

1 **Senate Bill No. 320**

2 (By Senators Kessler (Acting President), Plymale and Hall)

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4 [Introduced January 27, 2011; referred to the Committee on  
5 Government Organization; and then to the Committee on the  
6 Judiciary.]  
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11 A BILL to amend the Code of West Virginia, 1931, as amended, by  
12 adding thereto a new section, designated §15-2B-15; and to  
13 amend and reenact §57-5-11 of said code, all relating to  
14 requiring certain governmental entities and circuit courts to  
15 retain and preserve biological material for possible DNA  
16 testing that is gathered in the investigation or prosecution  
17 of a criminal case for the period of time that a defendant  
18 remains incarcerated in connection with that case; and  
19 establishing criminal penalties.

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

21 That the Code of West Virginia, 1931, as amended, be amended  
22 by adding thereto a new section, designated §15-2B-15; and that  
23 §57-5-11 of said code be amended and reenacted, all to read as  
24 follows:

1                                   **CHAPTER 15. PUBLIC SAFETY.**

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

3 **§15-2B-15. Preservation of biological evidence.**

4           (a) The appropriate governmental entity, including, but not  
5 limited to, any investigating law-enforcement agency, the clerk of  
6 the circuit court or the prosecuting attorney, shall preserve any  
7 biological evidence that was secured in the investigation or  
8 prosecution of a criminal case for the period of time that the  
9 defendant remains incarcerated in connection with that case.

10          (b) For purposes of this section, the term "biological  
11 evidence" means:

12           (1) A sexual assault forensic examination kit; or

13           (2) Any physical evidence that is reasonably likely to contain  
14 semen, blood, saliva, hair, skin tissue or other identified  
15 biological material.

16          (c) Subsection (a) of this section does not apply if:

17           (1) A court has denied a request or motion for DNA testing of  
18 the biological evidence by the defendant under the provisions of  
19 section fourteen of this article and no appeal is pending;

20           (2) The defendant knowingly and voluntarily waived the right  
21 to request DNA testing of the biological material in a court  
22 proceeding after the date of the enactment of the provisions of  
23 section fourteen of this article;

24           (3) After a conviction becomes final and the defendant has

1 exhausted all opportunities for direct review of the conviction,  
2 the defendant is notified by the appropriate governmental authority  
3 that the biological evidence may be destroyed and the defendant  
4 does not file a motion under section fourteen of this article  
5 within one hundred eighty days of receipt of the notice; and

6 (4) (A) The evidence must be returned to its rightful owner,  
7 or is of a size, bulk or physical character as to render retention  
8 impracticable;

9 (B) The appropriate governmental entity takes reasonable  
10 measures to remove and preserve portions of the material evidence  
11 sufficient to permit future DNA testing; or

12 (5) The biological evidence has already been subjected to DNA  
13 testing under section fourteen of this article and the results  
14 included the defendant as the source of the evidence.

15 (d) The appropriate governmental entity has the discretion to  
16 determine how the biological evidence is retained pursuant to this  
17 section so long as it is retained in a condition suitable for DNA  
18 testing and analysis.

19 (e) Nothing in this section preempts or supercedes any court  
20 order or any provision of another statute that may require  
21 evidence, including biological evidence, to be preserved.

22 (f) Any person who knowingly and intentionally destroys,  
23 alters or tampers with biological evidence that is required to be  
24 preserved under this section with the intent to prevent that

1 evidence from being subjected to DNA testing or prevents the  
 2 production or use of that evidence in a court proceeding, is guilty  
 3 of a felony and, upon conviction thereof, shall be fined not less  
 4 than \$500, nor more than \$5,000, or imprisoned in a state  
 5 correctional facility not less than one year, nor more than five  
 6 years, or both fined and imprisoned.

7 (g) Nothing in this section provides a basis for relief in any  
 8 state habeas corpus proceeding.

9 **CHAPTER 57. EVIDENCE AND WITNESSES.**

10 **ARTICLE 5. MISCELLANEOUS PROVISIONS.**

11 **§57-5-11. Disposal of exhibits or articles offered in evidence;  
 12 disposal of property in hands of law-enforcement  
 13 officials.**

14 Except as otherwise provided in section fifteen, article two-  
 15 b, chapter fifteen of this code, any circuit court in this state,  
 16 or the judge thereof in vacation, may in its discretion by order  
 17 entered of record dispose of by return to the owner, ~~thereof,~~ or by  
 18 destruction, sale or otherwise, any exhibit or article introduced  
 19 or offered in evidence at the hearing, or upon the trial, of any  
 20 matter or case before ~~such~~ the court or judge and remaining in the  
 21 custody or control of ~~such~~ the court for a period of thirty days  
 22 after the expiration of the time within which an appeal may be  
 23 taken from any final order or judgment in such matter or case if no

1 appeal is taken. ~~therefrom, or thirty days, after any final order~~  
2 ~~or judgment of an appellate court, if such appeal is taken therein.~~  
3 If an appeal is taken, items remaining in the possession of the  
4 court may be disposed of by order, sale, destruction, return to  
5 owner or otherwise, thirty days after a final order or judgment of  
6 an appellate court. ~~Provided, That~~ If the ownership of such exhibit  
7 or article ~~be~~ is known, the owner shall be notified and such  
8 exhibit or article shall be returned to him or her if he or she so  
9 desires.

10 Any sale directed hereunder shall be made upon such notice and  
11 terms and by such officer or other person as the court or judge  
12 ~~shall direct.~~ directs. The proceeds of any ~~such~~ sale shall be  
13 applied to the reasonable costs and expenses of ~~such~~ the sale as  
14 the court or judge ~~shall~~ allows and the remainder ~~thereof shall be~~  
15 is paid into the State Treasury.

16 The provisions of this section ~~shall~~ do not apply or extend to  
17 the county commission of any county nor shall any property or  
18 article be disposed of hereunder contrary to any other statute  
19 which expressly provides a different disposition.

NOTE: The purpose of this bill is to require certain governmental entities and circuit courts to retain and preserve biological material for possible DNA testing that is gathered in the investigation or prosecution of a criminal case for the period of time that a defendant remains incarcerated in connection with that case. The bill also provides a felony penalty for willful and

intentional violations.

§15-2B-15 is new; therefore, strike-throughs and underscoring have been omitted.

Strike-throughs indicate language that would be stricken from the present law and underscoring indicates new language that would be added.