

WEST VIRGINIA  
SECRETARY OF STATE  
KEN HECHLER  
ADMINISTRATIVE LAW DIVISION

Form #7

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FILED

MAR 29 2 12 PM '95

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

Effective Date

Apr. 18, 1995

NOTICE OF AN EMERGENCY RULE

AGENCY: West Virginia Div. of Public Safety TITLE NUMBER: 81

CITE AUTHORITY: W. Va. Code 15-2B-1 et seq.

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES  NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: \_\_\_\_\_

TITLE OF RULE BEING AMENDED: \_\_\_\_\_

IF NO, SERIES NUMBER OF RULE BEING FILED AS AN EMERGENCY: IX

TITLE OF RULE BEING FILED AS AN EMERGENCY: West Virginia DNA Databank

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR 42ND DAY AFTER FILING, WHICHEVER OCCURS FIRST.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

\*PLEASE SEE ATTACHED SHEET.

Use additional sheets if necessary

  
Signature

5.80

West Virginia Department of Military Affairs and Public Safety  
Division of Public Safety  
Title 81  
Series IX

**Circumstances Constituting an Emergency  
in  
Filing Proposed Rule**

The Legislature recently enacted the DNA Database and Databank Act of 1995 [hereinafter "the Act"], under W. Va. Code §15-2B-1 et seq. The Act provides for the creation of the State DNA Databank under the auspices of the West Virginia State Police. The Legislature, in Section 4(d)&(e) of the Act, mandated that the Superintendent of the West Virginia State Police promulgate legislative rules dealing with the establishment and operation of the Databank. Specifically, these rules are to deal with the collection, submission, and analysis of blood samples taken from convicted felons, as well as the proper storage of both the samples and test results. Further, the rules are required to outline the proper procedure for the exchange and expungement of records and information contained in the Databank. The Legislature, in Section 6(b) of the Act further stated that :

"All persons incarcerated in the state penitentiary or any regional jail in this state who are incarcerated due to the conviction of any offense listed in subsection (a) of this section who are incarcerated on the first day of July, one thousand nine hundred ninety-five, or who are convicted of any such offense on or after the first day of July, one thousand nine hundred ninety-five, shall have a blood sample drawn for purposes of analysis and storage of DNA."

The Legislature intends that the State DNA Databank begin operations on July 1, 1995. The implementation of the Databank is contingent upon the timely and proper submission of blood samples from the state penitentiary and regional jails. These proposed rules are essential in

**APPENDIX B**

**FISCAL NOTE FOR PROPOSED RULES**

**Rule Title:** West Virginia DNA Databank

**Type of Rule:**  **Legislative**  **Interpretive**  **Procedural**

**Agency** Marshall University

**Address** 400 Hal Greer Blvd.  
Huntington, WV

**1. Effect of Proposed Rule**

	ANNUAL FISCAL YEAR				
	DECREASE	INCREASE	CURRENT	NEW	TRANSFER
<b>ESTIMATED TOTAL * COST</b>	\$ 450,000	\$	\$ 450,000	\$	\$
<b>PERSONAL SERVICES</b>	125,000		125,000		
<b>CURRENT EXPENSE</b>	275,000		275,000		
<b>REPAIRS &amp; ALTERNATIONS</b>					
<b>EQUIPMENT</b>	50,000		50,000		
<b>OTHER</b>					

- 2. Explanation of above estimates:** Personal Services will require two technicians to be hired who will conduct DNA typing of blood samples and ensure quality control/assurance of the DNA laboratory. Current expenses will be directed towards the purchase of blood collection kits, DNA typing kits and other general supplies. Several equipment items are also required.
- 3. Objectives of these rules:** To promulgate legislation under the authority of W.VA. Code 15-2B-1 et seq. Blood samples obtained from convicted felons in the State of West Virginia will be typed by several methodologies in order to establish a DNA databank for the purposes of preventing and solving crimes of violence.

\*Estimated total cost represents program operation costs. All costs are covered by Legislature appropriations

Rule Title: West Virginia DNA Databank

**4. Explanation of Overall Economic Impact of Proposed Rule.**

**A. Economic Impact on State Government.**

The initial investment will establish DNA laboratories which will enable the Division of Public Safety to apply for funds through the Crime Bill 1994 for continued development.

**B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of Citizens.**

Has the potential to stimulate the growth of industries involved in medical diagnosis, environmental testing and other areas involving the analysis of DNA.

**C. Economic Impact on Citizens/Public at Large.**

Will introduce one facet of biotechnology into the economy of W. V., which could spur the development of high technologies and attract biotechnology firms to the area.

Date: 3/20/95

**Signature of Agency Head or Authorized Representative**

Herbert J. Kadet Vice President  
for Marshall University

**APPENDIX B**

**FISCAL NOTE FOR PROPOSED RULES**

Rule Title: West Virginia DNA Databank

Type of Rule:  Legislative     Interpretive     Procedural

Agency: West Virginia State Police

Address: 725 Jefferson Road  
South Charleston, WV 25309-1698

**1. Effect of Proposed Rule**

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
<u>ESTIMATED TOTAL COST</u>	\$ - 0 -	\$	\$ - 0 -	\$	\$
PERSONAL SERVICES					
CURRENT EXPENSE					
REPAIRS & ALTERNATIONS					
EQUIPMENT					
OTHER					

2. **Explanation of above estimates:** None with regard to the West Virginia State Police. See Fiscal Note prepared by Marshall University for program costs which have been funded by legislative appropriation to Marshall University.

3. **Objectives of these rules:** To promulgate legislation under the authority of W.Va. Code 15-2B-1 et seq. Blood samples obtained from convicted felons in the State of West Virginia will be typed by several methodologies in order to establish a DNA databank for the purposes of preventing and solving crimes of violence.

Rule Title: West Virginia DNA Databank

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

The initial investment will establish DNA laboratories which will enable the Division of Public Safety to apply for funds through the Crime Bill 1994 for continued development.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of Citizens.

Has the potential to stimulate the growth of industries involved in medical diagnosis, environmental testing and other areas involving the analysis of DNA.

C. Economic Impact on Citizens/Public at Large.

Will introduce one facet of biotechnology into the economy of West Virginia, which could spur the development of high technologies and attract biotechnology firms to the area.

Date: 3-20-95

Signature of Agency Head or Authorized Representative

St. Col. Gary N. Griffith

DATE:

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: West Virginia Division of Public Safety

EMERGENCY RULE TITLE: West Virginia DNA Databank

1. Date of Filing \_\_\_\_\_

2. Statutory authority for promulgating emergency rule:

DNA DATABASE AND DATABANK ACT OF 1995 W. Va. Code 15-2B-1 et seq.

3. Date of filing of proposed legislative rule: \_\_\_\_\_

4. Does the emergency rule adopt new language or does it amend or repeal a current legislative rule?

THE RULE ADOPTS NEW LANGUAGE AND IS A NEW RULE.

5. Has the same or similar emergency rule previously been filed and expired?

NO

6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the immediate preservation of public peace, health, safety or welfare.

N/A

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.

The Act at Section 6(b) requires the State DNA Databank to be operational by July 1, 1995. The rules are necessary to implement and administer the Databank. The rules are required by the Act.

8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

N/A

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## **Summary of Proposed Rule**

The State DNA Databank will serve as a central repository for unique genetic patterns of convicted felons as determined from their DNA. The administrative rules pertaining to the Databank are being promulgated pursuant to the DNA Database and Databank Act of 1995 under W. Va. Code §15-2B-1 et seq. These proposed rules are designed and intended to establish the methods and standards necessary to establish and operate the Databank. Among other things, the rules detail the proper collection, submission, and analysis of blood samples, as well as the proper methodology for the storage of samples and test results. Finally, the rules outline the proper procedure for both the exchange and expungement of information stored in the Databank.

guiding those individuals and entities who will be drawing the blood samples used to supply data to the Databank. If the proposed rules are caused to go through the complete Legislative rule making process prior to taking effect, it will be impossible for the Division of Public Safety to have rules in place on July 1, 1995. Thus, it is essential that the proposed rules be approved for emergency filing pursuant to W. Va. Code §29A-3-15(f)(2), if the State DNA Databank is to be implemented as the Legislature intended.

WEST VIRGINIA LEGISLATIVE RULE  
DEPARTMENT OF MILITARY AFFAIRS AND PUBLIC SAFETY  
DIVISION OF PUBLIC SAFETY  
TITLE 81  
SERIES IX

FILED  
Mar 29 2 13 PM '95  
OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

Title: West Virginia DNA Databank

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Section 1. General.

1.1. Scope - This legislative rule establishes the methods and standards necessary to establish and administer a DNA database/databank; as they relate to the withdrawal of blood samples, the submission of samples, the analysis of samples, the storage of samples and results, and the exchange and expungement of information concerning blood specimens collected for DNA analysis.

1.2. Authority - W. Va. Code §15-2B-1 et seq.

1.3. Filing Date -

1.4. Effective Date -

Section 2. Application and Enforcement.

2.1. Application - This legislative rule shall apply to any person or entity drawing, or causing to be drawn, samples of human blood for the purposes stated in this rule.

2.2. Enforcement - The enforcement of this legislative rule is vested with the Superintendent of the Division of Public Safety.

Section 3. Definitions.

As used in these rules, unless used in a context that clearly requires a different meaning, the term:

3.1. DNA Analysis - means the analysis performed on biological materials, including blood, to determine the genetic profile of the individual tested.

3.2. State Police - means the West Virginia Division of Public Safety.

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3.3. Medical Technician - means and shall include persons trained as medical technicians, emergency medical technicians, or phlebotomist.

3.4. WVSP DNA Databank Blood Kit (WVSP Kit) - means the kit provided by the West Virginia Division of Public Safety for the purposes of collecting Databank samples.

3.5 Marshall - means the DNA testing facility at the Marshall University School of Medicine.

3.6 Biochemistry Section - means the section of the State Police laboratory that administers the DNA Databank and conducts analysis of biological materials, including blood, to determine a genetic profile gleaned from DNA.

Section 4. Procedures for the Withdrawal of Blood Samples for DNA Analysis.

4.1. Blood withdrawal for the purposes of DNA analysis shall meet the following standards:

(a) All individuals convicted under the following sections of the West Virginia Code shall have a sample of blood withdrawn:

61-2-1, 61-2-2, 61-2-3; First and second degree murder  
61-2-4; Voluntary manslaughter  
61-2-7; Attempt to kill or injure by poison  
61-2-9; Malicious or unlawful assault, battery (felony)  
61-2-10; Assault during the commission of a felony  
61-2-10a; Violent crimes against the elderly  
61-2-12; Robbery or attempted robbery  
61-2-14; Abduction, kidnapping, etc.  
61-8-1 et seq.; All felony convictions  
61-8b-1 et seq.; All convictions  
61-8d-1 et seq.; All convictions

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(b) The blood shall be drawn only by a licensed registered professional nurse, doctor of medicine or osteopathy, or by a trained medical technician. The WVSP Kit shall be used only for the purposes outlined in this section of the West Virginia Code.

(c) The blood shall be drawn using the sterile, previously unused, needles and storage vessels provided in the WVSP Databank Blood Kit. The blood shall be drawn according to accepted medical procedures and according to the universal safety precautions outlined by the National Centers for Disease Control. The provided vessels shall be filled to capacity and sealed according to the instructions included in the WVSP Kit.

(d) The identity of the individual whose sample is collected shall be confirmed through an identification card bearing a photograph or through another means that would positively identify the blood donor. Only one donor shall be processed at a time to avoid potential mislabeling or misidentification of the samples.

(e) The information card provided in the Kit shall be completed in full at the time of sample collection according to the instructions included in the Kit. Also, the fingerprint identification block on the identification card shall be completed at the time of sample collection. A right thumb print shall be the print of choice. If a right thumb print is not possible, then a left thumb print shall be used. If a thumb print is not possible an index finger (right then left) shall be used for identity confirmation. If an index finger print cannot be collected, the middle finger (right then left), or ring finger print (right then left), or little finger print (right then left) shall be used to confirm identity. In the event that no finger print is possible due to the absence of fingers or hands, the fingerprint block shall be left blank. The identity of the digit used to make the fingerprint shall be noted on the identification card.

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(f) The verification of the information on the identification card shall be confirmed by a second individual. The witness shall sign the identification card on the appropriate signature line.

(g) The collected blood sample and the completed information card shall be placed in a WVSP Kit according to the instructions included, sealed, and mailed immediately to: West Virginia State Police, Biochemistry Section, 725 Jefferson Road, South Charleston, WV, 25309-1698.

(h) A log book, provided by the State Police, shall be maintained by the collection facility drawing the blood sample. The log shall contain the following information: WVSP kit number, name of donor, date and time of sample collection, name of witness, and name of collecting technician. The log shall be completed in full at the time of sample collection.

(i) The collection facility shall provide the Biochemistry Section with a copy of the log book. On January 15, April 15, July 15, and October 15 of each calendar year, a copy of the log book entries from the prior three month period shall be mailed to: West Virginia State Police, Biochemistry Section, 725 Jefferson Road, South Charleston, WV, 25309-1698. The collecting facility shall mail the log sheets even if no log entries occur in the three months prior to the mailing dates.

Section 5. Receipt of Blood Samples at State Police Headquarters.

5.1. The receipt of the samples shall be under the supervision of authorized personnel assigned to the Biochemistry Section, and shall meet the following standards:

(a) The Biochemistry Section shall maintain a log of all samples received. The log shall record the date of reception, submitting agency, WVSP kit number, donor, and a unique identification number.

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(b) Personnel assigned to the Biochemistry Section shall enter information from the WVSP Kit's identification card into the appropriate computer file. The card shall be labeled with a unique identifier and shall be filed in a secure/fireproof location.

(c) Each blood sample received shall be processed according to the existing Biochemistry Section safety and quality assurance guidelines. A minimum of two stain cards shall be prepared from the sample contained in the WVSP Kit. Each prepared stain card shall be labeled with unique identifiers. Samples shall be prepared for long term storage in a temperature monitored  $-70^{\circ}\text{C}$  storage device. All prepared stains shall be stored, upon drying, in sequential order in the long term storage device. One blood stain card shall be forwarded to DNA testing facility at Marshall.

(d) A freezer stain use log shall be maintained by the Biochemistry Section. The removal of a stain card from the long term storage device shall be noted on the log in the following manner: date and time of removal, purpose of removal, and date and time of return, if applicable. All transfers of stain cards to the DNA testing facility at Marshall shall be noted on the log.

Section 6. Transport and Receipt of Dried Blood Stains to Marshall University for DNA Analysis.

6.1. The transport and receipt of the samples shall be under the supervision of authorized personnel assigned to the Biochemistry Section and shall meet the following standards:

(a) Stain cards prepared for transport shall contain only the following data: sex, race, and unique identifier of the donor.

(b) The stain cards shall be transported to Marshall University by authorized personnel assigned to the Biochemistry Section. A stain card transport and receipt form shall be completed and signed by the transporting and receiving individuals. A copy of the transport and receipt form will be maintained in the records of both agencies.

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(c) Upon receipt of the stain cards at Marshall University, the information from each stain card shall be logged into the appropriate computer file. A backup file shall be maintained by Marshall in a secure, destruction-proof location.

(d) Upon receipt, stain cards shall be stored in a secure temperature monitored  $-70^{\circ}\text{C}$  storage device. The freezer shall be connected to an auxiliary power source in the event of power failures.

(e) A freezer stain use log shall be maintained by Marshall. The removal of a stain card from the long term storage device shall be noted on the log in the following manner: date and time of removal, purpose of removal, and date and time of return, if applicable. All transfers of stain cards to the Biochemistry Section shall be noted on the log.

(f) Entry and removal of stain cards shall be performed by the primary analyst, as assigned by Marshall, and witnessed by a second analyst. The handling of all stain cards shall be confirmed in this manner to verify stains are being identified properly prior to analysis. Both the primary and secondary analyst shall initial the log at each entry or withdrawal of stain cards.

Section 7. Handling, processing and analyzing blood samples at Marshall.

7.1. The handling, processing and analysis of stains at Marshall will be performed according to the nationally accepted guidelines for DNA analysis promulgated by the FBI Director, according to the guidelines promulgated by the American Society of Crime Laboratory Directors Laboratory Accreditation Board and according to The National DNA Index System (CODIS) Standards for the Acceptance of DNA Data. In addition to the preceding requirements the handling, processing, and analysis of samples shall meet the following standards:

(a) DNA analysis shall be conducted only by personnel who have successfully completed proficiency tests approved by the State Police.

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(b) DNA analysis shall be conducted only by personnel who have their personal DNA profiles on file for all DNA tests conducted by the DNA testing facility at Marshall.

(c) DNA analysis shall be conducted according to a State Police approved quality assurance program. Periodic quality control inspections shall be conducted by the State Police.

(d) All DNA analysis data shall be forwarded to the Biochemistry Section for inspection and approval.

(e) All DNA data generated by Marshall shall be stored in a format compatible with the National DNA Index System (CODIS) employed by the State Police and the FBI. Data generated at Marshall shall be stored in a location and in a way that is secure from alteration and destruction.

Section 8. The Monitoring, Inspection, and Prohibition on the Exchange of Information.

8.1. In order to safeguard the donor's personal privacy, the following standards shall be met in the gathering and exchange of information:

(a) The information contained in the West Virginia Databank shall be limited to that required to generate investigative leads. Names, addresses, criminal histories or other personally identifying information shall not be included.

(b) Access to DNA analysis records shall be restricted to criminal justice DNA laboratories. Laboratories other than the West Virginia State Police Crime Laboratory shall obtain a DNA record only when a potential DNA match is discovered. Release of identifying information shall occur only upon the verified request of an investigating law enforcement agency. Data communications concerning records shall be encrypted before transmission with electronic devices available only to the criminal justice community.

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(c) User authentication and access control shall be employed by the computer software used in the DNA Databank. Each user shall be uniquely identified by the software and all activity by a user shall be monitored. Transaction activities shall be monitored by the computer system to record what activity occurred (ex. add/edit/delete) and when the activity occurred. User authority shall be segregated to limit the activities that one user may perform as opposed to other users.

(d) In-State searches of the DNA Databank shall be limited to open criminal cases that are being actively investigated by a law enforcement agency. If a potential DNA match is identified, a match report shall be generated by the Biochemistry Section. The match report shall be used as probable cause by the investigating agency to obtain a court order for the collection of a fresh reference sample.

(e) All data entered into the Databank shall comply with the approved quality assurance guidelines of the State Police Crime Laboratory. Data from all points of entry, collection, storage, and testing shall be routinely monitored to insure its integrity.

Section 9. The Expungement of Information.

9.1. The expungement of DNA analysis records shall be under the supervision of authorized personnel assigned to the Biochemistry Section and shall meet the following standards:

(a) Records shall be expunged upon receipt of a court order. The ordering court shall be contacted and the order verified before expungement.

(b) A file shall be maintained of all expungement orders received and processed by the Biochemistry Section.

(c) Upon confirmation of the court order, the DNA Databank computer file relating to the donor and conviction named in the order shall be erased from the main file and all backup files. The corresponding identification card, and any copies that may exist, on file with the Biochemistry Section shall be destroyed. All corresponding blood stains collected, according to this section

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of the West Virginia Code, in the possession of or under the jurisdiction of the Biochemistry Section, shall be destroyed according to accepted safety guidelines for biohazard materials.

(d) Upon compliance, a notification letter of expungement shall be sent to the court of record by authorized personnel assigned to the Biochemistry Section.



KEN HECHLER  
Secretary of State

MARY P. RATLIFF  
Deputy Secretary of State

A. RENEE COE  
Deputy Secretary of State

CATHERINE FREROTTE  
Executive Assistant

Telephone: (304) 558-6000  
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WILLIAM H. HARRINGTON  
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JUDY COOPER  
Director, Administrative Law

DONALD R. WILKES  
Director, Corporations

(Plus all the volunteer  
help we can get)

FAX: (304) 558-0900

**STATE OF WEST VIRGINIA**

**SECRETARY OF STATE**

Building 1, Suite 157-K  
1900 Kanawha Blvd., East  
Charleston, WV 25305-0770

April 18, 1995

**NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE**

AGENCY: West Virginia Division of Public Safety

RULE: New Rule, Series 9, West Virginia DNA Databank

DATE FILED AS AN EMERGENCY RULE: March 29, 1995

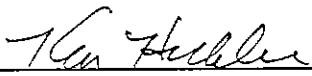
DECISION NO. 5-95

OFFICE OF THE  
SECRETARY OF STATE

APR 18 4 32 PM '95

FILED

Following review under WV Code 29A-3-15a, it is the decision of the Secretary of State that the above emergency rule be approved. A copy of the complete decision with required findings is available from this office.

  
KEN HECHLER  
Secretary of State



KEN HECHLER  
Secretary of State

MARY P. RATLIFF  
Deputy Secretary of State

A. RENEE COE  
Deputy Secretary of State

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help we can get)

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## STATE OF WEST VIRGINIA

### SECRETARY OF STATE

Building 1, Suite 157-K  
1900 Kanawha Blvd., East  
Charleston, WV 25305-0770

### EMERGENCY RULE DECISION (ERD 5-95)

AGENCY: West Virginia Division of Public Safety  
RULE: New Rule, Series 9, West Virginia DNA Databank  
FILED AS AN EMERGENCY RULE: March 29, 1995

- par. 1 The West Virginia Division of Public Safety (State Police) has filed the above new rule as an emergency rule.
- par. 2 West Virginia Code 29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [(29A-3-15a)(b)].
- par. 4 (A) Procedural Compliance: WV Code 29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).
- par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the thirty-five day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.
- par. 6 The State Police filed this emergency rule with supporting documents with the Secretary of State March 29, 1995 and with the LRMRC March 29, 1995.

par. 7 It is the determination of the Secretary of State that the State Police has complied with the procedural requirements of WV Code §29A-3-15 for adoption of an emergency rule.

par. 8 (B) Statutory Authority -- §15B-2B-4(d) & (e) reads:

*(d) The superintendent of the division shall further establish standards for testing and quality assurance of DNA testing and the exchange of information through the promulgation of a legislative rule pursuant to §29A of this code.*

*(e) The superintendent of the division of public safety shall promulgate additional legislative rules pursuant to §29A of this code necessary to establish and administer the DNA database and databank consistent with the requirements of state and federal law and consistent with the systems employed by the FBI.*

par. 9 WV Code §15-2B-9(b) & (c) further reads:

*(b) The superintendent of the division shall promulgate a legislative rule pursuant to §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 may be outlined by the national centers for disease control and prevention. No civil liability attaches to any person when the blood was drawn according to recognized medical procedures employing such universal precautions. No person is relieved of liability for negligence in the drawing of blood for purposes of DNA testing*

*(c) The superintendent of the division shall promulgate legislative rules pursuant to §29A of this code governing the procedures to be used in the withdrawal of blood 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.*

par. 10 It is the determination of the Secretary of State that the State Police has not exceeded its statutory authority in promulgating this emergency rule.

par. 11 (C) Emergency -- WV Code 29A-3-15(f) defines "emergency" as follows:

*(f) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.*

par. 12 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 13 The facts and circumstances as presented by the State Police are as follows:

The Legislature recently enacted the DNA Database and Databank Act of 1995 (hereinafter "the Act") under W. Va. Code §15-2B-1 et seq. The Act provides for the creation of the State DNA Databank under the auspices of the West Virginia State Police. The Legislature, in Section 4(d) & (e) of the Act, mandated that the Superintendent of the West Virginia State Police promulgate legislative rules dealing with the establishment and operation of the Databank. Specifically, these rules are to deal with the collection, submission and analysis of blood samples taken from convicted felons, as well as the proper storage of both the samples and test results. Further, the rules are required to outline the proper procedure for the exchange and expungement of records and information contained in the Databank. The Legislature, in Section 6(b) of the Act further stated that:

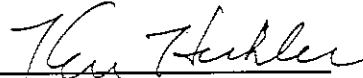
*"All persons incarcerated in the state penitentiary or any regional jail in this state who are incarcerated due to the conviction of any offense listed in subsection (a) of this section who are incarcerated on the first day of July, one thousand nine hundred ninety-five, or who are convicted of any such offense on or after the first day of July, one thousand nine hundred ninety-five, shall have a blood sample drawn for purposes of analysis and storage of DNA."*

The Legislature intends that the State DNA Data Bank begin on July 1, 1995. The implementation of the Databank is contingent upon the timely and proper submission of blood samples from the state penitentiary and regional jails. These proposed rules are essential in guiding those individuals and entities who will be drawing the blood samples used to supply data to the Databank. If the proposed rules are caused to go through the complete Legislative rule making process prior to taking effect, it will be impossible for the Division of Public Safety to have rules in place on July 1, 1995. Thus, it is essential that the proposed rule be approved for emergency filing pursuant to W. Va. Code §29A-3-15(f)(2), if the State DNA Databank is to be implemented as the Legislature intended.

par. 14 It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in §29A-3-15(f). . . "time limitation".

par. 15

This decision shall be cited as Emergency Rule Decision 5-95 or ERD 5-95 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the West Virginia Division of Public Safety, the Attorney General and the Legislative Rule Making Review Commission.



KEN HECHLER  
Secretary of State

Entered \_\_\_\_\_

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SECRETARY OF STATE