



Virginia State Crime Commission

SB 1289: Expungement of Criminal
Records in Virginia

May 11, 2009

Overview



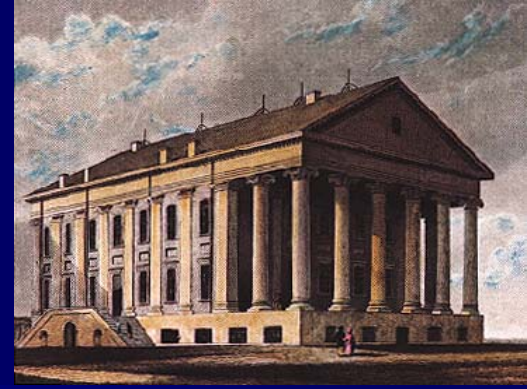
- Study Authorization
- Relevant Va. Code provisions
- Case law
- General policy considerations

Study Authorization



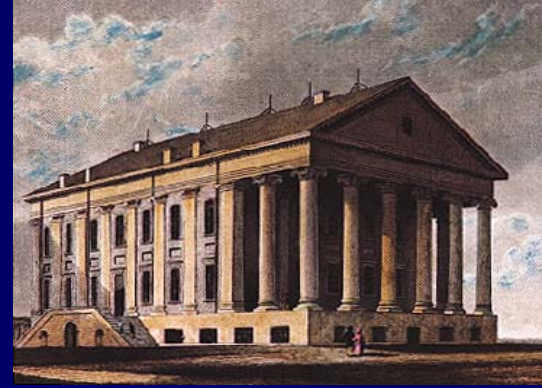
- **Senate Bill 1289** was introduced by Senator McEachin during the Regular Session of the 2009 General Assembly.
- The bill was referred to the Senate Courts of Justice Committee, where it was passed by.
- The subject matter of the bill was referred by letter to the Crime Commission.

Virginia Code



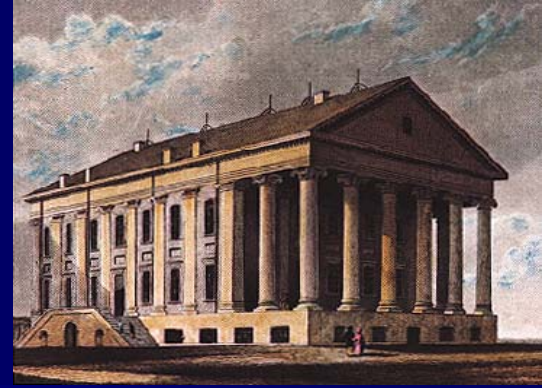
- Expungement in Virginia is governed by Virginia Code §§ 19.2-392.1 and 19.2-392.2.
- These Code sections were created in 1977 and have remained essentially the same since that time.

Virginia Code



- Va. Code § 19.2-392.1 provides the basic justification for expungement in Virginia:
 - The General Assembly finds that arrest records can be a hindrance to an innocent citizen's ability to obtain employment, an education and to obtain credit....This chapter is intended to protect such persons....

Virginia Code



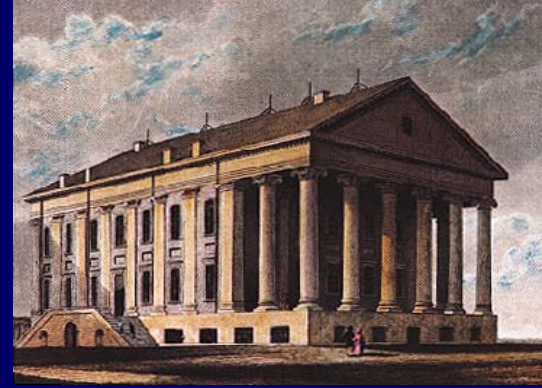
- Va. Code § 19.2-392.2 details the expungement process.
- It is only available to those persons who have been
 - acquitted;
 - had their criminal charge nolle prossed or dismissed (including by accord and satisfaction);
 - received an absolute pardon from the governor; or,
 - had their conviction vacated by a writ of actual innocence.

Virginia Code



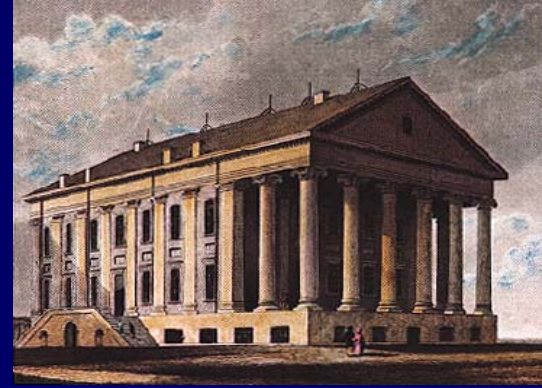
- The person seeking the expungement must file a petition with the circuit court of the county or city where the charge was disposed of, or dismissed.
- A copy of the petition is sent to the Commonwealth's Attorney for the county or city where the petition is filed.
- The petitioner is also required to have a criminal background check performed, with the results sent to the court prior to the hearing.

Virginia Code



- At the hearing, the circuit court will determine if the continued existence of the arrest record “causes or may cause circumstances which constitute a manifest injustice to the petitioner.”
 - Note that the Commonwealth’s Attorney is free to argue against expungement at the hearing, even if the case was dismissed.
- If the court finds that the petitioner has met his burden, it shall order that all police and court records relating to the charge be expunged.
- The losing party may appeal the court’s decision to the Virginia Supreme Court.

Virginia Code



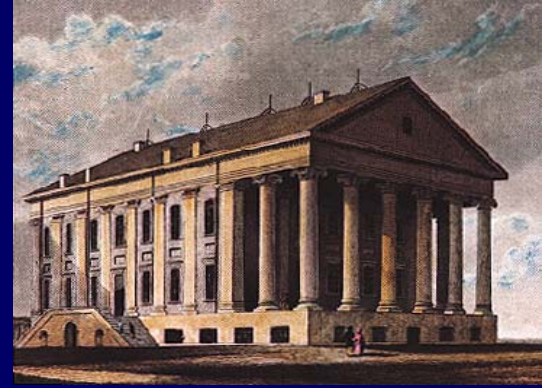
- In three instances, the circuit court must grant relief to the petitioner:
 - the petitioner is the victim of mistaken identity; i.e., he was arrested, but was not the person named in the warrant or indictment;
 - the petitioner has been granted an absolute pardon by the governor; or,
 - the petitioner has been granted a writ of actual innocence.

Virginia Code



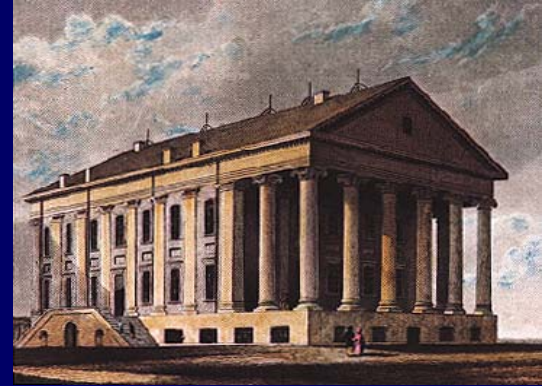
- In one other instance, the petitioner is presumed to be entitled to expungement.
- Virginia Code § 19.2-392.2(F) states:
 - if the petitioner has no prior criminal record and the arrest was for a misdemeanor violation, the petitioner shall be entitled, in the absence of good cause shown to the contrary by the Commonwealth, to expungement....

Virginia Code



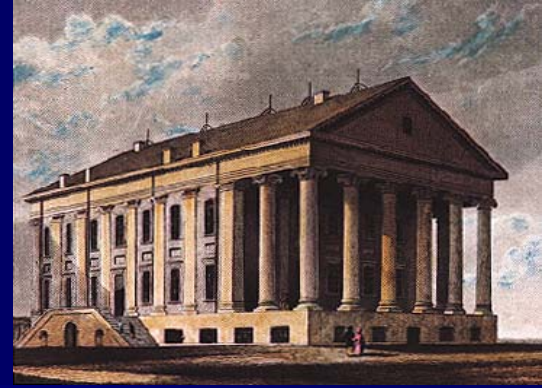
- Expungement is **NOT** available to a person that has been found guilty of an offense.
- If a circuit court enters an expungement order that is contrary to law, it is voidable upon motion and notice made within three years of the entry of the order.

Case law



- The Virginia Supreme Court has ruled repeatedly that expungement is only available to people who are actually innocent.
- Therefore, it is not available to people who have taken a “first offender” disposition in a drug possession case. Commonwealth v. Dotson, 276 Va. 278 (2008); Gregg v. Commonwealth, 227 Va. 504 (1984).
 - By statute, it is not available to a defendant who takes a “first offender” disposition in a domestic assault case. Va. Code § 18.2-57.3.
- It is not available to anyone who plead “no contest” in a criminal case if the court then finds that there is sufficient evidence to convict. Commonwealth v. Jackson, 255 Va. 552 (1998).
- It is not available to anyone who accepts a deferred disposition, even if the case is later dismissed. Daniel v. Commonwealth, 268 Va. 523 (2004).

Case law



- Some circuit court judges will not expunge a criminal charge that is otherwise eligible for expungement, if the petitioner has a previous conviction for a different offense. Miller v. Commonwealth, 55 Va. Cir. 110 (2001).

Policy considerations



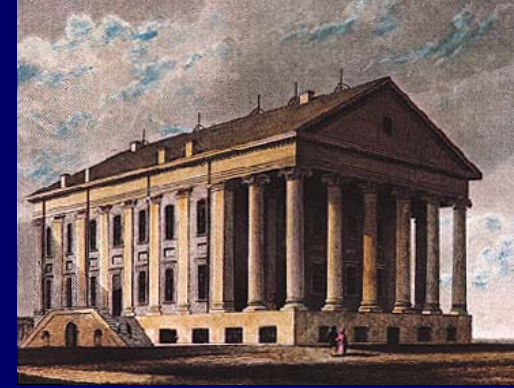
- Over the past few years, proposals have been made to allow expungements of certain types of convictions.
- Doing this would be a radical change in Virginia's expungement process, which has heretofore been limited to cases where the petitioner not only has had the charge dismissed, but also is actually innocent of the crime.

Policy considerations



- In Virginia, when a charge is expunged, the State Police attempt to make sure that all references to the charge are removed from all databases, both state and federal.
- The only remaining records of the arrest or criminal charge are the sealed court files, and a sealed record of the expungement that is kept by the State Police.
 - The State Police will only reveal the expungement of an individual if presented with a court order from the circuit court that ordered the expungement.

Policy considerations



- If the State Police's procedure for handling expungement orders remains the same, and "first offender" dispositions or dismissals are eligible to be expunged, prosecutors will never know if a defendant is eligible for "first offender" consideration, or has received this disposition in the past.
- Either the mechanics of expungement would need to be changed, or at least some defendants could receive multiple "first offender" dismissals.

Discussion