



Transforming our
community for **25** years

Overview of the Processes to Correct and Expunge/Restrict Criminal Records in Georgia:

*Reducing Barriers to Employment for
Georgians with Criminal Histories*

Includes the Recent Revisions to the Law in this Area

(Part VI of HB1176, Effective July 1, 2013)

Created By: The Georgia Justice Project (11/5/2012)

THE GEORGIA JUSTICE PROJECT'S COMING HOME PROGRAM

The Georgia Justice Project's (GJP) mission is to help break the cycle of poverty and crime. Poverty is so closely connected to the criminal justice system that a staggering 90% of those in the system are considered below the poverty line at the time of their arrest. GJP knows that the two biggest stabilizers for a low-wealth person are gainful employment and stable housing, necessities extremely difficult to access for those with a criminal record. In 2008, GJP launched the Coming Home Program, directly responding to the call for comprehensive reentry services for people with a criminal record in Georgia. The program builds on the organization's 26 years of experience in indigent criminal defense to assist individuals with the removal of employment and housing obstacles that arise from a criminal record. The program addresses these obstacles by providing direct service, community education and advocacy for legislative change.

GEORGIA'S REVOLVING DOOR

Georgia has the second highest incarceration rate in the country and an estimated 90% of those incarcerated will be released back into society. Currently more than 2.6 million Georgians have a criminal record – one of the highest rates in the country. Despite a clear fiscal need to ensure those released will not return and that they become taxpayers instead of tax-burdens, Georgia consistently ranks one of the worst states in the country for successfully reintegrating people with criminal records, particularly when it comes to employment opportunities.

The overwhelming research indicates that the single most important predictor of recidivism is lack of stable employment. Yet, the Legal Action Center gave Georgia the worst possible score for access to employment for people with a criminal record. A recent study found that those who are released from the criminal justice system, but unable to find a job are three times more likely to return to prison. No job means no income and without income basic needs such as food, clothing and shelter cannot be met. These economic hardships create conditions ripe for recidivism because there seems to be no alternative for those with a criminal record except to risk reoffending in order to meet their basic needs. This actual cost of recidivism to the state has been measured – the Department of Corrections found that lowering Georgia's recidivism rate by 1% would save taxpayers \$7 million each year.

THE CALL FOR LEGISLATIVE REFORM

Through the direct service component of the Coming Home Program, the Georgia Justice Project has acquired a wealth of subject matter expertise in the challenges encountered by those with a criminal record and the opportunities for legislative reform. For nearly three years, GJP advocated for major changes to the state's record restriction law – one of the worst in the country. Originally a stand-alone bill sponsored by Representative Jay Neal, the provisions were ultimately included in Governor Nathan Deal's Criminal Justice Reform Bill and signed into law in May of 2012. Under the new law, more Georgians will get the jobs for which they are qualified because their non-conviction records will be kept private during pre-employment background checks.

GJP's first legislative effort primarily dealt with expanding the types of non-conviction records that are eligible for expungement/restriction. However, a significant amount of people with criminal records will not benefit from the recent changes to the record restriction law because they have records of conviction. Under the current laws, these convictions will continue to be used to deny opportunities for these individuals to successfully reintegrate and therefore become contributing taxpayers. In light of Governor Deal's commitment to criminal justice reform, and legislators on both sides of the aisle taking a vested interest in successful reentry, GJP is optimistic that the state will continue to make legislative reforms that will address the many problems suffered by people with a criminal record, including those with records of conviction.

SUMMARY OF THE CHANGES TO THE LAW MADE IN HB 1176

WHAT IS O.C.G.A. §35-3-37?

In Georgia, the law governing correction, supplementation and expungement/restriction of criminal records is O.C.G.A. §35-3-37. The law was revised in Part VI of HB 1176, passed by both chambers of the Georgia General Assembly and signed into law by Governor Nathan Deal on May 2, 2012.

WHAT IS “EXPUNGEMENT”?

“Expungement” is a term used in the current version of the law but not defined. Contrary to popular belief, “expunged” records are never deleted or destroyed; instead access to those records is restricted for criminal justice and law enforcement purposes by the arresting agency and the Georgia Crime Information Center (hereinafter referred to as “The Center”). Abandoning the misleading term “expungement,” the revised law uses the more appropriate term, “restricted,” to reflect what actually occurs to eligible records. While the terminology has been corrected, what happens to the records has been unchanged – under the revised law, restricted records are only available to criminal justice officials for law enforcement purposes.

HOW HAS THE LAW ON MODIFYING CRIMINAL RECORDS IMPROVED?

The revisions to the law offer relief to the millions of Georgians with a criminal record by making the process to modify these records faster and more efficient. The type of case eligible for restriction has been significantly expanded and many parts of the process are now automatic, requiring no action by the individual. Moreover, for the first time people will be able to restrict access to information maintained by jails and courthouses, places previously not required to restrict access to information. This is important because jails and courthouses are the primary points of access for private background checking companies, which are predominantly used by potential employers and other decision-makers.

WHEN WILL THE CHANGES GO INTO EFFECT?

The revisions to the law become fully effective on July 1, 2013. Within this document, revisions are emphasized in text that is bold, underlined and italicized.

CORRECTING INACCURATE OR INCOMPLETE CRIMINAL HISTORY RECORD INFORMATION

It is not uncommon for a criminal record to contain inaccurate or incomplete information. When the charge or its severity level (misdemeanor or felony) is entered incorrectly to the disadvantage of the individual, the misleading criminal history report can lead to denied opportunities. It is also a problem for the applicant when the final result of a case is missing from the report. Decision-makers will then deny opportunities based on an arrest even though they do not know how the case was finally resolved. Denials based solely on the arrest can have a devastating impact on the applicant, particularly if they were never convicted. The revised law will expedite the correction process and require, when requested, that agencies send updated information to those previously given the incorrect information.

[Table 1] below provides details of the changes to the law in this area

CORRECTING INACCURATE / INCOMPLETE CRIMINAL RECORD INFORMATION	
TABLE 1	
<u>Law Until July 1, 2013:</u>	<u>Law After July 1, 2013:</u>
<p>Remedy to Correct Information:</p> <p><u>Step 1:</u> Request the agency in control of the information correct it;</p> <p><u>Step 2:</u> If agency corrects the Center must be notified</p> <p><u>Step 3:</u> If the agency declines, the individual has 30 days to appeal the decision;</p> <p><u>Step 4:</u> The court will have a hearing and if information is found to be incomplete/inaccurate, the court orders the agency to correct;</p> <p><u>Step 5:</u> The agency must <i>promptly</i> cause the information to be corrected in accordance with the court's order.</p> <p>Procedure for Correcting Information Previously Disseminated by the Agency:</p> <p>None</p>	<p>Remedy to Correct Information:</p> <p><u>Step 1:</u> Request the agency in control of the information correct it [<i>same as current law</i>];</p> <p><u>Step 2:</u> If agency is corrects, it must notify the Center <i>within 60 days</i>;</p> <p><u>Step 3:</u> If the agency declines, the individual has 30 days to appeal [<i>same as current law</i>];</p> <p><u>Step 4:</u> The court will have a hearing and if the information is found to be incomplete/inaccurate the court orders the agency to correct [<i>same as current law</i>];</p> <p><u>Step 5:</u> The agency must cause the information to be corrected in accordance with the court's order <i>within 60 days</i>.</p> <p>Procedure for Correcting Information Previously Disseminated by the Agency:</p> <p><u>Step 1: Individual provides the names to which the incorrect information was given and requests the agency send corrected information;</u></p> <p><u>Step 2: Agency has 60 days from the date of request to inform such individual/agency of the correction.</u></p>

EXPUNGING/RESTRICTING CRIMINAL HISTORY RECORD INFORMATION

The current law is extremely narrow and only allows restriction in limited circumstances. The process is costly and there is no time mandate on completion. A person can spend up to \$75.00 per arrest and wait well over a year for the record to be expunged. Worse still, “expunged” records continue to be used to deny opportunities. This is because private background checking companies, which are the primary source of criminal history reports, access “expunged” information at jails and courthouses, locations where records cannot be expunged, and in turn sell it to decision-makers who use the information to deny employment, housing or other opportunities. The revisions to the law will improve record restriction by expanding the types of cases that can be restricted and by making the process more efficient. The new law will also ensure access to restricted information is consistent because jails and courthouses will be required to restrict information which will effectively close the loophole that has allowed private background checking companies to access “expunged” records.

Tables 2-9 below provide details on the revisions to the law:

AGENCIES DIRECTED TO EXPUNGE/RESTRICT	
TABLE 2	
<u>Law Until July 1, 2013:</u>	<u>Law After July 1, 2013:</u>
<p>The following agencies are directed to expunge eligible criminal record information:</p> <p>The Center;</p> <p>The Arresting Agency.</p>	<p>The following agencies are directed to restrict eligible criminal record information:</p> <p>The Center <i>[same as current law]</i>;</p> <p>The Arresting Agency <i>[same as current law]</i>;</p> <p><u>Jails/Detention Centers – must restrict within 30 days of request by individual;</u></p> <p><u>Clerks of Court – must restrict within 60 days of an order of the court.</u></p>

GENERAL ELIGIBILITY REQUIREMENTS FOR EXPUNGEMENT/RESTRICTION	
TABLE 3	
<u>Law Until July 1, 2013:</u>	<u>Law After July 1, 2013:</u>
<p>At the time of request, an individual is not eligible for expungement if they:</p> <ol style="list-style-type: none"> 1. Have a pending case (including probation or parole), or 2. Have been convicted of the same or similar offense in the previous 5 years. 	<p><u>N/A - The law will no longer prohibit those with pending cases or those convicted of the same or similar offense within the previous 5 years from having eligible records restricted.</u></p>

ELIGIBILITY FOR EXPUNGEMENT/RESTRICTION PRIOR TO ¹FORMAL CHARGE

TABLE 4

<u>Law Until July 1, 2013:</u>	<u>Law After July 1, 2013:</u>
<p>An individual is eligible for expungement if:</p> <ol style="list-style-type: none"> 1. The arresting agency does not refer the case for prosecution, or 2. The prosecution dismisses the case without seeking formal charge. 	<p>An individual is eligible for restriction if:</p> <ol style="list-style-type: none"> 1. The arresting agency does not refer the case for prosecution [<i>same as current law</i>], 2. The prosecution dismisses the case without seeking formal charge [<i>same as current law</i>], or 3. <i>The grand jury returns two no bills</i> (twice chose not to return a bill of indictment).

HOW TO EXPUNGE/RESTRICT INFORMATION PRIOR TO FORMAL CHARGE

Table 5

<u>Law Until July 1, 2013:</u>	<u>Law After July 1, 2013:</u>
<p>Procedure for <u>All</u> Arrests :</p> <p>Step 1: Individual requests the arresting agency expunge the information (agency can charge a fee up to \$50);</p> <p>Step 2: The arresting agency submits the request to the prosecuting attorney's office;</p> <p>Step 3: The prosecuting attorney has 60 days to determine eligibility based on the law and return the decision to the arresting agency (NOTE: Most prosecuting attorney's offices do not comply with this 60-day mandate);</p> <p>Step 4: If approved, arresting agency destroys records and informs individual – go to Step 5, (NOTE: Most arresting agencies do not comply with the mandate to destroy information) If denied, arresting agency informs the individual who has the right to appeal;</p> <p>Step 5: Individual submits approved request to the Center for expungement with \$25.00 fee.</p>	<p>Procedure For Arrests Before July 1, 2013:</p> <p>Step 1: Individual requests arresting agency restrict the information (agency can charge fee up to \$50)[<i>same as current law</i>];</p> <p>Step 2: Within <i>30 days</i> the arresting agency must submit request to the prosecuting attorney's office;</p> <p>Step 3: Prosecuting attorney has <i>90 days</i> to decide whether they ²agree to restriction and return it to the arresting agency;</p> <p>Step 4: If approved, arresting agency has <i>30 days</i> to restrict the information and inform the individual – go to Step 5, If denied, arresting agency informs the individual who has the right to appeal;</p> <p>Step 5: Individual submits approved request to the Center for restriction with \$25.00 fee.</p> <p align="center">- Continued on Next Page -</p>

¹ A formal charge is an accusatory instrument filed against an individual generally by indictment for felonies and by accusation for misdemeanors.

² During the 2013 Legislative Session, GJP will advocate that prosecuting attorney's use the criteria established in the revised law to determine restriction eligibility

	<p>Procedures For Arrests After July 1, 2013:</p> <p>Arrests Not Referred for Prosecution</p> <p><u>Step 1: <i>Arresting agency restricts and notifies Center that also restricts, or</i></u></p> <p><u>Step 2: <i>If the arresting agency does not notify Center, the record is automatically restricted, with notice to arresting agency to also restrict, after:</i></u></p> <p style="padding-left: 40px;"><u><i>2 years – Misdemeanors</i></u></p> <p style="padding-left: 40px;"><u><i>4 years – Felonies</i></u></p> <p style="padding-left: 40px;"><u><i>7 years – Serious violent/sexual felonies</i></u></p> <p>Prosecution Dismisses Without Seeking Formal Charge</p> <p><u>Step 1: <i>Prosecuting attorney or clerk enters Not Presented to the Grand Jury (NPGJ) into the Center’s database, the Center automatically restricts and then notices the arresting agency to restrict within 30 days.</i></u></p> <p>Grand Jury Returns Two No-Bills</p> <p><u>Step 1: <i>Prosecuting attorney or clerk enters the appropriate disposition and upon entry of the second no-bill, the Center automatically restricts and notices the arresting agency to restrict within 30 days.</i></u></p>
--	--

Summary: The current law places the burden on the arrested individual to request and pay for record restriction – even though they were never formally charged. For arrests after July 1, 2013, the law will no longer require action by the individual. Instead, the arresting agency and the Center will automatically restrict access to eligible records. The revised law also places the burden on the arresting agency to notify the Center of its decision not to pursue a case, or alternatively in the event the arresting agency does not act, the record will automatically be restricted after a certain period of time. This change to the law shifts the burden to the state to restrict access to these records and no longer requires the individual to request nor pay for restriction. NOTE: Even though the process will be automatic for arrests after July 1, 2013, individuals will still need to request restriction of the records at the clerk of court and the jail/detention center.

ELIGIBILITY FOR EXPUNGEMENT/RESTRICTION AFTER FORMAL CHARGE	
Table 6	
<u>Law Until July 1, 2013:</u>	<u>Law After July 1, 2013:</u>
<p>An individual is eligible for expungement after formal charge if:</p> <ol style="list-style-type: none"> 1. The case was dismissed, dead docketed or nolle prosequi (not prosecuted) - Subject to 7 exceptions [See Pg. 10, Table 8 – Law Until July 1, 2013]. 	<p>An individual is eligible for restriction after formal charge if:</p> <ol style="list-style-type: none"> 1. The case is dismissed or nolle prosequi (not prosecuted) - Subject to 4 exceptions [See Pg. 10, Table 8- Law After July 1, 2013]; 2. The case was placed on the dead docket <u>and a period of twelve months has lapsed;</u> 3. <u>The case is dismissed after successful completion a drug court or mental health treatment program³ and the individual is not subsequently arrested for 5 years;</u> 4. <u>The individual is found not guilty (acquitted) by judge/jury</u> - Subject to 2 exceptions [See Pg. 10, Table 8 – Law After July 1, 2013]; 5. <u>The individual pleads guilty under the Conditional Discharge Statute (O.C.G.A. §16-13-2 – relating to misdemeanor marijuana possession), successfully completes the sentence, and is discharged without conviction;</u> 6. <u>The individual is a youthful offender (under age 21 at the time of conviction), convicted of certain misdemeanors, who successfully completes his/her sentence and is not subsequently arrested for 5 years;</u> 7. <u>The individual is charged with at least one felony offense but only convicted of an unrelated misdemeanor; and</u> 8. <u>A conviction is reversed or vacated and the prosecution does not retry the case for 2 years.</u>

Summary: The current law is extremely narrow in the types of cases that are eligible for restriction after formal charge. The revisions significantly expand the type of qualifying case to include acquittals, reversed convictions and cases dismissed by the prosecution when the individual successfully completes a drug or mental health treatment diversionary program. Also, for the first time in Georgia, certain records of conviction will be eligible for restriction.

³ During the 2013 Legislative Session, GJP will advocate that the records be eligible for restriction upon the successful completion of the drug court or mental health court treatment program.

PROCEDURE FOR EXPUNGEMENT/RESTRICTION AFTER FORMAL CHARGE	
Table 7	
<u>Law Until July 1, 2013:</u>	<u>Law After July 1, 2013:</u>
<p>For All Arrests - See Pg. 6 [Table 5 – Law Until July 1, 2013] – <i>same procedure</i></p>	<p>For Arrests Before July 1, 2013 – See Pg. 6 [Table 5 – Law After July 1, 2013] – <i>same procedure</i></p> <p>For Arrests After July 1, 2013:</p> <p>Dismissed/Nolle Prossed Cases Procedure: <u>Once an eligible disposition is entered, the Center automatically restricts access to the record and notifies the arresting agency to restrict within 30 days.</u></p> <p>Dead Docketed Cases: Procedure: <u>After 12 months the individual petitions the superior court to restrict access to the information. ⁴Court will determine whether restriction is appropriate by considering why the case was placed on the dead docket.</u></p> <p>Reversed/Vacated Convictions Procedure: <u>The individual petitions the superior court to restrict access to the information. Court grants request if appropriate by considering: a) why the case was reversed/vacated, b) why the state did not retry within 2 years and c) the public's interest in the record being publicly available.</u></p> <p>Felony Dismissed/Acquitted but Convicted of Unrelated Misdemeanor Procedure: <u>Individual petitions the superior court for restriction of dismissed felony charges. ⁵Court grants request if determined that the misdemeanor did not arise from same incident as the felony charge(s).</u></p> <p>Youthful Offenders (Under 21 Years of Age at Conviction) Procedure: <u>Upon successful completion of the sentence and another 5 years without arrest, the individual petitions the court for restriction. Court grants if appropriate, considering both the individual's conduct and the public's interest in the record being publicly available.</u></p> <p>Exceptions: Restriction is prohibited if the conviction was:</p> <ol style="list-style-type: none"> 1. Child molestation 2. Enticing a child for indecent purposes 3. Sexual assault by persons of authority 4. Keeping a place of prostitution 5. Pimping 6. Pandering by compulsion 7. Masturbation for hire 8. Giving massages in a place used for lewdness, prostitution, assignation, or masturbation for hire 9. Sexual battery 10. Any offense related to minors generally 11. Theft (except shoplifting) 12. Any serious traffic offense (i.e., DUI, vehicular manslaughter, vehicular homicide, etc.)

⁴ During the 2013 Legislative Session, GJP will advocate that the language that attempts to provide this remedy be clarified so that courts are aware of how to decide these types of requests.

EXCEPTIONS TO EXPUNGEMENT/RESTRICTION AFTER FORMAL CHARGE	
Table 8	
Law Until July 1, 2013:	Law After July 1, 2013:
<p>After formal charge, an individual is not eligible for expungement if:</p> <ol style="list-style-type: none"> 1. The case was dismissed, dead docketed, or nolle prosequi (not prosecuted) because: <ol style="list-style-type: none"> a. Of a plea agreement resulting in a conviction for an offense arising out of the same incident; b. The prosecution was barred from introducing material evidence against the individual; c. The conduct was part of a pattern of criminal activity prosecuted in another jurisdiction; d. Individual had some form of immunity from arrest or prosecution; e. A material witness refused or was unavailable to testify; f. The individual was incarcerated on other criminal charges and the prosecuting attorney elected not to prosecute for reasons of judicial economy; or g. The person completed a pretrial diversion program which did not specifically provide for expungement. <p>NOTE: Current law does not allow acquittals (not- guilty verdicts) to be expunged.</p>	<p>After formal charge, an individual is not eligible for restriction if:</p> <ol style="list-style-type: none"> 1. The case was dismissed or nolle prosequi (not prosecuted) because: <ol style="list-style-type: none"> a. Of plea agreement resulting in conviction <i>of the individual</i> for an offense arising out of the same incident; b. The prosecution was barred from introducing material evidence against the individual [<i>same as current law</i>]; c. The conduct was part of a pattern of criminal activity prosecuted in another jurisdiction [<i>same as current law</i>]; or d. Individual had some form of immunity from arrest or prosecution, [<i>same as current law</i>]. 2. The individual was acquitted but: <ol style="list-style-type: none"> a. Found guilty of some of the charges tried; or b. It is later determined that the acquittal was due to jury tampering or judicial misconduct.

Summary: The law after July 1, 2013, will reduce the number of exceptions to restriction for dismissed/not prosecuted cases. If a case is dismissed/not prosecuted because the individual successfully completed a pretrial diversion program, a material witness will not testify, or for reasons of judicial economy the records will be eligible for restriction. Also, under the revised law individuals who are acquitted of all charges will be eligible for record restriction unless there is judicial or jury misconduct.

APPEALING A DENIED REQUEST FOR EXPUNGEMENT/RESTRICTION: Table 9	
<u>Law Until July 1, 2013:</u>	<u>Law After July 1, 2013:</u>
<p>Appeal Procedure:</p> <ol style="list-style-type: none"> 1. If an individual is denied expungement, they can appeal to the superior court within 30 days; 2. A denial is only upheld if it is determined that the individual did not meet the criteria in the law. 	<p>*Appeal Procedure - Arrests Before July 1, 2013:</p> <ol style="list-style-type: none"> 1. If an individual is denied restriction they can appeal to the superior court (<i>no time deadline</i>); 2. A denial is upheld if it is determined that <i>the harm to the individual clearly outweighs the public interest in the information being publicly available.</i>

CONCLUSION

The information reflected on an individual’s criminal history is most critical to their ability to access opportunity in Georgia. However, the current law on modifying criminal history information is time-consuming, costly, burdensome and incomplete. Under the new law, individuals previously unable to access opportunities, due to misleading criminal histories, will be assured that their criminal history information is consistent, accurate and complete. The revisions to the law will improve public safety and reduce recidivism in Georgia because people who have access to opportunities, particularly stable employment, are less likely to commit crimes. Also, individuals, who are able to care for themselves and their families, contribute as productive taxpayers and are not likely to be re-arrested. Moreover, individuals who are not incarcerated, or on some form of governmental assistance save taxpayer dollars and lower the direct and collateral costs of incarceration. Georgia is one of the worst states in the country for successfully reintegrating people with criminal records, but the revisions to the record restriction law move a step in the right direction.

* Only applies to arrests prior to July 1, 2013 because after July 1, 2013 restriction is either automatic based on statutory eligibility or decided on a case-by-case basis by a court.