

# STATE OF NEW YORK

3512

2017-2018 Regular Sessions

## IN ASSEMBLY

January 27, 2017

Introduced by M. of A. SEPULVEDA -- 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 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 § 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 case-in-  
17 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.

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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 case-  
39 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 case-  
47 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 § 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 § 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 § 4. This act shall take effect on the sixtieth day after it shall  
20 have become a law.