

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: CS/SB 468

INTRODUCER: Judiciary Committee and Senator Bracy

SUBJECT: Expunction of Criminal History Records Relating to Certain Cannabis Offenses

DATE: March 29, 2021 **REVISED:** _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------------|----------------|-----------|--------------------|
| 1. | <u>Bond</u> | <u>Cibula</u> | <u>JU</u> | <u>Fav/CS</u> |
| 2. | <u>Stokes</u> | <u>Jones</u> | <u>CJ</u> | <u>Pre-meeting</u> |
| 3. | _____ | _____ | <u>AP</u> | _____ |

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 468 creates s. 943.0586, F.S., providing for the expunction of certain criminal history records relating to the misdemeanor offense of possession of 20 grams or less of cannabis, regardless of disposition. The language in the bill closely mirrors the procedures and requirements for court ordered expunction under s. 943.0585, F.S.

The bill provides that a person may only receive one expunction under this section, and may only petition the court for an expunction after at least one year has elapsed since the disposition of the criminal activity to which the petition pertains, and he or she is no longer under court supervision. A person who receives an expunction under this section is not precluded from seeking a sealing or expunction provided under any other section of law.

The bill may have a negative indeterminate fiscal impact on the Florida Department of Law Enforcement (FDLE) and the state courts. See Section V. Fiscal Impact Statement.

The bill is effective July 1, 2021.

II. Present Situation:

There are several limited forms of relief that may be sought in order to seal or expunge a criminal history record. The public will not have access to a criminal history record that has been sealed or expunged. Certain government or related entities have access to records even after they

are sealed. Most of the entities who have access to sealed records also have access to see whether a person has had an expunction. However, those entities do not have access to the expunged criminal history record without a court order.¹

Expunction of Criminal History Records

A criminal history record includes any non-judicial record maintained by a criminal justice agency² that contains criminal history information.³ Criminal history information is information collected by criminal justice agencies and consists of identifiable descriptions of individuals and notations of arrests, detentions, indictments, information, other formal criminal charges, and criminal dispositions.⁴

State courts have continuing jurisdiction over their own procedures, including the expunction and sealing of judicial records that contain criminal history information.⁵ Pursuant to statute, judges have the discretion to order criminal records maintained by the court system and records held by law enforcement agencies to be sealed⁶ or expunged for either a minor or an adult.⁷ However, no one has a right to have a record expunged and the request may be denied at the sole discretion of the court.⁸

A person may have his or her criminal history record⁹ expunged under certain enumerated circumstances.¹⁰ When a record is expunged, the criminal justice agencies¹¹ that possess the record must physically destroy or obliterate it. However, a criminal justice agency may retain a notation indicating compliance with an order to expunge.¹² The FDLE maintains a copy of the record to evaluate subsequent requests for sealing or expunction, and to recreate the record in the

¹ Florida Department of Law Enforcement Frequently Asked Questions, Florida Department of Law Enforcement, available at http://www.fdle.state.fl.us/Seal-and-Expunge-Process/Frequently-Asked-Questions#Sealed_vs_Expunged (last visited March 22, 2021).

² Section 943.045(11), F.S., provides that criminal justice agencies include the court, the FDLE, the Department of Juvenile Justice, components of the Department of Children and Families, and other governmental agencies that administrate criminal justice.

³ Section 943.045(6), F.S.

⁴ Section 943.045(5), F.S.

⁵ Sections 943.0585(4)(a) and 943.059(4)(a), F.S. The procedures, however, must be consistent with the duties established in statute. See also Henry P. Trawick, Jr., *Florida Pleading and Practice Forms* 11B. Fla. Pl. & Pr. Forms s. 97:14 (May 2020).

⁶ In general terms, sealing makes records confidential in most cases while expunction requires the actual physical destruction of records held by courts and most law enforcement agencies. When a record is sealed, it is preserved so that it is secure and inaccessible to any person who does not have a legal right to access the record or the information contained within the record. A court may order a criminal history record sealed, rendering it confidential and exempt from Florida's public records laws. Sections 943.045(19), 943.059(6), and 119.07(1), F.S., and Art. I, s. 24(a), Fla. Const.

⁷ Sections 943.0585(4)(b) and 943.059(4)(b), F.S.

⁸ Section 943.0585(4)(b) and (e), F.S.

⁹ Section 943, 045(6), F.S., provides that a "criminal history record" is any judicial record maintained by a criminal justice agency containing criminal history information.

¹⁰ Sections 943.0581, 943.0582, 943.0583, and 943.0585, F.S.

¹¹ Section 943.045(11), F.S., provides that "criminal justice agency," means: (1) A court; (2) the FDLE; (3) The Department of Juvenile Justice; (4) The protective investigations component of the Department of Children and Families, which investigates the crimes of abuse and neglect; and (5) Any other governmental agency or subunit thereof that performs the administration of criminal justice pursuant to a statute or rule of court and that allocates a substantial part of its annual budget to the administration of criminal justice.

¹² Section 943.0585(6)(a), F.S.

event a court vacates the order to expunge.¹³ The criminal history record retained by the FDLE is confidential and exempt.¹⁴ Once the record is expunged, a person may lawfully deny or fail to acknowledge the arrests covered by the expunged record, subject to exceptions.^{15, 16}

Court-Ordered Expunction

A court, in its discretion, may order the expunction of a person's criminal history record if the FDLE issues the person a certificate of eligibility for expunction.¹⁷ Generally, a person is eligible for expunction if:

- An indictment, information, or other charging document was not filed or issued in the case giving rise to the criminal history record.
- An indictment, information, or other charging document was filed or issued in the case giving rise to the criminal history record, but was dismissed or nolle prosequi by the State, was dismissed by the court, a judgment of acquittal was rendered, or a verdict of not guilty was rendered.
- The person is not seeking to expunge a criminal history record that is ineligible under s. 943.0584, F.S.¹⁸

¹³ Section 943.045(16), F.S.

¹⁴ Section 943.0585(6)(a), F.S.

¹⁵ Section 943.0585(6), F.S.

¹⁶ Section 943.0585(6), F.S., provides that enumerated entities include criminal justice agencies, The Florida Bar, the Department of Children and Families, the 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, the Department of Juvenile Justice, the Department of Education, a district school board, a university laboratory school, a charter school, a private or parochial school, a local governmental entity that licenses child care facilities, the Division of Insurance Agent and Agency Services within the Department of Financial Services, and the Bureau of License Issuance of the Division of Licensing within the Department of Agriculture and Consumer Services.

¹⁷ Section 943.0585(4), F.S.

¹⁸ Section 943.0584, F.S., A criminal history record is not eligible for court-ordered sealing if it relates to: Sexual misconduct (Sections 393.135, 394.4593, and 916.1075, F.S.); Illegal use of explosives (Chapter 552, F.S.); Terrorism (Section 775.30, F.S.); Murder (Sections 782.04, 782.065, and 782.09, F.S.); Manslaughter or homicide (Sections 782.07, 782.071, and 782.072, F.S.); Assault or battery of one family or household member by another family or household member (Sections 784.011 and 784.03, F.S.); Aggravated assault (Section 784.021, F.S.); Felony battery, domestic battery by strangulation, or aggravated battery (Sections 784.03, 784.041, and 784.045, F.S.); Stalking or aggravated stalking (Section 784.048, F.S.); Luring or enticing a child (Section 787.025, F.S.); Human trafficking (Section 787.06, F.S.); Kidnapping or false imprisonment (Sections 787.01 and 787.02, F.S.); Sexual battery, unlawful sexual activity with a minor, or female genital mutilation (Chapter 794, F.S.); Procuring a person under the age of 18 for prostitution (Section 796.03, F.S. (2013) (repealed by ch. 2014-160, s. 10, L.O.F.)); Lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age (Section 800.04, F.S.); Arson (Section 806.01, F.S.); Burglary of a dwelling (Section 810.02, F.S.); Voyeurism or video voyeurism (Sections 810.14 and 810.145, F.S.); Robbery or robbery by sudden snatching (Sections 812.13 and 812.131, F.S.); Carjacking (Section 812.133, F.S.); Home invasion robbery (Section 812.135, F.S.); A violation of the Florida Communications Fraud Act (Section 817.034, F.S.); Abuse of an elderly person or disabled adult or aggravated abuse of an elderly person or disabled adult (Section 825.102, F.S.); Lewd or lascivious offenses committed upon or in the presence of an elderly or disabled person (Section 825.1025, F.S.); Child abuse or aggravated child abuse (Section 827.03, F.S.); Sexual performance by a child (Section 827.071, F.S.); Offenses by public officers and employees (Chapter 839, F.S.); Certain acts in connection with obscenity (Section 847.0133, F.S.); A violation of the Computer Pornography and Child Exploitation Prevention Act (Section 893.0135, F.S.); Selling or buying of minors (Section 847.0145, F.S.); Aircraft piracy (Section 860.16, F.S.); Manufacturing a controlled substance (Chapter 893, F.S.); Drug trafficking (Section 893.135, F.S.); Any violation specified as a predicate offense for registration as a sexual predator or sexual offender. (Sections 775.21 and 943.0535, F.S.).

- The person is not seeking to seal a criminal history record relating to a violation of certain enumerated offenses.¹⁹
- The person has never, prior to filing the application for a certificate of eligibility, been either:
 - Adjudicated guilty of any criminal offense or comparable ordinance violation; or
 - Adjudicated delinquent of any felony or certain enumerated misdemeanors as a juvenile.
- The person has not been adjudicated guilty or delinquent for committing any of the acts stemming from the arrest or alleged criminal activity to which the petition to expunge pertains.
- The person has never secured a prior sealing or expunction, unless:
 - Expunction is sought of a criminal history record previously sealed for at least 10 years; and
 - The record was sealed because adjudication was withheld, or because a judgment of acquittal or verdict of not guilty was rendered.²⁰

Certificate of Eligibility

A person must first apply to the FDLE for a certificate of eligibility. The FDLE must issue a certificate of eligibility for court-ordered expunction to a person who:²¹

- Is eligible for expunction, as described above.
- Has submitted to the department a written certified statement from the appropriate state attorney or statewide prosecutor which confirms the criminal history record complies with certain requirements described above.
- Has submitted to the FDLE a certified copy of the disposition of the charge to which the petition pertains.
- Pays a \$75 processing fee to the FDLE for placement in the FDLE Operating Trust Fund, unless the executive director waives such fee.²²

Upon receiving a certificate of eligibility from the FDLE, a person must petition the court to expunge the record.²³ A complete petition contains both a valid certificate of eligibility, issued within the previous 12 months, and a sworn statement from the petitioner attesting to his or her eligibility.²⁴ It is solely within the court's discretion to grant or deny a petition to expunge.²⁵

¹⁹ Section 943.0585(1)(d)1.-13., F.S. Assault, as defined in s. 784.011, F.S.; battery, as defined in s. 784.03, F.S.; assault on a law enforcement officer, a firefighter, or other specified officers, as defined in s. 784.07(2)(a), F.S.; carrying a concealed weapon, as defined in s. 790.01(1), F.S.; open carrying of a weapon, as defined in s. 790.053, F.S.; unlawful possession or discharge of a weapon or firearm at a school-sponsored event or on school property, as defined in s. 790.115, F.S.; unlawful use of destructive devices or bombs, as defined in s. 790.1615(1), F.S.; unlawful possession of a firearm, as defined in s. 790.22(5), F.S.; exposure of sexual organs, as defined in s. 800.03, F.S.; arson, as defined in s. 806.031(1), F.S.; petit theft, as defined in s. 812.014(3), F.S.; or cruelty to animals, as defined in s. 828.12(1), F.S.

²⁰ Section 943.0585(1), F.S.

²¹ Section 943.0585(2), F.S.

²² Section 943.0585(2), F.S.

²³ Section 943.0585(3), F.S.

²⁴ Section 943.0585(3), F.S.

²⁵ Section 943.0585(4), F.S.

Fees to Expunge Records

The application for a certificate of eligibility to seal or expunge under either statute must include a certified copy of the disposition. The clerk charges \$2 per document for a certification fee²⁶ plus \$1 a page for copying²⁷ the disposition. The FDLE charges \$75 for the certificate of eligibility.²⁸

Other Types of Expunction

Other types of expunction include:

- Lawful self-defense expunction.²⁹
- Human trafficking victim expunction.³⁰
- Automatic Juvenile expunction.³¹
- Early juvenile expunction.³²
- Administrative expunction.³³
- Juvenile diversion program expunction.³⁴

III. Effect of Proposed Changes:

The bill creates s. 943.0586, F.S., providing for the expunction of certain criminal history records relating to the misdemeanor offense of possession of 20 grams or less of cannabis.

A person is eligible to petition the court for an expunction if:

- The person was arrested or given a notice to appear for a misdemeanor offense for obtaining, purchasing, or possessing 20 grams or less of cannabis, regardless of disposition.
- The person was not convicted of, nor pled no contest to, a contemporaneous offense other than the misdemeanor offense for obtaining, purchasing, or possessing 20 grams or less of cannabis.
- At least 1 year has elapsed since disposition of the offense or alleged criminal activity.
- The person is no longer under court supervision related to the cannabis offense.
- The person has not previously received this type of expunction.

A person must apply to the FDLE for a certificate of eligibility before he or she petitions a court to expunge a criminal history record. The bill directs the FDLE to establish procedures for applying for and issuing a certificate of eligibility. The FDLE must issue a certificate of eligibility to a person who is the subject of a criminal history record if that person:

- Satisfies the criteria listed above, and is not ineligible under s. 943.0584, F.S.³⁵

²⁶ Section 28.24(2), F.S.

²⁷ Section 28.24(5)(a), F.S.

²⁸ Section 943.0585(2)(a)4., F.S.

²⁹ Section 943.0578, F.S.

³⁰ Section 943.0583, F.S.

³¹ Section 943.0515(1)(b)1., F.S.

³² Section 943.0515(1)(b)2., F.S.

³³ Section 943.0581, F.S.

³⁴ Section 943.0582, F.S.

³⁵ See footnote 21.

- Has submitted to the FDLE a written certified statement from the appropriate state attorney or statewide prosecutor that confirms the criminal history record complies with the criteria listed above.
- Has submitted a certified copy of the disposition of the charge.
- Remits a processing fee.

A certificate of eligibility is valid for 12 months after the date it is issued by the FDLE.

The following must be submitted with the petition to expunge a criminal history record:

- A valid certificate of eligibility.
- The petitioner's sworn statement that he or she satisfies the eligibility requirements for expunction, and is eligible for expunction and to the best of his or her knowledge does not have any other petition to seal or expunge pending before any court.

A person who knowingly provides false information commits a third degree felony.

The bill further provides that courts have jurisdiction over their own procedures to the extent that such procedures are not inconsistent with the conditions, responsibilities, and duties established in the bill. A court may order a criminal justice agency to expunge a criminal history record of a person who complies with the requirements established in the bill.

The court may order expunction of a criminal history record pertaining to one arrest or one incident of alleged criminal activity. However, the court may order the expunction of a criminal history record pertaining to more than one arrest if the additional arrests directly relate to the original arrest.

The bill provides that it does not confer any right to expunction of any criminal history record and any request for expunction may be denied at the sole discretion of the court.

A copy of the completed petition must be served upon the state attorney or the statewide prosecutor, who, with the arresting agency, may respond to the petition. If the expunction is granted, the clerk must certify copies of the order to:

- The appropriate state attorney or statewide prosecutor.
- The arresting agency who must forward the order to any agency to which the arresting agency disseminated the criminal history record information.
- Any other agency which the court records reflect has received the criminal history record from the court.

Additionally, the FDLE must forward the order to the Federal Bureau of Investigations.

The FDLE and any other criminal justice agency is only required to act on a court order if the order is in compliance with the criteria described above. Upon receipt of an order that is not in compliance, the FDLE must notify:

- The appropriate state attorney or statewide prosecutor.
- The petitioner or the petitioner's attorney.
- The arresting agency.

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. A cause of action, including contempt of court, may 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 certificate of eligibility or comply with other requirements.

A person who has received an expunction may lawfully deny or fail to acknowledge the arrests and notices to appear covered by the expunged record, except in specified circumstances.³⁶

Except as provided above, a person who has been granted an expunction under this bill may not be held under any provision of law of this state to commit perjury or to be otherwise liable for giving a false statement by a person's failure to recite or acknowledge an expunged criminal history record.

The bill provides that a person who receives an expunction under this section is not precluded from seeking a sealing or expunction provided under ss. 943.0583, 943.0585, and 943.059, F.S., if the person is otherwise eligible.

The bill is effective July 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill does not require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in article VII, section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

To the extent the bill authorizes the imposition of a processing fee for a certificate of eligibility issued by the FDLE, the bill may be unconstitutional as a violation of the single-subject requirement for the imposition, authorization, or raising of a state tax or fee under Article VII, Section 19 of the Florida Constitution. Under that section, a "state tax or fee imposed, authorized, or raised under this section must be contained in a separate bill that contains no other subject." A "fee" is defined by the Florida

³⁶ Exceptions include, when the person is a defendant in a criminal prosecution; Is a candidate for admission to The Florida Bar; Is seeking employment or licensing with specified entities; Is seeking to be appointed as a guardian pursuant to s. 744.3125, F.S.

Constitution to mean “any charge or payment required by law, including any fee for service, fee or cost for licenses, and charge for service.”³⁷

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

This bill may have a negative indeterminate fiscal impact on the FDLE. The FDLE estimates a cost of \$911,038 (\$856,508 recurring) to manage the additional workload, and a cost of \$1,005,000 for technology modifications.³⁸ However, this estimate was provided prior to the inclusion of a fee in CS/SB 468. It is likely that the cost incurred by the FDLE will be offset by the fee provided in this bill.

This bill may have a negative indeterminate fiscal impact on the courts due to eligible persons filing petitions for expunction.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 943.0586 of the Florida Statutes.

³⁷ FLA. CONST. art. VII, s. 19(d)(1).

³⁸ The FDLE, *2021 Agency Analysis for SB 468*, p. 3, February 16, 2021 (On file with the Senate Committee on Criminal Justice).

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 March 16, 2021:

The committee substitute re-drafted the bill in order to closely follow existing expungement law codified at s. 943.0585, F.S. Significant policy changes made by the Committee Substitute include:

- The process is no longer completely free to the applicant, but will require a \$75 fee to the Department of Law Enforcement for a certificate of eligibility.
- The one year wait and the probation limitation are added.
- The petition must be filed with the sentencing court.
- The clerk of court is not responsible for service on the state attorney.
- Expungement is limited to one time under this new section.
- No other contemporaneous offense is allowed.
- Expungement is not automatic, it may be denied by the court.
- The exceptions allowing future access for select agencies was added.
- The CS specifies that expungement under this new section is not a bar to sealing or expungement of a different offense under another law.

- B. **Amendments:**

None.