

WEST VIRGINIA LEGISLATURE

2020 REGULAR SESSION

Introduced

Senate Bill 640

BY SENATOR TRUMP

[Introduced January 28, 2020; referred
to the Committee on Government Organization; and
then to the Committee on Finance]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new chapter,
 2 designated §15A-9-1, §15A-9-2, §15A-9-3, §15A-9-4, §15A-9-5, §15A-9-6, and §15A-9-7;
 3 and to amend and reenact §57-5-11 of said code; and to amend and reenact §62-1A-7 of
 4 said code, all relating to creating the Division of Biological Evidence Services of the
 5 Department of Military Affairs and Public Safety; creating definitions; providing for the
 6 appointment of a director and establishing qualifications therefor; establishing powers and
 7 duties of the division and its professional staff; creating a special fund for operation of the
 8 division; establishing procedures for storage and preservation of biological evidence;
 9 establishing remedies for noncompliance; and requiring disposition of evidence in the
 10 possession of courts and seized evidence with the division.

Be it enacted by the Legislature of West Virginia:

**CHAPTER 15A. DEPARTMENT OF MILITARY AFFAIRS AND PUBLIC
 SAFETY.**

ARTICLE 9. DIVISION OF BIOLOGICAL EVIDENCE SERVICES.

§15A-9-1. Definitions.

1 Unless the context in which used clearly requires a different meaning, as used in this
 2 article:
 3 (a) "Biological evidence" means any item that contains blood, semen, hair, saliva, skin
 4 tissue, fingernail scrapings, bone, bodily fluids, or other identifiable biological material that was
 5 collected as part of a criminal investigation or may reasonably be used to incriminate or exculpate
 6 any person for an offense;
 7 (b) "Custody" means when a person currently is incarcerated, on parole or probation, or
 8 subject to sex offender registration.
 9 (c) "Defendant" means a person charged with a criminal offense under the laws of the
 10 state;

11 (d) "Director" means the director of the Division of Biological Evidence Services of the
12 Department of Military Affairs and Public Safety;

13 (e) "Division" means the Division of Biological Evidence Services established in section
14 two of this article;

15 (f) "DNA" means deoxyribonucleic acid;

16 (g) "Law-enforcement or prosecuting agency" or "agency" means any governmental or
17 public entity within this state charged with the collection or retrieval of biological evidence.

§15A-9-2. Division created; purpose; use of facilities; rules and regulations.

1 (a) There is hereby created the Division of Biological Evidence Services of the Department
2 of Military Affairs and Public Safety for purposes of providing the appropriate facilities for the
3 centralized storage and preservation of biological evidence obtained in criminal investigations and
4 criminal trials throughout the state.

5 (b) The facilities of the division shall be available, subject to policies and procedures of
6 the division incorporated by reference through rules established by the director, to all law-
7 enforcement agencies of the state which collect biological evidence as a result of the investigation
8 of crime. Such rules shall be promulgated in accordance with the provisions of §29A-3-1, et seq.
9 of this code.

§15A-9-3. Director; appointment and qualifications.

1 The division shall be under the supervision and control of a director. The secretary shall
2 appoint a director of the division, who shall serve at the will and pleasure of the secretary. The
3 director must have extensive knowledge in the principles and practices of administration, five
4 years' experience in forensic sciences and DNA analysis, and extensive knowledge of the
5 procedures and techniques in forensic lab management.

§15A-9-4. Powers and duties of division generally; professional staff.

1 (a) The Division of Biological Evidence Services shall provide technical assistance to all
2 state law-enforcement agencies in the centralized storage of biological evidence collected as a

3 result of the investigation of crime. The division shall maintain facilities and services for the secure
4 receipt, storage, retention, and cataloguing of biological evidence for criminal investigations and
5 prosecutions. The facilities, services and personnel of the division shall be available for the
6 purposes set forth in this article, without charge, to the Office of the Chief Medical Examiner and
7 all duly constituted prosecuting, police and investigating agencies of the state.

8 (b) In addition to any other powers and duties set forth in this article, the Division of
9 Biological Evidence Services shall:

10 (1) Assure the safe storage, retention, and cataloguing of biological evidence received
11 from a law-enforcement agency;

12 (2) Coordinate with the West Virginia State Police Forensic Laboratory to make all stored
13 biological evidence available for testing as authorized by law; and

14 (3) Render expert court testimony when requested on the issues of the storage, retention,
15 cataloguing, and chain of custody of biological evidence received from a law-enforcement agency.

16 (c) The director is responsible for the development of personnel to carry out the technical
17 work of the division and may approve reimbursement of costs incurred by employees to obtain
18 education and training.

19 (d) The director shall maintain an appropriate electronic cataloguing system for all stored
20 biological evidence received from any law-enforcement agency of the state.

21 (e) All employees within the division are exempt from coverage under the classified
22 service.

§15A-9-5. Special fund created; payments into fund; disbursements from fund.

1 For the operation of the division, there is hereby created in the State Treasury a special
2 revolving fund to be known and designated as the “Biological Evidence Storage and Preservation
3 Fund.” This fund shall consist of all moneys made available for the operations of the division from
4 any source, including, but not limited to, all gifts, grants, bequests, or transfers from any source,
5 any moneys that may be appropriated and designated for the division by the Legislature, funds

6 received from the federal government or any agency or department thereof, which federal funds
7 the division is hereby authorized to receive, and all interest or other returned earned from
8 investment of the fund: *Provided*, That all moneys made available through grants and utilized for
9 purposes of this article shall be administered by the Division of Administrative Services, Justice
10 and Community Services. The provisions established in § 5A-3-1 *et seq.* of this code do not apply
11 to the division or any disbursements from the fund. All disbursements shall be made under the
12 direct supervision of the director.

§15A-9-6. Storage and preservation of biological evidence procedures.

1 (a) All law-enforcement agencies shall transmit any collected biological evidence to the
2 division, subject to the remedies set forth in §15A-9-7 of this code. Except as otherwise set forth
3 in this section, the division shall preserve all biological evidence as follows:

4 (i) Biological evidence that may be subject to DNA evidence testing and analysis in felony
5 crimes of violence against the person or felony offenses where the victim was a minor child shall
6 be retained indefinitely if the offense or act remains unsolved;

7 (ii) Biological evidence that may be subject to DNA evidence testing and analysis in felony
8 crimes of violence against the person or felony offenses where the victim was a minor child shall
9 be retained for a period of 50 years after a defendant is convicted and sentenced for the offense
10 or act;

11 (iii) Biological evidence that may be subject to DNA evidence testing and analysis in any
12 other felony offense shall be retained for a period of five years after a defendant is convicted and
13 sentenced for the offense or act, or 10 years from the date of the offense if the offense or act
14 remains unsolved.

15 (iv) Biological evidence that may be subject to DNA evidence testing and analysis in
16 misdemeanor offenses shall be retained for the length of any applicable statute of limitations or
17 the length of custody of a criminal defendant, whichever is longer.

18 (b) This section applies to evidence that:

19 (i) Was collected by a law-enforcement agency or other medical professional and received
20 by and in the possession of the division during the investigation or prosecution of a criminal
21 offense; and

22 (ii) At the time of collection was likely to contain biological material suitable for DNA testing
23 and analysis.

24 (c) The division shall retain evidence in the amount and manner sufficient to develop a
25 DNA profile from the biological material contained in or included on the evidence.

26 (d) Upon written request by a defendant, the division shall prepare an inventory of
27 biological evidence that has been preserved in connection with the defendant's criminal case.

28 (e) Notwithstanding the provisions of subsection-a of this section, the division may destroy
29 evidence that includes biological material if all of the following apply:

30 (1) The investigation of the law-enforcement agency has resulted in a prosecution or
31 prosecutions of all known offenders which have resulted in a final adjudication, whether or not the
32 evidence was introduced at any trial.

33 (2) No other provision of federal or state law requires the state to preserve the evidence.

34 (3) The division sends certified delivery of notice of intent to destroy the evidence to:

35 (A) All persons who remain in custody as a result of the criminal conviction, delinquency
36 adjudication, or commitment related to evidence in question;

37 (B) The attorney of record for each person in custody;

38 (C) The West Virginia Public Defender Services or any defense counsel of record; and

39 (D) The prosecuting attorney in the county of conviction.

40 (4) No person who is notified under subsection (e)(3) of this section does either of the
41 following within 60 days after the date on which the person received the notice:

42 (A) Files a motion for testing of evidence in a court of competent jurisdiction; or

43 (B) Submits a written request for retention of evidence to the division: *Provided*, That a
44 hearing shall be held in the court of competent jurisdiction as to the necessity to retain the

45 evidence pursuant to the written request.

46 (f) If, after providing notice under subsection (e)(3) of this section of its intent to destroy
47 evidence, the division receives a written request for retention of the evidence, the division shall
48 retain the evidence while the person or persons remain in custody or until further order of a court
49 of competent jurisdiction.

50 (g) The division shall not be required to preserve physical evidence that is of such a size,
51 bulk or physical character as to render retention impracticable. When such retention is
52 impracticable, the division shall remove and preserve portions of the material evidence likely to
53 contain biological evidence related to the offense, in a quantity sufficient to permit future DNA
54 testing, before returning or disposing of the physical evidence.

55 (h) Should the division be called upon to produce biological evidence that could not be
56 located and whose preservation was required under the provisions of this statute, the director
57 shall provide an affidavit in which he or she stipulates, under penalty of perjury, an accurate
58 description of the efforts taken to locate that evidence and that the evidence could not be located.

59 (i) As used in this section, "felony crime of violence against the person" means any felony
60 offenses set forth in §61-2-1 et seq., §61-3E-1 et seq., §61-8B-1 et seq., or §61-8D-1 et seq. of
61 this code, and the felony offenses of arson and burglary of a residence where an individual is
62 physically located at the time of the offense as set forth in §61-3-1 et seq. of this code.

63 (j) As used in this section, "felony offense where the victim was a minor child" means any
64 felony crime of violence against the person and any felony offenses set forth in §61-8-1 et seq.,
65 §61-8A-1 et seq., §61-8C-1 et seq., or §61-8D-1 et seq. of this code.

§15A-9-7. Remedies for noncompliance.

1 If a court finds that biological evidence was destroyed in violation of the provisions of this
2 section, it may impose appropriate sanctions and order appropriate remedies. Nothing in this
3 article shall create any cause of action for damages against the state, or any of its political
4 subdivisions or officers, employees or agents of the state or its political subdivisions.

CHAPTER 57. EVIDENCE AND WITNESSES.

ARTICLE 5. MISCELLANEOUS PROVISIONS.

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

1 Any circuit court in this state, or the judge thereof in vacation, may in its discretion by order
2 entered of record dispose of by return to the owner thereof, or by destruction, sale, or otherwise,
3 any exhibit or article introduced or offered in evidence at the hearing, or upon the trial, of any
4 matter or case before such court or judge, and remaining in the custody or control of such court
5 for a period of 30 days after the expiration of the time within which an appeal may be taken from
6 any final order or judgment in such matter or case, if no appeal is taken therefrom, or 30 days,
7 after any final order or judgment of an appellate court, if such appeal is taken therein: *Provided*,
8 That if the ownership of such exhibit or article be known, the owner shall be notified and such
9 exhibit or article shall be returned to him or her if he or she so desires: *Provided further*, That any
10 items in the custody of the court which contain biological evidence shall be returned to the Division
11 of Biological Evidence Services for disposition in accordance with the provisions of §15A-9-1, et
12 seq. of this code.

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

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

CHAPTER 62. CRIMINAL PROCEDURE.

ARTICLE 1A. SEARCH AND SEIZURE.

§62-1A-7. Disposition of seized property.

1 Property taken pursuant to the warrant shall be preserved as directed by the court or
2 magistrate for use as evidence and thereafter shall be returned, destroyed or otherwise disposed
3 of as the court or magistrate may direct: Provided, That any items in the custody of the court which
4 contain biological evidence shall be returned to the Division of Biological Evidence Services for
5 disposition in accordance with the provisions of §15A-9-1, et seq. of this code.

NOTE: The purpose of this bill is to establish the Division of Biological Evidence Services in the Department of Military Affairs and Public Safety for purposes of the preservation of biological evidence in criminal offenses.

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