

# **WEST VIRGINIA LEGISLATURE**

## **2017 REGULAR SESSION**

**Introduced**

### **House Bill 2532**

BY DELEGATES PUSHKIN, LANE, MCGEEHAN, ISNER,  
HORNBUCKLE, LOVEJOY, BREWER, FLUHARTY, BYRD AND  
WARD

[Introduced February 17, 2017; Referred  
to the Committee on Industry and Labor then the  
Judiciary.]

1 A BILL to amend and reenact §61-11-26 of the Code of West Virginia, 1931, as amended, relating  
 2 to allowing the expungement of certain felony convictions; setting forth the conditions for  
 3 expungement; establishing a procedure for expungement; creating conditions; providing  
 4 exceptions; and providing for procedures and for resulting legal status.

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

8 ~~(b) Expungement shall not be available for any conviction of an offense listed in subsection~~  
 9 ~~(i) of this section.~~

10 (a) For the purposes of this section, the terms "nonviolent misdemeanor" or "nonviolent  
 11 felony", mean any misdemeanor or felony except the following:

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

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

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

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

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

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

- 18           (E) Section five, article eight-a of this chapter;
- 19           (F) Section three, article eight-b of this chapter;
- 20           (G) Section four, article eight-b of this chapter;
- 21           (H) Section five, article eight-b of this chapter;
- 22           (I) Section seven, article eight-b of this chapter;
- 23           (J) Section eight, article eight-b of this chapter;
- 24           (K) Section nine, article eight-b of this chapter;
- 25           (L) Section ten, article eight-b of this chapter;
- 26           (M) Section two, article eight-c of this chapter;
- 27           (N) Section three, article eight-c of this chapter;
- 28           (O) Section three-a, article eight-d of this chapter;
- 29           (P) Section five, article eight-d of this chapter; and
- 30           (Q) Section six, article eight-d of this chapter;
- 31           (3) An offense involving the use or exhibition of a firearm, deadly weapon or dangerous
- 32 instrument;
- 33           (4) Any felony offense in article four, chapter sixty-a of this code where the offense involves
- 34 possession with the intent to sell or deliver to a minor child;
- 35           (5) Any felony crime of violence involving offenses contained in articles two, three-e, eight-
- 36 b or eight-d of this chapter, where the victim was a minor child;
- 37           (6) A violation of the provisions of subsection (b) or (c), section nine, article two of this
- 38 chapter where the victim was a spouse, a person with whom the person seeking expungement
- 39 had a child in common or with whom the person seeking expungement ever cohabitated prior to
- 40 the offense; and
- 41           (7) Any violation of the provisions of section twenty-eight, article two of this chapter.
- 42           (b) Notwithstanding any other provision of law, any person convicted of a nonviolent felony
- 43 or nonviolent misdemeanor offense or offenses arising from the same transaction in the same

44 session of court, may, pursuant to this section, petition the circuit court in which the conviction or  
45 convictions occurred for expungement of the conviction or convictions and the records associated  
46 therewith.

47 (c) The relief afforded by this subsection section is only available to persons having no  
48 other prior or subsequent convictions other than minor traffic violations at the time the petition is  
49 filed: *Provided*, That at the time the petition is filed and during the time the petition is pending,  
50 petitioner ~~may not be~~ is not the subject of an arrest or any other pending criminal proceeding. ~~No~~  
51 ~~person shall be eligible for expungement pursuant to the provisions of subsection (a) of this~~  
52 ~~section until one year after the conviction, completion of any sentence of incarceration or~~  
53 ~~probation, whichever is later in time~~

54 (d) (1) A person is not eligible for expungement of a nonviolent misdemeanor or  
55 misdemeanors until one year after the conviction, completion of any sentence of incarceration or  
56 probation, whichever is later in time.

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

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

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

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

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

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

69 (5) The statute or statutes and offense or offenses for which petitioner was charged and

70 of which petitioner was convicted;

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

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

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

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

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

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

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

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

96 and any proposed expungement order to any identified victims.

97           ~~(e)~~ (g) Upon receipt of a petition for expungement, the Superintendent of the State Police;  
98 the prosecuting attorney of the county of conviction; the chief of police or other executive head of  
99 the municipal police department wherein the offense was committed; the chief law-enforcement  
100 officer of any other law-enforcement agency which participated in the arrest of the petitioner; the  
101 superintendent or warden of any institution in which the petitioner was confined; the magistrate  
102 court or municipal court which disposed of the petitioner's criminal charge; all other state and local  
103 government agencies whose records would be affected by the proposed expungement and any  
104 other interested individual or agency that desires to oppose the expungement shall, within thirty  
105 days of receipt of the petition, file a notice of opposition with the court with supporting  
106 documentation and sworn statements setting forth the reasons for resisting the petition for  
107 expungement. A copy of any notice of opposition with supporting documentation and sworn  
108 statements shall be served upon the petitioner in accordance with trial court rules. The petitioner  
109 may file a reply no later than ten days after service of any notice of opposition to the petition for  
110 expungement.

111           ~~(f)~~ (h) The burden of proof shall be on the petitioner to prove by clear and convincing  
112 evidence that: (1) The conviction or convictions for which expungement is sought are the only  
113 convictions against petitioner and that the conviction or convictions are not excluded from  
114 expungement by subsection ~~(j)~~ (a) of this section; (2) that the requisite time period has passed  
115 since the conviction or convictions or end of the completion of any sentence of incarceration or  
116 probation; (3) petitioner has no criminal charges pending against him or her; (4) the expungement  
117 is consistent with the public welfare; (5) petitioner has, by his or her behavior since the conviction  
118 or convictions, evidenced that he or she has been rehabilitated and is law-abiding; and (6) any  
119 other matter deemed appropriate or necessary by the court to make a determination regarding  
120 the petition for expungement.

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

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

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

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

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

126 or, based upon supporting documentation and sworn statements filed in opposition to the petition,

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

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

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

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

131 (C) Summarily deny the petition if the court determines that the petition is insufficient or,

132 based upon supporting documentation and sworn statements filed in opposition to the petition,

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

134 ~~(h)~~ (j) If the court sets the matter for hearing, all interested parties who have filed a notice

135 of opposition shall be notified. At the hearing, the court may inquire into the background of the

136 petitioner and shall have access to any reports or records relating to the petitioner that are on file

137 with any law-enforcement authority, the institution of confinement, if any, and parole authority or

138 other agency which was in any way involved with the petitioner's arrest, conviction, sentence and

139 post-conviction supervision, including any record of arrest or conviction in any other state or

140 federal court. The court may hear testimony of witnesses and any other matter the court deems

141 proper and relevant to its determination regarding the petition. The court shall enter an order

142 reflecting its ruling on the petition for expungement with appropriate findings of fact and

143 conclusions of law.

144 ~~(i) No person shall be eligible for expungement of a conviction and the records associated~~

145 ~~therewith pursuant to the provisions of subsection (a) of this section for any violation involving the~~

146 ~~infliction of serious physical injury; involving the provisions of article eight-b of this chapter where~~

147 ~~the petitioner was eighteen years old, or older, at the time the violation occurred and the victim~~

148 ~~was twelve years of age, or younger, at the time the violation occurred; involving the use or~~  
149 ~~exhibition of a deadly weapon or dangerous instrument; of the provisions of subsection (b) or (c),~~  
150 ~~section nine, article two of this chapter where the victim was a spouse, a person with whom the~~  
151 ~~person seeking expungement had a child in common or with whom the person seeking~~  
152 ~~expungement ever cohabitated prior to the offense; any violation of the provisions of section~~  
153 ~~twenty-eight of said article; a conviction for driving under the influence of alcohol, controlled~~  
154 ~~substances or a conviction for a violation of section three, article four, chapter seventeen-b of this~~  
155 ~~code or section nineteen, article eight of this chapter.~~

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

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

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



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

178 (1) A motion to make the preliminary order a final order of expungement may not be made  
179 until five years have elapsed from the granting of the preliminary order.

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

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

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

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

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

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

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

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

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

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

205 (A) Summarily grant the motion;

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

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

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

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

224 (p) Except when asked as a condition of retaining or applying for employment, no person  
225 to whom an order has been entered pursuant to this section may be held thereafter under any  
226 provision of any law to be guilty of perjury or otherwise giving a false statement by reason of that  
227 person's failure to recite or acknowledge the arrest, indictment, information, trial or conviction,

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

231 (r) For the purposes of this section:

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

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

238 (3) "Sealing" means:

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

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

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

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

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

253           (u) The amendments made to this section during the 2017 regular session of the  
254 Legislature, 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. The bill provides a procedure for the expungement of certain nonviolent felony convictions and 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 provides that no person is required to disclose such conviction unless asked by an employer or potential employer.

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