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STATE OF VERMONT
OFFICE OF THE EXECUTIVE DIRECTOR
DEPARTMENT OF STATE'S ATTORNEYS & SHERIFFS

MEMORANDUM

TO: Joint Legislative Justice Oversight Committee

FROM: John Campbell, Executive Director

RE: Expungement Report pursuant to Act No. 178

DATE: November 1, 2018

[Executive Summary](#)

The Department of State's Attorneys and Sheriffs, the Office of the Attorney General, and Vermont Legal Aid¹ support:

1. expanding expungement-eligibility at a minimum to certain felony-level drug possession crimes under specified circumstances;
2. waiving filing fees for expungement petitions filed as stipulated motions or eliminating filing fees for all expungement petitions; and
3. asking the Vermont Sentencing Commission to identify all offenses that currently meet the definition of a "qualifying crime" under 13 V.S.A. § 7601(4).

The Department believes that automating the process of expunging and sealing criminal history records is a concept that needs further study.

[Background on Act No. 178](#)

In the second half of the 2017–18 biennium, the Senate and House Judiciary Committees took testimony on S.173, an act related to sealing criminal history records when there is no conviction. The overall purpose of this bill was to ensure that criminal charges are promptly

¹ The other stakeholders in the Act No. 178 report study committee either did not take a position on these policy matters or did not submit comments.

expunged in a number of situations where the State has not obtained a conviction, such as when a charge has been acquitted, dismissed with prejudice, or the statute of limitations for a charged crime has expired.

An early draft of S.173 also contained a provision that expanded the definition of crimes qualifying for expungement pursuant to 13 V.S.A. § 7601 to include many felony crimes. The Department of State's Attorneys and Sheriffs ("Department") requested, and the General Assembly agreed, that the Governor's Opioid Coordination Council ("OCC") review several expungement expansion proposals and provide comments on how they might impact any of the on-going public health, economic development, and law enforcement efforts across the State of Vermont.

The final version of the bill, which became Act No. 178 (Attachment A), contained a requirement that the Department draft a report for the Joint Legislative Justice Oversight Committee on or before November 1, 2018, that, among other requests, makes recommendations on expanding expungement eligibility to certain specified crimes and considers the viability of automating the process of expunging and sealing criminal history records. The report provision is summarized in the next section.

Report Requirements of Act No. 178

Section 4 of Act No. 178 (2018) directs the Department of State's Attorneys and Sheriffs, in consultation with the Office of the Court Administrator, the Vermont Crime Information Center, the Office of the Attorney General, the Office of the Defender General, the Center for Crime Victim Services, and Vermont Legal Aid to consider:

- a) Expanding the list of qualifying crimes eligible for expungement pursuant to 13 V.S.A. § 7601 to include any nonviolent drug-related offenses;
- b) the implications of such an expansion on public health, economic development, and law enforcement efforts in the State; and
- c) the viability of automating the process of expunging and sealing criminal history records.

Subsection (2) of Section 4 specifically requires the Department to "seek input from the Vermont Governor's Opioid Coordination Council" regarding any proposals to expand expungement eligibility.

Subsection (3) of Section 4 directs the Department to submit the findings of the group, including any recommendations on specific crimes to add to the definition of qualifying crimes to the Joint Legislative Justice Oversight Committee on or before November 1, 2018.

Proposals for Expanding Expungement Eligibility

The following proposals were presented to the OCC at the Council’s meeting on October 1, 2018²:

1. Expand the definition of “qualifying crime” to include most non-violent drug possession offenses (**Office of the Attorney General Proposal**)

This proposal from the **Office of the Attorney General** contemplates making certain drug possession crimes eligible for expungement. This proposal could be achieved by enumerating the following felony-level drug possession crimes in the definition of “qualifying crimes” pursuant to 13 V.S.A 7601(4):

Title 18

Chapter 84 (Possession and Control of Regulated Drugs)

- §4230(a) Marijuana Possession & Cultivation
- §4231(a) Cocaine Possession
- §4232(a) LSD Possession
- §4233(a) Heroin Possession
- §4234(a) Depressant, Stimulant, & Narcotic Drugs Possession
- §4234a(a) Methamphetamine Possession
- §4234b(a) Ephedrine and Pseudoephedrine, Possession
- §4235(b) Hallucinogenic drugs, Possession
- §4235a(a) Ecstasy, Possession

It is important to note that felony drug possession crimes are arguably predicate offenses under 18 VSA § 4238 and, therefore, may not be eligible for expungement without specifically addressing this conflict in the definition of “qualifying crime.”

2. Expand the definition of “qualifying crime” to include most non-violent drug possession offenses under specified circumstances (**Department of State’s Attorneys and Sheriffs Proposal**)

This proposal from the **Department of State’s Attorneys and Sheriffs** takes the proposal of the Office of the Attorney General and adds additional criteria that must be demonstrated by the petitioner when seeking an expungement for a felony drug possession conviction. Specifically, the following crimes would be eligible after demonstrating the criteria described below:

² The Department submitted to the OCC a number of additional proposals (Attachment B) for expanding expungement eligibility; however, they were not specifically discussed at the October 1st meeting due to time constraints.

Title 18

Chapter 84 (Possession and Control of Regulated Drugs)

- §4230(a) Marijuana Possession & Cultivation
- §4231(a) Cocaine Possession
- §4232(a) LSD Possession
- §4233(a) Heroin Possession
- §4234(a) Depressant, Stimulant, & Narcotic Drugs Possession
- §4234a(a) Methamphetamine Possession
- §4234b(a) Ephedrine and Pseudoephedrine, Possession
- §4235(b) Hallucinogenic drugs, Possession
- §4235a(a) Ecstasy, Possession

The court shall only grant petitions filed for felony drug possession convictions under the following conditions:

- a. Five years has elapsed from the date on which a person completes their sentence for a non-qualifying crime;
- b. No new convictions;
- c. All restitution and court fees have been paid;
- d. No pending criminal charges at the time the petition is filed; and
- e. Either of the following two conditions has been met:
 - i. The State’s Attorney stipulates to the petition; or
 - ii. Petitioner can establish by clear and convincing evidence each of the following:
 1. the circumstances underlying the conviction did not involve selling, dispensing, or trafficking of a regulated drug; and
 2. the circumstances underlying the conviction did not involve firearms.

Again, it is important to note that felony drug possession crimes are arguably predicate offenses under 18 VSA § 4238 and, therefore, may not be eligible for expungement without specifically addressing this conflict in the definition of “qualifying crime.”

3. Expand the definition of “qualifying crime” to include all non-violent drug and property felonies and redefine the “predicate offense” exception in 13 V.S.A. 7601(3) (Vermont Legal Aid Proposal) (Attachment B)

This proposal from **Vermont Legal Aid** would use the existing statutory framework and timelines for expungement contained in 13 V.S.A. 7602 but would add to the list of crimes that are eligible for expungement under 13 V.S.A 7601(4) to include non-violent drug and property felonies that are typically committed in the course of active addiction to illicit substances. Specifically, this proposal would make the following felony drug crimes expungement-eligible:

Title 18

Chapter 84 (Possession and Control of Regulated Drugs)

- §4230(a) Marijuana Possession & Cultivation

- §4231(a) Cocaine Possession
- §4231(b) Cocaine Selling or Dispensing
- §4232(a) LSD Possession
- §4232(b) LSD Selling or Dispensing
- §4233(a) Heroin Possession
- §4233(b) Heroin Selling or Dispensing
- §4234(a) Depressant, Stimulant, & Narcotic Drugs Possession
- §4234(b) Depressant, Stimulant, & Narcotic Drugs Selling or Dispensing
- §4234a(a) Methamphetamine Possession
- §4234a(b) Methamphetamine Selling or dispensing
- §4234b(a) Ephedrine and Pseudoephedrine, Possession
- §4234b(b) Ephedrine and Pseudoephedrine, Sale
- §4235(b) Hallucinogenic drugs, Possession
- §4235(c) Hallucinogenic drugs, Selling or dispensing
- §4235a(a) Ecstasy, Possession
- §4235a(b) Ecstasy, Selling or dispensing

This proposal would also expand expungement eligibility to the following felony crimes:

Title 13

Chapter 29 (Conspiracy)

- § 1404(c)(4) Conspiracy to receive stolen property
- § 1404(c)(5) Conspiracy related to trafficking substances

Chapter 43 (Forgery and Counterfeiting)

- § 1801 Forgery and Counterfeiting of Papers, Documents, Etc.
- § 1802 Uttering Forged or Counterfeited Instrument

Chapter 47 (Frauds)

- § 2001 False Personation
- § 2002 False Pretenses or Tokens
- § 2022 Bad Checks
- § 2030 Identity Theft

Chapter 57 (Larceny and Embezzlement)

- § 2531 Embezzlement
- § 2561 Receiving Stolen Property
- § 2575 Offense of Retail Theft
- § 2582 Theft of Services
- § 2591 Theft of Rented Property

Title 9

Chapter 105 (Credit Cards)

- § 4043 Credit Card Fraud
- § 4045(a) Illegal Possession of Credit Card

As part of this proposal, Legal Aid would also seek to redefine the “predicate offense” exception in 13 V.S.A. 7601(3). Under current law, all predicate offenses are not eligible for expungement under any circumstances. Legal Aid proposes generally to condense the list of predicate offenses, and specifically make Driving While Intoxicated offenses expungement-eligible after 10 years of no additional DUI.

4. Amend 13 V.S.A. § 7602 to allow petitions to expunge any crime, not just “qualifying crimes,” after a showing of “rehabilitation, mitigating circumstances, or hardship” (**Vermont Legal Aid Proposal**) (Attachment B)

This proposal from **Vermont Legal Aid** would afford offenders the ability to petition the Court to have any criminal conviction expunged, including currently non-qualifying offenses and predicate offenses, under the following conditions:

- a. Five years has elapsed from the date on which a person completes their sentence for a non-qualifying crime;
- b. No new convictions;
- c. All restitution has been paid;
- d. Petitioner can demonstrate
 - i. Rehabilitation;
 - ii. mitigating circumstances; or
 - iii. a significant hardship because of the criminal record.

Under this proposal, a State’s Attorney may object to the petition and a hearing will be scheduled. Following the hearing, the court may grant the petition over the State’s objection if it serves the interest of justice.

Findings

Criminal records, when used properly and retained for the appropriate amount of time, can be used as a tool used to predict future offending and potential risk levels of former offenders. However, the predictive value of a criminal record is not permanent or static. In many cases, each year that an individual desists from criminal activity, the criminal record’s relevance and predictive value diminishes. When records are maintained indefinitely, without consideration of a person’s rehabilitation or their desistence from criminal activity, risk averse and busy employers, landlords, educational institutions, etc. might be misled into believing the applicant with a criminal history is dangerous. The result is that individuals with criminal records are more likely to be denied the work, education, and housing opportunities that are fundamental to living a dignified life. It is important for the Vermont Legislature to consider the data and evidence about retention of records, and to tailor Vermont’s expungement laws accordingly.

Before summarizing the comments of the OCC members, it is important to note several considerations relevant to the potential effects of expanding expungement eligibility that have been raised by individual stakeholders in considering this report. First, by expanding qualifying convictions, particularly felony convictions, individuals granted expungements will, in all likelihood, be able to lawfully access or own firearms. If a disqualifying conviction is removed from an individual's criminal history record and the conviction was the only reason an individual was prohibited from owning or possessing a firearm, his or her rights to own or possess a firearm would be restored.

Second, expungement of criminal history records—including arrest, arraignment, and/or conviction—may not remove incidents from publicly available information channels. Upon processing an expungement, incident and individual data is removed from secure and limited access criminal justice sources (such as law enforcement records management systems and the criminal history repository at VCIC). However, nothing in the expungement process can remove previously public data (including arrest notifications and public court documents) from privately held or generated criminal history 'warehouses' (generally internet based). Thus, it is entirely possible that more information on an individual could be available via a 'google search' than through a review of secure and authenticated criminal justice information sources. This discrepancy can create confusion for both the individual affected and the public (including housing and employment screening).

That being said, individual petitioners and their attorneys can take several steps to comprehensively erase the records held by commercial repositories. Vermont Legal Aid has developed such a practice, and presumably, private attorneys have their own method of addressing this issue. Additionally, petitioners can invoke federal consumer protection laws when private records repositories refuse to take notice of expunged records. Finally, common business practice for local landlords, employers and colleges is to subscribe to criminal records databases, rather than to rely on google searches. Legal Aid estimates that fewer than 15% of their expungement clients' conviction information can be found through a simple google search.

Finally, on a technical level there are complications inherent in the process of expunging qualifying crimes that have been filed simultaneously with nonqualifying crimes. The expungement of individual charges is a resource intensive two-part process involving court staff and Research and Information Services (RIS) staff. After the order to expunge has been signed, court staff must contact RIS to remove the expunged charges from the case management system. Then court staff must redact any mention of the qualifying crimes from the paper record. The redaction of the paper record, including the affidavit, is highly cumbersome and perhaps not even the proper purview for court staff.³

³ The judiciary's difficulty in expunging qualifying from nonqualifying crimes is not unique. In the last legislative session, the Department of Corrections noted they did not have the capacity to expunge qualifying charges that are filed with nonqualifying charges. This is reflected in Act 201 in which statute 13 VSA §7609(b) states that "a criminal record that includes both qualifying and nonqualifying offenses shall not be eligible for expungement."

Comments of OCC Members

On October 1st, 2018, the Department of State's Attorneys and Sheriffs, the Vermont Crime Information Center, the Office of the Attorney General, the Center for Crime Victim Services, Vermont Legal Aid, and the Department of Corrections presented to the OCC an overview of how criminal histories are used by various agencies, the individual and societal value of expunging criminal convictions, and several specific proposals for expanding expungement eligibility. In general, the OCC was supportive of expanding expungement eligibility. Several of the members made specific comments on how expungement of felony drug offenses might impact law enforcement, economic development, and public health efforts in the State. The Department summarizes the substance of these comments from the OCC members as follows:

Law Enforcement Implications

- In general, officer safety is aided by knowledge of criminal histories.
- Criminal records establish patterns of behavior and provide law enforcement officers the most complete picture of an individual with whom they might have to engage. This includes confidential informants who often work in close quarters with law enforcement officers and are placed in extremely sensitive situations.
- Users in possession of even small amounts of drugs may also be dealing or involved with drug trafficking organizations. These individuals or their associates also tend to carry firearms or trade in firearms.
- Criminal records can be relevant in the decision to issue a search warrant, and that expunging convictions might negatively impact the ability to obtain search warrants.
- The federal charge of felony possession of a firearm relies on evidence of a prior felony conviction, which may be unavailable because of an expungement.
- Expanding expungement creates an inequity to an actual first-time offender with respect to a sentencing decision compared with that of a multiple offender that has had prior convictions expunged.

- As a general principal, reducing the consequences of committing a crime will have a negative impact on deterrence.
- Many of the collateral consequences of maintaining records of criminal convictions related to professional licensing and employment could be mitigated by statute or through expanding sealing opportunities, neither of which would impact officer safety.
- In reacting to the expungement expansion proposal from the State’s Attorneys, one member noted that the potential for geographical inconsistencies in the criminal justice system might be enhanced by associating expungement eligibility with the facts underlying a charge and not the conviction. By way of example, the member noted that the decision to plead down a dispensing charge to a possession charge already involves a high degree of prosecutorial discretion—which invites geographical disparity. He argued that the consequences of that high discretion decision would be amplified if it also impacted expungement eligibility.

Economic Development Implications

- Expungement provides immense positive benefits for workforce development, particularly in the ability of an individual to obtain and advance in employment opportunities.
- People are more than a criminal record. The expungement process is an opportunity for prosecutors, judges, and the public to see a person with a charge as a human being with a full life beyond that record and to give that person a chance to succeed free from that stigma.
- One member recalled that as Chittenden County State’s Attorney, the vast majority of expungement petitions he reviewed were from people, mostly women, who could not get jobs or professional licenses commensurate with their abilities because of their criminal histories.
- Expungement can correct geographical disparities in charging decisions and the historical lack of access to alternative justice programs that exist today.

- Expungement of certain crimes could negatively impact employers who rely on criminal records in assessing the trustworthiness of potential employees and whether they may pose an unacceptable safety risk to other employees or the business. Increased efforts to convince or educate employers to hire individuals with a criminal record in appropriate circumstances should be considered in lieu of simply expanding expungement eligibility.

Public Health Implications

- Providing a path to expungement for low level drug offenses will have a positive impact on an addict’s decision and determination to rehabilitate himself or herself.
- Expanding expungement opportunities embodies the need for forgiveness and second chances in the criminal justice system and society as a whole.
- Expungement eligibility should be limited to those that have made a “mistake” and not to “career” offenders.
- Regardless of whether expungement eligibility is expanded, the people who are currently eligible need easier access to the expungement process.
- Expungement of drug possession charges supports a shift in thinking about drug possession and use from a criminal matter to a health issue. It also helps remove the stigma of drug use and encourages rehabilitation.

Viability of Automatic Expungement & Sealing

Under 13 V.S.A. § 7602, a person seeking an expungement or sealing initiates the process by filing a petition with the court. One way to “automate” the expungement or sealing process would be to eliminate the requirement for the defendant to file a petition. Theoretically, a qualifying conviction could be tracked through the Department’s case management software. When a qualifying conviction becomes eligible for expungement or sealing, a draft petition could be generated by the Department and sent to the appropriate State’s Attorney, who would then have thirty days to object or stipulate to the expungement or sealing. If the State’s Attorney objects, the court could schedule a hearing on the matter.

While the Department could support such a process, we would need additional time to assess the potential costs and resources associated with such an expansion. Currently, our case management

system does not track data points relative to expungement and sealing, such as, qualifying crimes, statutes of limitation, waiting periods, intervening convictions, and outstanding obligations to the Court or the Restitution Unit. Automating a State's Attorney-initiated process would require significant upgrades to the Department's case management system, including the ability query outside databases which often cannot easily communicate with one another.

In addition to these technical obstacles, there are resource challenges to creating a such a system, both for the Department and for the Court Administrator's Office. From 2014 – 2017, the courts averaged approximately 719 expungements each year. The Court Administrator's Office anticipates that legislation passed last year—Act No. 178, Act No. 201, and Act No. 8 (2018 Special Session)—will lead to significantly higher number of expungements each year and has requested five temporary docket clerks whose sole function will be expungement processing. (See Attachment C). The Department does not know what the impact of these expansions will be on the various State's Attorneys' offices at this time. We would ask for additional time to understand the full impacts of the current expansion before considering an “automatic” expungement or sealing process for all qualifying crimes.

Waiver or Elimination of Filing Fees for Expungement Petitions

In the meantime, the Department would support waiving filing fees for expungement petitions that are filed as stipulated motions by the State's Attorney as one way to increase access to the expungement process for eligible individuals. Currently, a petitioner must pay a \$90 fee when filing an expungement petition pursuant to 32 V.S.A. § 1431.⁴ This fee is a General Fund revenue source.

In responding to this proposal, the Court Administrator's Office would like to note that waiving filing fees is only practicable if statutorily allowed and the petition is stipulated at the time of filing. The court can train staff to take no fee if a petition is filed with a stipulation. However, if a non-stipulated petition is filed with the appropriate filing fee, the courts do not have a process for refunding it later if the State's Attorney stipulates to granting the petition. One possible solution to this problem would be to waive the filing fee in all instances. The extent to which either proposal would impact State revenue is not something the Department as able to comment on presently.

Additionally, the Court points out that these proposals focus on the \$90 petition fee while remaining silent on concomitant restitution and surcharges which are required before expungement can be effectuated. 13 V.S.A. §7282 mandates that the court levy specific surcharges that cannot be waived. A substantial part of these surcharges is allocated to the Victims' Compensation Special Fund, the Domestic and Sexual Violence Special Fund and the Specialized Investigative Unit Grants Board.

⁴ It bears noting that the court already has the authority to waive part or all of a filing fee pursuant to 32 VSA §1431.

Recommendations from the Department

In the criminal justice system, prosecutors serve a dual role in protecting the public interest. On the one hand, they are responsible for bringing charges and seeking convictions against individuals who violate the law. Equally as important, they have a responsibility to remove convictions when an offender has repaid his debt to society and evidence of a conviction is no longer necessary to protect the public interest. Throughout this past year, State's Attorneys, with the invaluable support of Vermont Legal Aid, have been honoring the latter responsibility by holding expungement clinics throughout Vermont and providing assistance to qualifying individuals to help remove the burden these old convictions present.

With respect to expanding expungement eligibility, the Department believes that the modified version of the Attorney General's proposal, which expands eligibility to felony drug possession crimes when there is no evidence of firearms or selling, dispensing, or trafficking in the underlying charge, as well as no pending charges at the time of the petition, strikes the appropriate balance among the competing concerns related to public health, economic development, and law enforcement efforts in the State. This proposal extends workforce development benefits to a new class of individuals while accommodating some of the law enforcement concerns raised by the OCC members. It attempts to draw a distinction between those that have convictions related to opiate use disorder and those that have tried to capitalize on the opiate crisis. It helps to remove the stigma of addiction and reinforces a shift in thinking about drug use and possession as a chronic illness instead of a criminal activity. Finally, by offering an incentive towards rehabilitation, the Department believes the proposal will have a positive impact on public health outcomes in the State.

The Department further recommends that automating the process of expunging and sealing criminal history records is a concept that needs additional study. As noted above, from an administrative standpoint, the expungement and sealing process is complicated, labor intensive, and not something that can be easily automated under existing technologies. The Court Administrator's Office is currently developing processes to accommodate the recent expansions to the expungement laws that took effect this year. (See Attachment D). In working through this project, we will be in a better position to consider the resources necessary to automate or create an "automatic" expungement and sealing process.

The Department would like to thank the General Assembly for the opportunity to engage with this issue, the various stakeholders for their work in preparing this report, and the members of the OCC for their thoughtful input.