

Expungement, Pardons, and Restoration of Rights in Virginia

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Overview of Expungement, Pardons, and Restoration of Rights
What are we going to talk about today?

EXPUNGEMENT

PARDONS

RESTORATION OF RIGHTS

EXPUNGEMENT

- ▶ *Expungement* = erasing the arrest or court record associated with that incident.
- ▶ Physical removal and separation of the court record from other records and destruction of the police record (6 VAC 20-120-80)
- ▶ An expunged record can be obtained only with a court order.
- ▶ Employers, schools and governments can't ask about expunged records.
- ▶ Also known as sealing, set-aside or expunction.
- ▶ There is no federal expungement law.

Why Criminal Records Matter

- ▶ 70-100 million Americans have them, or 1/3 of all adults
- ▶ 19-24 million have felony convictions
- ▶ Misdemeanors outnumber felonies about 5:1
- ▶ 2.3 million people in U. S. Jails and prisons
- ▶ 4.4 million people on probation or parole

PARDONS

Three kinds of *Pardons*

Absolute Pardon = establishing your innocence for the crime

Simple Pardon = obtaining forgiveness the crime

Conditional Pardons and Medical Pardons = obtaining reduction in sentences under special circumstances

RESTORATION OF RIGHTS

► Restoration of Rights =
allowing you to vote and
restoring other civil rights,
after paying your debt to
society

Expungement of police and court records.

Eligibility, Justification, and Effect

Eligibility for Expungement

acquitted

***nolle prosequi* (pronounced “Null Pross”, means “no longer going to prosecute”)**

otherwise dismissed

Justification of Expungement

manifest injustice

Effect of Expungement

sealing the police and court records

Judicial Interpretation on Expungement

Eligibility for Expungement as “otherwise dismissed”

Necaise v. Commonwealth, 2011, 708 S.E.2d 864, 281 Va. 666

... Because the misdemeanors of which Necaise was convicted were lesser included offenses of the felonies with which he was charged, ... Expungement of the felony charges would distort the record ...

Dressner v. Commonwealth, 2013, 736 S.E.2d 735, 285 Va. 1

... The possession of marijuana charge in the instant case, however, was amended to the completely separate and unrelated charge ... Reckless driving is not a lesser-included offense of possession of marijuana. ... Thus, the charge was necessarily “otherwise dismissed” ...

A.R.A. v. Commonwealth, 2018, 809 S.E.2d 660, 295 Va. 153

... A.R.A. was charged with felony assault and battery, and the Commonwealth amended the charge to misdemeanor disorderly conduct. ... disorderly conduct is not a lesser included offense of felony assault and battery ... As a consequence, the felony assault charge was “otherwise dismissed” ...

Judicial Interpretation on Expungement

Justification for Expungement as stated in A.R.A v. Commonwealth

Once Eligibility for Expungement is established ...

... The focus of the expungement hearing ought to be on the impact of an existing record, not a retrial of a charge the Commonwealth elected not to prosecute. ...

... the manifest injustice standard in this instance is forward-looking, rather than backward-looking. The inquiry turns on whether the continued existence of the record will or may cause the petitioner a **manifest injustice** in the future. ...

... actual guilt or innocence was irrelevant under these circumstances. A.R.A. occupies the status of innocent with respect to the felony arrest ...

... facts simply demonstrate that she has not shown actual adverse effects on her employment up to this point. But the statute is broader. It contemplates expungement when the continued existence or dissemination of the record “**may cause circumstances**” that constitute a manifest injustice. ...

Expungement Procedure

City of Fredericksburg Instructions (Example)

- 1). Complete: **Petition for Expungement**
- 2). Complete: **Civil Coversheet**, checking Expungement in the 3rd column under the Miscellaneous heading
- 3). File the Petition with the Clerk of the Circuit Court
- 4). The clerk will give you a certified copy of the Petition for Expungement upon filing. Take this certified copy to the Fredericksburg Police.
- 5). The Fredericksburg Police Department will send the fingerprint cards to the Virginia State Police for processing.
- 6). The Petitioner must next file: **Notice of Hearing** at the Clerk's office;
- 7). Court Day bring **Expungement Order**

[Note, items in bold are standard forms available through the Fredericksburg website.]

Expungement Strategies

What are Virginia Attorneys Saying About Plea Bargains and Expungement

If the prosecutor amended the charge as part of the plea bargain to a completely different offense - say, **from possession of marijuana to reckless driving** - then you might have a way to get the original charge expunged.

Since **reckless driving is not a lesser included offense of a DUI offense**, it is very possible that you qualify to get it expunged.

Disorderly conduct does not constitute a lesser-included offense of assault upon a law enforcement officer. Thus, the defendant occupied “the status of innocent” as to that charge, and was eligible to seek expungement of that record.

New Updates and a Form of Expungement Rolled out in 2021

- *New Legislation passed in 2021 permits the expansion of crimes eligible for expungement by petition and creates a new category and process for the automatic expungement of certain crimes.*
- *"Automatic expungement" means to (i) restrict dissemination of criminal history record information contained in the Central Criminal Records Exchange to the purposes set forth in subsection C of § 19.2-392.12 and (ii) prohibit dissemination of court records, unless such dissemination is authorized by a court order for one of the purposes set forth in subsection C of § 19.2-392.12.*
- *Staggered implementation from July 1, 2021 until its anticipated complete implementation by 2025*
 - *Includes public information initiatives, and*
 - *state-level administrative changes to facilitate eligibility and automatic expungement for eligible persons.*
- *The process of automatic expungement will become automatic on before the integration and implementation of systems by 2025.*

What New Crimes Will Be Eligible for Petition for Expungement?

Additional Crimes Eligible for Petition to be Sealed Seven Years Following the Offense Date:

- Traffic infractions,
- Misdemeanors,
- Felony larcenies,
- Class 5 and 6 felonies, and
- Convictions granted a simple pardon.

What Crimes Will Be Eligible for Automatic Expungement?

Automatically Sealed Ten Years Following the Final Disposition Date:

- Underage alcohol purchase and possession,
- Petit larceny,
- Misdemeanor shoplifting, and
- Other select misdemeanors.

Automatically Sealed 11 Years From the Final Disposition of the Offense:

- Non-criminal traffic infractions

Are there Exceptions Within the New Legislation?

However, the Following Offenses are Listed as Ineligible for Automatic Expungement :

- Certain assault,
- Manslaughter, and
- Driving while intoxicated.

Also, sealing eligibility and contingency requirements that subjects have **no additional convictions** for certain time windows (broken out by offense class) prior to and following the sealing of records.

Records that involve **mistaken identity** will automatically be sealed at the time of the nolle prosequi of the charge upon notification by the Commonwealth Attorney or other person requesting the nolle prosequi.

Youth Expungement: Section 16.1-306

Juvenile records destroyed January 2 of each year when the subject of the record reaches age 19 or five years have passed since the last court proceeding.

Excludes all felonies and ancillary charges.

Allows Expungement by motion for dismissals and acquittals

Effect: “Upon destruction of the records of a proceeding as provided in the subsections A, B, and C, the violation of law shall be treated as if it never occurred.”

Pardons in Virginia

There are three types of pardons:

A **Simple Pardon** is a statement of official forgiveness. While it does not expunge (remove the conviction from) the record, it often serves as a means to advance in employment, education, and self-esteem.

A **Conditional Pardon** is available only to people who are currently incarcerated. It is usually granted for early release and involves certain conditions.

An **Absolute Pardon** is based on the belief that the petitioner was unjustly convicted and is innocent. An absolute pardon is the only form of executive clemency that would allow you to petition the court to have that conviction removed from your criminal record.

All pardons are processed by the Secretary of the Commonwealth's Office.

Simple Pardons

Effect, eligibility, and process

Effect

is an act by the Governor on behalf of the Commonwealth where official forgiveness is granted for a crime for which a person has been convicted.

Eligibility

You must be free of all conditions set by the court (including any probation period, suspended time, or good time behavior) on all convictions *followed by a waiting period of five years.*

Process

Complete the Virginia Pardon Petition Questionnaire.

If a simple pardon is granted, a notation will be added to the criminal record showing the word “pardon” next to the conviction.

Conditional Pardons

Effect, Eligibility, and Process

Effect

A **Conditional Pardon** is an act by the Governor to modify or end a sentence imposed by the court.

Eligibility

The Governor only grants a conditional pardon when there is substantial evidence of extraordinary circumstances to warrant it.

A special type of conditional clemency is a **Medical Pardon**. The inmate must meet the criteria of being terminally ill, with a life expectancy of three months or less.

Process

Complete the Virginia Pardon Petition Questionnaire

The petition process does not include a hearing, meeting or conference.

Absolute Pardons

Effect, Eligibility, and Process

Effect

An **Absolute Pardon** may be granted when the Governor is convinced that the petitioner is innocent of the charge for which he or she was convicted.

Eligibility

You pled “Not Guilty” throughout the judicial process.

You have exhausted all forms of judicial appeals.

You have petitioned the Attorney General’s office for a Writ of Actual Innocence.

Process

Complete the Virginia Pardon Petition Questionnaire

Restoration of Rights in Virginia

When are rights lost and how they are restored?

When are rights lost?

Anyone convicted of a felony in Virginia automatically loses his or her civil rights - the right to vote, serve on a jury, run for office, become a notary public and carry a firearm.

The Constitution of Virginia gives the Governor the sole discretion to restore civil rights, not including firearm rights.

How are rights restored?

The Secretary of the Commonwealth's office has proactively identified individuals who may meet the Governor's standards for restoration of rights and those individuals will be considered for possible restoration in the order of when they were released from supervision.

However, the Secretary of the Commonwealth gives priority consideration to individuals who request restoration of their civil rights. An individual seeking restoration of their civil rights may contact the Secretary of the Commonwealth to determine status and request restoration of rights.

Restoration of Rights

Eligibility and Process

Eligibility

An individual is eligible to have his/her rights restored by the Governor if he/she has been convicted of a felony and is no longer incarcerated or under active supervision (including supervised probation or parole).

The Governor does not have the authority to restore firearms rights. Contact your local circuit court for information about restoration of firearms rights.

Process

Individuals who request restoration of their rights and individuals who are identified as potentially eligible by the office, will be thoroughly reviewed by the Secretary of the Commonwealth's office, including checking their records with all relevant state agencies to ensure the individual meets the Governor's standards for restoration of rights.

The review process usually takes 30-60 days after an individual has contacted the office requesting restoration of rights.

Individuals can check their status on the Secretary of Commonwealth's website.

Recent Commentary on Virginia's Restoration of Rights

From The Atlantic Magazine of January 8, 2018

... When Republicans in Virginia's state legislature revolted at that executive order and won an August 2016 Virginia Supreme Court decision blocking restorations en masse, McAuliffe took another route, with his office reviewing thousands of felons' records and the governor restoring their rights individually using an autopen. ...

... Virginia now hosts a website that features dozens of testimonials of newly-enfranchised voters. One voter, Lynette, said "I feel like I can finally live as a whole citizen," since her restoration in October 2016. Another, Licia, said that "this opportunity has given me the strength to no longer look at myself as a second-class person, but an upstanding citizen, leader, and community advocate." ...

... The outgoing governor and his administration don't necessarily see their clemency campaign and restorations of rights campaign as part of the same project. ... one of which involves restoring civic life to people who've largely done their time, and the other which means actually forgiving people for perhaps even violent crimes—are different both optically and procedurally. "From a process standpoint, they're very different," Thomasson told me. "From a standpoint of believing in second chances, they're very similar." ...

Recent Statistics on Virginia's Restoration of Rights

"List of Pardons, Commutations, Reprieves and Other Forms of Clemency - January 14, 2018 to January 11, 2019"

Under Virginia law the Governor must produce an annual report summarizing pardons, commutations, and other forms of clemency approved during the past year.

Recently published statistics suggest that during his first year, Governor Northam continued the clemency and restoration of rights initiatives undertaken during Governor McAuliffe's administration.

46 Simple Pardons which include both felonies and misdemeanors with Sentence Dates ranging from 1977 through 2009

1 Medical Pardon is noted that provides for a medical furlough

1 Absolute Pardon is noted for a person convicted of disposal of a fetus.

8,864 individuals provided with Restoration of Rights

Frequently Asked Questions Regarding Restoration of Rights in Virginia

What is restoration of rights?

Anyone convicted of a felony in Virginia automatically loses their civil rights - the right to vote, serve on a jury, run for office, become a notary public and carry a firearm. The Constitution of Virginia gives the Governor the sole discretion to restore civil rights, not including firearm rights.

Am I eligible to have my rights restored?

Governor Northam will consider restoration of rights for any individuals that have finished any term of supervision and any term of supervised release (including supervised probation or parole).

I want to have my rights restored; Do I need to apply?

The most efficient way to have your rights restored is to contact the Secretary of the Commonwealth (SOC). You can let the SOC know you'd like to have your rights restored by contacting the SOC through their website. The SOC's office does work to identify individuals who meet the Governor's standards for rights restoration, even if they don't contact the SOC office.

How long does it take to get my rights restored?

The review process usually takes 30-60 days after an individual has contacted the office requesting restoration of rights.

How can I check to see if my rights have already been restored?

Individuals can check their status on the [Secretary of Commonwealth's website](#).
<https://www.restore.virginia.gov/> or <https://www.commonwealth.Virginia.gov>

What about my firearms rights?

The Governor does not have the authority to restore firearms rights. Contact your local circuit court for information about restoration of firearms rights.

What if I am not a United States citizen?

Noncitizens are not eligible to vote, serve on a jury or run for office, but may be eligible to serve as a notary public. Contact the SOC office at 804-692-0104 to have your rights restored.

Restoration of Firearms Rights

From <https://www.nzslaw.com/criminal-defense/firearms-rights-restoration/>

The usual method of firearms rights restoration is by petition in your local circuit court (or for non-Virginia residents, the circuit court in the jurisdiction of conviction). Those who live in Virginia but have out-of-state convictions must also pursue this judicial route to relief in order to hunt in Virginia.

The process in Virginia is:

1. Civil rights (Restoration of Rights) must first be restored by the governor
2. File a petition for a permit to: possess or carry a firearm, ammunition for a firearm, or a stun weapon.
3. The court may grant the petition “in its discretion and for good cause shown.”
4. The Commonwealth of Virginia (by the Commonwealth’s Attorney) can object to the petition and both sides may present evidence at a hearing.
5. Those with the best chance of success to regain firearms rights will have no additional criminal convictions and no history of violence or substance abuse.
6. A successful petition is typically supported with character letters and other evidence of productive citizenship.

What if you have a federal felony conviction?

If you were convicted of a felony under federal law, firearms restoration is obtained by presidential pardon only. It is extremely difficult to get a presidential pardon.

WHAT IF YOU HAVE MORE QUESTIONS?

- ▶ Legal Aid Works® does not currently have the staff to help people navigate the process of expungements, pardons, and restoration of rights. We rely on pro bono assistance from private attorneys who are willing to help. Call our pro bono coordinator for more information. 540-371-1105, Ext. 111
- ▶ Other places where you can get some quick, free or low-cost advice:
- ▶ www.Virginia.freelegalanswers.org
- ▶ Virginia State Bar Lawyer Referral: (800) 552-7977 (\$35 for 30 minute phone consultation)

THANK YOU!