

# WEST VIRGINIA LEGISLATURE

## 2019 REGULAR SESSION

Introduced

### House Bill 2485

FISCAL  
NOTE

BY DELEGATES PUSHKIN, MILLER, KUMP, ROWE, CAPUTO,  
BYRD, MCGEEHAN, QUEEN, CANESTRARO, PAYNTER AND  
WILSON

[Introduced January 17, 2019; Referred  
to the Committee on the Judiciary.]

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 West  
 2 Virginia, 1931, as amended, and to amend and reenact §61-11-26 of said code, all relating  
 3 to expungement of criminal convictions; allowing expungement for nonviolent felonies;  
 4 providing various time periods for eligibility of expungement based on type of crime;  
 5 specifying types of crimes ineligible for expungement; revising procedures for criminal  
 6 expungements; providing procedures for preliminary and final orders for expungement;  
 7 providing conditions for sealing, access and disclosures of records; allowing persons with  
 8 expunged records to deny records existence; providing that sealed records are not to  
 9 appear in criminal history record checks; defining terms; and providing for expiration of  
 10 existing law reducing criminal status from felony to misdemeanor for certain crimes  
 11 repealed in favor of these revised expungement requirements.

*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) Misdemeanors. — Subject to the limitations set forth in this section, Any a person  
 3 convicted of a misdemeanor offense or offenses arising from the same transaction ~~committed~~  
 4 ~~while he or she was between the ages of eighteen and twenty-six, inclusive, or series of~~  
 5 transactions may, pursuant to the provisions of this section, petition the circuit court in which the  
 6 conviction or convictions occurred for expungement of the conviction or convictions and the  
 7 records associated therewith. ~~The clerk of the circuit court shall charge and collect in advance the~~  
 8 ~~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) Nonviolent felonies. — Subject to the limitations set forth in this section, a person  
 11 convicted of a nonviolent felony offense or offenses arising from the same transaction or series  
 12 of transactions may, pursuant to this section, petition the circuit court in which the conviction or

13 convictions occurred for a preliminary order of expungement of the conviction or convictions and  
14 the records associated therewith, and subsequently a final order of expungement of the conviction  
15 or convictions and the records associated therewith 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) No person is eligible for expungement pursuant to §61-11-26(a)(1) of this code until  
26 one year after completion of any sentence of incarceration or completion of any period of  
27 supervision, whichever is later in time.

28 (2) No person is eligible for expungement pursuant to §61-11-26(a)(2) of this code until  
29 three years after completion of any sentence of incarceration or completion of any period of  
30 supervision, whichever is later in time.

31 (3) No person is 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 §61-  
33 11-26(a)(2) of this code.

34 (c) *Limitations on eligibility for expungement.* — No person is eligible for expungement of  
35 a conviction and the records associated therewith pursuant to §61-11-26(a) of this code for:

36 (1) Any felony crime of violence against the person or any misdemeanor offense involving  
37 the intentional infliction of physical injury to a minor;

38 (2) Any felony offense when the victim of the crime was a minor;

39 (3) Any misdemeanor violation of the provisions of §61-8B-1 et seq. of this code where  
40 the victim was mentally or physically incapacitated or where the petitioner was 18 years of age or  
41 older and the victim was 12 years of age or younger at the time the violation occurred;

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

44 (5) Any violation of §61-2-28 of this code or §61-2-9(b) or §61-2-9(c) of this code where  
45 the victim was spouse, a person seeking expungement had a child in common with or with whom  
46 the person seeking expungement ever cohabited prior to the offense.

47 (6) Any conviction for driving under the influence of alcohol or a controlled substance;

48 (7) Any conviction for a violation of §17B-4-3 of this code; and

49 (8) Any violation of §61-8-19 of this code.

50 (9) As used in this section a “felony crime of violence against the person” means those  
51 felony offenses set forth in §61-2-1 et seq., §61-3E-1 et seq., §61-8B-1 et seq., and §61-8D-1 et  
52 seq. of this code and “felony offenses where the victim was a minor” means felony violation of  
53 §61-3C-14b of this code and §61-8-1 et seq.; §61-8A-1 et seq.; §61-8C-1 et seq. and §61-8D-1  
54 et seq. of this code.

55 (10) A conviction for conspiracy to violate a felony set forth in this subsection constitutes  
56 a disqualifying offense.

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

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

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

64 (3) Petitioner’s date of birth and social security number;

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

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

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

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

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

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

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

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

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

85 ~~(d)~~ (e) Service of petition for expungement. — A copy of the petition, with any supporting  
86 documentation, shall be served by petitioner pursuant to the rules of the trial court upon the  
87 following persons or entities:

88 (1) The Superintendent of the State Police;

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

90 (3) the The chief of police or other executive head of the municipal police department

91 wherein the offense was committed;

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

94 ~~(5) the~~ The superintendent or warden of any institution in which the petitioner was  
95 confined; and

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

99 ~~The prosecutorial office that had jurisdiction over the offense or offenses~~ prosecuting  
100 attorney of the county of conviction for which expungement is sought shall serve by first class  
101 mail the petition for expungement, accompanying documentation and any proposed  
102 expungement order ~~to~~ upon any identified victims.

103 ~~(e)~~ (f) *Filing and service of notice of opposition to petition for expungement.* — Upon  
104 receipt of a petition for expungement, the ~~superintendent of the State Police; the prosecuting~~  
105 ~~attorney of the county of conviction; the chief of police or other executive head of the municipal~~  
106 ~~police department wherein the offense was committed; the chief law-enforcement officer of any~~  
107 ~~other law-enforcement agency which participated in the arrest of the petitioner; the superintendent~~  
108 ~~or warden of any institution in which the petitioner was confined; the magistrate court or municipal~~  
109 ~~court which disposed of the petitioner's criminal charge; all other state and local government~~  
110 ~~agencies whose records would be affected by the proposed expungement~~ persons and entities  
111 listed in §61-11-26(e) of this code and any other interested individual or agency that desires to  
112 oppose the expungement shall ~~shall~~ may, within 30 days of receipt of the petition, file a notice of  
113 opposition with the court with supporting documentation and sworn statements setting forth the  
114 reasons for resisting the petition for expungement.

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

117           (2) The petitioner may file a reply to a notice of opposition no later than ~~ten~~ 30 days after  
118 service of any notice of opposition to the petition for expungement.

119           ~~(f)~~ (g) Burden of proof. — The burden of proof shall be on the petitioner seeking an order  
120 of expungement to prove by clear and convincing evidence that: (1) The conviction or convictions  
121 for which expungement is sought are the only convictions against petitioner and that the  
122 conviction or convictions are not excluded from expungement by ~~subsection (j) of the provisions~~  
123 of this section; (2) the requisite time period has passed since the conviction or convictions or end  
124 of the completion of any sentence of incarceration or ~~probation~~ period of supervision as set forth  
125 in §61-11-26(b)(2) of this code; (3) petitioner has no criminal charges pending against him or her;  
126 (4) the expungement is consistent with the public welfare; (5) petitioner has, by his or her behavior  
127 since the conviction or convictions, evidenced that he or she has been rehabilitated and is law-  
128 abiding; and (6) any other matter deemed appropriate or necessary by the court to make a  
129 determination regarding the petition for expungement.

130           ~~(g)~~ (h) Court procedure for petition for expungement. — Within 60 days of the filing of a  
131 petition for expungement the circuit court shall:

132           (1) For persons eligible pursuant to §61-11-26(a)(1) of this code:

133           (A) Summarily grant the petition;

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

135           ~~(3)~~ (C) Summarily deny the petition if the court determines that the petition is insufficient  
136 or, based upon supporting documentation and sworn statements filed in opposition to the petition,  
137 the court determines that the petitioner, as a matter of law, is not entitled to expungement.

138           (2) For persons eligible pursuant to §61-11-26(a)(2) of this code:

139           (A) Summarily and preliminarily grant the petition subject to the provisions of §61-11-  
140 26(j) of this code;

141           (B) Set the matter for hearing; or

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

143 based upon supporting documentation and sworn statements filed in opposition to the petition,  
144 the court determines that the petitioner, as a matter of law, is not entitled to expungement.

145 If the court enters a preliminary order of expungement, it shall allow the record to remain  
146 open for a motion for final expungement or a motion to set aside the preliminary order of  
147 expungement.

148 ~~(h)~~ (i) Hearing on petition for expungement. — If the court sets the matter for hearing, all  
149 interested parties who have filed a notice of opposition shall be notified. At the hearing, the court  
150 may inquire into the background of the petitioner and shall have access to any reports or records  
151 relating to the petitioner that are on file with any law-enforcement authority, the institution of  
152 confinement, if any, and parole authority or other agency which was in any way involved with the  
153 petitioner's arrest, conviction, sentence and post-conviction supervision, including any record of  
154 arrest or conviction in any other state or federal court. The court may hear testimony of witnesses  
155 and any other matter the court deems proper and relevant to its determination regarding the  
156 petition. The court shall enter an order reflecting its ruling on the petition for expungement with  
157 appropriate findings of fact and conclusions of law.

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



169 ~~code or section nineteen, article eight of this chapter~~

170 (i) Preliminary and final orders of expungement for nonviolent felonies. — If the court  
171 grants the petition for expungement pursuant to §61-11-26(a)(2) of this code, the court's order  
172 shall be preliminary and subject to a motion by the petitioner to make the order a final order of  
173 expungement.

174 (1) Preliminary order of expungement. — A preliminary order of expungement shall order  
175 the sealing of all court records and other records pursuant to §61-11-26(l) of this code related to  
176 the nonviolent felony or felonies that are the subject of the petition. The preliminary order of  
177 expungement is subject to the following limitations:

178 (A) Notwithstanding the provisions of §61-11-26(m) of this code, the custodians of records  
179 subject to sealing pursuant to §61-11-26(k) of this code may inspect the sealed records without  
180 obtaining an order of the court, if inspection is made for a legitimate law enforcement purpose;  
181 and

182 (B) A preliminary order of expungement shall be vacated if the petitioner is convicted of a  
183 felony or misdemeanor offense other than a minor traffic violation subsequent to the entry of the  
184 preliminary order of expungement.

185 (2) Motion for final order of expungement. — A motion for a final order of expungement  
186 for a nonviolent felony or felonies may not be made until five years after the entry of the preliminary  
187 order of expungement.

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

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

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

194 (iii) Is subject of any outstanding warrants or is currently the subject of a pending criminal

195 proceeding.

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

198 (i) Summarily grant the motion;

199 (ii) Set the matter for hearing; or

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

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 60 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. ~~For the purposes of this section, "records" do not~~  
 212 ~~include the records of the Governor, the Legislature or the Secretary of State that pertain to a~~  
 213 ~~grant of pardon. Such records that pertain to a grant of pardon are not subject to an order of~~  
 214 ~~expungement. The amendment to this section during the fourth extraordinary session of the~~  
 215 ~~Legislature in the year 2009 is not for the purpose of changing existing law, but is intended to~~  
 216 ~~clarify the intent of the Legislature as to existing law regarding expungement~~

217 ~~(k)~~ (l) Disclosure of expunged matters. —

218 (1) Subject to the exceptions set forth in this section, Upon upon expungement, the  
 219 proceedings in the matter shall be deemed as a matter of law never to have occurred. The court  
 220 and other agencies shall reply to any inquiry that no record exists on the matter. The person

221 whose record is expunged shall not have to disclose the fact of the record or any matter relating  
222 thereto on an application for employment, credit or other type of application: Provided, That any  
223 person applying for a position in which he or she would be engaging in the prevention, detection,  
224 investigation, prosecution or incarceration of persons for violations of the law shall disclose any  
225 and all convictions to his or her prospective employer regardless of whether the conviction or  
226 convictions have been expunged pursuant to this section.

227 (2) No persons for whom an order of expungement has been entered pursuant to this  
228 section may be found guilty of perjury or otherwise giving a false statement, under any provision  
229 of this code, because of that person's failure to recite or acknowledge the arrest, indictment,  
230 information, trial or conviction: Provided, That the person is in compliance with §61-11-26(l)(1) of  
231 this code.

232 (3) Notwithstanding any provisions of this code to the contrary, persons required by state  
233 law to obtain a criminal history record check on a prospective employee are not considered to  
234 have knowledge of any convictions expunged under this section.

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

242 (n) For the purposes of this section:

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

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

250 (3) "Seal" means to remove information from public inspection in accordance with this  
251 section; and

252 (4) "Sealing" means:

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

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

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

260 (o) Fees for filing petition for expungement and processing orders of expungement. — The  
261 clerk of the circuit court shall charge and collect in advance the same fee for a petition for  
262 expungement as is charged for instituting a civil action pursuant to §59-1-11((a)(1) of this code.  
263 Any person obtaining an order of expungement pursuant to the provisions of this section shall pay  
264 a fee of \$50 to the records division of the West Virginia State Police to pay the cost of processing  
265 the order of expungement.

266 (p) Nothing in this section may be construed to allow a person obtaining relief pursuant to  
267 this section to be eligible for reinstatement of any retirement or employment benefit which he or  
268 she lost or forfeited due to the conviction or convictions expunged.

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

271 (r) The enactment of this section during the 2019 regular session includes the repeal of  
272 the provisions of §61-11b-1 et seq. of this code. Any person that had a sentence reduction

273 pursuant to the provisions of §61-11b-1 et seq. of this code may petition the court of record to  
 274 have the criminal offense reduction order converted into an order of expungement. Upon  
 275 verification by the court that the petitioner qualifies, the court shall enter an order of expungement  
 276 of the petitioner's conviction.

## **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 revise the process for eligibility for expungement of criminal records of persons convicted of nonviolent felonies; provides exclusions to eligibility; provides time periods for filing a petition for expungement; revises petition requirements and court procedure for evaluating preliminary and final orders of expungements; revises disclosure requirements for sealed record information; allows persons subject to an expungement to deny records existence; and provides for expiration of existing law reducing criminal status from felony to misdemeanor for certain crimes repealed in favor of these new expungement requirements.

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