Fiscal Impact Statement for Proposed Legislation

Virginia Criminal Sentencing Commission

House Bill No. 2113
Amendment in the Nature of a Substitute
(Patron Prior to Substitute – Herring)

LD#: 21200347 **Date:** 2/18/2021

Topic: 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 §§ 19.2-392.5 through 19.2-392.17. 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 introduces new criminal penalties regarding illegal disclosure and requiring disclosure of sealed records, and establishes civil penalties for business screening services that publish unauthorized police and criminal records.

Per proposed § 9.1-101, "sealing" of police and court records:

> "means to (i) restrict dissemination of criminal history record information contained in the Central Criminal Records Exchange, including any records relating to an arrest, charge, or conviction, 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 relating to an arrest, charge, or conviction [unless authorized by proposed statute]."

Under proposed § 19.2-392.12, traffic infractions, misdemeanors, felony 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. Certain assault, manslaughter, and driving while intoxicated offenses are listed as ineligible for sealing. Under § 19.2-392.6, underage alcohol purchase and possession, petit larceny, misdemeanor shoplifting, and other select misdemeanors would be automatically sealed ten years after the final disposition date. Under § 19.2-392.17, non-criminal traffic infractions would be automatically sealed 11 years from the final disposition of the offense. The proposal creates sealing eligibility and contingency requirements that subjects have no additional convictions for certain time windows (broken out by offense class) prior to and following the sealing of records. Additional processes are established for automatic sealing of acquitted, dismissed, and nolle prossed records or records involving mistaken identity.

The bill includes several new penalties relating to disclosure or request of sealed 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 § 19.2-392.14 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. Additionally, § 19.2-392.15 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 § 19.2-392.5 lays out circumstances where knowing or willful failure to disclose sealed records constitutes grounds for perjury under § 18.2-434, including: queries for employment with certain state, federal, law enforcement, or national security agencies (§ 19.2-392.5(E)); proceedings related to the care and custody of a child (§ 19.2-392.5(G)); and jury selection (§ 19.2-392.5(J)). Under § 18.2-434, perjury is a Class 5 felony.

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 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. It is not possible 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 a new Class 6 felony, 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 a new Class 6 felony, 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 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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[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.