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M E M O R A N D U M

TO: Honorable Sen. Prozanski, Chair

FROM: Aaron Knott, MCDA Policy Director

SUBJECT: Testimony on SB 397

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Protecting public safety and making Oregon safer begins with healthy, thriving communities. To achieve this goal, every Oregonian should have an equal opportunity to make a living wage, obtain affordable and stable housing, care for their families, age with dignity, and fully engage in civic participation.

Yet past mistakes can substantially disadvantage individuals in meeting even basic needs. A record of arrest or conviction can have significant consequences on a person's ability to obtain housing, maintain employment or receive crucial benefits and program eligibility. Nearly early 70 million Americans carry the stigma of a criminal record. To be more precise, one in three adults have been arrested by age 23¹ and nearly half of the children living in the United States have at least one parent who has a record of arrest or conviction². A criminal record comes with far reaching consequences—creating significant barriers to employment, housing, public assistance, and education. When the goals, dreams and potential of our friends and neighbors are limited, we all lose.

Record clearing (or expungement) is an established legal mechanism that gives people a second chance to rejoin their communities and our economy. For over 50 years, Oregon's own expungement statute has allowed individuals to clear certain criminal records under specific conditions. See ORS § 137.225 (1971).

¹ Erica Goode, *Many in U.S. Are Arrested by Age 23, Study Finds*, N.Y. TIMES, (Dec. 19, 2011), <https://www.nytimes.com/2011/12/19/us/nearly-a-third-of-americans-are-arrested-by-23-study-says.html>.

² Lottie Joiner and National Journal, *How Families Pay the Never-Ending Price of a Criminal Record*, THE ATLANTIC, (Dec. 15, 2015), <https://www.theatlantic.com/politics/archive/2015/12/how-families-pay-the-never-ending-price-of-a-criminal-record/433641/>.

This includes those who have been accused or arrested, but never convicted. See ORS § 137.225 (1983).

In 2021, the Oregon Legislature passed Senate Bill 397 with bipartisan majorities in both chambers.³ The bill sought to remove “access to justice” barriers by modernizing the expungement process, thereby making it more efficient and equitable.⁴ The legislation became effective on January 1, 2021.

Soon after the effective date, it became clear the impact of SB 397 was far more profound than expected. For example, in Multnomah County the number of expungement motions filed by the end of February exceeded the total number filed in the previous year. Moreover, unnecessary procedural adjustments created additional layers to an already over-burdened process (e.g., the strict requirement a hearing be scheduled when a prosecutor objects to a motion, even if the applicant did not request the hearing).

ADDITIONAL ADJUSTMENTS ARE NEEDED TO ENSURE THE FUNCTIONALITY OF THE EXPUNGEMENT PROCESS

After more than a year of SB 397 implementation, MCDA has identified five discrete issues that impact the efficiency of the expungement process. Therefore, MCDA recommends five technical adjustments to ORS § 137.225 that correspond to those concerns. None of the proposed statutory fixes propose to alter the expungement statute or the changes embodied in SB 397 in a meaningful way.⁵

ISSUE ONE: PROSECUTORS CAN ONLY OBJECT TO CONVICTION EXPUNGEMENT MOTIONS. PROSECUTORS CANNOT OBJECT TO AN ARREST EXPUNGEMENT MOTION, EVEN IF IT IS TECHNICALLY INELIGIBLE.

The expungement statute only allows a prosecuting attorney to object to a person’s motion when they file to expunge a conviction. Thus, a prosecuting

³ The final version of SB 397 (2021) was created through an extensive collaboration between prosecutors, defense attorneys, state agencies, and advocacy organizations that represented every part of the criminal legal system.

⁴ The major ways that SB 397 modified the expungement statute were (1) reducing the conviction-free, applicable waiting periods for convictions; (2) eliminating the standard filing fee and reducing the OSP fingerprint card fee for conviction motions; (3) an arrest can no longer be blocked by other arrests; (4) reducing the waiting period for a charge where no accusatory instrument was filed; and (5) clarifying the standard for a prosecuting attorney’s objection.

⁵ All five proposed legislative adjustments extend to ORS § 137.223 (the expungement statute for findings of Guilty Except Insanity).

attorney does not have authority to object to a person's motion when it is filed to expunge an arrest, even if the person is ineligible for expungement under the law.

PROPOSAL ONE: ALLOW TECHNICAL OBJECTIONS TO ARREST
EXPUNGEMENT MOTIONS.

Rather than a limited objection to only conviction expungement motions, the statute should clearly outline a prosecuting attorney may oppose a motion for a technical objection or a discretionary objection. A technical objection is a claim that the person's motion does not meet the statute's explicit eligibility requirements, whereas a discretionary objection is a claim that the applicant's "circumstances and behavior" create a risk to public safety. Where a technical objection—if true—requires a court to deny a motion; a court may still grant a motion even where a prosecuting attorney opposes a motion based on a discretionary objection.

A technical objection may also be broadly used with conviction or arrest expungement motions. Yet a discretionary objection may only be used in regards to a conviction.

ISSUE TWO: THE MANDATORY HEARING REQUIREMENT FOR ALL
OBJECTIONS IS ONEROUS AND BURDENSOME.

Regardless of the reason for a prosecuting attorney's objection, a mandatory hearing must be scheduled if a prosecutor opposes an expungement motion. However, the criteria for expungement eligibility are frequently inflexible – a petitioner will not overcome the prosecutor's objection, and so the hearing is often fruitless. And because the petitioner does not need to take any step to request the hearing, they frequently do not appear, which requires a significant amount of judicial and prosecutorial resources to absolutely no effect.

In practice, the mandatory hearing requirement has significantly increased the number of hearings for the courts, as well as the amount of time an applicant must wait until their scheduled hearing. In fact, since SB 397 went into effect, almost all the expungement hearings in Multnomah County have been for technical objections.⁶

⁶ Common technical objections are, for example, the (1) applicable waiting period has not passed; (2) an applicant has not completed payment of a court-ordered monetary obligation, such as restitution; (3) a motion was filed on a conviction charge that is not type-eligible; or (4) an applicant filed a motion where they were not the defendant in the case, etc.

PROPOSAL TWO: REQUIRE MANDATORY HEARINGS FOR DISCRETIONARY OBJECTIONS AND ALLOW “OPT-IN” HEARINGS FOR TECHNICAL OBJECTIONS.

When a prosecuting attorney objects to an expungement motion, require the prosecutor to indicate whether the objection is based on either a technical or discretionary objection. If the prosecuting attorney opposes based on a discretionary objection, require a mandatory hearing. If a prosecuting attorney opposes the motion based on a technical objection, allow the applicant to request a hearing within 60 days from the date the State’s objection was filed.⁷

ISSUE THREE: SB 397 WAS INTENDED TO CHANGE EXPUNGEMENT STATUTE SO CONVICTIONS NO LONGER “BLOCKED” ARRESTS.

After SB 397 passed, how to interpret a prominent subsection of the expungement statute became somewhat unclear. The initial drafters of SB 397 claimed it was their intent to eliminate the “blocking” of an arrest by a conviction. However, this concept was not reflected in the final version of SB 397—rather, the resulting statutory language requires a complicated analysis that often results in a peculiar outcome.

PROPOSAL THREE: MAKE A SMALL LANGUAGE MODIFICATION TO THE SUBSECTION AT ISSUE IN ORDER TO ACHIEVE THE ORIGINAL INTENT OF SB 397.

Two simple modifications to the language of subsection (7)(b) would clarify that only convictions are “blocked” by other convictions—while arrests are not.

The following two modifications to ORS § 137.225(7)(b) are recommended:

1. “...subsection (1)(a) of this section...”
2. “...that caused the [*arrest, citation, charge or*] conviction that is sought to be set aside...”

⁷ If a prosecuting attorney becomes aware of a procedural defect related to an applicant’s motion (e.g., failure to send fingerprints to the Oregon State Police, failure to file the motion with the clerk of court, failure to serve the prosecuting attorney’s office, etc.), the prosecuting attorney will notify the applicant by letter. The applicant will have 60 days from the date the letter was mailed (plus three days) in which to cure the procedural defect and notify the prosecuting attorney by email, phone, or first class mail. If the applicant fails to cure the defect and notify the prosecuting attorney within the proscribed time period, the prosecuting attorney may notify the court of the defect and ask the court to dismiss on its own motion.

ISSUE FOUR: TRAFFIC VIOLATIONS ARE NOT ELIGIBLE FOR EXPUNGEMENT.

Traffic violations⁸ (e.g., traffic infractions like speeding tickets, running a red light, etc.) are not eligible for expungement. These include traffic violations that do not result in a conviction.⁹ However, SB 397 arguably created ambiguity.

First, SB 397 did not intend to create this uncertainty as to traffic violations. Second, the expungement of traffic violations was never the Oregon legislature's intent or its purpose in passing the expungement statute. See *State v. Hammond*, 34 Or App 893, 897 (1978) (The expungement statute was enacted with the intent to clear the record of those individuals "who have demonstrated their ability to be responsible citizens. It thereby removes a cloud from the efforts of those persons to find employment and social acceptance, and otherwise bury the past."); See also *State v. McVein*, 305 Or App 525, 529 (2020) ("The legislature intended ORS 137.225 to combat the stigma associated with the public nature of a record of arrest or conviction by providing individuals with such a record the opportunity to purge it and start fresh."). And finally, the increased workload for prosecuting attorney's office would become overwhelming, thereby delaying the processing of applicants' expungement motions.

PROPOSAL FOUR: AMEND THE STATUTORY LANGUAGE TO CLARIFY THAT TRAFFIC VIOLATIONS ARE NOT ELIGIBLE FOR EXPUNGEMENT.

Please consider the proposed statutory language to clarify that all traffic violations are not eligible for expungement: "A state or municipal traffic violation, regardless of the disposition."

ISSUE FIVE: THERE IS NO CONSISTENCY TO THE COURT EXPUNGEMENT ORDERS.

If a court grants a person's motion, the expungement statute requires that the judge's order contains certain information (i.e., the original date of the person's arrest; the charge the person

⁸ A "traffic violation" is a traffic offense that is designated as a traffic violation in the statute defining the offense, or any other offense defined in the Oregon Vehicle Code that is punishable by a fine but that is not punishable by a term of imprisonment. ORS § 801.557.

⁹ In Multnomah County, our office has made an exception where a traffic misdemeanor is treated as a violation under ORS § 161.566 (by prosecuting attorney's office) or ORS § 161.568 (by the court) and the ultimate disposition *does not result in a conviction*. Because the original charge was a criminal offense, the non-conviction may be expunged.

was convicted of; whether the person was found guilty; which law enforcement agency arrested the person, etc.) After the order is signed by the judge, it is sent to the government agencies that have the person's criminal records, so the court record staff can seal and expunge the case. In order for the agency to comply with the judge's order, the court record staff must first find all the official criminal records. To do so, it is vital that the court order contain specific information about the applicant and the criminal case.

PROPOSAL FIVE: STANDARDIZE THE SPECIFIC INFORMATION THAT EACH COURT EXPUNGEMENT ORDER IS REQUIRED TO HAVE. CLARIFY IN THE STATUTE THAT AGENCIES MUST COMPLY WITH A COURT EXPUNGEMENT ORDER IF IT COMPLIES WITH THE STATUTE.

For an agency to fully comply with a court expungement order, certain criteria must be met and specific information must be included. Considering the (1) unending expungement motions being filed; (2) the countless number of courts and judges in Oregon; and (3) that agencies can only seal criminal records if the court expungement order meets certain criteria and contains specific information, MCDA recommends that the expungement statute be modified to explicitly required that all court expungement orders include the information listed below.¹⁰

Court identification number
District Attorney Number¹¹
Arrest charges
Date of arrest
Charges referred to court¹²
Convicted charges¹²
Date of conviction¹²
Police agency report number¹¹
Applicant's SID and FBI numbers¹¹
Applicant's name
Applicant's date of birth
Applicant's current mailing address

¹⁰ Certain information can only be provided by either the applicant, prosecuting attorney's, the judge, etc. For example, the applicant can only accurately provide their name, date of birth, and current mailing address. However, the prosecuting attorney's office has exclusive access to the Arrest Charges, Police Agency Report Number, and Applicant's FBI Number. Finally, other information should be publicly available through the Oregon eCourt Case Information (OECI) system or the individual court's clerk of court.

¹¹ If available.

¹² If applicable.

If it is not a viable option to require that the information listed above be contained in all court expungement orders, it is recommended that the Oregon Judicial Department explore create a statewide expungement order that all courts would be required to use.

It is also recommended that agencies that receive a court expungement order must comply if the order has enough information to identify the criminal record to must be sealed.

CONCLUSION

Senate Bill 397 was a deeply impactful bill which has caused tremendous changes in the process and frequency with which expungement is being sought by petitioners across Oregon. While a positive change from an access to justice perspective, the bill created a tremendous increase in workload for Oregon's prosecutors. While some of that increase in work is a necessary consequence of the purpose of the bill, the aspects of the legislation which are identified by the proposed amendments above are causing the significant diversion of limited resources without enhancing access to justice. If this body is considering amendments to the text of Senate Bill 397 as proposed by this bill, we would ask that these additional efficiencies be incorporated. These changes would smooth out the petitioning process, free up prosecutorial resources and improve the responsiveness of our system of expungement.

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