

2020 SPECIAL SESSION I

SENATE SUBSTITUTE

20201118D

SENATE BILL NO. 5043

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on Finance and Appropriations on September 3, 2020)

(Patrons Prior to Substitute—Senators Deeds, Norment [SB 5006], Peake [SB 5009], and McDougale [SB 5110])

A BILL to amend and reenact §§ 19.2-392.1, 19.2-392.2, and 19.2-392.4 of the Code of Virginia and to amend the Code of Virginia by adding in Article 1 of Chapter 2 of Title 17.1 a section numbered 17.1-205.1, relating to expungement of police and court records; Expungement Fee Fund created.

Be it enacted by the General Assembly of Virginia:

1. That §§ 19.2-392.1, 19.2-392.2, and 19.2-392.4 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Article 1 of Chapter 2 of Title 17.1 a section numbered 17.1-205.1 as follows:

§ 17.1-205.1. Expungement Fee Fund.

There is hereby created in the state treasury a special nonreverting fund to be known as the Expungement Fee Fund, referred to in this section as "the Fund." The Fund shall be established on the books of the Comptroller. All funds accruing to the Fund pursuant to § 19.2-392.2 and all funds appropriated for such purpose and any gifts, donations, grants, bequests, and other funds received on its behalf shall be paid into the state treasury and credited to the Fund. Interest earned on moneys in the Fund shall remain in the Fund and be credited to it. Any moneys remaining in the Fund, including interest thereon, at the end of each fiscal year shall not revert to the general fund but shall remain in the Fund. The Fund shall be administered by the Executive Secretary of the Supreme Court, who shall use such funds solely to fund the costs for the compensation of court-appointed counsel under the provisions of subsection O of § 19.2-392.2. Expenditures from the Fund shall be limited by an appropriation in the general appropriations act. Expenditures and disbursements from the Fund shall be made by the State Treasurer on warrants issued by the Comptroller upon request of the Executive Secretary of the Supreme Court.

§ 19.2-392.1. Statement of policy.

The General Assembly finds that arrest records can be a hindrance to an innocent citizen's ability to obtain employment, an education, and to obtain credit. It further finds that the police and court records of those of its citizens who have been absolutely pardoned for crimes for which they have been unjustly convicted can also be a hindrance. This chapter is intended to protect such persons from the unwarranted damage which that may occur as a result of being arrested and convicted.

§ 19.2-392.2. Expungement of police and court records.

A. If a person is charged with the commission of a crime, a civil offense, or any offense defined in Title 18.2, and

1. Is (i) the person is acquitted; or

2. A ; (ii) a nolle prosequi is taken or; (iii) the charge is otherwise dismissed, including dismissal by accord and satisfaction pursuant to § 19.2-151; (iv) (a) the person is convicted of a violation of § 4.1-305 or 18.2-250.1 or subsection B of § 18.2-371.2, (b) the person was under 21 years of age on the date of the incident leading to the conviction, (c) all fines and all orders of restitution have been satisfied, and (d) five years have passed since the date of conviction; (v) (a) the person was charged with a violation of § 4.1-305, 18.2-250, or 18.2-250.1 and such charge was discharged and dismissed as provided in § 4.1-305 or 18.2-251 and (b) all court costs and fines and all orders of restitution have been satisfied; or (vi) the person is convicted and has received a simple pardon for the commission of the crime or offense for which he seeks expungement and (a) has been of good behavior for the five years preceding the filing of his petition and (b) the conviction is not for a violent felony as defined in subsection C of § 17.1-805 or § 19.2-297.1, or any crime ancillary to such conviction, or for a violation of § 18.2-248, 18.2-248.01, 18.2-248.1, 18.2-255, 18.2-255.2, 18.2-258.02, or 24.2-1016, he may file a petition setting forth the relevant facts and requesting expungement of the police records and the court records relating to the charge or conviction.

B. 1. If any person whose name or other identification has been used without his consent or authorization by another person who has been charged or arrested using such name or identification, he may file a petition with the court disposing of the charge for relief pursuant to this section. Such person shall not be required to pay any fees for the filing of a petition under this subsection subdivision. A petition filed under this subsection subdivision shall include one complete set of the petitioner's fingerprints obtained from a law-enforcement agency.

2. 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 requesting to proceed without the payment of fees and costs, and

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60 *such petition:*

61 *a. States that (i) the final disposition of the criminal charge, civil offense, or conviction eligible for*
62 *expungement occurred within the last 12 calendar months, as shown by an attached copy of the final*
63 *case disposition; and (ii) petitioner was represented by court-appointed counsel or a public defender, as*
64 *certified by such person or his attorney with documentation of such representation attached; or*

65 *b. Requests a determination of indigency, pursuant to § 19.2-159, by the court with which such*
66 *person intends to files his expungement petition.*

67 C. The petition with a copy of the warrant, summons, or indictment if reasonably available shall be
68 filed in the circuit court of the county or city in which the case was disposed of ~~by acquittal or being~~
69 ~~otherwise dismissed~~ and shall contain, except where not reasonably available, the date of arrest and the
70 name of the arresting agency. Where this information is not reasonably available, the petition shall state
71 the reason for such unavailability. The petition shall further state the specific criminal charge ~~or~~, civil
72 offense, *or conviction* to be expunged, the date of final disposition of the charge *or conviction* as set
73 forth in the petition, the petitioner's date of birth, and the full name used by the petitioner at the time of
74 arrest.

75 D. A copy of the petition shall be served on the attorney for the Commonwealth of the city or
76 county in which the petition is filed. The attorney for the Commonwealth may file an objection or
77 answer to the petition or may give written notice to the court that he does not object to the petition
78 within 21 days after it is served on him.

79 E. The petitioner shall obtain from a law-enforcement agency one complete set of the petitioner's
80 fingerprints and shall provide that agency with a copy of the petition for expungement. The
81 law-enforcement agency shall submit the set of fingerprints to the Central Criminal Records Exchange
82 (CCRE) with a copy of the petition for expungement attached. The CCRE shall forward under seal to
83 the court a copy of the petitioner's criminal history, a copy of the source documents that resulted in the
84 CCRE entry that the petitioner wishes to expunge, if applicable, and the set of fingerprints. Upon
85 completion of the hearing, the court shall return the fingerprint card to the petitioner. If no hearing was
86 conducted, upon the entry of an order of expungement or an order denying the petition for
87 expungement, the court shall cause the fingerprint card to be destroyed unless, within 30 days of the
88 date of the entry of the order, the petitioner requests the return of the fingerprint card in person from the
89 clerk of the court or provides the clerk of the court a self-addressed, stamped envelope for the return of
90 the fingerprint card.

91 F. After receiving the criminal history record information from the CCRE, the court shall conduct a
92 hearing on the petition. If the court finds that the continued existence and possible dissemination of
93 information relating to the arrest, *charge, or conviction* of the petitioner causes or may cause
94 circumstances ~~which~~ *that* constitute a manifest injustice to the petitioner, it shall enter an order requiring
95 the expungement of the police and court records, including electronic records, relating to the *arrest,*
96 *charge, or conviction*. Otherwise, it shall deny the petition. However, if the petitioner has no prior
97 criminal record and the arrest, *charge, or conviction* was for a misdemeanor violation or the charge was
98 for a civil offense, the petitioner shall be entitled, in the absence of good cause shown to the contrary
99 by the Commonwealth, to expungement of the police and court records relating to the *arrest, charge, or*
100 *conviction* and the court shall enter an order of expungement. If the attorney for the Commonwealth of
101 the county or city in which the petition is filed (i) gives written notice to the court pursuant to
102 subsection D that he does not object to the petition and (ii) when the *arrest, charge, or conviction* to be
103 expunged is a felony, stipulates in such written notice that the continued existence and possible
104 dissemination of information relating to the arrest, *charge, or conviction* of the petitioner causes or may
105 cause circumstances ~~which~~ *that* constitute a manifest injustice to the petitioner, the court may enter an
106 order of expungement without conducting a hearing.

107 G. The Commonwealth shall be made party defendant to the proceeding. Any party aggrieved by the
108 decision of the court may appeal, as provided by law in civil cases.

109 H. Notwithstanding any other provision of this section, when ~~the~~ *a* charge is dismissed because the
110 court finds that the person arrested or charged is not the person named in the summons, warrant,
111 indictment, or presentment, the court dismissing the charge shall, upon motion of the person improperly
112 arrested or charged, enter an order requiring expungement of the police and court records relating to the
113 charge. Such order shall contain a statement that the dismissal and expungement are ordered pursuant to
114 this subsection and shall be accompanied by the complete set of the petitioner's fingerprints filed with
115 his petition. Upon the entry of such order, it shall be treated as provided in subsection K.

116 I. Notwithstanding any other provision of this section, upon receiving a copy pursuant to § 2.2-402
117 of an absolute pardon for the commission of a crime that a person did not commit, the court shall enter
118 an order requiring expungement of the police and court records relating to the charge and conviction.
119 Such order shall contain a statement that the expungement is ordered pursuant to this subsection. Upon
120 the entry of such order, it shall be treated as provided in subsection K.

121 J. Upon receiving a copy of a writ vacating a conviction pursuant to § 19.2-327.5 or 19.2-327.13, the

122 court shall enter an order requiring expungement of the police and court records relating to the charge
123 and conviction. Such order shall contain a statement that the expungement is ordered pursuant to this
124 subsection. Upon the entry of the order, it shall be treated as provided in subsection K.

125 K. Upon the entry of an order of expungement, the clerk of the court shall cause a copy of such
126 order to be forwarded to the Department of State Police, which shall, pursuant to rules and regulations
127 adopted pursuant to § 9.1-134, direct the manner by which the appropriate expungement or removal of
128 such records shall be effected.

129 L. Costs shall be as provided by § 17.1-275, but shall not be recoverable against the Commonwealth.
130 ~~If the court enters an order of expungement, the clerk of the court shall refund to the petitioner such~~
131 ~~costs paid by the petitioner. Any costs and expungement fees collected pursuant to this section shall be~~
132 ~~deposited in the Expungement Fee Fund created pursuant to § 17.1-205.1.~~

133 M. Any order entered where (i) the court or parties failed to strictly comply with the procedures set
134 forth in this section or (ii) the court enters an order of expungement contrary to law, shall be voidable
135 upon motion and notice made within three years of the entry of such order.

136 N. For purposes of this section, "simple pardon" means an act by the Governor on behalf of the
137 Commonwealth representing official forgiveness of a crime for which a person has been convicted.

138 O. *If a petitioner qualifies to file a petition for expungement without the payment of fees and costs*
139 *pursuant to subdivision B 2 and has requested court-appointed counsel, the court shall then appoint*
140 *counsel to file the petition for expungement and represent the petitioner in the expungement proceedings.*
141 *Counsel appointed to represent such a petitioner shall be compensated for his services on an hourly*
142 *basis at a rate set by the Supreme Court of Virginia, and subject to guidelines issued by the Executive*
143 *Secretary of the Supreme Court of Virginia, in a total amount not to exceed \$300 and such*
144 *compensation shall be paid from the Expungement Fee Fund.*

145 **§ 19.2-392.4. Prohibited practices by employers, educational institutions, agencies, etc., of state**
146 **and local governments; penalty.**

147 A. An employer or educational institution shall not, in any application, interview, or otherwise,
148 require an applicant for employment or admission to disclose information concerning any arrest ~~or~~,
149 criminal charge against him, *or conviction* that has been expunged. An applicant need not, in answer to
150 any question concerning any arrest ~~or~~, criminal charge that has not resulted in a conviction, *or*
151 *conviction*, include a reference to or information concerning arrests ~~or~~, charges, *or convictions* that have
152 been expunged.

153 B. Agencies, officials, and employees of the state and local governments shall not, in any
154 application, interview, or otherwise, require an applicant for a license, permit, registration, or
155 governmental service to disclose information concerning any arrest ~~or~~, criminal charge against him, *or*
156 *conviction* that has been expunged. An applicant need not, in answer to any question concerning any
157 arrest ~~or~~, criminal charge that has not resulted in a conviction, *or conviction*, include a reference to or
158 information concerning *arrests*, charges, *or convictions* that have been expunged. Such an application
159 may not be denied solely because of the applicant's refusal to disclose information concerning any arrest
160 ~~or~~, criminal charge against him, *or conviction* that has been expunged.

161 C. A person who willfully violates this section is guilty of a Class 1 misdemeanor for each violation.

162 **2. That the provisions of this act shall become effective on January 1, 2022.**