



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

TO: House Judiciary Committee
FROM: Evan Meenan, Deputy State's Attorney
RE: H.534 – An act relating to sealing criminal history records
DATE: February 15, 2022
CC: Michelle Childs, Legislative Counsel

The Department of State's Attorneys thanks the Committee for the opportunity to review and testify about H.534 Draft 3.1. As the Department has previously stated it is generally supportive of the direction H.534 is heading and appreciates the Committee's consideration of its proposals and testimony. This memorandum outlines the Department's remaining technical/procedural and substantive suggestions that it would like the Committee to consider before voting on the bill.

Technical/Procedural Issues

In its [November 5, 2021 Memo to the Vermont General Assembly](#), the Joint Legislative Justice Oversight Committee recommended that Vermont move from a two-track system of expunging and sealing to a one-track system of sealing. The Department agrees with this approach and H.534 mostly implements this recommendation. However, it doesn't amend:

- a. 13 V.S.A. 7603, which permits expungement of records when no conviction results;
- b. 13 V.S.A. 7604, which addresses how new criminal offenses impact *pending* expungement petitions; or
- c. 13 V.S.A. 7605, which limits when someone can file a new expungement petition when the court has already denied an expungement petition.

To fully move to a one-track system these statutes should be amended to refer to sealing and to conform with the other changes made in H.534.

Substantive Issues

1. Discovery Exception:

The Department is grateful to the Committee for including the discovery exception on page 21, lines 16-18 of the bill. This section of the bill, however, only deals with records sealed after conviction. The discovery concerns the Department has previously testified about also apply to cases that don't result in conviction. So, the Department would greatly appreciate a similar exception be inserted into page 22, lines 6-9 and any amended version of 13 V.S.A. 7603 the Committee drafts (see above).

If the Committee is considering not creating similar exceptions, it should consider what should happen if a defense attorney uncovers exculpatory information from a sealed or

expunged case in a newspaper, on social media, or during a witness interview they conduct on their own. Such information could include information indicating a witness or alleged victim may have previously been untruthful. Can the defense attorney use that information in court to cross examine the witness or victim? Can the defense attorney allege a discovery violation in support of a motion to dismiss the pending criminal charges?

2. Predicate Offenses (page 1, line 15):

As the Department has previously testified, the State's Attorneys have decided not to make a specific recommendation about what offenses should be "qualifying offenses." That is because the answer to that question will inevitably depend upon whether records are destroyed or sealed and who is granted access to sealed records. However, striking predicate offenses may result in making some offenses eligible that cover conduct the legislature has recently identified as concerning in its discussion of criminal threatening, such as making a bomb threat to a state building (13 V.S.A. 1753 false public alarms).¹ The Department does appreciate that the Committee may want to think about DUIs (also predicate offenses) differently from things like bomb threats.

3. Default Respondent (page 15, lines 13-14):

The Department would prefer State's Attorneys to be the default respondent in the cases they prosecute and let the Attorney General be the default respondent in the cases it prosecutes. Some language that could accomplish this is: "The State's Attorney, or Attorney General if it prosecuted the case resulting in the conviction, shall be the respondent in the matter. The State's Attorney and Attorney General may authorize each other to act as a respondent in matters where the other prosecuted the case resulting in the conviction." This reflects, amongst other things, prosecutors established relationships with victims and existing familiarity with the underlying case.

4. Subsequent Offenses:

One of the rationales for sealing criminal history records is that the longer someone goes without committing a new criminal offense the less likely they are to do so, i.e., the predictive value of a conviction goes down over time. 13 V.S.A. § 7602 as it currently exists takes this concept into account. For example, existing subsection (b)(1)(B) makes eligibility contingent on the person "not [having] been convicted of a crime arising out of a new incident or occurrence since the person was convicted for the qualifying crime."

Draft 3.1 of the bill makes the commission of new crimes irrelevant except for in certain DUIs and municipal violation records. Doing so is contrary to the above rationale for sealing. It also means that someone may continue to commit new crimes and remain eligible to have their prior convictions sealed. The Department proposes including the following as a criterion for sealing eligibility: "The person has not been convicted of a crime arising out of a new incident or occurrence since the person was convicted for the qualifying crime.in the INSERT years preceding the filing of the petition."

5. Index (page 22, line 17):

¹ A few other examples of predicate offenses that would appear to become newly eligible include 13 VSA §§ 3018 (hindering arrest), 2601a (open and gross lewdness), 3503 (threats to use weapons of mass destruction), and 3002 (impersonation of an officer).

To help ensure that prosecutors don't disclose information about cases that have been sealed, prosecutors need an easy way to identify in their own case management systems what cases have been sealed. In other words, they need to know what they are not allowed to talk about. The Department sometimes gets public records request for things like reports of all the cases handled by each office or each prosecutor. It would like the ability for those reports to identify which cases have been sealed so they can be redacted from the report before disclosure to the public. It is concerned that if it does that it will get in trouble because it does not have the express statutory authority to maintain an index of sealed cases. The Department greatly appreciates Judge Zonay's previous suggestion that reports from case management systems could be treated separately from the court's own special index. That is a very constructive solution for this issue.