

# **WEST VIRGINIA LEGISLATURE**

## **2023 REGULAR SESSION**

**Introduced**

### **House Bill 3025**

By Delegates Foster and Hardy

[Introduced January 25, 2023; 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-11  
 2 of the Code of West Virginia, 1931, as amended, all relating to DNA that is maintained for  
 3 law-enforcement purposes in West Virginia; providing updates for the policy of maintaining  
 4 DNA; requiring DNA testing of all persons convicted of felonies and certain misdemeanors;  
 5 updating definitions; adding language to further define and include qualified arrestees in  
 6 the state DNA database; requiring testing of qualified arrestees on intake; specifying  
 7 testing methods; authorizing emergency and requiring legislative rules; specifying  
 8 expungement for qualified arrestees in certain circumstances; and providing failure to  
 9 expunge or reasonable delay in expungement will not invalidate an identification, warrant,  
 10 probable cause to arrest or arrest based upon a database match.

*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. DNA records are an important identification tool that can be used to confirm  
 5 and verify information provided by fingerprints, and to identify additional information on potential  
 6 criminal activity not available through other means. In furtherance of such assistance, the  
 7 Legislature finds:

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

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

13 That requiring individuals ~~or convicted of~~ arrested for certain crimes designated offenses

14 ~~and convicted of a felony offense to provide a sample for~~ submit to DNA analysis with the resulting  
15 eligible DNA records maintained in a central DNA database will likewise further facilitate the  
16 aforementioned identification, detection, and exclusion and may serve to discourage recidivism.

17 Therefore, the Legislature finds that assisting federal, state, and local criminal justice and  
18 law-enforcement agencies through the use and development of DNA analysis is of the utmost  
19 importance and urgency in this state and that a DNA identification system shall be established as  
20 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 an  
3 authorized representative of the agency responsible for the arrest.

4 ~~(4)~~ (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 imprisonment, 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, or 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, burglary, or a felony offense where the victim was a minor child, as those terms  
37 are defined in §61-3-11 and §62-12-13 of this code.

38 (14) "Qualified offender" means any person convicted of a felony or a qualifying  
39 misdemeanor as designated in §15-2B-6 of this code.

40 ~~(12)~~ (15) "Qualifying offense" means any felony offense as described in ~~section six of this~~  
41 article §15-2B-6 of this code or any offense requiring a person to register as a sex offender under  
42 this code or the federal law. For the purpose of this article, a person found not guilty of a qualifying  
43 offense by reason of insanity or mental disease or defect shall be required to provide a DNA  
44 sample in accordance with this article.

45           ~~(13)~~ (16) "Registering Agency" means the West Virginia State Police.

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

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

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

1           The ~~division~~ State Police may enter into cooperative agreements with public or private  
2 agencies or entities to provide a service or facility associated with the administration of the DNA  
3 database and databank. In the event the division enters into any agreements for the purposes of:  
4 (1) Testing of qualified arrestee or qualified offender samples for CODIS; (2) criminal paternity  
5 cases; (3) criminal casework; or (4) identification of human remains, it shall first attempt to contract  
6 with the Marshall University Forensic Science Center for ~~such~~ the service or services.

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

1           (a) A qualified arrestee 18 years of age or older, taken into custody by an arresting  
2 authority for a felony crime of violence against the person, burglary, or a felony offense where the  
3 victim was a minor child, as those terms are defined in §61-3-11 and §62-12-13 of this code, shall  
4 submit to a DNA sample collection at the direction of the arresting authority. The DNA sample may  
5 be used only for DNA analysis as authorized by this article.

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

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

16           ~~(c)~~ (d) Any person convicted of a violation of §61-2-5 ~~or §61-2-13~~ of this code, ~~§61-3-1,~~  
17 ~~§61-3-2, §61-3-3, §61-3-4, §61-3-5, §61-3-7, §61-3-11, §61-3-12 (when that offense constitutes a~~  
18 ~~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~~  
19 ~~§61-4-3 of this code~~ shall provide a DNA sample to be used for DNA analysis as ~~described in~~  
20 authorized by this article.

21           ~~(d)~~ (e) Any person convicted of an ~~offense which constitutes a felony violation of the~~  
22 ~~provisions of §60A-4-401 et seq. of this code; or of an attempt to commit a violation of §61-2-1 or~~  
23 ~~§61-2-14a of this code; or an attempt to commit a violation of~~ any offense in §61-8B-1 *et seq.* of  
24 this code shall provide a DNA sample to be used for DNA analysis as ~~described in~~ authorized by  
25 this article.

26           ~~(e)~~ (f) The method of taking the DNA sample is subject to the ~~testing methods used by the~~  
27 approval of the West Virginia State Police Crime Lab. The DNA sample will be collected using a  
28 postage paid DNA collection kit provided by the West Virginia State Police.

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

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

39 and work release.

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

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

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

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

64 ~~(l)~~ (m) A DNA sample obtained in accordance with the requirements of this article and its

65 use in accordance with this chapter shall be considered to have been obtained in good faith.  
66 ~~Should~~ If an error ~~be~~ is determined to have occurred which caused a person's DNA to be obtained  
67 or submitted improperly, the DNA record shall be removed from CODIS and the DNA sample  
68 destroyed unless the individual has another qualifying offense or offenses.

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

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

1 (a) The Superintendent of the West Virginia State Police may promulgate an emergency  
2 rule and shall propose a legislative rule pursuant to Chapter 29A of this code establishing the  
3 procedure that an arresting authority shall use to obtain a DNA sample from a qualified arrestee.

4 ~~(a)~~ (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 §15-2B-6 of this code. When any person convicted of an offense described in section six~~  
7 ~~§15-2B-6 of this code is not incarcerated~~ imprisoned, the sheriff in the county where the person is  
8 convicted shall ensure that the DNA sample is collected from the person: *Provided*, That a DNA  
9 sample may be collected at a prison, regional facility or local hospital unit when so ordered by the  
10 sentencing court or other location determined by the sheriff.

11 ~~(b)~~ (c) The Superintendent of the West Virginia State Police shall promulgate a legislative  
12 rule pursuant to Chapter 29A of this code establishing which persons may ~~withdraw blood and~~  
13 ~~further establishing procedures to withdraw blood. At a minimum, these procedures shall require~~  
14 ~~that when blood is withdrawn for the purpose of DNA identification testing, a previously unused~~  
15 ~~and sterile needle and sterile vessel shall be used, the withdrawal shall otherwise be in strict~~  
16 ~~accord with accepted medical practices and in accordance with any recognized medical~~  
17 ~~procedures employing universal precautions as outlined by the Centers for Disease Control and~~



18 ~~Prevention. No civil liability attaches to any person when the blood was drawn according to~~  
19 ~~recognized medical procedures employing the universal precautions. No person is relieved of~~  
20 ~~liability for negligence in the drawing of blood for purposes of DNA testing~~ collect a sample for DNA  
21 analysis.

22 ~~(c)~~ (d) The Superintendent of the West Virginia State Police shall ~~promulgate legislative~~  
23 ~~rules~~ propose rules for legislative approval pursuant to Chapter 29A of this code governing the  
24 procedures to be used in the collection of DNA samples, submission, identification, analysis and  
25 storage of DNA samples and typing results of DNA samples submitted under this article which  
26 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~~ of 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)~~ (f) 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)~~ (g) A person, convicted of a qualifying offense and not incarcerated in a facility  
36 described in subsection (a) of this section, who has been put on notice of his or her obligation to  
37 provide a DNA sample and has not submitted a court ordered DNA sample at the request of a law-  
38 enforcement agency, ~~shall be~~ is 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 30 days from the receipt of the court order to comply unless there is a documented exception from  
41 the agency responsible for the DNA sample collection. A person refusing to comply with a court  
42 order directing that person submit a DNA sample may be considered in contempt.

43 ~~(g)~~ (h) 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 the  
45 Legislature in 2011, shall order, as a condition of such probation, that the convicted person report  
46 to the local sheriff's department to provide a DNA sample within 30 days.

**§15-2B-11.****Expungement.**

1 (a) A person from whom a DNA sample has been taken based upon an arrest for a felony  
2 crime of violence against the person, burglary, or a felony offense where the victim was a minor is  
3 entitled to have the DNA profile expunged from the state and federal databases where:

4 (1) The criminal charge is dismissed and the prosecuting attorney determines that the  
5 charge will not be pursued further.

6 (2) The grand jury has declined to return an indictment on the charge upon which the taking  
7 of the sample was authorized and the prosecuting attorney confirms no further attempts to pursue  
8 an indictment will be undertaken.

9 (3) The circuit court or jury has entered a judgment of acquittal on the charge or charges  
10 supporting the taking of the DNA sample.

11 (b) A person seeking expungement pursuant to subsection (a) of this section may, at no  
12 cost, submit a written application for expungement to the circuit court of the county in which the  
13 charge supporting the taking of a DNA sample was filed. The circuit court shall by order direct the  
14 prosecuting attorney and the superintendent to conduct appropriate inquiries and report their  
15 findings to the circuit court within 20 judicial days of record of the order.

16 (c) If no charge or conviction supporting the taking of a DNA sample is determined to exist,  
17 the circuit court shall enter an order directing the prosecuting attorney and the superintendent to  
18 purge all records in their possession and all databases of the DNA records and DNA profile and  
19 destroy the DNA sample.

20 (d) Upon complying with the provisions of subsection (c) of this section, the prosecuting  
21 attorney and the superintendent shall notify the circuit clerk in writing that the expungement of  
22 records and databases has occurred. The circuit clerk shall provide a copy of the notice to the

23 person who filed the application for the expungement.

24       (a) ~~(e)~~ Any ~~person convicted of a qualifying offense~~ qualified offender whose DNA record  
25 or profile has been included in the state database and whose DNA sample is stored in the state  
26 databank or the state's designated DNA typing, testing, and research laboratory may apply for  
27 expungement on the grounds that the qualifying conviction that resulted in the inclusion of the  
28 person's DNA record or profile in the state database or the inclusion of the person's DNA sample  
29 in the state databank has been reversed and the case dismissed. The person seeking  
30 expungement, either individually or through an attorney, may petition the court for expungement of  
31 the record. A copy of the petition for expungement shall be served on the prosecuting attorney for  
32 the judicial district in which the qualifying conviction was obtained not less than 20 days prior to the  
33 date of the hearing on the petition. A certified copy of the order reversing and dismissing the  
34 conviction shall be attached to an order of expungement.

35       (b) ~~(f)~~ Upon receipt of an order of expungement, the division shall purge the DNA record  
36 and all other identifiable information from the state database and the DNA sample stored in the  
37 state databank covered by the order. If the individual has more than one entry in the state  
38 database and databank, then only the entry covered by the expungement order shall be deleted  
39 from the state database or databank.

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

NOTE: The purpose of this bill is modify the way that DNA that is maintained for law-enforcement purposes in West Virginia. The bill provides updates for the policy of maintaining DNA. The bill requires DNA testing of all persons convicted of felonies and certain misdemeanors. The bill updates definitions. The bill adds language to further define and include qualified arrestees in the state DNA database. The bill requires testing of qualified arrestees on intake. The bill provides for testing methods. The bill authorizes emergency and requiring legislative rules. The bill specifies expungement for qualified arrestees in certain circumstances. Finally, the bill provides for failure to expunge or reasonable delay in expungement will not invalidate an identification, warrant, probable cause to arrest or arrest based upon a database match.

Strike-throughs indicate language that would be stricken from a heading or the present law

and underscoring indicates new language that would be added.