

MOTION FOR EXPUNGEMENT- INSTRUCTION SHEET

The expungement statutes are found in South Dakota Code sections 23A-3-26 through 33. Please refer to those code sections for complete information. They are attached to this sheet for your convenience. **Keep in mind that a Motion for Expungement can only be made on a “record of the arrest” where “no accusatory instrument was filed,” where the prosecution “formally dismisse{d} this entire criminal case on the record,” or where there was an acquittal of all charges.** [SDCL 23A-3-27](#). You may also have to wait a certain amount of time before filing. [SDCL 23A-3-27](#).

The expungement process begins when a motion is filed with the clerk of court for the court that had, or would have had, jurisdiction over the criminal matter sought to be expunged or removed from a person’s criminal record. SDCL 23A-3-27. A form for a [Motion for Expungement](#) (UJS-391) is available on the UJS website’s Expungement forms webpage. Please fill out that form, but do not sign the for until you are in the presence of a Notary Public or Clerk of Court. Be sure to bring identification to show the Notary or Clerk.

A motion for expungement is a civil filing and requires payment of civil filing fees and costs, unless a waiver is granted by the court. [SDCL 23A-3-28](#). Along with the motion, an individual must file a civil case filing statement form, which is available on the UJS website’s Expungement forms webpage: <https://ujslawhelp.sd.gov/Expungement.aspx>.

WARNING: By signing your name to a legal document that you file with the court, you are telling the court that you are telling the truth and that you have a good faith reason for your request. If you are not telling the truth, if you are misleading the court, or if you are serving or filing this document for an improper purpose, the court could find you in contempt or you could be prosecuted.

A motion for expungement must be served on the office for the prosecuting attorney who prosecuted the crime at least 14 days before any hearing. [SDCL 23A-3-28](#). Note, however, that a hearing may not be necessary. The defendant (arrested person), prosecuting attorney and victim may all consent to waive the hearing. [SDCL 23A-3-29](#). The form for collecting this information – requiring one form for each of the four parties to fill out, including you – is the waiver of Expungement Hearing form (UJS-392) available on the UJS website’s Expungement forms webpage.

If you cannot, or choose not to, seek a waiver from those other three parties, you need to properly serve notice of your expungement motion on the office of the prosecuting attorney as noted in the paragraph above. Contact the Clerk of Courts or Court Administrator’s Office and request that a hearing be scheduled approximately a month in the future. Fill out a draft Notice of Hearing for Expungement of Record (UJS-393)

with the date, time, and location and submit it to the Clerk. Then obtain certified copies of the Motion of Expungement and Notice of Hearing for Expungement of Record from the Clerk's Office and mail them to the office of the prosecuting attorney via first class mail. Now fill out the Affidavit of Mailing attached to the Motion for Expungement (UJS-391) form. [More information about serving motions can be found in SDCL 15-6-5(a) through SDCL 15-6-5(j) or the [UJS "Going Solo" Guide](#).] The Affidavit of Mailing must be filled out truthfully and signed in the Clerk and Provide proof of your timely, mailed service on the prosecuting attorney's office to the court.

If a hearing is held and an expungement is ordered by the court, provide the court with a draft Order of Expungement (UJS-394) available on the UJS website's Expungement Forms webpage. The court will send a nonpublic record of the disposition to the Division of Criminal Investigation.

You must then serve the prosecutor's office with the notice to the court's order to "start the clock" on the prosecution's 30-day timeframe for appeal per [SDCL 15-26A-6](#); otherwise, the prosecution may timely appeal the circuit court's expungement order to the South Dakota Supreme Court many months, even years, after the court's Expungement decision. You start the clock by filling out the Notice of Entry of Order of Expungement (UJS-395) and attaching to it a certified copy of the court's Order of Expungement that you obtain from the Clerk's Office. You then send both documents by first class mail to the office of the prosecuting attorney. As with serving a Motion for Expungement and the Notice of Hearing for Expungement of Record, you must fill out the Affidavit of Mailing to provide proof of mailed service on the prosecuting attorney's office and then sign it before a Notary Public (or Clerk), before it may be accepted by the Clerk for filing and, in turn, before the 30-day timeframe for appeal can start.

Note also that there is not a statute of limitation for seeking an expungement. [SDCL 23A-3-33](#).

STATUTES REGARDING EXPUNGEMENT (Current as of July 1, 2015)

23A-3-26. Definition of expungement

Terms used in §§ 23A-3-27 to 23A-3-33, inclusive, mean:

(1) "Expungement," the sealing of all records on file within any court, detention or correctional facility, law enforcement agency, criminal justice agency, or Department of Public Safety concerning a person's detection, apprehension, arrest, detention, trial or disposition of an offense within the criminal justice system. Expungement does not imply the physical destruction of records.

23A-3-27. Motion for expungement of arrest record

An arrested person may apply to the court that would have jurisdiction over the crime for which the person was arrested, for entry of an order expunging the record of the arrest:

- (1) After one year from the date of any arrest if no accusatory instrument was filed;
- (2) With the consent of the prosecuting attorney at any time after the prosecuting attorney formally dismisses the entire criminal case on the record; or
- (3) At any time after an acquittal.

23A-3-28. Service of motion--Fee

At least fourteen days before any hearing on a motion for expungement, a copy of the motion shall be served upon the office of the prosecuting attorney who prosecuted the crime or violation, or who had authority to prosecute the charge if there was no accusatory instrument filed. The prosecuting attorney may contest the motion in writing and at the hearing on the motion.

When a defendant or arrested person makes a motion under this section, the defendant or arrested person shall pay to the clerk of courts in the county where the motion is filed a fee equal to the filing fee for a civil action. If the defendant or arrested person establishes to the court's satisfaction that the person is indigent and unable to pay the fee, the court may waive the filing fee.

23A-3-29. Hearing on motion for expungement

The court may fix a time and place for a hearing on the motion unless waived by the defendant, arrested person, prosecuting attorney, and victim. The court may require the filing of such affidavits and may require the taking of such evidence as it deems proper.

23A-3-30. Order of expungement

The court may enter an order of expungement if satisfied that the ends of justice and the best interest of the public as well as the defendant or the arrested person will be served by the entry of the order.

23A-3-31. Report to Division of Criminal Investigation--Retention and use of nonpublic records--Sealing of records

Any order of expungement shall be reported to the Division of Criminal Investigation pursuant to chapters 23-5 and 23-6. The court shall forward a nonpublic record of disposition to the Division of Criminal Investigation which shall be retained solely for use by law enforcement agencies, prosecuting attorneys, and courts in sentencing the defendant or arrested person for subsequent offenses.

As part of any order of expungement, the court shall order that all official records, other than the nonpublic records to be retained by the Division of Criminal Investigation, be sealed along with all records relating to the defendant or arrested person's arrest, detention, indictment or information, trial, and disposition.

23A-3-32. Effect of order of expungement

The effect of an order of expungement is to restore the defendant or arrested person, in the contemplation of the law, to the status the person occupied before the person's arrest or indictment or information. No person as to whom an order of expungement has been entered shall be held thereafter under any provision of any law to be guilty of perjury or of giving a false statement by reason of the person's failure to recite or acknowledge the person's arrest, indictment or information, or trial in response to any inquiry made of the person for any purpose.

23A-3-33. No time limitation for making application

A court may issue an order of expungement for arrests that occurred before, as well as those that occurred after, July 1, 2010. There is no statute of limitation for making an application.