



VERMONT DEPARTMENT OF STATE'S ATTORNEYS AND
SHERIFFS
JULY 15, 2021 PRESENTATION TO THE JOINT LEGISLATIVE
JUSTICE OVERSIGHT COMMITTEE
SEALING AND EXPUNGING CRIMINAL HISTORY RECORDS



THE
DEPARTMENT
AGREES:

Rationale for Sealing/Expungement

- Reduce barriers to employment.
- Reduce barriers to housing.
- Reduce barriers to education.
- Help minimize public condemnation and stigmatization of individuals convicted of criminal offenses who have made meaningful strides towards rehabilitation.

SEALING AND
EXPUNGEMENT
SHOULD BE
AVAILABLE IN
APPROPRIATE
SITUATIONS

Factors to be considered should include:

- Type of crime.
- Criminal history.
- Impacts on victims and the community.
- Rehabilitation of the offender.
- The need for the public, as well as certain specific entities and individuals, to know about certain types of criminal offenses.

SEALING VERSUS EXPUNGEMENT

How are they different?

Expungements – Results in the actual total physical destruction of the underlying records except for the index maintained by the judiciary.

Sealing – Results in the segregation of the underlying records, which are retained but only made available to a limited number of people for limited purposes.

How are they the same?

13 V.S.A. § 7606 (effect of expungement) and 13 V.S.A. § 7607 (effect of sealing) both provide:

- “[S]uch person shall be treated in all respects as if he or she had never been arrested, convicted, or sentenced for the offense.”
- In employment and licensing applications, and as a witness is only “required to answer questions...with respect to arrests or convictions that have not been expunged.”
- Government must represent that “NO CRIMINAL RECORD EXISTS.”

2019 – ACT 32

EXPANSION OF
SEALING AND
EXPUNGEMENT

Issues Identified Post Act 32

- Conflicts with prosecutors' ethical obligations and defendants' due process rights.
- Defendants' occasional need/desire for records.
- Sufficiency of resources to process petitions (potentially a short-term issue).
- The ability to track recidivism.
- Potential confusion over the differences between sealing and expunging.
- Scope of judicial involvement.

ETHICAL OBLIGATIONS AND DUE PROCESS RIGHTS

- Vermont Rule of Professional Responsibility 3.8 – “The prosecutor in a criminal case shall...make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused...”
- Defendants are entitled to exculpatory evidence, which includes information pertaining to witness credibility. *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. U.S.*, 405 U.S. 150 (1972).
- Hypothetical One:
 - Witness/victim makes false statements during investigation/prosecution.
 - Investigation records get destroyed after expungement.
 - Witness/victim is later a witness in another case (not uncommon).
 - Witness/victim’s credibility important.
 - Prosecutor has personal knowledge of previous false statements, but no longer has any documents to give defendant and is legally prohibited from informing defendant false statement occurred.
- Hypothetical Two:
 - Witness convicted of FIPO and conviction expunged.
 - Witness called to testify in new case.
 - Witness’s credibility is important.
 - Witness asked whether s/he ever lied to police.
 - Witness legally allowed to say “no.”
 - Defendant convicted because jury had no reason to doubt witness.

DEFENDANT ACCESS TO RECORDS

- Actual case example:
 - Defendant commits a crime.
 - Acts constituting crime led to professional license revocation.
 - Defendant gets a deferred sentence.
 - Deferred sentence agreement satisfied and records are expunged.
 - Defendant makes a public records request for prosecution/investigation file for use in the appeal of the license revocation.
 - State response “no records exist” (because they were destroyed) and defendant gets zero records.

State's Attorney Offices

- Expungement orders have increased from 2,503 in 2018 to 7,700 in 2019 and 14,739 in 2020.
- Each petition takes 30 minutes on average to review. So, 7,400 hours.
- Takes even longer when only part of a docket is expunged and redactions are needed.
- The financial impacts of expungement need to be analyzed. Including whether the special sealing fund (13 V.S.A. § 7610) is sufficient.



RESOURCE
CHALLENGES


THE ABILITY TO TRACK RECIDIVISM RATES

- Many recent criminal justice reforms aimed at reducing recidivism.
- Need to measure success of those reforms.
- Statutory (28 V.S.A. § 4) definition of recidivism:
 - “The Department shall calculate the rate of recidivism based upon offenders who are sentenced to more than one year of incarceration who, after release from incarceration, return to prison within three years for a conviction for a new offense or violation of supervision resulting, and the new incarceration sentence or time served on the violation is at least 90 days.”
 - This definition is not synonymous with the commission of a crime, i.e., under this definition recidivism can go down without crime rates going down.
- Expungement should not occur in a way that does not allow them to be counted towards recidivism/crime rates. That risks misleading policy makers and Vermonters.

ADDITIONAL AREAS
OF INQUIRY POST
THE EXPANSION OF
ACT 32

Areas of Concern

- What offenses should be eligible.
- The impact of subsequent offenses.
- Which prosecuting office should be able to stipulate.
- Judicial oversight.



HOW OTHER
JURISDICTIONS
ARE ADDRESSING
EXPUNGEMENTS
AND SEALING

The Department performed an analysis of a state-by-state survey of expungement and sealing laws, including the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands.

- Analyzed the survey with the following questions in mind:
 - Should all criminal history records be eligible?
 - Should both expungement and sealing be options?
 - Should expungement/sealing be automatic?

SUMMARY OF 50-STATE SURVEY*

- 41 out of 54 jurisdictions appear to seal records, even when they use “expunge” and “expungement.”
- Only 17 out of 54 jurisdictions appear to have any form of automatic expungement.
- Zero jurisdictions make all convictions eligible.
- Biggest areas of discrepancy:
 - Who has access to sealed records and how?
 - What convictions are eligible?
 - Effect of prior and subsequent convictions?

* From October 2020.

ELIGIBLE OFFENSES

- 13 V.S.A. § 7601 defines “qualifying crime” by listing categories of crimes and some specific crimes.
- Worth inventorying all criminal offenses to determine what offenses should be eligible.
- Under some versions of S.7, the following offenses would arguably be eligible:
 - Accessories to listed offenses.
 - Attempts to commit listed offenses.
 - Crimes that qualify as hate motivated crimes under 13 V.S.A. § 1455 (simple assault of an Asian American like those covered in the news).
 - Law enforcement use of a prohibited restraint in violation of 13 V.S.A. § 1032 (Derek Chauvin had no death resulted).
 - Willful and malicious injuries caused by explosives, 13 V.S.A. § 1601, and placing a hoax device, 13 V.S.A. § 1612 (individual who set devices outside the Democratic and Republican Party National HQs as part of January 6th insurrection).
 - Slave (sex) traffic, which is different from human trafficking. 13 V.S.A. § 2635.
 - Criminal conduct by public servants, e.g., embezzlement by a government official and a cop who commits perjury.
 - Sexual exploitation of children. 13 V.S.A. Ch. 64.
- Who should know about these offenses? Hiring police departments and governmental agencies? Daycare centers? Adoption agencies?

- One rationale for expungements/sealing – The longer someone goes without committing a subsequent offense, the less likely they are to commit one.
 - *The Department does not dispute this premise.*
- Some versions of S.7 permitted people in some situations to commit subsequent offenses without losing original expungement/sealing eligibility date.
- Eligible 5 years from the later of: (i) date judgement satisfied; or (ii) date judgment on subsequent offense satisfied.
- Hypothetical:
 - Year 1 – principal offense committed.
 - Year 2 – subsequent offense committed.
 - Year 3 – judgment on subsequent offense satisfied.
 - Year 4 – judgment on principal offense satisfied.
 - Year 9 – principal offense expunged on original eligibility date.



WHO SHOULD STIPULATE?

- Some version of S.7 required that the prosecuting office who handled the case be the respondent unless that office stipulated that another could do it.
- Only applied to early petitions.
- In timely petitions, SAs could stipulate to AGO cases and vice versa *regardless of level of familiarity with the case, defendant, victim, and community impact.*
- Relationships between victims and prosecuting offices can be important.



JUDICIAL INVOLVEMENT

- 13 V.S.A. § 7602(a)(3) – The “court shall grant the petition without a hearing if the petitioner and the respondent stipulate to the granting of the petition.”
- Does “shall” prevent the court from denying a petition if it determined eligibility criteria are not met?
 - Law enforcement disagrees with prosecution?
 - Victim disagrees with prosecution?