

COMMITTEE SUBSTITUTE

FOR

**Senate Bill No. 533**

(By Senators Miller, Jenkins, Palumbo and Wells)

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[Originating in the Committee on the Judiciary;  
reported March 27, 2013.]

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A BILL to amend and reenact §61-2-9 and §61-2-28 of the Code of West Virginia, 1931, as amended, relating to directly prosecuting for battery an assault where the victim has certain relationships; conviction of which triggers federal firearms prosecution be prosecuted as a domestic battery or domestic assault to be consistent with federal case law and amending definition of “domestic battery” and “domestic assault”.

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

That §61-2-9 and §61-2-28 of the Code of West Virginia, 1931, as amended, be amended and reenacted, all to read as follows:

**ARTICLE 2. CRIMES AGAINST THE PERSON.**

**§61-2-9. Malicious or unlawful assault; assault; battery; penalties.**

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

13           (b) *Assault.* – If any person unlawfully attempts to  
14 commit a violent injury to the person of another or  
15 unlawfully commits an act which places another in  
16 reasonable apprehension of immediately receiving a violent

17 injury, he shall be guilty of a misdemeanor and, upon  
18 conviction, shall be confined in jail for not more than six  
19 months, or fined not more than \$100, or both such fine and  
20 imprisonment: Provided, That if the relationship elements of  
21 the parties meets those set forth in paragraphs (1), (2), (3) and  
22 (6), section two-hundred four, article twenty-seven, chapter  
23 forty-eight of this code then the individual shall be charged  
24 with the offense of domestic assault under section twenty-  
25 eight of this article.

26 (c) *Battery.* – If any person unlawfully and intentionally  
27 ~~makes~~ uses physical ~~contact of an insulting or provoking~~  
28 ~~nature with~~ force capable of causing physical pain or injury  
29 to the person of another or unlawfully and intentionally  
30 causes physical harm to another person, he shall be guilty of  
31 a misdemeanor and, upon conviction, shall be confined in jail  
32 for not more than twelve months, or fined not more than  
33 \$500, or both such fine and imprisonment: Provided, That if  
34 the relationship elements of the parties meets those set forth

35 in paragraphs (1), (2), (3) and (6), section two-hundred four,  
36 article twenty-seven, chapter forty-eight of this code then the  
37 individual shall be charged with the offense of domestic  
38 battery under section twenty-eight of this article.

39 (d) Any person convicted of a violation of subsection (b)  
40 or (c) of this section who has, in the ten years prior to said  
41 conviction, been convicted of a violation of either subsection  
42 (b) or (c) of this section where the victim was a current or  
43 former spouse, current or former sexual or intimate partner,  
44 a person with whom the defendant has a child in common, a  
45 person with whom the defendant cohabits or has cohabited,  
46 a parent or guardian, the defendant's child or ward or a  
47 member of the defendant's household at the time of the  
48 offense or convicted of a violation of section twenty-eight of  
49 this article or has served a period of pretrial diversion for an  
50 alleged violation of subsection (b) or (c) of this section or  
51 section twenty-eight of this article when the victim has such  
52 present or past relationship shall upon conviction be subject

53 to the penalties set forth in section twenty-eight of this article  
54 for a second, third or subsequent criminal act of domestic  
55 violence offense, as appropriate.

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

1 (a) *Domestic battery.* – Any person who unlawfully and  
2 intentionally ~~makes~~ uses physical ~~contact of an insulting or~~  
3 ~~provoking nature with~~ force capable of causing physical pain  
4 or injury to his or her family or household member or  
5 unlawfully and intentionally causes physical harm to his or  
6 her family or household member, is guilty of a misdemeanor  
7 and, upon conviction thereof, shall be confined in a county or  
8 regional jail for not more than twelve months, or fined not  
9 more than \$500, or both.

10 (b) *Domestic assault.* – Any person who unlawfully  
11 attempts to ~~commit a violent injury~~ use physical force  
12 capable of causing physical pain or injury against his or her  
13 family or household member or unlawfully commits an act  
14 which places his or her family or household member in

15 reasonable apprehension of immediately receiving a violent  
16 injury, is guilty of a misdemeanor and, upon conviction  
17 thereof, shall be confined in ~~a county or regional~~ jail for not  
18 more than six months, or fined not more than \$100, or both.

19 (c) *Second offense.* – Domestic assault or domestic  
20 battery.

21 A person convicted of a violation of subsection (a) of this  
22 section after having been previously convicted of a violation  
23 of subsection (a) or (b) of this section, after having been  
24 convicted of a violation of subsection (b) or (c), section nine  
25 of this article or subsection (a), section fourteen-g of this  
26 article where the victim was his or her current or former  
27 spouse, current or former sexual or intimate partner, person  
28 with whom the defendant has a child in common, person with  
29 whom the defendant cohabits or has cohabited, a parent or  
30 guardian, the defendant's child or ward or a member of the  
31 defendant's household at the time of the offense or who has  
32 previously been granted a period of pretrial diversion  
33 pursuant to section twenty-two, article eleven of this chapter

34 for a violation of subsection (a) or (b) of this section, or a  
35 violation of subsection (b) or (c), section nine of this article  
36 or subsection (a), section fourteen-g of this article where the  
37 victim was a current or former spouse, current or former  
38 sexual or intimate partner, person with whom the defendant  
39 has a child in common, person with whom the defendant  
40 cohabits or has cohabited, a parent or guardian, the  
41 defendant's child or ward or a member of the defendant's  
42 household at the time of the offense is guilty of a  
43 misdemeanor and, upon conviction thereof, shall be confined  
44 in a county or regional jail for not less than sixty days nor  
45 more than one year, or fined not more than \$1,000, or both.

46 A person convicted of a violation of subsection (b) of this  
47 section after having been previously convicted of a violation  
48 of subsection (a) or (b) of this section, after having been  
49 convicted of a violation of subsection (b) or (c), section nine  
50 of this article or subsection (a), section fourteen-g of this  
51 article where the victim was a current or former spouse,  
52 current or former sexual or intimate partner, person with

53 whom the defendant has a child in common, person with  
54 whom the defendant cohabits or has cohabited, a parent or  
55 guardian, the defendant's child or ward or a member of the  
56 defendant's household at the time of the offense or having  
57 previously been granted a period of pretrial diversion  
58 pursuant to section twenty-two, article eleven of this chapter  
59 for a violation of subsection (a) or (b) of this section or  
60 subsection (b) or (c), section nine of this article or subsection  
61 (a), section fourteen-g of this article where the victim was a  
62 current or former spouse, current or former sexual or intimate  
63 partner, person with whom the defendant has a child in  
64 common, person with whom the defendant cohabits or has  
65 cohabited, a parent or guardian, the defendant's child or ward  
66 or a member of the defendant's household at the time of the  
67 offense shall be confined in a county or regional jail for not  
68 less than thirty days nor more than six months, or fined not  
69 more than \$500, or both.

70 (d) Any person who has been convicted of a third or  
71 subsequent violation of the provisions of subsection (a) or (b)



72 of this section, a third or subsequent violation of the  
73 provisions of section nine of this article or subsection (a),  
74 section fourteen-g of this article where the victim was a  
75 current or former spouse, current or former sexual or intimate  
76 partner, person with whom the defendant has a child in  
77 common, person with whom the defendant cohabits or has  
78 cohabited, a parent or guardian, the defendant's child or ward  
79 or a member of the defendant's household at the time of the  
80 offense or who has previously been granted a period of  
81 pretrial diversion pursuant to section twenty-two, article  
82 eleven of this chapter for a violation of subsection (a) or (b)  
83 of this section or a violation of the provisions of section nine  
84 of this article or subsection (a), section fourteen-g of this  
85 article in which the victim was a current or former spouse,  
86 current or former sexual or intimate partner, person with  
87 whom the defendant has a child in common, person with  
88 whom the defendant cohabits or has cohabited, a parent or  
89 guardian, the defendant's child or ward or a member of the  
90 defendant's household at the time of the offense, or any

91 combination of convictions or diversions for these offenses,  
92 is guilty of a felony if the offense occurs within ten years of  
93 a prior conviction of any of these offenses and, upon  
94 conviction thereof, shall be confined in a state correctional  
95 facility not less than one nor more than five years or fined not  
96 more than \$2,500, or both.

97 (e) As used in this section, “family or household  
98 member” means “family or household member” as defined in  
99 §48-27-204 of this code.

100 (f) A person charged with a violation of this section may  
101 not also be charged with a violation of subsection (b) or (c),  
102 section nine of this article for the same act.

103 (g) No law-enforcement officer may be subject to any  
104 civil or criminal action for false arrest or unlawful detention  
105 for effecting an arrest pursuant to this section or pursuant to  
106 §48-27-1002 of this code.