

5894

2009-2010 Regular Sessions

I N S E N A T E

June 18, 2009

Introduced by Sen. HASSELL-THOMPSON -- (at request of the Governor) --
read twice and ordered printed, and when printed to be committed to
the Committee on Rules

AN ACT to amend the executive law, in relation to collection of DNA
samples from designated offenders, the release of certain criminal
records and the authority of the forensic science commission; to amend
the criminal procedure law, in relation to identification procedures,
access by defendants to DNA evidence and procedures for consideration
of post-conviction relief; to amend the penal law, in relation to
conditions of probation and conditional discharge and refusal to
provide a DNA sample; and to amend the court of claims act, in
relation to claims for unjust conviction and imprisonment

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEM-
BLY, DO ENACT AS FOLLOWS:

1 Section 1. Subdivision 7 of section 995 of the executive law, as
2 amended by chapter 2 of the laws of 2006, paragraph (a) as separately
3 amended by chapter 320 of the laws of 2006, is amended to read as
4 follows:
5 7. "Designated offender" means a person convicted of and sentenced for
6 any [one or more of the following provisions of the penal law (a)
7 sections 120.05, 120.10, and 120.11, relating to assault; sections
8 125.15 through 125.27 relating to homicide; sections 130.25, 130.30,
9 130.35, 130.40, 130.45, 130.50, 130.65, 130.67 and 130.70, relating to
10 sex offenses; sections 205.10, 205.15, 205.17 and 205.19, relating to
11 escape and other offenses, where the offender has been convicted within
12 the previous five years of one of the other felonies specified in this
13 subdivision; or sections 255.25, 255.26 and 255.27, relating to incest,
14 a violent felony offense as defined in subdivision one of section 70.02
15 of the penal law, attempted murder in the first degree, as defined in
16 section 110.00 and section 125.27 of the penal law, kidnapping in the
17 first degree, as defined in section 135.25 of the penal law, arson in

EXPLANATION--Matter in *ITALICS* (underscored) is new; matter in brackets
[] is old law to be omitted.

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1 the first degree, as defined in section 150.20 of the penal law,
2 burglary in the third degree, as defined in section 140.20 of the penal
3 law, attempted burglary in the third degree, as defined in section
4 110.00 and section 140.20 of the penal law, a felony defined in article
5 four hundred ninety of the penal law relating to terrorism or any
6 attempt to commit an offense defined in such article relating to terror-
7 ism which is a felony; or (b) criminal possession of a controlled
8 substance in the first degree, as defined in section 220.21 of the penal
9 law; criminal possession of a controlled substance in the second degree,
10 as defined in section 220.18 of the penal law; criminal sale of a
11 controlled substance, as defined in article 220 of the penal law; or
12 grand larceny in the fourth degree, as defined in subdivision five of
13 section 155.30 of the penal law; or (c) any misdemeanor or felony
14 defined as a sex offense or sexually violent offense pursuant to para-
15 graph (a), (b) or (c) of subdivision two or paragraph (a) of subdivision
16 three of section one hundred sixty-eight-a of the correction law; or (d)
17 any of the following felonies, or an attempt thereof where such attempt
18 is a felony offense:

19 aggravated assault upon a person less than eleven years old, as
20 defined in section 120.12 of the penal law; menacing in the first
21 degree, as defined in section 120.13 of the penal law; reckless endan-
22 germent in the first degree, as defined in section 120.25 of the penal
23 law; stalking in the second degree, as defined in section 120.55 of the
24 penal law; criminally negligent homicide, as defined in section 125.10
25 of the penal law; vehicular manslaughter in the second degree, as
26 defined in section 125.12 of the penal law; vehicular manslaughter in
27 the first degree, as defined in section 125.13 of the penal law;
28 persistent sexual abuse, as defined in section 130.53 of the penal law;
29 aggravated sexual abuse in the fourth degree, as defined in section
30 130.65-a of the penal law; female genital mutilation, as defined in
31 section 130.85 of the penal law; facilitating a sex offense with a
32 controlled substance, as defined in section 130.90 of the penal law;
33 unlawful imprisonment in the first degree, as defined in section 135.10
34 of the penal law; custodial interference in the first degree, as defined
35 in section 135.50 of the penal law; criminal trespass in the first
36 degree, as defined in section 140.17 of the penal law; criminal tamper-
37 ing in the first degree, as defined in section 145.20 of the penal law;
38 tampering with a consumer product in the first degree, as defined in
39 section 145.45 of the penal law; robbery in the third degree as defined
40 in section 160.05 of the penal law; identity theft in the second degree,
41 as defined in section 190.79 of the penal law; identity theft in the
42 first degree, as defined in section 190.80 of the penal law; promoting
43 prison contraband in the first degree, as defined in section 205.25 of
44 the penal law; tampering with a witness in the third degree, as defined
45 in section 215.11 of the penal law; tampering with a witness in the
46 second degree, as defined in section 215.12 of the penal law; tampering
47 with a witness in the first degree, as defined in section 215.13 of the
48 penal law; criminal contempt in the first degree, as defined in subdivi-
49 sions (b), (c) and (d) of section 215.51 of the penal law; aggravated
50 criminal contempt, as defined in section 215.52 of the penal law; bail
51 jumping in the second degree, as defined in section 215.56 of the penal
52 law; bail jumping in the first degree, as defined in section 215.57 of
53 the penal law; patronizing a prostitute in the second degree, as defined
54 in section 230.05 of the penal law; patronizing a prostitute in the
55 first degree, as defined in section 230.06 of the penal law; promoting
56 prostitution in the second degree, as defined in section 230.30 of the

1 penal law; promoting prostitution in the first degree, as defined in
2 section 230.32 of the penal law; compelling prostitution, as defined in
3 section 230.33 of the penal law; disseminating indecent materials to
4 minors in the second degree, as defined in section 235.21 of the penal
5 law; disseminating indecent materials to minors in the first degree, as
6 defined in section 235.22 of the penal law; riot in the first degree, as
7 defined in section 240.06 of the penal law; criminal anarchy, as defined
8 in section 240.15 of the penal law; aggravated harassment of an employee
9 by an inmate, as defined in section 240.32 of the penal law; unlawful
10 surveillance in the second degree, as defined in section 250.45 of the
11 penal law; unlawful surveillance in the first degree, as defined in
12 section 250.50 of the penal law; endangering the welfare of a vulnerable
13 elderly person in the second degree, as defined in section 260.32 of the
14 penal law; endangering the welfare of a vulnerable elderly person in the
15 first degree, as defined in section 260.34 of the penal law; use of a
16 child in a sexual performance, as defined in section 263.05 of the penal
17 law; promoting an obscene sexual performance by a child, as defined in
18 section 263.10 of the penal law; possessing an obscene sexual perform-
19 ance by a child, as defined in section 263.11 of the penal law; promot-
20 ing a sexual performance by a child, as defined in section 263.15 of the
21 penal law; possessing a sexual performance by a child, as defined in
22 section 263.16 of the penal law; criminal possession of a weapon in the
23 third degree, as defined in section 265.02 of the penal law; criminal
24 sale of a firearm in the third degree, as defined in section 265.11 of
25 the penal law; criminal sale of a firearm to a minor, as defined in
26 section 265.16 of the penal law; unlawful wearing of a body vest, as
27 defined in section 270.20 of the penal law; hate crimes as defined in
28 section 485.05 of the penal law; and crime of terrorism, as defined in
29 section 490.25 of the penal law; or (e) a felony defined in the penal
30 law or an attempt thereof where such attempt is a felony; or (f) any of
31 the following misdemeanors: assault in the third degree as defined in
32 section 120.00 of the penal law; attempted aggravated assault upon a
33 person less than eleven years old, as defined in section 110.00 and
34 section 120.12 of the penal law; attempted menacing in the first degree,
35 as defined in section 110.00 and section 120.13 of the penal law; menac-
36 ing in the second degree as defined in section 120.14 of the penal law;
37 menacing in the third degree as defined in section 120.15 of the penal
38 law; reckless endangerment in the second degree as defined in section
39 120.20 of the penal law; stalking in the fourth degree as defined in
40 section 120.45 of the penal law; stalking in the third degree as defined
41 in section 120.50 of the penal law; attempted stalking in the second
42 degree, as defined in section 110.00 and section 120.55 of the penal
43 law; forcible touching as defined in section 130.52 of the penal law
44 regardless of the age of the victim; sexual abuse in the third degree as
45 defined in section 130.55 of the penal law regardless of the age of the
46 victim; unlawful imprisonment in the second degree as defined in section
47 135.05 of the penal law regardless of the age of the victim; attempted
48 unlawful imprisonment in the first degree, as defined in section 110.00
49 and section 135.10 of the penal law regardless of the age of the victim;
50 criminal trespass in the second degree as defined in section 140.15 of
51 the penal law; possession of burglar's tools as defined in section
52 140.35 of the penal law; petit larceny as defined in section 155.25 of
53 the penal law; endangering the welfare of a child as defined in section
54 260.10 of the penal law; endangering the welfare of an incompetent or
55 physically disabled person as defined in section 260.25] FELONY DEFINED
56 IN THE PENAL LAW OR ANY MISDEMEANOR DEFINED IN THE PENAL LAW, OR A

PERSON ADJUDICATED AND SENTENCED AS A YOUTHFUL OFFENDER PURSUANT TO ARTICLE SEVEN HUNDRED TWENTY OF THE CRIMINAL PROCEDURE LAW FOR ANY SUCH MISDEMEANOR OR FELONY, OR A PERSON WHO IS REQUIRED TO REGISTER AS A SEX OFFENDER PURSUANT TO ARTICLE SIX-C OF THE CORRECTION LAW.

S 2. Subdivision 3 of section 995-c of the executive law, as amended by chapter 576 of the laws of 2004, is amended to read as follows:

3. (A) Any designated offender [subsequent to conviction and sentencing for a crime specified in subdivision seven of section nine hundred ninety-five of this article,] shall be required to provide a sample appropriate for DNA testing to determine identification characteristics specific to such person and to be included in a state DNA identification index pursuant to this article.

(B)(I) IN THE CASE OF A DESIGNATED OFFENDER WHO IS SENTENCED TO A TERM OF IMPRISONMENT, SUCH SAMPLE SHALL BE COLLECTED BY THE PUBLIC SERVANT TO WHOSE CUSTODY THE DESIGNATED OFFENDER HAS BEEN COMMITTED.

(II) IN THE CASE OF A DESIGNATED OFFENDER WHO IS SENTENCED TO A TERM OF PROBATION, INCLUDING A SENTENCE OF PROBATION IMPOSED IN CONJUNCTION WITH A SENTENCE OF IMPRISONMENT WHEN A SAMPLE HAS NOT ALREADY BEEN TAKEN, SUCH SAMPLE SHALL BE COLLECTED BY THE PROBATION DEPARTMENT SUPERVISING THE DESIGNATED OFFENDER.

(III) NOTHING IN THIS PARAGRAPH SHALL PROHIBIT THE COLLECTION OF A DNA SAMPLE FROM A DESIGNATED OFFENDER BY ANY COURT OFFICIAL, STATE OR LOCAL CORRECTION OFFICIAL OR EMPLOYEE, PROBATION OFFICER, PAROLE OFFICER, POLICE OFFICER, PEACE OFFICER, OR OTHER PUBLIC SERVANT WHO HAS BEEN NOTIFIED BY THE DIVISION THAT SUCH DESIGNATED OFFENDER HAS NOT PROVIDED A DNA SAMPLE.

S 3. Section 60.25 of the criminal procedure law, subparagraph (ii) of paragraph (a) of subdivision 1 as amended by chapter 479 of the laws of 1977, is amended to read as follows:

S 60.25 Rules of evidence; identification by means of previous recognition, in absence of present identification.

1. In any criminal proceeding in which the defendant's commission of an offense is in issue, testimony as provided in subdivision two may be given by a witness when:

(a) Such witness testifies that:

(i) He observed the person claimed by the people to be the defendant either at the time and place of the commission of the offense or upon some other occasion relevant to the case; and

(ii) On a subsequent occasion he observed, under circumstances consistent with such rights as an accused person may derive under the constitution of this state or of the United States, a person, OR A PHOTOGRAPH OR OTHER RECORDED IMAGE OF A PERSON, whom he recognized as the same person whom he had observed on the first or incriminating occasion; and

(iii) He is unable at the proceeding to state, on the basis of present recollection, whether or not the defendant is the person in question; and

(b) It is established that the defendant is in fact the person whom, OR WHOSE IMAGE, the witness observed and recognized on the second occasion. Such fact may be established by testimony of another person or persons to whom the witness promptly declared his recognition on such occasion.

2. Under circumstances prescribed in subdivision one, such witness may testify at the criminal proceeding that the person whom, OR WHOSE IMAGE, he observed and recognized on the second occasion is the same person whom he observed on the first or incriminating occasion. Such

1 testimony, together with the evidence that the defendant is in fact the
2 person whom the witness observed and recognized on the second occasion,
3 constitutes evidence in chief.

4 S 4. Section 60.30 of the criminal procedure law, as amended by chap-
5 ter 479 of the laws of 1977, is amended to read as follows:

6 S 60.30 Rules of evidence; identification by means of previous recogni-
7 tion, in addition to present identification.

8 In any criminal proceeding in which the defendant's commission of an
9 offense is in issue, a witness who testifies that (a) he observed the
10 person claimed by the people to be the defendant either at the time and
11 place of the commission of the offense or upon some other occasion rele-
12 vant to the case, and (b) on the basis of present recollection, the
13 defendant is the person in question and (c) on a subsequent occasion he
14 observed the defendant, OR A PHOTOGRAPH OR OTHER RECORDED IMAGE OF THE
15 DEFENDANT, under circumstances consistent with such rights as an accused
16 person may derive under the constitution of this state or of the United
17 States, and then also recognized him as the same person whom he had
18 observed on the first or incriminating occasion, may, in addition to
19 making an identification of the defendant at the criminal proceeding on
20 the basis of present recollection as the person whom he observed on the
21 first or incriminating occasion, also describe his previous recognition
22 of the defendant, OR THE IMAGE OF THE DEFENDANT, and testify that the
23 person whom, OR WHOSE IMAGE, he observed on such second occasion is the
24 same person whom he had observed on the first or incriminating occasion.
25 Such testimony constitutes evidence in chief.

26 S 5. The criminal procedure law is amended by adding a new section
27 60.32 to read as follows:

28 S 60.32 RULES OF EVIDENCE; IDENTIFICATION PROCEDURES AND GUIDELINES.

29 1. THERE ARE HEREBY ESTABLISHED THE FOLLOWING GUIDELINES FOR TRIAL
30 EVIDENCE OF CERTAIN IDENTIFICATION PROCEDURES:

31 A. A LAW ENFORCEMENT AGENCY CONDUCTING AN IDENTIFICATION PROCEDURE
32 SHALL, TO THE EXTENT FEASIBLE, SEEK TO EMPLOY THE FOLLOWING PRACTICES TO
33 ENHANCE RELIABILITY OF IDENTIFICATIONS.

34 B. WHEN A LAW ENFORCEMENT AGENCY CONDUCTS A CORPOREAL IDENTIFICATION
35 PROCEDURE IN WHICH MORE THAN ONE PERSON IS VIEWED:

36 I. THE WITNESS SHOULD BE INFORMED THAT THE PERPETRATOR MAY OR MAY NOT
37 BE AMONG THE PERSONS BEING VIEWED;

38 II. ONLY ONE SUSPECT SHOULD BE INCLUDED AMONG THE PERSONS VIEWED IN A
39 PARTICULAR GROUP;

40 III. AT LEAST FOUR PERSONS IN ADDITION TO THE SUSPECT SHOULD BE
41 VIEWED;

42 IV. IF PRACTICABLE, THE PERSON QUESTIONING THE WITNESS SHOULD NOT BE
43 MADE AWARE OF THE POSITION OF THE SUSPECT AMONG THOSE BEING VIEWED;

44 V. WHAT THE WITNESS SAYS IN MAKING OR FAILING TO MAKE ANY IDENTIFICA-
45 TION SHOULD BE WRITTEN DOWN OR OTHERWISE RECORDED.

46 C. WHEN A LAW ENFORCEMENT AGENCY CONDUCTS A CORPOREAL IDENTIFICATION
47 PROCEDURE IN WHICH ONLY ONE PERSON IS VIEWED:

48 I. THE WITNESS SHOULD BE INFORMED THAT THE PERPETRATOR MAY OR MAY NOT
49 BE THE PERSON BEING VIEWED; AND

50 II. WHAT THE WITNESS SAYS IN MAKING OR FAILING TO MAKE ANY IDENTIFICA-
51 TION SHOULD BE WRITTEN DOWN OR OTHERWISE RECORDED.

52 D. WHEN A LAW ENFORCEMENT AGENCY CONDUCTS AN IDENTIFICATION PROCEDURE
53 USING AN ARRAY OF PHOTOGRAPHS OR OTHER RECORDED IMAGES:

54 I. THE WITNESS SHOULD BE INFORMED THAT THE PERPETRATOR MAY OR MAY NOT
55 BE AMONG THE PERSONS WHOSE IMAGES ARE BEING VIEWED;

1 II. ONLY ONE SUSPECT SHOULD BE INCLUDED AMONG THE IMAGES VIEWED IN A
2 PARTICULAR ARRAY;

3 III. IMAGES OF AT LEAST FIVE PERSONS IN ADDITION TO THAT OF THE
4 SUSPECT SHOULD BE VIEWED;

5 IV. IF PRACTICABLE, THE PERSON QUESTIONING THE WITNESS SHOULD NOT BE
6 MADE AWARE OF THE POSITION OF THE SUSPECT AMONG THE IMAGES BEING VIEWED;

7 V. WHAT THE WITNESS SAYS IN MAKING OR FAILING TO MAKE ANY IDENTIFICA-
8 TION SHOULD BE WRITTEN DOWN OR OTHERWISE RECORDED.

9 E. A DEVIATION FROM THE FOREGOING PRACTICES DOES NOT CONSTITUTE A
10 VIOLATION OF THESE GUIDELINES WHEN IT IS NOT READILY POSSIBLE TO EMPLOY
11 THE PRACTICE IN QUESTION, OR WHEN IT OCCURS BY ACCIDENT OR OTHER REASON-
12 ABLY EXCUSABLE CAUSE.

13 2. WHEN THE PEOPLE INTRODUCE EVIDENCE OF A CORPOREAL OR IMAGE IDEN-
14 TIFICATION OF A DEFENDANT AT TRIAL, PURSUANT TO SECTION 60.25 OR SECTION
15 60.30 OF THIS ARTICLE, THE COURT SHALL CHARGE THE JURY IN ACCORDANCE
16 WITH THE PROVISIONS OF THIS SECTION.

17 3. THE COURT SHALL INSTRUCT THE JURY:

18 A. THAT NEW YORK LAW ESTABLISHES CERTAIN GUIDELINES FOR THE CONDUCT OF
19 IDENTIFICATION PROCEDURES;

20 B. AS TO THE CONTENT OF THOSE GUIDELINES BY READING SUBDIVISION ONE OF
21 THIS SECTION, EXCEPT THAT PARAGRAPHS B, C AND D SHOULD BE READ ONLY WHEN
22 APPLICABLE;

23 C. THAT THOSE GUIDELINES ARE MEANT TO ENHANCE THE RELIABILITY OF IDEN-
24 TIFICATION PROCEDURES AND TO REDUCE THE RISK OF MISIDENTIFICATION;

25 D. THAT WHETHER OR NOT THE GUIDELINES WERE FOLLOWED, THE JURY IS ENTI-
26 TLED TO CONSIDER EVIDENCE OF THE IDENTIFICATION IN QUESTION, AND MAY
27 GIVE THAT EVIDENCE SUCH WEIGHT AS IT SEES FIT; BUT

28 E. THAT IN ASSESSING THE RELIABILITY OF THE IDENTIFICATION IN QUES-
29 TION, THE JURY MAY CONSIDER WHETHER AND TO WHAT EXTENT THE GUIDELINES
30 WERE OR WERE NOT FOLLOWED AND THE CAUSES AND SIGNIFICANCE OF ANY
31 VIOLATIONS OF THE GUIDELINES.

32 4. THIS SECTION APPLIES ONLY TO THE USE AT TRIAL OF EVIDENCE OF THE
33 USE BY LAW ENFORCEMENT AGENCIES OF IDENTIFICATION PROCEDURES DESCRIBED
34 IN THIS SECTION. IT DOES NOT APPLY TO CONFIRMATORY PROCEDURES, SUCH AS
35 THE VIEWING OF A PERSON ALREADY KNOWN TO THE WITNESS, OR A SINGLE PHOTO-
36 GRAPH OR OTHER RECORDED IMAGE OF SUCH PERSON, OR TO IDENTIFICATIONS
37 RESULTING FROM CIRCUMSTANCES NOT ARRANGED BY A LAW ENFORCEMENT AGENCY.
38 THE GUIDELINES IN THIS SECTION DO NOT APPLY TO USE OF IDENTIFICATION
39 EVIDENCE IN INVESTIGATIONS, IN BAIL HEARINGS, BEFORE GRAND JURIES, IN
40 PRE-TRIAL OR CIVIL PROCEEDINGS, OR IN ANY CONTEXT OTHER THAN A CRIMINAL
41 TRIAL.

42 S 6. The executive law is amended by adding a new section 845-c to
43 read as follows:

44 S 845-C. CRIMINAL HISTORY RECORD SEARCHES; UNDISPOSED CASES. 1. WHEN,
45 PURSUANT TO STATUTE OR THE REGULATIONS OF THE DIVISION, THE DIVISION
46 CONDUCTS A SEARCH OF ITS CRIMINAL HISTORY RECORDS AND RETURNS A REPORT
47 THEREON, ALL REFERENCES TO UNDISPOSED CASES CONTAINED IN SUCH CRIMINAL
48 HISTORY RECORD SHALL BE EXCLUDED FROM SUCH REPORT.

49 2. FOR PURPOSES OF THIS SECTION, "UNDISPOSED CASE" SHALL MEAN A CRIMI-
50 NAL ACTION OR PROCEEDING IDENTIFIED IN THE DIVISION'S CRIMINAL HISTORY
51 RECORDS FOR WHICH NO CONVICTION OR IMPOSITION OF SENTENCE OR OTHER FINAL
52 DISPOSITION, OTHER THAN THE ISSUANCE OF AN UNEXECUTED BENCH WARRANT, HAS
53 BEEN RECORDED AND WITH RESPECT TO WHICH NO ENTRY HAS BEEN MADE IN THE
54 DIVISION'S CRIMINAL HISTORY RECORDS FOR A PERIOD OF AT LEAST TWENTY-FOUR
55 MONTHS PRECEDING THE ISSUANCE OF SUCH REPORT.

1 3. THE PROVISIONS OF SUBDIVISION ONE OF THIS SECTION SHALL NOT APPLY
2 TO CRIMINAL HISTORY RECORD INFORMATION PROVIDED BY THE DIVISION TO QUAL-
3 IFIED AGENCIES PURSUANT TO SUBDIVISION SIX OF SECTION EIGHT HUNDRED
4 THIRTY-SEVEN OF THIS ARTICLE.

5 S 7. Section 240.40 of the criminal procedure law is amended by adding
6 a new subdivision 1-a to read as follows:

7 1-A. UPON MOTION OF A DEFENDANT AGAINST WHOM AN INDICTMENT OR SUPERIOR
8 COURT INFORMATION IS PENDING, THE COURT IN WHICH SUCH ACCUSATORY INSTRU-
9 MENT IS PENDING MAY ORDER A COMPARISON OF A DNA PROFILE DERIVED FROM
10 EVIDENCE RECOVERED BY LAW ENFORCEMENT TO THE DEFENDANT'S DNA OR TO A DNA
11 DATABANK UPON A SHOWING BY THE DEFENDANT THAT SUCH COMPARISON IS MATERI-
12 AL TO THE PREPARATION OF A DEFENSE, AND THAT THE REQUEST IS REASONABLE,
13 PROVIDED THAT THE COURT SHALL NOT DO SO IF IT IS SATISFIED THAT THE
14 PEOPLE HAVE SHOWN GOOD CAUSE WHY SUCH AN ORDER SHOULD NOT BE ISSUED.
15 WHERE MORE THAN ONE SAMPLE HAS BEEN RECEIVED BY LAW ENFORCEMENT, THE
16 COURT MAY ORDER A COMPARISON TO SOME BUT NOT ALL SUCH SAMPLES. IF THE
17 MOTION OF THE DEFENDANT IS FOR COMPARISON OF A GIVEN PROFILE DERIVED
18 FROM DNA EVIDENCE TO A DNA DATABANK, THE COURT MAY DIRECT A STATE OR
19 LOCAL PUBLIC FORENSIC LABORATORY TO ARRANGE FOR SUCH PROFILE TO BE
20 ENTERED INTO AND SEARCHED AGAINST LOCAL, STATE, AND FEDERAL DNA DATA-
21 BANKS TO THE EXTENT, AND IN A MANNER, CONSISTENT WITH FEDERAL AND STATE
22 LAWS AND REGULATIONS GOVERNING SUCH DATABANKS, INCLUDING REQUIREMENTS AS
23 TO HOW PROFILES FOR FORENSIC DNA ANALYSIS MUST BE GENERATED, AND
24 REQUIREMENTS FOR SEARCHING AND STORAGE IN THE DATABANK IN QUESTION. IF
25 SUCH A DATABANK SEARCH REVEALS THAT THE DNA DERIVED FROM EVIDENCE RECOV-
26 ERED BY LAW ENFORCEMENT MATCHES A PROFILE IN THE DATABANK, THE DEFENDANT
27 SHALL BE NOTIFIED OF THE FACT THAT THERE WAS A MATCH WITH SOME SUCH
28 PROFILE, AND THE COURT SHALL GRANT REASONABLE ADJOURNMENTS SO AS TO
29 ALLOW THE PEOPLE TO PURSUE APPROPRIATE INVESTIGATIVE STEPS. NOTHING IN
30 THIS ARTICLE SHALL BE DEEMED TO ALLOW A DEFENDANT TO OBTAIN AN ORDER
31 REQUIRING COLLECTION OF A DNA SAMPLE FROM ANY OTHER PERSON.

32 S 8. Subdivision 1-a of section 440.30 of the criminal procedure law,
33 as amended by chapter 138 of the laws of 2004, is amended to read as
34 follows:

35 1-a. (a) Where the defendant's motion requests the performance of a
36 forensic DNA test on specified evidence, and upon the court's determi-
37 nation that any evidence containing deoxyribonucleic acid ("DNA") was
38 secured in connection with the [trial] PROCEEDINGS resulting in the
39 judgment, the court shall grant the application for forensic DNA testing
40 of such evidence upon its determination that if a DNA test had been
41 conducted on such evidence, LEADING TO A CONCLUSION THAT THE RESULTING
42 DNA PROFILE DID NOT MATCH THAT OF THE DEFENDANT, and if the results had
43 been admitted in the trial resulting in the judgment, there exists a
44 reasonable probability that the verdict would have been more favorable
45 to the defendant. IN THE CASE OF A DEFENDANT CONVICTED UPON A PLEA OF
46 GUILTY, THE COURT SHALL GRANT THE APPLICATION ONLY UPON ITS DETERMI-
47 NATION THAT IF A DNA TEST HAD BEEN CONDUCTED ON SUCH EVIDENCE, AND IF
48 THE RESULTS HAD BEEN AVAILABLE TO THE DEFENDANT, THERE EXISTS A REASON-
49 ABLE PROBABILITY THAT THE DEFENDANT WOULD NOT HAVE BEEN CONVICTED BY A
50 PLEA OF GUILTY OR OTHERWISE, AND IN MAKING THAT DETERMINATION, THE COURT
51 MAY CONSIDER, AMONG OTHER RELEVANT INFORMATION, THE PROCEEDINGS IN
52 CONNECTION WITH THE DEFENDANT'S PLEA OF GUILTY.

53 (b) In conjunction with the filing of a motion under this subdivision,
54 the court may direct the people to provide the defendant with informa-
55 tion in the possession of the people concerning the current physical
56 location of the specified evidence, INCLUDING DOCUMENTS, NOTES, LOGS OR

1 REPORTS, and if the specified evidence no longer exists or the physical
2 location of the specified evidence is unknown, a representation to that
3 effect and information and documentary evidence in the possession of the
4 people concerning the last known physical location of such specified
5 evidence. THE COURT MAY DIRECT THE PEOPLE TO TAKE REASONABLE MEASURES TO
6 ATTEMPT TO LOCATE ANY RELEVANT RECORDS OR PHYSICAL ITEMS THAT MAY BE IN
7 THE POSSESSION OF THE PEOPLE. If there is a finding by the court that
8 the specified evidence no longer exists or the physical location of such
9 specified evidence is unknown, such information in and of itself shall
10 not be a factor from which any inference unfavorable to the people may
11 be drawn by the court in deciding a motion under this section. The
12 court, on motion of the defendant, may also issue a subpoena duces tecum
13 directing a public or private hospital, laboratory or other entity to
14 produce such specified evidence in its possession and/or information and
15 documentary evidence in its possession concerning the location and
16 status of such specified evidence.

17 (C) IN ADDITION TO REQUESTING THE PERFORMANCE OF A FORENSIC DNA TEST
18 OF SPECIFIED EVIDENCE, AS SET FORTH IN PARAGRAPH (A) OF THIS SUBDIVI-
19 SION, THE DEFENDANT ALSO MAY MOVE FOR A COMPARISON OF A DNA PROFILE
20 DERIVED FROM EVIDENCE RECOVERED BY LAW ENFORCEMENT TO A DNA DATABANK. IN
21 DECIDING WHETHER TO GRANT A MOTION FOR SUCH COMPARISON, THE COURT MAY
22 CONSIDER WHETHER THE DEFENDANT HAD THE OPPORTUNITY TO MOVE FOR SUCH A
23 COMPARISON PURSUANT TO SUBDIVISION ONE-A OF SECTION 240.40 OF THIS PART,
24 BUT UNJUSTIFIABLY FAILED TO DO SO. IF THE COURT GRANTS THE MOTION FOR
25 SUCH A COMPARISON, IT MAY DIRECT A STATE OR LOCAL FORENSIC LABORATORY
26 WITHIN THE STATE TO ARRANGE FOR SUCH PROFILE TO BE ENTERED INTO AND
27 SEARCHED AGAINST LOCAL, STATE, AND FEDERAL DNA DATABANKS TO THE EXTENT,
28 AND IN A MANNER, CONSISTENT WITH FEDERAL AND STATE LAWS AND REGULATIONS
29 GOVERNING SUCH DATABANKS, INCLUDING REQUIREMENTS AS TO HOW PROFILES FOR
30 FORENSIC DNA ANALYSIS MUST BE GENERATED, AND REQUIREMENTS FOR SEARCHING
31 AND STORAGE IN THE DATABANK IN QUESTION. IF SUCH A DATABANK SEARCH
32 REVEALS THAT THE DNA DERIVED FROM EVIDENCE RECOVERED BY LAW ENFORCEMENT
33 MATCHES A PROFILE IN THE DATABANK, THE DEFENDANT SHALL BE NOTIFIED OF
34 THE FACT THAT THERE WAS A MATCH WITH SOME SUCH PROFILE, AND THE COURT
35 SHALL GRANT REASONABLE ADJOURNMENTS SO AS TO ALLOW THE PEOPLE TO PURSUE
36 APPROPRIATE INVESTIGATIVE STEPS. NOTHING IN THIS ARTICLE SHALL BE DEEMED
37 TO ALLOW A DEFENDANT TO OBTAIN AN ORDER REQUIRING COLLECTION OF A DNA
38 SAMPLE FROM ANY OTHER PERSON.

39 S 9. Section 440.30 of the criminal procedure law is amended by adding
40 a new subdivision 8 to read as follows:

41 8. AT ANY TIME AFTER THE ENTRY OF A JUDGMENT, IF THE PEOPLE BECOME
42 AWARE OF EVIDENCE SO EXCULPATORY THAT IT MAY EXONERATE A CONVICTED
43 DEFENDANT AND WAS NOT PREVIOUSLY KNOWN TO THE DEFENSE, THE PEOPLE SHALL
44 NOTIFY THE COURT OF THE EXISTENCE OF SUCH EVIDENCE. UPON RECEIPT OF SUCH
45 NOTIFICATION, THE COURT SHALL NOTIFY THE DEFENDANT TO THE SAME EFFECT
46 AND, IF APPROPRIATE, APPOINT DEFENSE COUNSEL SO THAT THE DEFENDANT MAY
47 SEEK ANY APPROPRIATE REMEDY UNDER THIS ARTICLE. THE PEOPLE MAY MAKE
48 NOTIFICATION TO A COURT PURSUANT TO THIS SUBDIVISION WITHOUT TAKING THE
49 POSITION THAT THE DEFENDANT WAS IN FACT INNOCENT, AND IF THE DEFENDANT
50 MOVES FOR RELIEF UNDER THIS ARTICLE, THE PEOPLE MAY TAKE ANY POSITION,
51 INCLUDING CONSENT OR OPPOSITION, AS TO SUCH MOTION. THE COURT MAY
52 CONSIDER, BUT NEED NOT GRANT, THE DEFENDANT'S RELEASE ON BAIL PENDING
53 THE DETERMINATION OF A MOTION MADE FOLLOWING SUCH A NOTIFICATION.

54 S 10. The section heading of section 440.40 of the criminal procedure
55 law is amended and a new subdivision 7 is added to read as follows:

56 Motion to set aside sentence OR TO VACATE JUDGMENT; by people.

1 7. AT ANY TIME AFTER THE ENTRY OF A JUDGMENT, THE PEOPLE MAY, IN LIEU
2 OF THE NOTIFICATION PROCEDURES SET FORTH IN SUBDIVISION EIGHT OF SECTION
3 440.30 OF THIS ARTICLE, MOVE TO VACATE A DEFENDANT'S JUDGMENT OF
4 CONVICTION UPON THE GROUND THAT THE DEFENDANT IS ACTUALLY INNOCENT OF
5 THE CHARGES UNDERLYING THE JUDGMENT. IN SUCH A MOTION, THE PEOPLE SHALL
6 SET FORTH EVIDENTIARY FACTS AND INFERENCES SUPPORTING THE CONTENTION
7 THAT THE DEFENDANT IS INNOCENT. UPON RECEIPT OF SUCH A MOTION, THE COURT
8 MUST ORDER THAT THE DEFENDANT BE PRODUCED BEFORE THE COURT WITHOUT
9 DELAY. AT SUCH A COURT APPEARANCE, THE COURT MAY SUMMARILY GRANT THE
10 MOTION BASED ON THE ALLEGATIONS IN THE PEOPLE'S MOTION AND IN ANY
11 RESPONSIVE PAPERS FILED ON THE DEFENDANT'S BEHALF, AND BASED ON ANY ORAL
12 ARGUMENTS MADE ON THE MOTION. IF THE COURT DOES NOT SUMMARILY GRANT THE
13 MOTION: (A) IT MUST APPOINT COUNSEL FOR THE DEFENDANT IF THE DEFENDANT
14 IS NOT ALREADY REPRESENTED BY COUNSEL; (B) IT MUST CONSIDER, BUT NEED
15 NOT GRANT, A DEFENDANT'S RELEASE ON BAIL PENDING THE DETERMINATION OF
16 THE MOTION; AND (C) IT MUST HOLD A PROMPT EVIDENTIARY HEARING BEFORE
17 RENDERING ITS DECISION TO GRANT OR DENY THE MOTION. IF THE COURT DENIES
18 THE MOTION, IT MUST SET FORTH FINDINGS OF FACTS AND CONCLUSIONS OF LAW
19 SUPPORTING ITS DECISION.

20 S 11. Section 65.10 of the penal law is amended by adding a new subdi-
21 vision 4-b to read as follows:

22 4-B. MANDATORY DNA CONDITION FOR DESIGNATED OFFENDERS AND CERTAIN
23 OTHER OFFENDERS. WHEN IMPOSING A SENTENCE OF PROBATION OR CONDITIONAL
24 DISCHARGE UPON A PERSON DEFINED AS A DESIGNATED OFFENDER PURSUANT TO
25 SUBDIVISION SEVEN OF SECTION NINE HUNDRED NINETY-FIVE OF THE EXECUTIVE
26 LAW, THE COURT SHALL REQUIRE AS A MANDATORY CONDITION OF SUCH SENTENCE
27 THAT SUCH PERSON PROVIDE A DNA SAMPLE AS REQUIRED BY SECTION NINE
28 HUNDRED NINETY-FIVE OF THE EXECUTIVE LAW. NOTHING IN THIS SUBDIVISION
29 SHALL BE CONSTRUED AS PROHIBITING A MANDATORY DNA CONDITION UPON ANY
30 OTHER OFFENDER WHERE AUTHORIZED BY ARTICLE FORTY-NINE OF THE EXECUTIVE
31 LAW.

32 S 12. The penal law is amended by adding a new section 270.40 to read
33 as follows:

34 S 270.40 FAILURE TO PROVIDE A DNA SAMPLE.

35 A PERSON IS GUILTY OF FAILURE TO PROVIDE A DNA SAMPLE WHEN HE OR SHE:
36 IS A DESIGNATED OFFENDER, AS DEFINED IN SUBDIVISION SEVEN OF SECTION
37 NINE HUNDRED NINETY-FIVE OF THE EXECUTIVE LAW, REQUIRED TO PROVIDE A
38 SAMPLE APPROPRIATE FOR DNA TESTING PURSUANT TO THE PROVISIONS OF SUBDI-
39 VISION THREE OF SECTION NINE HUNDRED NINETY-FIVE-C OF THE EXECUTIVE LAW
40 AND FAILS TO PROVIDE SUCH SAMPLE AFTER BEING NOTIFIED BY A COURT, STATE
41 OR LOCAL CORRECTION OFFICIAL OR EMPLOYEE, PAROLE OFFICER, PROBATION
42 OFFICER, POLICE OFFICER, PEACE OFFICER OR OTHER PUBLIC SERVANT OF SUCH
43 OFFENDER'S OBLIGATION TO PROVIDE SUCH SAMPLE.

44 FAILURE TO PROVIDE A DNA SAMPLE IS A CLASS A MISDEMEANOR.

45 S 13. Paragraph (b) of subdivision 3 and paragraph (b) of subdivision
46 5 of section 8-b of the court of claims act, as added by chapter 1009 of
47 the laws of 1984, are amended to read as follows:

48 (b) (i) he OR SHE has been pardoned upon the ground of innocence of
49 the crime or crimes for which he OR SHE was sentenced and which are the
50 grounds for the complaint; or (ii) his OR HER judgment of conviction was
51 reversed or vacated, and the accusatory instrument dismissed or, if a
52 new trial was ordered, either he OR SHE was found not guilty at the new
53 trial or he OR SHE was not retried and the accusatory instrument
54 dismissed; provided that the [judgement] JUDGMENT of conviction was
55 reversed or vacated, and the accusatory instrument was dismissed, on any
56 of the following grounds: (A) paragraph [(a),] (b), (c), [(e)] or (g) of

1 subdivision one of section 440.10 of the criminal procedure law; or (B)
2 subdivision one (where based upon grounds set forth in item (A) [hereof]
3 OF THIS SUBPARAGRAPH), two, three (where the count dismissed was the
4 sole basis for the imprisonment complained of) or five of section 470.20
5 of the criminal procedure law; or (C) comparable provisions of the
6 former code of criminal procedure or subsequent law; or (D) SUBDIVISION
7 SEVEN OF SECTION 440.40 OF THE CRIMINAL PROCEDURE LAW; OR (E) the stat-
8 ute, or application thereof, on which the accusatory instrument was
9 based violated the constitution of the United States or the state of New
10 York; OR (F) THE CLAIMANT'S CONVICTION WAS VACATED UNDER ANOTHER SECTION
11 OF LAW NOT ENUMERATED IN THIS PARAGRAPH, BUT WHOSE APPLICATION TO CLAIM-
12 ANT'S CONVICTION INVOLVED FACTS AND CIRCUMSTANCES THAT DIRECTLY SUPPORT
13 CLAIMANT'S ASSERTION OF INNOCENCE; AND PROVIDED THAT, IN CASES WHERE THE
14 CONVICTION MAY HAVE BEEN VACATED ON MORE THAN ONE GROUND, INCLUDING ONE
15 OF THE GROUNDS ENUMERATED IN THIS PARAGRAPH, THE COURT OF CLAIMS SHALL
16 NOT BE BOUND BY A DECISION OF THE CRIMINAL COURT VACATING THE CONVICTION
17 BASED ONLY ON A GROUND NOT ENUMERATED IN THIS PARAGRAPH; and

18 (b) (i) he OR SHE has been pardoned upon the ground of innocence of
19 the crime or crimes for which he OR SHE was sentenced and which are the
20 grounds for the complaint; or (ii) his OR HER judgment of conviction was
21 reversed or vacated, and the accusatory instrument dismissed or, if a
22 new trial was ordered, either he OR SHE was found not guilty at the new
23 trial or he OR SHE was not retried and the accusatory instrument
24 dismissed; provided that the [judgement] JUDGMENT of conviction was
25 reversed or vacated, and the accusatory instrument was dismissed, on any
26 of the following grounds: (A) paragraph [(a),] (b), (c)[, (e)] or (g) of
27 subdivision one of section 440.10 of the criminal procedure law; or (B)
28 subdivision one (where based upon grounds set forth in item (A) [hereof]
29 OF THIS PARAGRAPH), two, three (where the count dismissed was the sole
30 basis for the imprisonment complained of) or five of section 470.20 of
31 the criminal procedure law; or (C) comparable provisions of the former
32 code of criminal procedure or subsequent law; or (D) SUBDIVISION SEVEN
33 OF SECTION 440.40 OF THE CRIMINAL PROCEDURE LAW; OR (E) the statute, or
34 application thereof, on which the accusatory instrument was based
35 violated the constitution of the United States or the state of New York;
36 OR (F) THE CLAIMANT'S CONVICTION WAS VACATED UNDER ANOTHER SECTION OF
37 LAW NOT ENUMERATED IN THIS PARAGRAPH, BUT WHOSE APPLICATION TO CLAIM-
38 ANT'S CONVICTION INVOLVED FACTS AND CIRCUMSTANCES THAT DIRECTLY SUPPORT
39 CLAIMANT'S ASSERTION OF INNOCENCE; AND PROVIDED THAT, IN CASES WHERE THE
40 CONVICTION MAY HAVE BEEN VACATED ON MORE THAN ONE GROUND, INCLUDING ONE
41 OF THE GROUNDS ENUMERATED IN THIS PARAGRAPH, THE COURT OF CLAIMS SHALL
42 NOT BE BOUND BY A DECISION OF THE CRIMINAL COURT VACATING THE CONVICTION
43 BASED ONLY ON A GROUND NOT ENUMERATED IN THIS PARAGRAPH; and

44 S 14. Subdivision 7 of section 995-b of the executive law, as added
45 by chapter 737 of the laws of 1994, is amended and a new subdivision 1-a
46 is added to read as follows:

47 1-A. THE COMMISSION IS AUTHORIZED TO STUDY THE USE OF FORENSIC
48 EVIDENCE IN THE CRIMINAL JUSTICE SYSTEM, AND TO IDENTIFY AREAS IN WHICH
49 PROCEDURES SHOULD BE IMPROVED TO FURTHER THE GOALS OF EFFECTIVE, EFFI-
50 CIENT AND RELIABLE USE OF SUCH EVIDENCE. THE COMMISSION MAY CONSIDER
51 WHETHER PROCEDURES SHOULD BE IMPROVED IN AREAS INCLUDING BUT NOT LIMITED
52 TO THE COLLECTION, INDEXING, STORAGE, ANALYSIS, AND USE OF BIOLOGICAL
53 AND OTHER FORENSIC EVIDENCE; EDUCATION AND TRAINING; PROFESSIONAL
54 CERTIFICATION; FACILITY ACCREDITATION; SCIENTIFIC ANALYSIS OF EVIDENCE;
55 THE USE OF SUCH ANALYSIS IN JUDICIAL PROCEEDINGS; AND QUALITY CONTROL
56 AND QUALITY ASSURANCE PROCEDURES. AS TO ANY SUCH AREAS THE COMMISSION

1 MAY PROMULGATE NONBINDING STANDARDS AND BEST PRACTICES. THE FAILURE OF
2 ANY CRIMINAL JUSTICE AGENCY TO ADHERE TO SUCH STANDARDS OR BEST PRAC-
3 TICES SHALL NOT CAUSE OTHERWISE ADMISSIBLE EVIDENCE TO BE INADMISSIBLE
4 IN A CRIMINAL PROCEEDING OR CREATE ENTITLEMENT TO ANY OTHER RELIEF.
5 HOWEVER, THE COMMISSION MAY ALSO MAKE RECOMMENDATIONS FOR SUCH STANDARDS
6 TO BE MADE BINDING THROUGH LEGISLATIVE OR ADMINISTRATIVE ACTION.

7 7. The commission and DNA subcommittee may establish, appoint, and set
8 terms of members to as many advisory councils as it deems necessary to
9 provide specialized expertise to the commission with respect to EXISTING
10 AND new forensic technologies including DNA testing methodologies, AND
11 PROCEDURES FOR THE COLLECTION, HANDLING AND USE OF FORENSIC EVIDENCE.

12 S 15. If any section, subdivision, paragraph, clause, sentence,
13 phrase or other portion of this act is, for any reason, declared uncon-
14 constitutional or invalid, in whole or in part, by any court of competent
15 jurisdiction, such portion shall be deemed severable, and such adjudi-
16 cated unconstitutionality or invalidity shall not affect the validity of
17 the remaining portions of this act, which remaining portions shall
18 continue in full force and effect; provided, however, that if any
19 portion of section three, four, or five of this act is, for any reason,
20 declared unconstitutional or invalid, in whole or in part, by the court
21 of appeals, then sections three, four, and five of this act shall not be
22 deemed severable from each other, and sections three, four, and five of
23 this act shall all cease to be of any effect whatsoever, it being the
24 intent of the legislature that the provisions in sections three, four,
25 and five of this act would not have been enacted except together.

26 S 16. This act shall take effect immediately; provided, however, that
27 the amendments to subdivision 7 of section 995 of the executive law made
28 by section one of this act shall apply to designated offenses committed
29 on or after such effective date; provided, further, that sections three,
30 four and five of this act shall take effect on the ninetieth day after
31 it shall have become a law, and that section five shall apply to all
32 identification procedures conducted on or after such effective date;
33 provided, further, that section six of this act shall take effect on the
34 one hundred eightieth day after it shall have become a law, provided,
35 however, that prior to such effective date, the division of criminal
36 justice services, in cooperation with the state administrator of the
37 unified court system as well as any other public or private agency,
38 shall undertake such measures as may be necessary and appropriate to
39 update its criminal history records with respect to criminal cases for
40 which no final disposition has been reported; and provided, further,
41 that section twelve of this act shall take effect on the first of Novem-
42 ber next succeeding the date on which it shall have become a law.