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One Mistake Does Not Define You: Why First-Time Felony Drug Convictions Should Be Automatically Expunged after Five Years

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ONE MISTAKE DOES NOT DEFINE YOU: WHY FIRST-TIME FELONY DRUG CONVICTIONS SHOULD BE AUTOMATICALLY EXPUNGED AFTER FIVE YEARS

Kaylynn Johnson

I. INTRODUCTION

Under current state law, the Minnesota Expungement Statute limits which felony convictions are eligible for expungement. An expungement is the removal of a conviction from a person's criminal record.1 In Minnesota, expungement means that criminal records are sealed rather than permanently destroyed.2 In other words, each state agency is ordered to seal that criminal record and “may not

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disclose their existence or open them unless otherwise authorized by a court order or statutory authority.”

The legislature has acknowledged only a handful of felonies that are eligible for expungement by statutory authority. Without the opportunity for expungement, criminal records are accessible to the public through multiple online databases. With a click of a button, a landlord, employer, or the public can track a person’s criminal history. This is problematic because increased public access to criminal records negatively impacts employment and housing opportunities for convicted felons.

The current Minnesota Expungement Statute is problematic because it is an expensive process, the statute does not guarantee an expungement, the expungement process is difficult to navigate pro se, and the statute limits the felonies that are eligible for expungement. The solution to these problems is to automatically expunge first-time felony drug possession convictions after five years. This new model will allow for proper rehabilitation, economic increase, and reduced recidivism for those convicted of first-time felony drug possession.

II. ACCESSING CRIMINAL RECORDS

Under the U.S. Constitution, the First Amendment does not specifically state that the public has a right to access court records. In *Gannett Co., Inc. v. DePasquale*, the U.S. Supreme Court recognized that the Constitution gave the petitioner an affirmative right to access a pretrial proceeding. Following *Gannett*, two other cases developed an analysis to determine whether the First Amendment gave people the right to access specific judicial proceedings. In *Global Newspaper Co. v. Superior Court* and *Press-Enterprise Co. v. Superior Court*, the courts created a test for public access to records consisting of experience and logic. Under the test, the court must decide whether the place and process have historically been open to the press and public and whether public access plays a significant role in the functioning of the particular process. When both prongs are satisfied, the court document will be accessible to the public.

7. Id. at 855.
8. Id.
In 1977, the Minnesota Supreme Court held that courts have the power to seal records, but courts are limited to instances where the petitioner’s constitutional rights may be seriously infringed by their criminal record. The court limited the scope to include only criminal convictions that created an unfair disadvantage in obtaining constitutional rights. Judicial inherent authority was limited to granting expungements to prevent the denial of constitutional rights. In 1981, the Minnesota Supreme Court expanded judicial inherent authority beyond constitutional rights and included expungements within judicial duties. Judges took advantage of the broader discretion to grant expungements for people who struggled with issues beyond the denial of constitutional rights.

Before the development of the internet, landlords, employers, and the public physically walked to the county courthouse to retrieve judicial records. Executive records could be retrieved from the police station. Under the Rules of Public Access to Records of the Judicial Branch, Rule 2 states that “records of all courts and court administrators in the state of Minnesota are presumed to be open to any member of the public for inspection or copying at all times during the regular office hours of the custodian of records.” The public could pay the custodian of records a fee to print a copy of the record. For decades, this was the most efficient way to retrieve a court record.

Although criminal records were accessible, most people were not eager to walk down to court administration or the police station to retrieve judicial and executive records. Before the internet, public records could not be accessed online, so an expungement would seal the physical copies of records. Individuals could have their convictions expunged from their record with limited societal impact other than faint public memory or previously published newspapers. This meant that employers and landlords had to go...

10. Id.
11. See id.
13. See id.
16. Id.
through numerous steps to retrieve records just to evaluate an eligible applicant.

In the 1980s, the invention of the internet changed the way that public criminal records were accessed. The early stages of the internet did not function as a database for public records but as packets of messages traveling through a network.19 This was called ARPANET.20 The simple programming began as community chat rooms and email systems.21 By 1995, the World Wide Web was created, and the internet took off.22 Access to the internet quickly changed the way that people accessed information. Google was developed in the mid-1990s, which made searching for information much easier.23 Suddenly, employers and landlords could “google search” a potential employee or tenant for news stories about them. The faint public memory and newspaper headlines could be resurrected along with the societal disadvantages that came with them.

In addition to the emergence of the internet, the Minnesota legislature passed the Minnesota Government Data Practices Act (MGDPA) in 1993.24 This Act regulates all government data maintained by Minnesota state agencies, political subdivisions, and statewide systems.25 This includes both police records and court records.

The primary goal of the MGDPA is to allow public access to government information unless classified by statute or temporary classification.26 The MGDPA created a strong tension between protecting the individual right to privacy and what the public should have access to.27 To balance this tension, the legislature created provisions of freedom of information and open access while also having provisions to protect individual privacy.28

20. Id.
22. Id. at 107.
25. Id. at 841.
26. MINN. STAT. § 13.03 subdiv. 1 (2019) (“All government data collected, created, received, maintained or disseminated by a government entity shall be public unless classified by statute, or temporary classification pursuant to . . . [Minnesota Statutes section] 13.06 ([2019])”).
27. Westin, supra note 24, at 843.
28. Id. at 843–44.
The MGDPA has a strict classification for what information can be accessed and what must remain private. For example, information about police officers and law enforcement officials are not accessible in order to protect officer safety. Police and court records, on the other hand, are not banned by statute or temporary classification, so they are accessible to the public. The MGDPA laid out the strict standard for which state agencies’ documents would be accessible and which would be protected. The legislature could have protected police and court records, but determined that they should be publicly accessible.

In 2003, the Minnesota Supreme Court designated an advisory committee to study whether state public records should be accessible online. The committee recommended a “go-slow” approach, meaning that only the simplest records would be placed on the judicial branch’s Minnesota Court Information System (MNCIS). MNCIS is a database used to store public records for civil, family, traffic, and criminal cases in Minnesota. By 2007, Minnesota law provided that officers, state agencies, and other public authorities must preserve “all records necessary to a full and accurate knowledge of their official activities. Government records may be produced in the form of computerized records.” In addition, the federal judiciary’s online system called Public Access to Court Electronic Records (PACER) allowed registered users to access civil and criminal court documents for a fee. By the mid-2000s, the public had access to nearly all criminal records at the click of a button and a small fee.

Between 2004 and 2013, the court further restricted what types of public records could be sealed. In *State v. Schultz*, the Minnesota Court of Appeals held that the district court had the inherent authority to seal only judicial records. This restricted the district court’s ability to expunge records from the executive branch, which included police records.

Similarly, in *State v. M.D.T.*, the Minnesota Supreme Court upheld that a district court cannot expunge records held under the

29. *Id.* at 851–52.
30. *Id.* at 844.
31. *See id.*
32. *See Rick Linsk Coming Soon to A Computer Near You: Minnesota Court Records, 72-0CT BENCH & B. MINN. 28 (2015).*
33. *Id.*
34. *See Minnesota Trial Court Public Access (MPA) Remote View, MINN. JUD. BRANCH, http://pa.courts.state.mn.us/default.aspx (last visited Apr. 4, 2020) (demonstrating the types of cases stored on MNCIS).*
35. MINN. STAT. § 15.17 subdiv. 1 (2019).
37. 676 N.W.2d 337, 345 (Minn. Ct. App. 2004).
38. *Id.*
executive branch.\textsuperscript{39} In addition, the court held that there is a balancing test for granting an expungement, but it can only be used when expungement of executive branch records is necessary to the performance of a unique judicial function.\textsuperscript{40} Although executive records could not be expunged, these cases upheld the district court’s inherent authority to expunge criminal records in the judicial branch.\textsuperscript{41}

In 2015, PACER had over two million registered users.\textsuperscript{42} Rule 4 of the Minnesota Rules of Public Access to Records of the Judicial Branch establishes which types of records would not be accessible.\textsuperscript{43} Under Rule 4, records such as domestic abuse and harassment records, court service records, judicial work product and drafts, juvenile appeal cases, race records, and medical records are not accessible on MNCIS.\textsuperscript{44} This means that all adult criminal convictions will be accessible on MNCIS. As a result, employers, landlords, and the public no longer had to walk to the courthouse to access criminal records.

III. THE PROBLEM WITH INCREASED PUBLIC ACCESS TO CRIMINAL RECORDS

A. Employment Denial

Preventing felony drug possession convictions from being expunged is problematic because it denies employment opportunities. Due to increased public access to criminal records, employers can see almost immediately whether someone has a felony conviction. As a result, an employer may turn down an applicant simply because of a criminal record listed on MNCIS.

Under Title VII of the Civil Rights Act of 1964, an employer can deny someone employment for a felony conviction.\textsuperscript{45} There is nothing within the Act that explicitly bars employers from denying applicants based on their criminal records. However, a person can try to claim disparate impact under Title VII.\textsuperscript{46} Disparate impact is the “adverse effect of a facially neutral practice (esp. an employment practice) that nonetheless discriminates against persons because of their race, sex, national origin, age, or disability and that is not

\textsuperscript{39}. 831 N.W.2d 276 (Minn. 2013).
\textsuperscript{40}. \textit{Id.} at 283–84.
\textsuperscript{41}. \textit{Id.} at 283.
\textsuperscript{42}. Linsk, \textit{supra} note 32, at 28.
\textsuperscript{43}. \textit{MINN. RULES OF PUB. ACCESS TO REC. OF THE JUD. BRANCH} 1, 11 (Jan. 23, 2017), http://www.mncourts.gov/mncourtsgov/media/Appellate/Supreme%20Court/Court%20Rules/pub_access_rules.pdf.
\textsuperscript{44}. \textit{Id.}
\textsuperscript{46}. \textit{Id.}
justified by business necessity.” In order to prevail in a law suit, the complaining party must show that the employer used an employment practice that created a disparate impact on the basis of race, color, religion, sex, or national origin. The employer must then fail to show that the practice is related to the position in question and consistent with business necessity.

Individuals with criminal records have consistently struggled to prevail under disparate impact when they have been denied employment because of a criminal record. In *El v. Se. Pennsylvania Transp. Auth. (SEPTA)*, the court found that there was no evidence of disparate impact on an African American bus driver who was not hired because he had a homicide conviction on his record. The court held the Equal Employment Opportunity Commission (EEOC) declared that a person can be disqualified from a job on the basis of a previous conviction only if the employer considers the nature and gravity of the offense, the time passed since the offense, and the nature of the job held or sought. Also, the court held their refusal to hire someone with a criminal record is consistent with a business necessity.

Consistent with *El*, in *Manley v. Invesco*, the court again held that there was no evidence of disparate impact where an African American man applied for and was denied a developer position through Invesco. The man had an assault conviction and a driving without a license conviction on his record. Courts have consistently refused to recognize criminal history as a claim for disparate impact. Although Title VII provides this type of relief for employees, there is no guarantee that the court will find in favor of the employee.

Additionally, employers may do criminal background checks before hiring an employee. One way for employers to conduct criminal background checks is through the Fair Credit Reporting Act. The Fair Credit Reporting Act allows employers to reach out to third-party companies to run reports based on credit score or criminal background. If an employer chooses to use this method, they must notify the applicant in writing that this consumer report

49. Id.
50. 479 F.3d 232, 249 (3d Cir. 2007).
51. Id. at 243.
52. Id. at 247.
53. 555 F. Appx. 344, 348 (5th Cir. 2014).
54. Id. at 346.
57. Id.
will be conducted. Although this notifies the potential employee that a report will be run, there is no way for that person to object to the report. Even if they do try to object to the report, the employer can still see their criminal records on MNCIS.

In 2001, a survey using California employers revealed that only 45.8% of employers would be willing to hire an employee who had a drug-related conviction on their criminal record. This study analyzed all levels of drug convictions, so the percent may be smaller for felony drug convictions. Hiring factors included whether the applicant is a risk, whether the applicant had multiple offenses, and the applicant’s employment history. This study indicated that employers are reluctant to hire felony drug offenders and are legally justified in rejecting them.

States control the types of occupations a convicted felon can obtain post-conviction. In Minnesota, a person convicted of a felony drug crime is disqualified from working in direct contact positions for fifteen years. Direct contact positions consist of healthcare, caretaking, and child care positions. Healthcare positions include doctors, nurses, and specialized healthcare positions that involve direct contact with patients. Caretaking positions include taking care of the elderly, patients with disabilities, and children. Child care positions include daycare workers and preschool teachers. For at least fifteen years, individuals with felony drug possession convictions cannot obtain any of the previously mentioned jobs. Many of those jobs require additional schooling beyond high school, which cost time and money. In the meantime, convicted felons interested in those fields have to work in jobs that they are not passionate about for lower wages.

The direct contact positions banned for convicted felons under Minnesota Statutes section 245C.15 are positions which provide

60. Id. at 127–28.
61. Id.
62. MINN. STAT. § 245C.15 subdiv. 2(a) (2019).
65. Id.
67. MINN. STAT. § 245C.15 subdiv. 2(a) (2019).
stable income to employees and may even allow them to save some of that income. For example, the median income for a registered nurse is $71,450 per year in 2018. For a single person, this salary is enough to support oneself with additional leisure money. Many of the people who are incarcerated for a felony come from poverty prior to incarceration. In 2014, a study found that individuals between the ages of 27 and 42 (regardless of race, ethnicity, and gender) had a mean annual income of less than $20,000 a year prior to incarceration. After receiving a felony drug possession conviction and getting out of prison, a person has even more difficulty finding stable employment. Depriving convicted felons of employment opportunities forces them to work in low-income positions and creates a financial strain on their families.

Minnesota has made efforts to conceal records, including the “ban the box” statute, but the efforts are limited. Under the “ban the box” statute, a public or private employer cannot require disclosure of an applicant’s criminal record or criminal history until the applicant has been selected for an interview, or if there is no interview, before a conditional offer of employment. Under this statute, an application cannot contain a question like “have you ever been convicted of a crime?” However, this does not prevent the employer from going on MNCIS to look into the applicant’s criminal history when they receive the application. Once the applicant participates in an interview or is given a conditional offer, the employer can use any criminal background checks as consideration for revoking the offer. Despite the effort to bypass the initial prejudice surrounding convicted felons, many employers may choose to hire a different candidate without stating a specific

69.  Id.
72.  Id.
74.  MINN. STAT. § 364.021(a) (2019).
76.  Id.
77.  Id.
reason. The statute attempts to reduce the number of employers
who refuse to hire convicted felons, but convicted felons are often
unemployed much longer and lose the necessary work experience
that many employers are looking for. Fifteen years is a large span
of time that a convicted felon is banned from obtaining proper
employment experience or schooling that would make them a more
qualified candidate in the future.

In addition, the federal government has provided incentives for
employers to hire felons to try to close the gap between convicted
felons and unemployment. In these programs, state employers can
earn tax credit for hiring an ex-felon. Under the Internal Revenue
Service (IRS), an ex-felon only qualifies if they are hired within a
year of being convicted of a felony or being released from prison.
If ex-felons are hired, employers will receive a tax break of a few
thousand dollars for each qualified ex-felon. This is a problem
because employers may not want to hire a convicted felon who was
just released from prison less than a year prior. This program also
leaves out the large group of felons who are unable to find a job
within the first year and are still looking for employment several
years after completing their sentence.

Although these programs do provide incentives to employers to
hire felons, this is not enough. It is evident that individuals convicted
of felony drug offenses miss out on employment opportunities as
long as the conviction remains on their criminal record. Even if
given the opportunity to work in a specific field, many convicted
felons will not be hired. The increased access to public records has
made it easier for employers to reject convicted felons and harder
for felons to obtain stable employment.

B. Housing Denial

Preventing expungement of felony drug possession convictions
is problematic because it denies housing opportunities. Increased
public access to criminal records has made it easier for landlords to

78. Susan M. Heathfield, Why Employers Don’t Give Feedback to Rejected
Candidates, THE BALANCE CAREERS (last updated Nov. 7, 2019),

79. Binyamin Appelbaum, Out of Trouble, but Criminal Records Keep Men
Out of Work, N.Y. TIMES (Feb. 28, 2015),
https://www.nytimes.com/2015/03/01/business/out-of-trouble-but-criminal-
records-keep-men-out-of-work.html.

80. Work Opportunity Tax Credit, I.R.S.,
https://www.irs.gov/businesses/small-businesses-self-employed/work-
opportunity-tax-credit (last visited Apr. 5, 2020).

81. Id.

82. Id.

83. Id.
see potential tenants’ criminal history. Since many convicted felons are low-income, they cannot afford to purchase a house. The median value of a house in Minneapolis is $289,197.84 Instead, convicted felons are forced to rent or apply for federally funded public housing. Landlords usually conduct a screening process for future tenants who apply to rent property.85 A landlord can contract with a screening company to conduct background checks on potential applicants.86 These checks include rental history, criminal history, and any other relevant information that a landlord may need to know for rental purposes.87 Based on the screening, a landlord can then decide not to rent to that specific applicant.88 A landlord must notify applicants that they were denied from housing, but the landlord does not have to state why they were denied.89

If tenants believe they were denied housing on the basis of their criminal record, they are extremely limited in legal action. Under the Fair Housing Act (FHA), a landlord can refuse to rent to a person with a criminal record.90 Under the FHA, there are several protected classes. When making housing available to others, a landlord cannot discriminate on the basis of race, religion, sex, national origin, familial status, or disability.91 Criminal records are currently not a protected class under the FHA. This means that a person cannot file a discrimination claim under the FHA for denial of housing based on criminal record. The Department of Housing and Urban Development (HUD) stated that landlords often use criminal history as a pretext for discriminating against tenants based on race, national origin, or other protected class.92 Although not a protected class, a person could still try to sue for disparate treatment by claiming the

86. Id.
87. Id.
88. Id.
89. Id.
criminal record was a pretext for unlawful discrimination. However, there is a low likelihood that a person will prevail in a lawsuit if they sue for disparate treatment based on their criminal record.

In *Evans v. UDR, Inc.*, the court held that a landlord could deny someone solely by their criminal history. In *Evans*, the tenant argued that the landlord refused to accommodate her disability. In response, the landlord argued that he refused to make the accommodation because of the tenant’s criminal record. The court found that this was justifiable and did not constitute discrimination against the tenant’s mental disability. Similarly, in *Talley v. Lane*, the court held that considering an applicant’s criminal record is not forbidden under the FHA, so the landlord was justified in denying the tenant housing based on his extensive criminal record. Based on these two cases, courts have firmly held that criminal records can be used to deny someone housing accommodation or tenancy. The ability for tenants to fight the denial of housing based on criminal record is a steep, uphill battle that tenants have not yet won.

In addition, convicted felons who choose to apply for public housing rather than renting from a private landlord can be denied public housing based on criminal record. A person can be denied public housing if the criminal record will affect the health, safety, or welfare of other tenants. Drugs are often viewed as substances that negatively impact the health, safety, and the welfare of the community. Specifically, under Section 8 Housing laws, a person can be denied Section 8 housing when a family member has been convicted of a drug-related crime on the premises of a Section 8 home or associated areas. A felony drug conviction, therefore, would constitute a denial. When these convicted felons are denied rental property and public housing, many convicted felons may be left homeless. The cycle of low-income housing and homelessness continues as a result of the increased access to criminal records. This access has made it easier for landlords to deny housing to convicted felons and harder for convicted felons to find stable housing.

93. *Id.* at 9.
95. *Id.* at 679.
96. *Id.* at 688.
97. *Id.* at 695.
98. 13 F.3d 1031, 1034 (7th Cir. 1994).
100. *Id.*
IV. THE DEVELOPMENT OF THE MINNESOTA EXPUNGEMENT STATUTE

The increased access to criminal records has led to various changes in the Minnesota Expungement Statute. Historically, Minnesota did not always have a controlling statute that addressed expungements.102 Prior to the 1990s, small sections in separate statutes mentioned that individuals with a criminal conviction may get that conviction expunged.103 These sections were often reserved for youthful offenders, certain drug offenders, and juveniles who were prosecuted as adults.104 During this period, district court judges had immense discretion to decide who would be granted an expungement. In some jurisdictions, a judge required defendants to give notice of an expungement motion to the victim while others looked specifically at the defendant’s criminal history.105 Before the Minnesota Expungement Statute, case law governed a vast majority of the expungement decisions.

In 1996, the Minnesota legislature passed Minnesota Statutes section 609A.106 This statute defined an expungement as an available remedy, laid out the grounds for expungement, and addressed the necessary petition to expunge a criminal record.107 Minnesota Statutes section 609A.02 states that a petition may be filed to seal records related to an arrest, indictment, trial, or verdict if the records are not subject to Minnesota Statutes section 299C.11 subdivision 1, paragraph (b), and, if the person was ruled not guilty by reason of mental illness or the person successfully completed diversion program or stay of adjudication for at least one year.108 In addition, the statute allowed a small variety of different petty misdemeanors, misdemeanors, gross misdemeanors, and felonies to be expunged.109 Under this statute, the standard of proof for granting an expungement is clear and convincing evidence.110 The petitioner must demonstrate by clear and convincing evidence that the expungement would yield a benefit to the petitioner that outweighs the public safety concerns.111 If an expungement is granted, that criminal case will be sealed from judicial records, executive records,
or both. 112 Although this statute gave district judges statutory authority to expunge certain criminal convictions, it did not cover all types of crimes. 113

In 2015, the Minnesota legislature passed what has been known as the “Second Chance” law. 114 The law provided an expansion of the criminal expungement eligibility. 115 Under the new law, Minnesota Statutes section 260B.198 allows all records related to juvenile conviction tried as adults, petty misdemeanors, misdemeanors, gross misdemeanor domestic assault, and gross misdemeanor sexual assault convictions to be expunged. 116 Also, Minnesota Statutes section 609A made additions to the statute. 117 The new statute’s expansion allowed individuals to expunge their records when: “all pending actions or proceedings were resolved in favor of the petitioner;” the petitioner completed the terms of a diversion program or stay of adjudication and the petitioner has not been charged with a new crime for at least one year since the completion of the program; the petitioner was “convicted of or received a stayed sentence for a petty misdemeanor or misdemeanor and has not been convicted of a new crime for at least two years” since the discharge of the sentence; the petitioner was convicted of or received a stayed sentence for a gross misdemeanor and has not been convicted of a new crime for at least four years; or the petitioner was “convicted of or received a stayed sentence for a felony violation of an offense listed and has not been convicted of a new crime for at least five years.” 118 Additionally, the statute allowed both judicial and executive records to be eligible for expungement. 119 The Second Chance law revamped the original expungement statutes that established statutory authority for district courts and it provided a vast increase in expungement eligibility in Minnesota.

112. See Diebel, supra note 3, at 10.
113. See MINN. STAT. § 609.02 (2019) (demonstrating the types of crimes that may be expunged).
115. Id. at 16.
116. Id.
117. Id.
118. Id.
V. THE PROBLEM WITH THE CURRENT MINNESOTA EXPUNGEMENT STATUTE

The current Minnesota Expungement Statute is problematic for several reasons. Primarily, the statute is a problem because filing a motion for an expungement is too expensive. Currently, a person must pay $285 to file for an expungement, not including law library fees and mailing costs. The raw $285 covers the cost of the district court to review the case and determine if granting an expungement is appropriate.

There are numerous additional costs for individuals seeking an expungement such as printing, stamps, and envelopes. At the bare minimum, a person seeking an expungement in Minnesota must send copies of their notice of hearing and an order to seal to the Minnesota Bureau of Criminal Apprehension, the Office of the Minnesota Attorney General, the Minnesota Department of Corrections, the County Department of Corrections, the County Sheriff’s Office, and the County Attorney’s Office. This gives these state agencies an opportunity to object to the expungement motion if they wish.

Although this is the bare minimum requirement for proof of service, many people may not be able to afford to make at least six copies of that paperwork in addition to envelopes and stamps. A person could apply for an In Forma Pauperis (IFP), a waiver for the $285 fee, but it is dependent on income guidelines. As demonstrated by public defender eligibility in criminal cases, many people do not meet the low-income requirement for the court to grant an IFP because they do not have an annual income lower than 125% of the poverty line. Even if a convicted felon is low-income, there is no guarantee that the IFP will be approved because it is at the judge’s discretion.

In addition, the Minnesota Expungement Statute is a problem because there is no guarantee that an expungement order will be granted, despite all the time and effort invested in this process. There are two authorities surrounding an expungement order: statutory

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121. Id.
124. MINN. STAT. § 563.01 subdiv. 3(b) (2019).
125. Id.
authority and inherent authority.\textsuperscript{126} Under statutory authority, a magistrate looks at Minnesota Statutes section 609A.\textsuperscript{127} Since all felony drug possession convictions, aside from fifth-degree, are not statutorily eligible for expungement, a person may still apply for an expungement on the basis of inherent authority.

Under inherent authority, a magistrate looks at twelve factors to decide whether to grant an expungement order.\textsuperscript{128} These factors include the nature of the crime, the risk posed to society, the length of time since the crime, the complete criminal record, the community involvement, and other factors deemed relevant by the court.\textsuperscript{129} These factors give a magistrate an enormous amount of discretion when deciding whether to grant an expungement order. Even if a convicted felon serves the entire sentence and pays to get the crime expunged, there is no guarantee that the expungement will be granted. Even if decades go by, that one conviction may never be expunged from that person’s criminal record.

The third reason that the current Minnesota Expungement Statute is a problem is because the process for filing for an expungement is difficult to navigate pro se. When a person files an expungement motion, there is no right to counsel like in a traditional criminal case.\textsuperscript{130} Without help from an attorney, people may struggle to properly file an expungement motion pro se. It is an enormous burden for a pro se petitioner to accurately fill out the paperwork, properly serve the relevant parties, pay a $285 filing fee, and appear on their court date.\textsuperscript{131} After a long process, the district court judge can simply refuse to deny the expungement request.\textsuperscript{132}

In addition to struggling with the paperwork and legal terminology, a person must call the courthouse and attend the given court date.\textsuperscript{133} Many people may not be able to attend their given court date because of work, caretaking, or other circumstances.\textsuperscript{134}

\textsuperscript{126} See Diebel, supra note 3, at 10.
\textsuperscript{127} See supra note 97.
\textsuperscript{128} Gempeler, supra note 114.
\textsuperscript{129} Id.
\textsuperscript{131} Id.
\textsuperscript{133} How to Ask the Court to Expunge (Seal) your Criminal Court Record, MINN. JUD. BRANCH 1, 18 (2018), http://www.mncourts.gov/Documents/4/Public/Self_Help_Center/Step_by_Step_Guide_to_Expungements_FINAL_on_web.pdf.
\textsuperscript{134} Theo Spengler, Valid Reasons for Missing a Court Date, LEGAL BEAGLE (Nov. 28, 2018), https://legalbeagle.com/8364682-valid-reasons-missing-court-date.html.
As a result, their petition may be denied by the judge. The process for an expungement is very difficult for people who are unfamiliar with filing motions and having contact with the court.

The final reason that the Minnesota Expungement Statute is a problem is because the felonies eligible for expungement under Minnesota Statutes section 609A.02 are limited. Under the current statute, there are fifty different felonies that may be expunged using statutory authority. These felonies include altering livestock certificates, willful evasion of fuel tax, contempt, receiving stolen goods, and tampering with a fire alarm.\(^\text{135}\) A vast majority of these eligible felonies only occur occasionally and are not nearly as common as drug-related convictions.\(^\text{136}\) Drug possession convictions are technically victimless crimes because drugs are not being sold or used by anyone but the offender.\(^\text{137}\) Currently, fifth-degree felony drug convictions are eligible for expungement under statutory authority.\(^\text{138}\) Because the court has already recognized one degree of felony drug conviction, it follows that the statute should cover the additional felony drug possession convictions.

VI. THE SOLUTION: AUTOMATIC EXPUNGEMENT OF FIRST-TIME FELONY DRUG POSSESSION CONVICTIONS

The solution to the recurring problems with increased public access to criminal records and the current Minnesota Expungement Statute is to automatically expunge first-time felony drug possession convictions after five years. Under Minnesota Statutes section 609A.02 subdivision 3(a)(5), individuals convicted of a felony can expunge a conviction if they have not been convicted of a new crime for at least five years.\(^\text{139}\) A person is guilty of first degree felony drug possession if, on one or more occasions within a 90-day period, a person possessed fifty grams or more of cocaine or methamphetamine, twenty-five grams or more of heroin, 500 grams or more of narcotics, or fifty kilograms or more of marijuana.\(^\text{140}\) In other words, individuals in possession of a drug weighing roughly the amount of a golf ball are guilty of a felony drug possession charge.\(^\text{141}\) A person can be sentenced to imprisonment for first-degree drug possession for no more than 30 years or pay a fine of

\(^{135}\) See Minn. Stat. § 609A.02 subdiv. 3(b) (2019).


\(^{138}\) Minn. Stat. § 609A.02 subdiv. 3(a)(4) (2019).

\(^{139}\) Id. at § 609A.02 subdiv. 3(a)(5).

\(^{140}\) Id. at § 152.021 subdiv. 2(b) (2019).

not more than $1,000,000.\footnote{142} The Minnesota second, third, fourth, and fifth-degree felony drug possession statutes are similar to the first-degree, but the weight limits are less. For people convicted of first-time felony drug possession, automatic expungement would provide an opportunity to seal the conviction from their record and get another chance to have a successful life.\footnote{143}

A. Why Expunge First-Time Felony Drug Possession Convictions

All degrees of felony drug possession convictions should be eligible under the Minnesota Expungement Statute. More specifically, the statute should clarify that the conviction is not based on level and instead that it must be the defendant’s first felony drug possession conviction. Currently, only fifth-degree felony drug possession convictions are eligible for expungement.\footnote{144} Felony drug possession convictions are unique from other felony offenses because the crime is committed against the offender.\footnote{145} Unlike drug sale, drug possession involves solely the person in possession of the drugs.\footnote{146} When people commit this felony drug possession offense, their brains may not be fully matured, they may be suffering from drug addiction, or both.\footnote{147}

For many people who commit felony drug possession offenses, their brains were not fully matured at the time of the offense. This is because many people convicted of felony drug offenses are under the age of thirty.\footnote{148} In 2008, a meta-analysis gathered data on prefrontal cortex development.\footnote{149} The prefrontal cortex mainly affects the ability to formulate behavioral plans.\footnote{150} In other words, a person who does not have a fully developed prefrontal cortex may not consider the consequences of their actions and take more risks.\footnote{151} Using data from structural magnetic resonance imaging

\begin{footnotes}
\footnote{142}{MINN. STAT. § 152.021 subdiv. 3(a) (2019).}
\footnote{143}{Gempeler, supra note 114.}
\footnote{144}{MINN. STAT. § 609A.02 subdiv. 3(10) (2019).}
\footnote{146}{Id.}
\footnote{147}{See Leah H. Somerville, \textit{Searching for Signatures of Brain Maturity: What Are We Searching For?}, 92 NEURON J. 1164, 1164–67 (2016).}
\footnote{148}{See Shazia V. Siddiqui et al., \textit{Neuropsychology of Prefrontal Cortex}, 50 INDIAN J. OF PSYCHIATRY 202, 202–08 (2008).}
\footnote{149}{Id.}
\footnote{150}{Id.}
\end{footnotes}
(sMRI), the study found that “the regions of association complex including the prefrontal cortex show particularly late structural development.” 152 This means that maturation of the prefrontal cortex occurs later than puberty, and people may not fully understand the consequences of their behavior.

In addition, functional neuroimaging was used to evaluate cognitive control of subjects between ages eighteen and twenty-one. 153 This neuroimaging demonstrated that these subjects had a prefrontal cortex function more similar to thirteen to seventeen-year-olds in comparison to twenty-two to twenty-five-year-olds. 154 This study shows that a person’s prefrontal cortex develops much slower than the rest of the body. Although people physically reach the age of adulthood, their mental development may not be fully matured by the time they can be legally tried in the criminal justice system as adults. A person can be tried as an adult in the United States criminal justice system as early as age sixteen, depending on the circumstances. 155 Consistent with this research, another researcher found that the brain is continuing to actively develop well past the age of eighteen. 156

For many convicted felons, the lack of a fully developed prefrontal cortex may lead to immature, spontaneous decisions. 157 In comparison to other felonies, many people convicted of felony drug offenses are between ages eighteen and thirty. 158 In 2000, data was collected from across the U.S. on felony drug sentences. 159 Of 765,902 people recorded, 46% were under the age of thirty, despite the mean age being thirty-two. 160 The same data was collected in 2006 and found that 45% of people recorded were under the age of thirty. 161

This shows many people convicted of felony drug offenses are consistently under the age of thirty. 162 This is an extremely young age to get a felony drug possession conviction that will create

152. See Somerville, supra note 147, at 1165.
153. Id.
154. Id.
155. MN. STAT. § 609.055 subdiv. 2 (2019).
157. See Somerville, supra note 147, at 1165.
159. Id.
160. Id.
162. Id.
societal disadvantages for the rest of the person’s life. The lack of a matured prefrontal cortex explains why there is a high number of drug convictions in this age group. Although there may be other factors such as peer pressure or drug dependency, a lack of a mature brain has the ability to impact risk taking. The group that lacks a fully matured brain during the time of the offense is the same group that will face a permanent felony on their criminal records.

Further, individuals may obtain first-time felony drug possession convictions because of drug addiction. As previously stated, a first-degree felony drug offense is at least fifty grams, or roughly a golf-ball-sized amount of cocaine. In comparison to other objects, this seems rather small. In reality, a single dose (around one gram) could cause a person to overdose. Fifty grams of cocaine could get a person high on multiple occasions. If a prosecutor charges a defendant with felony drug possession, the presumption is that the drug was for personal use and not for sale. With multiple grams of these drugs, a person may become addicted.

In 2008, a meta-analysis collected data on drug users and crime rates. They found that of thirty studies, “the odds of offending were 2.8 and 3.8 times greater for drug users than non-drug users.”Although this study looked at the crimes of prostitution, burglary, and robbery, their findings are significant in showing the link between drug users and committing crimes. In 2007, 82.5% of people arrested for drug possession were arrested for drug abuse violations. This shows that people who are convicted of drug possession are often also abusing drugs.

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164. See Preston, supra note 141.
170. Id. at 117.
171. Id.
Drug addiction is a driving force for some people’s behavior.\textsuperscript{173} The addiction can be so strong that they will commit additional crimes in order to be able to support their drug habit.\textsuperscript{174} Drugs interfere with neurons that send, receive, and process signals through neurotransmitters.\textsuperscript{175} Depending on the drug, it may interfere with the prefrontal cortex’s signals and decrease its function.\textsuperscript{176} When ability to make decisions and control impulses is compromised, people will be more likely to commit crimes.

As a result, those who commit these crimes are fueling addiction by committing other crimes, such as selling drugs.\textsuperscript{177} While the sale of each drug may differ, several of the sellers take part in consuming the drug as well.\textsuperscript{178} In 2009, a study analyzed the hierarchy of heroin users around the Denver, Colorado area. They found there were three main groups crucial to successful heroin sales: immigrant sellers, junkie brokers, and customers.\textsuperscript{179} The junkie brokers were often the ones who sold heroin locally and would get paid through small injections of the heroin.\textsuperscript{180} This was a way for both the customers and the junkie brokers to fuel their addictions.\textsuperscript{181} The main reasons that drug users decide to become drug dealers is because the money from selling supports drug habits, selling is profitable, and personal values begin to be shaped by addiction.\textsuperscript{182} These three factors, when combined, are strong enough to make someone repeatedly commit a felony drug offense to fuel their addiction.

In Minnesota, it is possible for convicted felons to get sober and return to normal life. If a person who is charged with a crime appears to be drug dependent, the court can order the defendant to get treatment in a hospital, mental health facility, or drug treatment

\begin{thebibliography}{99}
\bibitem{174} Id.
\bibitem{176} Id.
\bibitem{178} Id.
\bibitem{180} Id. at 276.
\bibitem{181} Id.
\end{thebibliography}
facility.\textsuperscript{183} In order to evaluate whether a defendant needs drug treatment or not, the court considers factors such as the need for increased amounts of drug to receive desired effect, withdrawal symptoms, unsuccessful efforts to cut down on substance use, and continued psychological problems caused by the substance.\textsuperscript{184} Using these factors, the judge may order the defendant to join drug treatment as a part of sentencing.\textsuperscript{185} If a defendant is accepted into a drug treatment program, the court can impose a stay of execution.\textsuperscript{186} These types of programs allow individuals to rehabilitate from their drug dependency and create supportive opportunities for convicted felons to get back on their feet. After successfully completing a drug treatment program, it follows that the next step would be to seal the conviction in order to fully rehabilitate the defendant.

Due to increased public access to criminal records and the current expungement statute, the first step is to add all felony drug possession convictions to the statute. Numerous young adults make one mistake in their twenties and do not realize the consequences of their actions. When young convicted felons’ brains are fully matured, they may choose not to commit future crimes. Also, if they are given treatment to help fight drug addiction, they may be able to remain law-abiding. By adding all felony drug possession convictions to the Minnesota Expungement Statute, convicted felons will have a chance to become functioning members of society.

\textbf{B. Automatic Expungement}

Once first-time felony drug possession convictions are added to the Minnesota Expungement Statute, it follows that they be automatically expunged after five years. An automatic expungement includes all court documents for both the judicial and executive branches. This includes all documents from judicial proceedings from pretrial documents to sentencing orders. On the executive side, this includes all records from police reports to criminal complaints. Since both judicial and executive records can be accessed by the public, both should be sealed upon granting an expungement. By sealing the documents, the documents will be hidden from all state agencies and the public. On MNCIS, it will appear as though the person had never been charged with that specific crime. Although

\textsuperscript{184} \textit{Id}.
\textsuperscript{185} Henry W. McCarr & Jack S. Nordby, Criminal Law and Procedure, in 9A Minnesota Practice Series § 53:22 (Thomson West, 4th ed.).
\textsuperscript{186} \textit{Id}. 
the documents are sealed, they are not destroyed. The documents may be opened up by a judicial officer or upon request by a state agency, but they will be permanently sealed from the public, similar to the current Minnesota Expungement Statute.

Once defendants have successfully completed probation or their prison sentence, they have sufficiently completed their legal punishment for committing that crime. It follows that once convicted felons finish their sentences, the conviction will be automatically expunged from their record after five years. At that point, the person has paid their legal dues to society and successfully completed the ordered punishment. After five years, the lingering effects of a felony drug possession conviction creates extreme disadvantages in employment and housing. 187 Those who are eligible for expungement after waiting five years upon their release are motivated to put the conviction behind them and continue a sober lifestyle.

Judges often look to sentencing guidelines when making a sentencing decision, but ultimately, they have the discretion to decide whether to sentence a defendant to prison or probation. The more serious the offense, the more likely it is that a judge will sentence a person to prison rather than probation. In 2004, about 31% of people convicted of drug possession were sentenced to probation, 35% were sentenced to prison, and 29% were sentenced to jail. 188 Based on these statistics, over half of those convicted of drug possession were incarcerated for a period of time. Under the Minnesota Sentencing Guidelines, only those convicted of second-degree substance related crimes or lower should be sentenced to probation if they have a low criminal history score like first-time offenders. 189 Based on the guidelines, a first-time offender convicted of second-degree drug possession or lower should be sentenced anywhere between twelve months to forty-eight months on probation. 190 This means a defendant could be on probation anywhere from one to four years. For first-degree possession, the sentence can be up to sixty-five months with no criminal history score. 191

Automatic expungement would provide support for restoration of civil rights. Under Minnesota Statutes section 609.165, “a person

190. Id.
191. Id.
who has been deprived of civil rights by reason of conviction of a crime and is thereafter discharged, such discharge shall restore the person to all civil rights and to full citizenship.” 192 In other words, a person who is discharged after serving a sentence shall be restored all civil rights and full citizenship. Fundamental civil rights include the right to vote, right to a fair trial, and right to possess firearms. 193

Using this approach, convicted felons who successfully complete their sentences should have the opportunity to restore their rights through expungement. The idea is that after a person has served their sentence successfully, they have demonstrated the progress necessary to restore their rights. An automatic expungement would not only restore civil rights, but it would provide these individuals with the opportunity to have stable employment and housing.

Individuals convicted of felony drug possession would serve their entire sentence in prison or on probation. Once successfully completed, they will need to wait five years from the date of their completion to be eligible for an automatic expungement. After that five-year waiting period is complete, the court will automatically order the felony drug possession conviction to be expunged from judicial and executive records. After five years, those who have cleaned up their lives and no longer possess drugs should have an opportunity to remove that first drug possession conviction.

Under this proposed model, the person eligible for expungement would not be required to file any paperwork with the court or pay a filing fee. Rather than place the burden on the convicted felon to file for an expungement, the courts could seal the file based on an annual review of eligible cases. For those who are eligible, a notice will be sent to the prosecuting agency stating the defendant’s conviction will be expunged within 60 days without objection. Under the current system, it can take several months for online databases to remove cases where an expungement order was granted. 194 Without filing paperwork or holding a hearing, the process of removing the record from online databases will be even quicker.

C. Shifting the Burden of Proof to the State

If there is any dispute over whether to expunge the felony drug possession conviction, the state may file a motion objecting to the expungement of the conviction. The state will have the burden of proving why the conviction should remain on the record. This is similar to the way that dismissals and acquittals are currently

handled under Minnesota Statutes section 609A. Under that section, there is no waiting period for defendants who had a case resolved in their favor. Under Minnesota Statutes section 609A.02, subdivision 3(a)(1), the court “shall grant the petition to seal” unless “the agency or jurisdiction whose records would be affected establishes by clear and convincing evidence that the interests of the public and public safety outweigh the disadvantages to the petitioner of not sealing the record.” In other words, the state must show by clear and convincing evidence that public safety concerns would outweigh the disadvantages to the person seeking an expungement. These disadvantages include housing, employment, and reputation. If the state fails to meet their burden, the court shall grant the expungement.

Using a similar model, the legislature should adopt this approach for first-time felony drug possession convictions. Instead of the defendant filing an expungement motion, the state would file a motion explaining why the expungement should be denied. The state must show by clear and convincing evidence that public safety concerns outweigh the disadvantages of a first-time felony drug possession conviction that occurred over five years earlier. If the state can meet their burden, then the expungement will be denied. This provides convicted felons five years to stay clean from drug possession and make a strong showing that there are continuous societal disadvantages. This will ensure that the state also makes a strong argument for why there is still public safety concerns for a conviction that is over five years old.

D. Policy Support for Automatic Expungement

These proposed changes to the expungement statute are supported by public policy. Primarily, an automatic expungement after five years allows a person to have sufficient time to rehabilitate. Within the five-year waiting period, people have the power to make several changes in their lives. These changes may include new social groups, physical location, and education. After five years, a person is able to transition out of an old friend group, move away, and pursue an education. Over time, a person is more likely to resist peer pressure and make independent decisions. Five years provides individuals time to form new friendships and build a higher resistance to peer pressure. Additionally, research shows that those who received education in prison were less likely

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195. MINN. STAT. § 609A.03 subdiv. 5(b) (2019).
196. Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 DEV. PSYCHOL. 1, 10 (2007).
to return to prison after release.197 After five years, a new friend group, a new city, and higher education are sufficient signs of rehabilitation.

In addition to rehabilitation, expungement of first-time felony drug possession convictions would improve the economy. These individuals could obtain higher paying jobs and private, stable housing. Currently, food stamps are permanently banned for some drug offenders.198 Food stamps can be essential to survival for a person who gets suddenly fired, changes a job, or develops a life altering disease. People convicted of drug possession may not have access to those resources for their entire lives without an expungement and clean drug tests. It is not out of the norm to predict that at some point, these individuals will need additional assistance to provide for themselves and their families. If these individuals cannot receive assistance in meeting daily needs, they may resort to homelessness. Allowing a first-time felony drug possession conviction to be expunged would open the door to food stamps. This would provide convicted felons proper assistance until they gained employment and housing adequate to support themselves. In turn, this would decrease the rate of unemployment and homelessness.

Also, removing the conviction from criminal records would decrease the unemployment rate and boost the housing market. Without a felony drug possession conviction, individuals would be able to work in the fields that are currently banned for convicted felons. A criminal record without a drug possession conviction looks much more impressive in a criminal background check than record with a drug possession conviction.199 Once a person obtains a stable job with higher pay, they can apply for private housing and purchase their own homes. This would help decrease the unemployment rate and increase the housing market, which would boost the economy.

Finally, expungement of first-time felony drug possession convictions would reduce recidivism rates. Once the five-year waiting period is complete, people have had an opportunity to mature and stop committing drug-related offenses. In 2016, a study showed that individuals ages twenty to twenty-four are most likely to reoffend, but the number decreases for each following age group.200 Individuals ages thirty to thirty-four were less likely to

199. See Why Don’t Companies Hire Felons?, supra note 55.
reoffend than those aged twenty to twenty-four. This means that if someone is convicted when they are twenty years old, given a minimal sentence of six months on probation, and they then wait five years before being eligible for expungement, the earliest they could seek expungement is age twenty-five. Most likely, the convicted felon will serve a few years in prison or on probation before the five-year waiting period begins. With each year, studies show that the person is less likely to reoffend. After five years, the recidivism rate significantly decreases, and any concern for public safety will decrease. If convicted felons cannot obtain proper housing and employment, they may resort to reoffending. Especially with homelessness, many offenders become addicted to drugs and reoffend. The convicted felon’s disadvantages in employment and housing would outweigh public safety concerns after that five-year waiting period. Once convicted felons can obtain employment and housing, the public safety concerns decrease even further. Expunging first-time felony drug possession convictions would allow people to become functioning members of society and reduce the temptation to commit future crimes.

VII. CONCLUSION

In conclusion, preventing automatic expungement of first-time felony drug possession convictions is a continuous problem in Minnesota. Increased public access to criminal records calls for change in the Minnesota Expungement Statute. This increased public access negatively impacts convicted felons’ ability to gain stable employment and housing. Under the current statute, bringing an expungement motion is expensive, the statute does not guarantee an expungement will be granted, the expungement process is difficult to navigate pro se, and the statute limits what felons are eligible for expungement.

The solution is to automatically expunge first-time felony drug possession convictions after five years. If there is any dispute over whether the expungement should be granted, the prosecuting agency can file a motion to object to the expungement and hold a brief hearing with the judge. This shifts the burden to the state to show by clear and convincing evidence that public safety concerns outweigh the disadvantages to the convicted felons. As a result, this will provide a stronger incentive for the state to analyze why this expungement should be denied. Automatic expungement of first-time felony drug possession convictions after five years would allow

201. Id.
202. Id.
203. See id.
for proper rehabilitation, enhance the economy, and reduce recidivism. Without the opportunity to expunge a first-time felony drug possession conviction after five years, convicted felons will never be given a chance to fix their mistakes and become functioning members of the Minnesota community.