

EXPUNGEMENT

EXPUNGEMENT OF ARREST RECORDS AND DOCUMENTATION OF CRIMINAL PROCEEDINGS IN VIRGINIA: ELIGIBILITY AND PROCEDURES

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Alphabetical Index

[Ask LSNV](#)

[Blank Page](#)

[Home Page](#)

[Lawyer Referral](#)

[Legal Terms](#)

[LSNV's Disclaimer](#)

Virginia Judicial System

[Circuit Court](#)

[Gen. Dist. Court](#)

[J & DR Court](#)

[Virginia Code](#)

[Virginia Court Rules](#)

LSNV Services

[Consumer](#)

[Debtors' Rights Clinic](#)

[Elder](#)

[Employment & Civil Rights](#)

[Family](#)

[Health Care](#)

[HIV/AIDS](#)

[Housing](#)

[Immigration](#)

[Law Center for](#)

[Children](#)

[Pro Bono](#)

[Public Benefits](#)

[Student Loans](#)

[Taxes](#)

[Uncontested Divorce](#)

[Project](#)

Definition: Expungement is the term for a civil proceeding brought by someone who was arrested and charged with commission of a crime, but who was not convicted, to seal the police and court records of the arrest and criminal charge.

Cautionary Note: There is much information about expungement of criminal records that you can access over the Internet, and you may want to do some research on your own before considering this possible remedy. Laws differ substantially from state to state, even when the same term **EXPUNGEMENT** is used. What may be possible in another state may not be available in Virginia. Similarly, this information about expungement in Virginia is state-specific and may not be reliable to indicate whether expungement (or some other term, such as relief from civil disability, etc.) may be available. Also, many states have different types of Governor's pardons available. You should consult qualified counsel in your jurisdiction to find out what rights and options you may have for relief from a criminal record.

- I. [ELIGIBILITY FOR EXPUNGEMENT UNDER VIRGINIA LAW](#)
- II. [EXPUNGEMENT PROCEDURES IN STATE COURT](#)
- III. [CORRECTING A MISTAKEN CRIMINAL RECORD AND IDENTITY THEFT](#)
- IV. [EXPUNGEMENT OF FEDERAL CRIMINAL RECORDS](#)

V. [IF YOU ARE NOT ELIGIBLE FOR EXPUNGEMENT](#)

VI. FORMS FOR EXPUNGEMENT IN VIRGINIA STATE COURTS:

1. [Petition for Proceeding in Civil Case Without Payment of Fees or Costs \(CC1414\)](#) (Nov-99) <http://www.courts.state.va.us/forms/circuit/CC-1414Rev-1.pdf>
2. [Affidavit in Support of Application for Proceeding in Civil Case](#)

Without Payment of Fees or Costs (seeking waiver of fees) (LSNV)
(June-03) http://www.lsnv.org/Affidavit_Fees.pdf

3. Order for Petition or Affidavit for Proceeding in Civil Case Without Payment of Fees or Costs (LSNV) (seeking waiver of fees)
(June-03) http://www.lsnv.org/Order_Fees.pdf
4. Chancery Case Cover Sheet (Fairfax County)
(Apr-02) <http://www.fairfaxcounty.gov/courts/circuit/pdf/CCR-D-80.PDF>
5. Expungement Procedures (Fairfax County)
(Sept-02) <http://www.fairfaxcounty.gov/courts/circuit/pdf/CCR-A-35.PDF>
6. Expungement Petition: No Prior Criminal Record (LSNV)
(Jul-04) http://lsnv.org/Expung_Petition_No_Record.pdf
7. Expungement Petition: Multiple Criminal Charges (LSNV)
(Jul-04) http://lsnv.org/Expung_Petition_Multiple_Charges.pdf
8. Expungement Petition (Motion) Mistaken Identity (LSNV)
(Jul-04) http://lsnv.org/Expung_Petition_Mistaken_Identity.pdf
9. Notice of Hearing (Fairfax County)
(Mar-02) <http://www.fairfaxcounty.gov/courts/circuit/pdf/CCR-A-36.PDF>
10. Praecipe (LSNV)
(Jul-04) http://lsnv.org/Expung_Praecipe.pdf
11. Expungement Order (LSNV)
(Jul-04) http://lsnv.org/Expung_Order.pdf

I. ELIGIBILITY FOR EXPUNGEMENT UNDER VIRGINIA LAW

Expungement of the record of an arrest and the court proceedings for a criminal charge is a civil law remedy available for individuals who can claim to be innocent of a charge brought against them. This remedy, for adults, is authorized in Virginia Code § [19.2-392.2](#). The Legislature has provided for expungement of official records in order to help innocent individuals more easily obtain employment, education or credit. The legislation defines who is eligible to seek expungement, but leaves discretion for judges to determine from those who meet the statute's eligibility requirements who should be granted this relief.

WHO CAN SEEK EXPUNGEMENT OF CRIMINAL RECORDS?

- A defendant in a criminal case who appears and enters a "not guilty" plea, and then is tried by a

judge or jury and is acquitted of all charges.

- A party in a civil action who is arrested or is charged with contempt of court, but who is not found guilty of this charge.
- A defendant in a criminal case that the Commonwealth Attorney's office decides not to prosecute, by filing a motion to *nolle prosequi* the charge(s).
- A defendant who is charged with assault and battery or a misdemeanor for which there is a remedy by civil action when the injured party acknowledges to the court that there has been satisfaction for the injury, and the court grants an order discharging the case pursuant to Virginia Code § [19.2-151](#).
- An individual's name or identification have been used without consent or authorization by a defendant in a criminal case or cases.
- A defendant who has been convicted of a crime is subsequently granted an Absolute Pardon based upon determination of an unjust conviction.

Following are answers to frequently asked questions about availability of this legal remedy.

I WAS (IN MY OPINION) UNFAIRLY CONVICTED OF A CRIMINAL CHARGE, CAN I ASK THAT THE RECORD BE EXPUNGED?

No. "The expungement statute applies to innocent persons, not those who are guilty." *Gregg v. Commonwealth*, 227 Va. 504, 507 (1984). There is one extremely limited exception to this restriction on relief from convictions: when the Governor grants an Absolute Pardon for the conviction. Virginia Code § 53.1-229. There are three types of pardons: Absolute Pardons, Conditional Pardons and Simple Pardons. Only Absolute Pardons provide the legal basis to later seek expungement in Circuit Court of the record of a criminal conviction. Information about seeking an Absolute Pardon and forms for the application are available on the Governor's web site at: www.soc.state.va.us/Clemency.

I PLED GUILTY TO A MINOR CRIMINAL CHARGE (ON ADVICE OF MY ATTORNEY) A LONG TIME AGO, CAN I GET THE RECORD EXPUNGED?

No. Pleading guilty to a criminal charge precludes later claiming innocence of the crime. It does not matter what the charge was (misdemeanor or felony) or how much time has passed. In Virginia, the record of a criminal conviction is permanent.

I DID NOT PLEAD GUILTY, I PLED *NOLO CONTENDRE*; CAN I GET THE RECORD EXPUNGED?

No. A plea of *nolo contendere* is not a confession of guilt, but legally this is an expression by the defendant of willingness to be considered guilty for the purpose of imposing judgment and sentence. Entering this plea is not consistent with claiming to be innocent of the crime charged. *Bindra v. Commonwealth of Virginia*, 51 Va. Cir. 28 (1999). Similarly, entering an *Alford* plea (defendant maintains innocence, but concludes that the evidence requires entry of a guilty plea) precludes later claiming innocence, for the purpose of seeking an expungement.

I WAS UNDER 18 WHEN I WAS CONVICTED OF A CRIME, IS IT POSSIBLE FOR THE CRIMINAL RECORDS TO BE EXPUNGED?

Yes. Depending upon the type of criminal violation, the records may be expunged automatically—without you having to do anything. The law governing criminal records of juveniles is somewhat technical, and you may want to speak with an attorney to accurately assess your specific situation. Law enforcement records of juvenile prosecutions are generally kept confidential. Unless the conviction is for a violent felony or for a violation of the motor vehicle laws, the records are not readily available to the public.

There is a specific expungement statute addressing records kept of juveniles' convictions: Virginia Code § [16.1-306](#). The key elements of this law are:

AUTOMATIC DESTRUCTION OF RECORDS BY THE CLERK'S OFFICE

Each year the clerk of the Juvenile and Domestic Relations Court is directed to destroy records for any juvenile who has: reached 19, if five years have elapsed from the date of the last hearing. For motor vehicle violations reported to DMV, the records are destroyed when the juvenile reaches 29. If the juvenile was found guilty of an act which would have been a felony if committed by an adult, the records are not automatically destroyed.

**MOTIONS IN JUVENILE AND DOMESTIC RELATIONS COURT TO
DESTROY RECORDS OF CRIMINAL JUVENILE PROCEEDINGS**

A juvenile who was the subject of either a delinquency proceeding or a traffic proceeding, and who was found innocent or the proceeding was otherwise dismissed is eligible to file a motion to have the criminal records destroyed, without waiting for the automatic process to occur at age 19 or 29. The term "otherwise dismissed" used in Virginia Code § [19.2-303.2](#) is narrowly interpreted to only grant relief for someone who can claim innocence. *Galdo v. Commonwealth of Virginia*, 43 Va. Cir. (1997).

**ADDITIONAL PROTECTION FOR THE RIGHTS OF JUVENILES
PROSECUTED AND FOUND GUILTY IN CIRCUIT COURT**

A finding of guilt for a juvenile prosecuted in Circuit Court does not have the same adverse impact as conviction of an adult. Virginia Code § [16.1-308](#): "A finding of guilty on a petition charging delinquency under the provisions of this law shall not operate to impose any civil disabilities ordinarily imposed by conviction for a crime, nor shall any such finding operate to disqualify the child for employment by any state or local governmental agency."

**I WAS NOT CONVICTED OF A CRIMINAL CHARGE, DOES THAT MEAN THAT I AM ELIGIBLE TO SEEK
EXPUNGEMENT OF THE RECORDS?**

Not unless you can properly assert your innocence of the charge. A defendant may be guilty of a criminal charge even if there is not a final, formal determination of guilt made by a court. *Commonwealth v. Jackson*, 255 Va. 552 (1998). It is easier in Virginia to determine who is not eligible for an expungement order than it is to define who is qualified for this relief. Pleading "not guilty" to a charge [and having this box on the back of the criminal summons form checked] is perhaps the best way of documenting eligibility to claim innocence, if there is a favorable outcome to the court case.

**THE CRIMINAL CHARGE AGAINST ME WAS DISMISSED, AM I ELIGIBLE TO APPLY FOR EXPUNGEMENT
OF THE RECORDS?**

Maybe; but, a dismissal does not necessarily meet eligibility to claim innocence under the expungement statute. Dismissal of a criminal case means that the case is over and is no longer active on the court's docket. A dismissal, by itself, does not mean that there has been an outcome favorable to the defendant. For example, a simple assault charge may be continued with instructions by the court for the defendant to refrain from unlawful behavior for a period of time (e.g., one year) and at the end of the time if there has been no problem, the case will be subject to dismissal. Did the defendant take a posture in court claiming "not guilty" to the assault charge? Ordinarily, a court cannot require

behavior of a defendant who claims innocence of a criminal charge (other than the obligation to return for a scheduled court appearance).

MY CRIMINAL DEFENSE ATTORNEY WORKED OUT AN AGREEMENT WITH THE COMMONWEALTH ATTORNEY TO HAVE THE CRIMINAL CASE DISMISSED, AM I ELIGIBLE TO GET THE RECORDS EXPUNGED?

Probably, no. The concept of a “plea bargain” worked out with the Commonwealth Attorney’s office and the defendant is to reach a settlement, and the settlement of a criminal charge may be incompatible with the defendant later being able to claim innocence. If you agreed to either perform community service or make restitution to a victim of a crime, you probably cannot later claim innocence. You should consult an attorney to review the specific factual circumstances of the case you would like to have expunged. Your criminal defense attorney is in the best position to advise you about availability of this remedy, based upon resolution of the case.

I WAS CHARGED WITH ISSUING A BAD CHECK, BUT THE CASE WAS SETTLED AFTER I PAID THE MONEY I OWED—CAN I SEEK EXPUNGEMENT?

Possibly. This is a good example of the complexity of the law, and why the specific circumstances of a case determine how the law may be applied. An agreement to make restitution to a crime victim (to get a reduced sentence/punishment) would ordinarily be indication of an admission of guilt of the crime charged. However, a bad check criminal charge is a special situation: issuing a bad check may be a crime (if the check was knowingly issued with insufficient funds) or it may be only a violation of civil law. Reimbursing the person who is due the money may be an admission of civil, not criminal liability. Dismissal of a criminal bad check charge after the check has been made good may allow the defendant to later claim innocence. This could be an “otherwise dismissed” case under Virginia Code § [19.2-392.2](#)—A(2) that is eligible for expungement.

WHAT DOES *NOLLE PROSEQUI* MEAN, AND DOES THIS MEAN I AM ELIGIBLE TO SEEK EXPUNGEMENT OF THE RECORDS?

This Latin term, *nolle prosequi*, means that the Commonwealth Attorney’s office will not further prosecute the criminal charge(s). This is a motion made by the prosecutor, requesting that the court dismiss the case against the defendant. Under Virginia law, a *nolle prosequi* of a charge enables the defendant to later “file a petition setting forth the relevant facts and requesting expungement of the police records and the court records relating to the charge.” Virginia Code § 19.2-392.2—A(2). Dismissal of a criminal charge under this provision does not determine guilt, and therefore a defendant is able legally to later claim innocence.

I PLED GUILTY TO A CRIMINAL CHARGE BUT I HAVE A REALLY GOOD EXPLANATION WHY I NEED TO GET THIS EXPUNGED, CAN A JUDGE HELP ME?

No. A judge does not have discretion to grant relief to someone who does not meet the Legislature's terms for eligibility, and present Virginia policy clearly requires relief be limited to people who can lawfully claim to be innocent. *Sanderlin v. Commonwealth of Virginia*, 58 Va. Cir. 375 (2002). The discretion granted by the Legislature to a court is to grant or deny expungement to applicants who technically meet the eligibility requirement, not to help applicants who may have a sympathetic need for relief.

I WAS ACQUITTED OF A CRIMINAL CHARGE, AM I ENTITLED TO EXPUNGEMENT OF THE POLICE AND COURT RECORDS?

No. There is no unqualified "entitlement" to the civil remedy of expungement. The law (Title 19.2 of the Virginia Code) provides eligibility to apply for this relief. The Commonwealth Attorney's office has the legal burden to establish why this relief should be denied in a simple application: one criminal case, a misdemeanor charge and no prior criminal record. If a Judge denies relief in a case of a simple expungement, the denial could be reviewed for an abuse of discretion. If the case is not a simple request, then the burden to establish that relief should be granted is on the petitioner under the "manifest injustice" standard. It would be very difficult to challenge a Judge's discretionary decision in this latter type of application through an appeal. If the application is not a simple request, it should be carefully researched and prepared to make the best possible presentation.

WHAT! I AM PRESUMED INNOCENT UNTIL PROVEN GUILTY—RIGHT? AN ACQUITTAL MEANS THAT I WAS NOT GUILTY OF THE CRIME, ISN'T THIS DOUBLE JEOPARDY?

An acquittal does mean that there was a favorable outcome of the criminal case: either a judge or jury determined that proof of guilt was not established "beyond a reasonable doubt." This is not the same outcome as a finding of innocence (which is a legal presumption). Since the expungement remedy is a civil proceeding, a judge may apply the civil standard (whether there is evidence of a crime having been committed by a "preponderance of the evidence") to determine if the petitioner seeking expungement can fairly claim innocence. The Circuit Court in *Wilmoth v. Commonwealth of Virginia*, 12 Va. Cir. 22, 25 (1986), stated this principle governing exercise of discretion to look beyond the fact of an acquittal or dismissal:

Therefore, a Court could, without an abuse of discretion, deny expungement to one who had in fact by judgment duly been found not guilty. An acquitted person, for example, could be considered guilty based on a civil standard of proof. Nolle

prosequis can occur for a variety of reasons relating to evidence which the prosecution has available. Sometimes considering all evidence that is fully admissible, the Commonwealth seeks discontinuance of prosecution because the evidence is too weak. Other times in situations such as suppressions of evidence, the Commonwealth must, as it did in this instance, move for discontinuance for lack of admissible evidence. The two situations can lead to different opinions as to a defendant's guilt or innocence.

The request for expungement of criminal records is a separate case from the criminal case, and the judge has discretion in the expungement proceeding to examine the evidence of guilt under the civil standard.

WHAT DOES A COURT LOOK AT TO DECIDE IF AN ACQUITTAL WILL ALLOW ME TO HAVE THE RECORDS EXPUNGED?

The context for an acquittal ordinarily will indicate whether a court is likely to approve expungement. For example, if you were charged with a crime in General District Court and were convicted of the charge in that court, a successful appeal to Circuit Court would not necessarily resolve whether there was enough evidence—by the easier civil standard—to establish that a crime was committed. The favorable outcome on appeal would allow for an expungement application; however, the acquittal itself is only one factor that may be considered by a judge in deciding whether or not to grant an expungement application. Similarly, when a "true bill" was returned by a grand jury, even though the defendant was found not guilty after a jury trial, the court in *Yarrow v. Commonwealth of Virginia*, 46 Va. Cir. 309 (1998) did not find the petitioner satisfied the high standard of demonstrating "manifest injustice" to grant expungement of the record of a felony charge.

Convicting a defendant in the lower court or the indictment process to persuade a grand jury that there is sufficient evidence of a crime having occurred to prosecute the case would indicate that there might be enough evidence to establish guilt under the easier civil standard. If there was any such preliminary determination of guilt in a case subsequently dismissed, you should carefully review bringing an expungement petition with a knowledgeable attorney.

MY CRIMINAL DEFENSE ATTORNEY SAID THAT BECAUSE I WAS CHARGED WITH A MISDEMEANOR AND I HAVE NO PRIOR RECORD, THE ACQUITTAL MEANS I SHOULD BE GRANTED AN EXPUNGEMENT. IS THAT CORRECT?

Yes. In this circumstance if a petitioner seeking expungement has no prior criminal record and the arrest was for a misdemeanor violation, then

the applicant shall be entitled to expungement relief unless the Commonwealth Attorney's office presents good cause at the hearing on a petition to show the court why the remedy should not be granted. Virginia Code § 19.2-392.2—F. This (only one criminal case, a misdemeanor charge and no prior criminal record) presents a simple expungement application (see form petition) that is most likely to be approved by a judge. This is an application that may be easiest to bring, without assistance of counsel.

I WAS CHARGED WITH A FELONY, WHAT DO I HAVE TO DEMONSTRATE TO THE COURT TO BE GRANTED AN EXPUNGEMENT?

The court may require clear evidence, such as documentation from a prospective employer, of need for expungement. Speculation about possible difficulty in seeking employment or housing in order to expunge an eligible charge may not be enough. *Miller v. Commonwealth of Virginia*, 55 Va. Cir. 110 (2001). Some employers may require "clean" criminal histories to offer employment, and they may be willing to document this requirement in a brief letter that can be attached to the petition. Unlike a simple expungement application, if the charge that was dismissed was a felony, then the burden is shifted to the petitioner to demonstrate "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." Virginia Code § 19.2-392.2—F.

I HAVE A FELONY CHARGE THAT WAS DISMISSED THAT I WANT EXPUNGED, BUT I WAS CONVICTED OF A LESS SERIOUS CRIME IN THE PAST, AM I ELIGIBLE TO GET THIS RECORD EXPUNGED?

This application would be a request for partial expungement of a criminal record. This is more complicated; but, depending upon the facts, it may be possible to obtain expungement of the more serious charge that was dismissed even though the record of the less serious conviction will remain. In order to meet the showing of "manifest injustice" you will need to have a fairly clear, well organized presentation of the need for this relief. One example: if there was a minor charge that you were convicted of, and a serious charge was later brought and dismissed (e.g., distribution of drugs), a judge may agree that an employer might look at the later charge—even though there was no conviction—and consider it to screen out eligibility for a job. Avoiding that obstacle to employment could meet the court's required showing of "manifest injustice."

I HAVE BEEN CONVICTED OF SEVERAL CRIMINAL CHARGES, BUT I HAVE OTHER DISMISSED CHARGES LISTED ON MY CRIMINAL RECORD WHICH MAY BE ELIGIBLE FOR EXPUNGEMENT, CAN I EXPUNGE PART OF MY CRIMINAL RECORD?

This may be possible, but the more convictions in your history the less likely you will be granted partial expungement of your criminal record. How recent was the last conviction? This may be an important factor in granting or denying expungement of dismissed charges. The more time that has passed since any criminal charge has been brought, the more sympathetic a judge may be to grant partial expungement of a record.

WHEN IS “MANIFEST INJUSTICE” DEMONSTRATED BY A RECORD OF DISMISSED CHARGES AND CONVICTIONS?

There is no specific guidance for when a Circuit Court Judge is likely to be satisfied that a sufficient showing of possible manifest injustice has been made. What may be enough to persuade one Judge may not be adequate for another. Speculation about possible problems is probably not enough. One question often asked by Judges who consider these applications is: “Have you ever encountered a problem seeking a job because of the arrest information?” When there is a mixed record of convictions and dismissed charges, there may be a negative response from employers to the existence of the record—but this may be due to the convictions (which cannot be expunged) and not the dismissed charges. If you want to seek partial expungement of a criminal record, you would be well advised to at least consult an attorney to discuss whether an application is likely to be granted or denied; and, to discuss with counsel the information to explain the request that should be included in the petition.

THE CLERK’S OFFICE SAYS THEY NO LONGER HAVE A RECORD OF THE CASE, AM I ELIGIBLE TO EXPUNGE THE POLICE RECORDS?

You may be eligible, but even in the absence of the court records you will need to establish that you qualify to seek this relief. Under Virginia law, the clerk’s office is required to retain documents from criminal and traffic violation proceedings (including cases sealed in expungement proceedings) for 10 years. Virginia Code § [16.1-69.55](#). If a case was appealed to Circuit Court, the documents will have been transferred to the Circuit Court clerk’s office and may be found there. In some jurisdictions, records may have been transferred to a separate record keeping facility (for example, those more than 5 years old) and may be available there. If the clerk’s office or the storage facility used by the court do not have a judicial record of the case, you can be given a written statement that the records cannot be located or no longer exist.

I DO NOT REMEMBER EXACTLY WHAT HAPPENED IN THE CRIMINAL CASE AND THE CLERK'S OFFICE HAS TOLD ME THE COURT RECORDS CANNOT BE LOCATED, WHAT CAN I DO TO TRY TO DETERMINE WHAT HAPPENED?

Following are some suggestions to "reconstruct" accurate records of what happened with a case you do not clearly recall:

1. Contact your former criminal defense attorney; and, if he/she can be located, ask what the office records show about the case. The attorney might have a copy of the criminal case disposition or information about the case in a closed file.
2. Contact the Commonwealth Attorney's office. The prosecutors's office may rely on access to the records in the criminal clerk's office, but they might have some additional information.
3. The local police department office should be able to access, by computer, limited information about your criminal record. This computer information is not very detailed and may not be accurate. The best information about a criminal charge brought against you is the criminal history record maintained by the Central Criminal Records Exchange in Richmond; this state agency is part of the Department of State Police. You can access the information in your criminal history by going to a local police station to be fingerprinted. The police will forward your fingerprints, together with a request that you be sent a copy of your criminal history, for a \$5.00 fee. This report should make clear the outcome of a criminal case and either you (or an attorney reviewing the record for you) should be able to determine if you are eligible to petition for expungement—before you incur the expense of bringing a proceeding in Circuit Court.

WHAT DOES EXPUNGEMENT OF CRIMINAL RECORDS ACTUALLY DO? IF I AM ASKED ABOUT A CRIMINAL CASE THAT HAS BEEN EXPUNGED, WHAT CAN I SAY?

Under Virginia law, it is unlawful for anyone having access to expunged court or police records to open them, review them or disclose information from the sealed records unless first granted permission by the court that granted the expungement order. Virginia Code § [19.2-392.3](#)—A. In Virginia an employer or educational institution shall not require an applicant to disclose any information about an arrest or criminal charge that has been expunged. Virginia Code § [19.2-392.4](#)—A. In plain language, if you are asked on an employment application whether you have been convicted of a crime or arrested for a crime (that is covered by an expungement order) you can lawfully answer: no. The expungement process seals records, but the effect of an expungement order is to retroactively eliminate the arrest and criminal charge brought. Access

to and unsealing of an expunged criminal record is only permitted under very limited purposes by a law-enforcement agency for a criminal investigation.

The Legislature has also prohibited state and local agencies from requiring disclosure of expunged criminal records in any application or interview for a license, permit, registration or governmental employment. Virginia Code, § 19.2-392.4—B.

II. EXPUNGEMENT PROCEDURES

Expungement proceedings are brought in the Circuit Court for the jurisdiction where the charge(s) sought to be expunged were disposed of. Virginia Code § 19.2-392.2—C. If you have criminal charges eligible for expungement in different courts, you should consult an attorney to find out if it may be possible to have a request for expungement of multiple records to be heard in one court; or, if applications need to be brought in more than one court, where the first request should be made.

If the application is for relief from a mistaken identity conviction, then the request should be brought by petition or a motion in the court (General District Court, Juvenile and Domestic Relations Court or Circuit Court) where the case was concluded.

Expungement petitions are civil cases, given Chancery Numbers, and are generally heard according to the procedure in the local court for handling criminal motions. The attorney for the respondent Commonwealth of Virginia is the Office of the Commonwealth Attorney for that jurisdiction, not the Attorney General's office. Local procedures vary, so you will need to check with the Circuit Court web site or the clerk's office for the relevant Circuit Court to find out what procedures are followed to file and have heard these applications.

I HAD COURT-APPOINTED COUNSEL TO REPRESENT ME WITH THE CRIMINAL CASE THAT WAS DISMISSED, CAN I GET COURT-APPOINTED COUNSEL TO ASSIST WITH THE EXPUNGEMENT?

No. A petition for expungement is a civil proceeding, so—unlike defense of a criminal charge by an indigent defendant—there is no constitutional right to counsel. If you financially qualify for civil legal aid, you may be able to receive legal assistance with an expungement application.

HELP AVAILABLE FROM LEGAL SERVICES OF NORTHERN VIRGINIA

The Board of Legal Services of Northern Virginia has recognized that offering assistance with this type of case may be important to help someone overcome an obstacle to employment. The firm has made this a priority service for eligible

clients. You can contact any of the offices of Legal Services of Northern Virginia to determine if you are financially qualified for assistance; and, if you are, to schedule an appointment with an attorney to review your eligibility for expungement. Branch offices:

Alexandria: (703) 684-5566

Arlington: (703) 532-3733

Culmore: (703) 778-3445

Fairfax: (703) 246-4500

Leesburg: (703) 777-7450

Manassas: (703) 368-5711

Route One: (703) 778-3448

Subject to availability of staff, Legal Services of Northern Virginia may offer representation to residents of other parts of the state or the metropolitan Washington area who are eligible to seek expungement relief in one of the local jurisdictions covered: Alexandria, Arlington, Fairfax, Loudoun or Prince William, or in federal district court in Alexandria. Residents of Maryland or Washington, D.C. should contact the Arlington branch office to seek an appointment; the Arlington branch is a short walk from the Courthouse Metro station on the Orange line.

Other legal services programs in Virginia may or may not offer representation with this type of matter. If you cannot qualify for assistance from a legal aid firm, you can locate qualified counsel to consult or seek assistance from through any of the local lawyer referral services or the Virginia State Bar:

Virginia Bar Lawyer Referral Service: (800) 552-7977

Alexandria Lawyer Referral Service: (703) 548-1105

Arlington Lawyer Referral Service: (703) 228-3390

Fairfax Lawyer Referral Service: (703) 246-3780

OVERVIEW OF THE EXPUNGEMENT PROCESS:

- Prepare petition with attachments (copies of warrants of arrest and case dispositions, documentation of need for expungement, etc.)
- File copies of petition in Circuit Court and pay filing and service fees or submit application for poor person relief, waiving the fees
- Take a copy of the petition to a police station to be fingerprinted, to order a criminal history report from the Central Criminal Records Exchange in Richmond
- After the criminal history report has been received by the Court, schedule a hearing on your application (completing for service and filing a praecipe)
- Prepare a form Order, granting the application for relief, to hand in to the Judge who hears the application
- Appear for the hearing, and be prepared to explain why the expungement relief is being requested
- After court, if the relief is granted, get a copy of the Order to keep for your records.

A petition for expungement of a criminal record must strictly comply with the statutory requirements. *Nelson v. Commonwealth of Virginia*, 63 Va. Cir. 148 (2003). Even if the Commonwealth Attorney's office does not object to expungement, the court has discretion to decline to grant relief.

WHAT IS A PRAECIPE?

There is a sample form included with these instructions. A praecipe is a notice to the clerk's office to place on the court's calendar for a hearing, the expungement petition. Commonly, these hearings are set for a criminal motions docket. Local procedures vary: there are different days and times to schedule these hearings, and sometimes you need to go through either the Commonwealth Attorney's office to select a date or to go through the criminal docket clerk, or comply with another local procedure. Before you fill out a form praecipe (and this cannot be done when you file the petition because you do not know at that point when the criminal history will be filed with the court), you should speak with either a civil or criminal docket clerk to find out what the local procedure is. Even if the hearing is set through the Commonwealth Attorney's office, you need to send them a copy of the praecipe and complete the affidavit of service on the form.

HOW LONG DOES THE COURT PROCESS TO OBTAIN AN EXPUNGEMENT TAKE?

Typically, the process from filing the petition through the hearing and decision will take about two to three months. The process to seal and expunge police

and court records may take a number of additional months (the court records in Circuit Court of the expungement proceeding and the other court records of the case(s) expunged may be sealed relatively quickly, but the Department of State Police records may not be corrected for a number of months). The Department of State Police may send a letter to confirm when the records have been expunged.

Following are some answers to other frequently asked questions about the procedures and forms to seek expungement of criminal records:

I BELIEVE I AM ELIGIBLE TO APPLY FOR EXPUNGEMENT OF MY CRIMINAL RECORD, WHAT DO I NEED TO DO?

First, you should obtain a certified copy of the Warrant of Arrest and case disposition (ordinarily on the reverse side of the Warrant) for each charge you would like to have expunged. Usually, for cases brought in either General District Court or the Juvenile and Domestic Relations Court, there will be a single sheet of paper for each criminal charge; if there is more than one charge, there may be separate case numbers, and separate documents that need to be copied and certified. You need to have the clerk's office copy, front and back, and stamp certified, a copy of each case and/or charge you wish to include in the expungement application.

Second, you will need to prepare a petition. Annexed is a copy of a simple petition that can be completed electronically, or printed and filled out:

EXPUNGEMENT PETITION: NO PRIOR CRIMINAL RECORD

The elements required by statute to be included in a petition are:

- Your full name, at the time of the arrest
- The date of the arrest
- The arresting agency
- The specific criminal charge sought to be expunged
- The date of final disposition of the charge
- Your date of birth
- If the Warrant of Arrest is not available, state why it is unavailable

In addition to these factual elements required by Virginia Code § 392.2—C, an effective petition should also include:

- An allegation that the petitioner is innocent of the criminal charge sought to be expunged;

- A statement of the reason(s) why the petitioner is seeking expungement of the records; and,
- The petitioner's Social Security Number and the case number for each case/charge sought to be expunged

The petition should annex certified copies of the Warrant of Arrest and criminal disposition information for each case/charge; and, if any of the records are missing, a letter from the clerk's office stating that the records are unavailable.

WHAT DOES IT COST TO FILE AN EXPUNGEMENT PETITION IN CIRCUIT COURT?

The cost of an expungement proceeding can vary a little, based upon local charges. The fee for filing a proceeding is currently (in 2004) \$69.00, and the cost of serving the petition on the state is \$12.00, for a total of \$81.00. You can call the Circuit Court clerk's office in your jurisdiction, before you go in, to find out the exact amount and whether they require cash or will accept a money order.

If you have a limited household income, you may be eligible to ask the court to waive the expenses of bringing this proceeding. Virginia Code § 17.1-606 grants "poor person" relief for individuals from households with limited income and resources. Generally, your household must have net income at or below 125% of the federal poverty guidelines to be eligible for waiver. In Virginia, poor person relief is limited to current residents of the Commonwealth. Forms and instructions to file for poor person applications are available on the LSNV web site: www.lsnv.org/publicforms.

Petition for Proceeding in Civil Case Without Payment of Fees or Costs

and

Order for Proceeding in Civil Case Without Payment of Fees or Costs

An applicant submits a proposed order and supporting affidavit or petition, requesting poor person relief, when the expungement petition is filed. If the court grants the application, the filing and service fees will be waived. You will need to get a certified copy of the court's order to take with you to the police station to have the fee to order a copy of your criminal history waived.

ONCE I HAVE PREPARED AN EXPUNGEMENT PETITION, WHAT DO I NEED TO DO TO FILE A CASE IN CIRCUIT COURT?

Procedures vary a little from court to court. Generally, you will want to make four photocopies of the petition and the attachments. The original petition will be

filed with the clerk's office; one copy will be sent, to be served by the Sheriff's office on the Commonwealth Attorney's office. The Sheriff's office may want a second copy of the petition for what is called the return of service (the Sheriff's office may return a copy of the petition, with the information about the date and time of service, to the clerk's office). The clerk's office will date stamp two photocopies of the petition, with the Chancery Number written on the first page, and return them to you.

In some jurisdictions, for example in Fairfax, there may be other documents to complete. In Fairfax County Circuit Court you need to complete two copies of the Chancery Cover Sheet. This form sets out information about the names and addresses of the parties, what type of case is being filed and whether you want service to be made by the Sheriff's office. There is a similar, brief form to be completed in the City of Alexandria Circuit Court Clerk's office.

CAN I SAVE THE \$12.00 SERVICE FEE BY DELIVERING THE PETITION MYSELF TO THE OFFICE OF THE COMMONWEALTH ATTORNEY?

No—do not do that. The court clerk's office will prepare a summons that is served with the petition. The summons and petition are considered "original process" which should be served by someone who has no interest in the outcome of the case. You could have a private process server do this, but have the clerk's office send the necessary papers to the Sheriff's office and let them serve the papers and file the "return of service" which informs the court that service was made, when it was done and how it was done. After the initial papers are served, you are permitted to send any other pleadings (i.e., the praecipe) by ordinary mail, facsimile or hand-delivery to the Commonwealth Attorney. The Supreme Court of Virginia has also authorized exchange of pleadings by E-mail, but there are special procedures that must be followed in order to properly do that. Use regular mail. The original copies of all documents are always given to the Court.

WHAT HAPPENS AFTER THE PETITION IS FILED WITH THE COURT?

The two photocopies of the petition that you will have when you leave the clerk's office are for you and the local police department. You need to go to a local police station in order to be fingerprinted. Call first. Some police stations set aside limited times or only certain days of the week when they are willing to fingerprint people—who are not being arrested (to order a report of your criminal history from the Central Criminal Records Exchange in Richmond). You will need to leave one copy of the petition with the police department, to send with the fingerprints to Richmond to order your criminal history. The cost for fingerprinting and for the report are \$5.00.

It takes about a month for the Central Criminal Records Exchange to forward a sealed copy of your criminal history to the Circuit Court. After the report is received, then the case can be set for a hearing. You will probably need to check with the Court Clerk's office after about a month to see if the report has been received from Richmond.

In Alexandria, the Commonwealth Attorney's office will contact you to let you know when the report has been received, and what dates are available to schedule a hearing.

WHAT DO I NEED TO DO TO SET A HEARING ON MY PETITION?

Local procedures vary. You may need to speak with a criminal docket clerk, or a representative from the Commonwealth Attorney's office to select a date. Call the court clerk's office for information on the local procedure.

PROCEDURES IN FAIRFAX COUNTY

There is a detailed handout available from the Fairfax County Circuit Court Clerk's office explaining exactly what to do, and providing a copy of the notice of hearing form that needs to be completed. The explanation of procedures in Fairfax County Circuit Court and the form notice of hearing are set out with these instructions.

PROCEDURES IN OTHER COURTS

Generally the notice, addressed to the clerk's office scheduling a hearing date and time is called either a notice of hearing or a praecipe. Annexed to these instructions is a form praecipe used in many courts (check with the clerk's office to find out what is the local practice in your jurisdiction).

A copy is sent to the Commonwealth Attorney's office. Unlike service of the petition, you can deliver, fax or mail a copy of this notice without having to pay the Sheriff's office for service. You need to find out which days in the month and at what time expungement proceedings are heard. Even though these applications are civil cases, the hearings are placed on the criminal docket when Assistant Commonwealth Attorneys are present in court.

ONCE I HAVE SELECTED A HEARING DATE AND HAVE BOTH SERVED AND FILED A NOTICE SCHEDULING THE HEARING, WHAT DO I HAVE TO DO TO PREPARE FOR THE COURT APPEARANCE?

You should prepare to take to court for the hearing a draft order approving the expungement relief, in case the Judge grants your application. Annexed to these instructions is a sample form order that you can complete electronically and print out.

ORDER GRANTING EXPUNGEMENT

If your expungement application is more complicated than a simple request and you have decided to proceed without representation by an attorney, you should give very serious consideration to—at least—scheduling a consultation with a knowledgeable attorney to find out what local judges expect to be presented to show “manifest injustice” to get an application approved. You should be able to locate an attorney to consult with for a small fee by going through a local lawyer referral service or the Virginia Bar lawyer referral service. Some legal services programs offer advice or representation with these applications for financially eligible clients.

WHAT DO I HAVE TO DO TO PRESENT MY REQUEST IN COURT?

First, make sure you are on time. In some Circuit Courts, the civil cases on the docket are heard at the first call of the calendar when the Judge goes through the docket to find out which parties are present. You might be asked when your case is called how much time the hearing will take. Ordinarily, an expungement application does not take more than five minutes. A simple, uncontested expungement may be resolved in two minutes.

You should be prepared to explain to the Judge why you are seeking expungement (to help simplify a search for a job, etc.). If you are making a simple expungement application (one criminal case, no prior or subsequent criminal record and the charge was a misdemeanor), the Judge may not require you to have to answer questions or to testify. The Judge may simply ask the Commonwealth Attorney’s representative if they have any objection, and if there is none, ask you to hand to the court officer (bailiff) the order you prepared. You should hand the draft order to the Commonwealth Attorney, for the attorney to sign, before handing it to the court officer. At that point you are through.

IF THE JUDGE GRANTS MY APPLICATION FOR EXPUNGEMENT, WHAT HAPPENS NEXT? WHAT DO I NEED TO DO?

The Circuit Court file for the expungement will be returned by the Judge’s staff to the clerk’s office. Later in the day or the following day, you might want to stop by the clerk’s office to get a copy of the order, with the Judge’s signature. Once the file is expunged (sealed) you will not be able to get access to it. The Circuit Court clerk’s office will process the order and send instructions to the court where the case was brought that the records must be sealed. The Circuit Court order will later be sent to the Department of Criminal Justice Services in Richmond, to have the state criminal records information also sealed. The Department of State Police may send a confirming letter to you once the records are sealed. This process can take up to six months to complete;

although you can legally rely upon the expungement order once it has been signed by the Judge. Eventually, the national crime records maintained by the Federal Bureau of Investigation are also up-dated and corrected to reflect the Virginia expungement process.

MY APPLICATION IS MORE COMPLICATED THAN A SIMPLE EXPUNGEMENT, ARE THERE ANY DIFFERENT PROCEDURES TO FOLLOW?

Basically, if your request involves a felony charge or multiple charges, or a request for partial expungement of your criminal record the same process applies. You may want to include more information in the petition about your record and the reason for expungement. Although expungement petitions are fairly short, if you provide a well organized explanation of why you believe your application meets the “manifest injustice” standard in the petition, the Judge (or his/her law clerk) may have an opportunity to read through that and be prepared to ask you (or the Commonwealth Attorney’s representative) questions at the hearing, if it is unclear whether your application should be granted or denied. In order to avoid being speculative about how a charge or multiple charges may actually impact you, an employment counselor, an attorney or someone in a human resources or personnel office may be able to write a letter (to attach to the petition) explaining why a partial expungement of arrest information is needed or would be helpful.

Annexed to this information outline is a form petition to use in court when seeking expungement in a more complicated case:

PETITION FOR EXPUNGEMENT: MULTIPLE CRIMINAL CHARGES

III. CORRECTING A MISTAKEN CRIMINAL RECORD AND IDENTITY THEFT

It is a crime in Virginia for anyone to use the identification documents or identification information of another person to avoid a summons, arrest, prosecution or to impede a criminal investigation. Virginia Code § [18.2-186.3](#)—B(1). The identifying information that is prohibited to make use of by this law includes name, date of birth, Social Security Number, and/or a driver’s license number. These are the identifying information items ordinarily included in warrants of arrest, initiating criminal process. If someone is found guilty of criminal identity theft, the court can order the criminal defendant to make restitution to the victim. Virginia Code § 18.2-186.3—E. The statute describes restitution: “Such restitution may include the appropriated person’s or his estate’s actual expenses associated with correcting inaccuracies or errors in his credit report or other identifying information.” The statute also authorizes the Attorney General’s office to provide assistance to the victim in correcting errors

resulting from identity theft (although this assistance does not include legal representation). Virginia Code § 18.2-186.3—F.

There is a process in Virginia Code § 19.2-392.2 to correct state criminal records that mistakenly cite identifying information belonging to another, innocent party. Virginia Code § [18.2-186.5](#) authorizes a criminal record mistaken identity victim to petition for relief from the court where the criminal proceeding was brought. Once an order of expungement, based upon mistaken identity is granted, Virginia Code § 18.2-186.5 authorizes submission of a certified copy of the court's order to the Office of the Attorney General for preparation of an "Identity Theft Passport." The Attorney General's office and the Department of State Police cooperate in correction of governmental agency criminal records to protect the interest of the identity theft victim. The Identity Theft Passport may be sent to the Department of Motor Vehicles (among other agencies) to facilitate correction of mistaken identity information.

I HAVE A PROBLEM WITH MISTAKEN IDENTITY AND A CRIMINAL CONVICTION RECORD THAT I NEED TO HAVE CORRECTED, WHAT DO I NEED TO DO?

First, discuss your problem with an attorney. Generally, mistaken conviction information (e.g., someone used your name, date of birth, Social Security Number etc. when he/she was arrested) needs to be corrected by the court that decided the criminal case. You will probably need to petition for relief by filing/calendaring a motion in that court, in order to present your request. Virginia Code § 19.2-393.2—G. You might be capable of making this motion without legal representation, but you should first discuss your problem and planned application with an attorney. Annexed to this information is a form petition/motion, for use in court when seeking mistaken identity expungement relief:

PETITION FOR RELIEF FROM MISTAKEN IDENTITY CONVICTION

There may be issues in the application, even if you think the mistake is clear, that you are not aware of. For example, if a Judge believes you provided a relative or a friend with your identity information or that you know what the real identity of the criminal defendant was (and you withhold this from the court), your application might be denied. You want to be thoroughly prepared to present the necessary evidence to have the court agree to set aside a conviction record and delete (expunge) your identity information.

THERE IS MISTAKEN INFORMATION ABOUT ME IN A COMPUTER PRINTOUT I GOT FROM THE POLICE, BUT WHEN I ORDERED A CRIMINAL HISTORY FROM THE DEPARTMENT OF STATE POLICE THAT REPORT SHOWED NO CONVICTIONS—WHAT SHOULD I DO TO CLEAR MY NAME?

While the limited criminal record information accessible by computer should be accurate, sometimes a listing for a conviction is incorrect. For example, if you were charged with committing a felony and the charge was reduced to conviction for a misdemeanor, if the record indicates the conviction was for a felony, the problem might need to be corrected by the clerk's office or by the Department of State Police. You should consult an attorney to discuss your particular situation and problem. If there was a conviction, but the conviction information is inaccurate (you were the defendant, but the conviction information on record is not correct), the application to court would not be an expungement proceeding in Circuit Court but a motion in the court where there is an inaccurate or mistaken record.

It may not be necessary to go through the expense and difficulty of an expungement process in Circuit Court in order to correct some records, depending upon the particular circumstances. The process available to an identity theft victim to request correction of state criminal history records is set out in Virginia Code § [9.1-132](#). An individual has the right to inspect Department of State Police records to check for their accuracy, submit information to show there are mistaken listings and to request correction of state criminal history listings. If the CCRE does not agree to modify the listings, then the individual has a right to request review by the Criminal Justice Services Board, which may grant an administrative hearing.

The Central Criminal Records Exchange (Department of State Police) has an administrative process to request correction of mistaken identity information in the CCRE. This administrative process is called a "challenge of a record." The process is begun by reporting mistaken criminal record identity information to a local police department, sheriff's office or local office of the State Police and arranging to be fingerprinted for the purpose of challenging a criminal record (for which there may be a \$5.00 fee). The local police department then mails a letter with information about the mistaken identity or listing to:

Manager, Central Criminal Records Exchange
Virginia State Police
P.O. Box 27472
Richmond, Virginia 23261-7472

The CCRE will respond within 5 workdays and give notice of whether the criminal records have been modified, based upon the comparison of fingerprint information on file and the fingerprints submitted.

If the CCRE has mistaken information about the outcome of a criminal case (for example, you were convicted of a misdemeanor, but the criminal history report

shows conviction for a felony), the court can arrange correction of the state criminal records by contacting the CCRE—at your request.

To determine if these expedited processes to correct information inaccurately listed in your criminal history are possible, it is strongly recommended that you consult an attorney first, before going into a police station, clerk's office etc. to seek assistance.

VIRGINIA DMV HAS MISTAKEN INFORMATION SHOWING CONVICTIONS UNDER MY NAME, HOW DO I GET THIS CORRECTED?

The administrative process to correct mistaken criminal identity information does not apply to correcting mistaken listings maintained by the Department of Motor Vehicles. Virginia Code § [9.1-126](#)—B(iii). The expungement mistaken identity process may be necessary—with the DMV record corrected through the Attorney General's office—after a court order is issued. However, depending upon the nature of the mistaken information, DMV may agree to correct its listing without requiring court action. Correction of DMV records can raise complicated issues (for example, if there are mistaken entries of information about convictions from other states). You might or might not have to contact the other states to arrange for correction of your DMV record in Virginia.

If you have a problem with mistaken identity information in the transcript of your driving record, that may be too complicated for a DMV branch office manager to help you resolve. You should consult counsel to determine if the mistaken identity listing(s) can be corrected administratively, or if this must be done through application in court.

IV. EXPUNGEMENT OF FEDERAL CRIMINAL RECORDS

Federal law is similar to Virginia law on eligibility for expungement of records: there is a special provision for relief for defendants under 21, and relief is generally limited to individuals who can claim innocence of criminal charges brought against them.

STATUTORY REMEDY FOR SOME DEFENDANTS UNDER 21

There is a specific remedy in 18 U.S. Code § 3607(c) for expungement of the record of disposition of a person found guilty of an offense under section 404 of the Controlled Substances Act, 21 U.S.C. § 844. The federal expungement statute provides, in part:

The expungement order shall direct that there be expunged from all official records, except nonpublic records referred to in

subsection (b), all references to his arrest for the offense, the institution of criminal proceedings against him, and the results thereof. The effect of the order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or institution of criminal proceedings. A person concerning whom such an order has been entered shall not be held thereafter under any provision of law to be guilty of perjury, false swearing, or making a false statement by reason of his failure to recite or acknowledge such arrests or institution of criminal proceedings, or the results thereof, in response to an inquiry made of him for any purpose.

FEDERAL CIVIL REMEDY OF EXPUNGEMENT

Congress has not passed any other provision in the United States Code for non-juvenile federal defendants to be granted relief from the continued existence of records of criminal proceedings. However, it has been decided that federal judges can exercise equitable powers to grant this relief: when a person arrested is completely innocent of any crime and suffers significant adverse consequences as a result of existence of the criminal record. The Department of Justice has in the past taken the position that expungement should only be available when there is shown a constitutional violation or that an arrest was the result of unlawful action. That restricted view of exercise of the equitable remedy of expungement has been rejected. *United States of America v. Paul Van Wagner*, 746 F. Supp. 619 (E.D. Va. 1990). Expungement is appropriate where "the dangers of unwarranted adverse consequences to the individual outweigh the public interest in maintainance of the records." *Diamond v. United States*, 649 F.2d 496, 499 (7th Cir. 1981). Generally, granting expungement under federal decisional law is very limited [exceedingly narrow in scope], and will not be available even for someone who has been pardoned by the President. Acquittal of a charge, by itself, is not enough to establish an extraordinary circumstance to issue an expungement order. *United States of America v. Jamari Salleh*, 863 F. Supp. 283, 284 (E.D. Va. 1994).

V. IF YOU ARE NOT ELIGIBLE FOR EXPUNGEMENT

Because the scope of expungement under Virginia law (and the standard for granting Absolute Pardons) are both focused on limiting relief to juveniles and adults who can claim innocence, many criminal defendants will not qualify for relief from the existence of a criminal conviction record. Criminal history records are permanent, and the existence of a criminal conviction history may preclude some Virginia licensed employment (in child care or adult care facilities employees cannot have been convicted of assault) or employment with agencies (Virginia Lottery offices, e.g. when a crime of moral turpitude has been

committed). Security clearances required for some federal employment may preclude hiring individuals with a criminal history—no matter how minor or old the record may be.

Governmental and private employers are able to access criminal history information from the records maintained by the Department of State Police. This process is briefly explained on the web site of the Virginia State Police at: www.vsp.state.va.us/cjis_chrc. Under Virginia Code § 19.2-389, non-criminal justice agencies in the Commonwealth are authorized to receive conviction data on criminal name searches for the purposes of employment or licensure.

Many employers who ask about the criminal history of job applicants may only ask about convictions (not arrests) or felony convictions, within the past five or ten years. This current practice (inquiring about convictions, not arrests) is done to comply with federal law.

There is a limitation in federal civil rights law in using criminal history to screen out job applicants. This is why applications generally no longer ask about arrests, but only about convictions. Statistically, a disproportionate number of minorities (particularly African-Americans) have been subjected to arrest and criminal charges, and therefore they have a higher incidence of criminal histories. Using criminal history to screen job applicants may seem to be a neutral, non-discriminatory approach, but the federal Equal Employment Opportunity Commission has determined that this can have an unlawful “discriminatory impact” and therefore does or may violate federal law (Title VII of the Civil Rights Act of 1964). Screening employment applicants by asking about arrests (Have you ever been charged with committing a crime?) almost certainly could be a violation of federal law. [Why ask the question if the employer claims the answer does not matter in selecting employees?]

Screening applicants based upon convictions, or serious criminal charges poses a less clear situation to determine application of federal employment discrimination law. The existence of a criminal record and the subject matter of a conviction may need to be shown to be relevant to the position sought to be filled. If criminal history is used broadly to screen out minority applicants, a charge of discrimination may be merited to file with the Equal Employment Opportunity Commission (or a local human rights agency). You should consult an employment law attorney if you have questions about being denied job opportunities because of disclosure of your criminal record.

Employment law attorneys who counsel job applicants recommend answering truthfully questions asked on employment applications about criminal convictions. It is easier to obtain criminal conviction information now than in the past, and employers will discharge employees who are found to have

misrepresented their criminal history on an employment application. It is a virtual certainty that an employee caught with having misrepresented his or her criminal history will be terminated. Even if the misrepresentation is discovered months or years after the employee started work, the employer will almost certainly have a "no tolerance" policy. Even a proven good worker will not likely be retained, to avoid a complaint from others of discrimination.

The Virginia Employment Commission considers a termination for this reason to present a case of willful misconduct by the employee, disqualifying a discharged employee from unemployment compensation benefits.

If you have a criminal conviction record, you will more likely run into difficulty seeking employment if you apply for a job with a governmental agency, with a national company (or national chain) or with a private, federal government contractor. It may be easier to locate work by applying for jobs with small, local employers.

A local Offender Aid and Restoration agency may be able to offer specific, helpful employment search counseling. Offender Aid and Restoration may offer services focusing on interviewing skills and how to address the fact of a conviction in seeking a job. Generally, you are eligible for OAR services if you were ever convicted of a crime. You might seek information about OAR services by E-mail:

<mailto:transitionservices@OARonline.org>

There are many employers willing to give a break to applicants with a criminal history. They are more likely to respond favorably if information about a past criminal record is voluntarily disclosed.

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