

1 **Senate Bill No. 588**

2 (By Senators Palumbo and Plymale)

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4 [Introduced February 14, 2014; referred to the
5 Committee on the Judiciary.]
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10 A BILL to amend and reenact §15-2B-2, §15-2B-3, §15-2B-5, §15-2B-6,
11 §15-2B-9, §15-2B-10 and §15-2B-11 of the Code of West
12 Virginia, 1931, as amended; and to amend said code by adding
13 thereto a new section, designated §15-2B-11a, all relating to
14 the collection of DNA samples from individuals arrested for
15 first degree murder, second degree murder, kidnapping, first
16 degree and second degree sexual assault, aggravated robbery
17 and malicious wounding for inclusion in the DNA Databank.

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

19 That §15-2B-2, §15-2B-3, §15-2B-5, §15-2B-6, §15-2B-9,
20 §15-2B-10 and §15-2B-11 of the Code of West Virginia, 1931, as
21 amended, be amended and reenacted; and that said code be amended by
22 adding thereto a new section, designated §15-2B-11a, all to read as
23 follows:

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

2 **§15-2B-2. Policy.**

3 It is the policy of this state to assist federal, state and
4 local criminal justice and law-enforcement agencies in the
5 identification, detection and exclusion of individuals who are
6 subjects of the investigation or prosecution of violent crimes,
7 sex-related crimes and other crimes against the person. DNA
8 records are an important identification tool that can be used to
9 confirm/verify information provided by fingerprints. In
10 furtherance of such assistance, the Legislature finds:

11 That the analysis of DNA contained in biological evidence that
12 may be recovered from a crime scene facilitates such
13 identification, detection and exclusion;

14 That the comparison of DNA data recovered from a crime scene
15 with existing DNA records maintained in a central DNA database
16 further facilitates such identification, detection and exclusion;
17 and

18 That requiring individuals arrested or convicted of certain
19 crimes to provide a blood sample for DNA analysis with the
20 resulting DNA records maintained in a central DNA database will
21 likewise further facilitate the aforementioned confirmation,
22 identification, detection and exclusion and may serve to discourage
23 recidivism.

1 Therefore, the Legislature finds that assisting federal, state
2 and local criminal justice and law-enforcement agencies through the
3 use and development of DNA analysis is of the utmost importance and
4 urgency in this state and that a DNA identification system shall be
5 established as described in this article.

6 **§15-2B-3. Definitions.**

7 As used in this article:

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

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

16 (3) "Criminal justice agency" means an agency or institution
17 of a federal, state or local government, other than the office of
18 public defender, which performs as part of its principal function,
19 relating to the apprehension, investigation, prosecution,
20 adjudication, incarceration, supervision or rehabilitation of
21 criminal offenders.

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

23 (5) "DNA" means deoxyribonucleic acid. DNA is located in the

1 nucleus of cells and provides an individual's personal genetic
2 blueprint. DNA encodes genetic information that is the basis of
3 human heredity and forensic identification.

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

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

15 (8) "FBI" means the Federal Bureau of Investigation.

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

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

22 (11) "Partial match" means that two DNA profiles, while not an
23 exact match, share a sufficient number of characteristics to

1 indicate the possibility of a biological relationship.

2 (12) "Qualifying offense" means any felony offense as
3 described in section six of this article or any offense requiring
4 a person to register as a sex offender under this code or the
5 federal law. For the purpose of this article, a person found not
6 guilty of a qualifying offense by reason of insanity or mental
7 disease or defect shall be required to provide a DNA sample in
8 accordance with this article.

9 (13) "Registering Agency" means the West Virginia State
10 Police.

11 (14) "State DNA database" means all DNA identification records
12 included in the system administered by the West Virginia State
13 Police.

14 (15) "State DNA databank" means the repository of DNA samples
15 collected under the provisions of this article.

16 (16) "Arrestee" means any individual arrested for first degree
17 murder, second degree murder, kidnaping, first degree sexual
18 assault, second degree sexual assault, aggravated robbery or
19 malicious wounding.

20 (17) "Arresting authority" means the law-enforcement officer
21 who arrests the individual or an authorized representative of the
22 agency responsible for the arrest.

23 **§15-2B-5. Authority of division to enter into cooperative**

1 **agreements.**

2 The division may enter into cooperative agreements with public
3 or private agencies or entities to provide a service or facility
4 associated with the administration of the DNA database and
5 databank. In the event the division enters into any agreements for
6 the purposes of: (1) Testing of arrestee/offender samples for
7 CODIS; (2) criminal paternity cases; or (3) identification of human
8 remains for the Office of Chief Medical Examiner using nuclear DNA
9 technology, the division is authorized to only enter into such
10 agreements with the Marshall University Forensic Science Center.

11 **§15-2B-6. DNA sample required for DNA analysis upon conviction;**

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

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

23 (b) Any person presently incarcerated in a state correctional

1 facility or in jail in this state after conviction of any offense
2 listed in subsection (a) of this section shall provide a DNA sample
3 to be used for purposes of DNA analysis as described in this
4 article.

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

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

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

1 (f) When a person required to provide a DNA sample pursuant to
2 this section refuses to comply, the state shall apply to a circuit
3 court for an order requiring the person to provide a DNA sample.
4 Upon a finding of failure to comply, the circuit court shall order
5 the person to submit to DNA testing in conformity with the
6 provisions of this article.

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

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

1 (i) When this state accepts a person from another state under
2 any interstate compact, or under any other reciprocal agreement
3 with any county, state or federal agency or any other provision of
4 law whether or not the person is confined or released, the
5 transferred person must submit a DNA sample, if the person was
6 convicted of an offense in any other jurisdiction which would be
7 considered a qualifying offense as defined in section six if
8 committed in this state, or if the person was convicted of an
9 equivalent offense in any other jurisdiction. The person shall
10 provide the DNA sample in accordance with the rules of the
11 custodial institution or supervising agency. If the transferred
12 person has already submitted a DNA sample that can be found in the
13 national database, the accepting agency is not required to draw a
14 second DNA sample.

15 (j) If a person convicted of a qualifying offense is released
16 without giving a DNA sample due to an oversight or error or because
17 of the person's transfer from another jurisdiction, the person
18 shall give a DNA sample for inclusion in the state DNA database
19 after being notified of this obligation. Any such person may
20 request a copy of the court order requiring the sample prior to the
21 collection of the DNA sample.

22 (k) Duly authorized law-enforcement and corrections personnel
23 may employ reasonable force in cases where an individual refuses to

1 provide a DNA sample required under this article, and no such
2 employee shall be civilly or criminally liable for the use of such
3 reasonable force in the collection of the required DNA sample.

4 (l) A DNA sample obtained in good faith shall be deemed to
5 have been obtained in accordance with the requirements of this
6 article and its use in accordance with this chapter is authorized.
7 Once an error is determined to have occurred, the DNA record will
8 be removed from CODIS and the DNA sample destroyed unless the
9 individual has another qualifying offense(s).

10 (m) Persons authorized to collect DNA samples are not civilly
11 or criminally liable for the collection of a DNA sample pursuant to
12 this article if they perform these duties in good faith and in a
13 reasonable manner according to generally accepted medical or other
14 professional practices.

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

17 (a) Upon incarceration, the Division of Corrections, regional
18 jails and felon facilities shall ensure that the DNA sample is
19 collected from all persons described in section six of this
20 article. When any person convicted of an offense described in
21 section six is not incarcerated, the sheriff in the county where
22 the person is convicted shall ensure that the DNA sample is
23 collected from the person: *Provided*, That a DNA sample may be

1 collected at a prison, regional facility or local hospital unit
2 when so ordered by the sentencing court or other location
3 determined by the sheriff.

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

19 (c) The Superintendent of the West Virginia State Police shall
20 promulgate legislative rules pursuant to chapter twenty-nine-a of
21 this code governing the procedures to be used in the collection of
22 DNA samples, submission, identification, analysis and storage of
23 DNA samples and typing results of DNA samples submitted under this

1 article which shall be compatible with recognized federal
2 standards.

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

9 (e) The agency or institution having custody, control or
10 providing supervision of persons arrested for first degree murder,
11 second degree murder, kidnaping, first degree sexual assault,
12 second degree sexual assault, aggravated robbery or malicious
13 wounding, or convicted for qualifying offenses, as appropriate, is
14 authorized to contract with third parties to provide for the
15 collection of the DNA samples described in section six of this
16 article.

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

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

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

12 **§15-2B-10. DNA database exchange; severability.**

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

18 (b) The West Virginia State Police may furnish DNA records to
19 authorized law-enforcement and governmental agencies of the United
20 States and its territories, of foreign countries duly authorized to
21 receive them, of other states within the United States and of the
22 State of West Virginia upon proper request stating that the DNA
23 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;

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

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

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

23 (f) Searches of the state DNA database shall be performed in

1 accordance with state and federal law and procedures.

2 (g) The provisions of this article shall be liberally
3 construed and shall be held to be in addition to, and not in
4 substitution for or a limitation on the provisions of any other
5 law. If any provision or part of this article is held
6 unconstitutional or otherwise invalid, the remainder of this
7 article shall not be affected.

8 **§15-2B-11. Expungement.**

9 (a) Any person whose DNA record or profile has been included
10 in the state database and whose DNA sample is stored in the state
11 databank or the state's designated DNA typing, testing and research
12 laboratory may apply for expungement on the grounds that the felony
13 conviction that resulted in the inclusion of the person's DNA
14 record or profile in the state database or the inclusion of the
15 person's DNA sample in the state databank has been reversed and the
16 case dismissed. The person requesting expungement, either
17 individually or through an attorney, may apply to the court for
18 expungement of the record. A copy of the application for
19 expungement shall be served on the prosecuting attorney for the
20 judicial district in which the felony conviction was obtained not
21 less than twenty days prior to the date of the hearing on the
22 application. A certified copy of the order reversing and
23 dismissing the conviction shall be attached to an order of

1 expungement.

2 (b) Upon receipt of an order of expungement, the division
3 shall purge the DNA record and all other identifiable information
4 from the state database and the DNA sample stored in the state
5 databank covered by the order. If the individual has more than one
6 entry in the state database and databank, then only the entry
7 covered by the expungement order shall be deleted from the state
8 database or databank.

9 (c) Any identification, warrant, probable cause to arrest or
10 arrest based upon a database match is not invalidated due to a
11 failure to expunge or a reasonable delay in expunging records.

12 **§15-2B-11a. Expungement for arrestees.**

13 A person whose DNA record has been included in the State DNA
14 database in accordance with this article may request expungement on
15 the grounds that the arrest on which the authority for including
16 the persons' DNA record or DNA profile was based has resulted in
17 the charge being dismissed or has resulted in acquittal or no
18 charge was filed within the statute of limitations for the offense.

19 Upon receipt of a written request for expungement and any
20 other information necessary to ascertain the validity of the
21 request, the division shall expunge the DNA records and
22 identifiable information in the database pertaining to the arrestee
23 sample of the person and destroy the arrestee DNA sample from the

1 person, unless the division determines that the person has
2 otherwise become obligated to submit a DNA sample.

3 Any identification, warrant, probable cause to arrest or
4 arrest based upon a database match is not invalidated due to a
5 failure to expunge or a reasonable delay in expunging records.

NOTE: The purpose of this bill is to allow law enforcement to obtain DNA samples from arrestees for first and second degree murder, kidnaping, first and second degree sexual assault, aggravated robbery or malicious wounding.

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

§15-2B-11a is new; therefore, strike-throughs and underscoring have been omitted.