



2020

ANNUAL REPORT

VIRGINIA STATE CRIME COMMISSION





Delegate Charniele L. Herring, Chair • Senator John S. Edwards, Vice-Chair
Kristen J. Howard, Executive Director

June 30, 2021

TO: The Honorable Ralph S. Northam, Governor of Virginia
The Honorable Members of the General Assembly of Virginia

Pursuant to the provisions of the Code of Virginia §§ 30-156 through 30-164 establishing the Virginia State Crime Commission and setting forth its purpose, I have the honor of submitting the Commission's 2020 Annual Report.

Sincerely,

A handwritten signature in black ink that reads "Charniele L. Herring". The signature is written in a cursive, flowing style.

Charniele L. Herring
Majority Leader of the Virginia House of Delegates
Chair, Virginia State Crime Commission



TABLE OF CONTENTS

INTRODUCTION

Authority of the Crime Commission	3
Members of the Crime Commission	4
Crime Commission Staff.....	4
2020 Executive Summary of Activities.....	5

STUDY HIGHLIGHTS

Earned Sentence Credits.....	8
Expungement and Sealing of Criminal Records.....	9
Mandatory Minimum Sentences	11
Sex Trafficking – Vacatur of Convictions and Data Collection.....	12
Virginia Pre-Trial Data Project.....	13

STUDY REPORTS

Earned Sentence Credits.....	16
APPENDIX A: Sentence Reduction Credit Statutes	44
APPENDIX B: Sentence Reduction Credit System Comparison by State.....	46
Expungement and Sealing of Criminal Records.....	54
APPENDIX A: State Non-Conviction Sealing Laws	93
APPENDIX B: State Misdemeanor Conviction Sealing Laws.....	95

APPENDIX C: State Felony Conviction Sealing Laws.....	97
APPENDIX D: State Sealing of Specified Convictions	99
APPENDIX E: Offenses Commonly Excluded from State Sealing Statutes	100
APPENDIX F: State Waiting Periods for Sealing of Convictions.....	101
APPENDIX G: State Restitution Requirements for Sealing.....	102
APPENDIX H: State Burdens of Proof for Sealing.....	103
APPENDIX I: State Employment Sealing Provisions	104
APPENDIX J: State Maintenance of Sealed Records for Criminal Justice and Employment Purposes	105
APPENDIX K: States with Automatic Sealing Laws	107
APPENDIX L: State Sealing Data	109
Mandatory Minimum Sentences	111
APPENDIX A: Felony Offenses in Virginia that Require a Mandatory Minimum Sentence.....	142
APPENDIX B: Misdemeanor Offenses in Virginia that Require a Mandatory Minimum Sentence	152
Sex Trafficking – Vacatur of Convictions and Data Collection	156
APPENDIX A: Criminal Conviction Relief Statutes for Sex Trafficking Victims	173
APPENDIX B: States with Specific Offenses Eligible for Criminal Conviction Relief for Sex Trafficking Victims.....	176
Virginia Pre-Trial Data Project Update.....	178

AUTHORITY OF THE CRIME COMMISSION

The Virginia State Crime Commission (“Crime Commission”) was established as a legislative agency in 1966. The Crime Commission is a criminal justice agency in accordance with Virginia Code § 9.1-101. The purpose of the Crime Commission is to study, report, and make recommendations on all areas of public safety and protection (Virginia Code § 30-156 *et seq.*). In doing so, the Crime Commission endeavors to:

- ascertain the causes of crime and recommend ways to reduce and prevent it;
- explore and recommend methods of rehabilitating convicted individuals;
- study compensation of persons in law enforcement and related fields; and,
- study other related matters, including apprehension, trial, and punishment of criminal offenders.

The Crime Commission makes recommendations and assists other commissions, agencies, and legislators on matters related to Virginia’s criminal justice system. The Crime Commission cooperates with the executive branch of state government, the Attorney General's office, and the judiciary, who are in turn encouraged to cooperate with the Crime Commission. The Crime Commission also cooperates with other state and federal governments and agencies.

The Crime Commission consists of 13 members – 6 members of the House of Delegates, 3 members of the Senate, 3 non-legislative citizen members appointed by the Governor, and the Attorney General or his designee. Delegates are appointed by the Speaker of the House of Delegates in accordance with the principles of proportional representation contained in the Rules of the House of Delegates. Senators are appointed by the Senate Committee on Rules.

MEMBERS OF THE CRIME COMMISSION

HOUSE OF DELEGATES APPOINTEES

The Honorable Charniele L. Herring, Chair
The Honorable Les R. Adams
The Honorable Christopher E. Collins*
The Honorable Paul E. Krizek
The Honorable Joseph C. Lindsey*
The Honorable Michael P. Mullin

SENATE APPOINTEES

The Honorable John S. Edwards, Vice-Chair
The Honorable L. Louise Lucas
The Honorable Scott A. Surovell

ATTORNEY GENERAL

Erin B. Ashwell, Chief Deputy, Office of Attorney General,
Designee for Attorney General Mark R. Herring

GOVERNOR'S APPOINTEES

Chief Larry D. Boone, Chief of Police, Norfolk Police Department
Lori Hanky Haas, Virginia State Director, The Coalition to Stop Gun Violence
Larry D. Terry, II, Ph. D., Executive Director, Weldon Cooper Center for Public Service at
the University of Virginia

CRIME COMMISSION STAFF

Kristen J. Howard, Executive Director
Christina Barnes Arrington, Ph.D., Senior Methodologist
Colin L. Drabert, Deputy Director
Meghan R. Gaulding, Policy Analyst
Kashea P. Kovacs, Research Analyst
Jacob M. Lubetkin, Staff Attorney
Amanda M. Muncy, Staff Attorney
Tracy M. Roe, Policy and Operations Analyst
DeVon E. Simmons, Staff Attorney

Patrick Henry Building
1111 East Broad Street, Suite B036
Richmond, Virginia 23219
Website: <http://vscc.virginia.gov>

**Delegates Collins and Lindsey resigned as members of the House of Delegates on June 28, 2020, and November 15, 2020, respectively. The Crime Commission currently has two vacancies from the House of Delegates.*

2020 EXECUTIVE SUMMARY OF ACTIVITIES

The Crime Commission engaged in a wide variety of studies and projects throughout 2020. Crime Commission staff continued work on the *Virginia Pre-Trial Data Project* while also conducting several new studies, including earned sentence credits, expungement and sealing of criminal records, mandatory minimum sentences, and the vacatur of convictions for sex trafficking victims.

The Crime Commission held a meeting on August 31, 2020, to hear staff presentations on the expungement and sealing of criminal records and earned sentence credits. At the meeting, members endorsed legislation to create a system in Virginia to automatically seal numerous felony and misdemeanor convictions, as well as criminal charges that did not result in a conviction, on individuals' criminal history records and in court records. Members also endorsed legislation to increase and retroactively apply the maximum amount of earned sentence credits that an inmate can be awarded to reduce their overall term of incarceration.

The Crime Commission also held a meeting on January 5, 2021, to hear staff presentations on mandatory minimum sentences, the *Virginia Pre-Trial Data Project*, and the vacatur of convictions for sex trafficking victims. Members endorsed legislation which:

- Repealed all mandatory minimum sentences in the Code of Virginia;
- Allowed for the possible re-sentencing of inmates who remained incarcerated for a felony offense requiring a mandatory minimum sentence, except for Class 1 felonies and inmates with a mandatory minimum sentence of life imprisonment;
- Required the Virginia Criminal Sentencing Commission to annually collect and report on pre-trial data and to make such data publicly available;
- Mandated that the Crime Commission provide the October 2017 dataset from the *Virginia Pre-Trial Data Project* to the Virginia Criminal Sentencing Commission, which must then make the dataset publicly available;
- Created a process for sex trafficking victims who were convicted or adjudicated delinquent of prostitution, solicitation of prostitution, or maintaining a bawdy place to have their convictions or adjudications vacated by a circuit court; and,
- Divided Virginia's prostitution statute (Va. Code § 18.2-346) into two separate Code sections to better distinguish between prostitution and solicitation of prostitution offenses.

Crime Commission legislation was ultimately enacted to seal criminal history and court records (automatic and petition-based sealing), increase and retroactively award earned sentence credits to state responsible inmates, replicate the *Virginia Pre-Trial Data Project* and make such pre-trial data available to the public, allow for the vacatur of certain convictions and adjudications of delinquency for sex trafficking victims, and divide Virginia's prostitution statute into two Code sections. Legislation from the Crime Commission to repeal all mandatory minimum sentences in the Code of Virginia was left in a conference committee between the Senate and the House of Delegates.

Summaries of Crime Commission legislation introduced during the 2020 Special Session and 2021 Regular Session of the General Assembly are included within each report.

Additional information about these studies and presentations are available on the agency website at vscc.virginia.gov.



STUDY HIGHLIGHTS



EARNED SENTENCE CREDITS

Study Highlights

June 2021

42 states, including Virginia, award sentence reduction credits for good behavior, program participation, or both.

Per VADOC operating procedures, earned sentence credits are awarded based on four classification levels:

- Level I: 4.5 days for every 30 days served
- Level II: 3.0 days for every 30 days served
- Level III: 1.5 days for every 30 days served
- Level IV: no earned sentence credits awarded

Inmates in the ESC system in the VADOC must serve at least 85% of their sentence.

83% (10,395 of 12,519) of state responsible inmates released in Virginia in CY2019 were being awarded ESC at Level I.

Virginia's re-incarceration rate is currently one of the lowest in the nation.

Contact Us:

<http://vscc.virginia.gov>
vsccinfo@vscc.virginia.gov

What are sentence reduction credits?

Sentence reduction credits can be awarded to reduce the length of confinement for eligible inmates who meet specific requirements set forth in statute, rules, regulations, or department policies. These credits generally consist of either:

- Earned sentence credits (ESC): awarded for completing or participating in various programs, such as education, vocation, rehabilitation, or treatment courses, or for completing work assignments.
- Good time credits (GTC): awarded for complying with institutional rules.

Key Study Findings

Staff examined sentence reduction credits in Virginia and other states and found:

- The Code of Virginia includes three sentence reduction credit systems within the Virginia Department of Corrections (VADOC): earned sentence credits, good conduct allowance, and good conduct time. The earned sentence credits system, as implemented on January 1, 1995, is the most recent of the systems.
- VADOC inmates are classified within one of the three sentence reduction credit systems based on either the date of their criminal offense or the date on which they were convicted.
- Inmates classified in the earned sentence credits system must serve at least 85% of their sentence and are not eligible for parole.
- Virginia's earned sentence credits system consists of four classification levels as established by VADOC policy.
- VADOC offers a wide variety of programming, including education, treatment, and work programs, to inmates in state correctional facilities.
- VADOC programs frequently have substantial waitlists, with an average wait time of 15 months.
- 42 states have some type of sentence reduction credit system.
- The maximum accrual rates for sentence reduction credits varies significantly across states for both earned sentence credits and good time credits.
- Some states exclude certain inmates from being awarded sentence reduction credits based on type of offense or sentence or an inmate's classification level.

Crime Commission Legislation

Crime Commission members endorsed legislation during the 2020 Special Session of the General Assembly to make the following changes to Virginia's earned sentence credit system:

- Establish a four-level classification system in the Code of Virginia for the awarding and calculation of earned sentence credits;
- Increase the maximum earned sentence credits that can be awarded from 4.5 days per 30 days served up to 30 days per 30 days served; and,
- Award earned sentence credits retroactively at the increased rates.



EXPUNGEMENT AND SEALING OF CRIMINAL RECORDS

Study Highlights

Revised June 2021

A criminal charge or conviction can impact many areas of a person's life, such as:

- Employment
- Higher education
- Financial aid
- Housing
- Immigration
- Loan eligibility and credit
- Professional licensing
- Social stigma

Expungement provides a mechanism to:

- Address the collateral consequences caused by a criminal charge or conviction; and,
- Allow conviction relief for individuals in communities that have been disparately impacted by the criminal justice system.

There are approximately 1.59 million individuals in the Central Criminal Records Exchange with *at least* one criminal conviction as of July 31, 2020 according to the Virginia State Police.

Crime Commission Legislation

Crime Commission members endorsed legislation for introduction during the 2020 Special Session and the 2021 Regular Session of the General Assembly to:

1. Create an automatic expungement process to remove specified felony and misdemeanor convictions, deferred dispositions, non-convictions, and incidents of mistaken identity and unauthorized use of identifying information from criminal history records and to seal related court records.
2. Limit access and dissemination of expunged criminal and court records.
3. Provide protections in relation to employment, education, and housing applications for individuals who have had their criminal records expunged.
4. Require that third parties who collect and disseminate criminal records must delete records that have been expunged or face civil liability.
5. Provide employers with liability immunity when hiring workers who have had their criminal records expunged.

What is Virginia's expungement process?

Virginia law currently authorizes a petition-based process only for expungement of non-convictions from criminal history records (Virginia Code § 19.2-392.2). The current expungement process in Virginia requires the individual charged with the offense to file a petition and fingerprints with the circuit court, pay a filing fee, and possibly attend a hearing on the matter. Generally, the circuit court has broad discretion in whether to grant or deny the petition for expungement. If granted, the charge is removed from the person's criminal history record, access to the record is restricted, and a court order is required to view the sealed record.

How many expungement orders are granted each year?

Virginia State Police received an average of approximately 4,000 expungement orders per year for non-convictions (CY2017 to CY2019).

How do other states address expungement?

Virginia law does not currently allow for expungement of convictions or deferred dispositions; whereas, a sizeable number of states authorize such actions:

- 41 states allow misdemeanor convictions to be expunged or sealed; and,
- 36 states allow felony convictions to be expunged or sealed.

States that allow for expungement or sealing of convictions typically place some limitations on the type and number eligible offenses, the timeframe for relief, and whether restitution must be paid before a conviction can be expunged or sealed. For instance, misdemeanor convictions are generally eligible for expungement or sealing after 3-5 years and felony convictions after 5-10 years.

5 states have enacted legislation to automatically expunge numerous criminal charges and convictions:

- California
 - Michigan
 - New Jersey
 - Pennsylvania
 - Utah
-

Currently, only Pennsylvania is automatically expunging large numbers of criminal records in an automated manner.

New Jersey has allocated \$15 million for the implementation of an automatic expungement system.

Other states with more limited automatic expungement processes include Illinois, New York, South Dakota, and Vermont.

Other states considering the enactment of automatic expungement laws include Connecticut, Louisiana, North Carolina, and Washington.

Contact Us:

vscc.virginia.gov
vsccinfo@vscc.virginia.gov

What is automatic expungement?

Automatic expungement is initiated by the Commonwealth and allows for a defendant to receive conviction relief without having to file a petition or pay any fees. Access to an individual's expunged criminal history and court records would be limited to specific purposes as determined by the General Assembly.

Do other states automatically expunge criminal records?

Staff identified 5 states that have enacted legislation to automatically expunge convictions and non-convictions for various criminal offenses:

California

- Timeframes for automatic expungement of non-convictions vary based on whether criminal proceedings were initiated.
- Misdemeanors and infractions are automatically expunged after 1 year from conviction if not sentenced to probation.
- An offense is automatically expunged if a person is sentenced only to probation and the person completes that sentence without a revocation of probation.
- A person will not qualify for automatic expungement if they are a registered sex offender, on active probation, serving a sentence for another offense, or have pending criminal charges.

Michigan

- Non-convictions are automatically expunged, subject to certain conditions.
- Certain misdemeanor convictions are automatically expunged after 7 years from the imposition of the sentence.
- Certain felony convictions are automatically expunged after 10 years from the imposition of the sentence or the completion of any term of imprisonment.
- Felonies and certain misdemeanors cannot be automatically expunged if a person has charges pending or has been convicted of another offense.
- No more than 2 felony and 4 misdemeanor convictions in total can be automatically expunged, excluding low-level misdemeanors.

New Jersey

- Enacted legislation in 2019 to implement an automated expungement system. A task force has been created to examine technological, fiscal, and practical issues and challenges of such a system.

Pennsylvania

- Non-convictions are automatically expunged.
- Certain misdemeanor convictions are automatically expunged after 10 years if there are no subsequent misdemeanor or felony convictions and all court-ordered restitution has been paid.
- Certain prior convictions will disqualify a person from automatic expungement, such as a felony, four misdemeanors, indecent exposure, and various other offenses.

Utah

- Non-convictions are automatically expunged.
- Dismissals without prejudice are automatically expunged after 180 days.
- Certain misdemeanor convictions are expunged after 5 – 7 years.
- A person will not qualify for automatic expungement if they have unpaid fines, fees, or restitution, pending criminal charges, or certain prior convictions on their criminal records.



MANDATORY MINIMUM SENTENCES

Study Highlights

Revised June 2021

The Virginia Code contains 224 distinct mandatory minimum offenses across 34 criminal statutes, including:

- 162 felonies
- 62 misdemeanors

The most frequent mandatory minimum convictions over the last five years were for driving while intoxicated offenses.

Of the nearly 35,000 state responsible inmates incarcerated on June 30, 2019:

- 4% were serving only a mandatory minimum sentence;
- 27% were serving a combined mandatory minimum and non-mandatory minimum sentence;
- 62% were serving only a non-mandatory minimum sentence; and,
- 6% were serving a life, death, or three strikes sentence.

Contact Us:

vscc.virginia.gov
vsccinfo@vscc.virginia.gov

What is a mandatory minimum sentence?

A “mandatory minimum” sentence is a minimum punishment that must be imposed by a court when a person is convicted of a specific offense. Mandatory minimum sentences vary greatly by offense and can range from two days to life imprisonment. Courts often have discretion to impose a sentence above the mandatory minimum.

Are mandatory minimum sentences effective?

Research on the effectiveness of mandatory minimum sentences, as measured by deterrence and incapacitation, is inconclusive. The differences in penalties, and in the types of offenses involved, prevent general conclusions from being made. Some scholars have contended that there is no credible evidence of any deterrent effect, while others have found marginal deterrent effects or short-term deterrent effects. Furthermore, little evidence exists that lengthy prison sentences have a greater than marginal effect in decreasing recidivism.

Do mandatory minimum sentences result in disparate impacts?

Research has consistently found that mandatory minimum sentences contribute to overall disparities within the criminal justice system. Based on an analysis of state-responsible inmates incarcerated on June 30, 2019, the Virginia Department of Corrections found that 41% of Black inmates had one or more mandatory minimum sentences as compared to 26% of White inmates. The analysis also noted that male inmates had more mandatory minimum sentences than female inmates. While this analysis clearly demonstrates a disproportionate impact on Blacks and males, the exact reasons for these disparities remain unknown.

Which Virginia offenses have mandatory minimum sentences?

The majority of felony mandatory minimum sentences are for driving while intoxicated, narcotics, child pornography, and weapon offenses. Nearly all misdemeanor mandatory minimum sentences are for driving while intoxicated offenses. Mandatory minimum offenses comprised a very small proportion of the total charges and convictions in Virginia courts over the past five years.

Crime Commission Legislation

Crime Commission members endorsed legislation for introduction during the 2021 Regular Session of the General Assembly to:

- Repeal all mandatory minimum sentences in the Code of Virginia; and,
- Allow for possible re-sentencing of anyone who is currently serving a term of incarceration for a felony mandatory minimum offense, except for Class 1 and mandatory minimum life felony offenses.



SEX TRAFFICKING – VACATUR OF CONVICTIONS AND DATA COLLECTION

Study Highlights

Revised June 2021

Sex trafficking victims often lack the criminal intent to commit certain crimes related to their trafficking. Vacatur provides a remedy for victims to remove certain convictions from their criminal history records and a means to alleviate the collateral consequences of those convictions.

45 states provide conviction relief for victims of sex trafficking:

- 26 states vacate convictions
- 13 states expunge convictions
- 6 states seal convictions

5 states, including Virginia, provide no conviction relief for victims of sex trafficking.

All 45 states provide conviction relief for prostitution offenses. However, states vary greatly in terms of which other offenses qualify for relief:

- 17 states: prostitution offenses only
- 15 states: broad ranges of offenses
- 9 states: specified offenses
- 4 states: all offenses

Contact Us:

vscc.virginia.gov
vsccinfo@vscc.virginia.gov

What is vacatur?

Vacatur is the removal of a criminal conviction as if the person had never been found guilty of an offense. The Virginia Code currently allows convictions to be vacated under the writs of actual innocence statutes (Va. Code §§ 19.2-327.2 *et seq.* and 19.2-327.10 *et seq.*).

How can vacatur help sex trafficking victims?

Vacatur is a mechanism which can provide conviction relief to sex trafficking victims who lacked the criminal intent to commit certain offenses related to their trafficking. This conviction relief can mitigate the collateral consequences of certain criminal convictions directly related to their sex trafficking. Collateral consequences can include bars to employment, housing, education, and financial assistance. Vacatur can thus assist victims in stabilizing their lives and establishing themselves outside of the commercial sex industry.

Study Findings

During a 2018 study on sex trafficking by the Crime Commission, staff found that sex trafficking is a serious problem in Virginia; however, due to the dynamics of the commercial sex industry, a lack of data, and underreporting, the full scope of the problem is difficult to determine. Staff further found that victims of sex trafficking are often vulnerable, struggling with dysfunctional families, past abuse, trauma, drug dependence, and low self-esteem. Sex traffickers use these vulnerabilities to recruit victims into the commercial sex industry and frequently recruit juveniles.

Why are sex trafficking victims frequently treated as criminals?

Sex trafficking victims engage in a variety of criminal activity as a result of manipulation, coercion, deception, force, or intimidation by their trafficker. These victims frequently form a bond with their trafficker, and therefore do not see themselves or self-identify as victims until after they have left the commercial sex industry. These dynamics cause significant challenges in identifying victims, and therefore the criminal justice system often treats victims of sex trafficking as criminals.

Crime Commission Legislation

Crime Commission members unanimously endorsed legislation for introduction during the 2021 Regular Session of the General Assembly to:

- Create a petition-based process for victims of sex trafficking who were convicted or adjudicated delinquent of prostitution, solicitation of prostitution, or maintaining a bawdy place to have their conviction or adjudication vacated by a circuit court; and,
- Divide Virginia's prostitution statute (Va. Code § 18.2-346) into two separate Code sections to more clearly distinguish between prostitution and solicitation of prostitution offenses.



VIRGINIA PRE-TRIAL DATA PROJECT

Study Highlights

Revised June 2021

The *Virginia Pre-Trial Data Project* is a first-of-its-kind dataset providing vital baseline measures of Virginia's pre-trial system across all district and circuit courts for the entire month of October 2017.

The dataset includes nearly 23,000 adult defendants charged with a criminal offense in October 2017 and tracked through final case disposition.

Defendants were classified based on their ultimate pre-trial release mechanism or detention status:

- Released on summons
- Released on PR/unsecured bond (with or without pretrial services agency supervision)
- Released on secured bond (with or without pretrial services agency supervision)
- Held with secured bond entire pre-trial period
- Held without bond entire pre-trial period

What is the Virginia Pre-Trial Data Project?

The *Virginia Pre-Trial Data Project* is an unprecedented, collaborative effort to collect data relating to the overall pre-trial process across Virginia. All three branches of government and numerous state and local agencies participated in the Project, including the Virginia State Crime Commission, Virginia Criminal Sentencing Commission, Alexandria Circuit Court, Compensation Board, Department of Criminal Justice Services, Department of Corrections, Fairfax Circuit Court, Office of the Executive Secretary of the Supreme Court of Virginia, and Virginia State Police. The Virginia Criminal Sentencing Commission served as the central repository of the data provided by these entities and spent a tremendous amount of time organizing the complex information into a single dataset for analysis by Crime Commission staff.

Crime Commission Legislation

Crime Commission members unanimously endorsed legislation for introduction during the 2021 Regular Session of the General Assembly to:

- Require the Virginia Criminal Sentencing Commission to annually collect and report on pre-trial data and make such data publicly available so that it can be downloaded or viewed on an interactive data dashboard tool that displays aggregated data based on characteristics or indicators selected by the user; and,
- Mandate that the Crime Commission provide the October 2017 dataset from the *Pre-Trial Data Project* to the Virginia Criminal Sentencing Commission who will then make the dataset publicly available by October 1, 2021.

Crime Commission Request for Additional Study

Crime Commission staff found that the procedures when a detained defendant first appears before the court vary greatly across the Commonwealth and within courts in the same jurisdiction. Staff determined that addressing these variances will involve many logistical and resource considerations and will require collaboration amongst impacted stakeholders. In order to address this issue, the Crime Commission unanimously endorsed staff's recommendation to:

- Request that the Committee on District Courts (Va. Code § 16.1-69.33) study and make recommendations on procedures and practices for appointing an attorney and conducting a bond hearing when any detained defendant first appears before the court.

What are some of the statewide findings of the Project?

At its January 5, 2021, meeting, Crime Commission members were presented with initial statewide descriptive findings for the 15,715 defendants whose October 2017 contact event related to a new arrest. Detailed tables of statewide descriptive findings and a preliminary codebook are available on the agency website.

Hundreds of variables were collected for each defendant in the cohort relating to:

- Court appearance
- Public safety
- Demographics
- Indigency
- Classification of charges
- Prior criminal history
- Risk levels
- Bond information
- Time between contact event and release
- Time between release and any arrest for a new in-state jailable offense or charge for failure to appear
- Time between contact event and final case disposition
- Final case disposition
- Sentence type, if convicted

Contact Us:

vscc.virginia.gov
vsccinfo@vscc.virginia.gov

Key Statewide Findings:

- 87% (13,731 of 15,715) of defendants were ultimately released from custody during the pre-trial period. However, the number of days until release varied considerably across defendants.
- Most defendants released during the pre-trial period were not arrested for a new jailable in-state offense or charged with failure to appear.
- 22% (3,001 of 13,731) of defendants released during the pre-trial period were arrested for a new in-state offense punishable by incarceration.
- New arrests were primarily for misdemeanor offenses, with only 8% (1,068 of 13,731) of defendants arrested for a new felony offense and 2% (301 of 13,731) of defendants arrested for a new violent felony offense.
- 13% (1,715 of 13,731) of defendants released during the pre-trial period were charged with failure to appear.
- Males, defendants between the ages of 18-35, and Blacks were overrepresented across all pre-trial release mechanisms and detention categories. This disparity was even more pronounced for males and Blacks who were detained for the entire pre-trial period.
- Indigent defendants comprised *at least* 59% (6,785 of 11,426) of all individuals released on bond or detained.
- Median bond amounts ranged between \$2,000-\$3,500 and did not vary widely across defendants regardless of type of charge or pre-trial release mechanism.
- Public safety and court appearance rates, as well as demographics and risk levels of defendants, were very similar in both localities served and not served by pretrial services agencies.

It is important to note that statewide findings should not be generalized to the locality level. Localities vary widely in terms of demographics, socio-economic factors, law enforcement and court practices, and resources available.

What are the next steps?

Staff plans to conclude additional analyses of the October 2017 dataset. This will include a more thorough examination of statewide findings and preparation of descriptive findings for each locality in the Commonwealth. A data codebook for each of the variables in the dataset will also be provided. Staff will publish a detailed final report in 2021.

Additionally, staff were directed to continue this study for another year in order to examine additional aspects of the pre-trial process and the expansion of pre-trial diversion programs in the Commonwealth.



STUDY REPORTS

EARNED SENTENCE CREDITS

EXECUTIVE SUMMARY

During the 2020 Regular Session of the General Assembly, the House Courts of Justice Committee referred legislation to the Crime Commission (House Bill 1532) which proposed numerous changes to the earned sentence credits system within the Virginia Department of Corrections (VADOC).¹ The Executive Committee of the Crime Commission directed staff to study earned sentence credits and the use of such credits in Virginia. Staff found that earned sentence credits are often intertwined with good time credits, and therefore staff examined both of these types of sentence reduction credit systems.

Sentence reduction credits can reduce the length of confinement for eligible inmates who meet specific requirements set forth in statute, rules, regulations, or department policies. These credits are generally awarded in the form of either earned sentence credits or good time credits. Earned sentence credits are awarded to eligible inmates for completing or participating in various institutional programs, such as educational, vocational, rehabilitation, or treatment courses, or for completing work assignments. Good time credits are awarded to eligible inmates for complying with institutional rules.

As part of this study, staff examined Virginia's current sentence reduction credit systems as set forth in the Code of Virginia and in VADOC Operating Procedures and found that:

- The Code of Virginia includes three sentence reduction credit systems: Earned Sentence Credits, Good Conduct Allowance, and Good Conduct Time;
- Virginia's earned sentence credits system consists of four classification levels as established by VADOC policy;
- The maximum earned sentence credits that can be awarded to an inmate is 4.5 days for every 30 days served, meaning that an inmate who is classified within the earned sentence credits system must serve at least 85% of their total sentence; and,
- Previously awarded sentence reduction credits can be forfeited by an inmate for a violation of VADOC rules or regulations.

Staff also reviewed VADOC institutional programming at state correctional facilities and found that:

- VADOC offers a wide variety of programming to inmates while incarcerated in state correctional facilities;

- VADOC programs frequently have substantial waitlists;
- The time required to complete VADOC programs can range from a few hours to several years; and,
- Both VADOC and private entities provide reentry services to inmates upon their release from incarceration.

Furthermore, staff obtained and analyzed data on the state responsible (SR) inmate population in Virginia. An SR inmate is a person convicted of a felony and sentenced to 1 year or more of incarceration, or a person convicted of a parole violation and sentenced to 2 years or more of incarceration. On June 30, 2019, the total VADOC confined population included 34,719 SR inmates.² Staff examined the demographics of these SR inmates, types of sentences served (most serious offense type) among recently released SR inmates, sentence reduction credit classification levels of recently released SR inmates, and recidivism rates among SR inmates released between FY2011 and FY2015. During this broad review, staff found that:

- The SR inmate population in Virginia decreased by 8% between FY2015 and FY2019;
- Individuals who are male, Black, or between the ages of 25 and 44 were overrepresented in Virginia's SR inmate population;
- The number of SR inmates being held in local or regional jails has steadily declined over the past 5 years;
- Over the past decade, an average of 12,400 SR inmates were released annually in Virginia;
- The majority of SR inmates released from custody in CY2019 had a nonviolent offense listed as their most serious offense type;
- The majority of SR inmates released from custody in CY2019 were being awarded sentence reduction credits at the maximum accrual rate (Class Level I);
- Research demonstrates a link between certain predictive factors and recidivism among SR inmates released in Virginia; and,
- Virginia's re-incarceration rate is currently one of the lowest in the nation.

Finally, staff conducted a legal analysis of sentence reduction credit statutes across the United States and found that:

- 42 states award some form of sentence reduction credits;
- The maximum accrual rates for sentence reduction credits vary significantly across states;

- States may award sentence reduction credits at varying rates based upon an inmate's current sentence, prior criminal record, or classification level;
- Some states specifically exclude certain inmates from being awarded sentence reduction credits; and,
- Sentence reduction credits can be forfeited or withheld in most states for institutional infractions or new violations of law.

Crime Commission members reviewed study findings at the August 31, 2020, Commission meeting.³ Members voted to endorse legislation to amend Virginia's earned sentence credits system in a manner that was substantially similar to the proposals set forth in House Bill 1532 (Del. Don L. Scott) as introduced during the 2020 Regular Session of the General Assembly.

Legislation endorsed by the Crime Commission was introduced during the 2020 Special Session of the General Assembly (House Bill 5148 - Del. Don L. Scott).⁴ The bill underwent numerous revisions throughout the legislative process before it was passed by the General Assembly and signed into law by the Governor.⁵ The legislation has a delayed enactment and will take effect on July 1, 2022.

BACKGROUND

Crime Commission staff engaged in the following activities as part of its study on sentence reduction credits, including both earned sentence credits and good time credits:

- Reviewed available literature and relevant reports;
- Examined sentence reduction credit statutes in the Code of Virginia;
- Reviewed the operating procedures of the Virginia Department of Corrections;
- Requested data on the state responsible inmate population in Virginia;
- Analyzed sentence reduction credit statutes across the United States; and,
- Consulted with key stakeholders.

Defining Types of Sentence Reduction Credits

Sentence reduction credits can reduce the length of confinement for eligible inmates that comply with institutional rules and/or participate in rehabilitative programs or work assignments. Sentence reduction credits are generally awarded in the form of either earned sentence credits or good time credits, which for purposes of this report are defined as follows:

- Earned sentence credits: credits awarded to eligible inmates for completing or participating in various programs, such as educational, vocational, rehabilitation, or treatment courses, or for completing work assignments. These credits may be a one-time award upon completion of a program, or may be awarded on an on-going basis for satisfactory program participation.
- Good time credits: credits awarded to eligible inmates for complying with institutional rules. These credits are typically awarded on a monthly basis.

Earned sentence credits can be awarded in addition to, or combined with, good time credits. If earned sentence credits are awarded in addition to good time credits, the two sentence reduction credit systems will act independently of one another, and therefore may have different accrual rates, eligibility requirements, and exclusions. If earned sentence credits are awarded in combination with good time credits, then there is typically one credit accrual rate that is contingent upon both program participation and good behavior.

Scope of the Study

Two key points must be noted when examining sentence reduction credit systems in Virginia. First, sentence reduction credit systems only apply to state responsible (SR) inmates, which includes persons convicted of a felony and sentenced to 1 year or more of incarceration, or persons convicted of a parole violation and sentenced to 2 years or more of incarceration.⁶ Thus, when analyzing data on Virginia's inmate population during this study, staff limited its analysis to only SR inmates. Second, Virginia has a sentence reduction credit system that is referred to as an "earned sentence credits" system; however, that earned sentence credits system awards credits based on a combination of both compliance with institutional rules and participation in programming.⁷

Additionally, when examining the sentence reduction credit systems in other states, staff only examined the primary sentence reduction credit statutes of each state. Staff did not thoroughly review the rules, regulations, department policies, or other statutes governing sentence reduction credits in any state other than Virginia. Therefore, the analysis of sentence reduction credit systems in other states in this report is limited to these statutes; however, states may have additional caveats or exceptions to their sentence reduction credit systems in other rules, regulations, department policies, or statutes, such as penalty statutes.

VIRGINIA'S SENTENCE REDUCTION CREDIT SYSTEMS

The Code of Virginia includes three sentence reduction credit systems: Earned Sentence Credits, Good Conduct Allowance, and Good Conduct Time.

State responsible (SR) inmates in Virginia may be eligible for sentence reduction credits that reduce the length of their confinement. The particular sentence reduction credit system that an inmate may qualify for is based on either the date of conviction or the date the criminal offense was committed:

- Convicted on or before June 30, 1981: Good Conduct Time System (GCT);⁸
- Convicted between July 1, 1981, and December 31, 1994: Good Conduct Allowance System (GCA);⁹ and,
- Offense committed on or after January 1, 1995: Earned Sentence Credits System (ESC).¹⁰

According to data from the Virginia Department of Corrections (VADOC), 91% (31,742 of 34,719) of the confined SR inmate population on June 30, 2019, fell under the ESC system, while 9% (2,977 of 34,719) fell under either the GCT or the GCA systems. Inmates in the GCT and GCA systems are eligible for both sentence reduction credits and parole, while inmates in the ESC system eligible for earned sentence credits, but are not eligible for parole. This report will focus primarily on the most recently implemented system, ESC, which applies to the large majority of Virginia SR inmates.

Good Conduct Time (GCT) System

State responsible inmates confined for a felony conviction that was entered on or before June 30, 1981, may be eligible for sentence reduction credits under the GCT system.¹¹ These inmates may be awarded good conduct credits at a flat rate of 10 days per 20 days served.¹² Good conduct credits are awarded based on an inmate's adherence to written institutional rules and regulations.¹³ These inmates can also be awarded an additional 1 to 5 days of credits per month for participation in vocational or educational programs, or for "unusual progress towards rehabilitation."¹⁴ Unlike the other two sentence reduction credit systems in Virginia, all credits awarded under the GCT system can reduce an inmate's term of imprisonment for the purpose of determining their parole eligibility date.¹⁵

Good Conduct Allowance (GCA) System

State responsible inmates confined for a felony conviction that was entered between July 1, 1981, and December 31, 1994, may be eligible for sentence reduction credits under the GCA system.¹⁶ Additionally, inmates who are confined for a conviction entered prior to July 1, 1981, and who were eligible for the GCT system, can opt into the GCA system.¹⁷ Under the GCA system, the number of good conduct allowance credits awarded to eligible inmates is based on a four-level classification system established by the Code of Virginia.¹⁸ There is one credit accrual rate in the GCA system that includes both compliance with institutional rules and program participation.¹⁹ Inmates in Class I are awarded the maximum accrual of 30 days per 30 days served, inmates in Class II are awarded 20 days per 30 days served, inmates in Class III are awarded 10 days per 30 days served, and inmates in Class IV are not awarded any credits.²⁰ Credits awarded under the GCA system can be applied to reduce an inmate's maximum term of confinement; however, only one-half of the credits can be applied to reduce an inmate's parole eligibility date.²¹

Earned Sentence Credits (ESC) System

State responsible inmates confined for a felony offense committed on or after January 1, 1995, may be eligible to receive sentence reduction credits under the ESC system.²² Virginia's ESC system was implemented in 1995 in conjunction with the abolition of parole and the enactment of truth-in-sentencing.²³ Earned sentence credits are awarded based on adherence to institutional rules and participation in programs or work assignments through the VADOC.²⁴ Under the ESC system, an inmate can be awarded up to 4.5 days of earned sentence credits for every 30 days served, with a maximum reduction of 15% of their total sentence.²⁵ Inmates who refuse to accept a program assignment, and inmates who have been sentenced to life imprisonment, are not eligible to be awarded earned sentence credits.²⁶

Virginia's ESC system consists of four classification levels as established by VADOC policy.

While the Code of Virginia establishes the maximum accrual rate and general eligibility requirements for earned sentence credits, the process for administering the ESC system is set forth in VADOC policy. According to VADOC operating procedures, earned sentence credits are awarded based on four classification levels. The maximum award at each classification level is as follows:²⁷

- Class Level I: 4.5 days for every 30 days served

- Class Level II: 3.0 days for every 30 days served
- Class Level III: 1.5 days for every 30 days served
- Class Level IV: no earned sentence credits awarded

An inmate's classification level is based on an annual evaluation conducted by VADOC counselors.²⁸ Infractions, work assignments, and reentry planning, which includes participation in educational, vocational, and treatment programs, are the basis for this evaluation.²⁹ A numerical score is rendered after the evaluation and is used to determine an inmate's classification level.³⁰ Generally, inmates in Class Level I participate in programming and have no or limited institutional infractions.³¹ State responsible inmates are initially assigned to Class Level I; however, this classification can be adjusted if the inmate receives any disciplinary infractions while awaiting transfer to a VADOC facility.³² Inmates in Class Level II participate in programming, but have some minor institutional infractions, while inmates in Class Level III participate in programming, but have multiple institutional infractions.³³ Finally, inmates in Class Level IV either do not participate in programming, have serious institutional infractions, or are not eligible to be awarded earned sentence credits.³⁴

While classification levels are evaluated annually by a VADOC counselor, an inmate's classification level can also be adjusted following an administrative review. These administrative reviews, which can be held at any time, generally occur when an inmate no longer appears to be eligible or suitable for their current classification level, such as when an inmate is removed from or refuses to participate in a program.³⁵ A formal due process hearing is required if there is the possibility of a reduction of an inmate's earning levels outside of the annual review.³⁶

Previously awarded sentence reduction credits can be forfeited by an inmate for a violation of VADOC rules or regulations.

Accumulated sentence reduction credits (under any of Virginia's three sentence reduction systems) can be partially or fully forfeited following a violation of prohibited behavior as set forth VADOC's *Code of Offenses*.³⁷ The *Code of Offenses* lists a variety of prohibited conduct by inmates that can be punished through VADOC disciplinary actions or criminal prosecution. The prohibited conduct varies from criminal violations to institutional infractions, such as killing or attempting to kill another person; inciting or participating in a riot; threat of extortion or blackmail; or, false statements against a VADOC employee.³⁸ The total number of sentence reduction credits that can be forfeited varies based on the

nature of the violation. For most violations, the number of sentence reduction credits forfeited is based on the seriousness of the violation, the circumstances surrounding the violation, and whether the inmate has prior disciplinary issues.³⁹ However, for certain violations, the VADOC operating procedures specifically mandate the number of sentence reduction credits that must be forfeited. For example, an attempting to escape violation will result in forfeiture of all sentence reduction credits, while a violation for refusing to provide a DNA sample (1st offense) will result in forfeiture of 90 days of sentence reduction credits.⁴⁰ Once sentence reduction credits have been forfeited, those credits generally cannot be restored to the inmate.⁴¹

VADOC offers a wide variety of programming to SR inmates while incarcerated in state correctional facilities.

As previously mentioned, SR inmates must participate in programs in order to be awarded certain sentence reduction credits. A number of programs are offered by VADOC to SR inmates housed in state correctional facilities.⁴² The specific programs vary by facility, but can include cognitive, treatment, vocational, and educational programming.⁴³ According to data provided by VADOC, cognitive programs such as anger management, victim impact courses, problem-solving courses, topical seminars, and reentry planning/preparation, were among the programs with the highest rates of completion in CY2019.⁴⁴

VADOC programs frequently have substantial waitlists.

According to VADOC, while the wait time for SR inmates to enter a program varies, the combined average wait time for all counseling services, mental health, and educational programs is 15 months.⁴⁵ This wait time can be attributed to a variety of factors, such as lack of resources to fund a program, difficulty obtaining personnel to facilitate a program, or lack of physical space to offer a program.

Time required to complete VADOC programs can range from a few hours to several years.

The length of a VADOC program can vary from a few hours to several years. For example, orientation programs can last a few hours, substance abuse and cognitive programs can last a few weeks or months, and vocational and educational programs can last several years.⁴⁶ Additionally, there are some programs, such as mental health or substance abuse support groups, that are ongoing without an established end date.⁴⁷

Both VADOC and private entities provide reentry services to inmates upon their release from incarceration.

Various programs and resources are available to assist recently released inmates with successful reentry into society. VADOC offers a number of post-incarceration programs to individuals placed on community supervision upon release. Some of these programs include Family Reunification Seminars, Employment/Job Counseling, and Thinking for a Change - Peer Support.⁴⁸ Additionally, the PAPIS (Pre-release and Post-Incarceration Services) Virginia Reentry Coalition, which consists of nine organizations serving 96 jurisdictions throughout Virginia, provides recently released inmates with evidence-based recidivism reduction services, such as transitional housing, treatment, mentoring, job readiness, and employment placement services.⁴⁹ Finally, many localities across Virginia have Reentry Councils, which are comprised of various agencies and organizations working together to provide reentry services ranging from resource navigation to case management.⁵⁰

DATA ON VIRGINIA'S STATE RESPONSIBLE INMATE POPULATION

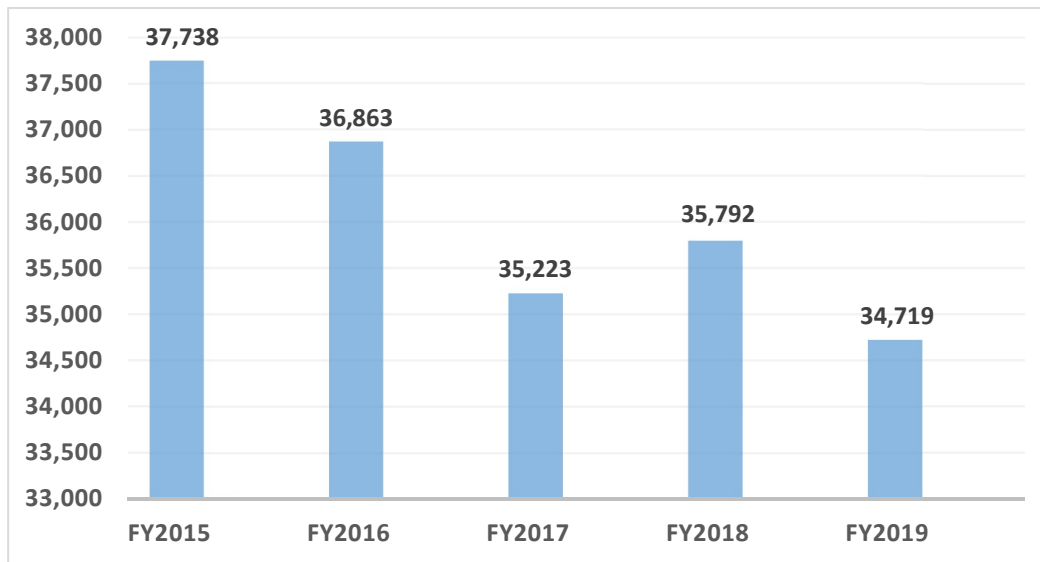
Staff examined both the SR confined inmate population and the population of recently released SR inmates in order to provide a complete picture of Virginia's sentence reduction credit systems. As such, staff requested data from VADOC related to the following:

- Overall SR confined population trends;
- Demographics of SR confined inmates;
- Number of SR inmates held in regional and local jails;
- Number of SR inmates released annually from VADOC;
- Types of sentences served (most serious offense type) among released SR inmates;
- Rates at which released SR inmates were being awarded earned sentence credits; and,
- Recidivism rates among released SR inmates.

The SR inmate population in Virginia decreased by 8% between FY2015 and FY2019.

As shown in Table 1, the overall SR inmate population in Virginia declined between FY2015 and FY2019.

Table 1: Total Virginia DOC State Responsible (SR) Confined Population, FY2015-FY2019



Source: Virginia Department of Corrections, *State Responsible Offender Population Trends*, FY2015-FY2019. The SR inmate population is based on the total number of SR inmates incarcerated on June 30 of the fiscal year indicated as extracted from VirginiaCORIS. The total includes SR inmates in DOC facilities and SR inmates housed in local and regional jails. Table prepared by Crime Commission staff.

Individuals who are male, Black, or between the ages of 25 and 44 were overrepresented in Virginia's SR inmate population.

Data revealed that both males and Black persons were overrepresented in the SR inmate population as compared to their percentage of Virginia's overall general population. Specifically, the U.S. Census Bureau estimated that as of July 1, 2019, Virginia's total population of approximately 8.5 million individuals was comprised of 49% males and 20% Black/African American individuals.⁵¹ However, when examining the demographics of the SR inmate population in Virginia on June 30, 2019, 92% (31,902 of 34,719) of inmates were male and 55% (19,198 of 34,719) of inmates were Black.⁵² Similarly, while the U.S. Census Bureau estimated that 27% of Virginia's population in 2019 was between the ages of 25 and 44, this same age group accounted for 60% (20,760 of 34,719) of the SR inmate population.⁵³

The number of SR inmates held in local or regional jails has steadily declined over the past 5 years.

Table 2 shows the number of SR inmates held in local or regional jails in Virginia at the end of each fiscal year for FY2015 to FY2019.⁵⁴ As seen in Table 2, the number of SR

inmates held in local or regional jails at the end of each fiscal year steadily declined over that 5 year time period.

Table 2: Number of SR Inmates Held in Local or Regional Jails

	Number of SR Inmates Held in Local or Regional Jails	% of Total SR Inmates Held in Local or Regional Jails	TOTAL SR Confined Population
FY2015	8,362	22%	37,738
FY2016	8,014	22%	36,863
FY2017	7,525	21%	35,223
FY2018	7,206	20%	35,792
FY2019	6,376	18%	34,719

Source: Virginia Department of Corrections, *State Responsible Offender Population Trends*, FY2015-FY2019. The SR inmate population is based on the total number of SR inmates incarcerated on June 30 of the fiscal year indicated as extracted from VirginiaCORIS. Table prepared by Crime Commission staff.

Over the past decade, an average of 12,400 SR inmates were released from custody annually in Virginia.

VADOC has released approximately 12,400 SR inmates per year since 2010, with 12,549 being released in CY2019.⁵⁵ The SR inmates released in CY2019 served an average total imposed sentence of 58 months (median=28 months).⁵⁶ The demographics of the SR inmates released in CY2019 were consistent with the overall SR confined inmate population, as 52% (6,470 of 12,549) of inmates released were White, 48% (6,010 of 12,549) were Black, 86% (10,776 of 12,549) were male, and 63% (7,885 of 12,549) were between the ages of 25 and 44.⁵⁷

The majority of SR inmates released from custody in CY2019 were serving a sentence for a nonviolent offense as their most serious offense type.

When looking at the SR inmates released during CY2019, 67% (8,367 of 12,549) were serving a sentence for a nonviolent most serious offense (MSO).⁵⁸ Larceny/fraud and drug sales/distribution were the most frequent overall MSO. This trend generally held when comparing the MSO across gender. Specifically, 22% (2,335 of 10,776) of male inmates and 40% (714 of 1,773) of female inmates had a larceny/fraud MSO, and 13% (1,435 of 10,776) of male inmates and 16% (276 of 1,773) of female inmates (16%) had a drug sales/distribution MSO.⁵⁹ Felony assault was the most common violent MSO, with 12% (1,322 of 10,776) of male inmates and 10% (178 of 1,773) of female inmates serving a sentence for this type of offense.⁶⁰

The majority of SR inmates released from custody in CY2019 were awarded sentence reduction credits at the maximum accrual rate (Level I).

According to VADOC data, 99.7% (12,519 of 12,549) of SR inmates released from custody in CY2019 were eligible to be awarded sentence reduction credits.⁶¹ Of these SR inmates released in CY2019:

- 83% (10,395 of 12,519) were awarded sentence reduction credits at Level I;
- 5% (599 of 12,519) were awarded sentence reduction credits at Level II;
- 4% (455 of 12,519) were awarded sentence reduction credits at Level III; and,
- 9% (1,070 of 12,519) were classified as Level IV, and thus not eligible for sentence reduction credits.⁶²

Research demonstrates a link between certain predictive factors and recidivism among SR inmates released in Virginia.

Recidivism data is regularly used to measure the effectiveness of policies and programs and can be defined in a number of different ways.⁶³ Recidivism is generally defined as a person's relapse into criminal activity or behavior.⁶⁴ VADOC measures recidivism using the following metrics:⁶⁵

- Re-arrest: any arrest reported in the Virginia State Police criminal history database for a felony or misdemeanor offense, including supervision violations, within the specified time period after release (local ordinance violations are not considered re-arrests);
- Re-conviction: a conviction resulting from a re-arrest that occurred within the specified time period (the actual conviction may occur outside the specified follow-up period); and,
- Re-incarceration: any sentence of incarceration for a felony offense with an imposed sentence of 1 or more years, or for a supervision violation with a sentence of 2 or more years.

Research conducted by VADOC indicated a link between certain predictive factors and recidivism among SR inmates released in Virginia, including.⁶⁶

- Gender: male inmates are more likely to recidivate
- Age: younger inmates are more likely to recidivate
- Previous SR incarceration: inmates with a higher number of previous SR incarcerations are more likely to recidivate

- Crime type of most serious offense: inmates whose most serious offense was a crime against property or public order are more likely to recidivate
- Evidence of mental health impairment: inmates with a mental health impairment are more likely to recidivate
- Location of SR incarceration: inmates who served their entire sentence in a local or regional jail are more likely to recidivate than inmates who served at least a portion of their sentence in a VADOC facility
- Risk assessment scores: inmates who were assessed as “high risk” for general recidivism or violent recidivism are more likely to recidivate
- History of positive drug tests for opioids: inmates with a history of positive drug tests for opioids are more likely to recidivate

Gender and Age

When examining offender demographics among SR inmates released during FY2015, VADOC data indicated that males and individuals under the age of 30 had the highest re-arrest and re-incarceration rates.⁶⁷ This finding was consistent with other criminological research that suggests that the vast majority of criminal offending is limited to adolescence and young adulthood, and that most individuals eventually desist from criminal offending over time.⁶⁸ Research has repeatedly demonstrated the link between a person’s age at the time of their first criminal offense and the persistence, frequency, and seriousness of criminal offending over time.⁶⁹

Crime Type of Most Serious Offense

According to VADOC data, SR inmates released during FY2015 whose most serious offense type was a property or public order offense had the highest re-arrest rates and re-incarceration rates (59% re-arrest rate and 27% re-incarceration rate).⁷⁰ This was followed by SR inmates whose most serious offense type was drug-related (49% re-arrest rate and 20% re-incarceration rate), and SR inmates with a crime of violence as their most serious offense type (49% re-arrest rate and 20% re-incarceration rate).⁷¹

Mental Health Impairment

According to VADOC, inmates are classified as having a mental health impairment when they are designated with a mental health code in the VirginiaCORIS data system, indicating either a “minimal, mild, moderate, or severe mental health impairment, or diagnosis of a serious mental illness.”⁷² Of the SR inmates released during FY2015, 20% (2,434 of 12,385) had evidence of a mental health impairment as defined above. In

general, the recidivism rate of offenders with a mental health impairment is higher than those with no evidence of a mental health impairment.⁷³

Location of SR incarceration

VADOC data showed that SR inmates released during FY2015 who spent their entire SR incarceration period in local or regional jails had a higher re-arrest rate (59%) and re-incarceration rate (26%) as compared to SR inmates who served at least a portion of their sentence in a VADOC facility (50% re-arrest rate and 21% re-incarceration rate).⁷⁴ This gap increased when examining SR inmates with a mental health impairment, as 36% of those who served the entire period of SR incarceration in a local or regional jail were re-incarcerated within 3 years, as compared to 24% of SR inmates who served at least a portion of their sentence in a VADOC facility.⁷⁵ One possible explanation for this difference in recidivism rates is that various programs, such as cognitive-behavioral programs, counseling, educational courses, and substance abuse treatment, are offered in VADOC facilities, but similar programs may not be commonly available in local or regional jails. Additionally, SR inmates in local and regional jails are typically serving shorter sentences than SR inmates in VADOC facilities. Thus, inmates who serve at least part of their SR incarceration in a VADOC facility may be better prepared to reenter society than those who serve their entire SR incarceration in a local or regional jail.⁷⁶

Risk Assessment Scores

In Virginia, the COMPAS risk and needs assessment instrument is used to evaluate a SR inmate's risk of engaging in general recidivism and violent recidivism, as well as identifying any needs that must be addressed to reduce an inmate's risk of recidivism.⁷⁷ According to VADOC data, SR inmates with the highest three year re-incarceration and re-arrest rates were those who had been assessed as "high risk" for general recidivism (67% re-arrest rate and 29% re-incarceration rate, respectively) and "high risk" for violent recidivism (69% re-arrest rate and 33% re-incarceration rate, respectively).⁷⁸

Risk and needs assessment tools do not indicate whether an offender will recidivate, but specify the probability or risk of future criminal activity.⁷⁹ It is important to note that general risk assessment tools are not commonly developed or validated to address specific types of recidivism. As such, a variety of separate risk and needs assessment tools have been developed, some of which are designed to predict one's propensity to engage in general recidivism, while others are focused on specific offending such as violent recidivism, sexual recidivism, or interpersonal violence.⁸⁰

History of Positive Drug Tests for Opioids

When examining the recidivism rates of SR inmates with a history of positive drug tests released during FY2015, VADOC data showed that inmates with a history of positive opioid tests had a higher re-incarceration rate (35%) when compared to inmates that did not have a history of positive opioid tests (22%).⁸¹ Data also showed that SR inmates with a prior positive opioid test who had served their entire term of incarceration in a regional or local jail had a higher re-incarceration rate (38%) than inmates with a prior positive opioid test who had served at least a portion of their term of incarceration in a VADOC facility (31%).⁸²

Virginia's re-incarceration rate is currently one of the lowest in the nation.

Virginia's re-incarceration rate has consistently been one of the lowest in the nation among the states that report this measure according to specified definitions and metrics.⁸³ VADOC attributes Virginia's low re-incarceration rate to effective reentry, educational, and treatment programs offered while SR inmates are incarcerated.⁸⁴ While re-arrest, re-conviction, or re-incarceration can be measured over any time frame, VADOC studies these measures over a 3 year period.⁸⁵ Table 3 illustrates the recidivism rates among SR inmates released during FY2011 through FY2015 as reported by VADOC.

Table 3: Virginia's 3 Year Follow-up Re-Arrest, Re-Conviction, and Re-Incarceration Rates

Year of Release	Number of SR Releases in Study	Re-arrest rate	Re-conviction rate	Re-incarceration rate
FY2011	12,263	56%	48%	23%
FY2012	11,496	56%	48%	23%
FY2013	11,575	56%	49%	22%
FY2014	12,021	56%	48%	23%
FY2015	12,385	53%	46%	23%

Source: Virginia Department of Corrections, *Recidivism at a Glance: Releases from State Responsible Incarceration*, May 2019, February 2020, and April 2021.⁸⁶ Table prepared by Crime Commission staff.

OTHER STATES: STATUTORY ANALYSIS OF SENTENCE REDUCTION CREDIT LAWS

As part of this study, staff examined the primary sentence reduction credit statutes across all 50 states.⁸⁷ The types of sentence reduction credits that can be accrued (earned sentence credits and/or good time credits), the maximum accrual rates, and the eligibility requirements for being awarded such credits are commonly set forth in statute, while the administration of the sentence reduction credit systems are typically governed by rules,

regulations, or department policies. Furthermore, while many sentence reduction credit statutes will specify which inmates are excluded from being awarded sentence reduction credits, additional exclusions or parameters for the accrual of such credits may also be set forth in rules, regulations, department policies, or separate statutes, such as penalty provisions of state law. As previously noted, the following analysis is based on the primary sentence reduction credit statutes of other states and not on the rules, regulations, department policies, or other statutes within those states.

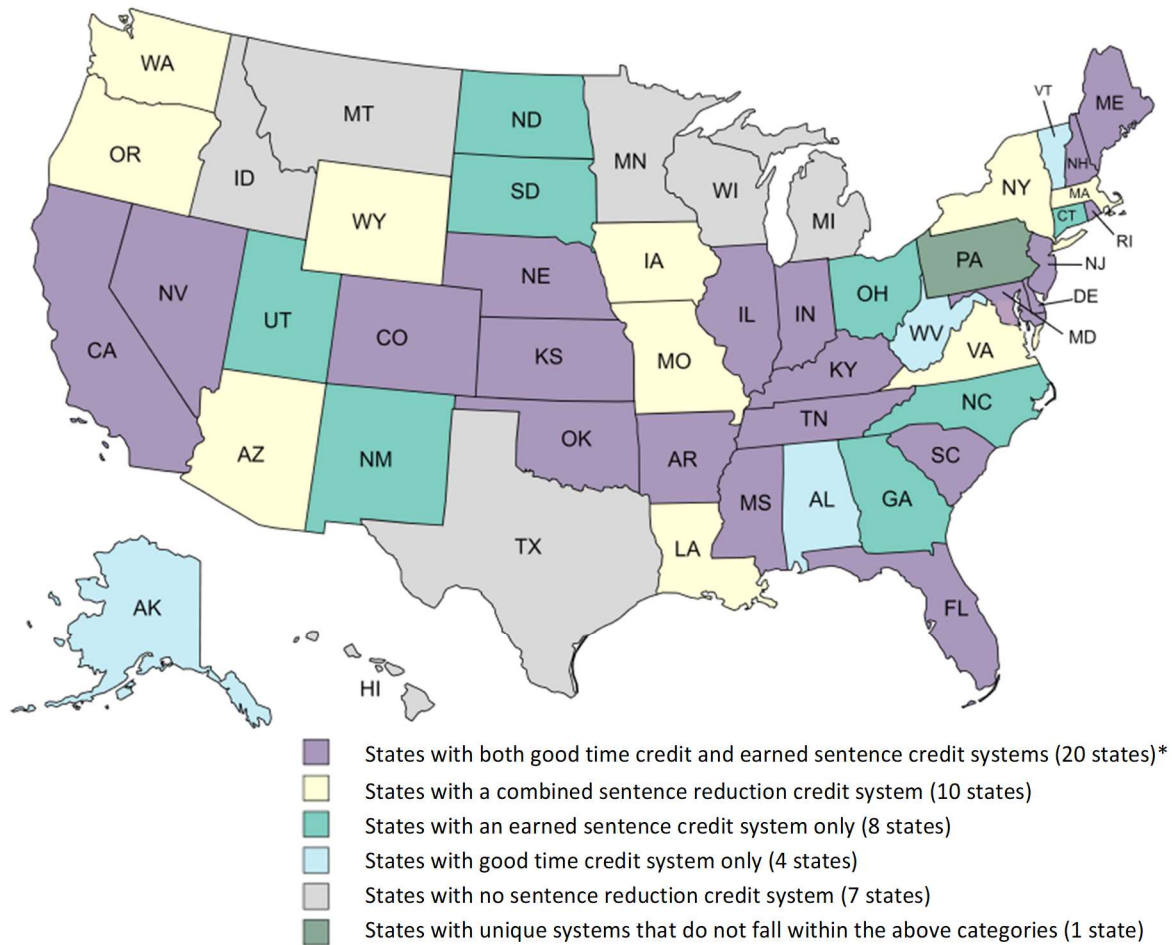
During this analysis, staff discovered that states used varying terminology to describe earned sentence credits and good time credits that are combined into one sentence reduction credit system. For example, some state laws will refer to these systems as an earned sentence credit system, while other state laws will refer to it as a good time credit system. Therefore, for purposes of this analysis, states with one sentence reduction credit system that is contingent on both good behavior and program participation will be categorized as having a combined system.⁸⁸ As such, the primary sentence reduction credit statutes across the United States, as of August 2020, fell into five main categories⁸⁹:

- (1) States with both a good time credit system and an earned sentence credit system, with each system acting independently of one another and having separate credit accrual rates;
- (2) States with a combined system, where there is one credit accrual rate that is contingent on both good conduct and program participation;⁹⁰
- (3) States with only a good time credit system, where program participation is not statutorily required;
- (4) States with only an earned sentence credits system, where good behavior is not statutorily required; and,
- (5) States with no sentence reduction credit systems.

Forty-two states award sentence reduction credits.

As seen in the following map, 42 states, including Virginia, award some type of sentence reduction credits for good behavior, program participation, or both.

Type of Sentence Reduction Credits by State



*The 20 states with both earned sentence credit and good time credit systems have separate accrual rates for each system. Map prepared by Crime Commission staff.

Based on an analysis of the primary sentence reduction credit statutes by state, staff found that:

- 20 states have both good time credit and earned sentence credit systems that allow inmates to earn separate credit accruals for each system. (Arkansas, California, Colorado, Delaware, Florida, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, Oklahoma, Rhode Island, South Carolina, and Tennessee).
- 10 states have a combined sentence reduction credit system with one accrual rate that is contingent on both good conduct and satisfactory program participation. (Arizona, Iowa, Louisiana,⁹¹ Massachusetts, Missouri, New York, Oregon, Virginia, Washington, and Wyoming).

- 8 states have earned sentence credit systems for program participation, but do not award additional credits for good behavior.⁹² (Connecticut, Georgia, New Mexico, North Carolina,⁹³ North Dakota, Ohio, South Dakota, and Utah).
- 4 states have a good time credit system only, with no statutory requirement for program participation.⁹⁴ (Alabama, Alaska, Vermont,⁹⁵ and West Virginia).
- 7 states do not have any type of sentence reduction credit system. (Hawaii, Idaho, Michigan, Minnesota, Montana, Texas,⁹⁶ and Wisconsin).
- Pennsylvania has a unique system that does not fall within the above categories. This state has a Recidivism Risk Reduction Incentive Program that reduces the sentence of an inmate who completes programming and maintains positive adjustment.⁹⁷ The sentencing judge in Pennsylvania determines whether a low-risk nonviolent offender can participate in this program⁹⁸ and also imposes the minimum sentence to be served upon completion of the program.⁹⁹

The maximum accrual rates for sentence reduction credits vary significantly across states.

Most sentence reduction credit statutes set a maximum limit on the total credits that can be awarded.¹⁰⁰ These maximum limits may be based specifically on the type of sentence reduction credit, such as limits on good time credits or earned sentence credits, or may set an overarching limit on maximum sentence reduction credits in general. When specifically looking at good time credits only, the maximum awardable credits varied greatly, ranging from 3 days per month in Delaware to 75 days for every 30 days served in Alabama.¹⁰¹ Similarly, when examining earned sentence credits only, the variations between states was even more complex, as some states make a one-time award upon program completion, while other states award credits on a recurring basis for program participation. For example, in Oklahoma, an inmate can be awarded between 90 and 200 earned sentence credits for completing a diploma or degree program, 80 credits for vocational training, or 70 credits upon completion of a treatment program.¹⁰² On the other hand, in North Dakota, inmates can be awarded 5 days of earned sentence credits per month for satisfactory participation in court-ordered or staff recommended programs.¹⁰³

In addition to these variations in maximum sentence reduction credits, states also differ on the maximum reduction of an inmate's overall sentence. For instance, in Nevada, an inmate's total sentence cannot be reduced by more than 58%.¹⁰⁴ Whereas, in Florida, the maximum sentence reduction is limited to 15% of the total sentence.¹⁰⁵ These overall

sentence reduction limitations supersede any maximum limits set on good time credits or earned sentence credits in those states.¹⁰⁶

States may award sentence reduction credits at varying rates based upon an inmate's current sentence, prior criminal record, or classification level.

Some sentence reduction credit statutes specifically limit the total credits that certain inmates can be awarded, meaning that certain inmates are awarded sentence reduction credits at a different rate than other inmates. These varying rates can be based on the type of offense for which an inmate was convicted, sentence imposed, length of incarceration, prior criminal record, classification as determined by the correctional department or institution, number of consecutive years without an infraction, or some combination of these factors. For example, in Arizona, inmates without a prior violent or aggravated felony conviction who are incarcerated for certain drug offenses can be awarded release credits at a rate of 3 days for every 7 days served;¹⁰⁷ whereas, other inmates in Arizona are awarded release credits at a rate of 1 day for every 6 days served.¹⁰⁸ On the other hand, in New Jersey, good time credits increase with each year of continuous good behavior, beginning at 7 days per month during the first year of incarceration and increasing over time to 16 days per month in the thirtieth year.¹⁰⁹

Some states specifically exclude certain inmates from being awarded sentence reduction credits.

Several states specify that inmates serving a life sentence or inmates convicted of violent felonies or felony sex offenses are ineligible for good time credits, earned sentence credits, or both. An analysis of state statutes revealed that:

- At least 21 states prohibit inmates sentenced to life in prison from being awarded sentence reduction credits.¹¹⁰ (Alabama, Alaska,¹¹¹ Arkansas, California, Delaware, Florida, Georgia, Illinois, Iowa, Louisiana, Mississippi, Missouri, New Mexico, New York, Ohio, Rhode Island, South Carolina, South Dakota, Utah, West Virginia, and Wyoming).
- At least 17 states prohibit inmates convicted of certain violent felonies from being awarded sentence reduction credits. (Alabama, Alaska, California, Connecticut, Georgia, Illinois, Indiana, Iowa, Louisiana, Mississippi, Missouri, Nevada, Ohio, Oklahoma, Oregon, South Carolina, and Washington). These states vary in terms of which violent felonies are excluded from sentence reduction credit systems. For example, some states exclude only 1 violent felony, such as murder, while other states

exclude multiple violent felonies. Additionally, some states only exclude inmates who have been convicted multiple times of committing violent offenses.

- At least 14 states prohibit inmates convicted of certain felony sex offenses from being awarded sentence reduction credits. (Alabama, Alaska, California, Connecticut, Georgia, Indiana, Louisiana, Maryland, Mississippi, Missouri, Nevada, Ohio, Oregon, and West Virginia). These states vary in terms of which felony sex offenses are excluded. For example, some states exclude specific sex offenses, such as sexual assault, while other states exclude specific categories of sex offenses, such as sex crimes committed against children. Additionally, some states exclude any inmate who has ever been convicted of a felony sex offense from being awarded any sentence reduction credits, regardless of the underlying offense for their current sentence.
- At least 4 states prohibit inmates convicted of certain violent felonies and certain sex offenses from being awarded earned sentence credits for program participation, but do allow these inmates to be awarded good time credits. (Arkansas, Florida, Maine, and Tennessee).
- At least 1 state, Rhode Island, prohibits inmates convicted of certain violent felonies and certain sex offenses from being awarded credits for good conduct, but allows these inmates to be awarded a limited amount of earned sentence credits.
- At least 10 states do not list any specific prohibitions on the awarding of sentence reduction credits in their primary sentence reduction credit statutes; however, those states may list prohibitions in other rules, regulations, department policies, or statutes. (Colorado, Kansas, Kentucky, Massachusetts, Nebraska, New Hampshire, New Jersey, North Dakota, Vermont, and Virginia).¹¹²

Sentence reduction credits can be forfeited or withheld in most states for institutional infractions or new violations of law.

In most states, earned sentence credits, good time credits, or both, can be forfeited or withheld if an inmate commits a serious institutional infraction or crime while incarcerated.¹¹³ Typically, state statutes specify certain infractions or crimes that can result in forfeiture or withholding of sentence reduction credits, such as escape, attempted escape, participation in a riot, or assault on correctional staff. However, some statutes direct the state correctional department or institution to establish department regulations or policies that set forth which infractions or crimes will result in the forfeiture or withholding of credits. Additionally, some states limit the total amount of sentence reduction credits that can be forfeited or withheld for one incident. For example, in

Illinois, an inmate cannot be penalized more than one year's worth of sentence reduction credits for any one infraction.¹¹⁴ Once sentence reduction credits have been forfeited, states commonly give either the warden or Director of the state correctional department or some other institutional entity the discretion to restore the forfeited credits.

CRIME COMMISSION LEGISLATION

The Crime Commission met on August 31, 2020, and heard a presentation from staff on sentence reduction credits and the use of such credits in Virginia.¹¹⁵ Staff provided Crime Commission members with draft legislation to modify the maximum amount of earned sentence credits that can be awarded in Virginia. Staff presented several policy options, such as which SR inmates would be eligible to be awarded the increased credits, the maximum amount of credits that could be awarded at each classification level, the initial classification level for SR inmates entering state correctional facilities, whether SR inmates could be awarded credits while incarcerated in local or regional jails, and whether the increased credits would apply retroactively. Ultimately, members voted to endorse draft legislation that was substantially similar to House Bill 1532 (Del. Don L. Scott) as introduced during the 2020 Regular Session of the General Assembly.¹¹⁶

Legislation endorsed by the Crime Commission to increase the maximum earned sentence credits for SR inmates was introduced during the 2020 Special Session of the General Assembly (House Bill 5148 - Del. Don L. Scott).¹¹⁷ The bill underwent numerous amendments during the legislative process before it was passed by the General Assembly and signed into law by the Governor.¹¹⁸ The bill takes effect on July 1, 2022.

The enacted legislation codifies four classification levels for earned sentence credits and increases the accrual rates in Levels I through III as illustrated in Table 4.

Table 4: Maximum Earned Sentence Credit Accruals: Current Virginia Law compared with Enacted Legislation (House Bill 5148 - effective 7/1/2022)

Class Level	Current Rates per 30 days served (DOC Policy)	New Rates under Enacted Legislation per 30 days served (Va. Code § 53.1-202.3)(Effective 7/1/22)
Level I	4.5 days	15 days
Level II	3.0 days	7.5 days
Level III	1.5 days	3.5 days
Level IV	0 days	0 days

Source: Virginia Department of Corrections. *Operating Procedure 830.3, Good Time Awards*; Va. Code § 53.1-202.3 (2020). Table prepared by Crime Commission staff.

The following additional items were also included in the enacted legislation:

- Increases earned sentence credit accruals for some SR inmates, while excluding other SR inmates who are serving sentences for specified offenses from being awarded the increased earned sentence credits;¹¹⁹
- Applies the increased earned sentence credit accruals retroactively to an eligible SR inmate's entire sentence;
- Requires an annual review of a SR inmate's classification level, as well as a written explanation as to why a SR inmate's classification level was or was not changed;
- Prohibits any changes to a SR inmate's classification level based on a lack of programming, educational, or employment opportunities at a state correctional facility;
- Allows for an immediate review of a SR inmate's classification level for disciplinary or non-compliance reasons or if that SR inmate is removed from programming;
- Grants SR inmates the right to appeal classification level changes using the VADOC grievance procedure;
- Requires VADOC to have similar educational, vocational, counseling, and substance abuse programs at all state correctional facilities,¹²⁰ and to ensure that similar educational, vocational, counseling, substance abuse, and reentry services are available at all state probation and parole offices;
- Mandates that VADOC convene a work group consisting of the Senate Committee on Finance and Appropriations, the House Committee on Appropriations, the Virginia State Crime Commission, and any other stakeholders, to study the impact of the earned sentence credit legislation and report to the Governor and General Assembly by June 1, 2023; and,
- Directs the Virginia Department of Criminal Justice Services to continue to provide grant funding to private entities for assistance with reentry services.

ACKNOWLEDGEMENTS

The Virginia State Crime Commission extends its appreciation to the Virginia Department of Corrections for its assistance and cooperation on this study.

ENDNOTES

¹ House Bill 1532 (Del. Don L. Scott) is available at <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=201&typ=bil&val=hb1532>.

² Virginia Department of Corrections, *State Responsible Offender Population Trends, FY2015-FY2019*. The SR inmate population is based on the total number of SR inmates incarcerated on June 30 of the fiscal year indicated as extracted from VirginiaCORIS. The total includes SR inmates in DOC facilities and SR inmates housed in local and regional jails.

³ See Virginia State Crime Commission. (Aug. 31, 2020). *Earned Sentence Credits*. Available at <http://vscc.virginia.gov/2020/VSCC%20Presentation%20-20Earned%20Sentence%20Credits.pdf>.

⁴ House Bill 5148 is available at <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=202&typ=bil&val=hb5148>.

⁵ 2020 Va. Acts, Sp. Sess. I, ch. 50.

⁶ Virginia Department of Corrections. (May 2019). *Recidivism at a Glance: Releases from State Responsible Incarceration*. Retrieved from <https://vadoc.virginia.gov/media/1412/vadoc-state-recidivism-report-may-2019.pdf>.

⁷ See VA. CODE ANN. § 53.1-202.2(A) (2020).

⁸ VA. CODE ANN. § 53.1-196 (2020).

⁹ VA. CODE ANN. § 53.1-199 (2020).

¹⁰ VA. CODE ANN. § 53.1-202.2 (2020).

¹¹ VA. CODE ANN. § 53.1-196 (2020). Inmates serving a sentence for a misdemeanor in any state correctional facility are also eligible to be awarded good conduct time credits.

¹² *Id.*

¹³ *Id.*

¹⁴ VA. CODE ANN. § 53.1-197 (2020). Sentence credits awarded for program participation or rehabilitation progress are referred to as “Extraordinary Good Time” credits in Virginia Department of Corrections Operating Procedures. See Virginia Department of Corrections. (2019). *Operating Procedure 830.3, Good Time Awards*. Retrieved from <https://vadoc.virginia.gov/files/operating-procedures/800/vadoc-op-830-3.pdf> at p.2.

¹⁵ VA. CODE ANN. § 53.1-196 (2020).

¹⁶ VA. CODE ANN. § 53.1-199 (2020). Inmates sentenced to jail for more than 12 months and inmates sentenced for a combination of felony and misdemeanor offenses are also eligible to be awarded good conduct allowance credits.

¹⁷ VA. CODE ANN. § 53.1-198 (2020).

¹⁸ VA. CODE ANN. § 53.1-201 (2020).

¹⁹ VA. CODE ANN. § 53.1-200 (2020).

²⁰ VA. CODE ANN. § 53.1-201 (2020).

²¹ VA. CODE ANN. § 53.1-199 (2020).

²² VA. CODE ANN. § 53.1-202.2 (2020). Inmates convicted of a felony offense committed on or after January 1, 1995, and sentenced to a term of incarceration in a local correctional facility are also eligible to be awarded earned sentence credits. Additionally, juveniles who were convicted and sentenced as serious offenders may be awarded earned sentence credits for the portions of their sentences served in the Department of Juvenile Justice.

²³ Under truth-in-sentencing in Virginia, a person convicted of a felony offense is not eligible for parole and must serve at least 85% of their sentence. See Virginia Criminal Sentencing

Commission. *A Decade of Truth-In-Sentencing in Virginia*. Retrieved from http://www.vcsc.virginia.gov/Mar_05/TIS_Brochure.pdf.

²⁴ VA. CODE ANN. §§ 53.1-202.2 (2020).

²⁵ VA. CODE ANN. § 53.1-202.3 (2020).

²⁶ See VA. CODE ANN. § 53.1-32.1(D) (2020). Refusing to accept a program assignment constitutes a violation of rules, and thus the inmate is not eligible to be awarded sentence reduction credits. See also VA. CODE ANN. § 19.2-297.1(C) (2020). Persons sentenced to life in prison are not eligible for good conduct allowance or earned sentence credits.

²⁷ Virginia Department of Corrections. (2019). *Operating Procedure 830.3, Good Time Awards*. Retrieved from <https://vadoc.virginia.gov/files/operating-procedures/800/vadoc-op-830-3.pdf>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Virginia Department of Corrections, personal communication, July 20, 2020.

³² *Supra* note 27.

³³ *Supra* note 31.

³⁴ *Supra* note 31.

³⁵ *Supra* note 27.

³⁶ VA. CODE ANN. § 53.1-189 (2020). See also Virginia Department of Corrections. (2021). *Operating Procedure 830.1, Institution Classification Management*. Retrieved from <https://vadoc.virginia.gov/files/operating-procedures/800/vadoc-op-830-1.pdf>

³⁷ Virginia Department of Corrections. (2016). *Operating Procedure 861.1, Offender Discipline, Institutions*. Retrieved from <https://vadoc.virginia.gov/files/operating-procedures/800/vadoc-op-861-1.pdf>. Accumulated sentence credits include Earned Sentence Credits, Good Time Allowance, and Good Conduct Time.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ VA. CODE ANN. §§ 53.1-189(C) and 53.1-202.4 (2020). See also Virginia Department of Corrections. (2016). *Operating Procedure 861.1, Offender Discipline, Institutions*. Retrieved from <https://vadoc.virginia.gov/files/operating-procedures/800/vadoc-op-861-1.pdf>. Generally, inmates cannot request restoration of forfeited sentence reduction credits; however, credits that were forfeited because an inmate refused to participate in preventative or prophylactic therapies related to contagious disease or refused to provide a DNA sample can be reinstated once that inmate complies with these requirements.

⁴² A list of programs available in state correctional facilities can be found at <https://vadoc.virginia.gov/offender-resources/incoming-offenders/facility-programs/>. These VADOC programs are not available to SR inmates confined in local or regional jails.

⁴³ Virginia Department of Corrections, personal communication, August 12, 2020.

⁴⁴ *Id.*

⁴⁵ *Id.* Per VADOC, wait times vary significantly amongst individual programs and locations, and this average wait time does not count SR inmates who are able to access programs immediately without being placed on a waitlist.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Information on programs available to inmates under VADOC community supervision can be found at <https://vadoc.virginia.gov/offender-resources/offenders-under-community-supervision/community-supervision-programs/>.

⁴⁹ Virginia Department of Criminal Justice Services. (2016). *PAPIS: Virginia Re-entry Coalition. Summary of Programs in Virginia FY 2016*. Retrieved from <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/papis-virginia-re-entry-coalition-summary-programs-virginia-fy2016.pdf>

⁵⁰ *Supra* note 31.

⁵¹ United States Census Bureau (2021). *Quickfacts: Virginia*. Retrieved from <https://www.census.gov/quickfacts/VA>.

⁵² Virginia Department of Corrections. (2020). *State Responsible Offender Demographic Profile FY 2019*. Retrieved from <https://vadoc.virginia.gov/media/1472/vadoc-research-state-responsible-demographic-report-2019.pdf>. See also United States Census Bureau. *American Community Survey 1-Year Estimates, Table S0101*. Generated by Crime Commission staff on June 7, 2021, using <https://data.census.gov/cedsci/>.

⁵³ *Id.*

⁵⁴ Virginia Department of Corrections. (2020). *State Responsible Offender Population Trends FY2015 – FY2019*. Retrieved from <https://vadoc.virginia.gov/media/1473/vadoc-offender-population-trend-report-2015-2019.pdf>

⁵⁵ Virginia Department of Corrections, personal communication, August 6, 2020.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* Per VADOC, the crime type for 1% of inmates released in CY2019 had not been reported.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ It should be noted that there are multiple ways in which recidivism can be measured. Recidivism can be defined as a re-arrest, re-conviction, re-incarceration, or an individual's self-admission to re-engaging in certain behaviors. The length of time in which recidivism measures are tracked also varies. There are several limitations of recidivism research that should be considered. For instance, many crimes go undetected or do not fully enter the system due to law enforcement, prosecutorial, or judicial discretion; thus, actual recidivism (regardless of how it is measured) is likely higher than the data suggests. Further, due to inconsistencies in the criminal justice system, similar crimes may be charged and/or sentenced differently. One person, for example, may be given a term of incarceration in a jail or prison, while another individual, who committed the same offense, may receive a probation-only term. While both individuals committed new crimes, only one would be counted in re-incarceration data. Finally, caution should be taken when comparing recidivism data between states, even if states use the same measure when reporting on recidivism. Population differences, available resources, and varying laws and policies are a few of the factors that can impact a state's recidivism data.

⁶⁴ Merriam-Webster. (Accessed June 14, 2021). *Recidivism*. Retrieved from <https://www.merriam-webster.com/dictionary/recidivism>.

- ⁶⁵ Virginia Department of Corrections. (2019). *Recidivism at a Glance: Releases from State Responsible Incarceration*. Retrieved from <https://vadoc.virginia.gov/media/1412/vadoc-state-recidivism-report-may-2019.pdf>.
- ⁶⁶ Virginia Department of Corrections. (2020). *VADOC Recidivism*. Retrieved from <https://vadoc.virginia.gov/media/1575/vadoc-recidivism-report-2020-08.pdf>.
- ⁶⁷ Virginia Department of Corrections. (2020). *Re-Incarceration and Re-Arrest Rates of VADOC SR Releases FY2015*. Retrieved from <https://vadoc.virginia.gov/media/1576/vadoc-recidivism-and-rearrest-report-2015.pdf>.
- ⁶⁸ See, e.g., Sampson, R.J., & Laub, J.H. (2003). Life-course desisters? Trajectories of crime among delinquent boys followed to age 70. *Criminology*, 41, 555-592; Piquero, A.R. Farrington, D.P., & Blumstein, A. (2003). The criminal career paradigm. In M. Tonry (ed.), *Crime and justice: A review of research*, pp. 359-506.
- ⁶⁹ See, e.g., Moffitt, T.E. (1993). Adolescence-limited and life-course-persistent antisocial behavior: A developmental taxonomy. *Psychological Review*, 100, 674-701.
- ⁷⁰ *Supra* note 67.
- ⁷¹ *Id.*
- ⁷² Virginia Department of Corrections. (2020). *VADOC Recidivism*. Retrieved from <https://vadoc.virginia.gov/media/1575/vadoc-recidivism-report-2020-08.pdf> at p.3.
- ⁷³ *Supra* note 67.
- ⁷⁴ *Supra* note 67.
- ⁷⁵ *Supra* note 66.
- ⁷⁶ *Supra* note 66.
- ⁷⁷ Virginia Department of Corrections. (2020). *Re-Incarceration and Re-Arrest Rates of VADOC FY2015 SR Releases*. Retrieved from <https://vadoc.virginia.gov/media/1576/vadoc-recidivism-and-rearrest-report-2015.pdf>.
- ⁷⁸ *Id.*
- ⁷⁹ See, e.g., Casey, P. M., Elek, J. K., Warren, R. K., Cheesman, F., Kleiman, M., & Ostrom, B. (2014). *Offender risk & needs assessment instruments: A primer for courts*. Williamsburg, VA: National Center for State Courts. Retrieved from https://www.ncsc.org/_data/assets/pdf_file/0018/26226/bja-rna-final-report_combined-files-8-22-14.pdf.
- ⁸⁰ *Id.*; See also Serin, R. C., & Lowenkamp, C. T. (2015). *Selecting and using risk and needs assessments*. Alexandria, VA: National Drug Court Institute. Retrieved from <https://www.ndci.org/wp-content/uploads/Fact%20Sheet%20Risk%20Assessment.pdf>.
- ⁸¹ *Supra* note 66.
- ⁸² *Supra* note 66.
- ⁸³ See Virginia Department of Corrections. (2020). *VADOC Recidivism*. Retrieved from <https://vadoc.virginia.gov/media/1575/vadoc-recidivism-report-2020-08.pdf>.
- ⁸⁴ Virginia Department of Corrections. (2020). *State Recidivism Comparison*. Retrieved from <https://vadoc.virginia.gov/media/1485/vadoc-state-recidivism-comparison-report-2020-02.pdf>.
- ⁸⁵ *Id.*

⁸⁶ Virginia Department of Corrections. (2019). *Recidivism at a glance: Releases from State Responsible Incarceration*. Retrieved from <https://vadoc.virginia.gov/media/1412/vadoc-state-recidivism-report-may-2019.pdf>. See also Virginia Department of Corrections. (2020). *Recidivism at a Glance: Releases from State Responsible Incarceration*. Retrieved from <https://vadoc.virginia.gov/media/1484/vadoc-state-recidivism-report-2020-02.pdf>.

⁸⁷ See Appendix A for a list of the sentence reduction credit statutes by state.

⁸⁸ Staff did not conduct a review of other state's rules, regulations, department policies, or other statutes that may impact sentence reduction credits, such as sentencing statutes.

⁸⁹ The legal analysis conducted by staff was based on state laws as of August 2020.

⁹⁰ States vary on whether combined sentence reduction credit systems are called good time credits or earned sentence credits; however, all of these combined systems function similarly in that there is one credit accrual rate that is contingent upon both good behavior and program participation.

⁹¹ See LA. STAT. ANN. § 15:828 (2020). Louisiana allows inmates to earn credits for program participation; however, these credits are used to reduce the inmate's projected good time parole supervision date. Therefore, this system was not considered in staff's analysis because the credits do not directly reduce the inmate's overall sentence.

⁹² For these 8 states, program participation was the only requirement specifically listed in the sentence reduction credit statutes; however, good conduct may be a separate requirement set forth in rules, regulations, or department policies.

⁹³ See N.C. GEN. STAT. § 148-13 (2020). North Carolina awards good time credits to inmates convicted of driving under the influence; however, these inmates are not eligible for earned sentence credits.

⁹⁴ For these 4 states, good conduct was the only requirement listed in the sentence reduction credit statutes; however, program participation may be a separate requirement set forth in rules, regulations, or department policies.

⁹⁵ VT. STAT. ANN. tit. 28, § 811 (2020). Vermont has a narrow good time credit system where inmates confined in work camps can be awarded credits for consistent or meritorious participation.

⁹⁶ See TEX. GOV'T CODE ANN. § 498.003 (West 2020). Texas has a good conduct time system; however, credits can only be applied to reduce an inmate's eligibility for parole or mandatory supervision. Therefore, this system was not considered in staff's analysis because the credits do not directly reduce the inmate's overall sentence.

⁹⁷ 61 PA. CONS. STAT. § 4506 (2020).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Institutions can develop classification systems for inmates that are based on criteria set forth in department policies.

¹⁰¹ DEL. CODE ANN. tit. 11, §4381 (2020). ALA. CODE § 14-9-41 (LexisNexis 2020).

¹⁰² OKLA. STAT. tit. 57, § 138 (2020).

¹⁰³ N.D. CENT. CODE § 12-54.1-01 (2020).

¹⁰⁴ NEV. REV. STAT. ANN. 209.4465 (LexisNexis 2020).

¹⁰⁵ FLA. STAT. ANN. § 944.275 (LexisNexis 2020).

¹⁰⁶ See Appendix B for a list of the maximum allowances for good time credits and earned sentence credits across the United States.

¹⁰⁷ ARIZ. REV. STAT. § 41-1604.07 (LexisNexis 2020).

¹⁰⁸ *Id.*

¹⁰⁹ N.J. REV. STAT. § 30:4-140 (2020).

¹¹⁰ States may have provisions in other statutes, such as a sentencing statute, which exclude inmates who were sentenced to life imprisonment from being awarded sentence reduction credits. For example, in Virginia, inmates serving life in prison are excluded from being awarded sentence reduction credits. VA. CODE ANN. § 19.2-297.1(C) (2020). Staff did not conduct a review of statutes outside of the primary sentence reduction statutes in other states. Additionally, this list does not include sentences of life imprisonment without parole, as staff assumed in its analysis that these inmates would not be eligible for any type of sentence reduction credits.

¹¹¹ Alaska law does not provide for a life sentence as punishment; however, Alaska law does include a mandatory 99-year term of incarceration.

¹¹² See VA. CODE ANN. § 19.2-297.1(C) (2020). See also VA. CODE ANN. § 53.1-202.2 *et. seq.* (2020). While Virginia excludes inmates sentenced to life imprisonment from being awarded sentence reduction credits in a sentencing statute and in VADOC policy, there are no exclusions specifically listed in Virginia's sentence reduction credit statutes.

¹¹³ A due process hearing is generally required to determine guilt before sentence reduction credits can be forfeited or withheld.

¹¹⁴ 730 ILL. COMP. STAT. ANN. 5/3-6-3 (LexisNexis 2020).

¹¹⁵ See Virginia State Crime Commission. (Aug. 31, 2020). *Earned Sentence Credits*. Available at <http://vsc.virginia.gov/2020/VSCC%20Presentation%20-%20Earned%20Sentence%20Credits.pdf>.

¹¹⁵ House Bill 5148 is available at <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=202&typ=bil&val=hb5148>.

¹¹⁶ House Bill 1532 is available at <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=201&typ=bil&val=hb1532>.

¹¹⁷ House Bill 5148 is available at <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=202&typ=bil&val=hb5148>.

¹¹⁸ 2020 Va. Acts, Sp. Sess. I, ch. 50.

¹¹⁹ See VA. CODE ANN. § 53.1-202.3(A) (2021) for a list of offenses which are excluded from accruing earned sentence credits at the new increased rates.

¹²⁰ This enactment clause led to the creation of VA. CODE ANN. § 53.1-202.5 (2021).

APPENDIX A: Sentence Reduction Credit Statutes

STATE	GOOD TIME CREDIT STATUTE	EARNED SENTENCE CREDIT STATUTE
Alabama	ALA. CODE § 14-9-41 <i>et. seq.</i>	None
Alaska	ALASKA STAT. § 33.20.010	None
Arizona*	ARIZ. REV. STAT. § 41-1604.06 ARIZ. REV. STAT. § 41-1604.07	ARIZ. REV. STAT. § 41-1604.06 ARIZ. REV. STAT. § 41-1604.07
Arkansas	ARK. CODE ANN. § 12-29-204	ARK. CODE ANN. § 12-29-202
California	CAL. PENAL CODE § 2931 CAL. CODE REGS. tit. 15, § 3043.2	CAL. PENAL CODE § 2931 CAL. PENAL CODE § 2933 <i>et. seq.</i> CAL. CODE REGS. tit. 15, § 3043.3 <i>et. seq.</i>
Colorado	COLO. REV. STAT. § 17-22.5-301	COLO. REV. STAT. § 17-22.5-302 COLO. REV. STAT. § 17-22.5-405
Connecticut	None	CONN. GEN. STAT. § 18-98e
Delaware	DEL. CODE ANN. tit. 11, § 4381	DEL. CODE ANN. tit. 11, § 4381
Florida	FLA. STAT. § 944.275	FLA. STAT. § 944.275
Georgia	None	GA. CODE ANN. § 42-5-101
Hawaii	None	None
Idaho	None	IDAHO CODE § 20-101D
Illinois	730 ILL. COMP. STAT. 5/3-6-3	730 ILL. COMP. STAT. 5/3-6-3
Indiana	IND. CODE § 35-50-6-3.1	IND. CODE § 35-50-6-3.3
Iowa*	IOWA CODE § 903A.2	IOWA CODE § 903A.2
Kansas	KAN. STAT. ANN. § 21-6821	KAN. STAT. ANN. § 21-6821
Kentucky	KY. REV. STAT. ANN. § 197.045	KY. REV. STAT. ANN. § 197.045
Louisiana*	LA. STAT. ANN. § 15:571.3	LA. STAT. ANN. § 15:571.3
Maine	ME. STAT. tit. 17, § 2307 ME. STAT. tit. 17, § 2308	ME. STAT. tit. 17, § 2307
Maryland	MD. CODE ANN., CORR. SERVS. § 3-704 MD. CODE ANN., CORR. SERVS. § 3-708	MD. CODE ANN., CORR. SERVS. § 3-705 MD. CODE ANN., CORR. SERVS. § 3-706
Massachusetts*	MASS. GEN. LAWS ch. 127, § 129D	MASS. GEN. LAWS ch. 127, § 129D
Michigan	None	None
Minnesota	None	None
Mississippi	MISS. CODE ANN. § 47-5-138	MISS. CODE ANN. § 47-5-142
Missouri*	MO. CODE REGS. ANN. tit. 14, § 10-5.010	MO. CODE REGS. ANN. tit. 14, § 10-5.010
Montana	None	None
Nebraska	NEB. REV. STAT. § 83-1,107	NEB. REV. STAT. § 83-1,107

STATE	GOOD TIME CREDIT STATUTE	EARNED SENTENCE CREDIT STATUTE
Nevada	NEV. REV. STAT. ANN. § 209.4465	NEV. REV. STAT. ANN. § 209.4465 NEV. REV. STAT. ANN. § 209.448 NEV. REV. STAT. ANN. § 209.449
New Hampshire	N.H. REV. STAT. ANN. § 651-A:22	N.H. REV. STAT. ANN. § 651-A:22-a
New Jersey	N.J. STAT. ANN. § 30:4-140	N.J. STAT. ANN. § 30:4-92
New Mexico	None	N.M. STAT. ANN. § 33-2-34
New York*	N.Y. CORRECT. LAW § 803	N.Y. CORRECT. LAW § 803
North Carolina	None	N.C. GEN. STAT. § 148-13 N.C. GEN. STAT. § 15A-1340.13 N.C. GEN. STAT. § 15A-1340.20
North Dakota	None	N.D. CENT. CODE § 12-54.1
Ohio	None	OHIO REV. CODE ANN. § 2967.193
Oklahoma	OKLA. STAT. tit. 57, § 57-138	OKLA. STAT. tit. 57, § 57-138
Oregon*	OR. REV. STAT. § 421.121	OR. REV. STAT. § 421.121
Pennsylvania	None	None
Rhode Island	R.I. GEN. LAWS § 42-56-24	42 R.I. GEN. LAWS § 42-56-24
South Carolina	S.C. CODE ANN. § 24-13-210	S.C. CODE ANN. § 24-13-230
South Dakota	None	S.D. CODIFIED LAWS § 24-15A-50.1
Tennessee	TENN. CODE ANN. § 41-21-236	TENN. CODE ANN. § 41-21-236
Texas	None	None
Utah	None	UTAH CODE ANN. § 77-27-5.4
Vermont	VT. STAT. ANN. tit. 28, § 818	None
Virginia*	VA. CODE ANN. § 53.1-196 (GCT) VA. CODE ANN. § 53.1-199 <i>et. seq.</i> (GCA) VA. CODE ANN. § 53.1-202.2 <i>et. seq.</i> (ESC)	VA. CODE ANN. § 53.1-197 (GCT) VA. CODE ANN. § 53.1-199 <i>et. seq.</i> (GCA) VA. CODE ANN. § 53.1-202.2 <i>et. seq.</i> (ESC)
Washington*	WASH. REV. CODE § 9.94A.729	WASH. REV. CODE § 9.94A.729
West Virginia	W. VA. CODE § 15A-4-17	None
Wisconsin	None	None
Wyoming*	WYO. STAT. ANN. § 7-13-420 001-0 WYO. CODE R. § 4	WYO. STAT. ANN. § 7-13-420 001-0 WYO. CODE R. § 4

* States that have a sentence credit reduction system with a single accrual rate that requires inmates to demonstrate both good conduct and satisfactory participation in institutional programming.

APPENDIX B: Sentence Reduction Credit System Comparison by State¹

STATE	MAXIMUM GOOD TIME CREDITS (GTC) ²	MAXIMUM EARNED SENTENCE CREDITS (ESC) ³	STATUTORY EXCLUSIONS BASED ON CONVICTION ⁴	STATUTORY EXCLUSIONS BASED ON SENTENCE ⁵
Alabama	75 days for every 30 days served	N/A	<ul style="list-style-type: none"> Class A felony Sex offense involving a child 	<ul style="list-style-type: none"> Life in prison Term of 15+ years
Alaska	1/3 of sentence	N/A	<ul style="list-style-type: none"> Felony Sex Offense Unclassified felony (1st or 2nd degree murder) 	<ul style="list-style-type: none"> Mandatory 99-year term Definite term
Arizona*	1 day for every 6 days served ⁶	Combined with GTC	<i>None listed in the sentence credit statute</i>	<ul style="list-style-type: none"> Court ordered to serve full term
Arkansas	30 days per month	360 days	EARNED SENTENCE CREDITS EXCLUSIONS: <ul style="list-style-type: none"> Murder Kidnapping Aggravated robbery Rape Trafficking 	GOOD TIME EXCLUSIONS: <ul style="list-style-type: none"> Disciplinary sentences MERITORIOUS GOOD TIME (ESC) EXCLUSIONS: <ul style="list-style-type: none"> Life in prison
California	1 day for every 2 days served ⁷	Varies by program	<ul style="list-style-type: none"> Convicted two or more previous times for a violent felony 	<ul style="list-style-type: none"> Life in prison
Colorado	15 days per month	12 days per month; 60 days for program completion	<i>None listed in the sentence credit statute</i>	<i>None listed in the sentence credit statute</i>
Connecticut	N/A	5 days per month	<ul style="list-style-type: none"> Murder; Manslaughter (1st degree with firearm); Aggravated sexual assault of a minor; home invasion Persistent dangerous felony offenders Persistent dangerous sexual offenders 	<ul style="list-style-type: none"> Offenders serving a period of special probation
Delaware	3 days per month <i>Note: Combined GTC and ESC accruals cannot exceed 160 days per year.</i>	5 days per month	<i>None listed in the sentence credit statute</i>	<ul style="list-style-type: none"> Life in prison Court ordered to serve full sentence or to serve at a Level V
Florida	10 days per month <i>Note: Combined GTC and ESC accruals cannot reduce sentence by more than 15%</i>	10 days per month; 60 days upon completion of high school equivalency diploma or vocation certificate	EARNED SENTENCE CREDITS EXCLUSIONS: <ul style="list-style-type: none"> Sentenced after October 1, 2014, for: <ul style="list-style-type: none"> Murder Kidnapping False Imprisonment Sexual Battery 	<ul style="list-style-type: none"> Life in prison

STATE	MAXIMUM GOOD TIME CREDITS (GTC) ²	MAXIMUM EARNED SENTENCE CREDITS (ESC) ³	STATUTORY EXCLUSIONS BASED ON CONVICTION ⁴	STATUTORY EXCLUSIONS BASED ON SENTENCE ⁵
Georgia	N/A	1 day per 1 day worked	<ul style="list-style-type: none"> Offenses that are not eligible for parole 	<ul style="list-style-type: none"> Life in prison Mandatory minimum sentences Certain sentences where an offender is required to serve 90% of the sentence Sentences of less than 2 years
Hawaii	N/A	N/A	N/A	N/A
Idaho	N/A	N/A	N/A	N/A
Illinois	1 day per 1 day served	1.5x good time credits; lump sum credits for program completion vary	<ul style="list-style-type: none"> 1st degree murder Terrorism 	<ul style="list-style-type: none"> Life in prison Court ordered to serve 100% of sentence or a mandatory minimum
Indiana	1 day per 1 day served	2 years or 1/3 of applicable credit time (whichever is less)	<ul style="list-style-type: none"> Class D classifications: <ul style="list-style-type: none"> Child molestation of a victim under age of 12 Murder during a sex crime Murder of a witness in a prosecution for a sex crime 	<i>None listed in the sentence credit statute</i>
Iowa*	1 and 2/10 of a day for each 1 day served	Combined with GTC	<ul style="list-style-type: none"> Attempted Murder 	<ul style="list-style-type: none"> Life in prison
Kansas	20%	120 days	<i>None listed in the sentence credit statute</i>	<i>None listed in the sentence credit statute</i>
Kentucky	10 days per month	90 days per program	<i>None listed in the sentence credit statute</i> <i>Note: Offenders convicted of sex offenses cannot earn credits until successful completion of the sex offender treatment program</i>	<i>None listed in the sentence credit statute</i>

STATE	MAXIMUM GOOD TIME CREDITS (GTC) ²	MAXIMUM EARNED SENTENCE CREDITS (ESC) ³	STATUTORY EXCLUSIONS BASED ON CONVICTION ⁴	STATUTORY EXCLUSIONS BASED ON SENTENCE ⁵
Louisiana*	30 days for every 30 days served	Combined with GTC	GOOD TIME AND EARNED TIME EXCLUSIONS: <ul style="list-style-type: none"> Person convicted a second time for of a crime of violence EARNED TIME EXCLUSIONS: <ul style="list-style-type: none"> Certain sex offenses (listed in LA. STAT. ANN. § 15:541) Offenders with more than one prior conviction for a violent crime or sex crime 	<ul style="list-style-type: none"> Life in prison Sentenced to imprisonment with hard labor
Maine	4 days per month ⁸	5 days per month	EARNED SENTENCE CREDITS EXCLUSIONS: <ul style="list-style-type: none"> Murder Sexual assaults/sex crimes Incest Indecent conduct Crimes between family members. The following crime against a family or household member: violent crimes, kidnapping, criminal restraint, forced labor, child endangerment, endanger dependent, violation of protective order, and obstructing report of crime 	<i>None listed in the sentence credit statute</i>
Maryland	10 days per month <i>Note: Combined GTC and ESC accruals cannot exceed 30 days per month for most inmates (certain inmates are limited to a maximum of 20 days per month)</i>	5 days per month per program	<ul style="list-style-type: none"> Rape involving a child under 16 Sexual assault involving a child under 16 Sexual offense in the 3rd degree if the inmate was previously convicted of sexual assault of a child under 16 	<i>NOTE: The parole board can decline to grant sentence credits after revocation of parole or mandatory supervision</i>
Massachusetts*	10 days per month ⁹	Combined with GTC	<i>None listed in the sentence credit statute</i>	<i>None listed in the sentence credit statute</i>
Michigan	N/A	N/A	N/A	N/A
Minnesota	N/A	N/A	N/A	N/A

STATE	MAXIMUM GOOD TIME CREDITS (GTC) ²	MAXIMUM EARNED SENTENCE CREDITS (ESC) ³	STATUTORY EXCLUSIONS BASED ON CONVICTION ⁴	STATUTORY EXCLUSIONS BASED ON SENTENCE ⁵
Mississippi	4.5 days per 30 days served	TBD by Commissioner	<ul style="list-style-type: none"> Habitual offender (convicted under MISS. CODE ANN. §§ 99-19-81 through 99-19-87) Sex crimes 	<ul style="list-style-type: none"> Mandatory minimum sentence Life in prison
Missouri*	2 months each year	Combined with GTC	<ul style="list-style-type: none"> Tampering with a victim or witness Drug sales or possession, if the inmate has a prior drug offense conviction Inmates whose conditional release has been extended to maximum release due to disciplinary issues Persistent sexual offender Class X-offender 	<ul style="list-style-type: none"> Life in prison Inmates required to serve minimum sentence Inmates sentenced as a dangerous or persistent offender
Montana	N/A	N/A	N/A	N/A
Nebraska	3 days per month (after the first year)	6 months per year	<i>None listed in the sentence credit statute</i>	<i>None listed in the sentence credit statute</i>
Nevada	20 days per month	10 days per month at the Director's discretion; lump sum of 60-120 days after program completion (varies by program)	<ul style="list-style-type: none"> Felony involving the use or threat of force or violence Felony sexual offense Certain violations of work zone regulations DUIs that result in bodily harm or death <p><i>NOTE: Inmates sentenced for category A or B felonies may only be awarded credits that are deducted from their maximum sentences</i></p>	<i>None listed in the sentence credit statute</i>
New Hampshire	12.5 days per month	21 months off sentence	<i>None listed in the sentence credit statute</i>	<i>None listed in the sentence credit statute</i>
New Jersey	16 days per month (after 30 th year of continuous good behavior)	1 day for each 5 days of productive occupation ¹⁰	<i>None listed in the sentence credit statute</i>	<i>None listed in the sentence credit statute</i>
New Mexico	N/A	30 days per month	<i>None listed in the sentence credit statute</i>	<ul style="list-style-type: none"> Life in prison

STATE	MAXIMUM GOOD TIME CREDITS (GTC) ²	MAXIMUM EARNED SENTENCE CREDITS (ESC) ³	STATUTORY EXCLUSIONS BASED ON CONVICTION ⁴	STATUTORY EXCLUSIONS BASED ON SENTENCE ⁵
New York*	1/3 of indeterminate sentence; 1/7 of determinate sentence	Combined with GTC	<i>None listed in the sentence credit statute</i>	<ul style="list-style-type: none"> Life in prison
North Carolina	N/A	Misdemeanors: 4 days per month Felonies: maximum credits set by the Secretary of Public Safety	<i>None listed in the sentence credit statute</i> <i>Note: The Secretary of Public Safety may issue regulations in regard to deductions for inmates serving sentences for impaired driving offenses</i>	<i>None listed in the sentence credit statute</i>
North Dakota	N/A	5 days per month	<i>None listed in the sentence credit statute</i>	<ul style="list-style-type: none"> Inmates convicted of offenses listed under N.D. CENT. CODE § 12-54.1-01 must serve 85% of their sentence
Ohio	N/A	8% of term	<ul style="list-style-type: none"> Aggravated murder Murder Conspiracy or attempt to commit murder Complicity in committing aggravated murder or murder Sexually orientated offenses committed after September 30, 2011. 	<ul style="list-style-type: none"> Life in prison
Oklahoma	60 credits per month	Varies by program	<ul style="list-style-type: none"> Crime which resulted in the death of a law enforcement officer, an employee of the DOC, or an employee of a private prison contractor while the victim was acting within the scope of their employment Violating any of the terms and conditions of probation and referred to an intermediate revocation facility 	<i>None listed in the sentence credit statute</i>
Oregon*	20%	Combined with GTC	<ul style="list-style-type: none"> Murder Certain violent felonies 	<ul style="list-style-type: none"> Determinate sentence (violent felonies) Mandatory Minimum
Pennsylvania	N/A	N/A	N/A	N/A

STATE	MAXIMUM GOOD TIME CREDITS (GTC) ²	MAXIMUM EARNED SENTENCE CREDITS (ESC) ³	STATUTORY EXCLUSIONS BASED ON CONVICTION ⁴	STATUTORY EXCLUSIONS BASED ON SENTENCE ⁵
Rhode Island	10 days per month	<ul style="list-style-type: none"> • 5 days per month for programs • 2 days per month for institutional industries • 30 days may be awarded upon completion of a program 	GOOD TIME CREDIT EXCLUSIONS: <ul style="list-style-type: none"> • Sexual assault • Intent to commit 1st degree sexual assault • Child pornography • Murder • Kidnapping a minor 	<ul style="list-style-type: none"> • Life in prison • A sentence of less than 6 months
South Carolina	20 days per month	180 days annually	<ul style="list-style-type: none"> • Murder (those sentenced to 30 years only) 	<ul style="list-style-type: none"> • Life in prison • Mandatory minimum of 30 years
South Dakota	N/A	Varies based on program (most are 90 days)	<i>None listed in the sentence credit statute</i>	<ul style="list-style-type: none"> • Life in prison
Tennessee	8 days per month	<ul style="list-style-type: none"> • 8 days per month • 60 days for program completion (max of one 60 day credit) 	EARNED SENTENCE CREDITS EXCLUSIONS <ul style="list-style-type: none"> • Inmates convicted of certain violent felonies must serve 85% of their sentence • Inmates convicted of certain sex offenses must serve 100% of their sentence 	<i>None listed in the sentence credit statute</i>
Texas	N/A	N/A	N/A	N/A
Utah	N/A	No maximum (no less than 4 months for two programs completed)	<i>None listed in the sentence credit statute</i>	<ul style="list-style-type: none"> • Ordered to serve life by the parole board • Inmates without a release date • Inmates that have not met a contingency requirement for release by parole board
Vermont	7 days per month	N/A	GOOD CONDUCT TIME EXCLUSIONS: <ul style="list-style-type: none"> • Incarcerated for a violation of release conditions 	<ul style="list-style-type: none"> • Inmates ordered to serve an uninterrupted sentence
Virginia*	4.5 days per 30 days served ¹¹	Combined with GTC	<i>None listed in the sentence credit statute</i>	<i>None listed in the sentence credit statute</i>
Washington*	1/3 of sentence	Combined with GTC	<ul style="list-style-type: none"> • Felony after July 23, 1995, that involved deadly weapon enhancements 	<i>None listed in the sentence credit statute</i>

STATE	MAXIMUM GOOD TIME CREDITS (GTC) ²	MAXIMUM EARNED SENTENCE CREDITS (ESC) ³	STATUTORY EXCLUSIONS BASED ON CONVICTION ⁴	STATUTORY EXCLUSIONS BASED ON SENTENCE ⁵
West Virginia	1 day for every 1 day served	N/A	<ul style="list-style-type: none"> Certain sex offenders listed under W. VA. CODE § 62-12-26 	<ul style="list-style-type: none"> Life in prison
Wisconsin	N/A	N/A	N/A	N/A
Wyoming*	15 days per month	Combined with GTC	None listed in the sentence credit statute	<ul style="list-style-type: none"> Life in prison

*States that have a program participation requirement in order to be awarded good time credits.

APPENDIX B FOOTNOTES

¹ Staff only analyzed sentence reduction credit systems where the awarded credits can be used to reduce an inmate's total term of confinement. Staff did not analyze sentence reduction credit systems that reduce other terms, such as an inmate's parole eligibility or length of supervision.

² The maximum accrual rates for good time credits can be based on a variety of factors, such as: type of offense, type of sentence, and/or offender classification. Therefore, not all inmates will accrue good time credits at the maximum rates listed.

³ Similar to good time credits, states may place certain limitations on the number of earned sentence credits that can be awarded. Therefore, not all inmates will accrue earned sentence credits at the maximum rates listed. Some states award additional earned sentence credits for meritorious conduct, such as acts of heroism or performing duties of outstanding importance. Because earned sentence credits for meritorious conduct are only awarded in limited circumstances, staff did not include these credits in this analysis.

⁴ Inmates convicted of offenses listed in the "statutory exclusions based on conviction" column are prohibited from earning good time credits, earned sentence credits, or both. Staff only examined the sentence reduction credit statutes in other states, and did not review rules, regulations, department policies, or other statutes, such as penalty statutes. Therefore, this list may not encompass all conviction-based exclusions in a particular state.

⁵ The "statutory exclusions based on sentence" column only lists exclusions that are specified in the state's sentence reduction credit statutes. Additional exclusions based on an inmate's sentence may be listed in a state's rules, regulations, department policies, or other statutes, such as penalty statutes. Some state's sentence reduction credit statutes specify that inmates sentenced to life without parole or death are excluded from being awarded sentence reduction credits, unless that inmate's sentence is commuted; however, not all states list these specific exclusions in statute. As such, staff did not include sentences of life without parole or death in this analysis, regardless of whether or not such exclusions were listed in a state's sentence reduction credit statutes.

⁶ See ARIZ. REV. STAT. § 41-1604.07 (LexisNexis 2020). Inmates serving a sentence for certain drug offenses (possession or use of: narcotics, dangerous drug, narcotic drug, or drug paraphernalia) who have not previously been convicted of a violent or aggravated felony, and who have successfully complete a drug treatment program, can be awarded good time credits of 3 days for every 7 days served.

⁷ See CAL. CODE REGS. tit. 15, § 3043.2 (2020). The maximum accrual for good time credits will increase to 1 day for each 1 day served (or 50% of the sentence) on May 1, 2021, for certain inmates not serving a sentence for a violent felony.

⁸ See ME. STAT. tit. 17, § 2308 (2020). In Maine, inmates convicted of certain violent crimes (crimes listed in the “statutory exclusions based on conviction” column) can be awarded a maximum of 5 days of good time credits per month; however, those inmates cannot be awarded earned sentence credits.

⁹ See MASS. GEN. LAWS ch. 127, § 129D (2020). Inmates working in state hospitals or schools can be awarded a maximum of 15 days per month in good time credits.

¹⁰ See N.J. STAT. ANN. § 30:4-92 (West 2020). Productive occupation includes all education, workforce skills, or vocational training programs. An inmate can earn cash (at inmate wage rates) or a deduction of time from their total sentence, or both.

¹¹ See VA. CODE ANN. § 53.1-202.2 *et. seq.* (2020). These maximum accruals are for Virginia’s most recent sentence reduction credit system (earned sentence credits). See *also* VA. CODE ANN. §§ 53.1-196 and 53.1-197 (2020). Inmates incarcerated under the good conduct time system (convicted on or before June 30, 1981) may be eligible to be awarded up to 10 days per 20 days served for good conduct and 5 days per month for program participation. See *also* VA. CODE ANN. § 53.1-199 *et. seq.* (2020). Inmates incarcerated under the good conduct allowance system (convicted on or after July 1, 1981, but before January 1, 1995) may be eligible to be awarded up to 30 days per 30 days served for good conduct and performance of their assignments.

EXPUNGEMENT AND SEALING OF CRIMINAL RECORDS

EXECUTIVE SUMMARY

During the 2020 Regular Session of the General Assembly, numerous bills related to criminal conviction relief were referred to the Crime Commission.¹ The Executive Committee of the Crime Commission directed staff to conduct a review of expungement in Virginia and of criminal conviction relief in other states, with a particular focus on the automatic sealing of criminal charges and convictions.

Criminal conviction relief refers to the practice of either removing or limiting access to certain charges or convictions on a person's criminal record. The two most common forms of criminal conviction relief in the United States are sealing and expungement. Sealing is generally defined as preventing access to a record, while expungement is generally defined as erasing or destroying a record. However, these definitions vary considerably by state. In addition, states use a significant array of other terminology to describe their own criminal conviction relief mechanisms. For purposes of this report, unless otherwise noted, the term sealing will be used to describe all criminal conviction relief mechanisms throughout the country.

Various matters intersect when examining criminal conviction relief, such as the collateral consequences of criminal charges and convictions, the disproportionate impact of the criminal justice system on certain racial and ethnic populations, desistance from crime, and redemption time. When examining these intersections, staff found that:

- Criminal charges and convictions can negatively impact a person's life long after they have completed the terms of their sentence;
- Certain racial and ethnic populations are disproportionately represented across the entire criminal justice system;
- Criminal offending varies considerably from individual-to-individual over the course of a lifetime; and,
- If a previously convicted person refrains from further criminal activity, there is a point in time when that person will present no greater threat of committing a new offense than a person with no criminal record.

Criminal conviction relief laws have been proposed as a mechanism to help alleviate the collateral consequences of a criminal record. States generally have two options when implementing criminal conviction relief processes. States can implement a process where an individual must petition a court to have their criminal record sealed (*petition-based*

sealing), or states can create a system whereby an individual's criminal record is automatically sealed at a specified time following the disposition of their case (*automatic sealing*). Both petition-based sealing and automatic sealing require certain conditions to be met before a criminal charge or conviction can be sealed.

Virginia law does not provide a mechanism for criminal conviction relief; however, the Commonwealth does have an expungement process to remove certain charges from criminal history and court records. Virginia's expungement process is petition-based and is only available for charges that did not result in a conviction or a deferred dismissal. Staff identified numerous challenges within Virginia's current expungement process that not only make it difficult to expand the petition-based process, but also act as barriers to implementing an automatic criminal conviction relief process in the Commonwealth. For example, Virginia's expungement process is time and labor intensive, existing electronic records and case management systems are unable to support an automated sealing process, and there is a lack of a uniform standard in regard to which offenses appear on a person's criminal record.

In addition to examining Virginia law, staff conducted a review of various aspects of criminal conviction relief laws across the United States. When reviewing petition-based criminal conviction relief laws for *misdemeanor* convictions, staff found that:

- 41 states allow some misdemeanor convictions to be sealed;
- 11 of these 41 states allow all misdemeanor convictions to be sealed;
- 15 states place no limits on the number of misdemeanor convictions that can be sealed; and,
- The waiting period ranges from the completion of the sentence up to 15 years before a misdemeanor conviction becomes eligible for sealing.

When reviewing petition-based criminal conviction relief laws for *felony* convictions, staff found that:

- 36 states allow some felony convictions to be sealed;
- 16 of these 36 states allow some *violent* felony convictions to be sealed;
- 10 states place no limits on the number of felony convictions that can be sealed; and,
- The waiting period ranges from the completion of the sentence up to 20 years before a felony conviction becomes eligible for sealing.

Staff discovered several significant similarities and differences amongst the criminal conviction relief laws of states with petition-based sealing, including:

- Several states have enacted laws that allow for the sealing of criminal convictions related to specific circumstances, such as sex trafficking, mistaken or stolen identity, marijuana offenses, larceny, and decriminalized offenses;
- Nearly every state excludes convictions for some sex offenses from sealing, and a significant number of states exclude convictions for domestic assault and battery, DUI, and violation of a protective order from sealing;
- The starting point for determining when a conviction is eligible for sealing varies across states;
- States vary on whether restitution must be paid in full before a conviction can be sealed;
- A large majority of states grant courts the discretion to determine whether the requirements for sealing have been met, as opposed to establishing a specific burden of proof for sealing;
- Nearly all states allow individuals to deny that a sealed conviction occurred when applying for employment, while several states address the use of such records by employers; and,
- Every state maintains sealed criminal records for certain specified purposes; however, those purposes vary across states.

When examining automatic sealing laws across the United States, staff found that there are 5 states that have enacted automatic sealing statutes for broad classes of non-convictions and convictions: California, Michigan, New Jersey, Pennsylvania, and Utah. All of these states also have petition-based sealing of non-convictions and convictions. These automatic sealing laws were all enacted in the last few years, with Pennsylvania's automatic sealing legislation being the first in June 2018. It is important to note that Pennsylvania is the only state that has implemented an automated system and has already sealed records of approximately 48 million offenses in over 36 million cases. The remaining states are currently in the process of implementing their automated systems. Furthermore, staff noted that 4 states have enacted more narrow legislation to automatically seal certain minor convictions (Illinois, New York, South Dakota, and Vermont).

Staff also found that the emergence of public and private online criminal record databases has presented a significant challenge to the sealing of criminal records. In the modern information age, criminal records are not only available on state court websites, but are also gathered and distributed by third party vendors who provide background check services to certain entities, such as government agencies and private companies. Additionally, criminal records are often disseminated by news outlets and on social

media, which makes it even more difficult to restrict access to this information. Ten states have enacted legislation to regulate the dissemination of the sealed criminal records by private entities.

Crime Commission members reviewed study findings at the August 31, 2020, Commission meeting. Staff provided Crime Commission members with draft legislation to create an automated process in Virginia to seal criminal history record information and court records for non-convictions, deferred and dismissed charges, and numerous felony and misdemeanor convictions, which was endorsed by the Crime Commission. This legislation was introduced during the 2020 Special Session of the General Assembly (House Bill 5146 - Del. Charniele L. Herring).² House Bill 5146 passed the House of Delegates; however, the version of House Bill 5146 that passed the Senate was significantly different because it was conformed to Senate Bill 5043.³ The bills were sent to a conference committee between the House of Delegates and the Senate where members were unable to resolve the differences. Both bills remained in conference and neither bill was enacted into law by the General Assembly.

During the 2021 Regular Session of the General Assembly, legislation was re-introduced to create an automatic sealing process in Virginia (House Bill 2113 - Del. Charniele L. Herring and Senate Bill 1372 - Sen. L. Louise Lucas).⁴ These bills were substantially similar to the version introduced during the 2020 Special Session of the General Assembly; however, the bills included additional language to address the dissemination of criminal and court records by third parties and to provide immunity protections for employers who hire individuals with sealed criminal records. Additionally, legislation was also introduced to create a broad petition-based sealing process and a narrower automatic sealing process (Senate Bill 1339 - Sen. Scott A. Surovell).⁵ The Senate Committee on the Judiciary ultimately incorporated Senate Bill 1372 into Senate Bill 1339.

Due to the significant differences between House Bill 2113 and Senate Bill 1339, members of the House of Delegates and the Senate worked with Crime Commission staff in an effort to produce a merged version of the two bills. Compromise legislation was developed that created both an automatic and a petition-based process for the sealing of adult criminal history and court records. Both bills were amended to reflect these compromises and were then passed by the General Assembly and signed into law by the Governor.⁶ The enacted legislation addressed seven key measures related to the sealing of criminal history record information and court records in Virginia, including defining the effects of sealing, the creation of both automatic and petition-based sealing processes for certain convictions, establishing waiting periods of 7 years for misdemeanors and 10 years for

felonies before a conviction can be sealed, restrictions on the dissemination and use of sealed records by public and private entities, specific provisions for implementing the new automatic and petition-based sealing processes, and the continued study of the expungement and sealing of criminal records by the Crime Commission.

BACKGROUND

Crime Commission staff engaged in the following activities as part of its study on the expungement and sealing of criminal records both in Virginia and the United States:

- Collected relevant literature and research examining criminal conviction relief and related matters;
- Examined Virginia expungement laws, procedures, and case law;
- Obtained data on the number of expungement orders entered in Virginia annually;
- Conducted a 50 state review of other states' criminal conviction relief statutes, including automatic and petition-based processes;⁷
- Analyzed state and federal laws governing the dissemination of criminal records by third parties;
- Consulted with subject-matter experts, stakeholders, practitioners, and advocates; and,
- Worked with stakeholders to develop a legislative framework for implementing both automatic and petition-based processes for the sealing of criminal history record information and court records in Virginia.

KEY TERMS AND SCOPE OF STUDY

Sealing and expungement are the main terms that describe the various criminal conviction relief mechanisms used across the United States.⁸ Sealing is generally defined as preventing access to a record; whereas, expungement is generally defined as erasing or destroying a record.⁹ However, states vary substantially in how the terms sealing and expungement are defined in statute. For example, while several states define expungement as “to permanently destroy, delete, or erase a record of an offense from the criminal history record,”¹⁰ other states define expungement as “the sealing of criminal records.”¹¹ Similar contradictions emerge when examining the definition of sealing across state statutes.¹² Additionally, states use other terms beyond sealing and expungement to describe certain criminal conviction relief mechanisms, such as vacatur,¹³ set aside,¹⁴ restrict,¹⁵ annulment,¹⁶ order of erasure,¹⁷ order for limited access,¹⁸ and order of non-disclosure.¹⁹ Given the varying terminology used to describe criminal conviction relief

mechanisms across the United States, this report will use the term sealing, unless otherwise indicated, to describe all criminal conviction relief mechanisms used throughout the country.

Additionally, this report will refer to both automatic and petition-based criminal record sealing processes as follows:

- *Automatic sealing* describes the process whereby an individual's criminal record is sealed at a specified time following the disposition of their case, provided that conditions for such automatic sealing have been satisfied.
- *Petition-based sealing* describes the primary sealing process used throughout the United States, whereby an individual petitions a court to have their criminal record sealed, and the court holds a hearing to determine whether to grant or deny the sealing request.

Finally, this report will refer to both non-conviction and conviction records. Within the context of sealing statutes, non-convictions include arrests, as well charges that concluded without a conviction, such as cases that ended with a finding of not guilty, an acquittal, a dismissal, or a *nolle prosequi*.²⁰ Convictions refer to charges that concluded with a finding of guilt.²¹

OVERVIEW OF RELEVANT LITERATURE AND RESEARCH

Criminal charges and convictions can negatively impact a person's life long after they have completed the terms of their sentence.

Criminal charges and convictions can impose a myriad of collateral consequences on an individual that persist long after that individual is no longer involved in the criminal justice system. The National Inventory of Collateral Consequences of Convictions (NICCC) found that there are over 45,000 federal and state collateral consequences that could potentially stem from a criminal conviction.²² In Virginia, individuals who are convicted of a felony may face nearly 900 collateral consequences.²³ These collateral consequences can include, but are not limited to, impeding an individual's ability to obtain employment, housing, higher education, financial aid, loan eligibility and credit, and professional licensing.²⁴ All of these collateral consequences can severely limit an individual's ability to reintegrate back into society following a criminal charge, conviction, or release from incarceration. Additionally, criminal charges and convictions may impose a significant negative social stigma, which serves to amplify the difficulties that individuals face while attempting to rehabilitate their lives.²⁵

Certain racial and ethnic populations are disproportionately represented across the entire criminal justice system.

It has been estimated that 78 million Americans, roughly one third of adults in the United States, have a criminal record.²⁶ In Virginia's Central Criminal Records Exchange (CCRE), there are approximately 2.5 million individuals with a criminal record (arrest and/or conviction).²⁷ Criminal records have disproportionately impacted certain racial and ethnic populations.²⁸ Black persons in particular have been disproportionately arrested and incarcerated for crimes as compared to other racial groups at both national and statewide levels. Specifically, when examining the total number of arrests in the United States during 2018, Black persons made up 27% of the arrests despite comprising only 13% of the overall United States population.²⁹ Furthermore, when examining the racial composition of state and federal prisoners in the United States, 2019 data shows that Black persons comprised 33% of sentenced state prisoners and 37% of sentenced federal prisoners in the United States.³⁰

This disproportionate impact is also seen in Virginia, where Black persons comprise close to 20% of the statewide population,³¹ but accounted for 42% of the arrests in 2019.³² Moreover, Black persons comprised 55% of the state responsible offender population in the Commonwealth at the end of FY2019.³³

In addition, the disproportionate impacts of the criminal justice system reverberate well beyond arrest and incarceration rates. As discussed in the previous section, the collateral consequences of a criminal record can impact many facets of an individual's life, including employment. For example, some evidence suggests that employers are more likely to reject a job application from a Black male with a criminal record than a White male with a comparable criminal record.³⁴

***Criminal offending varies considerably from individual-to-individual over the course of a lifetime.*³⁵**

A wide array of competing explanations have been developed to determine the correlates of crime and why individuals start criminal offending (onset), continue criminal offending (persistence), or stop criminal offending (desistance).³⁶ The presence, absence, or combination of certain factors can either mitigate or increase the risk that an individual will engage in criminal activity. Research also strongly emphasizes the impact of the timing, duration, and ordering of life events on an individual's propensity to offend.³⁷ The following factors, which can generally apply to all types of individuals and criminal

offenses, have been identified by research as impacting the onset, persistence, or desistance of criminal offending:

- Age
- Age at time of first criminal offense
- Anti-social behavior
- Drug/alcohol use or misuse
- Education
- Employment status
- Family environment
- Gender
- History of trauma or abuse
- Housing status
- Juvenile delinquency
- Levels of aggression and self-control
- Marital status
- Mental health status
- Military service
- Neighborhood
- Opportunity
- Parenthood
- Peer group
- Prior criminal history
- Prior incarceration
- Quality of interpersonal relationships
- Religiosity/Spirituality
- Self-esteem
- Self-identity
- Socio-economic status/poverty level

It is generally accepted that the vast majority of criminal offending is limited to adolescence and young adulthood, and that most individuals eventually desist from criminal offending over time.³⁸ It should be noted that desistance from criminal offending is frequently a gradual process rather than an immediate, one-time event.³⁹ Furthermore, research has repeatedly demonstrated the link between a person's age at the time of their first criminal offense and the persistence, frequency, and seriousness of criminal offending over time.⁴⁰ "Career criminals" tend to begin criminal activity at a younger age, have longer careers, and desist much later than other individuals.⁴¹

If a previously convicted person refrains from further criminal activity, there is a point in time when that person will present no greater threat of committing a new offense than a person with no criminal record.

Research appears to suggest that previously convicted individuals can reach a point of "redemption," which within the context of criminal offending can be defined as "the process of lifting the burden of the prior record."⁴² Redemption time is based on the concept that:

... recidivism probability declines with time "clean," so there is some point in time when a person with a criminal record who remained free of further contact with the criminal justice system is of no greater risk than any counterpart, an indication of redemption from the mark of an offender.⁴³

There are several ways redemption time can be measured to determine the point at which individuals with prior criminal history records resemble the non-offender population in terms of risk for a new contact with law enforcement, arrest, or conviction.⁴⁴ Research generally indicates that after a period of approximately 7 to 10 years, individuals with convictions as juveniles or young adults reach redemption.⁴⁵ However, the length of time to redemption may vary based on the type of criminal offending, with individuals who commit violent offenses taking longer to reach redemption than individuals who commit property offenses.⁴⁶ A wider variance in the length of time to redemption can also be observed when examining the *combined* impact of an individual's age at the time of conviction with their number of prior convictions.⁴⁷ The seminal piece of research examining this combined impact on redemption time found that:

- Offenders 32 years of age and older with no prior convictions resembled non-offenders in 2 to 6 years;⁴⁸
- Offenders 17 to 21 years old with 1 to 3 prior convictions resembled non-offenders after 13 to 16 years;⁴⁹ and,
- Offenders younger than 37 years of age with 4 or more prior convictions required a minimum of 23 years to potentially resemble non-offenders.⁵⁰

Limitations of redemption time research include variations across the data sources, sample sizes, sample composition, and measures of recidivism used. For instance, researchers noted that there were limitations to some of the foundational studies in terms of demographics, such as race and gender, which have previously been shown to impact recidivism.⁵¹ Research that is more recent has attempted to close this gap. For instance, one study found that male offenders generally reached redemption after a period of 10 years, while female offenders reached redemption after 4 years.⁵² When examining the risk of re-arrest among first-time offenders who are male, larger proportions of Black males were at risk of re-arrest in the first 10 years after their initial offense as compared to White males.⁵³ However, this study also found that after 10 years “there is virtually no difference between whites and blacks in their probabilities of being rearrested.”⁵⁴

Criminal conviction relief laws have been proposed as a mechanism to help alleviate the collateral consequences of a criminal record.

Proponents of criminal conviction relief laws contend that these laws can serve as a tool to help mitigate collateral consequences by allowing previously charged or convicted individuals to more easily reintegrate back into society, stabilize their lives, and become

less likely to commit a new offense.⁵⁵ For example, proponents cite recent studies that suggest that the sealing of criminal records can significantly increase an individual's ability to find employment and achieve higher pay.⁵⁶ Employment is crucial for stabilizing the lives of former offenders, since individuals who are able to find work following the completion of their criminal sentence are less likely to commit a new criminal offense.⁵⁷

A recent study of Michigan's expungement laws found that expungement recipients tended to see an increase in employment and wages following sealing.⁵⁸ However, the Michigan study found that expungement could not definitively be stated to have been the sole cause for the increase in employment and wages for individuals who successfully petitioned for expungement.⁵⁹ Another recent study from California similarly found that employment and wages increased significantly for individuals after their criminal records were sealed.⁶⁰ The California study examined a small cohort of only 235 individuals,⁶¹ and was only able to capture 3 years of post-sealing data for the cohort.⁶² Therefore, the conclusions drawn from both of these studies should be approached with caution.

Opponents of the sealing of criminal records have long stated that the sealing process is inherently flawed because it allows an individual to "falsify history."⁶³ Not only is the individual denying their own criminal record, but they are also hiding relevant information from employers.⁶⁴ Opponents contend that criminal records should be publicly available because employers and professional licensing boards have a common law duty of care to prevent foreseeable harm to others, and thus will look to criminal records as a predictor of future dangerous behavior.⁶⁵

EXPUNGEMENT OF CRIMINAL RECORDS IN VIRGINIA

Current Expungement Process

While Virginia law does not provide for criminal conviction relief, the Commonwealth does have a petition-based expungement process to remove certain charges from criminal history and court records.⁶⁶ Statutory and administrative law, along with relevant case law, govern the current expungement process. After criminal and court records have been expunged, access to those records is only permitted by an order from the circuit court that originally entered the order of expungement.⁶⁷

Virginia's expungement process is petition-based and only applies to certain non-convictions.

The term expungement is not defined in the Code of Virginia; however, per the Administrative Code of Virginia, expungement means "to remove, in accordance with a

court order, a criminal history record or a portion of a record from public inspection or normal access.”⁶⁸ The Code of Virginia only allows for the expungement of certain non-convictions, including charges that concluded in an acquittal, a *nolle prosequi*, or a dismissal.⁶⁹ Virginia courts have interpreted these categories of non-convictions fairly narrowly. For example, the Supreme Court of Virginia has denied expungement petitions for acquittals by reason of insanity,⁷⁰ dismissals following a plea of *nolo contendere*,⁷¹ and where a finding of evidence sufficient for guilt was made and the charge was deferred before ultimately being dismissed.⁷² Furthermore, traffic infractions are not eligible for expungement under the Code of Virginia.⁷³

In order to have a charge expunged, a person must file a petition for expungement in the circuit court in the jurisdiction where the charge was concluded.⁷⁴ A copy of that petition for expungement must be served on the attorney for the Commonwealth, who then has 21 days to file an objection or answer to the petition.⁷⁵ In addition, the petitioner must also obtain a complete set of fingerprints from a law-enforcement agency so that their criminal history record can be provided to the circuit court.⁷⁶ After receiving the petition for expungement and the petitioner’s criminal history record, the circuit court must conduct a hearing on whether to grant the petition, and “if the court finds that the continued existence and possible dissemination of information relating to the arrest of the petitioner causes or may cause circumstances which constitute a *manifest injustice* to the petitioner,” the court must enter an order requiring the expungement of criminal and court records.⁷⁷

Challenges within Virginia’s Current Expungement Process

There are several challenges within Virginia’s current expungement process, including time and labor intensive aspects of the process, the inability of current electronic records and case management systems to support an automated sealing process, and the lack of a uniform standard in regard to which offenses appear on a person’s criminal record. These challenges not only make it difficult to expand Virginia’s current petition-based process, but also act as additional barriers to implementing an automatic process to expunge or seal criminal records. Therefore, any measures to expand Virginia’s expungement process or to implement a sealing process, either automatic or petition-based, will require significant time and investment in order to ensure that such processes are properly implemented.

Challenge #1: Virginia's expungement process is time and labor intensive.

The expungement process in Virginia is time and labor intensive because it involves written communications between numerous agencies that maintain criminal history and court records, as well as manual labor to remove and restrict access to both the physical and electronic records.⁷⁸ For example, after a petition for expungement is filed, the Virginia State Police must review the petition along with the fingerprints submitted by the petitioner, send the petitioner's criminal history record and related documents to the circuit court, and archive any petition-related documents.⁷⁹ If the circuit court then enters an order to expunge the records, the clerk of the circuit court must send a copy of that order to the Virginia State Police.⁸⁰ This order begins the process of expunging the criminal history and court records.⁸¹

The Virginia State Police engage in a wide variety of activities as part of the expungement process, such as reviewing the order of expungement for compliance with existing law, consulting with the circuit court and/or the Office of the Attorney General in regard to any ambiguities or legal issues with the order of expungement, removing the record from the Central Criminal Records Exchange, notifying the FBI of the expungement, removing any mugshot images related to the offense, sealing any fingerprints related to the offense, sending letters to various state and local agencies notifying them of the expungement, and certifying compliance with the order of expungement to the circuit court.⁸² The Virginia State Police received approximately 4,000 expungement orders per year for non-convictions (CY2017 to CY2019),⁸³ and estimate that employees in their expungement section can process approximately 500 expungements per year per employee.⁸⁴

Similarly, both the circuit and the district courts in Virginia undertake numerous responsibilities in relation to the expungement process. The circuit courts receive the petition for expungement, establish a case in the case management system, ensure that a copy of the petition is served on the attorney for the Commonwealth, and conduct hearings on the petition. If an expungement order is entered, the circuit court sends that order to the Virginia State Police, removes related information from the circuit court case management system, and seals and stores court files related to the expunged offense until such files are destroyed.⁸⁵ In addition, if the expunged offense was heard in the district court, the district court must also remove related information from its case management system and seal and store related court files related to the expunged offense until such files are destroyed.⁸⁶ The Office of the Executive Secretary of the Supreme Court of Virginia estimates that expunging a district court record requires approximately 10 minutes of a clerk's time per expunged offense.⁸⁷ Furthermore, as

noted below, various other entities in addition to the Virginia State Police and the Virginia courts may be in possession of records that must be expunged after an order of expungement is entered.

Challenge #2: The current electronic records and case management systems in Virginia are unable to support an automated sealing process.

There are numerous electronic databases and case management systems utilized across various agencies in Virginia that may contain information related to criminal offenses. Such systems include, but are not limited to, the following:

- Virginia State Police, *Central Criminal Records Exchange* (CCRE);
- Office of the Executive Secretary of the Supreme Court of Virginia, *eMagistrate System* (eMag) and *Circuit and District Court Case Management Systems*;
- Fairfax County and Alexandria circuit courts, *individual court case management systems*;
- Virginia Department of Criminal Justice Services, *Pretrial and Community Corrections Case Management System* (PTCC);
- Virginia Department of Corrections, *Corrections Information System* (CORIS);
- Compensation Board, *Local Inmate Data System* (LIDS); and,
- Various other systems maintained by the Department of Motor Vehicles, the Department of Forensic Science, Commonwealth's Attorneys, local law enforcement agencies, local and regional jails, and other criminal justice agencies.

These systems vary in terms of age and functionality, and while some systems are able to communicate with each other, that communication is limited in scope and nature. Due to the age and limitations of these systems, Virginia cannot implement an automated sealing process under its current technological infrastructure.

Challenge #3: Virginia law does not provide a uniform standard in regard to which offenses appear on a person's criminal record.

Virginia law requires a report to be made to the CCRE when a person is arrested for or convicted of certain offenses.⁸⁸ Once reported to the CCRE, those arrests or convictions will appear on a person's criminal history record.⁸⁹ Offenses that must be reported to the CCRE include treason, any felony, any misdemeanor under Title 54.1 of the Code of Virginia (Professions and Occupations), any misdemeanor under Title 18.2 (Crimes and Offenses Generally), Title 19.2 (Criminal Procedure), or any similar ordinance, or any offense under sixteen other specific Code sections.⁹⁰ However, while Virginia law sets forth offenses that must be reported, the law also allows the CCRE to receive and include

charges and convictions on a person's criminal history record that are not required by law to be reported.⁹¹

These provisions of law have led to inconsistencies as to which offenses appear on an individual's Virginia criminal history record. While certain offenses must be reported statewide, localities differ in the offenses that they voluntarily report to the CCRE. For example, public intoxication is a Class 4 misdemeanor under the Code of Virginia and is therefore punishable by a maximum fine of \$250.⁹² As such, public intoxication is not required to be reported to the CCRE; however, some localities report this offense while others do not. This practice has resulted in inequities in regard to which offenses appear or do not appear on an individual's criminal history record.

50 STATE REVIEW: PETITION-BASED SEALING OF CRIMINAL RECORDS

Petition-based sealing of criminal records varies across the United States in regard to availability, offenses eligible for sealing, time periods until a conviction can be sealed, the number of convictions that can be sealed, burdens of proof, and the retention and use of sealed records.

Petition-based sealing allows courts to exercise discretion when ruling on sealing requests.

Advocates for a petition-based sealing process argue that such a process is important because it allows judges to have discretion when determining whether a criminal record should be sealed. Additionally, petition-based sealing generally allows prosecutors and victims to have input as to whether a criminal record should be sealed. Finally, advocates contend that the court hearing itself, where the court officially seals an individual's criminal record, can have a significant positive impact on the individual whose criminal record was sealed.⁹³

Non-Convictions

Forty-five states allow non-convictions to be sealed.

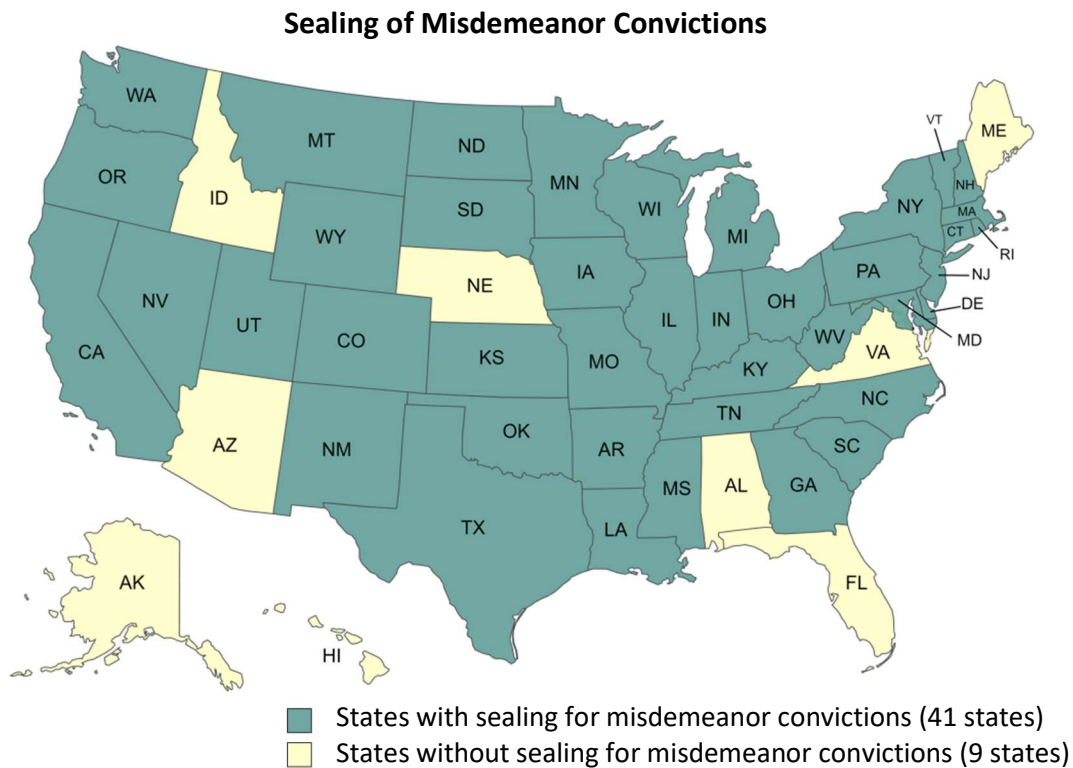
Forty-five states, including Virginia, allow non-convictions to be sealed.⁹⁴ As for the other 5 states, Alaska does not seal non-conviction records, but it does require that certain non-conviction court records be removed from court websites after 60 days.⁹⁵ Arizona does not have a sealing statute for non-convictions.⁹⁶ Montana has a statute that covers the expungement of an individual's fingerprints and photographs following a non-conviction, but not the person's criminal record.⁹⁷ North Dakota does not have a statute that covers

the sealing of non-convictions; however, it does have a court rule addressing the matter.⁹⁸ Finally, Maine is the only state with no criminal conviction relief mechanisms.

Misdemeanor Convictions

Forty-one states allow some misdemeanor convictions to be sealed.

Forty-one states allow for the sealing of some misdemeanor convictions. The map below illustrates which states allow for petition-based sealing of misdemeanor convictions.



Map prepared by Crime Commission staff.

Eleven of these 41 states allow all misdemeanor convictions to be sealed.

In examining the 41 states that allow for the sealing of misdemeanor convictions, 11 states allow all misdemeanor convictions to be sealed, while 30 states place some restrictions on which misdemeanor convictions can be sealed. These restrictions are detailed later in the report.

The waiting period ranges from the completion of the sentence up to 15 years before a misdemeanor conviction becomes eligible for sealing.

The amount of time before a misdemeanor conviction becomes eligible for sealing varies considerably across states. These waiting periods can range from the completion of the

State laws are similarly varied as to whether there are limits on the number of misdemeanor convictions that can be sealed. For example, 15 states place no limits on the number of misdemeanor convictions that can be sealed, while 5 states allow only a first offense to be sealed, and 3 states allow only 1 sealing petition per lifetime.⁹⁹

Thirty-six states allow some felony convictions to be sealed.

Sealing of Felony Convictions



Sixteen of these 36 states allow some violent felony convictions to be sealed.

In examining the 36 states that allow for the sealing of felony convictions, 16 states allow some violent felony convictions to be sealed, while 19 states prohibit the sealing of all violent felony convictions.¹⁰⁰ Only 1 state, Connecticut, allows all convictions to be sealed.

The waiting period ranges from the completion of the sentence up to 20 years before a felony conviction becomes eligible for sealing.

Similar to misdemeanor convictions, states impose a wide range of waiting periods before felony convictions become eligible for sealing. These waiting periods can range from the completion of the sentence up to 20 years; however, the waiting periods commonly range from 5 to 10 years. For example, 13 states require that individuals wait 5 years before a felony conviction can be sealed, and another 7 states impose a 5 year waiting period for specified felonies. Conversely, 11 states require that individuals wait 10 years before a felony conviction can be sealed, and another 6 states impose a 10 year waiting period for specified felonies.

Ten states place no limits on the number of felony convictions that can be sealed.

The number of felony convictions that can be sealed varies by state. For example, 10 states place no limits on the number of felony convictions that can be sealed, while 4 states only allow a first conviction to be sealed, 3 states allow only 1 felony conviction to be sealed, and 2 states provide that specified prior convictions bar a person from having any criminal records sealed.¹⁰¹

Specified Types of Convictions

Several states have enacted laws that allow for the sealing of criminal convictions related to specific circumstances, such as sex trafficking, mistaken or stolen identity, marijuana offenses, larceny, and decriminalized offenses.

Several states have enacted criminal conviction relief laws to address convictions that occurred under specific circumstances, such as:

- 45 states allow sex trafficking victims to petition for the sealing, expungement, or vacatur of convictions related to their sex trafficking;
- 17 states allow for the sealing of charges or convictions for individuals who were charged with an offense as a result of mistaken or stolen identity;
- 12 states specifically provide for the sealing of specified marijuana convictions;

- 41 states allow for the sealing of misdemeanor larceny convictions, with 34 of those states also allowing for the sealing of some felony larceny convictions; and,
- 10 states have provisions for the sealing of decriminalized offenses.¹⁰²

Excluded Offenses

Nearly every state excludes convictions for some sex offenses from sealing, and a significant number of states exclude convictions for domestic assault and battery, DUI, and violation of a protective order from sealing.

Of the 41 states that allow for petition-based sealing of convictions, Connecticut is the only state that does not exclude at least some convictions for sex offenses from being eligible for sealing. When looking at other offenses, 20 states exclude felony domestic assault and battery convictions from sealing, with 9 of those states also excluding misdemeanor domestic assault and battery convictions. Additionally, 17 states exclude felony driving under the influence (DUI) convictions from sealing, with 12 of those states also excluding misdemeanor DUI convictions. Finally, 7 states exclude convictions for protective order violations from sealing.¹⁰³

Waiting Periods

The starting point for determining when a conviction is eligible for sealing varies across states.

States begin the waiting period for when a conviction can be sealed at various times. For example, the waiting period in 19 states commences when the person has completed all of the terms and conditions of the sentence, 5 states begin at the date of conviction, and 5 states calculate the time based on when the individual was released from incarceration, probation, or parole. The other states use differing starting points, such as the date of the offense or the date of disposition. All of the states require an individual to remain conviction free during the waiting period in order to qualify for the sealing of a conviction.¹⁰⁴

Restitution

States vary on whether restitution must be paid in full before a conviction can be sealed.

An examination of state sealing statutes found that 18 states require restitution to be paid in full before sealing of a conviction can be granted, while 5 states allow restitution

to be paid after sealing has been granted. The remaining 18 states did not specifically address restitution in their sealing statutes.¹⁰⁵

Burden of Proof

A large majority of states that allow for petition-based sealing grant courts the discretion to determine whether the requirements for sealing have been met, as opposed to establishing a specific burden of proof for sealing.

In 29 of the 41 states that allow for the petition-based sealing of convictions, the court has broad discretion to determine whether the petitioner has met the statutory requirements for sealing. In the remaining states, 7 states require the petitioner to prove by clear and convincing evidence that they meet the requirements for sealing, and 5 states require the petitioner to prove that they meet such requirements by a preponderance of the evidence. The specific standards that courts must consider when ruling on a petition for sealing can include whether the harm of the conviction to the defendant outweighs the public interest, whether sealing is in the best interest of justice, and whether the petitioner has been rehabilitated.¹⁰⁶

Employment Implications

Nearly all states with petition-based sealing allow individuals to deny that a sealed conviction occurred when applying for employment, while several states address the use of such records by employers.

After a conviction has been sealed, 37 of the 41 states with petition-based sealing allow the individual to deny that the conviction occurred when applying for employment. Of these 37 states, 25 states have exceptions where an individual must disclose a sealed conviction to certain employers. Additionally, 14 states specifically limit the questions that employers can ask about sealed criminal records. Finally, 6 states provide liability immunity for employers who hire individuals who have had convictions sealed.¹⁰⁷

Access to Sealed Records

Every state with petition-based sealing maintains sealed criminal records for certain specified purposes; however, those purposes vary across states.

While states restrict access to and dissemination of sealed criminal records, all states with petition-based sealing maintain such records for specific uses.¹⁰⁸ For example, 39 states allow access to sealed criminal records for criminal justice purposes, which can include

use of such records for impeachment or other evidentiary purposes, sentencing, penalty enhancements, law enforcement investigations, or use in future proceedings related to a petition to seal a criminal record. Additionally, 26 states allow certain employers to access the sealed criminal records. Among the most common employer carve-outs are law enforcement agencies (15 states) and professional licensing boards (19 states).

50 STATE REVIEW: AUTOMATIC SEALING OF CRIMINAL RECORDS

While petition-based sealing is the predominant practice across the United States, states have recently begun to enact legislation to automatically seal certain non-convictions and convictions. As with petition-based sealing, there are variances amongst states in regard to offenses eligible for automatic sealing, time periods until a conviction can be automatically sealed, and restrictions on the automatic sealing of criminal records.

Automatic sealing significantly increases access to the sealing process for qualified individuals.

In recent years, advocacy for automatic sealing has grown because such a process increases access to criminal record sealing by qualified individuals.¹⁰⁹ Advocates for automatic sealing contend that this process increases access to sealing by removing some of the barriers that qualified individuals face under the traditional petition-based process. For example, an automatic sealing process does not require a filing fee;¹¹⁰ necessitate the assistance of an attorney;¹¹¹ or burden qualified individuals with multiple trips to courthouses, police stations, notary offices, and post offices.¹¹² In fact, qualified individuals do not even need to understand or know how automatic sealing laws work in order to benefit from the process.¹¹³

Recent data from Pennsylvania supports the contention that automatic sealing provides greater access to the process than petition-based sealing.¹¹⁴ Pennsylvania implemented an automatic sealing process in June 2019.¹¹⁵ Under this automatic sealing process, in a year and a half (June 28, 2019, to December 15, 2020), Pennsylvania automatically sealed over 48 million offenses from individuals' criminal records in over 36 million cases. Conversely, during a four-year period (November 2016 to December 2020) that pre-dated and overlapped with the automatic sealing process, Pennsylvania only sealed 3,835 offenses from individuals' criminal records in 1,681 cases under its petition-based sealing process. The massive number of offenses sealed during the first year and a half of the automatic sealing process was due, at least in part, to a significant number of qualifying eligible offenses that had accumulated in Pennsylvania's criminal records system;

however, even accounting for that backlog, far more criminal records were sealed under the automatic process than the petition-based process.¹¹⁶

Five states allow broad classes of non-convictions and convictions to be automatically sealed.

There are 5 states that have enacted automatic sealing statutes for broad classes of non-convictions and convictions: California,¹¹⁷ Michigan,¹¹⁸ New Jersey,¹¹⁹ Pennsylvania,¹²⁰ and Utah.¹²¹ All of these states also have petition-based sealing of non-convictions and convictions. These automatic sealing laws were all recently enacted, with Pennsylvania's automatic sealing legislation being the first in June 2018. It is important to note that Pennsylvania is the only state that has fully implemented an automated system and begun sealing criminal history records. The remaining states are currently in the process of implementing their automated systems.

California's automatic sealing statute provides that misdemeanors and infractions will be automatically sealed after one year from conviction as long as the individual was not sentenced to probation. Additionally, a felony or misdemeanor offense will be automatically sealed if a person is sentenced to only probation and the person completes that sentence without a revocation of probation. A person will not qualify for automatic sealing if they are a registered sex offender, or if they are on active probation, serving a sentence for another offense, or have pending criminal charges.¹²²

Michigan's automatic sealing statute provides that certain misdemeanor convictions will be automatically sealed after 7 years from the imposition of the sentence. Certain felony convictions will be automatically sealed after 10 years from the imposition of the sentence or the completion of any term of imprisonment. Felonies and certain misdemeanors cannot be automatically sealed if a person has charges pending or has been convicted of another offense during the waiting period. No more than 2 felony and 4 misdemeanor convictions in total can be automatically sealed, excluding low-level misdemeanors.¹²³

New Jersey's automatic sealing statute provides that all convictions, except for specified exceptions, will be eligible for automatic sealing after 10 years from the date of the person's most recent conviction, payment of any court-ordered financial assessment, satisfactory completion of probation or parole, or release from incarceration, whichever is later. A task force has been created to determine the technological, fiscal, and practical issues and challenges of such a system.¹²⁴

Pennsylvania’s automatic sealing statute provides that certain misdemeanor convictions are automatically sealed after 10 years if there are no subsequent misdemeanor or felony convictions and all court-ordered restitution has been paid. Certain prior convictions disqualify a person from having a record automatically sealed, such as convictions for a prior felony offense, indecent exposure, a total of 4 misdemeanors, and various other offenses.¹²⁵

Utah’s automatic sealing statute provides that certain misdemeanors are sealed after 5 to 7 years. A person will not qualify for automatic sealing if they have unpaid fines, fees, or restitution, pending criminal charges, or certain prior convictions on their criminal records.¹²⁶

Additional information on the automatic sealing statutes in California, Michigan, New Jersey, Pennsylvania, and Utah can be found in Appendix K.

Four states allow convictions for minor offenses to be automatically sealed.

South Dakota allows for automatic sealing of “any charge or conviction resulting from a case where a petty offense, municipal ordinance violation, or a Class 2 misdemeanor was the highest charged offense ... after 10 years if all court-ordered conditions on the case have been satisfied.”¹²⁷ Additionally, Illinois,¹²⁸ New York,¹²⁹ and Vermont¹³⁰ have all enacted statutes which allow for the automatic sealing of specified marijuana convictions.

THIRD PARTY ACCESS TO AND DISSEMINATION OF CRIMINAL RECORDS

While states can restrict access to and dissemination of criminal records in possession of government entities, numerous challenges exist to limiting the sharing and use of criminal record information that has entered the public domain.

Furthermore, the online proliferation of easily accessible criminal records undermines the intention of sealing criminal records. In the modern information age, criminal records are not only available on state court websites, but are also gathered and distributed by third party vendors who provide background check services to subscribers, such as government agencies and private companies. Additionally, criminal records are often disseminated by news outlets and on social media, which makes it even more difficult to restrict access to this information.¹³¹

The emergence of public and private online criminal record databases presents a significant challenge to the sealing of criminal records.

While numerous states have enacted legislation to seal criminal records, there is growing recognition that the online dissemination of criminal records potentially undermines the rehabilitative goals of sealing. Over the last several decades, criminal records have become increasingly accessible via online court databases, making convictions, as well as non-convictions, open to public inspection.¹³² This particular challenge exists in Virginia, as the Code of Virginia requires that non-confidential court case information be made available free of charge online.¹³³ The increased access to online criminal records has allowed private companies to create their own criminal records databases and provide background checks on individuals using those private databases. This has become a thriving industry, as many employers conduct background checks on prospective employees.

Some of the private companies that currently provide, or have previously provided, these private background checks are larger database servers, such as LexisNexis and Westlaw.¹³⁴ These larger database providers are often regulated under the federal Fair Credit Reporting Act (FCRA),¹³⁵ which requires that these databases “follow reasonable procedures to assure maximum possible accuracy” of information on their websites.¹³⁶ Unfortunately, some research has shown that databases regulated under the FCRA do not always obtain their information from reliable sources, and that even when the source is reliable, these companies do not always remove sealed records from their databases.¹³⁷

Beyond these larger database servers are companies and websites that either purchase information from government websites in bulk or scrape government databases and repackage the information for sale.¹³⁸ These companies are not regulated under the FCRA and there are generally few, if any, legal or internal requirements to ensure that the information they provide is accurate.¹³⁹ These particular companies and websites are not limited only to criminal records; mugshot image websites, for example, display booking photographs and arrest information of criminal defendants.¹⁴⁰ These companies and websites can be especially damaging to individuals who are seeking to move beyond their criminal records and reintegrate into society, especially since there is little incentive for these companies and websites to ensure the accuracy of the criminal records.¹⁴¹

Ten states have enacted legislation to regulate the dissemination of the sealed criminal records by private entities.

Ten states have enacted legislation with the intention of preventing the dissemination of sealed criminal records by private companies: Colorado,¹⁴² Connecticut,¹⁴³ Louisiana,¹⁴⁴ Michigan,¹⁴⁵ Minnesota,¹⁴⁶ Nevada,¹⁴⁷ New Jersey,¹⁴⁸ North Carolina,¹⁴⁹ Rhode Island,¹⁵⁰ and Texas.¹⁵¹ These statutes typically provide that after receiving notice that a criminal record has been sealed, a private company will be subject to civil penalties for disseminating the sealed record.¹⁵² While these states have made efforts to address third party dissemination, state laws and regulations of third party providers face certain limitations, as states cannot preempt, supersede, or contradict federal law or regulations, such as the FCRA or the Gramm-Leach-Bliley Act (15 U.S.C. § 6801-6809).

Public availability and dissemination of sealed criminal records does not eliminate all of the benefits that stem from sealing legislation.

While online and private dissemination of criminal records can undermine the goals of sealing, these challenges do not completely eliminate the benefits of sealing. In fact, some research has found that even with the proliferation of online criminal records, individuals who are able to have their criminal records sealed may still benefit significantly from that sealing. The Michigan expungement study, cited earlier in the report, examined employment and wage trends for individuals who were able to have their criminal records expunged between 1998 and 2011. The study found that employment and wage gains for individuals who obtained expungement remained steady throughout the study timeframe despite the increasing Internet usage during that time.¹⁵³

CRIME COMMISSION LEGISLATION

The Crime Commission met on August 31, 2020, and heard a presentation from staff that included information on the expungement process in Virginia, as well as the automatic and petition-based sealing of criminal records across the United States.¹⁵⁴ Staff provided Crime Commission members with draft legislation to create an automated process in Virginia to seal criminal history record information and court records for non-convictions, deferred and dismissed charges, and numerous felony and misdemeanor convictions. The draft legislation contained a clause to delay implementation of the automatic sealing provisions of the law until July 1, 2024, due to the complexities of implementing this automated process across the data systems of the Virginia State Police, the Office of the Executive Secretary of the Supreme Court of Virginia, and circuit court clerks.

The Crime Commission voted to endorse the draft legislation for introduction during the 2020 Special Session of the General Assembly.

2020 Special Session Legislation

Legislation endorsed by the Crime Commission to create an automatic sealing process was introduced during the 2020 Special Session of the General Assembly (House Bill 5146 - Del. Charniele L. Herring).¹⁵⁵ Additionally, during the 2020 Special Session of the General Assembly, the Senate passed a petition-based sealing bill (Senate Bill 5043 - Sen. Creigh R. Deeds).¹⁵⁶ This Senate legislation allowed for the petition-based sealing of certain drug and alcohol convictions and deferred dispositions, as well as offenses when a person had been granted a simple pardon by the Governor. Due to the significant differences between these two bills, the legislation was sent to a conference committee consisting of members of the House of Delegates and the Senate. Both bills remained in conference and neither bill was enacted into law by the General Assembly.

2021 Regular Session Legislation

During the 2021 Regular Session of the General Assembly, legislation was re-introduced to create an automatic sealing process (House Bill 2113 - Del. Charniele L. Herring and Senate Bill 1372 - Sen. L. Louise Lucas).¹⁵⁷ These bills were substantially similar to the version introduced during the 2020 Special Session of the General Assembly; however, the bills included additional language to address the dissemination of criminal and court records by third parties and to provide immunity protections for employers who hire individuals with sealed criminal records. Additionally, legislation was also introduced to create a broad petition-based sealing process for convictions and a narrower automatic sealing process (Senate Bill 1339 - Sen. Scott A. Surovell).¹⁵⁸ The Senate Committee on the Judiciary ultimately incorporated Senate Bill 1372 into Senate Bill 1339.

Due to the significant differences between House Bill 2113 and Senate Bill 1339, a group of members from the House of Delegates and Senate worked with Crime Commission staff to produce a merged version of the two bills. Staff drafted compromise legislation as agreed upon by members to create both an automatic and a petition-based process for the sealing of adult criminal history and court records. Both bills were passed by the General Assembly and signed into law by the Governor.¹⁵⁹

In addition, staff recognized that these new sealing processes would require a substantial cost to implement. Staff worked closely with the impacted state agencies, namely the Virginia State Police, the Office of the Executive Secretary of the Supreme Court of

Virginia, the Department of Motor Vehicles, and others, to identify the necessary costs. Staff determined that there would be significant one-time expenses to purchase systems and perform technology upgrades, as well as recurring personnel expenses, all of which were funded by the General Assembly.

The enacted legislation addressed seven key measures related to the sealing of criminal history record information and court records, which are described in greater detail below. Unless otherwise noted, these changes to Virginia law will take effect on July 1, 2025; however, the legislation can take effect sooner if the new automated systems are operational prior to that date.

1. Sealing: Definition and Effects

The term “sealing” is defined as restricting dissemination of criminal history record information and prohibiting dissemination of court records, including records relating to an arrest, charge, or conviction. Sealed criminal history record information and court records are maintained and may be accessed or used for twenty-five specified purposes.

After a charge or conviction is sealed, a person is generally allowed to deny that the charge or conviction occurred; however, a person cannot deny the sealed record under the following circumstances:

- When applying for employment as a law enforcement officer;
- Where disclosure is required for employment under federal or state law;
- When being considered for jury service;
- During proceedings related to the care and custody of a child; and,
- In accordance with any other regulations adopted in relation to the new sealing provisions.

2. Automatic Sealing Process

The legislation creates an automatic sealing process for convictions or deferred dispositions of 9 misdemeanor offenses, including:

- Purchase or possession of alcohol by a minor;¹⁶⁰
- Petit larceny;¹⁶¹
- Concealing or taking possession of merchandise;¹⁶²
- Trespass;¹⁶³
- Instigating trespass;¹⁶⁴
- Trespass on posted property;¹⁶⁵
- Misdemeanor distribution of marijuana;¹⁶⁶

- Possession of marijuana;¹⁶⁷ and,
- Disorderly conduct.¹⁶⁸

Additionally, various non-convictions will be automatically sealed, including:

- Misdemeanor offenses and mistaken identity offenses moving forward in time;
- Misdemeanor offenses retroactively, if the person has no convictions on their Virginia criminal history record and no charges in the past 3 years; and,
- Acquittals and dismissals with prejudice of felony offenses, with the concurrence of the attorney for the Commonwealth, moving forward in time.

Finally, all traffic infractions will be automatically sealed after 11 years.

3. Petition-Based Sealing Process

The legislation also creates a new petition-based process for the sealing of convictions and deferred dispositions for all misdemeanors, all Class 5 and Class 6 felonies, and all felony offenses punishable as larceny; however, DUI-related convictions and domestic assault and battery convictions are not eligible for sealing. The various requirements for petition-based sealing are set forth in the new statute.

4. Waiting Periods

The legislation establishes waiting periods of 7 years for misdemeanors and 10 years for felonies before a conviction or deferred disposition is eligible for sealing. In order to qualify for automatic sealing, a person cannot have been convicted of a crime in Virginia that requires a report to the Central Criminal Records Exchange (CCRE) or of a crime in any other jurisdiction during that time period. In order to qualify for petition-based sealing, a person must also remain conviction-free during the waiting period, and must satisfy other criteria for eligibility as set forth in the statute.

5. Restrictions: Employers and Third Parties

The bill prohibits state and local governments, private employers, educational institutions, housing sales and rental agencies, and insurance companies from inquiring about sealed charges or convictions, except in law enforcement hiring and when required for employment under federal or state law. Furthermore, third parties that collect and disseminate Virginia criminal history records and traffic records must delete any such records that have been sealed or face civil liability to the impacted person and enforcement action by the Attorney General.

6. New Processes: Implementation and Reporting

The legislation contains several provisions directing how the new sealing processes are to be implemented. These provisions include:

- Directing the Virginia State Police, the Office of the Executive Secretary of the Supreme Court of Virginia, and circuit court clerks to develop automated systems in order to implement these new sealing processes;
- Requiring the Virginia Department of Criminal Justice Services to develop regulations regarding the sealing and dissemination of criminal history record information;
- Requiring any criminal charge or conviction on a person's Virginia criminal record to be removed by July 1, 2021, if it was not required to be reported to the CCRE;
- Permitting only CCRE reportable criminal offenses to be included on a person's Virginia criminal record beginning July 1, 2021; and,
- Requiring magistrates and law enforcement officers to note the corresponding Virginia Code section on a warrant or summons when issuing a charge for a local ordinance violation beginning July 1, 2021.

In addition, the bill directs various entities to provide annual reports to the Crime Commission on the status of the implementation of these new processes, beginning November 1, 2021, as follows:

- Virginia State Police, the Office of the Executive Secretary of the Supreme Court of Virginia, and any circuit court clerk with a case management system must report on the progress of the development of automated systems to implement the new sealing processes;
- Virginia State Police must also report on the feasibility and cost of implementing an automated system to review out-of-state criminal history records; and,
- Virginia Court Clerks' Association must report on the necessary staffing and technology costs of implementing the new automatic and petition-based sealing processes.

7. Continued Study of Expungement and Sealing of Criminal Records

Finally, the legislation requires the Crime Commission to continue its study on the expungement and sealing of criminal records and to examine the following matters:

- Methods to educate the public on the sealing processes and the effects of an order to seal an arrest, charge, or conviction;

- The interplay between Virginia’s current expungement statutes and the sealing of criminal history record information and court records;
- The feasibility of destroying or purging expunged or sealed criminal history record information and court records;
- Permissible uses of criminal history record information and court records;
- Plea agreements in relation to the expungement or sealing of criminal history record information and court records; and,
- Any other relevant matters that arise during the course of the study.

The Crime Commission must report its findings on the continued study of expungement and sealing of criminal records by December 15, 2021. The report is also required to include a recommendation on the creation of a review process for any future changes to the expungement or sealing of criminal history record information or court records.¹⁶⁹

ACKNOWLEDGEMENTS

The Virginia State Crime Commission extends its appreciation to the following agencies and organizations for their assistance and cooperation on this study:

Commonwealth's Attorneys' Services Council

Consumer Litigation Associates, P.C.

Huntington Ingalls Industries – Newport News Shipbuilding

Kelly Guzzo, PLC

Legal Aid Justice Center

Office of the Executive Secretary of the Supreme Court of Virginia

Pennsylvania State Police

RELX/LexisNexis

State Corporation Commission

Virginia Association of Commonwealth's Attorneys

Virginia Court Clerks' Association

Virginia Criminal Sentencing Commission

Virginia Department of Motor Vehicles

Virginia Indigent Defense Commission

Virginia State Police

ENDNOTES

¹ House Bills 31, 32, 50, 91, 102, 128, 254, 255, 267, 268, 293, 294, 320, 476, 647, 830, 865, 1033, 1207, 1433, 1517, 1692; Senate Bills 223, 306, 808, 914, and 947; and House Joint Resolution 28.

² House Bill 5146 is available at: <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=202&typ=bil&val=hb5146>.

³ Senate Bill 5043 is available at: <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=202&typ=bil&val=sb5043>.

⁴ House Bill 2113 is available at: <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=212&typ=bil&val=hb2113>. Senate Bill 1372 is available at <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=211&typ=bil&val=sb1372>.

⁵ Senate Bill 1339 is available at: <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=212&typ=bil&val=sb1339>.

⁶ 2021 Va. Acts, Sp. Sess. I, ch. 524 and 542.

⁷ The database of sealing laws compiled by the Restoration of Rights Project (<https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside/> (last updated Jan. 24, 2021)) was utilized as a key resource for the 50 state review. Every state's laws were reviewed on LexisNexis and staff conducted additional searches on LexisNexis within each state's statutes to identify all relevant laws.

⁸ *But see* WASH. REV. CODE §§ 9.94A.640 and 9.96.060 (2020). Washington is the only state that uses vacatur as its primary conviction relief mechanism.

⁹ *Sealing of Records*, BLACK'S LAW DICTIONARY (9th ed. 2009) ("act or practice of officially preventing access to particular records, in the absence of a court order"); *Expunge*, *Id.* ("to erase or destroy"); *Expungement of Record*, *Id.* ("the removal of a conviction from a person's criminal record").

¹⁰ MONT. CODE ANN. § 46-18-1103(1) (2020); *see also* DEL. CODE ANN. tit. 11, § 4372(c)(3) (2020); 20 ILL. COMP. STAT. 2630/5.2(a)(1)(E) (2020); KY. REV. STAT. ANN. § 431.079(3) (LexisNexis 2020); MD. CODE ANN., CRIM. PROC. § 10-101(d) and (e) (LexisNexis 2020); and, TENN. CODE ANN. § 40-32-101(g)(12)(A) (2020).

¹¹ OKLA. STAT. tit. 22, § 18(B) (2020); *see also* LA. CODE CRIM. PROC. ANN. art. 972(1) (2020); MINN. STAT. § 609A.01 (2020); N.J. STAT. ANN. § 2C:52-1 (West 2020); S.D. CODIFIED LAWS § 23A-3-26 (2020); and, UTAH CODE ANN. § 77-40-102(9) (LexisNexis 2020).

¹² *See* ARK. CODE ANN. § 16-90-1404(4)(A) (2020). "Seal" means to expunge, remove, sequester, and treat as confidential the record or records in question according to the procedures established by this subchapter.

¹³ WASH. REV. CODE § 9.96.060(6)(a) (2020).

¹⁴ CAL. PENAL CODE § 1203.4(a)(1) (West 2020); MICH. COMP. LAWS SERV. § 780.622(1) (LexisNexis 2021); NEB. REV. STAT. ANN. § 29-2264(4) (LexisNexis 2020); and, OR. REV. STAT. § 137.225(3) (2020).

¹⁵ GA. CODE ANN. § 35-3-37(a)(6) (2020).

¹⁶ N.H. REV. STAT. ANN. § 651:5(X)(a) (LexisNexis 2020).

¹⁷ CONN. GEN. STAT. § 54-142a(d)(1) (2020).

¹⁸ 18 PA. CONS. STAT. § 9122.5 (2020).

¹⁹ TEX. GOV'T CODE ANN. § 411.0755 (West 2020).

²⁰ *Nolle prosequi*, BLACK'S LAW DICTIONARY (9th ed. 2009) ("A legal notice that a lawsuit or prosecution has been abandoned").

²¹ This report does not include an analysis on the sealing of deferred charges. In Virginia, the term "deferred" describes the process when a court withholds imposition of a sentence and places conditions on the defendant that, when met, allow for a charge to be dismissed. Other states have similar practices, but the terminology varies considerably across jurisdictions, such as "diverted" [TENN. CODE ANN. § 40-32-101 (2020)], "suspended" [MO. REV. STAT. § 557.011 (2020)], "discharged" [N.C. GEN. STAT. § 15A-145.2 (2020)], and "conditionally discharged" [N.M. STAT. ANN. § 31-20-13 (LexisNexis 2020)] charges. Due to the varying terminology for such deferred dispositions, this report focuses solely on sealing statutes for non-convictions and convictions.

²² National Inventory of Collateral Consequences of Conviction. (2021). Retrieved from <https://niccc.nationalreentryresourcecenter.org/>. Many of the identified collateral consequences impact employment or professional licensing, with the remainder affecting business opportunities, housing and residency, public benefits, family relationships, education, motor vehicle licensure and registration, and civic participation.

²³ The Commission to Examine Racial Inequity in Virginia Law. (2020). *Identifying and addressing the vestiges of inequity and inequality in Virginia's laws*, at p. 47 (hereinafter "Racial Inequity Report"). Retrieved from <https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/2020-Commission-Report---Inequity-and-Inequality-in-Virginia-Law.pdf>.

²⁴ Adams, E., Chen, E.Y., & Chapman, R. (2017). Erasing the mark of a criminal past: Ex-offenders' expectations and experiences with record clearance. *Punishment & Society*, 19(1), 23-52, at p. 25-26; Roberts J. (2015). Expunging America's rap sheet in the information age. *Wisconsin Law Review*, 2(321), 321-347, at pp. 327-328; Prescott, J.J., & Starr, S.B. (2020). *Expungement of criminal convictions: An empirical study*. *Harvard Law Review*, 133(8), 2460- 2555, at p. 2462; Solomon, A. (2012). In search of a job: Criminal records as barriers to employment, *NIJ Journal*, 270, 42-51, at pp. 44-46; Haber, E. (2018). Digital expungement. *Maryland Law Review*, 77(337), 337-385, at pp. 342-344 (provides a list of collateral consequences faced by those who have a criminal record).

²⁵ Roberts, *supra* note 24, at pp. 329-330 (access to criminal records has "helped create a tiered society in which individuals with a criminal history are effectively second-class citizens.").

²⁶ Federal Bureau of Investigation. (March 2021). *March 2021 Next Generation Identification (NGI) System Fact Sheet*. Retrieved from <https://www.fbi.gov/services/cjis/fingerprints-and-other-biometrics/ngi>; see also <https://www.fbi.gov/file-repository/ngi-monthly-fact-sheet/view>.

²⁷ Virginia State Police, personal communication, August 5, 2020.

²⁸ See, e.g., Brame, R., Bushway, S.D., Paternoster, R., & Turner, M.G. (2014). Demographic patterns of cumulative arrest prevalence by ages 18 and 23. *Crime & Delinquency*, 60(3), 471-486, at p. 471 (The authors of this 2014 study found that "about 30% of Black males have experienced at least one arrest by age 18 (vs. about 22% for White males) [and] by age 23 about 49% of Black males have been arrested (vs. about 38% for White males)."); see also Selbin, J., McCrary, J., & Epstein, J. (2018). Unmarked? Criminal record clearing and employment outcomes. *Journal of Criminal Law and Criminology*, 108(1), 1-72 at p. 4 ("Evidence suggests that by the age of twenty-three, almost one-half of all African-American and Latino men, more than one-third of white men, and almost one in eight women have been arrested.").

²⁹ For arrest data, see Federal Bureau of Investigation. *Table 43A: Arrests by Race and Ethnicity, 2018.*, Available at: <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-43> (last visited Apr. 30, 2021). This 2018 data shows that Black persons made up 27% of arrests (2,115,381 Black persons were arrested out of a total of 7,710,900 people arrested) despite comprising only 13% of the overall United States population; For 2018 U.S. population totals, see United States Census Bureau. *ACS Demographic and Housing Estimates, 2018.* Available at: <https://data.census.gov/cedsci/table?d=ACS%205-Year%20Estimates%20Data%20Profiles&tid=ACSDP5Y2018.DP05> (last visited Apr. 30, 2021).

³⁰ See Carson, E. A. (2020). *Prisoners in 2019.* Bureau of Justice Statistics, at pp. 20-23. Available at: <https://www.bjs.gov/content/pub/pdf/p19.pdf>. According to this report, Black persons comprised approximately 33% (409,600 of 1,249,700) of sentenced state prisoners in the United States on December 31, 2018 and 37% (57,900 of 158,107) of sentenced federal prisoners in the United States on September 30, 2019.

³¹ For Virginia population statistics, see United States Census Bureau, *Virginia*, <https://data.census.gov/cedsci/profile?g=0400000US51> (last visited Apr. 30, 2021).

³² For Virginia arrest statistics, see Virginia State Police. *Crime in Virginia 2019.* Virginia Department of State Police, at p. 65. Available at: https://www.vsp.virginia.gov/downloads/Crime_in_Virginia/Crime_In_Virginia_2019.pdf (last visited Apr. 30, 2021). In 2019, 42% (114,738 of 274,636) of those arrested in Virginia were Black persons.

³³ For corrections data, see Virginia Department of Corrections. *State Responsible Offender Population Trends: FY2015 – FY2019* at p. 7. Available at <https://vadoc.virginia.gov/media/1473/vadoc-offender-population-trend-report-2015-2019.pdf> (last visited Apr. 30, 2021). This report shows that, as of June 30, 2019, Black inmates comprised 55% (19,198 of 34,719) of the total state responsible confined population.

³⁴ Ipsa-Landa, S., & Loeffler, C.E. (2016). Indefinite punishment and the criminal record: Stigma reports among expungement-seekers in Illinois. *Criminology*, 54(3), 387-412, at p. 392.

³⁵ See, e.g., Dean, C.W., Brame, R., & Piquero, A. (1996). Criminal propensities, discrete groups of offenders, and persistence in crime. *Criminology*, 34(4), 547-574.

³⁶ There are a number of competing theories that attempt to explain criminal onset, persistence, and desistance, including but not limited to: life course theory, general theories of crime, social bond theory, strain theory, attachment theory, social learning theory, labeling theory, social control, developmental theories, criminal career/typologies, routine activity theory, self-derogation theory, and feminist theories. For an excellent overview of the various theories drawn upon to examine developmental and life course explanations of criminal offending, please see McGee, T.R., & Farrington, D.P. (2019). Developmental and life-course explanations of offending. *Psychology, Crime, & Law*, 25(6), 609-625; Sampson, R.J., & Laub, J.H. (2016). Turning points and the future of life-course criminology: Reflections on the 1986 criminal careers report. *Journal of Research in Crime and Delinquency*, 53(3), 321-335.

³⁷ See, e.g., Moffitt, T.E. (1993). Adolescence-limited and life-course-persistent antisocial behavior: A developmental taxonomy. *Psychological Review*, 100, 674-701.

³⁸ Sampson, R.J., & Laub, J.H. (2003). Life-course desisters? Trajectories of crime among delinquent boys followed to age 70. *Criminology*, 41, 555-592; Piquero, A.R., Farrington, D.P., & Blumstein, A. (2003). The criminal career paradigm. In M. Tonry (ed.), *Crime and justice: A review of research*, pp. 359-506.

³⁹ Metcalfe, C.F., & Baker, T. (2014). The drift from convention to crime: Exploring the relationship between co-offending and intermittency. *Criminal Justice & Behavior*, 41(1), 75-90.

⁴⁰ See, e.g., Moffitt, T.E. (1993). Adolescence-limited and life-course-persistent antisocial behavior: A developmental taxonomy. *Psychological Review*, 100, 674-701.

⁴¹ See, e.g., Gottfredson, M.R., & Hirschi, T. (2016). The criminal career perspective as an explanation of crime and a guide to crime control policy: The view from general theories of crime. *Journal of Research in Crime and Delinquency*, 53(3), 406-419.

⁴² Blumstein, A., & Nakamura, K. (2010). *Potential of redemption in criminal background checks: Final report to the National Institute of Justice.*, at p. 2. Retrieved from <https://www.ncjrs.gov/pdffiles1/nij/grants/232358.pdf>.

⁴³ *Id.*

⁴⁴ Blumstein, A., & Nakamura, K. (2009). Redemption in the presence of widespread criminal background checks. *Criminology*, 47(2), 327-359; Kurlychek, M., Brame, R., & Bushway, S. D. (2006). Does an old criminal record predict future offending? *Criminology & Public Policy*, 5(3), 483-504 at p.485; Kurlychek, M. C., Brame, R., & Bushway, S. D. (2007). Enduring risk? Old criminal records and predictions of future criminal involvement. *Crime & Delinquency*, 53(1), 64-83; Bushway, S. D., Nieuwebeerta, P., & Blokland, A. (2011). The predictive value of criminal background checks: Do age and criminal history affect time to redemption? *Criminology*, 49(1), 27-60; Soothill, K., & Francis, B. (2009). When do ex-offenders become like non-offenders. *The Howard Journal of Crime and Justice*, 48(4), 373-387.

⁴⁵ *Id.*

⁴⁶ Blumstein, A., & Nakamura, K. (2009). Redemption in the presence of widespread criminal background checks. *Criminology*, 47(2), 327-359.

⁴⁷ Bushway, S. D., Nieuwebeerta, P., & Blokland, A. (2011). The predictive value of criminal background checks: Do age and criminal history affect time to redemption? *Criminology*, 49(1), 27-60.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* In other words, if an offender had four or more convictions and then committed another offense (the 1977 conviction per the study baseline), it would take a minimum of 23 years from the 1977 conviction before reaching redemption.

⁵¹ See, e.g., Curcio, G., Pattavina, A., & Fisher, W. (2018). Gender differences on the road to redemption. *Feminist Criminology*, 13(2), 182-204.; Blumstein, A., & Nakamura, K. (2012). *Extension of current estimates of redemption times: Robustness testing, out-of-state arrests, and racial differences*. Washington, DC: National Institute of Justice. Retrieved from <https://www.ncjrs.gov/pdffiles1/nij/grants/240100.pdf>.

⁵² Curcio, G., Pattavina, A., & Fisher, W. (2018). Gender differences on the road to redemption. *Feminist Criminology*, 13(2), 182-204.

⁵³ Blumstein, A., & Nakamura, K. (2012). *Extension of current estimates of redemption times: Robustness testing, out-of-state arrests, and racial differences*. Washington, DC: National Institute of Justice. Retrieved from <https://www.ncjrs.gov/pdffiles1/nij/grants/240100.pdf>.

⁵⁴ *Id.* at p. 76.

⁵⁵ Haber, *supra* note 24, at p. 346. ("Expungement statutes generally have four goals: (1) reducing recidivism and thereby enhancing public safety; (2) enabling rehabilitation; (3) reducing illegal discrimination against presumptively rehabilitated individuals; and, (4) rewarding those who prove they have been rehabilitated.")

⁵⁶ Prescott, *supra* note 24, at p. 2533 (“Our analysis demonstrates that expungement is associated with large improvements in the employment rate and wages on average....”).

⁵⁷ Adams, *supra* note 24, at p. 25 (“Employment is key to successful reentry...” back into society); Uggen, C. (2000). Work as a turning point in the life course of criminals: A duration model of age, employment, and recidivism. *American Sociological Review*, 67(1), 529-546, at p. 542, available at http://users.cla.umn.edu/~uggen/Uggen_asr_00.pdf (“Work appears to be a turning point in the life course of criminal offenders over 26 years old. Offenders who are provided even marginal employment opportunities are less likely to reoffend than those not provided such opportunities.”); Solomon, A.L., Johnson, K., Travis, J., & McBride, E.C. (2000). *From prison to work: The employment dimensions of prisoner reentry*. Urban Institute Justice Policy Center, 1-32 at pp. 4-5, available at <https://www.urban.org/sites/default/files/publication/58126/411097-From-Prison-to-Work.PDF> (evidence shows that stable employment is correlated with aiding former offenders in re-integrating back into society).

⁵⁸ Prescott, *supra* note 24, at pp. 2467, 2528, & 2533-2534.

⁵⁹ Prescott, *supra* note 24, at pp. 2533-2534.

⁶⁰ Selbin, *supra* note 28, at pp. 8 & 46.

⁶¹ *Id.* at p. 41.

⁶² *Id.* at pp. 48-49.

⁶³ Kogon, B., & Loughery, D.L., Jr. (1971). Sealing and expungement of criminal records – The big lie. *Journal of Criminal Law and Criminology*, 61(3), 378-392 at p. 385; *see also* Jacobs, J.B. (2006). Mass incarceration and the proliferation of criminal records. *University of St. Thomas Law Journal*, 3(3), 387-420 at p. 411 (“In effect, it seeks to rewrite history, establishing that something did not happen although it really did. The problem is compounded if the expungement policy allows or requires lying to support the false history.”).

⁶⁴ Jacobs, *supra* note 63, at pp. 411-412.

⁶⁵ Connor, T. G., & White, K.J. (2013). The consideration of arrest and conviction records in employment decisions: A critique of the EEOC guidance. *Seton Hall Law Review*, 43(3), 971-1005, at pp. 972 & 974 (“There are solid business reasons to consider [criminal histories]. Criminological studies demonstrate that nothing predicts future criminal activity more accurately than a history of past criminal activity. An employer’s concern about loss of business assets or danger to persons exposed to its employees is well justified. Failure to identify and assess possible risks may expose the business to ruinous theft or result in serious harm to others.”)

⁶⁶ VA. CODE ANN. § 19.2-392.2 (2020). *But see* VA. CODE ANN. §§ 19.2-327.2 *et. seq.* and 19.2-327.10 *et. seq.* (2020). Virginia law does allow for criminal conviction relief if a person can prove that they are “actually innocent” of certain felony convictions.

⁶⁷ VA. CODE ANN. § 19.2-392.3 (2020).

⁶⁸ 6 VA. ADMIN. CODE § 20-120-20 (2020).

⁶⁹ VA. CODE ANN. § 19.2-392.2(A) (2020).

⁷⁰ *Eastlack v. Commonwealth*, 282 Va. 120, 710 S.E.2d 723 (Jun. 9, 2011).

⁷¹ *Commonwealth v. Dotson*, 276 Va. 278, 661 S.E.2d 473 (Jun. 6, 2008); *Commonwealth v. Jackson*, 255 Va. 552, 499 S.E.2d 276 (Apr. 17, 1998).

⁷² *Daniel v. Commonwealth*, 268 Va. 523, 604 S.E.2d 444 (Nov. 5, 2004).

⁷³ VA. CODE ANN. § 19.2-392.2(A) (2020).

⁷⁴ VA. CODE ANN. § 19.2-392.2(C) (2020).

⁷⁵ VA. CODE ANN. § 19.2-392.2(D) (2020).

⁷⁶ VA. CODE ANN. § 19.2-392.2(E) (2020).

⁷⁷ VA. CODE ANN. § 19.2-392.2(F) (emphasis added). The circuit court may enter an order of expungement without conducting a hearing under certain circumstances with the consent of the attorney for the Commonwealth.

⁷⁸ See 6 VA. ADMIN. CODE § 20-120-80 (2020).

⁷⁹ Virginia State Police, personal communication, July 21, 2020.

⁸⁰ VA. CODE ANN. § 19.2-392.2(K) (2020).

⁸¹ 6 VA. ADMIN. CODE § 20-120-80 (2020).

⁸² Virginia State Police, personal communication, July 21, 2020.

⁸³ Virginia State Police, personal communication, August 5, 2020.

⁸⁴ See Senate Bill 5043, Fiscal Impact Statement (Special Session of the 2020 General Assembly). Available at <https://lis.virginia.gov/cgi-bin/legp604.exe?202+oth+SB5043FS1122+PDF>.

⁸⁵ Office of the Executive Secretary of the Supreme Court of Virginia, personal communication, July 24, 2020.

⁸⁶ *Id.*

⁸⁷ See Senate Bill 5043, Fiscal Impact Statement (Special Session of the 2020 General Assembly). Available at <https://lis.virginia.gov/cgi-bin/legp604.exe?202+oth+SB5043FS1122+PDF>. Court records, which are not the criminal history records maintained in the CCRE, are destroyed after statutorily set time frames in VA. CODE ANN. §§ 16.1-69.55 and 17.1-213 (2020). Generally, misdemeanor and traffic court records are maintained for ten years regardless of outcome. Felony court records, as well as court records for misdemeanor domestic assault and battery and protective order violation cases, are generally maintained for twenty years. Court records for specified misdemeanor cases, including sexual battery, prostitution, and indecent exposure, as well as felony cases for violent and sexually violent offenses, are maintained for fifty years.

⁸⁸ VA. CODE ANN. § 19.2-390(A)(1) (2020).

⁸⁹ *Id.*

⁹⁰ *Id.* The specific Code sections requiring a report to the CCRE include VA. CODE ANN. §§ 3.2-6570, 4.1-309.1, 5.1-13, 15.2-1612, 16.1-253.2, 20-61, 46.2-339, 46.2-341.21, 46.2-341.24, 46.2-341.26:3, 46.2-817, 58.1-3141, 58.1-4018.1, 60.2-632, 63.2-1509, and 63.2-1727.

⁹¹ VA. CODE ANN. § 19.2-390(D) (2020).

⁹² VA. CODE ANN. § 18.2-388 (2020). See also VA. CODE ANN. § 18.2-11 (2020).

⁹³ Adams, *supra* note 24, at p. 42 (“More so than just the outcome (a clear record), the actual process of preparing for, and successfully completing, the record clearance application and hearing can have a powerful effect.”).

⁹⁴ See Appendix A for non-conviction sealing laws by state.

⁹⁵ ALASKA STAT. § 22.35.030 (2020).

⁹⁶ Arizona uses the term “set aside” in its statutes. This term was not included in the list in note 14 because a conviction which is set aside in Arizona is not required to be redacted or removed from a person’s criminal record, and therefore it is not actually sealed. ARIZ. REV. STAT. ANN. § 13-905 (2020). Arizona does seal records for individuals who have been wrongfully arrested or charged ARIZ. REV. STAT. ANN. § 13-4051 (2020). Arizona also vacates convictions for sex trafficking victims ARIZ. REV. STAT. ANN. § 13-909 (2020).

⁹⁷ MONT. CODE ANN. 44-5-202(8) (2020).

⁹⁸ N.D. SUP. CT. ADMIN. R. 41(5)(f) (2020). Available at <https://www.ndcourts.gov/legal-resources/rules/ndsuptadminr/41>.

⁹⁹ See Appendix B for misdemeanor conviction sealing laws by state.

¹⁰⁰ Generally, in examining whether a state included violent offenses in its sealing statutes, staff referred to Virginia’s definition of violent offenses in VA. CODE ANN. § 17.1-805 (2020). See Appendix C for additional information on violent felony convictions.

¹⁰¹ See Appendix C for a felony conviction sealing laws by state.

¹⁰² See Appendix D for sealing provisions for specific convictions by state.

¹⁰³ See Appendix E for commonly excluded offenses by state.

¹⁰⁴ See Appendix F for waiting periods for sealing by state.

¹⁰⁵ See Appendix G for restitution requirements for sealing by state.

¹⁰⁶ See Appendix H for burdens of proof for sealing by state.

¹⁰⁷ See Appendix I for employment sealing provisions by state.

¹⁰⁸ See Appendix J for the maintenance of sealed criminal records by state.

¹⁰⁹ Prescott, *supra* note 24, at p. 2551 (“Taken together, our findings strongly support increasing the availability of expungement — and particularly efforts to make expungements automatic, or at least procedurally easy to obtain.”); Kessler, A. (2015). Excavating expungement law: A comprehensive approach. *Temple Law Review*, 87(1), 403-446, at p. 437 (“Automatic expungement saves judicial and individual resources, and mitigates the problem of unawareness of the expungement remedy.”).

¹¹⁰ Prescott, *supra* note 24, at p. 2504 (discussing the difficulty that many people face when filing fees are required in order to initiate a conviction relief process).

¹¹¹ *Id.* at pp. 2505-2506 (“Although expungement applications can be filed *pro se*, the process is far less difficult to navigate for an experienced attorney. Yet, too often, none are available... [and paid attorneys are out of reach for most people with records.”]; Kessler, *supra* note 109, at p. 445 (“Hiring a lawyer to petition a court for expungement is often unaffordable for record holders.”).

¹¹² Prescott, *supra* note 24, at pp. 2503-2504 (“Taking time away from work and childcare responsibilities to go to a police station to be fingerprinted, to make several trips to a courthouse, to find a notary, and to mail all these materials to the right addresses may be simply impossible, or at least difficult enough to be strongly discouraging.”).

¹¹³ *Id.* at p. 2502 (Examining Michigan’s petition-based expungement laws, the authors found that “[m]any [people] do not know that the expungement law exists at all. Others may have a vague idea that expungement is possible, but they do not know that they are eligible or they are unfamiliar with what they need to do to pursue one (or how to find out).”). The authors found that, as a result of the access issues present in Michigan’s expungement system, only 6.5% of individuals eligible for expungement in Michigan were able to have their convictions expunged within five years of eligibility. *Id.* at pp. 2489 & 2501-2506.

¹¹⁴ See Appendix L for data from Pennsylvania and other states that publish such data.

¹¹⁵ See Appendix K for additional information on Pennsylvania’s automatic sealing process.

¹¹⁶ For additional information on Clean Slate in Pennsylvania, see The Unified Judicial System of Pennsylvania. *Clean slate, expungement and limited access*. Retrieved from <http://www.pacourts.us/learn/learn-about-the-judicial-system/clean-slate-expungement-and-limited-access>. For data on automatic and petition-based sealing in Pennsylvania, see The Unified Judicial System of Pennsylvania. (Dec. 16, 2020). *Processed Clean Slate Counts by County (June 28, 2019 – December 15, 2020)*. Retrieved from <https://www.pacourts.us/Storage/media/pdfs/20210224/160628-processedcleanslatenumberscounty-008210.pdf>.

- ¹¹⁷ CAL. PENAL CODE § 1203.425 (West 2020).
- ¹¹⁸ MICH. COMP. LAWS SERV. § 780.621g (LexisNexis 2021).
- ¹¹⁹ N.J. REV. STAT. § 2C:52-5.4 (2020).
- ¹²⁰ 18 PA. CONS. STAT. § 9122.2 (2020).
- ¹²¹ UTAH CODE ANN. §§ 77-40-102(5) (2020) and 77-40-114 (LexisNexis 2020).
- ¹²² CAL. PENAL CODE § 1203.425 (2020).
- ¹²³ MICH. COMP. LAWS SERV. § 780.621g (2021).
- ¹²⁴ N.J. REV. STAT. § 2C:52-5.4 (2020).
- ¹²⁵ 18 PA. CONS. STAT. § 9122.2 (2020).
- ¹²⁶ UTAH CODE ANN. § 77-40-114 (LexisNexis 2020).
- ¹²⁷ S.D. CODIFIED LAWS § 23A-3-34 (2020).
- ¹²⁸ 20 ILL. COMP. STAT. 2630/5.2(i) (2020).
- ¹²⁹ N.Y. CRIM. PROC. LAW § 160.50 (LexisNexis 2020).
- ¹³⁰ In Vermont, Governor Scott signed S.234 into law on October 7, 2020. Section 31 of this bill establishes a process to automatically expunge certain marijuana offenses by January 1, 2022. The bill is available at:
<https://legislature.vermont.gov/Documents/2020/Docs/ACTS/ACT167/ACT167%20As%20Enacted.pdf>.
- ¹³¹ Corda, A., & Lageson, S. (2020). Disordered punishment: Workaround technologies of criminal records disclosure and the rise of a new penal entrepreneurialism. *The British Journal of Criminology*, 60(2), 254-264 at p.259; Haber, *supra* note 24, at pp. 356-357.
- ¹³² Selbin, *supra* note 28, at pp.12-13; Roberts, *supra* note 24, at pp.328-329.
- ¹³³ VA. CODE ANN. § 17.1-293.1 (2020).
- ¹³⁴ Haber, *supra* note 24, at pp.356-357; Prescott, *supra* note 24, at p.2470.
- ¹³⁵ 15 U.S.C. § 1681 *et seq.* (2020).
- ¹³⁶ 15 U.S.C. § 1681e(b) (2020). *See also* 15 U.S.C. § 1681s-2(a)(1)(A) (2020) (“A person shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate.”)
- ¹³⁷ Roberts, *supra* note 24, at p. 345; *see also* Haber, *supra* note 24, at p.357 (discussing that the FCRA has been ineffective in regulating online criminal history record dissemination).
- ¹³⁸ Corda, *supra* note 131, at p. 249; Kessler, *supra* note 109, at pp.412-413.
- ¹³⁹ Haber, *supra* note 24, at pp.357-358.
- ¹⁴⁰ *Id.* at 357; Roberts, *supra* note 24, at pp. 329-330.
- ¹⁴¹ Haber, *supra* note 24, at 362-363 (Haber argues that, in fact, these websites have an incentive to maintain inaccurate information. The customers who purchase information from these websites, including “many employers, landlords, and educational institutions would prefer to obtain a criminal history record that contains expunged conduct to know the complete criminal history of a prospect, regardless of the state’s rationale for expunging it.”).
- ¹⁴² COLO. REV. STAT. § 24-72-703 (2020).
- ¹⁴³ CONN. GEN. STAT. § 54-142e (2020).
- ¹⁴⁴ LA. CODE CRIM. PROC. ANN. art. 974 (2020).
- ¹⁴⁵ MICH. COMP. LAWS § 780.623 (2021).
- ¹⁴⁶ MINN. STAT. § 332.70 (2020).
- ¹⁴⁷ NEV. REV. STAT. ANN. § 179.275 (LexisNexis 2021).
- ¹⁴⁸ N.J. REV. STAT. § 2C:52-30 (2020).

¹⁴⁹ N.C. GEN. STAT. § 15A-152 (2020).

¹⁵⁰ 12 R.I. GEN. LAWS § 12-1.3-4 (2020).

¹⁵¹ TEX. GOV'T CODE ANN. § 411.075 (West 2020).

¹⁵² See LA. CODE CRIM. PROC. ANN. art. 974(A) and (C) (2020); MINN. STAT. § 332.70(3) and (5) (2020); and, N.C. GEN. STAT. § 15A-152(a) and (c) (2020).

¹⁵³ Prescott, *supra* note 24, at pp.2541-2542 (2020) (“...[O]ur results suggest that it is possible for record clearing to generate substantial benefits for individuals with records notwithstanding the search tools currently available to employers.”)

¹⁵⁴ Virginia State Crime Commission. (Aug. 31, 2020). *Automatic expungement*. Available at <http://vscc.virginia.gov/2020/VSCC%20Presentation%20-%20Automatic%20Expungement.pdf>.

¹⁵⁵ House Bill 5146 is available at: <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=202&typ=bil&val=hb5146>.

¹⁵⁶ Senate Bill 5043 is available at: <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=202&typ=bil&val=sb5043>.

¹⁵⁷ House Bill 2113 is available at: <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=212&typ=bil&val=hb2113>. Senate Bill 1372 is available at <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=211&typ=bil&val=sb1372>.

¹⁵⁸ Senate Bill 1339 is available at: <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=212&typ=bil&val=sb1339>.

¹⁵⁹ 2021 Va. Acts, Sp. Sess. I, ch. 524 and 542.

¹⁶⁰ VA. CODE ANN. § 4.1-305 (2020).

¹⁶¹ VA. CODE ANN. § 18.2-96 (2020).

¹⁶² VA. CODE ANN. § 18.2-103 (2020).

¹⁶³ VA. CODE ANN. § 18.2-119 (2020).

¹⁶⁴ VA. CODE ANN. § 18.2-120 (2020).

¹⁶⁵ VA. CODE ANN. § 18.2-134 (2020).

¹⁶⁶ VA. CODE ANN. § 18.2-248.1(a)(1) (2020).

¹⁶⁷ VA. CODE ANN. § 18.2-250.1 (2019).

¹⁶⁸ VA. CODE ANN. § 18.2-415 (2020).

¹⁶⁹ See *supra* note 160.

APPENDIX A: State Non-Conviction Sealing Laws (45 States)

STATE	STATUTE(S)	WAITING PERIOD
Alabama	ALA. CODE §§ 15-27-1, 15-27-2	Immediate to 5 years
Arkansas	ARK. CODE ANN. §§ 16-90-1409, 16-90-1410	Immediate to 1 year
California	CAL. PENAL CODE §§ 851.91, 851.93	Immediate to 3 years
Colorado	COLO. REV. STAT. §§ 24-72-704, 24-72-705	Immediate to after the statute of limitations has run
Connecticut	CONN. GEN. STAT. § 54-142a	Immediate to 13 months
Delaware	DEL. CODE ANN. tit. 11, §§ 4372, 4373	Immediate to 1 year
Florida	FLA. STAT. §§ 943.0585, 943.059, 943.0595	Immediate sealing (10 years to seal)
Georgia	GA. CODE ANN. § 35-3-37	Immediate to 7 years
Hawaii	HAW. REV. STAT. § 831-3.2	Immediate
Idaho	IDAHO CODE § 67-3004	Immediate to 1 year
Illinois	20 ILL. COMP. STAT. 2630/5.2	Immediate
Indiana	IND. CODE § 35-38-9-1	1 year
Iowa	IOWA CODE § 901C.2	180 days
Kansas	KAN. STAT. ANN. § 22-2410	Immediate
Kentucky	KY. REV. STAT. ANN. § 431.076	30 days to 3 years
Louisiana	LA. CODE CRIM. PROC. ANN. art. 976	Immediate to after the statute of limitations has run
Maryland	MD. CODE ANN., CRIM. PROC. §§ 10-103, 10-103.1, 10-104, 10-105	Immediate to 3 years
Massachusetts	MASS. GEN. LAWS ch. 276, § 100H	Immediate
Michigan	MICH. COMP. LAWS § 28.243	Immediate to 60 days
Minnesota	MINN. STAT. §§ 299C.11, 609A.02	Immediate (certain non-convictions automatically sealed after 10 years)
Mississippi	MISS. CODE ANN. §§ 99-15-59, 99-19-71	Immediate to 1 year
Missouri	MO. REV. STAT. §§ 610.122, 610.140	3 years
Nebraska	NEB. REV. STAT. § 29-3523	Immediate to 1 year
Nevada	NEV. REV. STAT. ANN. § 179.255	Immediate to after the statute of limitations has run
New Hampshire	N.H. REV. STAT. ANN. § 651:5	30 days
New Jersey	N.J. STAT. ANN. § 2C:52-6	Immediate
New Mexico	N.M. STAT. ANN. § 29-3A-4	1 year
New York	N.Y. CRIM. PROC. LAW § 160.50	5 days

STATE	STATUTE(S)	WAITING PERIOD
North Carolina	N.C. GEN. STAT. § 15A-146	Immediate
Ohio	OHIO REV. CODE. ANN. §§ 2953.52, 2953.521	Immediate to 2 years
Oklahoma	OKLA. STAT. tit. 22, § 18	Immediate to after the statute of limitations has run
Oregon	OR. REV. STAT. § 137.225	Immediate to 1 year
Pennsylvania	18 PA. CONS. STAT. §§ 9122, 9122.2	Immediate
Rhode Island	R.I. GEN. LAWS § 12-1-12	60 days
South Carolina	S.C. CODE ANN. § 17-1-40	Immediate
South Dakota	S.D. CODIFIED LAWS § 23A-3-27	Immediate to 1 year
Tennessee	TENN. CODE ANN. § 40-32-101	Immediate
Texas	TEX. CODE CRIM. PROC. ANN. art. § 55.01	Immediate to 3 years
Utah	UTAH CODE ANN. §§ 77-40-104, 77-40-114	Immediate to after the statute of limitations has run
Vermont	VT. STAT. ANN. tit. 13, § 7603	Immediate
Virginia	VA. CODE ANN. § 19.2-392.2	Immediate
Washington	WASH. REV. CODE § 10.97.060	2 years to 3 years
West Virginia	W. VA. CODE § 61-11-25	60 days
Wisconsin	WIS. STAT. § 165.84	Immediate
Wyoming	WYO. STAT. ANN. § 7-13-1401	180 days

APPENDIX B: State Misdemeanor Conviction Sealing Laws (41 States)

STATE	STATUTE(S)	EXCLUDE OFFENSES (Y/N)*	WAITING PERIOD	QUANTITY LIMITS**
Arkansas	ARK. CODE ANN. § 16-90-1405	Y	Upon completion of sentence to 5 years	None
California	CAL. PENAL CODE §§ 1203.4, 1203.4a, 1203.41, 1203.425	Y	1 year	None
Colorado	COLO. REV. STAT. §§ 24-72-703, 24-72-706	Y	1 year to 3 years	One petition every 12 months
Connecticut	CONN. GEN. STAT. § 54-142a	N	3 years	None
Delaware	DEL. CODE ANN. tit. 11, §§ 4373, 4374	Y	5 years to 7 years	No prior convictions
Georgia	GA. CODE ANN. § 35-3-37	Y	4 years	Up to two misdemeanor convictions
Illinois	20 ILL. COMP. STAT. 2630/5.2	Y	3 years	None
Indiana	IND. CODE §§ 35-38-9-2, 35-38-9-9	Y	5 years	One petition per lifetime
Iowa	IOWA CODE § 901C.3	Y	8 years	One petition per lifetime
Kansas	KAN. STAT. ANN. § 21-6614	Y	3 years	No sealing of any record while offender is required to register
Kentucky	KY. REV. STAT. ANN. § 431.078	Y	5 years	None
Louisiana	LA. CODE CRIM. PROC. ANN. art. 977	Y	5 years	One petition every 5 years
Maryland	MD. CODE ANN., CRIM. PROC. §§ 10-105, 10-110	Y	4 years to 15 years	None
Massachusetts	MASS. GEN. LAWS ch. 276, §§ 100A, 100G, 100I	Y	3 years	None
Michigan	MICH. COMP. LAWS §§ 780.621, 780.621c, 780.621g, 780.624	Y	3 years to 7 years	Up to four misdemeanor convictions
Minnesota	MINN. STAT. § 609A.02	N	2 years to 4 years	None
Mississippi	MISS. CODE ANN. § 99-19-71	N	Upon completion of sentence	First offense only
Missouri	MO. REV. STAT. § 610.140	Y	3 years	Up to two misdemeanor convictions
Montana	MONT. CODE ANN. § 46-18-1104	N	5 years	One petition per lifetime
Nevada	NEV. REV. STAT. ANN. § 179.245	N	1 year to 7 years	None

STATE	STATUTE(S)	EXCLUDE OFFENSES (Y/N)*	WAITING PERIOD	QUANTITY LIMITS**
New Hampshire	N.H. REV. STAT. ANN. § 651:5	N	1 year to 3 years	One petition every 3 years
New Jersey	N.J. STAT. ANN. §§ 2C:52-2, 2C:52-3, 2C:52-5.3, 2C:52-14	N	5 years to 10 years	Up to five misdemeanor convictions
New Mexico	N.M. STAT. ANN. § 29-3A-5	Y	2 years to 4 years	None
New York	N.Y. CRIM. PROC. LAW § 160.59	N	10 years	Up to two misdemeanor convictions
North Carolina	N.C. GEN. STAT. § 15A-145.5	Y	5 years	First offense only
North Dakota	N.D. CENT. CODE § 12-60.1-02	Y	3 years	None
Ohio	OHIO REV. CODE. ANN. § 2953.31	Y	1 year	Up to two misdemeanor convictions
Oklahoma	OKLA. STAT. tit. 22, § 18	N	Upon completion of sentence to 5 years	No prior felony convictions
Oregon	OR. REV. STAT. § 137.225	N	3 years	No prior convictions within the past 10 years
Pennsylvania	18 PA. CONS. STAT. §§ 9122.1, 9122.2	Y	10 years	Certain prior convictions bar sealing
Rhode Island	R.I. GEN. LAWS § 12-1.3-2	Y	5 years to 10 years	Up to six misdemeanor convictions
South Carolina	S.C. CODE ANN. §§ 22-5-910, 22-5-920	Y	3 years to 5 years	None
South Dakota	S.D. CODIFIED LAWS §§ 23A-3-33, 23A-3-34	Y	10 years	None
Tennessee	TENN. CODE ANN. § 40-32-101	Y	5 years	No prior convictions
Texas	TEX. GOV'T CODE ANN. § 411.0735	Y	Upon completion of sentence to 2 years	First offense only
Utah	UTAH CODE ANN. §§ 77-40-102, 77-40-105, 77-40-114	Y	3 years to 7 years	Certain prior convictions bar sealing
Vermont	VT. STAT. ANN. tit. 13, §§ 7041, 7601, 7602	Y	5 years to 10 years	None
Washington	WASH. REV. CODE § 9.96.060	Y	3 years	None
West Virginia	W. VA. CODE § 61-11-26	Y	1 year to 2 years	Can only obtain sealing once
Wisconsin	WIS. STAT. § 973.015	N	Upon completion of sentence	First offense only
Wyoming	WYO. STAT. ANN. § 7-13-1501	Y	5 years	Can only obtain sealing once

* For "Exclude Offenses", Y denotes that the state excludes at least some misdemeanor offenses from being eligible for sealing, while N denotes that the state does not exclude any misdemeanor offenses from such eligibility.

** Generally, where states limit the number of convictions that can be sealed, those states provide an exception for instances when multiple convictions stemmed from the same event.

APPENDIX C: State Felony Conviction Sealing Laws (36 States)

STATE	STATUTE(S)	INCLUDE VIOLENT FELONIES (Y/N)*	WAITING PERIOD	QUANTITY LIMITS**
Arkansas	ARK. CODE ANN. §§ 16-90-1406, 16-90-1408	Y	Upon completion of sentence to 5 years	No more than one previous felony conviction
California	CAL. PENAL CODE §§ 1203.4, 1203.4a, 1203.41, 1203.425	Y	End of probation period	None
Colorado	COLO. REV. STAT. §§ 18-1.3-103.5, 24-72-703, 24-72-706	Y	3 years to 5 years	One petition every 12 months
Connecticut	CONN. GEN. STAT. § 54-142a	Y (all offenses)	5 years	None
Delaware	DEL. CODE ANN. tit. 11, §§ 4372, 4374, 4375	N	7 years	No prior convictions
Illinois	20 ILL. COMP. STAT. 2630/5.2	Y	3 years or until petitioner is no longer required to register	No prior felony convictions
Indiana	IND. CODE §§ 35-38-9-3, 35-38-9-4, 35-38-9-5, 35-38-9-9	Y	3 years to 10 years	One petition per lifetime
Kansas	KAN. STAT. ANN. § 21-6614	Y	3 years to 5 years	No sealing of any record while offender is required to register
Kentucky	KY. REV. STAT. ANN. § 431.073	N	5 years	Only one felony conviction
Louisiana	LA. CODE CRIM. PROC. ANN. art. 978	N	10 years	One petition every 15 years
Maryland	MD. CODE ANN., CRIM. PROC. § 10-110	Y	7 years to 15 years	None
Massachusetts	MASS. GEN. LAWS ch. 276, §§ 100A, 100G, 100I	Y	7 years	None
Michigan	MICH. COMP. LAWS §§ 780.621, 780.621c, 780.621g, 780.624	Y	5 years to 10 years	Up to two felony convictions
Minnesota	MINN. STAT. § 609A.02	Y	5 years	None
Mississippi	MISS. CODE ANN. § 99-19-71	N	5 years	Only one felony conviction
Missouri	MO. REV. STAT. § 610.140	N	7 years	Only one felony conviction
Nevada	NEV. REV. STAT. ANN. § 179.245	Y	2 years to 10 years	None

STATE	STATUTE(S)	INCLUDE VIOLENT FELONIES (Y/N)*	WAITING PERIOD	QUANTITY LIMITS**
New Hampshire	N.H. REV. STAT. ANN. § 651:5	N	2 years to 10 years	One petition every 3 years
New Jersey	N.J. STAT. ANN. §§ 2C:52-2, 2C:52-5.3, 2C:52-14	Y	5 years to 10 years	Only one felony conviction
New Mexico	N.M. STAT. ANN. § 29-3A-5	N	4 years to 10 years	None
New York	N.Y. CRIM. PROC. LAW § 160.59	N	10 years	Only one felony conviction
North Carolina	N.C. GEN. STAT. § 15A-145.5	N	10 years	First offense only
North Dakota	N.D. CENT. CODE § 12-60.1-02	Y	5 years	None
Ohio	OHIO REV. CODE. ANN. §§ 2953.31, 2953.32, 2953.36	N	3 years to 5 years	Up to five felony convictions
Oklahoma	OKLA. STAT. tit. 22, § 18	N	5 years to 10 years	No prior felony convictions up to two felony convictions
Oregon	OR. REV. STAT. § 137.225	Y	3 years to 20 years	No prior convictions within the past 10 years
Pennsylvania	18 PA. CONS. STAT. § 9122.1	N	10 years	Certain prior convictions bar sealing
Rhode Island	R.I. GEN. LAWS §§ 12-1.3-1, 12-1.3-2	N	10 years	First offense only
South Carolina	S.C. CODE ANN. § 22-5-920	N	5 years	First offense only
Tennessee	TENN. CODE ANN. § 40-32-101	N	5 years to 10 years	No prior convictions
Utah	UTAH CODE ANN. § 77-40-105	N	5 years to 10 years	Certain prior convictions bar sealing
Vermont	VT. STAT. ANN. tit. 13, §§ 7601, 7602	Y	5 years to 10 years	None
Washington	WASH. REV. CODE § 9.94A.640	Y	5 years to 10 years	None
West Virginia	W. VA. CODE § 61-11-26	N	5 years	Can only obtain sealing once
Wisconsin	WIS. STAT. § 973.015	N	Upon completion of sentence	First offense only
Wyoming	WYO. STAT. ANN. § 7-13-1502	N	10 years	Can only obtain sealing once

* For "Include Violent Felonies," Y denotes that the state allows specified violent offense convictions to be sealed, while N denotes that the state does not allow any violent offense convictions to be sealed.

** Generally, where states limit the number of convictions that can be sealed, those states provide an exception for instances when multiple convictions stemmed from the same event.

APPENDIX D: State Sealing of Specified Convictions

SPECIFIED CONVICTIONS	STATES
Sex Trafficking Victims	Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, Wyoming (45)
Felony Larceny	Arkansas, California, Colorado, Connecticut, Delaware, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Utah, Vermont, Washington, West Virginia, Wisconsin, Wyoming (34)
Mistaken or Stolen Identity	Alaska, Arizona, Colorado, D.C., Florida, Illinois, Kansas, Massachusetts, Missouri, Montana, Nebraska, New Jersey, North Carolina, Oklahoma, Rhode Island, Tennessee, Virginia (17)
Marijuana	California, Delaware, Illinois, Maryland, Michigan, Minnesota, New Hampshire, New Jersey, New York, North Dakota, Oregon, Washington (12)
Decriminalized Offenses	California, Connecticut, Delaware, D.C., Illinois, Maryland, Massachusetts, Nevada, Rhode Island, Vermont (10)

APPENDIX E: Offenses Commonly Excluded from State Sealing Statutes

DOMESTIC ASSAULT & BATTERY AND PROTECTIVE ORDER VIOLATIONS		
FELONY DOMESTIC A&B	MISDEMEANOR DOMESTIC A&B	PROTECTIVE ORDER VIOLATIONS
Arkansas, Colorado, Illinois, Iowa, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, West Virginia, Wyoming (20)	Colorado, Illinois, Iowa, Missouri, North Carolina, Rhode Island, Tennessee, Utah, West Virginia (9)	Illinois, Kentucky, Massachusetts, Missouri, Tennessee, Vermont, Washington (7)

DRIVING UNDER THE INFLUENCE	
FELONY DUI OFFENSES	MISDEMEANOR DUI OFFENSES
Colorado, Illinois, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Mexico, North Carolina, Pennsylvania, Rhode Island, Tennessee, Utah, Washington, West Virginia (17)	Colorado, Illinois, Iowa, Maryland, Michigan, Missouri, New Mexico, North Carolina, Rhode Island, Tennessee, Utah, West Virginia (12)

APPENDIX F: State Waiting Periods for Sealing of Convictions

COMMENCEMENT OF WAITING PERIOD	
WAITING PERIOD BEGINS AT:	STATE
Completion of Sentence	Arkansas, Georgia, Illinois, Maryland, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Mexico, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Washington, Wisconsin (19)
Date of Conviction	Indiana, Iowa, Oregon, Pennsylvania, Utah (5)
Date of Offense	Massachusetts, South Dakota (2)
Date of Disposition	Connecticut (1)
End of Probation and/or Parole	California (1)
Latest time period of either completion of sentence or release from probation/parole	Colorado, Kansas, Kentucky, Louisiana, Michigan (5)
Latest time period of either conviction and sentencing or release from incarceration	Delaware, New York (2)
Latest time period of either release from custody or discharge from probation/parole	Nevada, North Dakota (2)
Latest time period of either conviction, payment of restitution, completion of probation/parole, or release from incarceration	New Jersey, Wyoming (2)
Latest time period of either conviction, completion of sentence, or end of supervision	North Carolina, West Virginia (2)

APPENDIX G: State Restitution Requirements for Sealing

Restitution must be paid before sealing	Arkansas, Colorado, Indiana, Iowa, Missouri, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, West Virginia, Wyoming (18)
Restitution may be paid after sealing	Delaware, Illinois, Michigan, Minnesota, New Jersey (5)
Restitution not specifically addressed in sealing statutes	California, Connecticut, Georgia, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Montana, Nevada, New Hampshire, New York, Oregon, South Carolina, South Dakota, Washington, Wisconsin (18)

APPENDIX H: State Burdens of Proof for Sealing (Non-Convictions and Convictions)

COURT DISCRETION WHETHER STATUTORY REQUIREMENTS HAVE BEEN SATISFIED	CLEAR AND CONVINCING EVIDENCE	PREPONDERANCE OF THE EVIDENCE
California, Colorado, Connecticut, Illinois, Iowa, Kansas, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Washington, Wisconsin, Wyoming (29)	Arkansas, Kentucky, Minnesota, North Dakota, South Dakota, Utah, West Virginia (7)	Delaware, Georgia, Indiana, Louisiana, Montana (5)

APPENDIX I: State Employment Sealing Provisions

EMPLOYMENT PROVISIONS*	STATES
Person may deny existence of a sealed conviction without exceptions	Delaware, Kentucky, Maryland, Mississippi, Montana, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Vermont, Washington (12)
Person may deny existence of a sealed conviction with exceptions	Arkansas, California, Colorado, Connecticut, Illinois, Indiana, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, Texas, Utah, West Virginia (25)
Person cannot deny existence of a sealed conviction	Georgia, Iowa, Wisconsin, Wyoming (4)
Law limits questions that employers may ask regarding sealed convictions	California, Colorado, Connecticut, Illinois, Indiana, Massachusetts, New Hampshire, New York, Ohio, Oklahoma, Pennsylvania, Texas, Utah, Vermont (14)
Law limits liability for employers who hire persons with sealed convictions	Indiana, Massachusetts, Michigan, Minnesota, Pennsylvania, South Carolina (6)

* The term “person” refers to an individual who has had a criminal conviction sealed.

APPENDIX J: State Maintenance of Sealed Records for Criminal Justice and Employment Purposes

CRIMINAL JUSTICE PURPOSES	
States that maintain sealed records for criminal justice purposes*	Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, Wyoming (39)
Access to sealed records granted by court order	Colorado, Delaware, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Vermont, West Virginia (23)
Law enforcement investigations	Colorado, Delaware, Georgia, Illinois, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Montana, New Hampshire, New York, Ohio, Oklahoma, Oregon, Rhode Island, Vermont, West Virginia, Wisconsin, Wyoming (20)
Sentencing and/or penalty enhancement	Arkansas, California, Indiana, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Rhode Island, South Dakota, Tennessee, Texas, Utah, Washington (20)
Impeachment or other evidentiary purpose	Arkansas, California, Colorado, Connecticut, Georgia, Illinois, Indiana, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nevada, Ohio, Texas (17)
Use for determining or preventing future sealing requests	Colorado, Delaware, Kansas, Massachusetts, Michigan, Mississippi, Missouri, Nevada, New Jersey, North Carolina, Oklahoma, South Carolina (12)

* Several states maintain sealed records for multiple criminal justice purposes, and therefore these states are included in multiple categories within this table.

EMPLOYMENT PURPOSES	
States which maintain sealed records for employment purposes*	Arkansas, California, Colorado, Delaware, Georgia, Illinois, Indiana, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, Texas, Utah, West Virginia (26)
Professional licensing boards	Arkansas, California, Colorado, Illinois, Indiana, Kansas, Louisiana, Michigan, Minnesota, Missouri, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Pennsylvania, Rhode Island, Texas, Utah, West Virginia (19)
Law enforcement background checks	Arkansas, Delaware, Georgia, Illinois, Kansas, Michigan, Minnesota, Missouri, New Hampshire, New York, North Carolina, Rhode Island, Texas, Utah, West Virginia (15)

* Several states maintain sealed records for multiple employment purposes, and therefore these states are included in multiple categories within this table.

APPENDIX K: States with Automatic Sealing Laws (5 States)

CALIFORNIA	
Code Section:	CAL. PENAL CODE § 1203.425
Enacted:	October 8, 2019; amended August 6, 2020
Implementation Date:	July 1, 2022
Overview	<p>Creates an automatic sealing process for:</p> <ul style="list-style-type: none"> • Non-convictions after varying timeframes, which are based on whether criminal proceedings were initiated; • Misdemeanors and infractions after 1 year from conviction if not sentenced to probation; • Any offense if a person is sentenced only to probation and the person completes that sentence without a revocation of probation. <p>A person will not qualify for automatic sealing if they are a registered sex offender, on active probation, serving a sentence for another offense, or have pending criminal charges.</p> <p>California's clean slate process will only apply to offenses that occurred on or after January 1, 2021 (not retroactive).</p>

MICHIGAN	
Code Section:	MICH. COMP. LAWS § 780.621g
Enacted:	October 13, 2020
Implementation Date:	April 11, 2023
Overview	<p>Creates an automatic sealing process for:</p> <ul style="list-style-type: none"> • Non-convictions, subject to certain conditions; • Certain misdemeanor convictions 7 years from the imposition of the sentence; • Certain felony convictions after 10 years from the imposition of the sentence or the completion of any term of imprisonment. <p>Felonies and certain misdemeanors cannot be automatically sealed if a person has charges pending or has been convicted of another offense.</p> <p>No more than 2 felony and 4 misdemeanor convictions in total can be automatically sealed, excluding low-level misdemeanors.</p>

NEW JERSEY	
Code Section:	N.J. STAT. ANN. § 2C:52-5.4
Enacted:	December 18, 2019
Implementation Date:	There is currently no projected date for implementation.
Overview	Enacted legislation in 2019 to implement an automated sealing system. A task force was created to examine technological, fiscal, and practical issues and challenges of such a system.

PENNSYLVANIA	
Code Sections:	18 PA. CONS. STAT. §§ 9122.2 & 9122.3
Enacted:	June 28, 2018
Implementation Date:	June 28, 2019
Overview	<p>Pennsylvania is the only state that has actually implemented an automatic conviction relief system.</p> <p>Creates an automatic sealing process for:</p> <ul style="list-style-type: none"> • Non-convictions; • Certain misdemeanor convictions after 10 years if there are no subsequent misdemeanor or felony convictions and all court-ordered restitution has been paid. <p>Certain prior convictions will disqualify a person from automatic sealing, such as a felony, four misdemeanors, indecent exposure, and various other offenses.</p>

UTAH	
Code Sections:	UTAH CODE ANN. §§ 77-40-102, 77-40-114, 77-40-115, & 77-40-116
Enacted:	March 28, 2019
Implementation Date:	In the developmental phase - it is uncertain when it will be completely implemented.
Overview	<p>Creates an automatic sealing process for:</p> <ul style="list-style-type: none"> • Non-convictions (not guilty, nolle prosequi, or dismissed); • Specified traffic offenses; • Dismissals without prejudice after 180 days; • Certain misdemeanor convictions after 5 – 7 years. <p>A person will not qualify for automatic sealing if they have unpaid fines, fees, or restitution, pending criminal charges, or certain prior convictions on their criminal record</p>

APPENDIX L: State Sealing Data

PENNSYLVANIA AUTOMATIC SEALING DATA: JUNE 28, 2019 TO DECEMBER 15, 2020*	
TYPES OF CASES AND OFFENSES	TOTAL CASES AND OFFENSES EXPUNGED
Non-conviction Cases	16,354,636
Non-conviction Offenses	28,858,513
Conviction Summary Cases**	19,615,037
Conviction Summary Offenses**	19,830,748
Conviction Misdemeanor Cases	94,109
Conviction Misdemeanor Offenses	116,612
Total Cases Expunged	36,065,463
Total Offenses Expunged	48,809,708

Data from this table is available online at <http://www.pacourts.us/assets/files/setting-7047/file-8210.pdf?cb=5fb88e> (document can be accessed via the Pennsylvania courts website: <http://www.pacourts.us/learn/learn-about-the-judicial-system/clean-slate-expungement-and-limited-access>).

*Pennsylvania uses the term “limited access,” which is similar to sealing.

**A summary offense is generally punished by a fine of under \$1,000, imprisonment of 90 days or less, or both.

PENNSYLVANIA SEALING DATA (PETITION-BASED): NOVEMBER 2016 TO DECEMBER 2020*	
Cases Expunged by Petition	1,681
Offenses Expunged by Petition	3,835

Data from this table is available online at <http://www.pacourts.us/assets/files/setting-7047/file-8210.pdf?cb=5fb88e> (document can be accessed via the Pennsylvania courts website: <http://www.pacourts.us/learn/learn-about-the-judicial-system/clean-slate-expungement-and-limited-access>).

*Pennsylvania uses the term “limited access,” which is similar to sealing.

ILLINOIS EXPUNGEMENT AND SEALING DATA (PETITION-BASED)		
YEAR	ORDERS FOR EXPUNGEMENT RECEIVED BY THE STATE POLICE	ORDERS FOR SEALING RECEIVED BY THE STATE POLICE
2014	9,229	4,594
2015	9,905	6,483
2016	7,911	6,660
2017	10,231	5,942
2018	12,084	4,447
2019	15,877	7,316

Data from this table is available on the Illinois State Police website:

<https://isp.illinois.gov/BureauOfIdentification/Expungements>.

MARYLAND EXPUNGEMENT DATA (PETITION-BASED)		
Year	DISTRICT COURT EXPUNGEMENT PETITIONS FILED	CIRCUIT COURT EXPUNGEMENT PETITIONS FILED
2014	35,737	4,025
2015	32,726	2,448
2016	39,706	4,706
2017	47,697	6,811

Data from this table was found in a Senate Bill report filed by the Maryland Department of Legislative Services, which is available at http://mgaleg.maryland.gov/2018RS/fnotes/bil_0001/sb0101.pdf.

NORTH CAROLINA EXPUNCTION DATA (PETITION-BASED)	
FISCAL YEAR	EXPUNCTION ORDERS*
2014-15	7,972
2015-16	11,032
2016-17	12,438
2017-18	12,751
2018-19	15,545
2019-20	13,520
Total Expunction Orders	73,258

Data from this table was found in a 2020 Expunctions Report prepared by the North Carolina Administrative Office of the Courts, which is available at https://www.nccourts.gov/assets/documents/publications/NCAOC-Report-on-Expunctions-20200901.pdf?ch1pLi_Z0ANAmrTLkHf9TEgyfuKw1udi.

* “‘Expunction’ and ‘expungement’ mean the same thing. North Carolina’s expunction statutes use both terms interchangeably.” North Carolina Judicial Branch, *Expunction*, available at <https://www.nccourts.gov/help-topics/court-records/expunctions#:~:text=An%20expunction%20is%20a%20legal,charge%2C%20and%2For%20conviction>

MANDATORY MINIMUM SENTENCES

EXECUTIVE SUMMARY

During the 2020 Regular Session of the General Assembly, the Senate Committee on the Judiciary and the Senate Committee on Rules referred Senate Bill 537 (Sen. John S. Edwards) and Senate Joint Resolution 34 (Sen. Scott A. Surovell), respectively, to the Crime Commission.¹ The Executive Committee of the Crime Commission directed staff to examine mandatory minimum sentences and the use of such sentences in Virginia.

A “mandatory minimum” sentence is a minimum punishment that must be imposed by a court when a person is convicted of a specific offense. Various policy arguments have been raised by both proponents and opponents of mandatory minimum sentences. Proponents generally contend that such sentences deter crime and ensure uniform punishment, while opponents argue that such sentences contribute to inequities in the criminal justice system and do not deter crime.

Staff reviewed literature related to mandatory minimum sentences and found that:

- Research on the specific effectiveness of mandatory minimum sentences is inconclusive;
- Much of the basis for the use of mandatory minimum sentences is rooted in deterrence and rationale choice theories;
- Mandatory minimum sentences evolved as a result of a shift towards determinate sentencing; and,
- Mandatory minimum sentences disproportionately impact certain racial and ethnic populations.

Staff identified 34 criminal statutes in the Code of Virginia that contain a total of 224 distinct offenses requiring a mandatory minimum sentence with a term of confinement. Of these 224 offenses, 162 are felonies and 62 are misdemeanors. While the types of felony offenses primarily involve driving while intoxicated, drugs, child pornography, and weapon violations, the vast majority of the misdemeanor offenses are for driving while intoxicated. Staff obtained and analyzed charge and conviction data in Virginia from FY2016 through FY2020 for these offenses and found that over the last 5 years:

- Offenses requiring a mandatory minimum sentence accounted for an extremely low number of overall charges and convictions;

- The most frequently *charged* offenses requiring a mandatory minimum sentence varied significantly; and,
- Most *convictions* for offenses requiring a mandatory minimum sentence were for driving while intoxicated.

Additionally, staff requested and reviewed data from the Virginia Department of Corrections on the types of sentences that the 34,719 State Responsible incarcerated inmates were serving on June 30, 2019, and found that:

- Approximately one-third of these inmates were serving at least one mandatory minimum sentence;
- The types of offenses for inmates serving only mandatory minimum sentences varied significantly;
- Offenses requiring mandatory minimum sentences disproportionately impact Black persons and males in Virginia; and,
- Mandatory minimum sentences are not imposed consistently in practice in Virginia.

Staff also conducted a cursory review to determine whether any other states had amended or eliminated any mandatory minimum sentences, and if so, for which types of offenses. While staff identified 16 other states that have amended or eliminated mandatory minimum sentences for certain offenses, only 3 of those states have applied the changes retroactively.

Crime Commission members reviewed the study findings at the January 5, 2021, Commission meeting and were presented with the following policy options:

Policy Option 1: Should any mandatory minimum sentences be eliminated?
If so, for which offenses?

The Crime Commission voted to endorse legislation to eliminate all mandatory minimum sentences with a term of confinement from the Code of Virginia.

Policy Option 2: If any mandatory minimum sentences are eliminated, should convicted defendants be eligible for re-sentencing?

The Crime Commission voted to endorse legislation to allow for retroactive re-sentencing of all eliminated mandatory minimum sentences under Policy Option 1, with the exception of any (i) Class 1 felony, (ii) offenses punishable by life in prison, and (iii) misdemeanor offenses.

Policy Option 3: Should courts have the discretion to allow mandatory minimum sentences to be served concurrently with other offenses?

No motions were made by Crime Commission members on this policy option.

Legislation endorsed by the Crime Commission to eliminate all mandatory minimum sentences and to allow for retroactive re-sentencing with certain exceptions as described above was introduced during the 2021 Regular Session of the General Assembly (Senate Bill 1443 - Senator John S. Edwards).² Various amendments were made to the bill in the Senate Committee on the Judiciary before it ultimately passed the Senate. Additionally, legislation was also introduced to eliminate mandatory minimum sentences from 12 specific sections of the Code of Virginia and to allow retroactive re-sentencing for the felony offenses that were eliminated (House Bill 2331 - Del. Michael P. Mullin).³

Due to the differences between Senate Bill 1443 and House Bill 2331, the bills were sent to a conference committee consisting of members of the Senate and the House of Delegates. Both bills remained in conference and neither bill was enacted into law by the General Assembly.

BACKGROUND

Crime Commission staff engaged in the following activities as part of its study on mandatory minimum sentences and the use of such sentences in Virginia:

- Collected available literature and relevant reports relating to mandatory minimum sentences and deterrence;
- Reviewed all offenses requiring a mandatory minimum sentence under Virginia law;
- Examined Virginia case law relating to offenses requiring a mandatory minimum sentence;
- Obtained and analyzed data regarding charges and convictions for offenses requiring a mandatory minimum sentence in Virginia;
- Requested and analyzed data on the types of sentences being served by inmates in the custody of the Virginia Department of Corrections;
- Conducted a cursory review of amendments to and repeals of mandatory minimum sentences in other states; and,
- Consulted with key stakeholders.

A “mandatory minimum” sentence is a minimum punishment that must be imposed by a court when a person is convicted of a specific offense.⁴ The court may not suspend any portion of a mandatory minimum sentence;⁵ however, courts often have the discretion to impose a punishment that is greater than the prescribed mandatory minimum sentence.⁶ While mandatory minimum sentences can include a term of confinement, a fine, or community service,⁷ this report primarily focuses on criminal offenses that require a mandatory minimum sentence with a term of confinement upon conviction.

LITERATURE REVIEW

Various policy arguments have been raised by both proponents and opponents of mandatory minimum sentences.

Mandatory minimum sentences, like other criminal sentences in the Code of Virginia, represent policy decisions that have been made by the General Assembly over the years.⁸ Policy debates regarding the imposition of mandatory minimum sentences are not unique to Virginia.

Proponents contend that mandatory minimum sentences:⁹

- Deter crime;
- Help eliminate inequalities by providing uniformity and fairness, certainty and predictability of outcomes, and greater truth and integrity in sentencing;
- Guarantee that offenders are incapacitated and receive a pre-determined punishment; and,
- Induce cooperation with prosecutors.

Opponents contend that mandatory minimum sentences:¹⁰

- Do not ensure retribution or provide meaningful deterrence, as certainty of punishment and clarity does not equal deterrence;
- Have not eliminated discrepancies in punishment for similarly situated defendants;
- Distort sentences for whole classes of crimes and foster circumvention by judges, prosecutors, and juries; and,
- Inflict a “trial tax” when used to induce cooperation and guilty pleas from defendants who would otherwise exercise their constitutional right to trial by jury.

Research on the specific effectiveness of mandatory minimum sentences is inconclusive.

The effectiveness of mandatory minimum sentences has been frequently measured by impacts relating to deterrence and incapacitation.¹¹ Research regarding the deterrent effect of mandatory minimum sentences has provided mixed findings. Some scholars contend that there is no credible evidence of any deterrent effect,¹² while others have found marginal¹³ or short-term deterrent effects.¹⁴ The evidence regarding the general deterrent effect of severity-based sanctions, such as mandatory minimum sentencing, is varied; whereas, the relationship between these types of sanctions and specific deterrence is less clear.¹⁵ Further, the differences in the types of mandatory minimum sentences (fines to life imprisonment), and in the variety of offenses requiring a mandatory minimum sentence (traffic offenses to homicide), prevent general conclusions from being drawn.¹⁶

Incapacitation theory suggests that decreases in crime rates are achieved through increased rates of imprisonment because individuals are unable to engage in new criminal activity against the general public while incarcerated.¹⁷ Research has shown that imprisonment can have a deterrent effect, a criminogenic effect, or no effect on an individual's future reoffending.¹⁸ A large body of research demonstrates that lengthy prison sentences based on certain sentencing policies, including mandatory minimum sentences, do not serve as effective crime prevention strategies.¹⁹ The deterrent effect of imprisonment can be contingent upon several factors such as age, prior incarceration experience, and stage of criminal career.²⁰ Age has continued to be one of the most important predictors of criminal activity, with an individual's engagement in criminal activity peaking in late adolescence and young adulthood and declining as that individual ages.²¹ Research has repeatedly demonstrated the link between a person's age at the time of their first criminal offense and the persistence, frequency, and seriousness of criminal offending over time.²² Accordingly, some research on the criminal careers of offenders suggests that the effect of incapacitation is diminished because many offenders incarcerated for lengthy periods of time "would have ceased offending long before their prison terms expire."²³ Further, little evidence exists that lengthy prison sentences have a greater than marginal effect in decreasing recidivism.²⁴

In sum, it is unlikely that mandatory minimum sentences have a substantial deterrent effect.²⁵ Therefore, the use of mandatory minimum sentences cannot be justified *solely*

on the basis of deterrence; however, such use may be justified based on incapacitation effects and possibly retribution.²⁶

Much of the basis for the use of mandatory minimum sentences is rooted in deterrence and rationale choice theories.

Deterrence theory focuses on how the threat of punishment and the imposition of sanctions can be used to discourage individuals from engaging in criminal behavior.²⁷ This theory contends that criminal decision-making is a process, and therefore the research behind this theory centers on both an individual's and society's understanding of the potential sanctions that will occur if a person fails to engage in socially acceptable behavior.²⁸

Deterrence theory is based on three components: severity, certainty, and celerity (swiftness) of punishment.²⁹ Severity relates to the strength and weight of the punishment, certainty refers to the probability of detection and ensuing punishment, and celerity relates to how swiftly sanctions are applied once the offense has been committed and the individual detected.³⁰ According to deterrence theory, crime can be inhibited in two manners: general and specific deterrence. General deterrence occurs when the punishment for the crime prevents others in society who are considering engaging in a criminal activity from committing similar acts.³¹ Specific deterrence occurs when the punishment for the crime prevents the specific individual who is being punished from committing additional criminal acts in the future.³² Deterrence theory research has attempted to determine whether the severity of punishment,³³ the certainty of punishment,³⁴ or celerity of punishment³⁵ act as general or specific deterrents.

Deterrence theorists argue that punishment which is certain, occurs immediately after the crime takes place, and is severe enough to outweigh the benefits of engaging in criminal activity, is most effective in curbing criminal behavior.³⁶ These theorists assume that individuals are rational beings who engage in a process of considering the consequences of their actions, which includes weighing the costs and benefits of engaging in criminal behavior.³⁷ Rational choice theory, which is closely related to deterrence theory, focuses on understanding the impact of the anticipated costs and benefits of engaging in criminal behavior. Rational choice theory suggests that individuals rationally weigh the costs and benefits of offending in their decision to engage in criminal behavior.³⁸ Criminal activity is assumed to be deterred through the threat of sanctions and punishment and by increasing the anticipated costs of engaging

in criminal behavior.³⁹ A substantial body of research has focused on how an individual's *perception* of the risk of sanctions impacts the deterrent effect and how such perceptions and subsequent decision-making can vary greatly across offenders.⁴⁰ Ultimately, however, offenders will engage in criminal activity if the estimated utility, or the balance of "pleasures and pains," from engaging in the criminal activity is greater than the estimated utility from abstaining from criminal activity.⁴¹

A review of the research on deterrence theory and rational choice theory found that the effects of deterrence are mixed and have the ability to range in size from insignificant effects to modest effects or large effects.⁴² This small body of literature suggests that there is little evidence that severity-based deterrence measures produce general deterrent effects that are large enough to justify social and economic costs.⁴³ Certainty of punishment has been found to have a stronger deterrent effect than severity of punishment. Additionally, there is mixed evidence regarding the deterrent effect of the celerity (swiftness) of punishment. Finally, research suggests that the elements of deterrence do not operate independently of one another, but rather they interact, in order to achieve the goal of preventing criminal behavior.⁴⁴

Mandatory minimum sentences evolved as a result of a shift towards determinate sentencing.

Two of the predominant sentencing practices in the United States are indeterminate and determinate sentencing. Indeterminate sentencing is an offender-centered approach that focuses on the rehabilitation of offenders in correctional facilities through the use of employment and educational programs.⁴⁵ With indeterminate sentencing, judges are given wide discretion to sentence offenders to broad ranges of punishment, such as a range from 5 to 25 years of incarceration.⁴⁶ Further, an offender's release from incarceration is generally based on the discretion of a parole board, and such release is granted when that board determines that the individual has been properly rehabilitated and is suitable for release into the community.⁴⁷ Conversely, determinate sentencing is rooted in deterrence theory and aims to increase the certainty, severity, and celerity of punishment through incapacitation by reducing the sentencing discretion of judges.⁴⁸ Under determinate sentencing, judges are required to sentence offenders to definitive periods of incarceration.⁴⁹ Additionally, parole is eliminated and individuals are released from incarceration at the expiration of their sentence or through mandatory prison release policies.⁵⁰

Critics began to question the effectiveness of indeterminate sentencing beginning in the late 1960s and pushed for tougher crime control policies.⁵¹ Criticisms focused on disparity in sentence types, racially biased decisions, procedural unfairness, judicial authority, release decisions of parole boards, and the disregard of crime prevention.⁵² In addition, there were concerns with how inmates were being treated in correctional facilities.⁵³ All of this led to a shift in correctional ideology and policy that moved away from the rehabilitation of offenders toward deterrence, incapacitation, and crime prevention.⁵⁴ As a result, states began to adopt more determinate sentencing policies, such as mandatory minimum sentencing, truth-in-sentencing requiring individuals to serve a certain percentage of their sentence, habitual offender statutes, and three strikes laws.⁵⁵

The shift to determinate sentencing policies in some states was based on the desire for increased transparency, certainty, and consistency in sentencing.⁵⁶ Empirical research has consistently demonstrated that the implementation of determinate sentencing is associated with decreased state incarceration rates.⁵⁷ While research continues to demonstrate this pattern, there has been little attention given to explaining exactly *how* determinate sentencing contributes to decreased incarceration rates.⁵⁸

With determinate sentencing came the push for “structured” sentencing policies that controlled the discretion of judges in an effort to ensure uniform sentences for similar offenders and crimes.⁵⁹ Structured sentencing policies were achieved with states adopting presumptive sentencing guidelines, presumptive sentences, or voluntary guidelines.⁶⁰ Research indicates that the development of presumptive sentencing guidelines by sentencing commissions is the most effective manner to reduce disparity, regulate correctional spending, and increase consistency.⁶¹ Furthermore, researchers determined that states with presumptive guidelines established to control correctional resources and prison populations had lower incarceration rates.⁶²

Mandatory minimum sentences disproportionately impact certain racial and ethnic populations.

Mandatory minimum sentences have been found to contribute to disparities in the criminal justice system.⁶³ For example, some research has found that similarly situated defendants are ordered to serve dissimilar sentences for offenses requiring a mandatory minimum sentence.⁶⁴ Additionally, a body of research has found that mandatory minimum sentences undermine equality and exacerbate racial disparities.⁶⁵ In particular, research has found that mandatory minimum sentences have

disproportionately impacted Black and Hispanic defendants.⁶⁶ Specifically, Black males were found to receive sentences that were 50% longer than White males, and Hispanic males received sentences that were 17% longer as compared to White males.⁶⁷ This disproportionality remained even when accounting for other variables such as offense type, offense severity, and criminal history.⁶⁸ Additional research has found that even when controlling for the arrest offense, criminal history, and other prior characteristics, there was a sentence-length gap of about 10% between White and Black federal defendants.⁶⁹ Between 5-10% of this gap was explained by the initial charging decision of the prosecutor, with prosecutors in the sample almost twice as likely to bring a charge carrying a mandatory minimum sentence against a Black defendant.⁷⁰ Moreover, research has found that Black defendants received a higher proportion of mandatory minimum sentences as compared to White and Hispanic defendants.⁷¹ The root causes of these persistent disparities are not well understood.⁷² Researchers contend that the root causes may be the result of one or more of the following factors: (i) subconscious bias or racial stereotyping on the part of the judges;⁷³ (ii) prosecutorial bias;⁷⁴ or, (iii) sentencing policies that have a disparate impact against minorities.⁷⁵

VIRGINIA LAWS AND DATA

The Code of Virginia contains a total of 224 distinct offenses requiring a mandatory minimum sentence across 34 criminal statutes.

Staff conducted a review of the Code of Virginia and the Virginia Crime Codes (VCCs) and found that Virginia law includes 224 distinct offenses requiring a mandatory minimum sentence with a term of confinement across 34 criminal statutes. Of these 224 offenses, 162 are felonies and 62 are misdemeanors. As seen in Tables 1 and 2, the types of offenses range from misdemeanor traffic violations to murder, and the mandatory minimum sentences for these offenses range from 2 days in jail up to life imprisonment.

Table 1: Felony Offenses Requiring a Mandatory Minimum Sentence (162 total)

FELONY OFFENSES		
VCC Category	Mandatory Sentence Range	Number of Offenses
Assault	30 Days – 5 Years	5
Escapes	1 Year	1
Fraud	6 Months	1
Gangs	2 Years	2
Murder	1 Year – Life	3
Narcotics	6 Months - Life	44
Obscenity (Child Pornography)	1 Year – 15 Years	21
Protective Orders	6 Months	2
Sexual Assault	10 Years – Life	6
Traffic - DWI	90 Days – 1 Year 5 Days	58
Traffic- Other	12 Months – 1 Year	7
Vandalism	1 Year	2
Weapons	1 Year – 5 Years	10

Source: Virginia Criminal Sentencing Commission, *VCCs Excel Version* spreadsheet. Count of offenses by Crime Commission staff based on list of offenses provided in *VCCs Excel Version*, retrieved from http://www.vcsc.virginia.gov/codes_qbe.html. Offenses requiring a mandatory minimum sentence under Va. Code §§ 18.2-67.5:2, 18.2-67.5:3, and 19.2-297.1 are not included in the count. Offenses requiring a mandatory minimum sentence other than a term of confinement (fine or community service) are not included in this count. Table prepared by Crime Commission staff.

The majority of misdemeanor offenses requiring a mandatory minimum sentence in the Code of Virginia are for driving while intoxicated.

As illustrated in Table 2, driving while intoxicated (DWI) offenses comprise an overwhelming majority of the misdemeanor offenses requiring a mandatory minimum sentence in the Code of Virginia.

Table 2: Misdemeanor Offenses Requiring a Mandatory Minimum Sentence (62 total)

MISDEMEANOR OFFENSES		
VCC Category	Mandatory Sentence Range	Number of Offenses
Alcohol	30 Days	1
Protective Orders	60 Days	2
Simple Assault	2 Days – 6 Months	3
Tobacco	90 Days	2
Traffic - DWI	5 Days – 45 Days	52
Traffic - Other	10 Days	2

Source: Virginia Criminal Sentencing Commission, *VCCs Excel Version* spreadsheet. Count of offenses by Crime Commission staff based on list of offenses provided in *VCCs Excel Version*, retrieved from http://www.vcsc.virginia.gov/codes_qbe.html. Offenses that require a mandatory minimum sentence other than a term of confinement (fine or community service) are not included in this count. Table prepared by Crime Commission staff.

Offenses requiring a mandatory minimum sentence comprised a small proportion of the total charges and convictions in Virginia courts over the past 5 years.

Staff requested data on the total number of charges and convictions in Virginia’s circuit, general district, and juvenile and domestic relations district courts from FY2016 to FY2020.⁷⁶ As noted in Table 3, offenses requiring a mandatory minimum sentence accounted for only 4% of the charges and 3% of the convictions during that 5 year time period.

Table 3: Total Charges and Convictions, FY2016-FY2020

TOTAL CHARGES	4,903,574
Offense Did NOT Require a Mandatory Minimum Sentence	96%
Offense Required a Mandatory Minimum Sentence	4%
TOTAL CONVICTIONS	2,423,935
Offense Did NOT Require a Mandatory Minimum Sentence	97%
Offense Required a Mandatory Minimum Sentence	3%

Source: Virginia Criminal Sentencing Commission staff analysis of data from the Supreme Court of Virginia’s Case Management Systems (CMS) for the Circuit Court, General District Court, and Juvenile & Domestic Relations (JDR) Court (adult defendants only). The total number of charges and convictions exclude infractions. See endnote 76 for additional important notes, caveats, and limitations. Table prepared by Crime Commission staff.

The most frequently charged offenses requiring a mandatory minimum sentence over the last five years in Virginia varied significantly.

As noted in Table 4, the most frequently charged offenses requiring a mandatory minimum sentence between FY2016 and FY2020 in Virginia included driving on a revoked license (3rd or subsequent offense), assault on public servants, DWI, use of a firearm in a felony, and possession of a firearm by a non-violent felon.⁷⁷ It is important to note that the mandatory minimum sentence for driving on a revoked license (3rd or subsequent offense) was repealed on July 1, 2020, as a result of legislation enacted during the 2020 Regular Session of the General Assembly.⁷⁸

Table 4: Top 5 Charges per Year for Offenses Requiring a Mandatory Minimum Sentence, FY2016-FY2020

Rank	Offense Description	Mandatory Minimum Sentence	Average Charges per Year
1	<i>Driving w/ license revoked - 3rd or sub. in 10 years</i> Repealed as of 7/1/2020	10 days	5,572
2	Simple assault on law enforcement, court, DOC, fire/medical	6 months	4,002
3	DWI, First conviction, blood alcohol level .15 to .20	5 days	3,551
4	Firearm use in commission of felony - first offense	3 years	2,839
5	Convicted felon (non-violent w/in 10 yr.) - possess firearm	2 years	1,944
TOTAL AVERAGE NUMBER OF CHARGES PER YEAR, FY2016-FY2020			34,800

Source: Virginia Criminal Sentencing Commission staff analysis of data from the Supreme Court of Virginia's Case Management Systems (CMS) for the Circuit Court, General District Court, and Juvenile & Domestic Relations (JDR) Court (adult defendants only). See endnote 76 for additional important notes, caveats, and limitations. Table prepared by Crime Commission staff.

Most convictions for offenses requiring a mandatory minimum sentence over the past 5 years in Virginia were for driving while intoxicated.

As detailed in Table 5, DWI offenses accounted for four of the top five most frequent convictions for offenses requiring a mandatory minimum sentence in Virginia over the past 5 years. As previously noted, the remaining offense of driving on a revoked license (3rd or subsequent offense) was repealed as of July 1, 2020.⁷⁹

Table 5: Top 5 Convictions Per Year for Offenses Requiring a Mandatory Minimum Sentence, FY2016-FY2020

Rank	Offense Description	Mandatory Minimum Sentence	Average Convictions per Year
1	<i>Driving w/ license revoked - 3rd or sub. within 10 years</i> Repealed as of 7/1/2020	10 days	3,078
2	DWI, First conviction, blood alcohol level .15 to .20	5 days	2,624
3	DWI, Second conviction within less than 5 years	20 days	943
4	DWI, First conviction, blood alcohol level > .20	10 days	919
5	DWI, Second conviction within 5 to 10 years	10 days	828
TOTAL AVERAGE NUMBER OF CONVICTIONS PER YEAR, FY2016-FY2020			13,959

Source: Virginia Criminal Sentencing Commission staff analysis of data from the Supreme Court of Virginia's Case Management Systems (CMS) for the Circuit Court, General District Court, and Juvenile & Domestic Relations (JDR) Court (adult defendants only). See endnote 76 for additional important notes, caveats, and limitations. Table prepared by Crime Commission staff.

Offenses requiring mandatory minimum sentences disproportionately impact Black persons and males in Virginia.

An analysis by the Virginia Department of Corrections on the impact of mandatory minimum sentences on the State Responsible confined population as of June 30, 2019, found that:⁸⁰

- 41% of Black inmates were serving one or more mandatory minimum sentences as compared to 26% of White inmates; and,
- Male inmates were serving more mandatory minimum sentences than female inmates.⁸¹

Approximately one-third of the State Responsible confined population in Virginia on June 30, 2019, was serving at least one mandatory minimum sentence.

As of June 30, 2019, nearly 35,000 State Responsible inmates were confined in Virginia. As illustrated in Table 6, approximately one-third (10,990) of State Responsible inmates were serving at least one mandatory minimum sentence.⁸²

Table 6: Sentence Type of State Responsible Inmates

Sentence Type	Number of Inmates	% Total
Only Non-Mandatory Minimum Sentences	21,547	62%
Mandatory Minimum & Non-Mandatory Minimum Sentences	9,491	27%
Only Mandatory Minimum Sentences	1,499	4%
Life Sentence, Death Sentence, or Three Strikes	2,182	6%
TOTAL NUMBER OF SR INMATES	34,719	100%

Source: Virginia Department of Corrections, Research – Statistical Analysis & Forecast Unit. (December 2020). *Offense Information of SR Inmates Serving Mandatory Minimum Sentences*. Analysis is based upon sentencing information for inmates in the SR Confined Population on June 30, 2019. Percentages do not total 100 due to rounding. Table prepared by Crime Commission staff.

The Virginia Department of Corrections conducted further analysis on the 4% (1,499) of State Responsible confined inmates in Table 6 who were serving only mandatory minimum sentences. The outcome of this analysis, as detailed in Table 7, indicated that these inmates were serving mandatory minimum sentences for a wide variety of offenses, including drug distribution, driving on a revoked license, possession of a

firearm by a non-violent felon, use of a firearm in a felony, and assault on a public servant.⁸³

Table 7: Top 5 Offenses Amongst State Responsible Confined Inmates Serving Only Mandatory Minimum Sentences

Rank	Offense Description	Number of Offenses	% Total
1	Drug distribution	489	12%
2	License revoked - habitual offender drive w/out license	384	10%
3	Convicted felon (non-violent w/in 10 yr.) - possess firearm	298	7%
4	Firearm use in commission of felony – first offense	271	7%
5	Simple assault on law enforcement, court, DOC, fire/medical	269	7%
TOTAL OFFENSES		4,001	43%

Source: Virginia Department of Corrections, Research – Statistical Analysis & Forecast Unit. (December 2020). *Offense Information of SR Inmates Serving Mandatory Minimum Sentences*. Analysis is based upon sentencing information for inmates in the SR Confined Population on June 30, 2019. As inmates can be convicted of multiple, differing offenses, the offenses listed in this table may or may not be the most serious offense for these inmates. Table prepared by Crime Commission staff.

Mandatory minimum sentences are not imposed consistently in Virginia.

The inconsistent practices surrounding mandatory minimum sentences in Virginia typically stem from whether such sentences are ordered to be served consecutive to, or concurrent with, any other sentences. The distinction between a consecutive sentence and a concurrent sentence is significant in determining how long an individual will remain incarcerated. A consecutive sentence is when an individual serves multiple sentences one after another, while a concurrent sentence is when an individual serves multiple sentences at the same time. For example, if an individual receives two 5 year sentences and serves those sentences consecutively, that individual will serve a total of 10 years in prison. However, if those same two sentences are served concurrently, that individual will serve a total of 5 years in prison.

Virginia statutory and case law vary as to whether a mandatory minimum sentence can be served concurrently with any other sentence. As such, mandatory minimum sentences are not imposed consistently in practice.⁸⁴ One reason for the inconsistency is that the Code of Virginia treats sentences for non-mandatory minimum offenses differently than sentences for offenses requiring a mandatory minimum sentence. Under Virginia law, sentences for non-mandatory minimum offenses are served

consecutively, but courts may order those sentences to be served concurrently.⁸⁵ In contrast, many statutes that set forth offenses requiring a mandatory minimum sentence contain provisions that specifically require the mandatory minimum sentence to be served consecutively with any other sentence.⁸⁶ However, not all statutes that set forth offenses requiring a mandatory minimum sentence contain these specific consecutive sentencing provisions.⁸⁷ Therefore, whether a mandatory minimum sentence is ordered to be served concurrently with another sentence is often based on the interpretation of these statutes by judges and prosecutors across the Commonwealth.

A second reason for the inconsistent sentencing practices is based on how Virginia appellate courts have interpreted provisions in the Code of Virginia that direct the manner in which certain mandatory minimum sentences are to be served. For example, because the Code of Virginia uses varying language to mandate when mandatory minimum sentences must be served consecutively with other sentences, Virginia appellate courts have ruled that multiple convictions for possession of a firearm within ten years of having been convicted of a felony (2 year mandatory minimum sentence)⁸⁸ cannot be served concurrently with each other,⁸⁹ while multiple convictions for use or display of a firearm in committing a felony (3 year and 5 year mandatory minimum sentences)⁹⁰ and multiple convictions for production of child pornography, first offense (5 year mandatory minimum sentence)⁹¹ can be served concurrently with each other.⁹²

OTHER STATES

While several other states have amended or eliminated mandatory minimum sentences for certain offenses, only a few of those states have applied the changes retroactively.

As part of this study, staff conducted a cursory review to determine whether any other states have amended or eliminated any mandatory minimum sentences, and if so, for which types of offenses. Staff identified 16 states as of January 2021 that have amended or repealed mandatory minimum sentences for certain offenses; however, only 3 of those states applied the changes retroactively (California, Michigan, and New York). States that have amended or repealed mandatory minimum sentences include:⁹³

- Arkansas: reduced the length of mandatory minimum sentences for possession and distribution of certain drugs;⁹⁴

- California: California voters passed Proposition 36, which revised the state's three strikes law that imposed mandatory life sentences for third time offenders;⁹⁵
- Connecticut: eliminated mandatory minimum sentences for drug possession in school zones;⁹⁶
- Delaware: eliminated mandatory minimum sentences for some first-time drug offenders and reduced mandatory minimum sentences for certain drug offenses;⁹⁷
- Florida: eliminated mandatory minimum sentences for aggravated assault with a firearm;⁹⁸
- Iowa: eliminated mandatory minimum sentences for certain drug offenses;⁹⁹
- Louisiana: provided prosecutors with discretion to waive mandatory minimum sentences for nonviolent and non-sexual assault offenses;¹⁰⁰
- Maryland: eliminated mandatory minimum sentences for certain drug offenses;¹⁰¹
- Massachusetts: reduced the length of mandatory minimum sentences for certain drug offenses;¹⁰²
- Michigan: eliminated mandatory minimum sentences for most drug offenses;¹⁰³
- Missouri: eliminated mandatory minimum sentences for certain drug offenses;¹⁰⁴
- Montana: eliminated mandatory minimum sentences for drug offenses;¹⁰⁵
- New York: eliminated mandatory minimum sentences for certain drug offenses;¹⁰⁶
- North Dakota: reduced the length of mandatory minimum sentences for certain drug distribution offenses;¹⁰⁷
- Ohio: eliminated mandatory minimum sentences for certain drug offenses;¹⁰⁸ and,
- Oklahoma: eliminated mandatory minimum sentences for certain drug offenses.¹⁰⁹

CRIME COMMISSION LEGISLATION

The Crime Commission met on January 5, 2021, and heard a presentation from staff on mandatory minimum sentences and the use of such sentences in Virginia.¹¹⁰ Staff provided Crime Commission members with three policy options for consideration.

Policy Option 1: Should any mandatory minimum sentences be eliminated?
If so, for which offenses?

Staff advised Crime Commission members that the decision to eliminate all or some mandatory minimum sentences from the Code of Virginia was ultimately a policy decision. Staff provided members with a list of all offenses requiring a mandatory minimum sentence with a term of confinement in the Code of Virginia. The list included each offense, the mandatory minimum sentence, the sentencing range, and the average number of charges and convictions for each offense over the past 5 years.¹¹¹

Staff further advised members that most mandatory minimum sentences in the Code of Virginia constitute the low end of a sentencing range for a particular offense; however, a few of the mandatory minimum sentences are for a definitive period of incarceration. For example, a person convicted of possession of a firearm after having been convicted of a nonviolent felony within the past 10 years must be sentenced to a mandatory minimum of 2 years in prison, but may be sentenced up to 5 years in prison.¹¹² Conversely, a person convicted of first offense use of a firearm in the commission of certain felonies can only be sentenced to 3 years in prison.¹¹³ Therefore, if any mandatory minimum sentences are eliminated for offenses with a definitive period of incarceration, then members will need to determine new sentencing ranges for those particular offenses.¹¹⁴

Finally, staff noted that eliminating a mandatory minimum sentence does not eliminate the punishment for the underlying criminal offense. If a mandatory minimum sentence is eliminated, a person convicted of that offense will be sentenced based on the classification of the crime, the facts and circumstances of the offense, and the sentencing guidelines, as is the current practice for any non-mandatory minimum offense under the Code of Virginia.

The Crime Commission voted to endorse legislation to eliminate all mandatory minimum sentences with a term of confinement from the Code of Virginia.

Policy Option 2: If any mandatory minimum sentences are eliminated,
should convicted defendants be eligible for resentencing?

Policy Option 2 was contingent upon the decision on Policy Option 1. Staff advised members that Policy Option 2 dealt with the retroactive re-sentencing of any eliminated mandatory minimum sentences. Because the Crime Commission had voted to eliminate

all mandatory minimum sentences with a term of confinement from the Code of Virginia, staff asked for further guidance on whether any or all of the offenses requiring a mandatory minimum sentence would qualify for retroactive re-sentencing.

Staff noted that retroactive re-sentencing is a mechanism for equitable relief for individuals currently serving a now eliminated mandatory minimum sentence. However, staff cautioned that retroactive re-sentencing does present certain resource and logistical challenges, such as providing counsel to those defendants as part of the re-sentencing process and potentially returning incarcerated defendants to courts for re-sentencing hearings.

Crime Commission members were provided with draft legislation that created a petition process for retroactive re-sentencing. The re-sentencing process involved the defendant filing a petition with the sentencing court, a response from the Commonwealth's Attorney, provisions to appoint counsel for the defendant, notification to any victims of the underlying offense, a review of the petition by the court, and, if granted, a re-sentencing hearing and potential re-sentencing by the court. The draft legislation was based in concept on a current provision of the Code of Virginia which allows for re-sentencing if a defendant has not been transferred from the custody of a local or regional jail to a state correctional facility.¹¹⁵

The Crime Commission voted to endorse legislation to allow for retroactive re-sentencing of all eliminated mandatory minimum sentences under Policy Option 1, with the exception of any (i) Class 1 felony, (ii) offenses punishable by life in prison, and (iii) misdemeanor offenses.

Policy Option 3: Should courts have the discretion to allow mandatory minimum sentences to be served concurrently with other offenses?

Staff advised members that Policy Option 3 was a stand-alone policy option meant to address inconsistent practices for mandatory minimum sentences. Staff noted that allowing courts to have such discretion would provide clarity in the law and would grant courts greater flexibility in fashioning sentences. Adoption of this policy option would also address the numerous instances where a defendant is charged with multiple offenses requiring a mandatory minimum sentence that would result in a lengthy term of incarceration if the sentences were ordered to be served consecutively. Despite the potential benefits of this policy option, staff cautioned members that granting courts this discretion could unintentionally lead to other sentencing inconsistencies across the

Commonwealth, as this flexibility could result in widely varied sentences across localities for the same type of offense committed under similar circumstances.

Crime Commission members were provided with draft legislation to grant courts the explicit authority to allow mandatory minimum sentences to be served concurrently with other sentences. The draft legislation was based in concept on the current provision of the Code of Virginia that grants courts the discretion to allow non-mandatory minimum sentences to be served concurrently.¹¹⁶

No motions were made by Crime Commission members on Policy Option 3.

Legislation endorsed by the Crime Commission was introduced during the 2021 Regular Session of the General Assembly to eliminate all mandatory minimum sentences with a term of confinement from the Code of Virginia and to allow for retroactive re-sentencing for all such offenses, with the exception of re-sentencing for any (i) Class 1 felony, (ii) offenses punishable by life in prison, and (iii) misdemeanor offenses (Senate Bill 1443 - Senator John S. Edwards).¹¹⁷ Senator Edwards later offered a substitute version of this bill to eliminate all mandatory minimum sentences with a term of confinement from the Code of Virginia, with the exception of Class 1 felonies, and to also remove the retroactive re-sentencing provision from the bill. This substitute version was adopted by the Senate Committee on the Judiciary. Additionally, this substitute version created a work group to evaluate the feasibility of re-sentencing persons who were previously convicted of a felony offense that was punishable by a mandatory minimum term of confinement. The substitute version of Senate Bill 1443 passed the Senate.¹¹⁸ Additionally, legislation was also introduced to eliminate mandatory minimum sentences from 12 specific sections of the Code of Virginia and to allow retroactive re-sentencing for the felony offenses that were eliminated (House Bill 2331 - Del. Michael P. Mullin).¹¹⁹

Due to the differences between Senate Bill 1443 and House Bill 2331, the bills were sent to a conference committee consisting of members of the Senate and the House of Delegates. Both bills remained in conference and neither bill was enacted into law by the General Assembly.

ACKNOWLEDGEMENTS

The Virginia State Crime Commission extends its appreciation to the following agencies and organizations for their assistance and cooperation on this study:

Office of the Executive Secretary of the Supreme Court of Virginia

Virginia Association of Commonwealth's Attorneys

Virginia Criminal Sentencing Commission

Virginia Department of Corrections

Virginia Department of Juvenile Justice

Virginia Indigent Defense Commission

ENDNOTES

¹ Senate Bill 537 is available at <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=201&typ=bil&val=sb537>. Senate Joint Resolution 34 is available at <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=201&typ=bil&val=sj34>.

² Senate Bill 1443 is available at <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=212&typ=bil&val=sb1443>.

³ House Bill 2331 is available at <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=212&typ=bil&val=hb2331>. This bill proposed eliminating mandatory minimum sentences from VA. CODE ANN. §§ 3.2-4212, 4.1-302, 18.2-186.4, 18.2-248, 18.2-248.01, 18.2-248.03, 18.2-248.1, 18.2-248.5, 18.2-255, 18.2-255.2, 46.2-357, and 46.2-391 (2020).

⁴ See VA. CODE ANN. § 18.2-12.1 (2020).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ See, e.g., VA. CODE ANN. §§ 18.2-10 and 18.2-11 (2020).

⁹ Luna, E., & Cassell, P. G. (2010). Mandatory minimalism. *Cardoza Law Review*, 32, 1-83; Tonry, M. (2009). The mostly unintended effects of mandatory penalties: Two centuries of consistent findings. *Crime and Justice*, 38(1), 65-114.

¹⁰ *Id.*

¹¹ Tonry, M. (2009). The mostly unintended effects of mandatory penalties: Two centuries of consistent findings. *Crime and Justice*, 38(1), 65-114; Tonry, M. (2017). Making American sentencing just, humane, and effective. *Crime and Justice*, 46, 441-504.

¹² *Id.*

¹³ Durlauf, S. N., & Nagin, D. S. (2011). Imprisonment and crime: Can both be reduced? *Criminology and Public Policy*, 10(1), 13-54.

¹⁴ Mastrobuoni, G., & Rivers, D. (2016). Criminal discount factors and deterrence. IZA Discussion Paper No. 9769, Retrieved from <https://poseidon01.ssrn.com/delivery.php?ID=661105029067075097074085125122097075004068033079045035081059123124007046038116114111010122086077054004097080106086097126098105097080066118123122007116106125116110028122026019000&EXT=pdf>

¹⁵ Nagin, D., Cullen, F. T., & Jonson, C. L. (2009). Imprisonment and reoffending. *Crime and Justice*, 38(1), 115-200; Nagin, D. (2013). Deterrence in the twenty-first century: A review of evidence. *Crime and Justice*, 42(1), 199-263; Raaijmakers, E. A. C., de Keijser, J. W., Nieuwbeerta, P., & Dirkzwager, A. J. E. (2017). Why longer prison terms fail to serve a specific deterrent effect: An empirical assessment on the remembered severity of imprisonment. *Psychology, Crime & Law*, 23(1), 32-55.

¹⁶ The general public being informed about legal sanctions for engaging in criminal behavior impacts deterrence and public safety. Legal sanctions have the ability to deter the criminal behavior of potential offenders through a combination of legislation, simultaneous publicity, and enforcement. For example, a very detailed study that analyzed the impact of mandatory minimum jail sentences in Arizona for drunk driving found that the decrease in drunk driving arrests following the enactment of the “stiffer penalties” was more closely correlated with a corresponding public awareness campaign about the new laws and the dangers of drunk

driving, rather than the specific deterrent effect of the laws themselves. See, e.g., Apel, R. (2013). Sanctions, perceptions, and crime: Implications for criminal deterrence. *Journal of Quantitative Criminology*, 29, 67-101; Fradella, H. F. (2000). Mandatory minimum sentences: Arizona's ineffective tool for the social control of driving under the influence. *Criminal Justice Policy Review*, 11(2), 113-135; Pickett, J. T., Mancini, C., Mears, D. P., & Gertz, M. (2015). Public (mis)understanding of crime policy: The effects of criminal justice experience and media reliance. *Criminal Justice Policy Review*, 26, 500-522.

¹⁷ Stahlkopf, C., Males, M., & Macallair, D. (2010). Testing incapacitation theory: Youth crime and incarceration in California. *Crime & Delinquency*, 56(2), 253-268.

¹⁸ Bales, W. D., & Piquero, A. R. (2012). Assessing the impact of imprisonment on recidivism. *Journal of Experimental Criminology*, 8, 71-101, Cochran, J. C., Mears, D. P., & Bales, W. D. (2014). Assessing the effectiveness of correctional sanctions. *Journal of Quantitative Criminology*, 30(2), 317-347; Nagin, D., Cullen, F. T., & Jonson, C. L. (2009). Imprisonment and reoffending. *Crime and Justice*, 38(1), 115-200; Durlauf, S. N., & Nagin, D. S. (2011). Imprisonment and crime: Can both be reduced? *Criminology & Public Policy*, 10(1), 13-54; Meade, B., Steiner, B., Makarios, M., & Travis, L. (2013). Estimating a dose-response relationship between time served in prison and recidivism. *Journal of Research in Crime & Delinquency*, 4, 525-550; Mears, D. P., Cochran, J. C., & Cullen, F. T. (2015). Incarceration heterogeneity and its implications for assessing the effectiveness of imprisonment on recidivism. *Criminal Justice Policy Review*, 26(7), 691-712, Snodgrass, G. M., Blokland, A. A., Haviland, A., Nieuwbeerta, P., & Nagin, D. P. (2011). Does the time cause the crime? An examination of the relationship between time served and reoffending in the Netherlands. *Criminology*, 49(4), 1149-1194.

¹⁹ Cochran, J. C., Mears, D. P., & Bales, W. D. (2014). Assessing the effectiveness of correctional sanctions. *Journal of Quantitative Criminology*, 30, 317-324; Cullen, F. T., Johnson, C. L., & Nagin, D. S. (2011). Prisons do not reduce recidivism: The high cost of ignoring science. *The Prison Journal*, 91, 485-655; Mears, D. P., Cochran, J. C., Bales, W. D., & Bhati, A. S. (2016). Recidivism and time served in prison. *Journal of Criminal Law and Criminology*, 106, 82-122; Nagin, D. S. (2013). Deterrence in the twenty-first century. *Crime and Justice*, 42(1), 199-263; Piquero, A. R., Farrington, D. P., & Blumstein, A. (2007). *Key Issues in Criminal Career Research: New Analyses of the Cambridge Study in Delinquent Development*. New York: Cambridge University Press; Tonry, M. (2017). Making American sentencing just, humane, and effective. *Crime and Justice*, 46, 441-504.

²⁰ Nagin, D., Cullen, F. T., & Jonson, C. L. (2009). Imprisonment and reoffending. *Crime and Justice*, 38(1), 115-200.

²¹ Sampson, R. J., & Laub, J. H. (2003). Life-course desisters? Trajectories of crime among delinquent boys followed to age 70*. *Criminology*, 41(3), 301-339.

²² See, e.g., Moffitt, T. E. (1993). Adolescence-limited and life-course-persistent antisocial behavior: A developmental taxonomy. *Psychological Review*, 100, 674-701.

²³ Tonry, M. (2017). Making American sentencing just, humane, and effective. *Crime and Justice*, 46, 441-504, at p. 458.

²⁴ Subramanian, R., & Delaney, R. (2014). *Playbook for change? States reconsider mandatory sentences*. Vera Institute of Justice. https://www.vera.org/downloads/Publications/playbook-for-change-states-reconsider-mandatory-sentences/legacy_downloads/mandatory-sentences-policy-report-v3.pdf; The Pew Center on the States. (2011). *State of recidivism: The revolving door of America's prisons*. Washington, D.C., https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pes_assets/2011/pewstateofrecidivismpdf.pdf

²⁵ Durlauf, S. N., & Nagin, D. S. (2011). Imprisonment and crime: Can both be reduced? *Criminology & Public Policy*, 10(1), 13-54; Nagin, D. (2013). Deterrence in the twenty-first century: A review of evidence. *Crime and Justice*, 42(1), 199-263.

²⁶ Nagin, D. (2013). Deterrence in the twenty-first century: A review of evidence. *Crime and Justice*, 42(1), 199-263.

²⁷ Apel, R. (2013). Sanctions, perceptions, and crime: Implications for criminal deterrence. *Journal of Quantitative Criminology*, 29, 67-101; Piquero, A. R., Paternoster, R., Pogarsky, G., & Loughran, T. (2011). Elaborating the individual difference component in deterrence theory. *Annual Review of Law and Social Science*, 7, 335-360.

²⁸ Apel, R. (2013). Sanctions, perceptions, and crime: Implications for criminal deterrence. *Journal of Quantitative Criminology*, 29, 67-101.

²⁹ Beccaria, C. (1986[1764]). *On crimes and punishments*. Macmillan Publishing.; Bentham, J. (1988[1789]). *An introduction to the principles of morals and legislation*. Prometheus Books.

³⁰ Piquero, A. R., Paternoster, R., Pogarsky, G., & Loughran, T. (2011). Elaborating the individual difference component in deterrence theory. *Annual Review of Law and Social Science*, 7, 335-360.

³¹ *Id.*

³² *Id.*

³³ According to deterrence theory, there should be a decrease in an individual's likelihood of reoffending after release as a result of a more severe prison sentence. In other words, severe punishment has the potential to raise the anticipated cost of participating in criminal behavior. Researchers have tested this hypothesis in a number of ways: comparing the post-release behavior of individuals sentenced to a period of imprisonment and individuals on probation; examining post-release offending for groups of individuals sentenced to long and short periods of incarceration; and, comparing reoffending among those who experienced harsh prison conditions versus those who experienced more lenient prison conditions. However, researchers contend that there is not an abundance of literature that examines specific policy changes in the evaluation of the deterrent effect of changes in the severity of punishment given. For example, given the importance of sentence enhancements to contemporary criminal justice policy, there is a lack of research examining their deterrent effect. *See, e.g.,* Chen, M. K., & Shapiro, J. M. (2007). Do harsher prison conditions reduce recidivism? A discontinuity based approach. *American Law and Economics Review*, 9(1), 1-29; Cochran, J. C., Mears, D. P., & Bales, W. D. (2014). Assessing the effectiveness of correctional sanctions. *Journal of Quantitative Criminology*, 30(2), 317-347; Drago, F., Galbiati, R., & Vertova, P. (2011). Prison conditions and recidivism. *American Law and Economics Review*, 13(1), 103-130; Durlauf, S. N., & Nagin, D. S. (2011). Imprisonment and crime: Can both be

reduced? *Criminology & Public Policy*, 10(1), 13-54; Meade, B., Steiner, B., Makarios, M., & Travis, L. (2013). Estimating a dose-response relationship between time served in prison and recidivism. *Journal of Research in Crime & Delinquency*, 50(4), 525–550; Nagin, D. (2013). Deterrence in the twenty-first century: A review of evidence. *Crime and Justice*, 42(1), 199-263; Nagin, D. S., & Snodgrass, M. (2013). The effect of incarceration on re-offending: Evidence from a natural experiment in Pennsylvania. *Journal of Quantitative Criminology*, 29(4), 601–642; Raaijmakers, E. A. C., de Keijser, J. W., Nieuwbeerta, P., & Dirkzwager, A. J. E. (2017). Why longer prison terms fail to serve a specific deterrent effect: An empirical assessment on the remembered severity of imprisonment. *Psychology, Crime & Law*, 23(1), 32-55; Snodgrass, G. M., Blokland, A. A., Haviland, A., Nieuwbeerta, P., & Nagin, D. P. (2011). Does the time cause the crime? An examination of the relationship between time served and reoffending in the Netherlands. *Criminology*, 49(4), 1149–1194. One exception to the lack of research on this topic that should be noted relates to California’s three strikes laws. Numerous credible studies have examined the deterrent effect of California’s three strikes laws. In general, the research suggests only a modest deterrent effect. See, e.g., Durlauf, S. N., & Nagin, D. S. (2011). Imprisonment and crime: Can both be reduced? *Criminology & Public Policy*, 10(1), 13-54; Helland, E., & Tabarrok, A. (2007). Does three strikes deter? A nonparametric estimation. *Journal of Human Resources*, 42, 309–330; Nagin, D. (2013). Deterrence in the twenty-first century: A review of evidence. *Crime and Justice*, 42(1), 199-263.

³⁴ Researchers examining the perceived certainty of punishment indicate that it is a much stronger deterrent than the perceived severity of punishment. Evidence suggests that crime has a negative relationship to the perceived certainty of punishment at both the micro and macro-level. These findings have led to recognition of the “certainty principle” or “certainty effect”. Research has noted that findings in support of the deterrent effect of the certainty of punishment relate almost entirely to the probability of apprehension. Further, research has demonstrated that perceived certainty of punishment serves as a deterrent for the type of criminal offense committed and the frequency in which offenses are committed. See, e.g., Apel, R. (2013). Sanctions, perceptions, and crime: Implications for criminal deterrence. *Journal of Quantitative Criminology*, 29, 67-101; Loughran, T. A., Paternoster, R., & Weiss, D. (2012). Hyperbolic time discounting, offender time preferences and deterrence. *Journal of Quantitative Criminology*, 28, 607-628; Loughran, T. A., Pogarsky, G., Piquero, A. R., & Paternoster, R. (2012). Re-examining the functional form of the certainty effect in deterrence theory. *Justice Quarterly*, 29, 712-741; Nagin, D. (2013). Deterrence in the twenty-first century: A review of evidence. *Crime and Justice*, 42(1), 199-263; Walters, G. D. (2018). Change in the perceived certainty of punishment as an inhibitor of post-juvenile offending in serious delinquents: Deterrence at the adult transition. *Crime & Delinquency*, 64(10), 1306-1325.

³⁵ The celerity effects of punishment have been the least examined component of deterrence theory. In the literature, celerity has been defined as the period of time that elapses between the commission of the offense and punishment. Collectively, there exists a lack of agreement on whether swiftly received punishment serves as a deterrent. There are several types of studies that have sought to examine celerity effects: overall offending; specific types of offenses such as the use of illegal substances or drunk driving; and correctional interventions.

Researchers have also examined the length of time between the commission of an offense and arrest on recidivism. The celerity of arrest was found to have a small effect, with those who experienced longer periods of time between offense and arrest date found to be more likely to recidivate. See, e.g., Hawken, A., & Kleiman, M. (2009). Managing drug involved probationers with swift and certain sanctions: Evaluating Hawaii's HOPE. National Institute of Justice; Kleck, G., & Barnes, J. C. (2013). Deterrence and macro-level perceptions of punishment risks: Is there a "collective wisdom"? *Crime & Delinquency*, 59(7), 1006-1035; Kleck, G., Sever, B., Li, S., & Gertz, M. (2005). The missing link in general deterrence research. *Criminology*, 43, 623-660; Loughran, T. A., Paternoster, R., & Weiss, D. (2012). Hyperbolic time discounting, offender time preferences and deterrence. *Journal of Quantitative Criminology*, 28, 607-628; O'Connell, D., Visher, C. A., Martin, S., Parker, L., & Brent, J. (2011). Decide your time: Testing deterrence theory's certainty and celerity effects on substance-using probationers. *The Journal of Criminal Justice*, 39, 261-267; Pratt, T. C., & Cullen, F. T. (2005). Assessing macro-level predictors and theories of crime: A meta-analysis. *Crime and Justice: A Review of Research*, 32, 373-450; Pratt, T. C., & Turanovic, J. J. (2018). Celerity and deterrence. In S. Nagin, F. T. Cullen, & C. L. Jonson (Eds.), *Deterrence, choice, and crime: Contemporary perspectives – advances in criminological theory* (pp. 187-210). Routledge; Tomlinson, K. D. (2016). An examination of deterrence theory: Where do we stand? *Federal Probation*, 80(3), 33-38; Tavares, A. F., Mendes, S. M., & Costa, C. S. (2008). The impact of deterrence policies on reckless driving: The case of Portugal. *European Journal on Criminal Policy and Research*, 14, 417-429; Wagenaar, A. C., & Maldonado-Molina, M. M. (2007). Effects of drivers' license suspension policies on alcohol-related crash involvement: Long-term follow-up in forty-six states. *Alcoholism: Clinical and Experimental Research*, 31, 1399-1406; Zettler, H. R., Morris, R. G., Piquero, A. R., & Cardwell, S. M. (2015). Assessing the celerity of arrest on 3-year recidivism patterns in a sample of criminal defendants. *Journal of Criminal Justice*, 43, 428-436.

³⁶ Paternoster, R. (2010). How much do we really know about criminal deterrence? *Journal of Criminal Law & Criminology*, 100(3), 765-823.

³⁷ *Id.*

³⁸ Loughran, T. A., Paternoster, R., Chalfin, A., and Wilson, T. (2016). Can rational choice be considered a general theory of crime? Evidence from individual-level panel data. *Criminology*, 54(1), 86-112; Paternoster, R. (2010). How much do we really know about criminal deterrence? *Journal of Criminal Law & Criminology*, 100(3), 765-823; Pogarsky, G., Roche, S. P., & Pickett, J. T. (2017). Heuristics and biases, rational choice, and sanctions perceptions. *Criminology*, 55(1), 85-111.

³⁹ Piquero, A. R., Paternoster, R., Pogarsky, G., & Loughran, T. (2011). Elaborating the individual difference component in deterrence theory. *Annual Review of Law and Social Science*, 7, 335-360.

⁴⁰ The perceptions of the severity of sanctions can vary across offenders. Researchers have sought to determine how individuals come to make decisions to participate in criminal activity or to refrain from offending. There are several factors that have been shown to impact offenders' decision making such as personal, vicarious, experiential, and historical. For example, one's personal experiences with prior sanctions such as arrest or incarceration can cause individuals to update their risk perceptions upward or downward depending on if they

have committed crimes and experienced sanctions or have gotten away with their criminal behavior. Further, the experiences of those within one's personal network, such as peers or neighborhood residents, regarding criminal activity and subsequent sanctions has also been shown to impact one's perceptions of sanction certainty and severity. Criminological research contends that individuals who engage in criminal activity have an understanding of the risk of punishment, however it is typically inaccurate or vague. Individuals have minimal knowledge regarding the harshness of punishments for engaging in criminal behavior or the certainty of punishment. Moreover, individuals have been found to overestimate their probability of arrest for engaging in criminal behavior and underestimate the minimum and maximum penalties that are associated. Also, offenders have been found to be present oriented, therefore a lengthy sanction for committing a certain offense may not deter the individual from committing the offense. These individuals are concerned with the most recent past and immediate future and are characterized as having a "here and now" mindset. Moreover, present-oriented offenders are concerned with the immediate rewards of engaging in criminal behavior. See, e.g., Apel, R. (2013). Sanctions, perceptions, and crime: Implications for criminal deterrence. *Journal of Quantitative Criminology*, 29, 67-101; Anwar, S. & Loughran, T. A. (2011). Testing a Bayesian learning theory of deterrence among serious juvenile offenders. *Criminology*, 49, 667-698; Durlauf, S. N., & Nagin, D. S. (2011). Imprisonment and crime: Can both be reduced? *Criminology & Public Policy*, 10(1), 13-54; Jacobs, B. A., & Cherbonneau, M. (2018). Perceived sanction threats and projective risk sensitivity: Auto theft, carjacking, and the channeling effect. *Justice Quarterly*, 35(2), 191-222; Kim, B., Pratt, T. C., & Wallace, D. (2014). Adverse neighborhood conditions and sanction risk perceptions: Using SEM to examine direct and indirect effects. *Journal of Quantitative Criminology*, 30, 505-526; Loughran, T. A., Paternoster, R., Piquero, A. R., & Pogarsky, G. (2011). On ambiguity in perceptions of risk: Implications for criminal decision making and deterrence. *Criminology*, 49(4), 1029-1061; Nagin, D. (2013). Deterrence in the twenty-first century: A review of evidence. *Crime and Justice*, 42(1), 199-263; Piquero, A. R., Paternoster, R., Pogarsky, G., & Loughran, T. (2011). Elaborating the individual difference component in deterrence theory. *Annual Review of Law and Social Science*, 7, 335-360; Wilson, T., Paternoster, R., & Loughran, T. (2017). Direct and indirect experiential effects in an updating model of deterrence: A research note. *Journal of Research in Crime and Delinquency*, 54, 63-77.

⁴¹ Apel, R. (2013). Sanctions, perceptions, and crime: Implications for criminal deterrence. *Journal of Quantitative Criminology*, 29, 67-101; Loughran, T. A., Paternoster, R., Chalfin, A., and Wilson, T. (2016). Can rational choice be considered a general theory of crime? Evidence from individual-level panel data. *Criminology*, 54(1), 86-112.

⁴² Nagin, D. (2013). Deterrence in the twenty-first century: A review of evidence. *Crime and Justice*, 42(1), 199-263; Nagin, D., Cullen, F. T., & Jonson, C. L. (2009). Imprisonment and reoffending. *Crime and Justice*, 38(1), 115-200.

⁴³ Gottschalk, M. (2011). Extraordinary sentences and the proposed police surge. *Criminology & Public Policy*, 10(1), 123-136; Nagin, D. (2013). Deterrence in the twenty-first century: A review of evidence. *Crime and Justice*, 42(1), 199-263.

⁴⁴ *Id.*

- ⁴⁵ Harmon, M. G. (2013). "Fixed" sentencing: The effect on imprisonment rates over time. *Journal of Quantitative Criminology*, 29, 369-397; Lipsey, M., & Cullen, F. T. (2007). The effectiveness of correctional rehabilitation: A review of systematic reviews. *Annual Review of Law & Social Science*, 3, 297-320.
- ⁴⁶ *Id.*
- ⁴⁷ *Id.*
- ⁴⁸ King, R. (2015). Balancing the goals of determinate and indeterminate sentencing systems. *Federal Sentencing Reporter*, 28(2), 85-87; Zhang, Y., Zhang, L., & Vaughn, M. S. (2014). Indeterminate and determinate sentencing models: A state-specific analysis of their effects on recidivism. *Crime & Delinquency*, 60(5), 693-715.
- ⁴⁹ Engen, R. L. (2009). Assessing determinate and presumptive sentencing – Making research relevant. *Criminology & Public Policy*, 8(2), 323-336.
- ⁵⁰ Bales, W. D., & Miller, C. H. (2012). The impact of determinate sentencing on prisoner misconduct. *Journal of Criminal Justice*, 40, 394-403.
- ⁵¹ Harmon, M. G. (2013). "Fixed" sentencing: The effect on imprisonment rates over time. *Journal of Quantitative Criminology*, 29, 369-397; Zhang, Y., Zhang, L., & Vaughn, M. S. (2014). Indeterminate and determinate sentencing models: A state-specific analysis of their effects on recidivism. *Crime & Delinquency*, 60(5), 693-715.
- ⁵² Harmon, M. G. (2013). "Fixed" sentencing: The effect on imprisonment rates over time. *Journal of Quantitative Criminology*, 29, 369-397; Tonry, M. (2019). Fifty years of American sentencing reform: Nine lessons. *Crime and Justice*, 48, 1-34; Zhang, Y., Zhang, L., & Vaughn, M. S. (2014). Indeterminate and determinate sentencing models: A state-specific analysis of their effects on recidivism. *Crime & Delinquency*, 60(5), 693-715.
- ⁵³ King, R. (2015). Balancing the goals of determinate and indeterminate sentencing systems. *Federal Sentencing Reporter*, 28(2), 85-87.
- ⁵⁴ Zhang, Y., Zhang, L., & Vaughn, M. S. (2014). Indeterminate and determinate sentencing models: A state-specific analysis of their effects on recidivism. *Crime & Delinquency*, 60(5), 693-715.
- ⁵⁵ King, R. (2015). Balancing the goals of determinate and indeterminate sentencing systems. *Federal Sentencing Reporter*, 28(2), 85-87; Rengifo, A. F., & Stemen, D. (2015). The unintended effects of penal reform: African American presence, incarceration, and the abolition of discretionary parole in the United States. *Crime & Delinquency*, 61(5), 719-741.
- ⁵⁶ King, R. (2015). Balancing the goals of determinate and indeterminate sentencing systems. *Federal Sentencing Reporter*, 28(2), 85-87.
- ⁵⁷ Marvell, T. B., & Moody, C. E. (1996). Determinate sentencing and abolishing parole: The long-term impacts on prisons and crime. *Criminology*, 34, 107-128; Stemen, D., Rengifo, A., & Wilson, J. (2006). *Of fragmentation and ferment: Impact of state sentencing policies on incarceration rates in the United States, 1975-2002*. National Institute of Justice. Retrieved from <https://www.ojp.gov/pdffiles1/nij/grants/213003.pdf>; Rengifo, A. F., & Stemen, D. (2015). The unintended effects of penal reform: African American presence, incarceration, and the abolition of discretionary parole in the United States. *Crime & Delinquency*, 61(5), 719-741; Zhang, Y., Maxwell, C. D., & Vaughn, M. S. (2009). The impact of state sentencing policies on the US prison population. *Journal of Criminal Justice*, 37(2), 190-199.

⁵⁸ *Id.*

⁵⁹ Stemen, D., & Rengifo, A. F. (2011). Policies and imprisonment: The impact of structured sentencing and determinate sentencing on state incarceration rates, 1978-2004. *Justice Quarterly*, 28(1), 174-201.

⁶⁰ *Id.*

⁶¹ Tonry, M. (2019). Fifty years of American sentencing reform: Nine lessons. *Crime and Justice*, 48, 1-34.

⁶² Marvell, T. B. (1995). Sentencing guidelines and prison population growth. *Journal of Criminal Law and Criminology*, 85, 101-115; Nicholson-Crotty, S. (2004). The impact of sentencing guidelines on state-level sanctions: An analysis over time. *Crime and Delinquency*, 50, 395-411; Stemen, D., & Rengifo, A. F. (2011). Policies and imprisonment: The impact of structured sentencing and determinate sentencing on state incarceration rates, 1978-2004. *Justice Quarterly*, 28(1), 174-201.

⁶³ Baumer, E. P. (2013). Reassessing and redirecting research on race and sentencing. *Justice Quarterly*, 30, 231-261; Bushway, S., & Forst, B. (2013). Studying discretion in the processes that generate criminal justice sanctions. *Justice Quarterly*, 30, 199-222; Hofer, P. J. (2019). Federal sentencing after *Booker*. *Crime and Justice*, 48, 137-186; The Sentencing Project. (2008). *Reducing racial disparity in the criminal justice system: A manual for practitioners and policymakers*. Washington, D.C., <https://www.sentencingproject.org/wp-content/uploads/2016/01/Reducing-Racial-Disparity-in-the-Criminal-Justice-System-A-Manual-for-Practitioners-and-Policymakers.pdf>; Ulmer, J. T. (2012). Recent developments and new directions in sentencing research. *Justice Quarterly*, 29(1), 1-40.

⁶⁴ Starr, S. B., & Rehavi, M. M. (2013). Mandatory sentencing and racial disparity, assessing the role of prosecutors and the effects of *Booker*. *Yale Law Review*, 123(1), 2-80; Subramanian, R., & Delaney, R. (2014). Playbook for change? States reconsider mandatory sentences. Vera Institute of Justice. https://www.vera.org/downloads/Publications/playbook-for-change-states-reconsider-mandatory-sentences/legacy_downloads/mandatory-sentences-policy-report-v3.pdf; Yang, C. S. (2015). Free at last? Judicial discretion and racial disparities in federal sentencing. *The Journal of Legal Studies*, 44(1), 75-111.

⁶⁵ Hofer, P. J. (2011). Has *Booker* restored balance? A look at data on plea bargaining and sentencing. *Federal Sentencing Reporter*, 23, 326-332; Reimer, N. L., & Wayne, L. M. (2011). From the practitioners' perch: How mandatory minimum sentences and the prosecution's unfettered control over sentence reductions for cooperation subvert justice and exacerbate racial disparity. *University of Pennsylvania Law Review*, 160, 159-177; Snyder, D. (2015). One size does not fit all: A look at the disproportionate effects of federal mandatory minimum drug sentences on racial minorities and how they have contributed to the degradation of the underprivileged African-American family. *Hamline Journal of Public Law & Policy*, 36(1), 77-118; Starr, S. B., & Rehavi, M. M. (2013). Mandatory sentencing and racial disparity, assessing the role of prosecutors and the effects of *Booker*. *Yale Law Review*, 123(1), 2-80; Ulmer, J. T. (2012). Recent developments and new directions in sentencing research. *Justice Quarterly*, 29(1), 1-40.

- ⁶⁶ Mauer, M. (2018). Long-term sentences: Time to reconsider the scale of punishment. *University of Missouri- Kansas City Law Review*, 87(1), 113-131; Subramanian, R., & Delaney, R. (2014). *Playbook for change? States reconsider mandatory sentences*. Vera Institute of Justice. https://www.vera.org/downloads/Publications/playbook-for-change-states-reconsider-mandatory-sentences/legacy_downloads/mandatory-sentences-policy-report-v3.pdf ; Tonry, M. (2017). Making American sentencing just, humane, and effective. *Crime and Justice*, 46, 441-504.
- ⁶⁷ Ulmer, J., Painter-Davis, N., & Tinik, L. (2016). Disproportional imprisonment of Black and Hispanic males: Sentencing discretion, processing outcomes, and policy structures. *Justice Quarterly*, 33(4), 642-681.
- ⁶⁸ *Id.*
- ⁶⁹ Starr, S. B., & Rehavi, M. M. (2013). Mandatory sentencing and racial disparity, assessing the role of prosecutors and the effects of Booker. *Yale Law Review*, 123(1), 2-80.
- ⁷⁰ *Id.*
- ⁷¹ Fischman, J. B., & Schanzenbach, M. M. (2012). Racial disparities under the federal sentencing guidelines: The role of judicial discretion and mandatory minimums. *Journal of Empirical Legal Studies*, 9(4), 729-764, at p.761.
- ⁷² Fischman, J. B., & Schanzenbach, M. M. (2012). Racial disparities under the federal sentencing guidelines: The role of judicial discretion and mandatory minimums. *Journal of Empirical Legal Studies*, 9(4), 729-764.
- ⁷³ Wang, X., Mears, D. P., Spohn, C., & Dario, L. (2013). Assessing the differential effects of race and ethnicity on sentencing outcomes under different sentencing systems. *Crime & Delinquency*, 59(1), 87-114.
- ⁷⁴ Lu, L. D. (2007). Prosecutorial discretion and racial disparities in federal sentencing: Some views of former U.S. Attorneys. *Federal Sentencing Reporter*, 19(3), 192-201; Ulmer, J., Painter-Davis, N., & Tinik, L. (2016). Disproportional imprisonment of Black and Hispanic males: Sentencing discretion, processing outcomes, and policy structures. *Justice Quarterly*, 33(4), 642-681.
- ⁷⁵ Baron-Evans, A., & Stith, K. (2012). *Booker rules*. *University of Pennsylvania Law Review*, 160, 1631-1743; Hofer, P. J. (2012). Review of the U.S. Sentencing Commission's report to Congress: Mandatory minimum penalties in the federal criminal justice system. *Federal Sentencing Reporter*, 24(3), 193-213.
- ⁷⁶ Important notes, caveats, and limitations of the Virginia Criminal Sentencing Commission staff analysis of data from the Supreme Court of Virginia's Case Management Systems (CMS) for the Circuit Court, General District Court, and Juvenile & Domestic Relations (JDR) Court (adult defendants only): In order to avoid duplication, when analyzing Circuit Court CMS data, appeals from district courts were excluded. Circuit Court data do not include cases from Fairfax or Alexandria as clerks in those jurisdictions do not participate in the statewide Case Management System. Charge and conviction data exclude attempted and conspired felonies, as mandatory minimum penalties do not apply in such cases. Charges are based on the fiscal year filed. Convictions are based on the fiscal year the case was concluded. Figures include ordinance violations to the extent possible. Cases were selected for inclusion in the analysis based on information entered by court clerks into the CMS data systems.

⁷⁷ *Id.*

⁷⁸ 2020 Va. Acts ch. 1018.

⁷⁹ *Id.*

⁸⁰ A State Responsible inmate is a person convicted of a felony and sentenced to one year or more in prison, or a person convicted of a parole violation and sentenced to two years or more in prison.

⁸¹ Virginia Department of Corrections, Research – Statistical Analysis & Forecast Unit. (December 2020). *Disparities in sentencing among inmates with mandatory minimum sentences*. Analysis is based upon sentencing information for inmates in the SR Confined Population on June 30, 2019. Available at [http://vscc.virginia.gov/2021/DOC%20-%20Disparities%20in%20Sentencing%20among%20Offenders%20with%20Mandatory%20Minimum%20Sentences%20Dec2020update%20FINAL%20\(1\).pdf](http://vscc.virginia.gov/2021/DOC%20-%20Disparities%20in%20Sentencing%20among%20Offenders%20with%20Mandatory%20Minimum%20Sentences%20Dec2020update%20FINAL%20(1).pdf).

⁸² Virginia Department of Corrections, Research – Statistical Analysis & Forecast Unit. (December 2020). *Offense Information of SR Inmates Serving Mandatory Minimum Sentences*. Available at <http://vscc.virginia.gov/2021/DOC%20-%20Offense%20Information%20of%20SR%20Inmates%20Serving%20Mandatory%20Minimum%20Sentences%20Dec2020%20FINAL.pdf>.

⁸³ *Id.*

⁸⁴ Virginia Department of Corrections, Research – Statistical Analysis & Forecast Unit. (December 2020). *Disparities in sentencing among inmates with mandatory minimum sentences*. Analysis is based upon sentencing information for inmates in the SR Confined Population on June 30, 2019.

⁸⁵ VA. CODE ANN. § 19.2-308 (2020).

⁸⁶ See, e.g., VA. CODE ANN. §§ 16.1-253.2(A), 18.2-53.1, 18.2-67.1, 18.2-248, 18.2-374.1:1(C), and 53.1-203 (2020).

⁸⁷ See, e.g., VA. CODE ANN. §§ 4.1-302, 18.2-51.1, 18.2-186.4, 46.2-865.1 (2020).

⁸⁸ VA. CODE ANN. § 18.2-308.2(A) (2020).

⁸⁹ *Botkin v. Commonwealth*, 296 Va. 309, 819 S.E.2d 652 (Nov. 1, 2018).

⁹⁰ VA. CODE ANN. § 18.2-53.1 (2020).

⁹¹ VA. CODE ANN. § 18.2-374.1(C1) (2020).

⁹² *Brown v. Commonwealth*, 284 Va. 538, 733 S.E.2d 638 (Nov. 1, 2012); *Commonwealth v. Jefferson*, 60 Va. App. 749, 732 S.E.2d 728 (Oct. 16, 2012).

⁹³ For additional information, see Families Against Mandatory Minimums. (May 10, 2017). *Recent state-level reforms to mandatory minimums laws*. Retrieved from: <https://famm.org/wp-content/uploads/Recent-State-Reforms.pdf>. See also Families Against Mandatory Minimums. (Oct. 30, 2020). *State reforms to mandatory minimum sentencing laws*. Retrieved from: <https://famm.org/wp-content/uploads/Chart-STATE-REFORMS-TO-MANDATORY-MINIMUM-SENTENCING-LAWS-2018.pdf>.

⁹⁴ 2011 Ark. Acts 570.

⁹⁵ See California Courts. *California's three strikes sentencing law*. Retrieved from <https://www.courts.ca.gov/20142.htm>. See also Couzens, J.R. & Bigelow, T.A. (May 2017). *The amendment of the three strikes sentencing law*. Retrieved from <https://www.courts.ca.gov/documents/Three-Strikes-Amendment-Couzens-Bigelow.pdf>.

⁹⁶ 2015 Conn. Acts 2 (Special Sess.)

⁹⁷ 78 Del. Laws 13 (2011).

⁹⁸ 2016 Fla. Laws 7.

⁹⁹ 2017 Iowa Acts ch. 122.

¹⁰⁰ 2012 La. Acts 160.

¹⁰¹ 2016 Md. Laws 515.

¹⁰² 2012 Mass. Acts 192.

¹⁰³ 2002 Mich. Pub. Acts 666.

¹⁰⁴ 2012 Mo. Laws 628.

¹⁰⁵ 2017 Mont. Laws 321.

¹⁰⁶ 2009 N.Y. Laws 56. *See also* New York State Division of Criminal Justice Services. (2020).

2009 drug law changes 2019 annual report. Retrieved from

<https://www.criminaljustice.ny.gov/crimnet/ojsa/FINAL%202019%20Drug%20Law%20Reform%20Report%2011-17-20.pdf>.

¹⁰⁷ 2017 N.D. Laws 165. 2019 N.D. Laws 187.

¹⁰⁸ 2011 Ohio Laws Sess. Law 29.

¹⁰⁹ 2016 Okla. Sess. Laws 220.

¹¹⁰ Virginia State Crime Commission. (Jan. 5, 2021). *Mandatory Minimum Sentences*. Available at <http://vscc.virginia.gov/2021/VSCC%20Mandatory%20Minimums%20Presentation.pdf>.

¹¹¹ *See* Appendices A and B.

¹¹² VA. CODE ANN. § 18.2-308.2(A) (2020). *See also* VA. CODE ANN. § 18.2-10 (2020).

¹¹³ VA. CODE ANN. 18.2-53.1 (2020).

¹¹⁴ *See, e.g.*, VA. CODE ANN. § 18.2-9, 18.2-10, and 18.2-11 (2020). Staff identified three Code sections with offenses requiring a mandatory minimum sentence of a specific period of incarceration, including VA. CODE ANN. §§ 18.2-53.1, 18.2-248(H2), and 18.2-308.1(C) (2020).

¹¹⁵ *See* VA. CODE ANN. § 19.2-303 (2020).

¹¹⁶ VA. CODE ANN. § 19.2-308 (2020).

¹¹⁷ Senate Bill 1443 is available at <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=212&typ=bil&val=sb1443>

¹¹⁸ *Id.*

¹¹⁹ House Bill 2331 is available at <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=212&typ=bil&val=hb2331>. This bill proposed eliminating mandatory minimum sentences from VA. CODE ANN. §§ 3.2-4212, 4.1-302, 18.2-186.4, 18.2-248, 18.2-248.01, 18.2-248.03, 18.2-248.1, 18.2-248.5, 18.2-255, 18.2-255.2, 46.2-357, and 46.2-391 (2020).

APPENDIX A: Felony Offenses in Virginia that Require a Mandatory Minimum Sentence

ASSAULT (ASL)						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
18.2-53.1	Firearm use in commission of felony, 1 st offense	F9	3Y		2,839	504
18.2-53.1	Firearm use in commission of felony, subsequent	F9	5Y		217	50
18.2-51.1	Malicious bodily injury to law enforcement, fire or EMS	F9	2Y	5Y-30Y	40	5
18.2-51.1	Non-malicious injury to law enforcement	F6	1Y	1Y-5Y	5	3
18.2-57(C)	Simple assault on law enforcement	F6	6M	1Y-5Y	4,002	670

ESCAPE (ESC)						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
53.1-203(1)	Escape from a correctional facility	F6	1Y	1Y-5Y	12	4

FRAUD (FRD)						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
18.2-186.4	Publish name of law-enforcement intent to harass	F6	6M	1Y-5Y	0	0

GANGS (MOB)						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
18.2-46.2	Participation in crime for benefit/direction of gang	F5	2Y	1Y-10Y	4	0
18.2-46.2	Participation in crime for gang that includes juvenile	F4	2Y	2Y-10Y	26	2

MURDER (MUR)						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
18.2-31(A,6)	Law enforcement officer, offender 18 or older	F1	Life	Life - Death	1	1
18.2-36.1(B)	Involuntary manslaughter, under influence, vehicle	F9	1Y	1Y-20Y	35	12
18.2-36.1(B)	Involuntary manslaughter, under influence, watercraft	F9	1Y	1Y-20Y	0	0

NARCOTICS - MARIJUANA (NAR)						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
18.2-248(H,4)	Distribute 100 kilograms or more	F9	20Y (exception)	20Y-Life	1	0
18.2-248(H1,ii,4)	Distribute 100 kilograms, less than 250 kilograms	F9	20Y	20Y-Life	0	0
18.2-248(H2,ii,4)	Distribute 250 kilograms or more marijuana	F9	Life	40Y-Life (exception)	0	0
18.2-248.01	Transport Into Commonwealth 5lbs or more marijuana	F9	3Y	5Y-40Y	86	8
18.2-248.01	Transport into Commonwealth – 5 lbs. or more marijuana, 2 nd or subsequent	F9	10Y	5Y-40Y	1	0
18.2-248.1(d)	Sell, distribute, 3 rd or subsequent felony	F9	5Y	5Y-Life	26	5
18.2-255(A,ii)	Sell <1 oz. of marijuana, minor assists in distribution	F9	2Y	10Y-50Y	1	0
18.2-255(A,ii)	Sell 1 oz. or more of marijuana, minor assists in distribution	F9	5Y	10Y-50Y	0	0
18.2-255(A,i)	Sell <1 oz. of marijuana to minor	F9	2Y	10Y-50Y	33	4
18.2-255(A,i)	Sell 1 oz. or marijuana to minor	F9	5Y	10Y-50Y	3	0

NARCOTICS - MONEY – CONTINUING CRIMINAL ENTERPRISE (NAR)						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
18.2-248(H1,i)	Gross \$100,000 to <\$250,000 within 12 month period	F9	20Y	20Y-Life	1	0
18.2-248(H2,i)	Gross \$250,000 or more within 12 month period	F9	40Y, Life		0	0

NARCOTICS – SCHEDULE I OR II DRUGS (NAR)						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
18.2-248(C)	Sell with intent, 2 nd conviction	F9	3Y	5Y-Life	1,056	343
18.2-248(C)	Sell with intent, 3 rd or subsequent conviction	F9	10Y	10Y-Life	785	99
18.2-248(C,1)	Heroin distribute 100g, or more	F9	5Y (exception)	5Y-Life	4	1
18.2-248(C,2)	Cocaine mixture distribute 500 g or more	F9	5Y (exception)	5Y-Life	6	1
18.2-248(C,3)	Cocaine base, distribute 250g or more	F9	5Y (exception)	5Y-Life	4	1
18.2-248(C,4)	Methamphetamine distribute 10g or more	F9	5Y (exception)	5Y-Life	142	20
18.2-248(C1)	Manufacture methamphetamine – 3 rd subsequent	F9	3Y	10Y-Life	1	0
18.2-248(H)	Type Not Clear – distribute schedule I/II - quantity defined	F6	20Y	20Y-Life	1	0
18.2-248(H,1)	Heroin mixture, distribute 1.0 kilograms or more	F9	20Y (exception)	20Y-Life	1	0
18.2-248(H,2)	Cocaine mixture, distribute 5.0 kilograms or more	F9	20Y (exception)	20Y-Life	2	0
18.2-248(H,3)	Cocaine base, distribute 2.5 kilograms or more	F9	20Y (exception)	20Y-Life	0	0
18.2-248(H,5)	Methamphetamine distribute 100g or more	F9	20Y (exception)	20Y-Life	67	5
18.2-248(H1,ii)	Type not clear – distribute schedule I/II or marijuana - quantity defined	F9	20Y	20Y-Life	0	0
18.2-248(H1,ii,1)	Heroin mixture - distribute 1.0 kilograms less than 5.0 kilograms	F9	20Y	20Y-Life	2	0
18.2-248(H1,ii,2)	Cocaine mixture distribute, 5.0 kilograms less than 10.0 kilograms	F9	20Y	20Y-Life	0	0
18.2-248(H1,ii,3)	Cocaine base, distribute 2.5 kilograms less than 5.0 kilograms	F9	20Y	20Y-Life	0	0
18.2-248(H1,ii,5)	Methamphetamine distribute 100g <250g	F9	20Y	20Y-Life	0	0
18.2-248(H2,ii)	Type not clear – distribute schedule. I/II or marijuana - quantity defined	F9	40Y, Life		0	0
18.2-248(H2,ii,1)	Heroin mixture, distribute etc. 5.0 kilograms or more	F9	40Y, Life		0	0
18.2-248(H2,ii,2)	Cocaine mixture, distribute 10.0 kilograms or more	F9	40Y, Life		0	0
18.2-248(H2,ii,3)	Cocaine base, distribute 5.0 kilograms or more	F9	40, Life		0	0

NARCOTICS – SCHEDULE I OR II DRUGS (NAR) - Continued						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
18.2-248(H2,ii,5)	Methamphetamine distribute 250g or more / 1 kg or more of mixture	F9	40Y, Life		4	0
18.2-248.01	Transport into Commonwealth 1 oz. or more of cocaine	F9	3Y	5Y-40Y	28	2
18.2-248.01	Transport into Commonwealth 1 oz. or more of cocaine, 2 nd /subsequent	F9	10Y	5Y-40Y	0	0
18.2-248.01	Transport 1 oz. or more other Sch. I/II	F9	3Y	5Y-40Y	100	8
18.2-248.01	Transport 1 oz. or more Sch. I/II 2 nd /subsequent	F9	10Y	5Y-40Y	1	0
18.2-248.03(A)	Methamphetamine distribute 28g or more	F9	(3Y) (exception)	5Y-40Y	81	24
18.2-248.03(B)	Methamphetamine distribute 227g or more	F9	5Y (exception)	5Y-Life	34	9
18.2-255(A,i)	Sell Sch. I/II drug to minor	F9	5Y	10Y-50Y	11	4
18.2-255(A,ii)	Sell Sch. I/II drug, minor assists in distribution	F9	5Y	10Y-50Y	1	0
18.2-255.2	Distribute controlled substance on school property, 2 nd /subsequent	F6	1Y	1Y-5Y	1	0

NARCOTICS – STEROIDS (NAR)						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
18.2-248.5(A)	Anabolic steroids	F9	6M	1Y-10Y	9	1

OBSCENITY – CHILD PORN/CHILD SOLICITATION (OBS)						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
18.2-374.1:1(C,i)	Reproduce, transmit, sell child porn, subsequent	F9	5Y	5Y-20Y	309	33
18.2-374.1:1(C,ii)	Solicitation of child porn to gain entry to group, subsequent	F9	5Y	5Y-20Y	0	0
18.2-374.1(B,1)	Entice minor to perform in porn, age < 15	F9	5Y	5Y-30Y	23	4
18.2-374.1(B,1)	Entice minor to perform in porn, age < 15, 2 nd /subsequent	F9	15Y	15Y-40Y	14	0
18.2-374.1(B,1)	Entice minor to perform in porn, age 15 older	F9	3Y	3Y-30Y	16	3

OBSCENITY – CHILD PORN/CHILD SOLICITATION (OBS) - Continued						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
18.2-374.1(B,1)	Entice minor to perform in porn, age 15 older, subsequent	F9	10Y	10Y-30Y	7	1
18.2-374.1(B,4)	Finance child porn, age < 15	F9	5Y	5Y-30Y	10	1
18.2-374.1(B,4)	Finance child porn, age < 15 older, 2 nd /subsequent	F9	15Y	15Y-40Y	2	0
18.2-374.1(B,4)	Finance child porn, age 15 older	F9	3Y	3Y-30Y	0	0
18.2-374.1(B,4)	Finance child porn 15 older, 2 nd /subsequent	F9	10Y	10Y-30Y	0	0
18.2-374.1(B,2)	Produce, make child porn, age < 15	F9	5Y	5Y-30Y	24	17
18.2-374.1(B,2)	Produce make child porn, age < 15, 2 nd /subsequent	F9	15Y	15Y-40Y	46	8
18.2-374.1(B,2)	Produce make child porn, 15 older	F9	3Y	3Y-30Y	64	6
18.2-374.1(B,2)	Produce make child porn, 15 older, 2 nd /subsequent	F9	10Y	10Y-30Y	6	0
18.2-374.1(B,3)	Take part, film child porn, age < 15	F9	5Y	5Y-30Y	8	3
18.2-374.1(B,3)	Take part, film child porn, age < 15, 2 nd /subsequent	F9	15Y	15Y-40Y	3	2
18.2-374.1(B,3)	Take part, film child porn, age 15+	F9	3Y	3Y-30Y	3	1
18.2-374.1(B,3)	Take part, film child porn, age 15+, 2 nd /subsequent	F9	10Y	10Y-30Y	5	1
18.2-374.3(C)	Propose sex act by communication age <15	F9	5Y	5Y-30Y	300	50
18.2-374.3(C)	Propose sex act by communication <15, subsequent	F9	10Y	10Y-40Y	146	12
18.2-374.3(D)	Propose sex act by communication age 15 older	F9	1Y	1Y-20Y	32	9

PROTECTIVE ORDERS (PRT)						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
18.2-60.4(A)	Violation of protective order (violence) 3 rd within 20 yrs.	F6	6M	1Y-5Y	58	6
16.1-253.2(A)	Juvenile and Domestic Court: Violation of protective order (violence) 3 rd within 20 yrs.	F6	6M	1Y-5Y	174	22

SEXUAL ASSAULT (RAP)						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
18.2-61(A,iii)	Rape, Forcible: Intercourse with victim under age 13	F9	Life	Life	55	10
18.2-61(A,iii)	Rape, Forcible: Intercourse with victim under age 13, w/ kidnapping, burglary, wounding	F9	25Y	25Y-Life	1	0
18.2-67.1(A,1)	Sodomy, Forcible: Victim under age 13 (indicted as an adult)	F9	Life	Life	145	15
18.2-67.1(A,1)	Sodomy, Forcible: Victim under age 13, w/kidnapping, burglary, wounding	F9	25Y	25Y-Life	2	0
18.2-67.2(A,1)	Object Sexual Penetration: Victim under age 13	F9	Life	Life	113	8
18.2-67.2(A,1)	Object Sexual Penetration: Victim under age 13, w/ kidnapping, burglary, wounding	F9	25Y	25Y-Life	1	0

TRAFFIC – DRIVING WHILE INTOXICATED (DWI)						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
18.2-266	Third within 5 Years	F6	6M	1Y-5Y	461	146
18.2-266	Third within 5 years, BAC .15 to .20	F6	6M	1Y-5Y	34	10
18.2-266	Third within 5 years, BAC > .20	F6	6M	1Y-5Y	20	6
18.2-266	Third within 5 years, drugs	F6	6M	1Y-5Y	5	3
18.2-266	Third within 5 years – prior DWI manslaughter, assault or felony DWI	F6	1Y 6M	1Y-5Y	3	0
18.2-266	Third within 10 years	F6	90D	1Y-5Y	820	308
18.2-266	Third 10 years, BAC .15 to .20	F6	90D	1Y-5Y	5	3
18.2-266	Third 10 years, BAC > .20	F6	90D	1Y-5Y	36	13
18.2-266	Third within 10 years, drugs	F6	90D	1Y-5Y	10	11
18.2-266	Third within 10 years – prior DWI manslaughter, assault or felony DWI	F6	1Y 90D	1Y-5Y	16	4
18.2-266	Third within 5 years, w/ child	F6	6M 5D	1Y-5Y	9	4
18.2-266	Third within 5 years, BAC .15 to .20 w/child	F6	6M 5D	1Y-5Y	1	0
18.2-266	Third within 5 years, BAC > .20 w/child	F6	6M 5D	1Y-5Y	1	0

TRAFFIC – DRIVING WHILE INTOXICATED (DWI) - Continued						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
18.2-266	Third within 5 years, drugs w/ child	F6	6M 5D	1Y-5Y	0	0
18.2-266	Third within 5 years – prior DWI manslaughter, assault or felony DWI w/ child	F6	1Y 6M 5D	1Y-5Y	0	0
18.2-266	Third within 10 years, w/ child	F6	95D	1Y-5Y	20	7
18.2-266	Third within 10 years, BAC .15 to .20 w/child	F6	95D	1Y-5Y	1	0
18.2-266	Third within 10 years, BAC > .20 w/child	F6	95D	1Y-5Y	1	0
18.2-266	Third within 10 years, drugs w/child	F6	95D	1Y-5Y	0	1
18.2-266	Third within 10 years – prior DWI manslaughter, assault or felony DWI w/ child	F6	1Y 95D	1Y-5Y	0	0
18.2-266	Fourth or subsequent within 10 years	F6	1Y	1Y-5Y	190	64
18.2-266	Fourth or subsequent within 10 years, BAC .15 to .20	F6	1Y	1Y-5Y	9	3
18.2-266	Fourth or subsequent within 10 years, BAC > .20	F6	1Y	1Y-5Y	6	1
18.2-266	Fourth or subsequent within 10 yrs., drugs	F6	1Y	1Y-5Y	2	1
18.2-266	Fourth or subsequent within 10 years, w/ child	F6	1Y 5D	1Y-5Y	4	1
18.2-266	Fourth or subsequent within 10 yrs., BAC .15 to .20 w/child	F6	1Y 5D	1Y-5Y	0	0
18.2-266	Fourth or subsequent within 10 yrs., BAC > .20 w/ child	F6	1Y 5D	1Y-5Y	0	0
18.2-266	Fourth or subsequent within 10 yrs., drugs w/ child	F6	1Y 5D	1Y-5Y	0	0
18.2-266	Prior DWI manslaughter, assault felony DWI	F6	1Y	1Y-5Y	225	90
18.2-266	Prior DWI manslaughter, BAC .15 to .20	F6	1Y	1Y-5Y	16	5
18.2-266	Prior DWI manslaughter, BAC > .20	F6	1Y	1Y-5Y	10	2
18.2-266	Prior DWI manslaughter, w/ child	F6	1Y 5D	1Y-5Y	6	1
18.2-266	Prior DWI, BAC .15 to .20 w/ child	F6	1Y 5D	1Y-5Y	0	0
18.2-266	Prior DWI, BAC > .20 w/child	F6	1Y 5D	1Y-5Y	0	0

TRAFFIC – DRIVING WHILE INTOXICATED – COMMERCIAL VEHICLE (DWI)						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
46.2-341.24	Third within 5 years	F6	6M	1Y-5Y	0	0
46.2-341.24	Third within 5 yrs., BAC .15 to .20	F6	6M	1Y-5Y	0	0
46.2-341.24	Third within 5 yrs., BAC > .20	F6	6M	1Y-5Y	0	0
46.2-341.24	Third within 10 yrs.	F6	90D	1Y-5Y	0	0
46.2-341.24	Third within 10 yrs., BAC .15 to .20	F6	90D	1Y-5Y	0	0
46.2-341.24	Third within 10 yrs., BAC > .20	F6	90D	1Y-5Y	0	0
46.2-341.24	Third DWI within 5 yrs., w/child	F6	6M 5D	1Y-5Y	0	0
46.2-341.24	Third within 5 yrs., BAC .15 to .20 w/child	F6	6M 5D	1Y-5Y	0	0
46.2-341.24	Third within 5 yrs., BAC > .20 w/child	F6	6M 5D	1Y-5Y	0	0
46.2-341.24	Third within 10 yrs., w/child	F6	95D	1Y-5Y	0	0
46.2-341.24	Third within 10 yrs., BAC .15 to .20 w/child	F6	95D	1Y-5Y	0	0
46.2-341.24	Third within 10 yrs., BAC > .20 w/child	F6	95D	1Y-5Y	0	0
46.2-341.24	Fourth within 10 yrs.	F6	1Y	1Y-5Y	0	0
46.2-341.24	Fourth within 10 yrs., BAC .15 to .20	F6	1Y	1Y-5Y	0	0
46.2-341.24	Fourth within 10 yrs., BAC > .20	F6	1Y	1Y-5Y	0	0
46.2-341.24	Fourth within 10 yrs., w/child	F6	1Y 5D	1Y-5Y	0	0
46.2-341.24	Fourth within 10 yrs., BAC .15 to .20 w/child	F6	1Y 5D	1Y-5Y	0	0
46.2-341.24	Fourth within 10 yrs., BAC > .20 w/child	F6	1Y 5D	1Y-5Y	0	0
46.2-341.24	Prior DWI manslaughter	F6	1Y	1Y-5Y	0	0
46.2-341.24	Prior DWI manslaughter, BAC .15 to .20	F6	1Y	1Y-5Y	0	0
46.2-341.24	Prior DWI manslaughter, BAC > .20	F6	1Y	1Y-5Y	0	0
46.2-341.24	Prior DWI w/child	F6	1Y 5D	1Y-5Y	0	0
46.2-341.24	Prior DWI w/child, BAC .15 to .20	F6	1Y 5D	1Y-5Y	0	0
46.2-341.24	Prior DWI w/child, BAC > .20	F6	1Y 5D	1Y-5Y	0	0

TRAFFIC – OPERATOR’S LICENSE (LIC)						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
46.2-357(B,2)	DWI declared habitual offender	F9	1Y	1Y-5Y	68	16
46.2-357(B,2)	Operate vehicle, license revoked – endangerment	F9	12M	1Y-5Y	107	23
46.2-357(B,3)	Operate vehicle, licensed revoked, 2 nd or subsequent	F9	12M	1Y-5Y	875	213
46.2-391(D,2a,i)	Operate vehicle, license revoked endangerment	F9	12M	1Y-5Y	120	25
46.2-391(D,2a,ii)	Operate vehicle license revoked, DWI	F9	12M	1Y-5Y	194	50
46.2-391(D,3)	Operate vehicle license revoked, 2 nd or subsequent	F9	12M	1Y-5Y	90	22

TRAFFIC – RECKLESS DRIVING (REC)						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
46.2-865.1(A,2)	Cause death by racing	F9	1Y	1Y-20Y	1	0

VANDALISM, DAMAGE PROPERTY (VAN)						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
18.2-154	Shoot or throw missile at law enforcement	F4	1Y	2Y-10Y	4	2
18.2-154	Shoot or throw missile at law enforcement w/o malice	F6	1Y	1Y-5Y	1	0

WEAPONS (WPN)						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
18.2-308.4(B)	Poss. Sch. I/II with firearm	F6	2Y	1Y-5Y	604	79
18.2-308.4(C)	Sell more than 1lb. marijuana while possessing firearm	F6	5Y	1Y-5Y	Data Unavailable	Data Unavailable
18.2-308.4(C)	Sell Sch. I/II while possessing firearm	F6	5Y	1Y-5Y	Data Unavailable	Data Unavailable
18.2-308.2(A)	Convicted felon (nonviolent within 10 yr.) possess firearm	F6	2Y	1Y-5Y	1,940	480

WEAPONS (WPN) - Continued						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
<u>18.2-308.2(A)</u>	Convicted felon (violent) possess transport firearm	F6	5Y	1Y-5Y	1,581	197
<u>18.2-308.2:2(M,i)</u>	Purchase firearm – provide to ineligible person	F4	1Y	2Y-10Y	0	0
<u>18.2-308.2:2(N)</u>	Solicit by ineligible person	F4	5Y	2Y-10Y	0	0
<u>18.2-308.2:2(M,ii)</u>	Transport firearm out of state – provide to ineligible person	F4	1Y	2Y-10Y	0	0
<u>18.2-308.2:2(M)</u>	Provide > 1 firearm to ineligible person through purchase	F4	5Y	2Y-10Y	0	0
<u>18.2-308.1(C)</u>	Firearm use on school property	F9	5Y		1	0

APPENDIX B: Misdemeanor Offenses in Virginia that Require a Mandatory Minimum Sentence

AGRICULTURE, HORTICULTURE & FOOD (AGR)						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
3.2-4212(D,ii)	Possess, import cigarettes ≥ 3000 pkgs.	M1	90 D	0-12M	0	0
3.2-4212(D,i)	Sell or Distribute cigarettes not in directory ≥ 3000 pkgs.	M1	90 D	0-12M	0	0

ALCOHOL (ALC)						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
4.1-302	Sale, illegal alcohol - subsequent offense	M1	30 D	0-12M	0	0

ASSAULT (ASL)						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
18.2-57(D)	Simple Assault – Teacher, School Employee w/ weapon	M1	6 M	0-12M	3	7
18.2-57(D)	Simple Assault – Teacher, School Employee	M1	2 D	0-12M	17	10
18.2-57(E)	Simple assault- Health Care Provider	M1	2 D	0-12M	101	43

PROTECTIVE ORDERS (PRT)						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
16.1-253.2(A)	Violation of protective order (violence) 2 nd w/in 5 yrs. (JDR)	M1	60 D	0-12M	135	61
18.2-60.4(A)	Violation of protective order (violence) 2 nd w/in 5 yrs.	M1	60 D	0-12M	174	22

TRAFFIC – 1 st CONVICTION (DWI)						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
18.2-266	BAC .15 to .20	M1	5 D	0-12M	3,551	2,624
18.2-266	BAC > .20	M1	10 D	0-12M	1,262	919

TRAFFIC – 2 nd CONVICTION (DWI)						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
18.2-266	Within 5 years	S9	20 D	1M-1Y	1,625	943
18.2-266	Within 5 years, BAC .15 to .20	S9	30 D	1M-1Y	422	256
18.2-266	Within 5 years, BAC > .20	S9	40 D	1M-1Y	305	221
18.2-266	Within 5 years, drugs	S9	20 D	1M-1Y	8	4
18.2-266	Within 5-10 years	S9	10 D	1M-1Y	1,205	828
18.2-266	Within 5-10 years, BAC .15 to .20	S9	20 D	1M-1Y	283	169
18.2-266	Within 5-10 years, BAC > .20	S9	30 D	1M-1Y	148	92
18.2-266	Within 5-10 years, drugs	S9	10 D	1M-1Y	7	5
18.2-266	Within 10 years, BAC .15 to .20	S9	20 D	1M-1Y	8	26
18.2-266	Within 10 years, BAC > .20	S9	30 D	1M-1Y	7	14

TRAFFIC – 1 st CONVICTION WITH CHILD (DWI)						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
18.2-266	First Conviction	M1	5 D	0-12M	230	136
18.2-266	BAC .15 to .20	M1	10 D	0-12M	59	39
18.2-266	BAC > .20	M1	15 D	0-12M	31	23
18.2-266	Drugs	M1	5 D	0-12M	7	6

TRAFFIC – 2 nd CONVICTION WITH CHILD (DWI)						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
18.2-266	Within 5 years	S9	25 D	1M-1Y	27	15
18.2-266	Within 5 years, BAC .15 to .20	S9	35 D	1M-1Y	12	9
18.2-266	Within 5 years, BAC > .20	S9	45 D	1M-1Y	5	3

TRAFFIC – 2 nd CONVICTION WITH CHILD (DWI)						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
18.2-266	Within 5 years, drugs	S9	25 D	1M-1Y	1	1
18.2-266	Within 5-10 years	S9	15 D	1M-1Y	25	12
18.2-266	Within 5-10 years, BAC .15 to .20	S9	25 D	1M-1Y	5	4
18.2-266	Within 5-10 years, BAC > .20	S9	35 D	1M-1Y	5	3
18.2-266	Within 5-10 years, drugs	S9	15 D	1M-1Y	2	1
18.2-266	Within 10 years, BAC .15 to .20	S9	25 D	1M-1Y	0	1
18.2-266	Within 10 years, BAC > .20	S9	25 D	1M-1Y	1	1

TRAFFIC - COMMERCIAL VEHICLES – 1 st CONVICTION (DWI)						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
46.2-341.24	BAC .15 to .20	M1	5 D	0-12M	1	1
46.2-341.24	BAC > .20	M1	10 D	0-12M	2	2

TRAFFIC - COMMERCIAL VEHICLES – 2 nd CONVICTION (DWI)						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
46.2-341.24	Within 5 years	S9	20 D	1M-1Y	1	0
46.2-341.24	Within 5 years, drugs	S9	20 D	1M-1Y	0	0
46.2-341.24	Within 5 years, BAC .15 to .20	S9	30 D	1M-1Y	5	3
46.2-341.24	Within 5 years, BAC > .20	S9	40 D	1M-1Y	5	4
46.2-341.24	Within 5 to 10 years	S9	10 D	1M-1Y	1	1
46.2-341.24	Within 5 to 10 years, BAC .15 to .20	S9	20 D	1M-1Y	0	0
46.2-341.24	Within 5 to 10 years, BAC > .20	S9	30 D	1M-1Y	0	0
46.2-341.24	Within 5-10 years, drugs	S9	10 D	1M-1Y	0	0
46.2-341.24	Within 10 years, BAC .15 to .20	S9	20 D	1M-1Y	0	0
46.2-341.24	Within 10 years, BAC > .20	S9	30 D	1M-1Y	0	0

TRAFFIC - COMMERCIAL VEHICLES – 1 st CONVICTION WITH CHILD (DWI)						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
46.2-341.24	First Offense	M1	5 D	0-12M	0	0
46.2-341.24	BAC .15 to .20	M1	10 D	0-12M	0	0
46.2-341.24	BAC > .20	M1	15 D	0-12M	1	0
46.2-341.24	Drugs	M1	5 D	0-12M	0	0

TRAFFIC - COMMERCIAL VEHICLES – 2 nd CONVICTION WITH CHILD (DWI)						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
46.2-341.24	Within 5 years	S9	25 D	1M-1Y	0	0
46.2-341.24	Within 5 years, drugs	S9	25 D	1M-1Y	0	0
46.2-341.24	Within 5 years, BAC .15 to .20	S9	35 D	1M-1Y	0	0
46.2-341.24	Within 5 years, BAC > .20	S9	45 D	1M-1Y	0	0
46.2-341.24	Within 5-10 years	S9	15 D	1M-1Y	0	0
46.2-341.24	Within 5-10 years, BAC .15 to .20	S9	25 D	1M-1Y	0	0
46.2-341.24	Within 5-10 years, BAC > .20	S9	35 D	1M-1Y	0	0

TRAFFIC - COMMERCIAL VEHICLES – 2 nd CONVICTION WITH CHILD (DWI)						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
46.2-341.24	Within 5-10 years, drugs	S9	15 D	1M-1Y	0	0
46.2-341.24	Within 10 years, BAC .15 to .20	S9	25 D	1M-1Y	0	0
46.2-341.24	Within 10 years, BAC > .20	S9	35 D	1M-1Y	0	0

HABITUAL OFFENDER (LIC)						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
46.2-357(B,1)	Operate vehicle, license revoked	M1	10 D	0-12M	Data Unavailable	Data Unavailable

DRIVE AFTER LICENSE REVOKED FOR DWI, MANSLAUGHTER, MAIMING (LIC)						
Statute	Offense	Classification	Mandatory Minimum	Sentence Range	Avg. # Charges Filed Per Year (FY 16 - FY 20)	Avg. # Convictions Per Year (FY 16 – FY 20)
46.2-391(D,1)	No endangerment	M1	10 D	0-12M	187	141

SEX TRAFFICKING – VACATUR OF CONVICTIONS AND DATA COLLECTION

EXECUTIVE SUMMARY

The Crime Commission conducted a comprehensive study on sex trafficking in Virginia during 2018 and continued work on that study throughout 2019.¹ During the 2020 Regular Session of the General Assembly, several bills were referred to the Crime Commission which were meant to provide criminal conviction relief to sex trafficking victims by removing or limiting access to certain convictions relating to sex trafficking from their criminal records.² The Executive Committee of the Crime Commission directed staff to examine criminal conviction relief for sex trafficking victims as part of the Crime Commission’s broader study of the expungement and sealing of criminal records.

Staff conducted a general review of literature and research related to criminal conviction relief for sex trafficking victims and found that:

- Common forms of criminal conviction relief include vacatur, expungement, and sealing;
- Vacatur signifies that a sex trafficking victim did not have the criminal intent to commit certain crimes related to being sex trafficked; and,
- Vacatur is a mechanism used to help alleviate the collateral consequences that sex trafficking victims face as a result of convictions related to being sex trafficked.

Staff also examined criminal conviction relief laws across the United States that were enacted specifically to assist sex trafficking victims. Virginia law does not provide any viable criminal conviction relief mechanisms for sex trafficking victims. In reviewing the remaining states, staff found that:

- 45 states authorize some form of criminal conviction relief specifically for sex trafficking victims;
- All states that authorize criminal conviction relief for sex trafficking victims require the victim to petition the court for such relief;
- All states that authorize criminal conviction relief for sex trafficking victims include prostitution offenses in their relief statutes; however, states vary substantially in terms of other offenses that qualify for such relief;

- 20 states have statutes which create a rebuttable presumption that a person is a sex trafficking victim when that person presents official government documentation of their victim status to the court as part of the criminal conviction relief process; and,
- 9 states require sex trafficking victims to prove that they are no longer involved in sex trafficking in order to qualify for criminal conviction relief.

As a result of studying sex trafficking, staff determined that collecting data in Virginia is difficult due to the criminal penalties for both prostitution and solicitation of prostitution being combined into one statute.³ Staff found that including both of these provisions within the same statute presented significant data collection challenges, as it was often difficult to determine whether an individual had been charged with or convicted of engaging in prostitution, as opposed to being charged with or convicted of soliciting prostitution.

Crime Commission members reviewed study findings at the January 5, 2021, Commission meeting and were presented with the following two recommendations:

Recommendation 1: Virginia should enact legislation that allows sex trafficking victims to vacate convictions for prostitution and maintaining a bawdy place.

- **Policy Decision:** Should any other offenses be eligible for vacatur?

Members unanimously endorsed this recommendation and determined that convictions and adjudications of delinquency for prostitution, solicitation of prostitution, and maintaining a bawdy place should be eligible for vacatur. Legislation to allow sex trafficking victims to petition a circuit court for vacatur of certain convictions and adjudications of delinquency related to being sex trafficked was introduced during the 2021 Regular Session of the General Assembly (House Bill 2133 - Del. Karrie K. Delaney).⁴

Recommendation 2: Divide Virginia's prostitution statute into two separate Code sections to better distinguish between prostitution and solicitation of prostitution.

Members unanimously endorsed this recommendation to divide Virginia's prostitution statute (Va. Code § 18.2-346) into two separate Code sections in order to better distinguish between prostitution and solicitation of prostitution offenses. Legislation endorsed by the Crime Commission to separate the prostitution statute was also

introduced during the 2021 Regular Session of the General Assembly (House Bill 2169 - Del. Candi Mundon King).⁵

Both Crime Commission bills passed the General Assembly unanimously and were signed into law by the Governor.⁶

BACKGROUND

Crime Commission staff engaged in the following activities as part of the study on criminal conviction relief for sex trafficking victims:

- Conducted an overview of relevant literature and research on criminal conviction relief;
- Reviewed Virginia expungement laws, procedures, and case law;
- Examined the vacatur process set forth in the writ of actual innocence statutes in Virginia;⁷
- Conducted a 50 state review to identify and analyze all criminal conviction relief statutes for sex trafficking victims;⁸ and,
- Consulted with practitioners, subject-matter experts, and advocates.

Additionally, staff reviewed previous research from the Crime Commission's study published in 2018 which found that sex trafficking is occurring in Virginia.⁹ During this 2018 study, staff identified various dynamics within the commercial sex industry which present unique challenges to identifying and assisting sex trafficking victims, such as:

- Traffickers frequently prey on a victim's desire for love, hope, and a sense of belonging;
- Traffickers often target victims from vulnerable populations, such as runaway and homeless youth, foreign nationals, individuals with a history of domestic, sexual, or emotional abuse, persons with dysfunctional families, low self-esteem, or drug dependence, and people of lower socioeconomic status;
- Victims are difficult to identify because they often do not see themselves as victims or realize that they are being sex trafficked;
- Victims face various challenges in leaving the commercial sex industry, such as a lack of a support structure, limited basic life skills, lack of an education, a criminal record, difficulty securing housing or employment, mental health conditions, and health issues; and,
- The traditional criminal justice response has led to sex trafficking victims being treated as criminals.¹⁰

CRIMINAL CONVICTION RELIEF

Common forms of criminal conviction relief include vacatur, expungement, and sealing.

Vacatur is defined as the “act of annulling or setting aside.”¹¹ In the criminal context, vacatur is the removal of a conviction as if a person had never been found guilty of an offense. For example, if a sex trafficking victim was found guilty of prostitution and that conviction was vacated, the conviction would be removed from that victim’s criminal record.

Expungement is generally defined as erasing or destroying a record;¹² whereas, sealing is generally defined as preventing access to a record.¹³ Despite these general definitions, states vary substantially in how the terms expungement and sealing are statutorily defined. For example, while several states define expungement as “to permanently destroy, delete, or erase a record of an offense from the criminal history record,”¹⁴ other states define expungement as “the sealing of criminal records.”¹⁵ Similar contradictions emerge when examining the definition of sealing across states.¹⁶ In contrast to vacatur, expungement and sealing do not remove a criminal conviction from a person’s criminal record, but instead prevent access to that conviction on a person’s criminal record.¹⁷

Vacatur signifies that a sex trafficking victim did not have the criminal intent to commit certain crimes related to being sex trafficked.

In order to be convicted of a criminal offense, a person must generally have the criminal intent (*mens rea*) to commit the prohibited act.¹⁸ Sex trafficking victims may commit a variety of criminal acts either as a direct result of manipulation or intimidation by their trafficker, or as a consequence of being induced or forced to participate in the commercial sex industry.¹⁹ Criminal conviction relief laws enacted specifically to aid sex trafficking victims recognize that these particular victims did not have the criminal intent to commit certain crimes related to their sex trafficking. Of the three common forms of criminal conviction relief, vacatur serves as the strongest indicator that the criminal justice system no longer views a sex trafficking victim as being culpable for a certain criminal offense, as this form of relief specifically removes the conviction from the victim’s criminal record.²⁰

Vacatur is a mechanism used to help alleviate the collateral consequences that sex trafficking victims face as a result of convictions related to being sex trafficked.

After a sex trafficking victim has been convicted of a criminal offense, that victim will likely face a vast array of collateral consequences, such as barriers to obtaining employment, housing, higher education, financial aid, loan eligibility and credit, and professional licensing.²¹ These collateral consequences can severely limit a victim's ability to leave the commercial sex industry and reintegrate into society. Additionally, a criminal conviction can impose a significant negative social stigma which serves to amplify the difficulties that victims face when attempting to rehabilitate their lives.²²

Vacatur can be an important means of alleviating the collateral consequences of a criminal conviction that sex trafficking victims face. Victims who are able to have criminal convictions vacated and removed from their criminal records may face fewer barriers when seeking to establish a life outside of the commercial sex trafficking industry.²³

VIRGINIA LAW

Virginia does not allow for the expungement of any criminal convictions.

Sex trafficking victims in Virginia cannot expunge convictions from their criminal records because Virginia law does not allow for the expungement of any convictions.²⁴ The term expungement is not defined in the Code of Virginia; however, per the Administrative Code of Virginia, expungement means "to remove, in accordance with a court order, a criminal history record or a portion of a record from public inspection or normal access."²⁵ The Code of Virginia only allows for the expungement of certain charges that did not result in a conviction, including charges that concluded in an acquittal, a *nolle prosequi*, or a dismissal.²⁶ Virginia courts have interpreted these categories fairly narrowly. For example, the Supreme Court of Virginia has denied expungement petitions for acquittals by reason of insanity,²⁷ dismissals following a plea of *nolo contendere*,²⁸ and where a finding of evidence sufficient for guilt was made and the charge was deferred before ultimately being dismissed.²⁹

Virginia allows felony convictions to be vacated if an individual can demonstrate that they are actually innocent; however, sex trafficking victims are unlikely to qualify for criminal conviction relief under these laws.

Virginia has created a vacatur process for felony convictions in its writ of actual innocence statutes.³⁰ In order to have a writ of actual innocence granted, a convicted person must file a petition with the court and prove numerous elements by a preponderance of the evidence.³¹ If the convicted person proves these elements, then the writ of actual innocence is issued, the felony conviction is vacated, and the criminal records relating to the charge are expunged.³²

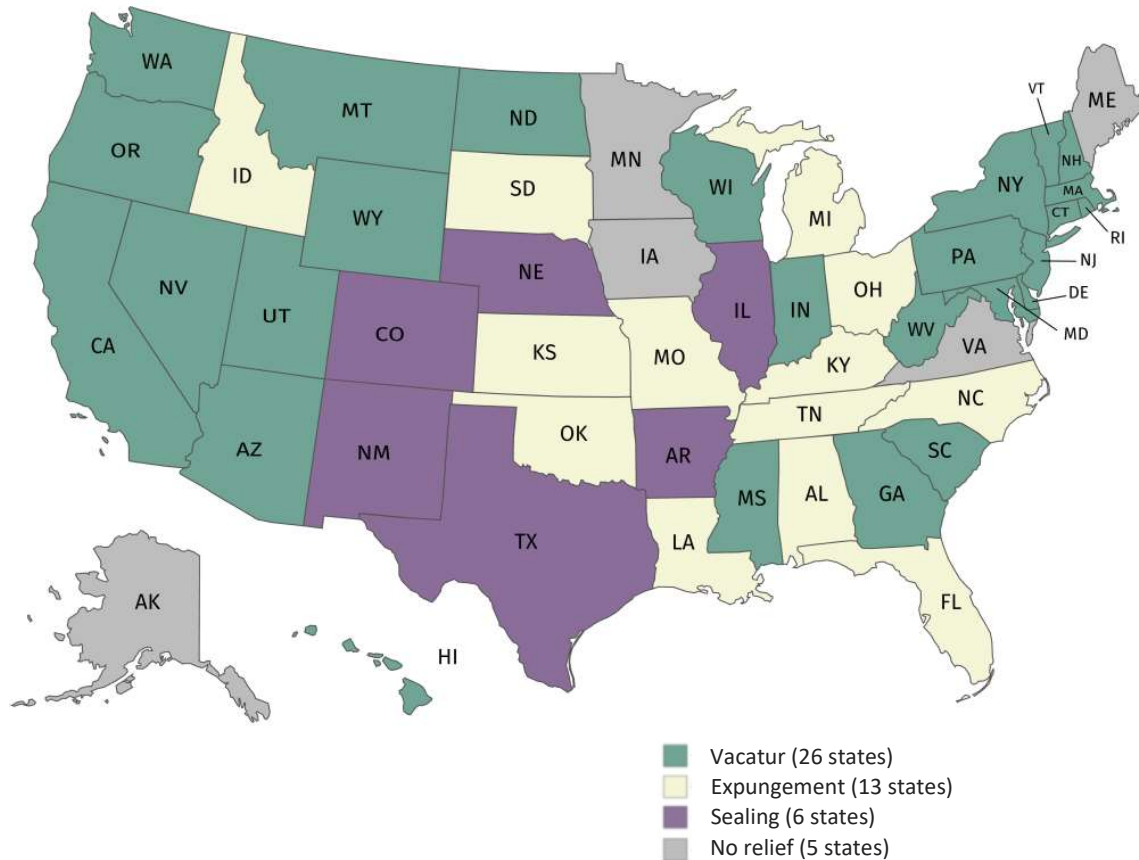
A significant element that a convicted person must prove when petitioning for a writ of actual innocence is that they are in fact “actually innocent” of the offense for which they were convicted.³³ Therefore, sex trafficking victims are not likely to qualify for such a writ because they did in fact commit the criminal offense for which they were convicted. Furthermore, writs of actual innocence are limited to felony convictions, creating an additional bar to sex trafficking victims who were convicted of misdemeanor offenses, such as prostitution.³⁴

50 STATE REVIEW

Forty-five states authorize some form of criminal conviction relief specifically for sex trafficking victims.

Nearly every state has enacted some form of criminal conviction relief specifically for sex trafficking victims.³⁵ As the map below illustrates, of the 45 states with such criminal conviction relief laws, 26 states authorize vacatur, 13 states permit expungement, and 6 states allow for sealing. The remaining 5 states, including Virginia, do not provide criminal conviction relief specifically for sex trafficking victims.

Criminal Conviction Relief Laws for Sex Trafficking Victims



Map prepared by Crime Commission staff.

All states that authorize criminal conviction relief for sex trafficking victims require the victim to petition the court for such relief.

Due to the complex nature of sex trafficking and the unique characteristics of sex trafficking victims, all of the states that allow criminal conviction relief for sex trafficking victims require the victim to petition for such relief. This means that a sex trafficking victim seeking to vacate, expunge, or seal a conviction must file a petition with the court and must then prove that the conviction meets the standards for criminal conviction relief as set out in statute. The standards for criminal conviction relief vary by state; however, the most common standard, as used in 31 states, is that the petitioner must prove that they committed the offense either as a result or as a direct result of being a victim of sex trafficking.³⁶ While almost every state requires a court hearing to determine whether the standards for criminal conviction relief have been met, 6 states allow the court to grant a petition for relief without a hearing when a prosecutor's office does not object to the petition.³⁷

All states that authorize criminal conviction relief for sex trafficking victims include prostitution offenses in their relief statutes; however, states vary substantially in terms of other offenses that qualify for such relief.

While all 45 states that provide criminal conviction relief for sex trafficking victims include prostitution-related offenses in their relief statutes, these states vary dramatically in terms of which other offenses are eligible for relief. An analysis of these 45 states found that:

- 17 states allow criminal conviction relief for only prostitution-related offenses (Arizona, Arkansas, Connecticut, Hawaii, Kansas, Louisiana, Michigan, Missouri, New Jersey, New York, North Dakota, Oklahoma, Oregon, Rhode Island, Washington, West Virginia, and Wisconsin);
- 15 states allow criminal conviction relief for a broad range of offenses, such as all nonviolent offenses, any offense other than violent felonies, and any non-homicide offense (Alabama, California, Colorado, Delaware, Florida, Idaho, Indiana, Kentucky, Montana, Nevada, New Mexico, North Carolina, Ohio, South Dakota, and Vermont);
- 9 states allow criminal conviction relief for a list of specific offenses (Maryland, Massachusetts, Mississippi, New Hampshire, Pennsylvania, South Carolina, Tennessee, Texas, and Utah);³⁸ and,
- 4 states allow criminal conviction relief for any offense (Georgia, Illinois, Nebraska, and Wyoming).

Twenty states have statutes that create a rebuttable presumption that a person is a sex trafficking victim when that person presents official government documentation of their victim status to the court as part of the criminal conviction relief process.

Twenty of the states that authorize criminal conviction relief for sex trafficking victims have provisions that create a rebuttable presumption that a person is a sex trafficking victim when that person presents official government documentation of their victim status to the court as part of the relief process.³⁹ Laws that allow the use of official government documentation to create a rebuttable presumption of a person's victim status can assist sex trafficking victims in two ways. First, this rebuttable presumption provides support to a person's legal position during the criminal conviction relief process, as the person always bears the burden of proving that they were a sex trafficking victim in order to obtain such relief. Second, this rebuttable presumption can help to avoid re-traumatizing a sex trafficking victim, as the person can use

documentation from a prior event to establish that they were a victim, as opposed to requiring the person to prove their victim status all over again in a new legal proceeding.⁴⁰

While these rebuttable presumption laws can offer benefits to sex trafficking victims, such laws also pose certain challenges during the criminal conviction relief process. First, staff was unable to determine what specific documents constitute “official government documentation.” States with such provisions generally did not define this phrase, and the definitions in the 6 states that attempted to define the phrase were quite broad and vague.⁴¹ Therefore, such official government documentation could potentially include complex documents like a T-visa,⁴² or a brief notation in a report by a person’s probation officer. Second, such legal presumptions serve to limit a court’s discretion when ruling on a matter. Furthermore, the decision not to include a rebuttable presumption in the relief process does not prohibit the sex trafficking victim from introducing official government documentation of their victim status. Such documentation is still admissible, but its admission does not create a rebuttable presumption that the person is a sex trafficking victim.

Nine states require sex trafficking victims to prove that they are no longer involved in sex trafficking in order to qualify for criminal conviction relief.

Nine states have enacted provisions within their criminal conviction relief laws that require a sex trafficking victim to prove that they are no longer involved in sex trafficking as a condition of the relief process.⁴³ This requirement stems from concerns that traffickers will use the criminal conviction relief process as an additional means to control their victims by promising to help the victim through the process if they are convicted of a crime. While this concern is certainly a possibility, it is highly unlikely that a trafficker will actually assist a victim during the criminal conviction relief process. First, if a victim successfully has a conviction concealed on or removed from their criminal record, the trafficker has one less means to control that victim. Second, traffickers have a strong self-interest against victims testifying in court about their sex trafficking and identifying who else might be involved in the sex trafficking scheme. Finally, because individuals must petition the court for criminal conviction relief, those victims who do petition tend to have left the commercial sex industry and stabilized their lives.⁴⁴

CRIME COMMISSION LEGISLATION

The Crime Commission met on January 5, 2021, and heard a presentation from staff on criminal conviction relief for sex trafficking victims across the United States and data collection in Virginia.⁴⁵ Staff provided Crime Commission members with the following two recommendations.

Recommendation 1: Virginia should enact legislation that allows sex trafficking victims to vacate convictions for prostitution and maintaining a bawdy place.

- **Policy Decision:** Should any other offenses be eligible for vacatur?

Staff recommended that Virginia enact legislation to allow sex trafficking victims to petition a circuit court for vacatur of certain convictions and adjudications of delinquency related to being sex trafficked, including convictions and adjudications of delinquency for prostitution and maintaining a bawdy place.⁴⁶ Staff made this recommendation for several reasons. First, 45 states have laws that provide some form of criminal conviction relief specifically for sex trafficking victims, with Virginia being 1 of the 5 states that does not allow for such relief. Second, a majority of the states that provide criminal conviction relief to sex trafficking victims allow these victims to have convictions vacated. Third, vacatur signifies that these sex trafficking victims did not have the criminal intent to commit these particular offenses. Finally, by allowing a conviction to be vacated, the conviction will be removed from a person's criminal record, and this may limit some of the collateral consequences that sex trafficking victims face as a result of such convictions.

Staff provided Crime Commission members with draft legislation to create a process in Virginia for sex trafficking victims to have convictions and adjudications of delinquency for prostitution and maintaining a bawdy place vacated. In drafting this legislation, staff sought to balance the need to assist these particular victims with the interest of the Commonwealth in preventing abuse of the process. The newly created vacatur process will require the sex trafficking victim to file a petition for vacatur with the circuit court in the jurisdiction where the conviction or adjudication of delinquency was entered. The petition is filed under oath, subject to the penalty of perjury. A copy of the petition must be provided to the attorney for the Commonwealth, who can then concur with or object to the petition. If the attorney for the Commonwealth objects to the petition, the circuit court must conduct a hearing and the sex trafficking victim must prove by a preponderance of the evidence that they committed the criminal offense as a direct result of being a victim of sex trafficking. If the court grants the petition, then the

conviction is vacated, the criminal records related to the conviction are expunged, the court maintains a copy of the vacatur order, and the sex trafficking victim may receive a refund of court costs, fines, and fees paid as a result of the vacated conviction. There are no limits on the number of petitions for vacatur that a sex trafficking victim may file, but the petitioner must disclose any prior petitions to the court.

Staff also presented a policy option as to whether additional offenses should be eligible for vacatur. Crime Commission members voted to also include solicitation of prostitution as an eligible offense for vacatur.⁴⁷ The Crime Commission then voted unanimously to endorse Recommendation 1. The Crime Commission voted unanimously to endorse the draft legislation for introduction during the 2021 Regular Session of the General Assembly (House Bill 2133 - Del. Karrie K. Delaney).⁴⁸

Recommendation 2: Divide Virginia's prostitution statute into two separate Code sections to better distinguish between prostitution and solicitation of prostitution.

During the Crime Commission study on sex trafficking conducted in 2018, staff found that data on the extent of commercial sex trafficking in Virginia is not readily available.⁴⁹ As part of the presentation to the Crime Commission on January 5, 2021, staff advised members that one particular challenge to data collection was the structure of Virginia's prostitution statute (Va. Code § 18.2-346). This challenge was due to the fact that Virginia's prostitution statute includes two subsections that encompass two distinctly different offenses: prostitution⁵⁰ and solicitation of prostitution.⁵¹ Therefore, if a person is charged with or convicted of a violation of this statute and no subsection is listed on the summons or warrant, then it is incredibly difficult to determine whether the charge related to engaging in prostitution or soliciting prostitution. A review of data from FY2014 to FY2018 included a significant number of charges and convictions for violations of Virginia Code § 18.2-346 in Virginia's general district courts where it was unclear whether the charge was related to prostitution or solicitation of prostitution.⁵²

Staff provided Crime Commission members with draft legislation to divide Virginia's prostitution statute into two separate Code sections in order to better distinguish between prostitution and solicitation of prostitution offenses.⁵³ Staff advised that by dividing this Code section into two distinct Code sections, data on sex trafficking in Virginia could be tracked more accurately, which could in turn aid in better identifying the supply and demand components of the commercial sex industry in Virginia. The Crime Commission voted unanimously to endorse the draft legislation for introduction

during the 2021 Regular Session of the General Assembly (House Bill 2169 - Del. Candi Mundon King).⁵⁴

Both Crime Commission bills passed the General Assembly unanimously and were signed into law by the Governor.⁵⁵

ACKNOWLEDGEMENTS

The Virginia State Crime Commission extends its appreciation to the following agencies and organizations for their assistance and cooperation on this study:

Amara Legal Center

Brooklyn Law School

Henrico County Commonwealth's Attorney's Office

Office of Executive Secretary of the Supreme Court of Virginia

Richmond Regional Human Trafficking Collaborative

Shared Hope International

Virginia Association of Commonwealth's Attorneys

Virginia Coalition Against Human Trafficking

Virginia Indigent Defense Commission

Virginia State Police

ENDNOTES

¹ See Virginia State Crime Commission. *2018 Annual Report: Sex Trafficking in Virginia*. Available at <http://vscc.virginia.gov/2019/VSCC%202018%20Annual%20Report%20-%20Sex%20Trafficking%20in%20Virginia.pdf>. See also Virginia State Crime Commission. *2019 Annual Report: Sex Trafficking in Virginia*. Available at <http://vscc.virginia.gov/2020/Sex%20Trafficking%20Update.pdf>.

² The bills referred to the Crime Commission during the Regular Session of the 2020 General Assembly included House Bill 128 (Del. Jason S. Miyares), House Bill 268 (Del. Steven E. Heretick), House Bill 1033 (Del. Charniele L. Herring), and Senate Bill 914 (Sen. Mamie E. Locke).

³ VA. CODE ANN. § 18.2-346 (2020).

⁴ House Bill 2133 is available at: <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=212&typ=bil&val=hb2133>.

⁵ House Bill 2169 is available at: <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=212&typ=bil&val=hb2169>.

⁶ 2021 Va. Acts, Sp. Sess. I, ch. 543 (vacatur). 2021 Va. Acts, Sp. Sess. I, ch. 188 (dividing prostitution statute).

⁷ VA. CODE ANN. §§ 19.2-327.2 *et seq.* and 19.2-327.10 *et seq.* (2020).

⁸ The database of criminal conviction relief laws compiled by the Restoration of Rights Project was a key resource in conducting the 50 state review. The laws of each state were reviewed on LexisNexis and staff performed additional searches on LexisNexis within each of the state statutes to ensure that all relevant laws were reviewed. See Restoration of Rights Project. *50 State comparison: Expungement, sealing, & other record relief*. Retrieved from <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside/> (last updated Jan. 24, 2021).

⁹ Virginia State Crime Commission. *2018 Annual Report: Sex Trafficking in Virginia*. Available at <http://vscc.virginia.gov/2019/VSCC%202018%20Annual%20Report%20-%20Sex%20Trafficking%20in%20Virginia.pdf>.

¹⁰ *Id.*

¹¹ *Vacatur*, BLACK'S LAW DICTIONARY (9th ed. 2009).

¹² *Expunge*, BLACK'S LAW DICTIONARY (9th ed. 2009) ("to erase or destroy"); *Expungement of Record*, *Id.* ("the removal of a conviction from a person's criminal record").

¹³ *Sealing of Records*, BLACK'S LAW DICTIONARY (9th ed. 2009) ("act or practice of officially preventing access to particular records, in the absence of a court order").

¹⁴ MONT. CODE ANN. § 46-18-1103(1) (2020). See also DEL. CODE ANN. tit. 11, § 4372(c)(3) (2020); 20 ILL. COMP. STAT. ANN. 2630/5.2(a)(1)(E) (LexisNexis 2020); KY. REV. STAT. ANN. § 431.079(3) (LexisNexis 2020); MD. CODE ANN., CRIM. PROC. § 10-101(d) and (e) (LexisNexis 2020); and, TENN. CODE ANN. § 40-32-101(g)(12)(A) (2020).

¹⁵ OKLA. STAT. tit. 22, § 18(B) (2020). See also LA. CODE CRIM. PROC. ANN. art. 972(1) (2020); MINN. STAT. § 609A.01 (2020); N.J. REV. STAT. § 2C:52-1 (2020); SD CODIFIED LAWS § 23A-3-26 (2020); and, UTAH CODE ANN. § 77-40-102(9) (LexisNexis 2020).

¹⁶ See ARK. CODE ANN. § 16-90-1404(4)(A) (2020). "Seal" means to expunge, remove, sequester, and treat as confidential the record or records in question according to the procedures established by this subchapter.

¹⁷ *Supra* notes 12 and 13.

¹⁸ *Mens rea*, BLACK'S LAW DICTIONARY (9th ed. 2009) ("The state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime; criminal intent or recklessness.")

¹⁹ Virginia State Crime Commission. *2018 Annual Report: Sex Trafficking in Virginia*, pp. 76-78 & 82-83. Available at <http://vscc.virginia.gov/2019/VSCC%202018%20Annual%20Report%20-%20Sex%20Trafficking%20in%20Virginia.pdf>

²⁰ Mullins, K. (2019). A path to protection: Collateral crime vacatur for Wisconsin's victims of sex trafficking. *Wisconsin Law Review*, 2019(6), 1551-1587 at p. 1567 ("vacatur is the favored method of relief for victims of trafficking ... because it stops victims from being viewed as criminals..."); United States Department of State. (2016). *Protecting victims from wrongful prosecution and further victimization*, at p. 2, available at <https://2009-2017.state.gov/documents/organization/259304.pdf> ("Vacatur is the formal recognition of 'factual innocence.' Vacatur laws should apply to both adults and children, given that anyone who has been forced, tricked, or coerced into criminal activity should not be considered as having consented to that activity.... These laws not only allow victims to correct past injustices, but also thereby help trafficking victims reclaim and rebuild their lives. Vacatur increases a survivor's ability to find work, reducing their economic vulnerabilities and the risk of being re-trafficked."); Lawrenson, C.P. (2014). The injustice of convicting sex trafficking victims: A model vacating convictions law. *Thomas Jefferson Law Review*, 36(1), 343-371 at p. 345 (Vacatur "laws acknowledge that victims face complex psychological and legal challenges as a consequence of trafficking. Accordingly, these laws recognize that convictions obtained by a victim during a trafficking situation should be vacated.")

²¹ Adams, E., Chen, E.Y., & Chapman, R. (2017). Erasing the mark of a criminal past: Ex-offenders' expectations and experiences with record clearance. *Punishment & Society*, 19(1), 23-52 at pp. 25-26; Roberts, J. (2015). Expunging America's rap sheet in the information age. *Wisconsin Law Review*, 2(321), 321-347 at pp. 327-328; Prescott, J.J., & Starr, S.B. (2020). Expungement of criminal convictions: An empirical study. *Harvard Law Review*, 133(8), 2460-2555 at p. 2462; Solomon, A. (2012). In search of a job: Criminal records as barriers to employment. *NIJ Journal*, 270, 42-51 at pp. 44-46; Haber, E. (2018). Digital expungement. *Maryland Law Review*, 77(2), 337-385 at pp. 343-344 (provides a list of collateral consequences faced by those who have a criminal record).

²² Roberts, *supra* note 21, at pp. 329-330 (access to criminal records has "helped create a tiered society in which individuals with a criminal history are effectively second-class citizens.").

²³ See *supra* note 20.

²⁴ VA. CODE ANN. § 19.2-392.2(A) (2020).

²⁵ 6 VA. ADMIN. CODE 20-120-20 (2020).

²⁶ VA. CODE ANN. § 19.2-392.2(A) (2020).

²⁷ *Eastlack v. Commonwealth*, 282 Va. 120, 710 S.E.2d 723 (Jun. 9, 2011).

²⁸ *Commonwealth v. Dotson*, 276 Va. 278, 661 S.E.2d 473 (Jun. 6, 2008); *Commonwealth v. Jackson*, 255 Va. 552, 499 S.E.2d 276 (Apr. 17, 1998).

²⁹ *Daniel v. Commonwealth*, 268 Va. 523, 604 S.E.2d 444 (Nov. 5, 2004).

³⁰ VA. CODE ANN. §§ 19.2-327.2 *et seq.* and 19.2-327.10 *et seq.* (2020).

³¹ VA. CODE ANN. §§ 19.2-327.3, 19.2-327.5, 19.2-327.11, and 19.2-327.13 (2020).

³² VA. CODE ANN. §§ 19.2-327.5 and 19.2-327.13 (2020).

³³ VA. CODE ANN. §§ 19.2-327.3(A) and 19.2-327.11(A) (2020).

³⁴ See VA. CODE ANN. § 18.2-346(A) (2020).

³⁵ See Appendix A for more detailed information on the criminal conviction relief laws for sex trafficking victims across all 50 states.

³⁶ The 31 states which require a person to prove that they committed an offense either as a result or a direct result of being a victim of sex trafficking include Arizona, Arkansas, California, Delaware, Georgia, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, West Virginia, Wisconsin, and Wyoming. See Appendix A for a listing of individual state statutes.

³⁷ See Arizona (ARIZ. REV. STAT. § 13-909(B) (LexisNexis 2020)); Arkansas (ARK. CODE ANN. § 16-90-1413(b)(2) (2020)); California (CAL. PENAL CODE § 236.14(d) (West 2020)); Georgia (GA. CODE ANN. § 17-10-21(a)(4) (2020)); Illinois (20 ILL. COMP. STAT. ANN. 2630/5.2(h)(3) (LexisNexis 2020)); and, Maryland (MD. CODE ANN., CRIM. PROC. § 8-302(e) (LexisNexis 2020)).

³⁸ See Appendix B for additional information on the specified offenses that are eligible for criminal conviction relief in each state.

³⁹ See Appendix A. The 20 states that allow individuals to use official government documentation to create a rebuttable presumption that they are a sex trafficking victim include Arkansas, California, Delaware, Florida, Georgia, Idaho, Kentucky, Louisiana, Massachusetts, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, Rhode Island, Vermont, and Wyoming.

⁴⁰ Amara Legal Center, Brooklyn Law School, and Shared Hope International, personal communication, Dec. 18, 2020.

⁴¹ These six states include Arkansas, Florida, Georgia, Massachusetts, Nebraska, and New Jersey. See Appendix A for a listing of individual state statutes.

⁴² A T-visa is a visa granted to non-U.S. citizen sex trafficking victims in order to allow them to remain in the United States to assist in the investigation and prosecution of human traffickers. See United States Department of State – Bureau of Consular Affairs, *Visas for Victims of Human Trafficking*. Retrieved from <https://travel.state.gov/content/travel/en/us-visas/other-visa-categories/visas-for-victims-of-human-trafficking.html> (last visited May 5, 2021).

⁴³ These nine states include California, Florida, Maryland, Michigan, Montana, Nevada, New Jersey, New York, and Wisconsin. See Appendix A for a listing of individual state statutes.

⁴⁴ Amara Legal Center, Brooklyn Law School, and Shared Hope International, personal communication, Dec. 18, 2020.

⁴⁵ Virginia State Crime Commission. (Jan. 5, 2021). *Vacatur of Convictions for Victims of Sex Trafficking*. Available at <http://vscc.virginia.gov/2021/VSCC%20Vacatur%20Victims%20Sex%20Trafficking%20FINAL.pdf>.

⁴⁶ VA. CODE ANN. §§ 18.2-346(A) and 18.2-347 (2020).

⁴⁷ VA. CODE ANN. § 18.2-346(B) (2020).

⁴⁸ House Bill 2133 is available at: <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=212&typ=bil&val=hb2133>.

⁴⁹ Virginia State Crime Commission. *2018 Annual Report: Sex Trafficking in Virginia*. p. 81. Available at <http://vscc.virginia.gov/2019/VSCC%202018%20Annual%20Report%20-%20Sex%20Trafficking%20in%20Virginia.pdf>.

⁵⁰ VA. CODE ANN. § 18.2-346(A) (2020).

⁵¹ VA. CODE ANN. § 18.2-346(B) (2020).

⁵² Virginia State Crime Commission. *2018 Annual Report: Sex Trafficking in Virginia*. p. 98.

Available at <http://vscc.virginia.gov/2019/VSCC%202018%20Annual%20Report%20-%20Sex%20Trafficking%20in%20Virginia.pdf>.

⁵³ The draft legislation to divide Virginia's prostitution statute into two separate Code sections was prepared by the Virginia Division of Legislative Services.

⁵⁴ House Bill 2169 is available at: <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=212&typ=bil&val=hb2169>.

⁵⁵ 2021 Va. Acts, Sp. Sess. I, ch. 188.

APPENDIX A: Criminal Conviction Relief Statutes for Sex Trafficking Victims

STATE	STATUTE(S)	TYPE OF CONVICTION RELIEF	ELIGIBLE OFFENSES	REBUTTABLE PRESUMPTION** (Y/N)	PETITIONER NO LONGER A VICTIM*** (Y/N)
Alabama	ALA. CODE §§ 15-27-1, 15-27-2	Expungement	Any offense other than violent felonies	N	N
Alaska	None	--	--	--	--
Arizona	ARIZ. REV. STAT. § 13-909	Vacatur	Prostitution offenses only	N	N
Arkansas	ARK. CODE ANN. § 16-90-1412	Sealing	Prostitution offenses only	Y	N
California	CAL. PENAL CODE § 236.14	Vacatur	Any nonviolent offense	Y	Y
Colorado	COLO. REV. STAT. § 24-72-707	Sealing	Any nonviolent misdemeanor	N	N
Connecticut	CONN. GEN. STAT. § 54-95c	Vacatur	Prostitution offenses only	N	N
Delaware	DEL. CODE ANN. tit. 11, § 787	Vacatur	Any offense other than violent felonies	Y	N
Florida	FLA. STAT. § 943.0583	Expungement	Any offense other than violent felonies	Y	Y
Georgia	GA. CODE ANN. §§ 17-10-21, 35-3-37	Vacatur	Any offense	Y	N
Hawaii	HAW. REV. STAT. § 712-1209.6	Vacatur	Prostitution offenses only	N	N
Idaho	IDAHO CODE § 67-3014	Expungement	Any offense other than offenses for which a defense of coercion would not be available	Y	N
Illinois	20 ILL. COMP. STAT. 2630/5.2	Sealing	Any offense	N	N
Indiana	IND. CODE § 35-38-10-2	Vacatur	Any nonviolent offense	N	N
Iowa	None	--	--	--	--
Kansas	KAN. STAT. ANN. § 21-6614	Expungement	Prostitution offenses only	N	N
Kentucky	KY. REV. STAT. ANN. § 529.160	Expungement	Any nonviolent offense	Y	N
Louisiana	LA. CHILD. CODE ANN. art. 923	Expungement	Prostitution offenses only	Y	N
Maine	None	--	--	--	--

STATE	STATUTE(S)	TYPE OF CONVICTION RELIEF	ELIGIBLE OFFENSES	REBUTTABLE PRESUMPTION** (Y/N)	PETITIONER NO LONGER A VICTIM*** (Y/N)
Maryland	MD. CODE ANN., CRIM. PROC. § 8-302	Vacatur	List of specified offenses*	N	Y
Massachusetts	MASS. GEN. LAWS ch. 265, § 59	Vacatur	List of specified offenses*	Y	N
Michigan	MICH. COMP. LAWS § 780.621	Expungement	Prostitution offenses only	N	Y
Minnesota	None	--	--	--	--
Mississippi	MISS. CODE ANN. § 97-3-54.6	Vacatur	List of specified offenses*	Y	N
Missouri	MO. REV. STAT. § 610.131	Expungement	Prostitution offenses only	N	N
Montana	MONT. CODE ANN. § 46-18-608	Vacatur	Any nonviolent offense	Y	Y
Nebraska	NEB. REV. STAT. §§ 29-3005, 29-3523	Sealing	Any offense	Y	N
Nevada	NEV. REV. STAT. ANN. § 179.247	Vacatur	Any nonviolent offense	N	Y
New Hampshire	N.H. REV. STAT. ANN. § 633:7	Vacatur	List of specified offenses*	Y	N
New Jersey	N.J. STAT. ANN. § 2C:44-1.1	Vacatur	Prostitution offenses only	Y	Y
New Mexico	N.M. STAT. ANN. § 30-52-1.2	Sealing	Any non-homicide offense	N	N
New York	N.Y. CRIM. PROC. LAW § 440.10	Vacatur	Prostitution offenses only	Y	Y
North Carolina	N.C. GEN. STAT. §§ 15A-145.9, 15A-1416.1	Expungement	Any nonviolent offense	N	N
North Dakota	N.D. CENT. CODE § 12.1-41-14	Vacatur	Prostitution offenses only	Y	N
Ohio	OHIO REV. CODE. ANN. § 2953.38	Expungement	Any offense other than murder or rape	N	N
Oklahoma	OKLA. STAT. tit. 22, § 19c	Expungement	Prostitution offenses only	N	N
Oregon	OR. REV. STAT. § 137.221	Vacatur	Prostitution offenses only	N	N
Pennsylvania	18 PA. CONS. STAT. § 3019	Vacatur	List of specified offenses*	Y	N
Rhode Island	R.I. GEN. LAWS § 11-67.1-17	Vacatur	Prostitution offenses only	Y	N
South Carolina	S.C. CODE ANN. § 16-3-2020	Vacatur	List of specified offenses*	N	N

STATE	STATUTE(S)	TYPE OF CONVICTION RELIEF	ELIGIBLE OFFENSES	REBUTTABLE PRESUMPTION** (Y/N)	PETITIONER NO LONGER A VICTIM*** (Y/N)
South Dakota	S.D. CODIFIED LAWS § 26-7A-115.1	Expungement	Any delinquency offense	N	N
Tennessee	TENN. CODE ANN. § 40-32-105	Expungement	List of specified offenses*	N	N
Texas	TEX. GOV'T CODE ANN. § 411.0728	Sealing	List of specified offenses*	N	N
Utah	UTAH CODE ANN. § 78B-9-104	Vacatur	List of specified offenses*	N	N
Vermont	VT. STAT. ANN. tit. 13, § 2658	Vacatur	Any offense other than specified violent offenses	Y	N
Virginia	None	--	--	--	--
Washington	WASH. REV. CODE § 9.96.060	Vacatur	Prostitution offenses only	N	N
West Virginia	W. VA. CODE § 61-14-9	Vacatur	Prostitution offenses only	N	N
Wisconsin	WIS. STAT. § 973.015	Vacatur	Prostitution offenses only	N	Y
Wyoming	WYO. STAT. ANN. § 6-2-708	Vacatur	Any offense	Y	N

* States that list specified offenses vary dramatically. See Appendix B for additional information on each of these states.

** "Rebuttable Presumption" refers to states with laws which create a rebuttable presumption that a person is a sex trafficking victim when that person presents official government documentation to the court as part of the criminal conviction relief process.

*** "Petitioner No Longer a Victim" refers to states with laws which require a person to demonstrate that they are no longer involved in sex trafficking in order to be granted criminal conviction relief.

APPENDIX B: States with Specific Offenses Eligible for Criminal Conviction Relief for Sex Trafficking Victims

STATE	STATUTE	ELIGIBLE OFFENSES
Maryland	MD. CODE ANN., CRIM. PROC. § 8-302	<p>Burglary offense: fourth degree burglary</p> <p>Driving offenses: driving with suspended registration; failure to display registration; driving without a license; failure to display license to police; possession of suspended license; driving while privilege is canceled, suspended, refused, or revoked; owner failure to maintain security on a vehicle; driving while uninsured</p> <p>Fraud offenses: possession or use of fraudulent government identification; public assistance fraud; false statement to law enforcement or public official</p> <p>Larceny offenses: misdemeanor theft; misdemeanor bad check</p> <p>Property offenses: malicious destruction of property in the lesser degree; trespass</p> <p>Peace & Order offenses: disturbing the peace and disorderly conduct</p> <p>Sex offenses: specified bestiality offenses; indecent exposure; prostitution; prostitution or loitering as prohibited by local law</p>
Massachusetts	MASS. GEN. LAWS ch. 265, § 59	<p>Resorting to restaurants or taverns for immoral purpose;</p> <p>Common night walkers, disorderly persons and disturbers of the peace;</p> <p>Engaging in sexual conduct for a fee; and,</p> <p>Simple possession of a controlled substance</p>
Mississippi	MISS. CODE ANN. § 97-3-54.6(5)	Any conviction under Mississippi's Human Trafficking Act (Miss. CODE ANN. §§ 97-3-54 to 97-3-54.9)
New Hampshire	N.H. REV. STAT. ANN. § 633:7	<p>Indecent exposure and lewdness;</p> <p>Prostitution;</p> <p>Any other misdemeanor; and,</p> <p>Any Class B felony</p>
Pennsylvania	18 PA. CONS. STAT. § 3019	<p>Trespass;</p> <p>Disorderly conduct;</p> <p>Loitering and prowling at night;</p> <p>Obstructing highways and other public passages;</p> <p>Prostitution offenses; and,</p> <p>Possession of controlled substances</p>
South Carolina	S.C. CODE ANN. § 16-3-2020(F)	Prostitution convictions and any conviction under South Carolina's Trafficking in Persons Article (S.C. CODE ANN. §§ 16-3-2010 to 16-3-2100)
Tennessee	TENN. CODE ANN. § 40-32-105	Any offenses eligible for expungement under Tennessee's expungement statute (TENN. CODE ANN. § 40-32-101(g))

STATE	STATUTE	ELIGIBLE OFFENSES
Texas	TEX. GOV'T CODE ANN. § 411.0728	Misdemeanor delivery of marijuana; Possession of marijuana; Misdemeanor theft; and, Prostitution
Utah	UTAH CODE ANN. § 78B-9-104	Possession of controlled substance; Aiding prostitution; Criminal trespass; Release of fur-bearing animals; Possession of forged writing or device; Retail theft; Unlawful possession of another's identification document; Lewdness; Prostitution; and, Sexual solicitation

VIRGINIA PRE-TRIAL DATA PROJECT UPDATE

The *Virginia Pre-Trial Data Project* stemmed from the Crime Commission's review of the pre-trial process in an effort to determine how effective various pre-trial release mechanisms are at ensuring public safety and appearance at court proceedings.¹ This ongoing *Project* represents a collaborative effort between numerous state and local agencies representing all three branches of government to identify and collect data related to the pre-trial process. The pre-trial period encompasses the various stages of a criminal case from the time a defendant is charged with an offense until the final disposition (trial and/or sentencing) of the matter.

The Crime Commission published its initial report on the *Virginia Pre-Trial Data Project*, including a preliminary analysis of statewide findings, in December 2019.² Crime Commission staff continued its analysis of the dataset from the *Project* throughout 2020. At the January 5, 2021, Crime Commission meeting staff presented an update on the *Project*, along with statewide descriptive findings from its continued analysis.³ Staff published this presentation, as well as handouts detailing the statewide descriptive findings and a preliminary data codebook.⁴ Staff is currently finalizing the descriptive statewide and locality level analysis and will publish a detailed final report in 2021.

CRIME COMMISSION LEGISLATION

Staff made the following two recommendations related to pre-trial data collection and the overall pre-trial process at the January 5, 2021, Crime Commission meeting:

Recommendation 1: Require the Virginia Criminal Sentencing Commission to annually collect and report on pre-trial data and to make such data publicly available in downloadable and interactive dashboard form.

Staff provided Crime Commission members with draft legislation to codify the *Virginia Pre-Trial Data Project*, require that the Virginia Criminal Sentencing Commission (VCSC) be responsible for continuing the collection of pre-trial data, mandate that it be replicated on an annual basis, and require that data from the *Project* be made available to the public. Staff recommended that the VCSC be responsible for future iterations of the *Project* since they have a vast amount of experience in analyzing large datasets and have already developed a methodology for obtaining pre-trial data. Furthermore, the VCSC routinely provides sentencing data to the public both through data requests and via an interactive dashboard on their website.

In order to fully understand Virginia's pre-trial system, it is imperative that statewide and locality level data measures continue to be collected. Replications of the initial dataset will afford the ability to track any changes in pre-trial trends or outcomes in the future, as well as inform policy decision-makers, practitioners, and researchers. Making the dataset publicly available is not only vital for data transparency, but it also will allow other entities the ability to perform their own data inquiries and analyses.

The Crime Commission voted unanimously to endorse the draft legislation for introduction during the 2021 Regular Session of the General Assembly.

Recommendation 2: Request that the Committee on District Courts study and make recommendations on procedures and practices for appointing an attorney and conducting a bond hearing when any detained person first appears before the court.

During the pre-trial process study, staff found that the procedures for when a defendant first appears before the court vary considerably across the Commonwealth, as well as within courts in the same jurisdiction. Due to the extent of these variations, staff recommended that subject matter experts and impacted stakeholders be brought together to discuss the many logistical and resource considerations required to address this issue. Staff recommended that the Committee on District Courts undertake this study because most defendants in Virginia who are held with a secure bond or held without bond make their first appearance before a district court.⁵ The Crime Commission unanimously voted to send a letter requesting that the Committee on District Courts conduct and complete a review of these issues and provide a report with recommendations to the Crime Commission. A report with findings and any recommendations will be provided to the Crime Commission by December 1, 2021.

2021 REGULAR SESSION LEGISLATION

The *Virginia Pre-Trial Data Project* legislation endorsed by the Crime Commission was introduced during the 2021 Regular Session of the General Assembly (House Bill 2110 - Del. Charniele L. Herring and Senate Bill 1391 - Sen. L. Louise Lucas).⁶ Both bills passed the General Assembly unanimously and were signed into law by the Governor.⁷

The enacted legislation requires the VCSC to annually collect and report on pre-trial data for all adults charged with aailable offense in the Commonwealth, such as:

- Defendant demographics, such as sex, race, birth year, and residential zip code;

- Whether the defendant is indigent;
- Types and classifications of charges;
- Prior criminal history;
- Bond information;
- Time between the charge and release from custody;
- If released from custody, time between release and a new offense or failure to appear;
- Final case disposition;
- Court appearance rates;
- Public safety rates (new arrest); and,
- Any other data deemed relevant and reliable by the VCSC.

The VCSC must also make this data available to the public as an electronic dataset and on an interactive data dashboard tool that displays data at the statewide and locality level. The VCSC is authorized to begin the collection of data on July 1, 2021. The first report from the VCSC is due by December 1, 2022, which is also when the pre-trial data must be made publicly available.

Additionally, the enacted legislation mandates that the Crime Commission provide the October 2017 dataset from the *Virginia Pre-Trial Data Project* to the VCSC so that they can make it publicly available as an electronic dataset by October 1, 2021.

ENDNOTES

¹ Virginia State Crime Commission. (2018). *2017 Annual report: Pretrial services agencies*, pp. 111-144. Available at <https://rga.lis.virginia.gov/Published/2018/RD207/PDF>. Virginia State Crime Commission. (2019). *2018 Annual report: Virginia Pre-Trial Data Project and pre-trial process*, pp. 42-71. Available at <https://rga.lis.virginia.gov/Published/2019/RD247/PDF>.

² Virginia State Crime Commission. (Dec. 2019). *Virginia Pre-Trial Data Project Preliminary Findings*. Available at <http://vscc.virginia.gov/images/VSCC%20Pre-Trial%20Data%20Project%20Preliminary%20Findings.pdf>.

³ Virginia State Crime Commission. (Jan. 5, 2021). *Virginia Pre-Trial Data Project*. Available at: <http://vscc.virginia.gov/2021/VSCC%20Virginia%20Pretrial%20Data%20Project%20Presentatio n.pdf>.

⁴ Virginia State Crime Commission. (Jan. 5, 2021). *Virginia Pre-Trial Data Project Statewide Descriptive Findings*. Available at <http://vscc.virginia.gov/2021/VSCC%20Pre-Trial%20Statewide%20Descriptive%20Findings%20Jan%202021.pdf>. Virginia State Crime Commission. (Jan. 5, 2021). *Virginia Pre-Trial Data Project Preliminary Data Codebook*. Available at <http://vscc.virginia.gov/2021/VSCC%20Pre-Trial%20Data%20Project%20Preliminary%20Data%20Codebook%20Definitions%20Jan%20202 1.pdf>.

⁵ See VA. CODE ANN. § 16.1-69.33 (2020) for additional information on the Committee on District Courts.

⁶ House Bill 2110 is available at <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=212&typ=bil&val=hb2110>. Senate Bill 1391 is available at <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=212&typ=bil&val=sb1391>.

⁷ 2021 Va. Acts, Sp. Sess. I, ch. 111 and 112.

