

1 COMMITTEE SUBSTITUTE

2 FOR

3 **Senate Bill No. 365**

4 (By Senators Kessler (Mr. President), Chafin, Laird, Miller and  
5 Stollings)

6 \_\_\_\_\_  
7 [Originating in the Committee on the Judiciary;  
8 reported March 29, 2013.]  
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12 A BILL to amend and reenact §61-11-26 of the Code of West Virginia,  
13 1931, as amended, relating to the expungement of certain  
14 criminal convictions generally; permitting expungement of  
15 certain felony convictions; establishing the amount of time  
16 after conviction of a felony before expungement may be sought;  
17 creating exceptions; clarifying that retirement or employment  
18 benefits lost due to conviction are not reinstated due to  
19 expungement; declaring that expungement does not preclude a  
20 person who has received an expungement from being subject to  
21 sentencing enhancements for second and subsequent violations;  
22 declaring that information in State Police database sufficient  
23 to prove existence of prior convictions; establishing a fee to  
24 offset State Police costs associated with administering this  
25 section and the Criminal Identification Bureau; establishing  
26 a special revenue account in the State Treasury for funds

1 received; and allowing funds to not expire.

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

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

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

6 **§61-11-26. Expungement of certain criminal convictions;**  
7 **procedures; effect.**

8 (a) Any person convicted of a misdemeanor or felony offense or  
9 offenses arising from the same transaction ~~committed while he or~~  
10 ~~she was between the ages of eighteen and twenty-six, inclusive,~~  
11 may, pursuant to ~~the provisions of~~ this section, petition the  
12 circuit court in which the conviction or convictions occurred for  
13 expungement of the conviction or convictions and the records  
14 associated ~~therewith~~ with the conviction or convictions. The clerk  
15 of the circuit court shall charge and collect in advance the same  
16 fee as is charged for instituting a civil action pursuant to  
17 subdivision (1), subsection (a), section eleven, article one,  
18 chapter fifty-nine of this code for a petition for expungement.

19 (b) Expungement ~~shall~~ is not ~~be~~ available for any conviction  
20 of an offense listed in subsection (i) of this section. The relief  
21 afforded by this subsection is only available to persons having no  
22 other prior or subsequent convictions other than minor traffic  
23 violations at the time the petition is filed: *Provided,* That at  
24 the time the petition is filed and during the time the petition is  
25 pending, petitioner may not be the subject of an arrest or any

1 other pending criminal proceeding. No person ~~shall be~~ is eligible  
2 for expungement pursuant to ~~the provisions of~~ subsection (a) of  
3 this section until one year after ~~the conviction,~~ completion of any  
4 sentence of incarceration or completion of any period of  
5 supervision, whichever is later in time, and in the case of a  
6 felony, five years after completion of any sentence of  
7 incarceration or ~~probation~~ any period of supervision, whichever is  
8 later in time.

9 (c) Each petition to expunge a conviction or convictions  
10 pursuant to this section shall be verified under oath and include  
11 the following information:

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

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

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

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

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

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

24 (7) Whether there is any current order for restitution,  
25 protection, restraining order or other no contact order prohibiting  
26 the petitioner from contacting the victims or whether there has

1 ever been a prior order for restitution, protection or restraining  
2 order prohibiting the petitioner from contacting the victim. If  
3 there is such a current order, petitioner shall attach a copy of  
4 that order to his or her petition;

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

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

9 (10) The steps the petitioner has taken since the time of the  
10 offenses toward personal rehabilitation, including treatment, work  
11 or other personal history that demonstrates rehabilitation;

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

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

17 (d) A copy of the petition, with any supporting documentation,  
18 shall be served by petitioner pursuant to the rules of the trial  
19 court upon the Superintendent of the State Police; the prosecuting  
20 attorney of the county of conviction; the chief of police or other  
21 executive head of the municipal police department wherein the  
22 offense was committed; the chief law-enforcement officer of any  
23 other law-enforcement agency which participated in the arrest of  
24 the petitioner; the superintendent or warden of any institution in  
25 which the petitioner was confined; the ~~magistrate court or~~  
26 ~~municipal~~ court which disposed of the petitioner's criminal charge;

1 and all other state and local government agencies whose records  
2 would be affected by the proposed expungement. The prosecutorial  
3 office that had jurisdiction over the offense or offenses for which  
4 expungement is sought shall serve by first class mail the petition  
5 for expungement, accompanying documentation and any proposed  
6 expungement order to any identified victims.

7 (e) Upon receipt of a petition for expungement, the  
8 Superintendent of the State Police; the prosecuting attorney of the  
9 county of conviction; the chief of police or other executive head  
10 of the municipal police department wherein the offense was  
11 committed; the chief law-enforcement officer of any other  
12 law-enforcement agency which participated in the arrest of the  
13 petitioner; the superintendent or warden of any institution in  
14 which the petitioner was confined; the ~~magistrate court~~ or  
15 ~~municipal~~ court which disposed of the petitioner's criminal charge  
16 or charges; all other state and local government agencies whose  
17 records would be affected by the proposed expungement; and any  
18 other interested individual or agency that desires to oppose the  
19 expungement shall, within thirty days of receipt of the petition,  
20 file a notice of opposition with the court with supporting  
21 documentation and sworn statements setting forth the reasons for  
22 resisting the petition for expungement. A copy of any notice of  
23 opposition with supporting documentation and sworn statements shall  
24 be served upon the petitioner in accordance with trial court rules.  
25 The petitioner may file a reply no later than ten days after  
26 service of any notice of opposition to the petition for

1 expungement.

2 (f) The burden of proof ~~shall be~~ is on the petitioner to prove  
3 by clear and convincing evidence that:

4 (1) The conviction or convictions for which expungement is  
5 sought are the only convictions against petitioner and that the  
6 conviction or convictions are not excluded from expungement by  
7 subsection ~~(j)~~ (i) of this section;

8 (2) ~~that~~ The requisite time period has passed since the  
9 conviction or convictions or end of the completion of any sentence  
10 of incarceration or probation;

11 (3) Petitioner has no criminal charges pending against him or  
12 her;

13 (4) The expungement is consistent with the public welfare;

14 (5) Petitioner has, by his or her behavior since the  
15 conviction or convictions, evidenced that he or she has been  
16 rehabilitated and is law abiding; and

17 (6) Any other matter deemed appropriate or necessary by the  
18 court to make a determination regarding the petition for  
19 expungement.

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

22 (1) Summarily grant the petition;

23 (2) Set the matter for hearing; or

24 (3) Summarily deny the petition if the court determines that  
25 the petition is insufficient or, based upon supporting  
26 documentation and sworn statements filed in opposition to the

1 petition, the court determines that the petitioner, as a matter of  
2 law, is not entitled to expungement.

3 (h) If the court sets the matter for hearing, all interested  
4 parties who have filed a notice of opposition shall be notified.  
5 At the hearing, the court may inquire into the background of the  
6 petitioner and shall have access to any reports or records relating  
7 to the petitioner that are on file with any law-enforcement  
8 authority, the institution of confinement, if any, and parole  
9 authority or other agency which was in any way involved with the  
10 petitioner's arrest, conviction, sentence and post-conviction  
11 supervision, including any record of arrest or conviction in any  
12 other state or federal court. The court may hear testimony of  
13 witnesses and any other matter the court deems proper and relevant  
14 to its determination regarding the petition. The court shall enter  
15 an order reflecting its ruling on the petition for expungement with  
16 appropriate findings of fact and conclusions of law.

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

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

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

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

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

4 ~~involving the use or exhibition of~~ (4) Any offense where the  
5 petitioner used or exhibited a deadly weapon or dangerous  
6 instrument;

7 (5) Any violation of section twenty-eight, article two of this  
8 chapter or ~~of the provisions of~~ subsection (b) or (c), section  
9 nine, article two of this chapter where the victim was a spouse, a  
10 person with whom the person seeking expungement had a child in  
11 common or with whom the person seeking expungement ever cohabitated  
12 prior to the offense; ~~any violation of the provisions of section~~  
13 ~~twenty-eight of said article; a~~

14 (6) Any conviction for driving under the influence of alcohol  
15 or a controlled substances substance; or a

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

18 (8) Any violation of section nineteen, article eight of this  
19 chapter.

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

25 (j) If the court grants the petition for expungement, it shall  
26 order the sealing of all records in the custody of the court and



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

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

23 (l) Inspection of the sealed records in the court's possession  
24 may thereafter be permitted by the court only upon a motion by the  
25 person who is the subject of the records or upon a petition filed  
26 by a prosecuting attorney that inspection and possible use of the

1 records in question are necessary to the investigation or  
2 prosecution of a crime in this state or another jurisdiction. If  
3 the court finds that the interests of justice will be served by  
4 granting a petition to inspect the sealed record, it may be  
5 granted.

6 (m) Nothing in this section may be construed to allow a person  
7 obtaining relief pursuant to this section to be eligible for any  
8 retirement or employment benefit which he or she lost or forfeited  
9 due to the conviction or convictions expunged.

10 (n) Notwithstanding the provisions of this section to the  
11 contrary, any person who has obtained relief pursuant to the  
12 provisions of this section who is subsequently convicted of another  
13 offense in a court of this state, another state or the United  
14 States shall be subject to any sentencing enhancement based upon  
15 having a prior conviction including, but not limited to, the  
16 provision of section eighteen, article eleven, chapter sixty-one of  
17 this code. Notwithstanding any provisions of law or rule to the  
18 contrary, should a person having received relief pursuant to this  
19 section be prosecuted or convicted of another offense subsequent to  
20 the expungement and thereby subject to an sentencing enhancement  
21 the records maintained by the West Virginia State Police pursuant  
22 to subsection (o) of this section shall constitute sufficient  
23 evidence of the prior conviction.

24 (o) Any court granting relief pursuant to the provisions of  
25 this section shall supply a copy of the order of expungement to the  
26 West Virginia State Police along with information identifying the

1 petitioner and containing information regarding the offense  
2 expunged to be placed in a confidential file accessible by  
3 prosecuting attorney and judicial officers for the purpose of  
4 ensuring that relief may not be afforded pursuant to this section  
5 more than once.

6 (p) In addition to any fees or costs required by this code,  
7 any person filing an action pursuant to this section shall pay,  
8 upon filing, a fee of \$100, which shall be transferred to the West  
9 Virginia State Police to assist in offsetting administrative costs  
10 associated with this section and the maintaining of offender  
11 registries.

12 (g) There is hereby created in the State Treasury a special  
13 revenue account designated the West Virginia State Police Criminal  
14 Justice Information Services Fund which shall consist of money  
15 deposited into the fund from fees collected under this section and  
16 moneys appropriated by the Legislature. Funds appropriated to the  
17 West Virginia State Police Criminal Justice Information Services  
18 Fund in accordance with this section that remain unallocated or  
19 unexpended at the end of a fiscal year do not expire, but remain in  
20 the line item to which they were originally appropriated and are  
21 available in the next fiscal year to be used for the purposes of  
22 operating and maintaining the West Virginia State Police Criminal  
23 Identification Bureau and other criminal justice information  
24 services registries operated by the State Police.