

3276

2011-2012 Regular Sessions

I N S E N A T E

February 15, 2011

Introduced by Sen. HASSELL-THOMPSON -- read twice and ordered printed,
and when printed to be committed 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 ASSEM-
BLY, DO ENACT AS FOLLOWS:

1 Section 1. The criminal procedure law is amended by adding a new
2 section 240.25 to read as follows:
3 S 240.25 DISCLOSURE OF INFORMATION EXCULPATORY TO THE DEFENSE.
4 1. DEFINITION. EXCULPATORY INFORMATION INCLUDES, BUT IS NOT LIMITED
5 TO, INFORMATION THAT IS MATERIAL AND FAVORABLE TO THE ACCUSED BECAUSE
6 THE INFORMATION:
7 (A) CASTS DOUBT ON WHETHER THE CONDUCT OF THE ACCUSED SATISFIED ONE OR
8 MORE OF THE ELEMENTS OF A CRIME CHARGED IN THE INDICTMENT, INFORMATION,
9 OR OTHER CHARGING INSTRUMENT;
10 (B) CASTS DOUBT ON WHETHER THE CRIME CHARGED OCCURRED;
11 (C) CASTS DOUBT ON THE ADMISSIBILITY OF EVIDENCE THAT THE PROSECUTOR
12 ANTICIPATES OFFERING IN THE PROSECUTION'S CASE-IN-CHIEF BECAUSE THE
13 INFORMATION PROVIDES A BASIS FOR A MOTION TO SUPPRESS OR EXCLUDE SUCH
14 EVIDENCE;
15 (D) CASTS DOUBT ON THE CREDIBILITY OR ACCURACY OF TESTIMONY OR OTHER
16 EVIDENCE THAT THE PROSECUTOR ANTICIPATES OFFERING IN HIS OR HER
17 CASE-IN-CHIEF;
18 (E) DIMINISHES THE DEGREE OF THE ACCUSED'S CULPABILITY OR THE LEVEL OF
19 OFFENSE CHARGED;
20 (F) SUPPORTS A DEFENSE TO THE CHARGE OR CHARGES PENDING AGAINST THE
21 ACCUSED;
22 (G) MITIGATES, REDUCES OR AFFECTS THE SENTENCE THAT MUST OR MIGHT BE
23 IMPOSED;
24 (H) TENDS TO LEAD TO INFORMATION THAT WOULD SATISFY PARAGRAPHS (A)
25 THROUGH (G) OF THIS SUBDIVISION.

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

LBD07101-01-1

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

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

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

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

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

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

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

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

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

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

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

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

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

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

51 (F) INFORMATION KNOWN OR ASCERTAINABLE TO THE PROSECUTOR OF ANY MENTAL
52 OR PHYSICAL IMPAIRMENT OF ANY WITNESS WHOM THE PROSECUTOR ANTICIPATES
53 CALLING IN HIS OR HER CASE-IN-CHIEF THAT MAY CAST DOUBT ON THE ABILITY
54 OF THAT WITNESS TO OBSERVE AND ACCURATELY AND TRUTHFULLY RECALL, AND TO
55 RELATE INFORMATION ABOUT A RELEVANT EVENT OR OTHER MATERIAL INFORMATION;

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

3 (H) ANYTHING REQUIRED TO BE DISCLOSED, PRIOR TO TRIAL, TO THE DEFEND-
4 ANT BY THE PROSECUTOR, PURSUANT TO THE CONSTITUTION OF THIS STATE OR OF
5 THE UNITED STATES.

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

17 5. CONTINUING OBLIGATION. IF AT ANY TIME AFTER THE TIME PERIODS SET
18 FORTH ABOVE THE PROSECUTOR LEARNS OF ADDITIONAL INFORMATION REQUIRED TO
19 BE DISCLOSED TO THE DEFENDANT PURSUANT TO SUBDIVISIONS ONE, TWO AND
20 THREE OF THIS SECTION, THE PROSECUTOR SHALL, PURSUANT TO THE CONTINUING
21 OBLIGATION TO DELIVER TO THE DEFENSE THE INFORMATION REQUIRED BY SUBDI-
22 VISIONS ONE, TWO AND THREE OF THIS SECTION, PROMPTLY NOTIFY THE DEFEND-
23 ANT AND THE COURT OF THE EXISTENCE OF SUCH INFORMATION AND EXPEDITIOUSLY
24 MAKE SUCH ITEMS AVAILABLE TO THE DEFENDANT FOR INSPECTION, PHOTOCOPYING,
25 COPYING, TESTING OR OTHER REPRODUCTION AS SET OUT IN SUBDIVISION FOUR OF
26 THIS SECTION.

27 6. APPLICATION TO THE COURT. (A) THE PROSECUTOR MAY SEEK A PROTECTIVE
28 ORDER BASED ON A REASONABLE SHOWING THAT A WITNESS OR OTHER PERSON WOULD
29 BE ENDANGERED BY DISCLOSURE OF THE INFORMATION REQUIRED BY THIS SECTION.
30 IF THE COURT FINDS THAT THE PROSECUTOR HAS MADE A REASONABLE SHOWING
31 THAT A WITNESS OR OTHER PERSON WOULD BE ENDANGERED BY DISCLOSURE, THE
32 COURT SHALL CONDUCT AN IN CAMERA REVIEW OF THE CLAIM, AND, IF APPROPRI-
33 ATE, REDACT THE INFORMATION GIVEN TO THE DEFENSE UNTIL SUCH TIME AS THE
34 LAW OR OTHER CIRCUMSTANCES OF THE CASE REQUIRE DISCLOSURE OF THE INFOR-
35 MATION.

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

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

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

53 8. CONFERENCE AND CERTIFICATION. (A) AT A TIME SET BY THE COURT BEFORE
54 THE FIRST DESIGNATED TRIAL DATE AND AT SUCH FURTHER TIMES AS THE COURT
55 ORDERS, THE PROSECUTOR SHALL IDENTIFY FOR THE COURT THE INFORMATION THAT
56 HAS BEEN DELIVERED TO THE DEFENSE AND CERTIFY THE DELIVERY. THE COURT

1 SHALL HOLD A CONFERENCE TO DETERMINE WHETHER THE PROSECUTOR HAS EXAMINED
2 THE PROSECUTOR'S FILE AND THE FILES OF THOSE ASSISTING THE PROSECUTOR
3 AND HAS DELIVERED THE REQUIRED INFORMATION.

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

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

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

21 (B) REOPEN A PRE-TRIAL HEARING;

22 (C) PRECLUDE INTRODUCTION OF EVIDENCE;

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

29 (E) NOTIFY THE SUPERVISING PROSECUTOR;

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

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

40 (B) IF IN CONNECTION WITH THE OBLIGATION TO DELIVER INFORMATION SET
41 OUT IN THIS SECTION OR THE STATE AND UNITED STATES CONSTITUTIONS, A
42 TRIAL OR APPELLATE COURT HAS CONCLUDED THAT IN THE COURSE OF A CRIMINAL
43 PROCEEDING, A PROSECUTOR HAS VIOLATED RULES 3.4(A)(1), 3.4(A)(3) OR
44 3.8(B) OF THE RULES OF PROFESSIONAL CONDUCT, OR OTHER RELEVANT STATUTES
45 AND RULES, BY INTENTIONALLY OR RECKLESSLY FAILING TO DELIVER OR TIMELY
46 DELIVER TO THE DEFENSE THE INFORMATION SET OUT IN THIS SECTION, THE
47 CONDUCT SHALL BE REFERRED BY THE JUDGE PURSUANT TO RULE 100.3(D)(2) OF
48 THE CODE OF JUDICIAL CONDUCT TO THE ATTORNEY DISCIPLINARY COMMITTEE OF
49 THE APPROPRIATE JUDICIAL DISTRICT FOR PROCEEDINGS PURSUANT TO APPLICABLE
50 RULES.

51 (C) IF AN ATTORNEY HAS A REASONABLE BASIS TO BELIEVE THAT A PROSECUTOR
52 HAS INTENTIONALLY OR RECKLESSLY FAILED TO DELIVER INFORMATION AS DEFINED
53 IN THIS STATUTE, THAT ATTORNEY SHALL NOTIFY THE ATTORNEY DISCIPLINARY
54 COMMITTEE OF THE APPROPRIATE JUDICIAL DISTRICT PURSUANT TO RULE 8.3(A)
55 OF THE RULES OF PROFESSIONAL CONDUCT FOR PROCEEDINGS PURSUANT TO COURT
56 RULES.

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

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

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

8 (L) INFORMATION RESULTING FROM COMPARING DNA TEST RESULTS ON SPECIMENS
9 FROM CRIME SCENE SAMPLE OR SAMPLES OBTAINED IN THE COURSE OF AN INVESTI-
10 GATION OF AN ALLEGED CRIME WITH THE DNA RECORDS MAINTAINED BY OR AVAIL-
11 ABLE THROUGH THE STATE DNA IDENTIFICATION INDEX ESTABLISHED PURSUANT TO
12 NEW YORK LAW OR ANY OFFICIAL FEDERAL DNA INDEX.

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

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

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