From Expungement To Sealing Of Criminal Records In Pennsylvania

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ABSTRACT

Over the last few decades, the collateral consequences for the estimated 3.8 million Pennsylvanians with criminal records have increased exponentially because of legislative action and ubiquitous background screening. Many people with criminal records struggle with these barriers years after having last encountered the criminal justice system. Their most effective remedy is to have their record cleared.

Until recently, Pennsylvania’s only method of record clearing was expungement, which is limited primarily to cases with non-conviction dispositions. The only broad category of convictions that can be expunged prior to November 14, 2016, are summary offenses, after five years. Pennsylvania’s record-clearing scheme changed in February 2016, with the passage of Act 5 of 2016.2 Act 5 introduces orders for limited access (often known informally as “sealing”).3 These new orders allow cases to remain accessible to criminal justice agencies and occupational licensing boards, but to no one else. Act 5 permits some second degree, third degree and ungraded misdemeanor convictions to be sealed after 10 years free of arrest or prosecution, although exceptions written into the law will disqualify many cases.4

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4. 18 Pa.C.S.A. §9122.1(a) and (b) (2015).
By allowing some misdemeanors to be sealed, Act 5 moves Pennsylvania into the mainstream of the record-clearing schemes of the 50 states. However, around half of the states allow more extensive expungement or sealing, with eleven states allowing many felonies to be cleared. Pennsylvania could take a significant step forward by adopting “Clean Slate” legislation now pending in the General Assembly, which would provide automatic sealing of misdemeanors, summary offenses and non-convictions after certain waiting periods.

EXPUNGEMENT AND SEALING SHIELD REDEEMED PEOPLE WITH CRIMINAL RECORDS FROM WIDESPREAD COLLATERAL CONSEQUENCES

Across America, an estimated one in three adults now has a criminal record. Given Pennsylvania’s 2014 population of 12.8 million, that percentage amounts to more than 3.8 million of our family, friends and neighbors.

This large population faces a barrage of “collateral consequences” beyond the sentences in their criminal cases. Employment barriers are the most notable. State and federal laws bar individuals with certain convictions from working in such occupations as long-term health care, child care, schools, and transportation. In many other occupations, criminal convictions prevent workers from obtaining or retaining mandatory occupational licenses. In unregulated occupations, rejections of job applicants with criminal records remain extremely common, although some progress has been made. Background screening is ubiquitous, performed by 87% of employers.

Housing and higher education are not far behind. An estimated 80% of landlords conduct criminal background checking. Two-thirds of colleges ask about criminal history or conduct background checks. Moreover, criminal court involvement can

7. See generally, id.
9. Community Legal Services, Inc., id (identifying 49 federal and state statutes restricting employment of Pennsylvanians with criminal records).
also disqualify a public benefits applicant.\textsuperscript{13} Also, court fines and costs not only present a financial burden, but can even lead to incarceration in a latter day version of debtor’s prison.\textsuperscript{14} When these dire consequences are taken together, it is not surprising that criminal records have been found to be a major cause of poverty.\textsuperscript{15}

Many of these collateral consequences are life-long. But people with criminal records who develop a track record of desisting from crime do not present ongoing risk for more than a few years. Research has found that the recidivism risk of those with a prior criminal record falls below the risk of arrest for the general population after approximately four to seven years of desisting from crime for violent offenders, four years for drug offenders, and three to four years for property offenders.\textsuperscript{16}

In light of these severe obstacles to economic security for such large numbers of people, many of whom have served their punishments and present no current threat, policy makers have sought ways to mitigate these barriers. The most well-known policy solution has been the enactment by states and localities of “ban-the-box” or “fair hiring” laws.\textsuperscript{17} Because of the racially disparate impact of laws and policies burdening people with criminal records,\textsuperscript{18} the civil rights laws also have provided remedies. In recent years, the federal agencies enforcing the civil rights laws have issued guidance addressing the application of these laws to criminal background screening.\textsuperscript{19}

But even when these remedies curtailing consideration of criminal records exist, they are not self-executing. An employer, for instance, must know about and understand EEOC’s extensive guidance on criminal records and have both the ability and the willingness to apply it properly for a job applicant to benefit from it. In the experience of the legal aid program in which I work, many employers fail to do so.\textsuperscript{20}

Accordingly, many state legislatures have turned to expansions of record clearing, through expungement or sealing, as perhaps the most effective tool to help people with criminal records return to the mainstream.\textsuperscript{21} Expungement and sealing protect


\textsuperscript{14} Vallas and Dietrich, supra note 6, at 29-33.

\textsuperscript{15} A recent study found that the poverty rate in the United States would have fallen by 20 percent between 1980 and 2004 if not for mass incarceration and the subsequent criminal records that it generated. Robert H. DeFinis and Lance Hannon, “The Impact of Mass Incarceration on Poverty,” \textit{59 Crime and Delinquency}, 562-86 (June 2013).


\textsuperscript{18} Vallas and Dietrich, supra note 6, at 1.


\textsuperscript{20} E.g., Sharon M. Dietrich, \textit{EEOC’s Criminal Record Guidance One Year Later: Lessons from the Community} (September 2013), available at \url{http://niec.gov/library/027679}.

people from collateral consequences after they have proved their rehabilitation through desistence from crime. With their waiting periods, expungement and sealing laws can limit collateral consequences to the period before the person has established a track record of rehabilitation.

Expungement and sealing are so effective because, quite simply, a person need not rely on an employer, landlord, college or other users of background checks to evaluate a criminal record in a legal or fair manner if the information is not made available. Moreover, these laws are broad remedies, helping with all collateral consequences, rather than, say, just employment barriers. Consequently, at least 23 states expanded eligibility for expungement or sealing between 2009 and 2014, including states as different as California, Indiana and Mississippi. A growing number of jurisdictions permit even some felony convictions to be expunged or sealed.

As discussed in the next section, expungement traditionally has been a narrow remedy in Pennsylvania, applying mostly to cases resulting in non-convictions. Convictions could be cleared primarily through Governor’s pardons available under the Pennsylvania Constitution, but fewer than 200 pardons have been issued per year. However, the recent adoption of Act 5, providing sealing for some misdemeanor convictions, marks the first major expansion of record-clearing in Pennsylvania, with another potentially on the horizon.

PENNSYLVANIA EXPUNGEMENT LAW PRIOR TO ACT 5

Expungement in Pennsylvania has its roots in the state constitution. The Pennsylvania courts recognize a due process right to seek expungement of an arrest record. They recognize serious losses that can be caused by an arrest record, including reputational and economic injury.

Despite the constitutional grounding, the bases for expungement have come primarily from statute, although occasionally from court rule. Eligibility for expungement is available for:

1. Charges on which the disposition is a non-conviction;
2. Convictions of a summary offense where the person has been free of arrest or prosecution for five years following the conviction for that offense;
3. Cases in which a person over age 21 files for expungement of a conviction of underage drinking under 18 Pa.C.S.A. §6308.

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29. 18 Pa.C.S.A. §9122(b)(3) (2015). This language has been construed to mean that a person is eligible for expungement if he has been arrest-free for any five-year period; the petitioner will not be permanently disqualified if he has been re-arrested within five years of the summary conviction. Commonwealth v. Giulian, ___ A.3d ___, 2016 WL 3908197, at 7 (Pa. 2016). In Giulian, the petitioner sought expungement of a 1997 summary offense even though she had been later convicted a year later for another summary offense. She had been crime-free for 16 years at the time of her petition. The Pennsylvania Supreme Court found her eligible for expungement.
(4) Certain juvenile cases;31

(5) Cases in which a diversionary sentence of Accelerated Rehabilitative Disposition (ARD) has been satisfied;32

(6) Probation without verdict (Section 17) diversionary cases for drug dependent first time offenders;33

(7) Cases in which the District Attorney agreed to dismissal upon satisfaction to the victim (Satisfaction and Agreement);34

(8) Convictions of a person over 70 years of age who has been free of arrest or prosecution for ten years,35 and, improbably,

(9) Convictions of a person who has been dead for over 3 years.36

In addition, a relatively new statute provides for convictions of certain offenses committed as a direct result of human trafficking to be vacated, with expungement done as part of the proceedings.37

Expungement petitions are filed in the county in which the case was prosecuted. They are simple forms, filed under Pa.R.Crim.P. 490 (for summary convictions) or Pa.R.Crim.P. 790 (for all other adult cases). The Administrative Office of Pennsylvania Courts (AOPC) has made form expungement petitions and orders available on its website.38

The analysis applied to an expungement petition generally depends upon the disposition of the case.40 On one end of the spectrum, the petitioner is automatically entitled to expungement if the case or charges therein resulted in an acquittal or the individual was ultimately pardoned by the Governor.41

More ordinarily, whether a case will be expunged depends on an exercise of discretion by the trial court, which must balance the harm to the individual caused by the record against the interests of the Commonwealth in preserving the record.42 The seminal case of Commonwealth v. Wexler43 identified a non-exhaustive though much cited list of the factors to be balanced: 1) the strength of Commonwealth’s case against petitioner; 2) the reasons the Commonwealth gives for wishing to retain the arrest record; 3) the petitioner’s age, employment history and criminal record; 4) the amount of time that has elapsed between the arrest and the filing of a petition; and 5) the specific adverse consequences the petitioner may endure should the petition be denied.44 The burden of persuasion is assigned to the Commonwealth, which must show why the record should not be expunged.45

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32. Pa.R.Crim.P. 320. Certain very serious offenses cannot be expunged despite a sentence of ARD where the victim was under 18 years of age. 18 Pa.C.S.A. §9122(b.1). However, district attorneys seldom agree to ARD for such offenses.
33. 35 P.S. §780-117 (2012).
34. 35 P.S. §780-119 (2012).
41. Partial expungement in a case of charges on which the petitioner was not convicted, often called a redaction, is permitted. Commonwealth v. Rodland, 871 A.2d 216 (Pa. Super. 2005).
44. Giulian, supra note 29 (quoting Wexler, supra n. 26).
45. Wexler, supra note 26, at 879.
46. These factors are analyzed in cases where the expungement of a summary offense conviction is considered, as well as in most cases where the outcome was not a conviction. Giulian, note 29 supra, at 7.
47. Wexler, supra note 26, at 880.
At the other end of the spectrum are cases in which some charges were dismissed as a result of a plea agreement. Where the Commonwealth proves that charges were dismissed in exchange for a guilty plea to the remaining charges, the agreement is seen as quasi-contractual, and expungement will be denied.\textsuperscript{48} The Commonwealth must meet its burden by clear and convincing evidence.\textsuperscript{49} Charges that have been \textit{nolle prossed} as part of a guilty plea can be expunged.\textsuperscript{50}

In Pennsylvania, expungement means complete destruction of the records of a case. “Expunge” is defined by statute as “[t]o remove information so that there is no trace or indication that such information existed. . .” except that limited information may be maintained by law enforcement in diversion cases.\textsuperscript{51} Thus, after an expungement order is entered, the court file and law enforcement records are destroyed, and the case is removed from the databases of the Pennsylvania State Police, AOPC, and the Federal Bureau of Investigation.

Consequently, an expunged case should not turn up in a background check prepared through searches of those public databases. However, it is entirely possible that commercial criminal background screeners, which provide the bulk of the background checks in this country, will erroneously continue to report an expunged case, because they maintain databases independently of their public information sources (usually data from courts). AOPC deserves credit for initiating a best practice in this regard, a “LifeCycle File” that identifies expunged cases required to be removed from privately held databases.\textsuperscript{52} Nevertheless, the commercial screeners often fail to properly apply this LifeCycle file. Commercial screeners’ reporting of expunged cases implicates the “accuracy” provisions of the Fair Credit Reporting Act,\textsuperscript{53} leading to numerous class actions against screeners.\textsuperscript{54}

\textbf{ACT 5 PROVIDES SEALING OF CERTAIN MISDEMEANOR CONVICTIONS}

Over the past several years, the Pennsylvania General Assembly had taken up, without enacting, bills providing for expungement of old misdemeanor convictions. Senate Bill 166 of 2015, which became Act 5, finally broke through, when the stakeholders agreed, for the first time, to implement the concept known colloquially as “sealing.” Sealing does not destroy or eliminate records in the manner of expungement. Instead, it maintains records for use primarily by law enforcement but prohibits their dissemination to others, such as employers and landlords.

The general rule of Act 5 is that second degree and third degree misdemeanors and ungraded misdemeanors can receive an “order for limited access” after an individual has been free of arrest or conviction following final release from confinement or supervision, whichever is later, for a period of 10 years.\textsuperscript{55} Given the Pennsylvania Supreme Court’s recent ruling in a case about summary offense convictions, it is an-

\textsuperscript{50}. Lutz, supra note 48, at 999 (citing Commonwealth v. Maxwell, 737 A.2d 1243 (Pa. Super. 1999)).
\textsuperscript{51}. 18 Pa.C.S.A. §9102. Law enforcement keeps records of expunged cases in diversion cases so that it knows that the person had his “one chance” previously if he offends again.
\textsuperscript{52}. Sharon M. Dietrich, \textit{Ants Under the Refrigerator? Removing Expunged Cases from Commercial Background Checks}, 30 Criminal Justice 26 (Section of Criminal Justice Winter 2016).
\textsuperscript{53}. 15 U.S.C. §§1681e(b) and 1681k.
\textsuperscript{55}. 18 Pa.C.S.A. §9122.1(a)(1).
anticipated that the ten-year period will be measured backward from the time of the filing of the petition, rather than forward from the release from confinement or supervision.\footnote{Giulian, supra note 29.}

There are exceptions to the general rule that will eliminate large numbers of misdemeanors from eligibility. A person will not be eligible to seal his second degree, third degree or ungraded misdemeanor convictions if the person was ever convicted of any of the following:\footnote{18 Pa.C.S.A. §9122.1(b).}

- Any first degree misdemeanor or felony.
- Four or more misdemeanors.
- An offense requiring sex offender registration.
- Any of the following specific offenses (criminal code section provided):
  - Second degree simple assault (Sect. 2701).\footnote{18 Pa.C.S.A. §9122.1(b)(ii) (2015).}
  - Sexual intercourse with animals (Sect. 3129).
  - Impersonating a public servant (Sect. 4912).
  - Intimidation of witnesses or victims (Sect. 4952).
  - Retaliation against witness, victim or party (Sect. 4953).
  - Intimidation, retaliation or obstruction in child abuse cases (Sect. 4958).

State and local police may disseminate information in a case where an order for limited access has been issued only to “criminal justice agencies”\footnote{18 Pa.C.S.A. §9122.1(b)(2)(ii) (2015).} as defined by statute\footnote{18 Pa.C.S.A. §9102 (2015). These agencies include courts with criminal jurisdiction, state and local police, correctional facilities, probation agencies, prosecutors, and parole and pardon boards.} and to occupational licensing agencies.\footnote{18 Pa.C.S.A. §9122.1(b.2) (2015).} Similar limits on dissemination apply to the courts, including on the website maintained by AOPC.\footnote{18 Pa.C.S.A. §9122.1(b)(3) (2015).} Other than law enforcement and occupational licensing agencies, no one may ask a person to disclose information about sealed cases.\footnote{18 Pa.C.S.A. §9122.1(a)(2) (2015).}

Act 5 added a hefty $132 fee for the filing not only of petitions for limited access but also for petitions for expungements.\footnote{42 Pa.C.S.A. §1725.7(a) (2016).} The statute may be ambiguous as to whether this is a per petition or per petitioner fee—a critical issue, as many petitioners file numerous petitions.\footnote{The statute reads in relevant part: “[A] person who files a petition for expungement . . . or a petition for an order of limited access . . . shall pay a fee of $132 to the clerk of courts at the time of filing.”\textit{Id.}} These fees are expected to be waived for indigent petitioners with \textit{in forma pauperis} status.\footnote{In its report on its proposed rule for petitions for limited access, the Criminal Procedural Rules Committee wrote:}

\begin{quote}
The Committee discussed a suggestion to incorporate procedures for obtaining \textit{in forma pauperis} status. However, the procedures for \textit{an} in \textit{forma pauperis} request are well known and a regular part of expungement practice. Therefore, the Committee concluded that including specific provisions in the limited access order procedures was unnecessary.
\end{quote}

The Criminal Procedure Rules Committee of the Supreme Court of Pennsylvania has published for comment a proposed new Pa.R.Crim.P. 791 to apply to petitions

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56. Giulian, supra note 29.
57. 18 Pa.C.S.A. §9122.1(b).
58. Simple assaults graded as third degree misdemeanors are not disqualifying and can be sealed. However, simple assault is more commonly graded as a second degree misdemeanor.
59. 18 Pa.C.S.A. §9102 (2015). These agencies include courts with criminal jurisdiction, state and local police, correctional facilities, probation agencies, prosecutors, and parole and pardon boards.
60. 18 Pa.C.S.A. §9122.1(b.2) (2015).
63. 42 Pa.C.S.A. §1725.7(a) (2016).
64. The statute reads in relevant part: “[A] person who files a petition for expungement . . . or a petition for an order of limited access . . . shall pay a fee of $132 to the clerk of courts at the time of filing.”\textit{Id.}
65. In its report on its proposed rule for petitions for limited access, the Criminal Procedural Rules Committee wrote:
66. 46 Pa. B. No. 28, at 3640 (July 9, 2016).
\end{multicite}
for orders of limited access. The procedures are derived from, and very similar to, petitions for expungement under Rule 790, including the required content of petitions. It is anticipated that AOPC will create a form petition and order for limited access. The Committee’s report seems to anticipate that if a case has charges subject both to expungement under Rule 790 and to limited access under Rule 791, two separate petitions will be filed.

Even in advance of implementation of Act 5, several legal and implementation issues can be anticipated. For instance, consider the following:

- In older cases, the grade of an offense is often unclear in the reports obtained from the Pennsylvania State Police and AOPC, and even in court files, if they still exist and can be located. Under Act 5, grades are crucial to establish eligibility. What happens if the grade is unclear or cannot be established? Who bears the burden of proof?
- If a person has been convicted of four separate misdemeanors but in fewer than four cases, is he disqualified? An individual might have all four charges on which he was convicted in a single case.
- Must all fines and costs be paid before sealing?
- How will sealed paper records, such as court files, be maintained, yet not provided to the general public?

Some of these issues doubtlessly will be answered in litigation in the years ahead.

**COMPARING PENNSYLVANIA WITH OTHER STATES ON EXPUNGEMENT AND SEALING REMEDIES**

When immersed in our own state’s laws and procedures, we can become complacent that our way is the only way. Before Act 5, Pennsylvania was out of step with the majority of states, which permit expungement or sealing of some misdemeanor convictions. But even as limited access comes to Pennsylvania, we will remain behind many other jurisdictions in the scope of our record-clearing law.

Record-clearing remedies in the 50 states are, literally and figuratively, all over the map. In addition to expungement and sealing, some states offer the more exotic procedures of set-aside, vacatur and annulment. And the legal meaning of each remedy differs from state to state. What some states consider “expungement” is more akin to our new orders of limited access.

Nevertheless, an overview of the scope of record clearing in the 50 states can be broadly summarized. Such an overview puts Pennsylvania, even after Act 5, squarely in the middle of the pack.

- Eleven states provide expungement, sealing or set-aside for a significant number of felony convictions (Arizona, Arkansas, Indiana, Kansas, Massachusetts, Minnesota, Nevada, New Hampshire, Puerto Rico, Utah and Washington). In addition, Oregon and Tennessee provide expungement of minor felonies.

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67. Id. at 3637.
68. Id. at 3639-40.
69. Id. at 3639.
70. Id. at 3640.
71. Love et al., supra note 23, at 485.
72. Id. at 487.
73. Id. at 489.
74. Id. at 490.
• In addition to the states that generally have remedies for felonies, eight states provide record clearing to most offenders with misdemeanor convictions (Delaware, Illinois, Kentucky, North Carolina, Oklahoma, South Dakota, Vermont, and Wyoming).\(^75\)

• Four states, including two of our neighbors, provide record clearing remedies for most first-time offenders, including some sentenced to prison (Michigan, New Jersey, Ohio, and Rhode Island).\(^76\)

These states are notable for their diversity: they are in all regions of the country, including the South and they are blue, red and purple in their electoral politics. A few states usually thought of as conservative stand out for the breadth of their approaches.

• Kansas and Utah provide expungement for most felonies if eligibility criteria are met.\(^77\)

• Arkansas allows minor felonies and drug convictions to be eligible for sealing after five years.\(^78\)

• Indiana permits expungement of most felonies after waiting periods in the five-to ten-year range.\(^79\)

• Missouri recently provided for expungements of felony convictions seven years after completion of sentence and of misdemeanor convictions after three years.\(^80\)

Thus, even with Pennsylvania’s new provision for sealing of a relatively small number of misdemeanors (given the broad exceptions in Act 5), it can safely be said that at least 23 states provide broader record clearing remedies than we do. The Commonwealth can go even further than Act 5 to help our former offenders who have redeemed themselves through broader sealing remedies.

**CLEAN SLATE: THE NEXT FRONTIER IN SEALING IN PENNSYLVANIA?**

The next step in sealing in Pennsylvania could be “Clean Slate,” a bill currently pending in both the Senate and the House. Clean Slate would eliminate the eligibility restrictions for misdemeanors in Act 5, applying broadly to most nonviolent misdemeanors (including those graded as first degree misdemeanors). Even more significantly, it would provide for automatic sealing without the filing and consideration of petitions for an order of limited access. Most non-violent misdemeanors would be sealed after 10 crime-free years; summary offenses would be sealed after five years, and non-conviction cases would be sealed 60 days after disposition.

Clean Slate would not eliminate existing expungement remedies, if individuals chose to pursue them. Its primary purpose is to provide a remedy to thousands of individuals who are eligible for expungement or sealing but do not pursue either of those remedies. A recent review of the criminal records of persons eligible for ex-
Punishment in Maryland revealed that fewer than a third had cleared their records. The reasons identified were lack of knowledge about expungement, lack of legal representation, and cost. These barriers to expungement or sealing in Pennsylvania would be overcome by the automatic sealing of Clean Slate.

Clean Slate would also eliminate the burden on Pennsylvania’s courts and district attorneys to individually handle growing numbers of expungement and sealing petitions. Clean Slate is further seen as an anti-recidivism bill. It offers former offenders the prospect of getting their case off of their records if they stay crime-free for the required period of time.

Clean Slate is a bipartisan bill. In the Senate, it is Senate Bill 1197, with Senator Scott Wagner (R-York) as its prime sponsor. It was introduced with 27 co-sponsors from both sides of the aisle. In the other chamber, House Bill 1984 is sponsored by Sheryl Delozier (R-Cumberland), joined by 37 co-sponsors. The bill is supported by the Coalition for Public Safety, a bipartisan coalition of national advocacy groups for criminal justice reform that has identified Pennsylvania as potentially the first state to enact Clean Slate into law.

**CONCLUSION**

While Pennsylvania has long provided for expungement of criminal records, the role of record clearing has become increasingly important as almost four million Pennsylvanians have been stymied by the consequences of criminal records. Act 5 is a move in the right direction, to allow some misdemeanors to be sealed. But as other states have shown as they have expanded their expungement and sealing laws, more generous eligibility and streamlined implementation will be needed in our state. Clean Slate’s automatic sealing may be the next step, with perhaps sealing of felonies for redeemed former offenders in the future.

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82. The partners in the Coalition for Public Safety are the American Civil Liberties Union, Americans for Tax Reform, Center for American Progress, Faith & Freedom Coalition, FreedomWorks, the Leadership Conference Education Fund, the NAACP, and Right on Crime. See [http://www.coalitionforpublicsafety.org/about/](http://www.coalitionforpublicsafety.org/about/).