

WEST VIRGINIA LEGISLATURE

2020 REGULAR SESSION

Introduced

Senate Bill 562

BY SENATORS TRUMP, STOLLINGS, WOELFEL, AND

FACEMIRE

[Introduced January 21, 2020; referred
to the Committee on the Judiciary]

1 A BILL to amend and reenact §61-11-26 and §61-11-26a of the Code of West Virginia, 1931, as
2 amended, all relating generally to expungement of certain criminal convictions; allowing a
3 person seeking expungement of convictions in multiple counties to file the petition in his
4 or her county of residence; clarifying that prosecuting attorneys in any county of conviction
5 wherein expungement is sought be provided notice of petition; eliminating the requirement
6 that the chief law-enforcement officer or head of a municipal law-enforcement agency
7 where the offense for which expungement is sought be given notice where such agency
8 was not the arresting agency; clarifying that Commissioner of Corrections be served with
9 a copy of the petition for expungement if the petitioner was confined or imprisoned for the
10 offense for which expungement is sought; clarifying that petitioner’s burden of proof as to
11 convictions for which expungement is sought are the only convictions against him or her
12 in the state; defining “expungement”; and directing that upon the granting of an order of
13 expungement all public records other than those under court seal are moved and
14 destroyed.

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. A person seeking expungement of
7 convictions in multiple counties may file a petition for expungement in his or her county of
8 residence, or if not a resident of this state in the counties wherein convictions occurred: *Provided,*

9 That the provisions of this section, or where applicable §61-11-26a of this code, are otherwise
10 met.

11 (2) *Nonviolent felonies.* —

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

17 (b) *Temporal requirements.* —

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

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

25 (3) *Nonviolent felonies.* — A person is not eligible for expungement of a nonviolent felony
26 pursuant to subdivision (2), subsection (a) of this section until five years after conviction,
27 completion of any sentence of incarceration, or completion of any period of supervision, whichever
28 is later in time.

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

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

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

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

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

39 (5) Any violation of §61-2-28 of this code, or any offense which violates §61-2-9(b) or §61-
40 2-9(c) of this code in which the victim was a spouse, a person with whom the person seeking
41 expungement had a child in common, or with whom the person seeking expungement ever
42 cohabited prior to the offense or a violation of §61-2-28(c) of this code;

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

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

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

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

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

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

49 (12) Any violation of §61-3-11 of this code;

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

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

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

55 (d) *Content of petition for expungements.* — Each petition to expunge a conviction or
56 convictions pursuant to this section shall be verified under oath and include the following
57 information: *Provided*, That a petition for the expungement of multiple misdemeanors shall identify
58 and group such information by circuit court, as applicable, from which expungement of a particular
59 conviction or convictions is being sought:

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

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

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

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

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

69 (6) The names of any victim or victims, or a statement that there were no identifiable
70 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 victim 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 a current order, the petitioner shall attach a copy of that order to
75 his or her petition;

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

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

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, by the court of any other state, or by any federal
84 court; and

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

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

90 (1) The Superintendent of the State Police;

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

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

94 ~~(4) (3) The chief law-enforcement officer of any other~~ the law-enforcement agency which
95 ~~participated in the arrest of~~ arrested the petitioner;

96 ~~(5) (4) The superintendent, or warden,~~ or the Commissioner of Corrections of any
97 institution in which the petitioner was confined or imprisoned pursuant to the conviction; and

98 ~~(6) (5) The circuit court, magistrate court, or municipal court which disposed of the~~
99 petitioner's 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 against the petitioner in this state and that the conviction or convictions are not
117 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

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

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

129 (1) Summarily grant the petition;

130 (2) Set the matter for hearing; or

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

134 (j) *Hearing on petition for expungement.* —

135 If the court sets the matter for hearing, all interested parties who have filed a notice of
136 opposition shall be notified. At the hearing, the court may inquire into the background of the

137 petitioner and shall have access to any reports or records relating to the petitioner that are on file
138 with any law-enforcement authority, the institution of confinement, if any, and parole authority or
139 other agency which was in any way involved with the petitioner's arrest, conviction, sentence, and
140 post-conviction supervision, including any record of arrest or conviction in any other state or
141 federal court. The court may hear testimony of witnesses and any other matter the court considers
142 proper and relevant to its determination regarding the petition. The court shall enter an order
143 reflecting its ruling on the petition for expungement with appropriate findings of fact and
144 conclusions of law.

145 (k) *Sealing of records.* — If the court grants the petition for expungement, it shall order the
146 sealing of all records in the custody of the court and expungement of any records in the custody
147 of any other agency or official, including law-enforcement records. Every agency with records
148 relating to the arrest, charge, or other matters arising out of the arrest or conviction that is ordered
149 to expunge records shall certify to the court within 60 days of the entry of the expungement order
150 that the required expungement has been completed. All orders enforcing the expungement
151 procedure shall also be sealed.

152 (l) *Disclosure of expunged matters.* —

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

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

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

170 (m) *Inspection of sealed records.* — Inspection of the sealed records in the court's
171 possession may thereafter be permitted by the court only upon a motion by the person who is the
172 subject of the records or upon a petition filed by a prosecuting attorney that inspection and
173 possible use of the records in question are necessary to the investigation or prosecution of a
174 crime in this state or another jurisdiction. If the court finds that there is a legitimate reason for
175 access and the interests of justice will be served by granting a petition to inspect the sealed
176 record, it may grant access under the terms and conditions determined by the court.

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

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

186 (p) For the purposes of this section:

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

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

194 ~~(2)~~ (3) "Felony crime of violence against the person" means those felony offenses set forth
195 in §61-2-1 *et seq.*, §61-3E-1 *et seq.*, §61-8B-1 *et seq.*, and §61-8D-1 *et seq.* of this code.

196 ~~(3)~~ (4) "Felony offenses in which the victim was a minor" means felony violations of §61-
197 3C-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.

198 ~~(4)~~ (5) "Nonviolent felony" means a felony that:

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

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

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

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

205 ~~(5)~~ (6) "Records" do not include the records of the Governor, the Legislature, or the
206 Secretary of State that pertain to a grant of pardon. Records that pertain to a grant of pardon are
207 not subject to an order of expungement.

208 ~~(6)~~ (7) "Seal" means removing information from public inspection in accordance with this
209 section.

210 ~~(7)~~ (8) "Sealing" means:

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

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

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

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

223 (r) The enactment of this section during the 2019 regular session of the Legislature
224 includes the repeal of the provisions of §61-11B-1 *et seq.* of this code. Any person that had a
225 sentence reduction pursuant to the provisions of §61-11B-1 *et seq.* of this code may petition the
226 court of record to have the criminal offense reduction order converted into an order of
227 expungement. Upon verification by the court that the petitioner qualifies, the court shall enter an
228 order of expungement of the petitioner's conviction.

§61-11-26a. Expungement of certain criminal convictions with approved treatment or recovery and job program.

1 (a) Notwithstanding any provisions of §61-11-26 of this code to the contrary, any person
2 who has been convicted of a nonviolent felony offense or multiple misdemeanors and that would
3 be eligible for expungement pursuant to the provisions of §61-11-26 of this code and who: (1) Has
4 a medically documented history of substance abuse and of successful compliance with a
5 substance abuse treatment or recovery and counseling program approved by the Secretary of
6 the Department of Health and Human Resources; or (2) graduates from a West Virginia
7 Department of Education-approved job readiness adult training course, or both, if applicable, may
8 petition the circuit court or circuit courts in which the conviction or convictions occurred for

9 expungement of the conviction or convictions and the records associated therewith as provided
10 in §61-11-26 of this code as follows:

11 (1) Any person who has been convicted of a single misdemeanor that would be eligible
12 for expungement pursuant to §61-11-26 of this code and satisfies the requirements of this section,
13 is eligible for expungement pursuant to §61-11-26(a)(1) of this code upon successful compliance
14 with an approved substance abuse treatment and recovery and counseling program for 90 days
15 or upon completion of an approved job readiness adult training course, or both, if applicable, but
16 after the completion of any sentence of incarceration or completion of any period of supervision,
17 whichever is later in time.

18 (2) Any person who has been convicted of multiple misdemeanors that would be eligible
19 for expungement pursuant to §61-11-26 of this code and satisfies the requirements of this section
20 is not eligible for expungement pursuant to §61-11-26(a)(1) of this code until one year after the
21 last conviction, completion of any sentence of incarceration, or completion of any period of
22 supervision ordered for the last conviction, whichever is later in time.

23 (3) Any person who has been convicted of a nonviolent felony offense that would be
24 eligible for expungement pursuant to §61-11-26 of this code and satisfies the requirements of this
25 section is not eligible for expungement pursuant to §61-11-26(a)(2) of this code until three years
26 after conviction, completion of any sentence of incarceration, or completion of any period of
27 supervision, whichever is later in time.

28 (b) In addition to the required content of a petition for expungement as required by §61-
29 11-26(d) of this code, any person petitioning for an expungement pursuant to the provisions of
30 this section shall also include the following, if applicable:

31 (1) Documentation of compliance with an approved treatment or recovery and counseling
32 program; and

33 (2) Certificate of graduation from an approved job readiness adult training course.

34 ~~(c) A person may file only one petition for expungement, to the circuit court or circuit courts~~
35 ~~as applicable, pursuant to the provisions of this section and the provisions of §61-11-26 of this~~
36 ~~code~~

37 (d) (c) The fee of \$100 to the records division of the West Virginia State Police for the cost
38 of processing the order of expungement required in §61-11-26(n) of this code is waived for
39 petitions of expungement filed pursuant to the provisions of this section.

NOTE: The purpose of this bill is to clarify expungement of certain crimes in this state.

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