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WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1995



ENROLLED

COMMITTEE SUBSTITUTE FOR
SENATE BILL NO. 27

(By Senators *TOUBIN, MR. PRESIDENT, AND*
BOLEY, BY REQUEST OF THE EXECUTIVE)



PASSED MARCH 4, 1995
In Effect 90 days from Passage

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COMMITTEE SUBSTITUTE
FOR
Senate Bill No. 27

(BY SENATORS TOMBLIN, MR. PRESIDENT, AND BOLEY, BY
REQUEST OF THE EXECUTIVE)

[Passed March 4, 1995; in effect ninety days from passage.]

AN ACT to amend and reenact sections two, ten, thirteen, fourteen, sixteen, seventeen and eighteen, article five, chapter forty-nine of the code of West Virginia, one thousand nine hundred thirty-one, as amended, all relating to the jurisdiction of courts over persons under eighteen years of age generally; the continuing jurisdiction of juvenile courts; the transfer of juvenile proceedings from juvenile jurisdiction to criminal jurisdiction of the courts; the commitment of juveniles upon disposition; the modification of dispositional orders; the transfer of juveniles from a secure facility to a penitentiary once the age of eighteen years is attained; the expungement of juvenile records; and the formulation of after-care plans for juveniles.

Be it enacted by the Legislature of West Virginia:

That sections two, ten, thirteen, fourteen, sixteen, seventeen and eighteen, article five, chapter forty-nine of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted, all to read as follows:

ARTICLE 5. JUVENILE PROCEEDINGS.

§49-5-2. Continuing jurisdiction of court.

1 As used in this article, a "child" shall include a person
2 under the age of eighteen years or a person subject to the
3 juvenile jurisdiction of the court pursuant to this section.
4 If a child commits an act which if committed by an adult
5 would be a crime and for such act is adjudged delin-
6 quent, the jurisdiction of the court shall continue until
7 the child becomes twenty-one years of age with the same
8 power over the child that the court had prior to the
9 child's becoming an adult and the further power to
10 sentence such person to not more than six months in jail
11 if the offender is over the age of eighteen years. This
12 shall not preclude the exercise of criminal jurisdiction
13 where the proceedings have been transferred to the
14 criminal jurisdiction of the court pursuant to section ten
15 of this article, or in case the offender, after becoming an
16 adult, commits a violation of law. A child may be
17 brought before the circuit court for proceedings under
18 this article by the following means and no others:

19 (a) By juvenile petition praying that the child be
20 adjudged neglected or delinquent;

21 (b) Certification or transfer to the juvenile jurisdiction
22 of the circuit court, from the criminal jurisdiction of
23 such court, from any foreign court or any court of this
24 state before which such child is brought charged with
25 the commission of a crime, as provided in section one,
26 one-a or one-b of this article;

27 (c) By warrant, capias or attachment issued by a judge,
28 referee or magistrate returnable to the circuit court,
29 charging a child with an act of delinquency.

§49-5-10. Waiver and transfer of jurisdiction.

1 (a) Upon written motion of the prosecuting attorney
 2 filed at least eight days prior to the adjudicatory hearing
 3 and with reasonable notice to the child, the parents,
 4 guardians or custodians of the child and the child's
 5 counsel, the court shall conduct a hearing to determine
 6 if juvenile jurisdiction should or must be waived and the
 7 proceeding transferred to the criminal jurisdiction of the
 8 court. Any motion filed in accordance with this section
 9 shall state, with particularity, the grounds for the
 10 requested transfer, including the grounds relied upon set
 11 forth in subsections (d), (e), (f) and (g) of this section and
 12 the burden shall be upon the state to establish such
 13 grounds by clear and convincing proof. Any hearing
 14 held under the provisions of this section shall be held
 15 within seven days of the filing of the motion for transfer
 16 unless it is continued for good cause.

17 (b) No inquiry relative to admission or denial of the
 18 allegations of the charge or the demand for jury trial
 19 shall be made by or before the court until a decision
 20 shall have been made relative to whether the proceeding
 21 is to be transferred to criminal jurisdiction.

22 (c) The court shall transfer a juvenile proceeding to
 23 criminal jurisdiction if a child who has attained the age
 24 of fourteen years shall make a demand on the record to
 25 be transferred to the criminal jurisdiction of the court.
 26 Such cases may then be referred to a magistrate for trial,
 27 if otherwise cognizable by a magistrate.

28 (d) The court shall transfer a juvenile proceeding to
 29 criminal jurisdiction if there is probable cause to believe
 30 that:

31 (1) The child is at least fourteen years of age and has
 32 committed the crime of treason under section one, article
 33 one, chapter sixty-one of this code; the crime of murder
 34 under sections one, two and three, article two of said
 35 chapter; the crime of robbery involving the use or
 36 presenting of firearms or other deadly weapons under
 37 section twelve of said article; and the crime of kidnap-
 38 ping under section fourteen-a of said article; the crime of

39 first degree arson under section one, article three of said
40 chapter; or the crime of sexual assault in the first degree
41 under section three, article eight-b of said chapter; or

42 (2) The child is at least fourteen years of age and has
43 committed an offense of violence to the person which
44 would be a felony if the child were an adult: *Provided*,
45 That the child has been previously adjudged delinquent
46 for the commission of an offense of violence to the
47 person which would be a felony if the child were an
48 adult; or

49 (3) The child is at least fourteen years of age and has
50 committed an offense which would be a felony if the
51 child were an adult: *Provided*, That the child has been
52 twice previously adjudged delinquent for the commission
53 of an offense which would be a felony if the child were
54 an adult.

55 (e) The court may transfer a juvenile proceeding to
56 criminal jurisdiction if there is probable cause to believe
57 that the child would otherwise satisfy the provisions of
58 subdivision (1), subsection (d) of this section, but who is
59 younger than fourteen years of age.

60 (f) The court may, upon consideration of the child's
61 mental and physical condition, maturity, emotional
62 attitude, home or family environment, school experience
63 and similar personal factors, transfer a juvenile proceed-
64 ing to criminal jurisdiction if there is probable cause to
65 believe that the child would otherwise satisfy the provi-
66 sions of subdivision (2) or (3), subsection (d) of this
67 section, but who is younger than fourteen years of age.

68 (g) The court may, upon consideration of the child's
69 mental and physical condition, maturity, emotional
70 attitude, home or family environment, school experience
71 and similar personal factors, transfer a juvenile proceed-
72 ing to criminal jurisdiction if there is probable cause to
73 believe that:

74 (1) The child, who is at least fourteen years of age, has
75 committed an offense of violence to the person which

76 would be a felony if the child were an adult; or

77 (2) The child, who is at least fourteen years of age, has
78 committed an offense which would be a felony if the
79 child were an adult: *Provided*, That the child has been
80 previously adjudged delinquent for the commission of a
81 crime which would be a felony if the child were an adult;
82 or

83 (3) The child, who is at least fourteen years of age, used
84 or presented a firearm or other deadly weapon during
85 the commission of a felony; or

86 (4) The child has committed a violation of the provi-
87 sions of section four hundred one, article four, chapter
88 sixty-a of this code which would be a felony if the child
89 were an adult involving the manufacture, delivery or
90 possession with the intent to deliver a narcotic drug. For
91 purposes of this subdivision, the term "narcotic drug"
92 shall have the same definition as that set forth in section
93 one hundred one, article one of said chapter.

94 (h) For purposes of this section the term "offense of
95 violence" means an offense which involves the use or
96 threatened use of physical force against a person.

97 (i) If, after a hearing, the court directs the transfer of
98 any juvenile proceeding to criminal jurisdiction, it shall
99 state on the record the findings of fact and conclusions
100 of law upon which its decision is based or shall incorpo-
101 rate such findings of fact and conclusions of law in its
102 order directing transfer.

103 (j) The child shall have the right to directly appeal an
104 order of transfer to the supreme court of appeals of the
105 state of West Virginia: *Provided*, That notice of intent to
106 appeal and a request for transcript be filed within ten
107 days from the date of the entry of any such order and the
108 petition for appeal shall be presented to the supreme
109 court of appeals within forty-five days from the entry of
110 such order, and that, in default thereof, the right of
111 appeal and the right to object to such order of transfer
112 shall be waived and may not thereafter be asserted. The

113 provisions of article five, chapter fifty-eight of this code
114 pertaining to the appeals of judgments in civil actions
115 shall apply to appeals under this chapter except as
116 herein modified. The court may, within forty-five days
117 of the entry of the order of transfer, by appropriate
118 order, extend and re-extend the period in which to file
119 the petition for appeal for such additional time, not to
120 exceed a total extension of sixty days, as in the court's
121 opinion may be necessary for preparation of the tran-
122 script: *Provided, however*, That the request for such
123 transcript was made by the party seeking appeal within
124 ten days of entry of such order of transfer. In the event
125 any such notice of intent to appeal and request for
126 transcript be timely filed, proceedings in criminal court
127 shall be stayed upon motion of the defendant pending
128 final action of the supreme court of appeals thereon.

§49-5-13. Disposition; appeal.

1 (a) In aid of disposition, the juvenile probation officer
2 assigned to the court shall, upon request of the court,
3 make an investigation of the environment of the child
4 and the alternative dispositions possible. The court,
5 upon its own motion, or upon request of counsel, may
6 order a psychological examination of the child. The
7 report of such examination and other investigative and
8 social reports shall not be made available to the court
9 until after the adjudicatory hearing. Unless waived,
10 copies of the report shall be provided to counsel for the
11 petitioner and counsel for the child no later than
12 seventy-two hours prior to the dispositional hearing.

13 (b) Following the adjudication, the court shall conduct
14 the dispositional proceeding, giving all parties an
15 opportunity to be heard. In disposition the court shall
16 not be limited to the relief sought in the petition and
17 shall, in electing from the following alternatives, con-
18 sider the best interests of the child and the welfare of the
19 public:

20 (1) Dismiss the petition;

21 (2) Refer the child and the child's parent or custodian
22 to a community agency for needed assistance and dismiss
23 the petition;

24 (3) Upon a finding that the child is in need of extra-
25 parental supervision: (A) Place the child under the
26 supervision of a probation officer of the court or of the
27 court of the county where the child has his or her usual
28 place of abode or other person while leaving the child in
29 custody of his or her parent or custodian; and (B) pre-
30 scribe a program of treatment or therapy or limit the
31 child's activities under terms which are reasonable and
32 within the child's ability to perform, including participa-
33 tion in the litter control program established pursuant to
34 section twenty-five, article seven, chapter twenty of this
35 code, or other appropriate programs of community
36 service;

37 (4) Upon a finding that a parent or custodian is not
38 willing or able to take custody of the child, that a child
39 is not willing to reside in the custody of his parent or
40 custodian, or that a parent or custodian cannot provide
41 the necessary supervision and care of the child, the court
42 may place the child in temporary foster care or tempo-
43 rarily commit the child to the state department or a child
44 welfare agency. The court order shall state that continu-
45 ation in the home is contrary to the best interest of the
46 child and why; and whether or not the state department
47 made a reasonable effort to prevent the placement or
48 that the emergency situation made such efforts unrea-
49 sonable or impossible. Whenever the court transfers
50 custody of a youth to the department of human services,
51 an appropriate order of financial support by the parents
52 or guardians shall be entered in accordance with section
53 five, article seven of this chapter and guidelines promul-
54 gated by the supreme court of appeals;

55 (5) Upon a finding that the best interests of the child or
56 the welfare of the public require it, and upon an adjudi-
57 cation of delinquency pursuant to subdivision (1), section
58 four, article one of this chapter, the court may commit

59 the child to an industrial home, correctional institution
60 for children, or other appropriate facility for the treat-
61 ment, instruction and rehabilitation of juveniles:
62 *Provided*, That the court maintains discretion to con-
63 sider alternative sentencing arrangements. Commit-
64 ments shall not exceed the maximum term for which an
65 adult could have been sentenced for the same offense.
66 The order shall state that continuation in the home is
67 contrary to the best interests of the child and why; and
68 whether or not the state department made a reasonable
69 effort to prevent the placement or that the emergency
70 situation made such efforts unreasonable or impossible;

71 (6) Upon an adjudication of delinquency pursuant to
72 subdivision (3) or (4), section four, article one of this
73 chapter, and upon a finding that the child is so totally
74 unmanageable, ungovernable and antisocial that the
75 child is amenable to no treatment or restraint short of
76 incarceration, commit the child to a rehabilitative
77 facility devoted exclusively to the custody and rehabili-
78 tation of children adjudicated delinquent pursuant to
79 said subdivision. Commitments shall not exceed the
80 maximum period of one year with discretion as to
81 discharge to rest with the director of the institution, who
82 may release the child and return him or her to the court
83 for further disposition. The order shall state that contin-
84 uation in the home is contrary to the best interests of the
85 child and why; and whether or not the state department
86 made a reasonable effort to prevent the placement or
87 that the emergency situation made such efforts unrea-
88 sonable or impossible; or

89 (7) After a hearing conducted under the procedures set
90 out in subsections (c) and (d), section four, article five,
91 chapter twenty-seven of this code, commit the child to a
92 mental health facility in accordance with the child's
93 treatment plan; the director may release a child and
94 return him to the court for further disposition. The
95 order shall state that continuation in the home is con-
96 trary to the best interests of the child and why; and
97 whether or not the state department made a reasonable

98 effort to prevent the placement or that the emergency
99 situation made such efforts unreasonable or impossible.

100 (c) The disposition of the child shall not be affected by
101 the fact that the child demanded a trial by jury or made
102 a plea of denial. Any dispositional order is subject to
103 appeal to the supreme court of appeals.

104 (d) Following disposition, it shall be inquired of the
105 respondent whether or not appeal is desired and the
106 response transcribed; a negative response shall not be
107 construed as a waiver. The evidence shall be transcribed
108 as soon as practicable and made available to the child or
109 his or her counsel, if the same is requested for purposes
110 of further proceedings. A judge may grant a stay of
111 execution pending further proceedings.

112 (e) Notwithstanding any other provision of this code to
113 the contrary, if a child charged with delinquency under
114 this chapter is transferred to adult jurisdiction and there
115 tried and convicted, the court may make its disposition
116 in accordance with this section in lieu of sentencing such
117 person as an adult.

§49-5-14. Modification of dispositional orders.

1 (a) A dispositional order of the court may be modified:

2 (1) Upon the motion of the probation officer, a state
3 department official or prosecuting attorney; or

4 (2) Upon the request of the child or a child's parent or
5 custodian who alleges a change of circumstances relating
6 to disposition of the child.

7 Upon such a motion or request, the court shall conduct
8 a review proceeding, except that if the last dispositional
9 order was within the previous six months the court may
10 deny a request for review. Notice in writing of a review
11 proceeding shall be given to the child, the child's parent
12 or custodian and all counsel not less than seventy-two
13 hours prior to the proceeding. The court shall review the
14 performance of the child, the child's parent or custodian,
15 the child's social worker and other persons providing

16 assistance to the child or child's family. If the motion or
17 request for review of disposition is based upon an
18 alleged violation of a court order, the court may modify
19 the dispositional order to a more restrictive alternative
20 if it finds clear and convincing proof of substantial
21 violation. In the absence of such proof, the court may
22 decline to modify the dispositional order or may modify
23 the order to one of the less restrictive alternatives set
24 forth in section thirteen of this article. No child shall be
25 required to seek a modification order as provided in this
26 section in order to exercise his right to seek release by
27 habeas corpus.

28 (b) In a hearing for modification of a dispositional
29 order, or in any other dispositional hearing, the court
30 shall consider the best interests of the child and the
31 welfare of the public.

**§49-5-16. Committing children to jail and detention facilities;
standards.**

1 (a) A child under eighteen years of age shall not be
2 committed to a jail or police station, except that any
3 child over fourteen years of age who has been committed
4 to an industrial home or correctional institution may be
5 held in the juvenile department of a jail while awaiting
6 transportation to the institution for a period not to
7 exceed ninety-six hours, and a child over fourteen years
8 of age who is charged with a crime which would be an
9 offense of violence which would be a felony if committed
10 by an adult, may, upon an order of the circuit court, be
11 housed in a juvenile detention portion of a county
12 facility, but not within sight of adult prisoners. A child
13 charged with or found to be delinquent solely under
14 subdivision (3), (4) or (5), section four, article one of this
15 chapter, shall not be housed in a detention or other
16 facility wherein persons are detained for criminal
17 offenses or for delinquency involving offenses which
18 would be crimes if committed by an adult: *Provided,*
19 That a child who is adjudicated delinquent under
20 subdivision (5) of said section and who has violated an

21 order of probation or a contempt order arising out of a
22 proceeding wherein the child was adjudicated delin-
23 quent for an offense which would be a crime if commit-
24 ted by an adult may not be housed in a detention or other
25 facility wherein persons are detained who have not been
26 adjudicated delinquent for such offenses.

27 (b) No child who has been convicted of an offense
28 under the adult jurisdiction of the circuit court shall be
29 held in custody in a penitentiary of this state: *Provided*,
30 That such child may be transferred from a secure juve-
31 nile facility to a penitentiary after he shall attain the age
32 of eighteen years if, in the judgment of the court which
33 committed such child, such transfer is appropriate:
34 *Provided, however*, That any other provision of this code
35 to the contrary notwithstanding, prior to such transfer
36 the child shall be returned to the sentencing court for the
37 purpose of reconsideration and modification of the
38 imposed sentence, which shall be based upon a review of
39 all records and relevant information relating to the
40 child's rehabilitation since his conviction under the adult
41 jurisdiction of the court.

**§49-5-17. Expungement of records; exceptions; no discrimina-
tion.**

1 (a) One year after the child's eighteenth birthday, or
2 one year after personal or juvenile jurisdiction shall have
3 terminated, whichever is later, the records of a juvenile
4 proceeding conducted under this chapter, including law-
5 enforcement files and records, fingerprints, physical
6 evidence and all other records pertaining to said pro-
7 ceeding shall be expunged by operation of law. When
8 records are expunged, they shall be returned to the court
9 in which the case was pending and kept in a separate
10 confidential file and not opened except upon order of the
11 court.

12 (b) Expungement shall be accomplished by physically
13 marking the records to show that such records have been
14 expunged and by the secure sealing and filing of said
15 records in such a manner that no one can determine the

16 identity of said juvenile except as provided in subsection
17 (d) of this section. Expungement shall have the legal
18 effect as if the offense never occurred.

19 (c) The child's counsel, parent, guardian or custodian,
20 the court, law-enforcement agencies and other public
21 and private agencies, in response to a request for record
22 information, shall reply that juvenile records are not
23 public records and are available only by order of the
24 circuit court in which the case was pending.

25 (d) Notwithstanding this or any other provision of this
26 code to the contrary, after the effective date of the
27 reenactment of this section juvenile records and law-
28 enforcement records shall not be disclosed or made
29 available for inspection except as follows:

30 (1) If a juvenile case is transferred to the criminal
31 jurisdiction of the court, and upon the happening of any
32 of the following:

33 (A) The failure of the juvenile transferred to timely file
34 an appeal of the order of transfer; or

35 (B) The refusal of the supreme court of appeals to hear
36 the petition of the juvenile appealing the order of
37 transfer; or

38 (C) The affirming of the order of transfer by the
39 supreme court of appeals, then all records of the case
40 generated thereafter shall be open to public inspection,
41 under all of the same structures and guidelines and
42 requirements of law as exist regarding records for the
43 prosecution of adults.

44 (2) The court may also, by written order pursuant to a
45 written petition, permit disclosure when:

46 (A) A court having juvenile jurisdiction has the child
47 before it in a juvenile proceeding;

48 (B) A court exercising criminal jurisdiction over the
49 child requests such records for the purpose of a presen-
50 tence report or other dispositional proceeding;

51 (C) The child or counsel for the child requests disclo-
52 sure or inspection of such records;

53 (D) The officials of public institutions to which a child
54 is committed require such records for transfer, parole or
55 discharge considerations; or

56 (E) A person doing research requests disclosure, on the
57 condition that information which would identify the
58 child or family involved in the proceeding shall not be
59 divulged.

60 (e) No individual, firm, corporation or other entity
61 shall, on account of a person's prior involvement in a
62 proceeding under this article, discriminate against any
63 person in access to, terms of, or conditions of employ-
64 ment, housing, education, credit, contractual rights or
65 otherwise.

66 (f) No records of a child convicted under the criminal
67 jurisdiction of the court pursuant to subdivision (1),
68 subsection (d), section ten of this article shall be ex-
69 punged.

70 (g) Any person who willfully violates this section shall
71 be guilty of a misdemeanor, and, upon conviction there-
72 of, shall be fined not more than one thousand dollars, or
73 confined in jail not more than six months, or both such
74 fine and imprisonment, and shall be liable for damages
75 in the amount of three hundred dollars or actual dam-
76 ages, whichever is greater.

**§49-5-18. After-care plans; submission to the court; com-
ments to be submitted; hearing on the plan and
adoption thereof.**

1 (a) Forty-five days prior to the discharge of a child
2 from any institution or facility pursuant to subdivision
3 (5), (6) or (7), subsection (b), section thirteen of this
4 article, the director of such institution or facility shall
5 have prepared and shall forward to the committing court
6 a copy of the child's proposed after-care plan. Copies of
7 the plan shall also be sent to: (1) The child's parents, if

8 any, or legal guardian if the child is not living with his
9 parents; (2) the child's lawyer; (3) the child's probation
10 officer or community mental health center professional;
11 (4) the prosecuting attorney of the county in which the
12 original commitment proceedings were held; and (5) the
13 principal of the school where the child will attend
14 school.

15 (b) The after-care plan shall contain a detailed descrip-
16 tion of the training, schooling, counseling and treatment
17 received while at the institution or facility and the same
18 proposed for the child upon his discharge. The plan shall
19 describe any problems the child may have, the source of
20 those problems and describe how those problems will be
21 addressed by the after-care plan. Attached to the plan
22 shall be a list of the persons who are to receive copies of
23 this plan.

24 (c) Within twenty-one days of the receipt of the plan,
25 the child's probation officer or community mental health
26 center professional shall, and any other person who
27 received a copy of the plan pursuant to subsection (a) of
28 this section may, submit written comments concerning
29 the plan to the court: *Provided*, That if any person does
30 submit comments upon the plan, he shall also send
31 copies of those comments to every other person who
32 received a copy of the plan pursuant to said subsection
33 from the director.

34 (d) Within the twenty-one days provided in subsection
35 (c) of this section it shall be the responsibility and duty
36 of the child's probation officer or the community mental
37 health center professional who receives a copy of the
38 after-care plan to contact all other persons, organiza-
39 tions and agencies to be involved in executing the plan
40 and to determine whether such persons, organizations
41 and agencies are capable of and will be adequately
42 prepared to execute the provisions of the plan: *Pro-*
43 *vided*, That if a hearing is held to discuss the plan as
44 provided in subsection (e) of this section, representatives
45 of such persons, organizations or agencies may be

46 required to appear unless excused by the court.

47 (e) The judge to whom the plan was sent shall within
48 forty-five days of receipt of the plan schedule and hold
49 a hearing to consider the plan, including any comments
50 or objections submitted in response thereto: *Provided*,
51 That if no adverse comments or objections are submitted,
52 a hearing need not be held. The court shall consider the
53 after-care plan as submitted and shall within five days
54 of the hearing or within forty-five days of the receipt of
55 the plan if no hearing is held issue an order which adopts
56 the plan as submitted or as modified in response to
57 comments and objections: *Provided, however*, That the
58 plan as adopted by order of the court shall be in the best
59 interests of the child and be in conformity with the
60 state's interest in youth as embodied in subsection (b),
61 section thirteen of this article: *Provided further*, That
62 the court shall appoint the child's probation officer or a
63 community mental health center professional to act as
64 supervisor of the plan, which supervisor shall make a
65 report commenting on the progress of the child to the
66 court every sixty days, or until the court shall determine
67 that no such report is necessary, or when the court
68 determines that after-care is no longer needed.

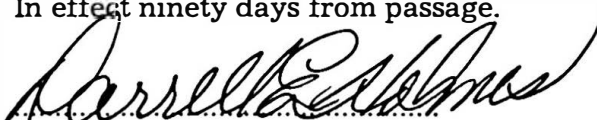
That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.


.....
Chairman Senate Committee


.....
Chairman House Committee


Originated in the Senate.

In effect ninety days from passage.

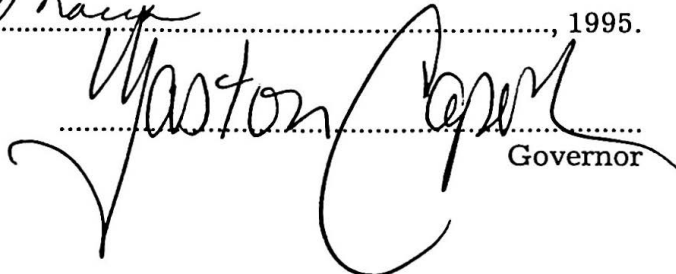

.....
Clerk of the Senate


.....
Clerk of the House of Delegates


.....
President of the Senate


.....
Speaker House of Delegates

The within is approved this the 13th
day of May, 1995.


.....
Governor

PRESENTED TO THE

GOVERNOR

Date

3/8/95

Time

4:55 pm