

4-20-2017

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Recommended Citation

Roberto Cruz, *Wounded Warriors' Justice Denied: Should Barriers to Expungement Keep Veterans Jobless and Homeless?*, 20 RICH. PUB. INT. L. REV. 231 (2017).

Available at: <http://scholarship.richmond.edu/pilr/vol20/iss3/5>

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WOUNDED WARRIORS' REDEMPTION DENIED:
SHOULDBARRIERS TO EXPUNGEMENTS KEEP VETERANS
UNEMPLOYED AND HOMELESS?

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ABSTRACT

Criminal records for veterans returning home after military service, particularly those related to service-related injuries, often pose difficult barriers for those returning to civilian life. Even if records have been expunged – as some states allow specifically for veterans – potential employers and other authorities may come across criminal records, resulting in reduced opportunities for wounded warriors. This Article presents the litany of problems posed to veterans with criminal records, first by discussing issues categorized legislative, judicial and executive branches of state government. The Author then examines three solutions proposed and enacted by some states, which promise to help veterans with criminal histories obtain employment and housing. This Article concludes that while barriers to veterans' reentry into civilian workforce can be daunting, state governments have the power to improve the current situation for the benefit of all Americans.

INTRODUCTION: THE CRIMINALIZATION OF WOUNDED
WARRIORS' MENTAL ILLNESS

The very nature of military life and combat causes psychological wounds in our service men and women.¹ Once in the civilian world, the mentally wounded warriors face serious problems such as trauma, suicide, homelessness and criminal behavior.² Some veterans with mental disabilities find a chance at redemption through the dignity of work and the safety of a home.³

¹ See generally *Public Health*, U.S. DEP'T OF VETERANS AFFS., <http://www.publichealth.va.gov/epidemiology/publications.asp> (last updated 2015) (providing information on various mental issues common among veterans); J. Michael Daly Hawkins, *Coming Home: Accommodating the Special Needs of Military Veterans to the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 563 (2010) (“The very nature of their service will make them more susceptible to a range of anti-social behavior.”).

² Jamison Fargo, Stephen Metraux, Thomas Byrne, Ellen Munley, Ann Elizabeth Montgomery, Harlan Jones,

George Sheldon, Vincent Kane, & Dennis Culhane, *Prevalence and Risk of Homelessness among US Veterans*, 9 PREV. CHRONIC DIS. 110 (2012); Marta Hoes, *Invisible Wounds: What Texas Should be doing for the Mental Health of its Veterans*, 13 TEX. TECH. ADMIN. L.J. 369, 371 (2012); Erin K. Dursa, Matthew J. Reinhard, Shannon K. Barth, & Aaron I. Schneiderman, *Prevalence of a Positive Screen for PTSD Among OEF/OIF and OEF/OIF-Era Veterans in a Large Population-Based Cohort*, 27 J. TRAUMA. STRESS 542, 544-545 (2014); Han K. Kang, Tim A. Bullman, Derek J. Smolenski, Nancy A. Skopp, Gregory A. Gahm, & Mark A. Reger, *Suicide Risk among 1.3 million Veterans who were on Active Duty during the Iraq and Afghanistan Wars*, 25 ANN. EPIDEMIOL 96, 97 (2015).

³ Keith Humphreys and Robert Rosenheck, *Treatment involvement and outcomes for four subtypes of homeless veterans*, 68(2) AM. J. OF ORTHOPSYCHIATRY 285 (1998); Gary Shaheen and John Rio, *Recognizing Work as a Priority in Preventing or Ending Homelessness*, 28 J PRIMARY PREVENT 341, 343 (2007) (“Over time, earned income and duration of labor force attachment increases among people with disabilities

Unfortunately, veterans with a mental illness often find themselves facing the criminal justice system.⁴ As a result, ex-offender veterans with mental illnesses and criminal histories have trouble finding jobs and housing.⁵ Veterans and their families thrive or fail in part because economic opportunities are tied to their criminal history.⁶ More to the point, a veteran with a criminal background will most probably face chronic unemployment.⁷ A criminal past also closes the doors to housing, particularly for minority home seekers.⁸ Fortunately, there are doors opened to those able to restore their good name through the expungement of their criminal records.⁹

Expungements promise to be a veteran's chance at redemptive justice.¹⁰ Generally, expungement aims to restore individuals with criminal records to their former legal status. "Expungement of record" is the "removal of a conviction from a person's criminal record."¹¹ The expungement process is also associated with the "sealing of records."¹² Record sealing is the act or practice of officially preventing access to particular records.¹³ Despite the promise of redemption, expungements and sealings, in practical terms, are

who have been homeless and among veterans").

⁴ See James P. LePage, Avery A. Lewis, Edward L. Washington, Brandi Davis & Anne Glasgow, *Effects of Structured Vocational Services in Ex-Offender Veterans with Mental Illness: 6-month Follow-up*, 50(2) J. REHAB. RES. DEV. 183-184 (2013).

⁵ *Id.*

⁶ Sara Kintzle, Mary Keeling, Elizabeth Xintarianos, Kamil Taylor-Diggs, Chris Munch, Anthony M. Hassan & Carl A. Castro, *Exploring the Economic & Employment Challenges Facing U.S. Veterans: A Qualitative Study of Volunteers of America Service Providers & Veteran Clients*, USC SCHOOL OF SOCIAL WORK, CENTER FOR INNOVATION AND RESEARCH ON VETERANS & MILITARY FAMILIES, May 2015.

⁷ See *Id.*

⁸ OFFICE OF GENERAL COUNSEL, U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, OFFICE OF THE GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS 8 (2016), https://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHStandCR.pdf.

⁹ See John Braithwaite, *Evidence for Restorative Justice*, 40 VT. B.J. 18 (Summer 2014); Tracie Mauriello & Anya Sostek, *Veterans Who Complete Intense Treatment Can Have Court Charges Expunged*, PITTSBURGH POST-GAZETTE, April 22, 2012, <http://www.post-gazette.com/local/region/2012/04/22/Veterans-who-complete-intense-treatment-can-have-court-charges-expunged/stories/201204220137>.

¹⁰ Expungement of Record, BLACK'S LAW DICTIONARY 702 (10th ed. 2014) ("Also termed *expunction of record*; *erasure of record*."); see, e.g., Mauriello & Sostek, *supra* note 9; see also Braithwaite, *supra* note 9, at 18 ("Restorative justice is a way of selecting strategies to respond to challenges like healing the hurts of crime. Empathic empowerment of stakeholders who take turns to speak in a circle are at the heart of its strategy. The evidence is encouraging that restorative justice works better than less flexible top-down state decision making."); see generally Gordon Bazemore, *Restorative Justice and Earned Redemption: Communities, Victims, and Offender Reintegration*, 41 AMERICAN BEHAVIORAL SCIENTIST n.6 768 (1998).

¹¹ Expungement of Record, BLACK'S LAW DICTIONARY 702 (10th ed. 2014).

¹² Anna Kessler, *Excavating Expungement Law: A Comprehensive Approach*, 87 TEMP. L. REV. 403, 409 (2015).

¹³ See Sealing of Records, BLACK'S LAW DICTIONARY 1551 (10th ed. 2014) ("The act or practice of officially preventing access to particular (esp. juvenile-criminal) records, in the absence of a court order.").

more commonly used to remove arrests and other non-conviction records.¹⁴ Also, veterans face unaffordable fees for criminal record sealings and expungements placed by state governments.¹⁵ What's more, an expunged or sealed record often remains available for law enforcement purposes and is almost never completely removed.¹⁶ Nonetheless, the evidence is convincing that redemptive justice can be powerfully effective.¹⁷

This Article aims to reveal the redemptive nature of expungements and strategies for getting veterans the benefits of expungements. Part I of this Article shows how state governments' built-in fees are a barrier to accessible expungements for jobless and homeless veterans and examines how criminal records survive the sealing and expungement processes and reappear on background checks. Part II describes barriers to expungement posed by the Legislative, Executive and Judicial branches, and discusses solutions to these problems. Part III presents three other potential solutions to employment problems faced by veterans: banning the box, eliminating ghost records, and adopting clean slate policies and second chance laws. This study concludes by acknowledging there are several redemptive strategies and policies to overcome barriers to expungements for veterans.

VETERAN'S REDEMPTION

Expungements redeem veterans by giving them a second chance.¹⁸ A veteran can generally remove non-conviction records in most states.¹⁹ Non-conviction records include criminal history record information that has not

¹⁴ See Kessler, *supra* note 12, at 409.

¹⁵ See, e.g., FLA. STAT. § 28.24 (2013) (requiring a fee of \$42 to expunge or seal records).

¹⁶ See Kessler, *supra* note 12, at 409.

¹⁷ See Braithwaite, *supra* note 9, at 21 (“The evidence is convincing that restorative justice *can* be powerfully effective. At the same time, the evidence is thin that these strategies *are consistently* effective as regulatory strategies. It seems likely that this pattern will always prevail even as the empirical evidence becomes more illuminating about the limits and strengths of restorative justice.”). The White House has outlined a vision of an America built to last—where an educated, skilled workforce has the knowledge, energy and expertise to compete in the global marketplace. Yet—for far too many Americans—that vision is limited by drug use, which not only limits the potential of the individual, but jeopardizes families, communities and neighborhoods. This science-based restorative plan, guided by the latest research on substance use, contains more than 100 specific reforms to protect public health and safety in America. Among its reforms, the plan aims to bring veterans with mental disabilities back to the workforce as contributing members of the Country’s economy. See generally OFFICE OF NATIONAL DRUG CONTROL POLICY: NATIONAL DRUG CONTROL POLICY (2010) (explaining the Obama Administration’s plan to reduce drug use and its consequences through the *National Drug Control Strategy*).

¹⁸ State v. N.W., 747 A.2d 819, 823 (N.J. Super. Ct. App. Div. 2000) (noting that the purpose of the expungement statute was to provide an offender with a “second chance”); see, e.g., ARK. CODE ANN. § 16-90-1417 (2014) (restoring the “privileges and rights” of an individual whose record has been sealed, and directing that the sealed record “shall not affect any of his or her civil rights or liberties”).

¹⁹ See Kessler *supra* note 12, at 408-09 (discussing the general state practice of more readily expunging non-conviction records as opposed to conviction records).

led to a disposition adverse to the suspect and for which proceedings are no longer actively pending.²⁰ Examples of non-conviction records are arrest reports, probationary sentences, deferred adjudications, adjudications withheld, not guilty convictions and convictions set aside.²¹

In fewer states and cases, treatment courts can remove conviction records for veterans with a service-connected mental disability.²² Veterans suffering from a military service-related mental illness, traumatic brain injury, substance abuse disorder, or psychological problem, are usually eligible for voluntary admission into a pretrial veterans' treatment intervention program.²³ Florida, for example, passed legislation providing, "Any person whose charges are dismissed after successful completion of the pretrial veterans' treatment intervention program, if otherwise eligible, may have his or her arrest record to the dismissed charges expunged."²⁴

At the same time, state legislation alone proves to be generally narrow in scope providing limited opportunity to expunge a criminal record.²⁵ The evidence is thin that these redemptive strategies are consistently effective as state regulations.²⁶ Plus, the uncertain and confusing nature of federal expungement law, jurisprudence and policy is fairly well documented by professional organizations and academia.²⁷ More relevant to our discussion,

²⁰ WASH. REV. CODE ANN. §5305 (West 2016); *See generally* Lynette Meachum, *Private Rap Sheet or Public Record? Reconciling the Disclosure of Nonconviction Information Under Washington's Public Disclosure and Criminal Records Privacy Acts*, 79 Wash. L. Rev. 693 (2004).

²¹ *See generally* Margaret Colgate Love, *NACDL Restoration of Rights Resource Project, Jurisdiction Profiles*, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, http://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/Judicial_Expungement_Sealing_and_Set-Aside.pdf (last visited Dec. 28, 2015) (providing a state-by-state profile relating to relief from the collateral consequences of conviction, including the pardon process).

²² *See The History*, JUST FOR VETS, <http://www.justiceforvets.org/vtc-history> (last visited Dec. 28, 2015) ("As of June 30, 2014 there are 220 Veterans Treatment Courts in our country with hundreds more in the planning stages."). *See generally* Alana Frederick, Article, *Veterans Treatment Courts: Analysis and Recommendations*, 38 LAW & PSYCHOL. REV. 211 (2014) (discussing the background and function of veteran treatment courts and the connection to mental health issues).

²³ FLA. STAT. ANN. § 948.16(2) (West 2016); *See* Hon. C. Philip Nichols, Jr., *Veterans Court: a New Concept for Maryland*, 47 MD. B.J. 42 (2014).

²⁴ FLA. STAT. ANN. § 948.08 (West 2016).

²⁵ Kessler, *supra* note 12, at 403; *see* Love, *supra* note 20 (Explains that expungement law trends are recorded by the National Association of Criminal Defense Lawyers (NACDL). NACDL maintains brief summaries of the law and practice in each U.S. jurisdiction, including the federal system, relating to relief from the collateral consequences of conviction and restoration of rights. Additionally, the Organization provides side by side comparison charts of the jurisdictions).

²⁶ *See* Braithwaite, *supra* note 9, at 5.

²⁷ *See* James W. Diehm, *Federal Expungement: a Concept in Need of a Definition*, 66 ST. JOHN'S L. REV. 73, 102-104 (1992) ("The federal law on expungement is in a state of uncertainty and confusion. [...] The present state of federal law is, to a great extent, the result of our attempt to develop a coherent body of expungement law through the decisional rather than the legislative process. The courts themselves have recognized that determinations regarding expungement are more appropriately made by the legislature. [...] Moreover, the determination of these issues cannot be left to the states. The nationwide

however, is the fact that expungement fees prove to be barriers to veterans' employment and housing.²⁸ Our initial analysis will focus on how expungement fee waivers are the veterans' redemptive strategy of choice to overcome statutory, judicial and executive barriers.

LEGISLATIVE, JUDICIAL AND EXECUTIVE BARRIERS & SOLUTIONS

A. Legislative Barriers & Solutions

Expungement fees are a barrier for low income veterans working to avoid joblessness and homelessness but fee waiver statutes can either become a bridge or a barrier to an expungement.²⁹ To facilitate the analysis of expungement fee waiver policies, statutory actions are identified on the basis of the following ideological leanings.

1. The Traditional "Indigence Based Expungement Fee Waiver Statutory Prohibition"

Traditional legislative action prohibits any and all expungement fee waivers based on indigence. For instance, Indiana Code Section 35-38-9-4(d) (Supp. 2013) stated that:

A person who files a petition to expunge conviction records shall pay the filing fees required for filing a civil action, and the clerk shall distribute the fees as in the case of a civil action. A person who files a petition to expunge conviction records may not receive a waiver or reduction of fees upon a showing of indigency.³⁰

Indiana's traditional statute did not allow expungement fees to be waived. In 2014, the Legislature removed the statutory barriers prohibiting

character of federal law requires that it be uniformly applied to all citizens from coast to coast."); Gabriel T. Thornton, Comment, *CRIMINAL LAW--FIRST CIRCUIT holds federal courts lack jurisdiction to expunge criminal records on equitable grounds--UNITED STATES V. COLOIAN*, 480 F.3d 47 (1st Cir. 2007), *CERT. DENIED*, 128 S. CT. 377 (2007), 41 SUFFOLK U. L. REV. 395, 396-98 (2008); Ritesh Patel, *Hall v. Alabama: do Federal Courts have Jurisdiction to Expunge Criminal Records?*, 34 AM. J. TRIAL ADVOC. 401, 403-04 (2010).

²⁸ Rebecca Vallas and Sharon Dietrich, *One Strike and You're Out: How We Can Remove Barriers to Economic Security and Mobility*, CENTER FOR AMERICAN PROGRESS (Dec. 2, 2014, 7:35 AM), <https://www.americanprogress.org/issues/poverty/report/2014/12/02/102308/one-strike-andyoure-out/>.

²⁹ *See id.*

³⁰ Ind. Code § 35-38-9-4(d) (Supp. 2013); *See also Wall v. Plummer*, 13 N.E.3d 420 (Ind. Ct. App. 2014).

any and all fee waivers under H.B. 1155.³¹ But the 2014 changes did not add language prohibiting assessing filing fees. Based upon the intent expressed by the legislative sponsors, however, the Indiana Supreme Court Division of State Court Administration opined that the filing fees should not be assessed.³² The Court Administrator's moderate statutory interpretation helps indigent veterans avoid expungement fees.

2. The Moderate "Indigence Based Expungement Fee Waiver Statute"

Moderate legislative action regulates expungement fee waivers based on indigence. Alabama Code Section 15-27-4 exemplifies this type of legislation by offering both a payment plan and fee waiver option to qualified indigent applicants.³³ Not every moderate action resembles Indiana's approach. The Alabama Code, for instance, states in its relevant section that:

(a) In addition to any cost of court or docket fee for filing the petition in circuit court, an administrative filing fee of three hundred dollars (\$300) shall be paid at the time the petition is filed and is a condition precedent to any ruling of the court pursuant to this chapter. The administrative filing fee shall not be waived by the court [...]

(b) Notwithstanding subsection (a), a person seeking relief under this chapter may apply for indigent status by completing an Affidavit of Substantial Hardship and Order which shall be submitted with the petition. If the court finds the petitioner is indigent, the court may set forth a payment plan for the petitioner to satisfy the filing fee over a period of time, which shall be paid in full, prior to any order granting an expungement.

(c) If a petitioner seeks expungement of an arrest record and the court in the original

³¹ H.R. 1155, 118th Gen. Assemb., 2d Reg. Sess. (Ind. 2014).

³² Indiana Supreme Court Division of State Court Administration, *Trial Court Administration Manual for Judges and Clerks* (2015 Ed.), available at <http://www.in.gov/judiciary/admin/files/pubs-trial-court-expungement-statutes.pdf> (last visited December 28, 2015).

³³ ALA. CODE § 15-27-4.

case made a clear and unequivocal judicial finding on the record that the arrest had no foundation of probable cause, the court, in the expungement proceeding, shall waive all docket fees and court costs, except for the filing fee in subsection (a).³⁴

Alabama's statutory barriers force jobless and homeless veterans to pay an unaffordable expungement filing fee before additional fees and costs can be waived by the court and the expungement order is granted.³⁵ Alabama's moderate statute prevents indigent veterans from overcoming expungement fee barriers.

3. The Progressive "Veterans Treatment Court"

Lastly, progressive legislative action allows for expungement fee waivers and veterans redemptive justice strategies. As mentioned earlier, Florida has a veteran treatment court statute, which is an example of progressive legislative action.³⁶ Minnesota offers a different path towards redemption.³⁷ Unlike Florida, Minnesota does not have a veteran's treatment court statute. Instead, local stakeholders have created their own redemptive justice strategies.

The road towards redemption in Minnesota begins with statutes 609A.03 and 609A.02(3)(a)(1), which prescribe that:

An individual who is the subject of a criminal record who is seeking the expungement of the record shall file a petition under this section and pay a filing fee [...]. The filing fee may be waived in cases of indigency and [...]

A petition may be filed [...] to seal all records relating to an arrest, indictment or information, trial, or verdict if [...] all pending actions or proceedings were resolved in favor of the petitioner. For purposes of this chapter, a verdict of not guilty by reason of

³⁴ *Id.*

³⁵ *Id.*

³⁶ FLA. STAT. § 948.16(2).

³⁷ MINN. STAT. 609A.03 (2014).

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mental illness is not a resolution in favor of the petitioner.³⁸

Some states, like Minnesota, waive the expungement filing fee in cases of indigence.³⁹ Likewise, states can also deny expungements even if a person has a favorable outcome in a criminal proceeding.⁴⁰ In those cases, states offer to seal criminal records for a period of time.⁴¹ Once the time lapses, the records are expunged provided that the individual does not have any additional record activity, such as another arrest or charge.⁴²

It should be noted that Minnesota statute 609A.02(3)(a)(1) bars record sealing where the not guilty verdict resulted from a determination of mental illness.⁴³ Those circumstances presuppose that a crime was actually committed.⁴⁴ Individuals found not to have committed the crime charged are allowed to seal their records.⁴⁵ There is no remedy for those individuals with mental disabilities found to have committed the crime charged.⁴⁶ The only way indigent veterans can avoid a guilty verdict for reason of mental illness, expunge their records, and apply for a fee waiver, is through Minnesota's 5th District treatment court.⁴⁷

Minnesota's 5th District treatment court is the result of a memorandum of agreement (MOA).⁴⁸ The MOA might not be the result of legislative action, but it bears to mention that it has not been statutorily banned.⁴⁹ The redemptive solution was created in 2012 as an initiative from the local County Attorney's Office and the Veterans Affairs Department (VA).⁵⁰ The County Attorney, the VA, a team of county agencies, and community representatives met to discuss cases of veterans facing criminal charges or struggling to meet their probation requirements.⁵¹ Judge Bradley C. Walker, a retired USMC Colonel, attended the meetings and found some components

³⁸ MINN. STAT. 609A.02 (2014); MINN. STAT. 609A.03 (2014).

³⁹ *E.g.*, MINN. STAT. 609A.03 (2014).

⁴⁰ Love, *supra* note 21.

⁴¹ Love, *supra* note 21.

⁴² Love, *supra* note 21.

⁴³ MINN. STAT. 609A.02(3)(a)(1) (2014).

⁴⁴ *See id.*

⁴⁵ *Id.*

⁴⁶ *See id.*

⁴⁷ *See* Minn. Jud. Branch, 5th District, *Multi-County Veterans Court (MCVC) Policy Manual 6-7* (2013),

http://www.mncourts.gov/mncourtsgov/media/scao_library/Drug%20Courts/5th%20District/Multi%20County%20Veterans%20Court/Policy_Manual_07-17-13_final.pdf.

⁴⁸ *Id.* at app. B.

⁴⁹ *See id.* at 1.

⁵⁰ *Id.*

⁵¹ *Id.*

of the traditional Veterans Court.⁵² He saw how the VA and community resources partnership broke down barriers, and improved the identification and needs of veterans.⁵³ At the same time, Judge Walker also found a lack of judicial leadership.⁵⁴ As a result, the stakeholders entered into a MOA with the judiciary.⁵⁵ The MOA adopts the ten key components for a veteran's court promulgated by the National Clearinghouse for Veterans Treatment Courts at the National Association of Drug Court Professionals (NADCP), which are:

Key Component #1: Veterans Court integrates alcohol, drug treatment, and mental health services with justice system case processing.

Veterans Court promotes sobriety, recovery and stability through a coordinated response to veteran dependency on alcohol, drugs, and/or management of their mental illness. Realization of these goals requires a team approach. This approach includes the cooperation and collaboration of the traditional partners found in drug treatment courts and mental health treatment courts with the addition of the Veteran Administration Health Care Network, veterans and veterans family support organizations, and veteran volunteer mentors.

Key Component #2: Using a nonadversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights

To facilitate the veteran's progress in treatment, the prosecutor and defense counsel shed their traditional adversarial courtroom relationship and work together as a team. Once a veteran is accepted into the court program, the team focus is on the

⁵² Minn. Jud. Branch, 5th District, *supra* note 47, at 1.

⁵³ Minn. Jud. Branch, 5th District, *supra* note 47, at 1.

⁵⁴ Minn. Jud. Branch, 5th District, *supra* note 47, at 1.

⁵⁵ Minn. Jud. Branch, 5th District, *supra* note 47, at 19.

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veteran's recovery and law-abiding behavior—not on the merits of the pending case.

Key Component #3: Eligible participants are identified early and promptly placed in the Veterans Court program

Early identification of veterans entering the criminal justice system is an integral part of the process of placement in the Veterans Court program. Arrest can be a traumatic event in a person's life. It creates an immediate crisis and can compel recognition of inappropriate behavior into the open, making denial by the veteran for the need for treatment difficult.

Key Component #4: Veterans Court provides access to a continuum of alcohol, drug, mental health and other related treatment and rehabilitation services

While primarily concerned with criminal activity, [Alcohol and other drug] AOD use, and mental illness, the Veterans Court Team also considers co-occurring problems such as primary medical problems, transmittable diseases, homelessness; basic educational deficits, unemployment and poor job preparation; spouse and family troubles—especially domestic violence—and the ongoing effects of war time trauma. Veteran peer mentors are essential to the Veterans Court Team. Ongoing veteran peer mentors interaction with the Veterans Court participants is essential. Their active, supportive relationship, maintained throughout treatment, increases the likelihood that a veteran will remain in treatment and improves the chances for sobriety and law-abiding behavior.

Key Component #5: Abstinence is monitored by frequent alcohol and other drug testing

Frequent court-ordered AOD testing is essential. An accurate testing program is the most objective and efficient way to establish a framework for accountability and to gauge each participant's progress.

Key Component #6: A coordinated strategy governs Veterans Court responses to participant compliance

A veteran's progress through the treatment court experience is measured by his or her compliance with the treatment regimen. Veterans Court reward cooperation as well as respond to noncompliance. Veterans Court establishes a coordinated strategy, including a continuum of graduated responses, to continuing drug use and other noncompliant behavior.

Key Component #7: Ongoing judicial interaction with each Veteran is essential

The judge is the leader of the Veterans Court Team. This active, supervising relationship, maintained throughout treatment, increases the likelihood that a veteran will remain in treatment and improves the chances for sobriety and law-abiding behavior. Ongoing judicial supervision also communicates to veterans that someone in authority cares about them and is closely watching what they do.

Key Component #8: Monitoring and evaluation measure the achievement of program goals and gauge effectiveness

Management and monitoring systems provide timely and accurate information about

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program progress. Program monitoring provides oversight and periodic measurements of the program's performance against its stated goals and objectives. Information and conclusions developed from periodic monitoring reports, process evaluation activities, and longitudinal evaluation studies may be used to modify program.

Key Component #9: Continuing interdisciplinary education promotes effective Veterans Court planning, implementation, and operations

All Veterans Court staff should be involved in education and training. Interdisciplinary education exposes criminal justice officials to veteran treatment issues, and Veteran Administration, veteran volunteer mentors, and treatment staff to criminal justice issues. It also develops shared understanding of the values, goals, and operating procedures of both the veteran administration, treatment and the justice system components.

Education and training programs help maintain a high level of professionalism, provide a forum for solidifying relationships among criminal justice, Veteran Administration, veteran volunteer mentors, and treatment personnel, and promote a spirit of commitment and collaboration.

Key Component #10: Forging partnerships among Veterans Court, Veterans Administration, public agencies, and community-based organizations generates local support and enhances Veteran Court effectiveness

Because of its unique position in the criminal justice system, Veterans Court is

well suited to develop coalitions among private community-based organizations, public criminal justice agencies, the Veteran Administration, veterans and veterans families support organizations, and AOD and mental health treatment delivery systems. Forming such coalitions expands the continuum of services available to Veterans Court participants and informs the community about Veterans Court concepts. The Veterans Court fosters system wide involvement through its commitment to share responsibility and participation of program partners.⁵⁶

By adopting the NADCP's 10 Key Components, Minnesota's 5th District treatment court created a redemptive solution for indigent veterans with mental illnesses. Minnesota's 5th District veterans can avoid a not guilty verdict for reason of mental illness, expunge their records, and qualify for fee waivers, employment and affordable housing. For that reason, the MOA is a model of judicial leadership overcoming statutory barriers. Still, in some states, there are judicial barriers to affordable expungements caused by procedural hurdles.

B. Judicial Barriers & Solutions

Expungement fee waiver procedures can also be a barrier for veterans trying to avoid joblessness and homelessness. Procedural barriers are more often than not the product of moderate "indigent waiver statutes." Alabama, as discussed earlier, exemplifies how indigent veterans have to pay an unaffordable filing fee before additional fees and costs can be waived by the court and an expungement order is granted.⁵⁷ Illinois is another moderately regulated state. Different from Alabama, Illinois' filing fees can be waived by the court, but not costs.⁵⁸ Nonetheless, neither statute offers guidelines to determine indigence. The question for Alabama and Illinois law makers is: How do judges determine who is indigent? The answer lies in judicial procedure.

⁵⁶ Minn. Jud. Branch, 5th District, *supra* note 47, at 17-18; *see also The Ten Key Components of Veterans Treatment Court*, THE NAT'L CLEARINGHOUSE FOR VETERANS TREATMENT COURTS AT THE NATIONAL ASS'N OF DRUG PROFESSIONALS, <http://www.ndcrc.org/content/10-key-components-veterans-treatment-courts>.

⁵⁷ *See* ALA. CODE § 15-27-4 (1975).

⁵⁸ ILL. COMP. STAT. ANN. 2630/5.2(d)(1), (10) (2016); ILL. ADMIN. CODE tit. 20, § 1205.40 (2016).

In Illinois, the judiciary answered the procedural question left unanswered by the legislature in the case of *People v. Lewis*.⁵⁹ In *Lewis*, the trial court denied the fee waivers under section 5–105.5(b) of the Illinois Code of Civil Procedure,⁶⁰ because expungement proceedings are not civil, but criminal matters, corollary to underlying criminal proceedings.⁶¹ The appellate court, to the contrary, held that the fee waivers should have been automatically granted because expungement proceedings are civil and the requirements of section 5–105.5(b) were met.⁶² Moreover, the decision points out that the procedure for expungement fees waivers only offers “all-or-nothing” options.⁶³ For that reason, the court can only grant or deny the waiver of all fees.⁶⁴

The importance of *Lewis* is not only in the fact that it clarified the “all-or-nothing” options available for expungement fee waivers, but it also incorporates indigence guidelines. By adopting Section 5–105.5, the court defined an indigent person seeking to expunge a record as someone “whose income is 125% or less of the current official federal poverty income guidelines or who is otherwise eligible to receive civil legal services under the eligibility guidelines of the civil legal services provider or court-sponsored pro bono program.”⁶⁵ As the procedure further suggests, expungement fees may be waived for people meeting Federal Poverty Guidelines, and must be waived for people represented by civil legal services or pro bono program lawyers.⁶⁶ Civil legal services and pro bono programs are primarily funded through the Legal Services Corporation (LSC) Act (“Act”).⁶⁷ The Act requires funded programs to assist people whose maximum income level equivalent to 125% of the Federal Poverty Guidelines.⁶⁸ Thus, the Federal Poverty Guidelines provide indigence eligibility standards for both the judiciary and LSC programs.

The public usually finds it difficult to picture the kind of individual considered indigent under the Department of Health and Human Services (HHS) Federal Poverty Guidelines.⁶⁹ LSC Programs adopt these guidelines

⁵⁹ See generally *People v. Lewis*, 961 N.E.2d 1237 (Ill. App. Ct. 2011).

⁶⁰ See *id.* at 1238 (“[T]he circuit court entered orders by docket entries, denying the waivers . . .”).

⁶¹ *Id.*

⁶² *Id.* at 1239.

⁶³ *Id.* at 1240.

⁶⁴ *People v. Lewis*, 961 N.E.2d at 1240.

⁶⁵ 735 ILL. COMP. STAT. 5 / 5-105.5(a) (2013).

⁶⁶ See 735 ILL. COMP. STAT. 5 / 5-105.5(b) (2013).

⁶⁷ 42 U.S.C. § 2996f(a)(2) (2012); see 45 C.F.R. §§ 1611.1, 1611.4 (2015).

⁶⁸ 45 C.F.R. § 1611.3 (2015) (following guidelines from 42 U.S.C. § 2996f(a)(2) to establish a maximum income level); Income Level for Individuals Eligible for Assistance, 80 Fed. Reg. 5485 (Feb. 2, 2015).

⁶⁹ See Annual Update of the HHS Poverty Guidelines, 80 Fed. Reg. 3236 (Jan. 22, 2015) (clarifying

and create tables that integrate the 125% threshold for individuals eligible for assistance.⁷⁰ The following table illustrates the LSC 2015 income guidelines:

Size of household	48 Contiguous states & D.C.	Alaska	Hawaii
1	\$14,713	\$18,400	\$16,938
2	19,913	24,900	22,913
3	25,113	31,400	28,888
4	30,313	37,900	34,863
5	35,513	44,400	40,838
6	40,713	50,900	46,813
7	45,913	57,400	52,788
8	51,113	63,900	58,763
For each additional member of the household in excess of 8, add:	5,200	6,500	5,975

Under these Guidelines, an individual living by him or herself must receive a monthly income of \$1,226 or less to qualify for services. To put things in perspective, we offer the following illustration of the typical legal aid client in need of veteran services at Coast to Coast Legal Aid of South Florida, Inc.⁷¹ The typical veteran submits the requisite financial informa-

prior legislative language, explaining administrative channels, and providing resources to the public).

⁷⁰ 45 C.F.R. § 1611, App. A (2015).

⁷¹ Coast to Coast Legal Aid of South Florida, Inc. (CCLA) is a non-profit law firm providing assistance to Broward County, Florida residents and funded in part by the Legal Services Corporation (LSC). Their VALOR Project provides education, outreach and representation to Veterans, active duty military, and their families. Moreover, VALOR is also funded by the Supportive Services of Veteran Families (SSVF) Program. Section 604 of the Veterans' Mental Health and Other Care Improvements Act of 2008, Public Law 110-387, authorized VA to develop the SSVF Program. Supportive services grants are awarded to selected private non-profit organizations and consumer cooperatives that assist very low-income Veteran families residing in or transitioning to permanent housing. Grantees provide a range of supportive services to eligible Veteran families that are designed to promote housing stability. The VA awarded an SSVF homeless grant to United Way of Broward County (UWBC). Likewise, the UMBC's SSVF Program partnered with CCLA's VALOR Project to provide legal services to eligible veterans. See *Department of Veteran Affairs Awards United Way of Broward County \$2 Million Grant*, UNITED WAY OF BROWARD COUNTY, (July 18, 2013), <http://www.unitedwaybroward.org/index.cfm?fuseaction=news.details&ArticleId=144> (last visited Dec. 28, 2015); see generally, COAST TO COAST

tion to establish his income and assets. The financial information usually confirms that a veteran is homeless because his or her income is insufficient to cover housing and living expenses. The typical veteran's gross income is limited to a VA pension of \$1,050 per month. The pension is sometimes garnished at a common rate of \$175 per month to cover some kind of VA overpayment of medical debt. Thus, a veteran's net income is usually \$875 per month. Due to a disability and/or a criminal record, the veteran cannot work. Conversely, the median cost of an "efficiency" housing unit in Broward County is \$748 per month.⁷² This leaves a veteran with \$127 to pay for utilities and daily living expenses. The Cost of Living Index for Fort Lauderdale, Broward County, FL is 115.7%, which is well above the median for US cities.⁷³ It is estimated that the average Florida resident's living monthly expenses are \$251 for food, \$192 for medical care, \$357 for transportation, and \$179 for incidentals.⁷⁴ In total, the veteran will need at least \$979 to cover his living expenses. Therefore, the veteran will not be able to avoid homelessness with only \$127 for living expenses. The veteran will need a full pension reinstatement and a combination of government assistance packages to make ends meet.

Therefore, Federal Poverty Guidelines offer an objective measure of indigence for judicial evaluation of expungement fee waiver applications. Several state agencies, however, still lack administrative guidelines to waive expungement fees.

C. Executive Branch Barriers & Solutions

Administrative fees are a barrier for low income veterans. The administrative fee waivers are more often than not the product of moderate "indigent waiver statutes." The risk of charging administrative fees under moderate statutes is that the executive branch can implement waiver policy using traditional guidelines. Florida, for instance, and as referenced beforehand, has adopted a progressive legislative agenda. But the administrative fee waiver policy has been left in the hands of the executive branch's Department of Law Enforcement, whose guidelines are traditional.

LEGAL AID, <http://www.coasttocoastlegalaid.org/> (last visited Dec. 28, 2015).

⁷² Dep't of Housing & Urb. Dev., *The FY 2013 Broward County FMRs for All Bedroom Sizes*, FY 2013 FAIR MARKET RENT DOCUMENTATION SYSTEM, http://www.huduser.gov/portal/datasets/fmr/fmrs/FY2013_code/2013summary.odn?INPUTNAME=METRO33100MM2680*Broward+County%2B1201199999&data=2013&year=2013&fmrtype=%24fmrtype%24&incpath=C:%5CHUDUSER%5CwwwMain%5Cd datasets%5Cfmr%5Cfmr%5CFY2013_Code&selection_type=county&path=%24path%24&stname=Florida (last visited Dec. 28, 2015).

⁷³ *Cost of Living Index for Selected U.S. Cities*, INFOPLEASE, <http://www.infoplease.com/business/economy/cost-living-index-us-cities.html> (last visited Nov. 17, 2016).

⁷⁴ See Amy Glasmeier, *Living Wage Calculation for Broward County, FL.*, MASS. INST. OF TECH., <http://livingwage.mit.edu/counties/12011> (last visited Nov. 17, 2016).

Florida Statutes 943.0585(2)(b) and 943.059(2)(b), provide that,

The department shall issue a certificate of eligibility for sealing to a person who is the subject of a criminal history record provided that such person: [...] (b) Remits a \$75 processing fee to the department for placement in the Department of Law Enforcement Operating Trust Fund, unless such fee is waived by the executive director.⁷⁵

Moreover, Florida Administrative Code Rules 11C-7.006 and 11C-7.007 state that, “A fee waiver may be granted by the Executive Director of the Department upon submission of a written request and in his determination that the waiver is in the best interests of criminal justice.”⁷⁶

The “best interest of criminal justice” is not a clear standard. In its implementation, the standard does not offer any guidelines and leaves fee waiver policy to the unfettered discretion of the Department’s Executive Director. For that reason, in its traditional implementation of expungement fee waiver policy, the Executive Director used the legislatively delegated authority to decide that an entire group of people would not be permitted to apply: indigents. So the Director will not waive the fee for the poor who cannot afford it. Under this traditional executive policy, Florida’s disabled low income veterans cannot request a fee waiver for a certificate of eligibility to expunge their criminal records and find employment.

By providing the Executive Director with the discretion to enact fee waiver rules, the legislature has impermissibly given the Administrative Agency the authority to declare who the law shall apply to.

Article II, Section 3 of the Florida Constitution creates three branches of government and prohibits one branch from exercising the powers of the other two branches:

Branches of government - The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers apper-

⁷⁵ FLA. STAT. ANN. §§ 943.0585(2)(b)-943.059(2)(b) (West 2014).

⁷⁶ FLA. ADMIN. CODE r. 11C-7.006-7.007.

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taining to either of the other branches unless expressly provided herein.⁷⁷

As the Florida Supreme Court has noted, the legislature possesses the constitutional power to transfer subordinate functions to “permit administration of legislative policy by an agency with the expertise and flexibility to deal with complex and fluid conditions.”⁷⁸ Under the nondelegation doctrine, however, the legislature “may not delegate the power to enact a law or the right to exercise unrestricted discretion in applying the law.”⁷⁹

Further, the nondelegation doctrine precludes the legislature from delegating its powers, “absent ascertainable minimal standards and guidelines.”⁸⁰ As the Florida Supreme Court stated in *Florida Dep’t of State, Div. of Elections v. Martin*,

In other words, statutes granting power to the executive branch “must clearly announce adequate standards to guide ... in the execution of the powers delegated. The statute must so clearly define the power delegated that the [executive] is precluded from acting through whim, showing favoritism, or exercising unbridled discretion.”⁸¹

When a statute lacks adequate guidelines, courts cannot determine if the agency is carrying out the legislative intent.⁸²

Accordingly, Florida Statutes 943.0585(2)(b) and 943.059(2)(b) constitute an unauthorized delegation of legislative authority.⁸³ Therefore, a court may declare the statute unconstitutional because it fails to delineate any standards or guidelines to curtail the Executive Director’s discretion to grant waivers and process applications, and allows for the arbitrary ex-

⁷⁷ FLA. CONST. art. II, § 3.

⁷⁸ *Microtel v. Fla. Pub. Serv. Comm’n*, 464 So.2d 1189, 1191 (Fla.1985) (citing *State, Dep’t of Citrus v. Griffin*, 239 So.2d 577 (Fla.1970)).

⁷⁹ *Sims v. State*, 754 So.2d 657, 668 (Fla. 2000). *Cf. Sims*, 754 So.2d at 670 (finding law was not unconstitutional because it clearly fixed the penalty to be imposed, delegating only the details of carrying out the execution to the department).

⁸⁰ *Dep’t of Bus. Reg., Div. of Alcoholic Beverages & Tobacco v. Jones*, 474 So.2d 359, 361 (Fla. 1st DCA 1985).

⁸¹ *Florida Dep’t of State, Div. of Elections v. Martin*, 916 So. 2d 763, 770 (Fla. 2005) (quoting *Lewis v. Bank of Pasco County*, 346 So.2d 53, 55–56 (Fla.1976)).

⁸² *Askew v. Cross Key Waterways*, 372 So.2d 913, 918–19 (Fla.1978); *Southern Alliance for Clean Energy v. Graham*, 113 So.3d 742, (Fla. 2013).

⁸³ See *Martin*, 916 So.2d at 771 (declaring a statute unconstitutional because it fails to delineate any standards or guidelines to guide the Department in exercising its discretion granted under the statute).

clusion of indigents as a class of applicants that includes disabled low income veterans. Alternatively, a court may order the Agency to cease and desist from failing to adopt fee waiver guidelines for the indigent.

That being the case, state executive branches like Florida would be wise to voluntarily adopt guidelines consistent with their legislatures' traditional, moderate or progressive policies before the issue is brought to court. State governments' adoption of fair chance policies would be a great start.

III. OTHER SOLUTIONS TO HELP VETERANS WITH CRIMINAL RECORDS

A. Fair Chance Policy: Ban the Box

In some states, the difference between sealing and expunging a record is substantial.⁸⁴ On one hand, the general public will not have access to a criminal history if the record is sealed.⁸⁵ In Florida, for instance, certain governmental or related entities have access to sealed record information in its entirety.⁸⁶ On the other hand, when a record has been expunged, those entities which would have access to a sealed record will be informed that the subject of the record has had a record expunged, but would not have access to the record itself without a court order.⁸⁷ All they would receive is a caveat statement indicating, "Criminal Information has been Expunged from this Record."⁸⁸ The effect of this policy is that a veteran with a sealed record may not have a problem getting a private sector job, but may find it difficult to be employed by government agencies with access to the sealed records.⁸⁹

In response, nineteen states and over one hundred cities and counties

⁸⁴ See Love, *supra* note 21.

⁸⁵ See Love, *supra* note 21.

⁸⁶ FLA. STAT. ANN. § 943.059(4)(a)(West 2015).

⁸⁷ Michelle Natividad Rodriguez & Beth Avery, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair-Chance Policies to Advance Employment Opportunities for People with Past Convictions*, NATIONAL EMPLOYMENT LAW PROJECT, Oct. 2016, at 1 ("A total of 24 states, representing nearly every region of the country, have adopted statewide policies—California (2013, 2010), Colorado (2012), Connecticut (2010, 2016), Delaware (2014), Georgia (2015), Hawaii (1998), Illinois (2014, 2013), Louisiana (2016), Maryland (2013), Massachusetts (2010), Minnesota (2013, 2009), Missouri (2016), Nebraska (2014), New Jersey (2014), New Mexico (2010), New York (2015), Ohio (2015), Oklahoma (2016), Oregon (2015), Rhode Island (2013), Tennessee (2016), Vermont (2015, 2016), Virginia (2015), and Wisconsin (2016). Nine states—Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, and Vermont—have removed the conviction history question from job applications for private employers, a change that advocates embrace as the next step in the evolution of these policies.")

⁸⁸ *Frequently Asked Questions*, FLA. DEP'T OF L. ENFORCEMENT, http://www.fdle.state.fl.us/cms/Seal-and-Expunge-Process/Frequently-Asked-Questions.aspx#Sealed_vs_Expunged (last visited Nov. 15, 2016).

⁸⁹ See Rodriguez & Avery, *supra* note 87, at 1.

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have adopted a fair chance policy widely known as “ban the box,” so that employers consider a job candidate’s qualifications first, without the stigma of a criminal record.⁹⁰ “These initiatives provide applicants a fair chance by removing the conviction history question on the job application and delaying the background check inquiry until later in the hiring process. Momentum for the policy has grown exponentially, particularly in recent years.”⁹¹

Florida, for instance, is not part of the nineteen state governments adopting the ban the box initiative.⁹² But several large Florida cities have adopted measures including Jacksonville, Orlando and Tampa.⁹³

On May 15, 2015, the City of Orlando announced a new policy that eliminates the criminal history inquiry from applications for City employment. The City does not conduct a background check until making a conditional offer of employment. For applicants to the police and fire department and to summer seasonal employees who work with children and people with disabilities, the criminal history inquiry will remain on the application. Applicants who are rejected due to criminal history are provided notification of the reason for the denial.⁹⁴

Miami-Dade illustrates a large county’s adoption of a fair chance policy.⁹⁵ Banning the box promotes redemptive justice, as explained by the County Commission Chairman Jean Monestime:

We have a moral responsibility to give them a chance, at least a second chance, to compete for a job. [...] We want people to have a chance to make an honest living.⁹⁶

⁹⁰ Rodriguez & Avery, *supra* note 87, at 1.

⁹¹ Rodriguez & Avery, *supra* note 87.

⁹² Rodriguez & Avery, *supra* note 87.

⁹³ Michael Vazquez, *Miami-Dade Removes Criminal History Question from Country Job Applications*, MIAMI HERALD (Oct. 6, 2015, 5:56 PM), <http://www.miamiherald.com/news/local/community/miamidade/article38002746.html>.

⁹⁴ Rodriguez & Avery, *supra* note 87, at 64.

⁹⁵ See Vazquez, *supra* note 93.

⁹⁶ Vazquez, *supra* note 93.

The fair chance policy has been extended to private sector jobs. For example, on December 1, 2014, the Columbia City Council in Missouri unanimously approved a fair chance ordinance that prohibits employers from inquiring into an applicant's criminal history until after a conditional offer of employment.⁹⁷

The fair chance policy provides a second chance at a government job to veterans with a sealed record.⁹⁸ It also advances private sector job opportunities to veterans with a record.⁹⁹ It is only fair for an employer banning the box to get a criminal record from the government after the conditional offer of employment.¹⁰⁰ The veteran is still protected if the record is sealed or expunged.¹⁰¹ Nevertheless, and regardless of whether the government's record has been sealed or expunged, a veteran looking for a job should still be aware about the fact that his or her criminal history may be available to potential employers through non-government sources.¹⁰²

B. Zombie Criminal Records

A private employer may still seek a potential employee's criminal history from sources other than the government.¹⁰³ In those cases, it does not matter if the record was sealed or expunged, because the information is held by private credit reporting agencies.¹⁰⁴ Accounts of credit reporting agencies (CRA or CRAs) selling very old criminal histories or even properly expunged records – called “zombie” records – have been on the rise in recent years. Pennsylvania has experience dealing with zombie records.¹⁰⁵

In Pennsylvania, criminal court records are made publicly available, at no cost and with no restrictions, in a database maintained by Administrative Office of Pennsylvania Courts (AOPC) Expungement Unit and available on its website.¹⁰⁶ As a general practice, expunged criminal charges in Philadel-

⁹⁷ See Rodriguez & Avery, *supra* note 87, at 60.

⁹⁸ See Rodriguez & Avery, *supra* note 87, at 69.

⁹⁹ See Rodriguez & Avery, *supra* note 87, at 10.

¹⁰⁰ Rodriguez & Avery, *supra* note 87, at 8.

¹⁰¹ See Rodriguez & Avery, *supra* note 87, at 6, 67.

¹⁰² COLLATERAL CONSEQUENCES RESOURCE CENTER, PREVENTING BACKGROUND SCREENERS FROM REPORTING EXPUNGED CRIMINAL CASES (2015), <http://ccresourcecenter.org/2015/04/17/preventing-background-screeners-from-reporting-expunged-criminal-cases>.

¹⁰³ See Sharon M. Dietrich, *Preventing Background Screeners from Reporting Expunged Criminal Cases*, CLEARINGHOUSE COMMUNITY (Sept. 17, 2015), http://www.legaltechcenter.net/10th-Privacy-Conference/access-litigated/materials/Preventing_Background_Screeners_from_Reporting_Expunged_Criminal_Cases.pdf.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1, 4; see e.g., Stokes v. Realpages, Inc., No. 15-1520 (E.D. Pa. Oct. 18, 2016) (order and opinion denying motion to dismiss).

¹⁰⁶ See UNIFIED JUDICIAL SYSTEM OF PA., *Judicial Administration*, <http://www.pacourts.us/judicial->

phia are hidden from public view in AOPC's database within days of an expungement order.¹⁰⁷ They are completely eliminated from the database that is provided to bulk purchasers shortly thereafter.¹⁰⁸

As part of its bulk sale of criminal record information to CRAs, and in a concentrated effort to avoid the reporting of expunged records, the AOPC also provides a "LifeCycle file" on a weekly basis.¹⁰⁹ The LifeCycle file contains a list of cases that bulk data subscribers must remove from their databases, including expunged cases. In other words, AOPC specifically identifies expunged cases to the purchasers of its bulk data so that they and their downstream users will remove the cases from their databases.¹¹⁰ AOPC's contract with its bulk data subscribers requires them to retrieve and access the LifeCycle file and failure to comply can result in termination of the contract.¹¹¹

A veteran with expunged charges can expect that his criminal record will be removed from public view in AOPC's database within days of the expungement order. As of the removal from public view of the expunged charges from AOPC's database accessible on AOPC's website, any CRA preparing a background check that maintained reasonable procedures to assure accuracy would have been aware that it was no longer appropriate to report the expunged charges.¹¹² Even if a preparer were to rely instead on bulk data obtained from AOPC, the preparer would know that expunged charges had been eliminated if it properly updated its database, through application of the LifeCycle file or otherwise.¹¹³

Notwithstanding, CRAs are known to report the expunged charges on background checks after the cases had been hidden from public view, eliminated from AOPC's database, and reported for deletion in a LifeCycle file.¹¹⁴ The return of the expunged charges demonstrates the trade practice of CRAs' failure to search any public records in which charges had been expunged.¹¹⁵ The zombie records keep coming back from the dead even if eliminated from all public data bases.¹¹⁶ As a result of the CRAs' inaccurate

administration (last visited Dec. 28, 2015).

¹⁰⁷ SUPREME CT. OF PA., ADMIN. OFFICE OF PA. CTS., RECORD RETENTION & DISPOSITION SCHEDULE WITH GUIDELINES (2014).

¹⁰⁸ See Dietrich, *supra* note 103, at 2.

¹⁰⁹ See Dietrich, *supra* note 103, at 2.

¹¹⁰ See Dietrich, *supra* note 103, at 2.

¹¹¹ See Dietrich, *supra* note 103, at 2.

¹¹² See Dietrich, *supra* note 103, at 3.

¹¹³ See Dietrich, *supra* note 103, at 2.

¹¹⁴ See Dietrich, *supra* note 103, at 4.

¹¹⁵ See Dietrich, *supra* note 103, at 4.

¹¹⁶ See Dietrich, *supra* note 103, at 5.

reports, applicants with zombie records are denied housing and job opportunities.¹¹⁷

Because the state government's LifeCycle file policy did not completely prevent zombie records, Pennsylvanians found a remedy against CRAs in a federal statute protecting consumer's rights: the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. (FCRA). The FCRA defines a CRA under 15 U.S.C. §§ 1681a(b) and (f).¹¹⁸ Moreover, the FCRA identifies the individuals harmed by the trade practice as "consumers" and that term is defined by 15 U.S.C. § 1681a(c).¹¹⁹ Pursuant to 15 U.S.C. §§ 1681e(b), 1681n and 1681o, CRA's are liable to the consumers for willfully and/or recklessly failing to follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom a consumer report relates.¹²⁰

Among other things, the FCRA regulates the collection, maintenance, and disclosure of consumer credit report information by CRAs, including public record information.¹²¹ Some CRAs obtain distilled and incomplete public record information, including criminal record history, from third party databases and courthouses and maintain such data in consumer files that they create and assemble.¹²² CRAs sell consumer files to landlords or employers wishing to investigate the background of consumers applying for residential leases or jobs.¹²³ CRAs are required to follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

Notwithstanding the FCRA, several CRAs do not maintain reasonable procedures designed to assure maximum possible accuracy.¹²⁴ Based upon a common policy and practice, some CRAs regularly and illegally report criminal records that have been expunged, sealed, or otherwise removed by court order.¹²⁵ The CRAs' practices not only violate the FCRA as a matter of law, but the practices exact serious consequences on consumer housing and job applicants and interstate commerce.¹²⁶ Consumers who have obtained the deletion of negative background history are prejudiced in their

¹¹⁷ See Dietrich, *supra* note 103, at 1.

¹¹⁸ 15 U.S.C. § 168a(f) (2012).

¹¹⁹ 15 U.S.C. § 1681a(c).

¹²⁰ 15 U.S.C. §§ 1681e(b), 1681n(a), 1681o(a).

¹²¹ Meir Feder & Rajeev Muttreja, *Understanding the Fair Credit Reporting Act*, PRAC. L. J. LITIG. 48, 49 (April/May 2016).

¹²² See Dietrich, *supra* note 103, at 2.

¹²³ See Dietrich, *supra* note 103, at 2.

¹²⁴ See Dietrich, *supra* note 103, at 2-3.

¹²⁵ See Dietrich, *supra* note 103, at 1.

¹²⁶ See Dietrich, *supra* note 103, at 1, 4.

ability to obtain leased housing or employment despite the fact that negative information no longer appears in the public record.¹²⁷

Case in point, Pennsylvanians filed the first class action suit against a CRA for selling zombie criminal records in *Giddiens v. LexisNexis Risk Solutions, Inc.*, on May 14, 2012, and on behalf of individuals who “were the subjects of background reports in which expunged criminal charges were reported.”¹²⁸ Represented by Community Legal Services, Inc. and Francis & Mailman, P.C., the Pennsylvania plaintiffs brought this action on behalf of employment applicants throughout the country who had been the subject of prejudicial, misleading and inaccurate background reports sold by LexisNexis to employers.¹²⁹

LexisNexis adopted and maintained a policy and practice of failing to timely update such applicants’ criminal record histories to eliminate the expunged cases or show that such cases have been expunged, thus not accurately reflecting the final disposition.¹³⁰ The prejudice caused by the erroneous reporting is exacerbated by LexisNexis’ failure to notify the consumer contemporaneously of the fact that the erroneous criminal record information is being sent to the employer, and the CRAs’ failure to maintain strict procedures to assure that expunged records are removed from their reports and that the information is complete and up to date.¹³¹ LexisNexis also pursued and maintained a policy and practice of failing to comply with the FCRA’s clear directive to provide consumers with written notice of the results of reinvestigations.¹³² The prejudice caused by the lack of notice is that consumers, who are entitled to receive copies of their credit files from the CRA pursuant to Section 1681(i) of the FCRA, are deprived of full disclosure, and unable to adequately verify and/or dispute the accuracy of the information that Defendant sells to employers.¹³³ LexisNexis’ practice harmed consumers seeking employment by preventing the consumers from verifying the accuracy of the information that the CRA reported and sold, and harmed interstate commerce as a whole.¹³⁴ The case settled on July 9, 2014, with an individual settlement payment of \$1,000 to each Settlement Class Member who did not opt out of the settlement class and who did not file a damages claim.¹³⁵ Individuals opting out had the op-

¹²⁷ See Dietrich, *supra* note 103, at 2.

¹²⁸ Giddiens Compl., *infra* note 130, at ¶ 44(b).

¹²⁹ Dietrich, *supra* note 103, at 2–3.

¹³⁰ Complaint at 1, *Giddiens v. LexisNexis Risk Solutions, Inc.*, (E.D. Pa.) (No. 12 Civ. 2624).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 1-2.

¹³⁴ *Id.* at 2.

¹³⁵ Settlement Agreement at 2, 17, *Giddiens v. LexisNexis Risk Solutions, Inc.*, (E.D. Pa.) (No. 12 Civ.

portunity to redress grievances through arbitration.¹³⁶ The total amount payable to Settlement Class Members in the aggregate with respect to damages claims was not to exceed \$995,000.¹³⁷ LexisNexis sold its employee screening business to First Advantage after several class actions were initiated.¹³⁸

The federal government has also taken steps to combat zombie criminal records. On October 29, 2015, the Consumer Financial Protection Bureau (CFPB) took action against two of the largest employment background screening report providers for failing to take basic steps to assure the information reported about job applicants was accurate. The serious inaccuracies reported by General Information Services, Inc. (GIS), and its affiliate, e-Background-checks.com, Inc. (BGC), potentially affected consumers' eligibility for employment and caused reputational harm. In the matter of *General Information Services, Inc. and e-Backgroundchecks.com, Inc.*, Case No. 2015-CFPB-0028, the CFPB found that GIS and BGC violated the FCRA by, among other things, failing to employ reasonable procedures to assure the maximum possible accuracy of the information contained in reports provided to consumers' potential employers. Specifically, the CFPB found that the companies violated sections 15 USC §§ 1681e(b), 1681k(a) and 1681c(a)(2) of the FCRA.¹³⁹

Section 15 USC § 1681(e)(b) deals with a CRAs' failure to employ reasonable procedures to assure maximum possible accuracy of the information in their reports. In the matter of *GIS and BGC*, the CFPB found that the companies failed to use basic procedures for matching public records information to the correct consumer.¹⁴⁰ For example, the Bureau found that GIS did not require employers to provide consumers' middle names, and neither company had a written policy for researching consumers with common names.¹⁴¹ The Bureau also found that GIS failed to use an audit process to adequately test the accuracy of the reports provided.¹⁴²

Section 15 USC § 1681(k)(a) deals with the CRAs' failure to meet the statutory requirements when reporting public record information that is likely to have an adverse effect on a consumer's ability to obtain employ-

2624).

¹³⁶ See generally *id.*

¹³⁷ *Id.* at 21.

¹³⁸ *Bolton v. First Advantage LNS Screening Sols., Inc.*, No. 14 Civ. 5735 PAC, 2015 WL 4039834, at *2 (S.D.N.Y. July 1, 2015).

¹³⁹ *General Information Services, Inc.*, Case No. 1015-CFPB-0028, 1, 1 (U.S. Consumer Fin. Prot. Bureau, Consent Order Oct. 29, 2015).

¹⁴⁰ *Id.* at 2.

¹⁴¹ *Id.* at 5.

¹⁴² See *id.* at 1, 9.

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ment. The Bureau found that, between 2010 and 2014, nearly 70 percent of criminal history disputes consumers filed with GIS resulted in some change or correction to the information in the consumer's background report.¹⁴³ "As a result, the companies provided prospective employers with inaccurate reports that included criminal records attached to the wrong consumers, dismissed and expunged records, and misdemeanors reported as felony convictions."¹⁴⁴ These inaccuracies can result in the denial of employment, missed economic opportunity, and reputational harm to otherwise qualified applicants.¹⁴⁵

The Section in 15 USC § 1681©(a)(2) deals with the CRAs' failure to exclude non-reportable information from employment background reports. The CFPB found that GIS and BGC unlawfully included certain information in consumer reports they provided to prospective employers.¹⁴⁶ Specifically, the CFPB found that the companies failed to take measures to prevent non-reportable civil suit and civil judgment information older than seven years from being illegally included in its reports.¹⁴⁷

Pursuant to the Consumer Financial Protection Act of 2010 (CFPA), 12 USC §§ 5563, 5565, the CFPB has the authority to take action against institutions or individuals engaging in unfair, deceptive, or abusive acts or practices or who otherwise violate federal consumer financial laws. Under the terms of the CFPB the Consent Order, the companies are required to provide monetary relief to harmed consumers, revise their compliance procedures, retain an independent consultant, develop a comprehensive audit program, and pay a penalty.¹⁴⁸

More to the point, the Consent Order requires GIS and BGC to provide \$10.5 million in relief to harmed consumers.¹⁴⁹ The companies must identify consumers negatively affected by their conduct and provide monetary relief.¹⁵⁰ The companies will pay approximately \$1,000 to each affected consumer.¹⁵¹ The companies will revise procedures to assure reporting ac-

¹⁴³ See *id.* at 2.

¹⁴⁴ *CFPB Takes Action Against Two of the Largest Employment Background Screening Report Providers for Serious Inaccuracies*, CONSUMER FIN. PROT. BUREAU (Oct. 29, 2015), <http://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-two-of-the-largest-employment-background-screening-report-providers-for-serious-inaccuracies/>.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ General Information Services, Inc., Case No. 2015-CFPB-0028, 1, 15 (U.S. Consumer Fin. Prot. Bureau, Consent Order Oct. 29, 2015).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

curacy.¹⁵² These procedures include using algorithms to distinguish records by middle name and match common names and nicknames, using consumer dispute data to determine the root causes of errors, and using software to identify and reconcile discrepancies.¹⁵³ The companies will also hire an independent consultant to review and assess the companies' policies, procedures, staffing levels, and systems.¹⁵⁴ The consultant will also recommend changes and improvements where necessary.¹⁵⁵ Additionally, GIS and BGC will develop a comprehensive audit program to test the accuracy, integrity, and completeness of the public-record information sourced to generate the companies' background reports.¹⁵⁶ The audit program will be implemented at a frequency necessary to reliably test the accuracy of the companies' background reports.¹⁵⁷ At least twice a year, the companies will evaluate and adjust the audit program in light of the results and any material changes to the companies' operations.¹⁵⁸ Finally, the corporations will collectively pay a civil monetary penalty of \$2.5 million for their illegal actions.¹⁵⁹

The FCRA provides all consumers, including veterans, with protections against zombie criminal records. Still, all of the solutions discussed before rely on the individual's request to expunge the criminal history from government sources.

C. Clean Slate Policy and Second Chance Laws

One solution to the expungement process is a clean slate policy. According to the Center for American Progress, the policy allows minor nonviolent cases to be automatically sealed after time has passed without subsequent conviction of a felony or a misdemeanor.¹⁶⁰ This means criminal records would only become available to law enforcement, but not the public. For misdemeanors, that period is ten years.¹⁶¹ For summary offenses, it is five

¹⁵² *Id.* at 12.

¹⁵³ *Id.*

¹⁵⁴ General Information Services, Inc., Case No. 2015-CFPB-0028, 1, 10 (U.S. Consumer Fin. Prot. Bureau, Consent Order Oct. 29, 2015).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 11-13.

¹⁵⁷ *Id.* at 11, 13.

¹⁵⁸ *Id.*

¹⁵⁹ General Information Services, Inc., Case No. 2015-CFPB-0028, 1, 16 (U.S. Consumer Fin. Prot. Bureau, Consent Order Oct. 29, 2015).

¹⁶⁰ REBECCA VALLAS & SHARON DIETRICH, ONE STRIKE AND YOU'RE OUT: HOW WE CAN REMOVE BARRIERS TO ECONOMIC SECURITY AND MOBILITY 34, (2014), available at <https://www.americanprogress.org/issues/poverty/report/2014/12/02/102308/one-strike-andyoure-out/> (last visited December 28, 2015).

¹⁶¹ *Id.*

years.¹⁶² For arrests that did not result in a conviction, there is no waiting period.¹⁶³ A clean slate is an agreement with the person with the criminal record.¹⁶⁴ If an eligible individual remains crime-free for the required period of time, his or her case will be sealed. No petition for sealing or court order would be needed.¹⁶⁵

The clean slate policy makes sense because people with nonviolent misdemeanor convictions who do not commit another crime within four to seven years are no more likely to commit a crime in the future than the general population.¹⁶⁶ Moreover, people who have redeemed themselves are trapped by lifetime barriers. For instance, nearly nine in ten employers¹⁶⁷ and four in five landlords¹⁶⁸ use criminal record background checks, putting employment and housing out of reach for many. To help alleviate these barriers, twenty three states and Washington, D.C., have expanded their record-clearing laws since 2009.¹⁶⁹

Also, a clean slate is automatic. Individuals do not need to file record-clearing petitions one by one.¹⁷⁰ This reduces a burdensome workload for the courts and makes it easier for those trying to find employment, housing, and other basic needs for their future success.¹⁷¹

More importantly, everyone benefits from a clean slate policy. People with criminal records will be able to move on with their lives, provide for their families, and become productive members of society.¹⁷² Families and

¹⁶² *Id.* at 37.

¹⁶³ *Id.* at 34.

¹⁶⁴ *Id.* at 34.

¹⁶⁵ VALLAS & DIETRICH, *supra* note 160, at 34.

¹⁶⁶ Alfred Blumstein and Kiminori Nakamura find that the risk of recidivism drops sharply over time. Specifically, they find that the risk of recidivism for individuals who have a prior conviction for a property offense drops to no different than the risk of arrest in the general population three to four years after the individual has remained crime free. Likewise, they find that the risk of recidivism for individuals with a drug conviction is no different than that of the general population after four years. For people with multiple convictions, they suggest a more conservative estimate of 10 years. See Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, *Criminology* 47 (2009) 327, 331-332.

¹⁶⁷ SOCIETY FOR HUMAN RESOURCE MANAGEMENT, *BACKGROUND CHECKING - THE USE OF CRIMINAL BACKGROUND CHECKS IN HIRING DECISIONS*, 2 (2012), available at <http://www.shrm.org/research/surveyfind-ings/articles/pages/criminalbackgroundcheck.aspx> (last visited December 28, 2015).

¹⁶⁸ See David Thacher, *The Rise of Criminal Background Screening in Rental Housing*, 33 L. & SOC. INQUIRY 5, 12 (2008).

¹⁶⁹ See Ram Subramanian & Rebecka Moreno, *Relief in Sight?: States Rethink the Collateral Consequences of Criminal Conviction, 2009-2014* 13 (New York: Vera Inst. of Just., 2014).

¹⁷⁰ See Rebecca Vallas & Sharon Dietrich, *One Strike and You're Out: How We Can Remove Barriers to Economic Security and Mobility* 13, (2014).

¹⁷¹ See *id.* at 13.

¹⁷² See *id.* at 1.

children of people with criminal records will benefit as their incomes increase, their housing improves, and other obstacles to family economic security are eliminated.¹⁷³ The criminal justice system will not be burdened with the transactional costs of many thousands of record-clearing petitions each year. State governments will save money as a result of reduced incarceration.¹⁷⁴ The state's economy will benefit from not shutting qualified jobseekers out of the labor force, which costs the national economy \$65 billion a year in lost gross domestic product, or GDP.¹⁷⁵ Lastly, communities will be safer as a result of lower recidivism rates due to reduced barriers to successful reentry.¹⁷⁶

The discussion at the state level has been spearheaded by U.S. Justice Action Network, a national nonprofit organization consisting of ranking members of both liberal and conservative organizations who seek to reform the criminal justice system in the U.S. The ACLU, Americans for Tax Reform, The Center for American Progress, The Faith and Freedom Coalition, Freedom Works, The Leadership Conference on Civil and Human Rights, and Right on Crime all partner with U.S. Justice Action Network to lobby for reform to the criminal justice system.¹⁷⁷ Holly Davis, the executive director of U.S. Justice Action Network said Pennsylvania, Ohio and Michigan are the first three states the organization has targeted to make changes at the state level.¹⁷⁸ "We chose those states because they do have leaders who are reform minded on both sides of the aisle which is very important to our organization that we have bipartisan coalition," she said.¹⁷⁹ However, while Michigan only explored the second chance law concept, Pennsylvania's "clean slate" bill promised to be the national model.¹⁸⁰ In the 2015 Regular Session, State Sen. Stewart Greenleaf, R-12th Dist., authored Senate Bill 166, which would have enabled those convicted of low-level misdemeanors to petition the court for an expungement after completing a sentence and seven years without another offense.¹⁸¹ Unfortunately, the clean

¹⁷³ *See id.*

¹⁷⁴ *See id.* at 24-25.

¹⁷⁵ VALLAS & DIETRICH, *supra* note 160, at 2.

¹⁷⁶ VALLAS & DIETRICH, *supra* note 160, at 45.

¹⁷⁷ Pa. Lawmakers Discuss Bill to Allow Minor Offenders to Expunge Criminal Records, THE TIMES HERALD, July 16, 2015, available at <http://www.timesherald.com/article/JR/20150716/NEWS/150719841> (last visited December 28, 2015).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Jane Von Bergen, Pennsylvania May Lead Way In "Clean Slate" Legislation, THE PHILADELPHIA INQUIRER, March 21, 2016, available at http://www.philly.com/philly/business/20160321_Pennsylvania_may_lead_way_in_Clean_Slate_legislation.html.

¹⁸¹ S.B. 166, Gen. Assemb., Reg. Sess. (Pa. 2015) (unenacted) available at <http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2015&sessInd=0&billBody=S&billTyp=B&billNbr=0166&pn=1517>.

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slate policy and second chance laws did not garnish enough support to help redeem veterans with mental disabilities.

CONCLUSION

In the end, the idea of a wounded warrior's chance at redemption has its detractors.¹⁸² While expungements give veterans and their families a second chance at economic self-sufficiency, state governments' fees bar access to the indigent. Moreover, even after a record is expunged, criminal history survives the sealing and expungement process and reappear on background checks. Nonetheless, redemptive strategies like indigent based fee waivers and treatment courts provide access to justice. Additionally, fair chance, fair credit reporting, and clean slate policies and statutes make it possible for veterans to seek employment and housing without the fear of being rejected on the basis of their criminal history.

¹⁸² Peter Breen, *Veterans and Their Courts*, ARIZONA ATTORNEY: SOUNDOFF, (Jan. 2011), https://www.myazbar.org/AZAttorney/PDF_Articles/0111Soundoffweb.pdf ("Please do not insult me by telling me that a mentally ill veteran cannot be a 'real' criminal.").

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