

WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

Engrossed

Committee Substitute

for

Senate Bill 152

SENATORS JEFFRIES, BALDWIN, STOLLINGS, WOELFEL,

AND LINDSAY, *original sponsors*

[Originating in the Committee on the Judiciary;

Reported on January 16, 2019]

1 A BILL to repeal §61-11B-1, §61-11B-2, §61-11B-3, §61-11B-4, and §61-11B-5 of the Code of
2 West Virginia, 1931, as amended; and to amend and reenact §61-11-26 of said code,
3 relating generally to expungement of certain convictions; defining terms; eliminating age
4 limitations for petitioners seeking to expunge certain misdemeanors; expanding eligibility
5 for criminal expungement to persons convicted of certain nonviolent felonies; providing
6 exclusions from eligibility; establishing time limitations for filing a petition for expungement;
7 creating petition requirements and court procedure for evaluating petitions for preliminary
8 and final orders of expungement for expungable offenses; providing for preliminary orders
9 of expungement for a felony before one may obtain a final order of expungement; clarifying
10 disclosure requirements with respect to the information sealed pursuant to an order of
11 expungement, including exemptions; providing standard for inspection of sealed records;
12 establishing fees; clarifying that an order of expungement does not reinstate eligibility for
13 certain benefits lost due to expunged conviction; and making technical changes.

Be it enacted by the Legislature of West Virginia:

ARTICLE 11. GENERAL PROVISIONS CONCERNING CRIMES.

§61-11-26. Expungement of certain criminal convictions; procedures; effect.

1 (a) Eligibility for expungement. —

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

10 (2) Subject to the limitations set forth in this section, a person convicted of a nonviolent
11 felony offense or offenses arising from the same transaction or series of transactions may,
12 pursuant to this section, petition the circuit court in which the conviction or convictions occurred
13 for a preliminary order of expungement of the conviction or convictions and the records associated
14 with the conviction and, subsequently, a final order of expungement of the conviction or
15 convictions and the records associated with the conviction if the conditions of this section are met.

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

24 (b) Temporal requirements. —

25 (1) A person is not eligible for expungement pursuant to subdivision (1), subsection (a) of
26 this section until one year after completion of any sentence of incarceration or completion of any
27 period of supervision, whichever is later in time.

28 (2) A person is not eligible for expungement pursuant to subdivision (2), subsection (a) of
29 this section until three years after completion of any sentence of incarceration or completion of
30 any period of supervision, whichever is later in time.

31 (3) A person is not eligible for permanent expungement until five years after an order is
32 entered granting the petition of that person for preliminary order of expungement pursuant to
33 subdivision (2), subsection (a) of this section.

34 (4) Notwithstanding the provisions of subdivisions (1), (2), and (3) of this subsection, a
35 person seeking expungement may directly petition for a final order of expungement if eight or
36 more years have elapsed since the later occurring completion of incarceration or supervision.

37 (c) Limitations on eligibility for expungement. — A person is not eligible for expungement
38 pursuant to subsection (a) of this section for convictions and the records associated with the
39 following offenses:

40 (1) Any felony offense of violence against the person as defined in subdivision (2),
41 subsection (q) of this section or any misdemeanor offense involving the intentional infliction of
42 physical injury to a minor or law-enforcement officer;

43 (2) Any felony offense when the victim of the crime was a minor as defined in subdivision
44 (3), subsection (q) of this section;

45 (3) Any misdemeanor offense which violates the provisions of §61-8B-1 et seq. of this
46 code, where the victim was mentally or physically incapacitated or where the petitioner was 18
47 years of age or older and the victim was 12 years of age or younger at the time the offense
48 occurred;

49 (4) Any offense where the petitioner used or exhibited a deadly weapon or dangerous
50 instrument;

51 (5) Any violation of §61-2-28 of this code, or any offense which violates §61-2-9(b) or §61-
52 2-9(c) of this code where the victim was a spouse, a person with whom the person seeking
53 expungement had a child in common, or with whom the person seeking expungement ever
54 cohabited prior to the offense or a violation of §61-2-28(c) of this code;

55 (6) Any violation of §61-2-29 of this code;

56 (7) Any offense of driving under the influence of alcohol or a controlled substance;

57 (8) Any offense which violates §17B-4-3 of this code;

58 (9) Any offense which violates §61-8-12 or §61-8-19 of this code;

59 (10) Any offense which violates §17E-1-13(g) of this code; and

60 (11) Any offense of conspiracy to commit a felony set forth in subdivisions (1) through (8),
61 inclusive, of this subsection.

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

65 (1) The ~~P~~petitioner's current name and all other legal names or aliases by which the
66 petitioner has been known at any time;

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

69 (3) The ~~P~~petitioner's date of birth and Social Security number;

70 (4) The ~~P~~petitioner's date of arrest, the court of jurisdiction, and criminal complaint,
71 indictment, summons, or case number;

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

74 (6) The names of any victim or victims, or a statement that there were no identifiable
75 victims;

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

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

82 (9) ~~Why~~ The grounds on which expungement is sought, ~~such as,~~ including, but not limited
83 to, employment or licensure purposes ~~and why it should be granted~~;

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

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

90 (12) Any supporting documents, sworn statements, affidavits, or other information
91 supporting the petition ~~to expunge~~ for expungement.

92 ~~(d)~~ (e) Service of petition for expungement. — The petitioner shall serve a copy of the
93 petition, with any supporting documentation, ~~shall be served by petitioner~~ pursuant to the rules of
94 the trial court upon the following persons or entities:

95 (1) The Superintendent of the State Police;

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

97 (3) The chief of police or other executive head of the municipal police department ~~wherein~~
98 where the offense was committed;

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

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

103 (6) The circuit court, magistrate court, or municipal court which disposed of the petitioner's
104 criminal charge. ~~and all other state and local government agencies whose records would~~
105 ~~be affected by the proposed expungement.~~

106 ~~(f) The prosecutorial office that had jurisdiction over the offense or offenses for~~ The
107 prosecuting attorney of the county in which expungement is sought shall serve ~~by first class mail~~
108 the petition for expungement, accompanying documentation, and any proposed expungement
109 order by first class mail to any identified victims.

110 ~~(e)~~ (g) Notice of opposition. —

111 (1) Upon receipt of a petition for expungement, the Superintendent of the State Police; the
112 prosecuting attorney of the county of conviction; the chief of police or other executive head of the
113 municipal police department wherein the offense was committed; the chief law enforcement
114 officer of any other law enforcement agency which participated in the arrest of the petitioner; the
115 superintendent or warden of any institution in which the petitioner was confined; the magistrate
116 court or municipal court which disposed of the petitioner's criminal charge; all other state and local
117 government agencies whose records would be affected by the proposed expungement Upon
118 receipt of a petition for expungement, the persons and entities listed in subsection (e) of this
119 section, and any other interested individual person or agency that desires to oppose the
120 expungement shall may, within 30 days of receipt of the petition, file a notice of opposition with
121 the court with supporting documentation and sworn statements setting forth the reasons for
122 resisting the petition for expungement.

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

125 (3) The petitioner may file a reply to a notice of opposition no later than ten 30 days after
126 service of any notice of opposition to the petition for expungement.

127 ~~(f)~~ (h) Burden of proof. — The burden of proof shall be on the petitioner seeking an order
128 of expungement to prove by clear and convincing evidence ~~that:~~

129 (1) That the conviction or convictions for which expungement is sought are the only
130 convictions against the petitioner and that the conviction or convictions are not excluded from
131 expungement by ~~subsection (j)~~ the provisions of this section;

132 (2) That the requisite time period has passed since ~~the conviction or convictions or end of~~
133 the completion of any sentence of incarceration or probation period of supervision as set forth in
134 subsection (b) of this section;

135 (3) That the petitioner has no criminal charges pending against him or her;

136 (4) That the expungement is consistent with the public welfare;

137 (5) That the petitioner has, by his or her behavior since the conviction or convictions,
138 evidenced that he or she has been rehabilitated and is law-abiding; and

139 (6) Any other ~~matter~~ facts deemed considered appropriate or necessary by the court to
140 make a determination regarding the petition for expungement.

141 ~~(g)~~ (i) Court procedure for petition for expungement. —

142 (1) Within 60 days of the filing of a petition for expungement the circuit court shall:

143 ~~(4)~~ (A) For persons eligible pursuant to subdivision (1), subsection (a) of this section:

144 (i) Summarily grant the petition;

145 ~~(2)~~ (ii) Set the matter for hearing; or

146 ~~(3)~~ (iii) Summarily deny the petition if the court determines that the petition is insufficient

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

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

149 (B) For persons eligible pursuant to subdivision (2), subsection (a) of this section:

150 (i) Summarily and preliminarily grant the petition subject to the provisions of this section;

151 (ii) Set the matter for hearing; or

152 (iii) Summarily deny the petition if the court determines that the petition is insufficient or,

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

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

155 (2) If the court enters a preliminary order of expungement, it shall allow the record to

156 remain open for a motion for final expungement or a motion to set aside the preliminary order of

157 expungement.

158 (i) (h)–If the court sets the matter for hearing, all interested parties who have filed a notice

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

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

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

162 other agency which was in any way involved with the petitioner’s arrest, conviction, sentence, and
163 post-conviction supervision, including any record of arrest or conviction in any other state or
164 federal court. The court may hear testimony of witnesses and any other matter the court ~~deems~~
165 considers proper and relevant to its determination regarding the petition. The court shall enter an
166 order reflecting its ruling on the petition for expungement with appropriate findings of fact and
167 conclusions of law.

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

180 (k) Preliminary and final orders of expungement for nonviolent felonies. — If the court
181 grants the petition for expungement pursuant to subdivision (2), subsection (a) of this section, the
182 court’s order shall be preliminary and subject to a motion by the petitioner to make the order a
183 final order of expungement.

184 (1) A preliminary order of expungement shall order the sealing of all court records and
185 other records pursuant to of this section related to the nonviolent felony or felonies that are the
186 subject of the petition. The preliminary order of expungement is subject to the following limitations:

187 (A) Notwithstanding the provisions of subsection (n) of this section, the custodians of
188 records subject to sealing pursuant to this section may inspect the sealed records without
189 obtaining an order of the court, if inspection is made for a legitimate law enforcement purpose;
190 and

191 (B) The court shall vacate the preliminary order of expungement if the petitioner is
192 convicted of a felony or misdemeanor offense other than a minor traffic violation subsequent to
193 the entry of the preliminary order of expungement.

194 (2) A motion for a final order of expungement for a nonviolent felony or felonies may not
195 be made until five years after the entry of the preliminary order of expungement.

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

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

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

202 (iii) Is the subject of any outstanding warrants or currently the subject of a pending criminal
203 proceeding.

204 (B) Within 90 days of the filing of a motion for a final order of expungement, the circuit
205 court shall:

206 (i) Summarily grant the motion;

207 (ii) Set the matter for hearing; or

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

213 ~~(j)~~ (l) Sealing of records. — If the court grants the petition for expungement, it shall order
214 the sealing of all records in the custody of the court and expungement of any records in the
215 custody of any other agency or official, including law-enforcement records. Every agency with
216 records relating to the arrest, charge, or other matters arising out of the arrest or conviction that
217 is ordered to expunge records shall certify to the court within 60 days of the entry of the
218 expungement order that the required expungement has been completed. All orders enforcing the
219 expungement procedure shall also be sealed. ~~For the purposes of this section, “records” do not~~
220 ~~include the records of the Governor, the Legislature or the Secretary of State that pertain to a~~
221 ~~grant of pardon. Such records that pertain to a grant of pardon are not subject to an order of~~
222 ~~expungement. The amendment to this section during the fourth extraordinary session of the~~
223 ~~Legislature in the year 2009 is not for the purpose of changing existing law, but is intended to~~
224 ~~clarify the intent of the Legislature as to existing law regarding expungement.~~

225 ~~(k)~~ (m) Disclosure of expunged matters. —

226 (1) Subject to the exceptions set forth in this section, upon expungement, the proceedings
227 in the matter shall be ~~deemed,~~ considered, as a matter of law, never to have occurred. The court
228 and other agencies shall reply to any inquiry that no record exists on the matter. The person
229 whose record is expunged shall not have to disclose the fact of the record or any matter relating
230 ~~thereto~~ to the record on an application for employment, credit, or other type of application:
231 Provided, That any person applying for a position in which he or she would be engaging in the
232 prevention, detection, investigation, prosecution, or incarceration of persons for violations of the
233 law shall disclose any and all convictions to his or her prospective employer, regardless of whether
234 the conviction or convictions have been expunged pursuant to this section.

235 (2) A person for whom an order of expungement has been entered pursuant to this section
236 may not be found guilty of perjury or otherwise giving a false statement, under any provision of
237 this code, because of that person’s failure to recite or acknowledge the arrest, indictment,

238 information, trial, or conviction, as long as the person is in compliance with subdivision (1) of this
239 subsection.

240 (3) Notwithstanding any provisions of this code to the contrary, a person required by state
241 law to obtain a criminal history record check on a prospective employee are authorized to have
242 knowledge of any convictions expunged under this section.

243 (†) (n) *Inspection of sealed records.* — Inspection of the sealed records in the court's
244 possession may thereafter be permitted by the court only upon a motion by the person who is the
245 subject of the records or upon a petition filed by a prosecuting attorney that inspection and
246 possible use of the records in question are necessary to the investigation or prosecution of a
247 crime in this state or another jurisdiction. If the court finds that there is a legitimate reason for
248 access and the interests of justice will be served by granting a petition to inspect the sealed
249 record, it may ~~be granted~~ grant access under the terms and conditions determined by the court.

250 (o) *Fees for filing petition for expungement and processing orders of expungement.* — The
251 clerk of the circuit court shall charge and collect in advance the same fee for a petition for
252 expungement as is charged for instituting a civil action pursuant to §59-1-11(a)(1) of this code. A
253 person obtaining an order of expungement pursuant to the provisions of this section shall pay a
254 fee of \$50 to the records division of the West Virginia State Police for the cost of processing the
255 order of expungement.

256 (p) Notwithstanding any provision of this code to the contrary, a person may only obtain
257 the relief afforded by the provisions of this section once.

258 (q) For the purposes of this section:

259 (1) "Court record" means an official record of a court about a proceeding that the clerk of
260 the court or other court personnel maintains. "Court record" includes an index, a docket entry, a
261 petition or other pleading, a memorandum, a transcription of proceedings, an electronic recording,
262 an order, and a judgment.

263 (2) “Felony crime of violence against the person” means those felony offenses set forth in
264 §61-2-1 et seq., §61-3E-1 et seq., §61-8B-1 et seq., and §61-8D-1 et seq. of this code.

265 (3) “Felony offenses where the victim was a minor” means felony violation of §61-3C-14b,
266 §61-8-1 et seq., §61-8A-1 et seq., §61-8C-1 et seq., or §61-8D-1 et seq. of this code.

267 (4) “Records” do not include the records of the Governor, the Legislature, or the Secretary
268 of State that pertain to a grant of pardon. Records that pertain to a grant of pardon are not subject
269 to an order of expungement.

270 (5) “Seal” means removing information from public inspection in accordance with this
271 section.

272 (6) “Sealing” means:

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

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

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

281 (r) Statutory construction. — Nothing in this section may be construed to allow a person
282 obtaining relief pursuant to this section to be eligible for reinstatement of any retirement or
283 employment benefit which he or she lost or forfeited due to the conviction or convictions
284 expunged.

ARTICLE 11B. CRIMINAL OFFENSE REDUCTION.

§61-11B-1. Legislative intent.

1 [Repealed.]

§61-11B-2. Definitions.

1 [Repealed.]

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

1 [Repealed.]

§61-11B-4. Petition for reduction.

1 [Repealed.]

§61-11B-5. Employer protections.

1 [Repealed.]

NOTE: The purpose of this bill is to amend the procedures and eligibility requirements for expungement of criminal 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.