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

8150--A

2013-2014 Regular Sessions

I N A S S E M B L Y

August 30, 2013

Introduced by M. of A. CLARK, STEVENSON, SIMOTAS, SCARBOROUGH, JAFFEE, SCHIMEL, GABRYSZAK -- Multi-Sponsored by -- M. of A. CERETTO, HOOPER, KATZ, MONTESANO -- read once and referred to the Committee on Codes -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the executive law, in relation to establishing the state sexual offense forensic evidence index and the processing of evidence related to sexual offenses

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

Section 1. Subdivisions 2 and 9 of section 995 of the executive law, as added by chapter 737 of the laws of 1994, are amended and a new subdivision 11 is added to read as follows:

2. For purposes of forensic DNA analysis, the term "forensic DNA laboratory" shall mean any forensic laboratory operated by the state or unit of local government, that performs forensic DNA testing on crime scenes, FORENSIC TESTING ON EVIDENCE OF SEXUAL OFFENSES or materials derived from the human body for use as evidence in a criminal proceeding or for purposes of identification and the term "forensic DNA testing" shall mean any test that employs techniques to examine deoxyribonucleic acid (DNA) derived from the human body for the purpose of providing information to resolve issues of identification. Regulation pursuant to this article shall not include DNA testing on materials derived from the human body pursuant to title five of article five of the public health law for the purpose of determining a person's genetic disease or medical condition and shall not include a laboratory operated by the federal government.

9. "DNA subcommittee" shall mean the subcommittee on forensic DNA laboratories and forensic DNA AND SEXUAL OFFENSE FORENSIC EVIDENCE testing established pursuant to subdivision thirteen of section nine hundred ninety-five-b of this article.

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

LBD11684-02-3

11. "STATE SEXUAL OFFENSE FORENSIC EVIDENCE INDEX" MEANS THE SEXUAL OFFENSE FORENSIC EVIDENCE RECORD SYSTEM FOR NEW YORK ESTABLISHED PURSUANT TO THIS ARTICLE.

S 2. Paragraph (b) of subdivision 2 of section 995-b of the executive law, as added by chapter 737 of the laws of 1994, is amended to read as follows:

(b) ensure that forensic analyses, including forensic DNA testing AND SEXUAL OFFENSE FORENSIC EVIDENCE TESTING, are performed in accordance with the highest scientific standards practicable;

S 3. Subdivisions 7, 9, 10, 11, 12 and 13 of section 995-b of the executive law, as added by chapter 737 of the laws of 1994 and paragraph (a) of subdivision 13 as amended by chapter 560 of the laws of 1999, are amended to read as follows:

7. The commission and DNA subcommittee may establish, appoint, and set terms of members to as many advisory councils as it deems necessary to provide specialized expertise to the commission with respect to new forensic technologies including DNA testing methodologies AND SEXUAL OFFENSE FORENSIC EVIDENCE TESTING METHODOLOGIES.

9. After reviewing recommendations from the division of criminal justice services, the commission, in consultation with the DNA subcommittee, shall promulgate a policy for the establishment and operation of a DNA identification index AND A SEXUAL OFFENSE FORENSIC EVIDENCE INDEX consistent with the operational requirements and capabilities of the division of criminal justice services. Such policy shall address the following issues:

(a) the forensic DNA methodology or methodologies to be utilized in compiling the [index] INDICES;

(b) procedures for assuring that the state DNA identification index AND THE STATE SEXUAL OFFENSE FORENSIC EVIDENCE INDEX [contains] CONTAIN the following safeguards:

(i) that any records maintained as part of such [an index] INDICES are accurate and complete;

(ii) that effective software and hardware designs are instituted with security features to prevent unauthorized access to such records;

(iii) that periodic audits will be conducted to ensure that no illegal disclosures of such records have taken place;

(iv) that access to record information system facilities, systems operating environments, data file contents whether while in use or when stored in a media library is restricted to authorized personnel only;

(v) that operation programs are used that will prohibit inquiry, record updates, or destruction of records from any source other than an authorized source of inquiry, update, or destruction of records;

(vi) that operational programs are used to detect and store for the output of authorized employees only all unauthorized attempts to penetrate the state DNA identification index AND THE STATE SEXUAL OFFENSE FORENSIC EVIDENCE INDEX;

(vii) that adequate and timely procedures exist to insure that any subject of the state DNA identification index AND THE STATE SEXUAL OFFENSE FORENSIC EVIDENCE INDEX has the right of access to and review of records relating to such individual contained in such [index] INDICES for the purpose of ascertaining their accuracy and completeness, including procedures for review of information maintained about such individuals and administrative review (including procedures for administrative appeal) and the necessary documentation to demonstrate that the information is inaccurate or incomplete;

(viii) that access to the [index] INDICES will be granted to an agency authorized by this article to have such access only pursuant to a written use and dissemination agreement, a copy of which is filed with the commission, which agreement sets forth the specific procedures by which such agency shall implement the provisions of subparagraphs (i) through (vii) of this paragraph, as applicable, and which agreement specifically prohibits the redisclosure by such agency of any information obtained from the DNA identification index AND THE STATE SEXUAL OFFENSE FORENSIC EVIDENCE INDEX; and

(ix) such policy shall provide for the mutual exchange, use and storage of DNA records with the system of DNA identification utilized by the federal bureau of investigation provided that the commission determines that such exchange, use and storage are consistent with the provisions of this article and applicable provisions of law.

10. Review, and if necessary, recommend modifications to, a plan for implementation of the DNA identification index AND THE STATE SEXUAL OFFENSE FORENSIC EVIDENCE INDEX submitted by the commissioner of criminal justice services pursuant to section nine hundred ninety-five-c of this article.

11. Upon the recommendation of the DNA subcommittee established pursuant to subdivision thirteen of this section, the commission shall designate one or more approved methodologies for the performance of forensic DNA testing AND SEXUAL ASSAULT FORENSIC EVIDENCE, and shall review and act upon applications by forensic DNA laboratories for approval to perform forensic DNA testing.

12. Promulgate standards for a determination of a match between the DNA records contained in the state DNA identification index AND THE STATE SEXUAL OFFENSE FORENSIC EVIDENCE INDEX and a DNA record of a person submitted for comparison therewith.

13. (a) The commission shall establish a subcommittee on forensic DNA laboratories and forensic DNA AND SEXUAL OFFENSE FORENSIC EVIDENCE testing. The chair of the subcommittee shall be appointed by the chair of the commission. The chair of the subcommittee shall appoint six other members to the subcommittee, one of whom shall represent the discipline of molecular biology and be appointed upon the recommendation of the commissioner of the department of health, one of whom shall represent the discipline of population genetics and be appointed upon the recommendation of the commissioner of the department of health, one of whom shall be representative of the discipline of laboratory standards and quality assurance regulation and monitoring and be appointed upon the recommendation of the commissioner of the department of health, one of whom shall be a forensic scientist and be appointed upon the recommendation of the commissioner of the department of health, one of whom shall be representative of the discipline of population genetics and be appointed upon the recommendation of the commissioner of criminal justice services and one of whom shall be representative of the discipline of forensic science and be appointed upon the recommendation of the commissioner of criminal justice services. Members of the DNA subcommittee shall serve for three year terms and be subject to the conditions of service specified in section nine hundred ninety-five-a of this article.

(b) The DNA subcommittee shall assess and evaluate all DNA AND SEXUAL OFFENSE FORENSIC EVIDENCE methodologies proposed to be used for forensic analysis, and make reports and recommendations to the commission as it deems necessary. The DNA subcommittee shall make binding recommendations for adoption by the commission addressing minimum scientific standards

to be utilized in conducting forensic DNA AND SEXUAL OFFENSE FORENSIC EVIDENCE analysis including, but not limited to, examination of specimens, population studies and methods employed to determine probabilities and interpret test results. The DNA subcommittee may require a demonstration by an independent laboratory of any proposed forensic DNA OR SEXUAL OFFENSE FORENSIC EVIDENCE testing methodology proposed to be used by a forensic laboratory.

(c) The DNA subcommittee shall make binding recommendations for adoption by the commission with regard to an accreditation program for laboratories performing forensic DNA AND SEXUAL OFFENSE FORENSIC EVIDENCE testing in accordance with the provisions of the state administrative procedure act. Such recommendations shall include the adoption and implementation of internal and external proficiency testing programs, including, if possible, a blind external proficiency testing program for forensic laboratories performing forensic DNA AND SEXUAL OFFENSE FORENSIC EVIDENCE testing. The DNA subcommittee shall also provide the commission with a list of accepted proficiency testers.

(d) The DNA subcommittee shall be authorized to advise the commission on any other matters regarding the implementation of scientific controls and quality assurance procedures for the performance of forensic DNA AND SEXUAL OFFENSE FORENSIC EVIDENCE testing, or on any other matters referred to it by the commission.

S 4. Section 995-d of the executive law, as added by chapter 737 of the laws of 1994 and subdivision 2 as amended by chapter 560 of the laws of 1999, is amended to read as follows:

S 995-d. Confidentiality. 1. All records, findings, reports, and results of DNA AND SEXUAL OFFENSE FORENSIC EVIDENCE testing performed on any person shall be confidential and may not be disclosed or redisclosed without the consent of the subject of such DNA OR SEXUAL OFFENSE FORENSIC EVIDENCE testing. Such records, findings, reports and results shall not be released to insurance companies, employers or potential employers, health providers, employment screening or personnel companies, agencies, or services, private investigation services, and may not be disclosed in response to a subpoena or other compulsory legal process or warrant, or upon request or order of any agency, authority, division, office, corporation, partnership, or any other private or public entity or person, except that nothing contained herein shall prohibit disclosure in response to a subpoena issued on behalf of the subject of such DNA OR SEXUAL OFFENSE FORENSIC EVIDENCE record or on behalf of a party in a civil proceeding where the subject of such DNA OR SEXUAL OFFENSE FORENSIC EVIDENCE record has put such record in issue.

2. Notwithstanding the provisions of subdivision one of this section, records, findings, reports, and results of DNA testing, other than a DNA record maintained in the state DNA identification index, may be disclosed in a criminal proceeding to the court, the prosecution, and the defense pursuant to a written request on a form prescribed by the commissioner of the division of criminal justice services. Notwithstanding the provisions of subdivision one of this section, a DNA OR SEXUAL OFFENSE FORENSIC EVIDENCE record maintained in the state DNA identification index may be disclosed pursuant to section nine hundred ninety-five-c of this article.

S 5. Section 995-e of the executive law, as added by chapter 737 of the laws of 1994, is amended to read as follows:

S 995-e. Applicability. This article shall not apply to a forensic DNA laboratory operated by any agency of the federal government, or to any

forensic DNA test OR SEXUAL OFFENSE FORENSIC EVIDENCE TEST performed by any such federal laboratory.

S 6. Section 995-f of the executive law, as amended by chapter 560 of the laws of 1999, is amended to read as follows:

S 995-f. Penalties. Any person who (a) intentionally discloses a DNA record, [or] the results of a forensic DNA test or analysis, OR THE RESULT OF A SEXUAL OFFENSE FORENSIC EVIDENCE TEST OF ANALYSIS, to an individual or agency other than one authorized to have access to such records pursuant to this article or (b) intentionally uses or receives DNA records, [or] the results of a forensic DNA test or analysis, OR THE RESULTS OF A SEXUAL OFFENSE FORENSIC EVIDENCE TEST OF ANALYSIS, for purposes other than those authorized pursuant to this article or (c) any person who knowingly tampers or attempts to tamper with any DNA sample [or], the collection container OR SEXUAL OFFENSE FORENSIC EVIDENCE SAMPLE without lawful authority shall be guilty of a class E felony.

S 7. The executive law is amended by adding a new section 995-g to read as follows:

S 995-G. STATE SEXUAL OFFENSE FORENSIC EVIDENCE INDEX. 1. FOLLOWING THE PROMULGATION OF A POLICY BY THE COMMISSION PURSUANT TO SUBDIVISION NINE OF SECTION NINE HUNDRED NINETY-FIVE-B OF THIS ARTICLE, THE COMMISSIONER OF CRIMINAL JUSTICE SERVICES IS AUTHORIZED TO PROMULGATE A PLAN FOR THE ESTABLISHMENT OF A COMPUTERIZED STATE SEXUAL OFFENSE FORENSIC EVIDENCE INDEX WITHIN THE DIVISION OF CRIMINAL JUSTICE SERVICES.

2. FOLLOWING THE REVIEW AND APPROVAL OF THE PLAN BY THE DNA SUBCOMMITTEE AND THE COMMISSION AND THE FILING OF SUCH PLAN WITH THE SPEAKER OF THE ASSEMBLY AND THE TEMPORARY PRESIDENT OF THE SENATE, THE COMMISSIONER OF CRIMINAL JUSTICE SERVICES IS HEREBY AUTHORIZED TO ESTABLISH A COMPUTERIZED STATE SEXUAL OFFENSE FORENSIC EVIDENCE INDEX PURSUANT TO THE PROVISIONS OF THIS ARTICLE.

3. ANY FORENSIC EVIDENCE COLLECTED OR OBTAINED IN CONNECTION WITH THE INVESTIGATION OF A CRIME OR OFFENSE CONTAINED IN ARTICLE ONE HUNDRED THIRTY OF THE PENAL LAW MUST BE INCLUDED IN THE STATE SEXUAL OFFENSE FORENSIC EVIDENCE INDEX PURSUANT TO THIS ARTICLE.

4. THE SEXUAL OFFENSE FORENSIC EVIDENCE SHALL BE COLLECTED, STORED AND FORWARDED TO ANY FORENSIC DNA LABORATORY WHICH HAS BEEN AUTHORIZED BY THE COMMISSION TO PERFORM SEXUAL OFFENSE FORENSIC EVIDENCE TESTING AND ANALYSIS FOR INCLUSION IN THE STATE SEXUAL OFFENSE FORENSIC EVIDENCE INDEX. SUCH LABORATORY SHALL PERFORM THE REQUISITE TESTING AND ANALYSIS WITHIN TEN BUSINESS DAYS OF COLLECTION, AND FORWARD THE RESULTING SEXUAL OFFENSE FORENSIC EVIDENCE RECORD TO THE STATE SEXUAL OFFENSE FORENSIC EVIDENCE INDEX IN ACCORDANCE WITH THE REGULATIONS OF THE DIVISION OF CRIMINAL JUSTICE SERVICES.

5. SEXUAL OFFENSE FORENSIC EVIDENCE THAT HAS BEEN BACKLOGGED SHALL BE FORWARDED TO ANY FORENSIC DNA LABORATORY WHICH HAS BEEN AUTHORIZED BY THE COMMISSION TO PERFORM SEXUAL OFFENSE FORENSIC EVIDENCE TESTING AND ANALYSIS FOR THE INCLUSION IN THE STATE SEXUAL OFFENSE FORENSIC EVIDENCE INDEX BY AUGUST FIRST, TWO THOUSAND FIFTEEN. SUCH LABORATORY SHALL PERFORM THE REQUISITE TESTING AND ANALYSIS WITHIN ONE HUNDRED TWENTY DAYS OF RECEIPT OF THE SEXUAL OFFENSE FORENSIC EVIDENCE AND FORWARD THE RESULTING SEXUAL OFFENSE FORENSIC EVIDENCE RECORD TO THE STATE SEXUAL OFFENSE FORENSIC EVIDENCE INDEX IN ACCORDANCE WITH THE REGULATIONS OF THE DIVISION OF CRIMINAL JUSTICE SERVICES.

6. SEXUAL OFFENSE FORENSIC EVIDENCE RECORDS CONTAINED IN THE STATE SEXUAL OFFENSE FORENSIC EVIDENCE INDEX SHALL BE RELEASED ONLY FOR THE FOLLOWING PURPOSES:

(A) TO A FEDERAL LAW ENFORCEMENT AGENCY, OR TO A STATE OR LOCAL LAW ENFORCEMENT AGENCY OR DISTRICT ATTORNEY'S OFFICE FOR LAW ENFORCEMENT IDENTIFICATION PURPOSES IN CONNECTION WITH THE INVESTIGATION OF THE COMMISSION OF ONE OR MORE CRIMES, PROVIDED THAT THERE EXISTS BETWEEN THE DIVISION AND SUCH AGENCY A WRITTEN AGREEMENT GOVERNING THE USE AND DISSEMINATION OF SUCH SEXUAL OFFENSE FORENSIC EVIDENCE RECORDS IN ACCORDANCE WITH THE PROVISIONS OF THIS ARTICLE; OR

(B) FOR CRIMINAL DEFENSE PURPOSES, TO A DEFENDANT OR HIS OR HER REPRESENTATIVE, WHO SHALL ALSO HAVE ACCESS TO SAMPLES AND ANALYSES PERFORMED IN CONNECTION WITH THE CASE IN WHICH SUCH DEFENDANT IS CHARGED.

7. REQUESTS FOR SEXUAL OFFENSE FORENSIC EVIDENCE RECORDS MUST BE IN WRITING, OR IN A FORM PRESCRIBED BY THE DIVISION AUTHORIZED BY THE REQUESTING PARTY, AND, OTHER THAN A REQUEST PURSUANT TO PARAGRAPH (B) OF SUBDIVISION SIX OF THIS SECTION, MAINTAINED ON FILE AT THE STATE SEXUAL OFFENSE FORENSIC EVIDENCE INDEX IN ACCORDANCE WITH RULES AND REGULATIONS PROMULGATED BY THE COMMISSIONER OF THE DIVISION OF CRIMINAL JUSTICE SERVICES.

8. THE DEFENDANT, INCLUDING THE REPRESENTATIVE OF A DEFENDANT, IN A CRIMINAL ACTION OR PROCEEDING SHALL HAVE ACCESS TO INFORMATION IN THE STATE SEXUAL OFFENSE FORENSIC EVIDENCE INDEX RELATING TO THE NUMBER OF REQUESTS PREVIOUSLY MADE FOR A COMPARISON SEARCH AND THE NAME AND IDENTITY OF ANY REQUESTING PARTY.

S 8. This act shall take effect on June 1, 2015.