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April 26, 2021

Sen. Dick Sears, Chair
Senate Committee on Judiciary
Vermont Senate
115 State St.
Montpelier, Vermont 05633-5301

Rep. Alice Emmons, Chair
House Committee on Corrections and Institutions
Vermont House of Representatives
115 State St.
Montpelier, Vermont 05633-5301

Rep. Maxine Grad, Chair
House Committee on Judiciary
Vermont House of Representatives
115 State St.
Montpelier, Vermont 05633-5301

Re: S.7, an act relating to expanding access to expungement and sealing of criminal history records

Dear Chair Sears, Chair Grad, and Chair Emmons:

We write in response to the Governor's Administration's letter encouraging you to stop working on S.7, an act relating to expanding access to expungement and sealing of criminal history records. As we outline below, we believe the Administration's concerns can be adequately addressed to allow this bill to become law so that Vermonters can more quickly benefit from the opportunities this bill presents.

In passing four expungement bills in four years, you have advanced the causes of safety, fairness, and prosperity. S.7 furthers these advances.

Those who are serious about public safety embrace increased expungements. Expungements lead to lower rates of re-offense,¹ in part by bringing better jobs and higher pay to those who receive them.² The arrest rate for those who receive an expungement is *below* the general population.³

Below we address points made by the Governor’s Administration in their letter of April 22, 2021. Many of the Administration’s concerns could be addressed with relatively straightforward textual fixes. Some are misplaced. We stand ready to work with you to bridge the differences.

The Legislature can enumerate the eligible felonies. The legislative process is ongoing, and S.7 can be refined so the eligible felonies are clearly enumerated in the bill—thereby eliminating the concern around unknown or unforeseen eligibility. This is a straightforward textual edit (simply replacing proposed subsection 13 VSA § 1702(j)).

Timeframe waiver authority can be discussed. With respect to waivers of timeframes, elected prosecutors are entrusted under our system of governance with making some of the gravest, most impactful decisions that government actors can make. They hold sole authority to bring criminal charges or refrain from charging. They hold great power over a defendant’s incarceration or liberty, and the safety of victims and the public. Prosecutorial authority far more impactful than expungement timeframe waiver authority is built into the fabric of our system. Nevertheless, potential alterations to the timeframe waiver authority are not complicated. For example, waiver authority could be reduced for those offenses where S.7 provides for a waiting period of greater than 5 years. We stand ready to work with you on this matter.

Expungements compliment Justice Reinvestment. Expungements do not undermine the good work of the Justice Reinvestment reforms. To the contrary, expungements are a powerful tool for reducing recidivism. As noted above, people who successfully receive an expungement have a *lower* risk of re-arrest than the general population.

Risk assessments will not be impacted by expungements. Expungements of old criminal records do not undermine the accuracy of risk assessments. The data does not back claims that criminal records forever predict a person’s risk to reoffend. To the contrary, even for people who commit crimes more dangerous than those that would be eligible for expungement in this bill, after six or seven years with no further offenses their risk of committing a new crime drops to that of the average person in the general population.⁴ An old record serves little purpose in assessing criminogenic behaviors.

¹ Ramakers, Nieuwebeerta, Van Wilsem, & Dirkzwager. (2017). Not Just Any Job Will Do: A Study on Employment Characteristics and Recidivism Risks After Release. *International journal of offender therapy and comparative criminology*, 61(16), 1795–1818; Sarah Lageson and Christopher Uggan, *Handbook of Life-Course Criminology: 201 Emerging Trends and Directions for Future Research*.

² Prescott, J.J. and Starr, Sonja B., *Expungement of Criminal Convictions: An Empirical Study* (June, 2020). *Harvard Law Review*, Vol. 133, No. 8 at pp 2460-2555.

³ Prescott, J.J. and Starr, *supra* note 2.

⁴ Kurlychek, Megan & BRAME, ROBERT & Bushway, Shawn. (2006). *Scarlet Letters and Recidivism: Does Old Criminal Record Predict Future Offending?*. *Criminology & Public Policy*.

Vermont’s ethos of evidence-based criminal justice policy would be served by S.7. Vermonters are perfectly capable of understanding issues of public importance. At events and at expungement clinics across the state we have heard from Vermonters eager for the economic opportunity they have been long denied because of the “scarlet letter” of an old record that, often, has no bearing on our public safety but carries tremendous, long-term unintended consequences for the individual.

Civil cases will be virtually unaffected by S.7. The viability of civil cases is not threatened by S.7. While it is possible (though unlikely, see below) that an offense could be expunged before a related civil suit is filed, it is important to remember two things:

- An expungement does not preclude a related civil case. All witnesses would still be available to testify in a civil suit. A plaintiff’s burden will be no heavier than it would have been if no criminal charge had been filed in the first place.
- Most criminal defendants in Vermont state courts are very low-income individuals who are “judgment-proof”—individuals who would not have the means to pay a civil court penalty and are therefore unlikely subjects of a lawsuit.

Significantly, an expungement occurring prior to the end of a civil statute of limitations is possible but unlikely. Most civil statutes of limitations, including most torts, are three years. Some are six years. The few that are longer would not be implicated by any expungement eligible offense under this bill. The shortest time-period before a crime can be sealed or expunged is 5 years after a person has completed their sentence. This puts it beyond all 3-year statutes of limitation, and a sentence of even one year of supervision puts all offenses at or beyond the 6-year statutes.

FDIC hiring requirements are not implicated by S.7. The relevant administrative rule in the Code of Federal Regulations explicitly exempts expunged and sealed offenses from the hiring prohibitions in FDIC law. [See this AGO memo](#) for more explanation.

The federal government cannot override state determinations regarding convictions. With respect to all federal regulatory issues, the State of Vermont has sovereign authority to determine when someone is convicted and when someone is no longer a convicted person under the laws of the state. The federal government cannot override those state determinations—which do not happen only in the case of traditional expungements. They happen in the case of deferred sentencings—where a guilty plea is entered but a person’s record is wiped clean after a period of success under DOC supervision. A person’s final conviction can also be overturned in a post-conviction relief proceeding. The federal government cannot override these state determinations that there has been no conviction—and it cannot override traditional expungement determinations either. If the State of Vermont determines that there has been no conviction under the laws of the state, no federal regulation can require a different determination—as the FDIC already recognized in its

2020 updated rule (see preceding paragraph). Even setting aside the sovereignty issue, the proposed eight-year waiting period for felony property offenses—which only begins after a sentence is completed—means it is unlikely someone could get an offense expunged prior to the end of the 10-year lookback requirement referenced in the Administration’s letter.

All agree the Legislature should address fiscal concerns. It has never been a point of dispute among stakeholders working to increase expungements that the costs of executing expungements should be paid for. There is no reason to believe that timely fiscal notes will not be responsibly considered. The Judiciary and State’s Attorneys long ago made their budgetary concerns known; it is good that Vermont Crime Information Center’s fiscal concerns are now known. Further, some of the costs associated with an expungement expansion will be short-term expenses due to a bubble of expungement petitions that will likely follow an initial expansion. These can appropriately be budgeted as short-term expenses.

In the end, we believe it would be a mistake to discontinue work on a very strong bill, which has already unanimously passed the Senate, particularly when the Administration’s concerns can be addressed. These are urgent matters; the Administration’s call for further study can and should be answered rapidly.

If the Administration is interested in achieving greater safety and economic opportunity for Vermonters through the expansion of expungements, we look forward to cooperating with them. If they are not, we will work with you to show them the way.

Sincerely,



T.J. Donovan
Attorney General



David Scherr
Assistant Attorney General
Co-Chief, Community Justice Division