

# **WEST VIRGINIA LEGISLATURE**

**2019 REGULAR SESSION**

**Enrolled**

**Committee Substitute**

**for**

**Senate Bill 17**

SENATORS TRUMP AND BOSO, *original sponsors*

[Passed January 29, 2019; in effect from passage]



1 AN ACT to amend and reenact §62-12-2 of the Code of West Virginia, 1931, as amended, relating  
2 to eligibility for probation generally; adding the option of a psychological study and  
3 diagnosis to the studies and treatment required for a person to be eligible for probation  
4 upon conviction of certain sexually related offenses; and adding offenses involving  
5 preparation, distribution, or exhibition of obscene matter to minors to the list of offenses  
6 for which such examinations are required for probation eligibility.

*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 are eligible for probation, notwithstanding the provisions of §61-11-18 and §61-  
4 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 is not eligible for probation. Nothing in this section may apply to an accessory before  
8 the fact or a principal in the second degree who has been convicted as if he or she were a principal  
9 in the first degree if, in the commission of or in the attempted commission of the felony, only the  
10 principal in the first degree used, presented, or brandished a firearm.

11 (c)(1) The existence of any fact which would make any person ineligible for probation  
12 under subsection (b) of this section because of the commission or attempted commission of a  
13 felony with the use, presentment, or brandishing of a firearm may not be applicable unless the  
14 fact is clearly stated and included in the indictment or presentment by which that person is charged  
15 and is either:

16 (A) Found by the court upon a plea of guilty or nolo contendere; or

17 (B) Found by the jury, if the matter be tried before a jury, upon submitting to the jury a  
18 special interrogatory for such purpose; or

19 (C) Found by the court, if the matter be tried by the court, without a jury.

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

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

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

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

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

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" means any instrument which will, or  
39 is designed to, or may readily be converted to, expel a projectile by the action of an explosive,  
40 gunpowder, or any other similar means.

41 (e) Any person who has been found guilty of, or pleaded guilty to, a violation of the  
42 provisions of §61-8-12 of this code, the provisions of §61-8A-1 *et seq.* of this code, the provisions

43 of §61-8B-1 *et seq.* or §61-8C-1 *et seq.* of this code, or under the provisions of §61-8D-5 of this  
44 code may only be eligible for probation after undergoing a physical, mental, and psychiatric or  
45 psychological study and diagnosis which shall include an ongoing treatment plan requiring active  
46 participation in sexual abuse counseling at a mental health facility or through some other  
47 approved program: *Provided*, That nothing disclosed by the person during such study or diagnosis  
48 may be made available to any law-enforcement agency or other party without that person's  
49 consent, or admissible in any court of this state, unless the information disclosed indicates the  
50 intention or plans of the probationer to do harm to any person, animal, institution, or property, in  
51 which case the information may be released only to such persons as might be necessary for  
52 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 §15-12-2a
- 74 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.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

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*Chairman, Senate Committee*

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*Chairman, House Committee*

Originated in the Senate.

In effect from passage.

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*Clerk of the Senate*

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*Clerk of the House of Delegates*

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*President of the Senate*

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*Speaker of the House of Delegates*

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The within ..... this the.....  
Day of ....., 2019.

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*Governor*