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

5580

2015-2016 Regular Sessions

I N S E N A T E

May 14, 2015

Introduced by Sen. AVELLA -- 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 grand jury rules of evidence

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

Section 1. Subdivision 1 of section 20.60 of the criminal procedure law is amended to read as follows:

1. An oral or written statement made by a person in one jurisdiction to a person in another jurisdiction by means of telecommunication, mail or any other method of communication is deemed to be made in each such jurisdiction. FOR PURPOSES OF THIS SUBDIVISION, SUCH STATEMENT SHALL INCLUDE TESTIMONY GIVEN PURSUANT TO SUBDIVISION FOUR-A OF SECTION 190.30 OF THIS CHAPTER.

S 2. Subdivision 1 of section 50.10 of the criminal procedure law is amended to read as follows:

1. "Immunity." A person who has been a witness in a legal proceeding, and [who cannot, except as otherwise provided in this subdivision, be convicted of any offense or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he gave evidence therein, possesses "immunity" from any such conviction, penalty or forfeiture], NEITHER THE EVIDENCE GIVEN BY SUCH WITNESS NOR ANY EVIDENCE DERIVED DIRECTLY OR INDIRECTLY THEREFROM MAY BE USED AGAINST THE WITNESS IN THE SAME OR ANY OTHER CRIMINAL PROCEEDING, POSSESSES "IMMUNITY". A person who possesses such immunity may nevertheless be convicted of perjury as a result of having given false testimony in such legal proceeding, and may be convicted of or adjudged in contempt as a result of having contumaciously refused to give evidence therein, AND THE EVIDENCE GIVEN BY THE PERSON AT THE PROCEEDING AT WHICH THE PERSON POSSESSED IMMUNITY MAY BE USED AGAINST SUCH PERSON IN ANY SUCH PROSECUTION FOR PERJURY OR JUDGMENT FOR CONTEMPT.

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

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S 3. Section 60.22 of the criminal procedure law is amended by adding a new subdivision 4 to read as follows:

4. FOR PURPOSES OF THIS SECTION, "CORROBORATIVE EVIDENCE" INCLUDES EVIDENCE FROM ONE OR MORE OTHER ACCOMPLICES.

S 4. Paragraph (b) of subdivision 1 of section 170.30 of the criminal procedure law is amended and a new subdivision 5 is added to read as follows:

(b) [The defendant has received immunity from prosecution for the offense charged, pursuant to sections 50.20 or 190.40] ALLEGATIONS IN THE INFORMATION, SIMPLIFIED INFORMATION, PROSECUTOR'S INFORMATION OR MISDEMEANOR COMPLAINT ARE BASED ON EVIDENCE PROTECTED BY IMMUNITY AS DEFINED IN SUBDIVISION ONE OF SECTION 50.10 OF THIS CHAPTER; or

5. WHERE THE DEFENDANT ESTABLISHES IN HIS OR HER MOTION THAT IMMUNITY HAS BEEN CONFERRED ON HIM OR HER, THE PEOPLE MUST THEN ESTABLISH, BY A PREPONDERANCE OF THE EVIDENCE, THAT SUCH EVIDENCE WAS NOT DERIVED, DIRECTLY OR INDIRECTLY, FROM THE EVIDENCE AS TO WHICH SUCH IMMUNITY WAS CONFERRED. A MOTION SEEKING RELIEF ON THIS GROUND SHALL NOT BE ENTERTAINED BEFORE A MOTION MADE PURSUANT TO SUBDIVISION EIGHT OF SECTION 710.20 OF THIS CHAPTER, SEEKING SUPPRESSION OF POTENTIAL EVIDENCE AS TO THE USE OF WHICH THE DEFENDANT POSSESSES IMMUNITY, HAS BEEN RESOLVED. UPON GRANT OF SUCH A MOTION, THE COURT MUST DISMISS THE INSTRUMENT; OTHERWISE, THE COURT MUST DENY THE MOTION TO DISMISS.

S 5. Paragraph (a) of subdivision 8 of section 190.30 of the criminal procedure law, as added by chapter 279 of the laws of 2008, is amended, subdivision 3 is amended by adding a new paragraph (h) and a new subdivision 4-a is added to read as follows:

(H) THAT A PERSON'S OWNERSHIP OF, OR POSSESSORY RIGHT IN, PERSONAL IDENTIFYING INFORMATION, AS DEFINED IN SUBDIVISION ONE OF SECTION 190.77 OF THE PENAL LAW, OR A PERSONAL IDENTIFICATION NUMBER, AS DEFINED IN PARAGRAPH B OF SUBDIVISION TWO OF SECTION 190.77 OF THE PENAL LAW AS ANY NUMBER OR CODE WHICH MAY BE USED ALONE OR IN CONJUNCTION WITH ANY OTHER INFORMATION TO ASSUME THE IDENTITY OF ANOTHER PERSON OR ACCESS FINANCIAL RESOURCES OR CREDIT OF ANOTHER PERSON, AND THE DEFENDANT'S LACK OF SUPERIOR OR EQUAL RIGHT TO USE OR POSSESSION THEREOF.

4-A. WHENEVER THE DISTRICT ATTORNEY HAS REASON TO BELIEVE THAT A WITNESS, OTHER THAN A WITNESS WHO WAIVES IMMUNITY PURSUANT TO SECTION 190.40 OF THIS ARTICLE, INCLUDING A DEFENDANT TESTIFYING ON HIS OR HER OWN BEHALF PURSUANT TO SUBDIVISION FIVE OF SECTION 190.50 OF THIS ARTICLE, IS LOCATED EITHER OUT-OF-STATE OR MORE THAN ONE HUNDRED MILES FROM THE GRAND JURY PROCEEDING, THE PERSON MAY PROVIDE LIVE TESTIMONY BY CLOSED CIRCUIT VIDEO OR VIDEOCONFERENCING IN THE SAME MANNER AS IF THE WITNESS HAD TESTIFIED IN PERSON. THE AUDIOVISUAL TECHNOLOGY USED PURSUANT TO THIS SECTION SHALL SEEK TO ENSURE THAT THE COMMUNICATION BE REASONABLY SECURE FROM INTERCEPTION OR EAVESDROPPING BY ANYONE OTHER THAN THE PERSONS COMMUNICATING, AND MUST ENSURE THAT THE WITNESS MAY BE CLEARLY HEARD, SEEN AND EXAMINED.

(A) THE TESTIMONY OF THE WITNESS SHALL BE:

(I) TAKEN BY A CERTIFIED VIDEOGRAPHER WHO IS IN THE PHYSICAL PRESENCE OF THE WITNESS. THE CERTIFIED VIDEOGRAPHER SHALL SIGN A WRITTEN DECLARATION WHICH STATES THAT THE WITNESS DOES NOT POSSESS ANY NOTES OR OTHER MATERIALS TO ASSIST IN THE WITNESS'S TESTIMONY;

(II) RECORDED AND PRESERVED THROUGH THE USE OF AUDIOVISUAL RECORDING TECHNOLOGY; AND

(III) TRANSCRIBED BY A CERTIFIED COURT REPORTER.

(B) BEFORE GIVING TESTIMONY, THE WITNESS SHALL BE SWORN AND SIGN A WRITTEN DECLARATION, WHICH ACKNOWLEDGES THAT THE WITNESS IS ALONE IN THE

ROOM WHERE THE TESTIMONY IS BEING TAKEN, THAT, TO HIS OR HER KNOWLEDGE, NO ONE OTHER THAN THE CERTIFIED VIDEOGRAPHER IS HEARING HIS OR HER TESTIMONY, THAT THE WITNESS UNDERSTANDS THAT HE OR SHE IS SUBJECT TO THE JURISDICTION OF THE COURTS OF THIS STATE AND MAY BE SUBJECT TO CRIMINAL PROSECUTION FOR THE COMMISSION OF ANY CRIME IN CONNECTION WITH HIS OR HER TESTIMONY, INCLUDING, WITHOUT LIMITATION, PERJURY AND CONTEMPT, AND THAT THE WITNESS CONSENTS TO SUCH JURISDICTION.

(C) THE ORIGINAL RECORDED TESTIMONY OF THE WITNESS MUST BE DELIVERED TO THE CERTIFIED COURT REPORTER.

[(a) A business record may be received in such grand jury proceedings as evidence of the following facts and similar facts stated therein:

(i) a person's use of, subscription to and charges and payments for communication equipment and services including but not limited to equipment or services provided by telephone companies and internet service providers, but not including recorded conversations or images communicated thereby; and

(ii) financial transactions, and a person's ownership or possessory interest in any account, at a bank, insurance company, brokerage, exchange or banking organization as defined in section two of the banking law.] ALL BUSINESS RECORDS AS DEFINED IN SUBDIVISION (A) OF RULE 4518 OF THE CIVIL PRACTICE LAW AND RULES AND SECTIONS THREE HUNDRED TWO AND THREE HUNDRED SIX OF THE STATE TECHNOLOGY LAW MAY BE RECEIVED IN SUCH GRAND JURY PROCEEDINGS AS EVIDENCE OF THE FACTS STATED THEREIN.

S 6. Section 210.35 of the criminal procedure law is amended by adding a new subdivision 4-a to read as follows:

4-A. EVIDENCE PROTECTED BY USE IMMUNITY WAS USED TO OBTAIN THE INDICTMENT. A MOTION SEEKING RELIEF ON THIS GROUND SHALL NOT BE ENTERTAINED BEFORE A MOTION MADE PURSUANT TO SUBDIVISION EIGHT OF SECTION 710.20 OF THIS CHAPTER, SEEKING SUPPRESSION OF POTENTIAL EVIDENCE AS TO THE USE OF WHICH THE DEFENDANT POSSESSES IMMUNITY, HAS BEEN RESOLVED. UPON THE GRANTING OF SUCH A MOTION, THE COURT MUST DISMISS THE INDICTMENT; OTHERWISE, THE COURT MUST DENY THE MOTION TO DISMISS; OR

S 7. The opening paragraph and subdivisions 6 and 7 of section 710.20 of the criminal procedure law, the opening paragraph and subdivision 6 as amended by chapter 8 of the laws of 1976 and subdivision 6 as renumbered by chapter 481 of the laws of 1983, subdivision 7 as added by chapter 744 of the laws of 1988, are amended and a new subdivision 8 is added to read as follows:

Upon motion of a defendant who (a) is aggrieved by unlawful or improper acquisition of evidence and has reasonable cause to believe that such may be offered against him OR HER in a criminal action, or (b) claims that improper identification testimony may be offered against him OR HER in a criminal action, OR (C) CLAIMS THAT EVIDENCE AS TO THE USE OF WHICH HE OR SHE POSSESSES IMMUNITY, AS DEFINED IN SUBDIVISION ONE OF SECTION 50.10 OF THIS CHAPTER, MAY BE OFFERED AGAINST HIM OR HER IN A CRIMINAL ACTION, a court may, under circumstances prescribed in this article, order that such evidence be suppressed or excluded upon the ground that it:

6. Consists of potential testimony regarding an observation of the defendant either at the time or place of the commission of the offense or upon some other occasion relevant to the case, which potential testimony would not be admissible upon the prospective trial of such charge owing to an improperly made previous identification of the defendant by the prospective witness[.]; OR

7. Consists of information obtained by means of a pen register or trap and trace device installed or used in violation of the provisions of article seven hundred five of this chapter[.]; OR

8. CONSISTS OF POTENTIAL EVIDENCE AS TO THE USE OF WHICH THE DEFENDANT POSSESSES IMMUNITY. WHERE THE DEFENDANT ESTABLISHES THAT IMMUNITY HAS BEEN CONFERRED ON HIM OR HER, THE PEOPLE MUST THEN ESTABLISH, BY A PREPONDERANCE OF THE EVIDENCE, THAT SUCH EVIDENCE WAS NOT DERIVED, DIRECTLY OR INDIRECTLY, FROM THE EVIDENCE AS TO WHICH IMMUNITY WAS CONFERRED.

S 8. This act shall take effect on the first of November next succeeding the date on which it shall have become a law.