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SENATE BILL NO. 1303

Offered January 11, 2023

Prefiled January 10, 2023

A *BILL to amend and reenact § 19.2-392.12, as it shall become effective, of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 19.2-392.2:3, relating to expungement and sealing of offenses resulting in a deferred and dismissed disposition or conviction by petition; defendant with a disorder or disability.*

Patrons—Boysko and McClellan; Delegate: Shin

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 and that the Code of Virginia is amended by adding a section numbered 19.2-392.2:3 as follows:

§ 19.2-392.2:3. Sealed records that are otherwise dismissed.

A. As used in this section, "simple pardon" means an act by the Governor on behalf of the Commonwealth representing official forgiveness of a crime for which a person has been convicted.

B. When a conviction or deferral and dismissal has been sealed pursuant to § 19.2-392.12, the defendant of such sealed record is a "defendant with a disorder or disability" as defined in subsection P of § 19.2-392.12, and the Governor granted the defendant a simple pardon for the commission of the crime or offense that was sealed, such conviction or deferral and dismissal shall be considered to be "otherwise dismissed" for purposes of this chapter.

§ 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

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59 of Virginia.

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

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

70 a. Seven years for any misdemeanor offense; or

71 b. Ten years for any felony offense;

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

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

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

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

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

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

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

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

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

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

119 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,
120 18.2-266, or 46.2-341.24 is ineligible for the sealing of records under this section.

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

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