

TO: Joint Legislative Justice Oversight Committee Members
FROM: Surcharge Study Group Members
RE: Findings & Recommendations for Legislative Action on Criminal Surcharges
DATE: November 12, 2019

I. Charge of the Study Group

H. 460: Sec. 12. SURCHARGES STUDY GROUP: During the 2019 legislative interim, the Vermont Center for Crime Victim Services (“CCVS”), the Office of the Court Administrator (the “Judiciary”), Vermont Legal Aid, and a representative of the special investigative units (“SIUs”) created pursuant to 24 V.S.A. §1940, shall examine the issue of requiring a petitioner to pay outstanding surcharges prior to a court granting an expungement or sealing petition. On or before October 15, 2019¹, the group shall report to the Joint Legislative Justice Oversight Committee with its findings and any recommendations for legislative action.

II. Executive Summary

Surcharges were established to provide funding for victim-based justice initiatives (base funding as well as supplemental funding). The accepted premise was to assign a measure of financial responsibility to those whose actions have given rise to the need for victims’ services.² In practice, this often creates a challenging hurdle for offenders with limited financial resources. The subcommittee grappled with the question of whether an offender who otherwise successfully completed the terms of sentencing should be prevented from accessing an expungement due to inability to pay outstanding surcharges. This system also creates challenges for the recipients because the funding is uncertain and decreasing over time.

VLA concern: Vermont courts have interpreted 13 V.S.A §7282 to prohibit the granting of criminal record expungements when surcharges are unpaid at the time of petitioning. The courts have the authority to assess fines and other fees based on a defendant’s income. The courts also have the authority to waive, suspend or modify other criminal legal debts. Surcharges, which attach to every criminal conviction, are unique in their status of being both assessed uniformly in every case,

¹ Filing of this report was delayed in order to obtain additional data and provide the group with an opportunity to review that data.

² See also footnote 11 that gives the legislative background for reliance on surcharges as an attempt to overcome budget shortfalls.

and owed without possibility of modification or waiver. This status removes discretion from the courts, and is particularly harmful because it prevents low-income clients seeking a second chance, who are otherwise eligible, from obtaining expungement. A solid 25% of Vermont Legal Aid's Expungement Clinic clients between December 2018 and August 2019 were prevented from expunging their records *solely* due to unpaid surcharges.³ See Appendix, Figures 1 & 2.

Individuals who are granted a court-ordered expungement have better job opportunities and earn more income after clearing their record.⁴ Expungement increases wages for individuals and tax revenues for communities⁵, and its effects are likely intergenerational.⁶ Vermont state leaders—including our lead law enforcement official—have embraced what common sense and empirical studies reveal about earnings and tax benefits conferred on people whose records are expunged.⁷ Unsurprisingly, Vermont Legal Aid's clients pursue expungements most frequently for the express employment and income benefits this remedy confers.⁸

³ Out of Vermont Legal Aid's 246 clients from January 2019-August 2019, 61 had surcharge-related barriers that prevented expungement. This does not count clients who had other eligibility barriers—such as those who had to wait longer to petition or those whose crime was not qualifying. 80% of those with surcharges owed more than \$150.

⁴ See e.g., Prescott, J.J. and Starr, Sonja B., *Expungement of Criminal Convictions: An Empirical Study* (March 16, 2019), <https://ssrn.com/abstract=3353620> (“those who obtain expungement experience a sharp upturn in their wage and employment trajectories; on average, within two years, wages go up by 25% versus the pre-expungement trajectory, an effect mostly driven by unemployed people finding jobs and very minimally employed people finding steadier or higher-paying work.”); See also, Jeffery Selbin, Justin McCrary and Joshua Epstein, *Unmarked? Criminal Record Clearing and Employment Outcomes*, J. CRIM. L. & CRIMINOLOGY 1 (2018); Meyli Chapin, Alon Elhanan, Matthew Rillera, Audrey Solomon, Tyler Woods, *A Cost Benefit Analysis of Criminal-Record Expungement in Santa Clara County*, STANFORD UNIVERSITY, PUBLIC POLICY SENIOR PRACTICUM at 15 (2014) (finding that respondents whose records were expunged earned, on average, \$6,190 more annually after obtaining an expungement).

⁵ Selbin, *Supra* note 2.

⁶ Rebecca Vallas, Melissa Boteach, Rachel West, & Jackie Odum, *Removing Barriers to Opportunity for Parents with Criminal Records and Their Children: A Two Generational Approach*, CENTER FOR AMERICAN PROGRESS (2015)(discussing the intergenerational harms caused by a parent's criminal involvement and subsequent criminal record—this analysis is applicable to expunged records); See also, Meredith Booker, *The Crippling Effect of Incarceration on Wealth*, THE PRISON POLICY INSTITUTE (2016).

⁷ See, https://www.stowetoday.com/news_and_citizen/opinion/opinion_columns/new-expungement-law-is-pro-safety-jobs-and-community/article_581b26da-a3f7-11e9-b9c3-27d281c162b5.html Vermont Attorney General T.J. Donovan says: “Expunging criminal records is a public safety, pro-jobs, pro-work solution that will provide economic opportunity and expand Vermont's workforce while protecting communities. Studies show that someone who receives an expungement is less likely to reoffend. People who have gotten their records expunged also significantly increase their earnings.”

⁸ Over 90% of VLA's clinic clients from December 2018-May 2019 cited employment-related issues as a primary motivator for seeking an expungement.

In 2019, the Vermont legislature eliminated one financial barrier to expungement. Act 32, Section 10, removed the \$90 court filing fee for all expungement petitions, recognizing that \$90 can be prohibitive for some and that financial status should not impede access to legal relief.⁹ Vermont Legal Aid sees surcharges as a similar wealth-based barrier to access to justice. In short, under the current scheme, wealthier people with Vermont criminal records are more likely to access to expungement remedy and its benefits than their poorer counterparts.

VLA Recommendation: Vermont Legal Aid recommends that the legislature provide that when surcharges are assessed, they are assessed proportionately with the defendant's ability to pay and that judges be given the explicit authority to waive surcharges when warranted. VLA also recommends that the legislature explicitly decouple expungement and sealing remedies from payment of criminal surcharges and clarify that expungement or sealing is permitted prior to full repayment of surcharges.

Judiciary Concern: Pursuant to 13 V.S.A. §7282(a), surcharges are imposed by the clerk of court or the Judicial Bureau as a result of a conviction. Distinct from the authority of the clerk to impose surcharges, the court does not have the authority to waive surcharges, §7282(b).

- A. The imposition of surcharges represents a policy decision by the legislature to, (1) impose such charges without regard to the ability of the individual to pay such assessments; (2) be paid, in lieu of full or partial general funding, to the benefit of four special funds: the Victims Compensation Special Fund, Domestic and Sexual Violence Special Fund, the Crime Victims' Restitution Special Fund, and the Specialized Investigative Unit (SIU) Grants Board; and (3) unlike fines and other aspects of a sentence, surcharges are not subject to the negotiations of the parties to the proceeding.

Whether surcharges should be subject to waiver or reduction, either at the initial sentencing or as part of a request for expungement, is also a policy decision. In that regard, as a matter of policy, the Judiciary does not take a position on whether surcharges should continue to be mandatory or subject to the exercise of judicial discretion. However, a change in the present statutory framework could have a significant impact on the judiciary, and unless supplemented by an increase in general funding, on the beneficiaries of the funding source as well.

⁹ A filing fee of \$90 for sealing a single DUI was retained. It was also acknowledged that many petitioners filed for several cases and were required to pay \$90 per case.

The Judiciary's ability to determine an individual's ability to pay is limited by the paucity of reliable information to make an informed decision and the time necessary to make such a decision. Financial information is generally based on self-report and not subject to verification. In addition, since 90-95% of all criminal cases result in plea agreements, the court's separate decision to determine the ability to pay surcharges may result in the rejection of an otherwise acceptable disposition. Further, the addition of a hearing on the ability to pay surcharges *initially assessed without regard to the individual's ability to pay*, would leave the statutory beneficiaries with an unpredictable funding stream.

B. Some stakeholders have suggested that an outstanding surcharge should not prohibit the court from sealing or expunging a criminal record, implying that the surcharges could be collected after sealing or expunging. This assumption is incorrect. Sealing or expunging a record when surcharges are owed is effectively a waiver of the surcharges and cancellation of the debt.

The Judiciary does not collect its own debt; it contracts with a collection agency. All third-party collection agencies are covered by the Fair Debt Collections Practices Act (FDCPA). The FDCPA requires that collectors provide validation of the debt. The sealing or expungement of a criminal record means there is no record of the underlying charge, which disables the Judiciary from validating the debt and establishing the identity of the debtor. Without such validation, all debts related to sealed or expunged records must be cancelled.

Judiciary Recommendation: If the legislature authorizes judges to waive or reduce surcharges, this waiver or reduction should be permitted only at the time of sentencing as one of the many factors to be considered by the parties and the court as part of the disposition of the case. Inability to pay alone, is not a basis to preclude any financial obligations by way of fine and/or surcharge. Any surcharge imposed at the time of sentencing shall be subject to review or reconsideration only as a part of the sentence and not subject to separate review.

In lieu of waiving or reducing surcharges, surcharges could be imposed concurrently as part of a multiple count or multiple docket plea agreement resulting in the assessment of a single surcharge at one sentencing event.

Either recommendation, the option to consider waiver or reduction of surcharges, or the option to run concurrent surcharges, will have an adverse impact on the funding sources of statutory beneficiaries.

A case cannot be expunged or sealed if surcharges remain outstanding or any other portion of a sentence has not been satisfied.

SIU Concern: Revenue generated by the existing SIU surcharge does not cover the expense to support this program and the trend in this revenue source has been in decline for a number of years. Further erosion of this revenue source by waiver of the surcharge will only exacerbate this gap.

SIU Recommendation: Support of the SIU program has been provided by general fund dollars and consistently exceeds the revenue generated by the surcharge. The surcharge has been used to offset the expense of the SIU program, but the performance of the surcharge has not been allowed to limit the support of the SIUs. Establishment of a waiver option for the SIU surcharge will require recognition that surcharges are not a reliable funding source for the long term. The concept of the surcharge with respect to offender accountability is worthy, but reliance upon a surcharge to adequately fund a broad-based government program is problematic.

CCVS Concern: Vermont relies upon fees and surcharges as a primary method of financial support (in conjunction with federal funds) for victim services across the state. The somewhat steady decline in special funds warrants a more broadly-based range of funding alternatives. The introduction of a waiver of surcharges exacerbates the funding shortfall that has been trending over the last several years and will continue to grow as more cases are moved to diversion, fewer driving tickets are issued, and surcharges such as this are eliminated or reduced.

CCVS Recommendation: This question requires further data collection and study. However, use of the General Fund to fully support victim services while relying upon a combination of federal funds, fees, and surcharges to supplement and backfill the General Fund dollars is a model to consider.

III. Context

a. The statutes

In Vermont, surcharges are fees set by statute to be levied by the clerk of the court in addition to any penalty or fine imposed by the court for a criminal offense and a select few civil violations. 13 V.S.A. § 7282. (Unless otherwise noted, all statutory sections cited here are in Title 13 of the Vermont Statutes Annotated). Surcharges that attach to criminal convictions are the only type of surcharges discussed here.

The surcharge amount is set by statute and has increased nearly 3,000% in the last 30 years. Prior to 1990, the surcharges assessed were \$5. Today, each criminal charge that results in a conviction has a \$147 surcharge assessed in addition to any fine, restitution ordered, or other charges assessed. Collected surcharges are deposited into four Special Funds¹⁰. The statute states that “surcharges shall not be waived by the court.” 13 V.S.A. § 7282(b).¹¹ Waiver is not defined in statute.

The collection process for unpaid surcharges is laid out in 13 V.S.A. § 7180¹², which was created in 2010. That statute instructs that when a surcharge remains unpaid for 75 days from the date of assessment, the court can either initiate contempt proceedings against the defendant *or* refer the debt to a designated collection agency.

Historically, the courts have not been initiating contempt proceedings to collect these debts. Instead, the unpaid surcharges are referred to Alliance One, the “designated collection agency” with whom the Vermont Judiciary contracts. By the time a petitioner for expungement or sealing¹³ files with the court, any unpaid surcharges have already been referred to Alliance One.¹⁴

¹⁰The \$147 is distributed as follows: \$29.75 to Victims’ Compensation Special Fund, \$10 to the Domestic and Sexual Violence Special Fund, and \$100 for Special Investigative Units. 13 V.S.A. § 7282 (a)(8)(D) and (c).

¹¹ This provision has been interpreted by the Court Administrator’s Office to mean that the courts cannot expunge a criminal record until and unless the associated surcharge has been paid. Vermont Legal Aid, which assists expungement petitioners, interprets the provision to mean that the courts must assess surcharges in every case, and that the courts do not have discretion to forgive the debt, but that the statute does not preclude sealing or expungement prior to full repayment.

¹² Created by Act 146 (2009-2010), the intent of which was the following. “Vermont state government is faced with a substantial gap between available revenues and projected expenditures based on the current manner of providing services. This act is the next step in allowing the redesigning of how to provide government services. Policy makers, administrators, service providers, and school administrators will now proceed to create outcome-driven changes in service and performance, and to implement these changes with reduced state funding. At the same time, accountability for meeting specified goals will be maintained through clear measures of outcome achievement, with quarterly reporting to, and oversight by, the general assembly, as provided in this act. The intent of the general assembly is to make the changes in law which will allow the creation of better methods for providing government services, while spending less money and still achieving the outcomes specified in the Challenges for Change Act.”

¹³ Under Vermont law, certain crimes can be expunged, wiping the record clean, § 7606, and others sealed, eliminating them from public access but allowing access to the courts and law enforcement, § 7607.

¹⁴ This is in vast majority of cases with Vermont Legal Aid. Some pre-2011 cases with surcharges were never referred to Alliance One.

b. Surcharge Recipients

Vermont has four special funds for surcharges: the Victims Compensation Special Fund, Domestic and Sexual Violence Special Fund, the Crime Victims' Restitution Special Fund, and the Specialized Investigative Unit (SIU) Grants Board. All except for the last are managed by the Vermont Center for Crime Victim Services.

i. Special Funds

The Center is the recipient of three special funds: Victims' Compensation, Restitution, and Domestic and Sexual Violence. The Victims' Compensation Fund receives funding from surcharges (\$29.75 of the \$147.00 surcharge on court fines and traffic tickets), restitution payments from defendants, and funds from inmate labor contributions from the prison industries enhancement program. § 5359(b)(1)-(3). The enabling statute anticipates funding through appropriations, § 5359(b)(4), but to date monies from the General Fund have never been appropriated. In addition, the Center receives Victims of Crime Act (VOCA) funds and STOP Violence Against Women funds from the U.S. Department of Justice, and Family Violence Prevention and Services funds from the U.S. Department of Health and Human Services. The Domestic and Sexual Violence special fund also receives funding from a fee on marriage licenses.

1. Victim's Compensation Special Fund

The purpose of the fund is to reimburse victims of crime, as long as they have no other source such as insurance, to pay for their losses for medical and dental care, mental health counseling, funeral costs, lost wages, travel expenses, crime scene cleanup, rent and relocation costs, safety and security, eyeglasses, hearing aids, dentures or any prosthetic device, and pet injuries and care.

2. Domestic and Sexual Violence Special Fund

The Domestic and Sexual Violence Fund receives \$10.00 of the \$147.00 surcharge on court fines and traffic tickets, § 7282(a)(8)(D), as well as a \$20 surcharge on marriage licenses enacted three years ago. 32 V.S.A. § 1712(1). The Fund supports grants to the Vermont Network Against Domestic and Sexual Violence and pays the cost of a Domestic Violence Trainer dedicated to domestic violence training at the Vermont Police Academy.

3. Crime Victims' Restitution Special Fund

The Crime Victims' Restitution Special Fund is capitalized by a 15 percent surcharge on criminal fines or certain civil penalties, as specified in 13 V.S.A. § 7282(a)(9). The Fund is authorized to make an advance payment of up to \$5,000.00 to an eligible individual crime victim. 13 V.S.A. § 5363(d). When an offender makes restitution payments, the amount received is paid out by first reimbursing the victim for his or her losses that were not eligible for an advance payment from the Fund. After the victim is made whole, the Fund gets reimbursed by the amount that was advanced to the victim. Businesses and governmental entities are not eligible to receive advances and instead receive payment as the Restitution Unit of the Center for Crime Victim Services collects from the offender.

4. The Specialized Investigative Unit Grants Board

This board was created through 24 V.S.A. § 1940(c). Since 2009, \$100 from every surcharge collected is deposited into the General Fund and is used to offset a portion of operational expenses for the Specialized Investigative Units. The SIU surcharge is distinguishable from the above-mentioned surcharges in that the SIUs are funded out of the General Fund, and are fully funded even when the revenue from surcharges decreases.

The annual expense for the SIUs is currently about \$2M for the support of 12 units, which provide statewide coverage. As noted in the attached figures, revenue generated from this surcharge has been in decline over the last several years. Further erosion of this surcharge will increase the gap between revenue received for the support of the SIUs and the expenses incurred by the units, but the SIUs will be funded through appropriations.

c. The Funding Trends

As evidenced by the figures below, surcharge collection amounts in Vermont are mostly diminishing. While the reasons for this trend have not been officially reported by the state, some members of the study group¹⁵ have suggested that both increasing poverty in Vermont and the increased reliance on Diversion programming have influenced this trend.

¹⁵ The Judiciary does not speculate on the cause for the decrease in receipts.

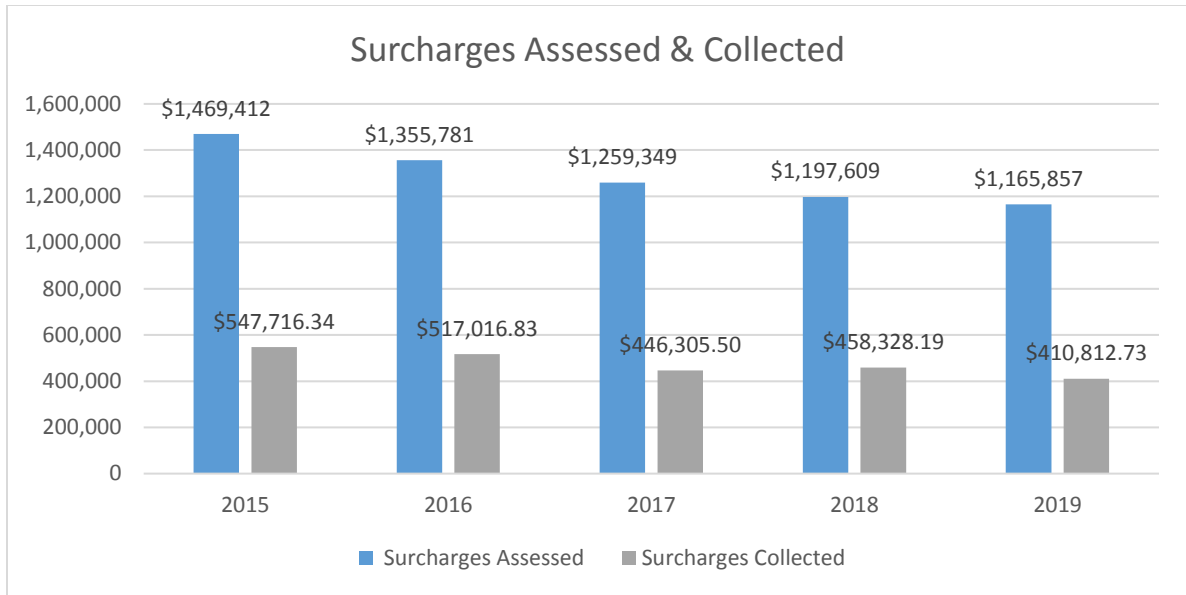


Figure 1. The “surcharges assessed” data is an approximation based on information provided by the Judiciary. These amounts were ascertained by multiplying the criminal convictions in Vermont by the \$147 surcharge assessment amount. The “surcharges collected” data includes all surcharges collected—both by the courts within 75 days of assessment and by Alliance One after 75 days.

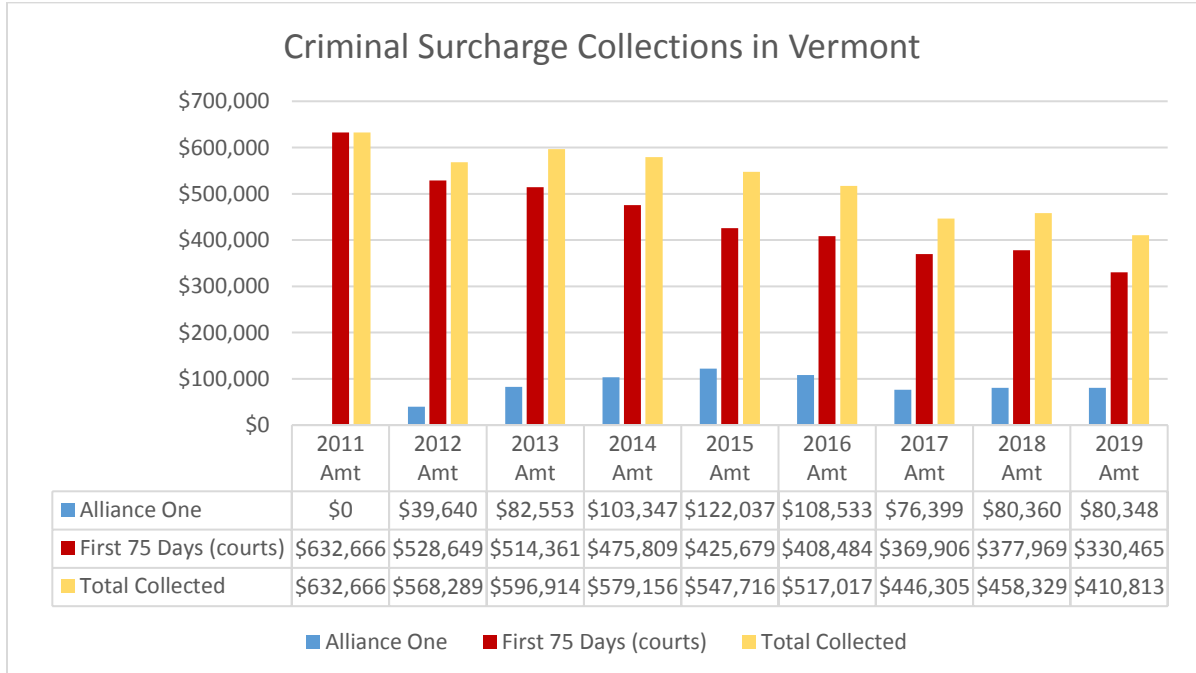


Figure 2. This chart includes the (1) total amount of surcharges collected by Alliance One, (2) total amount of surcharges collected by the courts within 75 days of assessment, and (3) combined total amount of surcharges collected.

d. Most other financial debt related to a criminal case is assessed with regard to Defendant's income and can be waived or modified.

In Vermont, a defendant with a criminal conviction may be assessed a number of different debts associated with their criminal case, the payment of which inures to the State. Of those, only surcharges are assessed at a uniform rate without consideration of ability to pay, and may not be waived or suspended by a judge under current law. Even with restitution, which inures to the victim, the court must make a finding of the defendant's ability to pay, the court can order that restitution be paid over time, and the court can amend the order in the future. These provisions ensure that defendants can maintain minimum income and resources for themselves and their families.

Fees for Public Defender Services: Fees for public defender services are set initially based upon a defendant's ability to pay and can be modified or eliminated later based on manifest hardship or the interests of justice.

Vermont requires prompt payment of fees for public defender services based on a person's ability to pay:

The court shall require any person assigned counsel . . . to pay for all or part of the cost of representation *based upon his or her ability to pay*. Unless the person and cohabiting family members are found to be financially unable to pay, in all cases the court shall order a minimum payment of \$50.00. This assignment fee shall be paid within 60 days of assignment of counsel.

13 V.S.A. § 5238(b)(emphasis added). In addition, a person ordered to pay for representation

may *at any time petition* the court making the order for remission of all of the amount or any part thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardships on the defendant or the defendant's immediate family or that the circumstances of case disposition and the interests of justice so require, the court may remit all or part of the amount due or modify the method of payment.

13 V.S.A. § 5238(f)(emphasis added).

Supervision Fees: The Department of Corrections collects up to \$30.00 a month for "supervisory" fees from each person who is on probation, furlough, pre-approved furlough, supervised community sentence or parole. The commissioner is guided by rules that limit "the maximum period of time offenders are subject to supervision fees" and require assessment of "the offender's ability to pay such fees." 28 V.S.A.

§ 102(c)(14) and Final Adopted Rule # 08016, effective May 5, 2008.

Diversion Program Fees: Each participant who is diverted from the criminal court into a community diversion program is assessed a “program fee,” which “shall be determined by program officers of employees based on the financial capabilities of the participant” and shall not exceed \$300. 3 V.S.A § 164(e)(9)

Fines: Fines are set at the time of sentencing and can be suspended at a later time. The subchapter on collection of fines, 13 V.S.A. Chapter 223, Subchapter 1, provides that a “Superior judge, in his or her discretion, may suspend all or any part of the fine assessed against a respondent.” 13 V.S.A. § 7178.

Restitution: The court must consider restitution in every case in which a victim has suffered a material loss. 13 V.S.A. § 7043(a)(1). Specifically, in awarding restitution, the court must make a finding on the “offender’s current ability to pay restitution, based on all financial information available to the court, including information provided by the offender.” 13 V.S.A. § 7043(d)(2). The court then issues an order of restitution, and where the offender is unable to pay at the time of sentencing, the court establishes a restitution payment schedule based upon the offender’s “current and reasonably foreseeable ability to pay.” 13 V.S.A. § 7043(e)(1). The order issued at sentencing can be modified later upon motion of the Restitution Unit or the offender, if the court “finds that modification is warranted by a substantial change in circumstances.” 13 V.S.A. § 7043(l).

**e. Interim Relief: Petitioners Rely on the Generosity of
Community Funds to Get Expungement Relief**

The Pennywise Foundation has created a small demonstration grant to cover the cost of surcharges for approximately 50 convictions. The Center for Justice Reform at Vermont Law School also has a small, temporary grant to cover the cost of surcharges.

This funding allows the poorest Vermonters who owe surcharges to clear their records and get back on their feet—to get a job or professional license and to find better housing. While these grants are important immediate relief, they are an interim, temporary fix. See Appendix for two examples of persons who have benefited from surcharges being paid with grant monies.

IV. Recommendations

The study group was not able to reach an agreement on recommendations for the Joint Legislative Justice Oversight Committee. Nevertheless, the study group members have the following recommendations for your consideration.

1. Vermont Legal Aid recommends that the legislature allow the courts to waive criminal surcharges and permit expungement of records prior to repayment of surcharge.

Vermont Legal Aid recommends a statutory change that would give courts the discretion to assess surcharges and to reduce or waive surcharges when appropriate. VLA also recommends a statutory change that ensures low-income Vermonters can access the expungement remedy prior to full repayment of the debt. Section 7282 of Title 13 sets out current Vermont law on surcharges. Section (b) provides: “The surcharges imposed by this section shall not be waived by the court.” Vermont Legal Aid recommends that this section be replaced with the following provision: “Any surcharges imposed by this section shall reflect the defendant’s current ability to pay and can be waived by the court. Unpaid surcharges shall not prevent expungement of a criminal record.”

The data shows that Vermont’s surcharge collections have not been robust since 2011, and those collections outcomes are getting worse as Vermont’s poverty is deepening. Low-income defendants who need expungement relief are denied the important, income-generating remedy until they can pay. For some people on public assistance, repayment of their surcharges could take years.

Criminal justice debt is a national issue and the American Bar Association has developed recommendations for state legislatures and court systems. In the wake of social unrest across the country since 2014¹⁶, countless organizations and academic institutions have studied the unique ways in which criminal justice debt harms poor communities and communities of color.¹⁷

¹⁶National Public Radio, *In Ferguson, Court Fines & Fees Fuel Anger*, August 24, 2014 <https://www.npr.org/2014/08/25/343143937/in-ferguson-court-fines-and-fees-fuel-anger>

¹⁷ Abby Shafroth and Larry Schwartzol, *Confronting Criminal Justice Debt: The Urgent Need for Comprehensive Reform*, National Consumer Law Center, Inc., and Criminal Justice Policy Program at Harvard Law, at 2 (“For many reasons, some police, courts, jails and prisons, and probation departments have had their essential functions distorted by the perceived need to raise revenue through the criminal justice system. To raise money, they impose heavy fines and fees...The targets of such fines and fees, and ultimately of collection, are often the local residents with the least ability to pay for the system. In sum, these criminal justice practices have resulted in the monetization of the relationship between the justice system and the people it is supposed to serve.”), <http://cjpp.law.harvard.edu/assets/Confronting-Criminal-Justice-Debt-The-Urgent-Need-for-Comprehensive-Reform.pdf>; Karin D. Martin, Sandra Susan Samith, and Wendy Still, *Shackled to*

In August 2018, the American Bar Association’s Working Group on Building Public Trust in the American Justice System issued a Resolution and Ten Guidelines on Fines and Fees, which includes recommendations on surcharges.¹⁸ Guideline 1 is particularly relevant to the question of whether Vermont should allow surcharges to be waived: “The amount imposed, if any, should never be greater than an individual’s ability to pay or more than the actual cost of the service provided. No law or rule should limit or prohibit a judge’s ability to waive or reduce any fee, and a full waiver of fees should be readily accessible to people for whom payment would cause a substantial hardship.”¹⁹

Vermont Legal Aid submits that the Court should have that discretion to place surcharges in a comparable position to other charges assessed against a defendant and to ensure Vermont courts are in alignment with ABA’s Guidelines. The ABA Guidelines highlight that relying on collections from defendants for providing necessary state services has detrimental effects on the perceived legitimacy of the justice system. When a petitioner has completed their sentence, is eligible for expungement, petitions for relief to move on with their lives, and is then prevented from doing so just because they are poor, these petitioners believe the justice system is obstructing their progress and preventing them from living normal, productive lives.

Debt: Criminal Justice Financial Obligations and the Barriers to Re-entry They Create, New Thinking in Community Corrections, January 2017, <https://www.ncjrs.gov/pdffiles1/nij/249976.pdf>.

¹⁸ ABA Resolution <https://www.americanbar.org/content/dam/aba/images/abanews/2018-AM-Resolutions/114.pdf>. American Bar Association, Ten Guidelines on Court Fines and Fees, August 2018,

https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_ind_10_guidelines_court_fines.pdf. The commentary to Guideline 1 makes clear that “fees” includes surcharges. As noted on page 1, such fees “have proliferated to the point where they can eclipse the fines imposed in low-level offenses.”

¹⁹ See, ABA 10 Guidelines, *Supra* note 20: **Guideline 7: Ability-to-Pay Standard**: “Ability-to-pay standards should be clear and consistent and should, at a minimum, require consideration of at least the following factors: receipt of needs-based or means-tested public assistance; income relative to an identified percentage of the Federal Poverty Guidelines; homelessness, health or mental health issues; financial obligations and dependents; eligibility for public defender or civil legal services; lack of access to transportation; current or recent incarceration; other fines and fees owed to courts; any special circumstances that bear on a person’s ability to pay; and whether payment would result in manifest hardship to the person or dependents.” See also, Sharon Brett and Mitali Nagrecha, Proportionate Financial Sanctions, Policy Prescription for Judicial Reform, CRIMINAL JUSTICE POLICY PROGRAM AT HARVARD LAW SCHOOL, September 2019.

http://cjpp.law.harvard.edu/assets/Proportionate-Financial-Sanctions_layout_FINAL.pdf (asserting that state legislatures should do away with surcharges and fees, and that all fines should be proportionate to severity of crime and offender’s ability to pay. The paper offers a day fine model explanation and calculator for jurisdictions to use).

Legal Aid believes surcharge collection to fund vital services is a regressive tax on the poorest, and is not a sustainable way to fund necessary services. A sizeable percentage of Vermont's criminal defendants are poor enough to be charged the minimum \$50 for their public defender. It is unrealistic to believe that this population will be able to produce the money to pay off standard surcharges, especially if they have charges from multiple cases.

2. The Center for Crime Victim Services recommends that any change regarding surcharges be delayed.

The Center for Crime Victim Services recommends further study and data collection before making any change regarding surcharges. At this point, the Center does not think we have adequate data to know if these recommendations are in the best interest of victims. The Center also has experience collecting restitution and expects that if the surcharges are not paid prior to sealing or expungement that little will be collected.

3. The SIU recommends that the Legislature consider whether reliance upon a surcharge is an appropriate way to fund a broad-based government program.

Support of the SIU program has been provided by general fund dollars and consistently exceeds the revenue generated by the surcharge. The surcharge has been used to offset the expense of the SIU program, but the performance of the surcharge has not been allowed to limit the support of the SIUs. Establishment of a waiver option for the SIU surcharge will require recognition that surcharges are not a reliable funding source for the long term. The concept of the surcharge with respect to offender accountability is worthy, but reliance upon a surcharge to adequately fund a broad-based government program is problematic.

4. The Judiciary recommends that if the legislature authorizes judges to waive or reduce surcharges, this waiver or reduction should be permitted only at the time of sentencing.

If the legislature authorizes judges to waive or reduce surcharges, this waiver or reduction should be permitted only at the time of sentencing as one of the many factors to be considered by the parties and the court as part of the disposition of the case. Inability to pay alone, is not a basis to preclude any financial obligations by way of fine and/or surcharge. Any surcharge imposed at the time of sentencing shall be subject to review or reconsideration only as a part of the sentence and not subject to separate review.

In lieu of waiving or reducing surcharges, surcharges could be imposed concurrently as part of a multiple count or multiple docket plea agreement resulting in the assessment of a single surcharge at one sentencing event.

Either recommendation, the option to consider waiver or reduction of surcharges, or the option to run concurrent surcharges, will have an adverse impact on the funding sources of statutory beneficiaries.

A case cannot be expunged or sealed if surcharges remain outstanding or any other portion of a sentence has not been satisfied.

Appendix

Two narratives from low-income Vermont Legal Aid clients that exemplify the importance of the Pennywise and Vermont Law School surcharge grants and highlight the need for reform.

TC is a young man of color who just finished his undergraduate degree at a Vermont college. He is now an aspiring artist and young professional. He petitioned the court *In Forma Pauperis* to seal 6 convictions from a series of offenses he committed when he was 19 and 20. The prosecutor requested a hearing on his sealing petition for the court to assess his rehabilitation. After testimony from his probation officer and TC about his rehabilitation, the judge stated on the record that he had never, in his 20 years in criminal practice, seen such a story of rehabilitation. The judge ordered the 6 convictions sealed.

But TC's rehabilitation was insufficient to clear his records. Before TC could walk out of the courtroom, the clerk stopped him and told him that his records would not be sealed until his surcharges were paid. He owed over \$800 to Alliance One. (He had no recollection of receiving a bill for that debt.) TC had just graduated from college and had a minimum wage job—as it was the only work he could get with his unsealed record. He could not pay that amount. But for the generous grant from **Pennywise Foundation**, he would have had to wait to seal his records until he could raise over \$800. Because of the Pennywise Grant, he started a better job with just three minor charges left on his record.

KM is a middle-aged woman, wife, mother and caretaker of an adult disabled child. She works at a chain retail store making \$11/hour. Her manager offered her a promotion, which would pay her \$4/hour more, but only if she could expunge her Retail Theft conviction from 5 years ago.

KM's motion to expunge was denied due to her unpaid surcharge of \$186. She never received a bill for the debt—Alliance One sent her two letters about the debt, to an old address. She sought out community funding to pay off the surcharge because she desperately and immediately needed that promotion. Without that assistance she would be making \$10 monthly payments for the next 18 months and would have lost the opportunity to move into a management position quickly. Once the surcharges were paid, she re-filed a stipulated expungement petition, which was granted by the court. She will be promoted as soon as her employer receives a copy of the expungement order.

Surcharge-Related Barriers for VLA Expungement Clients

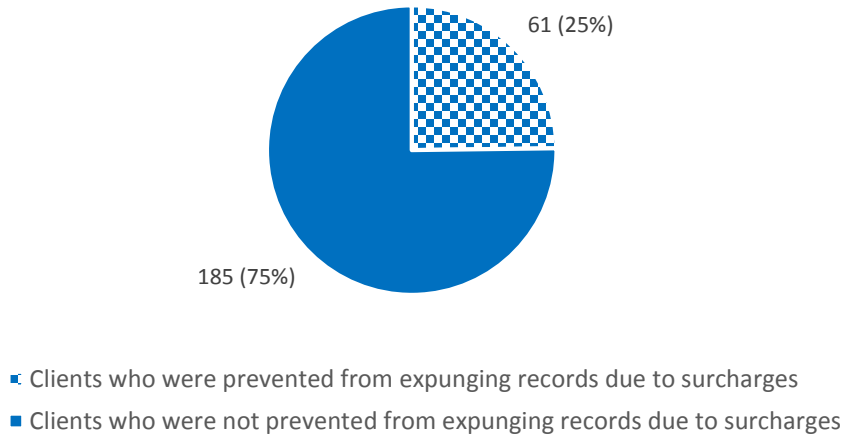


Figure 1: A full 25% of the individuals served at VLA clinics between December 1, 2018 and August 31, 2019, were either counseled out of petitioning for expungement or received an order from the court denying their petition due to surcharges owed.

Total Outstanding Surcharges for VLA Expungement Clients

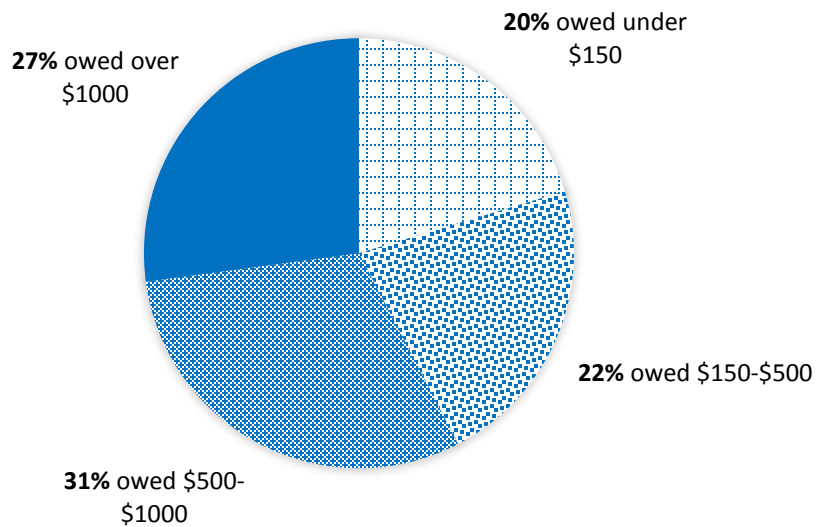


Figure 2: Of the clients prevented from expunging their records due to surcharges, 58% owed over \$500.