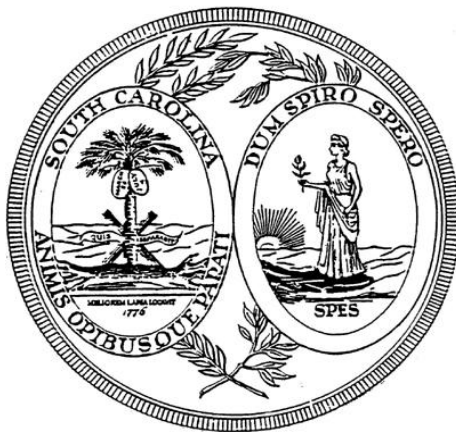


THE STUDY COMMITTEE ON EXPUNGEMENT OF CRIMINAL OFFENSES

REPORT TO THE GENERAL ASSEMBLY



October 13, 2014

Committee Members:

Senator Karl B. Allen, Chairman
Representative J. Todd Rutherford, Vice Chairman
Representative J. Derham Cole, Jr.
Senator Thomas D. "Tom" Corbin
Representative Peter M. McCoy, Jr.
Senator Paul Thurmond

Staff:

Emma Dean
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BACKGROUND

Act 323 of the 2013-2014 Legislative Session established the Study Committee on Expungement of Criminal Offenses (Committee). The Committee is directed to review the State's criminal laws to determine which criminal offenses may be appropriate for expungement after a certain time period and under certain circumstances, and to make recommendations to the General Assembly regarding proposed changes to the expungement laws affecting adults and juveniles. The Committee is required to review information, including, but not limited to, statistics available from the courts, the Commission on Prosecution Coordination, and the Commission on Indigent Defense regarding current expungement rates and criminal offenses that may be appropriate for expungement. In addition, the Committee is required to review expungement laws in other states.

The study committee is composed of three Senate members appointed by the Senate Judiciary Committee Chairman and three House of Representative (House) members appointed by the House Judiciary Committee Chairman. The Senate appointees are Senator Karl B. Allen, Senator Thomas D. "Tom" Corbin, and Senator Paul Thurmond. The House appointees are Representative J. Todd Rutherford, Representative J. Derham Cole, Jr., and Representative Peter M. McCoy, Jr.

The Committee is required to report recommendations to the General Assembly by October 13, 2014, at which time the Committee is dissolved.

The Committee met for the first time on August 13, 2014, for the purpose of organizing and selecting a Chairman and Vice Chairman. The Committee selected Senator Karl B. Allen as Chairman and Representative J. Todd Rutherford as Vice Chairman. The Committee also received an explanation of the Committee's duties and scheduled future meetings. On August 27, 2014, the Committee met to receive general testimony regarding expungement issues. On September 9, 2014, the Committee met to receive further general testimony and to identify key expungement issues for discussion at future meetings. The Committee met on September 19, 2014, September 26, 2014, and October 1, 2014, to receive specific testimony and suggestions regarding the identified issues. The Committee met for the last time on October 8, 2014, to discuss the issues, suggestions, and make a report to the General Assembly.

The Committee received testimony and suggestions from the courts, the Commission on Prosecution Coordination, the Department of Probation, Parole and Pardon Services, the Board of Pardons and Pardons, public defenders, solicitors, law enforcement, counties and municipalities, criminal defense lawyers, media, victim advocates, juvenile advocates, ex-offender advocates, constituents, and others.

COMMITTEE RECOMMENDATIONS

The Committee determined from the amount of testimony, the number of issues and suggestions, and the subject matter's complexity, that the Committee needs additional time to study expungements. This report outlines the expungement issues identified through testimony and the suggestions proposed by those who testified. The Committee discussed the issues and suggestions but did not vote to approve or disapprove the suggestions. Instead, the Committee recommends:

1. A task force of stakeholders interested in expungement issues should be established to review the issues and suggestions outlined in this report to determine if the stakeholders can reach agreements as to the issues and suggestions. The task force should be made up of representatives from the courts, the Commission on Prosecution Coordination, the Department of Probation, Parole and Pardon Services, public defenders, solicitors, law enforcement, counties and municipalities, criminal defense lawyers, media, victim advocates, juvenile advocates, ex-offender advocates, and others. The task force should begin meeting under the direction of Committee staff as soon as possible.

2. Committee staff should draft a bill consisting of all expungement statutes to pre-file for introduction in the Senate and House prior to the 2015-2016 legislative session. Also, Committee staff should draft a resolution to pre-file for introduction in the Senate and House prior to the 2015-2016 Legislative Session to re-establish this Committee, so that the Committee can continue to meet and discuss expungement issues.

3. Provided that the bill and resolution are referred to the Senate and House Judiciary Committees, the Senate Judiciary Committee Chairman should appoint the Senate members of this Committee to a special subcommittee to take up the bill and resolution. The House Judiciary Committee Chairman should refer the bill and resolution to the appropriate subcommittee. The House members of this Committee will be available to provide assistance to the House subcommittee. The subcommittees should take up the issues and suggestions presented in this report, as well as take into consideration suggestions and any agreements made by the stakeholder task force.

ISSUES AND SUGGESTIONS FROM TESTIMONY

The remainder of this report outlines the expungement issues identified during the testimony and the suggestions proposed by those who testified.

The Expungement Statutes and Process

The Expungement statutes are spread out amongst the various South Carolina Code sections. Individuals often have a difficult time finding the statutes and cohesively interpreting how the various statutes interact. Many statutes were created or amended in piecemeal fashion. As a result, attorneys, judges, agencies, and the like, have had a difficult time interpreting the statutes and determining the statutes' intent. In fact, the Attorney General regularly receives inquiries regarding interpretation of the expungement statutes.

Similarly, the expungement process is considered complex and difficult to understand. Applicants have a difficult time finding out how to apply for expungements, determining whether they are eligible for expungements, and following the expungement process. Additionally, agencies involved in the expungement process often complain that there are better and more efficient ways to handle expungements.

Suggestions from Testimony:

The expungement statutes should be consolidated and simplified. Also, the statutes' language should clearly provide direction and indicate the Legislature's intent.

The expungement process should be simplified and made easier to understand. The process should also be streamlined for efficiency.

The Cost Of Expungements

Expungements are expensive to process. The solicitors offices, courts, clerks of courts, SLED, and other agencies spend significant resources and employee hours processing expungements. The application process, verification process, and other required procedures cost agencies significant funds. Rarely do these agencies receive funds from the State or local governments specifically dedicated to expungements. Instead, expungements are predominantly paid for by the applicants. The funds received from applicants are often inadequate to pay for the actual cost of processing the applications. In addition, if a charge is dismissed or an individual is found not guilty, the fees are waived; thus, the agencies have to process the expungement with no reimbursement. Some of those charges are dismissed as the result of a plea bargain.

Expungements are also expensive for applicants. Many of whom are indigent or lower income. The \$250 expungement administration fee combined with the \$35 court filing fee, the \$25 SLED verification fee, and other related expenses often makes obtaining an expungement an impossibility.

Suggestions from Testimony:

State and local governments should provide funding dedicated to the processing of expungements.

If an individual's charges are dismissed as the result of a plea bargain, the individual should be required to pay the expungement fees or reduced expungement fees.

Expungement fees should be reduced or waived for those individuals determined to be indigent or lower income.

Pardons

Individuals who seek pardons are often confused about the impact the pardon will have upon their criminal records. A pardon means that an individual is fully forgiven from all legal consequences of the individual's crime. The Board of Pardons and Paroles (Board) determines if an individual is eligible for a pardon. The Board can grant a pardon; however, the Board does not have the ability to order expungements. The Board's decision is the final determination of pardon eligibility. A pardon fully restores an individual's civil rights lost as the result of a conviction, including, but not limited to, the right to vote, serve on a jury, hold certain public offices, testify at trial, and be licensed for certain occupations. However, a pardon does not expunge an individual's criminal record.

Suggestions from Testimony:

Allow individuals to apply to the Board for expungements at the same time the individuals apply for pardons. The Board should be able to determine if an individual is eligible for both a pardon and an expungement.

Eligible Offenses

Currently, several questions exist regarding South Carolina's expungement laws. Should SLED be able to consider convictions from other states when determining an individual's eligibility for expungement? Does an expungement for a first offense of one crime prohibit an individual from receiving an expungement for a first offense of another crime? Does expungement mean destruction of records or sealing of records? What is the applicable waiting period for an expungement? Is there a limit on the number of expungements an individual can receive? Should expungements be automatic?

Misdemeanor Offenses

Section 22-5-910 provides, in part, that an individual may apply for an expungement for a 1st offense conviction for a crime carrying a penalty of not more than 30 days imprisonment or a fine of \$1,000, or both, after 3 years from the date of the conviction. Misdemeanor offenses often have a penalty that exceeds 30 days imprisonment or a fine of \$1,000, or both; thus, an individual charged with such a misdemeanor offense is not eligible to apply for expungement.

Suggestions from Testimony:

Allow for the expungement of misdemeanor offenses regardless of the sentence.

Felony Offenses

Not all felony offenses are violent.

Suggestions from Testimony:

Allow for the expungement of non-violent felony offenses after a certain time period from conviction. The criminal records should be sealed instead of destroyed with limited access.

Non-violent and Violent Offenses

An individual who commits a violent offense is not eligible to apply for expungement. Not all non-violent offenses are eligible for expungement.

Suggestions from Testimony:

Allow for the expungement of nonviolent offenses.

Violent crimes, serious offenses, most serious offenses, sex offenses, and crimes against children should not be eligible for expungement.

Drug Offenses

An individual who commits a 1st time low-level drug offense can receive a conditional discharge and is eligible for expungement. However, individuals do not always receive conditional discharges for 1st time low-level drug offenses and are often not eligible for expungements.

Suggestions from Testimony:

Allow for the expungement of 1st time drug possession offenses, regardless of whether the individual received a conditional discharge.

Allow for the expungement of 1st time drug possession with intent to distribute offenses after a certain time period from conviction. The criminal records should be sealed instead of destroyed with limited access.

DUI/DUAC Offenses

Confusion exists as to whether Driving Under the Influence (“DUI”) offenses and Driving with an Unlawful Alcohol Concentration (“DUAC”) offenses are eligible for expungement. The DUI and DUAC statutes do not consider a conviction a prior offense, if the offense did not occur within 10 years of the subsequent offense.

Suggestions from Testimony:

Clarify whether or not DUI and DUAC offenses are eligible for expungement.

Allow for expungement of 1st offense DUI and DUAC after 10 years from conviction, if the individual has not committed a subsequent offense within the 10 year period.

Fraudulent Check Offenses

Confusion exists as to whether an individual is entitled to the expungement of more than one fraudulent check conviction when the individual was arrested at the same time for multiple counts of fraudulent checks or was convicted of multiple counts of fraudulent checks on the same day.

Suggestions from Testimony:

Allow for the expungement of multiple fraudulent check charges connected to a specific time period once restitution and fees have been paid.

Traffic Offenses, DNR Offenses, and Local Ordinance Violations

Traffic offenses, DNR offenses, and local ordinance violations are not eligible for expungement.

Suggestions from Testimony:

Allow for the expungement of traffic offenses, DNR offenses, and local ordinance violations if an arrest record is involved.

Traffic offenses with no arrest records should not prohibit an individual from obtaining an expungement.

Mugshot Websites

Booking or arrest photographs (mug shots) obtained from law enforcement are often reposted on commercial websites. Some commercial websites charge a fee to remove the mug shots even if the individual's charges are dismissed or the individual is found not guilty. Individuals often cannot afford to pay the fee to remove the mug shots. As a result, the mug shots remain on the websites damaging the individual's reputation.

Suggestions from Testimony:

Arrest records, including mug shots, should be sealed with limited access until a final determination has been made of an individual's innocence or guilt.

Commercial websites should be prohibited from charging fees for removing mug shots of individuals who have been found innocent or of individuals whose charges have been dismissed.

Job Discrimination

Employment is an important element of an ex-offender becoming a productive member of society. Without employment many ex-offenders return to a life of crime. Often individuals with criminal records, even records that have been expunged, have a difficult time finding employment. Employers are reluctant to hire ex-offenders. Employers often require job applicants to disclose criminal offenses even if the charges were dismissed or the individual was found not guilty.

Suggestions from Testimony:

Applicants for employment and licensing who have received expungements should be protected from discrimination by both private and public employers, including licensing agencies.

Once a criminal record is expunged, an individual should be able to deny the record's existence. The individual should be able to properly reply that no record exists upon inquiry.

Employers should be required to make an individual determination as to whether a conviction bears a rational relationship to the employment.

Employers who hire individuals who have received expungements should be insulated from liability.

Juveniles

Juvenile records are sealed and are eligible for expungement by court order when the juvenile reaches 18 years of age. Many juveniles do not know that they can have their records expunged; thus, their records remain accessible by certain agencies.

Suggestions from Testimony:

Allow for individuals to apply for expungements at 17 years of age.

All juvenile records relating to status or non-violent offenses should be automatically expunged once the case is dismissed or the juvenile has completed any dispositional sentence.

Juveniles who commit more serious crimes should be afforded a mechanism to apply for expungement.

Youthful Offenders

Section 22-5-920 provides that an individual who is not sentenced pursuant to the “Youthful Offender Act” (YOA) is not eligible to have records expunged pursuant to the YOA. Many offenders fall into the “youthful offender” category; however, they are not sentenced pursuant to the YOA, so they are not eligible for expungements pursuant to the YOA.

Suggestions from Testimony:

An individual who meets the definition of a “youthful offender” at the time of the individual’s conviction should be eligible for expungement regardless of whether the individual was sentenced as a “youthful offender” pursuant to the YOA.