

SB 4001

WEST VIRGINIA LEGISLATURE
SEVENTY-NINTH LEGISLATURE
FOURTH EXTRAORDINARY SESSION, 2009

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ENROLLED

Senate Bill No. 4001

(BY SENATORS TOMBLIN (MR. PRESIDENT)
AND CARUTH, BY REQUEST OF THE EXECUTIVE)

[Passed November 19, 2009; in effect from passage.]

OFFICE OF THE CLERK
WEST VIRGINIA
SECRETARY OF STATE

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CLARENCE M. MCGNA
SECRETARY OF STATE

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Senate Bill No. 4001

(BY SENATORS TOMBLIN (MR. PRESIDENT) AND CARUTH,
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[Passed November 19, 2009; in effect from passage.]

AN ACT to amend and reenact §5-1-16a of the Code of West Virginia, 1931, as amended; and to amend and reenact §61-11-26 of said code, all relating to clarifying that records of the Governor, the Legislature and the Secretary of State pertaining to a grant of pardon are not subject to an order of expungement; and making technical revisions.

Be it enacted by the Legislature of West Virginia:

That §5-1-16a of the Code of West Virginia, 1931, as amended, be amended and reenacted; and that §61-11-26 of said code be amended and reenacted, 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 unconditional
2 pardon from the Governor, pursuant to the provisions of
3 section eleven, article VII of the Constitution of West
4 Virginia and section sixteen of this article, may petition
5 the circuit court in the county where the conviction was
6 had to have the record of such conviction expunged. The
7 petition shall be served upon the prosecuting attorney of
8 the county where the petition was filed. Any person
9 petitioning the court for an order of expungement shall
10 publish a notice of the time and place that such petition
11 will be made, which notice shall be published as a Class I
12 legal advertisement in compliance with the provisions of
13 article three, chapter fifty-nine of this code and the
14 publication area for such publication shall be the county
15 where the petition is filed. The circuit court, upon verifi-
16 cation of the act of pardon and after a hearing to deter-
17 mine that good cause exists, may enter an order directing
18 that all public record of the petitioner's conviction be
19 expunged. For the purposes of this section, "public
20 record" or "record" does not include the records of the
21 Governor, the Legislature or the Secretary of State that
22 pertain to a grant of pardon. Such records that pertain to
23 a grant of pardon are not subject to an order of
24 expungement. The amendment to this section during the
25 fourth extraordinary session of the Legislature in the year
26 2009 is not for the purpose of changing existing law, but
27 is intended to clarify the intent of the Legislature as to
28 existing law regarding expungement.

29 (b) The record expunged pursuant to the provisions of
30 this section may not be considered in an application to any
31 educational institution in this state or an application for
32 any licensure required by any professional organization in
33 this state.

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

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

40 (e) No person shall be eligible for expungement of a
41 record of conviction of first degree murder, as defined in
42 section one, article two, chapter sixty-one of this code;
43 treason, as defined in section one, article one of said
44 chapter; kidnapping, as defined in section fourteen-a,
45 article two of said chapter; or any felony defined in article
46 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 or
2 offenses arising from the same transaction committed
3 while he or she was between the ages of eighteen and
4 twenty-six, inclusive, may, pursuant to the provisions of
5 this section, petition the circuit court in which the convic-
6 tion or convictions occurred for expungement of the
7 conviction or convictions and the records associated
8 therewith. The clerk of the circuit court shall charge and
9 collect in advance the same fee as is charged for instituting
10 a civil action pursuant to subdivision (1), subsection (a),
11 section eleven, article one, chapter fifty-nine of this code
12 for a petition for expungement.

13 (b) Expungement shall not be available for any convic-
14 tion of an offense listed in subsection (i) of this section.
15 The relief afforded by this subsection is only available to
16 persons having no other prior or subsequent convictions
17 other than minor traffic violations at the time the petition

18 is filed: *Provided*, That at the time the petition is filed and
19 during the time the petition is pending, petitioner may not
20 be the subject of an arrest or any other pending criminal
21 proceeding. No person shall be eligible for expungement
22 pursuant to the provisions of subsection (a) of this section
23 until one year after the conviction, completion of any
24 sentence of incarceration or probation, whichever is later
25 in time.

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

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

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

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

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

38 (5) The statute or statutes and offense or offenses for
39 which petitioner was charged and of which petitioner was
40 convicted;

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

43 (7) Whether there is any current order for restitution,
44 protection, restraining order or other no contact order
45 prohibiting the petitioner from contacting the victims or
46 whether there has ever been a prior order for restitution,
47 protection or restraining order prohibiting the petitioner
48 from contacting the victim. If there is such a current

49 order, petitioner shall attach a copy of that order to his or
50 her petition;

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

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

56 (10) The steps the petitioner has taken since the time of
57 the offenses toward personal rehabilitation, including
58 treatment, work or other personal history that demon-
59 strates rehabilitation;

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

64 (12) Any supporting documents, sworn statements,
65 affidavits or other information supporting the petition to
66 expunge.

67 (d) A copy of the petition, with any supporting documen-
68 tation, shall be served by petitioner pursuant to the rules
69 of the trial court upon the Superintendent of the State
70 Police; the prosecuting attorney of the county of convic-
71 tion; the chief of police or other executive head of the
72 municipal police department wherein the offense was
73 committed; the chief law-enforcement officer of any other
74 law-enforcement agency which participated in the arrest
75 of the petitioner; the superintendent or warden of any
76 institution in which the petitioner was confined; the
77 magistrate court or municipal court which disposed of the
78 petitioner's criminal charge; and all other state and local
79 government agencies whose records would be affected by
80 the proposed expungement. The prosecutorial office that
81 had jurisdiction over the offense or offenses for which

82 expungement is sought shall serve by first class mail the
83 petition for expungement, accompanying documentation
84 and any proposed expungement order to any identified
85 victims.

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

109 (f) The burden of proof shall be on the petitioner to
110 prove by clear and convincing evidence that: (1) The
111 conviction or convictions for which expungement is sought
112 are the only convictions against petitioner and that the
113 conviction or convictions are not excluded from
114 expungement by subsection (j) of this section; (2) that the
115 requisite time period has passed since the conviction or
116 convictions or end of the completion of any sentence of
117 incarceration or probation; (3) petitioner has no criminal

118 charges pending against him or her; (4) the expungement
119 is consistent with the public welfare; (5) petitioner has, by
120 his or her behavior since the conviction or convictions,
121 evidenced that he or she has been rehabilitated and is law-
122 abiding; and (6) any other matter deemed appropriate or
123 necessary by the court to make a determination regarding
124 the petition for expungement.

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

127 (1) Summarily grant the petition;

128 (2) Set the matter for hearing; or

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

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

150 (i) No person shall be eligible for expungement of a
151 conviction and the records associated therewith pursuant

152 to the provisions of subsection (a) of this section for any
153 violation involving the infliction of serious physical injury;
154 involving the provisions of article eight-b of this chapter
155 where the petitioner was eighteen years old, or older, at
156 the time the violation occurred and the victim was twelve
157 years of age, or younger, at the time the violation oc-
158 curred; involving the use or exhibition of a deadly weapon
159 or dangerous instrument; of the provisions of subsection
160 (b) or (c), section nine, article two of this chapter where
161 the victim was a spouse, a person with whom the person
162 seeking expungement had a child in common or with
163 whom the person seeking expungement ever cohabitated
164 prior to the offense; any violation of the provisions of
165 section twenty-eight of said article; a conviction for
166 driving under the influence of alcohol, controlled sub-
167 stances or a conviction for a violation of section three,
168 article four, chapter seventeen-b of this code or section
169 nineteen, article eight of this chapter.

170 (j) If the court grants the petition for expungement, it
171 shall order the sealing of all records in the custody of the
172 court and expungement of any records in the custody of
173 any other agency or official, including law-enforcement
174 records. Every agency with records relating to the arrest,
175 charge or other matters arising out of the arrest or convic-
176 tion that is ordered to expunge records shall certify to the
177 court within sixty days of the entry of the expungement
178 order that the required expungement has been completed.
179 All orders enforcing the expungement procedure shall also
180 be sealed. For the purposes of this section, "records" do
181 not include the records of the Governor, the Legislature or
182 the Secretary of State that pertain to a grant of pardon.
183 Such records that pertain to a grant of pardon are not
184 subject to an order of expungement. The amendment to
185 this section during the fourth extraordinary session of the
186 Legislature in the year 2009 is not for the purpose of
187 changing existing law, but is intended to clarify the intent

188 of the Legislature as to existing law regarding
189 expungement.

190 (k) Upon expungement, the proceedings in the matter
191 shall be deemed never to have occurred. The court and
192 other agencies shall reply to any inquiry that no record
193 exists on the matter. The person whose record is expunged
194 shall not have to disclose the fact of the record or any
195 matter relating thereto on an application for employment,
196 credit or other type of application.

197 (l) Inspection of the sealed records in the court's posses-
198 sion may thereafter be permitted by the court only upon a
199 motion by the person who is the subject of the records or
200 upon a petition filed by a prosecuting attorney that
201 inspection and possible use of the records in question are
202 necessary to the investigation or prosecution of a crime in
203 this state or another jurisdiction. If the court finds that
204 the interests of justice will be served by granting a petition
205 to inspect the sealed record, it may be granted.

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

[Signature]
.....
Chairman Senate Committee

[Signature]
.....
Chairman House Committee

Originated in the Senate.

In effect from passage.

[Signature]
.....
Clerk of the Senate

[Signature]
.....
Clerk of the House of Delegates

[Signature]
.....
President of the Senate

[Signature]
.....
Speaker House of Delegates

The within *is approved* this the *7th*
Day of *December* 2009.

[Signature]
.....
Governor

PRESENTED TO THE
GOVERNOR

DEC 2 2009

Time 4:20 pm