

1 COMMITTEE SUBSTITUTE

2 FOR

3 **Senate Bill No. 533**

4 (By Senators Miller, Jenkins, Palumbo and Wells)

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6 [Originating in the Committee on the Judiciary;

7 reported March 27, 2013.]
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10 A BILL to amend and reenact §61-2-9 and §61-2-28 of the Code of
11 West Virginia, 1931, as amended, relating to directly
12 prosecuting for battery an assault where the victim has
13 certain relationships; conviction of which triggers federal
14 firearms prosecution be prosecuted as a domestic battery or
15 domestic assault to be consistent with federal case law and
16 amending definition of "domestic battery" and "domestic
17 assault".

18 *Be it enacted by the Legislature of West Virginia:*

19 That §61-2-9 and §61-2-28 of the Code of West Virginia, 1931,
20 as amended, be amended and reenacted, all to read as follows:

21 **ARTICLE 2. CRIMES AGAINST THE PERSON.**

22 **§61-2-9. Malicious or unlawful assault; assault; battery;**
23 **penalties.**

24 (a) If any person maliciously shoot, stab, cut or wound any
25 person, or by any means cause him bodily injury with intent to

1 maim, disfigure, disable or kill, he shall, except where it is
2 otherwise provided, be guilty of a felony and, upon conviction,
3 shall be punished by confinement in the penitentiary not less than
4 two nor more than ten years. If such act be done unlawfully, but
5 not maliciously, with the intent aforesaid, the offender shall be
6 guilty of a felony and, upon conviction, shall, in the discretion
7 of the court, either be confined in the penitentiary not less than
8 one nor more than five years, or be confined in jail not exceeding
9 twelve months and fined not exceeding \$500.

10 (b) *Assault.* - If any person unlawfully attempts to commit a
11 violent injury to the person of another or unlawfully commits an
12 act which places another in reasonable apprehension of immediately
13 receiving a violent injury, he shall be guilty of a misdemeanor
14 and, upon conviction, shall be confined in jail for not more than
15 six months, or fined not more than \$100, or both such fine and
16 imprisonment: Provided, That if the relationship elements of the
17 parties meets those set forth in paragraphs (1), (2), (3) and (6),
18 section two-hundred four, article twenty-seven, chapter forty-eight
19 of this code then the individual shall be charged with the offense
20 of domestic assault under section twenty-eight of this article.

21 (c) *Battery.* - If any person unlawfully and intentionally
22 ~~makes uses~~ uses physical ~~contact of an insulting or provoking nature~~
23 ~~with~~ force capable of causing physical pain or injury to the person
24 of another or unlawfully and intentionally causes physical harm to
25 another person, he shall be guilty of a misdemeanor and, upon
26 conviction, shall be confined in jail for not more than twelve

1 months, or fined not more than \$500, or both such fine and
2 imprisonment: Provided, That if the relationship elements of the
3 parties meets those set forth in paragraphs (1), (2), (3) and (6),
4 section two-hundred four, article twenty-seven, chapter forty-eight
5 of this code then the individual shall be charged with the offense
6 of domestic battery under section twenty-eight of this article.

7 (d) Any person convicted of a violation of subsection (b) or
8 (c) of this section who has, in the ten years prior to said
9 conviction, been convicted of a violation of either subsection (b)
10 or (c) of this section where the victim was a current or former
11 spouse, current or former sexual or intimate partner, a person with
12 whom the defendant has a child in common, a person with whom the
13 defendant cohabits or has cohabited, a parent or guardian, the
14 defendant's child or ward or a member of the defendant's household
15 at the time of the offense or convicted of a violation of section
16 twenty-eight of this article or has served a period of pretrial
17 diversion for an alleged violation of subsection (b) or (c) of this
18 section or section twenty-eight of this article when the victim has
19 such present or past relationship shall upon conviction be subject
20 to the penalties set forth in section twenty-eight of this article
21 for a second, third or subsequent criminal act of domestic violence
22 offense, as appropriate.

23 **§61-2-28. Domestic violence - Criminal acts.**

24 (a) *Domestic battery.* - Any person who unlawfully and
25 intentionally ~~makes~~ uses physical ~~contact of an insulting or~~
26 ~~provoking nature with~~ force capable of causing physical pain or

1 injury to his or her family or household member or unlawfully and
2 intentionally causes physical harm to his or her family or
3 household member, is guilty of a misdemeanor and, upon conviction
4 thereof, shall be confined in a county or regional jail for not
5 more than twelve months, or fined not more than \$500, or both.

6 (b) *Domestic assault.* - Any person who unlawfully attempts to
7 ~~commit a violent injury~~ use physical force capable of causing
8 physical pain or injury against his or her family or household
9 member or unlawfully commits an act which places his or her family
10 or household member in reasonable apprehension of immediately
11 receiving a violent injury, is guilty of a misdemeanor and, upon
12 conviction thereof, shall be confined in ~~a county or regional~~ jail
13 for not more than six months, or fined not more than \$100, or both.

14 (c) *Second offense.* - Domestic assault or domestic battery.

15 A person convicted of a violation of subsection (a) of this
16 section after having been previously convicted of a violation of
17 subsection (a) or (b) of this section, after having been convicted
18 of a violation of subsection (b) or (c), section nine of this
19 article or subsection (a), section fourteen-g of this article where
20 the victim was his or her current or former spouse, current or
21 former sexual or intimate partner, person with whom the defendant
22 has a child in common, person with whom the defendant cohabits or
23 has cohabited, a parent or guardian, the defendant's child or ward
24 or a member of the defendant's household at the time of the offense
25 or who has previously been granted a period of pretrial diversion
26 pursuant to section twenty-two, article eleven of this chapter for

1 a violation of subsection (a) or (b) of this section, or a
2 violation of subsection (b) or (c), section nine of this article or
3 subsection (a), section fourteen-g of this article where the victim
4 was a current or former spouse, current or former sexual or
5 intimate partner, person with whom the defendant has a child in
6 common, person with whom the defendant cohabits or has cohabited,
7 a parent or guardian, the defendant's child or ward or a member of
8 the defendant's household at the time of the offense is guilty of
9 a misdemeanor and, upon conviction thereof, shall be confined in a
10 county or regional jail for not less than sixty days nor more than
11 one year, or fined not more than \$1,000, or both.

12 A person convicted of a violation of subsection (b) of this
13 section after having been previously convicted of a violation of
14 subsection (a) or (b) of this section, after having been convicted
15 of a violation of subsection (b) or (c), section nine of this
16 article or subsection (a), section fourteen-g of this article where
17 the victim was a current or former spouse, current or former sexual
18 or intimate partner, person with whom the defendant has a child in
19 common, person with whom the defendant cohabits or has cohabited,
20 a parent or guardian, the defendant's child or ward or a member of
21 the defendant's household at the time of the offense or having
22 previously been granted a period of pretrial diversion pursuant to
23 section twenty-two, article eleven of this chapter for a violation
24 of subsection (a) or (b) of this section or subsection (b) or (c),
25 section nine of this article or subsection (a), section fourteen-g
26 of this article where the victim was a current or former spouse,

1 current or former sexual or intimate partner, person with whom the
2 defendant has a child in common, person with whom the defendant
3 cohabits or has cohabited, a parent or guardian, the defendant's
4 child or ward or a member of the defendant's household at the time
5 of the offense shall be confined in a county or regional jail for
6 not less than thirty days nor more than six months, or fined not
7 more than \$500, or both.

8 (d) Any person who has been convicted of a third or subsequent
9 violation of the provisions of subsection (a) or (b) of this
10 section, a third or subsequent violation of the provisions of
11 section nine of this article or subsection (a), section fourteen-g
12 of this article where the victim was a current or former spouse,
13 current or former sexual or intimate partner, person with whom the
14 defendant has a child in common, person with whom the defendant
15 cohabits or has cohabited, a parent or guardian, the defendant's
16 child or ward or a member of the defendant's household at the time
17 of the offense or who has previously been granted a period of
18 pretrial diversion pursuant to section twenty-two, article eleven
19 of this chapter for a violation of subsection (a) or (b) of this
20 section or a violation of the provisions of section nine of this
21 article or subsection (a), section fourteen-g of this article in
22 which the victim was a current or former spouse, current or former
23 sexual or intimate partner, person with whom the defendant has a
24 child in common, person with whom the defendant cohabits or has
25 cohabited, a parent or guardian, the defendant's child or ward or
26 a member of the defendant's household at the time of the offense,

1 or any combination of convictions or diversions for these offenses,
2 is guilty of a felony if the offense occurs within ten years of a
3 prior conviction of any of these offenses and, upon conviction
4 thereof, shall be confined in a state correctional facility not
5 less than one nor more than five years or fined not more than
6 \$2,500, or both.

7 (e) As used in this section, "family or household member"
8 means "family or household member" as defined in §48-27-204 of this
9 code.

10 (f) A person charged with a violation of this section may not
11 also be charged with a violation of subsection (b) or (c), section
12 nine of this article for the same act.

13 (g) No law-enforcement officer may be subject to any civil or
14 criminal action for false arrest or unlawful detention for
15 effecting an arrest pursuant to this section or pursuant to § 48-
16 27-1002 of this code.