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WEST VIRGINIA LEGISLATURE

SEVENTY-EIGHTH LEGISLATURE

REGULAR SESSION, 2008

OFFICE WEST VIRGINIA
SECRETARY OF STATE

ENROLLED

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 142

(SENATOR KESSLER, *original sponsor*)

[Passed March 8, 2008; in effect ninety days from passage.]

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AN ACT to amend and reenact §5-1-16a of the Code of West Virginia, 1931, as amended; and to amend said code by adding thereto a new section, designated §61-11-26, all relating to expungement of certain criminal records generally; changing time frames for petitions for expungement after gubernatorial pardons; authorizing expungement of certain criminal convictions committed between the ages of eighteen and twenty-six; petition for expungement fee; time frame for eligibility for expungement; contents of the petition for expungement; service, notice and publication requirements for the petition for expungement; prosecutor and state agency opposition to the petition for expungement; burden of proof; court procedure for hearing and ruling upon the

petition; crimes which are not eligible for expungement; and establishing procedures for sealing and later use of expunged records.

Be it enacted by the Legislature of West Virginia:

That §5-1-16a the Code of West Virginia, 1931, as amended, be amended and reenacted; and that said code be amended by adding thereto a new section, designated §61-11-26, all to read as follows:

**CHAPTER 5. GENERAL POWERS AND AUTHORITY
OF THE GOVERNOR, SECRETARY OF STATE AND
ATTORNEY GENERAL; BOARD OF PUBLIC WORKS;
MISCELLANEOUS AGENCIES, COMMISSIONS,
OFFICES, PROGRAMS, ETC.**

ARTICLE 1. THE GOVERNOR.

§5-1-16a. Expungement of criminal record upon full and unconditional pardon.

1 (a) Any person who has received a full and
2 unconditional pardon from the Governor, pursuant to
3 the provisions of section eleven, article VII of the
4 Constitution of West Virginia and section sixteen of this
5 article may petition the circuit court in the county
6 where the conviction was had to have the record of such
7 conviction expunged. The petition shall be served upon
8 the prosecuting attorney of the county where the
9 petition was filed. Any person petitioning the court for
10 an order of expungement shall publish a notice of the
11 time and place that such petition will be made, which
12 notice shall be published as a Class I legal
13 advertisement in compliance with the provisions of
14 article three, chapter fifty-nine of this code and the
15 publication area for such publication shall be the
16 county where the petition is filed. The circuit court,
17 upon verification of the act of pardon and after a
18 hearing to determine that good cause exists, may enter
19 an order directing that all public record of the
20 petitioner's conviction be expunged.

21 (b) The record expunged pursuant to the provisions of
22 this section may not be considered in an application to
23 any educational institution in this state or an
24 application for any licensure required by any
25 professional organization in this state.

26 (c) No person shall be eligible for expungement
27 pursuant to this section until one year after having been
28 pardoned.

29 (d) No person shall be eligible for expungement
30 pursuant to this section until five years after the
31 discharge of his or her sentence upon the conviction for
32 which he or she was pardoned.

33 (e) No person shall be eligible for expungement of a
34 record of conviction of first degree murder, as defined
35 in section one, article two, chapter sixty-one of this
36 code; treason, as defined in section one, article one of
37 said chapter; kidnapping, as defined in section
38 fourteen-a, article two of said chapter; or any felony
39 defined in article eight-b of said chapter.

CHAPTER 61. CRIMES AND THEIR PUNISHMENT.

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

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

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

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

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

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

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

41 (5) The statute or statutes and offense or offenses for
42 which petitioner was charged and of which petitioner
43 was convicted;

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

46 (7) Whether there is any current order for restitution,
47 protection, restraining order or other no contact order

48 prohibiting the petitioner from contacting the victims
49 or whether there has ever been a prior order for
50 restitution, protection or restraining order prohibiting
51 the petitioner from contacting the victim. If there is
52 such a current order, petitioner shall attach a copy of
53 that order to his or her petition;

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

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

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

63 (11) Whether petitioner has ever been granted
64 expungement or similar relief regarding a criminal
65 conviction by any court in this state, any other state or
66 by any federal court;

67 (12) Documentation of the notice publication required
68 by subsection (d) of this section; and

69 (13) Any other supporting documents, sworn
70 statements, affidavits or other information supporting
71 the petition to expunge.

72 (d) Any person petitioning the court for an order of
73 expungement pursuant to the provisions of subsection
74 (a) of this section shall publish a notice that such
75 petition is being made, which notice shall include the
76 petitioner's name; the time and identification of the
77 conviction or convictions for which petitioner seeks
78 expungement; that expungement is sought pursuant to
79 section twenty-six, article eleven, chapter sixty-one of
80 this code; the court in which the petition will be filed;
81 and the right of any individual to file a notice of
82 opposition to the petition in the circuit court within ten
83 days of the publication of notice. The notice shall be

84 published as a Class I legal advertisement in
85 compliance with the provisions of article three, chapter
86 fifty-nine of this code and the publication area for such
87 publication shall be the county where the petition is
88 filed.

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

109 (f) Upon receipt of a petition for expungement, or
110 notice pursuant to subsection (d) of this section, the
111 Superintendent of the State Police; the prosecuting
112 attorney of the county of conviction; the chief of police
113 or other executive head of the municipal police
114 department wherein the offense was committed; the
115 chief law-enforcement officer of any other law-
116 enforcement agency which participated in the arrest of
117 the petitioner; the superintendent or warden of any
118 institution in which the petitioner was confined; the
119 magistrate court or municipal court which disposed of
120 the petitioner's criminal charge; all other state and local
121 government agencies whose records would be affected
122 by the proposed expungement and any other interested
123 individual or agency that desires to oppose the

124 expungement shall, within thirty days of receipt of the
125 petition or notice of the petition pursuant to subsection
126 (d) of this section, file a notice of opposition with the
127 court with supporting documentation and sworn
128 statements setting forth the reasons for resisting the
129 petition for expungement. A copy of any notice of
130 opposition with supporting documentation and sworn
131 statements shall be served upon the petitioner in
132 accordance with trial court rules. The petitioner may
133 file a reply no later than ten days after service of any
134 notice of opposition to the petition for expungement.

135 (g) The burden of proof shall be on the petitioner to
136 prove by clear and convincing evidence that: (1) The
137 conviction or convictions for which expungement is
138 sought are the only convictions against petitioner and
139 that the conviction or convictions are not excluded
140 from expungement by subsection (j) of this section; (2)
141 that the requisite time period has passed since the
142 conviction or convictions or end of the completion of
143 any sentence of incarceration or probation; (3)
144 petitioner has no criminal charges pending against him
145 or her; (4) the expungement is consistent with the
146 public welfare; (5) petitioner has, by his or her behavior
147 since the conviction or convictions, evidenced that he or
148 she has been rehabilitated and is law-abiding; and (6)
149 any other matter deemed appropriate or necessary by
150 the court to make a determination regarding the
151 petition for expungement.

152 (h) Within sixty days of the filing of a petition for
153 expungement the circuit court shall:

154 (1) Summarily grant the petition;

155 (2) Set the matter for hearing; or

156 (3) Summarily deny the petition if the court
157 determines that the petition is insufficient or, based
158 upon supporting documentation and sworn statements
159 filed in opposition to the petition, the court determines
160 that the petitioner, as a matter of law, is not entitled to
161 expungement.

162 (i) If the court sets the matter for hearing, all
163 interested parties who have filed a notice of opposition
164 shall be notified. At the hearing, the court may inquire
165 into the background of the petitioner and shall have
166 access to any reports or records relating to the
167 petitioner that are on file with any law-enforcement
168 authority, the institution of confinement, if any, and
169 parole authority or other agency which was in any way
170 involved with the petitioner's arrest, conviction,
171 sentence and post-conviction supervision, including any
172 record of arrest or conviction in any other state or
173 federal court. The court may hear testimony of
174 witnesses and any other matter the court deems proper
175 and relevant to its determination regarding the petition.
176 The court shall enter an order reflecting its ruling on
177 the petition for expungement with appropriate findings
178 of fact and conclusions of law.

179 (j) No person shall be eligible for expungement of
180 a conviction and the records associated therewith
181 pursuant to the provisions of subsection (a) of this
182 section for any violation involving the infliction of
183 serious physical injury; involving the provisions of
184 article eight-b of this chapter where the petitioner was
185 eighteen years old, or older, at the time the violation
186 occurred and the victim was twelve years of age, or
187 younger, at the time the violation occurred; involving
188 the use or exhibition of a deadly weapon or dangerous
189 instrument; of the provisions of subsection (b) or (c),
190 section nine, article two of this chapter where the
191 victim was a spouse, a person with whom the person
192 seeking expungement had a child in common or with
193 whom the person seeking expungement ever
194 cohabitated prior to the offense; any violation of the
195 provisions of section twenty-eight of said article; a
196 conviction for driving under the influence of alcohol,
197 controlled substances or a conviction for a violation of
198 section three, article four, chapter seventeen-b of this
199 code or section nineteen, article eight of this chapter.

200 (k) If the court grants the petition for expungement,
201 it shall order the sealing of all records in the custody of
202 the court and expungement of any records in the

203 custody of any other agency or official, including law-
204 enforcement records. Every agency with records
205 relating to the arrest, charge or other matters arising
206 out of the arrest or conviction that is ordered to
207 expunge records shall certify to the court within sixty
208 days of the entry of the expungement order that the
209 required expungement has been completed. All orders
210 enforcing the expungement procedure shall also be
211 sealed.

212 (l) Upon expungement, the proceedings in the
213 matter shall be deemed never to have occurred. The
214 court and other agencies shall reply to any inquiry that
215 no record exists on the matter. The person whose
216 record is expunged shall not have to disclose the fact of
217 the record or any matter relating thereto on an
218 application for employment, credit or other type of
219 application.

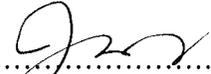
220 (m) Inspection of the sealed records in the court's
221 possession may thereafter be permitted by the court
222 only upon a motion by the person who is the subject of
223 the records or upon a petition filed by a prosecuting
224 attorney that inspection and possible use of the records
225 in question are necessary to the investigation or
226 prosecution of a crime in this state or another
227 jurisdiction. If the court finds that the interests of
228 justice will be served by granting a petition to inspect
229 the sealed record, it may be granted.

A handwritten signature in black ink, appearing to be "J. J. [unclear]", is located at the bottom left of the page. The signature is written in a cursive style and is somewhat faint.

Enr. Com. Sub. for S. B. No. 142] 10

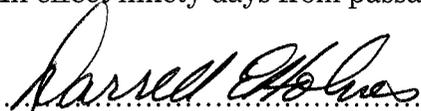
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

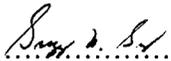

.....
Chairman Senate Committee


.....
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.


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Clerk of the Senate


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Clerk of the House of Delegates


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President of the Senate


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Speaker House of Delegates

The within is approved this
the 1st Day of April 2008.


.....
Governor

PRESENTED TO THE
GOVERNOR

MAR 25 2008

Time 3:40 pm