

Testimony – Senate Judiciary 3/16/22

H. 534, An act relating to sealing criminal history records

Good Morning Senator Sears and Committee members For the record I am Jaye Pershing Johnson, Governor Scott's Legal Counsel. I appreciate the opportunity to testify on sealing criminal history records. I hope you don't mind if I read my remarks which helps me keep my thoughts organized. Feel free to interrupt with questions.

As you know, we have grappled with expungement for years – I think this is the 6th bill in going on 6 years seeking to expand expungements and sealing. Last summer when the concept of sealing only was introduced, we were optimistic this could expand our policy options and areas of agreement. As Commissioner Schirling noted, universal sealing gives us the opportunity to balance the benefits touted by supporters of relief for offenders from “collateral consequences” and as a means to reducing barriers to employment, housing and education with maintain the health and safety of our communities. I am disappointed the House bill simply creates a sort of “expungement light” in order to make a number of non-violent felony crimes available for sealing and expungement. I also understand that may be entirely the point, but we cannot support the bill as written. I appreciate Senator Sears' observation this gives us another chance to discuss and restructure this system.

Our primary objections are threefold. First, as Commissioner Schirling has made clear, law enforcement needs access to those records to be able to do the jobs we expect them to do; [as an aside, with all due respect, “temptation to access” suggests an inherent distrust of law enforcement or a belief officers are inclined to abuse power which is misplaced. Law enforcement officers are entrusted with volumes of records now with consequences for violating their duties. As Commissioner Schirling testified, the issue is “informed response”; this expectation is codified in last year's use of force bill.

Second, as the recent conversation regarding S. 30 and S. 4 demonstrate, we need a NIC system with integrity and that means criminal records need to exist. This is true as well for background checks required by law and rule. Our background check laws are only as good as the data available to check.

Finally, this bill does nothing to simplify or streamline the process for those who may be eligible for expungement or sealing now.

The Chair of House Judiciary was reported to cite to testimony from a representative from the Brennan Center in support of the House Judiciary Committee's version of H. 534. That representative pointed to a NY Senate bill the Brennan center has supported which is a clean slate bill and seals all crimes but has a number of exceptions, including access for criminal justice agencies, access for NIC System purposes and access for background checks required by law, as well as other exceptions for circumstances noted by Commissioner Schirling which address benefits for defendants. I'm not saying this is the model for Vermont, but it gives us a different way to think about the potential of universal sealing for better policy.

I would like to note again Vermont's expungement laws are already quite robust – I would argue we already have a broader expungement regime in VT than most states despite the rhetoric of advocates. I have shared an inventory in the past (attached). There are at least 5 expungement laws for juvenile offenses alone. These include virtually automatic expungements for successful completion of diversion and virtually automatic expungement of qualifying crimes (which includes all non-violent misdemeanors), for successful completion of the terms of a conviction. They also include sealing the records of adjudicated delinquents (all crimes other than the Big 12) and sealing the records of all Youthful Offenders upon successful completion of the probation term – for ANY crime.

There are an additional 8 expungement laws for adults, including virtually automatic expungements for successful completion of adult diversion and successful completion of the terms of probation for a deferred sentence. In the case of deferred sentences, this is

all crimes other than listed crimes and two specific sex crimes against children. All misdemeanor crimes, other than listed misdemeanors, are eligible for expungement, as are convictions for drug possession.

We ALSO know from data and analysis of the Council of State Governments:

- The number of criminal cases filed with the state is fairly steady at about 15,000 cases per year;
- Of that number, roughly 78% are misdemeanors. Almost all misdemeanors are expungable now.
- Roughly 20% of misdemeanor cases and 10% of felonies result in dismissals and expungement through diversion.
- We also know 99% of convictions are the result of plea agreements.
- All misdemeanor charges with convictions are convicted as misdemeanors and approximately 40% of all felony charges are convicted as misdemeanors.
- We know from changes made in 2017 to the uniform law on collateral consequences courts are now required to advise offenders of the opportunity for expungement or sealing in pre-trial proceedings and again by DOC at release.

So most criminal records are already expungable. All criminal charges which stay in Family Court, including charges of violent crimes committed by young adults, never even become criminal records. Yet the widely reiterated talking point – these days - is that H. 534 is a workforce bill. I disagree. It seems to me the evidence points to the fact there is a vast pool of Vermonters with criminal records eligible for expungements who are not seeking them now. [As an aside, we have a workforce bill, an economic development bill and a housing bill all struggling to make crossover in the Legislature.]

Again, we believe there is a path forward for compromise on universal sealing which yields the policy outcomes of reduced collateral consequences, better jobs and more opportunity for housing and education, but not at the expense of the public safety of Vermonters.

Thank you so much for your time and attention.

EXPUNGEMENT/SEALING INVENTORY

(Yellow highlights for acts relating to expungement passed in the last 4 years)

JUVENILES/YOUTHFUL OFFENDERS

1. Applicable Law: 3 V.S.A. § 163 – Juveniles in Court Diversion (added in 2019 Act 77)

What Records Expungable: All delinquency records.

When Records Expungable: Automatic expungement after the two-year anniversary of a successful completion of juvenile diversion, with notice and opportunity to contest.

What Specifically Not Expungable: All “delinquent acts” expungable. Cases must be referred by SAs. None specifically not expungable other than by AG policy.

Basis for Expungement: The court shall expunge the records if it finds:

- (A) two years since successful completion of juvenile diversion by the participant and the dismissal of the case by the State's Attorney (SA);
- (B) no intervening convictions during the two-year period, and no criminal proceedings pending;
- (C) rehabilitation attained to the satisfaction of the court; and
- (D) no restitution owed under a contract executed with the Restitution Unit

2. Applicable Law: 13 V.S.A. § 7609 Automatic expungement of juvenile records (qualifying crimes) (added in 2018, Act 201)

What Records Expungable: Juvenile records (arrest, citation, investigation, charge, adjudication of guilt, criminal proceedings, and probation related to the sentence), when 18-21 at the time crime was committed.

When Records Expungable: Automatic expungement within 30 days after the date of successful completion of the terms and conditions of the sentence for the conviction, absent a finding of good cause by the court. Alternatively, an individual may also petition the court for an expungement after 30 days from completion of the terms and conditions of the sentence.

What Specifically Not Expungable: A criminal record that includes both qualifying and nonqualifying offenses.

Basis for Expungement: Successful completion of terms and conditions of sentence and payment of restitution unless waived court finds expungement will serve the interests of justice. VCIC shall retain a special index of sentences for sex offenses that are required to be on the sex offender registry and shall only be accessed by the

Director of VCIC and an individual who provides information to DOC to prepare a presentence investigation.

3. Applicable Law: 13 V.S.A. § 2802b Minor electronically disseminating indecent material to another. (added in 2009 (Act 58))

What Records Expungable: Records of minors who were electronically disseminating indecent material and adjudicated delinquent.

When Records Expungable: When minor reaches 18.

What Specifically Not Expungable: NA

Basis for Expungement: Expungement at age of majority.

4. Applicable Law: 33 V.S.A. § 5119 Sealing records for Delinquency Proceedings (Added in 2007(Act 185))

What Records Expungable: In matters relating to a child who has been adjudicated delinquent, sealing of all files and records related to the proceeding of the court, law enforcement, prosecution, and the Department for Children and Families.

Sealed files accessible by:

- (i) the commissioner and general counsel of any administrative department;
- (ii) the secretary and general counsel of any administrative agency;
- (iii) a sheriff;
- (iv) a police chief;
- (v) a State's Attorney;
- (vi) the Attorney General;
- (vii) the Director of the Vermont Crime Information Center; and
- (viii) necessary administrative staff.

When Records Expungable: Two years have elapsed since the final discharge of the person. **(But see 13 VSA 7609 applicable to qualifying crimes, automatically expunged.)**

What Specifically Not Expungable: Listed crimes.

Basis for Expungement: Expungable unless the court finds:

- (A) the person has been convicted of a listed crime or a proceeding is pending seeking conviction or adjudication for a listed crime; or
- (B) rehabilitation of the person has not been attained to the satisfaction of the court.

5. Applicable Law: 33 V.S.A. § 5287 Termination or Discontinuance of probation for Youthful Offenders (Added in 2017, Act 72)

What Records Expungable: For Youthful Offenders (all crimes eligible for 14-22 year old offenders). All records relating to the case in the Criminal Division shall be expunged, and all records relating to the case in the Family Court shall be sealed pursuant to section 13 V.S.A. § 5119. **(But see 13 VSA 7609 applicable to qualifying crimes, automatically expunged – applicable?)**

When Records Expungable: A motion or stipulation may be filed at any time in the Family Division requesting that the court terminate the youth's status as a youthful offender and discharge him or her from probation. The motion may be filed by the State's Attorney, the youth, the Department, or the court on its own motion.

If the court finds that the youth has successfully completed the terms of the probation order, it shall terminate youthful offender status, discharge the youth from probation, and file a written order dismissing the Family Division case. The Family Division shall provide notice of the dismissal to the Criminal Division, which shall dismiss the criminal case.

What Specifically Not Expungable: NA

Basis for Expungement: The court shall consider:

- (1) the degree to which the youth fulfilled the terms of the case plan and the probation order;
- (2) the youth's performance during treatment;
- (3) reports of treatment personnel; and
- (4) any other relevant facts associated with the youth's behavior.

Adults

6. Applicable Law: 3 V.S.A. § 164 – Adults in Court Diversion (added in 2019 (Act 77))

What Records Expungable:

- (1) Adults charged with a first or a second misdemeanor or a first nonviolent felony.
- (2) Adults and children 18 and over with a petition in the Family Division charged with an offense and who have substance abuse or mental health treatment needs regardless of the person's prior criminal history record,.

When Records Expungable: Automatic expungement after the two-year anniversary of a successful completion of adult diversion, with notice to SAs and opportunity to contest.

What Specifically Not Expungable: Felony listed crimes

Basis for Expungement: The court shall expunge the records if it finds:

- (A) two years since the successful completion of adult diversion and the dismissal of the case by the SA;
- (B) no intervening convictions during the two-year period, and no criminal proceedings pending;
- (C) rehabilitation attained to the satisfaction of the court; and
- (D) no restitution owed under a contract executed with the Restitution Unit.

7-8. Applicable Law: 12 V.S.A. § 5138, 15 V.S.A. § 1108– Contempt of Court for Violations of No Stalking, Sexual Assault or Abuse Prevention Orders (Added in 2005 (Act 193), Abuse Prevention added in 1985 (Act 79))

What Records Expungable: Convictions for misdemeanor criminal contempt prosecutions arising as a result of violations of orders against stalking or sexual assault.

When Records Expungable: Two years from conviction for criminal contempt.

What Specifically Not Expungable: Limited to criminal contempt convictions for violations of orders against stalking or sexual assault.

Basis for Expungement: On motion of the defendant to expunge the record of the criminal proceeding and conviction unless the defendant has been convicted of “a felony or misdemeanor involving moral turpitude” or an intervening violation of a protection order.

9. Applicable Law: 13 V.S.A. § 2658- Motion to vacate by victim of human trafficking (Added in 2012 (Act 94))

What Records Expungable: Convictions obtained as a result of the person having been a victim of human trafficking.

When Records Expungable: Upon a court’s decision to vacate the criminal conviction, .

What Specifically Not Expungable: Big 12 crimes

Basis for Expungement: (see above)

10. Applicable Law: 13 V.S.A. § 5413 – Sex Offense Reversed and Dismissed (Added in 1996, (Act 124))

What Records Expungable: Records shared for purposes of the sex offender registry relating to a sex offense that has been reversed and dismissed.

When Records Expungable: Records to be destroyed upon notice to the agency with information relating to the sex offender registry.

What Specifically Not Expungable: NA

Basis for Expungement: Reversal and dismissal of a sex offense

11. Applicable Law: 13 V.S.A. § 7041 Deferred Sentences (Added in 1972 (Act 239))

What Records Expungable: The Court shall issue an order to expunge all records and files related to the arrest, citation, investigation, charge, adjudication of guilt, criminal proceedings, and probation related to a deferred sentence. The record of the criminal proceedings shall be expunged.

When Records Expungable: Upon fulfillment of the terms of probation and of the deferred sentence agreement, the court shall strike the adjudication of guilt and discharge from probation, absent a finding of good cause by the court.

What Specifically Not Expungable: Listed crimes and lewd and lascivious conduct with a child unless the victim and the defendant were within five years of age and the act was consensual and sexual assault of a child under 16 unless the victim and the defendant were within five years of age and the act was consensual (may not be deferred). The VCIC shall retain a special index of deferred sentences for sex offenses that require registration with the Sex Offender Registry.

Basis for Expungement: Fulfillment of the terms of probation and of the deferred sentence

12. Applicable Law: (Title 13, Chapter 230 originally added in 2012, Act No. 131, Amended in 2015 (Act 36), 2017 (Act 57), 2018 (Act 178), 2019 (Act 32), 2021 (Act 58)) 13 V.S.A. §§ 7601, 7602 – Expungement and Sealing Criminal History Records

What Records Expungable:

- All misdemeanor offenses except those that are not:
 - Listed crimes;
 - Sexual exploitation of children;
 - Violation of a protection order;
 - Prostitution and open and gross lewdness;
 - A predicate offense

- The felonies of unlawful mischief (intentional property damage), grand larceny, burglary (not including in occupied dwellings which is Big 12), obtaining regulated drugs by fraud or deceit, uttering a forged or counterfeited instrument and drug possession;
- Convictions for crimes no longer unlawful; (7602(b))
- Crimes pardoned unconditionally;
- Sealing only for DUI not resulting in serious bodily injury or death to any person other than the operator, or related to operating a school bus with a blood alcohol concentration of 0.02 or more or operating a commercial vehicle with a blood alcohol concentration of 0.04 or more; or
- Burglary into an occupied dwelling when the person was 25 or younger, and the person did not carry a dangerous or deadly weapon.

When Records Expungable: It depends.

- Generally, the court shall grant the petition and order expungement of criminal history record if:
 - (A) Five years have passed since successful completion of terms and conditions of the sentence for the conviction, or successfully completion of terms and conditions of an indeterminate term of probation that commenced at least five years previously.
 - (B) No intervening conviction.
 - (C) Restitution and surcharges paid unless waived.
 - (D) The court finds that expungement serves the interests of justice.
- Alternatively, the court shall grant the petition and order sealing if:
 - (A) Five years have passed since successful completion of terms and conditions of the sentence for the conviction, or successfully completion of terms and conditions of an indeterminate term of probation that commenced at least five years previously.
 - (B) No intervening conviction.
 - (C) Restitution and surcharges paid unless waived.
 - (D) Court finds sealing better serves the interests of justice than expungement; and
 - (E) the person committed the crime after reaching 19.
- Alternatively, the court shall grant the petition and order expungement if:
 - (A) 10 years have passed since successful completion of the terms and conditions of the sentence for the conviction.
 - (B) The person has not been convicted of a felony in the last seven years.
 - (C) The person has not been convicted of a misdemeanor during the past five years.
 - (D) Restitution and surcharges paid unless waived.
 - (E) After considering the particular nature of any subsequent offense, the court finds expungement serves the interests of justice.
- Alternatively, the court shall grant the petition and order sealing if:

- (A) 10 years have passed since successful completion of the terms and conditions of the sentence for the conviction.
- (B) The person has not been convicted of a felony in the last seven years.
- (C) The person has not been convicted of a misdemeanor during the past five years.
- (D) Restitution and surcharges paid unless waived.
- (E) sealing better serves the interests of justice than expungement; and
- (F) the person committed the crime after reaching 19.
- For petitions filed for convictions of crimes which are no longer crimes, unless the court finds that expungement would not be in the interests of justice, the court shall grant the petition and order expungement if:
 - (A) Completion of sentence or supervision for the offense.
 - (B) Restitution and surcharges paid unless waived.
- For petitions filed for convictions for drug possession crimes that are no longer criminal:
 - (A) The petitioner must establish the conviction was based on possessing an amount of a drug no longer prohibited by law.
 - (B) Rebuttable presumption the amount of the regulated drug specified in the affidavit of probable cause was the amount possessed by the petitioner.
- Prior to granting expungement or sealing for burglaries, court must find it was not a burglary into an occupied dwelling.
- For DUI petitions, sealing only, the court shall grant the petition and order that the criminal history record be sealed if:
 - (A) 10 years have passed since successful completion of terms and conditions of the sentence for the conviction, or successful completion of terms and conditions of an indeterminate term of probation that commenced at least 10 years previously.
 - (B) No new DUI conviction.
 - (C) No intervening crimes.
 - (D) Restitution paid in full.
 - (E) Sealing serves the interests of justice.
- For petitions filed for burglary committed when under 25:
 - (A) 15 years have passed since successful completion of terms and conditions of the sentence for the conviction, or successful completion of an indeterminate term of probation that commenced at least 15 years previously.
 - (B) No intervening convictions.
 - (C) Restitution paid in full.
 - (D) Expungement or sealing serves the interests of justice.
- In the event of a new charge, the court shall not act on the petition until disposition of the new charge. (13 V.S.A. § 7604)

What Not Expungable: Felony offenses, other than as set forth above and misdemeanors that are listed crimes; offenses involving sexual exploitation of children; violations of protection orders against abuse, stalking and sexual abuse; prostitution; open and gross lewdness; and predicate offenses (criminal offense that can be used to

enhance a sentence levied for a later conviction, including DUI, domestic assault and stalking, but not including disorderly conduct and drug possession).

Also does not apply to CDL drivers seeking to seal or expunge a felony.

Basis for Expungement: (see above)

10. Applicable Law: 13 V.S.A. § 7607(c) -Effect of Sealing (Added in 2000 (Act 151))

A “criminal justice agency” may use a sealed criminal history record for “criminal justice purposes” and would be admissible as a prior DUI for purposes of enhanced penalties.

“Criminal justice agency” includes:

- all Vermont courts;
- other governmental agencies or subunits that allocate at least 50 percent of the agency's annual appropriation to criminal justice purposes. (20 V.S.A. § 2056a)

“Criminal justice purpose” includes:

- investigation, apprehension, detention, adjudication or correction of persons suspected, charged or convicted of criminal offenses.
- criminal identification activities,
- the collection, storage and dissemination of criminal history records
- screening for criminal justice employment.

11. Applicable Law: Act 167 of the Laws of 2020, § 31, Expungement of Marijuana Criminal History Records

What Records Expungable: Criminal history records of violations of 18 V.S.A. § 4230(a)(1) that occurred prior to January 1, 2021. [Possession of more than 1 ounce of cannabis or more than 5 grams of hashish or cultivate more than 2 mature cannabis plants or 4 immature cannabis plants.]

When Records Expungable: Automatic, not later than January 1, 2022.

What Specifically Not Expungable: NA

Basis for Expungement: Applicable possession charge.

