

Senate Bill No. 431

(By Senators Palumbo, Edgell, K. Facemyer, Jenkins,
Barnes, Klempa, Unger, Plymale, Yost and Nohe)

[Introduced February 4, 2011; referred to the Committee on the
Judiciary; and then to the Committee on Finance.]

A BILL to amend and reenact §15-2B-3, §15-2B-6, §15-2B-7, §15-2B-9,
§15-2B-10 and §15-2B-12 of the Code of West Virginia, 1931, as
amended; and to amend said code by adding thereto two new
sections, designated §15-2B-15 and §15-2B-16, all relating to
DNA data collection generally; providing definitions;
authorizing the West Virginia State Police to administer DNA
identification system; authorizing the West Virginia State
Police to enter into certain cooperative agreements; requiring
DNA sample be obtained upon conviction; identifying tests to
be performed on DNA samples; providing authority to maintain
samples; providing procedure for withdrawing and analyzing
samples; providing procedure for exchanging samples with
others; providing procedure for removing sample from database
by expungement; providing for destruction of samples;
providing penalties; and authorizing the West Virginia State
Police to collect certain fees for DNA testing.

Be it enacted by the Legislature of West Virginia:

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

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

7 **§15-2B-3. Definitions.**

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

9 ~~(a)~~ "CODIS" means the Federal Bureau of Investigation's
10 Combined DNA Index System that allows the storage and exchange of
11 DNA records submitted by federal, state and local forensic DNA
12 laboratories. The term "CODIS" includes the National DNA Index
13 System administered and operated by the Federal Bureau of
14 Investigation.

15 "Conviction" includes convictions by a jury or court, guilty
16 plea, plea of nolo contendere or a finding of not guilty by reason
17 of insanity or mental disease or defect. A finding of not guilty
18 by reason of insanity or mental disease or defect is considered a
19 conviction solely for purposes of this article insofar as the
20 finding requires a person to provide a DNA sample.

21 "Criminal justice agency" means an agency or institution of a
22 federal, state or local government, other than the office of public
23 defender, which performs as part of its principal function,
24 relating to the apprehension, investigation, prosecution,
25 adjudication, incarceration, supervision or rehabilitation of
26 criminal offenders.

1 "Division" means the West Virginia State Police.

2 "DNA" means deoxyribonucleic acid. DNA is located in the
3 nucleus of cells and provides an individual's personal genetic
4 blueprint. DNA encodes genetic information that is the basis of
5 human heredity and forensic identification.

6 ~~(b)~~ "DNA record" means DNA identification information stored
7 in any state DNA database pursuant to this article. The DNA record
8 is the result obtained from DNA typing tests. The DNA record is
9 comprised of the characteristics of a DNA sample which are of value
10 in establishing the identity of individuals. The results of all
11 DNA identification tests on an individual's DNA sample are also
12 included as a "DNA record".

13 ~~(c)~~ "DNA sample" means a tissue, fluid or other bodily sample,
14 suitable for testing, provided pursuant to this article or
15 submitted to the division laboratory for analysis pursuant to a
16 criminal investigation.

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

18 "Interim plan" means the plan used currently by the Federal
19 Bureau of Investigation for Partial Match Protocol and to be
20 adopted under the management rules of this article.

21 "Juvenile" and "child" refer to a person who has not attained
22 the age of eighteen years or a person who is otherwise subject to
23 the juvenile jurisdiction of a court pursuant to this article.

24 "Management rules" means the rules promulgated by the West
25 Virginia State Police that define all policy and procedures in the
26 administration of this article.

1 "Partial match" means that two DNA profiles, while not an
2 exact match, share a sufficient number of characteristics to
3 indicate the possibility of a biological relationship.

4 "Qualifying offense" means any felony offense as defined in
5 the penal code in any jurisdiction of the person and any offense
6 requiring a person to register as a sex offender under this code or
7 the federal law.

8 "Registering Agency" means the West Virginia State Police.

9 ~~(e)~~ "State DNA database" means all DNA identification records
10 included in the system administered by the West Virginia State
11 Police.

12 ~~(f)~~ "State DNA databank" means the repository of DNA samples
13 collected under the provisions of this article.

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

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

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

17 (a) Any person convicted of an offense described in section
18 one, four, seven, nine, nine-a (when that offense constitutes a
19 felony), ten, ten-a, ten-b, twelve, fourteen or fourteen-a, article
20 two, chapter sixty-one of this code or section twelve, article
21 eight of said chapter (when that offense constitutes a felony),
22 shall provide a DNA sample to be used for DNA analysis as described
23 in this article. Further, any person convicted of any offense
24 described in article eight-b or eight-d of said chapter shall
25 provide a DNA sample to be used for DNA analysis as described in
26 this article.

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

6 (c) Any person convicted of a violation of section five or
7 thirteen, article two, chapter sixty-one of this code, section one,
8 two, three, four, five, seven, eleven, twelve (when that offense
9 constitutes a felony) or subsection (a), section thirteen, article
10 three of said chapter, section three, four, five or ten, article
11 three-e of said chapter or section three, article four of said
12 chapter, shall provide a DNA sample to be used for DNA analysis as
13 described in this article.

14 (d) Any person convicted of an offense which constitutes a
15 felony violation of the provisions of article four, chapter sixty-a
16 of this code; or of an attempt to commit a violation of section one
17 or section fourteen-a, article two, chapter sixty-one of this code;
18 or an attempt to commit a violation of article eight-b of said
19 chapter shall provide a DNA sample to be used for DNA analysis as
20 described in this article.

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

25 (f) When a person required to provide a DNA sample pursuant to
26 this section refuses to comply, the state shall apply to a circuit

1 court for an order requiring the person to provide a DNA sample.
2 Upon a finding of failure to comply, the circuit court shall order
3 the person to submit to DNA testing in conformity with the
4 provisions of this article.

5 (g) The West Virginia State Police may, where not otherwise
6 mandated, require any person convicted of a felony offense under
7 the provisions of this code, to provide a DNA sample to be used for
8 the sole purpose of criminal identification of the convicted person
9 who provided the sample: *Provided*, That the person is under the
10 supervision of the criminal justice system at the time the request
11 for the sample is made. Supervision includes prison, the regional
12 jail system, parole, probation, home confinement, community
13 corrections program, and work release.

14 ~~(h) No part of the genetic information that is authorized to~~
15 ~~be collected pursuant to this article may be used for any purpose~~
16 ~~other than to establish the identity of the individual. The~~
17 ~~biological sample obtained to conduct the identity test not~~
18 ~~necessary to conduct a present or future identity test shall be~~
19 ~~destroyed following the performance of the initial identity test~~
20 ~~analysis.~~

21 (h) Duly authorized law enforcement and state personnel
22 designated by the collecting agency may employ reasonable force in
23 cases where a person refuses to provide a DNA sample required under
24 this article after first obtaining a court order requiring the
25 person to provide a DNA sample. Those duly authorized law
26 enforcement and state personnel designated by the collecting agency

1 are not civilly or criminally liable for the use of reasonable
2 force.

3 (i) On the effective date of the amendments to this section
4 enacted during the regular session of the Legislature in 2011, any
5 person required to register as a sex offender in this state and who
6 has not already provided a DNA sample in accordance with this
7 article, shall provide a DNA sample as determined by the
8 registration agency in consultation with the West Virginia State
9 Police Laboratory. The registering agency is responsible for the
10 collection and submission of the sample under this article.

11 (j) Effective January 1, 2012, any juvenile under the
12 supervision of the state as a result of an action which would be a
13 qualifying crime if committed by an adult or if a juvenile commits
14 an act which would be a qualifying crime if committed by an adult,
15 and the juvenile is adjudicated delinquent for that act, is
16 required to provide a DNA sample for the sole purpose of criminal
17 identification. The expungement requirements and procedures shall
18 be provided pursuant to section eleven of this article. A person
19 who is convicted or adjudicated delinquent for a qualifying offense
20 shall provide a DNA sample as a condition for any sentence or
21 adjudication which disposition will not involve a period of
22 incarceration. The confidentiality of juvenile records will comply
23 with the standards described in section ten, article two-b, chapter
24 fifteen of the code, as well as section seventeen, article five,
25 chapter forty-nine and section one, article seven, chapter forty
26 nine. The handling of the personal information associated with

1 juvenile DNA records will comply with section eighteen, article
2 five, chapter forty-nine where appropriate.

3 (k) When this state accepts a person from another state under
4 any interstate compact, or under any other reciprocal agreement
5 with any county, state or federal agency or any other provision of
6 law whether or not the person is confined or released, the
7 acceptance is conditional on the person providing a DNA sample if
8 the person was convicted of an offense in any other jurisdiction
9 which would be considered a qualifying offense as defined in
10 section six if committed in this state, or if the person was
11 convicted of an equivalent offense in any other jurisdiction. The
12 person shall provide the DNA sample in accordance with the rules of
13 the custodial institution or supervising agency. However, if the
14 West Virginia State Police determines that such person has already
15 submitted a DNA sample that is stored in the national database, the
16 accepting agency is not required to draw a second DNA sample.

17 (l) If a person convicted or adjudicated of a qualifying
18 offense is released without giving a DNA sample due to an oversight
19 or error or because of the person's transfer from another
20 jurisdiction, the person shall give a DNA sample for inclusion in
21 the state DNA database after being notified by the West Virginia
22 State Police Laboratory and, upon request by the person, being
23 provided a copy of the court order prior to the DNA sample being
24 collected.

25 **§15-2B-7. Tests to be performed on blood sample.**

26 The tests to be performed on each ~~blood~~ DNA sample shall

1 analyze and type the genetic markers contained in or derived from
2 the DNA sample in accordance with rules promulgated under this
3 article. Any ~~such~~ rule regarding the typing and analysis of the
4 ~~blood~~ DNA sample shall be consistent with any specifications
5 required by federal law.

6 **§15-2B-9. Procedures for withdrawal of blood sample for DNA**
7 **analysis and for conducting analysis.**

8 (a) Upon incarceration, the Division of Corrections, regional
9 jails ~~county jails~~ and felon facilities shall ensure that the ~~blood~~
10 DNA sample is ~~drawn~~ collected from all persons described in section
11 six of this article. When any person convicted of an offense
12 described in ~~said~~ section six is not incarcerated, the sheriff in
13 ~~such~~ the county where the person is convicted shall ensure that
14 ~~blood~~ the DNA sample is ~~drawn~~ collected from ~~such~~ the person at the
15 regional facility: *Provided*, That ~~blood~~ a DNA sample may be ~~drawn~~
16 collected at ~~a county jail or at~~ a prison, regional facility or
17 local hospital unit when so ordered by the sentencing court or
18 other location determined by the sheriff. ~~The sheriff shall~~
19 ~~transport such persons who are not incarcerated to the facility~~
20 ~~where the blood is drawn.~~

21 (b) The superintendent of the ~~division~~ West Virginia State
22 Police shall promulgate a legislative rule pursuant to chapter
23 twenty-nine-a of this code establishing which persons may withdraw
24 blood and further establishing procedures to withdraw blood. At a
25 minimum, these procedures shall require that when blood is
26 withdrawn for the purpose of DNA identification testing, a

1 previously unused and sterile needle and sterile vessel shall be
2 used, the withdrawal shall otherwise be in strict accord with
3 accepted medical practices and in accordance with any recognized
4 medical procedures employing universal precautions as ~~may be~~
5 outlined by the ~~national~~ Centers for Disease Control and
6 Prevention. No civil liability attaches to any person when the
7 blood was drawn according to recognized medical procedures
8 employing ~~such~~ the universal precautions. No person is relieved of
9 liability for negligence in the drawing of blood for purposes of
10 DNA testing.

11 (c) The superintendent of the ~~division~~ West Virginia State
12 Police shall promulgate legislative rules pursuant to chapter
13 twenty-nine-a of this code governing the procedures to be used in
14 the ~~withdrawal of blood~~ collection of DNA samples, submission,
15 identification, analysis and storage of DNA samples and typing
16 results of DNA samples submitted under this article which shall be
17 compatible with recognized federal standards.

18 (d) The agency having control, custody or supervision of
19 persons convicted or adjudicated delinquent for qualifying offenses
20 may, in consultation with and approval of the West Virginia State
21 Police Laboratory, promulgate rules or policies specifying the time
22 and manner of collection of the DNA samples as well as any other
23 matter necessary to carry out its responsibilities under this
24 article.

25 (e) The agency or institution having custody, control or
26 providing supervision of persons convicted or adjudicated

1 delinquent for qualifying offenses, as appropriate, is authorized
2 to contract with third parties to provide for the collection of the
3 DNA samples described in section six of this article.

4 (f) A person, convicted of a qualifying offense and not
5 incarcerated in a facility described in subsection (a) of this
6 section, who has not submitted a court ordered DNA sample at the
7 request of a law-enforcement agency, shall be responsible for
8 notifying the agency designated in the court order and complying
9 with that agency's directives for submitting a DNA sample. The
10 person shall have thirty days from the receipt of the court order
11 to comply unless there is a documented exception from the agency
12 responsible for the DNA sample collection. A person refusing to
13 comply with a court order directing that person submit a DNA sample
14 may be considered in contempt.

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

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

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

1 (1) For law-enforcement identification purposes by criminal
2 justice agencies;

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

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

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

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

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

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

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

26 (g) If a DNA match is developed and it is later determined

1 that the person's DNA sample was collected under this law by
2 mistake, the West Virginia State Police may, upon completion of the
3 confirmation process, still release the identification information
4 to the investigation agency. The detention arrest or conviction of
5 an individual based on this match is not invalidated.

6 **§15-2B-12. Confidentiality; unauthorized uses of DNA databank;**
7 **penalties.**

8 (a) All DNA profiles and samples submitted to the ~~division of~~
9 ~~public safety~~ West Virginia State Police pursuant to this article
10 shall be treated as confidential except as provided in this
11 article.

12 (b) Any person who, by virtue of employment or official
13 position has possession of or access to individually identifiable
14 DNA information contained in the state DNA database or databank and
15 who willfully discloses it in any manner to any person or agency
16 not entitled to receive it is guilty of a misdemeanor and, upon
17 conviction thereof, shall be fined not less than \$50 nor more than
18 \$500 or ~~be imprisoned in the county or regional jails~~ confined in
19 jail for a period not to exceed one year, or both fined and
20 ~~imprisoned~~ confined.

21 (c) Any person who, without authorization, willfully obtains
22 individually identifiable DNA information from the state DNA
23 database or databank is guilty of a misdemeanor and, upon
24 conviction thereof, shall be fined not less than \$50 nor more than
25 \$500 or ~~be imprisoned in the county or regional jails~~ confined in
26 jail for a period not to exceed one year, or both fined and

1 ~~imprisoned~~ confined.

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

7 (e) In case of a criminal proceeding, a request to access a
8 person's DNA record must be made in accordance with rules for
9 criminal discovery as provided in the West Virginia Code and the
10 Rules of Criminal Procedure. The West Virginia State Police
11 Laboratory is not required to provide the state DNA database for
12 criminal discovery purposes.

13 **§15-2B-15. Collection of fees to cover the cost of DNA profile**
14 **entry into the DNA database and DNA databank; cost**
15 **of collecting and analyzing DNA sample.**

16 Unless the court finds that undue hardship would result, a
17 mandatory fee of \$150, which is in addition to any other costs
18 imposed pursuant to statutory authority, shall automatically be
19 assessed on any person convicted of, or adjudicated delinquent for,
20 a qualifying offense. Notwithstanding any other provision of this
21 code, amounts collected as a result of this fee shall be
22 transferred to a special revenue account within the West Virginia
23 State Police entitled the West Virginia State Police DNA Database
24 Account. Funds deposited are only available for expenditures for
25 purposes associated with the processing of DNA samples for the DNA
26 database.

1 **§15-2B-16. Partial matches and the DNA database.**

2 In cases limited to murder, kidnapping and first and second
3 degree sexual assault, as defined in this code, where all
4 investigated leads have been exhausted and under the guidance of
5 the management rules, the partial match analysis may be used as an
6 investigative tool. The same standards and procedures defined in
7 the management rules and in this section apply to requests for
8 partial match information from criminal justice agencies from
9 outside the state.

NOTE: The purpose of this bill is to authorize the West Virginia State Police to administer DNA identification system and the collection of DNA generally.

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

§15-2B-15 and §15-2B-16 are new; therefore, strike-throughs and underscoring have been omitted.