

1 **H. B. 4337**

2
3 (By Delegates Eldridge, Campbell, Guthrie,
4 Poore, Marshall, Barker, L. Phillips, Skaff,
5 White, Longstreth and Barill)
6

7 [Introduced January 27, 2014; referred to the
8 Committee on the Judiciary then Finance.]

**FISCAL
NOTE**

9
10 A BILL to amend and reenact §61-2-9 and §61-2-28 of the Code of
11 West Virginia, 1931, as amended; and to amend and reenact
12 §61-8B-1 and §61-8B-3 of said code, all relating to crimes
13 against the person; and providing that an act of domestic
14 violence or sexual offense by strangling is an aggravated
15 felony offense; and providing criminal penalties.

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

17 That §61-2-9 and §61-2-28 of the Code of West Virginia, 1931,
18 as amended, be amended and reenacted; and that §61-8B-1 and
19 §61-8B-3 of said code be amended and reenacted, all to read as
20 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 shoots, stabs, cuts, strangles
25 or wounds any person, or by any means causes him or her bodily

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

12 (b) *Assault*. -- If any person unlawfully attempts to commit a
13 violent injury to the person of another or unlawfully commits an
14 act which places another in reasonable apprehension of immediately
15 receiving a violent injury, he or she ~~shall be~~ is guilty of a
16 misdemeanor and, upon conviction, shall be confined in jail for not
17 more than six months, or fined not more than \$100, or both ~~such~~
18 ~~fine and imprisonment~~ fined and confined.

19 (c) *Battery*. -- If any person unlawfully and intentionally
20 makes physical contact of an insulting or provoking nature with the
21 person of another or unlawfully and intentionally causes physical
22 harm to another person, he or she ~~shall be~~ is guilty of a
23 misdemeanor and, upon conviction, shall be confined in jail for not
24 more than twelve months, or fined not more than \$500, or both ~~such~~

1 ~~fine and imprisonment~~ fined and confined.

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

18 (e) As used in this section, "strangle" means knowingly
19 impeding the normal breathing or circulation of the blood of
20 another person by applying pressure on the neck of the other person
21 or blocking the nose or mouth of the other person.

22 **§61-2-28. Domestic violence -- Criminal acts.**

23 (a) *Domestic battery.* -- Any person who unlawfully and
24 intentionally makes physical contact of an insulting or provoking

1 nature with 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 fined
6 and confined.

7 (b) *Domestic assault*. -- Any person who unlawfully attempts to
8 commit a violent 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 fined and confined.

15 (c) *Second offense*. -- Domestic assault or domestic battery.
16 A person convicted of a violation of subsection (a) of this
17 section after having been previously convicted of a violation of
18 subsection (a) or (b) of this section, after having been convicted
19 of a violation of subsection (b) or (c), section nine of this
20 article or subsection (a), section fourteen-g of this article where
21 the victim was his or her current or former spouse, current or
22 former sexual or intimate partner, person with whom the defendant
23 has a child in common, person with whom the defendant cohabits or
24 has cohabited, a parent or guardian, the defendant's child or ward

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

16 A person convicted of a violation of subsection (b) of this
17 section after having been previously convicted of a violation of
18 subsection (a) or (b) of this section, after having been convicted
19 of a violation of subsection (b) or (c), section nine of this
20 article or subsection (a), section fourteen-g of this article where
21 the victim was a current or former spouse, current or former sexual
22 or intimate partner, person with whom the defendant has a child in
23 common, person with whom the defendant cohabits or has cohabited,
24 a parent or guardian, the defendant's child or ward or a member of

1 the defendant's household at the time of the offense or having
2 previously been granted a period of pretrial diversion pursuant to
3 section twenty-two, article eleven of this chapter for a violation
4 of subsection (a) or (b) of this section or subsection (b) or (c),
5 section nine of this article or subsection (a), section fourteen-g
6 of this article where the victim was a current or former spouse,
7 current or former sexual or intimate partner, person with whom the
8 defendant has a child in common, person with whom the defendant
9 cohabits or has cohabited, a parent or guardian, the defendant's
10 child or ward or a member of the defendant's household at the time
11 of the offense shall be confined in ~~a county or regional~~ jail for
12 not less than thirty days nor more than six months, or fined not
13 more than \$500, or both fined and confined.

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

1 of this chapter for a violation of subsection (a) or (b) of this
2 section or a violation of the provisions of section nine of this
3 article or subsection (a), section fourteen-g of this article in
4 which the victim was a current or former spouse, current or former
5 sexual or intimate partner, person with whom the defendant has a
6 child in common, person with whom the defendant cohabits or has
7 cohabited, a parent or guardian, the defendant's child or ward or
8 a member of the defendant's household at the time of the offense,
9 or any combination of convictions or diversions for these offenses,
10 is guilty of a felony if the offense occurs within ten years of a
11 prior conviction of any of these offenses and, upon conviction
12 thereof, shall be ~~confined~~ imprisoned in a state correctional
13 facility not less than one nor more than five years or fined not
14 more than \$2,500, or both fined and imprisoned.

15 (e) Any person who unlawfully and intentionally makes physical
16 contact by strangling his or her family or household member or
17 unlawfully and intentionally causes physical harm to his or her
18 family or household member as a result thereof, is guilty of an
19 aggravated felony and, upon conviction thereof, shall be fined not
20 more than \$5,000 or imprisoned in a state correctional facility for
21 not more than one year nor more than three years, or both fined and
22 imprisoned.

23 ~~(e)~~ (f) As used in this section, "family or household member"
24 means "family or household member" as defined in §48-27-204 of this

1 code.

2 ~~(f)~~ (g) A person charged with a violation of this section may
3 not also be charged with a violation of subsection (b) or (c),
4 section nine of this article for the same act.

5 ~~(g)~~ (h) No law-enforcement officer may be subject to any civil
6 or criminal action for false arrest or unlawful detention for
7 effecting an arrest pursuant to this section or pursuant to
8 §48-27-1002 of this code.

9 **ARTICLE 8B. SEXUAL OFFENSES.**

10 **§61-8B-1. Definition of terms.**

11 In this article, unless a different meaning plainly is
12 required:

13 (1) "Forcible compulsion" means:

14 (a) Physical force that overcomes such earnest resistance as
15 might reasonably be expected under the circumstances; or

16 (b) Threat or intimidation, expressed or implied, placing a
17 person in fear of immediate death or bodily injury to himself or
18 herself or another person or in fear that he or she or another
19 person will be kidnapped; or

20 (c) Fear by a person under sixteen years of age caused by
21 intimidation, expressed or implied, by another person who is at
22 least four years older than the victim.

23 For the purposes of this definition "resistance" includes
24 physical resistance or any clear communication of the victim's lack

1 of consent.

2 (2) "Married", for the purposes of this article in addition to
3 its legal meaning, includes persons living together as husband and
4 wife regardless of the legal status of their relationship.

5 (3) "Mentally defective" means that a person suffers from a
6 mental disease or defect which renders that person incapable of
7 appraising the nature of his or her conduct.

8 (4) "Mentally incapacitated" means that a person is rendered
9 temporarily incapable of appraising or controlling his or her
10 conduct as a result of the influence of a controlled or
11 intoxicating substance administered to that person without his or
12 her consent or as a result of any other act committed upon that
13 person without his or her consent.

14 (5) "Physically helpless" means that a person is unconscious
15 or for any reason is physically unable to communicate unwillingness
16 to an act.

17 (6) "Sexual contact" means any intentional touching, either
18 directly or through clothing, of the breasts, buttocks, anus or any
19 part of the sex organs of another person, or intentional touching
20 of any part of another person's body by the actor's sex organs,
21 where the victim is not married to the actor and the touching is
22 done for the purpose of gratifying the sexual desire of either
23 party.

24 (7) "Sexual intercourse" means any act between persons

1 involving penetration, however slight, of the female sex organ by
2 the male sex organ or involving contact between the sex organs of
3 one person and the mouth or anus of another person.

4 (8) "Sexual intrusion" means any act between persons involving
5 penetration, however slight, of the female sex organ or of the anus
6 of any person by an object for the purpose of degrading or
7 humiliating the person so penetrated or for gratifying the sexual
8 desire of either party.

9 (9) "Bodily injury" means substantial physical pain, illness
10 or any impairment of physical condition.

11 (10) "Serious bodily injury" means bodily injury which creates
12 a substantial risk of death, which causes serious or prolonged
13 disfigurement, prolonged impairment of health or prolonged loss or
14 impairment of the function of any bodily organ.

15 (11) "Deadly weapon" means any instrument, device or thing
16 capable of inflicting death or serious bodily injury, and designed
17 or specially adapted for use as a weapon, or possessed, carried or
18 used as a weapon.

19 (12) "Forensic medical examination" means an examination
20 provided to a possible victim of a violation of the provisions of
21 this article by medical personnel qualified to gather evidence of
22 the violation in a manner suitable for use in a court of law, to
23 include: An examination for physical trauma; a determination of
24 penetration or force; a patient interview; and the collection and

1 evaluation of other evidence that is potentially relevant to the
2 determination that a violation of the provisions of this article
3 occurred and to the determination of the identity of the assailant.

4 (13) "Strangles" means knowingly impeding the normal breathing
5 or circulation of the blood of another person by applying pressure
6 on the neck of the other person or blocking the nose or mouth of
7 the other person.

8 **§61-8B-3. Sexual assault in the first degree.**

9 (a) A person is guilty of sexual assault in the first degree
10 when:

11 (1) The person engages in sexual intercourse or sexual
12 intrusion with another person and, in so doing:

13 (i) Strangles or inflicts serious bodily injury upon anyone;
14 or

15 (ii) Employs a deadly weapon in the commission of the act; or

16 (2) The person, being fourteen years old or more, engages in
17 sexual intercourse or sexual intrusion with another person who is
18 younger than twelve years old and is not married to that person.

19 (b) Any person violating the provisions of this section is
20 guilty of a felony and, upon conviction thereof, shall be
21 imprisoned in a state correctional facility not less than fifteen
22 nor more than thirty-five years, or fined not less than \$1,000 nor
23 more than \$10,000 and imprisoned in a state correctional facility
24 not less than fifteen nor more than thirty-five years.

1 (c) Notwithstanding the provisions of subsection (b) of this
2 section, the penalty for any person violating the provisions of
3 subsection (a) of this section who is eighteen years of age or
4 older and whose victim is younger than twelve years of age, shall
5 be imprisonment in a state correctional facility for not less than
6 twenty-five nor more than one hundred years and a fine of not less
7 than \$5,000 nor more than \$25,000.

NOTE: The purpose of this bill is to provide that an act of domestic violence or a sexual offense by strangling is an aggravated felony offense.

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