

H. B. 3154

(By Delegates Manypenny, Fleischauer, Manchin,
Sponaugle and Kump)

[Introduced March 25, 2013; referred to the
Committee on the Judiciary then Finance.]

A BILL to amend and reenact §61-11-26 of the Code of West Virginia,
1931, as amended, relating to the expungement of certain
felony convictions; setting forth the conditions; establishing
a procedure; creating exceptions; and establishing its effect.

Be it enacted by the Legislature of West Virginia:

That §61-11-26 of the Code of West Virginia, 1931, as amended,
be amended and reenacted to read as follows:

ARTICLE 11. GENERAL PROVISIONS CONCERNING CRIMES.

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

(a) For the purposes of this section, the terms "nonviolent
misdemeanor" or "nonviolent felony", mean any misdemeanor or felony
except the following:

(1) Any offense involving the infliction of serious physical
injury;

(2) Any of the sex-related or stalking offenses provided by:

- 1 (A) Section nine-a, article two of this chapter;
- 2 (B) Section twelve, article eight of this chapter;
- 3 (C) Section two, article eight-a of this chapter;
- 4 (D) Section four, article eight-a of this chapter;
- 5 (E) Section five, article eight-a of this chapter;
- 6 (F) Section three, article eight-b of this chapter;
- 7 (G) Section four, article eight-b of this chapter;
- 8 (H) Section five, article eight-b of this chapter;
- 9 (I) Section seven, article eight-b of this chapter;
- 10 (J) Section eight, article eight-b of this chapter;
- 11 (K) Section nine, article eight-b of this chapter;
- 12 (L) Section ten, article eight-b of this chapter;
- 13 (M) Section two, article eight-c of this chapter;
- 14 (N) Section three, article eight-c of this chapter;
- 15 (O) Section three-a, article eight-d of this chapter;
- 16 (P) Section five, article eight-d of this chapter; and
- 17 (Q) Section six, article eight-d of this chapter;
- 18 (3) An offense involving the use or exhibition of a firearm,
19 deadly weapon or dangerous instrument;
- 20 (4) Any felony offense in article four, chapter sixty-a of
21 this code where the offense involves methamphetamines, heroin, or
22 cocaine, or possession with the intent to sell or deliver or sell
23 and deliver to a minor child;
- 24 (5) Any felony crime of violence involving offenses contained

1 in articles two, three-e, eight-b or eight-d of this chapter, where
2 the victim was a minor child;

3 (6) A violation of the provisions of subsection (b) or (c),
4 section nine, article two of this chapter where the victim was a
5 spouse, a person with whom the person seeking expungement had a
6 child in common or with whom the person seeking expungement ever
7 cohabitated prior to the offense;

8 (7) Any violation of the provisions of section twenty-eight,
9 article two of this chapter; and

10 (8) An offense involving driving under the influence of
11 alcohol, controlled substances or a conviction for a violation of
12 section three, article four, chapter seventeen-b of this code or
13 section nineteen, article eight of this chapter.

14 (b) Notwithstanding any other provision of law, any person
15 convicted of a nonviolent felony or nonviolent misdemeanor offense
16 or offenses arising from the same transaction committed while he or
17 she was between the ages of eighteen and twenty-six, inclusive, in
18 the same session of court, may, pursuant to the provisions of this
19 section, petition the circuit court in which the conviction or
20 convictions occurred for expungement of the conviction or
21 convictions and the records associated therewith. The clerk of the
22 circuit court shall charge and collect in advance the same fee as
23 is charged for instituting a civil action pursuant to subdivision
24 (1), subsection (a), section eleven, article one, chapter fifty-

1 ~~nine of this code for a petition for expungement.~~

2 ~~(b) Expungement shall not be available for any conviction of~~
3 ~~an offense listed in subsection (i) of this section.~~

4 (c) The relief afforded by this ~~subsection~~ section is only
5 available to persons having no other prior or subsequent
6 convictions other than minor traffic violations at the time the
7 petition is filed: *Provided*, That at the time the petition is
8 filed and during the time the petition is pending, petitioner ~~may~~
9 ~~not be~~ is not the subject of an arrest or any other pending
10 criminal proceeding.

11 (d) (1) ~~No~~ A person ~~shall be~~ is not eligible for expungement
12 ~~pursuant to the provisions of subsection (a) of this section of a~~
13 nonviolent misdemeanor or misdemeanors until one year after the
14 conviction, completion of any sentence of incarceration or
15 probation, whichever is later in time.

16 (2) A person is not eligible for expungement of a nonviolent
17 felony or felonies until five years after the conviction,
18 completion of any sentence of incarceration or parole, whichever is
19 later in time.

20 ~~(e)~~ (e) Each petition to expunge a conviction or convictions
21 pursuant to this section shall be verified under oath and include
22 the following information:

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

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

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

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

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

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

11 (7) Whether there is any current order for restitution,
12 protection, restraining order or other no contact order prohibiting
13 the petitioner from contacting the victims or whether there has
14 ever been a prior order for restitution, protection or restraining
15 order prohibiting the petitioner from contacting the victim. If
16 there is such a current order, petitioner shall attach a copy of
17 that order to his or her petition;

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

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

22 (10) The steps the petitioner has taken since the time of the
23 offenses toward personal rehabilitation, including treatment, work
24 or other personal history that demonstrates rehabilitation;

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

4 (12) Any supporting documents, sworn statements, affidavits or
5 other information supporting the petition to expunge.

6 ~~(d)~~ (f) A copy of the petition, with any supporting
7 documentation, shall be served by petitioner pursuant to the rules
8 of the trial court upon the Superintendent of the State Police; the
9 prosecuting attorney of the county of conviction; the chief of
10 police or other executive head of the municipal police department
11 wherein the offense was committed; the chief law-enforcement
12 officer of any other law-enforcement agency which participated in
13 the arrest of the petitioner; the superintendent or warden of any
14 institution in which the petitioner was confined; the magistrate
15 court or municipal court which disposed of the petitioner's
16 criminal charge; and all other state and local government agencies
17 whose records would be affected by the proposed expungement. The
18 prosecutorial office that had jurisdiction over the offense or
19 offenses for which expungement is sought shall serve by first class
20 mail the petition for expungement, accompanying documentation and
21 any proposed expungement order to any identified victims.

22 ~~(e)~~ (g) Upon receipt of a petition for expungement, the
23 Superintendent of the State Police; the prosecuting attorney of the
24 county of conviction; the chief of police or other executive head

1 of the municipal police department wherein the offense was
2 committed; the chief law-enforcement officer of any other law-
3 enforcement agency which participated in the arrest of the
4 petitioner; the superintendent or warden of any institution in
5 which the petitioner was confined; the magistrate court or
6 municipal court which disposed of the petitioner's criminal charge;
7 all other state and local government agencies whose records would
8 be affected by the proposed expungement and any other interested
9 individual or agency that desires to oppose the expungement shall,
10 within thirty days of receipt of the petition, file a notice of
11 opposition with the court with supporting documentation and sworn
12 statements setting forth the reasons for resisting the petition for
13 expungement. A copy of any notice of opposition with supporting
14 documentation and sworn statements shall be served upon the
15 petitioner in accordance with trial court rules. The petitioner
16 may file a reply no later than ten days after service of any notice
17 of opposition to the petition for expungement.

18 ~~(f)~~ (h) The burden of proof ~~shall be~~ is on the petitioner to
19 prove by clear and convincing evidence that:

20 (1) The conviction or convictions for which expungement is
21 sought are the only convictions against petitioner and that the
22 conviction or convictions are not excluded from expungement by
23 subsection ~~(j)~~ (a) of this section;

24 (2) That the requisite time period has passed since the

1 conviction or convictions or end of the completion of any sentence
2 of incarceration or probation;

3 (3) Petitioner has no criminal charges pending against him or
4 her;

5 (4) The expungement is consistent with the public welfare;

6 (5) Petitioner has, by his or her behavior since the
7 conviction or convictions, evidenced that he or she has been
8 rehabilitated and is law-abiding; and

9 (6) Any other matter deemed appropriate or necessary by the
10 court to make a determination regarding the petition for
11 expungement.

12 ~~(g)~~ (i) Within sixty days of the filing of a petition for
13 expungement the circuit court shall:

14 (1) In the case of a nonviolent misdemeanor:

15 ~~(1)~~ (A) Summarily grant the petition;

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

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

22 (2) In the case of a nonviolent felony:

23 (A) Summarily and preliminarily, grant the petition subject to
24 the provisions of subsection (1) of this section;

1 (B) Set the matter for hearing pursuant to subsection (j); or
2 (C) Summarily deny the petition if the court determines that
3 the petition is insufficient or, based upon supporting
4 documentation and sworn statements filed in opposition to the
5 petition, the court determines that the petitioner, as a matter of
6 law, is not entitled to expungement.

7 ~~(h)~~ (j) If the court sets the matter for hearing, all
8 interested parties who have filed a notice of opposition shall be
9 notified. At the hearing, the court may inquire into the
10 background of the petitioner and shall have access to any reports
11 or records relating to the petitioner that are on file with any
12 law-enforcement authority, the institution of confinement, if any,
13 and parole authority or other agency which was in any way involved
14 with the petitioner's arrest, conviction, sentence and post-
15 conviction supervision, including any record of arrest or
16 conviction in any other state or federal court. The court may hear
17 testimony of witnesses and any other matter the court deems proper
18 and relevant to its determination regarding the petition. The
19 court shall enter an order reflecting its ruling on the petition
20 for expungement with appropriate findings of fact and conclusions
21 of law.

22 ~~(i) No person shall be eligible for expungement of a~~
23 ~~conviction and the records associated therewith pursuant to the~~
24 ~~provisions of subsection (a) of this section for any violation~~

~~1 involving the infliction of serious physical injury; involving the
2 provisions of article eight-b of this chapter where the petitioner
3 was eighteen years old, or older, at the time the violation
4 occurred and the victim was twelve years of age, or younger, at the
5 time the violation occurred; involving the use or exhibition of a
6 deadly weapon or dangerous instrument; of the provisions of
7 subsection (b) or (c), section nine, article two of this chapter
8 where the victim was a spouse, a person with whom the person
9 seeking expungement had a child in common or with whom the person
10 seeking expungement ever cohabitated prior to the offense; any
11 violation of the provisions of section twenty-eight of said
12 article; a conviction for driving under the influence of alcohol,
13 controlled substances or a conviction for a violation of section
14 three, article four, chapter seventeen-b of this code or section
15 nineteen, article eight of this chapter.~~

16 ~~(j)~~ (k) If the court grants the petition for expungement, it
17 shall order:

18 (1) The sealing of all records in the custody of the court and
19 expungement of any records in the custody of any other agency or
20 official, including law-enforcement records.

21 (2) Every agency with records relating to the arrest, charge
22 or other matters arising out of the arrest or conviction that is
23 ordered to expunge records shall certify to the court within sixty
24 days of the entry of the expungement order that the required

1 expungement has been completed. The agency shall also reverse any
2 administrative actions taken against a person whose record is
3 expunged under this section as a result of the charges or
4 convictions expunged. This subsection does not apply to the
5 Department of Justice for DNA records and samples stored in the
6 state DNA Database and the state DNA Databank or to fingerprint
7 records. All orders enforcing the expungement procedure shall also
8 be sealed. All orders enforcing the expungement procedure shall
9 also be sealed. For the purposes of this section, "records" do not
10 include the records of the Governor, the Legislature or the
11 Secretary of State that pertain to a grant of pardon. Such records
12 that pertain to a grant of pardon are not subject to an order of
13 expungement. The amendment to this section during the fourth
14 extraordinary session of the Legislature in the year 2009 is not
15 for the purpose of changing existing law, but is intended to
16 clarify the intent of the Legislature as to existing law regarding
17 expungement.

18 (1) If the court grants the petition for expungement of a
19 nonviolent felony or felonies pursuant to subdivision (1),
20 subsection (i), the court's order shall be preliminary and subject
21 to a motion by the petitioner to make the order a final order of
22 expungement pursuant to subsection (m) of this section.

23 (1) A motion to make the preliminary order a final order of
24 expungement may not be made until five years have elapsed from the

1 granting of the preliminary order.

2 (2) A preliminary order granting a petition for the
3 expungement of a nonviolent felony shall order the sealing of all
4 records in the custody of the court and of any records in the
5 custody of any other agency or official, including law-enforcement
6 records related to the nonviolent felony or felonies that is the
7 subject of the petition.

8 (A) This subdivision does not preclude access to a sealed
9 record for a legitimate reason pursuant to subsection (n) of this
10 section.

11 (B) Within sixty days after entry of an order under this
12 subdivision, each custodian of court records that are subject to
13 the order of sealing shall advise in writing the court and the
14 parties of compliance with the order.

15 ~~(k)~~ (m) A petitioner who is granted a preliminary order
16 pursuant to subsection (l) of this section, may file a motion for
17 a final order of expungement after five years have elapsed from the
18 granting of the preliminary order.

19 (1) A motion filed under this subsection shall be verified
20 under oath and include the following information:

21 (A) Whether the petitioner is the subject of any outstanding
22 warrants or pending criminal cases;

23 (B) Whether the petitioner has any other felony or misdemeanor
24 convictions other than a traffic violation since the entry of the

1 preliminary order; and

2 (C) Whether the petitioner has outstanding restitution orders
3 or civil judgments representing amounts ordered for restitution
4 entered against the petitioner since the entry of the preliminary
5 order.

6 (2) The provisions of subsections (f), (g) and (h) of this
7 section apply to a motion filed under this subsection.

8 (3) Within sixty days of the filing of a motion for a final
9 order of expungement, the circuit court shall:

10 (A) Summarily grant the motion;

11 (B) Set the matter for hearing pursuant to subsection (j) of
12 this section; or

13 (C) Summarily deny the petition if the court determines that
14 the motion is insufficient or, based upon supporting documentation
15 and sworn statements filed in opposition to the motion, the court
16 determines that the petitioner, as a matter of law, is not entitled
17 to expungement.

18 ~~(k)~~ (n) Upon expungement, the proceedings in the matter shall
19 ~~be deemed~~ are considered never to have occurred. The court and
20 other agencies shall reply to any inquiry that no record exists on
21 the matter. The person whose record is expunged ~~shall~~ does not
22 have to disclose the fact of the record or any matter relating
23 thereto on an application for employment, credit or other type of
24 application.

1 ~~(t)~~ (o) Inspection of the sealed records in the court's
2 possession may thereafter be permitted by the court only upon a
3 motion by the person who is the subject of the records or upon a
4 petition filed by a prosecuting attorney that inspection and
5 possible use of the records in question are necessary to the
6 investigation or prosecution of a crime in this state or another
7 jurisdiction. If the court finds that there is a legitimate reason
8 for access and that the interests of justice will be served by
9 granting a petition to inspect the sealed record, it may be granted
10 under the terms and conditions that the court determines. In ruling
11 on a motion under this subsection, the court shall balance the
12 person's need for access to the record with the potential harm of
13 unwarranted adverse consequences to the petitioner that the
14 disclosure may create.

15 (p) (1) No person as to whom an order has been entered pursuant
16 to this section may be held thereafter under any provision of any
17 law to be guilty of perjury or otherwise giving a false statement
18 by reason of that person's failure to recite or acknowledge the
19 arrest, indictment, information, trial or conviction.

20 (2) Persons pursuing certification under the provisions of
21 article twenty-nine, chapter thirty of this code or employment as
22 a law-enforcement officer by a West Virginia law-enforcement agency
23 or a state institution of higher education or the Public Service
24 Commission of West Virginia, shall disclose any and all convictions

1 for the purpose of certification under the provisions of article
2 twenty-nine, chapter thirty of this code or to the West Virginia
3 law-enforcement agency or state institution of higher education or
4 the Public Service Commission of West Virginia with whom they are
5 seeking employment, regardless of whether or not the convictions
6 were expunged pursuant to the provisions of this section.

7 (3) Persons required by state law to obtain a criminal history
8 record check on a prospective employee are not considered to have
9 knowledge of any convictions expunged under this section.

10 (g) The clerk of the circuit court shall charge and collect in
11 advance the same fee as is charged for instituting a civil action
12 pursuant to subdivision (1), subsection (a), section eleven,
13 article one, chapter fifty-nine of this code for a petition for
14 expungement.

15 (r) For the purposes of this section:

16 (1) "Court record" means an official record of a court about
17 a proceeding that the clerk of the court or other court personnel
18 keeps. "Court record" includes an index, a docket entry, a petition
19 or other pleading, a memorandum, a transcription of proceedings, an
20 electronic recording, an order and a judgment.

21 (2) "Seal" means to remove information from public inspection
22 in accordance with this section.

23 (3) "Sealing" means:

24 (A) With respect to a record kept in a courthouse, removing to

1 a separate secure area to which persons who do not have a
2 legitimate reason for access are denied access;

3 (B) With respect to electronic information about a proceeding
4 on the website maintained by the magistrate court, circuit court or
5 the Supreme Court of Appeals, removing the information from the
6 public website; and

7 (C) With respect to a record maintained by any law-enforcement
8 agency, by removing to a separate secure area to which persons who
9 do not have a legitimate reason for access are denied access.

10 (r) As used in this section, the term "records" does not
11 include the records of the Governor, the Legislature or the
12 Secretary of State that pertain to a grant of pardon. Those
13 records that pertain to a grant of pardon are not subject to an
14 order of expungement.

15 (s) The amendment to this section during the fourth
16 extraordinary session of the Legislature in the year 2009 is not
17 for the purpose of changing existing law, but is intended to
18 clarify the intent of the Legislature as to existing law regarding
19 expungement.

NOTE: The purpose of this bill is to provide a procedure for the expungement of certain felony convictions. The bill prohibits the expungement of certain felony convictions, including those causing serious injury, those involving deadly weapons, certain assaults and batteries, domestic violence, driving under the influence of alcohol or controlled substances and sexual offenses.

The bill also sets forth the requirements before a petition may be made and before a petition may be granted. The bill also requires the petitioner to pay a fee.

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