S T A T E O F N E W Y O R K

S. 6733 A. 9555

S E N A T E - A S S E M B L Y

March 14, 2012

IN SENATE -- Introduced by Sens. SALAND, GOLDEN, SKELOS -- (at request of the Governor) -- read twice and ordered printed, and when printed to be committed to the Committee on Rules

IN ASSEMBLY -- Introduced by M. of A. LENTOL, SILVER, WEINSTEIN, FARRELL, LAVINE, O'DONNELL, CLARK, PAULIN -- Multi-Sponsored by -- M. of A. BRINDISI, BRONSON, CUSICK, GABRYSZAK, GOLDFEDER, HEVESI, LUPARDO, MORELLE, QUART, RAMOS, WEISENBERG, ZEBROWSKI -- (at request of the Governor) -- read once and referred to the Committee on Codes

AN ACT to amend the criminal procedure law and the executive law, in relation to DNA testing of certain offenders convicted of a crime

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

Section 1. Subdivision 1 of section 440.30 of the criminal procedure law is amended to read as follows:

1. (A) A motion to vacate a judgment pursuant to section 440.10 OF THIS ARTICLE and a motion to set aside a sentence pursuant to section 440.20 OF THIS ARTICLE must be made in writing and upon reasonable notice to the people. Upon the motion, a defendant who is in a position adequately to raise more than one ground should raise every such ground upon which he OR SHE intends to challenge the judgment or sentence. If the motion is based upon the existence or occurrence of facts, the motion papers must contain sworn allegations thereof, whether by the defendant or by another person or persons. Such sworn allegations may be based upon personal knowledge of the affiant or upon information and belief, provided that in the latter event the affiant must state the sources of such information and the grounds of such belief. The defendant may further submit documentary evidence or information supporting or tending to support the allegations of the moving papers. The people may file with the court, and in such case must serve a copy thereof upon the defendant or his OR HER counsel, if any, an answer denying or admitting any or all of the allegations of the motion papers, and may further submit documentary evidence or information refuting or tending to refute such allegations. After all papers of both parties have been filed, and

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

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after all documentary evidence or information, if any, has been submitted, the court must consider the same for the purpose of ascertaining whether the motion is determinable without a hearing to resolve questions of fact.

(B) IN CONJUNCTION WITH THE FILING OR CONSIDERATION OF A MOTION TO VACATE A JUDGMENT PURSUANT TO SECTION 440.10 OF THIS ARTICLE BY A DEFENDANT CONVICTED AFTER A TRIAL, IN CASES WHERE THE COURT HAS ORDERED AN EVIDENTIARY HEARING UPON SUCH MOTION, THE COURT MAY ORDER THAT THE PEOPLE PRODUCE OR MAKE AVAILABLE FOR INSPECTION PROPERTY, AS DEFINED IN SUBDIVISION THREE OF SECTION 240.10 OF THIS PART, IN ITS POSSESSION, CUSTODY, OR CONTROL THAT WAS SECURED IN CONNECTION WITH THE INVESTIGATION OR PROSECUTION OF THE DEFENDANT UPON CREDIBLE ALLEGATIONS BY THE DEFENDANT AND A FINDING BY THE COURT THAT SUCH PROPERTY, IF OBTAINED, WOULD BE PROBATIVE TO THE DETERMINATION OF DEFENDANT'S ACTUAL INNOCENCE, AND THAT THE REQUEST IS REASONABLE. THE COURT SHALL DENY OR LIMIT SUCH A REQUEST UPON A FINDING THAT SUCH A REQUEST, IF GRANTED, WOULD THREATEN THE INTEGRITY OR CHAIN OF CUSTODY OF PROPERTY OR THE INTEGRITY OF THE PROCESSES OR FUNCTIONS OF A LABORATORY CONDUCTING DNA TESTING, POSE A RISK OF HARM, INTIMIDATION, EMBARRASSMENT, REPRISAL, OR OTHER SUBSTANTIALLY NEGATIVE CONSEQUENCES TO ANY PERSON, UNDERMINE THE PROPER FUNCTIONS OF LAW ENFORCEMENT INCLUDING THE CONFIDENTIALITY OF INFORMANTS, OR ON THE BASIS OF ANY OTHER FACTOR IDENTIFIED BY THE COURT IN THE INTERESTS OF JUSTICE OR PUBLIC SAFETY. THE COURT SHALL FURTHER ENSURE THAT ANY PROPERTY PRODUCED PURSUANT TO THIS PARAGRAPH IS SUBJECT TO A PROTECTIVE ORDER, WHERE APPROPRIATE. THE COURT SHALL DENY ANY REQUEST MADE PURSUANT TO THIS PARAGRAPH WHERE:

(I) (1) THE DEFENDANT'S MOTION PURSUANT TO SECTION 440.10 OF THIS ARTICLE DOES NOT SEEK TO DEMONSTRATE HIS OR HER ACTUAL INNOCENCE OF THE OFFENSE OR OFFENSES OF WHICH HE OR SHE WAS CONVICTED THAT ARE THE SUBJECT OF THE MOTION, OR (2) THE DEFENDANT HAS NOT PRESENTED CREDIBLE ALLEGATIONS AND THE COURT HAS NOT FOUND THAT SUCH PROPERTY, IF OBTAINED, WOULD BE PROBATIVE TO THE DETERMINATION OF THE DEFENDANT'S ACTUAL INNOCENCE AND THAT THE REQUEST IS REASONABLE;

(II) THE DEFENDANT HAS MADE HIS OR HER MOTION AFTER FIVE YEARS FROM THE DATE OF THE JUDGMENT OF CONVICTION; PROVIDED, HOWEVER, THAT THIS LIMITATION PERIOD SHALL BE TOLLED FOR FIVE YEARS IF THE DEFENDANT IS IN CUSTODY IN CONNECTION WITH THE CONVICTION THAT IS THE SUBJECT OF HIS OR HER MOTION, AND PROVIDED FURTHER THAT, NOTWITHSTANDING SUCH LIMITATION PERIODS, THE COURT MAY CONSIDER THE MOTION IF THE DEFENDANT HAS SHOWN: (A) THAT HE OR SHE HAS BEEN PURSUING HIS OR HER RIGHTS DILIGENTLY AND THAT SOME EXTRAORDINARY CIRCUMSTANCE PREVENTED THE TIMELY FILING OF THE MOTION; (B) THAT THE FACTS UPON WHICH THE MOTION IS PREDICATED WERE UNKNOWN TO THE DEFENDANT OR HIS OR HER ATTORNEY AND COULD NOT HAVE BEEN ASCERTAINED BY THE EXERCISE OF DUE DILIGENCE PRIOR TO THE EXPIRATION OF THE STATUTE OF LIMITATIONS; OR (C) CONSIDERING ALL CIRCUMSTANCES OF THE CASE INCLUDING BUT NOT LIMITED TO EVIDENCE OF THE DEFENDANT'S GUILT, THE IMPACT OF GRANTING OR DENYING SUCH MOTION UPON PUBLIC CONFIDENCE IN THE CRIMINAL JUSTICE SYSTEM, OR UPON THE SAFETY OR WELFARE OF THE COMMUNITY, AND THE DEFENDANT'S DILIGENCE IN SEEKING TO OBTAIN THE REQUESTED PROPERTY OR RELATED RELIEF, THE INTERESTS OF JUSTICE WOULD BE SERVED BY CONSIDERING THE MOTION;

(III) THE DEFENDANT IS CHALLENGING A JUDGMENT CONVICTING HIM OR HER OF AN OFFENSE THAT IS NOT A FELONY DEFINED IN SECTION 10.00 OF THE PENAL LAW; OR

(IV) UPON A FINDING BY THE COURT THAT THE PROPERTY REQUESTED IN THIS MOTION WOULD BE AVAILABLE THROUGH OTHER MEANS THROUGH REASONABLE EFFORTS BY THE DEFENDANT TO OBTAIN SUCH PROPERTY.

S 2. Subdivision 1-a of section 440.30 of the criminal procedure law, as amended by chapter 138 of the laws of 2004, is amended to read as follows:

1-a. (a) (1) Where the defendant's motion requests the performance of a forensic DNA test on specified evidence, and upon the court's determination that any evidence containing deoxyribonucleic acid ("DNA") was secured in connection with the trial resulting in the judgment, the court shall grant the application for forensic DNA testing of such evidence upon its determination that if a DNA test had been conducted on such evidence, and if the results had been admitted in the trial resulting in the judgment, there exists a reasonable probability that the verdict would have been more favorable to the defendant.

(2) WHERE THE DEFENDANT'S MOTION FOR FORENSIC DNA TESTING OF SPECIFIED EVIDENCE IS MADE FOLLOWING A PLEA OF GUILTY AND ENTRY OF JUDGMENT THEREON CONVICTING HIM OR HER OF: (A) A HOMICIDE OFFENSE DEFINED IN ARTICLE ONE HUNDRED TWENTY-FIVE OF THE PENAL LAW, ANY FELONY SEX OFFENSE DEFINED IN ARTICLE ONE HUNDRED THIRTY OF THE PENAL LAW, A VIOLENT FELONY OFFENSE AS DEFINED IN PARAGRAPH (A) OF SUBDIVISION ONE OF SECTION 70.02 OF THE PENAL LAW, OR (B) ANY OTHER FELONY OFFENSE TO WHICH HE OR SHE PLED GUILTY AFTER BEING CHARGED IN AN INDICTMENT OR INFORMATION IN SUPERIOR COURT WITH ONE OR MORE OF THE OFFENSES LISTED IN CLAUSE (A) OF THIS SUBPARAGRAPH, THEN THE COURT SHALL GRANT SUCH A MOTION UPON ITS DETERMINATION THAT EVIDENCE CONTAINING DNA WAS SECURED IN CONNECTION WITH THE INVESTIGATION OR PROSECUTION OF THE DEFENDANT, AND IF A DNA TEST HAD BEEN CONDUCTED ON SUCH EVIDENCE AND THE RESULTS HAD BEEN KNOWN TO THE PARTIES PRIOR TO THE ENTRY OF THE DEFENDANT'S PLEA AND JUDGMENT THEREON, THERE EXISTS A SUBSTANTIAL PROBABILITY THAT THE EVIDENCE WOULD HAVE ESTABLISHED THE DEFENDANT'S ACTUAL INNOCENCE OF THE OFFENSE OR OFFENSES THAT ARE THE SUBJECT OF THE DEFENDANT'S MOTION; PROVIDED, HOWEVER, THAT:

(I) THE COURT SHALL CONSIDER WHETHER THE DEFENDANT HAD THE OPPORTUNITY TO REQUEST SUCH TESTING PRIOR TO ENTERING A GUILTY PLEA, AND, WHERE IT FINDS THAT THE DEFENDANT HAD SUCH OPPORTUNITY AND UNJUSTIFIABLY FAILED TO DO SO, THE COURT MAY DENY SUCH MOTION; AND

(II) A COURT SHALL DENY THE DEFENDANT'S MOTION FOR FORENSIC DNA TESTING WHERE THE DEFENDANT HAS MADE HIS OR HER MOTION MORE THAN FIVE YEARS AFTER ENTRY OF THE JUDGMENT OF CONVICTION; EXCEPT THAT THE LIMITATION PERIOD MAY BE TOLLED IF THE DEFENDANT HAS SHOWN: (A) THAT HE OR SHE HAS BEEN PURSUING HIS OR HER RIGHTS DILIGENTLY AND THAT SOME EXTRAORDINARY CIRCUMSTANCE PREVENTED THE TIMELY FILING OF THE MOTION FOR FORENSIC DNA TESTING; (B) THAT THE FACTS UPON WHICH THE MOTION IS PREDICATED WERE UNKNOWN TO THE DEFENDANT OR HIS OR HER ATTORNEY AND COULD NOT HAVE BEEN ASCERTAINED BY THE EXERCISE OF DUE DILIGENCE PRIOR TO THE EXPIRATION OF THIS STATUTE OF LIMITATIONS; OR (C) CONSIDERING ALL CIRCUMSTANCES OF THE CASE INCLUDING BUT NOT LIMITED TO EVIDENCE OF THE DEFENDANT'S GUILT, THE IMPACT OF GRANTING OR DENYING SUCH MOTION UPON PUBLIC CONFIDENCE IN THE CRIMINAL JUSTICE SYSTEM, OR UPON THE SAFETY OR WELFARE OF THE COMMUNITY, AND THE DEFENDANT'S DILIGENCE IN SEEKING TO OBTAIN THE REQUESTED PROPERTY OR RELATED RELIEF, THE INTERESTS OF JUSTICE WOULD BE SERVED BY TOLLING SUCH LIMITATION PERIOD.

(b) In conjunction with the filing of a motion under this subdivision, the court may direct the people to provide the defendant with information in the possession of the people concerning the current physical location of the specified evidence and if the specified evidence no

longer exists or the physical location of the specified evidence is unknown, a representation to that effect and information and documentary evidence in the possession of the people concerning the last known physical location of such specified evidence. If there is a finding by the court that the specified evidence no longer exists or the physical location of such specified evidence is unknown, such information in and of itself shall not be a factor from which any inference unfavorable to the people may be drawn by the court in deciding a motion under this section. The court, on motion of the defendant, may also issue a subpoena duces tecum directing a public or private hospital, laboratory or other entity to produce such specified evidence in its possession and/or information and documentary evidence in its possession concerning the location and status of such specified evidence.

(C) IN RESPONSE TO A MOTION UNDER THIS PARAGRAPH, UPON NOTICE TO THE PARTIES AND TO THE ENTITY REQUIRED TO PERFORM THE SEARCH THE COURT MAY ORDER AN ENTITY THAT HAS ACCESS TO THE COMBINED DNA INDEX SYSTEM ("CODIS") OR ITS SUCCESSOR SYSTEM TO COMPARE A DNA PROFILE OBTAINED FROM PROBATIVE BIOLOGICAL MATERIAL GATHERED IN CONNECTION WITH THE INVESTIGATION OR PROSECUTION OF THE DEFENDANT AGAINST DNA DATABANKS BY KEYBOARD SEARCHES, OR A SIMILAR METHOD THAT DOES NOT INVOLVE UPLOADING, UPON A COURT'S DETERMINATION THAT (1) SUCH PROFILE COMPLIES WITH FEDERAL BUREAU OF INVESTIGATION OR STATE REQUIREMENTS, WHICHEVER ARE APPLICABLE AND AS SUCH REQUIREMENTS ARE APPLIED TO LAW ENFORCEMENT AGENCIES SEEKING SUCH A COMPARISON, AND THAT THE DATA MEET STATE DNA INDEX SYSTEM AND/OR NATIONAL DNA INDEX SYSTEM CRITERIA AS SUCH CRITERIA ARE APPLIED TO LAW ENFORCEMENT AGENCIES SEEKING SUCH A COMPARISON AND (2) IF SUCH COMPARISON HAD BEEN CONDUCTED, AND IF THE RESULTS HAD BEEN ADMITTED IN THE TRIAL RESULTING IN THE JUDGMENT, A REASONABLE PROBABILITY EXISTS THAT THE VERDICT WOULD HAVE BEEN MORE FAVORABLE TO THE DEFENDANT, OR IN A CASE INVOLVING A PLEA OF GUILTY, IF THE RESULTS HAD BEEN AVAILABLE TO THE DEFENDANT PRIOR TO THE PLEA, A REASONABLE PROBABILITY EXISTS THAT THE CONVICTION WOULD NOT HAVE RESULTED. FOR PURPOSES OF THIS SUBDIVISION, A "KEYBOARD SEARCH" SHALL MEAN A SEARCH OF A DNA PROFILE AGAINST THE DATABANK IN WHICH THE PROFILE THAT IS SEARCHED IS NOT UPLOADED TO OR MAINTAINED IN THE DATABANK.

S 3. Subdivision 1 of section 240.40 of the criminal procedure law, as amended by chapter 558 of the laws of 1982, the opening paragraph as amended by chapter 317 of the laws of 1983, is amended to read as follows:

1. Upon motion of a defendant against whom an indictment, superior court information, prosecutor's information, information, or simplified information charging a misdemeanor is pending, the court in which such accusatory instrument is pending:

(a) must order discovery as to any material not disclosed upon a demand pursuant to section 240.20, if it finds that the prosecutor's refusal to disclose such material is not justified; (b) must, unless it is satisfied that the people have shown good cause why such an order should not be issued, order discovery or any other order authorized by subdivision one of section 240.70 as to any material not disclosed upon demand pursuant to section 240.20 where the prosecutor has failed to serve a timely written refusal pursuant to section 240.35; [and] (c) may order discovery with respect to any other property, which the people intend to introduce at the trial, upon a showing by the defendant that discovery with respect to such property is material to the preparation of his OR HER defense, and that the request is reasonable; AND (D) WHERE PROPERTY IN THE PEOPLE'S POSSESSION, CUSTODY, OR CONTROL THAT CONSISTS

OF A DEOXYRIBONUCLEIC ACID ("DNA") PROFILE OBTAINED FROM PROBATIVE BIOLOGICAL MATERIAL GATHERED IN CONNECTION WITH THE INVESTIGATION OR PROSECUTION OF THE DEFENDANT AND THE DEFENDANT ESTABLISHES THAT SUCH PROFILE COMPLIES WITH FEDERAL BUREAU OF INVESTIGATION OR STATE REQUIREMENTS, WHICHEVER ARE APPLICABLE AND AS SUCH REQUIREMENTS ARE APPLIED TO LAW ENFORCEMENT AGENCIES SEEKING A KEYBOARD SEARCH OR SIMILAR COMPARISON, AND THAT THE DATA MEETS STATE DNA INDEX SYSTEM OR NATIONAL DNA INDEX SYSTEM CRITERIA AS SUCH CRITERIA ARE APPLIED TO LAW ENFORCEMENT AGENCIES SEEKING SUCH A KEYBOARD SEARCH OR SIMILAR COMPARISON, THE COURT MAY ORDER AN ENTITY THAT HAS ACCESS TO THE COMBINED DNA INDEX SYSTEM OR ITS SUCCESSOR SYSTEM TO COMPARE SUCH DNA PROFILE AGAINST DNA DATABANKS BY KEYBOARD SEARCHES, OR A SIMILAR METHOD THAT DOES NOT INVOLVE UPLOADING, UPON NOTICE TO BOTH PARTIES AND THE ENTITY REQUIRED TO PERFORM THE SEARCH, UPON A SHOWING BY THE DEFENDANT THAT SUCH A COMPARISON IS MATERIAL TO THE PRESENTATION OF HIS OR HER DEFENSE AND THAT THE REQUEST IS REASONABLE. FOR PURPOSES OF THIS PARAGRAPH, A "KEYBOARD SEARCH" SHALL MEAN A SEARCH OF A DNA PROFILE AGAINST THE DATABANK IN WHICH THE PROFILE THAT IS SEARCHED IS NOT UPLOADED TO OR MAINTAINED IN THE DATABANK. Upon granting the motion pursuant to paragraph (c) [hereof] OF THIS SUBDIVISION, the court shall, upon motion of the people showing such to be material to the preparation of their case and that the request is reasonable, condition its order of discovery by further directing discovery by the people of property, of the same kind or character as that authorized to be inspected by the defendant, which he OR SHE intends to introduce at the trial.

S 4. Subdivision 1 of section 440.10 of the criminal procedure law is amended by adding a new paragraph (g-1) to read as follows:

(G-1) FORENSIC DNA TESTING OF EVIDENCE PERFORMED SINCE THE ENTRY OF A JUDGMENT, (1) IN THE CASE OF A DEFENDANT CONVICTED AFTER A GUILTY PLEA, THE COURT HAS DETERMINED THAT THE DEFENDANT HAS DEMONSTRATED A SUBSTANTIAL PROBABILITY THAT THE DEFENDANT WAS ACTUALLY INNOCENT OF THE OFFENSE OF WHICH HE OR SHE WAS CONVICTED, OR (2) IN THE CASE OF A DEFENDANT CONVICTED AFTER A TRIAL, THE COURT HAS DETERMINED THAT THERE EXISTS A REASONABLE PROBABILITY THAT THE VERDICT WOULD HAVE BEEN MORE FAVORABLE TO THE DEFENDANT.

S 5. Subdivision 7 of section 995 of the executive law, as amended by chapter 2 of the laws of 2006, paragraph (a) as separately amended by chapter 320 of the laws of 2006 and paragraph (f) as amended by chapter 405 of the laws of 2010, is amended to read as follows:

7. "Designated offender" means a person convicted of [and sentenced for any one or more of the following provisions of the penal law (a) sections 120.05, 120.10, and 120.11, relating to assault; sections 125.15 through 125.27 relating to homicide; sections 130.25, 130.30, 130.35, 130.40, 130.45, 130.50, 130.65, 130.67 and 130.70, relating to sex offenses; sections 205.10, 205.15, 205.17 and 205.19, relating to escape and other offenses, where the offender has been convicted within the previous five years of one of the other felonies specified in this subdivision; or sections 255.25, 255.26 and 255.27, relating to incest, a violent felony offense as defined in subdivision one of section 70.02 of the penal law, attempted murder in the first degree, as defined in section 110.00 and section 125.27 of the penal law, kidnapping in the first degree, as defined in section 135.25 of the penal law, arson in the first degree, as defined in section 150.20 of the penal law, burglary in the third degree, as defined in section 140.20 of the penal law, attempted burglary in the third degree, as defined in section 110.00 and section 140.20 of the penal law, a felony defined in article

four hundred ninety of the penal law relating to terrorism or any attempt to commit an offense defined in such article relating to terrorism which is a felony; or (b) criminal possession of a controlled substance in the first degree, as defined in section 220.21 of the penal law; criminal possession of a controlled substance in the second degree, as defined in section 220.18 of the penal law; criminal sale of a controlled substance, as defined in article 220 of the penal law; or grand larceny in the fourth degree, as defined in subdivision five of section 155.30 of the penal law; or (c) any misdemeanor or felony defined as a sex offense or sexually violent offense pursuant to paragraph (a), (b) or (c) of subdivision two or paragraph (a) of subdivision three of section one hundred sixty-eight-a of the correction law; or (d) any of the following felonies, or an attempt thereof where such attempt is a felony offense:

aggravated assault upon a person less than eleven years old, as defined in section 120.12 of the penal law; menacing in the first degree, as defined in section 120.13 of the penal law; reckless endangerment in the first degree, as defined in section 120.25 of the penal law; stalking in the second degree, as defined in section 120.55 of the penal law; criminally negligent homicide, as defined in section 125.10 of the penal law; vehicular manslaughter in the second degree, as defined in section 125.12 of the penal law; vehicular manslaughter in the first degree, as defined in section 125.13 of the penal law; persistent sexual abuse, as defined in section 130.53 of the penal law; aggravated sexual abuse in the fourth degree, as defined in section 130.65-a of the penal law; female genital mutilation, as defined in section 130.85 of the penal law; facilitating a sex offense with a controlled substance, as defined in section 130.90 of the penal law; unlawful imprisonment in the first degree, as defined in section 135.10 of the penal law; custodial interference in the first degree, as defined in section 135.50 of the penal law; criminal trespass in the first degree, as defined in section 140.17 of the penal law; criminal tampering in the first degree, as defined in section 145.20 of the penal law; tampering with a consumer product in the first degree, as defined in section 145.45 of the penal law; robbery in the third degree as defined in section 160.05 of the penal law; identity theft in the second degree, as defined in section 190.79 of the penal law; identity theft in the first degree, as defined in section 190.80 of the penal law; promoting prison contraband in the first degree, as defined in section 205.25 of the penal law; tampering with a witness in the third degree, as defined in section 215.11 of the penal law; tampering with a witness in the second degree, as defined in section 215.12 of the penal law; tampering with a witness in the first degree, as defined in section 215.13 of the penal law; criminal contempt in the first degree, as defined in subdivisions (b), (c) and (d) of section 215.51 of the penal law; aggravated criminal contempt, as defined in section 215.52 of the penal law; bail jumping in the second degree, as defined in section 215.56 of the penal law; bail jumping in the first degree, as defined in section 215.57 of the penal law; patronizing a prostitute in the second degree, as defined in section 230.05 of the penal law; patronizing a prostitute in the first degree, as defined in section 230.06 of the penal law; promoting prostitution in the second degree, as defined in section 230.30 of the penal law; promoting prostitution in the first degree, as defined in section 230.32 of the penal law; compelling prostitution, as defined in section 230.33 of the penal law; disseminating indecent materials to minors in the second degree, as defined in section 235.21 of the penal

law; disseminating indecent materials to minors in the first degree, as defined in section 235.22 of the penal law; riot in the first degree, as defined in section 240.06 of the penal law; criminal anarchy, as defined in section 240.15 of the penal law; aggravated harassment of an employee by an inmate, as defined in section 240.32 of the penal law; unlawful surveillance in the second degree, as defined in section 250.45 of the penal law; unlawful surveillance in the first degree, as defined in section 250.50 of the penal law; endangering the welfare of a vulnerable elderly person in the second degree, as defined in section 260.32 of the penal law; endangering the welfare of a vulnerable elderly person in the first degree, as defined in section 260.34 of the penal law; use of a child in a sexual performance, as defined in section 263.05 of the penal law; promoting an obscene sexual performance by a child, as defined in section 263.10 of the penal law; possessing an obscene sexual performance by a child, as defined in section 263.11 of the penal law; promoting a sexual performance by a child, as defined in section 263.15 of the penal law; possessing a sexual performance by a child, as defined in section 263.16 of the penal law; criminal possession of a weapon in the third degree, as defined in section 265.02 of the penal law; criminal sale of a firearm in the third degree, as defined in section 265.11 of the penal law; criminal sale of a firearm to a minor, as defined in section 265.16 of the penal law; unlawful wearing of a body vest, as defined in section 270.20 of the penal law; hate crimes as defined in section 485.05 of the penal law; and crime of terrorism, as defined in section 490.25 of the penal law; or (e) a felony defined in the penal law or an attempt thereof where such attempt is a felony; or (f) any of the following misdemeanors: assault in the third degree as defined in section 120.00 of the penal law; attempted aggravated assault upon a person less than eleven years old, as defined in section 110.00 and section 120.12 of the penal law; attempted menacing in the first degree, as defined in section 110.00 and section 120.13 of the penal law; menacing in the second degree as defined in section 120.14 of the penal law; menacing in the third degree as defined in section 120.15 of the penal law; reckless endangerment in the second degree as defined in section 120.20 of the penal law; stalking in the fourth degree as defined in section 120.45 of the penal law; stalking in the third degree as defined in section 120.50 of the penal law; attempted stalking in the second degree, as defined in section 110.00 and section 120.55 of the penal law; criminal obstruction of breathing or blood circulation as defined in section 121.11 of the penal law; forcible touching as defined in section 130.52 of the penal law regardless of the age of the victim; sexual abuse in the third degree as defined in section 130.55 of the penal law regardless of the age of the victim; unlawful imprisonment in the second degree as defined in section 135.05 of the penal law regardless of the age of the victim; attempted unlawful imprisonment in the first degree, as defined in section 110.00 and section 135.10 of the penal law regardless of the age of the victim; criminal trespass in the second degree as defined in section 140.15 of the penal law; possession of burglar's tools as defined in section 140.35 of the penal law; petit larceny as defined in section 155.25 of the penal law; endangering the welfare of a child as defined in section 260.10 of the penal law; endangering the welfare of an incompetent or physically disabled person as defined in section 260.25 of the penal law] ANY FELONY DEFINED IN ANY CHAPTER OF THE LAWS OF THE STATE OR ANY MISDEMEANOR DEFINED IN THE PENAL LAW EXCEPT THAT WHERE THE PERSON IS CONVICTED UNDER SECTION 221.10 OF THE PENAL LAW, ONLY A PERSON CONVICTED UNDER SUBDIVISION TWO OF SUCH

SECTION, OR A PERSON CONVICTED UNDER SUBDIVISION ONE OF SUCH SECTION WHO STANDS PREVIOUSLY CONVICTED OF ANY CRIME AS DEFINED IN SUBDIVISION SIX OF SECTION 10.00 OF THE PENAL LAW.

S 6. 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) IN THE CASE OF A DESIGNATED OFFENDER WHOSE SENTENCE DOES NOT INCLUDE EITHER A TERM OF IMPRISONMENT OR A TERM OF PROBATION, OUTSIDE OF THE CITY OF NEW YORK, THE COURT SHALL ORDER THAT THE DESIGNATED OFFENDER REPORT TO AN OFFICE OF THE SHERIFF OF THAT COUNTY, AND WHEN THE DESIGNATED OFFENDER DOES SO, SUCH SAMPLE SHALL BE COLLECTED BY THE SHERIFF'S OFFICE OR A COURT OFFICER. WITHIN THE CITY OF NEW YORK, THE COURT SHALL ORDER THAT THE SAMPLE BE COLLECTED BY A COURT OFFICER.

(IV) 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, OTHER LAW ENFORCEMENT OFFICIAL, OR DESIGNATED PERSONNEL OF THE DIVISION OF CRIMINAL JUSTICE SERVICES WHO HAS BEEN NOTIFIED BY THE DIVISION OF CRIMINAL JUSTICE SERVICES THAT SUCH DESIGNATED OFFENDER HAS NOT PROVIDED A DNA SAMPLE. UPON NOTIFICATION BY THE DIVISION OF CRIMINAL JUSTICE SERVICES THAT A DESIGNATED OFFENDER HAS NOT PROVIDED A DNA SAMPLE, SUCH COURT OFFICIAL, STATE OR LOCAL CORRECTION OFFICIAL OR EMPLOYEE, PROBATION OFFICER, PAROLE OFFICER, POLICE OFFICER, PEACE OFFICER OR OTHER LAW ENFORCEMENT OFFICIAL, OR DESIGNATED PERSONNEL OF THE DIVISION OF CRIMINAL JUSTICE SERVICES SHALL COLLECT THE DNA SAMPLE.

S 7. Nothing in this act shall be construed to create or impose an affirmative obligation upon laboratories, police departments, district attorneys, or any other law enforcement agencies or personnel to retain or preserve property that may contain DNA if such obligation did not exist prior to the effective date of this act, provided, however, that nothing in this act shall be construed to affect or remove any such obligation if it did exist prior to the effective date of this act.

S 8. The actual costs incurred in connection with DNA testing or keyboard searches performed pursuant to subdivision 1-a of section 440.30 of the criminal procedure law shall be borne by the defendant requesting such testing or searches, provided, however that the court, taking into account the defendant's financial resources, as well as any of the defendant's financial obligations, shall make a determination whether or not the payment of such cost would impose a hardship upon the defendant, and in such case, the state shall bear such costs.

S 9. This act shall take effect October 1, 2012; provided, however, that the amendments to subdivision 7 of section 995 of the executive law

made by section five of this act shall apply to conviction of designated offenses, and subparagraph two of paragraph (a) of subdivision 1-a of section 440.30 of the criminal procedure law as added by section two of this act shall apply to a guilty plea entered, on or after such effective date.