

WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

Introduced

Senate Bill 152

FISCAL
NOTE

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[Introduced January 10, 2019; Referred

to the Committee on the Judiciary]

1 A BILL to amend and reenact §61-11B-1, §61-11B-2, §61-11B-3, §61-11B-4, and §61-11B-5 of
 2 the Code of West Virginia, 1931, as amended, all relating to criminal offense
 3 expungement; changing current law related to offense reduction to instead apply as an
 4 expungement; amending definitions; clarifying that the petition may be used for more than
 5 one offense arising from the same act or occurrence; reducing the requisite time period
 6 required to wait before filing a petition; permitting the petition to be used to expunge certain
 7 misdemeanor offenses; and clarifying throughout that if the court grants the petition then
 8 the criminal offense is expunged.

Be it enacted by the Legislature of West Virginia:

ARTICLE 11B. CRIMINAL OFFENSE ~~REDUCTION~~ EXPUNGEMENT.

§61-11B-1. Legislative intent.

1 It is the Legislature's intention in enacting this article to establish a procedure whereby
 2 individuals convicted of certain criminal offenses may, pursuant to the provisions of this article,
 3 obtain ~~a reduced offense of conviction~~ an expungement. In enacting this article, it is also the
 4 Legislature's intent to improve the employment possibilities of certain persons while allowing the
 5 public notice of their actual conduct and prior transgressions without further penalty or diminution
 6 of employment opportunities.

§61-11B-2. Definitions.

1 ~~(a)~~ As used in this article, the following words and phrases shall have the meanings given
 2 to them in this section unless the context clearly indicates otherwise:

3 (1) "Criminal offense ~~reduction~~ expungement" means the ~~reduction~~ expungement of a
 4 qualifying ~~felony offense to a misdemeanor offense~~ pursuant to this article.

5 (2) "Excluded offense" means:

6 (A) An offense which involves the infliction of serious physical injury;

7 (B) A sexual offense, including, but not limited to, a violation of the felony provisions of
 8 §61-8-1 *et seq.* §61-8b-1 *et seq.* §61-8c-1 *et seq.* or §61-8d-1 *et seq.* of this code;

9 (C) An offense which involves the use or exhibition of a deadly weapon or dangerous
10 instrument;

11 (D) A felony violation of the provisions of §61-9-2 of this code;

12 (E) A felony violation of the provisions of §61-2-28 of this code;

13 (F) A felony violation of §17B-4-1 *et seq.* of this code; or

14 (G) A felony, the facts and circumstances of which the circuit court finds to be inconsistent
15 with the purposes of this article.

16 (3) "Nonviolent felony" means a felony conviction in a circuit court of this state, which the
17 circuit court finds is not: (i) An excluded offense as defined in ~~subdivision (2) of this article~~ this
18 section; and (ii) which does not involve violence or potential violence to another person or the
19 public.

20 (4) "Petitioner" means a person who has filed a petition seeking a criminal offense
21 ~~reduction~~ expungement under the provisions of this article.

22 (5) "Qualifying ~~felony~~ offense" means a nonviolent felony offense or misdemeanor offense,
23 or more than one such offense that arise out of the same act or occurrence, that is not excluded
24 from relief under this article.

25 (6) "~~Reduced misdemeanor~~" means ~~a legal status representing that a person previously~~
26 ~~convicted of a nonviolent qualifying felony has successfully petitioned a circuit court to have the~~
27 ~~felony conviction reduced to the status of a misdemeanor~~

28 (7) "Requisite time period" means ~~ten~~ five years after completion of any sentence or period
29 of supervision or probation, whichever is later, during which time there has been no commission
30 and conviction for a violation of law by the petitioner other than for a minor traffic offense.

§61-11B-3. Criminal offense reduction.

1 (a) Subject to the limitations and procedures set forth in this article, a person convicted of
2 a ~~nonviolent felony~~ qualifying offense may seek a criminal offense ~~reduction~~ expungement by
3 petition to the circuit court. If granted, the petitioner's ~~felony~~ conviction shall be vacated and the

4 petitioner's status will thereafter be designated on all records relating to the offense as a "~~reduced~~
 5 ~~misdemeanor~~" "expunged". The petitioner's criminal record shall also reflect that ~~he or she be~~
 6 ~~granted such legal status as is associated with being convicted of a misdemeanor~~ the offense has
 7 been expunged and, except as provided by the provisions of this article, the person shall not be
 8 deemed to have been convicted of a felony or the qualifying offense for any legal purpose or
 9 restriction.

10 (b) ~~Notwithstanding any provision of law to the contrary, the reduced misdemeanor~~
 11 ~~provided for under this article may not be expunged as part of this petition or by subsequent legal~~
 12 ~~proceeding or petition~~

13 (e) There shall be no entitlement to a criminal offense ~~reduction~~ expungement and the
 14 granting of the petition shall remain in the discretion of the circuit court.

15 (d) (c) Nothing in the section may be construed to allow a person obtaining relief pursuant
 16 to this article to be eligible for reinstatement of any retirement or employment benefit which he or
 17 she lost or forfeited due to the ~~felony~~ conviction or convictions vacated and ~~reduced to the status~~
 18 ~~of a misdemeanor~~ expunged.

§61-11B-4. Petition for reduction.

1 (a) A person seeking a criminal offense ~~reduction~~ expungement under this article shall file
 2 with the circuit court a petition, in a form and manner set forth by the West Virginia Supreme Court
 3 of Appeals.

4 (b) Any person filing a petition pursuant to the provisions of this article shall pay the filing
 5 fee set by the provisions of §59-1-11(a)(1) of this code: *Provided*, That in addition to the fee
 6 required by the provisions of this subsection a petitioner shall pay a fee of \$100 which shall be
 7 deposited into a nonappropriated special revenue account within the State Treasurer's office to
 8 be known as the West Virginia State Police Criminal History Account, said fee to be used to offset
 9 costs to the State Police for actions to facilitate the operation of this article.

10 (c) Each petition for criminal offense ~~reduction~~ expungement filed pursuant to this section

11 shall be verified under oath and include the following information:

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

14 (2) All of petitioner's addresses from the date of the offense for which a criminal offense
15 ~~reduction~~ expungement order is sought to the date of the filing of the petition;

16 (3) Petitioner's date of birth and Social Security number;

17 (4) Petitioner's date of arrest, the court of jurisdiction and criminal case number;

18 (5) The offense or offenses with which petitioner was charged and of which petitioner was
19 convicted and the statutory citations therefor;

20 (6) The names of any victim or victims, or where there are no identifiable victims such shall
21 be stated;

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

27 (8) The court's disposition of the matter and sentence imposed;

28 (9) The reasons a criminal offense ~~reduction~~ expungement is sought, such as, but not
29 limited to, employment or licensure purposes, and arguments in support thereof;

30 (10) The date upon which he or she completed any sentence or period of supervision or
31 probation;

32 (11) An express averment by the petitioner that he or she has neither committed nor been
33 convicted of a violation of law during the requisite time period;

34 (12) The action the petitioner has taken since the time of the offense or offenses toward
35 personal rehabilitation, including treatment, work or other personal history that demonstrates
36 rehabilitation;

37 (13) Whether petitioner has ever been granted criminal offense reduction, expungement
38 or similar relief regarding a criminal conviction by any court in this state, any other state or by any
39 federal court; and

40 (14) Any supporting documents, sworn statements, affidavits or other information
41 supporting the petition to ~~reduce~~ expunge the criminal offense.

42 (d) A copy of the petition, with any supporting documentation, shall be served by petitioner
43 pursuant to the West Virginia Rules of Civil Procedure upon the Superintendent of the State
44 Police; the prosecuting attorney of the county of conviction; the chief of police or other executive
45 head of the municipal police department wherein the offense was committed; the chief law-
46 enforcement officer of any other law-enforcement agency which participated in the arrest of the
47 petitioner; the circuit court of conviction, if the petition is filed in another circuit; the superintendent
48 or warden of any state correctional facility in which the petitioner was imprisoned; and any state
49 and local government agencies the records of which would be affected by the proposed criminal
50 offense reduction.

51 (e) The prosecuting attorney of the county in which the petition is filed shall serve by first
52 class mail the petition for criminal offense ~~reduction~~ expungement, accompanying documentation
53 and any proposed criminal offense reduction order to any identified victims.

54 (f) Upon receipt of a petition for criminal offense ~~reduction~~ expungement, the
55 Superintendent of the State Police, the prosecuting attorney of the county of conviction, the chief
56 of police or other executive head of the municipal police department wherein the offense was
57 committed, the chief law-enforcement officer of any other law-enforcement agency which
58 participated in the arrest of the petitioner, the superintendent or warden of any institution in which
59 the petitioner was confined, the circuit court of conviction, if the petition is filed in another circuit,
60 any state and local government agencies the records of which would be affected by the proposed
61 criminal offense ~~reduction~~ expungement and any interested individual or agency that desires to
62 oppose the criminal offense ~~reduction~~ expungement shall, within 30 days of receipt of the petition,

63 file a notice of opposition with the court with supporting documentation and sworn statements
64 setting forth the reasons for resisting the petition for criminal offense ~~reduction~~ expungement. A
65 copy of any notice of opposition with supporting documentation and sworn statements shall be
66 served upon the petitioner or his or her counsel in accordance with West Virginia Rules of Civil
67 Procedure. The petitioner may file a reply no later than 15 days after service of any notice of
68 opposition to the petition for criminal offense ~~reduction~~ expungement.

69 (g) The burden of proof shall be on the petitioner to prove by clear and convincing evidence
70 that:

71 (1) The conviction or convictions for which criminal offense ~~reduction~~ expungement is
72 sought are qualifying offenses and are the only convictions against petitioner;

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

75 (3) That the petitioner has neither committed nor been convicted of a violation of law in
76 the preceding 10 years;

77 (4) That petitioner has no criminal charges pending against him or her;

78 (5) That the criminal offense ~~reduction~~ expungement is consistent with the public welfare;

79 (6) That petitioner has, by his or her behavior since the conviction or convictions,
80 evidenced that he or she has been rehabilitated and has remained law-abiding; and

81 (7) Any other matter deemed appropriate or necessary by the court to make a
82 determination regarding the petition for criminal offense ~~reduction~~ expungement.

83 (h) Within 180 days of the filing of a petition for criminal offense ~~reduction~~ expungement
84 or as soon thereafter as is practicable the circuit court shall:

85 (1) Summarily grant the petition;

86 (2) Set the matter for hearing; or

87 (3) Summarily deny the petition, if the court determines that the petition is insufficient, or
88 based upon supporting documentation and sworn statements filed in opposition to the petition,

89 the court determines that the petitioner, as a matter of law, is not entitled to ~~reduction~~
90 expungement.

91 (i) If the court sets the matter for hearing, all interested parties who have filed a notice of
92 opposition shall be notified. At the hearing, the court may inquire into the background of the
93 petitioner and shall have access to any reports or records relating to the petitioner that are on file
94 with any law-enforcement authority, the institution of confinement, if any, and parole authority or
95 other agency which was in any way involved with the petitioner's arrest, conviction, sentence and
96 post-conviction supervision, including any record of arrest or conviction in any other state or
97 federal court. The court may hear testimony of witnesses and evidence of any other matter the
98 court deems proper and relevant to its determination regarding the petition. The court shall enter
99 an order reflecting its ruling on the petition for criminal offense ~~reduction~~ expungement with
100 appropriate findings of fact and conclusions of law.

101 (j) If the court grants the petition for criminal offense ~~reduction~~ expungement, it shall order
102 any records in the custody of the court, and of any other agency or official, including law-
103 enforcement records, to reflect ~~reduction~~ expungement of the ~~felony~~ offense. ~~to the status of~~
104 ~~reduced misdemeanor~~ Every agency with records relating to the arrest, charge or other matters
105 arising out of the arrest or conviction that is ordered to reflect the criminal offense ~~reduction~~
106 expungement in its records shall certify to the court within 90 days of the entry of the criminal
107 offense ~~reduction~~ expungement order that the required ~~reduction~~ expungement has been
108 completed: *Provided*, That upon inquiry by a prospective employer or on an application for
109 employment, credit or other type of application, he or she shall disclose the existence of the
110 ~~reduced misdemeanor~~ expunged conviction and acknowledgement of the prior conviction if asked
111 about prior convictions or crimes.

112 (k) Upon granting of criminal offense ~~reduction~~ expungement, the person whose ~~felony~~
113 offense has been ~~reduced~~ expunged under the provisions of this article shall not have to disclose
114 the fact of the record or any matter relating thereto on an application for employment, credit or

115 other type of application that he or she has a felony conviction or has been convicted of the
116 qualifying offense.

§61-11B-5. Employer protections.

1 (a) A cause of action may not be brought against an employer, general contractor,
2 premises owner or other third party solely based on the employer, general contractor, premises
3 owner or other third party employing a person or independent contractor who has been convicted
4 of a nonviolent, nonsexual offense or a person who has had his or her conviction ~~reduced~~
5 expunged pursuant to this article.

6 (b) In a negligent hiring action against an employer, general contractor, premises owner,
7 or other third party for the acts of an employee or independent contractor that is based on a theory
8 of liability other than that described by §61-11B-5(a) of this code, the fact that the employee or
9 independent contractor was convicted of a nonviolent, nonsexual offense or had his or her
10 conviction ~~reduced~~ expunged pursuant to this article before the employee or independent
11 contractor's employment or contractual obligation with the employer, general contractor, premises
12 owner or other third party, as applicable, may not be introduced into evidence.

13 (c) This section does not preclude any existing cause of action for failure of an employer
14 or other person to provide adequate supervision of an employee or independent contractor,
15 except that the fact that the employee or independent contractor has been convicted of a
16 nonviolent, nonsexual criminal offense or had his or her conviction ~~reduced~~ expunged pursuant
17 to this article may be introduced into evidence in the suit only if the employer:

18 (1) Knew of the conviction or was grossly negligent in not knowing of the conviction; ~~or~~
19 ~~reduced offense~~; and

20 (2) The conviction or ~~reduced offense~~ expungement was directly related to the nature of
21 the employee's or independent contractor's work and the conduct that gave rise to the alleged
22 injury that is the basis of the suit.

23 (d) This section shall not be interpreted as implying a cause of action exists for negligent

- 24 hiring of a person based upon his or her criminal record in factual situations not covered by the
- 25 provisions of this section.

NOTE: The purpose of this bill is to allow for criminal record expungement, rather than just reducing felonies to a misdemeanor and, to allow access to the petition process after five years instead of 10 years.

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