STATE OF NEW YORK

3334

2017-2018 Regular Sessions

IN SENATE

January 20, 2017

Introduced by Sens. BAILEY, DILAN, LATIMER, MONTGOMERY, PARKER, PERKINS -- read twice and ordered printed, and when printed to be committed to the Committee on Codes

AN ACT to amend the criminal procedure law and the penal law, in relation to criminal discovery; and to repeal certain provisions of the criminal procedure law relating thereto

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

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 Article 240 of the criminal procedure law is REPEALED.

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

ARTICLE 245 - DISCOVERY

Section 245.10 Availability of protective orders.
245.20 Phase one discovery obligation of prosecution.
245.30 Phase two discovery obligation of prosecution.
245.40 Reciprocal discovery obligation of the defendant.
245.45 Disclosure of prior misconduct or criminal acts.
245.50 Non-testimonial evidence from the defendant.
245.55 Court orders for preservation, access or discovery.
245.60 Material held by other governmental personnel.
245.65 Certificates of compliance.
245.70 Court ordered procedures to facilitate compliance.
245.75 Flow of information with police.
245.80 Continuing duty to disclose.
245.85 Work product.
245.90 Availability of remedies for violations.
245.95 Admissibility of discovery.

§ 245.10 Availability of protective orders.

1. Any discovery subject to protective order. Upon a showing of good cause, the court may at any time order that discovery or inspection of any kind of material or information under this article be denied,

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

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restricted, conditioned or deferred, or make such other order as is appropriate. The court may impose as a condition on discovery to a defendant that the material or information to be discovered be available only to counsel for the defendant. The court may permit a party seeking or opposing a protective order under this section, or another affected person, to submit papers or testify ex parte or in camera. Any such papers and a transcript of such testimony shall be sealed and shall constitute a part of the record on appeal. This section does not alter the allocation of the burden of proof with regard to matters at issue, including privilege.

2. Modification of time periods for discovery. Upon motion of a party in an individual case, the court may alter the time periods for discovery imposed by this article upon a showing of good cause.

3. Showing of good cause. Good cause under this section may include constitutional limitations; danger to the integrity of physical evidence; a substantial risk of physical harm, intimidation, economic reprisal, bribery or unjustified annoyance or embarrassment to any person; a substantial risk of an adverse effect upon the legitimate needs of law enforcement, including the protection of the confidentiality of informants; danger to any person stemming from factors such as a defendant's gang affiliation, prior history of interfering with witnesses, or threats or intimidating actions directed at potential witnesses; or other similar factors that outweigh the usefulness of the discovery.

§ 245.20 Phase one discovery obligation of prosecution.

1. Timing of phase one discovery for the defendant. The prosecution shall perform its phase one discovery obligations under this section within fifteen calendar days after the defendant's arraignment on an indictment, superior court information, prosecutor's information, information, or simplified information. Portions of materials claimed to be non-discoverable may be withheld pending a determination and ruling of the court under section 245.10 of this article; but the defendant shall be notified in writing that information has not been disclosed under a particular subdivision, and the discoverable portions of such materials shall be disclosed if practicable. When the discoverable materials are exceptionally voluminous, the time period in this subdivision may be stayed by an additional forty-five calendar days without need for a motion pursuant to subdivision two of section 245.10 of this article.

2. Phase one discovery for the defendant. The prosecution shall disclose to the defendant as part of phase one discovery, and permit the defendant to discover, inspect, copy or photograph, each of the following items and information when it relates to the subject matter of the case:

(a) All electronically stored police reports and law enforcement agency reports that are in the possession, custody or control of the prosecution, or persons under the prosecution's direction and control.

(b) All written or recorded statements, and the substance of all oral statements, made by the defendant or a co-defendant to a public servant engaged in law enforcement activity or to a person then acting under his or her direction or in cooperation with him or her, other than statements made in the course of the criminal transaction.

(c) A list of all tangible objects obtained from, or allegedly possessed by, the defendant or a co-defendant. The list shall include a designation by the prosecutor as to which objects were physically or constructively possessed by the defendant and were recovered during a search or seizure by a public servant or an agent thereof, and which

tangible objects were recovered by a public servant or an agent thereof after allegedly being abandoned by the defendant. If the prosecution intends to prove the defendant's possession of any tangible objects by means of a statutory presumption of possession, it shall designate that intention as to each such object. If reasonably practicable, it shall also designate the location from which each tangible object was recovered.

(d) The names of, and addresses or adequate alternative contact information for, all persons other than law enforcement personnel whom the prosecutor knows to have evidence or information relevant to any offense charged or to a potential defense thereto, including a designation by the prosecutor as to which of those persons may be called as witnesses. Information under this paragraph relating to any person may be withheld, and redacted from discovery materials, as provided in subdivision three or four of this section. Information under this paragraph relating to a confidential informant may be withheld, and redacted from discovery materials, without need for a motion pursuant to section 245.10 of this article; but the defendant shall be notified in writing that such information has not been disclosed, unless the court rules otherwise for good cause shown.

(e) The name, rank, shield number and business address of all law enforcement personnel whom the prosecutor knows to have evidence or information relevant to any offense charged or to a potential defense thereto. Information under this paragraph relating to undercover personnel may be withheld, and redacted from discovery materials, without need for a motion pursuant to section 245.10 of this article; but the defendant shall be notified in writing that such information has not been disclosed, unless the court rules otherwise for good cause shown.

(f) When written and recorded statements are in the possession of the prosecution (not solely in the possession of police or another law enforcement agency), all statements, written or recorded or summarized in any writing or recording, made by persons who have evidence or information relevant to any offense charged or to a potential defense thereto. Statements solely in the possession of police or another law enforcement agency at the time of phase one discovery are discoverable under paragraph (c) of subdivision two of section 245.30 of this article.

(g) When it is known to the prosecution (not solely known to police or another law enforcement agency), all evidence and information, whether or not admissible or recorded in tangible form, that tends to: (i) exculpate the defendant; (ii) mitigate the defendant's culpability as to a charged offense; (iii) support a potential defense to a charged offense; (iv) provide a basis for a motion to suppress evidence on constitutional grounds; (v) significantly impugn the credibility of an important prosecution witness, informant or evidence; or (vi) mitigate punishment. Favorable evidence and information known solely to police or another law enforcement agency at the time of phase one discovery is discoverable under paragraph (d) of subdivision two of section 245.30 of this article.

(h) Whether a search warrant has been executed and all documents relating thereto, including but not limited to the warrant, the warrant application, supporting affidavits, a police inventory of all property seized under the warrant, and a transcript of all testimony or other oral communications offered in support of the warrant application.

(i) The approximate date, time and place of the offense or offenses charged and of the defendant's arrest.

3. Prosecutor's option to restrict disclosure of contact information by arranging witness interview. Within the prosecutor's discretion, the address, telephone number or similar contact information for any person whose name is disclosed pursuant to paragraph (d) of subdivision two of this section may be withheld, and redacted from other discovery materials, without need for a motion pursuant to section 245.10 of this article, if the prosecutor makes the person available to counsel for the defendant for an in person interview within the time period specified in subdivision one of this section. This subdivision does not create any right for the defendant personally to attend or to participate in such an interview.

4. Prosecutor's option to restrict disclosure of contact information in violent felony cases. (a) Where the defendant is charged with a violent felony offense, within the prosecutor's discretion the address, telephone number or similar contact information for any person whose name is disclosed pursuant to paragraph (d) of subdivision two of this section may be withheld, and redacted from other discovery materials, without need for a motion pursuant to section 245.10 of this article; except that a list of the addresses or adequate alternative contact information for persons whose information has been withheld or redacted shall be separately provided to counsel for the defendant in a document clearly marked as confidential, unless a protective order pursuant to section 245.10 of this article is issued by the court for good cause shown. In addition discovery of this information may be conditioned on the defendant's personal consent, given in open court in the presence of the court at arraignment or at another time, to the use of the confidentiality procedure set forth in this subdivision. The court shall specifically caution the defendant, in the colloquy about use of this procedure, concerning the offenses of tampering with a witness and intimidating a victim or witness in article two hundred fifteen of the penal law. Nothing in this subdivision precludes the court from issuing a different protective order pursuant to section 245.10 of this article for good cause shown.

(b) When the confidentiality procedure set forth in this subdivision is used, the following requirements apply:

(i) Except as provided in subparagraph (ii) of this paragraph, counsel for the defendant may not disclose or permit to be disclosed to a defendant or to anyone else the list described in this subdivision or its contents, unless specifically permitted to do so by the court for good cause shown or unless the prosecutor gives written consent. The court may allow a party seeking or opposing such permission, or another affected person, to submit papers or testify ex parte or in camera. Any such papers and a transcript of such testimony shall be sealed and shall constitute a part of the record on appeal.

(ii) Notwithstanding subparagraph (i) of this paragraph, counsel for the defendant may disclose or permit to be disclosed the listed contact information for a potential witness to persons employed by the attorney or to persons appointed by the court to assist in the preparation of a defendant's case if that disclosure is required for that preparation. Persons provided this information by the attorney shall be informed by the attorney that further dissemination of the information, except as provided by this subdivision, is prohibited. Within the prosecutor's discretion, discovery of the listed contact information may be conditioned on service of a written statement by counsel for the defendant of the names of any employees who may be provided information pursuant to

this subsection, and describing any known prior connections between those employees and all defendants in the case.

(iii) If the defendant is acting as his or her own attorney, the court shall endeavor to protect the listed contact information for a potential witness by providing for contact only through persons appointed by the court to assist in the preparation of the defendant's case or by imposing other reasonable restrictions, absent a showing of good cause.

§ 245.30 Phase two discovery obligation of prosecution.

1. Timing of phase two discovery for the defendant. The prosecution shall perform its phase two discovery obligations under this section within ninety calendar days after the defendant's arraignment on an indictment, superior court information, prosecutor's information, information, or simplified information. Portions of materials claimed to be non-discoverable may be withheld pending a determination and ruling of the court under section 245.10 of this article; but the defendant shall be notified in writing that information has not been disclosed under a particular subdivision, and the discoverable portions of such materials shall be disclosed if practicable. When the discoverable materials are exceptionally voluminous, the time period in this subdivision may be stayed by an additional thirty calendar days without need for a motion pursuant to subdivision two of section 245.10 of this article.

2. Phase two discovery for the defendant. The prosecution shall disclose to the defendant as part of phase two discovery, and permit the defendant to discover, inspect, copy or photograph, each of the following items and information when it relates to the subject matter of the case and is in the possession, custody or control of the prosecution or persons under the prosecution's direction or control:

(a) All transcripts of the testimony of a person who has testified before a grand jury, including but not limited to the defendant or a co-defendant. If in the exercise of reasonable diligence, and due to the limited availability of transcription resources, a transcript is unavailable for disclosure within the time period specified in subdivision one of this section, that period may be stayed by an additional forty-five calendar days without need for a motion pursuant to section 245.10 of this article; except that the disclosure shall be made as soon as practicable and not later than thirty calendar days before a scheduled trial date, unless an order is obtained pursuant to section 245.10 of this article.

(b) All police reports and law enforcement agency reports, including those not electronically stored. Reports previously disclosed pursuant to paragraph (a) of subdivision two of section 245.20 of this article need not be disclosed again.

(c) All statements, written or recorded or summarized in any writing or recording, made by persons who have evidence or information relevant to any offense charged or to a potential defense thereto, including those that were solely in the possession of police or another law enforcement agency at the time of phase one discovery. Statements previously disclosed pursuant to paragraph (f) of subdivision two of section 245.20 of this article need not be disclosed again.

(d) All evidence and information, including that which was solely known to police or other law enforcement agencies at the time of phase one discovery, and whether or not it is admissible or recorded in tangible form, that tends to (i) exculpate the defendant; (ii) mitigate the defendant's culpability as to a charged offense; (iii) support a potential defense to a charged offense; (iv) provide a basis for a motion to suppress evidence on constitutional grounds; (v) impugn the credibility

of a prosecution witness, informant or evidence; or (vi) mitigate punishment. Evidence or information previously disclosed pursuant to paragraph (g) of subdivision two of section 245.20 of this article need not be disclosed again.

(e) A summary of all promises, rewards and inducements made to persons who may be called as witnesses, as well as requests for consideration by persons who may be called as witnesses, and copies of all documents relevant to a promise, reward or inducement.

(f) All tangible property that the prosecution intends to introduce in its case-in-chief at trial or a pre-trial hearing. Discovery of items under this paragraph may be conditioned on service of a demand to produce made by the defendant, if in phase one discovery the prosecution timely served notice on the defendant that a demand to produce items under this paragraph would have to be served on the prosecution within thirty days of that notice.

(g) All tapes or other electronic recordings which the prosecution intends to introduce at trial or a pre-trial hearing.

(h) All photographs and drawings made or completed by a public servant engaged in law enforcement activity, or which were made by a person whom the prosecutor intends to call as a witness at trial or a pre-trial hearing, or which the prosecution intends to introduce at trial or a pre-trial hearing.

(i) All photographs, photocopies and reproductions made by or at the direction of law enforcement personnel of any property prior to its release pursuant to section 450.10 of the penal law.

(j) All reports and documents concerning physical or mental examinations, or scientific tests or experiments or comparisons, relating to the criminal action or proceeding which were made by or at the request or direction of a public servant engaged in law enforcement activity, or which were made by a person whom the prosecutor intends to call as a witness at trial or a pre-trial hearing, or which the prosecution intends to introduce at trial or a pre-trial hearing.

(k) Expert opinion evidence, including the name, business address, current curriculum vitae, and a list of publications of each expert witness whom the prosecutor intends to call as a witness at trial or a pre-trial hearing, and all reports prepared by the expert that pertain to the case, or if no report is prepared, a written statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. This paragraph does not alter or in any way affect the procedures, obligations or rights set forth in section 250.10 of this title. If in the exercise of reasonable diligence this information is unavailable for disclosure within the time period specified in subdivision one of this section, that period shall be stayed without need for a motion pursuant to section 245.10 of this article; except that the disclosure shall be made as soon as practicable and not later than sixty calendar days before a scheduled trial date, unless an order is obtained pursuant to section 245.10 of this article.

(l) (i) If counsel for the defendant has access to a database by which to obtain the complete criminal history of all defendants and all persons designated as potential prosecution witnesses pursuant to paragraph (d) of subdivision two of section 245.20 of this article, the prosecutor shall either disclose a list of the birth dates and known aliases of those persons, or provide the defendant with the criminal history information. (ii) If counsel for the defendant lacks access to a database by which to obtain the complete criminal history of all defendants and all persons designated as potential prosecution witnesses

pursuant to paragraph (d) of subdivision two of section 245.20 of this article, the prosecutor shall either provide counsel for the defendant with access to such a database and disclose a list of the birth dates and known aliases of those persons, or provide the defendant with the criminal history information.

(m) When it is known to the prosecution, the existence of any pending criminal action against all persons designated as potential prosecution witnesses pursuant to paragraph (d) of subdivision two of section 245.20 of this article.

(n) In any prosecution alleging a violation of the vehicle and traffic law, where the defendant is charged by indictment, superior court information, prosecutor's information, information, or simplified information, the most recent record of inspection, calibration and repair of machines and instruments utilized to perform any scientific tests and experiments and the certification certificate, if any, held by the operator of the machine or instrument, and all other disclosures required under this article.

(o) In any prosecution alleging a violation of section 156.05 or 156.10 of the penal law, the time, place and manner such violation occurred.

§ 245.40 Reciprocal discovery obligation of the defendant.

1. Timing of reciprocal discovery for the prosecution. The defendant shall perform his or her reciprocal discovery obligations under this section within thirty calendar days after being served with the prosecution's certificate of compliance pursuant to subdivision one of section 245.65 of this article. Portions of materials claimed to be non-discoverable may be withheld pending a determination and ruling of the court under section 245.10 of this article; but the prosecution shall be notified in writing that information has not been disclosed under this section, and the discoverable portions of such materials shall be disclosed if practicable.

2. Reciprocal discovery for the prosecution. The defendant shall, subject to constitutional limitations, disclose to the prosecution, and permit the prosecution to discover, inspect, copy or photograph, each of the following items and information when it is within the defendant's or counsel for the defendant's possession or control:

(a) The names, known aliases, addresses and birth dates of all persons other than the defendant whom the defendant intends to call as witnesses at trial or a pre-trial hearing. Disclosure of this information for a person whom the defendant intends to call as a witness for the sole purpose of impeaching a prosecution witness is not required until after the prosecution witness has testified.

(b) All statements, written or recorded or summarized in any writing or recording, made by all persons other than the defendant whom the defendant intends to call as witnesses at trial or a pre-trial hearing; except that disclosure of such statements made by a person whom the defendant intends to call as a witness for the sole purpose of impeaching a prosecution witness is not required until after the prosecution witness has testified.

(c) A summary of all promises, rewards and inducements made to persons whom the defendant intends to call as witnesses at trial or a pre-trial hearing, as well as requests for consideration by such persons, and copies of all documents relevant to a promise, reward or inducement.

(d) All tangible property that the defendant intends to introduce in the defendant's case-in-chief at trial or a pre-trial hearing.

(e) All tapes or other electronic recordings which the defendant intends to introduce at trial or a pre-trial hearing.

(f) All photographs and drawings which the defendant intends to introduce at trial or a pre-trial hearing.

(g) All reports and documents concerning physical or mental examinations, or scientific tests or experiments or comparisons, which the defendant intends to introduce at trial or a pre-trial hearing, or which were made by a person whom the defendant intends to call as a witness at trial or a pre-trial hearing.

(h) Intended expert opinion evidence, including the name, business address, current curriculum vitae, and a list of publications of each expert witness whom the defendant intends to call as a witness at trial or a pre-trial hearing, and all reports prepared by the expert that pertain to the case, or if no report is prepared, a written statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. This paragraph does not alter or in any way affect the procedures, obligations or rights set forth in section 250.10 of this title. If in the exercise of reasonable diligence this information is unavailable for disclosure within the time period specified in subdivision one of this section, that period shall be stayed without need for a motion pursuant to section 245.10 of this article; except that the disclosure shall be made as soon as practicable and not later than thirty calendar days before a scheduled trial date, unless an order is obtained pursuant to section 245.10 of this article.

§ 245.45 Disclosure of prior misconduct or criminal acts.

1. Use at trial. Not later than fifteen calendar days before a scheduled trial date, the prosecution shall disclose to the defendant a list of all misconduct and criminal acts of the defendant not charged in the indictment, superior court information, prosecutor's information, information, or simplified information, which the prosecution intends to use at trial for purposes of:

(a) impeaching the credibility of the defendant; or

(b) as substantive proof of any material issue in the case.

2. Notification for what purpose. In addition, the prosecutor shall designate whether he or she intends to use each listed act for impeachment and/or as substantive proof.

§ 245.50 Non-testimonial evidence from the defendant.

1. Availability. After the filing of an accusatory instrument, and subject to constitutional limitations, the court may, upon motion of the prosecution showing probable cause to believe the defendant has committed the crime, a clear indication that relevant material evidence will be found, and that the method used to secure it is safe and reliable, require a defendant to provide non-testimonial evidence, including to:

(a) appear in a lineup;

(b) speak for identification by a witness or potential witness;

(c) be fingerprinted;

(d) pose for photographs not involving reenactment of an event;

(e) permit the taking of samples of the defendant's blood, hair, and other materials of the defendant's body that involves no unreasonable intrusion thereof;

(f) provide specimens of the defendant's handwriting; and

(g) submit to a reasonable physical or medical inspection of the defendant's body.

2. Limitations. This section shall not be construed to alter or in any way 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 state constitution or the United States constitution. This section shall not be construed to alter or in any way affect the administration of a chemical test where otherwise authorized. An order pursuant to this section may be denied, limited or conditioned as provided in section 245.10 of this article.

§ 245.55 Court orders for preservation, access or discovery.

1. Order to preserve evidence. At any time, a party may move for a court order to any individual, agency or other entity in possession, custody or control of items which relate to the subject matter of the case or are otherwise relevant, requiring that such items be preserved for a specified period of time. The court shall hear and rule upon such motions expeditiously. The court may modify or vacate such an order upon a showing that preservation of particular evidence will create significant hardship, on condition that the probative value of that evidence is preserved by a specified alternative means.

2. Order to grant access to premises. At any time, the defendant may move for a court order to any individual, agency or other entity in possession, custody or control of a crime scene or other premises that relates to the subject matter of the case or is otherwise relevant, requiring that counsel for the defendant be granted prompt and reasonable access to inspect, photograph or measure that crime scene or those premises, and that the condition of the crime scene or premises remain unchanged in the interim. The court shall hear and rule upon such motions expeditiously. The court may modify or vacate such an order upon a showing that granting access to a particular crime scene or premises will create significant hardship, on condition that the probative value of that location is preserved by a specified alternative means.

3. Discretionary discovery by order of the court. The court in its discretion may, upon a showing by the defendant that the request is reasonable and that the defendant is unable without undue hardship to obtain the substantial equivalent by other means, order the prosecution, or any individual, agency or other entity subject to the jurisdiction of the court, to make available for disclosure to the defendant any material or information which potentially relates to the subject matter of the case or is otherwise relevant. A motion under this subdivision must be on notice to any person or entity affected by the order. The court may, upon request of any person or entity affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive. The court may permit a party seeking or opposing a discretionary order of discovery under this subdivision, or another affected person or entity, to submit papers or testify ex parte or in camera. Any such papers and a transcript of such testimony shall be sealed and shall constitute a part of the record on appeal.

§ 245.60 Material held by other governmental personnel.

Upon the defendant's request and designation of material or information which would be discoverable under section 245.20 or 245.30 of this article if in the possession, custody or control of the prosecution or persons under the prosecution's direction or control, but which is, in fact, in the possession, custody or control of other governmental personnel, the prosecutor shall make a diligent, good faith effort to ascertain the existence of such material or information and to cause it to be made available for discovery. If the prosecutor's effort is unsuccessful and such material or information or other governmental personnel are subject to the jurisdiction of the court, the court, upon motion of the defendant, shall issue suitable subpoenas or orders to cause such material or information to be made available for discovery.

§ 245.65 Certificates of compliance.

1. By the prosecution. When the prosecution has provided the discovery required by sections 245.20 and 245.30 of this article, except for any items or information that are the subject of an order pursuant to section 245.10 of this article, it shall serve upon the defendant and file with the court a certificate of compliance. The certificate shall state that, after exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery, the prosecutor has disclosed and made available all known material and information subject to discovery. It shall also identify the items provided. If additional discovery is subsequently provided prior to trial pursuant to section 245.80 of this article, a supplemental certificate shall be served upon the defendant and filed with the court identifying the additional material and information provided. No adverse consequence to the prosecution or the prosecutor shall result from the filing of a certificate of compliance in good faith; but the court may grant a remedy for a discovery violation as provided in section 245.90 of this article.

2. By the defendant. When the defendant has provided all discovery required by section 245.40 of this article, except for any items or information that are the subject of an order pursuant to section 245.10 of this article, counsel for the defendant shall serve upon the prosecution and file with the court a certificate of compliance. The certificate shall state that, after exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery, counsel for the defendant has disclosed and made available all known material and information subject to discovery. It shall also identify the items provided. If additional discovery is subsequently provided prior to trial pursuant to section 245.80 of this article, a supplemental certificate shall be served upon the prosecution and filed with the court identifying the additional material and information provided. No adverse consequence to the defendant or counsel for the defendant shall result from the filing of a certificate of compliance in good faith; but the court may grant a remedy for a discovery violation as provided in section 245.90 of this article.

§ 245.70 Court ordered procedures to facilitate compliance.

To facilitate compliance with this article, and to reduce or streamline litigation of any disputes about discovery, the court in its discretion may issue an order:

1. requiring that the prosecutor and counsel for the defendant diligently confer to attempt to reach an accommodation as to any dispute concerning discovery prior to seeking a ruling from the court;

2. requiring a discovery compliance conference at a specified time prior to trial between the prosecutor, counsel for all defendants, and the court or its staff;

3. requiring the prosecution to file an additional certificate of compliance that states that the prosecutor and/or an appropriate named agent has made reasonable inquiries of all police officers and other persons who have participated in investigating or evaluating the case about the existence of any favorable evidence or information within paragraph (d) of subdivision two of section 245.30 of this article, including such evidence or information that was not reduced to writing or otherwise memorialized or preserved as evidence, and has disclosed any such information to the defendant; and/or

4. requiring other measures or proceedings designed to carry into effect the goals of this article.

§ 245.75 Flow of information with police.

1. Provision of law enforcement agency files. Upon request by the prosecution, a New York state law enforcement agency shall make available to the prosecution a complete copy of its complete files related to the investigation of the case or the prosecution of the defendant for compliance with this article, unless exceptional circumstances as found by senior law enforcement personnel justify withholding of any materials; but the prosecution shall be notified in writing that information has not been provided, unless exceptional circumstances require otherwise.

2. Sufficient communication for compliance. The prosecutor shall endeavor to ensure that a flow of information is maintained between the police and other investigative personnel and his or her office sufficient to place within his or her possession or control all material and information pertinent to the defendant and the offense or offenses charged, including any evidence or information which tends to exculpate the defendant 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 provide a basis for a motion to suppress evidence on constitutional grounds, or which tends to impugn the credibility of a prosecution witness, informant or evidence, or which would tend to mitigate the punishment of the defendant.

§ 245.80 Continuing duty to disclose.

If either the prosecution or the defendant subsequently learns of additional material or information which it would have been under a duty to disclose pursuant to any provisions of this article at the time of a previous discovery obligation or discovery order, it shall expeditiously notify the other party and disclose the additional material or information as required for initial discovery under this article. This provision also requires expeditious disclosure by the prosecution of material or information that became relevant to the case or discoverable based upon reciprocal discovery received from the defendant pursuant to section 245.40 of this article.

§ 245.85 Work product.

This article does not authorize discovery by a party of those portions of records, reports, correspondence, memoranda, or internal documents of the adverse party which are only the legal research, opinions, theories or conclusions of the adverse party or its attorney or the attorney's agents, or of statements of a defendant, written or recorded or summarized in any writing or recording, made to the attorney for the defendant or the attorney's agents.

§ 245.90 Availability of remedies for violations.

1. Need for remedy. (a) When material or information is discoverable under this article but is disclosed belatedly, the court shall impose an appropriate remedy if the party entitled to disclosure shows that it was significantly prejudiced. If the untimely disclosure occurred because the party responsible failed to make reasonably diligent efforts to comply with this article, the court has discretion to impose an appropriate remedy if the party entitled to disclosure shows some prejudice. In either situation the party entitled to disclosure shall be given reasonable time to prepare and respond to the new material.

(b) When material or information is discoverable under this article but cannot be disclosed because it has been lost or destroyed, the court shall impose an appropriate remedy if the party entitled to disclosure shows that the lost or destroyed material may have contained some information relevant to a contested issue. The appropriate remedy is that

which is proportionate to the potential ways in which the lost or destroyed material reasonably could have been helpful to the party entitled to disclosure.

2. Available remedies. For failure to comply with any discovery order imposed or issued pursuant to this article, the court may make a further order for discovery, grant a continuance, order that a hearing be reopened, order that a witness be called or recalled, instruct the jury that it may draw an adverse inference regarding the noncompliance, preclude or strike a witness's testimony or a portion of a witness's testimony, admit or exclude evidence, order a mistrial, order the dismissal of all or some of the charges, or make such other order as it deems just under the circumstances; except that any sanction against the defendant shall comport with the defendant's constitutional right to present a defense, and precluding a defense witness from testifying shall be permissible only upon a finding that the defendant's failure to comply with the discovery obligation or order was willful and motivated by a desire to obtain a tactical advantage.

3. Consequences of nondisclosure of statement of testifying prosecution witness. The failure of the prosecutor or any agent of the prosecutor to disclose any written or recorded statement made by a prosecution witness which relates to the subject matter of the witness's testimony 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 reopened pre-trial hearing when such statements were disclosed before the close of evidence at trial.

§ 245.95 Admissibility of discovery.

The fact that a party has indicated during the discovery process an intention to offer specified evidence or to call a specified witness is not admissible in evidence or grounds for adverse comment at a hearing or a trial.

§ 3. Subdivision 9 of section 65.20 of the criminal procedure law, as added by chapter 505 of the laws of 1985 and as 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~~] 245.30 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~~] 245.30 of this chapter as they concern all the witnesses the defendant intends to call at such hearing.

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

5. Court ordered bill of particulars. Where a prosecutor has timely served a written refusal pursuant to subdivision four of this section and upon motion, made in writing, of a defendant, who has made a request for a bill of particulars and whose request has not been complied with in whole or in part, the court must, to the extent a protective order is not warranted, order the prosecutor to comply with the request if it is satisfied that the items of factual information requested are authorized

to be included in a bill of particulars, and that such information is necessary to enable the defendant adequately to prepare or conduct his defense and, if the request was untimely, a finding of good cause for the delay. Where a prosecutor has not timely served a written refusal pursuant to subdivision four of this section the court must, unless it is satisfied that the people have shown good cause why such an order should not be issued, issue an order requiring the prosecutor to comply or providing for any other [~~order~~] remedy authorized by [~~subdivision one of~~] section [~~240.70~~] 245.90 of this title.

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

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

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

§ 340.30 Pre-trial discovery and notices of defenses.

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

§ 7. 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:

14. (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~~] 245.20 and subdivision two of section 245.30 and make available for inspection, photographing, copying or testing the property specified in [~~subdivision one of section 240.20~~] such sections; 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~~] 245.40 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~~] such section.

(b) Where a party refuses to make disclosure pursuant to this section, the provisions of [~~section 240.35, subdivision one of section 240.40 and section 240.50~~] sections 245.55, 245.70 and 245.90 shall apply.

(c) If, after complying with the provisions of this section or an order pursuant thereto, a party finds either before or during a sentencing proceeding or mental retardation hearing, additional material subject to discovery or covered by court order, the party shall promptly make disclosure or apply for a protective order pursuant to section 245.10.

(d) If the court finds that a party has failed to comply with any of the provisions of this section, the court may enter any of the [~~orders~~] remedies specified in subdivision one of section [~~240.70~~] 245.90.

§ 8. The opening paragraph of paragraph (b) of subdivision 1 of section 440.30 of the criminal procedure law, as added by chapter 19 of the laws of 2012, is amended to read as follows:

In conjunction with the filing or consideration of a motion to vacate a judgment pursuant to section 440.10 of this article by a defendant

convicted after a trial, in cases where the court has ordered an evidentiary hearing upon such motion, the court may order that the people produce or make available for inspection property, [~~as defined in subdivision three of section 240.10 of this part,~~] in its possession, custody, or control that was secured in connection with the investigation or prosecution of the defendant upon credible allegations by the defendant and a finding by the court that such property, if obtained, would be probative to the determination of defendant's actual innocence, and that the request is reasonable. The court shall deny or limit such a request upon a finding that such a request, if granted, would threaten the integrity or chain of custody of property or the integrity of the processes or functions of a laboratory conducting DNA testing, pose a risk of harm, intimidation, embarrassment, reprisal, or other substantially negative consequences to any person, undermine the proper functions of law enforcement including the confidentiality of informants, or on the basis of any other factor identified by the court in the interests of justice or public safety. The court shall further ensure that any property produced pursuant to this paragraph is subject to a protective order, where appropriate. The court shall deny any request made pursuant to this paragraph where:

§ 9. Subdivision 10 of section 450.10 of the penal law, as added by chapter 795 of the laws of 1984, is amended to read as follows:

10. Where there has been a failure to comply with the provisions of this section, and where the district attorney does not demonstrate to the satisfaction of the court that such failure has not caused the defendant prejudice, the court shall instruct the jury that it may consider such failure in determining the weight to be given such evidence and may also impose any other [~~sanction~~] **remedies** set forth in [~~subdivision one of~~] section [~~240.70~~] **245.90** of the criminal procedure law; provided, however, that unless the defendant has convinced the court that such failure has caused him undue prejudice, the court shall not preclude the district attorney from introducing into evidence the property, photographs, photocopies, or other reproductions of the property or, where appropriate, testimony concerning its value and condition, where such evidence is otherwise properly authenticated and admissible under the rules of evidence. Failure to comply with any one or more of the provisions of this section shall not for that reason alone be grounds for dismissal of the accusatory instrument.

§ 10. Subdivision 5 of section 480.10 of the penal law, as added by chapter 655 of the laws of 1990, is amended to read as follows:

5. In addition to information required to be disclosed pursuant to article two hundred [~~forty~~] **forty-five** of the criminal procedure law, when forfeiture is sought pursuant to this article, and following the defendant's arraignment on the special forfeiture information, the court shall order discovery of any information not otherwise disclosed which is material and reasonably necessary for preparation by the defendant with respect to a forfeiture proceeding brought pursuant to this article. Such material shall include those portions of the grand jury minutes and such other information which pertain solely to the special forfeiture information and shall not include information which pertains to the criminal charges. Upon application of the prosecutor, the court may issue a protective order pursuant to section [~~240.40~~] **245.10** of the criminal procedure law with respect to any information required to be disclosed pursuant to this subdivision.

§ 11. Section 460.80 of the penal law, as added by chapter 516 of the laws of 1986, is amended to read as follows:

§ 460.80 Court ordered disclosure.

Notwithstanding the provisions of article two hundred [~~forty~~] **forty-five** of the criminal procedure law, when forfeiture is sought pursuant to section 460.30 of this [~~chapter~~] **article**, the court may order discovery of any property not otherwise disclosed which is material and reasonably necessary for preparation by the defendant with respect to the forfeiture proceeding pursuant to such section. The court may issue a protective order denying, limiting, conditioning, delaying or regulating such discovery where a danger to the integrity of physical evidence or a substantial risk of physical harm, intimidation, economic reprisal, bribery or unjustified annoyance or embarrassment to any person or an adverse effect upon the legitimate needs of law enforcement, including the protection of the confidentiality of informants, or any other factor or set of factors outweighs the usefulness of the discovery.

§ 12. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided that the amendments to subdivision 9 of section 65.20 of the criminal procedure law made by section three of this act shall not affect the repeal of such section and shall be deemed repealed therewith.