

6907

2011-2012 Regular Sessions

I N A S S E M B L Y

April 5, 2011

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

AN ACT to amend the criminal procedure law and the penal law, in
relation to establishing new criminal discovery rules; and to repeal
article 240 of the criminal procedure law relating thereto

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

1 Section 1. Article 240 of the criminal procedure law is REPEALED.

2 S 2. The criminal procedure law is amended by adding a new article 245
3 to read as follows:

4 ARTICLE 245

5 DISCOVERY

6 SECTION 245.10 TIMING OF DISCOVERY.

7 245.20 AUTOMATIC DISCOVERY.

8 245.25 MATERIAL HELD BY OTHER GOVERNMENTAL PERSONNEL.

9 245.30 DISCRETIONARY DISCOVERY BY ORDER OF THE COURT.

10 245.35 DEPOSITIONS.

11 245.40 NON-TESTIMONIAL EVIDENCE FROM THE DEFENDANT.

12 245.45 PRESERVATION OF EVIDENCE.

13 245.50 CERTIFICATES OF COMPLIANCE.

14 245.55 FLOW OF INFORMATION.

15 245.60 CONTINUING DUTY TO DISCLOSE.

16 245.65 WORK PRODUCT.

17 245.70 PROTECTIVE ORDERS.

18 245.75 AMENDMENT OF DISCOVERY ORDERS.

19 245.80 WAIVER OF DISCOVERY BY DEFENDANT.

20 245.85 REMEDIES OR SANCTIONS FOR NONCOMPLIANCE.

21 245.90 ADMISSIBILITY OF DISCOVERY.

22 S 245.10 TIMING OF DISCOVERY.

23 1. PROSECUTION'S PERFORMANCE OF OBLIGATIONS. (A) THE PROSECUTION SHALL
24 PERFORM ITS INITIAL DISCOVERY OBLIGATIONS UNDER SUBDIVISION ONE OF

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

LBD10278-01-1

SECTION 245.20 OF THIS ARTICLE AS SOON AS PRACTICABLE BUT NOT LATER THAN FIFTEEN CALENDAR DAYS AFTER THE DEFENDANT'S ARRAIGNMENT ON AN INDICTMENT, SUPERIOR COURT INFORMATION, PROSECUTOR'S INFORMATION, INFORMATION, OR SIMPLIFIED INFORMATION CHARGING A MISDEMEANOR, EXCEPT THAT PORTIONS OF MATERIALS CLAIMED TO BE NON-DISCOVERABLE MAY BE WITHHELD PENDING A DETERMINATION AND RULING OF THE COURT UNDER SECTION 245.70 OF THIS ARTICLE; BUT THE DEFENDANT MUST BE NOTIFIED IN WRITING THAT INFORMATION HAS NOT BEEN DISCLOSED UNDER A PARTICULAR SECTION.

(B) THE PROSECUTION SHALL PERFORM ITS SUPPLEMENTAL DISCOVERY OBLIGATIONS UNDER SUBDIVISION TWO OF SECTION 245.20 OF THIS ARTICLE AS SOON AS PRACTICABLE BUT NOT LATER THAN FIFTEEN CALENDAR DAYS BEFORE TRIAL.

(C) UPON TIMELY DEFENSE REQUEST, THE PROSECUTION SHALL DISCLOSE MATERIALS UNDER PARAGRAPH (A) OF SUBDIVISION ONE OF SECTION 245.20 OF THIS ARTICLE TO ANY DEFENDANT WHO HAS BEEN ARRAIGNED IN A LOCAL CRIMINAL COURT UPON A CURRENTLY UNDISPOSED OF FELONY COMPLAINT CHARGING AN OFFENSE WHICH IS A SUBJECT OF A PROSPECTIVE OR PENDING GRAND JURY PROCEEDING, NO LATER THAN FORTY-EIGHT HOURS BEFORE THE TIME SCHEDULED FOR THE DEFENDANT TO TESTIFY AT A GRAND JURY PROCEEDING PURSUANT TO SUBDIVISION FIVE OF SECTION 190.50 OF THIS CHAPTER.

2. DISCLOSURE PRIOR TO A GUILTY PLEA DEADLINE. IF THE PROSECUTION HAS IMPOSED A GUILTY PLEA DEADLINE, BUT DOES NOT PROVIDE THE DEFENDANT WITH MATERIAL DISCLOSURE LISTED IN SUBDIVISION ONE OF SECTION 245.20 OF THIS ARTICLE AT LEAST THIRTY CALENDAR DAYS BEFORE THE GUILTY PLEA DEADLINE, THE COURT, UPON MOTION OF THE DEFENDANT, SHALL CONSIDER THE IMPACT OF THE FAILURE TO PROVIDE SUCH DISCLOSURE ON THE DEFENDANT'S DECISION TO ACCEPT OR REJECT A GUILTY PLEA OFFER. IF THE COURT DETERMINES THAT THE PROSECUTOR'S FAILURE TO PROVIDE SUCH DISCLOSURE MATERIALLY AFFECTED THE DEFENDANT'S DECISION TO REJECT A GUILTY PLEA OFFER AND THE PROSECUTOR DECLINES TO REINSTATE THAT LAPSED GUILTY PLEA OFFER, THE PRESUMPTIVE MINIMUM REMEDY OR SANCTION SHALL BE PRECLUSION FROM ADMISSION AT TRIAL OF ANY EVIDENCE NOT DISCLOSED AT LEAST THIRTY CALENDAR DAYS BEFORE THE DEADLINE. IF THE COURT DETERMINES, UPON MOTION OF THE DEFENDANT MADE PRIOR TO SENTENCING, THAT THE PROSECUTOR'S FAILURE TO PROVIDE DISCLOSURE LISTED IN PARAGRAPH (J) OF SUBDIVISION ONE OF SECTION 245.20 OF THIS ARTICLE MATERIALLY AFFECTED THE DEFENDANT'S DECISION TO ACCEPT A GUILTY PLEA OFFER, THE COURT SHALL VACATE THE GUILTY PLEA AND FURTHER PROCEEDINGS SHALL BE HAD ON THE ACCUSATORY INSTRUMENT.

3. DEFENDANT'S PERFORMANCE OF OBLIGATIONS. THE DEFENDANT SHALL PERFORM HIS OR HER DISCOVERY OBLIGATIONS UNDER SUBDIVISION THREE OF SECTION 245.20 OF THIS ARTICLE NOT LATER THAN THIRTY CALENDAR DAYS AFTER BEING SERVED WITH THE PROSECUTION'S CERTIFICATE OF COMPLIANCE PURSUANT TO SUBDIVISION ONE OF SECTION 245.50 OF THIS ARTICLE, EXCEPT THAT PORTIONS OF MATERIALS CLAIMED TO BE NON-DISCOVERABLE MAY BE WITHHELD PENDING A DETERMINATION AND RULING OF THE COURT UNDER SECTION 245.70 OF THIS ARTICLE; BUT THE PROSECUTION MUST BE NOTIFIED IN WRITING THAT INFORMATION HAS NOT BEEN DISCLOSED UNDER A PARTICULAR SECTION.

S 245.20 AUTOMATIC DISCOVERY.

1. INITIAL DISCOVERY FOR THE DEFENDANT. THE PROSECUTION SHALL DISCLOSE TO THE DEFENDANT, AND PERMIT THE DEFENDANT TO DISCOVER, INSPECT, COPY OR PHOTOGRAPH, EACH OF THE FOLLOWING ITEMS AND INFORMATION WHEN IT IS IN THE POSSESSION, CUSTODY OR CONTROL OF THE PROSECUTION OR PERSONS UNDER THE PROSECUTION'S DIRECTION OR CONTROL:

(A) ALL WRITTEN AND RECORDED STATEMENTS, AND THE SUBSTANCE OF ALL ORAL STATEMENTS, MADE BY THE DEFENDANT OR A CO-DEFENDANT WHICH RELATE TO THE SUBJECT MATTER OF THE CASE OR ARE OTHERWISE RELEVANT;

1 (B) ALL TRANSCRIPTS OF THE TESTIMONY OF A PERSON WHO HAS TESTIFIED
2 BEFORE ANY GRAND JURY WHEN THE TESTIMONY RELATES TO THE SUBJECT MATTER
3 OF THE CASE OR IS OTHERWISE RELEVANT;

4 (C) THE NAMES, KNOWN ALIASES, ADDRESSES AND BIRTH DATES OF ALL
5 PERSONS, OTHER THAN LAW ENFORCEMENT PERSONNEL, WHOM THE PROSECUTOR KNOWS
6 TO HAVE EVIDENCE OR INFORMATION RELEVANT TO ANY OFFENSE CHARGED OR TO A
7 POTENTIAL DEFENSE THERETO, INCLUDING A DESIGNATION BY THE PROSECUTOR AS
8 TO WHICH OF THOSE PERSONS MAY BE CALLED AS WITNESSES;

9 (D) THE NAME, RANK, SHIELD NUMBER AND BUSINESS ADDRESS OF ALL LAW
10 ENFORCEMENT PERSONNEL WHOM THE PROSECUTOR KNOWS TO HAVE EVIDENCE OR
11 INFORMATION RELEVANT TO ANY OFFENSE CHARGED OR TO A POTENTIAL DEFENSE
12 THERETO;

13 (E) ALL STATEMENTS, WRITTEN OR RECORDED OR SUMMARIZED IN ANY WRITING
14 OR RECORDING, WHICH RELATE TO THE SUBJECT MATTER OF THE CASE OR ARE
15 OTHERWISE RELEVANT AND WERE MADE BY PERSONS WHOM THE PROSECUTOR KNOWS TO
16 HAVE EVIDENCE OR INFORMATION RELEVANT TO ANY OFFENSE CHARGED OR TO A
17 POTENTIAL DEFENSE THERETO;

18 (F) INTENDED EXPERT OPINION EVIDENCE, INCLUDING THE NAME, BUSINESS
19 ADDRESS, CURRENT CURRICULUM VITAE, AND A LIST OF PUBLICATIONS OF EACH
20 INTENDED EXPERT WITNESS, AND ALL REPORTS PREPARED BY THE EXPERT THAT
21 PERTAIN TO THE CASE, OR IF NO REPORT IS PREPARED, A WRITTEN STATEMENT OF
22 THE FACTS AND OPINIONS TO WHICH THE EXPERT IS EXPECTED TO TESTIFY AND A
23 SUMMARY OF THE GROUNDS FOR EACH OPINION. THIS SUBDIVISION DOES NOT ALTER
24 OR IN ANY WAY AFFECT THE PROCEDURES, OBLIGATIONS OR RIGHTS SET FORTH IN
25 SECTION 250.10 OF THIS TITLE. IF IN THE EXERCISE OF REASONABLE DILIGENCE
26 THIS INFORMATION IS UNAVAILABLE FOR DISCLOSURE WITHIN THE TIME PERIOD
27 SPECIFIED IN SUBDIVISION ONE OF SECTION 245.10 OF THIS ARTICLE, THAT
28 PERIOD SHALL BE STAYED WITHOUT NEED FOR A MOTION PURSUANT TO SECTION
29 245.75 OF THIS ARTICLE; EXCEPT THAT THE DISCLOSURE SHALL BE MADE AS SOON
30 AS PRACTICABLE AND NOT LATER THAN SIXTY CALENDAR DAYS BEFORE TRIAL,
31 UNLESS AN ORDER IS OBTAINED PURSUANT TO SECTION 245.75 OF THIS ARTICLE;

32 (G) ALL POLICE REPORTS, LAW ENFORCEMENT AGENCY REPORTS, POLICE OFFICER
33 MEMO BOOK ENTRIES AND LOG ENTRIES AND NOTES, INTENDED EXHIBITS, TAPES
34 AND OTHER ELECTRONIC RECORDINGS, PHOTOGRAPHS, DRAWINGS, AND TANGIBLE
35 OBJECTS WHICH RELATE TO THE SUBJECT MATTER OF THE CASE OR ARE OTHERWISE
36 RELEVANT, INCLUDING ANY PHOTOGRAPH, PHOTOCOPY OR REPRODUCTION MADE BY OR
37 AT THE DIRECTION OF LAW ENFORCEMENT PERSONNEL OF ANY PROPERTY PRIOR TO
38 ITS RELEASE PURSUANT TO SECTION 450.10 OF THE PENAL LAW;

39 (H) ALL REPORTS, DOCUMENTS, RESULTS AND INFORMATION CONCERNING SCIENTIFIC
40 TESTS AND EXPERIMENTS AND COMPARISONS, AND PHYSICAL AND MENTAL
41 EXAMINATIONS OF ANY PERSON, WHICH RELATE TO THE SUBJECT MATTER OF THE
42 CASE OR ARE OTHERWISE RELEVANT;

43 (I) ALL TANGIBLE OBJECTS OBTAINED FROM OR ALLEGEDLY BELONGING TO THE
44 DEFENDANT OR A CO-DEFENDANT, INCLUDING A DESIGNATION BY THE PROSECUTOR
45 AS TO WHICH TANGIBLE OBJECTS WERE PHYSICALLY OR CONSTRUCTIVELY POSSESSED
46 BY THE DEFENDANT AND WERE RECOVERED DURING A SEARCH OR SEIZURE BY A
47 POLICE OFFICER OR OTHER PUBLIC SERVANT OR AN AGENT THEREOF, AND WHICH
48 TANGIBLE OBJECTS WERE RECOVERED BY A POLICE OFFICER OR OTHER PUBLIC
49 SERVANT OR AN AGENT THEREOF AFTER ALLEGEDLY BEING ABANDONED BY THE
50 DEFENDANT. IF THE PROSECUTION INTENDS TO PROVE THE DEFENDANT'S
51 POSSESSION OF ANY TANGIBLE OBJECTS SOLELY BY MEANS OF A STATUTORY
52 PRESUMPTION OF POSSESSION UNDER SECTION 220.25 OR 265.15 OF THE PENAL
53 LAW OR ANOTHER SECTION, IT SHALL ALSO DESIGNATE THAT INTENTION AS TO
54 EACH SUCH OBJECT. IN ADDITION THE PROSECUTOR SHALL DESIGNATE THE
55 LOCATIONS FROM WHICH ALL TANGIBLE OBJECTS WERE RECOVERED;

(J) ALL EVIDENCE AND INFORMATION WHICH TENDS TO NEGATE THE DEFENDANT'S GUILT OR TO MITIGATE THE DEFENDANT'S CULPABILITY AS TO A CHARGED OFFENSE, OR WHICH TENDS TO SUPPORT A POTENTIAL DEFENSE THERETO, OR WHICH TENDS TO SUPPORT A MOTION TO SUPPRESS EVIDENCE ON CONSTITUTIONAL GROUNDS, OR WHICH WOULD TEND TO REDUCE THE PUNISHMENT OF THE DEFENDANT.

(I) SUCH EVIDENCE OR INFORMATION INCLUDES BUT IS NOT LIMITED TO: AN OVERT OR TACIT LENIENCY DEAL WITH A POTENTIAL PROSECUTION WITNESS OR AN INFORMANT; A POTENTIAL PROSECUTION WITNESS'S OR AN INFORMANT'S PRIOR INCONSISTENT STATEMENTS; INFORMATION INDICATING A POTENTIAL PROSECUTION WITNESS'S OR AN INFORMANT'S POSSIBLE BIAS, INTEREST, HOSTILITY, OR REASONS TO FABRICATE; INFORMATION THAT TENDS TO UNDERCUT THE BELIEVABILITY OF A POTENTIAL PROSECUTION WITNESS'S OR AN INFORMANT'S FACTUAL ACCOUNT; PRIOR CONDUCT, MISCONDUCT AND CRIMINAL ACTS THAT TEND TO UNDERCUT THE CREDIBILITY OF A POTENTIAL PROSECUTION WITNESS OR AN INFORMANT; AND INFORMATION THAT TENDS TO UNDERCUT THE PROOF OF AN ELEMENT OF A CHARGED OFFENSE OR THAT OTHERWISE TENDS TO INDICATE THE DEFENDANT MAY NOT BE GUILTY.

(II) DISCLOSURE IS REQUIRED EVEN IF THE PROSECUTION DOUBTS THE BELIEVABILITY OR USEFULNESS TO THE DEFENDANT OF THE EVIDENCE OR INFORMATION, OR BELIEVES IT CAN BE RECONCILED WITH THE PROSECUTION'S OTHER EVIDENCE; OR IF IT HAS BOTH AN INCUPLYATORY AND AN EXCULPATORY EFFECT; OR IF IT RELATES TO A POTENTIAL DEFENSE DIFFERENT FROM THAT WHICH HAS BEEN ANNOUNCED OR IS BEING PURSUED; OR IF IT HAS NOT BEEN MEMORIALIZED OR RECORDED IN TANGIBLE FORM; OR IF IT IS NOT ADMISSIBLE AS EVIDENCE IN ITS PRESENT FORM; OR IF IT IS KNOWN TO THE DEFENDANT; OR IF IT RELATES TO A PERSON WHOM THE PROSECUTION DOES NOT INTEND TO CALL AT TRIAL BUT WHO POSSESSES EXCULPATORY INFORMATION;

(K) A SUMMARY OF ALL CORPOREAL OR NON-CORPOREAL OR VOICE IDENTIFICATION PROCEDURES, INCLUDING NOT ONLY PROCEDURES IN WHICH AN EYEWITNESS IDENTIFIED THE DEFENDANT BUT ALSO PROCEDURES IN WHICH AN EYEWITNESS DID NOT IDENTIFY THE DEFENDANT WHEN THE OPPORTUNITY FOR SUCH IDENTIFICATION EXISTED. THE SUMMARY SHALL INCLUDE:

(I) THE DATE, TIME, LOCATION, TYPE, AND RESULT OF EACH PROCEDURE;

(II) THE NAMES OF ALL PERSONS PRESENT AT EACH PROCEDURE IF KNOWN TO LAW ENFORCEMENT;

(III) THE NAME AND ADDRESS OF EACH EYEWITNESS AT EACH PROCEDURE;

(IV) THE NUMBER AND SOURCE OF ALL PHOTOGRAPHS OR LINEUP PARTICIPANTS USED IN EACH PROCEDURE;

(V) A COPY OF ALL PHOTOGRAPHS, PHOTOGRAPHIC ARRAYS, AND PHOTOGRAPHS TAKEN OF ALL LINEUPS VIEWED BY AN EYEWITNESS;

(VI) THE DESCRIPTIONS OF SUSPECTS ENTERED INTO AN ELECTRONIC OR COMPUTER PHOTOGRAPHIC IDENTIFICATION SYSTEM, AND A SAVED COLLECTION OF THE PHOTOGRAPHIC IMAGES GENERATED BY EACH DESCRIPTION AND VIEWED BY EACH EYEWITNESS;

(VII) WHETHER THE PROCEDURE WAS SIMULTANEOUS OR SEQUENTIAL;

(VIII) ALL STATEMENTS MADE IN THE PRESENCE OF OR BY EACH EYEWITNESS THAT ARE RELEVANT TO THE ISSUE OF IDENTITY OR TO THE FAIRNESS OR ACCURACY OF THE PROCEDURE, INCLUDING THE WORDS USED BY AN EYEWITNESS IN MAKING ANY IDENTIFICATION AND ANY WORDS DESCRIBING HIS OR HER CERTAINTY OR UNCERTAINTY IN AN IDENTIFICATION AT THE TIME IT WAS MADE;

(IX) ALL STATEMENTS MADE BY EACH EYEWITNESS REGARDING THE ROLE IN THE CHARGED OFFENSE OF A PERSON IDENTIFIED AND ANY OTHER RELATIONSHIP BETWEEN THEM;

(X) WHETHER THE EYEWITNESS SELECTED A DIFFERENT PERSON AS THE PERPETRATOR OR INDICATED A BELIEF THAT HE OR SHE COULD NOT IDENTIFY THE PERPETRATOR;

1 (XI) WHETHER BEFORE THE PROCEDURE THE EYEWITNESS WAS INSTRUCTED THAT
2 THE PERPETRATOR MIGHT OR MIGHT NOT BE PRESENT;

3 (XII) WHETHER THE ADMINISTRATOR OF EACH PROCEDURE KNEW WHICH PERSON
4 WAS THE SUSPECT, AND WHETHER, BEFORE THE PROCEDURE, THE EYEWITNESS WAS
5 INSTRUCTED THAT THE ADMINISTRATOR DID NOT KNOW WHICH PERSON WAS THE
6 SUSPECT; AND

7 (XIII) IF THE PROSECUTION POSSESSES INFORMATION THAT AN EYEWITNESS
8 MADE A CORPOREAL OR NON-CORPOREAL OR VOICE OBSERVATION OF THE DEFENDANT
9 ON ANY OTHER OCCASION AFTER THE TIME OF THE CHARGED OFFENSE BUT BEFORE
10 TRIAL, REGARDLESS OF THE INVOLVEMENT OR LACK OF INVOLVEMENT OF A POLICE
11 OFFICER OR OTHER PUBLIC SERVANT IN THAT OBSERVATION, IT SHALL ALSO
12 DISCLOSE THAT INFORMATION;

13 (L) A SUMMARY OF ALL PROMISES, REWARDS AND INDUCEMENTS MADE TO PERSONS
14 WHO MAY BE CALLED AS WITNESSES, AS WELL AS REQUESTS FOR CONSIDERATION BY
15 PERSONS WHO MAY BE CALLED AS WITNESSES, AND COPIES OF ALL DOCUMENTS
16 RELEVANT TO A PROMISE, REWARD AND INDUCEMENT;

17 (M) WHETHER THE PROSECUTION HAS ANY EVIDENCE OR INFORMATION THAT HAS
18 BEEN PROVIDED BY A CONFIDENTIAL INFORMANT OR A JAILHOUSE INFORMANT WHICH
19 RELATES TO THE SUBJECT MATTER OF THE CASE OR IS OTHERWISE RELEVANT;

20 (N) WHETHER A SEARCH WARRANT HAS BEEN EXECUTED AND ALL DOCUMENTS
21 RELATING THERETO, INCLUDING BUT NOT LIMITED TO THE WARRANT, THE WARRANT
22 APPLICATION, ALL SUPPORTING AFFIDAVITS, A POLICE INVENTORY OF ALL PROP-
23 erty SEIZED UNDER THE WARRANT, AND A TRANSCRIPT OF ALL TESTIMONY OR
24 OTHER ORAL COMMUNICATIONS OFFERED IN SUPPORT OF THE WARRANT APPLICATION;

25 (O) WHETHER THERE HAS BEEN ANY ELECTRONIC SURVEILLANCE, INCLUDING BUT
26 NOT LIMITED TO WIRETAPPING OR VIDEO SURVEILLANCE, OF A RESIDENCE OR
27 BUSINESS OR TELEPHONE OR COMPUTER OR OTHER ELECTRONIC OR DIGITAL DEVICE
28 OF THE DEFENDANT, OR OF CONVERSATIONS TO WHICH THE DEFENDANT OR A CO-DE-
29 FENDANT WAS A PARTY, AND ALL RECORDINGS, TRANSCRIPTS, DOCUMENTS,
30 WARRANTS AND WARRANT APPLICATION MATERIALS RELATING THERETO;

31 (P) THE APPROXIMATE DATE, TIME AND PLACE OF THE OFFENSE OR OFFENSES
32 CHARGED AND OF THE DEFENDANT'S SEIZURE AND ARREST;

33 (Q) WHETHER A CHARGED OFFENSE WAS SEEN BY A POLICE OFFICER OR OTHER
34 PUBLIC SERVANT FROM A POLICE OBSERVATION POST AND, IF SO, WHETHER VISUAL
35 MAGNIFICATION OR ENHANCEMENT EQUIPMENT WAS USED. THE PROSECUTION SHALL
36 PROVIDE COUNSEL FOR THE DEFENDANT WITH INFORMATION SUFFICIENT TO UNDER-
37 TAKE A REASONABLE INVESTIGATION OF THE LOCATION OF THE POLICE OBSERVA-
38 TION POST ON CONDITION THAT SUCH INFORMATION SHALL BE AVAILABLE ONLY TO
39 COUNSEL FOR THE DEFENDANT AND DEFENSE PERSONNEL AND NOT TO THE DEFENDANT
40 IF THE OBSERVATION POST IS STILL USED; EXCEPT THAT A DIFFERENT PROTEC-
41 TIVE ORDER PURSUANT TO SECTION 245.70 OF THIS ARTICLE MAY BE ISSUED BY
42 THE COURT FOR GOOD CAUSE SHOWN;

43 (R) ALL INFORMATION OR MATERIAL REQUIRED TO BE GATHERED OR MEMORIAL-
44 IZED PURSUANT TO SUBDIVISIONS ONE AND TWO OF SECTION 245.45 OF THIS
45 ARTICLE;

46 (S) ANY DOCUMENTATION THAT THE PROSECUTOR HAS OBTAINED THAT RELATES TO
47 THE SUBJECT MATTER OF THE CASE OR IS OTHERWISE RELEVANT, CONCERNING:

48 (I) CELLULAR TELEPHONE ACCOUNT INFORMATION AND RECORDS, CELLULAR TELE-
49 PHONE CALL DATA AND RECORDS, CELLULAR TELEPHONE TEXT MESSAGE DATA AND
50 RECORDS, RECORDINGS OF CELLULAR TELEPHONE MESSAGES, RECORDS OF CELLULAR
51 TELEPHONE TEXT MESSAGES, RECORDS OF CELLULAR TELEPHONE PHOTOGRAPHS, AND
52 CELLULAR TELEPHONE TOWER DATA AND RECORDS;

53 (II) EMAIL ACCOUNT INFORMATION AND RECORDS, AND RECORDS OF EMAIL
54 MESSAGES AND INSTANT MESSAGES;

55 (III) INTERNET SERVICE PROVIDER ACCOUNT INFORMATION AND RECORDS;

1 (IV) INTERNET SOCIAL NETWORK ACCOUNT INFORMATION, RECORDS AND POST-
2 INGS;

3 (V) RECORDS OF INTERNET INSTANT MESSAGES, WEB PAGES AND WEB POSTINGS;

4 (VI) ACCOUNT INFORMATION, RECORDS AND DATA FROM A PERSONAL DIGITAL
5 ASSISTANT DEVICE OR OTHER ELECTRONIC OR DIGITAL DEVICE USED FOR COMMUNI-
6 CATION OR FOR RECORDING OR STORING INFORMATION;

7 (VII) DATA, RECORDS AND DOCUMENTS OBTAINED FROM A COMPUTER HARD DRIVE;

8 (VIII) ACCOUNT INFORMATION, RECORDS AND DATA FROM AN ELECTRONIC TOLL
9 OR MASS TRANSIT SYSTEM FEE PAYMENT DEVICE; AND

10 (IX) SIMILAR DOCUMENTATION THAT RELATES TO OTHER ELECTRONIC OR DIGITAL
11 COMMUNICATION, RECORDING, OR STORAGE DEVICES;

12 (T) ANY DOCUMENTATION THAT THE PROSECUTOR HAS OBTAINED REGARDING PRIOR
13 AND PENDING ACCUSATORY INSTRUMENTS, CONVICTIONS, DISPOSITIONS, AND THE
14 PROBATIONARY STATUS OF ALL DEFENDANTS AND ALL WITNESSES DESIGNATED AS
15 POTENTIAL PROSECUTION WITNESSES PURSUANT TO PARAGRAPH (C) OF THIS SUBDI-
16 VISION. IF COUNSEL FOR THE DEFENDANT LACKS ACCESS TO A DATABASE BY WHICH
17 TO OBTAIN THE COMPLETE CRIMINAL RECORD OF ALL DEFENDANTS AND ALL
18 WITNESSES DESIGNATED AS POTENTIAL PROSECUTION WITNESSES, THE PROSECUTOR
19 ALSO SHALL EITHER (I) PROVIDE COUNSEL FOR THE DEFENDANT WITH ACCESS TO
20 SUCH A DATABASE, OR (II) PROVIDE THE DEFENDANT WITH THAT INFORMATION;

21 (U) IN ANY PROSECUTION ALLEGING A VIOLATION OF THE VEHICLE AND TRAFFIC
22 LAW, WHERE THE DEFENDANT IS CHARGED BY INDICTMENT, SUPERIOR COURT INFOR-
23 MATION, PROSECUTOR'S INFORMATION, INFORMATION, OR SIMPLIFIED INFORMATION
24 CHARGING A MISDEMEANOR, THE MOST RECENT RECORD OF INSPECTION, CALI-
25 BRATION AND REPAIR OF MACHINES AND INSTRUMENTS UTILIZED TO PERFORM ANY
26 SCIENTIFIC TESTS AND EXPERIMENTS AND THE CERTIFICATION CERTIFICATE, IF
27 ANY, HELD BY THE OPERATOR OF THE MACHINE OR INSTRUMENT, AND ALL OTHER
28 DISCLOSURES REQUIRED UNDER THIS ARTICLE; AND

29 (V) IN ANY PROSECUTION ALLEGING A VIOLATION OF SECTION 156.05 OR
30 156.10 OF THE PENAL LAW, THE TIME, PLACE AND MANNER OF NOTICE GIVEN
31 PURSUANT TO SUBDIVISION EIGHT OF SECTION 156.00 OF THE PENAL LAW.

32 2. SUPPLEMENTAL DISCOVERY FOR THE DEFENDANT. THE PROSECUTION SHALL
33 DISCLOSE TO THE DEFENDANT A LIST OF ALL MISCONDUCT AND CRIMINAL ACTS OF
34 THE DEFENDANT NOT CHARGED IN THE INDICTMENT, SUPERIOR COURT INFORMATION,
35 PROSECUTOR'S INFORMATION, INFORMATION, OR SIMPLIFIED INFORMATION CHARG-
36 ING A MISDEMEANOR, WHICH THE PROSECUTION INTENDS TO USE AT TRIAL FOR
37 PURPOSES OF IMPEACHING THE CREDIBILITY OF THE DEFENDANT OR AS SUBSTAN-
38 TIVE PROOF OF ANY MATERIAL ISSUE IN THE CASE.

39 3. RECIPROCAL DISCOVERY FOR THE PROSECUTION. (A) THE DEFENDANT SHALL,
40 SUBJECT TO CONSTITUTIONAL LIMITATIONS, DISCLOSE TO THE PROSECUTION, AND
41 PERMIT THE PROSECUTION TO DISCOVER, INSPECT, COPY OR PHOTOGRAPH, ANY
42 MATERIAL AND RELEVANT EVIDENCE WITHIN THE DEFENDANT'S OR COUNSEL FOR THE
43 DEFENDANT'S POSSESSION OR CONTROL THAT IS DISCOVERABLE UNDER PARAGRAPHS
44 (F), (G), (H) AND (L) OF SUBDIVISION ONE OF THIS SECTION, WHICH THE
45 DEFENDANT INTENDS TO OFFER AT TRIAL, AND THE NAMES, KNOWN ALIASES,
46 ADDRESSES, BIRTH DATES, AND ALL STATEMENTS, WRITTEN OR RECORDED OR
47 SUMMARIZED IN ANY WRITING OR RECORDING, OF THOSE PERSONS OTHER THAN THE
48 DEFENDANT WHOM THE DEFENDANT INTENDS TO CALL AS WITNESSES AT TRIAL.

49 (B) DISCLOSURE OF THE NAME, KNOWN ALIASES, ADDRESS, BIRTH DATE, AND
50 ALL STATEMENTS, WRITTEN OR RECORDED OR SUMMARIZED IN ANY WRITING OR
51 RECORDING, OF A PERSON WHOM THE DEFENDANT INTENDS TO CALL AS A WITNESS
52 FOR THE SOLE PURPOSE OF IMPEACHING A PROSECUTION WITNESS IS NOT REQUIRED
53 UNTIL AFTER SUCH PROSECUTION WITNESS HAS TESTIFIED AT TRIAL.

54 (C) IF IN THE EXERCISE OF REASONABLE DILIGENCE THE RECIPROCALLY
55 DISCOVERABLE INFORMATION UNDER PARAGRAPH (F) OF SUBDIVISION ONE OF THIS
56 SECTION IS UNAVAILABLE FOR DISCLOSURE WITHIN THE TIME PERIOD SPECIFIED

1 IN SUBDIVISION THREE OF SECTION 245.10 OF THIS ARTICLE, THAT PERIOD
2 SHALL BE STAYED WITHOUT NEED FOR A MOTION PURSUANT TO SECTION 245.75 OF
3 THIS ARTICLE; EXCEPT THAT THE DISCLOSURE SHALL BE MADE AS SOON AS PRACTICABLE
4 AND NOT LATER THAN THIRTY CALENDAR DAYS BEFORE TRIAL, UNLESS AN
5 ORDER IS OBTAINED PURSUANT TO SECTION 245.75 OF THIS ARTICLE.

6 4. STAY OF AUTOMATIC DISCOVERY; REMEDIES AND SANCTIONS. SUBDIVISIONS
7 ONE AND THREE OF SECTION 245.10 OF THIS ARTICLE AND SUBDIVISIONS ONE,
8 TWO AND THREE OF THIS SECTION SHALL HAVE THE FORCE AND EFFECT OF A COURT
9 ORDER, AND FAILURE TO PROVIDE DISCOVERY PURSUANT TO THEM MAY RESULT IN
10 APPLICATION OF ANY REMEDIES OR SANCTIONS PERMITTED FOR NON-COMPLIANCE
11 WITH A COURT ORDER UNDER SECTION 245.85 OF THIS ARTICLE. HOWEVER, IF IN
12 THE JUDGMENT OF EITHER PARTY GOOD CAUSE EXISTS FOR DECLINING TO MAKE ANY
13 OF THE DISCLOSURES SET FORTH ABOVE, IT MAY MOVE FOR A PROTECTIVE ORDER
14 PURSUANT TO SECTION 245.70 OF THIS ARTICLE AND PRODUCTION OF THE ITEM
15 SHALL BE STAYED PENDING A RULING BY THE COURT. THE OPPOSING PARTY SHALL
16 BE NOTIFIED IN WRITING THAT INFORMATION HAS NOT BEEN DISCLOSED UNDER A
17 PARTICULAR SECTION. WHEN SOME PARTS OF MATERIAL OR INFORMATION ARE
18 DISCOVERABLE BUT IN THE JUDGMENT OF A PARTY GOOD CAUSE EXISTS FOR
19 DECLINING TO DISCLOSE OTHER PARTS, THE DISCOVERABLE PARTS SHALL BE
20 DISCLOSED AND THE DISCLOSING PARTY SHALL GIVE NOTICE IN WRITING THAT
21 NONDISCOVERABLE PARTS HAVE BEEN WITHHELD.

22 5. NOTICE AND PRESERVATION OF EVIDENCE. (A) UPON RECEIPT OF INFORMATION
23 THAT ANY ITEM DESCRIBED IN SUBDIVISION ONE OF THIS SECTION EXISTS,
24 EXCEPT THAT IT IS NOT WITHIN THE POSSESSION, CUSTODY OR CONTROL OF THE
25 PROSECUTION OR PERSONS UNDER THE PROSECUTION'S DIRECTION OR CONTROL, THE
26 PROSECUTION SHALL EXPEDITIOUSLY NOTIFY THE DEFENDANT OF THE EXISTENCE OF
27 THE ITEM AND OF ALL INFORMATION KNOWN TO THE PROSECUTOR CONCERNING THE
28 ITEM'S LOCATION AND THE IDENTITY OF ANY PERSONS POSSESSING IT.

29 (B) AT ANY TIME, A PARTY MAY MOVE FOR AN ORDER TO ANY INDIVIDUAL,
30 AGENCY OR OTHER ENTITY IN POSSESSION, CUSTODY OR CONTROL OF ITEMS WHICH
31 RELATE TO THE SUBJECT MATTER OF THE CASE OR ARE OTHERWISE RELEVANT,
32 REQUIRING THAT SUCH ITEMS BE PRESERVED FOR A SPECIFIED PERIOD OF TIME.
33 IN ADDITION, AT ANY TIME, THE DEFENDANT MAY MOVE FOR AN ORDER TO ANY
34 INDIVIDUAL, AGENCY OR OTHER ENTITY IN POSSESSION, CUSTODY OR CONTROL OF
35 A CRIME SCENE THAT RELATES TO THE SUBJECT MATTER OF THE CASE OR IS
36 OTHERWISE RELEVANT, REQUIRING THAT COUNSEL FOR THE DEFENDANT BE GRANTED
37 PROMPT AND REASONABLE ACCESS TO INSPECT, PHOTOGRAPH OR MEASURE THAT
38 CRIME SCENE, AND THAT THE CONDITION OF THE CRIME SCENE REMAIN UNCHANGED
39 IN THE INTERIM. THE COURT SHALL HEAR AND RULE UPON SUCH MOTIONS EXPEDITIOUSLY.
40 THE COURT MAY MODIFY OR VACATE SUCH ORDERS UPON A SHOWING
41 THAT PRESERVATION OF PARTICULAR EVIDENCE, OR GRANTING ACCESS TO A
42 PARTICULAR CRIME SCENE, WILL CREATE SIGNIFICANT HARDSHIP, ON CONDITION
43 THAT THE PROBATIVE VALUE OF THAT EVIDENCE OR THAT LOCATION IS PRESERVED
44 BY A SPECIFIED ALTERNATIVE MEANS.

45 S 245.25 MATERIAL HELD BY OTHER GOVERNMENTAL PERSONNEL.

46 UPON THE DEFENDANT'S REQUEST AND DESIGNATION OF MATERIAL OR INFORMATION
47 WHICH WOULD BE DISCOVERABLE UNDER SECTION 245.20 OF THIS ARTICLE IF
48 IN THE POSSESSION, CUSTODY OR CONTROL OF THE PROSECUTION OR PERSONS
49 UNDER THE PROSECUTION'S DIRECTION OR CONTROL, BUT WHICH IS, IN FACT, IN
50 THE POSSESSION, CUSTODY OR CONTROL OF OTHER GOVERNMENTAL PERSONNEL, THE
51 PROSECUTOR SHALL USE DUE DILIGENCE AND MAKE GOOD FAITH EFFORTS TO CAUSE
52 SUCH MATERIAL OR INFORMATION TO BE MADE AVAILABLE TO THE DEFENDANT, AND
53 IF THE PROSECUTOR'S EFFORTS ARE UNSUCCESSFUL AND SUCH MATERIAL OR INFORMATION
54 OR OTHER GOVERNMENTAL PERSONNEL ARE SUBJECT TO THE JURISDICTION
55 OF THE COURT, THE COURT, UPON MOTION OF THE DEFENDANT, SHALL ISSUE SUIT-

1 ABLE SUBPOENAS OR ORDERS TO CAUSE SUCH MATERIAL OR INFORMATION TO BE
2 MADE AVAILABLE FOR DISCLOSURE TO THE DEFENDANT.

3 S 245.30 DISCRETIONARY DISCOVERY BY ORDER OF THE COURT.

4 THE COURT IN ITS DISCRETION MAY, UPON A SHOWING BY THE DEFENDANT THAT
5 THE REQUEST IS REASONABLE AND THAT THE DEFENDANT IS UNABLE WITHOUT UNDUE
6 HARDSHIP TO OBTAIN THE SUBSTANTIAL EQUIVALENT BY OTHER MEANS, ORDER THE
7 PROSECUTION, OR ANY INDIVIDUAL, AGENCY OR OTHER ENTITY SUBJECT TO THE
8 JURISDICTION OF THE COURT, TO MAKE AVAILABLE FOR DISCLOSURE TO THE
9 DEFENDANT ANY MATERIAL OR INFORMATION WHICH POTENTIALLY RELATES TO THE
10 SUBJECT MATTER OF THE CASE OR IS OTHERWISE RELEVANT. A MOTION UNDER THIS
11 SECTION MUST BE ON NOTICE TO ANY PERSON OR ENTITY AFFECTED BY THE ORDER.
12 THE COURT MAY, UPON REQUEST OF ANY PERSON OR ENTITY AFFECTED BY THE
13 ORDER, VACATE OR MODIFY THE ORDER IF COMPLIANCE WOULD BE UNREASONABLE OR
14 OPPRESSIVE. THE COURT MAY PERMIT A PARTY SEEKING OR OPPOSING A DISCRE-
15 TIONARY ORDER OF DISCOVERY UNDER THIS SECTION, OR ANOTHER AFFECTED
16 PERSON OR ENTITY, TO SUBMIT PAPERS OR TESTIFY EX PARTE OR IN CAMERA. ANY
17 SUCH PAPERS AND A TRANSCRIPT OF SUCH TESTIMONY SHALL BE SEALED AND SHALL
18 CONSTITUTE A PART OF THE RECORD ON APPEAL.

19 S 245.35 DEPOSITIONS.

20 1. AVAILABILITY; USE. AT ANY TIME AFTER THE FILING OF AN ACCUSATORY
21 INSTRUMENT, THE COURT IN ITS DISCRETION MAY, UPON MOTION OF ANY PARTY,
22 ORDER THE EXAMINATION OF ANY PERSON EXCEPT THE DEFENDANT UPON ORAL DEPO-
23 SITION IF THE PARTY SHOWS THAT THE PERSON'S TESTIMONY IS MATERIAL TO THE
24 CASE OR NECESSARY ADEQUATELY TO PREPARE A DEFENSE, AND THAT THE PERSON
25 WILL NOT COOPERATE IN GRANTING A PERSONAL INTERVIEW. A PERSON'S STATE-
26 MENTS IN A DEPOSITION UNDER THIS SECTION MAY BE USED IN SUBSEQUENT
27 PROCEEDINGS IN THE SAME MANNER AS OTHER OUT-OF-COURT STATEMENTS.

28 2. MOTION FOR TAKING DEPOSITION; NOTICE; SERVICE. A MOTION FOR DEPOSI-
29 TION SHALL SPECIFY THE TIME AND PLACE FOR TAKING THE DEPOSITION AND THE
30 NAME AND ADDRESS OF EACH PERSON TO BE EXAMINED, TOGETHER WITH DESIGNATED
31 PAPERS, DOCUMENTS, TAPES OR OTHER ELECTRONIC RECORDINGS, PHOTOGRAPHS OR
32 OTHER TANGIBLE OBJECTS, NOT PRIVILEGED, TO BE PRODUCED AT THE SAME TIME
33 AND PLACE. THE COURT MAY CHANGE SUCH TERMS AND SPECIFY ANY ADDITIONAL
34 CONDITIONS GOVERNING THE CONDUCT OF THE PROCEEDING. THE MOVING PARTY
35 SHALL PROVIDE NOTICE OF THE DEPOSITION IN THE MANNER PROVIDED FOR IN
36 CIVIL ACTIONS AND SERVE A SUBPOENA UPON THE DEPONENT, SPECIFYING THE
37 TERMS AND CONDITIONS SET FORTH IN THE COURT'S ORDER GRANTING THE DEPOSI-
38 TION, AND GIVE REASONABLE NOTICE OF THE DEPOSITION IN WRITING TO EVERY
39 OTHER PARTY.

40 3. MANNER OF TAKING. EXCEPT AS OTHERWISE PROVIDED IN THIS SECTION OR
41 BY ORDER OF THE COURT, DEPOSITIONS SHALL BE TAKEN IN THE MANNER PROVIDED
42 IN CIVIL ACTIONS. WITH THE CONSENT OF THE PARTIES, THE COURT MAY ORDER
43 THAT A DEPOSITION BE TAKEN ON WRITTEN INTERROGATORIES IN THE MANNER
44 PROVIDED IN CIVIL ACTIONS. ANY STATEMENTS, WRITTEN OR RECORDED OR SUMMA-
45 RIZED IN ANY WRITING OR RECORDING, OF THE WITNESS BEING DEPOSED WHICH
46 ARE IN THE POSSESSION, CUSTODY OR CONTROL OF ANY PARTY SHALL BE MADE
47 AVAILABLE FOR EXAMINATION AND USE AT THE TAKING OF THE DEPOSITION TO ANY
48 PARTY. THE DEPOSITION SHALL BE RECORDED BY AN ELECTRONIC RECORDING,
49 WHICH MUST INCLUDE NOT ONLY AUDIO BUT ALSO VISUAL RECORDING, UNLESS THE
50 COURT ORDERS OTHERWISE, OR THE PARTIES STIPULATE THAT IT SHALL BE
51 RECORDED IN ANOTHER MANNER. IF A DEPOSITION IS RECORDED BY OTHER THAN A
52 CERTIFIED COURT REPORTER, THE PARTY TAKING THE DEPOSITION SHALL PROVIDE
53 EVERY OTHER PARTY WITH A COPY OF THE RECORDING WITHIN FIFTEEN CALENDAR
54 DAYS AFTER THE TAKING OF THE DEPOSITION OR NOT LESS THAN TEN CALENDAR
55 DAYS BEFORE TRIAL, WHICHEVER IS EARLIER. THE PARTIES MAY STIPULATE, OR
56 THE COURT MAY ORDER, THAT A DEPOSITION BE TAKEN BY TELEPHONE AND

1 RECORDED. ALL PARTIES AND COUNSEL SHALL HAVE A RIGHT TO BE PRESENT AT
2 THE DEPOSITION. A DEFENDANT SHALL NOT BE PHYSICALLY PRESENT AT A DEPOSI-
3 TION, EXCEPT ON STIPULATION OF THE PARTIES OR BY ORDER OF THE COURT
4 BASED UPON A SHOWING OF GOOD CAUSE.

5 S 245.40 NON-TESTIMONIAL EVIDENCE FROM THE DEFENDANT.

6 1. AVAILABILITY. AFTER THE FILING OF AN ACCUSATORY INSTRUMENT, AND
7 SUBJECT TO CONSTITUTIONAL LIMITATIONS, THE COURT MAY, UPON MOTION OF THE
8 PROSECUTION SHOWING PROBABLE CAUSE TO BELIEVE THE DEFENDANT HAS COMMIT-
9 TED THE CRIME, A CLEAR INDICATION THAT RELEVANT MATERIAL EVIDENCE WILL
10 BE FOUND, AND THAT THE METHOD USED TO SECURE IT IS SAFE AND RELIABLE,
11 REQUIRE A DEFENDANT TO PROVIDE NON-TESTIMONIAL EVIDENCE, INCLUDING TO:

12 (A) APPEAR IN A LINEUP;

13 (B) SPEAK FOR IDENTIFICATION BY A WITNESS OR POTENTIAL WITNESS;

14 (C) BE FINGERPRINTED;

15 (D) POSE FOR PHOTOGRAPHS NOT INVOLVING REENACTMENT OF AN EVENT;

16 (E) PERMIT THE TAKING OF SAMPLES OF THE DEFENDANT'S BLOOD, HAIR, AND
17 OTHER MATERIALS OF THE DEFENDANT'S BODY THAT INVOLVES NO UNREASONABLE
18 INTRUSION THEREOF;

19 (F) PROVIDE SPECIMENS OF THE DEFENDANT'S HANDWRITING; AND

20 (G) SUBMIT TO A REASONABLE PHYSICAL OR MEDICAL INSPECTION OF THE
21 DEFENDANT'S BODY.

22 2. LIMITATIONS. THIS SECTION SHALL NOT BE CONSTRUED TO ALTER OR IN ANY
23 WAY AFFECT THE ISSUANCE OF A SIMILAR COURT ORDER, AS MAY BE AUTHORIZED
24 BY LAW, BEFORE THE FILING OF AN ACCUSATORY INSTRUMENT, CONSISTENT WITH
25 SUCH RIGHTS AS THE DEFENDANT MAY DERIVE FROM THE NEW YORK CONSTITUTION
26 OR THE UNITED STATES CONSTITUTION. THIS SECTION SHALL NOT BE CONSTRUED
27 TO ALTER OR IN ANY WAY AFFECT THE ADMINISTRATION OF A CHEMICAL TEST
28 WHERE OTHERWISE AUTHORIZED. AN ORDER PURSUANT TO THIS SECTION MAY BE
29 DENIED, LIMITED OR CONDITIONED AS PROVIDED IN SECTION 245.70 OF THIS
30 ARTICLE.

31 S 245.45 PRESERVATION OF EVIDENCE.

32 1. APPARENTLY MATERIAL WITNESS OR PHYSICAL EVIDENCE. (A) WHEN POLICE
33 OFFICERS OR OTHER LAW ENFORCEMENT PERSONNEL PARTICIPATE IN THE INVESTI-
34 GATION OF AN APPARENT CRIMINAL INCIDENT, AND PROVIDED THAT IT IS PRACTI-
35 CABLE UNDER THE CIRCUMSTANCES, THEY SHALL REQUEST AND MEMORIALIZE
36 CONTACT INFORMATION FOR AN APPARENTLY MATERIAL WITNESS OF WHOM THEY ARE
37 AWARE, AND THEY SHALL GATHER OR MEMORIALIZE APPARENTLY MATERIAL PHYSICAL
38 EVIDENCE OF WHICH THEY ARE AWARE, WHENEVER THE WITNESS OR PHYSICAL
39 EVIDENCE APPEARS TO BE OF SUCH A NATURE AND POTENTIAL SIGNIFICANCE THAT
40 AN ACCUSED MAY BE UNABLE TO OBTAIN OTHER EVIDENCE, POSSESSING A COMPARA-
41 BLE POTENTIAL TO MITIGATE OR NEGATE HIS OR HER GUILT WERE IT FOUND TO BE
42 EXCULPATORY, BY OTHER REASONABLY AVAILABLE MEANS UNLESS THESE ACTIONS
43 ARE TAKEN TO PRESERVE THE AVAILABILITY OF THE WITNESS OR THE PHYSICAL
44 EVIDENCE. THIS SUBDIVISION DOES NOT, HOWEVER, REQUIRE THAT POLICE OFFI-
45 CERS OR OTHER LAW ENFORCEMENT PERSONNEL TAKE AND PRESERVE A SECOND
46 SAMPLE OF THE DEFENDANT'S BREATH FOR LATER TESTING BY THE DEFENDANT IN
47 CASES ARISING UNDER THE VEHICLE AND TRAFFIC LAW.

48 (B) IF THE PROSECUTION IS UNABLE TO DISCLOSE SUCH MATERIAL TO THE
49 DEFENDANT PURSUANT TO PARAGRAPH (R) OF SUBDIVISION ONE OF SECTION 245.20
50 OF THIS ARTICLE DUE TO A FAILURE TO COMPLY WITH THIS OBLIGATION BY
51 POLICE OFFICERS OR BY OTHER LAW ENFORCEMENT PERSONNEL, THE COURT, UPON
52 MOTION OF THE DEFENDANT SHOWING THAT THE WITNESS OR EVIDENCE HAS BEEN
53 IRRETRIEVABLY LOST AND THAT THE DEFENDANT CANNOT OBTAIN OTHER EVIDENCE,
54 POSSESSING A COMPARABLE POTENTIAL TO MITIGATE OR NEGATE HIS OR HER GUILT
55 WERE IT FOUND TO BE EXCULPATORY, BY OTHER REASONABLY AVAILABLE MEANS,

1 SHALL IMPOSE AN APPROPRIATE REMEDY OR SANCTION PURSUANT TO SECTION
2 245.85 OF THIS ARTICLE.

3 2. VIDEOTAPE OF INTERVIEW AT POLICE STATION OR OTHER FACILITY OF
4 DETENTION. (A) NO ORAL, WRITTEN, OR SIGN LANGUAGE STATEMENT OF A SUSPECT
5 MADE DURING AN INTERVIEW AT A POLICE STATION OR OTHER FACILITY OF
6 DETENTION SHALL BE ADMISSIBLE AS SUBSTANTIVE EVIDENCE AGAINST THAT
7 PERSON IN ANY CRIMINAL PROCEEDING UNLESS AN ELECTRONIC RECORDING, WHICH
8 MUST BE FOCUSED UPON BOTH THE QUESTIONER AND THE SUSPECT THROUGHOUT AND
9 MUST INCLUDE NOT ONLY AUDIO BUT ALSO VISUAL RECORDING, IS MADE OF THE
10 COMPLETE INTERVIEW. INTERVIEWING WITHIN THE MEANING OF THIS SUBDIVISION
11 DOES NOT INCLUDE ROUTINE PEDIGREE INQUIRY OR STATEMENTS MADE IN OPEN
12 COURT OR BEFORE A GRAND JURY. BRIEF PERIODS OF RECESS DURING WHICH ALL
13 INTERVIEWING CEASES DO NOT CONSTITUTE AN IMPERMISSIBLE INTERRUPTION OF
14 THE COMPLETE INTERVIEW, BUT THE STARTING TIME OF SUCH A RECESS AND THE
15 RESUMPTION TIME OF THE INTERVIEW SHALL BE MEMORIALIZED. THE INTERVIEWER
16 NEED NOT INFORM THE SUSPECT THAT AN ELECTRONIC RECORDING IS BEING MADE.
17 A SUSPECT'S REFUSAL TO PARTICIPATE IN AN INTERVIEW BECAUSE IT IS ELEC-
18 TRONICALLY RECORDED, IF THAT REFUSAL ITSELF IS ELECTRONICALLY RECORDED
19 AS PROVIDED HEREIN, SHALL RENDER THIS SUBDIVISION INAPPLICABLE TO ALL
20 STATEMENTS MADE AFTER THE REFUSAL IF THE COURT FINDS BEYOND A REASONABLE
21 DOUBT THAT IT WAS VOLUNTARY AND UNEQUIVOCAL. LAW ENFORCEMENT PERSONNEL
22 SHALL NOT EXPRESSLY OR IMPLICITLY ENCOURAGE THE SUSPECT TO GIVE SUCH
23 CONDITIONAL CONSENT TO AN INTERVIEW IN LIEU OF A COMPLETELY RECORDED
24 INTERVIEW.

25 (B) IF THE COURT FINDS, BY A PREPONDERANCE OF THE EVIDENCE, THAT THE
26 DEFENDANT WAS SUBJECTED TO EARLIER INTERVIEWING AT A POLICE STATION OR
27 OTHER FACILITY OF DETENTION IN VIOLATION OF THIS SUBDIVISION, THEN UPON
28 DEFENSE REQUEST WHEN STATEMENTS MADE IN COMPLIANCE WITH THIS SUBDIVISION
29 ARE ADMITTED AT TRIAL AS EVIDENCE AGAINST THE DEFENDANT, THE COURT SHALL
30 GIVE THE FOLLOWING INSTRUCTION TO THE JURY AT THE TIME OF THEIR ADMIS-
31 SION AND AGAIN IN ITS FINAL INSTRUCTIONS ON THE LAW: "NEW YORK STATE LAW
32 REQUIRES THAT ALL INTERVIEWS OF A SUSPECT AT A POLICE STATION OR OTHER
33 FACILITY OF DETENTION MUST BE RECORDED BY VIDEOTAPE OR OTHER VISUAL
34 RECORDING, BECAUSE THIS ENHANCES THE RELIABILITY OF THE PROCESS UNDER
35 WHICH THE STATEMENTS ARE OBTAINED AND ALLOWS THE JURY TO MORE FAIRLY
36 ASSESS THE STATEMENTS. A JUDGE HAS FOUND IN THIS CASE THAT EARLIER
37 INTERVIEWING OCCURRED AT THE POLICE STATION OR OTHER FACILITY OF
38 DETENTION THAT WAS NOT RECORDED. BECAUSE OF THIS FAILURE TO COMPLY WITH
39 THE RULE THAT ALL SUCH INTERVIEWS MUST BE RECORDED, THE STATEMENTS BY
40 THE DEFENDANT THAT YOU HAVE SEEN SHOULD BE WEIGHED WITH GREAT CAUTION
41 AND CARE."

42 (C) NOTWITHSTANDING ANY OTHER PROVISION OF THIS SUBDIVISION, AN ORAL,
43 WRITTEN, OR SIGN LANGUAGE STATEMENT OF THE DEFENDANT MADE DURING AN
44 INTERVIEW AT A POLICE STATION OR OTHER FACILITY OF DETENTION IS ADMISSI-
45 BLE AS EVIDENCE AGAINST THE DEFENDANT IN A CRIMINAL PROCEEDING IN THIS
46 STATE IF THE STATEMENT WAS OBTAINED IN ANOTHER STATE IN COMPLIANCE WITH
47 THE LAWS OF THAT STATE, OR BY A FEDERAL LAW ENFORCEMENT OFFICER IN THIS
48 STATE OR ANOTHER STATE IN COMPLIANCE WITH THE LAWS OF THE UNITED STATES.

49 3. 911 TELEPHONE CALL AND POLICE RADIO TRANSMISSION ELECTRONIC
50 RECORDINGS. (A) WHENEVER AN ELECTRONIC RECORDING OF A 911 TELEPHONE CALL
51 OR A POLICE RADIO TRANSMISSION WAS MADE IN CONNECTION WITH THE INVESTI-
52 GATION OF AN APPARENT CRIMINAL INCIDENT, THE ARRESTING OFFICER OR LEAD
53 DETECTIVE SHALL EXPEDITIOUSLY NOTIFY THE PROSECUTION IN WRITING UPON THE
54 FILING OF AN ACCUSATORY INSTRUMENT OF THE EXISTENCE OF ALL SUCH KNOWN
55 RECORDINGS. THE PROSECUTION SHALL EXPEDITIOUSLY TAKE WHATEVER REASONABLE
56 STEPS ARE NECESSARY TO ENSURE THAT ALL KNOWN ELECTRONIC RECORDINGS OF

1 911 TELEPHONE CALLS AND POLICE RADIO TRANSMISSIONS MADE IN CONNECTION
2 WITH THE CASE ARE PRESERVED THROUGHOUT THE PENDENCY OF THE CASE. UPON
3 THE DEFENDANT'S TIMELY REQUEST AND DESIGNATION OF A SPECIFIC ELECTRONIC
4 RECORDING OF A 911 TELEPHONE CALL, THE PROSECUTION SHALL ALSO EXPE-
5 DITIOUSLY TAKE WHATEVER REASONABLE STEPS ARE NECESSARY TO ENSURE THAT IT
6 IS PRESERVED THROUGHOUT THE PENDENCY OF THE CASE.

7 (B) IF THE PROSECUTION FAILS TO DISCLOSE SUCH AN ELECTRONIC RECORDING
8 TO THE DEFENDANT PURSUANT TO PARAGRAPH (G) OF SUBDIVISION ONE OF SECTION
9 245.20 OF THIS ARTICLE DUE TO A FAILURE TO COMPLY WITH THIS OBLIGATION
10 BY POLICE OFFICERS OR OTHER LAW ENFORCEMENT OR PROSECUTION PERSONNEL,
11 THE COURT UPON MOTION OF THE DEFENDANT SHALL IMPOSE AN APPROPRIATE REME-
12 DY OR SANCTION PURSUANT TO SECTION 245.85 OF THE ARTICLE.

13 S 245.50 CERTIFICATES OF COMPLIANCE.

14 1. BY THE PROSECUTION. WHEN THE PROSECUTION HAS PROVIDED ALL DISCOVERY
15 REQUIRED BY SUBDIVISION ONE OF SECTION 245.20 OF THIS ARTICLE OR BY
16 COURT ORDER, IT SHALL FILE WITH THE COURT AND SERVE UPON THE DEFENDANT A
17 CERTIFICATE OF COMPLIANCE. THE CERTIFICATE SHALL STATE THAT, TO THE BEST
18 OF THE PROSECUTOR'S KNOWLEDGE AND AFTER MAKING REASONABLE INQUIRIES AND
19 EXERCISING DUE DILIGENCE, HE OR SHE HAS DISCLOSED AND MADE AVAILABLE ALL
20 MATERIAL AND INFORMATION SUBJECT TO DISCOVERY, AND SHALL IDENTIFY EACH
21 ITEM PROVIDED. IN ADDITION, THE CERTIFICATE SHALL STATE THAT, TO THE
22 BEST OF THE PROSECUTOR'S KNOWLEDGE AND AFTER MAKING REASONABLE INQUIRIES
23 AND EXERCISING DUE DILIGENCE:

24 (A) HE OR SHE HAS COMPLIED WITH THESE OBLIGATIONS WITH RESPECT TO ALL
25 MATERIAL AND INFORMATION IN THE CUSTODY OR CONTROL OF ALL POLICE OFFI-
26 CERS AND OTHER PERSONS WHO HAVE PARTICIPATED IN INVESTIGATING OR EVALU-
27 ATING THE CASE; AND

28 (B) HE OR SHE HAS MADE REASONABLE INQUIRIES OF ALL POLICE OFFICERS AND
29 OTHER PERSONS WHO HAVE PARTICIPATED IN INVESTIGATING OR EVALUATING THE
30 CASE ABOUT THE EXISTENCE OF ANY EVIDENCE OR INFORMATION WITHIN PARAGRAPH
31 (J) OF SUBDIVISION ONE OF SECTION 245.20 OF THIS ARTICLE, INCLUDING SUCH
32 EVIDENCE OR INFORMATION THAT WAS NOT REDUCED TO WRITING OR OTHERWISE
33 MEMORIALIZED OR PRESERVED AS EVIDENCE, AND HAS DISCLOSED ANY SUCH INFOR-
34 MATION TO THE DEFENDANT. IF ADDITIONAL DISCOVERY IS SUBSEQUENTLY
35 PROVIDED PURSUANT TO SECTION 245.60 OF THIS ARTICLE, A SUPPLEMENTAL
36 CERTIFICATE SHALL BE FILED WITH THE COURT AND SERVED UPON THE DEFENDANT
37 IDENTIFYING THE ADDITIONAL MATERIAL AND INFORMATION PROVIDED.

38 2. BY THE DEFENDANT. WHEN THE DEFENDANT HAS PROVIDED ALL DISCOVERY
39 REQUIRED BY SUBDIVISION THREE OF SECTION 245.20 OF THIS ARTICLE OR BY
40 COURT ORDER, COUNSEL FOR THE DEFENDANT SHALL FILE WITH THE COURT AND
41 SERVE UPON THE PROSECUTION A CERTIFICATE OF COMPLIANCE. THE CERTIFICATE
42 SHALL STATE THAT, TO THE BEST OF COUNSEL FOR THE DEFENDANT'S KNOWLEDGE
43 AND AFTER MAKING REASONABLE INQUIRIES AND EXERCISING DUE DILIGENCE, HE
44 OR SHE HAS DISCLOSED AND MADE AVAILABLE ALL MATERIAL AND INFORMATION
45 SUBJECT TO DISCOVERY, AND SHALL IDENTIFY EACH ITEM PROVIDED. IF ADDI-
46 TIONAL DISCOVERY IS SUBSEQUENTLY PROVIDED PURSUANT TO SECTION 245.60 OF
47 THIS ARTICLE, A SUPPLEMENTAL CERTIFICATE SHALL BE FILED WITH THE COURT
48 AND SERVED UPON THE PROSECUTION IDENTIFYING THE ADDITIONAL MATERIAL AND
49 INFORMATION PROVIDED.

50 S 245.55 FLOW OF INFORMATION.

51 1. SUFFICIENT COMMUNICATION FOR COMPLIANCE. THE PROSECUTOR SHALL
52 ENSURE THAT A FLOW OF INFORMATION IS MAINTAINED BETWEEN THE POLICE AND
53 OTHER INVESTIGATIVE PERSONNEL AND HIS OR HER OFFICE SUFFICIENT TO PLACE
54 WITHIN HIS OR HER POSSESSION OR CONTROL ALL MATERIAL AND INFORMATION
55 PERTINENT TO THE DEFENDANT AND THE OFFENSE OR OFFENSES CHARGED, INCLUD-
56 ING ANY EVIDENCE OR INFORMATION WHICH TENDS TO NEGATE THE DEFENDANT'S

1 GUILT OR TO MITIGATE THE DEFENDANT'S CULPABILITY AS TO A CHARGED
2 OFFENSE, OR WHICH TENDS TO SUPPORT A POTENTIAL DEFENSE THERETO, OR WHICH
3 TENDS TO PROVIDE A BASIS FOR A MOTION TO SUPPRESS EVIDENCE ON CONSTITU-
4 TIONAL GROUNDS, OR WHICH WOULD TEND TO REDUCE THE PUNISHMENT OF THE
5 DEFENDANT.

6 2. PROVISION OF LAW ENFORCEMENT AGENCY FILES. UPON REQUEST BY THE
7 PROSECUTION, A NEW YORK STATE LAW ENFORCEMENT AGENCY SHALL MAKE AVAIL-
8 ABLE TO THE PROSECUTION A COMPLETE COPY OF ITS COMPLETE FILES RELATED TO
9 THE INVESTIGATION OF THE CASE OR THE PROSECUTION OF THE DEFENDANT FOR
10 COMPLIANCE WITH THIS ARTICLE.

11 S 245.60 CONTINUING DUTY TO DISCLOSE.

12 IF EITHER THE PROSECUTION OR THE DEFENDANT SUBSEQUENTLY LEARNS OF
13 ADDITIONAL MATERIAL OR INFORMATION WHICH IT WOULD HAVE BEEN UNDER A DUTY
14 TO DISCLOSE PURSUANT TO ANY PROVISIONS OF THIS ARTICLE AT THE TIME OF A
15 PREVIOUS DISCOVERY OBLIGATION OR DISCOVERY ORDER, IT SHALL EXPEDITIOUSLY
16 NOTIFY THE OTHER PARTY AND DISCLOSE THE ADDITIONAL MATERIAL OR INFORMA-
17 TION AS REQUIRED FOR INITIAL DISCOVERY UNDER THIS ARTICLE. THIS
18 PROVISION ALSO REQUIRES EXPEDITIOUS DISCLOSURE BY THE PROSECUTION OF
19 MATERIAL OR INFORMATION THAT BECAME RELEVANT TO THE CASE OR DISCOVERABLE
20 BASED UPON RECIPROCAL DISCOVERY RECEIVED FROM THE DEFENDANT PURSUANT TO
21 SUBDIVISION THREE OF SECTION 245.20 OF THIS ARTICLE.

22 S 245.65 WORK PRODUCT.

23 THIS ARTICLE DOES NOT AUTHORIZE DISCOVERY BY A PARTY OF THOSE PORTIONS
24 OF RECORDS, REPORTS, CORRESPONDENCE, MEMORANDA, OR INTERNAL DOCUMENTS OF
25 THE ADVERSE PARTY WHICH ARE ONLY THE LEGAL RESEARCH, OPINIONS, THEORIES
26 OR CONCLUSIONS OF THE ADVERSE PARTY OR ITS ATTORNEY OR THE ATTORNEY'S
27 AGENTS, OR OF STATEMENTS OF A DEFENDANT, WRITTEN OR RECORDED OR SUMMA-
28 RIZED IN ANY WRITING OR RECORDING, MADE TO THE ATTORNEY FOR THE DEFEND-
29 ANT OR THE ATTORNEY'S AGENTS.

30 S 245.70 PROTECTIVE ORDERS.

31 UPON A SHOWING OF GOOD CAUSE, THE COURT MAY AT ANY TIME ORDER THAT
32 DISCOVERY OR INSPECTION BE DENIED, RESTRICTED, CONDITIONED OR DEFERRED,
33 OR MAKE SUCH OTHER ORDER AS IS APPROPRIATE. THE COURT MAY, FOR GOOD
34 CAUSE SHOWN, GRANT DISCOVERY TO A DEFENDANT ON THE CONDITION THAT THE
35 MATERIAL OR INFORMATION TO BE DISCOVERED BE AVAILABLE ONLY TO COUNSEL
36 FOR THE DEFENDANT. THIS PROVISION DOES NOT ALTER THE ALLOCATION OF THE
37 BURDEN OF PROOF WITH REGARD TO THE MATTER AT ISSUE, INCLUDING PRIVILEGE.
38 THE COURT MAY PERMIT A PARTY SEEKING OR OPPOSING A PROTECTIVE ORDER
39 UNDER THIS SECTION, OR ANOTHER AFFECTED PERSON, TO SUBMIT PAPERS OR
40 TESTIFY EX PARTE OR IN CAMERA. ANY SUCH PAPERS AND A TRANSCRIPT OF SUCH
41 TESTIMONY SHALL BE SEALED AND SHALL CONSTITUTE A PART OF THE RECORD ON
42 APPEAL.

43 S 245.75 AMENDMENT OF DISCOVERY ORDERS.

44 UPON MOTION OF EITHER PARTY MADE SUBSEQUENT TO AN ORDER OF THE COURT
45 ISSUED PURSUANT TO THIS ARTICLE, THE COURT MAY ALTER OR AMEND THE PREVI-
46 OUS ORDER OR ORDERS AS THE INTERESTS OF JUSTICE MAY REQUIRE. THE COURT
47 MAY, FOR GOOD CAUSE SHOWN, AFFIRM A PRIOR ORDER ISSUED OR IMPOSED PURSU-
48 ANT TO THIS ARTICLE GRANTING DISCOVERY TO A DEFENDANT UPON THE ADDI-
49 TIONAL CONDITION THAT THE MATERIAL OR INFORMATION TO BE DISCOVERED BE
50 AVAILABLE ONLY TO COUNSEL FOR THE DEFENDANT. THE COURT MAY ALTER THE
51 TIMES FOR COMPLIANCE WITH ANY DISCOVERY ORDER ISSUED OR IMPOSED PURSUANT
52 TO THIS ARTICLE UPON A SHOWING OF GOOD CAUSE.

53 S 245.80 WAIVER OF DISCOVERY BY DEFENDANT.

54 A DEFENDANT WHO DOES NOT SEEK DISCOVERY FROM THE PROSECUTION UNDER
55 THIS ARTICLE SHALL SO NOTIFY THE PROSECUTION AND THE COURT AT THE
56 DEFENDANT'S ARRAIGNMENT ON AN INDICTMENT, SUPERIOR COURT INFORMATION,

1 PROSECUTOR'S INFORMATION, INFORMATION, OR SIMPLIFIED INFORMATION CHARG-
2 ING A MISDEMEANOR, OR EXPEDITIOUSLY THEREAFTER BUT BEFORE RECEIVING
3 DISCOVERY FROM THE PROSECUTION PURSUANT TO SUBDIVISION ONE OF SECTION
4 245.20 OF THIS ARTICLE, AND THE DEFENDANT NEED NOT PROVIDE DISCOVERY TO
5 THE PROSECUTION PURSUANT TO SUBDIVISION THREE OF SECTION 245.20 AND
6 SECTION 245.60 OF THIS ARTICLE. A WAIVER SHALL BE IN WRITING AND SIGNED
7 BY THE DEFENDANT OR COUNSEL FOR THE DEFENDANT. SUCH A WAIVER DOES NOT
8 ALTER OR IN ANY WAY AFFECT THE PROCEDURES, OBLIGATIONS OR RIGHTS SET
9 FORTH IN SECTIONS 250.10, 250.20 AND 250.30 OF THIS TITLE, OR OTHERWISE
10 ESTABLISHED OR REQUIRED BY LAW.

11 S 245.85 REMEDIES OR SANCTIONS FOR NONCOMPLIANCE.

12 1. AVAILABLE REMEDIES OR SANCTIONS. FOR FAILURE TO COMPLY WITH ANY
13 DISCOVERY ORDER ISSUED OR IMPOSED PURSUANT TO THIS ARTICLE, THE COURT
14 MAY MAKE A FURTHER ORDER FOR DISCOVERY, GRANT A CONTINUANCE, ORDER THAT
15 A HEARING BE REOPENED, ORDER THAT A WITNESS BE CALLED OR RECALLED,
16 INSTRUCT THE JURY THAT IT MAY DRAW AN ADVERSE INFERENCE REGARDING THE
17 NONCOMPLIANCE, PRECLUDE OR STRIKE A WITNESS'S TESTIMONY OR A PORTION OF
18 A WITNESS'S TESTIMONY, ADMIT OR EXCLUDE EVIDENCE, ORDER A MISTRIAL,
19 ORDER THE DISMISSAL OF ALL OR SOME OF THE CHARGES, OR MAKE SUCH OTHER
20 ORDER AS IT DEEMS JUST UNDER THE CIRCUMSTANCES; EXCEPT THAT ANY SANCTION
21 AGAINST THE DEFENDANT SHALL COMPORT WITH THE DEFENDANT'S CONSTITUTIONAL
22 RIGHT TO PRESENT A DEFENSE, AND THE SANCTION OF PRECLUDING A DEFENSE
23 WITNESS FROM TESTIFYING SHALL BE PERMISSIBLE ONLY UPON A FINDING THAT
24 THE DEFENDANT'S FAILURE TO COMPLY WITH THE DISCOVERY ORDER WAS WILLFUL
25 AND MOTIVATED BY A DESIRE TO OBTAIN A TACTICAL ADVANTAGE.

26 2. NEED FOR REMEDY OR SANCTION. (A) WHEN MATERIAL OR INFORMATION IS
27 DISCOVERABLE UNDER THIS ARTICLE, BUT IT CANNOT BE DISCLOSED BECAUSE IT
28 HAS BEEN LOST OR DESTROYED, THE COURT SHALL IMPOSE AN APPROPRIATE REMEDY
29 OR SANCTION WHENEVER THE PARTY ENTITLED TO DISCLOSURE SHOWS THAT THE
30 LOST OR DESTROYED MATERIAL MAY HAVE CONTAINED SOME INFORMATION RELEVANT
31 TO A CONTESTED ISSUE. THE APPROPRIATE REMEDY OR SANCTION IS THAT WHICH
32 IS PROPORTIONATE TO THE POTENTIAL WAYS IN WHICH THE LOST OR DESTROYED
33 MATERIAL REASONABLY COULD HAVE BEEN HELPFUL TO THE PARTY ENTITLED TO
34 DISCLOSURE.

35 (B) WHEN MATERIAL OR INFORMATION IS DISCOVERABLE UNDER THIS ARTICLE,
36 BUT IT IS DISCLOSED BELATEDLY, THE COURT SHALL IMPOSE AN APPROPRIATE
37 REMEDY OR SANCTION WHENEVER THE PARTY ENTITLED TO DISCLOSURE SHOWS THAT
38 IT WAS SIGNIFICANTLY PREJUDICED.

39 3. SANCTION FOR NONDISCLOSURE OF STATEMENT OF TESTIFYING PROSECUTION
40 WITNESS. THE FAILURE OF THE PROSECUTOR OR ANY AGENT OF THE PROSECUTOR TO
41 DISCLOSE ANY WRITTEN OR RECORDED STATEMENT MADE BY A PROSECUTION WITNESS
42 WHICH RELATES TO THE SUBJECT MATTER OF THE WITNESS'S TESTIMONY SHALL NOT
43 CONSTITUTE GROUNDS FOR ANY COURT TO ORDER A NEW PRE-TRIAL HEARING OR SET
44 ASIDE A CONVICTION, OR REVERSE, MODIFY OR VACATE A JUDGMENT OF
45 CONVICTION, IN THE ABSENCE OF A SHOWING BY THE DEFENDANT THAT THERE IS A
46 REASONABLE POSSIBILITY THAT THE NON-DISCLOSURE MATERIALLY CONTRIBUTED TO
47 THE RESULT OF THE TRIAL OR OTHER PROCEEDING; PROVIDED, HOWEVER, THAT
48 NOTHING IN THIS SECTION SHALL AFFECT OR LIMIT ANY RIGHT THE DEFENDANT
49 MAY HAVE TO A REOPENED PRE-TRIAL HEARING WHEN SUCH STATEMENTS WERE
50 DISCLOSED BEFORE THE CLOSE OF EVIDENCE AT TRIAL.

51 S 245.90 ADMISSIBILITY OF DISCOVERY.

52 THE FACT THAT A PARTY HAS INDICATED DURING THE DISCOVERY PROCESS AN
53 INTENTION TO OFFER SPECIFIED EVIDENCE OR TO CALL A SPECIFIED WITNESS IS
54 NOT ADMISSIBLE IN EVIDENCE OR GROUNDS FOR ADVERSE COMMENT AT A HEARING
55 OR A TRIAL.

1 S 3. Section 65.20 of the criminal procedure law, as added by chapter
2 505 of the laws of 1985, subdivision 2 as added, the opening paragraph
3 of subdivision 10 as amended and subdivisions 3, 4, 5, 6, 7, 8, 9, 10,
4 11, 12 and 13 as renumbered by chapter 548 of the laws of 2007, subdivi-
5 sion 7 and paragraph (k) of subdivision 10 as amended by chapter 320 of
6 the laws of 2006 and subdivisions 11 and 12 as amended by chapter 455 of
7 the laws of 1991, is amended to read as follows:

8 S 65.20 Closed-circuit television; procedure for application and grounds
9 for determination.

10 1. Prior to the commencement of a criminal proceeding; other than a
11 grand jury proceeding, either party may apply to the court for an order
12 declaring that a child witness is vulnerable.

13 2. A child witness should be declared vulnerable when the court, in
14 accordance with the provisions of this section, determines by clear and
15 convincing evidence that the child witness would suffer serious mental
16 or emotional harm that would substantially impair the child witness'
17 ability to communicate with the finder of fact without the use of live,
18 two-way closed-circuit television.

19 3. A motion pursuant to subdivision one of this section must be made
20 in writing at least eight days before the commencement of trial or other
21 criminal proceeding upon reasonable notice to the other party and with
22 an opportunity to be heard.

23 4. The motion papers must state the basis for the motion and must
24 contain sworn allegations of fact which, if true, would support a deter-
25 mination by the court that the child witness is vulnerable. Such allega-
26 tions may be based upon the personal knowledge of the deponent or upon
27 information and belief, provided that, in the latter event, the sources
28 of such information and the grounds for such belief are stated.

29 5. The answering papers may admit or deny any of the alleged facts and
30 may, in addition, contain sworn allegations of fact relevant to the
31 motion, including the rights of the defendant, the need to protect the
32 child witness and the integrity of the truth-finding function of the
33 trier of fact.

34 6. Unless all material facts alleged in support of the motion made
35 pursuant to subdivision one of this section are conceded, the court
36 shall, in addition to examining the papers and hearing oral argument,
37 conduct an appropriate hearing for the purpose of making findings of
38 fact essential to the determination of the motion. Except as provided in
39 subdivision [six] SEVEN of this section, it may subpoena or call and
40 examine witnesses, who must either testify under oath or be permitted to
41 give unsworn testimony pursuant to subdivision two of section 60.20 and
42 must authorize the attorneys for the parties to do the same.

43 7. Notwithstanding any other provision of law, the child witness who
44 is alleged to be vulnerable may not be compelled to testify at such
45 hearing or to submit to any psychological or psychiatric examination.
46 The failure of the child witness to testify at such hearing shall not be
47 a ground for denying a motion made pursuant to subdivision one of this
48 section. Prior statements made by the child witness relating to any
49 allegations of conduct constituting an offense defined in article one
50 hundred thirty of the penal law or incest as defined in section 255.25,
51 255.26 or 255.27 of such law or to any allegation of words or conduct
52 constituting an attempt to prevent, impede or deter the child witness
53 from cooperating in the investigation or prosecution of the offense
54 shall be admissible at such hearing, provided, however, that a declara-
55 tion that a child witness is vulnerable may not be based solely upon
56 such prior statements.

1 8. (a) Notwithstanding any of the provisions of article forty-five of
2 the civil practice law and rules, any physician, psychologist, nurse or
3 social worker who has treated a child witness may testify at a hearing
4 conducted pursuant to subdivision five of this section concerning the
5 treatment of such child witness as such treatment relates to the issue
6 presented at the hearing, provided that any otherwise applicable statu-
7 tory privileges concerning communications between the child witness and
8 such physician, psychologist, nurse or social worker in connection with
9 such treatment shall not be deemed waived by such testimony alone,
10 except to the limited extent of permitting the court alone to examine in
11 camera reports, records or documents, if any, prepared by such physi-
12 cian, psychologist, nurse or social worker. If upon such examination the
13 court determines that such reports, records or documents, or any one or
14 portion thereof, contain information material and relevant to the issue
15 of whether the child witness is a vulnerable child witness, the court
16 shall disclose such information to both the attorney for the defendant
17 and the district attorney.

18 (b) At any time after a motion has been made pursuant to subdivision
19 one of this section, upon the demand of the other party the moving party
20 must furnish the demanding party with a copy of any and all of such
21 records, reports or other documents in the possession of such other
22 party and must, in addition, supply the court with a copy of all such
23 reports, records or other documents which are the subject of the demand.
24 At any time after a demand has been made pursuant to this paragraph, the
25 moving party may demand that property of the same kind or character in
26 possession of the party that originally made such demand be furnished to
27 the moving party and, if so furnished, be supplied, in addition, to the
28 court.

29 9. (a) Prior to the commencement of the hearing conducted pursuant to
30 subdivision [five] SIX of this section, the district attorney shall,
31 subject to a protective order, comply with the provisions of PARAGRAPH
32 (C) OF subdivision one of section [240.45] 245.20 of this chapter as
33 they concern any witness whom the district attorney intends to call at
34 the hearing and the child witness.

35 (b) Before a defendant calls a witness at such hearing, he or she
36 must, subject to a protective order, comply with the provisions of
37 subdivision [two] THREE of section [240.45] 245.20 of this chapter as
38 they concern all the witnesses the defendant intends to call at such
39 hearing.

40 10. The court may consider, in determining whether there are factors
41 which would cause the child witness to suffer serious mental or
42 emotional harm, a finding that any one or more of the following circum-
43 stances have been established by clear and convincing evidence:

44 (a) The manner of the commission of the offense of which the defendant
45 is accused was particularly heinous or was characterized by aggravating
46 circumstances.

47 (b) The child witness is particularly young or otherwise particularly
48 subject to psychological harm on account of a physical or mental condi-
49 tion which existed before the alleged commission of the offense.

50 (c) At the time of the alleged offense, the defendant occupied a posi-
51 tion of authority with respect to the child witness.

52 (d) The offense or offenses charged were part of an ongoing course of
53 conduct committed by the defendant against the child witness over an
54 extended period of time.

55 (e) A deadly weapon or dangerous instrument was allegedly used during
56 the commission of the crime.

1 (f) The defendant has inflicted serious physical injury upon the child
2 witness.

3 (g) A threat, express or implied, of physical violence to the child
4 witness or a third person if the child witness were to report the inci-
5 dent to any person or communicate information to or cooperate with a
6 court, grand jury, prosecutor, police officer or peace officer concern-
7 ing the incident has been made by or on behalf of the defendant.

8 (h) A threat, express or implied, of the incarceration of a parent or
9 guardian of the child witness, the removal of the child witness from the
10 family or the dissolution of the family of the child witness if the
11 child witness were to report the incident to any person or communicate
12 information to or cooperate with a court, grand jury, prosecutor, police
13 officer or peace officer concerning the incident has been made by or on
14 behalf of the defendant.

15 (i) A witness other than the child witness has received a threat of
16 physical violence directed at such witness or to a third person by or on
17 behalf of the defendant.

18 (j) The defendant, at the time of the inquiry, (i) is living in the
19 same household with the child witness, (ii) has ready access to the
20 child witness or (iii) is providing substantial financial support for
21 the child witness.

22 (k) The child witness has previously been the victim of an offense
23 defined in article one hundred thirty of the penal law or incest as
24 defined in section 255.25, 255.26 or 255.27 of such law.

25 (l) According to expert testimony, the child witness would be partic-
26 ularly [suceptible] SUSCEPTIBLE to psychological harm if required to
27 testify in open court or in the physical presence of the defendant.

28 11. Irrespective of whether a motion was made pursuant to subdivision
29 one of this section, the court, at the request of either party or on its
30 own motion, may decide that a child witness may be vulnerable based on
31 its own observations that a child witness who has been called to testify
32 at a criminal proceeding is suffering severe mental or emotional harm
33 and therefore is physically or mentally unable to testify or to continue
34 to testify in open court or in the physical presence of the defendant
35 and that the use of live, two-way closed-circuit television is necessary
36 to enable the child witness to testify. If the court so decides, it must
37 conduct the same hearing that subdivision [five] SIX of this section
38 requires when a motion is made pursuant to subdivision one of this
39 section, and it must make findings of fact pursuant to subdivisions
40 [nine] TEN and [eleven] TWELVE of this section, before determining that
41 the child witness is vulnerable.

42 12. In deciding whether a child witness is vulnerable, the court shall
43 make findings of fact which reflect the causal relationship between the
44 existence of any one or more of the factors set forth in subdivision
45 [nine] TEN of this section or other relevant factors which the court
46 finds are established and the determination that the child witness is
47 vulnerable. If the court is satisfied that the child witness is vulner-
48 able and that, under the facts and circumstances of the particular case,
49 the defendant's constitutional rights to an impartial jury or of
50 confrontation will not be impaired, it may enter an order granting the
51 application for the use of live, two-way closed-circuit television.

52 13. When the court has determined that a child witness is a vulnerable
53 child witness, it shall make a specific finding as to whether placing
54 the defendant and the child witness in the same room during the testimo-
55 ny of the child witness will contribute to the likelihood that the child
56 witness will suffer severe mental or emotional harm. If the court finds

1 that placing the defendant and the child witness in the same room during
2 the testimony of the child witness will contribute to the likelihood
3 that the child witness will suffer severe mental or emotional harm, the
4 order entered pursuant to subdivision [eleven] TWELVE of this section
5 shall direct that the defendant remain in the courtroom during the
6 testimony of the vulnerable child witness.

7 S 4. Subdivision 5 of section 200.95 of the criminal procedure law, as
8 added by chapter 558 of the laws of 1982, is amended to read as follows:

9 5. Court ordered bill of particulars. Where a prosecutor has timely
10 served a written refusal pursuant to subdivision four of this section
11 and upon motion, made in writing, of a defendant, who has made a request
12 for a bill of particulars and whose request has not been complied with
13 in whole or in part, the court must, to the extent a protective order is
14 not warranted, order the prosecutor to comply with the request if it is
15 satisfied that the items of factual information requested are authorized
16 to be included in a bill of particulars, and that such information is
17 necessary to enable the defendant adequately to prepare or conduct his
18 defense and, if the request was untimely, a finding of good cause for
19 the delay. Where a prosecutor has not timely served a written refusal
20 pursuant to subdivision four of this section the court must, unless it
21 is satisfied that the people have shown good cause why such an order
22 should not be issued, issue an order requiring the prosecutor to comply
23 or providing for any other order authorized by [subdivision one of
24 section 240.70] SECTIONS 245.75 AND/OR 245.85 OF THIS PART.

25 S 5. Paragraph (c) of subdivision 1 of section 255.10 of the criminal
26 procedure law, as added by chapter 763 of the laws of 1974, is amended
27 to read as follows:

28 (c) granting discovery pursuant to article [240] 245; or

29 S 6. Section 340.30 of the criminal procedure law is amended to read
30 as follows:

31 S 340.30 Pre-trial discovery and notices of defenses.

32 The provisions of article two hundred [forty] FORTY-FIVE, concerning
33 pre-trial discovery by a defendant under indictment in a superior court,
34 and article two hundred fifty, concerning pre-trial notice to the people
35 by a defendant under indictment in a superior court who intends to
36 advance a trial defense of mental disease or defect or of alibi, apply
37 to a prosecution of an information in a local criminal court.

38 S 7. Subdivision 14 of section 400.27 of the criminal procedure law,
39 as added by chapter 1 of the laws of 1995, is amended to read as
40 follows:

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

43 [(i)] the prosecutor shall, unless previously disclosed and subject to
44 a protective order, make available to the defendant the statements and
45 information specified in subdivision one of section [240.45] 245.20 OF
46 THIS PART and make available for inspection, photographing, copying or
47 testing the property specified in subdivision one of section [240.20;
48 and

49 (ii) the defendant shall, unless previously disclosed and subject to a
50 protective order, make available to the prosecution the statements and
51 information specified in subdivision two of section 240.45 and make
52 available for inspection, photographing, copying or testing, subject to
53 constitutional limitations, the reports, documents and other property
54 specified in subdivision one of section 240.30] 245.20 OF THIS PART.

1 (b) Where a party refuses to make disclosure pursuant to this section,
2 the provisions of [section 240.35, subdivision one of section 240.40 and
3 section 240.50] 245.70, 245.75 AND/OR 245.85 OF THIS PART shall apply.

4 (c) If, after complying with the provisions of this section or an
5 order pursuant thereto, a party finds either before or during a sentenc-
6 ing proceeding or mental retardation hearing, additional material
7 subject to discovery or covered by court order, the party shall promptly
8 make disclosure or apply for a protective order.

9 (d) If the court finds that a party has failed to comply with any of
10 the provisions of this section, the court may [enter] EMPLOY any of the
11 [orders] REMEDIES OR SANCTIONS specified in subdivision one of section
12 [240.70] 245.85 OF THIS PART.

13 S 8. Section 460.80 of the penal law, as added by chapter 516 of the
14 laws of 1986, is amended to read as follows:

15 S 460.80 Court ordered disclosure.

16 Notwithstanding the provisions of article two hundred [forty]
17 FORTY-FIVE of the criminal procedure law, when forfeiture is sought
18 pursuant to section 460.30 of this [chapter] ARTICLE, the court may
19 order discovery of any property not otherwise disclosed which is materi-
20 al and reasonably necessary for preparation by the defendant with
21 respect to the forfeiture proceeding pursuant to such section. The court
22 may issue a protective order denying, limiting, conditioning, delaying
23 or regulating such discovery where a danger to the integrity of physical
24 evidence or a substantial risk of physical harm, intimidation, economic
25 reprisal, bribery or unjustified annoyance or embarrassment to any
26 person or an adverse effect upon the legitimate needs of law enforce-
27 ment, including the protection of the confidentiality of informants, or
28 any other factor or set of factors outweighs the usefulness of the
29 discovery.

30 S 9. Subdivision 5 of section 480.10 of the penal law, as added by
31 chapter 655 of the laws of 1990, is amended to read as follows:

32 5. In addition to information required to be disclosed pursuant to
33 article two hundred [forty] FORTY-FIVE of the criminal procedure law,
34 when forfeiture is sought pursuant to this article, and following the
35 defendant's arraignment on the special forfeiture information, the court
36 shall order discovery of any information not otherwise disclosed which
37 is material and reasonably necessary for preparation by the defendant
38 with respect to a forfeiture proceeding brought pursuant to this arti-
39 cle. Such material shall include those portions of the grand jury
40 minutes and such other information which pertain solely to the special
41 forfeiture information and shall not include information which pertains
42 to the criminal charges. Upon application of the prosecutor, the court
43 may issue a protective order pursuant to section [240.40] 245.70 of the
44 criminal procedure law with respect to any information required to be
45 disclosed pursuant to this subdivision.

46 S 10. This act shall take effect on the ninetieth day after it shall
47 have become a law; provided, however, the amendments to section 65.20 of
48 the criminal procedure law made by section three of this act shall not
49 affect the repeal of such section and shall be deemed repealed there-
50 with.