

H.655 & H.762

OFFICE OF THE DEFENDER GENERAL

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EXPUNGEMENT WORKS

- Vermont has had expungement laws and sealing laws for many years. Both of these bills would change the landscape of criminal record confidentiality in Vermont by extraordinarily reducing or even eliminating access to expungement altogether.
- This would make Vermont an outlier. Most states have, just like Vermont does, a two-track system of sealing and expungement because the two processes serve different purposes. Like Vermont, most states use sealing for certain cases where later access to a record is necessary and expungement for cases where record deletion is appropriate. The criteria for what is expunged and what is sealed varies dramatically from state-to-state.

EXPUNGEMENT MAKES PEOPLE'S LIVES BETTER AND IMPROVES PUBLIC SAFETY

- A study in Michigan showed that people whose records were expunged saw an average of 25% increase in income within two years of expungement.
- Even in today's favorable employment environment, clients with even ancient criminal records are finding it hard to find jobs and housing.
- The three social factors that are most closely correlated with the commission of crimes are unemployment or unstable employment, lack of support or inclusion in a family, and engagement in a community. When people have old irrelevant records that prevent them from finding housing, jobs, and exclude them from communities.
- The same Michigan study showed that people who received expungements – including expungements for serious violent offenses – were actually less likely to be arrested in the years after their expungement than the general population.

OLD CRIMINAL RECORDS ARE NOT RELEVANT

- The value of access to a record of a criminal conviction is in its predictive nature. When someone commits an offense, they are statistically more likely to commit a further offense... for a short period of time.
- Recidivism rates are one of the most studied factors in criminal justice systems and what the studies of recidivism show is that for offenders who have committed minor offenses – misdemeanors, they are no more likely to commit a new offense than a member of the general public with no criminal history within about three years. More serious offenses, including felonies, are not predictive within 5-7 years. The most serious offenses, interpersonal felonies, are not predictive within 7-10 years.

“LAW ENFORCEMENT PURPOSES”

- Both of these bills would allow unfettered access to sealed records by law enforcement and prosecution. Allowing law enforcement and prosecution to have access to sealed records with no restrictions eliminates one of the most significant benefits of expungement.
- We already know that Black and Brown Vermonters are 350% more likely to be charged with a misdemeanor, 600% more likely to be charged with a felony, and 1400% more likely to be charged with a felony drug crime. That was the conclusion of the Council of State Governments study of Vermont incarceration in 2022.
- We also know that Black and Brown drivers in Vermont are more likely to be stopped than White drivers, and law enforcement is more likely to request a voluntary vehicle search of Black and Brown drivers than of White drivers, even though searches of Black and Brown drivers were less likely to result in the detection of contraband.

LAW ENFORCEMENT PURPOSES

- As public defenders, we see how that happens. We have all seen traffic stops based on a traffic violation that turn into a drug investigation based on an officer's knowledge that a person had a many years old drug conviction.
- What it means for police to have access without restriction to all criminal histories, whether sealed or not, is that the historical record of racially disparate policing in Vermont is going to inform the future of policing in Vermont. It will allow police to make decisions in the form of unfounded presumptions based on information that is stale and irrelevant to a person's current situation.
- Vermont would not be an outlier if it either maintained its current regime of expungement which prevents all access to expunged records or if it strictly limited such access.

IF WE ARE GOING TO ELIMINATE OR LIMIT EXPUNGEMENT

- There should be some guardrails.
- H.655 Section 5, 13 V.S.A. § 7607(c)(2)
- Upon motion properly brought, the court or a judge of such court, if such court is not in session, shall order disclosure of such records (1) to a defendant in an action for false arrest arising out of the proceedings so erased, or (2) to the prosecuting attorney and defense counsel in connection with any perjury charges which the prosecutor alleges may have arisen from the testimony elicited during the trial, or any false statement charges, or any proceeding held pursuant to section 53a-40b, or (3) counsel for the petitioner and the respondent in connection with any habeas corpus or other collateral civil action in which evidence pertaining to a nolle or dismissed criminal charge may become relevant. Such disclosure of such records is subject also to any records destruction program pursuant to which the records may have been destroyed. The jury charge in connection with erased offenses may be ordered by the judge for use by the judiciary, provided the names of the accused and the witnesses are omitted therefrom.

OR...

- (1) Information restricted and sealed pursuant to this Code section shall always be available for inspection, copying, and use:
 - (A) By the Judicial Qualifications Commission;
 - (B) By an attorney representing an accused individual who submits a sworn affidavit to the clerk of court attesting that such information is relevant to a criminal proceeding;
 - (C) By a prosecuting attorney or a public defender;
 - (D) Pursuant to a court order; and
 - (E) By an individual who is the subject of restricted criminal history record information or sealed court files.
- (2) The confidentiality of such information shall be maintained insofar as practicable.

OR...

- Inspection of the sealed records in the court's possession may thereafter be permitted by the court only upon a motion by the person who is the subject of the records or upon a petition filed by a prosecuting attorney that inspection and possible use of the records in question are necessary to the investigation or prosecution of a crime in this state or another jurisdiction. If the court finds that the interests of justice will be served by granting the petition, it may be granted.

SUPPORT H.655'S EXPANSION OF ELIGIBLE OFFENSES, BUT IT SHOULD GO FURTHER...

- Limiting expungement or sealing to a narrow list of offenses is not supported by any research. Studies have shown unanimously that even for offenses that we may find concerning, like the burning of a religious symbol or aggravated disorderly conduct, or voyeurism, a person's history of committing such offenses loses its predictive value quickly.
- Other states have much more expansive lists of offenses eligible for expungement. New Hampshire, next door, allows expungement of any offense except: Murder, manslaughter, negligent homicide, first degree assault (like Vermont's aggravated assault), aggravated felonious sexual assault, felonious sexual assault, Class A felony arson (defendant knew the structure was occupied, or structure was historic), robbery, incest, solicitation of a child for sexual conduct, possession, production or distribution of CSAM, witness tampering, falsifying evidence, felony obstruction of justice.
- All other offenses in NH are subject to expungement after 3, 5, or 10 years depending on the level of the offense.

EXPANDING THE LIST

- Vermont should expand its list of offenses eligible for sealing or expungement based on data and science. Even serious offenses should be considered for expungement or sealing.
- Vermont should use the studies and analysis of recidivism curves to identify appropriate “waiting periods” for expungement or sealing, but should allow *most* offenses to be expunged or sealed after the record of the offense no longer reflects an increased risk of commission of more crimes.

AUTOMATIC SEALING

- Making the process of sealing or expungement automatic is important. Only a small fraction of the people eligible for expungement take advantage of the process.
- In the study in Michigan that showed that people whose records were expunged had a 25% increase in income within two years, they also noted that only 6% of people eligible for expungement had their records expunged.
- There is no reason that we can't automate the process of sealing and expunging records – when people's records are eligible for expungement or sealing, they should be expunged or sealed without the need for a petition process.

BUT WE CAN DO THAT HERE AND NOW

- Several jurisdictions already have automatic record sealing laws in place. With New York and Washington DC adopting “clean slate” laws this year, there are now 18 states plus Washington DC with automatic record sealing or expungement.
- That gives us plenty of models to consider and the chance to incorporate one into H.655. A study committee can only do the same work that this committee could do now, but it slows down the process and allows Vermont to become even more of an outlier in the ways we limit access to sealing and expungement.
- An automatic sealing or expungement provision would not need to go into effect immediately, but there is no reason to delay writing and adopting one.