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Memorandum

To: Senate Judiciary Committee

From: Kari Bloom, Office of the Ohio Public Defender

Re: SB 4

Date: May 3, 2017

On May 2, 2017 Committee heard testimony from witnesses on SB 4, which seeks to expand expungement and intervention for some offenses, including those where the convicted person was also a victim of human trafficking. In the interest of holistic and effective legislation, please find this memorandum in response to the testimony offered by Mr. Murphy of the OPAA and subsequent questions from the Committee.

Sealing versus Expungement

Ohio Revised Code 2953.31-2953.62 speaks to sealing records. The process is complicated, even for courts. Sealing a record occurs when a court orders the record to be filed in an alternate, secure location. In order to get a record sealed, a person must be an eligible offender, apply to the court and pay $50.00, and attend a court hearing. During the sealing hearing, the court must weigh the government’s interests in maintaining the record of conviction against the defendant’s interests in having the record sealed.[[1]](#footnote-1)

Certain agencies and people can still access the record, as delineated by the legislature,[[2]](#footnote-2) and the record still exists in the county clerk’s office. When a record is sealed, internet queries may still show that the record exists, often prompting employers and other courts to inquire with the person regarding what the record holds.

Expunging a record means the court orders the record to be physically destroyed.[[3]](#footnote-3) In Ohio, expungement is only available for juvenile records and a certain few adult convictions, including prostitution and solicitation where the person is found to be a victim of human trafficking. . The provisions of SB 4, and other pending bills in the 132nd GA, include provisions to allow for expungement in certain circumstances to promote public safety and policy.

Currently, Ohio’s victims of human trafficking may apply to have their records sealed for convictions of solicitation and prostitution.[[4]](#footnote-4) Since, as professionals, we know that human trafficking victims are often forced to commit many crimes, including drug trafficking, stealing, and etc., SB 4 was introduced to allow those victims to seal records of any conviction except aggravated murder, murder, and rape. SB 4 is a common sense reaction to the collateral consequences human trafficking victims face.

A pitfall of SB 4 is that it requires victims to have convictions for prostitution and/or solicitation sealed before applying to have other convictions sealed. This requirement creates a loophole that many victims will fall through and thus lose out on the benefits of SB 4. The path to becoming a victim of human trafficking sometimes runs through solicitation and prostitution on one’s own free will, sometimes not. If, though, there are victims of human trafficking who either do not have prostitution or solicitation convictions to seal, or the sealing is denied by a court, then they will not be helped by SB 4.

To be as effective as possible, SB 4 must include a provision requiring courts or clerks of court to send the sealing and expunging orders to the Bureau of Criminal Investigation (BCI). BCI does not have the responsibility to make sure their records are correct, rather, they rely on courts to submit their sealing and expunging orders to their office in order to make changes to a criminal record. There are countless instances where BCI did not receive the court’s order to seal or expunge a record, and the conviction erroneously shows up on a background check. Employers, schools, and other government agencies who request and receive background checks rely on them for accuracy, and make employment decisions based on what BCI reports. That means people lose out on jobs or are dismissed from their positions because of the miscommunication between courts and BCI.

Expungement of dismissed cases

Similar to cases which resulted in a conviction as discussed above, non-conviction cases can also be sealed through court order. The person must use the same process as noted above. If, however, the person was subject of a case which the Grand Jury ignored or returned a No Bill, they must wait two years before applying for sealing. That means that people who are not charged with a crime have to wait two years to file for sealing, while those who are actually charged and found not guilty do not have to wait to have their record sealed. SB 4 remedies part of this problem, by extending expungement availability to people who are charged but not convicted. In light of the Supreme Court’s Task Force on Grand Jury reform, the Committee should consider how to deal with No Bills/ignored cases.[[5]](#footnote-5)

Grand jury secrecy

When cases are ordered sealed, or expunged in limited cases, documents maintained by the court are placed in a secure location. Attorney work product, Grand Jury reports, and other information about the case that is maintained outside of the court is not subject to the court’s order. As noted above, in No Bill cases, the person can’t file for sealing of the non-charge for two years. Notably, the person subject to the Grand Jury No Bill cannot examine the Grand Jury report, nor the evidence presented by the prosecutor because of the secrecy policy Ohio’s prosecutors enjoy. There are certainly cases which warrant Grand Jury report secrecy for public safety concerns, but that decision should be made in a case by case basis.[[6]](#footnote-6)

Duress and Necessity and the Existing Safe Harbor Provisions

The Committee heard testimony on this bill regarding protections for trafficked persons in the form of a duress defense. The duress defense in Ohio is known as necessity, and is a form of quasi self-defense. It is created by common law, and requires the defendant to affirmatively prove: (1) the harm was committed under the pressure of physical or natural force rather than human force, (2) the harm sought to be avoided is greater than, or at least equal to that sought to be prevented by the law defining the defense charged, (3) the actor reasonably believes at the moment that his act is necessary and is designed to avoid greater harm, (4) the actor must be without fault in bringing about the situation, and (5) the harm threatened must be imminent.[[7]](#footnote-7)

Additionally, Ohio courts have held that the force which the defendant claims created the necessity of the criminal conduct must be immediate and continuous, and that fear of future harm cannot be the basis of the defense.[[8]](#footnote-8) The logistics of human trafficking and the victimization that occurs is such that varied threats and pressures are presented to victims, with current or future consequences if the victim fails or disappoints their trafficker.

Necessity was not created for victims of human trafficking. In light of what we now know about human trafficking, asking trafficked people to prove that they were trafficked is poor public policy. Logistically, the person will have to take the stand and explain the trauma and events of their trafficked existence. Testifying about the people who trafficked him/her and how puts people in a very precarious position and makes them vulnerable to physical harm.

After that, the State will have the opportunity to expose the person as not-trafficked, likely by downplaying the existence of the trauma and objectification the person has been through. All of this information will be presented to a judge or jury, who, through no fault of their own, will not have the knowledge on the existence and prevalence of human trafficking that advocates and legislators are privy to.

Understanding the importance of balancing public safety with the personal safety of victims of human trafficking, the Ohio legislature passed a Safe Harbor provision to protect child victims of human trafficking.[[9]](#footnote-9) The law allows juvenile courts to hold a hearing to determine if they should hold the complaint against the child in abeyance for a period of time while conducting an investigation about the child. If the court finds that the child is a victim of human trafficking, the court can order treatment and counseling. Upon successful completion of the court-ordered treatment, the court can dismiss the complaint (even felonies).

This provision was new to courts and many advocates have expressed frustration with buy-in reluctance from court professionals. The Safe Harbor protection was the right thing to do, and many state and county level groups developed to help advocate for appropriate use of the law and protection of children. Evolving standards of decency require updating the Safe Harbor law, as SB 4 seeks to do.

1. *State v. Rojas,* 180 Ohio App. 3d 52, 2008-Ohio-6339. [↑](#footnote-ref-1)
2. Those who can see sealed records include: Prosecutors, judges and police for future criminal investigations, judges considering convictions for enhanced subsequent sentences, employers in law enforcement, jobs working with children or other protected groups, real estate institutions, and professional licensing boards (i.e. Ohio State Medical Board). [↑](#footnote-ref-2)
3. Often, the term expungement is used interchangeably with sealing when discussing adult records. [↑](#footnote-ref-3)
4. R.C. 2953.38 [↑](#footnote-ref-4)
5. Task Force Recommendations are available on the OSC website. [↑](#footnote-ref-5)
6. Recently the Ohio Supreme Court entertained a special task force on Grand Jury reform, which issued recommendations to improve Ohio’s Grand Jury process, which admittedly does not impact this bill. [↑](#footnote-ref-6)
7. *State v. Prince,* 71 Ohio App. 3d 694, 699 (1991). [↑](#footnote-ref-7)
8. *State v. Good,* 110 Ohio App. 415, 419 (1960). [↑](#footnote-ref-8)
9. R.C. 2152.021(F) [↑](#footnote-ref-9)