



CONSIDERATIONS FOR PROSECUTORS WHEN EVALUATING EXPUNGEMENT AND SEALING LEGISLATION

May 2024



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Acknowledgements

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This project was supported by Grant No. 2017-YX-BX-K002 awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Department of Justice's Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the SMART Office. Points of view or opinions in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice.

Considerations for Prosecutors When Evaluating Expungement and Sealing Legislation

Introduction

In the realm of criminal justice, the principles of rehabilitation and second chances are increasingly gaining recognition as essential components of a fair and just society. Expungement and sealing laws stand at the forefront of this movement, offering individuals the opportunity to move beyond past mistakes and rebuild their lives free from the stigma of a criminal record.

Prosecutors play a crucial role in the implementation and enforcement of these laws, tasked with evaluating their jurisdiction's legislation and its implications on both individuals and communities. The following list of considerations serves as a comprehensive guide for prosecutors, offering a systematic approach to assess the intricacies of expungement and sealing laws.

Covering a broad spectrum of issues, from determining eligibility criteria to exploring the nuances of rehabilitation and societal interests, this list provides prosecutors with a framework to navigate the complexities of expungement and sealing legislation. It is designed not to advocate for specific legislative actions, but rather to facilitate informed decision-making and promote fairness and equity in the application of these laws.

By engaging with these considerations, prosecutors can ensure that their actions align with the principles of justice, rehabilitation, and public safety. Ultimately, this guide aims to empower prosecutors to make informed and equitable decisions that contribute to the broader goals of promoting rehabilitation, reducing recidivism, and fostering a more inclusive and just society.

For a full overview of expungement and sealing statutes, See, [50 State Overview of Expungement and Sealing Statutes](#) and a [50 State Chart of Expungement and Sealing Statutes](#).

Expungement and Sealing Considerations for Prosecutors

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

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

What Offenses/Convictions are Eligible?

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

Which Persons are Ineligible?

- Are people ineligible if they:
 - Were more than 18 or 21 years of age at the time of the offense of conviction?
 - Are not first-time offenders?
 - Have been convicted of a crime of violence?
 - Have been convicted of a felony?
 - Have a certain number of prior felony or misdemeanor convictions?
 - Have a pending or intervening case?
 - Have already had a conviction sealed?

- Are seeking to seal more than one offense or multiple offenses in one incident?
- Have been incarcerated for the crime at issue?
- Have not paid all their fines, fees, and restitution?
- Are a candidate for public office or a public office holder?
- Are there other factors that might disqualify people from expungement or sealing, such as:
 - Untreated mental health or addiction issues?
 - A history of violence unrelated to a conviction?
 - Failure to demonstrate rehabilitation or attempts at rehabilitation?

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

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

What Records are Sealed?

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

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

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

How are the Records Concealed?

- Are records sealed or destroyed?
- Are only those records that pertain to a wrongful arrest or conviction destroyed?
- Are certain records, such as non-conviction records and decriminalized offense records, sealed automatically?
- Are low-level misdemeanors sealed automatically?
- Is a person required to file a petition to seal other conviction records?
- Are sealed records available to other law enforcement or criminal justice agencies without a court order?

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

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

When Does the Waiting Period Begin?

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

Who Determines Whether a Person Meets Basic Eligibility Requirements?

- Is there a statewide agency that determines eligibility (based on criminal history information)?

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

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

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

What Constitutes Rehabilitation?

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

Who Can Object to Sealing?

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

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

- Is the burden on the person to prove or on the prosecutor to disprove that a petition should be granted?
- Is the standard of proof different if one or the other has it?
- Is a petition to seal a case granted if the prosecutor/others fail to object within a stated period of time?

- Is a petition to seal a case granted/denied if there is:
 - Some evidence?
 - A reasonable probability?
 - A preponderance of the evidence?
 - Clear and convincing evidence that harm to the person outweighs harm to the community or vice versa, or that the person/government has/has not met the statutory requirements?

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

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

Who Can Have Access to Sealed Records?

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

Can Sealed Records be Unsealed?

- For use in decisions on bail, charges, sentencing, and sentencing enhancements?
- When the sealed offense is an element of a subsequent offense?
- When the sealed offense is relevant evidence in a new case?
- When a person is convicted of another misdemeanor/felony?
- When circumstances have changed?
- For impeachment?
- For civil litigation?

- When the public's interest in disclosure outweighs the person's interest in privacy?
- When there is a compelling reason to unseal the record?

Who Pays for the Costs of Sealing/Unsealing?

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

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

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