

# **WEST VIRGINIA LEGISLATURE**

## **2020 REGULAR SESSION**

**Introduced**

### **House Bill 4045**

BY DELEGATE STEELE

[Introduced January 08, 2020; Referred to the Committee  
on the Judiciary]

1 A BILL to amend and reenact §61-11-18 and §61-11-19 of the Code of West Virginia, 1931, as  
 2 amended, all relating to provisions of the “Habitual Offender” statute; and modifying  
 3 provisions addressing eligibility of certain crimes for consideration, expiration of sentence  
 4 prior to being considered, ineligibility for good time calculation, and eligibility for dual  
 5 treatment under section allowing enhanced sentencing for second or subsequent  
 6 offenses.

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

**ARTICLE 11. GENERAL PROVISIONS CONCERNING CRIMES.**

**§61-11-18. Punishment for second or third offense of felony.**

1 (a) Except as provided by subsection (b) of this section, when any person ~~is convicted of~~  
 2 ~~an offense and is subject to confinement in the state correctional facility therefor, and it is~~  
 3 ~~determined, as provided in section nineteen of this article, that such person had been before~~  
 4 ~~convicted in the United States of a crime punishable by confinement in a penitentiary~~ presented  
 5 for indictment to the grand jury, and prior to indictment, the county prosecuting attorney possesses  
 6 information that the person has been convicted in the United States of a crime punishable by  
 7 confinement in a correctional facility, the prosecuting attorney shall allege in the same indictment,  
 8 as a separate count or charge, that the person has been before convicted of a felony crime, and  
 9 a separate count shall state the jurisdiction, date of conviction, and type of crime for which the  
 10 person was convicted, and if the person is convicted of the additional charge or count, as provided  
 11 in §61-11-19 of this code, as well as the other crime or crimes set forth in the indictment, whether  
 12 in the same proceeding or separate the court shall, if the sentence to be imposed is for a definite  
 13 term of years, add five years to the time for which the person is or would be otherwise sentenced.  
 14 Whenever in such case the court imposes an indeterminate sentence, the minimum term shall be  
 15 twice the term of years otherwise provided for under such sentence.

16 (b) Notwithstanding the provisions of subsection (a) or (c) of this section or any other  
 17 provision of this code to the contrary, when any person is convicted of first degree murder or

18 second degree murder or a violation of §61-8B-3 of this code and it is determined, as provided in  
19 §61-11-19 of this code, that ~~such~~ the person had been before convicted in this state of first degree  
20 murder, second degree murder or a violation of §61-8B-3 of this code or has been so convicted  
21 under any law of the United States or any other state for an offense which has the same elements  
22 as any offense described in this subsection, ~~such~~ the person shall be punished by confinement  
23 in the state correctional facility for life and is not eligible for parole.

24 (c) When it is determined, as provided in §61-11-19 of this code, that ~~such~~ the person shall  
25 ~~have~~ has been twice before convicted in the United States of a crime punishable by confinement  
26 in a ~~penitentiary~~ correctional facility, the person shall be sentenced to be confined in ~~the~~ a state  
27 correctional facility for life.

28 (d) The following crimes may not be considered for the purposes of this section in  
29 determining whether a person is eligible for treatment under this section:

30 (1) Shoplifting, third offense; and

31 (2) Driving under the influence, third offense;

32 (e) All other crimes defined by West Virginia law as punishable by confinement in a  
33 correctional facility shall be considered for the purposes of this section in determining whether a  
34 person is eligible for treatment under this section.

35 (f) The court may not consider whether or not the person's sentence has expired for the  
36 prior conviction in counting the prior conviction for purposes of this section. The court shall include  
37 each conviction that arises from separate criminal transactions, regardless of whether the  
38 sentence for one conviction has expired prior to being charged with further crimes. Each separate  
39 crime shall be counted as a separate prior conviction unless the crime arises from the same  
40 criminal transaction or occurrence as the others.

41 (g) Any person convicted in accordance with this section and §61-11-19 of this code, is  
42 ineligible to receive "good time" credit under §15A-4-17 of this code.

43 (h) A conviction and sentence in accordance with this section and §61-11-19 of this code

44 is not a bar to sentencing enhancement provided for by section §60A-4-408 of this code.

**§61-11-19. Procedure in trial of persons for second or third offense.**

1           It ~~shall be~~ is the duty of the prosecuting attorney when he or she has knowledge of former  
2 ~~sentence or sentences to the penitentiary~~ convictions of any person ~~convicted~~ presented for  
3 indictment to the grand jury of an offense punishable by confinement in ~~the penitentiary a~~  
4 correctional facility ~~to give information thereof to the court immediately upon conviction and before~~  
5 ~~sentence. Said court shall, before expiration of the term at which such person was convicted,~~  
6 ~~cause such person or prisoner to be brought before it, and upon an information filed by the~~  
7 ~~prosecuting attorney, setting forth the records of conviction and sentence, or convictions and~~  
8 ~~sentences, as the case may be, and alleging the identity of the prisoner with the person named~~  
9 ~~in each, shall require the prisoner to say whether he is the same person or not. If he says he is~~  
10 ~~not, or remains silent, his plea, or the fact of his silence, shall be entered of record, and a jury~~  
11 ~~shall be impanelled to inquire whether the prisoner is the same person mentioned in the several~~  
12 ~~records. If the jury finds that he is not the same person, he shall be sentenced upon the charge~~  
13 ~~of which he was convicted as provided by law; but if they find that he is the same, or after being~~  
14 ~~duly cautioned if he acknowledged in open court that he is the same person, the court shall~~  
15 ~~sentence him to such further confinement as is prescribed by section eighteen of this article on a~~  
16 ~~second or third conviction as the case may be.~~

17           ~~The clerk of such court shall transmit a copy of said information to the warden of the~~  
18 ~~penitentiary, together with the other papers required by the provisions of section ten, article eight~~  
19 ~~(seven), chapter sixty-two of the Code of West Virginia, 1931~~ present in the same indictment, as  
20 a separate count or charge, that the person has been convicted of the felony crime, and the  
21 separate count shall state the jurisdiction, date of conviction, and type of crime for which the  
22 person was convicted. The court shall, bifurcate the trial on the matter, conducting a trial on the  
23 present criminal charges alleged in the indictment, and then conducting a trial on the matter of  
24 whether the person is the same person identified in the separate charge of the former conviction

25 or convictions. If the person indicted admits in open court, by his or her plea, that he or she is the  
26 same person set forth in the indictment that was convicted on the prior occasion or occasions,  
27 the court shall enter his or her plea of record, and proceed to sentence the person in accordance  
28 with the provisions of §61-11-18 of this code. If the person indicted does not admit in open court,  
29 by his or her plea, that he or she is the same person set forth in the indictment that was convicted  
30 on the prior occasion or occasions, the court shall impanel a jury to inquire whether the person is  
31 the same person convicted on the prior occasion or occasions. The burden of proof at the trial is  
32 upon the state to prove the person is the same person set forth in the indictment that was  
33 convicted on the prior occasion or occasions beyond a reasonable doubt. Should the jury find,  
34 beyond a reasonable doubt, that he or she is the same person convicted on the prior occasion or  
35 occasions, the court shall proceed to sentence the person according to the provisions of §61-11-  
36 18 of this code. The prosecuting attorney, and counsel for the accused, may engage in plea  
37 negotiations as to the charges contained in the indictment, including the charge or charges of  
38 prior criminal convictions subject to enhancement under §61-11-18 of this code, in accordance  
39 with the W. Va. Rules of Criminal Procedure as set forth by the Supreme Court of West Virginia.

40 ~~Nothing contained herein shall be construed as repealing~~ This section does not repeal the  
41 provisions of §62-8-4 of this code, but ~~no~~ a proceeding ~~shall~~ may not be instituted by the warden,  
42 as provided ~~therein~~ in that section, if the trial court has determined the fact of former conviction  
43 or convictions as provided ~~herein~~ in this section.

NOTE: The purpose of this bill is to modify provisions of the "Habitual Offender" statute by modifying provisions relating to: Eligibility of crimes for consideration; the expiration of sentence prior to being considered; providing ineligibility for good time calculation; and the eligibility for dual treatment under section allowing enhanced sentencing for second or subsequent offenses.

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