Council for Court Excellence

Creating an Expungement Statute for the District of Columbia: A Report and Proposed Legislation

Prepared by
The Expungement Subcommittee
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and Presented to
The D.C. Council Committee on the Judiciary
Councilmember Phil Mendelson, Chairman

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* No judicial member of CCE or judicial officer participated in the formulation of this report

Tab 2

INTRODUCTION

"Expungement" is frequently the term used for the process of erasing an individual's criminal record – the official records regarding arrests and/or a conviction -- to afford citizens the opportunity to put past contact with the criminal justice system behind them. In broad terms, there are three different categories of cases to which expungement may be applied. The first is cases of "actual innocence" in which it is conclusively determined that a person did not commit the offense for which he or she was arrested (or possibly even convicted). The second category involves cases where charges were dropped prior to trial or the defendant was acquitted at trial. In these cases, the person may or may not have committed an offense.[1] The third category involves cases where the defendant has been convicted of committing the offense. Obviously, persons fitting in the first category would be considered the most worthy of relief so that they are not harmed by a criminal record that should never have existed. Cases falling into the second or third categories are more debatable and policy judgments must be made about whether and when to grant relief to individuals in those categories. Nonetheless, thirty-six (36) of the fifty states permit individuals to clear their records if the charges against them are dropped or they are acquitted at trial, and a substantial number of states (24), provide for expungement of convictions in some instances.

The District of Columbia has several existing expungement provisions that provide for expungement in certain sets of circumstances ranging from actual innocence to convictions, but they are neither comprehensive nor coherent in their coverage. Furthermore, the most significant expungement provision was created by the courts rather than the legislature. The majority of the states, including Maryland and Virginia, have expungement statutes that reflect policy judgments by their lawmakers about when and under what circumstances the benefits of expungement will be made available to individuals. The District of Columbia should also have comprehensive, coherent legislation on this important subject.

The Council for Court Excellence (CCE) undertook to address the subject of expungement and to prepare a report that would summarize the existing state of the law, discuss key issues, and set forth options that the Council of the District of Columbia might wish to consider in enacting legislation on the subject. Founded in 1982, CCE is a nonpartisan, civic organization based in the District of Columbia whose purposes include identifying and promoting court reforms, improving public access to justice, and increasing public understanding and support of our justice system. The Council's Board of Directors is composed of members of the legal, business, civic, and judicial communities. We have worked closely with the D.C. Council and its Judiciary Committee on many issues, including the 1994 Probate Reform Act, the Office of Administrative Hearings Establishment Act of 2001 and subsequent amendments, as well as on a number of sentencing related matters, including the Advisory Commission on Sentencing Establishment Act of 1998, the Truth in Sentencing Amendment Act of 1998, and the Sentencing Reform Act of 2000.

[1]Even in cases of an acquittal after trial, the acquittal does not legally establish that the defendant was actually innocent, but rather that the judge or jury had a reasonable doubt as to the defendant's guilt. Further proceedings would be necessary to establish that the defendant is actually innocent. (In cases where the defendant can show "actual innocence," the defendant would fall into the first category, as noted above.)

CCE established a subcommittee focusing on expungement under the leadership of Leslie McAdoo, Esq., which was composed of CCE Board members with a broad range of experience in the D.C. criminal justice system, including defense counsel, former prosecutors, a senior Superior Court judge, and a former member of the D.C. Council. In addition, the subcommittee included members of the major stakeholders in the criminal justice system, including the U.S. Attorney's Office, the Office of Attorney General, the Public Defender Service, and the Pretrial Services Agency.[2] This group met regularly on a number of occasions over the past year to examine and discuss the issues and to formulate a report. In December 2005, members of the subcommittee met with D.C. Councilmember Phil Mendelson, the Chair of the Judiciary Committee, to discuss its work. As a result of that meeting, it was decided that CCE would submit draft expungement legislation along with its report to make its work product of greater potential assistance to the D.C. Council.

The CCE strongly supports the enactment of comprehensive legislation addressing expungement. Expungement is a quintessential public policy issue that is based on judgments about which reasonable persons may, and do, disagree. In this report on expungement, we have attempted to set forth the relevant issues in a fair and even-handed manner. The positions on these issues that are taken in the report and the associated draft legislation reflect the collective judgment of the subcommittee and, as such, are based on a number of compromises among competing interests and divergent views about the circumstances under which expungement should be available. Although the subcommittee worked together very cooperatively and was able to achieve a remarkable degree of consensus on many issues, unanimity was not achieved on every issue. Thus, certain provisions of the draft legislation and certain positions taken in this report may be criticized or opposed by particular CCE members or particular stakeholder agencies, while other members of the subcommittee will strongly support them, or advocate going beyond them. Finally, we note that no judicial member of CCE participated in the formulation of this report

[2] The subcommittee did not include a designated representative(s) of the business community and employers; some were asked to participate but were unable to do so. The concerns of employers were considered by the members of the subcommittee, all of whom belong to entities that are employers in the District, e.g., the prosecutor's offices, the Public Defender Service for the District of Columbia, private law firms, etc. In addition, a representative of a major business reviewed a draft of the subcommittee's work product and attended the final subcommittee meeting to discuss employer concerns.

NEED FOR THE LEGISLATION

"Expunging criminal records involves a trade-off between competing interests. An individual would like to pursue employment, housing or other major life activities without the stigma of an arrest or conviction record. On the other hand, society has an interest in maintaining criminal histories for purposes of future crime investigations and in order to make hiring, rental and other decisions about individuals." Deborah K. McKnight, Information Brief: Expungement of Criminal Records, Report for the Minnesota House of Representatives, 2, available at http://www.house.leg.state.mn.us/hrd/pubs/expgrecs.pdf (last visited Mar. 16, 2006).

Commentators, scholars, judges and legislators across the country have recognized the "pernicious effects" that criminal records can place on individuals, which include social stigma, prejudice in further criminal investigations or proceedings, and discrimination by employers. Larry Yackle, *Postconviction Remedies §146* (2005). An arrest record alone has considerable potential for adverse consequences in the areas of private employment, government employment, governmental housing, admission to the military, and the acquisition of credit. John Sellers, III, *Sealed with an Acquittal: When not Guilty Means Never Having to Say You were Tried*, 32 Cap. U.L. Rev. 1 (2003). Further, a host of state and federal laws limit the civil rights of individuals with criminal records, e.g. the ability to obtain employment, eligibility for public housing, public assistance and food stamps, eligibility for student loans, voting rights, drivers' license privileges, and rights to be foster and adoptive parents. Even a minor conviction can have consequences creating a *de facto* life sentence, without possibility of parole. Michael Mayfield, *Revisiting Expungement: Concealing Information in the Information Age*, 1997 Utah L. Rev. 1057 (1997).

The American Bar Association has recognized that, "a regime of collateral consequences may frustrate the reentry and rehabilitation of [offenders], and encourage recidivism." American Bar Association, ABA Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Persons R-4 (3d ed. 2003). Expungement statutes embody an official willingness to forget, which some consider essential to successful rehabilitation, a matter in which individuals and states have an interest. Michael Mayfield, *Revisiting Expungement: Concealing Information in the Information Age*, 1997 Utah L. Rev. 1057 (1997). One argument in favor of expungement is to prevent offenders from paying repeatedly for the same crime in the absence of any justification on the grounds of just deserts or dangerousness. A second reason is to offer offenders a positive reward for abstaining from criminal behavior. Julian Roberts, *The Role of Criminal Record in the Sentencing Process*, 22 Crime & Just. 303 (1997).

The need for an appropriate expungement mechanism is perhaps greater now than ever before. Most jurisdictions now utilize technology to make criminal records easier to access. Michael Mayfield, *Revisiting Expungement: Concealing Information in the Information Age*, 1997 Utah L. Rev. 1057 (1997); *see also*, Bureau of Justice Statistics, U.S. Department of Justice, *Survey of State Criminal History Information Systems* (2001) (Forty-nine states, the District of Columbia and Puerto Rico have automated some records). At the same time in the last two decades conviction rates have increased. *See* FBI Uniform Crime Reporting program. The convergence of these facts and the post-September 11th focus on security, which has increased employers' emphasis on any criminal record, make access to an expungement program all the more vital. An effective criminal justice system should be concerned with punishing appropriately while avoiding permanent collateral effects that are unwarranted or counterproductive.

OVERVIEW OF PROPOSED LEGISLATION

Bearing these public and private interests in mind, the draft legislation being proposed by the CCE consists essentially of two expungement provisions; the first addresses cases of actual innocence; the second addresses all other cases, including cases where charges were dropped or the defendant was acquitted at trial and some cases in which the defendant was convicted.

Cases of actual innocence are currently governed by Superior Court Criminal Rule 118. The proposed new provision basically adopts the approach of Rule 118 with certain adjustments. The burden remains on the individual to demonstrate that he or she is actually innocent of the offense. However, the time limits for seeking relief imposed by Rule 118 have been eliminated, and the burden of proof has been lowered from "clear and convincing evidence" to the "preponderance of the evidence" (although the higher standard would still be used if the person waits more than four years to seek relief). The new provision also applies to cases where the person demonstrates innocence after being acquitted at trial, a situation that Rule 118 did not address. The relief provided to innocent persons remains the same as under Rule 118 -- all law enforcement and court records relating to the arrest or prosecution are collected and placed under seal with the Superior Court. Finally, an additional, new component of relief restores the innocent person to the status he or she occupied before being arrested and/or charged so that the individual need not disclose the expunged arrest or conviction in response to questions on that subject.

The second provision is entirely new and provides for the expungement of charges that do not result in convictions and for a limited class of convictions. The relief provided in these cases is to remove public records relating to the charge or conviction, but to permit access by law enforcement agencies and the court, which would keep and continue to use the otherwise non-public records. Further, expungement of the public records in such cases is not automatic; the court must find that it is in the interests of justice to do so after weighing the competing interests in expunging the records and the interests in retaining public access to them. Charges that do not result in conviction are eligible for expungement after a waiting period of two years for less serious misdemeanors and five years for more serious misdemeanors and all felonies. Convictions eligible for expungement include many misdemeanors and four of the least serious felony charges. However, all other felony convictions are not eligible for expungement nor are misdemeanors involving sex offenses, intra-family offenses, offenses against children, fraud, or drunk driving. Further, a waiting period of seven years after the completion of the sentence (not the date of the conviction) is required. No expungement under this provision is permitted if the person has a conviction at any time for an offense that is not eligible for expungement or if the person has a subsequent conviction for any offense (other than minor traffic offenses or the like).

EXISTING D.C. EXPUNGEMENT PROVISIONS

There are a handful of existing expungement provisions in the District of Columbia and they are a bit of a crazy quilt. They are neither comprehensive nor coherent in their coverage, and the most significant provision was created by the courts, not by the legislature. A brief review of these provisions is useful for several reasons: (1) to explain existing practices; (2) to illuminate some of the policy judgments that the District has made so far with respect to expungement; and (3) to expose the large gaps in the coverage of these provisions.

1. Criminal Rule 118

The most significant current expungement provision in the District is Rule 118 of the Superior Court Rules of Criminal Procedure, which provides for the sealing of arrest records in cases of actual innocence, *i.e.* where a person did not commit the offense for which he or she had been arrested. This is a judicial rule created by the judges of the Superior Court rather than a statutory provision enacted by the D.C. Council. It was created in 1983 in response to the *en banc* decisions by the D.C. Court of Appeals in *District of Columbia v. Hudson*, 404 A.2d 175 (D.C. 1979) and 449 A.2d 294 (D.C. 1982).

The *Hudson* decisions dealt with the equitable power of the courts to fashion a remedy in cases of actual innocence. The Court of Appeals concluded that the courts have authority to grant relief, but spelled out certain limits and guidelines for doing so. First, the court concluded that the appropriate relief was not to destroy the arrest records but, rather, to collect the arrest records, file them with the court, and place them under seal. The court opted for this approach because it believed that ordering the destruction of arrest records would constitute too significant an intrusion by the Judiciary into the recordkeeping process of the Executive branch. *See* 404 A.2d at 180-81. Second, the court placed the burden on the individual to prove by "clear and convincing evidence" (a standard higher than the "preponderance of the evidence" but less than "beyond a reasonable doubt") either that no crime was committed or that the person did not commit it. *Id.* at 179. Third, the court declined to authorize the individual to deny the existence of the arrest in the future. Instead, the court decided that the appropriate remedy was for the trial court, when granting a motion to seal arrest records, to enter an order summarizing the facts and stating that the person was innocent; the person could then show that order to third parties if an issue arose in the future. *Id.* at 181-82; *see also id.* at 185 (separate statement of Nebeker, J.).

Rule 118, which was subsequently promulgated by the Superior Court, incorporates all of these features. In addition, it establishes some fairly stringent time limits for the filing of a motion to seal arrest records: (1) within 120 days after the charges have been dismissed, or (2) for good cause shown and to prevent manifest injustice, within 3 years after the prosecution has been terminated, or (3) at any time thereafter if the government does not object.

By its terms, Rule 118 applies only to cases where charges are dropped before trial; it does not apply to cases where the defendant is acquitted after standing trial. Nonetheless, the Court of Appeals has held that the courts still possess the equitable authority to seal an arrest record of persons who can demonstrate their innocence after standing trial. *Rezvan v. District of Columbia*, 582 A.2d 937 (D.C. 1990).

2. Statutory Provisions

Since the promulgation of Rule 118 in 1983, D.C. has enacted several statutes that provide for expungement of records with respect to particular sorts of offenses in cases other than those involving actual innocence.

There is an expungement provision covering first-time drug offenders who are charged with or convicted of illegal possession or use of a controlled substance and who successfully complete probation. D.C. Code § 48-904.01(e). There is another expungement provision for persons charged with or convicted of under-age drinking. D.C. Code § 25-1002(c)(4). These expungement provisions apply both to persons against whom charges have been dismissed (the second category outlined above) and persons who have been convicted (the third category).

Both of these statutes provide for the expungement of all official (police or court) records relating to the person's arrest, charge, trial, conviction, or dismissal, with the proviso that a nonpublic record shall be retained by the court or the police so that the expunged offense can be taken into account if the person commits another such offense. Section 25-1002(c)(4) also permits such records to be used to conduct criminal record checks for persons applying for a position as a law enforcement officer.

Both of these statutes also provide explicitly that the effect of the expungement is to restore the person to the status he or she occupied before the arrest or charge. They further provide that no person as to whom expungement has been granted shall be considered to be guilty of perjury or otherwise giving a false statement by reason or failure to recite or acknowledge such arrest, charge, or conviction. Under section 25-1002(c)(4), the person remains obliged to disclose the arrest and any expunged conviction in response to any direct question contained in any questionnaire or application for a position as a law enforcement officer. This provision does not explicitly state that a person need not acknowledge the existence of the expunged offense (other than when applying for a position as a law enforcement officer), but it prevents any criminal prosecution of individuals who do not acknowledge the offense. Further, by providing that the effect of the expungement is to restore the person to the status he or she occupied before the arrest or charge, the statute probably would prevent a private party, such as a prospective employer, from taking adverse action against an individual for failing to recite or acknowledge an expunged arrest, charge or conviction.

There are two remaining statutory provisions that should be noted. The first is a special expungement provision for parental kidnapping which is designed to expunge a conviction, but not the underlying arrest, once the children reach adulthood. D.C. Code § 16-1026. The second is a provision in the Youth Act which provides that the conviction of a youth offender (an adult less than 22 years old convicted of a crime other than murder) may be "set aside" under certain circumstances if the defendant successfully completes the sentence imposed. D.C. Code § 24-906. In that event, the youth offender is issued a certificate confirming that the conviction has been set aside. However, the court records relating to the conviction are not sealed nor are records regarding the underlying arrest expunged. Further, a conviction set aside under this section may still be used for a variety of purposes:

(1) In determining whether a person has committed a second or subsequent offense for purposes of imposing an enhanced sentence under any provision of law;
(2) In determining whether a drug offense is a second or subsequent offense for purposes of enhanced punishment;
(3) In determining an appropriate sentence if the person is subsequently convicted of another crime;
(4) For impeachment if the person testifies at trial;
(5) For cross-examining character witnesses; or
(6) For sex offender registration and notification.

GAPS IN EXISTING D.C. EXPUNGEMENT PROVISIONS

A review of the existing expungement provisions in the District makes clear that they are neither comprehensive nor consistent and coherent in their coverage. This is hardly surprising given that the most significant provision, Criminal Rule 118, is a judicial creation, and the statutory provisions were designed to address a few, specific criminal offenses rather than to formulate a comprehensive approach to expungement for the universe of criminal charges. It is desirable for the Legislative and the Executive branches to address the issue in comprehensive fashion and develop a rational approach that reflects considered policy judgments about the circumstances in which expungement should be available, what sort of relief should be granted, and what procedures should be followed. This will result in comparable situations being treated in similar fashion as opposed to the inconsistencies that currently exist.[3]

There are any number of gaps or inconsistencies in the existing D.C. expungement provisions that could be pointed out. For example, cases involving actual innocence are the most deserving of relief. Yet, in some ways, the relief available to the actually innocent under Rule 118 is inferior to the relief available to those who have been convicted of a drug offense or underage drinking and who qualify for expungement under the statutes specific to those offenses. Rule 118, unlike the two statutory provisions, does not provide that persons as to whom expungement has been granted shall not be considered guilty of perjury or giving a false statement if they fail to recite or acknowledge the arrest or charge that was expunged.

Likewise, it makes little sense to limit expungement to certain drug offenses and underage drinking when there are many other comparatively minor offenses as to which expungement is not available, for example, disorderly conduct, shoplifting, unlawful entry (a charge frequently employed with respect to demonstrators), and simple assault. Furthermore, in the case of the drug offenses and underage drinking, expungement is available even if the person is convicted of the offense whereas for the other offenses expungement is not available even if the charges have been dropped without any conviction (unless the defendant can prove innocence and obtain relief under Rule 118). These gaps and disparities are anomalous, and plainly do not reflect any overarching measured policy judgment by District lawmakers.

[3] We do not suggest, however, that the proposed expungement legislation supplant the existing statutory provisions, which are tailored to specific situations for which the City Council has already make public policy judgments.

EXPUNGEMENT IN "ACTUAL INNOCENCE" CASES

The prototypical situation for expungement of arrest records is cases of "actual innocence," *i.e.* where a person did not commit the offense for which he or she was arrested. As discussed above, Rule 118 of the Superior Court Rules of Criminal Procedure addresses this situation and provides for the sealing of arrest records in such cases. The burden is on the person arrested to seek relief by filing a motion with the Superior Court and then proving by clear and convincing evidence either that the offense did not occur or that he or she did not commit the offense. Rule 118 establishes some fairly stringent time limits for the filing of a motion to seal arrest records: (1) within 120 days after the charges have been dismissed, or (2) for good cause shown and to prevent manifest injustice, within 3 years after the prosecution has been terminated, or (3) at any time thereafter if the government does not object. Rule 118 applies only to cases where charges are dropped before trial; it does not apply to cases where the defendant is acquitted after standing trial. (The Court of Appeals has held that the courts still possess the equitable authority to seal an arrest record of a person who can demonstrate innocence after standing trial).

The need for legislation in actual innocence cases

Rule 118 is thoughtfully designed and appears to have worked reasonably well in practice. Nonetheless, it is desirable to supersede it with legislation because the terms and conditions for expungement reflect social policy judgments that the legislative branch, rather than the judiciary, should make. Rule 118 is a judicial creation that was designed to "codify" the court's inherent equitable authority to grant relief to individuals who were wrongly arrested. It is apparent that the courts felt compelled to create the rule because they were operating in a vacuum – there was no existing statutory expungement provision which could provide relief.

Further, although the D.C. Council could simply adopt Rule 118 wholesale, we believe that there are a series of policy issues that should be considered and that, at least in some respects, the provisions of Rule 118 should be altered.

Nature of relief to be given in actual innocence cases

The first set of issues involves the nature of the relief to be provided to individuals who establish their innocence. One question is whether the arrest records in issue should be destroyed or sealed. A second question is whether additional relief should be provided.

Sealing vs. destruction of records

The D.C. Court of Appeals, in its *Hudson* decisions on which Rule 118 is based, opted for sealing of arrest records rather than destruction of those records. One reason the court made this choice is because it felt that it would exceed the proper judicial sphere to order destruction of executive branch records. In addition, some members of the court saw strong policy reasons for preferring sealing instead of destruction of records. They noted that "[t]here will be no way to recreate and verify a destroyed official file of an erroneous arrest, in order to refute the memory, newspaper clippings, or other personal records of someone who, for a variety of motives .. may

choose to publicize that arrest." 404 A.2d at 184 (Ferren, J., concurring).[4] Thus, the Court of Appeals chose to place the arrest records under seal in the custody of the court (not the police), "subject to being opened on further order of the court only upon a showing of compelling need, such as other civil litigation concerning the particular arrest or the discovery of additional evidence concerning the occurrence of that arrest." *Id.* at 181.

It should be noted that, in cases of actual innocence, there is no legitimate interest in the police having future access to the arrest records in issue for law enforcement purposes, such as to develop suspects when other similar crimes are committed or to help make a charging decision if the individual is arrested on another charge. Because the individual was innocent, the mistaken arrest should not exist thereafter so far as the police are concerned. (As discussed below, a different calculus comes into play when formulating the appropriate relief in cases where the individual may have committed, or definitely did commit, the offense for which he or she was arrested).

An argument can be made that the arrest records should be destroyed in cases of actual innocence rather than simply sealed. However, as the Court of Appeals noted in *Hudson*, once official records are destroyed, they cannot be recreated and verified, and unforeseen situations may arise in which it becomes important to have access to those records. Thus, sealing appears to be the most prudent remedy. We are not aware of any problems in practice with the sealing remedy adopted in Rule 118, such as "leakage" of, or unauthorized access to, sealed records. In terms of the individuals having their slates effectively wiped clean of the arrest, there does not appear to be any substantial argument that destruction of the records is superior to sealing.

On a separate but related note, we believe it is useful to add a provision that the arrestee has a right to get copies of the sealed arrest records upon request, without having to make a showing of compelling need. It is unlikely that arrestees will make many such requests, and it is unlikely that arrestees would make such requests for illegitimate purposes.

Additional relief

Sealing (or destroying) an individual's arrest records may not provide him/her all of the relief that is necessary or desirable to keep the mistaken arrest from haunting him/her in the future. What, for example, is the individual to say if asked in the future whether he or she ever has been arrested? This is a difficult subject. Federal agencies, for example, require that an individual seeking a security clearance disclose any prior arrests, including those that have been expunged or sealed. D.C. legislation on the subject cannot override federal requirements. However, the District can determine whether any expunged arrest in D.C. thereafter constitutes an arrest for purposes of state law (because other states must give "full faith and credit" to D.C. laws).

[4] In a more recent decision, the D.C. Court of Appeals noted that, "[e]xpungement is a drastic remedy. It effectively rewrites history. In some measure, expungement conceals the truth and creates a misleading record . . ." Teachey v. Carver, 736 A.2d 998, 1007 (D.C. 1999). Of course, the very reason for expungement is a judgment that there are substantial reasons for "rewriting history." Still, the approach of sealing a record involves less rewriting of history than does destroying that record.

As noted above, the District already has enacted two expungement statutes relating to misdemeanor drug offenses and underage drinking, that do address the issue of whether an individual must disclose expunged arrests. Both of these statutes provide explicitly that the effect of the expungement is to restore the person to the status he or she occupied before the arrest or charge. They further provide that no person as to whom expungement has been granted shall be considered to be guilty of perjury or otherwise giving a false statement by reason or failure to recite or acknowledge such arrest, charge, or conviction. In the case of an underage drinking offense (but not a misdemeanor drug offense), the person remains obliged to disclose the arrest and any expunged conviction in response to any direct question contained in any questionnaire or application for a position as a law enforcement officer. These provisions do not explicitly state that a person need not acknowledge the existence of the expunged offense, but they prevent any criminal prosecution of the individual if he or she does not acknowledge the offense. Further, they probably would preclude a private party, such as a prospective employer, from taking adverse action against an individual for failing to recite or acknowledge an expunged arrest, charge or conviction.

These protections ought to be extended to individuals who establish their innocence. Indeed, these protections probably should be enhanced in two respects. First, there is no strong reason why a person who has established innocence should have to disclose the expunged arrest even when applying for a position as a law enforcement officer. Second, it would be useful if the protections were broadened or clarified to provide explicitly that neither the D.C. Government nor any private party can take any adverse action against an individual for failing to recite or acknowledge an expunged arrest, charge or conviction in cases where he or she has ultimately been determined to be innocent.

Time limits for seeking relief in actual innocence cases

A second issue with the current provisions of Rule 118 is the time limits that it sets for the filing of a motion to seal arrest records: (1) within 120 days after the charges have been dismissed, or (2) for good cause shown and to prevent manifest injustice, within 3 years after the prosecution has been terminated, or (3) at any time thereafter if the government does not object. The 120 day time limit is far too stringent a requirement. In many cases over the years, individuals have been unaware of their right to seek sealing until long after the 120 day time limit has expired, and the court has not always permitted the filing of a motion thereafter under the "good cause" provision. More recently, the Superior Court has provided written notice of the right to seek sealing to individuals whose charges are "no papered," *i.e.* dropped at the initial court appearance following the arrest. This is a very useful step for which the Court should be commended. Notwithstanding the notice, however, many individuals may not focus on this issue or follow through on it until much later when, for example, the arrest record hinders an employment opportunity.

If a person can demonstrate innocence, it is difficult to understand why there should be any time limit on the opportunity to have the arrest records sealed. One practical concern is that the passage of time may result in the loss of evidence that the Government would need to rebut a claim of innocence. Relevant records may be lost or witnesses may no longer be able to be located or their memories may have faded. For example, a judge posited a situation involving an arrest for a domestic assault followed several years later by a motion to seal after the arrestee finds that the arrest is hindering his employment opportunities and persuades his spouse to swear

that the alleged assault never happened. Meanwhile, the officers involved in the arrest have left the police force or have forgotten the incident and what the spouse said then that led to the arrest. However, time limits do not necessarily cure these problems. Moreover, if the time limits are eliminated, the burden remains on the arrestee to prove that the offense did not happen or that he did not commit it and the court is free to take any inordinate or inadequately explained delay into account when assessing the evidence and reaching a conclusion. On balance, we believe that the time limits in Rule 118 should be eliminated because they constitute an unnecessary barrier to relief for potentially deserving individuals.

In order to encourage prompt filing of expungement motions, however, we suggest that a lower standard of proof -- the preponderance of the evidence -- should be applied to motions filed within four years after the charge is dropped (or the arrestee attains age 18, in the case of persons over the age of 16 who are arrested and charged as adults pursuant to D.C. Code § 16-2301(3)). Persons who wait more than four years to file a motion for expungement would still be able to obtain relief but would have to meet a higher standard of proof – clear and convincing evidence. We discuss the standard of proof issue in more detail below.

Standard of proof in actual innocence cases

A third issue is the standard of proof to be applied in deciding motions for expungement. Rule 118 requires the person to prove by "clear and convincing evidence" that the offense did not occur or that the person did not commit it. This is a standard higher than the "preponderance of the evidence" standard usually used in civil cases but less than the "beyond a reasonable doubt" standard used to decide guilt at a criminal trial. The Court of Appeals, in *Hudson*, explained its rationale for choosing this standard of proof in the following terms: "Such a degree of proof seems appropriate for a proceeding in equity where the court must balance the interest of the individual in having an incorrect record corrected with the interest of society in maintaining records of events, viz., arrests, that would assist law enforcement officials to apprehend criminals in the future." 404 A.2d at 179.

The practical impact of the higher standard, however, is to deny relief in situations where the court concludes that the person probably is innocent but the evidence is not so strong that the court is prepared to conclude that the person clearly is innocent. One may question how strong society's interest is in maintaining public records of those arrests for whatever assistance they might provide law enforcement in catching criminals in the future. Another impetus behind the Court of Appeals' selection of the "clear and convincing evidence" standard may have been its discomfort at engaging in what might be termed judicial legislation and its consequent desire to adopt a conservative standard that would not be open to criticism. In other words, the Court of Appeals may have felt more constrained to set a stringent standard of proof than a legislature is.

We believe that the standard of proof in actual innocence cases should be reduced to the "preponderance of the evidence." The number of cases in which the standard of proof will end up making a difference in the outcome is likely to be relatively small.[5] The issue then becomes a

[5] If, contrary to our expectation, the adoption of a lower standard of proof triggers a large increase in the number of motions to seal being filed with the Superior Court and/or causes the Court to grant relief in too many close cases where there is substantial evidence that a person was guilty of the offense, then it may become desirable to revisit this issue.

policy judgment whether, in those few cases, it is better to deny relief to those individuals who are "probably" but not "clearly" innocent so that law enforcement can continue to have the records available for future investigative purposes or, instead, to grant relief to the individuals and deprive law enforcement of whatever benefit access to those records might provide. We favor granting relief in those situations. The judicial system makes momentous judgments and awards millions of dollars of damages based on what the preponderance of the evidence shows; that standard should also suffice for persons seeking relief because they have a criminal record for an offense they did not commit.

As noted above, we recommend that the current "clear and convincing evidence" standard could be retained for one class of motions seeking expungement – those filed more than four years after the charges were dropped. Such lengthy delays are likely to handicap the Government's ability to contest claims of innocence because relevant records, evidence, or witnesses may have been lost during the interim. Applying a higher standard of proof to such belated motions provides an appropriate incentive to individuals to seek relief promptly. At the same time, it preserves the ability of individuals who can clearly demonstrate their innocence to obtain relief at any time.

Relief after trial in actual innocence cases

A fourth issue is that Rule 118 applies only to cases where charges are dropped before trial; not apply to cases where the defendant is acquitted after standing trial. The Court of Appeals has held that the Superior Court possesses the equitable authority to seal an arrest record of a person who can demonstrate innocence after standing trial. *Rezvan v. District of Columbia*, 582 A.2d 937 (D.C. 1990). However, the Court of Appeals ruled that the person must meet an even higher standard than when prosecution terminates before trial. "In addition to showing by clear and convincing evidence that no crime occurred or that the arrest was based on mistaken identity, the person must establish the existence of some other circumstance that would make it manifestly unjust to decline to seal the arrest record in question for example, that the arrest was made without probable cause, that the arrest was otherwise in violation of constitutional rights, or that there was bad faith on the part of the prosecutor in continuing with the prosecution." *Id.* at 938.

This heightened standard makes little sense. Expungement in cases of actual innocence should depend solely on whether the defendant is innocent. The constitutional propriety of the arrest or the motives of the prosecutor in pursuing the case should have no bearing. On a practical level it is understandable that the Court of Appeals is concerned about sealing records of individuals who have been acquitted after standing trial. Experience teaches that most cases of actual innocence will be weeded out prior to trial. And an acquittal at trial is not proof that a defendant is innocent; only that the jury (or judge) had a reasonable doubt as to guilt. Thus, an acquittal should not establish any presumption that the defendant is innocent or entitled to expungement.

At the same time, it must be recognized that innocent persons sometimes are forced to stand trial. They are no less worthy of relief than persons against whom charges are dropped. Nonetheless, the very fact that they have stood trial does distinguish them and arguably impacts whether expungement is appropriate for other reasons. First, the Constitution guarantees a right to public criminal trials. *See generally Nixon v. Warner Communications, Inc.*, 435 U.S. 589

(1978). When a case has proceeded all the way to a public trial, it can be argued that sealing those records away from public access impinges on the community's right to observe and study the workings of its judicial system. In short, sealing the records of a public criminal trial may be too great a re-writing of history. Second, the fact of the acquittal itself arguably provides relief to defendants and lessens their need for expungement in order to restore their reputations – they can demonstrate that they were acquitted of the charge, unlike those persons against whom charges are simply dropped.

On balance, we conclude that an innocent person's legitimate interest in having the record wiped clean outweighs the countervailing interest in maintaining full public access to records of criminal proceedings. The number of cases in which an acquitted defendant will be found to be actually innocent is likely to be small. The public will have had full access to the trial at the time it occurred. *See Nixon v. Warner Communications, Inc.*, 435 U.S. at 610 (the requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed). If thereafter the records relating to the prosecution and trial are placed under seal because the defendant was found by the court to be actually innocent, this will not infringe the public's right of access to criminal trials.

There are some practical considerations tied to the trial process that impact upon the extent of relief that can or should be provided to an individual who has gone through pretrial proceedings or trial before being found actually innocent and entitled to expungement relief. First, a transcript of the pretrial or trial proceedings will have been created. If the individual was the only defendant, the transcript can simply be sealed together with other relevant records. If, however, it was a codefendant case and the codefendant(s) was culpable (or has not been found actually innocent), then the transcript should remain a public record. In that event it would be too tedious and time-consuming to redact all references to the innocent person. Likewise, the pretrial or trial process (or an appeal) may have generated a published decision by the court that mentions the individual's name but must remain a public record because it is intended to serve as precedent for future cases. Once again, it is unreasonable to attempt to redact the name of the innocent individual. Maryland has recognized these problems and has addressed them by providing that the scope of expungement does not extend to a transcript of court proceedings in a multiple defendant case or published opinions of the court. Md. Code Crim. Proc. § 10-102. This is a sensible limitation and we propose adoption of a comparable one.

Finally, D.C. currently has a statute that provides a mechanism for persons who have been convicted at trial to seek to vacate their conviction or obtain a new trial on the ground of actual innocence. D.C. Code § 22-4135. Persons whose innocence has been established through this process should be entitled to the benefit of the expungement provisions discussed here.

EXPUNGEMENT IN OTHER CASES

As noted at the outset of this report, there are three categories of cases to which expungement may be applied. The first category is cases of actual innocence, just discussed. These cases are the most deserving of relief and there is strong consensus in the subcommittee about providing relief and about the sort of relief that should be provided. We turn now to the remaining two categories, which engendered much greater debate.

The second category of cases to which expungement could potentially apply involves cases where charges were dropped prior to trial or the defendant was acquitted at trial. In these cases the person may or may not have committed an offense. It will not always be possible for an innocent persons to prove their innocence and qualify for "actual innocence" expungement relief. For example, a person may be arrested and charged with an offense based on an identification by an eyewitness who is mistaken. The case might be dropped because the identification is weak or the eyewitness becomes unavailable, or the defendant might be tried and acquitted. But, absent an unimpeachable alibi or comparable evidence, the accused person may be unable to affirmatively prove innocence. On the other hand, many persons in this category will be culpable to some greater or lesser degree. Charges are dropped for a wide variety of reasons, for example: because the offense was minor, or the defendant's participation in the offense was minor, or there were extenuating circumstances, or an essential witness was unavailable, or evidence was suppressed by the court. Charges also are dropped in situations where the defendant participated in a diversion program or deferred sentencing agreement, or has successfully completed probation before judgment. In sum, this category involves a very "mixed bag" of individuals and situations, some of whom are clearly deserving of relief (although they may be unable to prove it by the more rigorous standards required in actual innocence case) and others who may not be so “deserving” of relief due to innocence, but for whom the community shares an interest in letting them overcome their arrest record.

The third category involves cases where the defendant has been convicted of committing the offense. In these cases, there is no question about culpability. However, the offense at issue may be minor, or there may be extenuating circumstances, or it may become clear that the offense was an isolated mistake by an individual who has led an otherwise upright life or who has been rehabilitated since the offense was committed. At least some of these individuals may be deemed deserving of some form of expungement relief, despite being clearly guilty of the prior offense.

Although there are important distinctions between these latter two categories, and potentially between individuals within the same category, the subcommittee found it useful to consider these categories together for purposes of framing expungement legislation. The common denominator is that persons in these categories either may be, or actually are guilty. Some may well be innocent but, as discussed above, unable to prove their innocence and so cannot be identified as innocent on a case-by-case basis. Thus, if relief is to be provided to persons in either of these two categories, it can be done on the assumption that they are culpable (to some extent) but that they should nonetheless should be afforded the opportunity to move beyond their past involvement with the criminal justice system.

The need for legislation in the District of Columbia

The subcommittee took the view that the benefits of expungement should be made available in cases beyond those involving actual innocence. Currently (with very limited exceptions), persons who have a "brush with the law" in the District of Columbia are forever "branded" because they have no way of overcoming that episode and shielding it from prospective employers, lenders, or the public. The subcommittee believes that the District of Columbia expungement provisions are too restrictive and deny relief to a number of persons who deserve a second chance so that they can put unfortunate episodes behind them, obtain good employment, and become – and be perceived as -- productive members of the community.

Most states (36) provide an opportunity to individuals to clear their record if the charges against them are dropped or they are acquitted at trial.[4] (A summary of the expungement provisions of the various states, which was created by the United States Attorney's Office based on a 50 state survey of expungement statutes provided to the CCE by the law firm of Dow, Lohnes & Albertson, PLLC, is attached as an exhibit to this report). Maryland, for example, makes expungement available to most persons when the charges against them (misdemeanor or felony) are dropped or they are acquitted. *See* Md. Code Crim. Proc. § 10-105. Virginia makes expungement presumptively available to persons charged with misdemeanor offenses when the charges against them are dropped or they are acquitted. Expungement is also available with respect to felony charges in Virginia that are dropped or as to which there is an acquittal, but only if the court finds that the maintenance of the criminal record causes or may cause manifest injustice. Va. Code § 19.2-392.2.

A substantial number of states (24) provide for expungement of convictions in some instances, and 14 of these states permit expungement not only of misdemeanor convictions but also some felonies. Maryland and Virginia, however, are not among these states. They provide for expungement of records relating to convictions only in cases where the defendant has been pardoned. Md. Code Crim. Proc. § 10-105; Va. Code § 19.2-392.2.

As discussed above, the District of Columbia currently provides for the expungement of arrests or convictions of first-time misdemeanor drug offenders who successfully complete probation. D.C. Code § 48-904.01(e). There is another expungement provision for persons charged with or convicted of under-age drinking. D.C. Code § 25-1002(c)(4). In addition, there is a special expungement provision for parental kidnapping which is designed to expunge a conviction, but not the underlying arrest, once the children reach adulthood. D.C. Code § 16-1026. Finally, the conviction of a youth offender (a person less than 22 years old convicted of a crime other than murder) may be "set aside" (but not removed from public records) under certain circumstances if the defendant successfully completes the sentence imposed. D.C. Code § 24-906.

It is evident from a review of these existing provisions in the District of Columbia and elsewhere that the District's expungement provisions are haphazard and far more restrictive than those commonly available in other jurisdictions. This does not appear to reflect any policy

[4] Of these, 23 place restrictions on expungement if the individual has prior or subsequent arrests or convictions, or pending cases.

judgment by the D.C. Council but simply the fact that the issue of expungement has not been addressed comprehensively heretofore. Certainly, the problem of individuals being stigmatized and damaged by criminal records reflecting youthful mistakes or isolated lapses is no smaller in the District than in adjacent jurisdictions. Indeed, it almost certainly is a significant problem in the District given the impact of poverty and race upon whether an individual has a criminal record. Eligibility for many public sector and government contracting jobs (many of which require security clearances or other "trustworthiness" determinations), which are plentiful in this region, can be dependent on a person's prior criminal history. Thus, the lack of an expungement statute in D.C. may constitute a competitive disadvantage to its citizens seeking employment.

It should be noted that, since 1967, the Metropolitan Police Department has provided "arrest records" that contain only listings of convictions for which the sentence has been completed within the past ten years and forfeitures of collateral within the past 10 years, in conformity with the "Duncan Ordinance." *See* DCMR 1004. Nonetheless, attorneys who specialize in employment and security clearance law report that employers still are able to collect complete arrest records with ease, often through services that mine court records rather than going to the police department.[6] Further, they report that many contractors providing services in government buildings, including janitorial services, will not hire persons unless they have their arrest records expunged. It is not unusual for these contractors to ask individuals to get the record expunged to become eligible for a job for which they are otherwise qualified and would otherwise be offered.

Accordingly, we submit that the time has come for the District to bring its expungement provisions into line with the majority of other states and to provide a second chance to more of its citizens – especially young adults -- so that they can put mistakes behind them and move forward with their lives without being branded by a criminal record. In doing so, however, an appropriate balance must be struck between the competing interests involved. Individuals have an interest in expunging their records to remove an unnecessary stigma. The community has an interest in furthering individuals' rehabilitation and enhancing their employability. On the other hand, the community (including law enforcement, prospective employers, neighbors, *etc*.) also has an interest in having access to information relevant to public safety and decisions regarding employment, housing, and the like.. An employer, for example, may legitimately want to know whether a prospective bookkeeper has been arrested for, or convicted of, embezzlement, or whether a prospective driver has arrests or convictions for drunk driving.

Striking an appropriate balance between these competing interests, of course, involves making a number of difficult judgment calls about the extent of the expungement relief that should be made available and what restrictions should be placed upon eligibility for relief. Not surprisingly, the subcommittee spent the great majority of its deliberations on these issues. The result of the subcommittee's work reflects a series of compromises between these competing societal interests and the differing perspectives of the subcommittee members. We believe that the legislation we propose is thoughtful and fair, but readily acknowledge that the lines could be drawn differently.

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[6] It should also be noted that, beginning on January 1, 2006, the Superior Court no longer creates a case jacket for cases that are "no papered," *i.e.* dismissed at the initial court appearance. Because the court's computerized records system uses case jackets as its database, the public cannot retrieve information about post-January 1, 2006 arrests that are "no papered" by running the individual's name through the court's computer system.

Nature of relief to be given

As discussed above, the subcommittee recommends retaining the existing approach of sealing records, rather than destroying them, to accomplish expungement in cases of actual innocence. We believe that a different and more limited form of relief is appropriate in the categories of cases now under consideration, *i.e.*, where the individual may be or definitely is guilty.

In cases of actual innocence the criminal records are delivered to the Superior Court and placed under seal. Thereafter, they are unavailable to anyone, including law enforcement, except by court order upon a showing of compelling need. Because the individual was innocent, there is no need for the police to have future access to the sealed records for law enforcement purposes, such as to develop suspects when other similar crimes are committed or to help make a charging decision if the individual is arrested on another charge. Much less is there a legitimate need for potential employers or other members of the public to have access to the sealed records.

The calculus is quite different, however, when the records to be sealed relate to an individual who may be or is guilty of a criminal offense. In such instances, there are strong reasons for preserving the ability of law enforcement agencies to access those records for legitimate law enforcement purposes. As the D.C. Circuit Court of Appeals has noted:

> The government does . . . have a legitimate need for maintaining criminal records to efficiently conduct future criminal investigations. Law enforcement authorities have an interest in knowing, for example, that a definite suspect in a crime under investigation had previously been arrested or convicted, especially if for a similar offense. Likewise, police investigators will be greatly assisted if they are able to check whether persons residing or having been observed at the situs of an offense involving a particular modus operandi had previously been arrested or convicted of an offense involving the same modus operandi.

Doe v. Webster, 606 F.2d 1226, 1243 (D.C. Cir. 1979). Similarly, courts often consider criminal records in making a wide variety of decisions, ranging from pre-trial detention to sentencing decisions.

Significantly, the statutory expungement provisions in Maryland and Virginia authorize the preservation of "expunged" records for review by the Court and law enforcement officials under certain specified circumstances. *See* Md. Code Crim. Proc. §§ 10-102, 10-108(b) and (c); Va. Code Crim. Proc. § 19.2-392.3 and Va. Code Pub. Safety § 9.1-134. Likewise, Congress has enacted a statute authorizing the “expungement” of proceedings for certain first-time drug possession offenses, but has authorized the Department of Justice to maintain a non-public record of the proceedings for the purpose of determining whether the defendant qualifies for treatment under the section in a subsequent proceeding. *See* 21 U.S.C. § 844a(j). Already, the existing District of Columbia expungement provisions relating to drug offenses and underage drinking provide that a nonpublic record shall be retained by the court or the police so that the expunged offense can be taken into account if the person commits another such offense, and to conduct criminal record checks for persons applying for a position as a law enforcement officer. D.C. Code §§ 48-904.01(e)(1), 25-1002(c)(4).

Thus, the subcommittee decided that the expungement relief granted to individuals in cases other than actual innocence should not involve sealing the relevant records away from law enforcement agencies or the courts. Instead, the relief should be limited to the removal, deletion or sealing of publicly available records (computerized or tangible) relating to the criminal proceeding, while permitting law enforcement agencies and the Court to retain non-public records for official use.[7] These non-public records could be used or disclosed for legitimate law enforcement purposes (including the investigation and prosecution of other crimes, and use by corrections and parole officials), for use in future court criminal proceedings (including the preparation of pretrial services or pre-sentence reports, and other determinations that turn on whether the individual has a prior arrest or conviction)[8], for statistical purposes, and for gun licensing purposes.[9]

We believe that limiting the expungement relief in this fashion provides the best accommodation between an individual's interest in clearing the record and the community's interest in effective law enforcement. The purpose of expungement is to provide a deserving individual with a fresh start in the eyes of the community and, especially, prospective employers. It is not intended as a device to assist an individual who subsequently breaks the law to escape the consequences of past conduct.

In addition to law enforcement agencies, we concluded that records regarding an expunged arrest or conviction should also remain available to certain other entities with a legitimate "need to know" such information:

- a licensing agency with respect to an offense that may disqualify a person from obtaining that license;
- a school, day care center, before- or after-school facility or other educational or child protection agency or facility;
- a government employer or nominating or tenure commission with respect to employment of a judicial or quasi-judicial officer, or for employment at a senior level government position.

Convictions and non-convictions

Another threshold issue is whether expungement should be available with respect to some convictions or instead should be limited to cases where the charges were ultimately dismissed or the defendant was acquitted at trial. Prosecutors and some other members of the subcommittee were opposed to permitting any expungement of convictions. Their view is that

[7] As discussed above, the scope of expungement would not extend to a transcript of court proceedings in a multiple defendant case or published opinions of court. Nor should it extend to the court's financial records, such as a cash receipt or disbursement record, although those records are not routinely available to the public in any event.

[8] A somewhat related issue that the subcommittee considered was a proposal by the U.S. Attorney's office to "reverse" an expungement if the person subsequently is convicted of an offense. The subcommittee did not favor this proposal.

[9] The Metropolitan Police Department already limits its disclosure of "arrest records" to listings of convictions and forfeitures of collateral that have occurred within the past 10 years.

expunging convictions is too great a "rewriting of history" and that most cases in which there are significant extenuating circumstances are already dismissed by prosecutors rather than taken to trial. Expungement of convictions was also strongly opposed on the grounds that employers should be entitled to know about prior convictions when making employment decisions.[10] In addition, the view was expressed on behalf of the media that expunging convictions constitutes a "rewriting of history" that might adversely impact the media's ability to report on matters of public interest and importance: for example, whether a candidate for public office previously was convicted of a criminal offense. And, as discussed above, neither Maryland nor Virginia provides for expungement of convictions except in the rare instance where the defendant has been pardoned.

This issue plainly is a judgment call about which reasonable persons can disagree. Nonetheless, a majority of the subcommittee believe that expungement should be available with respect to at least some convictions. One reason is that the fact that a person has been convicted does not necessarily establish that he or she is more culpable, or less deserving of a second chance, than a similarly situated individual against whom charges were dismissed. Charges are often dismissed for reasons having nothing to do with the culpability of the defendant, such as evidentiary problems, etc. Moreover, there are a number of offenses that are sufficiently minor as to be appropriate candidates for expungement even in the event of conviction, provided that the defendant has an otherwise clean record and enough time has elapsed to demonstrate that the offense was an isolated episode. A majority of the subcommittee was concerned that employers are not adequately considering the effects of the passage of time and the isolated nature of the case when evaluating a prior conviction, particularly for relatively minor offenses, creating unnecessary hurdles to employment for many otherwise qualified individuals. And, as noted above, the public will have had full access to the earlier trial or plea resulting in the conviction for at least seven years, along with any media coverage at that time. Finally, as noted, a majority of the states that presently permit expungement of any kind extend the scope of their expungement statutes to include some convictions. In these circumstances, we therefore concluded that it is not too great a "rewriting of history" to expunge a minor conviction.

At the same time, the subcommittee recognized that there are a number of convictions that are too serious ever to be appropriate candidates for expungement. Further, as discussed in more detail below, we concluded that expungement of a less serious conviction should never be a matter of right. Instead, it should be permitted only after a lengthy waiting period (7 years following the completion of the sentence) and after a court determines affirmatively that expungement is warranted in a particular case.

Eligible and non-eligible offenses

The subcommittee spent a great deal of its time considering the issue of which criminal offenses ought to be eligible for expungement. Because offenses come in such a wide variety of "shapes and sizes," we found it difficult to draw very many bright line rules that certain offenses

[10] An employer's representative was concerned, for example, that the draft legislation would permit misdemeanor drug convictions to be expunged, noting that drug usage is a serious, ongoing problem in many workplaces. The employer conceded, however, that employers are able to conduct drug testing to address this issue and that the results of such testing are probably a better indicator of a current drug usage problem than a 7-10 year old conviction for drug possession. Further, as noted above, D.C. law already permits the expungement of a misdemeanor drug offense involving a first-time offender.

automatically would be precluded from expungement, or, conversely, would be entitled to expungement. Rather, with respect to many offenses, it is possible to envision some cases in which expungement would be appropriate and others in which it would not. Ultimately, we agreed on a framework that makes all but four felony convictions ineligible for expungement, and adopts a case-by-case approach to all offenses that are eligible for expungement. Under this framework, making an offense eligible for expungement is not a guarantee of expungement; it simply gives individuals a chance to make their case to the court. While this approach imposes more of a burden on Superior Court judges than would bright line rules, we believe that it will produce the soundest results.

We concluded that, in general, felony convictions should not be eligible for expungement. However, we believe that a very limited group of felonies -- Carrying a Pistol Without a License, violation of the Bail Reform Act (*i.e.* failing to appear in court when required), Unauthorized Use of a Vehicle, and Receiving Stolen Property -- are sufficiently minor, represent youthful indiscretions, or are of so little relevance to most employment decisions that they should at least be candidates for expungement, thereby giving the defendant an opportunity to persuade the court that relief is warranted in the particular case.[11]

With respect to misdemeanor convictions, we started from the proposition that most misdemeanor convictions should be eligible for expungement except for several categories of offenses that we believe should be ineligible because they are especially relevant to employers or other members of the community. The categories of misdemeanor convictions that would be ineligible for expungement include:

- all sex offenses, intra-family offenses, and offenses against children;
- offenses involving fraud;
- drunk driving and similar vehicular offenses.[12]

Expungement of eligible misdemeanor convictions (and the four eligible felony convictions) would be permitted only after a lengthy waiting period -- 7 years following the completion of the sentence -- and after a court determines affirmatively that expungement is warranted in a particular case. The requirement that the waiting period begin to run after completion of the sentence would effectively make the time period which the individual must wait to have the conviction expunged longer, and sometimes considerably longer, than the actual seven year waiting period itself. Even in those cases in which no term of incarceration was ordered, a period of probation or supervised release would need to be completed before the seven year waiting period begins to run. The subcommittee understood, based on the practical experience of the many criminal law practitioners on the subcommittee, that this would effectively extend the true period of time after which convictions could be expunged, as periods

[11] As discussed above, the United States Attorney's Office and the Office of the Attorney General dissented from this view, and took the position that all convictions, felony and misdemeanor, should be ineligible for expungement.

[12] A list of approximately fifty (50) ineligible misdemeanor and traffic offenses, a number of which are infrequently prosecuted, appears in section 2(7) of the draft legislation. This listing constitutes a compromise effort by the members of the subcommittee to identify misdemeanor offenses that are not appropriate for expungement for various public policy reasons. However, a significant minority of the subcommittee would have made a number of these misdemeanors eligible for expungement to be resolved on a case by case basis by the court.

of probation or supervised release are ordered by the Court in virtually every case resulting in a conviction.

It should be noted that the subcommittee's proposed approach to expunging convictions would make misdemeanor drug convictions eligible for expungement but exclude all felony drug convictions – which involve distribution or attempted distribution – from eligibility. We recognize both the toll drug offenses take on our community, and the volume of such cases that come before the Superior Court. We also recognize the reality that there are many individuals in the community for whom substance abuse was a major factor in their long-ago criminal behavior, including many persons who were involved in dealing drugs. There was a sense on the subcommittee that the hard work of overcoming addiction and changing destructive behavior should be recognized and weighed in the balance when determining whether to expunge an individual's criminal record. We were, however, unwilling to take the position that felony drug convictions, *i.e.* drug dealing, should be eligible for expungement.

The subcommittee engaged in a similar analysis of what offenses would be eligible for expungement in cases that do not result in a conviction, *i.e.* cases in which charges are dismissed or that result in an acquittal. After considerable debate, the consensus was that all such cases, both felonies and misdemeanors, should be eligible for expungement provided that the individual satisfies the other restrictions, such as having no disqualifying convictions or pending charges and having waited the prescribed period since the termination of the charge. Our philosophy was that, regardless of the nature of the offense, it was possible to envision at least some situations where expungement would be appropriate.[13]

We also concluded that it is appropriate to divide non-convictions along the same line that we divided convictions, and to impose different requirements on the two resulting groups of non-convictions. We placed in one group (i) all felonies, (ii) those misdemeanor offenses which, upon conviction, would be ineligible for expungement, and (iii) cases resolved through deferred prosecution or sentencing agreements.[14] This group of offenses would require a longer waiting period – 5 years – from the termination of the prosecution before becoming eligible for expungement. Further, the burden would be on the individual to persuade the court that the interests in favor of expungement outweigh the countervailing interests in retaining public access to the records. The remaining group of offenses, all of which are misdemeanors, would become eligible for expungement two years from the termination of the prosecution. In those cases, the individual would presumptively be entitled to expungement unless the prosecutor could persuade the court that the interests in retaining public access to the records outweighs the interests in favor of expungement.

[13] It should be noted that the Metropolitan Police Department does not disclose records of any arrest, no matter how serious the offense, that has not resulted in a conviction, pursuant to the Duncan Ordinance. This practice is apparently also consistent with the Human Rights Act.

[14] The rationale for including in this group misdemeanors resolved through deferred prosecution or sentencing agreements (*i.e.* some form of diversion program) is that, but for the defendant's participation in the program, he probably would have been prosecuted and convicted, rather than the case being dismissed. Prosecutors on the subcommittee noted that they might become more reluctant to admit persons to diversion programs if one of the consequences would be to permit expedited expungement of the case once it is concluded.

We also propose a non-exclusive list of relevant criteria for the court to consider in making the decision whether to grant expungement in a particular case, including (i) the nature and circumstances of the offense at issue; (ii) the person's role in the offense; and (iii) the history and characteristics of the person, including but not limited to the person's character, physical and mental condition, employment history, prior and subsequent conduct, history relating to drug or alcohol abuse (as well as successful completion of treatment programs), criminal history, and/or efforts at rehabilitation. These are the same factors that the courts are used to considering in making sentencing decisions or in deciding whether to grant a reduction of sentence. In addition, the court can take into account whether the individual previously has been granted expungement of other offenses under this provision or some other statute.

Waiting periods

An integral part of the framework for expungement that we propose is a waiting period before an individual may apply for expungement. The purpose of this waiting period is to ensure that an individual seeking expungement is not a repeat offender for whom relief would not be warranted. There are competing interests in setting a waiting period. The longer the waiting period, the greater the confidence becomes that an individual who has "kept a clean nose" will not repeat past mistake(s) and thus is an appropriate candidate for expungement. On the other hand, the longer the waiting period, the more it will impose a disability upon the person in terms of securing good employment, etc.

The subcommittee believed that the length of the waiting period should be tied to the seriousness of the offense and whether a conviction or non-conviction is sought to be expunged. We propose a waiting period of two years from the termination of prosecution for most misdemeanor non-convictions. We propose a period of five years from the termination of prosecution for non-convictions involving more serious misdemeanors and all felonies.

We propose a waiting period of seven years <u>from the completion of sentence</u> in the case of any conviction. As discussed above, only certain misdemeanors and four low level felonies are eligible for expungement under our proposal. Because these are less serious offenses (and assuming that the defendant has an otherwise clean record), the typical sentence is likely to be a term of supervised release (probation), perhaps in conjunction with a short period of incarceration. Typically, the length of probation will be 2-3 years in such cases. Thus, the practical effect of the seven year waiting period would be that, in most cases, a conviction would become eligible for expungement only after approximately ten years have elapsed since the date of the offense. That period would be somewhat shorter in cases involving the least serious offenses where the court imposed only a fine or a very short period of probation. The period would be longer if the court imposed a more lengthy sentence.

These waiting periods can be waived if the prosecution does not object. In some cases involving non-convictions, especially for minor charges that are "no papered" or dismissed, the prosecutor's office may not object to immediate expungement. In such cases, it is easier and more efficient to accomplish the expungement at that point in time rather than having to wait for several years.

On the other hand, the court would be free to decide in particular cases that it is not yet comfortable granting expungement even though the specified waiting period has passed.

Because the length of time that a person has maintained a clean record since the arrest or conviction is such a significant consideration in deciding whether expungement is appropriate, a court should be able to adopt a "wait and see" position in such a situation, by denying a motion for expungement "without prejudice" to it being renewed after a further passage of time.

Prior/subsequent record

The subcommittee spent a considerable amount of time discussing what restrictions should be imposed on eligibility for expungement in terms of prior and subsequent criminal records. In other words, when should another arrest or conviction disqualify an individual from seeking expungement of a particular arrest or conviction? Closely related to this issue is the question whether there should be a limit on the number of other arrests or convictions an individual may have or the number of times the individual can obtain expungement. Many of the states that permit expungement, including Maryland and Virginia, include eligibility restrictions in their statutes based on the individual's prior or subsequent record or the existence of pending charges. In addition, most of the states that allow expungement of convictions also include such restrictions on eligibility.[15] The subcommittee concluded that including some restrictions based on the individual's prior or subsequent record or for pending charges was appropriate.

Some members of the subcommittee opined that expungement should be a one-time opportunity and should be limited to individuals who have only a single blemish on an otherwise clean record. Other members believed that expungement should be available in a wider variety of situations, for instance, to individuals who have several arrests (and/or misdemeanor conviction(s)) when they are young but then turn their lives around and have a spotless record for many years, perhaps well beyond the requisite waiting periods discussed above. A consensus emerged that it is possible to envision certain cases in which expungement of more than one arrest and/or conviction might be appropriate and others in which it clearly would not. It is very difficult to sort out all of the variables in advance and formulate a series of detailed rules about eligibility. Thus, the subcommittee ultimately decided to adopt a limited number of rules restricting eligibility based on other arrests or convictions, and entrusted the court to decide on an individualized basis which of the eligible cases are deserving of relief.

We concluded that, if an individual ever has been convicted of an offense ineligible for expungement (i.e. most felonies and ineligible misdemeanors), then the individual is ineligible to seek expungement of any other arrests or convictions. A public record of the ineligible conviction would remain in any event, and we did not feel it served the communities interest, or constitute a reasonable use of the Superior Court's resources, in enabling such individuals to merely "clean up" or improve the balance of their records.

We also concluded that, if an individual is subsequently convicted of <u>any</u> offense (whether or not it would be eligible for expungement), then the individual becomes ineligible to seek expungement for prior arrests or convictions. This creates an incentive for persons interesting in clearing their record not to engage in any further criminal conduct. (The most minor offenses, such as traffic convictions and disorderly conduct, would not be counted for purposes of applying this restriction). It also has the practical effect of limiting eligibility for expungement to a single conviction: if a person has two prior convictions, the second would

[15] Twenty-two of the twenty-four states permitting convictions to be expunged include such restrictions.

make the first ineligible for expungement, although the person could seek expungement of the second offense.[16]

Subsequent arrests would not be disqualifying if they do not result in conviction. However, individuals seeking expungement could not have any pending criminal charge and the waiting period for all arrests and convictions would have to have expired before they could seek expungement of any. Further, an individual would be required to seek expungement of all eligible arrests or convictions at the same time, in order to avoid burdening the court with piecemeal proceedings. As a practical matter, a judge will consider the individual's entire criminal record when deciding whether to grant expungement of any part of that record.[17]

Burden and standard of proof

The court's decision whether to grant expungement in a particular case involves weighing the competing interests involved. On one hand, individuals have an interest in expunging their records in order to remove the attendant stigma, and the community has an interest in furthering the individuals' rehabilitation and enhancing their employability. On the other hand, the community (including prospective employers, landlords, neighbors, *etc.*) has an interest in retaining access to information relevant to public safety and decisions regarding employment, housing, and the like.[18] The respective weights of these various interests will vary according to the facts of each case.

The subcommittee concluded that individuals seeking to expunge a conviction should bear the burden of proving, by clear and convincing evidence, that the interests in clearing their records outweigh the countervailing interests in retaining access to that conviction, including the interest of (prospective) employers in making fully informed hiring or job assignment decisions and the interest in promoting public safety. As discussed earlier, this is a standard higher than the "preponderance of the evidence" standard usually used in civil cases but less than the "beyond a reasonable doubt" standard used to decide guilt at a criminal trial.

The same balancing test – whether the interests in clearing the individual's record outweigh the countervailing interests in retaining access to that record – would also be used in cases involving non-convictions, *i.e.*, dismissals and acquittals. However, we decided that the standard of proof in these cases should be the preponderance of the evidence. Further, in the

[16] As a practical matter, it is doubtful that expungement will be granted in many cases where an individual has more than one prior conviction, both because the most recent conviction which is eligible for expungement is not an isolated mistake and because the person would still have a public criminal record even if expungement were granted. Nonetheless, it is possible to conceive of cases in which a court might decide that such a "partial cleansing" of an individual's record is appropriate. A majority of the committee was of the view that a "partial cleansing" of an individual's record may be all that is necessary for the individual to obtain employment and therefore in appropriate cases is a proper exercise of the expungement process. A majority of the subcommittee rejected the view that expungement would only be appropriate if the expungement would create a completely "clean slate."

[17] An individual could choose to expedite consideration of expungement of older arrests or conviction(s) by waiving in writing the right to seek expungement with respect to a more recent arrest as to which the waiting period has not expired. As a practical matter, however, it is unlikely that a court would be willing to grant relief in such a situation.

[18] It should be noted that, consistent with the Crime Victims' Rights Act, the draft legislation makes specific provision for the victim(s) of a crime to be present and make a statement at an expungement hearing.

more serious group of these cases [*i.e.* (i) felonies, (ii) misdemeanors which, upon conviction, would be ineligible for expungement, and (iii) cases resolved through deferred prosecution or sentencing agreements] we concluded that the burden should be on the individual to prove that the interests in expungement outweigh the competing interests in retaining public access to the record. In the remaining, less serious misdemeanor cases, the burden should be on the prosecutor to prove that the interests in retaining access to the record outweigh the interests in favor of expungement. This approach is similar to that used in Virginia, where misdemeanor charges that do not result in conviction are entitled to be expunged unless the prosecution can show good cause to the contrary, whereas felony charges can be expunged only if the individual demonstrates that maintaining the criminal record causes or may cause manifest injustice to him/her.

Hearings

There was a concern that the case-by-case approach to expungement that we propose might burden the Superior Court with a significant new caseload of mini-trials regarding whether expungement should be granted in particular cases. Nonetheless, the alternative of drawing up bright line rules that particular offenses either are or are not entitled to expungement was deemed far less desirable. We believe that a case-by-case approach that enables the judges of the Superior Court to apply their experience and judgment to the wide variety of different situations that come before them will produce the soundest results.

We do not expect, however, that a judicial hearing will be required in every case, or even most cases, in order to make a determination whether to grant expungement. A court may decide on the papers that a given case is not eligible for expungement. Likewise, it may determine that expungement is inappropriate in a particular case based on information contained in the pleadings. A hearing would be required only when issues that might affect the court's determination whether to grant expungement require further development through the presentation of evidence. The hearings are intended to be informal and the rules of evidence would not apply at such hearings, much as at a sentencing hearing.

Retroactive effect

The subcommittee considered whether this proposed expungement legislation should apply to past arrests and convictions or, instead, be limited to arrests and convictions that occur after it becomes effective. There is a legitimate concern that there will be an initial flood of expungement motions that will place a significant additional burden on the Superior Court and the prosecutors' offices if the legislation applies to past arrests and convictions. However, the subcommittee unanimously concluded that there is no principled basis for not applying this legislation to prior arrests and convictions. All members of the subcommittee, including the representatives of the prosecutors' offices, agreed that the benefits of expungement should be extended to everyone in the community who is potentially eligible for relief.

Remaining issues

One issue that the subcommittee considered but was unable to resolve is whether an expunged conviction could subsequently be used to impeach an individual who testifies at a trial. Impeachment in District of Columbia courts is governed by D.C. Code § 14-305, which prohibits the use of convictions as to which more than ten years has elapsed since the sentence was completed. If an expunged conviction cannot be used for impeachment, then expungement could have the effect of reducing this period to seven years. The great majority of the subcommittee believed that an expunged conviction should not be used to impeach someone who simply is a witness at a trial.

At the same time, many members took a different view in situations where the expunged conviction relates to a defendant in a criminal trial; they felt that expungement should not be used to shield defendants from the impact of a prior conviction if they again run afoul of the law after having a conviction expunged. This is the approach taken by the Youth Act: a conviction that has been set aside pursuant to that Act can be used for impeachment if the person subsequently is charged with another crime and testifies at trial. There is a pending court challenge, however, to whether the Youth Act denies equal protection by treating defendants differently from other witnesses in this regard, or whether it unduly burdens a defendant's right to due process by precluding defense impeachment of government witnesses.

The subcommittee concluded that it should not attempt to resolve the issue at this time, as part of the draft legislation. The issue would become moot, for example, if the D.C Council were to decide not to permit expungement of convictions or, alternatively, if it lengthened the waiting period for expungement of convictions to ten years so as to match the impeachment period established by D.C. Code § 14-305. The issue also will be clarified when the courts rule on the pending challenges to the comparable impeachment issue under the Youth Act. In any event, the subcommittee decided to flag the issue for the D.C. Council, but to leave it unresolved.

A second issue that the subcommittee discussed but did not attempt to resolve is the possibility of adding a provision to the expungement legislation making the deliberate disclosure of expunged information (i.e. sealed or nonpublic information) a criminal offense or cause for removal from government employment. Maryland, for example, has such provisions in its law. There has not been any known problem regarding improper disclosure of records regarding actual innocence cases sealed pursuant at the Superior Court pursuant to Rule 118. There is a greater potential for improper disclosure regarding nonpublic records relating to arrests or convictions that would be expunged pursuant to the proposed legislation because many more persons will have access to them. However, the U.S. Attorney's Office advised the subcommittee that it anticipated working on legislation that would address more broadly the improper disclosure of information by government employees. Thus, the subcommittee decided not to address this issue in the proposed legislation.[19]

[19]The subcommittee did accept and include in the draft legislation a conforming amendment to the Freedom of Information Act offered and drafted by the U.S. Attorney's Office.

Tab 3

A BILL

_____

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

_____

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the “Criminal Record Expungement Act of 2006”.

Sec. 2. Definitions.

For purposes of this Act, the term:

(1) “Completion of the sentence” means the person has been unconditionally discharged from incarceration, commitment, probation, parole, or supervised release, whichever is latest.

(2) “Conviction” means the judgment (sentence) on a verdict or a finding of guilty, a plea of guilty or a plea of nolo contendere; or a plea or verdict of not guilty by reason of insanity.

(3) “Disqualifying arrest or conviction” means:

(A) A conviction in any jurisdiction after the arrest or conviction for which the motion to expunge has been filed;

(B) A pending criminal case in any jurisdiction;

(C) A conviction in the District of Columbia for an ineligible felony or ineligible misdemeanor or a conviction in any jurisdiction for an offense that involved conduct that would constitute an ineligible felony or ineligible misdemeanor if committed in the District of Columbia or prosecuted under the District of Columbia Code, or conduct that is substantially similar to that of an ineligible felony or ineligible misdemeanor.

(4) “Eligible felony” means:

(A) Carrying a pistol without a license (D.C. Official Code § 22-4504(a));

(B) Failure to appear (D.C. Official Code § 23-1327);

(C) Receiving stolen property (D.C. Official Code § 22-3232); and

(D) Unauthorized use of a vehicle (D.C. Official Code § 22-3215).

(5) “Eligible misdemeanor” means any misdemeanor that is not an “ineligible misdemeanor.”

(6) “Ineligible felony” means any felony that is not an “eligible felony."

(7) "Ineligible misdemeanor" means:

(A) An intrafamily offense, as defined in the Domestic Violence in Romantic Relationships Act of 1996, Law 10-237 (D.C. Official Code § 16-1001(5));

(B) Driving while intoxicated, driving under the influence, and operating while impaired (D.C. Official Code § 50-2201.05);

(C) A misdemeanor offense for which sex offender registration is required pursuant to the Sex Offender Registration Act of 1999 (D.C Official Code §22-4001), whether or not the registration period has expired;

(D) The following offenses involving violence or risk of violence or serious interference with another person:

(i) Stalking (D.C. Official Code § 22-404(b));

(ii) Criminal abuse of a vulnerable adult (D.C. Official Code § 22-936(a));

(iii) Interfering with access to a medical facility (D.C. Official Code § 22-1314.02); and

(iv) Possession of a pistol by a convicted felon (D.C. Official Code § 22-4503);

(E) The following offenses involving sexual abuse or misconduct or children:

(i) Failure to report child abuse (D.C. Official Code § 4-1321.07);

(ii) Refusal or neglect of guardian to provide for child under 14 years of age (D.C. Official Code § 22-1102);

(iii) Lewd, indecent or obscene acts (involving a child) (D.C. Official Code § 22-1312(b); 18 DCMR §§ 1312(b)X and 1312(b)Y);

(iv) Disorderly conduct (peeping tom) (D.C. Official Code § 22-1321; 18 DCMR § 1321(1)W);

(v) Obscenity (involving minor) (D.C. Official Code § 22-2201);

(vi) Misdemeanor sexual abuse (D.C. Official Code § 22-3006);

(vii) Misdemeanor child sexual abuse (pending);

(viii) Violating the Sex Offender Registration Act (D.C. Official Code § 22-4015);

(ix) Violating child labor laws (D.C. Official Code §§ 32-201 through 224); and

(x) Attempt abducting, pandering, procuring, compelling minors for purposes of prostitution (D.C. Official Code §§ 22-1803, 2704, 2706, 2707, 2710, 2711, or 2712 (pending));

(F) The following offenses involving theft or dishonesty:

(i) Election/Petition fraud (D.C. Official Code § 1-1001.08);

(ii) Public assistance fraud (D.C. Official Code § 4-218.01 through 218.05);

(iii) Trademark counterfeiting (D.C. Official Code § 22-902(b)(2));

(iv) Attempt trademark counterfeiting (D.C. Official Code §§ 22-1803, 22-902);

(v) Fraud (D.C. Official Code § 22-3222 (b)(2));

(vi) Attempt fraud (D.C. Official Code §§ 22-1803, 3222);

(vii) Credit card fraud (D.C. Official Code § 22-3223 (d)(2));

(viii) Attempt credit card fraud (D.C. Official Code § 22-1803, 3223);

(ix) Misdemeanor insurance fraud (pending);

(x) Attempt insurance fraud (D.C. Official Code §§ 22-1803, 3225.02, .03);

(xi) Telephone fraud (D.C. Official Code §§ 22-3226.06, 3226.10(3));

(xii) Attempt telephone fraud (D.C. Official Code §§ 22-1803, 3226.06, 3226.10);

(xiii) Identity theft, second degree (D.C. Official Code § 22-3227.02, 3227.03(b));

(xiv) Attempt identify theft (D.C. Official Code §§ 22-1803, 3227.02, 3226.03);

(xv) Fraudulent statements or failure to make statements to employee (D.C. Official Code § 47-4104);

(xvi) Fraudulent withholding information or failure to supply information to employer (D.C. Official Code § 47-4105);

(xvii) Fraud and false statements (D.C. Official Code § 47-4106);

(xviii) False statement/dealer certificate (D.C. Official Code § 50 1501.04a3 X); and

(xix) False information/registration (D.C. Official Code § 50 1501.04a3Y);

(G) The following offenses involving traffic violations:

(i) No school bus driver's license (18 DCMR § 200.1);

(ii) False statement on DMV document (18 DCMR § 1104.1);

(iii) No permit - 2nd or greater offense (D.C. Official Code § 50 1401(d));

(iv) Altered title (18 DCMR § 1104.3);

(v) Altered registration (18 DCMR § 1104.4); and

(vi) No commercial drivers license (50 DCMR § 405);

(H) A violation of a professional licensing regulation when a person is applying for a license in that field;

(I) A violation of building and housing code regulations;

(J) A violation of the Public Utility Commission regulations; and

(K) Attempt or conspiracy to commit any of the foregoing offenses (D.C. Official Code § 22-1803, 1805a).

(8) "Minor offense" means a traffic offense, disorderly conduct, or an offense that is punishable by a fine only**,** excluding any ineligible misdemeanor.

(9) "Public" means any person, agency, organization, or entity other than:

(A) Any court;

(B) Any federal, state, or local prosecutor;

(C) Any law enforcement agency;

(D) Any licensing agency with respect to an offense that may disqualify a person from obtaining that license;

(E) Any school, day care center, before or after school facility or other educational or child protection agency or facility;

(F) Any government employer or nominating or tenure commission with respect to:

(i) employment of a judicial or quasi-judicial officer, or

(ii) employment at a senior level government position.

Sec. 3. Expungement of criminal records on grounds of actual innocence.

(a) A person arrested for or charged with the commission of a criminal offense pursuant to the District of Columbia Code or Municipal Regulations whose prosecution has been terminated without conviction may file a motion with the Clerk of the Superior Court at any time to expunge records of the arrest and related court proceedings on grounds of actual innocence.

(b) The burden is on the movant to establish that:

(1) The offense for which the person was arrested or charged did not occur; or

(2) The movant did not commit the offense.

(c) If the motion is filed within four years after the prosecution has been terminated, the movant must satisfy the burden described in subsection (b) by a preponderance of the evidence.

(d) If the motion is filed more than four years after the prosecution has been terminated, the movant must satisfy the burden described in subsection (b) by clear and convincing evidence.

(e) In determining such motions, the court may, but is not required to, employ a rebuttable presumption that the movant is not entitled to relief if the court finds that the government has been substantially prejudiced in its ability to respond to the motion by the delay in its filing, unless the movant shows that the motion is based on grounds which the person could not have raised by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.

(f) An acquittal does not establish a presumption that the movant is innocent or entitled to relief pursuant to this section.

(g) A person whose conviction has been vacated pursuant to D.C. Official Code § 22-4135(g)(2), and whose subsequent prosecution is terminated without conviction may file a motion with the Clerk of the Superior Court pursuant to subsection (a) of this section or any other provision of law.

(h) A person who is found to be actually innocent pursuant to this section or D.C. Official Code § 22-4135(g)(3), shall be entitled to the following relief with respect to such count or counts:

(1) The Court shall order the prosecutor to collect from the prosecutor's office, the law enforcement agency responsible for the arrest and/or the Metropolitan Police Department all records of the movant's arrest in their central files, including without limitation all photographs, fingerprints, and other identification data. The Court shall also direct the prosecutor to arrange for the elimination of any computerized record of the movant's arrest. However, the Court shall expressly allow the prosecutor and the law enforcement agency to maintain a record of the arrest so long as the record is not retrievable by the identification of the movant. The court shall also order the prosecutor to request that the law enforcement agency responsible for the arrest retrieve any of the aforementioned records which were disseminated to pretrial services, corrections, and other law enforcement agencies, and to collect these records when retrieved.

(2) The court shall order the prosecutor to file with the Clerk of the Superior Court, within 60 days, all records collected by the law enforcement agency and in the prosecutor's own possession. These records shall be accompanied by a certification that to the best of the prosecutor's knowledge and belief no further records exist in the prosecutor's own possession and in the possession of the law enforcement agency's central records files or those of its disseminees, or that, if such records do exist, steps have been taken to retrieve them. The Court shall order the Clerk to collect all Superior Court records pertaining to the movant's arrest and cause to be purged any computerized record of such arrest. However, the Court shall expressly allow the Clerk to maintain a record of the arrest so long as the record is not retrievable by the identification of the movant. The Court shall also order the Clerk to file under seal all Superior Court records so retrieved, together with all records filed by the prosecutor pursuant to this paragraph, within 7 days after receipt of such records.

(3) The Court shall summarize in the order the factual circumstances of the challenged arrest and any post-arrest occurrences it deems relevant, and, if the facts support such a conclusion, shall rule as a matter of law that the movant did not commit the offense for which the movant was arrested or that no offense had been committed. A copy of the order shall be provided to the movant or his or her counsel. The movant may obtain a copy of the order at any time from the Clerk of the Court, upon proper identification, without a showing of need.

(4) In a case involving co-defendants in which the Court orders the movant's records sealed, the Court may order that only those records, or portions thereof, relating solely to the movant be sealed. The Court shall order that the movant's name be redacted to the extent practicable from records that are not sealed. The Court may make an in camera inspection of these records in order to make this determination. The Court need not order the redaction of references to the movant that appear in a transcript of court proceedings involving the co-defendant(s). After references to the movant have been sanitized as provided for herein, the Court shall order those records relating to co-defendants returned to the prosecutor or the Clerk.

(5) The Court shall not order the redaction of the movant's name from any published opinion of the trial or appellate courts that refer to the movant.

(6) The Clerk of the Superior Court shall place the records ordered sealed by the Court in a special file, appropriately and securely indexed in order to protect its confidentiality. Unless otherwise ordered by the Court, the Clerk shall reply in response to inquiries concerning the existence of records which have been sealed pursuant to this statute that no records are available.

(i) The effect of relief pursuant to this section shall be to restore the movant, in the contemplation of the law, to the status he or she occupied before being arrested and/or charged. No person as to whom such relief has been granted shall be held thereafter under any provision of law to be guilty of perjury or otherwise giving a false statement by reason of failure to recite or acknowledge his or her arrest, or charge, or trial in response to any inquiry made of him or her for any purpose.

Sec. 4. Expungement of public criminal records in other cases.

(a) A person arrested for, or charged with, the commission of an eligible misdemeanor pursuant to the District of Columbia Code or Municipal Regulations whose prosecution has been terminated without conviction may file a motion to expunge the publicly available records of the arrest and related court proceedings if:

(1) A period of at least two year(s) has elapsed since the termination of the case; and

(2) The movant does not have a disqualifying arrest or conviction.

(b) A person arrested for, or charged with, the commission of any other offense pursuant to the District of Columbia Code or Municipal Regulations whose prosecution has been terminated without conviction may file a motion to expunge the publicly available records of the arrest and related court proceedings if:

(1) A period of at least five years has elapsed since the termination of the case; and

(2) The movant does not have a disqualifying arrest or conviction.

(c) A person who has been convicted of an eligible misdemeanor or an eligible felony pursuant to the District of Columbia Code or Municipal Regulations may file a motion to expunge the publicly available records of the- arrest, related court proceedings, and conviction if:

(1) A period of at least seven years has elapsed since the completion of the movant's sentence; and

(2) The movant does not have a disqualifying arrest or conviction.

(d) The waiting periods in subsections (a), (b), and (c) of this section, before which a motion to expunge cannot be filed, must be satisfied with respect to all of the movant's arrests and/or conviction unless the movant waives in writing the right to seek expungement of an arrest or conviction as to which the prescribed waiting period has not elapsed.

(e) The waiting periods in subsections (a), (b),and (c) of this section may be waived by the prosecutor in writing.

. (f) The movant must seek to expunge all eligible arrests or conviction in the same proceeding unless the movant waives in writing the right to seek expungement with respect to a particular conviction or arrest(s).

(g) In determining whether a movant is eligible to file a motion to expunge because of a conviction, arrest, or pending charge, minor offenses shall not be considered.

(h) The Superior Court shall grant a motion to expunge if it is in the interests of justice to do so. In making this determination, the Court shall weigh the interests of the movant in expunging the publicly available records of his or arrest, related court proceedings, and/or conviction; the community's interest in retaining access to those records, including the interest of current or prospective employers in making fully informed hiring or job assignment decisions

and the interest in promoting public safety; and the community's interest in furthering the movant's rehabilitation and enhancing the movant's employability. In making this decision, the Court may consider:

(1) the nature and circumstances of the offense at issue;

(2) the movant's role in the offense or alleged offense and, in cases terminated without conviction, the weight of the evidence against the person;

(3) the history and characteristics of the movant, including but not limited to the movant’s:

(A) character;

(B) physical and mental condition;

(C) employment history;

(D) prior and subsequent conduct;

(E) history relating to drug or alcohol abuse or dependence and treatment opportunities;

(F) criminal history; and

(G) efforts at rehabilitation;

(4) the number of the arrests or conviction that are the subject of the motion;

(5) the time that has elapsed since the arrests or conviction that are the subject of the motion;

(6) whether the movant has previously obtained expungement or comparable relief under this section or any other provision of law other than by reason of actual innocence; and

(7) any statement made by the victim of the offense.

(i) In a motion filed under subsection (a), the burden shall be on the prosecutor to establish by a preponderance of the evidence that it is not in the interests of justice to grant relief. In a motion filed under subsection (b)**,** the burden shall be on the movant to establish by a preponderance of the evidence that it is in the interests of justice to grant relief. In a motion filed under subsection (c)**,** the burden shall be on the movant to establish by clear and convincing evidence that it is in the interests of justice to grant relief.

(j) A motion to expunge made pursuant to this section may be dismissed without prejudice to permit the movant to renew the motion after further passage of time. The Court may set a waiting period before a renewed motion can be filed.

(k) A motion to expunge made pursuant to this section may be dismissed if it appears that the movant has unreasonably delayed filing the motion and that the government has been prejudiced in its ability to respond to the motion by the delay in its filing, unless the movant shows that the motion is based on grounds which the person could not have raised by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.

(l) If the Court grants the motion to expunge, the Court shall order:

(1) The prosecutor, any law enforcement agency, and any pretrial, corrections, or community supervision agency to remove from their publicly available records all references that identify the movant as having been arrested, prosecuted, and/or convicted. The prosecutor's office and agencies shall be entitled to retain any and all records relating to the movant's arrest and/or conviction in a non-public file**.** The prosecutor's office shall file a certification with the Court within 90 days that, to the best of the prosecutor's knowledge and belief, all references that identify the movant as having been arrested**,** prosecuted, and/or

convicted have been removed from the publicly available records of the prosecutor's office and the affected agencies.

(2) The Clerk to remove or eliminate all publicly available Superior Court records that identify the movant as having been arrested, prosecuted and/or convicted. The Clerk shall be entitled to retain any and all records relating to the movant's arrest, related court proceedings**,** and/or conviction in a non-public file**.**

(3) In a case involving co-defendants in which the Court orders the movant's records expunged, the Court may order that only those records, or portions thereof, relating solely to the movant be redacted. The Court need not order the redaction of references to the movant that appear in a transcript of court proceedings involving the co-defendant(s).

(4) The Court shall not order the redaction of the movant's name from any published opinion of the trial or appellate courts that refer to the movant.

(5) Unless otherwise ordered by the Court, the Clerk and any other agency shall reply in response to inquiries from the public concerning the existence of records which have been expunged pursuant to this Act that no records are available.

(m) No person as to whom such relief has been granted shall be held thereafter under any provision of law to be guilty of perjury or otherwise giving a false statement by reason of failure to recite or acknowledge his or her arrest, or charge, or trial or conviction in response to any inquiry made of him or her for any purpose except that the expungement of records under this provision does not relieve a person of the obligation to disclose the expunged arrest or conviction in response to any direct question asked in connection with jury service or in response to any direct question contained in any questionnaire or application for a position with any person, agency, organization, or entity defined in Section 2(9)(A) – (F).

Sec. 5. Motion to expunge.

(a) A motion to expunge filed with the court pursuant to this chapter shall state grounds upon which eligibility for expungement is based and facts in support of the person's claim. It shall be accompanied by a statement of points and authorities in support thereof. The person may also file any appropriate exhibits, affidavits, and supporting documents.

(b) A motion pursuant to Section 4 must state all of the movant's arrests and convictions and must either (1) seek relief with respect to all arrests and any conviction eligible for relief or (2) waive in writing the right to seek expungement of the records pertaining to any omitted arrest(s) or conviction, including any arrest(s) or conviction as to which the relevant waiting periods in subsections 4(a), (b), and (c) have not elapsed. If the motion does not comply with this requirement or the waiting period has not elapsed for any arrest or conviction that is eligible for expungement, then the motion shall be dismissed without prejudice unless the person executes a written waiver with respect to that arrest or conviction.

(c) A copy of the motion shall be served upon the prosecutor.

(d) The prosecutor shall not be required to respond to the motion unless ordered to do so by the court.

Sec. 6. Review by court.

(a) If it plainly appears from the face of the motion, any accompanying exhibits and documents, and the record of any prior proceedings in the case, that the person is not eligible for relief or is not entitled to relief, the court, may dismiss or deny the motion. In the event the motion is not dismissed or denied after initial review, the court shall order the prosecutor to file a response to the motion.

(b) Upon the filing of the prosecutor's response, the court shall determine whether a hearing is required.

(c) If the court determines that a hearing is required, the hearing shall be scheduled promptly.

(d) At the hearing, the person and the prosecutor may present witnesses and information by proffer or otherwise. Hearsay evidence shall be admissible.

(e) An order dismissing, granting or denying the motion shall be in writing and include reasons.

(f) The court shall not be required to entertain a second or successive motion for similar relief on behalf of the same movant regarding the same offense(s), arrest(s) or conviction unless the previous motion was dismissed or denied without prejudice.

(g) An order dismissing, granting or denying a motion for expungement is a final order for purposes of appeal.

Sec. 7. Availability of expunged records.

(a) Records sealed on grounds of actual innocence pursuant to Section 3 shall be opened only on order of the Court upon a showing of compelling need, except that the movant shall be entitled to a copy of the sealed records upon request. A request for access to such sealed records may be made ex parte.

(b) Records retained in a non-public file pursuant to Section 4 shall be available:

(1) To any court, prosecutor, or law enforcement agency for any lawful purpose, including but not limited to:

(A) The investigation or prosecution of any offense;

(B) Determining whether a person is eligible to have an arrest or conviction expunged;

(C) Determining conditions of release for a subsequent arrest;

(D) Determining whether a person has committed a second or subsequent offense for charging or sentencing purposes;

(E) Determining an appropriate sentence if the person is subsequently convicted of another crime; and

(F) Employment decisions.

(2) For use in civil litigation relating to the arrest or conviction;

(3) Upon order of the Court for good cause shown;

(4) To any person or entity identified in Section 2(9)(D), (E), or (F), but only to the extent that such records would have been available to such persons or entities before relief under Section 4 was granted. Such records may be used for any lawful purpose, including but not limited to:

(A) Determining whether a person is eligible to be licensed in a particular trade or profession; and

(B) Employment decisions.

(5) To the movant or the authorized representative of the movant upon request, but only to the extent that such records would have been available to the movant before relief under Section 4 was granted..

Sec. 8. Savings provision.

This Act does not supersede any other provision of the D.C. Official Code providing for the expungement, sealing, or setting aside of criminal arrests or convictions.

Sec. 9. Conforming amendments.

(a) Section 204 of Title II of the District of Columbia Administrative Procedures Act, effective March 25, 1977 (D.C. Law 1-96; D.C. Official Code § 2-534) is amended by adding a new paragraph to read as follows:

"(13) Information that is ordered expunged and restricted from public access pursuant to the "Criminal Records Expungement Act of 2006".

(b) Chapter 19 of Title 23 of the District of Columbia Official Code is amended as follows:

(1) Section 23-1901 is amended as follows:

(A) Subsection (b)(4) is amended to read as follows:

"(4) Be present at all court proceedings related to the offense, including the sentencing, and release, parole, expungement, and post-conviction hearings, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony or where the needs of justice otherwise require.".

(B) Subsection (b)(7) is amended to read as follows:

"(7) Information about the conviction, sentencing, imprisonment, detention, and release of the offender, and about any court order to expunge the offender's criminal records.".

(2) Section 23-1902(d)(1) is amended to read as follows:

"(1) Scheduling of a release, parole, expungement, or post-conviction hearing for the offender.".

(3) Section 23-1904 is amended as follows:

(A) Subsection (a) is amended to read as follows:

"(a) Crime victims shall have the right to be present at the defendant's sentencing, release, parole, post-conviction, and expungement hearings.".

(B) Subsection (e) is amended to read as follows:

"(e) Crime victims shall have the right to make a statement at the defendant's sentencing and expungement hearings. The absence of the crime victim shall not preclude the court from holding the sentencing or expungement hearings.".

Sec. 10. Fiscal impact statement.

The Council adopts the fiscal impact statement of the Chief Financial Officer as the fiscal impact statement required be section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat, 813; D.C. Official Code § 1-206.02(c)(3)).

Sec. 11. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of Congressional review as provided in section 602(c)(2) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(2)), and publication in the District of Columbia Register.

INTRODUCTION

"Expungement" is frequently the term used for the process of erasing an individual's criminal record – the official records regarding arrests and/or a conviction -- to afford citizens the opportunity to put past contact with the criminal justice system behind them. In broad terms, there are three different categories of cases to which expungement may be applied. The first is cases of "actual innocence" in which it is conclusively determined that a person did not commit the offense for which he or she was arrested (or possibly even convicted). The second category involves cases where charges were dropped prior to trial or the defendant was acquitted at trial. In these cases, the person may or may not have committed an offense.[1] The third category involves cases where the defendant has been convicted of committing the offense. Obviously, persons fitting in the first category would be considered the most worthy of relief so that they are not harmed by a criminal record that should never have existed. Cases falling into the second or third categories are more debatable and policy judgments must be made about whether and when to grant relief to individuals in those categories. Nonetheless, thirty-six (36) of the fifty states permit individuals to clear their records if the charges against them are dropped or they are acquitted at trial, and a substantial number of states (24), provide for expungement of convictions in some instances.

The District of Columbia has several existing expungement provisions that provide for expungement in certain sets of circumstances ranging from actual innocence to convictions, but they are neither comprehensive nor coherent in their coverage. Furthermore, the most significant expungement provision was created by the courts rather than the legislature. The majority of the states, including Maryland and Virginia, have expungement statutes that reflect policy judgments by their lawmakers about when and under what circumstances the benefits of expungement will be made available to individuals. The District of Columbia should also have comprehensive, coherent legislation on this important subject.

The Council for Court Excellence (CCE) undertook to address the subject of expungement and to prepare a report that would summarize the existing state of the law, discuss key issues, and set forth options that the Council of the District of Columbia might wish to consider in enacting legislation on the subject. Founded in 1982, CCE is a nonpartisan, civic organization based in the District of Columbia whose purposes include identifying and promoting court reforms, improving public access to justice, and increasing public understanding and support of our justice system. The Council's Board of Directors is composed of members of the legal, business, civic, and judicial communities. We have worked closely with the D.C. Council and its Judiciary Committee on many issues, including the 1994 Probate Reform Act, the Office of Administrative Hearings Establishment Act of 2001 and subsequent amendments, as well as on a number of sentencing related matters, including the Advisory Commission on Sentencing Establishment Act of 1998, the Truth in Sentencing Amendment Act of 1998, and the Sentencing Reform Act of 2000.

[1]Even in cases of an acquittal after trial, the acquittal does not legally establish that the defendant was actually innocent, but rather that the judge or jury had a reasonable doubt as to the defendant's guilt. Further proceedings would be necessary to establish that the defendant is actually innocent. (In cases where the defendant can show "actual innocence," the defendant would fall into the first category, as noted above.)

Tab 4

CONVICTIONS	NON-CONVICTIONS
A 1. All Felonies, except: CPWL, BRA, RSP, UUV 2. Excluded misdemeanors, (*e.g.*, sex offenses, crimes against children, DWI and Domestic Violence.) <u>*Not Eligible*</u>	**B** All Felonies and Excluded misdemeanors, <u>*Eligible*</u> *To GRANT, court finds individual's and community's interests in rehabilitation and employability outweigh community's safety/other interests.* *Burden of proof: Preponderance of Evidence*
C All other Misdemeanors, and four felonies: CPWL, BRA, RSP, UUV <u>*Eligible*</u> *To GRANT, court finds individual's and community's interests in rehabilitation and employability outweigh community's safety/other interests.* *Burden of proof: Clear and convincing evidence*	**D** All other Misdemeanors. <u>*Eligible*</u> *Presumptively entitled to expungement, unless government can demonstrate not in interest of justice to grant.* *Burden of proof: Preponderance of Evidence*

Tab 5

Regional Analysis of Expungement Statutes

A. Maryland:

1. Expungement v. sealing (Crim. Pro. Art. 10-101):

   a. "Expunge" is defined as "to remove information from public inspection in accordance with this subtitle."

   b. "Expungement" is defined as "with respect to a court record or a police record means removal from public inspection: (1) by obliteration; (2) by removal to a separate secure area to which persons who do not have a legitimate reason for access are denied access; or (3) if access to a court record or police can be obtained only by reference to another court record or police record, b the expungement of it or the part if it that provides access."

   c. Scope of expungement does not include: (1) minor traffic violations, (2) published opinions of court, (3) a cash receipt or disbursement record, (4) transcript of court proceedings in a multiple defendant case, (5) an investigatory file, (6) "a record of the work product of a law enforcement unit that is used solely for police investigation." (Crim Pro. Art 10-102).

2. Standard of proof/restrictions/eligibility requirements (Crim. Pro. Art. 10-105):

   a. For arrest only cases, the police "shall" expunge, but may "deny" the request if the citizen is not eligible. The citizen may appeal the denial to the District Court. (Crim. Pro. Art. 10-103).

   b. For nolle prosequi before service cases, the court "may" expunge, unless the State objects and shows cause why the record should not be expunged. (Crim. Pro. Art. 10-104).

   c. If the State does not object, the court "shall" issue an order requiring the expungement.

   d. If the State objects, the court, after a hearing, "shall" issue an order requiring the expungement if the court finds that the person "is entitled" to expungement.

e. The court is required to advise the citizen of the right to expungement in cases in which the disposition of all the charges is potentially eligible. (Crim. Pro. Art. 6-232).

f. For arrest only cases, the citizen may not request the expungement unless the statute of limitations has run for all tort claims arising from the arrest, unless the citizen gives a release of all such claims, and there is an 8 year deadline for filing the request that runs from the date of the arrest. (Crim. Pro. Art. 10-103).

g. For acquittals, nolle prosequi, or dismissals, the citizen may not file for at least three years, unless the citizen gives a release of all tort claims.

h For Probation Before Judgment cases or stet case with conditions or drug or alcohol treatment, the citizen may not file earlier than the later of (1) discharge from probation or the completion of treatment, or (2) three years after the disposition.

i. For nolle prosequi cases with a condition of drug or alcohol treatment, the citizen may not file earlier than the completion of treatment.

j. For pardons, the citizen may not file for the expungement more than 10 years after the pardon was awarded.

k. For a compromised assault case or a stet, the citizen may not file within three years of the disposition.

l. Notwithstanding the above, the "court may grant a petition for expungement at any time on a showing of good cause."

m. Except for acquittals, arrests only, dismissals, and nolle prosequi before service cases, the citizen is not eligible for expungement if (1) convicted of a subsequent crime (except minor traffic violations), or (2) has a pending charge.

3. Types of dispositions available (Crim. Pro. Art. 10-105):

a. arrest only, no charge filed (Crim. Pro. Art. 10-103).
b. nolle prosequi before service (Crim. Pro. Art 10-104).
c. acquittal;
d. charge dismissed;

e. probation before judgment (except DUI and motor vehicle assaults and killings);
f. nolle prosequi;
g. stetted cases;
h. an assault case compromised under MD law by restitution to the victim;
i. cases transferred to juvenile court
j. pardons, if the person convicted of only one criminal act and it is not a crime of violence.

4. Specific Types of Crimes:

a. Juveniles – if charges transferred to juvenile court then an otherwise eligible person may petition juvenile court for expungement. (Md. Rule 11-601).

b. Domestic Violence – if the victim spouse has asserted the marital privilege, the record of the assertion is NOT expunged even if the charge is expunged – a "separate record" of the assertion is created – it is not eligible for expungement, but is also only available to the court, the State's Attorney and defense counsel. (Courts & Judicial Pro. Art. 9-106).

5. DNA (Md. Code, Public Safety Art. 2-511):

Available if the underlying offense is eligible for expungement.

6. Access for Other Purposes (Crim. Pro. Art. 10-108):

a. A court order is required to open or review the record.

b. After notice to the citizen, a hearing and good cause found, the court may order opening or reviewing of the record.

c. In the alternative, on ex parte proof in a verified petition to the court, the State's Attorney may obtain an order to review, but not copy, the record, if the record is needed by law enforcement for an ongoing investigation AND the investigation will be jeopardized or life or property endangered without immediate access.

7. Effect of expungement (Crim. Pro. Art. 10-109)

a. Disclosure of expunged information may not be required by any employer or educational institution from applicants or by a unit of the State government for licensing purposes.

b. A person need not disclose information concerning an expunged charge when answering a question concerning a criminal charge that did not result in conviction or a pardoned conviction.

c. Refusal to disclose information about expunged charges may not be the sole reason for an employer to discharge or refuse to hire or for a State agency to deny an application.

d. Violation of this statute is a crime – a misdemeanor subject to a $1,000 fine or one year imprisonment for each violation. State employees violating the section are subject to removal from public service.

B. Virginia:

1. Expungement v. sealing:

   Virginia's statute (Va. Code 19.2-392.2) permits "expungement of police and court records."

2. Standard of proof/restrictions/eligibility requirements (Va Code 19.2-392.2):

   a. If no prior record and arrest for a misdemeanor, then citizen "shall be entitled," unless "good cause" shown to the contrary by Commonwealth.

   b. If charge dismissed after court finds the person arrested is not the person named in the charging document (improper arrest), the court "shall enter an order requiring expungement."

   c. Otherwise, court must find continued record "causes or may cause . . . manifest injustice" to order expungement.

3. Types of dispositions available (Va Code 19.2-392.2):

   a. acquittal;
   b. nolle prosequi or dismissal;
   c. pardon;
   d. identity theft (also Va Code 18.2-186.5);
   e. bad faith or malicious intent in filing child abuse or neglect complaint or report (also Va. Code 63.2-1514).

4. Specific Types of Crimes:

   a. Juveniles –Records of circuit court proceedings in which the court deals with a child or juvenile in the same manner as the juvenile court are subject to the same destruction procedures as those of the juvenile court. (Va. Code 16.1-306 and 16.1-307)

   b. Domestic Violence – First Time Offender status for domestic assault is expressly barred from expungement. (Va Code 18.2-57.3).

c. Child Abuse and Neglect – Records of unfounded investigations and complaints and reports determined not to be valid that were required to be maintained in the child abuse and neglect information system's central registry shall be purged after one year from the date of the complaint or report if there are no subsequent complaints or reports regarding the same child or the subject of the complaint or report (or three years if request is made for an additional retention period by the subject). The record of family assessments shall be purged after three years from the date of the complaint or report if no subsequent complaints or reports regarding the same child or subject are made. Records of complaints and reports are able to be immediately purged if, through filing a civil action, it has been determined that the complaint or report was made in bad faith or with malicious intent. (Va. Code 63.2-1514.)

5. DNA (Va Code 19.2-310.7):

Only available if the felony conviction has been reversed and the case dismissed.

Tab 6

Note: This information is based solely on state expungement/sealing statutes and does not include analysis of other statutes (i.e. eligibility criteria for probation without judgment) or related case law.

	AL	AK	AZ	AR	CA	CO	CT	DE	FL	GA	HI	ID	IL	IN	IA	KS	KY	LA	ME	MD	MA	MI	MN	MS	MO
No expungement/sealing (3)		X																							
No adult expungement/sealing (1)	X																								
Arrests (36)				X	X		X	X	X	X	X	X	X	X		X	X	X	X	X	X		X	X	X
Misdemeanor arrests only (1)																									
Misdemeanor arrests w/ exceptions (1)																									
Drug possession or use arrests only(1)																							X		
Misdemeanor and felony arrests (25)				X	X		X	X		X	X	X		X		X	X		X	X	X				X
Misdemeanor and felony arrests w/ exceptions (8)									X				X					X						X	
Eligibility limited if prior or subsequent convictions, arrests or pending cases (23)								X	X	X		X	X	X		X	X			X	X				X
Convictions (24)			X			X									X	X	X				X	X	X*	X**	X
Misdemeanor convictions only (1)																									
Misd. convictions with exceptions (2)																	X								
Alcohol-related convictions only (5)						X									X										X
Drug possession or use convictions only (2)																							X		
Misd. and felony convictions (2)																					X				
Misdemeanor and felony convictions with exceptions (12)			X													X						X		X	
Eligibility limited if prior or subsequent convictions, arrests or pending cases (22)						X									X	X	X				X	X		X	X
Deferred sentencing/prosecution (10)				X							X				X						X			X	
Drug possession or use or alcohol related charges only (6)				X							X										X			X	
Misdemeanor and felony cases with exceptions (3)															X										
Eligibility limited if prior or subsequent convictions, arrests or pending cases (10)				X							X				X						X			X	
Applicant entitled to exp./sealing assuming conditions met (12)						X	X							X	X				X		Xa				
Expungement/sealing decision is discretionary (37)				X	X			X	X	X	X	X	X			X	X	X		X	Xc	X	X	X	X
Law enforcement access to expunged/sealed records (26)				X				X	X		X		X			X		Xf	X	X	X		X		
Licensing boards or certain employers (including law enf.) have access to records (16)				X				X	X		X		X			X		Xf	X				X		

Xa = arrests
Xc = convictions/probation without judgment
Xd = conviction for drug possession
Xf = felonies
X* = if convicted prior to 1976
X**= if pled guilty prior to 1983

Note: This information is based solely on state expungement/sealing statutes and does not include analysis of other statutes (i.e. eligibility criteria for probation without judgment) or related case law.

	MT	NE	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	SD	TN	TX	UT	VT	VA	WA	WV	WI	WY
No expungement/sealing (3)							X																	X	
No adult expungement/sealing (1)																									
Arrests (36)		X		X		X		X		X	X	X	X	X	X	X	X	X	X		X		X		X
Misdemeanor arrests only (1)														X											
Misdemeanor arrests w/ exceptions (1)						X																			
Drug possession or use arrests only(1)																									
Misdemeanor and felony arrests (25)		X		X				X		X					X	X	X		X		X		X		X
Misdemeanor and felony arrests w/ exceptions (8)											X	X	X					X							
Eligibility limited if prior or subsequent convictions, arrests or pending cases (23)								X		X	X	X	X	X	X		X	X	X				X		X
Convictions (24)			X	X	X				X	X	X	X	X	X	X			X	X			X			X
Misdemeanor convictions only (1)																									X
Misd. convictions with exceptions (2)											X														
Alcohol-related convictions only (5)													X					X							
Drug possession or use convictions only (2)									X																
Misd. and felony convictions (2)										X															
Misdemeanor and felony convictions with exceptions (12)			X	X	X							X		X	X				X			X			
Eligibility limited if prior or subsequent convictions, arrests or pending cases (22)			X	X	X				X	X	X	X	X	X	X			X	X			X			X
Deferred sentencing/prosecution (10)	X					X		X									X			X					
Drug possession or use or alcohol related charges only (6)						X		X																	
Misdemeanor and felony cases with exceptions (3)	X																X								
Eligibility limited if prior or subsequent convictions, arrests or pending cases (10)	X					X		X									X			X					
Applicant entitled to exp./sealing assuming conditions met (12)						Xa		Xa	X				Xd		Xa	X									
Expungement/sealing decision is discretionary (37)		X	X	X	X	Xc		Xc		X	X	X	X	X	Xc		X	X	X	X	X	X	X		X
Law enforcement access to expunged/sealed records (26)		X		X	X					X	X	X	X	X	X	X	X		X		X	X	X		
Licensing boards or certain employers (including law enf.) have access to records (16)		X	X	X	X					X				X					X						

Xa = arrests
Xc = convictions/probation without judgment
Xd = conviction for drug possession
Xf = felonies
X* = if convicted prior to 1976
X**= if pled guilty prior to 1983

Tab 7

State	Arrest v. Conviction	Type of Offense	Eligibility requirements	Post-expungment access
Alabama	No expungement for adults			
Alaska Stat.	No expungement except for mental health commitment			
Arizona, A.R.S. 13-907	Conviction	Any offense except those "involving infliction of serious physical injury" or "the use or exhibition of a deadly weapon or dangerous instrument"; require sex offender registration or a finding of sexual motivation; where the victim is a minor; and certain traffic offenses		
Arkansas, ACA 5-64-407	Probation without judgment	Possession of a controlled substance conviction ACA 5-64-407; cannot expunge for drunk driving ACA 5-65-108, -308 or for sex offense with victim under 18, 16-93-303.	No prior or subsequent record of drug use and fulfills probation and treatment and gets charges dismissed. ACA 5-64-407. Sex offenders still have to register after expungement. ACA 12-12-905.	Criminal justice agencies for criminal justice purposes as other laws permit, ACA 12-12-1008(d), or in connection with employment applications, or a prosecution, or a sentencing for a subsequent conviction, 16-90-903.
Arkansas, ACA 16-90-906	Arrest	Any offense	Eligible if charges dismissed or person is acquitted.	
California Penal Code sec. 851.8	Arrest	All offenses	If no accusatory pleading filed, can petition law enforcement agency with jurisdiction and agency can grant upon a determination of factual innocence and concurrence of prosecutor; can appeal to superior court; if pleading is filed but defendant not convicted, same process but prosecution notified 10 days before hearing; court can also order records sealed sua sponte after acquittal.	
Colorado, CRS 19-1-306 and 42-2-121(5)(a)	Conviction	DMV shall expunge all records concerning a conviction for driving with a BAC of at least 0.02 to 0.05 while under 21 years of age if no other convictions and fines/restitution is paid.		

State	Arrest v. Conviction	Type of Offense	Eligibility requirements	Post-expungment access
Connecticut, 54-142a(a)	Arrest	All offenses	Whenever the accused is found not guilty or the charge is dismissed, all records shall be erased.	
Delaware, 10 Del. Code sec. 1001	Arrest	All offenses	If charged and acquitted or charges are dismissed and court finds manifest injustice, court shall expunge; if defendant has previous conviction it is prima facie evidence of no manifest injustice.	Law enforcement agencies can have access to expunged information for hiring purposes and for lawful investigation of felonies.
Florida	Arrest	Expungement not available for certain sex crimes involving vulnerable populations and serious dangerous crimes (aggravated assault, murder, kidnapping, sex offenses, etc.).	Eligible only if the charges were dismissed or nolle processed (before or during adjudication); if charges not dismissed prior to trial, adjudication, or witholding of adjudication, must wait 10 years before applying for expungement; cannot have any prior convictions for criminal offenses or adjudicated delinquent for a felony or certain serious misdemeanors; can only have more than one arrest expunged if the additional arrests are directly related to the first arrest.	Criminal justice agencies can have access to expunged records for sentencing, hiring and criminal investigation purposes. Fla Stat. 943.0585. Cannot deny arrest if the person applies for employment in criminal justice, education or child and family services agency, applies for admission to Florida bar, or is a defendant in a subsequent criminal prosecution.
Georgia, OCGA sec. 35-3-37	Arrest	All offenses	Eligible if an arrest is dismissed without prosecution, no other charges are pending, no conviction for the same or similar offense within last five years excluding any period of incarceration; expungement shall not occur if an indictment is filed and charges were dismissed because of plea, prosecution was barred from introducing certain evidence, charges were dismissed for judicial economy, conduct was part of pattern of criminal activity, defendant had diplomatic immunity, or defendant completed diversion program.	
Hawaii, HRS sec. 706-622.5	Probation without judgment	Any first time conviction for use or possession of drugs	Can get one time expungement if defendant is nonviolent, gets treatment and fulfills probation	

State	Arrest v. Conviction	Type of Offense	Eligibility requirements	Post-expungment access
Hawaii, HRS sec. 831-3.2	Arrest	All offenses	If charged and not convicted of a crime, eligible for expungement unless conviction not obtained because of bail forfeiture, defendant fled prosecution, or defendant acquitted because of insanity	Court can access expunged records for sentencing; state or federal governments can access for hiring purposes for position affecting national or state security; law enforcement agencies can access when acting within scope of their duties.
Idaho, Code sec. 67-3004	Arrest	All offenses	Any person arrested or issued a summons not subsequently charged or subsequently acquitted may have fingerprint and criminal history record expunged pursuant to a written request.	
Illinois	Arrest	Misdemeanors and felonies; no sex offenses against minors under 18; does not apply to certain vehicle and sex offenses and crimes of violence.	Eligible if charged and not convicted and no previous conviction, can apply for expungement after 2 or 5 years (depending on charge); eligible if pardoned; if conviction is set aside and court determines by clear and convincing evidence that defendant is factually innocent, court shall enter expungement order.	Law enforcement agencies can access expunged records in performance of their duties, including as part of hiring process, 20 ILCS 2630/12.
Indiana Code Ann. 35-38-5-1	Arrest	All offenses	Whenever an arrest is made but no charges brought or charges dropped because of mistaken identity, no offense committed or an absence of PC, expungement petition shall be granted unless there is a record of other offenses or charges pending other than minor traffic offenses.	
Iowa sections 123.46, 907.9	Conviction and probation without judgment	Public intoxication (conviction) (123.46); all offenses except forcible felonies, sexual abuse committed by a mandatory reporter of child abuse when the victim is under 18, lascivious acts with a child, APO, certain DWI offenses, contempt, certain drug offenses involving methamphetamine, and offenses with mandatory minimums (if conviction deferred). 907.3.	If two years have passed, person may petition the court for exoneration and if no other criminal convictions, other than certain misdemeanors, the person shall be exonerated as a matter of law. 123.46 (public intoxication conviction); if defendant completes probation and judgment has been deferred, court shall expunge criminal record, 907.9.	

State	Arrest v. Conviction	Type of Offense	Eligibility requirements	Post-expungment access
Kansas	Arrest and conviction	All offenses (arrest) and all offenses except rape, child sex offenses, criminal sodomy, murder, voluntary and involuntary manslaughter and sexual battery (conviction). K.S.A. sec. 12-4516a and 21-4619.	Eligible if convicted of *city ordinance* and 3 years have elapsed and sentence is satisfied or discharged from probation, parole or supervised sentence or diversion program completed. Must wait 5 years if convicted of vehicular homicide, certain serious traffic offenses, or perjury. Court shall order expungement if no felony conviction during the past 2 years, no pending proceedings, circumstances warrant expungement and expungement is consistent with public welfare. K.S.A. sec. 12-4516. Court shall order expungement for *arrest records* if court finds no PC, defendant is not guilty, or the expungement would be in the best interests of justice and charges have been dismissed or no charges are likely to be filed. K.S.A. sec. 12-4516a. Eligible if convicted of *state offense* and 3 or more years (or 5 for more serious crimes) have elapsed since sentence satisfied. Court shall order if no felony conviction for 2 years, no proceedings pending, the circumstances and behavior of petitioner warrant expungement and expungement is consistent with the public welfare. K.S.A. sec. 21-4619.	Expunged convictions can be considered for sentencing purposes and can be disclosed for applications to be a private detective, security guard, social services employee, bar license, lottery, racing or gaming commission employee, or commercial driver's license. They can also be disclosed in a subsequent prosecution for an offense which requires as an element a prior conviction of the type expunged. K.S.A. sec. 12-4516. Criminal justice agencies can have access to the records. K.S.A. sec. 21-3110a.
Kentucky, KRS sec. 431.078	Conviction	Misdemeanors except sex offenses against a child	Eligible 5 years after completion of sentence and no previous felony conviction or misdemeanor conviction within last 5 years, no expungement applications since conviction, and no proceedings pending.	
Kentucky, KRS sec. 431.076	Arrest	All offenses	Eligible if found not guilty or charges have been dismissed without prejudice and not in exchange for a guilty plea, and no charges are pending. Eligible 60 days following acquittal or dismissal.	

State	Arrest v. Conviction	Type of Offense	Eligibility requirements	Post-expungment access
Louisiana, La. RS sec. 44:9.	Arrest	Misdemeanors (except no drunk/drug driving arrests) and felonies (except sex offenses involving a child under 17).	If misdemeanor, eligible if arrested and not charged or charges dismissed or acquitted; if felony, eligible if arrested and not charged or charges dismissed or acquitted and record is without substantial probative value as a prior act for any subsequent prosecution.	Misdemeanor records shall not be used for any investigative purpose; felony records can be used in pursuing prosecution or for investigative purposes, including to "confirm the qualifications of any person for any privilege or license authorized by law."
Maine, 16 MRS sec. 613	Arrest	All offenses	"Nonconviction data" (criminal history record info including arrest without prosecution within one year (no arraignment), no charges, indefinite postponement of prosecution), dismissal, acquittal or pardon) is only reviewable by express statutory or court order authorization, specific agreements with a criminal justice agency or research activities.	Criminal justice agencies can have access to "nonconviction data" "for the purpose of the administration of criminal justice and criminal justice agency employment."
Maryland Criminal Procedure Code Ann sec. 10-103	Arrest and conviction (if pardoned)	All offenses (arrest) and all offenses except crimes of violence (conviction and pardon).	Eligible if arrested but not charged, must give notice of request for expungement within 8 years; law enforcement unit investigates and expunges if facts on notice are true; can appeal to district court. If charged and not convicted or charged with one criminal act not a crime of violence and pardoned, eligible for expungement if no subsequent convictions (except minor traffic violations) or pending proceedings.	Court may grant an ex parte order allowing access on a verified petition filed by a State's Attorney if (i) the record is needed by a law enforcement unit for a pending criminal investigation; and (ii) the investigation will be jeopardized or life or property will be endangered without immediate access to the expunged record. Sec. 10-108.
Massachusetts ALM GL ch. 94C, sec. 34	Arrest and Probation without judgment (possession of controlled substance)	Possession of controlled substance	Eligible if charged, has no previous conviction of drug offense or felony, has had case continued or has been convicted and placed on probation and does not violate probation conditions; court may dismiss charges and expunge records at end of probation.	Law enforcement records that are not public records shall not be sealed.

State	Arrest v. Conviction	Type of Offense	Eligibility requirements	Post-expungment access
Massachusetts ALM GL ch. 276, sec. 100A, 100C	Arrest and conviction	All offenses	For misdemeanor convictions, eligible 10 years after sentence; for felony convictions, eligible 15 years after sentence; cannot have been found guilty of any criminal offense within last 10 years. If arrested and found not guilty or charges dismissed, commissioner of probation shall seal records.	
Michigan, MCL 780.621	Conviction	Misdemeanors and felonies except felony with life imprisonment maximum and certain sexual offenses.	Eligible five years after imposition of sentence or completion of term of imprisonment (whichever occurs later) if only one conviction on record; granted if circumstances and behavior warrant set aside and doing so is consistent with public welfare.	
Minnesota Stat. Sec. 152.18	Conviction	Possession of marijuana	Allows anyone found guilty of possession of small amount of marijuana prior to 1976 to petition for expungement.	
Minnesota Stat. Sec. 609A.02	Arrest	Possession of a controlled substance	Upon dismissal and discharge of proceedings, can petition for expungement. Expungement can be granted only upon clear and convincing evidence that it would yield a benefit to the petitioner commensurate with disadvantages to the public and public safety.	An expunged record may be opened for purposes of a criminal investigation, prosecution or sentencing upon an ex parte court order. It can be opened for hiring purposes of a criminal justice agency without a court order.
Mississippi Code Ann. Sec. 41-29-150	Arrest and Probation without judgment	Possession of controlled substance or paraphernalia	Can apply for expungement if probation fulfilled, judgment deferred and charges discharged, person has not reached 26th birthday.	
Mississippi Code Ann. Sec. 99-15-57	Arrest and conviction (prior to 1983)	All offenses except sex offenses, crimes against persons, and drug distribution offenses.	Eligible if pled guilty to offense prior to 1983, had no prior convictions and served sentence. Also eligible if arrested for a misdemeanor and not formally charged or prosecuted within 12 months of arrest. Sec. 99-15-59.	
Missouri, sec. 577.054 RS Mo.	Conviction	First time alcohol-related misdemeanor offense	Eligible not less than 10 years after offense if no other alcohol-related convictions since first offense.	

State	Arrest v. Conviction	Type of Offense	Eligibility requirements	Post-expungment access
Missouri sec. 610.122 RS Mo.	Arrest	All offenses	Eligible if court determines that there was no PC for the arrest, no charges will be pursued, the applicant has no prior or subsequent misdemeanor or felony convictions and did not receive a suspended sentence, and no related civil action is pending; applicant may not bring any subsequent action related to the arrest.	
Montana	Probation without judgment	All offenses (except offenses with mandatory minimum penalties). If certain sex offenses and the victim was under 16, the first 30 days of the sentence may not be deferred or suspended. If certain serious violent offenses, sexual assaults, and drug distribution offenses, the first 2 years may not be deferred or suspended. If deliberate homicide, first 10 years may not be deferred or suspended. 46-18-205.	Eligible if defendant received a deferred sentence and withdrew plea of guilty or nolo contendere, and court struck guilty verdict and dismissed charges. MCA sec. 46-18-204.	
Nebraska, RRS Neb. Sec. 29-3523	Arrest	All offenses	Records of arrests where no prosecution was completed or pending after one year shall not be disseminated publicly. A person is also eligible for expungement if he can show by clear and convincing evidence that the arrest was due to error by the arresting law enforcement agency.	Exceptions to release of records are if the person is currently the subject of a separate prosecution or correctional control, is currently an announced candidate for or holder of public office, is the subject of anonymous survey information, or requests release of the information.
Nevada	Conviction	All offenses except crimes against children and sex offenses or serious felonies (see distinction).	Depending on the seriousness of the offense, person may petition for expungement 3, 7, 10, 12 or 15 years after sentence completed. Court may grant if no convictions other than minor traffic violations since original sentence. NRS 179.245. A person may also petition for expungement upon completing a program for re-entry if the person was convicted for a single felony that did not involve use or threatened use of force. NRS sec. 179.259.	A professional licensing board is entitled to inspect a sealed record (after completion of re-entry program) for the purposes of determining suitability for a license or liability for misconduct. NRS sec. 179.259.

State	Arrest v. Conviction	Type of Offense	Eligibility requirements	Post-expungment access
New Hampshire, RSA 651:5.	Arrest and conviction	All offenses (arrest) and all offenses except any violent crime, any crime of obstruction of justice, or any offense to which petitioner was sentenced to an extended term of imprisonment (conviction).	Anyone not prosecuted or found not guilty may petition for annulment of criminal records. Depending on the seriousness of the offense, any person convicted of a crime may petition one, 3, 5 or 10 years after completing sentence, and only every 3 years if rejected the first time. People convicted of more than one offense are eligible as long as the time requirements are met.	Law enforcement officers can maintain and access information for legitimate law enforcement purposes, for defense of civil suits, or for fitness of duty evaluations.
New Jersey Stat. Sec. 2C:52-2	Conviction	All offenses except serious felonies (murder, treason, rape, kidnapping, robbery, arson, perjury, etc) and drug crimes (except possession of small amounts of marijuana and hashish).	Eligible after ten years (5 years for petty disorderly offenses) if no subsequent or prior convictions.	Agencies possessing expunged information can consult the information to ascertain if applicants for expungement have had offenses expunged before, and for purposes of sentencing, parole, corrections classification, and hiring for criminal justice agencies. sec. 2C:52-17, 20-23.
New Mexico, N.M. Stat. Ann. Sec. 29-3-8.1	Arrest	Misdemeanors except crimes of moral turpitude	If no final disposition of arrest (including nolle prosequi, dismissal of charges, decision not to file charges, referral to diversion program, placement on probation or imposition of a fine), arrest information shall be expunged.	
New Mexico, N.M. Stat. Ann. Sec. 30-31-28	Probation without judgment	Possession of a controlled substance	Eligible to apply for expungement if first drug-related conviction, probation fulfilled and charges dismissed.	
New York	Expungement for civil commitment only			
North Carolina Gen. Stat. Sec. 15A-146.	Arrest	All offenses	If found not guilty or charges dismissed and no previous expungements or felony convictions, person can apply and after a hearing, court shall order expunction.	
North Carolina Gen. Stat. Sec. 90-96	Probation without judgment	Certain misdemeanor and felony drug offenses	If no prior drug convictions and pleads guilty and fulfills deferred sentence/probation and charges are dismissed and offense occurred when under 21, a person may apply for expungement. See also sec. 90-113.14 (same criteria for possession of substances releasing toxic vapors or fumes).	

State	Arrest v. Conviction	Type of Offense	Eligibility requirements	Post-expungment access
North Dakota Cent. Code Sec. 19-03.1-23	Conviction	Possession of one ounce or less of marijuana	Court shall expunge conviction from record if first offense and the person is not subsequently convicted of any crime within the next two years.	
Ohio sec. 43.101	Arrest and conviction	All offenses	Eligible if convicted and a first offender (as defined in ORC Ann. 2953.32) (after one year for a misdemeanor and after 3 years for a felony), a verdict of not guilty, or dismissal of charges or no bill entered by grand jury (after 2 years). In the case of a conviction, court must determine whether applicant has been rehabilitated and whether interests of applicant are outweighed by interests of government (if government objects). ORC Ann. 2953.32 If not guilty or charges dismissed or not entered, no criminal proceedings are pending against applicant and applicant's interests outweigh the government's, court shall issue expungement order.	Law enforcement can have access to sealed records for purposes of charging decisions, investigations, parole purposes, for defending a civil action, for pre-trial diversion determination, and for hiring or licensing purposes. Prior convictions can also be introduced and proved in criminal proceedings.
Oklahoma22 Okl. St. sec. 18	Arrest and conviction	Misdemeanors and nonviolent felonies (both arrests and convictons)	Eligible if acquitted; conviction reversed and charges dropped; factual innocence established by DNA; no charges filed within one year of arrest or within statute of limitations; the person was under 18 at time offense was committed and person received full pardon; offense was a misdemeanor, 10 years have passed and the person has no other convictions; the offense was a nonviolent felony, the person has received a full pardon, and 10 years have passed and the person has no other convictions; or the person has been charged for a crime committed by someone else using that person's identity. Court may order sealing upon finding that the harm to privacy of the person or dangers of unwarranted adverse consequences outweigh the public interest in retaining the records.	Records shall be sealed to the public but not to law enforcement agencies for law enforcement purposes. Subsequent to sealing of records, police or prosecutors may petition the court to unseal the records; if, after a hearing, the court determines there has been a change of conditions or a compelling reason to unseal the records, the court may order all or a portion of the records unsealed. 22 Okl. St, sec. 19.

State	Arrest v. Conviction	Type of Offense	Eligibility requirements	Post-expungment access
Oregon ORS Sec. 137.225.	Arrest and conviction	Most misdemeanors and some felonies (including certain assaults, intimidation, third degree robbery, criminally negligent homicide, unlawful use of a weapon and attempted kidnapping in the second degree) except for sex crimes and certain crimes involving children.	Eligible if arrested (except for a state or municipal traffic offense), after one year, and no pending criminal charges, and no conviction for more than one crime within 10 years of motion, whether or not conviction is associated with same conviction sought to be set aside. If convicted, may apply within 3 years of judgment after completion of sentence. Court shall enter order unless clear and convincing evidence that granting order would not be in the best interests of justice and the defendant has been convicted of certain crimes, see ORS Sec. 137.225.	Prosecutor may move to reopen records for limited purpose of assisting in investigation.
Pennsylvania	Arrest and conviction	All offenses except sex crimes and indecent assault (arrest); possession of alcohol (conviction)	Eligible if no disposition of arrest within 18 months (arrest); is 21 years or older and was convicted of certain alcohol possession offenses and satisfied sentence conditions; is 70 years old and has no arrests or convictions within 10 years of release (conviction); or is dead for three years. 18 Pa. CS sec. 9122. If arrested or prosecuted for a drug offense, record may be expunged as a matter of right if charges dropped or acquitted. This right may be exercised only once. 35 P.S. sec. 780-119.	Prosecutor and court may maintain a list of names and other info of people whose records have been expunged for the purpose of determining subsequent eligibility for expungement and for identifying persons in criminal investigations. 18 Pa. CS sec. 9122.

State	Arrest v. Conviction	Type of Offense	Eligibility requirements	Post-expungment access
Rhode Island	Arrest and conviction	All offenses (arrest -- identification information); misdemeanors (arrest -- seal court records); all offenses except crimes of violence (conviction).	Any fingerprint or record of identification shall be destroyed within 60 days of acquittal, dismissal or exoneration, provided that the defendant shall have no previous felony conviction. Anyone charged with a DV offense who pleads not guilty, guilty or nolo contendere must wait 3 years. R.I. Gen. Laws sec. 12-1-12. Any person acquitted or otherwise exonerated can move for sealing court records, but only for misdemeanors. R.I. Gen. Laws sec. 12-1-12.1. Any first offender may move for expungement of all records of a conviction for a felony (after 10 years) or misdemeanor (after 5 years) unless convicted for a crime of violence. R.I. Gen. Laws sec. 12-1.3-2. The court may order expungement if it finds the petitioner has no other convictions in the preceeding 5 or 10 years, has no pending criminal proceedings, has exhibited good moral character, has attained rehabilitation to the court's satisfaction, and expungement is consistent with the public interest. R.I. Gen. Laws sec. 12-1.3-3. All records of motor vehicle violations shall be expunged within 3 years of violation. R.I. Gen. Laws	Expunged records may be used in subsequent sentencing proceedings. The petitioner must disclose record when applying for employment with law enforcement agency, for bar application, teaching or coaching certificate, or for employment with early childhood education facility. R.I. Gen. Laws sec. 12-1.3-4.
South Carolina	Arrest and conviction	All offenses (arrest) and all offenses except traffic or domestic violence offenses (conviction).	All records shall be expunged whenever any person has been charged with an offense and proceedings have been dismissed or the person has been found innocent. S.C. Code Ann. Sec. 17-1-40. A first offender may apply, one time, for expungement of arrest and conviction records if no other convictions within 3 years and if not a traffic offense or most domestic violence offenses. S.C. Code Ann. sec. 22-5-910.	Law enforcement can have access to records only to ensure no one applies for expungement more than once. S.C. Code Ann. sec. 22-5-910.
South Dakota, S.D. Codified Laws sec. 23A-27-17	Arrest	All offenses	Upon discharge and dismissal of charges, the court shall order that all records (except nonpublic criminal investigation records) be sealed.	Nonpublic criminal investigation records shall not be sealed.

State	Arrest v. Conviction	Type of Offense	Eligibility requirements	Post-expungment access
Tennessee, Tenn. Code Ann. Sec.	Arrest and probation without judgment	All offenses except sex offenses and serious felonies (probation without judgment) and all offenses (arrest)	Eligible if person pleads guilty to offense, except sex offense or serious felonies, has not been previously convicted of a felony or serious misdemeanor, and sentence and proceedings are deferred. Tenn. Code Ann. Sec. 40-35-313. Eligible to expunge arrest if charges dismissed and no prior felony or serious misdemeanor conviction or expungement. Tenn. Code sec. 38-6-118.	Courts shall maintain expunged records for the purpose of determining eligibility for deferred sentencing. The guilty plea is admissible in civil trials.
Texas	Arrest and conviction	All offenses except a crime that is part of a "criminal episode" (two or more crimes in the same episode) (arrest). Consumption on premises licensed for off-premises consumption (conviction).	Eligible if acquitted, pardoned, convicted and then acquitted by appeals court, no information or indictment has been presented (felonies) and the limitations period expired or the indictment or information was dismissed because of mistake or absence of PC, and no felony conviction for 5 years preceding arrest. Tex. Code. Crim. Proc. art. 55.01. For conviction of ABC offense, eligible if only one offense after one year without any other convictions. Tex. Alco. Bev. Code sec. 101.73.	
Utah	Arrest and conviction	For arrests -- all offenses. For convictions -- all offenses except capital and first degree felonies, second degree forcible felonies, any sexual act against a minor, automobile homicide, any registerable sex offense and DUI. Utah Code Ann. Sec. 77-18-12.	Eligible if 30 days have passed since the arrest and there have been no subsequent arrests and the person was released without charges, charges were dismissed, the person was acquitted or the record sealed. Court may order expungement if in the interest of justice. Utah Code Ann. sec. 77-18-10 and -12. For convictions, eligible 3, 5, 7, 10 or 15 years later (depending on seriousness of crime) if record does not include 2 or more felony convictions (not arising out of single episode), no previous felony or serious misdemeanor (within 15 years) expungements, no convictions since the conviction for which expungement is sought, and no pending proceedings. May apply for a second conviction expungement if 15 years have passed since release and any other conviction. sec. 77-18-12. Court shall grant unless by clear and convincing evidence it would be contrary to public interest. sec. 77-18-13.	Expunged records shall not be divulged except to the Board of Pardons and Parole, police POST board, federal authorities, Division of Occupational and Professional Licensing and the State Office of Education. A court may unseal the records for sentencing purposes. Utah Code Ann. sec. 77-18-15.

State	Arrest v. Conviction	Type of Offense	Eligibility requirements	Post-expungment access
Vermont	Diversion	Criteria developed by each State's Attorney	Eligible for sealing of records if arrested, first time offender, and after 2 years a diversion program has been fulfilled, no subsequent or pending convictions, and rehabilitation has been attained to the satisfaction of the court. 3 V.S.A. sec. 164.	
Virginia Code Ann. Sec. 19.2-392.2	Arrest	All offenses	If person charged and acquitted, charges are dismissed, or he is pardoned, he may petition for expungement. Upon finding that continued existence of records constitutes a manifest injustice to the petitioner, court shall enter an expungement order; otherwise it shall deny the petition. If the arrest was for a misdemeanor or the person charged is not the person named in the summons, indictment, etc, the petitioner shall be entitled, in the absence of good cause shown to the contrary, to expungement.	Upon a petition filed by the prosecutor alleging that the record is needed by a law enforcement agency for purposes of employment application or for a pending criminal investigation and that the investigation will be jeopardized or that life or property will be endangered without immediate access to the record, the court may enter an ex parte order, without notice to the person, permitting such access. An ex parte order may permit a review of the record, but may not permit a copy to be made of it. Va. Code Ann. sec. 19.2-392.3.
Washington, Rev. Code Wash. Sec. 9.94A.640	Conviction	All offenses except violent offenses, crimes against persons, DWI offenses, sex offenses and DV offenses (with certain conditions).	Eligible if there are no criminal charges pending and no convictions since the conviction sought to be expunged, has not gotten an expungement before, and 5 or 10 years have passed (if certain felonies).	Criminal justice enforcement agencies can have access to records.
West Virginia, W.Va. Code sec. 61-11-25	Arrest	All offenses	Eligible to apply 60 days after dismissal, if charges dismissed or found not guilty if no previous felony convictions.	Prosecutor can file a petition to inspect sealed records if necessary to the investigation or prosecution of a crime. Court may grant petition if it finds that the interests of justice will be served.
Wisconsin	None			

State	Arrest v. Conviction	Type of Offense	Eligibility requirements	Post-expungment access
Wyoming	Arrest and conviction	All offenses (arrest) and misdemeanors (conviction only for purposes of restoring firearms rights)	For arrests, eligible if 180 days have passed since the arrest, there are no formal charges pending, and at least one of the following applies: there was no conviction or disposition, no charges were filed, or charges were dismissed. Wyo. Stat. Sec. 7-13-1401. For convictions, may petition for expungement only for the purpose of restoring any firearm rights lost, if convicted of a misdemeanor not involving use of a firearm, one year has passed, and no previous convictions for which firearms rights have been lost. Wyo. Stat. sec. 7-13-1501.	

Tab 8

DL&A
DOW, LOHNES & ALBERTSON
PLLC

M E M O R A N D U M

TO: Michael Hays

FROM: Lynn Deavers
Aaron Eidelman
Eric Gibson

DATE: August 3, 2005

RE: Survey of State Expungement Statutes

Introduction

In most states, expungement is available for arrests and juvenile records. Whether denoted as "expunging" or "sealing" a record, or "annulling" a conviction, the result is generally the same: government records identifying an incident are made unavailable to the public.[1] The extent to which records are actually destroyed varies, but a minimum amount of information is typically retained by the criminal justice system.[2] In addition, most states have processes for correcting or removing inaccurate information from statewide registrations as sex offenders or child abusers.[3] Finally, many jurisdictions define the availability of expungement only under narrow circumstances.[4]

Identity Theft

A growing number of states have passed laws aimed at preventing identity theft, and many include provisions for expungement of inaccurate information from the records of persons whose identities were stolen. For example, in Alabama, records of inaccurate or incomplete information may be expunged upon request from the person who believes such information is

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[1] Black's Law Dictionary defines expungement as "the removal of a conviction . . . from a person's criminal record." Black's Law Dictionary 603 (7th ed. 1999). Here, the term expungement shall be used, regardless of the specific terminology of individual state statutes.

[2] *See, e.g.*, ARK. CODE ANN. § 16-90-903 (Michie 2005); DEL. CODE ANN. tit. 16, § 1230 (2005); FLA. STAT. § 943.045 (2005); 20 ILL. COMP. STAT. § 2630/12 (2005); IND. CODE ANN. § 31-39-8-6 (Michie 2004); KAN. STAT. ANN. § 21-3110a (2005); MINN. STAT. § 609A.01 (2004).

[3] ALA. CODE § 41-9-645 (2005); GA. CODE ANN. § 35-3-37 (2004); MISS. CODE. ANN. § 97-45-27 (2004); MO. REV. STAT. § 575.120 (2004); N.C. GEN. STAT. § 15A-147 (2004); OKLA. STAT. tit. 22 § 19 (2004); TEX. CRIM. PROC. CODE ANN. art. 55.01(d) (Vernon 2004); VA. CODE ANN. § 18.2-186.5 (Michie 2004).

[4] *See, e.g.*, 705 ILL. COMP. STAT. § 405/5-915 (2005); LA. REV. STAT. ANN. § 44.9 (2004); NEB. REV. STAT. § 29-4010 (2004); N.H. REV. STAT. ANN. § 651:5 (2004); OR. REV. STAT. § 137.225 (2004); R.I. GEN. LAWS §§ 12-1.3-1 – 12-1.3-4 (2004).

incorrect.[5] Similarly, Mississippi and North Carolina laws permit expungement of records for victims of identity theft, and Missouri courts may expunge a false identification from records where a person falsely impersonates another.[6] In Virginia, if someone is charged or arrested while using a person's name without consent, the victim of identity theft is eligible for expungement.[7] In these states, hearings are often held to determine that the person requesting expungement did not actually commit the crimes improperly attributed to him.[8]

The policy reasons for permitting expungement of offenses committed through identity theft are fairly straightforward**.** Persons who have their identities stolen are victims, rather than perpetrators of these crimes, and should not be penalized for the illegal actions of others.

DNA Information

Most states allow expungement of DNA information from state databases upon reversals of convictions, failure to press charges after information is collected, or a showing that no charges were filed after collecting the information. Currently, twenty six states permit expungement of DNA records upon reversal or dismissal of a conviction.[9]

Some states have passed variations on general reversal or dismissal requirements for DNA expungement. For example, California and Missouri permit DNA information to be expunged if there is no past or present offense or pending charge which qualifies the person for inclusion in the state DNA database.[10] Further, Illinois, New York, and Vermont laws allow expungement of DNA records if a pardon was granted, and Illinois requires genetic records to be expunged within thirty days after a person is found innocent or otherwise not criminally penalized.[11] If DNA information is included in the Pennsylvania state database by mistake, the requesting party must show proof of the mistake by clear and convincing evidence.[12] However, South Dakota law does not permit the invalidation of any ID, warrant, probable cause, or arrest

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[5] *See* ALA. CODE § 41-9-645 (2005); *see also* GA. CODE ANN. §35-3-37 (2004), OKLA. STAT. tit. 22, § 19 (2004).
[6] MISS. CODE ANN. § 97-45-27 (2004); N.C. GEN. STAT. § 15A-147 (2004); MO. REV. STAT. § 575.120 (2004); *see also* TEX. CRIM. PROC. CODE ANN. art. 55.01(d) (Vernon 2004).
[7] VA. CODE ANN. § 18.2-186.5 (Michie 2004).
[8] *See, e.g.*, N.C. GEN. STAT. § 15A-147 (2004).
[9] ALA. CODE § 36-18-26 (2005); ARIZ. REV. STAT. § 13-610 (2004); CAL. PENAL CODE § 299 (Deering 2005); CONN. GEN. STAT. § 54-1021 (2004); DEL. CODE ANN. tit. 29, § 4713 (2005); GA. CODE ANN. § 24-4-65 (2004); IDAHO CODE § 19-5513 (Michie 2004); 730 ILL. COMP. STAT. § 5/5-4-3 (2005); IND. CODE ANN. § 10-13-6-18 (Michie 2004); KY. REV. STAT. ANN. § 17.175 (Michie 2004); LA. REV. STAT. ANN. § 15:614 (2004); ME. REV. STAT. ANN. tit. 25, § 1577 (2004); MASS. GEN. LAWS ch. 22E, §15 (2004); MO. REV. STAT. §650.055 (2004); MONT. CODE ANN. § 44-6-107 (2004); NEB. REV. STAT. § 29-4109 (2004); N.H. REV. STAT. ANN. § 651-C:5 (2004); N.J. REV. STAT. § 53:1-20.25 (2004); N.Y. [EXEC.] LAW § 995-c (Consol. 2005); N.C. GEN. STAT.§ 15A-148 (2004); N.D. CENT. CODE § 31-13-07 (2004); 44 PA. CONS. STAT. ANN.§ 2321 (West 2004); R.I. GEN. LAWS § 12-1.5-13 (2004); S.C. CODE ANN. § 23-3-660 (2004); S.D. CODIFIED LAWS § 23-5A-28 (Michie 2003); TEX. GOV'T CODE ANN. § 411.151 (Vernon 2004); VT. STAT. ANN. tit. 20 § 1940 (2004); VA. CODE ANN. § 19.2-310.7 (Michie 2004); W.V. CODE ANN. § 15-2B-11 (Michie 2005); WIS. STAT. ANN. § 165.77(4) (West 2004); WYO. STAT. ANN. § 7-19-405 (Michie 2004).
[10] CAL. PENAL CODE § 299 (Deering 2005); MO. REV. STAT. § 650.055 (2004).
[11] 730 ILL. COMP. STAT § 5/5-4-3 (2005); N.Y. [EXEC.] LAW § 995-c (Consol. 2005); 410 ILL. COMP. STAT. § 513/15 (2005).
[12] *See* 44 PA. CONS. STAT. ANN. § 2321 (West 2004).

based on DNA information still included in the state database due to delay or failure to expunge those records.[13]

The policy considerations for expungement of DNA information are largely driven by privacy concerns. Considering that DNA provides independently unique information about a person, and is the most private physical information that can be obtained, the potential invasiveness and misuse of this information weighs heavily in favor of permitting destruction of these records. Although arrest information may be automatically expunged if no charges are filed, DNA information frequently requires an affirmative petition to the court for expungement. This increased burden may reflect the convenience and utility of a comprehensive DNA database in solving crimes. However, convenience must yield to privacy when a person requests removal following the reversal or dismissal of the crime that warranted entry of their DNA information into the database.

Juvenile Records

The majority of states have laws permitting the expungement of juvenile records after a minor has reached eighteen or twenty-one years of age, if the person has not been subsequently convicted of another crime. Felonies may only be expunged in a handful of states.[14] If a state permits expungement of felonies, a much longer period of good behavior is usually required after release (up to 15 years in Nevada), and violent or sexual offenses are generally not eligible for expungement.[15] In Alabama and New Mexico, juvenile delinquency records may be sealed upon request if the person has not been convicted of another crime after two years,[16] and Arkansas permits expungement anytime after the person's twenty-first birthday.[17] Illinois, Louisiana, Texas, and Wisconsin permit expungement of juvenile records upon a person's seventeenth birthday,[18] and expungement is available in Illinois for all juvenile records except those based upon first degree murder and sex offenses which would be felonies if committed by an adult.[19] Notably, Michigan requires the expungement of juvenile records when the person becomes thirty years old;[20] similarly, juvenile records in Virginia are automatically destroyed in January of each year if the person is at least nineteen years old, and it has been five years since any convictions.[21] In New Jersey, records related to possession of a controlled substance may be expunged after one year if the person was twenty-one years or younger at the time of the conviction.[22] If

[13] S.D. CODIFIED LAWS § 23-5A-31 (Michie 2003).
[14] *See, e.g.*, ARK. CODE ANN. § 16-90-602 (Michie 2005); IDAHO CODE § 20-525A (Michie 2004) (juvenile felony offender may request expungement after give years, or after reaching eighteen years of age, whichever occurs later).
[15] *See* KAN. STAT. ANN. § 38-1610 (2005) (expungement of juvenile records not available for certain aggravated offenses); S.C. CODE ANN. § 20-7-8525 (2004); WYO. STAT. ANN. § 14-6-241 (Michie 2004).
[16] ALA. CODE § 12-15-103 (2005); N.M. STAT. ANN. § 32A-3B-21 (LexisNexis 2004).
[17] Ark. Code § 9-27-309 (Michie 2005).
[18] 705 ILL. COMP. STAT. § 405/1-9 (2005); LA. CHILD CODE ANN. art. 919 (2004) (person seventeen or older may move to expunge records of juvenile criminal conduct); TEX. CRIM. PROC. CODE ANN. art. 45.0216 (Vernon 2004); WIS. STAT. ANN. § 938.355 (West 2004).
[19] 705 ILL. COMP. STAT. § 405/5-915 (2005).
[20] *See* MICH. COMP. LAWS §§ 5.925(E)(2)-(3)(a) (2004).
[21] VA. CODE ANN. § 16.1-306 (Michie 2004).
[22] N.J. REV. STAT. § 2C:52-5 (2004).

expungement is not done as a matter of right, hearings are held to determine whether a person's juvenile records should be expunged.[23]

Most states permit expungement of juvenile records because minors are held to a lower standard of culpability in crimes, and society is often more forgiving of children who commit crimes than adults. Some states maintain records for several years after minors reach eighteen years of age, to ensure that information is available if minors reoffend after reaching adulthood. In addition, minors who commit violent or sexual offenses may not have their records expunged likely because these crimes are considered more heinous by society. Records of these crimes may be useful in determining whether a person has exhibited a pattern of such behavior.

Standard of Proof

For most jurisdictions, arrests that do not result in a conviction or guilty plea may be expunged as a matter of right.[24] Records may be expunged if there are no further charges or convictions for a certain period of time.[25] Some states also apply the same standard to acquittals,

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[23] *See, e.g.*, Okla. Stat. tit. 10 § 7307-1.8 (2004) (person who is at least twenty-one years old with no adult convictions may petition the court for an expungement hearing, at which the court may order expungement if harm to the person's privacy interests outweighs the public interest).

[24] *See* ALASKA STAT. § 12.55.085 (Michie 2004) (conviction may be set aside if person was discharged by court without imposition of a sentence); ARK. CODE ANN. § 16-93-303 (Michie 2005) (first-time offender who completed probation, without a judgment of guilty, may have his record expunged); CAL. PENAL CODE § 851.85 (Deering 2005) (person acquitted of charge, if found factually innocent by the court, may have his records sealed); CONN. GEN. STAT. § 54-142a (2004) (person found not guilty of a charge, or if his charge is dismissed, may have his records erased upon expiration of time period for appeal); DEL. CODE ANN. tit. 10, § 1025 (2005) (person may request expungement of criminal records if charge is dismissed or not otherwise prosecuted); GA. CODE ANN. § 35-3-37 (2004) (person arrested for an offense but not prosecuted, or if charges are dismissed, may request expungement of records); 20 ILL. COMP. STAT. § 2630/5 (2005) (person acquitted or released without being convicted may request expungement of records upon showing good cause); IND. CODE ANN. § 35-38-5-1 (Michie 2004) (person may request expungement of arrest record if no charges filed, charges dropped due to mistake, no offense was committed, or upon an absence of probable cause); KAN. STAT. ANN. § 22-2410 (2005) (person may request expungement of arrest record); KY. REV. STAT. ANN. § 431.076 (Michie 2004) (person charged but found not guilty, or against whom charges were dismissed, may request expungement of all records, including arrest records, fingerprints, photographs and other data); MD. CODE ANN. [CRIM. PROC.] § 10-103 (LexisNexis 2004) (person may request expungement of arrest record if no charges filed); MISS. CODE ANN. § 99-15-57 (2004 (records shall be expunged if case dismissed or otherwise not prosecuted); N.J. REV. STAT. § 2C:52-6 (2004) (if arrest does not result in conviction, record may be expunged); N.C. GEN. STAT. § 15A-146 (2004) (arrest that does not result in conviction may be expunged); OHIO REV. STAT. ANN. § 2953.52 (Anderson 2005) (person may request sealing of records anytime after found not guilty or charges dismissed, or after two years from the return of no bill by a grand jury); OKLA. STAT. tit. 22 § 18 (2004) (person arrested with no charges filed, or upon reversal of conviction, may request expungement); 18 PA. CONS. STAT. ANN. § 9122 (arrest records expunged after eighteen months from date of arrest upon order or certification of no proceedings); S.C. CODE ANN. § 17-1-40 (2004) (arrest records expunged if acquitted or charges dismissed); TENN. CODE ANN. § 40-32-101 (2004) (expungement of arrest records available at no cost if acquitted, charges dismissed, arrested without charges, or no bill returned by a grand jury); UTAH CODE ANN. §§ 77-18-9 – 15 (2005) (expungement of arrest records available if released without charges filed, charges dismissed or acquitted); VA. CODE ANN. § 19.2-392.2 (Michie 2004) (person may request expungement if charged and acquitted, pardoned, or charges dismissed); W.V. CODE ANN. § 61-11-25 (Michie 2005) (person found not guilty or charged dismissed may apply for expungement of arrest records if no previous felony convictions); WYO. STAT. ANN. § 7-13-1401 (Michie 2004) (person may request expungement if at least 180 days since arrested and no charges filed or charges dismissed).

[25] *See, e.g.*, MO. REV. STAT. § 610.122 (2004) (arrest records expunged if person has no other convictions, and no charges pending related to arrest).

pardons, and other resolutions in favor of the defendant after a matter has reached trial.[26] Nebraska also requires individuals to prove by clear and convincing evidence that they were arrested by mistake in order to have the record of the arrest expunged.[27] In contrast, Maine automatically keeps arrest information confidential when no conviction results.[28]

Additionally, Idaho law requires a showing of clear and convincing evidence that the person is not at risk to commit any violent crimes,[29] and Illinois law requires a showing of good cause before expunging arrest records.[30] Other states have specific standards of proof that apply only to certain crimes. For example, Iowa require that dependent adult abuse information be expunged only upon showing by a preponderance of the evidence that the information is unfounded.[31] Similarly, Nebraska requires a showing by clear and convincing evidence that a sex offender does not have a criminal charge pending and is not at a substantial risk to commit another sexual offense before the person's records may be expunged.[32] Finally, Kansas mandates a showing that expungement of a person's arrest records is in the best interest of justice,[33] and expungement of arrest records may be granted in Utah unless there is clear and convincing evidence that it would be contrary to the interests of the public to do so.[34]

States that do not include a standard of proof in their expungement statutes may do so because they focus more on a balancing test between the applicant's need to seal the records and the legitimate needs of a state to maintain and access the records. States often permit expungement if the harm to the person outweighs society's interests. The few states that enunciate a specific standard of proof do so to leave courts discretion in deciding whether to grant an applicant's request for expungement, rather than following a bright-line rule. This allows for flexible determinations based on the circumstances surrounding each crime. However, many states permit expungement upon an affirmative request and a showing that all statutory requirements, such as a time limit and no subsequent offenses, are met. Nevertheless, courts often retain discretion in deciding whether to expunge records, striking a balance between bright-line rules mandating expungement and purely discretionary judgments.

Convictions

The expungement of conviction records are typically left to the court's discretion, conditioned on the defendant not having further convictions within a specified time after being released from incarceration or discharged from parole; expungement may also be mandatory if specific conditions are met. The former is the general rule. Almost every jurisdiction allows expungement of a first-time misdemeanor, especially if it was committed by a minor, as long as there have not been further convictions within a subsequent time period, usually two to five

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[26] *See, e.g.*, NEV. REV. STAT. §§ 179.255, 197A.160 (2004) (person may have arrest records sealed at any time after acquittal).
[27] *See* NEB. REV. STAT. § 29-3523 (2004) (person may have erroneous arrest record expunged upon showing of clear and convincing evidence).
[28] ME. REV. STAT. ANN. tit. 16, § 613 (2004).
[29] IDAHO CODE § 18-8310 (Michie 2004).
[30] 20 ILL. COMP. STAT. § 2630/5 (2005).
[31] IOWA CODE § 235B.9 (2003).
[32] *See* NEB. REV. STAT. § 29-4010 (2004).
[33] KAN. STAT. ANN. § 12-4516a (2005).
[34] UTAH CODE ANN. §§ 77-18-9 – 15 (2005).

years. [35] For example, Iowa law permits expungement upon request from a conviction after two years if the person has had no subsequent criminal convictions, other than simple misdemeanor violations.[36] In Kansas, courts will expunge a conviction records if the person has had no felony convictions for the past two years, and no charges are pending; the requesting person must also show that expungement of his records is in the public's interest.[37] In contrast, Massachusetts courts may seal records of a misdemeanor conviction ten years after the person's discharge or release, and felony conviction records may be sealed after fifteen years, if there have been no subsequent convictions.[38]

Convictions that are reversed and dismissed are often expunged upon request. For example, New Hampshire law permits persons to request expungement immediately after charges are dismissed; if there is a conviction, however, the defendant must wait one to ten years, depending on the severity of the crime.[39] Similarly, Maryland law permits expungement for charges that do not result in a conviction, if a request is made within three years.[40] Michigan courts may expunge a conviction if the person is convicted of only one offense, but only one conviction per person may be expunged; moreover, no expungement requests may be made until five years after the sentence was imposed or any term of imprisonment ended, whichever occurs later.[41] South Dakota and Hawaii also permit one-time expungement of conviction records upon successful completion of probation.[42]

Expungement is often available to offenders who complete probation or other diversion programs. For example, Nevada courts shall seal conviction records three years after the offender is discharged from probation, and may also seal records of a person convicted of drug possession three years after release if the court is satisfied that the person is rehabilitated.[43] Arizona courts also permit expungement of conviction records if the sentence is set aside as a result of successful probation.[44] In Vermont, expungement is available after two years from the person's successful completion of a diversion program, as long as there are no subsequent or pending charges.[45] The person must show, however, that he has been rehabilitated to the satisfaction of the court.[46]

Many states have specific provisions for expunction of drug or alcohol-related offenses.[47] In Arkansas, first-time offenders convicted of driving under the influence may have their records expunged upon successful completion of probation; records of felony convictions for possession

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[35] *See, e.g.*, KY. REV. STAT. ANN. § 431.078 (Michie 2004) (person convicted of a misdemeanor or other minor violation may request expungement after five years); *see also* MISS. CODE ANN. § 99-15-59 (2004) (first-time misdemeanor offender may have conviction expunged).
[36] *See* IOWA CODE § 123.46 (2003).
[37] KAN. STAT. ANN. § 12-4516 (2005).
[38] MASS. GEN. LAWS ch. 276, § 100A (2004).
[39] N.H. REV. STAT. ANN. § 651:5 (2004).
[40] MD. CODE ANN. [CRIM. PROC.] § 10-105 (LexisNexis 2004).
[41] MICH. COMP. LAWS §§ 780.621(1), (3) (2004).
[42] S.D. CODIFIED LAWS § 23A-27-17 (Michie 2003); HAW. REV. STAT. ANN. § 706-622.5 (Michie 2004).
[43] NEV. REV. STAT. §§ 176A.265, 453.3365 (2004).
[44] ARIZ. REV. STAT. § 13-907 (2004).
[45] VT. STAT. ANN. tit. 3 § 164 (2004).
[46] *Id.*
[47] *See, e.g.*, CAL. HEALTH & SAFETY CODE § 11361.5 (Deering 2005); *see also* COLO. REV. STAT. §§ 42-4-121, 42-4-1715 (2004).

of controlled substances may be also be expunged upon the successful completion of probation.[48] However, many states forbid expungement of conviction records for certain offenses, such as sex offenses,[49] aggravated violent crimes,[50] or those involving a child victim.[51]

In addition, some states allow expungement of conviction records for younger offenders. In Mississippi, a person who commits a drug offense prior to his twenty-sixth birthday and is a first-time offender may have his record expunged if he completes probation or rehabilitation instead of imprisonment.[52] Similarly, in Wisconsin, a person who commits a misdemeanor while under twenty one years of age may have those records expunged after completion of the sentence.[53]

The diverse treatment of expungement for convictions illustrates that states have not yet come to a consensus on this issue. States classify the availability of expungement in a variety of ways, ranging from general classifications of offenses, to a specific enumeration of eligible and non-eligible crimes. Other jurisdictions choose to leave the availability of expungement to the court's discretion. States that provide a required waiting period may do so to ensure that offenders are not likely to commit subsequent offenses. In addition, states that have more lenient expungement standards for younger offenders likely do so as a natural extension of juvenile expungement provisions. Similarly, states that permit expungement for drug or alcohol-related offenses may believe that offenders are better served through treatment and rehabilitation programs.

Arrests

Arrest records are generally expungeable as a matter of right, if they do not result in a conviction.[54] One interesting exception is Nebraska, which allows arrest records to be "expunged," but nevertheless allows access to arrest records of public officials and candidates for public office.[55] Some states permit expungement of arrest records if no charges are filed, while other states allow expungement even if charges are filed, as long as no conviction results.[56] California courts may seal arrest records only if the person was found factually innocent of all charges.[57] Notably, Hawaii mandates a waiting period of one year before expungement of arrest records may be requested.[58] Some states also require a hearing date, to determine whether

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[48] ARK. CODE ANN. §§ 5-65-108, 16-90-1201 (Michie 2005).
[49] *See, e.g.*, IDAHO CODE § 18-8310 (Michie 2004).
[50] *See, e.g.*, WASH. REV. CODE § 9.94A.640 (2005).
[51] *See, e.g.*, ARIZ. REV. STAT. § 13-907 (2004).
[52] *See* MISS. CODE ANN. § 41-29-150 (2004).
[53] WIS. STAT. ANN. § 973.015 (West 2004).
[54] *Supra* n.28.
[55] *See* NEB. REV. STAT. § 29-3523 (2004) (arrest records may be sealed, except for public officials or candidates for public office, if prosecution is inactive or completed within one year).
[56] *Compare* IDAHO CODE § 67-3004 (Michie 2004) (person may request expungement of records if arrested but not subsequently charged with crime); MD. CODE ANN., [CRIM. PROC.] § 10-103 (LexisNexis 2004) (person may request expungement of arrest records if no charges are brought), *with* ARK. CODE ANN. § 16-90-906 (Michie 2005) (person arrested and charges without a conviction may request expungement); CONN. GEN. STAT. § 54-142a (2004) (arrest records erased upon expiration of time for appeal if found not guilty of charges or charges dismissed).
[57] CAL. PENAL CODE § 851.85 (Deering 2005).
[58] HAW. REV. STAT. ANN. § 853-1 (Michie 2004).

expungement is in the interests of justice.[59] Massachusetts has the broadest language in its law, permitting the sealing of records in any action that is dismissed in any fashion.[60] In contrast, Missouri law notes that expungement does not deem an arrest invalid, and state agencies may retain records for any necessary administrative actions.[61]

Virginia law states a specific policy reason for permitting expungement of arrest records. The law states that arrest records may hinder an innocent citizen's ability to obtain employment, education, or credit.[62] The availability of expungement for arrest records highlights a tension between unfounded arrests and those that simply fail to result in a conviction. In some states, this tension is reflected in a mandatory waiting period before requesting expungement. Other states expunge arrest records automatically upon the expiration of this waiting period, or immediately upon acquittal. As noted in Virginia's policy statement, many states permit expungement of arrest records because of the prejudicial impact on a person's reputation. However, states may want to maintain these records for use as evidence against repeat offenders.

Sex Offenses

In most states, expungement of records of sexual offenses is not possible. However, some states do permit expungement of sexual crimes under limited circumstances. In Idaho, offenders may request expungement and exemption from their duty to register in the state database after ten years, if they show by clear and convincing evidence that they are not at risk to reoffend and no similar charges are pending. No expungement is possible for violent sexual predators of those convicted of an aggravated offense. Similarly, in Nebraska, offenders may request expungement if they are no longer obligated to register in the state database if they can show by clear and convincing evidence that they are not at a risk to reoffend and no similar charges of pending. Offenders sentenced to lifetime registration in the state database may not have their records expunged.

Some states do not allow expungement of sex offense records despite the fact that no conviction was obtained. Generally, sex offenses that are reversed or dismissed are treated as expugnable under conviction provisions.

The policy reasons for prohibiting expungement of sex offenses are fairly straightforward. States that prohibit expungement of sex offense records likely do so because sex offenders are at a higher risk of recidivism than those who commit other offenses. In addition, society considers these crimes particularly heinous. States may also want to maintain records of these offenses as evidence of past behavior if the offender commits a subsequent sex offense. States that fail to expunge sex offense records when no conviction is obtained may do so to retain them for future related charges that may be filed against the same offender.

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[59] *See, e.g.*, KAN. STAT. ANN. § 22-2410 (2005); KY. REV. STAT. ANN. § 202A.091 (Michie 2004); OHIO REV. CODE ANN. § 2593.52 (Anderson 2005); OR. REV. STAT. § 137.225 (2004).
[60] MASS. GEN. LAWS ch. 276, § 100C (2004).
[61] MO. REV. STAT. § 610.126 (2004).
[62] *See* VA. CODE ANN. § 19.2-392.1 (Michie 2004).

Domestic Violence

Domestic violence encompasses child abuse, spousal abuse, and dependent adult abuse. In the states that do address this topic, expungement is discussed in the context of convictions, for which it is generally not available,[63] and reports of abuse, which may be expunged if certain requirements are met.[64] For example, South Carolina law specifically exempts domestic violence convictions from expungement eligibility.[65] Other states allow for expungement of convictions, but require more difficult standards to be met. In Rhode Island, expungement is only available three years after domestic violence charges are brought, regardless of whether the person is actually convicted.[66] If reports of domestic violence are unfounded, particularly for claims of child abuse, expungement is generally available as a matter of right, and the burden of proof may rest with the government. For example, South Dakota law notes that the burden is on the government to prove the accuracy and consistency of findings of child abuse or neglect,[67] and Vermont law notes that the government has the burden of proving by a preponderance of the evidence that child abuse and neglect records should not be expunged.[68]

Expungement of domestic violence crimes tends to have more stringent requirements than ordinary convictions, but is generally more available than expungement for sex offenses. This reflects the need for society to protect vulnerable persons, while the availability of expungement recognizes that unfounded or inaccurate domestic violence reports can substantially harm a person's reputation. As with sex offenses, states may want to maintain these records as possible evidence of past behavior if a person commits a subsequent offense. Because these crimes are shunned by society, there may be a greater public interest in keeping the records available.

Miscellaneous

Some states have laws relating to expungement that do not fit into the categories described above. For example, Alaska and North Dakota permit expungement of mental health proceedings at any time, if the requesting person releases all claims arising from the proceedings.[69] Arizona law specifically forbids a person from carrying a concealed weapon in the state, even if the person has a permit from another state, if he is under indictment for, or has been convicted of, a felony offense in any jurisdiction, even if that conviction has been expunged.[70] In Illinois, the State Appellate Defender must establish and maintain a program to provide information about expungement to eligible persons.[71] West Virginia law permits expungement of first-time drug possession offenses, and Minnesota law specifically permits

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[63] *See, e.g.*, N.Y. [FAM. CT. ACT] § 1051 (2005).
[64] ALA. CODE § 26-14-3 (2005); ARK. CODE ANN. § 5-28-220 (Michie 2005); COLO. REV. STAT. § 19-3-505 (2004); GA. CODE ANN. § 49-5-184 (2004); HAW. REV. STAT. ANN. § 350-2 (Michie 2004); IDAHO CODE § 39-5304 (Michie 2004); 325 ILL. COMP. STAT. § 5/7.14 (2005); ME. REV. STAT. ANN. tit. 22, § 4008 (2004).
[65] S.C. CODE ANN. § 22-5-910 (2004).
[66] R.I. GEN. LAWS § 12-1-12 (2004).
[67] S.D. CODIFIED LAWS § 26-8A-11 (Michie 2003).
[68] VT. STAT. ANN. tit. 33 § 4916 (2004).
[69] *See* ALASKA STAT. § 47.30.850 (Michie 2004); N.D. CENT. CODE § 25-03.1-45 (2004)
[70] ARIZ. REV. STAT. § 13-3112 (2004).
[71] 705 ILL. COMP. STAT. § 105/10.6 (2005).

expungement of minor marijuana offenses occurring before 1976.[72] In Nevada, offenders who have completed a reentry program after imprisonment may have their records sealed after five years.[73]

These statutes likely reflect policy choices regarding unique issues facing individual states. It is unclear why some states choose to include expungement provisions for distinctive circumstances. Nevertheless, these statutes may exist as a result of extensive lobbying by specific interest groups, or a risk particularly linked to certain geographic areas.

[72] W.V. CODE ANN. § 60A-4-407 (Michie 2005); MINN. STAT. § 152.18 (2004).
[73] NEV. REV. STAT. § 179.259 (2004).