NEW YORK'S DISCOVERY REFORM LAW

A BENCH BOOK FOR JUDGES

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Kings County, Supreme Court, Criminal Term

July 2019

DISCOVERY BENCH BOOK

Criminal Procedure Law Article 245

TIMING OF DISCOVERY

CPL § 245.10

P's initial discovery obligations → No later than 15 days after arraignment

Exceptions:

Exceptionally voluminous and/or not in actual possession of P (must notify D in writing) → 30 day stay without motion

P's supplemental discovery (D's prior bad acts for impeachment or case-in-chief) → No later than 15 days before FSTD*

P shall disclose D's statements → No later than 48 hours before D to testify in GJ

D's discovery obligations → No later than 30 days after service of P's Certificate of Compliance

*FSTD: First Scheduled Trial Date

Electronically created or stored info →

15/30 days after arraignment. No later than 45 days before FSTD*

Hearing on challenge to protective order →

Within 3 business days

Appellate review of CT's protective order →

Within 2 business days of CT ruling

P's disclosure of automatic discovery prior to guilty plea →

No later than 3 days (pre-indictment) Or 7 days (all other accusatory instruments) before expiration/Ct deadline

*FSTD: First Scheduled Trial Date

PROSECUTION'S DISCOVERY OBLIGATIONS

DUTY OF THE PROSECUTION

CPL §245.20(2)

P shall make diligent, good faith effort to ascertain existence of material or information AND to cause such material/info to be made available for discovery where it is exists BUT is NOT within prosecutor's possession, custody or control – however, P not required to obtain subpoena duces tecum for material the D may obtain.

FLOW OR INFORMATION (LAW ENFORCEMENT DOCUMENTS)

CPL §245.55

All items and info in possession of NYS or local police or law enforcement agency SHALL BE DEEMED to in the possession of the P. P must identify all laboratories having contact with evidence but do not have to ascertain identity of witnesses not known to police.

P shall ensure a "flow of information" with law enforcement which SHALL make available to P complete copies of files. A/O or lead detective SHALL expeditiously notify P of all 911, radio calls and body camera.

ITEMS SUBJECT TO INITIAL DISCOVERY

CPL §245.20

(15/30 days from arraignment – CPL §245.10(1)(a))

a. Written or recorded statements, and the substance of all oral statements, made by D or co-D to law enforcement;

b. Grand jury testimony, including a D or co-D within 15 days of arraignment or stay up to 30 days without motion. No later than 30 days before first scheduled trial date;

c. Names and "**adequate contact information**" of non-law enforcement personnel who have evidence or info relevant to any offense charged or

to a potential defense. P to inform D whether they will be called as witnesses. No requirement to disclose physical address except by court order upon good cause shown;

d. Names and work affiliation of all law enforcement personnel whom the P knows to have evidence or info relevant to any offense charged or to a potential defense. U/C personnel may be withheld/redacted without motion. P shall notify D in writing unless "good cause" shown;

e. Statements, written or recorded or summarized by persons with evidence/info relevant to any offense charged or potential defense. Police reports, notes of police/investigators and law enforcement agency reports, including pre-trial hearing witnesses;

f. Expert opinion evidence, including CV, written report, list of publications, proficiency tests and results administered or taken in the last 10 years. If no written report, a written statement of the facts and opinions to which the expert is expected to testify. Where info not yet available, as soon as practicable but not later than 60 days before a first scheduled trial date; If P is responding or D is replying, add'l 30 days each;

g. Tapes or electronic recordings, including 911 calls, and indication of whether P intend to introduce at trial. If discoverable materials exceed 10 hours, P may disclose only that which they intend to introduce; however, if D requests everything, P has 15 days to provide list of source, quantity and general substance matter of remaining materials;

h. Photographs and drawings made by a public servant engaged in law enforcement activity, or made by a person whom the P intend to call as a witness, or which relate to the subject matter of the case;

i. Photographs, photocopies and reproductions made by or at direction of law enforcement of any property prior to release under PL §450.10

j. Reports, documents, records, data, calculations or writings concerning physical or mental examinations, or scientific tests relating to the criminal proceeding made by or at the direction of a public servant

engaged in law enforcement activity or made by a person the P intend to call as a witness at trial. Includes lab info management systems records, etc. On motion of a party, CT shall issue subpoena for these materials to be disclosed to any forensic science lab not under P's control;

k. Evidence and information tending to:
    i. negate D's guilt;
    ii. reduce degree of or mitigate D's culpability to a charged offense;
    iii. support a potential defense;
    iv. impeach credibility of a P witness;
    v. undermine evidence of D's identity as the perpetrator;
    vi. provide a basis for a motion to suppress;
    vii. mitigate punishment.

MUST be disclosed even if not recorded AND irrespective if P credits the info.

l. Summary of promises, rewards and inducements made to potential witnesses and any document related to such promise; including **"requests by persons" for consideration.**

m. List of tangible objects obtained from D or co-D, and circumstances of recovery (e.g., search warrant, constructive possession, statutory presumption, location etc.,), Right of D to inspect, copy, photograph and test;

n. Search warrant and supporting materials (listed within section);

o. All tangible property that relates to case with designation by P of intent to introduce on its case-in-chief, and if "in the exercise of reasonable diligence" P has not formed present intention w/in 15/30 day period, shall notify D in writing. Disclosure must be made "as soon as practicable";

p. Record of judgments of conviction for all Ds and persons designated as potential P witnesses with the exception of experts;

q. "When it is known to the P", pending criminal actions of individuals designated as potential witnesses for P;

r. Approximate date, time and place of the offense(s) and seizure/arrest;

s. VTL offenses – all records of certification, inspection, calibration, maintenance or repair of machines and instruments for the period of time 6 months before and 6 months after each test was conducted including gas chromatography;

t. Computer crimes - time, place and manner of violation. PL §156.05-156.10

u. Copy of all electronically created or stored information seized or obtained by law enforcement from D or a source other than D that relates to the subject matter of the case. If originates from a device/account that P believe D owned, maintained, or had access to and in possession/custody/control of P, P shall provide complete copy of electronically created or stored information from the device. P has 15/30 days initially if not practicable, then no later than 45 days before first scheduled trial date with written notice to D.

SUPPLEMENTAL DISCOVERY

CPL §245.20(3)

(as soon as practicable not later than 15 calendar days before first trial date, CPL §245.10(1)(b)

a. List of all misconduct and criminal acts of D NOT charged in the accusatory instrument which P intends to use at trial for either impeachment OR substantive proof of any material issue in the case. P must designate as such and list every act.

WORK PRODUCT

CPL §245.65

Legal research, opinions, theories or conclusions of attorneys are not discoverable.

COURT ORDERS

CPL § 245.30, 245.35, 245.40, 245.45

ORDER TO PRESERVE EVIDENCE

CPL §245.30(1)

Upon request of party, CT order requiring **any individual/agency/entity in possession/custody/control** of items related to the subject matter of the case be preserved for a specific time period.

CT shall hear and rule on such motions expeditiously.

CT may modify/vacate order upon a showing that preservation of evidence will create "**significant hardship**" to individual/agency/entity ordered to preserve "**on condition that the probative value of that evidence is preserved by a specified alternative means."**

ORDER TO GRANT ACCESS TO PREMISES

CPL §245.30(2)

After accusatory instr. has been filed, D may move, upon notice to P and any impacted individual/agency/entity, for CT **order to access a crime scene or other premises relevant to subject matter of case** and

Order grants D counsel **reasonable access to inspect, photo or measure crime scene/premises**,

Order states that **the condition of the crimes/scene or premises remain unchanged** in the interim.

CT shall consider

a. Ds expressed need for access to the premises including risk that D will be deprived of evidence/information relevant to the case;
b. the position of any individual/entity with possessory/ownership rights to premises;

c. the nature of the privacy interest and any perceived or actual hardship of the individual/entity with possessory/ownership right; and
d. the position of the P with respect to any application for access to the premises.

CT may deny access to premises when probative value of access to such location has been or will be preserved by specified alternative means.

Individual/entity with ownership/ possessory rights to the premises may request law enforcement presence at premises while D's counsel is present.

DISCRETIONARY DISCOVERY BY ORDER OF THE COURT

CPL §245.30(3)

CT, in its discretion, may order the prosecution OR any individual/agency/entity "**subject to the jurisdiction of the court**" to disclose to D any material/information which relates to the subject matter of the case and is reasonably likely to be material upon a showing by D that request is reasonable and D is unable without undue hardship to obtain the substantial equivalent by other means.

A motion must be on notice to any person/entity affected by the order.

CT may modify/vacate Order if compliance would be unreasonable or create significant hardship.

For good cause shown, CT may permit parties to submit papers or testify on the record **ex parte** or in **camera** and the papers/transcript of testimony may be sealed and shall constitute part of the record on appeal.

COURT ORDERED PROCEDURES TO FACILITATE COMPLIANCE

CPL §245.35

CT in its discretion may issue the following orders:

1. Requiring P and D to "diligently confer" to reach an accommodation as to any dispute prior to seeking a ruling from the CT

2. Requiring a Discovery Compliance Conference with CT or its staff

3. Requiring P to file additional Certificate of Compliance stating that P and/or appropriate named agent made reasonable inquiries of all police officers and others participating in investigation about the existence of any favorable evidence or information as per 245.20(k) **including such evidence/info not reduced to writing or otherwise memorialized/preserved**, has disclosed info to D.

4. Catchall Order requiring other measures or proceedings "designed to carry into effect the goals" of the discovery statute.

COURT ORDER UPON PROBABLE CAUSE FOR NON-TESTIMONIAL EVIDENCE

CPL § 245.40

Upon a showing of probable cause AND a "clear indication that relevant material evidence will be found" AND the method to be used is "safe and reliable", CT may order defendant to:

i. appear in lineup;
ii. speak for identification;
iii. be fingerprinted;
iv. pose for photographs that do NOT reenact the event;
v. give samples of blood, hair or other bodily materials that involve "no unreasonable intrusion" ;
vi. handwriting;
vii. reasonable physical or medical inspection

DNA COMPARISON ORDER

CPL § 245.45

Where there is a DNA profile obtained from relevant evidence, D can request the CT to order an entity with access that DNA databank to do a "keyboard" search comparison of the profile to the databanks upon a showing that it is "reasonable" or "material" to the defense. The profile would not be uploaded or maintained.

CERTIFICATES OF COMPLIANCE/TRIAL READINESS

CPL § 245.50; 245.60; 30.30(5); 30.30(5)(a)

CERTIFICATE OF COMPLIANCE

Prior to announcing ready for trial, the P **MUST** file and serve a "certificate of compliance" which states that "after exercising due diligence and making reasonable inquires to ascertain the existence of material and information subject to discovery" the P has turned over all relevant materials NOT subject to protective order under CPL §245.70.

SUPPLEMENTAL CERTIFICATE OF COMPLIANCE

Under 245.60 – entitled "continuing obligation to disclose", a "supplemental certificate of compliance must be F&S if P learns of additional materials – including that which was learned after receiving reciprocal discovery.

TRIAL READINESS

Under 245.50(3) & 30.30(5) - Absent a finding of "exceptional circumstances" the P cannot be deemed ready for trial (or no statement of trial readiness can be filed) without a certificate of discovery compliance being filed first. CT **SHALL** give defense oppt'y to be heard on record re: validity of certificate of compliance.

Under 30.30 (5)(a) – for a criminal court accusatory instrument, a statement of readiness is not valid unless a certificate if filed asserting that the requirement of 100.15 & 100.40 (conversion of hearsay allegations) have been met and all unconverted counts dismissed.

DEFENDANT'S OBLIGATION

D has same obligation to file a certificate of discovery compliance (and a supplemental one) once reciprocal discovery has been completed under 245.20(4).

DEFENDANT'S RECIPROCAL DISCOVERY TO PROSECUTION

CPL § 245.10(2) & 245.20(4)

TIMING

D's discovery obligation begins **not later than 30 days after being served with the prosecution's certificate of compliance** except for those items pending determination under 245.70 (protective orders) with notice to prosecution. CPL **§** 245.10(2)

MATERIALS

D shall, "subject to constitutional protections", disclose and permit the prosecution to "discover, inspect, copy or photograph" any material and relevant evidence within the defendant's or counsel's possession or control that is discoverable **under 245.20(1)(f)(g)(h)(j)(l) or (o)** which D intends to introduce at trial or hearing:

(f) expert opinion materials
(g) tapes or electronic recordings
(h) photos or drawings made by public servant,
(j)scientific tests or experiments,
(l) summary of all promises made to witnesses
(o) list of all tangible property

Including the names, addresses, birth dates and all statements "written or recorded or summarized in any writing or recording" or persons other than defendant to be called as witnesses:

HOWEVER, if witness is being called ONLY to impeach a prosecution witness then disclosure is NOT required until **AFTER** the prosecution witness has already testified.

ADDITIONAL COMPLIANCE TIME

If in "exercise of reasonable diligence" the materials in (f) or (o) unavailable for disclosure, period is stayed without a motion to be disclosed as soon as practicable**.**

PROTECTIVE ORDERS

CPL § 245.70

Pursuant to "automatic discovery", CPL§ 245.20 – P can withhold/redact both C/I and U/C info w/o motion but must notify D unless Ct finds "good cause shown"

UPON "GOOD CAUSE" SHOWING, CT MAY ORDER DISCOVERY/INSPECTION BE:

1. denied, restricted, conditioned, deferred or make such order as appropriate.

2. conditioned that material/information be available only to D counsel.

   However, if so, CT shall inform D on the record that D counsel is not permitted by law to disclose such material/information to D.

3. conditioned that D counsel may not disclose physical copies of the discoverable documents to D provided that P afford D access to inspect redacted copies of discoverable documents at a supervised location that has reasonable and regular hours for access.

CT may permit a party seeking/opposing a protective order or another affected party to submit papers or testify on the record *ex parte* or *in camera*. – papers sealed for record on appeal.

PROMPT HEARING

Upon a request for a protective order, unless D consents to P's request for a protective order, CT **shall conduct an "appropriate" hearing within 3 business days** to determine whether "good cause" has been shown and shall render a decision expeditiously.

Materials for hearing and transcripts may be sealed and shall constitute a part of the record on appeal.

SHOWING OF GOOD CAUSE

CT may consider the following:

a. constitutional rights or limitations;

b. danger to the integrity of physical evidence or the safety of a witness;

c. risk of intimidation, economical reprisal, bribery, harassment or unjustified annoyance or embarrassment to any person, and the nature, severity and likelihood of that risk;

d. a risk of an adverse effect upon the legitimate needs of law enforcement, including the protection of the confidentiality of informants, and the nature, severity and likelihood of that risk;

e. the nature and circumstances of the factual allegations in the case;

f. whether defendant has a history of witness intimidation or tampering and the nature of that history;

g. the nature of the stated reasons in support of a protective order;

h. the nature of the witness identifying information that is sought to be addressed by a protective order, including the option of employing adequate alternative contact information;

i. danger to any person stemming from factors such as a defendant's substantiated affiliation with a criminal enterprise as defined by Penal Law 460.10;

j. other similar factors found to outweigh the usefulness of the discovery.

SUCCESSOR COUNSEL OR PRO SE DEFENDANT

When the attorney-client relationship is terminated prior to trial, material/information disclosed to D counsel or limited by a protective order shall be provided only to D's successor counsel under the same conditions or returned to the P unless the CT rules otherwise or P give written consent.

D counsel work product shall not be provided to D, unless Ct rules otherwise or P give written consent.

If D proceeds pro se, CT may regulate time/place/manner of access to discovery materials/information - **CT may appoint a person to assist D in investigation or preparation of the case.**

Upon pro se motion, CT may modify/vacate condition/restriction relating to access to discoverable material/information, for "good cause" shown.

MODIFICATION OF TIME PERIODS FOR DISCLOSING

Upon motion of a party, CT may alter time periods for discovery imposed by statute upon a showing of "good cause."

EXPEDITED REVIEW OF ADVERSE RULING

a. An unsuccessful party seeking or opposing the granting of a protective order relating to name, address, contact information or statements of a person may obtain expedited review by an individual justice of the intermediate appellate court.

b. Review shall be sought within 2 business days of the ruling by OTSC filed with the intermediate appellate court and served upon the lower court and opposing party with 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 when opposing party was not made aware of the application upon good cause.

Lower CT order subject to review stayed until the intermediate appellate court renders a decision.

c. Rules of the intermediate appellate court apply with respect to assignment of the individual judge. Appellate Justice may consider any relevant/reliable information and may dispense with written briefs other than the materials submitted to the lower CT. Appellate Justice may dispense with issuing a written decision.

Such review, decision, order shall not affect the right of D, in subsequent appeal from a judgment of conviction, to claim as error the ruling reviewed.

COMPLIANCE WITH PROTECTIVE ORDER

Any protective order issued under the discovery statute is a mandate of the court for purposes of the offense of criminal contempt pursuant to CPL §215.50(3)

GUILTY PLEAS

CPL § 245.25 & 245.75

PROSECUTION'S OBLIGATION

P **must** disclose AND permit D to discover, inspect, copy, photograph and test all Automatic Discovery within possession/custody/control:

not less than **3 days** - upon felony complaint where P make pre-indictment guilty plea offer –

OR

not less than **7 days** on all other accusatory instruments -

prior to expiration date of any guilty plea offer by the P or any deadline imposed by CT for acceptance of plea.

Exception: items under protective order CPL §245.70. HOWEVER, if tends to be exculpatory, Ct **SHALL** reconsider protective order

COURT'S ROLE UPON VIOLATION

If P do not comply, D may move alleging a violation.

CT **must** consider impact of any violation on Ds decision to accept or reject plea offer.

If the CT finds that such violation **"materially affected**" D's decision, and if P decline to reinstate the lapsed or withdrawn plea offer, the CT –as a presumptive minimum sanction – **must** preclude the admission at trial of any evidence not disclosed.

CT may take other appropriate action as necessary to address non-compliance.

D can waive this right. HOWEVER, no guilty plea can be conditioned on such waiver. CPL §245.75

REMEDIES OR SANCTIONS FOR NON-COMPLIANCE

CPL § 245.80

NEED FOR REMEDY OR SANCTION.

When material/information is **disclosed "belatedly**,"

> CT shall impose an appropriate remedy/sanction if the party entitled to disclosure shows prejudice.
>
> CT shall give party entitled to disclosure reasonable time to prepare and respond to new material.

When material/information has been **lost/destroyed**,

> CT shall impose an appropriate remedy/sanction if the party entitled to disclosure shows that the lost/destroyed material may have contained some information relevant to a contested issue.
>
> CT shall impose "appropriate remedy or sanction" that "is proportionate to the potential ways in which the lost/destroyed material reasonably could have been helpful to the party entitled to disclosure."

AVAILABLE REMEDIES OR SANCTIONS.

a. make a further order for discovery;

b. grant a continuance;

c. order that a hearing be reopened;

d. order that a witness be called or recalled;

e. instruct the jury that it may draw and adverse inference regarding the non-compliance;

f. preclude or strike a witness's testimony or a portion of a witness's testimony;

g. admit or exclude evidence;

h. order a mistrial;

i. order the dismissal of all or some of the charges;

j. make such other order as it deems just under the circumstances;

EXCEPT . . . that any sanction against D shall comport with D's constitutional right to present a defense. Precluding a defense witness from testifying shall be permissible only upon a finding that the D's failure to comply with the discovery obligation or order was willful and motivated by a desire to obtain a tactical advantage.

CONSEQUENCE OF NON-DISCLOSURE OF STATEMENT OF TESTIFYING PROSECUTION WITNESS.

Failure of P (or any agent of P) to disclose any written/recorded statement made by a P's witness which related to the subject matter of the witness's testimony:

shall not constitute grounds for any CT to order a new pre-trial hearing or set aside a conviction, or reverse or modify or vacate judgment of conviction,

unless a showing by D 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 such right the D may have to a reopened pre-trial hearing when such statements were disclosed before the close of evidence at trial.

See also 245.55(3)(b): Failure by prosecution and/or law enforcement to disclose Electronic Recordings of specific items under 245.20(1)(e)(g)(k):
911 calls, radio runs, body cameras, Rosario material, defendant statement, or exculpatory/giglio material
SHALL result in an appropriate sanction and/or remedy under this section.