

# **WEST VIRGINIA LEGISLATURE**

**2024 REGULAR SESSION**

**ENROLLED**

**Committee Substitute**

**for**

**House Bill 4399**

BY DELEGATES NESTOR, KUMP, AND LEWIS

[Passed March 9, 2024; in effect ninety days from  
passage.]



1 AN ACT to amend and reenact §61-11-22, §61-11-22a, and §61-11-25 of the Code of West  
2 Virginia, 1931, as amended, relating to general provisions concerning crimes; correcting  
3 internal citations; expungement of criminal records; and when a civil action may be filed  
4 to expunge criminal records for cases where charges have been dismissed following a full  
5 and successful completion of a pretrial diversion or deferred adjudication; relating to  
6 exceptions to the allowance to file a civil action for expungement.

*Be it enacted by the Legislature of West Virginia:*

**ARTICLE 11. GENERAL PROVISIONS CONCERNING CRIMES.**

**§61-11-22. Pretrial diversion agreements; conditions; drug court programs.**

1 (a) A prosecuting attorney of any county of this state or a person acting as a special  
2 prosecutor may enter into a pretrial diversion agreement with a person charged with an offense  
3 against the State of West Virginia, when he or she considers it to be in the interests of justice.  
4 The agreement is to be in writing and is to be executed in the presence of the person's attorney,  
5 unless the person has executed a waiver of counsel.

6 (b) Any agreement entered into pursuant to the provisions of subsection (a) of this section  
7 may not exceed 24 months in duration. The duration of the agreement must be specified in the  
8 agreement. The terms of any agreement entered into pursuant to the provisions of this section  
9 may include conditions similar to those set forth in §62-12-9 of this code relating to conditions of  
10 probation. The agreement may require supervision by a probation officer of the circuit court, with  
11 the consent of the court. An agreement entered into pursuant to this section must include a  
12 provision that the applicable statute of limitations be tolled for the period of the agreement.

13 (c) A person who has entered into an agreement for pretrial diversion with a prosecuting  
14 attorney and who has successfully complied with the terms of the agreement is not subject to  
15 prosecution for the offense or offenses described in the agreement or for the underlying conduct  
16 or transaction constituting the offense or offenses described in the agreement, unless the  
17 agreement includes a provision that upon compliance the person agrees to plead guilty or nolo

18 contendere to a specific related offense, with or without a specific sentencing recommendation  
19 by the prosecuting attorney.

20 (d) No person charged with a violation of the provisions of §17C-5-2 of this code may  
21 participate in a pretrial diversion program: *Provided*, That a court may defer proceedings in  
22 accordance with §17C-5-2b of this code.

23 (e) No person is eligible for pretrial diversion programs if charged with:

24 (1) A felony crime of violence against the person where the alleged victim is a family or  
25 household member as defined in §48-27-204 of this code;

26 (2) A violation of §61-8-12 of this code or a felony violation of the provisions of §61-8B-1  
27 *et seq.*, §61-8C-1 *et seq.*, and §61-8D-1 *et seq.* of this code;

28 (3) A violation of §61-2-9a(a) of this code;

29 (4) A violation of §61-2-9d of this code;

30 (5) A violation of § 61-2-28 of this code; or

31 (6) A violation of §61-2-9 of this code where the alleged victim is a family or household  
32 member as defined in §48-27-204 of this code.

**§61-11-22a. Deferred adjudication.**

1 (a) Upon the entry of a guilty plea to a felony or misdemeanor before a circuit or magistrate  
2 court of this state entered in compliance with the provisions of Rule 11 of the West Virginia Rules  
3 of Criminal Procedure or Rule 10 of the West Virginia Rules of Criminal Procedure for Magistrate  
4 Courts and applicable judicial decisions, the court may, upon motion, defer acceptance of the  
5 guilty plea and defer further adjudication thereon and release the defendant upon such terms and  
6 conditions as the court deems just and necessary. Terms and conditions may include, but are not  
7 limited to, periods of incarceration, drug and alcohol treatment, counseling and participation in  
8 programs offered under §62-11A-1 *et seq.*, §62-11B-1 *et seq.*, and §62-11C-1 *et seq.* of this code.

9 (b) If the offense to which the plea of guilty is entered is a felony, the circuit court may  
10 defer adjudication for a period not to exceed three years. If the offense to which the plea of guilty

11 is entered is a misdemeanor, the court may defer adjudication for a period not to exceed two  
12 years.

13 (c) Unless otherwise specified by this section, a person is ineligible for a deferred  
14 adjudication program if he or she is charged with;

15 (1) A felony crime of violence against the person where the alleged victim is a family or  
16 household member as defined in §48-27-204 of this code;

17 (2) A violation of §61-8-12 of this code or a felony violation of the provisions of §61-8B-1  
18 *et seq.*, §61-8C-1 *et seq.*, and §61-8D-1 *et seq.* of this code;

19 (3) A violation of §61-2-9a(a) of this code;

20 (4) A violation of §61-2-9d of this code;

21 (5) A violation of §61-2-28 prosecuted under the provisions of subsections (c) or (d) of that  
22 section; or

23 (6) A violation of §61-2-9(a) of this code, or a violation of §61-2-9(b) or §61-2-9(c) of this  
24 code prosecuted under the provisions of subsection (d) of that section, where the alleged victim  
25 is a family or household member as defined in §48-27-204 of this code.

26 (7) A violation of §61-2-9(b) or §61-2-9(c) of this code or §61-2-28(a) or §61-2-28(b) of this  
27 code where a weapon was used in the commission of the crime, the defendant has a prior  
28 conviction of any of the offenses listed in subsection (c) of this section, the defendant has a prior  
29 felony conviction, or the defendant has previously entered into a prior pretrial diversion or deferred  
30 adjudication of crimes where the alleged victim is a family or household member as defined in  
31 §48-27-203 of this code.

32 (d) A person charged under §61-2-9a, §61-2-9d, or §61-2-9(a) of this code who has not  
33 previously been convicted of any of the offenses set forth in subsection (c) of this section, who  
34 has no prior felony conviction, and who has not previously entered into a prior pretrial diversion  
35 or deferred adjudication of crimes where the alleged victim is a family or household member as  
36 defined in §48-27-204 of this code, is eligible to participate in a deferred adjudication program:

37 *Provided*, That the person is not eligible for dismissal upon successful completion of the deferred  
38 period.

39 (e)(1) A person charged with a first offense violation of §61-2-28(a) or §61-2-28(b) of this  
40 code or a violation of §61-2-9(b) or §61-2-9(c) of this code where the alleged victim is a family or  
41 household member as defined in §48-27-204 is eligible for deferred adjudication if agreed to by  
42 the state and the defendant: *Provided*, That, for purposes of this section, “first offense violation”  
43 means the person would not, due to any prior charges or convictions, be subject to the  
44 enhancement provisions set forth in §61-2-9(d) or §61-2-28(c) or §61-2-28(d);

45 (2) In addition to terms and conditions authorized in subsection (a) of this section, a person  
46 participating in a deferred adjudication program pursuant to this subsection may be required to  
47 participate in compliance hearings and batterer intervention programs licensed under §48-26-402  
48 of this code;

49 (3) Notwithstanding the provisions of subsection (b) of this section, a deferral under this  
50 subsection shall be for a period of not less than 18 months nor more than three years; and

51 (4) A person may not participate in more than one deferred adjudication pursuant to this  
52 subsection.

53 (f) If the defendant complies with the court-imposed terms and conditions he or she shall  
54 be permitted to withdraw his or her plea of guilty and the matter dismissed or, as may be agreed  
55 upon by the court and the parties, enter a plea of guilty or no contest to a lesser offense.

56 (g) In the event the defendant is alleged to have violated the terms and conditions imposed  
57 upon him or her by the court during the period of deferral the prosecuting attorney may file a  
58 motion to accept the defendant’s plea of guilty and, following notice, a hearing shall be held on  
59 the matter.

60 (h) In the event the court determines that there is reasonable cause to believe that the  
61 defendant violated the terms and conditions imposed at the time the plea was entered, the court  
62 may accept the defendant’s plea to the original offense and impose a sentence in the court’s

63 discretion in accordance with the statutory penalty of the offense to which the plea of guilty was  
64 entered or impose such other terms and conditions as the court deems appropriate.

65 (i) The procedures set forth in this section are separate and distinct from that set forth in  
66 Rule 11(a)(2) of the West Virginia Rules of Criminal Procedure.

**§61-11-25. Expungement of criminal records for those found not guilty of crimes or against  
whom charges have been dismissed; expungement of criminal records for those  
that have successfully completed all requirements of a deferred adjudication or  
pretrial diversion; exceptions.**

1 (a) Any person who has been charged with a criminal offense under the laws of this state  
2 and who has been found not guilty of the offense, or against whom charges have been dismissed,  
3 and not in exchange for a guilty plea to another offense resulting in a conviction, may file a civil  
4 petition in the circuit court in which the charges were filed to expunge all records relating to the  
5 arrest, charge, or other matters arising out of the arrest or charge. Any person whose charges  
6 have been dismissed following a full and successful completion of a pre-trial diversion pursuant  
7 to §61-11-22 of this code, or whose charges have been dismissed following the full and successful  
8 completion of a deferred adjudication pursuant to §61-11-22a of this code, may file a civil petition  
9 in the circuit court for expungement of all charges originally brought, provided that the charges  
10 sought to be expunged arose from the same transaction or occurrence, and all records relating  
11 to the arrest, charges, or other matters arising out of the arrest or charges may be expunged:  
12 *Provided*, That no record in the Division of Motor Vehicles may be expunged by virtue of any order  
13 of expungement entered pursuant to §17C-5-2b of this code nor may any charges ultimately  
14 dismissed by way of full and successful completion of any deferred adjudication be expunged for  
15 violations of §61-2-28(a), §61-2-28(b), §61-2-9(a), §61-2-9a, §61-2-9(b), or §61-2-9(c) of this code  
16 where the alleged victim is a family or household member as defined in §48-27-204 of this code:  
17 *Provided, further*, That any person who has previously been convicted of a felony may not file a  
18 petition for expungement pursuant to this section. The term records as used in this section

19 includes, but is not limited to, arrest records, fingerprints, photographs, index references, or other  
20 data whether in documentary or electronic form, relating to the arrest, charge, or other matters  
21 arising out of the arrest or charge. Criminal investigation reports and all records relating to  
22 offenses subject to the provisions of §15-12-1 *et seq.* of this code because the person was found  
23 not guilty by reason of mental illness, intellectual disability, or addiction are exempt from the  
24 provisions of this section.

25 (b) The expungement petition shall be filed not sooner than 60 days following the order of  
26 acquittal or dismissal by the court. Any court entering an order of acquittal or dismissal shall inform  
27 the person who has been found not guilty or against whom charges have been dismissed of his  
28 or her rights to file a petition for expungement pursuant to this section.

29 (c) Following the filing of the petition, the court may set a date for a hearing. If the court  
30 does so, it shall notify the prosecuting attorney and the arresting agency of the petition and provide  
31 an opportunity for a response to the expungement petition.

32 (d) If the court finds that there are no current charges or proceedings pending relating to  
33 the matter for which the expungement is sought, the court may grant the petition and order the  
34 sealing of all records in the custody of the court and expungement of any records in the custody  
35 of any other agency or official including law enforcement records. Every agency with records  
36 relating to the arrest, charge, or other matters arising out of the arrest or charge, that is ordered  
37 to expunge records, shall certify to the court within 60 days of the entry of the expungement order,  
38 that the required expungement has been completed. All orders enforcing the expungement  
39 procedure shall also be sealed.

40 (e) Upon expungement, the proceedings in the matter shall be considered never to have  
41 occurred. The court and other agencies shall reply to any inquiry that no record exists on the  
42 matter. The person whose record is expunged shall not have to disclose the fact of the record or  
43 any matter relating thereto on an application for employment, credit, or other type of application.

44           (f) Inspection of the sealed records in the court's possession may thereafter be permitted  
45 by the court only upon a motion by the person who is the subject of the records or upon a petition  
46 filed by a prosecuting attorney that inspection and possible use of the records in question is  
47 necessary to the investigation or prosecution of a crime in this state or another jurisdiction. If the  
48 court finds that the interests of justice will be served by granting the petition, it may be granted.

49           (g) There shall be no filing fees charged or costs assessed for filing an action pursuant to  
50 this section.



The Clerk of the House of Delegates and the Clerk of the Senate hereby certify that the foregoing bill is correctly enrolled.

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*Clerk of the House of Delegates*

.....  
*Clerk of the Senate*

Originated in the House of Delegates.

In effect ninety days from passage.

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*Speaker of the House of Delegates*

.....  
*President of the Senate*

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The within is ..... this the.....  
Day of ....., 2024.

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*Governor*