

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 1013 Court-Ordered Expunction of Criminal History Records

**SPONSOR(S):** Criminal Justice Subcommittee and Steube

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 812

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	12 Y, 0 N, As CS	Jones	Cunningham
2) Judiciary Committee		Jones	Havlicak

### SUMMARY ANALYSIS

Section 943.0585, F.S., sets forth procedures for expunging a criminal history record. When a criminal history record is expunged, criminal justice agencies other than the Florida Department of Law Enforcement (FDLE) must physically destroy the record.

FDLE must issue a certificate of eligibility for expunction (certificate) if the criminal history record meets certain requirements. Currently, a person cannot obtain a certificate if their criminal history record resulted in a trial, unless the record had been sealed for a minimum of 10 years.

The bill removes the provisions prohibiting a person from obtaining a certificate if their criminal history record resulted in a trial. As a result, a person can obtain a certificate if their criminal history record resulted in a trial, regardless of whether the record had been sealed for a minimum of 10 years. Such persons must submit a written and certified statement from a state attorney or statewide prosecutor indicating that a judge or jury rendered a verdict of not guilty. The bill specifies that the records of a person adjudicated not guilty by reason of insanity are not eligible for expunction.

The bill requires FDLE to disclose an expunged criminal history record of a person who is adjudicated not guilty by reason of insanity or who is found to be incompetent to stand trial to any governmental agency that is authorized by state or federal law to determine eligibility to purchase or possess a firearm or to carry a concealed firearm.

The bill also amends s. 943.0585, F.S., to require a person or entity that publishes, displays, or in any way disseminates information regarding an arrest that has been expunged *to remove* such information from any publication, Internet posting, or credit report upon receipt of a certified copy of an order granting a petition to expunge without further notice or cost to the individual who is the subject of the order.

The bill does not appear to have any fiscal impact on state or local governments. However, the bill may negatively impact private businesses. See fiscal section.

The bill is effective on July 1, 2014.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Expunging Criminal History Records**

Section 943.0585, F.S., sets forth procedures for expunging a criminal history record. When a criminal history record<sup>1</sup> is expunged, criminal justice agencies<sup>2</sup> other than the Florida Department of Law Enforcement (FDLE) must physically destroy the record.<sup>3</sup> FDLE is required to retain expunged records.<sup>4</sup> Records that have been expunged are confidential and exempt from the public records law,<sup>5</sup> and it is a first degree misdemeanor<sup>6</sup> to divulge their existence.<sup>7</sup>

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,<sup>8</sup> petitioning the court for a record sealing or expunction, or are a defendant in a criminal prosecution.<sup>9</sup>

In 1992, the Legislature amended s. 943.0585, F.S., to require a person petitioning the court for an expunction to first obtain a certificate of eligibility for expunction (certificate) from FDLE.<sup>10</sup> In order to receive a certificate, a person must:

- Submit to FDLE a written, certified statement from the appropriate state attorney or statewide prosecutor indicating that:
  - An indictment, information, or other charging document was not filed or issued in the case; or if filed, was dismissed or nolle prosequi by the state attorney or statewide prosecutor or was dismissed by a court of competent jurisdiction;
  - None of the charges related to the record the person wishes to expunge resulted in a trial, without regard to whether the outcome of the trial was other than an adjudication of guilt; and
  - The criminal history record does not relate to a violation of specified offenses regardless of whether adjudication was withheld;<sup>11</sup>

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<sup>1</sup> Section 943.045(6), F.S., defines a “criminal history record” as any nonjudicial record maintained by a criminal justice agency containing criminal history information.

<sup>2</sup> Section 943.045(11), F.S., defines a “criminal justice agency” as: a court; the Florida Department of Law Enforcement; the Department of Juvenile Justice; the protective investigations component of the Department of Children and Families, which investigates the crimes of abuse and neglect; or 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.

<sup>3</sup> Section 943.0585(4), F.S. Criminal justice agencies are allowed to make a notation indicating compliance with an expunction order

<sup>4</sup> *Id.*

<sup>5</sup> Section 943.0585(4)(c), F.S.

<sup>6</sup> A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. Sections 775.082 and 775.083, F.S.

<sup>7</sup> Section 943.0585(4)(c), F.S., requires FDLE to disclose expunged criminal history records to specified entities for specified purposes.

<sup>8</sup> 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.

<sup>9</sup> Section 943.0585(4)(c), F.S.

<sup>10</sup> Chapter 1992-73, L.O.F.

<sup>11</sup> These offenses include: sexual misconduct with developmentally disabled clients, mental health patients, or forensic clients, or the reporting of such sexual misconduct; luring or enticing a child; sexual battery; procuring a person under 18 years for prostitution; lewd, lascivious, or indecent assault upon a child, lewd or lascivious offenses committed on an elderly or disabled person; communications fraud; sexual performance by a child; unlawful distribution of obscene materials to a minor; unlawful activities involving computer pornography; selling or buying minors for the purpose of engaging in sexually explicit conduct; offenses by public officers and employees; drug trafficking; and other dangerous crimes such as arson, aggravated assault or battery, kidnapping, murder, robbery, home invasion robbery, carjacking, stalking, domestic violence, and burglary.

- Pay a \$75 processing fee;
- Submit a certified copy of the disposition of the record they wish to have expunged;
- Have never been adjudicated guilty or delinquent for committing a felony or misdemeanor specified in s. 943.051(3)(b), F.S.,<sup>12</sup> prior to the date of their application for the certificate;
- Have never been adjudicated guilty or delinquent for committing any of the acts stemming from the arrest or alleged criminal activity of the record they wish to have expunged;
- Have never had a prior sealing or expunction of criminal history record unless an expunction is sought for a record previously sealed for 10 years and the record is otherwise eligible for expunction;
- No longer be under any court supervision related to the disposition of the record they wish to have expunged; and
- Have previously obtained a court order sealing the record for a minimum of 10 years because adjudication was withheld or because all charges related to the record they wish to have expunged were not dismissed prior to trial, without regard to whether the outcome of the trial was other than an adjudication of guilt.<sup>13</sup>

Once a petition to expunge is submitted, it is up to the court to decide whether the sealing or expunction is appropriate.<sup>14</sup>

Due to the requirements above, a person cannot obtain a certificate if their criminal history record resulted in a trial, unless the record had been sealed for a minimum of 10 years.<sup>15</sup>

### Effect of the Bill

The bill removes the provisions prohibiting a person from obtaining a certificate if their criminal history record resulted in a trial. As a result, a person can obtain a certificate if their criminal history record resulted in a trial, regardless of whether the record had been sealed for a minimum of 10 years. Such persons must submit a written and certified statement from a state attorney or statewide prosecutor indicating that *a judge or jury rendered a verdict of not guilty*. The bill specifies that the records of a person adjudicated not guilty by reason of insanity are not eligible for expunction.

The bill provides that an expunged criminal history record of a person who is adjudicated not guilty by reason of insanity or who is found to be incompetent to stand trial may be retained by FDLE and:

- Entered in state and national databases for use in determining eligibility to purchase or possess a firearm or to carry a concealed firearm; or
- Accessed or used by any governmental agency that is authorized by state or federal law to determine eligibility to purchase or possess a firearm or to carry a concealed firearm, in the course of such agency's official duties.

The bill requires FDLE to disclose an expunged criminal history record of a person who is adjudicated not guilty by reason of insanity or who is found to be incompetent to stand trial to any governmental agency that is authorized by state or federal law to determine eligibility to purchase or possess a firearm or to carry a concealed firearm.

The bill amends s. 943.0585(4), F.S., to require a person or entity that publishes, displays, or in any way disseminates information regarding an arrest that has been expunged *to remove* such information from any publication, Internet posting, or credit report upon receipt of a certified copy of an order

<sup>12</sup> These offenses include: assault, as defined in s. 784.011, F.S.; battery, as defined in s. 784.03, F.S.; carrying a concealed weapon, as defined in s. 790.01(1), F.S.; unlawful use of destructive devices or bombs, as defined in s. 790.1615(1), F.S.; negligent treatment of children, as defined in s. 827.05, F.S.; assault or battery on a law enforcement officer, a firefighter, or other specified officers, as defined in s. 784.07(2)(a) and (b), F.S.; open carrying of a weapon, as defined in s. 790.053 F.S.; exposure of sexual organs, as defined in s. 800.03, F.S.; unlawful possession of a firearm, as defined in s. 790.22(5), F.S.; petit theft, as defined in s. 812.014(3), F.S.; cruelty to animals, as defined in s. 828.12(1), F.S.; arson, as defined in s. 806.031(1), F.S.; and 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.

<sup>13</sup> The does not apply when a plea was not entered or all charges related to the record they wish to have expunged were dismissed prior to trial. Section 943.0585(2), F.S.

<sup>14</sup> Section 943.0585, F.S.

<sup>15</sup> *Id.*

granting a petition to expunge without further notice or cost to the individual who is the subject of the order.

**B. SECTION DIRECTORY:**

Section 1. Amends s. 943.0585, F.S., relating to court-ordered expunction of criminal history records.

Section 2. Provides an effective date of July 1, 2014.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

**1. Revenues:**

The bill does not appear to have any impact on state revenues.

**2. Expenditures:**

The bill does not appear to have any impact on state expenditures.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

**1. Revenues:**

The bill does not appear to have any impact on local government revenues.

**2. Expenditures:**

The bill does not appear to have any impact on local government expenditures.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill requires certain Florida businesses to remove information regarding an arrest that has been expunged from any publication, Internet posting, or credit report upon receipt of a certified copy of an order granting a petition to expunge. Florida businesses engaged in publishing this type of information may be negatively impacted.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

**1. Applicability of Municipality/County Mandates Provision:**

The bill does not appear to require counties or municipalities to take action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

**2. Other:**

The First Amendment to the United States Constitution and Article I, Section 4, of the Florida Constitution protect the rights of individuals to express themselves in a variety of ways. The constitutions protect not only speech and the written word, but also conduct intended to communicate. When lawmakers attempt to restrict or burden fundamental and basic rights such as these, the laws must not only be directed toward a legitimate public purpose, but they must be drawn as narrowly as possible. As the United States Supreme Court has noted, "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only

with narrow specificity."<sup>16</sup> Put another way, statutes cannot be so broad that they prohibit constitutionally protected conduct as well as unprotected conduct.<sup>17</sup>

In *Reno v. American Civil Liberties Union*, the United States Supreme Court stated:

[T]he growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.<sup>18</sup>

The bill requires any person or entity that publishes, displays, or in any way disseminates information regarding an arrest that has been expunged *to remove* such information from any publication, Internet posting, or credit report upon receipt of a certified copy of an order granting a petition to expunge. To the extent that the bill regulates content of speech protected by the First Amendment, it could be challenged as being unconstitutional.

#### B. RULE-MAKING AUTHORITY:

The bill may require FDLE to update its rules, however adequate rulemaking authority appears to exist.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill does not provide a penalty for businesses that do not remove the records when an expunction order is granted, nor would this prohibition apply to businesses outside of Florida.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 10, 2014, the Criminal Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment:

- Removed the provisions prohibiting a person from obtaining a certificate if their criminal history record resulted in a trial. As a result, a person can obtain a certificate if their criminal history record resulted in a trial, regardless of whether the record had been sealed for a minimum of 10 years; and
- Clarified that an expunged criminal history record of a person who is adjudicated not guilty by reason of insanity or who is found to be incompetent to stand trial can be retained and disclosed in certain specified instances to specified entities.

This analysis is drafted to the committee substitute as passed by the Criminal Justice Subcommittee.

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<sup>16</sup> *NAACP v. Button*, 371 U.S. 415, 433 (1963).

<sup>17</sup> *Sult v. State*, 906 So.2d 1013 (Fla. 2005).

<sup>18</sup> 521 U.S. 844 (1997).