



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

TO: Senate Judiciary Committee
FROM: Evan Meenan, Deputy State's Attorney
RE: [H.534 \(Draft 5.2\)](#) – An act relating to sealing criminal history records
DATE: March 15, 2022
CC: Michele Childs, Legislative Counsel

In its [November 5, 2021 Memo to the legislature](#), the Joint Legislative Justice Oversight Committee recommended moving from a two-track system of expunging and sealing to a one-track system of sealing. The Department agrees with this recommendation because it balances the desire to relieve rehabilitated defendants of the burdens of criminal convictions with the State's ethical and constitutional discovery obligations.

The House Judiciary Committee worked diligently on H.534 to make meaningful progress towards implementing this goal. The Department supports the direction H.534 is heading. The Department respectfully requests the Senate Judiciary Committee consider the following changes. The Department previously presented most of these changes to the House Judiciary Committee, which declined to include them in the current version of the bill.

Discovery Exceptions (page 22, lines 4-6)

H.534 (13 V.S.A. § 7607(c)(5)) permits the State "to disclose information contained in a sealed criminal history record when required to meet their otherwise legally required discovery obligations." This section of the bill only deals with records sealed after conviction. The discovery concerns identified in the Department's [July 15, 2021 presentation](#) to the Joint Legislative Justice Oversight Committee can also arise in cases that don't result in conviction. So, the Department would greatly appreciate a similar exception be inserted into page 22, lines 16-19 (13 V.S.A. § 7607(d)).

The Department's discovery concerns have recently arisen in two domestic assault prosecutions. In one case a defendant filed a motion to dismiss the charges against him after the State complied with an order to expunge the records associated with a case against the complaining witness who faced charges arising out of the same incident. The State dismissed the case without prejudice before the court ruled on the motion. In another case, the State dismissed charges against a defendant because it was unable to disclose information about the complaining witness's credibility from a prior expunged case in which she was also an alleged victim.

This is not just an issue of ensuring prosecutors are not subject to claims of discovery violations. Vermont Rule of Professional Responsibility 3.8 requires the "timely disclosure to

the defense of all evidence or information *known* to the prosecutor that tends to negate the guilt of the accused” because defendants have a constitutional right to that information.

Amend 13 V.S.A. § 7603

H.534 does not completely move to a one-track system because it still permits expungements in cases that don't result in convictions. To move completely to a one-track system 13 V.S.A. § 7603 should be amended. The House Judiciary Committee made a policy decision to permit expungement in these circumstances.

If the Committee wants expungements to be available in cases that don't result in convictions, for consistency the Department recommends 13 V.S.A. §§ 7604 (new offense when petition pending) and 7605 (denial of petition) refer to both “expungement” and “sealing.”

Case Reports

The Department sometimes gets public records requests for things like reports of all the cases handled by each office or each prosecutor. The Department would like the ability to generate reports from its case management system of what records have been sealed to help ensure prosecutors don't erroneously disclose sealed information. This will permit the Department to easily redact sealed cases from the report before disclosure to the public. H.534 allows the Court to have a special index (page 23, line 5-20), which has limited information and accessibility. The Department is not seeking access to the special index.

Multiple Counts

The Department also requests that when a single case involves multiple charges, any charges dismissed *as part of a plea agreement* should not be eligible for sealing until all the charges are eligible. There are two primary reasons for this. First, redactions can be impossible in cases where the facts in an affidavit pertain to multiple charges. Second, it may help minimize expungement errors. For example, this past December a court ordered the expungement of two counts in a docket when only one should have been expunged. This resulted in the erroneous expungement of a charge of careless or negligent operation of a vehicle that a defendant plead guilty to.

Default Respondent (page 15, lines 13-14)

H.534 potentially allows either the State's Attorneys or the Attorney General to be the respondent. The Department requests State's Attorneys to be the default respondent in the cases they prosecute, and 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.

Subsequent Offenses

One rationale for sealing criminal history records is that the longer someone goes without committing a new crime 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 currently worded 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.” Several versions of S.7 (2021) also attempted to take this into account through different language before it was passed in its final form.

H.534 takes this into account only in certain DUIs and municipal violation records. This means that someone may continue to commit new crimes and remain eligible to have their prior convictions sealed. The Department requests including the following language to address this: “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.”

Exception for Dismissed Charges (page 22, lines 14-17)

H.534 permits the prosecution to have access to cases dismissed without prejudice for three years. For many of the property offenses that will be qualifying offenses, this does not coincide with the statute of limitations. The following language could align H.534 with the statute of limitations for filing criminal charges: “The prosecution shall have access to cases dismissed without prejudice until the applicable statute of limitations expires.”

Predicate Offenses (page 1, line 15 to page 2, line 2)

The Department has not made a specific recommendation about what offenses should be “qualifying offenses.” But the conversation around sealing and expunging criminal records relates to other conversations that have been taking place in the legislature. Recently there have been incidents involving threatening behavior directed at elected officials and those who help run elections. Some of these incidents have been discussed in conversations about S.265 (criminal threatening). Striking predicate offenses may make some offenses eligible that cover concerning behavior directed towards these officials, such as making a bomb threat to a state building.¹ There may be policy reasons why the Committee may want to treat DUIs (also predicate offenses) differently from things like bomb threats.

¹ This could be charged under 13 V.S.A. 1753 (false public alarms). A few other examples of predicate offenses that would appear to become newly eligible include 13 V.S.A. §§ 3018 (hindering arrest), 2601a (open and gross lewdness), 3503 (threats to use weapons of mass destruction), and 3002 (impersonation of an officer).