



EXPUNGING AND SEALING CRIMINAL HISTORY RECORDS: AN OVERVIEW FOR PROSECUTORS

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Expunging and Sealing Criminal History Records: An Overview for Prosecutors

INTRODUCTION

In 2019-2022 alone, almost every state amended its statutes to expand expungement and/or sealing by increasing the number of eligible offenses, decreasing waiting periods, or removing other restrictions on eligibility. This article is based on a review of expungement and sealing statutes in the 50 states and the District of Columbia, as well as interviews with prosecutors in California, Massachusetts, Nevada, New York, Pennsylvania, and West Virginia.¹

Some state statutes are detailed; some are sparse. Some give greater discretion to prosecutors and judges in applying the law in a particular case; some give less. The complexities of our nation's expungement and sealing laws are a challenge for prosecutors, defense counsel, and the accused. One thing is known—the laws and practices on expungement and sealing will continue to evolve and change. See the Appendix for a list of considerations for prosecutors that summarizes the salient points about these complex statutes.

Given the broad scope of the legislative review, and for the sake of conciseness, footnotes are not provided for the many statutory details provided. The reader is encouraged to review the statutes themselves for the specifics of the laws in each state and to read the more detailed version of this article.²

The goal of the article is to assist prosecutors with evaluating current and proposed legislation. The article also highlights examples of how prosecutors have taken the lead in assisting with expungement or sealing, either through collaborative events or developing automatic sealing.

JUSTIFICATIONS FOR THE STATUTES

Across the country, states are re-evaluating the ways in which public safety is best promoted and past inequities are remedied. Initiatives such as "Clean State," "Fresh Start," and "Second Chance" promote sealing or expunging adult criminal records to achieve both goals.

¹ Many states have special or different provisions for juvenile, youth, first, or drug offenders. They are beyond the scope of this article.

² A longer and more detailed version of this article with references to specific state statutes can be found at PATRICIA RILEY & KRISTINE HAMANN, PROSECUTORS' CTR. FOR EXCELLENCE, 50 STATE OVERVIEW OF EXPUNGEMENT AND SEALING STATUTES (2023), <https://pceinc.org/wp-content/uploads/2023/07/20230630-50-STATE-OVERVIEW-OF-EXPUNGEMENT-AND-SEALING-Statutes-PCE.pdf>.

27 percent of formerly incarcerated persons are unemployed.³ Their criminal history record is a significant barrier to getting a job. Some studies have shown that post-conviction unemployment is closely tied to recidivism rates; if an offender receives a job post-conviction, he or she is much less likely to reoffend.⁴ Other studies have found that average rates of recidivism were lower in states with automatic expungement statutes, and the rates of college attendance, college graduation, and average future income were all higher.⁵ Because stable housing and education also contribute to employability, an inability to obtain either weighs heavily against people with a criminal record—especially for relatively low-risk people and those with relatively low-severity offenses.⁶

People with criminal records encompass a significant portion of the population and, because some racial minorities are disproportionately represented in the criminal justice system, it affects them to a greater extent than White individuals.⁷ Black Americans, for example, make up 13% of the general population but 38% of the prison population.⁸

There is wide consensus that expungement is an important step in the criminal justice system’s pursuit of racial equity.

DEFINITIONS

One complication in evaluating statutes that aim to conceal criminal history records is terminology. About half of the states use the term "expungement" ("expunction," "annulment") to mean prohibiting or limiting public access to criminal records and not total destruction. Indeed, only a half dozen states use the term expungement to mean total destruction and, in half of them, it means prohibiting public access. In most of the rest of the states, the term

³ See Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment among formerly incarcerated people*, PRISON POL’Y INITIATIVE (July 2018), <https://www.prisonpolicy.org/reports/outofwork.html>.

⁴ See CHRISTY VISHER ET AL., JUST. POL’Y. CTR., URB. INST., *EMPLOYMENT AFTER PRISON: A LONGITUDINAL STUDY OF RELEASEES IN THREE STATE 8* (2008), <https://www.urban.org/sites/default/files/publication/32106/411778-Employment-after-Prison-A-Longitudinal-Study-of-Releasees-in-Three-States.PDF>.

⁵ Mackenzie J. Yee, *Expungement Law: An Extraordinary Remedy for an Extraordinary Harm*, 25 GEO. J. POVERTY L. & POL’Y 169, 179 (2017), <https://www.law.georgetown.edu/poverty-journal/in-print/volume-25-issue-1-fall-2017/expungement-law-an-extraordinary-remedy-for-an-extraordinary-harm/> (in one California county, a cost-benefit analysis “found that expunging criminal records produced cumulative quantifiable net benefits for the government, in the form of increased tax revenues, reduced provision of public assistance, and legal fees.”).

⁶ See Leah Jacobs & Aaron Gottlieb, *The Effect of Housing Circumstances on Recidivism: Evidence From a Sample of People on Probation in San Francisco*, 47(9) CRIM. JUST. & BEHAV. (2020), <https://journals.sagepub.com/doi/10.1177/0093854820942285>.

⁷ Sarah Shannon et al., *The Growth, Scope, and Spatial Distribution of People With Felony Records in the United States, 1948–2010*, 54 DEMOGRAPHY 1795 (2017), <https://link.springer.com/article/10.1007/s13524-017-0611-1> (“[P]eople with felony convictions account for 8% of all adults, [but] 33% of African American adult males.”).

⁸ See *Race and ethnicity*, PRISON POL’Y INITIATIVE, https://www.prisonpolicy.org/research/race_and_ethnicity (last visited Oct. 17, 2023).

"seal" ("vacate," "set aside," "erasure," "restrict," "remove," "sequester") is used to mean prohibiting or limiting public access. In some states where public access is prohibited, a court order may be required for criminal justice agencies to access certain records as well.

DESTRUCTION

There are situations where fairness may dictate the destruction of an arrest or non-conviction record. This is particularly true when a person is wrongfully arrested. If a person should not have been arrested in the first place, then destroying the record has fewer potential drawbacks—although it reduces the possibility of analyzing such cases to reveal systemic issues, if any, that a community or criminal justice system should address. A handful of states specifically authorize the destruction of criminal history records where the person was falsely identified or accused of the crime; the person was the victim of identity theft; the offense is no longer a crime; there was misfeasance by law enforcement, witnesses, or court employees; a fraud on the court was perpetrated; the person was pardoned; and/or the person was determined to be factually innocent. Some states authorize the destruction of arrest records in any case that did not result in prosecution, was dismissed, or resulted in an acquittal, vacation, or reversal. A few states destroy identifying information, booking records, fingerprints, photographs, mug shots, and/or DNA related to expunged offenses.

Where a file, case, document, or other record is destroyed, references to it in logs, indices, or other tracking mechanisms may also be destroyed, thereby making it permanently irretrievable.⁹ In some states, a non-public index may be retained.

Even where a criminal record is destroyed or removed from official databases, it may be impossible to remove it entirely from, for example, published court opinions or news reports. Also, the records of some agencies are subject to destruction, while other agencies may be able to retain them. Moreover, even if a criminal record is destroyed in toto, it only "erases an individual's involvement with the criminal justice system of record, not his actual conduct and certainly not his conduct's effect on others."¹⁰ Finally, although some statutes extend to databases kept by non-governmental entities, others do not. Thus, while the information may not be available from the government, it may still be found online.

Most state statutes specify that when a criminal record is destroyed or concealed from public view, the person to whom it applies may lawfully assert that no such record exists and/or may not be prosecuted for perjury or false statements for denying the existence of such records. Similarly, government officials must respond that no record exists, or no record is available.

⁹ See *State v. Noel*, 5 P.3d 747, 749 (Wash. Ct. App. 2000); *State v. Wiley*, 2002 Ohio 2679, at *4 (Ohio Ct. App. 2002) (it becomes "a legal nullity as if it did not exist.").

¹⁰ *Matter of Finley*, 457 P.3d 263, 268 (Nev. Ct. App. 2019).

SEALING

Sealing, rather than destruction, can achieve the same objective of preventing unwarranted collateral consequences of a criminal arrest or conviction. Sealing records has several advantages over destroying them:

- It allows law enforcement to use investigative information should similar crimes be committed or additional evidence of the defendant's culpability be discovered;
- It is available to the prosecution and defense as potential *Brady* material if the case proceeds against a different defendant or if the person is a witness in another criminal case;
- It promotes accountability by ensuring that inspectors general, researchers, and/or the media can review and analyze arrest data. This is especially true for the media if personal identifying information is removed;
- It preserves the record in the event of civil litigation resulting from the arrest; and
- It allows the accused to access the records.

For the purposes of this article, unless expressly noted, it is assumed that records are sealed and not destroyed.

OVERVIEW OF THE LAWS

SEALING ARREST AND OTHER NON-CONVICTION RECORDS

In some states, arrest records are not public, but they may be accessible to at least some employers. Most states authorize sealing or destroying arrest records that do not result in charges, some automatically. Although some state laws single out arrests that do not result in charges (declination), other states include them with other kinds of cases that are terminated in favor of the accused, such as prearrest or pretrial diversion; successful probation before judgment; *nolle prosequi* or dismissals of all or part of a case, with or without prejudice; failure to proceed with prosecution within certain time limits; acquittals or partial acquittals; annulments or set-asides; findings of actual innocence; and pardons. It should be noted that if a record is not publicly available, there should be no adverse employment, housing, or educational consequences to the arrestee.

Example – Virginia

The Alexandria Commonwealth Attorney's Office partnered with the Alexandria Bar Association, the Alexandria City Circuit Court, and the Alexandria Sheriff to host an expungement clinic with an understanding that criminal records "can make it difficult to find a job, obtain housing,

or even get approved for credit or a mortgage.”¹¹ The clinic represented an unprecedented collaboration between system professionals in Alexandria to expunge the criminal records of community members.

SEALING MISDEMEANOR CONVICTIONS

For a person convicted of a misdemeanor, the long-term harm resulting from a criminal record can far outweigh the short-term harm the person caused to society. Even where there is an identifiable victim, in some cases the harm may be relatively small compared to the negative effects of a criminal record on the person convicted, depending on the crime committed.¹²

In weighing the potential harm to the person convicted against the potential harm to other individuals or the community, most legislatures have enacted statutes that authorize sealing at least some adult misdemeanor convictions. They vary greatly in terms of which crimes they include or exclude from consideration, waiting times, other eligibility requirements, and the findings a court must make if a prosecutor opposes making the criminal history record unavailable to the public.

SEALING FELONY CONVICTIONS

About 15 states have no statutory provisions for sealing felony conviction records and another two states permit it only when the sentence was suspended or was for probation only. As of 2022, about a dozen states allow for sealing or expungement of most felonies, and two dozen states either limit eligibility for sealing to lower-level felonies and/or restrict the number of felony offenses eligible.

Example – Illinois

The Kankakee County State’s Attorney partnered with the Circuit Clerk to host “Project Fresh Start”, a restorative justice expungement and sealing program for eligible felonies and misdemeanors. The event included on-site employment opportunities.¹³

¹¹ Les Machado, *City of Alexandria Hosting Expungement Clinic Saturday, March 25*, ZEBRA (Mar. 19, 2023), <https://thezebra.org/2023/03/19/expungement-clinic-saturday-march-25/>.

¹² It should be noted that some misdemeanors, such as domestic violence, child abuse, and sexual contact, can cause victims immeasurable harm and trauma. This should be taken into account when evaluating sealing and expungement applications.

¹³ See David Volden, *State’s Attorney’s office to host expungement program*, DAILY J. (Sep. 16, 2022), https://www.daily-journal.com/news/local/kankakee/states-attorneys-office-to-host-expungement-sealing-program/article_b20d14b0-345d-11ed-8162-8b722b9478cf.html.

INELIGIBLE OFFENSES

Almost all states with statutory provisions for sealing convictions exclude, in some or all circumstances: violent crimes, felony firearm or armed offenses, and/or crimes that carry a maximum penalty of life or 10 or more years of imprisonment. Other misdemeanors and felonies commonly excluded from sealing eligibility are domestic violence; sex offenses; offenses against a child or minor or an elderly, disabled, or vulnerable adult; and certain traffic offenses.

Some also exclude from sealing perjury; crimes of dishonesty; crimes against pregnant women; and/or aggravated offenses.

A handful of states have comprehensive lists of ineligible misdemeanors.

OTHER RESTRICTIONS

States may impose other restrictions on eligibility for sealing a conviction record, such as having one or more prior felony convictions; an intervening conviction; a pending case; or unpaid fees, fines, or restitution. In addition, sealing may be limited to:

- A specified number of eligible convictions, ranging from one to six misdemeanors and from one to three felonies;
- Convictions for which the person was not incarcerated, not incarcerated in the state prison, or not incarcerated at the time of the petition;
- Only one time or one time in a certain number of years; or
- A person whom the court finds to have been rehabilitated.

REPEALED OR DE-CRIMINALIZED OFFENSES

Less than a dozen states authorize sealing a criminal history record for *any* offense that has been legalized or decriminalized. Some of them have exceptions. For example, in Nevada, a prosecutor can object, in which case the court must hold a hearing to determine whether good cause exists to deny the request.

Altogether two-thirds of the states have legalized or decriminalized some or all offenses relating to the possession or use of marijuana; of these, more than half now permit or require convictions for these offenses to be sealed, referencing marijuana specifically or decriminalized offenses generally.¹⁴ A handful of states make a conviction for the possession of any drug eligible for sealing under some or all circumstances.

¹⁴ See Michael Hartman, *Cannabis Overview*, NAT'L CONF. OF STATE LEGISLATURES (May 31, 2022), <https://www.ncsl.org/civil-and-criminal-justice/cannabis-overview>.

VICTIMS OF HUMAN TRAFFICKING

Increasingly, state legislatures are authorizing criminal records of victims of human trafficking to be sealed. The burden is usually on the person to prove by a preponderance of the evidence¹⁵ that they were trafficked, and the offense was committed as the result or direct result of being trafficked. In several states, official documentation indicating that a person was a victim of human trafficking establishes a rebuttable presumption of trafficking victimization, although such documentation is not required. Other evidence that a court may consider include branding; tattoos; financial records; internet listings; texts, email, and voicemail messages; and affidavits of people who have first-hand knowledge of the petitioner's involvement in the commercial sex trade.

Some states limit such provisions to arrests or convictions for prostitution and offenses related to prostitution, drug possession, theft, or similar offenses; specific misdemeanors; crimes for which duress is not a defense; or non-violent crimes. Other states include almost any offense related to human trafficking except for homicide, murder, and rape; violent crimes; or crimes with a penalty of more than ten years.

PARDONED OFFENSES

Several states refer to pardons in their sealing statutes. Two states explicitly do not permit the prosecutor to oppose sealing a pardoned offense, while others allow the prosecutor to object or the court to assess the pardon. Furthermore in some states, sealing is mandatory although there may be exceptions for certain crimes, and in others, sealing is required if the pardon was granted on grounds of innocence.

PROCEDURES

AUTOMATIC SEALING

If the sole criterion for sealing an arrest record is the fact that it did not initially result in charges being filed, then there is little to be gained by not sealing the record automatically and immediately, or within a short amount of time after disposition. Automatic sealing under these circumstances, if achieved by a computer program, would impose few administrative burdens on the court and no additional work for the parties (police, prosecutor, pretrial services, court)—except to mark the records as having been sealed, and, if required, to store them in a separate physical or electronic area. The more expeditiously the sealing occurs, the less potential for harm to the arrestee.

¹⁵ This is normally the standard, although one state requires "reasonable probability", and other states require clear and convincing evidence.

Example – California

The Santa Clara District Attorney's Office is developing a way to automate the expungement of criminal records. Through collaboration with the Court and the Public Defender, the Office is working to streamline, automate and leverage data contained in its case management system to identify those eligible for relief. Santa Clara used a similar method to expunge records for those convicted of marijuana offenses after California passed legislation decriminalizing its possession.¹⁶

Even though a case may have been in the system for several months or years, some states automatically seal the records at the time of the disposition in favor of the accused or at some later time for some or all types of non-convictions.

A few states authorize automatic sealing for all misdemeanors, non-violent misdemeanors, lower-level misdemeanors, infractions, and some marijuana offenses. In many of these states, the prosecutor may object within a stated period of time. While not quite automatic, a few states have a rebuttable presumption that records should be sealed if the person has met the statutory requirements.¹⁷

A petition must be filed in all other cases, except where the prosecutor stipulates or consents to sealing. As a practical matter, a prosecutor's failure to object to a petition may have the same effect as a prosecutor's consent.

SEALING WITH A PETITION

Arrest and No Charge or No Conviction

In states where an arrest did not result in a charge and is not automatically sealed, the arrestee may petition to seal or destroy their arrest records. This allows prosecutors to object, although they are not required to do so. However, petitions are used infrequently, probably because the arrestee is either unaware of the process or does not have the means to pursue it. Thus, the requirement of a petition can exacerbate the gaps that have led to racial and economic disparities in the criminal justice system.

¹⁶ See the Santa Clara District Attorney's website at CNTY. OF THE SANTA CLARA DIST. ATT'Y, <https://countyda.sccgov.org/prosecution/departments/marijuana-expungements-faqs> (last visited Oct. 26, 2023); and a video explaining the process at Webinar by David Angel, *Automated Expungement*, PROSECUTOR'S CTR. FOR EXCELLENCE (Nov. 5, 2022), <https://www.youtube.com/watch?v=O15pZD3sfeo>.

¹⁷ See *Automatic Clearing of Records*, NAT'L CONF. OF STATE LEGISLATURES (July 19, 2021), <https://www.ncsl.org/civil-and-criminal-justice/automatic-clearing-of-records>; *50-State Comparison: Expungement, Sealing & Other Record Relief*, RESTORATION OF RTS. PROJECT (Oct. 2023), <https://ccsourcecenter.org/state-restoration-profiles/50-state-comparison-judicial-expungement-sealing-and-set-aside-2-2/>.

Even in cases where there is no conviction, some states restrict sealing under certain circumstances—including situations where a person is not acquitted of all charges or all charges are not dismissed; a person is charged with certain sex offenses and crimes against a child; and the charge was dismissed in a plea bargain and other charges are not eligible for sealing. In New Jersey, a dismissed charge cannot be sealed if it resulted from a plea bargain on other charges until the other charges are sealed.

Misdemeanor Convictions

In most of the states that permit misdemeanor convictions to be sealed, the conviction is not sealed automatically, and the person must file a petition. Expungement and sealing clinics have emerged because it may be difficult for people to know that they can petition and do so successfully without help.

Felony Convictions

In almost all jurisdictions that permit felonies to be sealed, the person must file a petition. If the prosecutor (or in some instances, the victim) objects, the court must schedule a hearing—although, without objection, it can decide based on the papers submitted with the petition. If the petitioner satisfies the basic eligibility requirements, some of the factors that various legislatures have directed courts to consider are:

- The nature and gravity of the offense or conduct that resulted in the petitioner's conviction;
- The petitioner's age, criminal history, and employment history;
- The petitioner's behavior since the conviction(s), as evidenced by participating in rehabilitative activities in prison and living a law-abiding life since release;
- The specific adverse consequences to which the petitioner may be subjected if the petition is denied; and
- Whether sealing the record is consistent with the welfare and safety of the public and is warranted by the interests of justice.

Example – New York

[The Brooklyn District Attorney Sealing Unit](#) encourages and facilitates applications to seal eligible criminal convictions, which include some felonies. The Unit collaborates with the Office of Court Administration, prosecutors, and defense attorneys to create a user-friendly application so that individuals can apply for sealing on their own. The Unit also works with the DA's Office of Public Engagement to spread the word in

*its communities, and to encourage more people to apply and resolve their petitions swiftly.*¹⁸

Determining Eligibility

In most states, where a person petitions the court, it is not always clear whether the court determines eligibility or relies on the prosecutor to oppose the petition if it believes the person is ineligible. A few states delegate eligibility determinations to a centralized repository. A petitioner must attach to the petition an official criminal history record or certificate of eligibility, or the repository must notify the court of a petitioner's eligibility. Prosecutors can still challenge eligibility and may oppose sealing on other grounds such as the interests of the public and public safety; the nature of the offense and the petitioner's history; the seriousness of other offenses of which the petitioner has been convicted; petitioner's character and lack of rehabilitation; and other relevant evidence. New Jersey, for example, specifically charges the prosecutor with "verify[ing] the accuracy" of a petition and "bring[ing] to the court's attention any facts which may be a bar to, or which may make inappropriate the granting of, such relief."¹⁹

Example – Kansas

*The Sedgewick District Attorney and Wichita Bar Association, in partnership with the defense bar, developed a Clean Slate Program to assist with sealing/expungement applications.*²⁰

Burden of Proof and Victim Notification

In some states, when they object to sealing, prosecutors bear the burden of proof by a preponderance of the evidence or by clear and convincing evidence. In others, petitioners bear the burden of proof by a preponderance of evidence or clear and convincing evidence that the harm they will suffer from not sealing the record is greater than the harm to the public from sealing.

Some states require victim notification and allow victims and others to weigh in on the issue, either on the papers, at a hearing, or both. The requirement of victim notification may be found either in sealing statutes or victims' rights statutes. Delaware requires the Attorney General to ascertain the victim's position on sealing, to include it in her answer to the petition, and to

¹⁸ See the Brooklyn District Attorney's website at THE BROOKLYN DIST. ATTORNEY'S OFF., <http://brooklynda.org> (last visited June 21, 2023).

¹⁹ N.J. STAT. ANN. § 2C:52-24 (West 2016).

²⁰ See the Wichita Bar Association's website at WICHITA BAR ASS'N, <https://www.wichitabar.org> (last viewed June 21, 2023).

orally inform the victim of the court's decision. However, the Attorney General may not provide the victim with a copy of the court order. Indiana specifies that a victim's statement may be in support of or opposition to the petition.

WAITING PERIOD

States prescribe various amounts of time after which an arrest or other non-conviction record can be sealed. They range from "at the time of disposition" or immediately; after the time for appeal has expired; to 30 days, one year, or 18 months later. The longer an arrest or other non-conviction record remains public, the greater the potential harm to the person who was not charged or convicted, or whose case was later reversed, vacated, or otherwise terminated. As a result, in fairness, the information should be removed from public access as expeditiously as possible.

States generally have some period during which a person must demonstrate rehabilitation before either automatically wiping a misdemeanor record clean or permitting the person to bring a petition. This is to provide some time for the person to demonstrate that they are now leading a law-abiding life. The tension here, however, is that people may be hobbled by a criminal record until their conviction is sealed. If the purpose of such statutes is to remove an obstacle to employment and housing, and thereby reduce the chances of recidivism, then the longer the wait, the less effective the sealing process may be.

The amount of time before a misdemeanor conviction may be eligible for sealing varies. Three to five years is most common, although a few states have shorter periods, and an almost equal number of states have longer periods. Some states distinguish between low-level misdemeanors and more serious ones. Some put misdemeanor and low-level felonies together. Vermont lengthens the waiting period if there is an intervening conviction, and New York tolls the waiting period until any period of incarceration is complete.

The waiting periods for felony convictions are triggered by the same events as misdemeanor convictions—but are generally much longer. In most states, the waiting period is between five to 10 years after the completion of a sentence. The wait can be as long as 10–15 years in some states, or as short as immediately, two or three years, or three to five years in others.

TRIGGERING EVENT

In most states, the waiting period starts when the person finishes his or her sentence, including prison, probation, parole, or supervised release. It also generally includes the requirement that all fees, fines, and restitution be paid. In a few states, the waiting period starts upon arrest, conviction, or last conviction. Running the waiting period contemporaneously with probation, parole, or supervised release should provide enough time for rehabilitation without saddling people with criminal records after they have paid their debt to society.

Most states require all financial obligations to be satisfied before sealing can be granted, although a few do not. However, for people without a job or without a job that covers basic living expenses, this may be difficult. Some states have carved out exceptions that allow sealing

to proceed and restitution to be paid later. But a failure to pay without a just excuse may invite revocation of a sealing order.

SCOPE OF RECORDS SEALED

The scope of records subject to sealing statutes varies.

When describing records to be sealed, many states use a definition similar to that of the National Criminal Information Center, which encompasses:

[I]nformation collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal criminal charges, and any disposition arising therefrom, including acquittal, sentencing, correctional supervision, and release.²¹

Other jurisdictions refer to court, law enforcement, police, criminal history information system, central repository, and/or probation records. Intelligence, investigative, and/or work product information is often excluded from sealing requirements, but such information generally is not publicly available in any event.

OFFICIAL ACCESS TO AND USE OF SEALED RECORDS

Most states make sealed records available to prosecutors, attorneys general, or criminal justice agencies. A significant portion of them state that such records can be used for criminal justice, law enforcement, investigative, or prosecution purposes or proceedings.

Some states specify purposes for which a sealed criminal history record may be used, including:

- When determining first offender or habitual offender status;
- When determining eligibility for probation before judgment, treatment, or diversion;
- When determining bail or pretrial release; charges; plea offers; sentences; pardon eligibility;
- When determining the identity of persons in criminal investigations;
- When determining whether a subsequent conviction can be set aside;
- Where a prior conviction is an element of a new offense;
- Where the person is likely to stand trial for the same or a similar offense;
- As exculpatory, mitigating, impeachment, or character evidence; and
- Where the prosecutor establishes relevance to a new prosecution.

A few states explicitly exclude prosecutors' records and files from their definitions of records that can be sealed. Others make it clear that an order of expungement shall not preclude a prosecutor's office from retaining a nonpublic record for law enforcement purposes only, and

²¹ 28 CFR § 20.3 (1999).

do not prohibit evidence or information in prosecution files from being used for the investigation and prosecution of a criminal case.

PUBLIC ACCESS TO SEALED RECORDS

Generally, sealed records must be kept in a way that prevents members of the public from accessing them. Even if criminal history records are sealed, however, several states carve out exceptions for certain employers—including law enforcement agencies, prosecutors, courts, criminal and juvenile justice agencies, and/or state bars. Some states also exempt insurance, regulatory, or licensing agencies; utilities, banks, and financial institutions; health care agencies; agencies serving children, the disabled, or the elderly; and/or certain lottery, gaming, and/or racing positions, among others. Arizona lists sealed criminal records that people must disclose if they are relevant to the job they are applying for—for example, burglary or theft from a structure if applying for a job that requires entering a residential structure; theft, forgery, and fraud if applying for a job involving handling someone else's money; and child abuse or aggravated assault if applying for a job involving children.

DISCLOSURE BY PERSON WITH A SEALED RECORD

Persons whose records are sealed are generally treated as not having a criminal history record. In more than two-thirds of states, sealing allows persons to lawfully say that they were not arrested, charged, or convicted; to deny that they have a criminal record; to respond "no" when asked whether they have a criminal record; to state that no record exists; and/or to swear under oath that they have no record without risking prosecution for perjury. However:

[T]he expungement statute does not transmute a once-true fact into a falsehood... Although [...] expungement statute[s] generally permit[] a person whose record has been expunged to misrepresent his past, it does not alter the metaphysical truth of his past, nor does it impose a regime of silence on those who know the truth.²²

UNSEALING SEALED RECORDS

Sealing a criminal history record may not end the matter forever. For example, records may be unsealed where there is a new charge or conviction; circumstances have changed and public disclosure outweighs the person's interest in privacy; they are relevant to a new prosecution; they are relevant to civil proceedings; or a person has not made a good faith effort to pay restitution.

²² *G.D. v. Kenny*, 15 A.3d 300, 315–16 (N.J. 2011) (citation omitted); see also *Martin v. Hearst Corporation*, 777 F.3d 546, 551 (2d. Cir. 2015) ("The statute creates legal fictions, but it does not and cannot undo historical facts or convert once-true facts into falsehoods.").

NON-GOVERNMENTAL DATA BASES AND INFORMATION

No matter the scope of a sealing statute, if it does not consider third-party companies who routinely purchase and disseminate criminal history records, the basic goal of concealment itself is difficult to achieve. Without a mechanism to apply sealing requirements to third parties, employers, housing providers, and educational institutions can use private background check companies to screen potential employees, tenants, and students for a criminal history that is officially sealed.

A few states have addressed non-governmental databases directly, requiring them to remove criminal history information that has been sealed. In Colorado, for example, if a person sends a copy of the sealing order to a private custodian, the custodian is required to delete the records that are subject to the order from its database.

News media are rarely mentioned in expungement and sealing statutes. However, a few states protect them from liability, damages, or criminal penalties for retaining or publishing information on a charge or conviction that has been sealed. Clearly, the First Amendment is implicated any time restrictions are placed on the publication of truthful information.²³

CONCLUSION

Sealing and expungement laws can be complex and daunting for all in the criminal justice system and most particularly for those who wish to petition for the relief. It is a given that the laws and practices on expungement and sealing will continue to evolve and change. With provisions and practices now in place—in one form or another—in almost all 50 states and the District of Columbia, legislators, courts, subjects of criminal records, law enforcement officials, and employers would benefit from rigorous, longitudinal studies of their efficiency and effect both for the accused and public safety.

²³ See Clay Calvert & Jerry Bruno, *When Cleansing Criminal History Clashes With the First Amendment and Online Journalism: Are Expungement Statutes Irrelevant in the Digital Age?* 19 J. COMM. L & TECH. POL'Y 123 (2010), <https://scholarship.law.edu/cgi/viewcontent.cgi?article=1518&context=commlaw>.

APPENDIX

EXPUNGEMENT AND SEALING CONSIDERATIONS FOR PROSECUTORS

The following list of issues and considerations can assist prosecutors in evaluating legislation related to expungement and sealing.

Note: This appendix is not intended to advocate for the enactment, repeal, or amendment of any legislation; it is merely intended to serve as a guide for prosecutors to evaluate their own laws.

What Offenses/Convictions are Eligible?

- Are all misdemeanors eligible? Or is there a list of eligible misdemeanors? Is there a list of exceptions?
- Are felonies or some felonies eligible?
- Are certain kinds of misdemeanors and felonies ineligible for sealing (*e.g.*, violent offenses, domestic violence, sex offenses, offenses involving a child or vulnerable adult, certain traffic offenses)?
- Is there a limitation on sealing crimes that are relevant to particular jobs or professions?
- How many crimes can be sealed and how often?
- Are offenses that have been legalized or decriminalized eligible?
- Are some or all offenses that were committed by a person as a direct result of having been the victim of human trafficking or intimate partner violence eligible? If so, do courts consider, for example, the degree of duress to which the person was subjected, the seriousness of the offense sought to be sealed, and the relative degree of physical harm done to any person in the commission of the offense?

Which Persons are Ineligible?

- Are people ineligible if they:
 - Were more than 18 or 21 years of age at the time of the offense of conviction?
 - Are not first-time offenders?
 - Have been convicted of a crime of violence?
 - Have been convicted of a felony?
 - Have a certain number of prior felony or misdemeanor convictions?
 - Have a pending or intervening case?
 - Have already had a conviction sealed?
 - Are seeking to seal more than one offense or multiple offenses in one incident?
 - Have been incarcerated for the crime at issue?
 - Have not paid all their fines, fees, and restitution?
 - Are a candidate for public office or a public office holder?

- Are there other factors that might disqualify people from expungement or sealing, such as:
 - Untreated mental health or addiction issues?
 - A history of violence unrelated to a conviction?
 - Failure to demonstrate rehabilitation or attempts at rehabilitation?

Are All Records Related to a Disposition that was Resolved in the Accused's Favor Sealed?

- Is sealing automatic in such cases?
- Is there an exception if relevant/related charges are still pending or resolved against the accused?
- Is there an exception if the charges were dropped as the result of a plea bargain? How is this ascertained?
- Do prosecutors, victims, or others have the opportunity to object either before or after automatic sealing?

What Records are Sealed?

- Court records?
- Police/law enforcement records?
- Criminal history record offices/central criminal history record repositories?
- Attorneys General's records?
- Prosecutors' (District/Commonwealth Attorneys') records?
- Pretrial, Probation, Parole records?
- Other criminal justice agencies' records?
- Commercial criminal history record providers' data?

Is Sealing Limited to What is Traditionally Provided in a Criminal Record History Search?

- Is data that identifies a person made inaccessible to the public?
- Is investigation or intelligence data exempt from disclosure to the public?
- Are prosecutors' files (not traditionally a source of criminal history information) sealed?
- Are officially published records, such as court opinions, exempt from sealing?

How are the Records Concealed?

- Are records sealed or destroyed?
- Are only those records that pertain to a wrongful arrest or conviction destroyed?
- Are certain records, such as non-conviction records and decriminalized offense records, sealed automatically?
- Are low-level misdemeanors sealed automatically?

- Is a person required to file a petition to seal other conviction records?
- Are sealed records available to other law enforcement or criminal justice agencies without a court order?

How Long is the Waiting Period for Filing a Petition or Automatic Sealing?

- How long is the waiting period?
- Is it longer for felonies than for misdemeanors?
- Are there factors other than the crime of conviction that affect the length of the waiting period?

When does the Waiting Period Begin?

- Is there a waiting period for cases that do not result in a conviction?
- If so, does the waiting period begin at disposition for cases that do not result in a conviction?
- Does the waiting period begin at sentencing, release from incarceration, or completion of probation, parole, or supervised release for convictions?
- If the waiting period begins at sentencing, is it tolled during any period of incarceration?
- Does the waiting period run concurrently with probation, parole, or supervised release? If so, is it structured so that it does not expire before the end of the sentence (*i.e.*, five years or the termination of probation, parole, or supervised release, whichever is later)?
- Does the waiting period start over if there is an intervening conviction (if the intervening conviction does not eliminate eligibility for sealing)?

Who Determines Whether a Person Meets Basic Eligibility Requirements?

- Is there a statewide agency that determines eligibility (based on criminal history information)?
- If not, is the person, the court, the arresting law enforcement agency, the prosecutor, the probation or parole agency, or some other entity charged with documenting whether the person meets the minimum requirements to be considered for concealing a criminal record?
- Regardless of which agency determines eligibility, does a prosecutor verify that the minimum requirements have been met?

What Other Factors are Considered for Automatic Sealing or a Petition?

- The underlying facts of the crime?
- Evidence of the person's rehabilitation or lack thereof?
- Evidence that the person is/is not likely to recidivate?
- The interests of justice?
- Other relevant information?

What Constitutes Rehabilitation?

- No further (known) involvement in the criminal justice system?
- Obtaining an education?
- Having a job?
- Supporting one's family?
- Involvement in community, religious, or charitable organizations?
- Successful addiction treatment?
- Compliance with mental health treatment?

Who Can Object to Sealing?

- Prosecutor?
- The court?
- Other criminal justice agencies?
- The victim(s)?
- Other interested persons?

What is the Standard and Burden of Proof to Grant Relief?

- Is the burden on the person to prove or on the prosecutor to disprove that a petition should be granted?
- Is the standard of proof different if one or the other has it?
- Is a petition to seal a case granted if the prosecutor/others fail to object within a stated period of time?
- Is a petition to seal a case granted/denied if there is:
 - Some evidence?
 - A reasonable probability?
 - A preponderance of the evidence?
 - Clear and convincing evidence that harm to the person outweighs harm to the community or vice versa, or that the person/government has/has not met the statutory requirements?

Is There a Mechanism to Oppose Automatic Sealing in Particular Cases?

- At the time of disposition?
- Prior to sealing?
- X days or months after the case has been automatically sealed?

Who Can Have Access to Sealed Records?

- Do all criminal justice agencies, including the court, have access to sealed records for any criminal justice, or other, purpose?

- Do certain employers, including law enforcement agencies, the courts, prosecutors' offices, state bars, and certain government or private employers, have access to sealed records for employment purposes?
- Do certain public and private agencies dealing with vulnerable populations have access to sealed records to exercise their responsibilities to their clients (*e.g.*, placement of foster children; services to the elderly; mental health facilities, schools; etc.)?
- Are there exceptions to prohibiting public access where the crime of conviction is relevant to the employment sought?
- Do victims of crime have full access to records related to the crime against them? What about other crimes committed by the same person?
- Do prosecutors and defense attorneys have access in order to discharge their *Brady* and other legal obligations?

Can Sealed Records be Unsealed?

- For use in decisions on bail, charges, sentencing, and sentencing enhancements?
- When the sealed offense is an element of a subsequent offense?
- When the sealed offense is relevant evidence in a new case?
- When a person is convicted of another misdemeanor/felony?
- When circumstances have changed?
- For impeachment?
- For civil litigation?
- When the public's interest in disclosure outweighs the person's interest in privacy?
- When there is a compelling reason to unseal the record?

Who Pays for the Costs of Sealing/Unsealing?

- Funds appropriated by the legislature to the involved agencies?
- Central repositories of criminal history information?
- The courts?
- Prosecutors?
- Fees imposed on petitioners (with a waiver provision for those who cannot afford them)?
- Indirectly through:
 - Automatically sealing classes of non-conviction and conviction records as appropriate?
 - The development and use of computer systems that can facilitate determinations of eligibility, notification to appropriate persons and agencies, and sealing or sequestering relevant records?
 - Requiring a petitioner to obtain a certificate of eligibility before filing a petition?

Are Private Companies Required to Delete or Seal Records that Have Been Officially Sealed?

- Are commercial criminal history record/business screening services providers required to delete any information related to an arrest or conviction that has been destroyed or sealed?
- Is the burden on the petitioner, the state, or the business to inform/ascertain whether an arrest or conviction has been destroyed or sealed?
- Are news-gathering organizations and individuals exempt from any adverse consequences for reporting on arrests and convictions that have been destroyed or sealed, or for retaining in their archives, articles, reports, and information about proceedings in the case?
- Are others who gather and disseminate criminal history information solely for journalistic, academic, government, or legal research exempt from adverse consequences for using it?