

Senate Bill No. 365

(By Senators Kessler (Mr. President), Chafin, Laird, Miller and
Stollings)

[Introduced February 25, 2013; referred to the Committee on the
Judiciary.]

A BILL to amend and reenact §61-11-26 of the Code of West Virginia,
1931, as amended, relating to the expungement of certain
criminal convictions generally; permitting expungement of
certain felony convictions; establishing the amount of time
after conviction of a felony before expungement may be sought;
and creating exceptions.

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) Any person convicted of a misdemeanor or felony offense or
offenses arising from the same transaction committed ~~while he or~~

1 ~~she was between the ages of eighteen and twenty-six, inclusive,~~
2 may, pursuant to ~~the provisions of~~ this section, petition the
3 circuit court in which the conviction or convictions occurred for
4 expungement of the conviction or convictions and the records
5 associated ~~therewith~~ with the conviction or convictions. The clerk
6 of the circuit court shall charge and collect in advance the same
7 fee as is charged for instituting a civil action pursuant to
8 subdivision (1), subsection (a), section eleven, article one,
9 chapter fifty-nine of this code for a petition for expungement.

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

1 (c) Each petition to expunge a conviction or convictions
2 pursuant to this section shall be verified under oath and include
3 the following information:

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

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

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

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

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

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

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

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

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

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

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

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

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

1 for expungement, accompanying documentation and any proposed
2 expungement order to any identified victims.

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

24 (f) The burden of proof ~~shall be~~ is on the petitioner to

1 prove by clear and convincing evidence that:

2 (1) The conviction or convictions for which expungement is
3 sought are the only convictions against petitioner and that the
4 conviction or convictions are not excluded from expungement by
5 subsection ~~(j)~~ (i) of this section;

6 (2) ~~that~~ The requisite time period has passed since the
7 conviction or convictions or end of the completion of any sentence
8 of incarceration or probation;

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

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

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

15 (6) Any other matter deemed appropriate or necessary by the
16 court to make a determination regarding the petition for
17 expungement.

18 (g) Within sixty days of the filing of a petition for
19 expungement the circuit court shall:

20 (1) Summarily grant the petition;

21 (2) Set the matter for hearing; or

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

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

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

17 (i) No person ~~shall be~~ is eligible for expungement of a
18 conviction and the records associated ~~therewith~~ with the conviction
19 pursuant to ~~the provisions of~~ subsection (a) of this section for:

20 (1) Any violation felony crime of violence against the person
21 or any misdemeanor offense involving the infliction of serious
22 physical injury;

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

1 ~~involving the provisions~~ (3) Any misdemeanor violation of
2 article eight-b of this chapter where the petitioner was eighteen
3 years old, or older, at the time the violation occurred and the
4 victim was twelve years of age, or younger, at the time the
5 violation occurred;

6 ~~involving the use or exhibition of~~ (4) Any offense where the
7 petitioner used or exhibited a deadly weapon or dangerous
8 instrument;

9 (5) Any violation of section twenty-eight, article two of this
10 chapter or of the provisions of subsection (b) or (c), section
11 nine, article two of this chapter where the victim was a spouse, a
12 person with whom the person seeking expungement had a child in
13 common or with whom the person seeking expungement ever cohabitated
14 prior to the offense;

15 ~~any violation of the provisions of section twenty-eight of said~~
16 ~~article; a~~

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

19 (7) Any conviction for a violation of section three, article
20 four, chapter seventeen-b of this code; or and

21 (8) Any violation of section nineteen, article eight of this
22 chapter.

23 As used in this section a "felony crime of violence against
24 the person" means those felony offenses set forth in articles two,

1 three-e, eight-b, eight-d, chapter sixty-one of this code and
2 "felony offenses where the victim was a minor" means felony
3 violation of articles eight, eight-a, eight-c and eight-d.

4 (j) If the court grants the petition for expungement, it shall
5 order the sealing of all records in the custody of the court and
6 expungement of any records in the custody of any other agency or
7 official, including law-enforcement records. Every agency with
8 records relating to the arrest, charge or other matters arising out
9 of the arrest or conviction that is ordered to expunge records
10 shall certify to the court within sixty days of the entry of the
11 expungement order that the required expungement has been completed.
12 All orders enforcing the expungement procedure shall also be
13 sealed. For the purposes of this section, "records" do not include
14 the records of the Governor, the Legislature or the Secretary of
15 State that pertain to a grant of pardon. Such records that pertain
16 to a grant of pardon are not subject to an order of expungement.
17 The amendment to this section during the fourth extraordinary
18 session of the Legislature in the year 2009 is not for the purpose
19 of changing existing law, but is intended to clarify the intent of
20 the Legislature as to existing law regarding expungement.

21 (k) Upon expungement, the proceedings in the matter shall be
22 deemed never to have occurred. The court and other agencies shall
23 reply to any inquiry that no record exists on the matter. The
24 person whose record is expunged shall not have to disclose the fact

1 of the record or any matter relating thereto on an application for
2 employment, credit or other type of application.

3 (1) Inspection of the sealed records in the court's possession
4 may thereafter be permitted by the court only upon a motion by the
5 person who is the subject of the records or upon a petition filed
6 by a prosecuting attorney that inspection and possible use of the
7 records in question are necessary to the investigation or
8 prosecution of a crime in this state or another jurisdiction. If
9 the court finds that the interests of justice will be served by
10 granting a petition to inspect the sealed record, it may be
11 granted.

NOTE: The purpose of this bill is to expand the circumstances where a person may seek to have a criminal conviction expunged. It extends the amount of time after conviction of a felony before expungement may be sought. It also adds crimes for which expungement may not be sought.

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