

The Just Criminal Justice Group, LLC



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TESTIMONY IN SUPPORT OF LEGISLATION PERTAINING TO THE EXPUNGMENT OF CRIMINAL RECORDS

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Addressing Common Misconceptions About Expungement.

In weighing the merits of the legislation referenced here legislators might find it helpful to consider the following question:

What exactly happens to information about the criminal case after a motion to expunge is granted?

There are many common misconceptions about this under current Rhode Island law. Many think that after the motion to expunge is granted that this information is dropped into the proverbial ‘black hole’ never to be seen or heard from again. Nothing could be further from the truth. Relying on existing law (that would remain unchanged by the pending legislation now under consideration should it be enacted into law) this is how expunged material can be accessed for a variety of legitimate, appropriate, and public safety purposes:

MISCONCEPTION #1. Once a Case Is Expunged An “Iron Curtain” Descends That Prevents Any and All Inquiry Into the Facts, Circumstances, and Disposition of That Case.

- While RIGL Sec. 12-1.3-4(a), (b) allows a person whose conviction of a crime has been expunged to state that he/she has never been convicted of the crime there are also EXCEPTIONS that require disclosure about the expunged case if the person is an applicant for:
 - a law enforcement agency position
 - admission to the bar of any court
 - a teaching certificate, under chapter 11 of title 16
 - a coaching certificate under § 16-11.1-1
 - the operator or employee of an early childhood education facility pursuant to chapter 48.1 of title 16

In these instances, the person, party, or agency receiving the application may properly inquire into the applicant’s prior criminal record and the applicant must respond truthfully.

MISCONCEPTION #2. Once a Case Is Expunged the Custodian of the Records is Prohibited from Ever Disclosing Any Information About the Criminal Case.

- While RIGL Sec. 12-1.3-4(c), (d) prohibits the custodian of records that have been expunged from disclosing the existence of the records there are also EXCEPTIONS that require the custodian to disclose when the inquiry is that of:
 - the individual whose record was expunged
 - a sentencing court following the conviction of the individual for the commission of a crime
 - a bar admission, character and fitness, or disciplinary committee, board, or agency, or court which is considering a bar admission, character and fitness, or disciplinary matter
 - the commissioner of elementary and secondary education
 - any law enforcement agency when the nature and character of the offense with which an individual is to be charged would be affected by virtue of the person having been previously convicted of the same offense
 - pursuant to an order of a court in order to effectuate the aforementioned provisions

Therefore, disclosure of an expunged criminal record is permitted in the following circumstances:

- to the court in connection with sentencing in a subsequent case
- to law enforcement when it makes the initial charging decision e.g. first, second, third, and subsequent domestic violence and certain drug offenses provide for an increase in both charge (from a misdemeanor to a felony) and penalty (mandatory jail)
- by court order

MISCONCEPTION #3. Expungements Are Granted Automatically Without Consideration of the Applicants Moral Character, Rehabilitation & Public Safety Concerns.

- RIGL Sec. 12-1.3-3(b)(1),(2) requires that the judge considering the petitioner’s expungement request make inquiry into the petitioner’s good moral character, rehabilitation, and that the expungement is consistent with the public interest
- A representative of the Department of the Attorney General is required to be present at each and every court proceeding whenever an application for an expungement is heard by the District or Superior Court. That representative can and does speak to the issue of eligibility for expungement and the factors that the court is obliged to consider; the petitioner’s good moral character, rehabilitation, and that the expungement is consistent with the public interest.

- If dissatisfied with the court's ruling granting the expungement application the Department of the Attorney General can and does appeal to the Rhode Island Supreme Court which can and frequently does overturn the lower court's decision.
- Anecdotal information and research strongly suggest that each and every application for expungement is carefully considered by the trial judges of the state taking into account those statutory factors that they are obliged to consider when acting upon an application for expungement.

MISCONCEPTION #4. Once a Case Is Expunged the Only Way to Access It Is By the Mechanism's Provided for in RIGL Sec. 12-1.3-4(c), (d).

- A court's order of expungement applies only to government entities and has limited effectiveness against 3rd parties.
- In the modern electronic online era the underlying facts, circumstances, and ultimate disposition of a case that has been expunged can remain on a variety of servers or "cached" in cyberspace long after they have been ordered removed from public access by the court.
- Instances where expunged material has been properly accessed via Lexis or other online services for free or for a fee paid for by potential employers.
- 2 CASE STUDIES: *State v. Wheaton*¹ & *State v. DeCarlo*²
 - **WHEATON:** Subsequent to conviction being overturned on appeal case was presumably expunged after dismissal or sealed after a "not guilty" verdict; as of 3/5/16 case does not appear on the RI Judiciary's online database of criminal records. However, information about the case still exists, can never be expunged, and is accessible in both the West Publishing Companies Atlantic Reporter and back issues of The Providence Journal.

¹ RI Judiciary's Portal to Access Criminal Records.

http://courtconnect.courts.ri.gov/pls/ri_adult/ck_public_qry_main.cp_main_idx

State v. Wheaton, 528 A.2d 1109, 1113 (RI 1987) (case dismissed because defendant was denied his right to a speedy trial)

Countersuit filed against town worker Providence Journal-Bulletin (Rhode Island) April 18, 2003, Friday South County Edition. "The countersuit cites a 1980s robbery conviction that had been expunged. Mr. Wheaton's case is one of immense legal significance because it stopped the travesty of delay used to incarcerate the accused, whether innocent or guilty, for unconstitutionally long periods of time before trial," said Judith Scott, Wheaton's attorney. "Mr. Wheaton has cause for just pride in the decision of the court."

² *Katie Mulvaney, Federal judge allows suit against ex-Providence detective, city in beating case, Providence Journal (3/16/16)* (suspended sentence for disorderly conduct imposed on Providence Police detective in connection with beating incident expunged; not available for public inspection; but still in public domain)

- DECARLO: In this case although a suspended sentence for disorderly conduct imposed on Providence Police detective in connection with beating incident was expunged and not available for public inspection information about the case is still in the public domain.

CONCLUSION: Expungement is a powerful tool that can enhance opportunities for rehabilitation (such as access to education, employment, and professional licensing) and a successful re-entry into society long after an individual with a criminal record has paid their debt to that same society. By addressing common misconceptions about the expungement process, it can be seen that his possibility for relief is carefully balanced with access to expunged material for a variety of legitimate, appropriate, and public safety purposes.

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