

NOTES

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NOTES

CRIMINAL RECORD EXPUNGEMENT AND ORDERS FOR LIMITED ACCESS IN PENNSYLVANIA

Aidan Kaplan*

I. INTRODUCTION

In November 2016, the Pennsylvania General Assembly passed legislation that marked a turning point in the Commonwealth's stance on its dissemination of criminal history record information.¹ Previously, individuals could have certain criminal history record information expunged, limited to summary and other minor offenses.² Section 9122 allows individuals convicted of certain misdemeanors to petition for a court order restricting Commonwealth criminal justice agencies to disseminating information about these crimes only to other Commonwealth agencies.³ In addition, § 9122 also protects those who have obtained such an "order for limited access" from being required to disclose the information covered by the order.⁴ The law also contains a provision ordering criminal justice agencies to "extract" information about the initiation of criminal proceedings against an individual after three years, if the Commonwealth is not pursuing a conviction in that

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¹ Act of Feb. 16, 2016, No. 5, 2016 Pa. Laws 10 (codified at 42 PA. CONS. STAT. § 1725.7 and 18 PA. CONS. STAT. §§ 9121, 9122.1).

² 18 PA. CONS. STAT. § 9122 (2018).

³ *Id.* § 9122.1(a)(1).

⁴ *Id.* § 9122.1(a)(2).

case, before the criminal justice agency disseminates the information to individuals or noncriminal justice agencies.⁵

Section 9122 received bipartisan support and was widely viewed as a success by both commentators and legislators.⁶ While § 9122 was a step in the right direction, in this Note I argue that it merely made Pennsylvania average in terms of its expungement law.⁷ I believe that the Pennsylvania General Assembly should have gone further in its reform.

II. WHAT ARE EXPUNGEMENT AND ORDERS FOR LIMITED ACCESS?

The Criminal History Record Information⁸ Act of 1979 (CHRIA)⁹ controls the dissemination¹⁰ of criminal history record information in Pennsylvania. The CHRIA governs both expungement and the removal of criminal history record information

⁵ *Id.* § 9121(b)(2).

⁶ Nathalie Baptiste, *Pennsylvania Offers Clean Slate to Offenders*, AM. PROSPECT: TAPPED: THE PROSPECT GROUP BLOG (May 13, 2016), <http://prospect.org/blog/tapped/pennsylvania-offers-clean-slate-ex-offenders>.

⁷ See Sharon M. Dietrich, *From Expungement to Sealing of Criminal Records in Pennsylvania*, 87 PA. B. ASS'N Q. 164 (2016).

⁸ “Criminal history record information” is

[i]nformation collected by criminal justice agencies concerning individuals, and arising from the initiation of a criminal proceeding, consisting of identifiable descriptions, dates and notations of arrests, indictments, informations, or other formal criminal charges and any dispositions arising therefrom. The term does not include intelligence information, investigative information or treatment information, including medical and psychological information, or information and records specified in § 9104 (relating to scope).

18 PA. CONS. STAT. § 9102 (2018).

⁹ *Id.* §§ 9101–83.

¹⁰ “Dissemination” is “[t]he oral or written transmission or disclosure of criminal history record information to individuals or agencies other than the criminal justice agency which maintains the information.” *Id.* § 9102. A “criminal justice agency” is

[a]ny court, including the minor judiciary, with criminal jurisdiction or any other governmental agency, or subunit thereof, created by statute or by the State or Federal constitutions, specifically authorized to perform as its principal function the administration of criminal justice, and which allocates a substantial portion of its annual budget to such function.

Id.

from public databanks “so that there is no trace or indication that such information existed.”¹¹ As of November 2016, the CHRIA also permits courts to enter an “order for limited access” to certain criminal history record information.¹² Petitioning for expungement is controlled by Rules 790 and 490 of Pennsylvania Rules of Criminal Procedure (PRCP), while petitioning for an order for limited access is controlled by Rule 791.¹³

A. *Expungement*

For those petitioning for expungement, the applicable rule depends on the charges filed in the case the petitioner seeks to have expunged. Rule 790 “provides the procedures for requesting and ordering expungement in court cases,”¹⁴ cases “in which one or more of the offenses charged is a misdemeanor, felony, or murder of the first, second, or third degree.”¹⁵ Rule 490 “provides the procedures for requesting and ordering expungement in summary cases,”¹⁶ cases “in which the only offense or offenses charged are summary offenses.”¹⁷

Individuals seeking expungement must “fil[e] a petition with the clerk of the courts of the judicial district in which the charges were disposed.”¹⁸ There are two types of petitions: the Petition for Expungement Pursuant to Pennsylvania Rule of Criminal Procedure 790 and the Petition for Expungement Pursuant to Pennsylvania Rule of Criminal Procedure 490.¹⁹ Both petitions require several items, including the specific charges to be expunged, the disposition of the case, the status of fines and

¹¹ *Id.*

¹² *See id.* § 9122.1.

¹³ PA. R. CRIM. P. 490 (procedure for obtaining expungement in summary cases); *id.* at 790 (procedure of obtaining expungement in court cases); *id.* at 791 (procedure of obtaining order for limited access in court cases).

¹⁴ *Id.* at 790.

¹⁵ *Id.* at 103 (definitions).

¹⁶ *Id.* at 490.

¹⁷ *Id.* at 103.

¹⁸ *Id.* at 490(A)(1), 790(A)(1).

¹⁹ Pennsylvania Judicial Center, *For the Public*, UNIFIED JUD. SYS. PA., <http://www.pacourts.us/forms/for-the-public> (last visited May 16, 2018).

restitution, and the reason for expungement.²⁰ Petitioners must also attach a current copy of their Pennsylvania State Police criminal history report.²¹

Within 60 (Rule 790) or 30 (Rule 490) days after service of the petition, “the attorney for the Commonwealth shall file a consent or objection to the petition or take no action.”²² Upon receipt of the attorney for the Commonwealth’s response, or no later than 14 days after the expiration of the 60 (Rule 790) or 30 (Rules 490) day period, the judge “shall grant or deny the petition or shall schedule a hearing.”²³ If the judge grants the petition, the judge “shall enter an order directing expungement.”²⁴ Such an order must contain, among other things, the judge’s reason for granting the petition.²⁵ If the judge denies the petition, they must enter an order denying the petition and state their reason for doing so.²⁶ Upon the judge’s order either to grant or deny the petition, both the Commonwealth and petitioner have 30 days to appeal.²⁷

There are two other situations in which Pennsylvanians can expunge criminal history record information. Rule 320 of the PRCP governs expungement within the Accelerated Rehabilitative Disposition (ARD) program,²⁸ and the Controlled Substance, Drug, Device, and Cosmetic Act²⁹ provides procedures for the expungement of information related to the Act when the charges are “withdrawn or dismissed or the person is acquitted of the charges.”³⁰ This Note focuses on the procedures under Rules 790 and 490. These rules apply to a much wider range of

²⁰ PA. R. CRIM. P. 490(A)(2)(a)–(j), 790(A)(2)(a)–(j).

²¹ *Id.* at 490(A)(3), 790(A)(3).

²² *Id.* at 490(B)(1), 790(B)(1).

²³ *Id.* at 490(B)(2), 790(B)(2).

²⁴ *Id.* at 490(B)(4), 790(B)(4).

²⁵ *Id.* at 490(C)(1)(a)–(j), 790(C)(1)(a)–(j).

²⁶ *Id.* at 490(B)(5), 790(B)(5).

²⁷ *Id.* at 490(B)(4)(b), 790(B)(4)(b).

²⁸ *Id.* at 320. ARD is a diversionary program available for first-time offenders when “the crime charged is relatively minor and does not involve a serious breach of the public trust.” *Id.* at Committee Introduction to ch. 3. The primary purpose of the program is “rehabilitation of the offender,” and the secondary purpose is for the “prompt disposition of charges. . . .” *Id.*

²⁹ 35 PA. STAT. ANN. §§ 780-101 to 780-144 (West 2018).

³⁰ *Id.* § 780-119.

criminal cases than those under the ARD program or the Controlled Substance, Drug, Device and Cosmetic Act, as the ARD program has a built-in expungement process³¹ and the Controlled Substance, Drug, Device and Cosmetic Act's procedures apply only to withdrawn or dismissed charges under that Act.³²

B. *Order for Limited Access*

Rule 791 provides the procedures for petitioning for an order for limited access.³³ Individuals seeking an order for limited access must file a Petition for Limited Access Pursuant to Pennsylvania Rule of Criminal Procedure 791.³⁴ The petition must include "the specific charges . . . to be subject to limited access, the reason(s) for the order for limited access" and "a statement that the case qualifies for a limited access order."³⁵

Within 30 days after service of the petition, "the attorney for the Commonwealth shall file a consent or objection to the petition or take no action."³⁶ Upon receipt of the attorney for the Commonwealth's response, or no later than 14 days after the expiration of the 30-day period, the judge "shall grant or deny the petition or shall schedule a hearing."³⁷ If the judge grants the petition, the judge

shall enter an order directing that the petitioner's criminal record history information that is subject to the limited access order shall not be disseminated to an individual, a noncriminal justice agency, or an internet website and that dissemination of the petitioner's criminal record history be limited only to a

³¹ PA. R. CRIM. P. 320. Upon successful completion of the program, participants "may move the court for an order dismissing the charges." *Id.* at 319. If the attorney for the Commonwealth does not object to dismissal of the charges within 30 days of being served with the motion, the judge "shall thereafter dismiss of the chargers against the defendant." *Id.* "When the judge orders the dismissal of the charges against the defendant, the judge shall also order the expungement of the defendant's arrest record" if the attorney for the Commonwealth did not object to expungement within the 30-day period after service of the motion to dismiss. *Id.* at 320. If the Commonwealth files an objection, the judge "shall hold a hearing on the objections" where the Commonwealth must present "compelling reasons why the arrest record should be retained." *Id.*

³² 35 PA. STAT. ANN. § 780-119 (West 2018).

³³ PA. R. CRIM. P. 791.

³⁴ *Id.* at 791(A)(1); Pennsylvania Judicial Center, *For the Public*, UNIFIED JUD. SYS. PA., <http://www.pacourts.us/forms/for-the-public> (last visited Apr. 20, 2018).

³⁵ PA. R. CRIM. P. 791(A)(2)(a)–(k).

³⁶ *Id.* at 791(B)(1).

³⁷ *Id.* at 791(B)(2).

criminal justice agency or government agency as provided in 18 Pa. C.S. § 9122.1.³⁸

Such an order must contain the judge's reasoning for granting the petition.³⁹ If the judge denies the petition, they must enter an order denying the petition and, again, state their reasoning.⁴⁰

III. WHAT INFORMATION IS SUBJECT TO EXPUNGEMENT OR AN ORDER FOR LIMITED ACCESS?

A. *Expungement*

18 Pa. C.S.A. § 9122 prescribes when criminal history record information can be expunged under Rules 709 and 409.⁴¹ Section 9122(a)(1) states that criminal history record information

shall be expunged in a specific criminal proceeding when no disposition⁴² has been received or, upon request for criminal history record information, no

³⁸ *Id.* at 791(B)(4).

³⁹ *Id.* at 791(C)(1)(i).

⁴⁰ *Id.* at 791(B)(5).

⁴¹ 18 Pa. C.S.A. § 9122 (2018).

⁴² The Commonwealth defines "disposition" as

[i]nformation indicating that criminal proceedings have been concluded, including information disclosing that police have elected not to refer a matter for prosecution, that a prosecuting authority has elected not to commence criminal proceedings or that a grand jury has failed to indict and disclosing the nature of the termination of the proceedings; or information disclosing that proceedings have been indefinitely postponed and also disclosing the reason for such postponement. Dispositions of criminal proceedings in the Commonwealth shall include, but not be limited to, acquittal, acquittal by reason of insanity, pretrial probation or diversion, charge dismissed, guilty plea, nolle prosequi, no information filed, nolo contendere plea, convicted, abatement, discharge under rules of the Pennsylvania Rules of Criminal Procedure, demurrer sustained, pardoned, sentence commuted, mistrial-defendant discharged, discharge from probation or parole or correctional supervision.

18 PA. CONS. STAT. § 9102 (2018).

disposition has been recorded in the repository⁴³ within 18 months after the date of arrest and the court of proper jurisdiction certifies . . . that no disposition is available and no action is pending.⁴⁴

Section 9122(a)(2) states that “criminal history record information shall be expunged . . . when a court order requires that such non-conviction data be expunged.”⁴⁵ Finally, § 9122(a)(3) states that

criminal history record information shall be expunged . . . when a person 21 years of age or older who has been convicted of a violation [relating to the purchase, consumption, possession or transportation of liquor or malt or brewed beverages] which occurred on or after the day the person attained 18 years of age, petitions the court of common pleas in the county where the conviction occurred seeking expungement and the person has satisfied all terms and conditions of the sentence imposed for the violation, including any suspension of operating privileges imposed [relating to the restriction of vehicle operating privileges].⁴⁶

Section 9122(b) describes when criminal history record information “may” be expunged. The first is when “[a]n individual reaches 70 years of age and has been free of arrest or prosecution for ten years following final release from confinement or supervision.”⁴⁷ The second is when “an individual who is the subject of the information has been dead for three years.”⁴⁸ Finally, a person convicted of a summary offense can petition the court for expungement if they have been “free of arrest or prosecution for five years following the conviction for that offense.”⁴⁹ The Pennsylvania Supreme Court ruled that the five-year period in § 9122(b)(3)(i) denotes any five-year period following the summary offense conviction in which the

⁴³ A “repository” is “[a]ny location in which criminal history record information is collected, compiled, maintained and disseminated by a criminal justice agency.” *Id.*

⁴⁴ *Id.* § 9122(a)(1).

⁴⁵ *Id.* § 9122(a)(2).

⁴⁶ *Id.* § 9122(a)(3).

⁴⁷ *Id.* § 9122(b)(1).

⁴⁸ *Id.* § 9122(b)(2).

⁴⁹ *Id.* § 9122(b)(3)(i).

offender is arrest- or prosecution-free, not the five years immediately following the case's conclusion.⁵⁰

When reviewing petitions for expungement, courts “must balance the individual’s right to be free from harm attendant to maintenance of [the] arrest record against [the] Commonwealth’s interests in preserving such [a] record.”⁵¹ *Commonwealth v. Wexler* provides a list of factors to be used when making this decision: (i) the strength of the Commonwealth’s case against petitioner; (ii) the reasons the Commonwealth gives for wishing to retain the arrest record; (iii) the petitioner’s age, employment history and criminal record; (iv) the amount of time that has elapsed between the arrest and the filing of a petition; and (v) the specific adverse consequences the petitioner may endure should the petition be denied.⁵²

B. Orders for Limited Access

Misdemeanors are not eligible for expungement in Pennsylvania; however, with the implementation of § 9122, Pennsylvanians can obtain orders for limited access to information regarding certain misdemeanors.⁵³ Individuals who have remained arrest-and-prosecution-free for ten years following the conclusion of their case can petition for a court order that

criminal history record information maintained by any criminal justice agency pertaining to a conviction for a misdemeanor of the second degree, a misdemeanor of the third degree or an ungraded offense which carries a maximum penalty of no more than two years be disseminated only to a criminal justice agency or a government agency.⁵⁴

⁵⁰ See *Commonwealth v. Giuliani*, 141 A.3d 1262, 1270 (Pa. 2016).

⁵¹ *Id.* at 1267.

⁵² *Commonwealth v. Wexler*, 431 A.2d 877 (Pa. 1981).

⁵³ 18 PA. CONS. STAT. § 9122.1 (2018).

⁵⁴ *Id.* § 9122.1 (2018). There are exceptions. A person is not eligible to seal his or her second or third-degree misdemeanor if that person was ever convicted of:

- (1) an offense punishable by imprisonment of more than two years, (2) four or more offenses punishable by imprisonment of one or more years, (3) a violation of § 2701 (relating to simple assault) unless the offense is graded as a third degree misdemeanor, (4) a violation of § 3129 (relating to sexual intercourse with an animal), (5) a violation of § 4912 (relating to impersonating a public servant), (6) a violation of § 4952 (relating to

Further, before a Commonwealth criminal justice agency disseminates criminal record information to an individual or noncriminal justice agency, it must “extract” information relating to the initiation of criminal proceedings where (i) three years have elapsed from the date of the arrest, (ii) no conviction as occurred, and (iii) no proceedings are pending seeking a correction.⁵⁵ Unlike expungements under § 9122(a)(1), these “extractions” do not require an individual to file a petition.⁵⁶

IV. WHY ARE EXPUNGEMENT AND ORDERS FOR LIMITED ACCESS IMPORTANT?

The United States is often championed as a “land of second chances,”⁵⁷ and Act 5 is specifically meant to provide Pennsylvanians with a “clean slate” after certain criminal convictions.⁵⁸ Individuals who have had their records expunged “express a sense of accomplishment (increased confidence and self-esteem), a sense of hope (focus on the future), and a sense of agency (control over their lives).”⁵⁹ This is likely because, in the United States, convincing people to provide employment, housing, or education to someone with a criminal background is often difficult.⁶⁰

intimidation of witnesses or victims), (7) a violation of § 4953 (relating to retaliation against witness, victim, or party), (8) a violation of § 4958 (relating to intimidation, retaliation or obstruction in child abuse cases), or (9) an offense which requires the offender to register as a sex offender.

Id. § 9122.1(b)(1)–(9). Further, information subject to an order for limited access may be disseminated to Commonwealth licensing agencies. *Id.* § 9122.1(a)(1)–(2).

⁵⁵ *Id.* § 9121(b)(2)(i)(A)–(C).

⁵⁶ *Id.* § 9121(a)(3).

⁵⁷ See Address Before a Joint Session of the Congress on the State of the Union, 1 Pub. Papers 81 (Jan. 20, 2004) (“America is the land of [the] second chance, and when the gates of the prison open, the path ahead should lead to a better life.”); see also Meg Leta Ambrose, Nicole Friess, Jill Van Matre, *Seeking Digital Redemption: The Future of Forgiveness in the Internet Age*, 29 SANTA CLARA COMPUTER & HIGH TECH. L.J. 99, 122–23 (2013) (arguing that “[b]asic American values and ideas of fairness stemming from pioneer histories, including allowing individuals to start afresh or wipe the slate clean, are in stark contrast with existing data production, collection, retention, and retrieval practices” associated with criminal records).

⁵⁸ S.B. 1197, 2015 Reg. Sess. (Pa. 2016); H.B. 1984, 2015 Reg. Sess. (Pa. 2016).

⁵⁹ Keramet Reiter, Jeffrey Selbin & Eliza Hersh, Opinion, *Should a Shoplifting Conviction Be an Indelible Scarlet Letter? Not in California*, L.A. TIMES (Dec. 28, 2014, 4:00 PM), <http://www.latimes.com/opinion/op-ed/la-oe-selbin-prop-47-criminal-records-20141229-story.html> (op-ed authored by researchers conducting qualitative study).

⁶⁰ See *infra* Part V., at 184–86.

The formal sanctions and informal biases against those with criminal records, known as “collateral consequences” of criminal conviction, are why obtaining expungement and orders for limited access are so important. In the following sections, I will describe the collateral consequences of criminal conviction in Pennsylvania. I will then discuss several systemic issues with criminal record expungement, then compare Pennsylvania’s expungement law to those of other states. Finally, I will discuss possible ideas for new legislation by the Pennsylvania General Assembly.

V. WHAT ARE COLLATERAL CONSEQUENCES?

The distinction between direct and collateral consequences of a criminal conviction is not entirely clear.⁶¹ However, the United States Supreme Court has described collateral consequences as “those matters not within the sentencing authority of the state trial court.”⁶² The Pennsylvania Supreme Court has defined the distinction between a direct and collateral consequence of a guilty plea as “the distinction between a criminal penalty and a civil requirement over which a sentencing judge has no control.”⁶³ One group of commentators describe collateral consequences as “the wide range of status-related penalties that are permitted or required by law because of a conviction even if not included in the court’s judgement,”⁶⁴ or “the range of legal penalties and disabilities that flow from a criminal conviction over and above the sentence imposed by the court.”⁶⁵ Law Professor Jenny Roberts describes them as those consequences that are not “‘direct,’ or penal, sanctions—such as jail or prison time, probationary period or a fine—which will result from conviction.”⁶⁶

⁶¹ See *Padilla v. Kentucky*, 559 U.S. 356, 364 n.8 (2010) (“There is some disagreement among the courts over how to distinguish between direct and collateral consequences.”).

⁶² *Id.* at 364.

⁶³ *Commonwealth v. Abraham*, 62 A.3d 343, 350 (Pa. 2012).

⁶⁴ MARGARET COLGATE LOVE, JENNY ROBERTS & CECELIA KLINGELE, *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY & PRACTICE* § 1:7 (2016).

⁶⁵ *Id.* § 1:8.

⁶⁶ Jenny Roberts, *Ignorance is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 124 (2009).

A. Collateral Consequences in Pennsylvania

In Pennsylvania, the collateral consequences of criminal conviction are numerous. A felony conviction bars an individual from voting,⁶⁷ enlisting in the armed services,⁶⁸ and possessing a firearm.⁶⁹ Certain convictions can also affect individuals' ability to obtain professional licenses.⁷⁰ However, the impact of a guilty conviction is especially significant when individuals attempt to gain employment or housing.

1. Employment

The CHRIA controls how Pennsylvania's employers can use criminal history record information.⁷¹ Employers may consider felony and misdemeanor convictions, but "only to the extent to which they relate to the applicant's suitability for employment in the position for which he has applied."⁷² If an employer decides not to hire an applicant based "in whole or in part" on criminal history record information, the employer must send written notice to the applicant.⁷³

Expungement and orders for limited access are extremely important for improving offenders' job prospects. Even within occupations that do not require a license, background screening is extremely commonplace.⁷⁴ While individuals may

⁶⁷ U.S. CONST. amend. XIV, § 2.

⁶⁸ 10 U.S.C.A. § 504(a) (West 2018).

⁶⁹ 18 PA. CONS. STAT. § 6105(a)(1) (2018).

⁷⁰ *Id.* § 9124. A licensing agency (a "board, commission or department of the Commonwealth") may consider criminal convictions when determining an applicant's eligibility for "licensing, certification, registration or permission to engage in a trade, profession, or occupation." *Id.* § 9124(a). These agencies can refuse to renew or to revoke licenses when the applicant has been convicted of any felony, or a misdemeanor that "relates to the trade, occupation, or profession for which the license . . . is sought." *Id.* § 9124(c). However, convictions "shall not preclude the issuance of a license, certificate, registration or permit." *Id.* § 9124(a). Licensing agencies are not allowed to base their decision on: "(1) records of arrest if there is no conviction of a crime based on the arrest, (2) convictions which have been annulled or expunged, (3) convictions of a summary offense, and (4) convictions for which the individual has received a pardon from the Governor [of Pennsylvania]." *Id.* § 9124(b)(1)–(4). Further, licensing agencies cannot consider convictions which "do not relate to the applicant's suitability for the license, certification, registration, or permit." *Id.* § 9124(b)(5).

⁷¹ *Id.* § 9125.

⁷² *Id.* § 9125(b).

⁷³ *Id.* § 9125(c).

⁷⁴ Research shows that 69% of such employers utilize background checks. *Background Checking—The Use of Criminal Background Checks in Hiring Decisions*, SOCIETY FOR HUMAN RESOURCE MGMT. (July 19,

obtain injunctive relief and damages against employers who use criminal history record information in a way that violates the CHRIA,⁷⁵ such a claim may be difficult to prove. Orders for expungement and limited access completely remove the applicant's reliance on employers to follow the CHRIA.

2. Housing

The stigma of a criminal conviction, or even the record of an arrest that did not lead to conviction, can create "significant barriers to securing housing."⁷⁶ The CHRIA does not specify how property owners may use criminal history record information to evaluate rental applicants, and the federal Fair Housing Act does not explicitly prohibit discrimination on the basis of an applicant's criminal convictions.⁷⁷ There is no data on the number of people excluded from public housing because of criminal records, or even the number of people with criminal records who would be ineligible if they applied.⁷⁸ However, an estimated 80% of private landlords conduct background checks,⁷⁹ likely disqualifying many with criminal records before they have a chance to demonstrate their suitability as tenants.

VI. OTHER ISSUES

There are several other systemic issues with collateral consequences beyond their effect on offenders' rights.⁸⁰ Many collateral consequences stem from laws that were promulgated without serious coordination; they appear in various state statutes, municipal ordinances, and agency regulations, making it difficult to identify which consequences apply to particular offenses.⁸¹ Further, when the consequences are not part of the official sentencing process, prosecutors and judges generally do not

2012), <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/pages/criminalbackgroundcheck.aspx>.

⁷⁵ 18 PA. CONS. STAT. § 9183 (2018).

⁷⁶ U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS (2016).

⁷⁷ 42 U.S.C. § 3631 (2018).

⁷⁸ MICHELLE ALEXANDER, *THE NEW JIM CROW* 147 (2012).

⁷⁹ David Thacher, *The Rise of Criminal Background Screening in Rental Housing*, 33 L. & SOC. INQUIRY 5, 5–12 (2008).

⁸⁰ LOVE ET AL., *supra* note 64, § 1:2.

⁸¹ *Id.*

consider whether they are appropriate in a given case.⁸² Oftentimes, this occurs because the judge, prosecutor, and even defense attorney are unaware that the consequences exist and do not “regard it as their job to inquire, much less inform the defendant about them.”⁸³ Thus, many defendants leave court unaware of their new constraints.⁸⁴

Individuals need not even be convicted before being stigmatized as a criminal; withdrawn or unpursued charges stay on a person’s record for three years unless that person has the means to hire an attorney to petition the court for expungement.⁸⁵ For many people with criminal records, doing so is simply too costly, making expungement impossible without outside help. This issue is a component of a larger problem involving criminal history record information: low-income offenders are more likely to have a criminal record, more likely to be affected by having such a record, and are frequently unable to rid themselves of their record due to financial constraints.⁸⁶ In this way, criminal records are both a “cause and consequence” of poverty.⁸⁷ It is a cause in that the collateral consequences of criminal records can make it extremely difficult to find employment and housing. It is a consequence because those in poverty are often the target of police investigation, particularly over the past three to four decades.⁸⁸

VII. POSSIBLE SOLUTIONS

One of the ways in which the collateral consequences of a criminal conviction can be mitigated is by expanding the classes of crimes available for criminal history record information expungement. The meaning of the term “expungement” differs across jurisdictions; what some states consider expungement is akin to what

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *See generally* 18 PA. CONS. STAT. §§ 9121, 9122, 9122.1 (2018).

⁸⁶ REBECCA VALLAS & SHARON DIETRICH, CTR. FOR AM. PROGRESS, ONE STRIKE AND YOU’RE OUT: HOW WE CAN ELIMINATE BARRIERS TO ECONOMIC SECURITY AND MOBILITY FOR PEOPLE WITH CRIMINAL RECORDS 29 (2014).

⁸⁷ *Id.* at 1.

⁸⁸ *See, e.g.*, JEFFREY REIMAN & PAUL LEIGHTON, THE RICH GET RICHER AND THE POOR GET PRISON: IDEOLOGY, CLASS, AND CRIMINAL JUSTICE 178 (Routledge 11th ed. 2016) (1979) (stating that “our present criminal justice system is heir to a long tradition of associating crime with the lower classes”).

Pennsylvania calls orders of limited access under § 9122.1.⁸⁹ Nevertheless, it is possible to “draw an overview of the scope of record clearing across the nation,”⁹⁰ and while Pennsylvania took an important step forward when it passed Act 5, it is still “behind many other jurisdictions in the scope of [its] record-clearing law.”⁹¹

For example, eleven states provide expungement or sealing for a significant number of felony convictions (Arizona, Arkansas, Indiana, Kansas, Massachusetts, Minnesota, Nevada, New Hampshire, Puerto Rico, Utah, and Washington).⁹² Oregon and Tennessee also provide expungement of minor felonies.⁹³ Eight other states provide record clearing to most offenders with misdemeanor convictions, including first-degree misdemeanors (Delaware, Illinois, Kentucky, North Carolina, Oklahoma, South Dakota, Vermont, and Wyoming).⁹⁴ Four states, including two of Pennsylvania’s neighbors, provide record-clearing remedies for most first-time offenders, including some sentenced to prison (Michigan, New Jersey, Ohio and Rhode Island).⁹⁵ Thus, even with the enactment of § 9122.1, at least 23 states provide broader record clearing remedies.⁹⁶ Pennsylvania should expand the classes of criminal records that can be expunged to include non-violent, minor felonies, particularly drug convictions.

Another possible method for increasing access to expungement is making the process automatic in particular situations. If the General Assembly already believes that certain criminal records should be expungable by petition, why not expunge these records automatically? This is especially true for non-violent offenses like drug possession. Further, automatic expungement is the only way that many indigent offenders will be able to clear their record and obtain employment or housing.

The General Assembly could also implement a mechanism whereby indigent offenders who owe court costs could file a petition for either permanent or temporary relief of these costs. The general rule that offenders cannot expunge their record if

⁸⁹ LOVE ET AL., *supra* note 64, § 4:6.

⁹⁰ Dietrich, *supra* note 7, at 170.

⁹¹ *Id.*

⁹² LOVE ET AL., *supra* note 64, at Appendix A-7.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Dietrich, *supra* note 7, at 171.

they owe any court costs can put people into a difficult catch-22: because of their criminal record they are unable to obtain a job, and without a job they cannot pay their court costs, meaning that they cannot remove their criminal record. Offenders who can afford court costs do not have this problem. This means that two people with the exact same criminal conviction could face radically different consequences for their conviction, merely based on relative economic status. This type of two-tiered justice system is inherently unfair.

In the absence of legislation at the state level, a possible local solution is the implementation of “ban the box” measures. Under these statutes, individual’s criminal history is revealed to a potential employer only after an opportunity for an interview has been granted or after a decision to offer employment has been reached.⁹⁷ Pittsburgh’s City Council passed two ban the box ordinances on December 17, 2012, one applying to city employment, the other to city contractors. Ordinance 2012-0013 provides that, except for certain safety-sensitive positions,⁹⁸ the City will not inquire about criminal background until it has determined that the applicant is otherwise qualified for the position.⁹⁹ At that point, the City will make a conditional job offer, pending a background check.¹⁰⁰ If the City believes it has ground to rescind the offer after the background check, the applicant must be given an opportunity to provide “clarifying information.”¹⁰¹ Ordinance 2012-0015 provides that municipal contracts shall have a provision requiring the contractor to comply with § 81.12(b), subject to exceptions recommended by the City Solicitor and approved in writing by the Mayor.¹⁰² These ordinances provide a step towards improving job prospects for those with criminal convictions. The broadening of expungement laws at the state level would have a much wider impact, however, and is a more appropriate solution.

⁹⁷ LOVE ET AL., *supra* note 64, § 6:17.

⁹⁸ “Excluding applications for the . . . positions of police officer, fire fighter, paramedic and school crossing guard, and except as otherwise required by state and federal law.” PITTSBURGH, PA., CODE OF ORDINANCES, tit. 1, art. XI, ch. 181, § 181.12(B)(1) (2018).

⁹⁹ *Id.*

¹⁰⁰ *Id.* § 181.12(B)(2).

¹⁰¹ *Id.* § 181.12(B)(3).

¹⁰² *Id.* at art. VII, ch. 161, § 161.16.

VIII. CONCLUSION

Pennsylvania has almost four million people with some sort of criminal background.¹⁰³ For this population, legal consequences and informal social stigmas associated with their records hold them back in life, sometimes even decades after the incident occurred. While § 9122 is a step in the right direction, Pennsylvania is still behind almost half of the nation in terms of the expansiveness of its expungement law.¹⁰⁴ More generous eligibility and an automated approach to expungement would help people across the state obtain housing, employment. More importantly, such measures may allow individuals across Pennsylvania to regain their agency and dignity.

¹⁰³ Dietrich, *supra* note 7, at 172.

¹⁰⁴ *Id.* at 171.