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TO: Joint Legislative Justice Oversight Committee  
House and Senate Committees on Judiciary

FROM: Hon. Thomas Zonay, Chair  
Commission on Sentencing Disparities and Criminal Code Reclassification  
("Sentencing Commission")

RE: Sentencing Commission Report pursuant to Act 32 (2019), *An act relating to sealing and expungement of criminal records*

DATE: October 31, 2019

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## Report Requirements

The Vermont General Assembly, through Act No. 142 (2018), *An act relating to establishing the Commission on Sentencing Disparities and Criminal Code Reclassification*, reconstituted the Commission on Sentencing Disparities and Criminal Code Reclassification ("Sentencing Commission"). The General Assembly, through Act 32 (2019), *An act relating to sealing and expungement of criminal records*, subsequently directed the Commission to conduct a comprehensive assessment of the statutes governing the expungement and sealing of criminal history records in Vermont, including reviewing the crimes eligible for expungement or sealing, the process by which criminal history records are expunged or sealed, the mechanism by which expunged or sealed records are indexed, and the effect of sealing or expungement. As a part of its assessment, the Commission was to evaluate all Vermont civil offenses and the crime of negligent operation of a motor vehicle under 23 V.S.A. § 1091(a) for their suitability for expungement or sealing eligibility. It further directed on or before November 1, 2019, the Commission shall report to the Joint Legislative Justice Oversight Committee and the House and Senate Committees on Judiciary with recommendations regarding:

- (A) improvements to the expungement and sealing process; and
- (B) any additional crimes or civil offenses appropriate for expungement or sealing eligibility.

## Findings and Recommendations

### I. Criminal Offenses

Current statutory structure: The Commission has attempted to design a comprehensive expungement and sealing scheme that contemplates most criminal offenses codified in Vermont law. This scheme is based on the current structure of the Vermont statutes. The scheme delineates tiers of severity for criminal offenses. In general, as offense severity increases, access to expungement or sealing decreases.

Potential Sentencing Commission redesign: At the time this report is being submitted the Commission remains in the process of designing a statutory structure in which crimes are delineated by class. That structure could be adapted to the system proposed herein, such that the tiers would be based on the classes instead of other proxies for crime severity. This could make the statute more concise.

The Commission's proposed scheme submitted herein would also fit a reclassified system without alteration.

The Commission recommends the following as to criminal offenses:

#### Misdemeanor Offenses

- Non-predicate misdemeanors not listed in 13 V.S.A. §5301(7):  
*Option for Commission consideration:* Eligible for sealing after 2 years.
  - Eligible for expungement 5 years after completion of sentence, or 5 years after intervening subsequent offense, whichever is later.
    - Can be sooner with state stipulation.
    - Without state stipulation a court may order a hearing.
  
- Predicate misdemeanors:
  - Eligible for sealing 5 years after completion of sentence, or 5 years after intervening subsequent offense, whichever is later.
    - Can be sooner with state stipulation.
    - Without state stipulation a hearing is required.
  - Eligible for expungement 5 years after sealing if no offense is committed subsequent to sealing. If a person is convicted of an intervening offense after sealing, the conviction restarts the 5-year clock for expungement.
  - This includes negligent operation of a motor vehicle under 23 V.S.A. § 1091(a).
  
- Misdemeanors listed in 13 V.S.A. §5301(7) (domestic assault, stalking, harassment, and violations of abuse prevention orders):

- No sealing or expungement allowed.
- DUI Offenses: treated in accordance with Act 32 of 2019.

### Felony Offenses

- Drug possession crimes—as enumerated in Act 32 of 2019:
- *Option for Commission consideration*: Eligible for sealing after 2 years.
  - Eligible for expungement 5 years after completion of sentence, or 5 years after intervening subsequent offense, whichever is later.
    - Can be sooner with state stipulation.
    - Without state stipulation a court may order a hearing.
- Felony property crimes, as enumerated by Sentencing Commission’s Fall 2019 report to the legislature, and Title 18 drug crimes other than Trafficking:
  - Eligible for sealing 10 years after completion of sentence, or 10 years after intervening subsequent offense, whichever is later.
    - Can be sooner with state stipulation.
    - Without state stipulation a hearing is required.
  - Eligible for expungement 10 years after sealing if no offense is committed subsequent to sealing. If a person is convicted of an intervening offense after sealing, the conviction restarts the 10-year clock for expungement.
- Felonies not otherwise enumerated and felony predicate offenses that are not Title 18 drug offenses or offenses listed in 13 V.S.A. §5301(7):
  - Eligible for sealing 15 years after completion of sentence, or 10 years after intervening subsequent offense, whichever is later.
    - No early state stipulation allowed.
  - Not eligible for expungement.
- Listed felonies (as defined by 13 V.S.A. § 5301(7)):
  - Not eligible for sealing or expungement.<sup>1</sup>

### 33 V.S.A. § 5119 sealing (under-21 sealing):

- The Commission recommends raising the age to include non-listed crimes “committed prior to attaining the age of 22.” This change would bring this subsection in line with the youthful offender scheme adopted by the Legislature, which presently extends eligibility up to 22 years of age. This could be done in statute by explicitly tying this provision to the definition for youthful offender eligibility.

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<sup>1</sup> This would eliminate expungement eligibility that currently exists for certain burglary offenses, though it could be preserved through specific exceptions.

Non-convictions:

- The Commission recommends maintaining the law and procedures set forth at 13 V.S.A. § 7603 for expungement of non-convictions.

Sentence completion:

- The Commission recommends that the legislature delete the word “successfully” from the phrase “successfully completed the terms and conditions of the sentence” in 13 V.S.A. § 7602. This eliminates an ambiguity about whether a violation of probation would disqualify the underlying conviction that gave rise to the probationary sentence—assuming the underlying conviction is otherwise eligible for sealing or expungement.

When determining eligibility, the Commission believes that the fact of sentence completion—and not an inquiry into the path to sentence completion—is the relevant question. The Commission believes this also codifies legislative intent.

Additional Notes:

- The Commission recognizes that the potential for there being separate proceedings for both sealing and expungement on the same offense could lead to a burden on the system. This may require additional resources being allocated to the Judiciary.
- The Commission also considered whether, with respect to those offenses where sealing is allowed first followed by expungement eligibility at a later date, the expungement should occur with no petition being required—even if there has been an intervening offense. Though this would have benefits, as is discussed *infra*, however, the Commission did not adopt this as a recommendation. Commission members expressed concern that given the current procedures and impact of expungement, i.e. the destruction of records, such a process could have an unintended negative impact upon subsequent investigations/prosecutions for criminal offenses, as well as negatively impact the individual defendant whose record is expunged.

**II. Civil Offenses:**

The Commission recommends the following as to civil offenses:

The Commission proposes making nine civil offenses eligible for petition-less expungement two years after they are issued if all fines and fees have been paid. If fines or fees have not been paid two years after issuance then the offenses will be expunged upon payment.

The nine offenses are:

1. 7 V.S.A. § 656(a)(2) (underage alcohol);
2. 18 V.S.A. § 4230b(a) (underage marijuana);
3. 23 V.S.A. § 301 of this title (operating an unregistered vehicle);
4. 23 V.S.A. § 307(a) of this title (failing to possess registration);
5. 23 V.S.A. § 611 of this title (failing to possess license);
6. 23 V.S.A. § 676(a) of this title (operating after suspension).
7. 23 V.S.A. § 601 of this title (operating without a license);
8. 23 V.S.A. § 800 of this title (operating without insurance);
9. 23 V.S.A. § 1222(c) of this title (operating an uninspected 11 vehicle).

These nine offenses were identified in H.276, introduced in the House in 2019. Unlike that bill, however, the Commission does not recommend that any of the offenses require a hearing prior to expungement. Rather, it recommends petition-less expungement for all nine.

Due to the cost and resource issues, as discussed below, a prospective application of this recommendation may be necessary. In the event that the Legislature proceeds in this manner, the Commission recommends that it consider allowing existing underage alcohol and underage marijuana offenses to be eligible for expungement, perhaps through a petition process, given that these two offenses carry the greatest collateral consequences.

Process and Cost: In 2018 there were approximately 20,000 tickets issued for the nine offenses set forth above. Unlike in the criminal code, there has never been expungements available for civil offenses. The Judicial Bureau and the Department of Motor Vehicles (“DMV”) may incur significant costs in terms of resources and staff time in order to implement this recommendation. The Commission recognizes that this proposal requires resources beyond those currently allocated to the Judiciary and the DMV and recommends that the Legislature commit the resources necessary to adopt and implement this proposal.

With respect to the Judicial Bureau, the technical process for accomplishing these expungements would require either a significant investment in designing new programming for their online system, an investment in additional staffing, or a combination of both. With respect to the DMV, additional staffing would be required. The resource estimations discussed by the Judiciary and the DMV both assumed a prospective amendment. An amendment that applies to existing offenses would require a still greater investment.

As noted *supra*, the Commission believes that the benefit to Vermonters outweighs the monetary costs, and that the Legislature should make the necessary commitment to implement the reform being proposed herein.

Policy: Expunging these offenses will help Vermont drivers get re-licensed by reducing exorbitant insurance costs that can result from accumulated civil offenses. Insured drivers are safer for everyone on the roads. It will also help prevent collateral consequences with respect to military service, since at present, some of these offenses can result in an inability to enlist or to

get promoted. The Commission believe that minor offenses deemed by the State of Vermont to be merely civil in nature should not interfere with the ability to serve the nation in the military.

### **III. Indexing and Data/Document Effect:**

The Commission recommends ensuring that the indexing process allows for adequate data collection such that studies of our criminal justice system may proceed. A separate issue considered by the Commission concerns the adequacy of the current indexing process insofar as it concerns retention of data/documents relating to an expunged offense.

The issue of retention of data/documents gives rise to two concerns identified by members of the Commission. First, the current expungement process, i.e. the permanent destruction of records, could have an unintended negative impact upon subsequent investigations, prosecutions, and defenses for criminal offenses. As such, the Commission recommends that the Legislature consider providing a retention process which may also allow access in limited circumstances by law enforcement or a defendant upon approval of the Court. Second, expungement may negatively impact individual defendants whose record have been expunged since in this digital age there would likely be electronic records in the public domain and defendants may need to have access to their entire record, not merely what is currently available in the expungement special index, to use for issues related to employment, immigration, housing, military or any other purpose. The Commission recommends retaining the current law allowing for an individual to obtain their own expunged record and ensuring that law is sufficient.

The Commission has made no decision on whether, or what, data and/or documents may be maintained, or how information that is not destroyed may be used in the future. That topic will be taken up as the Commission continues its work over the next year

### **IV. Notes:**

- Listed Offenses: The proposed expungement scheme makes use of the “listed offenses,” enumerated at 13 V.S.A. § 5301(7). The Commission noted, however, that the text of the listed offenses is unclear and insufficiently updated to the current statutory references. The Commission recommends the Legislature make the necessary technical updates. It does not, at this time, recommend substantive changes to the list.
- Occupational Licensing: The Commission also notes that the occupational licensing laws create additional collateral consequences for those with convictions. It believes that the same arguments that favor expanding access to expungements and sealing also favor ameliorating the effects of occupational licensing consequences. While the Commission believes this is outside the scope of its mandate and capacity, it recommends that the Legislature consider this issue.