D.C. Open Government Coalition

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Supplemental Testimony of
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On behalf of the D.C. Open Government Coalition
April 16, 2021

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

**Bill 24-180 — "The Record Expungement Simplification To Offer Relief and Equity (RESTORE) Amendment Act of 2021"**

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I am Robert Becker, a member of the D.C. Open Government Coalition's board of directors, and I testified April 8, 2021 at the committee's hearing on bills 24-63 and 24-110. Because the notice for the hearing did not include Bill 24-180 introduced April 1, I only made passing mention of it in my written and oral testimony. Several other witnesses testified about the proposed RESTORE Act, and it was unclear from Chairman Allen's remarks whether the committee would hold a separate hearing on that bill, or might include its provisions in a more comprehensive bill for consideration later.

This Supplemental Testimony presents our serious concerns about the constitutionality of the expungement and sealing provisions in the bill and their impact on the public's right of access to criminal case files.

Bill 24-180 suffers from the same constitutional infirmities we discussed in our testimony regarding bills 24-63 and 24-110, and we will not repeat those arguments. The RESTORE Act would deny the public access to a much larger universe of criminal case files, and it would remove those files from public view more quickly than those bills would.

Bill 24-180 establishes for the first time a procedure for expunging criminal case records, as opposed to sealing them.[1] It replaces two code sections describing procedures for sealing criminal cases — D.C. Code § 16-802, Sealing of criminal records on grounds of actual innocence; and D.C. Code § 16-803, Sealing of public criminal records in other cases — with

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[1] Bill 24-110 was styled as the "Criminal Record Expungement Amendment Act of 2021," but its text merely amended definitions regarding sealing of criminal case records.

very different sections describing the practical meaning of expungement and sealing — proposed § 16-802, Effect of Criminal Record Expungement, and proposed § 16-803, Effect of criminal record sealing.

The Coalition takes no position regarding the merits of allowing expungement of criminal charges. Nor do we object to proposed § 16-804(a)(1)(A), which would automatically expunge criminal case records where the defendant was convicted for conduct that has subsequently been decriminalized or legalized, subject to limitations set out in § 16-804(a)(2) and (a)(3).

In a case where a conviction has been vacated upon a finding that the underlying statute was facially unconstitutional, there would be a tangible benefit from allowing the defendant to deny that s/he had been arrested, charged and convicted. *See* proposed § 16-804(a)(1)(B). Because the published appellate opinion would include his/her name and the facts of the case, sealing the trial and appellate case files would provide the defendant no practical benefit. But doing so would deprive future defendants of information germane to their cases, and would deprive legislators, public policy advocates and researchers of records that might prevent enactment of defective statutes in the future.

Our main concern goes to the breadth of cases that may be expunged and sealed under the proposed amendments; the failure to recognize the strong, constitutionally based public interest in access to criminal case records; the absence of safeguards to protect that interest; and the rapidity with which cases will become hidden from public view.

Proposed § 16-804(b)(1) – (3)(B) largely supplants current § 16-802(f) – (i), substituting the remedy of expungement for the remedy in existing law of sealing. But proposed § 16-804(b)(3)(C) and (c) significantly expand expungement "in the interests of justice" by lowering to "a preponderance of the evidence" the defendant's burden to prevail, and markedly undermining the analytical framework established in D.C. Code § 22-4135 that judges now employ in ruling on sealing motions. In fact, this bill abandons current § 16-802(e)'s rebuttable presumption against granting such motions, and replaces it with an expectation that such motions will be granted unless the U.S. Attorney or the Attorney General object. It provides no avenue for anyone else to oppose expungement.[2]

To the extent that a judge deciding whether to expunge a case "in the interests of justice" must take into account "community interest," under proposed § 16-804(c), the focus is on "(2) The community's interest in furthering the movant's rehabilitation and enhancing the movant's employability," and on "(3) The 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.

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[2] Under § 22-4135(h), a judge is not required to consider a second or successive motion to seal. Proposed § 16-804(d) would allow defendants three bites at the apple before blocking further attempts.

Proposed § 16-805(a) would seal any criminal case, regardless of the seriousness of the charges, 30 days after a disposition short of conviction or a finding that the defendant was not guilty by reason of mental disease or defect. Automatic sealing would occur whether the case was "No Papered"; the prosecutor dismissed it as part of a plea bargain or did not retry it after a hung jury; a jury acquitted the defendant; or the D.C. Court of Appeals overturned the conviction due to a procedural error.

If a judge has found that it is "in the interests of justice," the bill encourages the sealing of any misdemeanor conviction, no matter how serious, a year after the defendant has completed the imposed sentence, any non-violet felony conviction two years after sentence completion, and any violent felony conviction three years after sentence completion.[3] But in § 16-805(d) it employs the same constitutionally deficient, biased judicial standard for determining when sealing is "in the interests of justice."

Proposed § 16-805(e) and (f) would introduce two additional constitutional defects. The former creates a rebuttable presumption that it is "in the interests of justice" to seal every conviction 10 years after the defendant has been discharged from incarceration or supervision. The latter gives defendants three opportunities to convince the judge to seal his or her case.

Due to an apparent typographical error, there is a second § 16-805(f), which allows judges, on their own initiative, to seal any criminal case as "equitable relief." It does not reserve such authority to the sentencing judge, nor does it establish a minimal interval between conviction and sealing. At least inferentially, a judge presiding over a civil case involving the convicted defendant could seal criminal case records as part of a settlement or judgment, regardless of whether sealing is "in the interests of justice."

As discussed in our April 8 testimony at page 5, 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.

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

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[3] § 23-1331(4) lists as crimes of violence,

> aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with significant bodily injury; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an attempt, solicitation, or conspiracy to commit any of the foregoing offenses.

background checks that uncover such contacts. D.C. already has legislation prohibiting application questions about prior criminal contacts, and Bill 24-180 addresses this issue with identical language in §§ 16-802 and 16-803, which state:

> "(b) No person as to whom criminal record sealing relief has been granted shall be held thereafter under any provision of law to be guilty of perjury or otherwise giving a false statement by reason of failure to recite or acknowledge their citation, arrest, charge, prosecution, or disposition, in response to any inquiry made of them for any purpose.

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. Before depriving the public of access to a substantial volume of criminal court records, it is incumbent on the Council to prohibit misuse of criminal case information and to punish violation of that prohibition.

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.

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