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## WISCONSIN LEGISLATIVE COUNCIL

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*Terry C. Anderson, Director  
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TO: SENATOR JON B. ERPENBACH

FROM: <sup>DM</sup> David Moore, Staff Attorney; and <sup>CK</sup> Larry Konopacki, Principal Attorney

RE: Effect of Felony Conviction Expunction on Concealed Carry License Eligibility

DATE: November 21, 2014

### INTRODUCTION

You asked whether a person who has had the record of a felony conviction expunged may obtain a license to carry a concealed weapon in Wisconsin. To obtain a concealed carry license, among other criteria, a person must not be prohibited from possessing a firearm under the Wisconsin or federal firearm possession statutes.

The Wisconsin firearm possession law prohibits a person who has been convicted of a felony from possessing a firearm unless a specific exception applies. The firearm possession statute does not contain an exemption for felony convictions for which the record was expunged. Therefore, with respect to state restrictions, the answer to your question turns on whether a person remains "convicted" of an offense if the person has had the record of the conviction expunged under Wisconsin law.

Unlike the state firearm possession law, the federal firearm possession law specifically provides that expunged felony convictions are no longer considered convictions for purposes of federal law. However, a state's expunction process must meet the federal meaning of expungement, or this exception does not apply. To do so, the state expunction process must completely remove the effects of the conviction.

In summary, as described in more detail in this memorandum, expunction of a conviction in Wisconsin only requires the elimination of court records related to the conviction, not the elimination of records held by law enforcement or other agencies or the vacation of the

underlying conviction.<sup>1</sup> Therefore, it appears to us that a person who has had the record of a felony conviction expunged continues to have been convicted of that offense and may not possess a firearm or obtain a concealed carry license under Wisconsin law because of that conviction. It also appears possible that a conviction for which the record is expunged through Wisconsin's expunction process would not qualify for the exception to the federal firearms possession restriction because such a conviction is arguably not completely eliminated.

However, it is our understanding that the Department of Justice (DOJ) considers an expunged conviction to be completely eliminated and has concluded that a person who has had a felony conviction expunged is not disqualified from possessing a firearm under federal or state law or obtaining a concealed carry license in Wisconsin as a result of that past conviction. Because no law or court decision specifically addresses the effect of a Wisconsin expunction of a felony conviction on the treatment of the conviction under the federal or state firearm possession statutes, and there is disagreement as to how these statutes should be interpreted, it is not possible to be certain how a court would resolve this issue.

## **BACKGROUND**

Wisconsin law authorizes a person to apply for a license, issued by DOJ, to carry a concealed weapon if he or she satisfies certain requirements, such as providing proof of firearms training. Persons licensed to carry a concealed weapon are exempt from the general prohibition against carrying a concealed weapon. DOJ may not issue a concealed carry license to an individual who is prohibited from possessing a firearm under s. 941.29, Stats., or who is prohibited from possessing a firearm under 18 U.S.C. s. 922 (g), among other restrictions.

### **Persons Prohibited from Possessing Firearms**

#### **State Law**

Section 941.29, Stats., prohibits certain persons from possessing firearms. Most relevant to your question,<sup>2</sup> under this statute, a person generally may not possess a firearm if any of the following circumstances applies:

- (1) The person was convicted of a felony in this state.
- (2) The person was convicted of a crime elsewhere that would be a felony if committed in this state.

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<sup>1</sup> This memorandum only evaluates the effect of expunction of a felony conviction under Wisconsin's expunction statute. Because expunction of convictions varies from state to state, the result may be different if a felony conviction is expunged under the laws of a different state.

<sup>2</sup> The statute also prohibits other persons from possessing a firearm, such as persons who have been involuntarily committed for treatment and ordered not to possess a firearm or are subject to certain types of restraining orders. This memorandum does not discuss the provisions related to these circumstances.

- (3) The person was adjudicated delinquent for an act committed on or after April 21, 1994, that if committed by an adult in this state would be a felony.

The firearm possession statute also sets forth certain exceptions under which a person who is prohibited from possessing a firearm because of a felony conviction or delinquency adjudication may lawfully possess a firearm. This statute provides that the prohibition against possessing a firearm does not apply to any of the following:

- (1) A person who has received a pardon with respect to the disqualifying offense and has been expressly authorized to possess a firearm under federal law.<sup>3</sup>
- (2) A person who has obtained relief from disabilities under 18 U.S.C. s. 925 (c). "Relief from disabilities" refers to a procedure available under federal law which allows the U. S. Attorney General to grant a person who is prohibited from possessing a firearm under federal law relief from this prohibition. The Attorney General has delegated this authority to the Bureau of Alcohol, Tobacco, and Firearms within the U.S. Department of Justice.
- (3) A person who was adjudicated delinquent for an act committed on or after April 21, 1994, that if committed by an adult in this state would be a felony, if a court subsequently determines that the person is not likely to act in a manner dangerous to public safety. In any action or proceeding regarding this determination, the person has the burden of proving by a preponderance of the evidence that he or she is not likely to act in a manner dangerous to public safety.

#### **Federal law**

Among other prohibitions, federal law prohibits a person from possessing a firearm which has been shipped or transported in interstate or foreign commerce if the person has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year, i.e., a felony. [18 U.S.C. s. 922 (g) (1).] For purposes of this restriction, a person is not considered to have been convicted of such a crime if the conviction has been expunged, unless such expungement expressly provides that the person may not possess firearms. [18 U.S.C. s. 921 (a) (20) (B).]

#### **Expunction of Conviction Records in Wisconsin**

Section 973.015, Stats., authorizes a circuit court, at the time of sentencing, to order that the offender's record be expunged upon the successful completion of his or her sentence if the offender was under the age of 25 when the offense was committed and the court determines the person will benefit and society will not be harmed if the record is expunged. [s. 973.015, Stats.] A record may only be expunged if the person is convicted of an offense for which the maximum term of imprisonment is six years or less. For that reason, the opportunity for expunction is

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<sup>3</sup> The Attorney General has issued an opinion that the requirement that a pardoned person must be expressly authorized to possess a firearm in order to legally do so has been invalidated by congressional action and is no longer a condition of this exemption. [72 Atty Gen. 22.]

limited to convictions for misdemeanors and Class I and Class H felonies.<sup>4</sup> A court may not order a record expunged for certain types of felony convictions, such as convictions for violent felonies, or for felony convictions for which the offender has a prior felony conviction.

When the court record is expunged, the clerk of court must: (1) remove any paper index and non-financial court record and place them in the case file; (2) electronically remove any automated non-financial record, except the case number; (3) seal the entire case file; and (4) destroy expunged court records in accordance with Wisconsin Supreme Court rules. [Supreme Court Rule 72.06.]

## DISCUSSION

You asked whether a person who has had a felony conviction expunged from his or her record may obtain a license to carry a concealed weapon from DOJ. As noted above, to be eligible for a license to carry a concealed weapon, a person must not be prohibited from possessing a firearm under s. 941.29, Stats., or 18 U.S.C. s. 922 (g).

As also described above, s. 941.29, Stats., generally prohibits any person who has been convicted of a felony from possessing a firearm. This statute also specifies the instances in which this prohibition does not apply. Other than exceptions for persons engaged in certain types of work who are required to possess a firearm as a condition of employment, the statute provides only two avenues for a person who has been convicted of a felony to regain the right to possess a firearm: (1) he or she has received a pardon; or (2) he or she has been granted relief from disabilities under the process provided by federal law. [s. 941.29 (5), Stats.]

The firearm possession statute also provides a mechanism for persons who would otherwise be prohibited from possessing a firearm because of a delinquency adjudication for an act that would be a felony if committed by an adult to regain that right. The statute authorizes those individuals to lawfully possess a firearm if "a court subsequently determines that the person is not likely to act in a manner dangerous to public safety." [s. 941.29 (8), Stats.]

Wisconsin's firearm possession statute does not, however, provide that a person convicted of a felony who has had the record of conviction expunged regains the right to possess a firearm. Therefore, whether a felony conviction for which the record has been expunged still disqualifies a person from possessing a firearm turns on the question of what effect expunction, under s. 973.015, Stats., has on the conviction itself. That is, the question is whether expunction under this statute vacates or nullifies a conviction, or whether the person remains convicted of the offense.

Other than the impacts it has on court records as described above, the expunction statute does not specify what effect expunction has on the underlying conviction. The Wisconsin Supreme Court discussed this lack of clarity in *State v. Leitner*, acknowledging that the statute

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<sup>4</sup> Prior to the enactment of 2009 Wisconsin Act 28 (the 2009 Budget Act), expunction was limited to convictions for misdemeanors and was limited to offenses committed while the offender was under the age of 21. The 2009 Budget Act expanded the circumstances under which conviction records could be expunged, but the Act did not modify the legal effect of expunction.

has been interpreted as “being subject to alternative interpretations,” and noting that the Wisconsin Court Records Management Committee, in a petition to the supreme court for rule-making on expunction, viewed the expunction statute “as being unclear whether it governs expunction of non-court records.” [*State v. Leitner*, 2002 WI 77, ¶ 21].

In *Leitner*, the court addressed what records the expunction statute applies to and whether the statute requires district attorneys and law enforcement agencies to expunge their records documenting the facts underlying an expunged record of conviction. The court also addressed whether a circuit court may consider, when sentencing an offender, the facts underlying a record of conviction expunged under s. 973.015. [*Id.*, ¶ 2.] The court held that Wisconsin’s expunction statute applies only to court records, does not require prosecutors or law enforcement agencies to destroy their records relating to an expunged conviction, and that a circuit court may consider the facts underlying an expunged record of conviction when sentencing a defendant for a subsequent offense. [*Id.*, ¶¶ 39-40.] The court also concluded s. 973.015, Stats., does not require the conviction to be removed from the person’s criminal background history, which in Wisconsin is maintained through the Crime Information Bureau at DOJ and is maintained nationally through the Federal Bureau of Investigation’s National Crime Information Center (NCIC). The court’s analysis in *Leitner* appears to distinguish between expunction of the court records related to a conviction and the complete vacating of the conviction itself.

The supreme court’s conclusions in *Leitner* are reflected in the Wisconsin Court System’s form that a person uses to petition a court for expunction of a record of conviction. [Petition to Expunge Court Record of Conviction, Form CR-266, 11/11.]<sup>5</sup> A person using this form to seek expunction of a record of conviction attests to the court, among other information, that:

UNDER OATH I STATE:

1. I am the person convicted in this case. I am asking that the court record of my conviction be expunged. I understand that if the record is expunged:

- Only the court record of the conviction will be expunged;
- Other court records and records of the police, the Crime Information Bureau, other law enforcement agencies, and the district attorney will not be affected, AND
- *The conviction is not vacated or set aside.* [Emphasis added.]

Under federal law, it is also generally prohibited for a person to possess a firearm if the person has been convicted of a crime punishable by imprisonment for a term exceeding one year, i.e., a felony. As described above, a person is not eligible for a concealed carry license in Wisconsin if the person is prohibited from possessing a firearm under federal law. [s. 175.60 (3) (b), Stats.] Unlike Wisconsin law, federal law specifically provides that expunged felony convictions are no longer considered convictions for purposes of that law. [18 U.S.C. s. 921 (a)

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<sup>5</sup><https://www.wicourts.gov/formdisplay/CR-266.pdf?formNumber=CR-266&formType=Form&formatId=2&language=en>

(20) (B).] However, it is unclear whether this federal law would be interpreted to apply to the type of limited "records expunction" provided for under Wisconsin law. [See, *Jennings v. Mukasky*, 511 F.3d 894 (9th Cir. 2007); *Wyoming v. U.S.*, 539 F.3d 1236, 1245-6 (10th Cir. 2008) (The federal definition of "expungement" requires state expunction law to "remove the fact of conviction for criminal justice purposes" and "completely remove the effects of the conviction" in order for federal firearm possession privileges to be restored.)] In any event, whether an expunction under state law qualifies as an expunction under federal law would only appear to affect the applicability of the federal firearm possession restriction, not the state restriction, because the federal exemption for "expunged convictions" only applies for purposes of the federal firearms law. [18 U.S.C. s. 921 (a) (20) (B).] The federal firearms laws do not "occupy the field" of firearms regulation to the exclusion of separate state regulation, absent direct and positive conflict between them. [18 U.S.C. s. 927.]

## CONCLUSION

The Wisconsin Supreme Court's analysis in *Leitner* and the application of that decision by the Wisconsin Court System appear to support the conclusion that a person who has been convicted of a felony for which the record has been expunged under s. 973.015, Stats., has not had the conviction vacated and remains convicted of that offense as it relates to the state firearm possession law. If that conclusion is correct, a person convicted of a felony for which the court record has been expunged would appear to be disqualified from possessing a firearm under s. 941.29, Stats., unless he or she is subject to one of the other exceptions described above, and would therefore be ineligible for a license to carry a concealed weapon. In addition, it is unclear whether an expunction under state law qualifies as an expunction under the federal firearms possession law. If a person remains convicted of an expunged offense under state law, or the person's conviction is not considered expunged under federal law, the person would be ineligible for a Wisconsin concealed carry license.

However, as noted above, DOJ has indicated that it has at least preliminarily concluded that a person who has been convicted of a felony for which the record of that conviction has been expunged is not prohibited from possessing a firearm under Wisconsin or federal law as a result of that conviction, and may be issued a concealed carry license. To fully evaluate this question, it would be important to attain and review a formal opinion from the DOJ outlining in detail the legal reasoning underlying the agency's conclusion. It would also be important to consider the degree of deference that a reviewing court may show to DOJ's statutory interpretation.

If you have any questions or would like to discuss legislation to clarify any of these issues, please feel free to contact us directly at the Legislative Council staff offices.

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