

WEST VIRGINIA LEGISLATURE

2017 REGULAR SESSION

Committee Substitute

for

Senate Bill 76

BY SENATORS JEFFRIES, ROMANO, MILLER, OJEDA,
WOELFEL, BEACH, GAUNCH, FACEMIRE AND STOLLINGS

[Originating in the Committee on the Judiciary;
reported on March 21, 2017.]

1 A BILL to amend and reenact §61-11-26 of the Code of West Virginia, 1931, as amended, relating
2 to the creation of the West Virginia Second Chance for Employment Act; defining terms;
3 eliminating age limitations for petitioners seeking to expunge certain misdemeanors;
4 expanding eligibility for criminal expungement to persons convicted of certain nonviolent
5 felonies; defining “nonviolent felony”; providing exclusions to eligibility; establishing time
6 limitations for filing a petition for expungement; creating petition requirements and court
7 procedure for evaluating preliminary and final orders of expungement for nonviolent
8 felonies; providing for preliminary orders of expungement; requiring a five-year period
9 under a preliminary order of expungement for a felony before one may obtain a final order
10 of expungement; clarifying disclosure requirements with respect to the information sealed
11 pursuant to an order of expungement, including exemptions; providing standard for
12 inspection of sealed records; and making technical changes.

Be it enacted by the Legislature of West Virginia:

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

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 shall be eligible for expungement pursuant to subdivision (1), subsection
26 (a) of this section until one year after completion of any sentence of incarceration or completion
27 of any period of supervision, whichever is later in time.

28 (2) No person shall be eligible for expungement pursuant to subdivision (2), subsection
29 (a) of this section until three years after completion of any sentence of incarceration or completion
30 of any period of supervision, whichever is later in time.

31 (3) No person shall be eligible for permanent expungement until five years after an order
32 is entered granting the petition of that person for preliminary order of expungement pursuant to
33 subdivision (2), subsection (a) of this section.

34 (c) Limitations on eligibility for expungement. — No person is eligible for expungement of
35 a conviction and the records associated therewith pursuant to subsection (a) of this section 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 article eight-b of this chapter where the
40 victim was mentally or physically incapacitated or where the petitioner was eighteen years of age
41 or older and the victim was twelve 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 section twenty-eight, article two of this chapter or subsection (b) or (c),
45 section nine, article two of this chapter where the victim was spouse, a person seeking
46 expungement had a child in common or with whom the person seeking expungement ever
47 cohabited prior to the offense.

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

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

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

52 (9) As used in this section a “felony crime of violence against the person” means those
53 felony offenses set forth in articles two, three-e, eight-b and eight-d, chapter sixty-one of this code
54 and “felony offenses where the victim was a minor” means felony violation of section fourteen-b,
55 article three-c of this chapter and articles eight, eight-a, eight-c and eight-d of this chapter.

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

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

61 (1) Petitioner’s current name and all other legal names or aliases by which petitioner has

62 been known at any time;

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

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

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

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

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

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

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

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

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

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

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

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

88 following persons or entities:

89 (1) The Superintendent of the State Police;

90 (2) ~~the~~ The prosecuting attorney of the county of conviction;

91 (3) ~~the~~ The chief of police or other executive head of the municipal police department
92 wherein the offense was committed;

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

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

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

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

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

114 opposition with the court with supporting documentation and sworn statements setting forth the
115 reasons for resisting the petition for expungement.

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

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

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

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

133 (1) For persons eligible pursuant to subdivision (1), subsection (a) of this section:

134 (A) Summarily grant the petition;

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

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

139 (2) For persons eligible pursuant to subdivision (2), subsection (a) of this section:

140 (A) Summarily and preliminarily grant the petition subject to the provisions of subsection
141 (i) of this section;

142 (B) Set the matter for hearing; or

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

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

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

159 ~~(i) No person shall be eligible for expungement of a conviction and the records associated~~
160 ~~therewith pursuant to the provisions of subsection (a) of this section for any violation involving the~~
161 ~~infliction of serious physical injury; involving the provisions of article eight b of this chapter where~~
162 ~~the petitioner was eighteen years old, or older, at the time the violation occurred and the victim~~
163 ~~was twelve years of age, or younger, at the time the violation occurred; involving the use or~~
164 ~~exhibition of a deadly weapon or dangerous instrument; of the provisions of subsection (b) or (c),~~
165 ~~section nine, article two of this chapter where the victim was a spouse, a person with whom the~~

166 ~~person seeking expungement had a child in common or with whom the person seeking~~
167 ~~expungement ever cohabitated prior to the offense; any violation of the provisions of section~~
168 ~~twenty-eight of said article; a conviction for driving under the influence of alcohol, controlled~~
169 ~~substances or a conviction for a violation of section three, article four, chapter seventeen-b of this~~
170 ~~code or section nineteen, article eight of this chapter.~~

171 (i) Preliminary and final orders of expungement for nonviolent felonies. — If the court
172 grants the petition for expungement pursuant to subdivision (2), subsection (a) of this section, the
173 court's order shall be preliminary and subject to a motion by the petitioner to make the order a
174 final order of expungement.

175 (1) Preliminary order of expungement. — A preliminary order of expungement shall order
176 the sealing of all court records and other records pursuant to subsection (k) of this section related
177 to the nonviolent felony or felonies that are the subject of the petition. The preliminary order of
178 expungement is subject to the following limitations:

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

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

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

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

191 (i) Has any felony or misdemeanor convictions other than a minor traffic violation since

192 entry of the preliminary order of expungement;

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

195 (iii) Is subject of any outstanding warrants or is currently the subject of a pending criminal
196 proceeding.

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

199 (i) Summarily grant the motion;

200 (ii) Set the matter for hearing; or

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

206 ~~(j)(k) *Sealing of records.* — If the court grants the petition for expungement, it shall order~~
207 ~~the sealing of all records in the custody of the court and expungement of any records in the~~
208 ~~custody of any other agency or official, including law-enforcement records. Every agency with~~
209 ~~records relating to the arrest, charge or other matters arising out of the arrest or conviction that is~~
210 ~~ordered to expunge records shall certify to the court within sixty days of the entry of the~~
211 ~~expungement order that the required expungement has been completed. All orders enforcing the~~
212 ~~expungement procedure shall also be sealed. For the purposes of this section, "records" do not~~
213 ~~include the records of the Governor, the Legislature or the Secretary of State that pertain to a~~
214 ~~grant of pardon. Such records that pertain to a grant of pardon are not subject to an order of~~
215 ~~expungement. The amendment to this section during the fourth extraordinary session of the~~
216 ~~Legislature in the year 2009 is not for the purpose of changing existing law, but is intended to~~
217 ~~clarify the intent of the Legislature as to existing law regarding expungement.~~

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

219 (1) Subject to the exceptions set forth in this section, ~~Upon~~ upon expungement, the
220 proceedings in the matter shall be deemed as a matter of law never to have occurred. The court
221 and other agencies shall reply to any inquiry that no record exists on the matter. The person
222 whose record is expunged shall not have to disclose the fact of the record or any matter relating
223 thereto on an application for employment, credit or other type of application: *Provided, That any*
224 person applying for a position in which he or she would be engaging in the prevention, detection,
225 investigation, prosecution or incarceration of persons for violations of the law shall disclose any
226 and all convictions to his or her prospective employer regardless of whether the conviction or
227 convictions have been expunged pursuant to this section.

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

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

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

243 (n) For the purposes of this section:

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

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

251 (3) “Seal” means to remove information from public inspection in accordance with this
252 section; and

253 (4) “Sealing” means:

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

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

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

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

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

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

272 (r) The amendment to this section during the fourth extraordinary session of the
273 Legislature in 2009 is not for the purpose of changing existing law, but is intended to clarify the
274 intent of the Legislature as to existing law regarding expungement.

275 (r) The amendments made to this section during the 2017 regular session of the
276 Legislature may be known and cited as the Second Chance for Employment Act.

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