



STATE OF VERMONT  
**OFFICE OF THE EXECUTIVE DIRECTOR**  
DEPARTMENT OF STATE'S ATTORNEYS & SHERIFFS

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INTRADPARTMENTAL MEMORANDUM

TO: Joint Legislative Justice Oversight Committee  
FROM: John Campbell, Executive Director  
Evan Meenan, Deputy State's Attorney  
RE: Act 58 (S.7) Expungement and Sealing of Criminal Records  
DATE: October 13, 2021  
CC: None

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**Introduction**

Act 58 (S.7) of the 2021-2022 legislative session requires the Joint Legislative Justice Oversight Committee to study the expansion of access to sealing and expungement by those convicted of criminal offenses.

On July 15, 2021, the Department presented to the Committee a presentation on Sealing and Expunging Criminal History Records, a 50-State survey of expungement laws, and a table summarizing this survey. *See Committee Page, available at <https://legislature.vermont.gov/committee/document/2022/40/Witness/John%20Campbell#documents-section>* (last visited September 22, 2021). The presentation explained how Vermont's existing expungement laws may:

1. Conflict with defendants' due process rights and prosecutors' ethical obligations.
2. Fail to consider defendants' occasional need/desire for records.
3. Tax the resources of state entities that must comply with expungement orders.
4. Impair the ability to accurately track recidivism rates.
5. Create confusion over the differences between expungement and sealing.
6. Fail to ensure proper judicial oversight over expungements.

Pertaining to the questions Act 58 (2021) requires the Committee to answer, the other materials reveal that:

1. 41 out of the 54 jurisdictions basically only provide for sealing. This is true even when the statutes use "expunge" or "expungement."
2. No jurisdictions make all convictions eligible for expungement.
3. Only 19 jurisdictions provide for some form of automatic expungement.
4. Most jurisdictions permit sealing/expunging even when someone has a prior criminal conviction and even when someone committed an offense after the offense they are seeking to have sealed/expunged.

These materials also indicate that there are four areas where there is a lot of disparities amongst jurisdictions. These disparities generally include:

1. The convictions that are eligible for sealing/expunging. One issue here is that not all jurisdictions have the same crimes and when they do, their definitions might differ.
2. The timing of when someone can seek sealing/expungement vis a vis the commission of a subsequent offense.
3. The impact of a prior criminal conviction.
4. The circumstances in which the police and prosecution can access records that have been sealed/expunged.

### **Proposal**

To address the problems identified in the Department's presentation, it proffers the following proposal:

1. No records should ever be destroyed, except pursuant to a records retention schedule approved by the Vermont State Archives and Records Administration. This should also apply to deferred sentences.
2. The following records should be automatically sealed:
  - a. Records of arrests resulting in no criminal charges after the expiration of the applicable statute of limitations.
  - b. Records of prosecutions resulting in a dismissal without prejudice after the expiration of the applicable statute of limitations.
  - c. Records of prosecutions resulting in the dismissal with prejudice, an acquittal, or the vacation of a conviction without the possibility of further legal proceedings.
3. Defendants may request to have records sealed after a to-be-determined amount of time, but:
  - a. Not all convictions would be eligible for expungement. Instead, a real inventory of criminal offenses needs to be conducted and no existing lists of offenses developed for different purposes should be used as a surrogate. Attached to this memo is an inventory that the Department conducted.
  - b. Law enforcement should continue to have access to their records for legitimate law enforcement purposes. Law enforcement agencies should be consulted before determining what constitutes legitimate law enforcement purposes.
  - c. The prosecution should have access to sealed records for (at a minimum) discovery purposes and to refute false public statements made about the offense.
  - d. To motivate continued good behavior, the State could petition the Court to unseal records if the person is convicted of a subsequent offense. The records could be resealed after the subsequent offense becomes eligible for expungement.
4. With regards to both types of sealing:
  - a. Records relating to a dismissed charge cannot be sealed when the dismissal was part of a plea agreement until the convictions resulting from the plea agreement are also eligible. This helps avoid time consuming redactions, especially when information cannot easily be segregated, e.g., affidavits containing facts supporting multiple different charges.
  - b. The law should state that defense attorneys, including the Defender General's Office and contract public defenders, are also required to seal their records.

- c. Instead of a process wherein the State can stipulate to sealing, the defendant should have to request a certificate of eligibility from the prosecuting office, which would have to certify whether the defendant is eligible. The defendant must then present that to the Court with his/her petition to seal. If no certificate is presented, the Court must hold a hearing. If a certificate is presented, the Court may hold a hearing, but is not required to do so.
- d. To address the subsequent conviction problem, the time in which a defendant becomes eligible to file a petition should be calculated backwards from the time of the petition rather than forwards from the time the sentence is satisfied.
- e. The effect for the defendant would be the same as under existing law, i.e., they can make all the same representations that the offense never occurred, and the State must represent that “no record exists.” To get around the problem of a defendant representing on the stand as a witness in another prosecution that the offense never occurred, the presiding judge would give a contemporaneous special instruction to the jury that the conviction happened, but was sealed because the witness met the eligibility criteria in statute (which the judge could recite). That way the jury could balance the probative value of any impeaching material with that of the witness’s subsequent good behavior.

### Inventory of Potential Offenses that Should not be Expunged

Big 12 – 33 V.S.A. § 5204(a)	Listed – 13 V.S.A. § 5301(7)	To exclude? <sup>1</sup>
<ul style="list-style-type: none"> <li>• arson causing death as defined in 13 V.S.A. § 501.</li> <li>• assault and robbery with a dangerous weapon as defined in 13 V.S.A. § 608(b).</li> <li>• assault and robbery causing bodily injury as defined in 13 V.S.A. § 608(c).</li> <li>• aggravated assault as defined in 13 V.S.A. § 1024.</li> <li>• murder as defined in 13 V.S.A. § 2301.</li> <li>• manslaughter as defined in 13 V.S.A. § 2304.</li> <li>• kidnapping as defined in 13 V.S.A. § 2405.</li> <li>• unlawful restraint as defined in 13 V.S.A. § 2406 or 2407.</li> <li>• maiming as defined in 13 V.S.A. § 2701.</li> <li>• sexual assault as defined in 13 V.S.A. § 3252(a)(1) or (a)(2).</li> <li>• aggravated sexual assault as defined in 13 V.S.A. § 3253.</li> <li>• burglary into an occupied dwelling as defined in 13 V.S.A. § 1201(c).</li> </ul>	<ul style="list-style-type: none"> <li>• stalking as defined in section 1062 of this title.</li> <li>• aggravated stalking as defined in subdivision 1063(a)(3) or (4) of this title.</li> <li>• domestic assault as defined in section 1042 of this title.</li> <li>• first degree aggravated domestic assault as defined in section 1043 of this title.</li> <li>• second degree aggravated domestic assault as defined in section 1044 of this title.</li> <li>• sexual assault as defined in section 3252 of this title. or its predecessor as it was defined in section 3201 or 3202 of this title.</li> <li>• aggravated sexual assault as defined in section 3253 of this title.</li> <li>• lewd or lascivious conduct as defined in section 2601 of this title.</li> <li>• lewd or lascivious conduct with a child as defined in section 2602 of this title.</li> <li>• murder as defined in section 2301 of this title.</li> <li>• aggravated murder as defined in section 2311 of this title.</li> <li>• manslaughter as defined in section 2304 of this title.</li> <li>• aggravated assault as defined in section 1024 of this title.</li> <li>• assault and robbery with a dangerous weapon as defined in subsection 608(b) of this title.</li> </ul>	<p style="text-align: center;"><u>Title 13</u></p> <ul style="list-style-type: none"> <li>• Conspiracy to commit an enumerated offense. 13 V.S.A. 1404.</li> <li>• Accessory to an enumerated offense. 13 V.S.A. §§ 3-5.</li> <li>• Criminal use of anesthetics. 13 V.S.A. § 12.</li> <li>• Hate-motivated crimes. 13 V.S.A. § 1455.</li> <li>• Animal cruelty. 13 V.S.A. § 352.</li> <li>• Aggravated animal cruelty. 13 V.S.A. § 352a.</li> <li>• Animal fights. 13 V.S.A. § 364.</li> <li>• Interference with or cruelty to a guide dog. 13 V.S.A. § 355.</li> <li>• Confinement of animals in vehicles. 13 V.S.A. § 386.</li> <li>• Transportation by railroad; rest and feeding. 13 V.S.A. § 381.</li> <li>• Transportation by truck; rest and feeding. 13 V.S.A. § 382.</li> <li>• First degree arson (burning someone’s house). 13 V.S.A. § 502.</li> <li>• Second degree arson (burning someone’s business). 13 V.S.A. § 503.</li> <li>• Burning forests (forest fire). 13 V.S.A. § 507.</li> <li>• Hindering officer (riots). 13 V.S.A. § 903.</li> <li>• Simple assault (when committed by a law enforcement officer). 13 V.S.A. § 1023</li> <li>• Interference with access to emergency services. 13 V.S.A. § 1031.</li> </ul>

<sup>1</sup> This listed was generated after a manual inventory of Titles 13, 18, and 23, as well as a Westlaw search for “imprison!”. It does not necessarily represent the offenses the Department wants to exclude, but instead represents the offenses the legislature may wish to consider excluding.

	<ul style="list-style-type: none"> <li>• arson causing death as defined in section 501 of this title.</li> <li>• assault and robbery causing bodily injury as defined in subsection 608(c) of this title.</li> <li>• maiming as defined in section 2701 of this title.</li> <li>• kidnapping as defined in section 2405 of this title or its predecessor as it was defined in section 2401 of this title.</li> <li>• unlawful restraint in the second degree as defined in section 2406 of this title.</li> <li>• unlawful restraint in the first degree as defined in section 2407 of this title.</li> <li>• recklessly endangering another person as defined in section 1025 of this title.</li> <li>• violation of abuse prevention order as defined in section 1030 of this title, excluding violation of an abuse prevention order issued pursuant to 15 V.S.A. § 1104 (emergency relief) or 33 V.S.A. § 6936 (emergency relief).</li> <li>• operating vehicle under the influence of alcohol or other substance with either death or serious bodily injury resulting as defined in 23 V.S.A. § 1210(f) and (g).</li> <li>• careless or negligent operation resulting in serious bodily injury or death as defined in 23 V.S.A. § 1091(b).</li> <li>• leaving the scene of an accident with serious bodily injury or death as defined in 23 V.S.A. § 1128(b) or (c).</li> <li>• burglary into an occupied dwelling as defined in subsection 1201(c) of this title.</li> <li>• the attempt to commit any of the offenses listed in this section.</li> </ul>	<ul style="list-style-type: none"> <li>• Law enforcement use of prohibited restraint. 13 V.S.A. § 1032.</li> <li>• Assault of protected professional; assault with bodily fluids (but not restricted to that form of assault). 13 V.S.A. § 1028.</li> <li>• Assault of correctional officer; assault with bodily fluids (but not restricted to that form of assault). 13 V.S.A. § 1028a.</li> <li>• Aggravated stalking. 13 V.S.A. §§ 1063(1) (violated court order), (2) (previous convictions), and (5) (deadly weapon).</li> <li>• Bribing public officers or employees. 13 V.S.A. § 1101.</li> <li>• Public officers or employees accepting bribes. 13 V.S.A. § 1102.</li> <li>• Bribing triers of causes. 13 V.S.A. § 1103.</li> <li>• Triers of causes accepting bribes. 13 V.S.A. § 1104.</li> <li>• Abandonment or exposure of baby. 13 V.S.A. § 1303.</li> <li>• Cruelty to a child. 13 V.S.A. § 1304.</li> <li>• Cruelty by person having custody of another. 13 V.S.A. § 1305.</li> <li>• Mistreatment of person with impaired cognitive function. 13 V.S.A. § 1306.</li> <li>• Unlawful sheltering; aiding a runaway child. 13 V.S.A. § 1311.</li> <li>• Abuse, neglect, and exploitation of vulnerable adults. 13 V.S.A. §§ 1376 (abuse), 1377 (unlawful restraint and confinement), 1378 (neglect), 1379 (sexual abuse), 1380 (financial exploitation), and 1381 (basically slavery).</li> </ul>
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	<ul style="list-style-type: none"> <li>• abuse (section 1376 of this title), abuse by restraint (section 1377 of this title), neglect (section 1378 of this title), sexual abuse (section 1379 of this title), financial exploitation (section 1380 of this title), and exploitation of services (section 1381 of this title).</li> <li>• aggravated sexual assault of a child in violation of section 3253a of this title.</li> <li>• human trafficking in violation of section 2652 of this title.</li> <li>• aggravated human trafficking in violation of section 2653 of this title.</li> </ul>	<ul style="list-style-type: none"> <li>• Unlawful aiding prisoners (at least when committed by a DOC employee or law enforcement official). 13 V.S.A. § 1502.</li> <li>• Officer aiding or voluntarily allowing escape. 13 V.S.A. § 1506.</li> <li>• Willful and malicious injuries caused by explosives (blowing up a house; setting a bomb in the capital). 13 V.S.A. § 1601.</li> <li>• Injuries caused by destructive devices (same). 13 V.S.A. § 1605.</li> <li>• Injuries caused by explosives (same). 13 V.S.A. § 1608.</li> <li>• Placing a hoax device. 13 V.S.A. § 1612.</li> <li>• Definition and penalty (extortion; could include sextortion). 13 V.S.A. § 1701.</li> <li>• Domestic terrorism. 13 V.S.A. § 1703.</li> <li>• False alarms to agencies of public safety (death or bodily injury resulting). 13 V.S.A. § 1751(b).</li> <li>• False reports to law enforcement authorities (when committed by another law enforcement authority). 13 V.S.A. § 1754.</li> <li>• False personation. 13 V.S.A. § 2001.</li> <li>• Employers without workers' compensation insurance; criminal sanction (actual case example of falsifying an insurance binder and serious employee injuries). 13 V.S.A. § 2025.</li> <li>• Installation of object in lieu of air bag. 13 V.S.A. § 2026.</li> <li>• Sale or trade of motor vehicle with an inoperable air bag. 13 V.S.A. § 2027.</li> <li>• Identity theft. 13 V.S.A. § 2030.</li> </ul>
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		<ul style="list-style-type: none"> <li>• Female genital mutilation or cutting. 13 V.S.A. § 3151.</li> <li>• Sexual exploitation of an inmate. 13 V.S.A. 3257.</li> <li>• Sexual exploitation of a minor (e.g., school personnel). 13 V.S.A. § 3258.</li> <li>• Sexual exploitation of a person in the custody of a law enforcement officer. 13 V.S.A. § 3259.</li> <li>• Treason. 13 V.S.A. § 3401.</li> <li>• Promotion of anarchy. 13 V.S.A. § 3405.</li> <li>• Violation of Sabotage Prevention Act (e.g., National Guard member). 13 V.S.A. §§ 3421-3445.</li> <li>• Furnishing information to enemy. 13 V.S.A. § 3482.</li> <li>• Weapons of Mass Destruction. 13 V.S.A. §§ 3502-3503.</li> <li>• Violating an extreme risk protection order. 13 V.S.A. § 4058(b)(1).</li> </ul> <p style="text-align: center;"><u>Title 18</u></p> <ul style="list-style-type: none"> <li>• Selling or dispensing a regulated drug with death resulting. 18 V.S.A. § 4250.</li> </ul> <p style="text-align: center;"><u>Title 23</u></p> <ul style="list-style-type: none"> <li>• Eluding a police officer with serious bodily injury or death resulting. 23 V.S.A. § 1133(b).</li> </ul> <p style="text-align: center;"><u>Title 26</u></p> <ul style="list-style-type: none"> <li>• Illegal practice (of medicine). 26 V.S.A. § 1314.</li> </ul>
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