STATE OF NEW YORK

3563

2017-2018 Regular Sessions

IN ASSEMBLY

January 27, 2017

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

AN ACT to amend the criminal procedure law, in relation to discovery procedure and requirements and to repeal subdivision 1 of section 240.10, section 240.45 and section 240.80 of such law relating thereto

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 9 of section 65.20 of the criminal procedure law, as added by chapter 505 of the laws of 1985 and renumbered by chapter 548 of the laws of 2007, is amended to read as follows:

9. (a) Prior to the commencement of the hearing conducted pursuant to subdivision five of this section, the district attorney shall, subject to a protective order, comply with the provisions of subdivision [~~one~~] **two** of section [~~240.45~~] **240.20** of this chapter as they concern any witness whom the district attorney intends to call at the hearing and the child witness.

(b) Before a defendant calls a witness at such hearing, he or she must, subject to a protective order, comply with the provisions of subdivision two of section [~~240.45~~] **240.30** of this chapter as they concern all the witnesses the defendant intends to call at such hearing.

§ 2. Subdivision 1 of section 240.10 of the criminal procedure law is REPEALED and subdivisions 2, 3 and 4 are renumbered subdivisions 1, 2 and 3.

§ 3. The criminal procedure law is amended by adding a new section 240.15 to read as follows:

§ 240.15 Discovery by defendant of arrest and complaint reports.

Upon arraignment, the prosecutor shall, subject to a protective order pursuant to section 240.50 of this article, provide the defendant with a copy of any law enforcement report describing the arrest and processing of the defendant and any official law enforcement report by which a crime is reported to the police.

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

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§ 4. The section heading and the opening paragraph of subdivision 1 of section 240.20 of the criminal procedure law, the section heading as added by chapter 412 of the laws of 1979 and the opening paragraph of subdivision 1 as amended by chapter 317 of the laws of 1983, are amended to read as follows:

Discovery[~~; upon demand of~~] to the defendant.

Except to the extent protected by court order, [~~upon a demand to produce by a defendant against whom~~] within fifteen days after arraignment on an indictment, superior court information, prosecutor's information, information, or simplified information charging a misdemeanor [~~is pending~~], the prosecutor shall disclose to the defendant and make available for inspection, photographing, copying or testing, the following property:

§ 5. Paragraph (h) of subdivision 1 of section 240.20 of the criminal procedure law, as added by chapter 412 of the laws of 1979 and as relettered by chapter 795 of the laws of 1984, is amended to read as follows:

(h) [~~Anything~~] Any other property or information 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.

§ 6. Subdivision 1 of section 240.20 of the criminal procedure law is amended by adding four new paragraphs (l), (m), (n) and (o) to read as follows:

(l) A scientific report or tests which tend to negate the guilt of the defendant.

(m) Information about a line-up, show-up or other identification procedure or from a witness which indicates that someone other than the defendant committed the crime.

(n) Information about a line-up, show-up or other identification procedure at which an eyewitness failed to identify the defendant as the perpetrator of the crime.

(o) Reports or interviews of any kind indicating that a person or persons other than the defendant committed the crime.

§ 7. Subdivision 2 of section 240.20 of the criminal procedure law is renumbered subdivision 4 and three new subdivisions 2, 3 and 5 are added to read as follows:

2. Within fifteen days of arraignment, the prosecutor shall, subject to a protective order, make available to the defendant:

(a) Any written or recorded statement, including any testimony before a grand jury and an examination videotaped pursuant to section 190.32 of this chapter, made by a person whom the prosecutor intends to call as a witness at trial, and which relates to the subject matter of the witness's testimony.

(b) A record of judgment of conviction of a witness the people intend to call at trial if the record of conviction is known by the prosecutor to exist.

(c) The existence of any pending criminal action against a witness the people intend to call at trial, if the pending criminal action is known by the prosecutor to exist.

(d) Any promises or threats to, or agreements with, a witness the prosecution intends to call at trial, if such promise, threat or agreement is related to the witness's testimony and is known by the prosecution.

(e) The name, address and qualifications of any expert, other than an expert governed by section 250.10 of this title, the people intend to call as a witness at trial, as well as a written report by that witness setting forth in reasonable detail the subject matter on which the

expert is expected to testify including the witness's opinion and conclusions, if any, as well as the basis for those opinions and conclusions.

The provisions of paragraphs (b) and (c) of this subdivision shall not be construed to require the prosecutor to fingerprint a witness or otherwise cause the division of criminal justice services or other law enforcement agency or court to issue a report concerning a witness.

3. If after complying with the provisions of this section, any property or information which is required to be disclosed comes into the possession of the prosecution, the prosecution shall, subject to a protective order, promptly disclose such property or information.

5. At the commencement of jury selection or in the case of a non-jury trial, before submission of evidence, the prosecutor shall, subject to a protective order, make available to the defense any written or recorded statement made by a person whom the prosecutor intends to call at trial and which relates to the subject matter of the witness's testimony, including unredacted statements previously disclosed in redacted form.

§ 8. Subdivision 4 of section 240.20 of the criminal procedure law, as added by chapter 412 of the laws of 1979 and renumbered by section seven of this act, is amended to read as follows:

4. The prosecutor shall make a diligent, good faith effort to ascertain the existence of [~~demanded~~] any property subject to discovery 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.

§ 9. Section 240.30 of the criminal procedure law, as added by chapter 412 of the laws of 1979, subdivision 1 as amended by chapter 558 of the laws of 1982 and the opening paragraph of subdivision 1 as amended by chapter 317 of the laws of 1983, is amended to read as follows:

§ 240.30 Discovery[~~; upon demand of~~] to the prosecutor.

1. Except to the extent protected by court order, upon [~~a demand to produce~~] disclosure by the prosecutor pursuant to section 240.20 of this article, a defendant against whom an indictment, superior court information, prosecutor's information, information, or simplified information charging a misdemeanor is pending shall disclose and make available for inspection, photographing, copying or testing, subject to constitutional limitations:

(a) any written report or document, or portion thereof, concerning a physical or mental examination, or scientific test, experiment, or comparisons, made by or at the request or direction of, the defendant, if the defendant intends to introduce such report or document at trial, or if the defendant has filed a notice of intent to proffer psychiatric evidence and such report or document relates thereto, or if such report or document was made by a person, other than defendant, whom defendant intends to call as a witness at trial; and

(b) any photograph, drawing, tape or other electronic recording which the defendant intends to introduce at trial.

2. At the commencement of jury selection, the defendant shall, subject to a protective order, make available to the prosecutor: (a) any written or recorded statement made by a person other than the defendant whom the defendant intends to call as a witness at the trial, and which relates to the subject matter of the witness's testimony, including unredacted statements previously disclosed in a redacted form;

(b) a record of judgment of conviction of a witness, other than the defendant, the defendant intends to call at trial if the record of conviction is known by the defendant to exist;

(c) the existence of any pending criminal action against a witness, other than the defendant, the defendant intends to call at trial, if the pending criminal action is known by the defendant to exist;

(d) any promises or threats to, or agreements with, a witness the defense intends to call at trial, if such promise, threat or agreement is related to the witness's testimony and is known by the calling party; and

(e) the name, address, and qualifications of any expert, other than an expert governed by section 250.10 of this title, the defense intends to call as a witness at trial, as well as a written report by that witness setting forth in reasonable detail the subject matter on which the expert is expected to testify including the witness's opinion and conclusions, if any, as well as the basis for those opinions and conclusions.

3. The defense shall make a diligent good faith effort to make such property available for discovery where it exists but the property is not within its possession, custody or control, provided, that the defendant shall not be required to obtain by subpoena duces tecum [~~demanded~~] material that the prosecutor may thereby obtain.

§ 10. Section 240.35 of the criminal procedure law, as added by chapter 412 of the laws of 1979, is amended to read as follows:

§ 240.35 Discovery; refusal [~~of demand~~] to disclose.

Notwithstanding the provisions of sections 240.20 and 240.30 of this article, the prosecutor or the defendant, as the case may be, may refuse to disclose any information for which [~~he~~] that party reasonably believes [~~is not discoverable by a demand to produce, pursuant to section 240.20 or section 240.30 as the case may be, or for which he reasonably believes~~] a protective order would be warranted. Such refusal shall be made in a writing, which shall set forth the grounds of such belief as fully as possible, consistent with the objective of the refusal. The writing shall be served upon the [~~demanding~~] other party and a copy shall be filed with the court.

§ 11. Section 240.40 of the criminal procedure law, as added by chapter 412 of the laws of 1979, subdivision 1 as amended by chapter 19 of the laws of 2012, the opening paragraph of subdivision 2 as amended by chapter 317 of the laws of 1983 and the closing paragraph of subdivision 2 as amended by chapter 481 of the laws of 1983, is amended to read as follows:

§ 240.40 Discovery; upon court order.

1. Upon motion of a defendant against whom an indictment, superior court information, prosecutor's information, information, or simplified information charging a misdemeanor is pending, the court in which such accusatory instrument is pending:

(a) must order discovery as to any material not disclosed [~~upon a demand~~] pursuant to section 240.20 of this article, if it finds that [~~the prosecutor's refusal to disclose such material is not justified~~] a protective order should not be issued; (b) must, unless it is satisfied that the people have shown good cause why such an order should [~~not~~] be issued, order discovery or issue any other order authorized by subdivision one of section 240.70 of this article as to any material not disclosed [~~upon demand~~] pursuant to section 240.20 of this article where the prosecutor has failed to serve a timely written refusal pursuant to section 240.35 of this article; (c) [~~may~~] must order discovery with

respect to any other property, which the people intend to introduce at the trial[~~, upon a showing by the defendant that discovery with respect to such property is material to the preparation of his or her defense, and that the request is reasonable~~]; and (d) where property in the people's possession, custody, or control that consists of a deoxyribonucleic acid ("DNA") profile obtained from probative biological material gathered in connection with the investigation or prosecution of the defendant and the defendant establishes that such profile complies with federal bureau of investigation or state requirements, whichever are applicable and as such requirements are applied to law enforcement agencies seeking a keyboard search or similar comparison, and that the data meets state DNA index system or national DNA index system criteria as such criteria are applied to law enforcement agencies seeking such a keyboard search or similar comparison, the court may order an entity that has access to the combined DNA index system or its successor system to compare such DNA profile against DNA databanks by keyboard searches, or a similar method that does not involve uploading, upon notice to both parties and the entity required to perform the search, upon a showing by the defendant that such a comparison is material to the presentation of his or her defense and that the request is reasonable. For purposes of this paragraph, a "keyboard search" shall mean a search of a DNA profile against the databank in which the profile that is searched is not uploaded to or maintained in the databank. Upon granting the motion pursuant to paragraph (c) of this subdivision, the court shall, upon motion of the people showing such to be material to the preparation of their case [~~and that the request is reasonable~~], condition its order of discovery by further directing discovery by the people of property, of the same kind or character as that authorized to be inspected by the defendant, which he or she intends to introduce at the trial.

2. Upon motion of the prosecutor, and subject to constitutional limitation, the court in which an indictment, superior court information, prosecutor's information, information, or simplified information charging a misdemeanor is pending: (a) must order discovery as to any property not disclosed [~~upon a demand~~] pursuant to section 240.30 **of this article**, if it finds that the defendant's refusal to disclose such material is not justified; and (b) may order the defendant to provide nontestimonial evidence. Such order may, among other things, require the defendant to:

(i) Appear in a line-up;

(ii) Speak for identification by witness or potential witness;

(iii) Be fingerprinted;

(iv) Pose for photographs not involving reenactment of an event;

(v) Permit the taking of samples of blood, hair or other materials from his **or her** body in a manner not involving an unreasonable intrusion thereof or a risk of serious physical injury thereto;

(vi) Provide specimens of his **or her** handwriting;

(vii) Submit to a reasonable physical or medical inspection of his **or her** body.

This subdivision shall not be construed to limit, expand, or otherwise affect the issuance of a similar court order, as may be authorized by law, before the filing of an accusatory instrument consistent with such rights as the defendant may derive from the constitution of this state or of the United States. This section shall not be construed to limit or otherwise affect the [~~adminstration~~] **administration** of a chemical test where otherwise authorized pursuant to section [~~one thousand one~~] **eleven** hundred ninety-four-a of the vehicle and traffic law.

3. An order pursuant to this section may be denied, limited or conditioned as provided in section 240.50 **of this article, otherwise authorized pursuant to section eleven hundred ninety-four of the vehicle and traffic law**.

§ 12. Section 240.45 of the criminal procedure law is REPEALED.

§ 13. Section 240.50 of the criminal procedure law is amended by adding a new subdivision 1-a to read as follows:

1-a. The court in which the criminal action is pending may, upon motion of either party for an order to redact the name and/or address of a witness, issue a protective order denying, limiting, conditioning or regulating discovery of the name and/or address of a witness pursuant to this article for good cause, including substantial risk of physical harm, intimidation, unjustified annoyance or embarrassment to the witness or an adverse effect upon the legitimate needs of law enforcement including the protection of the confidentiality of informants.

§ 14. Section 240.60 of the criminal procedure law, as added by chapter 412 of the laws of 1979, is amended to read as follows:

§ 240.60 Discovery; continuing duty to disclose.

If, after complying with the provisions of this article or an order pursuant thereto, a party finds, either before or during trial, additional material subject to discovery or covered by such order, [~~he~~] **that party** shall promptly comply with the [~~demand or~~] order, [~~refuse to comply with the demand where refusal is authorized,~~] or apply for a protective order.

§ 15. Subdivision 1 of section 240.70 of the criminal procedure law, as added by chapter 412 of the laws of 1979, is amended to read as follows:

1. If, during the course of discovery proceedings, the court finds that a party has failed to comply with any of the provisions of this article, the court may order such party 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**, give an adverse inference instruction to the trier of fact** or take any other appropriate action.

§ 16. Section 240.75 of the criminal procedure law, as added by chapter 1 of the laws of 2000, is amended to read as follows:

§ 240.75 Discovery; certain violations.

The failure of the prosecutor or any agent of the prosecutor to disclose statements that are required to be disclosed under subdivision one of section 240.44 [~~or paragraph (a) of subdivision one of section 240.45~~] of this article shall not constitute grounds for any court to order a new pre-trial hearing or set aside a conviction, or reverse, modify or vacate a judgment of conviction in the absence of a showing by the defendant that there is a reasonable possibility that the non-disclosure materially contributed to the result of the trial or other proceeding; provided, however, that nothing in this section shall affect or limit any right the defendant may have to a re-opened pre-trial hearing when such statements were disclosed before the close of evidence at trial.

§ 17. Section 240.80 of the criminal procedure law is REPEALED.

§ 18. Subdivision 2 of section 240.90 of the criminal procedure law, as added by chapter 412 of the laws of 1979, is amended to read as follows:

2. [~~A~~] **Within fifteen days after the prosecutor has disclosed to the defendant property described in section 240.20 of this article, a** motion by a defendant for discovery shall be made as **otherwise** prescribed in

section 255.20 of this [~~chapter~~] **title**. **Such motion must state that each item of property sought has not previously been disclosed to the defendant.**

§ 19. Paragraph (a) of subdivision 14 of section 400.27 of the criminal procedure law, as added by chapter 1 of the laws of 1995, is amended to read as follows:

(a) At a reasonable time prior to the sentencing proceeding or a mental retardation hearing:

(i) the prosecutor shall, unless previously disclosed and subject to a protective order, make available to the defendant the statements and information specified in subdivision [~~one~~] **two** of section [~~240.45~~] **240.20 of this chapter** and make available for inspection, photographing, copying or testing the property specified in subdivision one of section 240.20 **of this chapter**; and

(ii) the defendant shall, unless previously disclosed and subject to a protective order, make available to the prosecution the statements and information specified in subdivision two of section [~~240.45~~] **240.30 of this chapter** and make available for inspection, photographing, copying or testing, subject to constitutional limitations, the reports, documents and other property specified in subdivision one of section 240.30 **of this chapter**.

§ 20. Subdivision 2 of section 710.30 of the criminal procedure law, as separately amended by chapters 8 and 194 of the laws of 1976, is amended to read as follows:

2. Such notice must be served within [~~fifteen~~] **thirty** days after arraignment and before trial, and upon such service the defendant must be accorded reasonable opportunity to move before trial, pursuant to subdivision one of section 710.40 **of this article**, to suppress the specified evidence. For good cause shown, however, the court may permit the people to serve such notice, thereafter and in such case it must accord the defendant reasonable opportunity thereafter to make a suppression motion.

§ 21. This act shall take effect on the first of January next succeeding the date on which it shall have become a law, provided that the amendment to subdivision 9 of section 65.20 of the criminal procedure law, made by section one of this act, shall not affect the expiration and repeal of such section and shall expire and be deemed repealed therewith.