

## **Overview of SB 1339 (Surovell, 2021, Special Session I)**

SB1339, which was enacted as Chapter 524 of the Acts of Assembly of 2021, Special Session I, in part establishes a process for the automatic sealing of police and court records for certain convictions, deferred dispositions, and acquittals for offenses that have been nolle prossed or otherwise dismissed. The law also allows a person to petition for the sealing of police and court records relating to certain convictions. The relevant sections of SB 1339 outlined below regarding automatic sealing and sealing by petition have a contingent effective date of either (i) the first day of the fourth month following notification to the appropriate parties that the required automated systems to exchange information are in place or (ii) either July 1, 2025 or October 1, 2025.

### **Definitions**

Section 19.2-392.5 provides that "sealing" means "(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 . . . and (ii) prohibiting dissemination of court records related to an arrest, charge, or conviction, unless such dissemination is authorized by a court order . . . ."

### **Automatic Sealing of Records**

- A. Offenses resulting in a deferred and dismissed disposition or conviction (§ 19.2-392.6)
  - Offense charged + offense deferred and dismissed
    - § 4.1-305. Purchasing or possessing alcoholic beverages unlawful in certain cases; venue; exceptions; penalty; forfeiture; deferred proceedings; treatment and education programs and services.
    - § 18.2-250.1. (Repealed).
    - **Ineligible for automatic sealing if, on the date of the deferral or dismissal, the person was convicted of another offense that is not eligible for sealing under subsection A or B of § 19.2-392.6.**
  - Offense resulting in conviction
    - § 4.1-305. Purchasing or possessing alcoholic beverages unlawful in certain cases; venue; exceptions; penalty; forfeiture; deferred proceedings; treatment and education programs and services.
    - § 18.2-96. Petit larceny defined; how punished.
    - § 18.2-103. Concealing or taking possession of merchandise; altering price tags; transferring goods from one container to another; counseling, etc., another in performance of such acts.
    - § 18.2-119. Trespass after having been forbidden to do so; penalties.
    - § 18.2-120. Instigating, etc., such trespass by others; preventing service to persons not forbidden to trespass.
    - § 18.2-134. Trespass on posted property.
    - Misdemeanor violation of:
      - § 18.2-248.1. Penalties for sale, gift, distribution or possession with intent to sell, give or distribute marijuana.
      - § 18.2-250.1. (Repealed) (formerly simple possession of marijuana)
      - § 18.2-415. Disorderly conduct in public places.

- **Ineligible for automatic sealing if, on the date of conviction, the person was convicted of another offense that is not eligible for sealing under subsection A or B of § 19.2-392.6.**
- B. Offenses pursuant to § 19.2-392.6 are automatically sealed if seven years have passed since the date of conviction or dismissal and the person has received no other convictions that require reporting to the Central Criminal Records Exchange pursuant to § 19.2-390 or any other state, the District of Columbia, or the United States or any territory thereof.
- B. Offenses resulting in acquittal, nolle prosequi, or dismissal (§ 19.2-392.8)
  - Misdemeanor offenses
    - If a person is charged with a misdemeanor offense and (i) the person is acquitted, (ii) a nolle prosequi is entered, or (iii) the charge is otherwise dismissed, excluding any charge that is deferred and dismissed, the court shall order that the charge be automatically sealed pursuant to § 19.2-392.13.
    - Exceptions to automatic sealing under this section include:
      - The charge is ancillary to another charge that resulted in a conviction or finding of facts sufficient;
      - The nolle prosequi or dismissal is part of a plea agreement;
      - Another charge arising out of the same facts is pending;
      - The attorney for the Commonwealth intends to reinstitute the charge within three months;
      - Good cause exists that such charge should not be automatically sealed; or
      - The person charged with the offense objects to such automatic sealing.
  - Felony offenses
    - If a person is charged with a felony offense and is acquitted, or the charge is dismissed with prejudice, he may immediately orally request that the records be sealed.
- C. Misdemeanor offenses resulting in acquittal, nolle prosequi, or dismissal for persons with no convictions or deferred and dismissed offenses on their criminal history record (§ 19.2-392.11)

### **Sealing of Offenses by Petition**

- A. Offenses resulting in conviction or deferred and dismissed disposition (§ 19.2-392.12)
  - A person who has been convicted of or had a charge deferred and dismissed for a:
    - Misdemeanor offense;
    - Class 5 or Class 6 felony; or
    - Violation of § 18.2-95 or other felony offense in which the defendant is deemed guilty of larceny and punished as provided in § 18.2-95.
  - Such person may file a petition provided that he has:
    - Never been convicted of a Class 1 or 2 felony or any other felony punishable by life in prison;
    - Not been convicted of a Class 3 or 4 felony within the past 20 years; or
    - Not been convicted of any other felony within the past 10 years of petition.
  - Exceptions
    - § 18.2-36.1. Certain conduct punishable as involuntary manslaughter.
    - § 18.2-36.2. Involuntary manslaughter; operating a watercraft while under the influence.

- § 18.2-51.4. Maiming, etc., of another resulting from driving while intoxicated.
- § 18.2-51.5. Maiming, etc., of another resulting from operating a watercraft while intoxicated.
- § 18.2-57.2. Assault and battery against a family or household member.
- § 18.2-266. Driving motor vehicle, engine, etc., while intoxicated, etc.
- § 46.2-341.24. Driving a commercial motor vehicle while intoxicated, etc.
- **Subsection C of § 19.2-392.13 lists several exceptions for the prohibition on dissemination of criminal history record information.**

### **How will automatic sealing or sealing by petition impact considerations for barrier crimes?**

State law governs barrier crimes relating to the Department of Health, Department of Behavioral Health and Developmental Services, and Department of Education. The Department of Social Services must comply with not only state laws but also federal laws that govern barrier crimes.

Subsection I of § 19.2-392.5 provides that "(a)ny arrest, charge, or conviction sealed pursuant to § 19.2-392.7, 19.2-392.8, 19.2-392.9, 19.2-392.11, or 19.2-392.12 shall not constitute a barrier crime as defined in § 19.2-392.02, *except as otherwise required under federal law.*" (emphasis added)

Pursuant to Subsection I of § 19.2-392.5, any barrier crime eligible for sealing by petition and where such sealing of record is granted will no longer be a barrier to employment. Importantly, none of the offenses subject to automatic sealing are barrier crimes. Please refer to the attached list of barrier crimes that are eligible for sealing by petition.

### **Federal barrier crimes laws that affect the Department of Social Services and the Department of Education**

A. 42 U.S.C. § 671 requires states to have a plan for foster care and adoption assistance. Pursuant to subdivision (a)(20)(A), plans must include procedures for "criminal records checks, including fingerprint-based checks of national crime information databases . . . for any prospective foster or adoptive parent . . . ." Additionally, the federal statute requires that the plan include the following in such procedures:

1. Final approval shall not be granted if the criminal records check reveals a **felony conviction** for *child abuse or neglect; spousal abuse; a crime against children, including child pornography; or a crime involving violence, including rape, sexual assault, or homicide but not including other physical assault or battery.*
2. Final approval shall not be granted if the criminal records check reveals a felony conviction within the last five years of *physical assault, battery, or a drug-related offense.*

B. 42 U.S.C. § 9858f governs requirements for states that receive federal funds to require and conduct criminal background checks of child care staff members, including prospective child care staff members. The federal statute provides that an individual is ineligible for employment as a child care provider if the individual:

1. Refuses to consent to a criminal background check;
2. Knowingly makes a false statement in connection with such background check;

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3. Is registered, or is required to be registered, on a state sex offender registry or the National Sex Offender Registry;
4. Has been **convicted** of one of the following **felonies**: murder; child abuse or neglect; a crime against children, including child pornography; spousal abuse; a crime involving rape or sexual assault; kidnapping; arson; physical assault or battery; or a drug-related offense committed in the last five years; or
5. Has been **convicted** of a violent **misdemeanor** committed as an adult against a child, including *child abuse, child endangerment, sexual assault, or a misdemeanor involving child pornography*.

## **Barrier crimes eligible for sealing by petition**

### Class 5 felony

- § 18.2-35. How voluntary manslaughter punished.
- § 18.2-36. How involuntary manslaughter punished.
- § 18.2-46.2. Prohibited criminal street gang participation; penalty.
- § 18.2-46.3:3. Enhanced punishment for gang activity taking place in a gang-free zone; penalties.
- § 18.2-47. Abduction and kidnapping defined; punishment. *Subsections A & B only.*
- § 18.2-49. Threatening, attempting, or assisting in such abduction; penalty.
- § 18.2-52.1. Possession of infectious biological substances or radiological agents; penalties. *Subsection A only.*
- § 18.2-55. Bodily injuries caused by prisoners, state juvenile probationers and state and local adult probationers or adult parolees.
- § 18.2-58. Robbery; penalties. *Subsection B(3) only.*
- § 18.2-59. Extortion of money, property or pecuniary benefit.
- § 18.2-60. Threats of death or bodily injury to a person or member of his family; threats of death or bodily injury to persons on school property; threats of death or bodily injury to health care providers; penalty. *Subsections A(1) & A(3) if 18 years of age or older.*
- § 18.2-83. Threats to bomb or damage buildings or means of transportation; false information as to danger to such buildings, etc.; punishment; venue.
  - *If person under 15 years of age, Class 1 misdemeanor.*
- § 18.2-84. Causing, inciting, etc., commission of act proscribed by § 18.2-83.
- § 18.2-85. Manufacture, possession, use, etc., of fire bombs or explosive materials or devices; penalties.
  - *Class 6 felony if a person constructs/sends/uses, etc. a hoax explosive with intent to cause another person to believe it is a bomb or explosive.*
- § 18.2-286.1. Shooting from vehicles so as to endanger persons; penalty.
- § 18.2-357.1. Commercial sex trafficking; penalties. *Subsection A only.*
- § 18.2-370. Taking indecent liberties with children; penalties. *Subsections A, B, & D(i) only.*
- § 18.2-374.3. Use of communications systems to facilitate certain offenses involving children.
- § 18.2-405. What constitutes a riot; punishment.
- § 18.2-406. What constitutes an unlawful assembly; punishment.
- § 18.2-408. Conspiracy; incitement, etc., to riot.
- § 18.2-413. Commission of certain offenses in county, city or town declared by Governor to be in state of riot or insurrection.
- § 18.2-433.2. Paramilitary activity prohibited; penalty.
- § 18.2-474.1. Delivery of drugs, firearms, explosives, etc., to prisoners or committed persons.
  - *Not eligible for sealing if convicted of Class 3 felony under this section.*
- § 18.2-94. Possession of burglarious tools, etc.
- § 18.2-248.1. Penalties for sale, gift, distribution or possession with intent to sell, give or distribute marijuana.

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- *Not eligible if convicted under this section as a Class 4 felony.*
- § 18.2-258.02. Maintaining a fortified drug house; penalty.
- § 18.2-250. Possession of controlled substances unlawful.

Class 6 felony

- § 16.1-253.2. Violation of provisions of protective orders; penalty.
- § 18.2-46.3. Recruitment of persons for criminal street gang; penalty.
- § 18.2-46.6. Possession, manufacture, distribution, etc. of weapon of terrorism or hoax device prohibited; penalty. *Subsection C only.*
- § 18.2-50.3. Enticing, etc., another into a dwelling house with intent to commit certain felonies; penalty.
- § 18.2-51.3. Prohibition against reckless endangerment of others by throwing objects from places higher than one story; penalty.
- § 18.2-51.6. Strangulation of another; penalty.
- § 18.2-52. Malicious bodily injury by means of any caustic substance or agent or use of any explosive or fire.
- § 18.2-57. Assault and battery; penalty. *Subsections B & C only.*
- § 18.2-53. Shooting, etc., in committing or attempting a felony.
- § 18.2-56.1. Reckless handling of firearms; reckless handling while hunting. *Subsection B only.*
- § 18.2-57.02. Disarming a law-enforcement or correctional officer; penalty.
  - *Firearm or stun weapon only.*
- § 18.2-58. Robbery; penalties. *Subsection B(4) only.*
- § 18.2-60. Threats of death or bodily injury to a person or member of his family; threats of death or bodily injury to persons on school property; threats of death or bodily injury to health care providers; penalty. *Subsection A(2) only.*
- § 18.2-60.1. Threatening the Governor or his immediate family.
- § 18.2-60.3. Stalking; penalty. *Subsection B.*
- § 18.2-60.4. Violation of protective orders; penalty.
- § 18.2-63. Carnal knowledge of child between thirteen and fifteen years of age.
  - *Class 6 felony if accused is a minor and consenting child is 3 years or more the accused's junior.*
- § 18.2-64.1. Carnal knowledge of certain minors.
- § 18.2-64.2. Carnal knowledge of an inmate, parolee, probationer, detainee, or pretrial or posttrial offender; penalty.
- § 18.2-67.4:1. Infected sexual battery; penalty.
- § 18.2-67.5. Attempted rape, forcible sodomy, object sexual penetration, aggravated sexual battery, and sexual battery. *Attempted aggravated sexual battery only.*
- § 18.2-67.5:1. Punishment upon conviction of third misdemeanor offense.
- § 18.2-86. Setting fire to woods, fences, grass, etc.
- § 18.2-280. Willfully discharging firearms in public places. *Subsection A only.*
- § 18.2-281. Setting spring gun or other deadly weapon.
- § 18.2-282. Pointing, holding, or brandishing firearm, air or gas operated weapon or object similar in appearance; penalty.

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- § 18.2-282.1. Brandishing a machete or other bladed weapon with intent to intimidate; penalty.
- § 18.2-308.4. Possession of firearms while in possession of certain substances.
- § 18.2-346. Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties.
  - *Class 6 felony if soliciting from a minor who is 16 years of age or older; Class 5 felony if younger than 16 years of age.*
- § 18.2-348. Aiding prostitution or illicit sexual intercourse, etc.; penalty.
- § 18.2-349. Using vehicles to promote prostitution or unlawful sexual intercourse; penalty.
- § 18.2-370.1. Taking indecent liberties with children by person in custodial or supervisory relationship; penalties.
  - *Class 5 felony if second or subsequent offense subject to requirements enumerated in subsection B.*
- § 18.2-370.2. Sex offenses prohibiting proximity to children; penalty.
- § 18.2-370.3. Sex offenses prohibiting residing in proximity to children; penalty.
- § 18.2-370.4. Sex offenses prohibiting working on school property; penalty.
- § 18.2-370.5. Offenses prohibiting entry onto school or other property; penalty.
- § 18.2-371.1. Abuse and neglect of children; penalty; abandoned infant. *Subsection B only.*
- § 18.2-374.1:1. Possession, reproduction, distribution, solicitation, and facilitation of child pornography; penalty.
  - *Class 5 felony for second or subsequent offense.*
- § 18.2-374.4. Display of child pornography or grooming video or materials to a child unlawful; penalty.
- § 18.2-414. Injury to property or persons by persons unlawfully or riotously assembled.
- § 18.2-423. Burning cross on property of another or public place with intent to intimidate; penalty; prima facie evidence of intent.
- § 18.2-423.01. Burning object on property of another or a highway or other public place with intent to intimidate; penalty.
- § 18.2-423.1. Placing swastika on certain property with intent to intimidate; penalty; prima facie evidence of intent.
- § 18.2-423.2. Displaying noose on property of another or a highway or other public place with intent to intimidate; penalty.
- § 18.2-472.1. Providing false information or failing to provide registration information; penalty; prima facie evidence.
  - *Class 5 felony if second or subsequent offense.*
- § 18.2-477. Prisoner escaping from jail; how punished.
- § 18.2-477.1. Escapes from juvenile facility; penalty.
  - *Class 1 misdemeanor if occurs other than by force or violence.*
- § 18.2-477.2. Punishment for certain offenses committed within a secure juvenile facility or detention home.
  - *Class 5 felony if violation of subdivision 6 of § 53.1-203.*
- § 18.2-478. Escape from jail or custody by force or violence without setting fire to jail.

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- § 18.2-484. Advocacy of change in government by force, violence or other unlawful means.
- § 37.2-917. Escape of persons committed; penalty.
- § 53.1-203. Felonies by prisoners; penalties.
  - *Class 5 felony if violation of subdivision 6.*
- § 18.2-92. Breaking and entering dwelling house with intent to commit other misdemeanor.
  - *Class 2 felony if armed with deadly weapon.*
- § 4.1-1101. Home cultivation of marijuana for personal use; penalties. *Subsection B(3) only.*
- § 18.2-255. Distribution of certain drugs to persons under 18 prohibited; penalty.
- § 18.2-258. Certain premises deemed common nuisance; penalty.
- § 18.2-258.1. Obtaining drugs, procuring administration of controlled substances, etc., by fraud, deceit or forgery.
- § 18.2-258.2. Assisting individuals in unlawfully procuring prescription drugs; penalty.

Class 1 misdemeanor

- § 18.2-42. Assault or battery by mob.
- § 18.2-56.2. Allowing access to firearms by children; penalty.
- § 18.2-57. Assault and battery; penalty. *Subsections A, D, E only.*
- § 18.2-55.1. Hazing of youth gang members unlawful; criminal liability.
- § 18.2-56. Hazing unlawful; civil and criminal liability; duty of school, etc., officials; penalty.
- § 18.2-56.1. Reckless handling of firearms; reckless handling while hunting. *Subsections A & D only.*
- § 18.2-57.02. Disarming a law-enforcement or correctional officer; penalty.
  - *Chemical irritant weapon or impact weapon only.*
- § 18.2-60. Threats of death or bodily injury to a person or member of his family; threats of death or bodily injury to persons on school property; threats of death or bodily injury to health care providers; penalty. *Subsections A(3) if less than 18 years of age & B only.*
- § 18.2-67.4. Sexual battery.
- § 18.2-67.4:2. Sexual abuse of a child under 15 years of age; penalty.
- § 18.2-67.5. Attempted rape, forcible sodomy, object sexual penetration, aggravated sexual battery, and sexual battery. *Attempted sexual battery only.*
- § 18.2-80. Burning or destroying any other building or structure.
  - *If building unoccupied and valued at less than \$1,000, Class 1 misdemeanor.*
- § 18.2-81. Burning or destroying personal property, standing grain, etc.
  - *If valued at less than \$1,000, Class 1 misdemeanor.*
- § 18.2-87. Setting woods, etc., on fire intentionally whereby another is damaged or jeopardized.
- § 18.2-314. Failing to secure medical attention for injured child.
- § 18.2-366. Sexual intercourse by persons forbidden to marry; incest; penalties.
  - *Enhanced penalties for sexual intercourse with various family members.*
- § 18.2-369. Abuse and neglect of incapacitated adults; penalty.
  - *Class 6 felony if second or subsequent offense.*



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- *Not eligible if convicted as a Class 4 or Class 3 felony under this section.*
- § 18.2-370.6. Penetration of mouth of child with lascivious intent; penalty.
- § 18.2-386.1. Unlawful creation of image of another; penalty.
  - *Class 6 felony if violation involves a nonconsenting person under 18 years of age.*
  - *Class 6 felony for second or subsequent offense within a 10 year period.*
- § 18.2-386.2. Unlawful dissemination or sale of images of another; penalty.
- § 18.2-479. Escape without force or violence or setting fire to jail.
  - *Class 6 felony if confined for conviction of a felony.*

Class 2 misdemeanor

- § 18.2-57.01. Pointing laser at law-enforcement officer unlawful; penalty.
- § 18.2-87.1. Setting off chemical bombs capable of producing smoke in certain public buildings.

Class 4 misdemeanor

- § 18.2-88. Carelessly damaging property by fire.