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**Statement of the Council for Court Excellence
Before the Committee on the Judiciary and Public Safety
of the Council of the District of Columbia**

**Public Hearing on
B24-0063, the “Second Chance Amendment Act of 2021” and
B24-0110, the “Criminal Record Expungement Amendment Act of 2021”**

April 8, 2021

This testimony is presented by Jonathan Jeffress, a Board Director of the Council for Court Excellence (CCE) and co-chair of CCE’s Criminal Justice Committee. Mr. Jeffress is also a partner at KaiserDillon PLLC. Mr. Jeffress is joined by Emily Tatro, the Deputy Director for CCE. Please note that per our policy, no judicial member of CCE participated in the formulation or approval of this testimony. This testimony does not reflect the specific views of or endorsement by any judicial member of CCE.

Today we will testify on the urgent importance of enacting criminal record sealing, expungement, and accuracy legislation and hope the committee will consider not only B24-0063, the “Second Chance Amendment Act of 2021,” and B24-0110, the “Criminal Record Expungement Amendment Act of 2021,” but also the two bills that were introduced after notice of this hearing was circulated: B24-0160, the “Criminal Record Accuracy Assurance Act of 2021,” and B24-0180, the “Record Expungement Simplification to Offer Relief and Equity (RESTORE) Amendment Act of 2021.”

We are grateful to these bills introducers, Councilmember Trayon White, Councilmember Robert White, Councilmember Henderson, and Mayor Bowser, for introducing the criminal records bills pending before the Council, and to Chairman Allen for making this issue a priority. After more than three years of waiting since the last

hearing on similar bills in December 2017, we hope the Committee moves swiftly to markup so that the DC Council can quickly pass this much needed legislative reform.

The District has long needed to expand eligibility for criminal record sealing and expungement, speed up the process, and ensure the accuracy of records that are publicly available, but the economic recession brought by the COVID-19 pandemic makes the need even more urgent. About one in seven adult D.C. residents has a publicly available criminal record, despite only half of these individuals having been convicted of a crime.¹ While only 47% of D.C.'s population identifies as Black, 95% of people sentenced to prison in D.C. and 86% of people arrested by the Metropolitan Police Department are Black, which means that Black D.C. residents are much more likely than their white neighbors to have a criminal record.² There are also racial disparities in unemployment levels and rates of housing instability in the District: Black residents are seven times more likely to be unemployed as White residents,³ and evictions rates are substantially in Wards 5, 7, and 8, the same wards that have the largest share of Black residents, the highest rates of poverty⁴, and the greatest number of residents who have previously been incarcerated.⁵ Unemployment and housing instability have only gotten worse during the pandemic.

Now that the COVID-19 vaccine rollout is well underway and the restrictions on businesses eviction moratoria are beginning to lift, it is critical that the D.C. Council pass criminal record sealing

¹ Duane, M., Lynch, M., & Reimal, E. (2017, June 27). *Criminal Background Checks and Access to Jobs A Case Study of Washington, DC*. Urban Institute. <https://www.urban.org/research/publication/criminal-background-checks-and-access-jobs>

² District Task Force on Jails & Justice. (February 2021). *Jails & Justice: Our Transformation Starts Today*. <http://www.courtexcellence.org/uploads/publications/TransformationStartsToday.pdf>

³ Crawford, D. & Das, K. (2020, January 28). *Black Workers Matter: How the District's History of Exploitation & Discrimination Continues to Harm Black Workers*. DC Fiscal Policy Institute. <https://www.dcfpi.org/wp-content/uploads/2020/01/Black-Workers-Matter-PDF-5.pdf>

⁴ McCabe, B.J. & Rosen, E. (Fall 2020). *Eviction in Washington, DC: Racial and Geographic Disparities in Housing Instability*. Georgetown University. <https://georgetown.app.box.com/s/8cq4p8ap4nq5xm75b5mct0nz5002z3ap>

⁵ District Task Force on Jails & Justice. (February 2021). *Jails & Justice: Our Transformation Starts Today*. <http://www.courtexcellence.org/uploads/publications/TransformationStartsToday.pdf>

and expungement legislation so that people with records can fully participate in the reopening economy rather than being forced to the back of the line again. A survey of US employers highlighted the negative impact that a criminal record can have; 73% of respondents stated that even a nonviolent misdemeanor conviction would be “somewhat” or “very influential” in their decision not to extend a job offer.⁶ The stigma surrounding a criminal conviction is still prevalent, no matter the type of crime or when it occurred. Effective criminal record sealing legislation can combat this, providing a clean slate for returning citizens while maintaining public safety.

After consulting with a working group of practitioners and experts, as well as the District Task Force on Jails & Justice, CCE believes that D.C.’s new record sealing and expungement legislation must accomplish the following goals:

1. The system must be easy and relatively quick to navigate for a person seeking to seal or expunge their record, even without the assistance of an attorney;
2. It must clearly define sealing and expungement;
3. It must broaden eligibility for convictions and drastically shorten waiting periods;
4. It must automatically and retroactively apply to non-convictions and convictions that have since been decriminalized;
5. It must hold government agencies accountable for properly sealing and expunging records, and certifying they have done so;
6. It must also hold private companies accountable for accurately reporting records; and

⁶ Council for Court Excellence. (2016, December). *Beyond Second Chances: Returning Citizens’ Re-entry Struggles and Successes in the District of Columbia*. <http://www.courtexcellence.org/uploads/File/BSC-FINAL-web.pdf>

7. It must create exemptions with clear boundaries for access to records for legitimate reasons for law enforcement, researchers, and journalists.

CCE has several specific recommendations on issues presented in the draft bills, including: 1) sealing versus expungement, 2) offenses eligible for sealing, 3) waiting periods for convictions, 4) automatic sealing for non-convictions, 5) retroactivity, 6) cap on convictions, 7) certifications, 8) guidance for movants, and 9) Exceptions for Research and Journalism.

1) Sealing v. Expungement

The proposed bills differ among their use of expungement and record sealing. In existing D.C. law, and in the proposals, sealing is akin to locking records in a filing cabinet to which only law enforcement agencies and certain employers (for example, day care centers) have a key. Expungement can be likened to burning records – no trace is left behind. CCE recommends D.C. use sealing to handle most records, maintaining the current exception that allows expungement of records in cases of “actual innocence.” Sealing retains access for law enforcement to records so that they can be used to establish a pattern of arrests or eligibility for a deferred sentencing agreement. With limited exceptions, employers and housing providers will be unable to view an individual’s sealed criminal record. While expungement would fully restore a person his or her status before contact with law enforcement, record sealing, in effect, provides that restoration of status while seeking employment and housing, thus achieving the proposals’ purpose.

2) Offenses Eligible for Sealing

CCE supports making all misdemeanors eligible for record sealing, as well as all felonies, except for the most serious offenses as defined by the D.C. Sentencing Commission in Offense Severity Groups

1 and 2 of the Master Grid.⁷ Desistance research shows that the amount of time that has elapsed from the most recent conviction, not the type of offense, matters most when measuring the likelihood of re-offending. Because the risk of recidivism declines with time, we believe most offenses should be eligible for sealing in order to provide restoration for those deserving of a clean slate.⁸

3) Waiting Periods for Convictions

CCE supports a three-year waiting period for sealing misdemeanor convictions. At least 20 states already make certain misdemeanor convictions eligible for sealing after a waiting period of three years or less.⁹ Moreover, after discussion with our working group of diverse stakeholders, CCE believes five years is a reasonable waiting period for sealing eligible felony convictions. 19 states already make certain felonies eligible for record sealing after a period of five years or less.¹⁰

Robust research shows that people who remain crime-free for 3-4 years after a non-violent conviction and 4-7 years after a violent conviction are no more likely to recidivate than a member of the general community.¹¹ D.C.'s waiting period should be in line with the evidence and take into consideration the burden imposed on pro-se movants by imposing a different waiting period for each type of conviction. Maintaining single waiting period of three years for a misdemeanor conviction and a single

⁷ The District of Columbia Sentencing Commission. (2017, August 7). *Voluntary Sentencing Guidelines Manual*. [https://scdc.dc.gov/sites/default/files/dc/sites/scdc/publication/attachments/FINAL%202017%20Voluntary%20Sentencing%20Guidelines%20Manual%20\(Printer%20Proof%208-1-17\).pdf](https://scdc.dc.gov/sites/default/files/dc/sites/scdc/publication/attachments/FINAL%202017%20Voluntary%20Sentencing%20Guidelines%20Manual%20(Printer%20Proof%208-1-17).pdf)

⁸ Blumstein, A. & Nakamura, K. (2009). Redemption in the Presence of Widespread Background Checks. *American Society of Criminology*, 47(2), 349.

⁹ These states are Arkansas, Colorado, Delaware, Illinois, Kansas, Maryland, Minnesota, Michigan, Missouri, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, Oregon, South Carolina, Texas, Utah, Washington, and West Virginia. Restoration of Rights Project. (2021, March). *50-State Comparison: Expungement, Sealing, and Other Record Relief*. <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-judicial-expungement-sealing-and-set-aside/>

¹⁰ These states are Arkansas, Colorado, Illinois, Kansas, Kentucky, New Hampshire, Minnesota, Michigan, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, Tennessee, Utah, Vermont, Washington, and West Virginia. Restoration of Rights Project. (2021, March). *50-State Comparison: Expungement, Sealing, and Other Record Relief*. <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-judicial-expungement-sealing-and-set-aside/>

¹¹ Blumstein, A. & Nakamura, K. (2012). *Extension of Current Estimates of Redemption Times: Robustness Testing, Out-of-State Arrests, and Racial Differences*. National Criminal Justice Reference Service. <https://www.ncjrs.gov/pdffiles1/nij/grants/240100.pdf>.

waiting period of five years for a felony conviction best serves the interests of the individual and the public.

4) Automatic Sealing for Non-Convictions

CCE strongly supports automatically sealing records in all cases terminating without a conviction. Approximately half of the estimated 68,000 D.C. residents with a criminal record have no record of a corresponding conviction within the prior decade.¹² That means that 35,000 people face real ramifications when applying for jobs and housing, despite an arrest or charge not having led to a finding of guilt. To uphold fully the constitutional principles of our justice system, the burden must not be on the movant to seal an arrest for which no guilt was established. Therefore, CCE recommends automatic sealing for all non-convictions, with the prosecution retaining the option to file a motion in opposition to sealing an individual record.

5) Retroactivity for Automatic Sealing

Given the barrier a criminal record can play in an individual's life, CCE believes changes to D.C.'s criminal record sealing statute should apply retroactively. Just as the D.C. Code allows movants to petition for retroactive sealing of now decriminalized or legalized offenses, changes to sealing of non-convictions should apply with fairness to individuals past or present who may seek relief.¹³

CCE recognizes there may be practical challenges to retrieving and sealing records of non-convictions that are not electronically stored. For this reason, CCE recommends that the automatic sealing of non-convictions should be retroactive for as far back in time as electronic records exist. For records prior to this date, D.C. should allow a petitioner to file for sealing non-convictions, and the

¹² Duane, M., Lynch, M., & Reimal, E. (2017, June 27). *Criminal Background Checks and Access to Jobs A Case Study of Washington, DC*. Urban Institute. <https://www.urban.org/research/publication/criminal-background-checks-and-access-jobs>

¹³ D.C. Code Ann. § 16-803.02.

burden should be on the prosecutor to object to any motion. It is vital that the relevant government agencies are transparent with regard to when their electronic records begin and any other limitations they have in retrieving past records so that retroactivity can be implemented effectively.

6) Cap on Convictions

CCE strongly supports a change to the cap on convictions under current D.C. law, which effectively allows only for the sealing of the single most recent eligible conviction. People with a lengthy, but old, criminal history receive little benefit from having just their most recent eligible offense sealed. If the objective is to restore a movant's record to improve employment and housing prospects, then sealing just one conviction among many will fall short of this goal. Additionally, increasing the cap on the number of convictions eligible for sealing to a higher quantity is arbitrary. An individual who has met the proper waiting times without disqualifying convictions should be able to petition to seal any number of eligible offenses.

We believe language in the current statute that allows the Superior Court to weigh factors such as prior and subsequent conduct, and the number of the arrests or convictions that are the subject of the motion, are sufficient discretionary guidelines when determining whether to grant a motion to seal.¹⁴ I again emphasize that research shows it is the time elapsed since the most recent conviction – not quantity of convictions – that is most important in measuring risk of re-offense.¹⁵ Together, these factors support CCE's recommendation to remove any cap on convictions.

7) Certifications

CCE supports a process that holds agencies accountable to ensure they are abiding by

¹⁴ D.C. Code Ann. § 16-803(h).

¹⁵ Blumstein, A. & Nakamura, K. (2012). *Extension of Current Estimates of Redemption Times: Robustness Testing, Out-of-State Arrests, and Racial Differences*. National Criminal Justice Reference Service.
<https://www.ncjrs.gov/pdffiles1/nij/grants/240100.pdf>.

sealing orders. In order to restore fully a movant's record once sealed, it is imperative that all agencies that have access to this record send a certification to the Superior Court confirming such action, as required by current law. Members of CCE's working group reported that their clients rarely receive certifications from government agencies verifying that their records have been sealed. Therefore, CCE recommends that any legislation passed by the D.C. Council require the Superior Court to provide notice to the movant once it has received all certifications from the relevant agencies. This process will provide confidence to individuals to proceed with applications, knowing that their records have actually been sealed. We also support a regulatory mechanism to hold the various agencies and Court accountable if it does not provide certification to the movant within the statutorily required timeline.

8) Guidance for Movants

Accompanying any new criminal record sealing legislation, there must be clear guidance for movants on how to respond to questions about their record for employment or housing applications. CCE believes that guidance to answer "no record" to any inquiry into prior arrests, court appearances, or convictions that have been sealed is a sufficient instruction. Furthermore, the current provision of the D.C. Code, which states that a movant cannot be held guilty of perjury for failing to acknowledge a sealed record, should be retained.¹⁶ No individual should be compelled to share his or her sealed criminal record under fear of criminal punishment.

9) Exceptions for Research and Accountability

Finally, the legislation must assure that two kinds of public interest remain in balance. The District's interest in limiting the collateral consequences of justice involvement for individuals, as discussed above, must be considered alongside the public interest in transparency and accountability for

¹⁶ D.C. Code Ann. § 16-803(m).

the judicial branch of our democracy. That second interest has a long history of protection by the courts, to assure that proceedings are not secret and that the court operations are visible to the public.¹⁷ The public interest extends even further, to include access to bodies of records. Indeed, the research we relied on in the opening words of our testimony (Urban Institute data on those arrested but never convicted who are likely at risk in background checks) would not have been possible if court records were not publicly available.¹⁸ We request, therefore, that language carving out an exception for sharing anonymized records for research or journalistic purposes be added to any record-sealing bill:

Upon motion and for good cause shown, court records sealed under this section may at the discretion of the court, upon a balancing of the interest of individuals in nondisclosure of the information and the interest of the requesting party, be made available for scholarly, educational, journalistic, or governmental purposes only, provided, however, that identifying information of parties shall remain sealed unless the court determines that the release of such information is appropriate under this paragraph and necessary to fulfill the purpose of the request. Nothing in this paragraph shall be deemed to permit the release of personal identifying information for commercial purposes.

¹⁷ David S. Ardia, “Court Transparency and the First Amendment.” 38 *Cardozo Law Review* 835 (2017). Professor Ardia quotes Judge Frank Easterbrook, “The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification.” *Hicklin Eng’g, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006).

¹⁸ See note 1, *supra*. The authors explained their study method: “We accessed the District of Columbia Courts’ website to pull all criminal cases from January 1, 2007 to December 31, 2016, including felonies (levels I, II, III), misdemeanors, domestic violence, traffic offenses, and criminal contempt. The raw data included approximately 151,000 criminal cases. We screened out approximately 39,000 cases and drilled down to 112,359 cases, which were the focus of our analysis.” Marina Duane, *et al.*, *Criminal Background Checks and Access to Jobs: A Case Study of Washington, DC* (Urban Institute, July 2017; updated November 2017), p.18. Georgetown researchers Eva Rosen and Brian McCabe, who used landlord-tenant court records to help the District understand what is really going on in eviction cases, testified before the D.C. Council on October 27, 2020, about their study and added a plea that record-sealing legislation must “explicitly enable researchers to access the data.” <https://dcogc.org/wp-content/uploads/2020/11/Record-Sealing-Testimony1.pdf>.

Conclusion

The proposed criminal record sealing bills are a major step toward reforming D.C.'s current law and we encourage the Council to consider the research and experience of practitioners, as outlined in our testimony, as you continue to refine this legislation. Most importantly, we urge the Council to act quickly to pass a new record sealing and expungement scheme before Black residents are pushed to the back of the line as the economy begins to reopen. Thank you for your time and I welcome any questions you may have.