

# **WEST VIRGINIA LEGISLATURE**

## **2021 REGULAR SESSION**

**Introduced**

### **House Bill 3196**

BY DELEGATES HAMRICK, HORNBUCKLE AND

HIGGINBOTHAM

[Introduced March 16, 2021; Referred to the

Committee on the Judiciary]

1 A BILL to amend and reenact §61-11-26 of the Code of West Virginia, 1931, as amended, relating  
2 to automating the expungement of criminal records.

*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. —

3 Subject to the limitations set forth in this section, a person convicted of a misdemeanor  
4 offense or offenses may, pursuant to the provisions of this section, petition the circuit court in  
5 which the conviction or convictions occurred for expungement of the conviction or convictions and  
6 the records associated with the conviction or convictions.

7 (2) Nonviolent felonies. —

8 Subject to the limitations set forth in this section, a person convicted of a nonviolent felony  
9 offense or offenses arising from the same transaction or series of transactions may, pursuant to  
10 the provisions of this section, petition the circuit court in which the conviction or convictions  
11 occurred for expungement of the conviction or convictions and the records associated with the  
12 conviction or convictions.

13 (b) Temporal requirements. —

14 (1) Misdemeanor. — A person is not eligible for expungement pursuant to subdivision (1),  
15 subsection (a) of this section until one year after conviction, completion of any sentence of  
16 incarceration or completion of any period of supervision, whichever is later in time.

17 (2) More than one misdemeanor. — A person is not eligible for expungement of multiple  
18 misdemeanors pursuant to subdivision (1), subsection (a) of this section until two years after the  
19 last conviction, completion of any sentence of incarceration, or completion of any period of  
20 supervision ordered for the last conviction, whichever is later in time.

21 (3) Nonviolent felonies. — A person is not eligible for expungement of a nonviolent felony

22 pursuant to subdivision (2), subsection (a) of this section until five years after conviction,  
23 completion of any sentence of incarceration, or completion of any period of supervision, whichever  
24 is later in time.

25 (c) Limitations on eligibility for expungement. — A person is not eligible for expungement  
26 pursuant to subsection (a) of this section for convictions of the following offenses:

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

30 (2) Any felony offense in which the victim of the crime was a minor as defined in  
31 subdivision (3), subsection (p) of this section;

32 (3) Any violation of §61-8B-1 *et seq.* of this code;

33 (4) Any offense in which the petitioner used or exhibited a deadly weapon or dangerous  
34 instrument;

35 (5) Any violation of §61-2-28 of this code, or any offense which violates §61-2-9(b) or §61-  
36 2-9(c) of this code in which the victim was a spouse, a person with whom the person seeking  
37 expungement had a child in common, or with whom the person seeking expungement ever  
38 cohabited prior to the offense or a violation of §61-2-28(c) of this code;

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

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

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

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

43 (10) Any violation of §61-2-9a of this code;

44 (11) Any violation of §61-8B-8 and §61-8B-9 of this code;

45 (12) Any violation of §61-3-11 of this code involving a structure regularly used as a  
46 dwelling;

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48 (13) Any conviction for which the sentencing judge made a written finding that the offense  
49 was sexually motivated;

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

51 (15) Any offense of conspiracy or attempt to commit a felony set forth in subdivisions (1)  
52 through (11) and (13), inclusive, of this subsection.

53 *Provided*, That a conviction for driving under the influence of alcohol, controlled  
54 substances, or drugs shall not preclude expungement of an unrelated and otherwise expungable  
55 felony if the conviction for driving under the influence of alcohol, controlled substances, or drugs  
56 is at least five years old at the time the petition for expungement is filed.

57 (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: *Provided*, That a petition for the expungement of multiple misdemeanors shall identify  
60 and group such information by circuit court, as applicable, from which expungement of a particular  
61 conviction or convictions is being sought:

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

64 (2) All of the petitioner's addresses from the date of the offense in connection with which  
65 an expungement order is sought to date of the petition;

66 (3) The petitioner's date of birth and Social Security number;

67 (4) The petitioner's date of arrest, the court of jurisdiction, and criminal complaint,  
68 indictment, summons, or case number;

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

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

73 (7) Whether there is any current order for restitution, protection, restraining order, or other

74 no contact order prohibiting the petitioner from contacting the victim or whether there has ever  
75 been a prior order for restitution, protection, or restraining order prohibiting the petitioner from  
76 contacting the victim. If there is a current order, the petitioner shall attach a copy of that order to  
77 his or her petition;

78 (8) The disposition of the matter and sentence imposed, if any;

79 (9) The grounds on which expungement is sought, including, but not limited to,  
80 employment or licensure purposes;

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

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

87 (12) Any supporting documents, sworn statements, affidavits, or other information  
88 supporting the petition for expungement.

89 (e) Service of petition for expungement. — The petitioner shall serve a copy of the petition,  
90 with any supporting documentation, pursuant to the rules of the trial court upon the following  
91 persons or entities:

92 (1) The Superintendent of the State Police;

93 (2) The prosecuting attorney of the county or counties of conviction;

94 (3) The chief law-enforcement officer of the law-enforcement agency which arrested the  
95 petitioner;

96 (4) The superintendent, warden, or the Commissioner of Corrections of any institution in  
97 which the petitioner was confined or imprisoned pursuant to the conviction; and

98 (5) The circuit court, magistrate court, or municipal court which disposed of the petitioner's  
99 criminal charge.

100 (f) The prosecuting attorney of the county in which expungement is sought shall serve the  
101 petition for expungement, accompanying documentation, and any proposed expungement order  
102 by first class mail to any identified victims.

103 (g) Notice of opposition. —

104 (1) Upon receipt of a petition for expungement, the persons and entities listed in  
105 subsection (e) of this section, and any other interested person or agency that desires to oppose  
106 the expungement may, within 30 days of receipt of the petition, file a notice of opposition with the  
107 court with supporting documentation and sworn statements setting forth the reasons for resisting  
108 the petition for expungement.

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

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

113 (h) Burden of proof. — The burden of proof shall be on the petitioner seeking an order of  
114 expungement to prove by clear and convincing evidence:

115 (1) That the conviction or convictions for which expungement is sought are the only  
116 convictions for that specified offense or offenses against the petitioner in this state and that the  
117 conviction or convictions are not excluded from expungement by the provisions of this section;

118 (2) That the requisite time has passed since the conviction or convictions or the completion  
119 of any sentence of incarceration or period of supervision as set forth in subsection (b) of this  
120 section;

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

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

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

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126 (6) Any other facts considered appropriate or necessary by the court to make a  
127 determination regarding the petition for expungement.

128 (i) Court procedure for petition for expungement. — Within 60 days of the filing of a petition  
129 for expungement the circuit court shall:

130 (1) Summarily grant the petition;

131 (2) Return the petition to the petitioner to supply incomplete information or correct obvious  
132 errors in order to permit consideration of the petition on its merits;

133 (3) Set the matter for hearing; or

134 (4) Summarily deny the petition if the court determines the petition discloses on its face  
135 or, based upon supporting documentation and sworn statements filed in opposition to the petition,  
136 discloses that the petitioner, as a matter of law, is not entitled to expungement.

137 (j) Hearing on petition for expungement. —

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

148 (k) Sealing of records. — If the court grants the petition for expungement, it shall order the  
149 sealing of all records in the custody of the court and expungement of any records in the custody  
150 of any other agency or official, including law-enforcement records. Every agency with records  
151 relating to the arrest, charge, or other matters arising out of the arrest or conviction that is ordered

152 to expunge records shall certify to the court within 60 days of the entry of the expungement order  
153 that the required expungement has been completed. All orders enforcing the expungement  
154 procedure shall also be sealed.

155 (l) Disclosure of expunged matters. —

156 (1) Subject to the exceptions set forth in this section, upon expungement, the proceedings  
157 in the matter shall be considered, as a matter of law, never to have occurred. The court and other  
158 agencies shall reply to any inquiry that no record exists on the matter. The person whose record  
159 is expunged shall not have to disclose the fact of the record or any matter relating to the record  
160 on an application for employment, credit, or other type of application: *Provided*, That any person  
161 applying for a position in which he or she would be engaging in the prevention, detection,  
162 investigation, prosecution, or incarceration of persons for violations of the law shall disclose any  
163 and all convictions to his or her prospective employer, regardless of whether the conviction or  
164 convictions have been expunged pursuant to this section.

165 (2) A person for whom an order of expungement has been entered pursuant to this section  
166 may not be found guilty of perjury or otherwise giving a false statement, under any provision of  
167 this code, because of that person's failure to recite or acknowledge the arrest, indictment,  
168 information, trial, or conviction, as long as the person is in compliance with subdivision (1) of this  
169 subsection.

170 (3) Notwithstanding any provisions of this code to the contrary, any person required by  
171 state or federal law to obtain a criminal history record check on a prospective employee ~~are~~  
172 ~~authorized to~~ may have knowledge of any convictions expunged under this section.

173 (m) Inspection of sealed records. — Inspection of the sealed records in the court's  
174 possession may thereafter be permitted by the court only upon a motion by the person who is the  
175 subject of the records or upon a petition filed by a prosecuting attorney that inspection and  
176 possible use of the records in question are necessary to the investigation or prosecution of a  
177 crime in this state or another jurisdiction. If the court finds that there is a legitimate reason for

178 access and the interests of justice will be served by granting a petition to inspect the sealed  
179 record, it may grant access under the terms and conditions determined by the court.

180 (n) Fees for filing petition for expungement and processing orders of expungement. — The  
181 clerk of the circuit court shall charge and collect in advance the same fee for a petition for  
182 expungement as is charged for instituting a civil action pursuant to §59-1-11(a)(1) of this code. A  
183 person obtaining an order of expungement pursuant to the provisions of this section shall pay a  
184 fee of \$100 to the records division of the West Virginia State Police for the cost of processing the  
185 order of expungement deposited into a special revenue account within the State Treasurer's office  
186 to be known as the West Virginia State Police Criminal History Account.

187 (o) Notwithstanding any provision of this code to the contrary, a person may only obtain  
188 the relief of expungement afforded by the provisions of this section and §61-11-26a of this code  
189 once.

190 (p) For the purposes of this section:

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

195 (2) "Expungement" means the removal from all public records, other than those specifically  
196 exempted therefrom by the provisions of this section and §61-11-26a of this code, all evidence  
197 that a person has been charged or convicted of a crime.

198 (3) "Felony crime of violence against the person" means those felony offenses set forth in  
199 §61-2-1 *et seq.*, §61-3E-1 *et seq.*, §61-8B-1 *et seq.*, and §61-8D-1 *et seq.* of this code.

200 (4) "Felony offenses in which the victim was a minor" means felony violations of §61-3C-  
201 14b, §61-8-1 *et seq.*, §61-8A-1 *et seq.*, §61-8C-1 *et seq.*, or §61-8D-1 *et seq.* of this code.

202 (5) "Nonviolent felony" means a felony that:

203 (A) Is not an offense listed in subsection (c) of this section;

204 (B) Is not an offense involving the intentional infliction of serious bodily injury;

205 (C) Is an offense the conviction of which is based on facts and circumstances of which the  
206 circuit court finds to be consistent with the purposes of this article; and

207 (D) Is an offense the conviction of which the circuit court finds does not involve violence  
208 or potential violence to another person or the public.

209 (6) "Records" do not include the records of the Governor, the Legislature, or the Secretary  
210 of State that pertain to a grant of pardon. Records that pertain to a grant of pardon are not subject  
211 to an order of expungement.

212 (7) "Seal" means removing information from public inspection in accordance with this  
213 section.

214 (8) "Sealing" means:

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

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

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

223 (q) Statutory construction. — Nothing in this section may be construed to allow a person  
224 obtaining relief pursuant to this section to be eligible for reinstatement of any retirement or  
225 employment benefit which he or she lost or forfeited due to the conviction or convictions  
226 expunged.

227 (r) The enactment of this section during the 2019 regular session of the Legislature  
228 includes the repeal of the provisions of §61-11B-1 *et seq.* of this code. Any person that had a  
229 sentence reduction pursuant to the provisions of §61-11B-1 *et seq.* of this code may petition the

230 court of record to have the criminal offense reduction order converted into an order of  
231 expungement. Upon verification by the court that the petitioner qualifies, the court shall enter an  
232 order of expungement of the petitioner's conviction.

233 (s) Effective July 1, 2023, any person who is qualified for expungement shall have his or  
234 her records expunged by a court without the filing of a petition and without collection of the fee  
235 described in subsection (n) of this section if:

236 (1) The court determines the requirements for expungement have been met; and

237 (2) The court does not receive a notice of opposition after notifying the entities in  
238 subsection (e) of this section.

239 (t) Within 60 days of granting an expungement, a court shall send notice to the person  
240 with an expunged record that explains that, as a matter of the law, the expunged case is  
241 considered to have never occurred and that state agencies shall reply to any inquiry that no record  
242 exists on the matter. The person shall also be informed that he or she does not have to disclose  
243 the fact of the record or any matter relating to the record on an application for employment, credit,  
244 or other type of application: *Provided*, That the person is not applying for a position in which he  
245 or she would be engaging in the prevention, detection, investigation, prosecution, or incarceration  
246 of persons for violations of the law.

NOTE: The purpose of this bill is to ensure those citizens qualified for an expungement receive the expungement they are entitled to.

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