

WEST VIRGINIA LEGISLATURE

2021 REGULAR SESSION

Introduced

House Bill 2552

BY DELEGATE PUSHKIN

[Introduced February 16, 2021; Referred to the
Committee on the Judiciary]

1 A BILL to amend and reenact §61-11-26 of the Code of West Virginia, 1931, as amended, relating
2 to the removal of limitations on the expungement of certain criminal convictions.

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.

7 (2) *Nonviolent felonies.* —

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

13 (b) *Temporal requirements.* —

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

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

21 (3) *Nonviolent felonies.* — A person is not eligible for expungement of a nonviolent felony

22 pursuant to subdivision (2), subsection (a) of this section until five years after conviction,
23 completion of any sentence of incarceration or completion of any period of supervision, whichever
24 is later in time.

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

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

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

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

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

35 (5) Any violation of §61-2-28 of this code, or any offense which violates §61-2-9(b) or §61-
36 2-9(c) of this code in which the victim was a spouse, a person with whom the person seeking
37 expungement had a child in common, or with whom the person seeking expungement ever
38 cohabited prior to the offense or a violation of §61-2-28(c) of this code;

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

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

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

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

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

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

45 ~~(12) Any violation of §61-3-11 of this code involving a structure regularly used as a~~
46 ~~dwelling;~~

47 ~~(13)~~ (12) Any conviction for which the sentencing judge made a written finding that the

48 offense was sexually motivated;

49 ~~(14)~~ (13) Any offense which violates §17E-1-13(g) of this code; and

50 ~~(15)~~ (14) Any offense of conspiracy or attempt to commit a felony set forth in subdivisions
51 (1) through ~~(13)~~ (12), inclusive, of this subsection: *Provided*, That a conviction for driving under
52 the influence of alcohol, controlled substances, or drugs shall not preclude expungement of an
53 unrelated and otherwise expungable felony if the conviction for driving under the influence of
54 alcohol, controlled substances, or drugs is at least five years old at the time the petition for
55 expungement is filed.

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

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

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

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

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

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

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

72 (7) Whether there is any current order for restitution, protection, restraining order, or other
73 no contact order prohibiting the petitioner from contacting the victims or whether there has ever

74 been a prior order for restitution, protection, or restraining order prohibiting the petitioner from
75 contacting the victim. If there is a current order, the petitioner shall attach a copy of that order to
76 his or her petition;

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

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

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

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

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

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

91 (1) The Superintendent of the State Police;

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

93 (3) The chief law-enforcement officer of the law-enforcement agency which arrested the
94 petitioner;

95 (4) The superintendent, warden, or the commissioner of corrections of any institution in
96 which the petitioner was confined or imprisoned pursuant to the conviction; and

97 (5) The superintendent or warden of any institution in which the petitioner was confined;
98 and

99 (6) The circuit court, magistrate court, or municipal court which disposed of the petitioner's

100 criminal charge.

101 (f) The prosecuting attorney of the county in which expungement is sought shall serve the
102 petition for expungement, accompanying documentation, and any proposed expungement order
103 by first class mail to any identified victims.

104 (g) *Notice of opposition.* —

105 (1) Upon receipt of a petition for expungement, the persons and entities listed in
106 subsection (e) of this section, and any other interested person or agency that desires to oppose
107 the expungement may, within 30 days of receipt of the petition, file a notice of opposition with the
108 court with supporting documentation and sworn statements setting forth the reasons for resisting
109 the petition for expungement.

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

112 (3) The petitioner may file a reply to a notice of opposition no later than 30 days after
113 service of any notice of opposition to the petition for expungement.

114 (h) *Burden of proof.* — The burden of proof shall be on the petitioner seeking an order of
115 expungement to prove by clear and convincing evidence:

116 (1) That the conviction or convictions for which expungement is sought are the only
117 convictions for that specified offense or offenses against the petitioner in this state and that the
118 conviction or convictions are not excluded from expungement by the provisions of this section;

119 (2) That the requisite time has passed since the conviction or convictions or the completion
120 of any sentence of ~~incarceration~~ confinement or period of supervision as set forth in subsection
121 (b) of this section;

122 (3) That the petitioner has no criminal charges pending against him or her;

123 (4) That the expungement is consistent with the public welfare;

124 (5) That the petitioner has, by his or her behavior since the conviction or convictions,
125 evidenced that he or she has been rehabilitated and is law-abiding; and

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

128 (i) *Court procedure for petition for expungement.* —

129 Within 60 days of the filing of a petition for expungement the circuit court shall:

130 (1) Summarily grant the petition;

131 (2) Return the petition to the petitioner to supply incomplete information or correct obvious
132 errors in order to permit consideration of the petition on its merits;

133 (3) Set the matter for hearing; or

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

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

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

148 (k) *Sealing of records.* — If the court grants the petition for expungement, it shall order
149 the sealing of all records in the custody of the court and expungement of any records in the
150 custody of any other agency or official, including law-enforcement records. Every agency with
151 records relating to the arrest, charge, or other matters arising out of the arrest or conviction that

152 is ordered to expunge records shall certify to the court within 60 days of the entry of the
153 expungement order that the required expungement has been completed. All orders enforcing the
154 expungement procedure shall also be sealed.

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

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

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

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

173 (m) *Inspection of sealed records.* — Inspection of the sealed records in the court's
174 possession may thereafter be permitted by the court only upon a motion by the person who is the
175 subject of the records or upon a petition filed by a prosecuting attorney that inspection and
176 possible use of the records in question are necessary to the investigation or prosecution of a
177 crime in this state or another jurisdiction. If the court finds that there is a legitimate reason for

178 access and the interests of justice will be served by granting a petition to inspect the sealed
179 record, it may grant access under the terms and conditions determined by the court.

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

187 ~~(e) Notwithstanding any provision of this code to the contrary, a person may only obtain~~
188 ~~the relief afforded by the provisions of this section and §61-11-26a of this code once~~

189 ~~(p)~~ (o) For the purposes of this section:

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

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

197 (3) "Felony crime of violence against the person" means those felony offenses set forth in
198 §61-2-1 *et seq.*, §61-3E-1 *et seq.*, §61-8B-1 *et seq.*, and §61-8D-1 *et seq.* of this code.

199 (4) "Felony offenses in which the victim was a minor" means felony violation of §61-3C-
200 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.

201 (5) "Nonviolent felony" means a felony that:

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

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

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

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

208 (6) "Records" do not include the records of the Governor, the Legislature, or the Secretary
209 of State that pertain to a grant of pardon. Records that pertain to a grant of pardon are not subject
210 to an order of expungement.

211 (7) "Seal" means removing information from public inspection in accordance with this
212 section.

213 (8) "Sealing" means:

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

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

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

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

226 ~~(p)~~ (q) The enactment of this section during the 2019 regular session includes the repeal
227 of the provisions of §61-11B-1 *et seq.* of this code. Any person that had a sentence reduction
228 pursuant to the provisions of §61-11B-1 *et seq.* of this code may petition the court of record to
229 have the criminal offense reduction order converted into an order of expungement. Upon

230 verification by the court that the petitioner qualifies, the court shall enter an order of expungement
231 of the petitioner's conviction.

NOTE: The purpose of this bill is to remove the one-time limit on the expungement of certain criminal convictions. The bill also removes burglary and conspiracy to commit burglary from the specific crimes for which eligibility for expungement is limited.

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