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MONTPELIER
SPRINGFIELD

TO: Maxine Grad, Chair of House Judiciary Committee
FROM: Mairead C. O'Reilly, Esq., Poverty Law Fellow
DATE: March 30, 2018
RE: S. 173, an act relating to sealing criminal history records when there is no conviction

Good Morning Representative Grad and House Judiciary Committee Members,

My name is Mairead O'Reilly—I am the Poverty Law Fellow at Vermont Legal Aid. Over the last 20 months, my fellowship work has focused on the opioid crisis. Many of my clients are in recovery from opioid use disorder, and many have a criminal history. Early on, I noticed that criminal records impact my clients' recovery and reintegration efforts in dangerous ways that are costly to these individuals, their families and our communities.

I appreciate the opportunity to testify in support of S. 173.

Senate Bill 173 does three important things. First, it codifies a court process to seal and eventually expunge all non-conviction records, as a matter of course—removing the need for an affirmative petition to clear dismissed or acquitted charges. Second, the bill amends the “subsequent felony” provision. This would ensure that qualifying crimes committed prior to a felony offense are eligible for expungement seven years after a petitioner's last felony conviction.¹ And third, this bill creates a study committee to consider expanding the list of qualifying felony offenses and to investigate the viability of automating the expungement process for certain convictions. This committee would report back to the Joint Justice Oversight Committee by November 1, 2018.

i. Background

Vermont Legal Aid is a non-profit organization that advises and represents low-income Vermonters in civil legal matters. Our organization is interested in the issue of criminal records—and the barriers they create—because criminal records are inextricably related to poverty in today's world. Due to the rise of mass incarceration, a doubling of misdemeanor convictions over the last 40 years, and

¹ Currently, a petitioner is barred from expunging a qualifying crime if they were later convicted of *any* felony offense, regardless of how much time has lapsed since that conviction.

widespread access to criminal records, low-income Vermonters with records are routinely barred from habitable housing, decent employment, and educational opportunities. A criminal record both causes and exacerbates poverty, and its effects are intergenerational. It is important to note that people who are economically and socially marginalized because of race, class, sex, and national origin are more likely to be involved in the criminal justice system in the first instance—and therefore more likely to deal with the adverse consequences of a record. In the context of the opioid crisis, even our clients who sustain long-term recovery from opioid use disorder struggle to access these opportunities because of their criminal records—sometimes decades after their last criminal justice contact.

Vermont Legal Aid fields calls from Vermonters across the state who request record clearance help. This work can be tremendously impactful; when folks are eligible, a simple record clearance can help them gain access to opportunities that they have been denied for years. But in about half of our cases, we cannot provide comprehensive assistance because of the current statutory limitations, many of which are not evidence-based. These limitations are remnants of earlier eras in which fewer people had criminal records and access to criminal records was less widespread. The statute needs to be amended to reflect today's realities.

Broadly, our motivations for proposing these amendments are rooted in the lived experiences of our clients with records who have served their sentences and are begging to be included in our formal economy and into mainstream society. I want to share briefly a few illustrative stories with the Committee.

ii. Amendment to 13 V.S.A. § 7603

John showed up at my Howard Center legal clinic with a housing denial letter. His criminal history, he was told, merited a denial from subsidized housing. He was “too risky.” I gave a cursory review of his record, and what I initially saw didn't look good. During the last 5 years—while he was living in a tent on the outskirts of the city—he was arraigned on 20 separate criminal charges. Upon closer review though, I saw that only four of his recent criminal charges even resulted in a conviction—and all of the convictions were for non-violent misdemeanor offenses that were technical DOC violations or the direct result of his homelessness, or both. We appealed that decision, explaining the context of the charges and convictions—the denial was overturned, and John is now housed.

Vermont has a financial interest in ensuring its constituents, including John, are housed and employed. Yet the current expungement statute makes it far more likely that John and those similarly situated will remain unhoused and unemployed. Currently, 13 V.S.A. § 7603 requires each defendant to affirmatively petition the court to clear up dismissed and acquitted charges. But for vulnerable Vermonters who are homeless, tired and barely hanging on, petitioning to expunge

dismissed charges is hardly a priority. Additionally, few Vermonters even know that dismissed charges remain on their record. Unless a person has legal advice or representation, they are unlikely to clear up dismissed charges before being denied an opportunity. While organizations like Vermont Crime Information Center guard non-conviction information, the courts and some commercial databases share this information upon request.² And though a charge is not an indication of criminal culpability, landlords and employers often misunderstand criminal legal jargon, believing—like the housing agency that denied John—that a charge is as indicative of guilt as a conviction. In practice then, a record of a charge can be as harmful as a conviction to certain applicants.

The proposed amendment to 13 V.S.A. § 7603 would have the court seal each charge that is dismissed without prejudice after 12 months, as a matter of course. Once the statute of limitations runs, the court would expunge these charges. All charges that are dismissed with prejudice or acquitted would be expunged within 45 days. Either party could object to the routine sealing/expungement, which would trigger a hearing on the matter. An expungement index would be maintained.

iii. Amendment to 13 V.S.A. § 7602

Dave is a 40-year old Vermonter and a father to several children. He has been abstinent from heroin for over 16 years. Dave spends his days working and his evenings and weekends with his family. He has a number of misdemeanor charges and convictions from his early twenties as well as one felony conviction that he committed when he was 24. This Felony Retail Theft was his final criminal justice contact. Dave called Vermont Legal Aid this winter to request help clearing his record. He told me that he was offered a higher paying job, but the offer was contingent on a negative criminal background check. He also shared that he needed this job to start saving for college for his children—all of whom dream of attending one day. Dave’s children would be the first generation in his family to attend college, but his current wages are too low to begin saving. Unfortunately, not only is Dave’s felony conviction a permanent part of his record,³ but his misdemeanor convictions will remain on his record forever because he had a “subsequent felony offense.” It makes no difference that most of his crimes were committed nearly two decades ago and that he has not used illicit substances since. Dave is saddled with a permanent criminal record. Effectively, both Dave and his children have been sentenced to a life of poverty.

Dave’s situation is common. He narrowly missed eligibility for a life-changing legal remedy because of the chronology of his convictions—his most severe crime

² VCIC will only release non-conviction information to the individual whose record is being requested.

³ Only four felony offenses are expungement-eligible in Vermont, and Felony Retail Theft is not one of the eligible felony offenses.

happened to be the last one he ever committed. Criminal justice involvement isn't linear. Many of my clients who are in recovery were cyclically involved with the criminal justice system while they were in the throes of active use. The current statutory provision that focuses on chronology of convictions is not grounded in the research findings on recidivism.⁴ Rather, it arbitrarily—and perpetually—bars certain Vermonters from all relief solely because their ultimate or penultimate crime happens to have been a felony offense. The results do not make our communities safer, nor do they have any deterrent effect on criminal activity.

If passed, the proposed amendment to 13 V.S.A. § 7602 would allow a petitioner to expunge a qualifying crime even if they have a subsequent felony conviction, provided 7 years have passed since the last felony conviction. This proposal would bring the statute into alignment with the research and would make the results far less arbitrary.

iv. The Study Committee: Expanding the List of Qualifying Felony Offenses and Automating the Expungement Process

Over 50% of the people who call Vermont Legal Aid for help clearing a criminal record have a felony conviction. Often, these convictions were related to a past substance use disorder. Too frequently, advocates at Legal Aid have to explain to these callers that the statute offers very limited relief to people with felony convictions, regardless of how much time passed since completing their sentence.⁵ We discuss with clients the implications of a life-long felony record, we listen as clients agonize over their own and their children's future missed opportunities, and we offer creative strategies that might mitigate the effects of a criminal record. But no amount of counseling changes the fact that maintaining a felony record for life, without consideration of rehabilitation, mitigating circumstances, time passed, and other context is patently unfair, illogical, and contrary to Vermont's financial interests. We believe that Vermont can strike a smarter balance between public safety concerns and the need for Vermonters to be free of their felony record after time passed without recidivating.

Vermont Legal Aid serves many Vermonters and cannot guarantee assistance or representation on all criminal records cases. Automating the expungement process for certain offenses is a promising access to justice solution. Doing so would ensure that Vermonters from all income levels could remove and reduce barriers to employment, housing, and educational opportunities after they have served their time and demonstrated their rehabilitation.

⁴ Research shows that a person has not recidivated within 5-6 years, the likelihood that they will commit a new crime is indistinguishable from that of a person with no prior criminal history.

⁵ We explain that unless their felony offense is one of the four eligible felonies or unless that person committed the crime before they were 21, they must live with a felony record forever.

For the aforementioned reasons, we support a study committee focused on expanding the list of expungement-eligible felony offenses and that will consider the viability of automating some part of the expungement process.

v. **Conclusion**

During the first few months of the session, we worked with a range of stakeholders, including the Court Administrator's Office, the Office of the Attorney General, the Department of State's Attorneys and Sheriffs, and to a lesser extent Vermont Crime Information Center and Vermont Center for Crime Victims. The bill as passed by the Senate represents a consensus reached by the CAO, OAG, DSSA and VLA. If passed, S. 173 will immediately fix some of the outdated and unfair provisions of the statute that ostracize vulnerable Vermonters and adversely affect Vermont's interest in having an educated, employed, stably housed population. The bill also promises more progress in the coming year, which could help secure Vermont's position as a national leader on this issue.

Thank you for your time and attention. I look forward to answering your questions and discussing this with you further.