

# Clarifying Collateral Consequences

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# What are collateral consequences?

- Collateral consequences are additional penalties that attach to having contact with the criminal justice system. They are not part of the direct consequences of criminal conviction, such as prison, fines, or probation, but rather, refer to additional, adverse impacts on one's ability to participate in civic life
- These include adverse effects in accessing adequate housing, receiving welfare benefits, safely immigrating to this country, achieving employment, professional licensure, completing adoption procedures, and accessing property rights, amongst many other impediments

# What can be done to relieve collateral consequences?

- Because each state has their own form of collateral consequence relief, they vary in their approach and procedures.
- These variations exist in three main areas:
  - the forms of relief (what the relief does in the life of the individual)
  - the extent of the relief (what records the state's relief covers)
  - the availability of relief (what barriers, discretionary or otherwise, limit the ability for someone to seek relief)
- Depending on the state and the relief being offered, relief can be known as expungement / destroying, sealing, or “setting aside” of records.

# How are collateral consequence relief policies enacted?

- At the state level, legislative action and ballot measures have
  - In California, the legislature has passed numerous laws defining and expanding collateral consequence relief
  - In Arizona, expungement for cannabis convictions was passed via a ballot proposal
- At the federal level, there is no law regarding relief, but precedent allows for it in some jurisdictions.
  - There is a precedent limited scope of relief in the 10<sup>th</sup> Circuit

# Why would someone seek relief?

- Relief provides the only meaningful opportunity for individuals to reintegrate into society without the prejudice of contact with the criminal justice system
- Even in a state that doesn't offer expungement or sealing, "setting aside" a conviction by re-entering an uncontested guilty plea can have benefits for job opportunities
  - For example, an individual will be able to honestly answer "No," if asked, "Have you ever been convicted of a crime?"

# What are the forms of relief?

- Expungement
  - Destroying / deleting the record
- Sealing
  - Sealing the record from public access
- Setting aside
  - Entering a revised, uncontested plea of “not guilty” and updating the record
    - Notably, this does not seal / delete the previous record

# Overview:

This presentation will analyze:

1) What collateral consequence relief is available in each state

Collateral consequence relief in the following states will be discussed because of their potential for collateral consequence reform:

*Arizona, California, Colorado, Georgia, Kentucky, Michigan, New York, New Jersey, Oklahoma, South Carolina, and Texas*

2) What areas would be useful for advocacy within each state

3) Other useful information for advocates

Additionally, this presentation will look at federal expungement and efforts to reform drug policy to identify areas of future advocacy.

# Arizona

- Available Relief:
  - Limited “setting aside” of some convictions
  - Expungement of select cannabis convictions
- Areas for Advocacy:
  - Expanding the form of relief from “setting aside” to sealing or expungement
  - Creating a formal process for arrest record sealing
- Other Information:
  - Non-conviction (arrest) records can be sealed, but it must be done through a petition to the court and no standardized form or process is available



# California

- Available Relief:
  - “Setting aside” of certain records after statutorily defined waiting periods
  - Reclassification of former felonies into misdemeanors, if available
  - Automatic relief of cannabis convictions
- Areas for Advocacy:
  - Expanding automated setting aside of convictions
  - Reduction in waiting periods for drug offenses
- Other Information:
  - Under AB 1076, sealing of records that have been merely set aside is set to commence in 2021

# Colorado

- Available Relief:
  - Convictions from petty offenses to less serious felonies, including but not limited to drug crimes, are eligible for sealing
- Areas for Advocacy:
  - Expanding extent of relief and including more eligible offenses
  - Automating the sealing process
- Other Information:
  - The Colorado Judicial branch has [resources online for sealing](#)

# Georgia

- Available Relief:
  - Discretionary sealing of adult misdemeanors & pardoned felonies
  - Automatic sealing of non-conviction records
- Areas for Advocacy:
  - Expanding the extent of relief past misdemeanors & first-time drug charges
- Other information:
  - Records of felony charges dismissed pursuant to a plea to a misdemeanor may be restricted after four years

# Kentucky

- Available Relief:
  - Barring some exceptions, a Class D felony (or series of felonies stemming from the same incident) can be expunged after a 5-year waiting period
  - Misdemeanors & arrest records can be expunged as well after a similar waiting period
- Areas for Advocacy:
  - Mandatory expungement for non-violent Class D felonies
- Other Information:
  - Under HB327, for cases disposed after March 27, 2020, expungement of misdemeanor or felony charges resulting in acquittal or dismissal with prejudice is automatic upon disposition

# Michigan

- Available Relief:
  - Narrow prior to October 2020, now being expanded
  - In April 2021, law will allow for the setting aside of an unlimited number of misdemeanors and up to three felonies, with some exceptions
- Areas for Advocacy:
  - Expanded extent of relief to include more convictions
  - Reduction in waiting period for automatic expungement
- Other Information:
  - Non-conviction records are to be destroyed if charges are not brought

# New York

- Available Relief:
  - Sealing of records of no more than two convictions (barring some exceptions) after a 10-year waiting period. Only one can be a felony
- Areas for Advocacy:
  - Expanding the extent and form of relief offered – for the second most populous state, it is some of the most restrictive relief offered
- Other Information:
  - Automatic expungement is available for some minor cannabis convictions
  - Sealing of non-conviction records is automatic, barring objection from DA

# New Jersey

- Available Relief:
  - Records for indictable offenses, disorderly persons offenses, petty disorderly persons and municipal offenses can expunged once in a person's lifetime. An application by petition may seek expungement of up to four separate convictions, only one of which may be an indictable offense
- Areas for Advocacy:
  - While the extent of the relief could definitely be expanded, the once-in-a-lifetime availability of the relief is a real area for reform
- Other Information:
  - There exists a "Clean Slate" program that is still being implemented, which would allow for all convictions (except certain ineligible crimes) will be automatically made "inaccessible to the public" ten years after completion of the sentence imposed for the most recent conviction

# Oklahoma

- Available Relief:
  - Misdemeanor & felony records can be sealed after a waiting period
- Areas for Advocacy:
  - Barriers for arrest record sealing should be lowered
    - Arrest records can be expunged only if no charges are filed, if the person is acquitted or the conviction reversed, if factual innocence is proven by DNA, or if a pardon is based on a governor's finding of actual innocence
- Other Information:
  - Under HB1269, a person convicted of a nonviolent felony offense which was subsequently reclassified as a misdemeanor under Oklahoma law, can have their conviction expunged 30 days after completion of sentence. This is a notably short period of time, and a good point of reference for other states to emulate



# South Carolina

- Available Relief:
  - Expungement of first-time drug possession and intent to distribute charges can be sealed. Certain convictions for individuals age 18-25 may also be sealable under the Youthful Offender Act
- Areas for Advocacy:
  - Expanding the extent of relief available will be a big first step for South Carolina
- Other Information:
  - Arrest and non-conviction records are to be destroyed after a period of 120 days to three years, or indefinitely in the case of an on-going investigation

# Texas

- Available Relief:
  - An Order of Nondisclosure (sealing) is available for most first-time misdemeanor offenses and first-time DWI that did not result in an accident
- Areas for Advocacy:
  - Expanded form & extent of relief to include more non-violent convictions and more than a first-time conviction
- Other Information:
  - Texas State Senator Royce West has more detailed information about the process [available on his website.](#)

# Federal

- Available Relief:
  - No statutory federal collateral consequence relief is available, though there is some discretion for judges
- Areas for Advocacy:
  - Legislative intervention in Congress is necessary to meaningfully provide expungement at the federal level
  - Impact litigation in circuits that allow for discretionary judicial expungement could be
- Other Information:
  - Federal Expungement is a central part of the Marijuana Opportunity Reinvestment and Expungement Act of 2019, which would decriminalize cannabis at the federal level. The contours of this legislation are still being debated

# Current Drug Policy

- Emphasis on strict “law & order” policing has led to mass incarceration of marginalized communities
- That mass incarceration has largely impacted communities of color, and continues to do so today
- Lack of collateral consequence relief means higher rates of recidivism, as many doors are closed to those who are involved with the justice system

# Drug Policy Reform

- Recent efforts by organizations like Decriminalize Nature have led to massive shifts in local and state level drug policy – shifts that could have meaningful impact on collateral consequences relief
- Psilocybin mushrooms, ayahuasca, DMT, and other naturally derived plant medicines have been decriminalized in Santa Cruz, Denver, and Oakland
- All drug possession charges have been decriminalized in Oregon state
- These changes reflect a broader cultural shift, and show how corresponding efforts to expand collateral consequence relief

# Conclusion

- Collateral consequence relief has been identified as bipartisan policy goal, and will continue to be a priority for the incoming Biden administration
- The current patchwork of laws leaves many marginalized people with no recourse or meaningful way to reintegrate
- Advocating for the creation of collateral consequence relief at the federal level, and expanding available relief at the state level, will be vital areas of progress in the coming years