

STATE OF NEW YORK

2197

2019-2020 Regular Sessions

IN SENATE

January 23, 2019

Introduced by Sens. BAILEY, MONTGOMERY, PARKER, SEPULVEDA -- 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 § 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;

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

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1 (h) tends to lead to information that would satisfy paragraphs (a)
2 through (g) of this subdivision.

3 2. Timing of first delivery of information. Without a motion by the
4 defense, the following information must be disclosed and delivered by
5 the prosecution to the defense within twenty-eight days of arraignment
6 on the first charging instrument:

7 (a) information that casts doubt on the guilt of the accused of any
8 charge in the indictment, information or other charging instrument;

9 (b) information that casts doubt on the admissibility of evidence that
10 the prosecutor anticipates offering in his or her case-in-chief and that
11 could be the basis of a motion to suppress or exclude;

12 (c) a statement as to whether any promise, reward, or inducement has
13 been given to any witness whom the prosecutor anticipates calling in his
14 or her case-in-chief, identifying by name each such witness and each
15 promise, reward, or inducement, and a copy of any promise, reward, or
16 inducement that has been reduced to writing or print;

17 (d) a copy of any criminal record of any witness identified by name
18 whom the prosecutor anticipates calling in his or her case-in-chief
19 including the court of conviction, the crime of which the witness was
20 convicted, the date of the conviction, and the number of the case;

21 (e) a written statement setting out criminal charges pending against a
22 witness, who shall be identified by name, whom the prosecutor antic-
23 ipates calling in his or her case-in-chief;

24 (f) a written statement setting out the failure of a potential
25 witness, who shall be identified by name, to make a positive identifica-
26 tion of the accused in an identification procedure that has been held
27 with such a witness with respect to the crime;

28 (g) a written or oral statement from any person or other information
29 that tends to support a defense to the charges.

30 3. Pretrial delivery. Without a motion by the defense, the following
31 information must be disclosed and delivered not later than twenty-one
32 days prior to the date first set for trial:

33 (a) information that casts doubt on the credibility or accuracy of
34 evidence, including testimony of witnesses, concerning material issues
35 relating to whether a crime was committed and whether the accused
36 committed it, that the prosecutor anticipates presenting in his or her
37 case-in-chief;

38 (b) any inconsistent written or oral statement regarding the alleged
39 criminal conduct of the accused or a description of such statement, made
40 by a person whom the prosecution anticipates calling in his or her case-
41 in-chief;

42 (c) any statement regarding the alleged criminal conduct of the
43 accused or a description of such statement, made orally or in writing by
44 any person, that is inconsistent with a statement made orally or in
45 writing by a witness the prosecution anticipates calling in his or her
46 case-in-chief;

47 (d) any information reflecting bias or prejudice against the defendant
48 by a witness whom the prosecutor anticipates calling in his or her case-
49 in-chief;

50 (e) a written description of any prior bad act that constitutes a
51 crime known by the prosecutor to have been committed by any witness whom
52 the prosecution anticipates calling in his or her case-in-chief;

53 (f) information known or ascertainable to the prosecutor of any mental
54 or physical impairment of any witness whom the prosecutor anticipates
55 calling in his or her case-in-chief that may cast doubt on the ability

1 of that witness to observe and accurately and truthfully recall, and to
2 relate information about a relevant event or other material information;

3 (g) any other information that is within the definition set out in
4 subdivision one of this section;

5 (h) anything required to be disclosed, prior to trial, to the defend-
6 ant by the prosecutor, pursuant to the constitution of this state or of
7 the United States.

8 4. Delivery of information. The prosecutor shall disclose to the
9 defendant and make available for inspection, examination, photocopying,
10 copying, print out, retrieval, testing, or interview (for statements
11 previously made but not recorded in writing or mechanically) or by any
12 other method of access, all information including but not limited to
13 that in property, documents, reports, recordings, videos, records, in
14 the knowledge of a person but not recorded (all hereinafter called
15 information) which would provide the information set out in subdivisions
16 one, two, and three of this section regardless of whether such informa-
17 tion would itself constitute admissible evidence at trial or is other-
18 wise known to the defendant.

19 5. Continuing obligation. If at any time after the time periods set
20 forth above the prosecutor learns of additional information required to
21 be disclosed to the defendant pursuant to subdivisions one, two and
22 three of this section, the prosecutor shall, pursuant to the continuing
23 obligation to deliver to the defense the information required by subdi-
24 visions one, two and three of this section, promptly notify the defend-
25 ant and the court of the existence of such information and expeditiously
26 make such items available to the defendant for inspection, photocopying,
27 copying, testing or other reproduction as set out in subdivision four of
28 this section.

29 6. Application to the court. (a) The prosecutor may seek a protective
30 order based on a reasonable showing that a witness or other person would
31 be endangered by disclosure of the information required by this section.
32 If the court finds that the prosecutor has made a reasonable showing
33 that a witness or other person would be endangered by disclosure, the
34 court shall conduct an in camera review of the claim, and, if appropri-
35 ate, redact the information given to the defense until such time as the
36 law or other circumstances of the case require disclosure of the infor-
37 mation.

38 (b) If in the circumstances of a case, the prosecutor, at any time,
39 asserts that information was not delivered or was delivered late or is
40 not exculpatory within the terms of this statute or as required by the
41 state or United States constitutions and was not delivered based on that
42 reason, the court shall make an independent evaluation and determi-
43 nation, after hearing from defense counsel, as to whether the informa-
44 tion should be delivered pursuant to this subdivision.

45 (c) The prosecutor's view of whether the information is truthful or
46 accurate shall not be a factor used by the prosecutor or the court to
47 determine whether the information must be delivered to the defense
48 pursuant to this section.

49 7. Inquiries. Prior to the required dates for the disclosure of infor-
50 mation to the defense, the prosecutor shall make inquiries to learn
51 whether those agencies deemed by law to be assisting the prosecutor are
52 in possession of information defined in subdivisions one, two, and three
53 of this section, and shall obtain the information for delivery to the
54 defense in accord with this section.

55 8. Conference and certification. (a) At a time set by the court before
56 the first designated trial date and at such further times as the court

1 orders, the prosecutor shall identify for the court the information that
2 has been delivered to the defense and certify the delivery. The court
3 shall hold a conference to determine whether the prosecutor has examined
4 the prosecutor's file and the files of those assisting the prosecutor
5 and has delivered the required information.

6 (b) If the prosecutor delivers to the defense pursuant to this statute
7 large quantities of information, whether of documents, electronic infor-
8 mation, or other format, without identification of its significance to
9 the case, the court shall establish in the conference the procedure for
10 identification of the information and if needed grant an adjournment for
11 that to be accomplished by the prosecutor and examined by the defense.

12 9. Sanctions for late delivery or failure to deliver information
13 defined in this section. Where there is a failure by the prosecutor to
14 deliver the information set out in this section, or the information is
15 delivered after the required time period, at the request of the defense
16 or in the court's discretion, the court shall order one or more of the
17 following sanctions:

18 (a) grant an appropriate extension of time in the proceeding to allow
19 the defense to examine the information and to investigate based on the
20 late delivered information. For that effort, the court may authorize for
21 the defense investigators, lab tests, experts and other resources to
22 conduct the defense investigation;

23 (b) reopen a pre-trial hearing;

24 (c) preclude introduction of evidence;

25 (d) instruct the jury that the prosecutor has not delivered or deliv-
26 ered only after improper delay evidence that should have been delivered
27 and delivered timely and that the jurors may infer that the information
28 not disclosed was exculpatory or, if not disclosed or disclosed only
29 after undue delay, could have led to exculpatory information as defined
30 in subdivisions one, two and three of this section;

31 (e) notify the supervising prosecutor;

32 (f) refer the matter to the appropriate attorney disciplinary commit-
33 tee pursuant to subdivision ten of this section if after conducting such
34 inquiry as the court deems appropriate and issuing an opinion stating
35 the court's findings, the attorney's conduct is asserted to be improper
36 under the rules of professional conduct.

37 10. Lawyer sanctions. (a) Any judicial opinion which concludes that
38 there was an intentional or reckless failure to comply with this section
39 by a prosecutor shall be forwarded by the clerk of the court in which
40 the opinion is filed to the attorney disciplinary committee with juris-
41 diction.

42 (b) If in connection with the obligation to deliver information set
43 out in this section or the state and United States constitutions, a
44 trial or appellate court has concluded that in the course of a criminal
45 proceeding, a prosecutor has violated rules 3.4(a)(1), 3.4(a)(3) or
46 3.8(b) of the rules of professional conduct, or other relevant statutes
47 and rules, by intentionally or recklessly failing to deliver or timely
48 deliver to the defense the information set out in this section, the
49 conduct shall be referred by the judge pursuant to rule 100.3(D)(2) of
50 the code of judicial conduct to the attorney disciplinary committee of
51 the appropriate judicial district for proceedings pursuant to applicable
52 rules.

53 (c) If an attorney has a reasonable basis to believe that a prosecutor
54 has intentionally or recklessly failed to deliver information as defined
55 in this statute, that attorney shall notify the attorney disciplinary
56 committee of the appropriate judicial district pursuant to rule 8.3(a)

1 of the rules of professional conduct for proceedings pursuant to court
2 rules.

3 (d) If more than one event is referred to the attorney disciplinary
4 committee, the referrals shall be consolidated.

5 11. Use of false information. The provisions of subdivision ten of
6 this section shall apply to a prosecutor for the knowing or reckless use
7 of false or untruthful evidence.

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

10 (l) information resulting from comparing DNA test results on specimens
11 from crime scene sample or samples obtained in the course of an investi-
12 gation of an alleged crime with the DNA records maintained by or avail-
13 able through the state DNA identification index established pursuant to
14 New York law or any official federal DNA index.

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

17 (j) The people have failed to provide or to provide in a timely manner
18 evidence exculpatory to the defense as defined in section 240.25 of this
19 chapter and have failed to prove that there was no possibility that the
20 information would have affected the decision.

21 § 4. This act shall take effect on the sixtieth day after it shall
22 have become a law.