

# WEST VIRGINIA LEGISLATURE

2020 REGULAR SESSION

**Committee Substitute**

**for**

**Senate Bill 125**

SENATORS TRUMP, IHLENFELD, AND WOELFEL, *original*

*sponsors*

[Originating in the Committee on the Judiciary;

reported on January 16, 2020]



1 A BILL to amend and reenact §61-8B-11 of the Code of West Virginia, 1931, as amended, relating  
2 generally to evidence in prosecution for sexual offenses; prohibiting a victim from being  
3 subjected to certain physical examinations; providing that a victim's refusal to undergo  
4 certain physical examinations does not preclude admission of evidence regarding other  
5 physical examinations; and defining the term "sexual offense".

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

**ARTICLE 8B. SEXUAL OFFENSES.**

**§61-8B-11. Sexual offenses; evidence.**

1 (a) In any prosecution under this article in which the victim's lack of consent is based solely  
2 on the incapacity to consent because such victim was below a critical age, evidence of specific  
3 instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and  
4 reputation evidence of the victim's sexual conduct shall not be admissible. In any other  
5 prosecution under this article, evidence of specific instances of the victim's prior sexual conduct  
6 with the defendant shall be admissible on the issue of consent: *Provided*, That such evidence  
7 heard first out of the presence of the jury is found by the judge to be relevant.

8 (b) In any prosecution under this article evidence of specific instances of the victim's  
9 sexual conduct with persons other than the defendant, opinion evidence of the victim's sexual  
10 conduct, and reputation evidence of the victim's sexual conduct shall not be admissible: *Provided*,  
11 That such evidence shall be admissible solely for the purpose of impeaching credibility, if the  
12 victim first makes his or her previous sexual conduct an issue in the trial by introducing evidence  
13 with respect thereto.

14 (c) In any prosecution under this article, neither age nor mental capacity of the victim shall  
15 preclude the victim from testifying.

16 (d) At any stage of the proceedings, in any prosecution under this article, the court may  
17 permit a child who is 11 years old or less to use anatomically correct dolls, mannequins, or  
18 drawings to assist such child in testifying.

19           (e)(1) A court may not order or otherwise require an alleged victim in a prosecution for a  
20 sexual offense to submit to or undergo a gynecological or physical examination of the breasts,  
21 buttocks, anus, or any part of the sex organs.

22           (2) The refusal of an alleged victim to undergo an examination described in subdivision  
23 (1) of this section may not serve as the basis to exclude evidence obtained from other relevant  
24 examinations of the victim, except where constitutionally required.

25           (3) For the purposes of this subsection, the term “sexual offense” means any offense in  
26 which sexual intercourse, sexual contact, or sexual intrusion is an element of the offense, and  
27 includes any prosecution under this article, §61-8-12, or §61-8D-5 of this code.

NOTE: The purpose of this bill is to prohibit a victim in sexual offense prosecutions from being subjected to certain physical examinations. The bill overrules the decision of the Supreme Court of Appeals in *State ex rel. J.W. v. Knight*, 223 W.Va. 785, 679 S.E.2d 617 (2009).

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