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To: Members of the Joint Justice Oversight Committee
From: Mairead C. O'Reilly and Emily Kenyon, Vermont Legal Aid
RE: VLA Sealing Proposal
DATE: October 14, 2021

The outline below is Vermont Legal Aid's proposal for a sealing-only regime for the 2022 Vermont legislative session. Given the economic benefits to individuals and communities, and the impact that record clearance has on recidivism,¹ meaningful expansion of record clearance must be the goal this session. The means of achieving this goal, we propose, is threefold: Vermont must finally expand record clearance relief to most criminal offenses, so that lifelong criminal records are the exception, not the rule; we must create an evidence-based and simplified process that automates clearance where possible; and we must define sealing in a way that maintains the most crucial protections of expungement for petitioners.

As a preliminary note, we advocate for shorter wait-times because there's less "risk" in sealing sooner. In this proposal, sealed records can be used in sentencing for subsequent offenses for several years. And earlier sealing affords petitioner the benefit of a clean slate, which helps reduce recidivism.² Record clearance provides beneficiaries with access to better employment opportunities, and when people employed after incarceration, their risk of recidivating drops significantly. We also know that criminal records impede access to employment. Therefore, the sooner we clear records, the sooner we help people reintegrate, and the safer and more prosperous our communities become. The inverse is also true: the longer people have a criminal record, the longer they'll be out of decent work, the more likely they will be to reoffend—and the less employable they will become.

Vermont Legal Aid advocates for a standard wait-time *after sentence completion* of 3 years for misdemeanors, 7 years for felonies, and 10 years for serious felonies and more violent crimes. These timeframes will repeat throughout our proposal. And you will remember that these timelines are consistent with the desistance literature cited by David D'Amora last year—and by various advocates over the years—which says that the predictive value of a record is time limited. For misdemeanor records, that predictive value lasts for 3 years from the time of the last offense and for felony offenses that timeline is 7 years. For very serious crimes of violence, that predictive value of a criminal record could last up to 10 years.

Economic opportunity and public safety deeply interconnected, and we hope that Vermont record clearance law will begin to reflect that reality. We cannot afford to force Vermonters to wait years—sometimes decades—to seal their records. This wastes human potential. We need

¹J.J. Prescott & Sonja B. Starr, "The Power of a Clean Slate, Crime & Public Safety," 43 Regulation 28 (2020).
<https://www.cato.org/sites/cato.org/files/2020-06/regulation-v43n2-3.pdf>

² See, Model Policies: <https://allianceforsafetvandjustice.org/wp-content/uploads/2019/09/Model-Policies-Brief.pdf>

all hands on-deck in our state right now; all Vermonters who are able should have an opportunity to join our workforce and help us build back our communities.

Qualifying Crimes, 13 V.S.A. 7601(4): The crimes eligible for sealing should track the expansion in S. 7, which passed the Senate in 2021.

- **Include a catch-all provision:** For all offenses that remain “unqualifying”, petitioners should have the opportunity to file for relief, 10 years after sentence completion. Court shall provide an opportunity for hearing if, from pleading, rehabilitation appears likely and it would serve to stabilize the petitioner within their community.

Timeline for Sealing, 13 V.S.A. 7602: We propose shorter wait-time because sealing is inherently more guarded. VLA proposes that individuals must wait 3, 7 or 10 years after sentence completion to petition for sealing, or 3, 7 or 10 years from the date they were last convicted. These wait-times are commensurate with the severity of the offense, as suggested by the desistence literature.

- **Non-predicate misdemeanors:** sealed at 3 years from date of sentence completion
- **Property and drug felony offense and predicate misdemeanors:** sealed at 7 years
- **Serious felonies and violent crimes:** 10 years

Automated sealing: non-predicate misdemeanors shall be sealed by the court 3 years from the date of sentence completion if there is no intervening conviction or pending charge.

- Legal Financial Obligations for misdemeanors should not be a barrier to automatic (see, e.g., Connecticut’s automatic sealing law).

Definition of Sealing [Convictions] 13 V.S.A. 7607

- **Access for various actors:** access should be limited for up to 10 years after sealing; after access is rescinded, only researchers retain access.
 - **Court access:** For sentencing in subsequent offenses: the court (and parties) have access to sealed non-predicate misdemeanor cases for 3 years; predicate and felony cases for 7 years; and serious felonies for 10 years after the date of sealing.
 - **DOC access:** DOC has access to sealed records for 3 years for non-predicate misdemeanors 7 years for predicates and felonies. These can be used to inform risk assessment and supervision decisions. Individuals under supervision cannot be prohibited from sealing older records for greater employability.
 - **Law enforcement officer access:** Law enforcement officers cannot use sealed records to inform stops, searching, pre-charge investigation. Once records are sealed, police officers do not need to access to these records and must relinquish access immediately.
 - **After 7-10 years, only researchers have access:** 7-10 years after the record has been sealed, access to any part of that record by SAs is removed and they must relinquish right to any sealed record as though it is fully destroyed. Prosecutor may object, but this access is only extended only after demonstration that there

would be a “significant risk to public safety” if they lose access to particular case. *The sealing index will remain as is.*

- **Notification:** all actors are responsible for notifying the court administrator’s office when they destroy their records.
- **Unauthorized use:** Unauthorized use of sealed records results in financial penalty to actor and professional licensing discipline.

Definition of sealing [dismissed charges], 13 VSA 7603/07: We recommend that the 60-day sealing from the date of dismissal remain the same. Charges that were dismissed should be sealed from public view within 60 days from date of dismissal/acquittal. This should happen without petition.

- **Minimal access after sealing:**

- **Prosecutors’ Access is Durationally Limited:** Prosecutors have access to cases dismissed without prejudice that have been sealed for 3 years. Prosecutors may object but must show loss of access would pose a “significant risk to public safety”.
- **No law Enforcement Officer Access:** LEOs have no access to these sealed dismissed records and cannot use these records to inform any stop, search, pre-charge investigation.
- **No DOC Access:** DOC does not have access to sealed dismissed charges; they cannot use record of these incidents for any of their decisions regarding confinement, supervision, release, parole, or revocation of supervision.
- **Retroactivity of Sealing:** all pre-2018 dismissed charges should be fully sealed (no access except for researchers) by 2023. *Prosecutors who object to this must demonstrate why it would be a significant risk to public safety* to clear these records.
- **Index:** this remains.

- **Other considerations:**

- Any conviction already sealed should be treated [by courts, attorneys, DOC, law enforcement officers] as though it was sealed under this law and access should be relinquished according to timeframes adopted.
- This bill should include a provision that makes it unlawful and a violation of state discrimination law to use, request information about, or premise a decision on a record that has been sealed. [Model: Connecticut]
- Any record which was felony and is now misdemeanor shall be considered and treated as misdemeanor [Model: Massachusetts]
- Each record of sealing states that “all civil rights are restored,” unless court or prosecutor objection; and then limited restoration language should be included in order.
- Expungement of deferred cases: maintain as is.