

WEST VIRGINIA LEGISLATURE

2023 REGULAR SESSION

Introduced

Senate Bill 53

By Senator Rucker

[Introduced January 11, 2023; referred to
the Committee on the Judiciary; and then to the
Committee on Finance]

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; updating definitions; adding language to further define and include qualified
 5 arrestees in the state DNA database; requiring testing of qualified arrestees on intake;
 6 requiring a DNA sample from individuals convicted of a felony on or after March 9, 1995;
 7 specifying testing methods; authorizing emergency and 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 records checks. 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 arrested or convicted of certain crimes to ~~provide a sample for~~

14 submit to a DNA analysis with the resulting eligible DNA records maintained in a central DNA
 15 database will likewise further facilitate the aforementioned identification, detection, and exclusion
 16 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 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, 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 qualifying offense.

39 ~~(12)~~ (15) "Qualifying offense" means any felony offense as described in ~~section six of this~~
40 ~~article~~ §15-2B-6 of this code or any offense requiring a person to register as a sex offender under
41 this code or the federal law. For the purpose of this article, a person found not guilty of a qualifying
42 offense by reason of insanity or mental disease or defect shall be required to provide a DNA
43 sample in accordance 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; (3)
5 criminal casework; or (4) identification of human remains, it shall first attempt to contract with the
6 Marshall University Forensic Science Center for such the service or services.

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

1 (a) Any qualified arrestee who is 18 years of age or older and is arrested by an arresting
2 authority shall submit to a DNA sample collection during the intake process. The DNA sample shall
3 be used for DNA analysis as described in this article.

4 ~~(a) (b) Any person convicted of an offense described in §61-2-1, §61-2-4, §61-2-7, §61-2-
5 9, §61-2-9a (when that offense constitutes a felony), §61-2-10, §61-2-10a, §61-2-10b, §61-2-12,
6 §61-2-14, or §61-2-14a of this code, or §61-8-12 of this code (when that offense constitutes a
7 felony), a felony offense shall provide a DNA sample to be used for DNA analysis as described in
8 this article. Further, any person convicted of any offense described in §61-8B-1 *et seq.* of this code
9 or §61-8D-1 *et seq.* of this code shall provide a DNA sample to be used for DNA analysis as
10 described in this article.~~

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

14 ~~(c)~~ (d) Any person convicted of a violation of §61-2-5 or §61-2-13 of this code, ~~§61-3-1,~~
15 ~~§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~~
16 ~~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~~
17 ~~§61-4-3 of this code shall provide a DNA sample to be used for DNA analysis as described in this~~
18 article.

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

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

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

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

36 ~~(h)~~ (i) On the effective date of the amendments to this section enacted during the regular
37 session of the Legislature in 2011, any person required to register as a sex offender in this state
38 and who has not already provided a DNA sample in accordance with this article shall provide a
39 DNA sample as determined by the registration agency in consultation with the West Virginia State

40 Police Laboratory. The registering agency is responsible for the collection and submission of the
41 sample under this article.

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

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

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

60 ~~(l)~~ (m) A DNA sample obtained in accordance with the requirements of this article and its
61 use in accordance with this chapter shall be considered to have been obtained in good faith.
62 Should an error be determined to have occurred which caused a person's DNA to be obtained or
63 submitted improperly, the DNA record shall be removed from CODIS and the DNA sample
64 destroyed unless the individual has another qualifying offense or offenses.

65 ~~(m)~~ (n) Persons authorized to collect DNA samples shall not be civilly or criminally liable for

66 the collection of a DNA sample pursuant to this article if they perform these duties in good faith and
67 in a reasonable manner according to generally accepted medical or other professional practices.

68 (o) Notwithstanding any provision of this code to the contrary, any person convicted of an
69 offense requiring the providing of a DNA sample under this article on or after March 9, 1995, is
70 subject to the provisions of this section.

**§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 shall promulgate an emergency
2 rule and propose a legislative rule pursuant to Chapter 29A of this code establishing the procedure
3 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. When any person convicted of an offense described in section six is not incarcerated
7 imprisoned, the sheriff in the county where the person is convicted shall ensure that the DNA
8 sample is collected from the person: *Provided*, That a DNA sample may be collected at a prison,
9 regional facility or local hospital unit when so ordered by the sentencing court or other location
10 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 ~~(e)~~ (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 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~~ imprisoned in a
36 facility described in subsection (a) of this section, who has been put on notice of his or her
37 obligation to provide a DNA sample and has not submitted a court ordered DNA sample at the
38 request of a law-enforcement agency, shall be responsible for notifying the agency designated in
39 the court order and complying with that agency's directives for submitting a DNA sample. The
40 person shall have 30 days from the receipt of the court order to comply unless there is a
41 documented exception from the agency responsible for the DNA sample collection. A person
42 refusing to comply with a court order directing that person submit a DNA sample may be
43 considered in contempt.

44 ~~(g)~~ (h) Any court sentencing a person convicted of a qualifying offense to probation, on or
45 after the effective date of the amendments to this section enacted during the regular session of the

46 Legislature in 2011, shall order, as a condition of such probation, that the convicted person report
47 to the local sheriff's department to provide a DNA sample within 30 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
4 was based has resulted in the charge being dismissed or has resulted in acquittal or no charge
5 being 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 *Provided, That a circuit court, upon entry of a judgment of acquittal or dismissal with prejudice of*
11 *one ore more qualifying offenses, shall enter an order directing the West Virginia State Police to*
12 *purge the arrestee's DNA record from all databases if it is determined that the arrestee has no*
13 *other qualifying offenses: *Provided, however, That the West Virginia State Police shall notify the**
14 *Circuit Clerk in writing when the expungement is complete, and the Circuit Clerk shall provide a*
15 *copy of the notice to the person whose DNA record has been expunged.*

16 ~~(a)~~ (b) Any person convicted of a qualifying offense whose DNA record or profile has been
17 included in the state database and whose DNA sample is stored in the state databank or the
18 state's designated DNA typing, testing, and research laboratory may apply for expungement on
19 the grounds that the qualifying conviction that resulted in the inclusion of the person's DNA record
20 or profile in the state database or the inclusion of the person's DNA sample in the state databank
21 has been reversed and the case dismissed. The person seeking expungement, either individually
22 or through an attorney, may petition the court for expungement of the record. A copy of the petition
23 for expungement shall be served on the prosecuting attorney for the judicial district in which the

24 qualifying conviction was obtained not less than 20 days prior to the date of the hearing on the
25 petition. A certified copy of the order reversing and dismissing the conviction shall be attached to
26 an order of expungement.

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

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