

# **WEST VIRGINIA LEGISLATURE**

## **2016 REGULAR SESSION**

**Originating**

### **House Bill 4724**

(BY DELEGATES FOLK, OVERINGTON, ZATEZALO,  
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SUMMERS AND AZINGER)

[Originating in the Committee on the Judiciary;

Reported on February 24, 2016.]



1 A BILL to amend and reenact §61-5-27 of the Code of West Virginia, 1931, as amended, relating  
2 to adding a requirement for the likelihood of imminent lawless action to the prerequisites  
3 for the crime of intimidation and retaliation.

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

1 That §61-5-27 of the Code of West Virginia, 1931, as amended, be amended and  
2 reenacted to read as follows:

**ARTICLE 5. CRIMES AGAINST PUBLIC JUSTICE.**

**§61-5-27. Intimidation of and retaliation against public officers and employees, jurors and  
witnesses; fraudulent official proceedings and legal processes against public  
officials and employees; penalties.**

1 (a) *Definitions.* — As used in this section:

2 (1) “Fraudulent” means not legally issued or sanctioned under the laws of this state or of  
3 the United States, including forged, false and materially misstated;

4 (2) “Legal process” means an action, appeal, document instrument or other writing issued,  
5 filed or recorded to pursue a claim against person or property, exercise jurisdiction, enforce a  
6 judgment, fine a person, put a lien on property, authorize a search and seizure, arrest a person,  
7 incarcerate a person or direct a person to appear, perform or refrain from performing a specified  
8 act. “Legal process” includes, but is not limited to, a complaint, decree, demand, indictment,  
9 injunction, judgment, lien, motion, notice, order, petition, pleading, sentence, subpoena,  
10 summons, warrant or writ;

11 (3) “Official proceeding” means a proceeding involving a legal process or other process of  
12 a tribunal of this state or of the United States;

13 (4) “Person” means an individual, group, association, corporation or any other entity;

14 (5) “Public official or employee” means an elected or appointed official or employee, of a  
15 state or federal court, commission, department, agency, political subdivision or any governmental  
16 instrumentality;

17 (6) "Recorder" means a clerk or other employee in charge of recording instruments in a  
18 court, commission or other tribunal of this state or of the United States; and

19 (7) "Tribunal" means a court or other judicial or quasi-judicial entity, or an administrative,  
20 legislative or executive body, or that of a political subdivision, created or authorized under the  
21 Constitution or laws of this state or of the United States.

22 (b) *Intimidation; harassment.* — It is unlawful for a person to use intimidation, physical  
23 force, harassment or a fraudulent legal process or official proceeding, or to threaten to do so  
24 where such threat is likely to incite or produce imminent lawless action or to attempt to do so, with  
25 the intent to:

26 (1) Impede or obstruct a public official or employee from performing his or her official  
27 duties;

28 (2) Impede or obstruct a juror or witness from performing his or her official duties in an  
29 official proceeding;

30 (3) Influence, delay or prevent the testimony of any person in an official proceeding; or

31 (4) Cause or induce a person to: (A) Withhold testimony, or withhold a record, document  
32 or other object from an official proceeding; (B) alter, destroy, mutilate or conceal a record,  
33 document or other object impairing its integrity or availability for use in an official proceeding; (C)  
34 evade an official proceeding summoning a person to appear as a witness or produce a record,  
35 document or other object for an official proceeding; or (D) be absent from an official proceeding  
36 to which such person has been summoned.

37 (c) *Retaliation.* — It is unlawful for a person to cause injury or loss to person or property,  
38 or to threaten to do so where such threat is likely to incite or produce imminent lawless action or  
39 to attempt to do so, with the intent to:

40 (1) Retaliate against a public official or employee for the performance or nonperformance  
41 of an official duty;

42 (2) Retaliate against a juror or witness for performing his or her official duties in an official  
43 proceeding; or

44           (3) Retaliate against any other person for attending, testifying or participating in an official  
45 proceeding, or for the production of any record, document or other object produced by a person  
46 in an official proceeding.

47           (d) *Subsection (b) offense.* — A person who is convicted of an offense under subsection  
48 (b) is guilty of a misdemeanor and, shall be confined in jail for not more than one year or fined not  
49 more than \$1,000, or both.

50           (e) *Subsection (c) or subsequent offense.* — A person convicted of an offense under  
51 subsection (c) or a second offense under subsection (b) is guilty of a felony and, shall be confined  
52 in ~~the penitentiary~~ a correctional facility not less than one nor more than ten years or fined not  
53 more than \$2,000, or both.

54           (f) *Civil cause of action.* — A person who violates this section is liable in a civil action to  
55 any person harmed by the violation for injury or loss to person or property incurred as a result of  
56 the commission of the offense and for reasonable attorney's fees, court costs and other expenses  
57 incurred as a result of prosecuting a civil action commenced under this subsection, which is not  
58 the exclusive remedy of a person who suffers injury or loss to person or property as a result of a  
59 violation of this section.

60           (g) *Civil sanctions.* — In addition to the criminal and civil penalties set forth in this section,  
61 any fraudulent official proceeding or legal process brought in a tribunal of this state in violation of  
62 this section shall be dismissed by the tribunal and the person may be ordered to reimburse the  
63 aggravated person for reasonable attorney's fees, court costs and other expenses incurred in  
64 defending or dismissing such action.

65           (1) *Refusal to record.* — A recorder may refuse to record a clearly fraudulent lien or other  
66 legal process against a public official or employee or his or her property. The recorder does not  
67 have a duty to inspect or investigate whether a lien or other legal process is fraudulent nor is the  
68 recorder liable for refusing to record a lien or other legal process that the recorder believes is in  
69 violation of this section.

70 (2) If a fraudulent lien or other legal process against a public official or employee or his or  
71 her property is recorded then:

72 (A) *Request to release lien.* — The public official or employee may send a written request  
73 by certified mail to the person who filed the fraudulent lien or legal process, requesting the person  
74 to release or dismiss the lien or legal process. If such lien or legal process is not properly released  
75 or dismissed within twenty-one days, then it shall be inferred that the person intended to harass  
76 the public official or employee in violation of subsection (b) of this section and shall be subject to  
77 the criminal penalties in subsection (d) of this section and any other remedies provided for in this  
78 section; or

79 (B) *Notice of fraudulent lien.* — A government attorney on behalf of the public official or  
80 employee may record a notice of fraudulent lien or legal process with the recorder who accepted  
81 the lien or legal process for filing. Such notice shall invalidate the fraudulent lien or legal process  
82 and cause it to be removed from the records. No filing fee shall be charged for the filing of the  
83 notice.

84 (h) A person's lack of belief in the jurisdiction or authority of this state or of the United  
85 States is no defense to prosecution of a civil or criminal action under this section.

86 (i)(1) Nothing in this section prohibits or in any way limits the lawful acts of legitimate public  
87 officials or employees.

88 (2) Nothing in this section prohibits or in any way limits a person's lawful and legitimate  
89 right to freely assemble, express opinions or designate group affiliation.

90 (3) Nothing in this section prohibits or in any way limits a person's lawful and legitimate  
91 access to a tribunal of this state or prevents a person from instituting or responding to a lawful  
92 action.

NOTE: The purpose of this bill is to add the provisions of *Brandenburg v. Ohio*, 395 U.S. 444 (1969) clarifying that threats against public officials are actionable only in such instances where such threats are likely to incite or produce such imminent lawless action.

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