STATE OF NEW YORK

3570

2017-2018 Regular Sessions

IN ASSEMBLY

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Introduced by M. of A. LENTOL, BENEDETTO, COOK, DINOWITZ, ENGLEBRIGHT, GALEF, LAVINE, LIFTON -- Multi-Sponsored by -- M. of A. MAGNARELLI, PRETLOW, RAMOS, TITUS, ZEBROWSKI -- read once and referred to the Committee on Codes

AN ACT to amend the executive law, the criminal procedure law and the state finance law, in relation to DNA testing, data collection and record keeping, and to special indictments by fictitious name in DNA cases; and in relation to creating the innocence research project program

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

Section 1. Section 995-b of the executive law is amended by adding a new subdivision 15 to read as follows:

15. (a) The commission, in consultation with the DNA subcommittee, shall promulgate a plan to include all persons convicted of a penal law misdemeanor in the state DNA identification index. Such plan shall be submitted to the governor, the speaker of the assembly, and the temporary president of the senate no later than December first, two thousand seventeen.

(b) The plan required by this section shall include, but not be limited to, the following:

(i) the capacity of the New York state police forensic investigation center to process DNA samples collected from designated offenders;

(ii) the anticipated increase in the number of DNA samples collected per year due to the inclusion of all persons convicted of a penal law misdemeanor in the state DNA identification index;

(iii) the anticipated number of DNA samples that will be collected from persons in custody or under supervision for the conviction of a penal law misdemeanor as of the date of such plan;

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

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(iv) the anticipated backlog of unanalyzed DNA samples that will be created by expanding the state DNA identification index to include all persons convicted of a penal law misdemeanor;

(v) the manner in which a backlog of the unanalyzed DNA samples will be processed, and specifically, whether the state will be required to outsource the analysis of backlogged samples to private laboratories;

(vi) the estimated amount of time it will take to analyze all backlogged DNA samples;

(vii) the anticipated cost to collect and analyze DNA samples taken from persons convicted of a penal law misdemeanor each year and the cost to collect and analyze DNA samples taken from persons in custody or under supervision for the conviction of a penal law misdemeanor;

(viii) the annual number of arrests, indictments, and convictions that have resulted from comparing DNA records of designated offenders stored in the state DNA identification index with DNA records from unknown suspects derived from the forensic examination of crime scenes;

(ix) the anticipated effect on the prompt and accurate processing of DNA samples collected from the forensic examination of crime scenes due to the influx of DNA samples collected from persons convicted of a penal law misdemeanor.

(c) The plan required by this section shall also recommend:

(i) the amount of funding necessary to collect and analyze DNA samples collected from all persons convicted of a penal law misdemeanor;

(ii) the most effective way to process the increased number of DNA samples collected from persons convicted of a penal law misdemeanor to reduce any resulting backlog in an efficient manner; and

(iii) whether additional quality assurance measures should be implemented in conjunction with such expansion and what such measures should be.

§ 2. The opening paragraph of subdivision 1 of section 995-a of the executive law, as added by chapter 737 of the laws of 1994, is amended to read as follows:

There is hereby created in the executive department, the commission on forensic science, which shall consist of the following [~~fourteen~~] sixteen members:

§ 3. Paragraph (i) of subdivision 2 of section 995-a of the executive law, as added by chapter 737 of the laws of 1994, is amended, paragraph (j) is relettered (k) and a new paragraph (j) is added to read as follows:

(i) two members shall be members-at-large, one of whom shall be appointed upon the recommendation of the temporary president of the senate, and one of whom shall be appointed upon the recommendation of the speaker of the assembly; [~~and~~]

(j) two members shall be jointly appointed by the temporary president of the senate and the speaker of the assembly: one such person shall be a crime victims advocate, and one such person shall be an expert in biomedical ethics; and

§ 4. Subparagraph (ix) of paragraph (b) of subdivision 9 of section 995-b of the executive law, as added by chapter 737 of the laws of 1994, is amended and a new subparagraph (x) is added to read as follows:

(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[~~.~~]; and

(x) such policy, which shall be developed and promulgated within one year of the effective date of this subparagraph, shall determine, consistent with this article, the appropriate minimum period of time that forensic samples of blood, tissue and other biological material, obtained in connection with the forensic examination of crime scenes, should be retained by investigating authorities and the time or specified event or events, if any, after which, consistent with the interest of all persons and law enforcement, such samples may be destroyed. Pending the promulgation of a policy addressing the issues set forth in this subparagraph, the commission may adopt an interim policy mandating the preservation by investigating authorities of forensic samples of blood, tissue and other biological material obtained in connection with the forensic examination of crime scenes.

§ 5. Section 995-b of the executive law is amended by adding a new subdivision 14 to read as follows:

14. The commission shall review the confidentiality safeguards which are maintained with respect to DNA samples before and after information from such samples is encoded into the state DNA identification index and shall determine whether any additional confidentiality safeguards are necessary with respect to such samples. The commission shall also issue a report to the temporary president of the senate and the speaker of the assembly which describes how such samples are retained and the reasons for maintaining such samples, following the encoding of information from such samples into the state DNA identification index. Such report shall also recommend whether a program to destroy any such samples, following the encoding of information from such samples into the state DNA identification index, should be initiated or whether, alternatively, such samples shall continue to be maintained.

§ 6. Subdivision 2 of section 995-c of the executive law, as added by chapter 737 of the laws of 1994, is amended to read as follows:

2. (a) 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 DNA identification index pursuant to the provisions of this article. No other DNA identification index or compilation of DNA identification profiles may be maintained in this state provided, however, that this prohibition shall not be interpreted to prohibit any such index or compilation of DNA information obtained from crime scene samples or concerning missing persons.

(b) In accordance with subdivision one of this section and this subdivision, and in a manner consistent with this article, the commission may authorize the inclusion of DNA records derived from forensic examination of crime scenes in the state DNA identification index.

§ 7. Paragraph (b) of subdivision 9 of section 995-c of the executive law, as added by chapter 524 of the laws of 2002, is amended and two new paragraphs (c) and (d) are added to read as follows:

(b) As prescribed in this paragraph, if an individual, either voluntarily or pursuant to a warrant or order of a court, has provided a sample for DNA testing in connection with the investigation 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 a dismissal and the matter will not be tried or retried, or (iii) a criminal action 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. **Nothing in this paragraph shall prevent a court, at an earlier time, from ordering expungement in the manner specified in this paragraph in the interests of justice, in response to an application made on notice to the district attorney by the person who provided such DNA sample.** 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, 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 connection with the application for the order of expungement. **The person destroying or returning such record, samples, analyses and other documents shall maintain a record certifying the date, time and manner of destruction or return and identifying the person or persons destroying or returning same. The person destroying or returning same shall send a copy of this record to the person who submitted the sample or to the attorney who represented him or her in connection with the application for the order of expungement.**

(c) (i) Except as provided in paragraph (d) of this subdivision, if an individual has provided a sample for DNA testing in connection with the investigation or prosecution of a crime, other than in response to a demand authorized pursuant to subdivisions one, two and three of this section, or if a sample for DNA testing has otherwise come into the custody or possession of a law enforcement agency or an agent thereof, and the DNA profile derived from such sample does not match a DNA profile derived from crime scene evidence developed in connection with the investigation or prosecution of a criminal act or acts, every record, sample, analysis and other document relating to the DNA testing of such sample shall, at the discretion of the possessor thereof, be either returned to the individual who provided such sample, destroyed or maintained for the duration of the investigation, prosecution or adjudication of such criminal acts exclusively for use with respect to the investigation, prosecution and/or adjudication of the criminal charges for which such sample was obtained or with respect to any other criminal acts which the investigating agency has reason to believe may be linked to such sample; provided, however, that no later than five years after such sample is obtained or when the investigation or prosecution of such crime has concluded, whichever first occurs, such records, samples, analyses and other documents shall, at the discretion of the possessor thereof, be returned to such individual or destroyed, or sealed in a manner consistent with paragraph (c) and subparagraphs (ii), (iv) or (v)

of paragraph (d) of subdivision one of section 160.55 of the criminal procedure law.

(ii) The person returning, destroying or sealing such record, samples, analyses or other documents in accordance with this paragraph shall maintain a record certifying the date and manner of such return, destruction or sealing and identifying the person or persons returning, destroying or sealing same. The person returning, destroying or sealing same shall send a copy of this record to the person who submitted the sample.

(iii) This paragraph shall supplement and not supplant any applicable provision of paragraph (b) of this subdivision. This paragraph shall not apply to DNA records, samples, analyses and other documents obtained from the forensic examination of crime scene evidence, where the DNA profile developed from such crime scene evidence does not match the DNA profile of a known person.

(d) Notwithstanding the provisions of paragraphs (a), (b) and (c) of this subdivision, a DNA record which was obtained from a sample provided pursuant to paragraph (a) or (b) of this subdivision prior to the effective date of this paragraph need not be destroyed, returned or sealed, and may be included in the state DNA identification index established pursuant to this article, when, as of the effective date of this paragraph, the person who provided such sample stands convicted of a felony or misdemeanor defined in section nine hundred ninety-five of this article. All laws governing DNA records included in the state DNA identification index shall apply to any DNA record included in the state DNA identification index pursuant to this paragraph.

§ 8. Section 995-c of the executive law is amended by adding a new subdivision 10 to read as follows:

10. A superior court, in response to a motion for such comparison by a defendant, may order that DNA information from a crime scene sample or samples obtained in the course of the investigation of an alleged crime be checked against the DNA records maintained by or available through the state DNA identification index established pursuant to this section and the national DNA index system, and that the results of such check or checks be disclosed to such defendant and to the prosecutor whose jurisdiction includes the location of the alleged commission of such crime, upon a showing by the defendant that such an analysis may be material to his or her defense and that the request is reasonable.

§ 9. Section 995-d of the executive law is amended by adding two new subdivisions 3 and 4 to read as follows:

3. In accordance with the provisions of this subdivision, any individual DNA profile obtained or maintained by a state, county or local law enforcement agency, or an agent thereof, from a biological sample submitted in the manner described in paragraph (b) or (c) of subdivision nine of section nine hundred ninety-five-c of this article, may be compared individually or via computerized database to one or more DNA profiles maintained pursuant to or in accordance with subdivisions one, two and three of section nine hundred ninety-five-c of this article, and/or may be individually compared by such state, county or local law enforcement agency, or an agent thereof, to one or more DNA profiles developed from the forensic examination of crime scenes in one or more cases under investigation.

(a) If such individual DNA profile matches the DNA profile developed from the forensic examination of one or more crime scenes in one or more cases under investigation, and/or one or more DNA profiles maintained pursuant to subdivisions one, two and three of section nine hundred

ninety-five-c of this article, such individual DNA profile, together with the biological material from which such individual DNA profile was developed, may, as appropriate pursuant to applicable laws and rules of evidence and consistent with this article, be used in connection with the investigation, prosecution and/or adjudication of such person.

(b) If such individual DNA profile does not match the DNA profile developed from forensic examination of one or more crime scenes in one or more cases under investigation, and/or one or more DNA profiles maintained pursuant to subdivisions one, two and three of section nine hundred ninety-five-c of this article, such individual DNA profile, together with the biological material from which such individual DNA profile was developed, shall be dealt with in accordance with paragraph (c) of subdivision nine of section nine hundred ninety-five-c of this article.

4. (a) Except where the demand is pursuant to a court order or warrant or pursuant to subdivision three of section nine hundred ninety-five-c of this article, prior to requesting a biological sample from an individual that will be used for DNA testing, the police department, law enforcement agency, or agent thereof requesting such sample shall obtain written informed consent from such individual consisting of written authorization in plain language that is dated and signed and includes at least the following: (1) a general description of the test; (2) a statement that the DNA sample of the subject may initially be compared against any crime scene evidence or database of crime scene evidence and a description of whether, in the event such subject sample does not match a DNA profile derived from any such crime scene evidence, such subject sample will thereafter be returned, destroyed or retained. In the event the agent requesting such sample may retain such sample, such statement shall describe the circumstances under which such sample may thereafter be lawfully used; (3) the name of the person or specific categories of persons or organizations to whom the test results may be disclosed; (4) a statement that no tests other than those authorized shall be performed on the biological sample; and (5) a summary of the information set forth in paragraphs (b) and (c) of subdivision nine of section nine hundred ninety-five-c of this article.

(b) Noncompliance with any provision of this subdivision shall not in and of itself affect the admissibility of evidence or otherwise affect any conviction or criminal prosecution.

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

§ 995-f. Penalties. Any person who (a) intentionally discloses a DNA record, or the results of a forensic DNA test or 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, 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 without lawful authority or (d) intentionally subjects to or submits for testing or analysis not authorized by this article an individual's DNA record or sample, shall be guilty of a class [~~E~~] D felony.

§ 11. Section 1.20 of the criminal procedure law is amended by adding a new subdivision 44 to read as follows:

44. "Special fictitious name indictment" means an indictment of a person whose name is unknown but whose identity is established to the satisfaction of a grand jury pursuant to subdivision one of section

190.65 of this chapter by means of forensic deoxyribonucleic acid (DNA) testing of evidence. The caption of a special fictitious name indictment shall include a fictitious name, such as "John Doe" or "Jane Doe", in place of the name of the defendant whose true name is unknown.

§ 12. Subdivision 3 of section 190.65 of the criminal procedure law is amended to read as follows:

3. Upon voting to indict a person, a grand jury must, through its foreman or acting foreman, file an indictment with the court by which it was impaneled. When the name of the indicted person is unknown but his or her identity is established to the satisfaction of the grand jury pursuant to subdivision one of this section by means of forensic deoxyribonucleic acid (DNA) testing of evidence, then such indictment shall be filed by the grand jury with such court as a special fictitious name indictment. The authority to file a special fictitious name indictment pursuant to this subdivision shall be in addition to any other authority in law for the filing of an indictment when the name of an indicted person is unknown.

§ 13. Section 340.20 of the criminal procedure law is amended by adding a new subdivision 5 to read as follows:

5. Prior to accepting a defendant's plea of guilty to a count or counts of an information charging a misdemeanor, as defined in paragraph (a) of subdivision two of section 55.10 of the penal law and included in the definition of designated offender pursuant to subdivision seven of section nine hundred ninety-five of the executive law, the court shall advise the defendant that upon the conviction for such misdemeanor he or she will be required to provide a sample appropriate for DNA testing for inclusion in the state DNA identification index pursuant to article forty-nine-B of the executive law. The court shall affirm on the record or in writing that the defendant has been given the notice required by this subdivision. The failure of a court to advise the defendant pursuant to this subdivision or to otherwise comply with the provisions of this subdivision shall not be deemed to affect the voluntariness of a plea of guilty or the validity of a conviction.

§ 14. Subdivision 1-a of section 440.30 of the criminal procedure law is amended by adding a new paragraph (d) to read as follows:

(d) In conjunction with the filing of a motion under this subdivision, the court may direct the state to provide the movant with information, including documents, notes, logs or reports, relating to any physical items collected in connection with the case, where it is likely any such physical items, if subjected to DNA testing, would yield DNA information that meets the standard set forth in paragraph (a) of this subdivision. The court may direct the state to provide other reasonable assistance to the movant in locating any such records or items of physical evidence which may have been lost or destroyed. The court may also direct the people to take reasonable measures to attempt to locate any such records or physical items that may be in government custody and/or assist the movant in locating any such records or physical items that may be in the custody of a public or private hospital, laboratory or other facility. The court shall deny a request for assistance brought under this paragraph if the court determines that such request for assistance is frivolous, abusive or inappropriate.

§ 15. The state finance law is amended by adding a new section 97-pppp to read as follows:

§ 97-pppp. Assistance to police and crime laboratories; DNA evidence fund. 1. There is hereby created in the custody of the state comp-

troller a special fund to be known as the "assistance to police and crime laboratories: DNA evidence fund".

2. Such fund shall consist of all monies appropriated for the purpose of such fund, all other monies credited or transferred to such fund pursuant to law, all monies required by the provisions of this section or any other law to be paid into or credited to such account, and all monies received by the account or donated to it.

3. Monies of such fund shall be available for appropriation and allocation to the division of state police, to local police agencies, and to forensic DNA laboratories in this state, as defined in subdivision two of section nine hundred ninety-five of the executive law, to assist such entities in effectively collecting, testing and analyzing forensic DNA crime scene evidence pursuant to article forty-nine-B of the executive law. Fifty percent of such funds shall be made available for appropriation or allocation by the commissioner of criminal justice services for the purpose of funding an innocence research project program in this state.

4. Monies of such fund shall be paid out on the audit and warrant of the comptroller on vouchers certified or approved by the commissioner of criminal justice services.

§ 16. Innocence research project program. 1. There is hereby established in this state an innocence research project program. Funding shall be made available for the purposes of such program to up to three not-for-profit organizations by the commissioner of criminal justice services pursuant to subdivisions 3 and 4 of section 97-pppp of the state finance law.

2. The innocence research project program shall review and study cases in which there appears to be a reasonable possibility that a person charged with or convicted of a crime in this state may be innocent of the crime or crimes charged. Such program may provide legal and other expert assistance, and may also provide relevant training, including but not limited to training in the use of DNA evidence for forensic identification purposes, to attorneys engaged in the defense of criminal cases.

3. Each not-for-profit organization receiving funding for such program shall file an annual report with the commissioner of criminal justice services summarizing the activities of the program during the previous year. Such report shall be filed within one year after such organization first receives funding under such program, and annually thereafter for so long as the program receives such funding.

4. Before providing assistance to any individual believed to be actually innocent of the crime or crimes charged, the organization-based coordinator of such program shall determine whether such individual is financially able to pay for the proposed services or assistance to be provided. If such individual is able to financially afford to pay for such services or assistance, such coordinator shall request and receive such payment or payments on behalf of the program from such individual. All monies received from individuals pursuant to this subdivision shall be promptly forwarded by such coordinator to the state comptroller, for deposit into the "assistance to police and crime laboratories: DNA evidence fund" established pursuant to section 97-pppp of the state finance law.

§ 17. This act shall take effect immediately; provided, however, that:

(a) the amendments to paragraph (a) of subdivision 2 of section 995-c of the executive law made by section six of this act shall take effect on the one hundred twentieth day after it shall have become a law; and

(b) the amendments to section 340.20 of the criminal procedure law made by section thirteen of this act shall apply to pleas of guilty to a count or counts of an information entered 60 days or more after the effective date of this act.