STATE OF NEW YORK

1794

2019-2020 Regular Sessions

IN ASSEMBLY

January 17, 2019

Introduced by M. of A. MAGNARELLI -- read once and referred to the Committee on Governmental Operations

AN ACT to amend the executive law, in relation to establishing standards of regulation to permit familial searching and partial DNA matches as an investigative tool in certain unsolved crimes

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, as added by chapter 737 of the laws of 1994, subdivision 7 as amended by chapter 19 of the laws of 2012, is amended to read as follows:

§ 995. Definitions. When used in this article, the following words and terms shall have the meanings ascribed to them in this section:

1. For purposes of general forensic analysis the term "forensic laboratory" shall mean any laboratory operated by the state or unit of local government that performs forensic testing on evidence in a criminal investigation or proceeding or for purposes of identification provided, however, that the examination of latent fingerprints by a police agency shall not be subject to the provisions of this article.

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 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.

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

LBD01869-01-9

3. "DNA testing methodology" means methods and procedures used to extract and analyze DNA material, as well as the methods, procedures, assumptions, and studies used to draw statistical inferences from the test results.

4. "Blind external proficiency testing" means a test sample that is presented to a forensic laboratory for forensic DNA testing through a second agency, and which appears to the analysts to involve routine evidence submitted for forensic DNA testing.

5. "DNA" means deoxyribonucleic acid.

5-a. "DNA profile" means a set of DNA identification characteristics which may permit the DNA of one person to be distinguishable from that of another person. For short tandem repeat DNA profiles, it means the list of alleles carried by a particular individual at a specific set of genetic loci.

5-b. "Subject DNA profile" means the DNA profile generated by analysis of a biological sample collected from a subject convicted of a crime whose specimen was collected: after a criminal trial; pursuant to a plea agreement; as a condition of participation in a temporary release, comprehensive alcohol and substance abuse treatment (CASAT) or shock incarceration program; as a condition of release on parole, post-release supervision, presumptive release or conditional release on a definite or indeterminate sentence; or as a condition of probation or interim probation supervision.

5-c. "Subject index" means the electronic database containing DNA profiles generated from a subject convicted of a crime whose DNA specimen was collected: after a criminal trial; pursuant to a plea agreement; as a condition of participation in a temporary release, comprehensive alcohol and substance abuse treatment (CASAT) or shock incarceration program; as a condition of release on parole, post-release supervision, presumptive release or conditional release on a definite or indeterminate sentence; or as a condition of probation or interim probation supervision.

6. "State DNA identification index" means the DNA identification record system for New York state established pursuant to this article.

6-a. "CODIS" means the federal combined DNA index system.

6-b. "NDIS" means the national DNA index system.

6-c. "Forensic DNA index" means the electronic database in CODIS that contains DNA profiles generated from casework evidence by forensic DNA laboratories.

6-d. "Unidentified human remains index" means the electronic database in CODIS that contains DNA profiles generated from human remains of unknown origin.

7. "Designated offender" means a person convicted of any felony defined in any chapter of the laws of the state or any misdemeanor defined in the penal law except that where the person is convicted under section 221.10 of the penal law, only a person convicted under subdivision two of such section, or a person convicted under subdivision one of such section who stands previously convicted of any crime as defined in subdivision six of section 10.00 of the penal law.

8. "DNA record" means DNA identification information prepared by a forensic DNA laboratory and stored in the state DNA identification index for purposes of establishing identification in connection with law enforcement investigations or supporting statistical interpretation of the results of DNA analysis. A DNA record is the objective form of the results of a DNA analysis sample.

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

10. "Commission" shall mean the commission on forensic science established pursuant to section nine hundred ninety-five-a of this article.

11. "Division" shall mean the New York state division of criminal justice services.

12. "Allele" shall mean one of the alternate forms of the DNA at a particular genetic locus.

13. "Loci" shall mean the specific chromosomal locations of genes or other DNA elements such as short tandem repeats.

14. "STR" shall mean short tandem repeat.

15. "STR analysis" shall mean a form of testing which provides DNA profiles for loci which contain simple DNA unit repeats. STR loci on the Y-chromosome are referred to as "Y-STRs".

16. "Mitochondrial DNA testing" or "mtDNA testing" refers to analysis of genetic polymorphisms that occur in the DNA of mitochondria.

17. "Casework evidence DNA profile" shall mean a DNA profile that is derived from biological evidence originating from and associated with the commission of a crime.

18. "Convicted offender DNA profile" shall mean that DNA profile generated by testing of a biological sample collected from a designated offender as defined in subdivision seven of this section.

19. "Convicted offender index" shall mean that electronic database containing DNA profiles generated from designated offenders as defined by subdivision seven of this section and stored in CODIS.

20. "Forensic DNA profile" refers to a DNA profile that is derived from biological evidence originating from and associated with the commission of a crime.

21. "Indirect association" shall mean the determination during the CODIS candidate match confirmation process that a forensic index DNA profile is similar to a DNA profile in the convicted offender index or subject index and a comparison reveals that the offender or subject is not the source of the DNA profile but may be a relative of the source of the forensic index profile. An indirect association may also be referred to as a "partial match".

22. "Familial searching" refers to the process of purposefully searching a DNA databank for partial matches or indirect associations between a New York state convicted offender's DNA profile and a DNA profile developed from crime scene evidence.

23. "LDIS" refers to the level of the CODIS program in which a public DNA laboratory maintains its DNA records for searching and uploading to higher level indices such as SDIS and NDIS.

§ 2. Section 995-b of the executive law is amended by adding a new subdivision 12-a to read as follows:

12-a. In cases limited to violent felony offenses, homicides and burglary in the third degree, as defined by articles one hundred twenty-five and one hundred forty of the penal law, respectively, the commission shall promulgate standards that permit familial searching and the release of partial matches to investigating law enforcement officials and the appropriate prosecutor or prosecutors.

(a) Such standards shall permit the use of familial searching. Such standards shall also require the release of the results of such search to the investigating law enforcement officials and the appropriate prosecutor or prosecutors if, upon application of a police officer, a district attorney or other public servant acting in the course of his

official duties, a local court determines that all of the following conditions are satisfied:

(i) there is reasonable cause to believe that a familial search using the crime scene DNA profile may result in a partial DNA match;

(ii) the crime scene DNA profile derives from a single source and contains at least ten of the CODIS core loci;

(iii) the crime is unsolved and all practicable investigative leads have been exhausted;

(iv) the DNA laboratory has run an exact match on the crime scene DNA profile with negative results;

(v) the investigating law enforcement agency or the prosecutor makes a written request that the DNA laboratory conduct a familial search on the crime scene DNA profile; and

(vi) the investigating law enforcement agency and the prosecutor commit to further investigation of the case if the name of the potentially related offender is released and the name of the potentially related offender will be treated as a confidential, non-public investigative lead.

(b) Once a laboratory has received a partial match as a result of a familial search or a standard search of the DNA index, the laboratory submitting the crime scene DNA profile to the CODIS program shall complete an application to the division requesting the names of the involved offenders and, as part of the application, confirm that:

(i) an LDIS search has been performed using the crime scene profile in the forensic unknown index;

(ii) the crime scene DNA profile derives from a single source and contains at least ten of the CODIS core loci;

(iii) the submitting agency and the appropriate prosecutor have committed to pursue further investigation of the case if the name is released; and

(iv) the submitting laboratory has confirmed that release of the name will be followed by a report to the investigating law enforcement agency. The report will indicate that the match is indirect and will also indicate that the available data suggests that the source of the evidentiary DNA pattern is potentially a relative of the convicted offender.

(c) In the event that a laboratory finds a partial match as a result of a standard search of a DNA index, but does not receive an exact match, the laboratory shall first contact the submitting agency and the appropriate prosecutor to confirm that they are committed to pursue further investigation of the case if the name is released. After receiving written confirmation from the submitting agency and the appropriate prosecutor, the laboratory shall follow the steps outlined in paragraph (b) of this subdivision.

(d) The report generated from the submitting laboratory to the investigating law enforcement agency shall indicate that:

(i) the match is a result of familial searching or is a partial match resulting from a standard search of a DNA index;

(ii) the information provided is a confidential, non-public investigative lead; and

(iii) the available data suggests that the source of the evidentiary DNA pattern is potentially a relative of the convicted offender but is not conclusive evidence of the same.

(e) The division will provide the match information to the state DNA databank which, in turn, will calculate and report whether the appropriate statistical threshold approved by the DNA subcommittee has been met.

(f) Upon receiving a completed application from the local participating CODIS laboratory and confirmation from the databank that the appropriate statistical threshold has been met, the division shall release the name of the offender to the submitted laboratory who shall, in turn, release the information to the investigating law enforcement agency after a local criminal court has determined that all of the requirements in paragraph (a) of this subdivision have been satisfied. If the appropriate statistical threshold value is not supported by the available data, then testing of additional loci of the offender sample may be required and may include Y-STR and/or mtDNA analysis. If the subsequent testing does not meet the appropriate threshold, the databank will notify the division and the offender's name will not be released.

(g) This policy will be subject to review by the DNA subcommittee every two years.

(h) The same standards and procedures defined in this section apply to requests for partial match and familial searching information from criminal justice agencies from outside of the state.

§ 3. 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. (a) Any person who [~~(a)~~] (i) 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)~~] (ii) 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)~~] (iii) any person who knowingly tampers or attempts to tamper with any DNA sample or the collection container without lawful authority shall be guilty of a class E felony.

(b) Any person who (i) intentionally discloses a DNA record, or the results of a forensic DNA test or analysis, found as a result of familial searching or a partial match, to an individual or agency other than one authorized to have access to such records pursuant to this article or (ii) intentionally uses or receives DNA records, or the results of a forensic DNA test or analysis, found as a result of familial searching or a partial match, for purposes other than those authorized pursuant to this article shall be guilty of a class E felony, and upon conviction thereof, shall be subject to a fine of not more than ten thousand dollars and any such other penalties as provided.

§ 4. This act shall take effect immediately.