction records. Also allows the use of expunged convictions to calculate a defendant's prior record level for a subsequent offense. Applies to cases expunged on or after 1 July 2018.

SB 445 amends G.S. 15A-151(a), and enacts a new G.S. 15A-151.5(a), to require that the NCAOC make its otherwise confidential expunction records "electronically available to all prosecutors of this State if the criminal record was expunged on or after July 1, 2018."

This access applies to expunctions under the following statutes: G.S. 15A-145 (under 18 first offender misdemeanor expunction), G.S. 15A-145.1 (under 18 first offender gang offense expunction), G.S. 15A-145.2 (under 21 first offender drug offense expunction), G.S. 15A-145.3 (under 21 first offender toxic vapors offense expunction), G.S. 15A-145.4 (under 18 first offender nonviolent felony expunction), G.S. 15A-145.5 (nonviolent felony or nonviolent misdemeanor expunction), and G.S. 15A-145.6 (prostitution offense expunction). It also applies to an expunction under G.S. 15A-146 (dismissal and not guilty expunction), where the charge was dismissed, but not where the expunction was based on a finding of not guilty or not responsible.

For these same expunction statutes, except for G.S. 15A-146, SB 445 provides in a new G.S. 15A-151.5(b) that the expunction records may be used to calculate the defendant's prior record level if the person is convicted of a subsequent offense. This change applies to expunctions granted on or after 1 July 2018.

To facilitate the use of expunction information in this manner, SB 445 enacts the following new G.S. 15A-151.5(c): "For any expun[ction] granted on or after July 1, 2018, the information maintained by the Administrative Office of the Courts, and made available under subsection (a) of this section, shall be prima facie evidence of the expunged conviction for the purposes of calculating [the] prior record level of the named person and shall be admissible into evidence at a subsequent criminal sentencing hearing."

To account for this new use of prior expunction information, SB 445 makes conforming changes to the affected expunction statutes to memorialize that the information may be used at a sentencing hearing if the defendant is convicted of a subsequent criminal offense.

The bill also makes a conforming change to G.S. 15A-146 (dismissal and not guilty expunction), by relocating the not guilty / not responsible expunction to its own new subsection (a2). As a result, an expunction based on a dismissal will be addressed by subsections (a) and (a1) of the statute. An expunction based on a finding of not guilty or not responsible will be addressed by subsection (a2).

### **Effective Date**

**Effect of change:** Makes the changes explained above effective for expunction petitions filed on or after 1 December 2017, except that the changes regarding district attorney access and prior record level calculation apply to cases expunged on or after 1 July 2018.

The bill applies to expunction petitions filed on or after 1 December 2017.

Note, however, that the changes regarding prosecutor access and the calculation of a defendant's prior record level are limited to expunctions granted on or after 1 July 2018. The General Assembly has expressly codified this 1 July 2018 limitation in the new G.S. 15A-151.5.

### **Conclusion**

For a listing of the specific changes to each expunction statute, and the form(s) associated with each statute, see the appendix to this memorandum below.

The attorney position in the NCAOC Office of General Counsel responsible for expunction issues currently is vacant. Accordingly, for the time being, court officials with questions regarding these changes may contact the main General Counsel number at 919-890-1300 and press 0, or email Gabbi McKeithen at [gabrielle.c.mckeithen@nccourts.org](mailto:gabrielle.c.mckeithen@nccourts.org), and Gabbi will direct you to an appropriate person for assistance.

Court officials contacting the NCAOC Office of General Counsel by email about an expunction issue should take care not to include any identifying information about an expunged case in the email message in order to avoid revealing confidential expunction information.

Also please note that the NCAOC Office of General Counsel may advise only Judicial Branch officials and employees. The NCAOC may not advise private parties, private attorneys, law enforcement officers, or officials from other agencies external to the Judicial Branch.

**Appendix – Statute by Statute Review of Changes Enacted by S.L. 2017-195 (SB 445)**

Expunction Statute and Form(s)	Changes Enacted by S.L. 2017-195 (SB 445), Effective for Petitions Filed on or after 1 December 2017
<p><b>G.S. 15A-145 (under 18 first offender misdemeanor expunction)</b></p> <p>AOC-CR-264 AOC-CR-264 Instructions</p>	<ul style="list-style-type: none"> <li>▪ Requires the filing of the petition in the county of conviction.</li> <li>▪ Requires the filing of the petition with the clerk, who will forward it to the SBI and the NCAOC for the pre-hearing searches.</li> <li>▪ Makes a conforming change to account for the potential use of the expunged case information at a future sentencing hearing.</li> </ul>
<p><b>G.S. 15A-145.1 (under 18 first offender gang offense expunction)</b></p> <p>AOC-CR-269 AOC-CR-269 Instructions</p>	<ul style="list-style-type: none"> <li>▪ Requires the filing of the petition in the county of conviction.</li> <li>▪ Requires the filing of the petition with the clerk, who will forward it to the SBI and the NCAOC for the pre-hearing searches.</li> <li>▪ Makes a conforming change to account for the potential use of the expunged case information at a future sentencing hearing.</li> </ul>
<p><b>G.S. 15A-145.2 (under 21 first offender drug offense expunction)</b></p> <p>AOC-CR-266 AOC-CR-266 Instructions</p>	<ul style="list-style-type: none"> <li>▪ Requires the filing of the petition in the county of charge.</li> <li>▪ Replaces the term “application” with the term “petition” in subsection (a).</li> <li>▪ Requires the filing of the petition with the clerk, who will forward it to the SBI and the NCAOC for the pre-hearing searches.</li> <li>▪ Makes conforming changes to account for the potential use of the expunged case information at a future sentencing hearing.</li> <li>▪ Clarifies that the order applies to DPS (rather than DAC).</li> </ul>
<p><b>G.S. 15A-145.3 (under 21 first offender toxic vapors offense expunction)</b></p> <p>AOC-CR-268 AOC-CR-268 Instructions</p>	<ul style="list-style-type: none"> <li>▪ Requires the filing of the petition in the county of charge.</li> <li>▪ Replaces the term “application” with the term “petition” in subsection (a).</li> <li>▪ Requires the filing of the petition with the clerk, who will forward it to the SBI and the NCAOC for the pre-hearing searches.</li> <li>▪ Makes conforming changes to account for the potential use of the expunged case information at a future sentencing hearing.</li> </ul>

<p><b>G.S. 15A-145.4 (under 18 first offender nonviolent felony expunction)</b></p> <p>AOC-CR-279 AOC-CR-279 Instructions</p>	<ul style="list-style-type: none"> <li>Requires the filing of the petition in the county of conviction.</li> <li>Requires the filing of the petition with the clerk, who will forward it to the SBI and the NCAOC for the pre-hearing searches.</li> <li>Makes a conforming change to account for the potential use of the expunged case information at a future sentencing hearing.</li> </ul>
<p><b>G.S. 15A-145.5 (nonviolent felony or nonviolent misdemeanor expunction)</b></p> <p>AOC-CR-281 AOC-CR-281 Instructions</p>	<ul style="list-style-type: none"> <li>Requires the filing of the petition in the county of conviction.</li> <li>Requires the filing of the petition with the clerk, who will forward it to the SBI and the NCAOC for the pre-hearing searches.</li> <li>For non-violent felonies, reduces the waiting period from 15 years to 10 years.</li> <li>For non-violent misdemeanors, reduces the waiting period from 15 years to 5 years.</li> <li>Makes conforming changes to account for the potential use of the expunged case information at a future sentencing hearing.</li> </ul>
<p><b>G.S. 15A-145.6 (prostitution offense expunction)</b></p> <p>AOC-CR-282 AOC-CR-282 Instructions</p>	<ul style="list-style-type: none"> <li>Requires the filing of the petition in the county of conviction.</li> <li>Requires the filing of the petition with the clerk, who will forward it to the SBI and the NCAOC for the pre-hearing searches.</li> <li>Makes a conforming change to account for the potential use of the expunged case information at a future sentencing hearing.</li> </ul>
<p><b>G.S. 15A-146 (dismissal and not guilty expunction)</b></p> <p>AOC-CR-264 AOC-CR-264 Instructions</p>	<ul style="list-style-type: none"> <li>Replaces the terms “apply” and “application” with the term “petition” in subsections (a) and (a1).</li> <li>Separates dismissal expunctions from not guilty expunctions. Dismissal expunctions will remain in the existing subsections (a) and (a1). Not guilty expunctions will appear in a new subsection (a2).</li> <li>Removes the prior expunction bar.</li> <li>Removes the “same 12-month period / same term” requirement for multiple offenses.</li> <li>Requires the use of an NCAOC form.</li> <li>Requires the filing of the petition with the clerk.</li> <li>Requires the clerk to forward a granted petition to the NCAOC.</li> </ul>



<p><b>G.S. 15A-147 (identify theft and mistaken identity expunction)</b></p> <p>AOC-CR-263 AOC-CR-283</p>	<ul style="list-style-type: none"> <li>▪ Eliminates the references to “written motion” and “motion” in subsection (a). Leaves intact the references to “petition.”</li> <li>▪ Requires the use of an NCAOC form.</li> <li>▪ Requires the filing of the petition with the clerk.</li> <li>▪ Requires the clerk to forward a granted petition to the NCAOC.</li> </ul>
<p><b>G.S. 15A-148 (DNA expunction following dismissal on appeal or pardon)</b></p> <p><u>New</u> AOC-CR-284</p>	<ul style="list-style-type: none"> <li>▪ Requires the use of an NCAOC form.</li> <li>▪ Requires the filing of the petition with the clerk.</li> <li>▪ Requires the clerk to forward a granted petition to the NCAOC.</li> </ul>
<p><b>G.S. 15A-149 (pardon of innocence expunction)</b></p> <p>AOC-CR-265</p>	<ul style="list-style-type: none"> <li>▪ Eliminates the references to “written motion” in subsection (a). Leaves intact the references to “petition.”</li> <li>▪ Requires the clerk to forward a granted petition to the NCAOC.</li> </ul>
<p><b>G.S. 15A-150 (notification of expunction)</b></p>	<ul style="list-style-type: none"> <li>▪ Expressly requires the clerk to file with the NCAOC “petitions granted under this Article [i.e., Article 5 of Chapter 15A, which is the expunctions article], [and] any orders of expunction.”</li> <li>▪ Requires the clerk to send a certified copy of the order to the petitioner.</li> <li>▪ Replaces a reference to “expunge” with a reference to “purge.”</li> <li>▪ Requires the clerk to send separate copies to Combined Records and the SBI, as opposed to a single copy to DPS.</li> <li>▪ Requires the SBI specifically (rather than DPS generally) to forward the order to the FBI.</li> </ul>
<p><b>G.S. 15A-151 (access to confidential expunction information)</b></p> <p>AOC-CR-237 AOC-CR-280 AOC-G-260</p>	<ul style="list-style-type: none"> <li>▪ Requires the NCAOC “to maintain a confidential file <u>for expungements</u> containing the <u>petitions granted under this Article and the</u> names of those people for whom it received a notice under G.S. 15A-150.” (New language underlined.)</li> <li>▪ Makes formatting changes to the list of entities authorized to access confidential expunction information.</li> <li>▪ Requires the NCAOC to provide the information contained in its confidential expunction “file” to any person requesting confirmation of his or her own expunction</li> </ul>

	<p>(i.e., SB 445 removes the G.S. 15A-152 limitation).</p> <ul style="list-style-type: none"> <li>Requires the NCAOC to provide the information contained in its confidential expunction “file” to DAs’ Offices in accordance with the new G.S. 15A-151.5.</li> </ul>
<p><b>G.S. 15A-151.5 (prosecution access to expunction information; use of expunction information for prior record purposes)</b></p>	<ul style="list-style-type: none"> <li>Requires the NCAOC to make available electronically to the DAs’ Offices “all confidential files maintained under G.S. 15A-151” for the following expunctions: G.S. 15A-145; G.S. 15A-145.1; G.S. 15A-145.2; G.S. 15A-145.3; G.S. 15A-145.4; G.S. 15A-145.5; G.S. 15A-145.6; and G.S. 15A-146(a) &amp; (a1) (i.e., the G.S. 15A-146 dismissal expunctions, but <u>not</u> the G.S. 15A-146 not guilty expunctions). This applies to records expunged on or after 1 July 2018.</li> <li>Provides that, for an expunction under one of the statutes listed in the bulleted item immediately above (<u>except</u> for G.S. 15A-146) granted on or after 1 July 2018, the court may use the expunged conviction to calculate the defendant’s prior record level.</li> <li>Provides that for an expunction granted on or after 1 July 2018, “the information maintained by the Administrative Office of the Courts, and made available [electronically to the prosecution] under subsection (a) of this section, shall be prima facie evidence of the expunged conviction for the purposes of calculating prior record level of the named person and shall be admissible into evidence at a subsequent criminal sentencing hearing.”</li> </ul>
<p><b>G.S. 15A-152 (civil action for improper dissemination of expunction information by private entity)</b></p> <p>AOC-G-260</p>	<ul style="list-style-type: none"> <li>No changes.</li> </ul>
<p><b>G.S. 15A-153 (effect of expunction; employers, educational institutions, and government agencies)</b></p>	<ul style="list-style-type: none"> <li>No changes.</li> </ul>
<p><b>G.S. 15A-160 (annual legislative report on expunctions)</b></p>	<ul style="list-style-type: none"> <li>No changes.</li> </ul>