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# Minnesota's Inherent Authority Criminal Expungement Law: Two Years After State v. S.L.H.

## **Keywords**

Criminal records--Expungement--Minnesota

# MINNESOTA'S INHERENT AUTHORITY CRIMINAL EXPUNGEMENT LAW: TWO YEARS AFTER STATE V. S.L.H.

## 5 Wm. Mitchell J.L. & Prac. 2

By: **Lindsay W. Davis\***

The Minnesota Supreme Court last considered the issue of the inherent authority expungement, in particular, a district court's ability to seal records held outside the judicial branch, over two years ago in *State v. S.L.H.*<sup>1</sup> Since then, individuals continue to seek relief from the effects of their criminal records, and the number of expungement petitions has remained steady.<sup>2</sup> The Minnesota Court of Appeals has analyzed inherent authority criminal expungements in several cases since *S.L.H.*, producing two published decisions.<sup>3</sup> This article will explain how the appellate courts have applied and refined *S.L.H.*, and which circumstances may still warrant relief to seal executive-branch records under the court's inherent authority.

### I. BACKGROUND INFORMATION

An inherent authority expungement motion asks a district court judge to seal judicial and executive-branch records of a criminal case when the record does not meet one of three statutory criteria: MINN. STAT. §

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<sup>1</sup> 755 N.W.2d 271 (Minn. 2008).

<sup>2</sup> According to Wendy Gray, Criminal History Supervisor at the Minnesota Bureau of Criminal Apprehension (BCA), in 2009, the BCA received 3,126 criminal expungement petitions. In 2010, the BCA received 2,837 criminal expungement petitions. Of those, 2,512 resulted in some sort of court order, however some orders included multiple petitions. In 2010, 697 orders denied relief entirely; 1,043 ordered the BCA to seal their records based on statutory authority pursuant to MINN. STAT. Ch. 609A; 223 ordered the BCA to seal its records based on the court's inherent authority; 36 orders were based on the court's inherent authority, but did not order the BCA to seal their records. The BCA did not track the distinction between the different legal bases for expungement orders until 2010.

<sup>3</sup> See *State v. M.L.A.*, 785 N.W.2d 763 (Minn. Ct. App. 2010); *State v. N.G.K.*, 770 N.W.2d 177 (Minn. Ct. App. 2009).

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299C.11 (2010);<sup>4</sup> MINN. STAT. § 609A.02 (2010);<sup>5</sup> and MINN. STAT. § 260B.198, subdiv. 6 (2010).<sup>6</sup> The key question in any inherent authority expungement case is whether a district court has the ability to seal records held outside of the judicial branch. An expungement that seals only court records is normally not a complete remedy because the record remains available for public view and agency use through executive-branch agencies that continue to retain and disseminate the record.

### A. REVIEW OF STATE V. S.L.H.

*S.L.H.* is the Minnesota Supreme Court's most recent inherent authority case. The petitioner sought to expunge a 1992 drug possession conviction so that she could be better able to support her family, be a productive member of society, and achieve employment goals of becoming a Head Start teacher or a medical assistant.<sup>7</sup>

The Minnesota Supreme Court articulated a test that district courts could apply to inherent authority expungement cases to determine whether they could seal records held outside the judicial branch, assuming no constitutional violation was present in the case.<sup>8</sup> First, the court should identify a core judicial function at issue in the case or another "appropriate circumstance" that would warrant judicial intrusion into the executive branch.<sup>9</sup> In *S.L.H.*, only one core judicial function was mentioned, "reducing or eliminating unfairness to individuals."<sup>10</sup> Second, if an appropriate circumstance presents itself, the court should apply a balancing test: whether an expungement would yield a benefit to the petitioner equal to the disadvantages to the public and the court.<sup>11</sup> The court emphasized that judges should proceed cautiously when exercising inherent authority, affording deference to other branches of government when legislative authority mandates the use of those records.<sup>12</sup>

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<sup>4</sup> The statute requires that an individual send demand letters to law enforcement agencies instructing them to seal an arrest record for which probable cause was never established or the prosecution declined to file charges. The individual must not have been convicted of a felony or gross misdemeanor offense within ten years prior to the arrest in question.

<sup>5</sup> Relief under this statute is available for three types of criminal dispositions: 1) first-time drug offenses where the individual received and maintained a stay of adjudication under MINN. STAT. § 152.18; 2) conviction records when an individual was a juvenile when the offense was committed, but was certified adult for the offense; and 3) cases that were "resolved in favor" of the petitioner. This phrase is a term of art and the subject of a considerable amount of case law, but generally means that the individual never pled guilty to or admitted guilt in the case (e.g., continuance for dismissal, certain diversion programs, etc.).

<sup>6</sup> This statute allows a district court judge to expunge a juvenile adjudication of delinquency at any time he or she deems it advisable.

<sup>7</sup> *S.L.H.*, 755 N.W.2d at 273.

<sup>8</sup> *Id.* at 276–77.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 277.

<sup>11</sup> *Id.* at 276.

<sup>12</sup> *Id.* at 279.

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The court did not believe that the petitioner in *S.L.H.* presented “appropriate circumstances” for invoking the court’s inherent authority to seal non-judicial records.<sup>13</sup> The court held that helping individuals achieve their employment goals was not an essential court function that would warrant judicial intrusion into the executive branch.<sup>14</sup> Sealing executive-branch records would violate the Data Practices Act<sup>15</sup> and force other government agencies to seal a record that the legislature intended to be used for statutorily required background checks, most notably, the Department of Human Services (DHS).<sup>16</sup>

The *S.L.H.* court did not completely remove a district court judge’s ability to seal executive-branch criminal records.<sup>17</sup> In fact, Justice Anderson, joined by Justices Page and Meyer, wrote a broader concurrence emphasizing that courts may still use their inherent authority to seal non-judicial records under “appropriate circumstances.”<sup>18</sup> The opinion did not articulate which circumstances would warrant judicial intrusion into the executive-branch, except to explain in dicta that the petitioner in *State v. C.A.* would potentially meet the test because his conviction was set aside on appeal.<sup>19</sup> Removing the stigma of a criminal conviction in such a case would be an essential court function because the petitioner’s conviction is ultimately overturned.<sup>20</sup> The court did not provide any other examples of “appropriate circumstances” for judicial intrusion into the executive branch, thereby leaving the lower courts to decide which other circumstances would warrant similar relief.<sup>21</sup>

## II. RECENT CASE LAW DEVELOPMENTS

In the last two years, the Minnesota Court of Appeals has decided several cases that explore a court’s inherent authority to seal criminal records under the analysis of *State v. S.L.H.* Two of these cases are published decisions, *State v. N.G.K.*<sup>22</sup> and *State v. M.L.A.*<sup>23</sup> These cases offer some insight into when a district court may seal executive-branch records.

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<sup>13</sup> *Id.* at 277.

<sup>14</sup> *Id.* at 277–78.

<sup>15</sup> *Id.* at 278–79.

<sup>16</sup> *Id.* at 278–80. *See* MINN. STAT. §§ 245C.01–.34 (2010).

<sup>17</sup> *See* 755 N.W.2d at 274 (noting that the judiciary possesses inherent judicial authority to determine whether expungement is required to prevent infringement of constitutional rights).

<sup>18</sup> *See id.* at 280–82 (Anderson, J. concurring).

<sup>19</sup> *Id.* (citing *State v. C.A.*, 304 N.W.2d 353, 361 (Minn. 1981)).

<sup>20</sup> *S.L.H.*, 755 N.W.2d at 277–78.

<sup>21</sup> *Id.* at 276.

<sup>22</sup> 770 N.W.2d 177 (Minn. Ct. App. 2009).

<sup>23</sup> 785 N.W.2d 763 (Minn. Ct. App. 2010).

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**A. STATE V. N.G.K.**

*State v. N.G.K.* was the first published decision since *State v. S.L.H.* The pro se petitioner sought to expunge a 1997 gross-misdemeanor theft conviction.<sup>24</sup> His criminal record excluded him from advanced employment opportunities, and he was concerned that his record would prevent him from qualifying for financing to purchase a home.<sup>25</sup> The Hennepin County District Court sealed the judicial and executive-branch records pursuant to analysis in *State v. V.A.J.*<sup>26</sup> The City of Crystal appealed, challenging the court's decision to seal judicial and executive-branch records.<sup>27</sup>

The court of appeals affirmed the district court's decision to seal judicial records,<sup>28</sup> but reversed the decision to expunge executive-branch records.<sup>29</sup> The court determined that the district court erroneously relied upon *State v. V.A.J.* for authority to seal executive-branch records.<sup>30</sup>

In *V.A.J.*, the Minnesota Court of Appeals held that district courts maintain custodianship over criminal records created through the judicial process, and therefore a court has the power to order executive-branch agencies to seal all judicially-created records under its inherent authority.<sup>31</sup> *V.A.J.* was decided before the Minnesota Supreme Court decided *S.L.H.*, but the *S.L.H.* court did not overrule or mention *V.A.J.*<sup>32</sup> The court found that the *V.A.J.* holding is inconsistent with that of *S.L.H.*, which treats all criminal records possessed by the executive branch as the same, regardless of where they originated.<sup>33</sup> Therefore, "[t]he holding of *V.A.J.* does not survive *S.L.H.*"<sup>34</sup>

The court further noted that, like *S.L.H.*, the petitioner's conviction was fairly recent because it was still public data under the Data Practices Act.<sup>35</sup> Additionally, the Minnesota Supreme Court has never actually

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<sup>24</sup> *N.G.K.*, 770 N.W.2d. at 179.

<sup>25</sup> *Id.* at 179–80.

<sup>26</sup> *Id.* at 182 (citing *State v. V.A.J.* 744 N.W.2d 674 (Minn. Ct. App. 2008)).

<sup>27</sup> *Id.* at 179.

<sup>28</sup> *Id.* at 184.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 182.

<sup>31</sup> *V.A.J.*, 744 N.W.2d at 675, 678.

<sup>32</sup> *N.G.K.*, 770 N.W.2d at 182 n.1.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 182.

<sup>35</sup> *Id.* at 183. See MINN. STAT. § 13.87, subdiv. 1(b) (2007) (stating records are public for fifteen years after a person is discharged from probation or other supervision).

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approved a district court order expunging executive-branch records.<sup>36</sup> Therefore, sealing executive-branch records was not an appropriate circumstance that would implicate a core judicial function.<sup>37</sup>

### B. *STATE V. M.L.A.*

In *State v. M.L.A.*,<sup>38</sup> the petitioner sought expungement of a 2001 misdemeanor conviction for fifth-degree possession of methamphetamine.<sup>39</sup> The petitioner earned her licensed practical nurse diploma and was concerned that her criminal record would prevent her from obtaining board certification and working as a nurse and in her field.<sup>40</sup> She had previously held two set asides from the Minnesota Department of Human Services, which allowed her to work in a health care facility despite her record.<sup>41</sup>

The district court expunged the petitioner's misdemeanor record held by the Minnesota Department of Human Services, an executive-branch agency, under its inherent authority.<sup>42</sup> The district court relied on *State v. V.A.J.*<sup>43</sup> to order expungement of the executive-branch records.<sup>44</sup>

The court of appeals reversed the district court in *M.L.A.*<sup>45</sup> The court reasoned that *V.A.J.* is no longer valid law after *State v. S.L.H.* and *State v. N.G.K.*<sup>46</sup> The court then analyzed the case under *S.L.H.*<sup>47</sup> Under *S.L.H.*, a court must first identify the core judicial function at issue, giving due consideration to executive and legislative functions.<sup>48</sup> The *M.L.A.* court did not find that the petitioner's case implicated a core judicial function because the petitioner sought expungement to further her career goal of becoming a licensed nurse, much like the petitioner in *S.L.H.*<sup>49</sup> The court also noted that *M.L.A.*'s request would override DHS's

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<sup>36</sup> See *N.G.K.*, 770 N.W.2d at 183. See also *S.L.H.*, 755 N.W.2d at 277 (noting that the supreme court did say that *State v. C.A.* would probably pass the test).

<sup>37</sup> See *N.G.K.*, 770 N.W.2d at 183–84.

<sup>38</sup> 785 N.W.2d 763 (Minn. Ct. App. 2010).

<sup>39</sup> *Id.* at 764.

<sup>40</sup> *Id.* at 765.

<sup>41</sup> *Id.* at 770. A set aside allows an individual to work with vulnerable patients despite having a disqualifying crime on their record. See MINN. STAT. § 245C.22 (2010).

<sup>42</sup> *M.L.A.*, 785 N.W.2d at 765.

<sup>43</sup> 744 N.W.2d 674 (Minn. Ct. App. 2008).

<sup>44</sup> See *M.L.A.*, 785 N.W.2d at 766–67.

<sup>45</sup> *Id.* at 769.

<sup>46</sup> *Id.* at 767.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 767–68.

<sup>49</sup> See *id.* at 768.

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legislative mandate to conduct background studies for direct care jobs.<sup>50</sup> Judge Stauber's concurrence further explained that the petitioner had not identified an actual hardship or injury as a result of her criminal record.<sup>51</sup>

The *M.L.A.* decision is not surprising because the facts so closely mirror those of *S.L.H.* Both sought expungement of a drug possession conviction in order to advance their careers in the health care field. Additionally, both cases requested the court to interfere with statutorily required background checks and violate the Data Practices Act.

Like *S.L.H.*, the *M.L.A.* decision also includes a hopeful concurrence. Judge Stauber echoes the concurrence in *S.L.H.*, noting that "I do not interpret recent expungement cases of this court and the Supreme Court . . . as narrowly as some."<sup>52</sup> However, Judge Stauber's concurrence, like Justice Anderson's concurrence in *S.L.H.*, does not offer guidance about what type of case would rise to the level of an "appropriate circumstance" for sealing executive-branch records.<sup>53</sup>

### III. INHERENT AUTHORITY TRENDS

Despite the continued silence about what constitutes an "appropriate circumstance" to seal executive-branch records, we can glean some noteworthy trends from the recent inherent authority decisions to guide our expungement practice.

#### A. LEGAL ANALYSIS

The courts have been using a fairly consistent analysis for inherent authority cases since *S.L.H.* They first look at whether the district court abused its discretion by sealing *judicial* records.<sup>54</sup> The test for sealing judicial records involves a five-factor analysis: (a) the extent that a petitioner has demonstrated difficulties securing employment or housing as a result of the record; (b) the seriousness and nature of the offense; (c) the risk that the petitioner poses to the public and how expungement would affect the public's right to access the records; (d) additional offenses or evidence of rehabilitation since the offense; and (e) other objective evidence of hardship under the circumstances.<sup>55</sup>

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<sup>50</sup> *See id.*

<sup>51</sup> *See id.* at 770–71 (Stauber, J., concurring).

<sup>52</sup> *See id.* at 771.

<sup>53</sup> *See id.*

<sup>54</sup> *See, e.g.,* State v. M.E.M., No. A09-850, 2010 WL 772441, at \*1–2 (Minn. Ct. App. Mar. 9, 2010) (holding that the district court exceeded its inherent authority in ordering expungement of executive-branch records); State v. N.G.K., 770 N.W.2d 177, 179–81, 183 (holding the district court erred as a matter of law by interpreting the court's inherent authority to expunge records possessed by the executive branch).

<sup>55</sup> State v. H.A., 716 N.W.2d 360, 364 (Minn. Ct. App. 2006) (articulating the factors as a set for the first time).

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In most recent inherent authority cases, sealing judicial records is not the issue on appeal.<sup>56</sup> When the decision to expunge judicial records is an issue on appeal, the court of appeals has given great deference to district courts because the order originates from and is directed towards the judiciary.<sup>57</sup> For example, in *N.G.K.*, the state challenged the district court's decision to seal judicial records based on the fact that the petitioner did not cite any concrete examples of harm resulting from his record.<sup>58</sup> He alleged difficulty advancing in his career and feared that he would not be able to purchase a home due to his record.<sup>59</sup> The court found that although the petitioner's evidence of hardship was "somewhat vague," the district court did not err in finding such hardship and sealing the judicial records.<sup>60</sup>

After examining the decision to seal judicial records, the courts then examine the decision to seal executive-branch records. This is a much more difficult test than the test used for judicial records because the judicial order is directed at a different branch of government. The most critical legal development in this area is that *State v. S.L.H.* now trumps the analysis in *State v. V.A.J.* Both *N.G.K.* and *M.L.A.* emphasize this point. In fact, nearly all of the cases reviewing the use of inherent authority to seal or not seal executive records applied the analysis in *S.L.H.*<sup>61</sup> Therefore, practitioners should avoid using *State v. V.A.J.* as authority to seal executive-branch records and instead frame their legal argument in terms of *State v. S.L.H.*

Using *S.L.H.* as a guide, the appellate court first looks at whether the case presents a violation of constitutional rights. If so, the court may have authority to seal executive-branch records to prevent such an infringement.<sup>62</sup> If not, as is almost always the case, sealing executive-branch records must be linked to a "core judicial function," or "necessary to the performance of a judicial function as contemplated by our state constitution."<sup>63</sup>

The analysis is cushioned in terms of proceeding cautiously and respecting the important legislative and

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<sup>56</sup> See *State v. A.J.H.*, No. A09-274, 2009 WL 3735988, at \*1 (Minn. Ct. App. Nov. 10, 2009) (expungment of executive-branch records); *State v. S.D.G.*, Nos. A08-1390, A08-1391, 2009 WL 1684456, at \*1 (Minn. Ct. App. June 16, 2009) (expungment of executive-branch records); *State v. L.W.H., Jr.*, No. A08-0981, 2009 WL 1374543, at \*1 n.1 (Minn. Ct. App. May 19, 2009) (no appeal by the state of the district court's order expunging records held by the judicial branch).

<sup>57</sup> See *M.E.M.*, 2010 WL 772441, at \*1-2; *State v. K.J.B.*, No. A08-0866, 2009 WL 672392, at \*3 (Minn. Ct. App. Mar. 17, 2009).

<sup>58</sup> *N.G.K.*, 770 N.W.2d at 179-81.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 180-81.

<sup>61</sup> See *M.L.A.*, 785 N.W.2d 763, 767 (Minn. Ct. App. 2010); *Comm'r of Minn. Dept. of Serv. v. M.D.K.*, No. A09-1789, 2010 WL 3000171, at \*1 (Minn. Ct. App. Aug. 3, 2010); *State v. A.S.J.*, No. A09-1511, 2010 WL 773617, at \*1-2 (Minn. Ct. App. Mar. 9, 2010); *M.E.M.*, 2010 WL 772441, at \*3-4; *N.G.K.*, 770 N.W.2d at 182; *A.J.H.*, 2009 WL 3735988, at \*1-2; *State, City of Crystal v. S.D.G.*, Nos. A08-1390, A08-1391, 2009 WL 1684456, at \*1-2 (Minn. Ct. App. June 16, 2009); *L.W.H., Jr.*, 2009 WL 1374543, at \*2-3; *K.J.B.*, 2009 WL 672392, at \*2.

<sup>62</sup> See *State v. C.A.*, 304 N.W.2d 353, 358 (Minn. 1981); *M.L.A.*, 785 N.W.2d at 765 (Minn. Ct. App. 2010) (citing *S.L.H.*, 755 N.W.2d at 274 (Minn. 2008)) (to date, there is no precedent for a constitutional argument ever convincing an appellate court to seal executive records).

<sup>63</sup> See *N.G.K.*, 770 N.W.2d at 183-84.

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executive-branch functions that may require the use of criminal records.<sup>64</sup> Three important factors have emerged in this respect. First, whether the case sought to be expunged is still public under the Data Practices Act.<sup>65</sup> If so, sealing the Bureau of Criminal Apprehension (BCA) record would prevent law enforcement agencies from performing their legislatively designated duty of disseminating that data to the public and other government agencies. Second, whether directing the order at DHS would prevent them from performing a statutorily required background check on the petitioner if they work in a job involving direct contact with a vulnerable person.<sup>66</sup> Third, is whether the petitioner is requesting expungement for employment purposes. The court of appeals has consistently emphasized the idea from *S.L.H.* that sealing executive records for “employment goals” does not constitute a core judicial function.<sup>67</sup>

### **B. CAN A DISTRICT COURT EVER SEAL EXECUTIVE RECORDS OF A CONVICTION?**

#### **1. HOPE FROM CONCURRENCES AND REMANDS**

The appellate landscape for inherent authority expungements appears bleak for the average petitioner. Most of the court of appeals cases that have examined inherent authority expungements since *S.L.H.* have found that sealing executive records would not further a core judicial function, *i.e.*, the district court should not have sealed the executive-branch record.<sup>68</sup> The two cases most favorable to petitioners were remanded to the district court for consideration under *S.L.H.* without a decision on the merits of the case.<sup>69</sup> To date, there is not a post-*S.L.H.* decision granting full relief to a petitioner. However, all hope is not lost.

As stated in *S.L.H.* and *N.G.K.*, there is no “bright-line rule” prohibiting expungement of non-judicial records.<sup>70</sup> Additionally, two of the more compelling but unpublished cases to reach the court of appeals were remanded instead of reversed outright. In both cases, the court expressed frustration about not being able to provide a meaningful remedy for petitioners. In *State v. A.J.H.*, the court remanded for consideration in accordance with *S.L.H.*, but noted that *S.L.H.* did not completely eliminate the possibility of expunging executive records, and that *S.L.H.* did not distinguish between destroying and sealing criminal records.<sup>71</sup> The court also stated that the district court should consider the effect of an expungement order on the

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<sup>64</sup> See *id.*

<sup>65</sup> See *M.L.A.*, 785 N.W.2d at 766; *M.D.K.*, 2010 WL 3000171, at \*2; *M.E.M.*, 2010 WL 772441, at \*3; *N.G.K.*, 770 N.W.2d at 183; *K.J.B.*, 2009 WL 672392, at \*3.

<sup>66</sup> See *M.L.A.*, 785 N.W.2d at 768; *M.D.K.*, 2010 WL 3000171, at \*2; *M.E.M.*, 2010 WL 772441, at \*3.

<sup>67</sup> See *M.L.A.*, 785 N.W.2d at 768; *M.D.K.*, 2010 WL 3000171, at \*1; *A.S.J.*, 2010 WL 773617, at \*3; *M.E.M.*, 2010 WL 772441, at \*3; *S.D.G.*, 2009 WL 1684456, at \*2; *K.J.B.*, 2009 WL 672392, at \*3.

<sup>68</sup> See *M.L.A.*, 785 N.W.2d at 769; *M.D.K.*, 2010 WL 3000171, at \*2; *A.S.J.*, 2010 WL 773617, at \*3; *M.E.M.*, 2010 WL 772441, at \*3–4; *N.G.K.*, 770 N.W.2d at 183–84; *S.D.G.*, 2009 WL 1684456, at \*2–3; *K.J.B.*, 2009 WL 672392, at \*3.

<sup>69</sup> See *A.J.H.*, 2009 WL 3735988, at \*3; *L.W.H., Jr.*, 2009 WL 1374543, at \*3.

<sup>70</sup> See *N.G.K.*, 770 N.W.2d at 182 (citing *State v. S.L.H.*, 755 N.W.2d 271, 274–75 (Minn. 2008)).

<sup>71</sup> See *A.J.H.*, 2009 WL 3735988 at \*2.

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executive branch in comparison to the potential benefit to the petitioner.<sup>72</sup>

In *State v. L.W.H.*, the court of appeals remanded for consideration under *S.L.H.*, but articulated in dicta: The supreme court has not yet squarely addressed the issue of the lack of fundamental fairness of permitting expungement of judicial records, while allowing court-generated BCA records to be maintained, resulting in an empty remedy. Nor has the court specifically addressed whether a court's core judicial function is impaired when its orders are rendered meaningless by permitting expungement of its judicially maintained records while not permitting expungement of records generated by the judiciary.<sup>73</sup>

Similar frustration was echoed in Judge Stauber's concurrence in *State v. M.E.M.*<sup>74</sup> and Judge Shumaker's concurrence in *State v. A.S.J.*<sup>75</sup>

While a legislative solution would be ideal to address the lack of a complete judicial remedy, practitioners should incorporate such remedy arguments into their pleadings, considering that there are so many references to the importance of providing a meaningful remedy in the recent appellate decisions.

These remands and concurrences also show that the judicial branch as a whole has not completely dismissed the idea of sealing executive-branch records under its inherent authority. Indeed, in 2010, the BCA received 223 orders to seal its records based on the court's inherent authority.<sup>76</sup>

## 2. IDEAS FOR APPROPRIATE CIRCUMSTANCES AND CORE JUDICIAL FUNCTIONS

### a. DISMISSED CASES

We still do not know any examples of an appropriate circumstance to seal executive records based on published appellate decisions, apart from the *C.A.* case, which had been set aside on appeal.<sup>77</sup> However, the court of appeals has not yet had an opportunity to review several situations that may still qualify for relief under the analysis set forth in *S.L.H.* District courts continue to seal executive-branch records in certain rare situations, but many of these situations have not been reviewed by the court of appeals.

Using the logic in *C.A.*, district courts have sometimes viewed as a core judicial function sealing executive records in situations that parallel a case being set aside or ultimately dismissed. Examples include: vacate and dismiss dispositions; a stay of imposition on a misdemeanor; exonerated individuals; stays of

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<sup>72</sup> *See id.* at \*3.

<sup>73</sup> *L.W.H., Jr.*, 2009 WL 1374543 at \*2.

<sup>74</sup> *See State v. M.E.M.*, No. A09-850, 2010 WL 772441, at \*4 (Minn. Ct. App. Mar. 9, 2010) (Stauber, J., concurring).

<sup>75</sup> *See State v. A.S.J.*, No. A09-1511, 2010 WL 773617, at \*4 (Minn. Ct. App. Aug. 3, 2010) (Shumaker, J., concurring).

<sup>76</sup> Gray, *supra* note 2.

<sup>77</sup> *See State v. S.L.H.*, 755 N.W.2d 271, 276 (Minn. 2008). *See also* Comm'r of Minn. Dept. of Serv. v. M.D.K., No. A09-1789, 2010 WL 3000171, at \*3-4 (Minn. Ct. App. Aug. 3, 2010) (this case is the closest the appellate courts have come to generating any sort of list of core judicial functions).

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adjudication other than MINN. STAT. 152.18; and any other situation where the case was ultimately dismissed.

In these cases, similar to when a case is set aside on appeal, an individual leaves the court honestly believing that they will not suffer from the consequences of a criminal conviction. When the record appears later in employment, housing, and credit checks, it can affect the individual as though they had been convicted of the crime. In such cases, a court performs a core judicial function by sealing judicial and executive-branch records to ensure that the individual retains the benefit of the plea agreement that they originally accepted in court. Additionally, in these circumstances, the cases are not classified as public data under parts of the Data Practices Act because dismissed records do not involve actual convictions.<sup>78</sup>

However, practitioners should make this argument very carefully because of a recent unpublished appellate decision. In *State v. L.K.A.*, the Minnesota Court of Appeals reversed a district court decision granting expungement of executive-branch records for an individual who had received and completed a stay of adjudication on a 2002 felony theft of motor vehicle charge.<sup>79</sup> The individual argued that her case presented appropriate circumstances for relief because she did not stand convicted of the crime, and therefore the court should expunge the record in order to effectuate the stay of adjudication.<sup>80</sup> The court held that this view was too sweeping based on the cautious approach taken by the Minnesota Supreme Court.<sup>81</sup> The court further noted that while part of the Data Practices Act classifies dismissed cases as non-public,<sup>82</sup> another relevant part of the Data Practices Act classifies the same data as public, at least within the originating agency.<sup>83</sup> The court of appeals did not reconcile the two seemingly conflicting portions of the Data Practices Act, although the argument can be made that they appear to apply to different types of law enforcement agencies.<sup>84</sup> When making a dismissal under inherent authority argument, practitioners should keep in mind that the *L.K.A.* case is unpublished and the issue of expunging dismissed cases under a court's inherent authority needs further development.

### **b. OTHER UNIQUE SITUATIONS**

District courts have sealed other types of unique criminal cases under the analysis of *S.L.H.* beyond cases that were ultimately dismissed. Some judges believe that petty misdemeanor cases present appropriate

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<sup>78</sup> MINN. STAT. § 13.87, subdiv. 1(b) (2010) (stating that criminal *conviction* data remains public for fifteen years).

<sup>79</sup> No. A10-1521, 2011 WL 1364435, at \*1 (Minn. Ct. App. Apr. 12, 2011).

<sup>80</sup> *Id.* at \*3.

<sup>81</sup> *Id.* at \*2.

<sup>82</sup> *Id.* at \*3. See also MINN. STAT. § 13.87, subdiv. 1(b) (2010).

<sup>83</sup> *L.K.A.*, 2011 WL 1364435, at \*3. See also MINN. STAT. § 13.82, subdiv. 2 (2010).

<sup>84</sup> See MINN. STAT. § 13.87 (2010) (classifying such data as private, and applies to the BCA, which is the main source of background check data from executive-branch agencies. *But see* MINN. STAT. § 13.82 (2010) (applies to the BCA, in addition to other law enforcement agencies, but the public information is limited to data “created or collected” by law enforcement documenting actions taken by that agency, in the originating agency. Arguably, in most expungement cases, the BCA does not create original criminal data, but rather disseminates records that other originating agencies, such as police or sheriff’s offices, have created or collected.).

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circumstances for relief because while a person may have pled guilty to them, petty misdemeanors are not criminal cases<sup>85</sup> and they are not public under at least part of the Data Practices Act.<sup>86</sup> In these cases, an individual pled to a minor, non-criminal offense, not knowing that the record would be available through the Minnesota Court Information System (MNCIS) and other background checks. When a petty misdemeanor record causes the same problems as a criminal conviction, the court prevents unfairness to the individual by expunging both judicial and executive-branch records. However, as a practical note, it is wise to review individual's private criminal history from the BCA to determine whether it is necessary to include the BCA in the expungement request, as the BCA does not receive and report all minor petty misdemeanor cases.

Certain juvenile cases can also present an appropriate circumstance to seal executive-branch records. The only statutory remedies for juvenile expungement are limited to cases where a juvenile was adjudicated delinquent for a crime,<sup>87</sup> certified adult,<sup>88</sup> or the case was resolved in the child's favor without a guilty plea or admission.<sup>89</sup> However, if a child was placed on Extended Juvenile Jurisdiction (EJJ) or the case was dismissed after a guilty plea or admission, there is no statutory expungement remedy. When these juvenile records cause significant problems for the child, the equities can tip in favor of expungement of judicial and executive-branch records, considering the rehabilitative nature of the juvenile justice system, the age of the child at the time of offense, and the fact that juvenile records are supposed to be treated as private through many executive-branch agencies.<sup>90</sup>

Finally, some district courts have sealed adult criminal conviction cases where the case was closed more than fifteen years ago. Some judges feel that they have an obligation to provide an adequate remedy when an individual has been off paper for more than fifteen years, has taken steps to improve her life, and still suffers the consequences of a mistake that she made when she was much younger. These records are also classified as private under at least part of the Data Practices Act,<sup>91</sup> they no longer affect the individual's criminal history score under the Minnesota Sentencing Guidelines,<sup>92</sup> and they are often too old to disqualify a person from direct contact employment through the Department of Human Services.<sup>93</sup>

### c. DEPARTMENT OF HUMAN SERVICES RECORDS

The courts frown upon using inherent authority to seal conviction records held by DHS. However, the

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<sup>85</sup> MINN. STAT. § 609.02, subd. 4(a) (2010) (stating that petty misdemeanor offenses are not criminal offenses).

<sup>86</sup> See MINN. STAT. § 13.87, subd. 1(b) (2010).

<sup>87</sup> See MINN. STAT. § 260B.198, subd. 6 (2010).

<sup>88</sup> See MINN. STAT. § 609A.02, subd. 2 (2010).

<sup>89</sup> See *id.* at subd. 3.

<sup>90</sup> See MINN. STAT. § 13.87, subd. 3(e) (2010).

<sup>91</sup> See *id.* at subd. 1(b), 3(e).

<sup>92</sup> MINN. SENTENCING GUIDELINES § II.B.III (2010).

<sup>93</sup> See MINN. STAT. § 245C.15 (2010).

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argument can be made that DHS records may be sealed under implicit statutory authority, or in the alternative, that the legislature contemplated district courts sealing DHS conviction records, thereby alleviating some of the concerns associated with the judiciary intruding into the executive branch. Section 245C.08 subdivision 1(b) and section 609A.03 subdivision 7(3) of the 2010 Minnesota Statutes state that the Department of Human Services may use an expunged criminal record *unless* the order is served upon and directed towards the agency. If the legislature included these provisions in two separate statutes, one of which specifically mentions conviction records, then surely it contemplated district courts sealing DHS conviction records. The appellate courts have never considered this argument. In *M.L.A.*, the court declined to decide whether the court had statutory authority to seal DHS records under section 245C.08 subdivision 1(b) because the issue was not raised in district court.<sup>94</sup>

### d. BEYOND EMPLOYMENT GOALS

The courts have made it clear that they will not seal executive-branch records if the reason for doing so involves “employment goals” or other personal goals (e.g., obtaining a professional license, securing a loan, becoming a notary).<sup>95</sup> However, practitioners should explain in detail the reasons for the expungement request. Is the client merely trying to advance in his or her career, or has he or she been absolutely unable to find any job whatsoever? Are they relying on public assistance to survive? Have they been unable to find any housing because of their record? Similarly, practitioners should explain any mitigating circumstances surrounding the disposition of the case. For example, was the petitioner suffering from untreated mental illness at the time of the offense? Were they involved in an abusive situation? Such arguments seem more compelling than seeking expungement to obtain a white-collar job promotion or home loan.

Finally, if expungement of executive-branch records is not possible, a practitioner may want to consider whether sealing judicial records alone would provide an adequate remedy for his or her client. In a situation where the Bureau of Criminal Apprehension does not have the record, such as minor tab charges, and the individual does not need to seek relief from DHS disqualifications, then the record may only be publicly available through the courts. In this case, an expungement of court records may provide all the relief needed. Alternatively, if the individual has received a judicial record expungement, he or she may send a demand letter to the BCA to update the record in accordance with the Data Practice Act, which requires that criminal records be accurate.<sup>96</sup> The result is that the BCA would add a note after the record showing that the subject of the data received a judicial expungement in district court.

## IV. CONCLUSION

*S.L.H.* has certainly narrowed the inherent authority expungement remedy. A legislative solution seems to be the most appropriate course of action for the future. However, the remedy is not completely useless. Before accepting a case, practitioners should listen to their clients about why they want an expungement; learn as much as possible about the circumstances surrounding the offense and plea arrangement; and decide which records must be sealed for a complete remedy. A responsible approach to inherent authority expungements can preserve the limited remedy for those who are truly deserving.

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<sup>94</sup> *State v. M.L.A.*, 785 N.W.2d 763, 767–68 (Minn. Ct. App. 2010).

<sup>95</sup> *Id.* at 768.

<sup>96</sup> *See* MINN. STAT. § 13.04, subdiv. 4 (2010).