

# **WEST VIRGINIA LEGISLATURE**

## **2019 REGULAR SESSION**

**Introduced**

### **House Bill 2508**

BY DELEGATE STEELE, PAYNTER, HARSHBARGER,  
MANDT, JEFFRIES, J., GRAVES, HOWELL, WILSON,  
FOSTER AND KESSINGER

[Introduced January 17, 2019; Referred  
to the Committee on the Judiciary.]

1 A BILL to amend and reenact §62-12-2 of the Code of West Virginia, 1931, as amended, relating  
2 to making certain defendants who have been convicted of two or more prior unrelated  
3 felonies not a part of the same criminal transaction ineligible for probation; and  
4 establishing a procedure.

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

## **ARTICLE 12. PROBATION AND PAROLE.**

### **§62-12-2. Eligibility for probation.**

1 (a) ~~All persons~~ Persons who are found guilty of or plead guilty to any felony, the maximum  
2 penalty for which is less than life imprisonment, and all persons who are found guilty of or plead  
3 guilty to any misdemeanor, shall be eligible for probation, notwithstanding the provisions of §61-  
4 11-18 and §61-11-19 of this code: Provided, That those persons have not been convicted of two  
5 or more unrelated felony offenses, not arising from the same criminal transaction on a prior  
6 occasion in this jurisdiction or any other jurisdiction within the United States.

7 (b) The provisions of §62-12-2(a) of this code to the contrary notwithstanding, any person  
8 who commits or attempts to commit a felony with the use, presentment or brandishing of a firearm  
9 shall be ineligible for probation. Nothing in this section shall apply to an accessory before the fact  
10 or a principal in the second degree who has been convicted as if he or she were a principal in the  
11 first degree if, in the commission of or in the attempted commission of the felony, only the principal  
12 in the first degree used, presented or brandished a firearm.

13 (c)(1) The existence of any fact which would make any person ineligible for probation  
14 under §62-12-2(b) of this code to because of the commission or attempted commission of a felony  
15 with the use, presentment or brandishing of a firearm shall not be applicable unless such fact is  
16 clearly stated and included in the indictment or presentment by which such person is charged and  
17 is either: ~~(i)~~ (A) Found by the court upon a plea of guilty or nolo contendere; or ~~(ii)~~ (B) found by  
18 the jury, if the matter be tried before a jury, upon submitting to such jury a special interrogatory  
19 for such purpose; or ~~(iii)~~ (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) Shall apply to all applicable offenses occurring on or after August 1, of that year;

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

24 (C) Shall 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 such jury on or after August 1, of that year  
26 or 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 such  
29 finding shall be sought as fully as such grounds are otherwise required to be stated in an  
30 indictment, unless the grounds therefor are alleged in the indictment or presentment upon which  
31 the matter is being tried;

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

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) The court, upon sentencing the defendant, shall make inquiry of the officer preparing  
39 the pre-sentence investigation report, as to whether the defendant has two or more prior felony  
40 convictions, and the defendant shall be afforded the opportunity to confirm or deny the assertion  
41 of the officer preparing the report. If the defendant denies the assertion of the officer preparing  
42 the report, the state, by its counsel, shall present such evidence to the court as it may have in its  
43 possession concerning the prior felony convictions of the defendant, and the defendant shall  
44 present such evidence to the court as the defendant may have concerning the prior felony  
45 convictions of the defendant. The court, after hearing the evidence of both parties, shall determine

46 by a preponderance of the evidence whether the defendant has been convicted of two or more  
47 prior unrelated felonies, not arising from the same criminal transaction on a prior occasion in this  
48 jurisdiction or any jurisdiction within the United States. If the defendant confirms the assertion of  
49 the officer or be found by the court to have committed two prior unrelated felonies, not arising  
50 from the same criminal transaction on a prior occasion in this jurisdiction or any jurisdiction within  
51 the United States, the defendant is not eligible for a grant of probation under this article.

52       ~~(d)~~ (e) For the purpose of this section, the term “firearm” shall mean any instrument which  
53 will, or is designed to, or may readily be converted to, expel a projectile by the action of an  
54 explosive, gunpowder, or any other similar means.

55       ~~(e)~~ (f) In the case of any person who has been found guilty of, or pleaded guilty to, a  
56 violation of the provisions of §61-8-12, §61-8B-1 *et seq.*, §61-8C-1 *et seq.* or §61-8D-5 of this  
57 code, such person shall only be eligible for probation after undergoing a physical, mental and  
58 psychiatric study and diagnosis which shall include an on-going treatment plan requiring active  
59 participation in sexual abuse counseling at a mental health facility or through some other  
60 approved program: *Provided*, That nothing disclosed by the person during such study or diagnosis  
61 shall be made available to any law-enforcement agency, or other party without that person's  
62 consent, or admissible in any court of this state, unless such information disclosed shall indicate  
63 the intention or plans of the probationer to do harm to any person, animal, institution or property,  
64 in which case such information may be released only to such persons as might be necessary for  
65 protection of the said person, animal, institution or property.

66       Within 90 days of the effective date of this section as amended and reenacted during the  
67 first extraordinary session of the Legislature, 2006, the Secretary of the Department of Health and  
68 Human Resources shall propose rules and emergency rules for legislative approval in accordance  
69 with the provisions of §29A-3-1 *et seq.* of this code establishing qualifications for sex offender  
70 treatment programs and counselors based on accepted treatment protocols among licensed  
71 mental health professionals.

72           ~~(f)~~ (g) Any person who has been convicted of a violation of the provisions of §61-8B-1 *et*  
73 *seq.*, §61-8C-1 *et seq.* §61-8D-5, §61-8D-6, §61-2-14, §61-8-12 or §61-8-13 of this code, or of a  
74 felony violation involving a minor of §61-8-6 or §61-8-7 of this code, or of a similar provision in  
75 another jurisdiction shall be required to be registered upon release on probation. Any person who  
76 has been convicted of an attempt to commit any of the offenses set forth in this subsection shall  
77 also be registered upon release on probation.

78           ~~(g)~~ (h) The probation officer shall within three days of release of the offender, send written  
79 notice to the State Police of the release of the offender. The notice shall include:

80           (1) The full name of the person;

81           (2) The address where the person shall reside;

82           (3) The person's social security number;

83           (4) A recent photograph of the person;

84           (5) A brief description of the crime for which the person was convicted;

85           (6) Fingerprints; and

86           (7) For any person determined to be a sexually violent predator as defined in §15-12-2a  
87 of this code, the notice shall also include:

88           ~~(i)~~ (A) Identifying factors, including physical characteristics;

89           ~~(ii)~~ (B) History of the offense; and

90           ~~(iii)~~ (C) Documentation of any treatment received for the mental abnormality or personality  
91 disorder.

NOTE: The purpose of this bill is to make certain defendants who have been convicted of two or more prior unrelated felonies not a part of the same criminal transaction ineligible for probation. The bill also establishes a procedure.

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