

FILED

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

WEST VIRGINIA LEGISLATURE

THIRD EXTRAORDINARY SESSION, 2004

ENROLLED

House Bill No. 305

(By Mr. Speaker, Mr. Kiss, and Delegate Trump)

Passed November 16, 2004

In Effect from Passage

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

E N R O L L E D

H. B. 305

(BY MR. SPEAKER, MR. KISS, AND DELEGATE TRUMP)
[BY REQUEST OF THE EXECUTIVE]

[Passed November 16, 2004; in effect from passage.]

AN ACT to amend and reenact §15-2B-3 and §15-2B-6 of the code of West Virginia, 1931, as amended; and to amend said code by adding thereto a new section, designated §15-2B-14, all relating to DNA testing for convicts under certain circumstances.

Be it enacted by the Legislature of West Virginia:

That §15-2B-3 and §15-2B-6 of the code of West Virginia, 1931, as amended, be amended and reenacted; and that said code be amended by adding thereto a new section, designated §15-2B-14, all to read as follows:

ARTICLE 2B. DNA DATA.

§15-2B-3. Definitions.

- 1 As used in this article the following terms mean:
- 2 (a) "DNA" means deoxyribonucleic acid. DNA is located
- 3 in the nucleus of cells and provides an individual's personal
- 4 genetic blueprint. DNA encodes genetic information that is the
- 5 basis of human heredity and forensic identification.

6 (b) "DNA record" means DNA identification information
7 stored in any state DNA database pursuant to this article. The
8 DNA record is the result obtained from DNA typing tests. The
9 DNA record is comprised of the characteristics of a DNA
10 sample which are of value in establishing the identity of
11 individuals. The results of all DNA identification tests on an
12 individual's DNA sample are also included as a "DNA record".

13 (c) "DNA sample" means a tissue, fluid or other bodily
14 sample, suitable for testing, provided pursuant to this article or
15 submitted to the division laboratory for analysis pursuant to a
16 criminal investigation.

17 (d) "FBI" means the federal bureau of investigation.

18 (e) "State DNA database" means all DNA identification
19 records included in the system administered by the West
20 Virginia state police.

21 (f) "State DNA databank" means the repository of DNA
22 samples collected under the provisions of this article.

23 (g) "Division" means the West Virginia state police.

§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 section
2 one, four, seven, nine, nine-a (when that offense constitutes a
3 felony), ten, ten-a, ten-b, twelve, fourteen or fourteen-a, article
4 two, chapter sixty-one of this code or section twelve, article
5 eight of said chapter (when that offense constitutes a felony),
6 shall provide a DNA sample to be used for DNA analysis as
7 described in this article. Further, any person convicted of any
8 offense described in article eight-b or eight-d of said chapter
9 shall provide a DNA sample to be used for DNA analysis as
10 described in this article.

11 (b) Any person presently incarcerated in a state correctional
12 facility or a county or regional jail in this state after conviction

13 of any offense listed in subsection (a) of this section shall
14 provide a DNA sample to be used for purposes of DNA analysis
15 as described in this article.

16 (c) Any person convicted of a violation of section five or
17 thirteen, article two, chapter sixty-one of this code, section one,
18 two, three, four, five, seven, eleven, twelve (when that offense
19 constitutes a felony) or subsection (a), section thirteen, article
20 three of said chapter, section three, four, five or ten, article
21 three-e of said chapter or section three, article four of said
22 chapter, shall provide a DNA sample to be used for DNA
23 analysis as described in this article.

24 (d) Any person convicted of an offense which constitutes a
25 felony violation of the provisions of article four, chapter sixty-a
26 of this code; or of an attempt to commit a violation of section
27 one or section fourteen-a, article two, chapter sixty-one of this
28 code; or an attempt to commit a violation of article eight-b of
29 said chapter shall provide a DNA sample to be used for DNA
30 analysis as described in this article.

31 (e) The method of taking the DNA sample is subject to the
32 testing methods utilized by the West Virginia state police crime
33 lab.

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

40 (g) The West Virginia state police may, where not other-
41 wise mandated, require any person convicted of a felony
42 offense under the provisions of this code, to provide a DNA
43 sample to be used for the sole purpose of criminal identification
44 of the convicted person who provided the sample: *Provided,*
45 That the person is under the supervision of the criminal justice

46 system at the time the request for the sample is made. Supervi-
47 sion includes prison, the regional jail system, parole, probation,
48 home confinement, community corrections program, and work
49 release.

50 (h) No part of the genetic information that is authorized to
51 be collected pursuant to this article may be used for any
52 purpose other than to establish the identity of the individual.
53 The biological sample obtained to conduct the identity test not
54 necessary to conduct a present or future identity test shall be
55 destroyed following the performance of the initial identity test
56 analysis.

§15-2B-14. Right to DNA testing.

1 (a) A person convicted of a felony currently serving a term
2 of imprisonment may make a written motion before the trial
3 court that entered the judgment of conviction for performance
4 (DNA) testing.

5 (b) (1) An indigent convicted person may request appoint-
6 ment of counsel to prepare a motion under this section by
7 sending a written request to the court. The request must include
8 the person's statement that he or she was not the perpetrator of
9 the crime and that DNA testing is relevant to his or her asser-
10 tion of innocence. The request must also include the person's
11 statement as to whether he or she previously had appointed
12 counsel under this section.

13 (2) If any of the information required in subdivision (1) of
14 this section is missing from the request, the court shall return
15 the request to the convicted person and advise him or her that
16 the matter cannot be considered without the missing informa-
17 tion.

18 (3) (A) Upon a finding of indigency, the inclusion of
19 information required in subdivision (1) of this section, and that
20 counsel has not previously been appointed pursuant to this
21 subdivision, the court shall appoint counsel. Counsel shall

22 investigate and, if appropriate, file a motion for DNA testing
23 under this section. Counsel represents the indigent person solely
24 for the purpose of obtaining DNA testing under this section.

25 (B) Upon a finding of indigency, and that counsel has been
26 previously appointed pursuant to this subdivision, the court
27 may, in its discretion, appoint counsel. Counsel shall investigate
28 and, if appropriate, file a motion for DNA testing under this
29 section. Counsel represents the person solely for the purpose of
30 obtaining DNA testing under this section.

31 (4) Nothing in this section provides for a right to the
32 appointment of counsel in a post-conviction collateral proceed-
33 ing or sets a precedent for any such right. The representation
34 provided an indigent convicted person under this article is
35 solely for the limited purpose of filing and litigating a motion
36 for DNA testing pursuant to this section.

37 (c) (1) The motion shall be verified by the convicted person
38 under penalty of perjury and must do the following:

39 (A) Explain why the identity of the perpetrator was, or
40 should have been, a significant issue in the case.

41 (B) Explain, in light of all the evidence, how the requested
42 DNA testing would raise a reasonable probability the convicted
43 person's verdict or sentence would be more favorable if the
44 results of DNA testing had been available at the time of
45 conviction.

46 (C) Make every reasonable attempt to identify both the
47 evidence that should be tested and the specific type of DNA
48 testing sought.

49 (D) Reveal the results of any DNA or other biological
50 testing previously conducted by either the prosecution or
51 defense, if known.

52 (E) State whether any motion for testing under this section
53 has been filed previously and the results of that motion, if
54 known.

55 (2) Notice of the motion shall be served on the prosecuting
56 attorney in the county of conviction and, if known, the govern-
57 mental agency or laboratory holding the evidence sought to be
58 tested. Responses, if any, shall be filed within sixty days of the
59 date on which the prosecuting attorney is served with the
60 motion, unless a continuance is granted for good cause.

61 (d) If the court finds evidence was subject to prior DNA or
62 other forensic testing, by either the prosecution or defense, it
63 shall order the party at whose request the testing was conducted
64 to provide all parties and the court with access to the laboratory
65 reports, underlying data, and laboratory notes prepared in
66 connection with the DNA or other biological evidence testing.

67 (e) The court, in its discretion, may order a hearing on the
68 motion. The motion shall be heard by the judge who conducted
69 the trial or accepted the convicted person's plea, unless the
70 presiding judge determines that judge is unavailable. Upon
71 request of either party, the court may order, in the interest of
72 justice, that the convicted person be present at the hearing of the
73 motion.

74 (f) The court shall grant the motion for DNA testing if it
75 determines all of the following have been established:

76 (1) The evidence to be tested is available and in a condition
77 that would permit the DNA testing requested in the motion;

78 (2) The evidence to be tested has been subject to a chain of
79 custody sufficient to establish it has not been substituted,
80 tampered with, replaced or altered in any material aspect;

81 (3) The identity of the perpetrator of the crime was, or
82 should have been, a significant issue in the case;

83 (4) The convicted person has made a prima facie showing
84 that the evidence sought for testing is material to the issue of
85 the convicted person's identity as the perpetrator of or accom-
86 plice to, the crime, special circumstance, or enhancement
87 allegation resulting in the conviction or sentence;

88 (5) The requested DNA testing results would raise a
89 reasonable probability that, in light of all the evidence, the
90 convicted person's verdict or sentence would have been more
91 favorable if DNA testing results had been available at the time
92 of conviction. The court in its discretion may consider any
93 evidence regardless of whether it was introduced at trial;

94 (6) The evidence sought for testing meets either of the
95 following conditions:

96 (A) The evidence was not previously tested;

97 (B) The evidence was tested previously, but the requested
98 DNA test would provide results that are reasonably more
99 discriminating and probative of the identity of the perpetrator
100 or accomplice or have a reasonable probability of contradicting
101 prior test results;

102 (7) The testing requested employs a method generally
103 accepted within the relevant scientific community;

104 (8) The evidence or the presently desired method of testing
105 DNA were not available to the defendant at the time of trial or
106 a court has found ineffective assistance of counsel at the trial
107 court level;

108 (9) The motion is not made solely for the purpose of delay.

109 (g) If the court grants the motion for DNA testing, the court
110 order shall identify the specific evidence to be tested and the
111 DNA technology to be used. Testing shall be conducted by a
112 DNA forensic laboratory in this state.

113 (h) The result of any testing ordered under this section shall
114 be fully disclosed to the person filing the motion and the
115 prosecuting attorney. If requested by any party, the court shall
116 order production of the underlying laboratory data and notes.

117 (i) If testing was requested by the state or the individual is
118 an indigent, the cost of DNA testing shall be borne by the state.

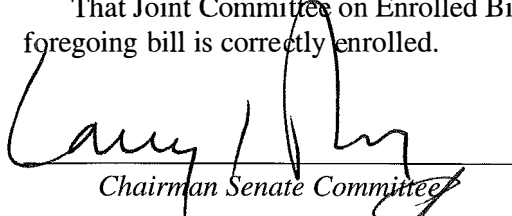
119 (j) An order granting or denying a motion for DNA testing
120 under this section is not to be appealable and is subject to
121 review only through a petition for writ of mandamus or
122 prohibition filed with the supreme court of appeals by the
123 person seeking DNA testing or the prosecuting attorney. The
124 petition shall be filed within twenty days of the court's order
125 granting or denying the motion for DNA testing. The court shall
126 expedite its review of a petition for writ of mandamus or
127 prohibition filed under this subsection.

128 (k) DNA testing ordered by the court pursuant to this
129 section shall be done as soon as practicable. However, if the
130 court finds that a miscarriage of justice will otherwise occur
131 and that it is necessary in the interests of justice to give priority
132 to the DNA testing, the court may require the DNA laboratory
133 to give priority to the DNA testing ordered pursuant to this
134 section over the laboratory's other pending casework.

135 (l) DNA profile information from biological samples taken
136 from a convicted person pursuant to a motion for post-convic-
137 tion DNA testing is exempt from any law requiring disclosure
138 of information to the public.

139 (m) Notwithstanding any other provision of law, the right
140 to file a motion for post-conviction DNA testing provided by
141 this section is absolute and may not be waived. This prohibition
142 applies to, but is not limited to, a waiver that is given as part of
143 an agreement resulting in a plea of guilty or nolo contendere.

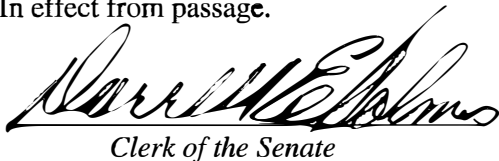
That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

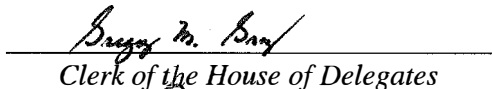

Chairman Senate Committee

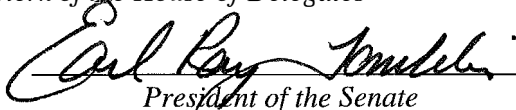

Chairman House Committee

Originating in the House.

In effect from passage.

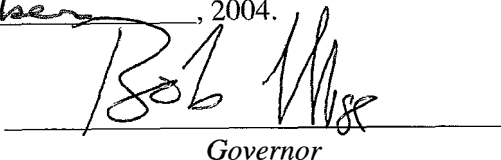

Clerk of the Senate


Clerk of the House of Delegates


President of the Senate


Speaker of the House of Delegates

The within is approved this the 2ND
day of December, 2004.


Governor

PRESENTED TO
THE GOVERNOR

DATE 11/19/04

TIME 4:20pm