



VIRGINIA STATE CRIME COMMISSION

2021 INTERIM EXECUTIVE SUMMARY OF ACTIVITIES

The Virginia State Crime Commission was established within the legislative branch of government in 1966. The Crime Commission is a criminal justice agency as defined by Virginia Code § 9.1-101, and is authorized to study, report, and make recommendations on all areas of public safety and protection (Virginia Code § 30-156 *et seq.*). The Crime Commission consists of thirteen members – six members of the House of Delegates, three members of the Senate, three non-legislative citizen members appointed by the Governor, and the Attorney General or his designee.

During 2021, Crime Commission staff completed its work and published the final report on the *Virginia Pre-Trial Data Project*, which included both statewide and locality level descriptive findings.¹ Legislation enacted during the 2021 General Assembly Session requires the Virginia Criminal Sentencing Commission to continue this *Project* on an annual basis by collecting and reporting on pretrial data and making such data publicly available, excluding any personal and case identifying information.

Staff also continued its work on the expungement and sealing of criminal records and parole. Additionally, staff was directed to examine secured bond and diversion, which stemmed from previous studies of the overall pretrial process.

The Crime Commission held meetings on November 4th and November 15th to review study findings. At the November 4th meeting, staff presented on the *Virginia Pre-Trial Data Project*, secured bond, and diversion. Three other entities also provided presentations on diversion. At the November 15th meeting, staff and key stakeholders updated Commission members on the expungement and sealing of criminal records. In addition, the Office of the Executive Secretary of the Supreme Court of Virginia advised members of the findings and policy considerations stemming from the *Appointment of Counsel at First Appearance Work Group*. Finally, the Department of Criminal Justice Services provided an update on pretrial services agencies. At the conclusion of the November 15th meeting, Commission members unanimously endorsed staff's recommendation to create two new positions at the Indigent Defense Commission to provide training and support for public defenders and court-appointed counsel in regard to expungement and sealing.

The Executive Director of the Crime Commission serves as the designee for the Chair of the Crime Commission on the Forensic Science Board, Indigent Defense Commission, and Advisory Committee on Sexual and Domestic Violence.

The Crime Commission will publish its 2021 Annual Report by June 30, 2022. Additional information about the Crime Commission is available on the agency website at <http://vscc.virginia.gov>.

¹ The *Virginia Pre-Trial Data Project: Final Report*, along with links to the descriptive findings at the statewide and locality level for each individual locality in Virginia, can be found on the Crime Commission's website at <http://vscc.virginia.gov/virginiapretrialdatapoint.asp>.



EXPUNGEMENT AND SEALING OF CRIMINAL AND COURT RECORDS

Study Highlights

January 2022

Virginia is now one of:

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

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

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

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

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

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

1. Examine the interplay between the expungement and sealing of records.

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

2. Recommend a review process for any changes to expungement or sealing.

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

3. Identify methods to educate the public on the new sealing processes.

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

4. Review the permissible uses of expunged and sealed records.

Expunged records can only be accessed and disclosed by court order. Sealed and marijuana expunged records can be accessed and disclosed for 25 purposes.

5. Evaluate the impact of plea agreements on expunged and sealed records.

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

6. Determine the feasibility of destroying expunged or sealed records.

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



SECURED BOND

Study Highlights

January 2022

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

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

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

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

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

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

What is secured bond?

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

Key Study Findings

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

1. Virginia is in a unique position to examine its pretrial system as a result of the *Virginia Pre-Trial Data Project* (“*Project*”). While the October 2017 statewide dataset from this *Project* can be used to inform policy decisions, it cannot explain the “why” behind the data. Additionally, it is important to note that the data is limited in scope, as it was collected for a one-month time period that precedes the COVID-19 pandemic and recent criminal justice reform measures in Virginia.
2. While several other states have enacted bail reform measures, various factors present challenges to ascertaining the specific impacts of these reforms. The primary challenge is that no state has completely eliminated the use of secured bond. Furthermore, several states implemented bail reform measures and then repealed or modified those reforms. Additional challenges include the recentness of reform measures, a lack of complete or reliable data, the COVID-19 pandemic, and an overall rise in crime rates nationwide.
3. The statewide analysis of the *Project* dataset showed that (i) most defendants were ultimately released prior to trial, (ii) the majority of those defendants were released on a PR or unsecured bond, (iii) the large majority of defendants who were released prior to trial appeared in court, and (iv) the majority of defendants who were released prior to trial were not arrested for a new in-state criminal offense during the pretrial period. Furthermore, when examining the defendants who were released prior to trial and arrested for a new in-state offense during the pretrial period, data showed that the vast majority of those defendants were arrested for an in-state misdemeanor.

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

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

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

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

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

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4. A bail determination is not based solely on the nature of the current criminal charge. Bail determinations are made on a case-by-case basis using various statutory criteria, such as the person's prior criminal record, their ties to the community, and their ability to pay bond. These criteria are intended to aid magistrates and judges when determining whether a person poses a flight risk or a risk to public safety, even when the person is charged with a seemingly minor crime.
5. Magistrates and judges have broad discretion when setting bail conditions. These conditions are meant to ensure that a person appears in court and maintains good behavior pending trial. Such imposed conditions can include, but are not limited to, pretrial services agency supervision, electronic monitoring, drug testing, curfews, and no contact orders.
6. The Virginia Code favors setting bail, but does not guarantee pretrial release. Magistrates and judges must set bail unless there is probable cause to believe that a person is a flight risk or a risk to public safety.
7. The statewide analysis of the *Project* dataset found that many of the defendants released during the pretrial period were indigent. At least half of defendants released on a PR or unsecured bond were indigent, while at least 62% of defendants released on a secured bond were indigent.
8. The statewide analysis of the *Project* dataset also found that many of the defendants detained the entire pretrial period were indigent. At least 78% of the defendants who were detained the entire pretrial period were indigent. This data does not explain why these defendants remained detained. Defendants may remain detained for a variety of reasons, such as being held without bail, not being able to afford the secured bond, not having family or friends who are able or willing to post bond, or choosing to remain detained.
9. Bail bondsmen and pretrial services agencies are unique, but can be complimentary. The 2019 statewide analysis of the *Project* dataset by staff found that public safety outcomes were identical across defendants released on PR or unsecured bond with pretrial services agency supervision, secured bond only, and secured bond with pretrial services agency supervision. However, this analysis also revealed that court appearance rates were higher for the group of defendants who were released on secured bond with pretrial services agency supervision.
10. The potential impacts of bail reform in Virginia are unknown. While changes can be made to the use of secured bond in Virginia, it is unknown how such changes will impact detention rates, court appearance rates, public safety rates, the use of other bail conditions, and the need for various resources.

Broader measures to address pretrial detention rates

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

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



DIVERSION

Study Highlights

January 2022

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

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

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

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

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

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What is diversion?

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

What is the purpose of diversion?

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

What are the benefits and challenges of diversion?

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

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

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

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

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

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

What is needed to expand diversion across Virginia?

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