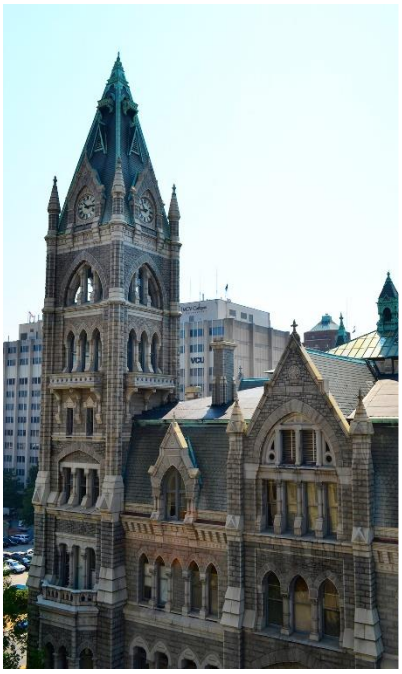
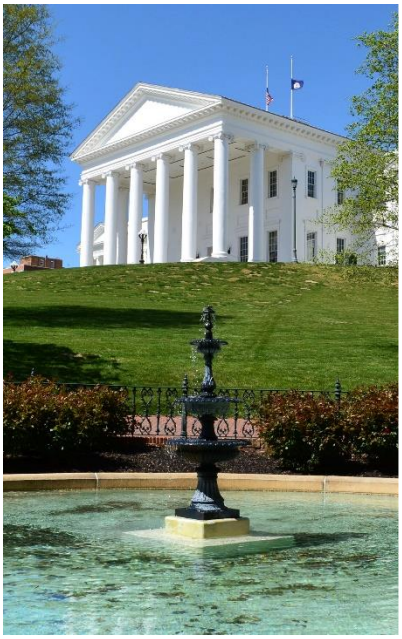
2021

ANNUAL REPORT

VIRGINIA STATE CRIME COMMISSION





Senator John S. Edwards, *Chair* ♦ Delegate Les R. Adams, *Vice-Chair*
Kristen J. Howard, *Executive Director*

June 30, 2022

TO: The Honorable Glenn Youngkin, 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 2021 Annual Report.

Very truly yours,

John S. Edwards, Chair

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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.

2021 MEMBERS OF THE CRIME COMMISSION

HOUSE OF DELEGATES APPOINTEES

The Honorable Charniele L. Herring, Chair
The Honorable Les R. Adams
The Honorable Jeffrey L. Campbell*
The Honorable Paul E. Krizek
The Honorable Delores L. McQuinn*
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
Kashea P. Kovacs, Research Analyst
Jake R. Lambert, Staff Attorney
Jacob M. Lubetkin, Staff Attorney
Amanda M. Muncy, Staff Attorney
Tracy M. Roe, Policy and Operations Analyst
DeVon E. Simmons, Staff Attorney

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**Delegates Campbell and McQuinn were appointed to the Crime Commission on August 13, 2021.*

2021 EXECUTIVE SUMMARY OF ACTIVITIES

The Crime Commission engaged in a variety of studies throughout 2021. Crime Commission staff continued work on several ongoing studies, including the *Virginia Pre-Trial Data Project*, parole, and the expungement and sealing of criminal records. In addition, staff examined two new topics, secured bond and diversion, which stemmed from previous studies of the overall pretrial process in Virginia.

In September, the Crime Commission published the *Virginia Pre-Trial Data Project: Final Report*.[1] The *Project,* which began in 2018, was developed to identify, merge, and analyze data from numerous state and local government agencies into a singular dataset that could be used to inform many important questions related to the pretrial process in Virginia. The *Project* resulted in the development of one of the most comprehensive collections of pretrial data in the nation. Legislation enacted during the 2021 General Assembly Session requires the Virginia Criminal Sentencing Commission to continue the *Project* on an annual basis by collecting and reporting on pretrial data and making such data publicly available, excluding any personal and case identifying information.[2]

The Crime Commission held meetings on November 4 and November 15 to review and discuss study findings. During the November 4 meeting, staff presented on the *Virginia Pre-Trial Data Project*, secured bond, and diversion. Commission members also heard presentations on diversion from the Virginia Department of Social Services, Virginia Association of Community Services Boards, and the Virginia Association of Community-Based Providers. During the November 15 meeting, staff and key stakeholders updated Commission members on the expungement and sealing of criminal records. In addition, the Office of the Executive Secretary of the Supreme Court of Virginia advised members of the findings and policy considerations stemming from the *Appointment of Counsel at First Appearance Work Group*. Finally, the Virginia Department of Criminal Justice Services provided an update on pretrial services agencies.

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

[1] The *Virginia Pre-Trial Data Project: Final Report*, along with links to descriptive findings at the statewide and locality level for each individual locality in Virginia, is available on the Crime Commission's website at http://vscc.virginia.gov/virginiapretrialdataproject.asp.

[2] The Virginia Criminal Sentencing Commission created a page on its website dedicated to the *Virginia Pre-Trial Data Project* which is available at http://www.vcsc.virginia.gov/pretrialdataproject.html. This page includes a link to the Sentencing Commission's interactive *Pre-Trial Data Project Dashboard*.

STUDY HIGHLIGHTS

DIVERSION

Study Highlights **January 2022**

Virginia law does not preclude the creation of local diversion programs.

Legislation is not required to expand diversion in Virginia, and new laws could inadvertently hinder or restrict existing local diversion programs.

Diversion in the criminal justice system intersects with numerous other societal challenges, such as:

- Education
- Health
- Housing
- Poverty
- Racial inequities
- Trauma
- Unemployment

Virginia can support diversion by providing funding and resources for new or existing programs.

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What is diversion?

Diversion is a broad term with various definitions. For purposes of the Crime Commission's study, staff defined diversion as an initiative or process (formal or informal) that allows an adult defendant to avoid a criminal charge and/or conviction by participating in or completing certain programs or conditions.

What is the purpose of diversion?

Diversion can be used to address the root causes of crime by focusing on treatment, prevention, and rehabilitation in the criminal justice system. Diversion programs can assist with meeting a wide variety of needs, such as substance abuse treatment, mental or behavioral health treatment, domestic violence counseling, employment, and housing.

What are the benefits and challenges of diversion?

The benefits of diversion include offender rehabilitation, reduced recidivism, avoiding the collateral consequences of a criminal record, and the preservation of criminal justice system resources. However, the challenges of diversion include a lack of funding and resources, limited programming, a lack of legal counsel at the appropriate phases, and burdensome program requirements for participants.

At what point in the criminal justice system can an individual be diverted?

Staff identified four specific diversion points in the criminal justice system:

1. Pre-Law Enforcement Encounter: individuals receive support and treatment in the community prior to any contact with the criminal justice system.
2. Pre-Arrest: law enforcement officers are instructed or empowered to divert individuals into treatment for behavioral needs in lieu of arrest under certain circumstances.
3. Pre-Charge: prosecutors either do not file charges or suspend the prosecution of charges while an individual participates in a diversion program.
4. Post-Charge: occurs after an individual has entered the court system and includes both deferred adjudication and specialty dockets.

How does diversion in Virginia compare to diversion in other states?

All 50 states have implemented some form of diversion. Virginia, similar to the majority of other states, has a mix of statewide statutory diversion and locality-specific diversion programs. The majority of statewide diversion in Virginia is post-charge, while locality-specific programs have been implemented using available resources to address the specific needs of the locality.

What is needed to expand diversion across Virginia?

Expanding diversion across Virginia will require additional and ongoing resources, communication and collaboration amongst stakeholders, and infrastructure for programs and supervision, such as hiring and training staff and service providers.

SECURED BOND

Study Highlights **January 2022**

An analysis of the 11,487 defendants in the *Virginia Pre-Trial Project* dataset who were charged with a new offense punishable by incarceration where a bail determination was made by a judicial officer revealed:

- 83% (9,503 of 11,487) were released during the pretrial period; and,
- 17% (1,984 of 11,487) were detained the entire pretrial period.

Of the 9,503 defendants released during the pretrial period:

- 56% (5,364) were released on PR or unsecured bond; and,
- 44% (4,139) were released on secured bond.

Most defendants were released from custody within 3 days of arrest.

The median secured bond amount was $2,500 across felony contact events and $2,000 across misdemeanor contact events.

What is secured bond?

When a person is charged with a crime and not released on a summons, that person will either be detained the entire pretrial period or released prior to trial under one of the following bail conditions: personal recognizance (PR) bond, unsecured bond, or secured bond. Neither PR nor unsecured bond require any financial conditions to be met before a person is released. Conversely, a secured bond requires a financial condition to be met before a person can be released. A secured bond can be posted by (i) paying the total amount of the bond in cash, (ii) allowing the court to obtain a lien against personal property, or (iii) utilizing a surety on the bond, who is most commonly a bail bondsman.

Key Study Findings

Staff conducted a comprehensive study of secured bond by reviewing relevant literature, examining Virginia bail statutes, analyzing statewide Virginia data, identifying bail reform measures in other states, and surveying numerous practitioners across Virginia. As a result of these efforts, staff developed the following ten key study findings relating to secured bond:

1. Virginia is in a unique position to examine its pretrial system as a result of the *Virginia Pre-Trial Data Project* ("*Project*"). While the October 2017 statewide dataset from this *Project* can be used to inform policy decisions, it cannot explain the "why" behind the data. Additionally, it is important to note that the data is limited in scope, as it was collected for a one-month time period that precedes the COVID-19 pandemic and recent criminal justice reform measures in Virginia.

2. While several other states have enacted bail reform measures, various factors present challenges to ascertaining the specific impacts of these reforms. The primary challenge is that no state has completely eliminated the use of secured bond. Furthermore, several states implemented bail reform measures and then repealed or modified those reforms. Additional challenges include the recentness of reform measures, a lack of complete or reliable data, the COVID-19 pandemic, and an overall rise in crime rates nationwide.

3. The statewide analysis of the *Project* dataset showed that (i) most defendants were ultimately released prior to trial, (ii) the majority of those defendants were released on a PR or unsecured bond, (iii) the large majority of defendants who were released prior to trial appeared in court, and (iv) the majority of defendants who were released prior to trial were not arrested for a new in-state criminal offense during the pretrial period. Furthermore, when examining the defendants who were released prior to trial and arrested for a new in-state offense during the pretrial period, data showed that the vast majority of those defendants were arrested for an in-state misdemeanor.

Of the 4,139 defendants who were released on a secured bond, 25% (1,019) also received pretrial services agency supervision.

Data on court appearance and public safety outcomes for the 9,503 defendants released during the pretrial period showed:

- 86% (8,149) were not charged with failure to appear during the pretrial period; and,
- 76% (7,204) were not arrested for a new in-state offense punishable by incarceration during the pretrial period.

Further examination of the 11,487 defendants who were charged with a new offense punishable by incarceration where a bail determination was made by a judicial officer found that:

- 59% were convicted of at least one charge in their contact event; and,
- Defendants who remained detained the entire pretrial period had higher conviction rates (77%) as compared to defendants who were released during the pretrial period (56%).

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4. A bail determination is not based solely on the nature of the current criminal charge. Bail determinations are made on a case-by-case basis using various statutory criteria, such as the person's prior criminal record, their ties to the community, and their ability to pay bond. These criteria are intended to aid magistrates and judges when determining whether a person poses a flight risk or a risk to public safety, even when the person is charged with a seemingly minor crime.

5. Magistrates and judges have broad discretion when setting bail conditions. These conditions are meant to ensure that a person appears in court and maintains good behavior pending trial. Such imposed conditions can include, but are not limited to, pretrial services agency supervision, electronic monitoring, drug testing, curfews, and no contact orders.

6. The Virginia Code favors setting bail, but does not guarantee pretrial release. Magistrates and judges must set bail unless there is probable cause to believe that a person is a flight risk or a risk to public safety.

7. The statewide analysis of the *Project* dataset found that many of the defendants released during the pretrial period were indigent. At least half of defendants released on a PR or unsecured bond were indigent, while at least 62% of defendants released on a secured bond were indigent.

8. The statewide analysis of the *Project* dataset also found that many of the defendants detained the entire pretrial period were indigent. At least 78% of the defendants who were detained the entire pretrial period were indigent. This data does not explain why these defendants remained detained. Defendants may remain detained for a variety of reasons, such as being held without bail, not being able to afford the secured bond, not having family or friends who are able or willing to post bond, or choosing to remain detained.

9. Bail bondsmen and pretrial services agencies are unique, but can be complimentary. The 2019 statewide analysis of the *Project* dataset by staff found that public safety outcomes were identical across defendants released on PR or unsecured bond with pretrial services agency supervision, secured bond only, and secured bond with pretrial services agency supervision. However, this analysis also revealed that court appearance rates were higher for the group of defendants who were released on secured bond with pretrial services agency supervision.

10. The potential impacts of bail reform in Virginia are unknown. While changes can be made to the use of secured bond in Virginia, it is unknown how such changes will impact detention rates, court appearance rates, public safety rates, the use of other bail conditions, and the need for various resources.

Broader measures to address pretrial detention rates

While this study focused primarily on the use of secured bond, other policy options exist to address pretrial detention rates in Virginia. These measures will require broader changes across the pretrial system, such as:

- Utilizing technology in the field so law enforcement officers can fingerprint individuals and release them on a summons for more classes of offenses;
- Implementing a non-interview based risk assessment instrument for use by magistrates and judges when making bail determinations;
- Expanding the availability of pretrial services agencies; and,
- Investing in community and pretrial diversion programs.

Expungement and Sealing of Criminal and Court Records

Study Highlights

January 2022

Virginia is now one of:

- 44 states that seal misdemeanor convictions;
- 38 states that seal felony convictions; and,
- 8 states that automatically seal broad classes of criminal offenses.

The Virginia Code currently includes three forms of criminal record relief:

- Expungement;
- Sealing; and,
- Marijuana expungement.

These three forms of criminal record relief are in conflict and must be reconciled to ensure:

- The framework is consistent;
- Individuals have access to the processes;
- Post-relief protections are uniform; and,
- Continuing resources to support the processes are made available.

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Staff continued its work on expungement and sealing of criminal and court records during 2021. Legislation was enacted during Special Session I of the 2021 General Assembly that created new automatic and petition-based processes to seal certain criminal charges and convictions (HB2113/SB1339). These bills also directed the Crime Commission to continue its study and examine the following unresolved matters:

1. Examine the interplay between the expungement and sealing of records.
The Virginia Code now contains three forms of criminal record relief: expungement, sealing, and marijuana expungement. Expungement removes records from public inspection, while sealing and marijuana expungement limit access to and dissemination of records to 25 specific purposes. These forms of relief vary significantly in terms of purpose, process, who has access to each process, and what protections are provided when a record is expunged or sealed. Numerous policy decisions must be made to align these provisions in the Code.

2. Recommend a review process for any changes to expungement or sealing.
Staff recommended that any legislation addressing the expungement or sealing of records be referred to the Crime Commission until the sealing legislation takes effect (July 2025 or earlier). Staff made this recommendation because the sealing legislation requires various stakeholders to provide annual reports to the Crime Commission until the new sealing processes are implemented. No motion was made on this recommendation.

3. Identify methods to educate the public on the new sealing processes.
Staff recommended creating two new full-time positions at the Indigent Defense Commission to provide training and support to public defenders and court-appointed counsel on the new expungement and sealing laws. The Crime Commission unanimously endorsed this recommendation.

4. Review the permissible uses of expunged and sealed records.
Expunged records can only be accessed and disclosed by court order. Sealed and marijuana expunged records can be accessed and disclosed for 25 purposes.

5. Evaluate the impact of plea agreements on expunged and sealed records.
Staff reviewed the Virginia Code and the criminal record relief laws of other states and identified a variety of competing approaches in regard to how expungement and sealing are impacted by plea agreements. Staff concluded that while plea agreements that restrict a person's ability to expunge or seal a record can be contrary to the intent of criminal record relief laws, there may be times when such an agreement is beneficial to a defendant.

6. Determine the feasibility of destroying expunged or sealed records.
Expunged records in Virginia are not initially destroyed, but rather physical and electronic access to such records is significantly restricted. Conversely, sealed and marijuana expunged records are maintained for 25 specific purposes. Staff determined that destroying expunged or sealed records would be extremely labor intensive, require significant resources from numerous entities, and be contrary to the intent of the new sealing legislation.

STUDY REPORTS

DIVERSION

EXECUTIVE SUMMARY

Since 2016, the Crime Commission has been studying various aspects of the pretrial process. In 2021, as an extension of this study, the Executive Committee of the Crime Commission directed staff to examine adult diversion. For purposes of this study, staff defined diversion as an initiative or process (formal or informal) which allows an adult defendant to avoid a criminal charge, conviction, or active incarceration by participating in or completing certain programs or conditions.

Diversion is part of a broader philosophical shift to prevention, treatment, and rehabilitation across various points in the criminal justice system. Diversion programs vary widely in their focus, scope, and outcomes; however, the overall purpose and goals of each program remain consistent. While diversion programs have a variety of potential benefits, such programs can be difficult to evaluate for various reasons.

Staff conducted a 50 state statutory review and found that almost every state has enacted laws that allow for some form of diversion. Staff further identified four key diversion points across the criminal justice system: (1) pre-law enforcement encounter, (2) pre-arrest, (3) pre-charge, and (4) post-charge. Staff determined that Virginia, like many other states, offers a mix of both statewide statutory diversion and locality-specific diversion programs. Staff identified some formal and informal diversion programs in Virginia by reviewing the Virginia Code and conducting an informal survey of numerous stakeholders; however, the full scope of diversion programming in Virginia is unknown.

At the November 4, 2021, Crime Commission meeting, staff informed Crime Commission members that new diversion legislation is not required and that the General Assembly can support diversion across Virginia by providing funding and resources for new and existing programs. Ultimately, staff advised that expanding diversion across Virginia will require additional and ongoing resources for treatment, supervision, and workforce needs, along with communication and collaboration amongst stakeholders to maximize these services and resources.

BACKGROUND AND METHODOLOGY

The Crime Commission has been studying various aspects of the pretrial process since 2016.[1] In 2021, the Executive Committee of the Crime Commission directed staff to conduct a review of diversion as part of this ongoing study. While the term diversion can have a variety of meanings,[2] staff defined diversion for purposes of this study as an initiative or process (formal or informal) which allows an adult defendant to avoid a criminal charge, conviction, or active incarceration by participating in or completing certain programs or conditions. The study was limited to adult diversion and did not address the juvenile justice system.

Due to the significant amount of information available on this topic, staff focused its efforts on developing a general overview of diversion and providing members of the Crime Commission with information about diversion in Virginia and in other states. Staff engaged in the following activities as part of its study on diversion:

- collected relevant literature on diversion programs and practices;
- reviewed Virginia laws governing diversion;
- surveyed localities to identify current diversion programs in Virginia;
- examined diversion laws and programs in other states;
- attended the *2021 Public Policy Conference* hosted by the Virginia Association of Community Services Boards;
- conducted informal surveys of various stakeholders in Virginia; and,
- met with various entities to learn about diversion practices in Virginia.

OVERVIEW OF DIVERSION

Formal diversion programs began to take hold in the early 1970s when prisons and jails across the United States saw a significant influx in population.[3] Over the next several decades, some form of diversion was adopted in every state throughout the country. Diversion is part of a broader philosophical shift to address the root causes of crime by focusing on treatment, prevention, and rehabilitation across various points in the criminal justice system.[4] Diversion within the criminal justice system intersects with a number of societal challenges, such as lack of education, poor mental and physical health, lack of housing, poverty, racial inequities, trauma, and unemployment.[5] While many diversion programs focus on individuals with substance use and mental health issues,[6] these programs are also designed to address a variety of other challenges, such as behavioral health, domestic violence, employment, and

housing. The variances across diversion programs demonstrates the array of challenges that many people who come in contact with the criminal justice system face.[7]

While diversion programs can vary widely in their focus, scope, and outcomes,[8] the overall purpose and goals of each program remain consistent. The basic purpose of diversion is to redirect individuals from the traditional criminal justice system while simultaneously ensuring that these individuals are held accountable for their criminal behavior.[9] Thus, diversion seeks to accomplish a number of goals when directing individuals away from the traditional criminal justice system, such as:

- decreasing collateral consequences;
- reducing recidivism;
- enhancing focus on fair and equitable justice;
- increasing defendant accountability and victim rights; and,
- improving process efficiency and cost reduction.[10]

Decreasing Collateral Consequences

A record of an arrest, criminal charge, or conviction can trigger a variety of collateral consequences that impede an individual's ability to become a productive member of the community long after he or she has completed the terms of his or her sentence.[11] Both misdemeanor and felony charges and convictions can impose significant collateral consequences on individuals.[12] The National Inventory of Collateral Consequences of Convictions found that there are over 45,000 federal and state collateral consequences that can potentially stem from a criminal conviction.[13] Such consequences may be long-term and can include, but are not limited to, challenges to obtaining employment and housing, limitations on business opportunities, the risk of deportation for non-citizens, and barriers to higher education and/or professional licensure.[14] In addition, 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.[15]

Reducing Recidivism

When properly designed and implemented, diversion can be effective in reducing recidivism.[16] Reducing recidivism is an important goal for diversion programs, especially since these programs are typically available to individuals who have been charged and/or convicted of low-level or first time offenses.[17] Thus diversion programs, when successful, can reduce the

chances that a first time offender engages in further activity that leads to more contact with the criminal justice system. However, because of the differences across diversion programs, the rate of re-offending varies according to the target population and the particular characteristics of each diversion program.[18]

In order to achieve a lower recidivism rate, effective diversion programs seek to rehabilitate program participants. The most effective rehabilitation diversion programs are informed by social science research and local data.[19] With successful rehabilitation, it is less likely that individuals will re-offend because diversion programs focus on addressing the underlying issues that they face, such as substance abuse or a mental health diagnosis.[20]

Enhancing Focus on Fair and Equitable Justice

Diversion programs can be a mechanism to promote fair and equitable justice. As such, programs should be designed to provide equal access to participants by using objective processes and tools to identify eligible candidates.[21] Ideally, diversion programs do not consider socioeconomic status, race, or other fundamental attributes to determine eligibility. In addition, the existence of formal and informal diversion programs can be made known to a wide variety of stakeholders, both in the criminal justice system and in the community, thereby ensuring that eligible individuals are identified and referred to such programs.

Increasing Defendant Accountability and Victim Rights

While a key component of diversion programming is treatment and rehabilitation, another important aspect involves addressing the harm that a criminal act caused an individual or the community at large.[22] Victims of crime have basic rights, which may include notification of court proceedings, the right to seek monetary restitution from offenders, and the option to provide a victim impact statement.[23] Some diversion programs are victim-centered and require that a victim consent to an offender's participation in the program, while other diversion programs do not require any victim involvement.

Diversion programs with a victim restoration component can emphasize the needs of a particular victim and offer a personalized approach to conflict resolution.[24] For instance, the defendant may be required to engage in community service, manual labor, mediation, or write letters of apology. In contrast, some diversion programs may benefit the community at large while providing no specific benefit to a particular victim. For example, if a person is arrested for committing a robbery due to an underlying substance abuse disorder, there may be a

significant community benefit to having the offender participate in a drug diversion program, even if the specific victim does not agree that a drug diversion program is an appropriate consequence.[25]

Improving Process Efficiency and Cost Reduction

The traditional method of how a case moves through the criminal justice system can be time consuming and expensive. Diversion can be a tool to limit expenses usually placed on the traditional criminal justice system, which can allow for the allocation of resources to more serious cases.[26] In many cases, a diversion program may be utilized to more quickly achieve a mutually agreed upon case resolution and thereby relieve the caseloads of overburdened courts. In addition to alleviating court caseloads, diversion programs can also be used to alleviate expenses in other parts of the criminal justice system, such as reducing the population of over-crowded jails and prisons.[27]

Diversion Limitations and Challenges

While diversion programs offer several potential benefits, some limitations and challenges exist when it comes to implementing and evaluating such programs. Two of the most prevalent challenges associated with diversion are a lack of program resources and a limited number of available programs. Effective diversion programs require resources to implement the program and then a continuum of resources to sustain the program. Without proper resources, implementing new diversion programs and sustaining existing diversion programs is not possible.

Aside from the resource challenges, diversion programs can place burdensome requirements on participants. Such requirements can make it difficult for participants who lack financial or transportation resources, or who face time constraints due to employment and/or family obligations, to successfully complete the diversion program.[28] Often there are a number of regularly scheduled in-person obligations a participant must attend, and this can prove difficult for participants who are employed or who lack transportation and/or stable housing. In addition, diversion program participants can face numerous financial obligations, such as paying restitution to victims, court fees, attorney fees, and diversion program fees.[29] These financial obligations can be burdensome to participants, particularly those who do not have a consistent income.[30] Furthermore, individuals may not have the opportunity to consult with legal counsel prior to entering a diversion program, which may mean that these individuals do

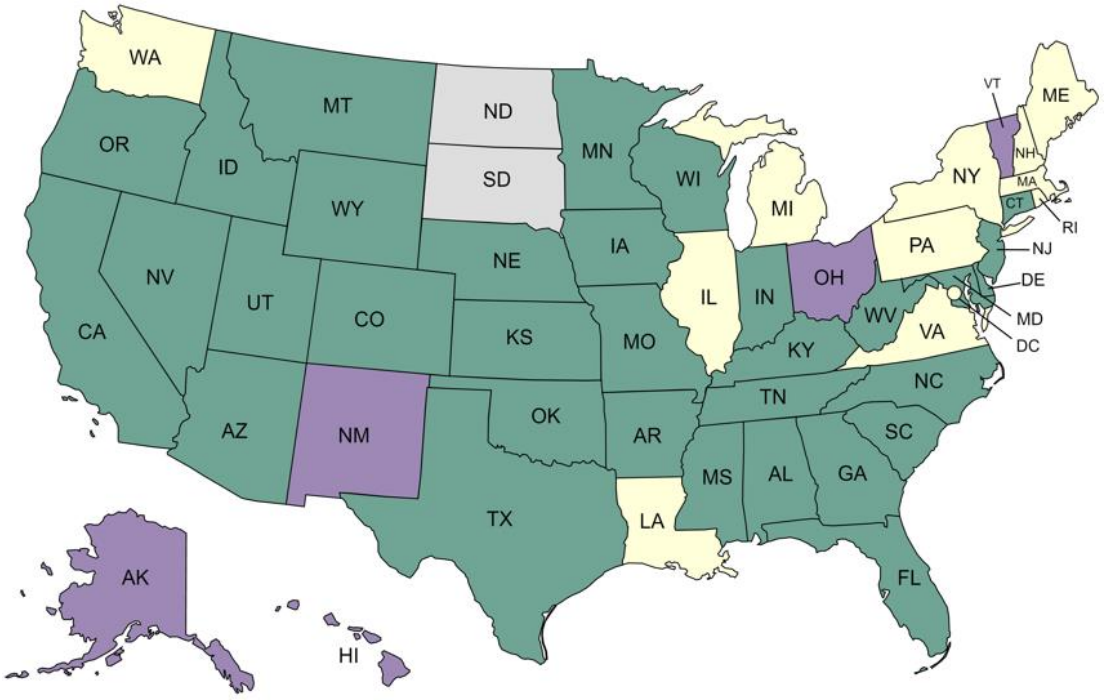
not understand that the program is voluntary or that they are not informed of all the financial and time burdens that these programs can impose. The inability to consult with legal counsel is more likely to occur when program entry occurs early in the criminal justice process.[31]

Finally, it is difficult to evaluate diversion programs and measure program outcomes due to a lack of program uniformity. As noted earlier in this report, there is no singular definition of diversion. Diversion programs are often community-based and therefore the terminology and criteria used varies across jurisdictions.[32] Similarly, there are no general standards for the collection or publication of data to track specific measures, such as participant demographics, cost/time savings, and recidivism rates.[33] As such, it can be challenging to evaluate diversion programs and replicate effective practices.

Diversion Across the United States

Staff conducted a 50 state statutory review and found that almost every state has enacted laws that allow for some form of diversion.[34] States commonly tailor statutory diversion programs to meet the needs of either the overall state population or of specific populations within the state.[35] As seen in the following map, staff identified states with general pretrial population diversion programs, population-specific diversion programs, or both types of programs.[36] Staff also found that there are many locality-specific diversion programs operating throughout the United States. Because Virginia law currently includes numerous post-disposition diversion statutes (as detailed later in this report), staff specifically focused on states with general *pretrial* population diversion statutes. Therefore, the analysis of the general pretrial population diversion states referenced in the map and described in the next section is solely limited to pretrial diversion statutes; however, the population-specific diversion states include both pretrial and post-disposition diversion statutes.

GENERAL PRETRIAL POPULATION AND POPULATION-SPECIFIC DIVERSION ACROSS THE UNITED STATES



- States with general pretrial population diversion programs (5 states)
- States with population-specific diversion programs (11 states and D.C.)
- States with both types of diversion programs (32 states)
- States without statutory diversion programs (2 states)

Map by Crime Commission staff based on legal analysis.

General Pretrial Population Diversion

Thirty-seven states authorize general pretrial population diversion programs, which are used to address the wide-ranging needs of individuals in the overall state population.[37] Typically, general pretrial population diversion statutes authorize a specific entity to create and/or administer a diversion program. Such authority is commonly designated to prosecuting attorneys, local courts, or other state governmental entities.[38] In addition, general pretrial population diversion statutes provide guidance on program eligibility requirements, and may specifically exclude certain individuals from a program based on their current criminal charge or prior criminal history.[39]

These general pretrial population diversion statutes and programs vary significantly across states. For example, Florida law authorizes pretrial intervention programs that provide criminal defendants with counseling, education, supervision, and medical and/or psychological treatment, on the condition that the victim, the State Attorney, and the judge who presided over the initial appearance hearing consent to the defendant's participation in the program.[40]

Minnesota requires each participating county attorney to establish a pretrial diversion program for adult offenders that meets statutory goals and conditions.[41] Missouri authorizes general diversionary programs to be created and administered by the Missouri Department of Corrections.[42] South Carolina allows each Circuit Solicitor the discretion to establish a pretrial intervention program in the particular circuit; however, the South Carolina Commission on Prosecution Coordination oversees the administrative procedures of these programs.[43]

Population-Specific Diversion

Forty-three states have population-specific diversion programs which are meant to address the needs of a specific population of individuals.[44] These population-specific diversion programs can be used to serve particular classes of individuals, such as those with substance use or mental health treatment needs.[45] Furthermore, population-specific diversion programs can be utilized for individuals who are charged with specific types of criminal offenses, such as drug possession, driving under the influence, domestic relations offenses, worthless check offenses, property offenses, prostitution-related offenses, human trafficking-related offenses, crimes related to homelessness, defendants statutorily classified as young adults, defendants charged with weapons offenses under certain circumstances, and defendants charged with crimes that affect their neighborhood.[46]

These population-specific diversion statutes and programs vary across states. For example, Alabama law authorizes a diversion program for defendants charged with a variety of offenses, including property offenses, whereupon successful completion of the program may result in a dismissal of the charges.[47] Arkansas law permits a program, either pretrial or post-trial, for defendants who are struggling with drug abuse.[48] Delaware law allows a defendant charged with issuing or passing a worthless check to enter into a diversion program, and if the defendant successfully completes the program, a court may dismiss the charges.[49] Nevada law authorizes a court to establish a program for the treatment of defendants with mental illness or intellectual disabilities. A defendant who qualifies for that Nevada program, and who successfully completes it, may have their charges dismissed by a court.[50]

Locality-Specific Diversion

In addition to the 50 state statutory review, staff also conducted a cursory review of locality-specific diversion programs across the United States. These locality-specific diversion programs operate in specific cities and/or counties within a state, but are not available to the

statewide population. Such programs are designed to focus on the specific needs of the local population and are often funded by the locality. Staff found that several states have locality-specific diversion programs that operate in addition to the statewide statutory programs.[51]

Diversion Points

Staff identified four key diversion points across the criminal justice system based upon a review of the literature and of the diversion statutes and programs from across the country. These key diversion points include: (1) pre-law enforcement encounter, (2) pre-arrest, (3) pre-charge, and (4) post-charge. Diverting an individual at or in-between one of these four points can involve an assortment of stakeholders, such as law enforcement officers, prosecutors, defense counsel, judges, court officials, pretrial services agencies, and others.[52] The discussion below, while by no means exhaustive, provides a description of each diversion point, as well as various examples of diversion programs that fall within each diversion point.

PRE-LAW ENFORCEMENT ENCOUNTER

The earliest diversion point is the pre-law enforcement encounter. At this stage, individuals receive support and treatment within the community prior to any contact with the criminal justice system.[53] These programs address an individual's underlying issues, such as substance abuse, mental health, homelessness, unemployment, and poverty, any of which may increase their likelihood of an encounter with law enforcement. Diversion at this stage allows individuals to avoid the collateral consequences that can stem from an arrest, charge, or conviction. Because pre-law enforcement encounter diversion occurs before an individual enters the criminal justice system, it is extremely difficult to determine the exact number of individuals who have been diverted at this diversion point.[54]

One example of a pre-law enforcement encounter diversion program is Crisis Assistance Helping Out On The Streets (CAHOOTS). Launched as a community policing initiative in Eugene, Oregon, in 1989, CAHOOTS provides a response to non-violent emergencies that involve mental illness, addiction, and/or homelessness.[55] Teams of two, a medic and crisis worker, respond to a variety of crises related to mental health using harm reduction and de-escalation methods.[56]

Another example of a pre-law enforcement diversion program is Assertive Community Treatment (ACT), which may also be referred to as Program of Assertive Community Treatment (PACT).[57] ACT is an evidence-based program that consists of an individualized

package of services geared towards meeting the day-to-day needs of individuals in the community who have serious mental illness by helping those individuals stay in treatment, maintain stable housing, secure and maintain employment, and engage in the community.[58] An ACT participant receives services from a multi-disciplinary team comprised of a psychiatrist, nurse, housing specialist, social worker, and an employment coach.[59] A few states have implemented statewide ACT programs, such as Delaware, Idaho, Michigan, Rhode Island, Texas, and Wisconsin. In addition, the United States Department of Veterans Affairs has implemented an ACT program, called Mental Health Intensive Case Management, which is designed to provide intensive and flexible community support for veterans diagnosed with a serious mental illness.[60]

PRE-ARREST DIVERSION

The second diversion point is at the pre-arrest phase. Diversion at this point empowers or requires law enforcement officers to divert individuals into treatment in lieu of arrest under certain circumstances.[61] Pre-arrest diversion commonly involves partnerships between local law enforcement agencies and other entities, such as mental health and substance abuse agencies and advocates, in order to assist individuals with mental health and/or substance use needs.[62] However, pre-arrest diversion can also be a means for individuals to participate in community-based programs to address needs beyond just mental health and substance use.

Many law enforcement agencies across the country have implemented pre-arrest diversion programs; however, such programs are more likely to operate in larger jurisdictions with larger law enforcement agencies.[63] These programs vary considerably in terms of their purposes, target populations, and eligibility requirements for participation.[64] While pre-arrest diversion programs are continuing to grow in popularity, there have only been a limited number of studies conducted to evaluate and document the effectiveness of these programs.[65] The following subsections provide an overview of two different pre-arrest diversion programs: the Crisis Intervention Team (CIT) model and the Law Enforcement Assisted Diversion (LEAD) program.

Crisis Intervention Team (CIT) Model

One common model of street-level pre-arrest diversion is the crisis intervention team (CIT) model, which involves specially trained law enforcement officers who are available to respond to situations in which mental illness may be a contributing factor.[66] There are over 2,700 CIT

sites throughout the nation.[67] CIT programs have been evaluated based upon a number of metrics, including law enforcement officers' likelihood of arresting individuals with mental illness, referring individuals with mental illness to community-based services, and use of force.

CIT has impacted pre-booking jail diversion, with law enforcement officers more likely to refer individuals to mental health resources and less likely to arrest them.[68] Research conducted to examine the impact of CIT on arrests found that law enforcement officers trained in CIT were less likely to arrest individuals with a mental illness as compared to control groups of non-CIT trained law enforcement officers.[69] Research has also found that CIT trained law enforcement officers were more likely to refer individuals with mental illness to community-based resources in comparison to non-CIT trained law enforcement officers.[70]

The research regarding the effectiveness of CIT on law enforcement officer use-of-force remains mixed.[71] For example, researchers have found that CIT status (whether or not a person was trained in CIT) was "not predictive" of the level of force used by law enforcement officers.[72] However, law enforcement officers trained in CIT were considerably more likely than officers not trained in CIT to report that the highest level of force used in encounters with individuals with mental illness was verbal engagement or negotiation.[73] Other research has found only a "marginal effect" of CIT training on law enforcement officer use-of-force in encounters with individuals with mental illness. For example, one study found that CIT trained law enforcement officers were generally more likely to use higher levels of force.[74] However, when accounting for suspect demeanor, the study found that CIT trained law enforcement officers were more likely to use less force than non-CIT trained law enforcement officers when a suspect's demeanor became more resistant.[75] Further, other factors were also found to impact use-of-force, such as neighborhood disadvantage and saturation of CIT trained law enforcement officers within a neighborhood.[76] Researchers indicate that there are challenges in comparing the effectiveness of CIT programs to similar intervention programs due to the lack of research examining those other models.[77]

Law Enforcement Assisted Diversion (LEAD) Program

An additional example of a pre-arrest diversion program is the Law Enforcement Assisted Diversion (LEAD) program. Established in 2011 as a pilot program in Seattle, Washington, the LEAD program focuses on diverting individuals who were suspected of committing low-level drug and prostitution offenses away from the criminal justice system toward social and legal services.[78] An evaluation conducted to examine the impact of the LEAD program on arrests and criminal charges in Seattle found that program participants were 58% less likely

to be arrested after entry into the program as compared to similar individuals who did not participate in the LEAD program.[79]

The LEAD program has since been implemented in jurisdictions across the United States, and the types of eligible charges for participation have expanded from drug offenses to include an array of nonviolent misdemeanors and lesser charges.[80] For example, a LEAD pilot program in San Francisco included various offenses, such as possession of a controlled substance, sale or transportation of a controlled substance, petty theft, grand theft, prostitution, and solicitation, for participants to be a part of the program.[81] An evaluation on the impact of the San Francisco LEAD program on outcomes such as misdemeanor and felony arrests indicated that participation in the LEAD program decreased the probability of future arrests.[82] Specifically, when comparing LEAD participants and non-participants over a 12 month period, misdemeanor arrests were 6 times higher for those who were not participants in the LEAD program, while felony arrests were almost 2.5 times higher for those who were not participants in the LEAD program.[83]

PRE-CHARGE DIVERSION

The third diversion point is pre-charge diversion, which is frequently referred to as prosecutor-led diversion. The traditional role of a prosecutor is to seek justice by charging and attempting to obtain the conviction of those who engage in criminal behavior, as well as by seeking a legally proportionate sentence.[84] More recently, however, the role of a prosecutor has broadened to include such activities as engaging community members to help solve local crime problems, collaborating with law enforcement on crime prevention, and expanding diversion opportunities.[85]

There are two opportunities for intervention at the pre-charge, or prosecutor-led, diversion point.[86] The first opportunity is at the pre-filing phase, where the prosecutor does not file criminal charges if the individual completes the diversion program. The second opportunity is at the post-filing phase, where the criminal case is filed with the court and the normal adjudication process is suspended by the prosecutor while the individual participates in a diversion program. All charges are typically dismissed upon the completion of the post-filing diversion program.[87]

Research regarding the effectiveness of pre-charge diversion programs has shown that they can be successful.[88] Multi-site evaluations of prosecutor-led diversion programs have found that individual programs have decreased the proportion of cases that resulted in a conviction,

reduced the frequency of re-arrest, and/or contributed to cost savings for criminal justice agencies.[89] For example, a multi-site evaluation of five prosecutor-led diversion programs was conducted to examine the impact of each program on case outcomes, use of jail, and two-year re-arrests.[90] The evaluation included five diversion programs (pre-filing or post-filing) from across three jurisdictions: Cook County Felony Drug School, Cook County Misdemeanor Deferred Prosecution Program, Milwaukee Diversion Program, Milwaukee Deferred Prosecution Program, and Chittenden County Rapid Intervention Community Court.[91] All five diversion programs were found to significantly decrease the percentage of cases that ended with a conviction.[92] For example, 3% of the cases in the Cook County Felony Drug School program ended with a conviction as compared to 63% of cases in the comparison group that did not participate in the program.[93] Further, all programs were also found to reduce jail sentences.[94] For example, 4% of defendants in the Milwaukee Diversion Program were sentenced to jail as compared to 50% in the comparison group who did not participate in the program.[95] Four of the five programs were also found to have decreased the frequency of re-arrest at two years from program enrollment for diversion program participants as compared to comparison group participants.[96] For example, 31% of those who participated in the Milwaukee Deferred Disposition Program were re-arrested after a period of two years as compared to 38% of comparison group participants.[97]

However, these results should not be generalized to argue that all pre-charge diversion programs are effective, especially since pre-charge diversion programs are diverse in terms of program goals, such as rehabilitation, reduced recidivism, and lessening collateral consequences.[98] Further, the programs are specifically established within local jurisdictions, and each local program utilizes differing metrics of success, such as program completion, decreased recidivism, increased utilization of services, reductions in substance use, and increased mental health management.[99] Additionally, comparisons across pre-charge diversion program outcomes and impacts are difficult due to the diverse admission criteria and conditions imposed by each program.

POST-CHARGE DIVERSION

The final diversion point is post-charge diversion, which occurs after a criminal charge has entered the court system and includes deferred adjudication or disposition, specialty dockets, problem-solving courts, and jail diversion. These programs are driven by therapeutic and rehabilitative objectives and may operate with a specialized team approach meant to provide services to defendants.[100]

A deferred adjudication or a deferred disposition are options that fall under the formal authority of the court. In general, a deferred adjudication allows the court to withhold a finding of guilt and a deferred disposition allows the court to withhold imposing a sentence. Oftentimes the court will order the defendant to complete some form of probation and/or other conditions as part of the order to defer the adjudication or disposition of a case. If the defendant successfully completes probation and/or the other conditions, then the court may dismiss the charge or fashion some other sentence that is more favorable to the defendant. A number of states have enacted statutes that address the deferred adjudication or deferred disposition processes.[101]

Specialty dockets and problem-solving courts are a specific approach to diversion which provide defendants with intensive treatment, graduated sanctions and rewards, court monitoring, and other programming, such as education or job training.[102] Specialty dockets and problem-solving courts involve teams that may be brought together from a variety of offices, such as judges, prosecutors, defense attorneys, mental health workers, and other service providers.[103] Such courts can include, but are not limited to, drug courts, mental health courts, and veterans' courts.[104] By the end of 2020, there were over 3,800 specialty dockets and problem-solving courts operating across the United States.[105]

Jail diversion programs are specialized programs that were created to address the issues associated with incarcerated criminal defendants with mental illnesses.[106] A significant number of individuals who are charged with a crime suffer from a mental illness.[107] Jail diversion programs aim to help participants avoid or reduce incarceration, reduce recidivism, and improve their mental health stability through regular contact with community-based treatment providers.[108]

Evidence regarding the effectiveness of post-charge diversion programs has been mixed; however, participation in mental health courts and drug courts has been associated with increased utilization of community behavioral health services and decreased substance use and recidivism.[109] For example, a meta-analysis examining the effectiveness of mental health courts found a "modest effect" on recidivism for participants as compared to those were traditionally processed through the criminal justice system.[110] Participation in mental health courts was most effective at reducing jail time after an individual completed the mental health court program.[111] A meta-analysis examining the effectiveness of drug courts found that adult drug courts are effective in reducing recidivism at one and three years post program entry.[112]

Despite these findings, there has been some criticism regarding the evaluation of specialty courts, especially drug courts. Researchers must overcome methodological, ethical, and legal challenges in evaluating the effectiveness of drug courts.[113] Methodological concerns focus on the ability to conduct research that is deemed methodologically rigorous to understand the effects of drug courts.[114] Randomized control trials in which individuals are randomly assigned to participate in treatment and control conditions is considered the gold standard in research.[115] However, the random assignment of individuals within the criminal justice system is not always a practical option.[116] The ethical concerns regarding research with drug courts centers on the vulnerability of participants.[117] Drug court participants who take part in a research study must understand, consent to, and voluntarily enroll in the research study.[118] The legal concerns focus on the impact that participating in a drug court research study has on the procedural due process rights of drug court participants.[119] Drug courts may require participants to pay a variety of fees and fines, often require an extensive period of participation that can be greater in time than the period of incarceration a defendant would have served for the crime, and require relapsed defendants to serve jail or prison sentences instead of receiving continued treatment and support.

DIVERSION IN VIRGINIA

Staff found that Virginia, like many other states, offers a mix of both statewide statutory diversion and locality-specific diversion programs. Staff reviewed the Virginia Code and conducted an informal survey of numerous stakeholders in an attempt to identify formal and informal diversion programs in Virginia. Respondents to these informal surveys included general district court judges, Commonwealth's Attorneys, Public Defenders, court-appointed counsel, and pretrial services agency directors. Based on these efforts, staff identified the following diversion opportunities in Virginia:

- deferred adjudication and deferred disposition statutes;
- Crisis Intervention Team (CIT) programs;
- drug treatment courts;
- behavioral health dockets;
- Assertive Community Treatment (ACT)/Program of Assertive Community Treatment (PACT); and,
- local diversion programs.

Deferred Adjudication and Disposition Statutes

Virginia enacted legislation in 2020 that allows the court to defer any criminal case, "with or without a determination, finding, or pronouncement of guilt," under terms and conditions agreed to by the parties or set by the court.[120] After deferring the case, the court may convict the defendant of the original charge, convict the defendant of an alternative charge, or dismiss the charge.[121] Additionally, charges that are dismissed under this new Code section can be expunged pursuant to an agreement of all the parties.[122]

While this new Code section allows for the deferred adjudication of any criminal case, most of Virginia's diversion statutes allow for the deferred disposition of specific criminal offenses. The Virginia Code explicitly permits the court to defer the disposition of the following offenses:[123]

- first offense drug possession;[124]
- first offense domestic assault and battery;[125]
- first offense underage consumption, purchase, or possession of alcohol;[126]
- first offenses under the Cannabis Control Act;[127]
- certain misdemeanor crimes against property;[128]
- first offense prescription fraud;[129]
- first offense damage or defacement of public or private buildings;[130]
- spousal rape, forcible sodomy, and object sexual penetration;[131] and,
- crimes committed by persons with autism or an intellectual disability.[132]

CIT Programs

In 2009, Crisis Intervention Team (CIT) programs were codified in Virginia.[133] These teams are designed to assist law-enforcement officers in responding to crisis situations involving persons with mental illness, substance abuse, or both.[134]

Drug Treatment Courts

The Drug Treatment Court Act was originally passed by the General Assembly in 2004.[135] Drug treatment courts are specialized court dockets within the existing structure of Virginia's court system.[136] Participants in drug treatment courts undergo intensive treatment and are subject to judicial monitoring and strict supervision by program staff.[137] There were 61 drug treatment court dockets approved to operate in Virginia as of fiscal year 2021.[138]

Behavioral Health Dockets

The Behavioral Health Docket Act was originally passed by the General Assembly in 2020.[139] Behavioral health dockets are also specialized criminal court dockets within the existing structure of Virginia's court system.[140] Behavioral health dockets are required to utilize evidence-based practices to diagnose behavioral health illness, provide treatment, enhance public safety, reduce recidivism, ensure offender accountability, and promote offender rehabilitation in the community.[141] There were 13 behavioral health dockets approved to operate in Virginia as of fiscal year 2021.[142]

ACT/PACT

Localities throughout Virginia have implemented ACT/PACT programs, such as Henrico County, Arlington County, the City of Alexandria, and the City of Norfolk. In addition, Virginia's Project BRAVO includes a component that makes ACT available to Medicaid recipients.[143]

Local Diversion Programs (Non-Statutory)

While the Virginia Code does not include any provisions that specifically *allow* localities to implement and operate local diversion programs, the Code does not explicitly *prohibit* such programs. As a result, staff was able to identify several localities in Virginia that have implemented diversion programs in order to specifically serve the needs of their local populations.

One such local program is *Diversion First* in Fairfax County.[144] *Diversion First* offers alternatives to incarceration for people with mental illness, co-occurring substance use disorders, and/or developmental disabilities, who come into contact with the criminal justice system for low level offenses.[145]

A second local program is *The First Step Program* in Virginia Beach.[146] This program provides individuals with an opioid abuse disorder the opportunity to walk into any Virginia Beach police precinct for assistance with obtaining treatment rather than incurring a criminal charge or suffering an overdose.[147]

A third local program is the *Dual Treatment Track Program* in Chesterfield County and the City of Colonial Heights.[148] This program is a court-ordered, pretrial jail diversion program for incarcerated offenders dually diagnosed with a major mental illness and substance abuse disorder.[149]

Finally, Augusta County introduced the *Law Enforcement Assisted Diversion Program* (LEAD) in 2021.[150] This program is a collaborative agreement between the Augusta County Commonwealth's Attorney's Office and the Augusta County Sheriff's Department for certain offenders to avoid charges, such as felony drug possession, and be diverted into treatment.[151]

It is important to note that these programs are just some examples of the local diversion programs that exist across the Commonwealth. Staff was unable to identify any comprehensive listing of formal and/or informal local diversion programs in Virginia. As such, the full scope of local diversion programs in Virginia remains unknown.

CONCLUSION

The Crime Commission met on November 4, 2021, and heard presentations on diversion from staff,[152] the Virginia Department of Social Services,[153] the Virginia Association of Community Service Boards,[154] and the Virginia Association of Community-Based Providers.[155]

Staff advised Crime Commission members that diversion is part of a broader philosophical shift to prevention, treatment, and rehabilitation across various points in the criminal justice system. Staff did not make any recommendations or propose any policy options to Crime Commission members on the topic of diversion for several reasons. First, Virginia's newly enacted statute that allows for the deferred adjudication or deferred disposition of any criminal offense had just taken effect on March 1, 2021, and the impacts of this new law were unknown.[156] Second, as previously noted, the Virginia Code already contains numerous provisions related to diversion. Third, the Virginia Code does not preclude the creation and operation of local diversion programs, and therefore legislation is not required to implement these local programs. Fourth, as described earlier in the report, a number of localities around Virginia are currently operating local diversion programs without the need for local diversion legislation. Finally, the extent of formal and informal local diversion programs across the Commonwealth remains unknown, and thus well-intentioned legislation meant to promote local diversion programs in Virginia could inadvertently hinder or restrict existing programs.

Staff informed Crime Commission members that the General Assembly can support diversion across Virginia by providing funding and resources for new and existing programs. The guest presenters at the Crime Commission meeting offered additional information to members on staffing and resource needs during their presentations. Ultimately, staff advised that expanding diversion across Virginia would require additional and ongoing resources for

treatment, supervision, and workforce needs, along with communication and collaboration amongst stakeholders to maximize these services and resources.

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Virginia Association of Community Services Boards

Virginia Community Criminal Justice Association

Virginia Department of Behavioral Health and Developmental Services

Virginia Department of Medical Assistance Services

Virginia Department of Social Services

Virginia Indigent Defense Commission

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APPENDIX A: General Pretrial Population Diversion Statutes

STATE	GENERAL PRETRIAL DIVERSION STATUTE
Alabama	ALA. CODE §12-17-226 et seq.
Alaska	ALASKA STAT. §12.55.078
Arizona	ARIZ. REV. STAT. ANN. § 11-361 et seq.
Arkansas	ARK. CODE ANN. § 5-4-901 et seq.
California	CAL. PENAL CODE § 1001.1 et seq.
Colorado	COLO. REV. STAT. § 18-1.3-101
Connecticut	CONN. GEN. STAT. § 54-56e
Delaware	DEL. CODE ANN. tit.11 § 4218
Florida	FLA. STAT. § 948.08
Georgia	GA. CODE ANN. § 42-3-70 et seq.
Hawaii	HAW. REV. STAT. § 853-1 et seq.
Idaho	IDAHO CODE § 19-2601
Indiana	IND. CODE § 33-39-1-8
Iowa	IOWA CODE § 907.3
Kansas	KAN. STAT. ANN. § 22-2907 et seq.
Kentucky	KY. REV. STAT. ANN. § 533.250
Maryland	MD. CODE ANN., CRIM. PROC. § 6-220
Minnesota	MINN. STAT. § 401.065
Mississippi	MISS. CODE ANN. § 99-15-105
Missouri	MO. REV. STAT. § 217.777
Montana	MONT. CODE ANN. § 46-16-130
Nebraska	NEB. REV. STAT. ANN. § 29-3601 et seq.
Nevada	NEV. REV. STAT. ANN. § 174.031
New Jersey	N.J. STAT. ANN. § 2C:43-12 et seq.
New Mexico	N.M. STAT. ANN. § 31-16A-1 et seq.
North Carolina	N.C. GEN. STAT. § 15A-1341
Ohio	OHIO REV. CODE ANN. § 2935.36
Oklahoma	OKLA. STAT. tit. 22 § 305.1
Oregon	OR. REV. STAT. § 135.881 et seq.
South Carolina	S.C. CODE ANN. § 17-22-10 et seq.
Tennessee	TENN. CODE ANN. § 40-15-101 et seq.
Texas	TEX. CODE CRIM. PROC. ANN. art. § 42A.101
Utah	UTAH CODE ANN. § 77-2-5 et seq.
West Virginia	W. VA. CODE § 61-11-22
Wisconsin	WIS. STAT. § 971.39
Wyoming	WYO. STAT. ANN. § 7-13-301

Appendix by Crime Commission staff based on legal analysis.

APPENDIX B: Population-Specific Diversion Statutes

State	Population							
	Substance Abuse	**Mental Health**	**Veterans/ Active Military**	**Domestic Relations**	**Worthless Check**	**Property Crimes**	**Prostitution/ Sex Trafficking**	**Other**
Alabama	§ 12-23A-1 et seq.				§ 12-17-224	§ 12-17-226 et seq.	§ 13A-6-181	
Arizona	§ 13-3422	§ 12-132 § 22-601 et seq.	§ 22-601 et seq.		§ 13-1810			**Homeless:** § 22-601 et seq.
Arkansas	§ 16-98-201 § 16-98-301 et seq.	§ 16-100-201 et seq. § 16-10-139	§ 16-10-139					
California	Penal Code § 1000-1000.6; § 1000.8-1000.10 § 1001.85 et seq.	Penal Code § 1001.20 et seq.	Penal Code § 1001.80	Penal Code § 1000.12; § 1001.70 et seq.	Penal Code § 1001.60 et seq.			**Young Adults (18-21) charged with a felony:** Penal Code § 1000.7
Colorado			§ 13-5-144	§ 19-3-310			§ 13-10-126	
Connecticut	§ 54-56i; § 17a-696; § 51-181b	§ 54-56l	§ 54-56l	§ 46b-38c				**Community-specific needs:** § 51-181c **Specified weapons crimes:** § 29-33 § 29-37a § 53-202l § 53-202w
Delaware	Title 16 § 4767			Title 10 § 1024	Title 11 § 900A			
District of Columbia	§ 48-904.01(e)							
Florida	§ 948.16	§ 394.47892	§ 948.16		§ 832.08			

State	Population							
	Substance Abuse	Mental Health	Veterans/ Active Military	Domestic Relations	Worthless Check	Property Crimes	Prostitution/ Sex Trafficking	Other
	§ 397.334	§ 948.16	§394.47891					
Georgia	§ 16-13-2 § 15-1-15	§ 15-1-16	§ 15-1-17					
Idaho	§ 19-5601 et seq.	§ 19-5601 et seq.						
Illinois	730 § 166/1 et seq.	730 § 168/1 et seq.	730 § 167/1 et seq.; 330 § 135/1 et seq.		720 § 5/17-1b			**First time weapon offenders:** 730 § 5/5-6-3.6
Indiana	§ 12-23-5-1 et seq. § 12-23-6.1-1 §12-23-7.1-1 et seq. § 33-23-16-1 et seq.	§ 11-12-3.7-1 et seq.; § 33-23-16-1 et seq. § 12-23-5-1 et seq.	§ 33-23-16-1 et seq.	§ 33-23-16-1 et seq.				**Community-specific needs:** § 33-23-16-1 et seq.
Iowa				§ 708.2B				
Kansas	§ 12-4414 et seq.							
Kentucky	§ 533.251 § 26A.400							
Louisiana	§ 13:587.4	§ 13:587.4; § 13:5351 et seq.	§ 13:5361 et seq.				**Purchase of sexual activity crimes:** § 15:243	**Human Trafficking** § 13:587.4
Maine	Title 4 § 421	Title 4 § 431	Title 4 § 433		Title 32 § 11013-A			
Maryland	[Cts. and Jud. Proc.] § 13-101.1							

State	Population							
	Substance Abuse	Mental Health	Veterans/ Active Military	Domestic Relations	Worthless Check	Property Crimes	Prostitution/ Sex Trafficking	Other
Massachusetts			276A § 10					**Young Adults (18-22):** 276A § 1 et seq.
Michigan	§ 333.7411 § 600-1060 et seq.	§ 600-1090 et seq.	§ 600.1200 et seq.	§ 769.4a				
Minnesota	§ 152.18				§ 628.69			
Mississippi	§ 9-23-1 et seq.	§ 9-27-1 et. seq.	§ 9-25-1					
Missouri	§ 478.001 et seq.							
Montana	§ 46-1-1101 et seq.	§ 46-1-1201 et seq.						
Nebraska	§ 24-1301 et seq.	§ 24-1301 et seq.	§ 24-1301 et seq.					
Nevada	§ 176A.230 et seq.	§ 176A.250 et seq.	§ 176A.280 et seq.					
New Hampshire	§ 490-G:2 et seq.	§ 490-H:1 et seq.	§ 490-I:1 et. seq.					
New Jersey	§ 2C:36A-1 § 30:6c-1 et seq.		§ 2C:43-23 et seq.					
New York	[Crim. Proc. Law] § 216.05							
North Carolina	§ 90-96 § 7A-793 et seq. § 15A-1341				§ 14-107.2		§ 14-204	**Substance abuse and mental illness:** § 7A-272
Oklahoma	63 § 2-901 et seq. 22 § 471 et seq.	22 § 472			22 § 111 et seq.	22 § 991f-1.1		
Oregon	§ 430.450 et seq.	§ 137.680	§ 137.680		§ 135.925			

State	Population							
	Substance Abuse	**Mental Health**	**Veterans/ Active Military**	**Domestic Relations**	**Worthless Check**	**Property Crimes**	**Prostitution/ Sex Trafficking**	**Other**
	§ 475.245 § 3.450							
Pennsylvania	35 § 780-117 42 § 916	42 § 916						
Rhode Island	§ 8-2-39.2							
South Carolina		§ 14-31-10 et seq.	§ 14-29-10 et seq.		§ 17-22-710			
Tennessee	§ 16-22-101 et seq.		§ 16-6-101 et seq.		§ 40-3-203			
Texas	§ 122.001 et seq. § 123.001 et seq.	§ 125.001 et seq.	§ 124.001 et seq.				**Human trafficking victims:** § 126.001 et seq.	**Public safety employees:** § 129.001 et seq.
Utah	§ 78A-5-201 et seq.		§ 78A-5-301					
Virginia	§ 18.2-251 § 18.2-254.1	§ 19.2-303.6		§ 18.2-57.3		§ 19.2-303.2		
Washington	§ 10.05.010 et seq. § 2.30.010 et seq.	§ 2.30.010 et seq. § 10.05.010 et seq.	§ 2.30.010 et seq.	§ 2.30.010 et seq.				**Additional therapeutic court programs:** § 2.30.010 et seq.
West Virginia	§ 62-15-1 et seq.				§ 61-3-39m et seq.			
Wisconsin				§ 971.37	§ 971.41			
Wyoming	§ 35-7-1037							

Appendix by Crime Commission staff based on legal analysis.

SECURED BOND

EXECUTIVE SUMMARY

The Executive Committee of the Crime Commission directed staff to examine the use of secured bond in Virginia and to provide options to reduce pretrial detention rates across the Commonwealth. Secured bond means that a financial condition must be satisfied before a person is released from detention prior to trial.

Staff determined the Virginia Code could be amended to restrict the use of secured bond; however, staff was unable to determine the impacts that restricting the use of secured bond may have on pretrial detention rates, court appearance rates, public safety rates, the use of other bond conditions, and resource needs across Virginia. Staff further determined that the Virginia Code could be amended to create a presumption of release without financial conditions or to explicitly require that judicial officers order the least restrictive conditions when determining bail; however, the impacts of these amendments are also unknown. Finally, staff noted that Virginia could explore broader changes across the criminal justice system in an effort to promote pretrial release.

These amendments to the Virginia Code, along with the potential impacts, were based on numerous sources of information, including literature on bail and secured bond, Virginia law, the dataset from the *Project*, bail reform measures and bail processes in other states, and a survey of pretrial system stakeholders in Virginia.

Staff provided Crime Commission members with four policy options intended to address the bail process in Virginia. Members made no motions on any of the following options:

> **Policy Option 1:** Should Virginia Code § 19.2-123 be amended to eliminate the requirement that a secured bond must be set when a person is arrested for a felony and (i) has a previous felony conviction; or, (ii) is on bond for an unrelated arrest; or, (iii) is currently on probation or parole?
>
> **Policy Option 2:** Should the Virginia Code be amended to create a presumption of release without financial conditions?
>
> **Policy Option 3:** Should the Virginia Code be amended to explicitly require that judicial officers order the least restrictive conditions when determining bail?

Policy Option 4: Should broader systematic changes be made across the criminal justice system to promote pretrial release?

BACKGROUND

The Crime Commission began studying pretrial services agencies in 2016.[1] This study was expanded in 2017 to include an examination of the entire pretrial process.[2] The expansion of the study ultimately led to the development of the *Project*.[3] In 2021, the Executive Committee of the Crime Commission directed staff to examine the use of secured bond in Virginia and provide options to reduce pretrial detention rates across the Commonwealth. Secured bond means that a financial condition must be satisfied before a person is released from detention prior to trial.[4]

For purposes of this study, staff primarily focused on three concepts: (1) restrictions on the use of secured bond, (2) presumption of release without financial conditions, and (3) least restrictive conditions. For purposes of this report, these concepts are defined as follows:

- Restrictions on the use of secured bond: legal restrictions that explicitly prohibit judicial officers from ordering a financial condition as a term of a defendant's bond.
- Presumption of release without financial conditions: the legal presumption that financial conditions should not be imposed as a condition of bond unless a judicial officer determines that a defendant is a flight risk or poses a danger to public safety.
- Least restrictive conditions: the legal requirement that a judicial officer must only order the least restrictive conditions necessary to ensure a defendant's appearance in court and to protect public safety when setting the terms of bond.[5]

Crime Commission staff engaged in a variety of activities as part of the study on secured bond, including (i) collecting relevant literature on matters relating to pretrial detention, bail reform, and bail determinations, (ii) reviewing provisions of the Virginia Code related to bail and the pretrial process, (iii) analyzing data from the *Project,* (iv) identifying recent changes to bail processes in other states, (v) reviewing bail laws and processes in other states, (vi) examining relevant pretrial detention data from other states, and (vii) surveying key stakeholders in Virginia.

LITERATURE OVERVIEW

A brief overview of research pertaining to national pretrial detention trends, bail reform efforts, and the general bail determination process is detailed below. This research provides a foundation for the specific bail processes in Virginia and other states as described later in this report.

Pretrial Detention Trends

Pretrial detention rates have grown significantly over the past 40 years.[6] When specifically examining local jail populations, data shows that a sizeable portion is comprised of persons who have not yet been convicted of an offense.[7] Since 2005, inmates detained prior to trial have accounted for nearly two-thirds of the total local jail population in the United States.[8] Specifically, in 2019, 65% (480,700 of 734,500) of inmates in local jails were being held prior to trial.[9]

For decades, advocates for bail reform have voiced significant concerns about the bail system and pretrial detention rates in the United States.[10] Furthermore, research has consistently demonstrated the negative consequences of being detained prior to trial. In particular, research has shown that those detained prior to trial are more likely to plead guilty, be convicted, be sentenced to longer periods of incarceration, and be unable to adequately prepare a defense.[11] Moreover, being detained prior to trial has been shown to negatively impact employment, future earnings, relationships with dependent children, and residential stability.[12] Researchers have also found that differences exist in both bail determinations and rates of pretrial detention across race, ethnicity, gender, and socioeconomic status.[13] Finally, the impact on jail capacities and the costs associated with excessive pretrial detention are also well documented in the literature.[14]

Bail Reform in the United States

The general goal of the bail system in the United States is to (i) release as many defendants as possible prior to trial so as to ensure that punishment is not unnecessarily imposed before a conviction, (ii) reduce failure to appear rates, and (iii) ensure that the public is protected from danger during the pretrial period.[15] Advocates for the current bail system contend that the current bail system reduces failures to appear and protects the public from crimes committed by defendants who are released prior to trial.[16] Conversely, critics argue that the current bail system:

- disadvantages poor individuals;
- disadvantages minority individuals, specifically Black and Hispanic defendants;
- increases mass incarceration;
- does not ensure that individuals appear for court;
- does not reduce pretrial criminal conduct; and,
- burdens taxpayers and state budgets with costs relating to pretrial detention.[17]

Historically, the focus of bail reform has been on reducing pretrial detention rates and lessening the socioeconomic and racial disparities that exist in the pretrial system, without increasing failures to appear or new criminal activity rates during the pretrial period.[18]

Bail reform in the United States has occurred in three distinct waves over the past 60 years. The first wave of bail reform occurred during the 1960s and emerged simultaneously with the civil rights movement and the "war on poverty."[19] Due to criticisms regarding the effectiveness of secured bond and the increase in secured bond amounts, advocates of bail reform sought to end over-detention by increasing the use of unsecured release and release on recognizance, along with limiting the use of money bail (secured bond).[20] Moreover, advocates pushed for the individualization of bail determinations, where personal factors such as employment, housing, and neighborhood of residence were taken into consideration for purposes of release determinations and pretrial "fact-finding."[21] The changes that occurred during the first wave of reform led to the establishment of the first pretrial services agencies, which gathered defendants' personal information to assist in pretrial release recommendations.[22] The reform movement of the 1960s concluded with the passage of the Bail Reform Act of 1966.[23] This 1966 Act focused on court appearance by creating a presumption that defendants charged with non-capital offenses should be released on their own recognizance, except when such release would not adequately ensure a defendant's appearance in court.[24] Furthermore, the 1966 Act provided that alternative least restrictive conditions were to be ordered when concerns existed that an individual might not appear at trial if released on a personal recognizance bond.[25]

The second wave of bail reform was ushered in during the 1970s and 1980s.[26] Prompted by rising crime rates, concerns about public safety, and sentiments regarding the commission of violent crime by those released prior to trial, reformers sought to shift the focus of the bail system to the protection of society from those individuals who were released prior to trial.[27] Congress passed the Bail Reform Act of 1984, which was part of the Comprehensive Crime Control Act that codified the detention of individuals who posed a flight risk or a danger to

public safety.[28] This change to federal bail policy was influenced by the "war on drugs" and "tough on crime" initiatives.[29] This 1984 Act amended the Bail Reform Act of 1966 by allowing the inclusion of "dangerousness" as a factor to be considered when determining bail.[30] The 1984 Act also permitted judicial officers to consider community safety when determining whether a defendant should be detained prior to trial.[31] Further, the 1984 Act established a "rebuttable presumption toward confinement" when a defendant was charged with certain types of offenses, such as violent crimes or serious drug crimes.[32] The 1984 Act also provided judicial officers with four options when ordering bond: (1) release on unsecured or personal recognizance bond, (2) release with conditions, (3) temporary detainment of an individual in certain situations, and (4) detainment of an individual for the entire period prior to trial.[33] This second wave of bail reform has been criticized generally for the racial underpinnings of the changes to bail policy and specifically for the inclusion of "dangerousness" in bail determinations.[34]

The United States is currently in what is considered the third wave of bail reform.[35] Reformers are attempting to end the racial and socioeconomic inequities that exist in the criminal justice system through a decreased reliance on secured bond.[36] The debate relating to the use of secured bond is similar to the arguments in support of and in opposition to the overall bail system. Proponents argue secured bond ensures court appearance and decreases the threat to public safety;[37] whereas, critics contend that secured bond has disparate impacts across socioeconomic status, race, and ethnicity.[38]

Despite these concerns, secured bond remains a frequently used bond condition in a majority of states.[39] Specific jurisdictions, such as Cook County (Illinois),[40] New Jersey,[41] Harris County (Texas),[42] Prince George's County (Maryland),[43] and the District of Columbia[44] have begun to evaluate how reducing the reliance on secured bond has impacted overall bail determinations, failure to appear rates, new criminal activity, jail capacity, and resources. Ultimately, research examining the impact of bond type on court appearance and public safety rates has provided mixed results.[45]

Alternatives to secured bond have been adopted in numerous states across the country through legislative changes, constitutional amendments, and court decisions.[46] Although these alternatives vary by state, such efforts typically include considering a defendant's ability to post a secured bond as part of the bail determination process, increasing the use of risk assessment tools, restricting the use of bail schedules, expanding law enforcement's authority to release defendants after an arrest (i.e., release on summons), and placing greater

emphasis on the danger that a defendant may pose to public safety, as opposed their risk of failure to appear, when determining bail.[47] While many alternatives to secured bond have been proposed and implemented, there is a lack of empirical research evaluating the implementation and outcomes of such practices.[48]

Bail Determination Process

If a defendant is detained and not released on a summons, the bail process begins with a judicial officer making a bail determination. When making bail determinations, judicial officers act as "pretrial gatekeepers"[49] after a defendant is arrested and processed into the criminal justice system.[50] The purpose of the bail determination is to ensure that the defendant, if released, will return to court and will not be a threat to public safety.[51] Scholars have sought to understand the process of how bail determinations are made, as judicial officers wield a considerable amount of discretion when making such determinations.[52] A number of factors related to the defendant are typically considered by a judicial officer when making a bail determination, such as:

- nature and seriousness of the alleged offense;
- prior criminal history record;
- court appearance history;
- community ties;
- employment and/or family obligation status;
- threat to public safety;
- risk of flight; and,
- risk assessment tool results.[53]

Research has classified such factors as being either legal or extralegal. Legal factors may include prior criminal history record and severity of the offense, while extralegal factors may include demographic information such as race, ethnicity, and gender.[54] Research studies have examined the specific impact of legal factors on judicial release decisions and found the strongest legal factors that impacted whether an individual was released or detained were the severity of the current offense and the individual's prior criminal history record.[55] Specifically, individuals with more extensive criminal history records who were charged with serious crimes had a higher probability of being detained prior to trial.[56]

On the other hand, research examining extralegal factors indicates disparities in how often judges release or detain similarly situated defendants across demographic factors such as

race and ethnicity, with Black and Hispanic defendants more likely to be detained without bond as compared to White defendants.[57] Similarly, research also found disparities in how often judges choose to release similarly situated defendants on non-financial conditions versus financial conditions, with Black and Hispanic defendants more likely to be ordered to post a secured bond with higher bond amounts as compared to White defendants.[58] Further, research has found that Black and Hispanic defendants post a secured bond less frequently as compared to similarly situated White defendants.[59]

Role of Risk Assessment Tools

No conversation relating to the bail system is complete without a discussion of pretrial risk assessment tools. With calls to reform the current bail system and decrease jail overcrowding, many jurisdictions are considering the best ways to make or inform pretrial release decisions.[60] As such, the use of pretrial risk assessments has become a key element in pretrial reform.[61]

Risk assessment tools are commonly used at various stages within the criminal justice system to assist in making decisions relating to individual defendants.[62] Studies have consistently found that validated actuarial risk assessment tools combined with professional judgement produce better outcomes in terms of predictive validity than subjective professional judgement alone.[63] Pretrial risk assessment tools were first developed in the 1960s and have since been increasingly implemented across the United States at the federal, state, and local levels. These risk assessment tools are designed to primarily assist judicial officers in evaluating defendants' risk of failure to appear and risk to public safety, as well as to help alleviate implicit bias that can impact release decisions during the bail determination process.[64] Researchers suggest that risk assessment tools can be used to help inform release and detention decisions because these tools are created to consider both static and dynamic risk factors that have been shown to impact both failure to appear and public safety.[65] Static risk factors are those that do not change, such as current charge and prior record, while dynamic risk factors are those that can change over time, such as employment and ties to the community.[66]

Recently, strong debates have arisen over the use of pretrial risk assessment tools.[67] Proponents argue that utilizing a pretrial risk assessment tool results in improved objectivity and fairness by reducing inconsistent or unpredictable decision-making by judicial officers.[68] Proponents also contend the use of these tools allows for the pretrial release of more defendants which reduces jail populations while still maintaining public safety.[69] Furthermore,

proponents also suggest pretrial risk assessment tools increase equity and fairness and enhance uniformity in decision-making.[70] Conversely, opponents argue risk assessment tools do not reliably predict pretrial outcomes. Moreover, opponents contend the use of such tools results in biased outcomes and reinforces disparities across certain racial, ethnic, and socioeconomic populations in the criminal justice system due to the reliance on data collected from a biased system (i.e., bias in – bias out).[71] Further, opponents claim these tools reduce judicial discretion and result in increased pretrial detention.[72]

Pretrial Release Outcomes

There are several factors that can impact court appearance and public safety outcomes, such as prior criminal history record, prior failures to appear, current offense type, additional pending charges, residential stability, strength of community ties, history of violence, and history of substance use.[73] Research has consistently found that prior criminal history, prior failures to appear, and current offense type are the most predictive factors of pretrial release failure.[74] For example, a meta-analysis sought to examine the relationship between various risk factors and numerous measures of pretrial failure, such as failures to appear, rearrests, and new crime pending case disposition.[75] Researchers found the factors most predictive of all the pretrial failure measures were a defendant's prior convictions, prior felonies, prior misdemeanors, juvenile arrests, and prior failures to appear.[76] This finding supports the use of these static factors in risk assessment tools, as these factors have been demonstrated to be the most predictive of pretrial failure. Furthermore, this finding is also consistent with the use of the legal factors that are of considerable importance in bail determinations made by judicial officials.[77]

Bond Conditions

In addition to determining whether to release a defendant prior to trial, a judicial officer must also determine what, if any, bond conditions to impose upon such defendant's release. While the recent wave of bail reform has focused on the use of secured bond, other bond conditions can be ordered that may not require a financial condition to be satisfied before a person can be released from pretrial detention. These bond conditions may provide an alternative to secured bond, or may be ordered in conjunction with a secured bond, and can be tailored to address the concerns of failure to appear and public safety.[78] Aside from secured bond, other bond conditions that can be imposed upon a defendant during the pretrial period vary by jurisdiction and may include, but are not limited to, the following:

- maintain or seek employment or education;
- no contact with specific persons;
- ban from certain places;
- alcohol screening or drug testing;
- home electronic monitoring or GPS monitoring; or,
- supervision by a pretrial services agency.[79]

Researchers emphasize the need for additional research regarding the effectiveness of specific bond conditions.[80] Evidence is mixed regarding the bond conditions that have been examined in terms of their effectiveness at reducing failures to appear or decreasing new criminal activity during the pretrial period.[81] For instance, research has varied results pertaining to the impact either electronic monitoring[82] or pretrial services agency supervision[83] has on court appearance and public safety rates.

Research emphasizes, however, that bond conditions should be associated with the charged conduct, commensurate to the defendant's risk of flight and new criminal activity prior to trial, and the least restrictive conditions possible to ensure court appearance and public safety.[84] As measures to reduce the use of secured bond are implemented, researchers and practitioners anticipate there may be an increase in other bond conditions imposed on defendants.[85] Concern exists that this practice may lead to the overuse of burdensome bond conditions, such as in-person reporting and electronic monitoring.[86] Bond conditions that involve electronic monitoring are of particular concern because research has pointed to the economic costs associated with electronic monitoring and the potential financial burden it places on defendants.[87]

Aside from being burdensome, there is concern the overuse of these other bond conditions may also have negative impacts on defendants, especially those who are initially deemed a low risk of offending. For example, in the context of post-conviction probation, intensive supervision has been shown to *increase* recidivism among those offenders with a low risk of reoffending due to the burden of the number of conditions imposed.[88] Researchers note that bond conditions closely mirror the post-conviction conditions of probation, and therefore some researchers contend an increase in the number and types of bond conditions imposed can carry adverse collateral consequences for defendants released prior to trial.[89] As previously noted, a defendant can be ordered to adhere to a number of bond conditions prior to trial; however, few of these bond conditions have been evaluated in order to understand their

potential consequences on defendants, such as financial costs, social costs, and criminogenic impacts.[90]

OVERVIEW OF VIRGINIA LAW

Staff conducted a comprehensive review of the components of Virginia law that relate to bail. The Virginia Code defines bail as "the pretrial release of a person from custody upon those terms and conditions specified by order of an appropriate judicial officer."[91] If a person is admitted to bail, it means that person has been released from custody on some type of bond pending trial. At the outset, it is important to note a judicial officer is not required to admit a defendant to bail and may order a defendant to be held without bail during the pretrial period.[92] The following sections provide an overview of the bail process in Virginia.

Types of Bond

The Virginia Code allows for a person to be admitted to bail under three different types of bond, including recognizance bond (typically referred to as a "personal recognizance" or "PR" bond), unsecured bond, and secured bond.[93] Neither a recognizance bond nor an unsecured bond require a person to satisfy any financial conditions prior to being released from pretrial detention; however, secured bond requires certain financial conditions to be satisfied before a person can be released from pretrial detention.[94] A secured bond can be posted in three different manners: (1) posting the total amount of the bond in cash, (2) allowing the court to obtain a lien against real estate or personal property, or (3) through a surety on the bond.[95]

Bond Conditions

If a person is granted bond, the Virginia Code allows a judicial officer to impose a variety of bond conditions.[96] Such bond conditions may include:

- supervision by a person, organization, or pretrial services agency;[97]
- restrictions on where a person may live or travel;[98]
- requirements to seek or maintain employment, maintain educational programming, avoid contact with the alleged victim and potential witnesses, comply with a curfew, refrain from possessing a firearm, refrain from excessive alcohol use or the use of any illegal narcotics, or submit to drug testing;[99]
- placement on home electronic monitoring or GPS monitoring;[100] or,

- any other condition reasonably necessary to assure appearance at court and good behavior pending trial.[101]

Judicial Officers

For purposes of bail determinations, a judicial officer is defined as any magistrate, judge, or clerk or deputy clerk of any district or circuit court.[102] While clerks are included in this definition, these individuals rarely make bail determinations in criminal cases. Thus, magistrates and judges are primarily responsible for making bail determinations on criminal charges in Virginia.

In Virginia, magistrates are considered judicial officers because they are granted various powers, such as the authority to issue process of arrest, issue search warrants, make bail determinations, issue civil warrants, administer oaths and take acknowledgments, act as conservators of the peace, and perform other acts or functions authorized by law.[103]

Bail Determination Process

Assuming that probable cause exists to issue a criminal charge,[104] if a person is arrested and not released on a summons,[105] then the person must be brought before a judicial officer for a bail hearing "without unnecessary delay."[106] Data from the *Project* revealed most defendants in Virginia who were arrested for a new criminal charge punishable by incarceration had their initial bail hearing before a magistrate.[107]

If a magistrate or judge denies bail, requires excessive bond, or sets unreasonable bond conditions, the defendant may appeal that bail determination to the next higher court, all the way up to the Supreme Court of Virginia.[108] Similarly, the attorney for the Commonwealth may also appeal a bail determination in the same manner.[109]

Criteria for Determining Bail

Magistrates and judges have broad discretion when determining bail and ordering bond conditions.[110] While Virginia law grants broad discretion for the ultimate bail determination, the Virginia Code sets forth ten specific criteria that a judicial officer must consider when determining bail and ordering bond conditions, including:

- the nature and circumstances of the offense;
- whether a firearm was used in the offense;
- the weight of the evidence;
- the financial resources of the accused and their ability to pay a bond;

- the character of the accused, including family ties, employment, and education;
- length of residence in the community;
- criminal history record;
- past appearances or failures to appear at court proceedings;
- whether the person is likely to obstruct justice if released; and,
- any other relevant information about whether the person is unlikely to appear for court proceedings.[111]

In addition, when the General Assembly repealed presumptions against bail from the Virginia Code during the 2021 Special Session I of the General Assembly, it added eight specific criteria that must also be considered by judicial officers when determining whether to hold a defendant without bail.[112] These eight specific criteria include:

- the nature and circumstances of the offense;
- whether a firearm was used in the offense;
- the weight of the evidence;
- the history of the accused in regard to family ties or employment, education, or medical, mental health, or substance abuse treatment;
- length of residence in, or other ties to, the community;
- criminal history record;
- past appearances or failures to appear at court proceedings; and,
- whether the person is likely to obstruct justice if released.[113]

Use of Secured Bond

The Virginia Code specifically authorizes judicial officers to impose a secured bond as a condition of release.[114] The Virginia Code does not place any explicit restrictions on a judicial officer's authority to impose a secured bond. The only general limitation that applies to secured bond, as well as to any other bond conditions, is that it be reasonably fixed so as to ensure that the person appears in court and maintains good behavior pending trial.[115]

Presumption of Release

The Virginia Code contains language that favors pretrial release; however, the Code does not impose a presumption of release without financial conditions. Specifically, the Virginia Code provides that "a person who is held in custody pending trial…*shall* be admitted to bail by a

judicial officer, unless there is probable cause to believe that" the person will not appear in court or that the person poses an unreasonable danger to public safety.[116]

While this language favors pretrial release, it does not guarantee that a person will in fact be released during the pretrial period. For example, a person may be granted a secured bond; however, that person may remain detained for the entire pretrial period for a variety of reasons, such as an inability to afford a secured bond, lack of access to family or friends to post a secured bond, or a personal decision to remain in custody.

Least Restrictive Conditions

While judicial officers have broad discretion when ordering bond conditions, the Virginia Code repeatedly states that such conditions must be *reasonable* in order to ensure that the person appears in court and maintains good behavior pending trial.[117] However, the Virginia Code does not define what constitutes a reasonable condition in relation to these two criteria.

Pretrial Services Agencies

The Pretrial Services Act authorizes the creation of pretrial services agencies.[118] Localities may establish and operate these pretrial services agencies, subject to the standards prescribed by the Virginia Department of Criminal Justice Services (DCJS).[119] If a locality establishes a pretrial services agency, that agency is required to:

- investigate and interview defendants who are detained prior to trial;
- present a pretrial investigation report to the court;
- supervise defendants who were ordered to pretrial services as a condition of bond;
- conduct random drug and alcohol tests on defendants who are under supervision and for whom a judicial officer has ordered such testing;
- seek a *capias* for the arrest of a supervised defendant if that defendant's actions present a risk of flight or a risk to public safety;
- seek a show cause for the defendant to appear before the court for noncompliance with supervision;
- provide information to law-enforcement to assist with locating defendants for whom a *capias* has been issued; and,
- keep records as required by the DCJS.[120]

In addition to the duties mandated by the Virginia Code, pretrial services agencies *may* also:

- request that a person charged with a crime voluntarily submit to drug or alcohol testing for use by a judicial officer when determining conditions of release;
- facilitate the placement of defendants in substance abuse education or treatment programs or services;
- sign for the custody of a defendant as a condition of an unsecured bond;
- provide defendant information and investigative services for defendants prior to a bail hearing before a magistrate;
- supervise defendants placed on home electronic monitoring as a condition of bond;
- prepare financial eligibility statements for interviewed defendants for purposes of determining whether that defendant is indigent; and,
- coordinate certain services for foreign-language speaking and deaf or hard-of-hearing defendants.[121]

Bail Bondsmen

Bail bondsmen have a significant presence in Virginia's pretrial system.[122] Bail bondsmen are licensed by DCJS and are subject to certain professional standards of conduct.[123] There are three types of bail bondsmen in Virginia, including surety bail bondsmen, property bail bondsmen, and agents of property bail bondsmen.[124] Bail bondsmen serve to assist with satisfying the financial condition of a secured bond so a defendant can be released prior to trial. A surety bail bondsman will serve as a surety on the secured bond, while a property bail bondsman (or their agent) will pledge real property, cash, or certificates of deposit as the security for a secured bond.[125] In exchange for these services, bail bondsmen may charge a fee of not less than 10% but not more than 15% of the amount of the secured bond.[126] If a defendant fails to appear before the court as required, the court may order the bail bondsman on the case to forfeit the amount of the secured bond.[127]

As noted in the Crime Commission's 2018 Annual Report, bail bondsmen:

- view their primary role as ensuring a defendant's appearance at court proceedings;
- do not routinely supervise the other bond conditions imposed by judicial officers;
- rely heavily on family, friends, and acquaintances of a defendant to ensure court appearance; and,
- will guarantee the appearance of a defendant who resides either in-state or out-of-state.[128]

RELEVANT FINDINGS FROM THE *VIRGINIA PRE-TRIAL PROJECT*

Virginia is in a unique position to examine its pretrial system as a result of the *Project*,[129] which is one of the most comprehensive collections of pretrial data in the nation. While this comprehensive dataset can be used to inform policy decisions related to the pretrial process, it is important to note that the dataset cannot explain the "why" behind the data. For example, the *Project* dataset can provide the number of individuals who were charged with failure to appear, but it cannot explain "why" they did not appear for their court hearing. Additionally, the *Project's* initial dataset is limited to a one-month time period (October 2017), which pre-dates the COVID-19 pandemic and other criminal justice reforms in Virginia.[130]

The *Project* identified 11,487 defendants who were charged with a new criminal offense punishable by incarceration during October 2017 where the bail determination was made by a judicial officer. A statewide descriptive analysis was conducted for these 11,487 defendants across a wide variety of measures. The following statewide descriptive findings were relevant to the issue of bail determinations and the use of secured bond.

Pretrial Release and Bond Type

The statewide descriptive analysis showed most defendants were ultimately released prior to trial. As seen in Table 1, the data revealed 83% (9,503 of 11,487) of defendants were released during the pretrial period.

Table 1: Pre-Trial Release Status of Defendants in Cohort

	Number of Defendants	Percentage
Released During Pre-Trial Period ("Released")	9,503	83%
Detained Entire Pre-Trial Period ("Detained")	1,984	17%
Total Defendants	**11,487**	**100%**

Source: Virginia Pre-Trial Data Project. Analysis completed by VSCC staff.

Furthermore, the statewide descriptive analysis showed the majority of defendants who were released during the pretrial period were granted a personal recognizance or unsecured bond. As seen in Table 2, the data revealed 56% (5,364 of 9,503) of defendants were released on a PR or unsecured bond.

Table 2: Bond Type at Release for Defendants in Cohort		
	Number of Defendants	Percentage
Released on Personal Recognizance or Unsecured Bond	5,364	56%
Released on Secured Bond	4,139	44%
Total Defendants	**9,503**	**100%**

Source: Virginia Pre-Trial Data Project. Analysis completed by VSCC staff.

Court Appearance and Public Safety Outcomes

The statewide descriptive analysis showed the vast majority of defendants who were released prior to trial (any bond type) appeared in court. As seen in Table 3, the data revealed 86% (8,149 of 9,503) of these defendants were not charged with failure to appear during the pretrial period.

Table 3: Statewide Court Appearance Outcomes for Released Defendants		
	Number of Defendants	Percentage
Charged with Failure to Appear		
Yes	1,354	14%
No	8,149	86%
Total Defendants	**9,503**	**100%**

Source: Virginia Pre-Trial Data Project. Analysis completed by VSCC staff.

Additionally, the statewide descriptive analysis showed the majority of defendants who were released prior to trial (any bond type) were not arrested for a new in-state criminal offense punishable by incarceration during the pretrial period. As seen in Table 4, the data revealed 76% (7,204 of 11,487) of these defendants were not arrested for a new in-state offense punishable by incarceration.[131]

Table 4: Statewide Public Safety Outcomes for Released Defendants		
	Number of Defendants	Percentage
Arrested for *Any* New In-State Offense Punishable by Incarceration		
Yes	2,299	24%
No	7,204	76%
Total Defendants	**9,503**	**100%**

Source: Virginia Pre-Trial Data Project. Analysis completed by VSCC staff.

Indigency

In order to qualify for court-appointed counsel, a court must find that a defendant is indigent based on certain income and asset guidelines.[132] The statewide descriptive analysis showed *at least* 59% (6,818 of 11,487) of the defendants were indigent, regardless of final pre-trial release status.[133]

The statewide descriptive analysis found many of the 9,503 defendants who were released during the pretrial period were indigent, with a specific breakdown by bond type as follows:

- *at least* 51% (2,708 of 5,364) of defendants who were released on PR or unsecured bond were indigent; and,
- *at least* 62% (2,559 of 4,139) of defendants who were released on secured bond were indigent.

Similarly, the statewide descriptive analysis also found many of the defendants who were detained the entire pretrial period were indigent. At least 78% (1,551 of 1,984) of detained defendants were identified as being indigent. As previously noted, the *Project* dataset cannot explain "why" these individuals were detained the entire pretrial period, as a defendant may remain detained for a variety of reasons, such as being held without bail, an inability to afford a secured bond, lack of access to family or friends to post a secured bond, or a personal decision to remain in custody.

Bail Bondsmen and Pretrial Services Agencies

As described above, bail bondsmen and pretrial services agencies serve unique roles in the pretrial system; however, these roles can be complimentary. Bail bondsmen typically engage with family and friends of a defendant and focus their efforts on ensuring a defendant appears in court, while pretrial services agencies directly supervise the defendant in an effort to ensure compliance with the bond conditions. The statewide descriptive analysis found 25% (1,019 of 4,139) of defendants who were released on secured bond were also placed under pretrial services agency supervision.

In addition to the most recent 2021 statewide descriptive analysis, staff previously used the *Project* dataset in 2019 to examine the public safety and court appearance outcomes across defendants ultimately released on (i) PR or unsecured bond only, (ii) PR or unsecured bond with pretrial services agency supervision, (iii) secured bond only, and (iv) secured bond with pretrial services agency supervision.[134] This 2019 analysis found defendants released on "PR

or unsecured bond only" had fewer new in-state arrests punishable by incarceration (higher public safety rates) than the groups of defendants released on "PR or unsecured with pretrial services agency supervision", "secured bond only", or "secured bond with pretrial services agency supervision." When examining the latter three groups of defendants, the analysis showed the public safety outcomes were identical across all three groups. However, the analysis revealed the group of defendants released on a "secured bond with pretrial services agency supervision" had higher court appearance rates than not only the groups of defendants released on either "PR or unsecured bond with pretrial services agency supervision" or "secured bond only" but also the group of defendants released on "PR or unsecured bond only."

BAIL PROCESSES IN OTHER STATES

Staff conducted a review of the bail processes in other states for two specific purposes. First, staff identified states that recently made changes to their bail processes and then attempted to ascertain the impacts of those reforms.[135] Second, while conducting this review of these changes, staff systematically took note of whether several specific concepts were present across states, such as restrictions on the use of secured bond, presumptions of release without financial conditions, and the use of least restrictive conditions. As a result of this review, staff worked to identify and compare states with these three different concepts in their statutes and/or court rules. The following is a summary of staff's findings from the review of the bail processes in other states. Note that the classifications of states presented in this section are based on the definitions as provided in the "Background" section of this report.

Recent Bail Process Changes

As of November 2021, staff identified at least 24 states that had enacted measures to amend their bail processes within the last five years.[136] The nature of these reforms varied significantly. Some states enacted laws to restrict the use of secured bond and promote pretrial release, while other states moved in the opposite direction and passed legislation requiring the use of secured bond in certain instances. Additionally, some states enacted bail measures and then quickly scaled back or repealed those measures.

Staff identified at least 17 states that enacted measures meant to promote pretrial release within the past five years.[137] For example, in 2021, Maine eliminated the use of financial bond conditions for Class E crimes; however, that law contains six specific exceptions for when

financial conditions can still be imposed.[138] Furthermore, Maine added language to its Code to require judicial officers to consider a defendant's ability to afford a financial condition, maintain employment, provide caregiving responsibilities, and address specific health care needs when setting bail.[139] Similarly, in 2018, Vermont amended its Code to prohibit the use of secured bond for persons charged with an expungement-eligible misdemeanor offense;[140] however, if the person is a risk of flight, the court may impose a maximum bail amount of $200.[141]

Conversely, at least two states passed laws within the last five years which expanded the use of secured bond for certain offenses. In 2021, Texas passed "The Damon Allen Act," which prohibits releasing a defendant on a personal (unsecured) bond if that defendant is either charged with a violent offense or charged with certain other offenses while on bail or community supervision for a violent offense.[142] Similarly, in 2021 Alabama passed "Aniah's Law," which is a proposed constitutional amendment that will grant judges broader discretion to deny bail to defendants charged with committing violent crimes, provided that a prosecutor first makes a request that bail be denied.[143] Because this Alabama law proposes a constitutional amendment, it must first be approved by a statewide referendum before taking effect.[144] The referendum vote will be held in November 2022.

Finally, at least five states enacted bail measures meant to restrict the use of secured bond or promote pretrial release, but then scaled back or repealed those measures.[145] For example, in 2019, New York enacted legislation requiring the court to release a person on their own recognizance or with non-monetary conditions, unless that person was charged with a qualifying offense for which secured bond could be ordered.[146] However, after law enforcement and various public officials expressed concerns about this new legislation,[147] the New York legislature revised the measure in 2020 by adding several crimes to the list of qualifying offenses for which secured bond can be ordered, such as sex trafficking, money laundering, and grand larceny in the first degree.[148]

Likewise, in 2016, Alaska passed legislation based on recommendations from the Alaska Criminal Justice Commission to create a new evidence-based pretrial release system and to eliminate secured bond for certain pretrial defendants.[149] However, in 2019, the newly elected Governor of Alaska signed a bill into law that effectively repealed many of these 2016 reforms,[150] such as eliminating the requirements to consider a defendant's pretrial risk assessment score and to find clear and convincing evidence before imposing secured bond.[151]

Impacts of Recent Bail Reforms

While several states amended their bail processes within the past five years, the specific impacts of those changes are difficult to determine. First, no state has completely eliminated the use of secured bond from its bail process. The Illinois legislature recently passed the Illinois Pretrial Fairness Act, making it the first state in the nation to enact legislation to eliminate the use of secured bond; however, the bail provisions of this Act do not take full effect until 2023.[152] Second, as noted above, several states enacted and then scaled back or repealed bail legislation, making the impacts of those measures difficult to assess. Third, some measures were just recently enacted and therefore not enough time has passed to identify any specific impacts, such as the 2021 measures in Maine and Texas described above. Fourth, assessing the impacts of specific measures was difficult due to a lack of complete or reliable data in other states. Fifth, other external factors, such as a nationwide increase in the violent crime rate, posed obstacles to isolating the specific impacts of these measures.[153] Finally, the COVID-19 pandemic continues to have significant impacts across all of society, including the operations of the criminal justice systems in states and localities.

Nonetheless, staff was able to identify some reports on the impacts of recent changes to the bail processes in New Jersey, Prince George's County (Maryland), Cook County (Illinois), and Harris County (Texas). Initial findings relating to the impacts of these measures have thus far been mixed.

New Jersey

The use of monetary bail in New Jersey has been largely eliminated as a result of its 2017 Criminal Justice Reform (CJR) initiative.[154] Under this initiative, a pretrial risk assessment tool, the Public Safety Assessment (PSA), is used to classify a defendant's risk of new criminal activity and failure to appear for court and to provide a decision-making framework to inform release conditions. Defendants who are deemed a low-risk by the PSA are often released on a complaint-summons without being transported to jail, or are released on non-financial conditions set by the court, while defendants who are deemed high-risk by the PSA can be detained upon the motion of a prosecutor and an order from the court.[155] The 2019 Annual CJR report to the New Jersey Governor and the Legislature demonstrated similar court appearance and new criminal activity rates between those arrested and released prior to trial in 2018 versus those arrested and released prior to trial in 2017. Specifically, the pretrial court appearance rates for those arrested and released prior to trial in 2018 was 89.9% as

compared to 89.4% for those arrested and released prior to trial in 2017.[156] In terms of new criminal activity, the report found that 13.8% of those arrested and released in 2018 were charged with an indictable offense as compared to 13.7% of those arrested and released prior to trial in 2017.[157]

Prince George's County, Maryland

In October 2016, Maryland Attorney General Brian E. Frosh sent a letter urging members of the Maryland Courts Standing Committee on Rules of Practice and Procedure to consider changes to Maryland Rule 4-216 in order to ensure judicial officers do not set financial conditions solely for the purpose of detaining a defendant.[158] In July 2017, new Maryland Rule 4-216.1 took effect with the intent of promoting the pretrial release of defendants on their own recognizance, or on an unsecured bond when necessary.[159] Despite this rule change, a June 2018 study of bail in Prince George's County, Maryland, found the pretrial jail population stayed the same, there was an increase in persons held without bond, and a disproportionate number of Black defendants were held prior to trial.[160]

Cook County, Illinois

In 2017, General Order 18.8A (GO18.8A) was issued by the Chief Judge of the Circuit Court of Cook County, Illinois. This General Order established a presumption of release without monetary bail. For those required to post a monetary bail, lower bail amounts were encouraged and the order specified bail should be set at an amount affordable for the defendant. An evaluation was conducted to examine the impact of GO18.8A among felony defendants.[161] After the issuance of GO18.8A, 57% of defendants received an I-Bond (personal recognizance bond), as compared to 26% of defendants before its passage. Additionally, 81% of defendants were released prior to trial with the passage of GO18.8A, as compared to 77% prior to its passage. When examining court appearance rates, GO18.8A was associated with an increase in the odds of failure to appear, with a failure to appear rate of 16.7% prior to the passage of the order and a 19.8% rate after passage. In analyzing public safety rates, GO18.8A was found to have no effect on the odds of new criminal activity of individuals released prior to trial, with a new criminal activity rate of 17.5% prior to the passage of the order and a 17.1% rate after passage. The Order was also found to have no effect on the odds of new violent criminal activity of individuals released pretrial, with a 3.0% rate prior to the passage of the order and 3.1% rate after passage.

Harris County, Texas

In February 2019, the amended Local Rule 9 of the Harris County Criminal Courts at Law was adopted which overturned the previous secured money bail schedule and required the immediate release of defendants arrested for misdemeanors on a personal bond or General Order Bond.[162] This Rule also allows for individuals who are arrested for offenses that fall within six "carve-out" categories to be detained for up to 48 hours for an individualized bail hearing.[163] In November 2019, the ODonnell Consent Decree was approved to ensure Harris County follows Amended Local Rule 9.[164] In addition to incorporating Local Rule 9, the ODonnell Consent Decree also requires strong procedural protections during misdemeanor bail hearings, such as guaranteeing the right to counsel at bail hearings for all individuals who are charged with misdemeanors; improving release procedures, such as the implementation of a court notification system; and, increasing access to data relating to misdemeanor pretrial release decisions and defendant demographic information.[165] According to reports from the Court-Appointed Monitor of the consent decree, the implementation of Local Rule 9 led to a significant increase in the release of those arrested for misdemeanors.[166] Additionally, there has been a significant decrease in the number of individuals released on a secured bond.[167] In 2015, 92% of cases had a secured bond set as compared to 14% of cases in 2020.[168] Further, the rate of repeat offending slightly decreased after the implementation of Rule 9, with 20.5% of misdemeanor arrestees in 2019 repeat offending compared to 23.4% in 2015.[169] Moreover, Rule 9 narrowed the disparity between the proportion of Black and White defendants in pretrial detention and release.[170] This report also discussed the increase in violent crime such as homicides in Harris County.[171] The report indicated no evidence could be found attributing the increase in homicides to bail reform due to changes in the bail process being restricted to misdemeanors.[172] However, a report issued by the Harris County District Attorney's Office found bail reform led to an increase in pretrial release, recidivism, bond failure, and violent crime.[173] Specifically, when examining offender-level recidivism rates, the annual recidivism rate increased to 20-23% after bail reform compared to 17-21% prior to bail reform.[174] Additionally, the report indicates a 50% increase in the overall bond failure rate.[175] Further, there was an increase in monthly offenses of all violent crime types within one to five months of the implementation of amended Local Rule 9.[176]

Restrictions on the Use of Secured Bond

Staff sought to identify states that explicitly prohibit the use of secured bond for certain offenses either by statute or court rule. Staff identified at least seven states that explicitly restrict the use of secured bond in some manner.[177]

These states have various restrictions on the use of secured bond. As previously noted, Illinois recently became the first state to enact legislation to eliminate the use of secured bond (effective 2023).[178] Similarly, New York requires the court to release defendants on their own recognizance or with non-monetary conditions, unless the defendant is charged with a qualifying offense for which use of a secured bond is permitted.[179]

In Connecticut, a court cannot impose financial conditions of release for misdemeanor offenses, unless the charge is for family violence, the arrested person requests financial conditions, or the court makes a finding on the record that the person will likely fail to appear, obstruct justice, or threaten safety to themselves or another.[180]

Presumption of Release without Financial Conditions

Staff sought to identify states that have adopted a presumption of release without financial conditions, unless the defendant poses a risk of flight or a danger to public safety. Staff identified at least 26 states with statutes or court rules that fit these criteria.[181]

States have implemented these presumptions of release without financial conditions in a variety of manners. Florida law creates a presumption in favor of release on nonmonetary conditions for any person who is granted pretrial release, unless that person is charged with a specific "dangerous crime."[182] Similarly, a person appearing before the court in Minnesota must be released on a personal recognizance or an unsecured appearance bond, unless the court determines that the person's release will endanger public safety or will not reasonably assure their court appearance.[183] Additionally, in West Virginia, a person charged with a misdemeanor offense must be released on their own recognizance, unless (i) there is good cause shown why such person should not be released in this manner or (ii) the person is charged with certain misdemeanors that are exempted from the requirement.[184]

Least Restrictive Conditions

Staff identified at least 21 states that require judicial officers to impose the least restrictive conditions when determining bail or setting bond conditions.[185] States vary widely in terms of

how these least restrictive conditions are applied. In Texas, a magistrate must impose the least restrictive conditions and bond necessary to reasonably ensure the defendant's appearance in court and the safety of the community, law enforcement, and the alleged victim.[186] Georgia law requires that when determining bail for a misdemeanor charge, courts not impose excessive bail and only impose conditions that are reasonably necessary to ensure court appearance and protect public safety.[187] In contrast, courts in Alabama "may impose the least onerous condition or conditions" reasonably necessary to ensure a defendant's appearance and eliminate or minimize the risk to public safety when setting the terms of bond.[188]

POTENTIAL IMPACTS OF BAIL REFORM IN VIRGINIA

Staff examined literature, bail statutes in the Virginia Code, and bail processes in other states in an effort to determine the potential impacts of bail reform in Virginia. In addition, staff surveyed numerous pretrial system stakeholders in Virginia, including Commonwealth's Attorneys, Public Defenders, court-appointed counsel, judges, magistrates, pretrial services agency directors, and bail bondsmen, in an effort to identify any such impacts. Ultimately, staff determined the potential impacts of any bail reform measures in Virginia were unknown. However, these efforts raised five important questions about how bail reform would impact Virginia.

Will pretrial detention rates be impacted?

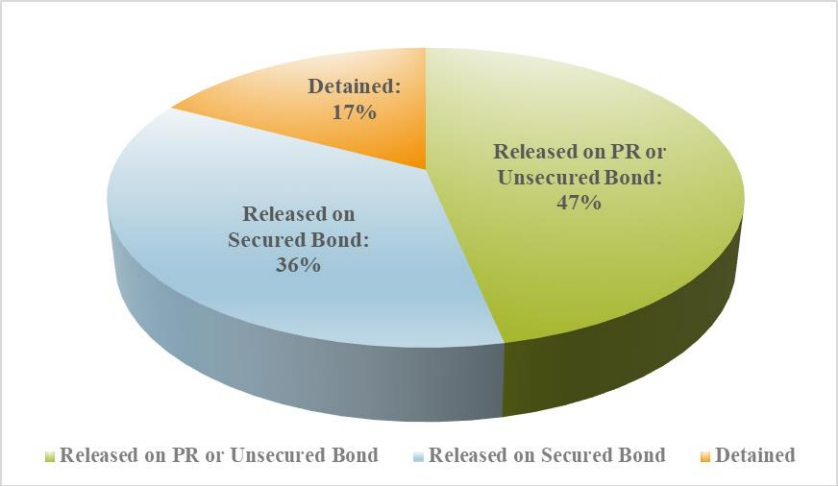
Pretrial defendants in Virginia ultimately fall into one of three pretrial release status categories: released on PR or unsecured bond (without financial conditions), released on secured bond (with financial conditions), or detained the entire pretrial period. The statewide analysis of the *Project* dataset showed that of the 11,487 defendants who were charged with a new criminal offense punishable by incarceration during October 2017 where the bail determination was made by a judicial officer:

- 47% (5,364 of 11,487) were released on a PR or unsecured bond;
- 36% (4,139 of 11,487) were released on a secured bond; and,
- 17% (1,984 of 11,487) were detained the entire period.

Chart 1 illustrates the pretrial release status classification of these 11,487 defendants in the *Project* cohort. Hypothetically, if Virginia were to enact any measures that restrict the use of secured bond, it is uncertain how many of the 4,139 defendants who were released on

secured bond would instead be released on a PR or unsecured bond, as opposed to being detained the entire pretrial period.

Chart 1: Pre-Trial Release Status of Defendants in Cohort



Source: Virginia Pre-Trial Data Project. Chart prepared by Crime Commission staff.

As previously noted, Virginia repealed all presumptions against bond from its bail statutes effective July 1, 2021.[189] Prior to the repeal of all of these presumptions, defendants who were charged with certain offenses had to produce evidence to overcome the legal presumption that they were a risk of flight or a danger to the community in order to be granted bond.[190] The amended statute eliminates these presumptions against bond and requires judicial officers to grant bond unless there is probable cause to believe that the defendant is a flight risk or poses a danger to public safety.[191] Due to the recentness of this change to Virginia's bail statutes, the impacts of this new policy, if any, remain unknown. Similarly, if the General Assembly enacts any future changes to the bail process in Virginia, the impacts of those changes are likely to remain unknown until sufficient time has passed to observe and analyze any impacts.

Will court appearance rates be impacted?

As previously noted, the statewide analysis from the *Project* showed that of the 9,503 defendants released during the pretrial period in Virginia, 86% (8,149) were not charged with failure to appear. Additionally, as previously referenced, data showed that 92% (3,685 of 4,017) of defendants released on secured bond utilized the services of a bail bondsman. The primary stated purpose of these bail bondsmen is to ensure a defendant's court appearance. It is unknown how court appearance rates would be impacted if the General Assembly were to enact any bail reform measures.

Survey respondents expressed concerns that restricting or eliminating the use of secured bond could result in higher failure to appear rates, which may in turn lead to more continuances of criminal cases, multiple court dates for victims and witnesses, and the potential for increased detention rates amongst defendants who are charged with failure to appear and defendants who reside out-of-state.

Will public safety rates be impacted?

The 2021 statewide analysis of the *Project* showed that of the 9,503 defendants released during the pretrial period, 76% (7,204) were not arrested for a new in-state offense punishable by incarceration, while 24% (2,299) were arrested for such an offense. Additionally, as discussed earlier, staff's 2019 analysis of the *Project* dataset found identical public safety outcomes across defendants released on (i) PR or unsecured bond with pretrial services agency supervision, (ii) secured bond only, and (iii) secured bond with pretrial services agency supervision.[192] As with court appearance rates, it is unknown how public safety rates would be impacted if the General Assembly were to enact any bail reform measures.

Will other bond conditions be used more frequently?

Survey respondents expressed concerns that measures to restrict or eliminate the use of secured bond could lead judicial officers to order other bond conditions more frequently, such as pretrial services agency supervision or electronic monitoring. Respondents worried that any increased use of such bond conditions could inadvertently create additional barriers to pretrial release for indigent defendants and defendants with limited access to resources. For example, defendants may not have the time or ability to travel and meet with a pretrial services agency, or they may not be able to afford the costs associated with electronic monitoring. Various concerns with over-conditioning were discussed in the "Literature Overview" section of this report.

Will additional resources be required?

The uncertainty of the answers to the first four questions posed in this section led survey respondents to raise additional questions about the potential resources required if any bail reform measures are enacted in Virginia. Respondents suggested that additional resources may be needed across various entities, such as:

- Law enforcement agencies: to locate defendants who fail to appear (both in- and out-of-state residents) and to serve witness subpoenas on cases that are continued when a defendant fails to appear.
- Local and regional jails: to house additional inmates if more defendants are initially detained prior to trial or are detained for the entire pretrial period.
- Pretrial services agencies: to increase caseload supervision capacity if more defendants are referred to pretrial services agency supervision as a condition of bond.

Until the impacts of any bail reform measures in Virginia become known, it will be very difficult to determine what, if any, additional resources these entities may need.

CRIME COMMISSION LEGISLATION

The Crime Commission met on November 4, 2021, and heard a presentation from staff on secured bond. At the conclusion of the presentation, staff provided members with four policy options to address the bail process in Virginia. No motions were made by Crime Commission members on these policy options.

> **Policy Option 1:** Should Virginia Code § 19.2-123 be amended to eliminate the requirement that a secured bond must be set when a person is arrested for a felony and (i) has a previous felony conviction; or, (ii) is on bond for an unrelated arrest; or, (iii) is currently on probation or parole?

Staff identified Virginia Code § 19.2-123 as an instance in Virginia's bail statutes where the use of secured bond was mandated. Staff provided this policy option to Crime Commission members because data from the *Project* was available to help inform this policy decision. While such data was available, staff reiterated that the potential impacts of any amendments to Virginia Code § 19.2-123 were unknown.

Under Virginia Code § 19.2-123, if a magistrate or judge chooses to admit a person to bail, that magistrate or judge must order a secured bond in instances where that person is charged with a felony and meets any of the following criteria:

- has a previous felony conviction (Criteria 1); or,
- is currently on bond for an unrelated arrest (Criteria 2); or,
- is currently on probation or parole (Criteria 3).[193]

While Virginia Code § 19.2-123 requires that a secured bond be ordered in these specific circumstances, the Code does allow a magistrate or judge to order a PR or unsecured bond with the agreement of the attorney for the Commonwealth.[194] Thus, in its current form, Virginia Code § 19.2-123 limits judicial officer discretion and allows the attorney for the Commonwealth to potentially override the bail determination of a magistrate or a judge.

Based on a review of the *Project* dataset, staff determined 21% (2,373 of 11,487) of defendants in the statewide descriptive analysis met at least one of the criteria for a secured bond as set forth in Virginia Code § 19.2-123. Table 5 provides a breakdown of these 2,373 defendants based upon the criteria requiring a secured bond as described above.

Table 5: Classification of Defendants in Cohort Meeting Virginia Code § 19.2-123 Criteria

	Number of Defendants
Criteria 1	1,182
Criteria 2	8
Criteria 3	246
Criteria 1 and 2	4
Criteria 1 and 3	922
Criteria 2 and 3	2
Criteria 1, 2, and 3	9
TOTAL DEFENDANTS	**2,373**

Source: Virginia Pre-Trial Data Project. Analysis completed by VSCC staff.

Staff next examined the most serious felony offense category in the contact event for each of the 2,373 defendants who met the criteria for a secured bond as set forth in Virginia Code § 19.2-123. As seen in Table 6, the most serious felony offense categories were narcotics, larceny, and assault.

Table 6: Most Serious Felony Offense for Defendants in Cohort Meeting Virginia Code § 19.2-123 Criteria

	Number of Defendants	Percentage
Narcotics	765	32%
Larceny	522	22%
Assault	251	11%
Fraud	143	6%
Weapon	122	5%
All Other Offenses	570	24%
TOTAL DEFENDANTS	**2,373**	**100%**

Source: Virginia Pre-Trial Data Project. Analysis completed by VSCC staff.

A review of the in-state criminal history records of the defendants who met the criteria for a secured bond as set forth in Virginia Code § 19.2-123 found 89% (2,117 of 2,373) had a prior in-state felony conviction. Further analysis revealed that of these 2,117 defendants:

- 65% (1,375 of 2,117) had a prior in-state felony conviction within the past 5 years; and,
- 35% (742 of 2,117) had a prior in-state felony conviction older than 5 years.

When compared to all defendants in the statewide descriptive analysis, the defendants who met the criteria for a secured bond as set forth in Virginia Code § 19.2-123 had much higher risk levels for failure to appear and new criminal activity as measured by the Public Safety Assessment (PSA). Similarly, when compared to all released defendants in the statewide descriptive analysis, the released defendants who met the criteria for a secured bond set forth in Virginia Code § 19.2-123 were charged with failure to appear and arrested for new in-state offenses at higher rates.

Finally, when examining the final pretrial release status of the 2,373 defendants who met the criteria for a secured bond as set forth in Virginia Code § 19.2-123, the *Project* dataset showed that ultimately:

- 47% (1,127 of 2,373) were released on secured bond;[195]
- 39% (930 of 2,373) remained detained the entire pretrial period; and,
- 13% (316 of 2,373) were released on a PR or unsecured bond.

Policy Option 2: Should the Virginia Code be amended to create a presumption of release without financial conditions?

The concept of presumption of release without financial conditions has emerged as part of the discussion on the use of secured bond.[196] As previously mentioned, this concept is based on the premise that financial bail conditions should not be imposed if a person is not a flight risk or a risk to public safety. The key arguments in support of this concept are that it supports a presumption of innocence for those accused of a crime and that it is meant to reduce pretrial detention rates.[197]

While the Virginia Code favors setting bail, it does not explicitly prohibit the use of secured bond when a person is not found to be a flight risk or to pose a danger to public safety.[198] Staff identified at least 26 states that have enacted a presumption of release without financial conditions for all or specific offenses, unless the defendant poses a risk of flight or a danger to public safety; however, these measures vary across states.[199]

Staff was unable to determine what would occur if Virginia amended its current bail statutes to create a presumption of release without financial conditions. As seen in Table 1 above, the statewide descriptive analysis of the *Project* showed that most defendants were ultimately released prior to trial under Virginia's statutory framework. It is uncertain whether amending the Virginia Code in this manner would impact these pretrial release rates.

> **Policy Option 3:** Should the Virginia Code be amended to explicitly require that judicial officers order the least restrictive conditions when determining bail?

Research indicates that bond, similar to other release conditions, should be the least restrictive option utilized to guarantee that an individual appears for court and maintains good behavior pending trial.[200] "Least restrictive conditions" is a phrase related to the application of excessive bail.[201] Specifically, bail and bond conditions are to be set at a level to guarantee no more than "a constitutionally valid purpose for limiting pretrial freedom."[202] Furthermore, least restrictive conditions suggest bond conditions should only entail measures that are the least burdensome and inflict the least hardship on individuals.[203] Thus, bond conditions are limited to requirements that will ensure court appearance and maintain public safety.[204] The concept of least restrictive conditions is included in the American Bar Association criminal justice standards on pretrial release, federal and District of Columbia statues, and other state statutes.[205]

While the Virginia Code does not specifically use the phrase "least restrictive conditions," the Code does provide that bond conditions must be reasonable in order to ensure the person appears in court and remains of good behavior pending trial.[206] However, the Virginia Code also authorizes judicial officers to impose a wide variety of bond conditions, and it does not specify when these conditions may or may not be reasonable.[207] Staff identified at least 21 states that have enacted least restrictive conditions as part of their bail processes; however, these states have not clearly defined what constitutes a least restrictive condition or how such conditions are to be applied.

Given that the Virginia Code currently contains a variation of the least restrictive conditions concept, the impacts of any amendments to the Code are unknown. Because bail determinations are made on a case-by-case basis, what constitutes a least restrictive condition will be a subjective decision for each magistrate and judge across the Commonwealth. Furthermore, this practice may impose a limit to judicial officer discretion

when a variety of bond conditions may be necessary to ensure court appearance, public safety, or both.

> **Policy Option 4:** Should broader systematic changes be made across the criminal justice system to promote pretrial release in Virginia?

Restricting or eliminating the use of secured bond is not the only option available when considering ways to decrease pretrial detention rates. Various aspects of the criminal justice system can also be examined to determine potential approaches to reduce such rates. Staff identified the following areas that members could explore as part of a broader systematic change meant to decrease pretrial detention rates in the Commonwealth.

Amending the Virginia Code to allow for release on a summons for nonviolent felony offenses.

Law enforcement officers in Virginia are only authorized to release a person on a summons for a misdemeanor offense.[208] When a law enforcement officer arrests a person for a felony offense, that person must be brought before a judicial officer and that person's fingerprints must be obtained.[209] In recent years, bail reform advocates have promoted the concept of releasing more defendants on a summons for nonviolent misdemeanor and felony offenses.[210] Legislators could amend the law to allow law enforcement officers to release individuals charged with certain nonviolent felony offenses on a summons.

Utilizing technology to allow law enforcement officers to fingerprint defendants in the field.

In order for a criminal charge or conviction to appear on a person's criminal history record, an arrest report that includes the person's fingerprints must be submitted to the Central Criminal Records Exchange (CCRE).[211] As part of the discussion on expanding release on a summons in Virginia, members may want to consider increasing law enforcement's ability to obtain fingerprints in the field so these charges appear on a person's criminal history record.

The Virginia State Police (VSP) launched an Electronic Summons System (E-Summons) pilot program in Northern Virginia on September 23, 2019.[212] E-Summons is a mobile technology unit used by a state trooper to automate the traffic summons process in the field and to electronically transmit data to Virginia's general district courts.[213] While E-Summons does not include the capability to obtain a person's fingerprints at the time a summons is issued,

Virginia could examine adding these capabilities to the system and expanding its use across law enforcement agencies statewide. The General Assembly could look to the Virginia State Police Electronic Summons System Fund as one potential funding source for enhancing E-Summons and expanding its use statewide.[214]

Implementing a non-interview based pre-trial risk assessment instrument for use by all magistrates and judges when making bail determinations.

The Virginia Code requires pretrial services agencies to investigate and interview pretrial defendants and to provide a pretrial investigation report to assist courts in bail determinations.[215]

The Virginia Pretrial Risk Assessment Instrument (VPRAI) is the tool currently used by Virginia pretrial services agencies when preparing the pretrial investigation report.[216] The VPRAI provides information on a defendant's overall combined risk level for failure to appear and public safety.[217] In order to fully complete the VPRAI, an interview must be conducted with the defendant.[218] Crime Commission staff previously found thousands of defendants who were eligible for a pretrial investigation did not receive such an investigation, while simultaneously the majority of defendants referred for pretrial services agency supervision were referred by a judge without the benefit of a pretrial investigation.[219]

One possible solution to ensure that as many eligible defendants as possible receive a pretrial investigation is through the use of a non-interview based pretrial risk assessment instrument. A representative from DCJS provided an update on pretrial services agencies at the November 15, 2021, meeting of the Crime Commission. The representative advised that DCJS will be engaging in a pilot of an alternative pretrial risk assessment tool, the Public Safety Assessment (PSA), in three sites (City of Richmond, Prince William County, and the combined County of Augusta and City of Staunton/Waynesboro) and will also be applying to the Advancing Pre-trial and Policy Research Organization (APPR) for technical assistance.

The PSA, unlike the VPRAI, does not require an interview with the defendant and is able to provide distinct risk levels of both failure to appear and new criminal activity, as well as note whether there is a risk of new violent criminal activity.[220] Arizona, Kentucky, New Jersey, and Utah have implemented the PSA statewide.[221] DCJS can monitor the PSA pilot project and then make a determination as to whether the PSA should be utilized statewide in Virginia.[222]

Identifying and evaluating court notification programs.

Various jurisdictions across the country, including the cities of Richmond and Petersburg in Virginia, have engaged in the use of text notifications to remind defendants of their court dates.[223] Such programs have been implemented in an effort to reduce jail occupancy and increase appearance in court.[224] Research indicates failure to appear rates can be reduced if court hearing notifications are received by text message or phone call.[225] However, while studies indicate court notification programs are effective at reducing failure to appear rates, future research should continue to examine the impact of the frequency of contact, contact techniques, and timeliness of contact on failure to appear rates.[226] Virginia could identify court notification programs in the Commonwealth and other states and then evaluate the effect of these programs on failure to appear rates.

Expanding the availability pretrial services agency supervision.

As of March 2022, there were 35 pretrial services agencies serving 115 of Virginia's 133 cities and counties.[227] Funding was provided in the 2020 Appropriations Act to expand the availability of pretrial services agencies in Virginia between 2020 and 2022.[228] Virginia could consider further expanding the number of pretrial services agencies to cover more, or all, of the Commonwealth.

Other states are also expanding the capabilities of their pretrial services agencies. As mentioned previously, Illinois enacted legislation to eliminate the use of secured bond beginning in 2023.[229] The Illinois Supreme Court formed a Pretrial Practices Implementation Task Force in July 2020 charged with helping the Supreme Court determine how to implement recommendations made in the final report of the Commission on Pretrial Practices released in April 2020.[230] The Pretrial Practices Commission's final report pointed to the experiences of other states including New Jersey and New York, and concluded the first step in eliminating secured bond is establishing a robust and effective pretrial system and dedicating adequate resources to allow for evidence-based risk assessment and pretrial supervision.[231] Further, the Administrative Office of the Illinois Courts Office of Statewide Pretrial Services created a three-phased plan to implement a statewide pretrial services agency.[232]

Investing in diversion programs.

Crime Commission staff conducted a study on diversion in Virginia and other states over the past year. While this term has various definitions, staff defined diversion for purposes of the

study as an initiative or process (formal or informal) that allows an adult defendant to avoid a criminal charge and/or conviction by participating in or completing certain programs or conditions. Staff concluded legislation is not required to expand diversion across Virginia; however, such expansion will require additional and ongoing resources, communication and collaboration amongst stakeholders, and infrastructure for programs and supervision. A report on diversion is included in the Crime Commission's 2021 Annual Report.[233]

CONCLUSION

The Executive Committee of the Crime Commission directed staff to examine the use of secured bond in Virginia and to provide options to reduce pretrial detention rates across the Commonwealth. Staff determined the Virginia Code could be amended to restrict the use of secured bond; however, staff was unable to determine the impacts that restricting the use of secured bond may have on pretrial detention rates, court appearance rates, public safety rates, the use of other bond conditions, and resource needs across Virginia. Staff further determined that the Virginia Code could be amended to create a presumption of release without financial conditions or to explicitly require that judicial officers order the least restrictive conditions when determining bail; however, the impacts of these amendments are also unknown. Finally, staff noted that Virginia could explore broader changes across the criminal justice system in an effort to promote pretrial release.

ENDNOTES

[1] *See* Virginia Department of Criminal Justice Services. (2016, November 10). *Pretrial services agencies: Risk-informed pretrial decision making in the Commonwealth of Virginia*. Presentation to the Virginia State Crime Commission. Available at http://vscc.virginia.gov/Virginia%20Pretrial%20Services%20Presentation%2012-5-2016.pdf.
[2] *See* Virginia State Crime Commission. (2018). *2017 annual report:* Pretrial services agencies. Available at http://vscc.virginia.gov/2018/2017%20Annual%20Report%20Pretrial.pdf. *See also* Virginia State Crime Commission. (2019). *2018 annual report: Virginia Pre-Trial Data Project and pre-trial process.* Available at http://vscc.virginia.gov/2019/VSCC%202018%20Annual%20Report%20-%20Pre-trial%20Data%20Project%20and%20Pre-trial%20Process.pdf.
[3] *See* Virginia State Crime Commission. (2021, September). *Virginia Pre-Trial Data Project*. Available at http://vscc.virginia.gov/VirginiaPretrialDataProject/VSCC%20PreTrial%20Data%20Project_Final%20Report.pdf.
[4] *See* VA. CODE ANN. §§ 19.2-119 and 19.2-123(A)(2a) (2021).
[5] *See* American Bar Association. *Criminal Justice Section Standards. Standard 10-1.2*. *Release under least restrictive conditions; diversion and other alternative release options*. Retrieved from https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_blk/. *See also* Pretrial Justice Institute. (2015). *Glossary of terms and phrases relating to bail and the pretrial release or detention decision*. Pretrial Justice Institute. Retrieved from https://www.courts.wa.gov/subsite/mjc/docs/GlossaryofTerms.pdf. Least restrictive conditions may also be referred to as other terms, such as least onerous conditions or least restrictive means.
[6] *See, e.g.,* Bureau of Justice Statistics. (1986, May). *Jail inmates, 1984,* at p. 2: Table 2 – Detention status of adult jail inmates, 1978, 1983, and 1984. Retrieved from https://bjs.ojp.gov/content/pub/pdf/ji84.pdf; Zeng, Z., & Minton, T.D. (2021, March). *Jail inmates in 2019.* Bureau of Justice Statistics, at p. 6: Table 4 - Percent of confined inmates in local jails, by characteristics, 2005, 2008, 2010, and 2015-2019. Retrieved from https://bjs.ojp.gov/content/pub/pdf/ji19.pdf; Dobbie, W., Goldin, J., & Yang, C. S. (2018). The effects of pretrial detention on conviction, future crime, and employment: Evidence from randomly assigned judges. *The American Economic Review*, *108*(2), 201-240; For overall context on the total adult incarcerated population: Since 2010, approximately 2 million persons each year were incarcerated in local jails, state prisons, and federal prisons. *See* Bureau of Justice Statistics. (2022, March 22). *Number of persons supervised by adult correctional systems in the U.S., by correctional status, 1980-2020*. Data source: *Annual Probation Survey, Annual Survey of Jails, Census of Jails, and National Prisoner Statistics Program*. However, in 2020, the total incarcerated population dropped to 1.6 million. *See* Carson, E.A. (2021, December). *Prisoners in 2020 – Statistical* Tables, at p. 3: "The COVID-19 pandemic had significant effects on all stages of the criminal justice process, including state and federal correctional systems. In most states, courts significantly altered operations for part or all of 2020, leading to delays in trials and/or sentencing of persons and decreasing the overall number of admissions to prison. At the same time, states and the Federal Bureau of Prisons adopted an array of policies to mitigate transmission of COVID-19, including the suspension of transfers between prison facilities or from local jails to prisons; expedited releases of persons in prison based on their crimes, time served, and behavior; and releases to home confinement. All of these factors contributed to the 15% decline in the total U.S. prison population from yearend 2019 to yearend 2020 described in this report."
[7] *See*, *e.g.,* Zeng, Z., & Minton, T.D. (2021, October). *Census of Jails, 2005–2019 – Statistical Tables.* Bureau of Justice Statistics. Note: "Unconvicted" is a term used by the Bureau of Justice Statistics and is defined as "awaiting court action on a current charge or held in jail for other reasons."
[8] Zeng, Z., & Minton, T.D. (2021, March). *Jail inmates in 2019.* Bureau of Justice Statistics, at p. 6: Table 4 - Percent of confined inmates in local jails, by characteristics, 2005, 2008, 2010, and 2015-2019. Retrieved from https://bjs.ojp.gov/content/pub/pdf/ji19.pdf.
[9] Zeng, Z., & Minton, T.D. (2021 March). *Jail inmates in 2019.* Bureau of Justice Statistics, at p. 5: Table 3 - Number of confined inmates in local jails, by characteristics, 2005, 2008, 2010, and 2015-2019. Retrieved from https://bjs.ojp.gov/content/pub/pdf/ji19.pdf. However, it should be noted that Virginia's percentage of local inmates being held pretrial in 2019 was at 47.4%, which was much lower than both the national average and most other states. *See,* Zeng, Z., & Minton, T.D. (2021, October). *Census of Jails, 2005–2019 – Statistical Tables.* Bureau of Justice Statistics, at p. 20: Table 8 - Confined inmates in local jails, by conviction status and state, midyear 2019. Retrieved from https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/cj0519st.pdf.
[10] Cassell, P. G., & Fowles, R. (2020). Does bail reform increase crime? An empirical assessment of the public safety implications of bail reform in Cook County, Illinois. *Wake Forest Law Review*, *55*(5), 933-984; Sardar, M. B. (2019). Give me liberty or give me alternatives: Ending cash bail and its impact on pretrial incarceration. *Brooklyn Law Review*, *84*(4), 1421-1458; Stevenson, M., & Mayson, S. G. (2017). Bail reform: New directions for pretrial detention and release. *Faculty Scholarship at Penn Law*. Retrieved from https://scholarship.law.upenn.edu/faculty_scholarship/1745.

[11] *See, e.g.,* Dobbie, W., Goldin, J., & Yang, C. S. (2018). The effects of pretrial detention on conviction, future crime, and employment: Evidence from randomly assigned judges. *The American Economic Review*, *108*(2), 201-240; Gupta, A., Hansman, C., & Frenchman, E. (2016). The heavy costs of high bail: Evidence from judge randomization. *Journal of Legal Studies*, *45*, 471-505; Heaton, P., Mayson, S. G., & Stevenson, M. (2017). The downstream consequences of misdemeanor pretrial detention. *Stanford Law Review*, *69*(3), 711-794; Myers, N. M. (2017). Eroding the presumption of innocence: Pre-trial detention and the use of conditional release on bail. *The British Journal of Criminology*, *57*(3), 664-683; Leslie, E., & Pope, N. G. (2018). The unintended impact of pretrial detention on case outcomes: Evidence from New York City arraignments. *The Journal of Law & Economics*, *60*(3), 529-557; Sacks, M., & Ackerman, A. R. (2014). Bail and sentencing: Does pretrial detention lead to harsher punishment? *Criminal Justice Policy Review*, *25*, 59–77; Stevenson, M. T. (2018). Distortion of justice: How the inability to pay bail affects case outcomes. *Journal of Law, Economics, and Organization*, *34*(4), 511-542; Sutton, J. R. (2013). Structural bias in the sentencing of felony defendants. *Social Science Research*, 42, 1207–1221.

[12] *See, e.g.,* Baughman, S. B. (2017). Costs of pretrial detention. *Boston University Law Review*, *97*(1), 1-30; Dobbie, W., Goldin, J., & Yang, C. S. (2018). The effects of pretrial detention on conviction, future crime, and employment: Evidence from randomly assigned judges. *The American Economic Review*, *108*(2), 201-240; Gupta, A., Hansman, C., & Frenchman, E. (2016). The heavy costs of high bail: Evidence from judge randomization. *Journal of Legal Studies*, *45*, 471-505; Holsinger, A. M. (2016). *Analyzing bond supervision data: The effects of pretrial detention on self-reported outcomes*. Crime and Justice Institute. Retrieved from http://www.crj.org/assets/2017/07/13_bond_supervision_report_R3.pdf; Holsinger, A.M., & Holsinger, K. (2018). Analyzing bond supervision data: The effects of pretrial detention on self-reported outcomes. *Federal Probation*, *82*(2), 39-45; Leslie, E., & Pope, N. G. (2018). The unintended impact of pretrial detention on case outcomes: Evidence from New York City arraignments. *The Journal of Law & Economics*, *60*(3), 529-557; Lowenkamp, C.T., & VanNostrand, M. (2013). *Exploring the impact of supervision on pretrial outcomes*. New York: Laura and John Arnold Foundation; Pager, D. (2003). The mark of a criminal record. *American Journal of Sociology*, *108*, 937–975; Western, B. (2006). *Punishment and inequality*. New York, NY: Russell Sage Foundation.

[13] *See, e.g.,* Barno, M., Martinez, D. N., & Williams, K. R. (2020). Exploring alternatives to cash bail: An evaluation of Orange County's Pretrial Assessment and Release Supervision (PARS) program. *American Journal of Criminal Justice*, *45*, 363-378; Baughman, S. B. (2017). Costs of pretrial detention. *Boston University Law* Review, *97*(1), 1-30; Donnelly, E. A., & Macdonald, J. M. (2018). The downstream effects of bail and pretrial detention on racial disparities in incarceration. *The Journal of Criminal Law and Criminology*, *108*(4), 775-814; Martinez, B. P., Petersen, N., & Omori, M. (2020). Time, money, and punishment: Institutional racial-ethnic inequalities in pretrial detention and case outcomes. *Crime & Delinquency*, *66*(6-7), 837-863; Rabuy, B., & Kopf, D. (2016). *Detaining the poor: How money bail perpetuates an endless cycle of poverty and jail time*. Prison Policy Initiative. Retrieved from https://www.prisonpolicy.org/reports/incomejails.html; Zeng, Z. (2018). *Jail inmates in 2016*. Washington, DC: Bureau of Justice Statistics.

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[18] *See, e.g.,* Doyle, C., Bains, C., & Hopkins, B. (2019). *Bail reform: A guide for state and local policymakers.* Criminal Justice Policy Program; Stevenson, M., & Mayson, S. G. (2017). Bail reform: New directions for pretrial detention and release. *Faculty Scholarship at Penn Law*. Retrieved from https://scholarship.law.upenn.edu/faculty_scholarship/1745;
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[86] *Id.*

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[88] *See, e.g.,* Hopkins, B., Bains, C., & Doyle, C. (2018). Principles of pretrial release reforming bail without repeating its harms. *Journal of Criminal Law & Criminology*, *108*(4), 679-700; Klingele, C. (2013). Rethinking the use of community supervision. *Journal of Criminal Law & Criminology*, *103*(4), 1035-1070.

[89] Bechtel, K., Holsinger, A. M., Lowenkamp, C. T., & Warren, M. J. (2017). A meta-analytic review of pretrial research: Risk assessment, bond type, and interventions. *American Journal of Criminal Justice*, *42*(2), 443–467; Carroll, J. E. (2021). Beyond bail. *Florida Law Review*, *73*, 143-197; Gouldin, L. P. (2020). Reforming pretrial decision-making. *Wake Forest Law Review*, *55*(4), 857-906.

[90] Bechtel, K., Holsinger, A. M., Lowenkamp, C. T., & Warren, M. J. (2017). A meta-analytic review of pretrial research: Risk assessment, bond type, and interventions. *American Journal of Criminal Justice*, *42*(2), 443–467; Carroll, J. E. (2021). Beyond bail. *Florida Law Review*, *73*, 143-197.

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[92] VA. CODE ANN. § 19.2-120(A) (2021).

[93] VA. CODE ANN. § 19.2-119 (2021).

[94] *See* VA. CODE ANN. § 19.2-123(A)(2a) (2021).

[95] *See* VA. CODE ANN. § 19.2-123(A)(3) (2021).

[96] VA. CODE ANN. § 19.2-123(A) (2021).

[97] VA. CODE ANN. § 19.2-123(A)(1) (2021).

[98] VA. CODE ANN. § 19.2-123(A)(2) (2021).

[99] VA. CODE ANN. § 19.2-123(A)(3b) (2021).

[100] VA. CODE ANN. § 19.2-123(A)(4) (2021).

[101] *Id*.

[102] VA. CODE ANN. § 19.2-119 (2021).

[103] VA. CODE ANN. §19.2-45 (2021).

[104] *See* VA. CODE ANN. § 19.2-72 (2021). *See also* VA. CODE ANN. § 19.2-81 (2021).

[105] *See* VA. CODE ANN. §§ 19.2-73 and 19.2-74 (2021).

[106] VA. CODE ANN. § 19.2-80 (2021). *See also* VA. CODE ANN. § 19.2-82(A) (2021).

[107] The *Project* defined a "new criminal offense punishable by incarceration" as meaning that the defendant was initially arrested and brought before a judicial officer for the criminal offense during October 2017, regardless of the date on which the criminal offense was alleged to have occurred. Data from the *Project* revealed that 99% (11,378 of 11,487) of defendants in the cohort appeared before a magistrate and 1% (109 of 11,487) of defendants in the cohort were arrested following a direct indictment.
[108] VA. CODE ANN. § 19.2-124(A) (2021).
[109] VA. CODE ANN. § 19.2-124(B) (2021).
[110] *See* Fisher v. Commonwealth, 236 Va. 403, 374 S.E.2d 46 (Nov. 18, 1988). *See also* Commonwealth v. Duse, 295 Va. 1, 809 S.E.2d 513 (Feb. 12, 2018). *See also* Billingsley v. Commonwealth, 2022 Va. App. LEXIS 77 (Mar. 22, 2022).
[111] VA. CODE ANN. § 19.2-121(A) (2021).
[112] 2021 Va. Acts, Sp. Sess. I, ch. 337. The legislation repealing all presumptions against bail from the Virginia Code is available at https://lis.virginia.gov/cgi-bin/legp604.exe?212+sum+SB1266. A wide range of criminal offenses previously carried a rebuttable presumption against bail. Examples of such offenses include, but are not limited to, first and second degree murder, voluntary manslaughter, kidnapping, malicious felonious assault, robbery, felonious sexual assault, arson of an occupied structure, certain drug distribution crimes, firearms crimes that carried a mandatory minimum sentence, certain protective order violations, sex trafficking crimes, certain driving under the influence crimes, and strangulation.
[113] VA. CODE ANN. § 19.2-120(B) (2021).
[114] VA. CODE ANN. §§ 19.2-119 and 19.2-123(A)(3) (2021).
[115] VA. CODE ANN. § 19.2-121(A) (2021).
[116] VA. CODE ANN. § 19.2-120(A) (2021).
[117] VA. CODE ANN. §§ 19.2-121(A) and 19.2-123(A)(4) (2021).
[118] VA. CODE ANN. § 19.2-152.2 *et. seq.* (2021).
[119] VA. CODE ANN. § 19.2-152.3 (2021).
[120] VA. CODE ANN. § 19.2-152.4:3(A) (2021).
[121] VA. CODE ANN. § 19.2-152.4:3(B) (2021).
[122] Data from the *Virginia Pre-Trial Data Project* showed that 92% (3,685 of 4,017) of the defendants in the cohort who were released on a secured bond for a new criminal offense punishable by incarceration during October 2017 utilized the services of a bail bondsman.
[123] VA. CODE ANN. § 9.1-185.5 (2021); 6 VA. ADMIN CODE §20-250-250 (2021).
[124] VA. CODE ANN. § 9.1-185 (2021). Note: As of November 2018, there were 375 actively licensed bail bondsmen in Virginia. This total included 238 surety bail bondsmen, 51 property bail bondsmen, 56 agents, and an additional 30 individuals who had a combination of these licenses per the Virginia Department of Criminal Justices Services, email communication, November 2, 2018.
[125] VA. CODE ANN. § 9.1-185 (2021).
[126] 6 VA. ADMIN CODE §20-250-250(M) (2021).
[127] VA. CODE ANN. § 19.2-143 (2021).
[128] Virginia State Crime Commission. (2019). *2018 annual report: Virginia Pre-Trial Data Project and pre-trial process*. p. 57. Available at http://vscc.virginia.gov/2019/VSCC%202018%20Annual%20Report%20-%20Pre-trial%20Data%20Project%20and%20Pre-trial%20Process.pdf.
[129] Virginia State Crime Commission. (2021, September). *Virginia Pre-Trial Data Project*. Available at http://vscc.virginia.gov/virginiapretrialdataproject.asp.
[130] The Virginia Criminal Sentencing Commission will replicate the *Project* on an annual basis. Subsequent datasets will incorporate a full fiscal year of data rather than data from a singular month.
[131] The data further revealed that of the 2,299 released defendants who were arrested for a new in-state offense punishable by incarceration, 88% (2,029 of 2,299) were arrested for a misdemeanor offense.
[132] VA. CODE ANN. § 19.2-159 (2021); *See* Office of the Executive Secretary of the Supreme Court of Virginia. (January 21, 2022). *Eligibility for court-appointed counsel indigency guidelines*. Retrieved from https://www.vacourts.gov/courtadmin/aoc/djs/resources/indigency_guidelines.pdf.
[133] The indigency variable is a proxy measure calculated based upon whether the attorney type at case closure in the court case management systems was noted as a public defender or court-appointed attorney. This measure does not capture any changes to the attorney type that occurred before case closure.
[134] Virginia State Crime Commission. (2019, December). *Virginia Pre-Trial Data Project preliminary findings*. Available at http://vscc.virginia.gov/images/VSCC%20Pre-Trial%20Data%20Project%20Preliminary%20Findings.pdf.
[135] Staff sought to identify amendments to bail processes in other states over the past 5 years. Staff selected this time period in an effort to identify recent trends across the country.
[136] *See* Appendix A for a list of amendments by state over the past five years.
[137] *See* Appendix A for a list of amendments by state over the past five years.
[138] ME. REV. STAT. ANN. tit. 15, § 1026(3)(B-1) (2021). *See* ME. REV. STAT. ANN. tit. 17-A, § 1604(1)(E) (2021). The maximum term of imprisonment for a Class E crime is 6 months.

[139] ME. REV. STAT. ANN. tit. 15, §1026(4)(C)(4), (12), (13), and (14) (2021).
[140] VT. STAT. ANN. tit. 13 § 7551(b)(1)(B) (2021).
[141] VT. STAT. ANN. tit. 13 § 7551(b)(2) (2021).
[142] TEX. CRIM. PROC. CODE ANN. § 17.03(b-2) (2021). *See also* McCullough, J. (2021, September 13). Texas bill to require cash bail for those accused of violent crimes becomes law. *The Texas Tribune*. Retrieved from https://www.texastribune.org/2021/09/03/texas-bail-legislation-abbott/.
[143] 2021 Ala. Acts 267. *See also* Moseley, B. (2021, April 8). Alabama Senate passes Aniah's Law. *Alabama Political Reporter*. Retrieved from https://www.alreporter.com/2021/04/08/senate-passes-aniahs-law/
[144] *See* Alabama Const. Art. XVII, §284.01.
[145] *See* Appendix A for a list of amendments by state over the past five years.
[146] 2019 N.Y. Laws 59 (Part JJJ) § 2(4).
[147] Greene, L., & Parascandola, R. (2020, March 5). Many suspects freed under bail reform go on to commit major crimes: NYPD. *New York Daily News*. Retrieved from https://www.nydailynews.com/new-york/ny-crime-bail-reform-20200305-orj4edxnh5awfojesnohu276mq-story.html.
[148] 2020 N.Y. Laws 56 (Part UUU) § 2(4)(e), (g), and (o).
[149] UAA Justice Center. (2016). Senate Bill 91: Summary of Policy Reforms. *Alaska Justice Forum,* 33(1), 2.
[150] 2019 AK. Sess. Laws 4.
[151] *Id*.
[152] 725 ILL. COMP. STAT. 5/110-1.5 (2023); *See also* Ali, S. (2021, February 24). Illinois becomes first state to end cash bail as part of criminal justice reform law. *NBC News*. Retrieved from https://www.nbcnews.com/news/us-news/illinois-becomes-first-state-end-money-bail-part-massive-criminal-n1258679.
[153] The increases in homicide offenses and aggravated assault offenses were particularly noteworthy. *See* FBI. (2020). *Crime Data Explorer,* Rate of homicide offenses by U.S. population, 2010-2020 *and* Rate of aggravated assault offenses by U.S. population, 2010-2020; *See also* Chalfin, A., & MacDonald, J. (2021, July 9). We don't know why violent crime is up. But we know there's more than one cause. *The Washington Post*. Retrieved from https://www.washingtonpost.com/outlook/we-dont-know-why-violent-crime-is-up-but-we-know-theres-more-than-one-cause/2021/07/09/467dd25c-df9a-11eb-ae31-6b7c5c34f0d6_story.html.
[154] Anderson, C., Redcross, C., Valentine, E., & Miratrix, L. (2019). *Evaluation of pretrial justice system reforms that use the Public Safety Assessment: Effects of New Jersey's criminal justice reform*. New York: MDRC. Retrieved from https://www.mdrc.org/sites/default/files/PSA_New_Jersey_Report_%231.pdf.
[155] *Id*.
[156] Grant, G. A. (2019). *Report to the Governor and the Legislature*. Retrieved from https://www.njcourts.gov/courts/assets/criminal/cjrannualreport2019.pdf?c=XNp.
[157] *Id.*
[158] Letter from Brian Frosh, Attorney General, Maryland, to Alan M. Wilner, Chair, Standing Committee on Rules of Practice and Procedure (2016, October 25) Retrieved from https://www.marylandattorneygeneral.gov/News%20Documents/Rules_Committee_Letter_on_Pretrial_Release.pdf
[159] Md. Rule 4-216.1(b)(A) (2021). *See also* Standing Committee on Rules of Practice and Procedure. (2016, November 22). *Notice of proposed rule changes*. Retrieved from https://mdcourts.gov/sites/default/files/rules/reports/192nd.pdf.
[160] Color of Change & Progressive Maryland. (2018, June). *Prince George's County: A study of bail*. Retrieved from https://static.colorofchange.org/static/v3/pg_report.pdf.
[161] Stemen, D., & Olson, D. (2020). *Dollars and sense in Cook County: Examining the impact of General Order 18.8A on felony bond court decisions, pretrial release, and crime*. Chicago: Loyola University Chicago.
[162] Garrett, B. L., & Thompson, S. G. (2021). Monitoring the misdemeanor bail reform consent decree in Harris County, Texas. *Judicature*, *105*(2), 40-47.
[163] Garrett, B. L., & Thompson, S. G. (2021). Monitoring the misdemeanor bail reform consent decree in Harris County, Texas. *Judicature*, *105*(2), 40-47; Harris County Criminal Courts at Law. (2021). *Rules of Court*. Retrieved from https://www.ccl.hctx.net/attorneys/rules/rules.pdf.
[164] The ODonnell Consent Decree is the first federal court-supervised remedy concerning bail. The consent decree is the result of the 2016 class action lawsuit, *ODonnell et al. v. Harris County et al.*, filed alleging that misdemeanor arrestees were subject to unconstitutional bail practices in Harris County, Texas. *See also*, Harris County Justice Administration. (2022). *ODonnell Consent Decree*. Retrieved from https://jad.harriscountytx.gov/ODonnell-Consent-Decree; Garrett, B. L. & Thompson, S. G. (2021). Monitoring the misdemeanor bail reform consent decree in Harris County, Texas. *Judicature*, *105*(2), 40-47.
[165] Garrett, B. L., & Thompson, S. G. (2021). Monitoring the misdemeanor bail reform consent decree in Harris County, Texas. *Judicature*, *105*(2), 40-47.
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[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] Garrett, B. L., Thompson, S. G., Carmichael, D., Naufal, G., Jeong, J., Seasock, A., Caspers, H., & Kang, S. (2021). *Monitoring pretrial reform in Harris County: Second report of the court-appointed monitor*. Retrieved from https://static.texastribune.org/media/files/f66da81cc40c6bf4bbec22e822314f44/second-odonnell-report.pdf.
[172] *Id.*
[173] Harris County District Attorney's Office. (2021). Bail, crime & public safety. Retrieved from https://app.dao.hctx.net/sites/default/files/2021-09/HCDAO%20Bail%20Crime%20%20Public%20Safety%20Report%2009.02.21_0.pdf
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *See* Appendix B for a list of states which restrict the use of secured bond for specific offenses.
[178] 725 ILL. COMP. STAT. 5/110-1.5 (2023); *See also* Ali, S. (2021, February 24). Illinois becomes first state to end cash bail as part of criminal justice reform law. *NBC News*. Retrieved from https://www.nbcnews.com/news/us-news/illinois-becomes-first-state-end-money-bail-part-massive-criminal-n1258679.
[179] *See* 2019 N.Y. Laws 59 (Part JJJ) § 2(4). *See also* 2020 N.Y. Laws 56 (Part UUU) § 2(4).
[180] CONN. GEN. STAT. §54-64a(2) (2021).
[181] *See* Appendix C for a list of states with a presumption of release without financial conditions.
[182] FLA. STAT. §907.041(3) (2021).
[183] MINN. R. CRIM. P. 6.02 (2016).
[184] W. VA. CODE § 62-1C-1a(a)(1) (2021).
[185] *See* Appendix D for a list of states that require the use of least restrictive conditions of bond. Note that when identifying these states, staff focused on states that specifically use the phrase least restrictive conditions, or a similar phrase such as least onerous conditions or least restrictive means, in their statutes or court rules.
[186] TEX. CODE CRIM. PROC. CODE. ANN. art. 17.028(b) (2021).
[187] GA. CODE ANN. § 17-6-1(B)(1) (2021).
[188] ALA. R. CRIM. P. RULE 7.2. (2022).
[189] 2021 Va. Acts, Sp. Sess. I, ch. 337. The legislation repealing all presumptions against bail from the Virginia Code is available at https://lis.virginia.gov/cgi-bin/legp604.exe?212+sum+SB1266. A wide range of criminal offenses previously carried a rebuttable presumption against bail. Examples of such offenses include, but are not limited to, first and second degree murder, voluntary manslaughter, kidnapping, malicious felonious assault, robbery, felonious sexual assault, arson of an occupied structure, certain drug distribution crimes, firearms crimes that carried a mandatory minimum sentence, certain protective order violations, sex trafficking crimes, certain driving under the influence crimes, and strangulation.
[190] *Id. See also* former VA. CODE ANN. §§ 19.2-120(B), (C), (D), and (E) and 19.2-120.1 (2020).
[191] VA. CODE ANN. § 19.2-120(A) (2021).
[192] Virginia State Crime Commission. (2019, December). *Virginia Pre-Trial Data Project preliminary findings*. Available at http://vscc.virginia.gov/images/VSCC%20Pre-Trial%20Data%20Project%20Preliminary%20Findings.pdf.
[193] VA. CODE ANN. § 19.2-123(A) (2021).
[194] *Id*.
[195] The median bond amount at release for these 1,127 defendants was $2,500.
[196] Doyle, C., Bains, C., & Hopkins, B. (2019). *Bail reform: A guide for state and local policymakers*. Criminal Justice Policy Program; Hopkins, B., Bains, C., & Doyle, C. (2018). Principles of pretrial release reforming bail without repeating its harms. *Journal of Criminal Law & Criminology*, *108*(4), 679-700; Sardar, M. B. (2019). Give me liberty or give me alternatives: Ending cash bail and its impact on pretrial incarceration. *Brooklyn Law Review*, *84*(4), 1421-1458.
[197] Stevenson, M., & Mayson, S. G. (2017). Bail reform: New directions for pretrial detention and release. *Faculty Scholarship at Penn Law*. Retrieved from https://scholarship.law.upenn.edu/faculty_scholarship/1745; Doyle, C., Bains, C., & Hopkins, B. (2019). *Bail reform: A guide for state and local policymakers*. Criminal Justice Policy Program.
[198] VA. CODE ANN. §19.2-120(A) (2021).
[199] *See* Appendix C for a list of states with a presumption of release without financial conditions.

[200] VanNostrand, M., Rose, K., & Weibrecht, K. (2011). *State of the science of pretrial release recommendations and supervision*. Pretrial Justice Institute. Retrieved from https://www.ncsc.org/__data/assets/pdf_file/0015/1653/state-of-the-science-pretrial-recommendations-and-supervision-pji-2011.ashx.pdf.
[201] Pretrial Justice Institute. (2015). *Glossary of terms and phrases relating to bail and the pretrial release or detention decision.* Pretrial Justice Institute. Retrieved from https://www.courts.wa.gov/subsite/mjc/docs/GlossaryofTerms.pdf.
[202] *Id.* at p.15.
[203] *Id.*
[204] National Center on State Courts. (2019). *Bail reform: A practical guide based on research and experience.* Retrieved from https://www.ncsc.org/__data/assets/pdf_file/0023/16808/bail-reform-guide-3-12-19.pdf.
[205] *Id.*
[206] VA. CODE ANN. §§ 19.2-121(A) and 19.2-123(A)(4) (2021).
[207] *See* VA. CODE ANN. §19.2-123 (2021).
[208] VA. CODE ANN. § 19.2-74(A) (2021).
[209] VA. CODE ANN. §§ 19.2-80 and 19.2-390(A)(1) (2021).
[210] For additional information on this practice, *see, e.g.,* International Association of Chiefs of Police. (2016). *Citation in lieu of arrest: Examining law enforcement's use of citation across the United States.* Retrieved from https://www.theiacp.org/sites/default/files/all/c/Citation%20in%20Lieu%20of%20Arrest%20Literature%20Review.pdf; National Conference of State Legislatures. (2019, March 18). Citation in lieu of arrest. Retrieved from https://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx.
[211] *See* Virginia State Crime Commission. (2019). *2018 Annual report: Fingerprinting of defendants*. Available at http://vscc.virginia.gov/2019/VSCC%202018%20Annual%20Report%20-%20Fingerprinting%20of%20Defendants.pdf.
[212] *See* Virginia Department of State Police. Col. Gary T. Settle (2019). *E-Summons Pilot Project activities and outcomes of system implementation*. Retrieved from https://rga.lis.virginia.gov/Published/2019/RD498/PDF
[213] *Id*.
[214] VA. CODE ANN. § 17.1-275.14 (2021). *See also* Va. Code Ann. § 17.1-279.1 (2021).
[215] VA. CODE ANN. § 19.2-152.4:3(A)(1) and (A)(2) (2021).
[216] Virginia Department of Criminal Justice Services. (2018, April 2). *Virginia Pretrial Risk Assessment Instrument. Instruction Manual – Version 4.3*. Retrieved from https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/virginia-pretrial-risk-assessment-instrument-vprai_0.pdf.
[217] *Id*.
[218] *Id*.
[219] Virginia State Crime Commission. (2019). *2018 annual report: Virginia Pre-Trial Data Project and pre-trial process*, at pp. 49-50: "The Virginia Code requires pretrial services agency officers to investigate and interview defendants who are detained in jails and to complete a pretrial investigation report for the court. In FY18, over 27,500 of the nearly 39,000 defendants who received a pretrial investigation were ultimately not ordered to report to pretrial services agency supervision as a condition of bond. The fact that a defendant was interviewed and not placed on pretrial services agency supervision was not a concern noted by staff because the court had received information to use when making a bond determination. However, over 26,000 defendants who were eligible for a pretrial investigation did not receive one. Throughout the course of the study, staff were presented with numerous reasons as to why pretrial investigations may not have been completed, such as mental health issues, medical emergencies, intoxication, limited resources of pretrial services agencies, time constraints at jails, malfunctioning video interview equipment, and defendants who refuse to be interviewed. While there are many reasons why a pretrial investigation may not be completed, data is not readily available or consistently maintained in order to determine why such a high number of eligible defendants are not receiving the required pretrial investigation. Additionally, it should be noted that significantly more defendants were placed on pretrial services agency supervision without a pretrial investigation (direct placement) than with such an investigation. Of the 28,735 placements to pretrial services supervision made in FY18, 61% (17,568) of defendants were directly placed without a pretrial investigation, while only 39% (11,167) of defendants were placed following such an investigation.[219] Staff found these numbers to be significant for two reasons. First, pretrial services agencies invest significant resources in conducting pretrial investigations. Second, pretrial services agency directors and officers frequently commented on the lack of resources available to such agencies. The resources required to conduct such pretrial investigations coupled with the lack of resources that pretrial services agencies are facing is an issue that must further be examined as agencies consider how to allocate resources between their investigative and supervision responsibilities." Available at http://vscc.virginia.gov/2019/VSCC%202018%20Annual%20Report%20-%20Pre-trial%20Data%20Project%20and%20Pre-trial%20Process.pdf.
[220] *See, e.g.*, Advancing Pretrial Policy & Research (APPR). *About the Public Safety Assessment*. Retrieved from https://www-cdn.law.stanford.edu/wp-content/uploads/2019/05/PSA-Sheet-CC-Final-5.10-CC-Upload.pdf; For

additional information relating to the PSA, *see, e.g*., Stanford Pretrial Risk Assessment Tools Factsheet Project. *Risk assessment factsheet: Public Safety Assessment (PSA).* Retrieved from https://wwwcdn.law.stanford.edu/wp-content/uploads/2019/05/PSA-Sheet-CC-Final-5.10-CC-Upload.pdf. Note that the terms Public Safety Assessment, PSA, and the PSA logo (collectively, the "PSA Marks") are trademarks of the Laura and John Arnold Foundation (LJAF).

[221] Advancing Pretrial Policy & Research (n.d.). *Public Safety Assessment Sites.* Retrieved from https://advancingpretrial.org/psa/psa-map/.

[222] VA. CODE ANN. § 19.2-152.3 (2021).

[223] *See* Associated Press. (2019, May 4). Virginia court system uses text messages to remind you to show up. *WDBJ7.* Retrieved from https://www.wdbj7.com/content/news/Virginia-will-now--509485351.html. *See also* Solomon, B. (2019, May 8). Some Virginia public defenders sending 'see you in court' reminders to clients. *WHSV3*. Retrieved from https://www.whsv.com/content/news/Some-Virginia-public-defenders-sending-see-you-in-court-reminders-to-clients-509647351.html.

[224] Betchel, K., Holsinger, A. M., Lowenkamp, C. T., & Warren, M. J. (2017). A meta-analytic review of pretrial research: Risk assessment, bond type, and intervention. *American Journal of Criminal Justice*, *42*, 443-467; Hatton, R., & Smith, J. (2021). *Research on the effectiveness of pretrial support and supervision services: A guide for pretrial services programs*. UNC School of Government Criminal Justice Innovation Lab.

[225] Ferri, R. (2022). The benefits of live court date reminder phone calls during pretrial case processing. *Journal of Experimental Criminology*, *18*, 149-169; Hatton, R., & Smith, J. (2021). *Research on the effectiveness of pretrial support and supervision services: A guide for pretrial services programs*. UNC School of Government Criminal Justice Innovation Lab; Howat, H., Forsyth, C. J., Biggar, R., & Howat, S. (2016). Improving court-appearance rates through court-date reminder phone calls. *Criminal Justice Studies*, *29*(1), 77–87; Lowder, E. M., & Foudray, C. M. A. (2021). Use of risk assessments in pretrial supervision and decision-making and associated outcomes. *Crime & Delinquency*, *67*(11), 1765-1791; Lowenkamp, C. T., Holsinger, A. M., & Dierks, T. (2018). Assessing the effects of court date notifications within pretrial case processing. *American Journal of Criminal Justice*, *43*(2), 167–180; Rosenbaum, D. I., Hutsell, N., Tomkins, A. J., Bornstein, B. H., Herian, M. N., & Neeley, E. M. (2012). Court date reminder postcards: A benefit-cost analysis using reminder cards to reduce failure to appear rates. *Judicature, 95*(4), 177–187.

[226] Ferri, R. (2022). The benefits of live court date reminder phone calls during pretrial case processing. *Journal of Experimental Criminology*, *18*, 149-169; Hatton, R., & Smith, J. (2021). *Research on the effectiveness of pretrial support and supervision services: A guide for pretrial services programs*. UNC School of Government Criminal Justice Innovation Lab.

[227] Virginia Department of Criminal Justice Services. (2022, March). *Report on pretrial services agencies FY2021*. Retrieved from https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/report-pretrial-services-fy-2021.pdf.

[228] *Id.* The funding increased the number of localities served by pretrial services agencies from 100 to 115 between 2020 and March 2022. *See also* Virginia Department of Criminal Justice Services. (2020, December). *Report on pretrial services agencies FY2020*. Retrieved from https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/report-pretrial-services-fy2020.pdf.

[229] 725 ILL. COMP. STAT. 5/110-1.5 (2023).

[230] *See* Illinois Courts. Pretrial Implementation Task Force. Retrieved from https://www.illinoiscourts.gov/courts/additional-resources/pretrial-implementation-task-force/.

[231] *Id*.

[232] Illinois Bar Association. (2022). The state of Illinois courts: What is happening in and around Illinois courtrooms (despite the pandemic). *Bench & Bar*, *52*(6), 1-15. Retrieved from https://www.isba.org/sites/default/files/sections/benchandbar/newsletter/Bench%20and%20Bar%20May%202022.pdf. Phase 1 (to be completed by January 1, 2023) involves establishing legal and evidence-based pretrial services in counties without such services. Phase 2 (between January 1, 2023, and December 31, 2023) will include transitioning circuit courts in counties with reimbursed positions into a statewide model. Phase 3 (January 1, 2024, to December 31, 2024) will culminate with transitioning the remaining counties into the statewide model.

[233] Virginia State Crime Commission. (2022). *2021 annual report: Diversion*.

APPENDIX A: States That Amended Their Bail Processes (24) (1/2016 – 11/2021)

More Restrictive: the state enacted amendments to its bail process that either increased the use of secured bond in certain instances or adopted other measures that were not specifically meant to promote pretrial release.

Less Restrictive: the state enacted amendments to its bail process or other measures that were either meant to limit the use of secured bond or promote pretrial release.

STATE	YEAR	ACT	TYPE OF AMENDMENT
Alabama	2021 (pending vote)[1]	2021 Ala. Acts 267	**More Restrictive** Alabama passed Aniah's Law, a proposed constitutional amendment that would allow judges and prosecutors broader discretion in requesting and denying bail to those accused of committing violent crimes. The legislation is named for Aniah Blanchard, a 19-year old Alabama college student who was kidnapped and murdered in October 2019. The defendant was out on bond at the time of the offense.
Alaska	2016 (enacted), 2019 (rolled back)	2016 AK. Sess. Laws 36 2019 AK. Sess. Laws 4	**Less Restrictive, then Rolled Back** In 2016, Alaska Governor Bill Walker signed into law reforms relating to pretrial, sentencing, and corrections. In 2019, Alaska Governor Michael Dunleavy signed into law a criminal justice package that repealed and replaced previous reforms.
Arizona	2018	Ariz. R. Crim. P. 7.3 (2022)	**Less Restrictive** Arizona Chief Justice Scott Bales issued Administrative Order No. 2016-16 establishing the Task Force on Fair Justice for All: Court Ordered Fines, Penalties, Fees and Pretrial Release Policies. The Task Force ultimately made 65 recommendations.[2] In 2018, the Arizona Supreme Court approved a number of changes to the state's Rules of Criminal Procedure regarding some of the recommendations.[3]
California	2021	In re Humphrey, 482 P.3d 1008, (2021)	**Less Restrictive** A defendant may not be held in custody pending trial unless the court has made an individualized determination that the arrestee has the financial ability to pay, but nonetheless failed to pay, the amount of bail the court finds reasonably necessary.

STATE	YEAR	ACT	TYPE OF AMENDMENT
Colorado	2019	2019 Colo. Ch. 132	**Less Restrictive** The Act prohibits a court from imposing a monetary condition of release for a defendant charged with a traffic offense, petty offense, or comparable municipal offense, except for a traffic offense involving death or bodily injury, eluding a police officer, circumventing an interlock device, or a municipal offense with substantially similar elements to a state misdemeanor offense.
Connecticut	2017	2017 Conn. Acts 145 (Reg. Sess.)	**Less Restrictive** The Act created a bond review time schedule for individuals held pretrial for misdemeanor and felony offenses. The Act also eliminated secured bond for specific misdemeanor offenses with judicial exceptions.
Delaware	2018 (enacted), 2021 (rolled back)	81 Del. Laws 200 (2018) 83 Del. Laws 72 (2021)	**Less Restrictive, then Rolled Back** In 2018, judges were encouraged to use other pretrial release conditions than secured bond. Also instructed judges to use an evidence based risk assessment tool in bail determinations. In 2021, created a secured bond presumption for certain serious offenses.
Illinois	2020	2019 Ill. Laws 652	**Less Restrictive** Eliminates the use of secured bond. Effective January 1, 2023.
Georgia	2018 (enacted), 2021 (rolled back)	2018 Ga. Laws 416 2020 Ga. Laws 547	**Less Restrictive, then Rolled Back** In 2016, required the court to consider financial circumstances of an accused individual when determining bail. In 2021, required the court to use unsecured or secured bond when determining bail for specific offenses.
Indiana	2020	Ind. R. Crim. P. 26 (2016) Codified in 2017: 2017 Ind. Acts 187 (2017)	**Less Restrictive** In 2016, the Indiana Supreme Court adopted Criminal Rule 26. Under the rule, the court encourages courts to utilize the results of an evidence-based risk assessment and release arrestees who do not present a flight or public safety risk without secured bond. The rule became effective statewide on January 1, 2020.

STATE	YEAR	ACT	TYPE OF AMENDMENT
Maine	2021	2021 Me. Laws 397	**Less Restrictive** Eliminated secured bond for non-violent Class E misdemeanors, the least serious criminal violations.
Maryland	2017	Md. Rule 4-216.1	**Less Restrictive** Adopted a rule to promote the release of defendants on their own recognizance or unsecured bond.
Massachusetts	2018	2018 Mass. Acts 69	**Less Restrictive** Requires judges to issue a reason for secured bond decisions. Also, created a commission to evaluate the bail system.
Missouri	2019	Order dated December 18, 2018, re: Rules 21, 22 and 33.	**Less Restrictive** Court must start with non-monetary conditions of release and may impose monetary conditions only in an amount not exceeding what is necessary to ensure safety or defendant's appearance.
Nebraska	2020	2020 Neb. Laws 881	**Less Restrictive** Eliminated secured bond for lowest level misdemeanors and city ordinances with judicial exceptions.
New Hampshire	2019	2019 N.H. Laws 143	**Less Restrictive** Amended procedure for considering dangerousness of defendant during bail determination. Also, re-established commission on pretrial detention.
New Jersey	2017	2014 N.J. Laws 31	**Less Restrictive** Primarily rely on pretrial release by non-monetary means. Secured bond used only if it is determined that no other conditions of release will suffice.
New Mexico	2016	Sen. J. Res. 1, 2016 Leg., Reg. Sess. (N.M. 2016)	**Less Restrictive** A defendant who is neither a danger nor a flight risk shall not be detained solely because of financial inability to afford a secured bond.
New York	2019 (enacted), 2020 (rolled back)	2019 N.Y. Laws 59 2020 N.Y. Laws 56	**Less Restrictive, then Rolled Back** In 2019, presumption of release on own recognizance for select misdemeanors and nonviolent felonies. In 2020, additional offenses added to list of secured bond offenses.

STATE	YEAR	ACT	TYPE OF AMENDMENT
Texas	2021	Acts 2021, 87th Leg., 2nd C.S., ch. 11 (S.B. 6)	**More Restrictive** Prohibits the release on personal recognizance bond a defendant charged with a violent offense or charged while released on bail.
Utah	2020 (enacted), 2021 (rolled back)	2020 Utah Laws 185 2021 Utah Laws 431	**Less Restrictive, then Rolled Back** In 2020, created a presumption of release for individuals arrested for certain criminal offenses. In 2021, removed the presumption of release for a person arrested for certain criminal offenses.
Vermont	2018	2017 Vt. Acts & Resolves 164	**Less Restrictive** Created a cap for secured bond amounts for low level nonviolent offenses of $200.
Virginia	2020, 2021	2020 Va. Acts 999 2021 Va. Acts 337	**Less Restrictive** In 2020, allowed judicial officers to make bail determinations without consulting an attorney for the Commonwealth for offenses which give rise to a rebuttable presumption against bail. In 2021, removed rebuttable presumption against bond for specific offenses.
West Virginia	2020	2020 W. Va. Acts 98	**Less Restrictive** For specific misdemeanor offenses, judicial officer will release individual on own recognizance.

Appendix by Crime Commission staff based on legal analysis.

[1] Alabama's reform is a constitutional amendment that requires approval through a statewide referendum. The vote will take place November 2022. *See* Alabama Const. Art. XVII, §284.01.
[2] Supreme Court of the State of Arizona. (2016, August 12). Justice for all: Report and recommendations of the task force on fair justice for all: Court-ordered fines, penalties, fees, and pretrial release policies. Retrieved from https://www.azcourts.gov/Portals/74/TFFAIR/Reports/FINAL%20FairJustice%20Aug%2012-final%20formatted%20versionRED%20(002).pdf?ver=9pLeF4I9Bwm-V5BSVeB1vQ%3d%3d.
[3] Fradella, H., & Scott-Hayward, C. (2019). Advancing bail and pretrial justice reform in Arizona. *Arizona State Law Journal, 52,* 845-881. Retrieved from https://arizonastatelawjournal.org/2021/01/13/advancing-bail-and-pretrial-justice-reform-in-arizona/#_ftn156.

APPENDIX B: States Which Restrict the Use of Secured Bond for Specific Offenses (7)

STATE	STATUTE
Colorado	COLO. REV. STAT. §16-4-113 (2021)
Connecticut	CONN. GEN. STAT. § 54-64a (2021)
Illinois	725 ILL. COMP. STAT. 5/100-1.5 (2021)
Maine	ME. REV. STAT. ANN. tit. 15, § 1026 (2021)
New York	N.Y. CRIM. PROC. LAW § 510.10 (2021)
Vermont	VT. STAT. ANN. tit. 15, § 7551 (2021)
West Virginia	W. VA. CODE § 62-1C-1A (2021)

Appendix by Crime Commission staff based on legal analysis.

APPENDIX C: States With a Presumption of Release Without Financial Conditions (26)

STATE	STATUTE
Alaska	ALASKA STAT. § 12.30.011 (2021)
Arizona	ARIZ. REV. STAT. ANN. § 13-3967 (2021)
Arkansas	ARK. R. CRIM. P. RULE 9.2 (2022)
California	CAL PENAL CODE § 1270 (2021)
Colorado	COLO. REV. STAT. § 16-4-113 (2021)
Delaware	DEL. CODE ANN. tit. 11 § 2105 (2021)
Florida	FLA. STAT. § 907.041 (2021)
Illinois	725 ILL. COMP. STAT. 5/110-2 (2021)
Iowa	IOWA CODE § 811.2 (2021)
Kentucky	KY. REV. STAT. ANN. § 431.520 (2021)
Maine	ME. REV. STAT. ANN tit. 15 § 1026 (2021)
Maryland	MD. CODE ANN., CRIM. PROC. § 5-101 (2021)
Minnesota	MINN. R. CRIM. P. 6.02 (2016)
Missouri	MO. REV. STAT. § 544.455 (2021)
Nebraska	NEB. REV. STAT. § 29-901 (2021)
New Jersey	N.J. STAT. ANN. §§ 2A:162-16, 2A:162-17 (2021)
New Mexico	N.M.D. CT. CRIM. P. RULES 5-401 (2020)
New York	N.Y. CRIM. PROC. LAW § 510.10 (2021)
North Dakota	N.D. R. CRIM. P. RULE 46 (2020)
Oregon	OR. REV. STAT. § 135.245 (2021)
South Carolina	S.C. CODE ANN. § 17-15-10 (2021)
South Dakota	S.D. CODIFIED LAWS § 23A-43-2 (2021)
Vermont	VT. STAT. ANN. tit.13, § 7554 (2021)
Washington	WASH. SUPER. CT. CRIM. R. 3.2
West Virginia	W. VA. CODE § 62-1C-1a (2021)
Wyoming	WYO. R. CRIM. P. RULE 46.1(2019)

Appendix by Crime Commission staff based on legal analysis.

APPENDIX D: States Which Require the Least Restrictive Conditions of Bond (21)

STATE	STATUTE
Alabama	ALA. R. CRIM. P. RULE 7.2 (2022)
Alaska	ALASKA STAT. § 12.30.011 (2021)
Arizona	Ariz. R. Crim. P. 7.3 (2018)
Colorado	COLO. REV. STAT. § 16-4-103 (2021)
Connecticut	CONN. GEN. STAT. § 54-64a (2021)
Georgia	GA. CODE ANN. § 17-6-1 (2021)
Hawaii	HAW. REV. STAT. § 804-4 (2021)
Maine	ME. REV. STAT. ANN. tit.15, § 1026 (2021)
Maryland	MD. RULE 4-216.1 (2021)
Nebraska	NEB. REV. STAT. § 29-901 (2021)
Nevada	NEV. REV. STAT. ANN. §178.4851 (2021)
New Jersey	N.J. STAT. ANN. §§ 2A:162-16, 2A: 162-17 (2021)
New Mexico	N.M.D. CT. CRIM. P. RULES 5-401 (2020)
New York	N.Y. CRIM. PROC. LAW § 510.10 (2021)
Oregon	OR. REV. STAT. § 135.245 (2021)
Tennessee	TENN. CODE ANN. § 40-11-116 (2021)
Texas	TEX. CODE. CRIM. PROC. ANN. art. 17.028 (2021)
Vermont	VT. STAT. ANN. tit. 13, § 7554 (2021)
Washington	WASH. SUPER. CT. CRIM. R. 3.2
West Virginia	W. VA. CODE § 62-1C-1a (2021)
Wyoming	WYO. R. CRIM. P. 46.1

Appendix by Crime Commission staff based on legal analysis.

UPDATE: EXPUNGEMENT AND SEALING OF CRIMINAL AND COURT RECORDS

EXECUTIVE SUMMARY

Prior to 2021, the only criminal record relief available in Virginia was for the expungement of non-convictions. During the 2021 Special Session I of the General Assembly, legislation was enacted which created two new criminal record relief processes, sealing (automatic and petition-based)[1] and marijuana expungement (automatic and petition-based).[2] Additionally, the sealing legislation contained enactment clauses directing the Crime Commission to continue its study of expungement and sealing.

During its review, Crime Commission staff determined that the expungement, sealing, and marijuana expungement statutes contain significant variations, both technical and substantive, that legislators may wish to reconcile in order to ensure that the framework is consistent, individuals have access to the processes, and post-criminal record relief protections are uniform. Staff further noted that additional funding will be needed in order to successfully implement the new processes and provide criminal record relief.

Therefore, staff recommended that the Crime Commission continue to examine this topic in order to identify and reconcile conflicts between the three criminal record relief processes. Additionally, staff recommended that any legislation addressing the expungement or sealing of criminal and court records should continue to be referred to the Crime Commission until the new sealing law takes effect (July 2025 or earlier). No motion was made for either of these recommendations.

Finally, staff recommended creating two new full-time positions at the Virginia Indigent Defense Commission to provide training and support to public defenders and court-appointed counsel on the new expungement and sealing laws (total estimated annual cost: $215,000).[3] Budget amendments were introduced in both the House and Senate, but were not included in the final budget adopted by the General Assembly and signed by the Governor.[4]

BACKGROUND

In 2020, the Executive Committee of the Crime Commission directed staff to conduct a review of expungement in Virginia and of criminal record relief in other states, with a particular focus on the automatic sealing of criminal charges and convictions.[5] At the time of that study, the

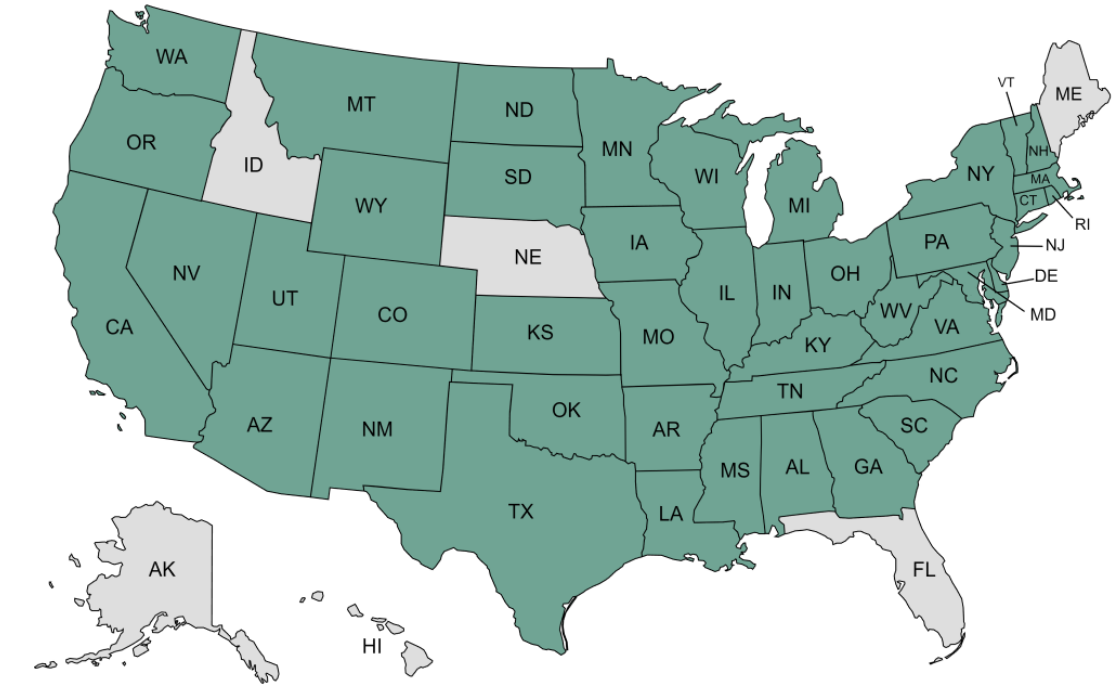
only criminal record relief process available in Virginia was for the expungement of charges that concluded without a conviction (non-convictions).[6] Virginia law did not include a process to expunge or seal criminal convictions, except in very narrow circumstances involving actual innocence claims.[7]

2021 Study Findings

Legislation enacted during the 2021 Special Session I of the General Assembly created an automatic process to seal specific convictions, deferred dismissals,[8] and non-convictions, as well as a petition-based process to seal a wide variety of convictions and deferred dismissals.[9] In addition to the new sealing laws, separate legislation enacted during the 2021 Special Session I of the General Assembly allowed for the automatic and petition-based expungement of certain marijuana offenses.[10] With the passage of this new legislation during the 2021 Special Session I of the General Assembly, Virginia is now one of:

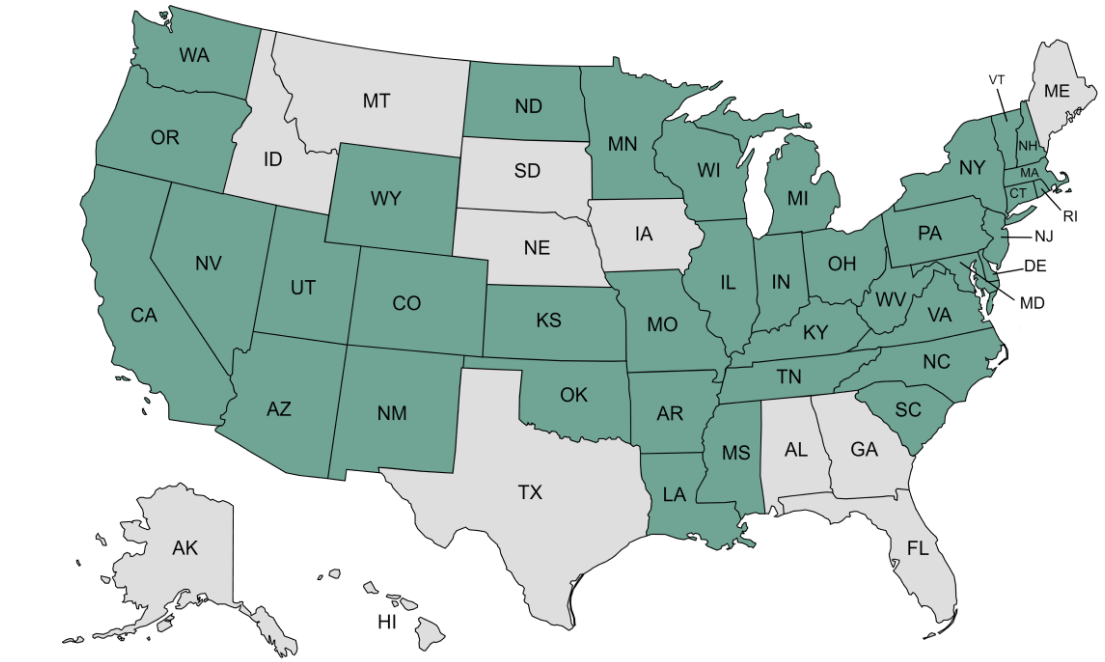
- 44 states to provide criminal conviction relief for misdemeanor offenses;[11]
- 38 states to provide criminal conviction relief for felony offenses;[12]
- 13 states to provide specific criminal conviction relief for marijuana offenses after having legalized the possession of marijuana (both medical and recreational);[13] and,
- 9 states to provide automatic criminal conviction relief.[14]

44 STATES PROVIDE MISDEMEANOR CONVICTION RELIEF



Map by Crime Commission staff based on legal analysis.

38 STATES PROVIDE FELONY CONVICTION RELIEF



- States with conviction relief for felonies
- States without conviction relief for felonies

Map by Crime Commission staff based on legal analysis.

The 2021 sealing legislation required the Crime Commission to continue its study on the expungement and sealing of criminal records.[15] Specifically, the legislation contained six mandates directing the Crime Commission to:

1. Review the interplay between the expungement and sealing of criminal records;
2. Recommend a review process for proposed changes to the expungement or sealing of criminal records;
3. Determine methods to educate the public on the new sealing processes;
4. Study the permissible uses of expunged and sealed criminal records;
5. Review plea agreements in relation to expunged and sealed criminal records; and,
6. Determine the feasibility of destroying expunged or sealed criminal records.

In order to address these legislative mandates, Crime Commission staff reviewed Virginia laws and practices, compared the new and existing Virginia criminal record relief processes, examined relevant laws and practices from other states, updated staff's previous 50 state review of criminal record relief laws, and consulted with stakeholders, practitioners, and advocates.

Legislative Mandate #1: Review the interplay between the expungement and sealing of criminal records.

The sealing legislation directed the Crime Commission to review the interplay between the expungement and sealing of criminal records under Virginia law. Staff found that the Virginia Code now includes three forms of criminal record relief: expungement, sealing, and marijuana expungement.[16] These terms are defined as follows:

- Expungement: this term is not defined in the Virginia Code; 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."[17]
- Sealing: this term is defined in the Virginia Code as restricting the dissemination of criminal history record information and prohibiting the dissemination of court records.[18]
- Marijuana expungement: the term "expungement" is not defined in the Virginia Code or the Administrative Code of Virginia as it relates to the automatic or petition-based expungement of marijuana offenses; however, marijuana expungement appears to function more in practice like sealing as opposed to expungement.[19]

The new sealing and marijuana expungement processes will not take effect until July 1, 2025; however, these processes can take effect sooner if the new automated systems are operational prior to that date. The expungement process for non-convictions is already available in Virginia.

During its review, staff determined that expungement, sealing, and marijuana expungement statutes contain significant variations, both technical and substantive, that legislators may wish to reconcile in order to ensure that the framework is consistent, individuals have access to the processes, and post-criminal record relief protections are uniform.

I. FRAMEWORK

The framework for the three forms of criminal record relief in the Virginia Code varies significantly in regard to:

(A) eligible offenses, waiting periods, and criteria for granting relief;

(B) access to and dissemination of records;

(C) procedural differences;

(D) marijuana offenses;

(E) mistaken identity or unauthorized use of identifying information; and,

(F) miscellaneous matters.

A. Eligible Offenses, Waiting Periods, and Criteria for Relief

Staff found variations across eligible offenses, waiting periods, and criteria for relief when comparing expungement; sealing (automatic sealing of convictions and deferred dismissals, automatic sealing of non-convictions, and petition-based sealing); and, marijuana expungement (automatic marijuana expungement and petition-based marijuana expungement).

EXPUNGEMENT

The expungement process is only available for certain non-convictions, meaning charges that concluded with an acquittal, a *nolle prosequi*, or a dismissal.[20] Virginia courts have interpreted these categories of non-convictions narrowly. For example, the Supreme Court of Virginia has denied expungement petitions for acquittals by reason of insanity,[21] dismissals following a plea of *nolo contendere*,[22] and where a finding of evidence sufficient for guilt was made and the charge was deferred before ultimately being dismissed.[23]

There is no waiting period required before a person can petition for expungement of a non-conviction.[24] A court shall order the expungement of police and court records if it 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*[25] to the petitioner."[26]

AUTOMATIC SEALING OF CONVICTIONS AND DEFERRED DISMISSALS

Convictions under the following nine specified Virginia Code sections will be eligible for automatic sealing beginning July 1, 2025, or sooner if the new automated systems are operational prior to that date:

- § 4.1-305 (underage consumption, purchase, or possession of alcohol);
- § 18.2-96 (petit larceny);
- § 18.2-103 (concealing or taking possession of merchandise);
- § 18.2-119 (trespass);
- § 18.2-120 (instigating trespass by others);
- § 18.2-134 (trespass on posted property);

- § 18.2-248.1 (sell or distribute, or possess with the intent to sell or distribute, marijuana);
- § 18.2-250.1 (possession of marijuana); and,
- § 18.2-415 (disorderly conduct).[27]

Additionally, violations under Virginia Code §§ 4.1-305 and 18.2-250.1 that were deferred and dismissed will also be eligible for automatic sealing.[28]

The convictions and deferred dismissals cited above will be sealed after seven years from the date of the conviction or the final dismissal, provided that the person has not been convicted of any additional offense in Virginia requiring a report to the Central Criminal Records Exchange (CCRE) or any out-of-state offense, excluding traffic infractions, during that time period.[29] Additionally, a conviction or deferred dismissal will not be automatically sealed if, on the date of such conviction, deferral, or dismissal, the person was convicted of another offense that is ineligible for automatic sealing.[30]

AUTOMATIC SEALING OF NON-CONVICTIONS

In addition to the above convictions and deferred dismissals, certain misdemeanor non-convictions,[31] certain felony non-convictions,[32] offenses resulting from mistaken identity or unauthorized use of identifying information,[33] and traffic infractions[34] will be eligible for automatic sealing beginning July 1, 2025, or sooner if the new automated systems are operational prior to that date.

When the new sealing legislation takes effect, misdemeanor non-convictions moving forward in time must be ordered to be sealed at the time the court enters the acquittal, *nolle prosequi*, or dismissal.[35] However, the court does not have to enter an order to seal a misdemeanor non-conviction if any of the following six specific circumstances are brought to the attention of the court: (1) the charge is ancillary to another charge that resulted in a conviction; (2) the non-conviction was reached as result of a plea agreement; (3) another charge arising from the same facts and circumstances is pending against the person; (4) the Commonwealth intends to reinstitute the charge or any other charge arising out of the same facts and circumstances within 3 months; (5) the Commonwealth establishes by a preponderance of the evidence that good cause exists to deny the automatic sealing of the charge; or, (6) the person charged with the offense objects to the automatic sealing.[36]

Similarly, when the new sealing legislation takes effect, felony offenses moving forward in time that conclude in an acquittal or a dismissal with prejudice may be automatically sealed.[37]

Following an acquittal or dismissal with prejudice, the defendant may make an oral motion for sealing, and if the attorney for the Commonwealth concurs with the motion, the court must enter an order to automatically seal the offense.[38] If the attorney for the Commonwealth does not concur, the felony acquittal or dismissal with prejudice cannot be automatically sealed and the defendant will have to petition for expungement.[39]

In addition to addressing certain misdemeanor and felony non-convictions moving forward in time, the sealing legislation created a process to automatically seal certain misdemeanor non-convictions *retroactively*.[40] On at least an annual basis, the Virginia State Police (VSP) must review the CCRE and identify persons with a misdemeanor non-conviction on their criminal history record who (i) have no other criminal convictions in the CCRE on their criminal history record and (ii) have no criminal charges in the CCRE on their criminal history record within the past three years.[41] If these criteria are met, then the misdemeanor non-conviction on the person's criminal history record shall be automatically sealed.[42]

Aside from the misdemeanor and felony non-convictions previously mentioned, any offense moving forward in time that was based on mistaken identity or unauthorized use of identifying information must be ordered to be automatically sealed at the time when a *nolle prosequi* or dismissal order is entered.[43] Finally, traffic infractions are automatically sealed after 11 years from the date of final disposition of the offense, unless such records are required to be maintained by the Virginia Department of Motor Vehicles in order to comply with federal law.[44]

PETITION-BASED SEALING

A person will be able to petition to seal a conviction or deferred dismissal for a misdemeanor, Class 5 or 6 felony, grand larceny (Virginia Code § 18.2-95), and any other felony offense deemed larceny and punished as provided in Virginia Code § 18.2-95 beginning July 1, 2025, or sooner if the new automated systems are operational prior to that date.[45] Certain offenses are excluded from petition-based sealing, such as domestic assault and battery and DUI-related offenses.[46]

A person who petitions to seal a conviction or deferred dismissal must satisfy *both* the criteria to petition and the criteria to have the petition for sealing granted. First, in order to be eligible to petition, the petitioner (i) cannot ever have been convicted of a Class 1 or 2 felony or any other felony punishable by life imprisonment, (ii) cannot have been convicted of a Class 3 or 4 felony within the past 20 years, and (iii) cannot have been convicted of any other felony

within the past 10 years.[47] Second, if the person is eligible to petition, then the person must meet the following criteria in order to have the sealing petition granted:

- If the petition is to seal a misdemeanor offense, then 7 years must have passed since the dismissal of the deferred charge, the conviction, or the person's release from incarceration, whichever of these dates occurred latest in time, and the person cannot have been convicted of any additional offense in Virginia which requires a report to the CCRE or any out-of-state offense, excluding traffic infractions, during that time period;[48]
- If the petition is to seal a felony offense, then 10 years must have passed since the dismissal of the deferred charge, the conviction, or the person's release from incarceration, whichever of these dates occurred latest in time, and the person cannot have been convicted of any additional offense in Virginia which requires a report to the CCRE or any out-of-state offense, excluding traffic infractions, during that time period;[49]
- If the petition is to seal an offense that involved the use or dependence on alcohol or any narcotic drug, the court must find that the person has demonstrated their rehabilitation;[50]
- The court must find that the petitioner has not previously had two other convictions or deferred dismissals arising out of different sentencing events sealed via a petition;[51] and,
- The court must find that the continued existence of the charge or conviction "causes or may cause circumstances that constitute a *manifest injustice* to the petitioner."[52]

AUTOMATIC MARIJUANA EXPUNGEMENT

All records related to an arrest, criminal charge, conviction, or civil offense (both convictions and non-convictions) for possession of marijuana and misdemeanor distribution of marijuana will be eligible for automatic expungement beginning July 1, 2025, or sooner if the new automated systems are operational prior to that date.[53] There will be no waiting periods or any other criteria that must be satisfied before either of these offenses are automatically expunged.[54] All of the eligible offenses contained within the CCRE will be automatically expunged once the new automated systems are in place.

PETITION-BASED MARIJUANA EXPUNGEMENT

Only convictions and deferred dismissals for felony distribution of marijuana (Virginia Code § 18.2-248.1) and misdemeanor sale or possession of drug paraphernalia (Virginia Code § 18.2-265.3(A)) will be eligible for petition-based marijuana expungement beginning July 1, 2025, or sooner if the new automated systems are operational prior to that date.[55] There will be no waiting period required before a person can petition for expungement of an eligible offense.[56] As with petitions for the expungement of non-convictions under the traditional expungement process,[57] a court shall grant a marijuana expungement petition if "the court finds that the continued existence and possible dissemination of information relating to the arrest, charge, conviction, or adjudication of the petitioner causes or may cause circumstances that constitute a *manifest injustice* to the petitioner."[58]

B. Access to and Dissemination of Records

A police or court record that has been expunged can only be accessed or disclosed via an order from the court that originally ordered the record to be expunged.[59]

Sealed criminal history records in the CCRE can be accessed and disseminated without a court order for 25 specific purposes, which are discussed in greater detail in the "Legislative Mandate #4" section of this report.[60] Sealed court records can be accessed and disclosed for those same 25 specifics purposes; however, a court order is required prior to accessing or disclosing such court records.[61]

Records which are expunged via the marijuana automatic and petition-based expungement processes can be accessed and disclosed for the same 25 specified purposes as sealed records.[62] However, it is unclear whether a court order will also be required to access and disclose marijuana expunged records.[63]

C. Procedural Differences

There are several procedural differences between the petition-based expungement, petition-based sealing, automatic sealing, and automatic marijuana expungement processes. These differences are discussed below.

PETITION-BASED EXPUNGEMENT AND PETITION-BASED SEALING

The current expungement process for non-convictions is only petition-based.[64] The process for petition-based marijuana expungement mirrors the current non-conviction expungement

process.[65] As noted in last year's Crime Commission report, the current expungement process for non-convictions is cumbersome, time consuming, and resource intensive for both the petitioner and the stakeholders.[66] In particular, the current expungement process requires:

- the petitioner to serve a copy of the petition for expungement on the attorney for the Commonwealth;[67]
- the petitioner to be fingerprinted;[68]
- a copy of the petitioner's criminal history record to be provided to the court by the CCRE based on the petitioner's fingerprints;[69] and,
- the clerk of court to manually provide a copy of the order of expungement to the VSP if the expungement is granted.[70]

The petition-based sealing process will utilize new procedures, along with the new automated systems being put in place by the VSP and the courts, to allow:

- the petitioner to deliver or mail a copy of the petition to the attorney for the Commonwealth;[71]
- the petitioner's criminal history record to be provided to the court by law enforcement or the attorney for the Commonwealth using a name-based search so that fingerprinting is not required;[72] and,
- the clerk of court and the VSP to electronically share notice of the sealing order so as to alleviate the manual labor required to make such notifications.[73]

While the new petition-based sealing process is more convenient for both the petitioner and the stakeholders, there are matters that remain unresolved in all of the petition-based expungement and sealing statutes. For example, all of the statutes require the attorney for the Commonwealth to file a response to the petition within 21 days; however, none of the statutes provide a remedy if the attorney for the Commonwealth does not respond within that timeframe.[74] Furthermore, none of the petition-based sealing statutes contain a specific timeframe within which the court must act on a petition for expungement or sealing.[75] Finally, while non-convictions can be expunged under the current petition-based expungement process, Virginia law does not include any process that allows a person to *petition* for the sealing or marijuana expungement of a non-conviction.

AUTOMATIC SEALING AND AUTOMATIC MARIJUANA EXPUNGEMENT

Neither automatic sealing nor automatic marijuana expungement require the person who is eligible for the criminal record relief to take any proactive steps to have the offense sealed or

expunged.[76] If an offense is present within the CCRE and meets the criteria for automatic sealing or automatic marijuana expungement, that offense will be sealed or expunged via communications between the VSP, the courts, and other stakeholders.[77]

It is important to note that the automatic sealing of convictions or deferred dismissals, or the automatic marijuana expungement of eligible offenses, will not occur if an otherwise eligible offense is not contained within the CCRE. For example, if a person was convicted of possession of marijuana and that conviction was transmitted to the CCRE, then that conviction will be expunged under the automatic marijuana expungement statute.[78] Conversely, if a person was convicted of possession of marijuana and that conviction was not transmitted to the CCRE, then that conviction will not be automatically expunged and the person will need to petition to seal that conviction.[79]

D. Marijuana Offenses: Expungement vs. Sealing

The most critical matter to be resolved in regard to marijuana expungement is whether this process will function in practice as expungement or sealing. As previously noted, while the marijuana expungement statutes use the term "expungement," the expunged marijuana records remain accessible for the same 25 specified purposes as sealed records.[80] This is contrary to the current expungement process and to how expunged criminal records have traditionally been handled, with access and dissemination only permitted via a court order.[81] Furthermore, substantial resources would be required to expunge these marijuana offenses under the current expungement process.[82]

E. Mistaken Identity or Unauthorized Use of Identifying Information

The new sealing statutes include a provision which allows for the automatic sealing of arrests or charges that came as a result of mistaken identity or unauthorized use of identifying information.[83] This sealing provision may cause confusion given that the current expungement statute contains a subsection that allows these cases to be expunged upon motion of the improperly arrested or charged person.[84] Thus, confusion may arise regarding which process to utilize, as well as how to access and disseminate records in these particular cases. As previously noted, a sealed criminal record remains accessible for 25 specified purposes, while an expunged record is available only via court order; therefore, a criminal record which has been both sealed and expunged may lead to conflicts regarding how that record can be accessed and disclosed.

F. Miscellaneous Matters

Staff identified the following additional matters in regard to these three forms of criminal record relief that may need to be resolved:

- the petition-based sealing statute provides that sealing petitions and pleadings are to be maintained under seal by the circuit court clerk unless otherwise ordered by the court, while the expungement and petition-based marijuana expungement statutes do not include such provisions;[85]
- the petition-based marijuana expungement statute does not allow individuals to petition for the common charge of possession or distribution of controlled paraphernalia;[86] and,
- varying penalties exist across the criminal record relief statutes, such as a Class 2 misdemeanor for intentional unlawful dissemination of an electronic list of automatic marijuana expunged offenses,[87] a Class 1 misdemeanor for accessing or disclosing an expunged record,[88] a Class 1 misdemeanor for willfully accessing or disclosing a sealed record,[89] and a Class 6 felony for maliciously and intentionally accessing or disclosing a sealed record.[90]

II. ACCESS TO THE CRIMINAL RECORD RELIEF PROCESSES

Staff also identified statutory differences in relation to a person's ability to access the various criminal record relief processes, specifically in regard to court-appointed counsel and court fees.

COURT-APPOINTED COUNSEL

The petition-based sealing statute allows the court to appoint counsel to indigent petitioners to assist them through the sealing process.[91] Additionally, a "Sealing Fee Fund" was created to provide a means of paying court-appointed counsel to assist with the petitions for sealing.[92] No similar provisions exist in either the expungement statute or the petition-based marijuana expungement statute to provide court-appointed counsel for indigent petitioners.[93]

COURT FEES

The petition-based sealing statute specifically provides that indigent individuals do not have to pay any court fees or costs in order to file a sealing petition.[94] In contrast, indigent

individuals who petition for expungement or marijuana expungement must pay the court costs in order to file their petition, but they receive a refund if the expungement petition is granted.[95]

III. POST-RELIEF PROTECTIONS

The newly enacted sealing legislation contains a variety of post-relief protections that are not included in the expungement or marijuana expungement statutes. These protections include:

- restricting the disclosure of sealed criminal records in applications for the sale or rental of housing and in any insurance application;[96]
- providing that no person can be found guilty of perjury if they deny or fail to disclose a sealed conviction, with limited statutory exceptions;[97] and,
- granting immunity to court clerks from civil lawsuits arising out of the sealing of a court record, except where the court clerk acted with gross negligence or willful misconduct.[98]

Additionally, the sealing legislation includes a provision which governs criminal records held by a "business screening service," which is defined as "a person engaged in the business of collecting, assembling, evaluating, or disseminating Virginia criminal history records or traffic history records on individuals."[99] This business screening service statute:

- requires any business screening service to delete criminal history records that it knows have been sealed;[100]
- directs the business screening service to register with the VSP to electronically receive copies of sealing orders;[101]
- imposes civil liability on a business screening service upon a violation of the statute;[102] and,
- allows the Virginia Attorney General to enforce the statute.[103]

No similar provisions exist in the expungement or marijuana expungement statutes to govern these business screening services.[104]

IV. CONTINUING RESOURCES

In addition to the framework, access, and protection issues noted above, the General Assembly will need to provide further resources for the implementation and continuation of the new sealing and marijuana expungement processes. The following entities may require additional resources:

- Virginia State Police (VSP): Funding was provided to the VSP during the 2021 Special Session I of the General Assembly for a one-time replacement of its information technology systems (~$12.6 million)[105] and for four positions to assist with the new sealing processes (~$438,000 annually).[106] As a result of this 2021 funding, VSP is in the process of acquiring a new information technology system.[107] VSP may still need additional funding to review out-of-state criminal history records.[108]
- Office of the Executive Secretary of the Supreme Court of Virginia (OES): Partial funding was provided to the OES for the implementation of the new sealing processes (~$1.5 million of the ~$6 million requested).[109] OES is also in the process of building a "data vault" to store court records that have been sealed and hiring personnel to implement the new processes.[110] OES will need additional funding for positions and programming.[111]
- Circuit court clerks: Funding was not provided for clerks as additional time was needed to fully determine their funding and resource needs. At the November Crime Commission meeting, clerks indicated that they will need funding for additional staff.[112]
- Department of Motor Vehicles: Funding will be required when the legislation takes effect in July 2025 for additional staffing and new automated processes.

Legislative Mandate 2: Recommend a review process for proposed changes to the expungement or sealing of criminal records.

The sealing legislation directed the Crime Commission to provide a recommendation on how to create a review process for any proposed changes to the expungement or sealing of criminal records. Staff determined that any such review process would involve both policy and technical components. Policy decisions, such as determining which offenses should be eligible for expungement and sealing, will need to be made by legislators. Conversely, stakeholders may be better situated to review any technical changes to the expungement and sealing processes.

With these considerations in mind, staff initially examined the composition of various existing entities, such as the Virginia Department of Criminal Justice Services Board and its committees,[113] the Joint Commission on Technology and Science,[114] and the Virginia Code Commission,[115] to determine whether any existing entities would be situated to consider future policy and technical changes to the expungement and sealing of criminal records. Staff then explored the option of creating a new entity, similar to the Joint Subcommittee to Study Barrier

Crimes and Criminal History Record Checks,[116] which would be responsible for reviewing proposed changes to the expungement and sealing of criminal records.

Staff was unable to identify an existing entity that could sufficiently address both the policy and technical components of any proposed changes to the expungement or sealing processes. Furthermore, staff was concerned about the resources that would be required to create a new entity to solely address the narrow topics of expungement and sealing. Therefore, staff ultimately recommended that any legislation related to the expungement or sealing of criminal records be referred to the Crime Commission at least until the sealing legislation takes effect. Additional information on this staff recommendation is set forth in the "Crime Commission Legislation" section of this report.

Legislative Mandate 3: Determine methods to educate the public on the new sealing processes.

The sealing legislation directed the Crime Commission to consult with stakeholders to determine and recommend methods to educate the public on the new sealing processes and the effects of a sealing order. Staff examined public awareness campaigns generally and found that effective campaigns have well-defined goals and a clear message that reaches the target audience.[117] Staff identified various public awareness campaigns that successfully implemented these strategies, such as anti-smoking,[118] breast cancer awareness,[119] and road safety campaigns.[120]

Efforts are already underway by state and national community stakeholders to educate the public about existing conviction relief laws. In Virginia, the Legal Aid Justice Center has made information about the Commonwealth's new criminal record sealing laws available on its website.[121] Information about the recently enacted automatic conviction relief processes in Pennsylvania and Michigan is available online through the Community Legal Services of Philadelphia[122] and Safe and Just Michigan[123] websites. The National Expungement Works coalition hosts events throughout the country to provide education about and assistance with conviction relief processes.[124]

In addition to identifying current public awareness efforts by community stakeholders, staff also observed that most states with conviction relief processes include at least some information about the processes on publicly available government websites. This information is typically found on a state's judicial website, the Attorney General's website, or a law enforcement website, and usually includes links to forms, FAQs, and summaries of the legal

requirements and processes to qualify for and seek criminal conviction relief. For example, the Rhode Island Attorney General's website provides a link to an application where an individual can be pre-screened to determine if they are eligible for expungement before filing court paperwork.[125] Similarly, the New Jersey Courts' website allows a petitioner to apply online for free, and the expungement process can be completed in some cases without having to appear in court.[126]

Based on a review of public awareness efforts by both community stakeholders and government entities, staff determined that effectively promoting public awareness of the new criminal record relief laws in Virginia will require collaboration between the community stakeholders and government agencies who are most likely to come into contact with individuals who will benefit from the new sealing law. Therefore, staff recommended that funding be provided for two new full-time employees at the Virginia Indigent Defense Commission to provide training and support to public defenders and court-appointed counsel on the new expungement and sealing laws. Additional information on this staff recommendation is set forth in the "Crime Commission Legislation" section of this report.

Legislative Mandate 4: Study the permissible uses of expunged and sealed criminal records.

The sealing legislation directed the Crime Commission to study the permissible uses of expunged, sealed, and marijuana expunged criminal records. Staff found that access to and disclosure of expunged records is extremely limited and subject to judicial discretion. An expunged record can only be opened, reviewed, or disclosed after obtaining an order from the court that originally ordered the record to be expunged.[127] Alternatively, sealed and marijuana expunged criminal history record information may be accessed and disseminated for 25 specific reasons as set forth in the Virginia Code, including:

1. Making a determination as to whether a person is eligible to possess or purchase a firearm;
2. Providing a fingerprint comparison using fingerprints maintained in the Automated Fingerprint Information System (AFIS);
3. Research purposes for the Virginia Criminal Sentencing Commission;
4. Screening anyone seeking full-time or part-time employment with any law enforcement agency;

5. Screening by the State Health Commissioner of anyone seeking full-time or part-time employment with any emergency medical services agency;
6. Screening anyone seeking full-time or part-time employment with the Department of Forensic Science;
7. Screening by the chief law-enforcement officer of a locality of anyone seeking to volunteer with or become an employee of an emergency medical services agency;
8. Complying with the Federal Motor Carrier Safety Administration regulations;
9. Complying with any federal law requiring disclosure of a criminal record for employment;
10. Screening anyone seeking a position where access is granted to an area subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any contract with, or statute or regulation of, the United States or any Executive Order of the President;
11. Screening anyone seeking to engage in the collection of court costs, fines, or restitution;
12. Administering and using the DNA Analysis and Data Bank;
13. Publishing decisions of the Supreme Court, Court of Appeals, or any circuit court;
14. Screening anyone seeking full-time or part-time employment as a clerk, magistrate, or judge;
15. Complying with the Virginia Code or a local ordinance which requires an employer to conduct a criminal background check;
16. Complying with the rules and regulations in Virginia Code §§ 9.1-128 and 9.1-134;
17. Allowing any business screening service to comply with Virginia Code § 19.2-392.16;
18. Complying with any constitutional and statutory duties to provide exculpatory, mitigating, and impeachment evidence to an accused;
19. Use in a criminal or civil proceeding as authorized by law;
20. Use in a protective order hearing as authorized by law;
21. Allowing the Department of Social Services or any local department of social services to comply with any statutory duties;
22. Use in a proceeding on the care and custody of a child as authorized by law;
23. Determining a person’s eligibility to seal a criminal record under the petition process in Virginia Code § 19.2-392.12;
24. Determining a person's eligibility to be empaneled as a juror; and,

25. Use by the person arrested, charged, or convicted of the offense that was sealed or expunged. [128]

Court records related to sealed criminal history record information can be accessed and disseminated for the same 25 reasons previously listed; however, a court order is required prior to accessing or disseminating this information.[129] Additionally, the newly enacted sealing legislation requires the Virginia Department of Criminal Justice Services to develop regulations governing the dissemination of sealed criminal history record information.[130]

Virginia's approach to the permissible uses of sealed and marijuana expunged criminal history record information is consistent with the practices of other states across the country. Staff found that all states with criminal record relief laws maintain criminal records for at least some specified purposes. For example, 42 states allow access to sealed or expunged criminal records for criminal justice purposes, which can include 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.[131] Additionally, 29 states allow certain employers to access sealed or expunged criminal records.[132] Among the most common employer carve-outs are law enforcement agencies (20 states)[133] and professional licensing boards (19 states).[134]

Similarly, Virginia's approach to expunging marijuana records is consistent with other states that have legalized possession of marijuana for both recreational and medical purposes (dual-legalization). Staff identified a total of 13 states that have (i) legalized possession of marijuana for recreational purposes, (ii) legalized possession of marijuana for medical purposes, and (iii) enacted specific criminal record relief statutes for certain marijuana convictions.[135] Of these 13 states, only California and Connecticut require the complete destruction of the records.[136] Illinois requires "obliteration" of the petitioner's name from the public record, but the circuit court file is impounded and not destroyed.[137] The 10 remaining dual-legalized states, including Virginia, allow for at least some level of access to the sealed or expunged marijuana record.[138]

Legislative Mandate 5: Review plea agreements in relation to expunged and sealed criminal records.

The sealing legislation directed the Crime Commission to study plea agreements in relation to the expungement and sealing of criminal records. Staff found that Virginia's newly enacted sealing legislation does contain a provision which addresses plea agreements: misdemeanor non-convictions are to be automatically sealed unless the *nolle prosequi* or dismissal of the

offense was part of a plea agreement.[139] This provision is similar to statutes in at least five other states which explicitly bar the expungement or sealing of convictions or dispositions reached as a result of a plea agreement.[140] Staff also identified at least four states that statutorily bar waiving the right to expunge or seal a criminal record as part of a plea agreement.[141]

Staff also examined other provisions relating to plea agreements in the Virginia Code and found that Virginia has adopted varying approaches to plea agreements in criminal cases. For example, in the general deferred adjudication statute, the Commonwealth's Attorney and the defendant must agree that a charge dismissed under that statute will be eligible for expungement.[142] Conversely, in juvenile serious offender cases, Virginia law allows the Department of Juvenile Justice to petition a court for a hearing for the early release of a juvenile and authorizes the court to grant such early release "notwithstanding the terms of any plea agreement."[143]

Ultimately, staff determined that any changes to plea agreements in relation to expungement or sealing is a policy decision to be made by Crime Commission members and the General Assembly. As such, staff noted two competing policy matters for consideration. Allowing plea agreements that restrict a person's ability to expunge or seal a criminal charge or conviction may impact the overall effectiveness of any criminal conviction relief legislation, especially since the vast majority of cases in Virginia that end in a conviction are the result of a guilty plea.[144] However, enacting legislation that limits Commonwealth's Attorneys' plea bargaining abilities may inadvertently lead to adverse consequences for defendants. Certain plea agreements that are advantageous to defendants could be eliminated if statutory restrictions are imposed. For example, a Commonwealth's Attorney may offer to reduce a felony offense to a misdemeanor offense as part of a plea agreement, so long as the defendant agrees not to petition to have the misdemeanor conviction sealed.

Legislative Mandate 6: Determine the feasibility of destroying expunged or sealed criminal records.

The sealing legislation directed the Crime Commission to study the feasibility of destroying or purging expunged or sealed criminal records. Staff determined that while destroying these records is feasible, such destruction will be contrary to the intent of Virginia's newly enacted sealing and marijuana expungement legislation, will require substantial changes to the current expungement process, and will require significant resources. Additionally, staff noted that

such destruction would make Virginia an outlier amongst states that allow for criminal conviction relief, as nearly all of the states which provide for such relief retain expunged or sealed criminal records for at least some specified purposes.[145] Only Massachusetts appears to destroy expunged criminal records,[146] but no state destroys sealed criminal records.

Staff also found several impediments to the destruction of expunged or sealed criminal records. First, as previously noted, sealed and marijuana expunged records can be accessed and disseminated for 25 specific purposes.[147] Destroying such records would run counter to the legislative intent of maintaining these records for those 25 specific purposes.

Second, expunged records in Virginia are not initially destroyed, but rather physical and electronic access to such records is significantly restricted.[148] Furthermore, an order of expungement is voidable for up to three years after the entry of such order,[149] so the Library of Virginia record retention schedule requires these expunged records to be retained for at least three years prior to destruction.[150] Destroying expunged records prior to three years from the entry of an expungement order will require a substantive change to Virginia's expungement law.

Third, the newly enacted sealing legislation in Virginia was intentionally drafted in a manner to minimize the resources required to implement the sealing process, as well as to be less time and labor intensive than the traditional expungement process.[151] The new sealing statutes require sealed records to be maintained, but sealed records are digitally flagged so that the VSP and the courts know whether the records can be accessed and disclosed.

Finally, many sealed court records can be destroyed after a period of time under current court record retention laws. For example, Virginia law allows district courts to destroy records relating to most misdemeanors, traffic infractions, expunged proceedings, and felonies that were not certified to the grand jury after 10 years.[152] Similarly, circuit courts may destroy a variety of court records after 10 years.[153] It is important to note that while court records can be destroyed after these time periods, it does not necessarily mean that the court records will be destroyed. Additionally, these record retention and destruction laws apply to court records, but not to criminal history record information that is permanently maintained within the Virginia CCRE.

CRIME COMMISSION LEGISLATION

The Crime Commission met on November 15, 2021, and heard presentations from staff, the Virginia State Police (VSP),[154] the Office of the Executive Secretary of the Supreme Court of Virginia (OES),[155] and the Virginia Court Clerks' Association[156] on the expungement and sealing of criminal and court records.[157] Staff made the following three recommendations:

> **Recommendation 1:** The Crime Commission should continue to examine the expungement and sealing of criminal and court records in order to reconcile conflicts between the three criminal record relief processes now in the Virginia Code.

As noted throughout this report, a variety of conflicts exist in relation to the three forms of criminal record relief (expungement, sealing, and marijuana expungement) currently contained within the Virginia Code. The Crime Commission has been studying expungement and sealing since 2020. Staff is familiar with the subject matter and the stakeholders involved in the processes. Furthermore, the sealing legislation requires VSP, OES, and certain circuit court clerks to report annually to the Crime Commission until the new automated sealing systems have been implemented.[158] Therefore, staff recommended that the Crime Commission continue to examine the expungement and sealing of criminal and court records. No motion was made on this recommendation.

> **Recommendation 2:** Legislation addressing the expungement or sealing of criminal and court records should continue to be referred to the Crime Commission until the new sealing law takes effect (July 2025 or earlier).

Staff made this recommendation for the same reasons set forth in Recommendation 1 in order to ensure that the Virginia Code will not be in conflict when the new sealing and marijuana expungement processes take effect. Furthermore, staff determined that the Crime Commission is well positioned to address both the policy and technical components involved in the criminal record relief processes. Staff could work with stakeholders to address technical concerns with any such legislation, while also providing Crime Commission members with the information necessary to make any policy decisions related to such legislation. No motion was made on this recommendation.

Recommendation 3: Authorize funding for two new full-time positions at the Virginia Indigent Defense Commission to provide training and support to public defenders and court-appointed counsel on the new expungement and sealing laws (total estimated annual cost: $215,000).[159]

Staff determined that effectively promoting public awareness of the new criminal record relief laws in Virginia will require collaboration between government agencies and community stakeholders who are most likely to come into contact with individuals who will benefit from these new laws. The Virginia Indigent Defense Commission (IDC) currently certifies and provides training to public defenders and court-appointed counsel for indigent criminal defendants, and therefore the IDC seemed to be an ideal location for such positions.[160]

Another reason for this recommendation was because Crime Commission staff had made a similar recommendation in 2018 to create a Sex Trafficking Response Coordinator position at the Virginia Department of Criminal Justice Services.[161] This coordinator position was ultimately codified into law and now serves as a resource for both government entities and community stakeholders.[162] Staff has received positive feedback on the impact of this position and therefore determined that these two new positions at IDC may be equally as beneficial to the field.

The Crime Commission unanimously endorsed this recommendation. Both Senator John S. Edwards and Delegate Les R. Adams introduced budget amendments for these two positions at the Indigent Defense Commission at an annual total of $214,980. This budget item was not included in the final budget adopted by the General Assembly and signed by the Governor.[163]

Additionally, staff was directed to draft legislation to clarify that the offenses that are eligible for expungement under the new marijuana expungement statutes are to be expunged and not sealed. As previously noted, these marijuana expungement statutes appear in the expungement chapter of the Virginia Code; however, marijuana expungement functions in practice like sealing where the offenses are maintained and able to be accessed and disseminated for 25 specific purposes.[164] Crime Commission staff worked with the Division of Legislative Services and numerous stakeholders in order to draft legislation as directed by the Crime Commission. Ultimately, it was determined that marijuana offenses could not be expunged under the current expungement process for a variety of reasons, such as the resources required, a potential loss of highway safety funding, and the need for such convictions when conducting federal security clearance investigations. Therefore, legislation

was drafted to remove the marijuana expungement provisions from the expungement chapter of the Virginia Code and insert those provisions into the new sealing chapter.[165] That legislation was introduced as Senate Bill 742 (Sen. Surovell) during the 2022 Regular Session of the General Assembly.[166] The bill passed the Senate, but was left in the House Courts of Justice Committee.

SUMMARY AND CONCLUSION

With the enactment of the new sealing and marijuana expungement legislation, Virginia has significantly expanded the number of individuals who are eligible to obtain criminal record relief. While the new processes, along with the current expungement statute, may provide benefits to individuals who qualify for such relief,[167] these three criminal record relief processes are in conflict. Legislators may wish to consider reconciling these conflicts before the new processes take effect. The major issues to be reconciled include (i) establishing a consistent and streamlined framework for all three criminal record relief processes, (ii) ensuring that individuals are able to access the processes, and (iii) creating uniform post-relief protections. Furthermore, while the Virginia State Police and the Office of the Executive Secretary of the Supreme Court of Virginia have been provided with resources to begin implementation of the new sealing processes, additional funding will be needed in order for those entities and other stakeholders to successfully implement these new processes and to provide criminal record relief.

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Virginia Department of Motor Vehicles

Virginia Indigent Defense Commission

Virginia State Police

ENDNOTES

[1] 2021 Va. Acts, Sp. Sess. I, ch. 524 and 542. These Acts stemmed from House Bill 2113 and Senate Bill 1339. House Bill 2113 is available at https://lis.virginia.gov/cgi-bin/legp604.exe?ses=212&typ=bil&val=hb2113. Senate Bill 1339 is available at https://lis.virginia.gov/cgi-bin/legp604.exe?ses=212&typ=bil&val=sb1339.
[2] 2021 Va. Acts, Sp. Sess. I, ch. 550 and 551. These Acts stemmed from House Bill 2312 and Senate Bill 1406. House Bill 2312 is available at: https://lis.virginia.gov/cgi-bin/legp604.exe?ses=212&typ=bil&val=hb2312. Senate Bill 1406 is available at: https://lis.virginia.gov/cgi-bin/legp604.exe?ses=212&typ=bil&val=sb1406.
[3] Virginia State Crime Commission. (2021, November 15). *2022 Session legislative package*. Available at http://vscc.virginia.gov/2021/Nov15/VSCC%202022%20Legislative%20Package.pdf.
[4] For the amendment to Item 51 #1s of the Senate budget, *see* https://budget.lis.virginia.gov/amendment/2022/1/SB30/Introduced/MR/51/1s/. For the amendment to Item 51 #1h of the House budget, see https://budget.lis.virginia.gov/amendment/2022/1/HB30/Introduced/MR/51/1h/.
[5] Virginia State Crime Commission. (2021). *2020 annual report: Expungement and sealing of criminal records.* Available at http://vscc.virginia.gov/2021/VSCC%202020%20Annual%20Report%20Expungement%20and%20Sealing.pdf.
[6] VA. CODE ANN. §§ 19.2-392.1 to 19.2-392.4 (2021). A non-conviction may include such final dispositions as an acquittal, *nolle prosequi*, dismissal, or deferred dismissal. *See also* VA. CODE ANN. § 19.2-298.02(D) (2021). Under Virginia's general criminal deferred disposition statute, a charge which has been deferred and dismissed may be expunged if both the Commonwealth's Attorney and the defendant agree that the dismissed charge is eligible for expungement. This statute was enacted during the 2020 Special Session I of the Virginia General Assembly.
[7] Virginia law does allow for criminal conviction relief if a person can prove that they are "actually innocent" of certain felony convictions. *See* VA. CODE ANN. §§ 19.2-327.2 et. seq. and 19.2-327.10 *et. seq.* (2020).
[8] A deferred dismissal refers to a circumstance where a criminal charge is dismissed after the defendant completes certain terms or conditions ordered by the court.
[9] 2021 Va. Acts, Sp. Sess. I, ch. 524 and 542. These Acts stemmed from House Bill 2113 and Senate Bill 1339. House Bill 2113 is available at https://lis.virginia.gov/cgi-bin/legp604.exe?ses=212&typ=bil&val=hb2113. Senate Bill 1339 is available at https://lis.virginia.gov/cgi-bin/legp604.exe?ses=212&typ=bil&val=sb1339.
[10] 2021 Va. Acts, Sp. Sess. I, ch. 550 and 551. These Acts stemmed from House Bill 2312 and Senate Bill 1406. House Bill 2312 is available at: https://lis.virginia.gov/cgi-bin/legp604.exe?ses=212&typ=bil&val=hb2312. Senate Bill 1406 is available at: https://lis.virginia.gov/cgi-bin/legp604.exe?ses=212&typ=bil&val=sb1406.
[11] In addition to Virginia, Alabama (ALA. CODE § 15-27-1 (2021)) and Arizona (ARIZ. REV. STAT. ANN. § 13-911 (2021)) also enacted new conviction relief laws within the last year. *See also* Virginia State Crime Commission. (2021). *2020 annual report: Expungement and sealing of criminal records.* Available at http://vscc.virginia.gov/2021/VSCC%202020%20Annual%20Report%20Expungement%20and%20Sealing.pdf. Appendix B of the 2021 Crime Commission report includes information on the other 41 states that allow for the sealing of misdemeanor convictions.
[12] In addition to Virginia, Arizona (ARIZ. REV. STAT. ANN. § 13-911 (2021)) also enacted new conviction relief laws which include felony offenses within the last year. *See also* Virginia State Crime Commission. (2021). *2020 annual report: Expungement and sealing of criminal records.* Available at http://vscc.virginia.gov/2021/VSCC%202020%20Annual%20Report%20Expungement%20and%20Sealing.pdf. Appendix C of the 2021 Crime Commission report includes information on the other 36 states that allow for the sealing of felony convictions.
[13] *See* Appendix A for a list of 13 states that have enacted marijuana-specific expungement, recreational marijuana legalization, and medical marijuana legalization statutes.
[14] *See* Appendix B for an overview of states with automatic criminal conviction relief laws.
[15] 2021 Va. Acts, Sp. Sess. I, ch. 524 and 542.
[16] *See* Appendix C for a table summarizing various aspects of the expungement, sealing, and marijuana expungement processes in Virginia.
[17] 6 VA. ADMIN. CODE § 20-120-20 (2021).
[18] VA. CODE ANN. § 19.2-392.5(A) (2021) (Sealing is defined as "… (i) restricting dissemination of criminal history record information contained in the Central Criminal Records Exchange, including any records relating to an arrest, charge, or conviction, in accordance with the purposes set forth in § 19.2-392.13 and pursuant to the rules and regulations adopted pursuant to § 9.1-128 and the procedures adopted pursuant to § 9.1-134 and (ii) prohibiting dissemination of court records related to an arrest, charge, or conviction, unless such dissemination is authorized by a court order for one or more of the purposes set forth in § 19.2-392.13.").
[19] *See* VA. CODE ANN. §§ 19.2-392.2:1 and 19.2-392.2 (2021).
[20] VA. CODE ANN. § 19.2-392.2(A) (2021).
[21] *Eastlack v. Commonwealth*, 282 Va. 120 (Jun. 9, 2011).

[22] *Commonwealth v. Dotson*, 276 Va. 278 (Jun. 6, 2008); *Commonwealth v. Jackson*, 255 Va. 552 (Apr. 17, 1998).
[23] *Daniel v. Commonwealth*, 268 Va. 523 (Nov. 5, 2004). *But see* VA. CODE ANN. § 19.2-298.02(D) (2021). Under Virginia's general criminal deferred disposition statute, a charge which has been deferred and dismissed may be expunged if both the Commonwealth's Attorney and the defendant agree that the dismissed charge is eligible for expungement. This statute was enacted during the 2020 Special Session I of the Virginia General Assembly.
[24] VA. CODE ANN. § 19.2-392.2 (2021).
[25] In considering an expungement petition, the Virginia Supreme Court has found that "[a] reasonable possibility of a hindrance to obtaining employment, an education, or credit can … serve as a basis for a finding of manifest injustice." *A.R.A. v. Commonwealth*, 295 Va. 153, 161-62 (Mar. 1, 2018).
[26] VA. CODE ANN. § 19.2-392.2(F) (2021). Note that if the petitioner has no prior criminal record and the non-conviction to be expunged was a misdemeanor or civil offense, then the petitioner shall be entitled to expungement of such records, unless the Commonwealth can show good cause why such charge should not be expunged.
[27] VA. CODE ANN. § 19.2-392.6(B) (2021). Note that staff has identified a technical concern with the automatic sealing of convictions and deferred dismissals for violations of Virginia Code § 4.1-305 (underage possession of alcohol). All of these offenses have been deleted from the Virginia Central Criminal Records Exchange, and thus such offenses are not able to be automatically sealed under the current statutory process.
[28] VA. CODE ANN. § 19.2-392.6(A) (2021).
[29] VA. CODE ANN. § 19.2-392.6(C) (2021).
[30] VA. CODE ANN. § 19.2-392.6(D) (2021).
[31] VA. CODE ANN. § 19.2-392.8(A) (2021).
[32] VA. CODE ANN. § 19.2-392.8(B) (2021).
[33] VA. CODE ANN. § 19.2-392.9 (2021).
[34] VA. CODE ANN. § 19.2-392.17 (2021).
[35] VA. CODE ANN. § 19.2-392.8(A) (2021).
[36] VA. CODE ANN. § 19.2-392.8(A) (2021).
[37] VA. CODE ANN. § 19.2-392.8(B) (2021).
[38] VA. CODE ANN. § 19.2-392.8(B) (2021).
[39] *Id*. *See also* VA. CODE ANN. § 19.2-392.2 (2021).
[40] *See* VA. CODE ANN. § 19.2-392.11 (2021).
[41] VA. CODE ANN. § 19.2-392.11(A) (2021).
[42] VA. CODE ANN. § 19.2-392.11 (2021).
[43] VA. CODE ANN. § 19.2-392.9 (2021).
[44] VA. CODE ANN. § 19.2-392.17 (2021).
[45] VA. CODE ANN. § 19.2-392.12(A) (2021).
[46] *Id.* The offenses excluded from petition-based sealing include VA. CODE ANN. §§ 18.2-36.1 and 18.2-36.2 (involuntary manslaughter), VA. CODE ANN. §§ 18.2-51.4 and 18.2-51.5 (maiming of another as a result of DUI), VA. CODE ANN. § 18.2-57.2 (domestic assault and battery), and VA. CODE ANN. §§ 18.2-266 and 46.2-341.24 (DUI).
[47] *Id.*
[48] VA. CODE ANN. § 19.2-392.12(F)(1)(a) (2021).
[49] VA. CODE ANN. § 19.2-392.12(F)(1)(b) (2021).
[50] VA. CODE ANN. § 19.2-392.12(F)(2) (2021).
[51] VA. CODE ANN. § 19.2-392.12(F)(3) (2021).
[52] VA. CODE ANN. § 19.2-392.12(F)(4) (2021).
[53] VA. CODE ANN. § 19.2-392.2:1(A) (2021). *But see* 2021 Va. Acts, Sp. Sess. I, ch. 550 and 551. The legislation that legalized the possession of marijuana required that the provisions relating to the repeal of Va. Code § 18.2-248.1 (distribution of marijuana) be re-enacted during the 2022 Regular Session of the General Assembly. The provisions related to the repeal of Va. Code § 18.2-248.1 were not re-enacted and therefore offenses for misdemeanor distribution of marijuana will not be eligible for automatic expungement unless the General Assembly takes future action.
[54] VA. CODE ANN. § 19.2-392.2:1 (2021).
[55] VA. CODE ANN. § 19.2-392.2:2(A) (2021). *But see* 2021 Va. Acts, Sp. Sess. I, ch. 550 and 551. The legislation that legalized the possession of marijuana required that the provisions relating to the repeal of Va. Code § 18.2-248.1 (distribution of marijuana) be re-enacted during the 2022 Regular Session of the General Assembly. The provisions related to the repeal of Va. Code § 18.2-248.1 were not re-enacted and therefore offenses for felony distribution of marijuana will not be eligible for petition-based expungement unless the General Assembly takes future action.
[56] VA. CODE ANN. § 19.2-392.2:2 (2021). While there is no waiting period to petition for expungement of an eligible marijuana offense, this new Virginia Code section will not take effect until either July 1, 2025, or until the new

expungement and sealing processes are operational, whichever date is sooner. Therefore, a petitioner must wait until the new Code section takes effect before filing a petition.
[57] VA. CODE ANN. § 19.2-392.2 (2021).
[58] VA. CODE ANN. § 19.2-392.2:2(E) (2021).
[59] VA. CODE ANN. § 19.2-392.3 (2021).
[60] VA. CODE ANN. § 19.2-392.13(C) (2021).
[61] VA. CODE ANN. § 19.2-392.13(D) (2021).
[62] VA. CODE ANN. §§ 19.2-392.2:1(F) and 19.2-392.2:2(H) (2021).
[63] *See* VA. CODE ANN. § 19.2-392.3 (2021).
[64] VA. CODE ANN. § 19.2-392.2 (2021).
[65] VA. CODE ANN. § 19.2-392.2:2 (2021).
[66] Virginia State Crime Commission. (2021). *2020 annual report: Expungement and sealing of criminal records.* pp. 65-66. Available at http://vscc.virginia.gov/2021/VSCC%202020%20Annual%20Report%20Expungement%20and%20Sealing.pdf.
[67] VA. CODE ANN. §§ 19.2-392.2(D) and 19.2-392.2:2(C) (2021).
[68] VA. CODE ANN. § 19.2-392.2(E) and 19.2-392.2:2(D) (2021).
[69] VA. CODE ANN. § 19.2-392.2(E) and 19.2-392.2:2(D) (2021).
[70] VA. CODE ANN. § 19.2-392.2(K) and 19.2-392.2:2(G) (2021).
[71] VA. CODE ANN. § 19.2-392.12(D) (2021).
[72] VA. CODE ANN. § 19.2-392.12(E) (2021).
[73] VA. CODE ANN. § 19.2-392.12(I) (2021).
[74] VA. CODE ANN. §§ 19.2-392.2(D), 19.2-392.2:2(C), and 19.2-392.12(D) (2021).
[75] *See* VA. CODE ANN. §§ 19.2-392.2, 19.2-392.2:2, and 19.2-392.12 (2021).
[76] VA. CODE ANN. §§ 19.2-392.2:1, 19.2-392.2-6, and 19.2-392.2-7 (2021).
[77] VA. CODE ANN. §§ 19.2-392.2:1, 19.2-392.2-6, and 19.2-392.2-7 (2021).
[78] VA. CODE ANN. § 19.2-392.2:1 (2021).
[79] VA. CODE ANN. §§ 19.2-392.2:1 and 19.2-392.2-12 (2021).
[80] VA. CODE ANN. §§ 19.2-392.2:1(F) and 19.2-392.2:2(H) (2021).
[81] VA. CODE ANN. § 19.2-392.3 (2021).
[82] For example, as of October 2021, the Central Criminal Records Exchange maintained by VSP contained approximately 314,262 arrest records for possession of marijuana and misdemeanor distribution of marijuana that will be eligible for automatic expungement. VSP estimates that one employee in their expungement section can process approximately 500 expungements per year. Therefore, VSP will need significant resources for personnel to expunge these offenses. Furthermore, the needs of other entities, such as the Offices of the Executive Secretary of the Supreme Court, circuit court clerks, and numerous other stakeholders, will need to be taken into account.
[83] VA. CODE ANN. § 19.2-392.9 (2021).
[84] VA. CODE ANN. § 19.2-392.2(H) (2021).
[85] VA. CODE ANN. § 19.2-392.12(M) (2021).
[86] *See* VA. CODE ANN. § 54.1-3466 (2021).
[87] VA. CODE ANN. § 19.2-392.2:1(H) (2021). *See also* VA. CODE ANN. §§ 9.1-136 and 18.2-11 (2021). A Class 2 misdemeanor is punishable by up to 6 months in jail and a $1,000 fine.
[88] VA. CODE ANN. § 19.2-392.3(C) (2021). *See also* VA. CODE ANN. § 18.2-11 (2021). A Class 1 misdemeanor is punishable by up to 12 months in jail and a $2,500 fine.
[89] VA. CODE ANN. § 19.2-392.14(C) (2021). *See also* VA. CODE ANN. § 18.2-11 (2021). A Class 1 misdemeanor is punishable by up to 12 months in jail and a $2,500 fine.
[90] VA. CODE ANN. § 19.2-392.14(C) (2021). *See also* VA. CODE ANN. § 18.2-10 (2021). A Class 6 felony is punishable by a prison term of 1 to 5 years, or up to 12 months in jail, and up to a $2,500 fine.
[91] VA. CODE ANN. § 19.2-392.12(L) (2021).
[92] VA. CODE ANN. § 17.1-205.1 (2021). Note that while this "Sealing Fee Fund" has been established, a funding source has not yet been established for the Fund.
[93] *See* VA. CODE ANN. §§ 19.2-392.2 and 19.2-392.2:2 (2021).
[94] VA. CODE ANN. § 19.2-392.12(B) (2021).
[95] VA. CODE ANN. §§ 19.2-392.2(L) and 19.2-392.2:2(J) (2021).
[96] VA. CODE ANN. §§ 19.2-392.15(D) and 19.2-392.15(F) (2021).
[97] VA. CODE ANN. § 19.2-392.5(D) (2021).
[98] VA. CODE ANN. § 19.2-392.5(C) (2021).
[99] VA. CODE ANN. § 19.2-392.16(A) (2021).
[100] VA. CODE ANN. § 19.2-392.16(B) (2021).
[101] VA. CODE ANN. § 19.2-392.16(C) (2021).
[102] VA. CODE ANN. § 19.2-392.16(G) (2021).
[103] VA. CODE ANN. § 19.2-392.16(H) (2021).

[104] *But see* VA. CODE ANN. § 9.1-135 (2021). This Code section provides civil remedies for the unlawful distribution of expunged records.
[105] 2021 Va. Acts, Sp. Sess. I, ch. 552, Item 425(Q). Retrieved from https://budget.lis.virginia.gov/item/2021/2/HB1800/Chapter/1/425/.
[106] 2021 Va. Acts, Sp. Sess. I, ch. 552, Item 425(R). Retrieved from https://budget.lis.virginia.gov/item/2021/2/HB1800/Chapter/1/425/.
[107] Virginia State Police. (2021, November 15). *Project CRIS: A presentation to the Virginia State Crime Commission*. Available at http://vscc.virginia.gov/2021/Nov15/VSP%20Presentation%20-%20Project%20CRIS.pdf.
[108] Virginia State Police. (2021, October). *Automated out-of-state record checks; Progress on development feasibility and cost.* Retrieved from https://rga.lis.virginia.gov/Published/2021/RD502/PDF.
[109] 2021 Va. Acts, Sp. Sess. I, ch. 552, Item 39(Q). Retrieved from https://budget.lis.virginia.gov/item/2021/2/HB1800/Chapter/1/39/.
[110] Office of the Executive Secretary of the Supreme Court of Virginia. (2021, October 29). *Letter to the Virginia State Crime Commission.* Available at https://rga.lis.virginia.gov/Published/2021/RD585/PDF.
[111] *Id.*
[112] Virginia Court Clerks' Association. (2021, November 15). *Memorandum to the Virginia State Crime Commission*. Available at http://vscc.virginia.gov/2021/Nov15/VCCA%20Memorandum.pdf.
[113] *See* Virginia Department of Criminal Justice Services. *Boards & committees*. Retrieved from https://www.dcjs.virginia.gov/about-dcjs/boards-committees.
[114] *See* Joint Commission on Technology and Science. Retrieved from https://studies.virginiageneralassembly.gov/studies/179.
[115] *See* Virginia Code Commission. Retrieved from http://codecommission.dls.virginia.gov/.
[116] *See* Joint Subcommittee to Study Barrier Crimes and Criminal History Records Checks. Retrieved from https://studies.virginiageneralassembly.gov/studies/546.
[117] Christiano, A., & Neimand, A. (2017). Stop raising awareness already. *Stanford Social Innovation Review*, *15*(2), 34-41, at p. 39 (To create a successful public awareness campaign, you must "target your audience as narrowly as possible; create compelling messages with clear calls to action; develop a theory of change; and use the right messenger." Retrieved from https://ssir.org/articles/entry/stop_raising_awareness_already; Wakefield, M., Laken, B., & Hornik, R.C. (2010). Use of mass media campaigns to change health behavior. *The Lancet*, *376(1)*, 1261-1271, at p. 1262 (In discussing the success of anti-smoking campaigns, the authors found that "[c]omprehensive reviews of controlled field experiments and population studies show that mass media campaigns were associated with a decline in young people starting smoking and with an increase in the number of adults stopping. Smoking prevention in young people seems to have been more likely when mass media efforts were combined with programmes in schools, the community, or both. Many population studies have documented reductions in adult smoking prevalence when mass media campaigns have been combined with other tobacco control strategies, such as increases in tobacco taxation or smoke-free policies.").
[118] Wakefield, *supra* note 117, at p. 1262.
[119] Jacobsen, G.D., & Jacobsen, K.H. (2011). Health awareness campaigns and diagnosis rates: Evidence from National Breast Cancer Awareness Month. *Journal of Health Economics*, *30(1)*, 55-61, at p. 56 ("[O]ur findings suggest that the breast cancer awareness movement has been successful in promoting earlier detection of disease. The success is likely due both to an increase in immediate diagnoses in response to specific events (as tested for in this paper) during the early years of the campaign and to cumulative increases in public awareness that led to year-round behavioral changes in more recent years.").
[120] Wakefield, *supra* note 117, at p. 1267 ("Road safety mass media campaigns have promoted reductions in the frequency of road accidents and deaths through increases in uses of seat belts, booster seats for children, and helmets for bicyclists, skateboarders, and motorcyclists, and reductions in speeding, driver fatigue, and drink driving. The average associated decline in vehicle crashes has been estimated to be at least 7%, and of alcohol-impaired driving to be 13%. Results of designated driver programmes have been less conclusive. The most notable road safety campaigns have promoted seat belt use. The Click It or Ticket programme in North Carolina, USA, was associated with an increase in seat belt use from 63% to 80% and lowered rates of highway deaths, and became a model for other state and national programmes. A version in Washington state, USA, reported gains from 83% up to 95% of seat belt use. Law enforcement and repeated cycles of short-term mass media exposure seem, therefore, to have been important components of road safety campaign effectiveness.").
[121] Legal Aid Justice Center. *Virginia's 2021 record-sealing law*. Retrieved May 11, 2022, from https://www.justice4all.org/new-record-sealing-law-information/.
[122] Community Legal Services of Philadelphia. Retrieved May 11, 2022, from https://mycleanslatepa.com/.
[123] Safe & Just Michigan. Retrieved May 11, 2022, from https://www.safeandjustmi.org/.
[124] National Expungement Works. Retrieved May 11, 2022 from https://newxnow.org/.
[125] Attorney General State of Rhode Island. *Expungement online application*. Retrieved May 11, 2022, from https://docs.google.com/forms/d/e/1FAIpQLSfl-ySNQNHbTTZafe7z2qEbPABU9snzwepc_acGYIwEjUNrOw/viewform.

[126] New Jersey Courts. *Expunging your court record*. Retrieved May 11, 2022, from https://www.njcourts.gov/selfhelp/expungement.html.
[127] VA. CODE ANN. § 19.2-392.3 (2021). Note that an *ex parte* order may be obtained under subsection B when the expunged record is needed by law enforcement either for conducting a background check on a potential law enforcement employee, or for a pending investigation where the investigation will be jeopardized, or life or property will be endangered, without immediate access to the expunged record.
[128] VA. CODE ANN. §§ 19.2-392.2:1(F), 19.2-392.2:2(H), and 19.2-392.13(C) (2021).
[129] VA. CODE ANN. § 19.2-392.13(D) (2021).
[130] 2021 Va. Acts, Sp. Sess. I, ch. 524 and 542.
[131] Alabama (ALA. CODE §§ 15-27-7 and 15-27-10 (2021)), Arizona (ARIZ. REV. STAT. ANN. § 13-911 (2021)), Arkansas (ARK. CODE ANN. § 16-90-1417 (2019)), California (CAL. PENAL CODE §§ 1203.4, 1203.4a, 1203.425, and 1210.1 (2021)), Colorado (COLO. REV. STAT. § 24-72-703 (2021)), Connecticut (CONN. GEN. STAT. §§ 54-142a and 54-142c (2021)), Delaware (DEL. CODE ANN. tit. 11, § 4376 (2019)), Georgia (GA. CODE ANN. § 35-3-37 (2021)), Illinois (20 ILL. COMP. STAT. 2630/5.2, 2630/12, and 2630/13 (2021)), Indiana (IND. CODE § 35-38-9-6 (2022)), Iowa (IOWA CODE § 901C.3 (2019)), Kansas (KAN. STAT. ANN. § 21-6614 (2021)), Louisiana (LA. CODE CRIM. PROC. ANN. art. 973 (2018)), Maryland (MD. CODE ANN., CRIM. PROC. § 10-108 (2001)), Massachusetts (MASS. GEN. LAWS ch. 276, §§ 100A, 100C, and 100D (2018)), Michigan (MICH. COMP. LAWS §§ 780.622 and 780.623 (2021)), Minnesota (MINN. STAT. § 609A.03 (2021)), Mississippi (MISS. CODE ANN. § 99-19-71 (2019)), Missouri (MO. REV. STAT. §§ 610.120 and 610.140 (2021)), Montana (MONT. CODE ANN. § 46-18-1103 (2019)), Nevada (NEV. REV. STAT. § 179.295 (2019)), New Hampshire (N.H. REV. STAT. ANN. § 651:5 (2020)), New Jersey (N.J. STAT. ANN. §§ 2C:52-19 and 2C:52-22 (1979)), New York (N.Y. CRIM. PROC. LAW § 160.59 (2017)), North Carolina (N.C. GEN. STAT. § 15A-145.5 (2021)), North Dakota (N.D. CENT. CODE § 12-60.1-01 (2021)), Ohio (OHIO REV. CODE. ANN. § 2953.32 (2021)), Oklahoma (OKLA. STAT. tit. 22, §§ 18 and 19 (2019)), Oregon (OR. REV. STAT. § 137.225 (2021)), Pennsylvania (18 PA. CONS. STAT. § 9121 (2018)), Rhode Island (R.I. GEN. LAWS § 12-1.3-4 (1993)), South Carolina (S.C. CODE ANN. § 22-5-910 (2018)), South Dakota (S.D. CODIFIED LAWS § 23A-3-34 (2021)), Tennessee (TENN. CODE ANN. § 40-32-101 (2021)), Texas (TEX. CODE CRIM. PROC. art. 55.03 (2005); TEX. GOV'T CODE ANN. §§ 411.076, 411.0765, and 411.0775 (2019)), Utah (UTAH CODE ANN. § 77-40-109 (2019)), Vermont (VT. STAT. ANN. tit. 13, § 7607 (2019)), Virginia (VA. CODE ANN. §§ 19.2-392.2:1, -392.2:2, -392.3, and -392.13 (2021)), Washington (WASH. REV. CODE §§ 9.94A.640 and 9.96.060 (2021)), West Virginia (W. VA. CODE § 61-11-26 (2020)), Wisconsin (WIS. STAT. § 973.015 (2016) and *State v. Leitner*, 646 N.W.2d 341, 352 (Wis. 2002)), and Wyoming (WYO. STAT. ANN. § 7-13-1401 (2019)).
[132] Alabama (ALA. CODE § 15-27-6 (2014)), Arizona (ARIZ. REV. STAT. ANN. § 13-911 (2021)), Arkansas (ARK. CODE ANN. § 16-90-1417 (2019)), California (CAL. PENAL CODE §§ 1203.4, 1203.4a, 1203.425, and 1210.1 (2021)), Colorado (COLO. REV. STAT. § 24-72-703 (2021)), Delaware (DEL. CODE ANN. tit. 11, § 4376 (2019)), Georgia (GA. CODE ANN. § 35-3-37 (2021)), Illinois (20 ILL. COMP. STAT. 2630/12 (2018)), Indiana (IND. CODE § 35-38-9-6 (2022)), Kansas (KAN. STAT. ANN. § 21-6614 (2021)), Louisiana (LA. CODE CRIM. PROC. ANN. art. 973 (2018)), Michigan (MICH. COMP. LAWS § 780.623 (2021)), Minnesota (MINN. STAT. § 609A.03 (2021)), Mississippi (MISS. CODE ANN. § 99-19-71 (2019)), Missouri (MO. REV. STAT. §§ 610.120 and 610.140 (2021)), Nevada (NEV. REV. STAT. § 179.301 (2017)), New Hampshire (N.H. REV. STAT. ANN. § 651:5 (2020)), New Jersey (N.J. STAT. ANN. § 2C:52-2 (2019)), New Mexico (N.M. STAT. ANN. § 29-3A-7 (2019)), New York (N.Y. CRIM. PROC. LAW § 160.59 (2017)), North Carolina (N.C. GEN. STAT. § 15A-153 (2021)), North Dakota (N.D. CENT. CODE § 12-60.1-04 (2021)), Ohio (OHIO REV. CODE. ANN. § 2953.32 (2021)), Pennsylvania (18 PA. CONS. STAT. § 9121 (2018)), Rhode Island (R.I. GEN. LAWS § 12-1.3-4 (1993)), Texas (TEX. GOV'T CODE ANN. §§ 411.076 and 411.0765 (2019)), Utah (UTAH CODE ANN. § 77-40-109 (2019)), Virginia (VA. CODE ANN. §§ 19.2-392.2:1(F), 19.2-392.2:2(H), and 19.2-392.13(C)), and West Virginia (W. VA. CODE § 61-11-26 (2020)).
[133] Alabama (ALA. CODE § 15-27-6 (2014)), Arizona (ARIZ. REV. STAT. ANN. § 13-911 (2021)), Arkansas (ARK. CODE ANN. § 16-90-1417 (2019)), California (CAL. PENAL CODE §§ 1203.425 and 1210.1 (2021)), Delaware (DEL. CODE ANN. tit. 11, § 4376 (2019)), Georgia (GA. CODE ANN. § 35-3-37 (2021)), Illinois (20 ILL. COMP. STAT. 2630/12 (2018)), Kansas (KAN. STAT. ANN. § 21-6614 (2021)), Michigan (MICH. COMP. LAWS § 780.623 (2021)), Minnesota (MINN. STAT. § 609A.03 (2021)), Missouri (MO. REV. STAT. §§ 610.120 and 610.140 (2021)), New Hampshire (N.H. REV. STAT. ANN. § 651:5 (2020)), New York (N.Y. CRIM. PROC. LAW § 160.59 (2017)), North Carolina (N.C. GEN. STAT. § 15A-153 (2021)), Ohio (OHIO REV. CODE. ANN. § 2953.32 (2021)), Rhode Island (R.I. GEN. LAWS § 12-1.3-4 (1993)), Texas (TEX. GOV'T CODE ANN. §§ 411.076 and 411.0765 (2019)), Utah (UTAH CODE ANN. § 77-40-109 (2019)), Virginia (VA. CODE ANN. §§ 19.2-392.2:1(F), 19.2-392.2:2(H), and 19.2-392.13(C)), and West Virginia (W. VA. CODE § 61-11-26 (2020)).
[134] Alabama (ALA. CODE § 15-27-6 (2014)), Arkansas (ARK. CODE ANN. § 16-90-1417 (2019)), California (CAL. PENAL CODE §§ 1203.4, 1203.4a, 1203.425, and 1210.1 (2021)), Colorado (COLO. REV. STAT. § 24-72-703 (2021)), Indiana (IND. CODE § 35-38-9-6 (2022)), Kansas (KAN. STAT. ANN. § 21-6614 (2021)), Louisiana (LA. CODE CRIM. PROC. ANN. art. 973 (2018)), Michigan (MICH. COMP. LAWS § 780.623 (2021)), Minnesota (MINN. STAT. § 609A.03 (2021)), Missouri (MO. REV. STAT. §§ 610.120 and 610.140 (2021)), Nevada (NEV. REV. STAT. § 179.301 (2017)), New Jersey (N.J. STAT. ANN. § 2C:52-2 (2019)), New Mexico (N.M. STAT. ANN. § 29-3A-7 (2019)), North Dakota (N.D. CENT. CODE § 12-60.1-04 (2021)), Ohio (OHIO REV. CODE. ANN. § 2953.32 (2021)),

Pennsylvania (18 PA. CONS. STAT. § 9121 (2018)), Rhode Island (R.I. GEN. LAWS § 12-1.3-4 (1993)), Texas (TEX. GOV'T CODE ANN. §§ 411.076 and 411.0765 (2019)), Utah (UTAH CODE ANN. § 77-40-109 (2019)), and West Virginia (W. VA. CODE § 61-11-26 (2020)).

[135] *See* Appendix A for a list of 13 states that have enacted marijuana-specific expungement, recreational marijuana legalization, and medical marijuana legalization statutes.

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] VA. CODE ANN. § 19.2-392.8(A)(2) (2021).

[140] *Id*.

[141] *See* Appendix D for tables describing state laws on plea agreements in relation to expunged or sealed records.

[142] VA. CODE ANN. § 19.2-298.02(D) (2021). In a criminal case, a deferred disposition is when, with the agreement of the Commonwealth's Attorney and the defense, a court can delay reaching a verdict and continue the case until the defendant has met agreed upon or court-imposed terms and conditions. If the defendant satisfies the terms and conditions and commits no other criminal offenses, the court may dismiss the charge.

[143] VA. CODE ANN. §§ 16.1-285.1(F) and 16.1-285.2(D) and (E) (2021). A juvenile serious offender is a juvenile "who has been found guilty of an offense which would be a felony if committed by an adult, and either (i) the juvenile is on parole for an offense which would be a felony if committed by an adult, (ii) the juvenile was committed to the state for an offense which would be a felony if committed by an adult within the immediately preceding twelve months, (iii) the felony offense is punishable by a term of confinement of greater than twenty years if the felony was committed by an adult, or (iv) the juvenile has been previously adjudicated delinquent for an offense which if committed by an adult would be a felony punishable by a term of confinement of twenty years or more…." VA. CODE ANN. § 16.1-285.1 (2021).

[144] Virginia Criminal Sentencing Commission. (2021). *2021 annual report*, at p. 25. ("During the last fiscal year, 91% of Guideline cases were sentenced following guilty pleas…."). Retrieved from http://www.vcsc.virginia.gov/2021AnnualReport.pdf

[145] *See supra* notes 131 to 134.

[146] *See* MASS. GEN. LAWS ch. 276, § 100E (2018) ("'Expunge', 'expunged', or 'expungement', the permanent erasure or destruction of a record so that the record is no longer accessible to, or maintained by, the court, any criminal justice agencies or any other state agency, municipal agency or county agency. If the record contains information on a person other than the petitioner, it may be maintained with all identifying information of the petitioner permanently obliterated or erased."); *see also* Mass.gov (2021), *Expunge your criminal record*, ("Having a criminal record expunged means that the record will be permanently destroyed so that it's no longer accessible by the court or any other state, municipal, or county agencies. *It's not the same as having a record sealed*."). Retrieved from https://www.mass.gov/expunge-your-criminal-record

[147] VA. CODE ANN. §§ 19.2-392.2:1(F), 19.2-392.2:2(H), and 19.2-392.13(C) (2021).

[148] VA. CODE ANN. § 19.2-392.2(K) (2021); 6VAC20-120-80 (2021).

[149] VA. CODE ANN. § 19.2-392.2(M) (2021).

[150] Library of Virginia. (2011, November 21). *Records retention and disposition schedule. General schedule No. 12. Circuit court records*. Retrieved from https://www.lva.virginia.gov/agencies/records/sched_local/GS-12.pdf.

[151] Virginia State Crime Commission (2021). *2020 annual report: Expungement and sealing of criminal records.* pp. 65-66. Available at http://vscc.virginia.gov/2021/VSCC%202020%20Annual%20Report%20Expungement%20and%20Sealing.pdf.

[152] VA. CODE ANN. §§ 16.1-69.55(A)(1) and 16.1-69.55(A)(2) (2021).

[153] VA. CODE ANN. § 17.1-213 (2021).

[154] Virginia State Crime Commission. (2021, November 15). *Project CRIS*. Available at http://vscc.virginia.gov/2021/Nov15/VSP%20Presentation%20-%20Project%20CRIS.pdf.

[155] Virginia State Crime Commission. (2021, November 15). *Office of the Executive Secretary Report.* Available at https://rga.lis.virginia.gov/Published/2021/RD585/PDF.

[156] Virginia State Crime Commission. (2021, November 15). *Circuit Court Clerks' Association memorandum*. Available at http://vscc.virginia.gov/2021/Nov15/VCCA%20Memorandum.pdf.

[157] Virginia State Crime Commission. (2021, November 15). *Expungement and sealing of criminal and court records.* Staff presentation. Available at http://vscc.virginia.gov/2021/Nov15/VSCC%202021%20Expungement%20and%20Sealing%20Presentation.pdf.

[158] 2021 Va. Acts, Sp. Sess. I, ch. 524 and 542.

[159] Virginia State Crime Commission. (2021, November 15). *2022 Session legislative package*. Available at http://vscc.virginia.gov/2021/Nov15/VSCC%202022%20Legislative%20Package.pdf.

[160] *See* Virginia Indigent Defense Commission. Retrieved from http://www.vadefenders.org/.

[161] Virginia State Crime Commission. (2019). *2018 annual report: Sex trafficking in Virginia.* p. 89. Available at http://vscc.virginia.gov/2019/VSCC%202018%20Annual%20Report%20-%20Sex%20Trafficking%20in%20Virginia.pdf.

[162] VA. CODE ANN. § 9.1-116.5 (2021).
[163] For the amendment to Item 51 #1s of the Senate budget, *see* https://budget.lis.virginia.gov/amendment/2022/1/SB30/Introduced/MR/51/1s/. For the amendment to Item 51 #1h of the House budget, see https://budget.lis.virginia.gov/amendment/2022/1/HB30/Introduced/MR/51/1h/.
[164] VA. CODE ANN. §§ 19.2-392.2:1 and 19.2-392.2:2 (2021).
[165] VA. CODE ANN. § 19.2-392.5 *et. seq.* (2021).
[166] Senate Bill 742 is available at https://lis.virginia.gov/cgi-bin/legp604.exe?ses=221&typ=bil&val=sb742.
[167] Prescott, J.J., & Starr, S.B. (2020). Expungement of criminal convictions: An empirical study. *Harvard Law Review, 133*(8), 2460- 2555, at p. 2533-2534 ("Our analysis demonstrates that expungement is associated with large improvements in the employment rate and wages on average — and, in particular, a reversal of the pre-expungement downward trend that we observe for recipients as a group."); 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. 46 ("…we found that: (1) the record clearing intervention appears to boost both average employment rates and real earnings, though the durability of these increases is not yet known; and (2) participants sought the record clearing remedy after a period of suppressed earnings, in spite of relatively active and stable employment rates.").

APPENDIX A: States That Have Enacted Marijuana-Specific Expungement, Recreational Marijuana Legalization, and Medical Marijuana Legalization Statutes

State	Marijuana-Specific Expungement Statute	Recreational Marijuana Legalization Statute	Medical Marijuana Legalization Statute
Arizona	ARIZ. REV. STAT. ANN. § 36-2862 (2020)	ARIZ. REV. STAT. ANN. § 36-2852 (2020)	ARIZ. REV. STAT. ANN. §§ 36-2801 – 36-2822 (2022)
California	CAL. HEALTH & SAFETY CODE § 11361.8 (2022)	CAL. HEALTH & SAFETY CODE § 11362.1 (2017)	CAL. HEALTH & SAFETY CODE § 11362.5 (1996)
Colorado	COLO. REV. STAT. § 24-72-706 (2022)	COLO. CONST. art. XVIII, § 16	COLO. CONST. art. XVIII, § 14
Connecticut	CONN. GEN. STAT. § 54-142d (2022)	CONN. GEN. STAT. §§ 21a-420 – 21a-422s (2022)	CONN. GEN. STAT. §§ 21a-408 – 21a-410 (2022)
Illinois	20 ILL. COMP. STAT. 2630/5.2 (2021)	410 ILL. COMP. STAT. 705/1-1 – 705/999-99 (2022)	410 ILL. COMP. STAT. 130/1 – 130/999 (2022)
Michigan	MICH. COMP. LAWS § 780.621E (2021)	MICH. COMP. LAWS §§ 333.27951-333.27967 (2022)	MICH. COMP. LAWS §§ 333.26421-333.26430 (2022)
Montana	MONT. CODE ANN. § 16-12-113 (2022)	MONT. CODE ANN. § 16-12-106 (2021)	MONT. CODE ANN. §§ 16-12-501 – 16-12-533 (2021)
New Jersey	N.J. STAT. ANN. § 2C:52-6.1 (2022)	N.J. CONST. art. IV § VII	N.J. STAT. ANN. §§ 24:6I-1 – 24:6I-56 (2022)
New Mexico	N.M. STAT. ANN. § 29-3A-8 (2021)	N.M. STAT. ANN. 26-2C-25 (2022)	N.M. STAT. ANN. § 26-2B-1 – 26-2B-10 (2022)
New York	N.Y. CRIM. PROC. LAW § 160.50 (2021)	N.Y. CAN. LAW §§ 61 – 89 (2022)	N.Y. CAN. LAW §§ 30 – 45 (2022)
Oregon	OR. REV. STAT. § 137.226 (2017)	OR. REV. STAT. §§ 475C.001 – 475C.529 (2022)	OR. REV. STAT. §§ 475C.770 – 475C.919 (2022)
Virginia	VA. CODE ANN. §§ 19.2-392.2:1 and 19.2-392.2:2 (2021)	VA. CODE ANN. § 4.1-1100 (2021)	VA. CODE ANN. § 18.2-251.1 (1979)
Washington	WASH. REV. CODE § 9.96.060 (2022)	WASH. REV. CODE § 69.50.4013 (2022)	WASH. REV. CODE §§ 69.51A.005 – 69.51A.900 (2022)

Appendix by Crime Commission staff based on legal analysis.

APPENDIX B: States With Automatic Criminal Conviction Relief Laws (Updated June 2022)

CALIFORNIA	
Code Section:	CAL. PENAL CODE § 1203.425 (2022)
Enacted:	October 8, 2019; amended August 6, 2020
Implementation Date:	July 1, 2022
Overview	Creates an automatic sealing process for: • 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. 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. California's clean slate process will only apply to offenses which occurred on or after January 1, 2021 (not retroactive).

CONNECTICUT	
Code Section:	CONN. GEN. STAT. § 54-142a (2022)
Enacted:	June 10, 2021
Implementation Date:	January 1, 2023
Overview	Creates an automatic sealing process for: • Non-convictions after varying timeframes, which are based on the type of non-conviction outcome; • Any classified or unclassified misdemeanors after seven years from the date on which the court entered the convicted person's most recent judgment of conviction; • Any class D or E felony or an unclassified felony offense carrying a term of imprisonment of not more than five years after ten years from the date on which the court entered the convicted person's most recent judgment of conviction. Family violence offenses, nonviolent sexual offenses, and sexually violent offenses are not eligible for automatic sealing. Connecticut's clean slate process will only apply to offenses which occurred on or after January 1, 2000 (partially retroactive).

DELAWARE	
Code Sections:	DEL. CODE ANN. tit. 11, §§ 4372, 4373, and 4373A (2022)
Enacted:	November 8, 2021
Implementation Date:	August 1, 2024
Overview	Creates an automatic expungement process for: • Non-convictions; • Misdemeanor convictions (with specified exceptions) after 5 years from the date of conviction; • Felony drug possession after 5 years from the date of conviction; • Certain felony convictions after 10 years from the date of conviction or the date of release from incarceration, which is later. No records can be automatically expunged while a person has pending criminal charges. The granting of an expungement for a felony conviction will bar the expungement of any subsequent felony convictions. Additionally, a person will not be eligible for expungement if the person has been granted an expungement for a prior conviction in the past 10 years.

MICHIGAN	
Code Section:	MICH. COMP. LAWS § 780.621g (2021)
Enacted:	October 13, 2020
Implementation Date:	April 11, 2023
Overview	Creates an automatic sealing process for: • 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. Felonies and certain misdemeanors cannot be automatically sealed if a person has charges pending or has been convicted of another offense. No more than two felony and four misdemeanor convictions in total can be automatically sealed, excluding low-level misdemeanors.

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

PENNSYLVANIA	
Code Sections:	18 PA. CONS. STAT. §§ 9122.2 and 9122.3 (2020)
Enacted:	June 28, 2018
Implementation Date:	June 28, 2019
Overview	Pennsylvania is the only state that has actually implemented an automatic conviction relief system. Creates an automatic sealing process for: • 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. Certain prior convictions will disqualify a person from automatic sealing, such as a felony, four misdemeanors, indecent exposure, and various other offenses.

SOUTH DAKOTA	
Code Section:	S.D. CODIFIED LAWS § 23A-3-34 (2021)
Enacted:	March 10, 2016; amended March 25, 2021
Implementation Date:	Unknown
Overview	Creates an automatic sealing process for: • 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 five years. A person will qualify for automatic sealing only if all court-ordered conditions on the case have been satisfied and they have not been convicted of any further offenses within those five years.

UTAH	
Code Sections:	UTAH CODE ANN. §§ 77-40-102, 77-40-114, 77-40-115, and 77-40-116 (2022)
Enacted:	March 28, 2019
Implementation Date:	Unknown
Overview	Utah's automated sealing system is in the developmental phase and it is uncertain when it will be completely implemented. Creates an automatic sealing process for: • Non-convictions (not guilty, *nolle prosequi*, or dismissed); • Specified traffic offenses; • Dismissals without prejudice after 180 days; • Certain misdemeanor convictions 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 record.

VIRGINIA	
Code Sections:	VA. CODE ANN. §§ 19.2-392.2:1 and 19.2-392.6 – 19.2-392.11 (2021)
Enacted:	April 7, 2021
Implementation Date:	July 1, 2025 (or sooner if automated systems implement earlier)
Overview	Virginia has enacted two automatic criminal record relief processes. The first is an automatic expungement process for all arrests, criminal charges, convictions, or civil offenses (both convictions and non-convictions) for possession of marijuana. All eligible offenses in the Virginia CCRE will be automatically expunged when the law takes effect. The second is an automatic sealing process for: • Specified criminal convictions and deferred and dismissed dispositions after 7 years; • Non-convictions (acquittal, *nolle prosequi*, or otherwise dismissed) both going forward in time and retroactively; • Traffic offenses after 11 years; and, • Mistaken identity and unauthorized use of identifying information cases. A person will not qualify for automatic sealing of a conviction or deferred and dismissed disposition if: • they are convicted of an offense which requires a report to the CCRE during the seven year waiting period; or, • they were convicted of any offense which does not qualify for automatic sealing on the date of their conviction or on the date of the deferral or dismissal of their charge.

Appendix by Crime Commission staff based on legal analysis.

APPENDIX C: Criminal Record Relief Processes in Virginia

Process[1]	Eligible Offenses	Waiting Period	Criteria for Relief	Access and Disclosure	Court-Appointed Counsel[2]	Filing Fees[3]	3rd Party Notification[4]
Expungement (Non-Convictions)	Non-convictions[5]	None	Manifest Injustice[6]	Court order[7]	No	Refunded if granted[8]	No
Automatic Sealing (Convictions and Deferred Dismissals)	9 specified Virginia Code sections[9]	7 years[10]	No Virginia CCRE reportable or out-of-state convictions[11]	25 specific purposes[12]	N/A	N/A	Yes
Automatic Sealing (Misdemeanor Non-Convictions - 7/1/25 onward)	Any misdemeanor non-conviction, excluding Title 46.2 traffic infractions[13]	None[14]	Must be granted unless any of the 6 disqualifying criteria apply[15]	25 specific purposes[16]	On underlying criminal case[17]	N/A	Yes
Automatic Sealing (Felony Non-Convictions - 7/1/25 onward)	Any felony concluding in an acquittal or dismissal with prejudice[18]	None[19]	Concurrence of the Commonwealth's Attorney[20]	25 specific purposes[21]	On underlying criminal case [22]	N/A	Yes
Automatic Sealing (Misdemeanor Non-Convictions Retroactively)	Any misdemeanor non-conviction[23]	None – VSP shall review the CCRE on at least an annual basis[24]	No charges in the past 3 years for any violation of Virginia law that requires a report to the CCRE[25]	25 specific purposes[26]	N/A	N/A	Yes
Petition-Based Sealing (Convictions and Deferred Dismissals)	Misdemeanors, Class 5 or 6 felonies, grand larceny, or any felony larceny offense, except DUI-related and domestic assault[27]	7 years for misdemeanors; 10 years for felonies[28]	Criteria to file; and, Criteria to grant can vary based on type of offense[29]	25 specific purposes[30]	Yes[31]	Not required if indigent[32]	Yes
Automatic Marijuana Expungement (Arrests, Criminal Charges, Convictions, and Civil Offenses)	Possession of marijuana and misdemeanor distribution of marijuana[33]	None[34]	None	25 specific purposes[35] Possibly a court order[36]	N/A	N/A	No
Petition-Based Marijuana Expungement (Convictions and Deferred Dismissals)	Felony distribution of marijuana and misdemeanor sale or possession of drug paraphernalia[37]	None	Manifest Injustice[38]	25 specific purposes[39] Possibly a court order[40]	No	Refunded if granted[41]	No

Appendix by Crime Commission staff based on legal analysis.

[1] Only the expungement process is currently available in Virginia. The sealing and marijuana expungement processes will take effect beginning July 1, 2025, or sooner if the new automated systems are operational prior to that date. Note that one additional sealing process, the automatic sealing of traffic infractions, is not included in this list. *See* VA. CODE ANN. § 19.2-392.17 (2021). Traffic infractions are sealed by law after 11 years unless federal law prohibits the Virginia Department of Motor Vehicles from sealing the infraction. *See also* VA. CODE ANN. §§ 19.2-392.2(H) and 19.2-392.9 (2021). The expungement process and the automatic sealing process are in conflict in relation to non-convictions based on mistaken identity or unauthorized use of identifying information.
[2] Denotes whether an indigent person has access to court-appointed counsel to assist with the criminal record relief process.
[3] Denotes whether an indigent person is required to pay court filing fees as part of the criminal record relief process.
[4] Denotes whether a third-party business screening service is notified if the criminal record relief is granted. *See* VA. CODE ANN. § 19.2-392.16 (2021). A business screening service is defined as "a person engaged in the business of collecting, assembling, evaluating, or disseminating Virginia criminal history records or traffic history records on individuals" but "does not include any government entity or the news media."
[5] VA. CODE ANN. § 19.2-392.2(A) (2021).
[6] VA. CODE ANN. § 19.2-392.2(F) (2021).
[7] VA. CODE ANN. § 19.2-392.3 (2021).
[8] VA. CODE ANN. § 19.2-392.2(L) (2021).
[9] VA. CODE ANN. § 19.2-392.6(A) and (B) (2021).
[10] VA. CODE ANN. § 19.2-392.6(C) (2021). The waiting period begins at the date of conviction or dismissal.
[11] *Id.* Note that CCRE refers to the Central Criminal Records Exchange maintained by the Virginia State Police. Also note that per VA. CODE ANN. § 19.2-392.6(D) (2021), an offense will not be automatically sealed if the person was convicted of a non-eligible offense on the same date of the deferral, dismissal, or conviction as the eligible offense.
[12] VA. CODE ANN. §§ 19.2-392.7(F) and 19.2-392.13 (2021).
[13] VA. CODE ANN. § 19.2-392.8(A) (2021).
[14] *Id.*
[15] *Id.*
[16] VA. CODE ANN. §§ 19.2-392.8(E) and 19.2-392.13 (2021).
[17] *See* VA. CODE ANN. §§ 19.2-159 and 19.2-163.3 (2021). The decision on whether to seal an offense under this process is made immediately upon the conclusion of the criminal case; however, it is unclear whether the public defender or court-appointed counsel on the criminal case will be permitted to assist with the civil automatic sealing process.
[18] VA. CODE ANN. § 19.2-392.8(B) (2021).
[19] *Id.*
[20] *Id.*
[21] VA. CODE ANN. §§ 19.2-392.8(E) and 19.2-392.13 (2021).
[22] *See* VA. CODE ANN. §§ 19.2-159 and 19.2-163.3 (2021). The decision on whether to seal an offense under this process is made immediately upon the conclusion of the criminal case; however, it is unclear whether the public defender or court-appointed counsel on the criminal case will be permitted to assist with the civil automatic sealing process.
[23] VA. CODE ANN. § 19.2-392.11(A) (2021).
[24] *Id*. Note that VSP refers to the Virginia State Police.
[25] *Id.*
[26] VA. CODE ANN. §§ 19.2-392.11(F) and 19.2-392.13 (2021).
[27] VA. CODE ANN. § 19.2-392.12(A) (2021). The offenses excluded from petition-based sealing include VA. CODE ANN. §§ 18.2-36.1 and 18.2-36.2 (involuntary manslaughter), VA. CODE ANN. §§ 18.2-51.4 and 18.2-51.5 (maiming of another as a result of DUI), VA. CODE ANN. § 18.2-57.2 (domestic assault and battery), and VA. CODE ANN. §§ 18.2-266 and 46.2-341.24 (DUI).
[28] VA. CODE ANN. § 19.2-392.12(F)(1) (2021). The waiting period begins at the date of conviction, dismissal, or release from incarceration, whichever date occurred latest in time.
[29] VA. CODE ANN. § 19.2-392.12(A) and (F) (2021).
[30] VA. CODE ANN. §§ 19.2-392.12(M) and 19.2-392.13 (2021).
[31] VA. CODE ANN. § 19.2-392.12(L) (2021).
[32] VA. CODE ANN. § 19.2-392.12(B) (2021).
[33] VA. CODE ANN. § 19.2-392.2:1(A) (2021). Note that the provisions of marijuana expungement related to distribution of marijuana were not re-enacted as required during the 2022 Regular Session of the General Assembly; therefore, distribution of marijuana offenses will not be eligible for expungement absent further action by the General Assembly.
[34] *See* VA. CODE ANN. §§ 19.2-392.2:1(B), (C), and (D) (2021). Virginia State Police must provide a list of offenses in the CCRE that meet the requirements for expungement to the Executive Secretary of the Supreme Court and any circuit court clerk who maintains a case management system that interfaces with the State Police no later than July 1, 2025.

[35] VA. CODE ANN. § 19.2-392.2:1(F) (2021).
[36] *See* VA. CODE ANN. § 19.2-392.3 (2021). It is unclear whether a court order is required to access and disseminate a marijuana expunged record.
[37] VA. CODE ANN. § 19.2-392.2:2(A) (2021). Note that the provisions of marijuana expungement related to distribution of marijuana were not re-enacted as required during the 2022 Regular Session of the General Assembly; therefore, distribution of marijuana offenses will not be eligible for expungement absent further action by the General Assembly.
[38] VA. CODE ANN. § 19.2-392.2:2(E) (2021).
[39] VA. CODE ANN. § 19.2-392.2:2(H) (2021).
[40] *See* VA. CODE ANN. § 19.2-392.3 (2021). It is unclear whether a court order is required to access and disseminate a marijuana expunged record.
[41] VA. CODE ANN. § 19.2-392.2:2(J) (2021).

APPENDIX D: State Laws on Plea Agreements in Relation to Expunged or Sealed Records

STATES BARRING WAIVER OF RIGHT TO EXPUNGE OR SEAL IN A PLEA AGREEMENT

Colorado	COLO. REV. STAT. § 24-72-703 (2021)
Indiana	IND. CODE ANN. § 35-38-9-11 (2014)
Massachusetts	MASS. GEN. LAWS ch. 276, § 100R (2018)
New York	N.Y. CRIM. PROC. LAW § 160.59 (2017)

STATES BARRING EXPUNGEMENT OR SEALING FOLLOWING A PLEA AGREEMENT

Georgia	GA. CODE ANN. § 35-3-37 (2021)
New Jersey	N.J. STAT. ANN. § 2C:52-6 (2020)
North Carolina	N.C. GEN. STAT. § 15A-146 (2021)
Pennsylvania	*Commonwealth v. Lutz*, 788 A.2d 993, 1000 (Sup. Ct. Penn., Nov. 21, 2001)
West Virginia	W. VA. CODE § 61-11-25 (2012)

Appendix by Crime Commission staff based on legal analysis.


VIRGINIA STATE
CRIME COMMISSION