

# MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

1224

2007 HOUSE JUDICIARY

HB 1224

## 2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1224

House Judiciary Committee

Check here for Conference Committee

Hearing Date: 1/16/07

Recorder Job Number: 1211

Committee Clerk Signature

*R. Penrose*

Minutes:

**Chairman DeKrey:** We will open the hearing on HB 1224.

**Rep. Klemin:** I am a sponsor of this bill and explained the bill. I was asked to introduce this bill by Judge Wefald on behalf of the district judges. This is the bill I mentioned this morning in the hearing on HB 1197 that contains a different amendment to the DNA law, section 3, page 2 of this bill. However, this bill amends that section in a different place and different respect. I don't believe there is any conflict between this bill and HB 1197. They both amend this section but they do it in different places.

**Judge Bob Wefald:** I support this bill (see attached testimony). The fact that HB 1197 is also amending this one section dealing with DNA, I ran that by the AG and if you take a look at it, the first part of subsection 3 of HB 1224 changes that to seal the record. However, if you look at the rest of that in section 12.4, it leaves in place the current language that the laboratory shall expunge all identifiable information in the database pertaining to the person and destroy all samples from the person upon receipt of a certified order. I ran that by AG, and asked if they wanted this cleaned up as well, and I've got a memo back that said absolutely not, this is in compliance with a federal rule, but it's absolutely not a problem for you to amend this bill the way it is. Basically, we're dealing with federal law when they maintain the DNA

database. I want nothing to do with writing any such rule, and I think the rational thing is to simply seal the record and then when the state crime lab gets an order that a record has been sealed, they will then physically get rid of as much as they can; the sample and whatever records they can.

**Rep. Koppelman:** I understand what you are talking about here, in regard to the practical inability to expunge a record in the digital age. If there a difference legally. In other words, you mentioned that a sealed record could be opened with a court order.

**Judge Bob Wefald:** Right.

**Rep. Koppelman:** I assume an expunged record could not, on the assumption that it doesn't exist.

**Judge Bob Wefald:** That's correct. The idea that expunged records that you take the paper copy and shred it up and everybody forgets that you ever heard about it; erase all entries in the journal, etc. Unfortunately, even in the paper record you're not going to be able to do that. We really have to have a record of the order expunging it. So we have to say so and so's conviction for marijuana is hereby expunged. We have to have a record. If we don't have an order, then someone could say that they'll just expunge this record here and no one will know the difference. I think the idea behind expungement is to help people out, but in fact, I don't think we can physically do it.

**Rep. Koppelman:** Would it be possible to simply change the definition in law of expungement instead of going this route, and have it state that even though a physical record may exist, it is for all legal purposes non-existent and therefore could not be reopened by a court order, whereas a sealed record could.

**Judge Bob Wefald:** I suspect that is not nearly as clean a solution as closing and sealing the record. Everybody understands what a sealed record is, the media, etc. If we say it is

expunged and it's not expunged, I think it would be more confusing than to simply seal the record. Because a sealed record is all right there. The other thing about records, and I don't mean to be harsh about it, people go out and commit crimes, there is a real good and sufficient reason why we have a process to take care of that. In the criminal system, most of what we do in the courts is criminal. And everybody wants to give everybody a break. Nobody wants anyone to go to prison. We try to give them a break every time. You have to do something really horrendous the first time out to wind up getting prison time. The fact that somebody got busted for marijuana, and wants a completely clean record, I don't think it's that big a deal anymore.

**Rep. Koppelman:** I appreciate that. My question to you is whether we are going beyond making just a logistical or clerical change in how this is being presented. Actually it is a policy change, only to the extent that in essence, change is what we are currently or traditionally doing in law with an expungement to the point of sealing it. Correct me if I'm wrong, but what I'm hearing is the only difference between the two legally, and I understand physically the difference between expunged going away and doesn't exist and sealed means it is still on file and can't open it without a court order. But a legal difference, whether that expunged file still physically exists somewhere in cyber space or on paper, the legal difference it seems to me is that if you move it to a sealed record, it still could be opened by court order. That is a different thing. This is really a policy change; when it is expunged we think it is gone forever, and now with a court order you could potentially open the file.

**Judge Bob Wefald:** I've been in the law business since 1970 and I've never had a successful effort by anyone to ever expunge a record. It's been there. The most times it comes up, when someone is charged with using marijuana and wants the record expunged. I am not aware that any record has been shredded and whited out, etc. I guess you could call it

a policy change. I like to say it's more of a rational way to do this. The problems we have in trying to expunge something, it's literally not possible; to do it the way people would think that it is. If I were arrested for a first time marijuana charge, and I said that time has gone by, and I want my record expunged. I think I would be really disappointed with the result because I think somebody would know about it in the court system. I think the cops could always find it. The cops have their own arrest records.

**Chairman DeKrey:** We have the same problem on the Pardon Board, when you say you are giving someone a pardon, all you do it enter it on a line in the record that says they were pardoned. There is still a record.

**Judge Bob Wefald:** In respect to the Pardon and that kind of record, what it does for someone is says I have been pardoned. In the case of the marijuana, you say "I've done my deferred imposition, I followed the rules, this doesn't apply anymore". I regularly tell people in court when we give them that really great break and say that it is a deferred imposition of sentence. You keep your nose clean for 18 months or a year, and what is going to happen is that your guilty plea is going to be changed to not guilty, there's going to be order dismissing it and I say, the cops are still going to know about this. We have people five years later, they come in and say I've had a deferred imposition five years ago, and we may not consider that, but the cops know about it. I guarantee you they do.

**Rep. Meyer:** I guess my concern is that we are innocent until we are proven guilty.

**Judge Bob Wefald:** Exactly.

**Rep. Meyer:** So how does this tie into HB 1197 where we are going to do a DNA sample. I have concerns with that. So you do the DNA sample and that becomes a closed record.

You're found innocent, you haven't done it. There are those cases that are found innocent. They took a DNA sample and it becomes a closed record. It's always going to be there right.

**Judge Bob Wefald:** The DNA sample part is specifically addressed in subsection 3. The state crime lab said we will continue to expunge the samples and the records that we had, so that the DNA part is completely covered. The second thing is that the results of a criminal case is never an innocent verdict. It's either guilty or not guilty. Innocence is a matter for the Good Lord to judge, I think. The third thing is when a person is charged with a crime, when you are found not guilty, there is still a complete file in the clerk's office, with the criminal complaint and officer's affidavit, the jury verdict, whatever is in there. All the motions, it all stays in the file. Law enforcement will have a record that said you were arrested on such and such a date, for such and such a crime and it would show that you were found not guilty of the charge, and it was dismissed. So there is always going to be a record there. The DNA thing is covered by the state lab under a federal law that they follow in terms of how they expunge or destroy a DNA sample. But as for the rest of the criminal matter, once you get a traffic ticket, or speeding ticket, it goes to the public transportation, they have a record of it. They may not report it to the insurance company after so many years, I would suspect that it's always there.

**Rep. Meyer:** Will the state crime lab expunge the records on the DNA sample and paperwork.

**Judge Bob Wefald:** They have a federal law that they follow and as I understand from the memo that was given to me by the AG, that they don't see any conflict between subsection 3 as it is drafted and their existing federal requirement with respect to how they handle the DNA records and samples of people who are found not guilty or against whom the case was dismissed. I don't know what that procedure is. It wasn't in place when I was Attorney General, when we thought a fingerprint was a big deal.

**Rep. Boehning:** If you get an expunged record, after 10 years, they can't go back and use that record against you, is that correct.

**Judge Bob Wefald:** A sealed record is not to be considered. The only way a sealed record can be opened is by order of the court. The person with the warrant can't just open the file; they have to petition, give good and sufficient reasons for doing it, then judge will make a decision on whether or not to open the record. I would say that in terms of sentencing for a crime, it would not be considered if it has been sealed.

**Rep. Boehning:** An expunged record you can't go back and look at it, where you can with a sealed record.

**Judge Bob Wefald:** The problem is that as optimistic and hopeful as we can be that a record would be expunged, I'm telling you that the evidence today that it cannot be done. You can take the clerk's file and shred it, but the electronic data is going to be there. The cops are going to have it in their database. We have to have some sort of an Order from a judge that says the record of the defendant who was charged with \_\_\_ with this case number \_\_\_ is hereby expunged. Then the clerk will destroy the record. But still, that would be evidence. The person says I want to walk away forever, and have this behind me; somebody could look at the record and say here it is right here. This comes up with admission to the Bar, taking the State Bar Exam. It asks if you have ever been arrested. Not convicted. I suppose in cases of federal security clearances, you would have to report that you had been arrested; you would have to report it truthfully. We're never going to completely erase a record of a criminal matter.

**Rep. Griffin:** A sealed record can be petitioned to be open and the court can order that.

**Judge Bob Wefald:** What happens in court, a person can bring up anything they want, you can ask them if they have ever been convicted of such and such a crime. You can't look at the judge and say, Hey Judge, that record's been expunged. You can't let him answer that question. You could probably make a motion in limine to try to limit what can come in there;



but the fact that they know of the crime, you can't wipe out the person's memory. I think that the notion behind expungement is that the thing is going to disappear completely. I don't think there is anyway that is ever going to happen.

**Rep. Griffin:** But you could keep it away from the jury, if it were expunged vs. an open, sealed record.

**Judge Bob Wefald:** What happens, the evidence comes in either through an exhibit or testimony. If your witness is the one whose record you are concerned about, the person is asked the question, weren't you arrested for possession of marijuana in 2008? You think, that has been expunged, what do I do now. The truthful answer is yes, I was. We very seldom admit criminal records into evidence. I can't think of a single reason why we would do that during the course of a trial because in the course of a trial, the issue is not someone's prior record; the issue is the present crime of which the person is charged. It is an error to allow prior bad acts to come in to weigh in on the present case. You can ask people about their criminal history in certain circumstances.

**Rep. Onstad:** Along the same line of discussion, we are being asked to replace the word expunged with seal the court record.

**Judge Bob Wefald:** Yes.

**Rep. Onstad:** Let's go to line 12, what if we put that back and said, it was once expunged, the court may be open.

**Judge Bob Wefald:** You could not be able to do that. In fact, it would be better to have the sealed record to look at in cases if it ever came up, rather than rely on people's memories of what the record is.

**Rep. Onstad:** I agree with you, let's replace it. I don't understand once sealed, now to open it up and the court still has a chance to go back and look at it. We're not exchanging one definition for another. Aren't you kind of expanding it a little bit?

**Judge Bob Wefald:** The problem is that in court, the court records you have to be very careful of how you deal with them, we can't just let anyone decide what's going to be a record and what isn't going to be a record. We have sealed records in this state that are 100 years old. Every once in a while we have to go back and say do we have any legitimate reason for looking at this.

**Rep. Onstad:** Because of the digital technology and so on, is it a penalty if someone hacked into and got information on a sealed record?

**Judge Bob Wefald:** The quick answer is I don't know. My only job is to see to it that we have due process and that things get handled properly and if the person is convicted and sentence is imposed within the authorized limits. There are all sorts of penalties for hacking.

**Rep. Koppelman:** What is the value of a sealed record, of a court record being sealed or expunged?

**Judge Bob Wefald:** I tried to make it clear. I don't think there's any real utility in the word value in expunging the record, because I don't really believe it happens. When it comes time to access a sealed record that has to be done by court order. If it got to the point where someone was in court and asked about it, the way we handle that is good lawyers anticipate what's coming up, they go to the judge beforehand I think this issue is going to come up in this particular case, I want a motion in limine, I want the court's order right now as to how this issue is going to be treated. It gives everybody a heads up, often times we rule on those issues before the case starts. So we know what's going on. I would say that accessing a record is more difficult and much more infrequent than you might think.

**Rep. Koppelman:** If that's true, and you also said earlier that you rarely admit a sealed record in a court case, what is the value of having the record sealed.

**Judge Bob Wefald:** The value for sealing it is for a lot of reasons, such as adoption, etc. The average person can't walk in off the street and see someone's records if they are sealed. With respect to these criminal matters, the information doesn't simply go away. It's more honest to say that we are going to seal the record than to expunge it. If someone needs it, they can get a court order and try to get it unsealed, but it rarely happens. There is a lot of public information out there that you can never remove from all databases floating around out there. I don't think it is a conflict for the Legislature to say, we want to give the people a break in certain cases and help them out. The conflict is that the people committed a crime in the first place. The cops will have a file; the state's attorney has a file, etc.

**Rep. Koppelman:** The practical, clerical, logistical problem we're dealing with but we also recognize the policy shift that you represent. If the legislature in its wisdom decides that we don't mind changing the word expunged to sealed; it seems to me that we can accomplish this by changing the language on lines 12 and 13, rather than saying once sealed the court record may be open solely by order of the court, upon showing of good cause, to language something like, "once sealed the court record may not be opened in court".

**Judge Bob Wefald:** That would not bother me. The problem is that we don't know what the future holds. We don't know what the reasons are for asking for information in the future. We don't know if someone's electronic record is been misinterpreted over time. If it were me, I would rather have the record stay there, and I would like to have my record be accurate.

**Rep. Koppelman:** So what you're asking for is not just for logistical, clerical change, you're asking for the policy change to say, seal them and let the court get at them if they need to.

**Judge Bob Wefald:** I guess I can say that is a policy change, but the problem is that it isn't a change in reality. We've never gotten rid of them.

**Rep. Koppelman:** Except that you are able to open them. Can you request an expunged record?

**Judge Bob Wefald:** If the record is physically there, I can get it. I simply could look at records and get at them now. I'm just telling you that the more honest thing to tell people is that we're going to seal the record, just like in juvenile records, adoption, domestic records. Everybody understands that concept.

**Rep. Koppelman:** Is there any difference between a juvenile's sealed record and an adult's sealed record.

**Judge Bob Wefald:** The basic sealing of a record is to keep the media out, to keep the people out that don't belong there, to keep people who are snooping for information. Law enforcement knows this. Juvenile records – let's assume we have a young man, 12 years old and goes on a horrendous crime spree, when the person becomes 19 or 21, and continues the crime spree, we get that all the time. The pre-sentence investigation gives us that information every time. We know exactly what's going on. Now the media is not free to go out and do that. We seal most pre-sentence investigations, media can't get to that. The report contains a lot of private, family information. We have to have that information so that we can make a proper assessment as to what ought to happen with this particular individual. The police have it too. The people who don't get to it are the people that have no business getting to it.

**Rep. Delmore:** What are the safeguards that we can put in place with sealed records? Do other states expunge or do they seal records.

**Judge Bob Wefald:** I don't have a clue about what other states do. I didn't do a web search to see. I'm just addressing the situation in North Dakota. The problem, to get back to the

beginning, the judiciary Supreme Court loves to write rules. They already rule on expunging records. We can't tell clerks how to expunge it, because there is no answer, that's the problem.

**Rep. Klemin:** I understand you're saying that you can have the record expunged in the courthouse, the clerk could tear it up, we might also have it someplace else in electronic format or paper format and so it's still out there in the possession of a third party. If that third party says here it is, there is really nothing a person can do about it.

**Judge Bob Wefald:** Partially what you said is true. The clerk can take a hard copy record; you can put it in the shredder. We have to have a record of the court order saying, expunge this file. So we're always going to have something in the court record that says, the defendant, court file #, this court record was ordered expunged on this date.

**Rep. Klemin:** What I'm getting at is there a difference between the real affect of expunging vs. the effect of sealing on the ability of third parties to disclose what they've got.

**Judge Bob Wefald:** There isn't. Third parties have their information, whether it is the cops or the newspaper, that is the problem. A lot of the information gets into the newspaper right off the bat. We have no authority to tell the newspapers what to do.

**Rep. Klemin:** Once you seal a record it is completely confidential, under our statute and for a public official to disclose a confidential record can subject themselves to liabilities.

**Judge Bob Wefald:** That's true, but internally this is a document, these are facts that are relevant to criminal investigations, and background.

**Rep. Klemin:** An expunged record is not confidential as opposed to a sealed record being confidential and subject to our other statutes on the affect of liability.

**Judge Bob Wefald:** That is correct. A sealed record has certain protections with certain consequences for the violation of sealed records. I would urge you to give this bill a Do Pass.

I understand this addresses matters differently than we had with expungement, but the problem is that I am convinced that expunged records still exist. I think it's better to have them sealed, because everyone understands what that is, it's a much more honest response to a person who is in that situation.

**Chairman DeKrey:** Thank you. Further testimony in support. Testimony in opposition. We will close the hearing.

## 2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1224

House Judiciary Committee

Check here for Conference Committee

Hearing Date: 1/17/07

Recorder Job Number: 1297

Committee Clerk Signature

*A. Penrose*

Minutes:

**Chairman DeKrey:** We will take a look at HB 1224.

**Rep. Koppelman:** Explained the amendment. This basically does what I think the advocates have said what they want to do and that is to make the procedure here that is something workable and realistic. They basically testified that expungement is physically impossible, so therefore let's change it to seal. Their rationale was that they can't physically do it. Then we talk about the other issue that this is a policy shift because of the differences between a sealed record vs. an expunged record. Although they implied that wasn't their intent, I think that is the effect. Clearly this would change the policy as well as the wording. This amendment, for the purposes of this measure, say that it will allow the change from expunged to sealed; but it would say that they can't be reopened even by court order, which is the policy difference between the two. We can either kill the bill or we could amend it this way if we don't want to change the policy. I recommend that we pass the bill with this amendment. I so move the amendment (see attached amendment).

**Rep. Boehning:** Second.

**Chairman DeKrey:** We will take a voice vote. Motion carried. We now have the bill before us as amended.

**Rep. Delmore:** I move a Do Pass as amended.

**Rep. Meyer:** Second.

**Rep. Klemin:** Judge Wefald sent us an e-mail this morning, attaching an article from the New York Times and expunging and the problem goes to the electronic databases that are all out there and expunging something from the court records is not expunging it from the world. So it is a problem that they are trying to address. The expunging situation really doesn't have the kind of affect that they would really like to have. I think the amendment does take care of a little loophole in here, that would seem to allow the court to open a sealed record with show of good cause.

**Rep. Koppelman:** That was my intent to bring the amendment, to say if they want this as a housekeeping measure for the reasons we heard testimony on and you reiterated, let's make, for purposes of this statute, sealing essentially the same, legally as expungement, i.e. the record is gone, we can't get at it, the court can't open it.

**Rep. Klemin:** I agree with Rep. Koppelman in that there was an unintended consequence in trying to solve one problem and really making another.

**Chairman DeKrey:** The clerk will call the roll on a Do Pass as amended.

**14 YES 0 NO 0 ABSENT DO PASS AS AMEND CARRIER: Rep. Koppelman**



**House Amendments to HB 1224 (70061.0201) - Judiciary Committee 01/18/2007**

Page 1, line 12, after "may" insert "not" and replace "solely" with "even"

Page 1, line 13, remove "upon the showing of good cause"

**House Amendments to HB 1224 (70061.0201) - Judiciary Committee 01/18/2007**

Page 2, line 2, after "may" insert "not", replace "solely" with "even", and remove "upon a showing of good cause"

Page 2, line 13, after "may" insert "not", replace "solely" with "even", and remove "upon a showing of"

Page 2, line 14, remove "good cause"

Renumber accordingly

Date: 1-17-07  
Roll Call Vote #: 1

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 1224

House JUDICIARY Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken No Pass as Amended

Motion Made By Rep. Delmore Seconded By Rep. Meyer

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Rep. Delmore	✓	
Rep. Klemin	✓		Rep. Griffin	✓	
Rep. Boehning	✓		Rep. Meyer	✓	
Rep. Charging	✓		Rep. Onstad	✓	
Rep. Dahl	✓		Rep. Wolf	✓	
Rep. Heller	✓				
Rep. Kingsbury	✓				
Rep. Koppelman	✓				
Rep. Kretschmar	✓				

Total (Yes) 14 No 0

Absent 0

Floor Assignment Rep. Koppelman

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**HB 1224: Judiciary Committee (Rep. DeKrey, Chairman) recommends AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (14 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1224 was placed on the Sixth order on the calendar.

Page 1, line 12, after "may" insert "not" and replace "solely" with "even"

Page 1, line 13, remove "upon the showing of good cause"

Page 2, line 2, after "may" insert "not", replace "solely" with "even", and remove "upon a showing of good cause"

Page 2, line 13, after "may" insert "not", replace "solely" with "even", and remove "upon a showing of"

Page 2, line 14, remove "good cause"

Renumber accordingly

2007 SENATE JUDICIARY

HB 1224

## 2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1224

### Senate Judiciary Committee

Check here for Conference Committee

Hearing Date: February 13, 2007

Recorder Job Number: 3442

Committee Clerk Signature *Maria L. Solberg*

**Minutes:** Relating to changing expunged records to sealed records.

**Senator David Nething**, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following committee work:

#### Testimony in Favor of the Bill:

**Sen. Dick Dever**, Dist. #32 Introduced the bill for Rep. Klemin – Att. #1 and spoke of his meeting with his judges and the confusion of the word “expunge”. He also introduced the Judge.

**Judge Bob Wefald**, Burleigh County Judge (meter 2:00) Reviewed the bill – Att. #2a  
He spoke of New York Times Article and Memo to the Attorney General’s office – Att. #2b  
They reviewed the house changes (meter 4:07). They went into long discussion in section 3...  
“Once sealed may never be opened” and how this does not exist. Spoke of a record will always exist even if it has been sealed or expunged. There is always some form of documentation. For example the news paper publishes the original sentence. They reviewed the definition of expunged.

**Sen. Nelson** asked (meter 4:30) for a review of the changes the house made to the bill.

They spoke of HB 1197 in the DNA Samples reference 31-13-07 and section 3 of this bill. This change should be picked up by the code reviser.

**Sen. Nething** asked (meter 8:43) if the judge had ever expunged a record. They cited an example of a record being "expunged" during session. A record of the original statement would still be found in the Daily Journal and all who attend would have a copy of it. You could never total erase a record.

**Sen. Fiebiger** asked what the legal deference of a sealed verses expunged record (meter 10:28) technically it is a "state of mind" issue. Spoke of on an application and the question being asked if one has been convicted of a crime. Spoke of it being "expunged" would you admit to it or not. They had discussion on how a conviction can be dropped if a person meets certain requirements. Gave examples (meter 13:50)

**Sen. Olafson** asked why this law was specific to Marijuana? Spoke of the history of the drug and all of the juvenile records that were involved at the time.

**Testimony Against the bill:**

None

**Testimony Neutral to the bill:**

None

**Senator David Nething**, Chairman closed the hearing.

**Sen. Olafson** made the motion to Do Pass HB 1224 and **Sen. Marcellais** seconded the motion. All members were in favor and the motion passes.

Carrier: **Sen. Nething**

**Senator David Nething**, Chairman closed the hearing.



**REPORT OF STANDING COMMITTEE (410)**  
February 13, 2007 12:43 p.m.

**Module No: SR-30-3052**  
**Carrier: Nething**  
**Insert LC: . Title: .**

**REPORT OF STANDING COMMITTEE**

**HB 1224, as engrossed: Judiciary Committee (Sen. Nething, Chairman) recommends DO PASS (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1224 was placed on the Fourteenth order on the calendar.**



2007 TESTIMONY

HB 1224

## Testimony on HB 1224

Given by Bob Wefald

House Bill 1224 amends three sections of law to change a requirement that the records concerned be sealed instead of expunged. The problem quite simply is that it is literally impossible to expunge a criminal record. I'm not sure it was ever possible to expunge a record, but with digital records and electronics it is now virtually impossible to totally expunge a record. This issue came up for the judiciary when we attempted to write a rule to tell the clerks how to completely expunge a record. It turns out it really cannot be done. What can be done is the record can be sealed. This is something that is done all the time, and it is understood by the courts, clerks, attorneys and the media as well as anyone else who reviews court files.

There have been news reports in 2006 of litigation in other states where records can simply not be expunged. I have no knowledge of any such litigation in North Dakota, nor do I look forward toward any such litigation.

I urge you to forward this bill to the full House of Representatives with a DO PASS recommendation.

With respect to section 3 of the bill dealing with DNA samples in NDCC 31-13-07, I need to point out two things to you. The first is that this bill does NOT eliminate the requirement that the State Crime Lab has that it must "expunge all identifiable information in the data base pertaining to the person and destroy all samples from the person upon receipt of a certified order." This refers to persons whose convictions have been reversed or whose cases have been dismissed. Attorney General Wayne Stenehjem sent me a

(over)

memo from the State Crime Lab indicating this legislation will not interfere with their federal requirements. The second point is that HB 1197 in its section 2 has to be amended to conform to section 3 of HB 1224. The language proposed in section 2 of HB 1197 is fine, it just needs to also have the language proposed in section 3 of HB 1224. I suppose you could add the language of section 2 of HB 1197 to section 3 of HB 1224 and then delete section 2 from HB 1197. Or you could add the proposed language in section 3 of HB 1224 to section 2 of HB 1197 and delete section 3 of HB 1224. But if both bills are enacted as is, there will be a problem.

Att #1  
2-13-07

**NDLA, S JUD**

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**From:** Klemin, Lawrence R.  
**Sent:** Monday, February 12, 2007 3:48 PM  
**To:** Dever, Dick D.; Lyson, Stanley; Nething, David E.  
**Cc:** NDLA, S JUD  
**Subject:** HB 1224 Expunged Records

The hearing on HB 1224 is scheduled to be held on 2/13 at 10:30 am. The House will be in floor session at that time. This bill was introduced at the request of the District Judges and is a simple noncontroversial bill. I have conferred with Judge Bob Wefald and he plans to either be at the hearing to explain the bill or will have some other judge present. Due to the House floor session, I am not planning to attend the hearing. All I would be doing at the hearing is to introduce the judge. I don't think that my appearance will be necessary for a proper hearing on the bill. Two of you on the bill as co-sponsors are also on the Senate Judiciary Committee and can provide any needed introduction of the judge better than I can. Thanks.

Rep. Larry Klemin  
[www.klemin.com](http://www.klemin.com)

HH # La  
2-13-07

## Testimony on HB 1224

Given by Bob Wefald

House Bill 1224 amends three section of law to change a requirement that ~~the~~ records concerned be sealed instead of expunged. The problem quite simply is that ~~it~~ is literally impossible to expunge a criminal record. I'm not sure it was ever possible to expunge a record, but with digital records and electronics it is now virtually impossible to totally expunge a record. This issue came up for the judiciary when we attempted to write a rule to tell the clerks how to completely expunge a record. It turns out it really cannot be done. What can be done and what the clerks and courts understand is to seal a record. This is something that is done all the time, and it is understood by the courts, clerks, attorneys and the media as well as anyone else who reviews court files.

There have been news reports in 2006 of litigation in other states where records can simply not be expunged. I have of no knowledge of any such litigation in North Dakota nor do I look forward toward any such litigation. Below is an article from the New York Times which is an example of problems that can arise with expungement.

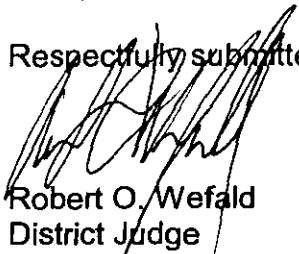
The House of Representatives passed an amended version of this legislation. I have no problem with the amendment which simply provides that the sealed record can never be opened even with a court order.

With respect to section 3 of the bill dealing with DNA samples in NDCC 31-13-07 I need to point out two things to you. The first is that this bill does NOT eliminate the requirement that the State Crime Lab has that it must "expunge all identifiable information in the data base pertaining to the person and destroy all samples from the person upon receipt of a certified order." This refers to persons whose convictions have been reversed or whose cases have been dismissed. Attorney General Wayne Stenehjem sent me a

memo from the State Crime Lab indicating this legislation will not interfere with their federal requirements. A copy of the Memo from his office is set forth below.

The second point is that HB 1197 in its section 2 has to be amended to conform to section 3 of HB 1224. The language proposed in section 2 of HB 1197 is fine, it just needs to also have the language proposed in section 3 of HB 1224. I suppose you could add the language of section 2 of HB 1197 to section 3 of HB 1224 and then delete section 2 from HB 1197. Or you could add the proposed language in section 3 of HB 1224 to section 2 of HB 1197 and delete section 3 of HB 1224. But if both bills are enacted as is there will be a problem.

Respectfully submitted,

  
Robert O. Wefald  
District Judge

*Att. 2.b.*

**MEMO TO THE ATTORNEY GENERAL**

TO: Ms. Hope Olson  
North Dakota Office of the Attorney General  
Crime Laboratory Division

FROM: Ms. Dawn Herkenham  
SAIC

SUBJECT: Proposed House Bill No. 1224

DATE: January 12, 2007

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As requested, I have reviewed the above-referenced legislation and offer the following comments:

- Federal law requires that laboratories participating in the National DNA Index System (NDIS) expunge DNA profiles from persons whose qualifying convictions are overturned. There is a similar provision for the DNA profiles of persons who have been

arrested. The Federal expungement provisions were effective December 19, 2001 and require, in pertinent part, that states participating in NDIS "shall promptly expunge from that index the DNA analysis (DNA profile) of a person included in the index by that state if the responsible agency or official of that state receives, for each conviction of the person of an offense on the basis of which that analysis (profile) was or could have been included in the index, a certified copy of a final court order establishing that such conviction has been overturned." A court order is not considered "final" for these purposes if time remains for an appeal or application for discretionary review with respect to the order. *See* 42 U.S.C. §14132(d)(2).

- The proposed House Bill No. 1224 appears to replace a reference to a petition for expungement, for persons whose convictions have been reversed, with a sealing provision that would permit the court record to be opened pursuant to judicial court order upon a showing of good cause. The proposed sealing of the court record does not appear to affect the requirement for expungement of the DNA data in the data base (House Bill No. 1224, page 2, lines 9-10) nor the destruction of the samples. Thus, the proposed House Bill No. 1224 should not impact your participation in NDIS since expungement of the DNA data would still be required at the State and National levels.

I hope this information is of assistance. You may wish to obtain the advice of your agency legal representative in this matter. Please let me know if you have any questions or need additional information. Thank you.

#### New York Times - October 17, 2006

In 41 states, people accused or convicted of crimes have the legal right to rewrite history. They can have their criminal records expunged, and in theory that means that all traces of their encounters with the justice system will disappear.

But enormous commercial databases are fast undoing the societal bargain of expungement, one that used to give people who had committed minor crimes a clean slate and a fresh start.

Most states seal at least some records of juvenile offenses. Many states also allow adults arrested for or convicted of minor crimes like possessing marijuana, shoplifting or disorderly conduct to ask a judge, sometimes after a certain amount of time has passed without further trouble, to expunge their records. If the judge agrees, the records are destroyed or sealed.

But real expungement is becoming significantly harder to accomplish in the electronic age. Records once held only in paper form by law enforcement agencies, courts and corrections departments are now routinely digitized and sold in bulk to the private sector. Some commercial databases now contain more than 100 million criminal records. They are updated only fitfully, and expunged records now often turn up in criminal background checks ordered by employers and landlords.

Thomas A. Wilder, the district clerk for Tarrant County in Fort Worth, said he had received harsh criticism for refusing, on principle, to sell criminal history records in bulk.

"How the hell do I expunge anything," Mr. Wilder asked, "if I sell tapes and disks all over the country?"

Private database companies say they are diligent in updating their records to reflect the later expungement of criminal records. But lawyers, judges and experts in criminal justice say it is common for people to lose jobs and housing over information in databases that courts have ordered expunged.

These critics say that even the biggest vendors do not always update their records promptly and thoroughly and that many smaller ones use outdated, incomplete and sometimes inaccurate data.

Lida Rodriguez-Taseff, a lawyer in Miami, tells her clients that expungement is a waste of time. "To tell someone their record is gone is essentially to lie to them," Ms. Rodriguez-Taseff said. "In an electronic age, people should understand that once they have been convicted or arrested that will never go away."

Judge Stanford Blake, whose court often enters expungement orders, said his inability to make them effective had left him feeling frustrated and helpless.

"It's a horrible situation," said Judge Blake, the administrative judge of the criminal division of the Eleventh Circuit Court in Miami. "It's the ultimate Big Brother, always watching you."

The rise in the availability of criminal histories has been accompanied by a surge in demand for them. Since the attacks of Sept. 11, 2001, criminal background checks have become routine in many employment applications.

"Something like 80 percent of large- or medium-sized employers now do background checks," said Debbie A. Mukamal, the director of the Prisoner Reentry Institute at John Jay College of Criminal Justice in New York. "Employers need to know about job-related convictions to make a nuanced, responsible decision so that they can protect themselves and the public and give people a fair shot at employment."

But the current system, Ms. Mukamal added, is not working. "It's unfettered," she said. "It's not regulated. There's misinformation."

ChoicePoint, one of the larger database companies, performed nine million background checks last year, said Matt Furman, a spokesman. The company's error rate is very small, Mr. Furman said. "One out of every thousand background checks has led to a consumer contact" disputing or complaining about the information provided, he said, "and one of a thousand contacts results in a change."

There have been only a few lawsuits taking issue with the information provided to employers in background checks.

In one, filed in June in federal court in Brooklyn, Victor Guevares sued a company that had offered him a job and a database company that he says caused the offer to be withdrawn.



Mr. Guevaras, now 33, was convicted of disorderly conduct more than a decade ago. New York considers that a violation like a traffic infraction rather than a crime and bars database companies from reporting such offenses to employers.

But Acxiom, a database company, reported the disorderly conduct charges to the Tyco Healthcare Group, which had offered Mr. Guevaras a job in 2004. Tyco promptly withdrew the offer, one that would have doubled Mr. Guevaras's salary, to \$46,000. It based its decision, his lawsuit says, on its mistaken understanding that he had committed a misdemeanor and had lied on his application about whether he had ever been "convicted of any crime which was not expunged or sealed by a court."

Mr. Guevaras, a gregarious man with a shaved head and big brown eyes, said that losing the job, which would have propelled his family into the middle class, devastated him. "I've never been arrested," he said. "I've never been locked up. I've never done jail time."

In court papers, both companies denied wrongdoing, and Tyco has sued Acxiom for breach of contract.

Catherine H. O'Neill, a lawyer with the Legal Action Center, which represents Mr. Guevaras, said Acxiom deserved much of the blame.

"They should not have been vacuuming up this information in the first place," Ms. O'Neill said.

A lawyer for Acxiom and a spokesman for Tyco declined to comment.

There is often plenty of fault to go around. Even within the government, various agencies often fail to coordinate their records.

"The problem often arises," said Ms. Rodriguez-Taseff, the Miami lawyer, "because so many agencies have access to criminal records — the department of corrections, the police, the Florida Department of Law Enforcement and the courts. Even though you have an expunged record, oftentimes a policing agency or a corrections facility allows private entities to gain access to it."

Some state laws place the burden on employers, on the apparent theory that the problem is not the availability of information but the use to which it is put. Illinois, for instance, prohibits prospective employers from asking about or making decisions based on expunged or sealed criminal histories.

A Minnesota man who agreed to talk about his experiences in exchange for anonymity said an expunged 1992 felony conviction — he declined to say for what — and erroneous information about a crime he did not commit have kept him from obtaining work for six months.

He said the database companies he contacted had been responsive if not especially fast in clearing up the problem. Some told him they updated their records annually. "I don't think the consumer reporting agencies mean to be" reporting inaccurate or sealed information, he said. "They just need to get new CD's."

In November 2005, a Florida woman obtained a court order expunging records concerning her arrest in a domestic dispute the previous spring. The judge ordered the

state and local police, the county sheriff and the court clerk to "expunge all information concerning indicia of arrest or criminal history."

But when the woman tried to buy a condominium this summer, the **arrest** nonetheless popped up in a routine background check. The deal fell through.

"It's going to haunt her for the rest of her life," said a relative of the woman, who shared court and Internet search records in exchange for a promise not to identify her or her family. "They're using public records at a given point in time and they're not updating them, and they're ruining people's lives."

Margaret Colgate Love, the nation's pardon attorney for most of the 1990's and the author of a new book called "Relief from the Collateral Consequences of a Criminal Conviction," said problems like these were rooted in the nature of expungement.

"It does reveal," Ms. Love said, "how perilous it is to build a public policy on a lie."