



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#: 21103298

Date: 1/28/2021

Topic: Automatic expungement 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, likely to be negligible**
- **Juvenile Detention Facilities:**
Cannot be determined, likely to be negligible**

** 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 19.2-392.16 to create a process for the automatic expungement of criminal records for certain convictions, deferred dispositions, acquittals, and for offenses that have been nolle prossed or otherwise dismissed. The bill also provides a process for the automatic expungement of criminal records for charges arising from mistaken identity or the unauthorized use of identifying information.

The proposed § 19.2-392.5(C) states that individuals cannot be held guilty for perjury or giving a false statement arising out of a person’s denial or failure to disclose an offense that was automatically expunged, unless such denial or failure to disclose is in response to a query from certain employers listed in § 19.2-392.5(D), including Virginia law enforcement agencies, state and federal employers required by code to make such a query, and positions related to national security.

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 a denial or failure to disclose an offense to one of the specified employers can be prosecuted in the same manner as perjury and other false

swearings, individuals who deny or fail to disclose an offense to an employer listed in § 19.2-392.5(D) may be charged with perjury.

The proposed § 19.2-392.13 establishes a new Class 1 misdemeanor for the unauthorized disclosure of an automatically expunged record, and § 19.2-392.14 establishes a new Class 1 misdemeanor prohibiting employers, landlords, educational institutions, and state and local agencies from requiring an individual to disclose automatically expunged records. Exemptions to the latter offense are provided for the same employers as listed in § 19.2-392.5(D).

The 2020 General Assembly enacted legislation establishing Class 1 misdemeanors under § 19.2-389.3 for unauthorized government agencies, employers, or colleges requiring disclosure of court and police records related to marijuana possession. The proposal adds property rental or sale applications to the list of items prohibited from requiring such disclosure.

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 misdemeanors for unauthorized disclosure and requiring disclosure of automatically expunged records, or for property rental or sale applications requiring disclosure of possession of marijuana records.

Impact of Proposed Legislation:

State adult correctional facilities.¹ Because it potentially expands the applicability of an existing felony offense, 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 an existing felony offense, amends a Class 1 misdemeanor, and creates two new Class 1 misdemeanors, 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.

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.

Virginia’s sentencing guidelines. Felony convictions under § 18.2-434 are covered by the sentencing guidelines as the primary, or most serious, offense. No adjustment to the 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 but is likely to be negligible.

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 but is likely to be negligible.

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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