WEST VIRGINIA LEGISLATURE
FIRST EXTRAORDINARY SESSION, 1986

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ENROLLED

HOUSE BILL No. 150

(By Mr. Del. Hatfield & Del. Mastandoni)

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Passed May 22, 1986

In Effect July 1, 1986
ENROLLED

H. B. 150

(By Delegate Hatfield and Delegate Mastrantoni)

[Passed May 22, 1986; in effect July 1, 1986.]

AN ACT to amend and reenact section eight, article two-b; section nine, article six-a; section seven, article seven, all of chapter forty-nine of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to amend and reenact sections six, seven, eight, twelve and twenty-four, article eight, chapter sixty-one of said code; to further amend said article eight by adding thereto a new section, designated section thirteen; to amend and reenact sections one, ten and eleven, article eight-b of chapter sixty-one of said code; to further amend said article eight-b by adding thereto two new sections, designated sections thirteen and fourteen; to amend and reenact sections one, two and three, article eight-c of said chapter; to further amend said article eight-c by adding thereto two new sections, designated sections four and five; and to amend and reenact sections two and thirteen, article twelve, chapter sixty-two of said code, all relating to the protection, treatment and care of children; child abuse and neglect and criminal conviction investigations required for foster care applicants; reporting requirements in cases of suspected abuse and neglect; convicted persons under certain circumstances to pay costs of treatment of victims of contributing to the delinquency of a minor, incest, sexual offenses, cruelty to children, indecent exposure, and distributing, exhibiting and filming of sexually explicit conduct of minors; places of prostitution; penalties; receiving support from prostitution; penalties
for exploitation of children; changing definitions relating to filming of sexually explicit conduct of minors and other sexual offenses; removing financial gain as an element of the offense; use of anatomically correct dolls, mannequins or drawings to assist children in testifying in cases of incest and other sex offense in certain circumstances; limits on interviews with children in certain sex offense cases; restitution for victim treatment costs; study and diagnosis required regarding danger to children and certain notifications in determining eligibility for probation and parole in certain sex offense cases; increasing criminal penalties.

Be it enacted by the Legislature of West Virginia:

That section eight, article two-b; section nine, article six-a; and section seven, article seven, all of chapter forty-nine of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; that sections six, seven, eight, twelve and twenty-four, article eight, chapter sixty-one of said code be amended and reenacted; that said article eight be further amended by adding thereto a new section designated section thirteen; that sections one, ten and eleven, article eight-b, chapter sixty-one of said code be amended and reenacted; that said article eight-b be further amended by adding thereto two new sections, designated sections thirteen and fourteen; that sections one, two and three, article eight-c of said chapter be amended and reenacted; that said article eight-c be further amended by adding thereto two new sections, designated sections four and five; and that sections two and thirteen, article twelve, chapter sixty-two of said code be amended and reenacted, all to read as follows:

CHAPTER 49. CHILD WELFARE.

ARTICLE 2B. DUTIES OF COMMISSIONER OF HUMAN SERVICES FOR CHILD WELFARE.

§49-2B-8. Application for license or approval.

1 Any person or corporation, or any governmental agency intending to act as a child welfare agency shall apply for a license or approval to operate child care facilities regulated by this article. Applications for license or approval shall be made separately for each child care facility to be licensed or approved.
The commissioner may prescribe forms and reasonable application procedures. Before issuing a license or approval, the commissioner shall investigate the facility, program and persons responsible for the care of children. The investigation shall also include, but not be limited to, review of resource need, reputation, character and purposes of applicants, a check of personnel medical records, the financial records of applicants, and consideration of the proposed plan for child care from intake to discharge. The investigation shall also include a check into the child abuse and neglect records of the department relevant to the applicant and the criminal conviction records of the department of public safety to determine if any applicant and any of the employees of the facility have a child abuse, child neglect or criminal conviction record of causing harm to another person.

The commissioner shall make a decision on each application within sixty days of its receipt and shall provide to unsuccessful applicants written reasons for the decision.

ARTICLE 6A. REPORTS OF CHILDREN SUSPECTED TO BE ABUSED OR NEGLECTED.

§49-6A-9. Establishment of child protective services; general duties and powers; cooperation of other state agencies.

The state department shall establish or designate in every county a local child protective service to perform the duties and functions set forth in this article.

Except in cases involving institutional abuse or cases in which police investigation also appears appropriate, the child protective service shall be the sole public agency responsible for receiving, investigating or arranging for investigation and coordinating the investigation of all reports of child abuse or neglect: Provided, That under no circumstances shall investigating personnel be relatives of the accused, the child or the families involved. In accordance with the local plan for child protective services, it shall provide protective services to prevent further abuse or neglect of children and provide for or arrange for and coordinate and
monitor the provision of those services necessary to ensure the safety of children. The local child protective service shall be organized to maximize the continuity of responsibility, care and service of individual workers for individual children and families.

Each local child protective service shall:

(1) Receive or arrange for the receipt of all reports of children known or suspected to be abused or neglected on a twenty-four hour, seven-day-a-week basis and cross-file all such reports under the names of the children, the family, any person substantiated as being an abuser or neglector by investigation of the department of human services, with use of such cross-filing of such person's name limited to the internal use of the department.

(2) Provide or arrange for emergency children's services to be available at all times; and

(3) Within twenty-four hours of notification of suspected child abuse or neglect, commence or cause to be commenced a thorough investigation of the report and the child's environment.

In those cases in which the local child protective service determines that the best interests of the child require court action, the local child protective service shall initiate the appropriate legal proceeding.

The local child protective service shall be responsible for providing, directing or coordinating the appropriate and timely delivery of services to any child suspected or known to be abused or neglected, including services to the child's family and those responsible for the child's care.

To carry out the purposes of this article, all departments, boards, bureaus and other agencies of the state or any of its political subdivisions and all agencies providing services under the local child protective service plan, shall, upon request, provide to the local child protective service such assistance and information as will enable it to fulfill its responsibilities.

ARTICLE 7. GENERAL PROVISIONS.
§49-7-7. Contributing to delinquency or neglect of a child.

A person who by any act or omission contributes to, encourages or tends to cause the delinquency or neglect of any child, including, but not limited to, aiding or encouraging any such child to habitually or continually refuse to respond, without just cause, to the lawful supervision of such child's parents, guardian or custodian or to be habitually absent from school without just cause, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than fifty nor more than five hundred dollars, or imprisoned in the county jail for a period not exceeding one year, or both fined and imprisoned.

In addition to any penalty provided under this section and any restitution which may be ordered by the court under article eleven-a of chapter sixty-one, the court may order any person convicted under the provisions of this section to pay all or any portion of the cost of medical, psychological or psychiatric treatment of the child resulting from the act or acts for which the person is convicted, whether or not the child is considered to have sustained bodily injury.

CHAPTER 61. CRIMES AND THEIR PUNISHMENT.

ARTICLE 8. CRIMES AGAINST CHASTITY, MORALITY AND DECENCY.

§61-8-6. Detention of person in place of prostitution; penalty.

Whoever shall by any means keep, hold, detain or restrain any person in a house of prostitution or other place where prostitution is practiced or allowed; or whoever shall, directly or indirectly, keep, hold, detain or restrain, or attempt to keep, hold, detain or restrain, in any house of prostitution or other place where prostitution is practiced or allowed, any person by any means, for the purpose of compelling such person, directly or indirectly, to pay, liquidate or cancel any debt, dues or obligations incurred or said to have been incurred by such person shall, upon conviction for the first offense under this section, be punished by imprisonment in the county jail for a period of not less than
six months nor more than one year, and by a fine of not less than one hundred nor more than five hundred dollars, and upon conviction for any subsequent offense under this section shall be punished by imprisonment in the penitentiary for not less than one nor more than three years: Provided, That in any offense under this section where the person so kept, held, detained or restrained is a minor, any person violating the provisions of this section shall be guilty of a felony, and, upon conviction, shall be confined in the penitentiary not less than two years nor more than five years or fined not more than five thousand dollars, or both.

§61-8-7. Procuring for house of prostitution; penalty; venue; competency as witness; marriage no defense.

Any person who shall procure an inmate for a house of prostitution, or who, by promises, threats, violence, or by any device or scheme, shall cause, induce, persuade or encourage a person to become an inmate of a house of prostitution, or shall procure a place as inmate in a house of prostitution for a person; or any person who shall, by promises, threats, violence, or by any device or scheme cause, induce, persuade or encourage an inmate of a house of prostitution to remain therein as such inmate; or any person who shall, by fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, procure any person to become an inmate of a house of ill fame, or to enter any place in which prostitution is encouraged or allowed within this state, or to come into or leave this state for the purpose of prostitution, or who shall procure any person to become an inmate of a house of ill fame within this state or to come into or leave this state for the purpose of prostitution; or shall receive or give or agree to receive or give any money or thing of value for procuring or attempting to procure any person to become an inmate of a house of ill fame within this state, or to come into or leave this state for the purpose of prostitution, shall be guilty of pandering, and, upon a first conviction for an offense under this section, shall be punished by imprisonment in the county jail for a
period of not less than six months nor more than one
year, and by a fine of not less than one hundred nor
more than five hundred dollars, and upon conviction for
any subsequent offense under this section shall be
punished by imprisonment in the penitentiary for a
period of not less than one nor more than five years:

Provided, That where the inmate referred to in this
section is a minor, any person violating the provisions
of this section shall be guilty of a felony, and, upon
conviction shall be confined in the penitentiary not less
than two years nor more than five years or fined not
more than five thousand dollars, or both.

It shall not be a defense to prosecution for any of the
acts prohibited in this section that any part of such act
or acts shall have been committed outside of this state,
and the offense shall in such case be deemed and alleged
to have been committed and the offender tried and
punished in any county in which the prostitution was
intended to be practiced, or in which the offense was
consummated, or any overt act in furtherance of the
offense was committed.

Any such person shall be a competent witness in any
prosecution under this section to testify for or against
the accused as to any transaction, or as to conversation
with the accused, or by the accused with another person
or persons in his or her presence, notwithstanding his
or her having married the accused before or after the
violation of any of the provisions of this section, whether
called as a witness during the existence of the marriage
or after its dissolution. The act or state of marriage shall
not be a defense to any violation of this section.

§61-8-8. Receiving support from prostitution; pimping;
penalty; prostitute may testify.

Any person who, knowing another person to be a
prostitute, shall live or derive support or maintenance,
in whole or in part, from the earnings or proceeds of
the prostitution of such prostitute, or from money loaned
or advanced to or charged against such prostitution by
any keeper or manager or inmate of a house or other
place where prostitution is practiced or allowed, or shall
tout or receive compensation for touting for such
prostitution, shall be guilty of pimping, and, upon the
first conviction for such offense, shall be punished by
imprisonment in the county jail for a period of not less
than six months nor more than one year, and by a fine
of not less than one hundred nor more than five hundred
dollars; and, upon a conviction for any subsequent
offense hereunder, shall be punished by imprisonment
in the penitentiary for a period of not less than one nor
more than three years: Provided, That where the
prostitute referred to in this section is a minor, any
person violating the provisions of this section shall be
guilty of a felony, and, upon conviction shall be confined
in the penitentiary not less than two years or fined not
more than five thousand dollars, or both. A prostitute
shall be a competent witness in any prosecution
hereunder to testify for or against the accused as to any
transaction or conversation with the accused, or by the
accused with another person or persons in the presence
of the prostitute, even if the prostitute may have
married the accused before or after the violation of any
of the provisions of this section, whether called as a
witness during the existence of the marriage or after its
dissolution.

§61-8-12. Incest; penalty.

(a) For the purposes of this section:

(1) "Aunt" means the sister of a person's mother or
father;

(2) "Brother" means the son of a person's mother or
father;

(3) "Daughter" means a person's natural daughter,
adoptive daughter or the daughter of a person's husband
or wife;

(4) "Father" means a person's natural father, adoptive
father or the husband of a person's mother;

(5) "Granddaughter" means the daughter of a person's
son or daughter;

(6) "Grandfather" means the father of a person's
father or mother;

(7) "Grandmother" means the mother of a person’s father or mother;

(8) "Grandson" means the son of a person’s son or daughter;

(9) "Mother" means a person’s natural mother, adoptive mother or the wife of a person’s father;

(10) "Niece" means the daughter of a person’s brother or sister;

(11) "Nephew" means the son of a person’s brother or sister;

(12) "Sexual intercourse" means any act between persons involving penetration, however slight, of the female sex organ by the male sex organ or involving contact between the sex organs of one person and the mouth or anus of another person;

(13) "Sexual intrusion" means any act between persons involving penetration, however slight, of the female sex organ or of the anus of any person by an object for the purpose of degrading or humiliating the person so penetrated or for gratifying the sexual desire of either party;

(14) "Sister" means the daughter of a person’s father or mother;

(15) "Son" means a person’s natural son, adoptive son or the son of a person’s husband or wife;

(16) "Uncle" means the brother of a person’s father or mother.

(b) A person is guilty of incest when such person engages in sexual intercourse or sexual intrusion with his or her father, mother, brother, sister, daughter, son, grandfather, grandmother, grandson, granddaughter, nephew, niece, uncle or aunt.

(c) Any person who violates the provisions of this section shall be guilty of a felony, and, upon conviction thereof, shall be imprisoned in the penitentiary not less
than five years nor more than ten years, or fined not more than five thousand dollars and imprisoned in the penitentiary not less than five years nor more than ten years.

(d) In addition to any penalty provided under this section and any restitution which may be ordered by the court under article eleven-a of this chapter, the court may order any person convicted under the provisions of this section where the victim is a minor, to pay all or any portion of the cost of medical, psychological or psychiatric treatment of the victim, the need for which results from the act or acts for which the person is convicted, whether or not the victim is considered to have sustained bodily injury.

§61-8-13. Incest; limits on interviews of children eleven years old or less; evidence.

(a) In any prosecution under the provisions of section twelve of this article, the court may provide by rule for reasonable limits on the number of interviews to which a victim who is eleven years old or less must submit for law enforcement or discovery purposes. To the extent possible the rule shall protect the mental and emotional health of the child from the psychological damage of repeated interrogation and at the same time preserve the rights of the public and the defendant.

(b) At any stage of the proceedings, in any prosecution under this article, the court may permit a child who is eleven years old or less to use anatomically correct dolls, mannequins or drawings to assist such child in testifying.

(c) In any prosecution under this article in which the victim's lack of consent is based solely on the incapacity to consent because such victim was below a critical age, evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct and reputation evidence of the victim's sexual conduct shall not be admissible. In any other prosecution under this article, evidence of specific instances of the victim's prior sexual conduct with the defendant shall be admissible on the issue of consent: Provided, That such
evidence heard first out of the presence of the jury is
found by the judge to be relevant.

(d) In any prosecution under this article evidence of
specific instances of the victim's sexual conduct with
persons other than the defendant, opinion evidence of
the victim's sexual conduct and reputation evidence of
the victim's sexual conduct shall not be admissible:
Provided, That such evidence shall be admissible solely
for the purpose of impeaching credibility, if the victim
first makes his or her previous sexual conduct an issue
in the trial by introducing evidence with respect thereto.

(e) In any prosecution under this article, neither age
nor mental capacity of the victim shall preclude the
victim from testifying.


Any person who shall cruelly ill treat, abuse, or inflict
unnecessarily cruel punishment upon, any infant or
minor child, and any person, having the care, custody
or control of any minor child, who shall willfully
abandon or neglect the same, shall be guilty of a
misdemeanor, and, upon conviction thereof, shall be
fined not less than one hundred nor more than one
thousand dollars, and, in the discretion of the court, may
be imprisoned in the county jail not exceeding one year
for each offense.

In addition to any penalty provided under this section
and any restitution which may be ordered by the court
under article eleven-a of this chapter, the court may
order any person convicted under the provisions of this
section to pay all or any portion of the cost of medical,
psychological or psychiatric treatment of the victim, the
need for which results from the act or acts for which
the person is convicted, whether or not the victim is
considered to have sustained bodily injury.

ARTICLE 8B. SEXUAL OFFENSES.

§61-8B-1. Definition of terms.

In this article, unless a different meaning plainly is
required:
(1) "Forcible compulsion" means:

(a) Physical force that overcomes such earnest resistance as might reasonably be expected under the circumstances; or

(b) Threat or intimidation, expressed or implied, placing a person in fear of immediate death or bodily injury to himself or another person or in fear that he or another person will be kidnapped; or

(c) Fear by a child under sixteen years of age caused by intimidation, expressed or implied, by another person four years older than the victim.

For the purposes of this definition "resistance" includes physical resistance or any clear communication of the victim's lack of consent.

(2) "Married," for the purposes of this article in addition to its legal meaning, includes persons living together as husband and wife regardless of the legal status of their relationship.

(3) "Mentally defective" means that a person suffers from a mental disease or defect which renders such person incapable of appraising the nature of his conduct.

(4) "Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his or her conduct as a result of the influence of a controlled or intoxicating substance administered to such person without his or her consent or as a result of any other act committed upon such person without his or her consent.

(5) "Physically helpless" means that a person is unconscious or for any reason is physically unable to communicate unwillingness to an act.

(6) "Sexual contact" means any intentional touching, either directly or through clothing, of the anus or any part of the sex organs of another person, or the breasts of a female or intentional touching of any part of another person's body by the actor's sex organs, where the victim is not married to the actor and the touching is done for the purpose of gratifying the sexual desire of either
(7) "Sexual intercourse" means any act between persons not married to each other involving penetration, however slight, of the female sex organ by the male sex organ or involving contact between the sex organs of one person and the mouth or anus of another person.

(8) "Sexual intrusion" means any act between persons not married to each other involving penetration, however slight, of the female sex organ or of the anus of any person by an object for the purpose of degrading or humiliating the person so penetrated or for gratifying the sexual desire of either party.

(9) "Bodily injury" means substantial physical pain, illness or any impairment of physical condition.

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

(11) "Deadly weapon" means any instrument, device or thing capable of inflicting death or serious bodily injury, and designed or specially adapted for use as a weapon, or possessed, carried or used as a weapon.

§61-8B-10. Indecent exposure.

(a) A person is guilty of indecent exposure when such person intentionally exposes his or her sex organs or anus or the sex organs or anus of another person, or intentionally causes such exposure by another or engages in any overt act of sexual gratification, and does so under circumstances in which the person knows that the conduct is likely to cause affront or alarm.

(b) Any person who violates the provisions of this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be confined in the county jail not more than ninety days, or fined not more than two hundred fifty dollars and confined in the county jail not more than ninety days.

(a) In any prosecution under this article in which the victim's lack of consent is based solely on the incapacity to consent because such victim was below a critical age, evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct and reputation evidence of the victim's sexual conduct shall not be admissible. In any other prosecution under this article, evidence of specific instances of the victim's prior sexual conduct with the defendant shall be admissible on the issue of consent: Provided, That such evidence heard first out of the presence of the jury is found by the judge to be relevant.

(b) In any prosecution under this article evidence of specific instances of the victim's sexual conduct with persons other than the defendant, opinion evidence of the victim's sexual conduct and reputation evidence of the victim's sexual conduct shall not be admissible: Provided, That such evidence shall be admissible solely for the purpose of impeaching credibility, if the victim first makes his or her previous sexual conduct an issue in the trial by introducing evidence with respect thereto.

(c) In any prosecution under this article, neither age nor mental capacity of the victim shall preclude the victim from testifying.

(d) At any stage of the proceedings, in any prosecution under this article, the court may permit a child who is eleven years old or less to use anatomically correct dolls, mannequins or drawings to assist such child in testifying.


In addition to any penalty provided under this article and any restitution, which may be ordered by the court under article eleven-a of this chapter, the court may order any person convicted under the provisions of this article to pay all or any portion of the cost of medical, psychological or psychiatric treatment of the victim, the need for which results from the act or acts for which the defendant is convicted, whether or not the victim is considered to have sustained bodily injury.
§61-8B-14. Limits on interviews of children eleven years old or less.

In any prosecution under this article, the court may provide by rule for reasonable limits on the number of interviews to which a victim who is a child who is eleven years old or less must submit for law enforcement or discovery purposes. The rule shall to the extent possible protect the mental and emotional health of the child from the psychological damage of repeated interrogations while at the same time preserve the rights of the public and the defendant.

ARTICLE 8C. FILMING OF SEXUALLY EXPLICIT CONDUCT OF MINORS.

§61-8C-1. Definitions.

For the purposes of this article:

(a) "Minor" means any child under eighteen years of age.

(b) "Knowledge" means knowing or having reasonable cause to know which warrants further inspection or inquiry.

(c) "Sexually explicit conduct" includes any of the following, whether actually performed or simulated:

1. Genital to genital intercourse;
2. Fellatio;
3. Cunnilingus;
4. Anal intercourse;
5. Oral to anal intercourse;
6. Bestiality;
7. Masturbation;
8. Sadomasochistic abuse, including, but not limited to, flagellation, torture or bondage;
9. Excretory functions in a sexual context; or
10. Exhibition of the genitals, pubic or rectal areas of any person in a sexual context.
Section 61-SC-2. Use of minors in filming sexually explicit conduct prohibited; penalty.

(a) Any person who causes or knowingly permits, uses, persuades, induces, entices or coerces such minor to engage in or uses such minor to do or assist in any sexually explicit conduct shall be guilty of a felony when such person has knowledge that any such act is being photographed or filmed. Upon conviction thereof, such person shall be fined not more than ten thousand dollars, or imprisoned in the penitentiary not more than ten years, or both fined and imprisoned.

(b) Any person who photographs or films such minor engaging in any sexually explicit conduct shall be guilty of a felony, and, upon conviction thereof, shall be fined not more than ten thousand dollars, or imprisoned in the penitentiary not more than ten years, or both fined and imprisoned.

(c) Any parent, legal guardian or person having custody and control of a minor, who photographs or films such minor in any sexually explicit conduct or causes or knowingly permits, uses, persuades, induces, entices or coerces such minor child to engage in or assist in any sexually explicit act shall be guilty of a felony when such person has knowledge that any such act may be photographed or filmed. Upon conviction thereof, such persons shall be fined not more than ten thousand dollars, or imprisoned in the penitentiary not more than ten years, or both fined and imprisoned.

Section 61-SC-3. Distribution and exhibiting of material depicting minors engaged in sexually explicit conduct prohibited; penalty.

(a) Any person who with knowledge, sends or causes to be sent, or distributes, exhibits, or displays or transports with the intent to distribute, exhibit or display any material visually portraying a minor engaged in any sexually explicit conduct shall be guilty of a misdemeanor, and, upon conviction thereof, shall be
imprisoned in the county jail not more than twelve
months and fined not more than two thousand dollars.

(b) Any person previously convicted under this section
and who is again convicted under this section, shall be
guilty of a felony, and, upon conviction thereof, shall be
imprisoned in the penitentiary for not more than two
years, and fined not more than four thousand dollars.

§61-8C-4. Payments of treatment costs for minor.

In addition to any penalty provided under this article
and any restitution which may be ordered by the court
under article eleven-a of this chapter, the court may
order any person convicted under the provisions of this
article to pay all or any portion of the cost of medical,
psychological or psychiatric treatment of the minor
resulting from the act or acts for which the person is
convicted, whether or not the minor is considered to
have sustained bodily injury.

§61-8C-5. Limits on interviews of children eleven years
old or less; evidence.

(a) In any prosecution under this article, the court
may provide by rule for reasonable limits on the number
of interviews to which a victim who is eleven years old
or less must submit for law enforcement or discovery
purposes. The rule shall to the extent possible protect
the mental and emotional health of the child from the
psychological damage of repeated interrogation and at
the same time preserve the rights of the public and the
defendant.

(b) At any stage of the proceedings, in any prosecution
under this article, the court may permit a child who is
eleven years old or less to use anatomically correct dolls,
mannequins or drawings to assist such child in testify-
ing.

CHAPTER 62. CRIMINAL PROCEDURE.

ARTICLE 12. PROBATION AND PAROLE.

§62-12-2. Eligibility for probation.

(a) All persons who are found guilty of or plead guilty
to any felony, the maximum penalty for which is less
than life imprisonment, and all persons who are found
guilty of or plead guilty to any misdemeanor, shall be
eligible for probation, notwithstanding the provisions of
sections eighteen and nineteen, article eleven, chapter
sixty-one of this code.

(b) The provisions of subsection (a) of this section to
the contrary notwithstanding, any person who commits
or attempts to commit a felony with the use, present-
ment or brandishing of a firearm shall be ineligible for
probation. Nothing in this section shall apply to an
accessory before the fact or a principal in the second
degree who has been convicted as if he or she were a
principal in the first degree if, in the commission of or
in the attempted commission of the felony, only the
principal in the first degree used, presented or bran-
dished a firearm.

(c) (1) The existence of any fact which would make
any person ineligible for probation under subsection (b)
of this section because of the commission or attempted
commission of a felony with the use, presentment or
brandishing of a firearm shall not be applicable unless
such fact is clearly stated and included in the indictment
or presentment by which such person is charged and is
either (i) found by the court upon a plea of guilty or nolo
contendere, or (ii) found by the jury, if the matter be
tried before a jury, upon submitting to such jury a
special interrogatory for such purpose or (iii) found by
the court, if the matter be tried by the court, without
a jury.

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

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

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

(C) Shall apply with respect to the submission of a
special interrogatory to the jury and the finding to be
made thereon in any case submitted to such jury on or
after the first day of August of that year or to the
requisite findings of the court upon a plea of guilty or
in any case tried without a jury: Provided, That the state
shall give notice in writing of its intent to seek such
finding by the jury or court, as the case may be, which
notice shall state with particularity the grounds upon
which such finding shall be sought as fully as such
grounds are otherwise required to be stated in an
indictment, unless the grounds therefor are alleged in
the indictment or presentment upon which the matter
is being tried;

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

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

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

(e) In the case of any person who has been found
guilty of, pleaded guilty to, a felony or misdemeanor
under the provisions of section twelve or twenty-four of
article eight of chapter sixty-one, or under the provi-
sions of article eight-c or eight-b, both of chapter sixty-
one, all of this code, such person shall only be eligible
for probation after undergoing a physical, mental and
psychiatric study and diagnosis which shall include an
on-going treatment plan requiring active participation
in sexual abuse counseling at a mental health facility or
through some other approved program: Provided, That
nothing disclosed by the person during such study or
diagnosis shall be made available to any law enforce-
ment agency, or other party without that person's
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81 consent, or admissible in any court of this state, unless
82 such information disclosed shall indicate the intention or
83 plans of the probationer to do harm to any person,
84 animal, institution, or property, in which case such
85 information may be released only to such persons as
86 might be necessary for protection of the said person,
87 animal, institution, or property.

§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
3 will be subserved thereby, and subject to the limitations
4 hereinafter provided, shall release any such prisoner on
5 parole for such terms and upon such conditions as are
6 provided by this article. Any prisoner of a penitentiary
7 of this state, to be eligible for parole:

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

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

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

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

(ii) Shall apply with respect to the contents of any indictment or presentment returned on or after the first day of August of that year irrespective of when the offense occurred;

(iii) Shall apply with respect to the submission of a special interrogatory to the jury and the finding to be made thereon in any case submitted to such jury on or after the first day of August of that year or to the requisite findings of the court upon a plea of guilty or in any case tried without a jury: Provided, That the state shall give notice in writing of its intent to seek such finding by the jury or court, as the case may be, which notice shall state with particularity the grounds upon which such finding shall be sought as fully as such grounds are otherwise required to be stated in an indictment, unless the grounds therefor are alleged in the indictment or presentment upon which the matter is being tried;

(iv) Shall not apply with respect to cases not affected by such amendment and in such cases the prior provisions of this section shall apply and be construed
Insofar as such amendments relate to mandatory sentences restricting the eligibility for parole, all such matters requiring such sentence shall be proved beyond a reasonable doubt in all cases tried by the jury or the court.

(2) Shall not be under punishment or in solitary confinement for any infraction of prison rules;

(3) Shall have maintained a record of good conduct in prison for a period of at least three months immediately preceding the date of his or her release on parole;

(4) Shall have submitted to the board a written parole release plan setting forth proposed plans for his or her place of residence, employment and, if appropriate, his or her plans regarding education and post-release counseling and treatment, said parole release plan having been approved by the commissioner of corrections or his or her authorized representative.

(5) Shall have satisfied the board that if released on parole he or she will not constitute a danger to the community.

Except in the case of one serving a life sentence, no person who has been previously twice convicted of a felony may be released on parole until he or she has served the minimum term provided by law for the crime for which he or she was convicted. No person sentenced for life may be paroled until he or she has served ten years, and no person sentenced for life who has been previously twice convicted of a felony may be paroled until he or she has served fifteen years. In the case of a person sentenced to any penal institution of this state, it shall be the duty of the board, as soon as such person becomes eligible, to consider the advisability of his or her release on parole. If, upon such consideration, parole be denied, the board shall at least once a year reconsider and review the case of every prisoner so eligible, which reconsideration and review shall be by the entire board. If parole be denied, the prisoner shall be promptly notified.
(b) In the case of any person sentenced to or confined under sentence in any city or county jail in this state, the board shall act only upon written application for parole. If such jail prisoner is under sentence on a felony conviction, the provisions hereof relating to penitentiary prisoners shall apply to and control his or her release on parole. If such person is serving time on a misdemeanor conviction, he or she is eligible for parole consideration, upon receipt of his or her written parole application and after time for probation release by the sentencing court or judge has expired.

(c) The board shall, with the approval of the governor, adopt rules and regulations governing the procedure in the granting of parole. No provision of this article and none of the rules and regulations adopted hereunder are intended or shall be construed to contravene, limit or otherwise interfere with or affect the authority of the governor to grant pardons and reprieves, commute sentences, remit fines or otherwise exercise his or her constitutional powers of executive clemency.

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

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

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

(2) On improvement or other changes noted in the
prisoner's mental and moral condition while in prison, including a statement expressive of the prisoner’s current attitude toward society in general, toward the judge who sentenced him or her, toward the prosecuting attorney who prosecuted him or her, toward the policeman or other officer who arrested the prisoner and toward the crime for which he or she is under sentence and his or her previous criminal record;

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

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

The board may waive the requirement of any such report when not available or not applicable as to any prisoner considered for parole but, in every such case, shall enter in the record thereof its reason for such waiver: Provided, That in the case of a prisoner who is incarcerated because such prisoner has been found guilty of, or has pleaded guilty to a felony under the provisions of section twelve of article eight of chapter sixty-one of this code or under the provisions of article eight-b or eight-c of chapter sixty-one, the board may not waive the report required by this subsection and the report shall include a study and diagnosis which shall include an on-going treatment plan requiring active participation in sexual abuse counseling at an approved mental health facility or through some other approved program: Provided, however, That nothing disclosed by the person during such study or diagnosis shall be made available to any law enforcement agency, or other party without that person's consent, or admissible in any court of this state, unless such information disclosed shall indicate the intention or plans of the parolee to do harm
Progress reports of outpatient treatment shall be made at least every six months to the parole officer supervising such person. In addition, in such cases, the parole board shall inform the prosecuting attorney of the county in which the person was convicted of the parole hearing and shall request that the prosecuting attorney inform the parole board of the circumstances surrounding a conviction or plea of guilty, plea bargaining and other background information that might be useful in its deliberations. The board shall also notify the victim, or the parents or guardian of the victim if the victim is still a minor, of the person being considered for parole in such a case.

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

The board and its designated agents shall at all times have access to inmates imprisoned in any penal or correctional institutions of this state or in any city or county jail in this state, and shall have the power to obtain any information or aid necessary to the performance of their duties from other departments and agencies of the state or from any political subdivision thereof.

The board shall, if so requested by the governor, investigate and consider all applications for pardon, reprieve or commutation and shall make recommendation thereon to the governor.

Prior to making such recommendation and prior to releasing any penitentiary person on parole, the board
shall notify the sentencing judge and prosecuting attorney at least ten days before such recommendation or parole.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Bruce O. Williams
Chairman Senate Committee

Floyd Fuller
Chairman House Committee

Originating in the House.

Takes effect July 1, 1986.

J. W. Weil
Clerk of the Senate

Donald J. Webb
Clerk of the House of Delegates

M. L. Gore
President of the Senate

Joseph M. Bailey
Speaker of the House of Delegates

The within __________________ this the __________
day of __________________, 1986.

Arthur Dressler
Governor