

1 COMMITTEE SUBSTITUTE

2 for

3 **H. B. 2946**

4 (By Delegates Ellem, Border, Perdue, Miley, Ellington,

5 Hamilton, Reynolds, Kominar and C. Miller)

6 (Originating in the Committee on the Judiciary)

7  
8 [February 25, 2011]

9  
10 A BILL to repeal §60A-10-5 and §60A-10-8 of the code of West  
11 Virginia, 1931, as amended; to amend and reenact §60A-10-2,  
12 §60A-10-3, §60A-10-4, §60A-10-6, §60A-10-7 and §60A-10-11 of  
13 said code, all relating to requiring a prescription to  
14 dispense drug products that contain as an active ingredient  
15 ephedrine, pseudoephedrine, phenylpropanolamine and other  
16 precursors of methamphetamine; making and such drugs a  
17 Schedule III drug; repealing certain provisions and  
18 definitions that are no longer applicable; adding findings;  
19 exempting wholesalers from certain requirements of the United  
20 States Drug Enforcement Administration relating to storage,  
21 reporting, record keeping or physical security control  
22 requirements for controlled substances containing ephedrine,  
23 pseudoephedrine or phenylpropanolamine; adding affirmative  
24 defenses; and providing penalties.

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

26 That §60A-10-5 and §60A-10-8 of the Code of West

1 Virginia, 1931, as amended, be repealed; that §60A-10-2, §60A-10-3,  
2 §60A-10-4, §60A-10-6, §60A-10-7 and §60A-10-11 of said code be  
3 amended and reenacted to read as follows:

4 **ARTICLE 10. METHAMPHETAMINE LABORATORY ERADICATION ACT.**

5 **§60A-10-2. Purpose; findings.**

6 The Legislature finds:

7 (a) That the illegal production and distribution of  
8 methamphetamine is an increasing problem nationwide and  
9 particularly prevalent in rural states such as West Virginia.

10 (b) That methamphetamine is a highly addictive drug that can  
11 be manufactured in small and portable laboratories. These  
12 laboratories are operated by individuals who manufacture the drug  
13 in a clandestine and unsafe manner, often resulting in explosions  
14 and fires that can injure not only the individuals involved, but  
15 their families, neighbors, law-enforcement officers and firemen.

16 (c) That use of methamphetamine can result in fatal kidney and  
17 lung disorders, brain damage, liver damage, blood clots, chronic  
18 depression, hallucinations, violent and aggressive behavior,  
19 malnutrition, disturbed personality development, deficient immune  
20 system and psychosis. Children born to mothers who are abusers of  
21 methamphetamine can be born addicted and suffer birth defects, low  
22 birth weight, tremors, excessive crying, attention deficit disorder  
23 and behavior disorders.

24 (d) That in addition to the physical consequences to an  
25 individual who uses methamphetamine, usage of the drug also  
26 produces an increase in automobile accidents, explosions and fires,

1 increased criminal activity, increased medical costs due to  
2 emergency room visits, increases in domestic violence, increased  
3 spread of infectious diseases and a loss in worker productivity.

4 (e) That environmental damage is another consequence of the  
5 methamphetamine epidemic. Each pound of methamphetamine produced  
6 leaves behind five to six pounds of toxic waste. Chemicals and  
7 byproducts that result from the manufacture of methamphetamine are  
8 often poured into plumbing systems, storm drains or directly onto  
9 the ground. Clean up of methamphetamine laboratories is extremely  
10 resource-intensive, with an average remediation cost of five  
11 thousand dollars.

12 (f) That in other states, which have required a prescription  
13 for those drugs that are used to facilitate production of  
14 methamphetamine, there has been a significant decrease in the  
15 number of methamphetamine laboratories in those states.

16 ~~(f)~~(g) That it is in the best interest of every West Virginian  
17 to develop a viable solution to address the growing methamphetamine  
18 problem in the State of West Virginia. The Legislature finds that  
19 restricting access to ~~over-the-counter~~ drugs used to facilitate  
20 production of methamphetamine is necessary to protect the public  
21 safety of all West Virginians.

22 ~~(g)~~(h) That it is further in the best interests of every West  
23 Virginian to create impediments to the manufacture of  
24 methamphetamine by requiring persons purchasing chemicals necessary  
25 to the process to ~~provide identification~~ have a lawful prescription  
26 before purchasing.

1 **§60A-10-3. Definitions.**

2 In this article:

3 (a) "Board of Pharmacy" or "board" means the West Virginia  
4 Board of Pharmacy established by the provisions of article five,  
5 chapter thirty of this code.

6 (b) "Designated precursor" means any drug product made subject  
7 to the requirements of this article by the provisions of section  
8 seven of this article.

9 (c) "Distributor" means any person within this state or  
10 another state, other than a manufacturer or wholesaler, who sells,  
11 delivers, transfers or in any manner furnishes a drug product to  
12 any person who is not the ultimate user or consumer of the product;

13 (d) "Drug product" means a pharmaceutical product that  
14 contains as an ~~its—single~~ active ingredient ephedrine,  
15 pseudoephedrine or phenylpropanolamine or a substance identified on  
16 the supplemental list provided for in section seven of this article  
17 which may be sold without a prescription and which is labeled for  
18 use by a consumer in accordance with the requirements of the laws  
19 and rules of this state and the federal government.

20 (e) "Ephedrine " means ephedrine, its salts or optical isomers  
21 or salts of optical isomers.

22 (f) "Manufacturer" means any person within this state who  
23 produces, compounds, packages or in any manner initially prepares  
24 for sale or use any drug product or any such person in another  
25 state if they cause the products to be compounded, packaged or  
26 transported into this state.

1 (g) "Phenylpropanolamine" means phenylpropanolamine, its  
2 salts, optical isomers and salts of optical isomers.

3 (h) "Pseudoephedrine" means pseudoephedrine, its salts,  
4 optical isomers and salts of optical isomers.

5 (i) "Precursor" means any substance which may be used along  
6 with other substances as a component in the production and  
7 distribution of illegal methamphetamine.

8 (j) "Pharmacist" means an individual currently licensed by  
9 this state to engage in the practice of pharmacy and pharmaceutical  
10 care as defined in subsection (t), section one-b, article fifty,  
11 chapter thirty of this code.

12 (k) "Pharmacy intern" has the same meaning as the term  
13 "intern" as set forth in section one-b, article five, chapter  
14 thirty of this code.

15 (l) "Pharmacy" means any drugstore, apothecary or place within  
16 this state where drugs are dispensed and sold at retail or display  
17 for sale at retail and pharmaceutical care is provided outside of  
18 this state where drugs are dispensed and pharmaceutical care is  
19 provided to residents of this state.

20 ~~(m) "Pharmacy counter" means an area in the pharmacy~~  
21 ~~restricted to the public where controlled substances are stored and~~  
22 ~~housed and where controlled substances may only be sold,~~  
23 ~~transferred or dispensed by a pharmacist or pharmacy technician.~~

24 ~~(n)~~(m) "Pharmacy technician" means a registered technician who  
25 meets the requirements for registration as set forth in article  
26 five, chapter thirty of this code.

1       ~~(o) "Retail establishment" means any entity or person within~~  
2 ~~this state who sells, transfers or distributes goods, including~~  
3 ~~over-the-counter drug products, to an ultimate consumer.~~       ~~(p) (n)~~

4 "Schedule ~~VIII~~" means the schedule of controlled substances set out  
5 in section two hundred ~~twelve eight~~, section two of this chapter.

6       ~~(q) "Single active ingredient" means those ingredients listed~~  
7 ~~on a drug product package as the only active ingredient in over-~~  
8 ~~the-counter medication or identified on the Schedule maintained by~~  
9 ~~the Board of Pharmacy as being primarily used in the illegal~~  
10 ~~production and distribution of methamphetamine.~~

11       ~~(r)~~(o) "Superintendent of the State Police" or  
12 "Superintendent" means the Superintendent of the West Virginia  
13 State Police as set forth in section five, article two, chapter  
14 fifteen of this code.

15       ~~(s)~~(p) "Wholesaler" means any person within this state or  
16 another state, other than a manufacturer, who sells, transfers or  
17 in any manner furnishes a drug product to any other person in this  
18 state for the purpose of being resold.

19 **§60A-10-4. Purchase, receipt, acquisition and possession of**  
20 **substances to be used as precursor to manufacture of**  
21 **methamphetamine or another controlled substance; offenses;**  
22 **exceptions; penalties.**

23       (a) Any person who within any thirty-day period knowingly  
24 purchases, receives or otherwise possesses more than ~~three packages~~  
25 ~~of a drug product~~ the amount prescribed in a single prescription

1 containing as ~~its single~~ an active ingredient ephedrine,  
2 pseudoephedrine or phenylpropanolamine or more than nine grams of  
3 ephedrine, pseudoephedrine or phenylpropanolamine in any form shall  
4 be guilty of a misdemeanor and, upon conviction, shall be confined  
5 in a jail for not more than one year, fined not more than \$1,000,  
6 or both, unless the person can provide an order from a person  
7 authorized to prescribe controlled substances explaining why the  
8 multiple prescriptions are medically necessary.

9 (b) Notwithstanding the provisions of subsection (a) of this  
10 section, any person convicted of a second or subsequent violation  
11 of the provisions of said subsection or a statute or ordinance of  
12 the United States or another state which contains the same  
13 essential elements shall be guilty of a felony and, upon  
14 conviction, shall be confined in a state correctional facility for  
15 not less than one nor more than five years, fined not more than  
16 \$25,000, or both.

17 (c) The provisions of subsection (a) of this section shall not  
18 apply to:

19 (1) Drug products which are for pediatric use primarily  
20 intended for administration to children under the age of twelve;

21 (2) Drug products which have been determined by the Board of  
22 Pharmacy to be in a form which is unamenable to being used for the  
23 manufacture of methamphetamine;

24 (3) Persons lawfully possessing drug products in their  
25 capacities as distributors, wholesalers, manufacturers,  
26 pharmacists, pharmacy interns, pharmacy technicians, health care

1 professionals or persons possessing such drug products pursuant to  
2 a valid prescription.

3 (d) Notwithstanding any provision of this code to the  
4 contrary, any person who knowingly possesses any amount of  
5 ephedrine, pseudoephedrine, phenylpropanolamine or other designated  
6 precursor with the intent to use it in the manufacture of  
7 methamphetamine or who knowingly possesses a substance containing  
8 ephedrine, pseudoephedrine or phenylpropanolamine or their salts,  
9 optical isomers or salts of optical isomers in a state or form  
10 which is, or has been altered or converted from the state or form  
11 in which these chemicals are, or were, commercially distributed  
12 shall be guilty of a felony and, upon conviction, shall be confined  
13 in a state correctional facility for not less than two nor more  
14 than ten years, fined not more than \$25,000, or both.

15 (e) (1) Any pharmacy, wholesaler, manufacturer or distributor  
16 of drug products containing as ~~their single~~ an active ingredient  
17 ephedrine, pseudoephedrine, phenylpropanolamine, their salts or  
18 optical isomers or salts of optical isomers or other designated  
19 precursor shall obtain a registration annually from the State Board  
20 of Pharmacy as described in section six of this article. ~~Any such~~  
21 ~~pharmacy, wholesaler, manufacturer or distributor shall keep~~  
22 ~~complete records of all sales and transactions as provided in~~  
23 ~~section eight of this article. The records shall be gathered and~~  
24 ~~maintained pursuant to legislative rule promulgated by the Board of~~  
25 ~~Pharmacy.~~

26 (f) It is an affirmative defense to any offense in this



1 section that the person:

2 (1) Obtained the drug(s) containing ephedrine, pseudoephedrine  
3 or phenylpropanolamine lawfully;

4 (2) Possessed no more than nine grams of ephedrine,  
5 pseudoephedrine or phenylpropanolamine in any form; and

6 (3) Possessed the drug(s) under circumstances that are  
7 consistent with typical medicinal or household use, as indicated by  
8 factors including but not limited to: storage location, purchase  
9 date, or possession of the product in a variety of strengths,  
10 brands, types, purposes or expiration dates.

11 (2) Any drug products possessed without a registration as  
12 provided in this section are subject to forfeiture upon conviction  
13 for a violation of this section.

14 (3) In addition to any administrative penalties provided by  
15 law, any violation of this subsection is a misdemeanor, punishable  
16 upon conviction by a fine in an amount not more than \$10,000.

17 **§60A-10-6. Registration to sell, manufacture or distribute**  
18 **products; rule-making authority.**

19 The State Board of Pharmacy shall propose rules for  
20 legislative approval in accordance with the provisions of article  
21 three, chapter twenty-nine-a of this code to require that every  
22 wholesaler, manufacturer or distributor of any drug product  
23 containing as ~~their single~~ an active ingredient ephedrine or  
24 pseudoephedrine or a substance identified on the supplemental list  
25 provided for in section seven of this article shall obtain a  
26 registration and permit issued by the State Board of Pharmacy to

1 sell, distribute or transfer the product containing as their  
2 single active ingredient ephedrine, pseudoephedrine or  
3 phenylpropanolamine.

4 **§60A-10-7. Restricted products; rule-making authority.**

5 ~~(a) On or before July 1, 2005,~~ The Board of Pharmacy shall  
6 promulgate emergency and legislative rules pursuant to the  
7 provision of article three, chapter twenty-nine-a of this code to  
8 implement a program wherein the Board of Pharmacy shall consult  
9 ~~consults~~ with the Superintendent of the State Police in identifying  
10 drug products which are a designated precursor, in addition to  
11 those that contain as ~~their single~~ an active ingredient ephedrine,  
12 pseudoephedrine or phenylpropanolamine, that are commonly being  
13 used in the production and distribution of methamphetamine. Those  
14 drug products which the Superintendent of the State Police have  
15 demonstrated by empirical evidence are commonly used in the  
16 manufacture of methamphetamine shall be added to a supplemental  
17 list and ~~shall be~~ are subject to all of the restrictions of this  
18 article. ~~These~~ The rules established pursuant to this section  
19 shall include (1) a process whereby pharmacies are made aware of  
20 all drug products that contain as ~~their single~~ an active ingredient  
21 ephedrine, pseudoephedrine and phenylpropanolamine that will be  
22 listed as a Schedule ~~V~~ III substance. ~~and must be sold, transferred~~  
23 ~~or dispensed from behind a pharmacy counter;~~

24 (2) Wholesale drug distributors licensed by the Board of  
25 Pharmacy and registered with, and regulated by, the United States  
26 Drug Enforcement Administration are exempt from storage,

1 reporting, record keeping or physical security control requirements  
2 for controlled substances containing pseudoephedrine. A process  
3 whereby pharmacies and retail establishments are made aware of  
4 additional drug products added to Schedule VIII that are required  
5 to be placed behind the pharmacy counter for sale, transfer or  
6 distribution can be periodically reviewed and updated.

7  ~~(b) At any time after July 1, 2005, the Board of Pharmacy,~~  
8  ~~upon the recommendation of the superintendent of the State Police,~~  
9  ~~shall promulgate emergency and legislative rules pursuant to the~~  
10  ~~provision of article three, chapter twenty-nine-a of this code to~~  
11  ~~implement an updated supplemental list of products containing the~~  
12  ~~controlled substances ephedrine, pseudoephedrine or~~  
13  ~~phenylpropanolamine as an active ingredient or any other drug used~~  
14  ~~as a precursor in the manufacture of methamphetamine, which the~~  
15  ~~superintendent of the State Police has demonstrated by empirical~~  
16  ~~evidence is being used in the manufacture of methamphetamine. This~~  
17  ~~listing process shall comport with the requirements of subsection~~  
18  ~~(a) of this section.~~

19 **§60A-10-11. Reporting to the Legislative Oversight Commission on**  
20 **Health and Human Resources Accountability.**

21 On or before the first day of December, two thousand ~~five~~  
22 eleven, the Superintendent of the West Virginia State Police shall  
23 submit a report including findings, conclusions and  
24 recommendations, together with drafts of any legislation necessary,  
25 to improve the effectiveness of a reduction in illegal  
26 methamphetamine production and distribution to the Legislative

1 Oversight Commission on Health and Human Resources Accountability  
2 for consideration.