

WEST VIRGINIA LEGISLATURE

2017 REGULAR SESSION

Introduced

Senate Bill 366

BY SENATORS CARMICHAEL (MR. PRESIDENT)

AND PREZIOSO

(By Request of the Executive)

[Introduced February 21, 2017; 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 the creation of the West Virginia Second Chance Act; defining terms; expanding
 3 eligibility for expungement to persons convicted of nonviolent felonies; defining “nonviolent
 4 felony”; providing exceptions to eligibility and timing of filing a petition for expungement;
 5 creating petition requirements and court procedure for evaluating preliminary and final
 6 orders of expungement for nonviolent felonies; providing limitations on preliminary orders
 7 of expungement; clarifying disclosure requirements with respect to the information sealed
 8 pursuant to an order of expungement, including exemptions; providing standard for
 9 inspection of sealed records; and making technical changes.

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) Eligibility for expungement.

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

9 (2) Nonviolent Felonies – Any person convicted of a nonviolent felony offense, as defined
 10 in subsection (c) of this section, or nonviolent felony offenses arising from the same transaction,
 11 may, pursuant to this section, petition the circuit court in which the conviction or convictions
 12 occurred for preliminary order of expungement of the conviction or convictions and the records

13 associated therewith, and subsequently the final order of expungement of the conviction or
14 convictions and the records associated therewith.

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

23 (b) Fee for filing petition for expungement – The clerk of the circuit court shall charge and
24 collect in advance the same fee for a petition for expungement as is charged for instituting a civil
25 action pursuant to subdivision (1), subsection (a), section eleven, article one, chapter fifty-nine of
26 this code.

27 (c) Limitations on eligibility for expungement –

28 (1) Certain convictions excluded – For the purposes of this section, the term “nonviolent
29 felony” means any felony offense other than the following:

30 (A) A felony crime of violence against the person as defined in subsection (o), section
31 twenty-seven, article five, chapter twenty-eight of this code;

32 (B) A felony offense where the victim was a minor child, as defined in subsection (p),
33 section twenty-seven, article five, chapter twenty-eight of this code;

34 (C) A felony offense involving the use or exhibition of a firearm, deadly weapon or
35 dangerous instrument;

36 (D) A felony offense involving possession of a controlled substance with the intent to sell

37 or deliver to a minor child, as set forth in article four, chapter sixty-a of this code; or

38 (E) A prior conviction in this state or another state for a crime that requires registration as
39 a sex offender pursuant to article twelve, chapter fifteen of this code.

40 (2) Temporal requirements –

41 (A) No person shall be eligible for expungement pursuant to subdivision (1) of subsection
42 (a) of this section until one year after completion of any sentence of incarceration or completion
43 of any period of supervision, whichever is later in time.

44 (B) No person shall be eligible for preliminary order of expungement pursuant to
45 subdivision (2) of subsection (a) of this section until five years after completion of any sentence
46 of incarceration or completion of any period of supervision, whichever is later in time.

47 (C) No person shall be eligible for permanent expungement pursuant to subdivision (2) of
48 subsection (a) of this section until five years after an order is entered granting the person’s petition
49 for preliminary order of expungement.

50 (3) Other miscellaneous exclusions – No person shall be eligible for expungement under
51 this section if he or she:

52 (A) Has any prior or subsequent convictions other than minor traffic violations at the time
53 the petition is filed: *Provided*, That at the time the petition is filed and during the time the petition
54 is pending, the petitioner may not be the subject of arrest or any other pending criminal
55 proceeding;

56 (B) Has violated the provisions of section twenty-eight, article two of this chapter;

57 (C) Has been convicted of driving under the influence of alcohol or controlled substances
58 or has violated section three, article four, chapter seventeen-b of this code; or

59 (D) Conviction of any offense which disqualifies such person of forever holding any office
60 of honor, trust or profit in this state.

61 ~~(e)~~ (d) Content of petition for expungement - Each petition to expunge a conviction or
62 convictions pursuant to this section shall be verified under oath and include the following
63 information:

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

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

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

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

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

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

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

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

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

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

84 (11) Whether petitioner has ever been granted expungement or similar relief regarding a

85 criminal conviction by any court in this state, any other state or by any federal court; and

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

88 ~~(d)~~ (e) Service of petition for expungement - A copy of the petition, with any supporting
89 documentation, shall be served by petitioner pursuant to the rules of the trial court upon the
90 following persons or entities:

91 (1) The Superintendent of the State Police;

92 (2) The prosecuting attorney of the county of conviction;

93 (3) The chief of police or other executive head of the municipal police department wherein
94 the offense was committed;

95 (4) The chief law-enforcement officer of any other law-enforcement agency which
96 participated in the arrest of the petitioner;

97 (5) The superintendent or warden of any institution in which the petitioner was confined;

98 (6) The magistrate court or municipal court which disposed of the petitioner's criminal
99 charge; and

100 (7) All other state and local government agencies whose records would be affected by the
101 proposed expungement.

102 The prosecutorial office that had jurisdiction over the offense or offenses for which
103 expungement is sought shall serve by first class mail the petition for expungement, accompanying
104 documentation and any proposed expungement order to any identified victims.

105 ~~(e)~~ (f) Filing and service of notice of opposition to petition for expungement - Upon receipt
106 of a petition for expungement, the ~~Superintendent of the State Police; the prosecuting attorney of~~
107 ~~the county of conviction; the chief of police or other executive head of the municipal police~~
108 ~~department wherein the offense was committed; the chief law-enforcement officer of any other~~

109 ~~law-enforcement agency which participated in the arrest of the petitioner; the superintendent or~~
110 ~~warden of any institution in which the petitioner was confined; the magistrate court or municipal~~
111 ~~court which disposed of the petitioner's criminal charge; all other state and local government~~
112 ~~agencies whose records would be affected by the proposed expungement~~ persons and entities
113 listed in subdivision (e) of this section, and any other interested individual or agency that desires
114 to oppose the expungement shall, within thirty days of receipt of the petition, file a notice of
115 opposition with the court with supporting documentation and sworn statements setting forth the
116 reasons for resisting the petition for expungement.

117 (1) A copy of any notice of opposition with supporting documentation and sworn
118 statements shall be served upon the petitioner in accordance with trial court rules.

119 (2) The petitioner may file a reply no later than ten days after service of any notice of
120 opposition to the petition for expungement.

121 ~~(f)~~ (g) *Burden of proof* - The burden of proof shall be on the petitioner to prove by clear
122 and convincing evidence that: (1) The conviction or convictions for which expungement is sought
123 are the only convictions against petitioner and that the conviction or convictions are not excluded
124 from expungement by subsection ~~(j)~~ (c) of this section; (2) that the requisite time period has
125 passed since the conviction or convictions or end of the completion of any sentence of
126 incarceration or ~~probation~~ period of supervision as set forth in subdivision (2), subsection (c) of
127 this section; (3) petitioner has no criminal charges pending against him or her; (4) the
128 expungement is consistent with the public welfare; (5) petitioner has, by his or her behavior since
129 the conviction or convictions, evidenced that he or she has been rehabilitated and is law-abiding;
130 and (6) any other matter deemed appropriate or necessary by the court to make a determination
131 regarding the petition for expungement.

132 ~~(g)~~ (h) *Court procedure for petition for expungement* - Within sixty days of the filing of a

133 petition for expungement the circuit court shall:

134 (1) For persons eligible pursuant to subdivision (1) of subsection (a) of this section:

135 (A) Summarily grant the petition;

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

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

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

139 the court determines that the petitioner, as a matter of law, is not entitled to expungement; or

140 (2) For persons eligible pursuant to subdivision (2) of subsection (a) of this section:

141 (A) Summarily and preliminarily grant the petition subject to the provisions of subsection

142 (i) of this section;

143 (B) Set the matter for hearing; or

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

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

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

147 ~~(h)~~ (i) *Hearing on petition for expungement* - If the court sets the matter for hearing, all

148 interested parties who have filed a notice of opposition shall be notified. At the hearing, the court

149 may inquire into the background of the petitioner and shall have access to any reports or records

150 relating to the petitioner that are on file with any law-enforcement authority, the institution of

151 confinement, if any, and parole authority or other agency which was in any way involved with the

152 petitioner's arrest, conviction, sentence and post-conviction supervision, including any record of

153 arrest or conviction in any other state or federal court. The court may hear testimony of witnesses

154 and any other matter the court deems proper and relevant to its determination regarding the

155 petition. The court shall enter an order reflecting its ruling on the petition for expungement with

156 appropriate findings of fact and conclusions of law.

157 ~~(i) No person shall be eligible for expungement of a conviction and the records associated~~
158 ~~therewith pursuant to the provisions of subsection (a) of this section for any violation involving the~~
159 ~~infliction of serious physical injury; involving the provisions of article eight b of this chapter where~~
160 ~~the petitioner was eighteen years old, or older, at the time the violation occurred and the victim~~
161 ~~was twelve years of age, or younger, at the time the violation occurred; involving the use or~~
162 ~~exhibition of a deadly weapon or dangerous instrument; of the provisions of subsection (b) or (c),~~
163 ~~section nine, article two of this chapter where the victim was a spouse, a person with whom the~~
164 ~~person seeking expungement had a child in common or with whom the person seeking~~
165 ~~expungement ever cohabitated prior to the offense; any violation of the provisions of section~~
166 ~~twenty-eight of said article; a conviction for driving under the influence of alcohol, controlled~~
167 ~~substances or a conviction for a violation of section three, article four, chapter seventeen b of this~~
168 ~~code or section nineteen, article eight of this chapter.~~

169 (j) Preliminary and final orders of expungement for nonviolent felonies - If the court grants
170 the petition for expungement pursuant to subdivision (2), subsection (a) of this section, the court's
171 order shall be preliminary and subject to a motion by the petitioner to make the order a final order
172 of expungement.

173 (1) Preliminary order of expungement – A preliminary order of expungement shall order
174 the sealing of all court records and other records pursuant to subsection (k) of this section related
175 to the nonviolent felony or felonies that are the subject of the petition. The preliminary order of
176 expungement is subject to the following limitations:

177 (A) Notwithstanding subsection (m) of this section, the custodians of records subject to
178 sealing pursuant to subsection (k) of this section may inspect the sealed records without obtaining
179 an order of the court if inspection is made for a legitimate law-enforcement purpose; and

180 (B) A preliminary order of expungement shall be vacated if the petitioner is convicted of a

181 felony or misdemeanor offense other than a minor traffic violation subsequent to the entry of the
182 order.

183 (2) Motion for final order of expungement - A motion to make the preliminary order of
184 expungement a final order of expungement may not be made until five years after the preliminary
185 order of expungement was entered by the court.

186 (A) A motion filed under this subdivision shall be verified under oath and include
187 information evidencing whether the petitioner:

188 (i) Has any felony or misdemeanor convictions other than a minor traffic violation since
189 entry of the preliminary order of expungement;

190 (ii) Has outstanding restitution orders or civil judgments representing amounts ordered for
191 restitution against the petitioner since the entry of the preliminary order of expungement; or

192 (iii) Is subject of any outstanding warrants or is currently the subject of a pending criminal
193 proceeding.

194 (B) Within sixty days of the filing of a motion for a final order of expungement, the circuit
195 court shall:

196 (i) Summarily grant the motion;

197 (ii) Set the matter for hearing; or

198 (iii) Summarily deny the petition if the court determines that the motion is insufficient or,
199 based upon supporting documentation and sworn statements filed in opposition to the motion, the
200 court determines that the petitioner, as a matter of law, is not entitled to expungement. If the court
201 determines that the petitioner is not entitled to expungement as a matter of law, the court shall
202 also vacate the preliminary order of expungement.

203 (C) The provisions of subsections (f), (g) and (h) of this section apply to a motion filed
204 under this subsection.

205 ~~(j)~~ (k) Sealing of records - If the court grants the petition for expungement, it shall order
206 the sealing of all records in the custody of the court and expungement of any records in the
207 custody of any other agency or official, including law-enforcement records. Every agency with
208 records relating to the arrest, charge or other matters arising out of the arrest or conviction that is
209 ordered to expunge records shall certify to the court within sixty days of the entry of the
210 expungement order that the required expungement has been completed. All orders enforcing the
211 expungement procedure shall also be sealed. This subsection shall not apply to the Department
212 of Justice for DNA records and samples stored in the State DNA Database and the State DNA
213 Databank or to fingerprint records. ~~For the purposes of this section, "records" do not include the~~
214 ~~records of the Governor, the Legislature or the Secretary of State that pertain to a grant of pardon.~~
215 ~~Such records that pertain to a grant of pardon are not subject to an order of expungement. The~~
216 ~~amendment to this section during the fourth extraordinary session of the Legislature in the year~~
217 ~~2009 is not for the purpose of changing existing law, but is intended to clarify the intent of the~~
218 ~~Legislature as to existing law regarding expungement.~~

219 ~~(k)~~ (l) Disclosure of expunged proceedings –

220 (1) Upon expungement, the proceedings in the matter shall be deemed are considered
221 never to have occurred. The court and other agencies shall reply to any inquiry that no record
222 exists on the matter. The person whose record is expunged shall not have to disclose the fact of
223 the record or any matter relating thereto on an application for employment, credit or other type of
224 application: Provided, That any person pursuing certification under the provisions of article twenty-
225 nine, chapter thirty of this code or employment as a law-enforcement officer by a West Virginia
226 law-enforcement agency or a state institution of higher education or the Public Service
227 Commission of West Virginia, shall disclose any and all convictions for the purpose of certification
228 or seeking employment, regardless of whether the convictions were expunged pursuant to this

229 section.

230 (2) No person for whom an order of expungement has been entered pursuant to this
231 section may be found guilty of perjury or otherwise giving a false statement, under any provision
232 of this code, because of that person's failure to recite or acknowledge the arrest, indictment,
233 information, trial or conviction: *Provided*, That the person is in compliance with subdivision (1),
234 subsection (l) of this section.

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

237 (+) (m) *Inspection of sealed records* - Inspection of the sealed records in the court's
238 possession may thereafter be permitted by the court only upon a motion by the person who is the
239 subject of the records or upon a petition filed by a prosecuting attorney that inspection and
240 possible use of the records in question are necessary to the investigation or prosecution of a
241 crime in this state or another jurisdiction. If the court finds that there is a legitimate reason for
242 access and the interests of justice will be served by granting a petition to inspect the sealed
243 record, it may be granted under the terms and conditions that the court determines.

244 (n) For the purposes of this section,

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

249 (2) "Records" do not include the records of the Governor, the Legislature or the Secretary
250 of State that pertain to a grant of pardon. Such records that pertain to a grant of pardon are not
251 subject to an order of expungement.

252 (3) "Seal" means to remove information from public inspection in accordance with this

253 section.

254 (4) "Sealing" means:

255 (A) For a record kept in a courthouse, removing to a separate secure area to which
256 persons who do not have a legitimate reason for access are denied access;

257 (B) For electronic information about a proceeding on the website maintained by the
258 magistrate court, circuit court or the Supreme Court of Appeals, removing the information from
259 the public website; and

260 (C) For a record maintained by any law-enforcement agency, by removing to a separate
261 secure area to which persons who do not have a legitimate reason for access are denied access.

262 (o) The amendment to this section during the fourth extraordinary session of the
263 Legislature in the year 2009 is not for the purpose of changing existing law, but is intended to
264 clarify the intent of the Legislature as to existing law regarding expungement.

265 (p) The amendments made to this section during the regular session of the Legislature in
266 2017 may be known and cited as the "Second Chance Act."

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NOTE: The purpose of this bill is to expand eligibility for expungement to persons convicted of nonviolent felonies; define nonviolent felony, providing exceptions to eligibility and timing of filing a petition for expungement; create petition requirements and court procedure for evaluating preliminary and final orders of expungement for nonviolent felonies; provide limitations on preliminary orders of expungement; clarify disclosure requirements with respect to the information sealed pursuant to an order of expungement, including exemptions; and provide standard for inspection of sealed records.

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