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THE GENERAL ASSEMBLY OF PENNSYLVANIA

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SENATE BILL

No. 1338 Session of  
2011

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INTRODUCED BY GREENLEAF, ERICKSON, SOLOBAY, BREWSTER, FERLO,  
WASHINGTON AND HUGHES, NOVEMBER 10, 2011

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REFERRED TO JUDICIARY, NOVEMBER 10, 2011

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AN ACT

1 Amending Titles 18 (Crimes and Offenses), 42 (Judiciary and  
2 Judicial Procedure) and 44 (Law and Justice) of the  
3 Pennsylvania Consolidated Statutes, providing for tampering  
4 with biological evidence; further providing for expungement;  
5 providing for informant testimony, further providing for  
6 controlled substance forfeiture, for sovereign immunity and  
7 for exceptions to sovereign immunity; providing for wrongful  
8 conviction and imprisonment; further providing for  
9 preservation of biological evidence; repealing provisions  
10 relating to postconviction DNA testing; further providing for  
11 jurisdiction and proceedings; providing for postconviction  
12 DNA testing; and providing for comparisons with CODIS data,  
13 for recording of custodial interrogations, for eyewitness  
14 identifications, for forensic laboratories and for powers and  
15 duties of the board.

16 The General Assembly of the Commonwealth of Pennsylvania  
17 hereby enacts as follows:

18 Section 1. Title 18 of the Pennsylvania Consolidated  
19 Statutes is amended by adding a section to read:

20 § 5113. Tampering with biological evidence.

21 A person commits a misdemeanor of the first degree if he  
22 knowingly and intentionally destroys, alters or tampers with  
23 biological evidence that is required to be preserved under 42  
24 Pa.C.S § 9502 (relating to preservation of biological evidence)

1 with the intent to prevent that evidence from being subjected to  
2 DNA testing or prevent the production or use of that evidence in  
3 an official proceeding.

4 Section 2. Section 9122(a) of Title 18 is amended to read:  
5 § 9122. Expungement.

6 (a) Specific proceedings.--Criminal history record  
7 information shall be expunged in a specific criminal proceeding  
8 when:

9 (1) no disposition has been received or, upon request  
10 for criminal history record information, no disposition has  
11 been recorded in the repository within 18 months after the  
12 date of arrest and the court of proper jurisdiction certifies  
13 to the director of the repository that no disposition is  
14 available and no action is pending. Expungement shall not  
15 occur until the certification from the court is received and  
16 the director of the repository authorizes such expungement;

17 (2) a court order requires that such nonconviction data  
18 be expunged; [or]

19 (3) a person 21 years of age or older who has been  
20 convicted of a violation of section 6308 (relating to  
21 purchase, consumption, possession or transportation of liquor  
22 or malt or brewed beverages) petitions the court of common  
23 pleas in the county where the conviction occurred seeking  
24 expungement and the person has satisfied all terms and  
25 conditions of the sentence imposed for the violation,  
26 including any suspension of operating privileges imposed  
27 pursuant to section 6310.4 (relating to restriction of  
28 operating privileges). Upon review of the petition, the court  
29 shall order the expungement of all criminal history record  
30 information and all administrative records of the Department

1 of Transportation relating to said conviction[.]; or

2 (4) an individual:

3 (i) is found by the Commonwealth Court under 42  
4 Pa.C.S. Ch. 85 Subch. D (relating to claims for wrongful  
5 conviction and imprisonment) to have been wrongfully  
6 convicted and imprisoned;

7 (ii) has agreed to a favorable written settlement  
8 for a civil claim relating to a wrongful conviction and  
9 imprisonment; or

10 (iii) has obtained a civil judgment that establishes  
11 wrongful conviction and imprisonment.

12 \* \* \*

13 Section 3. Title 42 is amended by adding a section to read:

14 § 5919.1. Informant testimony.

15 (a) Disclosures.--In any case in which the prosecution  
16 attempts to introduce evidence of incriminating statements made  
17 by the accused to an informant or overheard by an informant, the  
18 prosecution shall timely disclose all of the following to the  
19 defense:

20 (1) The intention of the prosecution to introduce the  
21 testimony of an informant.

22 (2) The complete criminal history of an informant.

23 (3) Any deal, promise, inducement or benefit which the  
24 offering party has made or will make to the informant.

25 (4) The substance of the testimony to be given by the  
26 informant, including all statements made by the accused and  
27 heard by the informant.

28 (5) The time and place of each statement, the time and  
29 place of its disclosure to law enforcement officials and the  
30 names of all persons who were present when the statement was

1 made.

2 (6) Whether, at any time, the informant recanted his  
3 testimony and, if so, the time and place of the recantation,  
4 the nature of the recantation and the names of the persons  
5 who were present at the recantation.

6 (7) Other cases in which the informant testified and  
7 whether the informant received any promise, inducement or  
8 benefit in exchange for or after that testimony.

9 (8) Any other information relevant to the credibility of  
10 the informant.

11 (b) Hearing.--In any capital case in which the prosecution  
12 attempts to introduce testimony of incriminating statements made  
13 by the accused to an informant or overheard by an informant, the  
14 court shall conduct a hearing before the introduction of the  
15 testimony to determine whether the testimony is reliable. If the  
16 prosecution fails to show by a preponderance of the evidence  
17 that the statement is reliable, the court may not allow the  
18 testimony to be heard at trial. At this hearing, the court shall  
19 consider the factors enumerated in subsection (a) as well as any  
20 other factors relating to reliability. A hearing under this  
21 subsection is not required if the defendant waives the right to  
22 the hearing or if an electronic recording was made of the  
23 statement of the accused.

24 (c) Applicability.--This section applies to informant  
25 evidence obtained in the course of the investigation of a  
26 felony.

27 (d) Definitions.--As used in this section the following  
28 words and phrases shall have the meanings given to them in this  
29 subsection:

30 "Electronic recording." An audio or audiovisual recording of

1 a statement.

2 "Informant." An individual whom the prosecution offers as a  
3 witness to testify about admissions of an accused that were made  
4 to or overheard by the informant while both the informant and  
5 the accused were incarcerated in a penal institution.

6 Section 4. Sections 6801(f) and (h) and 8521(a) of Title 42  
7 are amended to read:

8 § 6801. Controlled substances forfeiture.

9 \* \* \*

10 (f) Use of cash or proceeds of property.--Cash or proceeds  
11 of forfeited property transferred to the custody of the district  
12 attorney pursuant to subsection (e) shall be placed in the  
13 operating fund of the county in which the district attorney is  
14 elected. The appropriate county authority shall immediately  
15 release from the operating fund, without restriction, a [like  
16 amount] portion for the use of the district attorney enforcing  
17 the provisions of The Controlled Substance, Drug, Device and  
18 Cosmetic Act while retaining an adequate balance to preserve  
19 biological evidence as required under section 9502 (relating to  
20 preservation of biological evidence). The entity having  
21 budgetary control shall not anticipate future forfeitures or  
22 proceeds therefrom in adoption and approval of the budget for  
23 the district attorney.

24 \* \* \*

25 (h) Authorization to utilize property.--The district  
26 attorney and the Attorney General shall utilize forfeited  
27 property or proceeds thereof for the purpose of enforcing the  
28 provisions of The Controlled Substance, Drug, Device and  
29 Cosmetic Act, 18 Pa.C.S. (relating to crimes and offenses) and  
30 75 Pa.C.S. (relating to vehicles). In appropriate cases, the

1 district attorney and the Attorney General may designate  
2 proceeds from forfeited property to be utilized by community-  
3 based drug and crime-fighting programs and for relocation and  
4 protection of witnesses in criminal cases.

5 \* \* \*

6 § 8521. Sovereign immunity generally.

7 (a) General rule.--Except as otherwise provided in this  
8 subchapter and Subchapter D (relating to claims for wrongful  
9 conviction and imprisonment), no provision of this title shall  
10 constitute a waiver of sovereign immunity for the purpose of 1  
11 Pa.C.S. section 2310 (relating to sovereign immunity reaffirmed;  
12 specific waiver) or otherwise.

13 \* \* \*

14 Section 5. Section 8522(b) of Title 42 is amended by adding  
15 a paragraph to read:

16 § 8522. Exceptions to sovereign immunity.

17 \* \* \*

18 (b) Acts which may impose liability.--The following acts by  
19 a Commonwealth party may result in the imposition of liability  
20 on the Commonwealth and the defense of sovereign immunity shall  
21 not be raised to claims for damages caused by:

22 \* \* \*

23 (10) Wrongful conviction and imprisonment.--Wrongful  
24 conviction and imprisonment for which claims may be brought  
25 under Subchapter D (relating to claims for wrongful  
26 conviction and imprisonment).

27 \* \* \*

28 Section 6. Chapter 85 of Title 42 is amended by adding a  
29 subchapter to read:

30 SUBCHAPTER D

1                   CLAIMS FOR WRONGFUL CONVICTION AND IMPRISONMENT

2   Sec.

3   8581. Eligibility.

4   8582. Statement of claim and basis of award.

5   8583. Commonwealth Court.

6   8584. Presentation of claim.

7   8585. Damages.

8   8586. Report and order.

9   8587. Notice.

10 8588. Statute of limitations.

11 § 8581. Eligibility.

12     Any person convicted and subsequently imprisoned for one or  
13 more crimes that the person did not commit and who has been  
14 released from prison and is not subject to retrial, or the heirs  
15 of such person if the person is deceased, may present a claim  
16 for damages against the Commonwealth. Other than credit for time  
17 served, a claimant is not entitled to compensation under this  
18 subchapter for any portion of a sentence spent incarcerated  
19 during which the claimant was also serving a consecutive or  
20 concurrent sentence for another crime to which this subchapter  
21 does not apply. The acceptance by the claimant of any judicial  
22 award, compromise or settlement shall be in writing and shall,  
23 except when procured by fraud, be final and conclusive on the  
24 claimant and completely bar any further action by the claimant  
25 against the Commonwealth for the same subject matter.

26 § 8582. Statement of claim and basis of award.

27     (a) Evidence of claim.--To present a claim for wrongful  
28 conviction and imprisonment, the claimant must establish that:

29             (1) He has been convicted of one or more crimes and  
30             subsequently sentenced to a term of imprisonment and has

1 served all or any part of the sentence.

2 (2) His actual innocence has been established by:

3 (i) being pardoned by the Governor for the crime or  
4 crimes for which he was sentenced, and which are the  
5 basis for the claim, on the grounds that the crime or  
6 crimes were either not committed at all or, if committed,  
7 were not committed by the defendant;

8 (ii) having the judgment of conviction of the  
9 claimant reversed or vacated and the accusatory  
10 instrument dismissed if the judgment of conviction was  
11 reversed or vacated or the accusatory instrument was  
12 dismissed on grounds consistent with innocence; or

13 (iii) if a new trial was ordered, either being found  
14 not guilty at the new trial or not being retried and the  
15 accusatory instrument dismissed.

16 (b) Basis of award.--To obtain a judgment in the claimant's  
17 favor, the claimant must demonstrate that:

18 (1) The claimant was convicted of one or more crimes and  
19 subsequently sentenced to a term of imprisonment and has  
20 served all or any part of the sentence.

21 (2) By clear and convincing evidence his actual  
22 innocence has been established under subsection (a)(2).

23 § 8583. Commonwealth Court.

24 Proceedings before the court shall be governed by rules  
25 established by the court, which shall emphasize, to the greatest  
26 extent possible, informality of proceedings. No claimant shall  
27 be required to be represented or accompanied by an attorney.

28 § 8584. Presentation of claim.

29 All claims of wrongful conviction and imprisonment shall be  
30 presented to and heard by the Commonwealth Court. Upon

1 presentation of a claim under section 8582 (relating to  
2 statement of claim and basis of award), the court shall fix a  
3 time and place to hear the claim. At least 15 days prior to the  
4 time fixed for the hearing, the court shall mail notice thereof  
5 to the claimant and to the district attorney in the district  
6 where the claimant was prosecuted for the crimes which serve as  
7 the basis for this claim. The district attorney may offer  
8 evidence and argue in opposition to the claim for damages. If  
9 the claimant was prosecuted by the Office of Attorney General,  
10 then that office, rather than the district attorney, must be  
11 notified that it may oppose the claim under this section.

12 § 8585. Damages.

13 If the Commonwealth Court finds that the claimant was  
14 wrongfully convicted and imprisoned, it may award damages as  
15 follows:

16 (1) A minimum of \$50,000 for each year of incarceration,  
17 as adjusted annually to account for inflation from the  
18 effective date of this section, and prorated for partial  
19 years served.

20 (2) In a lump sum or as an annuity as chosen by the  
21 claimant.

22 (3) Compensation for any reasonable reintegrative  
23 services and mental and physical health care costs incurred  
24 by the claimant for the time period between his release from  
25 incarceration and the date of his award.

26 (4) Reasonable attorney fees calculated at 10% of the  
27 damage award plus expenses. Exclusive of expenses, these fees  
28 may not exceed \$75,000, as adjusted annually to account for  
29 inflation from the effective date of this section, unless the  
30 court approves an additional amount for good cause. These

1 fees may not be deducted from the compensation due the  
2 claimant nor may his counsel receive additional fees from the  
3 client for this matter.

4 (5) Compensation to those entitled to child-support  
5 payments owed by the claimant that became due, and interest  
6 on child-support arrearages that accrued during the time the  
7 claimant served in prison but were not paid. Such  
8 compensation is to be provided out of the total cash award to  
9 the claimant under paragraph (1).

10 (6) In any case for which compensation is authorized by  
11 this subchapter, the payment of compensation may be:

12 (i) to or for the benefit of the claimant; or

13 (ii) in the case of death of the claimant, to or for  
14 the benefit of any one or more of the heirs at law of the  
15 claimant who at the time of the claimant's demise were  
16 dependent upon the claimant for support.

17 (7) To decide damages, the Commonwealth Court shall  
18 consider all circumstances surrounding the claim, including,  
19 but not limited to, the length of the claimant's wrongful  
20 incarceration, any injuries the claimant sustained while  
21 incarcerated, any other need for financial aid and any other  
22 relevant matters. Insofar as practical, the Commonwealth  
23 Court shall formulate standards for uniform application in  
24 recommending compensation.

25 (8) The damage award is not subject to any cap  
26 applicable to private parties in civil lawsuits.

27 (9) The damage award may not be offset by any expenses  
28 incurred by the Commonwealth or any political subdivision of  
29 the Commonwealth, including, but not limited to, expenses  
30 incurred to secure the claimant's custody or to feed, clothe

1 or provide medical services for the claimant, nor may the  
2 court offset the value of any services or reduction in fees  
3 for services or the value thereof to be provided to the  
4 claimant that may be awarded to the claimant under this  
5 section.

6 (10) The award of damages shall include reimbursement  
7 for any statutorily mandated and court-assessed costs, fines,  
8 restitution and fees to the extent that they have been  
9 collected.

10 (11) A decision of the Commonwealth Court on behalf of  
11 the claimant shall result in the automatic expungement of the  
12 criminal history record of the claimant as it relates to the  
13 crimes that form the basis of this claim. As part of its  
14 decision, the court shall specifically direct the  
15 Pennsylvania State Police and the prosecuting district  
16 attorney of the original crimes that form the basis of this  
17 claim to expunge the record consistent with this paragraph.  
18 Accordingly, the court shall forward a copy of its decision  
19 to the Pennsylvania State Police and to the prosecuting  
20 district attorney.

21 (12) The damage award is not subject to any Commonwealth  
22 taxes.

23 § 8586. Report and order.

24 The Commonwealth Court shall issue a ruling and order and  
25 provide the State Treasurer a statement of the total  
26 compensation due and owing to the claimant from the  
27 Commonwealth.

28 § 8587. Notice.

29 (a) Court.--A court granting judicial relief as described in  
30 section 8582(a) (relating to statement of claim and basis of

1 award) shall provide a copy of this subchapter to the individual  
2 seeking such relief at the time the court determines that the  
3 claimant's claim is likely to succeed. The individual shall be  
4 required to acknowledge his receipt of a copy of this subchapter  
5 in writing on a form established by the Supreme Court. The  
6 acknowledgment shall be entered on the docket by the court and  
7 shall be admissible in any proceeding filed by a claimant under  
8 this subchapter.

9 (b) Board of Pardons.--Upon the issuance of a full pardon on  
10 or after the effective date of this subchapter, the Board of  
11 Pardons shall provide a copy of this subchapter to an individual  
12 when pardoned as described in section 8582(a). The individual  
13 shall be required to acknowledge his receipt of a copy of this  
14 subchapter in writing on a form established by the board, which  
15 shall be retained on file by the board as part of its official  
16 records and shall be admissible in any proceeding filed by a  
17 claimant under this subchapter.

18 (c) Failure to provide notice.--In the event a claimant  
19 granted judicial relief or a full pardon on or after the  
20 effective date of this subchapter shows he did not properly  
21 receive a copy of the information required by this section, the  
22 claimant shall receive a one-year extension on the two-year time  
23 limit provided in section 8588 (relating to statute of  
24 limitations).

25 (d) Notice by Supreme Court.--The Supreme Court shall make  
26 reasonable attempts to notify all persons who were granted  
27 judicial relief as described in section 8582(a), prior to the  
28 enactment of this subchapter, of their rights under this  
29 subchapter.

30 § 8588. Statute of limitations.

1 An action for compensation brought by a wrongfully convicted  
2 person under this subchapter shall be commenced within two years  
3 after either the grant of a pardon or the grant of judicial  
4 relief and satisfaction of other conditions described in section  
5 8582 (relating to statement of claim and basis of award). Any  
6 action by the Commonwealth challenging or appealing the grant of  
7 judicial relief tolls the two-year period. Persons convicted,  
8 incarcerated and released from custody prior to the effective  
9 date of this subchapter shall commence an action under this  
10 subchapter within five years of the effective date.

11 Section 7. Title 42 is amended by adding a section to read:  
12 § 9502. Preservation of biological evidence.

13 (a) General rule.--Notwithstanding any other provision of  
14 law, the prosecuting jurisdiction or its designee shall preserve  
15 biological evidence that was secured in the investigation or  
16 prosecution of a criminal offense, if criminal proceedings are  
17 pending or if a defendant is under a sentence of imprisonment  
18 for that offense. Prosecuting jurisdictions may act jointly to  
19 comply with this section.

20 (b) Applicability.--Subsection (a) shall not apply if:

21 (1) a court has denied a request or motion for DNA  
22 testing of the biological evidence by the defendant under Ch.  
23 95, Subch. E (relating to postconviction DNA testing), and no  
24 appeal is pending;

25 (2) after a conviction becomes final and the defendant  
26 has exhausted all opportunities for direct review of the  
27 conviction, the defendant, his counsel of record and the  
28 public defender is notified that the biological evidence may  
29 be destroyed and the defendant does not file a motion under  
30 Ch. 95 Subch. E, within one year of receipt of the notice; or

1       (3) the evidence must be returned to its rightful owner,  
2 or is of such a size, bulk or physical character as to render  
3 retention impractical and:

4           (i) the prosecuting jurisdiction or its designee  
5 takes reasonable measures to remove and preserve portions  
6 of the material evidence sufficient to permit future DNA  
7 testing; or

8           (ii) the biological evidence has already been  
9 subjected to DNA testing under Ch. 95 Subch. E and the  
10 results included the defendant as the source of the  
11 evidence.

12       (c) Other preservation requirement.--Biological evidence  
13 required to be preserved under this section shall be preserved  
14 under reasonable conditions designed to preserve the integrity  
15 of the evidence and the testing process, which must be  
16 consistent with applicable standards promulgated by a nationally  
17 recognized accrediting board and approved by the Forensic  
18 Advisory Board. Nothing in this section preempts or supersedes  
19 any statute, regulation, court order or other provision of law  
20 that may require evidence, including biological evidence, to be  
21 preserved.

22       (d) Regulations.--Not later than 180 days after the date of  
23 this section's enactment, the prosecuting jurisdiction shall  
24 promulgate rules or regulations to implement and enforce this  
25 section, including appropriate disciplinary sanctions to ensure  
26 compliance.

27       (e) Fee.--Unless the court finds that undue hardship would  
28 result, a fee of \$125 shall automatically be assessed on a  
29 person convicted or adjudicated delinquent for a criminal  
30 offense requiring preservation of biological evidence under this

1 section. All proceeds derived from this fee shall be transmitted  
2 to the prosecuting jurisdiction. This fee is in addition to any  
3 other fees imposed by statutory authority and the fee shall be  
4 assessed per capita rather than per criminal offense or amount  
5 of biological evidence. This fee shall be collected in  
6 accordance with section 9728 (relating to collection of  
7 restitution, reparation, fees, costs, fines and penalties).  
8 Subsection (a) applies regardless whether a fee under this  
9 subsection is assessed and collected. If the conviction or  
10 adjudication of delinquency is reversed or vacated or if the  
11 sentence is vacated, the prosecuting jurisdiction shall promptly  
12 refund the fee.

13 (f) Definitions.--As used in this section, the following  
14 words and phrases shall have the meanings given to them in this  
15 subsection:

16 "Biological evidence." The contents of a sexual assault  
17 examination kit, and any item that contains blood, semen, hair,  
18 saliva, skin tissue, fingernail scrapings, bone, bodily fluids  
19 or other biological material that was collected as part of the  
20 criminal investigation that may be probative of the  
21 perpetrator's identity or may reasonably be used to incriminate  
22 or exculpate any person for the offense. This definition applies  
23 whether that material is cataloged separately, e.g., on a slide  
24 or swab or in a test tube, or is present on other evidence,  
25 including clothing, ligatures, bedding or other household  
26 material, drinking cups or cigarettes.

27 "Criminal offense." An act that can be prosecuted under any  
28 of the following provisions of 18 Pa.C.S. (relating to crimes  
29 and offenses):

30 Chapter 25 (relating to criminal homicide).

1           Chapter 27 (relating to assault).  
2           Chapter 29 (relating to kidnapping).  
3           Chapter 31 (relating to sexual offenses).  
4           Chapter 37 (relating to robbery).

5           "Prosecuting jurisdiction." The county where the criminal  
6 offense occurred.

7           Section 8. Section 9543.1 of Title 42 is repealed:

8           [§ 9543.1. Postconviction DNA testing.

9           (a) Motion.--

10           (1) An individual convicted of a criminal offense in a  
11 court of this Commonwealth and serving a term of imprisonment  
12 or awaiting execution because of a sentence of death may  
13 apply by making a written motion to the sentencing court for  
14 the performance of forensic DNA testing on specific evidence  
15 that is related to the investigation or prosecution that  
16 resulted in the judgment of conviction.

17           (2) The evidence may have been discovered either prior  
18 to or after the applicant's conviction. The evidence shall be  
19 available for testing as of the date of the motion. If the  
20 evidence was discovered prior to the applicant's conviction,  
21 the evidence shall not have been subject to the DNA testing  
22 requested because the technology for testing was not in  
23 existence at the time of the trial or the applicant's counsel  
24 did not seek testing at the time of the trial in a case where  
25 a verdict was rendered on or before January 1, 1995, or the  
26 applicant's counsel sought funds from the court to pay for  
27 the testing because his client was indigent and the court  
28 refused the request despite the client's indigency.

29           (b) Notice to the Commonwealth.--

30           (1) Upon receipt of a motion under subsection (a), the

1 court shall notify the Commonwealth and shall afford the  
2 Commonwealth an opportunity to respond to the motion.

3 (2) Upon receipt of a motion under subsection (a) or  
4 notice of the motion, as applicable, the Commonwealth and the  
5 court shall take the steps reasonably necessary to ensure  
6 that any remaining biological material in the possession of  
7 the Commonwealth or the court is preserved pending the  
8 completion of the proceedings under this section.

9 (c) Requirements.--In any motion under subsection (a), under  
10 penalty of perjury, the applicant shall:

11 (1) (i) specify the evidence to be tested;

12 (ii) state that the applicant consents to provide  
13 samples of bodily fluid for use in the DNA testing; and

14 (iii) acknowledge that the applicant understands  
15 that, if the motion is granted, any data obtained from  
16 any DNA samples or test results may be entered into law  
17 enforcement databases, may be used in the investigation  
18 of other crimes and may be used as evidence against the  
19 applicant in other cases.

20 (2) (i) assert the applicant's actual innocence of the  
21 offense for which the applicant was convicted; and

22 (ii) in a capital case:

23 (A) assert the applicant's actual innocence of  
24 the charged or uncharged conduct constituting an  
25 aggravating circumstance under section 9711(d)  
26 (relating to sentencing procedure for murder of the  
27 first degree) if the applicant's exoneration of the  
28 conduct would result in vacating a sentence of death;

29 or

30 (B) assert that the outcome of the DNA testing

1 would establish a mitigating circumstance under  
2 section 9711(e) (7) if that mitigating circumstance  
3 was presented to the sentencing judge or jury and  
4 facts as to that issue were in dispute at the  
5 sentencing hearing.

6 (3) present a prima facie case demonstrating that the:

7 (i) identity of or the participation in the crime by  
8 the perpetrator was at issue in the proceedings that  
9 resulted in the applicant's conviction and sentencing;  
10 and

11 (ii) DNA testing of the specific evidence, assuming  
12 exculpatory results, would establish:

13 (A) the applicant's actual innocence of the  
14 offense for which the applicant was convicted;

15 (B) in a capital case, the applicant's actual  
16 innocence of the charged or uncharged conduct  
17 constituting an aggravating circumstance under  
18 section 9711(d) if the applicant's exoneration of the  
19 conduct would result in vacating a sentence of death;  
20 or

21 (C) in a capital case, a mitigating circumstance  
22 under section 9711(e) (7) under the circumstances set  
23 forth in subsection (c) (1) (iv).

24 (d) Order.--

25 (1) Except as provided in paragraph (2), the court shall  
26 order the testing requested in a motion under subsection (a)  
27 under reasonable conditions designed to preserve the  
28 integrity of the evidence and the testing process upon a  
29 determination, after review of the record of the applicant's  
30 trial, that the:

1 (i) requirements of subsection (c) have been met;  
2 (ii) evidence to be tested has been subject to a  
3 chain of custody sufficient to establish that it has not  
4 been altered in any material respect; and

5 (iii) motion is made in a timely manner and for the  
6 purpose of demonstrating the applicant's actual innocence  
7 and not to delay the execution of sentence or  
8 administration of justice.

9 (2) The court shall not order the testing requested in a  
10 motion under subsection (a) if, after review of the record of  
11 the applicant's trial, the court determines that there is no  
12 reasonable possibility that the testing would produce  
13 exculpatory evidence that:

14 (i) would establish the applicant's actual innocence  
15 of the offense for which the applicant was convicted;

16 (ii) in a capital case, would establish the  
17 applicant's actual innocence of the charged or uncharged  
18 conduct constituting an aggravating circumstance under  
19 section 9711(d) if the applicant's exoneration of the  
20 conduct would result in vacating a sentence of death; or

21 (iii) in a capital case, would establish a  
22 mitigating circumstance under section 9711(e)(7) under  
23 the circumstances set forth in subsection (c)(1)(iv).

24 (e) Testing procedures.--

25 (1) Any DNA testing ordered under this section shall be  
26 conducted by:

27 (i) a laboratory mutually selected by the  
28 Commonwealth and the applicant;

29 (ii) if the Commonwealth and the applicant are  
30 unable to agree on a laboratory, a laboratory selected by

1 the court that ordered the testing; or

2 (iii) if the applicant is indigent, the testing  
3 shall be conducted by the Pennsylvania State Police or,  
4 at the Pennsylvania State Police's sole discretion, by a  
5 laboratory designated by the Pennsylvania State Police.

6 (2) The costs of any testing ordered under this section  
7 shall be paid:

8 (i) by the applicant; or

9 (ii) in the case of an applicant who is indigent, by  
10 the Commonwealth of Pennsylvania.

11 (3) Testing conducted by the Pennsylvania State Police  
12 shall be carried out in accordance with the protocols and  
13 procedures established by the Pennsylvania State Police.

14 (f) Posttesting procedures.--

15 (1) After the DNA testing conducted under this section  
16 has been completed, the applicant may, pursuant to section  
17 9545(b)(2) (relating to jurisdiction and proceedings), during  
18 the 60-day period beginning on the date on which the  
19 applicant is notified of the test results, petition to the  
20 court for postconviction relief pursuant to section 9543(a)  
21 (2)(vi) (relating to eligibility for relief).

22 (2) Upon receipt of a petition filed under paragraph  
23 (1), the court shall consider the petition along with any  
24 answer filed by the Commonwealth and shall conduct a hearing  
25 thereon.

26 (3) In any hearing on a petition for postconviction  
27 relief filed under paragraph (1), the court shall determine  
28 whether the exculpatory evidence resulting from the DNA  
29 testing conducted under this section would have changed the  
30 outcome of the trial as required by section 9543(a)(2)(vi).

1 (g) Effect of motion.--The filing of a motion for forensic  
2 DNA testing pursuant to subsection (a) shall have the following  
3 effect:

4 (1) The filing of the motion shall constitute the  
5 applicant's consent to provide samples of bodily fluid for  
6 use in the DNA testing.

7 (2) The data from any DNA samples or test results  
8 obtained as a result of the motion may be entered into law  
9 enforcement databases, may be used in the investigation of  
10 other crimes and may be used as evidence against the  
11 applicant in other cases.

12 (h) Definitions.--As used in this section, the following  
13 words and phrases shall have the meanings given to them in this  
14 subsection:

15 "Applicant." The individual who files a motion under  
16 subsection (a).

17 "DNA." Deoxyribonucleic acid.]

18 Section 9. Section 9545(b) of Title 42 is amended to read:  
19 § 9545. Jurisdiction and proceedings.

20 \* \* \*

21 (b) Time for filing petition.--

22 (1) Any petition under this subchapter, including a  
23 second or subsequent petition, shall be filed within one year  
24 of the date the judgment becomes final, unless the petition  
25 alleges and the petitioner proves that:

26 (i) the failure to raise the claim previously was  
27 the result of interference by government officials with  
28 the presentation of the claim in violation of the  
29 Constitution or laws of this Commonwealth or the  
30 Constitution or laws of the United States;

1 (ii) the facts upon which the claim is predicated  
2 were unknown to the petitioner and could not have been  
3 ascertained by the exercise of due diligence; or

4 (iii) the right asserted is a constitutional right  
5 that was recognized by the Supreme Court of the United  
6 States or the Supreme Court of Pennsylvania after the  
7 time period provided in this section and has been held by  
8 that court to apply retroactively.

9 (2) Any petition invoking an exception provided in  
10 paragraph (1) shall be filed within [60 days] one year of the  
11 date the claim could have been presented.

12 (3) For purposes of this subchapter, a judgment becomes  
13 final at the conclusion of direct review, including  
14 discretionary review in the Supreme Court of the United  
15 States and the Supreme Court of Pennsylvania, or at the  
16 expiration of time for seeking the review.

17 (4) For purposes of this subchapter, "government  
18 officials" shall not include defense counsel, whether  
19 appointed or retained.

20 (5) This subsection does not apply to a petition filed  
21 under Subchapter E (relating to postconviction DNA testing).

22 \* \* \*

23 Section 10. Chapter 95 of Title 42 is amended by adding a  
24 subchapter to read:

25 SUBCHAPTER E

26 POSTCONVICTION DNA TESTING

27 Sec.

28 9581. Short title of subchapter.

29 9582. Definitions.

30 9583. Right to file petition for DNA testing.

- 1 9584. Form of petition.
- 2 9585. Filing, docketing and effect of petition.
- 3 9586. Counsel for indigent petitioners.
- 4 9587. Dismissal or acceptance for adjudication.
- 5 9588. Proceedings on petition.
- 6 9589. Comparisons with CODIS data.
- 7 9590. Discovery.
- 8 9591. Testing procedures.
- 9 9592. Appeal.
- 10 9593. Procedure after test results.
- 11 § 9581. Short title of subchapter.

12 This subchapter shall be known and may be cited as the  
13 Pennsylvania Postconviction DNA Testing Act.

14 § 9582. Definitions.

15 The following words and phrases when used in this subchapter  
16 shall have the meanings given in this section unless the context  
17 clearly indicates otherwise:

18 "Biological evidence." The contents of a sexual assault  
19 examination kit and any item that contains blood, semen, hair,  
20 saliva, skin tissue, fingernail scrapings, bone, bodily fluids  
21 or other biological material that was collected as part of the  
22 criminal investigation that may be probative of the  
23 perpetrator's identity or may reasonably be used to incriminate  
24 or exculpate any person for the offense. This definition applies  
25 whether that material is cataloged separately, e.g., on a slide  
26 or swab or in a test tube, or is present on other evidence,  
27 including clothing, ligatures, bedding or other household  
28 material, drinking cups or cigarettes.

29 "CODIS." The Federal Combined DNA Index System.

30 "DNA testing." Postconviction forensic DNA testing under

1 this subchapter.

2 "State DNA Data Base." The State DNA Data Base established  
3 under 44 Pa.C.S. § 2312 (relating to State DNA Data Base).

4 "Successive petition." A petition for DNA testing filed by a  
5 petitioner who has previously filed a petition for DNA testing.  
6 § 9583. Right to file petition for DNA testing.

7 Notwithstanding any other provision of law governing  
8 postconviction relief, an individual convicted of a crime may  
9 file a petition for DNA testing under this subchapter. A waiver  
10 of the right to file a petition for DNA testing is not  
11 effective, whether the purported waiver is made by itself, as  
12 part of an agreement resulting in a plea of guilty or nolo  
13 contendere, or in any other manner.

14 § 9584. Form of petition.

15 (a) Contents of petition.--The petition for DNA testing must  
16 be made under oath by the petitioner and must include the  
17 following:

18 (1) A statement of the facts relied on in support of the  
19 petition, including a description of the physical evidence  
20 containing DNA to be tested and, if known, the present  
21 location or the last known location of the evidence and how  
22 it was originally obtained.

23 (2) A statement that the evidence was not previously  
24 tested for DNA or a statement that subsequent scientific  
25 developments in DNA testing techniques would likely produce a  
26 definitive result establishing that the petitioner is not the  
27 person who committed the crime.

28 (3) A statement that the petitioner is innocent of a  
29 crime for which the petitioner was sentenced.

30 (4) In a successive petition, the person's certification

1 that he has not filed a previous petition on similar grounds,  
2 and a statement of the reason for the petitioner's failure to  
3 raise the current grounds in the previous petition.

4 (5) A statement describing how the requested DNA testing  
5 will exonerate the defendant of the crime or will mitigate  
6 the sentence received by the petitioner for the crime.

7 (6) The petitioner's consent to provide samples of  
8 bodily fluid for use in the DNA testing.

9 (7) The petitioner's consent that the data from any DNA  
10 samples or test results obtained as a result of the petition  
11 may be entered into law enforcement databases, used in the  
12 investigation of other crimes or used as evidence against the  
13 petitioner in other cases.

14 (b) Form.--If the Supreme Court promulgates an official form  
15 for a petition for DNA testing, the Department of Corrections  
16 shall make the form available to prisoners.  
17 § 9585. Filing, docketing and effect of petition.

18 (a) Filing.--A request for DNA testing may be filed at any  
19 time following sentencing, and shall be by written petition and  
20 be filed with the clerk of courts of the judicial district in  
21 which the sentence was imposed.

22 (b) Notice to the Commonwealth.--A copy of the petition  
23 shall be served on the attorney for the Commonwealth. The  
24 Commonwealth may respond in accordance with the Pennsylvania  
25 Rules of Criminal Procedure.

26 (c) Court rules.--Except as otherwise provided in this  
27 subchapter, the Pennsylvania Rules of Criminal Procedure apply  
28 to a petition for DNA testing, and the petition shall be  
29 considered a petition for postconviction collateral relief under  
30 those rules.

1 (d) Effect of filing petition.--

2 (1) The filing of a petition for forensic DNA testing  
3 constitutes the petitioner's consent to provide samples of  
4 bodily fluid for use in the DNA testing.

5 (2) The filing of the petition also constitutes the  
6 consent of the petitioner that the data from any DNA samples  
7 or test results obtained as a result of the petition may be  
8 entered into law enforcement databases, used in the  
9 investigation of other crimes or used as evidence against the  
10 petitioner in other cases.

11 (3) The court shall ensure that the petitioner has filed  
12 the petition with knowledge of paragraphs (1) and (2) and has  
13 knowingly and intelligently consented to their provisions.  
14 Averments in the petition as provided under section 9584(a)  
15 (6) and (7) (relating to form of petition), or a written  
16 representation that the petitioner has filed the petition  
17 with knowledge of paragraphs (1) and (2) and has knowingly  
18 and intelligently consented to their provisions, filed of  
19 record and signed by petitioner or counsel for the  
20 petitioner, is sufficient to establish consent under this  
21 paragraph.

22 (e) Inventory.--Upon receipt of a petition for DNA testing,  
23 the Commonwealth shall promptly prepare an inventory of the  
24 evidence related to the case and serve a copy of the inventory  
25 to the prosecution, the petitioner, the petitioner's attorney  
26 and the court.

27 § 9586. Counsel for indigent petitioners.

28 (a) Request for counsel.--An indigent, convicted individual  
29 may request appointment of counsel to prepare a petition for DNA  
30 testing by sending a written request to the court. The request

1 shall include the individual's statement that he was not the  
2 perpetrator of the crime and that DNA testing is relevant to his  
3 assertion of innocence. The request also shall include the  
4 individual's statement as to whether he previously has had  
5 counsel appointed under this section. If any of the information  
6 required by this subsection is missing from the request, the  
7 court shall return the request to the convicted individual and  
8 advise him that the matter cannot be considered without the  
9 missing information or, if the Supreme Court has promulgated a  
10 form for a request for appointment of counsel to prepare a  
11 petition for DNA testing, the court may send him that form.

12 (b) Appointment of counsel.--Upon a finding that the  
13 individual is indigent:

14 (1) If counsel has not previously been appointed under  
15 this subsection, the court shall appoint counsel to  
16 investigate and, if appropriate, to file a petition for DNA  
17 testing and to represent the individual solely for the  
18 purpose of obtaining the testing.

19 (2) If counsel has been previously appointed under this  
20 section, the court may appoint counsel to perform the duties  
21 described in paragraph (1).

22 § 9587. Dismissal or acceptance for adjudication.

23 (a) General rule.--Unless subsection (c) applies, the court  
24 shall dismiss a petition on its own motion without requiring the  
25 Commonwealth to respond to the petition if either of the  
26 following apply:

27 (1) The petition is frivolous.

28 (2) In the case of a successive petition, the petition  
29 fails to meet the requirements of subsection (b).

30 (b) Successive petitions.--The court shall hear a successive

1 petition if the petition alleges substantially new or different  
2 grounds for relief, including factual, scientific or legal  
3 arguments not previously presented, or the availability of more  
4 advanced DNA technology that provides a reasonable probability  
5 of more probative results.

6 (c) Interests of justice.--The court may adjudicate any  
7 petition under this subchapter if the interests of justice so  
8 require.

9 § 9588. Proceedings on petition.

10 (a) Criteria for relief.--Unless the court dismisses a  
11 petition under section 9587 (relating to dismissal or acceptance  
12 for adjudication), the court shall promptly conduct a hearing on  
13 the petition. The court shall grant the DNA testing requested by  
14 the petition if it finds all of the following:

15 (1) The petitioner has demonstrated a reasonable  
16 probability that the petitioner would not have been convicted  
17 or would have received a lesser sentence if favorable results  
18 had been obtained through DNA testing, under this subchapter  
19 or under previously applicable law, at the time of the  
20 original prosecution.

21 (2) The evidence to be tested was secured in relation to  
22 the offense underlying the challenged conviction and one of  
23 the following applies:

24 (i) The evidence was not previously subjected to DNA  
25 testing under this subchapter or under previously  
26 applicable law.

27 (ii) Although previously subjected to DNA testing  
28 under this subchapter or under previously applicable law,  
29 the evidence can be subjected to additional DNA testing  
30 that provides a reasonable likelihood of more probative

1           results.

2           (3) At least one item of evidence that the petitioner  
3 seeks to have tested is in existence.

4           (4) The chain of custody of the evidence to be tested  
5 establishes that the evidence has not been tampered with,  
6 replaced or altered in any material respect or, if the chain  
7 of custody does not establish the integrity of the evidence,  
8 the results of the DNA testing can establish the integrity of  
9 the evidence. Evidence that has been in the custody of law  
10 enforcement, other government officials or a public or  
11 private hospital shall be presumed to satisfy this paragraph,  
12 absent specific evidence of material tampering, replacement  
13 or alteration.

14           (5) The petition is made to demonstrate factual  
15 innocence or the appropriateness of a lesser sentence and not  
16 solely to unreasonably delay the execution of sentence or the  
17 administration of justice.

18           (b) Other orders.--The court may make such other orders as  
19 may be appropriate in connection with proceedings under this  
20 subchapter, either on its own initiative or on motion of any  
21 party to the proceedings.

22   § 9589. Comparisons with CODIS data.

23           For purposes of supporting a petition under this subchapter,  
24 a petitioner may request and the court may order a law  
25 enforcement entity that has access to CODIS or the State DNA  
26 Data Base to submit the DNA profile obtained from probative  
27 biological material from crime scene evidence to those databases  
28 to determine whether that profile matches a profile of a known  
29 individual or a profile from an unsolved crime. The DNA profile  
30 submitted to the databases must comply with the Federal Bureau

1 of Investigation's requirements for the uploading of crime scene  
2 profiles to CODIS.

3 § 9590. Discovery.

4 (a) Court orders.--At any time after a petition has been  
5 filed under this subchapter, the court may order the  
6 Commonwealth to do any or all of the following:

7 (1) Locate and provide the petitioner with any reports,  
8 notes, logs or other documents relating to items of physical  
9 evidence collected in connection with the case, or otherwise  
10 assist the petitioner in locating items of biological  
11 evidence that the Commonwealth contends have been lost or  
12 destroyed.

13 (2) Take reasonable measures to locate biological  
14 evidence that may be in the custody of the Commonwealth.

15 (3) Assist the petitioner in locating evidence that may  
16 be in the custody of a public or private hospital, public or  
17 private laboratory or other facility.

18 (4) Produce laboratory reports prepared in connection  
19 with the DNA testing, as well as the underlying data and the  
20 laboratory notes, if evidence had previously been subjected  
21 to DNA testing under this subchapter or previously applicable  
22 law.

23 (b) Previous testing.--If the prosecution or the petitioner  
24 previously conducted DNA testing or other testing of biological  
25 evidence without knowledge of the other party, that testing  
26 shall be revealed in the petition for testing or the response.

27 (c) Reports and data.--If the court orders new DNA testing,  
28 the court shall order the production of any laboratory reports  
29 prepared in connection with the DNA testing. The court may also  
30 order production of the underlying data or other laboratory

1 documents.

2 (d) Results.--The results of the DNA testing shall be  
3 disclosed to the prosecution, the petitioner and the court.

4 § 9591. Testing procedures.

5 (a) Court supervision.--The court may order any or all of  
6 the following:

7 (1) The preservation of some portion of the sample for  
8 replication of the test.

9 (2) Additional DNA testing, if the results of the  
10 initial testing are inconclusive or additional scientific  
11 analysis of the results is otherwise required.

12 (3) The collection and DNA testing of additional  
13 reference samples for comparison purposes.

14 (b) Selection of laboratory.--DNA testing shall be conducted  
15 by a laboratory mutually selected by the Commonwealth and the  
16 petitioner. If the Commonwealth and the petitioner are unable to  
17 agree on a laboratory, the testing shall be conducted by a  
18 laboratory selected by the court. If the petitioner is indigent,  
19 the testing shall be conducted by the Pennsylvania State Police  
20 or, at the Pennsylvania State Police's sole discretion, by a  
21 laboratory designated by the Pennsylvania State Police. A  
22 laboratory selected under this subsection must be accredited.

23 (c) Costs.--The costs of DNA testing shall be paid by the  
24 petitioner, or in the case of an indigent petitioner, by the  
25 Commonwealth.

26 (d) Testing by the Pennsylvania State Police.--DNA testing  
27 conducted by the Pennsylvania State Police shall be carried out  
28 in accordance with the protocols and procedures established by  
29 the Pennsylvania State Police and approved by ASCLD/LAB.

30 (e) Confidentiality.--DNA profile information from

1 biological samples taken from any individual under this  
2 subchapter is exempt from any law requiring disclosure of  
3 information to the public.

4 (f) Definitions.--As used in this section, the following  
5 words and phrases shall have the meanings given to them in this  
6 subsection:

7 "Accredited." Accredited by ASCLD/LAB.

8 "ASCLD/LAB." The Laboratory Accreditation Board of the  
9 American Society of Crime Laboratory Directors.

10 § 9592. Appeal.

11 A petitioner may appeal a decision denying DNA testing under  
12 the Pennsylvania Rules of Appellate Procedure.

13 § 9593. Procedure after test results.

14 (a) Results favorable to petitioner.--If the results of DNA  
15 testing are favorable to the petitioner, the court shall conduct  
16 a hearing to determine the appropriate relief to be granted.  
17 Based on the results of the testing and any evidence or other  
18 matter presented at the hearing, the court shall thereafter  
19 enter any order that serves the interests of justice. An order  
20 under this subsection may:

21 (1) Set aside or vacate the petitioner's judgment of  
22 conviction, judgment of not guilty by reason of mental  
23 disease or defect or adjudication of delinquency.

24 (2) Grant the petitioner a new trial or fact-finding  
25 hearing.

26 (3) Grant the petitioner a new sentencing hearing,  
27 commitment hearing or dispositional hearing.

28 (4) Discharge the petitioner from custody.

29 (5) Specify the disposition of any evidence that remains  
30 after the completion of the testing.



1 Subchapter

2 A. Recording of Interrogations

3 B. Eyewitness Identifications

4 SUBCHAPTER A

5 RECORDING OF INTERROGATIONS

6 Sec.

7 8301. Definitions.

8 8302. Recording requirement.

9 8303. Applicability.

10 8304. Wiretap exception to recording.

11 8305. Sanctions.

12 8306. Handling and preservation of electronic recordings.

13 § 8301. Definitions.

14 The following words and phrases when used in this subchapter  
15 shall have the meanings given to them in this section unless the  
16 context clearly indicates otherwise:

17 "Custodial interrogation." An interview in which a question,  
18 statement or other conduct is reasonably likely to elicit an  
19 incriminating response and occurs while the individual  
20 interviewed is in custody.

21 "Custody." A state of affairs in which the individual who is  
22 interviewed by a law enforcement officer is physically deprived  
23 of his freedom in any significant way or is placed in a  
24 situation in which he reasonably believes his freedom of action  
25 or movement is restricted.

26 "Electronic recording." An audiovisual or audio recording of  
27 a statement.

28 "Interview." A conversation between a law enforcement  
29 officer and another individual that takes place in the course of  
30 a criminal investigation.

1 "Law enforcement agency." A government entity whose  
2 responsibilities include enforcement of criminal laws or the  
3 investigation of suspected criminal activity.

4 "Law enforcement officer." An officer or other employee of a  
5 law enforcement agency whose personal responsibilities include  
6 enforcement of criminal laws or the investigation of suspected  
7 criminal activity.

8 "Statement." An oral, written, sign language or nonverbal  
9 communication that takes place during a custodial interrogation.

10 § 8302. Recording requirement.

11 An electronic recording must be made of any custodial  
12 interrogation relating to the investigation of the following  
13 offenses:

14 (1) An offense under 18 Pa.C.S. Ch. 25 (relating to  
15 criminal homicide).

16 (2) An offense classified as a felony under 18 Pa.C.S.  
17 Ch. 31 (relating to sexual offenses).

18 (3) An offense under 18 Pa.C.S. Ch. 37 (relating to  
19 robbery).

20 (4) An offense classified as a felony under 18 Pa.C.S. §  
21 3301 (relating to arson and related offenses).

22 (5) An attempt under 18 Pa.C.S. § 901 (relating to  
23 criminal attempt) or conspiracy under 18 Pa.C.S. § 903  
24 (relating to criminal conspiracy) to commit an offense  
25 referred to in paragraph (1), (2), (3) or (4).

26 § 8303. Applicability.

27 (a) Exceptions.--Section 8302 (relating to recording  
28 requirement) does not apply if the court finds all of the  
29 following:

30 (1) That the statement is admissible as evidence.

1           (2) That the statement is proven by a preponderance of  
2 the evidence to have been made voluntarily and to be  
3 reliable.

4           (3) That a law enforcement officer made a  
5 contemporaneous record of the reason for not making an  
6 electronic recording of the statement, or it was proven by a  
7 preponderance of the evidence that it was not feasible to  
8 make such a record. The reason provided must be consistent  
9 with paragraph (4).

10          (4) That it is proven by a preponderance of the evidence  
11 that one or more of the following circumstances existed at  
12 the time of the custodial interrogation:

13           (i) The statement was made spontaneously and was not  
14 made in response to a question.

15           (ii) The statement was made spontaneously in the  
16 course of the routine intake processing of the  
17 individual.

18           (iii) The law enforcement officer in good faith  
19 failed to make an electronic recording of the custodial  
20 interrogation because the officer inadvertently failed to  
21 operate the recording equipment properly, or without the  
22 officer's knowledge, the recording equipment  
23 malfunctioned or stopped operating.

24           (iv) The custodial interrogation took place in  
25 another jurisdiction and was conducted by an official of  
26 that jurisdiction in compliance with the law of that  
27 jurisdiction.

28           (v) The law enforcement officers conducting or  
29 contemporaneously observing the custodial interrogation  
30 reasonably believed that the making of an electronic

1 recording would jeopardize the safety of the individual,  
2 a law enforcement officer, a confidential informant or  
3 another individual.

4 (vi) The law enforcement officers conducting or  
5 contemporaneously observing the custodial interrogation  
6 reasonably believed that the crime for which the  
7 individual was subjected to custodial interrogation was  
8 not among those listed in section 8302.

9 (vii) Exigent circumstances existed which prevented  
10 or made infeasible the making of an electronic recording  
11 of the custodial interrogation.

12 (viii) Before the custodial interrogation, the  
13 individual to be interrogated indicated that he would  
14 participate only if the custodial interrogation were not  
15 electronically recorded and, if feasible, the agreement  
16 to participate without recording were electronically  
17 recorded.

18 (b) Exclusions.--Section 8302 does not apply to a statement  
19 if any of the following apply:

20 (1) The statement is offered as evidence solely to  
21 impeach or rebut the testimony of the individual interrogated  
22 and not as substantive evidence.

23 (2) The custodial interrogation takes place before a  
24 grand jury or court of record.

25 § 8304. Wiretap exception to recording.

26 Notwithstanding 18 Pa.C.S. Ch. 57 (relating to wiretapping  
27 and electronic surveillance), a law enforcement officer engaged  
28 in custodial interrogation under section 8302 (relating to  
29 recording requirement) may record that custodial interrogation  
30 without consent or knowledge of that individual being held or

1 interrogated. A law enforcement officer may nevertheless obtain  
2 an individual's consent to recording or inform that individual  
3 that the custodial interrogation will be recorded.

4 § 8305. Sanctions.

5 Except as provided in section 8303 (relating to  
6 applicability), if the statement is obtained in violation of the  
7 terms of this subchapter and is otherwise admissible, the trial  
8 court shall instruct the jury that a State statute required the  
9 recording of the statement to ensure a more reliable  
10 determination at trial as to the circumstances and substance of  
11 any statement made by the defendant, that the police failed to  
12 abide by the terms of the statute and therefore no recording is  
13 available for the jury and that the jury may take into account  
14 the failure to record the statement in determining what weight  
15 to give the statement.

16 § 8306. Handling and preservation of electronic recordings.

17 (a) Handling.--The law enforcement agency shall clearly  
18 identify and catalog all electronic recordings.

19 (b) Preservation.--

20 (1) If a juvenile or criminal proceeding is brought  
21 against a person interrogated in an electronically recorded  
22 custodial interrogation, law enforcement personnel shall  
23 preserve the electronic recording until all appeals,  
24 postconviction and habeas corpus proceedings by the  
25 individual interrogated are concluded or the time within  
26 which such proceedings must be brought has expired.

27 (2) If a juvenile or criminal proceeding is not brought  
28 against an individual interrogated in an electronically  
29 recorded custodial interrogation, law enforcement personnel  
30 shall preserve the electronic recording until all applicable

1 Federal and State statutes of limitations bar prosecution of  
2 the individual.

3 SUBCHAPTER B

4 EYEWITNESS IDENTIFICATIONS

5 Sec.

6 8311. Short title of subchapter.

7 8312. Legislative purpose.

8 8313. Definitions.

9 8314. Eyewitness identification procedures.

10 8315. Trial practice.

11 8316. Dissemination of identification procedures.

12 § 8311. Short title of subchapter.

13 This subchapter shall be known and may be cited as the  
14 Eyewitness Identification Improvement Act.

15 § 8312. Legislative purpose.

16 The purpose of this subchapter is to help solve crime,  
17 convict the guilty and protect the innocent in criminal  
18 proceedings by improving procedures for eyewitness  
19 identification of suspected perpetrators while ensuring that  
20 police can promptly, safely and effectively investigate crimes.

21 § 8313. Definitions.

22 The following words and phrases when used in this subchapter  
23 shall have the meanings given to them in this section unless the  
24 context clearly indicates otherwise:

25 "Administrator." The individual who conducts a live or photo  
26 lineup.

27 "Blind lineup." A lineup where either of the following  
28 occurs:

29 (1) In the case of a live or photo lineup, the  
30 administrator does not know the identity of the suspect.

1           (2) In the case of a photo lineup in which the  
2           administrator knows the identity of the suspect, the  
3           administrator does not know which photograph the eyewitness  
4           is viewing at any given time.

5           "Eyewitness." An individual who observes another individual  
6           at or near the scene of a criminal offense.

7           "Filler." An individual who is not suspected of an offense  
8           and is included in an identification procedure.

9           "Identification procedure." An investigative procedure in  
10          which a law enforcement official requests an eyewitness to  
11          attempt to identify an individual who perpetrated a criminal  
12          offense. The term includes a live lineup, a photo lineup or a  
13          show-up.

14          "Law enforcement agency." A governmental entity whose  
15          responsibilities include enforcement of criminal laws or the  
16          investigation of suspected criminal activity.

17          "Law enforcement officer." An officer or other employee of a  
18          law enforcement agency whose personal responsibilities include  
19          enforcement of criminal laws or the investigation of suspected  
20          criminal activity.

21          "Live lineup." An identification procedure in which several  
22          individuals, including the suspect and fillers, are displayed to  
23          an eyewitness for the purpose of determining whether the  
24          eyewitness identifies the suspect as the perpetrator.

25          "Photo lineup." An identification procedure in which an  
26          array of photographs, comprising a photograph of the suspect and  
27          photographs of fillers, is displayed to an eyewitness either in  
28          hard copy form or via computer for the purpose of determining  
29          whether the eyewitness identifies the suspect as the  
30          perpetrator.

1 "Show-up." An identification procedure in which an  
2 eyewitness is presented with a suspect for the purpose of  
3 determining whether the eyewitness identifies the individual as  
4 the perpetrator.

5 "Suspect." The individual believed by law enforcement  
6 investigators to be the possible perpetrator of the crime.  
7 § 8314. Eyewitness identification procedures.

8 (a) General rule.--An eyewitness identification procedure  
9 conducted by a law enforcement agency must comply with this  
10 section.

11 (b) Description of the perpetrator.--Except as provided in  
12 subsection (h) (1), the eyewitness's description of the  
13 perpetrator and the circumstances under which the eyewitness  
14 observed the perpetrator, in the eyewitness's own words, shall  
15 be obtained and documented immediately prior to a live or photo  
16 lineup, unless such a description was recorded or otherwise  
17 documented by law enforcement personnel before the commencement  
18 of the identification procedure.

19 (c) Blind lineup administration.--Subject to the exceptions  
20 in this subsection, a blind lineup shall be conducted. If the  
21 lineup is not blind, the administrator shall state in writing  
22 the reason that a blind lineup was not used. A blind lineup need  
23 not be conducted if any of the following apply:

24 (1) A blind lineup is not practicable under the  
25 circumstances. The administrator shall state in writing the  
26 reasons that a blind lineup is not practicable.

27 (2) The law enforcement agency employs a single lineup  
28 administrator who conducts all of its lineups, counsel for  
29 the suspect is present at the lineup, and the identification  
30 procedure complies with subsections (d), (e), (f), (g), (i)

1 and (j).

2 (3) The law enforcement agency audiovisually records the  
3 identification process and that identification procedure  
4 complies with subsections (d), (e), (f), (g), (i) and (j).

5 (d) Prelineup instructions.--Prior to a live or photo  
6 lineup, the administrator shall apprise the eyewitness of all of  
7 the following:

8 (1) That the perpetrator may or may not be among the  
9 individuals presented in the identification procedure.

10 (2) That the eyewitness should not feel compelled to  
11 make an identification.

12 (3) That the investigation will continue whether or not  
13 an identification is made.

14 (4) That if an identification is made, the administrator  
15 will ask the eyewitness to state, in his own words, how  
16 certain he is of the identification.

17 (e) Contact among eyewitnesses.--If more than one eyewitness  
18 views a live or photo lineup in a session, the administrator  
19 shall not permit the eyewitnesses to communicate with each other  
20 until all identification procedures in the session have been  
21 completed. Reasonable efforts shall be made so that an  
22 eyewitness does not see or hear the identification or  
23 nonidentification made by any other witness.

24 (f) Lineup composition.--The administrator shall conduct the  
25 lineup such that:

26 (1) Only one suspect is included in a live or photo  
27 lineup.

28 (2) In a live lineup, the following apply:

29 (i) All lineup participants are out of view of the  
30 eyewitness prior to the identification procedure.

1           (ii) At least five fillers are used.

2           (iii) Any identifying actions, such as speech,  
3 gestures or movements, are performed by all lineup  
4 participants.

5           (3) In a photo lineup, the following apply:

6           (i) The photograph of the suspect is placed in a  
7 different position in the lineup for each eyewitness.

8           (ii) At least five fillers are used.

9           (g) Comment after lineup.--An administrator or law  
10 enforcement officer may not comment or otherwise indicate  
11 whether an identification has identified a suspect.

12          (h) Show-ups.--The following apply to show-ups:

13          (1) When practicable and when safe for the witness and  
14 law enforcement officers, the person conducting the show-up  
15 shall obtain the eyewitness's description of the perpetrator  
16 and shall record or otherwise document the description before  
17 commencing the show-up. If compliance with this paragraph is  
18 not practicable or safe, the person conducting the show-up  
19 shall state in writing the reasons for the failure to comply.

20          (2) When practicable and when safe for the witness and  
21 the law enforcement officers, the person conducting the  
22 show-up shall apprise the eyewitness of all of the following  
23 before commencing the show-up:

24           (i) That the perpetrator may or may not be the  
25 individual presented to the eyewitness.

26           (ii) That the eyewitness should not feel compelled  
27 to make an identification.

28           (iii) That the investigation will continue whether  
29 or not an identification is made.

30           (iv) That if an identification is made, the

1 administrator will ask the eyewitness to state, in his  
2 own words, how certain he is of the identification.

3 (3) When performing a show-up, law enforcement personnel  
4 shall take reasonable measures to preclude the eyewitness  
5 from drawing inferences prejudicial to the suspect, including  
6 the following:

7 (i) Refraining from suggesting through statements or  
8 nonverbal conduct that the suspect is or may be the  
9 perpetrator of the crime.

10 (ii) When practicable and when safe for the witness  
11 and the law enforcement officers, removing handcuffs from  
12 the suspect and having the show-up take place at some  
13 distance from a squad car.

14 (4) If there are multiple eyewitnesses to a criminal  
15 offense under investigation, police shall make reasonable  
16 efforts to prevent an eyewitness from seeing or hearing the  
17 identification or nonidentification made by any other  
18 witness.

19 (5) If an eyewitness is requested to make an  
20 identification of more than one suspect at a show-up, the  
21 suspects shall be separated and the person conducting the  
22 show-up shall perform a separate show-up for each suspect  
23 when practicable and when safe for the witness and the law  
24 enforcement officers.

25 (i) Confidence statement.--If an eyewitness identifies an  
26 individual as the perpetrator at an identification procedure,  
27 the administrator shall immediately request a statement from the  
28 eyewitness, in the eyewitness's own words, as to the  
29 eyewitness's confidence level that the individual he identified  
30 is the perpetrator. The eyewitness must not be permitted to see

1 or hear any information concerning the identified individual  
2 until after the administrator obtains the eyewitness's  
3 confidence statement.

4 (j) Record.--The administrator shall make a record of the  
5 identification procedure. The record must include all  
6 identification and nonidentification results obtained during the  
7 identification procedure as well as any confidence statement.

8 § 8315. Trial practice.

9 (a) Suppression.--The trial court may consider evidence of  
10 failure to comply with this subchapter in adjudicating a motion  
11 to suppress an eyewitness identification.

12 (b) Misidentification.--Evidence of failure to comply with  
13 this subchapter may be admitted at trial in support of a claim  
14 of eyewitness misidentification.

15 (c) Jury instruction.--

16 (1) If sufficient evidence of failure to comply with  
17 this subchapter is presented at trial, the trial court shall  
18 instruct the jury that it may consider the evidence of  
19 noncompliance as a reason to view the identification evidence  
20 with caution.

21 (2) At the request of either party, the trial court may  
22 instruct the jury as to the requirements of this subchapter  
23 and how compliance or failure to comply with those  
24 requirements may affect the reliability of the  
25 identification.

26 § 8316. Dissemination of identification procedures.

27 (a) Training.--The Pennsylvania State Police and the  
28 Municipal Police Officers' Education and Training Commission  
29 shall develop and conduct a training program for law enforcement  
30 officers and recruits regarding the method of conducting

1 identification procedures under this subchapter and the  
2 scientific findings supporting the methods prescribed by this  
3 subchapter.

4 (b) Adoption of procedures.--Each law enforcement agency  
5 shall adopt a written protocol for eyewitness identification  
6 procedures consistent with this subchapter.

7 Section 13. Title 44 is amended by adding a part to read:

8 PART V  
9 FORENSIC LABORATORIES

10 Chapter

11 91. Preliminary Provisions (Reserved)

12 93. Accreditation

13 95. Oversight

14 CHAPTER 91  
15 PRELIMINARY PROVISIONS  
16 (RESERVED)

17 CHAPTER 93  
18 ACCREDITATION

19 Subchapter

20 A. Public Laboratories

21 B. (Reserved)

22 SUBCHAPTER A  
23 PUBLIC LABORATORIES

24 Sec.

25 9301. Definitions.

26 9302. Technical peer review system.

27 9303. Proficiency testing program.

28 9304. Accreditation.

29 9305. External investigation.

30 § 9301. Definitions.

1 The following words and phrases when used in this subchapter  
2 shall have the meanings given to them in this section unless the  
3 context clearly indicates otherwise:

4 "Forensic laboratory." A laboratory operated by the  
5 Commonwealth or a municipality whose experts perform forensic  
6 tests and provide opinion testimony in a court of law.

7 "Forensic test." A medical, chemical, toxicological,  
8 ballistic or other expert examination or test performed on  
9 physical evidence, including DNA evidence, to determine the  
10 association of evidence to a crime.

11 "Nationally recognized accreditation standards." Standards  
12 adopted by the American Society of Crime Laboratory Directors  
13 Laboratory Accreditation Board, the American Board of Forensic  
14 Toxicology or a similar board that covers a forensic test or  
15 examination done by a forensic investigator or scientist.

16 "Physical evidence." A tangible object or substance relating  
17 to a crime.

18 "Proficiency testing program." A program whereby the  
19 competency of analysis and the quality of performance of a  
20 laboratory is evaluated by external testing.

21 "Technical peer review system." A system whereby the  
22 casework by an employee of a forensic laboratory is reviewed for  
23 administrative and technical correctness by a qualified  
24 administrator or peer or both.

25 § 9302. Technical peer review system.

26 All forensic laboratories shall have a technical peer review  
27 system sufficient to meet or exceed nationally recognized  
28 accreditation standards.

29 § 9303. Proficiency testing program.

30 All forensic laboratories shall have a proficiency testing

1 program sufficient to meet or exceed nationally recognized  
2 accreditation standards.

3 § 9304. Accreditation.

4 (a) General rule.--All forensic laboratories shall be  
5 accredited by a nationally recognized accrediting board for the  
6 forensic tests performed by the forensic laboratory.

7 (b) Exception.--A forensic laboratory may be exempt from the  
8 accreditation required under subsection (a) if independent  
9 accreditation by a nationally recognized accrediting board is  
10 unavailable or inappropriate for the forensic laboratory or the  
11 applicable forensic test.

12 § 9305. External investigation.

13 The Commonwealth and municipalities with forensic  
14 laboratories shall have a governmental entity with an  
15 appropriate process in place to independently, externally  
16 investigate allegations of serious negligence or misconduct  
17 committed by employees or contractors of the forensic laboratory  
18 that substantially affect the integrity of forensic results.

19 SUBCHAPTER B

20 (RESERVED)

21 CHAPTER 95

22 OVERSIGHT

23 Subchapter

24 A. Advisory Board

25 B. (Reserved)

26 SUBCHAPTER A

27 ADVISORY BOARD

28 Sec.

29 9501. Establishment.

30 9502. Powers and duties.

1 9503. Cooperation.

2 9504. Report.

3 9505. Investigations.

4 § 9501. Establishment.

5 (a) Membership.--There is established a Forensic Advisory  
6 Board, which shall consist of:

7 (1) The director of the Pennsylvania State Police's  
8 Bureau of Forensic Services, ex officio.

9 (2) A forensic scientist employed by the Pennsylvania  
10 State Police's Bureau of Forensic Services.

11 (3) Two forensic scientists employed by accredited,  
12 privately operated forensic laboratories.

13 (4) A director of a forensic laboratory operated by a  
14 municipality.

15 (5) The Attorney General, ex officio.

16 (6) A full-time, sworn chief of police.

17 (7) A district attorney.

18 (8) A public defender.

19 (9) A criminal defense attorney who is not a public  
20 defender.

21 (10) A judge from a court of common pleas.

22 (11) A criminal justice or forensic science faculty  
23 member from the Pennsylvania State System of Higher  
24 Education.

25 (12) A board-certified forensic pathologist who is a  
26 coroner or medical examiner.

27 (b) Terms.--The members under subsection (a) (1) and (5)  
28 shall serve ex officio. The member under subsection (a) (2) shall  
29 serve at the pleasure of the director of the Pennsylvania State  
30 Police's Bureau of Forensic Services. All other members shall

1 serve a term of three years, except the members initially  
2 appointed under subsection (a) (7), (9) and (12), whose initial  
3 term shall be one year and the members initially appointed under  
4 subsection (a) (8) and (11) and one of those appointed under  
5 subsection (a) (3), whose initial term shall be two years.  
6 Vacancies shall be filled by the appointing authority for the  
7 remainder of the vacated term.

8 (c) Appointments.--The member under subsection (a) (2) shall  
9 be appointed by the director of the Pennsylvania State Police's  
10 Bureau of Forensic Services. The ex officio members may  
11 designate a substitute to serve on the Forensic Advisory Board.  
12 The member appointed under subsection (a) (4) may designate a  
13 subordinate who is a forensic scientist to substitute for and  
14 serve on the Forensic Advisory Board. The chief justice shall  
15 appoint the member under subsection (a) (10). All other members  
16 shall be appointed by the Governor. Members may be reappointed.  
17 The board may annually select a chairman and vice chairman, who  
18 shall be selected from the members under subsection (a) (3), (10),  
19 (11) and (12).

20 (d) Quorum.--Seven members of the Forensic Advisory Board  
21 constitute a quorum.

22 § 9502. Powers and duties.

23 (a) Recommendations.--The Forensic Advisory Board shall  
24 review and make recommendations as to how best to configure,  
25 fund and improve the delivery of State and municipal forensic  
26 laboratory services. To the extent feasible, the review and  
27 recommendations shall include, but are not limited to,  
28 addressing the following issues:

29 (1) If the existing mix of Commonwealth and municipal  
30 forensic laboratories is the most effective and efficient

1 means to meet current and projected needs.

2 (2) Whether publicly operated forensic laboratories  
3 should be consolidated. If consolidation occurs, who should  
4 have oversight of forensic laboratories.

5 (3) Whether all publicly operated forensic laboratories  
6 should provide similar services or if certain services should  
7 be centralized.

8 (4) Consideration of how other states manage and oversee  
9 their forensic laboratories.

10 (5) With respect to staff and training, consideration of  
11 the following:

12 (i) How to address recruitment and retention of  
13 forensic laboratory staff.

14 (ii) Whether educational and training opportunities  
15 are adequate to meet projected staffing requirements of  
16 publicly operated forensic laboratories.

17 (iii) Whether continuing education is available to  
18 ensure that forensic science personnel are up-to-date in  
19 their fields of expertise.

20 (iv) If forensic laboratory personnel should be  
21 certified and if so, the appropriate certifier.

22 (v) Whether continuing education available to the  
23 bar and judiciary adequately serves the needs of the  
24 criminal justice system.

25 (6) With respect to funding, consideration of the  
26 following:

27 (i) Whether the current method of funding publicly  
28 operated forensic laboratories is predictable, stable and  
29 adequate to meet future growth demands and to provide  
30 accurate and timely testing results.

1           (ii) The adequacy of salary structures at publicly  
2 operated forensic laboratories to attract and retain  
3 competent analysts and examiners.

4           (iii) Whether publicly operated forensic  
5 laboratories are appropriately maximizing their  
6 opportunities to receive grants and other supplements.

7           (7) With respect to performance standards and equipment,  
8 consideration of the following:

9           (i) Whether workload demands at publicly operated  
10 forensic laboratories are being prioritized properly to  
11 deal with backlogs and whether there are important  
12 workload issues not being addressed.

13           (ii) If existing publicly operated forensic  
14 laboratories have the necessary capabilities, staffing  
15 and equipment.

16           (iii) Whether publicly operated forensic  
17 laboratories are compliant with Chapter 93 (relating to  
18 accreditation).

19           (b) Reporting system.--The Forensic Advisory Board shall  
20 develop and implement a reporting system through which a  
21 publicly operated forensic laboratory reports professional  
22 negligence and misconduct.

23           (c) Standards.--The Forensic Advisory Board shall promulgate  
24 standards it approves under 42 Pa.C.S. § 9502(c) (relating to  
25 preservation of biological evidence).

26           (d) Training.--The Forensic Advisory Board may coordinate,  
27 offer and collect a fee to train or otherwise provide continuing  
28 education relating to forensic science and its applications to  
29 criminal investigators, crime scene investigators, prosecutors,  
30 defense attorneys, judges, forensic nurses, coroners, medical

1 examiners, forensic scientists and others involved in criminal  
2 justice who would benefit from these educational opportunities.  
3 § 9503. Cooperation.

4 Forensic laboratories operated by the Commonwealth and  
5 municipalities shall cooperate with and assist the Forensic  
6 Advisory Board. Administrative support for the Forensic Advisory  
7 Board shall be provided by the Governor's Office.

8 § 9504. Report.

9 The Forensic Advisory Board shall periodically report its  
10 recommendations and basis for its recommendations as well as the  
11 results of any investigations to the investigated entity or  
12 party, the Governor and the General Assembly. The  
13 recommendations shall be made publicly accessible.

14 § 9505. Investigations.

15 (a) Professional negligence; misconduct.--For an  
16 investigation under section 9305 (relating to external  
17 investigation), the Forensic Advisory Board shall timely  
18 investigate any allegation reported under section 9502(b)  
19 (relating to powers and duties) and may investigate other  
20 allegations of professional negligence or misconduct that would  
21 substantially affect the integrity of the results of forensic  
22 analyses.

23 (b) Costs.--Any costs incurred by the board shall be borne  
24 by the laboratory, facility or entity being investigated.

25 (c) Assistance.--If necessary, the board may contract with a  
26 qualified person or ask any publicly employed forensic scientist  
27 to assist the board in fulfilling its duties under this section.  
28 In obtaining assistance under this subsection, the board may  
29 neither ask nor accept assistance from a forensic scientist  
30 employed by a publicly operated forensic laboratory that is the

1 subject of the investigation.

2 (d) Recusal.--Any member of the board associated with a  
3 publicly operated forensic laboratory that is the subject of an  
4 investigation under this section must recuse himself from any  
5 deliberation and action the board might take in the matter.

6 (e) Duties.--The board shall:

7 (1) Prepare a written report that identifies and  
8 describes all methods and procedures used to discover the  
9 alleged actions, whether the allegations are founded and any  
10 corrective actions taken or suggested.

11 (2) Conduct retrospective examinations of other forensic  
12 analyses to determine if a pattern of negligence or  
13 misconduct exists and to perform follow-up examinations to  
14 make certain any and all corrective actions were properly  
15 implemented.

16 (3) Ensure compliance with established retention and  
17 preservation of evidence regulations.

18 SUBCHAPTER B

19 (RESERVED)

20 Section 14. This act shall take effect as follows:

21 (1) The following provisions shall take effect  
22 immediately:

23 (i) This section.

24 (ii) The addition of 44 Pa.C.S. § 9301 and Ch. 95.

25 (2) The addition of 42 Pa.C.S. § 5919.1 shall take  
26 effect in 60 days.

27 (3) The following provisions shall take effect in 180  
28 days:

29 (i) The amendment of 18 Pa.C.S. § 9122(a).

30 (ii) The amendment of 42 Pa.C.S. §§ 8521(a) and

1           8522 (b) .

2           (iii) The addition of 42 Pa.C.S. Ch. 85 Subch. D.

3           (4) The addition 44 Pa.C.S. Ch. 83 Subch. A shall take  
4 effect in one year.

5           (5) The addition of 44 Pa.C.S. § 9302 shall take effect  
6 in three years.

7           (6) The addition of 44 Pa.C.S. § 9303 shall take effect  
8 in five years.

9           (7) The addition of 44 Pa.C.S. § 9304 shall take effect  
10 in seven years.

11           (8) The addition of 44 Pa.C.S. § 9305 shall take effect  
12 in two years.

13           (9) The remainder of this act shall take effect in 120  
14 days.