

WEST VIRGINIA LEGISLATURE

2016 REGULAR SESSION

Introduced

Senate Bill 411

BY SENATORS WALTERS, LAIRD, KESSLER, MILLER,

FACEMIRE, ROMANO AND GAUNCH

[Introduced January 27, 2016;

Referred to the Committee on the Judiciary.]

1 A BILL to amend and reenact §61-11-26 of the Code of West Virginia, 1931, as amended, relating
 2 to creating Second Chance for Employment Act; allowing expungement of certain felony
 3 convictions; setting forth conditions; establishing procedure; creating exceptions; and
 4 establishing its effect.

Be it enacted by the Legislature of West Virginia:

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

ARTICLE 11. GENERAL PROVISIONS CONCERNING CRIMES.

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

1 (a) For the purposes of this section, the terms “nonviolent misdemeanor” or “nonviolent
 2 felony”, mean any misdemeanor or felony except the following:

3 (1) Any offense involving the infliction of serious physical injury;

4 (2) Any of the sex-related or stalking offenses provided by:

5 (A) Section nine-a, article two of this chapter;

6 (B) Section twelve, article eight of this chapter;

7 (C) Section two, article eight-a of this chapter;

8 (D) Section four, article eight-a of this chapter;

9 (E) Section five, article eight-a of this chapter;

10 (F) Section three, article eight-b of this chapter;

11 (G) Section four, article eight-b of this chapter;

12 (H) Section five, article eight-b of this chapter;

13 (I) Section seven, article eight-b of this chapter;

14 (J) Section eight, article eight-b of this chapter;

15 (K) Section nine, article eight-b of this chapter;

16 (L) Section ten, article eight-b of this chapter;

17 (M) Section two, article eight-c of this chapter;

- 18 (N) Section three, article eight-c of this chapter;
- 19 (O) Section three-a, article eight-d of this chapter;
- 20 (P) Section five, article eight-d of this chapter; and
- 21 (Q) Section six, article eight-d of this chapter;
- 22 (3) An offense involving the use or exhibition of a firearm, deadly weapon or dangerous
- 23 instrument;
- 24 (4) Any felony offense in article four, chapter sixty-a of this code where the offense involves
- 25 possession with the intent to sell or deliver to a minor child;
- 26 (5) Any felony crime of violence involving offenses contained in articles two, three-e, eight-
- 27 b or eight-d of this chapter, where the victim was a minor child;
- 28 (6) A violation of the provisions of subsection (b) or (c), section nine, article two of this
- 29 chapter where the victim was a spouse, a person with whom the person seeking expungement
- 30 had a child in common or with whom the person seeking expungement ever cohabitated prior to
- 31 the offense; and
- 32 (7) Any violation of the provisions of section twenty-eight, article two of this chapter.
- 33 (b) Notwithstanding any other provision of law, any person convicted of a nonviolent felony
- 34 or nonviolent misdemeanor offense or offenses arising from the same transaction committed while
- 35 he or she was between the ages of eighteen and twenty-six, inclusive, in the same session of
- 36 court, may, pursuant to the provisions of this section, petition the circuit court in which the
- 37 conviction or convictions occurred for expungement of the conviction or convictions and the
- 38 records associated therewith. The clerk of the circuit court shall charge and collect in advance
- 39 the same fee as is charged for instituting a civil action pursuant to subdivision (1), subsection (a),
- 40 section eleven, article one, chapter fifty-nine of this code for a petition for expungement.
- 41 ~~(b) Expungement shall not be available for any conviction of an offense listed in subsection~~
- 42 ~~(i) of this section.~~
- 43 (c) The relief afforded by this subsection section is only available to persons having no

44 other prior or subsequent convictions other than minor traffic violations at the time the petition is
45 filed: *Provided*, That at the time the petition is filed and during the time the petition is pending,
46 petitioner ~~may not be~~ is not the subject of an arrest or any other pending criminal proceeding.

47 ~~(d) (1) No~~ A person shall be is not eligible for expungement pursuant to the provisions of
48 ~~subsection (a) of this section~~ of a nonviolent misdemeanor or misdemeanors until one year after
49 the conviction, completion of any sentence of incarceration or probation, whichever is later in time.

50 (2) A person is not eligible for expungement of a nonviolent felony or felonies until five
51 years after the conviction, completion of any sentence of incarceration or parole, whichever is
52 later in time.

53 ~~(e)~~ (e) Each petition to expunge a conviction or convictions pursuant to this section shall
54 be verified under oath and include the following information:

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

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

59 (3) Petitioner's date of birth and social security number;

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

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

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

65 (7) Whether there is any current order for restitution, protection, restraining order or other
66 no contact order prohibiting the petitioner from contacting the victims or whether there has ever
67 been a prior order for restitution, protection or restraining order prohibiting the petitioner from
68 contacting the victim. If there is such a current order, petitioner shall attach a copy of that order
69 to his or her petition;

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

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

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

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

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

79 ~~(d)~~ (f) A copy of the petition, with any supporting documentation, shall be served by
80 petitioner pursuant to the rules of the trial court upon the superintendent of the State Police; the
81 prosecuting attorney of the county of conviction; the chief of police or other executive head of the
82 municipal police department wherein the offense was committed; the chief law-enforcement
83 officer of any other law-enforcement agency which participated in the arrest of the petitioner; the
84 superintendent or warden of any institution in which the petitioner was confined; the magistrate
85 court or municipal court which disposed of the petitioner's criminal charge; and all other state and
86 local government agencies whose records would be affected by the proposed expungement. The
87 prosecutorial office that had jurisdiction over the offense or offenses for which expungement is
88 sought shall serve by first class mail the petition for expungement, accompanying documentation
89 and any proposed expungement order to any identified victims.

90 ~~(e)~~ (g) Upon receipt of a petition for expungement, the superintendent of the State Police;
91 the prosecuting attorney of the county of conviction; the chief of police or other executive head of
92 the municipal police department wherein the offense was committed; the chief law-enforcement
93 officer of any other law-enforcement agency which participated in the arrest of the petitioner; the
94 superintendent or warden of any institution in which the petitioner was confined; the magistrate
95 court or municipal court which disposed of the petitioner's criminal charge; all other state and local

96 government agencies whose records would be affected by the proposed expungement and any
97 other interested individual or agency that desires to oppose the expungement shall, within thirty
98 days of receipt of the petition, file a notice of opposition with the court with supporting
99 documentation and sworn statements setting forth the reasons for resisting the petition for
100 expungement. A copy of any notice of opposition with supporting documentation and sworn
101 statements shall be served upon the petitioner in accordance with trial court rules. The petitioner
102 may file a reply no later than ten days after service of any notice of opposition to the petition for
103 expungement.

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

106 (1) The conviction or convictions for which expungement is sought are the only convictions
107 against petitioner and that the conviction or convictions are not excluded from expungement by
108 subsection ~~(f)~~ (a) of this section;

109 (2) That the requisite time period has passed since the conviction or convictions or end of
110 the completion of any sentence of incarceration or probation;

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

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

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

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

117 ~~(g)~~ (i) Within sixty days of the filing of a petition for expungement the circuit court shall:

118 (1) In the case of a nonviolent misdemeanor:

119 ~~(1)~~ (A) Summarily grant the petition;

120 ~~(2)~~ (B) Set the matter for hearing; or

121 ~~(3)~~ (C) Summarily deny the petition if the court determines that the petition is insufficient

122 or, based upon supporting documentation and sworn statements filed in opposition to the petition,
123 the court determines that the petitioner, as a matter of law, is not entitled to expungement.

124 (2) In the case of a nonviolent felony:

125 (A) Summarily and preliminarily, grant the petition subject to the provisions of subsection
126 (l) of this section;

127 (B) Set the matter for hearing pursuant to subsection (j); or

128 (C) Summarily deny the petition if the court determines that the petition is insufficient or,
129 based upon supporting documentation and sworn statements filed in opposition to the petition,
130 the court determines that the petitioner, as a matter of law, is not entitled to expungement.

131 ~~(h)~~ (j) If the court sets the matter for hearing, all interested parties who have filed a notice
132 of opposition shall be notified. At the hearing, the court may inquire into the background of the
133 petitioner and shall have access to any reports or records relating to the petitioner that are on file
134 with any law-enforcement authority, the institution of confinement, if any, and parole authority or
135 other agency which was in any way involved with the petitioner's arrest, conviction, sentence and
136 post-conviction supervision, including any record of arrest or conviction in any other state or
137 federal court. The court may hear testimony of witnesses and any other matter the court deems
138 proper and relevant to its determination regarding the petition. The court shall enter an order
139 reflecting its ruling on the petition for expungement with appropriate findings of fact and
140 conclusions of law.

141 ~~(i) No person shall be eligible for expungement of a conviction and the records associated~~
142 ~~therewith pursuant to the provisions of subsection (a) of this section for any violation involving the~~
143 ~~infliction of serious physical injury; involving the provisions of article eight-b of this chapter where~~
144 ~~the petitioner was eighteen years old, or older, at the time the violation occurred and the victim~~
145 ~~was twelve years of age, or younger, at the time the violation occurred; involving the use or~~
146 ~~exhibition of a deadly weapon or dangerous instrument; of the provisions of subsection (b) or (c),~~
147 ~~section nine, article two of this chapter where the victim was a spouse, a person with whom the~~

148 ~~person seeking expungement had a child in common or with whom the person seeking~~
149 ~~expungement ever cohabitated prior to the offense; any violation of the provisions of section~~
150 ~~twenty-eight of said article; a conviction for driving under the influence of alcohol, controlled~~
151 ~~substances or a conviction for a violation of section three, article four, chapter seventeen-b of this~~
152 ~~code or section nineteen, article eight of this chapter.~~

153 ~~(j)~~ (k) If the court grants the petition for expungement, it shall order:

154 (1) The sealing of all records in the custody of the court and expungement of any records
155 in the custody of any other agency or official, including law-enforcement records.

156 (2) Every agency with records relating to the arrest, charge or other matters arising out of
157 the arrest or conviction that is ordered to expunge records shall certify to the court within sixty
158 days of the entry of the expungement order that the required expungement has been completed.
159 The agency shall also reverse any administrative actions taken against a person whose record is
160 expunged under this section as a result of the charges or convictions expunged. This subsection
161 does not apply to the Department of Justice for DNA records and samples stored in the state DNA
162 Database and the state DNA Databank or to fingerprint records. All orders enforcing the
163 expungement procedure shall also be sealed. ~~For the purposes of this section, "records" do not~~
164 ~~include the records of the Governor, the Legislature or the Secretary of State that pertain to a~~
165 ~~grant of pardon. Such records that pertain to a grant of pardon are not subject to an order of~~
166 ~~expungement. The amendment to this section during the fourth extraordinary session of the~~
167 ~~Legislature in the year 2009 is not for the purpose of changing existing law, but is intended to~~
168 ~~clarify the intent of the Legislature as to existing law regarding expungement.~~

169 (l) If the court grants the petition for expungement of a nonviolent felony or felonies
170 pursuant to subdivision (1), subsection (i), the court's order shall be preliminary and subject to a
171 motion by the petitioner to make the order a final order of expungement pursuant to subsection
172 (m) of this section.

173 (1) A motion to make the preliminary order a final order of expungement may not be made

174 until five years have elapsed from the granting of the preliminary order.

175 (2) A preliminary order granting a petition for the expungement of a nonviolent felony shall
176 order the sealing of all records in the custody of the court and of any records in the custody of any
177 other agency or official, including law-enforcement records related to the nonviolent felony or
178 felonies that is the subject of the petition.

179 (A) This subdivision does not preclude access to a sealed record for a legitimate reason
180 pursuant to subsection (n) of this section.

181 (B) Within sixty days after entry of an order under this subdivision, each custodian of court
182 records that are subject to the order of sealing shall advise in writing the court and the parties of
183 compliance with the order.

184 (m) A petitioner who is granted a preliminary order pursuant to subsection (l) of this
185 section, may file a motion for a final order of expungement after five years have elapsed from the
186 granting of the preliminary order.

187 (1) A motion filed under this subsection shall be verified under oath and include the
188 following information:

189 (A) Whether the petitioner is the subject of any outstanding warrants or pending criminal
190 cases;

191 (B) Whether the petitioner has any other felony or misdemeanor convictions other than a
192 traffic violation since the entry of the preliminary order; and

193 (C) Whether the petitioner has outstanding restitution orders or civil judgments
194 representing amounts ordered for restitution entered against the petitioner since the entry of the
195 preliminary order.

196 (2) The provisions of subsections (f), (g) and (h) of this section apply to a motion filed
197 under this subsection.

198 (3) Within sixty days of the filing of a motion for a final order of expungement, the circuit
199 court shall:

200 (A) Summarily grant the motion;

201 (B) Set the matter for hearing pursuant to subsection (j) of this section; or

202 (C) Summarily deny the petition if the court determines that the motion is insufficient or,
203 based upon supporting documentation and sworn statements filed in opposition to the motion, the
204 court determines that the petitioner, as a matter of law, is not entitled to expungement.

205 ~~(k)~~ (n) Upon expungement, the proceedings in the matter ~~shall be deemed~~ are considered
206 never to have occurred. The court and other agencies shall reply to any inquiry that no record
207 exists on the matter. The person whose record is expunged ~~shall~~ does not have to disclose the
208 fact of the record or any matter relating thereto on an application for employment, credit or other
209 type of application.

210 ~~(l)~~ (o) Inspection of the sealed records in the court's possession may thereafter be
211 permitted by the court only upon a motion by the person who is the subject of the records or upon
212 a petition filed by a prosecuting attorney that inspection and possible use of the records in
213 question are necessary to the investigation or prosecution of a crime in this state or another
214 jurisdiction. If the court finds that there is a legitimate reason for access and that the interests of
215 justice will be served by granting a petition to inspect the sealed record, it may be granted under
216 the terms and conditions that the court determines. In ruling on a motion under this subsection,
217 the court shall balance the person's need for access to the record with the potential harm of
218 unwarranted adverse consequences to the petitioner that the disclosure may create.

219 (p)(1) No person as to whom an order has been entered pursuant to this section may be
220 held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false
221 statement by reason of that person's failure to recite or acknowledge the arrest, indictment,
222 information, trial or conviction.

223 (2) Persons pursuing certification under the provisions of article twenty-nine, chapter thirty
224 of this code or employment as a law-enforcement officer by a West Virginia law-enforcement
225 agency or a state institution of higher education or the Public Service Commission of West

226 Virginia, shall disclose any and all convictions for the purpose of certification under the provisions
227 of article twenty-nine, chapter thirty of this code or to the West Virginia law-enforcement agency
228 or state institution of higher education or the Public Service Commission of West Virginia with
229 whom they are seeking employment, regardless of whether or not the convictions were expunged
230 pursuant to the provisions of this section.

231 (3) Persons required by state law to obtain a criminal history record check on a prospective
232 employee are not considered to have knowledge of any convictions expunged under this section.

233 (g) The clerk of the circuit court shall charge and collect in advance the same fee as is
234 charged for instituting a civil action pursuant to subdivision (1), subsection (a), section eleven,
235 article one, chapter fifty-nine of this code for a petition for expungement.

236 (r) For the purposes of this section:

237 (1) "Court record" means an official record of a court about a proceeding that the clerk of
238 the court or other court personnel keeps. "Court record" includes an index, a docket entry, a
239 petition or other pleading, a memorandum, a transcription of proceedings, an electronic recording,
240 an order and a judgment.

241 (2) "Seal" means to remove information from public inspection in accordance with this
242 section.

243 (3) "Sealing" means:

244 (A) With respect to a record kept in a courthouse, removing to a separate secure area to
245 which persons who do not have a legitimate reason for access are denied access;

246 (B) With respect to electronic information about a proceeding on the website maintained
247 by the magistrate court, circuit court or the Supreme Court of Appeals, removing the information
248 from the public website; and

249 (C) With respect to a record maintained by any law-enforcement agency, by removing to
250 a separate secure area to which persons who do not have a legitimate reason for access are
251 denied access.

252 (s) As used in this section, the term "records" does not include the records of the Governor,
253 the Legislature or the Secretary of State that pertain to a grant of pardon. Those records that
254 pertain to a grant of pardon are not subject to an order of expungement.

255 (t) The amendment to this section during the regular session of the Legislature in 2009 is
256 not for the purpose of changing existing law, but is intended to clarify the intent of the Legislature
257 as to existing law regarding expungement.

258 (u) The amendments made to this section during the regular session of the Legislature in
259 2016 may be known and cited as the "Second Chance for Employment Act."

NOTE: The purpose of this bill is to create the Second Chance for Employment Act. It provides a procedure for the expungement of certain felony convictions. The bill prohibits the expungement of certain felony convictions, including those causing serious injury, those involving deadly weapons, certain assaults and batteries, domestic violence and sexual offenses. The bill also sets forth the requirements before a petition may be made and before a petition may be granted. The bill also requires the petitioner to pay a fee.

Strike-throughs indicate language that would be stricken from a heading or the present law, and underscoring indicates new language that would be added.