

WEST VIRGINIA LEGISLATURE

# SENATE JOURNAL

EIGHTY-FOURTH LEGISLATURE  
REGULAR SESSION, 2019  
FIFTY-THIRD DAY

---

Charleston, West Virginia, Saturday, March 2, 2019

The Senate met at 9:22 a.m.

(Senator Carmichael, Mr. President, in the Chair.)

Prayer was offered by the Honorable Glenn D. Jeffries, a senator from the eighth district.

The Senate was then led in recitation of the Pledge of Allegiance by the Honorable Bill Hamilton, a senator from the eleventh district.

Pending the reading of the Journal of Friday, March 1, 2019,

At the request of Senator Azinger, unanimous consent being granted, the Journal was approved and the further reading thereof dispensed with.

The Senate proceeded to the third order of business.

A message from the Clerk of the House of Delegates announced the amendment by that body, passage as amended, and requested the concurrence of the Senate in the House of Delegates amendments, as to

**Eng. Com. Sub. for Senate Bill 295**, Relating to crimes against public justice.

On motion of Senator Takubo, the bill was taken up for immediate consideration.

The following House of Delegates amendments to the bill were reported by the Clerk:

On page one, section seventeen, line three, by striking out the words "court security officer";

On page one, section seventeen, line eight, by striking out the words "court security officer";

And,

On page two, section seventeen, line twenty-four, by striking out the words "court security officer".

On motion of Senator Takubo, the Senate refused to concur in the foregoing House amendments to the bill (Eng. Com. Sub. for S. B. 295) and requested the House of Delegates to recede therefrom.

*Ordered*, That the Clerk communicate to the House of Delegates the action of the Senate and request concurrence therein.

A message from the Clerk of the House of Delegates announced the amendment by that body, passage as amended, and requested the concurrence of the Senate in the House of Delegates amendments, as to

**Eng. Com. Sub. for Senate Bill 518**, Restricting sale and trade of dextromethorphan.

On motion of Senator Takubo, the bill was taken up for immediate consideration.

The following House of Delegates amendments to the bill were reported by the Clerk:

On page one, after line seven, by inserting a new subsection, designated subsection (d), to read as follows:

(d) A person making a retail sale of a finished drug product containing any quantity of dextromethorphan shall require and obtain proof of age from the purchaser before completing the sale, unless from the purchaser's outward appearance the person making the sale would reasonably presume the purchaser to be at least 25 years of age.;

And,

By relettering the remaining subsections.

On motion of Senator Takubo, the Senate concurred in the House of Delegates amendments to the bill.

Engrossed Committee Substitute for Senate Bill 518, as amended by the House of Delegates, was then put upon its passage.

On the passage of the bill, the yeas were: Azinger, Baldwin, Blair, Boley, Boso, Clements, Cline, Facemire, Hamilton, Hardesty, Ihlenfeld, Jeffries, Lindsay, Maynard, Palumbo, Plymale, Roberts, Romano, Rucker, Smith, Stollings, Swope, Sypolt, Takubo, Tarr, Trump, Unger, Weld, and Carmichael (Mr. President)—29.

The nays were: None.

Absent: Beach, Mann, Maroney, Prezioso, and Woelfel—5.

So, a majority of all the members elected to the Senate having voted in the affirmative, the President declared the bill (Eng. Com. Sub. for S. B. 518) passed with its title.

*Ordered*, That the Clerk communicate to the House of Delegates the action of the Senate.

A message from the Clerk of the House of Delegates announced the amendment by that body, passage as amended with its House of Delegates amended title, to take effect from passage, and requested the concurrence of the Senate in the House of Delegates amendments, as to

**Eng. Senate Bill 545**, Relating to HIV testing.

On motion of Senator Takubo, the bill was taken up for immediate consideration.

The following House of Delegates amendments to the bill were reported by the Clerk:

By striking out everything after the enacting clause and inserting in lieu thereof the following:

**§64-7-4. Office of the Insurance Commission.**

The legislative rule filed in the State Register on April 3, 2003, authorized under the authority of §33-2-10(a) of this code, relating to standards for AIDS-related underwriting questions and AIDS testing in connection with applications for life or health insurance policies (AIDS Regulations, 114 CSR 27) is authorized with the following: amendment:

~~“5.9. The testing is required to be administered on a nondiscriminatory basis for all individuals in the same underwriting class. No proposed insured may be denied coverage or rated a substandard risk on the basis of HIV testing unless acceptable testing protocol is followed including the use of FDA-licensed tests. The following is the acceptable HIV testing protocol for use in this state:~~

~~a. An initial enzyme linked immunosorbent assay (ELISA) test is administered to the proposed insured, and it indicates the presence of HIV antibodies; and~~

~~b. A second ELISA test is administered and it indicates the presence of HIV; and~~

~~c. A Western Blot test is conducted and it confirms the results of the two ELISA tests.~~

5.10. If any of the tests in the ~~ELISA-ELISA-Western Blot series produce~~ confirmatory test produces a negative result, the testing ceases and the proposed insured cannot be denied coverage based on AIDS-related testing.

~~For Example: If the initial ELISA test yields a negative result, the testing ceases. If the initial ELISA test yields a positive result and the subsequent ELISA test yields a negative result, the testing ceases. If both ELISA tests yield a positive result and the Western Blot test yields a negative result, for purposes of insurability, the results are negative.;~~

And,

By striking out the title and substituting therefor a new title, to read as follows:

**Eng. Senate Bill 545**—A Bill to amend and reenact §64-7-4, of the Code of West Virginia, 1931, as amended, relating to authorizing the Office of the Insurance Commission to promulgate a legislative rule relating HIV testing; and eliminating outdated testing protocols.

On motion of Senator Takubo, the Senate concurred in the House of Delegates amendments to the bill.

Engrossed Senate Bill 545, as amended by the House of Delegates, was then put upon its passage.

On the passage of the bill, the yeas were: Azinger, Blair, Boley, Boso, Clements, Cline, Facemire, Hamilton, Hardesty, Ihlenfeld, Jeffries, Lindsay, Maynard, Palumbo, Plymale, Roberts, Romano, Rucker, Smith, Stollings, Swope, Sypolt, Takubo, Tarr, Trump, Unger, Weld, and Carmichael (Mr. President)—28.

The nays were: Baldwin—1.

Absent: Beach, Mann, Maroney, Prezioso, and Woelfel—5.

So, a majority of all the members elected to the Senate having voted in the affirmative, the President declared the bill (Eng. S. B. 545) passed with its House of Delegates amended title.

Senator Takubo moved that the bill take effect from passage.

On this question, the yeas were: Azinger, Blair, Boley, Boso, Clements, Cline, Facemire, Hamilton, Hardesty, Ihlenfeld, Jeffries, Lindsay, Maynard, Palumbo, Plymale, Roberts, Romano, Rucker, Smith, Stollings, Swope, Sypolt, Takubo, Tarr, Trump, Unger, Weld, and Carmichael (Mr. President)—28.

The nays were: Baldwin—1.

Absent: Beach, Mann, Maroney, Prezioso, and Woelfel—5.

So, two thirds of all the members elected to the Senate having voted in the affirmative, the President declared the bill (Eng. S. B. 545) takes effect from passage.

*Ordered*, That the Clerk communicate to the House of Delegates the action of the Senate.

A message from the Clerk of the House of Delegates announced the concurrence by that body in the passage of

**Eng. Senate Bill 593**, Permitting critical access hospital become community outpatient medical center.

A message from the Clerk of the House of Delegates announced the concurrence by that body in the adoption of

**Senate Concurrent Resolution 35**, Designating days for displaying Honor and Remember Flag at WV Veterans Memorial.

A message from the Clerk of the House of Delegates announced the concurrence by that body in the Senate amendment to, and the passage as amended, of

**Eng. Com. Sub. for House Bill 2740**, Barring a parent from inheriting from a child in certain instances.

A message from the Clerk of the House of Delegates announced the concurrence by that body in the Senate amendment to, and the passage as amended, of

**Eng. House Bill 2759**, Providing for the ancillary administration of West Virginia real estate owned by nonresidents by affidavit and without administration.

A message from the Clerk of the House of Delegates announced the adoption by that body and requested the concurrence of the Senate in the adoption of

**House Concurrent Resolution 15**—Requesting the Joint Committee on Government and Finance study the impact of business regulations and economic development incentives to recruit and retain small business in West Virginia.

Referred to the Committee on Rules.

A message from the Clerk of the House of Delegates announced the adoption by that body and requested the concurrence of the Senate in the adoption of

**House Concurrent Resolution 20**—Requesting the Division of Highways name bridge number 18-13-0-.12, near Sandyville in Jackson County, locally known as the Sandyville Bridge, the “PFC Charles Everett Hurd Memorial Bridge”.

Referred to the Committee on Transportation and Infrastructure.

A message from the Clerk of the House of Delegates announced the adoption by that body and requested the concurrence of the Senate in the adoption of

**House Concurrent Resolution 65**—Requesting the Division of Highways name a portion of WV 3, starting at the eastern city limits of Union and ending at the intersection with CR 11, Keenan Road, in Monroe County, the “Vietnam Veterans Memorial Highway”.

Referred to the Committee on Transportation and Infrastructure.

A message from the Clerk of the House of Delegates announced the adoption by that body and requested the concurrence of the Senate in the adoption of

**House Concurrent Resolution 66**—Requesting the Division of Highways name bridge number 20-4-0.01 (20A006), (38.49033, -81.34935) locally known as Big Sandy Bridge, carrying WV Rt. 4 over Big Sandy Creek in Clendenin, Kanawha County, the “U. S. Army SPC Thurman ‘Duwayne’ Young Memorial Bridge”.

Referred to the Committee on Transportation and Infrastructure.

A message from the Clerk of the House of Delegates announced the adoption by that body and requested the concurrence of the Senate in the adoption of

**House Concurrent Resolution 74**—Requesting the Division of Highways name a portion of Two-Mile Road (WV Route 36) beginning 1.3 miles from the start of the hollow and Two-Mile Road a distance of .6 mile total, or 1.9 miles from the start of the hollow, in Lincoln County, the “U. S. Army PFC James Leslie Pridemore Memorial Road”.

Referred to the Committee on Transportation and Infrastructure.

A message from the Clerk of the House of Delegates announced the adoption by that body and requested the concurrence of the Senate in the adoption of

**House Concurrent Resolution 81**—Requesting the Capitol Building Commission to create a subcommittee to raise private funds sufficient to erect a statue of Charles Elwood “Chuck”

Yeager on the State Capitol Complex grounds wherein the end of Washington Street East intersects California Avenue.

Referred to the Committee on Rules.

### Executive Communications

The Clerk then presented communications from His Excellency, the Governor, advising that on March 1, 2019, he had approved **Enr. Senate Bill 377, Enr. Committee Substitute for Senate Bill 489, Enr. Committee Substitute for House Bill 2324, Enr. House Bill 2351, Enr. Committee Substitute for House Bill 2607, Enr. House Bill 2666, and Enr. House Bill 2668.**

The Senate proceeded to the fourth order of business.

Senator Blair, from the Committee on Finance, submitted the following report, which was received:

Your Committee on Finance has had under consideration

**Eng. House Bill 2009**, Creating a new category of Innovation in Education grant program.

With amendments from the Committee on Education pending;

And has also amended same.

And reports the same back with the recommendation that it do pass as last amended by the Committee on Finance.

Respectfully submitted,

Craig Blair,  
*Chair.*

Senator Maroney, from the Committee on Health and Human Resources, submitted the following report, which was received:

Your Committee on Health and Human Resources has had under consideration

**Eng. Com. Sub. for House Bill 2010**, Relating to foster care.

And has amended same.

And reports the same back with the recommendation that it do pass, as amended; but under the original double committee reference first be referred to the Committee on Finance.

Respectfully submitted,

Michael J. Maroney,  
*Chair.*

At the request of Senator Takubo, unanimous consent being granted, the bill (Eng. Com. Sub. for H. B. 2010) contained in the preceding report from the Committee on Health and Human

Resources was taken up for immediate consideration, read a first time, ordered to second reading, and, under the original double committee reference, was then referred to the Committee on Finance, with an amendment from the Committee on Health and Human Resources pending.

Senator Swope, from the Committee on the Workforce, submitted the following report, which was received:

Your Committee on the Workforce has had under consideration

**Eng. Com. Sub. for House Bill 2049**, Relating to a prime contractor's responsibility for wages and benefits.

And has amended same.

And reports the same back with the recommendation that it do pass, as amended; but under the original double committee reference first be referred to the Committee on the Judiciary.

Respectfully submitted,

Chandler Swope,  
*Chair.*

At the request of Senator Takubo, unanimous consent being granted, the bill (Eng. Com. Sub. for H. B. 2049) contained in the preceding report from the Committee on the Workforce was taken up for immediate consideration, read a first time, ordered to second reading, and, under the original double committee reference, was then referred to the Committee on the Judiciary, with amendments from the Committee on the Workforce pending.

Senator Rucker, from the Committee on Education, submitted the following report, which was received:

Your Committee on Education has had under consideration

**Eng. Com. Sub. for House Bill 2363**, Relating to the Upper Kanawha Valley Resiliency and Revitalization Program.

And has amended same.

And reports the same back with the recommendation that it do pass, as amended; but under the original double committee reference first be referred to the Committee on Government Organization.

Respectfully submitted,

Patricia Puertas Rucker,  
*Chair.*

At the request of Senator Takubo, unanimous consent being granted, the bill (Eng. Com. Sub. for H. B. 2363) contained in the preceding report from the Committee on Education was taken up for immediate consideration, read a first time, ordered to second reading, and, under the original double committee reference, was then referred to the Committee on Government Organization, with an amendment from the Committee on Education pending.

Senator Maynard, from the Committee on Economic Development, submitted the following report, which was received:

Your Committee on Economic Development has had under consideration

**Eng. Com. Sub. for House Bill 2550**, Creating a matching program for the Small Business Innovation and Research Program and the Small Business Technology Transfer Program.

And has amended same.

And reports the same back with the recommendation that it do pass, as amended; but under the original double committee reference first be referred to the Committee on Finance.

Respectfully submitted,

Mark R. Maynard,  
*Chair.*

At the request of Senator Takubo, unanimous consent being granted, the bill (Eng. Com. Sub. for H. B. 2550) contained in the preceding report from the Committee on Economic Development was taken up for immediate consideration, read a first time, ordered to second reading, and, under the original double committee reference, was then referred to the Committee on Finance, with amendments from the Committee on Economic Development pending.

Senator Smith, from the Committee on Energy, Industry, and Mining, submitted the following report, which was received:

Your Committee on Energy, Industry, and Mining has had under consideration

**Eng. Com. Sub. for House Bill 2673**, Creating the Oil and Gas Abandoned Well Plugging Fund.

And has amended same.

And reports the same back with the recommendation that it do pass, as amended; but under the original double committee reference first be referred to the Committee on Finance.

Respectfully submitted,

Randy E. Smith,  
*Chair.*

At the request of Senator Takubo, unanimous consent being granted, the bill (Eng. Com. Sub. for H. B. 2673) contained in the preceding report from the Committee on Energy, Industry, and Mining was taken up for immediate consideration, read a first time, ordered to second reading, and, under the original double committee reference, was then referred to the Committee on Finance, with an amendment from the Committee on Energy, Industry, and Mining pending.

Senator Rucker, from the Committee on Education, submitted the following report, which was received:

Your Committee on Education has had under consideration



**Eng. House Bill 2853**, Establishing the West Virginia Program for Open Education Resources.

And reports the same back with the recommendation that it do pass; but under the original double committee reference first be referred to the Committee on Finance.

Respectfully submitted,

Patricia Puertas Rucker,  
*Chair.*

At the request of Senator Takubo, unanimous consent being granted, the bill (Eng. H. B. 2853) contained in the preceding report from the Committee on Education was taken up for immediate consideration, read a first time, ordered to second reading, and, under the original double committee reference, was then referred to the Committee on Finance.

The Senate proceeded to the eighth order of business.

**Eng. Com. Sub. for House Bill 2359**, Relating to exemptions to the commercial driver's license requirements.

On third reading, coming up in regular order, was read a third time and put upon its passage.

On the passage of the bill, the yeas were: Azinger, Baldwin, Blair, Boley, Boso, Clements, Cline, Hamilton, Hardesty, Jeffries, Lindsay, Maynard, Roberts, Romano, Rucker, Smith, Swope, Sypolt, Takubo, Tarr, Trump, Unger, Weld, Woelfel, and Carmichael (Mr. President)—25.

The nays were: Facemire, Ihlenfeld, Palumbo, Plymale, and Stollings—5.

Absent: Beach, Mann, Maroney, and Prezioso—4.

So, a majority of all the members present and voting having voted in the affirmative, the President declared the bill (Eng. Com. Sub. for H. B. 2359) passed.

The following amendment to the title of the bill, from the Committee on Transportation and Infrastructure, was reported by the Clerk and adopted:

**Eng. Com. Sub. for House Bill 2359**—A Bill to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section, designated §17E-1-8a, relating to providing for a restricted commercial driver's license for employees of designated farm-related service industries; establishing fee for the issuance of such license; and authorizing the Commissioner of Motor Vehicles to define seasonal periods.

*Ordered*, That the Clerk communicate to the House of Delegates the action of the Senate and request concurrence therein.

**Eng. Com. Sub. for House Bill 2476**, Relating to the valuation of a motor vehicle involved in an insurance claim.

On third reading, coming up in regular order, was read a third time and put upon its passage.

On the passage of the bill, the yeas were: Azinger, Baldwin, Blair, Boley, Boso, Clements, Cline, Facemire, Hamilton, Hardesty, Ihlenfeld, Jeffries, Lindsay, Maynard, Palumbo, Plymale, Roberts, Romano, Rucker, Smith, Stollings, Swope, Sypolt, Takubo, Tarr, Trump, Unger, Weld, Woelfel, and Carmichael (Mr. President)—30.

The nays were: None.

Absent: Beach, Mann, Maroney, and Prezioso—4.

So, a majority of all the members present and voting having voted in the affirmative, the President declared the bill (Eng. Com. Sub. for H. B. 2476) passed with its title.

*Ordered*, That the Clerk communicate to the House of Delegates the action of the Senate and request concurrence therein.

**Eng. Com. Sub. for House Bill 2531**, Permitting trained nurses to provide mental health services in a medication-assisted treatment program.

On third reading, coming up in regular order, was reported by the Clerk.

At the request of Senator Takubo, unanimous consent being granted, the bill was laid over one day, retaining its place on the calendar.

**Eng. House Bill 2547**, Relating to the election prohibition zone.

On third reading, coming up in regular order, was read a third time and put upon its passage.

Pending discussion,

The question being “Shall Engrossed House Bill 2547 pass?”

On the passage of the bill, the yeas were: Baldwin, Blair, Boley, Boso, Clements, Cline, Hamilton, Hardesty, Lindsay, Palumbo, Roberts, Romano, Smith, Stollings, Swope, Takubo, Trump, Weld, Woelfel, and Carmichael (Mr. President)—20.

The nays were: Azinger, Facemire, Ihlenfeld, Jeffries, Maynard, Plymale, Rucker, Sypolt, Tarr, and Unger—10.

Absent: Beach, Mann, Maroney, and Prezioso—4.

So, a majority of all the members present and voting having voted in the affirmative, the President declared the bill (Eng. H. B. 2547) passed.

The following amendment to the title of the bill, from the Committee on the Judiciary, was reported by the Clerk and adopted:

**Eng. House Bill 2547**—A Bill to amend and reenact §3-1-37 of the Code of West Virginia, 1931, as amended; and to amend and reenact §3-9-6 and §3-9-9 of said code, all relating to restrictions on presence and conduct at or within 200 feet of polling places; prohibiting persons other than voters and election officials from being or remaining within 200 feet of entrance of polling place while polls are open; permitting person delivering voter to polling place to discharge voter within 200 feet of entrance of polling place; requiring person delivering voter to remove

vehicle 200 feet until the voter with is to be transported from polling place or another voter delivered; permitting vehicles delivering voters who require assistance to remain within 200 feet of entrance until voter is to be transported from polling place; providing that a person violating restrictions on remaining within 200 feet of a polling place is guilty of a misdemeanor and subject to criminal penalties; prohibiting electioneering in or within 200 feet of polling place on election day; prohibiting electioneering in or within 200 feet of early voting polling places during early voting periods; and providing that person electioneering within 200 feet of polling places or early voting polling places is guilty of a misdemeanor and is subject to criminal penalties.

*Ordered*, That the Clerk communicate to the House of Delegates the action of the Senate and request concurrence therein.

**Eng. House Bill 2691**, Providing that a license to carry a concealed deadly weapon expires on the holder's birthday.

On third reading, coming up in regular order, was read a third time and put upon its passage.

On the passage of the bill, the yeas were: Azinger, Baldwin, Blair, Boley, Boso, Clements, Cline, Facemire, Hamilton, Hardesty, Ihlenfeld, Jeffries, Lindsay, Maynard, Palumbo, Plymale, Roberts, Romano, Rucker, Smith, Stollings, Swope, Sypolt, Takubo, Tarr, Trump, Unger, Weld, Woelfel, and Carmichael (Mr. President)—30.

The nays were: None.

Absent: Beach, Mann, Maroney, and Prezioso—4.

So, a majority of all the members present and voting having voted in the affirmative, the President declared the bill (Eng. H. B. 2691) passed.

The following amendment to the title of the bill, from the Committee on the Judiciary, was reported by the Clerk and adopted:

**Eng. House Bill 2691**—A Bill to amend and reenact §61-7-4 of the Code of West Virginia, 1931, as amended, relating to providing that a license to carry a concealed deadly weapon currently in effect expires on the holder's birthday occurring during the fifth year of licensure or five years from the date of issuance, whichever is later in time; providing that renewals of such licenses and licenses newly issued after the effective date of the amendments to this section are valid for five years from the licensee's birthday, and maintaining provisions making licenses subject to revocation for cause.

Senator Takubo moved that the bill take effect from passage.

On this question, the yeas were: Azinger, Baldwin, Blair, Boley, Boso, Clements, Cline, Facemire, Hamilton, Hardesty, Ihlenfeld, Jeffries, Lindsay, Maynard, Palumbo, Plymale, Roberts, Romano, Rucker, Smith, Stollings, Swope, Sypolt, Takubo, Tarr, Trump, Unger, Weld, Woelfel, and Carmichael (Mr. President)—30.

The nays were: None.

Absent: Beach, Mann, Maroney, and Prezioso—4.

So, two thirds of all the members elected to the Senate having voted in the affirmative, the President declared the bill (Eng. H. B. 2691) takes effect from passage.

*Ordered*, That the Clerk communicate to the House of Delegates the action of the Senate and request concurrence therein.

**Eng. Com. Sub. for House Bill 2813**, Relating generally to collection of use tax.

On third reading, coming up in regular order, was read a third time and put upon its passage.

On the passage of the bill, the yeas were: Azinger, Baldwin, Blair, Boley, Boso, Clements, Cline, Facemire, Hamilton, Hardesty, Ihlenfeld, Jeffries, Lindsay, Maynard, Palumbo, Plymale, Roberts, Romano, Rucker, Smith, Stollings, Swope, Sypolt, Takubo, Tarr, Trump, Unger, Weld, Woelfel, and Carmichael (Mr. President)—30.

The nays were: None.

Absent: Beach, Mann, Maroney, and Prezioso—4.

So, a majority of all the members present and voting having voted in the affirmative, the President declared the bill (Eng. Com. Sub. for H. B. 2813) passed.

On motion of Senator Blair, the following amendment to the title of the bill was reported by the Clerk and adopted:

**Eng. Com. Sub. for House Bill 2813**—A Bill to amend and reenact §11-15A-1 of the Code of West Virginia, 1931, as amended; and to amend said code by adding thereto a new section, designated §11-15A-6b, all relating generally to collection of use tax; defining terms, requiring collection of use tax by marketplace facilitators, remote sellers, and referrers satisfying certain economic nexus requirements; and specifying internal effective date.

*Ordered*, That the Clerk communicate to the House of Delegates the action of the Senate and request concurrence therein.

The Senate proceeded to the ninth order of business.

**Com. Sub. for Senate Bill 150**, Budget Bill.

On second reading, coming up in regular order, was read a second time.

At the request of Senator Takubo, and by unanimous consent, the bill was advanced to third reading with the right for amendments to be considered on that reading.

**Eng. Com. Sub. for House Bill 2183**, Clarifying where a charge of DUI may be brought against an individual.

On second reading, coming up in regular order, was read a second time.

The following amendment to the bill, from the Committee on the Judiciary, was reported by the Clerk and adopted:

By striking out everything after the enacting clause and inserting in lieu thereof the following:

**ARTICLE 5. SERIOUS TRAFFIC OFFENSES.****§17C-5-2. Driving under influence of alcohol, controlled substances or drugs; penalties.**(a) *Definitions-*

(1) "Impaired state" means a person:

(A) Is under the influence of alcohol;

(B) Is under the influence of any controlled substance;

(C) Is under the influence of any other drug or inhalant substance;

(D) Is under the combined influence of alcohol and any controlled substance or any other drug; or

(E) Has an alcohol concentration in his or her blood of eight hundredths of one percent or more, by weight.

(2) "Bodily Injury" means injury that causes substantial physical pain, illness or any impairment of physical condition.

(3) "Serious Bodily Injury" means bodily injury that creates a substantial risk of death, that causes serious or prolonged disfigurement, prolonged impairment of health or prolonged loss or impairment of the function of any bodily organ.

(b) Any person who drives a vehicle in this state while he or she is in an impaired state and such impaired state proximately causes the death of any person is guilty of a felony and, upon conviction thereof, shall be imprisoned in a state correctional facility for not less than three nor more than 15 years and shall be fined not less than \$1,000 nor more than \$3,000: *Provided*, That any death charged under this subsection must occur within one year of the offense.

(c) Any person who drives a vehicle in this state while he or she is in an impaired state and such impaired state proximately causes serious bodily injury to any person other than himself or herself, is guilty of a felony and, upon conviction thereof, shall be imprisoned in a state correctional facility for not less than two nor more than 10 years and shall be fined not less than \$1,000 nor more than \$3,000.

(d) Any person who drives a vehicle in this state while he or she is in an impaired state and such impaired state proximately causes a bodily injury to any person other than himself or herself, is guilty of a misdemeanor and, upon conviction thereof, shall be confined in jail for not less than one day more than one year and shall be fined not less than \$200 nor more than \$1,000: *Provided*, That such jail term shall include actual confinement of not less than 24 hours: *Provided, however*, That a person sentenced pursuant to this subsection shall receive credit for any period of actual confinement he or she served upon arrest for the subject offense.

(e) Any person who drives a vehicle in this state: (i) While he or she is in an impaired state or (ii) while he or she is in an impaired state but has an alcohol concentration in his or her blood of less than fifteen hundredths of one percent by weight, is guilty of a misdemeanor and, upon conviction thereof, shall be confined in jail for up to six months and shall be fined not less than

\$100 nor more than \$500: *Provided*, That a person sentenced pursuant to this subsection shall receive credit for any period of actual confinement he or she served upon arrest for the subject offense.

(f) Any person who drives a vehicle in this state while he or she has an alcohol concentration in his or her blood of fifteen hundredths of one percent or more, by weight, is guilty of a misdemeanor and, upon conviction thereof, shall be confined in jail for not less than two days nor more than six months, which jail term is to include actual confinement of not less than 24 hours, and shall be fined not less than \$200 nor more than \$1,000. A person sentenced pursuant to this subdivision shall receive credit for any period of actual confinement he or she served upon arrest for the subject offense.

(g) Any person who, being a habitual user of narcotic drugs or amphetamine or any derivative thereof, drives a vehicle in this state is guilty of a misdemeanor and, upon conviction thereof, shall be confined in jail for not less than one day nor more than six months, which jail term is to include actual confinement of not less than 24 hours, and shall be fined not less than \$100 nor more than \$500. A person sentenced pursuant to this subdivision shall receive credit for any period of actual confinement he or she served upon arrest for the subject offense.

(h) Any person who knowingly permits his or her vehicle to be driven in this state by any other person who is in an impaired state is guilty of a misdemeanor and, upon conviction thereof, shall be confined in jail for not more than six months and shall be fined not less than \$100 nor more than \$500.

(i) Any person who knowingly permits his or her vehicle to be driven in this state by any other person who is a habitual user of narcotic drugs or amphetamine or any derivative thereof is guilty of a misdemeanor and, upon conviction thereof, shall be confined in jail for not more than six months and shall be fined not less than \$100 nor more than \$500.

(j) Any person under the age of 21 years who drives a vehicle in this state while he or she has an alcohol concentration in his or her blood of two hundredths of one percent or more, by weight, but less than eight hundredths of one percent, by weight, for a first offense under this subsection is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than \$25 nor more than \$100. For a second or subsequent offense under this subsection, the person is guilty of a misdemeanor and, upon conviction thereof, shall be confined in jail for 24 hours and shall be fined not less than \$100 nor more than \$500. A person who is charged with a first offense under the provisions of this subsection may move for a continuance of the proceedings, from time to time, to allow the person to participate in the Motor Vehicle Alcohol Test and Lock Program as provided in §17C-5A-3a of this code. Upon successful completion of the program, the court shall dismiss the charge against the person and expunge the person's record as it relates to the alleged offense. In the event the person fails to successfully complete the program, the court shall proceed to an adjudication of the alleged offense. A motion for a continuance under this subsection may not be construed as an admission or be used as evidence.

A person arrested and charged with an offense under the provisions of this subsection or subsection (b), (c), (d), (e), (f), (g), (h) or (i) of this section may not also be charged with an offense under this subsection arising out of the same transaction or occurrence.

(k) Any person who drives a vehicle in this state while he or she is in an impaired state and has within the vehicle one or more other persons who are unemancipated minors who have not yet reached their 16<sup>th</sup> birthday is guilty of a misdemeanor and, upon conviction thereof, shall be

confined in jail for not less than two days nor more than 12 months, and shall be fined not less than \$200 nor more than \$1,000: *Provided*, That such jail term shall include actual confinement of not less than 48 hours: *Provided, however*, That a person sentenced pursuant to this subdivision shall receive credit for any period of actual confinement he or she served upon arrest for the subject offense.

(l) A person violating any provision of subsection (d), (e), (f), (g), (h), or (j) of this section, for the second offense under this section, is guilty of a misdemeanor and, upon conviction thereof, shall be confined in jail for not less than six months nor more than one year and the court may, in its discretion, impose a fine of not less than \$1,000 nor more than \$3,000.

(m) A person violating any provision of subsection (d), (e), (f), (g), (h) or (j) of this section, for the third or any subsequent offense under this section, is guilty of a felony and, upon conviction thereof, shall be imprisoned in a state correctional facility for not less than two nor more than five years and the court may, in its discretion, impose a fine of not less than \$3,000 nor more than \$5,000.

(n) For purposes of subsections (l) and (m) of this section relating to second, third and subsequent offenses, the following events shall be regarded as offenses under this section:

(1) Any conviction under the provisions of subsection (b), (c), (d), (e), (f), (g) or (h) of this section or under a prior enactment of this section for an offense which occurred within the 10-year period immediately preceding the date of arrest in the current proceeding;

(2) Any conviction under a municipal ordinance of this state or any other state or a statute of the United States or of any other state of an offense which has the same elements as an offense described in subsection (b), (c), (d), (e), (f), (g), (h) or (i) of this section, which offense occurred within the 10-year period immediately preceding the date of arrest in the current proceeding; and,

(3) Any period of conditional probation imposed pursuant to §17C-5-2b of this code for violation of subsection (e) of this section, which violation occurred within the 10-year period immediately preceding the date of arrest in the current proceeding.

(o) A person may be charged in a warrant or indictment or information for a second or subsequent offense under this section if the person has been previously arrested for or charged with a violation of this section which is alleged to have occurred within the applicable time period for prior offenses, notwithstanding the fact that there has not been a final adjudication of the charges for the alleged previous offense. In that case, the warrant or indictment or information must set forth the date, location and particulars of the previous offense or offenses. No person may be convicted of a second or subsequent offense under this section unless the conviction for the previous offense has become final, or the person has previously had a period of conditional probation imposed pursuant to §17C-5-2b of this article.

(p) The fact that any person charged with a violation of subsection (b), (c), (d), (e), (f) or (g) of this section, or any person permitted to drive as described under subsection(h) or (i) of this section, is or has been legally entitled to use alcohol, a controlled substance or a drug does not constitute a defense against any charge of violating subsection (b), (c), (d), (e), (f), (g), (h) or (i) of this section.

(q) For purposes of this section, the term "controlled substance" has the meaning ascribed to it in §60A-1-101 *et seq.* of this code.

(r) The sentences provided in this section upon conviction for a violation of this article are mandatory and are not subject to suspension or probation: *Provided*, That the court may apply the provisions of §62-11A-1 *et seq.* of this code to a person sentenced or committed to a term of one year or less for a first offense under this section: *Provided, however*, That the court may impose a term of conditional probation pursuant to §17C-5-2b of this code to persons adjudicated thereunder. An order for home detention by the court pursuant to the provisions of §62-11B-1 *et seq.* of this code may be used as an alternative sentence to any period of incarceration required by this section for a first or subsequent offense: *Provided further*, That for any period of home incarceration ordered for a person convicted of a second offense under this section, electronic monitoring shall be required for no fewer than five days of the total period of home confinement ordered and the offender may not leave home for those five days notwithstanding the provisions of §62-11B-5 of this code: *And provided further*, That for any period of home incarceration ordered for a person convicted of a third or subsequent violation of this section, electronic monitoring shall be included for no fewer than 10 days of the total period of home confinement ordered and the offender may not leave home for those 10 days notwithstanding §62-11B-5 of this code.

(s) As used in subsections (e), (f), (g), (h), (i), and (j) of this section, the words “drives a vehicle in this state” do not mean or include driving or operating a vehicle solely and exclusively on one’s own property.

The bill (Eng. Com. Sub. for H. B. 2183), as amended, was then ordered to third reading.

**Eng. Com. Sub. for House Bill 2362**, Ardala Miller Memorial Act.

On second reading, coming up in regular order, was read a second time.

The following amendment to the bill, from the Committee on the Judiciary, was reported by the Clerk:

By striking out everything after the enacting clause and inserting in lieu thereof the following:

### **ARTICLE 3. VOTING BY ABSENTEES.**

#### **§3-3-1. Persons eligible to vote absentee ballots.**

(a) All registered and other qualified voters of the county may vote an absentee ballot during the period of early voting in person.

(b) Registered voters and other qualified voters in the county are authorized to vote an absentee ballot by mail in the following circumstances:

(1) Any voter who is confined to a specific location and prevented from voting in person throughout the period of voting in person because of:

(A) Illness, injury, or other medical reason;

(B) Physical disability or immobility due to extreme advanced age; or

(C) Incarceration or home detention: *Provided*, That the underlying conviction is not for a crime which is a felony or a violation of §3-9-12, §3-9-13, or §3-9-16 of this code involving bribery in an election;



(2) Any voter who is absent from the county throughout the period and available hours for voting in person because of:

(A) Personal or business travel;

(B) Attendance at a college, university, or other place of education or training; or

(C) Employment which because of hours worked and distance from the county seat make voting in person impossible;

(3) Any voter absent from the county throughout the period and available hours for voting in person and who is an absent uniformed services voter or overseas voter, as defined by 42 U.S.C. §1973, *et seq.*, the Uniformed and Overseas Citizens Absentee Voting Act of 1986, including members of the uniformed services on active duty, members of the merchant marine, spouses and dependents of those members on active duty and persons who reside outside the United States and are qualified to vote in the last place in which the person was domiciled before leaving the United States;

(4) Any voter who is required to dwell temporarily outside the county and is absent from the county throughout the time for voting in person because of:

(A) Serving as an elected or appointed federal or state officer; or

(B) Serving in any other documented employment assignment of specific duration of four years or less;

(5) Any voter for whom the designated area for absentee voting within the county courthouse or annex of the courthouse and the voter's assigned polling place are inaccessible because of his or her physical disability; and

(6) Any voter who is participating in the Address Confidentiality Program as established by §48-28A-103 of this code.

(c) Registered voters and other qualified voters in the county may, in the following circumstances, vote an emergency absentee ballot, subject to the availability of the services as provided in this article:

(1) Any voter who is confined or expects to be confined in a hospital or other duly licensed health care facility within the county of residence or other authorized area, as provided in this article, on the day of the election;

(2) Any voter who resides in a nursing home within the county of residence and would be otherwise unable to vote in person, providing the county commission has authorized the services if the voter has resided in the nursing home for a period of less than 30 days; ~~and~~

(3) Any voter who becomes confined, on or after the seventh day preceding an election, to a specific location within the county because of illness, injury, physical disability, immobility due to advanced age, or another medical reason: *Provided*, That the county clerk may require a written confirmation by a licensed physician that the voter meets the criteria of this subdivision before permitting such voter to vote an emergency absentee ballot; and

~~(3)~~ (4) Any voter who is working as a replacement poll worker and is assigned to a precinct out of his or her voting district, if the assignment was made after the period for voting an absentee ballot in person has expired.

**§3-3-5c. Procedures for voting an emergency absentee ballot by qualified voters.**

(a) Notwithstanding any other provision of this chapter, a person qualified to vote an emergency absentee ballot, as provided in §3-3-1(c) of this code, may vote an emergency absentee ballot under the procedures established in this section. The county commission may adopt a policy extending the emergency absentee voting procedures to: (1) Qualified voters in hospitals or other duly licensed health care facilities within an adjacent county or within 35 miles of the county seat; or (2) qualified voters in nursing homes within the county; or (3) qualified voters who become confined, on or after the seventh day preceding an election, to a specific location within the county because of illness, injury, physical disability, immobility due to advanced age, or another medical reason: *Provided,* That the policy is to be adopted by the county commission at least 90 days prior to the election that will be affected and a copy of the policy is to be filed with the Secretary of State.

(b) On or before the 56th day preceding the date on which any election is to be held, the official designated to supervise and conduct absentee voting shall notify the county commission of the number of sets of emergency absentee ballot commissioners which he or she determines necessary to perform the duties and functions pursuant to this section.

(c) A set of emergency absentee ballot commissioners at-large shall consist of two persons with different political party affiliations appointed by the county commission in accordance with the procedure prescribed for the appointment of election commissioners under the provisions of §3-1-1 *et seq.* of this code. Emergency absentee ballot commissioners have the same qualifications and rights and take the same oath required under the provisions of this chapter for commissioners of elections. Emergency absentee ballot commissioners are to be compensated for services and expenses in the same manner as commissioners of election or poll clerks obtaining and delivering election supplies under the provisions of §3-1-44 of this code.

(d) Upon request of the voter or a member of the voter's immediate family or, when the county commission has adopted a policy to provide emergency absentee voting services to nursing home residents within the county, upon request of a staff member of the nursing home, the official designated to supervise and conduct absentee voting, upon receiving a proper request for voting an emergency absentee ballot no earlier than the seventh day next preceding the election and no later than noon of election day shall supply to the emergency absentee ballot commissioners the application for voting an emergency absentee ballot and the balloting materials. The emergency absentee ballot application is to be prescribed by the Secretary of State and is to include the name, residence address and political party affiliation of the voter, the date, location and reason for confinement in the case of an emergency, and the name of the attending physician.

(e) The application for an emergency absentee ballot is to be signed by the person applying. If the person applying for an emergency absentee ballot is unable to sign his or her application because of illiteracy or physical disability, he or she is to make his or her mark on the signature line provided for an illiterate or disabled applicant, the mark is to be witnessed. The person assisting the voter and witnessing the mark of the voter shall sign his or her name in the space provided.

(f) A declaration is to be completed and signed by each of the emergency absentee ballot commissioners, stating their names, the date on which they appeared at the place of confinement of the person applying for an emergency absentee ballot, and the particulars of the confinement.

(g) At least one of the emergency absentee ballot commissioners receiving the balloting materials shall sign a receipt which is to be attached to the application form. Each of the emergency absentee ballot commissioners shall deliver the materials to the absent voter, await his or her completion of the application and ballot and return the application and the ballot to the official designated to supervise and conduct absentee voting. Upon delivering the application and the voted ballot to the official, the emergency absentee ballot commissioners shall sign an oath that no person other than the absent voter voted the ballot. The application and the voted ballot are to be returned to the official designated to supervise and conduct absentee voting prior to the close of the polls on election day. Any ballots received by the official after the time that delivery may reasonably be made but before the closing of the polls are to be delivered to the canvassing board along with the absentee ballots challenged in accordance with the provisions of §3-3-10 of this code.

(h) Upon receiving the application and emergency absentee ballot, the official designated to supervise and conduct absentee voting shall ascertain whether the application is complete, whether the voter appears to be eligible to vote an emergency absentee ballot, and whether the voter is properly registered to vote with the office of the clerk of the county commission. If the voter is found to be properly registered in the precinct shown on the application, the ballot is to be delivered to the precinct election commissioner pursuant to §3-3-7 of this code. If the voter is found not to be registered or is otherwise ineligible to vote an emergency ballot, the ballot is to be challenged for the appropriate reason provided for in §3-3-10 of this code.

(i) If either or both of the emergency absentee ballot commissioners refuse to sign any application for voting an emergency absentee ballot, the voter may vote as an emergency absentee and the ballot will be challenged in accordance with the provisions of §3-3-10 of this code, in addition to those absentee ballots subject to challenge as provided in that section.

(j) Any voter who receives assistance in voting an emergency absentee ballot shall comply with the provisions of §3-3-6 of this code. Any other provisions of this chapter relating to absentee ballots not altered by the provisions of this section are to govern the treatment of emergency absentee ballots.

Following discussion,

At the request of Senator Trump, unanimous consent being granted, the bill was laid over one day, retaining its place on the calendar, with the Judiciary committee amendment pending.

**Eng. House Bill 2525**, Tobacco Cessation Therapy Access Act.

Having been read a second time on yesterday, Friday, March 1, 2019, and now coming up in regular order, was reported by the Clerk.

At the request of Senator Takubo, unanimous consent being granted, the bill was laid over one day, retaining its place on the calendar.

**Eng. House Bill 2530**, Creating a voluntary certification for recovery residences.

Having been read a second time on yesterday, Friday, March 1, 2019, and now coming up in regular order, was reported by the Clerk.

At the request of Senator Takubo, unanimous consent being granted, the bill was laid over one day, retaining its place on the calendar.

**Eng. Com. Sub. for House Bill 2609**, Relating to presumptions of abandonment and indication of ownership in property.

On second reading, coming up in regular order, was read a second time and ordered to third reading.

**Eng. Com. Sub. for House Bill 2907**, Requiring a form of a certified commitment order to the Division of Corrections and Rehabilitation.

On second reading, coming up in regular order, was read a second time.

The following amendment to the bill, from the Committee on the Judiciary, was reported by the Clerk and adopted:

By striking out everything after the enacting clause and inserting in lieu thereof the following:

**ARTICLE 7. EXECUTION OF SENTENCES; STAYS.**

**§62-7-10. Prison Commitment paper order.**

The clerk of a circuit court in which a person is sentenced to serve a period of incarceration in a state ~~correctional facility~~ prison shall transmit to the Commissioner of the Division of Corrections and ~~the West Virginia Regional Jail Authority~~ Rehabilitation a certified commitment order in the same as, or similar to, the form provided for in this section. A person may not be committed to a prison unless the commitment order is signed by the circuit judge with jurisdiction over the matter. The amendments to this section enacted during the 2019 regular session of the Legislature are effective July 1, 2019. If a commitment order in a form other than the one provided in this section is issued, the commitment order is required, at a minimum, to contain the same information.

IN THE CIRCUIT COURT OF \_\_\_\_\_ COUNTY, WEST VIRGINIA

State of West Virginia

v. \_\_\_\_\_ circuit court Case No. \_\_\_\_\_

Defendant: \_\_\_\_\_

DOB: \_\_\_\_\_ SSN: XXX-XX-\_\_\_\_\_ Gender: \_\_\_\_\_ Male/\_\_\_\_\_ Female

**WEST VIRGINIA DIVISION OF CORRECTIONS AND REHABILITATION CERTIFIED PRISON COMMITMENT ORDER**

On the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, the State of West Virginia, by \_\_\_\_\_, and the defendant appeared in person and with counsel, \_\_\_\_\_.

The defendant has been convicted of the following offense(s):

\_\_\_\_\_

The defendant is committed to the custody of the Commissioner of Corrections and Rehabilitation for a period of:

\_\_\_\_\_.

Conviction Date: \_\_\_\_\_ Sentence Date: \_\_\_\_\_

Effective Sentence Date: \_\_\_\_\_ Resentence Date: \_\_\_\_\_  
Consecutive to: \_\_\_\_ Concurrent with:

\_\_\_\_\_

Credit for Jail/Prison Time Served: \_\_\_\_\_ days Credit for Home Incarceration: \_\_\_\_\_ days

Credit for Home Incarceration Parole: \_\_\_\_\_ days Other NonPenal Credit: \_\_\_\_\_ days

Additionally, the court finds:

\_\_\_\_\_

The defendant shall be transported to and held in a ~~West Virginia Regional Jail Authority~~ facility ~~until transfer into the physical custody of the Commissioner~~ under the control of the Commissioner of the Division of Corrections and Rehabilitation. The court further orders that the cost of incarceration in the regional jail pending transfer shall be paid by the Commissioner ~~from the date entry of this order forward~~ consistent with the provisions of §15A-3-16 of this code.

Special \_\_\_\_\_ Instructions:

\_\_\_\_\_

It is further ordered that the Circuit Clerk shall immediately transmit a certified copy of this commitment order to the ~~West Virginia Regional Jail Authority and to the Central Office Inmate Records Manager of the Division of Corrections and Rehabilitation~~ by facsimile at (fax number), by email at (email address) or other electronic transmission, or by mail at (street address).

Enter this \_\_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_.

\_\_\_\_\_

Circuit Judge

**§62-7-10a. Jail Commitment order.**

The clerk of a circuit court or magistrate court in which a person is sentenced to serve a period of incarceration in a jail facility under the control of the Commissioner of Corrections and Rehabilitation shall transmit to the Commissioner of the Division of Corrections and Rehabilitation a certified commitment order in the form provided for in this section. A person may not be committed to a jail unless the commitment order is signed by the circuit court judge or magistrate with jurisdiction over the matter. The amendments to this section enacted during the 2019 regular session of the Legislature are effective on July 1, 2019.

IN THE CIRCUIT/MAGISTRATE COURT OF \_\_\_\_\_ COUNTY, WEST VIRGINIA

State of West Virginia

v. \_\_\_\_\_ circuit/magistrate court Case No. \_\_\_\_\_

Defendant: \_\_\_\_\_

DOB: \_\_\_\_\_ SSN: XXX-XX- \_\_\_\_\_ Gender: \_\_\_\_\_ Male/ \_\_\_\_\_ Female

WEST VIRGINIA DIVISION OF CORRECTIONS AND REHABILITATION CERTIFIED JAIL COMMITMENT ORDER

On the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, the State of West Virginia, by \_\_\_\_\_, and the defendant appeared in person and with counsel, \_\_\_\_\_.

The defendant has been convicted of the following offense(s):

\_\_\_\_\_

The defendant is committed to the custody of the Commissioner of Corrections and Rehabilitation \_\_\_\_\_ for \_\_\_\_\_ a \_\_\_\_\_ period \_\_\_\_\_ of: \_\_\_\_\_.

Conviction Date: \_\_\_\_\_ Sentence Date: \_\_\_\_\_

Effective Sentence Date: \_\_\_\_\_ Resentence Date: \_\_\_\_\_

Consecutive to: \_\_\_\_\_ Concurrent with: \_\_\_\_\_

\_\_\_\_\_

Credit for Time Served: \_\_\_\_\_ days Credit for Home Incarceration: \_\_\_\_\_ days

Credit for Home Incarceration Parole: \_\_\_\_\_ days Other NonPenal Credit: \_\_\_\_\_ days

Additionally, the court finds:

\_\_\_\_\_

The defendant shall be transported to and held in a jail facility for the prescribed period of confinement in accordance with law. The court further orders that the cost of incarceration of misdemeanants sentenced to confinement in a jail shall be paid in accordance with the provisions of §15A-3-16 of this code.

Special \_\_\_\_\_ Instructions:

\_\_\_\_\_

It is further ordered that the Circuit Clerk or Magistrate Court Clerk shall immediately transmit a certified copy of this commitment order to the Central Office Inmate Records Manager of the

Division of Corrections and Rehabilitation by facsimile at (fax number), by email at (email address) or other electronic transmission, or by mail at (street address).

Enter this \_\_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_\_.

\_\_\_\_\_  
Circuit Judge/Magistrate

The bill (Eng. Com. Sub. for H. B. 2907), as amended, was then ordered to third reading.

**Eng. Com. Sub. for House Bill 2975**, Relating to imposition of sexual acts on persons incarcerated.

On second reading, coming up in regular order, was read a second time.

The following amendment to the bill, from the Committee on the Judiciary, was reported by the Clerk and adopted:

By striking out everything after the enacting clause and inserting in lieu thereof the following:

**ARTICLE 8B. SEXUAL OFFENSES.**

**§61-8B-2. Lack of consent.**

(a) Whether or not specifically stated, it is an element of every offense defined in this article that the sexual act was committed without the consent of the victim.

(b) Lack of consent results from:

- (1) Forcible compulsion;
- (2) Incapacity to consent; or

(3) If the offense charged is sexual abuse, any circumstances in addition to the forcible compulsion or incapacity to consent in which the victim does not expressly or impliedly acquiesce in the actor's conduct.

(c) A person is deemed incapable of consent when such person is:

- (1) Less than sixteen years old;
- (2) Mentally defective;
- (3) Mentally incapacitated;
- (4) Physically helpless; or

(5) Subject to incarceration, confinement or supervision by a state, county, or local government entity, when the actor is a person prohibited from having sexual intercourse or causing sexual intrusion or sexual contact pursuant to §61-8B-10 of this code. ~~subsections (a) and (b) of section ten of this article.~~

**§61-8B-10. Imposition of sexual acts on persons incarcerated or under supervision; penalties.**

(a) Any person employed by the Division of Corrections and Rehabilitation, any person working at a correctional facility managed by the Commissioner of Corrections and Rehabilitation pursuant to contract or as an employee of a state agency or as a volunteer ~~any person working at a correctional facility managed by the Division of Juvenile Services pursuant to contract or as an employee of a state agency, any person employed by a jail or by the Regional Jail and Correctional Facility Authority, any person working at a facility managed by the Regional Jail and Correctional Facility Authority or a jail or any person employed by, or acting pursuant to, the authority of any sheriff, county commission, or court to ensure compliance with the provisions of §62-11B-1 et seq. of this code who engages in sexual intercourse, sexual intrusion, or sexual contact with a person who is incarcerated in this state is guilty of a felony and, upon conviction thereof, shall be fined not more than \$5,000 or imprisoned ~~confined in a state correctional facility under the control of the Commissioner of Corrections for not less than one nor more than five years or fined not more than \$5,000 both fined and imprisoned.~~~~

(b) Any person employed by the Division of Corrections and Rehabilitation as a parole officer or by the West Virginia Supreme Court of Appeals as an adult or juvenile probation officer, who engages in sexual intercourse, sexual intrusion, or sexual contact with a person said parole officer or probation officer is charged as part of his or her employment with supervising, is guilty of a felony and, upon conviction thereof, shall be fined not more than \$5,000 or imprisoned ~~confined in a state correctional facility under the control of the Commissioner of Corrections for not less than one nor more than five years, or both fined and imprisoned. or fined not more than \$5,000, or both.~~

(c) Any person working or volunteering in an alternative sentence program authorized by the provisions of §62-11C-1, et seq. of this code who, as part of his or her employment or volunteer duties, supervises program participants, engages in sexual intercourse, sexual intrusion, or sexual contact with a program participant is guilty of a felony and upon conviction, shall be fined not more than \$5,000, imprisoned in a state correctional facility for not less than one nor more than five years, or both fined and imprisoned.

~~(e)~~ (d) The term "incarcerated in this state" for purposes of this section includes in addition to its usual meaning, offenders serving a sentence under the provisions of article §62-11B-1 et seq. of this code.

~~(d)~~(e) Authorized pat-down, strip search or other security related tasks ~~does~~ not constitute sexual contact pursuant to this section.

The bill (Eng. Com. Sub. for H. B. 2975), as amended, was then ordered to third reading.

**Eng. House Bill 3083**, Adding temporary work during the legislative session as exclusion to the term employment for purposes of unemployment compensation.

On second reading, coming up in regular order, was read a second time.

The following amendment to the bill, from the Committee on the Judiciary, was reported by the Clerk and adopted:

By striking out everything after the enacting clause and inserting in lieu thereof the following:



**ARTICLE 1. UNEMPLOYMENT COMPENSATION. ARTICLE 1A. DEFINITIONS.****§21A-1A-17. Exclusions from employment.**

The term "employment" does not include:

(1) Service performed in the employ of the United States or any instrumentality of the United States exempt under the Constitution of the United States from the payments imposed by this law, except that to the extent that the Congress of the United States permits states to require any instrumentalities of the United States to make payments into an unemployment fund under a state unemployment compensation law, all of the provisions of this law are applicable to the instrumentalities and to service performed for the instrumentalities in the same manner, to the same extent, and on the same terms as to all other employers, employing units, individuals, and services: *Provided*, That if this state is not certified for any year by the Secretary of Labor under 26 U.S.C. § 3404, subsection (c), the payments required of the instrumentalities with respect to the year shall be refunded by the commissioner from the fund in the same manner and within the same period as is provided in §21A-5-19 of this code with respect to payments erroneously collected;

(2) Service performed with respect to which unemployment compensation is payable under the Railroad Unemployment Insurance Act and service with respect to which unemployment benefits are payable under an unemployment compensation system for maritime employees established by an Act of Congress. The Commissioner may enter into agreements with the proper agency established under an Act of Congress to provide reciprocal treatment to individuals who, after acquiring potential rights to unemployment compensation under an Act of Congress or who have, after acquiring potential rights to unemployment compensation under an act of Congress, acquired rights to benefit under this chapter. Such agreement shall become effective 10 days after the publications which shall comply with the general rules of the Department;

(3) Service performed by an individual in agricultural labor, except as provided in §21A-1A-16(12) of this code, the definition of "employment". For purposes of this subdivision, the term "agricultural labor" includes all services performed:

(A) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training and management of livestock, bees, poultry, and fur-bearing animals and wildlife;

(B) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of the farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of the service is performed on a farm;

(C) In connection with the production or harvesting of any commodity defined as an agricultural commodity in section fifteen (g) of the Agricultural Marketing Act, as amended, as codified in 12 U.S.C. § 1141j, subsection (g), or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

(D) (i) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if the operator produced more than one half of the commodity with respect to which the service is performed; or (ii) in the employ of a group of operators of farms (or a cooperative organization of which the operators are members) in the performance of service described in subparagraph (i) of this paragraph, but only if the operators produced more than one half of the commodity with respect to which the service is performed; but the provisions of subparagraphs (i) and (ii) of this paragraph are not applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption;

(E) On a farm operated for profit if the service is not in the course of the employer's trade or business or is domestic service in a private home of the employer. As used in this subdivision, the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animals, truck farms, plantations, ranches, greenhouses, ranges, and nurseries, or other similar land areas or structures used primarily for the raising of any agricultural or horticultural commodities;

(4) Domestic service in a private home except as provided in §21A-1A-16(13) of this code, the definition of "employment";

(5) Service performed by an individual in the employ of his or her son, daughter, or spouse;

(6) Service performed by a child under the age of 18 years in the employ of his or her father or mother;

(7) Service as an officer or member of a crew of an American vessel, performed on or in connection with the vessel, if the operating office, from which the operations of the vessel operating on navigable waters within or without the United States are ordinarily and regularly supervised, managed, directed, and controlled, is without this state;

(8) Service performed by agents of mutual fund broker-dealers or insurance companies, exclusive of industrial insurance agents, or by agents of investment companies, who are compensated wholly on a commission basis;

(9) Service performed: (A) In the employ of a church or convention or association of churches, or an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches; or (B) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his or her ministry or by a member of a religious order in the exercise of duties required by the order; or (C) by an individual receiving rehabilitation or remunerative work in a facility conducted for the purpose of carrying out a program of either: (i) Rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury; or (ii) providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market: *Provided*, That this exemption does not apply to services performed by individuals if they are not receiving rehabilitation or remunerative work on account of their impaired capacity; or (D) as part of an unemployment work-relief or work-training program assisted or financed, in whole or in part, by any federal agency or an agency of a state or political subdivision thereof, by an individual receiving the work relief or work training; or (E) by an inmate of a custodial or penal institution;

(10) Service performed in the employ of a school, college, or university, if the service is performed: (A) By a student who is enrolled and is regularly attending classes at the school, college,

or university; or (B) by the spouse of a student, if the spouse is advised, at the time the spouse commences to perform the service, that: (i) The employment of the spouse to perform the service is provided under a program to provide financial assistance to the student by the school, college, or university; and (ii) the employment will not be covered by any program of unemployment insurance;

(11) Service performed by an individual who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on as a student in a full-time program, taken for credit at the institution, which combines academic instruction with work experience, if the service is an integral part of the program and the institution has so certified to the employer, except that this subdivision does not apply to service performed in a program established for or on behalf of an employer or group of employers;

(12) Service performed in the employ of a hospital, if the service is performed by a patient of the hospital, as defined in this article;

(13) Service in the employ of a governmental entity referred to in §21A-1A-16(9) of this code, the definition of "employment", if the service is performed by an individual in the exercise of duties: (A) As an elected official; (B) as a member of a legislative body, or a member of the judiciary, of a state or political subdivision; (C) as an employee serving on a temporary basis for the legislature during, or in support of, the legislative session; (D) as a member of the state National Guard or air National Guard, except as provided in §21A-1A-28 of this code; ~~(D)~~ (E) as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or similar emergency; ~~(E)~~ (F) in a position which, under or pursuant to the laws of this state, is designated as: (i) A major nontenured policymaking or advisory position; or (ii) a policymaking or advisory position the performance of the duties of which ordinarily does not require more than eight hours per week; or ~~(F)~~ (G) as any election official appointed to serve during any municipal, county, or state election, if the amount of remuneration received by the individual during the calendar year for services as an election official is less than \$1,000;

(14) Service performed by a bona fide partner of a partnership for the partnership; and

(15) Service performed by a person for his or her own sole proprietorship.

Notwithstanding the foregoing exclusions from the definition of "employment", services, except agricultural labor and domestic service in a private home, are in employment if with respect to the services a tax is required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a State Unemployment Compensation Fund, or which as a condition for full tax credit against the tax imposed by the federal Unemployment Tax Act are required to be covered under this chapter.

The bill (Eng. H. B. 3083), as amended, was then ordered to third reading.

**Eng. House Bill 3148**, Making a supplementary appropriation to the Department of Health and Human Resources, Division of Human Services.

On second reading, coming up in regular order, was read a second time and ordered to third reading.

The Senate proceeded to the tenth order of business.

At the request of Senator Takubo, unanimous consent being granted, the following bills on first reading were considered read a first time and ordered to second reading:

**Eng. House Bill 2311**, Exempting short-term license holders to submit information to the State Tax Commission once the term of the permit has expired.

**Eng. Com. Sub. for House Bill 2405**, Imposing a healthcare related provider tax on certain health care organizations.

**Eng. Com. Sub. for House Bill 2439**, Relating to fire service equipment and training funds for volunteer and part-volunteer fire companies.

**Eng. House Bill 2509**, Clarifying that theft of a controlled substance is a felony.

**Eng. Com. Sub. for House Bill 2538**, Providing banking services for medical cannabis.

**Eng. Com. Sub. for House Bill 2600**, Relating to publication of sample ballots.

**Eng. Com. Sub. for House Bill 2734**, Relating to reduced rates for low-income residential customers of privately owned sewer and combined water and sewer utilities.

**Eng. House Bill 2872**, Authorizing law-enforcement officers to assist the State Fire Marshal.

**Eng. House Bill 2958**, Authorizing the State Auditor to conduct regular financial examinations or audits of all volunteer fire companies.

**Eng. Com. Sub. for House Bill 3021**, Relating to the disposition of permit fees, registration fees and civil penalties imposed against thoroughbred horse racing licensees.

**Eng. House Bill 3045**, Exempting certain complimentary hotel rooms from hotel occupancy tax.

And,

**Eng. House Bill 3095**, Establishing a minimum monthly retirement annuity for certain retirants.

The Senate proceeded to the twelfth order of business.

Remarks were made by Senators Plymale and Trump.

Thereafter, at the request of Senator Stollings, and by unanimous consent, the remarks by Senator Plymale were ordered printed in the Appendix to the Journal.

At the request of Senator Takubo, unanimous consent being granted, leaves of absence for the day were granted Senators Beach, Mann, Maroney, and Prezioso.

Pending announcement of meetings of standing committees of the Senate, including the Committee on Rules,

On motion of Senator Takubo, at 10:14 a.m., the Senate adjourned until Monday, March 4, 2019, at 11 a.m.

---

## **SENATE CALENDAR**

**Monday, March 04, 2019  
11:00 AM**

### **THIRD READING**

- Com. Sub. for S. B. 150 - Budget Bill - (With right to amend)
- Eng. Com. Sub. for H. B. 2183 - Clarifying where a charge of DUI may be brought against an individual - (Com. title amend. pending)
- Eng. Com. Sub. for H. B. 2531 - Permitting trained nurses to provide mental health services in a medication-assisted treatment program
- Eng. Com. Sub. for H. B. 2609 - Relating to presumptions of abandonment and indication of ownership in property (original similar to SB407)
- Eng. Com. Sub. for H. B. 2907 - Requiring a form of a certified commitment order to the Division of Corrections and Rehabilitation - (Com. title amend. pending)
- Eng. Com. Sub. for H. B. 2975 - Relating to imposition of sexual acts on persons incarcerated - (Com. title amend. pending)
- Eng. H. B. 3083 - Adding temporary work during the legislative session as exclusion to the term employment for purposes of unemployment compensation
- Eng. H. B. 3148 - Making a supplementary appropriation to the Department of Health and Human Resources, Division of Human Services

### **SECOND READING**

- Eng. H. B. 2311 - Exempting short-term license holders to submit information to the State Tax Commission once the term of the permit has expired - (Com. amend. pending)
- Eng. Com. Sub. for H. B. 2362 - Ardala Miller Memorial Act - (Amend. and title amend. pending)
- Eng. Com. Sub. for H. B. 2405 - Imposing a healthcare related provider tax on certain health care organizations - (Com. amends. pending)
- Eng. Com. Sub. for H. B. 2439 - Relating to fire service equipment and training funds for volunteer and part-volunteer fire companies
- Eng. H. B. 2509 - Clarifying that theft of a controlled substance is a felony - (Com. title amend. pending)
- Eng. H. B. 2525 - Tobacco Cessation Therapy Access Act - (Com. amends. pending)
- Eng. H. B. 2530 - Creating a voluntary certification for recovery residences - (Com. amend. and title amend. pending)
- Eng. Com. Sub. for H. B. 2538 - Providing banking services for medical cannabis
- Eng. Com. Sub. for H. B. 2600 - Relating to publication of sample ballots - (Com. amend. and title amend. pending)

Eng. Com. Sub. for H. B. 2734 - Relating to reduced rates for low-income residential customers of privately owned sewer and combined water and sewer utilities

Eng. H. B. 2872 - Authorizing law-enforcement officers to assist the State Fire Marshal - (Com. amend. and title amend. pending)

Eng. H. B. 2958 - Authorizing the State Auditor to conduct regular financial examinations or audits of all volunteer fire companies - (Com. amends. pending)

Eng. Com. Sub. for H. B. 3021 - Relating to the disposition of permit fees, registration fees and civil penalties imposed against thoroughbred horse racing licensees

Eng. H. B. 3045 - Exempting certain complimentary hotel rooms from hotel occupancy tax

Eng. H. B. 3095 - Establishing a minimum monthly retirement annuity for certain retirants

### **FIRST READING**

Eng. H. B. 2009 - Creating a new category of Innovation in Education grant program - (Com. amends. pending)