

Veto-1305

WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1986

— ● —

ENROLLED

Com. Sub. for
HOUSE BILL No. 1305

(By ~~Mr.~~ Del. Hatfield & Del. Masterton)

— ● —

Passed March 7, 1986

In Effect From Passage

ENROLLED
COMMITTEE SUBSTITUTE
FOR
H. B. 1305
(By DELEGATE HATFIELD and DELEGATE MASTRANTONI)

[Passed March 7, 1986; in effect from passage.]

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 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
- 2 agency intending to act as a child welfare agency shall

3 apply for a license or approval to operate child care
4 facilities regulated by this article. Applications for
5 license or approval shall be made separately for each
6 child care facility to be licensed or approved.

7 The commissioner may prescribe forms and reasona-
8 ble application procedures. Before issuing a license or
9 approval, the commissioner shall investigate the facility,
10 program and persons responsible for the care of
11 children. The investigation shall also include, but not be
12 limited to, review of resource need, reputation, charac-
13 ter and purposes of applicants, a check of personnel
14 medical records, the financial records of applicants, and
15 consideration of the proposed plan for child care from
16 intake to discharge. The investigation shall also include
17 a check into the child abuse and neglect records of the
18 department relevant to the applicant and the criminal
19 conviction records of the department of public safety to
20 determine if any applicant and any of the employees of
21 the facility have a child abuse, child neglect or criminal
22 conviction record of causing harm to another person.

23 The commissioner shall make a decision on each
24 application within sixty days of its receipt and shall
25 provide to unsuccessful applicants written reasons for
26 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.**

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

4 Except in cases involving institutional abuse or cases
5 in which police investigation also appears appropriate,
6 the child protective service shall be the sole public
7 agency responsible for receiving, investigating or
8 arranging for investigation and coordinating the
9 investigation of all reports of child abuse or neglect:
10 *Provided*, That under no circumstances shall investigat-
11 ing personnel be relatives of the accused, the child or

12 the families involved. In accordance with the local plan
13 for child protective services, it shall provide protective
14 services to prevent further abuse or neglect of children
15 and provide for or arrange for and coordinate and
16 monitor the provision of those services necessary to
17 ensure the safety of children. The local child protective
18 service shall be organized to maximize the continuity of
19 responsibility, care and service of individual workers for
20 individual children and families.

21 Each local child protective service shall:

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

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

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

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

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

46 To carry out the purposes of this article, all depart-
47 ments, boards, bureaus and other agencies of the state
48 or any of its political subdivisions and all agencies
49 providing services under the local child protective
50 service plan, shall, upon request, provide to the local

51 child protective service such assistance and information
52 as will enable it to fulfill its responsibilities.

ARTICLE 7. GENERAL PROVISIONS.

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

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

13 In addition to any penalty provided under this section
14 and any restitution which may be ordered by the court
15 under article eleven-a of chapter sixty-one, the court
16 may order any person convicted under the provisions of
17 this section to pay all or any portion of the cost of
18 medical, psychological or psychiatric treatment of the
19 child resulting from the act or acts for which the person
20 is convicted, whether or not the child is considered to
21 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.

1 Whoever shall by any means keep, hold, detain or
2 restrain any person in a house of prostitution or other
3 place where prostitution is practiced or allowed; or
4 whoever shall, directly or indirectly, keep, hold, detain
5 or restrain, or attempt to keep, hold, detain or restrain,
6 in any house of prostitution or other place where
7 prostitution is practiced or allowed, any person by any
8 means, for the purpose of compelling such person,
9 directly or indirectly, to pay, liquidate or cancel any

10 debt, dues or obligations incurred or said to have been
11 incurred by such person shall, upon conviction for the
12 first offense under this section, be punished by impri-
13 sonment in the county jail for a period of not less than
14 six months nor more than one year, and by a fine of not
15 less than one hundred nor more than five hundred
16 dollars, and upon conviction for any subsequent offense
17 under this section shall be punished by imprisonment in
18 the penitentiary for not less than one nor more than
19 three years: *Provided*, That in any offense under this
20 section where the person so kept, held, detained or
21 restrained is a minor, any person violating the provi-
22 sions of this section shall be guilty of a felony, and, upon
23 conviction, shall be confined in the penitentiary not less
24 than two years nor more than five years or fined not
25 more than five thousand dollars, or both.

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

1 Any person who shall procure an inmate for a house
2 of prostitution, or who, by promises, threats, violence, or
3 by any device or scheme, shall cause, induce, persuade
4 or encourage a person to become an inmate of a house
5 of prostitution, or shall procure a place as inmate in a
6 house of prostitution for a person; or any person who
7 shall, by promises, threats, violence, or by any device or
8 scheme cause, induce, persuade or encourage an inmate
9 of a house of prostitution to remain therein as such
10 inmate; or any person who shall, by fraud or artifice,
11 or by duress of person or goods, or by abuse of any
12 position of confidence or authority, procure any person
13 to become an inmate of a house of ill fame, or to enter
14 any place in which prostitution is encouraged or allowed
15 within this state, or to come into or leave this state for
16 the purpose of prostitution, or who shall procure any
17 person to become an inmate of a house of ill fame within
18 this state or to come into or leave this state for the
19 purpose of prostitution; or shall receive or give or agree
20 to receive or give any money or thing of value for
21 procuring or attempting to procure any person to
22 become an inmate of a house of ill fame within this state,

23 or to come into or leave this state for the purpose of
24 prostitution, shall be guilty of pandering, and, upon a
25 first conviction for an offense under this section, shall
26 be punished by imprisonment in the county jail for a
27 period of not less than six months nor more than one
28 year, and by a fine of not less than one hundred nor
29 more than five hundred dollars, and upon conviction for
30 any subsequent offense under this section shall be
31 punished by imprisonment in the penitentiary for a
32 period of not less than one nor more than five years:
33 *Provided*, That where the inmate referred to in this
34 section is a minor, any person violating the provisions
35 of this section shall be guilty of a felony, and, upon
36 conviction, shall be confined in the penitentiary not less
37 than two years nor more than five years or fined not
38 more than five thousand dollars, or both.

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

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

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

1 Any person who, knowing another person to be a
2 prostitute, shall live or derive support or maintenance,
3 in whole or in part, from the earnings or proceeds of

4 the prostitution of such prostitute, or from money loaned
5 or advanced to or charged against such prostitution by
6 any keeper or manager or inmate of a house or other
7 place where prostitution is practiced or allowed, or shall
8 tout or receive compensation for touting for such
9 prostitution, shall be guilty of pimping, and, upon the
10 first conviction for such offense, shall be punished by
11 imprisonment in the county jail for a period of not less
12 than six months nor more than one year, and by a fine
13 of not less than one hundred nor more than five hundred
14 dollars; and, upon a conviction for any subsequent
15 offense hereunder, shall be punished by imprisonment
16 in the penitentiary for a period of not less than one nor
17 more than three years: *Provided*, That where the
18 prostitute referred to in this section is a minor, any
19 person violating the provisions of this section shall be
20 guilty of a felony, and, upon conviction shall be confined
21 in the penitentiary not less than two years or fined not
22 more than five thousand dollars, or both. A prostitute
23 shall be a competent witness in any prosecution
24 hereunder to testify for or against the accused as to any
25 transaction or conversation with the accused, or by the
26 accused with another person or persons in the presence
27 of the prostitute, even if the prostitute may have
28 married the accused before or after the violation of any
29 of the provisions of this section, whether called as a
30 witness during the existence of the marriage or after its
31 dissolution.

§61-8-12. Incest; penalty.

- 1 (a) For the purposes of this section:
- 2 (1) "Aunt" means the sister of a person's mother or
3 father;
- 4 (2) "Brother" means the son of a person's mother or
5 father;
- 6 (3) "Daughter" means a person's natural daughter,
7 adoptive daughter or the daughter of a person's husband
8 or wife;
- 9 (4) "Father" means a person's natural father, adoptive
10 father or the husband of a person's mother;

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

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

15 (7) "Grandmother" means the mother of a person's
16 father or mother;

17 (8) "Grandson" means the son of a person's son or
18 daughter;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 (c) In any prosecution under this article in which the
16 victim's lack of consent is based solely on the incapacity
17 to consent because such victim was below a critical age,
18 evidence of specific instances of the victim's sexual
19 conduct, opinion evidence of the victim's sexual conduct
20 and reputation evidence of the victim's sexual conduct
21 shall not be admissible. In any other prosecution under

22 this article, evidence of specific instances of the victim's
 23 prior sexual conduct with the defendant shall be
 24 admissible on the issue of consent: *Provided*, That such
 25 evidence heard first out of the presence of the jury is
 26 found by the judge to be relevant.

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

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

§61-8-24. Cruelty to children; penalty.

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

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

ARTICLE 8B. SEXUAL OFFENSES.

§61-8B-1. Definition of terms.

1 In this article, unless a different meaning plainly is
2 required:

3 (1) "Forcible compulsion" means:

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

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

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

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

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

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

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

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

34 (6) "Sexual contact" means any intentional touching,
35 either directly or through clothing, of the anus or any
36 part of the sex organs of another person, or the breasts
37 of a female or intentional touching of any part of another

38 person's body by the actor's sex organs, where the victim
39 is not married to the actor and the touching is done for
40 the purpose of gratifying the sexual desire of either
41 party.

42 (7) "Sexual intercourse" means any act between
43 persons not married to each other involving penetration,
44 however slight, of the female sex organ by the male sex
45 organ or involving contact between the sex organs of one
46 person and the mouth or anus of another person.

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

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

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

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

§61-8B-10. Indecent exposure.

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

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

12 hundred fifty dollars and confined in the county jail not
13 more than ninety days.

§61-8B-11. Sexual offenses; evidence.

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

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

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

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

§61-8B-13. Payment of treatment cost for victim.

1 In addition to any penalty provided under this article
2 and any restitution, which may be ordered by the court
3 under article eleven-a of this chapter, the court may
4 order any person convicted under the provisions of this
5 article to pay all or any portion of the cost of medical,
6 psychological or psychiatric treatment of the victim, the

7 need for which results from the act or acts for which
8 the defendant is convicted, whether or not the victim is
9 considered to have sustained bodily injury.

**§61-8B-14. Limits on interviews of children eleven years
old or less.**

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

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

§61-8C-1. Definitions.

1 For the purposes of this article:

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

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

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

9 (1) Genital to genital intercourse;

10 (2) Fellatio;

11 (3) Cunnilingus;

12 (4) Anal intercourse;

13 (5) Oral to anal intercourse;

14 (6) Bestiality;

15 (7) Masturbation;

16 (8) Sadomasochistic abuse, including, but not limited
17 to, flagellation, torture or bondage;

18 (9) Excretory functions in a sexual context; or

19 (10) Exhibition of the genitals, pubic or rectal areas
20 of any person in a sexual context.

21 (d) "Person" means an individual, partnership, firm,
22 association, corporation or other legal entity.

**§61-8C-2. Use of minors in filming sexually explicit
conduct prohibited; penalty.**

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

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

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

**§61-8C-3. Distribution and exhibiting of material depict-
ing minors engaged in sexually explicit
conduct prohibited; penalty.**

1 (a) Any person who with knowledge, sends or causes
2 to be sent, or distributes, exhibits, or displays or

3 transports with the intent to distribute, exhibit or
4 display any material visually portraying a minor
5 engaged in any sexually explicit conduct shall be guilty
6 of a misdemeanor, and, upon conviction thereof, shall be
7 imprisoned in the county jail not more than twelve
8 months and fined not more than two thousand dollars.

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

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

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

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

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

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

CHAPTER 62. CRIMINAL PROCEDURE.

ARTICLE 12. PROBATION AND PAROLE.

§62-12-2. Eligibility for probation.

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

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

19 (c) (1) The existence of any fact which would make any
20 person ineligible for probation under subsection (b) of
21 this section because of the commission or attempted
22 commission of a felony with the use, presentment or
23 brandishing of a firearm shall not be applicable unless
24 such fact is clearly stated and included in the indictment
25 or presentment by which such person is charged and is
26 either (i) found by the court upon a plea of guilty or nolo
27 contendere, or (ii) found by the jury, if the matter be
28 tried before a jury, upon submitting to such jury a
29 special interrogatory for such purpose or (iii) found by
30 the court, if the matter be tried by the court, without
31 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
35 or after the first day of August of that year;

36 (B) Shall apply with respect to the contents of any
37 indictment or presentment returned on or after the first

38 day of August of that year irrespective of when the
39 offense occurred;

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

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

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

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

67 (e) In the case of any person who has been found guilty
68 of, pleaded guilty to, a felony or misdemeanor under the
69 provisions of section twelve or twenty-four of article
70 eight of chapter sixty-one, or under the provisions of
71 article eight-c or eight-b, both of chapter sixty-one, all
72 of this code, such person shall only be eligible for
73 probation after undergoing a physical, mental and
74 psychiatric study and diagnosis which shall include an
75 on-going treatment plan requiring active participation
76 in sexual abuse counseling at a mental health facility or
77 through some other approved program: *Provided*, That

78 nothing disclosed by the person during such study or
79 diagnosis shall be made available to any law enforce-
80 ment agency, or other party without that person's
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
 33 brandishing of a firearm unless such fact is clearly
 34 stated and included in the indictment or presentment by
 35 which such person was charged and was either (i) found
 36 by the court at the time of trial upon a plea of guilty
 37 or nolo contendere, or (ii) found by the jury, upon
 38 submitting to such jury a special interrogatory for such
 39 purpose if the matter was tried before a jury, or (iii)
 40 found by the court, if the matter was tried by the court
 41 without a jury.

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

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

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

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

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

69 (iv) Shall not apply with respect to cases not affected
70 by such amendment and in such cases the prior
71 provisions of this section shall apply and be construed
72 without reference to such amendment.

73 Insofar as such amendments relate to mandatory
74 sentences restricting the eligibility for parole, all such
75 matters requiring such sentence shall be proved beyond
76 a reasonable doubt in all cases tried by the jury or the
77 court.

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

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

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

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

93 Except in the case of one serving a life sentence, no
94 person who has been previously twice convicted of a
95 felony may be released on parole until he or she has
96 served the minimum term provided by law for the crime
97 for which he or she was convicted. No person sentenced
98 for life may be paroled until he or she has served ten
99 years, and no person sentenced for life who has been
100 previously twice convicted of a felony may be paroled
101 until he or she has served fifteen years. In the case of
102 a person sentenced to any penal institution of this state,
103 it shall be the duty of the board, as soon as such person
104 becomes eligible, to consider the advisability of his or
105 her release on parole. If, upon such consideration, parole
106 be denied, the board shall at least three times a year
107 reconsider and review the case of every prisoner so

108 eligible, which reconsideration and review shall be by
109 the entire board. If parole be denied, the prisoner shall
110 be promptly notified.

111 (b) In the case of any person sentenced to or confined
112 under sentence in any city or county jail in this state,
113 the board shall act only upon written application for
114 parole. If such jail prisoner is under sentence on a felony
115 conviction, the provisions hereof relating to penitentiary
116 prisoners shall apply to and control his or her release
117 on parole. If such person is serving time on a misdemea-
118 nor conviction, he or she is eligible for parole consider-
119 ation, upon receipt of his or her written parole
120 application and after time for probation release by the
121 sentencing court or judge has expired.

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

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

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

145 (1) On the prisoner's conduct record while in prison,
146 including a detailed statement showing any and all
147 infractions of prison rules by the prisoner and the

148 nature and extent of discipline and punishment admin-
149 istered therefor;

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

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

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

171 The board may waive the requirement of any such
172 report when not available or not applicable as to any
173 prisoner considered for parole but, in every such case,
174 shall enter in the record thereof its reason for such
175 waiver: *Provided*, That in the case of a prisoner who is
176 incarcerated because such prisoner has been found
177 guilty of, or has pleaded guilty to a felony under the
178 provisions of section twelve of article eight of chapter
179 sixty-one of this code or under the provisions of article
180 eight-b or eight-c of chapter sixty-one, the board may
181 not waive the report required by this subsection and the
182 report shall include a study and diagnosis which shall
183 include an on-going treatment plan requiring active
184 participation in sexual abuse counseling at an approved
185 mental health facility or through some other approved
186 program: *Provided, however*, That nothing disclosed by
187 the person during such study or diagnosis shall be made

188 available to any law enforcement agency, or other party
189 without that person's consent, or admissible in any court
190 of this state, unless such information disclosed shall
191 indicate the intention or plans of the parolee to do harm
192 to any person, animal, institution, or to property.
193 Progress reports of outpatient treatment shall be made
194 at least every six months to the parole officer supervising
195 such person. In addition, in such cases, the parole
196 board shall inform the prosecuting attorney of the
197 county in which the person was convicted of the parole
198 hearing and shall request that the prosecuting attorney
199 inform the parole board of the circumstances surrounding
200 a conviction or plea of guilty, plea bargaining and
201 other background information that might be useful in
202 its deliberations. The board shall also notify the victim,
203 or the parents or guardian of the victim if the victim
204 is still a minor, of the person being considered for parole
205 in such a case.

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

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

226 The board shall, if so requested by the governor,
227 investigate and consider all applications for pardon,
228 reprieve or commutation and shall make recommenda-

229 tion thereon to the governor.

230 Prior to making such recommendation and prior to
231 releasing any penitentiary person on parole, the board
232 shall notify the sentencing judge and prosecuting
233 attorney at least ten days before such recommendation
234 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 from passage.

Judd C. Waller
Clerk of the Senate

Donald L. Hogg
Clerk of the House of Delegates

Dan Tonkovich
President of the Senate

Joseph P. Allwright
Speaker of the House of Delegates

The within disappeared this the 26th
day of March, 1986.

Arch A. Moore
Governor

PRESENTED TO THE

GOVERNOR

Date 3/21/86

Time 4:45 p.m.

RECEIVED

1936 MAR 26 AM 10:09

OFFICE OF THE
SECRETARY OF STATE

FILED IN THE OFFICE OF
SECRETARY OF STATE OF
WEST VIRGINIA

THIS DATE 3/26/86