

# **WEST VIRGINIA LEGISLATURE**

**2019 REGULAR SESSION**

**Introduced**

## **Senate Bill 17**

BY SENATORS TRUMP AND BOSO

[Introduced January 9, 2019; Referred  
to the Committee on the Judiciary]

1 A BILL to amend and reenact §62-12-2 of the Code of West Virginia, 1931, as amended, relating  
 2 to eligibility for probation; and adding the option of a psychological study and diagnosis to  
 3 the studies and treatment required for a person to be eligible for probation.

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

**ARTICLE 12. PROBATION AND PAROLE.**

**§62-12-2. Eligibility for probation.**

1 (a) All persons who are found guilty of or plead guilty to any felony, the maximum penalty  
 2 for which is less than life imprisonment, and all persons who are found guilty of or plead guilty to  
 3 any misdemeanor, ~~shall be~~ are eligible for probation, notwithstanding the provisions of §61-11-18  
 4 and §61-11-19 of this code.

5 (b) The provisions of subsection (a) of this section to the contrary notwithstanding, any  
 6 person who commits or attempts to commit a felony with the use, presentment or brandishing of  
 7 a firearm ~~shall be ineligible~~ are not eligible for probation. Nothing in this section ~~shall~~ may apply  
 8 to an accessory before the fact or a principal in the second degree who has been convicted as if  
 9 he or she were a principal in the first degree if, in the commission of or in the attempted  
 10 commission of the felony, only the principal in the first degree used, presented or brandished a  
 11 firearm.

12 (c)(1) The existence of any fact which would make any person ineligible for probation  
 13 under subsection (b) of this section because of the commission or attempted commission of a  
 14 felony with the use, presentment or brandishing of a firearm ~~shall~~ may not be applicable unless  
 15 ~~such~~ the fact is clearly stated and included in the indictment or presentment by which ~~such~~ that  
 16 person is charged and is either: (i) Found by the court upon a plea of guilty or nolo contendere;  
 17 or (ii) found by the jury, if the matter be tried before a jury, upon submitting to ~~such~~ the jury a  
 18 special interrogatory for such purpose; or (iii) found by the court, if the matter be tried by the court,  
 19 without a jury.

20 (2) The amendments to this subsection adopted in the year 1981:

21 (A) ~~Shall~~ Apply to all applicable offenses occurring on or after August 1, of that year;

22 (B) ~~Shall~~ Apply with respect to the contents of any indictment or presentment returned on  
23 or after August 1, of that year irrespective of when the offense occurred;

24 (C) ~~Shall~~ Apply with respect to the submission of a special interrogatory to the jury and  
25 the finding to be made thereon in any case submitted to ~~such~~ the jury on or after August 1, of that  
26 year or to the requisite findings of the court upon a plea of guilty or in any case tried without a  
27 jury: *Provided*, That the state shall give notice in writing of its intent to seek such finding by the  
28 jury or court, as the case may be, which notice shall state with particularity the grounds upon  
29 which ~~such~~ the finding ~~shall be~~ is sought as fully as such grounds are otherwise required to be  
30 stated in an indictment, unless the grounds therefor are alleged in the indictment or presentment  
31 upon which the matter is being tried;

32 (D) ~~Shall~~ May not apply with respect to cases not affected by ~~such~~ the amendment and in  
33 such cases the prior provisions of this section shall apply and be construed without reference to  
34 ~~such~~ the amendment; and

35 Insofar as such amendments relate to mandatory sentences without probation, all such  
36 matters requiring such sentence shall be proved beyond a reasonable doubt in all cases tried by  
37 the jury or the court.

38 (d) For the purpose of this section, the term "firearm" ~~shall~~ means any instrument which  
39 will, or is designed to, or may readily be converted to, expel a projectile by the action of an  
40 explosive, gunpowder, or any other similar means.

41 (e) ~~In the case of~~ Any person who has been found guilty of, or pleaded guilty to, a violation  
42 of the provisions of §61-8-12 of this code, the provisions of §61-8B-1 et seq. or §61-8C-1 et seq  
43 of said code, or under the provisions of §61-8D-5 of said code, ~~such person shall~~ may only be  
44 eligible for probation after undergoing a physical, mental and psychiatric or psychological study

45 and diagnosis which shall include an on-going treatment plan requiring active participation in  
46 sexual abuse counseling at a mental health facility or through some other approved program:  
47 *Provided*, That nothing disclosed by the person during such study or diagnosis ~~shall~~ may be made  
48 available to any law-enforcement agency, or other party without that person's consent, or  
49 admissible in any court of this state, unless ~~such~~ the information disclosed ~~shall~~ indicates the  
50 intention or plans of the probationer to do harm to any person, animal, institution or property, in  
51 which case ~~such~~ the information may be released only to such persons as might be necessary  
52 for protection of the said person, animal, institution or property.

53           Within 90 days of the effective date of this section as amended and reenacted during the  
54 first extraordinary session of the Legislature, 2006, the Secretary of the Department of Health and  
55 Human Resources shall propose rules and emergency rules for legislative approval in accordance  
56 with the provisions of §29A-3-1 et seq. of this code establishing qualifications for sex offender  
57 treatment programs and counselors based on accepted treatment protocols among licensed  
58 mental health professionals.

59           (f) Any person who has been convicted of a violation of the provisions of §61-8B-1 et seq.  
60 and §61-8C-1 et seq. or §61-8D-5 and §61-8D-6 of this code, or of §61-2-14, §61-8-12 and §61-  
61 8-13 of this code, or of a felony violation involving a minor of §61-8-6 or §61-8-7 of this code, or  
62 of a similar provision in another jurisdiction shall be required to be registered upon release on  
63 probation. Any person who has been convicted of an attempt to commit any of the offenses set  
64 forth in this subsection shall also be registered upon release on probation.

65           (g) The probation officer shall within three days of release of the offender, send written  
66 notice to the State Police of the release of the offender. The notice shall include:

- 67           (1) The full name of the person;
- 68           (2) The address where the person shall reside;

- 69 (3) The person's social security number;
- 70 (4) A recent photograph of the person;
- 71 (5) A brief description of the crime for which the person was convicted;
- 72 (6) Fingerprints; and
- 73 (7) For any person determined to be a sexually violent predator as defined in section two-
- 74 a, article twelve, chapter fifteen of this code, the notice shall also include:
- 75 (i) Identifying factors, including physical characteristics;
- 76 (ii) History of the offense; and
- 77 (iii) Documentation of any treatment received for the mental abnormality or personality
- 78 disorder.

NOTE: The purpose of this bill is to add the option of a psychological study and diagnosis to the studies and treatment required for a person to be eligible for probation.

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