

1 COMMITTEE SUBSTITUTE

2 FOR

3 **H. B. 3054**

4 (By Delegates Miley, Longstreth, Fleischauer,
5 Skaff, Hamilton, Sobonya and C. Miller)

6 (Originating in the Committee on Finance)

7 [February 24, 2011]

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10 A BILL to amend and reenact §15-2B-3, §15-2B-6, §15-2B-7, §15-2B-9,
11 §15-2B-10 and §15-2B-12 of the Code of West Virginia, 1931,
12 as amended; and to amend said code by adding thereto two new
13 sections, designated §15-2B-15 and §15-2B-16, all relating to
14 the collection and use of DNA data generally; providing for
15 the collection of DNA samples from certain persons; providing
16 for a penalty of contempt for a person refusing to furnish a
17 DNA sample pursuant to a court order; and authorizing the West
18 Virginia State Police to collect certain fees for DNA testing.

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

20 That §15-2B-3, §15-2B-6, §15-2B-7, §15-2B-9, §15-2B-10 and
21 §15-2B-12 of the Code of West Virginia, 1931, as amended, be
22 amended and reenacted; and that said code be amended by adding
23 thereto two new sections, designated §15-2B-15 and §15-2B-16, all
24 to read as follows:

25 **ARTICLE 2B. DNA DATA.**

26 **§15-2B-3. Definitions.**

1 As used in this article: ~~the following terms mean:~~

2 (1) "CODIS" means the Federal Bureau of Investigation's
3 Combined DNA Index System that allows the storage and exchange of
4 DNA records submitted by federal, state and local forensic DNA
5 laboratories. The term "CODIS" includes the National DNA Index
6 System administered and operated by the Federal Bureau of
7 Investigation.

8 (2) "Conviction" includes convictions by a jury or court,
9 guilty plea, or plea of nolo contendere.

10 (3) "Criminal justice agency" means an agency or institution
11 of a federal, state or local government, other than the office of
12 public defender, which performs as part of its principal function,
13 relating to the apprehension, investigation, prosecution,
14 adjudication, incarceration, supervision or rehabilitation of
15 criminal offenders.

16 (4) "Division" means the West Virginia State Police.

17 ~~(a)~~ (5) "DNA" means deoxyribonucleic acid. DNA is located in
18 the nucleus of cells and provides an individual's personal genetic
19 blueprint. DNA encodes genetic information that is the basis of
20 human heredity and forensic identification.

21 ~~(b)~~ (6) "DNA record" means DNA identification information
22 stored in any state DNA database pursuant to this article. The DNA
23 record is the result obtained from DNA typing tests. The DNA
24 record is comprised of the characteristics of a DNA sample which
25 are of value in establishing the identity of individuals. The
26 results of all DNA identification tests on an individual's DNA

1 sample are also included as a "DNA record".

2 ~~(e)~~(7) "DNA sample" means a tissue, fluid or other bodily
3 sample, suitable for testing, provided pursuant to this article or
4 submitted to the division laboratory for analysis pursuant to a
5 criminal investigation.

6 ~~(d)~~(8) "FBI" means the Federal Bureau of Investigation.

7 (9) "Interim plan" means the plan used currently by the
8 Federal Bureau of Investigation for Partial Match Protocol and to
9 be adopted under the management rules of this article.

10 (10) "Management rules" means the rules promulgated by the
11 West Virginia State Police that define all policy and procedures in
12 the administration of this article.

13 (11) "Partial match" means that two DNA profiles, while not an
14 exact match, share a sufficient number of characteristics to
15 indicate the possibility of a biological relationship.

16 (12) "Qualifying offense" means any felony offense as
17 described in section six of this article or any offense requiring
18 a person to register as a sex offender under this code or the
19 federal law. For the purpose of this article, a person found not
20 guilty of a qualifying offense by reason of insanity or mental
21 disease or defect shall be required to provide a DNA sample in
22 accordance with this article.

23 (13) "Registering Agency" means the West Virginia State
24 Police.

25 ~~(e)~~(14) "State DNA database" means all DNA identification
26 records included in the system administered by the West Virginia

1 State Police.

2 ~~(f)~~(15) "State DNA databank" means the repository of DNA
3 samples collected under the provisions of this article.

4 ~~(g) "Division" means the West Virginia State Police.~~

5 **§15-2B-6. DNA sample required for DNA analysis upon conviction;**

6 **DNA sample required for certain prisoners.**

7 (a) Any person convicted of an offense described in section
8 one, four, seven, nine, nine-a (when that offense constitutes a
9 felony), ten, ten-a, ten-b, twelve, fourteen or fourteen-a, article
10 two, chapter sixty-one of this code or section twelve, article
11 eight of said chapter (when that offense constitutes a felony),
12 shall provide a DNA sample to be used for DNA analysis as described
13 in this article. Further, any person convicted of any offense
14 described in article eight-b or eight-d of said chapter shall
15 provide a DNA sample to be used for DNA analysis as described in
16 this article.

17 (b) Any person presently incarcerated in a state correctional
18 facility or ~~a county or regional~~ in jail in this state after
19 conviction of any offense listed in subsection (a) of this section
20 shall provide a DNA sample to be used for purposes of DNA analysis
21 as described in this article.

22 (c) Any person convicted of a violation of section five or
23 thirteen, article two, chapter sixty-one of this code, section one,
24 two, three, four, five, seven, eleven, twelve (when that offense
25 constitutes a felony) or subsection (a), section thirteen, article
26 three of said chapter, section three, four, five or ten, article

1 three-e of said chapter or section three, article four of said
2 chapter, shall provide a DNA sample to be used for DNA analysis as
3 described in this article.

4 (d) Any person convicted of an offense which constitutes a
5 felony violation of the provisions of article four, chapter sixty-a
6 of this code; or of an attempt to commit a violation of section one
7 or section fourteen-a, article two, chapter sixty-one of this code;
8 or an attempt to commit a violation of article eight-b of said
9 chapter shall provide a DNA sample to be used for DNA analysis as
10 described in this article.

11 (e) The method of taking the DNA sample is subject to the
12 testing methods ~~utilized~~ used by the West Virginia State Police
13 Crime Lab. The DNA sample will be collected using a postage paid
14 DNA collection kit provided by the West Virginia State Police.

15 (f) When a person required to provide a DNA sample pursuant to
16 this section refuses to comply, the state shall apply to a circuit
17 court for an order requiring the person to provide a DNA sample.
18 Upon a finding of failure to comply, the circuit court shall order
19 the person to submit to DNA testing in conformity with the
20 provisions of this article.

21 (g) The West Virginia State Police may, where not otherwise
22 mandated, require any person convicted of a felony offense under
23 the provisions of this code, to provide a DNA sample to be used for
24 the sole purpose of criminal identification of the convicted person
25 who provided the sample: *Provided*, That the person is under the
26 supervision of the criminal justice system at the time the request

1 for the sample is made. Supervision includes prison, the regional
2 jail system, parole, probation, home confinement, community
3 corrections program, and work release.

4 ~~(h) No part of the genetic information that is authorized to
5 be collected pursuant to this article may be used for any purpose
6 other than to establish the identity of the individual. The
7 biological sample obtained to conduct the identity test not
8 necessary to conduct a present or future identity test shall be
9 destroyed following the performance of the initial identity test
10 analysis.~~

11 (h) On the effective date of the amendments to this section
12 enacted during the regular session of the Legislature in 2011, any
13 person required to register as a sex offender in this state and who
14 has not already provided a DNA sample in accordance with this
15 article, shall provide a DNA sample as determined by the
16 registration agency in consultation with the West Virginia State
17 Police Laboratory. The registering agency is responsible for the
18 collection and submission of the sample under this article.

19 (i) When this state accepts a person from another state under
20 any interstate compact, or under any other reciprocal agreement
21 with any county, state or federal agency or any other provision of
22 law whether or not the person is confined or released, the
23 transferred person must submit a DNA sample, if the person was
24 convicted of an offense in any other jurisdiction which would be
25 considered a qualifying offense as defined in section six if
26 committed in this state, or if the person was convicted of an

1 equivalent offense in any other jurisdiction. The person shall
2 provide the DNA sample in accordance with the rules of the
3 custodial institution or supervising agency. If the transferred
4 person has already submitted a DNA sample that can be found in the
5 national database, the accepting agency is not required to draw a
6 second DNA sample.

7 (j) If a person convicted of a qualifying offense is released
8 without giving a DNA sample due to an oversight or error or because
9 of the person's transfer from another jurisdiction, the person
10 shall give a DNA sample for inclusion in the state DNA database
11 after being notified of this obligation. Any such person may
12 request a copy of the court order requiring the sample prior to the
13 collection of the DNA sample.

14 **§15-2B-7. Tests to be performed on DNA sample.**

15 The tests to be performed on each ~~blood~~ DNA sample shall
16 analyze and type the genetic markers contained in or derived from
17 the DNA sample in accordance with rules promulgated under this
18 article. Any ~~such~~ rule regarding the typing and analysis of the
19 ~~blood~~ DNA sample shall be consistent with any specifications
20 required by federal law.

21 **§15-2B-9. Procedures for withdrawal of blood sample for DNA**
22 **analysis and for conducting analysis.**

23 (a) Upon incarceration, the Division of Corrections, regional
24 jails ~~county jails~~ and felon facilities shall ensure that the ~~blood~~
25 DNA sample is ~~drawn~~ collected from all persons described in section

1 six of this article. When any person convicted of an offense
2 described in ~~said~~ section six is not incarcerated, the sheriff in
3 ~~such~~ the county where the person is convicted shall ensure that
4 ~~blood~~ the DNA sample is ~~drawn~~ collected from ~~such~~ the person at the
5 ~~regional facility~~: *Provided*, That ~~blood~~ a DNA sample may be ~~drawn~~
6 collected at ~~a county jail or at~~ a prison, regional facility or
7 local hospital unit when so ordered by the sentencing court or
8 other location determined by the sheriff. ~~The sheriff shall~~
9 ~~transport such persons who are not incarcerated to the facility~~
10 ~~where the blood is drawn.~~

11 (b) The Superintendent of the ~~division~~ West Virginia State
12 Police shall promulgate a legislative rule pursuant to chapter
13 twenty-nine-a of this code establishing which persons may withdraw
14 blood and further establishing procedures to withdraw blood. At a
15 minimum, these procedures shall require that when blood is
16 withdrawn for the purpose of DNA identification testing, a
17 previously unused and sterile needle and sterile vessel shall be
18 used, the withdrawal shall otherwise be in strict accord with
19 accepted medical practices and in accordance with any recognized
20 medical procedures employing universal precautions as ~~may be~~
21 outlined by the ~~national~~ Centers for Disease Control and
22 Prevention. No civil liability attaches to any person when the
23 blood was drawn according to recognized medical procedures
24 employing ~~such~~ the universal precautions. No person is relieved of
25 liability for negligence in the drawing of blood for purposes of
26 DNA testing.

1 (c) The Superintendent of the ~~division~~ West Virginia State
2 Police shall promulgate legislative rules pursuant to chapter
3 twenty-nine-a of this code governing the procedures to be used in
4 the ~~withdrawal of blood~~ collection of DNA samples, submission,
5 identification, analysis and storage of DNA samples and typing
6 results of DNA samples submitted under this article which shall be
7 compatible with recognized federal standards.

8 (d) The agency having control, custody or supervision of
9 persons convicted for qualifying offenses may, in consultation with
10 and approval of the West Virginia State Police Laboratory,
11 promulgate rules or policies specifying the time and manner of
12 collection of the DNA samples as well as any other matter necessary
13 to carry out its responsibilities under this article.

14 (e) The agency or institution having custody, control or
15 providing supervision of persons convicted for qualifying offenses,
16 as appropriate, is authorized to contract with third parties to
17 provide for the collection of the DNA samples described in section
18 six of this article.

19 (f) A person, convicted of a qualifying offense and not
20 incarcerated in a facility described in subsection (a) of this
21 section, who has been put on notice of his or her obligation to
22 provide a DNA sample and has not submitted a court ordered DNA
23 sample at the request of a law-enforcement agency, shall be
24 responsible for notifying the agency designated in the court order
25 and complying with that agency's directives for submitting a DNA
26 sample. The person shall have thirty days from the receipt of the

1 court order to comply unless there is a documented exception from
2 the agency responsible for the DNA sample collection. A person
3 refusing to comply with a court order directing that person submit
4 a DNA sample may be considered in contempt.

5 (g) Any court sentencing a person convicted of a qualifying
6 offense to probation, on or after the effective date of the
7 amendments to this section enacted during the regular session of
8 the Legislature in 2011, shall order, as a condition of such
9 probation, that the convicted person report to the local sheriff's
10 department to provide a DNA sample within thirty days.

11 **§15-2B-10. DNA database exchange.**

12 (a) The ~~division~~ West Virginia State Police shall receive DNA
13 samples, store, analyze, classify and file the DNA records
14 consisting of all identification characteristics of DNA profiles
15 from ~~blood~~ DNA samples submitted pursuant to the procedures for
16 conducting DNA analysis of ~~blood~~ DNA samples.

17 (b) The ~~division~~ West Virginia State Police may furnish DNA
18 records to authorized law-enforcement and governmental agencies of
19 the United States and its territories, of foreign countries duly
20 authorized to receive ~~the same~~ them, of other states within the
21 United States and of the State of West Virginia upon proper request
22 stating that the DNA records requested will be used solely:

23 (1) For law enforcement identification purposes by criminal
24 justice agencies;

25 (2) In judicial proceedings, if otherwise expressly permitted
26 by state or federal laws; ~~or~~

1 (3) If personal identifying information is removed, for a
2 population statistics database, for identification research and
3 protocol development purposes, or for quality control purposes; or

4 (4) For the identification of unidentified human remains,
5 missing persons and relatives of missing persons.

6 (c) The Superintendent of the ~~division~~ West Virginia State
7 Police shall promulgate ~~further~~ legislative rules pursuant to
8 chapter twenty-nine-a of this code governing the methods by which
9 any law-enforcement agency or other authorized entity may obtain
10 information from the state DNA database consistent with this
11 section and federal law.

12 (d) The ~~division~~ West Virginia State Police may release DNA
13 samples, without personal identifying information, to any agency or
14 entity with which the ~~division~~ West Virginia State Police contracts
15 pursuant to section five of this article.

16 (e) The West Virginia State Police may release DNA samples for
17 criminal defense and appeal purposes, to a defendant who is
18 entitled to access to samples and analysis performed in connection
19 with the case in which the defendant is charged or was convicted.

20 (f) Searches of the state DNA database shall be performed in
21 accordance with state and federal law and procedures.

22 **§15-2B-12. Confidentiality; unauthorized uses of DNA databank;**
23 **penalties.**

24 (a) All DNA profiles and samples submitted to the ~~division of~~
25 ~~public safety~~ West Virginia State Police pursuant to this article
26 shall be treated as confidential except as provided in this

1 article.

2 (b) Any person who, by virtue of employment or official
3 position has possession of or access to individually identifiable
4 DNA information contained in the state DNA database or databank and
5 who willfully discloses it in any manner to any person or agency
6 not entitled to receive it is guilty of a misdemeanor and, upon
7 conviction thereof, shall be fined not less than \$50 nor more than
8 \$500 or ~~be imprisoned in the county or regional jails~~ confined in
9 jail for a period not to exceed one year, or both fined and
10 ~~imprisoned~~ confined.

11 (c) Any person who, without authorization, willfully obtains
12 individually identifiable DNA information from the state DNA
13 database or databank is guilty of a misdemeanor and, upon
14 conviction thereof, shall be fined not less than \$50 nor more than
15 \$500 or ~~be imprisoned in the county or regional jails~~ confined in
16 jail for a period not to exceed one year, or both fined and
17 ~~imprisoned~~ confined.

18 (d) DNA records and DNA samples submitted to the West Virginia
19 State Police Laboratory pursuant to this article are exempt from
20 disclosure under the provisions of article one, chapter
21 twenty-nine-b of this code, or any other statutory provision or
22 court opinion requiring the disclosure of public records.

23 (e) In case of a criminal proceeding, a request to access a
24 person's DNA record must be made in accordance with rules for
25 criminal discovery as provided in the West Virginia Code and the
26 Rules of Criminal Procedure. The West Virginia State Police

1 Laboratory is not required to provide, for criminal discovery
2 purposes, more than the DNA profile(s) and identifying information
3 generated as a result of the search that led to the match between
4 the case evidence and the defendant.

5 **§15-2B-15. Collection of fees to cover the cost of DNA profile**
6 **entry into the DNA database and DNA databank; cost**
7 **of collecting and analyzing DNA sample.**

8 For persons convicted after July 1, 2011, a mandatory fee of
9 \$150, which is in addition to any other costs imposed pursuant to
10 statutory authority, shall automatically be assessed on any person
11 convicted of, or adjudicated delinquent for, a qualifying offense,
12 unless the court finds that undue hardship would result. This fee
13 shall be collected by the sentencing court or the agency
14 responsible for the collection of the DNA sample and remitted to
15 the State Treasury on or before the tenth of every month.
16 Notwithstanding any other provision of this code to the contrary,
17 all moneys collected as a result of this fee shall be deposited in
18 a special account within the State Treasury to be known as the
19 "West Virginia State Police DNA Database Account" to be
20 administered by the Superintendent of the West Virginia State
21 Police. Expenditures from the fund are authorized from collections
22 for purposes associated with the processing of DNA samples for the
23 DNA database.

24 **§15-2B-16. Partial matches and the DNA database.**

25 The division may use the data in the DNA database for partial

1 match analysis for criminal investigations of murder, kidnapping
2 and first and second degree sexual assault, as defined in this
3 code, where all investigated leads have been exhausted. The
4 division shall follow the standards and procedures defined in the
5 Interim Plan when replying to requests for partial match
6 information from criminal justice agencies from within or outside
7 the state until such time as the division promulgates management
8 rules.