

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: CS/SB 118

INTRODUCER: Judiciary Committee and Senator Steube

SUBJECT: Criminal History Records

DATE: January 25, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Brown</u>	<u>Cibula</u>	<u>JU</u>	<u>Fav/CS</u>
2.	_____	_____	<u>CJ</u>	_____
3.	_____	_____	<u>AP</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 118 expands the types of dispositions of criminal cases for which a defendant may later seek an expunction of the underlying criminal history record. Currently, records relating to charges disposed of by a trial are ineligible for expunction, regardless of the verdict in the case. Under the bill, a criminal record relating to a case resolved by a judgment of acquittal or a not guilty verdict is also eligible for expunction.

The bill also authorizes a cause of action against a person or entity who publishes arrest booking photographs and offers to remove them for a fee. Under the procedure in the bill, a person may file a civil action against the publisher of his or her arrest booking photograph if the publisher fails to remove the photograph within 10 days after a written request. As a remedy for failing to comply with a removal request, the bill authorizes a court to enjoin further publication of the photograph and impose a penalty of \$1,000 per day for injunction violations. The court also must award reasonable attorney fees and costs related to the issuance of the injunction.

The court also must award reasonable attorney fees and costs related to the issuance of the injunction. Additionally, the publisher will be subject to other penalties under the Florida Deceptive and Unfair Trade Practices Act.

II. Present Situation:

Sealing and Expunction of Criminal Records

A court may order a criminal record to be sealed or expunged. If the court orders a record to be sealed, the record is securely preserved and inaccessible unless a person has a legal right of access to the record.¹

In contrast, if a court orders a partial expunction or an expunction of an entire record, any criminal justice agency in custody of the record must physically destroy the record or part of the record. However, the Department of Law Enforcement is required to retain all records for the purpose of evaluating subsequent requests for sealing or expunction or to recreate a record if necessary.²

Expunction of Criminal Records

Eligibility for Expunction

The court may order expunction of a criminal record involving only one arrest or alleged incidence of criminal activity, unless additional arrests directly relate to the original arrest.³ Additionally, records of certain crimes are ineligible for expunction. Many of these are sex crimes, such as sexual battery, sex crimes against children, sexual misconduct in the workplace, sexual misconduct in institutions housing vulnerable persons, and voyeurism. Other ineligible records relate to violations of the Florida Communications Fraud Act, offenses by public officers and employees, human trafficking, dangerous crimes for which nonmonetary pretrial release is not available,⁴ or any violation requiring registration as a sexual predator.⁵

Applying for a Certificate of Eligibility

A person seeking to have a criminal record expunged must first obtain a valid certificate of eligibility from the Department of Law Enforcement. To do so, the person must provide to the department:

- A written, certified statement from the appropriate state attorney or statewide prosecutor that:
 - An indictment, information, or other charging document was not filed or issued in the case.
 - An indictment, information, or other charging document, if filed or issued in the case, was dismissed or dropped by the state attorney or the court, and that none of the charges resulted in a trial, without regard to whether the outcome of the trial was other than an adjudication of guilt.⁶

¹ Section 943.045(19), F.S.

² Section 943.045(16), F.S.

³ Section 943.0585, F.S.

⁴ Dangerous crimes include arson, aggravated assault or battery, child abuse, kidnapping, homicide, manslaughter, robbery, sexual battery, burglary, and terrorism. Section 907.041(4)(a), F.S.

⁵ Section 943.0585(2)(a)3., F.S.

⁶ Therefore, a case resolved by a judgment of acquittal is not eligible for an expunction. A judgment of acquittal may occur after the state concludes its case if the evidence in the light most favorable to the state is insufficient for conviction. BLACK'S LAW DICTIONARY, 6th ed.

- The applicant does not have a criminal history record containing certain delineated crimes.⁷
- A \$75 processing fee to the department for placement in the Department of Law Enforcement Operating Trust Fund, unless the fee is waived.
- A certified copy of the disposition of the charge.

The person must also:

- Have not, before the date the application for a certificate of eligibility is filed, been adjudicated guilty of a criminal offense or comparable ordinance violation, or been adjudicated delinquent for committing any felony or a misdemeanor specified in s. 943.051(3)(b).⁸
- Have not been adjudicated guilty or delinquent of committing any of the acts stemming from the arrest or alleged criminal activity to which the petition to expunge pertains.
- Have not secured a prior sealing or expunction other than the required 10-year sealing for the offense sought to be expunged.
- Not be under court supervision for the arrest or crime to which the petition to expunge pertains.
- Have previously obtained a court order sealing the record for a minimum of 10 years. The requirement for the record to have been sealed for 10 years does not apply if a plea was not entered or all charges related to the arrest or offense to which the petition to expunge pertains were dismissed before trial.⁹

Filing a Petition with the Court

After receiving the certificate of eligibility, the person must file a petition with the court to expunge the record. The petitioner must also include a sworn statement attesting that he or she has never:

- Been adjudicated guilty of a crime or comparable ordinance violation, or adjudicated delinquent of a disqualifying crime that would have precluded receipt of the certificate of eligibility¹⁰;
- Been adjudicated guilty of, or adjudicated delinquent for committing, any of the acts stemming from the arrest of alleged criminal activity to which the petition pertains; or
- Secured a prior sealing or expunction of a criminal history record unless expunction is sought of a criminal history record previously sealed for 10 years, provided the record is otherwise eligible for expunction.¹¹

Processing an Order to Expunge

If the court grants a petition to expunge, several entities are required to forward copies of the order to relevant persons or entities. The clerk of the court must provide the order to the state

⁷ These crimes of assault include battery, carrying a concealed weapon, unlawful use of destructive devices or bombs, neglect of a child, assault or battery on a law enforcement officer, firefighter, or certain other officers, open carry of a weapon, exposure of sexual organs, unlawful possession or discharge of a firearm or weapon, including at a school-sponsored event or school property, petit theft, cruelty to animals, and arson. Section 943.0585(2)(a)3., F.S.

⁸ *Id.* These are currently the same crimes identified in s. 943.0585(2)(a)3., F.S.

⁹ Section 943.0585(2), F.S.

¹⁰ Section 943.501(3)(b), F.S.

¹¹ Section 943.0585(1), F.S.

attorney or statewide prosecutor, the arresting agency, and any entity that previously received the criminal history record. The arresting agency must provide the order to any entity to which the agency previously disseminated the criminal history record information. Finally, the Department of Law Enforcement must provide the order to the Federal Bureau of Investigation.¹²

Effect of an Expunction of a Criminal History Record

Any criminal justice agency having custody of a record that is expunged must physically destroy or obliterate the record. The department, however, must maintain the record. The record itself, in the custody of the department, is protected as confidential and exempt from disclosure requirements under the public records laws.¹³

The person who has received the expunction may deny or fail to report the arrests expunged, unless the person:

- Is applying for a position as a guardian, a position with a criminal justice agency, or a position with an agency which is responsible for the protection of vulnerable persons, including children, disabled persons, and elderly persons;
- Is being criminally prosecuted;
- Is petitioning for an expunction of a human trafficking offense or a sealing of a criminal history record; or
- Is applying to The Florida Bar for licensure.¹⁴

The Posting of Booking Photos or Criminal History Information on Websites

State Law Bans

In recent years, an industry has emerged in which commercial website operators repost booking or arrest photographs (mugshots). The operators make a profit by charging the subject of the photos a fee for removing the image. Although some of the operators remove photos at no cost if the charge(s) were dropped or the person found not guilty, others charge a fee. Also, photos posted on one site may be reposted to other sites, causing continuing harm to the reputation of the individual.¹⁵

Thirteen states enacted legislation designed to prohibit commercial website operators from posting mugshot photos on a website and exacting a fee for removal of the photos from the website.¹⁶ Of these, 5 states require website operators to remove photos of persons criminally charged from websites if an expungement order is in effect. These states are Maryland, Oregon, South Carolina, Texas, and Wyoming, all of which provide only civil relief.

¹² Section 943.0585(3), F.S.

¹³ Section 943.0585(4), F.S.

¹⁴ Section 943.0585(4)(a), F.S.

¹⁵ National Conference of State Legislatures (NCSL), *Mug Shots and Booking Photo Websites, Overview* (Jan. 12, 2016).

¹⁶ These are California, Colorado, Georgia, Illinois, Kentucky, Maryland, Missouri, Oregon, South Carolina, Texas, Utah, Virginia, and Wyoming.

Case Law

Persons having a criminal history record have challenged the posting of their images and information by commercial entities based on various causes of action. These include claims for an invasion of privacy based on false light¹⁷, invasion of privacy based on unauthorized appropriation of name or likeness, defamation by slander, and unjust enrichment. Claimants have met with varying degrees of success.¹⁸

In Florida prevailing in a civil cause of action against a website that displays mugshot photos seems unlikely because of the lack of recognized causes of action. In 2008, the Florida Supreme Court indicated that Florida does not recognize tort claims based on false light, “Because we conclude that false light is largely duplicative of existing torts, but without the attendant protections of the First Amendment.”¹⁹ The Court specifically noted that the key elements of a false claim are nearly identical to the elements required in a defamation case.²⁰ The state does recognize defamation claims.²¹

The Florida Deceptive and Unfair Trade Practices Act (FDUTPA)

History and Purpose of FDUTPA

The Legislature enacted the Florida Deceptive and Unfair Trade Practices Act in 1973 (FDUTPA).²² A consumer and business protection measure, FDUTPA prohibits unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in trade or commerce.²³ FDUTPA, known as the “Little FTC Act,” is based on federal law.²⁴ Actions are brought by the State Attorney or the Department of Legal Affairs when it is in the public interest on behalf of consumers or governmental entities.²⁵ The Office of the State Attorney may enforce violations of FDUTPA if the violations take place under its jurisdiction. The Department of Legal Affairs, Office of the Attorney General, has enforcement authority if the violation is multi-jurisdictional, the state attorney defers in writing, or the state attorney fails to act within 90 days

¹⁷ A claim of false light is a type of a claim of invasion of privacy based in tort. By way of example, to prevail in a false light claim in Pennsylvania, a defendant must establish that a highly offensive false statement was publicized by a defendant with knowledge or in reckless disregard of its falsity. *Santillo v. Reedel*, 430 Pa. Super. 290, 295-296 (1983).

¹⁸ *See, i.e., Bilotta v. Citizens Info. Assocs., LLC.*, 2014 U.S. Dist. LEXIS 68495, 18 (2014), in which the court dismissed a plaintiff’s motion for certification as a class action based on the failure of the claimant to establish adequate bases of the claimants as a class; *Jamali v. Maricopa County*, 2013 U.S. Dist. LEXIS 75323, 10 (2013), in which the court dismissed the case as being improperly filed in federal court; and *Taha v. Bucks County*, 9 F.Supp. 3d 490, 11, 12 (2014), in which the court denied the defendant’s pretrial motion to dismiss a false-light claim. In this case, the plaintiff, who insisted he was innocent, entered into a deferred prosecution agreement, and after fulfilling all conditions, received an automatic expungement of his criminal charge. Under the facts presented to the court, “The bustedmugshots.com webpage on which Taha’s profile appears features the legend ‘BUSTED!’ in large bold letters over his mugshot . . . prominently placed in the center of the page, as are two clickable options to ‘Get Detailed Information About This Arrest.’” . . . Taha’s allegations, accepted as true, are sufficient to state a false-light claim “that is plausible on its face.” *Id.* at 10-11.

¹⁹ *Jews for Jesus v. Rapp*, 997 So. 2d 1098, 1100, 1115 (2008).

²⁰ *Id.* at 1105-1106.

²¹ *Id.* at 1111-1112.

²² Chapter 73-124, L.O.F.

²³ Section 501.202, F.S.

²⁴ David J. Federbush, *Damages under FDUTPA*, 78-MAY FLA. B.J. 20, 26 (2004); Douglas B. Brown, *Florida Legislature Broadens the Scope of the “Little FTC Act,”* 67-OCT FLA. B.J. 50 (1993).

²⁵ David J. Federbush, *FDUTPA for Civil Antitrust*, 76 FLA. B.J. 52, 57 (Dec. 2002).

after a written complaint is filed.²⁶ Although the Department of Legal Affairs is the primary enforcer and administrator of FDUTPA, ~~followed by state attorneys~~, consumers may file suit through private actions.

Remedies under FDUTPA

The Department of Legal Affairs and the State Attorney, as enforcing authorities, may seek the following remedies:

- Declaratory judgments;
- Injunctive relief;
- Actual damages;
- Cease and desist orders; and
- Civil penalties, in an amount of up to \$10,000 per violation for willful violations.²⁷

Enforcing authorities may also request attorney fees and costs of investigation or litigation.²⁸

Remedies for private parties are limited to a:

- Declaratory judgment and an injunction where a person is aggrieved by a FDUTPA violation; and
- Actual damages, attorney fees and court costs, where a person has suffered a loss due to an FDUTPA violation.²⁹

III. Effect of Proposed Changes:

New Bases for Expunction

This bill enables a person who has a criminal history record to seek expunction of the record if the alleged criminal activity resulted in a judgment of acquittal rendered by the court or a verdict of not guilty by a court or jury. Currently, charges disposed of by trial are ineligible for expunction, regardless of the verdict in the trial.

Ban on Publication of an Expunged Criminal History Record

The bill requires a publisher of arrest booking photographs to remove the photographs upon a written request by the person in the photographs, or his or her legal representative. Upon receipt of the request, the publisher must remove the photographs without charging a fee within 10 calendar days.

If the publisher does not comply with the removal requirement, in addition to issuing an injunction, a court may impose civil penalties of \$1,000 per day, reasonable attorney fees, and court costs. Additionally, the publisher will be subject to other penalties under the Florida Unfair or Deceptive Trade Practice Act.

²⁶ Section 501.203(2), F.S.

²⁷ Sections 501.207(1) and 501.2075, F.S.

²⁸ Section 501.2105, F.S.

²⁹ Section 501.211(1) and (2), F.S.

The bill takes effect July 1, 2017.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Requiring private entities to remove booking arrest photos may result in a constitutional challenge based on the First Amendment to the extent that the bill regulates protected speech. However, the absence of a sufficiently analogous case on point makes the potential outcome of a First Amendment challenge speculative.³⁰

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill may reduce costs for defendants who have had their criminal history record expunged. First, the bill now prohibits publishers of the information or images from charging fees for removing information and images relating to an expunged record. Also, the bill authorizes a civil cause of action, with an entitlement to attorney fees and costs, against those who fail to remove expunged records.

C. Government Sector Impact:

The Department of Law Enforcement indicates that although they will need to make a technological change, they expect a minimal fiscal impact.³¹

³⁰ For comparison, see *Fla. Star v. B.J.F.*, 491 U.S. 524, 525, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989) (holding that a newspaper was not liable for disclosing a victim's identity obtained from a police report released by law enforcement in violation of law, and further that the matter was of public concern and that imposing damages on the newspaper violated the First Amendment); *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001), holding that if a publisher lawfully obtains the information in question, the speech is protected by the First Amendment provided it is a matter of public concern, even if the source recorded it unlawfully.

³¹ Department of Law Enforcement, *2017 FDLE Legislative Bill Analysis for SB 118*, Dec. 19, 2016.

The Office of the State Courts Administrator expects an increase in judicial workload because more people will be eligible for expunction of their criminal history records. Also, creating a new injunction process and a new crime for the unlawful dissemination of expunged records will increase workload. However, the fiscal impact of these changes is indeterminate due to the unavailability of data needed to accurately establish the increase in judicial workload.³²

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 943.0585, Florida Statutes.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Judiciary Committee on January 24, 2017:

The CS qualifies as eligible for expunction a case in which a judge renders a judgment of acquittal.

The CS also:

- Removes the expunction requirement for cases for which a person may get an arrest booking photograph removed from publication or dissemination by a private publisher;
- Reduces from 14, to 10, the number of calendar days in which a publisher has to remove the photographs before a person can seek an injunction;
- Removes criminal penalties but increases from \$500 to \$1,000, the civil fine that a court may impose on a publisher who fails to comply with removal of the photographs; and
- Subjects the publisher to additional penalties under the Florida Deceptive and Unfair Trade Practices Act, including a civil penalty of up to \$10,000 per willful violation.

- B. **Amendments:**

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

³² Office of the State Courts Administrator, *Bill Analysis and Fiscal Impact Statement*, Jan. 23, 2017.