NEW HAMPSHIRE'S ANNULMENT LAWS

Table of Contents

Annulment: What is it?

"The purpose of the annulment statute is to reduce the collateral consequences of a criminal conviction and 'to afford an offender … a chance to start anew without this stigma in his records.'" *Wolfgram v. Dep't of Safety*, 169 N.H. 32, 36 (2016) (quoting *State v. Roe*, 118 N.H. 690, 692-93 (1978)).

Annulment is the destruction of the public record of a criminal conviction. A request for a case summary, or request at the clerk's office to look at a file, will result only in the statement that there is no such case. The word must have been borrowed from marital law and for good reason – for the most part, the goal of annulment is to make it seem like the person was never arrested, prosecuted, and/or convicted at all. (Many other States use the term "expungement" to describe their own similar statutes).

And as long as a required fee is paid to scrub the State Police criminal record of the annulled conviction, if a third party obtains a copy of the person's State Police criminal record post-annulment, the arrest and conviction will no longer appear on the record. It's not that the record shows "conviction annulled." The record shows nothing – no entry at all.

What Benefits are Provided by Annulment of Conviction(s)?

Annulment of a criminal conviction or convictions is very beneficial for the former defendant's employment prospects, career development, and public reputation, not only because the record is wiped clean, but because the statute provides another level of protection:

> In any application for employment, license or other civil right or privilege, or in any appearance as a witness in any proceeding or hearing, a person may be questioned about a previous criminal record only in terms such

as '*Have you ever been arrested for or convicted of a crime that has not been annulled by a court?*'

RSA 651:5, X(c) (Emphasis added).

It even used to be a misdemeanor crime for a third party to disclose the existence of another's annulled arrest or conviction, but the legislature repealed that provision. Laws 2012, 249:2; *see Grafton County Attorney's Office v. Canner*, 169 N.H. 319, 326-27 (2016).

As suggested in the quote that opens these materials, annulment not only eliminates the conviction, but may provide a pathway to eliminate *collateral consequences* of criminal convictions:

- Potential restoration of 2d Amendment rights
- Eligibility for government benefits, government permits, and government-issued licenses that are barred for people with certain criminal convictions.
- Loss of public benefits that are barred for convicted felons, etc.
- Restoration of voting rights in States that, unlike New Hampshire, disqualify convicted felons from voting for life.
- Immigration consequences? Not so much. Read further….
- The National Inventory of Collateral Consequences website[1] provides a searchable database of at least 43,863 different collateral consequences of various convictions under state and federal laws. Avoiding collateral consequences is a big deal!
- But for all these collateral consequences, including 2d Amendment rights, do not tell a client that annulment automatically wipes out the collateral consequences. Just like the client has to pay $100 to the State Police to scrub the record clean, the client may have to take affirmative steps in other arenas of life to remove the impact of collateral consequences.

How far does all of this go? The statute further provides that, "[u]pon entry of an order of annulment … [t]he person whose record is annulled shall be treated in *all* respects as if he or she had never been arrested, convicted or sentenced," RSA 651:5, X(a) (Emphasis added). Applying this language in a civil suit brought against an ex-spouse, the Court held that the civil plaintiff would have to relitigate whether she was assaulted by her estranged husband and could not rely on the record of conviction to conclusively prove that fact, because it had been annulled. *Brown v. Brown*, 133 N.H. 442, 446 (1990).

[1] https://niccc.nationalreentryresourcecenter.org/consequences

But as shown in the remainder of these materials, the statutory language turns out to be something of an exaggeration: It's really much more like the person whose record is annulled shall be treated in "*some* respects" as if never arrested, convicted or sentenced, not in "*all* respects." An annulment is a "legal fiction" that does not necessarily mean an end to public access, and public discussion, of information about the facts underlying the arrest or conviction. *Grafton County Attorney's Office v. Canner*, 169 N.H. 319, 325-26 (2016).

Thus, the local police department and prosecuting agency, and the State Police, may retain information about the case which can be used in a future bail or sentencing hearing, in future criminal investigations, in evaluating the fitness of an individual to serve as a police officer, and for other specified exceptions.

The federal government, FBI and other agencies, will retain the information and post it on an FBI "triple I" (Interstate Identification Index) criminal record check. Law enforcement employers and private and public employers that deal with information or technologies that present national security risks, can access the III record.

A published opinion of the New Hampshire Supreme Court remains published, on the books, on Lexis/Westlaw, and on "Google" etc., even if the underlying conviction has been annulled. RSA 651:5, XV.

Nevertheless, an annulment is very valuable because most employers generally cannot obtain an FBI III record check. Most employers rely on the "local" (State Police Criminal and Dept. of Safety Motor Vehicle) record checks, which they can obtain by having an employee or job applicant sign a release. Thus, the annulled arrest and/or conviction will be invisible to most employers running a background check.

But more generally, most lawyers who have helped their retained clients, or especially pro bono clients, say the same thing: The granted annulment can change the person's life, or change their conception of themselves, or both. It's such a good feeling!

The public policy considerations underlying NH's annulment law are very much in vogue right now – for example, the "Right to be Forgotten" laws or similar proposed legislation we have seen in Europe and elsewhere around the world, or the laws in Massachusetts that prohibit employers from looking back more than a few years for most convictions when doing a record check.

Who can Get an Annulment?

Annulment is available for most criminal convictions, after the required waiting period passes and if the applicant has stayed out of trouble.

Accordingly, it's easier to list the types of convictions that are NOT eligible for annulment, ever. That list consists mostly of what you would expect to see – murder, 1st degree assault, rape, kidnapping, arson – plus some offenses that come as a surprise (incest, obstructing governmental operations). Why shouldn't a young person convicted of incest be able to annul the conviction years later? That's a question for the legislature – as you can see from the legislative "Source" section of RSA 651:5 below, the legislature has tinkered with this statute many, many times!

How Do You Get an Annulment?

To get an annulment in New Hampshire, you must file paperwork, with a filing fee, and potentially another fee for a background check by the Department of Correction. Filing and other fees can be waived for indigent applicants. The courts did a good job with keeping the form simple for most lay people to follow, but still, the law is so complex that the applicant would benefit greatly from a lawyer, especially a pro bono lawyer through 603 Legal's outreach program! The wait can be as little as a couple of weeks for some types of annulments, but others take much longer.

The paperwork is not complicated, but NH's annulment law is full of pitfalls. The annulment statutes are scattered across several different chapters of the motor vehicle and criminal codes. There are multiple forms for different types of offenses. And there are multiple different waiting periods for annulments, and even multiple methods of computing time, as discussed in the next section.

Waiting Periods for Annulment Eligibility.

First of all, there is only a 30-day waiting period before a charge that did *not* result in a conviction can be annulled. These include charges that are dismissed by the court, charges "nol prossed" (dismissed) by the prosecutor, and charges for which the accused was found not guilty. *State v. Williams*, 173 N.H. 540, 545 (2020); *State v. Skinner*, 149 N.H. 102, 103 (2003).

The statute actually says there is no waiting period – a petition can be brought "at any time," RSA 651:5, II, but the forms all include a 30-day waiting period to account for the time period during which a party could file an appeal of the dismissal.

Another provision of the annulment law, however, states that no charge can be annulled until all charges that are "part of the same case" are eligible

for annulment. RSA 651:5; *State v. Bobola*, 168 N.H. 771, 777-78 (2016). So let's say a person commits two assaults that are part of the same case, and reaches a plea bargain where the accused pleads guilty and is convicted of only one, the other being dismissed. In that situation, the person has to wait out the time period for annulment for the charge of conviction before being able to petition to annul the dismissed charge. *Bobola*, 168 N.H. at 777-78.

But what if the person had committed three assaults on different dates, the cases were consolidated for a negotiated plea agreement, and as an outcome, there was one conviction and two dismissed offenses? In that situation, the defendant can petition to annul the two dismissed offenses, because putting these 3 otherwise unrelated cases into the same plea and sentencing hearing does not make them part of "the same case." *State v. Williams*, 173 N.H. 540, 546 (2020).

Different offenses have different waiting periods before you can get an annulment – for example, a year for most "violation" level offenses, 2-5 years for most misdemeanors, 5 years for class B felonies, 7 years for drug felonies other than simple possession, 10 years for class A felonies, 10 years for misdemeanor sexual assault or felony indecent exposure.

However, the waiting period is 7 years for any motor vehicle offense, even a violation offense such as a speeding ticket, that can be a "predicate" for habitual offender certification. This is to accommodate the fact that the habitual offender law penalizes people for having a certain number of "major" and "minor" motor vehicle convictions in a 5-year period. Note, however, that most motor vehicle offenses, including some dangerous ones like running a red light or running a stop sign, are not predicates for habitual offender law. These non-predicates can be annulled under the general "violation offense" timeliness requirements.

The waiting period for "domestic violence" and driving while intoxicated convictions is 10 years.

The method of calculating the waiting period differs depending on the type of conviction:

- For almost all offenses, the waiting period is calculated not from the date of conviction, but from the point in time "when the petitioner has completed all the terms and conditions of the sentence and has thereafter been convicted of no other crime, except a motor vehicle offense classified as a violation other than driving while intoxicated…." RSA 651:5, III.
- Practically speaking, that ends up being the date of conviction if there are no terms of conditions of the sentence – for example, a speeding

ticket, carrying only a fine, no portion of which was suspended, and paid on the date of conviction.

- For DWI offenses, however, the waiting period begins running from the date of conviction, not from the point in time when all terms and conditions of the sentence are satisfied. RSA 265:82, IV; *State v. Meister*, 125 N.H. 435, 438 (1984).
- Things start to get complicated with felony drug cases where the controlled drug act sets forth a *7-year* waiting period for annulment which runs f*rom the date of conviction*, RSA 318-B:28-a, but RSA 651:5 sets forth 5- and 10-year waiting periods for class B and class A felonies that run from the point when *all terms and conditions of the sentence are satisfied*. *State v. Patterson*, 145 N.H. 462, 464 (2000). Essentially, whichever is the longest period controls. *Id.* at 465.
- There is a special case (but not an uncommon scenario) where a person is convicted of offenses, and then within the statutory waiting period for annulment, commits and is convicted of another offense or offenses, … but then within the new statutory annulment period for the *latest*-occurring offense, does remain of good behavior and otherwise meet all eligibility requirements for annulment. In all cases, the applicant has to work their way backwards, first petitioning to annul the most recent conviction(s), and then after securing annulment, then going back to court and pursing annulment of the earlier convictions. In *State v. Williams*, 173 N.H. 540 (2020), the State argued that the person in our hypothetical should *never* be eligible for annulment of *any* of the offenses, because RSA 651:5, V states that no annulment can be granted "if annulment of any part of the record is barred," and no annulment can be granted until the "time requirements… for all offenses of record have been met." The Court, however, rejected this "draconian interpretation" and held that if the defendant is eligible for annulment of the latest-occurring offense, she can petition to annul it, and then work her way backwards to the earlier convictions. 173 N.H. at 548.
- Thus, a new conviction extends the time periods for annulment of all convictions, but does not foreclose annulment of all previous convictions. *Id.*

And of course, some offenses are never eligible for annulment.

What is the legal standard?

In theory, the legal standard applied by the court is: Will annulment "assist in the petitioner's rehabilitation and will be consistent with the public welfare"? RSA 651:5, I.

In *State v. Baker*, 164 N.H. 296 (2012), the Court provided further guidance to lower courts for the application of this standard:

> In deciding whether annulment is consistent with the public welfare, the trial court should weigh the factors in favor of annulment, such as evidence of the defendant's exemplary conduct and character since his last conviction, against the public interest in keeping his convictions a matter of public record.
>
> …
>
> Thus, in exercising its discretion, the court may consider such factors as the number and circumstances of the convictions at issue, the defendant's age at the time of each conviction, the time span of the convictions, and the particular manner in which annulment would aid the defendant's rehabilitation — for example, by allowing him to obtain a professional license or to pursue a calling otherwise prohibited to those convicted of a crime. By identifying potential factors, [the Court does] not intend to limit the court's discretion to consider any relevant factor.

Id. at 300.

If the offense of record is of a type where a subsequent conviction will carry enhanced penalties, the court considering an annulment petition may consider this as a factor but may not make it dispositive. For example, the court cannot deny a petition for annulment of a drug conviction, *solely* on the basis that a subsequent drug conviction would carry enhanced penalties under RSA 318-B:26, I(b)(2). *State v. Meister*, 125 N.H. 435, 439 (1984). The Court in *Meister* explained:

> Rather, in deciding whether to grant an annulment of the record of conviction for such an offense, a trial court must weigh the possibility that an individual might commit a second offense and, because of the annulment, avoid the enhanced penalty provisions of the statute, against the possible rehabilitative value of annulling the defendant's record of conviction and thereby relieving him or her of the disadvantages resulting from a permanent criminal record. A trial court must decide each case based upon a careful review of its own unique facts.

Id. at 439.

All this makes the standards seem complicated and appears to allow vast discretion to the court considering an annulment petition.

But in practice, virtually all annulment petitions of violations and misdemeanors, and many if not most annulment petitions for felony convictions, are routinely approved upon proof that the applicant meets the procedural requirements such as timeliness and not having any new offenses.

And perhaps as a further deterrent to the exercise of "too much discretion," it looks like every reversal on appeal by the New Hampshire Supreme Court has been the reversal of the *denial* of annulment, not the reversal of the granting of annulment.

Procedural Traps.

There are procedural traps that the applicant and counsel need to be aware of. If the applicant files the petition before the required waiting period has expired, it will be denied, and the applicant will have to wait three years before she can file again. NH RSA 651:5. The laws do not comport with "common sense" - for example, the waiting period to annul a violation speeding ticket is several years longer than the waiting period to annul a conviction for a misdemeanor (non-domestic violence) assault, theft or drug possession. But if you do a pro bono annulment referred to counsel by NH Legal Aid, most if not all of those procedural issues have already been vetted by their staff.

Why didn't we give you a checklist and forms?

Because nhlegalaid.org has all of that on their website, and the court's website also has a checklist for preparation of annulment petitions. On 603 Legal Aid's website, there is general information, there is a FAQ, there are instructions for how to do things like get a copy of one's criminal record, there are instructions for which of the several forms to use depending on the type of case and age of conviction, and there is a checklist that functions as a sort of flowchart of what one must do to get an annulment.

Free Speech and Open Government Considerations.

The tension between the annulment law, the right to free speech, and the public interest in limiting governmental secrecy has led to some deep philosophical musings in judicial opinions. For example, our Court approvingly

quoted a long passage from a New Jersey court discussing their expungement law:

> '[t]he expungement statute does not transmute a once-true fact into a falsehood. It does not require the excision of records from the historical archives of newspapers or bound volumes of reported decisions or a personal diary. It cannot banish memories. It is not intended to create an Orwellian scheme whereby previously public information — long maintained in official records — now becomes beyond the reach of public discourse . … Although our expungement statute generally permits a person whose record has been expunged to misrepresent his past, it does not alter the metaphysical truth of his past, nor does it impose a regime of silence on those who know the truth.'

Grafton County Attorney's Office v. Canner, 169 N.H. 319, 326 (2016) (quoting G.D. v. Kenny, 205 N.J. 275, 15 A.3d 300, 315-16 (N.J. 2011)).

Applying these principles, the *Canner* Court held that the annulment statute does not prevent public access under RSA 91-a, the Right-to-Know law, to public records regarding the underlying facts of the arrest or conviction, because "allowing the public access to these records will shed light on the government's actions giving rise to [the subject of the annulment's] arrest, prosecution, and acquittal." *Id.* at 327.

These principles may be bad news for the person who got the annulment, but they are good news for our democracy. "The public has a substantial interest in understanding how investigations of alleged crimes are conducted, and how prosecutors exercise their discretion when deciding whether to prosecute, reach a plea agreement, or try cases." *Id.* at 328. Fans of the free speech and express open government provisions of the State Constitution, and the First Amendment, will be thrilled to read the court's reasoning:

> Our holding today advances this important goal: The ability of the public to learn about the decisions of law enforcement officials and prosecutors will not be frustrated merely because a defendant has secured an annulment. Prosecutors 'bear responsibility for [a] number of critical decisions, including what charges to bring' and 'whether to extend a plea bargain,' and the decisions of an individual prosecutor can have a significant impact on the progress of a case. Williams v. Pennsylvania, 136 S. Ct. 1899, 1907, 195 L. Ed. 2d 132 (2016). Because a prosecutor must be publicly accountable for his or her decisions, see Cheney v. United States Dist. Court for D.C., 542 U.S. 367, 386, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004), the public should have access to information that will enable it to assess how prosecutors exercise the tremendous power and discretion with which they are entrusted. See Morrison v.

> Olson, 487 U.S. 654, 727-28, 108 S. Ct. 2597, 101 L. Ed. 2d 569 (1988) (Scalia, J., dissenting) (explaining that public review of [*329] prosecutorial decisions serves as "the primary check" on the "vast power" and "immense discretion" given to prosecutors).

Canner, 169 N.H. at 328-29.

The Court applied these principles in a landmark case involving a candidate for public office whose opponents, and the press, disclosed his prior annulled conviction. *Lovejoy v. Linehan*, 161 N.H. 483 (2011). At that time, it was a crime to disclose the existence of an annulled conviction (it was legislatively repealed almost immediately after the election campaign). The criminalization of disclosure at the time did not factor into the court's decision, but certainly made the involved newspaper reporter look courageous!

Instead, the court addressed this issue: Can citizens or media outlets who disclose an annulled arrest or conviction be sued for the tort of intentional invasion of privacy, since the existence of an annulled conviction is a very private matter? Without addressing constitutional free speech issues, the Court answered this question with a resounding "no" in the context of disclosure of the annulment of conviction of a candidate for public office. *Lovejoy v. Linehan*, 161 N.H. 483 (2011) ("The qualifications of a candidate for public office is an area of legitimate concern to the public and, therefore, a candidate loses his or her privacy right to this information."). It remains undecided whether the right to free speech would prevent such a lawsuit brought by a non-public figure.

Jury Service

Citizens are eligible for jury service, despite a disqualifying conviction such as a felony conviction, at the point in time that the citizen becomes eligible for annulment, even if the person never actually applied for and received an annulment. *United States v. Howe*, 167 N.H. 143 (2014) (answering a certified question from the First Circuit Court of Appeals).

Motor Vehicle Habitual Offenders

An annulled motor vehicle conviction can still be considered by the Department of Safety for purpose of determining eligibility for the status of "habitual offender" as discussed elsewhere in these materials. RSA 651:5, X(a).

However, the Department of Safety must maintain its record in a manner so that the public does not have access to the existence of annulled convictions and does not have access to any prior habitual offender certification that was based on annulled convictions. *Wolfgram v. N.H. Dep't of Safety*, 169 N.H. 32 (2016).

Sentencing Hearing in a Later-Occurring Offense.

Even after a conviction has been annulled, that same court may consider the annulled conviction at a sentencing hearing for a new, later-occurring offense. RSA 651:5, X(a) ("upon conviction of any crime committed after the order of annulment has been entered, the prior conviction may be considered by the court in determining the sentence to be imposed....").

Immigration Consequences

An immigration law decision, *In re Pickering*, is enclosed and it carries bad news: The Feds don't recognize an annulment when it comes to immigration consequences. The decision states:

> If a court vacates an alien's conviction for reasons solely related to rehabilitation or immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings, the conviction is not eliminated for immigration purposes.

In re Pickering, Bd of Immigration Appeals (06/11/2003).

And further, annulment may make things worse for immigration purposes, because there is no court record, so no way to prove any mitigating circumstances about the case. Immigration lawyers always tell us not to file for annulment until the client has retained qualified immigration counsel to direct the best course of action.

> *(Thanks to immigration law expert Ron Abramson of Shaheen & Gordon for sharing this decision -- and for giving us so much good guidance over the years).*

How About Google, Bing, and the Rest of the Internet?

An annulment can only go so far in rehabilitating a person's public reputation. Many clients ask if they can scrub the internet of information about their arrest or conviction post-annulment. The answer is: You have to go to the host of each and every website where the information appears and try to get them to do so. Some will upon proof of the annulment, such as the "Patch" website for the City of Concord, NH.

Impact of Annulment on Civil Litigation.

As discussed above, an annulment of an arrest or conviction means a party can no longer use the conviction as conclusive proof of a fact, but does not prevent the party from introducing into evidence the underlying facts that brought about the arrest or conviction. *Brown v. Brown*, 133 N.H. 442, 446 (1990) (annulment law "'only extends as far as evidence of the conviction itself,'

and does not prohibit introduction of the underlying facts and circumstances giving rise to the conviction, provided that such evidence can be introduced without reference to the actual criminal proceeding.") (Quoting *Panas v. Harakis & K-Mart Corp.,* 129 N.H. 591, 610 (1987)).

How do We Ethically Advise Clients About How to Answer Questions About their Annulled Convictions?

The annulment laws only provide a clear answer to one situation: Since NH law requires that employers and grantors of a "license, or other civil right or privilege" ask only about "convictions that have not been annulled," we can advise our clients to say "no" if they are asked by a prospective employer, etc **in New Hampshire** if they have any prior convictions.

Pretty much everything else a client can possibly ask presents ethical quandaries. We are forbidden from counseling our client to lie to a third party. And lying to some third parties, like the federal government on forms related to immigration, may be a more serious crime than the crime that we got annulled in the first place. In this and many other contexts, discovery of the lie may be worse than discovery of the conviction in terms of the applicant's prospects for a favorable immigration decision, admission to college or graduate school, a career in law enforcement, etc.

And even in the employment context, saying "no" to the question about convictions may not be a good idea if the conviction was annulled from official records, but very much alive and well on the easiest and cheapest platform available for employers to conduct a background check: Google.

LAWS GOVERNING ANNULMENT REPRODUCED HERE

Annulment of Non-Motor Vehicle Offenses.

The law governing annulment of non-motor vehicle offenses is found at RSA 651:5, and is reproduced here:

651:5 Annulment of Criminal Records. –

I. Except as provided in paragraphs V-VIII, the record of arrest, conviction and sentence of any person may be annulled by the sentencing court at any time in response to a petition for annulment which is timely brought in accordance with the provisions of this section if in the opinion of the court, the annulment will assist in the petitioner's rehabilitation and will be consistent with the public welfare. The court may grant or deny an annulment without a hearing, unless a hearing is requested by the petitioner.

II. For an offense disposed of before January 1, 2019 and any offense not subject to paragraph II-a, any person whose arrest has resulted in a finding of not guilty, or whose case was dismissed or not prosecuted, may petition for annulment of the arrest record or court record, or both, at any time in accordance with the provisions of this section. Any person who was convicted of a criminal offense whose conviction was subsequently vacated by a court may petition for annulment of the arrest record or court record, or both, in accordance with the provisions of this section. Nothing in this paragraph shall limit the provisions of subparagraph XI(b).

II-a. (a) For an offense disposed of on or after January 1, 2019, any person whose arrest has resulted in a finding of not guilty on all charges that resulted from the arrest, or whose case was dismissed or not prosecuted, shall have the arrest record and court record annulled:

(1) Thirty days following the finding of dismissal if an appeal is not taken under RSA 606:10 or finding of not guilty; or

(2) Upon final determination of the appeal affirming the finding of dismissal if an appeal is taken under RSA 606:10.

(b) For an offense disposed of on or after January 1, 2019, any person who was convicted of a criminal offense whose conviction was subsequently vacated by a court shall have the arrest record and court record annulled. Nothing in this paragraph shall limit the provisions of subparagraph XI(b).

III. Except as provided in RSA 265-A:21 or in paragraphs V and VI, any person convicted of an offense may petition for annulment of the record of arrest, conviction, and sentence when the petitioner has completed all the terms and conditions of the sentence and has thereafter been convicted of no other crime, except a motor vehicle offense classified as a violation other than driving while intoxicated under RSA 265-A:2, I, RSA 265:82, or RSA 265:82-a for a period of time as follows:

(a)(1) For a violation with a conviction date prior to January 1, 2019 or a violation with a conviction date on or after January 1, 2019 that was not the highest offense of conviction, one year, unless the underlying conviction was for an offense specified under RSA 259:39.

(2) For a violation with a conviction date on or after January 1, 2019 where the violation was the highest offense of conviction, unless the underlying conviction was for an offense specified under RSA 259:39, or another violation for which there is an enhanced penalty for a subsequent conviction, one year after the person has completed all the terms and conditions of the sentence. Upon completion of a petition by the person stating that the conviction is eligible for annulment, the court shall submit a notice of its determination to the person convicted of the offense and to the prosecutor. The prosecutor shall have 20 days from the date of receipt of the notice to object to the annulment on the ground that the offense is not eligible for annulment or that the person has not completed all the terms and conditions of the sentence. If the prosecutor fails to timely object or the court denies the prosecutor's objection, the court shall annul the conviction.

(b)(1) For a class B misdemeanor with a conviction date prior to January 1, 2019 or a class B misdemeanor with a conviction date on or after January 1, 2019 that was not the highest offense of conviction, except as provided in subparagraphs (f) and (h), 2 years.

(2) For a class B misdemeanor with a conviction date on or after January 1, 2019 where the class B misdemeanor was the highest offense of conviction, except as provided in subparagraphs (f) and (h), 2 years after the person has completed all the terms and conditions of the sentence. Upon completion of a petition by the person stating that the class B misdemeanor is eligible for annulment, the court shall submit a notice of its determination to the person convicted of the offense and to the prosecutor. The prosecutor shall have 20 days from the date of receipt of the notice to object to the annulment on the ground that the offense is not eligible for annulment or that the person has not completed all the terms and conditions of the sentence. If the prosecutor fails to timely object or the court denies the prosecutor's objection, the court shall annul the conviction.

(c) For a class A misdemeanor except as provided in subparagraphs (f) and (i), 3 years.

(d) For a class B felony except as provided in subparagraphs (g) and (i), 5 years.

(e) For a class A felony, except as provided in subparagraph (i), 10 years.

(f) For sexual assault under RSA 632-A:4, 10 years.

(g) For felony indecent exposure or lewdness under RSA 645:1, II, 10 years.

(h) For any misdemeanor domestic violence offense under RSA 631:2-b, 10 years. In the event an individual is convicted of a subsequent misdemeanor or felony domestic violence offense under RSA 631:2-b, the earlier domestic violence conviction shall not eligible for an annulment until the most recent domestic violence conviction has become eligible for an annulment.

(i) For a class A misdemeanor or felony offense under RSA 318-B:26, II, 2 years.

IV. If a petition for annulment is denied, no further petition shall be brought more frequently than every 3 years thereafter.

V. No petition shall be brought and no annulment granted in the case of any violent crime, of felony obstruction of justice crimes, or of any offense for which the petitioner was sentenced to an extended term of imprisonment under RSA 651:6.

VI. If a person has been convicted of more than one offense, no petition for annulment shall be brought and no annulment granted:

(a) If annulment of any part of the record is barred under paragraph V; or

(b) Until the time requirements under paragraphs III and IV for all offenses of record have been met.

VI-a. A conviction for an offense committed under the laws of another state which would not be considered an offense under New Hampshire law, shall not count as a conviction for the purpose of obtaining an annulment under this section.

VII. If, prior to disposition by the court of a petition for annulment, the petitioner is charged with an offense conviction for which would bar such annulment under paragraph V or VI(a) or would extend the time requirements under paragraphs III, IV and VI(b), the petition shall not be acted upon until the charge is disposed.

VIII. Any petition for annulment which does not meet the requirements of paragraphs III-VI shall be dismissed without a hearing.

IX. When a petition for annulment is timely brought, the court shall require the department of corrections to report to the court concerning any state or federal convictions, arrests, or prosecutions of the petitioner and any other information which the court believes may aid in making a determination on the petition. The department shall charge the petitioner a fee of $100 to cover the cost of such investigation unless the petitioner demonstrates that he or she is indigent, or has been found not guilty, or the case has been dismissed or not prosecuted in accordance with paragraph II. The department of safety shall charge the successful petitioner a fee of $100 for researching and correcting the criminal history record accordingly, unless the petitioner demonstrates that he or she is indigent, or has been found not guilty, or the case has been dismissed or not prosecuted in accordance with paragraph II. The court shall provide a copy of the petition to the prosecutor of the underlying offense and permit them to be heard regarding the interest of justice in regard to the petition. The petitioner's request for a court filing fee waiver shall be submitted on a form supplied by the court.

X. Upon entry of an order of annulment:

(a) The person whose record is annulled shall be treated in all respects as if he or she had never been arrested, convicted or sentenced, except that, upon conviction of any crime committed after the order of annulment has been entered, the prior conviction may be considered by the court in determining the sentence to be imposed, and may be counted toward habitual offender status under RSA 259:39.

(b) The court shall issue the person a certificate stating that such person's behavior after the conviction has warranted the issuance of the order, and that its effect is to annul the arrest, conviction, and sentence, and shall notify the state police criminal records unit, the prosecuting agency, and the arresting agency.

(c) The court records relating to an annulled arrest, conviction, or sentence shall be sealed and available only to the person whose record was annulled, his or her attorney, a court for sentencing pursuant to subparagraph (a), law enforcement personnel for legitimate law enforcement purposes, or as otherwise provided in this section.

(d) Upon payment of a fee not to exceed $100 to the state police, and subject to the provisions of subparagraph XI(b), the state police criminal records unit shall remove the annulled criminal record and inform all appropriate state and federal agencies of the annulment, unless the petitioner demonstrates that he or she is indigent, or has been found not guilty, or the case has been dismissed or not prosecuted in accordance with paragraph II. The state police shall grant the fee waiver request where the petitioner demonstrates indigency by including with the fee waiver request an affidavit listing the petitioner's monthly net income and that of his or her spouse, and the assets of the petitioner and his or her spouse. The fee waiver request form used shall be substantially similar to the forms for waiver of fees and costs in the superior courts.

(e) The arresting agency and the prosecuting agency shall clearly identify in their respective files and in their respective electronic records that the arrest or conviction and sentence have been annulled.

(f) In any application for employment, license or other civil right or privilege, or in any appearance as a witness in any proceeding or hearing, a person may be questioned about a previous criminal record only in terms such as "Have you ever been arrested for or convicted of a crime that has not been annulled by a court?"

XI. Nothing in this section shall affect any right:

(a) Of the person whose record has been annulled to appeal from the conviction or sentence or to rely on it in bar of any subsequent proceedings for the same offense; or

(b) Of law enforcement officers to maintain arrest and conviction records and to communicate information regarding the annulled record of arrest or conviction to other law enforcement officers for legitimate investigative purposes or in defense of any civil suit arising out of the facts of the arrest, or to the police standards and training council solely for the purpose of assisting the council in determining the fitness of an individual to serve as a law enforcement officer, in any of which cases such information shall not be disclosed to any other person.

XII. [Repealed.]

XIII. As used in this section, "violent crime" means:

(a) Capital murder, first or second degree murder, manslaughter, or class A felony negligent homicide under RSA 630;

(b) First degree assault under RSA 631:1;

(c) Aggravated felonious sexual assault or felonious sexual assault under RSA 632-A;

(d) Kidnapping or criminal restraint under RSA 633;

(e) Class A felony arson under RSA 634:1;

(f) Robbery under RSA 636;

(g) Incest under RSA 639:2, III or endangering the welfare of a child by solicitation under RSA 639:3, III; or

(h) Any felonious offense involving child sexual abuse images under RSA 649-A.

XIV. As used in this section, "crime of obstruction of justice" means:

(a) Tampering with witnesses or informants under RSA 641:5 or falsifying evidence under RSA 641:6; or

(b) Any felonious offense of obstructing governmental operations under RSA 642.

XV. A petition for annulment of any record of arrest, conviction, and sentence authorized by this section may be brought in the supreme court with respect to any such record in the supreme court, provided that no record in the supreme court relating to an opinion published in the New Hampshire Reports may be annulled.

XVI. A journalist or reporter shall not be subject to civil or criminal penalties for publishing or broadcasting:

(a) That a person had a criminal record that has been annulled, including the content of that record.

(b) That a person has a criminal record, including the content of such record, without reporting that the record has been annulled, if the journalist or reporter does not have knowledge of the annulment.

XVII. No person or entity, whether public or private, shall be subject to civil or criminal penalties for not removing from public access or making corrections to a report or statement that a person has a criminal record, including the content of such record, if thereafter the criminal record was annulled. This provision shall apply to any report or statement, regardless of its format.

Source. 1971, 518:1. 1985, 205:2. 1986, 49:1; 189:1. 1988, 238:6. 1991, 159:1. 1992, 269:11. 1994, 224:1. 1998, 325:2. 2002, 269:1. 2006, 163:3; 260:34. 2008, 62:4; 104:1. 2009, 144:131. 2011, 219:1-3. 2012, 249:1, 2. 2013, 123:1. 2014, 170:1. 2015, 135:1, eff. Jan. 1, 2016. 2016, 89:1, eff. Jan. 1, 2017; 325:2, eff. Aug. 20, 2016 at 12:01 a.m. 2017, 91:8, eff. Aug. 6, 2017. 2018, 366:4-10, eff. Aug. 31, 2018. 2020, 12:1, eff. Sept. 14, 2020.

Annulment of Felony Drug Convictions

318-B:28-a Annulments of Criminal Records. – No court shall order an annulment, pursuant to RSA 651:5 or any other provision of law, of any record of conviction for a felony under RSA 318-B until 7 years after the date of conviction.

Source. 1985, 205:1. 1988, 238:5, eff. Jan. 1, 1989.

But see discussion of *State v. Patterson* above!

Annulment of Motor Vehicle Offenses Other than DWI that are Predicates for NH's Habitual Offender Law.

Before reproducing the governing statute, NH RSA 259:39, a little explanation is needed: NH's law provides a list of 22 different offenses that count as "majors" (major offenses) for purpose of the Habitual Offender law. The most commonly prosecuted "major" offenses are Driving While Intoxicated, Operating after Suspension, Reckless Operation, Negligent Operation, Possession of Controlled Drugs in a Motor Vehicle, and Conduct after an Accident (leaving the scene of an accident). Any three of these in a 5-year period will certify the driver as an habitual offender. However, if two or more major convictions result from a single criminal prosecution and there are no prior major offenses in the five-year period, the multiple majors count as only one major offense. The purpose of this exception is to not unduly penalize the defendant who manages to commit multiple major offenses all at once (like driving while intoxicated *and* while under suspension), but who is a first offender.

Counterintuitively, while there are many "major" offenses, there are only 4 different offenses that count as "minor" offenses: Speeding, Driving without a Valid License, Operating without proof of financial responsibility when required, and Crossing the Center Line. This leaves out a lot of common motor vehicle offenses, such as running a red light or running a stop sign or crossing the white/fog line. Any 12 of these offenses in a 5-year period will certify the person as a habitual offender. Any 4 of them count as one major. Thus, for example, two majors and four minors would result in certification.

Here's the statute:

259:39 Habitual Offender. –

" Habitual offender " means any resident or nonresident person whose record, as maintained in the office of the division, shows that such person has accumulated convictions in the number provided in paragraph I, II or III of this section for those offenses listed therein and committed within a 5-year period, based on the date of the offense. After a conviction for an offense listed either in paragraph I or in paragraph II and during the 5-year period, if a subsequent single

incident results in convictions for more than one offense under the same paragraph, each such conviction may be counted separately for the purpose of certifying a person as an habitual offender. A person who meets the requirements of one of the following three paragraphs shall be certified as an habitual offender:

I. Three or more convictions, singularly or in combination, of the following offenses:

(a) Conviction of any offense specified in RSA 261:73;

(b) Conviction of any offense specified in RSA 262:1, I;

(c) Conviction of any offense specified in RSA 262:8;

(d) Conviction of any offense specified in RSA 262:12;

(e) Conviction of any offense specified in RSA 262:13;

(f) Conviction of any offense specified in RSA 263:12, V;

(g) Conviction of any offense specified in RSA 263:64;

(h) Conviction of any offense specified in RSA 264:25;

(i) Conviction of any offense specified in RSA 265:4;

(j) Conviction of any offense specified in RSA 265:79;

(k) Conviction of any offense involving a vehicle specified in RSA 265-A:2, I;

(l) Conviction of any offense involving a vehicle specified in RSA 265-A:3;

(m) Conviction under RSA 630:2 of manslaughter resulting from the operation of a motor vehicle;

(n) Conviction under RSA 630:3 of a negligent homicide resulting from the operation of a motor vehicle;

(o) Conviction of any felony in which a motor vehicle is used;

(p) Conviction of any offense specified in RSA 265:75;

(q) Conviction of any offense specified in RSA 265:54;

(r) Conviction of any offense specified in RSA 265:82;

(s) Conviction of any offense specified in RSA 265:82-a;

(t) Conviction of any offense specified in RSA 262:23;

(u) Conviction of any offense specified in RSA 265-A:43; or

(v) Conviction of any offense specified in RSA 265:79-b.

II. Twelve or more convictions, singularly or in combination, of the following offenses:

(a) Conviction of any offense specified in RSA 265:22.

(b) Conviction of any offense specified in RSA 265:60.

(c) Conviction of any offense specified in RSA 263:1.

(d) Conviction of any offense specified in RSA 263:63.

III. A combination of one conviction of an offense specified under paragraph I and at least 8 convictions, singularly or in combination, of offenses specified under paragraph II; or a combination of 2 convictions, singularly or in combination, of offenses specified under paragraph I and at least 4 convictions, singularly or in combination, of offenses specified under paragraph II.

Source. RSA 262-B:2, I. 1969, 433:1. 1973, 584:1. 1975, 496:1. 1981, 146:1. 1987, 238:1. 1989, 305:25. 1990, 60:2. 2001, 132:1. 2006, 260:13. 2008, 62:1. 2010, 251:1, eff. Sept. 4, 2010.

Materials prepared for Table 8 of the Daniel Webster-Batchelder American Inns of Court in April, 2023 by Ted Lothstein, who encourages readers to ask for his help with pro bono annulments in the future.

Ted Lothstein
Lothstein Guerriero, PLLC
5 Green Street
Concord, NH 03301
603-513-1919
ted@nhdefender.com
www.NHDefender.com

Lovejoy v. Linehan

Supreme Court of New Hampshire

November 17, 2010, Argued; February 23, 2011, Opinion Issued

No. 2010-343

Reporter
161 N.H. 483 *; 20 A.3d 274 **; 2011 N.H. LEXIS 13 ***; 39 Media L. Rep. 1477

DAVID J. LOVEJOY v. JAMES DANIEL LINEHAN *& a.*

Subsequent History: Released for Publication June 27, 2011.

Prior History: **[***1]** Rockingham.

Disposition: Affirmed.

Counsel: *Douglas, Leonard & Garvey, P.C.*, of Concord (*Charles G. Douglas, III* and *Jason R.L. Major* on the brief, and *Mr. Douglas* orally), for the plaintiff.

Orr & Reno, P.A., of Concord (*Michael D. Ramsdell* on the brief and orally), for defendant James Daniel Linehan.

McNeill, Taylor & Gallo, P.A., of Dover (*R. Peter Taylor* on the brief and orally), for defendant Mark Peirce.

Sheehan Phinney Bass + Green, P.A., of Manchester (*Christopher Cole* and *Elizabeth A. Bailey* on the memorandum of law), for defendant Rockingham County.

Malloy & Sullivan, of Manchester, for defendant Karen Dandurant, filed no brief.

Judges: HICKS, J. DALIANIS, C.J., and DUGGAN and CONBOY, JJ., concurred.

Opinion by: HICKS

Opinion

[*484] **[**275]** HICKS, J. The plaintiff, David J. Lovejoy, appeals an order of the Superior Court (*NICOLOSI*, J.) dismissing his claim for invasion of privacy by public disclosure of private facts against defendants James Daniel Linehan and Mark Peirce. We affirm.

The following **[***2]** facts are recited in the trial court's order or are supported by the record. This case arises out of the 2009 election for Rockingham County Sheriff in which the plaintiff challenged Linehan, the incumbent. Peirce was a deputy sheriff and Linehan's second-in-command.

On October 27, 2008, the *Portsmouth Herald* published an article written by defendant Karen Dandurant that contained the following: "A record **[*485]** provided to the Herald said Lovejoy was involved in a case of simple assault and was convicted in 1989. Lovejoy said the case was annulled and was thrown out of court by the judge."

The plaintiff brought suit against Linehan, Peirce, Dandurant and Rockingham County, which was alleged to be responsible for the actions of Linehan and Peirce, its employees, under the doctrine of *respondeat superior*. The amended complaint alleges that Linehan and Peirce, assisted by other county employees, prepared "documents containing information about the plaintiff's annulled conviction." Linehan and Peirce then allegedly provided the "annulled criminal record to Ms. **[**276]** Dandurant for a story they knew she was writing for the Portsmouth Herald."

The complaint alleged a number of counts against the various **[***3]** defendants, only one of which is relevant here: Count II alleged a claim against all defendants for invasion of privacy by public disclosure of private facts. It alleged that such disclosure "put the plaintiff in a position of having to publicly discuss a matter that the legislature has declared private, confidential, and

prohibited from publicity under RSA 651:5."

Linehan, Peirce and Dandurant moved to dismiss count II for failure to plead sufficient facts on which to obtain relief, which the trial court granted. On appeal, the plaintiff moved to nonsuit Dandurant with prejudice. We denied the motion without prejudice to the plaintiff seeking relief in the trial court and remanded for that limited purpose. We now review the plaintiff's claims against Linehan and Peirce under the following standard: "We must, as the trial court was required to, determine whether the allegations in the plaintiff's pleadings are reasonably susceptible of a construction that would permit recovery." *Provencal v. Vermont Mut. Ins. Co.*, 132 N.H. 742, 744-45 (1990) (quotation and brackets omitted).

> We assume the [plaintiff's] pleadings to be true and construe all reasonable inferences in the light most favorable **[***4]** to [him]. We then engage in a threshold inquiry that tests the facts in [his] petition against the applicable law, and if the allegations constitute a basis for legal relief, we must hold that it was improper to grant the motion to dismiss.

McNamara v. Hersh, 157 N.H. 72, 73, 945 A.2d 18 (2008) (citation omitted).

[1] In *Hamberger v. Eastman*, 106 N.H. 107, 206 A.2d 239 (1964), we recognized that "invasion of the right of privacy is not a single tort but consists of four distinct torts," including: "(1) intrusion upon the plaintiff's physical and mental solitude or seclusion; (2) public disclosure of private facts; (3) publicity which places the plaintiff in a false light in the public eye; (4) appropriation, for the defendant's benefit or advantage, of the plaintiff's **[*486]** name or likeness." *Hamberger*, 106 N.H. at 109, 110. We deal here with the public disclosure form of the tort, which "involves the invasion of something secret, secluded or private pertaining to the plaintiff." *Karch v. Baybank FSB*, 147 N.H. 525, 535, 794 A.2d 763 (2002) (quotation omitted).

[2] As set forth in the RESTATEMENT (SECOND) OF TORTS:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of **[***5]** his privacy, if the matter publicized is of a kind that
>
> (a) would be highly offensive to a reasonable person, and
>
> (b) is not of legitimate concern to the public.

RESTATEMENT (SECOND) OF TORTS § 652D (1977). The trial court ruled that the plaintiff's claim failed as a matter of law because "the disclosures concerning the annulled conviction addressed a matter of legitimate public concern."

On appeal, the plaintiff contends that the trial court erred in concluding that his annulled conviction was not private and was a matter of legitimate public concern. He argues: "[G]iven the legislative and judicial policy determinations inherent in the annulment of a criminal record, and the existence of a criminal sanction for disclosure of an annulled record, a more serious and meaningful definition of a 'private fact' would be hard to **[**277]** imagine." The plaintiff's argument relies upon the statutory provision regarding annulment of criminal records, RSA 651:5 (2007 & Supp. 2010). Therefore, we examine the relevant portions of that statute.

RSA 651:5 provides, in part, that upon the entry of an annulment order, "[t]he person whose record is annulled shall be treated in all respects as if he had never been **[***6]** arrested, convicted or sentenced, except" in certain circumstances not relevant to this appeal. RSA 651:5, X(a) (2007). The statute further provides that "[a] person is guilty of a misdemeanor if, during the life of another who has had a record of arrest or conviction annulled pursuant to this section, he discloses or communicates the existence of such record except as provided in subparagraph XI(b)." RSA 651:5, XII (2007).

[3] The plaintiff argues that pursuant to RSA 651:5, he "had the expectation that his criminal conviction was effectively erased from any possibility of further public discourse." Linehan counters that "RSA 651:5 does not include a private cause of action, and therefore, the statute did not create an actionable privacy interest." Peirce similarly argues that "[a]n annulment under RSA 651:5 does not expressly turn the public event of a criminal conviction into a 'private, secret, or secluded fact.' " We agree. **[*487]** While RSA 651:5, XII imposes criminal liability on one who discloses an annulled record, the statute does not provide a civil remedy to the person whose record is disclosed. Moreover, the statute provides that "[t]he *person* whose record is annulled shall be treated **[***7]** in all respects as if he had never been arrested, convicted or sentenced"; it does not enshroud the record itself with a cloak of secrecy. RSA 651:5, X(a) (emphasis added). As Peirce argues:

> The [plaintiff] essentially contends that an annulled conviction must be treated under RSA 651:5 as if it had never occurred. This conceptually impossible position has not only been rejected by other states,

> it is also contrary to the clear language of the statute … [which] describes various circumstances in which the annulled record can be used.

(Citation omitted.) *Cf. Eagle v. Morgan*, 88 F.3d 620, 626 (8th Cir. 1996) (noting that the Arkansas legislature does not "possess the Orwellian power to permanently erase from the public record those affairs that take place in open court" and expressing "doubt [that] this was the [legislature's] intention … [when the statute itself provides that] an expunged conviction can be used for certain purposes"); *Nilson v. Layton City*, 45 F.3d 369, 372 (10th Cir. 1995) (noting that "[a]n expungement order does not privatize criminal activity. While it removes a particular arrest and/or conviction from an individual's criminal record, the underlying object **[***8]** of expungement remains public … [and therefore an expunged record] is not entitled to privacy protection.").

The plaintiff nevertheless argues that *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989), supports his claim that he has a privacy interest in his annulled criminal record that is not overcome by a legitimate public concern in that record. He asserts that while the Supreme Court recognized that "there is undoubtedly some public interest in anyone's criminal history, especially if the history is in some way related to the subject's dealing with a public official or agency," it held "that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy." *Reporters Committee*, 489 U.S. at 774, 780. *Reporters Committee*, however, is inapposite **[**278]** in a number of respects. First, it dealt with "[t]he question of the statutory meaning of privacy under the [Freedom of Information Act, *see* 5 U.S.C. § 552 (b)(7)(C) (2006)]," which the Supreme Court noted "is, **[***9]** of course, not the same as the question whether a tort action might lie for invasion of privacy." *Id.* at 762 n.13. In addition, as Peirce argues, "[t]he circumstances in the *Reporters Committee* case are fundamentally different … [because] the individual whose **[*488]** criminal records were at issue was not running for public office." Rather, the individual "allegedly had improper dealings with a corrupt Congressman," but was himself a private citizen. *Id.* at 774.

[4, 5] Here, the plaintiff was a candidate for public office. Linehan argues, therefore, that when he entered the county sheriff election race, the plaintiff "not only opened himself up to the disclosure of otherwise private facts, but also rendered his annulled assault conviction a matter of legitimate public concern." We agree.

> [A] candidate's decision to apply for an elected public office places his or her qualifications for that office at issue, and, consequently, requires members of the public, either individually or through their representatives, to evaluate the particular candidate. Thus, a candidate voluntarily seeking to fill an elected public office has a diminished privacy expectation in personal information relevant to that **[***10]** office.

Lambert v. Belknap County Convention, 157 N.H. 375, 384, 949 A.2d 709 (2008) (action under State's Right-to-Know Law). Moreover, "[t]he public has a significant interest in knowing the candidates under consideration for that office." *Id.* In balancing those interests in *Lambert*, we concluded "that the public's interest in disclosure significantly outweighs the privacy interests of the candidates." *Id.* at 385.

[6-8] Our task here is to determine whether the plaintiff's annulled record is a matter of legitimate public concern for purposes of the tort of invasion of privacy by public disclosure of private facts. We conclude that it is. As stated in *Summe v. Kenton County Clerk's Office*, 626 F. Supp. 2d 680, 692 n.8 (E.D. Ky. 2009), *aff'd in part*, 604 F.3d 257 (6th Cir. 2010), "The qualifications of a candidate for public office is an area of legitimate concern to the public and, therefore, a candidate loses his or her privacy right to this information." In determining whether the plaintiff's annulled conviction was relevant to his qualifications for the county sheriff position, we note that in New Hampshire, "the sheriff maintains his common law powers, duties and responsibilities as chief law enforcement **[***11]** officer of the county." *Linehan v. Rockingham County Comm'rs*, 151 N.H. 276, 283, 855 A.2d 1271 (2004). We conclude that a prior assault conviction, whether subsequently annulled or not, is relevant to the qualifications for that position. *Cf. Santillo v. Reedel*, 430 Pa. Super. 290, 634 A.2d 264, 266 (Pa. Super. Ct. 1993) (finding fact that complaint of sexual abuse of a minor had been made against candidate for public office of district justice was matter of legitimate public concern; where the appellant "sought a position that would enable him to judge the conduct of others and **[*489]** determine whether that conduct was in conformity with the law[,] [a] claim that he violated the law was relevant and newsworthy").

[9] We note, as did the trial court, that RSA 651:5 itself recognizes that an annulled conviction is relevant to determining a person's fitness for a law enforcement position. RSA 651:5, XI(b) provides that nothing in RSA 651:5 shall affect any right:

> **[**279]** (b) Of law enforcement officers to maintain arrest and conviction records and to communicate information regarding the annulled record of arrest or conviction to … the police standards and training council solely for the purpose of assisting the council in determining **[***12]** the fitness of an individual to serve as a law enforcement officer, in any of which cases such information shall not be disclosed to any other person.

RSA 651:5, XI(b) (2007). The plaintiff takes issue with the trial court's reference to RSA 651:5, XI(b), arguing that the court, by quoting only a portion of the provision, "overlooked the statute's unambiguous language regarding *to whom* such annulled information may be provided." The plaintiff also argues that "[t]he trial court erred by judicially expanding the exceptions to nondisclosure provided by the New Hampshire legislature under RSA 651:5," thereby "ignor[ing] the familiar axiom of statutory construction that provides the expression of one thing in a statute implies the exclusion of another." (Quotations omitted.)

[10] The plaintiff misconstrues the trial court's order. The court did not purport to apply RSA 651:5, XI(b) to the case at hand, and therefore neither ignored the language of, nor expanded, the statutory exceptions. Rather, the court relied upon the statute's implicit acknowledgment of the relevance of a person's annulled conviction to the person's qualifications for a law enforcement position. That legislative acknowledgement **[***13]** is merely additional support for the obvious point, recognized elsewhere, that a person's prior violation of the law is relevant to assessing his fitness to enforce it. *See Santillo*, 634 A.2d at 266. We therefore find no error in the trial court's citation of RSA 651:5, XI(b) to support its conclusion that because the "Plaintiff sought to obtain, via public election, the position of chief law enforcement officer, … [the] Plaintiff's annulled conviction was, as a matter of law, of legitimate public concern."

Finally, the plaintiff argues that "[t]he trial court erred by failing to appreciate the distinction between the *publication* of a news story about the defendant's unlawful disclosure of the plaintiff's annulled conviction, and the actual unlawful *disclosure* of that protected, private information by the defendants in the first instance." Because we have found the annulled **[*490]** conviction to be a matter of legitimate public concern, the plaintiff's claim fails as a matter of law, and we therefore need not address the publicity element of the tort. *See* RESTATEMENT (SECOND) OF TORTS, *supra*.

We also need not address the constitutional issues raised by Peirce, as we have disposed of the **[***14]** issues on nonconstitutional grounds. *See Britton v. Town of Chester*, 134 N.H. 434, 441, 595 A.2d 492 (1991). Lastly, we dismiss as moot the plaintiff's motion to strike the appendix to Linehan's brief as we did not rely upon any of the documents contained therein, and we grant Linehan's assented-to motion to submit late authority.

Affirmed.

DALIANIS, C.J., and DUGGAN and CONBOY, JJ., concurred.

End of Document

Grafton County Attorney's Office v. Canner

Supreme Court of New Hampshire

March 3, 2016, Argued; August 23, 2016, Opinion Issued

No. 2015-0536

Reporter
169 N.H. 319 *; 147 A.3d 410 **; 2016 N.H. LEXIS 185 ***

GRAFTON COUNTY ATTORNEY'S OFFICE v. ELIZABETH CANNER *& a.*

Prior History: **[***1]** Grafton.

Disposition: Affirmed and remanded.

Counsel: *Lara J. Saffo*, county attorney, on the brief, for the Grafton County Attorney's Office.

Prince Lobel Tye LLP, of Boston, Massachusetts (*Robert A. Bertsche* on the brief and orally), for Elizabeth Canner.

DesMeules, Olmstead & Ostler, of Norwich, Vermont (*George H. Ostler* on the brief, and *Cabot R. Teachout* orally), for John Doe.

Gallagher, Callahan & Gartrell, P.C., of Concord (*Charles P. Bauer* on the memorandum of law), for Town of Hanover/Hanover Police Department.

Judges: BASSETT, J. DALIANIS, C.J., and HICKS, CONBOY, and LYNN, JJ., concurred.

Opinion by: BASSETT

Opinion

[411]** BASSETT, J. John Doe appeals an order of the Superior Court (*MacLeod*, J.) ruling in favor of Elizabeth Canner. Canner requested, under the New **[*322]** Hampshire Right-to-Know Law, RSA chapter 91-A (2013 & Supp. 2015), access to records relating to Doe's arrest and prosecution. Prior to the filing of Canner's Right-to-Know requests, Doe had filed a petition for annulment under RSA 651:5 (2016). While Canner's request was pending, Doe's annulment petition was granted. The trial court concluded that, notwithstanding the fact that Doe's petition for annulment had been granted, records relating to Doe's arrest and prosecution are not categorically exempt **[***2]** from public inspection under the Right-to-Know Law. We affirm and remand for further proceedings consistent with this opinion.

[1] This case presents an issue of first impression in New Hampshire: Whether records maintained by arresting and prosecuting agencies pertaining to an annulled arrest and the related prosecution are categorically exempt from public inspection under the Right-to-Know Law. Resolution of this case requires us to interpret several statutory provisions, including certain provisions of the Right-to-Know Law. "The ordinary rules of statutory construction apply to our review of the Right-to-Know **[**412]** Law." *CaremarkPCS Health v. N.H. Dep't of Admin. Servs.*, 167 N.H. 583, 587 (2015) (quotation omitted). Thus, we are the final arbiter of the legislature's intent as expressed in the words of the statute considered as a whole. *Id.* When examining the language of a statute, we ascribe the plain and ordinary meaning to the words used. *Id.* We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. *Id.* We also interpret a statute in the context of the overall statutory scheme and not in isolation. *Id.*

[2] "Our ultimate goal in construing the **[***3]** Right-to-Know Law is to further the statutory and constitutional objectives of increasing public access to all public documents and governmental proceedings and to provide the utmost information to the public about what its government is up to." *Prof'l Firefighters of N.H. v. Local Gov't Ctr.*, 159 N.H. 699, 705 (2010) (quotation and citation omitted); *see also* N.H. CONST. pt. I, art. 8. "Thus, we construe provisions favoring disclosure

broadly, while construing exemptions narrowly." *Prof'l Firefighters of N.H.*, 159 N.H. at 707 (quotation omitted). The party arguing for nondisclosure has the burden of proof. *See id.*

RSA 91-A:4, I (2013), in relevant part, states:

> Every citizen during the regular or business hours of all public bodies or agencies, and on the regular business premises of such public bodies or agencies, has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies, … *except as otherwise prohibited by statute or RSA 91-A:5*.

[*323] (Emphasis added.) Doe argues that the records relating to his arrest and prosecution are exempt from public inspection under RSA 91-A:4, I, because the annulment statute, RSA 651:5, prohibits their disclosure.

[3] RSA 651:5, I, provides that:

> [T]he record of arrest, conviction and sentence of any person may be annulled by the sentencing court at any time in response to a petition for annulment which **[***4]** is timely brought in accordance with the provisions of this section if in the opinion of the court, the annulment will assist in the petitioner's rehabilitation and will be consistent with the public welfare.

Because the purpose of annulment is to reduce the collateral consequences of a criminal arrest and "to afford an offender … a chance to start anew without this stigma in his records," *State v. Roe*, 118 N.H. 690, 692-93, 393 A.2d 553 (1978) (quotation omitted), the statute further provides that, "[u]pon entry of an order of annulment … [t]he person whose record is annulled shall be treated in all respects as if he or she had never been arrested, convicted or sentenced," RSA 651:5, X(a).

The record reflects the following pertinent facts. In 2013, "John Doe" was indicted by a Grafton County grand jury on multiple felony counts. The Grafton County Attorney's Office prosecuted Doe. Doe was acquitted by a jury on all charges. In April 2014, Doe filed a petition in the Superior Court pursuant to RSA 651:5 to annul the records of his arrest and prosecution. In July 2014, the court granted Doe's petition.

In June 2014, while Doe's petition for annulment was pending, Canner submitted Right-to-Know requests to the county attorney's office and the Hanover Police Department. **[***5]** She sought "any and all documents and information related [to Doe's] [t]rial," as well as documents, audio, and **[**413]** video related to the Hanover Police Department's initial investigation into the allegations against Doe. In response, the county attorney filed a petition for declaratory judgment in the Superior Court seeking a ruling as to whether: (1) given Doe's then-pending petition for annulment, the records requested under the Right-to-Know Law would be exempt from public inspection if the petition were granted; and (2) based upon privacy concerns related to Doe and other persons involved in the case, many of the requested materials would be exempt from public inspection under the Right-to-Know Law. The county attorney noted that neither the annulment statute nor the Right-to-Know Law provided guidance as to "whether the prosecutorial file is available pursuant to [a] Right to Know request after annulment." The Hanover Police Department joined in the county attorney's action. Canner filed an answer and a counterclaim for declaratory judgment.

[*324] The trial court bifurcated the proceedings before it, and both the county attorney's office and Canner filed cross-motions for partial summary judgment **[***6]** on the threshold issue of whether, after an annulment has been granted, records pertaining to an annulled arrest and its prosecution maintained by arresting and prosecuting agencies are exempt from public inspection under the Right-to-Know Law. The trial court concluded that "RSA 651:5 does not clearly and entirely" exempt records relating to an annulled arrest and the related prosecution from disclosure under the Right-to-Know Law, observing that "RSA 651:5, X(a) treats the *person*, not the [annulled] *record*, as if he had never been arrested, and therefore the record is not necessarily 'enshroud[ed] … with a cloak of secrecy.' "

The trial court provided two primary reasons for its conclusion. First, it noted that RSA 651:5 "treats prosecutor and police records differently than it treats court records or records in the state [police] criminal records unit." It also observed that, although the annulment statute provides that "court records must be sealed" and that the state police criminal records unit must "remove the annulled criminal record" from its files, "prosecuting and arresting agencies must only clearly identify on the records that the arrest is annulled." Second, the trial court concluded that RSA 651:5, XI(b) does not set forth the **[***7]** only circumstances under which law enforcement officials are permitted to use annulled records but, rather, it provides a "non-exclusive list clarifying law enforcement's rights to disclose

information in those circumstances." After observing that its ruling did "not bear any weight on whether an RSA 91-A:5 exemption" might "preclude disclosure [of] John Doe's annulled record on privacy grounds," *see* RSA 91-A:5, IV (2013) (exempting from disclosure "confidential … information" and "files whose disclosure would constitute invasion of privacy"), the trial court ruled that records maintained by arresting and prosecuting agencies relating to an annulled arrest and subsequent prosecution are not categorically exempt from public inspection under the Right-to-Know Law. After Doe's motion for reconsideration was denied, he filed this appeal.

"In reviewing the trial court's rulings on cross-motions for summary judgment, we consider the evidence in the light most favorable to each party in its capacity as the nonmoving party and, if no genuine issue of material fact exists, we determine whether the moving party is entitled to judgment as a matter of law." *CaremarkPCS Health*, 167 N.H. at 586 (quotation omitted). We review the trial court's application **[***8]** of the law to the facts *de novo. Id.*

[414]** Because the trial court bifurcated the proceedings before it, the narrow question before us is whether records pertaining to Doe's annulled arrest and the related prosecution maintained by arresting and prosecuting agencies are categorically exempt from public inspection pursuant to RSA 91-A:4, I. **[*325]** This is a question of law, which we review *de novo. See id.* at 586-87. Because Doe argues for nondisclosure, he has the burden of demonstrating that the records are exempt from public inspection. *See id.* at 587.

Doe argues that RSA 651:5, X(a) creates "an express statutory exemption" from the Right-to-Know Law for "arrest and prosecution records that have been annulled by court order." He also asserts that allowing public access to these records would contravene the plain language of the annulment statute and undermine the purpose of an annulment — to "eliminate the negative consequences of having a criminal record." Canner counters that the annulment statute "explicitly recognizes various scenarios under which records referencing the underlying criminal proceeding[s] may be disclosed," and that, although the statute requires that courts and the state police criminal records unit make annulled records "inaccessible to **[***9]** the general public," the records of arresting and prosecuting agencies "remain subject to disclosure under the Right to Know Law." We agree with Canner.

[4] We recently interpreted RSA 651:5, X(a) in a case involving a political candidate who disclosed his opponent's annulled conviction to a newspaper. *See Lovejoy v. Linehan*, 161 N.H. 483, 484-85, 20 A.3d 274 (2011). The plaintiff in *Lovejoy* argued that he "had the expectation that his [annulled] criminal conviction was effectively erased from any possibility of further public discourse," and, therefore, the sharing of his annulled conviction with the media constituted a tortious invasion of privacy. *Id.* at 486 (quotation omitted). We disagreed, explaining that, although RSA 651:5, X(a) provides that "the *person* whose record is annulled shall be treated in all respects as if he had never been arrested, convicted or sentenced[,] it does not enshroud the record itself with a cloak of secrecy." *Id.* at 487 (quotation and brackets omitted). We observed that treating an annulled conviction as if it had never occurred was "conceptually impossible" and "contrary to the clear language of the statute which describes various circumstances in which the annulled record can be used." *Id.* (quotations, brackets, and ellipsis omitted); *see* RSA 651:5, X(a), (c), XI(b) (identifying circumstances **[***10]** in which annulled records may be considered or disclosed). Thus, we held that "an annulment under RSA 651:5 does not expressly turn the public event of a criminal conviction into a private, secret, or secluded fact." *Lovejoy*, 161 N.H. at 486 (quotations and brackets omitted); *see also Panas v. Harakis & K-Mart Corp.*, 129 N.H. 591, 611, 529 A.2d 976 (1987) (observing that annulment statute "only extends as far as evidence of the conviction itself" **[*326]** and that although annulment statute "effectively erases the conviction, no such similar erasure is effected against the facts giving rise to the conviction").

[5] Although *Lovejoy* did not involve a request under the Right-to-Know Law, and was decided prior to the legislature's repeal of the provision of the annulment statute that made it a misdemeanor to knowingly disclose the existence of an annulled record except under certain circumstances, we find that case instructive. *See* RSA 651:5, XII (Supp. 2012); Laws 2012, 249:2 (repealing provision). As we recently observed, the purpose of an annulment is **[**415]** to limit the legal effect of a prior arrest rather than to conceal the fact that it occurred. *See Wolfgram v. N.H. Dep't of Safety*, 169 N.H. 32, 38, 169 N.H. 32, 140 A.3d 517, 2016 N.H. LEXIS 44 (2016) ("[A]lthough annulment creates a legal fiction that a person has never been arrested, convicted, or sentenced, prior convictions remain a historical reality **[***11]** and can be considered in limited circumstances."). We agree with the reasoning

of the New Jersey Supreme Court:

> It is true that under [New Jersey's] expungement statute, as a matter of law, an expunged conviction is deemed not to have occurred . … [b]ut the expungement statute does not transmute a once-true fact into a falsehood. It does not require the excision of records from the historical archives of newspapers or bound volumes of reported decisions or a personal diary. It cannot banish memories. It is not intended to create an Orwellian scheme whereby previously public information — long maintained in official records — now becomes beyond the reach of public discourse . … Although our expungement statute generally permits a person whose record has been expunged to misrepresent his past, it does not alter the metaphysical truth of his past, nor does it impose a regime of silence on those who know the truth.

G.D. v. Kenny, 205 N.J. 275, 15 A.3d 300, 315-16 (N.J. 2011) (quotation and citation omitted).

Here, if we were to accept Doe's interpretation of RSA 651:5, X(a), the result would indeed be "Orwellian." As the county attorney observed, it would "confuse the public enormously" if the county attorney were required to deny the existence of the prosecutorial **[***12]** file. Additionally, allowing public access to the records sought by Canner in this case will not subvert the legal fiction created by the annulment statute — that Doe "shall be treated in all respects as if he … had never been arrested, convicted or sentenced." RSA 651:5, X(a). As the county attorney correctly stated, "if asked if he was arrested, [Doe] could state 'no' in relation to this arrest." At **[*327]** the same time, allowing the public access to these records will shed light on the government's actions giving rise to Doe's arrest, prosecution, and acquittal.

[6, 7] Other provisions of the annulment statute support the conclusion that records pertaining to an annulled arrest and the related prosecution are not categorically exempt from disclosure pursuant to a Right-to-Know request. The annulment statute delineates the responsibilities of various agencies and public bodies that maintain annulled records. *See* RSA 651:5, X(c)-(e). Although the statute plainly requires that court records and the records of the state police criminal records unit be "sealed" or "remove[d]," RSA 651:5, X(c)-(d), it provides no such directive to arresting and prosecuting agencies regarding public access to their records, *see* RSA 651:5, X(e) (providing that police and prosecutors **[***13]** must only "clearly identify" in their records that "the arrest or conviction and sentence have been annulled"). We agree with the trial court that, had the legislature "intended to remove prosecuting and arrest agency records from the public, it could have used language [in RSA 651:5, X(e)] such as that used in RSA 651:5, X(c) [and] (d)." *See*, *e.g.*, *In re Estate of McCarty*, 166 N.H. 548, 551, 100 A.3d 525 (2014) (observing that if the legislature desired to limit the application of a statute it could have done so explicitly and "we will not add language that the legislature did not see fit to include").

Doe also argues that, because he was acquitted of all charges, the purpose of an annulment — to "eliminate the negative consequences of having a criminal record" — can be achieved only if the "social **[**416]** and economic stigma resulting from having an arrest record and publicly accessible records relating to [his] criminal case" is removed. Thus, he contends that, in cases involving an arrest and a subsequent acquittal, "annulment necessarily requires removing prosecution and police files, as well as court files, from being a matter of public record." (Quotation omitted.) We disagree.

[8] Although, under certain circumstances, the annulment statute differentiates between those individuals who have **[***14]** been acquitted and those who have been convicted, *e.g.*, in relation to the waiting period to petition for annulment and the payment of fees, *see* RSA 651:5, II, IX, it does not provide for disparate treatment of their records. Rather, for all relevant purposes, the annulment statute prescribes the same rules regarding the use of annulled records, regardless of whether an individual has been acquitted or convicted. *See* RSA 651:5, X. Nor can we discern a reason why the public's right to "the utmost information … about what its government is up to," *Prof'l Firefighters of N.H.*, 159 N.H. at 705 (quotation omitted), should depend upon whether a defendant was acquitted or convicted. The **[*328]** public has a substantial interest in understanding how investigations of alleged crimes are conducted, and how prosecutors exercise their discretion when deciding whether to prosecute, reach a plea agreement, or try cases.

[9] Accordingly, we hold that records maintained by arresting and prosecuting agencies pertaining to an annulled arrest and the related prosecution do not fall under the exemption in RSA 91-A:4, I, for records that are "otherwise prohibited by statute" from public inspection. Thus, they are not categorically exempt from

public inspection. Allowing the public to access the **[***15]** records related to Doe's arrest and prosecution will facilitate a more informed public discussion about the decisions made by law enforcement officials and prosecutors. If records of arresting and prosecuting agencies pertaining to an annulled arrest, conviction, or sentence were categorically exempt from public inspection, any citizen wishing to assess or comment upon the actions of the police or the prosecutor in a given case would be unable to examine the primary sources of information — agency records — and, instead, would have to rely upon media accounts. *See*, *e.g.*, *State ex rel. Cincinnati Enq. v. Winkler*, 151 Ohio App. 3d 10, 2002 Ohio 7334, 782 N.E.2d 1247, 1250 (Ohio Ct. App. 2002) (Gorman, J., dissenting) *aff'd*, 101 Ohio St. 3d 382, 2004 Ohio 1581, 805 N.E.2d 1094 (Ohio 2004) (expressing concern that the "story of a trial" would "depend on hearsay accounts from secondary sources"). This problem is heightened here by the fact that, as Canner notes, articles regarding Doe's arrest, prosecution, and acquittal "are quickly … retrievable by a 'Google' search" for Doe's name.

[10] "Our ultimate goal in construing the Right-to-Know Law is to further the statutory and constitutional objectives of increasing public access to all public documents and governmental proceedings and to provide the utmost information to the public about what its government is up to." *Prof'l Firefighters of N.H.*, 159 N.H. at 705 (quotation **[***16]** and citation omitted). Our holding today advances this important goal: The ability of the public to learn about the decisions of law enforcement officials and prosecutors will not be frustrated merely because a defendant has secured an annulment. Prosecutors "bear responsibility for [a] number of critical decisions, including what charges to bring" and "whether to extend a plea bargain," and the decisions of an individual prosecutor can have a significant impact on the **[**417]** progress of a case. *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1907, 195 L. Ed. 2d 132 (2016). Because a prosecutor must be publicly accountable for his or her decisions, *see Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 386, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004), the public should have access to information that will enable it to assess how prosecutors exercise the tremendous power and discretion with which they are entrusted. *See Morrison v. Olson*, 487 U.S. 654, 727-28, 108 S. Ct. 2597, 101 L. Ed. 2d 569 (1988) (SCALIA, J., dissenting) (explaining that public review of **[*329]** prosecutorial decisions serves as "the primary check" on the "vast power" and "immense discretion" given to prosecutors).

We note that, because the trial court bifurcated the proceedings, it has yet to decide whether the records related to Doe's arrest and prosecution fall under any other exemption in RSA chapter 91-A, such as RSA 91-A:5, IV which excludes from public inspection attorney work product and other records **[***17]** pertaining to "confidential" information, as well as "files whose disclosure would constitute invasion of privacy." *See*, *e.g.*, *N.H. Right to Life v. Dir., N.H. Charitable Trusts Unit*, 169 N.H. 95, 104-105 (2016) ("[A]ttorney work product, like communications protected by the attorney-client privilege, falls within the Right-to-Know Law exemption for 'confidential' information."); *38 Endicott St. N. v. State Fire Marshal*, 163 N.H. 656, 661, 44 A.3d 571 (2012) (records compiled for law enforcement purposes are exempt from disclosure to the extent that their production would constitute an invasion of privacy). Accordingly, our decision today does not resolve the question of whether the records related to Doe's arrest and prosecution ultimately will be available for public inspection under the Right-to-Know Law.

Affirmed and remanded.

DALIANIS, C.J., and HICKS, CONBOY, and LYNN, JJ., concurred.

End of Document

In re Christopher PICKERING, Respondent

File A70 539 319 - Detroit

Decided June 11, 2003

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

(1) If a court vacates an alien's conviction for reasons solely related to rehabilitation or immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings, the conviction is not eliminated for immigration purposes.

(2) Where the record indicated that the respondent's conviction for possession of a controlled substance was quashed by a Canadian court for the sole purpose of avoiding the bar to his acquisition of permanent residence, the court's action was not effective to eliminate the conviction for immigration purposes.

FOR RESPONDENT: Marshal E. Hyman, Esquire, Troy, Michigan

FOR THE DEPARTMENT OF HOMELAND SECURITY:[1] Marsha K. Nettles, Assistant District Counsel

BEFORE: Board Panel: FILPPU, GUENDELSBERGER, and PAULEY, Board Members.

PAULEY, Board Member:

In a decision dated September 21, 1999, an Immigration Judge found the respondent removable as an alien convicted of a controlled substance violation and ordered him removed from the United States. The respondent has appealed, arguing that he has not been convicted for immigration purposes because a Canadian court with jurisdiction over the matter issued an order quashing his conviction. The appeal will be dismissed.

I. FACTUAL AND PROCEDURAL HISTORY

The respondent is a native and citizen of Canada. On November 6, 1980, he was convicted in Chatham, Ontario, Canada, of unlawful possession of a restricted drug, namely, Lysergic Acid Diethylamide ("LSD"), contrary to Section 41(1) of the Food & Drugs Act. The respondent was sentenced to

[1] We note that the functions of the Immigration and Naturalization Service have been transferred to the Department of Homeland Security pursuant to the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

pay a fine of $300.00 (Canadian) or, in default of payment, to 30 days in custody.

In March 1993, the respondent filed an application for adjustment of status. Aware that his controlled substance conviction rendered him ineligible for adjustment, the respondent subsequently requested that the Ontario Court of Justice (General Division) quash the conviction. In a judgment dated June 20, 1997, the court quashed the respondent's 1980 conviction for unlawful possession of LSD. On August 21, 1998, the respondent's application for adjustment of status was denied and removal proceedings were initiated.

The Immigration Judge found the respondent removable on the basis of his conviction and ordered him removed. In his decision, the Immigration Judge declined to give effect to the Canadian court's order quashing the conviction, finding that the court's action was for rehabilitative purposes to allow the respondent to live permanently in the United States.

II. ISSUE

The question presented in this appeal is whether the Canadian court's order quashing the respondent's conviction vitiates the conviction for immigration purposes. On the facts of this case, we find that it does not.

III. ANALYSIS

Section 101(a)(48)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(48)(A) (2000), defines the term "conviction" as follows:

> The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication has been withheld, where—
>
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
>
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Although the definition of a conviction in section 101(a)(48)(A) does not directly address "quashing" of convictions, we have considered the issue of vacated convictions in two recent decisions. We held in *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), that under the definition in section 101(a)(48)(A), no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. In *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000), we determined that a conviction that had been

vacated on the merits pursuant to Article 440 of the New York Criminal Procedure Law did not constitute a conviction for immigration purposes within the meaning of the statute.

The issue presented in this case is not directly controlled by either *Matter of Roldan* or *Matter of Rodriguez-Ruiz*. We limited our holding in *Roldan* to "those circumstances where an alien has been the beneficiary of a state rehabilitative statute which purports to erase the record of guilt." *Matter of Roldan*, *supra*, at 523. *Rodriguez-Ruiz* involved a statute authorizing vacation of a conviction based on the legal merits of the underlying proceedings. The Government argued that because the New York conviction had been vacated "for purposes of avoiding removal, and not for reasons relating to a constitutional or legal defect in the criminal proceedings," the respondent's conviction should remain a "conviction" under the Act. *Matter of Rodriguez-Ruiz*, *supra*, at 1379. We rejected that contention, finding that the court's order was not within the parameters of *Roldan* because the law under which the conviction was vacated was not an expungement or rehabilitative statute. We further held that we would not look behind the state court judgment to ascertain whether the court acted in accordance with its own law in vacating the conviction.

The federal courts have also considered whether section 101(a)(42)(A) of the Act provides an exception for a vacated conviction from the definition of a "conviction." In *Herrera-Inirio v. INS*, 208 F.3d 299, 306 (1st Cir. 2000), the United States Court of Appeals for the First Circuit noted that the "emphasis that Congress placed on the *original* admission of guilt plainly indicates that a subsequent dismissal of the charges, based solely on rehabilitative goals and not on the merits of the charge or on a defect in the underlying criminal proceedings, does not vitiate that original admission." Thus, the court concluded that

> state rehabilitative programs that have the effect of vacating a conviction other than on the merits or on a basis tied to the violation of a statutory or constitutional right in the underlying criminal case have no bearing in determining whether an alien is to be considered "convicted" under section 1101(a)(48)(A).

Id. at 306. In reaching this conclusion, the court relied on *United States v. Campbell*, 167 F.3d 94, 98 (2d Cir. 1999), where the Second Circuit observed that "no provision [in the immigration laws] excepts from this definition a conviction that has been vacated" and found that a state order setting aside a conviction was invalid for immigration purposes where it "was not based on any showing of innocence or on any suggestion that the conviction had been improperly obtained."

In *Zaitona v. INS*, 9 F.3d 432, 436-37 (6th Cir. 1993), the Sixth Circuit, in whose jurisdiction this case arises, held that a district court order vacating a federal conviction would not be recognized for immigration purposes where

the sole reason for the order was to enter an otherwise untimely judicial recommendation against deportation in order to prevent the alien's deportation. In this regard, the Sixth Circuit stated that the sentencing court should not subsequently be permitted "to vacate a judgment for reasons that have nothing to do with the underlying validity of the guilty plea and original conviction themselves." *Id.* at 436.

The Sixth Circuit's approach is also consistent with other relevant federal court decisions. *See, e.g.*, *Renteria-Gonzalez v. INS*, 322 F.3d 804, 812 (5th Cir. 2002) (stating that "the text, structure, and history of the INA suggest that a vacated federal conviction does remain valid for purposes of the immigration laws");[2] *Beltran-Leon v. INS*, 134 F.3d 1379, 1380-81 (9th Cir. 1998) (finding that a vacated conviction remained a conviction for deportation purposes where the state court's action, pursuant to a writ of audita querela, was undertaken "solely in order to prevent deportation and the subsequent hardship to [the alien] and his family"); *cf. United States v. Bravo-Diaz*, 312 F.3d 995 (9th Cir. 2002) (finding that audita querela and the All Writs Act are unavailable to undo a conviction in order to avoid deportation on equitable grounds where there is no legal defect in the conviction); *United States v. Tablie*, 166 F.3d 505 (2d Cir. 1999) (same); *Doe v. INS*, 120 F.3d 200 (9th Cir. 1997) (same).

In accord with the federal court opinions applying the definition of a conviction at section 101(a)(48)(A) of the Act, we find that there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as rehabilitation or immigration hardships. Thus, if a court with jurisdiction vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a "conviction" within the meaning of section 101(a)(48)(A). If, however, a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the respondent remains "convicted" for immigration purposes.[3] The fact that the case at bar involves a foreign conviction does not alter our analysis with respect to the purpose of the subsequent vacation of that conviction.

---

[2] The majority opinion in *Renteria-Gonzalez v. INS*, *supra*, indicates that a vacated federal conviction remains valid for purposes of the immigration laws irrespective of the reasons why the conviction was vacated. *See id.* at 822-23 (Benavides, J., specially concurring). This approach appears contrary to *Matter of Rodriguez-Ruiz*, *supra*, and we decline at this time to adopt it outside the jurisdiction of the Fifth Circuit.

[3] *But cf. Matter of Sirhan*, 13 I&N Dec. 592 (BIA 1970); *Matter of O'Sullivan*, 10 I&N Dec. 320 (BIA 1963) (declining to find that a conviction was vacated for the sole purpose of avoiding deportation).

The resolution of this case therefore turns on whether the conviction was quashed on the basis of a defect in the underlying criminal proceedings.[4] In making this determination, we look to the law under which the Canadian court issued its order and the terms of the order itself, as well as the reasons presented by the respondent in requesting that the court vacate the conviction.

The order quashing the conviction in this case does not reference the law pursuant to which the conviction was vacated. Although the respondent noted in his affidavit that he sought the relief pursuant to Section 24(1) of the Canadian Charter of Rights and Freedoms and has argued that the purpose of this section is to provide appropriate and just remedies for violation of Charter rights, we are unable to discern such a purpose from the official documentation submitted in support of the claim.

Turning to the wording of the order and the respondent's request for post-conviction relief, we note that the judgment only refers, as the grounds for ordering the conviction quashed, to the respondent's request and his supporting affidavit. Significantly, neither document identifies a basis to question the integrity of the underlying criminal proceeding or conviction. The affidavit alleges that the respondent's controlled substance conviction is a bar to his permanent residence in the United States and indicates that the sole purpose for the order is to eliminate that bar.[5] Under these circumstances, we find that the quashing of the conviction was not based on a defect in the conviction or in the proceedings underlying the conviction, but instead appears to have been entered solely for immigration purposes. For these reasons, we agree with the Immigration Judge that the respondent has a "conviction" for possession of a controlled substance within the meaning of section 101(a)(48)(A) of the Act. Accordingly, the respondent's appeal will be dismissed.

ORDER: The appeal is dismissed.

[4] There is no contention that the Canadian court has inaccurately stated the basis for its ruling.

[5] The affidavit recites that the respondent had been granted a pardon in 1996 for his 1980 LSD offense (as well as for convictions in 1977 for taking a vehicle without consent and in 1979 for assault causing bodily harm), but that he had been advised that only the 1980 crime stood as a "bar to gaining permanent residency in the United States." We note that the foreign pardon the respondent received would not serve to eliminate his convictions for immigration purposes. *See Matter of B-*, 7 I&N Dec. 166 (BIA 1956); *cf.* section 237(a)(2)(A)(v) of the Act, 8 U.S.C. § 1227(a)(2)(A)(v) (2000).