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Memorandum

To: Rep. Alice M. Emmons, Chair, Joint Legislative Justice Oversight Committee

From: Tari Scott, Chief of Trial Court Operations, Vermont Judiciary

Subject: Preliminary Report: Impact to Date of Expungement Bills Act 178, Act 201 and Act 8

Date: August 31, 2018

Introduction

The judiciary is committed to operationalizing all laws promptly, accurately, and with fidelity to legislative intention. We acknowledge the policy behind the decision to create new opportunities for the expungement of criminal records and we appreciate this invitation to provide information to the Joint Legislative Justice Oversight Committee regarding the impacts of Act 178, Act 201, and Act 8 on the judiciary's operations. To bolster the committee's understanding of these impacts, the memo also outlines the reality of court-initiated expungement (aka "automatic" expungement), the inherent challenges of expunging select individual charges, the specific challenges of implementing Acts 178 and 201, the unintended consequences of Act 201, and a recommendation for an alternative procedural mechanism for expungement.

Background

The Vermont General Assembly ushered many significant expungement related bills into law during the 2017-2018 legislative session. These bills have affected the expungement of qualifying criminal charges in several ways:

- Act 178 (2018) relaxed the eligibility requirements for expungement by amending 13 VSA §7602(c)(1)(B)—this permits a defendant who committed a felony crime to petition to expunge unrelated qualifying crimes if the felony crime was not committed in the last 7 years.
- Act 86 (2018) expanded the list of expungement eligible charges by decriminalizing possession of small amounts of marijuana.
- Act 178 (2018), Act 201 (2018), and Act 8 (2018 Special Session) shifted the onus of initiating expungement off defendants and onto the courts under certain circumstances.

Court-Initiated Expungement

Many stakeholders refer to the court-initiated expungement provisions outlined in Acts 178, 201 and 8 as "automatic" expungement. This term is inaccurate. Historically, the defendant was required to start the process by filing a petition with the associated filing fee or application to waive filing fee. However, with the passage of Acts 178, 201 and 8, in certain situations, the responsibility of initiating expungement has passed to the court.

The term "automatic" expungement also assumes that the process can be easily and entirely automated within the judiciary's current case management system. This is also inaccurate. Our current VTADS system is limited to identifying charges that *may be* eligible for expungement. However, beyond listing these charges, VTADS cannot perform any additional automated steps. The remainder of the expungement process will require the direct attention of our judges and court staff.

Complications of Expunging Select Individual Charges

Once a case that is fully eligible for expungement has been identified, court staff removes the criminal history record in VTADS, enters into a confidential index the statutorily required case information and expungement order, and then destroys the original file. This whole process may take 10-15 minutes per case depending on the court staff's level of expertise.

However, the procedure to expunge an individual charge within a multi count affidavit is complicated and vastly more time consuming. The excision of charges from VTADS is so complex, it can only currently be performed by three highly trained IT staff. The redaction of affidavits is also required as part of the expungement process, but its complexity often requires assistance from court operations managers and judges to perform this task. As suggested below, the process could be streamlined if state's attorneys were responsible for submitting redacted affidavits to the court.

The challenge of expunging select individual charges is not unique to the judiciary. The exception to expungement carved out in Act 201 came at the behest of the Department of Corrections. DOC noted that the department lacked the capacity to expunge criminal records that include both qualifying and nonqualifying crimes.

Specific Challenges in Court-Initiated Expungement Under Acts 178 and 201

Beyond the added workload for staff and judges, there are aspects of Acts 178 and Act 201 that present unanticipated challenges that are outlined below.

Act 178

- 13 VSA §7603(a) and (e) direct the court to seal or expunge cases where there has been no conviction. While the statutes direct the courts how to proceed with cases dismissed *before* trial, the statutes are silent on charges dismissed *during* or *after* trial.
- 13 VSA §7603(a) and (e) direct the courts to expunge criminal records based on the disposition of charges. It is unclear how to proceed with cases that include a range of charge dispositions.
- 13 VSA §7603(f) directs the court to expunge sealed records after the statute of limitations has expired. Because the statute of limitations can be different for specific cases, the courts do not have an automated way for determining whether the statute of limitations has expired. One way to address this gap is for the judiciary to enhance

VTADS to include a statute of limitation field and for SAs to specify the statute of limitation for each charge. Without this information from the SA, this provision cannot be implemented.

Act 201

- 13 VSA §7609(a) directs the court to order the expungement of criminal history records "absent a finding of good cause by the court." It is unclear what this provision signifies, particularly as the statute does not direct the court to notify any party of the intent to expunge. Further, this omission regarding notice of the parties appears contradictory in intent to 13 VSA §7608 which requires the SA to notice victims when a petition to expunge has been filed.
- 13 VSA §7609(b) carves out an exception to court-initiated expungement when a criminal record includes qualifying and nonqualifying crimes. It is unclear whether this exception stands even when the nonqualifying crimes have been dismissed or otherwise disposed.
- 13 VSA §7609(c) directs individuals 18-21 years of age to file a petition for expungement. This conflicts with 13 VSA §7609(a) which does not require a petition. Legislative counsel advised that the intent of this subsection is to provide recourse for older offenders who were 18-21 years old at the time of the crime. However, the statutory language does not indicate this.

Unanticipated Consequences of Accelerated Expungements Under Act 201

The judiciary relies on the accuracy of its data to assign resources for the operations of the court and to report to stakeholders. The speed with which criminal records can be expunged under Act 201 will have an adverse impact on the judiciary's ability to fulfill these duties. For example, under Act 201's accelerated timeline, it is possible for an 18-21-year-old offender to receive a fine only sentence, satisfy the sentence, and have the charge expunged within a matter of months. Just as the expunged record will no longer exist to those requesting to view it, the expunged case will not be accounted for in the court's annual statistics and weighted caseload studies.

Furthermore, expungement of criminal convictions could adversely impact the ability of independent evaluators to report on rates of recidivism generally, as in certain dockets, such as treatment dockets, and it would also affect the related cost-benefit analysis of these dockets. To the extent that a subset of treatment-docket participants (a significant number or whom are in the 18-21 age bracket) automatically qualify for expungement of certain convictions from their court records, the results of outcome evaluations would likely be skewed to show lower rates of participation and recidivism than these dockets actually achieve. As a result, evaluations would likely not only paint a rosier picture of the effectiveness of these dockets, but also inflate the cost per participant. Also, these dockets would not comply with best practices, which require the dockets to report accurately the recidivism rates of their participants.

Fiscal Impact

From 2014 to 2017, the courts averaged approximately 719 expungements each year. It is anticipated that the legislation will lead to a significantly higher number of expungements each year. Managing the increase will require the hiring of five temporary docket clerks (one for each of five administrative regions) whose sole function will be expungement processing. With each position paid at the current rate of $16.66 an hour for 2,080 hours a year, the total cost of salaries

will be $173,264 per year. In addition, it is anticipated that the judiciary will also incur other costs for the purchase of computer equipment and payment of licensing fees.

Additionally, judiciary management will need to reallocate more effort towards managing the evolving expungement processes. Resources will be spent designing workflows that comply with legislative requirements, recruiting temporary employees, developing and implementing trainings, and programming changes in VTADS until the next generation case management system is implemented statewide. Since the signing of Acts 178, 201 and 8, a crew of court managers, judges, RIS staff have already worked over 100 hours reconciling court processes to the new expungement statutes and reprogramming VTADS. And this work still continues.

Recommendations

As noted above we suggest that the legislature consider adopting a state's attorney-initiated expungement process as the preferred procedural mechanism. This is not a cost-shifting proposal because the cost of expungement to the Judiciary will be the same as outlined above, but a recognition that the state's attorneys are best positioned to start the expungement process. State's attorneys can identify when a charge is eligible for expungement and file a stipulated petition to expunge with the court. If the petition to expunge is for an individual charge, the state's attorney will prepare and simultaneously file a redacted affidavit with the petition to expunge.

There are many benefits to this alternative procedure:

1. The defendant will no longer need to file a petition to expunge. Therefore, the defendant will neither incur the associated filing fee nor need to file a request to waive the fee.
2. The state's attorneys will not be burdened by a 30-day period in which to receive dozens or possibly hundreds of court-initiated notices of intent to expunge, review the case files, notify victims where applicable, and decide whether to object to expungement. This 30-day period is defined in Act 178 [see 13 VSA §7603(h)] and Act 8 [see 3 VSA §164(g)].
3. When select individual charges are expunged, the redaction of the affidavit will be completed by state's attorneys who have the understanding, unique to the charge, of what information can and should be removed from the affidavit.

Thank you for your consideration of our memo. We hope that we have illustrated the impact of Acts 178, 201 and 8 on our operations. We also hope we have successfully highlighted potential areas of concern and potential solutions as the legislature considers how to move forward. We hope that our comments and concerns can contribute meaningfully to the discourse regarding the expungement of criminal records.