

**STATUS:**

**S 6733 SALAND** Same as Uni. [A 9555](#) Lentol (MS)

**Governor Program # 29**

ON FILE: 03/14/12 Criminal Procedure Law

TITLE....Relates to DNA testing of certain offenders convicted of a crime

03/14/12 REFERRED TO RULES  
 03/14/12 ORDERED TO THIRD READING CAL.366  
 03/14/12 MESSAGE OF NECESSITY - 3 DAY MESSAGE  
 03/14/12 PASSED SENATE  
 03/14/12 DELIVERED TO ASSEMBLY  
 03/15/12 referred to codes  
 03/15/12 substituted for a9555  
 03/15/12 ordered to third reading rules cal.18  
 03/15/12 message of necessity - 3 day message  
 03/15/12 passed assembly  
 03/15/12 returned to senate  
 03/15/12 DELIVERED TO GOVERNOR

**A9555 Lentol (MS)** Same as Uni. [S 6733](#) SALAND  
**Governor Program # 29**

Criminal Procedure Law

TITLE....Relates to DNA testing of certain offenders convicted of a crime

03/14/12 referred to codes  
 03/15/12 reported referred to rules  
 03/15/12 reported  
 03/15/12 rules report cal.18  
 03/15/12 substituted by s6733  
**S06733 SALAND**  
 03/14/12 REFERRED TO RULES  
 03/14/12 ORDERED TO THIRD READING CAL.366  
 03/14/12 MESSAGE OF NECESSITY - 3 DAY MESSAGE  
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 03/15/12 message of necessity - 3 day message  
 03/15/12 passed assembly  
 03/15/12 returned to senate  
 03/15/12 DELIVERED TO GOVERNOR

**VOTING:**

<a href="#">03/15/12</a>	S6733	Assembly Vote	Yes: 135	No : 4
<a href="#">03/14/12</a>	S6733	Senate Vote	Aye: 36	Nay: 0

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**Floor Votes:**

03/15/12 S6733 Assembly Vote Yes: 135 No : 4

<b>Yes</b> Abbate	<b>Yes</b> Abinanti	<b>Yes</b> Amedore	<b>Yes</b> Arroyo
<b>Yes</b> Aubry	<b>Yes</b> Barclay	<b>No</b> Barron	<b>Yes</b> Benedetto
<b>Yes</b> Blankenbush	<b>Yes</b> Boyland	<b>Yes</b> Boyle	<b>Yes</b> Braunstein
<b>Yes</b> Brennan	<b>Yes</b> Brindisi	<b>Yes</b> Bronson	<b>Yes</b> Brook-Krasny
<b>ER</b> Burling	<b>Yes</b> Butler	<b>Yes</b> Cahill	<b>Yes</b> Calhoun
<b>Yes</b> Camara	<b>Yes</b> Canestrari	<b>Yes</b> Castelli	<b>Yes</b> Castro
<b>Yes</b> Ceretto	<b>Yes</b> Clark	<b>Yes</b> Colton	<b>Yes</b> Conte
<b>Yes</b> Cook	<b>Yes</b> Corwin	<b>No</b> Crespo	<b>Yes</b> Crouch
<b>Yes</b> Curran	<b>Yes</b> Cusick	<b>Yes</b> Cymbrowitz	<b>ER</b> DenDekker
<b>Yes</b> Dinowitz	<b>Yes</b> Duprey	<b>Yes</b> Englebright	<b>Yes</b> Espinal

<b>Yes</b>	Farrell	<b>Yes</b>	Finch	<b>Yes</b>	Fitzpatrick	<b>Yes</b>	Friend
<b>Yes</b>	Gabryszak	<b>Yes</b>	Galef	<b>ER</b>	Gantt	<b>No</b>	Gibson
<b>Yes</b>	Giglio	<b>Yes</b>	Glick	<b>Yes</b>	Goldfeder	<b>Yes</b>	Goodell
<b>Yes</b>	Gottfried	<b>Yes</b>	Graf	<b>Yes</b>	Gunther A	<b>Yes</b>	Hanna
<b>Yes</b>	Hawley	<b>ER</b>	Heastie	<b>Yes</b>	Hevesi	<b>Yes</b>	Hikind
<b>Yes</b>	Hooper	<b>Yes</b>	Jacobs	<b>Yes</b>	Jaffee	<b>Yes</b>	Jeffries
<b>Yes</b>	Johns	<b>Yes</b>	Jordan	<b>Yes</b>	Katz	<b>Yes</b>	Kavanagh
<b>Yes</b>	Kellner	<b>Yes</b>	Kolb	<b>Yes</b>	Lancman	<b>Yes</b>	Latimer
<b>Yes</b>	Lavine	<b>Yes</b>	Lentol	<b>Yes</b>	Lifton	<b>Yes</b>	Linares
<b>Yes</b>	Lopez P	<b>Yes</b>	Lopez V	<b>Yes</b>	Losquadro	<b>Yes</b>	Lupardo
<b>Yes</b>	Magee	<b>Yes</b>	Magnarelli	<b>Yes</b>	Maisel	<b>Yes</b>	Malliotakis
<b>Yes</b>	Markey	<b>Yes</b>	McDonough	<b>Yes</b>	McEneny	<b>Yes</b>	McKevitt
<b>Yes</b>	McLaughlin	<b>Yes</b>	Meng	<b>Yes</b>	Miller D	<b>Yes</b>	Miller J
<b>Yes</b>	Miller M	<b>Yes</b>	Millman	<b>Yes</b>	Montesano	<b>Yes</b>	Morelle
<b>Yes</b>	Moya	<b>Yes</b>	Murray	<b>Yes</b>	Nolan	<b>Yes</b>	Oaks
<b>Yes</b>	O'Donnell	<b>Yes</b>	Ortiz	<b>Yes</b>	Palmesano	<b>Yes</b>	Paulin
<b>No</b>	Peoples-Stokes	<b>Yes</b>	Perry	<b>Yes</b>	Pretlow	<b>Yes</b>	Quart
<b>Yes</b>	Ra	<b>Yes</b>	Rabbitt	<b>Yes</b>	Raia	<b>Yes</b>	Ramos
<b>Yes</b>	Reilich	<b>Yes</b>	Reilly	<b>Yes</b>	Rivera J	<b>Yes</b>	Rivera N
<b>Yes</b>	Rivera P	<b>Yes</b>	Roberts	<b>ER</b>	Robinson	<b>Yes</b>	Rodriguez
<b>Yes</b>	Rosenthal	<b>Yes</b>	Russell	<b>Yes</b>	Ryan	<b>Yes</b>	Saladino
<b>Yes</b>	Sayward	<b>ER</b>	Scarborough	<b>Yes</b>	Schimel	<b>Yes</b>	Schimminger
<b>Yes</b>	Simanowitz	<b>Yes</b>	Simotas	<b>Yes</b>	Smardz	<b>Yes</b>	Stevenson
<b>Yes</b>	Sweeney	<b>Yes</b>	Tedisco	<b>Yes</b>	Tenney	<b>Yes</b>	Thiele
<b>Yes</b>	Titone	<b>Yes</b>	Titus	<b>Yes</b>	Tobacco	<b>Yes</b>	Walter
<b>Yes</b>	Weinstein	<b>Yes</b>	Weisenberg	<b>Yes</b>	Weprin	<b>ER</b>	Wright
<b>Yes</b>	Zebrowski K	<b>Yes</b>	Mr. Speaker				

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### Floor Votes:

03/14/12 S6733 Senate Vote Aye: 36 Nay: 0

<b>Abs</b>	Adams	<b>Abs</b>	Addabbo	<b>Aye</b>	Alesi	<b>Abs</b>	Avella
<b>Aye</b>	Ball	<b>Aye</b>	Bonacic	<b>Abs</b>	Breslin	<b>Aye</b>	Carlucci
<b>Aye</b>	DeFrancisco	<b>Abs</b>	Diaz	<b>Abs</b>	Dilan	<b>Abs</b>	Duane
<b>Abs</b>	Espailat	<b>Aye</b>	Farley	<b>Aye</b>	Flanagan	<b>Aye</b>	Fuschillo
<b>Aye</b>	Gallivan	<b>Abs</b>	Gianaris	<b>Aye</b>	Golden	<b>Aye</b>	Griffo
<b>Aye</b>	Grisanti	<b>Aye</b>	Hannon	<b>Abs</b>	Hassell-Thompson	<b>Abs</b>	Huntley
<b>Aye</b>	Johnson	<b>Abs</b>	Kennedy	<b>Aye</b>	Klein	<b>Abs</b>	Krueger
<b>Aye</b>	Lanza	<b>Aye</b>	Larkin	<b>Aye</b>	LaValle	<b>Aye</b>	Libous
<b>Aye</b>	Little	<b>Aye</b>	Marcellino	<b>Aye</b>	Martins	<b>Aye</b>	Maziarz
<b>Aye</b>	McDonald	<b>Abs</b>	Montgomery	<b>Aye</b>	Nozzolio	<b>Aye</b>	O'Mara
<b>Exc</b>	Oppenheimer	<b>Abs</b>	Parker	<b>Abs</b>	Peralta	<b>Abs</b>	Perkins

<b>Aye</b> Ranzenhofer	<b>Aye</b> Ritchie	<b>Abs</b> Rivera	<b>Aye</b> Robach
<b>Aye</b> Saland	<b>Abs</b> Sampson	<b>Aye</b> Savino	<b>Abs</b> Serrano
<b>Aye</b> Seward	<b>Aye</b> Skelos	<b>Abs</b> Smith	<b>Abs</b> Squadron
<b>Abs</b> Stavisky	<b>Abs</b> Stewart-Cousins	<b>Aye</b> Valesky	<b>Aye</b> Young
<b>Aye</b> Zeldin			

**SUMMARY:**

SALAND, GOLDEN, SKELOS

Amd SS440.30, 240.40 &amp; 440.10, CP L; amd SS995 &amp; 995-c, Exec L

Relates to DNA testing of certain offenders convicted of a crime.

Governor's Program

**BILL TEXT:****STATE OF NEW YORK**

S. 6733

A. 9555

**SENATE - ASSEMBLY**

March 14, 2012

IN SENATE -- Introduced by Sens. SALAND, GOLDEN, SKELOS -- (at request of the Governor) -- read twice and ordered printed, and when printed to be committed to the Committee on Rules

IN ASSEMBLY -- Introduced by M. of A. LENTOL, SILVER, WEINSTEIN, FARRELL, LAVINE, O'DONNELL, CLARK, PAULIN -- Multi-Sponsored by -- M. of A. BRINDISI, BRONSON, CUSICK, GABRYSZAK, GOLDFEDER, HEVESI, LUPARDO, MORELLE, QUART, RAMOS, WEISENBERG, ZEBROWSKI -- (at request of the Governor) -- read once and referred to the Committee on Codes

AN ACT to amend the criminal procedure law and the executive law, in relation to DNA testing of certain offenders convicted of a crime

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

1 Section 1. Subdivision 1 of section 440.30 of the criminal procedure  
2 law is amended to read as follows:

3 1. (a) A motion to vacate a judgment pursuant to section 440.10 of  
4 this article and a motion to set aside a sentence pursuant to section  
5 440.20 of this article must be made in writing and upon reasonable  
6 notice to the people. Upon the motion, a defendant who is in a position  
7 adequately to raise more than one ground should raise every such ground  
8 upon which he or she intends to challenge the judgment or sentence. If  
9 the motion is based upon the existence or occurrence of facts, the  
10 motion papers must contain sworn allegations thereof, whether by the  
11 defendant or by another person or persons. Such sworn allegations may be  
12 based upon personal knowledge of the affiant or upon information and  
13 belief, provided that in the latter event the affiant must state the  
14 sources of such information and the grounds of such belief. The defend-  
15 ant may further submit documentary evidence or information supporting or

16 tending to support the allegations of the moving papers. The people may  
17 file with the court, and in such case must serve a copy thereof upon the  
18 defendant or his or her counsel, if any, an answer denying or admitting  
19 any or all of the allegations of the motion papers, and may further  
20 submit documentary evidence or information refuting or tending to refute  
21 such allegations. After all papers of both parties have been filed, and

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

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1 after all documentary evidence or information, if any, has been submit-  
2 ted, the court must consider the same for the purpose of ascertaining  
3 whether the motion is determinable without a hearing to resolve ques-  
4 tions of fact.

5 (b) In conjunction with the filing or consideration of a motion to  
6 vacate a judgment pursuant to section 440.10 of this article by a  
7 defendant convicted after a trial, in cases where the court has ordered  
8 an evidentiary hearing upon such motion, the court may order that the  
9 people produce or make available for inspection property, as defined in  
10 subdivision three of section 240.10 of this part, in its possession,  
11 custody, or control that was secured in connection with the investi-  
12 gation or prosecution of the defendant upon credible allegations by the  
13 defendant and a finding by the court that such property, if obtained,  
14 would be probative to the determination of defendant's actual innocence,  
15 and that the request is reasonable. The court shall deny or limit such a  
16 request upon a finding that such a request, if granted, would threaten  
17 the integrity or chain of custody of property or the integrity of the  
18 processes or functions of a laboratory conducting DNA testing, pose a  
19 risk of harm, intimidation, embarrassment, reprisal, or other substan-  
20 tially negative consequences to any person, undermine the proper func-  
21 tions of law enforcement including the confidentiality of informants, or  
22 on the basis of any other factor identified by the court in the inter-  
23 ests of justice or public safety. The court shall further ensure that  
24 any property produced pursuant to this paragraph is subject to a protec-  
25 tive order, where appropriate. The court shall deny any request made  
26 pursuant to this paragraph where:

27 (i) (1) the defendant's motion pursuant to section 440.10 of this  
28 article does not seek to demonstrate his or her actual innocence of the  
29 offense or offenses of which he or she was convicted that are the  
30 subject of the motion, or (2) the defendant has not presented credible  
31 allegations and the court has not found that such property, if obtained,  
32 would be probative to the determination of the defendant's actual inno-  
33 cence and that the request is reasonable;

34 (ii) the defendant has made his or her motion after five years from  
35 the date of the judgment of conviction; provided, however, that this  
36 limitation period shall be tolled for five years if the defendant is in  
37 custody in connection with the conviction that is the subject of his or  
38 her motion, and provided further that, notwithstanding such limitation  
39 periods, the court may consider the motion if the defendant has shown:

40 (A) that he or she has been pursuing his or her rights diligently and  
41 that some extraordinary circumstance prevented the timely filing of the  
42 motion; (B) that the facts upon which the motion is predicated were  
43 unknown to the defendant or his or her attorney and could not have been  
44 ascertained by the exercise of due diligence prior to the expiration of  
45 the statute of limitations; or (C) considering all circumstances of the  
46 case including but not limited to evidence of the defendant's guilt, the  
47 impact of granting or denying such motion upon public confidence in the  
48 criminal justice system, or upon the safety or welfare of the community,  
49 and the defendant's diligence in seeking to obtain the requested proper-  
50 ty or related relief, the interests of justice would be served by  
51 considering the motion;

52 (iii) the defendant is challenging a judgment convicting him or her of  
53 an offense that is not a felony defined in section 10.00 of the penal  
54 law; or

1 (iv) upon a finding by the court that the property requested in this  
2 motion would be available through other means through reasonable efforts  
3 by the defendant to obtain such property.

4 § 2. Subdivision 1-a of section 440.30 of the criminal procedure law,  
5 as amended by chapter 138 of the laws of 2004, is amended to read as  
6 follows:

7 1-a. (a) (1) Where the defendant's motion requests the performance of  
8 a forensic DNA test on specified evidence, and upon the court's determi-  
9 nation that any evidence containing deoxyribonucleic acid ("DNA") was  
10 secured in connection with the trial resulting in the judgment, the  
11 court shall grant the application for forensic DNA testing of such  
12 evidence upon its determination that if a DNA test had been conducted on  
13 such evidence, and if the results had been admitted in the trial result-  
14 ing in the judgment, there exists a reasonable probability that the  
15 verdict would have been more favorable to the defendant.

16 (2) Where the defendant's motion for forensic DNA testing of specified  
17 evidence is made following a plea of guilty and entry of judgment there-  
18 on convicting him or her of: (A) a homicide offense defined in article  
19 one hundred twenty-five of the penal law, any felony sex offense defined  
20 in article one hundred thirty of the penal law, a violent felony offense  
21 as defined in paragraph (a) of subdivision one of section 70.02 of the  
22 penal law, or (B) any other felony offense to which he or she pled guilty  
23 after being charged in an indictment or information in superior court  
24 with one or more of the offenses listed in clause (A) of this subpara-  
25 graph, then the court shall grant such a motion upon its determination  
26 that evidence containing DNA was secured in connection with the investi-  
27 gation or prosecution of the defendant, and if a DNA test had been  
28 conducted on such evidence and the results had been known to the parties  
29 prior to the entry of the defendant's plea and judgment thereon, there  
30 exists a substantial probability that the evidence would have estab-  
31 lished the defendant's actual innocence of the offense or offenses that  
32 are the subject of the defendant's motion; provided, however, that:

33 (i) the court shall consider whether the defendant had the opportunity  
34 to request such testing prior to entering a guilty plea, and, where it  
35 finds that the defendant had such opportunity and unjustifiably failed  
36 to do so, the court may deny such motion; and

37 (ii) a court shall deny the defendant's motion for forensic DNA test-  
38 ing where the defendant has made his or her motion more than five years  
39 after entry of the judgment of conviction; except that the limitation  
40 period may be tolled if the defendant has shown: (A) that he or she has  
41 been pursuing his or her rights diligently and that some extraordinary  
42 circumstance prevented the timely filing of the motion for forensic DNA  
43 testing; (B) that the facts upon which the motion is predicated were  
44 unknown to the defendant or his or her attorney and could not have been  
45 ascertained by the exercise of due diligence prior to the expiration of  
46 this statute of limitations; or (C) considering all circumstances of the  
47 case including but not limited to evidence of the defendant's guilt, the  
48 impact of granting or denying such motion upon public confidence in the  
49 criminal justice system, or upon the safety or welfare of the community,  
50 and the defendant's diligence in seeking to obtain the requested proper-  
51 ty or related relief, the interests of justice would be served by toll-  
52 ing such limitation period.

53 (b) In conjunction with the filing of a motion under this subdivision,  
54 the court may direct the people to provide the defendant with informa-  
55 tion in the possession of the people concerning the current physical  
56 location of the specified evidence and if the specified evidence no

1 longer exists or the physical location of the specified evidence is  
2 unknown, a representation to that effect and information and documentary  
3 evidence in the possession of the people concerning the last known phys-  
4 ical location of such specified evidence. If there is a finding by the  
5 court that the specified evidence no longer exists or the physical  
6 location of such specified evidence is unknown, such information in and  
7 of itself shall not be a factor from which any inference unfavorable to  
8 the people may be drawn by the court in deciding a motion under this  
9 section. The court, on motion of the defendant, may also issue a subpoe-  
10 na duces tecum directing a public or private hospital, laboratory or  
11 other entity to produce such specified evidence in its possession and/or  
12 information and documentary evidence in its possession concerning the  
13 location and status of such specified evidence.

14 (c) In response to a motion under this paragraph, upon notice to the  
15 parties and to the entity required to perform the search the court may  
16 order an entity that has access to the combined DNA index system  
17 ("CODIS") or its successor system to compare a DNA profile obtained from  
18 probative biological material gathered in connection with the investi-  
19 gation or prosecution of the defendant against DNA databanks by keyboard  
20 searches, or a similar method that does not involve uploading, upon a  
21 court's determination that (1) such profile complies with federal bureau  
22 of investigation or state requirements, whichever are applicable and as  
23 such requirements are applied to law enforcement agencies seeking such a  
24 comparison, and that the data meet state DNA index system and/or  
25 national DNA index system criteria as such criteria are applied to law  
26 enforcement agencies seeking such a comparison and (2) if such compar-  
27 ison had been conducted, and if the results had been admitted in the  
28 trial resulting in the judgment, a reasonable probability exists that  
29 the verdict would have been more favorable to the defendant, or in a  
30 case involving a plea of guilty, if the results had been available to  
31 the defendant prior to the plea, a reasonable probability exists that  
32 the conviction would not have resulted. For purposes of this subdivi-  
33 sion, a "keyboard search" shall mean a search of a DNA profile against  
34 the databank in which the profile that is searched is not uploaded to or  
35 maintained in the databank.

36 § 3. Subdivision 1 of section 240.40 of the criminal procedure law, as  
37 amended by chapter 558 of the laws of 1982, the opening paragraph as  
38 amended by chapter 317 of the laws of 1983, is amended to read as  
39 follows:

40 1. Upon motion of a defendant against whom an indictment, superior  
41 court information, prosecutor's information, information, or simplified  
42 information charging a misdemeanor is pending, the court in which such  
43 accusatory instrument is pending:

44 (a) must order discovery as to any material not disclosed upon a  
45 demand pursuant to section 240.20, if it finds that the prosecutor's  
46 refusal to disclose such material is not justified; (b) must, unless it  
47 is satisfied that the people have shown good cause why such an order  
48 should not be issued, order discovery or any other order authorized by  
49 subdivision one of section 240.70 as to any material not disclosed upon  
50 demand pursuant to section 240.20 where the prosecutor has failed to  
51 serve a timely written refusal pursuant to section 240.35; ~~and~~ (c) may  
52 order discovery with respect to any other property, which the people  
53 intend to introduce at the trial, upon a showing by the defendant that  
54 discovery with respect to such property is material to the preparation  
55 of his or her defense, and that the request is reasonable; and (d) where  
56 property in the people's possession, custody, or control that consists

1 of a deoxyribonucleic acid ("DNA") profile obtained from probative  
2 biological material gathered in connection with the investigation or  
3 prosecution of the defendant and the defendant establishes that such  
4 profile complies with federal bureau of investigation or state require-  
5 ments, whichever are applicable and as such requirements are applied to  
6 law enforcement agencies seeking a keyboard search or similar compar-  
7 ison, and that the data meets state DNA index system or national DNA  
8 index system criteria as such criteria are applied to law enforcement  
9 agencies seeking such a keyboard search or similar comparison, the court  
10 may order an entity that has access to the combined DNA index system or  
11 its successor system to compare such DNA profile against DNA databanks  
12 by keyboard searches, or a similar method that does not involve upload-  
13 ing, upon notice to both parties and the entity required to perform the  
14 search, upon a showing by the defendant that such a comparison is mate-  
15 rial to the presentation of his or her defense and that the request is  
16 reasonable. For purposes of this paragraph, a "keyboard search" shall  
17 mean a search of a DNA profile against the databank in which the profile  
18 that is searched is not uploaded to or maintained in the databank. Upon  
19 granting the motion pursuant to paragraph (c) [hereof] of this subdivi-  
20 sion, the court shall, upon motion of the people showing such to be  
21 material to the preparation of their case and that the request is  
22 reasonable, condition its order of discovery by further directing  
23 discovery by the people of property, of the same kind or character as  
24 that authorized to be inspected by the defendant, which he or she  
25 intends to introduce at the trial.

26 § 4. Subdivision 1 of section 440.10 of the criminal procedure law is  
27 amended by adding a new paragraph (g-1) to read as follows:

28 (g-1) Forensic DNA testing of evidence performed since the entry of a  
29 judgment, (1) in the case of a defendant convicted after a guilty plea,  
30 the court has determined that the defendant has demonstrated a substan-  
31 tial probability that the defendant was actually innocent of the offense  
32 of which he or she was convicted, or (2) in the case of a defendant  
33 convicted after a trial, the court has determined that there exists a  
34 reasonable probability that the verdict would have been more favorable  
35 to the defendant.

36 § 5. Subdivision 7 of section 995 of the executive law, as amended by  
37 chapter 2 of the laws of 2006, paragraph (a) as separately amended by  
38 chapter 320 of the laws of 2006 and paragraph (f) as amended by chapter  
39 405 of the laws of 2010, is amended to read as follows:

40 7. "Designated offender" means a person convicted of [~~and sentenced~~  
41 ~~for any one or more of the following provisions of the penal law (a)~~  
42 ~~sections 120.05, 120.10, and 120.11, relating to assault; sections~~  
43 ~~125.15 through 125.27 relating to homicide; sections 130.25, 130.30,~~  
44 ~~130.35, 130.40, 130.45, 130.50, 130.65, 130.67 and 130.70, relating to~~  
45 ~~sex offenses; sections 205.10, 205.15, 205.17 and 205.19, relating to~~  
46 ~~escape and other offenses, where the offender has been convicted within~~  
47 ~~the previous five years of one of the other felonies specified in this~~  
48 ~~subdivision; or sections 255.25, 255.26 and 255.27, relating to incest,~~  
49 ~~a violent felony offense as defined in subdivision one of section 70.02~~  
50 ~~of the penal law, attempted murder in the first degree, as defined in~~  
51 ~~section 110.00 and section 125.27 of the penal law, kidnapping in the~~  
52 ~~first degree, as defined in section 135.25 of the penal law, arson in~~  
53 ~~the first degree, as defined in section 150.20 of the penal law,~~  
54 ~~burglary in the third degree, as defined in section 140.20 of the penal~~  
55 ~~law, attempted burglary in the third degree, as defined in section~~  
56 ~~110.00 and section 140.20 of the penal law, a felony defined in article~~



1 ~~four hundred ninety of the penal law relating to terrorism or any~~  
2 ~~attempt to commit an offense defined in such article relating to terror-~~  
3 ~~ism which is a felony; or (b) criminal possession of a controlled~~  
4 ~~substance in the first degree, as defined in section 220.21 of the penal~~  
5 ~~law; criminal possession of a controlled substance in the second degree,~~  
6 ~~as defined in section 220.18 of the penal law; criminal sale of a~~  
7 ~~controlled substance, as defined in article 220 of the penal law; or~~  
8 ~~grand larceny in the fourth degree, as defined in subdivision five of~~  
9 ~~section 155.30 of the penal law; or (c) any misdemeanor or felony~~  
10 ~~defined as a sex offense or sexually violent offense pursuant to para-~~  
11 ~~graph (a), (b) or (c) of subdivision two or paragraph (a) of subdivision~~  
12 ~~three of section one hundred sixty-eight-a of the correction law; or (d)~~  
13 ~~any of the following felonies, or an attempt thereof where such attempt~~  
14 ~~is a felony offense:~~

15 ~~aggravated assault upon a person less than eleven years old, as~~  
16 ~~defined in section 120.12 of the penal law; menacing in the first~~  
17 ~~degree, as defined in section 120.13 of the penal law; reckless endan-~~  
18 ~~germent in the first degree, as defined in section 120.25 of the penal~~  
19 ~~law; stalking in the second degree, as defined in section 120.55 of the~~  
20 ~~penal law; criminally negligent homicide, as defined in section 125.10~~  
21 ~~of the penal law; vehicular manslaughter in the second degree, as~~  
22 ~~defined in section 125.12 of the penal law; vehicular manslaughter in~~  
23 ~~the first degree, as defined in section 125.13 of the penal law;~~  
24 ~~persistent sexual abuse, as defined in section 130.53 of the penal law;~~  
25 ~~aggravated sexual abuse in the fourth degree, as defined in section~~  
26 ~~130.65-a of the penal law; female genital mutilation, as defined in~~  
27 ~~section 130.85 of the penal law; facilitating a sex offense with a~~  
28 ~~controlled substance, as defined in section 130.90 of the penal law;~~  
29 ~~unlawful imprisonment in the first degree, as defined in section 135.10~~  
30 ~~of the penal law; custodial interference in the first degree, as defined~~  
31 ~~in section 135.50 of the penal law; criminal trespass in the first~~  
32 ~~degree, as defined in section 140.17 of the penal law; criminal tamper-~~  
33 ~~ing in the first degree, as defined in section 145.20 of the penal law;~~  
34 ~~tampering with a consumer product in the first degree, as defined in~~  
35 ~~section 145.45 of the penal law; robbery in the third degree as defined~~  
36 ~~in section 160.05 of the penal law; identity theft in the second degree,~~  
37 ~~as defined in section 190.79 of the penal law; identity theft in the~~  
38 ~~first degree, as defined in section 190.80 of the penal law; promoting~~  
39 ~~prison contraband in the first degree, as defined in section 205.25 of~~  
40 ~~the penal law; tampering with a witness in the third degree, as defined~~  
41 ~~in section 215.11 of the penal law; tampering with a witness in the~~  
42 ~~second degree, as defined in section 215.12 of the penal law; tampering~~  
43 ~~with a witness in the first degree, as defined in section 215.13 of the~~  
44 ~~penal law; criminal contempt in the first degree, as defined in subdivi-~~  
45 ~~sions (b), (c) and (d) of section 215.51 of the penal law; aggravated~~  
46 ~~criminal contempt, as defined in section 215.52 of the penal law; bail~~  
47 ~~jumping in the second degree, as defined in section 215.56 of the penal~~  
48 ~~law; bail jumping in the first degree, as defined in section 215.57 of~~  
49 ~~the penal law; patronizing a prostitute in the second degree, as defined~~  
50 ~~in section 230.05 of the penal law; patronizing a prostitute in the~~  
51 ~~first degree, as defined in section 230.06 of the penal law; promoting~~  
52 ~~prostitution in the second degree, as defined in section 230.30 of the~~  
53 ~~penal law; promoting prostitution in the first degree, as defined in~~  
54 ~~section 230.32 of the penal law; compelling prostitution, as defined in~~  
55 ~~section 230.33 of the penal law; disseminating indecent materials to~~  
56 ~~minors in the second degree, as defined in section 235.21 of the penal~~

1 ~~law; disseminating indecent materials to minors in the first degree, as~~  
2 ~~defined in section 235.22 of the penal law; riot in the first degree, as~~  
3 ~~defined in section 240.06 of the penal law; criminal anarchy, as defined~~  
4 ~~in section 240.15 of the penal law; aggravated harassment of an employee~~  
5 ~~by an inmate, as defined in section 240.32 of the penal law; unlawful~~  
6 ~~surveillance in the second degree, as defined in section 250.45 of the~~  
7 ~~penal law; unlawful surveillance in the first degree, as defined in~~  
8 ~~section 250.50 of the penal law; endangering the welfare of a vulnerable~~  
9 ~~elderly person in the second degree, as defined in section 260.32 of the~~  
10 ~~penal law; endangering the welfare of a vulnerable elderly person in the~~  
11 ~~first degree, as defined in section 260.34 of the penal law; use of a~~  
12 ~~child in a sexual performance, as defined in section 263.05 of the penal~~  
13 ~~law; promoting an obscene sexual performance by a child, as defined in~~  
14 ~~section 263.10 of the penal law; possessing an obscene sexual perform-~~  
15 ~~ance by a child, as defined in section 263.11 of the penal law; promot-~~  
16 ~~ing a sexual performance by a child, as defined in section 263.15 of the~~  
17 ~~penal law; possessing a sexual performance by a child, as defined in~~  
18 ~~section 263.16 of the penal law; criminal possession of a weapon in the~~  
19 ~~third degree, as defined in section 265.02 of the penal law; criminal~~  
20 ~~sale of a firearm in the third degree, as defined in section 265.11 of~~  
21 ~~the penal law; criminal sale of a firearm to a minor, as defined in~~  
22 ~~section 265.16 of the penal law; unlawful wearing of a body vest, as~~  
23 ~~defined in section 270.20 of the penal law; hate crimes as defined in~~  
24 ~~section 485.05 of the penal law; and crime of terrorism, as defined in~~  
25 ~~section 490.25 of the penal law; or (e) a felony defined in the penal~~  
26 ~~law or an attempt thereof where such attempt is a felony; or (f) any of~~  
27 ~~the following misdemeanors: assault in the third degree as defined in~~  
28 ~~section 120.00 of the penal law; attempted aggravated assault upon a~~  
29 ~~person less than eleven years old, as defined in section 110.00 and~~  
30 ~~section 120.12 of the penal law; attempted menacing in the first degree,~~  
31 ~~as defined in section 110.00 and section 120.13 of the penal law; menac-~~  
32 ~~ing in the second degree as defined in section 120.14 of the penal law;~~  
33 ~~menacing in the third degree as defined in section 120.15 of the penal~~  
34 ~~law; reckless endangerment in the second degree as defined in section~~  
35 ~~120.20 of the penal law; stalking in the fourth degree as defined in~~  
36 ~~section 120.45 of the penal law; stalking in the third degree as defined~~  
37 ~~in section 120.50 of the penal law; attempted stalking in the second~~  
38 ~~degree, as defined in section 110.00 and section 120.55 of the penal~~  
39 ~~law; criminal obstruction of breathing or blood circulation as defined~~  
40 ~~in section 121.11 of the penal law; forcible touching as defined in~~  
41 ~~section 130.52 of the penal law regardless of the age of the victim;~~  
42 ~~sexual abuse in the third degree as defined in section 130.55 of the~~  
43 ~~penal law regardless of the age of the victim; unlawful imprisonment in~~  
44 ~~the second degree as defined in section 135.05 of the penal law regard-~~  
45 ~~less of the age of the victim; attempted unlawful imprisonment in the~~  
46 ~~first degree, as defined in section 110.00 and section 135.10 of the~~  
47 ~~penal law regardless of the age of the victim; criminal trespass in the~~  
48 ~~second degree as defined in section 140.15 of the penal law; possession~~  
49 ~~of burglar's tools as defined in section 140.35 of the penal law; petit~~  
50 ~~larceny as defined in section 155.25 of the penal law; endangering the~~  
51 ~~welfare of a child as defined in section 260.10 of the penal law; endan-~~  
52 ~~gering the welfare of an incompetent or physically disabled person as~~  
53 ~~defined in section 260.25 of the penal law] any felony defined in any~~  
54 ~~chapter of the laws of the state or any misdemeanor defined in the penal~~  
55 ~~law except that where the person is convicted under section 221.10 of~~  
56 ~~the penal law, only a person convicted under subdivision two of such~~

1 section, or a person convicted under subdivision one of such section who  
2 stands previously convicted of any crime as defined in subdivision six  
3 of section 10.00 of the penal law.

4 § 6. Subdivision 3 of section 995-c of the executive law, as amended  
5 by chapter 576 of the laws of 2004, is amended to read as follows:

6 3. (a) Any designated offender subsequent to conviction and sentencing  
7 for a crime specified in subdivision seven of section nine hundred nine-  
8 ty-five of this article, shall be required to provide a sample appropri-  
9 ate for DNA testing to determine identification characteristics specific  
10 to such person and to be included in a state DNA identification index  
11 pursuant to this article.

12 (b) (i) In the case of a designated offender who is sentenced to a  
13 term of imprisonment, such sample shall be collected by the public serv-  
14 ant to whose custody the designated offender has been committed.

15 (ii) In the case of a designated offender who is sentenced to a term  
16 of probation, including a sentence of probation imposed in conjunction  
17 with a sentence of imprisonment when a sample has not already been  
18 taken, such sample shall be collected by the probation department super-  
19 vising the designated offender.

20 (iii) In the case of a designated offender whose sentence does not  
21 include either a term of imprisonment or a term of probation, outside of  
22 the city of New York, the court shall order that the designated offender  
23 report to an office of the sheriff of that county, and when the desig-  
24 nated offender does so, such sample shall be collected by the sheriff's  
25 office or a court officer. Within the city of New York, the court shall  
26 order that the sample be collected by a court officer.

27 (iv) Nothing in this paragraph shall prohibit the collection of a DNA  
28 sample from a designated offender by any court official, state or local  
29 correction official or employee, probation officer, parole officer,  
30 police officer, peace officer, other law enforcement official, or desig-  
31 nated personnel of the division of criminal justice services who has  
32 been notified by the division of criminal justice services that such  
33 designated offender has not provided a DNA sample. Upon notification by  
34 the division of criminal justice services that a designated offender has  
35 not provided a DNA sample, such court official, state or local  
36 correction official or employee, probation officer, parole officer,  
37 police officer, peace officer or other law enforcement official, or  
38 designated personnel of the division of criminal justice services shall  
39 collect the DNA sample.

40 § 7. Nothing in this act shall be construed to create or impose an  
41 affirmative obligation upon laboratories, police departments, district  
42 attorneys, or any other law enforcement agencies or personnel to retain  
43 or preserve property that may contain DNA if such obligation did not  
44 exist prior to the effective date of this act, provided, however, that  
45 nothing in this act shall be construed to affect or remove any such  
46 obligation if it did exist prior to the effective date of this act.

47 § 8. The actual costs incurred in connection with DNA testing or  
48 keyboard searches performed pursuant to subdivision 1-a of section  
49 440.30 of the criminal procedure law shall be borne by the defendant  
50 requesting such testing or searches, provided, however that the court,  
51 taking into account the defendant's financial resources, as well as any  
52 of the defendant's financial obligations, shall make a determination  
53 whether or not the payment of such cost would impose a hardship upon the  
54 defendant, and in such case, the state shall bear such costs.

55 § 9. This act shall take effect October 1, 2012; provided, however,  
56 that the amendments to subdivision 7 of section 995 of the executive law

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1 made by section five of this act shall apply to conviction of designated  
2 offenses, and subparagraph two of paragraph (a) of subdivision 1-a of  
3 section 440.30 of the criminal procedure law as added by section two of  
4 this act shall apply to a guilty plea entered, on or after such effec-  
5 tive date.

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**SPONSORS MEMO:**

**NEW YORK STATE SENATE  
INTRODUCER'S MEMORANDUM IN SUPPORT  
submitted in accordance with Senate Rule VI. Sec 1**

**BILL NUMBER:** S6733

**SPONSOR:** SALAND

**TITLE OF BILL:**

An act to amend the criminal procedure law and the executive law, in relation to DNA testing of certain offenders convicted of a crime

**PURPOSE:**

This legislation would amend the Criminal Procedure Law ("CPL") and Executive Law ("EL") to expand the collection of DNA samples from defendants convicted of crimes in New York State to include, for the first time in this state and across the country, all felonies and all penal law misdemeanors. The bill would also enhance the protections afforded defendants to demonstrate their actual innocence by providing access in certain circumstances to DNA testing in post-plea contexts. In addition, the bill would provide a mechanism for defendants convicted after a trial who have obtained a hearing on a post-conviction motion seeking to demonstrate actual innocence for certain discovery from the people to facilitate such a hearing.

**SUMMARY OF PROVISIONS:**

Section 1 of the bill would amend subdivision 1 of CPL § 440.30 to provide for discovery of property in the possession, custody and control of the prosecution in certain circumstances where a defendant filing a post-conviction motion after trial has asserted his or her actual innocence and has obtained an evidentiary hearing. There is a statute of limitations for bringing such a motion depending on whether a defendant is incarcerated or not. This provision would ensure maximum protection of victims and the integrity of the criminal justice process, as well.

Section 2 of the bill would amend subdivision 1-a of CPL § 440.30 to provide for DNA testing under certain circumstances to defendants convicted after entering a guilty plea in conjunction with a post-conviction motion to vacate the judgment, and to provide for DNA "keyboard searches" to be performed upon a court's order.

Section 3 of the bill would amend subdivision 1 of CPL § 240.40 to provide for DNA "keyboard searches" to be performed under certain circumstances upon a court's order before trial.

Section 4 of the bill would amend subdivision 1 of CPL § 440.10 to set the standard for post-conviction motions seeking to vacate a judgment

based upon the results of DNA testing by providing that the defendant must demonstrate a substantial probability that he or she is actually innocent of the offense of which he or she was convicted or that there is a reasonable probability that the verdict would have been more favorable to the defendant.

Section 5 of the bill would amend subdivision 7 of EL § 995 to mandate that DNA samples be collected from all offenders convicted of any felony defined in any chapter of the laws of the state or any misdemeanor defined in the penal law. Where an individual is convicted of the class B misdemeanor of possessing marihuana or smoking marihuana in plain view but has never been convicted of any crime before, DNA is not collected from that defendant; if the defendant has been convicted of any crime, then DNA is collected from him or her.

Section 6 of the bill would amend subdivision 3 of EL §995-c to provide for the administration of the collection of DNA samples from convicted offenders.

Section 7 clarifies that nothing in the act should be construed to create, impose, affect, or remove any existing obligation on laboratories, police departments, district attorneys, or any other law enforcement agencies to retain or preserve property that may contain DNA.

Section 8 provides that the actual costs incurred for DNA testing or "keyboard searches" performed pursuant to subdivision 1-a of CPL §440.30 be borne by the defendant, provided, however, that the State would bear such costs upon a court's finding that, taking into account a defendant's financial resources and financial obligations, the payment of such costs would impose a hardship.

Section 9 provides the effective dates of the provisions of the bill. The portions of the bill relating to post-plea DNA testing would apply only to pleas entered on or after the effective date and the collection of DNA would occur for crimes committed on or after the effective date.

#### **EXISTING LAW:**

The existing provisions govern DNA: (1) DNA testing and post-conviction motions are in CPL § 440 ; (2) pre-trial discovery are in CPL § 240; (3) DNA collection for the state DNA identification system are in EL § 995; and (4) the Commission on Forensic Science are in EL §995.

#### **STATEMENT IN SUPPORT:**

The DNA identification index ("Databank") is a powerful tool both for preventing and solving crimes and for establishing a defendant's innocence. Since its inception in 1996, there have been more than 10,000 hits against the Databank resulting in over 2,900 convictions. Currently, convicted offenders who are in the Databank have, on average, been convicted of three crimes -- and in some cases as many as 30 crimes -- for which no DNA has been collected before they were convicted of the DNA-eligible offense. Because individuals who commit serious crimes also commit less serious crimes, collecting DNA from individuals convicted of any Penal Law misdemeanor and all felonies will help to prevent and solve murders, rapes, and other crimes. The last expansion of the Databank that included petit larceny provides concrete evidence of the promise that this expansion holds: when petit larceny was added to list of DNA eligible crimes in 2006, it resulted in solving almost 1000 crimes, including 223 rapes and 53 homicides.

The Databank also plays a significant role in helping to determine who did not commit a crime. There have been 27 individuals exonerated in New York through DNA evidence, as well as countless suspects who have been

excluded and cleared most often at the earliest stages of an investigation. This legislation provides for expanded access to defendants, both before trial and after plea or conviction, to DNA testing and other discovery to demonstrate their innocence.

**BUDGET IMPLICATIONS:**

This legislation is not expected to have a significant impact on the State's budget.

**EFFECTIVE DATE:**

This act shall take effect October 1, 2012.

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