

The West Virginia Second Chance Expungement Gap

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Key Findings

Population with criminal charges: ~432K

Population with conviction records: ~227K

People with convictions eligible for relief (share): ~75%

People with convictions eligible for relief (population): ~171K

People with *any* record eligible for relief (share): ~83%

People with *any* record eligible for relief (population): ~356K

Uptake rate of *any* record relief: ~0.7%

Estimated # of expungements in last year of data (2019)²: ~112

Years to clear the backlog: ~3,183

Estimated aggregate annual earnings loss associated with people with clearable convictions: \$872M

*Does not include consideration of fines and fees

I. Abstract

SB 562 §61-11-26 allows individuals whose criminal records meet certain conditions to expunge their records. Ascertaining, then applying the law to a sample of 944 criminal histories, including 66% with convictions records, and then extrapolating to the estimated population of 432K individuals in the state with court records,³ we estimate the share and number of people who are eligible for relief but have not yet received it. These individuals fall within the “second chance gap,” the difference between eligibility for and receipt of record relief.⁴ We also estimate the

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² We use 2019 data due to the disruption to expungement services due to COVID in 2020 and 2021.

³ This is a rough estimate obtained by calculating 25% of the 2022 total state population of 1.8M people, reflecting the national average of the population with criminal records (80M people with records / 331M Americans); cf. Becki R. Goggins et al., *Survey of State Criminal History Information Systems, 2020: A Criminal Justice Information Policy Report*, SEARCH (2020), available at <https://www.ncjrs.gov/pdffiles1/bjs/grants/255651.pdf>, Table 1 (listing the total number of subjects with criminal records in the DE state repository as of Dec. 2018 as 714K, which, at roughly 40% of the population, likely overstates the criminal population in West Virginia).

⁴ The “second chance gap” is defined in Chien (2020), *supra* note 1.

aggregate earnings loss associated with people in the second chance gap.⁵ We did not model legal financial obligations or other out of record criteria.

Based on the method described above, we find that approximately 75% of individuals in our sample are eligible to clear at least one conviction, 54% of individuals with conviction records are eligible to clear all of their convictions, 83% of individuals with criminal records are eligible to clear their records, and 69% of individuals with criminal records are eligible to receive relief for all records. Extrapolating to the total number of people with records in West Virginia, this yields an estimated 171K people with conviction records that are eligible for conviction relief and 356K people with criminal records that are eligible for any relief that haven't received it.

Combining historical expungement statistics with our eligibility calculations, we estimate that 0.7% of people with records eligible for relief have received it, leaving behind 99.3% of people with records in the West Virginia "Second Chance Gap". To ascertain the approximate annual earnings loss associated with West Virginia's second chance convictions gap, we multiply the number of people in the convictions gap (171K) by \$5,100, a conservative estimate for the average loss in earnings yearly due to the second chance gap.⁶ We estimate that \$872 Million in cumulative earnings are lost every year in West Virginia due to convictions that could be, but have not been cleared.

Based on reported records, the State expunged 112 cases in the last year of available data (2019). At this rate, it would take approximately 3,183 years to clear the existing second chance expungement gap. However, due to ambiguities in the law and deficiencies in the data uncovered during our analysis, including regarding disposition, chargetype, and sentence completion criteria, to provide relief through "Clean Slate" automated approaches would require significant data normalization and cleaning efforts. We include, in Appendix E, statute drafting alternatives to avoid some of these problems.

Included in our report are the following: Methodology (Appendix A); Data Sample Description (Appendix B); Common Charges (Appendix C); Detailed Expungement Statistics (Appendix D); Clearance Criteria Challenges and Legislative Drafting Alternatives (Appendix E).

II. Summary

⁵ We rely on the methodology and estimates provided in Colleen Chien et al., *Estimating the Earnings Loss Associated with a Criminal Record and Suspended Driver's License*, __ Ariz. Law Rev. Forthcoming 2022 (estimating, based on review of the literature, the national average earnings loss associated with having misdemeanor and felony convictions to be \$5,100 and \$6,400, respectively, and multiplying by the number of people in the gap by \$5,100, conservatively, to arrive at an aggregate earnings loss associated with people in the gap).

⁶ \$5,100 is a national average that is associated with misdemeanors (see *Id.*), but the second chance gap in West Virginia includes individuals with both misdemeanor and felony convictions, and the state's average annual income of \$65K puts it in the bottom third of states (<https://worldpopulationreview.com/state-rankings/average-income-by-state>), both of which make the number a conservative estimate.

Every time a person is convicted of a crime, this event is memorialized in the person’s criminal record in perpetuity, setting off thousands of potential collateral consequences, including being penalized in searches for employment, housing, and volunteer opportunities.

To remove these harmful consequences, West Virginia law allows people whose criminal records meet certain conditions to expunge their records.⁷ However, we suspect the “second chance gap” in West Virginia—the share of people eligible for relief who haven’t expunged records because of hurdles in the petition process—is large. To carry out our analysis, we ascertained charge eligibility based on reading the code, inferred whether a person had a charge pending, and made assumptions about the estimated date of completion of the sentence based on the passage of time derived from practice. Importantly, we did not account for outstanding fines or out of state charges which could potentially disqualify some individuals for relief,⁸ nor did we model criteria from whom eligibility was unascertainable from the available record.

III. Key Findings:

Using the approach described briefly above and in detail in Appendix A we find that:

- In the state of West Virginia, an estimated 432K out of approximately 1.8M state residents have criminal records and 227K people have conviction records.
- Of those with conviction records, an estimated 75%, or about 171K people, are eligible for expungement of their convictions, while an estimated 83% of those with records, or about 356K people, are eligible for expungement of all or part of their records under the current law (not taking into account fines, fees, and out of state charges).
- We estimate that approximately **69% of individuals with records could clear their records entirely and that 54% of individuals with convictions could clear all their convictions.**
- Based on the assumption that our sample is representative of people with court records in West Virginia, we estimate that the current felony population in West Virginia is approximately 43K people. The share of people with felonies eligible for convictions relief is 57%.
- Based on records obtained from the sources disclosed in Appendix D and methods disclosed in Appendix A, we estimate, conservatively, that the state issued approximately 2K total expungements over the last 20 years. Based on these numbers and the calculations above, we estimate that 0.7% of people eligible to clear any record have done so, leaving 99.3% of people in the expungement uptake gap.
- At current rates of expungement, it would take over 3,000 years to clear the existing backlog of eligible charges using current methods.
- The aggregate earnings loss of the 227K people with convictions in the West Virginia second chance gap translates to a cumulative annual earnings loss of about \$872 Million.

⁷ The relevant record relief law is described under “West Virginia Expungement Rules” in Appendix A.

⁸ West Virginia does not expressly require payment of court debt to qualify for record clearing but the decision to grant relief is discretionary upon the court or administrative body responsible and may include consideration of court debt. (<https://www.nclc.org/images/pdf/criminal-justice/Report-High-Cost-of-Fresh-Start.pdf>)

IV. Conclusion

Based on our analysis, West Virginia’s expungement laws allow for approximately 83% of those who live burdened with records to get records relief, 75% to get relief from convictions, 69% to clear their records entirely, and 54% of individuals with convictions to clear all convictions. But to date, we estimate that 0.7% of those eligible for conviction relief have actually received it, leaving about 99% of people in the expungement uptake gap. The second chance expungement gap translates into a cumulative annual earnings loss to the state of about \$1.1 billion.

Appendix A: Methodology

To estimate the number and share of people eligible for but not receiving relief in each state, we proceeded as follows, implementing the approach developed in Colleen V. Chien, *America’s Paper Prisons: The Second Chance Gap* (2020) (Chien (2020)).

First, we ascertained the relevant records relief laws and developed rules logic, using legal research to develop lists of eligible and ineligible charges. Next, we obtained and cleaned the data sample and collected information on the state’s criminal population. Where possible, we also obtained administrative data on the number of expungements granted historically. We then developed flow logic to model the laws and applied the flow logic to the data sample to estimate eligibility shares in the sample. Finally we extrapolated from the population in the sample to the total criminal population in the entire state to calculate number and share of individuals in the “current gap” (people with current records eligible for relief) as well as the “uptake gap” (share of people eligible for expungement over time that have not received it). The descriptions below disclose several shortcomings in our approach, including our inability to account for outstanding fines or out of state charges that could potentially disqualify some individuals for relief, our failure to model criteria from whom eligibility was unascertainable from the available record, the existence of missing data for which we assumed a lack of eligibility, and our inability to be sure that our sample was representative of all with criminal records in the state.

Ascertaining the Law and Developing Rules Logic

Based on the court guidelines, statutes, and guides from non-profits listed below, we discerned the law and determined its internal logic with respect to the charge grade (e.g., misdemeanor or felony), offense type (e.g., non-violent or domestic violence charge), time (e.g., 3-year waiting period), disposition type (e.g., nolo contendere) and person conditions (e.g., a lifetime limit of 2 convictions) that define eligibility. These are disclosed in every report in the “West Virginia Expungement Rules” section below.

From these rules, we created lists of eligible and ineligible offenses. To do so, we reviewed the relief rules for disqualified classes of charges and then searched the criminal code for the corresponding statute name or number corresponding with each class of charges. We then used

these statutes to identify the characteristics of each potentially eligible offense: their charge type (e.g. misdemeanor or felony), degree, and the maximum possible duration of incarceration/amount to be fined for each offense. Once we had assembled the characteristics of each potentially ineligible offense, we cross-referenced each offense and its characteristics against the eligibility statute. If a specific statute section was outside the prescribed characteristics of any category of eligibility (e.g., class of offense, degree, maximum duration of incarceration/amount to be fined, etc.), the offense was deemed ineligible for expungement. The offenses that were within each of the eligibility requirements after this process were deemed eligible for expungement. We did not consider the eligibility of offenses that fulfilled the unmodeled criteria referenced above, making our estimate both under-inclusive and over-inclusive.

Obtaining the Data Sample and Collecting Data on the State Population of Individuals with Criminal Records and the Number of Expungements Granted

From a data vendor, we obtained court records from the data source indicated below. Where not already available, we used Name+DOB to create unique person IDs and created state-specific criminal histories for each person. Profile information on the analyzed population is provided below in every report in Appendix B.

We approximated the number of people with criminal charges using a few methods. If state criminal population information was available directly from the state, we relied on it. When it was not available, we considered two sources. First, we consulted public records provided by SEARCH (2018), a listing of criminal subject counts provided by the repositories of each state. We then adjusted for growth in the number of people with records using a 3% CAGR average based on 10 years of historical data. As a sanity check, we compared this number with the estimated number of people with criminal records derived based on taking the population of people in the state from the Census and then multiplying the “national average” share of ~25% of Americans having a criminal record (derived from 331M total individuals in the population and 80M individuals with criminal records). When the difference was large (i.e., more than ~25%), we used the population-derived number. The raw numbers derived from SEARCH records and from the state include multi-state offenders, people who did not live in the state at the time of the crime, and people that may have left the state since their disposition. Regardless of the source, the raw numbers do not account for deported or deceased people. As described in the report, where possible, we made adjustments to take into account these factors, but it should be reiterated that from these reasons, the population numbers provided are estimates.

We further accounted for people with uncharged arrests as described in Chien (2020) based on an analysis prepared by Professor Robert Apel of Rutgers University (based on the NLSY97, an ongoing U.S. Bureau of Labor Statistics survey tracking 7,335 randomly selected people starting in their 20’s) by removing them from our eligibility analysis, which is based on court records.

In addition to researching the number of individuals with criminal histories, we sought from state sources administrative data on the number of expungements granted historically. When public reports were not available, we filed records requests or consulted other sources of information.

We used this data to calculate the “uptake rate” and number of years it would take to clear the backlog.

Applying the Law to the Sample Data to Obtain an Eligibility Share

To apply the law to data, we used the methods described in Chien (2020) to first prepare the data by cleaning and labeling dispositions and charges data. We report the share of charges missing dispositions or charge types in Appendix B of each report. We then applied the logic to the sample to obtain a share of people eligible for records relief in the sample. When relevant data was missing, we assumed, conservatively, that the charge or incident was ineligible for relief.

To approximate “sentence completion,” we used recorded sentences where available, assuming that the sentence had been carried out. Where sentence completion was not readily available, we assumed that the sentence was completed 2.5 years after the disposition date for misdemeanor charges and 3.5 years after the disposition date for felony charges. Importantly, we did not account for outstanding fines or out of state charges, which could potentially disqualify some individuals for relief per the summary of the rules.

When the eligibility of frequently occurring charges wasn’t addressed directly by the “top down” methodology described above of researching eligibility or ineligibility based on the rules, we used a “bottom up” approach of researching these charges and ascertaining their eligibility one by one.

Applying the Eligibility Share to the Criminal Population and State History of Relief to Estimate the Number of People in the Second Chance Gap

To develop a total state eligibility estimate based on the shares derived in the steps above, we assumed that the sample was representative enough of the criminal population that we could use its eligibility shares as the basis for a state estimate. We then applied these shares to the estimated number of people with court criminal records in the state, developed using the approach described above. This yielded our estimation of the number and share of individuals in the “current gap” (people with records currently eligible for relief) as well as, in combination with the expungement actuals mentioned above, the “uptake gap” (share of people eligible for expungement over time that have not received it).

RULES

West Virginia Expungement Rules

Sources: [Legal Aid Guide](#) (December 2020) | [West Virginia CCRC](#) (October 25, 2020) | [SB 562 §61-11-26](#) (March 7, 2020) [Expungement Instructions](#) (2019)

Convictions:

1. Misdemeanors:

- a. Expungement of one misdemeanor if person has no prior felony conviction and no pending criminal charges at time of petition and 1 year has passed since last conviction OR completion of any sentence of incarceration/supervision, whichever is later in time and 1 year has passed (1 year waiting period + later trigger) (§ 61-11-26(b)(1)).
 - b. Expungement of more than one misdemeanor if person has no pending criminal charges at time of petition and 2 years have passed since last conviction OR completion of any sentence of incarceration/supervision, whichever is later in time (2+ year waiting period) (§ 61-11-26(b)(2)).
2. Felonies:
 - a. Expungement of non-violent felony conviction if 5 years have passed since last conviction OR completion of any sentence of incarceration/supervision, whichever is later in time (5+ year waiting period) (§ 61-11-26(b)(3)).
 3. Not Eligible: Offenses listed in SB 562 § 61-11-26(c).
 4. Lifetime or Other Limits: Individuals can only request expungement of criminal records under §§61-11-26 and 61-11-26a once in a lifetime.
 5. Treatment of Multiple Convictions from the Same Incident:
 - a. Expungement of non-violent felony convictions arising from the same transaction or series of transactions if 5 years have passed since last conviction OR completion of any sentence of incarceration/supervision, whichever is later in time (5+ year waiting period) (§ 61-11-26(b)(3)).
 6. LFO Payment Required for Sentence Completion: No.
 7. Other Unmodeled Criteria or Details: Completion of approved substance abuse treatment and adult training programs will shorten waiting period (§ 61-11-26a(a)).
 - a. Single misdemeanor → 90 day waiting period
 - b. Multiple misdemeanors → 1 year waiting period
 - c. Non-violent felony → 3 year waiting period

Non-Convictions:

1. Expungement for records in cases of acquittal or dismissed charges after 60 day waiting period from date of disposition (§§ 61-11-25(a), (b)).
 - a. Records from DUI cases are ineligible and individuals with prior felony conviction are ineligible.

Appendix B: Data Sample Description

Our data comprised a sample of criminal histories chosen at random from a background check company based on checks conducted from 2018-2019 as described in Chien (2020).

| Data Statistics | |
|---|-----|
| Number of People in the Sample | 944 |
| Share of People with Convictions | 66% |
| Share of People with Felony Convictions | 13% |

| | |
|--|-----|
| Share of People with Misdemeanor Convictions in the Sample | 61% |
| Share of People with Felony Charges in the Sample | 29% |
| Share of Charges Missing Dispositions | 0% |
| Share of Charges Missing Charge Types | 0% |

Appendix C: Common Charges

A. Top 10 Charges in our Dataset

| <u>Charges</u> | <u>Number of Charges</u> | <u>Percentage of Charges</u> |
|---|--------------------------|------------------------------|
| Shoplifting | 49 | 4% |
| Speeding | 48 | 3% |
| Petit Larceny | 46 | 3% |
| Knowingly or Intentionally Possessing a Controlled Substance without a Valid Prescription | 33 | 2% |
| Domestic Battery | 26 | 2% |
| Driving while License Suspended or Revoked; General | 21 | 2% |
| Driving Suspended/Revoked Non-DUI | 20 | 1% |
| Possession of a Controlled Substance without a Valid Prescription | 20 | 1% |
| No Insurance | 18 | 1% |
| Conspiracy | 17 | 1% |
| Total share and charges associated with top 10 charges | 298 | 21% |

B. Top 10 Expungeable Charges in our Dataset

| <u>Expungeable Charges</u> | <u>Number of Charges</u> | <u>Percentage of Charges</u> |
|----------------------------|--------------------------|------------------------------|
| Shoplifting | 38 | 4.4% |

| | | |
|---|------------|--------------|
| Petit Larceny | 34 | 3.9% |
| Speeding | 32 | 3.7% |
| Knowingly or Intentionally Possessing a Controlled Substance without a Valid Prescription | 21 | 2.4% |
| Possession of a Controlled Substance without a Valid Prescription | 15 | 1.7% |
| Burglary | 13 | 1.5% |
| Driving Under the Influence | 12 | 1.4% |
| Conspiracy | 12 | 1.4% |
| Truancy | 12 | 1.4% |
| Disorderly Conduct | 11 | 1.3% |
| Total share and charges associated with top 10 expungeable charges | 200 | 23.2% |

Appendix D: Detailed Expungement Statistics

We obtained expungement statistics from the Administrative Office of the Supreme Court of Appeals in West Virginia. The Administrative Office reports that 757 cases were expunged between 2016 and 2020.

Appendix E: Clearance Criteria Challenges and Legislative Drafting Alternatives⁹

| Criteria | Administrability Challenge | Example | Drafting Alternative |
|---------------------|--|---|------------------------------|
| Sentence completion | Not tracked in court data and hard to infer as clean sentencing data is often not available; it also is often unclear whether or not outstanding fines and | Records relating to a first conviction ...voided upon the petitioner's successful completion of the sentence will be sealed by the court. KRS §§ 218A.276(1), (8), (9). | Disposition Date (+ X Years) |

⁹ Adapted from Chien (2020).

| | | | |
|--|--|---|--|
| | fees must be paid and whether they have been. | Record...can be sealed by the court one year after sentence completion if the petitioner has no subsequent charges or convictions. Colo. Rev. Stat. § 24-72-705(1)(c)(I), (1)(e)(I). | |
| First conviction; qualifying conditions | Lack of unique identifier across precludes determination | | Bless commercial identification approximation technique |
| Personal demographic traits such as age, military status, or other condition | Information may not be easily ascertainable / available on the record or charge category condition | Records relating to an offense committed by current and former military personnel „,can be dismissed Cal. Pen. Code § 1170.; A record relating to a matter sealed pursuant to section 781 is destroyed ...when the person reaches 38 years of age. Cal. Welf. & Inst. Code §781(d). Cal. Welf. & Inst. Code § 781(d). | Specify an identification strategy that can be implemented at scale or do not include demographic traits |
| Class or grade condition | Missing class, grade or category information | Records relating to a charge or conviction for a petty offense, municipal ordinance violation, or a Class 2 misdemeanor as the highest charge can be removed from the public record after 10 years, if all court-ordered conditions are satisfied. S.D. Codified Laws § 23A-3-34. | Explicitly specify the qualifying crimes |
| Court-ordered conditions | Require individual review /check for any “court-ordered” conditions and compliance re: same | | Do not include court-ordered conditions |
| Laundry list disposition criteria | Vulnerable to changes to definitions, requires detailed clean data | Records of arrest are destroyed within 60 days after detention without arrest, acquittal, dismissal, no true bill, no information, or other exoneration. R.I. Gen. Laws § 12-1-12(a), (b). | Simple description e.g. “All records that do not end in a conviction” |