

APPROVED AND SIGNED BY THE GOVERNOR

Date 4-29-81

Time \_\_\_\_\_

No: 1176

# WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1981



# ENROLLED

Com. Sub. for  
HOUSE BILL No. 1176

(By Mr. Tucker)



Passed April 11, 1981

In Effect Ninety Days From Passage



**ENROLLED**  
COMMITTEE SUBSTITUTE  
FOR

**H. B. 1176**

(By MR. TUCKER)

[Passed April 11, 1981; in effect ninety days from passage.]

AN ACT to amend and reenact sections two, thirteen and nineteen, article twelve, chapter sixty-two of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to probation and parole generally; the powers and duties of the board of parole; eligibility for probation or parole; ineligibility for probation or parole when firearm involved; the limitations and conditions with respect to such ineligibility; procedure for granting parole; and violation of parole; admission of parolee to bail.

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

That sections two, thirteen, and nineteen, article twelve, chapter sixty-two of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

**ARTICLE 12. PROBATION AND PAROLE.**

**§62-12-2. Probation; when eligible and ineligible therefor; definitions.**

- 1 (a) All persons who have not been previously convicted of a  
2 felony within five years from the date of the felony for which

3 they are charged, and who are found guilty of or plead guilty  
4 to any felony, the maximum penalty for which is less than  
5 life imprisonment, and all persons whether previously con-  
6 victed or not, who are found guilty of or plead guilty to any  
7 misdemeanor, shall be eligible for probation, notwithstanding  
8 the provisions of sections eighteen and nineteen, article eleven,  
9 chapter sixty-one of this code.

10 (b) The provisions of subsection (a) of this section to  
11 the contrary notwithstanding, any person who commits or  
12 attempts to commit a felony with the use, presentment or  
13 brandishing of a firearm shall be ineligible for probation.  
14 Nothing in this section shall apply to an accessory before the  
15 fact or a principal in the second degree who has been convicted  
16 as if he were a principal in the first degree if, in the commission  
17 of or in the attempted commission of the felony, only the  
18 principal in the first degree used, presented or brandished  
19 a firearm.

20 (c) (1) The existence of any fact which would make any  
21 person ineligible for probation under subsection (b) of this  
22 section because of the commission or attempted commission  
23 of a felony with the use, presentment or brandishing of a  
24 firearm shall not be applicable unless such fact is clearly  
25 stated and included in the indictment or presentment by  
26 which such person is charged and is either (i) found by the  
27 court upon a plea of guilty or nolo contendere, or (ii) found  
28 by the jury, if the matter be tried before a jury, upon submitting  
29 to such jury a special interrogatory for such purpose or (iii)  
30 found by the court, if the matter be tried by the court, with-  
31 out a jury.

32 (2) The amendments to this subsection adopted in the  
33 year one thousand nine hundred eighty-one:

34 (A) shall apply to all applicable offenses occurring on or  
35 after the first day of August of that year;

36 (B) shall apply with respect to the contents of any indict-  
37 ment or presentment returned on or after the first day of  
38 August of that year irrespective of when the offense occurred;

39 (C) shall apply with respect to the submission of a special

40 interrogatory to the jury and the finding to be made thereon  
41 in any case submitted to such jury on or after the first day  
42 of August of that year or to the requisite findings of the court  
43 upon a plea of guilty or in any case tried without a jury:  
44 *Provided*, That the state shall give notice in writing of its  
45 intent to seek such finding by the jury or court, as the case  
46 may be, which notice shall state with particularity the grounds  
47 upon which such finding shall be sought as fully as such  
48 grounds are otherwise required to be stated in an indictment,  
49 unless the grounds therefor are alleged in the indictment or  
50 presentment upon which the matter is being tried;

51 (D) shall not apply with respect to cases not affected  
52 by such amendment and in such cases the prior provisions of  
53 this section shall apply and be construed without reference  
54 to such amendment; and

55 Insofar as such amendments relate to mandatory sentences  
56 without probation, all such matters requiring such sentence  
57 shall be proved beyond a reasonable doubt in all cases tried  
58 by the jury or the court.

59 (d) For the purpose of this section, the term "firearm"  
60 shall mean any instrument which will, or is designed to, or  
61 may readily be converted to, expel a projectile by the action  
62 of an explosive, gunpowder, or any other smiliar means.

**§62-12-13. Powers and duties of board; eligibility for parole;  
procedure for granting parole.**

1 (a) The board of parole, whenever it is of the opinion  
2 that the best interests of the state and of the prisoner will  
3 be subserved thereby, and subject to the limitations hereinafter  
4 provided, shall have the authority to release any such prisoner  
5 on parole for such terms and upon such conditions as are  
6 provided by this article. Any prisoner of a pentitentiary of  
7 this state, to be eligible for parole:

8 (1) (A) Shall have served the minimum term of his indeter-  
9 minate sentence, or shall have served one third of his definite  
10 term sentence, as the case may be, except that in no case shall  
11 any person who committed, or attempted to commit a felony

12 with the use, presentment or brandishing of a firearm, be  
13 eligible for parole prior to serving a minimum of three years  
14 of his sentence or the maximum sentence imposed by the court,  
15 whichever is less: *Provided*, That any person who committed,  
16 or attempted to commit, any violation of section twelve, article  
17 two, chapter sixty-one of this code, with the use, presentment  
18 or brandishing of a firearm, shall not be eligible for parole  
19 prior to serving a minimum of five years of his sentence or  
20 one-third of his definite term sentence, whichever shall  
21 be the greater. Nothing in this section shall apply to an  
22 accessory before the fact or a principal in second degree  
23 who has been convicted as if he were a principal in the first  
24 degree if, in the commission of or in the attempted com-  
25 mission of the felony, only the principal in the first degree  
26 used, presented or brandished a firearm. No person is in-  
27 eligible for parole under the provisions of this subdivision  
28 because of the commission or attempted commission of a  
29 felony with the use, presentment or brandishing of a firearm  
30 unless such fact is clearly stated and included in the indictment  
31 or presentment by which such person was charged and was  
32 either (i) found by the court at the time of trial upon a plea  
33 of guilty or nolo contendere, or (ii) found by the jury upon  
34 submitting to such jury a special interrogatory for such purpose  
35 if the matter was tried before a jury, or (iii) found by the  
36 court, if the matter was tried by the court without a jury.

37 For the purpose of this section, the term "firearm" shall  
38 mean any instrument which will, or is designed to, or may  
39 readily be converted to, expel a projectile by the action of an  
40 explosive, gunpowder or any other similar means.

41 (B) The amendments to this subsection adopted in the  
42 year one thousand nine hundred eighty-one:

43 (i) shall apply to all applicable offenses occurring on or  
44 after the first day of August of that year;

45 (ii) shall apply with respect to the contents of any indict-  
46 ment or presentment returned on or after the first day of August  
47 of that year irrespective of when the offense occurred;

48 (iii) shall apply with respect to the submission of a special  
49 interrogatory to the jury and the finding to be made thereon

50 in any case submitted to such jury on or after the first day  
51 of August of that year or to the requisite findings of the  
52 court upon a plea of guilty or in any case tried without a  
53 jury: *Provided*, That the state shall give notice in writing  
54 of its intent to seek such finding by the jury or court, as  
55 the case may be, which notice shall state with particularity  
56 the grounds upon which such finding shall be sought as  
57 fully as such grounds are otherwise required to be stated in  
58 an indictment, unless the grounds therefor are alleged in the  
59 indictment or presentment upon which the matter is being  
60 tried;

61 (iv) shall not apply with respect to cases not affected by  
62 such amendment and in such cases the prior provisions of  
63 this section shall apply and be construed without reference  
64 to such amendment.

65 Insofar as such amendments relate to mandatory sentences  
66 restricting the eligibility for parole, all such matters requiring  
67 such sentence shall be proved beyond a reasonable doubt  
68 in all cases tried by the jury or the court.

69 (2) Shall not be under punishment or in solitary confine-  
70 ment for any infraction of prison rules;

71 (3) Shall have maintained a record of good conduct in  
72 prison for a period of at least three months immediately pre-  
73 ceding the date of his release on parole;

74 (4) Shall have satisfied the board that, if released on  
75 parole, he will conduct himself in a lawful manner and that  
76 his release is not incompatible with the best interests and  
77 welfare of society generally.

78 Except in the case of one serving a life sentence, no  
79 person who has been previously twice convicted of a felony  
80 may be released on parole until he has served the minimum  
81 term provided by law for the crime for which he was con-  
82 victed. No person sentenced for life may be paroled until  
83 he has served ten years, and no person sentenced for life  
84 who has been previously twice convicted of a felony may  
85 be paroled until he has served fifteen years. In the case of  
86 a person sentenced to any penal institution of this state, it

87 shall be the duty of the board, as soon as such person be-  
88 comes eligible, to consider the advisability of his or her  
89 release on parole. If, upon such consideration, parole be  
90 denied, the board shall at least once a year reconsider and  
91 review the case of every prisoner so eligible, which recon-  
92 sideration and review shall be by the entire board. If parole  
93 be denied, the prisoner shall be promptly notified.

94 (b) In the case of any person sentenced to or confined  
95 under sentence in any city or county jail in this state, the  
96 board shall act only upon written application for parole.  
97 If such jail prisoner is under sentence on a felony conviction,  
98 the provisions hereof relating to penitentiary prisoners shall  
99 apply to and control his release on parole. If such person  
100 is serving time on a misdemeanor conviction, he is eligible  
101 for parole consideration, upon receipt of his written parole  
102 application and after time for probation release by the sen-  
103 tencing court or judge has expired.

104 (c) The board shall, with the approval of the governor,  
105 adopt rules and regulations governing the procedure in the  
106 granting of parole. No provision of this article and none  
107 of the rules and regulations adopted hereunder are intended  
108 or shall be construed to contravene, limit or otherwise inter-  
109 fere with or affect the authority of the governor to grant  
110 pardons and reprieves, commute sentences, remit fines or  
111 otherwise exercise his constitutional powers of executive  
112 clemency.

113 The board shall be charged with the duty of supervising  
114 all probationers and parolees whose supervision may have  
115 been undertaken by this state by reason of any interstate  
116 compact entered into pursuant to the uniform act for out of  
117 state parolee supervision.

118 (d) When considering a penitentiary prisoner for release  
119 on parole, the board of parole shall have before it an  
120 authentic copy of or report on the prisoner's current criminal  
121 record as provided through the department of public safety  
122 of West Virginia, the United States department of justice or  
123 other reliable criminal information sources and written reports  
124 of the warden or superintendent of the penitentiary, as the  
125 case may be, to which such prisoner is sentenced;

126 (1) On the prisoner's conduct record while in prison,  
127 including a detailed statement showing any and all infractions  
128 of prison rules by the prisoner and the nature and extent  
129 of discipline and punishment administered therefor;

130 (2) On improvement or other changes noted in the  
131 prisoner's mental and moral condition while in prison, in-  
132 cluding a statement expressive of the prisoner's current attitude  
133 toward society in general, toward the judge who sentenced  
134 him, toward the prosecuting attorney who prosecuted him,  
135 toward the policeman or other officer who arrested him  
136 and toward the crime for which he is under sentence and  
137 his previous criminal record;

138 (3) On the prisoner's industrial record while in prison,  
139 showing the nature of his prison work or occupation and the  
140 average number of hours per day he has been employed in  
141 prison industry and recommending the nature and kinds of  
142 employment which he is best fitted to perform and in which  
143 he is most likely to succeed when he leaves prison;

144 (4) On physical, mental and psychiatric examinations of  
145 the prisoner conducted, insofar as practicable, within the  
146 two months next preceding parole consideration by the board.

147 The board may waive the requirement of any such report  
148 when not available or not applicable as to any prisoner  
149 considered for parole but, in every such case, shall enter in  
150 the record thereof its reason for such waiver.

151 Before releasing any penitentiary prisoner on parole, the  
152 board of parole shall arrange for him to appear in person  
153 before the board and the board may examine and interrogate  
154 him on any matters pertaining to his parole, including reports  
155 before the board made pursuant to the provisions hereof. The  
156 board shall reach its own written conclusions as to the  
157 desirability of releasing such prisoner on parole. The warden  
158 or superintendent shall furnish all necessary assistance and  
159 cooperate to the fullest extent with the board of parole. All  
160 information, records and reports received by the board shall  
161 be kept on permanent file.

162 The board and its designated agents shall at all times  
163 have access to inmates imprisoned in any penal or correctional

164 institutions of this state or in any city or county jail in this  
165 state, and shall have the power to obtain any information or  
166 aid necessary to the performance of their duties from other  
167 departments and agencies of the state or from any political  
168 subdivision thereof.

169 The board shall, if so requested by the governor, investi-  
170 gate and consider all applications for pardon, reprieve or  
171 commutation and shall make recommendation thereon to the  
172 governor.

173 Prior to making such recommendation and prior to re-  
174 leasing any penitentiary person on parole the board shall  
175 notify the sentencing judge and prosecuting attorney at least  
176 ten days before such recommendation or parole.

**§62-12-19. Violation of parole.**

1 If at any time during the period of parole, there shall be  
2 reasonable cause to believe that the parolee has violated any  
3 of the conditions of his release on parole, the probation and  
4 parole officer may arrest him with or without an order or  
5 warrant, or the board of probation and parole may issue its  
6 written order or warrant for his arrest, which written order  
7 or warrant shall be sufficient for his arrest by any officer  
8 charged with the duty of executing an ordinary criminal  
9 process. The board's written order or warrant delivered to  
10 the sheriff against the paroled prisoner shall be a command  
11 to keep custody of the parolee for the jurisdiction of the board,  
12 and during the period of custody, the parolee may be ad-  
13 mitted to bail by the court before which the parolee was  
14 sentenced. If the parolee is not released on a bond, the costs  
15 of confining such paroled prisoner shall be paid out of the  
16 funds appropriated for the penitentiary from which he was  
17 paroled.

18 When a parolee is under arrest for violation of the con-  
19 ditions of his parole, he shall be given a prompt and summary  
20 hearing, at which the parolee and his counsel shall be given  
21 an opportunity to attend. If at the hearing, it shall appear  
22 to the satisfaction of the board that the parolee has violated  
23 any condition of his release on parole, or any rules and  
24 regulations for his supervision, the board may revoke his

25 parole and may require him to serve in prison the remainder  
26 or any portion of his maximum sentence for which, at the  
27 time of his release, he was subject to imprisonment: *Provided*,  
28 That if the violation of the conditions of parole or rules  
29 and regulations for his supervision is not a felony as set  
30 out in section eighteen of this article, the board may, if in  
31 its judgment the best interests of justice do not require that  
32 the parole be revoked, release him from custody and continue  
33 him on parole.

34 When a parolee has violated the conditions of his release  
35 on parole by confession to, or being convicted of any of the  
36 crimes mentioned in section eighteen of this article, he shall  
37 be returned to the penitentiary of this State to serve the  
38 remainder of his maximum sentence, during which remaining  
39 part of his sentence he shall be ineligible for further parole.

40 Whenever the parole of a paroled prisoner has been re-  
41 voked, the warden shall upon receipt of the board's written  
42 order of revocation, convey and transport the paroled pris-  
43 oner to the penitentiary from which he was granted a release  
44 on parole. A paroled prisoner whose parole has been re-  
45 voked shall remain in custody of the sheriff until delivery to  
46 guard sent and duly authorized by the warden for the removal  
47 of the paroled prisoner to the penitentiary; the cost of  
48 confining such paroled prisoner shall be paid out of the funds  
49 appropriated for the penitentiary from which he was paroled.

50 When a paroled prisoner is convicted of, or confesses to,  
51 any one of the crimes enumerated in section eighteen of this  
52 article, it shall be the duty of the board to cause him to be  
53 returned to this state for a summary hearing as provided by  
54 this article. A warrant filed by the board shall stop the  
55 running of his sentence until the paroled prisoner is within  
56 the jurisdiction of West Virginia. Whenever a paroled prisoner  
57 has absconded supervision, the board shall issue its warrant  
58 for his apprehension and return to this state for the summary  
59 hearing provided by this article: *Provided*, That the board  
60 may, if it be of opinion the best interests of justice do not  
61 require such hearing, cause the paroled absconder to be  
62 released to continue on parole.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

*R. P. Bayler*  
Chairman Senate Committee

*Tony E. Whitlow*  
Chairman House Committee

Originated in the House.

Takes effect ninety days from passage.

*Todd C. Wick*  
Clerk of the Senate

*W. Blankenship*  
Clerk of the House of Delegates

*Wm. P. Roach*  
President of the Senate

*Charles M. See, Jr.*  
Speaker House of Delegates

The within *is approved* this the *29*  
day of *April*, 1981.

*John I. Reppert*  
Governor

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SECY. OF STATE