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Wave of Change: The Expansion of Appellate Review in Criminal Cases Pursuant to Newly-Enacted Discovery Statute, CPL Article 245

The legislature passed a sweeping bill repealing Article 240 of the Criminal Procedure Law in its entirety effective Jan. 1, 2020, and replacing it with Article 245, which vastly expands discovery in the state, transforming New York from one of the most restrictive states to one of the most expansive with respect to pre-trial disclosure and transparency.

By **Donna Aldea** | August 16, 2019 at 01:45 PM

In the realm of criminal justice, last April brought more than just showers; it brought a flood of new legislation on bail and discovery that, according to prosecutors, will deluge and drown an already taxed system, and according to the defense will flower into a new era of long-needed reform, reducing wrongful convictions and remedying injustices in the criminal justice system. With respect to discovery, the legislature passed a sweeping bill repealing Article 240 of the Criminal Procedure Law in its entirety effective Jan. 1, 2020, and replacing it with Article 245, which vastly expands discovery in the state, transforming New York from one of the most restrictive states to one of the most expansive with respect to pre-trial disclosure and transparency.

For the appellate practitioner, these sweeping changes will surely lead to a multitude of novel appellate issues in the years to come, as the boundaries and impacts of these new laws are tested and challenged, with arguments on both sides weaving their slow path through pleadings and litigation in the trial courts, and then ultimately making their way up on appeal. But one small subsection of one short provision—a little-discussed and barely-noticed raindrop in the monsoon of changes contained in Article 245—will require far more immediate attention from the Appellate Divisions of this state, and, concomitantly, from the attorneys who argue there.

Tempering the broad disclosure requirements imposed by Article 245, §245.70 of the Criminal Procedure Law, effective January 1st, permits either party to move the trial court for a protective order limiting, upon a showing of good cause, the information to be turned over, by either denying, restricting, conditioning, or deferring its disclosure. Premising a finding of “good cause” on factors such as witness safety, protection of confidential informants, and risk of tampering with proceedings—all weighed against defendant’s constitutional rights to due process and to present a defense—the section

mandates that, unless the defense consents to the People's request for a protective order, the trial court must hold a prompt hearing within three business days and render a decision expeditiously. The statute further provides that the materials submitted and a transcript of the hearing may be sealed, and shall constitute a part of the record on appeal. Pretty standard so far. But then comes the kicker: Subsection 6 additionally provides for expedited "review" of the trial court's ruling by an individual Justice of the Appellate Division upon the application of either party.

To the criminal practitioner, this review provision is quite foreign. Unlike in civil cases, where interlocutory appeals are commonplace, in criminal practice in New York there is no provision whatsoever for an interlocutory appeal of a trial judge's order. Rather, defendants may only appeal from a "judgment," i.e., a conviction and sentence (see CPL §450.10). And prosecutors are even more limited, as double jeopardy bars them from appealing from a judgment of acquittal, and the only pre-trial orders they may appeal are those effectively terminating the prosecution or resulting in reduction or dismissal of charges (see CPL §§450.20; 450.50). Thus, to the extent that the new provision provides for a kind of interlocutory appeal, it certainly breaks new ground. But the tremors it causes in doing so may be enough to topple it.

In this regard, to the extent the provision provides for appellate review of a trial court's order by a *single* Justice of the Appellate Division, it seems to run afoul of the constitution. Article 6, §4(b) of the New York State Constitution states that "in each appellate division, four justices shall constitute a quorum, and the concurrence of three shall be necessary to a decision." To avoid this quandary, it would be necessary to deem this something other than appellate review. But, if so, then what would it be? Other motions that are made to single Justices of the Appellate Division, like applications for bail pending

appeal, for example, do not involve review—and possible reversal—of a trial court's order. To the contrary, that provision explicitly provides that only one application may be made, *either* to the trial judge *or* to a Justice of the Appellate Division (CPL §460.50); so there is no possibility for either review or reversal of a lower court's order. And in instances where the Appellate Division is authorized to engage in civil review of criminal court orders pursuant to common law writs, like habeas corpus for bail review, or the writs of mandamus or prohibition that are now subsumed under CPLR Article 78 for extraordinary abuses of judicial authority, the review is by a full panel of four Justices—not by a single appellate judge. Moreover, under both habeas corpus and Article 78, the burdens on the moving party are onerous, with review limited to the question of whether the trial court exceeded its authority, and not whether it simply reached an incorrect result. By contrast, §240.70 provides no standard of review or deference, seemingly permitting an appellate Justice to engage in de novo review and simply substitute her judgment for that of the trial court.

On the other hand, other details governing this review provision make it quite unlike an appeal; but also raise additional questions. Section 245.70(6)(b), for instance, provides that the "review shall be sought … by order to show cause," but, in the same breath, provides that "service on the opposing party … [is] unnecessary where the opposing party was not made aware of the application for a protective order and good cause is shown." There does not seem to be any other instance in the criminal law permitting an ex parte appeal, nor, more fundamentally, any logic to filing an "order to show cause" in the absence of any opposing party to appear and show cause why the order should not be granted. Likewise, §245.70(6)(c) provides that, notwithstanding the review, decision, and order of the Appellate Division Justice under this section, a defendant may still "claim as error the ruling

reviewed" in a subsequent appeal from a judgment of conviction—in other words, the same trial-court ruling would be subject to intermediate appellate review *twice*: once before conviction and once after, with potentially inconsistent results. More careful scrutiny of this particular language yields additional anomalies. By its terms, post-conviction, a defendant may only claim as error "the ruling reviewed"—i.e., the *trial court's original ruling* on the protective order—and *not* the order of the single Appellate Division Justice. So, if the trial judge denies the People's request for a protective order, and a single Appellate Division Justice reverses that order and grants a protective order on expedited review, the defendant would be unable to challenge this adverse ruling on appeal. This amounts to a potentially unconstitutional restriction on defendant's right to appeal. Of course, even if this language were modified or interpreted differently to avoid this problem, it is difficult to fathom how review of the single Appellate Division Justice's order could be accomplished anyway, as the statute, for the sake of expediency, dispenses with the need for any written briefs or even any written opinion, leaving little for an appellate court to review.

Aside from these cerebral legal issues, which will surely be the subject of much litigation in the future, the provision raises practical concerns, which are far more immediate. With full and comprehensive discovery now mandated in every case within 15 days of arraignment, and prior to withdrawal of any plea offer, and with protective orders widely available to both parties, and a limitless array of options available to the trial court in issuing such orders—including full denial of discovery, partial redactions, conditional or limited disclosures to specified individuals, deferral of time limits, or any "other order as is appropriate"—it is not difficult to contemplate that such protective orders may be widely and regularly sought. By extension, as either party may obtain as-of-right expedited review of an adverse or partially-adverse order to a

Justice of the Appellate Division, it is not difficult to imagine that the number of such applications may prove to be quite large. Not only will the Appellate Division have to allocate already-limited resources to this review, but it will also have to figure out the mechanics of implementing the provision, which explicitly leaves "the assignment of the individual appellate justice, and the mode of and procedure for the review [to] be determined by rules of the individual appellate courts." CPL §245.70(6)(c). That process is already underway. According to Aprilanne Agostino, Clerk of the Court for the Appellate Division, Second Department, "the four departments of the Appellate Division are currently discussing how to handle the implementation of the new provision from a procedural standpoint, whether on a statewide level or departmentally." The Second Department, which is the busiest of the four departments, with the heaviest caseload, is also acutely aware of the need to "streamline the process," Ms. Agostino said, and will take "all necessary steps to ensure speedy resolution" of these new motions. Indeed, with the statute providing for an automatic stay of the "lower court's order subject to review … until the appellate justice renders a determination" (CPL §245.70[6][b]), a quick decision is critically important to avoid backlog in the trial courts, as well.

Whatever side of the courtroom you occupy, and whatever your opinion of the new discovery reform provisions, one thing is certain: A wave of change is coming. Whether the levee will hold, or the floodgates will open, remains to be seen.

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