DISCOVERY REFORM:
THE 2019 LEGISLATIVE CHANGES TO NEW YORK DISCOVERY

TABLE OF CONTENTS
Powerpoint Slides
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DISCOVERY REFORM

THE 2019 LEGISLATIVE CHANGES TO NEW YORK DISCOVERY

HOW WE GOT HERE

- NEW YORK DISCOVERY LAWS HISTORICALLY VERY UNFAIR TO DEFENDANTS
- PLEA V. TRIAL DECISIONS MADE WITHOUT KNOWLEDGE OF EVIDENCE
- REULSTS:
  - MANY WRONGFUL TRIAL CONVICTIONS
  - MANY MORE DEFENDANTS TAKING OR REJECTING PLEA DEALS WITHOUT ADEQUATE INFORMATION
  - MORE CITIZENS FELONIZED, INCARCERATED, SUPERVISED
- PREVIOUS RELIEF WAS LIMITED TO POST-CONVICTION LITIGATION [440, HABES, APPEALS, ETC]

SOME HIGHLIGHTS

- Old CPL Article 240 repealed – new statute is Article 245
- No need for discovery demands – discovery will be automatic
- Timing of discovery changes
- Discovery required before plea
- Prosecutor deemed in possession of police records
- **Presumption in favor of disclosure – we get the close calls**
- We get grand jury minutes!

COMPLIANCE BY PROSECUTOR – CPL 245.50(1)

Old law [CPL 240]	**New law CPL 245**
Prosecutors claimed they complied and courts just accepted this.	Prosecutors must file a **Certificate of Compliance** affirming that they have met all of they statutory discovery obligations.

DEMANDS + DELAYS

Old law [CPL 240]	**New law CPL 245**
DEFENDANT MUST SERVE A TIMELY DEMAND	NO DEMAND NEEDED
PROSECUTOR MUST DISCLOSE… WHENEVER, MAYBE NEVER	PROSECUTOR MUST DISCLOSE WITHIN 15 DAYS OF ANY ARRAIGNMENT - CPL 245.10(1)(a) ANY ACCUSATORY EXCEPT UTTS*

*Note: To the extent that Uniform Traffic Tickets as Simplified Informations [CPL 1.20 (5)] can be answered without an actual appearance, the new Discovery rules would not be expected to apply. If a person were to appear for an arraignment and proceedings, on a UTT/STI, 245.10's application to arraignments on simplified informations seems clear and rights under the new article may be triggered.

DA : "BUT JUDGE, THERE A SO MUCH AND WE ARE HAVING TROUBLE GETTING IT!"

Old law [CPL 240]	**New law CPL 245.10**
Judge: That's awful, take all the time you need. Poor thing. Just be sure to provide it before the verdict, unless that is also inconvenient.	Judge: What *diligent, good faith efforts* were made to comply in a timely manner?

REDACTIONS

Old law [CPL 240]	**New law CPL 245.10**
Prosecutor would simply hold back or redact discoverable items or would ask [often ex parte] for a protective order for items unknown to the defense.	Prosecutor must move for a protective order in writing + on notice to the defendant and must disclose all other items in the meantime.

SUPPLEMENTAL DISCOVERY AKA *SANDOVAL /MOLINEUX*

Old law [CPL 240]	**New law CPL 245.20(3)**
Judge: provide whenever you'd like, up to you. But try to do so before jury selection.	• Prosecutor shall disclose list of **all misconduct and criminal acts of defendant** not charged in indictment, superior court information, prosecutor's information, information, or simplified information, **which prosecutor intends to use at trial** for: (a) impeaching credibility - ***Sandoval***) (b) substantive proof of any material issue in case- ***Molineux*** • Prosecutor must designate which (a or b) proof being used for (Timing statute 245.10[b] requires disclosure not later than 15 days before first scheduled trial date.) • Law: "as soon as practicable but not less than 15 calendar days before first scheduled trial date" • "as soon as practicable" = if they have it 64 days before trial they should disclose it <u>then</u>]

PH / GRAND JURY

Old law [CPL 240]	**New law CPL 245.20(3)**
Defense not entitled to **defendant's statements** before GJ [only within 15 days of arraignment in superior court on a felony]	Defense entitled to defendant's statements [oral + written] **48 hours before** defendant's scheduled GJ testimony

To trigger this requirement, the defendant must notify the prosecutor of the defendant's *present* [at the time of the notice] intention to testify.

The prosecutor must then provide all statements 48 hours before the testimony is scheduled to occur.

After reviewing the statements, defendant's can inform the prosecutor the defendant has now decided against testifying.

"ITEMS + INFORMATION"
CPL 245.20(1)

245.20(1) "Initial discovery for the defendant. The prosecution shall disclose to the defendant, and permit the defendant to discover, inspect, copy photograph and test, all items and **information** that relate to the subject matter of the case and are in the possession, custody or control of the prosecution or persons under the prosecution's direction or control, including but not limited to…"

What if officer views private company's helpful video but does not obtain or write report? It's still **information**, isn't it?

NUTSHELL VERSION OF CHANGES

Old law [CPL 240]	**New law [CPL 245]**
All written or recorded **statement** by Δ or jointly tried co-Δ, made to police other than in the course of the crime	All written or recorded **statement** by Δ or ~~jointly tried~~ co-Δ, made to police ~~other than in the course of the crime~~
Any transcript of testimony relating to the crime, given by the Δ, or by a co-Δ to be tried jointly, before any **grand jury**	All transcripts of testimony of "*a person who has testified before a **grand jury**, including but not limited to the Δ or a co-Δ.*" 245.20(1)(b) – Delays for transcription *may* be ok but final deadline is **75 days after arraignment + 30 days before 1st trial date**
None	**Names and contact information** for all persons other than law enforcement "whom prosecutor knows to have evidence or information relevant to any offense charged or to any potential defense thereto," including which will be called as witnesses. Physical address can be demanded on motion.
None	**Names and work affiliation for all law enforcement** whom prosecutor "knows to have evidence or information relevant to any offense charged or to any potential defense thereto", including which may be called as witnesses. • **Information = sights, smells, sounds, weather or not any record is made** • **No more getting away with one cop describing what 6 cops did**

NUTSHELL VERSION OF CHANGES CONTINUED

Old law [CPL 240]	**New law [CPL 245]**
None	"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 any potential defense thereto, including **all police reports, notes** of police and other investigators, and law enforcement agency reports." Applies at Hearing + Trial
None	Name, business address, c.v., list of publications, proficiency tests and results in past ten years for each witness DA will call as witness at pre-trial hearings or trial All reports prepared by the expert pertaining to case, or if no report prepared, a written statement of facts and opinions about which expert will testify and summary of grounds for each opinion.

NUTSHELL VERSION OF CHANGES CONTINUED

Old law [CPL 240]	**New law [CPL 245]**
Any tapes or other **electronic recordings** which the prosecutor intends to introduce at trial, irrespective of whether such recording was made during the course of the criminal transaction	**All electronic recordings including 911**, designation by prosecutor of which they intend to use at trial or hearing. If exceed ten hours, DA may disclose only recordings it intends to introduce at trial or hearing with list of source and approximate quantity of other recordings and general subject matter if known, and defense shall have right upon request to obtain recordings not previously disclosed. Must be as soon as practicable but not less than 15 days after defendant's request unless 245.70 protective order.
Any **photograph or drawing** relating to the criminal action or proceeding which was made or completed by a public servant engaged in law enforcement activity, or which was made by a person whom the prosecutor intends to call as a witness at **trial**, or which the people intend to introduce at trial	All **photos and drawings** made by public servant engaged in law enforcement or made by a person the prosecutor intends to call as a witness at **hearing or trial**, or which relate to subject matter of the case.

NUTSHELL VERSION OF CHANGES CONTINUED

Old law [CPL 240]	New law [CPL 245]
Anything required to be disclosed, prior to trial, to the defendant by the prosecutor, pursuant to the constitution of this state or of the United States.	• All evidence and information, including that which is known to police or other law enforcement agencies acting on the government's behalf in the case, that tends to: (i) **negate the defendant's guilt** as to a charged offense; (ii) reduce the degree of or mitigate the defendant's culpability as to a charged offense; (iii) **support a potential defense** to a charged offense; (iv) **impeach the credibility** of a testifying prosecution witness; (v) **undermine evidence of the defendant's identity** as a perpetrator of a charged offense; (vi) provide a **basis for a motion to suppress** evidence; or (vii) **mitigate punishment**. • Information under this subdivision shall be disclosed **whether or not such information is recorded in tangible form and irrespective of whether the prosecutor credits the information**. • The prosecutor shall disclose the information expeditiously upon its receipt and shall not delay disclosure if it is obtained earlier than the time period for disclosure in subdivision one of section 245.10 of this article. • A summary of **all promises, rewards and inducements** made to, or in favor of, 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.

NUTSHELL VERSION OF CHANGES CONTINUED

Old law [CPL 240]	**New law [CPL 245]**
Any written **report or document**, or portion thereof, concerning a physical or mental examination, or scientific **test or experiment**, relating to the criminal action or proceeding which was made by, or at the request or direction of a public servant engaged in law enforcement activity, or which was made by a person whom the prosecutor intends to call as a witness at trial, or which the people intend to introduce **at trial**	All **reports, records, data, calculations** (see statute for detailed description of material) concerning physical or mental examinations, or scientific **tests or experiments or comparisons**, relating to the criminal action or proceeding, made by or at the direction of law enforcement, or made by a person the prosecutor intends to call at a hearing or trial, or which prosecutor intends to introduce **at hearing or trial**. • This includes **lab information management system records, findings relating to conformance with accreditation, and conflicting analyses or results**. • If the prosecution submitted to a lab not under prosecution's control, court may on motion of party issue subpoenas to lab to cause materials described to be made available for disclosure

NUTSHELL VERSION OF CHANGES CONTINUED

Old law [CPL 240]	**New law [CPL 245]**
Any other **property** obtained from the defendant, or a co-defendant **to be tried jointly**;	• List of all tangible objects obtained from or possessed by **defendant or co-defendant**; • Designation by prosecutor which objects **physically possessed, which constructively**; • Which were recovered during search or seizure by public servant or agent; • Which were allegedly recovered after being **abandoned** by defendant; • If prosecution intends to use **presumption**, shall designate intention as to each such object; • If reasonably practicable, prosecutor shall also designate **location object recovered from;** • Defense may inspect, copy, photograph and test.

NUTSHELL VERSION OF CHANGES CONTINUED

Old law [CPL 240]	**New law [CPL 245]**
None	Whether a search warrant has been executed and all documents relating thereto, including but not limited to the: • **search warrant**, • **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.
None	**All tangible property** that relates to subject matter of case • Designation **which items prosecution intends to introduce in case-in-chief** at trial or pre-trial hearing; • If prosecution has not formed intent to offer in statutory period ("I don't know if I'm offering it at trial") prosecution shall notify defendant in writing, and time stayed without need for motion, but disclosure shall be made as soon as possible and subject to continuing duty to disclose.

NUTSHELL VERSION OF CHANGES CONTINUED

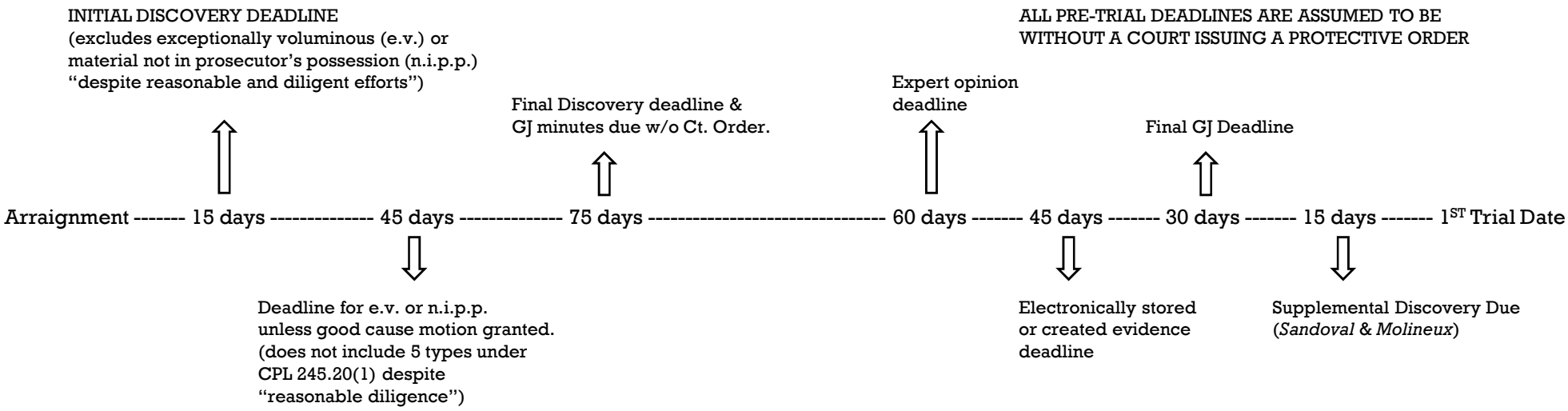
Old law [CPL 240]	New law [CPL 245]

None	• Complete record of **judgments of conviction** for all
	  • **defendants** and
	  • all persons designated as **potential prosecution witnesses** under subdivision (c) other than experts.
	
	• When known to prosecution, existence of **any pending criminal action** against all persons designated as potential prosecution witnesses under subdivision (c) (and how do they not know if pending in NY?)
	
	• **Date, time and place of arrest** of offense(s) charged and of defendant's **seizure** and arrest

DWI + COMPUTER TRESPASS CASES

DWI	**COMPUTER TRESPASS**
In any prosecution alleging violation of V&T, all records of calibration, certification, etc. of instruments used to perform testing for six months before and after test done;	• Copy of all electronically stored information as described; • More specifics – read statute; • Prosecution cannot turn over illegal computer info – child porn • Statute specifically recognizes defendant still has right to be free from unreasonable search and seizure under NY and US constitutions

TIMELINE


INITIAL DISCOVERY DEADLINE
(excludes exceptionally voluminous (e.v.) or material not in prosecutor's possession (n.i.p.p.) "despite reasonable and diligent efforts")
Final Discovery deadline & GJ minutes due w/o Ct. Order.
Expert opinion deadline
ALL PRE-TRIAL DEADLINES ARE ASSUMED TO BE WITHOUT A COURT ISSUING A PROTECTIVE ORDER
Final GJ Deadline
Arraignment ------- 15 days ---------- 45 days ---------- 75 days ---------- 60 days ------- 45 days ------- 30 days ------- 15 days ------- 1ST Trial Date
Deadline for e.v. or n.i.p.p. unless good cause motion granted. (does not include 5 types under CPL 245.20(1) despite "reasonable diligence")
Electronically stored or created evidence deadline
Supplemental Discovery Due (*Sandoval* & *Molineux*)

DA: "BUT I DON'T HAVE IT"
CPL 245: DOESN'T MATTER, FORK IT OVER

- Prosecutor shall make diligent, good faith effort to ascertain existence of discoverable material, and to cause it to be disclosed if prosecutor does not possess BUT
- ALL items and information related to prosecution of charge in possession of any NY state or local police or law enforcement agency shall be deemed to be in the possession of the prosecution.
- Prosecution shall also identify any lab having contact with evidence related to prosecution of charge.

<u>HOWEVER</u> :

- Prosecution not required to ascertain existence of witnesses not known to police or other law enforcement.
- Prosecutor shall not be required to obtain by subpoena material defendant can obtain;

DEFENSE TO PROSECUTOR
REQUIRED RECIPROCAL DISCOVERY - TIMING

- Defense compliance triggered by prosecutor's compliance
- CPL 245.50(2) - Certificate of compliance, by defendant – "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."
- Defense must perform discovery under 245.20(4) not later than 30 calendar days after being served with DA certificate of compliance (CPL 245.50), except if moving for protective order under 245.70, but must disclose to prosecutor *in writing* information being withheld.

DEFENSE TO PROSECUTOR REQUIRED RECIPROCAL DISCOVERY

- Defendant shall disclose subject to constitutional limitations to prosecutor and permit inspection, copying, photographing, any material and relevant evidence **in defendant's** or counsel's possession or control that is discoverable under 245.20(1)(f), (g), (h), (j), (l) and (o) which defendant intends to introduce at trial or pre-trial hearing…

  (f) – Expert opinion evidence

  (g) – Tapes and electronic recordings

  (h) – Photos and drawings

  (j) – Physical and mental exam documents and reports

  (l) – Rewards, promises to witnesses. (Do we have to advise them of their promises they forgot to tell us about?)

  (o) – Tangible property

DEFENSE TO PROSECUTOR REQUIRED RECIPROCAL DISCOVERY

If with reasonable diligence, defense discovery required under (f) (expert opinion) and (o) (tangible property) are unavailable for disclosure within 245.10(2) time period, can be stayed without motion but disclosure shall be made as soon as practicable.

DEFENSE TO PROSECUTOR REQUIRED RECIPROCAL DISCOVERY

- Must provide witness names, addresses, birth dates,
- All statements, written or recorded or summarized in any writing or recording, of those persons other than the defendant whom defendant intends to call as witnesses at trial or pre-trial hearing

  - DA not required to disclose physical addresses 245.10(1)(c). Why are we? *Wardius v. Oregon*
  - What if we don't have dobs for police we may call? (Consider 245.70 motion.)
  - What if we don't know?

DEFENSE TO PROSECUTOR REQUIRED RECIPROCAL DISCOVERY IMPEACHMENT MATERIAL

- Disclosure of name, address, birth date and statements of defense witness being called for sole purpose of impeachment of prosecution witness is not required until after the prosecution witness has testified at trial.

STAY OF AUTOMATIC DISCOVERY – 245.20(5)

- 245.10 (1)-(4) have the effect of a court order and failure to provide discovery may result in application of any remedies or sanctions permissible for violation of court order under CPL 245.80 (sanctions);
- However, if either party believes good cause exists for declining to make any disclosures, party may move for protective order under CPL 245.70 and production shall be stayed;
- Opposing party shall be notified in writing information not disclosed and note section of 245.10(1). If some is discoverable and party seeks protection for part, party must disclose discoverable portion.

PRESUMPTION OF OPENNESS – 245.20(7)

- Presumption in favor of disclosure when interpreting CPL 245.10 (timing of discovery), 245.25 (discovery prior to certain guilty pleas) and 245.20(1) (initial discovery for defendant).
- Question – the legislature applied the presumption to the prosecutor's discovery obligations, even naming the subdivision of CPL 245.20, but not to defense reciprocal discovery – is this an argument we can and should make?

DISCLOSURE PRIOR TO CERTAIN GUILTY PLEAS
CPL 245.25(1) – P**RE-INDICTMENT** PLEAS

- Subd. 1 – Pre-indictment guilty pleas. Upon felony complaint, if pre—indictment offer, prosecutor must disclose to the defense all items discoverable under 245.20(1) (Initial discovery statute) that are in possession of prosecutor. Must be not less than **three calendar days** before expiration of guilty plea or deadline imposed by court.
- If prosecution does not comply, defense can make motion alleging violation of subdivision.
- Court must consider impact on defendant's decision to accept/reject offer.
- If court finds materially affected decision, and prosecution will not reinstate lapsed offer, court as minimum sanction must preclude admission of any evidence not disclosed, but may take any other appropriate action.
- Does not apply to 245.70 material unless it was exculpatory;
- Prosecutor may not condition plea offer on waiver of discovery, though defendant may waive discovery.

ISSUES

- Will there be more pressure to "adjourn to set?"
- Should we move to withdraw plea if discovery reflects material that was exculpatory?
- What if discovery demonstrates strong case against defendant – should we move to dismiss the indictment? Will this have to be in five days as defendant might have chosen to testify given new material?
- Other issues?

OTHER GUILTY PLEAS
245.25(2)

- Applies to all other accusatories;
- Prosecutor 245.20(1) discovery in their custody or control not less than 7 days before expiration date of any guilty plea offer by the prosecution or deadline imposed by the court.
- If prosecutor does not comply, defendant may file motion.
- Court must consider impact of failure to provide discovery.
- If court finds materially affected defendant's decision, and plea offer is not reinstated, court must preclude admission at trial of any evidence, or take other appropriate action.
- Does not include 245.70 material (subject to protective order) except exculpatory.
- Guilty plea may not be conditioned on waiver, though defendant may waive.

ORDER TO PRESERVE EVIDENCE
245.30(1)

- "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."
- Court shall hear and rule upon such motions expeditiously.
- Court may modify or vacate order upon showing preservation creates hardship to individual, agency or entity, as long as probative value of evidence is preserved by specified alternative means.
- Does this mean that prosecutors have to move to hold our clients' cars, allegedly held as evidence in cases?

ORDER TO GRANT ACCESS TO PREMISES 245.30(2)

- After accusatory filed, and without prejudice to issue subpoena, defendant may move, upon notice to prosecution and any impacted individual, agency or entity, for court order to access crime scene or other premises relevant to subject matter of the case, requiring defense counsel be given reasonable access to inspect, photograph, measure crime scene or premises, and that scene remain unchanged in interim.
- Court shall consider defense expressed need including risk that defendant will be deprived of evidence or information relevant to case, position of any individual or entity with possessory or ownership rights, nature of privacy interest, any perceived or actual hardship to owner/possessor, position of prosecution.
- Court may deny when probative value has been or will be preserved by specified alternative means.
- If court grants access, owner/possessor may request law enforcement be present.

DISCRETIONARY DISCOVERY BY ORDER OF THE COURT – CPL 245.30(3)

- Court may in discretion, upon showing by defense request is reasonable and defendant unable without undue hardship to obtain substantial equivalent by other means, order prosecution or any individual, agency or other entity subject to jurisdiction of court, make available for disclosure to defendant any material or information which relates to subject matter of the case and is reasonably likely to be material.
- Motion must be made on notice to person or entity affected by order.
- Court may, upon request of affected party, modify or vacate if compliance would be unreasonable or will create significant hardship. Party seeking or opposing discretionary discovery can submit papers or testify on the record *ex parte* or in camera.
- For good cause shown, any papers and transcript of testimony may be sealed and made part of appellate record.

WHAT EVIDENCE DOES 245.30(3) COVER? DIFFERENCE BETWEEN THAT AND SUBPOENA?

- Phone records? Facebook? Shotspotter? Who is required testifying party?
- Stored Communications Act
- Not just material but *information* too – Do they have to create information for our use?
- Video from businesses or private residences?
- Lab or lab employee information not covered by statute?
- From DA –
- Prior testimony of expert in another case?
- Tangible evidence held by third parties?
- Bivona stuff?
- Does information mean they may have to sit for an interview?

COURT ORDERED PROCEDURES TO FACILITATE COMPLIANCE – 245.35

To facilitate compliance with discovery statute, and to reduce litigation about discovery, court may issue order:

(1) Requiring prosecutor and defense diligently confer to reach agreement about disputed discovery before seeking court ruling;

(2) Requiring discovery compliance conference between prosecutor, counsel for defendants and court or its staff;

(3) Requiring prosecutor to file additional certificate of compliance that states prosecutor has made reasonable inquiries of all police and others who participated in investigating case about favorable or 245.20(1)(k) (*Brady)* information, including information that was not memorialized or preserved;

(4) Requiring other measures to effectuate goals of the discovery statute.

NON-TESTIMONIAL EVIDENCE FROM THE DEFENDANT – 245.40

- After filing of an accusatory, and subject to constitutional limitations, court may, upon motion of prosecutor showing probable cause to believe defendant committed a crime + clear indication relevant material evidence will be found, + method used is safe and reliable (*Matter of Abe A)*, require defendant to provide non-testimonial evidence including:
  - (a) appear in lineup
  - (b) speak for identification by witness
  - (c) be fingerprinted
  - (d) pose for photographs not involving reenactment
  - (e) permit sampling of defendant's blood, hair and other materials of defendant's body that involve no unreasonable intrusion
  - (f) provide specimens of defendant's handwriting
  - (g) submit to reasonable physical or medical inspection of defendant's body

- Subd 2 – This does not affect court order before filing of accusatory

DNA COMPARISON ORDER – 245.45

- Where property in DA's possession, custody or control consists of DNA profile from probative biological material collected in connection with the investigation of the crime or defendant, or prosecution of defendant, and defendant establishes (a) profile complies with FBI or state keyboard search requirements, whichever applies; (b) data meets state or national DNA index system criteria as applied to law enforcement seeking keyboard search, court may, upon motion of defendant against whom all but complaint are pending, order entity that has access to CODIS to compare DNA against DNA databanks by keyboard searches, upon notice to both parties and entity required to perform search, upon showing by defendant comparison is material to presentation of defense and request is reasonable. Not required to upload.

PROSECUTION CERTIFICATE OF COMPLIANCE; READINESS FOR TRIAL – 245.50

1. By prosecution. When a prosecutor has provided 245.20(1) discovery except items subject to 245.70 protective order, they shall serve on defendant and file with court certificate of compliance. It shall state after exercising due diligence and making reasonable inquiries to ascertain existence of material and information subject to discovery, prosecutor has disclosed and made available all known material and information subject to discovery, and will list items provided. If additional discovery later provided before trial under 245.60 (continuing duty) prosecutor shall serve a supplemental certificate identifying additional material and information. No adverse consequence for filing of certificate in good faith, but court may grant remedy or sanction for discovery violation as set forth in 245.80 (remedies for non-compliance).

DEFENSE CERTIFICATE OF COMPLIANCE 245.50(2)

- When defendant has provided all discovery required by 245.20(4), except those protected by order pursuant to 245.70, defense counsel shall serve upon prosecution and file with court certificate of compliance. Certificate shall state after exercising due diligence and making reasonable inquiries, counsel has turned over all known discoverable material and information.
- Also must identify items provided.
- If additional discovery pursuant to 245.60 (additional information did not know of previously) provided supplemental certificate shall be filed and served identifying additional material and information.
- No adverse consequence if good faith compliance, but court may grant remedy or sanction for violation.

TRIAL READINESS
245.50(3)

- Absent individualized finding of exceptional circumstances by court, prosecution shall not be deemed ready for trial for purposes of CPL 30.30 until it has filed a proper certificate pursuant to CPL 245.50(1).
- This relates to CPL 30.30(5), which requires the court to make inquiry after an announcement of readiness, and provides the defense with the right to challenge the assertion.

  - Practice tip – save cover letters and time-stamped envelopes, mark the file on dates discovery received and certificate of compliance received.

FLOW OF INFORMATION: POLICE → DA 245.55

- 1. Sufficient communication for compliance: DA and assistant DA assigned shall try to ensure flow of information maintained between police and other investigators and DA's office sufficient to obtain control over all material and information pertinent to defendant and offenses charged, including 245.20(k) (*Brady*) material.
- 2. Provision of law enforcement agency files. Absent court order or requirement defense counsel obtain security clearance required by law, upon request of prosecution, each NY and local law enforcement agency **shall** make available to prosecution **complete** copy of its records and files related to investigation of case or prosecution of defendant.
- CPL 245.20 –diligent good faith effort to ascertain existence of material or information.

FLOW OF INFORMATION: POLICE → DA
911/ RADIO CALLS / BWC

- 911 telephone call and police radio transmission electronic recordings, police worn body camera recordings and other police recordings.
- Whenever recording of 911, transmissions, BWC or other police recording was made or received in connection with investigations, arresting officer or lead detective **shall** expeditiously notify prosecution in writing upon filing of an accusatory of existence of all known recordings.
- Prosecutor **shall** expeditiously take whatever steps are necessary to ensure all such items are preserved.
- Upon defendant's timely request and designation of specific recording of 911 call, prosecution shall also expeditiously take whatever steps are necessary to ensure it is preserved.

FLOW OF INFORMATION: POLICE → DA
REMEDY FOR FAILURE

- If prosecution fails to disclose electronic recording to defendant pursuant to 245.20(1)(e)(statements by any person), (g)(all tapes or recordings and which will be used by prosecutor) or (k)(*Brady and beyond)* due to failure to comply, court upon motion of defendant **shall** impose an appropriate remedy or sanction pursuant to section 245.80. No showing of harm to defense necessary.

P↔Δ
CONTINUING DUTY TO DISCLOSE

- If either prosecution or defense later learns of additional material which they have duty to disclose, they must expeditiously notify opponent and disclose additional material. This also requires prosecutor expeditiously disclose information that becomes relevant based on reciprocal discovery by defense.

WORK PRODUCT

- No discovery of work product – records, reports, correspondence, memoranda or internal documents or conclusions of adverse party, its attorney, or attorney's agents, or statements of defendant made to the attorney for the defendant or their agent.
- *People v. Consolazio*, 40 N.Y.2d 446 (1976) – DA's notes discoverable

PROTECTIVE ORDERS
245.70(1)

Any discovery subject to protective order.

- Upon showing of good cause by either party, court may at any time order discovery or inspection of items be denied, restricted, conditioned or deferred, or make other appropriate order;
- Court may impose as condition to defendant material be available only to counsel for defendant;
- Court may bar physical copy of discovery to defendant as long as defendant gets access to redacted copies while supervised, in location like prosecutor's office, jail, court, police station…

PROTECTIVE ORDERS, CONT'D

- If court limits some discovery to defense counsel, court shall inform defendant on record his or her attorney is not permitted to disclose such material to defendant;
  - Impact on attorney client relationship?
- Court may permit party seeking or proposing protective order, or other affected person, to submit papers or testify on record *ex parte* or *in camera*. Any such papers and transcript may be sealed and shall constitute a part of the record on appeal.
- These provisions do not alter burden of proof with regard to matters at issue, including privilege.

PROTECTIVE ORDERS
245.70(2) AND (3)

(2) Modification of time periods for discovery. Upon motion of a party, the court may alter time periods for discovery for *good cause* shown.

(3) Upon a request for protective order, unless defendant voluntarily consents to prosecution request (AND WHY WOULD YOU?), the court shall conduct an "appropriate" hearing within three business days to determine whether good cause has been shown and, when practicable, shall render decision expeditiously. Any materials and transcript may be sealed and shall constitute part of record on appeal.

PROTECTIVE ORDERS CONTINUED -

- Defense response to motion required?
- Burden of proof at hearing?
- Hearsay admissible?
- Defense entitled to present evidence?
- Decision within 3 days? Written decision required?
- Appeal must be within 2 days – expedited transcript? Or detailed notes?

PROTECTIVE ORDERS
245.70(4) – GOOD CAUSE NOW

In determining good cause court may consider:

- Constitutional rights or limitations [Right to confront + cross examine, etc.];
- Danger to integrity of physical evidence or safety of witness;
- Risk of intimidation, economic reprisal, bribery, harassment or unjustified annoyance or embarrassment to any person, and nature, severity and likelihood of risk;
- Risk of adverse effect upon legitimate needs of law enforcement including protection of confidentiality of informants and nature, severity and likelihood of risk;
    - Recorded jail call with threat?

PROTECTIVE ORDERS
265.70(4) – GOOD CAUSE, CONT'D

- Nature and circumstances of the factual allegations in the case;
- Whether defendant has history of witness intimidation or tampering and nature of that history;
  - Conviction required??
- Nature of stated reasons in support of protective order;
- Nature of witness identifying information sought to be addressed by protective order including option of employing adequate alternative contact information;
- Danger to any person stemming from factors such as defendant's substantiated affiliation with a criminal enterprise as defined in PL 460.10(3) (NO MORE "THE CRIME ANALYSIS CENTER SAYS HE'S A GANG MEMBER")
- Other similar factors.

SUCCESSOR COUNSEL OR PRO SE DEFENDANT 245.70(5)

- In cases where attorney-client relationship ends before trial, any material disclosed subject to condition it is only available to counsel for defendant, or limited in dissemination in some other way, shall only be provided to successor counsel under same conditions unless court rules otherwise for good cause shown or prosecutor gives written consent.
- Work product derived from material shall not be given to the defendant unless court rules otherwise or prosecutor agrees.
- If you are relieved, make sure you communicate with court, prosecutor and new counsel about status of records subject to protective order before you turn over file.
- This section also has rules about protected discovery for pro se defendants.

EXPEDITED REVIEW OF ADVERSE RULING 245.70(6)

- (a) A party that has unsuccessfully sought or opposed protective order relating to name, address, contact information or statements of person may obtain expedited review by individual justice of intermediate appellate court to which appeal would be taken;
- (b) Review shall be sought within two business days of adverse or partially adverse ruling, by order to show cause filed with intermediate appellate court. OTSC shall also be timely served on lower court and prosecutor, and accompanied by sworn affirmation stating in good faith (i) ruling affects substantial interests and (ii) diligent efforts to reach accommodation of underlying discovery have failed or no accommodation was feasible. However no diligent efforts statement necessary where opposing party not made aware of application and good cause is shown for omitting service on opposing party. (Presumably, appeal by one who has sought and been denied protective order.)

EXPEDITED REVIEW OF ADVERSE RULING 245.70(6)(C) AND (7)

- (c) Assignment of judge and mode of review determined by rules of that appellate court. Appellate judge may consider any relevant and reliable information bearing on issue, and may dispense with written briefs other than supporting and opposing materials previously submitted to lower court. Appellate judge may dispense with issuance of written opinion, and when practicable shall render decision and order expeditiously.
- This review does not bar raising on appeal as error.
- (7) Compliance with protective order. You better. Or you can be held in contempt under PL 215.50(3).

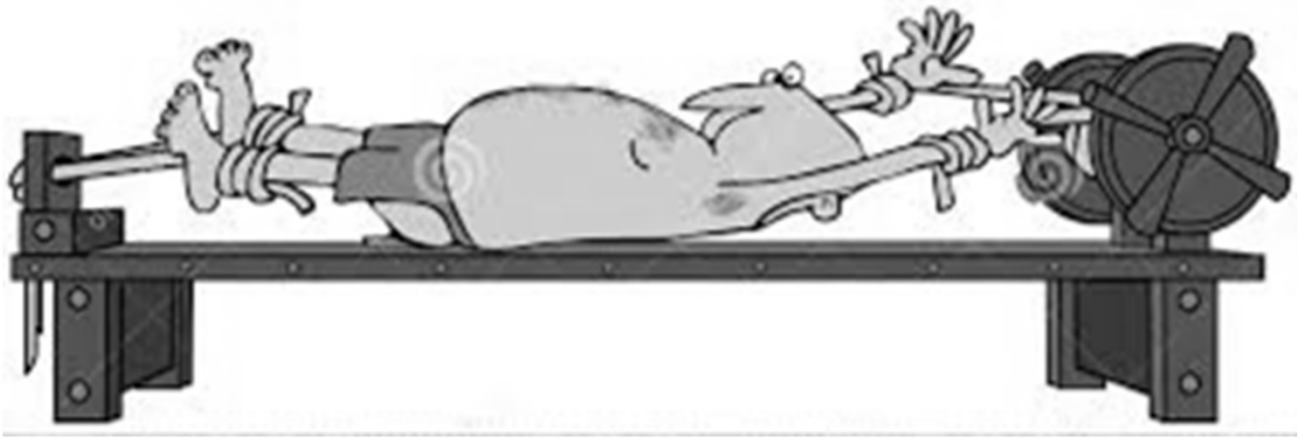
WAIVER OF DISCOVERY BY DEFENDANT 245.75

- Defendant who does not seek discovery from prosecution shall notify them at arraignment on all accusatories except complaint, or expeditiously thereafter, but before receiving 245.20(1) discovery.
- If defendant declines discovery, defense need not provide 245.20(4) and 245.60 (continuing duty) discovery.
- Waiver must be in writing, filed with the court.
- Waiver does not alter notice requirements of Article 250 [notices of defenses] or other requirements under the law.
- Prosecution may not condition plea offer on waiver.

STRATEGY ON WAIVER OF DISCOVERY

- Why and when would you do this, if ever? (Choosing not to disclose important witness or discovery)
- Is it worth it?
- Cost/benefit analysis

SANCTIONS



REMEDIES OR SANCTIONS
245.80

- (1) Need for remedy or sanction. (a) When material is disclosed belatedly [as opposed to failure to disclose] , court SHALL impose an appropriate remedy or sanction if party entitled to disclosure shows it was prejudiced. Regardless of showing of prejudice, party entitled shall be given reasonable time to prepare and respond to the new material. (Statute bars last minute discovery dumps.) (Late, prejudice, mandatory sanction)
  - Show when? At a hearing? If yes, what is burden?

REMEDIES OR SANCTIONS

- (b) When material or information is discoverable but cannot be disclosed because lost or destroyed, court SHALL impose appropriate remedy or sanction if party entitled to disclosure shows lost or destroyed information may have contained information relevant to contested issue. (Lost or destroyed, may have been helpful – not proof of prejudice, mandatory sanction.)
  - Is this in conflict with 245.55(3) requiring no showing of relevance on recordings

REMEDIES OR SANCTIONS

(2) Available remedies or sanctions. Court may:

- Make further order for discovery;
- Grant continuance;
- Order that hearing be reopened;
- Order witness be called or recalled;

SANCTIONS LIST

- Instruct jury it may draw adverse inference regarding non-compliance (Focus on DA conduct, not just missing evidence?)
- Preclude or strike testimony;
- Admit or exclude evidence;
- Order a mistrial;
- Order dismissal of some or all of the charges;
- Make such other order as it deems just under circumstances.
    - Get creative!

SANCTIONS AGAINST DEFENSE 245.80(2)

- Wait, what?!

- EXCEPT – Any sanction against defendant shall comport with defendant's constitutional right to present a defense, and precluding defense witness shall only be permissible upon finding defendant's failure to comply with discovery was willful and motivated by desire to obtain tactical advantage.

SANCTIONS, CONT'D
245.80(3) – CONSEQUENCES OF PROSECUTION FAILURE TO PROVIDE *ROSARIO*

- (3) Consequences of non-disclosure of statement of testifying prosecution witness.

The failure of the prosecutor to disclose any written or recorded statement made by prosecution witness, relating to subject matter of witness's testimony shall not be grounds for new pre-trial hearing, to set aside conviction, reverse, modify or vacate judgment of conviction, in absence of showing by defendant there is reasonable possibility that the non-disclosure materially contributed to the result of the trial or other proceedings. Nothing shall limit right defendant have to reopen pre-trial hearing when such statements were disclosed before close of proof at trial.

ADMISSIBILITY OF DISCOVERY
245.85

- The fact that a party indicated during discovery process they intended to offer specified evidence or particular witness is not admissible in evidence or as grounds for comment at hearing or trial.

SUBPOENAS
610.20

Subpoena statute remains largely the same except for a few major changes –

- Three days notice to agency of state or locality of subpoena duces tecum unless emergency;
- Removal of requirement that opposing party (aka prosecutor) be notified of subpoena duces tecum to state agency;
- "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."

END