

1 COMMITTEE SUBSTITUTE

2 FOR

3 **Senate Bill No. 547**

4 (By Senators Wills, Klempa, Stollings and Kessler (Mr.  
5 President))

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7 [Originating in the Committee on the Judiciary;  
8 reported February 22, 2012.]  
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13 A BILL to amend and reenact §61-11-26 of the Code of West Virginia,  
14 1931, as amended, relating to the expungement of certain  
15 criminal convictions generally; permitting expungement of  
16 certain felony convictions; establishing the amount of time  
17 after conviction of a felony before expungement may be sought;  
18 and creating exceptions.

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

20 That §61-11-26 of the Code of West Virginia, 1931, as amended,  
21 be amended and reenacted to read as follows:

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

23 **§61-11-26. Expungement of certain criminal convictions;**  
24 **procedures; effect.**

25 (a) Any person convicted of a misdemeanor or felony offense or

1 offenses arising from the same transaction committed ~~while he or~~  
2 ~~she was between the ages of eighteen and twenty-six, inclusive,~~  
3 may, pursuant to ~~the provisions of~~ this section, petition the  
4 circuit court in which the conviction or convictions occurred for  
5 expungement of the conviction or convictions and the records  
6 associated therewith. The clerk of the circuit court shall charge  
7 and collect in advance the same fee as is charged for instituting  
8 a civil action pursuant to subdivision (1), subsection (a), section  
9 eleven, article one, chapter fifty-nine of this code for a petition  
10 for expungement.

11 (b) Expungement shall not be available for any conviction of  
12 an offense listed in subsection (i) of this section. The relief  
13 afforded by this subsection is only available to persons having no  
14 other prior or subsequent convictions other than minor traffic  
15 violations at the time the petition is filed: *Provided*, That at  
16 the time the petition is filed and during the time the petition is  
17 pending, petitioner may not be the subject of an arrest or any  
18 other pending criminal proceeding. No person shall be eligible for  
19 expungement pursuant to ~~the provisions of~~ subsection (a) of this  
20 section until one year after ~~the conviction,~~ completion of any  
21 sentence of incarceration or ~~probation~~ completion of any period of  
22 supervision, whichever is later in time, and in the case of a  
23 felony, three years after completion of any sentence of  
24 incarceration or any period of supervision, whichever is later in  
25 time.

26 (c) Each petition to expunge a conviction or convictions

1 pursuant to this section shall be verified under oath and include  
2 the following information:

3 (1) Petitioner's current name and all other legal names or  
4 aliases by which petitioner has been known at any time;

5 (2) All of petitioner's addresses from the date of the offense  
6 or alleged offense in connection with which an expungement order is  
7 sought to date of the petition;

8 (3) Petitioner's date of birth and Social Security number;

9 (4) Petitioner's date of arrest, the court of jurisdiction and  
10 criminal complaint, indictment, summons or case number;

11 (5) The statute or statutes and offense or offenses for which  
12 petitioner was charged and of which petitioner was convicted;

13 (6) The names of any victim or victims, or that there were no  
14 identifiable victims;

15 (7) Whether there is any current order for restitution,  
16 protection, restraining order or other no contact order prohibiting  
17 the petitioner from contacting the victims or whether there has  
18 ever been a prior order for restitution, protection or restraining  
19 order prohibiting the petitioner from contacting the victim. If  
20 there is such a current order, petitioner shall attach a copy of  
21 that order to his or her petition;

22 (8) The court's disposition of the matter and punishment  
23 imposed, if any;

24 (9) Why expungement is sought, such as, but not limited to,  
25 employment or licensure purposes, and why it should be granted;

26 (10) The steps the petitioner has taken since the time of the

1 offenses toward personal rehabilitation, including treatment, work  
2 or other personal history that demonstrates rehabilitation;

3 (11) Whether petitioner has ever been granted expungement or  
4 similar relief regarding a criminal conviction by any court in this  
5 state, any other state or by any federal court; and

6 (12) Any supporting documents, sworn statements, affidavits or  
7 other information supporting the petition to expunge.

8 (d) A copy of the petition, with any supporting documentation,  
9 shall be served by petitioner pursuant to the rules of the trial  
10 court upon the Superintendent of the State Police; the prosecuting  
11 attorney of the county of conviction; the chief of police or other  
12 executive head of the municipal police department wherein the  
13 offense was committed; the chief law-enforcement officer of any  
14 other law-enforcement agency which participated in the arrest of  
15 the petitioner; the superintendent or warden of any institution in  
16 which the petitioner was confined; the ~~magistrate court or~~  
17 ~~municipal~~ court which disposed of the petitioner's criminal charge;  
18 and all other state and local government agencies whose records  
19 would be affected by the proposed expungement. The prosecutorial  
20 office that had jurisdiction over the offense or offenses for which  
21 expungement is sought shall serve by first class mail the petition  
22 for expungement, accompanying documentation and any proposed  
23 expungement order to any identified victims.

24 (e) Upon receipt of a petition for expungement, the  
25 Superintendent of the State Police; the prosecuting attorney of the  
26 county of conviction; the chief of police or other executive head

1 of the municipal police department wherein the offense was  
2 committed; the chief law-enforcement officer of any other law-  
3 enforcement agency which participated in the arrest of the  
4 petitioner; the superintendent or warden of any institution in  
5 which the petitioner was confined; the ~~magistrate court or~~  
6 ~~municipal~~ court which disposed of the petitioner's criminal charge  
7 or charges; all other state and local government agencies whose  
8 records would be affected by the proposed expungement and any other  
9 interested individual or agency that desires to oppose the  
10 expungement shall, within thirty days of receipt of the petition,  
11 file a notice of opposition with the court with supporting  
12 documentation and sworn statements setting forth the reasons for  
13 resisting the petition for expungement. A copy of any notice of  
14 opposition with supporting documentation and sworn statements shall  
15 be served upon the petitioner in accordance with trial court rules.  
16 The petitioner may file a reply no later than ten days after  
17 service of any notice of opposition to the petition for  
18 expungement.

19 (f) The burden of proof shall be on the petitioner to prove by  
20 clear and convincing evidence that: (1) The conviction or  
21 convictions for which expungement is sought are the only  
22 convictions against petitioner and that the conviction or  
23 convictions are not excluded from expungement by subsection ~~(j)~~ (i)  
24 of this section; (2) that the requisite time period has passed  
25 since the conviction or convictions or end of the completion of any  
26 sentence of incarceration or probation; (3) petitioner has no

1 criminal charges pending against him or her; (4) the expungement is  
2 consistent with the public welfare; (5) petitioner has, by his or  
3 her behavior since the conviction or convictions, evidenced that he  
4 or she has been rehabilitated and is law abiding; and (6) any other  
5 matter deemed appropriate or necessary by the court to make a  
6 determination regarding the petition for expungement.

7 (g) Within sixty days of the filing of a petition for  
8 expungement the circuit court shall:

9 (1) Summarily grant the petition;

10 (2) Set the matter for hearing; or

11 (3) Summarily deny the petition if the court determines that  
12 the petition is insufficient or, based upon supporting  
13 documentation and sworn statements filed in opposition to the  
14 petition, the court determines that the petitioner, as a matter of  
15 law, is not entitled to expungement.

16 (h) If the court sets the matter for hearing, all interested  
17 parties who have filed a notice of opposition shall be notified.  
18 At the hearing, the court may inquire into the background of the  
19 petitioner and shall have access to any reports or records relating  
20 to the petitioner that are on file with any law-enforcement  
21 authority, the institution of confinement, if any, and parole  
22 authority or other agency which was in any way involved with the  
23 petitioner's arrest, conviction, sentence and post-conviction  
24 supervision, including any record of arrest or conviction in any  
25 other state or federal court. The court may hear testimony of  
26 witnesses and any other matter the court deems proper and relevant

1 to its determination regarding the petition. The court shall enter  
2 an order reflecting its ruling on the petition for expungement with  
3 appropriate findings of fact and conclusions of law.

4 ~~(i) No person shall be eligible for expungement of a~~  
5 ~~conviction and the records associated therewith pursuant to the~~  
6 ~~provisions of subsection (a) of this section for involving the use~~  
7 ~~or exhibition of a deadly weapon or dangerous instrument; of the~~  
8 ~~provisions of subsection (b) or (c), section nine, article two of~~  
9 ~~this chapter where the victim was a spouse, a person with whom the~~  
10 ~~person seeking expungement had a child in common or with whom the~~  
11 ~~person seeking expungement ever cohabitated prior to the offense,~~  
12 ~~any violation of the provisions of section twenty-eight of said~~  
13 ~~article, any conviction for driving under the influence of alcohol,~~  
14 ~~controlled substances or a conviction for a violation of section~~  
15 ~~three, article four, chapter seventeen b of this code or section~~  
16 ~~nineteen, article eight of this chapter.~~

17 (i) No person is eligible for expungement of a conviction and  
18 the records associated there with pursuant to subsection (a) of  
19 this section for:

20 (1) Any felony crime of violence against the person or any  
21 misdemeanor offense involving the intentional infliction of  
22 physical injury;

23 (2) Any felony offense when the victim of the crime was a  
24 minor;

25 (3) Any misdemeanor violation of the provisions of article  
26 eight-b of this chapter when the petitioner was eighteen years of

1 age or older and the victim was twelve years of age or younger at  
2 the time the violation occurred;

3 (4) Any offense where the petitioner used or exhibited a  
4 deadly weapon or dangerous instrument;

5 (5) Any violation of section twenty-eight , article two of  
6 this chapter or subsections (b) or (c), section nine, article two  
7 of this chapter where the victim was spouse, a person seeking  
8 expungement had a child in common or with whom the person seeking  
9 expungement ever cohabited prior to the offense prior to the  
10 offense.

11 (6) Any conviction for driving under the influence of alcohol  
12 or a controlled substance;

13 (7) Any conviction for a violation of section three, article  
14 four, chapter seventeen-b of this code; and

15 (8) Any violation of section nineteen, article eight of this  
16 chapter.

17 As used in this section a "felony crime of violence against  
18 the person" means those felony offenses set forth in articles two,  
19 three-e, eight-b, eight-d, chapter sixty-one of this code and  
20 "felony offenses where the victim was a minor" means felony  
21 violation of articles eight, eight-a, eight-c and eight-d.

22 (j) If the court grants the petition for expungement, it shall  
23 order the sealing of all records in the custody of the court and  
24 expungement of any records in the custody of any other agency or  
25 official, including law-enforcement records. Every agency with  
26 records relating to the arrest, charge or other matters arising out

1 of the arrest or conviction that is ordered to expunge records  
2 shall certify to the court within sixty days of the entry of the  
3 expungement order that the required expungement has been completed.  
4 All orders enforcing the expungement procedure shall also be  
5 sealed. For the purposes of this section, "records" do not include  
6 the records of the Governor, the Legislature or the Secretary of  
7 State that pertain to a grant of pardon. Such records that pertain  
8 to a grant of pardon are not subject to an order of expungement.  
9 The amendment to this section during the fourth extraordinary  
10 session of the Legislature in the year 2009 is not for the purpose  
11 of changing existing law, but is intended to clarify the intent of  
12 the Legislature as to existing law regarding expungement.

13 (k) Upon expungement, the proceedings in the matter shall be  
14 deemed never to have occurred. The court and other agencies shall  
15 reply to any inquiry that no record exists on the matter. The  
16 person whose record is expunged shall not have to disclose the fact  
17 of the record or any matter relating thereto on an application for  
18 employment, credit or other type of application.

19 (l) Inspection of the sealed records in the court's possession  
20 may thereafter be permitted by the court only upon a motion by the  
21 person who is the subject of the records or upon a petition filed  
22 by a prosecuting attorney that inspection and possible use of the  
23 records in question are necessary to the investigation or  
24 prosecution of a crime in this state or another jurisdiction. If  
25 the court finds that the interests of justice will be served by  
26 granting a petition to inspect the sealed record, it may be

1 granted.