

The Delaware Second Chance Expungement Gap

By: Colleen Chien, Evan Hastings, Zuyan Huang, and Daniel Grigore¹

Key Findings

People with criminal records: ~250K

People with conviction records: ~153K

Share of people with convictions eligible for relief: ~40%

People with convictions eligible for relief : ~61K

Uptake rate of *any* records relief: 6%

Expungements in last year of data (adult): ~1,101 (2019)

Years to clear the backlog based on current rates: 194

*Does not include consideration of fines and fees

I. Abstract

Del. Code Ann. tit. 11, §§ 4372, *et seq* allows individuals whose criminal records meet certain conditions to expunge their records. Ascertaining, then applying the law to a sample of 1,266 criminal histories including 66% with convictions records, and then extrapolating to the estimated population of 250K individuals in the state with criminal records,² we estimate the share and number of people who are eligible for relief but have not received it and therefore fall into the “second chance gap”—the difference between eligibility for and receipt of records relief.³ (We did not model legal financial obligations or other out of record criteria).

Based on the method described above, we find that approximately 40% of individuals in our sample are eligible to clear their convictions, 38% can clear all convictions, and 85% of individuals with records are eligible to clear their records, 54% of all records. Extrapolating to the total number of people with records in Delaware, this yields an estimated 61K people with convictions that are eligible for convictions relief, 153K with records that are eligible for any

¹ Colleen Chien is a Professor at Santa Clara University School of Law, and founder of the Second Chance Gap Initiative; Evan Hastings is a Graduate Fellow at Santa Clara University School of Law; Prajakta Pringale holds a Masters Degree from the Data Analytics Santa Clara Leavey School of Business; Daniel Grigore is a second year law student at Santa Clara University School of Law. We thank our community partner, American Civil Liberties Union (ACLU) of Delaware, for their input into the operation of the laws and expungement sources. This report is based on the concept and definition of the “second chance gap” described in Colleen V. Chien, “America’s Paper Prisons: The Second Chance Gap,” 119 Mich. Law. Rev. 519 (2020) Contact: colleenchien@gmail.com | www.paperprisons.org.

² Rough estimate based on 25% of the 2017 population of 962K people, reflecting the national average (80M out of 330M people). Cf. Becki 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 criminal records in the DE state repository as of Dec 2018 as 2.7M, a number that likely overstates the current criminal population since the number of people in Delaware is 962K).

³ As defined in Chien (2020), *supra* note 1.

relief that haven't received it.⁴ Combining historical expungement statistics with our eligibility calculations, an estimated 6% of people with records eligible for relief have received it, leaving behind 94% of people with records. Based on reported records, the State expunged approximately 1,101 cases in the last year of available data (2019). At this rate, it would take approximately ~194 years to clear the existing second chance expungement gap in the backlog alone. However, due to deficiencies in the data and ambiguities in the law 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 our Methodology (Appendix A); Disposition Data Report (Appendix B); Appendix C (Common Charges); Detailed Expungement Statistics (Appendix D); Clearance Criteria Challenges and Legislative Drafting Alternatives (Appendix E).

II. Summary

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, Delaware law allows people whose criminal records meet certain conditions to pardon their records.⁵ However, the "second chance gap" in Delaware - the share of people eligible for relief who haven't expunged records because of hurdles in the petition process - we suspect 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, 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 Delaware, we estimate that approximately 250K people have criminal records, around 150K of those with conviction records.
- Of those with convictions, an estimated 40%, or about 61K people are eligible for expungement of their convictions, and an estimated 85%, or about 213K are eligible for relief from their records, convictions and nonconvictions (not taking into account fines

⁴ As defined id.

⁵ Described in "Rules" Section of Appendix A.

and fees and out of state charges). Approximately **54% of individuals with records (or 107K people), we estimate, could clear their records entirely, 38% of individuals with convictions (or 58K) could clear all convictions.**

- Based on the assumption that our sample is representative of people with court records in Delaware, we estimate that the current felony population in Delaware is approximately 48K people.
- 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 7K expungements over the last 20 years. Based on these numbers and the calculations above, we estimate that 6% of people eligible to clear any record have done so, leaving 94% of people in the expungements second chance gap.
- At current rates of expungement, it would take over 194 years to clear the existing backlog of criminal histories eligible for relief using current methods.

IV. Conclusion

Based on our analysis, Delaware’s expungement laws allow for approximately 85% of those who live burdened with records to get records relief, 40% to get relief from convictions, and for 54% of individuals with records could clear their records entirely, 38% of individuals with convictions could clear all convictions. But to date we estimate that 6% of those eligible for convictions relief have actually received the remedy, leaving 94% of people in the expungement uptake gap.

Appendix A: Methodology

To carry out our analysis, we implemented the approach developed in Colleen V. Chien, *The Second Chance Gap* (2020) as follows. First, we ascertained the relevant records relief laws and developed rules logic, using legal research to develop lists of ineligible and eligible charges. Next, we obtained and cleaned a sample of criminal histories from the state and collected information on the state’s criminal population. When possible, we also obtained administrative data on the number of expungements granted historically. Next, we developed flow logic to model the existing laws. Next we applied the flow logic to the criminal history sample to estimate eligibility shares in the sample. Finally, we extrapolated from the population in the sample to the total criminal population in the state overall, making adjustments derived from actuals, to calculate number and share of individuals in the “current gap” (people with currently records eligible for relief) as well as the “uptake gap” (share of people eligible for expungement over time that have not received them). The descriptions below disclose several shortcomings in our approach, including our inability to account for outstanding fines, or pending or out of state charges which could potentially disqualify some individuals for relief, 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. (See Chien 2020 for additional details). We use the term “expunge” loosely throughout this methodology to refer to the form of records relief available in the state pursuant to the statutes described in the RULES section of this report.

Ascertaining the Law and Developing Rules Logic

Based on the court guidelines, statutes, and guides from non-profits listed in the RULES section, 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. See “RULES” below. To the extent possible, we consulted with local attorneys to check our assumptions, and disclosed the eligibility conditions we weren’t able to model due to data or other limitations.

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. felony, misdemeanor), degree, and the maximum possible duration of incarceration/amount to be fine 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 under-inclusive and over-inclusive.

Obtaining a Data Sample of Criminal Histories and Ascertaining the State Population of Individuals with Criminal Records

We obtained a sample of criminal histories from the data source indicated below. Where the criminal histories of individuals were not already available based on a person ID, we used Name+DOB to create unique IDs and create state-specific criminal histories for each person. Descriptive statistics for our sample are provided in Appendix B. Whether supplied or generated, the person ID used has the risk of double counting individuals due to inconsistencies in name records, however, to minimize the bias introduced by this methodology, we relied on the sample

primarily for eligibility ratios, rather than supply absolute numbers of people with criminal histories in the state.

To ascertain the state population, we collected information on the number of people with biometric criminal records in the state from SEARCH (2020), a consortium of repositories (adjusting for growth in the number of people with records and accounting for people with uncharged arrests as described in Chien (2020)). Because they are based on biometric data, repository data should contain fewer if any duplicates. However, because the SEARCH sources do not systematically purge people who have moved out of state or have died, they are somewhat inflated. If total criminal population information was available directly from the state through administrative records, we considered it as well, and relied upon the smaller number of the two sources..

To ascertain data on the number of expungements granted historically, we consulted administrative data sources and related public disclosures, with the results reported in Appendix D.

Applying the Law to the Sample Data to Obtain an Eligibility Share (Current Gap)

To ascertain shares of people with records eligible for but not receiving relief (current gap), 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 chargetypes below in Appendix B. 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 took the conservative approach under the logic by assuming either that the charge or incident was ineligible for relief or removing it from the analysis. This step could introduce further errors into our analysis.

To approximate “sentence completion” we used recorded sentences where available, assuming that the sentence had been carried out, and taking an average period where a range of times was provided. Where usable sentence data was not available, we assumed that sentences were completed 2.5 years after the disposition date for misdemeanor charges, and 3.5 years after the disposition date for felony charges where sentence. Importantly, unless otherwise indicated, 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 below. If not available from our data source, we also did not account for pending charges which are disqualifying in some jurisdictions, however based on the literature we believe the share of people with records that have a currently pending charge is small, less than 5%.

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, Uptake Gap

To develop a state eligibility estimate based on the shares derived in the previous step, 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 criminal records in the state to obtain an estimate for the number of people in the "second chance gap." If the state sample was "convictions only" data, we conservatively reduced the criminal population eligible for relief by a share based on a sample of state actuals as provided in Chien 2020 Appendix B-3.

To calculate the "uptake rate" the share and number of people with records eligible for relief that have received this relief, we combined our estimates of the number of people in the second chance gap and combined it with a conservative estimate of the number of expungements granted over 20 years. To generate this estimate, we used actuals, but when not available over the entire period, we extrapolated back based on the first year of available data.

RULES

Delaware expungement Rules

Source: [Delaware CCRC](#) (8/18/2020) / [Del. Code Ann. tit. 11, §§ 4372, et seq](#) (2020) / [Delaware Court Guide](#) (2020)

CONVICTIONS:

1. Misdemeanors:
 - a. Expungement mandatory for convictions for 1 or more violations arising from same case after 3-year waiting period from date of conviction if clean (no convictions prior or subsequent to conviction). [§ 4373\(a\)\(2\)](#)
 - b. Expungement mandatory for convictions for 1 or more misdemeanors and/or violations arising from same case after 5-year waiting period from date of conviction if clean (no convictions prior or subsequent to conviction). [§ 4373\(a\)\(3\)](#)
 - c. Expungement discretionary for convictions for 1 or more misdemeanors not listed in [§ 4373\(b\)](#) arising from same case, after 3-year waiting period starting from date

of conviction or release from incarceration, whichever is later, and clean (no prior or subsequent convictions) upon showing of manifest injustice by petitioner. . [§ 4374\(a\)\(1\)](#).

- d. Expungement discretionary for convictions for 1 or more misdemeanors listed in [§ 4373\(b\)](#), arising from same case, after 7-year waiting period starting from date of conviction or release from incarceration, whichever is later, and clean (no prior or subsequent convictions) upon showing of manifest injustice by petitioner. . [§ 4374\(a\)\(2\)](#).
 - e. Expungement for pardoned misdemeanors and felonies with no waiting-period or clean requirement. [§ 4375\(a\)](#).
 - f. Expungement for cannabis possession class B misdemeanor if only offense and person is under 21, upon turning 21 and completion of sentence with no pending charges. [Section 4764\(j\)](#)
 - g. Expungement discretionary for convictions that have a child or vulnerable adult victim or are domestic violence related.
2. Felonies:
- a. Expungement discretionary for convictions for a single non-violent felony (defined by [Title 11 4201\(c\)](#)) after 7-year waiting period starting from date of conviction or release from incarceration, whichever is later, and clean (no prior or subsequent convictions) upon showing of manifest injustice by petitioner. [§ 4374\(a\)\(3\)](#).
3. Not eligible:
- a. Expungement not available for offenses listed under [§ 4372\(f\)\(1\)-\(5\)](#)
 - b. Mandatory expungement not available for offenses listed under [§ 4373\(b\)\(1\)-\(5\)](#)
 - c. Discretionary expungement not available for offenses listed under [§ 4374\(b\)\(1\)-\(4\)](#)
 - d. Expungement for pardoned offenses not available for offenses listed under [§ 4375\(b\)](#).
 - e. Not eligible if any pending case, currently serving a sentence, prior expungement within the last 10 years.
4. Lifetime or other Limits: Appears to be limited to once per lifetime for convictions due to eligibility element of “no prior convictions”, with exceptions for convictions listed under [§ 4372\(g\)](#) and (h). Unclear for non-convictions, appear there is no limit.
5. Treatment of Multiple Convictions from the Same Incident: Treated as single conviction, but “the requirement of “no prior or subsequent convictions” is ambiguous where relief is authorized for multiple convictions.” (CCRC Profile)
6. LFO payment required for sentence completion: Yes but may be waived and yes for non-convictions given diversion. [Del. Code Ann. tit. 16 § 4767](#)

7. Other Unmodeled Criteria or details: Juvenile, human trafficking. Note that there was a broad expansion in 2019 with mandatory and discretionary expungement criteria. Also, records may be destroyed once person reaches age of 80 or 75 with no prior criminal activity for prior 40 years. Del. Code Ann. tit. 11, § 8506(c).

NON-CONVICTIONS:

1. Expungement are mandatory upon petition for all cases where charges are “terminated in favor of the accused” (acquittals of all charges, a nolle prosequi on all charges, dismissal after probation before judgment, dismissal of all charges, and arrests that are not charged within 1 year of the arrest) with no wait-period. Del. Code tit. 11, § 4372(b)
2. Expungement available for successful completion of deferred adjudication Del. Code Ann. tit. 11, § 4218 or first-time controlled substance offenses where entered into a diversion program, upon completion of sentence. [Del. Code Ann. tit. 16 § 4767](#)

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 1998-2019 as described in Chien (2020).

<u>Data Statistics</u>	
Number of People in the Sample	1,266
Share of People with Convictions	66%
Share of People with Felony Convictions	19%
Share of People with Misdemeanor Convictions in the Sample	52%
Share of People with Felony Charges in the Sample	34%
Share of Charges Missing Dispositions	0.99%
Share of Charges Missing Chargetypes	0.06%

Appendix C: Common Charges

A. Top 10 Charges in our Dataset

<u>Charges</u>	<u>Number of Charges</u>	<u>Percentage of Charges</u>
offensive touching	431	6.25%
possession drug paraphernalia	222	3.22%

conspiracy 2nd degree	191	2.77%
assault 3rd degree	178	2.58%
insurance card	163	2.36%
driving license suspended / revoked	152	2.20%
theft	151	2.19%
conspiracy 3rd degree	147	2.13%
disorderly conduct	147	2.13%
harassment	133	1.93%
Total share and charges associated with top 10 charges	1915	27.77%

B. Top 10 Expungeable Charges in our Dataset

<u>Expungeable Charges</u>	<u>Number of Charges</u>	<u>Percentage of Expungeable Charges</u>
offensive touching	369	7.55%
possession drug paraphernalia	149	3.05%
insurance card	146	2.99%
conspiracy 2nd degree	130	2.66%
assault 3rd degree	128	2.62%
conspiracy 3rd degree	119	2.43%
harassment	110	2.25%
driving license suspended / revoked	105	2.15%
disorderly conduct	105	2.15%
possession marijuana	93	1.90%
Total share and charges associated with top 10 expungeable charges	1454	29.73%

Appendix D: Detailed Expungement Statistics

We obtained expungement statistics from the Delaware Administrative Office of the Courts (AOC), at <https://courts.delaware.gov/aoc/publications.aspx>. The Delaware AOC reports that a total of 6,967 expungements were granted during fiscal years 2014, 2016, 2017, 2018, and 2019.

The total number of expungements granted between 2014 and 2019 contemplates expunctions granted to both adults and juveniles. Because our analysis focuses on only adult expungements, we halved this number for 2019 for calculation purposes in order to avoid an overestimation (official statistics pending based on a data request). From our conversations with state expungement experts, prior to 2020, the majority of reported expungements were likely granted to juveniles as there were stringent limitations on the expungement criteria for adult records, so we also used this approach in our estimation of 20-year expungements.

Not captured in our numbers are mandatory expungements that, since 2020, can be accomplished by submitting a petition to the State Bureau of Identification, not the courts.

Appendix E: Clearance Criteria Challenges and Legislative Drafting Alternatives⁶

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 fees must be paid, and whether have been.	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). 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).	Disposition Date (+ X Years)
First conviction; qualifying conditions	Lack of unique identifier across precludes determination		Bless commercial identification approximation technique
Personal demographic trait 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	Explicitly specify the qualifying crimes

⁶ Adapted from Chien (2020)

Court-ordered conditions	Require individual review /check for any “court-ordered” conditions and compliance re: same	public record after 10 years, if all court-ordered conditions are satisfied. S.D. Codified Laws § 23A-3-34.	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”