

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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

~~(m)~~ (n) Persons authorized to collect DNA samples shall not be civilly or criminally liable for the collection of a DNA sample pursuant to this article if they perform these duties in good faith and 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.

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

~~(a)~~ (b) Upon incarceration, the Division of Corrections, regional jails and felon facilities shall ensure that the DNA sample is collected from all persons described in ~~section six of this article~~ §15-2B-6 of this code. When any person convicted of an offense described in ~~section six~~ §15-2B-6 of this code is not ~~incarcerated~~ imprisoned, the sheriff in the county where the person is convicted shall ensure that the DNA sample is collected from the person: *Provided*, That a DNA sample may be collected at a prison, regional facility or local hospital unit when so ordered by the sentencing court or other location determined by the sheriff.

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

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

~~(c)~~ (d) The Superintendent of the West Virginia State Police shall ~~promulgate legislative rules~~ propose rules for legislative approval pursuant to Chapter 29A of this code governing the procedures to be used in the collection of DNA samples, submission, identification, analysis and storage of DNA samples and typing results of DNA samples submitted under this article which shall be compatible with recognized federal standards.

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

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

~~(f)~~ (g) A person, convicted of a qualifying offense and not incarcerated in a facility described in subsection (a) of this section, who has been put on notice of his or her obligation to provide a DNA sample and has not submitted a court ordered DNA sample at the request of a law-enforcement agency, ~~shall be~~ is responsible for notifying the agency designated in the court order and complying with that agency's directives for submitting a DNA sample. The person shall have 30 days from the receipt of the court order to comply unless there is a documented exception from the agency responsible for the DNA sample collection. A person refusing to comply with a court order directing that person submit a DNA sample may be considered in contempt.

~~(g)~~ (h) Any court sentencing a person convicted of a qualifying offense to probation, on or

after the effective date of the amendments to this section enacted during the regular session of the Legislature in 2011, shall order, as a condition of such probation, that the convicted person report to the local sheriff's department to provide a DNA sample within 30 days.

§15-2B-11.**Expungement.**

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

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

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

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

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

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

(d) Upon complying with the provisions of subsection (c) of this section, the prosecuting attorney and the superintendent shall notify the circuit clerk in writing that the expungement of 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.