STATE OF NEW YORK

9168

IN SENATE

September 17, 2018

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

AN ACT to amend the executive law and the criminal procedure law, in relation to establishing the office of special investigation

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The executive law is amended by adding a new section 70-b to read as follows:

§ 70-b. Office of special investigation. 1. There shall be established within the department of law an office of special investigation which shall investigate and, if warranted, prosecute any alleged criminal offense or offenses committed by a person who is a police officer as defined in subdivision thirty-four of section 1.20 of the criminal procedure law, or a peace officer as defined in subdivision thirty-three of section 1.20 of the criminal procedure law, concerning the death, or the investigation of the death, of any person where such death resulted from or potentially resulted from any encounter with such police officer or peace officer, whether or not such person was in custody. The office shall have the powers and duties specified in subdivisions two and eight of section sixty-three of this article for purposes of this section, and shall possess and exercise all the prosecutorial powers necessary to investigate and, if warranted, prosecute such offenses, provided, however, that approval, direction or requirement of the governor as may otherwise be required by such subdivisions shall not be required. The jurisdiction of the office of special investigation shall displace and supersede in all ways the authority and jurisdiction of the county district attorney for the investigation and prosecution of such offenses. In any investigation and prosecution conducted pursuant to this section, the district attorney shall only exercise such powers and perform such duties as designated to him or her by the office of special investigation. The office of special investigation within the department of law shall be headed by the deputy attorney general appointed by the attorney general pursuant to subdivision three of this section.

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

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2. (a) In any investigation and prosecution undertaken pursuant to this section, the office of special investigation shall conduct a full, reasoned, and independent investigation including, but not limited to: (i) gathering and analyzing evidence; (ii) conducting witness interviews; and (iii) reviewing and commissioning any necessary investigative and scientific reports, and reviewing audio and video recordings.

(b) In all matters pursuant to subdivision one of this section, the deputy attorney general, appointed pursuant to subdivision three of this section, may appear in person or by any assistant attorney general he or she may designate before any court or grand jury in the state and exercise all of the powers and perform all of the duties with respect to such actions or proceedings which the district attorney would otherwise be authorized or required to exercise or perform.

3. Notwithstanding any other provision of law, the attorney general shall, without civil service examination, appoint and employ, fix his or her compensation, and at his or her pleasure remove, a deputy attorney general in charge of the office of special investigation. The attorney general may, and without civil service examination, appoint and employ, and at pleasure remove, such assistant deputies, investigators and other persons as he or she deems necessary, determine their duties and fix their compensation.

4. (a) Where an investigation or prosecution of the type described in subdivision one of this section involves acts that appear to have been engaged in by a police officer or peace officer employed by the state of New York, the attorney general shall promptly apply to a superior court in the county in which such acts allegedly occurred for the appointment of an independent counsel to investigate and potentially prosecute such matter. Notwithstanding the provisions of any other law, such court shall thereupon appoint a qualified and experienced attorney at law, capable of investigating and prosecuting such matter, not employed as a district attorney, assistant district attorney or assistant attorney general, and having no personal or professional conflicts of interest, to act as an independent counsel with respect to such matter, at a reasonable and appropriate hourly rate to be set by such court.

(b) The attorney general shall promptly notify the state comptroller, the court and the public when such appointment has been made and accepted by such attorney. Reasonable fees for attorneys and investigation and litigation expenses shall be paid by the state to such private counsel from time to time during the pendency of the investigation and any prosecution and appeal, upon the audit and warrant of the comptroller. Any dispute with respect to the payment of such fees and expenses shall be resolved by the court upon motion or by way of a special proceeding.

(c) In all matters pursuant to subdivision one of this section, the independent counsel appointed pursuant to this subdivision shall possess and exercise the powers and duties of the office of special investigation pursuant to subdivisions one and two of this section, and may appear in person or by any assistant independent counsel he or she may designate before any court or grand jury in the state and exercise all of the powers and perform all of the duties with respect to such actions or proceedings which the district attorney would otherwise be authorized or required to exercise or perform.

5. (a) With respect to any investigation pursuant to this section, the office of special investigation or the independent counsel, as the case may be, shall, as a part of the duties under this section, prepare and publicly release a report on all cases where: (i) the office or inde-

pendent counsel, as the case may be, declines to present evidence to a grand jury regarding the death of a person as described in subdivision one of this section; or (ii) the grand jury declines to return an indictment on any felony charges.

(b) The report shall include: (i) with respect to subparagraph (i) of paragraph (a) of this subdivision, an explanation as to why such office or independent counsel declined to present evidence to a grand jury; (ii) with respect to subparagraph (ii) of paragraph (a) of this subdivision, a report of the outcome of the grand jury proceedings and, to the greatest extent possible, an explanation of that outcome; and (iii) any recommendations for systemic or other reforms arising from the investigation.

6. Six months after this subdivision takes effect, and annually on such date thereafter, the office of special investigation shall issue a report, which shall be made available to the public and posted on the website of the department of law, which shall provide information on the matters investigated by such office, and by independent counsel appointed pursuant to subdivision four of this section, during such reporting period. The information presented shall include, but not be limited to: the county and geographic location of each matter investigated; a description of the circumstances of each case; racial, ethnic, age, gender and other demographic information concerning the persons involved or alleged to be involved; information concerning whether a criminal charge or charges were filed against any person involved or alleged to be involved in such matter; the nature of such charges; and the status or, where applicable, outcome with respect to all such criminal charges. Such report shall also include recommendations for any systemic or other reforms recommended as a result of such investigations.

§ 2. Subdivision 6 of section 190.25 of the criminal procedure law is amended to read as follows:

6. (a) The legal advisors of the grand jury are the court and the district attorney, and the grand jury may not seek or receive legal advice from any other source. Where necessary or appropriate, the court or the district attorney, or both, must instruct the grand jury concerning the law with respect to its duties or any matter before it, and such instructions must be recorded in the minutes.

(b) Notwithstanding paragraph (a) of this subdivision, or any other law to the contrary, in any proceeding before a grand jury that involves the submission of a criminal charge or charges against a person or persons for an act or acts that occurred at a time when such person was a police officer or peace officer, and that concern the death of any person that resulted from or potentially resulted from any encounter with such police officer or peace officer, the court, after consultation on the record with the prosecutor, shall instruct the grand jury as to the criminal charge or charges to be submitted and the law applicable to such charges and to the matters before such grand jury. Thereafter, any questions, requests for exhibits, requests for readback of testimony or other requests from the grand jury or a member thereof shall be provided to the court, and addressed by the court after consultation on the record with the prosecutor.

(c) Notwithstanding the provisions of subdivision four of this section, or any other law to the contrary, following final action by the grand jury on the charge or charges submitted pursuant to paragraph (b) of this subdivision, the court shall make such legal instructions and charges submitted to such grand jury available to the public on request,

provided that the names of witnesses and any information that would identify such witnesses included in such legal instructions or charges shall be redacted when the court determines, in a written order released to the public, and issued after notice to the people and the requester and an opportunity to be heard and reasonable efforts to notify and provide an opportunity to be heard to any other appropriate person or agency, that there is a reasonable likelihood that public release of such information would endanger any individual.

(d) Nothing in this paragraph or paragraphs (b) or (c) of this subdivision shall be interpreted as limiting or restricting any broader right of access to grand jury materials under any other law, common law or court precedent.

§ 3. This act shall take effect on the thirtieth day after it shall have become a law.