

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: CS/SB 1142

INTRODUCER: Judiciary Committee and Senator Steube

SUBJECT: Expunction of Criminal History Records

DATE: February 14, 2018

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Storch</u>	<u>Jones</u>	<u>CJ</u>	Favorable
2.	<u>Tulloch</u>	<u>Cibula</u>	<u>JU</u>	Fav/CS
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1142 revises the eligibility requirements that must be met for a person to seek a court-ordered expunction of a criminal history record.

Currently, a person is ineligible for a court-ordered expunction of a criminal history record that resulted in a trial, without regard to the outcome. The bill permits a person to obtain a court-ordered expunction of a criminal history record if the person is acquitted either after trial, as a result of a not guilty verdict, or during trial, as a result of the court granting a motion for judgment of acquittal.

Additionally, a person who under current law seeks to expunge a criminal history record that resulted in a trial, without regard to the outcome, must have the record sealed for a minimum of 10 years prior to seeking an expunction of the record. The bill provides that a person who was acquitted as a result of a not guilty verdict after trial or a favorable ruling on a motion for judgment of acquittal during trial does not have to obtain a sealing of the record for a minimum of 10 years prior to seeking an expunction of the record.

The bill also amends the application requirements in s. 943.059, F.S., for persons seeking a certificate of eligibility to seal a criminal history record, which is a prerequisite for petitioning the court to seal the record for 10 years. In turn, sealing the record for 10 years is a prerequisite for petitioning the court to expunge the record. Currently, the Florida Department of Law Enforcement must issue a certificate of eligibility for sealing a record even though the

applicant's criminal offense (e.g., sexual offenses) will automatically disqualify him or her from later having the record expunged by the court. The bill authorizes FDLE to reject the application for a certificate of eligibility to seal the record if the applicant has a disqualifying offense. The bill also provides that this provision will be effective upon becoming law.

II. Present Situation:

Expunction of Criminal History Record

A criminal history record¹ is “any nonjudicial record maintained by a criminal justice agency containing criminal history information.”² Florida law³ makes adult criminal history records accessible to the public unless the record has been sealed or expunged.⁴ Sealed records are placed under highly restricted access,⁵ while expunged records are removed from record systems and destroyed.⁶ In addition to the court-ordered expungement process, Florida statutes authorize the following expungement processes:

- Administrative, for records of arrests determined to have been made contrary to law or by mistake;⁷
- Juvenile diversion for records of arrests of minors who complete a prearrest or postarrest diversion program;⁸
- Lawful self-defense, for records relating to a person who is later found to have acted in lawful self-defense;⁹
- Human trafficking, for records of offenses committed while the person was being victimized as part of a human trafficking scheme;¹⁰
- Automatic juvenile, for records of juvenile offenses as long as the person does not commit any serious offenses between age 18 and 26;¹¹ and
- Early juvenile, for records of juvenile offenses as long as the person does not commit any serious offenses between age 18 and 21.¹²

¹ Section 943.045(6), F.S.

² “Criminal history information . . . consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal criminal charges and the disposition thereof.” *See* s. 943.045(5), F.S.

³ Section 943.053(3)(a), F.S.

⁴ Florida Department of Law Enforcement, *Seal and Expunge Process*, <http://www.fdle.state.fl.us/Seal-and-Expunge-Process/Seal-and-Expunge-Home.aspx> (last visited Feb. 8, 2018). *See id.*

⁵ *See id.* Sealed records are those that have been preserved “under such circumstances” to be “secure and inaccessible to any person not having a legal right of access to the record or the information contained and preserved therein”. *See* s. 943.045(19), F.S.

⁶ “Expunction of a criminal history record” is “the court-ordered physical destruction or obliteration of a record or portion of a record by any criminal justice agency having custody thereof, or as prescribed by the court issuing the order[.]” *See* s. 943.045(16), F.S.

⁷ Section 943.0581, F.S.

⁸ Section 943.0582, F.S.

⁹ Section 943.0585(5), F.S.

¹⁰ Section 943.0583, F.S.

¹¹ Section 943.0515, F.S.

¹² Section 943.0515(1)(b)2., F.S.

Court-Ordered Expunction of Criminal Record (Section 1)

A court may order a criminal history record of a minor or an adult to be expunged. A person is permitted to obtain one court-ordered expunction in their lifetime.¹³

To qualify for a court-ordered expunction, a person must first obtain a certificate of eligibility from the Florida Department of Law Enforcement pursuant to requirements set forth in ss. 943.0585(2) or 943.0585(5), F.S. To obtain the certificate, a person must submit to the FDLE:

- A written, certified statement from the appropriate state attorney or statewide prosecutor which indicates:
 - An indictment, information, or other charging document was not filed or issued in the case.¹⁴
 - An indictment, information, or other charging document, if filed or issued in the case, was dismissed or *nolle prosequi*¹⁵ by the state attorney or statewide prosecutor, and that none of the charges that the person is seeking to expunge *resulted in a trial*, without regard to the outcome of the trial.¹⁶
 - The criminal history record does not relate to certain violations.¹⁷
- A \$75 processing fee, unless it is waived by the executive director.
- A certified copy of the disposition of the charge.¹⁸

In addition, the applicant must not:

- Prior to the date the application for a certificate of eligibility is filed, have been adjudicated guilty of a criminal offense or comparable ordinance violation, or been adjudicated delinquent for committing any felony or a misdemeanor specified in s. 943.051(3)(b), F.S.;¹⁹
- Have been adjudicated guilty of, or adjudicated delinquent for committing, any of the acts stemming from the arrest or alleged criminal activity to which the petition to expunge pertains;
- Be under court supervision for the arrest or alleged criminal activity to which the petition pertains; and

¹³ Section 943.0585, F.S.

¹⁴ Section 943.0585(2)(a)1., F.S.

¹⁵ In criminal cases, a “*nolle prosequi*” is a formal entry in the record by the prosecutor declaring that the case will not be further prosecuted. BLACK’S LAW DICTIONARY (10th ed. 2014).

¹⁶ Section 943.0585(2)(a)2., F.S.

¹⁷ These violations include sexual misconduct, luring or enticing a child, sexual battery, procuring a person under 18 for prostitution, lewd or lascivious offenses committed in front of a minor, an elderly person, or a disabled person, voyeurism, violations of the Florida Communications Fraud Act, sexual abuse of a child, offenses by public officers and employees, acts in connection with obscenity and minors, child pornography, selling or buying of minors, drug trafficking, violation of pretrial detention, and any violation specified as a predicated offense for registration as a sexual predator pursuant to the Florida Sexual Predators Act. *See* s. 943.0585(2)(a)3., F.S.

¹⁸ Section 943.0585(2)(b)-(c), F.S.

¹⁹ These offenses include assault, battery, carrying a concealed weapon, unlawful use of destructive devices or bombs, child neglect, assault or battery on a law enforcement officer, a firefighter, or other specified officer, open carrying of a weapon, indecent exposure, unlawful possession of a firearm, petit theft, animal cruelty, arson, and unlawful possession or discharge of a weapon or firearm at a school-sponsored event or on school property. *See* s. 943.051(3)(b), F.S.

- Have secured a prior expunction or sealing of a criminal history record, unless the expunction sought is of a criminal history record previously sealed for 10 years pursuant to s. 943.0585(2)(h), F.S.²⁰

Section 943.0585(2)(h), F.S., provides that if an applicant's arrest or alleged criminal activity resulted in the withholding adjudication or a trial, the applicant's criminal history record must have been sealed for 10 years to be eligible for expunction. This sealing requirement does not apply, however, when a plea was not entered or all charges were dismissed prior to trial.²¹

Upon receipt of a certificate of eligibility for expunction, a person must then petition the court to expunge his or her criminal history record. Along with the certificate,²² the petition must include a sworn statement attesting that the petitioner:

- Has never been adjudicated guilty of a criminal offense or comparable ordinance violation, or been adjudicated delinquent for committing any felony or a specified misdemeanor;²³
- Has not been adjudicated guilty of, or adjudicated delinquent for committing, any of the acts stemming from the arrest or alleged criminal activity to which the petition pertains;
- Has never secured a prior sealing or expunction of a criminal history record, unless the expunction is sought for a criminal history record previously sealed for 10 years pursuant to s. 943.0585(2)(h), F.S. (above), and the record is otherwise eligible for expunction; and
- Believes to the best of his or her knowledge that the record is eligible for such an expunction and does not have any other petition to expunge or seal pending before any court.²⁴

A copy of the completed petition is then served upon the appropriate state attorney or statewide prosecutor and the arresting agency, any of which may respond to the court regarding the petition.²⁵ There is no statutory right to a court-ordered expunction and any request for expunction of a criminal history record may be denied at the sole discretion of the court.²⁶

Prerequisite to Expunction: Sealing the Criminal History Record (Section 2)

When a criminal history record must be sealed for 10 years as a prerequisite to expunction, the person seeking to have the record sealed must follow the procedures in s. 943.059, F.S.²⁷ Prior to petitioning a court to seal the record, the person must apply for a certificate of eligibility for sealing from the FDLE.²⁸ The FDLE is required to issue a certificate of eligibility if the person is no longer under court supervision for the criminal charge or arrest at issue, and has:

- Submitted a certified copy of the disposition of the criminal charge at issue;
- Remitted a \$75 processing fee;
- Never been adjudicated guilty, or delinquent if a juvenile, of a criminal offense prior to filing the application for the certificate;

²⁰ Section 943.0585(2)(d)-(g), F.S.

²¹ The 10-year sealing requirement applies without regard to the outcome of the trial. Section 943.0585(2)(h), F.S.

²² Section 943.0585(1)(a), F.S.

²³ *See supra*, n. 20.

²⁴ Section 943.0585(1)(b), F.S.

²⁵ Section 943.0585(3)(a), F.S.

²⁶ Section 943.0585, F.S.

²⁷ These procedures are very similar to those set out in s. 943.0585, F.S.

²⁸ Section 943.059(2), F.S.

- Not been adjudicated guilty or delinquent for acts stemming from the criminal charge at issue; and
- Never previously had a record sealed or expunged.²⁹

Once the FDLE issues a certificate of eligibility for sealing of the record, the person may petition the court to seal the record³⁰ and serve the petition on the appropriate state attorney of statewide prosecutor.³¹ However, the court may *not* seal the record when the criminal history relates to certain statutory violations, such as aggravated child abuse or the predicate offenses for registration as a sexual predator or sexual offender.³²

Under current law, even if the person's criminal history relates to one of the automatic disqualifying offenses, the FDLE is not permitted to deny a certificate of eligibility to seal the record. In *Lazard v. State*, the Fifth District Court of Appeal held that the FDLE had overreached its statutory authority under s. 943.059, F.S., by denying an application for a certificate of eligibility to seal a record even though the application pertained to an offense that would automatically disqualify the applicant from sealing and expunction.³³ The court held that, under the statute, it was up to the court whether the person had committed one of the disqualifying offenses.³⁴

Since the ruling in *Lazar*, the FDLE reports that it has issued approximately 75 certificates of eligibility to persons who are statutorily barred from expunction later.³⁵

Effect of a Court-Ordered Criminal History Record Expunction

If the court grants a petition to expunge a criminal history record, the clerk of the court then certifies copies of the order to the appropriate state attorney and the arresting agency and any other agency that has received the criminal history record from the court. In turn, the arresting agency must provide the expunction order to any agencies to which it disseminated the applicant's criminal history record. The FDLE must provide the expunction order to the Federal Bureau of Investigation.³⁶

Upon receiving the court's expunction order, with the exception of FDLE, any criminal justice agency that has a copy of the applicant's criminal history record must physically destroy or obliterate the record. The FDLE is required to maintain the criminal history record to be used for certain types of background checks, generally involving employment in sensitive positions, such as becoming a member of The Florida Bar or law enforcement agency or working with the elderly or children.³⁷ However, the record is confidential and exempt from disclosure

²⁹ Section 943.059(2)(a)-(f), F.S.

³⁰ Section 943.059(1)(a), F.S.

³¹ Section 943.059(3)(a), F.S.

³² Section 943.059, F.S. These disqualifying offenses are the same as those listed in s. 943.0585. *See supra* n. 17

³³ 229 So. 3d 439, 441 (Fla. 5th DCA 2017) (concerning the offense of aggravated child abuse).

³⁴ *Id.*

³⁵ Email from Brenda G. Johnson, Policy & Planning Administrator, Office of External Affairs, Florida Department of Law Enforcement, to Thomas Cibula, Staff Director, Senate Judiciary Committee (Feb. 13, 2018) (on file with the Senate Judiciary Committee).

³⁶ Section 943.0585(3)(b), F.S.

³⁷ Section 943.0585(4)(a)1., (a)4.-6., (a)7.-8., and (c), F.S.

requirements under the public records laws. Only a court order can make the record available to a person or entity that is otherwise excluded.³⁸

A person who has his or her criminal history record expunged may lawfully deny or fail to acknowledge the record that was expunged, unless he or she is:

- A defendant in a criminal prosecution;
- Seeking appointment as a guardian, a position with a criminal justice agency, a license by the Division of Insurance Agent and Agency Services within the Department of Financial Services, or a position with an agency that is responsible for the protection of vulnerable persons, including children, the disabled, or the elderly;
- Petitioning to have a court-ordered criminal history record expunged or sealed or petitioning for relief under s. 943.0583, F.S.;³⁹ or
- A candidate for admission to The Florida Bar.⁴⁰

III. Effect of Proposed Changes:

Currently, a person is ineligible for a court-ordered expunction of a criminal history record if that person went to trial on the charges, regardless of whether the outcome of the trial was an acquittal. The bill repeals this prohibition and permits a person to seek a court-ordered expunction of a criminal history record involving a trial that resulted in a not guilty verdict, rendered by a judge or jury, or an order granting a motion for judgment of acquittal rendered by a judge.

Additionally, current law requires that the criminal history record of a person who went to trial on the charges be sealed for a minimum of 10 years prior to seeking an expunction of the record. The bill amends this requirement and provides that if the trial results in an acquittal resulting either from a not guilty verdict or a favorable ruling on a motion for judgment of acquittal, the 10-year sealing requirement does not apply. These changes take effect July 1, 2018.

The bill also amends the application requirements in s. 943.059(2), F.S., for persons seeking a certificate of eligibility to seal a criminal history record, which is a prerequisite for petitioning the court to seal the record for 10 years. In turn, having the record sealed for 10 years is a prerequisite for petitioning the court to expunge the record.

Currently, the Florida Department of Law Enforcement must issue a certificate of eligibility for sealing a record even though the applicant's criminal offense (e.g., sexual offenses) will automatically disqualify him or her from later having the record sealed or ultimately expunged by the court. The bill fixes this by authorizing FDLE to reject the application for a certificate of eligibility to seal the record if the applicant has an automatic disqualifying offense. The bill also provides that this provision will be effective upon becoming law.

³⁸ Section 943.0585(4)(a)-(b), F.S.

³⁹ Section 943.0583(3), F.S., provides that a victim of human trafficking may petition for the expunction of a criminal history record resulting from the arrest or filing of charges for an offense committed or reported to have been committing while the person was a victim or human trafficking, which offense was committed or reported to have been committed as a part of the human trafficking scheme of which the person was a victim or at the direction of an operator of the scheme, including, but not limited to, violations under chs. 796 and 847, F.S., without regard to the disposition of the arrest or of any charges.

⁴⁰ Section 943.0585(4)(a), F.S.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Current law prohibits a person from seeking the expunction of a criminal history record that resulted in a trial, regardless of the outcome. However, current law allows a person to have this record sealed. The bill enables a person to seek the expunction of a criminal history record that resulted in a not guilty verdict at trial, and provides that a prior sealing is not required.

The Florida Department of Law Enforcement estimates that this change will result in the submission of approximately 5,000 additional applications for a court-ordered expunction, which will require an additional full-time employee. The fiscal impact to accommodate for this increase in applications is projected to be \$62,441 in year one and \$58,686 in recurring years.⁴¹

Despite FDLE's estimate, it is unclear whether the bill will lead to an increase in applications rather than a shift in the type of application submitted. The bill enables a person who was previously only eligible to have his or her criminal history record sealed to now be able to seek an expunction of a criminal history record without obtaining a prior sealing. It seems that this will result in such persons submitting an application for a court-ordered expunction, rather than a court-ordered sealing. As such, the bill might not result in a significant increase in applications.

⁴¹ Florida Department of Law Enforcement, *2018 Legislative Bill Analysis for SB 1142*, (January 5, 2018) (on file with the Senate Judiciary Committee).

The bill will have a small positive impact on the FDLE's workload, as the FDLE will no longer be required to issue certificates of eligibility for sealing a record when the criminal offense at issue is an automatically disqualifying offense.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 943.0585 and 943.059.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Judiciary on February 13, 2018:

The Committee Substitute:

- Expands the eligibility for court-ordered expunction of criminal records under section 1, to *any* acquittal obtained during a trial, whether the result of a not guilty verdict or a court's favorable ruling on a motion for judgment of acquittal.
- Amends the application requirements for persons seeking a certificate of eligibility to seal a record and authorizes the Florida Department of Law Enforcement to reject such an application if the record concerns a criminal offense that will automatically disqualify the applicant upon petitioning the court.

B. Amendments:

None