

# STATE OF NEW YORK

7722

## IN SENATE

February 13, 2018

Introduced by Sens. BAILEY, BENJAMIN -- 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 implementing automatic 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 Assem-  
bly, do enact as follows:

1 Section 1. Article 240 of the criminal procedure law is REPEALED and a  
2 new article 240 is added to read as follows:

3 ARTICLE 240

4 AUTOMATIC DISCOVERY

5 Section 240.10 Automatic discovery; generally.

6 240.15 Automatic discovery; sanctions.

7 240.20 Automatic discovery; depositions.

8 240.25 Automatic discovery; notice and preservation of evidence.

9 240.30 Automatic discovery; remedies or sanctions for noncompli-  
10 ance.

11 240.35 Automatic discovery; discretionary discovery by order of  
12 the court.

13 240.40 Automatic discovery; order to grant access to premises.

14 240.45 Automatic discovery; certificate of compliance.

15 240.50 Automatic discovery; continuing duty.

16 240.55 Automatic discovery; work product.

17 240.60 Automatic discovery; protective orders.

18 240.65 Automatic discovery; amendment of discovery orders.

19 240.70 Automatic discovery; non-testimonial evidence from the  
20 defendant.

21 240.75 Automatic discovery; orders regarding DNA comparisons.

22 § 240.10 Automatic discovery; generally.

23 1. Mandatory open file discovery. (a) Upon commencement of a criminal  
24 action, and without a motion by the defense, the prosecution shall  
25 disclose to the defense, and permit the defense to discover, inspect,  
26 copy or photograph, and test all items and information in the  
27 possession, custody or control of the prosecution, or persons under the

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

LBD14730-02-8

1 prosecution's direction or control, which relate to the subject matter  
2 of the case or are otherwise relevant, including but not limited to:

3 (i) All statements, written or recorded or summarized in any writing  
4 or recording, and the substance of all oral statements, made by the  
5 defendant or a co-defendant;

6 (ii) All statements, written or recorded or summarized in any writing  
7 or recording, and the substance of all oral statements, made by persons  
8 whom the prosecutor knows to have evidence or information that relate to  
9 the subject matter of the case or are otherwise relevant;

10 (iii) All photographs, tangible objects, video and audio recordings,  
11 and electronic recordings and data, including but not limited to cell  
12 phone triangulation data, pen registry and wire tapping data, that  
13 relate to the subject matter of the case or are otherwise relevant; with  
14 respect to tangible objects obtained from, or allegedly possessed by,  
15 the defendant or a co-defendant, the prosecution shall provide a summary  
16 indicating whether the object was physically or constructively possessed  
17 by the defendant, whether the object was recovered during a search or  
18 seizure by a public servant or an agent thereof, whether the prosecution  
19 intends to prove the object was recovered by a public servant or agent  
20 thereof after being abandoned by the defendant, whether the prosecution  
21 intends to prove the defendant's possession of the object by means of a  
22 statutory presumption of possession, and the location where the object  
23 was recovered;

24 (iv) Reports and records of physical or mental examinations of the  
25 defendant or the complaining witness or of scientific tests or exper-  
26 iments, including all data, calculations, or writings of any kind,  
27 including but not limited to, preliminary tests or screening results and  
28 bench notes;

29 (v) All exhibits and demonstrative evidence the prosecutor intends to  
30 introduce at a hearing or trial that relate to the subject matter of the  
31 case or are otherwise relevant;

32 (vi) The names, known aliases, addresses and birth dates of all  
33 persons, other than law enforcement personnel, whom the prosecutor knows  
34 to have evidence or information that relate to the subject matter of the  
35 case or are otherwise relevant, as well as a designation by the prosecu-  
36 tor as to which of those persons may be called as witnesses;

37 (vii) Any documentation and summary of prior complaints, indictments,  
38 convictions, dispositions, and findings of false testimony of all  
39 defendants and of any person the prosecutor has designated as a civilian  
40 witness who may be called at trial pursuant to subparagraph (vi) of this  
41 paragraph;

42 (viii) The name, rank, shield number and business address of all law  
43 enforcement personnel whom the prosecutor knows to have evidence or  
44 information that relate to the subject matter of the case or are other-  
45 wise relevant;

46 (ix) Any documentation and summary of impeachment material, including  
47 but not limited to: prior complaints, indictments, convictions, pending  
48 and closed investigation records, and instances where said person has  
49 been found incredible, of any person the prosecutor has designated as a  
50 law enforcement officer or agent thereof who participated in the inves-  
51 tigation that relates to the subject matter of the case pursuant to  
52 subparagraph (vii) of this paragraph;

53 (x) All transcripts of the testimony of any person who has testified  
54 before any grand jury when the testimony relates to the subject matter  
55 of the case or is otherwise relevant;

1 (xi) A summary, pursuant to subdivision two of this section of all  
2 corporeal or non-corporeal or voice identification procedures, whether  
3 or not an identification was made, and all documents, photographs, and  
4 other materials relating thereto;

5 (xii) All facts, evidence, and information favorable to the defendant,  
6 including but not limited to information that tends to negate the  
7 defendant's guilt or that tends to mitigate the defendant's culpability  
8 as to a charged offense, or that tends to support a potential defense  
9 thereto, or that tends to support a motion to suppress evidence on  
10 constitutional or statutory grounds, or that would tend to reduce the  
11 punishment of the defendant, or that is relevant to a witness's credi-  
12 bility, without regard to the materiality of the information;

13 (xiii) A summary of all discussions, overt or tacit promises, rewards,  
14 inducements, or offers of leniency made to a potential prosecution  
15 witness, and copies of all documents and materials relevant to such  
16 promise, reward, inducement, or offer of leniency;

17 (xiv) A summary of all evidence or information that has been provided  
18 by a confidential informant or jailhouse informant and that relate to  
19 the subject matter of the case or are otherwise relevant;

20 (xv) Information regarding whether a search warrant has been executed  
21 and all documents and electronic recordings or records relating thereto,  
22 including but not limited to the warrant, the warrant application, all  
23 supporting affidavits, a police inventory of all property seized under  
24 the warrant, and a transcript of all testimony or other oral communi-  
25 cations offered in support of the warrant application;

26 (xvi) Information regarding whether there has been any electronic  
27 surveillance, including but not limited to wire tapping or video  
28 surveillance, of a residence or business or telephone or computer or  
29 other electronic or digital device or social media accounts of the  
30 defendant, or of conversations to which the defendant or a co-defendant  
31 was a party, and all recordings, transcripts, documents, warrants and  
32 warrant application materials relating thereto;

33 (xvii) Intended expert opinion evidence, including the name, business  
34 address, current curriculum vitae, and a list of publications of each  
35 intended expert witness, and all reports prepared by the expert that  
36 pertain to the case, or if no report is prepared, a written statement of  
37 the facts and opinions to which the expert is expected to testify and a  
38 summary of the grounds for each opinion, and any instances where the  
39 expert has been found incredible or to have been in perjury; if such  
40 intended expert opinion evidence is not furnished within fifteen days of  
41 the expert witness's completion of the report, the expert witness may,  
42 upon application by the defendant, be barred from testifying at trial;

43 (xviii) A list of all misconduct and criminal acts of the defendant  
44 not charged in the indictment, superior court information, prosecutor's  
45 information, information, or simplified information charging a misdemea-  
46 nor, which the prosecution intends to use at trial for purposes of  
47 impeaching the credibility of the defendant or as substantive proof of  
48 any material issue in the case; and

49 (xix) All department of criminal justice services criminal history  
50 record checks for all witnesses who the prosecution intends to call, all  
51 defendants, and all co-defendants.

52 (b) Nothing in this subdivision shall be interpreted to limit the  
53 scope of the prosecution's discovery obligations. In all questions aris-  
54 ing regarding the scope of the prosecution's obligation to disclose to  
55 the defense and to permit the defense to discover, inspect, copy or  
56 photograph all items and information in the possession, custody or

1 control of the prosecution, or persons under the prosecution's direction  
2 or control, which relate to the subject matter of the case or are other-  
3 wise relevant, there shall be a presumption in favor of disclosure.

4 2. Identification procedure summaries. Summaries disclosed pursuant to  
5 subparagraph (xi) of paragraph (a) of subdivision one of this section  
6 shall include:

7 (a) The date, time, location, type, and result of each procedure;

8 (b) The names of all persons present at each procedure if known to law  
9 enforcement;

10 (c) The name and address of each eyewitness at each procedure;

11 (d) The number and source of all photographs or lineup participants  
12 used in each procedure;

13 (e) A copy of all photographs, photographic arrays, and photographs  
14 taken of all lineups viewed by an eyewitness;

15 (f) The descriptions of suspects entered into an electronic or comput-  
16 er photographic identification system, and a saved collection of the  
17 photographic images generated by each description and viewed by each  
18 eyewitness;

19 (g) Whether the procedure was simultaneous or sequential;

20 (h) All statements made in the presence of or by each eyewitness;

21 (i) Whether the eyewitness selected a different person as the perpe-  
22 trator or indicated a belief that he or she could not identify the  
23 perpetrator;

24 (j) Whether before the procedure the eyewitness was instructed that  
25 the perpetrator might or might not be present; and

26 (k) Whether the administrator of each procedure knew which person was  
27 the suspect, and whether, before the procedure, the eyewitness was  
28 instructed that the administrator did not know which person was the  
29 suspect.

30 3. Disclosure prior to guilty plea deadline. (a) Upon a felony  
31 complaint, where the prosecutor has made a pre-indictment guilty plea  
32 offer, the prosecutor must disclose to the defense, and permit the  
33 defense to discover, inspect, copy or photograph, and test all items and  
34 information that would be discoverable under subdivision one of this  
35 section that are in the possession, custody or control of the prose-  
36 cution. Such disclosure must be completed within a reasonable time, but  
37 not less than three days, prior to the expiration date of any guilty  
38 plea offer by the prosecution or any deadline imposed by the court for a  
39 guilty plea. A defendant may waive his or her rights under this subdi-  
40 vision; except that a guilty plea offer may not be conditioned on such  
41 waiver.

42 (b) Upon an indictment, superior court information, prosecutor's  
43 information, simplified information charging a misdemeanor, information,  
44 or misdemeanor complaint, the prosecution must comply with all disclo-  
45 sure required by subdivision one of this section and file a certificate  
46 of compliance pursuant to section 240.45 of this article at least seven  
47 days prior to the expiration date of any guilty plea offer by the prose-  
48 cution or any deadline imposed by the court for a guilty plea. If the  
49 prosecution does not comply with this subdivision, the offer shall be  
50 deemed available to the defendant until seven days after the prosecution  
51 has filed a certificate of compliance. A defendant may waive his or her  
52 rights under this subdivision; except that a guilty plea offer may not  
53 be conditioned on such waiver.

54 4. Reciprocal discovery. The defendant shall, subject to constitu-  
55 tional limitations and within ninety days of when the prosecution files  
56 its certificate of compliance pursuant to section 240.45 of this arti-

1 cle, disclose to the prosecution, and permit the prosecution to discov-  
2 er, inspect, copy, photograph, or test:

3 (a) Intended expert opinion evidence, including the name, business  
4 address, current curriculum vitae, and a list of publications of each  
5 intended expert witness, and all reports prepared by the expert that  
6 pertain to the case, or if no report is prepared, a written statement of  
7 the facts and opinions to which the expert is expected to testify and a  
8 summary of the grounds for each opinion;

9 (b) All photographs, tangible objects, video and audio recordings,  
10 electronic recordings and data, reports of physical or mental examina-  
11 tions of any person or of scientific tests or experiments, and exhibits  
12 that the defendant intends to introduce at trial in his or her case in  
13 chief; and

14 (c) All statements, written or recorded or summarized in any writing  
15 or recording made by a witness who the defendant intends to call at  
16 trial, other than statements made by the defendant, except that disclo-  
17 sure under this subdivision is not required until the close of the pros-  
18 ecution's case in chief.

19 5. Redactions permitted. Either party is permitted to redact social  
20 security numbers and tax numbers from disclosures.

21 § 240.15 Automatic discovery; sanctions.

22 Section 240.10 of this article shall have the force and effect of a  
23 court order, and failure to provide discovery pursuant to such section  
24 may result in application of any sanctions permitted for noncompliance  
25 with a court order under section 240.30 of this article. However, if in  
26 the judgment of either party good cause exists for declining to make any  
27 of the disclosures set forth in section 240.10 of this article, it may  
28 move for a protective order pursuant to section 240.60 of this article  
29 and production of the item shall be stayed pending a ruling by the  
30 court. The opposing party shall be notified in writing what specific  
31 information or material has not been disclosed and the grounds for the  
32 protective order sought or the reason that the information or material  
33 cannot immediately be disclosed.

34 § 240.20 Automatic discovery; depositions.

35 1. Obtaining depositions. At any time after the commencement of a  
36 criminal action, upon service of a subpoena, the defendant may obtain  
37 the deposition of any person on oral examination, where such person's  
38 testimony is material to the case or relevant to the preparation of a  
39 defense. A person's statements in a deposition may be used in subsequent  
40 proceedings in the same manner as other out-of-court statements.

41 2. Location of deposition. Deposition of a witness shall be taken in  
42 the county where the witness lives, or in such other location as is  
43 agreed upon by the parties, or at a location designated by the court.  
44 The deposition of any person confined in prison shall be taken where  
45 such person is confined, unless otherwise ordered by the court.

46 3. Experts. The defendant may discover by deposition the facts and  
47 opinions to which an expert is expected to testify. Unless manifest  
48 injustice would result, the court shall require that the party seeking  
49 discovery from an expert pay the expert a reasonable hourly fee for the  
50 time such expert is deposed.

51 4. Failure of witness to comply. The court may preclude the testimony  
52 of any witness who fails to comply with a properly served deposition  
53 subpoena from testifying at hearing and/or trial.

54 § 240.25 Automatic discovery; notice and preservation of evidence.

55 1. Notice. Upon receipt of information that any item described in  
56 subparagraphs (i) through (xix) of paragraph (a) of subdivision one of

1 section 240.10 of this article exists, except that it is not within the  
2 possession, custody or control of the prosecution, or persons under its  
3 direction and control, the prosecution shall expeditiously notify the  
4 defendant of the existence of the item and all information known to the  
5 prosecutor concerning the item's location and the identity of any  
6 persons possessing it.

7 2. Preservation order. At any time, a party may move for an order to  
8 any individual, agency or other entity in possession, custody or control  
9 of items that relate to the subject matter of the case or are otherwise  
10 relevant, including but not limited to requiring that such items be  
11 preserved for a specified period of time. In addition, the defendant  
12 may move for an order to any individual, agency or other entity in  
13 possession, custody or control of a crime scene that relates to the  
14 subject matter of the case or is otherwise relevant, requiring that  
15 counsel for the defendant be granted prompt and reasonable access to  
16 inspect, photograph or measure that crime scene, and that the condition  
17 of the crime scene remain unchanged in the interim. The court shall hear  
18 and rule upon motions made pursuant to this subdivision expeditiously.  
19 The court may modify or vacate such an order upon a showing that preser-  
20 vation of particular evidence will create significant hardship, on  
21 condition that the probative value of said evidence is preserved by a  
22 specified alternative means.

23 3. Material held by other governmental personnel. Upon request of the  
24 defendant, the prosecutor shall use due diligence and make good faith  
25 efforts to make available for disclosure to the defendant materials that  
26 would be discoverable under subparagraphs (i) through (xix) of paragraph  
27 (a) of subdivision one of section 240.10 of this article but that are in  
28 possession, custody, or control of other governmental personnel. Where  
29 the prosecutor's efforts are unsuccessful, the court upon motion of the  
30 defendant shall issue suitable subpoenas or orders to cause such materi-  
31 als to be made available for disclosure to the defendant.

32 4. Material witnesses and physical evidence. When police officers or  
33 other law enforcement personnel participate in the investigation of an  
34 apparent criminal incident, and provided that it is practicable under  
35 the circumstances, they shall request and memorialize contact informa-  
36 tion for all persons of whom they are aware with material evidence or  
37 information that relate to the subject matter of the case or are other-  
38 wise relevant, and shall gather or memorialize apparently material phys-  
39 ical evidence of which they are aware.

40 5. Electronic recordings of interviews at police stations or other  
41 detention facilities. No oral, written, or sign language statement of a  
42 suspect made during an interview at a police station or other detention  
43 facility shall be admissible as substantive evidence against that person  
44 in any criminal proceeding unless an electronic recording is made of all  
45 interviews of the suspect. Each recording must be of the complete inter-  
46 view, must include both audio and visual recording, and must be focused  
47 upon both the questioner, interpreter, if present, and the suspect  
48 throughout. Any photograph, video, or object shown to the defendant  
49 during the interview must be preserved for inspection.

50 6. Certain recordings. The prosecutor shall expeditiously take steps  
51 to discover, preserve, and disclose all video, audio, or electronic  
52 recordings made in connection with the investigation of an apparent  
53 criminal incident, including but not limited to 911 telephone calls, law  
54 enforcement radio transmissions, and video recordings made by law  
55 enforcement, including body camera footage.

56 § 240.30 Automatic discovery; remedies or sanctions for noncompliance.

1 1. Available remedies or sanctions. For failure to comply with any  
2 discovery obligation issued or imposed pursuant to this article, the  
3 court shall make a further order for discovery, grant a continuance,  
4 order that a hearing be reopened, order that a witness be called or  
5 recalled, instruct the jury that it may draw an adverse inference  
6 regarding the noncompliance, preclude or strike a witness's testimony or  
7 a portion of a witness's testimony, admit or exclude evidence, order a  
8 mistrial, order the dismissal of all or some of the charges, or make  
9 such other order as it deems just under the circumstances; except that  
10 any sanction against the defendant shall comport with the defendant's  
11 constitutional right to present a defense, confront witnesses, and pres-  
12 ent evidence relevant to his or her defense, and the sanction of  
13 precluding a defense witness from testifying shall be permissible only  
14 upon a finding that the defendant's failure to comply with the discovery  
15 order was willful and motivated by a desire to obtain a tactical advan-  
16 tage.

17 2. Need for remedy or sanction; lost or destroyed material. When  
18 material or information is discoverable under this article, but it  
19 cannot be disclosed because it has been lost or destroyed, the evidence  
20 shall be deemed presumptively favorable to the defendant. The court  
21 shall impose an appropriate remedy or sanction whenever the party enti-  
22 tled to disclosure shows that the lost or destroyed material may have  
23 contained some information relevant to a contested issue.

24 3. Need for remedy or sanction; belated disclosure. When material or  
25 information is discoverable under this article, but it is disclosed  
26 belatedly, the defendant shall be entitled to an adjournment of up to  
27 thirty days, or for a reasonable period, whichever is longer. When there  
28 has been belated disclosure, the court shall impose an appropriate reme-  
29 dy or sanction whenever the party entitled to disclosure shows that it  
30 was prejudiced.

31 § 240.35 Automatic discovery; discretionary discovery by order of the  
32 court.

33 The court in its discretion may, upon a showing by the defendant that  
34 the request is reasonable and that the defendant is unable without undue  
35 hardship to obtain the substantial equivalent by other means, order the  
36 prosecution, or any individual, agency or other entity subject to the  
37 jurisdiction of the court, to make available for disclosure to the  
38 defendant any material or information which potentially relates to the  
39 subject matter of the case or is otherwise relevant. An application  
40 under this section must be on notice to any person or entity affected by  
41 the order. The court may, upon request of any person or entity affected  
42 by the order, vacate or modify the order if compliance would be unrea-  
43 sonable or oppressive. The court may permit a party seeking or opposing  
44 a discretionary order of discovery under this section, or another  
45 affected person or entity, to submit papers or testify ex parte or in  
46 camera. Any such papers and a transcript of such testimony shall be  
47 sealed and shall constitute a part of the record on appeal.

48 § 240.40 Automatic discovery; order to grant access to premises.

49 At any time, the defendant may move for a court order to any individ-  
50 ual, agency or other entity in possession, custody or control of a crime  
51 scene or other premises that relates to the subject matter of the case  
52 or is otherwise relevant, requiring that counsel for the defendant be  
53 granted prompt and reasonable access to inspect, photograph or measure  
54 that crime scene or those premises, and that the condition of the crime  
55 scene or premises remain unchanged in the interim. The court shall hear  
56 and rule upon such motions expeditiously. The court may modify or vacate

1 such an order upon a showing that granting access to a particular crime  
2 scene or premises will create significant hardship, on condition that  
3 the probative value of that location is preserved by a specified alter-  
4 native means.

5 § 240.45 Automatic discovery; certificate of compliance.

6 When a party has provided all discovery required by this section or by  
7 court order, it shall file with the court a certificate of compliance.  
8 The certificate shall state that, to the best of its knowledge and after  
9 reasonable inquiry, due diligence, and good faith effort, the party has  
10 disclosed and made available all items subject to discovery, and shall  
11 identify each item provided. The prosecution shall not be deemed ready  
12 for trial for purposes of section 30.30 of this chapter until it has  
13 filed a certificate pursuant to this section. If further discovery is  
14 subsequently provided, a supplemental certificate shall be filed with  
15 the court identifying the additional items provided explaining why the  
16 newly provided discovery was not provided prior to the original certifi-  
17 cate of compliance.

18 § 240.50 Automatic discovery; continuing duty.

19 If either the prosecution or the defense subsequently learns of addi-  
20 tional material that it would have been under a duty to disclose or  
21 produce pursuant to any provisions of this article at the time of a  
22 previous discovery obligation or order, it shall expeditiously notify  
23 the other party and shall disclose the material in the same manner as  
24 required for initial discovery under this article, but no later than the  
25 next scheduled court appearance.

26 § 240.55 Automatic discovery; work product.

27 This section does not authorize discovery by a party of those portions  
28 of records, reports, correspondence, memoranda, or internal documents of  
29 the adverse party that are only the legal research, opinions, theories,  
30 or conclusions of the adverse party or its attorney or the attorney's  
31 agents, or of statements of a defendant, written or recorded or summa-  
32 rized in any writing or recording, made to the attorney for the defend-  
33 ant or the attorney's agents.

34 § 240.60 Automatic discovery; protective orders.

35 1. Standard. Upon a showing of good cause by clear and convincing  
36 evidence that disclosure would negatively affect the safety or security  
37 of a known person or entity and that any limitation of disclosure is  
38 necessary to protect a known person or entity, the court may at any time  
39 order that the discovery, disclosure, or inspection be denied,  
40 restricted, or deferred, or make such other order as is appropriate,  
41 upon written motion of the party seeking the protective order. The court  
42 may, for good cause shown, grant discovery to a defendant on the condi-  
43 tion that the material to be discovered be available only to counsel for  
44 the defendant. This provision does not alter the allocation of the  
45 burden of proof with regard to the matter at issue, including privilege.

46 2. Hearing. Upon a request for such an order, the court shall conduct  
47 a hearing, either ex parte with just a prosecutor or defense counsel or  
48 in the presence of both the prosecutor and defense counsel, within three  
49 business days to determine whether good cause has been shown. If there-  
50 after the court enters an order granting relief, the material submitted  
51 in camera must be sealed, along with the minutes to the proceeding and  
52 written motions, and shall be preserved in the records of the court to  
53 be made available to the appellate court in the event of an appeal.

54 § 240.65 Automatic discovery; amendment of discovery orders.

55 Upon motion of either party made subsequent to an order of the court  
56 pursuant to this section, the court may alter or amend the previous



1 order or orders as the interests of justice may require. The court may,  
2 for good cause shown, affirm a prior order granting discovery to a  
3 defendant upon the additional condition that the material to be discov-  
4 ered be available only to counsel for the defendant.

5 § 240.70 Automatic discovery; non-testimonial evidence from the defend-  
6 ant.

7 After the filing of an accusatory instrument, and subject to constitu-  
8 tional limitations, the court may, upon motion of the prosecution show-  
9 ing probable cause to believe the defendant has committed the crime, a  
10 clear indication that relevant material evidence will be found, and that  
11 the method used to secure it is safe and reliable, require a defendant  
12 to provide non-testimonial evidence, including to:

- 13 1. Appear in a lineup;
- 14 2. Speak for identification by a witness or potential witness;
- 15 3. Be fingerprinted;
- 16 4. Pose for photographs not involving reenactment of an event;
- 17 5. Permit the taking of samples of the defendant's blood, hair, or  
18 other materials of the defendant's body that involves no unreasonable  
19 intrusion thereof;
- 20 6. Provide specimens of the defendant's handwriting; or
- 21 7. Submit to a reasonable physical or medical inspection of the  
22 defendant's body.

23 § 240.75 Automatic discovery; orders regarding DNA comparisons.

24 Where property in the prosecution's possession, custody, or control  
25 that consists of a deoxyribonucleic acid ("DNA") profile obtained from  
26 probative biological material gathered in connection with the investi-  
27 gation or prosecution of the defendant and the defendant establishes  
28 that such profile complies with federal bureau of investigation or state  
29 requirements, whichever are applicable and as such requirements are  
30 applied to law enforcement agencies seeking a keyboard search or similar  
31 comparison, and that the data meets state DNA index system or national  
32 DNA index system criteria as such criteria are applied to law enforce-  
33 ment agencies seeking such a keyboard search or similar comparison, the  
34 court may order an entity that has access to the combined DNA index  
35 system or its successor system to compare such DNA profile against DNA  
36 databanks by keyboard searches, or a similar method that does not  
37 involve uploading, upon notice to both parties and the entity required  
38 to perform the search, upon a showing by the defendant that such a  
39 comparison is material to the presentation of his or her defense and  
40 that the request is reasonable. For purposes of this paragraph, a  
41 "keyboard search" shall mean a search of a DNA profile against the data-  
42 bank in which the profile that is searched is not uploaded to or main-  
43 tained in the databank.

44 § 2. Subdivision 9 of section 65.20 of the criminal procedure law, as  
45 added by chapter 505 of the laws of 1985 and as renumbered by chapter  
46 548 of the laws of 2007, is amended to read as follows:

47 9. (a) Prior to the commencement of the hearing conducted pursuant to  
48 subdivision five of this section, the district attorney shall, subject  
49 to a protective order, comply with the provisions of [~~subdivision one of~~  
50 ~~section 240.45~~] article two hundred forty of this chapter as they  
51 concern any witness whom the district attorney intends to call at the  
52 hearing and the child witness.

53 (b) Before a defendant calls a witness at such hearing, he or she  
54 must, subject to a protective order, comply with the provisions of  
55 [~~subdivision two of section 240.45~~] article two hundred forty of this

1 chapter as they concern all the witnesses the defendant intends to call  
2 at such hearing.

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

5 5. Court ordered bill of particulars. Where a prosecutor has timely  
6 served a written refusal pursuant to subdivision four of this section  
7 and upon motion, made in writing, of a defendant, who has made a request  
8 for a bill of particulars and whose request has not been complied with  
9 in whole or in part, the court must, to the extent a protective order is  
10 not warranted, order the prosecutor to comply with the request if it is  
11 satisfied that the items of factual information requested are authorized  
12 to be included in a bill of particulars, and that such information is  
13 necessary to enable the defendant adequately to prepare or conduct his  
14 defense and, if the request was untimely, a finding of good cause for  
15 the delay. Where a prosecutor has not timely served a written refusal  
16 pursuant to subdivision four of this section the court must, unless it  
17 is satisfied that the people have shown good cause why such an order  
18 should not be issued, issue an order requiring the prosecutor to comply  
19 or providing for any other [~~order~~] remedy or sanction authorized by  
20 [~~subdivision one of~~] section [~~240.70~~] 240.30 of this part.

21 § 4. Subdivision 14 of section 400.27 of the criminal procedure law,  
22 as added by chapter 1 of the laws of 1995, is amended to read as  
23 follows:

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

26 (i) the prosecutor shall, unless previously disclosed and subject to a  
27 protective order, make available to the defendant the statements and  
28 information specified in [~~subdivision one of section 240.45~~] sections  
29 240.10, 240.20 and 240.25 of this part and make available for  
30 inspection, photographing, copying or testing the property specified in  
31 [~~subdivision one of section 240.20~~] such sections; and

32 (ii) the defendant shall, unless previously disclosed and subject to a  
33 protective order, make available to the prosecution the statements and  
34 information specified in subdivision [~~two~~] four of section [~~240.45~~]  
35 240.10 of this part and make available for inspection, photographing,  
36 copying or testing, subject to constitutional limitations, the reports,  
37 documents and other property specified in such subdivision [~~one of~~  
38 section 240.30].

39 (b) Where a party refuses to make disclosure pursuant to this section,  
40 the provisions of [~~section 240.35, subdivision one of section 240.40 and~~  
41 ~~section 240.50~~] section 240.60 of this part shall apply.

42 (c) If, after complying with the provisions of this section or an  
43 order pursuant thereto, a party finds either before or during a sentenc-  
44 ing proceeding or mental retardation hearing, additional material  
45 subject to discovery or covered by court order, the party shall promptly  
46 make disclosure or apply for a protective order pursuant to section  
47 240.60 of this part.

48 (d) If the court finds that a party has failed to comply with any of  
49 the provisions of this section, the court may enter any of the [~~orders~~]  
50 remedies or sanctions specified in [~~subdivision one of~~] section [~~240.70~~]  
51 270.30 of this part.

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

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

1 convicted after a trial, in cases where the court has ordered an eviden-  
2 tiary hearing upon such motion, the court may order that the people  
3 produce or make available for inspection property, as defined [~~in subdivi-~~  
4 ~~vision three of section 240.10 of this part~~] as any existing tangible  
5 personal or real property, including, but not limited to, books,  
6 records, reports, memoranda, papers, photographs, tapes or other elec-  
7 tronic recordings, articles of clothing, fingerprints, blood samples,  
8 finger nail scrapings or handwriting specimens, but excluding attorneys'  
9 work product, in its possession, custody, or control that was secured in  
10 connection with the investigation or prosecution of the defendant upon  
11 credible allegations by the defendant and a finding by the court that  
12 such property, if obtained, would be probative to the determination of  
13 the defendant's actual innocence, and that the request is reasonable.  
14 The court shall deny or limit such a request upon a finding that such a  
15 request, if granted, would threaten the integrity or chain of custody of  
16 property or the integrity of the processes or functions of a laboratory  
17 conducting DNA testing, pose a risk of harm, intimidation, embarrass-  
18 ment, reprisal, or other substantially negative consequences to any  
19 person, undermine the proper functions of law enforcement including the  
20 confidentiality of informants, or on the basis of any other factor iden-  
21 tified by the court in the interests of justice or public safety. The  
22 court shall further ensure that any property produced pursuant to this  
23 paragraph is subject to a protective order, where appropriate. The court  
24 shall deny any request made pursuant to this paragraph where:

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

27 10. Where there has been a failure to comply with the provisions of  
28 this section, and where the district attorney does not demonstrate to  
29 the satisfaction of the court that such failure has not caused the  
30 defendant prejudice, the court shall instruct the jury that it may  
31 consider such failure in determining the weight to be given such  
32 evidence and may also impose any other [~~sanction~~] remedy or sanction set  
33 forth in [~~subdivision one of~~] section [~~240.70~~] 240.30 of the criminal  
34 procedure law; provided, however, that unless the defendant has  
35 convinced the court that such failure has caused him undue prejudice,  
36 the court shall not preclude the district attorney from introducing into  
37 evidence the property, photographs, photocopies, or other reproductions  
38 of the property or, where appropriate, testimony concerning its value  
39 and condition, where such evidence is otherwise properly authenticated  
40 and admissible under the rules of evidence. Failure to comply with any  
41 one or more of the provisions of this section shall not for that reason  
42 alone be grounds for dismissal of the accusatory instrument.

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

45 5. In addition to information required to be disclosed pursuant to  
46 article two hundred forty of the criminal procedure law, when forfeiture  
47 is sought pursuant to this article, and following the defendant's  
48 arraignment on the special forfeiture information, the court shall order  
49 discovery of any information not otherwise disclosed which is material  
50 and reasonably necessary for preparation by the defendant with respect  
51 to a forfeiture proceeding brought pursuant to this article. Such mate-  
52 rial shall include those portions of the grand jury minutes and such  
53 other information which pertain solely to the special forfeiture infor-  
54 mation and shall not include information which pertains to the criminal  
55 charges. Upon application of the prosecutor, the court may issue a  
56 protective order pursuant to section [~~240.40~~] 240.60 of the criminal

1 procedure law with respect to any information required to be disclosed  
2 pursuant to this subdivision.

3 § 8. This act shall take effect on the ninetieth day after it shall  
4 have become a law and shall apply to all arraignments commencing on or  
5 after such effective date; provided, however, that the amendments to  
6 subdivision 9 of section 65.20 of the criminal procedure law made by  
7 section two of this act shall not affect the repeal of such section and  
8 shall be deemed repealed therewith.