S T A T E O F N E W Y O R K

4879

2011-2012 Regular Sessions

I N A S S E M B L Y

February 8, 2011

Introduced by M. of A. P. RIVERA -- Multi-Sponsored by -- M. of A. GIBSON, GLICK, GOTTFRIED, HEASTIE, HIKIND, McDONOUGH, SCARBOROUGH -- read once and referred to the Committee on Codes

AN ACT to amend the criminal procedure law, in relation to exculpatory material

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The criminal procedure law is amended by adding a new section 240.25 to read as follows:

S 240.25 DISCLOSURE OF INFORMATION EXCULPATORY TO THE DEFENSE.

1. DEFINITION. EXCULPATORY INFORMATION INCLUDES, BUT IS NOT LIMITED TO, INFORMATION THAT IS MATERIAL AND FAVORABLE TO THE ACCUSED BECAUSE THE INFORMATION:

(A) CASTS DOUBT ON WHETHER THE CONDUCT OF THE ACCUSED SATISFIED ONE OR MORE OF THE ELEMENTS OF A CRIME CHARGED IN THE INDICTMENT, INFORMATION, OR OTHER CHARGING INSTRUMENT;

(B) CASTS DOUBT ON WHETHER THE CRIME CHARGED OCCURRED;

(C) CASTS DOUBT ON THE ADMISSIBILITY OF EVIDENCE THAT THE PROSECUTOR ANTICIPATES OFFERING IN THE PROSECUTION'S CASE-IN-CHIEF BECAUSE THE INFORMATION PROVIDES A BASIS FOR A MOTION TO SUPPRESS OR EXCLUDE SUCH EVIDENCE;

(D) CASTS DOUBT ON THE CREDIBILITY OR ACCURACY OF TESTIMONY OR OTHER EVIDENCE THAT THE PROSECUTOR ANTICIPATES OFFERING IN HIS OR HER CASE-IN-CHIEF;

(E) DIMINISHES THE DEGREE OF THE ACCUSED'S CULPABILITY OR THE LEVEL OF OFFENSE CHARGED;

(F) SUPPORTS A DEFENSE TO THE CHARGE OR CHARGES PENDING AGAINST THE ACCUSED;

(G) MITIGATES, REDUCES OR AFFECTS THE SENTENCE THAT MUST OR MIGHT BE IMPOSED;

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

LBD07101-01-1

(H) TENDS TO LEAD TO INFORMATION THAT WOULD SATISFY PARAGRAPHS (A) THROUGH (G) OF THIS SUBDIVISION.

2. TIMING OF FIRST DELIVERY OF INFORMATION. WITHOUT A MOTION BY THE DEFENSE, THE FOLLOWING INFORMATION MUST BE DISCLOSED AND DELIVERED BY THE PROSECUTION TO THE DEFENSE WITHIN TWENTY-EIGHT DAYS OF ARRAIGNMENT ON THE FIRST CHARGING INSTRUMENT:

(A) INFORMATION THAT CASTS DOUBT ON THE GUILT OF THE ACCUSED OF ANY CHARGE IN THE INDICTMENT, INFORMATION OR OTHER CHARGING INSTRUMENT;

(B) INFORMATION THAT CASTS DOUBT ON THE ADMISSIBILITY OF EVIDENCE THAT THE PROSECUTOR ANTICIPATES OFFERING IN HIS OR HER CASE-IN-CHIEF AND THAT COULD BE THE BASIS OF A MOTION TO SUPPRESS OR EXCLUDE;

(C) A STATEMENT AS TO WHETHER ANY PROMISE, REWARD, OR INDUCEMENT HAS BEEN GIVEN TO ANY WITNESS WHOM THE PROSECUTOR ANTICIPATES CALLING IN HIS OR HER CASE-IN-CHIEF, IDENTIFYING BY NAME EACH SUCH WITNESS AND EACH PROMISE, REWARD, OR INDUCEMENT, AND A COPY OF ANY PROMISE, REWARD, OR INDUCEMENT THAT HAS BEEN REDUCED TO WRITING OR PRINT;

(D) A COPY OF ANY CRIMINAL RECORD OF ANY WITNESS IDENTIFIED BY NAME WHOM THE PROSECUTOR ANTICIPATES CALLING IN HIS OR HER CASE-IN-CHIEF INCLUDING THE COURT OF CONVICTION, THE CRIME OF WHICH THE WITNESS WAS CONVICTED, THE DATE OF THE CONVICTION, AND THE NUMBER OF THE CASE;

(E) A WRITTEN STATEMENT SETTING OUT CRIMINAL CHARGES PENDING AGAINST A WITNESS, WHO SHALL BE IDENTIFIED BY NAME, WHOM THE PROSECUTOR ANTICIPATES CALLING IN HIS OR HER CASE-IN-CHIEF;

(F) A WRITTEN STATEMENT SETTING OUT THE FAILURE OF A POTENTIAL WITNESS, WHO SHALL BE IDENTIFIED BY NAME, TO MAKE A POSITIVE IDENTIFICATION OF THE ACCUSED IN AN IDENTIFICATION PROCEDURE THAT HAS BEEN HELD WITH SUCH A WITNESS WITH RESPECT TO THE CRIME;

(G) A WRITTEN OR ORAL STATEMENT FROM ANY PERSON OR OTHER INFORMATION THAT TENDS TO SUPPORT A DEFENSE TO THE CHARGES.

3. PRETRIAL DELIVERY. WITHOUT A MOTION BY THE DEFENSE, THE FOLLOWING INFORMATION MUST BE DISCLOSED AND DELIVERED NOT LATER THAN TWENTY-ONE DAYS PRIOR TO THE DATE FIRST SET FOR TRIAL:

(A) INFORMATION THAT CASTS DOUBT ON THE CREDIBILITY OR ACCURACY OF EVIDENCE, INCLUDING TESTIMONY OF WITNESSES, CONCERNING MATERIAL ISSUES RELATING TO WHETHER A CRIME WAS COMMITTED AND WHETHER THE ACCUSED COMMITTED IT, THAT THE PROSECUTOR ANTICIPATES PRESENTING IN HIS OR HER CASE-IN-CHIEF;

(B) ANY INCONSISTENT WRITTEN OR ORAL STATEMENT REGARDING THE ALLEGED CRIMINAL CONDUCT OF THE ACCUSED OR A DESCRIPTION OF SUCH STATEMENT, MADE BY A PERSON WHOM THE PROSECUTION ANTICIPATES CALLING IN HIS OR HER CASE-IN-CHIEF;

(C) ANY STATEMENT REGARDING THE ALLEGED CRIMINAL CONDUCT OF THE ACCUSED OR A DESCRIPTION OF SUCH STATEMENT, MADE ORALLY OR IN WRITING BY ANY PERSON, THAT IS INCONSISTENT WITH A STATEMENT MADE ORALLY OR IN WRITING BY A WITNESS THE PROSECUTION ANTICIPATES CALLING IN HIS OR HER CASE-IN-CHIEF;

(D) ANY INFORMATION REFLECTING BIAS OR PREJUDICE AGAINST THE DEFENDANT BY A WITNESS WHOM THE PROSECUTOR ANTICIPATES CALLING IN HIS OR HER CASE-IN-CHIEF;

(E) A WRITTEN DESCRIPTION OF ANY PRIOR BAD ACT THAT CONSTITUTES A CRIME KNOWN BY THE PROSECUTOR TO HAVE BEEN COMMITTED BY ANY WITNESS WHOM THE PROSECUTION ANTICIPATES CALLING IN HIS OR HER CASE-IN-CHIEF;

(F) INFORMATION KNOWN OR ASCERTAINABLE TO THE PROSECUTOR OF ANY MENTAL OR PHYSICAL IMPAIRMENT OF ANY WITNESS WHOM THE PROSECUTOR ANTICIPATES CALLING IN HIS OR HER CASE-IN-CHIEF THAT MAY CAST DOUBT ON THE ABILITY

OF THAT WITNESS TO OBSERVE AND ACCURATELY AND TRUTHFULLY RECALL, AND TO RELATE INFORMATION ABOUT A RELEVANT EVENT OR OTHER MATERIAL INFORMATION;

(G) ANY OTHER INFORMATION THAT IS WITHIN THE DEFINITION SET OUT IN SUBDIVISION ONE OF THIS SECTION;

(H) ANYTHING REQUIRED TO BE DISCLOSED, PRIOR TO TRIAL, TO THE DEFENDANT BY THE PROSECUTOR, PURSUANT TO THE CONSTITUTION OF THIS STATE OR OF THE UNITED STATES.

4. DELIVERY OF INFORMATION. THE PROSECUTOR SHALL DISCLOSE TO THE DEFENDANT AND MAKE AVAILABLE FOR INSPECTION, EXAMINATION, PHOTOCOPYING, COPYING, PRINT OUT, RETRIEVAL, TESTING, OR INTERVIEW (FOR STATEMENTS PREVIOUSLY MADE BUT NOT RECORDED IN WRITING OR MECHANICALLY) OR BY ANY OTHER METHOD OF ACCESS, ALL INFORMATION INCLUDING BUT NOT LIMITED TO THAT IN PROPERTY, DOCUMENTS, REPORTS, RECORDINGS, VIDEOS, RECORDS, IN THE KNOWLEDGE OF A PERSON BUT NOT RECORDED (ALL HEREINAFTER CALLED INFORMATION) WHICH WOULD PROVIDE THE INFORMATION SET OUT IN SUBDIVISIONS ONE, TWO, AND THREE OF THIS SECTION REGARDLESS OF WHETHER SUCH INFORMATION WOULD ITSELF CONSTITUTE ADMISSIBLE EVIDENCE AT TRIAL OR IS OTHERWISE KNOWN TO THE DEFENDANT.

5. CONTINUING OBLIGATION. IF AT ANY TIME AFTER THE TIME PERIODS SET FORTH ABOVE THE PROSECUTOR LEARNS OF ADDITIONAL INFORMATION REQUIRED TO BE DISCLOSED TO THE DEFENDANT PURSUANT TO SUBDIVISIONS ONE, TWO AND THREE OF THIS SECTION, THE PROSECUTOR SHALL, PURSUANT TO THE CONTINUING OBLIGATION TO DELIVER TO THE DEFENSE THE INFORMATION REQUIRED BY SUBDIVISIONS ONE, TWO AND THREE OF THIS SECTION, PROMPTLY NOTIFY THE DEFENDANT AND THE COURT OF THE EXISTENCE OF SUCH INFORMATION AND EXPEDITIOUSLY MAKE SUCH ITEMS AVAILABLE TO THE DEFENDANT FOR INSPECTION, PHOTOCOPYING, COPYING, TESTING OR OTHER REPRODUCTION AS SET OUT IN SUBDIVISION FOUR OF THIS SECTION.

6. APPLICATION TO THE COURT. (A) THE PROSECUTOR MAY SEEK A PROTECTIVE ORDER BASED ON A REASONABLE SHOWING THAT A WITNESS OR OTHER PERSON WOULD BE ENDANGERED BY DISCLOSURE OF THE INFORMATION REQUIRED BY THIS SECTION. IF THE COURT FINDS THAT THE PROSECUTOR HAS MADE A REASONABLE SHOWING THAT A WITNESS OR OTHER PERSON WOULD BE ENDANGERED BY DISCLOSURE, THE COURT SHALL CONDUCT AN IN CAMERA REVIEW OF THE CLAIM, AND, IF APPROPRIATE, REDACT THE INFORMATION GIVEN TO THE DEFENSE UNTIL SUCH TIME AS THE LAW OR OTHER CIRCUMSTANCES OF THE CASE REQUIRE DISCLOSURE OF THE INFORMATION.

(B) IF IN THE CIRCUMSTANCES OF A CASE, THE PROSECUTOR, AT ANY TIME, ASSERTS THAT INFORMATION WAS NOT DELIVERED OR WAS DELIVERED LATE OR IS NOT EXCULPATORY WITHIN THE TERMS OF THIS STATUTE OR AS REQUIRED BY THE STATE OR UNITED STATES CONSTITUTIONS AND WAS NOT DELIVERED BASED ON THAT REASON, THE COURT SHALL MAKE AN INDEPENDENT EVALUATION AND DETERMINATION, AFTER HEARING FROM DEFENSE COUNSEL, AS TO WHETHER THE INFORMATION SHOULD BE DELIVERED PURSUANT TO THIS SUBDIVISION.

(C) THE PROSECUTOR'S VIEW OF WHETHER THE INFORMATION IS TRUTHFUL OR ACCURATE SHALL NOT BE A FACTOR USED BY THE PROSECUTOR OR THE COURT TO DETERMINE WHETHER THE INFORMATION MUST BE DELIVERED TO THE DEFENSE PURSUANT TO THIS SECTION.

7. INQUIRIES. PRIOR TO THE REQUIRED DATES FOR THE DISCLOSURE OF INFORMATION TO THE DEFENSE, THE PROSECUTOR SHALL MAKE INQUIRIES TO LEARN WHETHER THOSE AGENCIES DEEMED BY LAW TO BE ASSISTING THE PROSECUTOR ARE IN POSSESSION OF INFORMATION DEFINED IN SUBDIVISIONS ONE, TWO, AND THREE OF THIS SECTION, AND SHALL OBTAIN THE INFORMATION FOR DELIVERY TO THE DEFENSE IN ACCORD WITH THIS SECTION.

8. CONFERENCE AND CERTIFICATION. (A) AT A TIME SET BY THE COURT BEFORE THE FIRST DESIGNATED TRIAL DATE AND AT SUCH FURTHER TIMES AS THE COURT

ORDERS, THE PROSECUTOR SHALL IDENTIFY FOR THE COURT THE INFORMATION THAT HAS BEEN DELIVERED TO THE DEFENSE AND CERTIFY THE DELIVERY. THE COURT SHALL HOLD A CONFERENCE TO DETERMINE WHETHER THE PROSECUTOR HAS EXAMINED THE PROSECUTOR'S FILE AND THE FILES OF THOSE ASSISTING THE PROSECUTOR AND HAS DELIVERED THE REQUIRED INFORMATION.

(B) IF THE PROSECUTOR DELIVERS TO THE DEFENSE PURSUANT TO THIS STATUTE LARGE QUANTITIES OF INFORMATION, WHETHER OF DOCUMENTS, ELECTRONIC INFORMATION, OR OTHER FORMAT, WITHOUT IDENTIFICATION OF ITS SIGNIFICANCE TO THE CASE, THE COURT SHALL ESTABLISH IN THE CONFERENCE THE PROCEDURE FOR IDENTIFICATION OF THE INFORMATION AND IF NEEDED GRANT AN ADJOURNMENT FOR THAT TO BE ACCOMPLISHED BY THE PROSECUTOR AND EXAMINED BY THE DEFENSE.

9. SANCTIONS FOR LATE DELIVERY OR FAILURE TO DELIVER INFORMATION DEFINED IN THIS SECTION. WHERE THERE IS A FAILURE BY THE PROSECUTOR TO DELIVER THE INFORMATION SET OUT IN THIS SECTION, OR THE INFORMATION IS DELIVERED AFTER THE REQUIRED TIME PERIOD, AT THE REQUEST OF THE DEFENSE OR IN THE COURT'S DISCRETION, THE COURT SHALL ORDER ONE OR MORE OF THE FOLLOWING SANCTIONS:

(A) GRANT AN APPROPRIATE EXTENSION OF TIME IN THE PROCEEDING TO ALLOW THE DEFENSE TO EXAMINE THE INFORMATION AND TO INVESTIGATE BASED ON THE LATE DELIVERED INFORMATION. FOR THAT EFFORT, THE COURT MAY AUTHORIZE FOR THE DEFENSE INVESTIGATORS, LAB TESTS, EXPERTS AND OTHER RESOURCES TO CONDUCT THE DEFENSE INVESTIGATION;

(B) REOPEN A PRE-TRIAL HEARING;

(C) PRECLUDE INTRODUCTION OF EVIDENCE;

(D) INSTRUCT THE JURY THAT THE PROSECUTOR HAS NOT DELIVERED OR DELIVERED ONLY AFTER IMPROPER DELAY EVIDENCE THAT SHOULD HAVE BEEN DELIVERED AND DELIVERED TIMELY AND THAT THE JURORS MAY INFER THAT THE INFORMATION NOT DISCLOSED WAS EXCULPATORY OR, IF NOT DISCLOSED OR DISCLOSED ONLY AFTER UNDUE DELAY, COULD HAVE LED TO EXCULPATORY INFORMATION AS DEFINED IN SUBDIVISIONS ONE, TWO AND THREE OF THIS SECTION;

(E) NOTIFY THE SUPERVISING PROSECUTOR;

(F) REFER THE MATTER TO THE APPROPRIATE ATTORNEY DISCIPLINARY COMMITTEE PURSUANT TO SUBDIVISION TEN OF THIS SECTION IF AFTER CONDUCTING SUCH INQUIRY AS THE COURT DEEMS APPROPRIATE AND ISSUING AN OPINION STATING THE COURT'S FINDINGS, THE ATTORNEY'S CONDUCT IS ASSERTED TO BE IMPROPER UNDER THE RULES OF PROFESSIONAL CONDUCT.

10. LAWYER SANCTIONS. (A) ANY JUDICIAL OPINION WHICH CONCLUDES THAT THERE WAS AN INTENTIONAL OR RECKLESS FAILURE TO COMPLY WITH THIS SECTION BY A PROSECUTOR SHALL BE FORWARDED BY THE CLERK OF THE COURT IN WHICH THE OPINION IS FILED TO THE ATTORNEY DISCIPLINARY COMMITTEE WITH JURISDICTION.

(B) IF IN CONNECTION WITH THE OBLIGATION TO DELIVER INFORMATION SET OUT IN THIS SECTION OR THE STATE AND UNITED STATES CONSTITUTIONS, A TRIAL OR APPELLATE COURT HAS CONCLUDED THAT IN THE COURSE OF A CRIMINAL PROCEEDING, A PROSECUTOR HAS VIOLATED RULES 3.4(A)(1), 3.4(A)(3) OR 3.8(B) OF THE RULES OF PROFESSIONAL CONDUCT, OR OTHER RELEVANT STATUTES AND RULES, BY INTENTIONALLY OR RECKLESSLY FAILING TO DELIVER OR TIMELY DELIVER TO THE DEFENSE THE INFORMATION SET OUT IN THIS SECTION, THE CONDUCT SHALL BE REFERRED BY THE JUDGE PURSUANT TO RULE 100.3(D)(2) OF THE CODE OF JUDICIAL CONDUCT TO THE ATTORNEY DISCIPLINARY COMMITTEE OF THE APPROPRIATE JUDICIAL DISTRICT FOR PROCEEDINGS PURSUANT TO APPLICABLE RULES.

(C) IF AN ATTORNEY HAS A REASONABLE BASIS TO BELIEVE THAT A PROSECUTOR HAS INTENTIONALLY OR RECKLESSLY FAILED TO DELIVER INFORMATION AS DEFINED IN THIS STATUTE, THAT ATTORNEY SHALL NOTIFY THE ATTORNEY DISCIPLINARY COMMITTEE OF THE APPROPRIATE JUDICIAL DISTRICT PURSUANT TO RULE 8.3(A)

OF THE RULES OF PROFESSIONAL CONDUCT FOR PROCEEDINGS PURSUANT TO COURT RULES.

(D) IF MORE THAN ONE EVENT IS REFERRED TO THE ATTORNEY DISCIPLINARY COMMITTEE, THE REFERRALS SHALL BE CONSOLIDATED.

11. USE OF FALSE INFORMATION. THE PROVISIONS OF SUBDIVISION TEN OF THIS SECTION SHALL APPLY TO A PROSECUTOR FOR THE KNOWING OR RECKLESS USE OF FALSE OR UNTRUTHFUL EVIDENCE.

S 2. Subdivision 1 of section 240.20 of the criminal procedure law is amended by adding a new paragraph (l) to read as follows:

(L) INFORMATION RESULTING FROM COMPARING DNA TEST RESULTS ON SPECIMENS FROM CRIME SCENE SAMPLE OR SAMPLES OBTAINED IN THE COURSE OF AN INVESTIGATION OF AN ALLEGED CRIME WITH THE DNA RECORDS MAINTAINED BY OR AVAILABLE THROUGH THE STATE DNA IDENTIFICATION INDEX ESTABLISHED PURSUANT TO NEW YORK LAW OR ANY OFFICIAL FEDERAL DNA INDEX.

S 3. Subdivision 1 of section 440.10 of the criminal procedure law is amended by adding a new paragraph (j) to read as follows:

(J) THE PEOPLE HAVE FAILED TO PROVIDE OR TO PROVIDE IN A TIMELY MANNER EVIDENCE EXCULPATORY TO THE DEFENSE AS DEFINED IN SECTION 240.25 OF THIS CHAPTER AND HAVE FAILED TO PROVE THAT THERE WAS NO POSSIBILITY THAT THE INFORMATION WOULD HAVE AFFECTED THE DECISION.

S 4. This act shall take effect on the sixtieth day after it shall have become a law.