AMENDED
Public Hearing Testimony before Senate Standing Committee on Codes
Subject: Senate Bill No. S1553A "Clean Slate" Act
Hon. Darcel D. Clark
Bronx County District Attorney
May 6, 2021

Thank you for providing this opportunity to talk with you about the Clean Slate legislation.

The legislature's goals are laudable in creating "Clean Slate." We see the need and agree that the collateral consequences of a criminal record significantly impact the ability to earn a living, to access housing, education, public benefits, voting and so much more.

We understand the thinking behind Clean Slate's automatic sealing and expungement. It is a response to what many have identified as an "uptake gap" or "second chance gap" in petition-based sealing and expungement models. The "gap" identifies the large percentage of people who are discouraged from applying for relief due to barriers to access as a result of difficulty navigating our current sealing statute 160.59. Many who qualify for sealing or expungement do not understand the eligibility criteria, some find the application process too burdensome, and of course, court processes can be intimidating. Automatic relief attempts to close the gap by shifting the burden from those who are justice involved to the government stakeholders who can review their records and determine whether someone is eligible for relief without requiring individuals to ask for relief.

We believe in second chances, and *reasonable* measures to seal and expunge criminal records. However, the proposed legislation, as presently constructed, requires a few fixes that if left unchecked, will result in serious public safety concerns. In short, I suggest: (1) narrowing the scope of automatically crimes sealed to most misdemeanors and low-level non-violent felonies; (2) include court discretion on violent felony convictions; (3) use evidence-based timelines; and (4) create a working committee of criminal justice stakeholders to review proposed amendments to this legislation.

These suggestions are based on decades of experience as a judge, a prosecutor, and a life-long Bronx resident. I share these potential solutions with you today with an eye towards implementing restorative measures and Clean Slate initiatives that have the best chance of achieving your legislative intent without consequences that jeopardize public safety.

Let's start by examining crimes that are eligible for sealing.

Under the proposed legislation, almost **all** crimes are eligible for sealing and expungement. While it is reasonable to consider applying this statute to most misdemeanors and low-level felonies, the proposed legislation is overbroad when it automatically seals violent crimes. The statute should include mechanisms to examine whether the sealing or expungement of a violent crime is appropriate, and whether criminal conduct at issue was against children, vulnerable adults, or if it involved large scale fraud, dishonesty or theft.

The statute should also provide exemptions for more than just law enforcement to review sealed convictions. For example: schools or child-care providers should be able to check if prospective employees have convictions for child abuse or neglect; hospitals and nursing facilities should be able to screen for felony convictions based on abuse, injury to patients or another vulnerable group; those employed to drive should be screened for DWI convictions; and financial institutions should be able to check for convictions that involve serious theft or fraud.

Although the statute does not intend to apply to convictions for sex offenses, the statute must sure up its language to prevent sex offenders from utilizing this legislation. Presently, if a conviction results in sex offender registration, those sex offenders who move out of state for a few years and never register for SORA under New York's statute will automatically have their New York records of convictions sealed and then expunged. These offenders could then move back to New York after expungement without the necessary monitoring that legislature intended.

The statute must accommodate for repeat patterns of domestic violence that are presented in a short period of time.

I just laid bare a few solutions that could mend the breadth of crimes covered by the legislation; and I will now turn to some of unique challenges presented when criminal records are *automatically* sealed or expunged.

Foremost, there must be some form of review built into the process to determine if the sealing or expungement is correct, or if the criminal record failed to meet the specific statutory criteria for sealing or expungement.

Consider this: Under the present version, what happens if sealing or expungement is not authorized under the statute because of a recent conviction, or because the defendant is under parole or probation, but the conviction is erroneously sealed or expunged? There

should be language within the statute that builds in appropriate checks and balances before criminal records are sealed and expunged.

Again, one measure of compromise, the legislature could apply the automatic sealing or expungement only to most misdemeanors and low-level non-violent felonies. With this change, there could be more support for a less stringent process of review, but there must be a process of review for violent felony convictions.

Given that the statute intends to address violent felony convictions, the court should have an opportunity to exercise its discretion, weigh appropriate factors, and consider any potential aggravating or mitigating facts. Cases of substantial magnitude are often pled to a lower-level violent offense. The court is best situated to make these determinations of whether sealing or expungement under the facts of each case is appropriate.

Also, the legislation should provide notice to crime survivors, victims and their families or the community. This would provide an opportunity for crime survivors or the community to have a voice and express their concerns when someone moves to seal or expunge violent felony convictions.

As to the time requirement of this statute, in the case of a violent felony conviction, the records are sealed three years after sentence on the most recent felony conviction. Three years is too short a time to seal a violent felony conviction. Plus, there is no tolling provision for the sealing of records to account for the time that an individual is incarcerated. As a result, if someone is serving a prison sentence that is longer than three years (for example a murder or manslaughter conviction), and is still in prison (but not under the supervision of probation or parole), the record of conviction could be sealed under the statute. Clearly, this is not the desired result of the legislature, and it demonstrates why this piece of legislation could use more collaboration in its revision.

As we take a closer look at the time requirements for expungement, in the case of a violent felony conviction, the records are expunged seven years (excluding the period of incarceration) after sentence on the most recent felony conviction and after completion of probation or parole. Seven years after release and completion of probation or parole is too short a time to demonstrate that someone merits expungement of their criminal record for a violent felony conviction. We should work together to examine the research and evidence-based data that establishes an appropriate period of time that must lapse before we consider sealing and expungement of violent felony convictions.

Finally, I will briefly discuss a couple revisions to statute that concern scientific evidence

and the DNA databank.

The legislation requires the expungement of photographs, prints, and retina scans. Rather than expungement, the legislation should aim to ensure that records are properly sealed. The mere existence of photographs, prints, and retina scans do not present obstacles to restoring rights or reentering society. The expungement of these materials results in the destruction of evidence that often reliably solves crimes.

The statute also states that biometric information must be expunged. The statute should make clear that this does not include DNA information from the DNA databank. Many cases including rape and murder are solved using evidence and information contained in the DNA databank. Further, individuals who are accused of crimes are exonerated or excluded from consideration based on the information contained in the DNA databank. Amending this statute to provide clarity about the specific biometric information would remove the public safety hazard of destroying DNA evidence.

In conclusion, I believe our shared goals lead us to, wherever possible, remove unnecessary roadblocks to employment opportunities, higher education, safe housing, voting, and successful reintegration into society. Taking this step to create measures to seal and expunge criminal records makes sense. If we work together on this Clean Slate legislation, we can remove the flaws that warrant significant revision. I welcome the opportunity to work with you, our criminal justice stakeholders and community partners to make this legislation viable. If we take a moment to pause this legislation, allow the criminal justice community to come together – the court, the defense bar, advocates, the prosecution and law enforcement – to have a meaningful opportunity to review amendments and find consensus, we will achieve the sensible reform that restores our community. Thank you.