Council of the District of Columbia
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
MEMORANDUM
1350 Pennsylvania Avenue, NW, Washington, DC 20004

TO:	Nyasha Smith, Secretary of the Council
FROM:	Charles Allen, Chairperson, Committee on the Judiciary and Public Safety CA
RE:	Closing Hearing Record
DATE:	June 12, 2021

Dear Ms. Smith,

Please find attached copies of the Hearing Notice, Agenda and Witness List, and testimony for the Committee on the Judiciary and Public Safety's April 8, 2021 Public Hearing on Bill 24-0063, the "Second Chance Amendment Act of 2021", and Bill 24-0110, the "Criminal Record Expungement Amendment Act of 2021".

The following witnesses testified at the hearing or submitted written testimony to the Committee:

i. Public Witnesses

1. Jonathan Jeffress, Board Director, Council for Court Excellence
2. Emily Tatro, Deputy Director, Council for Court Excellence
3. Margaret Love, Executive Director, Collateral Consequences Resource Center
4. Hannah Akintoye, Managing Attorney, Hannah Akintoye Law, PLLC
5. Patrice Sulton, Executive Director, D.C. Justice Lab
6. Salim Adofo, Chair, ANC 8C
7. Robert Vinson Brannum, Commissioner, ANC 5E08
8. Hen Brooks, Public Witness
9. Jon Cooper, Public Witness
10. Troy Burner, Intern, D.C. Reentry Action Network
11. Sunny Kuti, Youth Organizer, The National Reentry Network for Returning Citizens
12. Rabbi Charles Feinberg, Executive Director, Interfaith Action for Human Rights
13. Elenore Wade, Visiting Associate Professor of Clinical Law & Friedman Fellow, Prisoner & Reentry Clinic, The George Washington University Law School
14. Robert Becker, Representative, D.C. Open Government Coalition
15. Richard Gilbert, Representative, District of Columbia Association of Criminal Defense Lawyers
16. Sarah Bradach, Advocacy Volunteer, D.C. Justice Lab

17. Gina Daye Williams, Director, Reentry Housing Initiative, Jubilee Housing
18. Ashley Carter, Equal Justice Works Fellow, D.C. Volunteer Lawyers Project
19. Jennie Berman, Supervising Attorney, D.C. Volunteer Lawyers Project
20. Rebecca Barson, Co-Chair, D.C. Leadership Council, Jews United for Justice
21. Doni Crawford, Policy Analyst, D.C. Fiscal Policy Institute
22. Tony Littlejohn, Public Witness
23. Etienne Boussougou, Public Witness
24. Cosette Audi, Public Witness
25. Darnelle Martin, Public Witness
26. D.C. Coalition Against Domestic Violence
27. Olinda Moyd, Adjunct Professor, Reentry Clinic, Howard University School of Law
28. Josephine Ross, Professor, Reentry Clinic, Howard University School of Law
29. Ernest Glover, Public Witness
30. Bridgette Stumpf, Executive Director, Network for Victim Recovery of D.C.
31. Fred Hill, Public Witness
32. Lanet Scott, The Scott Law Firm, LLC
33. Samuel Gassman, Public Witness
34. Sondra Fiorella, Public Witness
35. Elizabeth Miksztal, Public Witness
36. Celia Okoro, Public Witness
37. Sarah Cripps, Public Witness
38. Aladdin Fawal, Public Witness
39. Jaclyn Sersland, Public Witness
40. Amy Guerrero, Public Witness
41. Matt Monteverde, Public Witness
42. Joshua Jomarron, Public Witness
43. Peter Walter, Public Witness
44. Sarah Siraj, Public Witness
45. Tena-Lesly Reid, Public Witness
46. Anastasia Slastushinskaya, Public Witness
47. Raul Banos, Public Witness

ii. Government Witnesses

1. Christopher Geldart, Acting Deputy Mayor for Public Safety and Justice
2. Jeminé Trouth, Assistant Chief, Criminal Section, Public Safety Division, Office of the Attorney General for the District of Columbia
3. Katya Semyonova, Special Counsel to the Director for Policy, Public Defender Service for the District of Columbia
4. Elana Suttenberg, Special Counsel to the U.S. Attorney for Legislative Affairs, United States Attorney's Office for the District of Columbia

Council of the District of Columbia
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
NOTICE OF PUBLIC HEARING
1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004

COUNCILMEMBER CHARLES ALLEN, CHAIRPERSON
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY

ANNOUNCES A PUBLIC HEARING ON

B24-0063, THE "SECOND CHANCE AMENDMENT ACT OF 2021"

AND

B24-0110, THE "CRIMINAL RECORD EXPUNGEMENT AMENDMENT ACT OF 2021"

Thursday, April 8, 2021, 9:30 a.m. – 3:30 p.m.
Virtual Hearing via Zoom
To Watch Live:
https://dccouncil.us/council-videos/
http://video.oct.dc.gov/DCC/jw.html
https://www.facebook.com/CMcharlesallen/

On Thursday, April 8, 2021, Councilmember Charles Allen, Chairperson of the Committee on the Judiciary and Public Safety, will convene a public hearing to consider Bill 24-0063, the "Second Chance Amendment Act of 2021", and Bill 24-0110, the "Criminal Record Expungement Amendment Act of 2021." The hearing will be conducted virtually via Zoom from 9:30 a.m. to 3:30 p.m.

The stated purpose of B24-0063, the "Second Chance Amendment Act of 2021", is to amend Chapter 8 of Title 16 to increase the number of eligible convictions that may be sealed, to reduce the number of years a resident must remain off papered to seal an eligible conviction, to simplify and shorten the process that a resident must undertake to seal a charge that does not end in a conviction, and to have a group of independent legal experts look at ineligible misdemeanors and felonies and issue a report with recommendations for eligibility.

The stated purpose of B24-0110, the "Criminal Record Expungement Amendment Act of 2021", is to amend section 16-801 of the District of Columbia Official Code to expand the definition of an eligible felony and to make all misdemeanors eligible for sealing.

The Committee invites the public to provide oral and/or written testimony. Public witnesses seeking to provide oral testimony at the Committee's hearing must thoroughly review the following instructions:

- Anyone wishing to provide oral testimony must email the Committee at judiciary@dccouncil.us with their name, telephone number, organizational affiliation, and title (if any), by the **close of business on Friday, April 2, 2021**.
- The Committee will approve witnesses' registrations based on the total time allotted for public testimony. The Committee will also determine the order of witnesses' testimony.
- Representatives of organizations will be allowed a maximum of five minutes for oral testimony, and individuals (and any subsequent representatives of the same organizations) will be allowed a maximum of three minutes.
- Witnesses are not permitted to yield their time to, or substitute their testimony for, the testimony of another individual or organization.
- If possible, witnesses should submit a copy of their testimony electronically in advance to judiciary@dccouncil.us.
- Witnesses who anticipate needing language interpretation are requested to inform the Committee as soon as possible, but no later than five business days before the hearing. The Committee will make every effort to fulfill timely requests; however, requests received fewer than five business days before the hearing may not be fulfilled.

For witnesses who are unable to testify at the hearing, written statements will be made part of the official record. Copies of written statements should be emailed to the Committee at judiciary@dccouncil.us **no later than the close of business on Friday, April 16, 2021.**

COUNCILMEMBER CHARLES ALLEN, CHAIRPERSON
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY

ANNOUNCES A PUBLIC HEARING ON

B24-0063, THE "SECOND CHANCE AMENDMENT ACT OF 2021"

AND

B24-0110, THE "CRIMINAL RECORD EXPUNGEMENT AMENDMENT ACT OF 2021"

Thursday, April 8, 2021, 9:30 a.m. – 3:30 p.m.
Virtual Hearing via Zoom
To Watch Live:
https://dccouncil.us/council-videos/
http://video.oct.dc.gov/DCC/jw.html
https://www.facebook.com/CMcharlesallen/

AGENDA AND WITNESS LIST

I. CALL TO ORDER

II. OPENING REMARKS

III. WITNESS TESTIMONY

i. Public Witnesses

Panel 1

1. Jonathan Jeffress, Board Director, Council for Court Excellence
2. Emily Tatro, Deputy Director, Council for Court Excellence
3. Margaret Love, Executive Director, Collateral Consequences Resource Center
4. Hannah Akintoye, Managing Attorney, Hannah Akintoye Law, PLLC

5. Patrice Sulton, Executive Director, D.C. Justice Lab
6. Salim Adofo, Chair, ANC 8C
7. Robert Vinson Brannum, Commissioner, ANC 5E08
8. Hen Brooks, Public Witness

Panel 2

9. Jon Cooper, Public Witness
10. Troy Burner, Intern, D.C. Reentry Action Network
11. Sunny Kuti, Youth Organizer, The National Reentry Network for Returning Citizens
12. Rabbi Charles Feinberg, Executive Director, Interfaith Action for Human Rights
13. Elenore Wade, Visiting Associate Professor of Clinical Law & Friedman Fellow, Prisoner & Reentry Clinic, The George Washington University Law School
14. Robert Becker, Representative, D.C. Open Government Coalition
15. Richard Gilbert, Representative, District of Columbia Association of Criminal Defense Lawyers

ii. Government Witnesses

1. Christopher Geldart, Acting Deputy Mayor for Public Safety and Justice
2. Jeminé Trouth, Assistant Chief, Criminal Section, Public Safety Division, Office of the Attorney General for the District of Columbia
3. Katya Semyonova, Special Counsel to the Director for Policy, Public Defender Service for the District of Columbia
4. Elana Suttenberg, Special Counsel to the U.S. Attorney for Legislative Affairs, United States Attorney's Office for the District of Columbia

IV. ADJOURNMENT

2020-2021

OFFICERS

CHAIR OF THE BOARD
Tamika L. Tremaglio
Deloitte, LLP

PRESIDENT
Patrick McGlone
Ullico Inc.

IMMEDIATE PAST PRESIDENT
Irvin B. Nathan
Arnold & Porter LLP (ret.)

VICE PRESIDENT
James H. Hulme
Arent Fox LLP

SECRETARY
John B. (Jay) Kennedy
The Washington Post

TREASURER &
FINANCE COMMITTEE CHAIR
Julia A. Matthews

EXECUTIVE COMMITTEE

Debra R. Belott
Jones Day

Carol Elder Bruce
Law Office of Carol Elder Bruce, PLLC

Kevin A. Chambers
U.S. Department of Justice

Paulette E. Chapman
Koonz, McKenney, Johnson, & DePaolis LLP

Barry Coburn
Coburn & Greenbaum PLLC

David H. Cox
Jackson & Campbell, P.C.

Eric S. Glover

Peter R. Kolker
Zuckerman Spaeder LLP

Victor E. Long
Regan Zambri Long PLLC

Fritz Mulhauser

Benjamin J. Razi
Covington & Burling LLP

Elizabeth A. Scully
BakerHostetler

James P. Tuite

Natalie S. Walker
Webster & Fredrickson, PLLC

Cynthia G. Wright

Joanne L. Zimolzak

Lisa B. Zycherman
Davis Wright Tremaine LLP

NOMINATING COMMITTEE
CHAIR
Brian L. Schwalb
Venable LLP

EXECUTIVE DIRECTOR
Misty C. Thomas

Judicial leaders not listed.

Council for Court Excellence
Improving Justice for the Community

Statement of the Council for Court Excellence
Before the Committee on the Judiciary and Public Safety
of the Council of the District of Columbia

Public Hearing on
B24-0063, the "Second Chance Amendment Act of 2021" and
B24-0110, the "Criminal Record Expungement Amendment Act of 2021"

April 8, 2021

This testimony is presented by Jonathan Jeffress, a Board Director of the Council for Court Excellence (CCE) and co-chair of CCE's Criminal Justice Committee. Mr. Jefress is also a partner at KaiserDillon PLLC. Mr. Jeffress is joined by Emily Tatro, the Deputy Director for CCE. Please note that per our policy, no judicial member of CCE participated in the formulation or approval of this testimony. This testimony does not reflect the specific views of or endorsement by any judicial member of CCE.

Today we will testify on the urgent importance of enacting criminal record sealing, expungement, and accuracy legislation and hope the committee will consider not only B24-0063, the "Second Chance Amendment Act of 2021," and B24-0110, the "Criminal Record Expungement Amendment Act of 2021," but also the two bills that were introduced after notice of this hearing was circulated: B24-0160, the "Criminal Record Accuracy Assurance Act of 2021," and B24-0180, the "Record Expungement Simplification to Offer Relief and Equity (RESTORE) Amendment Act of 2021."

We are grateful to these bills introducers, Councilmember Trayon White, Councilmember Robert White, Councilmember Henderson, and Mayor Bowser, for introducing the criminal records bills pending before the Council, and to Chairman Allen for making this issue a priority. After more than three years of waiting since the last

1111 14th Street, NW, Suite 500 | Washington, DC 20005-5628
Tel: (202) 785-5917 | Fax: (202) 785-5922
www.courtexcellence.org

hearing on similar bills in December 2017, we hope the Committee moves swiftly to markup so that the DC Council can quickly pass this much needed legislative reform.

The District has long needed to expand eligibility for criminal record sealing and expungement, speed up the process, and ensure the accuracy of records that are publicly available, but the economic recession brought by the COVID-19 pandemic makes the need even more urgent. About one in seven adult D.C. residents has a publicly available criminal record, despite only half of these individuals having been convicted of a crime.[1] While only 47% of D.C.'s population identifies as Black, 95% of people sentenced to prison in D.C. and 86% of people arrested by the Metropolitan Police Department are Black, which means that Black D.C. residents are much more likely than their white neighbors to have a criminal record.[2] There are also racial disparities in unemployment levels and rates of housing instability in the District: Black residents are seven times more likely to be unemployed as White residents,[3] and evictions rates are substantially higher in Wards 5, 7, and 8, the same wards that have the largest share of Black residents, the highest rates of poverty[4], and the greatest number of residents who have previously been incarcerated.[5] Unemployment and housing instability have only gotten worse during the pandemic.

Now that the COVID-19 vaccine rollout is well underway and the restrictions on businesses eviction moratoria are beginning to lift, it is critical that the D.C. Council pass criminal record sealing and expungement legislation so that people with records can fully participate in the reopening economy

---

[1] Duane, M., Lynch, M., & Reimal, E. (2017, June 27). *Criminal Background Checks and Access to Jobs A Case Study of Washington, DC.* Urban Institute. https://www.urban.org/research/publication/criminal-background-checks-and-access-jobs

[2] District Task Force on Jails & Justice. (February 2021). *Jails & Justice: Our Transformation Starts Today*. http://www.courtexcellence.org/uploads/publications/TransformationStartsToday.pdf

[3] Crawford, D. & Das, K. (2020, January 28). *Black Workers Matter: How the District's History of Exploitation & Discrimination Continues to Harm Black Workers.* DC Fiscal Policy Institute. https://www.dcfpi.org/wp-content/uploads/2020/01/Black-Workers-Matter-PDF-5.pdf

[4] McCabe, B.J. & Rosen, E. (Fall 2020). *Eviction in Washington, DC: Racial and Geographic Disparities in Housing Instability*. Georgetown University. https://georgetown.app.box.com/s/8cq4p8ap4nq5xm75b5mct0nz5002z3ap

[5] District Task Force on Jails & Justice. (February 2021). *Jails & Justice: Our Transformation Starts Today*. http://www.courtexcellence.org/uploads/publications/TransformationStartsToday.pdf

rather than being forced to the back of the line again. A survey of US employers highlighted the negative impact that a criminal record can have; 73% of respondents stated that even a nonviolent misdemeanor conviction would be "somewhat" or "very influential" in their decision not to extend a job offer.[6] The stigma surrounding a criminal conviction is still prevalent, no matter the type of crime or when it occurred. Effective criminal record sealing legislation can combat this, providing a clean slate for returning citizens while maintaining public safety.

After consulting with a working group of practitioners and experts, as well as the District Task Force on Jails & Justice, CCE believes that D.C.'s new record sealing and expungement legislation must accomplish the following goals:

1. The system must be easy and relatively quick to navigate for a person seeking to seal or expunge their record, even without the assistance of an attorney;
2. It must clearly define sealing and expungement;
3. It must broaden eligibility for convictions and drastically shorten waiting periods;
4. It must automatically and retroactively apply to non-convictions and convictions that have since been decriminalized;
5. It must hold government agencies accountable for properly sealing and expunging records, and certifying they have done so;
6. It must also hold private companies accountable for accurately reporting records; and
7. It must create exemptions with clear boundaries for access to records for legitimate reasons for law enforcement, researchers, and journalists.

[6] Council for Court Excellence. (2016, December). *Beyond Second Chances: Returning Citizens' Re-entry Struggles and Successes in the District of Columbia.* http://www.courtexcellence.org/uploads/File/BSC-FINAL-web.pdf

CCE has several specific recommendations on issues presented in the draft bills, including: 1) sealing versus expungement, 2) offenses eligible for sealing, 3) waiting periods for convictions, 4) automatic sealing for non-convictions, 5) retroactivity, 6) cap on convictions, 7) certifications, 8) guidance for movants, and 9) Exceptions for Research and Journalism.

1) Sealing v. Expungement

The proposed bills differ among their use of expungement and record sealing. In existing D.C. law, and in the proposals, sealing is akin to locking records in a filing cabinet to which only law enforcement agencies and certain employers (for example, day care centers) have a key. Expungement can be likened to burning records – no trace is left behind. CCE recommends D.C. use sealing to handle most records, maintaining the current exception that allows expungement of records in cases of "actual innocence." Sealing retains access for law enforcement to records so that they can be used to establish a pattern of arrests or eligibility for a deferred sentencing agreement. With limited exceptions, employers and housing providers will be unable to view an individual's sealed criminal record. While expungement would fully restore a person his or her status before contact with law enforcement, record sealing, in effect, provides that restoration of status while seeking employment and housing, thus achieving the proposals' purpose.

2) Offenses Eligible for Sealing

CCE supports making all misdemeanors eligible for record sealing, as well as all felonies, except for the most serious offenses as defined by the D.C. Sentencing Commission in Offense Severity Groups 1 and 2 of the Master Grid.[7] Desistance research shows that the amount of time that has elapsed from the

[7] The District of Columbia Sentencing Commission. (2017, August 7). *Voluntary Sentencing Guidelines Manual.* https://scdc.dc.gov/sites/default/files/dc/sites/scdc/publication/attachments/FINAL%202017%20Voluntary%20Sentencing%20Guidelines%20Manual%20(Printer%20Proof%208-1-17).pdf

most recent conviction, not the type of offense, matters most when measuring the likelihood of re-offending. Because the risk of recidivism declines with time, we believe most offenses should be eligible for sealing in order to provide restoration for those deserving of a clean slate.[8]

3) Waiting Periods for Convictions

CCE supports a three-year waiting period for sealing misdemeanor convictions. At least 20 states already make certain misdemeanor convictions eligible for sealing after a waiting period of three years or less.[9] Moreover, after discussion with our working group of diverse stakeholders, CCE believes five years is a reasonable waiting period for sealing eligible felony convictions. 19 states already make certain felonies eligible for record sealing after a period of five years or less.[10]

Robust research shows that people who remain crime-free for 3-4 years after a non-violent conviction and 4-7 years after a violent conviction are no more likely to recidivate than a member of the general community.[11] D.C.'s waiting period should be in line with the evidence and take into consideration the burden imposed on pro-se movants by imposing a different waiting period for each type of conviction. Maintaining single waiting period of three years for a misdemeanor conviction and a single waiting period of five years for a felony conviction best serves the interests of the individual and the public.

---

[8] Blumstein, A. & Nakamura, K. (2009). Redemption in the Presence of Widespread Background Checks. *American Society of Criminology, 47*(2), 349.

[9] These states are Arkansas, Colorado, Delaware, Illinois, Kansas, Maryland, Minnesota, Michigan, Missouri, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, Oregon, South Carolina, Texas, Utah, Washington, and West Virginia. Restoration of Rights Project. (2021, March). *50-State Comparison: Expungement, Sealing, and Other Record Relief.* https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside/

[10] These states are Arkansas, Colorado, Illinois, Kansas, Kentucky, New Hampshire, Minnesota, Michigan, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, Tennessee, Utah, Vermont, Washington, and West Virginia. Restoration of Rights Project. (2021, March). *50-State Comparison: Expungement, Sealing, and Other Record Relief.* https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside/

[11] Blumstein, A. & Nakamura, K. (2012). *Extension of Current Estimates of Redemption Times: Robustness Testing, Out-of-State Arrests, and Racial Differences*. National Criminal Justice Reference Service. https://www.ncjrs.gov/pdffiles1/nij/grants/240100.pdf.

4) Automatic Sealing for Non-Convictions

CCE strongly supports automatically sealing records in all cases terminating without a conviction. Approximately half of the estimated 68,000 D.C. residents with a criminal record have no record of a corresponding conviction within the prior decade.[12] That means that 35,000 people face real ramifications when applying for jobs and housing, despite an arrest or charge not having led to a finding of guilt. To uphold fully the constitutional principles of our justice system, the burden must not be on the movant to seal an arrest for which no guilt was established. Therefore, CCE recommends automatic sealing for all non-convictions, with the prosecution retaining the option to file a motion in opposition to sealing an individual record.

5) Retroactivity for Automatic Sealing

Given the barrier a criminal record can play in an individual's life, CCE believes changes to D.C.'s criminal record sealing statute should apply retroactively. Just as the D.C. Code allows movants to petition for retroactive sealing of now decriminalized or legalized offenses, changes to sealing of non-convictions should apply with fairness to individuals past or present who may seek relief.[13]

CCE recognizes there may be practical challenges to retrieving and sealing records of non-convictions that are not electronically stored. For this reason, CCE recommends that the automatic sealing of non-convictions should be retroactive for as far back in time as electronic records exist. For records prior to this date, D.C. should allow a petitioner to file for sealing non- convictions, and the burden should be on the prosecutor to object to any motion. It is vital that the relevant government

[12] Duane, M., Lynch, M., & Reimal, E. (2017, June 27). *Criminal Background Checks and Access to Jobs A Case Study of Washington, DC.* Urban Institute. https://www.urban.org/research/publication/criminal-background-checks-and-access-jobs
[13] D.C. Code Ann. § 16-803.02.

agencies are transparent with regard to when their electronic records begin and any other limitations they have in retrieving past records so that retroactivity can be implemented effectively.

6) Cap on Convictions

CCE strongly supports a change to the cap on convictions under current D.C. law, which effectively allows only for the sealing of the single most recent eligible conviction. People with a lengthy, but old, criminal history receive little benefit from having just their most recent eligible offense sealed. If the objective is to restore a movant's record to improve employment and housing prospects, then sealing just one conviction among many will fall short of this goal. Additionally, increasing the cap on the number of convictions eligible for sealing to a higher quantity is arbitrary. An individual who has met the proper waiting times without disqualifying convictions should be able to petition to seal any number of eligible offenses.

We believe language in the current statute that allows the Superior Court to weigh factors such as prior and subsequent conduct, and the number of the arrests or convictions that are the subject of the motion, are sufficient discretionary guidelines when determining whether to grant a motion to seal.[14] I again emphasize that research shows it is the time elapsed since the most recent conviction – not quantity of convictions – that is most important in measuring risk of re-offense.[15] Together, these factors support CCE's recommendation to remove any cap on convictions.

7) Certifications

CCE supports a process that holds agencies accountable to ensure they are abiding by

[14] D.C. Code Ann. § 16-803(h).
[15] Blumstein, A. & Nakamura, K. (2012). *Extension of Current Estimates of Redemption Times: Robustness Testing, Out-of-State Arrests, and Racial Differences*. National Criminal Justice Reference Service. https://www.ncjrs.gov/pdffiles1/nij/grants/240100.pdf.

sealing orders. In order to restore fully a movant's record once sealed, it is imperative that all agencies that have access to this record send a certification to the Superior Court confirming such action, as required by current law. Members of CCE's working group reported that their clients rarely receive certifications from government agencies verifying that their records have been sealed. Therefore, CCE recommends that any legislation passed by the D.C. Council require the Superior Court to provide notice to the movant once it has received all certifications from the relevant agencies. This process will provide confidence to individuals to proceed with applications, knowing that their records have actually been sealed. We also support a regulatory mechanism to hold the various agencies and Court accountable if it does not provide certification to the movant within the statutorily required timeline.

8) Guidance for Movants

Accompanying any new criminal record sealing legislation, there must be clear guidance for movants on how to respond to questions about their record for employment or housing applications. CCE believes that guidance to answer "no record" to any inquiry into prior arrests, court appearances, or convictions that have been sealed is a sufficient instruction. Furthermore, the current provision of the D.C. Code, which states that a movant cannot be held guilty of perjury for failing to acknowledge a sealed record, should be retained.[16] No individual should be compelled to share his or her sealed criminal record under fear of criminal punishment.

9) Exceptions for Research and Accountability

Finally, the legislation must assure that two kinds of public interest remain in balance. The District's interest in limiting the collateral consequences of justice involvement for individuals, as discussed above, must be considered alongside the public interest in transparency and accountability for

[16] D.C. Code Ann. § 16-803(m).

the judicial branch of our democracy. That second interest has a long history of protection by the courts, to assure that proceedings are not secret and that the court operations are visible to the public.[17] The public interest extends even further, to include access to bodies of records. Indeed, the research we relied on in the opening words of our testimony (Urban Institute data on those arrested but never convicted who are likely at risk in background checks) would not have been possible if court records were not publicly available.[18] We request, therefore, that language carving out an exception for sharing anonymized records for research or journalistic purposes be added to any record-sealing bill:

> Upon motion and for good cause shown, court records sealed under this section may at the discretion of the court, upon a balancing of the interest of individuals in nondisclosure of the information and the interest of the requesting party, be made available for scholarly, educational, journalistic, or governmental purposes only, provided, however, that identifying information of parties shall remain sealed unless the court determines that the release of such information is appropriate under this paragraph and necessary to fulfill the purpose of the request. Nothing in this paragraph shall be deemed to permit the release of personal identifying information for commercial purposes.

---

[17] David S. Ardia, "Court Transparency and the First Amendment." 38 *Cardozo Law Review* 835 (2017). Professor Ardia quotes Judge Frank Easterbrook, "The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification." *Hicklin Eng'g, L.C. v. Bartell,* 439 F.3d 346, 348 (7th Cir. 2006).

[18] See note 1, supra. The authors explained their study method: "We accessed the District of Columbia Courts' website to pull all criminal cases from January 1, 2007 to December 31, 2016, including felonies (levels I, II, III), misdemeanors, domestic violence, traffic offenses, and criminal contempt. The raw data included approximately 151,000 criminal cases. We screened out approximately 39,000 cases and drilled down to 112,359 cases, which were the focus of our analysis." Marina Duane, *et al.*, *Criminal Background Checks and Access to Jobs: A Case Study of Washington, DC* (Urban Institute, July 2017; updated November 2017), p.18. Georgetown researchers Eva Rosen and Brian McCabe, who used landlord-tenant court records to help the District understand what is really going on in eviction cases, testified before the D.C. Council on October 27, 2020, about their study and added a plea that record-sealing legislation must "explicitly enable researchers to access the data." https://dcogc.org/wp-content/uploads/2020/11/Record-Sealing-Testimony1.pdf.

Conclusion

The proposed criminal record sealing bills are a major step toward reforming D.C.'s current law and we encourage the Council to consider the research and experience of practitioners, as outlined in our testimony, as you continue to refine this legislation. Most importantly, we urge the Council to act quickly to pass a new record sealing and expungement scheme before Black residents are pushed to the back of the line as the economy begins to reopen. Thank you for your time and I welcome any questions you may have.

STATEMENT ON

B24-0063,
THE "SECOND CHANCE AMENDMENT ACT OF 2021"

and

B24-0110,
THE "CRIMINAL RECORD EXPUNGEMENT AMENDMENT ACT OF 2021"

by

ROBERT VINSON BRANNUM

ADVISORY NEIGHBORHOOD COMMISSIONER - 5E08
CHAIRMAN EMERITUS, 5TH DISTRICT CITIZENS' ADVISORY COUNCIL

Before the

Judiciary & Public Safety Public Roundtable

COMMITTEE ON JUDICIARY AND PUBLIC SAFETY
COUNCIL OF THE DISTRICT OF COLUMBIA

Thursday, April 8, 2021
9:30 a.m. – 3:30 p.m.

Greetings and salutations and good morning Chairman Allen and members of the Committee, my name is Robert Vinson Brannum. I am the ANC Commissioner for Single Member District 5E08. I am Chairman Emeritus of the 5th District Citizens Advisory Council and currently an at-large member of the Chief's Citizen Advisory Council.

Mr. Chairman and members of the committee, B24-0063, the "Second Chance Amendment Act of 2021" and B24-0110, the "Criminal Record Expungement Amendment Act of 2021, are both meritorious, in the best interests of criminal justice reform, and deserve the approval of the Council of the District of Columbia. Please know, I take this opportunity by testimonial extension to support legislation, Bill 24-0180, "The Record Expungement Simplification To Offer Relief and Equity (RESTORE) Amendment Act of 2021", although it is not on today's Committee Agenda for consideration.

At the outset of my statement, I assert for the record I am not a lawyer. I am by ancestral inspiration a concerned citizen and

community activist committed to the principles of justice and equality. I have on many occasions guided young people who seeking to turn their lives around from certain unacceptable youthful misconduct, who at that moment find themselves in the judicial system. It is my view these two (2) measures collectively will allow persons, particularly low-income and Black and Brown residents of the District of Columbia arrested, yet not prosecuted, charged, yet not convicted for certain eligible offenses the opportunity to seal their records and to move forward with their lives for themselves and their families.

I have been a long and strong advocate for official transparency and open government to include judicial proceedings. It is my view the sunlight of social and community responsibility serves to protect all of the community and society.

However, I do not believe the indefinite or perpetual public record availability should hinder a person's future positive participation in society and supporting one's family. The ability to get a job, secure a place to live or to obtain personal or

professional credit support has to be forever marred by certain forgivable youthful personal misconduct or the government's decision not to charge or to prosecute for low hanging criminal offenses.

Following my non-lawyer review of the "Second Chance Amendment Act of 2021" I submit these recommendations:

- the waiting period of at least 5 years should be removed, [page 2, line numbers 50-51]
- the number of prior motions should be eliminated or clarified,
  [page 2, line numbers 53-54]
- the meaning of unreasonable delay should be clarified, [page 8, lines 169-173].

Mr. Chairman and members of the Committee, these are some of my immediate concerns and recommendations I submit for the record, reserving the right offer additional and appropriate insights.

####

Testimony of Jon Cooper before DC Council hearing on Sealing and Expungement of Criminal Offenses

Good Morning to Councilman Allen and my Councilwoman Nadeau and the Council as a Whole. My name is Jon Cooper. I come today to urge you to pass a bill on Sealing and Expungement of Criminal Offenses. I support this and the many other efforts on criminal justice reform.

The basis of my belief come from my work and personal experiences. I teach a course on Reentry at George Washington University, during which I have had the pleasure and sadness of teaching many students about the barriers to reentry for Returning Citizens. Of relevance today, their criminal record mostly bars them from many jobs, as well as educational opportunities. By one study, for instance, 90% of schools and college look negatively on applicants with criminal records. While recent Ban the Box legislation has been helpful its doe does not prevent many of the problems.

While I recognize that some felonies should not be sealed or expunged, I believe that all misdemeanors and most felonies should be eligible for this treatment. I particularly like features in the present bills that would allow review of the offenses within limited time periods and which would have the rebuttable presumption that all offenses should be removed after 10 years. (most credit reporting removes negative reports sooner than that).

I have personally experienced these problems. I was released after serving a sentence from a non-violent felony plea almost 6 years ago. Although I was selected and found highly qualified for several senior jobs, my record resulted in a quick rejection. While I accept full responsibility for my criminal offense, it is a long-time since 2007 when they occurred.

I will end with a quick story. I was accepted and served successfully in a one-year program as a senior environmental scientist with the DC Dept of Energy and the Environment, through a USEPA program; my background was fully disclosed. I was then offered another USEPA position. Low and behold my appointment was delayed. I then got an email from a security officer that they would not clear me for the position because I was charged with 7 offenses. All those offenses were dismissed by a U.S. District Judge -- but their presence in my record were enough to lose the position.

Expungement of at least the dismissed charges would have made all the difference here. And since the plea bargain offense was a low-level non-violent offense, it too should have been expunged.

Please help me and the many other returning citizens who have turned their lives around by adopted this important bill.

Thank you.

DC RAN
WASHINGTON DC'S
REENTRY ACTION NETWORK

PUBLIC HEARING

B24-0063, the "Second Chance Amendment Act of 2021"

and

B24-0110, the "Criminal Record Expungement Amendment Act of 2021"

Thursday, March 8, 2021

Committee on the Judiciary and Public Safety
Ward 6 Councilmember Charles Allen, Chairman

Testimony of
Troy Burner
Intern, DC Reentry Action Network

My name is Troy Burner. I am at present the D.C. RAN Intern, as well as a Mentor/Peer Navigator for Changing Perceptions. I am honored to be before you, Mr. Chairman and the Committee in hopes of urging you to pass the "Second Chance Amendment Act of 2021 and the "Criminal Record Expungement Act of 2021.

In November 2018, I was released from the custody of the BOP, after serving almost 25 years of incarceration. I immediately found that though I was released, ultimately my liberties were still being restricted.

Whether it is housing or employment, the stain of incarceration will serve as an impediment to moving forward. That is, on top of already being behind and entering a playing field that is uneven. Incarceration itself is payment debt to society, yet upon return that STAIN remains. That STAIN is not conducive to progress for the individual, the community or reducing recidivism.

Even more, that STAIN serves as a direct contrast to what our esteemed Mayor declares are our D.C. Core Values. It is our mission to be, accessible, diverse, equitable, livable, opportunistic, prosperous, resilient, and safe city. Those are D.C.'s eight stated values. Though we have eight stated values, livability, safety, and equity are touted as D.C.'s top 3 values. I submit to you that livability, safety, and equity creates inclusivity.

With the ever-increasing number of releases because of the Incarceration Reduction Amendment Act of 2016, we are serving as an example of the positive impact that can be had on the community and that has truth, even living with a record. I stand before you today, now an exonerated man, but still STAINED and living with a record.

I implore you Mr. Chairman and the Committee to seal and expunge by passing the "Second Chance Amendment Act of 2021" and the "Criminal Record Expungement Act of 2021." Thank you for the opportunity to share with you the impact of living with a record.

Testimony on Legislative Proposals to Reform Expungement and Sealing of Criminal Records

Sunny Kuti
Youth Organizer

The National Reentry Network for Returning Citizens, Inc.
Before the
Committee of the Judiciary
for
Council of the District of Columbia
Charles Allen, Chairperson

Thursday, April 8, 2021

Good morning everyone,

I would like to formally thank Councilmember Allen for giving me this opportunity to speak.

My name is Sunny Kuti. I am the recently hired Youth Organizer for the National Reentry Network for Returning Citizens. My inquiry today is on an issue that directly affects me and other young black men like me. It is human nature to make a mistake, and as human beings we are all entitled to them. At the age of 17, growing up in an area that was heavily ruled by crime, it was easy for me to make a mistake and fall in with the wrong people. That mistake still affects me today. 8 years later with multiple barriers and very limited windows of opportunity, it feels as though the weight of the world is on my shoulders, constantly pressuring me and attempting to bring me down or give up on me. Sad to say, but I'm only one of the millions of adults and youth worldwide that this issue affects. In my own experience, I've been on several job interviews and I was denied a job because I was deemed unqualified to be a waiter. To the average person that may not seem as a big issue, but to a youth like myself it is devastating, discouraging and cruel. I was denied a job because of my past, my record, that's it. Why would you judge me as a young person for a mistake I made for a job, housing or a line of credit? Why not talk to me and find out if I'm prepared to meet the challenge that change and a second chance has to offer?

While incarcerated, I have taken every step possible to rehabilitate myself to be released from prison, and to come home to direct discrimination makes me feel as though all of my time was wasted. Finding a job is one of the conditions of release. Can you imagine the feeling I'm going back to prison or I can't feed my family because of a discrimination? According to the MPD records in 2019, 38,651 people were arrested and 2,759 of those people were juveniles[1]. These discriminations deny people a second chance at life and for many youth they deny a chance at life all because of a mistake. These discriminations put us in a lose-lose situation and it makes us feel like quitting or as though we are worthless.

---

[1] District of Columbia Metropolitan Police Department (MPD), Annual Report Fiscal Year 2019, https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/MPD%20Annual%20Report%202019_lowres.pdf

Being a returning citizen, we need real opportunities, not false hopes. Upon my release I was introduced to Mr. Stewart and The National Reentry Network for Returning Citizens, I was invited to participate in the Ready4Work program and now I'm employed and my future is bright. Mr. Stewart looked past my faults and saw my needs, he has met my needs and now we are working on my faults. I can't tell you how much this opportunity means to me. The District of Columbia ranks 40th compared to the other 50 states as far as the law regarding record sealing and expungement[2]. I believe that the District of Columbia should follow suit in accordance with the laws of other states that automatically expunge or seal criminal records. The District of Columbia allows you to seal your records, but it is a lengthy process that involves more resources, such as money and a lawyer, which often discourages a person from doing so. A 2021 report from the Task Force on Jails & Justice shows that more than 1/4 of local felonies are not prosecuted, and more than 1/2 of misdemeanors are dropped, and yet, these arrests remain in public record[3]. This is an ongoing issue that deserves much attention and a drastic change.

We at the National Reentry Network of Returning Citizens believe that you should invest in people and not prisons. Once again, I would like to thank you all for giving me the opportunity to be a voice for the voiceless, and please remember that the American dream belongs to everybody and everybody deserves a second chance thank you.

Sunny Kuti
Youth Organizer
The National Reentry Network for Returning Citizens

---

[2] Love, Margaret, and David Schlussel. Collateral Consequences Resource Center, Oct 2020, The Reintegration Report Card: Grading the States on Laws Restoring Rights and Opportunities After Arrest or Conviction. https://ccresourcecenter.org/wp-content/uploads/2020/10/The-Reintegration-Report-Card_FINAL-converted.pdf

[3] Jails & Justice: Our Transformation Starts Today, Phase II Findings & Implementation Plan of the District Task Force on Jails & Justice, Feb 2021, http://www.courtexcellence.org/uploads/publications/TransformationStartsToday.pdf

Testimony before DC Council Judiciary & Public Safety Committee
April 8, 2021
B24-0063 - Second Chance Amendment Act of 2021
B24-0110, THE "CRIMINAL RECORD EXPUNGEMENT AMENDMENT ACT OF 2021"
Rabbi Charles Feinberg
Interfaith Action for Human Rights

Good morning. Thank you for the opportunity to testify this morning regarding B24-0063, "Second Chance Amendment Act of 2021," and B24-0110, "Criminal Record Expungement Amendment Act of 201."

My name is Rabbi Charles Feinberg. I am the executive director of Interfaith Action for Human Rights which represents people of faith who educate and advocate in Maryland, DC and Virginia for corrections systems that avoid unnecessarily punitive practices such as solitary confinement and that instead focus on rehabilitation and successful reentry.

I commend the Council for taking up legislation that will expand the number and kinds of records that can be sealed. I support amending Chapter 8 of Title 16 to increase the number of eligible convictions that may be sealed, to reduce the number of years a resident must remain off papered to seal an eligible conviction, to simplify and shorten the process that a resident must undertake to seal a charge that does not end in a conviction.

I also support expanding the definition of an eligible felony and to make all misdemeanors eligible for sealing. Felonies are expanded to (A) Failure to appear (§ 23-1327); 31 "(B) First or second degree theft (§ 22-3211); and 32 "(C) Felony possession (§ 48-904.01(a)

However, I am disappointed that this legislation does not go far enough. This legislation does not address granting eligibility for expunging serious felonies. Nor does it include simplified waiting period and simplified burdens of proof. Furthermore, the legislation should mandate clearer rules on how sealed records may be accessed and used. It should also give clearer guidance to our courts to decide motions as well as limiting the time for a court to decide a motion to seal. Finally, the legislation should make the instructions on how to file simple and easy to read. People should be able file without hiring an attorney.

The basic question that we all have to address is how many times and how long do we punish someone who was convicted of a crime? Once convicted of a felony, a DC resident becomes incarcerated in the Bureau of Prisons. He or she spends a number of years there. While there they do not receive the educational, psychological, and medical services they need to help them make different decisions for themselves. Many have served lengthy sentences and they return to a city that has dramatically changed since they lived here. Many are not prepared to re-enter. Many do not have homes to return to.

Then they return to the District and the punishment does not end. Do we provide housing for those returning from prison? No, we really don't. Do the landlords want them? No, they don't. Here is another barrier that is so difficult to overcome: finding a decent and affordable place to live in. Many then have to jump from one couch in one house to another and too often end up living on the street.

The same barriers apply to those seeking employment. Since our incarceration system does not provide coherent and meaningful educational programs, too many leave prison without the knowledge and skills needed to survive in a modern economy.

What do we do? We haggle over how long the records of those returning from prison should be open and when they can be sealed. We put up one barrier after another that returning citizens have to navigate and somehow bypass in order to live and prosper. The overwhelming percentage of those affected are black and brown people.

This city desperately needs political leadership that first and foremost will teach us not to fear people returning from prison. The fear of returning citizens blinds us from seeing their humanity. The fear of returning citizens causes us to continue punishing them for years after they have completed their time in prison. The fear of returning citizens prevents us from providing the services they need in order to succeed and live at peace with themselves and with others.

The legislation is a step forward. But it is an insufficient step forward. We need bolder steps and more ambitious programs for those returning. We need you to lead and not be afraid.

D.C. Open Government Coalition

3901 Argyle Terrace, N.W.
Washington, D.C. 20011
www.dcogc.org

Testimony of
Robert S. Becker
Revised

On behalf of the D.C. Open Government Coalition
April 8, 2021

Before the Committee on the Judiciary and Public Safety
Council of the District of Columbia

Bill 24-63 — the "Second Chance Amendment Act of 2021" and
Bill 24-110 — the "Criminal Record Expungement Amendment Act of 2021"

I am Robert Becker, a member of the D.C. Open Government Coalition's board of directors, and I want to thank you for inviting us to testify today regarding these bills. In my day job for the past 30 years, I have been a criminal defense lawyer representing indigent defendants under the Criminal Justice Act in the D.C. Court of Appeals, the Superior Court of the District of Columbia, the U.S. Court of Appeals for the D.C. Circuit and the U.S. District Court for the District of Columbia.

In 2017, the Coalition went on record supporting the underlying goal of similar bills introduced in Council Period 22. Today, we reiterate that D.C. residents should be able to move on with their lives without fear that public or private entities will deny them jobs, housing, credit or other benefits due to past arrests, charges terminated short of conviction, and in some cases that end with convictions. We recognize as well that there may be cases where sealing records would be appropriate after case-by-case consideration of competing interests.

As we said in 2017, the approach bills 24-63 and 24-110 take to achieve that goal overlook the collateral consequences for the public and future criminal defendants of sealing large volumes of criminal case records. For the public, access to court records is crucial to holding governmental leaders, including law enforcement, prosecutors and the courts, accountable for arrests, prosecutions, and case outcomes. For future criminal defendants, pleadings and orders from past cases are invaluable resources in presenting arguments to trial and appellate judges.

We encourage all involved to engage in an open process to determine how we can help D.C. residents improve their lives without infringing the public's constitutional right to access

information and without impairing the ability of D.C. residents to defend themselves in the future from criminal charges. We believe a balance is possible and appreciate the opportunity to work together to identify and achieve a balance.

Our comments today focus on Bill 24-63, which appears to subsume the relatively minor definitional amendments in Bill 24-110. But our greater concern, prompted by Councilmember Henderson's introduction April 1 of Bill 24-180, "The Record Expungement Simplification To Offer Relief and Equity (RESTORE) Amendment Act of 2021," is that these bills presage an escalating effort to deny the public access to criminal case records, regardless of whether defendants were convicted of misdemeanors or violent felonies, and regardless of defendants' criminal conduct.[1]

Our concerns about the proposed amendments fall into three categories. The first is that the First Amendment guarantees transparency of criminal case records because police, prosecutors and the courts wield enormous power over District residents and visitors. The public and news media must have access to effectively fulfill their duty as a watchdog over the criminal justice system to ensure that they mete out justice evenhandedly.

The second concern under the First Amendment is that transparency of police and court records, even in cases that do not produce convictions, inspires public confidence in the criminal justice system. The U.S. Supreme Court has recognized that "[s]ecrecy is profoundly inimical to this demonstrative purpose…. Open[ness] … assure[s] the public that procedural rights are respected, and that justice is afforded equally." *Richmond Newspapers v. Virginia*, 448 U.S. 555, 595 (1980). It elaborated that secrecy "breed[s] suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law. Public access is essential … to achieve the objective of maintaining public confidence in the administration of justice." *Id.*

The third is that transparency is key to protecting the individual rights of D.C. residents who come into contact with police and the courts, and by sealing records Bill 24-63 would deprive residents of that protection. Strictly speaking this legislation applies to criminal judicial cases, not law enforcement records. But we believe the Metropolitan Police will view the proposed amendments as creating a broad Freedom of Information Act exemption that would cover records documenting interactions between officers and civilians. Community and public interest groups, and the media frequently use such records, as well as criminal case records, to document discriminatory enforcement practices, systemic corruption and officer misconduct.

Before we testified about this issue in 2017, we enlisted Ropes & Gray, LLC, our outside counsel, to research the state of the law nationwide regarding sealing and expungement of court and law enforcement records in criminal cases. They identified 11 states that have sealing and/or expungement laws, and in which legislators had recently debated the issues that are before you today. What we learned is that statutes in each of those states requires defendants to petition the court to initiate the process. This ensures that the process satisfies the U.S. Supreme Court's

---

[1] Several witnesses at the hearing testified about the RESTORE Act, even though it was not on the agenda. We have submitted supplemental testimony presenting our concerns about it.

procedural requirements.[2]

There is considerable variation among states, and within states among categories of offenses, in the amount of time defendants must wait before filing petitions. In cases that end without convictions, Illinois, Massachusetts and under certain circumstances Nevada, permit defendants, when the case is closed, to request sealing; other states impose a waiting period. In some states, defendants may petition to seal non-violent misdemeanor convictions a year after completing their sentences; and in some they must wait up to 15 years before petitioning to seal felony convictions.

All of the states restrict the types of offenses that may be sealed, and appear to exclude violent felonies. Maine permits only youthful offenders, those under age 21, to petition where the maximum penalty is 6 months in prison and a $1,000 fine. In Wisconsin, defendants must be under age 25, and the maximum penalty must be less than six years in prison. In New York, a defendant may request that no more than two offenses be sealed, including one felony. In Colorado, Massachusetts, Maine, New York, Pennsylvania and under certain circumstances in Wisconsin, a defendant who commits another crime becomes ineligible for sealing and previously sealed cases must be unsealed.

In 2017, bills were introduced in Pennsylvania and Maine that would have automatically sealed some criminal cases after dismissal or final disposition. In 2018, the Maine legislature rejected a bill that would have automatically seal convictions after 7 years if the maximum penalty for the offense was no more than six years in prison and a $5,000 fine, and the defendant had no subsequent convictions. L.D. #1202, AN ACT TO CLEAR A PATH TO EMPLOYMENT, Me. 128th Leg., March 27, 2018. In 2019, Pennsylvania became the only state to implement automatic sealing of non-violent misdemeanor convictions and cases that do not end with conviction.[3]

The amendments before you would provide D.C. residents no greater protection than residents of other jurisdictions have, but the District would become a national outlier in revoking the public's right of access to court records in such a short time and without regard to subsequent criminal justice contacts.

BILL 24-63 WOULD DEPRIVE THE PUBLIC OF IMPORTANT INFORMATION BY AUTOMATICALLY SEALING CRIMINAL CASES

Bill 24-63 includes amendments to D.C. Code § 16-803 that would reduce the time a defendant would have to wait before petitioning the Superior Court to seal criminal case records following convictions. The Coalition takes no position regarding the merits of those amendments.

The bill's major proposal is new D.C. Code § 16-803.01a that would automatically seal all court

---

[2] Our 2017 report is attached. We request the opportunity to submit an updated version reflecting legislative developments in the past three years.

[3] Misdemeanors would be sealed 10 years after sentence completion if the defendant has had no subsequent charges.

and related police records 90 days after the case ends in many, if not most, misdemeanor and many felony cases that do not result in conviction.[4] Defendants charged with dangerous crimes, as defined in D.C. Code § 23-1331(3), would have to petition the court to seal their cases.[5] Whether the government dropped the charges, the defendant was acquitted after a lengthy trial, or the D.C. Court of Appeals vacated a guilty verdict due to a procedural trial error, all records would be hidden from public view unless prosecutors object.

Under Bill 24-63, defendants who have prior serious misdemeanor convictions would have to wait three years after completing their sentences before their non-conviction cases are sealed automatically. But Bill 24-110(2)(c)(1) would eliminate that requirement. Under Bill 24-63(d), defendants who have prior felony convictions would have to wait five years after completing their sentences before petitioning to have their non-conviction cases sealed, but Bill 24-110(2)(c)(2) would reduce the waiting period to two years. It is significant that prior convictions are not an impediment to sealing. According to proposed § 16-803.01a, "(f) The Superior Court shall grant a motion to seal pursuant to subsections (a) and (b), or shall seal *sua sponte* pursuant to subsection (4), if it is in the interests of justice to do so…."

Proposed § 16-803.01a(f) places on the government the burden of proving by a preponderance of the evidence that sealing is not "in the interests of justice." In doing so, it markedly undermining the analytical framework established in D.C. Code § 22-4135 that judges now employ in ruling on sealing motions.

To the extent that a judge deciding whether to seal a case "in the interests of justice" must take into account "community interest" under proposed § 16-803.01a(f), the focus is on "(2) The

---

[4] In 2017, the mayor proposed this amendment in Bill 22-560.

[5] D.C. Code § 23-1331 states:

(3) The term "dangerous crime" means:

(A) Any felony offense under Chapter 45 of Title 22 (Weapons) or Unit A of Chapter 25 of Title 7 (Firearms Control);

(B) Any felony offense under Chapter 27 of Title 22 (Prostitution, Pandering);

(C) Any felony offense under Unit A of Chapter 9 of Title 48 (Controlled Substances);

(D) Arson or attempted arson of any premises adaptable for overnight accommodation of persons or for carrying on business;

(E) Burglary or attempted burglary;

(F) Cruelty to children;

(G) Robbery or attempted robbery;

(H) Sexual abuse in the first degree, or assault with intent to commit first degree sexual abuse;

(I) Any felony offense established by the Prohibition Against Human Trafficking Amendment Act of 2010 [D.C. Law 18-239; § 22-1831 et seq.] or any conspiracy to commit such an offense; or

(J) Fleeing from an officer in a motor vehicle (felony).

community's interest in retaining access to the 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." The bill never acknowledges the public's First Amendment interest in access to criminal case records, much less instructs judges to consider that interest. The only other "community interest" a judge must consider is "(3) The community's interest in furthering the movant's rehabilitation and enhancing the movant's employability."

A statute that would automatically seal criminal judicial records would not comply with First Amendment procedural requirements enunciated by the Supreme Court in at least five opinions.[6] The Court said the public's right of access is not absolute. *Richmond Newspapers, supra*, at 581 n. 18. But before denying access a judge must determine that secrecy would further a compelling interest that overrides the public interest in access, that any restriction imposed be no broader than necessary to protect that interest, and that secrecy will, in fact, protect the competing interest. *Globe, supra*, at 606 – 8. Consistent with the First Amendment, a defendant must assert his or her desire to have records sealed; a judge cannot act on a presumption about the defendant's wishes. *Press-Enterprise I*, at 512. In response to a defendant's request, the court must apply the three-part test to the facts of the case before it, and set out findings on the record supporting a decision to seal court records. *Globe, supra*, at 609. Because the Supreme Court placed such a premium on the benefits of public access, it required a detailed, written record to facilitate appellate review of the judge's factual findings and legal conclusions.

THERE ARE MORE EFFECTIVE, NARROWLY TAILORED WAYS TO PROTECT D.C. RESIDENTS

These bills fail the Supreme Court's test because they do not require judges to determine whether other remedies would protect a defendant's rights, and encourage sealing of records when doing so would provide a defendant no practical benefit.

One of the problems individuals face after they have been arrested or charged with a crime for which they were not convicted is that prospective employers, landlords, lenders or licensing bodies may ask about prior contacts with the criminal justice system, or may conduct background checks that uncover such contacts. D.C. already has legislation prohibiting application questions about prior contacts with the criminal justice system. But this Council has never seriously considered legislation prohibiting use of criminal case records in making employment, housing, credit and licensing decisions, and imposing civil or criminal penalties for such use.

The First Amendment would bar public access restrictions where the narrower remedies above would suffice to protect the criminal defendant's interests. Bill 24-63 presume, without supporting evidence, that enforcing information-use restrictions would be too difficult or too

---

[6] *Gannett v. DePasquale*, 443 U.S. 368 (1979); *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Press-Enterprise v. Superior Court (Press-Enterprise I)*, 464 U.S. 501 (1984); and *Press-Enterprise v. Superior Court (Press-Enterprise II)*, 478 U.S. 1 (1986).

costly.

SEALING RECORDS WILL NOT PROTECT D.C. RESIDENTS

The premise underlying Bills 24-63 and 24-110, and to a much greater extent Bill 24-180, is that sealing court and police records will protect D.C. residents against discrimination based on prior contacts with the criminal justice system. For several reasons, these measures will provide only the illusion of protection.

Cases that attracted media attention, provide an obvious illustration of why this legislation will fail. Even if the public cannot access sealed records, news stories about the case will be readily available. In fact, public availability of court and police records might benefit the defendant by providing greater detail and context.

Even in run-of-the-mill cases, denying public access will provide little or no protection. In the Internet age, private entities scrape vast amounts of police and court data from online private and government databases. Even if the Superior Court seals police and court records under this legislation, it is likely that businesses and private investigators will be able to purchase and use the records. But if a case is dismissed for want of prosecution and sealed, the private data source, although accurate, may be incomplete. The data provider would be unable to update its records, and the person to whom the records relate will suffer the consequences.

Because D.C. law does not prohibit discriminatory use of criminal case records in employment, leasing, licensing, financial and other contexts, and they would deprive businesses and investigators of complete, as well as accurate, information, the secrecy created by bills 24-63 and 24-110 will cause greater harm to D.C. residents' individual rights than current law.

TO PREVENT DISCRIMINATION AND PROTECT RESIDENTS' RIGHTS, CRIMINAL CASE RECORDS MUST REMAIN OPEN

Concurring in *Richmond Newspapers, supra*, at 604, Justice Blackmun wrote,

> [t]he public has an intense need and a deserved right to know about the administration of justice in general; about the prosecution of local crimes in particular; about the conduct of the judge, the prosecutor, defense counsel, police officers, other public servants, and all the actors in the judicial arena; and about the trial itself.

Justice Stevens concurred that

> public access … acts as an important check, akin in purpose to the other checks and balances that infuse our system of government. The knowledge that every criminal [case] is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power…. Indeed, [without] publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.

Id. at 596 (citations and internal quotations omitted).

By sealing criminal case records, the bills before you would substantially remove the formidable check public scrutiny imposes on police, prosecutorial and judicial power. To illustrate why you should reject these proposals, we offer some examples of how public interest groups and the media have used law enforcement and court records, of the types these bills would seal, to challenge discriminatory practices most harmful to poor and minority community members.

The *Florida Times-Union* in Jacksonville, and ProPublica published a series, WALKING WHILE BLACK,[7] demonstrating that

> pedestrian tickets — typically costing $65, but carrying the power to damage one's credit or suspend a driver's license if unpaid — were disproportionately issued to blacks, almost all of them in the city's poorest neighborhoods. In the last five years, blacks received 55 percent of all pedestrian tickets in Jacksonville, while only accounting for 29 percent of the population.

Reporters analyzed records of 2,200 citations between 2012 and 2017 — nearly 200 issued by one officer[8] — and interviewed numerous charged individuals, government officials and experts. The paper explained its methodology:

> We obtained Traffic Citation Accounting Transmission data from Florida Court Clerks and Comptrollers through the Florida Sunshine Law. This dataset contains all tickets issued in the state of Florida from January 2012 to July 2017…. We narrowed our data to Duval County because of the completeness of its reporting and because black residents are ticketed at a higher rate there than in any other large county in Florida. This data set covered 2,232 pedestrian tickets. We removed 24 tickets issued to cyclists, producing a dataset of 2,208 pedestrian tickets.
>
> …
>
> The pedestrian ticket dataset included the recipient's race, date of birth, gender and residence to the zip-code level.
>
> …
>
> We obtained disposition records from Florida Court Clerks and Comptrollers and court records from the Duval Clerk of Courts Summary Report System data to look at the status of cases resulting from pedestrian tickets.

The Sheriff's department acknowledged that "officers typically [] questioned the pedestrians and often got them to consent to a search. Officers could also search an individual if they felt in some way threatened or the person failed to cooperate in showing identification." Using court records

---

[7] WALKING WHILE BLACK: Jacksonville's enforcement of pedestrian violations raises concerns that it's another example of racial profiling, *Florida Times-Union*, November 16, 2017.
[8] WALKING WHILE BLACK: One Officer, Scores of Tickets, and a Familiar Racial Disparity, *Florida Times-Union*, November 17, 2017.

the *Times-Union* and ProPublica

> identif[ied] at least 149 cases in which a pedestrian violation led to a search and subsequent additional charge. Even more than the total pool of pedestrian violators, those that are charged with more serious offenses tend to be African American. Overall, the Times-Union/ProPublica analysis showed, 80 percent of those for whom pedestrian violations were accompanied by other charges were black; 77 percent of the additional charges involved drugs

A significant number of tickets were issued in error for such supposed offenses as not being able to produce identification when stopped for jaywalking.

To illustrate the scope of the problem and the impact of the discriminatory enforcement, the *Times-Union* interviewed several individuals who had been charged and published details of their cases.[9] If the Council enacts the proposed amendments, such reporting would be impossible in Washington.

Using criminal case records, the ACLU in Minneapolis analyzed 96,000 arrests between January 2012 and September 2014 for low-level crimes — offenses for which penalties were less than a year in jail and fines no greater than $3,000.[10] It found that Blacks and Native Americans were nearly 9 times more likely than Whites to be arrested for such offenses.

In its introduction to the report, the ACLU quoted Hennepin County District Judge Kevin Burke, who explained that a low-level arrest

> can end up taking somebody who just got a job at Taco Bell and have him fired because they missed work because they were in jail for driving after a suspension case…. Because they missed [work], they're now behind in their child support…. Because they're behind in their child support, the county attorney's office will try to hold them in contempt, to hassle them to get them to pay child support.

To make its point, the ACLU mainly relied on statistical analysis of the records. But under the amendments before you, even that would be difficult, if not impossible, because case records, including those created by police, would be sealed, often within 90 days.

The Maryland Office of the Public Defender in 2016 relied on 700,000 court records to demonstrate the impact on poor, minority families of a predatory bail bond system.[11] It concluded that

---

[9] WALKING WHILE BLACK: Learn more about Jacksonville residents who have been stopped, *Florida Times-Union*.

[10] PICKING UP THE PIECES: Policing in America, a Minneapolis Case Study, American Civil Liberties Union of Minnesota, May 6, 2015.

[11] THE HIGH COST OF BAIL: How Maryland's Reliance on Money Bail Jails the Poor and Costs the Community Millions, Maryland Office of the Public Defender, November 2016.

> [i]n practice, this system jails the poor and allows the rich to go free…. [S]tudies show that the widespread use of "secured bail" — which requires payment or security, such as a property title, posted directly to the court, or posting of corporate bond to obtain release — causes new crime, coerces convictions, and has little or no impact on defendants' return to court….

A similar examination in Ferguson, Missouri, by the U.S. Department of Justice uncovered evidence of corruption in the bail system.[12]

In SECOND-CHANCE CITY, a six-part series published between May and December 2016, *The Washington Post* analysis of arrest, court records and sentencing data prompted 2017 amendments to the Youth Act.[13] In the third article,[14] *The Post* explained how it researched the series.

> To study the implementation of the District's Youth Rehabilitation Act, The Washington Post drew from a number of sources, combining information where possible for a more complete understanding of the effects of the law.
>
> The Post requested and received a data set from the D.C. Sentencing Commission containing all 3,188 felony sentences issued under the Youth Act from January 2010 to April 2016. The data did not contain information on the identities of those sentenced but included the ages of offenders, dates of conviction, charges at conviction and a statistical weighting of their criminal histories.
>
> The Post wrote software to search the District's online court database to identify all publicly available criminal cases, felony and misdemeanor, 168,265 between January 2007 and November 2016. The Post then pulled docket information on every case and analyzed the data, identifying all felony and misdemeanor crimes sentenced under the Youth Act that have not been expunged. By matching crimes and sentencing dates to the Sentencing Commission's data, The Post was able to identify 85 percent of the 3,188 felony offenders sentenced under the Youth Act since 2010.
>
> The Post also identified upward of 3,000 misdemeanor crimes for which sentences were given under the Youth Act. Because the Sentencing Commission does not track these crimes, reporters could not determine how many convictions have been expunged because sentences have been successfully completed.
>
> The Post also requested data on those arrested on homicide charges in the District since 2010 from the Metropolitan Police Department. Using data pulled from the District's court website, reporters identified 121 individuals arrested on homicide charges who

---

[12] INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, U.S. Department of Justice, March 4, 2016.

[13] SECOND CHANCE CITY (Part I), *The Washington Post*, May 14, 2016.

[14] SECOND-CHANCE LAW FOR YOUNG CRIMINALS PUTS VIOLENT OFFENDERS BACK ON D.C. STREETS, *The Washington Post*, December 3, 2016.

previously were sentenced under the Youth Act. Reporters verified the identity of each offender by pulling files at D.C. Superior Court.

In the future, if the Council enacts these amendments, *The Post* would be unable to do this type of in-depth analysis of criminal cases and provide D.C. residents and the Council a detailed explanation of how systemic faults impact this community.[15]

Using records obtained through a FOIA lawsuit, *The Guardian* reported extensively on a secret facility Chicago police operated from 2004 to 2015 in which more than 3,500 individuals, 82 percent of them African American, were held and "eventually charged, mostly with forms of drug possession … but also for minor infractions such as traffic violations, public urination and driving without a seatbelt."[16] They were interrogated without access to counsel, and family members often did not learn where the detainees were until after they were formally charged.

In 2014, *USA Today* analyzed arrest records nationwide and documented a "staggering" racial gap in arrest rates in several American cities.[17] It found that "[a]t least 70 departments scattered from Connecticut to California arrested black people at a rate 10 times higher than people who are not black." Gannett newspapers in several of those cities used the data to publish stories focusing on local arrests.[18]

The mayor of Buffalo, N.Y., established a Strike Force and Housing Unit in the police department to combat gangs, drugs and guns in public housing. The mayor's goal was laudable, but, using police and court records, *InvestigativePost* found that "judges tossed out evidence seized by officers on the grounds police had no reasonable justification to conduct the searches. In two of those instances, judges raised questions about the testimony of officers because of conflicting video evidence or its sheer implausibility."[19]

When similar bills came before this committee in 2017, we cited some of these examples in discussions with D.C. government officials. They tended to say the Maryland and Missouri bail bond examples are not relevant because D.C. does not have such a system.

They are wrong. The issue before you is not about fixing specific flaws in the criminal justice system. It is about protecting individual rights, and whether sealing public court and police records will improve the lot of D.C. residents who have come in contact with the criminal justice system. These examples are very relevant because they demonstrate how public interest groups and the news media use these types of records to call attention to a broad range of systemic

---

[15] Using records obtained under the Freedom of Information Act, *The Post* reported on increases in marijuana arrests since passage of Proposition 71. D.C. ARRESTS FOR PUBLIC USE OF MARIJUANA NEARLY TRIPLED LAST YEAR, July 11, 2017

[16] HOMAN SQUARE: Chicago police detained thousands of black Americans at interrogation facility, *The Guardian*, August 5, 2015.

[17] RACIAL GAP IN U.S. ARREST RATES: "Staggering disparity," *USAToday*, November 18, 2014.

[18] *See, e.g.,* WHO GETS ARRESTED MOST ON DELMARVA?, *Delmarva now*, November 18, 2014.

[19] BUFFALO POLICE WHO CROSS THE LINE, *InvestigativePost*, September 20, 2017.

problems that deprive D.C. residents of their rights.

These examples make another important point. There is a very clear difference between the reports the ACLU, the Maryland Public Defender and the Justice Department prepared on one hand, and projects done by the *Florida Times-Union/*ProPublica, *The Washington Post, The Guardian*, *USAToday* and *InvestigativePost* on the other. The former relied almost exclusively on data analysis of publicly available agency records. The reports' findings are shocking, but for most people in the community remote and abstract. The latter used similar records to find cases, defendants and victims, and ultimately to show in a compelling way how the criminal justice system failed the community. Anyone who read SECOND-CHANCE CITY, WALKING WHILE BLACK or HOMAN SQUARE could understand the problem and its impact on the community.

Bills 24-63 and 24-110 are well-intentioned, but the remedies they propose cannot effectively achieve their goal. They might prevent discrimination against some individuals by some employers, landlords, financial institutions and licensing bodies. But they do nothing to eradicate systemic impediments that prevent D.C. residents from moving on after encounters with the criminal justice system. In fact, by sealing criminal case records these bills would perpetuate systemic flaws that deprive residents of their rights.

I would like to briefly exit my role as transparency advocate and speak to you as a criminal defense lawyer. As I noted at the beginning, for the past 30 years I have represented indigent criminal defendants — mostly Black and Hispanic D.C. residents — in trial and appellate proceedings up to the U.S. Supreme Court. In furthering my clients' interests, particularly in response to prosecutors' harsh sentencing requests, I have relied on pleadings and orders in past cases, sometimes reaching back 10 to 15 years.[20] I can tell you without equivocation that if enacted, these bills will deprive future criminal defendants and their lawyers of an invaluable trove of information to defend against police and prosecutorial over-reach.

We look forward to working with you to find a solution that will better the lives of D.C. residents without depriving the public generally and future criminal defendants of access to criminal case records. Thank you.

* * *

Contact:
Robert Becker
(202) 306-2276
rbecker@dcappeals.com

---

[20] To illustrate the detrimental impact these bills would have, I have attached a brief I filed in a sentencing appeal before the D.C. Circuit in 2017. *United States v. Powers*, 885 F.3d 728 (D.C. Cir. 2018). In arguing that my client's sentence was unduly harsh, I analyzed indictments, plea agreements and factual proffers, sentencing memoranda and judgments in approximately 90 cases from the preceding decade in which defendants had been sentenced for violating the same statute.

The D.C. Open Government Coalition is a citizens' group established in 2009 to enhance public access to government information and ensure the transparency of government operations of the District of Columbia. Transparency promotes civic engagement and is critical to responsive and accountable government. We strive to improve the processes by which the public gains access to government records (including data) and proceedings, and to educate the public and government officials about the principles and benefits of open government in a democratic society.

Overview of Analysis on Record Sealing and Expungement in Various States

We studied current law and proposed legislation relating to the expungement and/or sealing of records for arrests and convictions in California, Colorado, Florida, Illinois, Maine, Massachusetts, Nevada, New York, Ohio, Pennsylvania and Wisconsin. We selected these states for our inquiry due to press attention regarding recent expungement and sealing proposals that we thought would be helpful in benchmarking the recent proposals in D.C. As such, we began looking at relatively recent news articles on the subject and preparing a list of states for further research based on what we had seen mentioned in these articles. In doing so, we did not address local measures at the municipal or county level, where the initiatives may have been less visible. Because we focused on states that received recent press attention, we may have missed states that had considered these measures not as recently.

Our chart distinguishes between bills that were successfully passed into law and proposed bills currently under consideration as well as whether the current law and proposed bills relate to sealing, expungement, or both of arrests and/or conviction records. Our research revealed that the states surveyed have some procedures in place to seal conviction records for certain crimes. With respect to expungement, several states surveyed do not provide for the expungement of arrest or conviction records at this time (Massachusetts, Maine, Nevada, Ohio and New York), while some do in certain circumstances (California, Colorado, Florida, Illinois and Pennsylvania), and others are currently considering such measures (Massachusetts, New York, Ohio and Wisconsin).[1] Only two states surveyed currently provide for the automatic sealing or expunging of records -- arrest records in Pennsylvania are automatically not disclosed to the public (sealed) if three years have elapsed with no conviction and no proceedings are pending and the court must order the expungement of criminal records in Colorado if an individual was arrested as a result of mistaken identity and did not have any charges filed. In addition, Maine and Pennsylvania are currently considering proposals for automatic sealing of records.[2] We did not focus on legislation providing for the expungement or sealing of records related to juvenile arrests and/or convictions, as these were generally provided for in most of the states surveyed.

Several articles have been published regarding initiatives to broaden opportunities to expunge and/or seal records in each of the states surveyed and the tone generally taken has been positive, with the argument being that the individuals impacted deserve a second chance and would have better access to employment and housing opportunities as a result. We did read an opinion piece arguing against a proposed bill in Ohio that would provide for automatic expungement of arrest records based on mistaken identity without any review, but that position (arguing against expungement or sealing for public records purposes) is less visible among the press pieces we reviewed, perhaps because there have not been many instances of proposed legislation providing for automatic sealing or expungement. In addition, bills proposing automatic sealing of certain criminal records, such as in Pennsylvania, are receiving support in part due to their potential to shrink state spending on the court systems. Overall, the D.C. proposal appears to be in line with the wave of states since 2013 that have taken steps to enact or expand legislation mitigating the effect of criminal record history on individual lives, but is broader in its reach than most proposals or existing laws of the states surveyed. To that end, we will continue to monitor the developments surrounding this issue and will add to this chart as necessary.

---

[1] "Expungement" for purposes of the chart and this review is generally defined as the destruction of records so that no record exists relating to the arrest or conviction (although some exceptions do exist). Different states use different terms and have different significance attached to expungement (e.g., CA uses the term "dismissal" and the record shows a dismissal on the record instead of it being destroyed).

[2] A few of the states surveyed currently provide for, or are considering implementing, the automatic sealing or expungement of records with or without judicial review where the records concern juveniles.

State	Current Law			New Law/Proposed Bill			Notes (politics, contentious votes, etc.)	Links
	Non-convictions	*Convictions*	*Sealing vs. Expungements*	*Non-convictions*	*Convictions*	*Sealing vs. Expungements*		
CA	Situation specific. The sealing of records may be requested, pending judge approval based on specific requirements. If the requirements are met, the records will be sealed and not available to the public. There are some limitations, depending on the type of remedy or end result requested. The following situations allow for a petition to seal (and potentially destroy) an arrest record: Arrest without a formal case filed. Arrest with a formal case that was later dismissed. Acquittal at trial. Conviction set aside based upon a determination of factual innocence. Successful completion of a pre-filing diversion program. Successful completion of a drug diversion program.	Situation specific. **Sealing:** Sealing available for misdemeanors committed prior to age 18 that are eligible or have previously received relief under enumerated CA Penal Codes. Other petitions to seal are available for minors. **Expungement:** The following cases allow for a petition for conviction reduction, dismissal (expungement), or both. Misdemeanor conviction with current probation. Misdemeanor conviction and completed probation. Misdemeanor conviction or infraction, without probation. Felony that could have been charged as a misdemeanor, and current probation. Felony that could have been charged as a misdemeanor, and completed probation or county jail time. Felony conviction with county jail sentence under Pen. Code § 1170(h)(5). Person is in the Department of Justice's DNA and Forensic Identification Database but there is no qualifying offense or pending charge justifying inclusion within the database. **Exclusions:** Dismissals (expungements) are unavailable for some misdemeanors, and infractions within the Vehicle Code; and violations of certain enumerated crimes (e.g., certain lewd crimes involving children)	A combination of sealing and dismissal (expungement) exist. These are situation and offense specific (see "conviction" column for specific convictions). Dismissals of convictions result in the record showing a dismissal instead of a conviction. Arrests without the filing of a formal court case, and an arrest with a dismissed court case can be dismissed (expunged).	**New Law:** SB 393 Authorizes record sealing for those arrested but never convicted of a crime (effective 1/1/2018). Allows a person who has "suffered an arrest that did not result in a conviction" to petition the court to have the arrest and related records sealed. Persons may petition for sealing of records. If approved, record will state that the arrest is sealed, and that it cannot be released outside the criminal justice sector. The law prohibits the Department of Justice from disclosing, as a part of the state summary criminal history information furnished to specified entities that an individual was granted relief to have his or her arrest record sealed. Existing law requires the Department of Justice to maintain state summary criminal history information, as defined, and requires the Attorney General to furnish state summary criminal history information to specified entities and individuals if needed in the course of their duties. The state summary criminal history information shall include, next to or below the entry regarding the sealed	N/A	Sealing only		https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB393 http://www.courts.ca.gov/1070.htm

State	Current Law			New Law/Proposed Bill			Notes (politics, contentious votes, etc.)	Links
	Non-convictions	*Convictions*	*Sealing vs. Expungements*	*Non-convictions*	*Convictions*	*Sealing vs. Expungements*		
				arrest, a note stating "arrest relief granted." Criminal history providers (organizations that provide background screening services) can disclose information regarding sealed records to other Criminal History Providers, but are limited in their ability to disseminate to other groups. If a person or entity disseminates information relating to a sealed arrest without authorization, then that person or entity will be subject to civil penalty. The petitioner has the initial burden of proof and then the burden of proof shifts to the prosecuting attorney. An "arrest did not result in a conviction" if: (i) No conviction occurred, the charge has been dismissed, and the charge may not be refiled. (ii) No conviction occurred and the arrestee has been acquitted of the charges. (iii) A conviction occurred, but has been vacated or reversed on appeal, all appellate remedies have been exhausted, and the charge may not be refiled. **Exclusions:** A person is ineligible to have his or her records sealed if the person has been charged with certain enumerated crimes or under specified circumstances. With respect to the crime of				

State	Current Law			New Law/Proposed Bill			Notes (politics, contentious votes, etc.)	Links
	Non-convictions	*Convictions*	*Sealing vs. Expungements*	*Non-convictions*	*Convictions*	*Sealing vs. Expungements*		
				domestic violence (if the person's record demonstrates a pattern of domestic violence arrests), for example, the person may obtain the sealing of his or her arrest only upon a showing that the sealing would serve the interests of justice.				
CO	Before 2016, the only option if case was dismissed was a formal petition and a hearing under section 24-72-702.	Only allowed for certain offenses, which have specific requirements ranging from 1 year to 10 years, but all require a petition to the court (except fare evasion): controlled substances (sections 24-72-704-705); victims of human trafficking (24-72-706); theft of public transportation services (section 24-72-706) petty offenses and municipal offense (section 24-72-708 (passed in 2017)), and posting an intimate photograph of a person on the internet (24-72-709). Must wait 10 years for plea agreement.	Sealing only. If a conviction record is sealed, some agencies and the state bar can still have access: An order sealing conviction records does not deny access to the criminal records of a defendant by any court, law enforcement agency, criminal justice agency, prosecuting attorney, or party or agency required by law to conduct a criminal history record check on an individual If a defendant is convicted of a new criminal offense after an order sealing conviction records is entered, the court shall order the conviction records to be unsealed. (section 24-72-703) A member of the public may petition the court to unseal a file upon a showing that circumstances have come into existence since the original sealing and, as a result, the public interest in disclosure now outweighs the defendant's interest in privacy. (section 24-72-703)	**New Law** 2016 law added a provision that says if a case against a person is dismissed, the defendant is eligible to have their criminal record sealed and the request can be informal and made at the time of dismissal. The defendant can also petition in a written motion. 2016 law added a provision allowing juvenile records to be "expunged" immediately if the juvenile was found not guilty; the petition was dismissed; or successful completion of a juvenile diversion program, a deferred adjudication or an information adjustment. 2016 law added a provision expunging arrest and criminal records of a person arrested as a result of mistaken identity and did not have any charges filed. Law enforcement agency that made arrest must petition the court within 90 days after the investigation. Court shall order expungement no later than 90 days after receiving the petition.	**New Law** 2016 law added a provision "expunging" certain juvenile records generally 1 year after the end of probation, 3 years after the end of parole supervision and 5 years from the end of probation or parole, whichever is later, if the juvenile has been adjudicated a repeat or mandatory juvenile offender and if the juvenile has not further violated any criminal statute. Juvenile can file a petition or court, juvenile probation department, juvenile parole department, the juvenile, a guardian or parent, or a guardian ad litem, may initiate expungement proceedings. Notice is given and court must make finding at a hearing. Certain exclusions are set included in the law. **Proposed Bill** 2017 – House bill that would allow persons who were convicted of criminal offenses for the use, cultivation, or possession of marijuana to petition for the sealing of criminal records relating to such convictions if their behavior would not have been illegal if it had occurred on or	**New Law** Expungement in cases of mistaken identity (although term is not defined in the provision) and sealing for juvenile records. "Expungement" for the juvenile statute means the designation of juvenile delinquency records whereby such records are deemed never to have existed. Records are not destroyed – may be inspected by order of a court and will be available to any judge and probation department for use in any future juvenile or adult sentencing hearing regrading the person whose record was expunged.		http://www.leg.state.co.us/clics/clics2016a/csl.nsf/fsbillcont2/326C84186493684E87257F4000590C71/$FILE/116_signed.pdf https://www.colorado.gov/pacific/cbi/disposition-update-and-sealing-arrest-record https://law.justia.com/codes/colorado/2016/title-24/public-open-records/article-72/part-7/section-24-72-701 (through 709) http://www.lpdirect.net/casb/crs/19-1-306.html http://leg.colorado.gov/bills/hb17-1333

State	Current Law			New Law/Proposed Bill			Notes (politics, contentious votes, etc.)	Links
	Non-convictions	*Convictions*	*Sealing vs. Expungements*	*Non-convictions*	*Convictions*	*Sealing vs. Expungements*		
					after 12/10/12. Appears to be postponed indefinitely.			
FL	Any court or competent jurisdiction may order a criminal justice agency to seal the criminal arrest (non-conviction) record of a minor or an adult who complies with Fla. Stat. § 943.59. The Petitioner must first apply to the Florida Department of Law Enforcement for a Certificate of Eligibility. **Exceptions:** Non-convictions that are sexual in nature, violent or otherwise serious misdemeanors are ineligible for sealing and/or expungement. Generally, relief is only available to persons without a prior record, but a court may, at its sole discretion, order the sealing of a criminal history record pertaining to more than one arrest if the additional arrests directly relate to the original arrest. There are certain rights available for juveniles in re: sealing and expungements, but generally, records of juvenile adjudications are confidential.	A conviction in any criminal case renders a person ineligible to seal or expunge a criminal record.	**Sealing** Sealing is available when there has been no adjudication of guilt, including withheld adjudication. Sealed records are only available to the subject of the record, or the subject's attorney; to criminal justice agencies for their respective criminal justice purposes, or to certain entities for their respective licensing and employment purposes. The public is unable to access these records. **Expungement** Expungement is available only when no charges are filed or charges are dismissed prior to trial. Records may be expunged if they have been sealed for at least ten years. Expungement is the physical destruction of records by any criminal justice agency having custody thereof, or as prescribed by the court issuing the order. Criminal history records in the custody of the Department of Law Enforcement remains retained in all cases for a limited number of reasons.	N/A	N/A	N/A	Current law in effect 2015.	http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&Search_String=sealing&URL=0100-0199/0119/Sections/0119.07.html http://www.leg.state.fl.us/statutes/index.cfm?mode=View%20Statutes&SubMenu=1&App_mode=Display_Statute&Search_String=sealing&URL=0900-0999/0943/Sections/0943.0585.html http://ccresourcecenter.org/state-restoration-profiles/florida-restoration-of-rights-pardon-expungement-sealing/ **Juvenile Information:** http://www.leg.state.fl.us/statutes/index.cfm?mode=View%20Statutes&SubMenu=1&App_mode=Display_Statute&Search_String=sealing&URL=0900-0999/0943/Sections/0943.0582.html http://www.leg.state.fl.us/statutes/index.cfm?mode=View%20Statutes&SubMenu=1&App_mode=Display_Statute&Search_String=sealing&URL=0900-0999/0958/Sections/0958.13.html
IL	Arrests and charges for misdemeanors and felonies that did not lead to a conviction can be sealed at any time, including minor	The vast majority of misdemeanor, or felony convictions cannot be expunged.	**Sealing:** Sealed records are maintained by government agencies. Most of the general public will not have access to the	**New Law** Effective January 1, 2018, cases that were dismissed or acquitted can be immediately	N/A	N/A	N/A	**Current Law:** http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=350&ChapterID=5

State	Current Law			New Law/Proposed Bill			Notes (politics, contentious votes, etc.)	Links
	Non-convictions	*Convictions*	*Sealing vs. Expungements*	*Non-convictions*	*Convictions*	*Sealing vs. Expungements*		
	traffic offenses, unless the person was released without being charged. Arrests for misdemeanors and felonies that did not result in a conviction can be expunged. There are certain rights available for juveniles in re: sealing and expungement.	Most misdemeanor and felony convictions are eligible for sealing after 3-5 years from the completion of the most recent case. **Exceptions:** DUI/Reckless Driving, animal crimes, sex crimes, domestic battery/violations of orders of protection. These offenses require a pardon from the Governor authorizing expungement or sealing after a 5 year waiting period. Certain special felony probations, such as TASC probation (nonviolent criminal defendants with substance use disorders) or First Offender drug probation, are not considered convictions and may be eligible for expungement or sealing. Automatic expungement for civil law violations of section 4(a) of the Cannabis Control Act or Section 3.5(c) of the Drug Paraphernalia Control Act.	contents of the record. However, law enforcement and the courts will still have access to the records, as will a few employers and other entities as allowed by law. **Expungements:** Expunged records are destroyed or returned to the petitioner. The Government Agencies will destroy their records and remove all mention from the public record. Unless a conviction was reversed, vacated, pardoned by the Governor, or approved for expungement by the Prisoner Review board, it cannot be expunged.	sealed through a petition during the original hearing.				https://www.illinois.gov/osad/Expungement/Documents/Crinminal%20Exp%20Guide/ExpungementSealingOverview.pdf https://www.illinoislegalaid.org/legal-information/what-offenses-can-be-expunged-what-offenses-can-be-sealed https://www.illinoislegalaid.org/legal-information/what-offenses-can-be-expunged-what-offenses-can-be-sealed
MA	Depends on the court. District court: Non-convictions in district court - the defendant can make a petition to seal the record immediately or anytime thereafter. Must meet legal standard. Boston Municipal Court – Petition to seal record per c. 276, section 100C. Not guilty, no bill by grand jury, no probable cause - the defendant can make a petition to seal the record immediately or anytime thereafter and the record shall be sealed. If nolle	General rule: criminal records may be sealed 5 years after a misdemeanor and 10 years after a felony by filing a signed form with the probation office as long as the petitioner has not been found guilty of any criminal offense in MA or in any other state in the interim. (c. 276, section 100A). This was decreased in 2012 from 10 and 15 years, respectively. Certain sex offenses must wait 15 years (c. 276, section 100A) Any offense that is no longer a crime is eligible for sealing immediately (c. 276, section 100A) Entries of delinquency: file in the office of the commissioner of probation a request to seal after three	Sealing only. Certain court cases (for example, visitation of a child and abuse) and criminal justice agencies may have accesses to sealed records (c. 276, sections 100A and 100D) Application for employment that ask about prior arrests must state that those with a sealed record can answer "no record."(c. 276, section 100A).	**Proposed Bill** Adds that if a juvenile case ended in dismissal, nolle prosequi, or without adjudication, the court shall order the sealing at the time of the disposition unless person charged objects.	**Proposed Bill** Generally, the same but seals misdemeanors after 3 years and felony records after 7 years. Removes references in sections 33 and 34 that states departmental records shall not be sealed. Adds that a person with a juvenile record of entries of a court appearance may file with the office of the commissioner of probation a request that the commissioner seal the file after 1 year. At the time of dismissal, nolle prosequi, non-	**Proposed Bill** Expungement for certain juvenile records or if in the interest of justice. Expungement for juvenile records of misdemeanor convictions or adjudications or misdemeanor cases ending in dismissal, nolle prosequi, or without adjudication. Offense must have been committed before person turned 18 and the person must file petition with a judge in the court where the appearance or disposition occurred. Court has discretion to expunge. Expunges the case		Law http://www.mass.gov/courts/case-legal-res/law-lib/laws-by-subj/about/cori.html http://www.mass/gov/courts/selfhelp/criminal-law/seal-record/html Bill https://malegislature/gov/Bills/190/S2170 Articles https://www.bostonglobe.com/business/2016/04/11/state

State	Current Law			New Law/Proposed Bill			Notes (politics, contentious votes, etc.)	Links
	Non-convictions	*Convictions*	*Sealing vs. Expungements*	*Non-convictions*	*Convictions*	*Sealing vs. Expungements*		
	prosequi has been entered or case was dismissed, and it appears that substantial justice would best be served, the court shall direct the clerk to seal the file.	years. Reported to police and court agencies as "sealed delinquency record over three years old" and to others as "no record." (c. 276, section 100B) Unlawful possession of particular controlled substances: certain convictions that result in continuation or probation or charges that have been dismissed may be sealed by the court; however, departmental records which are not public records, maintained by police and other law enforcement agencies, and shall not be sealed. (c. 94C, section 34) Unlawful possession of particular controlled substances: if any person if found not guilty or if a complaint against him is dismissed or an indictment nol prossed for a violation, the court shall order all official records sealed; provided, however, that departmental records maintained by police and other law enforcement agencies which are not public records shall not be sealed (c. 94C, section 44) **Exclusions:** Sex offenders who have been classified as a level 2 or level 3 sex offender shall not be eligible for sealing of sex offenses (c. 276, section 100A) Convictions related to firearms sales, ammunition sales, illegal sale or possession of self-defense spray, and weapons Violations of crimes against public justice Violations of conduct of public officials and employees			adjudication or when imposing a sentence, the court shall inform juveniles in writing of their right to seek sealing. **Exclusions** Adds convictions for resisting arrest.	from the interstate identification index as well. Court may order expungement if the court determines that expungement is in the interest of justice (for example, cases of misidentification or errors, defendant had no connection to criminal activity, defendant was prosecuted because another person impersonated the defendant, fraud on the court, lack of probable cause or violation of constitutional right). Court shall enter findings of fact. Expunges the case from the interstate identification index as well.		-speeds-sealing-criminal-records/1xbS3h5xpgZ9HJ03kKo6DJ/story.html http://www.masslive.com/politics/index.ssf/2017/10/senate_judiciary_chair_outline.html

State	Current Law			New Law/Proposed Bill			Notes (politics, contentious votes, etc.)	Links
	Non-convictions	*Convictions*	*Sealing vs. Expungements*	*Non-convictions*	*Convictions*	*Sealing vs. Expungements*		
ME	Disclosure of non-conviction records are not generally available to the public, but may be made to "any person who makes a specific inquiry…as to whether a named individual was summoned, arrested or detained or had formal criminal charges initiated on a specific date." Me. Rev. Stat. Ann. Tit. 16, § 705(1)(E).	General Rule: there is no provision for sealing or expungement of adult convictions. Sealing only appropriate where: (i) a Class E Crime (crimes punishable by up to six months incarceration and a $1,000 fine) was (ii) committed while a person was 18 years old or older, but younger than 21 and (iii) the person has not been convicted of any other offenses and (iv) has no charges pending. Me. Rev. Stat. Ann. Tit. 15, §§ 2251, 2255. A 4 year waiting period applies from the time of completion of sentence. §2252. Sealing is mandatory if the court finds that that the individual meets all eligibility criteria above. §2254(5). If a person is convicted of an offense after sealing, then the sealed records must be unsealed. §2254(7). Sealed records may not be disseminated to anyone except other criminal justice agencies. §2255. A person whose record has been sealed may respond to inquiries from anyone other than criminal justice agencies by not disclosing the conviction. § 2256. **Exclusion:** sexual assault offenses are ineligible. § 2251. The only other way to seal the records of adult convictions is to obtain an executive pardon, which transforms information concerning the pardoned conviction to "non-conviction" data that is not generally available to the public, but may be	Sealing only.	N/A	**Proposed Bill** **Proposed bill establishes an automatic process for individuals convicted of Class C (crimes punishable by up to five years incarceration and a $5,000 fine), D (crimes punishable by up to 364 days incarceration and a $2,000 fine) or E (crimes punishable by up to six months incarceration and a $1,000 fine) crimes to have the records of those convictions sealed if:** **(i) the individual has not been convicted of any other crime in ME or any other jurisdiction and** **(ii) at least 7 years have passed since the date of conviction.** **If a state agency objects to automatic sealing, the convicted individual may file a motion in the underlying criminal proceeding requesting the records be sealed.** Reduction in the 7-year waiting period is available where a convicted individual files a motion showing his or her high school diploma or postsecondary certificate or degree, obtained after the conviction. Inquiries from entities other than criminal justice agencies may be fielded as though the sealed conviction never happened.	N/A		Bill: https://legislature.maine.gov/legis/bills/bills_128th/billtexts/SP040301.asp

State	Current Law			New Law/Proposed Bill			Notes (politics, contentious votes, etc.)	Links
	Non-convictions	*Convictions*	*Sealing vs. Expungements*	*Non-convictions*	*Convictions*	*Sealing vs. Expungements*		
		available through specific inquiry. (*See non-convictions*).			**Exclusions:** Domestic violence and sexual assaults are ineligible.			
NV	If a defendant has been arrested for alleged criminal conduct and charges are dismissed, the prosecutor declined prosecution of charges or the defendant is acquitted, such defendant may petition (i) the court in which the charges were dismissed at any time after dismissal; (ii) the court having jurisdiction in which charges were declined for prosecution anytime after statute of limitations has run, 10 years after the arrest or pursuant to stipulation; or (iii) the court in which acquittal was entered at any time after acquittal. Upon receiving petition, court shall notify law enforcement agency that arrested petitioner and prosecutor and anyone having relevant evidence may testify and present evidence at petition hearing. If at hearing court finds that there is no evidence further action will be brought against defendant, court may order sealed all records of arrest and of proceedings relating to acquittal, declination or dismissal. However, if prosecutor previously declined prosecution and records were sealed, prosecutor may subsequently file charges	Convicted defendants may petition to have the related records sealed if: (i) he/she has successfully completed court-ordered probation; (ii) he/she has successfully completed a reentry program (inapplicable to sex offenses and offenses against children) (may petition 5 years after completion); (iii) he/she completed a court-ordered drug or alcohol treatment and conviction was set aside; (iv) he/she was convicted of possession of a controlled substance not for purposes of sale (may petition after 3 years from sentencing date); or (v) he/she was convicted of any of the following crimes: (A) misdemeanors other than gross misdemeanors (2 year wait after the later of release date from custody or discharge from probation/parole); (B) gross misdemeanors (7 year wait after the later of release date from custody or discharge from probation/parole); (C) Category E felonies (7 year wait after the later of release date from custody or discharge from probation/parole); (D) Category C/D felonies (12 year wait after the later of release date from custody or discharge from probation/parole); and (E) Category A/B felonies (15 year wait after the later of release date from custody or discharge from probation/parole). If the conviction of a person is set aside, defendant may petition court that set aside the conviction at any time after conviction has been set aside for the sealing of records related to the setting aside of the conviction. Court shall notify prosecutor. If after hearing the court	Eligible in certain cases for sealing only.	N/A	**New Law** Laws were recently approved by the Governor allowing sealing of the following records: -records related to eviction under certain procedural circumstances (effective 10/1/17) -records related to convictions for offenses in which the defendant was a victim of sex trafficking or involuntary servitude (providing that where the judgment of conviction is vacated for such defendant, the court is required to seal the related records) (effective 10/1/17) -records related to convictions for solicitation of prostitution, where the defendant was assigned to a program of treatment after discharge (effective 10/1/17) -records related to convictions on behalf of a person who is given a dishonorable discharge from probation if such person is otherwise eligible to have the records sealed. The law additionally reduces the length of certain periods that a person is required to wait before petitioning a court for the sealing of records and authorizes the court to order sealing with a hearing if the prosecuting attorney stipulates to the sealing. The law also reduces the wait	Sealings only.	Generally favorable reviews of new record sealing laws as one of the broadest in the US. Obtaining senate approval has generally been more difficult than obtaining assembly approval, with contentious votes on bills providing for the sealing of records related to eviction under certain procedural circumstances, the sealing of records related to convictions on behalf of a person who is given a dishonorable discharge from probation if such person is otherwise eligible to have the records sealed and on revising wait periods for authorization to petition the court for sealing conviction records for various types of convictions.	**Current Law**: https://www.leg.state.nv.us/NRS/NRS-179.html#NRS179Sec255 **New Law**: https://www.leg.state.nv.us/Session/79th2017/Bills/AB/AB107_EN.pdf https://www.leg.state.nv.us/Session/79th2017/Bills/AB/AB243_EN.pdf https://www.leg.state.nv.us/Session/79th2017/Bills/AB/AB259_EN.pdf https://www.leg.state.nv.us/Session/79th2017/Bills/AB/AB260_EN.pdf https://www.leg.state.nv.us/Session/79th2017/Bills/AB/AB327_EN.pdf https://www.leg.state.nv.us/Session/79th2017/Bills/SB/SB125_EN.pdf

State	Current Law			New Law/Proposed Bill			Notes (politics, contentious votes, etc.)	Links
	Non-convictions	*Convictions*	*Sealing vs. Expungements*	*Non-convictions*	*Convictions*	*Sealing vs. Expungements*		
	any time before running of statute of limitations and court shall order inspection of records without prosecutor's petition.	finds that conviction was set aside, court may order sealed all records relating to the setting aside of the conviction.			period from 5 years to 4 years after completion of a program for the sealing of records of a person who completes a correctional or judicial program for reentry into the community (effective 10/1/17). Effective 10/1/17, recent law also revised the wait period for authorization to petition the court for sealing conviction records as follows: -Category A felony, crime of violence or burglary of a residence: 10 year wait after the later of release date from custody or discharge from probation/parole -Category B/C/D felony: 5 year wait after the later of release date from custody or discharge from probation/parole -Category E felony: 2 year wait after the later of release date from custody or discharge from probation/parole -Gross misdemeanor: 2 year wait after the later of release date from custody or discharge from probation -Misdemeanor for battery, harassment, stalking or violation of protection order: 2 year wait after the later of release date from custody or no longer under suspended sentence -Any other misdemeanor: 1 year wait after the later of release date from custody or no longer under suspended sentence			

State	Current Law			New Law/Proposed Bill			Notes (politics, contentious votes, etc.)	Links
	Non-convictions	*Convictions*	*Sealing vs. Expungements*	*Non-convictions*	*Convictions*	*Sealing vs. Expungements*		
NY	Arrest records can be sealed if the case was terminated in the defendant's favor – *e.g.,* if the charges were dismissed, dropped, vacated, or the conviction was set aside.	Under prior law, convictions for most noncriminal offenses (such as traffic infractions or disorderly conduct violations) could be sealed. Felony and misdemeanor convictions could not be sealed, with the exception of crimes committed because of substance abuse (which may be eligible for conditional sealing). Records could still be seen by the defendant, anyone authorized by the defendant, a law enforcement agency upon request to the court, among others.	Sealing only.		**New Law** Effective 10/7/17, a defendant who has been convicted of up to 2 eligible offenses (as defined in the NY State Criminal Procedure Law "CPL") (maximum 1 felony) may apply to the court in which he or she was convicted of the most serious offense to have such conviction(s) sealed if it at least 10 years have passed since the imposition of the sentence on the defendant's last conviction or his/her latest release from incarceration. Defendant must submit a completed application to the court, which shall be served upon the DA of the county in which the conviction(s) were obtained. The DA shall notify the court within 45 days if he or she objects. Upon determining application is not subject to mandatory denial but is opposed by the DA, the sentencing judge shall conduct a hearing on the application and consider relevant factors. When a sentencing judge orders sealing pursuant to section 160.59 of the Criminal Procedure Law ("CPL"), all official records relating to the arrests, prosecutions and convictions on file shall be sealed; however, fingerprints and photographs shall be retained. Records are available to the defendant or a designated agent, qualified	Expansions to both sealing and expungements of records have been proposed in this legislative session. New laws provide for sealing only. Records can be sealed for up to 2 eligible offenses (maximum 1 felony). Eligible offenses mean any crime not including sex offenses, violent or Class A felony offenses, offenses for which registration as a sex offender is required, and felony offenses where the underlying offense is not an eligible offense or an attempt to commit an ineligible offense if the attempt is a felony.	Generally favorable reviews of new record sealing law.	**Law** https://www.nysenate.gov/legislation/laws/CPL/160.59 **Bills** https://www.nysenate.gov/legislation/bills/2017/S4706 https://www.nysenate.gov/legislation/bills/2017/S4705 https://www.nysenate.gov/legislation/bills/2017/S4704 https://www.nysenate.gov/legislation/bills/2017/A5303

State	Current Law			New Law/Proposed Bill			Notes (politics, contentious votes, etc.)	Links
	Non-convictions	*Convictions*	*Sealing vs. Expungements*	*Non-convictions*	*Convictions*	*Sealing vs. Expungements*		
					agencies as defined in the CPL and federal/state law enforcement agencies when acting in the scope of their duties, among others. **Exclusions** Sentencing judge shall summarily deny application when (i) the defendant is required to register as a sex offender; (ii) the defendant has previously obtained sealing of the maximum number of convictions allowable under CPL; (iii) it has not yet been at least 10 years since the imposition of the sentence on the defendant's last conviction (or latest release from incarceration); (iv) the defendant has an undisposed arrest or charge pending; (v) the defendant was convicted of any crime after the date of entry of judgment of the last conviction for which sealing is sought; (vi) the defendant has failed to provide the court with a sworn statement of reasons for granting relief; or (vii) the defendant has been convicted of two or more felonies or more than two crimes. **Proposed Bills** Proposed bill relating to petition for expungement of records for certain marijuana convictions provides that any person who has been convicted of criminal possession of marijuana in the			

State	Current Law			New Law/Proposed Bill			Notes (politics, contentious votes, etc.)	Links
	Non-convictions	*Convictions*	*Sealing vs. Expungements*	*Non-convictions*	*Convictions*	*Sealing vs. Expungements*		
					fifth degree, and has not been convicted of any prior or subsequent offense in NY or any other state or by the U.S. may, after the expiration of 2 years from date of conviction, satisfactory completion of probation, parole, supervised release and the payment of any fines, petition the court to expunge the conviction. Within 90 days if there is no objection from law enforcement and there have been no additional convictions, the court may direct law enforcement agencies to expunge all records of arrest, detention, conviction and sentence. Proposed bill authorizing the expungement of certain convictions after 10 years from the date of conviction for those who have successfully completed the terms of his/her sentence. Such individuals may present a verified petition to the appropriate court seeking an order that such conviction and all records/information pertaining thereto be expunged. Does not apply to convictions of Class A or violent felonies or offenses for which registration as a sex offender is required. Other proposed bills to be considered during the 2017-18 legislative session relate to petition for expungement of records for certain juveniles convicted of a nonviolent offense after five years,			

State	Current Law			New Law/Proposed Bill			Notes (politics, contentious votes, etc.)	Links
	Non-convictions	*Convictions*	*Sealing vs. Expungements*	*Non-convictions*	*Convictions*	*Sealing vs. Expungements*		
					expungement of records for certain juveniles convicted of a nonviolent offense after seven years, and petition for expungement of records of arrest, investigation, detention and computer databases in certain instances where such person may have been falsely arrested, whose case was dismissed, or where innocent.			
OH	If a defendant was arrested and no formal charges were filed, the defendant may contact local law enforcement division to determine how to seal arrest record.	A defendant who is found not guilty of an offense or who is the defendant named in a dismissed complaint, indictment or information may apply to seal relevant records. The court shall determine whether (i) the person was found not guilty in the case, (ii) the complaint, indictment or information in the case was dismissed, or (iii) a no bill was returned in the case and 2 years or more have passed since the report to the court of that no bill. The court shall also determine (i) whether criminal proceedings are pending against the person and whether the prosecutor has filed an objection to the application, and (ii) weigh the interests of the person against the legitimate needs of the government to maintain the records. If the court determines (i) that the person was found not guilty or (ii) that the complaint, indictment or information was dismissed with prejudice (or without prejudice with expiry of the relevant statute of limitations), the court shall issue an order directing sealing of the records. Additionally, if the court determines that the person was found not guilty, that the complaint, indictment or information was dismissed, that a no bill was returned and that the	Generally sealing only, though if there are future criminal investigations of the defendant, prosecutors, judges and police can access the sealed records.	**Proposed Bill** Proposed bill would provide for the expungement of official records related to the apprehension, arrest, criminal charging or trial of a person based on mistaken identity.	**Proposed Bill** Proposed bill would permit a person to apply for the sealing of official records pertaining to a case in which the person was convicted of an offense for which the person is granted a pardon. Application may be filed at any time after grant of pardon or at any time after all of the conditions precedent or subsequent of a pardon are met.	Expungement in case of mistaken identity. Sealing for convictions where pardon was granted for offense for which defendant was convicted.	The following opinion piece disagrees with the expungement proposition, claiming it denies the legitimate review of records: http://www.dispatch.com/opinion/20170612/dennis-hetzel-expungement-denies-legitimate-review-of-records	http://codes.ohio.gov/orc/2953 https://www.legislature.ohio.gov/legislation/legislation-documents?id=GA132-SB-159 https://www.legislature.ohio.gov/legislation/legislation-status?id=GA132-HB-64

State	Current Law			New Law/Proposed Bill			Notes (politics, contentious votes, etc.)	Links
	Non-convictions	*Convictions*	*Sealing vs. Expungements*	*Non-convictions*	*Convictions*	*Sealing vs. Expungements*		
		appropriate time has expired from the date of the report to the court, that no criminal proceedings are pending and that the interests of the person are not outweighed by legitimate governmental needs to maintain such records, the court shall issue an order directing all official case records be sealed and that the proceedings in the case be deemed not to have occurred.						
PA	Expungement is available where no disposition is indicated after 18 months, or otherwise where the court orders it, including cases handled pursuant to Accelerated Rehabilitative Disposition (pre-plea diversion) where defendant successfully completes the terms of ARD probation. 18 Pa.C.S. §§9122(a), (b) and (b.1). **Exclusions:** Certain sex offenses are ineligible. **Arrest records are automatically not disclosed to the public (sealed) if three years have elapsed with no conviction and no proceedings pending.** **18 Pa.C.S. §9121(b)(2)(i)**	Beginning November 2016, individuals who meet the following criteria are allowed to petition the court for an "order of limited access" (**sealing**): (i) those convicted of a misdemeanor of the 2nd or 3rd degree; (ii) free of arrest and conviction for a period of 10 years; (iii) never convicted of certain crimes (felonies, 1st degree misdemeanors or simple assault); (iv) have fewer than 4 misdemeanor convictions; and (v) all fines and costs associated with the case have been paid. 18 Pa.C.S §9122.1 Unlike expunged records, records sealed under an "order for limited access" are not destroyed and remain available to state professional and occupational licensing agencies and to agencies such as the Department of Human Services for child protective services' use, as well as to criminal justice agencies. Unless requested by an agency to whom disclosure is already authorized, individuals may refuse to disclose information about the sealed case to any non-criminal justice agency.	Sealing and expungement in certain circumstances.	**Proposed Bill:** **Under Senate Bill 529 and House Bill 1419, dubbed the Clean Slate Acts, criminal records automatically would seal if a defendant is not convicted.**	**Proposed Bill:** **Under Senate Bill 529 and House Bill 1419, the records of nonviolent misdemeanor convictions would automatically be sealed after 10 years, so long as the offender stays crime free during that time.** **Records would automatically be sealed within two months of becoming eligible.** **The proposed bills would also prohibit licensing agencies from considering sealed convictions in application determinations.**	Sealing only	See links to articles in column to the right	**Proposed Senate Bill:** http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2017&sessInd=0&billBody=S&billTyp=B&billNbr=0529&pn=0854 **Proposed House Bill:** http://www.legis.state.pa.us/cfdocs/billinfo/BillInfo.cfm?syear=2017&sind=0&body=H&type=B&bn=1419 **Articles:** http://www.phillyvoice.com/clean-slate-act-seal-nonviolent-misdemeanors-advances-pa-senate/ https://www.theatlantic.com/politics/archive/2017/04/simplifying-how-the-courts-seal-criminal-records/521964/

State	Current Law			New Law/Proposed Bill			Notes (politics, contentious votes, etc.)	Links
	Non-convictions	*Convictions*	*Sealing vs. Expungements*	*Non-convictions*	*Convictions*	*Sealing vs. Expungements*		
		Exclusions: Felonies, first degree misdemeanors, simple assault and sex offenses are ineligible. Courts may **expunge** records of several classes of offenses: (i) Summary Offenses (minor criminal offenses such as disorderly conduct, loitering, harassment, low level retail theft): where an individual has been free of arrest or prosecution for 5 years following the conviction for the offense in question. (ii) Elderly Offenders: where a person has reached age 70 and has been arrest-free for 10 years following final release from confinement or supervision or when that person ahs been dead for 3 years. (iii) Underage Drinking: expungement is mandatory for convictions of under 18 Pa.C.S. §6308, if the applicant is over 21 at the time of asking for expungement. (iv) Pardoned Offenses: where an individual has been pardoned by the Governor. An offender may deny that he was ever convicted and the records are destroyed, except that the information related to the crime may be made available to a court or law enforcement agency upon request, but may solely be used for the purpose of determining subsequent eligibility for diversion programs, probation, expungement and identifying persons in criminal investigations. 18 Pa.C.S. §9122						

State	Current Law			New Law/Proposed Bill			Notes (politics, contentious votes, etc.)	Links
	Non-convictions	*Convictions*	*Sealing vs. Expungements*	*Non-convictions*	*Convictions*	*Sealing vs. Expungements*		
WI		Expungement generally can only be ordered at time of sentencing for crimes committed while under 25 years and where maximum imprisonment is 6 years or less. For certain invasion of privacy offenses, if committed when the person was under age of 18, the court shall order the record be expunged upon successful completion of sentence. Records may be expunged in certain instances for victims of human trafficking. **Exclusions** Certain felonies if the person has, in their lifetime, been convicted of a prior felony offense or if the felony is a violent offense.	Generally, sealing. Law enforcement agencies or prosecutors are not required to destroy records relating to an expunged conviction. Courts may consider the facts underlying an expunged conviction in sentencing in another case. Wisconsin Department of Justice Crime Information Bureau maintains a record of all convictions, regardless of expungement.		**Proposed Bill** Would allow a person to petition the court for expungement after successful completion of the sentence if the court didn't order it at the time of sentencing. If denied, court can revisit every two years. Court can, on its own motion, order at the time of sentencing that the record be expunged upon completion of the sentence or order that a person's record is not eligible for expungement. District attorney must make reasonable attempts to notify victim when a petition for expungement is filed. Victim can appear at the hearing, submit written statements or waive the hearing. There is another proposed bill that is similar, but allows expungement requests after 1 year of successfully completing the sentence and a $100 fee for each petition filed.	**Proposed Bill** Expungement: Clears the record from the Wisconsin Department of Justice Crime Information Bureau, which feeds the FBI's database.		Current law: https://docs.legis.wisconsin.gov/statutes/statutes/973/015 Proposed bill #1: http://docs.legis.wisconsin.gov/2017/proposals/reg/asm/bill/ab331 Proposed bill #2: http://docs.legis.wisconsin.gov/2017/related/proposals/sb53 Articles: http://www.co.manitowoc.wi.us/media/2307/expungement-of-court-recordsexpungingcourtrecordsbrochure.pdf http://urbanmilwaukee.com/2017/09/06/court-watch-bill-lets-some-criminal-records-be-expunged/ http://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=9&Issue=11&ArticleID=25648

Oral Argument Not Yet Scheduled

IN THE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-3012

United States,

Appellee,

vs.

James M. Powers

Appellant.

On Appeal from the
United States District Court
For the District of Columbia
16-Cr.-76

Brief of Appellant
(Corrected)

Robert S. Becker*
5614 Connecticut Avenue, N.W.
No. 155
Washington, D.C. 20015
(202) 364-8013
rbecker@dcappeals.com
Counsel for James M. Powers

**Counsel of Record*
Appointed by the Court

Filed: July 20, 2017

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici.

Appellant James M. Powers and Appellee the United States of America appeared in the U.S. District Court for the District of Columbia. Matthew G. Kaiser represented Mr. Powers. Cassandra J. Barnum, from the Environmental Crimes Section of the U.S. Department of Justice, and Assistant U.S. Attorney Virginia Cheatham represented the United States.

B. Rulings Under Review

At issue before this Court is Appellant's sentence imposed by the Hon. Amy Berman Jackson January 30, 2017. Appellant's judgment of conviction is reproduced in Appellant's Appendix. App. 26.

C. Related Cases

This case has not previously been before this Court, and no other cases currently on appeal are related to it.

STATUTES & RULES

Pursuant to Fed. R. App. P. 28(f) and D.C. Cir. R. 28(a)(5), relevant statutes and rules are set forth in the Addendum to this brief.

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES ii

STATUTES & RULES ii

TABLE OF AUTHORITIES iv

STATEMENT OF JURISDICTION 1

ISSUES PRESENTED 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 5

SUMMARY OF THE ARGUMENT 8

ARGUMENT 9

MR. POWERS'S SENTENCE VIOLATES 18 U.S.C. § 3553(A)(6) BECAUSE IT IS MUCH LONGER THAN OTHER COURTS HAVE IMPOSED ON SIMILAR DEFENDANTS IN FACTUALLY SIMILAR CASES 9

Standard of review 10

The main function of the U.S. Sentencing Guidelines is to ensure sentencing uniformity nationwide 11

MR. POWERS'S SENTENCE IS PROCEDURALLY UNREASONABLE 14

Application of the § 2Q1.2(b)(1)(A) 6-level enhancement produced a disparate sentence 16

Application of the § 2Q1.2(b)(2) 9-level enhancement caused a substantial disparity 19

MR. POWERS'S SENTENCE IS SUBSTANTIVELY UNREASONABLE 25

Even after a 5-level downward variance Mr. Powers's sentence is disparate 26

Defendants who committed far more serious crimes were sentenced to 12 months or less 28

CONCLUSION 31

ADDENDA A-1

TABLE OF AUTHORITIES[†]

CASES

Gall v. United States, 552 U.S. 38 (2007) ---------- 11, 13, 14

Kimbrough v. United States, 552 U.S. 89 (2007)---------- 13

Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) ---------- 25

**Rita v. United States*, 551 U.S. 338 (2007) ----------11, 13

United States v. Avery, No. 13-Cr.-129 (E.D. Va. sent. Feb. 7, 2014)-- 18, 19, 30

United States v. Azizi, No. 06-Cr.-548 (N.D. Cal. sent. Aug. 27, 2008)----- 22

United States v. Badhwar, No. 11-Cr.-20362 (E.D. Mich. sent. July 16, 2012) ----------18, 19

United States v. Beshears, No. 14-Cr.-6 (E.D. Texas sent. May 26, 2016)---------- 29

United States v. Bieri, No. 11-Cr.-30174 (S.D. Ill. sent. May 9, 2013) -18, 30

**United States v. Booker*, 543 U.S. 220 (2005)---------- 11, 12, 14

United States v. Bush, No. 15-Cr.-20251 (E.D. Mich. sent. Aug. 22, 2016) ---------- 19

United States v. Callahan, No. 06-Cr.-85 (W.D. Va. sent. Aug. 1, 2007) ----------17, 19

United States v. Coleman, 451 F.3d 151 (3d Cir. 2006)---------- 11

United States v. Doe, 617 F.3d 766 (3d Cir. 2010)----------10, 11

**United States v. Fagans*, 406 F.3d 138 (2d Cir. 2005) ---------- 15

United States v. Fillers, et al., No. 09-Cr.-144 (E.D. Tenn. filed Aug. 25, 2009) ----------21, 23

**United States v. Irey*, 612 F.3d 1160 (11th Cir. 2010)---------- 25

United States v. Jenkins, 854 F.3d 181 (2d Cir. 2017)---------- 26

United States v. Jones, 744 F.3d 1362 (D.C. Cir. 2014) ---------- 25

United States v. Mayer, No. 13-Cr.-242 (N.D. Ohio sent. Dec. 16, 2013)-- 29

United States v. Miller, No. 15-Cr.-163 (D. D.C. sent. May 12, 2017) -------2

United States v. Pinski, et al., No. 10-Cr.-20042 (CD Ill. filed June 9, 2010) ---------- 21, 23, 30

[†] Citations to precedents principally relied upon are preceded by asterisks (*).

United States v. Pyles, No. 14-3069, 2017 U.S. App. LEXIS 12140 (D.C. Cir. July 7, 2017) ---------- 15

United States v. Saleh, No. 15-Cr.-20475 (E.D. Mich. sent. Jan. 7, 2016) ----------23, 30

United States v. Scardecchio, No. 05-Cr.-472 (E.D. Pa. sent. Oct. 18, 2006) ---------- 28

United States v. Smith, 629 Fed. Appx. 292 (3d Cir. 2015) ---------- 24

United States v. Smith, No. 11-Cr.-132, (E.D. Pa. filed March 8, 2011) ---- 24

United States v. Soyars, No. 10-Cr.-90 (D. Colo. sent. Feb. 8, 2011) ------- 28

United States v. Umbriac, No. 06-Cr.-270 (E.D. Pa. sent. Dec. 12, 2007) ----------17, 19

United States v. Waite, et al., No. 11-Cr.-20433 (E.D. Mich. filed July 19, 2011) ----------23, 30

United States v. Williams (Terry), No. 13-Cr.-20854 (E.D. Mich. sent. Oct. 24, 2014) ---------- 28

United States v. Yi, et al., No. 10-Cr.-793, (C.D. Cal. filed July 22, 2010) ----------20, 23

STATUTES

18 U.S.C. § 2 ----------2

18 U.S.C. § 371 ---------- 20

18 U.S.C. § 1001 ----------16, 22

18 U.S.C. § 1291 ----------1

18 U.S.C. § 1341 ----------16, 28

18 U.S.C. § 1343 ----------3

18 U.S.C. § 1819 ---------- 22

18 U.S.C. § 3553 ---------- 2, 3, 8, 9, 10, 12, 13, 14, 15, 25, 30, 2

18 U.S.C. § 3742 ---------- 1, 10

42. U.S.C. § 7413 ------2, 3, 8, 9, 17, 18, 19, 20, 21, 22, 23, 24, 27, 28, 29, 30

D.C. Code § 22-2321 ----------3

D.C. Code § 22-2322 ----------3

Toxic Substances Control Act. 15 U.S.C. § 2601, *et seq.* ---------- 16

U.S.S.G. § 2Q1.2 ---1, 3, 11, 14, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 28, 29

U.S.S.G. § 3B1.1 ---------- 18, 24, 29

U.S.S.G. § 3E1.1 ---------- 3, 18

RULES

40 C.F.R. § 61.145----------2
D.C. Cir. R. 28 ---------- ii
Fed. R. App. P. 4 ----------1
Fed. R. App. P. 28 ---------- ii
Fed. R. Crim. P. 11 ----------28, 29

CONSTITUTIONAL PROVISIONS

U.S. Const., Amend. VI---------- 12

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES, **APPELLEE,** vs. **JAMES M. POWERS,** **APPELLANT.**	Nos. 17-3012 (16-Cr.-76)

STATEMENT OF JURISDICTION

This is an appeal from final judgments of conviction and imposition of sentences by the U.S. District Court for the District of Columbia. Appellant filed a Notice of Appeal within 14 days of judgment in compliance with Fed. R. App. P. 4(b), and this Court has jurisdiction pursuant to 18 U.S.C. §§ 1291 and 3742(a)(2). Appellant's Notices of Appeal is reproduced in the Appendix. App. 33.[1]

ISSUES PRESENTED

1. Whether the trial court erred by applying a 6-level sentence enhancement enumerated in U.S.S.G. § 2Q1.2(b)(1)(A) and a 9-level enhancement enumerated in § 2Q1.2(b)(2) to produce an offense level of 23 for the crime to which Mr. Powers pleaded guilty?[2]

---

[1] References to the Appendix will be designated "App." followed by the relevant page number(s). References to transcripts of proceedings will be designated "Tr." followed by the date of the proceeding and relevant page number, i.e. Tr. 10/28/10AM, 3. References to the Addendum to this brief will be designated "Add." followed by the relevant page numbers, i.e. Add. A-3.

[2] Mr. Powers received a 3-level downward departure for acceptance of responsibility, and the court calculated his applicable Guidelines range of 33 – 41 months in prison based on Offense Level 20, Criminal History Category I.

2. Whether, due to application of those enhancements or to the court's clearly erroneous assessment of factors enumerated in 18 U.S.C. § 3553(a)(1 – 6), the sentence imposed, 20 months in prison followed by 36 months of supervised release, represents an "unwarranted sentence disparit[y] among defendants with similar records who have been found guilty of similar conduct…."?

STATEMENT OF THE CASE

A seven-count indictment returned May 5, 2016 charged Mr. Powers with violating the Clean Air Act, wire fraud under federal law, and first-degree fraud under the D.C. Code in relation to the conversion of Friendship House at 619 D Street, S.E., into The Maples condominiums.[3]

According to the government, Appellant failed to notify the D.C. Department of the Environment that the renovation would require removal of pipe wrap, floor tiles, and other materials containing asbestos, in violation of 42 U.S.C. § 7413(c)(1), 18 U.S.C. § 2 and 40 C.F.R. § 61.145(b) (Count I). It charged Mr. Powers with failing to remove the asbestos before beginning renovation in violation of §§ 7413(c)(1) and 2, and § 61.145(c)(1) (Count II); failure to employ a qualified on-site representative to oversee asbestos removal in violation of §§ 7413(c)(1) and 2, and § 61.145(c)(8) (Count III); and negligent release of asbestos into the environment in violation of §§ 7413(c)(4) and 2 (Count IV). The indictment said Mr. Powers committed wire fraud through a company he owned by making it appear that the company would perform necessary asbestos abatement,

[3] The government charged Larry Miller, who owned the company Mr. Powers employed to do the renovation, with one count of negligent release of asbestos into the environment, in violation of § 7413(c)(4). *United States v. Miller*, No. 15-Cr.-163 (D. D.C. sent. May 12, 2017). Miller became a cooperator, and with prosecutors' assistance received a sentence May 12, 2017 of probation for 24 months and a special assessment of $25.

in violation of 18 U.S.C. §§ 1343 and 2 (Counts V and VI), and in violation of D.C. Code §§ 22-2321(a) and 22-2322(a)(1) (Count VII).

Mr. Powers pleaded guilty September 7, 2016 to Count II, failing to remove asbestos before starting renovation, and the government dismissed the six remaining charges. Regarding sentencing, the government and appellant agreed that violation of § 7413(c)(1) has a base offense level of 8 and that he should receive a 2-level downward departure for acceptance of responsibility under U.S.S.G. § 3E1.1, and an additional level under § 3E1.1(b) if his total offense level exceeded 16. Mr. Powers reserved the right to argue against application of the 6- and 9-level enhancements in §§ 2Q1.2(b)(1)(A) and (b)(2), respectively.

In his sentencing memo, Mr. Powers's trial counsel argued strenuously for a sentence of probation. He set out in detail Appellant's efforts since this case began to overcome his addiction, maintain a strong relationship with his children, and do good works in the community, and attached numerous letters as supporting evidence. James Powers' Memorandum in Advance of Sentencing (Powers Memo), 33 – 37; App. 116 – 20.

The district court agreed with the government January 30, 2017 that both enhancements applied, bringing Mr. Powers to Offense Level (OL) 23 minus 3 levels for acceptance of responsibility, and that the applicable Guidelines range was 33 – 41 months in prison. After weighing the § 3553(a) factors, the court sentenced Appellant to 20 months in prison, 36 months of supervised release, and a $100 special assessment.

Citing cases involving similarly situated defendants who pleaded guilty to violating § 7413(c)(1), Appellant argued for a sentence of probation. But the judge said,

> I think that a probationary sentence would not be sufficient to serve the purposes of punishment and deterrence, given all the factual circumstances laid out in connection with the nature and circumstances of the offense. But I don't believe that a long sentence of incarceration is necessary to serve those purposes either. I find that the 33 to 41 months will be greater than necessary to serve the statutory purposes, given your history and characteristics and the relatively short duration of the job and the small number of workers involved.

Tr. 1/30/17, 53. The court permitted Mr. Powers to surrender, and he began serving his sentence March 16, 2017.

Mr. Powers noted his appeal January 31, 2017.

STATEMENT OF FACTS

Mr. Powers earned a Masters of Business Administration degree in 1988 from the University of North Carolina, Chapel Hill, and for most of his career since then was involved in finance and real estate investment.

In 2005, he joined Paul McNamara, who had been his mentor since the early 1980s, and John Ryan to form Potomac Capital Advisors, LLC (PCA), of Bethesda, Maryland. McNamara, the firm's chairman, solicited investors; Mr. Powers, its president, generated deals and oversaw investments; and Ryan provided strategic and tactical oversight. McNamara and Ryan each owned 38 percent of the company, and Mr. Powers owned 24 percent. In 2006, Kathy Lively, a passive partner, joined the firm for a 10-percent equity interest

Altus Partners of the District approached PCA in late 2009 with a proposal to purchase the historic Friendship House property at 619 D Street, S.E., and convert it into condominium dwellings.[4] Altus provided 10 percent of the funding and PCA the rest, and they formed The Maples DC, LLC, which purchased the property in March 2010.

An environmental consultant reported that pipe wrap, floor tiles, floor mastic, wall board and wall joint compound in the building contained asbestos in quantities that would require abatement under the Clean Air Act. Statement of the Offense, 7. App. 51.

In real estate investment projects like The Maples, typically the investment firm puts up the capital and may be consulted on major financial issues that arise during the project. The development firm, Altus in this instance, manages the project.

[4] The structure dates to the Civil War, when it served as a military hospital.

But, after a series of delays, Mr. Powers decided to get involved in a way that is atypical because the success or failure of PCA's investments could directly affect his pay. At the time, his three children were approaching college age and he was in the process of getting divorced.[5] He feared loss of income because the delays would significantly increase project costs.

Mr. Powers proposed in mid-2011 that Altus contract Miller Demolition Co. of Atlanta, Georgia, to perform demolition at The Maples. Before coming to the Washington area, Appellant and Larry Miller, the company's owner, had worked together on real estate projects in Atlanta, and Miller had worked on an apartment building McNamara and Ryan owned.

Appellant introduced Miller to the Altus partners in June 2011 at a walk-through of the site. They discussed the work to be done and Mr. Powers pointed out asbestos pipe wrap and floor tiles. Joint Stipulations of Fact (Joint Stip.), Doc. 23-1, 4; App. 61. Although the Clean Air Act requires removal of asbestos before renovation, Mr. Powers planned for Miller to remove interior walls and fixtures without disturbing the pipe insulation and floor tiles. James Powers' Memorandum in Advance of Sentencing, 6; App. 89.

FEM IX, LLC, a company Mr. Powers created for a previous real estate project, contracted with The Maples LLC to perform "[a]sbestos abatement of all materials identified in [an asbestos survey] dated March 22, 2010," and to engage Miller to perform demolition, "exclude[ing] removal of asbestos or lead based material." *Id.* Appellant had engaged an abatement company to come in after Miller's crew finished to remove the asbestos. He did not disclose to the principals at The Maples DC, LLC his ownership of FEM IX, and he was under no obligation to do so. *Id.* at 7.

---

[5] Mr. Powers is an alcoholic, and was drinking heavily at the time.

Miller brought workers from Atlanta and housed them in Maryland. Under his supervision, they began demolition August 23, 2011 and performed most of the work by September 21, 2011. Statement of the Offense, *supra*, at 8; App. 52. The workers wore paper masks from the start of the project until September 21, 2011, after which they wore cartridge masks in which cartridges were vacuumed but not replaced. Joint Stip., *supra*, at 4; App. 61. An unidentified amount of the materials they took out of The Maples contained asbestos. *Id.*

A D.C. Department of the Environment (DDOE) official inspected The Maples September 21, and observed workers doing renovation work amidst suspected asbestos. Statement of the Offense, 9; App. 53. Mr. Powers told DDOE officials the following day that demolition work would stop, but the renovation proceeded. *Id.* at 9 – 10. Although Mr. Powers knew work continued, it was his understanding that the crew was working around asbestos-containing material, not removing it.

A DDOE representative returned to The Maples October 25, 2011 and saw workers eating lunch in the rear of the property. The agency issued a formal Cease and Desist Order that day.

SUMMARY OF THE ARGUMENT

Mr. Powers pleaded guilty to one count of violating § 7413(c)(1) in relation to removal of asbestos pipe wrap, floor tile and other building materials from an historic structure being converted to condominiums. The district court sentenced him to 20 months in prison, 36 months of supervised release, and a $100 special assessment.

In imposing the sentence, the court committed procedural errors in calculating Mr. Powers's offense level and in failing to properly consider whether the resulting sentence would constitute an unwarranted sentence disparity in violation of § 3553(a)(6).

After application of the 6- and 9-level enhancements, and a 3-level reduction for acceptance of responsibility, Mr. Powers's offense level was 20, and the applicable Guidelines range would be 33 – 41 months in prison. In the past decade, only four out of 62 defendants convicted of violating § 7413(c)(1) have received sentences of 33 months or longer.

The court then granted a 5-level downward variance based on its assessment of the § 3553(a) factors. But in weighing the factors it failed to properly consider the primary goal of the Sentence Reform Act — ensuring sentence uniformity nationwide. As a result, the sentence imposed is substantively, as well as procedurally, unreasonable.

ARGUMENT

MR. POWERS'S SENTENCE VIOLATES 18 U.S.C. § 3553(A)(6) BECAUSE IT IS MUCH LONGER THAN OTHER COURTS HAVE IMPOSED ON SIMILAR DEFENDANTS IN FACTUALLY SIMILAR CASES

According to a database of criminal enforcement cases the Environmental Protection Agency maintains, 62 individual defendants have been sentenced nationwide for violating § 7413(c)(1) since October 1, 2006, the beginning of Fiscal Year 2007.[6] App. 212 – 18. Only nine, 15 percent including Mr. Powers, received sentences of 20 months or longer. Judges sentenced 17 other defendants, 27 percent, to prison terms of 12 months or less; and they sentenced 25 defendants, 40 percent, to probation, sometimes including periods of home detention.

A comparison of offense levels applied in 47 defendants' sentence calculations places Mr. Powers in an equally small cohort.[7] Advisory Guidelines ranges for him and eight other defendants were calculated at Offense Level 20 or higher. The average offense level in the 47 cases was 15.6, and the median was 13.

In Mr. Powers's case, the district court arrived at Offense Level 20 by adding six levels to the base offense level of 8 because asbestos was discharged into the environment for an extended period, and 9 levels because the renovation project exposed workers to the risk of serious bodily injury or death. It then gave Mr. Powers a 3-level reduction for acceptance of responsibility. After discussing

---

[6] https://www.epa.gov/enforcement/summary-criminal-prosecutions.

[7] Presentence reports and Statements of Reasons judges file are not publicly available through PACER, and transcripts of sentencing proceedings are only sporadically available. Therefore, it is difficult to determine in many cases the offense levels and criminal history categories actually applied. However, plea agreements, stipulations, and the parties' sentencing memoranda frequently provide information from which offense levels and criminal history categories may be inferred. It was possible to determine the actual offense level, or to arrive at estimates, in 47 of the 62 cases.

several of the § 3553(a) factors, the judge went further, applying a downward variance from the applicable Guidelines range of 33 – 41 months, in effect sentencing him at Offense Level 15, Criminal History Category I.

On the surface, Mr. Powers's sentence, 20 months in prison and 36 months of supervised release, appears reasonable. But analysis of the 61 other cases demonstrates that his sentence violates § 3553(a)(6) because it represents a substantial disparity from sentences imposed on other defendants like Appellant who committed similar crimes.

The disparity has two underlying causes. One is procedural — the court's application of the two enhancements totaling 15 offense levels and failure to give adequate weight to § 3553(a)(6). The other is substantive — its application of the other § 3553(a) factors. The most glaring distinction among Mr. Powers and other defendants sentenced to 20 months or longer is that each of the others was a developer, an asbestos abatement contractor, demolition and salvage contractor, or an experienced demolition or abatement supervisor, and some of them had lengthy criminal records. Mr. Powers was a real estate investment and finance professional who, through a series of bad choices made while abusing alcohol, took on a project management role for which he was untrained and ill-equipped.

Standard of review

A criminal defendant may appeal his sentence "(1) if it was imposed in violation of law; [or] (2) was imposed as a result of an incorrect application of the sentencing guidelines…." § 3742(a).

This Court reviews the procedural reasonableness of a sentence for abuse of discretion. *See, e.g., United States v. Doe*, 617 F.3d 766, 769 (3d Cir. 2010). "Where procedural reasonableness turns on a question of statutory interpretation, we conduct plenary review of the meaning of the statute." *United States v.*

Coleman, 451 F.3d 151, 156 (3d Cir. 2006). The appellate court examines the substantive reasonableness of the sentence only if the sentencing court followed the proper procedure. *Doe, supra*, at 770. Relying on the remedial opinion in *United States v. Booker*, 543 U.S. 220, 263 (2005), the Supreme Court held "that appellate review for reasonableness would help to avoid 'excessive sentencing disparities' and 'would tend to iron out sentencing differences.' " *Gall v. United States*, 552 U.S. 38, 63 (2007).

In his sentencing memorandum and at the sentencing hearing, trial counsel argued that the government's evidence did not support application of the 6-level enhancement in § 2Q1.2(b)(1)(A) and the 9-level enhancement in § 2Q1.2(b)(2). *See* James Powers' Memorandum in Advance of Sentencing, 11 – 21; App. 94 – 104. He argued further that application of both enhancements would produce a much stiffer sentence than other courts had imposed for similar conduct. *Id.* at 25 – 31; App. 108 - 114.

In sum, both issues are preserved for this Court's review.

The main function of the U.S. Sentencing Guidelines is to ensure sentencing uniformity nationwide

The Supreme Court stated very clearly that

> Congress' basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity…. That uniformity does not consist simply of similar sentences for those convicted of violations of the same statute…. It consists, more importantly, of similar relationships between sentences and real conduct….

Booker, supra, at 253 – 4. In establishing applicable Guidelines ranges the Sentencing Commission sought to avoid disparities as well. *See Gall, supra*, at 54; *Rita v. United States*, 551 U.S. 338, 348 (2007).

The Court in *Booker* rejected mandatory application of the U.S. Sentencing Guidelines on Sixth Amendment grounds. Its remedial opinion instructed district judges first to calculate the Guidelines range applicable to the defendant's crime of conviction. A proper calculation of the range, taking into account the "real" offense conduct and the defendant's criminal history, would produce more uniform sentences because the Guidelines offense levels reflect the Sentencing Commission's analysis of sentences in more than 10,000 cases nationwide.

After determining the applicable Guidelines range, the Supreme Court said, judges should determine the appropriate sentence within or outside the Guidelines range by applying the factors enumerated in § 3553(a):

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed —
>
> > (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> >
> > (B) to afford adequate deterrence to criminal conduct;
> >
> > (C) to protect the public from further crimes of the defendant; and
> >
> > (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for —
>
> > (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines …
>
> (5) any pertinent policy statement …

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

But the Supreme Court's admonitions to avoid sentencing disparities arise mainly in appeals challenging a judge's decision about whether to impose a sentence within or outside the Guidelines range. As Justice Stevens explained, in *Rita* the Court held that "when a district judge's discretionary decision in a particular case accords with the sentence the United States Sentencing Commission deems appropriate 'in the mine run of cases,' the court of appeals may presume that the sentence is reasonable." *Gall, supra*, at 40. In *Gall*, the Court held that

> while the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences — whether inside … or significantly outside the Guidelines range — under a deferential abuse-of-discretion standard.

Id. at 41.

In *Kimbrough v. United States*, 552 U.S. 89, 109 – 111 (2007), the Court upheld a trial court decision to grant a substantial downward variance because the judge concluded by applying the § 3553(a) factors that the applicable Guidelines range would produce an excessive sentence.

A concern running through all of these precedents, frequently voiced in dissent, is that the Guidelines are the agent for achieving uniformity in sentencing, and that over-emphasis of the § 3553(a) factors to justify out-of-guidelines sentences is the agent of sentencing disparity.

> It is unrealistic to think this goal [of sentence uniformity] can be achieved over the long term if sentencing judges need only give lip service to the Guidelines. The other sentencing factors set out in § 3553(a) are so broad that they impose few real restraints on sentencing judges…. Thus, if judges are obligated to do no more than consult the Guidelines before deciding upon the sentence that is, in their independent judgment, sufficient to serve

> the other § 3553(a) factors, federal sentencing will not "move . . . in Congress' preferred direction." … On the contrary, sentencing disparities will gradually increase.

Gall, supra, at 63 – 64 (Alito, J. *dissenting*).

Although the district court gave Mr. Powers a significant downward variance from what it calculated to be the applicable Guidelines range, the variance is not the cause of the sentence disparity in the case at bar. The disparity derives from the judge's application of two substantial enhancements for specific offense characteristics[8] in a manner that is inconsistent with how other courts have applied them, and the judge's failure to properly compare the sentence she intended to impose against sentences imposed on similarly situated defendants who committed similar crimes.

MR. POWERS'S SENTENCE IS PROCEDURALLY UNREASONABLE

Post-*Booker*, a defendant's sentence is procedurally unreasonable if the district court improperly calculated the applicable Guidelines range, failed to consider the § 3553(a) factors, selected a sentence based on clearly erroneous facts, or failed to adequately explain any deviation from the Guidelines range. *See Gall, supra*, at 51.

---

[8] U.S.S.G. § 2Q1.2 …

(b) Specific Offense Characteristics

(1) (A) If the offense resulted in an ongoing, continuous, or repetitive discharge, release, or emission of a hazardous or toxic substance or pesticide into the environment, increase by **6** levels; or

(B) if the offense otherwise involved a discharge, release, or emission of a hazardous or toxic substance or pesticide, increase by 4 levels.

(2) If the offense resulted in a substantial likelihood of death or serious bodily injury, increase by 9 levels.

> [A]n incorrect calculation of the applicable Guidelines range will taint not only a Guidelines sentence, if one is imposed, but also a non-Guidelines sentence, which may have been explicitly selected with what was thought to be the applicable Guidelines range as a frame of reference.

United States v. Fagans, 406 F.3d 138, 141 (2d Cir. 2005). "The requirement to consider the § 3553(a) factors is procedural…." *United States v. Pyles*, No. 14-3069, 2017 U.S. App. LEXIS 12140, 65 (D.C. Cir. July 7, 2017)(Williams, S.J., *dissenting*).

In this case the district court committed procedural error by misinterpreting rules for applying two enhancements to Mr. Powers's offense level, and by failing to give appropriate weight to § 3553(a)(6). At sentencing, in addressing the § 3553(a) factors, the judge said,

> I'm supposed to look at the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct. And the defense provided me with information about this issue, as did the government. But I really couldn't conclude, based on what the defense told me about the people who received probationary sentences, that those offenses were really similar….
>
> None of the factual scenarios I was told about involve the kind of knowing falsehoods, the continuation after stop-work, and the personal profit involved here. And it's interesting the defense made a point that the higher level cases involved some counts that got dealt away. And I think, you know, we do have the fraud count here. I think, though, in the end, the government's cases were actually helpful to the defense because clearly even in the government's discussion of where these cases end out, the 42 months was very much of an outlier.

Tr. 1/30/17, 52; App. 203.

The court's explanation demonstrates two procedural errors. First, it considered avoidance of unwarranted sentence disparities only in relation to the appropriateness of a probationary sentence, and not in relation to a shorter term of incarceration. Second, as the discussion below demonstrates, it clearly disregarded

or downplayed very egregious conduct by defendants in other cases who received much shorter sentences. Defendants in many of the cases cited below were charged with, and some were sentenced for, making false statements in violation of 18 U.S.C. § 1001, mail fraud in violation of 18 U.S.C. § 1341, and Toxic Substances Control Act violations. 15 U.S.C. § 2601, *et seq.* Defendants in many of them ignored repeated warnings over much longer periods of time, affected larger populations by discharging asbestos into the environment, and stood to gain far more in profits than Mr. Powers if their crimes had gone undetected.

Application of the § 2Q1.2(b)(1)(A) 6-level enhancement produced a disparate sentence

Determining whether to apply the § 2Q1.2(b)(1)(B) 4-level enhancement for discharging asbestos into the environment is straightforward — if a discharge occurred, the offense level should be 12. But there is substantial room for debate about whether to apply the § 2Q1.2(b)(1)(A) 6-level enhancement because the discharge was "ongoing, continuous, or repetitive." Application Note 5 recognizes that

> [a] wide range of conduct, involving the handling of different quantities of materials with widely differing propensities, potentially is covered. Depending upon the harm resulting from the emission, release or discharge, the quantity and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation, a departure of up to two levels in either direction from the offense levels prescribed in these specific offense characteristics may be appropriate.

Furthermore, the Sentencing Commission points out that, "[a]lthough other sections of the guidelines generally prescribe a base offense level of 6 for regulatory violations, § 2Q1.2 prescribes a base offense level of 8 because of the inherently dangerous nature of hazardous … substances…." In other words, the

Commission accounted for some of the risks posed by Mr. Powers's conduct by incorporating an additional penalty into the base offense level.

In the past decade, courts, often with the government's agreement, have applied only a 4-level enhancement in cases similar to, and more egregious than, Mr. Powers's.

In *United States v. Callahan*, No. 06-Cr.-85 (W.D. Va. sent. Aug. 1, 2007), the owner of a building hired Callahan, who falsely claimed to be an experienced asbestos abatement contractor, for $2,100 to remove asbestos from the basement. Callahan recruited three homeless men for the job, which took three days, and he disposed of the contaminated debris in a city landfill. Government's Sentencing Memorandum (Callahan Memo), 2 – 3; App. 274 – 75. A year later, inspectors found more asbestos, which cost $12,000 to remove. *Id.* at 3. Callahan pleaded guilty to one § 7413(c)(1) count, the government dismissed four more counts, and the court sentenced him at Offense Level 12, including the § 2Q1.2(b)(1)(B) 4-level enhancement and an additional two levels for harming vulnerable victims. Callahan Memo, 15 – 16; App. 287 – 88.

In *United States v. Umbriac*, No. 06-Cr.-270 (E.D. Pa. sent. Dec. 12, 2007), the defendant owned a demolition contracting firm, and previously worked for another company that performed asbestos abatement as well as demolition. Indictment, 1; App. 304. Umbriac demolished century-old railroad shop buildings in March 2002, and asbestos-contaminated debris remained on the site at least until August 2006. *Id.* at 4 – 5; App. 307 – 8. Umbriac pleaded guilty to one count of violating § 7413(c)(1), Judgment in a Criminal Case, 1; App. 324, and the government agreed to application of the 4-level enhancement and a 2-level downward departure for acceptance of responsibility. Plea Agreement, 5 – 6; App. 317 – 18.

In *United States v. Badhwar*, No. 11-Cr.-20362 (E.D. Mich. sent. July 16, 2012), the defendant was a work supervisor for a demolition company hired by the City of Detroit to demolish a fire-damaged school. Over a period of about two weeks, his crew removed a large quantity of asbestos and disposed of it in a municipal landfill. Government's Sentencing Memorandum, 3 – 4; App. 535 – 36. Nonetheless, prosecutors asked for only the § 2Q1.2(b)(1)(B) 4-level enhancement. *Id.* at 7 – 8; App. 539 – 40.

In *United States v. Bieri*, No. 11-Cr.-30174 (S.D. Ill. sent. May 9, 2013), Franklin Bieri, owner of a demolition and salvage company, hired an abatement company to remove asbestos from two buildings at a factory he purchased, and beginning in March 2010 employed untrained workers to remove asbestos and salvage pipes and metal from the "boiler house" and other buildings. Information, 1 – 2; App. 734 – 35. In July 2010, a state inspector tested debris piles on the site and found them to contain 50 percent asbestos. *Id.* at 3; App. 736. Bieri pleaded guilty to one § 7413(c)(1) count and the parties agreed to application of the § 2Q1.2(b)(1)(B) 4-level enhancement, the U.S.S.G. § 3B1.1 2-level supervisory role enhancement, and the § 3E1.1 2-level reduction for acceptance of responsibility. Plea Agreement, 7 – 8; App. 747 – 48.

In *United States v. Avery*, No. 13-Cr.-129 (E.D. Va. sent. Feb. 7, 2014), a licensed asbestos abatement contractor pleaded guilty to one count of violating § 7413(c)(1) by illegally removed a large quantity of asbestos, improperly packaging the debris, and storing it on two sites from July 2012 until at least February 2013. Statement of Facts, 2 – 3; Government's Position With Respect to Sentencing Factors in the Presentence Report (Avery Memo), 2 – 3; App. 850 – 51. He had previously pleaded guilty to charges stemming from an oil spill during a

marine salvage operation. Avery Memo, 2. Nonetheless, the government agreed to sentencing at Offense Level 10.

In *United States v. Bush*, No. 15-Cr.-20251 (E.D. Mich. sent. Aug. 22, 2016), the defendant pleaded guilty to one count of violating § 7413(c)(1) by illegally removing and storing asbestos between February and April 2014 during demolition of a former automobile dealership. Government's Sentencing Memorandum, 3 – 6; App. 949 – 52. The government dismissed two § 7413(c)(1) counts and agreed to a 4-level enhancement under § 2Q1.2(b)(1)(B). *Id.* at 9; App. 955.

Each of these defendants encountered asbestos as part of their daily business operations, clearly understood the statutory requirements for removing it, and knew the health hazards posed by improper handling and disposal. Each admitted to discharging asbestos into the environment for significant periods.

Mr. Powers was a real estate investment professional, and there is no evidence that his previous projects involved asbestos abatement. Unquestionably, he knew there was asbestos in The Maples, and that its removal would be heavily regulated and costly. But, in comparison with *Callahan*, *Umbriac*, *Badhwar*, *Avery* and *Bush*, the goal of minimizing sentence disparities and Application Note 5 militate in favor of applying the § 2Q1.2(b)(1)(B) enchantment, not the § 2Q1.2(b)(1)(A) enhancement.

Application of the § 2Q1.2(b)(2) 9-level enhancement caused a substantial disparity

The judge's application of the 9-level increase because the discharges in this case posed a substantial health risk is inconsistent with the Application Notes and the way in which prosecutors and sentencing judges in other cases have applied that enhancement. According to Application Note 6,

> [s]ubsection (b)(2) applies to offenses where the public health is seriously endangered. Depending upon the nature of the risk created and the number of people placed at risk, a departure of up to three levels upward or downward may be warranted….

Without attempting to minimize what occurred during demolition at The Maples, the discharge of asbestos there, as the court noted at sentencing, occurred sporadically over two months and affected a relatively small number of individuals.

A review of the eight other cases in which defendants' offense levels were 23 or higher before adjustment for acceptance of responsibility, demonstrates that judges rarely apply the full 9-level enhancement.

In *United States v. Yi, et al.*, No. 10-Cr.-793, (C.D. Cal. filed July 22, 2010), a jury convicted Charles Yi, managing partner of a company that owned an apartment complex being converted to condominium and another that performed the renovation, of four § 7413(c)(1) counts and one 18 U.S.C. § 371 conspiracy count. Codefendant John Bostic, vice president of the development company and chief executive of the construction company, pleaded guilty to one § 371 count, the court dismissed all § 7413(c)(1) counts, and he cooperated with the government. Joseph Yoon, the project supervisor, pleaded guilty to one § 371 count and cooperated as well. The defendants knew ceiling tiles in the complex contained asbestos, but employed several untrained day laborers for nearly a month to scrape the tiles off the ceilings. Indictment, 7 – 10; App. 404 – 407. "The illegal scraping resulted in the repeated release of asbestos-containing material throughout the apartment complex and the surrounding area because Santa Ana winds were blowing" at the time. EPA Summary of Criminal Prosecutions, Yoon, *et al.*, 1; App. 393. After inspectors shut the project down, it cost $1.2 million to clean the site. *Id.* According to government sentencing memoranda, the Presentence Report

applied the 9-level enhancement in Yi's and Bostic's cases.[9] Government's Sentencing Position for Defendant Charles Yi, 2 – 9, App. 418 – 25; Government's Sentencing Position for Defendant John Bostic, 6 – 8, App. 446 – 48.

In *United States v. Pinski, et al.*, No. 10-Cr.-20042 (CD Ill. filed June 9, 2010), Michael Pinski, owner of a five-story building, hired Duane O'Malley, owner of Origin Fire Protection, to remove asbestos pipe wrap at a price substantially less than a certified abatement contractor would have charged. EPA Summary of Criminal Prosecutions, O'Malley, *et al.*, 1; App. 555. James Mikrut hired and supervised five untrained workers for about a week to remove the insulation. Indictment, 4; App. 561. Subsequently, Mikrut transported 127 bags of insulation to a nearby town and dumped them in an open field. *Id.* at 5; App. 562. A jury convicted O'Malley of five § 7413(c)(1) counts, Mikrut pleaded guilty to five § 7413(c)(1) counts, and Pinski pleaded guilty to one § 7413(c)(1). The court applied the 9-level enhancement in sentencing O'Malley at Offense Level (OL) 31, Criminal History Category (CH) II; and Mikrut at OL 24, CH I. *See* The United States Of America's Supplemental Commentary to the Presentence Report, 5, App. 592; Tr. 7/25/12, 6 (O'Malley), App. 616; Sentencing Commentary, 4, App. 627; Tr. 9/20/12, 5 (Mikrut), App. 635. In sentencing Pinski, the court relied on Application Note 6, and applied only a 6-level enhancement under § 2Q1.2(b)(2). Tr. 1/14/13, 17 – 18; App. 580 – 81.

In *United States v. Fillers, et al.*, No. 09-Cr.-144 (E.D. Tenn. filed Aug. 25, 2009), Donald and Gary Fillers, and David Wood purchased an unused factory that occupied a city block of Chattanooga in a densely populated residential and commercial area, intending to demolish the buildings and salvage building materials. Sentencing Memorandum of the United States, 2; App. 670. They hired

[9] No publicly available document provides Yoon's offense level.

Mathis's company to demolish the buildings. They obtained several estimates in the range of $120,000 to $130,000 for asbestos abatement, but hired a different company to perform a partial abatement for $29,000. *Id.* at 3 – 6; App. 671 – 74. After the partial abatement, Wood hired day laborers, drug addicts and street people over a period of 11 months to salvage materials from the buildings, remove the remaining asbestos, and store the debris on the site. *Id.* at 8 – 9; App. 676 – 77. When they demolished the structures, Mathis's crew disbursed remaining asbestos into the environment. *Id.* at 9; App. 677. A jury convicted Wood, Donald Fillers and Mathis of conspiracy to violate the Clean Air Act. Under § 7413(c)(1), it convicted Donald Fillers of six counts, Wood of five counts, and Mathis of two counts. It convicted Fillers and Wood of violating § 1001 — making false statements, and Fillers of one count of violating 18 U.S.C. § 1819 — obstruction of justice. The government argued for application of the 9-level enhancement against Wood, Mathis and Donald Fillers. *Id.* at 27 – 31; App. 695 – 99.

In *United States v. Azizi*, No. 06-Cr.-548 (N.D. Cal. sent. Aug. 27, 2008), a jury convicted the defendant of three § 7413(c)(1) counts arising from demolition of a commercial building between December 2002 and February 2003. Indictment, 5; App. 337. Instead of paying an estimated $43,000 to have an abatement contractor remove asbestos from the building, Azizi hired a handyman to demolish the building and deposit the rubble in a municipal landfill. United States' Sentencing Memorandum, 5, App. 345. The government agreed to the § 2Q1.2(b)(1)(B) 4-level enhancement, and asked the court to apply § 2Q1.2(b)(2), which at Offense Level 21, Criminal History Category V, would have established a Guidelines range of 70 – 84 month. *Id.* at 5, 8 – 10; App. 345, 348 – 50. The offense level actually applied is unclear because the judge sentenced Azizi to only 10 months in prison. EPA Summary of Criminal Prosecution - Azizi, 1; App. 330.

In *United States v. Saleh*, No. 15-Cr.-20475 (E.D. Mich. sent. Jan. 7, 2016), the owner of a charter school hired Sam Saleh to demolish the building, which contained thousands of linear feet of asbestos pipe insulation. EPA Summary of Criminal Prosecutions – Saleh, 1; App. 909. The notice Saleh filed regarding abatement grossly understated the amount of asbestos removed in May and June 2013, and the subcontractor who performed the work violated work regulations. *Id.* at 1 – 2. In calculating Saleh's offense level, the government applied the § 2Q1.2(b)(1)(A) 6-level enhancement, and under § 2Q1.2(b)(2) only six levels because the number of individuals placed at risk was small. Worksheet A, 1; App. 912.

In summary, that sentencing courts appear to have applied the 9-level enhancement in § 2Q1.2(b)(2) in only four § 7413(c)(1) cases over the past decade. The case at bar, which exposed a small number of individuals to asbestos over a relatively short time, is markedly different than the other three cases. In *Yi*, although the asbestos removal lasted only about a month, all residents of the apartment complex and the workers were exposed. In *Pinski*, the demolition involved five workers and took about a week, but the defendants then dumped the debris in an open field, where it remained for an unspecified amount of time. Finally, in *Fillers*, the project exposed a large number of workers and a densely populated neighborhood to asbestos for nearly a year. All defendants to whom courts applied the 9-level enhancement, except Mr. Powers, were demolition or abatement professionals.

There are several other cases in which defendants' conduct was far more egregious than Mr. Powers's, and sentencing judges did not apply the § 2Q1.2(b)(2) enhancement. For example, in *United States v. Waite, et al.*, No. 11-Cr.-20433 (E.D. Mich. filed July 19, 2011), Brian Waite was an abatement

company project manager and Daniel Clements was the company's on-site supervisor tasked with removing asbestos from a former automobile plant between December 2010 and February 2011. Indictment, 1 – 2; App. 487 – 88. They gave workers a goal of removing 1,000 feet of asbestos material a day, instructed them to deposit the debris in dumpsters, and disposed of asbestos in a local landfill. *Id.* at 2 – 3; App. 488 – 89. Each defendant pleaded guilty to two § 7413(c)(1) counts. The government asked for the § 2Q1.2(b)(1)(A) six-level enhancement against each, and the § 3B1.1(c) 2-level enhancement against Waite because he took a leadership role. Government's Sentencing Memorandum (Waite), 8 – 9, App. 501 – 2; Government's Sentencing Memorandum (Clements), 7 – 8, App. 519 – 20.

In *United States v. Smith*, No. 11-Cr.-132, (E.D. Pa. filed March 8, 2011), Gene Smith purchased a warehouse in downtown Philadelphia, near a church and residences. He contracted with Clarence Cole to renovate the building and remove a boiler and pipes covered with asbestos insulation. *United States v. Smith*, 629 Fed. Appx. 292, 294 (3d Cir. 2015). From October to early November 2007, Cole's crew used sledgehammers to break up the pipes and deposited the debris in an open dumpster outside the building. *Id.* Months later, after several failed attempts to get Smith to clean up the site, the EPA cleaned it up. *Id.*. A jury convicted Smith of five § 7413(c)(1) counts and conspiracy, and the district court sentenced him at Offense Level 16, including the § 2Q1.2(b)(1)(A) 6-level enhancement, and the § 3B1.1(c) 2-level enhancement for his leadership role. *Id.* at 295. Cole pleaded guilty to the same charges and the court sentenced him at Offense Level 17.[10] The government asked for Offense Level 20. Government's Sentencing Memorandum (Cole Memo), 2; App. 782.

---

[10] According to Defendant's Sentencing Memorandum and Motion for Downward Variance, 1 – 2, App. 798 – 99, the applicable Guidelines range was 24 – 30 months and he had no significant criminal record.

If the district court believed the case at bar warranted the § 2Q1.2(b)(2) enhancement, it at least should have applied a 3-level downward departure under Application Note 6. If it had done so, Mr. Powers's Guidelines range would have been 24 – 30 months, not 33 – 41 months in prison.

MR. POWERS'S SENTENCE IS SUBSTANTIVELY UNREASONABLE

A sentence is substantively unreasonable if the judge fails to consider the applicable Guidelines range or the § 3553(a) factors, and instead simply selects what the judge deems an appropriate sentence.

In a case where appellants, like Mr. Powers, received downward variances, this Court said, "[b]ecause it is well established that sentences that fall within the Guidelines range are entitled to a presumption of reasonableness, … it is 'hard to imagine' how we could find appellants' below-Guidelines sentences to be unreasonably high." *United States v. Jones*, 744 F.3d 1362, 1368 (D.C. Cir. 2014). In doing so, the Court failed to acknowledge that the presumption of reasonableness is rebuttable.

In fact, "a district court commits a clear error of judgment when it considers the proper factors but balances them unreasonably…. The principle that discretion can be abused by unreasonably balancing proper factors is solidly established in Supreme Court precedent…." *United States v. Irey*, 612 F.3d 1160, 1189 (11th Cir. 2010)(*citing Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981))(citations omitted). The Eleventh Circuit explained that

> [i]n the context of sentencing, the proper factors are set out in 18 U.S.C. § 3553(a), and a district court commits a clear error in judgment when it weighs those factors unreasonably, arriving at a sentence that does not achieve the purposes of sentencing as stated in § 3553(a)….

> In reviewing the reasonableness of a sentence, we must, as the Supreme Court has instructed us, consider the totality of the facts and circumstances.

Id. (internal quotations omitted).

According to the Second Circuit,

> [w]e evaluate … whether each sentencing factor, as explained by the district court, can bear the weight assigned it under the totality of circumstances in the case…. We conclude that the factors upon which the district court relied — retribution, deterrence, and incapacitation, and the attributes of [Appellant] and his crimes — cannot bear the weight of the sentence the district court imposed. Our conclusion that the sentence is excessive is reinforced by the need to avoid unwarranted sentence disparities…

United States v. Jenkins, 854 F.3d 181, 188 (2d Cir. 2017)(citations and internal quotations omitted).

Even after a 5-level downward variance Mr. Powers's sentence is disparate

At Offense Level 20, Criminal History Category I, the district court calculated Mr. Powers's applicable Guidelines Range to be 33 – 41 months in prison. But the sentence imposed is equivalent to Offense Level 15. In meting out that penalty the judge said,

> I want to state that I would have imposed this sentence after a full consideration of all the statutory factors whether I had found the full amount of the guideline enhancement sought by the government and arrived at a level 20, or whether I had subtracted the two additional levels for ongoing discharge to get to level 15, or if I had not applied any enhancements at all.

Tr. 1/30/17, 54.

That statement defies logic because if the judge had applied no enhancements Mr. Powers's offense level would have been 6[11] and the applicable

[11] The base offense level under § 2Q1.2(a) is 8, minus two levels for acceptance of responsibility.

Guidelines range would have been 0 – 6 months in prison. Had the court imposed a 20-month sentence, effectively a 9-level increase, this Court almost certainly would have considered the sentence substantively unreasonable.

That is particularly true in light of the judge's statement that she granted a variance because the job was of "relatively short duration," a "small number of workers [were] involved," and in consideration of Mr. Powers's "history and characteristics." *Id.* at 53.

More importantly, the district court's statement strongly suggests that it "simply selected what [it] deem[ed] an appropriate sentence" for Mr. Powers. Viewed from that perspective, the court's sentencing decision falls squarely within the definition of substantive unreasonableness.

The sentence impose on Mr. Powers is longer than sentences imposed on 85 percent of defendants convicted under § 7413(c)(1) in the past decade. Defendants who received longer sentences included O'Malley, convicted by a jury of five § 7413(c)(1) counts and sentenced to 120 months at OL 31/CH II, App. 613 (see above at 21); Donald Fillers, convicted by a jury of six § 7413(c)(1) counts and other charges and sentenced to 48 months at OL 23/CH I, App. 712 (see above at 21 – 22); Yi, convicted by a jury of four § 7413(c)(1) counts and conspiracy, and sentenced to 48 months at OL 27/CH I, App. 427 (see above at 20 – 21); Smith, convicted by a jury of five § 7413(c)(1) counts and conspiracy and sentenced to 42 months at OL 16/CH V, App. 813 (see above at 24); Callahan, who pleaded guilty to two § 7413(c)(1) counts and was sentenced to 21 months at OL 12/CH IV, App. 292 (see above at 17); Wood, convicted by a jury of five § 7413(c)(1) counts and other charges, and sentenced to 20 months at OL 23/CH I, App. 719 (see above at 21 – 22); and Cole, who pleaded guilty to five § 7413(c)(1) counts and conspiracy and was sentenced to 24 months at OL 17/CH I, App. 804 (see above at 24).

Finally, in *United States v. Williams (Terry)*, No. 13-Cr.-20854 (E.D. Mich. sent. Oct. 24, 2014), Williams owned and planned to redevelop the site of a former automobile plant. Rule 11 Plea Agreement, 3; App. 874. Between March and June 2012, his employees discharged into the environment large quantities of coolant and asbestos while dismantling air conditioning systems and removing pipes from the plant. *Id.* at 3 – 4; App. 874 – 75. He pleaded guilty to two § 7413(c)(1) counts, and the parties agreed to application of the §§ 2Q1.2(b)(1)(A) and 3B1.1(c) enhancements. *Id.* at 11 – 16; App. 882 – 87. The court sentenced him to 27 months at OL 15/CH IV. The government did not seek application of § 2Q1.2(b)(2).

Defendants who committed far more serious crimes were sentenced to 12 months or less

In *United States v. Scardecchio*, No. 05-Cr.-472 (E.D. Pa. sent. Oct. 18, 2006), the defendant was the principal work supervisor for an asbestos abatement company from 2001 to August 2004. United States' Sentencing Memorandum, 2; App. 235. An indictment against the company, its owner and the defendant charged Scardecchio with eight § 7413(c)(1) counts, 15 counts of violating § 1341 — mail fraud, and other offenses, related to projects over several years that had 30 to 50 victims. *Id.* at 7 – 8; App. 240 – 41. Scardecchio pleaded guilty to two § 1341 counts and one § 7413(c)(1) count, and the parties agreed on OL 15/CH I. Although the government asked for a Guidelines sentence in the range of 18 – 24 months, *Id.* 8 – 9, App. 241 – 42, the court sentenced Scardecchio to 12 months. EPA Summary of Criminal Prosecutions, Scardecchio, 1; App. 233.

In *United States v. Soyars*, No. 10-Cr.-90 (D. Colo. sent. Feb. 8, 2011), the owner of an asbestos abatement company was indicted on nine § 7413(c)(1) counts arising from improper storage of asbestos debris from two projects over a year.

The government calculated his offense level as 13, including a 4-level enhancement under § 2Q1.2(b)(3) because the cost of cleanup was substantial, a 4-level enhancement under § 3B1.1(a) because Soyars was a leader of an activity involving five or more individuals, and a 3-level reduction for acceptance of responsibility. Plea Agreement and Statement of Facts Relevant to Sentencing, 11; App. 375. The court sentenced Soyars to six months in prison and three months of home detention during 36 months of supervised release, and ordered restitution of $435,000 to cover the cleanup cost. Amended Judgment and a Criminal Case, Doc. 49; App. 378.

In *United States v. Mayer*, No. 13-Cr.-242 (N.D. Ohio sent. Dec. 16, 2013), John Mayer pleaded guilty to four § 7413(c)(1) counts arising from removal between September and December 2010 of a boiler, pipes and asbestos insulation from a warehouse he leased, and the dumping of asbestos-laden debris at three sites, including residential areas. Indictment, 3 – 5; App. 824 – 26. The parties agreed to sentencing at OL 12/CH II, Defendant John Mayer's Sentencing Memorandum, 1; App. 829, and the court sentenced him to 12 months and 24 months of supervised release.

In *United States v. Beshears*, No. 14-Cr.-6 (E.D. Texas sent. May 26, 2016), the owner of a pipeline contracted Rodney Beshears to excavate and remove pipe coated with asbestos. Indictment, 3; App. 926. Between October 2011 and March 2012, Beshears's workers removed several thousand feet of pipe between Diana and Ore City, Texas, in violation of the Clean Air Act. *Id.* at 4; App. 927. Pursuant to Rule 11(c)(1)(c), the parties agreed to incarceration for 12 months followed by supervised release for 24 months. Judgment in a Criminal Case, 2 – 3; App. 930 – 31.

In *Waite, supra*, the court sentenced defendant Waite at OL 13/CH I to 12 months, and defendant Clements at OL 12/CH I to probation for 24 months, including six months of home detention. Judgment in a Criminal Case, 2 – 3; App. 504 – 5; see above at 23 – 24. In *Pinski, supra*, although the court sentenced two men who oversaw demolition to lengthy prison terms, it sentenced the building owner who hired them at OL 18/CH I to only six months in prison and six months of home detention during 24 months of supervised release. App. 578 – 80; see above at 21. In *Bieri, supra*, the court sentenced defendant at OL 12/CH I to five months in prison and 36 months of supervised release, including three months of home detention. App. 751 – 53; see above at 18. In *Avery, supra*, the court sentenced defendant at OL 10/CH II to 10 months of incarceration, including five months of home detention. App. 862 – 64; see above at 18 – 19. In *Saleh, supra*, the court sentenced defendant at OL 17/CH I to supervised release for 12 months, including home detention for three months. Judgment in a Criminal Case, 3 – 4. App. 916 – 18. See above at 23.

In the case at bar, the district court abused its discretion by limiting its consideration of § 3553(a)(6) solely to cases nationwide in which defendants were sentenced to probation. Had it examined the 85 percent of defendants who received sentences shorter than Mr. Powers's in the past decade for violating § 7413(c)(1), and the egregious conduct many of them committed, the substantive unreasonableness of Appellant's sentence would have been apparent.

CONCLUSION

For the reasons stated above and any others that may appear following oral argument, Appellant James M. Powers respectfully requests that the Court vacate his sentence because it is procedurally and substantively unreasonable, and that it remand his case for resentencing.

Respectfully submitted,

_____

Robert S. Becker, Esq.
D.C. Bar No. 370482
PMB # 155
5614 Connecticut Avenue, N.W.
Washington, D.C. 20015
(202) 364-8013
Attorney for James M. Powers
(*Appointed by the Court*)

CERTIFICATE AS TO TYPE VOLUME

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(B)(i) and D.C. Cir. R. 32(a)(3)(C), that the attached Brief of Appellant contains 8,461 words as measured using the word processor word count utility.

Robert S. Becker
2017.07.19
08:30:16 -04'00'

Robert S. Becker

CERTIFICATE OF SERVICE

I, Robert S. Becker, hereby certify that on July 18, 2017 I filed the foregoing Brief of Appellant with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. All counsel in this appeal are registered users of the Court's CM/ECF system and will receive service electronically.

Robert S. Becker
2017.07.19
08:30:28 -04'00'

Robert S. Becker

ADDENDA

TABLE OF CONTENTS

Relevant Statutes and Guidelines

18 U.S.C. § 3553 ..... A-3

42 U.S.C. § 7413 ..... A-4

U.S.S.G. § 2Q1.2 ..... A-5

40 C.F.R. 61.145 ..... A-6

18 U.S.C. § 3553

Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g) [18 USCS § 3742(g)], are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g) [18 USCS § 3742(g)], is in effect on the date the defendant is sentenced.[;]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

42 U.S.C. § 7413

…

(c) Criminal penalties.

- (1) Any person who knowingly violates any requirement or prohibition of an applicable implementation plan (during any period of federally assumed enforcement or more than 30 days after having been notified under subsection (a)(1) by the Administrator that such person is violating such requirement or prohibition), any order under subsection (a) of this section, requirement or prohibition of section 111(e) of this title [42 USCS § 7411(e)] (relating to new source performance standards), section 112 of this title [42 USCS § 7412], section 114 of this title [42 USCS § 7414] (relating to inspections, etc.), section 129 of this title

[42 USCS § 7429] (relating to solid waste combustion), section 165(a) of this title [42 USCS § 7475(a)] (relating to preconstruction requirements), an order under section 167 of this title [42 USCS § 7477] (relating to preconstruction requirements), an order under section 303 of title III [42 USCS § 7603] (relating to emergency orders), section 502(a) or 503(c) of title V [42 USCS § 7661a(a) or 7661b(c)] (relating to permits), or any requirement or prohibition of title IV (relating to acid deposition control), or title VI [42 USCS §§ 7671 et seq.] (relating to stratospheric ozone control), including a requirement of any rule, order, waiver, or permit promulgated or approved under such sections or titles, and including any requirement for the payment of any fee owed the United States under this Act (other than title II [42 USCS §§ 7521 et seq.]) shall, upon conviction, be punished by a fine pursuant to title 18 of the United States Code, or by imprisonment for not to exceed 5 years, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

§2Q1.2. Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce

(a) Base Offense Level: **8**

(b) Specific Offense Characteristics

(1) (A) If the offense resulted in an ongoing, continuous, or repetitive discharge, release, or emission of a hazardous or toxic substance or pesticide into the environment, increase by **6** levels; or

(B) if the offense otherwise involved a discharge, release, or emission of a hazardous or toxic substance or pesticide, increase by **4** levels.

(2) If the offense resulted in a substantial likelihood of death or serious bodily injury, increase by **9** levels.

(3) If the offense resulted in disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure, increase by **4** levels.

(4) If the offense involved transportation, treatment, storage, or disposal without a permit or in violation of a permit, increase by **4** levels.

(5) If a recordkeeping offense reflected an effort to conceal a substantive environmental offense, use the offense level for the substantive offense.

(6) If the offense involved a simple recordkeeping or reporting violation only, decrease by **2** levels.

(7) If the defendant was convicted under 49 U.S.C. § 5124 or § 46312, increase by **2** levels.

§ 61.145 Standard for demolition and renovation.

(a) Applicability. To determine which requirements of paragraphs (a), (b), and (c) of this section apply to the owner or operator of a demolition or renovation activity and prior to the commencement of the demolition or renovation, thoroughly inspect the affected facility or part of the facility where the demolition or renovation operation will occur for the presence of asbestos, including Category I and Category II nonfriable ACM. The requirements of paragraphs (b) and (c) of this section apply to each owner or operator of a demolition or renovation activity, including the removal of RACM as follows:

(1) In a facility being demolished, all the requirements of paragraphs (b) and (c) of this section apply, except as provided in paragraph (a)(3) of this section, if the combined amount of RACM is

(i) At least 80 linear meters (260 linear feet) on pipes or at least 15 square meters (160 square feet) on other facility components, or

(ii) At least 1 cubic meter (35 cubic feet) off facility components where the length or area could not be measured previously.

(2) In a facility being demolished, only the notification requirements of paragraphs (b)(1), (2), (3)(i) and (iv), and (4)(i) through (vii) and (4)(ix) and (xvi) of this section apply, if the combined amount of RACM is

(i) Less than 80 linear meters (260 linear feet) on pipes and less than 15 square meters (160 square feet) on other facility components, and

(ii) Less than one cubic meter (35 cubic feet) off

facility components where the length or area could not be measured previously or there is no asbestos.

(3) If the facility is being demolished under an order of a State or local government agency, issued because the facility is structurally unsound and in danger of imminent collapse, only the requirements of paragraphs (b)(1), (b)(2), (b)(3)(iii), (b)(4) (except (b)(4)(viii)), (b)(5), and (c)(4) through (c)(9) of this section apply.

(4) In a facility being renovated, including any individual nonscheduled renovation operation, all the requirements of paragraphs (b) and (c) of this section apply if the combined amount of RACM to be stripped, removed, dislodged, cut, drilled, or similarly disturbed is

(i) At least 80 linear meters (260 linear feet) on pipes or at least 15 square meters (160 square feet) on other facility components, or

(ii) At least 1 cubic meter (35 cubic feet) off facility components where the length or area could not be measured previously.

(iii) To determine whether paragraph (a)(4) of this section applies to planned renovation operations involving individual nonscheduled operations, predict the combined additive amount of RACM to be removed or stripped during a calendar year of January 1 through December 31.

(iv) To determine whether paragraph (a)(4) of this section applies to emergency renovation operations, estimate the combined amount of RACM to be removed or stripped as a result of the sudden, unexpected event that necessitated the renovation.

(5) Owners or operators of demolition and renovation operations are exempt from the requirements of §§ 61.05(a), 61.07, and 61.09.

(b) Notification requirements. Each owner or operator of a demolition or renovation activity to which this section applies shall:

(1) Provide the Administrator with written notice of intention to demolish or renovate. Delivery of the

notice by U.S. Postal Service, commercial delivery service, or hand delivery is acceptable.

(2) Update notice, as necessary, including when the amount of asbestos affected changes by at least 20 percent.

(3) Postmark or deliver the notice as follows:

(i) At least 10 working days before asbestos stripping or removal work or any other activity begins (such as site preparation that would break up, dislodge or similarly disturb asbestos material), if the operation is described in paragraphs (a) (1) and (4) (except (a)(4)(iii) and (a)(4)(iv)) of this section. If the operation is as described in paragraph (a)(2) of this section, notification is required 10 working days before demolition begins.

(ii) At least 10 working days before the end of the calendar year preceding the year for which notice is being given for renovations described in paragraph (a)(4)(iii) of this section.

(iii) As early as possible before, but not later than, the following working day if the operation is a demolition ordered according to paragraph (a)(3) of this section or, if the operation is a renovation described in paragraph (a)(4)(iv) of this section.

(iv) For asbestos stripping or removal work in a demolition or renovation operation, described in paragraphs (a) (1) and (4) (except (a)(4)(iii) and (a)(4)(iv)) of this section, and for a demolition described in paragraph (a)(2) of this section, that will begin on a date other than the one contained in the original notice, notice of the new start date must be provided to the Administrator as follows:

(A) When the asbestos stripping or removal operation or demolition operation covered by this paragraph will begin after the date contained in the notice,

(1) Notify the Administrator of the new start date

by telephone as soon as possible before the original start date, and

(2) Provide the Administrator with a written notice of the new start date as soon as possible before, and no later than, the original start date. Delivery of the updated notice by the U.S. Postal Service, commercial delivery service, or hand delivery is acceptable.

(B) When the asbestos stripping or removal operation or demolition operation covered by this paragraph will begin on a date earlier than the original start date,

(1) Provide the Administrator with a written notice of the new start date at least 10 working days before asbestos stripping or removal work begins.

(2) For demolitions covered by paragraph (a)(2) of this section, provide the Administrator written notice of a new start date at least 10 working days before commencement of demolition. Delivery of updated notice by U.S. Postal Service, commercial delivery service, or hand delivery is acceptable.

(C) In no event shall an operation covered by this paragraph begin on a date other than the date contained in the written notice of the new start date.

(4) Include the following in the notice:

(i) An indication of whether the notice is the original or a revised notification.

(ii) Name, address, and telephone number of both the facility owner and operator and the asbestos removal contractor owner or operator.

(iii) Type of operation: demolition or renovation.

(iv) Description of the facility or affected part of the facility including the size (square meters [square feet] and number of floors), age, and present and prior use of the facility.

(v) Procedure, including analytical methods, employed to detect the presence of RACM and Category I and Category II nonfriable ACM.

(vi) Estimate of the approximate amount of RACM to be removed from the facility in terms of length of pipe in linear meters (linear feet), surface area in square meters (square feet) on other facility components, or volume in cubic meters (cubic feet) if off the facility components. Also, estimate the approximate amount of Category I and Category II nonfriable ACM in the affected part of the facility that will not be removed before demolition.

(vii) Location and street address (including building number or name and floor or room number, if appropriate), city, county, and state, of the facility being demolished or renovated.

(viii) Scheduled starting and completion dates of asbestos removal work (or any other activity, such as site preparation that would break up, dislodge, or similarly disturb asbestos material) in a demolition or renovation; planned renovation operations involving individual nonscheduled operations shall only include the beginning and ending dates of the report period as described in paragraph (a)(4)(iii) of this section.

(ix) Scheduled starting and completion dates of demolition or renovation.

(x) Description of planned demolition or renovation work to be performed and method(s) to be employed, including demolition or renovation techniques to be used and description of affected facility components.

(xi) Description of work practices and engineering

controls to be used to comply with the requirements of this subpart, including asbestos removal and waste-handling emission control procedures.

(xii) Name and location of the waste disposal site where the asbestos-containing waste material will be deposited.

(xiii)A certification that at least one person trained as required by paragraph (c)(8) of this section will supervise the stripping and removal described by this notification. This requirement shall become effective 1 year after promulgation of this regulation.

(xiv) For facilities described in paragraph (a)(3) of this section, the name, title, and authority of the State or local government representative who has ordered the demolition, the date that the order was issued, and the date on which the demolition was ordered to begin. A copy of the order shall be attached to the notification.

(xv) For emergency renovations described in paragraph (a)(4)(iv) of this section, the date and hour that the emergency occurred, a description of the sudden, unexpected event, and an explanation of how the event caused an unsafe condition, or would cause equipment damage or an unreasonable financial burden.

(xvi) Description of procedures to be followed in the event that unexpected RACM is found or Category II nonfriable ACM becomes crumbled, pulverized, or reduced to powder.

(xvii) Name, address, and telephone number of the waste transporter.

(5) The information required in paragraph (b)(4) of this section must be reported using a form similiar to that shown in Figure 3.

(c) Procedures for asbestos emission control. Each owner or operator of a demolition or renovation activity to whom this paragraph applies, according to paragraph (a) of this section, shall comply with the following procedures:

(1) Remove all RACM from a facility being demolished or renovated before any activity begins that would break up, dislodge, or similarly disturb the material or preclude access to the material for subsequent removal. RACM need not be removed before demolition if:

(i) It is Category I nonfriable ACM that is not in poor condition and is not friable.

(ii) It is on a facility component that is encased in concrete or other similarly hard material and is adequately wet whenever exposed during demolition; or

(iii) It was not accessible for testing and was, therefore, not discovered until after demolition began and, as a result of the demolition, the material cannot be safely removed. If not removed for safety reasons, the exposed RACM and any asbestos-contaminated debris must be treated as asbestos-containing waste material and adequately wet at all times until disposed of.

(iv) They are Category II nonfriable ACM and the probability is low that the materials will become crumbled, pulverized, or reduced to powder during demolition.

(2) When a facility component that contains, is covered with, or is coated with RACM is being taken out of the facility as a unit or in sections:

(i) Adequately wet all RACM exposed during cutting or disjoining operations; and

(ii) Carefully lower each unit or section to the floor and to ground level, not dropping, throwing, sliding, or otherwise damaging or disturbing the RACM.

(3) When RACM is stripped from a facility component while it remains in place in the facility, adequately wet the RACM during the stripping operation.

(i) In renovation operations, wetting is not required if:

(A) The owner or operator has obtained prior written approval from the Administrator based

on a written application that wetting to comply with this paragraph would unavoidably damage equipment or present a safety hazard; and

(B) The owner or operator uses of the following emission control methods:

(1)A local exhaust ventilation and collection system designed and operated to capture the particulate asbestos material produced by the stripping and removal of the asbestos materials. The system must exhibit no visible emissions to the outside air or be designed and operated in accordance with the requirements in § 61.152.

(2)A glove-bag system designed and operated to contain the particulate asbestos material produced by the stripping of the asbestos materials.

(3) Leak-tight wrapping to contain all RACM prior to dismantlement.

(ii) In renovation operations where wetting would result in equipment damage or a safety hazard, and the methods allowed in paragraph (c)(3)(i) of this section cannot be used, another method may be used after obtaining written approval from the Administrator based upon a determination that it is equivalent to wetting in controlling emissions or to the methods allowed in paragraph (c)(3)(i) of this section.

(iii)A copy of the Administrator's written approval shall be kept at the worksite and made available for inspection.

(4) After a facility component covered with, coated with, or containing RACM has been taken out of the facility as a unit or in sections pursuant to paragraph (c)(2) of this section, it shall be stripped or contained in leak-tight

wrapping, except as described in paragraph (c)(5) of this section. If stripped, either:

(i) Adequately wet the RACM during stripping; or

(ii) Use a local exhaust ventilation and collection system designed and operated to capture the particulate asbestos material produced by the stripping. The system must exhibit no visible emissions to the outside air or be designed and operated in accordance with the requirements in § 61.152.

(5) For large facility components such as reactor vessels, large tanks, and steam generators, but not beams (which must be handled in accordance with paragraphs (c)(2), (3), and (4) of this section), the RACM is not required to be stripped if the following requirements are met:

(i) The component is removed, transported, stored, disposed of, or reused without disturbing or damaging the RACM.

(ii) The component is encased in a leak-tight wrapping.

(iii) The leak-tight wrapping is labeled according to § 61.149(d)(1)(i), (ii), and (iii) during all loading and unloading operations and during storage.

(6) For all RACM, including material that has been removed or stripped:

(i) Adequately wet the material and ensure that it remains wet until collected and contained or treated in preparation for disposal in accordance with § 61.150; and

(ii) Carefully lower the material to the ground and floor, not dropping, throwing, sliding, or otherwise damaging or disturbing the material.

(iii) Transport the material to the ground via leak-tight chutes or containers if it has been removed or stripped more than 50 feet above ground level and was not removed as units or in sections.

(iv)RACM contained in leak-tight wrapping that has been removed in accordance with

paragraphs (c)(4) and (c)(3)(i)(B)(3) of this section need not be wetted.

(7) When the temperature at the point of wetting is below 0 [degrees]C (32 [degrees]F):

(i) The owner or operator need not comply with paragraph (c)(2)(i) and the wetting provisions of paragraph (c)(3) of this section.

(ii) The owner or operator shall remove facility components containing, coated with, or covered with RACM as units or in sections to the maximum extent possible.

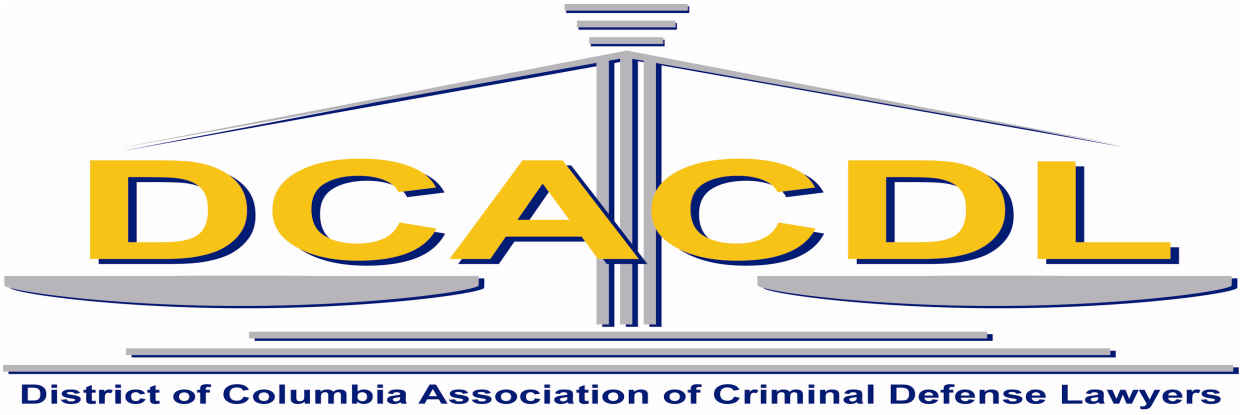
(iii) During periods when wetting operations are suspended due to freezing temperatures, the owner or operator must record the temperature in the area containing the facility components at the beginning, middle, and end of each workday and keep daily temperature records available for inspection by the Administrator during normal business hours at the demolition or renovation site. The owner or operator shall retain the temperature records for at least 2 years.

(8) Effective 1 year after promulgation of this regulation, no RACM shall be stripped, removed, or otherwise handled or disturbed at a facility regulated by this section unless at least one on-site representative, such as a foreman or management-level person or other authorized representative, trained in the provisions of this regulation and the means of complying with them, is present. Every 2 years, the trained on-site individual shall receive refresher training in the provisions of this regulation. The required training shall include as a minimum: applicability; notifications; material identification; control procedures for removals including, at least, wetting, local exhaust ventilation, negative pressure enclosures, glove-bag procedures, and High Efficiency Particulate Air (HEPA) filters; waste disposal work practices; reporting and recordkeeping; and asbestos hazards and worker protection. Evidence

that the required training has been completed shall be posted and made available for inspection by the Administrator at the demolition or renovation site.

(9) For facilities described in paragraph (a)(3) of this section, adequately wet the portion of the facility that contains RACM during the wrecking operation.

(10) If a facility is demolished by intentional burning, all RACM including Category I and Category II nonfriable ACM must be removed in accordance with the NESHAP before burning.



c/o Jenifer Wicks, President
400 7th Street NW Suite 202
Washington, D.C. 20004
(202) 393-3004
dcacdl@gmail.com

Honorable Charles Allen
Chair, Committee on the Judiciary and Public Safety
Council of the District of Columbia
1350 Pennsylvania Avenue, N.W.
Washington, D.C., 20004

April 16, 2021

Via email to judiciary@dccouncil.us (no paper copy mailed)

RE: Testimony Concerning Criminal Records Sealing

Dear Councilmember Allen,

I appreciate the Committee giving me the opportunity to testify on behalf of the District of Columbia Association of Criminal Defense Lawyers (DCACDL) on B24-0063, The "Second Chance Amendment Act Of 2021" and B24-0110, The "Criminal Record Expungement Amendment Act Of 2021" at the Committee hearing on Thursday, April 8, 2021. The Committee also considered the merits of B24-0180, the Record Expungement Simplification To Offer Relief and Equity (RESTORE) Amendment Act of 2021. This written testimony is intended to supplement that oral testimony.

DCACDL recommends the Committee adopt the RESTORE Act, which is more comprehensive and more significantly simplifies the sealing and expungement process. There are two areas in which some additional comments by a representative of an organization of experienced criminal trial lawyers may be helpful.

I. BURDENS OF PROOF

During your questioning of the government witnesses, you raised questions about the burden of proof for sealing and expungement. "Burden of proof" encompasses two related, but different, concepts. There is a "burden of production" which asks which party has the responsibility for showing that a particular matter is actually in dispute. The "burden of persuasion" asks which party has the burden of convincing the decider of its view of the matter. Sometimes these two burdens can be on different parties. For example, in an assault case before a defendant can claim self-defense, there must be some evidence that the defendant was in danger or reasonably believed that he was; this is an example of a burden of production. Once a defendant reaches that

threshold, the burden of persuasion shifts to the prosecution to prove beyond a reasonable doubt that the defendant did not act in self-defense.

We believe a crucial distinction should be made between arrests and charges that did not result in a conviction and those that did. As to the former, we believe that sealing the criminal record should be automatic. We also believe that sealing should be automatic when there is a conviction for an offense which is no longer a criminal offense, such as some marijuana convictions, offenses which are subsequently shown not to have occurred and offenses for which it is subsequently shown, pursuant to Chapter 41A of Title 22, that the person did not commit the offense. To the extent that the government believes that such a record should not be sealed, the government should have the burden of production by filing a motion with the court opposing such sealing and the burden of persuasion to convince the court that the interests of the community outweigh the defendant's interests in living without the enduring stigma of an arrest.

On the other hand, we agree that once the government has obtained a conviction, either through a plea of guilty or after a trial, the burden should shift to the defendant to file a motion for expungement or sealing and subsequently prove by a preponderance of the evidence that such sealing or expungement is in the interests of justice. The RESTORE Act lays out in proposed new sections 16-804 (c) and 16-805 (d) the factors which a court should consider in determining when the interests of justice require sealing or expungement.

II. ACCESS TO COUNSEL

While we agree that the RESTORE Act is much simpler than the other proposed bills concerning sealing and expungement, we do not agree that such simplification obviates the need for counsel when the government contests the sealing or expungement. The procedures set out in the proposed new sections 16-804 (c) and 16-805 (d), for example, require a party to assemble facts, argue how those facts relates to the enumerated factors, and persuade a judge that the balance favors the result desired by the party. That is precisely what lawyers are trained to do. An uncounseled defendant going up against a trained advocate for the government is at a distinct disadvantage. For that reason, DCACDL recommends amending the RESTORE Act to authorize courts to appoint counsel for the defendant both when the government moves the court to deny automatic sealing or expungement and when the government opposes a motion to seal or expunge a conviction in the interests of justice. It has been our experience that judges almost universally prefer to adjudicate complex matters when both parties have qualified counsel. We note that courts routinely appoint counsel in resentencing matters under the IRAA or the Second Look Act.

DCACDL is delighted that a consensus seems to have formed around the necessity of expanding the eligibility for sealing and expungement of criminal records. There are several proposed bills to achieve that goal. DCACDL recommends adoption of the RESTORE Act, with the additional provision of permitting the court to appoint counsel in contested matters.

Respectfully,

/s/

Richard Gilbert

Sarah Bradach
Public Hearing on B24-0063 and B24-0110, April 8, 2021
(781)-492-8990, slbradach@gmail.com
DC Justice Lab, Advocacy Volunteer

Good morning, Chairperson Allen, members, and staff of the Committee on the Judiciary and Public Safety.

My name is Sarah Bradach and I am a Ward 1 resident and Advocacy Volunteer at DC Justice Lab. I am writing to demonstrate my wholehearted support for Councilmember Christina Henderson's Record Expungement Simplification to Offer Relief and Equity (RESTORE) Act, and transformative record relief more broadly. I will keep my testimony brief as the most critical voices in this conversation are individuals directly impacted by criminal records and their loved ones.

While returning citizens, the public, the Mayor, and the Council have made it clear that record relief reform is a priority for achieving equity in the District, only the RESTORE Act responds comprehensively to the concerns of each of these parties. In addition to drastically simplifying the process and expanding eligibility, one of its defining features is its use of plain language to eliminate the need for costly legal assistance.

The RESTORE Act presents an unrivaled opportunity for the District to lead a progressive wave of record reform legislation across the United States. This legislation is a demonstration of restorative justice that is long overdue. As arrests, convictions, and resulting criminal records disportionately and unfairly impact Black individuals in Washington, DC, expanding record relief will restore rights and opportunities to these same individuals en masse. The gross racial and economic inequity embedded in the contemporary criminal legal system can only be met with transformative solutions to reverse harm and keep *everyone* safe. Criminal records do not serve the interest of public safety.

I ask the Council to consider the gravity of this decision and the incredible opportunity that the RESTORE Act presents for our returning neighbors. It is up to the Council to determine whether the District is a safe place to return to.

Thank you for your time,
Sarah Bradach

Jubilee Housing

Affordable Housing Resident Life Youth Services Reentry Housing

TESTIMONY OF GINA DAYE WILLIAMS

DIRECTOR – REENTRY HOUSINNG INITIATVE

JUBILEE HOUSING

BEFORE

COMMITTEE ON JUDICIARY AND PUBLIC SAFETY

B24-0063 – SECOND CHANCE AMENDMENT ACT OF 2021

B24-0010 – CRIMINAL RECORD EXPUNGEMENT ACT OF 2021

OVERSIGHT HEARING FOR THE OFFICE OF VICTIM SERVICES AND JUSTICE GRANTS

APRIL 8, 2021

Good morning Chairperson Allen and members of the Committee. My name is Gina Daye-Williams, and I am the Director of the Reentry Housing Initiative for Jubilee Housing. Jubilee Housing is also an active member of the DC Reentry Action Network (RAN) – the District's leading voice on reentry issues and the only coalition exclusively for reentry service providers and their clients.

Jubilee Housing is supportive of the aforementioned bills designed to minimize one of the many barriers faced by returning citizens as they seek to rebuild their lives after a period of incarceration and the availability of public information for previous justice involvement. We know from direct involvement with returning citizens that past criminal records – whether they are convictions or arrests for either misdemeanors or felonies – can often serve as a major stumbling block to obtaining employment or securing housing. Increasing and automating the types and categories of crimes available for sealing and expungement of past criminal records can be the difference between a successful return to society or a recidivism statistic.

For over 46 years, Jubilee Housing has developed and managed affordable apartment communities in the Adams Morgan, Columbia Heights, and Mount Pleasant neighborhoods of the city, while also providing supportive services to our residents. We have completed the development of 300 units of deeply affordable housing with services at a combined investment of over $100M. Over the past two years, Jubilee Housing acquired 3 buildings and a parcel of 5 lots designed to add 120 units of housing and services for both returning citizens and residents in need of deeply affordable housing.

Nearly a decade ago, Jubilee gained awareness of the magnitude of challenges facing returning citizens. As a result, Jubilee worked diligently with a group of key support service providers to

create supportive housing for individuals reentering the community in DC after time served in jail or prison. Our Reentry Transitional Housing Program, now in its eighth full year, is Jubilee's response to target housing, community support, and comprehensive services explicitly to this group. Jubilee currently offers Housing for up to 45 returning citizens each year through a transitional supportive housing program. Upon successful completion, residents are able to transition to Jubilee apartments (based on availability) and to other long-term affordable housing options. We believe a model which combines housing with wrap around support services will lead to successful transitions. Indeed, Jubilee Housing's Reentry Initiative demonstrates the impact of stable housing and services through its recidivism data. Jubilee has served 200 people in the 8-year history of the program and has averted $3.4 million dollars in DC recidivism costs by achieving a 3-year incarceration rate of 11%, a significant percentage below the average recidivism rate.

While Jubilee can provide a strong base for returning citizens, we also need to lower barriers that keep these residents from a successful return from incarceration. Expanding and automating sealing and expungement of past criminal records is an important step to opening doors.

I want to give a real life example of how current access to past criminal records can impede a successful transition. One of our residents joined our program after a period of incarceration of over 12 years. Over the past 10 months, this resident has persevered despite his past challenges. He has become acclimated to current trends and a new life. He successfully completed several employment training programs, has become connected to pro-social networks of people, and has obtained full-time employment. He is also a graduate of the Inmate to Entrepreneur Program. Despite his level of commitment and his early successes following incarceration, he has been denied better employment opportunities due to his past criminal history upon completion of background checks. Expungement and sealing of past records could have improved the results of his background checks and opened new employment doors.

We understand that this particular hearing pertains to Bills 24-0063 and 24-0010. However, we are aware that recently introduced legislation would combine record sealing and expungement in one bill and simplify the process. The Record Expungement Simplification Offer Relief and Equity (RESTORE) Amendment Act of 2021 (B24-0180) will simplify current laws related to record sealing, expand eligibility for people with felonies, and provide an avenue for record expungement in certain areas. It is our recommendation that this committee combine the best measures of the RESTORE Amendment along the two bills being considered as part of this hearing. Lowering unnecessary barriers in housing and employment for justice involved residents will correct laws which have negatively impacted communities of color in our city for many years.

Thank you for the opportunity to testify and I welcome any questions from members of the Committee.

DC VOLUNTEER LAWYERS PROJECT
EST. 2008

Testimony of Ashley Carter, Equal Justice Works Fellow and Jennie Berman, Supervising Attorney
DC Volunteer Lawyers Project
Before the Committee on the Judiciary and Public Safety
Council of the District of Columbia:
Bill 24-0063: Second Chance Amendment Act of 2021
Bill 24-0110: Criminal Record Expungement Amendment Act of 2021
April 14th, 2021

Thank you for the opportunity to provide written testimony to the Council. We are writing today on behalf of the DC Volunteer Lawyers Project. The DC Volunteer Lawyers Project (DCVLP) is a non-profit organization that was established in 2008 to provide direct legal and advocacy assistance to low-income survivors of domestic violence, at-risk children, and other vulnerable individuals. We believe that a life free from violence and abuse is a basic human right, and we work to reach this goal through direct legal services, advocacy, training, and outreach. DCVLP attorneys provide survivors of domestic violence with trauma-centric representation in Civil Protection Order cases, family law matters including custody, child support, and divorce, and immigration cases. We also provide advocacy regarding victims' legal rights in related criminal proceedings against abusers, housing, employment, public benefits and other matters. DCVLP attorneys also represent at-risk children as guardians *ad litem* in contested custody matters.

At the outset, DCVLP applauds the efforts that the Council has made to take serious action towards criminal justice reform through the Criminal Record Expungement Amendment Act of 2021 (Bill 24-0110) and the Second Chance Amendment of 2021 (Bill 24-0063). DCVLP clients are overwhelmingly individuals of color who are experiencing poverty – factors that cause our clients to experience outsized suffering at the hands of the criminal justice system. Past criminal records may

prevent our clients from obtaining employment, forcing them to remain financially reliant on their abusers and unable to leave the relationship. If our clients defend themselves against abusers in order to survive, they may be wrongfully arrested and even charged with criminal offenses. Survivors who are forced into homelessness as a result of abuse may be charged for crimes of survival. Survivors living in poverty often lack access to adequate mental health care to process and address their trauma, and this lack of access can lead to further interactions with the criminal justice system. DCVLP therefore generally supports legislation that would allow for a faster and more accessible process for sealing and expungement of criminal records.

While DCVLP generally supports the goals of increasing access to record sealing and expungement, DCVLP also believes that the bills as proposed lack certain safeguards that are necessary to protect the interests of survivors of domestic violence, sexual assault and stalking, child victims of abuse and neglect, and the interests of attorneys and advocates who work on their behalf. DCVLP is opposed to automatic sealing or expunging records of domestic violence, child abuse, and neglect, parental kidnapping or sexual assault misdemeanors. The ability to access criminal records (arrests, charging documents and convictions) related to the aforementioned crimes, regardless of whether arrests or charges result in convictions, is extremely important for survivors engaged in civil proceedings, specifically child custody matters and Civil Protection Order cases.

Child Custody: Criminal records are absolutely vital for judges, attorneys, and litigants in child custody cases. Pursuant to D.C. Code 16-914(a)(3), a judge presiding over a custody case must determine what is in the best interests of a child. In doing so, the court must consider whether there is evidence of an intrafamily offense as defined by D.C. Code 16-1001(8). If a judge in a custody case

finds that there is, in fact, evidence that a party has committed an intrafamily offense, child abuse or neglect, or parental kidnapping, the law requires that court to change its presumptions regarding child custody, and begin from the presumption that joint custody is not in a child's best interests. Litigants in custody court often use records of past convictions for domestic violence misdemeanors to prove that intrafamily offenses occurred – sometimes years after the convictions occur. In addition, attorneys who are appointed as guardians *ad litem* in custody or abuse and neglect matters conduct thorough investigations into the history of all parties in order to determine the best interests of children. It is essential that guardians *at litem* have some way to access criminal history records, even if those records did not result in a conviction, in order to conduct full and fair investigations and keep children safe.

Civil Protection Orders (CPOs): In Civil Protection Order cases the Court is required to consider the "entire mosaic" of the parties' relationship – and this often requires judges to examine past convictions for domestic violence misdemeanors that occurred years, or even decades, before the current case. Expunging all misdemeanor offenses, including domestic violence offenses and misdemeanor cruelty to children, could place survivors and their children in dangerous situations and prohibit courts from examining evidence that they are mandated to consider. Often there are multiple domestic violence misdemeanor cases filed against the same abuser, some of which may not have resulted in a conviction, but being able to show the full history allows the petitioner to establish a pattern of behavior on the part of the abuser.

Recommendations:

DCVLP asks that the Council consider the interests of domestic violence survivors and at-risk children and proposes the following amendments:

- DCVLP recommends amending the Criminal Record Expungement Amendment Act of 2021 to provide that convictions for misdemeanor domestic violence, sexual assault, cruelty to children, and parental kidnapping offenses are not eligible for expungement.
- DCVLP asks that the Council consider amending D.C. Code § 23-1331(3) to re-classify domestic violence misdemeanors, misdemeanor cruelty to children, and all sexual assaults as "dangerous crimes".
- While we are opposed to automatic sealing, to the extent the bills allow for sealing of records of domestic violence offenses (convictions and non-convictions), DCVLP recommends that the Council take a victim-centered approach to the legislation. We recommend that the Council require at least a three-year waiting period before permitting sealing records of a domestic violence offense. Pursuant to D.C. Code § 12-301(8), a survivor of domestic violence may file a Petition for a Civil Protection Order alleging incidents that occurred within the past three years. Additionally, CPOs currently last up to one year and there are pending amendments to the Intrafamily Offenses Act that will extend the length of a CPO for up to two years. This timeframe will also allow victims to use criminal records as evidence when filing for an extension of their protective orders. Providing a three-year waiting period for sealing domestic violence records of non-convictions will also enable survivors to continue seeking relief for the abuse that they have faced, and allow attorneys to investigate these claims, even if there was no criminal charge or conviction.

- The proposed legislation takes into account the interests of law enforcement and prosecutors by providing processes where they can oppose the sealing of records or continue have access to sealed records. There is not a similar mechanism for victims of these crimes to oppose the sealing of records. Therefore, DCVLP also recommends that the sealing process for any domestic violence offenses should require notification to the victim, and an opportunity for the victim to file a response or make an objection. Additionally, DCVLP recommends that the Council amend D.C. Code § 16–806 to permit victims and guardians *ad litem* to unseal records as needed for litigation and investigation purposes.

We would like to thank the Council for considering the safety and interests of domestic violence survivors and at-risk children. We are available to answer any questions.

/s/ Ashley Carter

Ashley Carter
Equal Justice Works Fellow

/s/ Jennie Berman

Jennie Berman
Supervising Attorney

Written Testimony in Support of the ***RESTORE Act of 2021***
Submitted to the Committee on the Judiciary and Public Safety by Rebecca Barson, Ward 3 Resident on behalf of Jews United for Justice
April 15, 2021

Thank you to Chairman Allen and the members of the Committee on the Judiciary and Public Safety for holding this important hearing on the issue of record sealing and for allowing me to provide written testimony. My name is Rebecca Barson, and I am a long-time resident of Woodley Park in Ward 3, as well as the co-chair of the DC Leadership Council for Jews United for Justice (JUFJ). JUFJ is a community of thousands of Jews and allies committed to advancing social, racial, and economic justice in DC. I am providing today's testimony on behalf of both myself and JUFJ.

Both JUFJ and I strongly support the Record Expungement Simplification to Offer Relief and Equity (RESTORE) Act, and we thank Councilmember Henderson for her efforts to develop this legislation and Councilmembers Allen, Nadeau, Cheh, Robert White, Pinto, Silverman, and Bonds for also sponsoring this important piece of legislation.

As the DC Justice Lab, who worked with Councilmember Henderson on developing this legislation, says on their website, "criminal record expungement is a racial justice issue." The overwhelming majority of people arrested, in jail, and in prison in the District are Black, meaning that Black people also make up the vast majority of the 1 in 7 District residents living with publicly-available criminal records. These criminal records continue to negatively affect their life prospects by making it more difficult to access housing, employment, and other opportunities.

Compounding this reality is that the District has a restrictive and challenging record-sealing process, which means that criminal records can follow people for years, if not their entire lives. And even non-convictions can negatively affect people due to the difficulty of this process. The RESTORE Act presents a solution to these issues by making the record sealing process easier, increasing access to record relief, and automating certain instances of expungement and sealing. This legislation has the power to make a positive difference in the lives of so many residents of the District, particularly Black residents, who have been living under the burden of a publicly available criminal record.

JUFJ and I encourage you to hear and pass the RESTORE Act out of your committee and move it on the full Council for their consideration. Thank you.

Independent Research. Poverty Solutions. Better DC Government.

Testimony of Doni Crawford, Policy Analyst
Record Expungement Simplification to Offer Relief and Equity Amendment Act of 2021
Committee on the Judiciary and Public Safety
April 15, 2021

Chairperson Allen and members of the Committee, thank you for the opportunity to provide testimony. My name is Doni Crawford, and I am a policy analyst at the DC Fiscal Policy Institute (DCFPI). DCFPI is a nonprofit organization that promotes budget choices to address DC's racial and economic inequities and to build widespread prosperity in the District of Columbia, through independent research and policy recommendations.

DCFPI strongly supports a more simplified DC expungement process, an expansion of expungement-eligible offenses, and automatic expungement for decriminalized offenses, as envisioned in the Record Expungement Simplification to Offer Relief and Equity (RESTORE) Amendment Act of 2021.

Although the RESTORE Act was not part of the official record during last week's public hearing, Councilmember Henderson and DC Justice Lab developed this bill in deep collaboration with returning citizens, defense attorneys, prosecutors, and local and national justice reform organizations.[1] It would continue District advancements in racial equity by completely re-writing Title 16, Chapter 8 of the DC Code to expand expungement and sealing opportunities for affected individuals—the overwhelmingly majority whom are Black men.[2]

I recommend that the RESTORE Act make automatic sealing for non-convictions retroactive and remove waiting periods for sealing for all convictions to better ensure that impacted individuals are able to fully reintegrate and compete in society. I also urge the Council to move quickly to incorporate RESTORE Act language into committee markups and pass legislation before the public emergency is lifted to ensure that eligible individuals can fairly be considered for new employment and housing opportunities.

The Devastating Effects of Targeted Criminalization and Unjust Policing on Black People

Due to unjust policing practices, Black people comprise 86 percent of people arrested and 95 percent of people in prison serving DC Code sentences, despite only making up a little less than half of the population.[3, 4] Cannabis policing practices in DC are similarly anti-Black. Black people made up 84 percent of arrests for public consumption and 89 percent of all cannabis-related arrests between 2015 and 2019, according to a recent Washington Post study.[5]

Interactions with the criminal justice system can result in criminal records that include both convictions and non-convictions, and criminal records can drastically reduce an individual's likelihood to be hired for a job and ability to secure housing. These collateral consequences are

further intensified for Black people, who continue to face racial discrimination in job and housing markets and the highest rates of unemployment during the pandemic, regardless of their criminal record.[6, 7] These consequences are often familial and intergenerational, leading to greater risk of housing instability, including homelessness, and economic insecurity for spouses, partners, and children.

Roughly one in seven District residents has a publicly available criminal record from the past 10 years, and only half were convicted of a crime, according to the Urban Institute.[8] Research has shown that employers and landlords have used publicly available criminal records to discriminate against prospective employees and tenants, even though it is illegal in DC.[9] Sealing non-conviction records would help reduce this type of discrimination. But DC law is stringent and makes it difficult for non-conviction records to be sealed—a process rivaled by only Alabama in its complexity and severity.[10]

Recommendations to Strengthen the RESTORE Act

It is morally imperative that we adopt this legislation so that individuals (and their families) who have been arrested but not convicted, convicted of decriminalized crimes, or have returned home from serving their time are given the opportunity to succeed and thrive in our economy without facing additional barriers to employment and housing. I am supportive of the RESTORE Act's provisions to: increase access to criminal record relief; detail the DC sealing and expungement process in plain language; and allow automatic expungement for decriminalized offenses such as cannabis possession and cannabis consumption on private property. I further recommend that the RESTORE Act:

- Make automatic sealing for non-convictions retroactive indefinitely;
- Remove waiting periods for sealing for all convictions to better ensure immediate fair access to the job and housing markets; and,
- Require private companies to purge information about arrest and conviction data for records that are expunged, sealed, or resulted in non-conviction and establish penalties for non-compliance (this can also be accomplished through passage of the Criminal Record Accuracy Assurance Act of 2021).[11]

Thank you for the opportunity to provide testimony.

---

[1] DC Justice Lab, Restore Act of 2021, April 2021.
[2] Marina Duane, Emily Reimal, and Matthew Lynch, Criminal Background Checks and Access to Jobs: A Case Study of Washington DC, Urban Institute, July 2017.
[3] ACLU DC, Racial Disparities in D.C. Policing: Descriptive Evidence From 2013-2017, Updated July 31, 2019.
[4] Council for Court Excellence, Analysis of BOP Data Snapshot from July 4, 2020, September 30, 2020.
[5] Paul Schwartzman and John D. Harden, D.C. legalized marijuana, but one thing didn't change: Almost everyone arrested on pot charges is Black, The Washington Post, September 15, 2020.
[6] Doni Crawford and Kamolika Das, Black Workers Matter: How the District's History of Exploitation & Discrimination Continues to Harm Black Workers, DC Fiscal Policy Institute, January 28, 2020.
[7] Doni Crawford, Black Workers in the Grip of the Recession—Declining UI Trust Fund Could Cause More Harm, DC Fiscal Policy Institute, November 20, 2020.
[8] Duane, Reimal, and Lynch.

[9] Kate Coventry, Testimony of Kate Coventry at the Public Hearing on the Fair Tenant Screening Act of 2019 and the Michael A. Stoops Anti-Discrimination Amendment Act of 2019, DC Fiscal Policy Institute, October 27, 2020.
[10] Margaret Love, DC's non-conviction sealing law is uniquely complex and restrictive, Collateral Consequences Resource Center, March 30, 2021.
[11] Doni Crawford, First in Line: Why the District Must Take a Reparative Approach to Recreational Cannabis Policy for Black and Brown Communities, DC Fiscal Policy Institute, February 16, 2021.

Testimony of Tony Littlejohn

Before the Committee on Judiciary and Public Safety of the District of Columbia

Public Hearing Regarding:

Second Chance Amendment Act of 2021
B24-0063

Criminal Record Expungement Amendment Act of 2021
B24-0110

April 15, 2021

My name is Tony Littlejohn and I am one of the many people impacted by having a criminal record in D.C. I am writing to support expanding access to record sealing and expungement.

Over fifteen years ago, I was arrested for selling CDs and DVDs. My wife had lost her job and we had to come up with more money to support our family. I know my actions were wrong and I paid my debt to society when I was convicted of a felony for piracy (deceptive labeling).

This conviction ruined my life. It is the first and last time I was in trouble, yet it is a permanent stain on my record. Because of this case, I was fired from my stable, well-paying, government job as a security guard. A job I had worked for about fifteen years. Even though I am more than qualified, I have not been able to get another job as a security guard. When an employer learned about my record, they looked at me differently. I now have to work menial jobs just to survive. These menial jobs have been tough on my body and I am getting too old to do so much manual labor.

Record sealing and expungement gives people a second opportunity at life. Criminal records hold people back and prevent people from getting a job. Expungement will help people get out – and stay out – of the system. The burden of a record really only hurts those already disadvantaged. People with wealth and power are often able to avoid a serious charge or use a connection to get hired in spite of the record. The current system feels like it is setting up the normal person to fail.

The current law can be improved in many ways. First, more charges should be eligible for expungement. After someone completes their sentence, and has had enough time without any other convictions, felony and misdemeanor convictions should be sealed. Second, the process should be automatic. I did not know anything about the laws of record sealing and originally thought that if I waited long enough the case would be expunged on its own. It was not until I met with a lawyer that I learned about the process and learned that I was ineligible. I think many people would benefit from eligible cases being sealed without having to take any steps. Last, you should not have to explain why you are worthy of having a case sealed. I think that it is degrading and a show of control. If enough time has passed without any other convictions, the case should be expunged.

America is often said to be a country that believes in second chances, but that has not been my experience. Please improve the record sealing laws to give people a second chance. Thank you for this opportunity to testify.

Testimony of Etienne Boussougou

Before the Committee on Judiciary and Public Safety of the District of Columbia

Public Hearing Regarding:

Second Chance Amendment Act of 2021
B24-0063

Criminal Record Expungement Amendment Act of 2021
B24-0110

April 15, 2021

My name is Etienne Boussougou and I am writing to share the challenges I have experienced because of my criminal record. Record sealing and expungement are important to help the people and families impacted by criminal records get back on their feet.

Many years ago, I was convicted of misdemeanor fraud which is not eligible for sealing under the current law. After my conviction, I worked as a driver for various rideshare companies until I was fired, after six years, because of my conviction. After I was fired, I applied for about twenty jobs. I was denied each of these jobs after they did a background check. How am I supposed to survive if I do not have a job? Because I am out of work, I can't pay my rent, I am behind on my bills, and I struggle to buy food. Every day, I worry about what life will look like the next day. I worry about becoming homeless and what I will eat. I know lots of other people who have criminal records, can't find work, and have become homeless.

My criminal record not only impacts me. It impacts the lives of my kids. I have three children, age eighteen and younger, who rely on me to support them. I worry about how long I will be able to keep my children safe and housed when I can't find work. Criminal records have an impact on generation to generation. My record punishes not only me, but my three young kids. Expungement will help people like me get jobs, go back to school, take care of family, and raise children to be safe and healthy. Having a job helps someone stay out of trouble. Nobody is perfect. People make mistakes and find themselves in bad situations but everybody deserves a real second chance. Expungement will give people a real second chance and help keep families together.

The DC laws can be improved by expanding the types of charges that can be sealed or expunged. Felonies and misdemeanors should be able to be expunged. The criminal system punishes people for their actions, and people learn from their mistakes. Everybody, regardless of their offense, deserves a second chance. Another improvement to the laws is to shorten the waiting period before you can have a case expunged. The sooner a case can be expunged, the sooner someone can go back to work and take care of their families. Having expungement available sooner would help keep people in houses, off the streets, and out of trouble.

Thank you for taking the time to read my testimony.

Council of the District of Columbia
Committee on the Judiciary & Public Safety

Written Testimony in response to the Thursday, April 8, 2021 Public Hearing on B24-0063, the "Second Chance Amendment Act of 2021" and B24-0110, the "Criminal Record Expungement Amendment Act of 2021".

My name is Cosette Audi and I am a Ward One Resident. I am writing to convey my strong support for the Criminal Record Expungement Amendment Act of 2021, or the RESTORE Amendment Act. This bill, introduced by Councilmember Christina Henderson, and co-introduced by Councilmembers Charles Allen, Brianne Nadeau, Mary Cheh, Robert White, Brooke Pinto, Elissa Silverman, and Anita Bonds, would dramatically streamline the process for sealing or expunging a criminal record and also substantially expand the number of people eligible for this relief.

The comprehensive RESTORE Act, which was informed by community members, would act in the following ways to simplify the process of sealing or expunging a criminal record:

- Provides clear definitions of record expungement and record sealing;
- Provides a clear definition of the purposes for which a request to access or disclose records may be made;
- Creates a framework for expungement upon written motion for non-convictions;
- Facilitates automatic sealing for non-convictions;
- Empowers the court, in its discretion, to seal records of felony convictions;
- Eliminates disqualifying convictions as a barrier to seeking and obtaining relief; and
- Places time limits on the court's determination of motions to seal.

Enacting the RESTORE Act would transform the employment and housing opportunities of the 1 in 7 people currently living with publicly-available criminal records in DC, creating an environment where returning citizens can thrive, instead of continuing to be punished. This would be particularly impactful on the District's Black residents who comprise 86% of people arrested in DC, 92% of people in jail, and 95% of people in prison serving DC Code sentences.

The RESTORE Act would be a tremendous step forward for advancing racial justice by removing the structural barriers that reinforce inequity. I strongly urge you to pass this legislation. Thank you.

Cosette Audi

cosetteaudi@gmail.com
(330) 705-5064

1425 Chapin St. NW
Apt. 31A
Washington, DC 20009

Testimony of Darnell Martin

Before the Committee on Judiciary and Public Safety of the District of Columbia

Public Hearing Regarding:

Second Chance Amendment Act of 2021
B24-0063

Criminal Record Expungement Amendment Act of 2021
B24-0110

April 16, 2021

My name is Darnell Martin and I live in Ward 8. I have lived in D.C. on and off since 2002. I am writing to share my story about how my criminal record has impacted me.

I have a past history with addiction and I was living mainly on the street at the time. I made a bad decision, mostly involving drug and theft charges, and now it affects every area of my life. My criminal record has impacted my job opportunities, where I was able to live, and my emotions. For example, I am a computer person and have not been able to get a job working with computers because of my record. I now drive a dump truck. Although I have been blessed to find another way to make money, I know that I will keep being held back from getting the type of job I have always wanted. Like so many others, I want to support my family, and to do that I need access to better paying jobs for which I am qualified.

Record sealing and expungement is an important issue to me because criminal records remain public for way too long and criminal records prevent people from getting jobs. You should not be judged forever based on a bad decision. Employers don't think about the changes people have made in their life. Without expungement, it is like second chances don't exist.

I think all criminal offenses, even murder, should be eligible for expungement after a person has paid their debt to society. I feel that misdemeanors should be eligible after three years and felonies should be eligible after five years. The current waiting period of eight years for misdemeanor convictions is a long time, especially for something that could be as simple as theft of a candy bar. I also think that some cases should be automatically expunged. Many people might not understand the process and automatic expungement would help them and help people who have eligible cases but don't try for expungement.

I had records in Maryland and was able to have them expunged. It was much simpler than D.C. In Maryland, the waiting periods are not as long. I think I only had to wait three years for a misdemeanor. Also, I only had to fill out a simple form at the court to start the process. In the form, I did not have to submit information about my life or steps I had taken since the case. The main focus was how much time had passed since my record. It was simple enough that I did not need a lawyer to help me. The Council should make expungement in D.C. more straightforward and easier to navigate.

People make mistakes. If not given a chance to move on from those mistakes, they might end up right back in trouble. Please let me move on. Please let the others who have a record move on. Thank you for reading my testimony.

DCCoalition
Against Domestic Violence

Council of the District of Columbia

Committee on Judiciary and Public Safety

Councilmember Charles Allen, Chairperson

B24-0063, THE "SECOND CHANCE AMENDMENT ACT OF 2021"
AND
B24-0110, THE "CRIMINAL RECORD EXPUNGEMENT AMENDMENT ACT OF 2021"

April 16th, 2020

Submitted written testimony of:

DC Coalition Against Domestic Violence

5 Thomas Circle, NW

Washington, DC 20005

Tel. 202-299-1181

www.dccadv.org

DCCADV is the federally-recognized statewide coalition of domestic violence service providers in the District. DCCADV's members include crisis and transitional housing providers, counseling and case management services, legal services, and culturally specific organizations serving: African-American; Latino; Asian and Pacific Islander; Immigrant; and LGBTQ survivors of domestic violence. Our members also serve teens and youth and survivors who are Deaf and Hard of Hearing. Our members are on the front lines each day providing life-saving services to more than 30,000 District residents each year. Domestic violence continues to be a leading public safety concern for Washington, D.C. 39 percent of women living in D.C. have experienced sexual violence, physical violence, and/or stalking perpetrated by an intimate partner.[1]

DCCADV understands the reasons why the Mayor's office and the Council have introduced B24-0110, (Criminal Record Expungement Act of 2021; B24-0063 (Second Chance Amendment Act of 2021) and B24-0180 (Record Expungement Simplification to Offer Relief and Equity [RESTORE] Amendment Act. While these comments are supposed to address B24-0063 and B24-0180, our response will also discuss the RESTORE Act.

As a Coalition that provides support and resources which support thousands of survivors each year, we understand that criminal legal reforms can be complex, especially when trying to balance the needs of survivors and individuals impacted by the system. In January of 2021, our member programs voted on and passed a resolution on the police response in the District and survivor need.[2] Our position statement was in response to listening sessions that we held with survivors in the summer of 2020, and years of advocating on behalf of and listening to survivors express their frustration with how police respond to domestic violence incidents. Survivors are also impacted by police reform bills and criminal legal system reforms. They are

[1] *Source: S.G. Smith, et al., The National Intimate Partner and Sexual Violence Survey: 2010-2012 State Report (2017)*

[2] https://dccadv.org/2021/01/position-statement/

community leaders, parents, and guardians who are also wrongfully arrested, pulled over for no reason, and profiled just for existing. Hence, we support the efforts that the District is taking to address the systemic racism within the legal system. While we support these efforts, we ask that Councilmembers remember survivors and include survivors and service providers in the process of developing and implementing expungement and record sealing reforms.

Currently, under §16-801(9) interpersonal violence, intimate partner violence, and intrafamily violence convictions are considered ineligible for sealing. The three bills that have been introduced would have an impact on domestic violence arrests and convictions, with decreasing the waiting periods for someone to petition to seal or expunge a conviction or they would allow an arrest for a domestic violence-related crime to be automatically sealed or expunged within 30 to 90 days. We agree that automatic sealing and expungement for arrests for some non-violent crimes are warranted, given the history and racism with the criminal/legal system and law enforcement agencies. However, we have an issue with the bills grouping all crimes together and specifically, not distinguishing the unique circumstances with domestic violence cases.

Allowing the expungement of misdemeanor crimes in domestic violence cases would cause immeasurable harm to survivors by compromising safety and hindering criminal and civil legal access to justice and remedies. Domestic violence cases are overwhelmingly represented in the misdemeanor dockets and many felony cases are often reduced to misdemeanors for various reasons. These cases often involve repeat offenders with the same victims or different victims. The arrests, charges, dismissals, and convictions of offenders tell a story that is helpful to prosecutors when deciding to go forward with prosecution; if enhanced charges are required based on repeat offenses; and how to fashion reasonable plea negotiations, effective

trial strategies, and fair sentencing recommendations. Expungement removes a very important tool for prosecutors and courts by requiring them to purge pieces of a survivor's experiences which are helpful to prosecutors when deciding to go forward with prosecution. Expungement effectively removes a very important tool for prosecutors and courts by requiring them to purge pieces of a survivor's experiences which are needed to effectively pursue a crime when justice dictates for the safety of the survivor and accountability of the offender.

Many survivors are intimidated, threatened, or afraid to work with prosecutors even if the offender has been arrested. Survivors may depend on the abuser financially or the abuser may have threatened to not allow the survivor to ever see their children again if the survivor pursues domestic violence charges. Domestic violence is about power and control and many abusers use manipulation to keep survivors from obtaining help. It's irresponsible to maintain that cases with multiple arrests – like domestic violence cases – should be allowed to be sealed or expunged because of the perceived lack of cooperation by survivors. If anything, multiple arrests should be a red flag to prosecutors. Allowing cases to be automatically sealed or expunged within 30 to 90 days will keep a survivor from receiving justice.

Furthermore, many survivors access the records needed for other civil justice remedies that provide safety, support, and findings. For example, an arrest, charge, and/or conviction for a domestic violence offense is helpful in protective order hearings which provide a *prima facie* case for a no contact with the survivor, but also custody and visitation provisions (if children are involved) and economic support. A history of arrest, charges, and/or convictions are also necessary in family law cases of divorce to support grounds for divorce, custody and visitation, temporary spousal support, and child support.

Changing expungement laws is crucial, but we still ask that Council give survivors a choice in how they want to be heard. We acknowledge that some survivors may not want to engage with the Courts or police during a domestic violence incident. However, for those survivors that do choose to work with prosecutors, give testimony, or petition for civil protections orders to protect themselves or their families, survivors should be given the option to be kept informed. If any of the three bills are implemented, survivors and victims of crime should be notified, by the Courts, if there is a motion to seal or expunge an arrest or conviction and they should have the opportunity to consent or object to the motion.

In addition to providing exceptions for domestic violence crimes and notice to survivors, DCCADV recommends that a domestic violence service provider be on the panel of legal experts in determining what crimes are ineligible for sealing. Domestic Violence service providers have expertise on addressing housing, legal, and many other issues, and having this knowledge on the panel would not only be meaningful for survivors, but for all District residents.

Thank you, Chairman Allen, for your continued support. We look forward to working together to reform criminal legal systems, procedures, and practices that have been oppressive and a hindrance to so many in the furtherance of life, liberty, and the pursuit of justice. We are philosophically aligned with the legislative intent of the bills before the Council. However, we ask that if the Committee chooses to further explore sealing, exceptions are created for crimes of interpersonal, intimate partner, and intrafamily violence.

Statement Submitted by the Howard University School of Law
Clinical Law Center
Reentry Clinic

To The

Committee on the Judiciary and Public Safety
The Honorable Charles Allen, Chair

On Three Proposed Bills

B24-0064, The Second Chance Amendment Act of 2021

B24-0110.Criminal Record Expungement Amendment Act of 2021

B24-180, The Record Exungement Simplification to Offer Relief and Equity (RESTORE) Amendment Act of 2021

Submitted

Friday, April 16, 2021

By

Adjunct Professor Olinda Moyd

Olinda.moyd@howard.edu

&

Professor Josephine Ross

Jross@law.howard.edu

Greetings Chairman Allen, Council members, staff, and residents of the District. We commend the Committee on the Judiciary and Public Safety for wrestling with the much-warranted task of modernizing and streamlining the District's record sealing statutes. The Reentry Clinic is the newest clinic at the Howard University School of Law and was birthed from the need to assist District residents as they return to their communities after an encounter with the criminal legal system. Since the inception of clinic in the fall of 2020, record sealing has been the cornerstone of our student practice and we have filed record sealing motions for numerous District residents. In addition to providing direct representation to people seeking to have their records sealed in D.C. Superior Court, we engage in policy advocacy on matters related to eliminating collateral consequences which result from arrests and incarceration.

When a person leaves prison and the exit door closes behind them, they must embark upon a road often filled with cracks and potholes as they journey towards successful reentry. Navigating through an outdated and cumbersome record sealing statute poses unnecessary structural impediments. The current legislation, found in Chapter 8 of the Code of the District of Columbia, is complex and too convoluted for lay people to decipher. Many of the residents who we represent have attempted to get their records sealed on their own but hit roadblocks when trying to understand the eligibility criteria, categorize the waiting periods and sort through the disqualifying arrests or convictions. Now is the time to streamline the sealing process with the ultimate goal of giving every District resident a meaningful opportunity to be made whole again. Even our law students struggle to grasp some of the intricacies of these statutes.

Criminal Record Expungement Amendment Act of 2021 (B24-0110)

We support The Criminal Record Expungement Amendment Act of 2021, B24-0110, that would make all misdemeanors eligible for sealing and create opportunities for many people with felony convictions to seek relief. Currently, " failure to appear" is the only felony eligible for record sealing. See Section 16-801(8). This proposed bill seeks to expand the list of eligible felonies to include first and second degree theft and felony drug possession offenses. We support this expansion and urge the council to consider further expanding eligible offenses to exclude only those categorized by statute as the most serious. Furthermore, the current list of ineligible misdemeanor offenses is so broad in scope and so extensive that it begins with letter A and extends through double letters NN. This list, totaling 40 misdemeanor offenses ineligible for sealing, is oppressive and unusually restrictive for people who are trying to remove minor offenses from their record.

The Record Expungement Simplification to Offer Relief and Equity ("RESTORE") Amendment Act of 2021 (B24-180)

We also support The Record Expungement Simplification to Offer Relief and Equity ("RESTORE") Amendment Act of 2021 which facilitates automatic record sealing for non-convictions. All non-convictions should be automatically sealed by the government without the burden of requiring action by the movant. A person who is stopped by the police and gets arrested based on a "hunch" by an officer, but is subsequently released when the charging agency decides not to paper the case, should not have to carry the burden of being labeled with this unsubstantiated arrest for years to come. Once a case is dismissed by the government, at any point in the judicial process, the clerk's office should take on the managerial task of sealing the record and then notifying the person that it has been done. The current system privileges those with education and access to lawyers over equally deserving candidates. Moreover, many District residents live with the mistaken belief that no papered or dismissed cases will

not appear on their record and are blindsided when their employment, housing or other achievements evaporate after a criminal background check. In additional to automatic sealing, The "RESTORE" Act also creates a framework for complete expungement, upon written motion, for non-convictions and automatic expungement for decriminalized offenses. Complete expungement means the elimination of all publicly available physical and computerized records referencing the identity of the person.

According to a report from the Collateral Consequences Resource Center, during the last year, twenty states updated their record sealing and expungement laws to provide greater relief. Sixteen states allow for automatic relief, mostly for non-convictions.[1] The District lags behind other jurisdictions and the results are damaging. A resident whose arrest was not assigned a case number, never formally prosecuted by the U.S. Attorney's Office and never made it to court should not be saddled with the weight of struggling to untangle complex legislation, ordering their criminal records or awaiting the expiration of the statutory time period before filing a motion in D.C. Superior Court. Some of the clients we represent have moved on with their lives, live in other states and are not readily able to navigate the quagmire of complex legislation to get their records sealed. Even after filing the motion, a person often waits for months before the government is ordered to file a response and then several more months before a decision is made by the court to grant or deny the request. Despite the fact that the government is in a better position to know when an offense has been decriminalized, the current statute still places the burden the resident who has a closed case. This must change.

[1] See Collateral Consequences Resource Center, Restoration of Rights Project, 50-State Comparison: Expungement, Sealing & Other Record Relief, updated March 2021.www.ccresourcecenter.org/

The Second Chance Amendment Act of 2021 (B24-0063)

Inevitably, each semester we represent clients who are anxious to have their records sealed, only to advise that they must await the expiration of the statutory waiting period, which varies based on the type and status of the offense. Routinely, we must advise clients that, despite their rehabilitation efforts and their contributions to the community, they must still wait before their motion can be filed. We have to carry some cases from semester to semester before they ripen. In one case, a middle-aged client shared with her student attorney that she just wants the motion filed "before her life ends." She made previous unsuccessful attempts to seal her own records before the clinic accepted representation in her case.

We support The Second Chance Amendment Act of 2021, B24-0063, in that it seeks to decrease the waiting periods that one must exhaust before seeking to have records sealed. This bill also seeks to reduce the number of years a person must wait in order to seal an eligible conviction and also to shorten the process that a person must undertake to seal a charge that does not end with conviction. Empirical data shows that reoffending is most likely to occur within the first few years of release [2] and that people age out of criminality, becoming less likely to reoffend as they age. In contrast, the waiting periods in the current statute are too long and are not based on best practices.

Finally, recent events have forced us as a society to confront the inequities and racial disparities engrained in our legal system. It is critical that the council factor in the disparate impact of all proposed legislation on people of color. With African-Americans representing 86% of the persons in the District arrested, the impact on communities of color is obvious. One in seven people in the District has a

[2] See Seven Things to Know About Repeat Offenders: A new report looks at recidivism among inmates released from federal prisons, The Marshall Project by Bill Keller, March 9, 2016.
https://www.themarshalproject.org/2016/03/09/seven-things-to-know-about-repeat-offenders

criminal record and most of them are people of color who come from over-policed and under-resourced communities. The ease with which a person can become entangled in the system must be matched by the process of being free from the stigma and discrimination associated with having a criminal record.

As we move towards a post-COVID environment, we must ensure that people of color, who have already been disproportionately impacted by the pandemic, are not placed further in the back of the line due to unnecessary statutory barriers. We urge you to make record sealing automatic for all non-convictions, reduce the waiting periods and expand the arrests and convictions eligible for sealing.

Ernest Glover
1459 Ridge Place, S.E.
Washington, D.C. 20020

Greetings,

I am Ernest Glover, a returning citizen and lifetime resident of this wonderful city, Washington, D. C. I have been home now for seven months after serving 13 years of a 20-year federal sentence, as a result of Compassionate Release due to the Covid-19 pandemic. My prior sentence started in August of 2008 as a life sentence without parole, for a non-violent drug offense. The life sentence was mandatory, as this was my third drug conviction. In January of 2017, past President B. Obama granted me clemency, which reduced my life sentence to 20 years.

I am addressing this committee to express my concerns about the D.C Youth Act, and its effect on later sentencing. In 1984, I had a drug conviction, and was sentenced to probation for 3 years under the D.C. Youth Act in Superior Court. Following the completion of my probation in 1987, I was informed that my case was sealed due to the completion of my Youth Act. I was not made aware that my Youth Act conviction was “set aside” and not expunged and could be used in later sentencing as an adult. During my sentencing for a second offense in April 1996, my 1984 Youth Act conviction was not considered for my sentence. I was arrested in June 2007 on allegations resulting in a drug offense, and I exercised my sixth amendment right for a fair and speedy trial. During my sentencing, the federal courts stated that they were using my Youth Act conviction to enhance my sentence, resulting in life without parole. I was under the impression that my Youth Act conviction was sealed and not set aside and could not be used against me in future convictions. Following my sentencing, I spent six months researching case law to find out that my Youth Act was only partially sealed, this was devastating to me and my loved ones.

My position is that Youth Act convictions should be expungable after 5 to 10 years of no re-offenses by the individual. Also, clarity of the conviction being partially sealed and/or set-aside and could possibly be considered in future convictions should be stated clearly in all final Court Order documentation.

The U.S. Department of Justice: Office of Justice Programs shared from the Kentucky Law Journal on the need for revision in youth corrections: “Expungement of Criminal convictions under the Youth Corrections Act - The need for Revision.” Kentucky Law Journal Vol. 66 Issue: 3 Dated (1997-98). The article mentions that when the Federal Youth Corrections Act (FYCA) was passed in 1950, expungement statutes were not common, although the need for such legislation had become apparent. The FYCA calls for automatically setting aside a conviction upon the unconditional discharge of the youth from the Youth Correctional Division. However, offenders granted such relief were often unclear on the circumstances of it. I am in agreement with sealing and the expungement of first- and second-degree theft felonies, possession felonies, and all misdemeanors or “no-papered” charges. Citizens should have the option of having these types of charges sealed or expunged following the completion of their sentence. I

am asking this committee/ council to consider the difference in the effect of a sealed record that can be used in sentencing under certain circumstances, versus an expunged record that is deleted and cannot be considered during sentencing.

I am currently a member of The National Reentry Network for Returning Citizens and serve on the Board of Directors. I was granted the opportunity to participate in and complete the Ready 4 Work program. I recently completed the DC DOES Project Empowerment Program, where they are providing the opportunity for me to attend the First Class CDL Training school in Alexandria, VA.

In closing, I want to thank this committee for providing citizens with the opportunity to voice their concerns on the effects of the D.C. Youth Act, and for being committed to a fair justice system in the District of Columbia. I am very appreciative for the resources that are provided by the city to returning citizens.

Respectfully,

Ernest Glover
April 14, 2021

nvrdc
Network for Victim Recovery of DC

Committee on the Judiciary
Public Hearing on Bill 24-063, the "Second Chance Amendment Act of 2021" and Bill 24-110, the "Criminal Record Expungement Amendment Act of 2021"
Testimony of Bridgette Stumpf, Network for Victim Recovery of DC's Executive Director
April 16, 2021

Thank you Chairperson Allen, other committee members, and staff. My name is Bridgette Stumpf and I am submitting this testimony on behalf of Network for Victim Recovery of DC (NVRDC) regarding the "Second Chance Amendment Act of 2021" and the "Criminal Record Expungement Amendment Act of 2021." Since its inception in 2012, NVRDC has served over 5,000 individuals impacted by crime—offering holistic services including free legal representation, advocacy, and case management in the District of Columbia.

We are grateful for the leadership of this Committee in pushing for necessary criminal legal reforms that thoughtfully consider the root causes of violence and its long-reaching impacts. We believe that equitable opportunities to education, employment, and stable housing, are important foundations that can reduce community harms that contribute to violence.

Furthermore, NVRDC acknowledges the importance of record sealing and expungement as a tool to mitigate the ways in which systemic racism leads to over-policing and disparate legal and social consequences for Black-communities. However, record sealing is not a one-size-fits-all solution that should be applied rapidly and identically for all crimes and all defendants. It is critical that the Council consider the implications of record sealing on victims of crime—and the overarching goal for the wider community—when examining this legislation. We believe any conversation about the impact of a crime cannot sincerely occur without the voice of the person most affected by it. For this crucial reason, we ask that the Council help integrate the perspectives of crime victims into the implementation of this legislation in the most meaningful way possible. NVRDC's testimony will address three main considerations for this legislation:

- Ensuring fairness for victims of crime, including notice and the opportunity to be heard;

- Differentiation between sealing of general crimes and violent crimes, including intrafamily offense[1] related misdemeanors, specifically increased waiting periods, and sealing only upon motion with notice to the victim; and
- The critical public safety implications related to the sealing of intrafamily offense related misdemeanors and other violent crimes, currently included as "ineligible misdemeanors" in DC Code § 16-801(9).

The Crime Victims' Rights Act[2], and the DC Crime Victims' Bill of Rights[3], seek to remind the criminal legal system that the privacy, safety, and dignity of victims must be taken into account throughout the entirety of a criminal case, from investigation through post-conviction. It is in that spirit, that NVRDC requests that this Committee consider how the "Second Chance Amendment Act of 2021" and the "Criminal Record Expungement Amendment Act of 2021" can be implemented to create the time and space for consideration of the crime victims whose lives were and continue to be affected by the offenders' actions.

Many victims of domestic violence, sexual assault, and stalking face significant barriers when seeking justice through the criminal legal system. It often takes multiple calls to law enforcement, arrests, and dismissed cases for a domestic violence survivor to feel ready to testify against the person who harmed them. The uniquely personal nature of these crimes and the power and control exercised by the abuser over the survivor of domestic violence make testifying about that violence uniquely burdensome and difficult. Survivors of intrafamily violence, including sexual assault, are frequently disbelieved[4] when they report and often lack evidence of a crime that occurred privately (frequently characterized as "he said, she said" cases). Only 9 out of every 1,000 sexual assaults will ever be referred to a prosecutor and even fewer will result in a conviction.[5] Due to the ongoing effects of experiencing trauma, many survivors of intrafamily violence struggle to remember the exact

---

[1] D.C. Code § 16-1001(8). "Intrafamily offense' means interpersonal, intimate partner, or intrafamily violence," and includes stalking, sexual assault, and sexual abuse.
[2]Crime Victims' Rights Act ("CVRA"), 18 U.S.C. § 3771.
[3]D.C. Code § 23-1901.
[4]Epstein, Deborah and Goodman, Lisa, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences* (2019). University of Pennsylvania Law Review, Vol. 167, Issue 2, Pp. 399-461., Georgetown University Law Center Scholarship @ Georgetown Law, 2018, Available at SSRN: https://ssrn.com/abstract=3133066.
[5]Federal Bureau of Investigation, National Incident-Based Reporting System, 2012-2016 (2017).

details or dates of the acts that occurred.[6] Often the only comfort and sense of justice for a survivor of these intrafamily offenses is the knowledge that the arrest and record exists to warn other future potential victims about this person's propensity for violence. Those survivors deserve the opportunity to be notified and heard prior to the sealing of that record.

The "Second Chance Amendment Act of 2021" is particularly concerning in its creation of rapid automatic sealing of all non-conviction misdemeanors after only 90 days, lumping intrafamily offense related misdemeanors in with general victimless crimes like simple possession. To place this in context, as a result of the COVID-19 pandemic, the Superior Court has a backup of cases that may result in a survivor of domestic violence waiting up to two years for resolution of their intrafamily offense related misdemeanor, but an abuser who had their case dismissed would receive automatic sealing of all records of the arrest and prosecution within just 90 days. Failing to include the right to notice and the opportunity to be heard in the sealing process would make meaningless the current protections provided in the Crime Victims' Rights Act[7], and the DC Crime Victims' Bill of Rights.[8] We are *not* requesting that crime victims' are given the deciding vote in an offender's future and an offender's record, but that they are afforded, at the very minimum, timely notice and an opportunity to be meaningfully heard, as required by current law.

We support the provisions of the "Criminal Record Expungement Amendment Act of 2021" that require an accused offender of an intrafamily offense related misdemeanor to obtain sealing only upon motion to the court. We would request that the crime victim be notified and provided the opportunity to respond to that motion. We are troubled however by the proposed repeal of DC Code § 16-801(9) which would eliminate the important distinction between general misdemeanors and violent misdemeanors and the change in waiting period from 8 years to a mere 2 years. During testimony before the Council, even adamant supporters of these bills acknowledged that a waiting period of four to seven years after a violent conviction was appropriate given the propensity for recidivism in these

---

[6]Epstein, Deborah and Goodman, Lisa, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences* (2019). University of Pennsylvania Law Review, Vol. 167, Issue 2, Pp. 399-461., Georgetown University Law Center Scholarship @ Georgetown Law, 2018, Available at SSRN: https://ssrn.com/abstract=3133066.
[7]Crime Victims' Rights Act ("CVRA"), 18 U.S.C. § 3771.
[8]D.C. Code § 23-1901.

cases.[9] Indeed, the proposed legislation would mean that a convicted sex offender would in many cases be eligible for sealing of that record after a mere two years. This is concerning given that sex offender treatment aimed to reduce reoffending may be ordered for more than two-year period. In addition to considering the appropriate waiting period, it could be helpful to assess the age of the defendant at the time of the offense and how this should impact decisions around record sealing and expungement given cognitive brain development and its impacts on decision making.

It is also helpful to consider the potential public safety implications of these proposed changes. The correlation between gun violence and domestic violence is extremely significant. In 2018, one third of callers to the National Domestic Violence Hotline reported that their abuser had threatened them with a gun.[10] In a journalistic analysis of mass shootings, one third of perpetrators of mass murder had a history of domestic violence, stalking or harassing women.[11] Furthermore, in conducting best interest of the child determinations in custody disputes in the District, judges must consider a variety of factors, including evidence of an intrafamily offense, which often may be a conviction for an intrafamily offense-related misdemeanor. Having access to such information can be an important tool in evaluating the safety needs and best interest of a child in a custody case. NVRDC also believes that further consideration should be given regarding a judge's ability to evaluate and understand a defendant's criminal history when seeking to seal a record related to domestic violence, sexual assault, or stalking. Exceptions to sealing and expungement laws for domestic violence-related offenses can be found in Georgia, Virginia, and Maryland.[12]

Felony prosecutions for crimes committed against vulnerable adults and children in the District are often pled down to misdemeanors. Given that perpetrators of abuse against children and vulnerable adults often seek out positions in which they have easy access to

---

[9]Testimony of Emily Tatro, Deputy Director for the Council on Court Excellence. April 8, 2021.
[10]Logan TK, Lynch KR. Dangerous liaisons: examining the connection of stalking and gun threats among partner abuse victims. Violence and Victims. 2018; 33(3): 399-416.
[11]Folman M. Armed and misogynist: how toxic masculinity fuels mass shootings. Mother Jones. June 2019. Britzky H. Most mass shooters have a history of violence against women. The California shooter did too. Axios. November 9, 2018.
[12] Ga. Code § 35-3-37; Va. Code Ann § 19.2-392 (Effective July 1, 2022); Md. Code § 10-101 (e)(1-3).

those populations, prior convictions for crimes committed against children or vulnerable adults can be a helpful information.[13] To rapidly remove all record of a violent crime or intrafamily offense would remove an important protection in our society, especially for those seeking information about a potential partner, caretaker, or employee.

We must include crime victims in conversations around moving towards a more equitable and just society via criminal legal reform efforts. As such, it is incredibly important that any commissions or panels convened, such as the one proposed in the Second Chance Amendment Act, include one or more representatives from the victim services community that specifically provides crime victims' rights representation.

NVRDC respectfully requests the Council to consider our concerns raised in this testimony, in addition to the testimony submitted by the DC Coalition Against Domestic Violence. We know that this Committee understands the value of nuanced approaches to address the far-reaching impacts of trauma and we offer these suggestions in an effort to move toward a more equitable and just response to crime that aims to prevent violence and the harm it causes.

[13]RAINN, "Grooming: Know the Warning Signs," https://www.rainn.org/news/grooming-know-warning-signs (Jul. 10, 2020).

TESTIMONY OF FREDERICK HILL, III
Before the D.C. Council's Judiciary and Public Safety Committee
1425 Bangor Street S.E.
Washington, DC 20020
(202) 330-2211
fredhill@gotta-gonow.com

Good day Chairman Allen, D.C. Councilmembers, and the community at large. My name is Fred Hill and I want to thank you for allowing me to provide testimony about Bill 24-0063, The Second Chance Amendment Act of 2021.

At the outset, I want to share my thoughts, a few questions and concerns about Bill 24-0063, The Second Chance Amendment Act of 2021. The 40,000 people who are arrested in the Nation's Capital but not prosecuted have a criminal record that follows them and adversely affects their ability to gain meaningful employment, access housing and other social benefits; therefore, denying them a positive quality of life. Almost 10,000 people per year attempt to get legal advice to seal their records to no avail.

The time spent trying to get records sealed is burdensome because of minimum staffing at official agencies and organizations. Moreover, it takes an enormous amount of time to find an organization that can handle a person's case. This is because the organizations are often operating with overwhelming caseloads.

If Bill 24-0063, The Second Chance Amendment Act of 2021 passes Council, it will reform our city's system and automatically seal certain records. (Non-dangerous, Non-conviction) It will also shorten the wait period before a person is "eligible" to have their documents sealed, and expand eligibility of document sealing for others.

In 90 days, a person arrested but not prosecuted, and those who are charged with a crime but not convicted, would be allowed to have their records sealed after their case is terminated. If a person's case leads to a conviction, this legislation sets forth a process that allows for a panel of legal experts to determine under what circumstances a sealing of records could take place. Cases going before this panel of legal experts are diverse in nature. These legal experts will consider and decide whether individual cases should be eligible for sealing of records and/or shortening the time frame for that sealing to take place.

This legislation will amend Chapter 8 of Title 16 in a manner that will require that a person will be off papered to seal an eligible conviction or to shorten the process that a resident of the District of Columbia must undertake to seal a charge that does not end in a conviction. The independent legal experts must look at ineligible misdemeanors and felonies and issue a report with recommendations for eligibility.

This is important as it gives those making the decision time to gauge whether a person has made adequate and sustainable progress since being "off papered".

It is important to know the cost for reviewing records. It is also important to detail the qualifications and requirements for the "legal experts" charged with the responsibility for considering the cases that come before them.

If the person's request for sealing is accepted, does that person have to follow the rest of their sentencing requirement? (Mental health counseling, Anger management, Addiction treatment and other requirements) I am wondering if this bill will be used as a form of diversion and if they fall under the diversion umbrella. What does this mean for sealing this part of their request?

There are many charges that do result in conviction that are horrific and heinous. In those instances, not one should be automatically sealed after the passage of a certain period of time. The process should require the filing of a Motion showing that a person has made a concerted effort to change their behavior and lifestyle in an evidentiary way.

Where the record concerns a dangerous crime under D.C. Code 23-1331(3) or a crime of violence under D.C. Code 23-1331(4) or where a victim in the case was a minor (a person under the age of 18) the record should not be sealed unless a mandatory motion is filed and corrective behavior and lifestyle changes have been documented. Our youth should not be privy to having their records sealed simply because they were under the age of 18 years old when the crime was committed.

A "Background check" should be required if a person is seeking certain types of employment, special housing, permission to carry a firearm, or work with vulnerable populations and children. If someone is charged with crimes at a childcare center, crimes against vulnerable populations, any crime against children, sexual abuse, or violent offenses with guns, at that point the record should not be eligible for sealing despite motions being filed.

There are a lot of people who will benefit from this bill but we must think about the victims and their families for whom there is barely a mention. Victims and their families should be allowed to weigh in on motions and the expert decisions to seal or expunge records.

This bill has loopholes big enough for a cruise ship to pass through and that is my concern for it as a whole. I also believe that there is a population of folks who will extremely benefit from this bill too. Thank you for allowing me to provide my testimony.

Thank you.

Respectfully Submitted,

Frederick Hill, III

Frederick Hill, III

Resident of Ward 8

District of Columbia Business Owner

April 16, 2021

THE SCOTT LAW FIRM, LLC
JUSTICE • KNOWLEDGE • COMPASSION
P: (202)526-4808
F: (202)568-6152
lscott@lscottlawoffice.com
www.lscottlawoffice.com

April 16, 2021

SENT VIA ELECTRONIC MAIL TO: judiciary@dccouncil.us

The Honorable Charles Allen
Committee on the Judiciary and Public Safety, Chair
Council for the District of Columbia
John A. Wilson Building
1350 Pennsylvania Avenue, NW, Suite 110
Washington, DC 20004

Dear Chairman Allen:

My name is Lanet Scott, I write in my dual capacity as a current District resident and criminal defense attorney. Please accept my full support of bills B24-0063, The "Second Chance Amendment Act of 2021" and B24-0110, The "Criminal Record Expungement Amendment Act of 2021."

In 2018, JE a native District resident, made a conscious choice to serve the community. JE decided that rather than critique those who stood on the front line trying to make change, JE would become part of the solution. JE modeled the hashtag "don't just stand there #dosomething!"[1]

JE applied to be a police officer with the District of Columbia's Metropolitan Police Department ("MPD"). Entry into MPD is a multi-phase process as you may know. JE earned 90 percent or better on each phase, including the psychological exam. As JE was undergoing the latter, MPD began conducting its background investigation. Suddenly, JE's process came to a screeching halt. JE had a conviction that dated back to 1989 and was immediately disqualified; JE's entry into MPD terminated forthwith.

JE is my client. Because of that, I took an advocacy approach going straight to upper management, and ultimately to then Chief-of-Police Peter Newsham who eventually agreed with the decision to uphold the disqualification. JE was crushed. I was crushed. This was a misdemeanor conviction from 30 years ago at the time JE applied.

JE, a graduate of Ballou High School, Ward 8 resident and dedicated community advocate steered clear of the criminal justice system for upwards of 30 plus years. JE is the type of police officer this City needs, particularly East-of-the-River. If given the opportunity to serve, JE would be a homegrown officer, unabashedly and unapologetic in the approach to community policing, with a keen ability to balance that against law enforcement. A mishap 3 decades old should not prevent JE from earning the opportunity to serve in such capacity.

1 As attributed to the Honorable Councilmember Trayon White, Sr.

THE SCOTT LAW FIRM, LLC
JUSTICE • KNOWLEDGE • COMPASSION
P: (202)526-4808
F: (202)568-6152
lscott@lscottlawoffice.com
www.lscottlawoffice.com

The policing climate in urban cities continues to plague this nation including our City; from the horror of George Floyd's murder, to the death of Adam Toledo, the 13 year old killed in Chicago days ago, to the mob who stormed our sacred Capitol costing the lives of Capitol Police officers. Now more than ever we need bold leaders and improvement within the MPD – this includes intentional hiring of black officers, particularly those who grew up in the District. JE fits the mold perfectly.

Therefore, I strongly ask the committee to pass these bills. The stated purpose of B24-0063, the "Second Chance Amendment Act of 2021" is to amend Chapter 8 of Title 16 to increase the number of eligible convictions that may be sealed. The stated purpose of B24-0110, the "Criminal Record Expungement Amendment Act of 2021", is to amend Section 16-801 of the District of Columbia Official Code to expand the definition of an eligible felony and to make all misdemeanors eligible for sealing. Had these bills been law when JE applied to become an officer, I would have attended the graduation of officer JE. More importantly, the spirit behind these laws is to strip the punishment that returning citizens face. That is, after they have served their time, they ought not be dealt the blow of penalty again and again through subtle or overt methods like employment or housing discrimination. Set them free. #sealtherecord.

Thank you for the opportunity to testify. I am available to answer questions. I can be reached at: lscott@lscottlawoffice.com, or (202) 526-4808.

Yours-in-Service,

Lanet Scott, Esq.
Licensed in DC and MD

Judiciary and Public Safety Committee
cc: The Honorable Anita Bonds, Councilmember-at-Large: ruppuluri@dccouncil.us
The Honorable Mary Cheh, Councilmember Ward 3 : mporcello@dccouncil.us
The Honorable Brooke Pinto, Councilmember Ward 2: bweise@dccouncil.us
The Honorable Vincent Gray, Councilmember Ward 7: tnorflis@dccouncil.us

Thank you, Members of the Council of the District of Columbia for hearing my statement.

My name is Samuel Gassman, and I am a student at the George Washington University in DC.

I support the DC Justice Lab's bill regarding sealing and expungement. The foundation of the criminal justice system lies within the 6th Amendment to the Constitution, in which terminology is utilized regarding a fast and simple nature of criminal justice policy. This can be noted in the assertion of speedy trials, as well as that the accused has the right to be informed of the nature and cause of an accusation.

The concept of speed and simplistic nature in criminal justice should not solely apply to trials, but to the whole of the criminal justice system. Thus, I must advocate for the DC Justice Lab's bill which provides great simplifications and clarity of law.

In addition, I am inclined to advocate for the modified expungement policy as provided by DC Justice Lab's new bill. Non-convictions at minimum should not contribute to the publicly visible record of an individual, although should by all means maintain their presence with regards to visibility for law enforcement and prosecution (except in the case of motion by court).

With regards to convictions, given that the constraint is that a record is only sealed if it can be proven to be in the interest of justice, there are no guarantees towards sealing, which provides an intermediate means between current policy and effectively excusing all crime.

Thank you very much for your consideration.

I am a criminal justice student attending George Washington DC as part of my studies. I am highly interested in the criminal justice system and reentry for citizens being released from prison and what are the struggles of reentry and life after a felony. As part of my work I have researched heavily the reentry process and the many difficulties that come along with that. I urge you to make changes to the bills regarding sealing and expungement and move in favor of making sealing and expungement easier for those being released or those trying to expunge records from mistakes they have made in the past. It is important as lawmakers and government officials to take care of those who have made mistakes but are no longer committing crime. Living everyday life after prison comes with so many challenges even years after release especially because of the stigma attached to having a record. Sealing and expunging records of DC residents would widely improve someone's life after prison especially when applying for jobs or housing. By passing a law making the sealing and expungement process easier and more accessible for those who qualify is an important part of the democratic duties of lawmakers, as having a record for many people limits their ability to function in a society post incarceration.

Elizabeth Miksztal
emiksztal@gwu.edu

To: DC Council
Regarding: Sealing and impingement bills
May 3, 2021

Throughout my time at George Washington University I got to take a class called Punishment and Reentry. This criminal justice course opened my eyes to so many of the struggles faced by returning citizens. Through readings, guest speakers, and analysis of contemporary policy I feel urged to contact the DC city council. As of right now, there are three bills that concern Sealing of Records and Expungement. Of these three versions, it's clear that the DC justice Lab is offering the most beneficial features. Their plan includes Record expungement, eligibility for serious felonies, automatic sealing, and shorter waiting periods. These are all crucial for individuals to obtain a better future. Due to the unfortunate nature of our criminal justice system recidivism is very high. Without proper support, we will see crime rates become stagnant and in turn lives and families destroyed. Furthermore, this plan offers simplified burdens of proof, no disqualifying arrests or convictions, clearer rules on how sealed records may be accessed and used, and clearer guidance for the court to decide motions. Returning citizens often lack the financial freedom to find housing, education, and transport. Therefore, it's critical DC council does what they can in order to limit the number of court fees by making the process as straightforward as possible. The DC justice lab bill will also limit time for the court to decide a motion to seal and make it easy to read and understand without hiring an attorney. I urge you to put more funding into these programs and consider a bill that will help solve recidivism.

Celia Okoro

Sealing and Impingement Bill

Good afternoon, to whom it may concern. I am writing this letter today in regards to the sealing and impingement bill that will be discussed today. In hopes to put forth my opinion into the topic and the concerns it may have on the DC community. I am completely with the decision to seal records for certain crimes (misdemeanor and felonies). By doing so It will be very beneficial to the individual when it comes to job opportunities, housing, education and more. By taking this action in a way it will eliminate the hidden biases that are present within these sub-areas. When it comes to applying for a job there are some places that have advocated for “Ban the Box” which the goal is to eliminate the mandatory option on job applications to answer if you have ever been arrested and or convicted of a crime. Which on some grounds is an automatic disqualification from a job application/opportunity . Which can be discouraging to others, when they feel as though they will never have the opportunity to get a job because of their past. When it comes to housing the same situation applies, if someone has been arrested and or convicted they are not eligible to stay in certain subsidized housing and or low income housing areas because it does not abide by the policy and regulations that they have set up. Making it harder for them in general. When it comes to higher education, there is always a question on the application process that asks if you have been arrested and or convicted of a crime. If yes, you may be restricted to some on campus things and or your aid may be affected. All of these things are obstacles that many individuals face all around the world but specifically in Washington D.C as well. Yes the individual so happened to have made a mistake that was wrong

and in the end they paid the result that was enforced by the justice system. But in all honest I do not believe that allowing them to continue to pay for the mistake for the rest of their lives will be beneficial, in a way it goes against the whole saying that “everyone deserves a second chance” if they deserve a second chance they should also have the same opportunities and benefits that others have in hopes to better themselves in a more positive way. I understand that sealing records is a big issue and is not something that just happens overnight but instead gradually. I hope that tonight you guys are able to look at the situation from a different perspective. I also understand that some crimes committed will not have the opportunity to be sealed due to their severity but take into consideration the minor offenses and go from there.

Thank you for your time,

Dear DC Council Members,

To those that read this, I hope you are safe and healthy in these frankly odd times. Being a felon during such arduous times only amplifies the worst aspects of this pandemic. If the terms of a felons sentence is met, their record should be expunged after the fact. Simple as that. The criminal justice system is a tumultuous path in of itself, the lingering effects of such a sentence are even more detrimental. Incarcerated individuals cannot effectively reenter society when their record is attached to them like an unforgiving weight, continuously unable to put their head above water - to claim a single breath, a single reprieve.

The current laws regarding expungement are laughable and inhumane, and both the Mayor's Bill and CM T. White's Bill seems like an afterthought, minimal care and thought put into the lives of returning citizens in the District of Columbia. The DC Council has a chance, the power to facilitate a dramatic remodeling of the felony expungement process. This bill should not only include record expungement, but automatic sealings, shorter waiting periods, simplified burdens of proof, eligibility of serious offenders, clear rules regarding the access and use of sealed records, and a process so simple an average citizen could through it without the help of an attorney.

An expungement of a felony is not an act of absolution for said crime, but the beginning of the healing process, whether that be for the individual themselves, the victim, or greater society. More so, the aforementioned reforms do not need to be in the competing interest of public safety. In fact, the lack of stability and collateral sanctions imposed by said records can maladaptively effect a returning citizen's attempts to participate in prosocial behavior and conventional norms.

Concerned citizen,
Sarah Cripps

Dear members of the DC Council,

My name is Aladdin Fawal and I am a sophomore criminal justice major at The George Washington University in Washington, DC. I have taken great interest in criminal justice reform, and this semester I have taken a class titled "Punishment & Reentry," focusing on the challenges returning citizens face when released from incarceration. I have overviewed the three bills concerning the Sealing of Records and Expungement and I believe that the DC Justice Lab's Bill will best accommodate returning citizens and help to reduce recidivism rates. I am very concerned about how the current law, the Mayor's bill, and CM T. White's Bill does not provide the necessary components of expungement. One of the biggest issues facing returning citizens is the endless cycle of punishment they face even upon release. They have been found guilty and served their designated punishment by the courts, yet upon reentry to the community face stigmatization and disqualification of benefits that prevent them from ever becoming meaningful citizens again. Limitations on employment, housing eligibility, and access to other public services make it impossible to return to a normal life, and often force the returning citizen back to crime in order to survive. When employers see a felony record, the returning citizen is often turned away and are forced back into crime to sustain financial issues, increasing recidivism rates. Expungement of records is thus essential in order to provide the returning citizens an opportunity to return to the community as a regular citizen, not one burdened and marked with a felony status. DC Justice Lab's bill provides for record expungement, automatic sealing, simplified waiting periods and burdens of proof, clearer rules on how sealed records may be accessed and used, and clearer guidance for courts to decide on motions. Time limits for courts to decide a motion to seal and having the motion easy to read and understand without hiring an attorney further assist the returning citizen in expungement. Lastly, it is important to

acknowledge that those with serious felonies have served their time in prison, and when released should be eligible for these same expungement opportunities. There should be no disqualifying arrests or convictions that prevent eligibility for expungement, as anyone is capable of change. In my class we have heard from returning citizens and read about stories of those who have changed in prison and want to live a normal life upon release, even those with more serious felonies. Expungement is a necessary step towards criminal justice reform that will make the system more just, as those who have served their time can sever their ties from prison and lead normal, noncriminal lives. DC Justice Lab's bill does just that, and I hope that you consider this when making your decision.

Thank you, and all the best,

Aladdin Fawal

Hello,

My name's Jaclyn Sersland and I am a student in a class on punishment and reentry at George Washington University and our professor told us about the opportunity to send our thoughts on the bills on sealing records and expungement being proposed and considered. I am pasting my comments below, but if I should send them in a PDF or word document instead then I am happy to resend them.

The famous quote is "do the crime, do the time," but often the offender's punishment extends long after their prison sentence because of the stigmatization of a felony conviction. In our class, we read a book by Keesha Middlemaas on how a criminal record is like a social disability because it disables ex-felons from obtaining a job, housing, financial aid for education, and more. A criminal record follows them long after they did their time for the sentence, and if they have grown from their mistakes, how can they ever prove that if society is constantly holding them back? That's why I think a record expungement is so important and why it is so great that the DC Justice Lab is advocating for that because it helps clear some of the major obstacles that make reentry so difficult. Some other aspects I thought would be very impactful is making serious felons eligible for parole. Violent and serious offenders are often left out of valuable programs when they are some of the ones who need it most. Plus, if they have exhibited good behavior, there is no reason someone should continue being punished for the person they were several years ago if it is obvious they have changed. Additionally, having papers that are easy to read and understand are so important given the low education most people going through the system tend to have. Many end up in bad deals in the first place because of education barriers that leave them unaware of what they're entering, so having this transparency with the process is very important.

Being a criminal justice major is filled with pessimism at times because of how harsh the criminal justice system has been, especially to minorities. Seeing a bill like this proposed that covers several major problems with reentry while being transparent and aimed at positive reform rather than harsher penalties gives me hope that the world of criminal justice is moving in the right direction.

from,
Jaclyn.

To Whom It May Concern:

My name is Amy Guerrero and I am a rising senior at The George Washington University. I am writing this letter to express my support for DC Justice Lab's bill on record expungement, The Restore Amendment Act of 2021.

According to the DC Justice Lab, in the District it can be very difficult to seal the record of an arrest, even after a long wait, and regardless of whether the person was ever actually convicted. The current record sealing eligibility requirements are confusing and official disposition records are sometimes hard to obtain. Of the 40,000 people who are arrested in DC each year, almost one-third are no-papered, yet these individuals still bear a criminal record. This is fundamentally unjust.

Unfortunately, this issue is overwhelmingly harmful to Black residents of DC. From 2013 to 2017, 86% of people arrested in the District were Black. As the nation awakens to the realities of mass incarceration and racial injustice, we know too well that Black individuals face disproportionately higher rates of arrest, conviction, lengthy sentencing, and racial discrimination in employment and housing markets.

Therefore, I strongly encourage the passage of the Restore Amendment Act. If enacted, it would dramatically simplify the process for sealing or expunging a criminal record and significantly expand the number of people eligible for relief.

Thank you for your time and consideration.

Best,

Amy Guerrero

DC Council,

It has come to my attention through participation in coursework on reentry, that the DC Council will be considering three sealing and expungement bills. I would like to emphasize the importance of record sealing and expungement as it pertains to the reentry process for all prisoners. Some of the most relevant theory bases for this issue resides within labeling theory. Individuals who are labeled publicly as criminals, will surely be treated differently by others, affecting their access to housing and employment. Through this labeling process by others, they will in turn start to see themselves differently, often fulfilling the role that others stigmatize them for. Any changes to sealing and expungement that could lessen the burden that prisoners face upon reentry will also lessen the burden on local government as well. Communities will benefit from lower recidivism, in turn reducing costs of crime on victims and the criminal justice system. Prisoners in the reentry process should be given a chance to live the American dream upon their release, regardless of criminal record. Public records of criminal history cut this dream short before individuals are given a chance to make good on their intent to change. I would urge the DC Council to consider these benefits, and also acknowledge that the cost of changing sealing and expungement laws to be very low in all senses. This is a chance to reform the DC Criminal Justice System for the better.

Thanks,
Matt Monteverde
GW'22, Department of Sociology

Joshua Jomarron
Via Email: Joshuajomarron3@gmail.com

DC Council

Via email: Judiciary@dccouncil.us

RE: Sealing of Records and Expungement

To DC Council,

As a student of the George Washington University, resident in the DMV area I would like to share my personal experience and explain how important sealing records and expungement are in peoples life.

To begin, I just want to clarify that my parents were the most supportive, motivating, and loving parents I could ever ask for. But my father wasn't always the best citizen in his younger age. Before, I was born my father was involved in several criminal activities leading to grow his criminal record. Once I was born, he decided to change his life around and do everything by the book and make money the legal way.

Due to his record, it became very difficult and many times he was tempted to return to his life of crime. He had applied for multiple licenses to be a general contractor but was denied because of the background checks showing his criminal record. It wasn't until my older brother, now a senior partner at a law firm in Miami, FL, was able to expunge his record that he was able to his residential contractor's license in New Jersey.

My father now runs his own a remodeling service company servicing states nationwide including the District of Colombia. Thanks expungement laws in Florida was my dad able to stay away from the life of crime and return to society with actual opportunity.

One of the most important aspects to reduce recidivism is to understand the difficulties it is to get a job with a record. More the obstacles that we tear down like providing expungement opportunities the more money the District will benefit in the long run. Once DC becomes a state, and IT WILL, having more people employed will only help the District grow.

I hope you consider my personal story today and pass the DC Justice Lab bill that is being proposed.

Thank you,

Joshua Jomarron.

DC Council

4/30/2021

The Committee on The Judiciary and Public Safety,

My name is Peter Walter, and I want to submit my opinions on the DC Council for the upcoming roundtable on Local Control of Parole in the District of Columbia. The Mayor's proposed Bill, The DC Justice Lab's proposal, and CMT. White's Bill all have varying expungement & sealing laws features. The Mayor's proposed Bill incorporates shorter waiting periods which were included in every proposal but not in the current law. Also, Mayor Bowser proposed automatic sealing, which is supported only by the DC Justice Lab. Although I feel strongly about the beneficial aspects of multiple features on the list, other than shorter waiting periods and automatic sealing, the other prospective clauses have no more than one party in favor. Due to the current status of the probability that any clause outside of shorter waiting periods and automatic sealing will be a contender on March 6th, the two proposed features I am advocating in favor of The District of Columbia's Mayor, Muriel Bowser's proposed Bill. The current time-time for sealing various non-conviction records can take anywhere from two-four years which is outrageous. Suppose there is a conviction without an arrest. In that case, the individual incurs the burden and now has to petition the DC-Supreme Court to seal their non-conviction record, so my question to the committee of The Judiciary and Public Safety is what justifies your decision not to include a mandate for the sealing to occur in a 90-day period? The way I see it, if there is an arrest made without a conviction, there is no cost that outweighs the benefit received by the individual's augmented employment opportunity, financial stability, social intractability, and livelihood without having the stamp of an arrest on their record. My

perspective on the reentry process as a whole has changed significantly after being exposed to educational material and guest speakers in my college course. The range of speakers included individuals who have been in the prison system, work to get people out/improve the rights for inmates and individuals who have successfully reentered society and their assessment of the current justice system. Specifically, during the semester, I examined the burden that a criminal record has on an individual's ability to be a positively contributing member of society. One individual by the name of Tyrone Walker significantly changed my perspective on what a successful path to reentry entails and his experience with the Georgetown University PIVOT program. Mr.Walker worked tirelessly at achieving his goal of gaining employment, learning financial responsibility, and acquiring housing. Most importantly, when you hear him speak, you can tell that he will change the lives of many people who feel that they have nowhere to turn. The point being, without the help of the PIVOT program, Mr.Walker would not have been exposed to the opportunity that led him to become a contributing member of society. The issue is that there are over 500,000 individuals reentering society each year and only a few programs as effective as the PIVOT program. Lastly, my perspective on what alterations would significantly impact the current reentry process is different from what they were a year ago. It is unrealistic to assume that all the essential facets of reentry can be provided, but it falls on you to include shorter waiting periods and automatic sealing.

Please consider D.C Mayor Muriel Bowser's Bill! This change is not only within your reach, but it is your decision.

Thank you for taking the time to read my submission.

Peter Walter

DC Comments: Expungement and Sealing

"Let the punishment fit the crime"—*Willian Schwenck*

Once someone is convicted of a crime, that conviction can change the rest of their life. They are punished. Deemed as 'deviants.' Seen forever as convicts and bear the weight of that label. However, after they've served their time their punishment does not stop there. Even though they may physically be free returning citizens, they are not. There are incarcerated for what seems like a lifetime by their prior prison status. This is in the form of job accessibility, housing access, and access to educational resources. Returning citizens shouldn't have to face punishment beyond the time they've already served. Returning citizens shouldn't have to be socially punished for their past mistakes. Allowing a more streamlined expungement and sealing process is what stands in the way of returning citizens and their release from social punishment. It was what allow them the fresh start they need. They should not have to reminded over and over again that they were formerly incarcerated. They are more than well aware of that. It is something that they will probably never leave them. However, having a record ostracizes them from a lot of the basic necessities of society. Their lives shouldn't be made harder through certain limitations and caveats to being eligible for record expungement and/or sealing. Making this process more accessible would allow them to legally see any application and say they do not have a criminal background. This would finally release them into society as the full citizens they are. Also, the access to stable housing and legitimate employment will not only make them feel as though they've reintegrated into society, but lessen the likelihood they will recidivate. As it stands now, the social punishment that returning citizens face does not fit the crime. They've already served their time and been punished. They deserve a greater chance and freedom from their labels through a broadened right to record expungement and sealing.

To: D.C. Council

From: Anastasia Slastushinskaya, George Washington University undergraduate

R.E.: Comments Regarding Sealing of Records and Expungement bills.

Dear D.C. Council,

My name is Anastasia Slastushinskaya, and I am a current undergraduate student at the George Washington University (GWU) who is taking the Punishment & Reentry (SOC 2189) course this semester. I read through the "New Parole Authority for The District of Columbia" regarding the placement of new parole authority, and I wanted to write my opinion regarding the subject matter.

Incarceration devastates a lot of families and communities, and I believe it is a very important step that the new parole authority will consider every applicant as an individual, rather than an offender. Furthermore, establishing a connection between family and community is another important step that can open doors towards a successful reentry. In our Punishment & Reentry course, we have heard a lot of speakers discuss the difficulty that the reentry process can create for returning citizens and their families, especially people of color. Minorities are more likely to experience trauma, as well as other disorders that may get mistreated or ignored completely, so I believe it is important to look into the returning citizens' health and their experience upon reentry.

I believe that we, as a society, and a community of Washington, D.C., owe a chance to listen to the returning citizens, to learn about their experience during the reentry process, and what our role as a community should be when it comes to helping the returning citizens get back into their lives. Thank you for taking the time and creating a new parole authority agenda that would allow the community to be part of the reentry process as much as possible. Whether it is through monthly hearings or victim-offender reconciliation, I believe that this is a big step towards improving our criminal justice system and giving back to our returning citizens.

Sincerely,

Anastasia Slastushinskaya

Hello DC Council, I am a junior studying international affairs and criminal justice at the George Washington University. I wish to provide my understanding and experience with the criminal justice procedure, reentry, and the expungement and sealing of criminal records. My parents were Cuban immigrants who travelled to the United States in the mid-90s in the hopes of finding a better life. Only a few months before I was born my father was arrested and spent three years inside a federal prison. She was shunned and rejected by friends and family alike, the only help she received was from her uncle who offered her a highly generous 700 dollar rent at a time where prices were typically double that. In order to care for me, a young infant, she could not take on a job as she could not afford a babysitter and friends and family refused to help. For those three years we mostly lived off social support programs and the few savings and assets which were not frozen or seized by the federal government. We ran out of savings on the day my father was released, and he scrambled to find a job to support me and my mother. We were fortunate, because of the confrontational international relations between Cuba and the U.S. my father was not sent back to Cuba. The majority of immigrants with convictions are not so lucky and are often returned to their country of origin. Nevertheless, expungement does present an avenue for non-citizen formerly incarcerated persons to avoid mandatory deportation, especially for simple drug convictions or minor/equivalent crimes dismissible under the First Offender Act. Extensions of these policies to include a greater number of offenses would be highly beneficial for migrant populations and are needed as a result of culture clashes. Many non-citizens will find it exceedingly difficult to adapt to the new responsibilities that are expected of them as residents and guests of the United States; certain offenses in the U.S. may not hold that weight in a migrant's country of origin and yet they are given but a single chance to adapt to life as Americans. Of course, I understand revisions and extensions of the rights of migrants according to the First Offender Act may be out of the scope of the DC Council. However, by making expungement simpler, more extensive, and faster the DC Council will have already set the groundwork at a local level that improves the experience of non-citizens during this dismissal process for when improvements and expansions are made to the First Offender Act.

Returning to the experience of my family with reentry, as my father scrambled for employment within the first month of his return, he encountered challenges caused by his criminal record. He was intimidated by job applications which requested he indicate any felony convictions, and for those he did apply to he never received any replies. Fortunately, after just a month of searching he was able to obtain employment with a budding chauffer company that did not perform a criminal background check. He remained with them for some time, however, future instances where he searched for a job would remain similar, if not worse with the growing influence of the internet and the greater levels of job competition. As this brief example might show, a criminal record is a major handicap for returning citizens and keeps them from employment. This is a major risk factor for recidivism as formerly incarcerated persons try desperately to support themselves and their families. The proposed changes by the DC Justice Lab would make job searches much easier in three major ways, and by proxy, reduce recidivism. First, a shorter process means returning citizens may begin their job search sooner. Second, returning citizens will be placed on an even playing field with people who do not have an arrest record, ensuring qualified individuals are not barred employment for past mistakes and can get on track sooner. Third, it makes it easier for returning citizens who lack the support of family and friends to obtain housing. Lastly, it combats racial prejudice and discrimination present in society. The expungement and sealing of criminal records means that racist employers and landlords cannot disguise their prejudices behind the veil of criminal records. This is especially relevant as the criminal justice system disproportionately affects minority communities. Since his release in 2003, my father has not committed any criminal offences and has granted him and his family the life he came here for. Currently, he works as a truck owner/operator and has since obtained his citizenship. By making the expungement and sealing easier, the DC Council can grant men and women like my father a second chance to improve their own lives and contribute to society in a meaningful way.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Executive Office of Mayor Muriel Bowser

Public Hearing on

B24-063, the "Second Chance Amendment Act of 2021"

Bill 24-110, the "Criminal Record Expungement Amendment Act of 2021"

Testimony of
Chris Geldart
Acting Deputy Mayor for Public Safety and Justice

Before the
Committee on the Judiciary and Public Safety
Charles Allen, Chairperson
Council of the District of Columbia

April 8, 2021
9:30 AM

Good morning, Chairperson Allen, members, and staff of the Committee on the Judiciary and Public Safety. I am Chris Geldart, Acting Deputy Mayor for Public Safety and Justice, and I am here to testify in support of Mayor Bowser's "Second Chance Amendment Act of 2021."

This bill was first introduced in November 2017 and a hearing was held a month later. Modernizing our criminal record sealing laws is a racial justice and equity issue. A criminal record can have a lifetime impact on a person, reducing their ability to obtain a job, housing, or education. We believe this legislation needs to move forward this year so we can provide relief to tens of thousands of our residents.

I appreciate and want to acknowledge the two related bills introduced by Councilmembers Trayon White and Christina Henderson. My testimony today is based on what I think is our shared belief that everyone deserves a second chance.

The Current Record Sealing System in the District

Our current criminal records system is complicated, overly punitive, and sidelines far too many of our residents from pursuing meaningful opportunities to better their lives. It is based on an outdated worldview that assumes there is an ongoing risk posed by those who have had any interaction with the criminal justice system – even if that contact does not result in either a trial or conviction. The current system does not adequately weigh the deleterious impact of a criminal record on a person's life. It is not grounded in recent research and literature. And, perhaps most importantly, it unnecessarily creates a false choice between public safety and reentry. In fact, public safety is enhanced when we give individuals access to opportunity and it is diminished when we put up barriers that make opportunity more distant and unachievable.

Each year, thousands of individuals are arrested in the District for offenses ranging from violent felonies to misdemeanors and outstanding warrants. Once arrested, each person will have a criminal record for a minimum of two years – even in a case where the arrest does not result in a trial, let alone a conviction. Currently, the burden is almost always on the individual to file a petition with the D.C. Superior Court, asking a judge to allow their arrest record to be sealed. The person must convince a judge that it is in the interest of justice to grant their motion to seal their record. The Superior Court judge has the discretion to reject the petition.

While some misdemeanor convictions are eligible to be sealed, the large majority of criminal offenses – including every felony, except failure to appear – are never eligible for sealing. Additionally, there are significant waiting periods before a person is eligible to file a petition with Superior Court. Furthermore, before a person is eligible to petition to seal an eligible misdemeanor conviction or felony failure to appear conviction, they must be "off papers" for eight years.[1] Lastly, for convictions, the resident is limited with regard to how many convictions may be sealed, and only the most recent conviction may be sealed, effectively establishing the cap at one.

The "Second Chance Amendment Act of 2021"

[1] "Off papers" means that the individual has completed their term of incarceration, probation, supervised release, or parole and has satisfied any other requirements from the court and remained conviction free.

When examining how best to reform the system, our legislation suggests three approaches:

- First, shorten the time period a person must wait before seeking to seal their record;
- Second, change the level of discretion D.C. Superior Court judges can use when reviewing petitions to seal a record; and
- Third, expand the types of offenses eligible for record sealing.

The complexities of the D.C. Code require two different types of analysis: one for non-convictions[2] and one for convictions. I will address these analyses, recommend a clarification for our proposed legislation, and finish with the Executive opinion on B24-110. While my office is still conducting an analysis of Councilmember Henderson's RESTORE Act, we look forward to working with the Council on the ambitious reforms contained in all the bills.

A. Non-conviction records

In cases of arrests without conviction, District law currently places the burden on individuals to petition D.C. Superior Court to seal their non-conviction record. The process is time-consuming and frustrating. It must be improved.

Mayor Bowser's bill would mandate the automatic sealing of many non-conviction records and shorten the timeframe for sealing them to 90 days, drastically shorter than the current two to four years.

For individuals arrested for crimes other than those designated under the D.C. Code as "violent or dangerous,"[3] the burden to seal the record would shift from that person to the justice system. Under the Mayor's bill, the D.C. Superior Court would seal non-conviction records within 90 days of the termination of the case. Following an order from the Court, the Metropolitan Police Department would seal their records relating to the non-conviction and send a certification back to the Court. The Court would then notify the resident that their records were sealed.

For non-convictions involving charges for violent or dangerous crimes, the person would still be eligible to seal the record after 90 days by filing a motion with the Superior Court. This process would be a significant improvement from the current waiting period of up to four years. The burden remains on the petitioner, however, and it allows an impartial third party, a Superior Court judge, to determine whether there is any remaining public safety value in maintaining the person's record. This provision recognizes that there will be some instances where it is in the public interest to keep a record from being sealed, but it allows for that determination to occur in a much shorter period of time. Examples of this may be individuals with repeated arrests for similar allegations, especially crimes like domestic violence, elder abuse, and sexual assault, where it may be

[2] A "non-conviction" is any disposition of a criminal case, other than a guilty plea, a plea of no contest, or a finding of guilt by a court. It includes arrests that do not result in prosecutions and prosecutions that do not result in a finding or admission of guilt.

[3] D.C. Official Code §§ 23-1331(3) & 23-1331(4).

inherently difficult to obtain the cooperation of the victim in order to pursue a prosecution. Under the Mayor's bill, if there is no prosecutorial objection, or if an objection is overruled by a judge, the record would be sealed.

The Second Chance Act would also retroactively benefit tens of thousands of individuals with existing non-conviction records. It would make any person with a non-conviction record eligible to file a motion to seal that record beginning 90 days from the termination of the case. Many would be eligible to seal their non-conviction record as soon as this bill was to go into effect.

B. Conviction Records

Research around recidivism has continued to evolve and has expanded to trying to understand why a person recidivates. Time released from prison is one factor. But the ability of a returning citizen to have access to mental health and trauma counseling, a safe and stable place to stay, and access to employment, all in a timely manner, heavily influence whether a person recidivates. In light of this research and our policy goal of fully reintegrating returning citizens into the community, the Mayor's bill would lower the number of years required to be "off papers" to seal an eligible conviction from eight years to five. Additionally, a five-year waiting period would help bring the District closer in line with research around "redemptive time."[4]

We also believe it is important to change the number of convictions an individual is eligible to seal. Current District law is overly punitive and allows only the most recent single conviction to be sealed.[5] Our legislation would allow up to five convictions to be sealed.

We are strongly supportive of the need to expand the offenses eligible for sealing. Current law makes every misdemeanor conviction eligible for sealing, unless it has been specifically designated as ineligible by D.C. Official Code § 16-801(9).[6] Only one felony, failure to appear in

---

[4] Redemptive time describes the period of time that after a person is released from jail and remains free of any subsequent convictions for a period of time, that person's likelihood to recidivate is the same as a member of the general public.

[5] D.C. Official Code § 16-801(5).

[6] Those misdemeanors include:
(A) Interpersonal violence as defined in § 16-1001(6)(B), intimate partner violence as defined in § 16-1001(7), and intrafamily violence as defined in § 16-1001(9).
(B) Driving while intoxicated, driving under the influence, and operating while impaired (§ 50-2201.05);
(C) A misdemeanor offense for which sex offender registration is required pursuant to Chapter 40 of Title 22, whether or not the registration period has expired;
(D) Criminal abuse of a vulnerable adult (§ 22-936(a));
(E) Interfering with access to a medical facility (§ 22-1314.02);
(F) Possession of a pistol by a convicted felon (§ 22-4503(a)(2) [see now § 22-4503(a)(1)]);
(G) Failure to report child abuse (§ 4-1321.07);
(H) Refusal or neglect of guardian to provide for child under 14 years of age (§ 22-1102);
(I) Disorderly conduct (peeping tom) (§ 22-1321);
(J) Misdemeanor sexual abuse (§ 22-3006);
(K) Violating the Sex Offender Registration Act (§ 22-4015);
(L) Violating child labor laws (§§ 32-201 through 32-224);
(M) Election/Petition fraud (§ 1-1001.08);

court, is eligible for sealing. We support conducting a review of other felonies that should be considered eligible for record sealing. But we believe that should be done methodically, based on expert research and data and accounting for the complexity of our criminal code. In our legislation, the Criminal Code Reform Commission (CCRC), an independent research office, would be tasked with reviewing the District's criminal laws to identify additional offenses that should be eligible for sealing, as well as whether and how to adjust the sealing waiting times for different types of convictions. The CCRC is composed of criminal justice experts who just completed a multi-year analysis of the District's criminal laws and proposed a massive overhaul of them. We believe the CCRC is ideally suited to conduct the necessary informed review that would be required under our bill.

C. Clarifications to the Proposed Legislation

We would like to offer one drafting adjustment to improve the clarity of the bill.

We propose including the phrase "crime of violence" in the provision which allows for sealing of non-conviction records on page 4, line 83 of the Mayor's bill to go along with the phrase "dangerous crime." The exclusion of this term was a drafting error, and the change should be made in order to mirror the references to both types of offenses in the current D.C. Official Code.

Council Bills on Record Sealing

(N) Public assistance fraud (§§ 4-218.01 through 4-218.05);
(O) Trademark counterfeiting (§ 22-902(b)(1));
(P) Attempted trademark counterfeiting (§§ 22-1803, 22-902);
(Q) Fraud in the second degree (§ 22-3222(b)(2));
(R) Attempted fraud (§§ 22-1803, 22-3222);
(S) Credit card fraud (§ 22-3223(d)(2));
(T) Attempted credit card fraud (§ 22-1803, 22-223) [§§ 22-1803, 22-3223];
(U) Misdemeanor insurance fraud (§ 22-3225.03a);
(V) Attempted insurance fraud (§§ 22-1803, 22-3225.02, 22-3225.03);
(W) Telephone fraud (§§ 22-3226.06, 22-3226.10(3));
(X) Attempted telephone fraud (§§ 22-1803, 22-3226.06, 22-3226.10);
(Y) Identity theft, second degree (§§ 22-3227.02, 22-3227.03(b));
(Z) Attempted identify theft (§§ 22-1803, 22-3227.02, 22-3227.03);
(AA) Fraudulent statements or failure to make statements to employee (§ 47-4104);
(BB) Fraudulent withholding information or failure to supply information to employer (§ 47-4105);
(CC) Fraud and false statements (§ 47-4106);
(DD) False statement/dealer certificate (§ 50-1501.04(a)(3));
(EE) False information/registration (§ 50-1501.04(a)(3));
(FF) No school bus driver's license (18 DCMR § 1305.1);
(GG) False statement on Department of Motor Vehicles document (18 DCMR § 1104.1);
(HH) No permit - second or greater offense (§ 50-1401.01(d));
(II) Altered title (18 DCMR § 1104.3);
(JJ) Altered registration (18 DCMR § 1104.4);
(KK) No commercial driver's license (§ 50-405);
(LL) A violation of building and housing code regulations;
(MM) A violation of the Public Utility Commission regulations; and
(NN) Attempt or conspiracy to commit any of the foregoing offenses (§§ 22-1803, 22-1805a).

Councilmember Trayon White's legislation, the "Criminal Record Expungement Amendment Act of 2021," Bill 24-110, would shorten the waiting period for a person to seal their eligible felony criminal record from eight years to two years. The bill would expand the felony convictions eligible to be sealed, to include felony theft and felony drug possession. We support the bill's objective to expand crimes eligible for sealing and shorten waiting periods. However, we believe the better approach is through an independent, expert analysis of the District's criminal laws, as proposed in our legislation. This option would allow us to move forward in a deliberate, thoughtful way.

Councilmember Christina Henderson's bill, the "Record Expungement Simplification to Offer Relief and Equity Act of 2021," would rewrite Chapter 8 of Title 16 of the D.C. Code. While my office is still conducting a review of the bill, it would require D.C. Superior Court to automatically expunge all convictions for crimes that have been decriminalized and to automatically seal non-convictions; shorten waiting periods for criminal records to become eligible to be sealed; and shorten timeframes for judges, responding parties, and agencies who certify records are sealed to respond to motions.

As these bills show, there continues to be significant interest in modernizing our criminal record sealing laws. My commitment is to work with Councilmembers on making this happen during this Council Period.

The Essential Role of the D.C. Superior Court

As we work together on this critical issue, I must emphasize the essential role of the D.C. Superior Court in any efforts to modernize our record sealing process. The Mayor's bill was drafted with input from the previous Superior Court Chief Judge and court staff. In our ongoing discussions with the Court, they have expressed concerns over requirements enacted by Council that cannot be done with their current technology and staffing. As we know, the Superior Court operates independently of the Mayor and Council, with its judges appointed by the President and confirmed by the Senate. Their funding goes through the federal appropriations process and exists outside the District Government's budget. We must include the direct involvement of the Court to ensure the legislations' intent matches the Court's capacity. Otherwise we risk enacting a law that cannot be fully implemented by the Court, thereby frustrating our residents and failing to meet their needs and expectations.

Working Together to Improve Our Residents' Lives

I am eager to work with Councilmembers to forward these important reforms to our criminal justice system. I thank all the witnesses who testified on this important subject and appreciate their continued input into the final product. The way criminal records are created, processed, and tethered to a resident negatively impacts their chance to go to school, earn a degree or trade skill, or even be allowed to live in an apartment building. This collective impact impedes their ability to be a positive contributing resident.

As the three complementary bills show, we are all pushing in the same direction. Beyond enactment of a final bill, there will be many steps needed to bring actual relief to the residents:

- Residents will require educational outreach on the impacts of the new law.
- Record sealing clinics will need to be set up to connect residents and pro bono attorneys.
- And we will need attorneys and legal staff to help handle the caseloads.

This is an issue that I believe must be approached as a partnership between the Executive, the Council, the Superior Court, and advocates for reform.

I look forward to working with you on this important criminal justice reform. Thank you for the opportunity to testify today. I am available to answer any questions.

Statement of Jeminé Trouth
Assistant Chief of the Criminal Section with the Public Safety Division
Office of the Attorney General for the District of Columbia

Before the

Committee on the Judiciary and Public Safety
The Honorable Charles Allen, Chair

Public Oversight Hearing
on
B24-0063, The "Second Chance Amendment Act of 2021"
B24-0110, "Criminal Record Expungement Amendment Act of 2021"

Thursday, April 8, 2021
9:30 a.m. – 3:30 p.m.

Virtual Hearing via Zoom

Greetings Chairman Allen, Councilmembers, staff, and residents. My name is Jeminé Trouth and I serve as Assistant Chief in the Criminal Section of the Public Safety Division of the Office of the Attorney General for the District of Columbia (OAG). I am pleased to appear on behalf of Attorney General Karl A. Racine to testify regarding: B24-0063, the *Second Chance Amendment Act of 2021* and B24-0110, the *Criminal Record Expungement Amendment Act of 2021*.

I want to begin by thanking the Committee on the Judiciary and Public Safety for holding this hearing on these two important pieces of legislation. Criminal records, including those that do not result in conviction, can have long-lasting and devastating effects on individuals and families—making it harder to secure employment, housing, and even federal loans. And, due to over-policing and structural racism in the criminal legal system, these negative impacts fall disproportionately on Black and brown residents, perpetuating and exacerbating racial disparities in wealth, health, access to education, and many other aspects of life. Allowing residents to seal from public view criminal records that are preventing them from addressing essential life needs without a corresponding public safety benefit is a critical piece of advancing racial equity in the District.

The District's current statutory framework governing sealing and expungements is confusing, overly restrictive, and makes it too difficult for residents to seal an eligible record. OAG is being proactive in helping people get eligible records sealed under the current law. For example, OAG declined to prosecute over 290 arrests for curfew violation that were made during the protests sparked by the death of George Floyd. Many of these individuals are eligible to have their record of arrest sealed, but a motion must first be filed. OAG is trying to contact each of them

to obtain consent to file a motion to seal on their behalf. This process, however, is cumbersome and inefficient, and inevitably, we will not be successful in reaching all eligible arrestees.

I applaud Mayor Bowser and the Council for highlighting the need for reform and for holding this roundtable to receive input about what should be included in legislation creating a new process for sealing or expunging criminal records. OAG supports the ideas reflected in these bills: expanding the list of offenses that are eligible for sealing, shortening waiting periods, streamlining the process, including by automatically sealing many records, and eliminating automatic disqualifiers for records that are otherwise eligible for sealing. In my testimony today, I will highlight some considerations for the Council in drafting legislation that accomplishes these important goals.

For arrests that do not result in conviction, OAG supports automatic sealing of almost all misdemeanors. However, the legislation must include that records of these arrests still are readily accessible to law enforcement agencies and may be used for law enforcement purposes.

This is important for several reasons. First, prosecutors must be able to consider prior conduct for the purpose of making charging decisions and plea offers. It is important to note here that, as part of its efforts to reduce criminal legal system involvement where possible, OAG makes liberal use of its discretion to reach deferred prosecution and deferred sentencing agreements with criminal defendants. Successful completion of these diversion programs means the defendant does not have a record of conviction. This is an important tool. However, if the person ultimately reoffends, OAG must be able to access and use records of the prior arrest in making decisions, including whether to offer diversion, in the subsequent case. Next, the rules of evidence allow prosecutors in specific, limited circumstances to introduce evidence of prior conduct to prove the defendant committed the crime at issue. Even where an arrest is sealed, prosecutors must be able

to access and use the information of the prior arrest for these purposes. Finally, if OAG decides not to paper a case and it is automatically sealed, we must be able to unseal it if we later decide to prosecute the offense within the statute of limitations, for example, if new evidence is obtained after our "no papering" decision.

These concerns are particularly salient with arrests related to domestic violence. The intimate and repetitive nature of domestic violence means that incidents are rarely isolated. Due to a myriad of societal and personal factors, many victims of intimate partner or intrafamily violence are unable to leave their abusers even after an abusers' arrest or prosecution. In these cases, OAG must be able to consider the person's complete history in making charging and plea decisions, and to access and use the information in criminal trials and in our Civil Protection Order contempt cases. As long as these protections are in place, OAG supports automatic sealing of most misdemeanors as soon as the case ends or a no-paper decision is made.

For some misdemeanors, however, sealing should not be automatic. For misdemeanors in which the victim is a child or an elderly person, prosecutors should be given an opportunity to be heard before an arrest that does not result in conviction is sealed. For example, criminal abuse of a vulnerable adult or elderly person, criminal negligence, or financial exploitation of a vulnerable adult or elderly person, can all be charged as misdemeanors, as can many other offenses people use to target this population, such as second-degree fraud, telephone fraud, and second-degree identity theft. Some offenses against children, including "Lewd, Indecent, or Obscene Acts; Sexual Proposal to a Minor," is also a misdemeanor. Loved ones and employers seeking caregivers for children and for elderly and vulnerable adults rely on background checks to protect the vulnerable person from exploitation and abuse. If these offenses are automatically sealed, it will be more difficult to protect children and vulnerable adults from those who might prey upon them. We urge

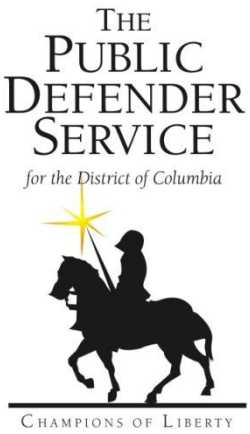
the Council to include in the legislation that arrests for these offenses require a motion to be filed before sealing is granted so the Court will have an opportunity to evaluate risks before sealing the arrest from public view.

For arrests that do result in conviction, there are additional considerations. As with non-convictions, the information must be available and usable by law enforcement agencies. For convictions, however, the fact of the conviction must also be usable for the purpose of increasing sentences pursuant to recidivism statutes. Driving Under the Influence (DUI) convictions provide an important example. Driving under the influence in extremely dangerous. According to the National Highway Traffic Safety Administration, 29 percent of the District's traffic fatalities in 2018 involved alcohol-impaired driving. And OAG's internal data shows that approximately 24 percent of our DUI cases in 2019 were committed by repeat offenders. For this reason, District law provides for sentencing enhancements for prior offenses. If a conviction for a DUI is sealed, it still must be able to be used for the purpose of increasing the sentence of repeat offenders.

OAG also supports expanding the list of convictions that are eligible for sealing, simplifying and reducing waiting periods for sealing convictions, and simplifying the standard in considering motions to seal convictions and non-convictions. Instead of including a list of arrests and convictions that makes one ineligible for sealing a record, the legislation should simply allow the Court to consider a person's prior criminal record and grant the motion if it finds it to be in the interests of justice.

OAG appreciates how complicated it is to craft legislation that appropriately balances the need to reduce harm from criminal records with the need to protect public safety. It is clear, however, that our current system does not go nearly far enough. Thank you for your important and careful work to modernize these statutes. OAG looks forward to continuing to work with you and

all stakeholders to achieve the important goal of expanding the eligibility for and simplifying the process of sealing criminal records. Thank you for considering my testimony.



COMMENTS OF THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA

concerning

Criminal Record Expungement Amendment Act of 2021, Bill 24-0110
Second Chance Amendment Act of 2021, Bill 24-0063

Presented by
Katerina Semyonova

before

COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY
COUNCIL OF THE DISTRICT OF COLUMBIA

Chairman Charles Allen

April 8, 2021

Avis E. Buchanan, Director
Public Defender Service
633 Indiana Avenue, N.W.
Washington, D.C. 20004
(202) 628-1200

Thank you for the opportunity to testify on Bill 24-0110, the Criminal Record Expungement Amendment Act of 2021 and Bill 24-0063, the Second Chance Amendment Act of 2021. I am Katerina Semyonova, Special Counsel to the Director on Policy and Legislation at the Public Defender Service for the District of Columbia. PDS strongly supports record sealing reform. The two bills pending before the Committee and the newly introduced record sealing bill and the reintroduced record accuracy bill begin to meaningfully address the harm caused by the persistence of criminal records – of documented accusations and convictions that prevent District residents from their pursuit of education, employment, and housing. We are truly hopeful that these bills will go a long way toward improving the lives of District residents and advancing racial equity.

The current legal structure for record sealing is broken. Before the pandemic, it was typical for law enforcement to arrest about 100 people from Saturday afternoon to Monday morning. About 30 of those arrests would be "no papered" before the detained individual ever saw a judge. That means that while those individuals were processed by law enforcement and held overnight, by morning, when police presented their evidence to a prosecutor, a decision would be made not to move the case forward. The arrested individuals are released to continue their lives, except that they now have arrest records.

If the arrest was for what the D.C. Code calls an "eligible misdemeanor,"[1] they must wait two years before they can ask a judge to seal the record of the arrest.[2] If the arrest was for a felony or an "ineligible misdemeanor,"[3] they must wait 3 years to ask a

[1] D.C. Code § 16-801(7).

[2] D.C. Code § 16-803(a)(1)(A).

[3] D.C. Code § 16-801(9).

judge to seal the record of the arrest.[4] If the arrest was for a felony or ineligible misdemeanor and the government dismissed the case after papering -- for example, on the third court date -- they must wait 4 years before asking a judge to seal the case.[5] If the individual has a conviction in an entirely different matter that follows that arrest, they are subject to additional waiting periods of 5 or 10 years depending on the severity of the conviction.[6] These additional waiting periods apply although the non-conviction -- meaning the accusation that was dismissed -- has nothing to do whatsoever with the conviction. Even after waiting for 2, 3, or 4 years, and sometimes an additional 5 or 10 years, record sealing for that arrest record is not automatic. The passage of the time periods only allows the person to file a motion to ask a judge to seal the record. Once a person files the motion, they have to wait, typically for three to six months but sometimes up to a year, for a judicial decision about whether the record will be sealed.

Every day before the pandemic people whose cases were no papered in Superior Court were given a form instructing them to come to the Public Defender Service for help with record sealing. PDS has seen thousands of people with no papered or dismissed cases. PDS has to tell these people that although they suffered the incredible disruption of arrest, that they were pulled from the street before they could make child care arrangements or tell their employers that they would not be arriving at work, they would then have to wait some additional number of years before they could go to court to ask to have the record of arrest removed from public view. We also explain to people that they

---

[4] D.C. Code § 16-803(b)(1)(A).

[5] *Id*.

[6] D.C. Code § 16-803(a)(2), (b)(2).

can have their records expunged immediately if they can somehow prove their own innocence in a process that does not involve any right to police paperwork or even a lawyer. The people that we see at PDS are rightly outraged.

PDS believes that reform for sealing non-convictions should have three main components: 1) the elimination of waiting periods for all offenses; 2) an automatic process for sealing all non-convictions that does not require unrepresented people to file motions and appear in court; and 3) access to the sealed files for defense attorneys in the same manner as law enforcement and access for the arrestee themselves as needed.

The waiting periods that delay record sealing or expungement for non-convictions overwhelmingly burden Black residents who face the highest rates of arrest and abusive and discriminatory policing.[7] People who come to PDS for help with record sealing are devastated when they learn about the waiting periods. They have immediate concerns about job loss and cannot wait years or months for sealing to occur. These waiting periods reflect an assumption of guilt. They signal a belief that although the prosecution failed to prove a single offense beyond a reasonable doubt, the shame and burden of an accusation should stay with the individual because the police or the prosecution were probably right in their allegation. This assumption is not fair to District residents,

---

[7] Peter Hermann, *Study finds disproportionate number of black people arrested in D.C.*, Washington Post, May 14, 2019. Available at: https://www.washingtonpost.com/local/public-safety/study-finds-disproportionate-number-of-black-people-arrested-in-dc/2019/05/14/92cf2d26-735a-11e9-8be0-ca575670e91c_story.html
See also, ACLU's analysis of stop and frisk data, *Racial Disparities in Stops by the D.C. Metropolitan Police Department: Review of Five Months of Data*, June 16, 2020. Available at: https://www.acludc.org/sites/default/files/2020_06_15_aclu_stops_report_final.pdf

regardless of the nature of the allegation and it harms Black residents who then face higher rates of joblessness and poverty.[8]

PDS also calls for a non-discretionary and automatic process for sealing all non-convictions.[9] Under current law, a judge shall grant a motion to seal if it is in the interests of justice to do so.[10] The determination of whether sealing is in the interests of justice includes multiple mandatory and discretionary factors.[11] Some of these factors are inaccessible to defendants, for instance while the sealing decision may depend on the nature and circumstances of the offense, individuals typically do not have any right to discovery. Most individuals are unrepresented in sealing proceedings because they no longer have a constitutional right to counsel once the case is dismissed.[12] Yet they are saddled with a process that sometimes requires multiple filings and responses to government pleadings. In recognition of the fact that these criminal records come from non-convictions, the Council should create a process for record sealing that is automatic. It should not require further action by the accused – no more multiple phone calls, visits

---

[8] Marissa J. Lang, *The District's economy is booming, but many black Washingtonians have been left out, study finds*, Washington Post, February 11, 2020. Available at: https://www.washingtonpost.com/local/the-districts-economy-is-booming-but-many-black-washingtonians-have-been-left-out-study-finds/2020/02/10/180cfe0a-49c5-11ea-bdbf-1dfb23249293_story.html

[9] Bill 22-0560 includes an automatic sealing provision for all non-convictions that are not labeled "dangerous crimes." Bill 22-0447 provides for automatic expungement after 90 days for all non-convictions so long as the offense of arrest was not a felony punishable by more than 15 years of incarceration. Bill 22-0447 also creates automatic expungement for non-convictions for arrests for felony offenses punishable by more than 15 years of incarceration after 2 years.

[10] D.C. Code § 16-803(h)(1).

[11] D.C. Code § 16-803(h)(1)(A).

[12] Since the constitutional "right to counsel attaches at or after the time that adversary judicial proceedings have been initiated" most people whose cases were no papered were never even appointed counsel. *Kirby v. Illinois,* 406 U.S. 682, 688–689 (1972).

to the clerk's office, multi-page motions, and waiting for judicial responses. Automatic record sealing is also well within the current capability of the court. The court already manages sealed dockets and seals cases when a set aside is ordered under the Youth Rehabilitation Act and expunges cases under the first-time drug possession provision.[13] Sealing the record immediately also has no impact on a decision by the prosecution to refile the case and should not serve as a justification for delaying relief. If the accusation was not proven, and the case was closed, the stain of that accusation should be removed immediately and automatically.

One difference between the Second Chance Amendment Act of 2021 and the recently introduced, Record Expungement Simplification To Offer Relief and Equity (RESTORE) Amendment Act of 2021[14] is whether records should be sealed or expunged. For employment and housing, both sealing and expungement can offer meaningful relief from the damage caused by records of arrests and convictions. Sealing becomes an inferior remedy if the list of entities that have access to sealed records becomes too long. Current law allows any court, prosecutor, law enforcement agency, licensed school or child care provider to access sealed records.[15] The Second Chance Amendment Act would add the entire federal government to the list of entities that can view sealed

---

[13] D.C. Code 48-904.01(e)(2).

[14] Bill 22-0447.

[15] D.C. Code § 16-801(11): ""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 licensed 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, executive-grade government position."

records. Adding the entire federal government destroys the point of sealing the records. However, complete expungement of files may lead to other miscarriages of justice. PDS believes that it is important to allow access to arrest files for the defense for cases in which an individual's prior arrests may be relevant to later prosecutions of other individuals. For instance, the defense should be permitted to investigate and potentially expose that a witness's statement relates to that witness's own fears of arrest and prosecution for related conduct.[16] Whatever access to sealed records is permitted to law enforcement should also be granted to the defense.

Reform of current law is also necessary with respect to convictions. Under current law, a narrow group of misdemeanors, deemed "eligible misdemeanors"[17] may be sealed but only after an 8 year waiting period from the conclusion of a sentence, and only if a judge exercises their discretion to seal.[18] Only one felony offense, failure to appear, which criminalizes missing a court date, can potentially be sealed by a judge.[19] An individual can only seal one conviction, and it must be the most recent conviction.[20]

---

[16] The prosecution would also have an obligation to turn this information over to the defense. *See Brady v. Maryland*, 373 U.S. 83 (1963). The Due Process Clause of the Fifth Amendment requires the prosecution to disclose to the defense, upon request, material evidence that is favorable to the accused.

[17] D.C. Code 16-801(7) and (9) define and list eligible and ineligible misdemeanors. Eligible misdemeanors are misdemeanors that are not ineligible misdemeanors.

[18] D.C. Code 16-803(c)(1) and (h)(1).

[19] D.C. Code 16-801(6).

[20] D.C. Code 16-801(5)(A) defines disqualifying arrest or conviction as a "conviction in any jurisdiction <u>after</u> the arrest or conviction for which the motion to seal has been filed." Under D.C. Code 16-803(c)(2), a movant convicted an eligible misdemeanor or felony failure to appear may file a motion to seal the records of a conviction only if he or she does not have a disqualifying conviction – meaning a conviction subsequent to the one the movant is trying to seal. Thus an individual can only seal one conviction and it must be the most recent one.

The current law means that an individual with a robbery conviction from 1975, because robbery is a felony, can never seal that record regardless of that person's demonstrable rehabilitation. An individual with multiple convictions for misdemeanor drug possession cannot have their record sealed even where those convictions stemmed from drug addiction and from a time period when the District took a more punitive approach to drug abuse.

PDS supports broad record sealing relief for convictions because of the harm caused by criminal records. Expansive sealing relief is an integral part of a re-entry program in that it advances employment, education, and housing opportunities for returning citizens. PDS supports numerous aspects of how the Record Expungement Simplification to Offer Relief and Equity Amendment Act, addresses criminal convictions including making all offenses eligible for sealing, reducing waiting periods, and creating a presumption for sealing all offenses after10 years. However, even if the Council supports the approach of the Second Chance Amendment Act, which directs the Criminal Code Reform Commission to study if additional offenses should be made eligible for sealing, the Council should provide immediate sealing relief for all misdemeanors by passing Bill 24-0110, the Criminal Record Expungement Amendment Act. Treating all misdemeanors as eligible for sealing relief recognizes that the vast majority of these convictions were obtained without a jury trial and that they are, by definition, for lower level offenses.[21] There is also clear evidence that criminal records

[21] "No statute applicable to the District of Columbia provides a general definition of either 'felony' or 'misdemeanor.'" *Henson v. United States*, 399 A.2d 16, 20 (D.C.1979) (explaining that "[l]argely for historical reasons, the courts in this jurisdiction generally define 'felony' as any offense for which the maximum penalty provided for the offense is imprisonment for more than one year; generally, all other crimes are misdemeanors")

for misdemeanor drug offenses disproportionately impact Black residents although individuals of all races use drugs at approximately the same rates[22] and that misdemeanor arrests often rely on discretionary decisions made by police officers and are subject to the same biases that taint the criminal legal system as a whole.

In order to effectuate records sealing reforms, the Council should also incorporate the reforms in Bill 24-0161, the Criminal Record Accuracy Assurance Act. This bill is forward-thinking in recognizing that many of the problems with criminal records stem from inaccurate reporting by private companies. PDS fully supports Bill 24-0161 and makes four recommendations to further its reforms.

First, PDS recommends that the bill include a provision requiring private record reporting companies to provide the subject of the record with a copy of the criminal history that the company reported. There are now hundreds of private companies that report criminal history for landlords and employers. The enforcement provisions of Bill 24-0161will have little impact unless individuals also learn who reported inaccurate data and exactly what data was reported.

Second, PDS recommends that Bill 24-0161 require that a criminal history report state the source of the reported information and the date on which the information was received from that source. Many criminal history providers, rather than searching court records on line or in a clerk's office, will buy data from a data mining company. Individuals will be better able to correct erroneous record information, and seek

[22] Tonry, M., & Melewski, M. (2008), *The Malign Effects of Drug and Crime Control Policy on Black Americans*. In M. Tonry (Ed.), Crime and justice: A review of research (pp. 1-44). Chicago, IL: University of Chicago Press; James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. Rev. 21, 48 (2012).

enforcement of Bill 24-0161, if they know the source of the record information and the date that the information was acquired.

Third, PDS recommends that Bill 24-0161 require private criminal history providers to use two identifiers such as date of birth and name before reporting an individual's record. PDS has handled cases of erroneously reported criminal records where private providers have used only a single identifier.

Fourth, while Bill 24-0161 addresses only private criminal history providers, there should be a formal court process for correcting erroneous criminal records held by MPD and Superior Court. Incorrect records typically stem from data entry errors by MPD or the court or from identity theft. Currently, rather than having a viable direct filing avenue in Superior Court, people with erroneous records contact PDS for assistance.[23] In identity theft cases, PDS works with the Office of the United States Attorney to get records from the incorrectly attributed offense and take comparison fingerprints. In cases of data entry errors at MPD, PDS also goes through the Office of the United States Attorney to advocate for MPD to correct the errors. The process is informal, takes a long period of time, and is dependent on individuals finding their way to PDS. There should instead be a formal process that can be initiated in the Superior Court clerk's office and that includes timelines for MPD and any prosecuting agencies to respond to complaints about incorrect criminal records.

[23] D.C. Code 16-803(c-2) provides that: "A person to whom a District of Columbia arrest has been attributed, who attests under oath that he or she was incorrectly identified or named, may file a motion to seal publicly available records of the arrest if the law enforcement agency did not take fingerprints at the time of the arrest and no other form of reliable identification was presented by the person who was arrested." However, this code section does not provide an avenue for relief in cases where fingerprints or identification were used or where the error results from something other than incorrect identification.

PDS again thanks the Council for its work on these issues and stands ready to assist the Council with these reforms.

BEFORE THE
COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY
COUNCILMEMBER CHARLES ALLEN, CHAIRMAN

PUBLIC HEARING
on

Bill 24-0063, the "Second Chance Amendment Act of 2021"
and
Bill 24-0110, the "Criminal Record Expungement Amendment Act of 2021"

STATEMENT OF ELANA SUTTENBERG
SPECIAL COUNSEL TO THE UNITED STATES ATTORNEY
UNITED STATES ATTORNEY'S OFFICE FOR THE DISTRICT OF COLUMBIA

Thursday, April 8, 2021, 9:30 a.m.

Virtual Hearing via Zoom

Chairman Allen and Members of the Council:

My name is Elana Suttenberg, and I am the Special Counsel for Legislative Affairs at the United States Attorney's Office for the District of Columbia. I thank you for the opportunity to appear today to share the Office's views regarding the proposed legislation.

At the outset, I want to express my Office's commitment to expanded record sealing and the simplification of the record sealing process. We recognize that, in many instances, the most fair and just result in a case is to allow a record to be sealed, so that the person who was arrested or charged is not unduly encumbered by a criminal record.

Consistent with the recognition that, in certain circumstances, the most fair and just result may not be a conviction, USAO offers a variety of diversion programs for defendants in DC Superior Court. The goal of our diversion programs is to maximize public safety, reduce recidivism, and enhance a fair and efficient criminal justice system. Pretrial diversion allows a defendant to receive services and treatment, and to participate in programming that benefits both the defendant and the community.[1] To ensure that more people can benefit from diversion, we also recently expanded pretrial diversion opportunities. For example, last year we expanded access to Mental Health Court to defendants accused of domestic violence offenses. We also expanded access to diversion for first-time defendants accused of certain felony offenses, offering them a pathway to a clean record. And past participation in diversion, whether successful or not, no longer acts as an automatic bar to future participation. Finally, consistent with our commitment to expanded record sealing, we plan to implement a policy whereby, when a first-time arrestee successfully completes diversion in an eligible case, USAO agrees to waive the typical waiting period so that a defendant can immediately move to seal the case after successfully completing diversion.

As to the bills under consideration today, there are several questions regarding record sealing that we will address. First, USAO will address the question of which offenses that do not result in convictions should be eligible for sealing, and which offenses that do result in convictions should be eligible for sealing. Second, we will address the question of what type of sealing is appropriate. Third, we will address the question of whether sealing should be automatic or by motion.

First, we examine the question of which offenses that do not result in convictions should be eligible for sealing, and which offenses that do result in convictions should be eligible for sealing. We support expanding sealing for offenses that do not result in a conviction in a manner similar to the approach of Mayor Bowser's proposal in the Second Chance Amendment Act of

[1] Although diversion options are varied and tailored to meet the needs of each case, victim, and defendant, options for diversion may include: completing an anger management class or a domestic violence intervention program; receiving mental health, alcohol, or drug treatment; staying away from and having no contact with a victim or a location; and/or completing community service. If a defendant successfully completes the diversion requirements, the case is dismissed, and the defendant does not have a conviction in that case. As appropriate, we also divert cases to the Superior Court Mental Health Community Court (Mental Health Court) or the Superior Court Drug Intervention Program (Drug Court). These voluntary treatment courts connect defendants with serious mental health issues or drug addictions to qualified treatment providers, with the goal of treating these individuals and keeping them out of the criminal justice system. More information about USAO's diversion programs is available at https://www.justice.gov/usao-dc/diversion-programs.

2021, introduced as Bill 24-0063.[2] Where the offense constituted a dangerous crime under D.C. Code § 23-1331(3), a crime of violence under D.C. Code § 23-1331(4), or where the victim in the case was a minor—that is, a person under 18 years old—we support allowing a person to seal that arrest or charge, but believe that a motion to seal, versus automatic sealing, should be required. It is important to include offenses that involve a minor in this category because, as especially vulnerable victims for whom the community owes a heightened duty, the community has a particular interest in being aware of these offenses. Where the offense did not constitute a dangerous crime under D.C. Code § 23-1331(3) or a crime of violence under D.C. Code § 23-1331(4), or where the victim was not a minor, and where the arrest or charge terminates without conviction after this legislation takes effect, we support automatic sealing; where the arrest or charge terminated without conviction before this legislation took effect, we support allowing a person to move to seal that arrest or charge.

By contrast, there should be a more limited category of offenses eligible for sealing where there is a conviction, which recognizes that the community has a greater interest in access to conviction records than non-conviction records.[3] Conviction records can be used to conduct background checks on individuals looking to purchase guns, work with children, or become employed in a position involving public trust. If a person were ineligible to obtain a gun as a result of a conviction, if a person were convicted of an offense involving a minor victim, if a person were convicted of sexual abuse, or if a person were convicted of an intrafamily offense, that conviction should not be eligible for sealing. Further, many of the offenses that are listed as "ineligible misdemeanors"[4] that are not eligible for sealing under current law relate to the safety of the community and should be available to the community. For example, the current list of "ineligible misdemeanors" that are not eligible for sealing includes misdemeanor sexual abuse, intrafamily offenses, misdemeanor offenses for which sex offender registration is required, failure to report child abuse, criminal abuse of a vulnerable adult, and other offenses. It may be appropriate to reevaluate some of the offenses that are deemed "ineligible misdemeanors" under current law, but we should recognize that many of the offenses on that list were included because they relate to a vulnerable population or relate to veracity. We therefore support sealing for all D.C. Code misdemeanors where there is a conviction, except: (1) many of the offenses included in the list of "ineligible misdemeanors" under current law, including sexual offenses and intrafamily offenses; (2) an offense where the victim in the case was a minor—that is, a person under 18 years old; and (3) an offense that would render a person ineligible to purchase a handgun under D.C. Code § 7-2502.03, which includes all felonies, certain weapons offenses, and certain misdemeanors committed within 5 years.

---

[2] Under current law, the non-convictions eligible for sealing after a 2-year waiting period are offenses deemed "eligible misdemeanors," *see* D.C. Code § 16-803(a), and the non-convictions eligible for sealing after a 3- or 4-year waiting period are characterized as "any other offense," *see* D.C. Code § 16-803(b). Both types of non-convictions require that a person not have a "disqualifying arrest or conviction," and can only be sealed following a motion to seal. There are various scenarios in which an arrest or a charge may not result in a conviction. For example: prosecutors may "no paper" an arrest and not file any charges; prosecutors may voluntarily dismiss a case, including as part of a global resolution involving guilty pleas in other pending cases; prosecutors may dismiss a case after a defendant successfully completes diversion; a court may dismiss a case; or a defendant may be found not guilty at trial.

[3] Under current law, the convictions eligible for sealing after an 8-year waiting period are offenses deemed "eligible misdemeanors" and "eligible felonies." *See* D.C. Code § 16-803(c). These convictions require that a person not have a "disqualifying arrest or conviction."

[4] *See* D.C. Code § 16-801(9).

At the same time, for both convictions and non-convictions, we support eliminating the "disqualifying arrest or conviction" requirement that, under current law, precludes an individual from moving to seal an otherwise eligible offense if they have a subsequent "disqualifying arrest or conviction." Removing this requirement will simplify and streamline the record sealing process to make it easier for a person to move to seal their record, and easier for the courts and attorneys to process these cases. Where a motion to seal is filed, it would still be appropriate for a court to consider the defendant's criminal history—including subsequent arrests and convictions—as part of an "interests of justice" analysis, but those other arrests and convictions should not be an *automatic* bar to eligibility for sealing.

Second, we consider the question of what type of sealing is appropriate. We support record sealing that would allow a person's publicly available criminal record to be limited. We do not, however, support expungement (as contrasted with sealing) or other limitations on sealing that would result in law enforcement being unable to access records. From a public access perspective, there is no difference between sealing and expungement—that is, a person with a sealed arrest or charge can answer questions to potential employers or others in the community with the same answer, and truthfully state that they have not been arrested, charged, or convicted. But sealed records, as opposed to expunged records, would remain available to law enforcement, including prosecutors, and other appropriate actors. From a law enforcement perspective, it is appropriate for prosecutors to rely on certain non-convictions—even if sealed—when making a charging decision. For example, in a domestic violence case, there may be multiple "no-papered" misdemeanor arrests against a defendant involving the same victim, even where the evidence could have supported the government filing charges. That abuse could escalate into more serious abuse, culminating in serious injury to the victim. When assessing what charges are appropriate, the previous "no-papered" arrests can be highly relevant to assessing a pattern and history of abuse. Further, there must be a mechanism for USAO to continue to be able to review a "no-papered" arrest, even if it is sealed. For example, USAO may decline to charge a case at the time of arrest, but continue to investigate the case through the grand jury and, if appropriate, file charges at a later time. USAO may also decline to charge a case at the time of arrest due to insufficient evidence, but file charges at a later point at any time before the statute of limitations expires if law enforcement later becomes aware of additional evidence or witnesses that would support a prosecution. In addition, we should consider what access victims should have to sealed records in cases in which they are victims, and what information prosecutors and law enforcement should be permitted to disclose to victims when a record is sealed.

Expungement, by contrast, would have adverse impacts that are not immediately apparent.[5] This would include an impact on USAO's ability to locate and disclose potentially relevant *Brady* material—that is, material that is favorable to a defendant.[6] Sealing would help alleviate those *Brady* concerns. Closed files, including those that do not result in a conviction, sometimes contain *Brady* information, and USAO obtains that information from closed files. If those files were expunged, the government would not be able to access that material either for its own investigatory purposes or to disclose to the defense.[7] This would be a detriment to the

[5] In addition, federal agencies have certain recordkeeping requirements that would prohibit them from destroying or disposing of their records in certain circumstances.

[6] *See Brady v. Maryland*, 373 U.S. 83 (1963).

[7] Exculpatory material can be present even in relatively low-level misdemeanor offenses. For example, if

defense at trial and to the government's need to conduct a comprehensive investigation.

Further, for any sealed records, law enforcement needs to be able to access those records via electronic records keeping. Given that USAO processes approximately 20,000 arrests per year, we rely on our electronic records system to search our records. We need to ensure that cases that are sealed can continue to be investigated by the grand jury, and that the sealing provisions do not prohibit prosecutors from sharing sealed information with law enforcement and the grand jury. We need to ensure that these records are searchable through law enforcement databases and are available to law enforcement—including prosecutors—and community supervision agencies, such as the Pretrial Services Agency and the Court Services and Offender Supervision Agency. These community supervision agencies write reports at intake and before sentencing that, among other things, compile a defendant's criminal history for the use of attorneys and the court to allow the court to conduct a comprehensive review of the defendant's background and the circumstances of the case. Past convictions can be relevant to calculation of criminal history score under the DC Voluntary Sentencing Guidelines. When a defendant with a sealed record engages in subsequent criminal activity, previously sealed records should be available for use by the courts when making detention decisions and ascertaining an appropriate sentence, in a manner similar to how conviction set-asides are treated under the Youth Rehabilitation Act,[8] how juvenile case records are treated, and how certain sealed records are treated under current law.[9] Considering a defendant's criminal history in its totality allows consideration of a defendant's subsequent criminal activity in its appropriate context, and allows judges to consider all relevant facts in their decisions. Finally, we believe that it is important for the Council to ensure that any sealing legislation has a mechanism that allows a court to unseal a previously sealed record if, for example, a case that was originally "no-papered" is later charged, or if USAO needs to provide sealed records to the defense in a case.

Third, we address the question of whether sealing should be automatic or by motion. As discussed above, in a manner similar to the proposal in the Second Chance Amendment Act, we support the automatic sealing of non-convictions where the offense <u>was not</u> a crime of violence, dangerous crime, or crime that involved a minor victim, where the arrest or charge terminates without conviction <u>after</u> this legislation takes effect. Automatic sealing would mean that, absent an objection from the prosecutor, the record would be automatically sealed. Where the arrest or charge terminates without conviction <u>before</u> this legislation takes effect, however, sealing by motion is appropriate. There are two primary reasons for this distinction. The first reason is to

---

a case were originally investigated as a felony offense, a witness may have testified in the grand jury and perjured himself or herself. If a case went to trial as a misdemeanor offense, a witness may have perjured himself or herself at trial, or, regardless of whether it went to trial, a witness may have made inconsistent statements to police or prosecutors that could be exculpatory. The government should be able to access those prior statements to assess a witness's credibility and to make disclosures to the defense. Even in a case of actual innocence, although the person who is found to be actually innocent should be entitled to seal their case records, law enforcement needs to be able to keep those case records. If, for example, a person were found to be actually innocent due to misidentification, prosecutors and law enforcement would need access to those case records in the event that the person who actually committed the offense is correctly identified and prosecuted. Moreover, if, for example, a person is found to be actually innocent due to a witness's false or inconsistent statements originally incriminating that person, law enforcement should be aware of that witness's false or inconsistent statements when investigating any subsequent case involving the same witness.

[8] *See* D.C. Code § 24-906(f).

[9] *See* D.C. Code § 16-806(b).

give full weight to crime victims and crime victim rights, and the relationship between this sealing legislation and the Crime Victims' Rights Act, which, among other things, provides that a victim has a right to be present at all court proceedings related to the offense, including record-sealing hearings.[10] Automatic retroactive sealing would make compliance with this provision virtually impossible, given the sheer volume of cases that would be eligible for sealing. The second reason is a logistical reality. Although automatic retroactive sealing may be well-intentioned, there would be hundreds of thousands of arrests and other non-convictions to process, which would involve the coordination of multiple agencies and the courts to implement. As to non-convictions where the offense was a crime of violence, dangerous crime, or crime that involved a minor victim, and as to convictions, sealing by motion remains appropriate. This allows a court to fully review each case to assess the offense and whether sealing is appropriate. When there is a motion to seal, we ask the Council to include an order for the government to respond.[11] This facilitates our processing of these cases, because absent a court order, we often do not become aware when a motion to seal is filed. It would also streamline and expedite the process if individuals looking to seal their records moved to seal all eligible offenses at the same time.

Finally, although the policy objectives of this legislation are laudable, we anticipate that the practical and logistical realities of both drafting and implementing this legislation will be complex, and many partners will need to be engaged to maximize efficiencies and streamline the process. We stand ready to work with the Council and our partners both to develop and successfully implement this legislation.

* * *

The U.S. Attorney's Office for the District of Columbia commends the Council and the Mayor for their commitment to streamlining and enhancing record sealing in the District, and looks forward to continuing to work with the Council on this important issue.

---

[10] *See* D.C. Code § 23-1901(b)(4).

[11] *See, e.g.*, D.C. Code § 16-804(d), which provides: "The prosecutor shall not be required to respond to the motion unless ordered to do so by the Court…."