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

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I N A S S E M B L Y

February 3, 2014

Introduced by M. of A. TITONE -- read once and referred to the Committee on Codes

AN ACT to amend the criminal procedure law, in relation to mandating prosecutorial disclosure of exculpatory evidence

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 DISCOVERY; PROSECUTION'S DUTY TO DISCLOSE EXCULPATORY EVIDENCE.

1. IN ADDITION TO THE REQUIREMENTS OF SECTION 240.20 OF THIS ARTICLE, THE PROSECUTION SHALL DISCLOSE TO THE DEFENDANT AND MAKE AVAILABLE FOR INSPECTION, PHOTOGRAPHIC, COPYING OR TESTING, THE FOLLOWING PROPERTY WITHIN TWENTY DAYS AFTER RECEIPT OF A WRITTEN DEMAND MADE BY THE DEFENDANT:

(A) ANY AND ALL EXCULPATORY MATERIALS THEN IN THE POSSESSION OF THE PROSECUTION OR ANY BRANCH OF LAW ENFORCEMENT INVOLVED IN THE PROSECUTION OF THE DEFENDANT, OR EXCULPATORY MATERIALS WHICH MAY COME INTO THE POSSESSION OF THE PROSECUTION OR ANY BRANCH OF LAW ENFORCEMENT INVOLVED IN THE PROSECUTION OF THE DEFENDANT THROUGH THE EXERCISE OF DUE DILIGENCE PURSUANT TO SECTION 240.60 OF THIS ARTICLE;

(B) EVIDENCE WHICH DISPROVES THE IDENTITY OF THE DEFENDANT AS THE PERPETRATOR OF THE CRIME AT ISSUE IN THE CRIMINAL ACTION OR PROCEEDING PENDING AGAINST THE DEFENDANT;

(C) EVIDENCE WHICH TENDS TO DISPROVE AN ELEMENT OF ANY CRIME CHARGED IN SUCH ACTION OR PROCEEDING;

(D) EVIDENCE WHICH CONSTITUTES A PRIOR REPRESENTATION OF A WITNESS ACCOUNT WHICH VARIES IN ANY DEGREE FROM ANY STATEMENTS OF THE WITNESS, WHENEVER MADE, WITH REGARD TO A DESCRIPTION OF THE EVENTS SURROUNDING THE CRIME AT ISSUE IN SUCH ACTION OR PROCEEDING;

(E) EVIDENCE THAT A WITNESS HAS A PRIOR CRIMINAL HISTORY;

(F) EVIDENCE THAT A WITNESS HAS ENGAGED IN ACTS WHICH WOULD BEAR UPON HIS OR HER CREDIBILITY AND THE INTEGRITY OF HIS OR HER TESTIMONY; OR

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

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(G) EVIDENCE WHICH WOULD CAUSE A REASONABLE PERSON TO QUESTION THE VERACITY OF A WITNESS, SUCH AS MOTIVE, BIAS, COMPENSATION, OR INFORMATION WHICH WOULD TEND TO DEVALUE THE TESTIMONY OFFERED.

2. THE PROSECUTOR SHALL MAKE A DILIGENT, GOOD FAITH EFFORT TO ASCERTAIN THE EXISTENCE OF DEMANDED PROPERTY AND TO CAUSE SUCH PROPERTY TO BE MADE AVAILABLE FOR DISCOVERY WHERE IT EXISTS BUT IS NOT WITHIN THE PROSECUTOR'S POSSESSION, CUSTODY OR CONTROL; PROVIDED, THAT THE PROSECUTOR SHALL NOT BE REQUIRED TO OBTAIN BY SUBPOENA DUCES TECUM DEMANDED MATERIAL WHICH THE DEFENDANT MAY THEREBY OBTAIN.

3. THE PROSECUTION MAY REQUEST AN IN CAMERA REVIEW OF ANY EVIDENCE DEMANDED BY THE DEFENDANT PURSUANT TO SUBDIVISION ONE OF THIS SECTION. AFTER AN IN CAMERA REVIEW OF THE MATERIALS PROVIDED AND AFTER AFFORDING ALL PARTIES A REASONABLE OPPORTUNITY TO BE HEARD, THE COURT SHALL PROMPTLY MAKE A WRITTEN DETERMINATION WHETHER THE REQUESTED REVIEW OF THE INFORMATION CAN REASONABLY BE EXPECTED TO CAUSE SUBSTANTIAL AND IDENTIFIABLE HARM TO OTHERS WHICH OUTWEIGHS THE DEFENDANT'S RIGHT OF ACCESS TO THE INFORMATION OR WHETHER THE REQUESTED REVIEW WOULD HAVE A DETRIMENTAL EFFECT ON THE ACTION OR PROCEEDING, OR WHETHER ALL OR PART OF THE MATERIALS SOUGHT TO BE REVIEWED CONSTITUTE PERSONAL NOTES AND OBSERVATIONS, AND SHALL ACCORDINGLY DETERMINE WHETHER ACCESS TO ALL OR PART OF SUCH MATERIALS BY THE DEFENDANT SHALL BE GRANTED. IN THE EVENT THAT THE COURT DETERMINES THAT THE REQUEST FOR ACCESS SHALL BE GRANTED TO THE DEFENDANT IN WHOLE OR IN PART, THE COURT SHALL NOTIFY ALL PARTIES AND THE COURT SHALL GRANT ACCESS TO THE DEFENDANT PURSUANT TO SUCH DETERMINATION.

4. IF THE COURT FINDS THAT THE PROSECUTION HAS FAILED TO COMPLY WITH ANY OF THE PROVISIONS OF THIS SECTION, THE COURT MAY ORDER THE PROSECUTION TO PERMIT DISCOVERY OF THE PROPERTY NOT PREVIOUSLY DISCLOSED, GRANT A CONTINUANCE, ISSUE A PROTECTIVE ORDER, PROHIBIT THE INTRODUCTION OF CERTAIN EVIDENCE OR THE CALLING OF CERTAIN WITNESSES OR TAKE ANY OTHER APPROPRIATE ACTION.

5. IF THE COURT FINDS THAT THE PROSECUTION HAS WILLFULLY FAILED TO COMPLY WITH ANY OF THE PROVISIONS OF THIS SECTION THE COURT MAY:

(A) DISMISS THE CRIMINAL ACTION OR PROCEEDING OR, IF DISMISSAL IS NOT SUPPORTED BY THE RECORD, INSTRUCT THE JURY THAT AN ADVERSE INFERENCE MAY BE DRAWN AGAINST THE PROSECUTION FOR THEIR FAILURE TO PROVIDE THE REQUESTED DISCLOSURE;

(B) FINE THE INDIVIDUAL PROSECUTOR AND THE DISTRICT ATTORNEY'S OFFICE JOINTLY AND SEVERALLY THE AMOUNT OF TWO THOUSAND FIVE HUNDRED DOLLARS FOR EACH WILLFUL VIOLATION OF SUBDIVISION ONE OF THIS SECTION; OR

(C) WHERE AN INDIVIDUAL PROSECUTOR OR DISTRICT ATTORNEY'S OFFICE HAS BEEN PREVIOUSLY FINED FOR VIOLATING THIS SECTION, FINE THE INDIVIDUAL PROSECUTOR AND THE DISTRICT ATTORNEY'S OFFICE JOINTLY AND SEVERALLY THE AMOUNT OF FIVE THOUSAND DOLLARS FOR EACH WILLFUL VIOLATION OF SUBDIVISION ONE OF THIS SECTION.

S 2. This act shall take effect immediately.