

# Michigan Clean Slate Expungement Laws (eff. April 11, 2021)

BY: ANNE YANTUS, PRO BONO COUNSEL  
BODMAN PLC

# First, A Word About Terminology

Michigan Expungement Statutes Do Not Refer to Expungement or  
Expunction

***Application to SET ASIDE a Conviction***

# Second, Always Check the Statute

## WARNING:

This presentation is no substitute for checking the relevant statutes

*MCL 780.621 et seq*

This presentation includes discussion of some important parts of the statutes, but does not include everything in the statutes

# Three Discrete Topics of Discussion

1. **Traditional Application Process (revised, eff. 4/11/21)**
2. **Misdemeanor Marijuana Set-Asides (new, eff. 4/11/21)**
3. **Automatic Set-Aside Process (new, eff. late 2022 or later)**

# For All Three Topics, What Is **NOT** Accomplished by a Set-Aside

When a conviction is set aside, a **NON-PUBLIC RECORD** is still available to the governor, prosecutors, law enforcement, the courts, judicial licensing, etc., for specified purposes

No return of fines, costs and assessments already paid

Defendant must still pay restitution (if there is outstanding balance)

Conviction is still available for most sentence enhancement purposes and for future sentencing decisions for crimes with a maximum penalty of more than one year

# Traditional Applications for Adult Convictions

Set Aside for **Adult** Convictions: **MCL 780.621 et seq**  
*(as amended by 2020 Public Acts 187, 188, 190, 191, 193)*

Note: To set aside juvenile adjudications, see MCL 712A.18e,  
effective July 3, 2021, 2020 PA 361

# Traditional Applications for Adults

- ❖ **Who Is Eligible**
- ❖ **Ineligible Offenses**
- ❖ **Waiting Period**

# Traditional Applications for Adults

## ❖ Who Is Eligible

- Number of Felony Convictions
- Subdivisions b and c
- Same Transaction Rule

## ❖ Ineligible Offenses

## ❖ Waiting Period



# Traditional Application: Who Is Eligible to Set Aside a Conviction?

**PRE-2011, could have only one conviction and one set-aside**

**JUNE 2011, could set aside one conviction even if had two additional “minor offense” convictions**

**JANUARY 2015, could set aside one felony or two misdemeanors**

# Traditional Application: Who Is Eligible to Set Aside A Conviction?

Effective April 11, 2021

***“Except as provided in subdivisions (b) and (c), a person convicted of 1 or more criminal offenses, but not more than a total of 3 felony offenses, in this state, may apply to have all of his or her convictions from this state set aside.”***  
*[MCL 780.621, emphasis supplied]*

**Person with Four or More Felonies Is Ineligible for Any Relief**

# Traditional Application: Who Is Eligible (MCL 780.621, subdivisions b and c)

**General Rule: Person with Not More Than Three Felony Convictions**

**Subdivision b: “An applicant may not have more than a total of 2 convictions for an assaultive crime set aside under this act during his or her lifetime.” (“assaultive crime” is defined in MCL 780.621)**

**Subdivision c: “An applicant may not have more than 1 felony conviction for the same offense set aside under this section if the offense is punishable by more than 10 years imprisonment.”**

# Traditional Application: Who Is Eligible

**What If the Person Has Five Felony Convictions, But Three Arose From the Same Transaction?**

# Traditional Application: Same Transaction or “One Bad Night” Rule

New MCL 780.621b treats multiple contemporaneous offenses as one if:

- ❖ **Committed During Same Transaction, and**
- ❖ **Within Twenty-Four Hours**

*Multiple felony convictions will be treated as one felony, and multiple misdemeanor convictions will be treated as one misdemeanor, if the rule is satisfied*

# Same Transaction Rule Does Not Apply to

- ❖ **Assaultive Crime (including out of state convictions)**
- ❖ **Crime Involving Use or Possession of Dangerous Weapon**
- ❖ **Crime with Maximum Penalty of Ten Years or More**

# Can This Person Set Aside **FIVE** Felony Convictions?

**One Larceny in Building (1980)**

**One Retail Fraud 1<sup>st</sup> (1990)**

**Three Unlawful Driving Away Auto (2010) (arose from SAME TRANSACTION)**

**\*Unlawful Driving Away Auto Is Not Assaultive Crime**

**\*Unlawful Driving Away Auto Has 5-Year Maximum Penalty**

**Answer is YES** (would count as three felonies & no violation of subdivisions b or c)

# Can This Person Set Aside His/Her Five Felony Convictions?

Larceny in Building (1980)

Retail Fraud 1<sup>st</sup> (1990)

Three Unarmed Robberies (2010) (arose from same transaction)

Unarmed Robbery Is Assaultive Crime

Unarmed Robbery Has 15-Year Maximum

**Answer is No** (would count as five felonies & also violates subdivisions b and c)



# Traditional Applications for Adults

## ❖ Who Is Eligible

- Number of Felony Convictions
- Subdivisions b and c
- Same Transaction Rule

## ❖ Ineligible Offenses (LET'S DISCUSS THIS)

## ❖ Waiting Period

# Traditional Application: Ineligible Offenses

Assuming the Individual Meets the General Test of Not More Than Three Felony Convictions and No Violation of Subdivisions (b) or (c)

**Are There Offenses That Cannot Be Expunged?**

**YES, SOME OFFENSES ARE INELIGIBLE OFFENSES**

# Traditional Application: Ineligible Offenses, MCL 780.621c

- ❖ No Crimes with LIFE Maximum Penalty (and Attempts)
- ❖ No Felony Child Abuse and Most Sex Crimes (and Attempts)
- ❖ No Felony Domestic Violence, if have Misdemeanor DV
- ❖ No Human Trafficking under MCL 750.462i or 462j
- ❖ No for Select Traffic Offenses

# Traditional Application: Ineligible TRAFFIC Offenses

Traffic Offenses May Now Be Set Aside under MCL 780.621c, Except the Following Traffic Offenses **ARE INELIGIBLE**:

- ❖ **Operating While Intoxicated (OWI)** (although pending bill may change this)
- ❖ **Traffic Offenses Causing Injury or Death**
- ❖ **Commercial Motor Vehicle Traffic Offense**

# Is this Person Eligible to Set Aside These Three Convictions?

One FELONY Conviction for CARJACKING (1990), One MISDEMEANOR for OPERATING WHILE INTOXICATED (2010), and One MISDEMEANOR for DRIVING WITH SUSPENDED LICENSE (2014)

**NO: Carjacking (life maximum penalty)**

**NO: OWI (ineligible traffic offense)**

**YES: Driving While License Suspended (unless death, injury or commercial motor vehicle offense)**

# Traditional Applications for Adults

## ❖ Who Is Eligible

- Number of Felony Convictions
- Subdivisions b and c
- Same Transaction Rule

## ❖ Ineligible Offenses (Life, most sex, felony DV, etc.)

## ❖ Waiting Period (LET'S DISCUSS THIS)

# Traditional Application: New Waiting Periods under MCL 780.621d

**Two or More Felony Convictions: SEVEN YEARS**

**One Felony or One or More Serious Misdemeanors: FIVE YEARS**

**One or More Non-Serious Misdemeanors: THREE YEARS**

\*Serious misdemeanor is defined in MCL 780.621 and MCL 780.811

\*No waiting period for marijuana misdemeanor set asides & some human trafficking victims

# Traditional Application: When Does the Waiting Period Start?

From the last of the following events:

- 1. Imposition of sentence**
- 2. Completion of probation**
- 3. Completion of imprisonment**
- 4. Completion of parole**



# Traditional Application: No New Conviction or Pending Charges

A court may not set aside a conviction if:

- ❖ **The applicant has pending criminal charges**
- ❖ **The applicant has a new conviction during the waiting period**

MCL 780.621d

# Traditional Application: Wait Period Questions

Does the Wait Period Begin at the End of Each Sentence or at the End of the Last Sentence for Multiple Offenses in the Same Category?

Statute provides: **“An application . . . to set aside more than 1 felony conviction shall only be filed 7 or more years after whichever of the following events occurs last: (a) Imposition of the sentence for the convictions . . . (b) Completion of any term of felony probation imposed for the convictions . . . (c) Discharge from parole for the convictions . . . (d) Completion of any term of imprisonment imposed for the convictions that the applicant seeks to set aside.”** MCL 780.621d. (Note use of plural “for the convictions”)

# Traditional Application: Wait Period Questions

Can a Person Expunge Multiple Convictions if there Was a New Conviction After a Previous One?

**“The applicant has not been convicted of any criminal offense during the applicable time period .**

**”**

• • •

MCL 780.621d. (Note “during the applicable time period”)

# Traditional Application: Is this Person Eligible to File?

**Larceny in a Building (felony), completed probation with no jail 1996**

**Retail Fraud First (felony), completed probation and jail 2005**

**Driving With Suspended License (non-serious misdemeanor), \$200 fine 2013**

**Probably YES** (seven years between each felony, three years after the non-serious misdemeanor, but this assumes non-conservative reading of statute)

# Traditional Applications for Adults

## ❖ Who Is Eligible

- Not More Than Three Felony Convictions
- No Violation of Subdivisions b and c
- Same Transaction Rule

## ❖ Ineligible Offenses (Life, sex, child abuse, DV, OWI etc.)

## ❖ Waiting Period (seven, five and three years)



# Misdemeanor Marijuana Set Asides

# Why Special Rules for Misdemeanor Marijuana

- ❖ **Recreational marijuana became legal in Michigan effective December 6, 2018**
- ❖ **What to do about old marijuana convictions that would not be a crime if committed now?**

# Misdemeanor Marijuana Set Asides

- ❖ **Special Rules Apply to Misdemeanor Marijuana Set Asides, see MCL 780.621e and MCL 780.621f**
- ❖ **Must Be Done Via Traditional Application Process**
- ❖ **No Waiting Period**



# Misdemeanor Marijuana Convictions Include:

- ❖ **Possession of Marijuana under MCL 333.7403(2)(d)**
- ❖ **Use of Marijuana under MCL 333.7404(2)(d)**
- ❖ **Marijuana Paraphernalia under MCL 333.7543**
- ❖ **A Local Ordinance Substantially Corresponding to Above Crimes**

MCL 780.621e

# No Waiting Period for Misdemeanor Marijuana

- ❖ No Wait Period Specified in MCL 780.621d (traditional application)
- ❖ No Wait Period Specified in MCL 780.621e (misdemeanor marijuana)
- ❖ Instead, MCL 780.621e states, “Beginning on January 1, 2020, a person convicted of 1 or more misdemeanor marijuana offenses may apply to set aside the conviction or convictions under this subsection.”

\*Note, subsection 621e did not take effect until April 11, 2021.

# Once Application is Filed for Misdemeanor Marijuana

- ❖ **REBUTTABLE PRESUMPTION** that the conviction would not have been a crime if committed on or after December 6, 2018 (date on which recreational marijuana was legalized)
- ❖ **Prosecutor has 60 days to file answer rebutting presumption, using preponderance of evidence standard**

MCL 780.621e

# Rebuttable Presumption and Hearing

- ❖ If prosecutor files timely rebuttal, court must set hearing within 30 days
- ❖ If prosecutor does not file answer, court must enter order granting application within 21 days
- ❖ Losing party may file for rehearing, reconsideration or appeal

MCL 780.621e and MCL 780.621f

# What an Individual Does *NOT* Win with a Misdemeanor Marijuana Set Aside

- ❖ **No return of fines, costs, fees or forfeited property/money**
- ❖ **Not entitled to resentencing on a prior conviction where the misdemeanor marijuana conviction was used to score the sentencing guidelines or used to determine the appropriate sentence**

# Additional Consideration with Misdemeanor Marijuana Set Asides

- ❖ **Same Transaction Rule Applies to Misdemeanor Marijuana Set Asides, MCL 780.621f**
- ❖ **MSP and arresting agency continue to maintain non-public record of conviction and the following agencies may access the record for certain purposes (governor, law enforcement, prosecutor, judicial branch agencies, MDOC, attorney general, courts), MCL 780.621f & 780.623**

# Three Discrete Topics of Discussion


1. **Traditional Application Process (revised, eff. 4/11/21)**
2. **Misdemeanor Marijuana Set-Asides (new, eff. 4/11/21)**
3. **Automatic Set-Aside Process (new, eff. late 2022 or later)**

# If the Traditional or Misdemeanor Application Is Denied

**If the court denies the application, make sure to request language in the order allowing re-filing before three years (if re-filing is desired)**

See MCL 780.621d





Copyright 20221 Bodman PLC. Bodman has prepared this for informational purposes only. This message or the information contained herein is not intended to create, and receipt of it does not evidence, an attorney-client relationship. Readers should not act on this information without consulting the applicable statutes. Individual circumstances or other facts might affect the applicability of conclusions expressed herein.