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

5214

2011-2012 Regular Sessions

I N S E N A T E

May 3, 2011

Introduced by Sen. KLEIN -- read twice and ordered printed, and when printed to be committed to the Committee on Finance

AN ACT to amend the executive law and the criminal procedure law, in relation to requiring individuals arrested in connection with a felony to submit a DNA sample; and to amend the criminal procedure law, in relation to authorizing the granting of a motion to vacate judgment upon proof of a defendant's innocence

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

Section 1. Section 995 of the executive law is amended by adding a new subdivision 7-a to read as follows:

7-A. "FELONY ARRESTEE" MEANS A PERSON ARRESTED AND CHARGED WITH ANY ONE OR MORE OF THE FOLLOWING FELONIES, OR AN ATTEMPT THEREOF WHERE SUCH ATTEMPT IS A FELONY OFFENSE, AS DEFINED IN THE PENAL LAW: SECTIONS 120.05, 120.06, 120.07, 120.10, 120.11 AND 120.12, RELATING TO ASSAULT; SECTIONS 120.55 AND 120.60, RELATING TO STALKING; SECTION 120.70, RELATING TO LURING A CHILD; SECTIONS 125.15, 125.20, 125.21, 125.22, 125.25, 125.26 AND 125.27, RELATING TO HOMICIDE; SECTIONS 130.25, 130.30, 130.35, 130.40, 130.45, 130.50, 130.53, 130.65, 130.67, 130.70, 130.75, 130.80, 130.95 AND 130.96, RELATING TO SEX OFFENSES; SECTIONS 135.10, 135.20, 135.25 AND 135.35, RELATING TO KIDNAPPING AND LABOR TRAFFICKING; SECTIONS 140.17, 140.20, 140.25 AND 140.30, RELATING TO BURGLARY; SECTIONS 150.05, 150.10, 150.15 AND 150.20, RELATING TO ARSON; SECTIONS 155.30, 155.35, 155.40 AND 155.42, RELATING TO GRAND LARCENY; SECTIONS 160.05, 160.10 AND 160.15, RELATING TO ROBBERY; SECTION 230.34 RELATING TO SEX TRAFFICKING; SECTIONS 235.21 AND 235.22, RELATING TO DISSEMINATION OF INDECENT MATERIAL TO MINORS; SECTIONS 250.45 AND 250.50, RELATING TO UNLAWFUL SURVEILLANCE; SECTIONS 255.25, 255.26, AND 255.27, RELATING TO INCEST; SECTIONS 263.05, 263.10, 263.11, 263.15, 263.16, AND 263.30, RELATING TO SEXUAL PERFORMANCE BY A CHILD; OR SECTIONS 265.02,

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

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265.03, 265.04, 265.08, 265.09, 265.11, 265.12, 265.13, 265.14 AND 265.16, RELATING TO FIREARMS AND OTHER DANGEROUS WEAPONS.

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) A FELONY ARRESTEE SHALL BE REQUIRED TO PROVIDE A SAMPLE APPROPRIATE FOR DNA TESTING UPON HIS OR HER ARREST, UNLESS SUCH FELONY ARRESTEE HAS PREVIOUSLY PROVIDED A SAMPLE THAT IS INCLUDED IN THE STATE DNA IDENTIFICATION INDEX.

(C) A PUBLIC SERVANT TO WHOSE CUSTODY A DESIGNATED OFFENDER OR FELONY ARRESTEE WHO HAS NOT YET PROVIDED A DNA SAMPLE HAS BEEN COMMITTED SHALL SEEK AN ORDER OF THE COURT TO COLLECT SUCH SAMPLE IF THE OFFENDER, AFTER WRITTEN OR ORAL REQUEST, REFUSES TO PROVIDE SUCH SAMPLE.

(D) THE DETENTION, ARREST, INDICTMENT OR CONVICTION OF A PERSON BASED UPON DNA RECORDS CONTAINED IN THE STATE DNA IDENTIFICATION INDEX SHALL NOT BE INVALIDATED IF IT IS LATER DETERMINED THAT THE DIVISION OF CRIMINAL JUSTICE SERVICES INADVERTENTLY, BUT IN GOOD FAITH, COLLECTED OR PLACED THE PERSON'S DNA SAMPLE IN THE INDEX.

(E) THE COMMISSIONER OF CRIMINAL JUSTICE SERVICES SHALL PROMULGATE RULES AND REGULATIONS GOVERNING THE PERIODIC REVIEW OF THE DNA IDENTIFICATION INDEX TO DETERMINE WHETHER OR NOT THE INDEX CONTAINS DNA PROFILES THAT SHOULD NOT BE IN THE INDEX, INCLUDING THE STEPS NECESSARY TO EXPUNGE ANY PROFILES WHICH THE DIVISION OF CRIMINAL JUSTICE SERVICES DETERMINES SHOULD NOT BE IN THE INDEX.

S 3. Subdivision 9 of section 995-c of the executive law, as amended by chapter 524 of the laws of 2002, is amended to read as follows:

9. (a) Upon receipt of notification of a reversal or a vacatur of a conviction, or of the granting of a pardon pursuant to article two-A of this chapter, of an individual whose DNA record has been stored in the state DNA identification index in accordance with this article by the division of criminal justice services, the DNA record shall be expunged from the state DNA identification index, and such individual may apply to the court in which the judgment of conviction was originally entered for an order directing the expungement of any DNA record and any samples, analyses, or other documents relating to the DNA testing of such individual in connection with the investigation or prosecution of the crime which resulted in the conviction that was reversed or vacated or for which the pardon was granted. A copy of such application shall be served on the district attorney and an order directing expungement may be granted if the court finds that all appeals relating to the conviction have been concluded; that such individual will not be retried, or, if a retrial has occurred, the trier of fact has rendered a verdict of complete acquittal, and that expungement will not adversely affect the investigation or prosecution of some other person or persons for the crime. The division shall, by rule or regulation, prescribe procedures to ensure that the DNA record in the state DNA identification index, and any samples, analyses, or other documents relating to such record, whether in the possession of the division, or any law enforcement or police agency, or any forensic DNA laboratory, including any duplicates or copies thereof, at the discretion of the possessor thereof, are either destroyed or returned to such individual, or to the

attorney who represented him or her at the time such reversal, vacatur or pardon, was granted. The commissioner shall also adopt by rule and regulation a procedure for the expungement in other appropriate circumstances of DNA records contained in the index.

(b) As prescribed in this paragraph, if an individual, either voluntarily, PURSUANT TO PARAGRAPH (B) OF SUBDIVISION THREE OF THIS SECTION, or pursuant to a warrant or order of a court, has provided a sample for DNA testing in connection with the investigation, ARREST or prosecution of a crime and (i) no criminal action against the individual relating to such crime was commenced within the period specified by section 30.10 of the criminal procedure law, or (ii) a criminal action was commenced against the individual relating to such crime which resulted in a complete acquittal, or (iii) a criminal action WAS COMMENCED against the individual relating to such crime [resulted in a conviction that was subsequently reversed or vacated, or for which the individual was granted a pardon pursuant to article two-A of this chapter, such individual may apply to the supreme court or the court in which the judgment of conviction was originally entered for an order directing the expungement of any DNA record and any samples, analyses, or other documents relating to the DNA testing of such individual in connection with the investigation or prosecution of such crime. A copy of such application shall be served on the district attorney and an order directing expungement may be granted if the court finds that the individual has satisfied the conditions of one of the subparagraphs of this paragraph; that if a judgment of conviction was reversed or vacated, all appeals relating thereto have been concluded and the individual will not be retried, or, if a retrial has occurred, the trier of fact has rendered a verdict of complete acquittal, and that expungement will not adversely affect the investigation or prosecution of some other person or persons for the crime. If an order directing the expungement of any DNA record and any samples, analyses or other documents relating to the DNA testing of such individual is issued] WHICH WAS RESOLVED BY A DISMISSAL, SUCCESSFUL COMPLETION OF A PRE-PROSECUTION DIVERSION PROGRAM, OR CONDITIONAL DISCHARGE OR MISDEMEANOR CONVICTION THAT DID NOT REQUIRE DNA COLLECTION PURSUANT TO SECTION NINE HUNDRED NINETY-FIVE OF THIS ARTICLE, THE DNA RECORD SHALL BE EXPUNGED FROM THE STATE DNA IDENTIFICATION INDEX. AN INDIVIDUAL MAY REQUEST EXPUNGEMENT OF ANY DNA RECORD AND ANY SAMPLES, ANALYSES OR OTHER DOCUMENTS RELATING TO THE DNA TESTING OF SUCH INDIVIDUAL BY PROVIDING THE FOLLOWING MATERIALS TO THE DIVISION OF CRIMINAL JUSTICE SERVICES:

(1) A WRITTEN REQUEST FOR EXPUNGEMENT OF THE SAMPLE AND DNA RECORDS; AND

(2) A CERTIFIED COPY OF THE DISMISSAL, SUCCESSFUL COMPLETION OF A PRE-PROSECUTION DIVERSION PROGRAM OR A CONDITIONAL DISCHARGE, MISDEMEANOR CONVICTION OR ACQUITTAL; AND

(3) A SWORN STATEMENT FROM THE DISTRICT ATTORNEY'S OFFICE WITH JURISDICTION OVER THE MATTER THAT: THE CASE WAS DISMISSED; A PRE-PROSECUTION DIVERSION PROGRAM OR CONDITIONAL DISCHARGE, MISDEMEANOR CONVICTION EXCLUDED FROM DNA COLLECTION PURSUANT TO SECTION NINE HUNDRED NINETY-FIVE OF THIS ARTICLE OR ACQUITTAL OCCURRED; NO FELONY CHARGES AROSE OUT OF THE ARREST; OR NO CRIMINAL ACTION AGAINST THE INDIVIDUAL RELATING TO SUCH CRIME WAS COMMENCED WITHIN THE PERIOD SPECIFIED BY SECTION 30.10 OF THE CRIMINAL PROCEDURE LAW; AND THAT EXPUNGEMENT WILL NOT ADVERSELY AFFECT THE INVESTIGATION OR PROSECUTION OF SOME OTHER PERSON OR PERSONS FOR THE CRIME.

(C) IF EXPUNGEMENT IS WARRANTED PURSUANT TO PARAGRAPH (A) OR (B) OF THIS SUBDIVISION, such record and any samples, analyses, or other documents shall, at the discretion of the possessor thereof, be destroyed or returned to such individual or to the attorney who represented him or her IN THE CRIMINAL ACTION OR in connection with the [application for the order of] REQUEST FOR expungement.

(D) NO EXPUNGEMENT SHALL BE GRANTED WHERE AN INDIVIDUAL HAS A PRIOR CONVICTION REQUIRING A DNA SAMPLE, OR A PENDING FELONY CHARGE FOR WHICH COLLECTION OF A SAMPLE IS AUTHORIZED PURSUANT TO THE PROVISIONS OF PARAGRAPH (B) OF SUBDIVISION THREE OF THIS SECTION.

S 4. Subdivision 6 of section 120.90 of the criminal procedure law, as amended by chapter 424 of the laws of 1998, is amended to read as follows:

6. Before bringing a defendant arrested pursuant to a warrant before the local criminal court in which such warrant is returnable, a police officer must without unnecessary delay perform all fingerprinting and other preliminary police duties required in the particular case. In any case in which the defendant is not brought by a police officer before such court but, following his arrest in another county for an offense specified in subdivision one of section 160.10 OF THIS TITLE, is released by a local criminal court of such other county on his own recognizance or on bail for his appearance on a specified date before the local criminal court before which the warrant is returnable, the latter court must, upon arraignment of the defendant before it, direct that he be fingerprinted AND HAVE A SAMPLE APPROPRIATE FOR DNA TESTING TAKEN, IF REQUIRED PURSUANT TO SECTION NINE HUNDRED NINETY-FIVE-C OF THE EXECUTIVE LAW, by the appropriate officer or agency, and that he appear at an appropriate designated time and place for such purpose.

S 5. Section 130.60 of the criminal procedure law, as amended by chapter 95 of the laws of 1991, subdivision 1 as amended by chapter 446 of the laws of 1993, is amended to read as follows:

S 130.60 Summons; fingerprinting of defendant.

1. Upon the arraignment of a defendant whose court attendance has been secured by the issuance and service of a summons, based upon an indictment, a prosecutor's information or upon an information, felony complaint or misdemeanor complaint filed by a complainant who is a police officer, the court must, if an offense charged in the accusatory instrument is one specified in subdivision one of section 160.10 OF THIS TITLE, direct that the defendant be fingerprinted by the appropriate police officer or agency, and that he or she appear at an appropriate designated time and place for such purpose. IF AN OFFENSE CHARGED IN THE ACCUSATORY INSTRUMENT IS ONE SPECIFIED IN SUBDIVISION SEVEN-A OF SECTION NINE HUNDRED NINETY-FIVE OF THE EXECUTIVE LAW, THE COURT MUST DIRECT THAT A SAMPLE APPROPRIATE FOR DNA TESTING BE TAKEN, AND THAT HE OR SHE APPEAR AT AN APPROPRIATE DESIGNATED TIME AND PLACE FOR SUCH PURPOSE.

2. Upon the arraignment of a defendant whose court attendance has been secured by the issuance and service of a summons based upon an information or misdemeanor complaint filed by a complainant who is not a police officer, and who has not previously been fingerprinted OR FROM WHOM A DNA SAMPLE HAS NOT PREVIOUSLY BEEN TAKEN AND WAS REQUIRED PURSUANT TO SECTION NINE HUNDRED NINETY-FIVE-C OF THE EXECUTIVE LAW, the court may, if it finds reasonable cause to believe that the defendant has committed an offense specified in subdivision one of section 160.10 OF THIS TITLE, direct that the defendant be fingerprinted AND/OR HAVE A SAMPLE APPROPRIATE FOR DNA TESTING TAKEN, IF REQUIRED BY SECTION NINE HUNDRED NINE-

TY-FIVE-C OF THE EXECUTIVE LAW, by the appropriate police officer or agency and that he appear at an appropriate designated time and place for such purpose. A defendant whose court appearance has been secured by the issuance and service of a criminal summons based upon a misdemeanor complaint or information filed by a complainant who is not a police officer, must be directed by the court, upon conviction of the defendant, to be fingerprinted AND HAVE A SAMPLE APPROPRIATE FOR DNA TESTING TAKEN, IF REQUIRED BY SECTION NINE HUNDRED NINETY-FIVE-C OF THE EXECUTIVE LAW, by the appropriate police officer or agency and the court must also direct that the defendant appear at an appropriate designated time and place for such purpose, if the defendant is convicted of any offense specified in subdivision one of section 160.10 OF THIS TITLE.

S 6. Subdivision 5 of section 140.20 of the criminal procedure law, as amended by chapter 762 of the laws of 1971, is amended to read as follows:

5. Before service of an appearance ticket upon an arrested person pursuant to subdivision two or three OF THIS SECTION, the issuing police officer must, if the offense designated in such appearance ticket is one of those specified in subdivision one of section 160.10 OF THIS TITLE, cause such person to be fingerprinted AND HAVE A SAMPLE APPROPRIATE FOR DNA TESTING TAKEN, IF REQUIRED BY SECTION NINE HUNDRED NINETY-FIVE-C OF THE EXECUTIVE LAW, in the same manner as would be required were no appearance ticket to be issued or served.

S 7. Subdivision 2 of section 140.27 of the criminal procedure law, as amended by chapter 843 of the laws of 1980, is amended to read as follows:

2. Upon arresting a person without a warrant, a peace officer, except as otherwise provided in subdivision three OF THIS SECTION, must without unnecessary delay bring him or cause him to be brought before a local criminal court, as provided in section 100.55 OF THIS CHAPTER and subdivision one of section 140.20 OF THIS ARTICLE, and must without unnecessary delay file or cause to be filed therewith an appropriate accusatory instrument. If the offense which is the subject of the arrest is one of those specified in subdivision one of section 160.10 OF THIS TITLE, the arrested person must be fingerprinted and photographed, AND HAVE A SAMPLE APPROPRIATE FOR DNA TESTING TAKEN IF REQUIRED BY SECTION NINE HUNDRED NINETY-FIVE-C OF THE EXECUTIVE LAW, as therein provided. In order to execute the required post-arrest functions, such arresting peace officer may perform such functions himself or he may enlist the aid of a police officer for the performance thereof in the manner provided in subdivision one of section 140.20 OF THIS ARTICLE.

S 8. Section 150.70 of the criminal procedure law, as amended by chapter 762 of the laws of 1971, is amended to read as follows:

S 150.70 Appearance ticket; fingerprinting AND DNA ANALYSIS SAMPLE of defendant.

Upon the arraignment of a defendant who has not been arrested and whose court attendance has been secured by the issuance and service of an appearance ticket pursuant to subdivision one of section 150.20 OF THIS ARTICLE, the court must, if an offense charged in the accusatory instrument is one specified in subdivision one of section 160.10 OF THIS TITLE, direct that the defendant be fingerprinted AND HAVE A SAMPLE APPROPRIATE FOR DNA TESTING TAKEN WHEN REQUIRED BY SECTION NINE HUNDRED NINETY-FIVE-C OF THE EXECUTIVE LAW by the appropriate police officer or agency, and that he appear at an appropriate designated time and place for such purpose.

S 9. Section 160.20 of the criminal procedure law, as amended by chapter 108 of the laws of 1973, is amended to read as follows:

S 160.20 Fingerprinting AND DNA ANALYSIS SAMPLE; forwarding of fingerprints AND DNA ANALYSIS SAMPLE.

1. Upon the taking of fingerprints of an arrested person or defendant as prescribed in section 160.10 OF THIS ARTICLE, the appropriate police officer or agency must without unnecessary delay forward two copies of such fingerprints to the division of criminal justice services.

2. UPON TAKING A SAMPLE APPROPRIATE FOR DNA TESTING, THE APPROPRIATE POLICE OFFICE OR AGENCY MUST WITHOUT UNNECESSARY DELAY STORE AND FORWARD SUCH DNA SAMPLE TO A FORENSIC DNA LABORATORY FOR FORENSIC DNA TESTING AND ANALYSES, AND INCLUSION IN THE STATE DNA IDENTIFICATION INDEX IN ACCORDANCE WITH SUBDIVISION FIVE OF SECTION NINE HUNDRED NINETY-FIVE-C OF THE EXECUTIVE LAW.

S 10. Paragraphs (d) and (e) of subdivision 1 of section 160.50 of the criminal procedure law, paragraph (d) as amended by section 73 of subpart B of part C of chapter 62 of the laws of 2011 and paragraph (e) as amended by chapter 169 of the laws of 1994, are amended and a new paragraph (f) is added to read as follows:

(d) such records shall be made available to the person accused or to such person's designated agent, and shall be made available to (i) a prosecutor in any proceeding in which the accused has moved for an order pursuant to section 170.56 or 210.46 of this [chapter] PART, or (ii) a law enforcement agency upon ex parte motion in any superior court, if such agency demonstrates to the satisfaction of the court that justice requires that such records be made available to it, or (iii) any state or local officer or agency with responsibility for the issuance of licenses to possess guns, when the accused has made application for such a license, or (iv) the New York state department of corrections and community supervision when the accused is on parole supervision as a result of conditional release or a parole release granted by the New York state board of parole, and the arrest which is the subject of the inquiry is one which occurred while the accused was under such supervision or (v) any prospective employer of a police officer or peace officer as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of this chapter, in relation to an application for employment as a police officer or peace officer; provided, however, that every person who is an applicant for the position of police officer or peace officer shall be furnished with a copy of all records obtained under this paragraph and afforded an opportunity to make an explanation thereto, or (vi) the probation department responsible for supervision of the accused when the arrest which is the subject of the inquiry is one which occurred while the accused was under such supervision; [and]

(e) where fingerprints subject to the provisions of this section have been received by the division of criminal justice services and have been filed by the division as digital images, such images may be retained, provided that a fingerprint card of the individual is on file with the division which was not sealed pursuant to this section or section 160.55 of this article[.]; AND

(F) A SAMPLE APPROPRIATE FOR DNA TESTING TAKEN FROM SUCH PERSON PURSUANT TO SECTION NINE HUNDRED NINETY-FIVE-C OF THE EXECUTIVE LAW, AND ANY DNA RECORD RELATING TO SUCH SAMPLE, AND ANY ANALYSES OR OTHER DOCUMENTS RELATING TO SUCH DNA SAMPLE SHALL BE EXPUNGED, DESTROYED OR RETURNED IN ACCORDANCE WITH SUBDIVISION NINE OF SUCH SECTION OF THE EXECUTIVE LAW.

S 11. Paragraphs (d) and (e) of subdivision 1 of section 160.55 of the criminal procedure law, paragraph (d) as amended by section 74 of subpart B of part C of chapter 62 of the laws of 2011 and paragraph (e) as amended by chapter 169 of the laws of 1994, are amended and a new paragraph (f) is added to read as follows:

(d) the records referred to in paragraph (c) of this subdivision shall be made available to the person accused or to such person's designated agent, and shall be made available to (i) a prosecutor in any proceeding in which the accused has moved for an order pursuant to section 170.56 or 210.46 of this [chapter] PART, or (ii) a law enforcement agency upon ex parte motion in any superior court, if such agency demonstrates to the satisfaction of the court that justice requires that such records be made available to it, or (iii) any state or local officer or agency with responsibility for the issuance of licenses to possess guns, when the accused has made application for such a license, or (iv) the New York state department of corrections and community supervision when the accused is under parole supervision as a result of conditional release or parole release granted by the New York state board of parole and the arrest which is the subject of the inquiry is one which occurred while the accused was under such supervision, or (v) the probation department responsible for supervision of the accused when the arrest which is the subject of the inquiry is one which occurred while the accused was under such supervision, or (vi) a police agency, probation department, sheriff's office, district attorney's office, department of correction of any municipality and parole department, for law enforcement purposes, upon arrest in instances in which the individual stands convicted of harassment in the second degree, as defined in section 240.26 of the penal law, committed against a member of the same family or household as the defendant, as defined in subdivision one of section 530.11 of this chapter, and determined pursuant to subdivision eight-a of section 170.10 of this title; [and]

(e) where fingerprints subject to the provisions of this section have been received by the division of criminal justice services and have been filed by the division as digital images, such images may be retained, provided that a fingerprint card of the individual is on file with the division which was not sealed pursuant to this section or section 160.50 of this article[.]; AND

(F) A SAMPLE APPROPRIATE FOR DNA TESTING TAKEN FROM SUCH PERSON PURSUANT TO SECTION NINE HUNDRED NINETY-FIVE-C OF THE EXECUTIVE LAW, ANY DNA RECORD RELATING TO SUCH SAMPLE, AND ANY ANALYSES OR OTHER DOCUMENTS RELATING TO SUCH DNA SAMPLE SHALL BE EXPUNGED, DESTROYED OR RETURNED IN ACCORDANCE WITH SUBDIVISION NINE OF SUCH SECTION OF THE EXECUTIVE LAW.

S 12. Subparagraph (ii) of paragraph (i) of subdivision 1 of section 440.10 of the criminal procedure law, as added by chapter 332 of the laws of 2010, is amended and a new paragraph (j) is added to read as follows:

(ii) official documentation of the defendant's status as a victim of sex trafficking or trafficking in persons at the time of the offense from a federal, state or local government agency shall create a presumption that the defendant's participation in the offense was a result of having been a victim of sex trafficking or trafficking in persons, but shall not be required for granting a motion under this paragraph[.]; OR

(J) THE DEFENDANT IS ACTUALLY INNOCENT OF THE CRIME OR CRIMES OF WHICH HE OR SHE WAS CONVICTED. FOR PURPOSES OF THIS PARAGRAPH, A DEFENDANT IS ACTUALLY INNOCENT WHERE IT IS ESTABLISHED BY CLEAR AND CONVINCING

EVIDENCE THAT NO TRIER OF FACT WOULD HAVE CONVICTED THE DEFENDANT UNDER A REASONABLE DOUBT STANDARD AND IN LIGHT OF ALL AVAILABLE EVIDENCE.

S 13. Subdivision 4 of section 440.10 of the criminal procedure law, as amended by chapter 332 of the laws of 2010, is amended to read as follows:

4. If the court grants the motion, it must, except as provided in subdivision five or six of this section, vacate the judgment, and must dismiss the accusatory instrument, or order a new trial, or take such other action as is appropriate in the circumstances. IF THE DEFENDANT HAS ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE THAT HE OR SHE IS ACTUALLY INNOCENT, IN THAT NO TRIER OF FACT WOULD HAVE CONVICTED THE DEFENDANT OF THE OFFENSE OR OFFENSES UNDER A REASONABLE DOUBT STANDARD AND IN LIGHT OF ALL AVAILABLE EVIDENCE, THE COURT SHALL DISMISS THE ACCUSATORY INSTRUMENT.

S 14. Section 440.10 of the criminal procedure law is amended by adding a new subdivision 9 to read as follows:

9. NOTWITHSTANDING ANY OTHER PROVISION OF THIS SECTION, THE COURT MUST ADDRESS THE MERITS OF ANY CLAIM FOR RELIEF WHEN THE CLAIMANT CAN SHOW, IN LIGHT OF ALL AVAILABLE EVIDENCE, THAT THERE EXISTS A REASONABLE PROBABILITY THAT HE OR SHE IS ACTUALLY INNOCENT.

S 15. This act shall take effect immediately, except that sections one through eleven of this act shall take effect on the one hundred eightieth day after it shall have become a law.