

STATE OF NEW YORK

1038

2017-2018 Regular Sessions

IN SENATE

January 6, 2017

Introduced by Sen. FUNKE -- 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

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, 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.

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

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§ 2. Subdivision 3 of section 995-c of the executive law is amended by adding four new paragraphs (c), (d), (e) and (f) to read as follows:

(c) 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.

(d) 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.

(e) 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.

(f) 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.

§ 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 (c) 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

1 of a crime and (i) no criminal action against the individual relating to
2 such crime was commenced within the period specified by section 30.10 of
3 the criminal procedure law, or (ii) a criminal action was commenced
4 against the individual relating to such crime which resulted in a
5 complete acquittal, or (iii) a criminal action was commenced against the
6 individual relating to such crime [~~resulted in a conviction that was~~
7 ~~subsequently reversed or vacated, or for which the individual was grant-~~
8 ~~ed a pardon pursuant to article two-A of this chapter, such individual~~
9 ~~may apply to the supreme court or the court in which the judgment of~~
10 ~~conviction was originally entered for an order directing the expungement~~
11 ~~of any DNA record and any samples, analyses, or other documents relating~~
12 ~~to the DNA testing of such individual in connection with the investi-~~
13 ~~gation or prosecution of such crime. A copy of such application shall be~~
14 ~~served on the district attorney and an order directing expungement may~~
15 ~~be granted if the court finds that the individual has satisfied the~~
16 ~~conditions of one of the subparagraphs of this paragraph, that if a~~
17 ~~judgment of conviction was reversed or vacated, all appeals relating~~
18 ~~thereto have been concluded and the individual will not be retried, or,~~
19 ~~if a retrial has occurred, the trier of fact has rendered a verdict of~~
20 ~~complete acquittal, and that expungement will not adversely affect the~~
21 ~~investigation or prosecution of some other person or persons for the~~
22 ~~crime. If an order directing the expungement of any DNA record and any~~
23 ~~samples, analyses or other documents relating to the DNA testing of such~~
24 ~~individual is issued] which was resolved by a dismissal, successful
25 completion of a pre-prosecution diversion program, or conditional
26 discharge or misdemeanor conviction that did not require DNA collection
27 pursuant to section nine hundred ninety-five of this article, the DNA
28 record shall be expunged from the state DNA identification index. An
29 individual may request expungement of any DNA record and any samples,
30 analyses or other documents relating to the DNA testing of such individ-
31 ual by providing the following materials to the division of criminal
32 justice services:~~

33 (1) a written request for expungement of the sample and DNA records;
34 and

35 (2) a certified copy of the dismissal, successful completion of a
36 pre-prosecution diversion program or a conditional discharge, misdemea-
37 nor conviction or acquittal; and

38 (3) a sworn statement from the district attorney's office with juris-
39 diction over the matter that: the case was dismissed; a pre-prosecution
40 diversion program or conditional discharge, misdemeanor conviction
41 excluded from DNA collection pursuant to section nine hundred ninety-
42 five of this article or acquittal occurred; no felony charges arose out
43 of the arrest; or no criminal action against the individual relating to
44 such crime was commenced within the period specified by section 30.10 of
45 the criminal procedure law; and that expungement will not adversely
46 affect the investigation or prosecution of some other person or persons
47 for the crime.

48 (c) If expungement is warranted pursuant to paragraph (a) or (b) of
49 this subdivision, such record and any samples, analyses, or other docu-
50 ments shall, at the discretion of the possessor thereof, be destroyed or
51 returned to such individual or to the attorney who represented him or
52 her in the criminal action or in connection with the [application for
53 the order of] request for expungement.

54 (d) No expungement shall be granted where an individual has a prior
55 conviction requiring a DNA sample, or a pending felony charge for which

1 collection of a sample is authorized pursuant to the provisions of para-
2 graph (c) of subdivision three of this section.

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

6 6. Before bringing a defendant arrested pursuant to a warrant before
7 the local criminal court in which such warrant is returnable, a police
8 officer must without unnecessary delay perform all fingerprinting and
9 other preliminary police duties required in the particular case. In any
10 case in which the defendant is not brought by a police officer before
11 such court but, following his arrest in another county for an offense
12 specified in subdivision one of section 160.10 of this title, is
13 released by a local criminal court of such other county on his own
14 recognizance or on bail for his appearance on a specified date before
15 the local criminal court before which the warrant is returnable, the
16 latter court must, upon arraignment of the defendant before it, direct
17 that he be fingerprinted and have a sample appropriate for DNA testing
18 taken, if required pursuant to section nine hundred ninety-five-c of the
19 executive law, by the appropriate officer or agency, and that he appear
20 at an appropriate designated time and place for such purpose.

21 § 5. Section 130.60 of the criminal procedure law, as amended by chap-
22 ter 95 of the laws of 1991, subdivision 1 as amended by chapter 446 of
23 the laws of 1993, is amended to read as follows:

24 § 130.60 Summons; fingerprinting of defendant.

25 1. Upon the arraignment of a defendant whose court attendance has been
26 secured by the issuance and service of a summons, based upon an indict-
27 ment, a prosecutor's information or upon an information, felony
28 complaint or misdemeanor complaint filed by a complainant who is a
29 police officer, the court must, if an offense charged in the accusatory
30 instrument is one specified in subdivision one of section 160.10 of this
31 title, direct that the defendant be fingerprinted by the appropriate
32 police officer or agency, and that he or she appear at an appropriate
33 designated time and place for such purpose. If an offense charged in
34 the accusatory instrument is one specified in subdivision seven-a of
35 section nine hundred ninety-five of the executive law, the court must
36 direct that a sample appropriate for DNA testing be taken, and that he
37 or she appear at an appropriate designated time and place for such
38 purpose.

39 2. Upon the arraignment of a defendant whose court attendance has been
40 secured by the issuance and service of a summons based upon an informa-
41 tion or misdemeanor complaint filed by a complainant who is not a police
42 officer, and who has not previously been fingerprinted or from whom a
43 DNA sample has not previously been taken and was required pursuant to
44 section nine hundred ninety-five-c of the executive law, the court may,
45 if it finds reasonable cause to believe that the defendant has committed
46 an offense specified in subdivision one of section 160.10 of this title,
47 direct that the defendant be fingerprinted and/or have a sample appro-
48 priate for DNA testing taken, if required by section nine hundred nine-
49 ty-five-c of the executive law, by the appropriate police officer or
50 agency and that he appear at an appropriate designated time and place
51 for such purpose. A defendant whose court appearance has been secured by
52 the issuance and service of a criminal summons based upon a misdemeanor
53 complaint or information filed by a complainant who is not a police
54 officer, must be directed by the court, upon conviction of the defend-
55 ant, to be fingerprinted and have a sample appropriate for DNA testing
56 taken, if required by section nine hundred ninety-five-c of the execu-

1 tive law, by the appropriate police officer or agency and the court must
2 also direct that the defendant appear at an appropriate designated time
3 and place for such purpose, if the defendant is convicted of any offense
4 specified in subdivision one of section 160.10 of this title.

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

8 5. Before service of an appearance ticket upon an arrested person
9 pursuant to subdivision two or three of this section, the issuing police
10 officer must, if the offense designated in such appearance ticket is one
11 of those specified in subdivision one of section 160.10 of this title,
12 cause such person to be fingerprinted and have a sample appropriate for
13 DNA testing taken, if required by section nine hundred ninety-five-c of
14 the executive law, in the same manner as would be required were no
15 appearance ticket to be issued or served.

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

19 2. Upon arresting a person without a warrant, a peace officer, except
20 as otherwise provided in subdivision three of this section, must without
21 unnecessary delay bring him or cause him to be brought before a local
22 criminal court, as provided in section 100.55 and subdivision one of
23 section 140.20 of this article, and must without unnecessary delay file
24 or cause to be filed therewith an appropriate accusatory instrument. If
25 the offense which is the subject of the arrest is one of those specified
26 in subdivision one of section 160.10 of this title, the arrested person
27 must be fingerprinted and photographed, and have a sample appropriate
28 for DNA testing taken if required by section nine hundred ninety-five-c
29 of the executive law, as therein provided. In order to execute the
30 required post-arrest functions, such arresting peace officer may perform
31 such functions himself or he may enlist the aid of a police officer for
32 the performance thereof in the manner provided in subdivision one of
33 section 140.20 of this article.

34 § 8. Section 150.70 of the criminal procedure law, as amended by chap-
35 ter 762 of the laws of 1971, is amended to read as follows:

36 § 150.70 Appearance ticket; fingerprinting and DNA analysis sample of
37 defendant.

38 Upon the arraignment of a defendant who has not been arrested and
39 whose court attendance has been secured by the issuance and service of
40 an appearance ticket pursuant to subdivision one of section 150.20 of
41 this article, the court must, if an offense charged in the accusatory
42 instrument is one specified in subdivision one of section 160.10 of this
43 title, direct that the defendant be fingerprinted and have a sample
44 appropriate for DNA testing taken when required by section nine hundred
45 ninety-five-c of the executive law by the appropriate police officer or
46 agency, and that he appear at an appropriate designated time and place
47 for such purpose.

48 § 9. Section 160.20 of the criminal procedure law, as amended by chap-
49 ter 108 of the laws of 1973, is amended to read as follows:

50 § 160.20 Fingerprinting and DNA analysis sample; forwarding of finger-
51 prints and DNA analysis sample.

52 1. Upon the taking of fingerprints of an arrested person or defendant
53 as prescribed in section 160.10 of this article, the appropriate police
54 officer or agency must without unnecessary delay forward two copies of
55 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.

§ 10. Paragraphs (d) and (e) of subdivision 1 of section 160.50 of the criminal procedure law, paragraph (d) as amended by chapter 449 of the laws of 2015 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, or (ii) a law enforcement agency upon ex parte motion in any superior court, ~~[or in any district court, city court or the criminal court of the city of New York provided that such court sealed the record,]~~ 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.

§ 11. Paragraphs (d) and (e) of subdivision 1 of section 160.55 of the criminal procedure law, paragraph (d) as amended by chapter 449 of the laws of 2015 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, or (ii) a law enforcement agency upon ex

1 parte motion in any superior court, [~~or in any district court, city~~
2 ~~court or the criminal court of the city of New York provided that such~~
3 ~~court sealed the record,~~] if such agency demonstrates to the satisfac-
4 tion of the court that justice requires that such records be made avail-
5 able to it, or (iii) any state or local officer or agency with responsi-
6 bility for the issuance of licenses to possess guns, when the accused
7 has made application for such a license, or (iv) the [~~New York state~~]
8 department of corrections and community supervision when the accused is
9 under parole supervision as a result of conditional release or parole
10 release granted by the [~~New York~~] state board of parole and the arrest
11 which is the subject of the inquiry is one which occurred while the
12 accused was under such supervision, or (v) the probation department
13 responsible for supervision of the accused when the arrest which is the
14 subject of the inquiry is one which occurred while the accused was under
15 such supervision, or (vi) a police agency, probation department, sher-
16 iff's office, district attorney's office, department of correction of
17 any municipality and parole department, for law enforcement purposes,
18 upon arrest in instances in which the individual stands convicted of
19 harassment in the second degree, as defined in section 240.26 of the
20 penal law, committed against a member of the same family or household as
21 the defendant, as defined in subdivision one of section 530.11 of this
22 chapter, and determined pursuant to subdivision eight-a of section
23 170.10 of this title; [~~and~~]

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

30 (f) a sample appropriate for DNA testing taken from such person pursu-
31 ant to section nine hundred ninety-five-c of the executive law, any DNA
32 record relating to such sample, and any analyses or other documents
33 relating to such DNA sample shall be expunged, destroyed or returned in
34 accordance with subdivision nine of such section of the executive law.

35 § 12. This act shall take effect on the one hundred eightieth day
36 after it shall have become a law.