

COMMITTEE SUBSTITUTE

FOR

## **Senate Bill No. 365**

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

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[Originating in the Committee on the Judiciary;  
reported March 29, 2013.]

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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; creating exceptions; clarifying that retirement or employment benefits lost due to conviction are not reinstated due to expungement; declaring that expungement does not preclude a person who has received an expungement from being subject to sentencing enhancements for second and

subsequent violations; declaring that information in State Police database sufficient to prove existence of prior convictions; establishing a fee to offset State Police costs associated with administering this section and the Criminal Identification Bureau; establishing a special revenue account in the State Treasury for funds received; and allowing funds to not expire.

*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.**

1 (a) Any person convicted of a misdemeanor or felony  
2 offense or offenses arising from the same transaction  
3 ~~committed while he or she was between the ages of eighteen~~  
4 ~~and twenty-six, inclusive~~, may, pursuant to ~~the provisions of~~  
5 this section, petition the circuit court in which the conviction

6 or convictions occurred for expungement of the conviction or  
 7 convictions and the records associated ~~therewith~~ with the  
 8 conviction or convictions. The clerk of the circuit court shall  
 9 charge and collect in advance the same fee as is charged for  
 10 instituting a civil action pursuant to subdivision (1),  
 11 subsection (a), section eleven, article one, chapter fifty-nine  
 12 of this code for a petition for expungement.

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

25 supervision, whichever is later in time, and in the case of a  
26 felony, five years after completion of any sentence of  
27 incarceration or ~~probation~~ any period of supervision,  
28 whichever is later in time.

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

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

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

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

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

40 (5) The statute or statutes and offense or offenses for  
41 which petitioner was charged and of which petitioner was  
42 convicted;

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

45 (7) Whether there is any current order for restitution,  
46 protection, restraining order or other no contact order  
47 prohibiting the petitioner from contacting the victims or  
48 whether there has ever been a prior order for restitution,  
49 protection or restraining order prohibiting the petitioner from  
50 contacting the victim. If there is such a current order,  
51 petitioner shall attach a copy of that order to his or her  
52 petition;

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

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

58 (10) The steps the petitioner has taken since the time of  
59 the offenses toward personal rehabilitation, including  
60 treatment, work or other personal history that demonstrates  
61 rehabilitation;

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

66 (12) Any supporting documents, sworn statements,  
67 affidavits or other information supporting the petition to  
68 expunge.

69 (d) A copy of the petition, with any supporting  
70 documentation, shall be served by petitioner pursuant to the  
71 rules of the trial court upon the Superintendent of the State  
72 Police; the prosecuting attorney of the county of conviction;  
73 the chief of police or other executive head of the municipal  
74 police department wherein the offense was committed; the  
75 chief law-enforcement officer of any other law-enforcement  
76 agency which participated in the arrest of the petitioner; the  
77 superintendent or warden of any institution in which the  
78 petitioner was confined; the ~~magistrate court or municipal~~  
79 court which disposed of the petitioner's criminal charge; and  
80 all other state and local government agencies whose records

81 would be affected by the proposed expungement. The  
 82 prosecutorial office that had jurisdiction over the offense or  
 83 offenses for which expungement is sought shall serve by first  
 84 class mail the petition for expungement, accompanying  
 85 documentation and any proposed expungement order to any  
 86 identified victims.

87 (e) Upon receipt of a petition for expungement, the  
 88 Superintendent of the State Police; the prosecuting attorney  
 89 of the county of conviction; the chief of police or other  
 90 executive head of the municipal police department wherein  
 91 the offense was committed; the chief law-enforcement officer  
 92 of any other law-enforcement agency which participated in  
 93 the arrest of the petitioner; the superintendent or warden of  
 94 any institution in which the petitioner was confined; the  
 95 ~~magistrate court or municipal~~ court which disposed of the  
 96 petitioner's criminal charge or charges; all other state and  
 97 local government agencies whose records would be affected  
 98 by the proposed expungement; and any other interested  
 99 individual or agency that desires to oppose the expungement

100 shall, within thirty days of receipt of the petition, file a notice  
101 of opposition with the court with supporting documentation  
102 and sworn statements setting forth the reasons for resisting  
103 the petition for expungement. A copy of any notice of  
104 opposition with supporting documentation and sworn  
105 statements shall be served upon the petitioner in accordance  
106 with trial court rules. The petitioner may file a reply no later  
107 than ten days after service of any notice of opposition to the  
108 petition for expungement.

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

111 (1) The conviction or convictions for which expungement  
112 is sought are the only convictions against petitioner and that  
113 the conviction or convictions are not excluded from  
114 expungement by subsection ~~(j)~~ (i) of this section;

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

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

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

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

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

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

130 (1) Summarily grant the petition;

131 (2) Set the matter for hearing; or

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

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

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

156 (1) Any ~~violation~~ felony crime of violence against the  
157 person or any misdemeanor offense involving the infliction  
158 of serious physical injury;

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

161 ~~involving the provisions~~ (3) Any misdemeanor violation  
162 of article eight-b of this chapter where the petitioner was  
163 eighteen years old, or older, at the time the violation occurred  
164 and the victim was twelve years of age, or younger, at the  
165 time the violation occurred;

166 ~~involving the use or exhibition of~~ (4) Any offense where  
167 the petitioner used or exhibited a deadly weapon or  
168 dangerous instrument;

169 (5) Any violation of section twenty-eight, article two of  
170 this chapter or ~~of the provisions of~~ subsection (b) or (c),  
171 section nine, article two of this chapter where the victim was  
172 a spouse, a person with whom the person seeking  
173 expungement had a child in common or with whom the  
174 person seeking expungement ever cohabitated prior to the

175 offense; ~~any violation of the provisions of section~~  
176 ~~twenty-eight of said article; a~~

177 (6) Any conviction for driving under the influence of  
178 alcohol or a controlled substances substance; ~~or a~~

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

181 (8) Any violation of section nineteen, article eight of this  
182 chapter.

183 As used in this section, a “felony crime of violence  
184 against the person” means those felony offenses set forth in  
185 articles two, three-e, eight-b and eight-d, chapter sixty-one of  
186 this code and “felony offenses where the victim was a minor”  
187 means felony violation of articles eight, eight-a, eight-c and  
188 eight-d.

189 (j) If the court grants the petition for expungement, it  
190 shall order the sealing of all records in the custody of the  
191 court and expungement of any records in the custody of any  
192 other agency or official, including law-enforcement records.  
193 Every agency with records relating to the arrest, charge or

194 other matters arising out of the arrest or conviction that is  
195 ordered to expunge records shall certify to the court within  
196 ~~sixty~~ ninety days of the entry of the expungement order that  
197 the required expungement has been completed. All orders  
198 enforcing the expungement procedure shall also be sealed.  
199 For the purposes of this section, “records” do not include the  
200 records of the Governor, the Legislature or the Secretary of  
201 State that pertain to a grant of pardon. Such records that  
202 pertain to a grant of pardon are not subject to an order of  
203 expungement. The amendment to this section during the  
204 fourth extraordinary session of the Legislature in the year  
205 2009 is not for the purpose of changing existing law, but is  
206 intended to clarify the intent of the Legislature as to existing  
207 law regarding expungement.

208 (k) Upon expungement, the proceedings in the matter  
209 shall be deemed never to have occurred. The court and other  
210 agencies shall reply to any inquiry that no record exists on  
211 the matter. The person whose record is expunged shall not  
212 have to disclose the fact of the record or any matter relating

213 thereto on an application for employment, credit or other type  
214 of application.

215 (l) Inspection of the sealed records in the court's  
216 possession may thereafter be permitted by the court only  
217 upon a motion by the person who is the subject of the records  
218 or upon a petition filed by a prosecuting attorney that  
219 inspection and possible use of the records in question are  
220 necessary to the investigation or prosecution of a crime in  
221 this state or another jurisdiction. If the court finds that the  
222 interests of justice will be served by granting a petition to  
223 inspect the sealed record, it may be granted.

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

228 (n) Notwithstanding the provisions of this section to the  
229 contrary, any person who has obtained relief pursuant to the  
230 provisions of this section who is subsequently convicted of  
231 another offense in a court of this state, another state or the  
232 United States shall be subject to any sentencing enhancement

233 based upon having a prior conviction including, but not limited  
 234 to, the provision of section eighteen, article eleven, chapter  
 235 sixty-one of this code. Notwithstanding any provisions of law  
 236 or rule to the contrary, should a person having received relief  
 237 pursuant to this section be prosecuted or convicted of another  
 238 offense subsequent to the expungement and thereby subject to  
 239 an sentencing enhancement the records maintained by the West  
 240 Virginia State Police pursuant to subsection (o) of this section  
 241 shall constitute sufficient evidence of the prior conviction.

242 (o) Any court granting relief pursuant to the provisions of  
 243 this section shall supply a copy of the order of expungement  
 244 to the West Virginia State Police along with information  
 245 identifying the petitioner and containing information  
 246 regarding the offense expunged to be placed in a confidential  
 247 file accessible by prosecuting attorney and judicial officers  
 248 for the purpose of ensuring that relief may not be afforded  
 249 pursuant to this section more than once.

250 (p) In addition to any fees or costs required by this code,  
 251 any person filing an action pursuant to this section shall pay,

252 upon filing, a fee of \$100, which shall be transferred to the  
253 West Virginia State Police to assist in offsetting  
254 administrative costs associated with this section and the  
255 maintaining of offender registries.

256 (q) There is hereby created in the State Treasury a special  
257 revenue account designated the West Virginia State Police  
258 Criminal Justice Information Services Fund which shall  
259 consist of money deposited into the fund from fees collected  
260 under this section and moneys appropriated by the  
261 Legislature. Funds appropriated to the West Virginia State  
262 Police Criminal Justice Information Services Fund in  
263 accordance with this section that remain unallocated or  
264 unexpended at the end of a fiscal year do not expire, but  
265 remain in the line item to which they were originally  
266 appropriated and are available in the next fiscal year to be  
267 used for the purposes of operating and maintaining the West  
268 Virginia State Police Criminal Identification Bureau and  
269 other criminal justice information services registries operated  
270 by the State Police.