Fiscal Impact Statement for Proposed Legislation

Virginia Criminal Sentencing Commission

Senate Bill No. 1339

(Patron – Surovell)

LD#: 21100793 **Date:** 1/13/2021

Topic: Expungement and sealing of criminal records

Fiscal Impact Summary:

- **State Adult Correctional Facilities:** $50,000 *
- **Local Adult Correctional Facilities:** Cannot be determined
- **Adult Community Corrections Programs:** Cannot be determined

- **Juvenile Direct Care:** Cannot be determined **
- **Juvenile Detention Facilities:** Cannot be determined **

** Provided by the Department of Juvenile Justice

* The estimated amount of the necessary appropriation cannot be determined for periods of imprisonment in state adult correctional facilities; therefore, Chapter 1289 of the Acts of Assembly of 2020 requires the Virginia Criminal Sentencing Commission to assign a minimum fiscal impact of $50,000.

Pursuant to § 30-19.1:4, fiscal impact statements prepared by the Virginia Criminal Sentencing Commission only include the estimated increase in operating costs associated with additional state-responsible prison beds and do not reflect any other costs or savings that may be associated with the proposed legislation.

Summary of Proposed Legislation:

The proposal amends numerous sections of the *Code of Virginia* and adds §§ 1-229.1, 8.01-40.5, 17.1-205.1, 19.2-392.5, and 19.2-392.6. The bill creates a process for the sealing of criminal records for certain charges, convictions, deferred dispositions, acquittals, and for offenses that have been nolle prossed or otherwise dismissed. The bill also expands the eligibility of criminal records for expungement, expedites the expungement process for dismissed district court charges, and introduces new criminal penalties regarding illegal disclosure and requiring disclosure of sealed and expunged records.

Per proposed § 19.2-392.1:1, "sealing" of criminal records:

> "means to (i) restrict dissemination of criminal history record information contained in the Central Criminal Records Exchange pursuant to rules and regulations adopted pursuant to § 9.1-128 and procedures adopted pursuant to § 9.1-134 and (ii) prohibit dissemination of court records."

The same section defines "expungement" of records as:

> "to remove all electronic and manual police and court records or portion thereof from a repository of such records, including criminal history record information contained in the Central Criminal

> Records Exchange, and place such records in a physically sealed and separate file or recorded to an offline medium, pursuant to procedures adopted pursuant to § 9.1-134."

Under proposed § 19.2-392.2:2, traffic infractions, misdemeanors, grand larcenies, Class 5 and 6 felonies, and convictions granted a simple pardon would be eligible for petition to be sealed ten years following the offense date. Under § 19.2-392.2:3, Class 3 and 4 misdemeanors and certain drug convictions involving marijuana would be automatically sealed ten years after the most recent offense date. The proposal creates eligibility requirements that subjects have no additional convictions for certain time windows (broken out by offense class) prior to and following the sealing of records.

While § 19.2-392.2 currently allows for the expungement of acquitted and dismissed charges, the proposal amends this section to allow expungement of police and court records relating to convictions of marijuana possession, underage alcohol or tobacco possession, and using a false ID to obtain alcohol and for deferred disposition dismissals for possession of controlled substances or marijuana, underage alcohol or tobacco possession, and using a false ID to obtain alcohol.

The bill includes several new penalties relating to disclosure or request of sealed or expunged records. Currently under §§ 19.2-392.3 and 19.2-392.4, it is a Class 1 misdemeanor to illegally disclose or require the disclosure of expunged records. The 2020 General Assembly enacted legislation establishing Class 1 misdemeanors for government agencies, employers, or colleges requiring disclosure of marijuana arrest records without authorization. The proposed § 19.2-392.3:1 establishes a new Class 1 misdemeanor for the unauthorized disclosure of a sealed record, and a Class 6 felony for any person who makes an unauthorized disclosure of such record maliciously and intentionally. Similarly, the proposed § 19.2-392.3(C) includes a new Class 6 felony for maliciously and intentionally disclosing an expunged record. Additionally, § 19.2-392.4:1 establishes a new Class 1 misdemeanor prohibiting employers, landlords, educational institutions, and state and local agencies from requiring an individual to disclose sealed records. Exemptions to the latter offense are provided including Virginia law enforcement agencies, state and federal employers required by code to make such a query, and positions related to national security.

The proposed § 19.2-392.3:1(B) states that any subject of a sealed record may submit a request under oath to the circuit court to obtain such records for himself or his designee. Under § 18.2-434, a person to whom an oath is lawfully administered who willfully and falsely swears to any material matter may be prosecuted for perjury, a Class 5 felony. If violation of the proposed record request oath can be prosecuted in the same manner as perjury and other false swearings, individuals who falsely swear an oath to request sealed records under the proposed § 19.2-392.3:1(B) may be charged with perjury.

Analysis:

Existing data do not contain sufficient detail to estimate the number of additional individuals who may be convicted of perjury if the proposal were enacted. However, affected offenders may be sentenced similarly to those who are currently convicted of perjury under § 18.2-434 for falsely swearing an oath.

Sentencing Guidelines data for fiscal year (FY) 2019 and FY2020 indicate that 85 offenders were convicted of a Class 5 felony for falsely swearing an oath under § 18.2-434. The perjury offense was the primary, or most serious, offense at sentencing in 59 of the cases. Of these, 28.8% of the offenders did not receive an active term of incarceration to serve after sentencing. Another 50.8% of the offenders were given a local-responsible (jail) term for which the median sentence was three months. The remaining 20.3 % received a state-responsible (prison) term with a median sentence of 1.8 years.

Existing data do not contain sufficient detail to estimate the number of additional individuals who may be convicted under the proposed Class 1 misdemeanor for unauthorized disclosure or requiring disclosure of sealed records, or proposed Class 6 felonies for intentional and malicious disclosure of sealed or expunged records.

According to General District Court Case Management System (CMS) data for fiscal year (FY) 2015 to FY2020, one individual was convicted of a Class 1 misdemeanor under § 19.2-392.3 for illegal disclosure of expunged criminal records. This was the only offense at sentencing, and the offender did not receive an active term of incarceration to serve after sentencing. Existing data do not contain sufficient detail to determine whether this case involved malicious and intentional disclosure. General District Court CMS data for the same six-year period indicate there were no Class 1 misdemeanor convictions under § 19.2-392.4 for requiring disclosure of expunged criminal records.

Impact of Proposed Legislation:

State adult correctional facilities.[1] Because it potentially expands the applicability of an existing felony offense and creates two new Class 6 felonies, the proposal may increase the state-responsible (prison) bed space needs of the Commonwealth. Existing data do not provide sufficient detail to estimate the number of new felony convictions that could result from enactment of the proposal. Therefore, the impact on prison bed space needs cannot be determined.

Local adult correctional facilities. Because it potentially expands the applicability of existing offenses and creates two new Class 1 misdemeanors and two new Class 6 felonies, the proposal may increase the local-responsible (jail) bed space needs. Since the number of new convictions that may result from enactment of the proposal cannot be determined, the magnitude of the impact on jail bed space needs cannot be estimated.

Adult community corrections programs. Because the proposal could result in felony and misdemeanor convictions and subsequent supervision requirements for additional offenders, the proposal may increase the need for adult community corrections resources.

Virginia's sentencing guidelines. Felony convictions under § 18.2-434 are covered by the sentencing guidelines as the primary, or most serious, offense. As new felony offenses, convictions under the proposed *Code* sections would not be covered by the guidelines as the primary, or most serious, offense. Such convictions, however, could augment the guidelines recommendation if the most serious offense at sentencing is covered by the guidelines. No adjustment to these guidelines is necessary under the proposal.

Juvenile direct care. According to the Department of Juvenile Justice, the impact of the proposal on direct care (juvenile correctional center or alternative commitment placement) bed space needs cannot be determined.

Juvenile detention facilities. The Department of Juvenile Justice reports that the proposal's impact on the bed space needs of juvenile detention facilities cannot be determined.

Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation cannot be determined for periods of imprisonment in state adult correctional facilities; therefore, Chapter 1289 of the

[1] Pursuant to § 30-19.1:4, fiscal impact statements prepared by the Virginia Criminal Sentencing Commission only include the estimated increase in operating costs associated with additional state-responsible prison beds and do not reflect any other costs or savings that may be associated with the proposed legislation.

Acts of Assembly of 2020 requires the Virginia Criminal Sentencing Commission to assign a minimum fiscal impact of $50,000.

Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation cannot be determined for periods of commitment to the custody of the Department of Juvenile Justice.

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