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AN AMICUS PERSPECTIVE ON RECENT MINNESOTA CRIMINAL EXPUNGEMENT

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I. Introduction

This article explores the public policy considerations surrounding criminal conviction record sealing and the effect of two recent appellate decisions on criminal expungement law in Minnesota.[1] Legal Aid and other service providers for Minnesota's low-income population have a strong interest in adequate post-conviction remedies, as individuals with criminal records have a very difficult time obtaining stable housing and employment. Southern Minnesota Regional Legal Services participated as *amicus curiae* when, for the first time in over 25 years, the Minnesota Supreme Court accepted a case centered on a court's inherent authority to seal criminal records.[2]

A Perfect Storm

Minnesota's ex-offender population started increasing during the same time that Minnesota government agencies made criminal conviction data easily accessible and employers and landlords began performing criminal background checks at unprecedented levels. These trends, coupled with a series of restrictive Minnesota Court of Appeals decisions about criminal expungements, have created an extremely hostile environment for individuals with a criminal record who are attempting to reintegrate into society.

Minnesota has seen a dramatic rise in the number of criminal convictions in the last few decades. In 1990, according to the Minnesota Sentencing Guidelines Commission, Minnesota courts processed 8884 felony

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[1] The scope of this article is limited to criminal conviction expungements, which are largely a creature of case law. Minn. Stat. Ch. 609A and Minn. Stat. § 299C.11 (2006) govern expungement of criminal records for unprosecuted arrest records, for cases that were charged but resolved in favor of the defendant, for cases in which juveniles were certified as adults, and for certain first-time drug offenses.

[2] The Minnesota Supreme Court has decided two criminal expungement cases since 1981, however these cases centered on very narrow issues. In re Quinn, 517 N.W.2d 895 (Minn. 1994) involved sealing non-judicial, law enforcement, and prosecutorial data. In State v. Ambaye, 616 N.W.2d 257 (Minn. 2000), the Court addressed the question of relief when an individual was found not guilty by reason of insanity.

sentences.[3] By 2007, the number had grown to 16,168.[4] This number does not include gross misdemeanor or misdemeanor convictions. Minnesota prisons released 8187 inmates in 2007.[5] This number does not include the thousands of other inmates who are released from county correctional facilities or discharged from probation each year.

At the same time that the number of criminal convictions increased, the Minnesota Legislature and courts made criminal conviction data much more accessible to the general public. Four years ago, employers and landlords had to pay a fee to the Bureau of Criminal Apprehension (BCA) or travel to county courthouses to view criminal records for their applicants. In the last three years, two major state entities began posting criminal conviction records online for free: the BCA[6] and the Minnesota Judicial Branch.[7]

Employers have also recently stepped up their efforts at screening applicants for criminal records. In 1996, private employers checked criminal records for just over 50% of job applicants. By 2004, close to 80% of employers performed criminal background checks.[8] Jobs in the health care field, one of the most in-demand employment areas, require background checks to ensure the safety of the population served. However, these checks are so extensive that they disqualify applicants based on minor property crimes, such as writing a worthless check.[9] Ex-offenders face equally challenging barriers in their search for affordable housing, as public housing and private landlords perform extensive background checks on applicants.[10]

The Minnesota Legislature has recognized the need for reform in the area of ex-offender re-entry. Several commissions and working groups have convened and produced recommendations to ease restrictions on

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[3] Minn. Sentencing Guidelines Comm'n, Sentencing Practices: Annual Summary Statistics for Felony Offenders Sentenced in 2007 at 12 (2008), http://www.msgc.state.mn.us/data_reports/2007/data_summary_2007.pdf.

[4] *Id.* at 13.

[5] Minn. Dept. of Corr., Adult Inmate Profile, as of 01/01/2008, at 5 (2008), http://www.doc.state.mn.us/aboutdoc/stats/documents/AdultInmateProfile01-01-2008.pdf.

[6] *See* Minnesota Bureau of Criminal Apprehension, Minnesota Public Criminal History, https://cch.state.mn.us/ (last visited February 8, 2009). This website was created as a result of a legislative change in 2003. S.F. 0002, 83rd Leg., 1st Spec. Sess. (Minn. 2003).

[7] In 2005, the Minnesota Supreme Court promulgated a new rule allowing remote access to criminal conviction records through the Minnesota Judicial Branch website. Minn. R. Pub. Access Rec. Jud. Branch 8 (2008). http://www.mn.courts.gov/Documents/0/Public/Rules/pub_acess_rules_(eff-03-01-2008).pdf. Minnesota Court Information System (MNCIS) records are available at: Minnesota Trial Court Public Access (MPA) Remote View, http://pa.courts.state.mn.us/default.aspx.

[8] *See* Evren Esen, Workplace Violence Survey, Society for Human Resource Management, at 18 (2004).

[9] *See* Minn. Stat. § 245C.15 (2007).

[10] Nat'l Hous. Law Project, An Affordable Home on Re-Entry: Federally Assisted Housing and Previously Incarcerated Individuals 3-4 (2008), http://www.nhlp.org/ (follow "An Affordable Home on Reentry" hyperlink). The regulations that control eligibility for public housing are: 24 C.F.R. § 982.553 (2007), 24 C.F.R. § 960.204 (2007), and 24 C.F.R. § 982.553 (b) (2007).

criminal record sealing.[11] To date, the Minnesota Legislature has not passed any significant criminal expungement measures or re-entry reform, despite numerous bill introductions each year.[12] Because the legislature has not passed any legislation in this area, it is important that the courts offer guidance and remedies, especially because the issue of inherent authority is a unique judicial function.

II. A BRIEF HISTORY OF MINNESOTA CRIMINAL EXPUNGEMENT CASE LAW

The central issue in any criminal expungement case is the extent to which a district court judge may seal an individual's criminal record. Therefore, it is important to understand how many state, local, and federal agencies maintain, disseminate, and use criminal records to disqualify individuals for employment and other opportunities. In any criminal conviction case, the following non-judicial agencies, departments or officials may hold an individual's record: police department; sheriff department; city attorney; county attorney; Minnesota Attorney General; district court; probation department; county diversion program; the Minnesota Bureau of Criminal Apprehension; the FBI; the Minnesota Department of Human Services; the Minnesota Department of Health; and the Minnesota Department of Corrections. In every expungement case, an advocate's goal is to seal all records that would provide a meaningful remedy for their client. Minnesota appellate courts have been inconsistent in their rulings regarding when a judge may seal criminal records held by non-judicial agencies.

A. *State v. C.A.* [13]

The most important criminal expungement case in Minnesota is *State v. C.A.* This case involved a 1977 conviction for consensual sodomy, which was later set-aside on appeal.[14] The Minnesota Supreme Court ruled on whether the individual could obtain relief under Minnesota Statute § 299c.11.[15] However, the Court extensively explained its position on inherent judicial authority to expunge criminal records in dicta.[16]

The court held that a district court judge may use their inherent judicial powers to expunge criminal

[11] *See*, *e.g.*, Criminal and Juvenile Justice Information Policy Group, Report to the Legislature on Background Checks and Sealing of Criminal Records (2008), http://www.crimnet.state.mn.us/docs/BGCheckSealingReportFinal2008.pdf; Collateral Sanctions Comm., Criminal Records and Employment in Minnesota, Report and Recommendations of the 2007 Collateral Sanctions Committee (2008), http://www.msgc.state.mn.us/projects/collateral_sanctions/Collateral_Sanctions_Report_2008.pdf.

[12] *See*, *e.g*, S.F. 3442, 85th Leg., Reg. Sess. (Minn. 2008); H.F. 3859, 85th Leg., Reg. Sess. (Minn. 2008).

[13] *See* State v. C.A., 304 N.W.2d 353 (Minn. 1981).

[14] *See id.* at 355.

[15] *See id.* at 357. Minn. Stat. § 299c.11 (2007) governs sealing law enforcement data dor cases that were never charged.

[16] *See id.* at 357-358.

conviction records in the absence of statutory authority.[17] A district court judge may use their inherent authority to expunge criminal records if the constitutional rights of the petitioner have been violated, or, if no constitutional violation has been alleged, "[u]nder appropriate circumstances...when the relief requested is necessary to the performance of a judicial function as contemplated by our state constitution."[18] The court stated that district courts, in determining whether the latter test was met, balance "[w]hether the expungement will yield a benefit to the petitioner commensurate with the disadvantages to the public from the elimination of the record and the burden on the court of issuing, enforcing and monitoring an expungement order."[19] The *C.A.* court suggested as its sole example that use of a district court's inherent authority would be appropriate "to control court records and agents of the court in order to reduce or eliminate unfairness to individuals."[20] The court cautioned that district court judges should proceed cautiously when exercising inherent judicial powers.[21]

The court specified which agencies would be subject to an expungement order if a district court judge used inherent judicial power to seal a criminal record under "appropriate circumstances."[22] The order could extend to "court records and agents of the court,"[23] which could include the district court, county attorney "or other attorneys."[24] Additionally, named individuals in police departments, officials in charge of correctional facilities, or members of the corrections board could be subject to orders not to disclose to a limited extent, especially when disclosure is made to the BCA.[25]

Because *C.A.* was decided in 1981, when Minnesota's Data Practices laws were much different and records were generally more private and more difficult to obtain, the court was silent about all of the records that would need to be sealed today to ensure a complete remedy for an individual with a conviction record. The court said nothing about sealing the records that the B.C.A. actually held, as well as probation records, Department of Health or Human Services records, and records of the Attorney General.

B. Subsequent Appellate Cases

In the years following *C.A.*, district courts routinely sealed judicial and executive branch records if the individual met *C.A.'s* balancing test. For example, in *State v. P.A.D.*, the Court of Appeals held that "[t]he

[17] *See id.*at 358.

[18] *See id.* (citing *In re* Clerk of Lyon County Courts' Compensation, 241 N.W.2d 781, 786 (Minn. 1976)).

[19] *See C.A.*, 304 N.W.2d at 358.

[20] *See id.*

[21] *See id.* at 359.

[22] *See id.* at 358.

[23] *See id.*

[24] *See id.* at 360.

[25] *See id.* at 360-361.

court, to fashion a meaningful remedy for P.A.D., is empowered to order the expungement of all records held by the B.C.A. which are now available to the public." [26]

In 1999, the court of appeals began restricting the expungement remedy, emphasizing the Separation of Powers principle over the rights of an individual to obtain an adequate remedy. Restriction began in 1999 with *State v. T.M.B.*[27] The *T.M.B.* court held that fashioning a meaningful remedy is not an essential judicial function that could warrant sealing records held by another branch of government.[28][This holding was echoed in several published and unpublished cases, most notably *State v. Schultz*.[29] The *Schultz* decision was so far-reaching that it only allowed district court judges to seal records held by an agency of the executive branch if a violation of constitutional rights had occurred or if the executive branch had abused its discretion in the case.[30]

III. RECENT APPELLATE CASE LAW

Many, but not all, district court judges stopped sealing all non-judicial records after *Schultz* was decided in 2004. Sealing only judicial branch records, when so many other agencies hold and disseminate criminal records, made the inherent authority expungement a hollow remedy. Employers and landlords could still access the records through the B.C.A., the sheriff, the police, or any number of private background check agencies that draw data from these sources.

At the same time that district courts stopped routinely sealing non-judicial records, the B.C.A. and the Minnesota Judicial Branch began posting conviction data online for free, and background checks became increasingly common.[31] Many individuals with an interest in helping low-income clients and clients who otherwise suffered because of a criminal conviction wanted judges to avoid such an overly restrictive view of the court's inherent authority and provide a meaningful remedy for individuals seeking an expungement. This year, the Minnesota Court of Appeals and the Minnesota Supreme Court revisited the issue of a court's inherent authority to seal criminal records in two important new cases.

A. *State v. V.A.J.* [32]

The petitioner in *State v. V.A.J.* requested expungement of a 2000 misdemeanor theft conviction under the

[26] *See* State v. P.A.D., 436 N.W.2d 808, 810-11 (Minn. Ct. App. 1989).

[27] *See* 590 N.W.2d 809 (Minn. Ct. App. 1999).

[28] *See id.* at 813.

[29] *See Schultz*, 676 N.W.2d 337, 343 (Minn. Ct. App. 2004).

[30] *See id.*

[31] *See supra*, nn. 6-8.

[32] *See* 744 N.W.2d 674 (Minn. Ct. App. 2008) *rev. denied* (Oct. 1, 2008).

court's inherent authority.[33] She wanted an expungement for employment purposes, and appealed the district court's decision to seal only her court records.[34] The court of appeals reversed the district court, acknowledging that sealing judicial records did not provide a meaningful remedy, especially when so many executive agencies were posting records online.[35] The court reiterated important dicta from *C.A.* - that courts must proceed cautiously when sealing records pursuant to the court's inherent authority, but that this guidance did not mean that a court could not seal non-judicial records when doing so is conducive to fashioning a meaningful remedy.[36] The court explained that the judiciary may intrude on other branches of government to protect against actions by other branches that could "curtail its powers, impair its efficiency, or otherwise to accomplish its purpose for which it was created...or to vindicate a petitioner's legal rights in order to protect judiciary's strength and independence."[37]

The *V.A.J.* court held that the judiciary could control court records and agents of the court.[38] The court reasoned that criminal records *are* court records if they contain data generated as a result of a judicial proceeding.[39] Essentially, if a record stemmed from a court proceeding, then a court has jurisdiction over it and may seal therefore seal it.[40] This meant that courts could seal judicially created public records maintained by the B.C.A..[41]

The state requested certiorari, which the Minnesota Supreme Court granted and stayed on April 15, 2008. The supreme court stayed the review because it had already granted review to a case with an identical issue, *State v. S.L.H.*, 755 N.W.2d 271 (Minn. 2008). On October 1, 2008, the Minnesota Supreme Court vacated review for *V.A.J.*, after deciding *S.L.H.*

B. *State v. S.L.H.* [42]

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 achieve her employment goals.[43] The district

[33] *See id.* at 675-676.

[34] *See id.* at 675.

[35] *See id.* at 677.

[36] *See id.* at 676.

[37] *See id.* at 676-677 (citing *Lyon County*, 241 N.W.2d at 784).

[38] *See V.A.J.*, 744 N.W.2d at 674.

[39] *See id.*

[40] *See id.* at 678.

[41] *See id.*

[42] *See S.L.H.*, 755 N.W.2d 271 (Minn. 2008)

[43] *See id.* at 273.

court sealed only the petitioner's court records - not the petitioner's criminal records - and the petitioner appealed.[44] The Minnesota Court of Appeals affirmed, holding that the district court did not have authority to expunge executive branch criminal records absent a constitutional violation.[45]

The supreme court affirmed the court of appeals, but offered a broader remedy because it did not limit it to sealing non-judicial records to cases where a violation of constitutional rights had occurred.[46] The supreme court articulated a test that courts could apply to inherent authority expungement cases. 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.[47] Second, the court should apply the balancing test in *C.A.*, whether an expungement would yield a benefit to the petitioner equal to the disadvantages to the public and the court.[48] The court emphasized that judges should proceed cautiously when exercising inherent authority, affording deference to other branches of government when legislative authority mandates use of those records.[49]

The Court did not believe that S.L.H. presented "appropriate circumstances" for invoking the court's inherent authority to seal non-judicial records.[50] Helping individuals achieve their employment goals was not an essential court function.[51] The court noted that unlike the petitioner in *C.A.*, S.L.H.'s conviction was not set-aside.[52] Additionally, granting her expungement request would force executive agencies to seal records that the legislature intended to be used for background checks, such as Department of Human Services records for direct care jobs.[53]

Chief Justice Anderson's concurrence emphasized that courts may use their inherent authority to seal non-judicial records under "appropriate circumstances."[54] He also explained which records could be sealed if a

[44] *See id.*

[45] *See id.* at 274.

[46] *See id.* at n. 3.

[47] *See id.* at 276-277.

[48] *See id.* at 276.

[49] *See id.* at 279.

[50] *See id*. at 277.

[51] *See id*. at 277-278.

[52] *See id*. at 277.

[53] *See* id. at 278-80; *see* Minn. Stat. Ch. 245C.

[54] *See S.L.H.*, 755 N.W.2d at 281-82.

judge determined that a petitioner presented "appropriate circumstances" for an inherent authority expungement.[55] His analysis mirrors the court's in *C.A.*[56]

IV. RECONCILING RECENT CASE LAW DEVELOPMENTS

V.A.J. and *S.L.H.* present two very different outcomes for cases involving the same issue: whether a district court judge may seal non-judicial criminal records using a court's inherent authority. Both petitioners had one old criminal conviction that occurred when they were young.[57] Both had compelling reasons for requesting expungement.[58] Yet V.A.J. was granted relief, while S.L.H. was not. The *V.A.J.* court emphasized the ability of the judicial branch to affect other branches of government, but the *S.L.H.* court cautioned that such action should be used sparingly.[59] Both cases remain good law in Minnesota today. Practitioners must be able to reconcile the two cases, as well as *C.A.* - the seminal expungement case in Minnesota - in order to fully understand the inherent authority remedy for their clients.

A. Factual Differences

S.L.H. and *V.A.J.* can be distinguished factually, which may begin to explain the different outcome in each case. Although both cases involved an old criminal conviction, the nature of the underlying convictions may have contributed to the different decisions. *V.A.J.* involved a property crime of theft.[60] The case was originally charged as a gross misdemeanor, but the petitioner pled to a misdemeanor charge.[61] There was no indication in the record that the case ever rose to the level of a felony offense.[62] *V.A.J.*, therefore, did not deal with a crime against a person.

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[55] *See id*.

[56] *See id*. at 280-82. *See supra*, section II A.

[57] *See*, *V.A.J.*, 744 N.W.2d; *S.L.H.*, *see S.L.H.*, 755 N.W.2d at 273.

[58] *See*, *V.A.J.*, 744 N.W.2d at 675-76 (V.A.J. "was scheduled to earn a finance degree and was concerned that her conviction would prevent her from using her degree to secure future employment"); *see S.L.H.*, 755 N.W.2d at 273 (S.L.H. was a single parent and solely responsible for supporting her family. *Id.* She had specific career ambitions but was afraid she would not be able to accomplish them absent expungement of her criminal record.)

[59] *See*, *V.A.J.*, 744 N.W.2d at 676-77 ("The judiciary, by means of its inherent authority, is able to protect against actions by the other branches of government that could 'curtail its powers, impair its efficiency, or otherwise preclude it from accomplishing the purpose for which it was created.'" (quoting State v. T.M.B., 590 N.W.2d 809, 811 (Minn. Ct. App.1999) (citing *Lyon County*, 308 Minn at 177, 241 N.W.2d at 784.)); *S.L.H.*, 755 N.W.2d at 278 (citing *C.A.*, 304 N.W.2d at 359, for the proposition that because a core judicial function is not present in this case, "the courts must proceed cautiously.")

[60] *See*, *V.A.J.*, 744 N.W.2d at 675.

[61] *Id*.

[62] *See*, *generally*, *V.A.J.*, 744 N.W.2d.

The underlying charge in *S.L.H.*, meanwhile, was more severe than in *V.A.J.* T he petitioner in *S.L.H.* was originally charged with two counts of a felony second-degree controlled substance crime.[63] The supreme court found it noteworthy that the petitioner had 17 grams of cocaine in her possession when she was arrested.[64] The sentencing court stayed imposition of her felony sentence and the case was deemed a misdemeanor only after she completed three years of probation.[65] The Court also noted that S.L.H. had been subsequently arrested but not charged in 2004, only two years before she had requested her expungement.[66]

V.A.J. presented no subsequent arrests.[67] Arguably, possessing a large quantity of cocaine in a car and being arrested two years before an expungement request implicates public safety concerns much more than an isolated misdemeanor property crime. *C.A.* also involved a less severe crime than *S.L.H.*. C.A.'s conviction involved consensual sodomy,[68] a crime that was later declared unconstitutional for violating an individual's right to privacy under the Minnesota Constitution.[69][

Both petitioners in V.A.J. and S.L.H. had employment concerns stemming from their criminal records.[70] V.A.J. had been denied employment positions because of her criminal record, and she was concerned that her record would prevent her from obtaining employment after she finished her finance degree.[71] S.L.H. also presented employment problems, but the Court classified her employment problems as merely aspirational,[72] whereas the court in V.A.J. noted the petitioner's actual employment hardship stemming from her criminal record.[73] The Court noted that S.L.H. believed that an expungement would enable her to "be better able to support [her] family" and "to be a more productive member of society."[74] The Court later stated that, "helping individuals achieve employment goals is not 'essential to the existence, dignity, and function of a court because it is a court."[75]

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[63] *S.L.H.*, 755 N.W.2d at 273.

[64] *Id.*

[65] *Id.*

[66] *Id.* at n. 1. The court also noted that S.L.H. had sealed this arrest under Minn. Stat. § 299c.11. *Id.*

[67] *See, generally, V.A.J.*, 744 N.W.2d at 675.

[68] *See, C.A.*, 304 N.W.2d at 355.

[69] *See*, Doe v. Ventura, No. MC 01-489, 2001 WL 543734, at * 9 (D. Minn. May 15, 2001); *see*, Devescovi v. Ventura, 195 F.Supp.2d 1146 (D. Minn. 2002).

[70] *See, supra*, n. 58.

[71] *V.A.J.*, 744 N.W.2d 674, 675 (Minn. Ct. App. 2008).

[72] *See, supra, n. 58.*

[73] *Id.*

[74] *See S.L.H.*, 755 N.W.2d at 273.

[75] *See Id.* at 277-278.

Employment was also problematic for the petitioner in S.L.H. because of the nature of her desired employment. S.L.H. wanted to work with vulnerable people as a medical assistant and Head Start teacher.[76] Jobs that involve direct contact with vulnerable people require background checks through the Minnesota Department of Human Services.[77] These checks are mandated by the legislature and administered and enforced through the executive branch.[78] S.L.H. could be disqualified for 15 years based on her felony drug charge under Minnesota's background study law.[79] Her 15-year disqualification period had not yet expired when she petitioned the court for an expungement. S.L.H.'s admitted desire to work in a field regulated by the executive branch contributed to the Court's decision to refrain from granting her full relief.[80] Sealing records held by these agencies would contravene the intent of the legislature and intrude on an executive function to protect the state's most vulnerable population.[81] By contrast, the V.A.J. case involved no record of desiring to work with vulnerable people.[82]

B. Legal Similarities

The factual differences mentioned above may have contributed to the different outcomes in *V.A.J.* and *S.L.H.*. If the Minnesota Supreme Court had found a significant legal error in *V.A.J.*, they could have reviewed the case, as they had already granted review and stayed it pending the decision in *S.L.H.*, but they declined to do so, dismissing the review altogether on October 1, 2008.[83] Therefore, both cases offer valid guidance for when a court may use its inherent authority to seal criminal records.

V.A.J. and *S.L.H.* offer similar legal bases for when a judge can exercise inherent authority to seal non-judicial records. Both cases rely heavily on *C.A.* for their legal analysis. *V.A.J.* is focused on the meaningful remedy aspect of *C.A.*, whereas *S.L.H.* is focused on the language in *C.A.* cautioning courts to tread carefully.

The *V.A.J.* court summarizes *C.A.* as follows:

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[76] *See Id*. at 273.

[77] *See*, Minn. Stat. § 245A.04, subd. 3 (2006) (describing Minnesota Department of Human Services background studies and stating employees providing direct-contact services in personal-care-provider organizations shall be studied), and subd. 3(d) (stating that after background study, individual may be disqualified from holding a direct-contact position at licensed facility.)

[78] *See*, Minn. Stat. § 144.057 (2006) (stating background studies for MDH shall be conducted by DHS.)

[79] *See* Minn. Stat. § 245C.15, subd. 2 (2007).

[80] *See S.L.H.*, 755 N.W.2d at 273.

[81] *See S.L.H.*, 755 N.W.2d at 279, n.8.

[82] *See V.A.J.*, 744 N.W.2d at 674.

[83] *See* State v. V.A.J., 744 N.W.2d 674 (Minn. Ct. App. 2008).

A district court has inherent authority to expunge records when "necessary to the performance of [] unique judicial functions."...The court's inherent authority to control judicial functions includes control over court records and agents of the court...When a court orders expungement by way of inherent authority it "must proceed cautiously in exercising that authority in order to respect the equally unique authority of the executive and legislative branches of government."...But this does not mean that a court is precluded from sealing records controlled by other branches when doing so is necessary or conducive to providing a meaningful remedy for the petitioner.[84]

The *S.L.H.* court offers a similar summary of *C.A.*:

[In *C.A.*]...we first identified the judicial function at issue...because...the judiciary is limited to those functions that are 'essential to the existence, dignity, and function of a court because it is a court.' The judicial function at issue in *C.A.* was that of controlling 'court records and agents of the court in order to reduce or eliminate unfairness to individuals." We explained that..."[under appropriate circumstances" the judiciary's inherent authority "extends to the issuance of expungement orders affecting court records an agents of the court."... Counseling restraint in the exercise of the judiciary's inherent expungement authority, we explained that this authority extends only to its unique judicial functions," and that "courts must proceed cautiously in exercising that authority in order to respect the equally unique authority of the executive and legislative branches of government . . ..[85]

All three major criminal expungement cases offer the same basic rule: District court judges, when deciding a criminal conviction expungement case, must proceed cautiously, but this does not mean that they can never use their inherent authority to seal non-judicial records. Courts may use their inherent authority in appropriate circumstances to seal non-judicial records when doing so is necessary for the performance of a unique judicial function.

The *C.A.* court characterized the requisite judicial function as "controlling court records and agents of the court in order to reduce or eliminate unfairness to individuals, even though the unfairness is not of such intensity as to give a constitutional dimension."[86] The *S.L.H.* court cited the same judicial function. .[87]

The *V.A.J.* court focused on different judicial functions, namely protecting judicial integrity and vindicating a person's legal rights:

Judicial intrusions upon the functions of other branches of government are permissible in limited situations...The judiciary, by means of its inherent authority, is able to protect against actions by other branches of government that could "curtail its powers, impair its efficiency, or otherwise preclude it from accomplishing the purpose for which it was created."...The judiciary may intrude upon other branches of government in order to vindicate a petitioner's legal rights or in order to protect the judiciary's strength and

[84] *See V.A.J.*, 744 N.W.2d at 676 (citing *C.A.*, 304 N.W.2d 353, 353-360).

[85] *See S.L.H.*, 755 N.W.2d at 276 (citing *C.A.*, 304 N.W.2d at 358-359).

[86] *See C.A.*, 304 N.W.2d at 358.

[87] *See S.L.H.*, 755 N.W.2d at 277.

independence.[88]

While the judicial functions in *S.L.H.* and *V.A.J.* are different, both originated in a 1976 Minnesota Supreme Court case, *In re Clerk of Lyon County Courts' Comp.*.[89] *Lyon County* involved a district court's power to set a minimum salary for district court clerk.[90] The *Lyon* court explained at length the history and parameters of judicial inherent authority in Minnesota.[91]

The language and outcome of *V.A.J.* is different than *S.L.H.* because the *V.A.J.* court used a different judicial function as a basis to exercise inherent authority. The *V.A.J.* court was more concerned with a court's ability to control court records and thus provide a meaningful remedy. This judicial function, coupled with the fact that V.A.J.'s rather innocuous misdemeanor presented no complications with executive-branch access to records for statutorily mandated background checks, explains why V.A.J.'s case was successful. The *S.L.H.* court, on the other hand, focused on unfairness to individuals and did not emphasize protecting judicial integrity.[92] *S.L.H.* also involved a more severe underlying felony conviction, a subsequent arrest, and a desire to obtain an expungement to avoid executive-branch background checks that were mandated by the legislature. [93] Ultimately, the *S.L.H.* court concluded that sealing the petitioner's executive-branch records did not implicate a core judicial function, and therefore the court was not warranted in exercising its inherent authority to seal non-judicial records because no appropriate circumstances existed.[94]

V. Where Do We Stand Post-S.L.H.?

S.L.H. and *V.A.J.* offer several lessons for expungement practitioners. First, and most importantly, the two cases reversed the recent appellate trend of prohibiting the exercise of inherent authority to seal conviction records unless the conviction involved a constitutional violation.[95] Considering that there is no positive appellate authority for claiming a constitutional rights violation as a basis for an inherent authority case,[96] today the threshold question for any inherent authority expungement case should be: does this case present the appropriate circumstances for a judge to exercise inherent authority, namely, what unique judicial

[88] *See V.A.J.*, 744 N.W.2d at 676-677.

[89] 241 N.W.2d 781 (Minn. 1976).

[90] *See Lyon County*, 241 N.W.2d at 782.

[91] *See id.* at 782-83.

[92] *See S.L.H.*, 755 N.W.2d at 277.

[93] *See id.*

[94] *See id.*

[95] *See* State v. Schultz, 676 N.W.2d 343 (Minn. App. 2004).

[96] The court of appeals held that S.L.H.'s conviction did not constitute cruel and unusual punishment or a due process violation. *See* State v. S.L.H., No. A06-1750, 2007 WL 2769652, at *2 (Minn. Ct. App. Sept. 25, 2007). *S.L.H.* did not raise these issues in front of the Minnesota Supreme Court.

function is implicated in this case?

The Minnesota Supreme Court has offered one example in *C.A.* and *S.L.H.*, namely, controlling court records and agents of the court to reduce or eliminate unfairness to individuals.[97] The Minnesota Court of Appeals has offered two more functions, to protect against intrusions by other branches of the government that could curtail the judiciary's power and vindicating a petitioner's legal rights.[98]

As we have learned from *S.L.H.*, courts must proceed cautiously, so it is important for practitioners to try to understand which agencies have a vested interest or legislative authority to retain the individual's conviction record, and whether the individual can show a compelling reason why the court should order another branch to seal its record.[99]

The second question to ask when considering an inherent authority expungement case is whether the individual can show that they meet the balancing test set out in *C.A.*: "whether expungement will yield a benefit to the petitioner commensurate with the disadvantages to the public from the elimination of the record and the burden on the court in issuing, enforcing and monitoring an expungement order."[100]

Several factors are important to meet the balancing test. As the *C.A.* court noted, "[a]n order based on inherent authority of the courts will not be issued in a pointless attempt to confine the dissemination of facts already widely known and recorded in the public sector."[101] This means that if a criminal case was widely publicized, then an expungement is not an adequate remedy because a district judge does not have jurisdiction over the media in an expungement case and the conviction would therefore be publicly available despite an expungement order.[102] Another factor in the balancing test is hardship. Practitioners should be able to make an adequate record of hardship stemming from the record. The *S.L.H.* court did not look favorably upon an individual seeking to find better employment. However, individuals who cannot meet even their basic needs because of their record are in a much stronger position to ask for relief. For example, can the individual find any type of employment? Does the individual have to rely on public assistance as a main source of income? Was the individual denied housing because of their conviction? A practitioner must also be able to make an adequate record of rehabilitation for the balancing test. How much time has passed since the individual was discharged from probation? Has the individual reoffended since the conviction? What steps has the individual taken to improve their education or job skills? Has the individual participated

[97] *See C.A.*, 304 N.W.2d 353 at 355; *see S.L.H.*, 755 N.W.2d at 276.

[98] *See V.A.J.*, 744 N.W.2d at 676-77.

[99] In *C.A.*, the petitioner's conviction was set-aside on appeal, so a conviction record was especially unfair. Similar situations may include convictions that are old enough that they would have no effect on an individual's criminal history score or legislatively mandated restrictions, cases that have been pardoned, vacated and dismissed, cases where adjudication was withheld, or other cases where courts intended a final result other than a conviction, but do not qualify for an expungement under chapter 609A.

[100] *See C.A.*, 304 N.W.2d at 358.

[101] *See id*.

[102] District court judges do not have jurisdiction over records maintained by private background check companies and data harvesters, such as Choice Point, but once an expungement has been granted, agencies must update their records in accordance with accuracy requirements in the federal Fair Credit Reporting Act. 15 U.S.C.A. § 1681 (2007).

in volunteer or community work? Has the individual participated in treatment programs for drugs, alcohol, or anger management?

Finally, a practitioner should consider which records a district court judge should seal when granting an inherent authority expungement. *C.A.* stated that under appropriate circumstances, a district court judge could seal court records and records held by agents of the court. The *C.A.* court named the following agencies and individuals as legitimate subjects of an order: the clerk of district court, the county attorney, the sheriff, and individuals in police departments, officials in charge of correctional facilities, and members of the board of corrections could be ordered not to disclose the conviction record to the B.C.A.. They could order the FBI to return data to the sheriff.[103] The concurrence in *S.L.H.* offered similar guidance.[104] Even though twenty seven years had elapsed, the *S.L.H.* court did not update *C.A.*'s analysis of which records could be subject to an inherent authority expungement order under appropriate circumstances, but the *V.A.J.* court did. The *V.A.J.* court considered the fact that many executive agencies post information online and disseminate criminal data like never before:

[W]ith the increasing capabilities of electronic sharing of information and increased public availability of criminal records, the extent of judicial intrusion upon the functions of other branches in furnishing expungement remedies requires clarification and direction.[105]

V.A.J. did not list specific agencies, but it set out a broad rule to guide judges when sealing executive branch records:

Reconciling the line of expungement cases gives authority to the district court, in the exercise of its inherent authority, to seal records that were initially created and developed through the judicial process and are presently being held by an executive agency, in the case of BCA records, public information.[106]

The *V.A.J.* court limited the reach to records created as a result of a judicial proceeding. This means that internal law enforcement records, arrest records that were never charged, and other records not created in a court are not subject to a district judge's order. However, any executive branch agency holding court-generated information is fair game.[107]

VI. Conclusion

Thousands of Minnesotans struggle to meet their basic needs due to their criminal conviction record. Attorneys who are interested in helping clients vindicate their legal rights and escape poverty can use

[103] *See C.A.*, 304 N.W.2d at 360-362.

[104] *See S.L.H.*, 755 N.W.2d at 281-282.

[105] *See V.A.J.*, 744 N.W.2d at 677.

[106] *See id.*

[107] The *V.A.J.* concurrence states: "[F]or records generated because of and through the mechanisms of the judicial system the district court has inherent expungement authority no matter where else those records might be kept." *Id.* at 678.

criminal expungement as a tool to help their clients. This motion requires careful consideration of the client's hardship and rehabilitation, as well as the government's interest in retaining the records, so that courts can exercise their inherent authority in a cautious but meaningful way.