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 Criminal Justice

BILL:	SB 1504
INTRODUCER:	Senators Brandes and Rouson
SUBJECT:	Sentencing
DATE:	February 3, 2020
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cox	Jones	CJ	**Pre-meeting**
2.			ACJ	
3.			AP	

I. Summary:

SB 1504 creates s. 322.3401, F.S., expressly providing for the retroactive application of the changes made by CS/HB 7125 (2019) to s. 322.34, F.S., related to the offense of driving while license suspended or revoked (DWLSR).

The bill defines two terms for purposes of s. 322.3401, F.S., including the term:

- "Former s. 322.34", which means a reference to s. 322.34, F.S., as it existed at any time before its amendment by ch. 2019-167, L.O.F.; and
- "New s. 322.34", which means a reference to s. 322.34, F.S., as it exists after the amendments made by ch. 2019-167, L.O.F., became effective.

The bill requires a person who committed the offense of DWLSR:

- Before October 1, 2019, but who was not sentenced under former s. 322.34, F.S., before October 1, 2020, to be sentenced for the degree of offense as provided for in the new s. 322.34, F.S.
- Before October 1, 2019, and who was sentenced before October 1, 2019, to a term of imprisonment pursuant to former s. 322.34, F.S., and who is serving such term of imprisonment on or after October 1, 2020, to be resentenced to the degree of offense that is consistent with the new s. 322.34, F.S.

The bill provides procedures for the resentencing of eligible persons and requires the court of original jurisdiction, upon receiving an application for sentence review from the eligible person, to hold a sentence review hearing to determine if the eligible person meets the criteria for resentencing.

The bill provides that if the court determines at the sentence review hearing that the eligible person meets the criteria, the court must resentence the person in accordance to the offense as it is classified under the new s. 322.34, F.S. Further, the sentence cannot exceed the person's

original sentence with credit for time served. If the court determines that the person does not meet the criteria for resentencing, the court must provide written reasons for such determination.

In addition to the retroactive application of sentencing provisions of the new s. 322.34, F.S., the bill provides that a person who has been convicted of a felony under former s. 322.34, F.S., and whose offense would not be classified as a felony under the new s. 322.34, F.S., must:

- Be treated as if he or she had been convicted of a misdemeanor for purposes of any right, privilege, benefit, remedy, or collateral consequence that the person might be entitled to but for such felony conviction.
- Have all fines, fees, and costs related to such felony conviction waived.

The bill also creates s. 943.0587, F.S., providing that a person is eligible to expunge a criminal history record of a conviction that resulted from former s. 322.34, F.S., in specified circumstances.

In part, the bill provides for the retroactive application of changes made to the offense of DWLSR in the 2019 Legislative session. To the extent that the bill results in persons being resentenced and released from imprisonment, the bill will have an indeterminate negative prison bed impact (i.e. an unquantifiable decrease). See Section V. Fiscal Impact Statement.

Section 1 of the bill, which relates to the retroactive application of the changes to the DWLSR offense, is effective October 1, 2020. Section 2, which relates to the expunction of certain DWLSR offenses is effective on the same date as SB 1506 or similar legislation, which is tied to this bill, goes into effect if such legislation is adopted during this session.

II. Present Situation:

Driver Licenses

Florida law requires a person to hold a driver license[1] or be exempted from licensure to operate a motor vehicle on the state's roadways.[2] Exemptions to the licensure requirement include nonresidents who possess a valid driver license issued by their home states, federal government, employees operating a government vehicle for official business, and people operating a road machine, tractor, or golf cart.[3]

The Department of Highway Safety and Motor Vehicles (DHSMV) can suspend or revoke a driver license or driving privilege for both driving-related and non-driving related reasons. Suspension means the temporary withdrawal of the privilege to drive[4] and revocation means a termination of the privilege to drive.[5]

[1] "Driver license" is a certificate that, subject to all other requirements of law, authorizes an individual to drive a motor vehicle and denotes an operator's license as defined in 49 U.S.C. s. 30301. Section 322.01(17), F.S.
[2] Section 322.03(1), F.S.
[3] Section 322.04, F.S.
[4] Section 322.01(40), F.S.
[5] Section 322.01(36), F.S.

Among the driving-related reasons that a person may have had his or her license suspended or revoked are convictions for fleeing or attempting to elude a law enforcement officer,[6] driving under the influence (DUI),[7] and refusal to submit to a lawful breath, blood, or urine test in a DUI investigation.[8] Alternatively, some of the non-driving related convictions a person may have his or her license suspended or revoked for are graffiti by a minor[9] and certain drug offenses.[10]

Additionally, the clerk of the court can direct the DHSMV to suspend a license for several reasons, including failure to comply with civil penalties.[11] Such a suspension lasts until the individual is compliant with the court's requirements for reinstatement[12] or if the court grants relief from the suspension.[13] A person with a suspended or revoked license cannot drive, which can inhibit his or her ability to work and can further impede the process of resolving outstanding financial obligations.[14]

Section 322.34, F.S. (2018)

Prior to October 1, 2019, a person committed the offense of driving while license suspended, revoked, canceled, or disqualified (DWLSR) if his or her driver license or driving privilege had been canceled, suspended, or revoked and he or she, knowing of such cancellation, suspension, revocation, or suspension,[15] drove any motor vehicle. The penalties for DWLSR ranged from a moving traffic violation to a third degree felony.[16]

Under the former provisions, a person could be charged with a third-degree felony[17] for the offense of DWLSR if:

- He or she knew of the suspension or revocation and had at least two prior convictions for DWLSR;
- He or she qualified as a habitual traffic offender;[18] or
- His or her license had been permanently revoked.[19]

[6] Section 316.1935(5), F.S.
[7] *See* ss. 316.193, 322.26, 322.271, and 322.28, F.S.
[8] *See* ss. 316.193 and 322.2615(1)(b), F.S.
[9] Section 806.13, F.S.
[10] Section 322.055, F.S.
[11] Section 322.245, F.S.
[12] *See* ss. 318.15(2) and 322.245(5), F.S.
[13] Section 322.245(5), F.S.
[14] Section 322.271, F.S., allows a person to have his or her driving privilege reinstated on a restricted basis solely for business or employment purposes under certain circumstances.
[15] The element of knowledge is satisfied in several ways, including: if the person has been previously cited as provided in s. 322.34(1), F.S., the person admits to knowledge of the cancellation, suspension, or revocation, or the person received notice of such status. There is a rebuttable presumption that the knowledge requirement is satisfied if a judgment or order appears in the DHSMV's records for any case except for one involving a suspension by the department for failure to pay a traffic fine or for a financial responsibility violation. *See* s. 322.34(2), F.S.
[16] *See* s. 322.34(2), F.S.
[17] A third degree felony is punishable by up to 5 years' incarceration and a fine of up to $5,000. Sections 775.082 and 775.083, F.S.
[18] *See* s. 322.264, F.S.
[19] *See* ss. 322.34 and 322.341, F.S. (2018).

Section 322.34, F.S. (2019) and CS/HB 7125 (2019)

The 2019 Legislature passed and the Governor signed into law CS/HB 7125, which, in part, amended the provisions related to DWLSR.[20] Subsequent to the effective date of CS/HB 7125 (2019), the offense of DWLSR is classified as a:

- Misdemeanor of the second degree, upon a first conviction.[21]
- Misdemeanor of the first degree, upon a second or subsequent conviction, unless the suspension is related to an enumerated offense discussed below.[22]
- A felony of the third degree, upon a third or subsequent conviction if the current violation of DWLSR or the most recent prior violation of DWLSR is resulting from a violation of:
  - DUI;
  - Refusal to submit to a urine, breath-alcohol, or blood alcohol test;
  - A traffic offense causing death or serious bodily injury; or
  - Fleeing or eluding.[23]

CS/HB 7125 (2019) also added the term "suspension or revocation equivalent status" to ch. 322, F.S., and defined it to mean a designation for a person who does not have a driver license or driving privilege but would qualify for suspension or revocation of his or her driver license or driving privilege if licensed.[24] This term was added to s. 322.34(2), F.S., therefore expanding the criminal penalties for DWLSR to apply to a person who does not have a driver license or driving privilege, but is under suspension or revocation equivalent status.

Collateral Consequences of Felony Convictions

A collateral consequence is any adverse legal effect of a conviction that is not a part of a sentence.[25] Such consequences are legal and regulatory restrictions that limit or prohibit people convicted of crimes from accessing employment, business and occupational licensing, housing, voting, education, and other rights, benefits, and opportunities.[26] Some examples of collateral consequences that occur upon any felony conviction in Florida include the loss of the right to vote,[27] hold public office,[28] serve on a jury,[29] obtain certain professional licenses,[30] and owning

[20] Chapter 2019-167, L.O.F.
[21] Section 322.34(2)(a), F.S. A second degree misdemeanor is punishable by up to 60 days in jail and a fine of up to $500. Sections 775.082 and 775.083, F.S.
[22] Additionally, a person convicted under this paragraph for a third or subsequent conviction must serve a minimum of ten days in jail. Section 322.34(2)(b), F.S. A first degree misdemeanor is punishable by up to one year in jail and a fine of up to $1,000. Sections 775.082 and 775.083, F.S.
[23] The penalties amended in CS/HB 7125 (2019) do not apply to all persons who commit the offense of DWLSR. Section 322.34(5)-(7) and (10), F.S., provide different penalties for certain offenders who violate these provisions.
[24] The DHSMV is authorized to designate a person as having suspension or revocation equivalent status in the same manner as it is authorized to suspend or revoke a driver license or driving privilege by law. *See* s. 322.34(41), F.S.
[25] The Miami-Dade Florida Public Defender's Office, *What You Don't Know Can Hurt You: The Collateral Consequences of a Conviction in Florida*, Updated April 2019, p. 7, available at http://www.pdmiami.com/ConsequencesManual.pdf (last visited January 21, 2020).
[26] U.S. Commission on Civil Rights, *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities*, Executive Summary, June 2019, p. 1, available at https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf (last visited January 21, 2020).
[27] Art. VI, s. 4, FLA. CONST.; s. 97.041, F.S.
[28] *Id*.
[29] Section 40.013(1), F.S.
[30] For example, s*ee* chs. 455, 489, and 626, F.S.

or possessing a firearm.[31] There are additional collateral consequences that can occur as a result of a felony conviction of specified offenses, such as the loss of driving privileges related to drug and theft offenses.[32]

The History of Florida's Constitutional Savings Clause

Prior to 2019, Florida and two other states had a constitutional savings clause.[33] In 1885, Florida adopted Article III, Section 32 of the Florida Constitution. This provision was the predecessor to Article X, Section 9 of the Florida Constitution, which remained in place until 2019.[34] Article III, Section 32 provided:

> The repeal or amendment of any criminal statute shall not affect the prosecution or punishment of any crime committed before such repeal or amendment.[35]

The Florida Supreme Court has discussed the origin of this savings clause:

> [In *Ex parte Pells*, 28 Fla. 67 (1891),] [w]e explained that article III, section 32 originated after the Court decided the case of *Higgenbotham v. State*, 19 Fla. 557 (1882). In *Higgenbotham*, the Court invalidated a conviction of assault with intent to commit murder because the assault statute was repealed after the crime was committed but before prosecution took place, and there was no savings clause in the statute to allow the then-pending prosecution to proceed. Under those circumstances, we reasoned, "no further proceedings can, after the repealing law takes effect, be taken under the law so repealed." *Ex parte Pells*, 28 Fla. at 73, 9 So. at 834. We then inferred that the people of Florida approved article III, Section 32, in 1885 to provide a constitutional savings clause, thereby negating the effect of the *Higgenbotham* holding. *See also Sigsbee v. State*, 43 Fla. 524, 529, 30 So. 816, 817 (1901).[36]

In 1968, Florida adopted Article X, Section 9 of the Florida Constitution, which provided:

> Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.

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[31] Section 790.23, F.S.
[32] *See* ss. 322.055 and 812.0155, F.S.
[33] Oklahoma and New Mexico. *See* OKLA. CONST. art. V, s. 54 and N.M. CONST. art. IV, s. 33.
[34] *State v. Watts*, 558 So.2d 994, 999 (Fla. 1990). It appears that at various times Florida had a general savings statute for criminal laws. *See Reynolds v. State*, 33 Fla. 301, 303 (Fla. 1894) (describing Section 2523, Rev. Stat.) and *Castle v. State*, 330 So.2d 10, 11 (Fla. 1976) (describing s. 775.12, F.S. (1973)).
[35] "The effect of this constitutional provision is to give to all criminal legislation a prospective effectiveness; that is to say, the repeal or amendment, by subsequent legislation, of a pre-existing criminal statute, does not become effective, either as a repeal or as an amendment of such pre-existing statute, in so far as offenses are concerned that have already been committed prior to the taking effect of such repealing or amending law." *Raines v. State*, 42 Fla. 141, 145 (1900). "Courts have interpreted this section the same as its successor provision in the 1968 revision." *State v. Watts*, 558 So.2d at 999 n. 5.
[36] *State v. Watts*, 558 So.2d at 999.

In 2018, Florida adopted the following amendment to Article X, Section 9 of the Florida Constitution:

> Repeal ~~or amendment~~ of a criminal statute shall not affect prosecution ~~or punishment~~ for any crime ~~previously~~ committed before such repeal.

Revised Article X, Section 9 of the Florida Constitution only prohibits applying the repeal of a criminal statute to any crime committed before such repeal if this retroactive application "affects prosecution." The revised constitutional savings clause does not expressly prohibit retroactive application of a repeal that does not affect prosecution, a repeal that affects punishment, or an amendment of a criminal statute that affects prosecution or punishment.

The elimination of the expressed prohibition on certain retroactive applications is not a directive to the Legislature to retroactively apply what was formerly prohibited. As the Florida Supreme Court recently stated: "… [T]here will no longer be any provision in the Florida Constitution that would prohibit the Legislature from applying an amended criminal statute retroactively to pending prosecutions or sentences. However, nothing in our constitution does or will require the Legislature to do so, and the repeal of the prohibition will not require that they do so."[37]

Terms Used in Florida's Constitutional Savings Clause

For purposes of the constitutional savings clause, the Florida Supreme Court has defined the term "criminal statute" broadly: "In *Washington v. Dowling*, 92 Fla. 601, 109 So. 588 (1926), this Court provided the following definition for the words 'criminal statute': '[A]n act of the Legislature as an organized body relating to crime or punishment … defining crime, treating of its nature, or providing for its punishment.' *Id.*, 109 So. at 591."[38]

In regard to Article X, Section 9 of the Florida Constitution, the Florida Supreme Court does not appear to have ever clearly indicated whether a "criminal statute" also includes its parts or provisions and whether an amendment can "repeal" those parts or provisions. An amendment can modify a part or provision of a statute but it can also eliminate or nullify it. In several cases unrelated to Article X, Section 9 of the Florida Constitution, the Court and several Florida appellate courts have described amendments repealing or effectively repealing subsections or paragraphs of statutes.[39] However, courts do not always describe an amendment deleting a provision as a repeal or causing a repeal.[40]

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[37] *Jimenez v. Jones*, 261 So.3d 502, 504 (Fla. 2018).
[38] *Smiley v. State*, 966 So. 2d 330, 337 (Fla. 2007).
[39] *See, e.g., State v. Lindsay*, 284 So.2d 377, 378 n. 1 (Fla. 1973) (Florida Supreme Court noting that ch. 72-179, L.O.F., "repealed Subsections (2) and (3) of Section 39.01"); *L. Ross, Inc. v. R.W. Roberts Constr. Co., Inc.*, 466 So.2d 1096, 1097 (Fla. 5th DCA 1985) (footnote omitted), *approved*, 481 So.2d 484 (Fla. 1986) (court stating that "[t]his case involves the retroactive application of a statutory amendment which repealed a limitation in the amount of attorney's fees made recoverable by statute in certain actions"); and *State v. Richardson*, 915 So.2d 86, 89 (Fla. 2005) (Florida Supreme Court noting that in its previous decision it "held that the Legislature had effectively repealed the sequential conviction rule because the then current version of the statute, which had recently been significantly amended in 1988, did not contain the sequential conviction requirement").
[40] *See, e.g., Macchione v. State*, 123 So. 3d 114 (Fla. 2013) (describing various amendments to s. 836.10, F.S., including the deletion of language, without describing any of the changes as a repeal).

There is little guidance on what retroactive repeals "affect prosecution" in violation of Article X, Section 9 of the Florida Constitution, other than the Florida Supreme Court indicating that purely procedural changes do not "affect prosecution." The Court has construed the constitutional savings clause as "saving" substantive rights and liabilities. "Remedial statutes or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the legal conception of a retrospective law, or the general rule against retrospective operation of statutes."[41] However, "a statute that achieves 'remedial purpose by creating substantive new rights or imposing new legal burdens' is treated as a substantive change in the law."[42]

Florida's Statutory Savings Clause (Section 775.022, F.S.)

CS/SB 1656 (2019) created s. 775.022, F.S., which is a general savings statute for criminal statutes.[43] Typically, a general savings statute prevents the repeal of a criminal statute from abating pending criminal prosecutions, unless the repealing act expressly provides for abatement. "Abatement" means no further prosecution for the criminal violation.

Section 775.022, F.S., defines a "criminal statute" to mean a statute, whether substantive or procedural, dealing in any way with a crime or its punishment, defining a crime or a defense to a crime, or providing for the punishment of a crime.

In part, s. 775.022, F.S., states that, except as expressly provided in an act of the Legislature or as provided in two specified exceptions, the reenactment or amendment of a criminal statute must operate prospectively and will not affect or abate any of the following:

- The prior operation of the statute or a prosecution or enforcement under the criminal statute;
- A violation of the criminal statute based on any act or omission occurring before the effective date of the act; and
- A prior penalty, prior forfeiture, or prior punishment incurred or imposed under the statute.

The effect of the first exception mentioned above is that the penalty, forfeiture, or punishment for a violation of a criminal statute through a reenactment or an amendment of a criminal statute must be imposed retroactively if the sentence has not been imposed, including in the instance when the sentence is imposed after the effective date of the amendment.

Further, s. 775.022, F.S., does not preclude the Legislature from expressly providing for a more extensive retroactive application either to legislation in the future or legislation that was enacted prior to the effective date of the general savings statute. This is because the general savings statute specifically provides for a legislative exception to the default position of prospectivity.

[41] *City of Lakeland v. Catinella*, 129 So.2d 133, 136 (Fla. 1961).
[42] *Smiley v. State*, 966 So.2d at 334, quoting *Arrow Air v. Walsh*, 645 So.2d 422, 424 (Fla. 1994).
[43] *See* ch. 2019-63, L.O.F.

Expunction of Criminal History Records

Overview

Another consequence of a felony conviction in Florida is the prohibition of obtaining a court-ordered expunction. Florida law makes adult criminal history records accessible to the public unless the record has been sealed or expunged.[44] Criminal history records related to certain offenses are barred from being expunged through the court-order process.[45] Section 943.0585, F.S., sets forth procedures for expunging criminal history records through court-order. When a criminal history record is expunged, criminal justice agencies other than the Florida Department of Law Enforcement (FDLE) must physically destroy the record.[46] Criminal justice agencies are allowed to make a notation indicating compliance with an expunction order. The FDLE is required to retain expunged records.[47]

Records that have been expunged are confidential and exempt[48] from the public records law.[49]

Persons who have had their criminal history records expunged may lawfully deny or fail to acknowledge the arrests covered by their record, except when they are applying for certain types of employment,[50] petitioning the court for a record sealing or expunction, or are a defendant in a criminal prosecution.[51]

Process for Obtaining a Court-Ordered Expunction

To qualify for a court-ordered expunction, a person must first obtain a certificate of eligibility (COE) from the FDLE.[52] To obtain the COE from the FDLE, a person must comply with a

[44] Florida Department of Law Enforcement, *Seal and Expunge Process*, available at http://www.fdle.state.fl.us/Seal-and-Expunge-Process/Seal-and-Expunge-Home.aspx (last visited January 21, 2020). *See also* s. 943.053, F.S.
[45] *See* 943.0584, F.S., for a complete list of offenses that are ineligible for court-ordered expunction.
[46] Section 943.0585(6)(a), F.S. Section 943.045(16), F.S., defines "expunction of a criminal history record" to mean 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, except that criminal history records in the custody of the FDLE must be retained in all cases for purposes of evaluating subsequent requests by the subject of the record for sealing or expunction, or for purposes of recreating the record in the event an order to expunge is vacated by a court of competent jurisdiction.
[47] Section 943.0585(6)(a), F.S.
[48] There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. *See WFTV, Inc. v. The Sch. Bd. of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in the statutory exemption. *See* 85-62 Fla. Op. Att'y Gen. (1985).
[49] Section 943.0585(6)(d), F.S.
[50] These include candidates for employment with a criminal justice agency; applicants for admission to the Florida Bar; those seeking a sensitive position involving direct contact with children, the developmentally disabled, or the elderly with the Department of Children and Family Services, Division of Vocational Rehabilitation within the Department of Education, the Agency for Health Care Administration, the Agency for Persons with Disabilities, the Department of Health, the Department of Elderly Affairs, or the Department of Juvenile Justice; persons seeking to be employed or licensed by the Department of Education, any district school board, any university laboratory school, any charter school, any private or parochial school, or any local governmental entity that licenses child care facilities; or a Florida seaport.
[51] Section 943.0585(6)(a), F.S.
[52] *See* s. 943.0585(2), F.S.

number of requirements, including, in part, that he or she has never been adjudicated guilty or delinquent of a:

- Criminal offense;
- Comparable ordinance violation; or
- Specified felony or misdemeanor prior to the COE application date.[53]

Further, a person may seek a court-ordered expunction immediately, provided the person is no longer subject to court supervision, if none of the charges related to the arrest or alleged criminal activity resulted in a trial or relate to an offense enumerated in s. 943.0584, F.S., and:

- An indictment, information, or other charging document was not filed or issued in the case (no-information); or
- An indictment, information, or other charging document was filed or issued in the case, but it was dismissed or nolle prosequi by the state attorney or statewide prosecutor, or was dismissed by a court of competent jurisdiction (dismissal). [54]

Upon receipt of a COE, the person must then petition the court to expunge the criminal history record. The petition must include the COE and a sworn statement from the petitioner that he or she is eligible for expunction to the best of his or her knowledge.[55] 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.[56]

There is no statutory right to a court-ordered expunction and any request for such an expunction of a criminal history record may be denied at the sole discretion of the court.[57] The court is only authorized to order the expunction of a record that pertains to one arrest or one incident of alleged criminal activity.[58] However, the court may order the expunction of a record pertaining to more than one arrest if such additional arrests directly relate to the original arrest.[59]

Effect of an Expunction

Any record that the court grants the expunction of must be physically destroyed or obliterated by any criminal justice agency having such record. The FDLE, however, is required to maintain the record. That record is confidential and exempt from disclosure requirements under the public records laws. Only a court order would make the record available to a person or entity that is otherwise excluded.[60]

[53] *See* s. 943.0585(1) and (2), F.S., for full requirements for obtaining a COE.
[54] *See* s. 943.0585(1), F.S.
[55] *See* s. 943.0585(3)(b), F.S.
[56] Section 943.0585(5)(a), F.S.
[57] Section 943.0585(4)(e), F.S.
[58] Section 943.0585(4)(c), F.S.
[59] *Id*. The court must articulate in writing its intention to expunge or seal a record pertaining to multiple arrests and a criminal justice agency may not expunge or seal multiple records without such written documentation. The court is also permitted to expunge or seal only a portion of a record.
[60] *See* s. 943.0585(6), F.S.

III. Effect of Proposed Changes:

Retroactive Application of the New DWLSR Offense

The bill creates s. 322.3401, F.S., expressly providing for the retroactive application of the changes made by CS/HB 7125 (2019) to s. 322.34, F.S., related to the offense of DWLSR.

The bill provides legislative intent language, which states:

> It is the intent of the Legislature to retroactively apply section 12 of chapter 2019-167, Laws of Florida, only as provided in this section, to persons who committed driving while license suspended, revoked, canceled, or disqualified before October 1, 2019, the effective date of section 12 of chapter 2019-167, Laws of Florida, which amended s. 322.34 to modify criminal penalties and collateral consequences for offenses under that section.

The bill defines two terms for purposes of s. 322.3401, F.S., including the term:
- "Former s. 322.34", which means a reference to s. 322.34, F.S., as it existed at any time before its amendment by ch. 2019-167, L.O.F.
- "New s. 322.34", which means a reference to s. 322.34, F.S., as it exists after the amendments made by ch. 2019-167, L.O.F., became effective.

The bill requires a person who committed the offense of DWLSR:
- Before October 1, 2019, but who was not sentenced under former s. 322.34, F.S., before October 1, 2020, to be sentenced for the degree of offense as provided for in the new s. 322.34, F.S.
- Before October 1, 2019, who was sentenced before October 1, 2019 to a term of imprisonment pursuant to former s. 322.34, F.S., and who is serving such term of imprisonment on or after October 1, 2020, to be resentenced to the degree of offense that is consistent with the degree provided for in the new s. 322.34, F.S.

The bill provides procedures for the resentencing of eligible persons. Specifically:
- The DOC is required to notify an eligible person of his or her eligibility to request a sentence review hearing.
- The person seeking a sentence review may submit an application to the court of original jurisdiction requesting that a sentence review hearing be held.
- The sentencing court must retain original jurisdiction for the duration of the sentence for the purpose of conducting sentence review hearings.
- A person who is eligible for a sentence review hearing may be represented by counsel and the court is required to appoint a public defender to represent the person if he or she cannot afford an attorney.

Upon receiving an application for sentence review from the eligible person, the court of original jurisdiction must hold a sentence review hearing to determine if the eligible person meets the criteria for resentencing.

If the court determines at the sentence review hearing that the eligible person meets the criteria, the court must resentence the person in the above-mentioned manner and cannot exceed the person's original sentence with credit for time served. If the court determines that such person does not meet the criteria for resentencing, the court must provide written reasons for such determination.

In addition to the retroactive application of sentencing provisions of the new s. 322.34, F.S., the bill provides that a person who has been convicted of a felony under former s. 322.34, F.S., and whose offense would not be classified as a felony under the new s. 322.34, F.S., must:

- Be treated as if he or she had been convicted of a misdemeanor violation for purposes of any right, privilege, benefit, remedy, or collateral consequence that the person might be entitled to but for such felony conviction.
- Have all fines, fees, and costs related to such felony conviction waived.

Because the bill expressly provides for retroactive application of the changes the bill makes, the bill has provided a legislative exception to the default position of prospectively.

Expunction Related to DWLSR Offenses

The bill also creates s. 943.0587, F.S., authorizing a person to petition a court to expunge a criminal history record for a conviction under former s. 322.34, F.S., under certain circumstances, including if the person:

- Received a withholding of adjudication or adjudication of guilt for a violation of DWLSR under former s. 322.34, F.S., and whose conviction would not be classified as a felony under the new s. 322.34, F.S.; and
- Only has felony convictions for the offense of DWLSR pursuant to the former s. 322.34, F.S.

The bill defines the terms of "former s. 322.34" and "new s. 322.34" in the same manner as described above.

Unlike other expunctions, an expunction granted in accordance with the bill does not prevent the person who receives such relief from petitioning for the expunction or sealing of a later criminal history record as provided for in ss. 943.0583, 943.0585, and 943.059, F.S., if the person is otherwise eligible under those sections.

The bill provides that a person seeking to expunge a criminal history record must apply to the FDLE for a COE prior to petitioning a court to expunge a criminal history record for eligible DWLSR offenses. The FDLE is required to adopt rules to establish procedures for applying for and issuing a COE for expunction. The FDLE is required to issue the COE to a person who is the subject of a criminal history record eligible under the bill if that person:

- Satisfies the eligibility criteria listed below;
- Has submitted to the FDLE a written certified statement from the appropriate state attorney or statewide prosecutor which confirms the criminal history record complies with the criteria of the bill;
- Has submitted to the FDLE a certified copy of the disposition of the charge to which the petition to expunge pertains; and

- Remits a $75 processing fee to the FDLE for placement in the Department of Law Enforcement Operating Trust Fund, unless the executive director waives such fee.

As with COE certificates for other court-ordered expunctions, the bill provides that the COE is valid for 12 months after the date stamped on the certificate when issued by the FDLE. After that time, the petitioner must reapply for a new COE. The petitioner's status and the law in effect at the time of the renewal application determine the petitioner's eligibility.

The bill provides that a petition to expunge a criminal history record must be accompanied by:
- A valid COE issued by the FDLE.
- The petitioner's sworn statement that he or she:
  - Satisfies the eligibility requirements for expunction in accordance with the provisions of the bill; and
  - Is eligible for expunction to the best of his or her knowledge.

Further, the bill provides that it is a third degree felony for a person to knowingly provide false information on a sworn statement for expunction pursuant to the bill. This is a similar penalty as is provided for in s. 943.0585, F.S.

The bill requires a copy of the completed petition to expunge to be served upon the appropriate state attorney or the statewide prosecutor and upon the arresting agency, which entity is then able to respond to the court regarding the completed petition to expunge.

If relief is granted by the court, the following actions must be taken:
- The clerk of the court must certify copies of the order to the appropriate state attorney or the statewide prosecutor and the arresting agency.
- The arresting agency is required to forward the order to any other agency to which the arresting agency disseminated the criminal history record information to which the order pertains.
- The FDLE must forward the order to expunge to the Federal Bureau of Investigation.
- The clerk of the court must certify a copy of the order to any other agency which the records of the court reflect has received the criminal history record from the court.

The FDLE or any other criminal justice agency is not required to act on an order to expunge entered by a court when such order does not comply with the requirements of the bill. Upon receipt of such an order, the FDLE must notify the issuing court, the appropriate state attorney or statewide prosecutor, the petitioner or the petitioner's attorney, and the arresting agency of the reason for noncompliance. The appropriate state attorney or statewide prosecutor must take action within 60 days to correct the record and petition the court to void the order. The bill provides that a cause of action, including contempt of court, does not arise against any criminal justice agency for failure to comply with an order to expunge when the petitioner for such order failed to obtain the COE as required or when the order does not otherwise comply with the requirements.

The bill provides that the effect of the expunction order is identical to the effect of court-ordered expunction orders that have been issued pursuant to s. 943.0585, F.S. Specifically, the bill provides:

- The person who is the subject of a criminal history record that is expunged may lawfully deny or fail to acknowledge the arrests and convictions covered by the expunged record, except when the subject of the record:
  - Is a candidate for employment with a criminal justice agency;
  - Is a defendant in a criminal prosecution;
  - Concurrently or subsequently petitions for relief under this section, s. 943.0583, F.S., s. 943.059, F.S., or s. 943.0585, F.S.;
  - Is a candidate for admission to The Florida Bar;
  - Is seeking to be employed or licensed by or to contract with the Department of Children and Families, the Division of Vocational Rehabilitation of the Department of Education, the Agency for Health Care Administration, the Agency for Persons with Disabilities, the Department of Health, the Department of Elderly Affairs, or the Department of Juvenile Justice or to be employed or used by such contractor or licensee in a sensitive position having direct contact with children, the disabled, or the elderly;
  - Is seeking to be employed or licensed by the Department of Education, any district school board, any university laboratory school, any charter school, any private or parochial school, or any local governmental entity that licenses child care facilities;
  - Is seeking to be licensed by the Division of Insurance Agent and Agency Services within the Department of Financial Services; or
  - Is seeking to be appointed as a guardian pursuant to s. 744.3125, F.S.
- Except as mentioned above, a person who has been granted an expunction may not be held to commit perjury or to be otherwise liable for giving a false statement by reason of such person's failure to recite or acknowledge an expunged criminal history record.

Section 1 of the bill, which relates to the retroactive application of the changes to the DWLSR offense, is effective October 1, 2020. Section 2, which relates to the expunction of certain DWLSR offenses is effective on the same date as SB 1506 or similar legislation, which is tied to this bill, goes into effect if such legislation is adopted during this session.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference has not heard the bill yet, but the Office of Economic and Demographic Research (EDR) prepared a preliminary estimate for the overall bill stating that the bill will have a negative significant prison bed impact (i.e. decrease of more than 25 beds).[61]

Retroactive Application of the DWLSR Offense Amendments

The EDR further stated that the provisions related to the retroactive application of amendments made to s. 322.34, F.S. (2018), in the 2019 Legislative session will have a negative significant prison bed impact.[62]

The bill also allows for people to be sentenced to misdemeanor penalties, rather than to prison for such offenses. To the extent that the bill results in persons being sentenced to non-state sanctions or resentenced and released from imprisonment with the DOC, the bill will have an indeterminate negative prison bed impact (i.e. an unquantifiable decrease).

Expunction Provisions

The EDR also stated that the bill will have a positive insignificant prison bed impact for the provisions of the bill creating penalties related to the expunction provisions of the bill (i.e. an increase of 10 or fewer prison beds).[63]

[61] The EDR, Preliminary Estimate on SB 1504 – Sentencing, p. 2 (on file with the Senate Criminal Justice Committee) (hereinafter cited as "Preliminary Estimate for SB 1504").
[62] Preliminary Estimate for SB 1504, p. 1.
[63] Preliminary Estimate for SB 1504, p. 2.

The bill allows for certain persons to have any specified criminal history records related to a DWLSR conviction expunged. To the effect that this additional category of records eligible for expunction increase the workload to process such expunctions, the bill may result in a negative fiscal impact on the FDLE. Such workload may result in the FDLE needing additional staff or resources, which may be offset in part by the $75 fee collected for each application for COE associated with this additional category of expunction records.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates the following sections of the Florida Statutes: 322.3401 and 943.0587.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.