

# **WEST VIRGINIA LEGISLATURE**

## **2017 REGULAR SESSION**

**Introduced**

### **Senate Bill 167**

BY SENATORS WOELFEL AND OJEDA

[Introduced February 8, 2017; referred

to the Committee on the Judiciary]

1 A BILL to amend and reenact §15-2B-2, §15-2B-3, §15-2B-5, §15-2B-6, §15-2B-9 and §15-2B-  
2 11 of the Code of West Virginia, 1931, as amended; and to amend said code by adding  
3 thereto a new section, designated §15-9B-4, all relating to DNA evidence; requiring the  
4 collection of DNA samples from individuals arrested for certain felony crimes for inclusion  
5 in and search of the DNA databank; defining terms; providing that DNA samples shall be  
6 taken by buccal swab rather than drawing blood; authorizing certain cooperative  
7 agreements; requiring qualified arrestees to submit to a DNA sample collection during the  
8 arrest intake; requiring a DNA sample be taken of any person convicted of a felony  
9 offense; authorizing the use of the DNA sample in accordance with this article; authorizing  
10 law-enforcement and corrections employees to use reasonable force to obtain a DNA  
11 sample when an individual refuses; limiting liability when a person obtaining a DNA sample  
12 acts in good faith and considering the sample taken in accordance with this article; setting  
13 forth a process for handling samples taken in error; requiring Superintendent of the State  
14 Police to submit emergency and legislative rules detailing the collection of DNA samples  
15 from qualifying arrestees; setting forth a process for expungement of the DNA sample;  
16 stating that any database match is not invalidated by a failure to or delay in expunging  
17 records; expanding authority of the Sexual Assault Forensic Examination Commission;  
18 requiring the commission to authorize a subgroup to establish protocols and propose  
19 legislative rules regarding the submission of sexual assault forensic examination kits in a  
20 timely manner from health care providers to law-enforcement agencies and from law-  
21 enforcement agencies to the West Virginia State Police, the Marshall University Forensic  
22 Science Center or certain other accredited laboratories with certain restrictions and  
23 requirements; authorizing promulgation of emergency rules with certain restrictions;  
24 requiring the rules to address testing of the kits, return of the kits and retention of the kits;  
25 permitting certain repackaging of kits not associated with an open case file pursuant to

26 requirements of the commission; and ensuring that the changes and associated rules do  
27 not create a claim or right to relief by any person.

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

1 That §15-2B-2, §15-2B-3, §15-2B-5, §15-2B-6, §15-2B-9 and §15-2B-11 of the Code of  
2 West Virginia, 1931, as amended, be amended and reenacted; and that said code be amended  
3 by adding thereto a new section, designated §15-9B-4, all to read as follows:

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

### **§15-2B-2. Policy.**

1 It is the policy of this state to assist federal, state and local criminal justice and law-  
2 enforcement agencies in the identification, detection and exclusion of individuals who are subjects  
3 of the investigation or prosecution of violent crimes, sex-related crimes and other crimes against  
4 the person. In furtherance of such assistance, the Legislature finds:

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

7 That the comparison of DNA data recovered from a crime scene with existing DNA records  
8 maintained in a central DNA database further facilitates such identification, detection and  
9 exclusion; and

10 That requiring individuals arrested or convicted of certain crimes to ~~provide a blood sample~~  
11 ~~for submit to a~~ DNA analysis with the resulting DNA records maintained in a central DNA database  
12 will likewise further facilitate the aforementioned identification, detection and exclusion and may  
13 serve to discourage recidivism.

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

### **§15-2B-3. Definitions.**

1           As used in this article:

2           (1) "Arresting authority" means the law-enforcement officer who arrests the individual or  
3           an authorized representative of the agency responsible for the arrest.

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

8           (2) (3) "Conviction" includes convictions by a jury or court, guilty plea, or plea of nolo  
9           contendere.

10          (3) (4) "Criminal justice agency" means an agency or institution of a federal, state or local  
11           government, other than the office of public defender, which performs as part of its principal  
12           function, relating to the apprehension, investigation, prosecution, adjudication, incarceration,  
13           supervision or rehabilitation of criminal offenders.

14          (4) (5) "Division" means the West Virginia State Police."

15          (5) (6) "DNA" means deoxyribonucleic acid. DNA is located in the nucleus of cells and  
16           provides an individual's personal genetic blueprint. DNA encodes genetic information that is the  
17           basis of human heredity relationships and forensic identification.

18          (6) (7) "DNA record" means DNA identification information stored in any state DNA  
19           database pursuant to this article. The DNA record is the result obtained from DNA typing tests.  
20           The DNA record is comprised of the characteristics of a DNA sample which are of value in  
21           establishing the identity of individuals. The results of all DNA identification tests on an individual's  
22           DNA sample are also included as a "DNA record".

23          (7) (8) "DNA sample" means ~~a tissue, fluid or other bodily sample the cells collected~~  
24           through a buccal swab, also known as a buccal smear, that is collected from the inside of a  
25           person's cheek and is suitable for testing, provided pursuant to this article or submitted to the  
26           division laboratory for analysis pursuant to a criminal investigation.

27           (8) (9) "FBI" means the Federal Bureau of Investigation.

28           (9) (10) "Interim plan" means the plan used currently by the Federal Bureau of  
29       Investigation for Partial Match Protocol and to be adopted under the management rules of this  
30       article.

31           (10) (11) "Management rules" means the rules promulgated by the West Virginia State  
32       Police that define all policy and procedures in the administration of this article.

33           (11) (12) "Partial match" means that two DNA profiles, while not an exact match, share a  
34       sufficient number of characteristics to indicate the possibility of a biological relationship.

35           (13) "Qualified arrestee" means any individual arrested for a felony crime of violence  
36       against the person or a felony offense where the victim was a minor child, as those phrases are  
37       defined in section twenty-seven, article five, chapter twenty-eight of this code.

38           (14) "Qualified offender" means any person convicted of a qualifying offense.

39           (12) (15) "Qualifying offense" means any felony offense as described in section six of this  
40       article or any offense requiring a person to register as a sex offender under this code or the federal  
41       law. For the purpose of this article, a person found not guilty of a qualifying offense by reason of  
42       insanity or mental disease or defect shall be required to provide a DNA sample in accordance  
43       with this article.

44           (13) (16) "Registering Agency" means the West Virginia State Police.

45           (14) (17) "State DNA database" means all DNA identification records included in the  
46       system administered by the West Virginia State Police.

47           (15) (18) "State DNA databank" means the repository of DNA samples collected under the  
48       provisions of this article.

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

1           The division may enter into cooperative agreements with public or private agencies or  
2       entities to provide a service or facility associated with the administration of the DNA database and  
3       databank. In the event the division enters into any agreements for the purposes of (1) testing of

4     qualified arrestee or qualified offender samples for CODIS; (2) criminal paternity cases; or (3)  
5     criminal casework; or (4) identification of human remains for the Office of Chief Medical Examiner  
6     using nuclear DNA technology, the division is authorized to only enter into such agreements with  
7     the Marshall University Forensic Science Center.

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

1       (a) Any qualified arrestee who is eighteen years of age or older and is arrested by an  
2     authorized arresting authority shall submit to a DNA sample collection during the intake process.  
3     The DNA sample shall be used for DNA analysis as described in this article after a magistrate or  
4     circuit judge has made a finding that there was probable cause for the arrest. If a magistrate or  
5     circuit judge finds that there was no probable cause for the arrest, then the DNA sample collected  
6     shall be destroyed prior to submission to CODIS.

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

14       (c) Any person presently incarcerated in a state correctional facility or in jail in this state  
15    after conviction of any offense listed in subsection (a) of this section shall provide a DNA sample  
16    to be used for purposes of DNA analysis as described in this article.

17       (d) Any person convicted of a violation of section five or thirteen, article two, chapter  
18    sixty-one of this code, section one, two, three, four, five, seven, eleven, twelve(when that offense  
19    constitutes a felony) or subsection (a), section thirteen, article three of said chapter, section three,  
20    four, five or ten, article three-e of said chapter or section three, article four of said chapter, shall

21 provide a DNA sample to be used for DNA analysis as described in this article.

22 (d) (e) Any person convicted of ~~an offense which constitutes a felony violation of the~~  
23 ~~provisions of article four, chapter sixty-a of this code; or of an attempt to commit a violation of~~  
24 ~~section one or section fourteen-a, article two, chapter sixty-one of this code; or an attempt to~~  
25 commit a violation of article eight-b of said chapter sixty-one of this code shall provide a DNA  
26 sample to be used for DNA analysis as described in this article.

27 (e) (f) The method of taking the DNA sample is subject to the testing methods used by the  
28 West Virginia State Police Crime Lab, the Marshall University Forensic Science Center or any  
29 other ANAB accredited DNA analysis laboratory within West Virginia. The DNA sample will be  
30 collected using a postage paid DNA collection kit provided by the West Virginia State Police.

31 (f) (g) When a person required to provide a DNA sample pursuant to this section refuses  
32 to comply, the state shall apply to a circuit court for an order requiring the person to provide a  
33 DNA sample. Upon a finding of failure to comply, the circuit court shall order the person to submit  
34 to DNA testing in conformity with the provisions of this article.

35 (g) ~~The West Virginia State Police may, where not otherwise mandated, require any~~  
36 ~~person convicted of a felony offense under the provisions of this code, to provide a DNA sample~~  
37 ~~to be used for the sole purpose of criminal identification of the convicted person who provided the~~  
38 ~~sample: Provided, That the person is under the supervision of the criminal justice system at the~~  
39 ~~time the request for the sample is made. Supervision includes prison, the regional jail system,~~  
40 ~~parole, probation, home confinement, community corrections program, and work release.~~

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

47                   (i) When this state accepts a person from another state under any interstate compact, or  
48 under any other reciprocal agreement with any county, state or federal agency or any other  
49 provision of law whether or not the person is confined or released, the transferred person must  
50 submit a DNA sample, if the person was convicted of an offense in any other jurisdiction which  
51 would be considered a qualifying offense as defined in section six if committed in this state, or if  
52 the person was convicted of an equivalent offense in any other jurisdiction. The person shall  
53 provide the DNA sample in accordance with the rules of the custodial institution or supervising  
54 agency. If the transferred person has already submitted a DNA sample that can be found in the  
55 national database, the accepting agency is not required to draw a second DNA sample.

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

61                   (k) Duly authorized law-enforcement and corrections personnel may employ reasonable  
62 force in cases where an individual refuses to provide a DNA sample required under this article,  
63 and no such employee shall be civilly or criminally liable for the use of such reasonable force in  
64 the collection of the required DNA sample.

65                   (l) A DNA sample obtained in good faith shall be considered to have been obtained in  
66 accordance with the requirements of this article and its use in accordance with this chapter is  
67 authorized. Once an error is determined to have occurred that caused a person's DNA to be  
68 submitted improperly, the DNA record will be removed from CODIS and the DNA sample  
69 destroyed unless the individual has another qualifying offense or offenses.

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

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

1       (a) The Superintendent of the West Virginia State Police shall promulgate an emergency  
2       rule and propose a legislative rule pursuant to chapter twenty-nine-a of this code establishing the  
3       procedure that an arresting authority shall use to obtain a DNA sample on a qualified arrestee.

4           (b) Upon incarceration, the Division of Corrections, regional jails and felon facilities  
5       shall ensure that the DNA sample is collected from all persons described in section six of this  
6       article. When any person convicted of an offense described in section six is not incarcerated, the  
7       sheriff in the county where the person is convicted shall ensure that the DNA sample is collected  
8       from the person: *Provided*, That a DNA sample may be collected at a prison, regional facility or  
9       local hospital unit when so ordered by the sentencing court or other location determined by the  
10      sheriff.

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

22          (d) The Superintendent of the West Virginia State Police shall ~~promulgate legislative~~  
23       propose rules for legislative approval pursuant to chapter twenty-nine-a of this code  
24       governing the procedures to be used in the collection of DNA samples, submission, identification,

25 analysis and storage of DNA samples and typing results of DNA samples submitted under this  
26 article which shall be compatible with recognized federal standards.

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

32 (e) ~~The agency or institution having custody, control or providing supervision of persons  
33 convicted for qualifying offenses, as appropriate, is authorized to contract with third parties to  
34 provide for the collection of the DNA samples described in section six of this article~~

35 (f) A person, convicted of a qualifying offense and not incarcerated in a facility described  
36 in subsection (a) (b) of this section, who has been put on notice of his or her obligation to provide  
37 a DNA sample and has not submitted a court ordered DNA sample at the request of a law-  
38 enforcement agency, shall be responsible for notifying the agency designated in the court order  
39 and complying with that agency's directives for submitting a DNA sample. The person shall have  
40 thirty days from the receipt of the court order to comply unless there is a documented exception  
41 from the agency responsible for the DNA sample collection. A person refusing to comply with a  
42 court order directing that person submit a DNA sample may be considered in contempt.

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

#### **§15-2B-11. Expungement.**

1 (a) Any qualifying arrestee whose DNA record has been included in the state DNA  
2 database in accordance with this article may apply for expungement on the grounds that the arrest  
3 on which the authority for searching and including the person's DNA record or DNA profile was

4       based has resulted in the charge being dismissed or has resulted in acquittal or no charge was  
5       filed within the statute of limitations for the offense. Upon receipt of a written application for  
6       expungement and any other information necessary to ascertain the validity of the request, the  
7       division shall expunge the DNA records and identifiable information in the database pertaining to  
8       the arrestee sample of the person and destroy the arrestee DNA sample from the person, unless  
9       the division determines that the person has otherwise become obligated to submit a DNA sample.

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

21           (b) (c) Upon receipt of an order of expungement, the division shall purge the DNA record  
22 and all other identifiable information from the state database and the DNA sample stored in the  
23 state databank covered by the order. If the individual has more than one entry in the state  
24 database and databank, then only the entry covered by the expungement order shall be deleted  
25 from the state database or databank.

26           d) Any identification, warrant, probable cause to arrest or arrest based upon a database  
27 match is not invalidated due to a failure to expunge or a reasonable delay in expunging records.

## **ARTICLE 9B. SEXUAL ASSAULT EXAMINATION NETWORK.**

### **§15-9B-4. Submission, testing and retention of sexual assault forensic examination kits.**

1       (a) The Sexual Assault Forensic Examination Commission created by section one of this  
2       article shall establish a sub-group of persons with subject matter expertise to establish best-  
3       practice protocols for the submission of sexual assault forensic examination kits by the health  
4       care providers. The commission may propose rules for legislative approval, in accordance with  
5       article three, chapter twenty-nine-a of this code, detailing the best-practice protocols. If the  
6       Legislature approves of the legislative rules, then Local Sexual Assault Forensic Examination  
7       Boards shall follow those rules. If legislative rules detailing the best-practice protocols are not  
8       proposed and approved, then Local Sexual Assault Forensic Examination Boards may adopt the  
9       best-practice protocols or use it as a guide to set out a system for submitting the sexual assault  
10      forensic examination kits from the health care provider to the relevant law-enforcement agency.

11       (b) The commission shall propose rules for legislative approval, in accordance with article  
12      three, chapter twenty-nine-a of this code, that require law-enforcement agencies in possession of  
13      a sexual assault forensic examination kit to forward the sexual assault kit to the West Virginia  
14      State Police, the Marshall University Forensic Science Center or any other ANAB accredited DNA  
15      analysis laboratory within West Virginia, at the direction of the West Virginia State Police, for a  
16      DNA analysis of the sexual assault kit. The rule shall set forth the process and requirements for  
17      submissions, including a defined timeline for submission of kits in law-enforcement possession  
18      as of the effective date of this section and the time limits for the submission of future kits. The rule  
19      shall require the West Virginia State Police, the Marshall University Forensic Science Center or  
20      other ANAB accredited DNA analysis laboratory within West Virginia to perform a DNA analysis  
21      of any sexual assault examination kits pursuant to a defined timeline, to enter the resulting DNA  
22      record into the DNA database created pursuant to article two-b of this chapter, and to return the  
23      sexual assault kit to the law-enforcement agency that made the submission. The rule shall also  
24      set forth protocols for the law-enforcement agency to secure the sexual assault kit following the  
25      DNA analysis and set standards for retention of the evidence to ensure it will preserve the DNA  
26      evidence.

27       (c) If there is a nonreport, where a sexual assault kit is submitted to Marshall University  
28       Forensic Science Center or any other ANAB accredited DNA analysis laboratory within West  
29       Virginia, but the kit is not connected to an open case file, the kit shall be preserved in its original  
30       packaging for two years. After two years, the Marshall University Forensic Science Center or other  
31       ANAB accredited DNA analysis laboratory within West Virginia may archive the kit in a manner  
32       that allows easier storage and retains the ability to test the usable contents in the future if an open  
33       case file associated with the contents arises, pursuant to requirements created by the commission  
34       that ensure proper chain of custody is protected and contents are preserved appropriately.

35       (d) The failure of any law-enforcement agency to comply with any time limit specified in  
36       this section or the rules created at the direction of this section does not create, and may not be  
37       construed as creating, any basis or right to appeal, claim for or right to post conviction relief, or  
38       claim for or right to a new trial or any other claim or right to relief by any person.

39       (e) The commission may promulgate emergency rules pursuant to the provisions of  
40       section fifteen, article three, chapter twenty-nine-a of this code, in order to implement this section:  
41       *Provided, That the emergency rules may not permit the destruction of any DNA evidence.*

NOTE: The purpose of this bill is to allow law enforcement to obtain DNA samples from arrestees for certain criminal offenses, and that DNA samples shall be taken by buccal swab rather than drawing blood. The bill expands DNA sample collection to all those convicted of a felony offense. The bill expands the authority of the Sexual Assault Forensic Examination Commission and requires the commission to authorize a sub-group to establish protocols and propose legislative rules regarding the submission of sexual assault forensic examination kits in a timely manner from health care providers to law-enforcement agencies and from law-enforcement agencies to the West Virginia State Police, the Marshall University Forensic Science Center or certain other accredited laboratories with certain restrictions and requirements. The bill also increases the preservation, submission and testing of certain DNA evidence.

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