

WEST VIRGINIA LEGISLATURE

2018 REGULAR SESSION

Committee Substitute

for

Senate Bill 36

BY SENATORS WOELFEL AND PLYMALE

[Originating in the Committee on the Judiciary;

reported on February 9, 2018]

1 A BILL to amend and reenact §15-2B-2, §15-2B-5, §15-2B-6, and §15-2B-11 of the Code of West
2 Virginia, 1931, as amended; and to amend said code by adding thereto a new section,
3 designated §15-9B-4, all relating generally to DNA testing; allowing the West Virginia State
4 Police Forensic Laboratory to use qualified outside entities for DNA testing; clarifying that
5 the State Police shall attempt to contract with the Marshall University Forensic Science
6 Center for certain DNA testing when outsourcing such testing; granting legislative and
7 emergency rule-making authority to the Sexual Assault Forensic Examination
8 Commission; directing the commission to promulgate time frames for DNA sample
9 submission; expanding types of testing the West Virginia State Police Forensic Laboratory
10 may outsource; authorizing law-enforcement and correctional officers to use reasonable
11 force to obtain DNA samples; providing that DNA samples taken by law-enforcement and
12 corrections personnel in compliance with this article are deemed to be in good faith;
13 exempting law-enforcement and correctional officers from civil and criminal liability for
14 good faith collection of samples done in a reasonable manner consistent with generally
15 accepted practices; directing that erroneously obtained DNA samples be removed from
16 database and samples destroyed; and clarifying that judicial expungement proceedings
17 proceed by petition.

Be it enacted by the Legislature of West Virginia:

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
3 subjects of the investigation or prosecution of violent crimes, sex-related crimes, and other crimes
4 against 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 convicted of certain crimes to provide a blood sample for DNA
11 analysis with the resulting eligible DNA records maintained in a central DNA database will likewise
12 further facilitate the aforementioned identification, detection, and exclusion and may serve to
13 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-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 offender samples for CODIS; (2) criminal paternity cases; ~~or~~ (3) criminal casework; or (4)
5 identification of human remains, for the Office of Chief Medical Examiner using nuclear DNA
6 technology, the division is authorized to only enter into such agreements with it shall first attempt
7 to contract with the Marshall University Forensic Science Center for such service or services.

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

1 (a) Any person convicted of an offense described in ~~§61-4-4, §61-2-1, §61-2-4, §61-2-7,~~
2 ~~§61-2-9, §61-2-9a (when that offense constitutes a felony), §61-2-10, §61-2-10a, §61-2-10b, §61-~~
3 ~~2-12, §61-2-14, or §61-2-14a of this code, or §61-8-12 of this code (when that offense constitutes~~
4 ~~a felony), shall provide a DNA sample to be used for DNA analysis as described in this article.~~
5 Further, any person convicted of any offense described in §61-8B-1 *et seq.* of this code or §61-

6 8D-1 *et seq.* of this code shall provide a DNA sample to be used for DNA analysis as described
7 in this article.

8 (b) Any person presently incarcerated in a state correctional facility or in jail in this state
9 after conviction of any offense listed in this section shall provide a DNA sample to be used for
10 purposes of DNA analysis as described in this article.

11 (c) Any person convicted of a violation of §61-2-5 or §61-2-13 of this code, §61-3-1, §61-
12 3-2, §61-3-3, §61-3-4, §61-3-5, §61-3-7, §61-3-11, §61-3-12 (when that offense constitutes a
13 felony), or §61-3-13(a) of this code, §61-3E-3, §61-3E-4, §61-3E-5, or §61-3E-10 of this code, or
14 §61-4-3 of this code shall provide a DNA sample to be used for DNA analysis as described in this
15 article.

16 (d) Any person convicted of an offense which constitutes a felony violation of the
17 provisions of ~~§60A-4-401~~ ~~61A-4-4~~ *et seq.* of this code; or of an attempt to commit a violation of
18 §61-2-1 or §61-2-14a of this code; or an attempt to commit a violation of §61-8B-1 *et seq.* of this
19 code shall provide a DNA sample to be used for DNA analysis as described in this article.

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

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

27 (g) The West Virginia State Police may, where not otherwise mandated, require any
28 person convicted of a felony offense under the provisions of this code to provide a DNA sample
29 to be used for the sole purpose of criminal identification of the convicted person who provided the
30 sample: *Provided*, That the person is under the supervision of the criminal justice system at the
31 time the request for the sample is made. Supervision includes prison, the regional jail system,

32 parole, probation, home confinement, community corrections program, and work release.

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

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

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

53 (k) Duly authorized law-enforcement employees, Regional Jail Authority employees, and
54 Division of Corrections employees may use reasonable force in cases where an individual refuses
55 to provide a DNA sample required under this article, and the employees are not civilly or criminally
56 liable for the use of reasonable force in the collection of the required DNA sample.

57 (l) A DNA sample obtained in accordance with the requirements of this article and its use

58 in accordance with this chapter shall be considered to have been obtained in good faith. Should
59 an error be determined to have occurred which caused a person's DNA to be obtained or
60 submitted improperly, the DNA record shall be removed from CODIS and the DNA sample
61 destroyed unless the individual has another qualifying offense or offenses.

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

§15-2B-11. Expungement.

1 (a) Any person convicted of a qualifying offense whose DNA record or profile has been
2 included in the state database and whose DNA sample is stored in the state databank or the
3 state's designated DNA typing, testing, and research laboratory may apply for expungement on
4 the grounds that the ~~felony~~ qualifying conviction that resulted in the inclusion of the person's DNA
5 record or profile in the state database or the inclusion of the person's DNA sample in the state
6 databank has been reversed and the case dismissed. The person ~~requesting~~ seeking
7 expungement, either individually or through an attorney, may ~~apply to~~ petition the court for
8 expungement of the record. A copy of the ~~application~~ petition for expungement shall be served
9 on the prosecuting attorney for the judicial district in which the ~~felony~~ qualifying conviction was
10 obtained not less than 20 days prior to the date of the hearing on the ~~application~~ petition. A
11 certified copy of the order reversing and dismissing the conviction shall be attached to an order
12 of expungement.

13 (b) Upon receipt of an order of expungement, the division shall purge the DNA record and
14 all other identifiable information from the state database and the DNA sample stored in the state
15 databank covered by the order. If the individual has more than one entry in the state database
16 and databank, then only the entry covered by the expungement order shall be deleted from the
17 state database or databank.

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 §15-9B-1 of this
2 code shall establish a subgroup of persons with subject matter expertise to establish best-practice
3 protocols for the submission, retention, and disposition of sexual assault forensic examination kits
4 collected by health care providers. The commission shall propose rules for legislative approval,
5 in accordance with §29A-3-1 et seq. of this code, detailing best-practice protocols. Upon approval
6 of the legislative rules, local sexual assault forensic examination boards shall follow the rules.

7 (b) Rules promulgated pursuant to §15-9B-4(a) of this code shall include:

8 (1) Time frames for submission of sexual assault forensic examination kits in the
9 possession of law enforcement; and

10 (2) Protocols for storage of DNA samples and sexual assault forensic examination kits.

11 (c) The commission may promulgate emergency rules pursuant to the provisions of §29A-
12 3-15 of this code in order to implement this section: *Provided*, That no emergency rule may permit
13 the destruction of any DNA evidence.