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**Testimony of Jaye Pershing Johnson, Governor's Counsel, before the Joint  
Justice Oversight Committee.**

**July 15, 2021**

**S. 7, An act relating to expanding access to expungement and sealing of criminal  
history records**

I appreciate the opportunity to testify on expungements in Vermont and I hope this is just the start of a continuing conversation.

Senator Sears is correct – we expressed policy concerns with S. 7. But we supported the legislature's decision to review the issue of expungement more holistically. I believe, as with many criminal justice issues, it is important to take a step back and take stock of our purpose and our existing laws and think about whether what we have now is serving the purpose (or purposes) as we think about making significant additional changes. As discussed today, it may be that more effective alternatives are available. [For example, more effective housing options for offenders are already under consideration, as discussed the morning of this testimony.]

With respect to purpose, expungement is variously described as relief for offenders from "collateral consequences," a jobs bill, and a means to reducing barriers to employment, housing and education. But as we all know, the devil is in the details. The Office of the Attorney General maintains a database of state and federal collateral consequences laws

and regulations which can be found on their website. [found here: [Consequence Search – Vermont Compilation of Collateral Consequences \(ccresourcecenter.org\)](#)]

There are actually hundreds of state and federal laws imposing collateral consequences on offenders, arguably all passed for the purpose of protecting the public or a segment of the public. Perhaps the Legislature should take a look at its body of work creating collateral consequences before it generally takes on increasing the number of felony expungable offenses in order for those offenders to achieve general relief from collateral consequences. It would seem important to understand what exact relief we are offering to what offenders and under what circumstances. Should someone convicted of misdemeanor possession of child pornography ever be a bus driver again? Should a person convicted of domestic violence or violation of an abuse prevention order, human trafficking or drug trafficking possess a firearm? There are barriers - collateral consequences of a conviction for those crimes – which are imposed for a reason.

It is my understanding all crimes expunged come with the benefit of relief from all collateral consequences. But if that is the Legislature's policy direction, one thing we believe is Vermonters who may be eligible for expungements aren't seeking them. David Damora [of the Council of State Governments] can likely speak to this.

Our laws are already expansive in terms of off ramps, expungements and sealing, but these laws are very complex.

Vermont's expungement laws are already quite robust – I would argue we already have a broad expungement regime in VT. There are at least 5 expungement laws for juvenile offenses alone. These include automatic expungements for successful completion of diversion and automatic expungement of qualifying crimes (which includes all non-violent misdemeanors), for successful completion of the terms of a conviction [use of the term "automatic" subject to the caveat there is still some court review and consideration]. They also include sealing the records of adjudicated delinquents (all crimes other than the Big

12) and sealing the records of all Youthful Offenders upon successful completion of the probation term. This could be for ANY crime.

There are an additional 8 expungement laws for adults, including automatic expungements for successful completion of adult diversion and successful completion of the terms of probation for a deferred sentence. All misdemeanor crimes, other than listed misdemeanors, are eligible for expungement, as are convictions for drug possession. [Again, use of the term “automatic” subject to the caveat there is still some court review and consideration.]

If the intent is to unlock human potential, it seems the real issue is not to add more serious crimes to an already under-utilized system, but address the issue of uptake for the laws we already have.

What we know from data and analysis of the Council of State Governments is:

- The number of criminal cases filed with the state is fairly steady at about 15,000 cases per year;
- Of that number, roughly 78% are misdemeanors. Almost all misdemeanors are expungable now.
- Roughly 20% of misdemeanor cases and 10% of felonies result in dismissals and expungement through diversion.
- We also know 99% of convictions are the result of plea agreements.
- All misdemeanor charges with convictions are convicted as misdemeanors and approximately 40% of all felony charges are convicted as misdemeanors.
- We know from changes made in 2017 to the uniform law on collateral consequences courts are now required to advise offenders of the opportunity for expungement or sealing in pre-trial proceedings and again by DOC at release.

Again, most misdemeanors are already expungable [as are certain drug possession charges and certain felony property offenses – **See the inventory of expungement/sealing laws, attached**]. [Regardless of the reason felonies are pled

down to misdemeanors or drug possession, they are still expungable.] For juveniles this is automatic upon successful completion of the terms and conditions of the sentence and 5 years for adults. In 2017 this waiting period was reduced from 10 years to 5 years.

Again, if your goal is to reduce barriers to housing, jobs and education, most Vermonters with criminal records are already eligible for expungements and receive notice of their eligibility at least once. Our low rate of uptake on expungement and sealing suggests we need to do work on why Vermonters are not seeking expungements before we simply add more crimes to an already overly complex structure. As some have mentioned – find ways to simplify and streamline the existing laws.

If what we are REALLY talking about is relief from collateral consequences for violent felony offenders, I think Vermonters should understand this. It is important to note the victims of LISTED crimes suffer significant impacts. That's why the list exists and is defined in a law established for the benefit of victims. Some of these offenses will result in death or serious injury. Most, if not all, will result in a lifetime of trauma for the victims. These are consequences suffered by victims through no fault of their own. And yet our focus today is on the consequences for offenders.

I have been asked to testify on which of the LISTED crimes should be expungable offenses. It is true, as mentioned by the Office of the Attorney General and as advised by the Council of State Governments, the risk of re-offense goes down with time and arguably after 7 years for most crimes the risk is very small. However the Legislature has drawn the line at the "Big 12" and it is my understanding we are not talking about the "Big 12" which also appear as listed crimes. The Office of the Attorney General would add abuse of authority by law enforcement. Almost everyone will draw the line somewhere.

Listed crimes include the Big 12, highlighted in yellow, but also:

- stalking and aggravated stalking (13 VSA 1062, 1063(a)(3))
- misdemeanor domestic assault (13 VSA 1042);
- first and second degree aggravated domestic assault (13 VSA 1043, 1044);

- sexual assault, aggravated sexual assault and aggravated sexual assault of a child (13 VSA 3252, 3253, 3253a);
- lewd or lascivious conduct (13 VSA 2601);
- lewd or lascivious conduct with a child (13 VSA 2602);
- murder and aggravated murder (13 VSA 2301, 2311)
- manslaughter (13 VSA 2304);
- aggravated assault (13 VSA 1024);
- assault and robbery with a dangerous weapon (13 VSA 608(b));
- arson causing death (13 VSA 501);
- assault and robbery causing bodily injury (13 VSA 608);
- maiming (13 VSA 2701);
- kidnapping (13 VSA 2405);
- unlawful restraint in the second degree (13 VSA 2406);
- unlawful restraint in the first degree (13 VSA 2407);
- recklessly endangering another person (13 VSA 1025);
- violation of abuse prevention order (13 VSA 1030) (excluding ERPOs);
- operating a vehicle under the influence of alcohol or drugs with death or serious bodily injury resulting (23 V.S.A. § 1210(f) and (g));
- careless or negligent operation resulting in serious bodily injury or death (23 V.S.A. § 1091(b));
- leaving the scene of an accident with serious bodily injury or death (23 V.S.A. § 1128(b) or (c));
- burglary into an occupied dwelling (13 VSA 1201(c));
- the attempt to commit any of the offenses listed in this section;
- elder abuse or other abuse or exploitation of a vulnerable person, including restraint, neglect, sexual abuse, financial exploitation and exploitation of services (13 VSA 1376 -1381);
- human trafficking and aggravated human trafficking (13 VSA 2652, 2653).

I would also note those convicted of a second or subsequent conviction for voyeurism (13 VSA 2605) are required to register on Sex Offender registry but this is not currently a listed offense. [The Office of States' Attorneys and Sheriffs has flagged other offenses worth considering for any list of non-expungable offenses.]

At this point in the discussion, I am not able to suggest any of the listed crimes be added for expungement.

Thank you so much for your time and attention.

## EXPUNGEMENT/SEALING INVENTORY

(Yellow highlights for acts relating to expungement passed in the last 4 years)

### JUVENILES/YOUTHFUL OFFENDERS

#### 1. Applicable Law: 3 V.S.A. § 163 – Juveniles in Court Diversion (added in 2019 Act 77)

What Records Expungable: All delinquency records.

When Records Expungable: Automatic expungement after the two-year anniversary of a successful completion of juvenile diversion, with notice and opportunity to contest.

What Specifically Not Expungable: All “delinquent acts” expungable. Cases must be referred by SAs. None specifically not expungable other than by AG policy.

Basis for Expungement: The court shall expunge the records if it finds:

- (A) two years since successful completion of juvenile diversion by the participant and the dismissal of the case by the State's Attorney (SA);
- (B) no intervening convictions during the two-year period, and no criminal proceedings pending;
- (C) rehabilitation attained to the satisfaction of the court; and
- (D) no restitution owed under a contract executed with the Restitution Unit

#### 2. Applicable Law: 13 V.S.A. § 7609 Automatic expungement of juvenile records (qualifying crimes) (added in 2018, Act 201)

What Records Expungable: Juvenile records (arrest, citation, investigation, charge, adjudication of guilt, criminal proceedings, and probation related to the sentence), when 18-21 at the time crime was committed.

When Records Expungable: Automatic expungement within 30 days after the date of successful completion of the terms and conditions of the sentence for the conviction, absent a finding of good cause by the court. Alternatively, an individual may also petition the court for an expungement after 30 days from completion of the terms and conditions of the sentence.

What Specifically Not Expungable: A criminal record that includes both qualifying and nonqualifying offenses.

Basis for Expungement: Successful completion of terms and conditions of sentence and payment of restitution unless waived court finds expungement will serve the interests of justice. VCIC shall retain a special index of sentences for sex offenses that are required to be on the sex offender registry and shall only be accessed by the

Director of VCIC and an individual who provides information to DOC to prepare a presentence investigation.

**3. Applicable Law: 13 V.S.A. § 2802b Minor electronically disseminating indecent material to another. (added in 2009 (Act 58))**

What Records Expungable: Records of minors who were electronically disseminating indecent material and adjudicated delinquent.

When Records Expungable: When minor reaches 18.

What Specifically Not Expungable: NA

Basis for Expungement: Expungement at age of majority.

**4. Applicable Law: 33 V.S.A. § 5119 Sealing records for Delinquency Proceedings (Added in 2007(Act 185))**

What Records Expungable: In matters relating to a child who has been adjudicated delinquent, sealing of all files and records related to the proceeding of the court, law enforcement, prosecution, and the Department for Children and Families.

Sealed files accessible by:

- (i) the commissioner and general counsel of any administrative department;
- (ii) the secretary and general counsel of any administrative agency;
- (iii) a sheriff;
- (iv) a police chief;
- (v) a State's Attorney;
- (vi) the Attorney General;
- (vii) the Director of the Vermont Crime Information Center; and
- (viii) necessary administrative staff.

When Records Expungable: Two years have elapsed since the final discharge of the person. **(But see 13 VSA 7609 applicable to qualifying crimes, automatically expunged.)**

What Specifically Not Expungable: Listed crimes.

Basis for Expungement: Expungable unless the court finds:

- (A) the person has been convicted of a listed crime or a proceeding is pending seeking conviction or adjudication for a listed crime; or
- (B) rehabilitation of the person has not been attained to the satisfaction of the court.



**5. Applicable Law: 33 V.S.A. § 5287 Termination or Discontinuance of probation for Youthful Offenders (Added in 2017, Act 72)**

What Records Expungable: For Youthful Offenders (all crimes eligible for 14-22 year old offenders). All records relating to the case in the Criminal Division shall be expunged, and all records relating to the case in the Family Court shall be sealed pursuant to section 13 V.S.A. § 5119. **(But see 13 VSA 7609 applicable to qualifying crimes, automatically expunged – applicable?)**

When Records Expungable: A motion or stipulation may be filed at any time in the Family Division requesting that the court terminate the youth's status as a youthful offender and discharge him or her from probation. The motion may be filed by the State's Attorney, the youth, the Department, or the court on its own motion.

If the court finds that the youth has successfully completed the terms of the probation order, it shall terminate youthful offender status, discharge the youth from probation, and file a written order dismissing the Family Division case. The Family Division shall provide notice of the dismissal to the Criminal Division, which shall dismiss the criminal case.

What Specifically Not Expungable: NA

Basis for Expungement: The court shall consider:

- (1) the degree to which the youth fulfilled the terms of the case plan and the probation order;
- (2) the youth's performance during treatment;
- (3) reports of treatment personnel; and
- (4) any other relevant facts associated with the youth's behavior.

**Adults**

**6. Applicable Law: 3 V.S.A. § 164 – Adults in Court Diversion (added in 2019 (Act 77))**

What Records Expungable:

- (1) Adults charged with a first or a second misdemeanor or a first nonviolent felony.
- (2) Adults and children 18 and over with a petition in the Family Division charged with an offense and who have substance abuse or mental health treatment needs regardless of the person's prior criminal history record,.

When Records Expungable: Automatic expungement after the two-year anniversary of a successful completion of adult diversion, with notice to SAs and opportunity to contest.

What Specifically Not Expungable: Felony listed crimes

Basis for Expungement: The court shall expunge the records if it finds:

- (A) two years since the successful completion of adult diversion and the dismissal of the case by the SA;
- (B) no intervening convictions during the two-year period, and no criminal proceedings pending;
- (C) rehabilitation attained to the satisfaction of the court; and
- (D) no restitution owed under a contract executed with the Restitution Unit.

**7-8. Applicable Law: 12 V.S.A. § 5138, 15 V.S.A. § 1108– Contempt of Court for Violations of No Stalking, Sexual Assault or Abuse Prevention Orders (Added in 2005 (Act 193), Abuse Prevention added in 1985 (Act 79))**

What Records Expungable: Convictions for misdemeanor criminal contempt prosecutions arising as a result of violations of orders against stalking or sexual assault.

When Records Expungable: Two years from conviction for criminal contempt.

What Specifically Not Expungable: Limited to criminal contempt convictions for violations of orders against stalking or sexual assault.

Basis for Expungement: On motion of the defendant to expunge the record of the criminal proceeding and conviction unless the defendant has been convicted of “a felony or misdemeanor involving moral turpitude” or an intervening violation of a protection order.

**9. Applicable Law: 13 V.S.A. § 2658- Motion to vacate by victim of human trafficking (Added in 2012 (Act 94))**

What Records Expungable: Convictions obtained as a result of the person having been a victim of human trafficking.

When Records Expungable: Upon a court’s decision to vacate the criminal conviction, .

What Specifically Not Expungable: Big 12 crimes

Basis for Expungement: (see above)

**10. Applicable Law: 13 V.S.A. § 5413 – Sex Offense Reversed and Dismissed (Added in 1996, (Act 124))**

What Records Expungable: Records shared for purposes of the sex offender registry relating to a sex offense that has been reversed and dismissed.

When Records Expungable: Records to be destroyed upon notice to the agency with information relating to the sex offender registry.

What Specifically Not Expungable: NA

Basis for Expungement: Reversal and dismissal of a sex offense

### **11. Applicable Law: 13 V.S.A. § 7041 Deferred Sentences (Added in 1972 (Act 239))**

What Records Expungable: The Court shall issue an order to expunge all records and files related to the arrest, citation, investigation, charge, adjudication of guilt, criminal proceedings, and probation related to a deferred sentence. The record of the criminal proceedings shall be expunged.

When Records Expungable: Upon fulfillment of the terms of probation and of the deferred sentence agreement, the court shall strike the adjudication of guilt and discharge from probation, absent a finding of good cause by the court.

What Specifically Not Expungable: Listed crimes and lewd and lascivious conduct with a child unless the victim and the defendant were within five years of age and the act was consensual and sexual assault of a child under 16 unless the victim and the defendant were within five years of age and the act was consensual (may not be deferred). The VCIC shall retain a special index of deferred sentences for sex offenses that require registration with the Sex Offender Registry.

Basis for Expungement: Fulfillment of the terms of probation and of the deferred sentence

### **12. Applicable Law: (Title 13, Chapter 230 originally added in 2012, Act No. 131, Amended in 2015 (Act 36), 2017 (Act 57), 2018 (Act 178), 2019 (Act 32), 2021 (Act 58)) 13 V.S.A. §§ 7601, 7602 – Expungement and Sealing Criminal History Records**

What Records Expungable:

- All misdemeanor offenses except those that are not:
  - Listed crimes;
  - Sexual exploitation of children;
  - Violation of a protection order;
  - Prostitution and open and gross lewdness;
  - A predicate offense

- The felonies of unlawful mischief (intentional property damage), grand larceny, burglary (not including in occupied dwellings which is Big 12), obtaining regulated drugs by fraud or deceit, uttering a forged or counterfeited instrument and drug possession;
- Convictions for crimes no longer unlawful; (7602(b))
- Crimes pardoned unconditionally;
- Sealing only for DUI not resulting in serious bodily injury or death to any person other than the operator, or related to operating a school bus with a blood alcohol concentration of 0.02 or more or operating a commercial vehicle with a blood alcohol concentration of 0.04 or more; or
- Burglary into an occupied dwelling when the person was 25 or younger, and the person did not carry a dangerous or deadly weapon.

When Records Expungable: It depends.

- Generally, the court shall grant the petition and order expungement of criminal history record if:
  - (A) Five years have passed since successful completion of terms and conditions of the sentence for the conviction, or successfully completion of terms and conditions of an indeterminate term of probation that commenced at least five years previously.
  - (B) No intervening conviction.
  - (C) Restitution and surcharges paid unless waived.
  - (D) The court finds that expungement serves the interests of justice.
- Alternatively, the court shall grant the petition and order sealing if:
  - (A) Five years have passed since successful completion of terms and conditions of the sentence for the conviction, or successfully completion of terms and conditions of an indeterminate term of probation that commenced at least five years previously.
  - (B) No intervening conviction.
  - (C) Restitution and surcharges paid unless waived.
  - (D) Court finds sealing better serves the interests of justice than expungement; and
  - (E) the person committed the crime after reaching 19.
- Alternatively, the court shall grant the petition and order expungement if:
  - (A) 10 years have passed since successful completion of the terms and conditions of the sentence for the conviction.
  - (B) The person has not been convicted of a felony in the last seven years.
  - (C) The person has not been convicted of a misdemeanor during the past five years.
  - (D) Restitution and surcharges paid unless waived.
  - (E) After considering the particular nature of any subsequent offense, the court finds expungement serves the interests of justice.
- Alternatively, the court shall grant the petition and order sealing if:

- (A) 10 years have passed since successful completion of the terms and conditions of the sentence for the conviction.
- (B) The person has not been convicted of a felony in the last seven years.
- (C) The person has not been convicted of a misdemeanor during the past five years.
- (D) Restitution and surcharges paid unless waived.
- (E) sealing better serves the interests of justice than expungement; and
- (F) the person committed the crime after reaching 19.
- For petitions filed for convictions of crimes which are no longer crimes, unless the court finds that expungement would not be in the interests of justice, the court shall grant the petition and order expungement if:
  - (A) Completion of sentence or supervision for the offense.
  - (B) Restitution and surcharges paid unless waived.
- For petitions filed for convictions for drug possession crimes that are no longer criminal:
  - (A) The petitioner must establish the conviction was based on possessing an amount of a drug no longer prohibited by law.
  - (B) Rebuttable presumption the amount of the regulated drug specified in the affidavit of probable cause was the amount possessed by the petitioner.
- Prior to granting expungement or sealing for burglaries, court must find it was not a burglary into an occupied dwelling.
- For DUI petitions, sealing only, the court shall grant the petition and order that the criminal history record be sealed if:
  - (A) 10 years have passed since successful completion of terms and conditions of the sentence for the conviction, or successful completion of terms and conditions of an indeterminate term of probation that commenced at least 10 years previously.
  - (B) No new DUI conviction.
  - (C) No intervening crimes.
  - (D) Restitution paid in full.
  - (E) Sealing serves the interests of justice.
- For petitions filed for burglary committed when under 25:
  - (A) 15 years have passed since successful completion of terms and conditions of the sentence for the conviction, or successful completion of an indeterminate term of probation that commenced at least 15 years previously.
  - (B) No intervening convictions.
  - (C) Restitution paid in full.
  - (D) Expungement or sealing serves the interests of justice.
- In the event of a new charge, the court shall not act on the petition until disposition of the new charge. (13 V.S.A. § 7604)

What Not Expungable: Felony offenses, other than as set forth above and misdemeanors that are listed crimes; offenses involving sexual exploitation of children; violations of protection orders against abuse, stalking and sexual abuse; prostitution; open and gross lewdness; and predicate offenses (criminal offense that can be used to

enhance a sentence levied for a later conviction, including DUI, domestic assault and stalking, but not including disorderly conduct and drug possession).

Also does not apply to CDL drivers seeking to seal or expunge a felony.

Basis for Expungement: (see above)

**10. Applicable Law: 13 V.S.A. § 7607(c) -Effect of Sealing (Added in 2000 (Act 151))**

A “criminal justice agency” may use a sealed criminal history record for “criminal justice purposes” and would be admissible as a prior DUI for purposes of enhanced penalties.

“Criminal justice agency” includes:

- all Vermont courts;
- other governmental agencies or subunits that allocate at least 50 percent of the agency's annual appropriation to criminal justice purposes. (20 V.S.A. § 2056a)

“Criminal justice purpose” includes:

- investigation, apprehension, detention, adjudication or correction of persons suspected, charged or convicted of criminal offenses.
- criminal identification activities,
- the collection, storage and dissemination of criminal history records
- screening for criminal justice employment.

**11. Applicable Law: Act 167 of the Laws of 2020, § 31, Expungement of Marijuana Criminal History Records**

What Records Expungable: Criminal history records of violations of 18 V.S.A. § 4230(a)(1) that occurred prior to January 1, 2021. [Possession of more than 1 ounce of cannabis or more than 5 grams of hashish or cultivate more than 2 mature cannabis plants or 4 immature cannabis plants.]

When Records Expungable: Automatic, not later than January 1, 2022.

What Specifically Not Expungable: NA

Basis for Expungement: Applicable possession charge.