STATE OF NEW YORK

6848

2017-2018 Regular Sessions

IN SENATE

August 9, 2017

Introduced by Sens. AVELLA, HAMILTON -- read twice and ordered printed, and when printed to be committed to the Committee on Rules

AN ACT to amend the criminal procedure law and the penal law, in relation to discovery, pretrial motions, securing attendance of witnesses by subpoena, motion to suppress evidence, tampering with a witness or intimidating a victim and to repeal article 240 of the criminal procedure law relating to discovery

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 Article 240 of the criminal procedure law is REPEALED.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, discovery or DNA comparison.

245.60 Diligent effort to ascertain existence of material and information.

245.65 Certificates of compliance.

245.70 Court ordered procedures to facilitate compliance.

245.75 Continuing duty to disclose.

245.80 Work product.

245.85 Availability of remedies for violations.

245.90 Admissibility of discovery.

§ 245.10 Availability of protective orders.

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

1. Any discovery subject to protective order. Upon a showing of good cause by either party, the court may at any time order that discovery or inspection of any kind of material or information under this article be denied, 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; or, alternatively, that counsel for the defendant, and persons employed by the attorney or appointed by the court to assist in the preparation of a defendant's case, may not disclose physical copies of the discoverable documents to a defendant or to anyone else, provided that the prosecution affords the defendant access to inspect redacted copies of the discoverable documents at a supervised location that provides regular and reasonable hours for such access, such as a prosecutor's office, police station, facility of detention, or court. The court may permit a party seeking or opposing a protective order under this section, or another affected person, to submit papers or testify on the record ex parte or in camera. Any such papers and a transcript of such testimony may 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 rights or 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 also outweigh the usefulness of the discovery.

4. Successor counsel or pro se defendant. In cases in which the attorney-client relationship is terminated prior to trial for any reason, any material or information disclosed subject to a condition that it be available only to counsel for the defendant, or limited in dissemination by protective order or otherwise, shall be provided only to successor counsel for the defendant under the same condition or be returned to the prosecution, unless the court rules otherwise for good cause shown or the prosecutor gives written consent. Any work product derived from such material or information shall not be provided to the defendant, unless the court rules otherwise or the prosecutor gives written consent. If the defendant is acting as his or her own attorney, the court may regulate the time, place and manner of access to any discoverable material or information; and it may as appropriate appoint persons to assist the defendant in the investigation or preparation of the case. Upon motion or application of a defendant acting as his or her own attorney, the court may at any time modify or vacate any condition or restriction relating to access to discoverable material or information, for good cause shown.

5. Expedited review of adverse ruling. (a) A party that has unsuccessfully sought, or unsuccessfully opposed the granting of, a protective order under this section relating to the name, address, contact informa-

tion or statements of a person may obtain expedited review of that ruling by an individual justice of the intermediate appellate court to which an appeal from a judgment of conviction in the case would be taken.

(b) Such review shall be sought within two business days of the adverse or partially adverse ruling, by order to show cause filed with the intermediate appellate court. The order to show cause shall in addition be timely served on the lower court and on the opposing party, and shall be accompanied by a sworn affirmation stating in good faith (i) that the ruling affects substantial interests, and (ii) that diligent efforts to reach an accommodation of the underlying discovery dispute with opposing counsel failed or that no accommodation was feasible; except that service on the opposing party, and a statement regarding efforts to reach an accommodation, are unnecessary where the opposing party was not made aware of the application for a protective order and good cause exists for omitting service of the order to show cause on the opposing party. The lower court's order subject to review shall be stayed until the appellate justice renders decision.

(c) The assignment of the individual appellate justice, and the mode of and procedure for the review, are determined by rules of the individual appellate courts. The appellate justice may consider any relevant and reliable information bearing on the issue, and may dispense with written briefs other than supporting and opposing materials previously submitted to the lower court. The appellate justice may dispense with the issuance of a written opinion in rendering his or her decision, and when practicable shall render decision expeditiously. Such review and decision shall not affect the right of a defendant, in a subsequent appeal from a judgment of conviction, to claim as error the ruling reviewed.

6. Compliance with protective order. Any protective order issued under this article is a mandate of the court for purposes of the offense of criminal contempt in subdivision three of section 215.50 of the penal law.

§ 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 subsection, 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 up to an additional forty-five calendar days without need for a motion pursuant to subdivision two of section 245.10 of this article. When the prosecutor is engaged in an ongoing trial or does not report to work due to a vacation or similar reason during one or more days of the time period in this subdivision, that time period may be stayed by an additional seven 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 follow-

ing 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 subsection 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 subsection 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 and work affiliation 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 subsection 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. The prosecution shall disclose evidence or information under this subsection expeditiously upon its receipt by the prosecutor, notwithstanding the otherwise-applicable time periods for disclosure in 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. In lieu of an in-person interview, a telephone interview may be used where arranging an in-person interview is not reasonably practicable or the person declines to participate in an in-person interview; but law enforcement personnel shall not expressly or implicitly encourage a person to decline to participate in an in-person interview. This subdivision does not create any right for the defendant personally to attend or to participate in such an interview. The prosecution shall provide counsel for the defendant with the other materials discoverable under subdivision two of this section prior to 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 on the record ex parte or in camera. Any such papers and a transcript of such testimony may be sealed and shall constitute a part of the record on appeal. The obligation to maintain confidentiality described in this subdivision is a mandate of the court for purposes of the offense of criminal contempt in subdivision three of section 215.50 of the penal law.

(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 investigation or preparation of a defendant's case if that disclosure is required for that investigation or 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, in lieu of use of the confidentiality procedure set forth in this subdivision, the court shall consider any arguments of the defendant relating to a need for contact information for a potential witness, and any countervailing arguments of the prosecution or another affected person. Where such arguments are made, the court shall then order as to each such potential witness, as appropriate, that adequate contact information either be provided or be withheld, or provide for contact with the potential witness only through persons appointed by the court to assist in the investigation or preparation of the defendant's case, or impose any other reasonable restrictions on disclosure. Expedited review of a ruling under this subparagraph may be sought as provided in subdivision five of section 245.10 of this article.

(iv) If counsel for the defendant learns about any intentional or unintentional breach of the confidentiality procedure set forth in this subdivision that was attributable to conduct of a lawyer for any defendant in the case, or conduct of a person employed by a lawyer in the case or appointed by the court, he or she shall expeditiously notify the court or the prosecutor.

§ 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 subsection, 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 up to 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 up to 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. When the court is required to review grand jury transcripts, the prosecution shall disclose them to the court expeditiously upon their receipt by the prosecutor, notwithstanding the otherwise-applicable time periods for disclosure in 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. The prosecution shall disclose evidence or information under this subsection expeditiously upon its receipt by the prosecutor, notwithstanding the otherwise-applicable time periods for disclosure in this article.

(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 subsection 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 subsection would have to be served on the prosecution within thirty days of that notice. If in the exercise of reasonable diligence the prosecutor has not formed an intention within the time period specified in this section that an item under this subsection will be introduced at trial or a pre-trial hearing, that period shall be stayed without need for a motion pursuant to subdivision two of section 245.10 of this article; but the disclosure shall be made as soon as practicable and subject to the continuing duty to disclose in section 245.75 of this article.

(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. When the prosecution's expert witness is being called in response to disclosure of an expert witness by the defendant, the court shall alter a scheduled trial date, if necessary, to allow the prosecution thirty calendar days to make the disclosure and the defendant thirty calendar days to prepare and respond to the new materials.

(l) The results of complete criminal history record checks for all defendants and all persons designated as potential prosecution witnesses pursuant to paragraph (d) of subdivision two of section 245.20 of this article, other than those witnesses who are experts or law enforcement officers.

(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 sections 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 a particular subsection, 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, including but not limited to tapes or other electronic recordings and photographs and drawings, that the defendant intends to introduce in the defendant's case-in-chief at trial or a pre-trial hearing. If in the exercise of reasonable diligence counsel for the defendant has not formed an intention within the time period specified in this section that an item under this subsection will be introduced at trial or a pre-trial hearing, that period shall be stayed without need for a motion pursuant to subdivision two of section 245.10

of this article; but the disclosure shall be made as soon as practicable and subject to the continuing duty to disclose in section 245.75 of this article.

(e) 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.

(f) 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 prosecution shall designate whether it 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, discovery or DNA comparison.

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 and is reasonably likely to be material. 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, modify or vacate the order if compliance would be unreasonable or will create significant hardship. 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 on the record ex parte or in camera. Any such papers and a transcript of such testimony may be sealed and shall constitute a part of the record on appeal.

4. DNA comparison order. Where property in the prosecution's possession, custody, or control consists of a deoxyribonucleic acid ("DNA") profile obtained from probative biological material gathered in connection with the investigation or prosecution of the defendant, and the defendant establishes (a) that such profile complies with federal bureau of investigation or state requirements, whichever are applicable and as such requirements are applied to law enforcement agencies seeking a keyboard search or similar comparison, and (b) that the data meets state DNA index system or national DNA index system criteria as such criteria are applied to law enforcement agencies seeking such a keyboard search or similar comparison, the court may--upon motion of a defendant against whom an indictment, superior court information, prosecutor's

information, information, or simplified information is pending--order an entity that has access to the combined DNA index system or its successor system to compare such DNA profile against DNA databanks by keyboard searches, or a similar method that does not involve uploading, upon notice to both parties and the entity required to perform the search, upon a showing by the defendant that such a comparison is material to the presentation of his or her defense and that the request is reasonable. For purposes of this paragraph, a "keyboard search" shall mean a search of a DNA profile against the databank in which the profile that is searched is not uploaded to or maintained in the databank.

§ 245.60 Diligent effort to ascertain existence of material and information.

The prosecutor shall make a diligent, good faith effort to ascertain the existence of material or information discoverable under sections 245.20 or 245.30 of this article and to cause such material or information to be made available for discovery where it exists but is not within the prosecutor's possession, custody or control; provided that the prosecutor shall not be required to obtain by subpoena duces tecum material or information which the defendant may thereby obtain. This provision shall not require the prosecutor to ascertain the existence of witnesses not known to police or another law enforcement agency, or the written or recorded statements thereof, under paragraph (d) of section 245.20 and paragraph (c) of section 245.30 of this article.

§ 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 245.75 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 245.85 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 245.75 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 compli-

ance in good faith; but the court may grant a remedy for a discovery violation as provided in section 245.85 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 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.

§ 245.80 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.

§ 245.85 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. Regardless of a showing of prejudice 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.

§ 245.90 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 1 of section 255.20 of the criminal procedure law, as amended by chapter 369 of the laws of 1982, is amended to read as follows:

1. Except as otherwise expressly provided by law, whether the defendant is represented by counsel or elects to proceed pro se, all pre-trial motions shall be served or filed within forty-five days after arraignment and before commencement of trial, or within such additional time as the court may fix upon application of the defendant made prior to entry of judgment. In an action in which either (a) material or information has been disclosed pursuant to paragraphs (c) or (h) of subdivision two of section 245.20, (b) an eavesdropping warrant and application have been furnished pursuant to section 700.70 or (c) a notice of intention to introduce evidence has been served pursuant to section 710.30, such period shall be extended until forty-five days after the last date of such service. If the defendant is not represented by counsel and has requested an adjournment to obtain counsel or to have counsel assigned, such forty-five day period shall commence on the date counsel initially appears on defendant's behalf.

§ 4. Subdivision 8 of section 450.20 of the criminal procedure law is amended to read as follows:

8. An order suppressing evidence, entered before trial pursuant to section 710.20**, or an order precluding evidence, entered before trial pursuant to section 710.30**; provided that the people file a statement in the appellate court pursuant to section 450.50.

§ 5. Section 450.50 of the criminal procedure law is amended to read as follows:

§ 450.50 Appeal by people from order suppressing **or precluding** evidence; filing of statement in appellate court.

1. In taking an appeal, pursuant to subdivision eight of section 450.20, to an intermediate appellate court from an order of a criminal court suppressing **or precluding** evidence, the people must file, in addition to a notice of appeal or, as the case may be, an affidavit of errors, a statement asserting that the deprivation of the use of the evidence ordered suppressed **or precluded** has rendered the sum of the proof available to the people with respect to a criminal charge which has been filed in the court either (a) insufficient as a matter of law, or (b) so weak in its entirety that any reasonable possibility of prosecuting such charge to a conviction has been effectively destroyed.

2. The taking of an appeal by the people, pursuant to subdivision eight of section 450.20, from an order suppressing **or precluding** evidence constitutes a bar to the prosecution of the accusatory instrument involving the evidence ordered suppressed **or precluded**, unless and until such suppression **or preclusion** order is reversed upon appeal and vacated.

§ 6. Subdivision 3 of section 610.20 of the criminal procedure law is amended and a new subdivision 4 is added to read as follows:

3. An attorney for a defendant in a criminal action or proceeding, as an officer of a criminal court, may issue a subpoena of such court, subscribed by himself, for the attendance in such court of any witness whom the defendant is entitled to call in such action or proceeding. An attorney for a defendant may not issue a subpoena duces tecum of the court directed to any department, bureau or agency of the state or of a political subdivision thereof, or to any officer or representative thereof**, unless the subpoena is indorsed by the court and provides at least three days for the production of the requested materials. In the case of an emergency, the court may by order dispense with the three-day production period**. [~~Such a subpoena duces tecum may be issued in behalf of a defendant upon order of a court pursuant to the rules applicable to civil cases as provided in section twenty-three hundred seven of the civil practice law and rules.~~]

4. The showing required to sustain any subpoena under this section is that the testimony or evidence sought is reasonably likely to be relevant and material to the proceedings, and the subpoena is not overbroad or unreasonably burdensome.

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

§ 710.30 Motion to suppress evidence; notice to defendant of intention to offer evidence.

1. Whenever the people intend to offer at a trial (a) evidence of a statement made by a defendant to a public servant, which statement if involuntarily made would render the evidence thereof suppressible upon motion pursuant to subdivision three of section 710.20, or (b) testimony regarding an observation of the defendant either at the time or place of the commission of the offense or upon some other occasion relevant to the case, to be given by a witness who has previously identified him as

such, or (c) tangible objects obtained from the defendant or a place or entity in which a court may rule that the defendant had standing, they must serve upon the defendant a notice of such intention, specifying the evidence intended to be offered. Where notice is given under subdivision two of this section, such notice shall specify all identification procedures in which the witness participated, including photographic procedures, regardless of whether the particular procedure will be offered at trial.

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

3. In the absence of service of notice upon a defendant as prescribed in this section, no evidence of a kind specified in subdivision one may be received against him upon trial unless he has, despite the lack of such notice, moved to suppress such evidence and such motion has been denied and the evidence thereby rendered admissible as prescribed in subdivision two of section 710.70.

4. On an appeal from a judgment of conviction, a defendant who moved to suppress evidence after having unsuccessfully sought preclusion of such evidence under this section may challenge both the denial of preclusion and the denial of suppression.

§ 8. Section 215.11 of the penal law, as added by chapter 664 of the laws of 1982, is amended to read as follows:

§ 215.11 Tampering with a witness in the third degree.

A person is guilty of tampering with a witness in the third degree when, knowing that a person is about to be called as a witness in a criminal proceeding:

1. He wrongfully compels or attempts to compel such person to absent himself from, or otherwise to avoid or seek to avoid appearing or testifying at such proceeding by means of instilling in him a fear that the actor will cause physical injury to such person or another person; or

2. He wrongfully compels or attempts to compel such person to swear falsely by means of instilling in him a fear that the actor will cause physical injury to such person or another person.

Tampering with a witness in the third degree is a class [~~E~~] D felony.

§ 9. Section 215.12 of the penal law, as added by chapter 664 of the laws of 1982, is amended to read as follows:

§ 215.12 Tampering with a witness in the second degree.

A person is guilty of tampering with a witness in the second degree when he:

1. Intentionally causes physical injury to a person for the purpose of obstructing, delaying, preventing or impeding the giving of testimony in a criminal proceeding by such person or another person or for the purpose of compelling such person or another person to swear falsely; or

2. He intentionally causes physical injury to a person on account of such person or another person having testified in a criminal proceeding.

Tampering with a witness in the second degree is a class [~~D~~] C felony.

§ 10. Section 215.15 of the penal law, as added by chapter 667 of the laws of 1985, is amended to read as follows:

§ 215.15 Intimidating a victim or witness in the third degree.

A person is guilty of intimidating a victim or witness in the third degree when, knowing that another person possesses information relating to a criminal transaction and other than in the course of that criminal transaction or immediate flight therefrom, he:

1. Wrongfully compels or attempts to compel such other person to refrain from communicating such information to any court, grand jury, prosecutor, police officer or peace officer by means of instilling in him a fear that the actor will cause physical injury to such other person or another person; or

2. Intentionally damages the property of such other person or another person for the purpose of compelling such other person or another person to refrain from communicating, or on account of such other person or another person having communicated, information relating to that criminal transaction to any court, grand jury, prosecutor, police officer or peace officer.

Intimidating a victim or witness in the third degree is a class [~~E~~] **D** felony.

§ 11. Section 215.16 of the penal law, as added by chapter 667 of the laws of 1985, is amended to read as follows:

§ 215.16 Intimidating a victim or witness in the second degree.

A person is guilty of intimidating a victim or witness in the second degree when, other than in the course of that criminal transaction or immediate flight therefrom, he:

1. Intentionally causes physical injury to another person for the purpose of obstructing, delaying, preventing or impeding the communication by such other person or another person of information relating to a criminal transaction to any court, grand jury, prosecutor, police officer or peace officer or for the purpose of compelling such other person or another person to swear falsely; or

2. Intentionally causes physical injury to another person on account of such other person or another person having communicated information relating to a criminal transaction to any court, grand jury, prosecutor, police officer or peace officer; or

3. Recklessly causes physical injury to another person by intentionally damaging the property of such other person or another person, for the purpose of obstructing, delaying, preventing or impeding such other person or another person from communicating, or on account of such other person or another person having communicated, information relating to a criminal transaction to any court, grand jury, prosecutor, police officer or peace officer.

Intimidating a victim or witness in the second degree is a class [~~D~~] **C** felony.

§ 12. This act shall take effect immediately.