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MONTPELIER
SPRINGFIELD

TO: Senate Judiciary Committee Chair and Members

FROM: Mairead C. O'Reilly, Esq.

DATE: January 13, 2021

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

Dear Senate Judiciary Committee Chair & Members:

Thank you for the opportunity to testify about this bill and for your commitment to expungement reform in Vermont. This work is as important now as it was before the pandemic began. Many Vermonters whose collateral consequences inhibited their access to decent housing or employment before the pandemic have found themselves in a more dire situation due to the tightening of both the housing and job markets. Passing this bill, as drafted, would advance criminal record reform in a significant way and help countless Vermonters access the markers of a dignified life.

Below are Vermont Legal Aid's proposed amendments, which attempt to balance the needs of low-income Vermonters seeking a second chance with requests from other stakeholders.

- 1. Technical amendment to the effectuate the 2020 surcharge amendment**
 - a. Proposed Amendment:** 13 V.S.A. § 7282. SURCHARGE (b) The surcharges imposed by this section shall not be waived by the court except as part of an expungement or sealing proceeding where the petitioner demonstrates an inability to pay.
 - b. Explanation:** This proposed technical amendment would help the courts operationalize the intent of the surcharge provisions passed in Act 167 (2020), which grant judges the discretion to waive surcharges. In that act, the general assembly amended 13 V.S.A. 7602 to include the following provision. "Any restitution and surcharges ordered by the court have been paid in full, provided that payment of surcharges shall not be required if the surcharges have been waived by the court pursuant to section 7282 of this title.

The citation to 13 V.S.A. § 7282 has created some confusion among the courts and members of the bar because 7282 was not amended. We recommend including “sealing” here so that both expungement and sealing petitioners may have access to a waiver where they demonstrate an inability to pay.

2. Recommended substantive amendments to “qualifying felony property crimes” section, 13 V.S.A. 7602(i)(p.15-16)

a. Proposed Amendments:

- 13 V.S.A. 7602(i)(2), p. 16, lines 11-14: “A criminal history record sealed pursuant to this subsection (i) shall be eligible for expungement pursuant to section 7606 of this title eight years after the date on which sealing order is issue if the person ~~does not commit any criminal offense subsequent to the sealed offense~~ is not convicted of any new offense pursuant to 13 V.S.A 5301(7), 13 V.S.A. 7602(c) or (i) within the 7 years prior to petitioning for expungement or has not been convicted of an offense pursuant to 13 V.S.A. 7602(b) within 3 years of petitioning for expungement.
- 13 V.S.A. 7602(i)(3), p. 16, lines 15-17: “If the respondent stipulates to a petition to seal filed prior to, on, or after the date the offense is eligible for sealing as provided in this subsection, the court may grant the petition to seal or expunge without a hearing.”

b. Explanation: 13 V.S.A. 7602(i)(2): this provision as drafted bars petitioners seeking to expunge a sealed felony property crime if they have ever been charged with *committing* a subsequent offense after the commission of the sealed felony property crime. The concerns are that this provision is overbroad, without support in the literature on recidivism and public safety, and would have disparate racial impacts. We recommend narrowing the subsequent offense limitations for expungement to say that a person cannot expunge a sealed felony property crime if they have been convicted of a more serious offense within the last 7 years or a minor offense within 3 years.

13 V.S.A. 7602(i)(3): this subsection as drafted prevents state’s attorneys from stipulating to the expungement of felony property crimes. The state’s attorneys should maintain the discretion to stipulate to expungement of

these offenses prior to, on or after the date these cases are eligible for sealing.

3. Recommended clarification to the definition of “subsequent offense” pursuant to 13 V.S.A. 7601(6)

- a. **Proposed amendment:** P. 8, line 14: (6) “Subsequent offense” means the conviction of a crime committed by the person who is the subject of a petition to expunge or seal a criminal history record that arose out of a new incident or occurrence after the person was convicted of the crime to be expunged or sealed.
- b. **Explanation:** A subsequent offense resets the clock for sealing or expungement eligibility where there is no stipulation, but this should only be required when the petitioner was convicted of an offense, rather than accused or charged of committing an offense. A dismissed case should not reset the clock, and the language as drafted could create confusion and litigation on this point.

4. Recommended inclusion of a notice provision in sealing orders about the right to subsequent expungement

- a. Upon passage of this bill, sealing will become the default record clearance remedy for more serious crimes, as it is a required precondition to an expungement for misdemeanor predicates and felony property crimes. To inform Vermonters of their right to a subsequent expungement after a second waiting period, we propose amending the notice provision in 13 V.S.A. 7607 to include notice about this right.

5. Recommended Study Committee

- a. We respectfully recommend that this bill create a study committee that will investigate the viability of implementing an automated expungement system for an additional subset of convictions. This would build off of the 2020 progress made by the General Assembly in passing Act 167, which requires courts to automatically expunge misdemeanor marijuana convictions.