WASHINGTON LAWYERS' COMMITTEE
FOR CIVIL RIGHTS AND URBAN AFFAIRS

COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON THE JUDICIARY

The "Criminal Record Expungement Amendment Act of 2017" (22-0045)
The "Criminal Record Accuracy Assurance Act of 2017" (22-0404)
The "Record Sealing Modernization Amendment Act of 2017" (22-0447)
The "Second Chance Amendment Act of 2017" (22-0560)

Testimony of
Philip Fornaci, Director, D.C. Prisoners' Project
Tiffany Yang, Skadden Fellow
Washington Lawyers' Committee for Civil Rights and Urban Affairs
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Thank you for this opportunity to provide written testimony regarding the Criminal Record Expungement Amendment Act of 2017, the Record Sealing Modernization Amendment Act of 2017, the Second Chance Amendment Act of 2017, and the Criminal Record Accuracy Assurance Act of 2017.

For nearly fifty years, the Washington Lawyers' Committee for Civil Rights and Urban Affairs ("the Committee") has addressed issues of discrimination, racial injustice, and entrenched poverty through litigation and policy advocacy. The Committee has also since 2006 provided direct representation and other services to D.C. prisoners and returning citizens. We strongly support passage of a simplified but comprehensive version of the three bills addressing criminal record sealing. Taken collectively, these bills embody important steps in limiting the collateral damage that involvement in the criminal system can inflict on individuals and on our community. Passage of such a bill would not only expand opportunities for individuals with prior involvement in the criminal system but would also enable our city to make necessary strides in addressing past and current policing practices that disproportionately affect the District's African-American community.

I. Disparate Policing & Collateral Consequences in the District

A. Racially Biased Policing

In 2013, the Committee released a detailed report, *Racial Disparities in Arrests in the District of Columbia, 2009-2011*. Utilizing Metropolitan Police arrest records and D.C. Superior Court filings, the report documented the enormously disproportionate policing of the African-

American community in D.C. For example in 2010, when African-Americans represented approximately 48 percent of the D.C. population, and whites represented 42 percent:

- 83 percent of all arrests were of African-Americans. When arrests as a part of political demonstrations (civil disobedience) are excluded, the proportion of African-American arrests soared to nearly 94 percent of all arrests.
- African-Americans made up 91 percent of drug arrests, including 94 percent of marijuana arrests, despite rates of reported usage approximately equal between white and African-American D.C. residents.
- The same pattern of disproportionate arrests of African-Americans was found in every category of arrest, from traffic offenses (70 percent) to disorderly conduct arrests (76 percent) to simple assault (nearly 80 percent).
- 96 percent of all arrests were for non-violent offenses as defined by the FBI.

Typically, discussions about crime and public safety focus on the specter of violence and property damage, yet most arrests and policing in D.C. target involve minor, non-violent offenses, and overwhelmingly target African-Americans.

The D.C. Sentencing Commission found in 2012 that the racial bias reflected in arrest statistics persists through court adjudication. The Commission noted that of the 2,154 felony offenders sentenced by the D.C Superior Court in 2012, 92.8 percent were African American.[1] Overall, the rate of incarceration of African Americans in D.C. has been estimated to be some 19 times the rate of whites.[2]

For D.C. to make progress on the most difficult issues facing this city – the uneven distribution of income, wealth, educational and housing opportunities, most frequently based on race – we must address not only the ongoing racial biases in policing but also the legacy of a racially-biased criminal system that continues to destroy individual lives and communities. D.C.'s system of criminal enforcement has never been "color-blind," nor have the consequences of an arrest or criminal conviction.

B. Collateral Consequences of Criminal System Involvement

Under accepted norms of due process, when a criminal sentence has been served, or an arrest charge dismissed, the affected person should be restored to the social standing he or she occupied prior to the conviction. Yet as this Committee knows all too well, the collateral

[111] District Of Columbia Sentencing and Criminal Code Revision Commission, 2012 Annual Report, at 52 (April 26, 2013), *available at* http://scdc.dc.gov/sites/default/files/dc/sites/scdc/publication/attachments/annual_report_2012.pdf.
[2] *See* M. Mauer and R. King, Uneven Justice: State Rates of Incarceration by Race and Ethnicity 11 (Sentencing Project, July 2007).

consequences of an arrest or conviction result in enormous obstacles for individuals in Washington, D.C. in securing employment, housing, and other services. Despite the enactment of "Ban the Box" laws in housing and employment, landlords and employers continue to refuse opportunities to people with known criminal records, flouting the law by making decisions based solely on a criminal record, no matter how minor the offense or how long ago it was committed. While more robust enforcement of Ban the Box statutes and other laws can help to ameliorate these problems to some extent, the bills under consideration today can have a far more expansive impact on these issues.

In another Washington Lawyers' Committee report in 2014, *The Collateral Consequences of Arrest and Conviction in Washington, DC, Maryland and Virginia*, we recommended that D.C. "review and improve [its] existing mechanisms for seeking individualized relief from collateral consequences, through methods like expungement or sealing of records and restoration of rights." The reforms under consideration today are long overdue.

In 2011, the Council for Court Excellence found that nearly half of people released from incarceration in D.C. "may be jobless with little prospect of finding consistent work."[3] The primary reason for their inability to find a job is a criminal record, even after years of job searches. While many returning citizens lack job skills, even those with training and job experience are often excluded from employment simply because they have a criminal record. At the Washington Lawyers' Committee, we are seeing the same problems for returning citizens in securing housing, with many housing providers having blanket exclusions for people with felony records, and often exclusions for any criminal record at all. Again, such exclusions continue to occur even years and decades after release from incarceration.

The inability to effectively reintegrate into community life after a criminal conviction, or simply an arrest, can be devastating. This Committee on the Judiciary and Public Safety has previously found that "[w]ithin three years of being released from jail or prison, about 50 percent of returning citizens will reenter the criminal justice system, and whether or not a returning citizen can find employment is one of the best predictors of recidivism."[4] People with criminal records, particularly those that include felonies, face life-long bars to employment and housing.

C. Misplaced Opposition to Expansion of Expungement and Record Sealing

Unfortunately, current D.C. law limits criminal record sealing to a small number of misdemeanor offenses and only one felony offense. For several years, advocates have sought to expand these options to better meet the needs of the majority of people with criminal records. While it is useful for people with a single misdemeanor arrest or conviction on their records to seal

[3] Council for Court Excellence, *Unlocking Employment Opportunities for Previously Incarcerated Persons in the District of Columbia* (2011), at 7.
[4] *See* D.C. Council Comm. on the Judiciary and Public Safety, "Report on Bill 20-642, the 'Fair criminal records Screening Amendment Act of 2014'" (May 28, 2014) at 5.

their records, limiting these options to misdemeanors does nothing to support the reintegration of people with more serious offenses on their records into society.

The most common objections to expanding record-sealing options in particular have been raised by law enforcement. While law enforcement agencies continue to have access to even sealed records of criminal offenses, those agencies have often argued that criminal records should be available for the general public for review. Such a position is not only misguided but is an attempt to expand the reach of criminal law enforcement beyond the context of criminal adjudication. The Office of the United States Attorney for Washington, D.C. has repeatedly and successfully worked to limit record-sealing options, in the interests of "public safety."

However, expansion of record sealing and expungement options are not matters for law enforcement. Indeed, after service of a criminal sentence, there is no role for law enforcement in formulating civil rights policy.

II. Proposed Changes to the Drafted Legislation re: Sealing

A. Expand Eligibility for Sealing to All Misdemeanors and Felonies

There is general consensus among these bills to expand the list of offenses eligible for record sealing. This consensus reflects a growing understanding of the disparate and relentless impact that our criminal justice system has had on vulnerable communities, and we commend the Council's recognition of these reentry barriers. We are especially appreciative of Councilmember Grosso's bill, which expands eligibility to encompass all misdemeanors and most felonies. However, in continuing to limit eligibility to certain offenses, the proposed legislation prejudices those with the most need for record sealing. We therefore urge the Council to consider expanding eligibility to all misdemeanor and felony offenses.

In considering this recommendation, it is important to note the realities of the sealing process. Records that are sealed remain accessible to the courts and to law enforcement, including prosecutors. Establishing eligibility for record sealing is not equivalent to automatic sealing; individuals remain obligated to file a motion with the court, to allow the filing of an opposition to their motion, and to present evidence in support of their motion. They remain obligated to demonstrate they have no disqualifying arrests or convictions during the relevant waiting periods. Prosecutors remain entitled to argue that the sealing of the record would pose a significant threat to public safety. The court remains entitled to weigh both arguments before rendering a decision. Defining an offense as eligible does nothing more than provide the opportunity to petition for the court's consideration of a sealing request.

To limit the list of eligible offenses is to declare that certain offenses are wholly beyond redemption, no matter the circumstance. This cannot be the Council's intent. The courts are well equipped to consider all the relevant factors, to weigh both the individual's evidence of rehabilitation as well as any opposition from the prosecutor. Barring entire categories of offenses

from eligibility is a gross injustice for individuals who have served their time, paid their debt to society, and have made concerted efforts to reenter their communities following their release. We therefore urge the Council to expand the list of eligible offenses to all misdemeanors and felonies.

We note, however, that the bills diverge on the process for determining which previously-ineligible offenses should become eligible for record sealing. This determination must be made by the Council in the first instance; we believe it would be misguided to defer this issue to the Criminal Code Reform Commission, as Mayor Bowser's bill provides. This Commission is an unelected body comprised of five appointed attorneys. Notably, no guidance is provided to the Commission about the process for making these determinations or the factors that must be considered when expanding eligibility. There are no provisions requiring community or public input, and the Commission cannot be held accountable by its constituents. It must be this Council, comprised of Councilmembers elected by residents of this District, that makes this determination.

B. Provide for the Automatic Sealing of All Non-Convictions with Clear Retroactivity

We strongly support the automatic sealing of any non-conviction. As we highlighted above, the racial disparities in policing are systemic and pervasive. This targeted policing disproportionately harms African-American residents, and these disparities are present at every stage of law enforcement. We also note that the vast majority of arrests in the District are made for minor and nonviolent offenses, including those offenses that criminalize poverty and homelessness. The context and impact of such disparate policing clearly bolsters the need for automatic sealing of all non-convictions.

Failing to create automaticity would also contradict a fundamental right in our society: the presumption of innocence. We have seen many returning citizen clients struggle to find housing or employment due to nothing more than a decades-old arrest record. An arrest, on its own, should not be permitted to continuously bar an individual from economic or housing stability. The government bears the burden of proof when seeking a conviction and, when the government fails to achieve a conviction or deliberately dismisses a case, the burden of proving fitness for record sealing should not then turn on the individual who suffered the arrest. Without automatic and expedient sealing of non-convictions, this sealing legislation will achieve an incomplete measure of reform.

Explicit retroactivity is also necessary to achieve the reform envisioned by these bills. Without automatic retroactive application, especially with respect to non-convictions, thousands of DC residents will remain burdened by the unjust collateral consequences of their criminal records.

C. Use a Simplified Tier System when Imposing Waiting Periods for Conviction Sealing

We also suggest that the Council consider a simplified tier system for waiting periods when designing the sealing procedure for convictions. Creating a complicated scheme will frustrate reform by confusing prosecutors, judges, advocates, and community members alike.

We commend Councilmember Grosso's bill for its necessarily expansive vision for reforming the sealing process. However, relying on the length of the relevant sentence may not be the appropriate measurement for assigning different waiting periods. In many instances, the length of the sentence fails to correspond with the character or severity of the underlying offense. One of our clients, for example, was sentenced to over twenty years in prison for robbing a convenience store with nothing more than a toy gun. The complicated and problematic scheme of sentencing enhancements exacerbates this concern. We therefore suggest a two-tier system for misdemeanors and felonies with a waiting period of 90 days and 5 years, respectively. This proposal incorporates the waiting periods identified in Councilmember Grosso and Mayor Bowser's legislation, and this variation acknowledges the difference in severity between misdemeanor and felony convictions.

We note that the Council and the U.S. Parole Commission have already recognized the propriety of a five-year waiting period in a similar context. The Equitable Street Time Credit Amendment Act of 2008 provides a presumption that "five years after releasing a prisoner on supervision, the Parole Commission shall terminate supervision over the parolee" regardless of the nature of the underlying conviction. Supervision will thereby be terminated unless the Commission determines, after an appropriate hearing, that "there is a likelihood that the parolee will engage in conduct violating any criminal law." Here, too, we are faced with individuals who have been released from imprisonment after completing their sentences. And as we highlighted above, an individual would not receive automatic sealing of his or her conviction after five years; rather, she would simply receive the opportunity to request the court's consideration of record sealing. The Court, like the Commission, would then have a chance to evaluate the relevant inquiry regarding public safety.

D. Eliminate the Arbitrary Cap on the Number of Eligible Convictions

We also urge the Council to eliminate any arbitrary caps on the number of convictions that may be sealed. There is no empirical data to suggest that five convictions reflect the end of an individual's potential for rehabilitation, as Mayor Bowser's bill would do. Indeed, given the clear racial disparities in policing, conviction rates, and incarceration, an arbitrary cap would unjustly and disproportionately burden the District's communities of color.

The Council must ignore the temptation to equate the mere quantity of convictions to an individual's potential for rehabilitation. We have had clients who collected numerous misdemeanor convictions for drug possession when they suffered from severe drug addiction, who

have since moved past their addiction in the intervening decades. We have had clients who made a series of rash decisions during a short stretch of their youth, but who have made concerted efforts to rehabilitate themselves in the decades following those mistakes. We have had clients who, during the periods in which they were homeless, collected numerous misdemeanors for offenses that criminalized their homelessness, such as public urination. We have had clients who, because they do not have the means to afford cars or taxis, have arrived 15 to 30 minutes late to their court date due to unreliable bus schedules. Despite their appearance and explanation for their tardiness, they have been convicted of failure to appear, an offense that often, in practice, criminalizes those in poverty.

Those who oppose eliminating an arbitrary cap will echo concerns about repeat offenders. However, the courts are well equipped to determine the context of each conviction and to weigh whether their circumstances warrant sealing. Second, empirical data suggests that it is the age of the criminal record, not the number of convictions at issue, that is most relevant when assessing recidivism risks. Numerous studies have indicated that after four to seven years without a subsequent conviction, an individual with a criminal record presents no statistically greater risk of future criminal activity than an individual with no prior convictions.[5] Finally, the imposition of waiting periods and disqualifying offenses is already in place to mitigate against this concern. Unduly limiting the number of convictions eligible for sealing, with no empirical support and grounded solely on abstract concerns about recidivism, would be a mistake.

E. Allow for Successive Sealing Motions Regarding the Same Offenses

We note that none of the three bills allows for successive motions to seal the same offense, and we urge the Council to reconsider this posture. Providing an individual one chance, and one chance only, to seal an offense is a misguided attempt at pursuing efficiency. It prejudices those who are unable to obtain legal representation, and it disregards completely an individual's potential for future rehabilitation.

In a different jurisdiction, I once represented a client who sought expungement of a misdemeanor conviction from her past. By the time I met her, she had experienced two failed attempts at expungement – but she had represented herself during both attempts with no help or guidance in navigating the legal process. She did not know that she could collect evidence to demonstrate her rehabilitation, nor did she understand how that evidence could be formed. She believed, as many laymen reasonably would, that her nearly five-year clean record, as well as her

[5] *See* Blumstein, Alfred & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, Criminology, Vol. 47 No. 2 (May 2009); Blumstein, Alfred & Kiminori Nakamura, *Redemption in an Era of Widespread Criminal Background Checks*, 263 Nat'l Institute Justice J. 10 (2010); Kurlychek, Megan C., et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 Criminology and Pub. Pol'y 483 (2006); Kulychek, Megan C., et al., *Enduring Risk? Old Criminal Records and Short-Term Predictions of Criminal Involvement*, 53 Crime and Delinquency 64 (2007).

own oral testimony during the hearing, would be enough. On both occasions, a prosecutor opposed her motion and the Court ruled against her.

When I met her, I immediately saw a compelling history of rehabilitation. She had restored a healthy, trusting relationship with the person she had assaulted. She had successfully completed an anger management program, and she had worked with the same therapist for five years – a therapist who was enthusiastic about her progress. Her family trusted her to care for her young nieces and nephews, and she became the sole caretaker of her mother, who loved and admired her. She was fulfilling her education requirements for a new career in medical administration, and she was enrolled in her last required course. In sum, she was a compelling candidate for expungement, but she had difficulties overcoming a barrier that many members of the community face: she had no experience with the expungement process, and she did not know how to take all this supportive information and capture it on paper. I collected declarations from her parole officer, therapist, and family, made copies of her progress reports in therapy and anger management, and documented the community support she had received and given over the five-year period. After we submitted her petition and accompanying exhibits to the court, the prosecutor – who had twice before opposed expungement – informed me she would not oppose this petition. This was tantamount to prosecutorial approval. My client finally had her record expunged, but this result – and the many doors it opened for her employment and housing stability – would have been impossible here in the District.

Again, procedures in the parole context are instructive here. If the Parole Commission does not terminate supervision five years after release, the parolee may request a hearing annually thereafter, and the Commission is required to conduct an early termination hearing at least once every two years.[6] Those who oppose the allowance of successive motions may argue that doing so will open floodgates of litigation, or that it will incentivize the filing of frivolous motions. Neither concern is warranted. Appropriate safeguards can be included in statutory language, such as an annual timeframe, to ensure that courts are not overly burdened by sealing motions. Moreover, appropriate safeguards already exist to protect against frivolous motions; the imposition of waiting periods and disqualifying offenses significantly limits the pool of eligible individuals. If this Council truly believes in the concept of second chances, why are movants provided only one opportunity to seal an offense?

F. Provide Explicit Guidance regarding Housing and Employment Consequences

Finally, we emphasize the need for explicit guidance regarding the impact of sealed records on applications for employment and housing. As Mayor Bowser's bill enumerates in § 16-806.01, an applicant with a sealed record should be empowered to answer "no record" with

[6] *See* 14 C.F.R. 39 § 2.43(c) (2010), *available at* https://www.gpo.gov/fdsys/pkg/FR-2010-03-03/pdf/2010-4270.pdf

respect to a criminal records inquiry when seeking housing or employment. The reform envisioned by this bill will be meaningless unless housing providers, employers, applicants, and advocates are all given explicit guidance regarding the impact of a sealed record. Without direct instructions from the Council, housing providers and employers may remain empowered to discriminate against returning citizens, and returning citizens (as well as their advocates) may remain confused about their answers to these threshold application questions. Such guidance is necessary to the success of this legislation, and we urge the Council to keep this provision in its finalized draft.

III. Recommendations re: the Criminal Record Accuracy Assurance Act of 2017

The Criminal Record Accuracy Assurance Act seeks to insure that the goals of record-sealing and expungement are not defeated by the failures of non-governmental "criminal history provider" companies to update their records. This is an important first step toward insuring that criminal records that have been expunged or sealed are also expunged or sealed in the records held by private companies, which provide third-party background check data to companies and individuals.

There is a staggering number of private companies that provide criminal histories to third parties, most of which provide generally inaccurate or incomplete information. There is no central database of criminal convictions nationally, and very few accessible arrest records in most jurisdictions, so most of these companies simply gather whatever information is readily available and sell it. In particular, those that offer "instant results" and similar near-automatic background records are inherently inaccurate. The more reputable investigative agencies engaged in this work do detailed records searches within county and municipal court databases, a process that is time-consuming and expensive. The latter companies are less commonly used by small employers and individuals, who prefer low-cost options that appear to provide valid results.

This bill seeks to create an administrative process to file complaints against companies providing inaccurate criminal histories to third parties. While a laudable goal, many of the companies in this industry would be extremely difficult to locate, much less prosecute in an administrative process. Many are web-based companies, without readily-apparent physical addresses. Others are simply "fly-by-night" outfits that would similarly be difficult to challenge. While administrative complaints might serve to address errors made by larger, more-established entities, these are not the most prolific providers of these services.

As noted by the New York Times in 2012, the federal Fair Credit Reporting Act "was intended to protect consumers from incorrect information that often lurks in the public records that background companies draw on for their reports. For example, the law requires background check companies to notify people in a timely manner when their data is being sent to an employer — so inaccuracies can be challenged — or to ensure that the public record that is being reported is

complete and current."[7] As the times noted at that time, federal enforcement has been difficult, and lax. Indeed, in 2012 the Federal Trade Commission filed its first enforcement action under the Act, which was passed in 1970.

Even if the D.C. Department of Human Rights (DHR) is motivated to enforce this law, that agency is itself plagued with challenges with its current mandates. In particular, enforcement of the Ban the Box laws in employment (Fair Criminal Record Screening Act of 2014) and housing (Fair Criminal Record Screening for Housing Act of 2016) has been minimal, with only a tiny percentage of cases resolved through the administrative process.[8] Problems with OHR enforcement of its broad mandate are well-known to this Committee, which has struggled with those problems for decades. It is difficult to imagine how DHR could possible handle this additional, and more complex, authority to DHR without significant staffing increases.

As with the Ban the Box statutes, this legislation limits available remedies to the DHR administrative process. The bill explicitly excludes a private right of action that would allow aggrieved parties to file their own lawsuits. This short-sighted effort to limit litigation also serves to limit meaningful enforcement. Even with its potentially limited enforcement potential, the bill further limits enforcement by barring private litigation. We strongly recommend that the bill be amended to allow for a private right of action. We also recommend that the Council revisit the same issue with regard to the Ban the Box laws to similarly allow for a private right of action.

[7] "Accuracy in Criminal Background Checks," New York Times (unsigned editorial), August 9, 2012.

[8] A 2016 Freedom of Information Act request on enforcement data from DHR under the of the Fair Criminal Record Screening Act of 2014 revealed that fewer than 30 cases (out of more than 1,200 claims filed) had been adjudicated in the first 18 months after passage of the law.