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SENATE BILL NO. 443

Senate Amendments in [] - February 11, 2022

Prefiled January 11, 2022

A *BILL to amend and reenact § 19.2-392.12, as it shall become effective, of the Code of Virginia, relating to sealing of offenses resulting in a deferred and dismissed disposition or conviction by petition; defendant with a disorder or disability.*

Patrons Prior to Engrossment—Senators Boysko and McClellan

Referred to Committee on the Judiciary

Be it enacted by the General Assembly of Virginia:

1. That § 19.2-392.12, as it shall become effective, of the Code of Virginia is amended and reenacted as follows:

§ 19.2-392.12. (For contingent effective date see Acts 2021, Sp. Sess. I, cc. 524 and 542) Sealing of offenses resulting in a deferred and dismissed disposition or conviction by petition.

A. Except for a conviction or deferral and dismissal of a violation of § 18.2-36.1, 18.2-36.2, 18.2-51.4, 18.2-51.5, 18.2-57.2, 18.2-266, or 46.2-341.24, a person who has been convicted of or had a charge deferred and dismissed for a (i) misdemeanor offense, (ii) Class 5 or 6 felony, or (iii) violation of § 18.2-95 or any other felony offense in which the defendant is deemed guilty of larceny and punished as provided in § 18.2-95, or (iv) Class 4 felony for a defendant with a disorder or disability may file a petition setting forth the relevant facts and requesting sealing of the criminal history record information and court records relating to the charge or conviction, provided that such person has (a) never been convicted of a Class 1 or 2 felony or any other felony punishable by imprisonment for life, (b) not been convicted of a Class 3 or 4 felony within the past 20 years [or within the past 10 years in the case of a defendant with a disorder or disability], or (c) not been convicted of any other felony within the past 10 years of his petition.

B. A person shall not be required to pay any fees or costs for filing a petition pursuant to this section if such person files a petition to proceed without the payment of fees and costs, and the court with which such person files his petition finds such person to be indigent pursuant to § 19.2-159.

C. The petition with a copy of the warrant, summons, or indictment, if reasonably available, shall be filed in the circuit court of the county or city in which the case was disposed of and shall contain, except when not reasonably available, the date of arrest, the name of the arresting agency, and the date of conviction. When this information is not reasonably available, the petition shall state the reason for such unavailability. The petition shall further state the charge or conviction to be sealed; the date of final disposition of the charge or conviction as set forth in the petition; the petitioner's date of birth, sex, race, and social security number, if available; and the full name used by the petitioner at the time of arrest or summons. A petitioner may only have two petitions granted pursuant to this section within his lifetime.

D. The Commonwealth shall be made party to the proceeding. The petitioner shall provide a copy of the petition by delivery or by first-class mail, postage prepaid, to the attorney for the Commonwealth of the city or county in which the petition is filed. The attorney for the Commonwealth may file an objection or answer to the petition or may give written notice to the court that he does not object to the petition within 21 days after it is delivered to him or received in the mail.

E. Upon receipt of the petition, the circuit court shall order that the attorney for the Commonwealth or a law-enforcement officer, as defined in § 9.1-101, provide the court with a sealed copy of the criminal history record of the petitioner. Upon completion of the hearing, the court shall cause the criminal history record to be destroyed unless, within 30 days of the date of the entry of the final order in the matter, the petitioner or the attorney for the Commonwealth notes an appeal to the Supreme Court of Virginia.

F. After receiving the criminal history record of the petitioner, the court may conduct a hearing on the petition. The court shall enter an order requiring the sealing of the criminal history record information and court records, including electronic records, relating to the charge or conviction, only if the court finds that all criteria in subdivisions 1 through 4 are met, as follows:

1. During a period after the date of (i) dismissal of a deferred charge, (ii) conviction, or (iii) release from incarceration of the charge or conviction set forth in the petition, whichever date occurred later, the person has not been convicted of violating any law of the Commonwealth that requires a report to the Central Criminal Records Exchange under subsection A of § 19.2-390 or any other state, the District of Columbia, or the United States or any territory thereof, excluding traffic infractions under Title 46.2,

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59 for:

60 a. Seven years for any misdemeanor offense; or

61 b. Ten years for any felony offense;

62 2. If the records relating to the offense indicate that the occurrence leading to the deferral or
63 conviction involved the use or dependence upon alcohol or any narcotic drug or any other
64 self-administered intoxicant or drug of whatsoever nature, the petitioner has demonstrated his
65 rehabilitation;

66 3. The petitioner has not previously obtained the sealing of two other deferrals or convictions arising
67 out of different sentencing events; and

68 4. The continued existence and possible dissemination of information relating to the charge or
69 conviction of the petitioner causes or may cause circumstances that constitute a manifest injustice to the
70 petitioner.

71 G. If the attorney for the Commonwealth of the county or city in which the petition is filed (i) gives
72 written notice to the court pursuant to subsection D that he does not object to the petition and (ii)
73 stipulates in such written notice that the petitioner is eligible to have such offense sealed, and the
74 continued existence and possible dissemination of information relating to the charge or conviction of the
75 petitioner causes or may cause circumstances that constitute a manifest injustice to the petitioner, the
76 court may enter an order of sealing without conducting a hearing.

77 H. Any party aggrieved by the decision of the court may appeal, as provided by law in civil cases.

78 I. Upon the entry of an order of sealing, the clerk of the court shall cause an electronic copy of such
79 order to be forwarded to the Department of State Police. Such electronic order shall contain the
80 petitioner's full name, date of birth, sex, race, and social security number, if available, as well as the
81 petitioner's state identification number from the criminal history record, the court case number of the
82 charge or conviction to be sealed, if available, and the document control number, if available. Upon
83 receipt of such electronic order, the Department of State Police shall seal such records in accordance
84 with § 19.2-392.13. When sealing such charge or conviction, the Department of State Police shall
85 include a notation on the criminal history record that such offense was sealed pursuant to this section.
86 The Department of State Police shall also electronically notify the Office of the Executive Secretary of
87 the Supreme Court and any other agencies and individuals known to maintain or to have obtained such
88 a record that such record has been ordered to be sealed and may only be disseminated in accordance
89 with § 19.2-392.13 and pursuant to the rules and regulations adopted pursuant to § 9.1-128 and the
90 procedures adopted pursuant to § 9.1-134.

91 J. Costs shall be as provided by § 17.1-275 but shall not be recoverable against the Commonwealth.
92 Any costs collected pursuant to this section shall be deposited in the Sealing Fee Fund created pursuant
93 to § 17.1-205.1.

94 K. Any order entered where (i) the court or parties failed to strictly comply with the procedures set
95 forth in this section or (ii) the court enters an order for the sealing of records contrary to law shall be
96 voidable upon motion and notice made within two years of the entry of such order.

97 L. If a petitioner qualifies to file a petition for sealing of records without the payment of fees and
98 costs pursuant to subsection B and has requested court-appointed counsel, the court shall then appoint
99 counsel to file the petition for sealing of records and represent the petitioner in the sealed records
100 proceedings. Counsel appointed to represent such a petitioner shall be compensated for his services
101 subject to guidelines issued by the Executive Secretary of the Supreme Court of Virginia, in a total
102 amount not to exceed \$120, as determined by the court, and such compensation shall be paid from the
103 Sealing Fee Fund as provided in § 17.1-205.1.

104 M. A petition filed under this section and any responsive pleadings filed by the attorney for the
105 Commonwealth shall be maintained under seal by the clerk unless otherwise ordered by the court. Any
106 order to seal issued pursuant to this section shall be sealed and may only be disseminated for the
107 purposes set forth in § 19.2-392.13 and pursuant to rules and regulations adopted pursuant to § 9.1-128
108 and procedures adopted pursuant to § 9.1-134.

109 N. A conviction or deferral and dismissal of § 18.2-36.1, 18.2-36.2, 18.2-51.4, 18.2-51.5, 18.2-57.2,
110 18.2-266, or 46.2-341.24 is ineligible for the sealing of records under this section.

111 O. Nothing in this chapter shall prohibit the circuit court from entering an order to seal a charge or
112 conviction under this section when such charge or conviction is eligible for sealing under some other
113 section of this chapter.

114 P. As used in this section, "defendant with a disorder or disability" means a defendant who has been
115 diagnosed by a psychiatrist or clinical psychologist with (i) an autism spectrum disorder as defined in
116 the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders published by the
117 American Psychiatric Association or (ii) an intellectual disability as defined in § 37.2-100, and for
118 whom the court finds by clear and convincing evidence that the criminal conduct was caused by or had
119 a direct and substantial relationship to the person's disorder or disability.